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UTOCRATICALLY FLEXIBLE WORKPLACE

A History of Overtime Regulation in the United States

Marc Linder
THE AUTOCRATICALLY FLEXIBLE WORKPLACE
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Marc Linder

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Great labour...continued for several days together, is in most men naturally followed by a great desire of relaxation, which if not restrained by force or by some strong necessity, is almost irresistible. It is the call of nature, which requires to be relieved.... If it is not complied with, the consequences are often dangerous, and sometimes fatal, and such as almost always, sooner or later, bring on the peculiar infirmity of the trade. If masters would always listen to the dictates of reason and humanity, they have frequently occasion rather to moderate, than to animate the application of many of their workmen.


But the workingman misunderstands his own interests as well as his own rights, if he conceives that because his right has a natural priority to that of capital, he can invoke legislation to interfere in the bargain between him and the capitalist.... The legislature cannot take the first step in this direction, without so far subverting the right of individual property, and establishing communism.... As between adult parties, this stepping in to say by statute how many hours a day the laborer shall work, means nothing in his favor, unless it means that he shall get more for less, or that the law shall make a better bargain for him than he can make for himself.

*Report of the Special Commission on the Hours of Labor, and the Condition and Prospects of the Industrial Classes* 29, 31 ([Mass.] House No. 98, 1866)
# Contents

*Preface*  
*Acknowledgments*  

## Part I

**INTRODUCTION**

1. *Autocratic Flexibility*  

## Part II

**THEORY AND STRUCTURE OF OVERTIME REGULATION**

2. *The Struggle for the Normal Working Day: From Surplus Value to Family Values*  
3. *The Self-Contradictions of an Overtime Penalty/Premium*  

## Part III

**MAXIMUM-HOURS LAWS BEFORE THE FAIR LABOR STANDARDS ACT**

4. *State and Federal Maximum-Hours Regulation Before the Fair Labor Standards Act*  
5. *"We Didn’t Think That the Legislature Would Be So Crazy": Territorial Alaska’s Absolute Universal Eight-Hour Law*  
6. *Montana’s Constitutionalization of the Eight-Hour Day*  
7. *“Pennsylvania of All Places”: A Short-Lived Little New Deal Makes a Big Deal of Maximum-Hours Regulation for Men*  

## Part IV

**THE FAIR LABOR STANDARDS ACT**

8. *The Legislative History and Purposes of the FLSA Overtime Compensation Provision*  

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9 Employers' Struggle Against Statutorily Imposed Premium Overtime Wages for Non-Minimum Wage Workers: 1938-1942 263
10 The Supreme Court Spreads Confusion Instead of Employment 279
11 Workers During World War II: From the Struggle Against Overtime Work to the Struggle for Overtime Premiums 292
12 On the Waterfront: Overtime on Overtime? 302
13 Taking Care of Business: Congress Cuts Overtime Coverage in 1949 318
14 Unsuccessful Congressional Initiatives to Raise the Overtime Premium or Lower the Overtime Threshold: The 1950s to 1970s 327

Part V

The Right to Refuse

15 State Laws Prohibiting Mandatory Overtime Work 357

Part VI

Foreign Exemplars of "Flexibility"

16 The European Union: Unemployment, Shorter Hours, and More Overtime Work 393
17 Ontario: A Mirror for the Future of Hours Law in the United States? 413

Part VII

Conclusion

18 Increased Velocity of Throughput and Autocratic Flexibility 463

Bibliography 477
Index 519
Preface

The Autocratically Flexible Workplace: A History of Overtime Regulation in the United States complements, but does not supersede, the author’s “Moments Are the Elements of Profit”: Overtime and the Deregulation of Working Hours Under the Fair Labor Standards Act (2000). The two books differ in four major respects. First, chapters 2, 3, and 4 of the earlier book, which deal with specialized aspects of the FLSA (the exclusion from an entitlement to premium overtime compensation of executive employees, of workers engaged in so-called preliminary and post-liminary work activities as a result of the Portal-to-Portal Act of 1947, and of employees of small firms) and comprise about two-thirds of that book, have been entirely omitted. Second, the history of overtime regulation, which takes up the first chapter of the earlier book, has been expanded from about 200 to 475 pages. About 60 percent of the new material encompasses extended explorations of the heretofore hidden histories of the fates of Montana’s constitutionalization of the eight-hour day in 1936 (Chapter 6) and Pennsylvania’s 44-hour week law of 1937 (Chapter 7)—the closest encounter with a generally applicable prohibition of overtime work the United States has ever known—as well as the comparative analysis of the transformative dilution of Ontario’s Employment Standards Act (Chapter 17). As a result, whereas four-fifths of “Moments Are the Elements of Profit” is devoted to the FLSA, that regime takes up only one-fourth of The Autocratically Flexible Workplace, which is less of a specialist’s and labor lawyer’s book and more of a social and labor history. Third, three-fifths of the remaining chapters have been supplemented with additional historical material and updates of the most recent statutory and judicial developments; in particular Chapters 1-4, 8, 14-16, and 18 have been significantly revised and expanded. Only Chapter 5, on Alaska’s eight-hour law, and Chapters 9-13, dealing with the legislative, administrative, and judicial evolution of the Fair Labor Standards Act from the day it went into effect in 1938 until its first significant postwar amendments in 1949, remain substantively largely unchanged, though they too have undergone revision; they have been retained for the sake of the continuity of the analysis. Finally, a comprehensive bibliography has been added.
Acknowledgments

Many archivists, librarians, officials, and others were extremely helpful in providing copies of unpublished or otherwise unavailable documents and materials that made possible the analysis of the remarkable legal developments in Alaska (Chapter 5), Montana (Chapter 6), Pennsylvania (Chapter 7), and the Canadian provinces (Chapters 17-18): Judy Skagerberg, Alaska State Archives, Juneau; John Stewart, chief archivist, Alaska State Archives; Sylvie Savage, Alaska and Polar Regions Archives, Rasmuson Library, University of Alaska Fairbanks; Diane Kodiak, National Archives and Records Administration, Anchorage; Ellie Arguimbau, archivist, Montana Historical Society, Helena; Judy Meadows, State Law Librarian of Montana, Helena; Barbara Mittal, librarian, Great Falls Tribune; Fritz Snyder, director, University of Montana Law Library; Randall Tenor, State Library of Pennsylvania, Harrisburg; Jay Craig, Senate Library, Harrisburg; Jonathan Stayer, archivist, Pennsylvania State Archives, Harrisburg; Graeme Moore, program advisor, Employment Standards Branch, Ministry of Skills Development and Labour, Surrey, British Columbia; Suzanne Craig, provincial specialist on hours, Employment Practices Branch, Ontario Ministry of Labour, Toronto; Prof. Judy Fudge, Osgoode Hall Law School, York University, Toronto; David Leaman, worker, Toyota Motor Manufacturing Canada Inc., Cambridge, Ontario; Marianne Rogers, York University Law Library, Toronto; Chris Schenk, research director, Ontario Federation of Labour, Toronto; Ted Tjaden, Bora Laskin Law Library, University of Toronto; and Lee Ann Campbell, employment standards officer, Labour Services Branch, Justice Department, Whitehorse, Yukon Territory. Howell John Harris, Reader in History, University of Durham, generously emailed his notes of the archival materials of the Philadelphia Metal Manufacturers’ Association dealing with the 1937 Pennsylvania law. Bob Ramsey of the University of Iowa scanned in the cover image.
Part I

Introduction

The Department of Labor and Industry and the Industrial Board is empowered by the statute to grant "overtime" in appropriate instances, i.e. to grant the privilege of employing workers more than eight hours per day where unnecessary hardship would otherwise be entailed. What form of statute meeting the needs of public health and welfare would these [employer-]plaintiffs prefer? Would they be better pleased with a law establishing a truly rigid eight-hour day and containing no provision for variation? Would they prefer a law establishing an invariable basic eight-hour day but permitting "overtime" at a scheduled increase in compensation? Clearly a general provision for "overtime" transforms hour legislation into a thinly-disguised wage bill; in effect the Legislature says to employers, "You may consistently work your employees excessive hours, detrimental to both public health and welfare, if you only pay them enough." As a matter of fact, the statute in question is as mild as any such legislation feasibly could be and still accomplish the objectives of promoting public health and welfare. Obviously, the real objections of the plaintiffs are not to the terms of this act, but to any form of regulation of hours of employment.1

1

Autocratic Flexibility

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

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

As the word “overtime” in the sense of abnormally long workdays or work­weeks has come to share cramped dictionary space with the alternative, positively-valued meanings of the premium wage for such work and the extension of a tied sporting contest, its original, distinctly unpleasant significance for workers has been submerged.³ Nevertheless, employers’ power to compel employees to work beyond their normal hours—or lose their livelihood—remains a stark reminder that the modern “flexible” workplace is no haven of libertarianism. Ac­quiescence in this autocratic regime is in part accounted for by an ideological inversion, which enables the power of profit-making capital to legitimate itself as carrying on business “for the benefit of the community at large,” meaning the market and the aggregated demand of consumers in search of commodities now, whereas recalcitrant workers are viewed as selfish owners of one factor of pro­duction, who are thwarting the general will “for the benefit of a particular class....”⁴ Employers’ ideological success is also a gauge of the decline of the early twentieth-century progressive consumers’ movement, which conceived of

²[Maine] Legislative Record, H-2022 (Rep. Samson, Mar. 30, 1998). The word “week” has been substituted in brackets for “day,” which was manifestly a typo or a misspeaking.
³The sports meaning is even illustrated before the workplace meaning in Webster’s Third New International Dictionary of the English Language Unabridged 1611:2 (1993). Even for the newspaper of record, a computer search reveals that the vast majority of uses of “overtime” in The New York Times are sports-related. Whether the participants share the spectators’ excitement or regard extended time as unpaid overtime work may in large part be a function of their perception of their activity as play and/or work.
⁴Hersees of Woodstock Ltd. v. Goldstein, 38 Dominion Law. Rep. (2d) 449, 454 (Ontario Ct. App. 1963) (holding that a union’s putative right to engage in secondary picketing must yield to a store’s “right to trade”). A related phenomenon of ideological inversion situated on a different epistemological plane causes newspaper reports of strikes “to describe the event as the story of interference with the reader’s life.” Walter Lippman, Public Opinion 350 (1960 [1922]).
consumers "as the arbiters of the interests of the community, or the 'general wel­
fare'" in fostering "ethical consumption" designed to improve working conditions
and raise labor standards.5

In a renewed drive to repress the irrepressible fact that the commodity labor
power is inseparable from mortal human beings seeking to lead another life out­
side the sphere subject to the monolithic laws of capital's self-valorization, em­
ployers all over the world adamantly insist that labor standards laws are "out of
touch with the business realities and social aspects of the new world of work.
The new world involves 7 days a week, 24 hours a day, 'just in time' demands on
businesses...."6 Not surprisingly, the pressures inherent in such just-in-time re­
gimes have increasingly spawned disputes over the imposition of overtime work.7
Even firms that do not seriously question "the role of the government as a guar­
antor of the minimum standards of employment for all employees," have vocifer­
osely objected to state control of hours of work. In their drive to attain the "flexi­
bility" needed to accommodate "customers' demands" and expand their hours of
operation, employers, even in countries that merely impose overtime premiums
rather than maximum-hours caps, have demanded the right to "exploit their pow­
er" to "enter into private agreements with their employees that circumvent" na­
tional norms.8 Thus one Canadian employers' organization urges the creation of
the right to opt out of compulsory labor norms so long as employees "have freely
entered into agreements to work outside the strict requirements" of the law. As
the prime example of what it regards as the law's inefficient impediment to flexi­
bility the group cites overtime regulations: "[I]f an employee wished to work
more hours in order to earn money to meet certain personal needs and the em­
ployers has work available, but does not wish to pay overtime for that work, they
cannot agree to have that work performed at straight time rates, even though both
the employer and the employee mutually benefit from that arrangement."9

The enormous increases in the productivity and intensity of labor that have
brought about a post-industrial, hi-tech, information society have done little to

5Landon Storrs, Civilizing Capitalism: The National Consumers' League, Women’s

ponse to Fair and Effective: A Review of Employment Standards in British Columbia

7Richmond Die Casting Ltd. and C.A.W., Local 1994, 44 C.L.A.S. 197 (1996); DDM
Plastics Inc. and I.A.M.A.W., Local 2792, 94 Labour Arbitration Cases (4th) 215, 217

8Mark Thompson, Rights and Responsibilities in a Changing Workplace: A Review of

ponse to Fair and Effective: A Review of Employment Standards in British Columbia at
19.
abate capitalism’s drive to impose a longer workday and workweek than millions of workers want to work. Although rising productivity makes shorter working hours possible and heightened fatigue associated with greater intensity of labor should make them necessary, employers and economists still regard longer hours as a means of boosting the rate of growth and accumulation. Nor has the rhetoric of the new virtual economy rid capitalists of their venerable habit, as Victorian factory inspectors put it, of “petty pilferings of minutes” of unpaid overtime labor: by massively ignoring the law, employers in the United States have “shortchanged” employees by a conservatively estimated $19 billion a year.

The end of the nineteenth and beginning of the twentieth century witnessed large-scale campaigns by organized labor for the eight-hour day. A century later the legislative initiative on hours regulation in the United States (and other advanced capitalist societies) has passed back to capital. The so-called maximum hours provision of the Fair Labor Standards Act (FLSA), which in reality is merely a “maximum nonovertime hours” provision—designating “40 hours as the maximum number that an employee subject to its provisions may work for an employer in any workweek without receiving additional compensation at not less than the statutory rate for overtime”—has never prohibited employers from working their adult employees for as long as firms find necessary: “Not only may an employee be worked twenty-four hours per day; but one hundred and twenty-four hours of overtime per week would not violate the law so long as the employee was paid for all such overtime at the required rate.” While more than

10Edward Denison, Why Growth Rates Differ: Postwar Experience in Nine Western Countries 59 (1969 [1967]).
14The title of the overtime provision is “Maximum Hours.” Fair Labor Standards Act of 1938, ch. 676, § 7, 52 Stat. 1060, 1063 (current version at 29 U.S.C. § 207 (1994)). As a court noted with regard to a related statutory term (used in § 218): “‘Maximum workweek’ does not in fact limit the number of hours an employee may work. ... It must refer to that number of excess hours worked for which an overtime rate must be paid.” State v. Comfort Cab, Inc., 286 A.2d 742, 748 (N.J. Super. 1972).
16Missel v. Overnight Motor Transp. Co., 126 F.2d 98, 104 (4th Cir. 1942). The court calculated 124 hours as the difference between the 168 hours in a week and the 44-hour statutory overtime threshold that was in effect in 1938-39 when the action arose.
The Autocratically Flexible Workplace

a hundred countries from Albania to Zimbabwe statutorily impose a maximum limit on the length of the workday or week and/or the number of overtime hours per day, week, month or year, the United States stands virtually alone among major economic powers in entrusting the enforcement of this crucial labor norm exclusively to a legislated financial disincentive.¹⁷

The possible components of a national working-time regime¹⁸ include: (1) a definition of the length of the normal workday and workweek beyond which employers: (a) may not require or permit workers to work additional hours at all; (b) are privileged to require or permit workers to work additional hours, but only subject to certain conditions; or (c) must pay a wage premium/penalty for the privilege of operating such an overtime system; (2) a right to refuse to work such overtime hours; (3) the maximum number of permissible daily, weekly, monthly, and/or annual overtime hours; (4) the maximum number of total permissible daily or weekly hours equal to the sum of normal and overtime hours; (5) a fixing of the overtime premium/penalty; (6) the minimum number of mandatory weekly or monthly days of rest; (7) a limit or ban on unsocial night and weekend hours; (8) the minimum number of days of mandatory annual paid leave (vacation)¹⁹; (9) the designation of public holidays: (a) on which non-essential employment is prohibited²⁰; (b) which must be compensated at regular rates even if work-free; or (c) which, if worked, work must be compensated at overtime rates²¹; and (10) the minimum scope of mandatory meal, rest, and bathroom breaks.²²

No country rigorously enforces a national working-time regime incorporating all of these dimensions, but the system prevailing in the United States is especially and distinctively underdeveloped: its national law encompasses only the setting of an aspirational 40-hour week and the requirement of a 50-percent wage premium/penalty for overtime hours.²³ And even this meager protection excludes


¹⁸Unless otherwise noted, most of these components are included in the Council Directive 93/104/EC of 23 November 1993 Concerning Certain Aspects of the Organisation of Working Time, in Official Journal of the European Communities L 307/18-24 (Dec. 13, 1993) or in European national statutes; see below ch. 16.


²⁰General Laws of Massachusetts, ch. 149, § 45 (2000).


²³State laws in the United States provide fragmentary protection in the form of days of rest, rest and meal breaks, and public holidays. On the lack of nationally mandated rest and meal breaks and the vindication of the right to bathroom breaks, see Marc Linder and
from its scope almost 50 million workers (or 40 percent of all wage and salary employees) from managers to farm laborers.\textsuperscript{24} Unsurprisingly, by the year 2000, workers in the United States worked the longest annual hours (1,979) in the advanced capitalist world.\textsuperscript{25}

Even the national working-time regimes of Japan and South Korea, characterized in recent decades by extraordinarily long annual working hours, not only include mandatory rest days, rest periods, and paid annual leave,\textsuperscript{26} but are subject to several substantive overtime constraints. In Japan—where average annual hours were intentionally reduced, from 2,031 to 1,842, from 1990 to 1999\textsuperscript{27}—employers under the Labor Standards Law are not only formally required to obtain the permission of the union or a person representing a majority of the employees before exceeding the eight-hour day or 40-hour week (at which point overtime rates ranging between 25 and 50 percent are imposed), but must also conform such overtime over a longer period of time to an average of 40 hours per week. Moreover, the workdays of those performing work underground or that is especially injurious to health may not exceed 10 hours, subject to further intervention by the Labor Minister, who may prescribe standards for limiting the extension of working hours based on workers’ welfare.\textsuperscript{28}

In South Korea, a newly industrialized country, but—with a per capita gross domestic product in 1999 only one-half of that of the United States—not in the group of advanced capitalist countries,\textsuperscript{29} the world’s longest working hours and very low wages undergirded the labor-repressive economic ‘miracle’ of the 1960s and 1970s,\textsuperscript{30} reaching as many as 2,800 annually in factories producing for the world market in the mid-1970s; as late as 1986, the average workweek amounted


\textsuperscript{27}International Labour Office, \textit{Key Indicators of the Labour Market 2001-2002}, tab. 6b.

\textsuperscript{28}Rödöki-junhö, art. 32, 36, and 37.


to 57 hours.\(^{31}\) At an annual average of 2,474 hours in 2000, South Korean workers still work the world’s longest hours, though 215 fewer than in 1980.\(^{32}\) Amendments in 1989 to the Labor Standards Act shortened the normal workweek from 48 to 44 hours and the normal workday is eight hours, but employers are granted a “flexible working hours system” permitting them to extend these norms, provided that average weekly hours over two weeks do not exceed 44 and hours in neither week exceed 48; a written agreement with the workers’ representative privileges employers to average hours over four weeks, provided that the average does not exceed the 44-hour norm and no weekly or daily hours exceed 56 or 12, respectively. Workers are not entitled to premium overtime wages under this hours-averaging scheme—an exemption that employers in the United States are zealously pursuing—but under a separate provision requiring an agreement between the parties, employers must pay a 50-percent premium for weekly hours that may be extended for up to 12 beyond the norm. Under special circumstances, even this ceiling may be raised, with the Labor Minister’s approval and the workers’ consent; in urgent situations, an employer may obtain the Minister’s approval after the fact, but if the Minister determines that the extension was inappropriate, he may order the employer to give the workers rest periods or days off equivalent to the unilateral extension.\(^{33}\) Although the South Korean working-time regime is obviously exceedingly generous to employers, it nevertheless imposes absolute limits on the length of the workweek that have always been lacking in the U.S. labor-protective system.

Likewise, European countries have long prohibited employers from making full use of their economic power to compel workers to work supra-normal hours. Even in the United Kingdom, which until recently had outdone the United States in committing its national-hours regime to voluntarism in the form of collective bargaining (or individual adhesion contracts), implementation of the European Union’s Working Time Directive in the 1990s has finally made principled inroads into the U.K.’s largely laissez-faire system.\(^{34}\)

The three English-speaking, former white-settler colonies of the British Commonwealth maintain systems that differ from the U.K. and U.S. regimes.\(^{35}\)


\(^{33}\)Labor Standards Act, art. 49-50, 52, 55, in Statutes of the Republic of Korea 19:10-13. On employers’ efforts to amend the FLSA to create hours-averaging without overtime liability, see below chs. 1 and 18.

\(^{34}\)See below ch. 16.

\(^{35}\)International Labour Office, *Conditions of Work Digest*, vol. 14: *Working Time*
In governmentally centralized New Zealand, hours and overtime rates are determined by individual and collective contracts. To be sure, New Zealand’s Minimum Wage Act fixes the workweek at 40 hours, but it also both excludes overtime and permits the parties to establish a longer workweek by agreement. In Australia, “neoliberal notions of labour market deregulation...have grafted on to an inadequate inherited system” of compulsory conciliation and arbitration awards, which set hours and overtime premiums, “an even more inadequate system that fosters small islands of single-employer collective agreements and a sea of individual contracting.” The result has been the emergence of a large and growing sector of the labor force working “very extended or indeed extremely extended weekly hours,” many of them unpaid. Thirty-one percent of full-time (largely non-professional managerial) employees work more than 48 hours per week. Australia also has “the developed world’s highest rate of unpaid over-time, with 25% of full time employees not paid for an average 2.7 hours a week each.” However, in 2001-2002 the Australian Council of Trade Unions brought a (still pending) test case before the Australian Industrial Relations Commission seeking the insertion of a clause in awards prohibiting employers from requiring employees to work unreasonable hours; the unreasonableness would be judged by reference to a large number of criteria, including the employee’s total number of hours, risk of fatigue, and family responsibilities. In addition, under the unions’ approach, employees would be given a two-day paid rest break if they worked an average of 60 hours over four weeks, 54 hours over eight weeks, or 48 hours over 12 weeks.

Least laissez-faire of the three Commonwealth countries is Canada, whose federal government is constitutionally disabled from enacting national labor legislation. All Canadian jurisdictions impose overtime penalties, while legislation in the federal jurisdiction, Alberta, Newfoundland, Ontario, and the Northwest Territories impose various daily and/or weekly maximum hours limits; moreover,
laws in British Columbia, Manitoba, Ontario, Saskatchewan, and Yukon Territory facially entitle workers to refuse to work overtime.41 The crucial distinction between, on the one hand, prohibiting long hours and/or giving workers the right to refuse to work such hours and, on the other hand, empowering employers to require workers to work beyond the standard workweek at premium wages or risk losing their livelihoods has become so unfamiliar to American public policy analysis that two U.S. labor relations scholars in a recent comparison of labor standards in the United States and Canada defined the category of "overtime/hours of work" exclusively by reference to the threshold number of weekly hours triggering premium pay.42 This narrow view ignores the fact that the Canadian provincial labor standards laws entitling workers to refuse to work overtime represent a protective dimension virtually unheard of and unimaginable for the nonunion sector in the United States.

Disillusionment with the efficacy of overtime penalties as a means of deterring employers from forcing employees to work excessive hours is venerable. As far back as 1894, when New Zealand amended its Factories Act to permit some overwork by women and boys under 16 years of age in exchange for a premium: "It was expected to reduce greatly the amount of overtime worked, but...[w]hen trade was brisk the employers paid the extra money rather than delay to execute orders."43 As the FLSA's time-and-a-half for overtime provision has increasingly lost its deterrent force, thus advancing the de facto deregulation of working hours, the labor movement has at times sought to make a virtue of the market-knows-best Zeitgeist by claiming that the "purpose of the FLSA's overtime provision is not to create an entitlement of employees, who work long hours for premium pay for overtime work. Rather, its purpose is to generate a national system in which employers are discouraged from requiring overtime work. The overtime provisions of the Act are intended to be a free market mechanism to enforce a national 'hours of work' rule."44 Even when the labor movement takes the opposite position, pragmatically advocating creation of a right to refuse


43William Pember Reeves, State Experiments in Australia and New Zealand 2:42 (1903).

mandatory overtime and preservation of "the right of workers to work long hours if they choose to do so," these efforts to salvage some elements of hours regulation ignore the contradiction inherent in basing mandatory labor standards on anarchic free labor markets, which tend to reach equilibrium at the lowest common denominator of employers that would prefer repeal of the statutory overtime penalty and a return to a totally unregulated working-time regime and choiceless or short-sighted workers, who must or will work however many overtime hours employers require of them.

An industrial bakery in a New York City suburb employing almost exclusively Latin American immigrants, many of whom are in the United States illegally, offers an apt illustration of the consequences of this libertarian subversion of labor norms. J. J. Cassone Bakery’s lawyer interprets its compulsory 72-hour weeks as what makes "many of our employees...happy. They can work substantial hours and can make $35,000 and up a year in what is basically a minimum wage industry." Echoing this version, one Salvadoran worker asks rhetorically: "Do you think you can work just 40 hours a week and still buy a house?" Some workers are so paralyzed by this disembodied arithmetic that they voted against the Bakery and Confectionary Workers Union—which urges unionization on the grounds that payment of the $11 to $15 hourly wage rates prevailing at some unionized bakeries would make 40-hour weeks possible—precisely because they "fear that a union contract would limit them to 40 hours a week."

Nor are nonunion workers alone in being caught up in the contradiction. A recent survey of more than 4,000 unionized hourly workers in a broad range of industries in the United States found that 46 percent wanted to work even more weekly overtime than the 6.63 hours they were already working because they "feel they are likely to lose their jobs" and/or "cannot afford food, medical care, clothing, leisure activities, and monthly bills..." The contradictory attitude was sharpened where Canadian members of the International Association of Machinists who wanted to avoid mandatory overtime were nevertheless suspicious of the employer’s proposal to create a student labor pool designed to make overtime voluntary for them: they "objected to other people being given the opportunity to work what would otherwise have been their overtime."

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46Steven Greenhouse, "In Fierce Union Fight, Immigrants Are Torn," N.Y. Times, Oct. 9, 2000, at A25:2-6 (nat. ed.).


48DM Plastics Inc. and I.A.M.A.W., Local 2792, 94 Labour Arbitration Cases (4th)
The Autocratically Flexible Workplace

The Canadian Labour Congress (CLC)—the peak organization of Canada’s labor unions—at least acknowledges the existence of a division within the working class: “Long hours are not just imposed by employers. Many workers want to work overtime to maintain their standard of living at a time when real wages are stagnant or falling. Reducing overtime will involve a process of debate and discussion within the labour movement.” Nevertheless, the CLC’s argument that “[w]e bargain premiums for overtime not as a reward but as a penalty” fails to do justice to the self-defeating structure of the enhanced wage, which operates to motivate workers to work the excess hours.

And the contradiction is dissolved entirely, in an unexpected direction, when unions argue that collective bargaining agreements give individual workers “an absolute right to unlimited overtime.” For example, the United Automobile Workers (UAW), demanding overtime work from a resistant employer, took Northern Telecom Canada, Ltd. to arbitration in the mid-1980s because the firm had failed to seek a second governmental permit to extend the number of overtime hours permissible under an exemption from Ontario’s Employment Standards Act, which imposes a maximum workday and workweek. In response to the union’s claim that the statute’s “provisions are minimum standards only and that a collective agreement can provide for greater entitlements,” it was, perversely, the arbitrator who had to remind the UAW that:

overtime opportunity is not a benefit to which any positive entitlement is granted under the Act. Rather, the Act places a ceiling beyond which the employee is not permitted to work. The Act does provide minimum standards of pay in overtime situations but in no other sense may it be considered as a minimum standard of entitlement to actually work specific amounts of overtime. The intent and purpose of the overtime sections would appear to focus more on a protection of employees against exploitation by excessive use of overtime than on granting positive minimum entitlements apart from the actual rate of pay when working overtime.

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53Re Northern Telecom Canada Ltd. and United Automobile Workers, Local 1915 at 448.
Yet at the same time 700 workers were laid off at the same factory, prompting a union leader to complain that the remaining workers' 12,700 monthly overtime hours were the result of their being "forced by the pressure of layoff threats to work as much as possible before they too become a layoff statistic" and to recommend a complete ban on overtime permits.\(^5^4\)

The labor movement's self-contradictory position also overlooks the close affinity between "free-market" overtime laws and nineteenth-century declaratory or hortatory legal day's work statutes, which, in the words of the British economist William Stanley Jevons, "being purely permissive in character, ha[d] proved to be a dead letter."\(^5^5\) New Hampshire enacted the first in 1847, titled, "An Act regulating the hours of labor in manufactories." It provided: "In all contracts for or relating to labor, ten hours of actual labor shall be taken to be a day's work, unless otherwise agreed by the parties; and no person shall be required to or holden to perform more than ten hours of labor in any one day, except in pursuance of an express contract requiring a greater time."\(^5^6\) Such statutes, which indiscriminately classified involuntary overwork as consensual, reflected a conviction, not alien to that underlying the FLSA, that state intervention on behalf of workers "should not curtail individual liberty to contract, but could be effective without so doing."\(^5^7\)

Nevertheless, the mere fact that the FLSA modestly charges employers for the privilege of violating the aspirational norm of a 40-hour week triggered employers' efforts in the 1990s, after the Republicans had gained a majority in both Houses of Congress, to repeal the act's "rigid and inflexible" hours provisions.\(^5^8\) Associations of big and small businesses, represented by the Labor Policy Association and the Flexible Employment, Compensation, and Scheduling Coalition, began an "assault" on labor's "most sacred icon—the 40-hour week."\(^5^9\) Employers are seeking to persuade Congress to create 80-hour two-week or even

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\(^5^4\)John Deverell, "Overtime Laws: Is It Time to Retool Them?" \textit{Toronto Star}, July 29, 1986, at A14 (Lexis) (quoting Ken Ouellette, pres., Canadian Automobile Workers Northern Telecom Council). In the intervening period the CAW had been formed as the union declared itself independent of the UAW.

\(^5^5\)W. Stanley Jevons, \textit{The State in Relation to Labour} 64 (1882).

\(^5^6\)\text{1847 N.H. Laws, ch. 488, § 1 at 465-66.} The Illinois legislature has never repealed its meaningless eight-hour law: "On and after the first day of May, 1867, eight hours of labor between the rising and the setting of the sun, in all mechanical trades, arts ane employments, and other cases of labor and service by the day, except farm employments, shall constitute and be an legal day's work, where there is no special contract or agreement to the contrary." 820 ILCS 145/1 (1999).


The Autocratically Flexible Workplace

160-hour four-week pay periods, during which they would be even freer than their aforementioned competitors in South Korea to work their employees any number of hours during an individual week without being required to pay time and a half for hours beyond 40 per week.60 In contrast, the labor movement, although successful in warding off such thrusts under a Democratic president, is in no position to secure enactment of statutory protection against employers' power-based imposition of mandatory overtime, let alone to persuade Congress that a shorter workweek is possible and desirable.

In spite of the considerable attention paid to employers' recent campaign to roll back hours regulation, participants and observers have overlooked capital's vigorous opposition to such government intervention literally since the day the FLSA went into effect in 1938. The balance of social and ideological forces has become so skewed that, without having to fear public ridicule in the press, in 1995 Republican Senator John Ashcroft could characterize a bill that empowered firms to eliminate the aspirational 40-hour week as "put[ting] work schedule decisionmaking back in the hands of employees."61

In the latest iteration of this plan, Republican Senators Judd Gregg and Kay Bailey Hutchison in March 2001 introduced the Workplace Flexibility Act,62 which Gregg touted as capable of having a "monumental impact on the lives" of workers.63 Despite the fact that the proposal not only does nothing to shorten the workweek or interfere with employers' power to impose overtime work, but in fact presupposes that workers will continue to be "required to work overtime," Hutchison announced before the Senate: "For the first time in 50 years, America’s blue collar working men and women will be empowered to help determine the course of their work week. And thereby, workers will be given greater control over their most precious asset in their lives and in the lives of their families: time."64 Senator Hutchison was so far from attributing any responsibility to employers for the fact that "millions of people in this country must punch a time...".

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60 E.g., Work and Family Integration Act, S. 1129, § 2, 104th Cong., 1st Sess. (1995) (160 hours); H.R. 2723, § 2, 104th Cong., 1st Sess. (1995) (160 hours); Family Friendly Workplace Act, S. 4, § 3(b), 105th Cong., 1st Sess. (1997) (80 hours) (filibustered by Democrats); Family Friendly Workplace Act, S. 1241, § 3, 106th Cong., 1st Sess. (1999) (80 hours, permitting up to 50-hour workweek without overtime liability, sponsored by 38 Republicans). The U.S. Supreme Court has anticipatorily approved this policy inversion by adducing employers' privilege under the act to "tell the employee to take off an afternoon, a day, or even an entire week" as flowing from the FLSA's purpose of protecting workers from "the evil of overwork." Christensen v. Harris County, 529 U.S. 576, 585 (2000).


64 147 Cong. Rec. at S 2993 (Mar. 27, 2001). It is unclear what Senator Hutchison believes happened 50 years ago.
clock, and they never seem to have enough time they need to get things done, much less the time they would like to spend on home and family,” that she faulted “the federal government” and its FLSA for “giv[ing] them the least amount of flexibility in scheduling their work week.”

The key, according to Senator Gregg, to insuring that the government “get out of the way” and stop creating “barriers to opportunities for love and nurture” that single mothers and workers with a high school education and less than $28,000 in income would be giving their families was the proposal to permit employers (with individual workers’ consent) to establish biweekly work programs, under which workweeks as long as 50 hours without overtime compensation would be lawful, provided that hours for the two weeks did not exceed 80. Elimination of the overtime premium for those hours must, in Senator Hutchison’s view, be a welcome relief to workers, since she described it as giving “employers and employees the option of a two-week, 80 hour work period during which, without incurring an overtime penalty, up to 10 hours could be ‘flexed’ between the two week period.”

Management, in turn, buttresses the claim that it “has retained its inherent right...to require that employees shall respond to its call for overtime” on the grounds that anarchy is the unthinkable alternative: rolling electrical blackouts are “of course, possible, if there is a law that says that overtime can’t be mandatory.” Even in 1960, in the midst of the postwar Keynesian boom and cooperation between strong unions and management, a monumental Brookings Institution study of collective bargaining found nothing paradoxical in asserting that some plants had become “vulnerable to employee control of leisure” and asking: “Who is to control the use of their leisure time?”

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65147 Cong. Rec. at S 2992.
66147 Cong. Rec. at S 2989 (Sen. Gregg).
67S. 624, § 3.
68147 Cong. Rec. at S 2992.
70[California] Senate Committee on Industrial Relations, Interim Hearings on AB 1295—Mandatory Overtime 1:177 (Nov. 8, 1977) (statement of Wayland Bonbright, industrial relations manager, Pac. Gas & Elec. Co.). Bonbright’s invocation of alleged mass refusals to work overtime in the British electrical power industry at the time of the hearings was misleading since overtime was a minor aspect of the labor action. More importantly, no British law empowered workers to refuse to work overtime, and union officials opposed the actions. The point here is that if workers feel strongly enough about their working conditions to strike and thus impose considerable inconvenience on the rest of the working class and society, they may do so with or without legal sanction. “Power Cuts Unofficial But Effective,” Economist, Nov. 5, 1977, at 110 (Lexis); “Pay Policy Under Public-Sector Siege,” Economist, Nov. 12, 1977, at 85 (Lexis).
The Autocratically Flexible Workplace

Although even Friedrich Engels conceded that the working hours of a modern factory are incompatible with individual workers’ autonomy, the compulsion to keep invested capital continuously in motion, as Sidney and Beatrice Webb agreed, makes it “a special aggravation of this subordination, that, under the circumstances of the modern capitalist industry, the employer’s decision will perpetually be biased in favor of lengthening the working day.” A century later, even the Republican chairman of the Subcommittee on Workforce Protections of the House of Representatives confirmed this capital-logic at a hearing devoted to revising the overtime provisions of the FLSA. Cass Ballenger, himself an employer in North Carolina, informed the witnesses: “In our company, we found out that if you bought a $3-½ million printing press, you can’t afford to run it just 40 hours a week. You have to run it seven days a week, 24 hours a day. And then you end up with people working overtime.” Yet this “autocratic judgment of their employer,” which typically reflects firms’ inexorable prioritizing of the demands of competition and profitability over workers’ needs, is not the only conceivable countermodel; democratic macrosocietal co-determination of the length of the workday is also thinkable. However, as long as the dominant ideology ordains, as The New York Times editors put it in 1912, that “[t]he interest of the public is rather in the output than in the length of the working day,” the compulsions of production will prevail over human needs.

In a pseudo-antipaternalist turn, factory autocrats sought to invert this logic by projecting the collective normalization of the working day as an expropriation of the worker. In rhetoric that still resonates with free-marketeers, Alfred I. Du Pont, vice-president of E. I. Du Pont Company, testified to Congress in 1904 against federal regulation of government contractors: “To peremptorily establish the eight-hour limitation, denying the right to labor more than eight hours a day...must clearly militate against the laborer in the exercise of his labor, which

72Friedrich Engels, “Dell'Autorità,” in I:24 Karl Marx [and] Friedrich Engels, MEGA (Gesamtausgabe) 82-86 at 85 (1984 [1873]). Only disingenuousness can account for the following response by the Master Builders Society of London on August 26, 1858, to a request by carpenters for a reduction in hours from ten to nine with no change in pay: “inasmuch as there is no compulsion by which workmen are obliged to labour for a given number of hours, it really amounts to an alteration in the rate of wages.” G. Shaw Lefevre and Thomas Bennet, “Account of the Strike and Lock-Out in the Building Trades of London, in 1859-60,” in Trades’ Societies and Strikes: Report of the Committee on Trades’ Societies, Appointed by the National Association for the Promotion of Social Science 53-76 at 55 (1860).

73Sidney Webb and Beatrice Webb, Industrial Democracy 327 (new ed., 1920 [1897]).


75Webb and Webb, Industrial Democracy at 334.

is his property and the privilege of contracting or marketing his property rights.\textsuperscript{77} That the Du Ponts were fantasizing about workers who could exercise their labor 24 hours a day—"the immanent drive of capitalist production," according to Karl Marx, but "physically impossible"\textsuperscript{78}—emerged two decades later from a prediction by Irénée du Pont, president of the company:

\begin{quote}
"[T]here are a number of great things which chemistry can and will do....

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

"I think it likely that material will be found which, taken into the human system, will accomplish the results of eight hours' sleep. This will change the active existence of a man from sixteen hours a day to twenty-four hours a day...."\textsuperscript{79}
\end{quote}

As is always the case with state-imposed labor standards, overcoming the imperatives of capital's self-valorization must confront resistance based on employers' more prosaic principal argument—that national labor laws exert a harmful impact in a world in which global competition is no longer a menacing tendency dimly visible on the horizon, but a force to be reckoned with daily in ways big and small. In the words of the chairman of the House Economic Opportunities Committee: "As each American firm encounters the challenges of the modern global economy, it faces a seriously outdated and inflexible federal scheme of regulating employee compensation and scheduling."\textsuperscript{80}

This claim was made specifically with regard to the FLSA overtime premium by Virgil Day, vice president in charge of labor relations at General Electric and one of the central figures in articulating Big Business's post-World War II policies toward the state. In a statement to the House Labor Committee in 1964 on a proposed FLSA amendment to increase the overtime penalty/premium from 50 to 100 percent, Day observed that "our competition everywhere else in the world would be delighted to see this overtime penalty legislation passed here. The great

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\textsuperscript{77}Eight Hours for Laborers on Government Work: Report by the Hon. Victor H. Metcalf, Secretary Department of Commerce and Labor, on H. R. 4064 (Eight-Hour Bill) 33-34 (H. Doc. No. 413, 58th Cong., 3d Sess. 1905).
\textsuperscript{80}William Goodling, "National Press Club Remarks" (Jan. 10, 1995) (Lexis) (formerly House Labor Committee).
\end{flushleft}
beneficiaries would not be the workers in Pittsburgh, Schenectady, and Detroit, but the workers in Liverpool, Hamburg, and Yokohama.\textsuperscript{81}

The defense is venerable. As far back as the 1840s, British employers defended overtime work as "necessary to compete with the lightly-taxed foreigner..."\textsuperscript{82} In the late nineteenth century, when the federal government was said to be still merely "a state of courts and parties,"\textsuperscript{83} expanding monopolies deployed the same capital-logic. Testifying before Congress against a bill to establish an absolute eight-hour day for laborers, workmen, and mechanics on public works or work performed for the United States government, the representative of the Bethlehem and Carnegie steel companies observed:

...it is evident that the interests of many of the largest manufacturing concerns would be injured by the passage of this act. In the world’s competition for foreign trade the cheapest product secures the market. Any effort by Congress to indirectly reduce the hours of labor...must militate against the manufacturing interests of this country, compelling them ultimately to do work and produce results at a disadvantage in competition with manufacturers in other parts of the world beyond the paternal control of the Congress of the United States.\textsuperscript{84}

To the owner of a shipbuilding company with six million dollars invested in plant, it made a "vast difference" whether a worker and hence that plant worked eight hours or nine.\textsuperscript{85} The passage of a century has done little to alter this capital-logic, as developments in the 1990s at an "immense, windowless" AT&T/Lucent Technologies microelectronics factory in Orlando, Florida, revealed:

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

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


\textsuperscript{82}J. Binns, \textit{Prize Essay on Systematic Overtime Working and Its Consequences, Moral, Physical, Mental, and Social} 7 (1846).


\textsuperscript{85}\textit{Hours of Labor for Workmen, Mechanics, Etc., Employed Upon Public Work of the United States} at 74 (testimony of Charles Cramp, pres., William Cramp & Sons Ship and Engine Building Co.).
community patterns of work, sleep and play....

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

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

"The week is getting redistributed toward work," said Jerome M. Rosow, president of the Work in America Institute.... Part of the price, he said, is the traditional weekend: "Leisure is getting squeezed out."

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

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

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

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

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

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

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

Labor’s rhetoric, however, did modulate during the twentieth century. It is difficult to imagine a labor leader in the early twenty-first century echoing the sentiments of Samuel Gompers, the president of the American Federation of Labor and chief public disputant of the manufacturing interests in 1898, that the eight-hour day gave workers the opportunity for “more rest, so that they may have the means by which they can think for themselves, rather than having our

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captains of industry doing all the thinking for them."87 By the twenty-first century, when millions of workers had come to rely on overtime pay to make ends meet, it has even become rare for union officials to be blunt enough to complain, as they did in the 1960s, that "employers use overtime as a substitute for decent hourly rates."88 And the opposition that an Alaska territorial senator mounted in 1919 against the presence of a time and a half overtime provision in an eight-hour bill on the grounds that it offered a premium for the violation of the proposed law would doubtless stamp him as an enemy of labor today.89

87 Hours of Labor for Workmen, Mechanics, Etc., Employed Upon Public Work of the United States at 41.
89 "8 Hour Law May Not Pass Senate," Weekly Nome Industrial Worker, Apr. 26, 1919, at 1:4 (Sen. John Ronan). To be sure, since Ronan was a member of a mine owners association who had supported the ten-hour day and helped break strikes by recruiting strikebreakers, it seems unlikely that he was speaking as an avid advocate of the absolute eight-hour day. Evangeline Atwood, Frontier Politics: Alaska's James Wickersham 171 (1979).
Part II

Theory and Structure of Overtime Regulation

The saying goes that “the loyal union man, out for a good time, not only expects a good time, but a time and a half.”

Overtime is one of the great unexplained phenomena of modern industrial life.

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The Struggle for the Normal Working Day:
From Surplus Value to Family Values

This is a family values law. It gives somebody out there that doesn’t dare to say, I don’t want to work because I will lose my job, a chance to do so.1

Labor Unions over a century ago fought for the 40-hour workweek. What we are seeing today is workers working 60-hour weeks. There should be a healthy balance: eight hours of work, eight hours of sleep and eight hours with the family.2

The concept of “overtime” presupposes the existence of a normal or basic workday or workweek, but the word has, at least in English, been cut loose from the spontaneous link to its former synonym, “overwork”—and the even more pathos-laden older term “overoil”3—which is still preserved, for example, in Danish and Dutch.4 The first modern use of “Over-time” and “Over-work” cited in the Oxford English Dictionary, though in fact not the first use, is The Dictionary of Trade Products, Commercial, Manufacturing, and Technical Terms from 1858, which defined the two terms (in one entry) as “extra labour done beyond the regular fixed hours of business.”5 In 1870 New York State enacted

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4See Lov om Forbud mod Overarbejde (Act: Prohibition of Overtime), in ILO, Legislative Series, 1937—Den. 3. The Dutch word is “overwerk.” Most major western (and some eastern) languages, including Albanian, Arabic, Basque, Czech, Finnish, French, German, Greek, Hebrew, Hungarian, Italian, Latvian, Lithuanian, Norwegian, Persian, Portuguese, Romanian, Serbo-Croat, Slovene, Spanish, Swedish, and Yiddish, express the term “overtime” with some variant of overtime, overhours, or additional or extra hours or time. Russian and Polish use a slightly different framework: “time beyond that fixed” (сверхуроchnыпнй) and “time beyond that programmed” (nadprogramowы), respectively. Chinese and Japanese use somewhat different approaches: extra shift (jiáiban) and remaining, or left-over, or left undone business (zangyò), respectively.
5Peter Simmonds, The Dictionary of Trade Products, Commercial, Manufacturing, and Technical Terms 269 (1858); Oxford English Dictionary at 7:331, 338. The New Zealand Factories Act, 1894, which for the first time permitted overtime, at premium rates, for women and children, used an unusual hybrid term: “The Inspector shall keep a list of the
a legal day's work statute declaring that "eight hours shall constitute a day's work for all classes of mechanics, workingmen, and laborers, excepting those engaged in farm and domestic labor, but overwork for extra compensation by agreement between employer and employee is hereby admitted."6 The survival of "overwork" in New York's current legal day's work statute (which "does not prevent an agreement for overwork at an increased compensation")7 appears to be unique in the entire corpus of state and federal statutes.8 The disuse into which the word has fallen is reflected in the fact that, since World War II only one court decision has, according to another computerized database search, used the word "overwork" in a FLSA case, except for quoting from a 1942 U.S. Supreme Court case, which in turn was quoting from President Roosevelt's FLSA message to Congress.9 And even that one court used "overwork" merely in citing the plaintiffs' complaint and did not itself adopt the term.10

Deprived of this connection to overexertion, "overtime," which, instead, has now also come to mean the premium wage paid for overwork, clothes abnormally long working time with such a self-explanatory patina that it is workers' resistance to, rather than employers' demand for, overtime work that seems to require justification. In the words of one economist: "The existence of 'overtime unemployment'—that is, of offers to work at premium rates that are not taken up—is evidence of disequilibrium of some kind."11 But generally economists perceive the best of all possible equilibria: "Premium rates of time and one-half or double time are more than adequate to offset any natural disinclination to work overtime...."12

In contrast, the fundamental purpose behind the struggle for the normal work-
day of eight hours or workweek of 40 hours lay in withdrawing all time beyond that norm from the economic play of forces and economic calculations—whether by employers or workers—and committing it exclusively to workers’ nonproduction-oriented personal development or collective activities. No matter what the length of the workday, as the AFL Executive Council declared in 1919, “sufficient remuneration should be received by the workers to make it possible to live comfortably without working overtime.”\(^{13}\) To this extent, universalist, collective, and egalitarian notions prevailed with regard to the distribution of work within the working class as a whole and avoidance of the creation of subclasses of overworked and unemployed workers.\(^{14}\)

Normalization of working time also means knowing long before clocking in whether the employer will demand overwork later that day.\(^ {15}\) Yet, for example, workers scheduled for only four hours of work daily have not even been permitted to call home or take a break when the boss informed them at the end of their workday: “You can’t leave, it’s busy, I got to hold you over... three hours....” This version of compulsory overtime is especially insidious because it enables employers “to hold the people over at no extra cost....”\(^{16}\)

The institutionalization of overwork has long blinded market-knows-besters to its nonconsensual aspects, although the enveloping rhetoric has grown more sophisticated. In 1859, when one of the demands of London building tradesmen striking for a reduction in their working day from ten to nine hours was abolition of “systematic overtime,”\(^{17}\) the *Times* reported that “the great object of the masters is to crush once and for ever those trade societies which, in their view, interfere so arbitrarily and so vexatiously in trade arrangements between the employer and his men. ... For example, the masons...will not allow...overtime.”\(^{18}\) Workers resisted systematic overtime because it “reduced the normal day to a nullity.”\(^ {19}\)

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\(^{19}\) Webb and Webb, *History of Trade Unionism* at 333. Legal restriction of systematic overtime was one of the British unions’ primary legislative goals in the early twentieth
A century later, the discourse had been purged of any trace of conflict. Operating with a presumption that work schedules constitute an "optimum for the majority of workers," blackboard economics posits that "overtime pay will always induce the typical worker to offer his services beyond the standard schedule...." Indeed, economists are puzzled by those who prefer more leisure, chalk­ing it up to "inertia, or lack of other opportunities...."20

Such economists also ignore the costs to workers of overwork. If a collectively bargained or statutorily imposed overtime rule is required to bring about a substitution of unemployed workers at straight-time wages for already employed workers at premium rates, they infer an increase in unit labor costs "since presumptively employers would have substituted additional workers for additional hours of existing workers even without such a rule if such a course would have been efficient."21 Overlooked is the cost of the shortened working lives of workers, which overtime premiums cannot internalize.

Historically the concept of overtime ("over-hours" in nineteenth-century Britain)22 did not arise until coercive collective action, either through labor unions or the state, had created a normal or standard working day. And even then, workers paid by the hour or the piece did not initially benefit from the normalization if employers continued to work them at the regular rate; only workers receiving a fixed daily wage for a day's work consisting of a variable number of hours could gain—provided that the employer did not lower the day wage.23

The advantages of overtime work to employers paying workers on a daily or weekly basis can be illustrated today in terms of salaried employees who are required to work unlimited hours for a fixed salary.24 The impact of an atomized labor market, unregulated by the state, on the length of the working day is also exemplified by the situation of 10,000 low-paid female department store employees in New York City around the time of World War I:

"Most of us think that the girls' work...is over at 6 o'clock, but this is not true. It is
the custom to keep the girls until 7, 8, 9, 10 and later to sort stock, to put things in order, to change departments. In most of the stores they receive nothing for this overtime, but in some of them they are given 35 cents for supper money. One store pays 17 cents an hour for overtime.25

The change that labor standards legislation could bring about was documented in New Zealand at the end of the nineteenth century, when adult men were excluded from the Factories Act. As the Department of Labour there observed: “If a woman works overtime she had not only to be paid for it, but a minimum wage for it is fixed, and the employer is liable to suffer for a breach of the law if such wage is not paid. The man, on the contrary, may be worked not only outrageously long hours at his ordinary day’s work, but kept on at overtime, without pay, till either his strength or his patience is exhausted.”26

Karl Marx provided an economic analysis of this regime in the 1860s. Assuming that the average workweek consisted of six 12-hour days and that 10 of those 12 hours were devoted to creating the value that reproduced the worker, leaving the capitalist with two hours of surplus value, Marx set a hypothetical case in which the workday was extended by one hour or six hours weekly. Since these six hours were all devoted to creating surplus value, the capitalist was getting a very good deal: otherwise he would have to pay wages to an additional worker for three days or three additional workers for one day to extract six hours of surplus value.27 That European workers as late as 1880 did not always receive premium wages for overwork is clear from a questionnaire that Marx devised: “Are extra wages—and which—paid in case of overtime?”28

Marx also furnished a general framework for understanding struggles over the length of the workday or workweek.29 On the surface, this struggle centers on the conflict between the buyer and the seller of a commodity which generates


28Karl Marx, “Questionnaire for Workers,” in Karl Marx [and] Friedrich Engels, Gesamtausgabe (MEGA) I:25:199-207 at 204 (1985 [1880]). In 1836, members of the machinists union in London, who had worked a 10 and a half hour day and often an additional two hours at the ordinary rate, successfully struck for time and a quarter and time and a half for overtime hours. James Jefferys, The Story of the Engineers, 1800-1945, at 21 (n.d. [1945]).

29For an attempt to place Marx’s unique analysis within the framework of economic theories of the length of working time, see Chris Nyland, “Capitalism and the History of Worktime Thought,” British J. of Sociology 37(4):513-34 (Dec. 1986).
special problems because, unlike the situation with a general run-of-the-mill commodity, the body and mind of the human seller of labor power cannot be separated from its daily use by the buyer. Since the law of exchange of commodities, however, does not recognize any special rules for this particular exchange, the capitalist buyer tries to extract the greatest possible profit from the use of the worker’s labor power for the day’s or week’s worth he has bought. The question then becomes: how long is a workday or workweek? Since the human seller lives beyond the day, he must make sure that he sells his only commodity for a price high enough to enable him to reappear at work the next day with his labor power in a condition of strength and health that meets the standards set by his competitors. But the worker as a rational labor market participant must also exercise sufficient foresight to husband his only economic asset for a lifetime—or at least the standard working life of his type of labor. If the daily value of his commodity equals its lifetime value divided by 30 years or approximately 10,000 workdays, then he must make sure that overlong workdays and workweeks do not force him to expend so much additional energy that he uses up 1/5,000 or 1/3,333 of his lifetime supply for only 1/10,000 of its lifetime value.30 As a sociologist of work said in the 1990s of highly skilled white-collar workers in Germany who were working increasingly longer hours: “there is a risk that many ‘brains’ will be able to function for only 10-20 years, rather than a full working life.”31 For this reason socialist unions regarded eight-hour laws as “life lengthening” acts.32

The worker therefore regards such overwork as crossing the line from the capitalist’s rightful use to plundering of his labor power and, as such, a breach of their contract and of the law of the exchange of commodities. His demand for a workday or workweek of normal length—defined by its compatibility with a healthy 30-year worklife—is as rightful as the capitalist’s demand that the worker work as long as possible each day and week. Because the capitalist is not a slaveholder, he has no (capital-) invested interest in the length of the worklife of his individual employees: “A quick succession of unhealthy and short-lived generations will keep the labour market as well supplied as a series of vigorous and long-lived generations.”33 Thus as long as the employer can find equivalent replacements in the labor market when he needs them, this private contractual dispute cannot be resolved between individual buyer and seller. The resulting “anti-

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33Karl Marx, *Value, Price and Profit* 57 (Eleanor Marx Aveling ed. 1935 [1865]).
The Struggle for the Normal Working Day

The "normal" of right against right must, Marx argued, be decided by "the respective powers of the combatants." But since "in its merely economic action capital is the stronger side," a class-wide settlement of the hours issue was possible only through "general political action," which meant "legislative interference" under pressure from the working class. Consequently, the normalization of the workday and workweek appears historically as a struggle between the "aggregate capitalist, i.e., the class of capitalists, and the aggregate worker, or the working class."36

In contrast, neoclassical economics has tried to reduce this society-defining struggle between two rights into mere market failure: "the marginal social cost of longer workweeks exceeded the marginal private cost to employers. In the absence of government intervention these divergencies persisted because low family incomes did not permit many women and children the luxury of turning down jobs with low wages and long hours...." The overtime penalty can then be "thought of as a tax to make employers bear the full marginal social cost of their hours decisions."37

The sea change in the conflict over a shorter workweek is captured by the current union refrain that "[t]he question is...[s]hould workers be forced to work or should they be given the choice to spend time with their families?"38 This individualistic turn is also deeply embedded in the very collective bargaining agreements that offer some union members a modicum of protection against imposition of overtime work. The Memorandum of Understanding on Overtime appended to the 1993 agreement between the United Automobile Workers (UAW) and the major U.S. automobile manufacturers, which programmatically declares that it "represents an accommodation between the needs of the Corporation and the rights of individual employees to decline overtime work on occasion for a variety of individual and personal reasons,"39 prohibits and penalizes any collective action by workers:

Any right to decline daily overtime or Saturday or Sunday work that this Memorandum of Understanding confers on any employee may be exercised only by such

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34Marx, Das Kapital at 1:249.
35Marx, Value, Price and Profit at 58-59.
36Marx, Das Kapital at 1:249.
39Agreement Between UAW and the General Motors Corporation: October 24, 1993, at 244.
employee acting separately and individually, without collusion, conspiracy or agreement with, or the influence of, any other employee or employees or the Union or pursuant to any other concerted action or decision. No employee shall seek by any means to cause or influence any other employee to decline to work overtime. Violation by any employee of the terms, purpose or intent of this Paragraph shall, in addition to subjecting the employee to discipline, nullify for one (1) month...the employee's right to decline overtime.40

This individualistic "family values" approach—which in a feminist framework becomes workers' need for "flexibility in order to combine paid employment with their lifestyle decisions, the most important of which, from a social perspective, is the decision to care for others, especially children"41—stands in sharp contrast to the nineteenth- and early twentieth-century collectivist context, when labor "predicated its demand for leisure as a means to the creation of a better social order. To produce intelligent citizens, essential to the existence of a democracy, everybody should have sufficient leisure to permit attendance at night schools, time for reading, discussion, and attendance at political meetings."42 Around the time of the Civil War, the eight-hours movement was in part driven by the demand that a bright line be drawn between the time during which workers were wage-slaves to capital and the time during which they were free.43

The thousand-page brief that Louis Brandeis, Felix Frankfurter, and Josephine Goldmark produced in support of the 1913 Oregon ten-hour law when its constitutionality was attacked before the U.S. Supreme Court collected massive evidence on the detrimental impact of long hours on workers' health, safety, morals, and citizenship.44

Press accounts of long workweeks have been common for decades, though they appear in cycles. Often they have one-sidedly focused on factory (especially automobile) workers who voluntarily work "unbelievable amounts of overtime"—upwards of 80 hours a week—over months and even years in order to achieve six-figure annual incomes to finance consumption patterns otherwise unattainable for the manual working class. Such presentations do mention the disruptive impact such total absorption by work can exert on workers' family lives and also allude to the greater exposure to injuries associated with the attendant

42 Marion Cahill, *Shorter Hours: A Study of the Movement Since the Civil War* 14 (1932).
fatigue, but they insist on the consensual nature of the choices.45 Even the UAW, arguably the country’s strongest union and collective bargaining partner of the automobile manufacturers, which have adamantly insisted on the practice for decades, is said not to “press too hard because its members tend to enjoy the extra income from those overtime hours more than they’re distressed by having to work them.” The president of one Ford UAW local in Michigan estimated in 1999 that “probably 70 percent of my people would be pretty upset if the UAW helped get restrictions on overtime.”46 Similar conflicts have riven the Canadian Auto Workers.47 Such attitudes underscore how profound the sea change has been since the AFL representative told Congress in 1948 that the FLSA “was established to reduce unemployment and put everybody on a 40-hour week. ... [T]he intent of the act is not to give the worker more money for overtime but to reduce unemployment.”48

Nevertheless, occasionally the press also reported on “rebellion against overtime....” As the business cycle moved toward its high point in 1972-73, factory workers began “losing their taste for longer hours, whatever the pay.” Discussing why 15 cement-plant repair-crew workers had refused to perform five hours of overtime on a Friday night, the Wall Street Journal quoted this explanation by a 51-year-old employee: “‘When you work around cement kilns, it just sweats everything out of you. Eight hours of work in this heat and filth is enough.’” But this attitude in a work force covered by contracts with a mandatory overtime clause did not sit well with “an angry and worried” official, who remarked: “‘A few years ago you never had a problem like this.... Men simply didn’t refuse overtime work before.’” As the economy expanded and orders increased and more overtime would be needed, industrial managers feared “more instances in which workers balk.”49

A new phase in the history of overtime work appeared by the end of the


The Autocratically Flexible Workplace

1990s, employers' unrelenting appropriation of their employees' time began "wearing down" assembly line workers, making "many fatigued workers finally...ready to value a normal workweek more than the considerable financial incentives...." Average weekly overtime in manufacturing in the mid- and late 1990s reached their highest levels since the Bureau of Labor Statistics (BLS) began collecting such data in 1956. Prior to 1993, the highest average weekly level of overtime in manufacturing had been 4.1 hours at the height of the Vietnam War boom in early 1966; from January 1993 on, the figure virtually never fell below 4 hours until February 2001, reaching annual averages between 4.4 and 4.8 hours from 1995 through 1998, and exceeding five hours in some months.50 Manufacturing firms were so reliant on overtime during the expansion phase of the business cycle between March 1991 and January 1998 that the increase in overtime hours equated to 571,000 full-time 40-hour per week jobs, only slightly fewer than the increase in production worker jobs totalling 601,000.51 As corporate strategies polarized the labor force into "overtimers" and "temps"—already Marx had observed that such terms reduced workers to nothing but "personified labor time"52—journalists could point to the self-identified "greedy" "overtime hogs" and those who "are grabbing all the hours they can...merely to stay afloat in a time of stagnating wages."53

At times the press also turns its attention to overtime imposed by employers on unwilling workers, who are fired for refusing to work. Such accounts raise the question as to how much has changed with regard to control over the length of the workweek exerted by the compulsions of spontaneous labor markets and employers' autocracies since the middle of the nineteenth century, when British factory

50BLS, Employment, Hours, and Earnings: United States, 1909-94, at 2:1195-96 (Bull. 2445, 1994); BLS, Employment, Hours, and Earnings: United States, 1988-96, at 432-33 (Bull. 2481, 1996); 42 (1) Employment and Earnings, tab. B-15 at 102 (Jan. 1995); Employment and Earnings 46(1):tab. 50 at 230 (Jan. 1999); Employment and Earnings 48(1):tab. 52 at 231 (Jan. 2001); Employment and Earnings 48(10):tab. B-8 at 61 (Oct. 2001). The BLS defines overtime hours as those worked by production workers "for which overtime premiums were paid because the hours were in excess of the number of hours of either the straight-time workday or the workweek" during the survey pay period. Employment and Earnings 46(1):252 (Jan. 1999). This methodology overstates overtime since some workers receiving premium pay for working more than eight hours daily do not work 40 hours weekly. A BLS survey from May 1985 revealed that 1.6 million or 15 percent of the 10.5 million workers receiving overtime pay worked 40 hours or fewer. Darrell Carr, "Overtime Work: An Expanded View," Monthly Lab. Rev. 109(11):36-39 (Nov. 1986).


52Marx, Das Kapital at 1:257-58 (referring to the terms "full times" and "half times" used in Victorian Britain for factory workers).

inspectors reported on adult male cotton spinners who preferred to work 10-hour days for less wages, but were compelled to work as many as five hours of overtime daily lest they be forced to change places with the unemployed.\textsuperscript{34} The \textit{Wall Street Journal}, for example, in the wake of the Reagan-depression of the early 1980s, quoted a worker bemoaning the irony that at the end of the twentieth century "we’re working the same hours our grandfathers worked."\textsuperscript{35} The reporters were even alive to the need to educate the paper’s typical readers that not all overtime is created equal:

Americans with steady, white-collar jobs, many of whom also work 50 to 60 hours a week, often without extra pay, may find it hard to identify with factory workers bitter about working overtime following a recession when many were laid off. But office work tends to be more interesting than running a stamping press. And office workers are free to sit down, take a few minutes for coffee and, if necessary, slip out to the dentist.\textsuperscript{55}

Until the 1990s, governmental concern with and union opposition to overtime work were largely rooted in fears of exacerbating already high levels of unemployment. But as the declining volume of unemployment in the mid- and late 1990s brought on a resurgence of and opposition to overtime, the trigger has been overtime’s coercive character and corrosive impact on workers’ lives. This resistance to what one steelworker called ‘‘a new form of slavery,’’\textsuperscript{56} found its adequate rhetorical expression in a firefighters’ lawsuit alleging that extended forced overtime violates the constitutional prohibition against involuntary servitude.\textsuperscript{57}

In the 1990s, protests, especially in the automobile industry, also took the form of strikes. The collective bargaining agreement in force at the time ritualistically recited that while General Motors “recognized the legitimacy of the Union’s concern that production not be scheduled on a sustained basis on overtime rather than recalling laid off employees or hiring new employees,” the UAW “recognized that the scheduling of overtime serves an essential purpose in many situations in order to meet temporary or seasonal increases in sales, at new-model start-up, and to make up for production lost due to factors beyond the parties’ control....” The contract set up a procedure for reviewing overtime work schedules to insure that overtime not be scheduled “on an ongoing basis in cases where

\textsuperscript{34}\textit{Marx, Das Kapital} at 1:301.


\textsuperscript{56}\textit{Barnet Wolf, “Pushed to the Limit,” Columbus Dispatch,} Dec. 17, 2000, at 16 (Lexis).

there are practical and economical alternatives." In 1994, General Motors workers in Flint, Michigan, who had been working six days a week as long as 11 and a half hours a day for two years, struck, demanding that the company hire additional workers. The psychological and physical toll that such unrelenting work had taken caused the modal middle-aged workers to realize that even $60,000 annual incomes could not make them "bounce back" from injuries or fatigue as they could when they were younger; they simply needed more non-worktime. An agreement was reached in this instance, but the UAW continues to regard GM's overtime levels as "relentless" as the company insists on reducing its unionized workforce through attrition.

Ironically, even the compellers at times recognize the irrationality of compulsory overtime from their own perspective in confrontation with workers acting as rational owners of the commodity labor power seeking to preserve its long-term value against opportunistic depredations by employers: "Prolonged overtime often cuts productivity...because workers pace themselves to be able to stand the extra hours." One company that relentlessly imposes overtime on its employees, US West, seemed to portray itself as its own hapless victim when it asserted that it was "just as interested in reducing mandatory overtime because it wants its employees to be rested and refreshed when they begin work." The US West case is especially important because it reveals that although forced overtime has become a "big flashpoint" for unions, even strong unions such as the Communication Workers of America (CWA) have been relatively powerless to resist employers' demands. In 1998, when the union made overtime a key issue because members "were missing Little League games and sometimes even church services," the best the CWA could achieve after a two-week strike by 35,000 workers was capping mandatory overtime at 16 hours weekly in 1999 and 8 hours in 2000, and a guarantee of at least one five-day week per month in 1999 and two in 2001. During negotiations in 2000, the largest CWA local at BellSouth "asked that workers have the right to turn down overtime, but the contract only tinkers with BellSouth's power to force the work." The company continued to

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61 Marx, Das Kapital at 1:568-70.
62 Stricharchuk and Winter, "Worked Up."
63 "Mandatory Overtime Seen as Key Bargaining Issue" at 436.
"have the right to compel 12 hours of overtime each week, with one exception: For three months of the year, the company would trim it to 10 hours per week." 64 When the same issue confronted members of the International Brotherhood of Electrical Workers employed by GTE, one local union business manager said "he would settle only reluctantly for limiting the amount of required overtime to 16 hours a week. 'This bothers all unions.... Our forefathers in the labor movement died to get the 8-hour work day.' " 65

Resistance to demands for overtime has been undermined by administrative and judicial rulings, dating back to the inception of the National Labor Relations Act (NLRA), vindicating employers' claims that, just as "[f]ailure to work overtime hours is the same as failure to work regular straight-time hours," 66 employers' autocratic rule applies to both. The National Labor Relations Board disqualifies such a refusenik as seeking to "dictate the terms of his employment" and thus engaging in "unprotected insubordination" leaving him "legitimately subject to discipline." 67

Consequently, workers who concertedly refuse to work overtime while continuing to work the normal working day forfeit their rights under the NLRA; their employers may lawfully consider them strikers and permanently replace them. The legal basis for this outcome is judges' rejection of guerrilla warfare as protected activity—of the notion, as a federal appellate court declared as early as 1939, that "an employee can be on a strike and at work simultaneously. We think he must be on the job subject to the authority and control of the employer, or off the job as a striker, in support of some grievance." The monopoly hold that this binary world has on the judicial mind stems, in turn, from a deeper bias concerning capitalist control of the workplace as the natural order of things and codetermination as anarchy or tyranny: "We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. ... It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by

64 Michael Kanell, "Decision Time at BellSouth," Atlanta Journal and Constitution, Aug. 29, 2000, at 1F (Lexis).
67 Mead Corp.-Publishing Paper Div.-Escanaba, 275 NLRB 323, 324 (1985). See also Poppin Fresh Pies, Inc., 256 NLRB 233, 234 (1981), in which a Spanish-speaking married couple at a pie factory were fired for refusing to work overtime because the employer had not paid them properly for previous overtime: "'me no work no more overtime for this company, this company no pay overtime, and me and Hortencia is going la casa'" (Member Jenkins, concurring in part and dissenting in part).
which they could prescribe all conditions affecting their employment."

One point virtually everyone agrees on is that: "Employers can force their employees to work overtime—no matter how much they object." Employees, according to the U.S. Department of Labor (DOL), "must work as many extra hours as their employers demand or face losing their jobs. ... '(Labor laws) don't give employees any protection if they refuse to work overtime,' Richard Backer, assistant district director for the U.S. Department of Labor, said...." The more aseptic version in the DOL regulations explains: "Since there is no absolute limitation...on the number of hours that an employee may work in any workweek, he may work as many hours a week as he and his employer see fit" so long as the required overtime compensation is paid. The reason that workers acquiesce in these impositions, according to a professor of management, is straightforward: "If the alternative to overtime is unemployment, that isn't so attractive. Workers don't see 70 hours versus 40 hours, but 70 hours versus nothing."

Under state labor laws, too, "adult employees can be required to work overtime as long as they're paid time and a half for more than a 40-hour week...." A Washington state labor official offered this explanation of employer behavior: "If I have two employees, I have to pay two Labor and Industries coverage, two medical-care payments, two Social Security.... If I can take one employee and work the heck out of him, then my overall costs are going to be down."

To be sure, workers under union collective bargaining agreements may grieve particularly egregiously motivated dismissals. For example, a telephone repairman with 24 years' seniority won his arbitration 18 months after he had been discharged for refusing to work overtime on the grounds that as a divorced parent with sole custody he had to pick up his two children after school; the employer had found the "excuse" unreasonable on the grounds that he could have made other arrangements. However, for the overwhelming majority of workers in the

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68C.G. Conn, Ltd. v. NLRB, 108 F.2d 390, 397 (7th Cir. 1939). See also NLRB v. Mt. Clemens Pottery Co., 147 F.2d 262 (6th Cir. 1945). First Nat. Bk. Omaha v. NLRB, 413 F.2d 921 (8th Cir. 1969), upheld the same principle, but enforced the Board's order of reinstatement both because the employer had committed the form error of not replacing the women who walked off the job in the middle of their involuntary overtime before they had returned to work the next morning and the weight of the evidence did not support the employer's claim that "the girls intended to walk off the job again if their overtime demands were not met...." Id. at 924.


73Kevin Galvin, "Some Workers Protest Rise in Forced Overtime," Chattanooga Free
United States, who lack union representation, no such protection from autocratic employers is available.

But even in the unionized sector, in 1980 only 19.3 percent of major collective bargaining agreements conferred on only 21.6 of all workers covered by such contracts the right to refuse overtime. In the mid-1970s, fewer than 5 percent of a sample of collective bargaining agreements had entitled workers to refuse overtime without limitations, while another 19 percent permitted them to do so under certain conditions such as a reasonable excuse or the availability of a replacement worker. And “[i]n the absence of an express contractual stipulation or a binding prior understanding, arbitrators universally rule that management has the right to require employees to work reasonable amounts of overtime.”

A case involving a strong union that failed to negotiate any express limitation on overtime illustrates both the power that even unionized firms may retain and the modicum of freedom that counter-organization secures unionists. In 1947 the Ford Motor Company announced at one of its plants that, beginning six days later, workers would work nine hours daily until further notice. Near the end of the very first day of the new schedule, “Supervision instructed the employees to continue working until the production schedule for that day was completed.” Two workers who refused to remain at work beyond the already lengthened

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74 Calculated according to BLS, Characteristics of Major Collective Bargaining Agreements, January 1, 1980, tab. 4.1 at 61 (Bull. 2095, 1981). Major agreements were defined as covering 1,000 or more workers. In Canada, the proportion of all major collective bargaining agreements with provisions affording the right to refuse overtime under certain circumstances was 31.7 percent in 1988, 30 percent in 1993, and 31.8 percent in 1998; the proportion providing an unconditional right rose from 7.7 percent in 1988 to 10.3 percent in 1998. Human Resources Development Canada, Work and Family Provisions in Canadian Collective Agreements, ch. 1 (Mar. 2001), on http://labour.hrdc-drhc.gc.ca/psait_spila/dfcfecc_wfpcca/ch1a-en.html. According to a 1970 survey, only 18 percent of workers reported that they could not refuse to work overtime without being penalized, although 30 percent reported that they would like to work less overtime. University of Michigan Survey Research Center, Survey of Working Conditions: Final Report on Univariate and Bivariate Tables, tab. 7.14 at 231, tab. 7.16 at 234 (1971).

75 BLS, Hours, Overtime and Weekend Work 20-22 (BLS Bull. 1425-15, 1974).

76 Roger Abrams and Dennis Nolan, “Time at a Premium: The Arbitration of Overtime and Premium Pay Disputes,” 45 Ohio St. L. J. 837, 845 (1984). See also Marvin Hill, Jr. and Anthony Sincicopi, Management Rights: A Legal and Arbitral Analysis 513 (1986) (“Management’s right to require that an employee work overtime has been consistently recognized by arbitrators”). Nevertheless, arbitrators have not universally vindicated employers’ power to compel overtime work. In Connecticut River Mills, Inc. 6 Lab. Arb. (BNA) 1017, 1019 (1947), the arbitrator ruled that under a contract providing that an 8-hour day, 40-hour week “shall be in effect without revision,” work beyond these hours was “solely within the discretion of the employee,” even where workers for some time had been working 6-day, 48-hour weeks. According to the arbitrator, employers requiring scheduling flexibility had to include express language in their contracts.
workday were initially discharged but then reinstated with a three-day lay-off penalty. After asserting that the amount of overtime requested would not have endangered the workers' health, the prominent labor arbitrator, Harry Shulman, the Sterling Law Professor and later Dean of the Yale Law School, rejected the UAW's argument that work beyond the standard 40-hour week was optional with the workers: it flew in the face of an express contractual provision—only recently added—according to which Ford """"retains the sole right...to determine the starting and quitting time and the number of hours to be worked.""""77 Despite this clear basis, Shulman also found that a worker's refusal to work overtime may be justified under certain circumstances:

Except when specifically so hired, employees are not on continuous call 24 hours a day. While they must recognize that they may be called upon to work overtime, they may properly plan their lives on the basis of their customary work schedules. Under the parties' present Agreement, when an employee is asked to work overtime, he may not refuse merely because he does not like to work more than eight hours, does not need the extra money, or for no reason at all. But if the overtime work would unduly interfere with plans he made, then his refusal may be justified. If he is given advance notice sufficient to enable him to alter his plans, he must do so. But if the direction is given to him without such notice, then it would be arbitrary to require him to forego [sic] plans which he made in justifiable reliance upon his normal work schedule—unless, indeed, his commitments are of such trivial importance as not to deserve consideration.78

Despite the fact that management had handed down its order shortly before quitting time, Shulman ruled that one of the workers was unjustified in refusing to work without offering any reason; nevertheless, the arbitrator's award reduced his suspension without pay to one day. Shulman then rescinded Ford's punishment of the other worker altogether because overtime work would have caused him to lose his ride home with another worker and to take public transportation, which would have taken a substantially longer amount of time, which was also disproportionate to the amount of overtime. The arbitrator added that if Ford had given the worker notice a day or two earlier, the case would have been different.79

This arbitral mercy, based on the common law of the unionized shop, con-

79Ford Motor Co., 11 Lab. Arb. (BNA) at 1160-61. In contrast, in a nonunion case involving a minimum wage worker who sought unemployment benefits after quitting a job which for three months had required four hours of commuting daily on public transportation following the demise of his truck which he could not afford to repair, the court ruled that such commutes in the Los Angeles area were too common to make the claimant's travel time unreasonable. Zorrero v. Unemployment Ins. App. Bd., 47 Cal.App.3d 434 (1975).
The Struggle for the Normal Working Day

continues to characterize arbitrations, which subject managerial prerogatives in this area to a reasonableness criterion: employers' power to order overtime may be overridden where the extended work period is unreasonably long, inconsistent with workers' health, safety, and endurance, or is imposed under unreasonable circumstances. To be sure, this standard does not attain the stage of enlightenment embodied in a prominent Canadian arbitrator's suggestion that "the reasonableness of discipline for refusal to work overtime does not simply involve the employer's 'reserved' right of management to control its own property and production but also involves the employee's 'reserved' right to the use of his own time."80

This sphere of autocracy tempered by reasonableness may be contrasted with the fate of workers in the union-free sector. When a key punch operator was told on a Thursday that mandatory overtime was scheduled for Saturday, she reminded her supervisor that she would not be able to work because she had planned a birthday party for her husband. Working for a nonunion firm, Deborah Butler could not challenge her discharge; instead, her legal dispute focused merely on whether she was entitled to unemployment compensation. Under Colorado law, as in many other states, resolution of that question pivoted on whether organizing her spouse's birthday party constituted good cause for refusing mandatory overtime; that standard was defined by reference to "compelling personal reasons affecting either the worker or his immediate family."82 The court glossed those reasons by adopting phraseology from other courts: "quitting must be for such a cause as would, in a similar situation, reasonably motivate the average able-bodied and qualified worker to give up his or her employment with its certain wage rewards in order to enter the ranks of the unemployed." ... While claimant understandably desired to give the birthday party for her husband, we do not think a reasonable person would refuse to work overtime and thereby sacrifice employment for this reason."83

Employers' entitlement to extract overtime is so deeply anchored in the judicial mind that even a worker who had been injured on the job and whose physician suggested that he not work more than eight hours a day was denied relief under the Americans with Disabilities Act (ADA) after his employer had rejected

his request that it accommodate his disability by not assigning him overtime. In
2000 a federal appeals court held that the Florida Power & Light Company’s “ag­
gressive same-day” policy of meeting consumer demand by connecting and dis­
connecting electric meters within 24 hours made the performance of mandatory
overtime an essential function of the job by creating fluctuating production
requirements so that the worker, who could not work overtime, failed to meet the
ADA’s threshold requirement and therefore suffered no unlawful discrimination
when he was fired.84 Thus an employer’s prestatutory power to force workers to
work overtime instead of hiring additional workers trumps this protective statute:
the company can bootstrap itself into the privilege of firing workers injured on
the job who can no longer work 216 overtime hours per year simply by under­
staffing the workplace in terms of the long-term health of its employees.85

Nor does the case stand alone. Two years later a Washington State appeals
court looked to it for “guidance” in interpreting a similar state anti-discrimination
law. When an employee who had worked at Microsoft 60 to 80 hours per week
for nine years was diagnosed with hepatitis C, his doctor advised him to reduce
his working hours to 40 to insure adequate rest. Since the employee was engaged
in marketing to two large Microsoft customers, he proposed dropping one of them
so that he could work 40 hours; Microsoft agreed to this proposal while it evalu­
ated the feasibility of the accommodation. Although the employee performed
well with the one customer, “Microsoft concluded that it was unable to accommo­
date Davis in his position short of hiring additional staff, which it determined was
not reasonable,” and terminated him.86 Despite the court’s inability to cite any
facts—other than “management’s view that long hours is the ‘cultural norm’ for
jobs in sales”87—in support of the claim by one of the most profitable large cor­
porations in the United States that it would be unreasonable to require it to hire
one additional person to work 40 hours, the court held that “[r]easonable minds
could not differ that overtime in the systems engineer position were [sic] essential
functions of the job that Microsoft was not required to eliminate.”88

84Davis v. Florida Power & Light Co., 205 F.3d 1301 (11th Cir. 2000).
85To be sure, the ADA regulations state that a “job function may be considered
essential...because of the limited number of employees available among whom the per­
formance of that job function can be distributed.” 42 CFR § 1630.2(n)(2)(ii) (1999). But
the definition is circular if “can” merely means that the employer has for reasons of
profitability decided not to hire additional workers.
87Petition for Review at 14 (quoting RP 10/12 135:5 ), Davis v. Microsoft Corp. (Wash.
88Davis v. Microsoft Corp., 37 P.3d at 336, 337 (quote).
The Self-Contradictions of an Overtime Penalty/Premium

There was a man who sold spears and shields. Holding up a shield to the people, he cried: "My shields! They are extraordinarily solid—no matter how good the spear, nothing can pierce them." Then he picked up a spear and shouted: "My spears! They are very sharp—no matter how hard and solid the shield, there is nothing they cannot pierce."

Those standing on the side listened and snickered. One of them asked him: "So according to what you said, your spears are the sharpest and your shields are the strongest. What happens if your spear is used to pierce your shield?" Disconcerted, the man could not give an answer.1

In the workingman's world there is something called an "overtime hog." The name, a union epithet, refers to the worker who is forever trying to put in overtime. Among the biggest of all headaches shop stewards have is the question of who is going to put in overtime and get its premium pay. These days, it seems, there is not enough overtime to go around. The average in manufacturing industries reaches two to three hours a week or about half an hour a day per worker. So it raises all the dangers of favoritism.

That someone can favor a friend by seeing that he gets overtime work may sound at first like a teacher's keeping the good boys after school to write on the blackboard one hundred times, "I have been a good boy."2

An hours law aimed at creating macrosocial norms such as shielding life spheres from the demands of production, preserving workers' health, or spreading employment must, to be successful, withhold from individual workers the discretion to overwork. In conformity with this collective orientation, absolute maximum hours laws, such as numerous ones protecting children and women3 as well as the general statutes enacted in Alaska in 19174 and in Pennsylvania in 1937,5 no more permitted workers to decide for themselves whether to work overtime than minimum wage or occupational health and safety laws permit workers to seek possible short-term benefits for themselves by undercutting standards for

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1zi xiang mào dùn, in Zhōngguó chéngyǔ xuǎncuí 1:91 (1984), Taken from The Book of Han Fei Zi (3rd century B.C.), this story is the origin of the Chinese idiom (literally "oneself spear shield"), which means to contradict oneself.

2Sebastian de Grazia, Of Time, Work, and Leisure 131 (1964 [1962]).

3See below ch. 4.

4See below ch. 5.

5See below ch. 7.
everyone else. In contrast, a purely overtime-premium law like the FLSA is addressed to the employer, who, as arbitrator Harry Shulman recognized, "must determine whether the overtime work is worth the greater cost to him. ... No deterrence is accomplished by leaving the choice with the employee for whom the premium must act as an encouragement rather than as a deterrence."6

As early as the 1880s, New York State's highest court, in interpreting the state's virtually meaningless "legal day's work" statute of 1870—which declared eight hours a day's work, but admitted "overwork for extra compensation by agreement between employer and employe"7—nevertheless recognized: "Any construction which should hold out to the laborer extraordinary inducements to prolong his hours of labor and to shorten those of rest and recreation would directly conflict with the spirit and meaning of this legislation and the benefits intended to be furnished by it."8

The overtime approach differed fundamentally from the aspirations expressed in older labor discourse. At its 1887 annual convention, for example, the AFL had advised strongly against overtime work, which interfered with the eight-hour movement while many workers were unemployed: "It is an instigator of the basest selfishness, a radical violation of union principles...."9 In the late nineteenth century, some unions began prohibiting their members from working overtime while other members were unemployed, as well as demanding that employers distribute overtime to the unemployed.10 Others, like the National Cotton Mule Spinners, did not shy away from "censur[ing] all those who are guilty of working overtime without a protest."11 The U.S. Industrial Commission reported in 1901 that only a few unions "felt themselves strong enough to forbid overtime absolutely" to their members by means of fines and other sanctions.12 Similarly,

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71870 N.Y. Laws ch. 385, § 1, at 919.
8McCarthy v. Mayor, Aldermen and Commonality of the City of New York, 96 N.Y. 1, 6 (1884). It is unclear what meaning the court attributed to the law since it denied extra payment for hours beyond eight, but at the same time conceded that the law's "plain and obvious intent was to place control of the hours of labor within the discretion of the employe and give him the privilege at his option of declining to work beyond the time fixed by the statute," yet nowhere suggested that it would have been willing to countenance the claim that an employer was not entitled to fire a worker who refused to acquiesce in overwork. Id.
9American Federation of Labor, History, Encyclopedia, Reference Book 1:309 (1919) (citing the Report of the Proceedings of the AFL from 1887 at 43, although there is no such page in that report and this passage also appears nowhere else in that publication).
12Reports of the Industrial Commission on Labor Organizations, Labor Disputes, and
Self-Contradictions of an Overtime Penalty/Premium

unionists in the early twentieth century saw the need to educate the "'overtime hogs,' who have no concern in the organization other than the amount of money in their pay envelopes."13

Behind these demands lay the insight that overtime work enables employers to increase the supply of labor without increasing the supply of laborers so that this artificial oversupply, by increasing the number of unemployed, depresses the wage level of the employed.14 By 1919, when premium overtime rates had appeared in the contracts of virtually all AFL international unions, the AFL convention declared that overtime work should be discouraged and penalized by demands for double time.15 A decade later, the convention, which found it contrary to union principles that some workers engaged in avoidable overtime while others were unemployed, recommended the abolition of overtime wherever possible and its use only for reasons beyond the control of management and workers.16

Looking back at the history of overtime in 1947, labor historian and economist Philip Taft testified at trial in one of the most important FLSA overtime cases that the desire for additional compensation had never been a general principle: "the one predominant feeling—it is a feeling because it is not a worked out intellectual concept—of labor throughout its history, is the fear of unemployment, even in good times; as you examine the conventions of the different unions..., you find this constantly repeated over and over again, that we do not want overtime. We want to reduce the hours of labor to spread the work."17 Indeed, at the time Taft was testifying some collective bargaining agreements still instantiated this venerable demand: "Except in cases of emergency, there shall be no regularly scheduled overtime in a classification as long as any employee on the company's pay roll in that classification who is qualified to perform the work, remains laid off without being given the opportunity of returning to work."18 The trial judge


17Testimony of Prof. Philip Taft, Transcript of Record at 346-47, Bay Ridge Operating Co. v. Aaron, 334 U.S. 446 (1947). Taft stressed that economists did not accept the underlying view that the amount of labor is limited. Id. at 329.

even adopted Taft’s position as a finding of fact: “The purpose of the demand of organized labor in American industry for penalty compensation for overtime was...prompted by the laborers’ desire for a shorter work day, and was not generally intended as a method of increasing earnings.”

For decades unions, with varying degrees of success, had included overtime penalties in collective bargaining agreements to discourage employers from working employees overlong hours where they could not be prohibited outright. Fewer contracts imposed absolute bans or requirements that each instance of overtime be authorized by the union. At early-twentieth-century congressional hearings on bills to prohibit overtime (except for emergencies) and mandate the eight-hour day on government works, union leaders were interrogated by employers’ spokesmen as to why they sought by legislation what they themselves did not include in their own private-sector contracts. Unionists repeatedly testified that their contracts permitted overtime only in “extraordinary emergencies,” which in some instances only the union shop steward was authorized to declare. Under such circumstances, overtime was “almost wiped out” because “[t]here is nobody who cares to pay time and half time.” One union official testified in 1904 that his union’s entire 800 members did not work a total of even 10 hours’ overtime annually. Samuel Gompers added that the bill provided for overtime for the gov-

19Findings of Fact 28 (c), Transcript of Record at 605, Bay Ridge Operating Co.


2, Testimony of Prof. Philip Taft, Transcript of Record at 329-30, Bay Ridge Operating Co. A few minutes later, however Taft testified that “there is no union contract that I know—there may be some—that explicitly prohibits work beyond a certain time, because there may be a job that is in the middle, you may spoil materials, you may require the filling of an order. ... I know of no single contract where it is absolutely prohibited, and that certainly would be a very foolish clause....” Id. at 357, 384. In fact, a BLS study of overtime provisions in collective bargaining agreements in force at precisely the time of Taft’s testimony offered examples of absolute bans. BLS, Collective Bargaining Provisions: Hours of Work: Overtime Pay: Shift Operations 64 (Bull. No. 908-18, 1950). Similarly, the economist Solomon Barkin, who at the time was research director for the Textile Workers Organizing Committee, testified in 1938 at a trial testing the constitutionality of a Pennsylvania maximum-hours statute that “the great majority” of union contracts did not prohibit overtime; yet a few seconds earlier he had stated that “we have many . . . collective agreements . . . which specifically prohibit such over-time to any of the workers, in order to permit others to put up such work.” Record at 863a-864a, Holgate Bros. Co. v. Bashore, 331 Pa. 255 (1938).

22Eight Hours for Laborers on Government Work: Hearings Before the House Committee on Labor, 58th Cong. 418 (1904) (testimony of Herman Schulteis, Knights of Labor, and Milford Spohn, chairman, legis, comm., Central Labor Union, Washington,
Self-Contradictions of an Overtime Penalty/Premium

In the early twentieth century unions protested against overtime work out of collective-compulsory principle. Gompers repeatedly declared to congressional committees considering a ban on overtime work on government works that “we want no overtime. We want no man to have even the opportunity of overtime...unless there be an extraordinary emergency....”\(^{24}\) When a Congressman asked him whether unions were opposed to workers’ “having the privilege of working overtime for extra pay,” Gompers rejected the premise; instead, he urged enactment of “a law to prevent the employers of labor either directly or indirectly making conditions such as to compel the workmen to work more than eight hours a day by any species of inducement that shall have the general tendency to increase the hours of labor.”\(^{25}\)

The building trades unions had, going back to the middle of the nineteenth century, bargained for time and a half or double time to regulate overtime as part of the overriding purpose of equalizing their members’ work opportunities.\(^{26}\) Unions sometimes reinforced this approach by giving overtime work only to their unemployed members or by prohibiting members from working overtime for any firm other than their regular-hours employer. Employers’ skepticism toward the claim that construction unions were merely trying to protect the standard work-week was based on the counterclaim that building deadlines made overtime an ongoing necessity.\(^{27}\) Indeed, employers insisted not only that employees in general and construction workers in particular “covet” overtime,\(^{28}\) but that unions insisted on premium overtime rates not to discourage overtime work, but “[f]or the simple reason that they can get it.”\(^{29}\)

However, the whole point of penalty overtime rates was turned on its head...
in the nineteenth century as employers came to accept shorter standard workweeks in return for overtime work. For example, among construction workers in Britain in the second half of the nineteenth century: "Overtime was converted from a disincentive on the employer to an incentive for the men." Consequently, "where there were no restrictions on overtime work the determination of the hours of work was in effect returned to the individual bargain where each individual's leisure was purchasable at some premium rate of pay. Thus the overtime rate became one of the means through which the employer could undermine the union attempts to restrict supply. Ironically the unions had originally pressed for its introduction as part of their effort to restrict supply." Instead of deterring employers from overworking employees, premium rates became "a means of inducing employees to spend longer hours at work." For example, the British machinists union (Amalgamated Society of Engineers), which had sought to ban systematic overtime, but in 1851-52 had lost a major strike over it (and piecework and other issues) against employers determined to thwart union efforts to interfere with their entrepreneurial decision to use their expensive capital equipment more intensively, by 1874 saw no remedy for it; by the beginning of the twentieth century the union had deleted the term from its vocabulary as it was constrained to accept collective bargaining agreements that not only permitted up to 40 overtime hours per month, but included "urgency and emergency" clauses that could be interpreted broadly enough "to make overtime practically unlimited."

Historically, this insight that overtime premiums would make workers complicit in undermining their class's own standards even inspired state court judges to deny the overtime compensation claims of workers who had complied with employers' requests to work more than the maximum number of hours in states with statutes that absolutely prohibited and criminalized employment beyond a certain number of hours. In the best-known such case, decided under a Utah statute, the state supreme court upheld the trial judge's ruling:

"Had the employe the right to waive this protection, both for himself and the state, it can readily be seen that it rests entirely with him to abrogate the operation of the law, and to cause it to become a dead letter. He may make the period of employment eight, ten, twelve or any greater number of hours, at his option, with the result that the conditions re-

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Self-Contradictions of an Overtime Penalty/Premium

lating to the period of employment in mines and mills would now exist as before enactment of this law—a matter purely of contract between the parties."

Even under statutes not interpreted to hold workers criminally co-liable for their violation, courts denied compensation on the grounds that granting recovery would permit them to gain from thwarting the enforcement of a benevolent public policy.

In contrast, union officials in the latter part of the twentieth century who concede that "where people want to voluntarily work overtime, that's their determination to make," have abandoned the mandatory classwide principle that they would never consider yielding with regard to minimum wages or health and safety regulations. With the loss of the deterrent value of the overtime penalty and its degeneration into a mere entitlement to a modest premium for overwork, many current defenders of the overtime premium advocate its retention on the grounds of its efficacy in preserving living standards, especially for low-paid workers. Such friends of labor are unaware that the argument was long ago a favorite among labor's enemies, who, cloaking it with ostensibly anti-paternalistic arguments on behalf of their workers, used it to attack unions' advocacy of eight-hour laws banning overtime work.

For example, at the beginning of the twentieth century, when mine and metals employers in Colorado succeeded in thwarting the will of the vast majority of the electorate, which had voted in favor of an eight-hours law, one of the arguments used by the chairman of the board of the powerful Colorado Fuel and Iron Company to oppose it was the alleged injustice it did to miners, who would have been deprived of the opportunity to work overtime so that they could earn enough

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34Short v. Bullion-Beck & Champion Mining Co., 57 P. 720, 721 (Utah 1899).
36[California] Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime 1:18 (William Robertson, exec. sec'y-treas., Los Angeles County Federation of Labor).
37In an almost comical misunderstanding of the point of the FLSA overtime provision, a popular expose of the fast-food industry rebuked these employers for letting so few of their employees "qualify for overtime...." Instead: "By hiring a large number of crew members for each restaurant...and employing them for fewer than forty hours a week whenever possible, the chains keep their labor costs to a bare minimum." Eric Schlosser, Fast Food Nation: The Dark Side of the All-American Meal 73-74 (2001). The author appears to be unaware of the fact that shorter hours for a larger number of workers is precisely the intended result of the financial deterrent of the overtime penalty. Oddly, the author, who details several illegal methods used by these chains to deprive workers of the overtime they do work, fails to mention one of the principal scams—shifting all overtime work to so-called assistant managers, who are then misclassified as "exempt" from overtime protection. 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).
money to educate their sons and elevate them to higher social positions. At the same time, a representative of the Bethlehem and United States Steel companies, attributing the meteoric rise of some managers to the college educations that they had been able to finance with overtime earnings, went so far as to assert before Congress in 1902 that the ban on overtime work in a proposed eight-hour law for workers on government works was actually designed to prevent such careers.... It is to compel men to remain on the same dead level, to prevent men from having the opportunity to rise above their fellow-men. That is the purpose, the direct purpose...of the bill. It is to say to one man of somewhat superior natural ability, “You shall not go faster than your brother who has not the mental capacity that you have. ... If you have more muscle, you must not be permitted to exert it.”

In 1912, a perennial congressional employer-witness against eight-hour bills for federal government works that did not permit overtime work alleged: “On one occasion I declared that I could go before the people of my district and defeat...the Member from that district, if he supported a bill of this character, and that I would make the contest with him over the question whether or not he was in favor of striking down the rights of the American workingman to work overtime for overtime pay, which is the very purpose of this bill.” And on the same occasion, when Congress, after two decades of union urging, enacted such a statute to cover government contracts, The New York Times taunted labor: “Overtime is forbidden, although extra pay at higher rates is a boon to the wage-earner. ... Eight hours’ work and eight hours’ pay are not attractive under the present narrow margins of wages above the cost of living. For some there is no such margin, and any such reduction of pay would be...a calamity for them....”

This question was once again prominently raised in 1997 in connection with unsuccessful congressional efforts to enact the so-called Family Friendly Workplace Act, which would have amended the FLSA to empower employers to offer compensatory time off in lieu of premium pay. The minority Senate Democrats protested the proposal because

the very workers who currently rely most heavily on overtime pay are the employees most


vulnerable to coercion and retaliation by their employer.

Thus, to understand the real world impact of this bill, we must look at the workers who are currently depending on overtime pay to make ends meet. Overwhelmingly, they are working for low wages. One-fourth of workers earning overtime earn under $12,000 per year. 44 percent of workers who depend on overtime earn $16,000 per year or less, and 61 percent earn $20,000 per year or less. These are classic low-wage jobs, where workers need every dollar of pay they can earn. Furthermore, overtime pay makes up a significant percentage of many hourly workers' take-home pay. When they work overtime, manufacturing workers find that an average of nearly 15 percent of their take-home pay is attributable to the extra hours. If this bill becomes law, many of them will lose overtime pay that they depend on to pay the rent, buy food, and provide clothing for their children.

Millions of those who rely on overtime earn only the minimum wage.43

Wage and Hour Administrators use similarly self-contradictory reasoning. In attacking big business's drive to undermine the 40-hour week and the payment of penalty overtime wages, Maria Echaveste charged: "The issue is not about flexibility... It's about money. And the net result of change will not be flexibility but the loss of money out of the pockets of workers who need the overtime."44 Echaveste correctly unmasked employers' efforts to camouflage their attack on the FLSA as motivated by the desire to lower wage costs, but her ledger-book logic equating money saved and money lost stands the historical struggle over shorter hours on its head. And her successor, T. Michael Kerr, apparently saw no contradiction in explaining the "purpose and importance of overtime pay" to Congress in these terms:

Protecting the integrity of the regular rate is key to ensuring workers overtime rights. An important purpose of the overtime premium pay requirement is to limit the burden of excessive work hours for employees and their families, and to ensure workers are fairly compensated when they are required to work long hours.

For many workers, overtime pay is an important part of their income that helps them make ends meet. Average weekly overtime hours have been at or near record levels for much of the 1990s. Over-time hours and overtime pay have become increasingly important to many workers...as the amount of overtime work has trended upward.45

Employers, too, have used the same argument to attack legislative efforts to

put an end to mandatory overtime. As the Ford Motor Company informed the California Senate Committee on Industrial Relations a quarter-century ago: “in the automotive industry, a substantial number of employees [sic] look upon overtime pay as being an integral part of their paycheck or earning capacity. Indeed, our experience at Ford is that substantially all of our overtime grievances are submitted by employees who believe that they have been improperly denied overtime as opposed to protesting the fact that if it is scheduled, they were required to work.”

A labor arbitrator dealing with a grievance over an employer’s failure to equalize the distribution of overtime also reproduced the self-contradiction. Thus he observed that the FLSA premium-rate provision was “designed to maintain economic stability, create jobs, and protect the well being of employees.” But at the same time he stressed: “Many employees prize the opportunity to add to their income by working overtime. Indeed the possibility of earning such extra income has come to be regarded as a vital ingredient of the whole employment package and is often featured as such in company recruitment advertisements.”

Nor is the attitude confined to the United States. A Canadian historian skeptical of the “new economic paradigm” of the global marketplace that “Canada embraced” in the wake of the “economic disaster” of the early 1990s and that treated people as commodities, nevertheless viewed overtime work as a perquisite: “Recovery began when laid-off workers, jarred by the new Employment Insurance rules, accepted minimum-wage jobs without benefits, seniority, or overtime.”

Even a resolutely pro-labor economist who has untiringly defended the FLSA against employer attacks, loses sight of logic in asserting: “When an employer insists on long hours per week, the costs spill over onto family and parenting time, student time, leisure, and volunteer time. In a sense, the overtime premium makes employers bear more of the social spillover costs imposed by their own hours decisions.” It is unclear what “sense” Lonnie Golden can mean since no matter how much money the premium redistributes from the employer to the overtime worker, it cannot restore to the worker the lost time that he will never


be able to devote to these nonproduction activities.

Regardless of whether reliance on overtime premiums is a rational means of raising the annual incomes of low-wage workers, it is irreconcilable with using the statutory overtime penalty to discourage excessive working hours and fostering work sharing. In the context of an unprincipled Democratic opposition to Republican efforts to dismantle the New Deal's skeletal labor-protective system, promoting the overlong workweeks that the labor movement struggled for decades to abolish no longer even provoke demands for an explanation as to why the traditional goals of shorter hours and work sharing should be sacrificed for marginal increases in weekly wages that tendentially depress hourly wage rates.

Evidence of the perverse result of relying on overtime to bolster low-waged workers' incomes is provided by numerous BLS surveys showing that a below-average proportion of labor union members work overtime, but an above-average proportion are paid premium overtime when they do work long weeks. In May 1978, for example, 23.2 percent of blue-collar unionists worked 41 hours a week or more compared with 31.4 percent of nonunionists, while 83.3 percent of unionists but only 62.4 percent of nonunionists received premium pay. Among construction wage and salary workers, 13.2 percent of unionists and 27.5 percent of nonunionists worked overtime, while 73.6 percent of unionists and only 50.1 percent of nonunionists were paid overtime premiums. In manufacturing, the corresponding figures were 23.4 and 30.3 percent, and 88.7 and 56.3 percent, respectively.50 On average, employees of establishments imposing overtime do not receive compensatory higher straight-time wages, but union workers do.51

Female piece-rate bookbinders in London in 1877 were neither the first nor last workers to learn the Sisyphean lesson that, as one of the factory inspectors' reports noted, "if overtime were continued for a few weeks together their earnings would soon fall to about the same amount as when they worked the regular hours."52 Although workers "reap no permanent advantage" from long hours, premium pay, as nineteenth-century trade unionists gradually learned, instead of discouraging overtime work, "stimulated the men in various trades to desire it."53

The fundamental defect in unions' and Democrats' current rhetoric—and it


53George Howell, Trade Unionism: New and Old 79, 78 (1891).
The Autocratically Flexible Workplace

is mere rhetoric devoid of any principle or theory—to combat efforts by employers and Republicans to undermine the 40-hour week lies in the wholesale adoption of their opponents’ individualist-consensual framework. Two centuries of union campaigns have demonstrated that regulation of the length of the workday or workweek cannot be based on worker or employer voluntarism; on the contrary, the very existence of normal working hours presupposes collective-compulsory principles embedded in collective bargaining agreements or statutes.

As Sidney and Beatrice Webb explained a century ago, the failure to proceed along such lines results in an inexorable drift toward longer hours, if not lower wage rates. The history of British union agreements regarding overtime work in the nineteenth century, which bears startling resemblances to the late-twentieth-century experience in the United States, revealed that when the employer had been deprived of the unilateral power to extend the working day as he wished, he insisted, “in conceding a customary fixed working day,” that workers accommodate him with respect to emergencies and sudden rush orders by working beyond the usual hours. Unable to refute this claim, union leaders turned the concession into “a source of extra wages” for their members by negotiating for higher time and a quarter or time and a half rates:

This arrangement appeared a reasonable compromise, advantageous to both parties. The employers gained the elasticity they declared to be necessary to the profitable carrying on of their business.... The workmen...were recompensed by a higher rate of payment for the disturbance of their customary arrangement of life, and the extra strain of continuing work in a tired state. The concession involved a deviation from the Normal Day, but the exacton of extra rates would...restrict overtime to real emergencies. ...

Further experience of these extra rates for overtime work has convinced nearly all Trade Unionists that they afford the smallest degree of protection to the Normal Day, whilst they are productive of evil consequences to both parties. In spite of the extra rates, employers have...adopted the practice of systematically working their men for one or two hours a day overtime, for months at a stretch, and, in some cases, even all the year round. ... The result is that the long hours become customary, and subject to alteration at the will of the employer. Nor has the individual workman any genuine choice. ...

Whilst the practice of systematic overtime deprives the workman of any control over his hours of labor, the Trade Unionists are beginning to realise that it insidiously affects also the rate of wages. If there is any truth in the economists’ assumption that it is the customary standard of life of each class of workers which, in the long run, subtly determines their average weekly earnings, systematic overtime, if paid for as an extra, must...tend to lower the rate per hour. That frequent opportunities are afforded for working overtime is...often given by employers as an excuse for paying a low rate of weekly wages. Where payment is made by the piece, it is usually impossible...to distinguish between “time” and “overtime,” and in such cases a promise of systematic overtime, enabling the men to make up their total earnings to the old standard, is a common inducement to them to submit to a reduction of their piecework rates. But the timeworker is...as much at the mercy of the employer as the pieceworker. The promise of “time and a quar-
ter" for the extra hours is a powerful temptation to the stronger men to acquiesce in a re-
duction of the Standard Rate of payment for the normal working day.

Moreover, when bad times come, and the demand for a particular kind of labor falls
off, there is an almost irreversible tendency for the amount of overtime to increase. The
employers see in it a chance of reducing the cost of production by spreading the heavy
items of rent, interest on machinery, and office charges over more hours of work. The
workmen are tempted to make up, by extra labor, their drooping weekly earnings. Exactly
at the moment when the community needs...ten per cent less work from its...building
operatives, a large number of these are pressed and tempted to give ten per cent more
work—to the end that nearly twenty per cent of the trade can find no employment
whatever! ... Even the employers are now beginning to object to the arrangement. They
feel that it is unbusinesslike to pay higher rates for tired work.54

Significantly, the Webbs gave a similar cautionary account of statutory hours
regulation. When Parliament extended the ten-hours regime from textile and
allied industries to other factories and workshops, it failed to retain the scheme
of rigidly fixed uniform hours: “Endeavours were made, by sanctioning overtime
under certain conditions,...to meet the varying circumstances of different indus-
tries.” The result, they reported, was that the “overtime regulations hailed as one
of the sensible advantages of the Act of 1878, have gone far to neutralise any
regulation of hours at all.” In the end, overtime seldom remained the exception
that the law contemplated.55

The same analysis was accepted by trade unionists in the United States.
Writing in 1903, John Mitchell, the president of the United Mine Workers,
stressed that it was “absolutely essential to regulate the question of overtime” in
order to limit working hours:

The ideal of an agreement upon the working day should be to limit its length to a reason-
able number of hours, while at the same permitting the employer in cases of emergency
to keep his men at work for a longer period. It has been shown in practice, however, that
where overtime is paid for at the same rate as ordinary time, so-called emergencies multi-
ply, overtime is resorted to systematically, and the normal working day is broken down.
The men who have thus secured an eight-hour day find that they are regularly working
eight hours per day plus, say, two hours overtime, and after a few years, they may receive
for their ten hours no more, if not actually less, than formerly for their eight hours of
work. To remedy this evil and to avert this peril, trade unionists have in many cases been
obliged to charge for overtime at a considerably higher rate, such as time and a quarter,
time and a half, or double time. This is fair to the wage earner, since the last hour of work

[1897]).
55 Webb and Webb, Industrial Democracy at 349-50. For the relevant statutory pro-
visions, see Factory and Workshop Act, 1878, 41 Vict. ch. 16, §§ 53-57, at 137, 157-59.
is harder for him than any other, whereas to the employer, who pays most for this last hour, it is the least valuable, since the workman is tired. Theoretically, therefore, the employer will work overtime only in especially good seasons or in emergencies. In actual practice, however, overtime, even when paid for at a higher rate, tends often to become systematic and to lengthen the working day without permanently increasing wages. Consequently, unions have frequently been compelled to prohibit overtime entirely, to limit the maximum amount of overtime per week or month, or to make other provisions that overtime, while serving the employer’s purpose, may not be used to break down the standard working day.56

Clarity about the self-defeating character of premium overtime compensation was commonplace among unionists in the early twentieth century even in the statutory context. Between 1892 and 1912, when Congress debated an eight-hour law for employees of contractors on government works, union leaders repeatedly urged legislators not to yield to employers’ requests to include an overtime provision. Employers alleged that “the chance to work overtime” was a “privilege,” which a foreman handed out to workers he “wants to be good to....”57 The president of a shipyard representing the National Metal Trades Association and the National Association of Manufacturers (NAM), whose more than 4,000 members employed 1.7 million workers, testified to the Senate Labor Committee that overtime was a “Godsend to tens of thousands of young men who are working.” Purporting to speak on behalf of these firms’ employees, Wallace Downey declared:

The overtime that is paid to those men upon Friday or Saturday night is in itself so much money that it would seem fabulous were I to mention it. You gentlemen do not hear anything about it, but the wives at home and the children hear about it. The overtime money is a very important part of the man’s earnings. His whole year’s living is laid out on the basis of his average wages and average time made, and the overtime money he makes is something for his wife to get something extra for herself and her children with.58

The president of the AFL, Samuel Gompers, was most vociferous in warning that such payments were dysfunctional for workers. “As a matter of fact,” he told the House Labor Committee in 1902:


it is not extra pay; that is, only temporarily is it extra pay, for as the hours of labor are increased generally wages fall to the wages earned in the shorter workday.

In other words, I say that for a ten-hour day, and when overtime is practiced, there is an increase of pay to those who have this overtime. When the overtime becomes general, the wages earned in the lengthened day's work is not more, but generally less, than the wages earned in the shorter workday. This is the universal economic law, from which there is absolutely no deviation.59

Gompers had also expressed the labor movement's adamant opposition to overtime two years earlier to the U.S. Industrial Commission. Outlining the same reequilibration process, he added that "after a while it happens that overtime—overwork—becomes the rule and is no longer overwork."60

A decade later, the president of a machinists union local explained to the Senate Labor Committee that the union negotiated premium overtime provisions in its collective bargaining agreements with private firms "to prevent the manufacturers from using overtime, and not for the sake of getting extra money, because we know very well that if we work overtime continuously, that becomes a new basis for our day's work, and eventually we will have to work a longer time, and that the straight time will become the regular time, for the same old pay."61

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59Eight Hours for Laborers on Government Work: Hearings Before the House Committee on Labor, 57th Cong., 1st Sess. 92 (1902).


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


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-

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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. 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.

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, 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, 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. The 30-hour bill that Representative Connery introduced in the

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7 This 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).

8 Benjamin 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

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 woodworking 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).


13H.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.”

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. Once President Wilson’s executive orders inaugurated this wartime overtime regime, 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: “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.”

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. (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-
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-


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 Excluding 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.”


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.


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

The Autocratically Flexible Workplace

weekly.  

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 bill in 1935. Lacking a legislative majority, the labor movement was forced to make the kinds of compromises and concessions 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. 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. Court injunctions, however, prevented enforcement of the law, which because of its eight-hour daily limitation, was stricter than the FLSA.

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). The South Carolina statute adopted almost verbatim the provision from the North Carolina

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1943 N.C. Sess Laws ch. 59, § 1 at 55.


31936 S.C. Acts No. 832, §§ 2 and 12 at 1568, 1570.

41938 S.C. Acts No. 702, § 11 at 1565, 1567.

5Lahne, 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.

61938 S.C. Acts No. 943, § 1 at 1883, 1883-84.
statute authorizing longer workweeks during “rushing business”—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. Finally, the law limited the
weekly hours of all female workers in garment factories to 40 and those of all
employees in finishing, dying, 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.

In spite of the huge number of workers who were placed outside the pro­
tection 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 unconstitu­
tional the following year. In fact, it was precisely these gaps that proved its un­
doing. To be sure, it was not the spotty protection of workers, but the arbitrarily
and unreasonably discriminatory manner in which liability was imposed on em­
ployers 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 stat­
ute would subject all establishments to the 56-hour regime, whereas the legis­
lature expressly stated that it did not intend to regulate hours in that universal
manner. 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 in­
dicated 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.

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 undertak­
ings...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).
13Gasque, 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. Storr, 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 working-men 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 employees, 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

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141897 N.Y. Laws ch. 415, art. 8, § 110, at 461, 485.
161896 Utah Laws ch. 72, at 219.
“We Didn’t Think that the Legislature Would Be So Crazy”: Territorial Alaska’s Absolute Universal Eight-Hour Law

The Government is contented with the eight-hour law; why can’t we little people in this frontier, God-forsaken country, have it? We are here trying to make a country out of it and make a living. We don’t want very much.¹

It is my deliberate opinion, based upon a wide experience in this Territory, embracing to some extent every known condition affecting either labor or capital, that if there is a country on earth where there is a logical and reasonable demand for a shorter work day, it is Alaska. This is because of climatic conditions, which are frequently extremely unfavorable..., together with the isolation of the workingmen; and added to this is the fact that the average wage paid labor...is in most instances below that paid for the classes of work in the western and Pacific coast states.²

The eight-hour statute—prohibiting overtime work except when life or property was in imminent danger—covering all workers (including adult men and business partners) enacted by the Alaska territorial legislature in 1917 is the most radical piece of hours regulation in the history of the United States. Workers, especially miners, in this frontier society had been agitating for the eight-hour day for a number of years in the face of mine owners’ insistence on 10-hour days on the grounds that short seasons (lasting from May to October) required full use of every day. Understandably, miners were not keen on exposing themselves to punishing long days on hands and knees in damp permafrost mining operations, and expressly made the argument that such long workdays would shorten their working lives.³

¹“Hearings Before the Governor of Alaska on the Eight-Hour Law (Chapter 55, Session Laws of Alaska, 1917)” at 31 (Feb. 5-21, 1918) (statement of Jesse Rice), in Record Group 101, Box 2616, Alaska State Archives.

²Letter from Alaska Territorial Governor J. F. A. Strong to the Secretary of the Interior at 7 (Feb. 25, 1918), in Record Group 101: Territorial Governor, Series 130: General Correspondence, Box 159, File Code 156: Eight-Hour Workday Law, Alaska State Archives.

³James Foster, “Syndicalism Northern Style: The Life and Death of WFM No. 193,” 5 Alaska Journal 130-41 (Summer 1975); James Foster, “The Western Federation Comes
The gold rush of the late 1890s had made Alaska the last frontier that “attracted rugged individualists with no capital but their hands, their courage, and a winter’s grubstake, to wring an independent fortune from the Territory’s gravels.” However, within a few years, large monopolies turned “these little men” into “sullen wage-workers....” The salmon trust, for example, “brought home to residents that corporation control meant Asiatic labor” by staffing its floating canneries anchored in the territory’s harbors with Hindus, Filipinos, and Chinese. Supreme among these monopolies was the so-called Guggenmorgor or Morganheim syndicate.4 The Guggenheim family and the House of Morgan, the owners of this combination, as James Wickersham, Alaska’s leading politician and for many years its delegate to Congress,5 explained to the House Committee on the Territories in 1913, “have thrown out their tentacles along the coast in Alaska, have secured a monopoly of our coal, copper, and transportation, and they are in control of the three principal gateways to the interior of Alaska. They control the transportation in Alaska; they control the situation with respect to railroad building in Alaska; they control the fisheries in Alaska; they control the copper of Alaska....”6 Not surprisingly, the Guggenheim-Morgan syndicate also “wielded tremendous influence in Washington on all matters pertaining to Alaska and its business associates in the territory were influential in local politics.”7

The eight-hour day had become such a mainstream demand among the monopolies’ proletarianized workers on the last frontier—the vast majority of whom were unmarried men8—that during the 1908 election campaign for congressional

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5 Although Wickersham was widely held to be the Syndicate’s staunchest foe, in 1906 and 1907 the Guggenheim-Morgan interests asked him to be their general counsel in Alaska; he declined because he refused to be subservient to the Guggenheims’ corporation general counsel in Seattle, but when asked whether he would consider that position, he said yes. Evangeline Atwood, Frontier Politics: Alaska’s James Wickersham 137, 146 (1979) (not revealing why the deal was not consummated).


8 In 1910, white males outnumbered white females five to one in the total population; 71 percent of white men over the age of 15 were unmarried. 3 Bureau of the Census,
delegate all candidates agreed on the need for it; similarly, during the run-up to the elections for the first territorial legislature in 1912, party platforms also endorsed an eight-hour day. Wickersham and his followers saw the congressional grant of home rule as undermining the Syndicate's political power, but others took a jaundiced view of the legislature's limited taxing powers and lack of control over such key industries as railroads and fishing, for which the salmon canneries had successfully lobbied. Despite its initial opposition to home rule, such restrictions meant that the Syndicate "existed quite comfortably under territorial government."

Indeed, the "Alaska syndicate came out the winner in Alaska's first Senate" by virtue of the election of four "corporate-oriented candidates" who could "kill an undesirable piece of legislation" in that eight-member chamber. Nevertheless, miners, who together with mine owners predominated among the legislators at that first legislative session in 1913, succeeded in enacting an eight-hour law for employment in underground mines and smelters and related operations on the grounds that it was "injurious to health and dangerous to life and limb." The legislature also enacted an eight-hour law that year for all work performed by contract for the territory or any municipality; longer workdays were permitted only "in cases of extraordinary emergency such as danger to life or property...." The strong presence in Alaska of the radical Western Federation of Miners and the Socialist Party, which inscribed the eight-hour day in its plat-
form in 1912, may have helped drive the legislation forward.\textsuperscript{16}

The territorial governor’s message to the second session of the legislature in 1915—which, as the result of the departure of most of the corporate-oriented senators, Wickersham “could control”\textsuperscript{17}—recommended extension of the eight-hour law to placer mines. Governor John Strong, himself a former Alaskan miner,\textsuperscript{18} justified his view by reference to the general experience “that a man who works eight hours a day will do as much work as he who works ten hours, and he will probably do it better.”\textsuperscript{19} Contentious debate saw both a repetition of the mine employers’ argument that shorter hours were incompatible with a short season and a testimonial by at least one of the legislators who had been a miner of his experience of spending 10 hours in the muck and mud.\textsuperscript{20} Finally, the legislature amended the 1913 eight-hour law to include underground placer mining.\textsuperscript{21}

Concurrently with this debate over miners the legislature was also considering a more general eight-hour law. The first such bill was timid: it would have limited the workweek in laundries to 48 hours and conferred the eight-hour day on female workers in hotels, restaurants, bakeries, and telephone and telegraph exchanges.\textsuperscript{22} The House of Representatives then recommitted the bill to the Labor, Capital, and Immigration Committee, instructing it to include all industries.\textsuperscript{23} Just two days before the session was to end, the press reported that absent some unforeseen event, the House would pass a universal eight-hour bill,\textsuperscript{24} but the


\textsuperscript{17}Atwood, \textit{Frontier Politics} at 286-87.

\textsuperscript{18}Gruening, \textit{The State of Alaska} at 166.


\textsuperscript{21}1915 Alaska Sess. Laws ch. 6 at 6.

\textsuperscript{22}“Several Cases of Employment Affected,” \textit{Alaska Daily Empire}, Mar. 11, 1915, at 1:3.

\textsuperscript{23}“Hanging Abolished; 8-Hour Day for All Industries Favored,” \textit{Alaska Daily Empire}, Apr. 21, 1915, at 1:1.

\textsuperscript{24}“General 8-Hour Bill May Pass,” \textit{Alaska Daily Empire}, Apr. 27, 1915, at 3:5. In the very next column to this report the main newspaper of the capital, Juneau, printed a restaurant advertisement dressed up like a news article which mocked the proposed eight-hour law: A pro-eight-hour legislator is arrested by the sheriff for working his servants overtime whom he had sent to take his sick mother-in-law to the doctor; when the dog sled breaks down, they have to work more than eight hours, but the mother-in-law is nevertheless stranded in the blizzard. “Legislative Doings,” \textit{Alaska Daily Empire}, Apr. 27, 1915, at 3:4.
next day the House defeated the bill 9 to 6.  

On the last day of the session, the legislature—which, the president of the Senate stated three years later, “decided that it did not wish to assume the responsibility of enacting so important a measure without first submitting the question...to the people” ordered that the question as to whether the electorate favored a general eight-hour day for “all wage earners and salary earners” in Alaska be submitted to the electors at the next general election. If they voted in favor of the eight-hour day, the next session of the legislature was required to enact implementing legislation. Thus although the scope of the law was uniquely universal in covering adult males and all industries, it did not propose to include non-wage or salary earners such as profit-taking business owners. The wording of the legislative proposal, as employers would point out two years later, also failed to specify whether “eight-hour day” meant an absolute ban on overtime work or merely imposed a penalty wage premium. However, since the first two legislatures, to the accompaniment of considerable publicity, had just enacted two eight-hour laws for miners permitting no overtime work, there would have been little reason to assume that the proposed general eight-hour statute was to be a mere overtime law.

Workers and labor unions displayed considerable enthusiasm for the referendum. Even the Nome local of the Western Federation of Miners, whose Industrial Worker took a jaundiced view of capitalist political institutions, carried a streamer at the top of the front page during the run-up to the election urging workers to vote Yes. For these socialists, an eight-hour law “means more leisure for the worker; it means more rest and more time to fit oneself for the struggle for existence, so that we may learn to work and act that this existence will be no longer a struggle....” The industrial democracy to which the organization aspired would “not be hastened by keeping men and women with their noses to the grindstone, so that they know little of actual happenings, less of themselves....” The day before the election, the paper, while bemoaning that non-workers, who tended to accept employers’ viewpoint, were entitled to vote, conceded that some employers had recognized that shorter hours were “a business proposition because they got more out of the workers.” But the Industrial Worker added that workers had their own reasons for wanting the shorter workday, including the

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resulting reduction in unemployment and competition.\textsuperscript{30}

Interest in the referendum was intensified when, just two weeks before the election, the district court for the Fourth Judicial Division sitting in Fairbanks, on formal-technical grounds barely comprehensible to non-lawyers, invalidated the 1915 act that had amended the 1913 eight-hour law for miners to cover underground placer mining.\textsuperscript{31} The case arose when, at the request of the United States, a grand jury indicted Sylvester Howell and Jennie Cleveland in July 1916 for having employed a worker in April for ten hours per day in underground placer mining workings in the absence of any imminent danger to life or property. In their defense, the employers raised the constitutional claim that the act was void as special legislation (presumably because it applied only to mining), but the court chose not to reach this issue. Instead, the judge accepted the defendants' argument that the title and body of the 1913 act limited its scope to lode mining, and, since the title of the 1915 amendment failed to extend the scope of the act, it was not germane to the act's subject matter other than lode mining, and therefore placer mining had never been validly subject to the law.\textsuperscript{32}

Despite sustaining the employers' position, the judge, Charles Bunnell, who would play an even more prominent part in the struggle over the general eight-hour law in 1918, stressed that it was only with "the greatest reluctance" that courts invalidated laws enacted to protect workers engaged in hazardous occupations. Nevertheless, they were "compelled" to do so because of the legislature's failure to formulate the title of the 1915 amendment to expand the scope of the law.\textsuperscript{33} Two years later, in a speech during his congressional delegate campaign, Wickersham, who himself had for years been the district judge sitting in Fairbanks, called Bunnell's decision "the silliest rot he had ever read in a judicial decision...."\textsuperscript{34}

Public interest in the eight-hour law was signaled by the fact that on the same day that Bunnell read his decision aloud in court, the \textit{Fairbanks Daily News-Miner}, under a screaming banner headline, "8-Hour Law Unconstitutional," reprinted virtually the entire text. In a somewhat smaller font, the newspaper added the more colorful sub-headline: "Not Worth the Paper It's Written On." In case readers failed to turn to the inside pages, the editors helpfully summarized the


\textsuperscript{32}United States v. Howell, 5 Alaska at 578-79, 581.

\textsuperscript{33}United States v. Howell, 5 Alaska at 582.

\textsuperscript{34}"Wick Opens Up G.O.P. Campaign," \textit{Tri-Weekly Nome Industrial Worker}, Aug. 3, 1918, at 1, col. 4, at 4, col. 1-4 at 3.
day’s editorial at the top of the article in large bolded type: “After Balling Upp [sic] Mineowners and Mineworkers Alike for a Year and Making Nothing But Trouble, Submitted to the Courts It Is Discovered That Alaska’s 8-Hour Law Was Never a Law In Fact and Never Binding Upon Anybody Unless They Thought So.” Beyond expressing its glee about the law’s demise, the newspaper astutely observed that the decision was of “the greatest importance” not just to the litigants, but to “the whole Territory, as it is likely that similar decisions will be rendered by other courts in the other divisions, if the matter ever comes up there.”35 (Curiously, two years later, in the aftermath of Bunnell’s decision striking down an eight-hour law, almost none of its supporters raised the converse question—whether it was still valid in Alaska’s other three judicial divisions.) Without offering any supporting examples, the News-Miner editorialized that the statute had proved “an undesirable restriction upon laboring man and employer...resulting in an entire season’s loss and annoyance to all of them....”36

Despite telegraph and telephone, news of the ruling moved slowly across the tundra. A whole month elapsed before the main newspaper down in Anchorage printed long excerpts from the decision,37 and six weeks before the Industrial Worker out in remote Nome could discharge its anti-capitalist bile. Throwing up its hands, the paper charged that it was no use a layman discussing the relative merits of a judicial decision. These later [sic] day judges have a theologian of the middle ages...beaten a city block when it comes to splitting hairs, and the only interesting feature...is that the successful hair splitting on the bench is generally performed when some labor law is to be thrown out. ...

These decisions like Bunnell’s, these foolishly drawn up laws which the Bunnells tear up so easily, serve to show the worker that such scraps of paper are just scraps of paper and no more, when the economic power behind the legislators and the judges will have them so act. But when a labor organization, exerting its economic might and through the legislation enacted in the Union Hall, passes its eight hour law, there is a cast iron code that all the judges from hell to breakfast cannot tear with their long lean claws, try they ever so hard.38

Despite, or perhaps because of, Bunnell’s ruling, more than 85 percent of voters in the referendum, led by the miners, favored the proposition at the general election in November 1916.39 The following March, Governor Strong, in his

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39 The vote was 10,416 in favor and 1,782 opposed. “Complete Returns of November
message to the legislature at the beginning of its third session, reminded its members to "give careful consideration to this important matter, and to take such action as will carry out the expressed mandate of the people."40

II

The legislature did consider the matter, but not with the alacrity that the socialist *Industrial Worker* thought appropriate in light of the fact that the minority in the referendum "was so small that one could almost say the eight hour day demand was unanimous...."41 A steady stream of mockery about the "Solons" and how they "shirk eight hour day" appeared in the paper for weeks.42 But the bill that the Senate began considering in March was identical to the one that labor organizations had sought to introduce, and even the cynical *Industrial Worker* gave little chance of passage to an amendment to exempt the all-important fish canneries,43 whose association telegraphed the legislature urging exemption on the grounds of "absolute necessity for safety of the country" of salmon production during World War I, which the United States had just entered.44 During the legislative debate dire predictions were made of "the great calamity that would result" especially with respect to the cannery interests and curtailing of the nation's food supply.45

Patriotism, however, was not the fishing industry's real motivation. Rather, the canneries were impelled by the need to ward off interference with their practice of requiring employees to work extraordinarily long hours. Just a few months before the legislative debates, William Kirk, the general secretary of United Charities of Rochester, had published an article in *Survey* exposing these

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patterns. At one salmon cannery he met a 10-year-old boy whose job was "to watch an interminable row of cans as they passed him on a traveling belt. Every minute or so he would take out a bent can. For 10 cents an hour, and usually for ten hours a day, and six days a week, he had his eyes fixed on the can chute. Sometimes, he said, he worked ten and a half hours a day and sometimes as many as thirteen." At another cannery, children 10 to 12 years old were working from seven in the morning until six and often nine in the evening, including Sundays.\(^46\)

Often men and boys worked seven days a week, 14 or 14 and a half hours daily. A group of Hawaiian workers were paid a fixed $180 for the season to work seven days a week, 11 hours a day, with overtime (work after 6 p.m.) paid at 15 cents an hour. The canneries were especially partial toward Chinese workers: "they are industrious and tractable. They have such a low standard of living that they are willing to work excessively long hours without grumbling...."\(^47\) Better even than Chinese workers, however, was machinery that did the work of 20 workers disassembling salmon by hand; the machine was known as the "iron Chink."\(^48\)

Salmon cannery owners, however, did not need to rely solely on their own telegrams: they were influential enough to secure intervention by higher powerholders. In the midst of the legislative deliberations, Territorial Governor Strong transmitted to the legislators a telegram that he had received from Interior Secretary Franklin K. Lane—who had jurisdiction over Alaska—requesting, on behalf of the salmon packing industry, inclusion in the law of a clause authorizing waiver of the eight-hour provision by the governor if a national emergency were declared by the interior secretary or the Council of National Defense.\(^49\) The Council, which was established by Congress in 1916 to coordinate resources, consisted of several cabinet secretaries and worked through a huge network of state and local organizations; it asked all state legislatures to delegate to the

\(^{46}\)William Kirk, "Labor Forces of the Alaska Coast," 36(14) Survey 351-57 at 351 (July 1, 1916). Alaska’s child labor law applied only to mining, but after a 1919 federal child labor tax law had been interpreted as applying to canneries in Alaska, the territorial labor commissioner recommended that "steps be taken to free native Alaskan children from the operation of this act." Biennial Report of the Labor Commissioner for Alaska, 1919-1920, at 4 (1921), in Record Group 101, Ser. 130, Box 196, File 52 Reports, Folder 196-3, Alaska State Archives. Such steps were presumably unnecessary since the U.S. Supreme Court struck the law down as unconstitutional. Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

\(^{47}\)Kirk, "Labor Forces of the Alaska Coast" at 352-53. Cannery employers also used a labor contractor system in an effort to rid themselves of any liability for wages; the largely Chinese crew leaders often failed to pay the workers. Id. at 352, 356-57.

\(^{48}\)Salin, Die wirtschaftliche Entwicklung von Alaska at 37.

governors the power to suspend or modify state labor laws during the war when the Council requested such suspension or modification. The local councils of defense in Alaska, whose members were commonly "leading citizens of the community" associated with fishing or mining, sought to combine their call for longer workdays with combating the influence of the International Workers of the World in those industries. Two days after receiving Lane's telegram, the Alaska House of Representatives added the suspension provision to the bill. Even on the eve of final passage, the Nome newspaper of the Western Federation of Miners pilloried the senators for "pulling off a good josh on their constituents" by considering yet another referendum despite the more than ten to one majority in the original referendum: "Anything to avert this labor legislation in the interest of the higher-ups." A few days later the Senate did pass a bill providing for an expression of voter opinion on whether the general eight-hour law for all wage and salary earners should be amended to exclude industries operating only during the short summer seasons, such as placer mines, canneries, and agriculture (as well as clerks), but the House did not concur.

The legislature, however, did act. First, after the Alaska attorney general had filed an opinion with the House that the legislature's power to limit miners' hours was "no longer a mooted question," the legislature enacted a new special eight-hour law for miners not vulnerable to the defects that had prompted Judge Bunnell to strike down the 1915 act. Then the legislators, by a vote of 6-0 in the Senate and 14-2 in the House, enacted an unprecedented universal absolute

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52 The Journal of the House of Representatives of the Third Legislative Assembly of the Territory of Alaska at 146.

53 "Senate Joshers Want to Refer Eight Hour Again," Daily Nome Industrial Worker, Apr. 26, 1917, at 4, col. 2 (the 10 to 1 figure was incorrect).

54 "Session of Alaska Legislature Ends Thursday," Anchorage Daily Times, May 2, 1917, at 1, col. 2; The Senate Journal of the Third Legislative Assembly of the Territory of Alaska 143, 211 (1917) (Senate Bill No. 75); The Journal of the House of Representatives of the Third Legislative Assembly of the Territory of Alaska at 315.


56 1917 Alaska Sess. Laws ch. 4 at 3.

57 The Senate Journal of the Third Legislative Assembly of the Territory of Alaska at 117; The Journal of the House of Representatives of the Third Legislative Assembly of the Territory of Alaska at 183.
Territorial Alaska’s Absolute Universal Eight-Hour Law

eight-hour law. In the House, the bill had been introduced by Philip Corrigan, the chairman of the Committee on Labor, Capital, and Immigration, and a former miner, socialist, and president of Nome Local 240 of the Western Federation of Miners; in the Senate, another former miner, Swedish-born John Sundback, filed the bill.58 (After being informed by the Attorney General that such a bill would not affect the general eight-hour law, the House passed an eight-hour law for women in numerous industries, but refused to concur in the Senate amendment to exclude “Natives or mixed blood during the salmon canning season,” and the bill died.)59

The new law’s central provision read:

That a period of employment for all wage earners, and salary earners in the Territory of Alaska shall not exceed eight hours (8) within any calendar day, except in cases when life or property is in imminent danger. Employment as herein used shall be construed as the performance of labor or services for any individual, partnership, association or corporation, whether the person performing such labor or service be a member of such partnership or association to stockholder or officer of such corporation or not.60

Each day’s violation constituted a separate misdemeanor and was punishable by a fine of $100 to $500 and/or 60 days’ to six months’ imprisonment. Finally, the statute included the provision that the interior secretary had urged empowering the governor to suspend or modify the operation of the law, at the request of the interior secretary or Council of National Defense, during World War I.61

“One of the most discussed provisions of the law” and one that made it unique was the ban on work beyond eight hours even by business partners. The Anchorage Sunday Times, focusing on the issue of unfair intra-capitalist competition, editorialized that since the law did not impose such a ban “where a man is sole owner of his business,” he “alone will have the right to work as long as he wishes, while the one which is owned by two partners, even though both are not


there, will be unable to work more than eight hours."62 Despite almost unanimous votes in both chambers on final enactment, this particular provision was subject to considerable controversy.63 The Committee of the Whole of the House had recommended adoption of a proviso "that the period of employment prescribed by this Act shall not apply to Superintendents, Managers, Bosses, Foremen, or other executives of any partnership, association or corporations when acting as such." After the House struck "Bosses," it did adopt this amendment, but the Senate did not agree to it. A further motion in the House to strike the language imposing coverage on partners and corporate officers failed by a vote of 4-12.64 That even the senators were plagued by some doubts as to the bill's constitutionality was signaled by their having voted twice to defer consideration of it until they received the attorney general's opinion.65

III

Notably, employers undertook no public campaign to persuade Congress to exercise its power to repeal the eight-hour law.66 Their low profile during the legislative debates may not have been irrational. First of all, firms, and especially canneries, may have been relying on the suspension mechanism during the war years. Second, the other large employing industry, mining, was already largely subject to a special eight-hour law. The new law did apply for the first time to surface placer mining and dredges, but the number of newly covered workers was "small as compared with the other mining industries."67 And finally, some employers may have assumed that a judge sympathetic to their interests might de-

63Legislative history analysis is, unfortunately, impeded by the fact that not all of the bills and amendments from the 1913, 1915, or 1917 legislative sessions have survived. Telephone interview with Judy Skagerberg, Alaska State Archives, Juneau (March 2000).
64The Journal of the House of Representatives of the Third Legislative Assembly of the Territory of Alaska at 170-71 (House Bill No. 28); The Senate Journal of the Third Legislative Assembly of the Territory of Alaska at 183, 196, 222. The House acted in the same vein when it voted to narrow the scope of coverage by substituting "all wage earners and salary earners" for "all labor or services." This language was enacted, but a further House proviso "that this Act shall not be construed to prohibit extra hours of employment necessitated by a change of shift" was not. The Journal of the House of Representatives of the Third Legislative Assembly of the Territory of Alaska at 170.
65The Senate Journal of the Third Legislative Assembly of the Territory of Alaska at 81, 108 (Senate Bill No 13).
66In establishing a territorial legislature in Alaska, Congress reserved to itself the right to disapprove any statutes enacted there. Act of Aug. 24, 1912, ch. 387, § 20, 37 Stat. 512, 518.
67Report of the Territorial Mine Inspector to the Governor of Alaska for the Year 1917, at 11-12 (1918).
clare the law unconstitutional.

The first possibility was highlighted in the governor’s annual report for 1917, which reminded the interior secretary that the governor was authorized to suspend the law if the secretary requested him to do so.68 Predictably, as January 1, 1918, the effective date of the law, approached, employers began urging the authorities to make use of this mechanism. On December 4, the Interior Department wired Strong that a lumber mill company in Wrangell had petitioned the secretary to suspend the law “alleging enforcement will necessitate discontinuance [sic] of business....” The department instructed the governor to “take up matter with company, ascertain facts and submit your recommendation on application.”69

Three days later, Newton Baker, the Secretary of War and chairman of the Council of National Defense, requested that Strong suspend the law as to the salmon industry for the duration of the war. Enforcement of the eight-hour law, according to Baker, “would either materially increase the cost or decrease the output of canned salmon, a most essential article of diet of our army our navy our civilian population and our allies....”70 The pressure on the governor mounted three days later when he received an almost identical telegram from Interior Secretary Lane, who added that Herbert Hoover of the U.S. Food Administration concurred in the request.71

On December 15, 1917, Strong issued a proclamation suspending the eight-hour law not only as to the salmon fisheries and canneries, as Baker and Lane had requested, but also to “any manufacturing industry...whose products are necessary to the proper preparation of salmon as a food supply....”72 After this first suspension, the governor seized the initiative two weeks later, recommending that Lane request him to suspend the law as to taking, preparing, and curing all other kinds of food fish.73 Lane took a week to reply to Strong’s telegram, stating merely that he had “no request [for] suspension” regarding those industries, but asking for

69 From Meyer Asst. to the Secretary to Governor Strong, Dec. 4, 1917, in Record Group 101, File Code 156, Box 152, Alaska State Archives.
71 Telegram from Secretary Lane to Governor Strong, Dec. 10, 1917, in Record Group 101, File Code 156, Box 152, Alaska State Archives.
73 Telegram from Governor Strong to Secretary Interior, Dec. 28, 1917, in Record Group 101, File Code 156, Box 152, Alaska State Archives.
Strong’s view regarding suspension of the law in mining.\textsuperscript{74} One possible reason for the alacrity with which Strong complied with Lane’s requests was the governor’s knowledge that Alaska Democrats at that very moment were lobbying the Wilson administration not to reappoint him in 1918 because he had failed to side with the Democratic candidate in the aftermath of the contested election for congressional delegate against Wickersham.\textsuperscript{75}

Nevertheless, and expressly legitimizing his action by reference to Lane’s “request,” the governor on January 7, 1918, issued an executive order suspending the law as to the rest of the fishing industry.\textsuperscript{76} Two days later Strong, however, answered a telegram from Lane\textsuperscript{77} to the effect that no exception should be granted one of Alaska’s railroads because he believed that the eight-hour law’s emergency provision covered longer hours caused by winter weather and that therefore “no prosecution would follow.”\textsuperscript{78}

Not until December 21, 1917, did Strong reply to Lane’s telegram of December 4 concerning the lumber mill. In his five-page letter the governor defended his action regarding the salmon industry on the grounds that, as a seasonal business, it would experience lower output if subject to the eight-hour law. After conceding that labor was scarce throughout Alaska—a finding that he would negate just two months later—he nevertheless opposed suspension in mining, but admitted that if the lumber manufacturing industry’s claims were true, “it probably would be advisable to suspend the operation of the 8-hour law” as to it as well as to logging. After offering this specific advice, Strong veered off into a sermon about the patriotic demands of self-denial and self-sacrifice that applied to the “employer and capitalist” as much as to the workman.\textsuperscript{79}

In December 1917 and January 1918 the governor was bombarded with telegrams from capital and labor. The Ketchikan Power Company was perhaps most vigorous in not only requesting total suspension during the war, but also

\textsuperscript{74}Telegram from Secretary Lane to Governor Strong, Jan. 5, 1917 [sic; should be 1918], in Record Group 101, File Code 156, Box 159, Alaska State Archives. This curious exchange would be clarified if the telegram contained a typo: Lane’s phrase, “I have no request suspension,” should perhaps have read, “I have to request suspension.”


\textsuperscript{76}Territory of Alaska, Governor’s Office, Executive Order, Jan. 7, 1918, in Record Group 101, File Code 156, Box 159, Alaska State Archives.

\textsuperscript{77}Telegram from Secretary Lane to Gov. Strong, Jan. 9, 1918, in Record Group 101, File Code 156, Box 159, Alaska State Archives.

\textsuperscript{78}Telegram from Governor Strong to Secretary Interior, Jan. 9, 1918, in Record Group 101, File Code 156, Box 159, Alaska State Archives.

\textsuperscript{79}Letter from Governor to Secretary of the Interior, Dec. 21, 1917, in Record Group 101, File Code 156, Box 152, Alaska State Archives. Strong did not explain how seasonality was relevant if canneries could operate on two or three shifts.
"feelin[ing] this is an unjust law for Alaska and should never have been placed on the records.\textsuperscript{80} Workers, in contrast, were concerned about enforcement of the new eight-hour law: as early as December 3, 1917, the Alaska Labor Union wired Strong that 2,000 members had unanimously passed a resolution demanding that the statute not be rescinded.\textsuperscript{81} Governor Strong, mindful of union opinion and that the legislature had unanimously passed a law strongly approved by the people in a referendum, decided not to heed the call by the Anchorage Chamber of Commerce for suspension of the law altogether during the war.\textsuperscript{82}

Nevertheless, the future of the eight-hour law became dimmer on New Year's Day 1918, when Interior Secretary Lane telegraphed Strong that the Anchorage Chamber of Commerce and the Cordova Council of Defense had requested general suspension and asked the governor to "wire me your views as to whether or not necessity exist [sic] for such action.\textsuperscript{83} Strong's negative reply the following day was firm: "[I]t is my opinion that no necessity exists for general suspension.... This office has received but few requests for such action, and many against it. Labor organization protests have been especially numerous.\textsuperscript{84}

Strong's personal views about the law may have been accurately reflected in his assurance to a private correspondent in early January that it was his "honest conviction that nothing would be gained by the general suspension of the law, and that includes the mining industry of the Territory. A general 8-hour law is being adopted all over the country, and the people of the Territory might just as well make up their minds that the day of the 8 hours has come and is here to stay." He buttressed this belief by reference to his own observations in the printing and newspaper business (he had been editor of the \textit{Nome Nugget} and \textit{Alaska Daily Empire}), which had taught him that printers became physically exhausted by ten hours of work and that they could do as much work and more cheerfully in eight hours.\textsuperscript{85} To be sure, Strong's optimism may have been the result of his lack of

\textsuperscript{80}Telegram from Ketchikan Power Co. to Major Strong, Governor of Alaska, Dec. 15, 1917, in Record Group 101, File Code 156, Box 152, Alaska State Archives.

\textsuperscript{81}Telegram from W J Henry to Hon J F A Strong, Dec. 3, 1917, in Record Group 101, File Code 156, Box 152, Alaska State Archives.


\textsuperscript{83}Telegram from Franklin K. Lane to Hon. J F A Strong, Jan. 1, 1918, in Record Group 101, File Code 156, Box 159, Alaska State Archives.

\textsuperscript{84}Telegram from Strong, Governor to Secretary Interior, Jan. 2, 1918, in Record Group 101, File Code 156, Box 159, Alaska State Archives.

\textsuperscript{85}Letter from Governor Strong to Dr. Aline Bradley (Jan. 9, 1918), in J. F. A. Strong Papers, Box 1 Folder 25, Alaska and Polar Regions Archives, Rasmuson Library.
familiarity with details of the various laws; in any event, contrary to his view, the absolute eight-hour day for adult males (including business partners) with no provision for overtime work had not yet come. Indeed, more than 80 years later it had still not arrived.

To some employers or local branches of the Territorial Council of Defense requesting a general suspension of the eight-hour law Strong sent pro forma replies in January 1918, stating merely that under the statute his authority to suspend could be triggered only by a request from the secretary of the interior or the Council of National Defense.86 To others he offered substantive reasons, stressing that during the campaign from 1915 to 1917 “no public speakers or the press of the Territory [had] discussed the merits of this referendum, neither did they protest against the passage of the law by the legislature.”87

In the meantime, one of the initial consequences of the eight-hour law was the decision by stores in Anchorage to close at 6 p.m.,88 a proposal that the socialist Alaska Labor News had made a year earlier on the grounds that Anchorage—which originated in 1915 as a tent settlement for workers building the Alaska railway—had already passed through its founding years when late-night hours were a necessity, but “hard on the clerks, hard on the business men.”89 The Anchorage Sunday Times editorially welcomed this early closing as a “condition which long ago should have been in existence” since most workers in Anchorage left work at 4:30 or 5 p.m. so that shopping could be completed by 6 p.m.90

The new law was also sufficiently talked about to become the subject of everyday humor. Under the headline, “Harmony Actor Does Not Heed Eight-Hour Law,” one paper reported that “[a]nybody...depressed over the fact that the law prevents more than eight hours’ work in one day, should go” see a new funny film where he would have to “put in overtime laughing.”91

On January 10, Lane returned to the issue of the lumber industry and Strong’s letter of Dec. 21, this time requesting further investigation and a definite recom-

86See, e.g., W. Whittlesey, Secretary, Seward Branch Alaska Territorial Council of Defense to Governor J. F. A. Strong, Dec. 22, 1917, in Record Group 101, File Code 156, Box 152, Alaska State Archives; Governor Strong to W. Whittlesey, Jan. 8, 1918, in Record Group 101, File Code 156, Box 159, Alaska State Archives.

87Governor to Local Council of Defense, Valdez, Jan. 12, 1918, in Record Group 101, File Code 156, Box 159, Alaska State Archives.


mandation concerning the company's claim that it was unable to supply spruce for airplanes.  

A week later Strong replied, tacitly reversing himself, now advising against suspension because he was convinced that Alaska mills did not manufacture lumber suitable for airplanes.  

Despite his resistance to further suspensions, employers' demands for a free hand with regard to the length of the workday became more intense. On January 15, the Guggenheim Kennecott Copper Corporation, "the greatest copper trust in the world," which the previous summer had accomplished the difficult task of breaking a strike by recruiting miners in Alaska in the midst of an alleged labor shortage—stressing the interest of the United States Government in its output, wired Strong that in the "present National emergency it does not seem advisable that our plant should be subject to a sixteen hour shutdown and production stopped simply because mechanics...are not allowed by law to work even an hour overtime...."  

The copper trust's influence was magnified during World War I during which production in Alaska recorded huge increases and far surpassed gold mining in value. Two days later, the manager of a large mining company sought to sway the governor by charging that only "certain of the unions or socialist class" opposed the nationwide movement to suspend eight-hour laws for non-underground mining operations, while "all real Americans, whether laborers or otherwise" supported it. Then on the January 19, Interior Secretary Lane wired Strong, again conveying requests to suspend the law as to railroads and steamships based on claims of labor shortages and prohibitive increases in operating expenses.  

This flood of messages culminated in Lane's telegram of January 23, in-
forming the governor that the Council of National Defense had advised the states that no action should be taken on requests to suspend their eight-hour laws until the governor had held a hearing and concluded that suspension was advisable. Lane therefore instructed Strong to hold hearings on the petitions from the lumber manufacturing, logging, railroad, steamship, and mining industries, to send him and the Council a brief summary of the facts and his advice.100

IV

The next day Governor Strong announced that beginning February 5 he would hold public hearings on petitions by those named industries for suspension of the law as to them and authorization to work employees more than eight hours for extra compensation. The announcement sparked mass labor meetings in January and February in support of the new law.101 Unions sought to refute claims by operators of copper mines, logging camps, and lumber mills that an alleged scarcity of workers would make it impossible to meet war production needs by arguing that it was "common knowledge" that all the requisite skilled and unskilled workers would be forthcoming if employers paid fair wages for an eight-hour day.102 They also observed that double shifts would take care of any labor shortage resulting from an eight-hour shift.103 In contrast, local councils of defense urged the governor to suspend the law entirely; the council in Ketchikan, for example, asserted that carpenters, machinists, electricians, loggers, and others "must be available at all hours to make up" for the impossibility of increasing the number of workers caused by the labor shortage.104

Thousands attended mass meetings under the auspices of the Alaska Labor

100Telegram from Lane to Hon J F A Strong, Jan. 23, 1919, in Record Group 101, File Code 156, Box 159, Alaska State Archives.


104Telegram from Ryus to Governor J F A Strong, Feb. 3, 1918, in Record Group 101, File Code 156, Box 159, Alaska State Archives.
Territorial Alaska’s Absolute Universal Eight-Hour Law

Union to oppose abrogation of the law.105 These protest meetings captured the prevailing sentiment concerning overtime work. At one meeting in Juneau the night before the hearings began, a petition was debated including a proposal to provide workers with the option of working more than eight hours. Although the meeting had “started off like an old maids’ tea party,” the optional overtime proposal “immediately brought out a storm of protest” and it was voted down. Equally interesting was the discussion of a proposal to petition the governor to mandate time and a half for overtime work by fishermen, who, as a result of the governor’s suspension of the new law as to them, were “required to work as long as the employer deems necessary.” A representative of the fishermen, however, urged those attending not to take any action that might confuse the two issues: “If the workers of this and other sections will stand solidly behind the eight-hour law as it now stands, the fishermen will take other means of protecting themselves.”106

The hearings, which extended over more than two weeks, received broad coverage in the territorial press, the opening day, for example, being reported in a banner headline in the Juneau paper.107 Mining, fisheries, logging, and shipping employers were most heavily represented at the hearings.108 Much more interesting than employers’ and workers’ predictably stylized and empirically unverifiable responses to Governor Strong’s call to focus on the question of whether Alaska was suffering from a labor shortage were the class divisions on the issue of whether workers should be permitted to work overtime.109 Employers favored antipaternalistic arguments. Ralph Robertson, one of the territory’s leading corporate lawyers and acting as agent of several companies,110 asserted: “If a man wants to work overtime, he is entitled to it, but this law prohibits them from working their men over eight hours or paying them for it, no matter what pro-


106 “Action Taken Last Night at Mass Meeting,” Alaska Daily Empire, Feb. 5, 1918, at 6, col. 3-4.


108 For the list of the companies (including Kennecott Copper Co.) testifying in favor of suspension, see Letter from Governor Strong to Secretary of the Interior at 2; “Hearings Before the Governor of Alaska on the Eight-Hour Law (Chapter 55, Session Laws of Alaska): Feb. 5 to 21, 1918” [unpaginated].


110 Robertson was also a U.S. Commissioner in Juneau in 1913, territorial director of the U.S. Employment Service from 1917 to 1919, mayor of Juneau from 1920 to 1923, and president of the Juneau Chamber of Commerce, in addition to presiding over Juneau’s leading corporate law firms into the 1960s. 4 Alaska Reports viii (1914); The American Bar: A Biographical Directory of Contemporary Lawyers of the United States and Canada, at 1166 (1926).
portion of the profits they are willing to give." Moreover, employers insisted that some "men want to work overtime; they demand the right to work overtime, and they do work overtime." Ironically, in comparison with Alaska's absolute eight-hour law, a statute that forced employers to pay premium overtime began to look appealing. According to Robertson:

If this law would permit them, like the Oregon law does, which has gone to the Supreme Court and been held valid, ... to employ men for an hour or two hours or three hours and pay them overtime, double time, or one-half time, whatever is a fair basis, as agreed upon between the labor and the employer, it would be a different proposition. But this law cuts them off on the 8 hours. ... If they work their men overtime, they are violating the letter of the law, if it is only five minutes overtime, just as much as though they worked them three hours overtime; and the laboring man has no way of getting paid, or saying to the employer, "I am willing to work overtime. I realize you are at a disadvantage and I am willing to work overtime."

Other employer representatives tried a different tack. P. E. Bradley, speaking on behalf of two gold mining companies and a local council of defense, reported that all of his principals agreed that "eight hours a day was long enough for any man to work. However, they all" also felt that during the war "it would not be asking too much" to modify the law to "protect the workingman against being compelled to work more than eight hours, if he didn't see fit," but "at the same time giving him the privilege of working overtime in case he would like to do so and was paid for that overtime." Herbert Faulkner, another Juneau corporate lawyer-lobbyist representing mining companies and an influential force in the Republican Party, urged permissive overtime and went so far as to assert: "There is no answer to that argument. [N]o laboring man can have any valid objection to that kind of a proposition for this reason: that if they don't want to

111"Hearings Before the Governor of Alaska on the Eight-Hour Law" at 6. A typo in the transcript makes it appear as if Governor Strong made this statement, but it is clear from the context that Robertson's name was inadvertently omitted.
112"Hearings Before the Governor of Alaska on the Eight-Hour Law" at 192 (Robert Capers referring to longshoremen). For hearing testimony of longshoremen who worked 36 hours without any overtime, see id. at 201 (E. E. Allen).
113"Hearings Before the Governor of Alaska on the Eight-Hour Law" at 8 (Robertson).
114"Hearings Before the Governor of Alaska on the Eight-Hour Law" at 51.
115Faulkner, who had been a U.S. marshall in Juneau, also engaged in a long corporate law career. 3 Alaska Reports vi; The American Bar: The Professional Directory of Leading Lawyers Throughout the World 1529 (39th ed. 1957); Who's Who in Alaskan Politics at 28-29; Atwood, Frontier Politics at 303. Faulkner and Robertson were the leading business lawyers in Juneau. Pamela Cravez, "Seizing the Frontier: Alaska's Territorial Lawyers" 41 (MS, n.d. [1984]).
work more than eight hours, they don’t have to.”\textsuperscript{116} The credibility of his call for replacing mandatory labor standards with a consensual race to the bottom may, however, have been tarnished by his historically suspect claim that “the mining companies do not want to force the men to work more than eight hours. It would be a ridiculous proposition to say that they could force any man to work more than eight hours.”\textsuperscript{117}

When one of the workers at the hearing, E. E. Tracy, tried to explain to Bradley why enforcement of labor standards could not be based on individual workers’ willpower, even Governor Strong seemed unable to grasp the point of a nonpermissive standard:

MR. TRACY: ... We know, I know that there’s lot of times I would like to work ten hours; maybe I would like to work 12 hours, but I can’t do it because the law prevents you— it keeps you away from me. I am not making any personal reflections, but I mean that the people are protected against—

GOVERNOR STRONG: Pardon me. You are opposed to the workingmen working overtime?

MR. TRACY: Yes.

GOVERNOR STRONG: Absolutely?

MR. TRACY: Absolutely. Although I agree with Mr. Bradley—I believe there’s times when it is absolutely necessary to work overtime, and then there’s times when it’s required—when it’s absolutely necessary—that some of the boys would also like to put in a couple of extra hours. I know— at least, I feel that way about it, that if I don’t work overtime, I am only causing myself a hindrance, but if I don’t want to work overtime, with the 8-hour law, then I’ve got some protection, because just the minute there is plenty of men come into the country and we get a little overabundance, the boss comes along and says, “Here, we would like to have you work a couple of hours overtime.” Well, maybe I have something special to do.... If I don’t work that two hours overtime, I roll up my blankets and get out. That’s the way it works every place I ever been.\textsuperscript{118}

By the end of the hearings, however, Strong seemed to understand the basis of workers’ resistance when one of their representatives explained to him that while they would be willing to work ten hours or more at time and a half if it was necessary to maintain the army, “they are not willing, even at time and a half overtime, to work overtime, to work ten hours because some corporations ask for it. It would be practically establishing a ten-hour day. That’s the ground they take.”\textsuperscript{119}

\textsuperscript{116}“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 68.

\textsuperscript{117}“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 72.

\textsuperscript{118}“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 57.

\textsuperscript{119}“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 218 (S. E. Mandle).
Even more revealing than the overtime debate, however, was the explanatory light that the testimony shed on the legislature's puzzling enactment of such a radical maximum hours law. The antagonistic colloquies between representatives of capital and pro-labor former and current state legislators finally brought to light what public debate had failed to articulate in 1916-17—namely, that participants in the legislative process had been fully aware of the radical and unique character of their universal absolute eight-hour law.

Already on the first day of the hearings an interrogation of a worker by two representatives of saw-mill, logging, fishing, steamship, and mining companies produced more understanding of the law than the previous three years of public discussion. When the worker, Jesse Rice, stated that workers were not "kicking so much about the wages, but they know they don't have to work more than 8 hours in the States and we haven't got it here," Robertson and Faulkner challenged him:

MR. ROBERTSON: In what states do they have it?
MR. RICE: I don’t remember them all—Washington has an eight-hour law.
MR. FAULKNER: One like this?
MR. RICE: No---
MR. FAULKNER: Their 8-hour law applies to hazardous occupations. Isn’t that it?
MR. RICE: Well, I won’t state.
MR. FAULKNER: Do you know any state where they have a general 8-hour law like this[?]
MR. RICE: No; there is no states, but the employers are giving their employees an 8-hour law.
MR. FAULKNER: Do you know of any place where they have a law like this[?]
MR. RICE: No, this law is very rigid, and it’s for a good cause. The workingman doesn’t need to work more than 8 hours a day. If he can’t make a living in 8 hours, he might as well not live.120

Later, when Faulkner observed that the manager of a steamship company office would be violating the law if he worked more than eight hours in order to perform the work of other employees who had left and couldn’t be immediately replaced, a labor representative asked him and the other employer representatives opposed to the law why they had not raised such issues before the legislature acted.121 Faulkner did not respond immediately, but shortly afterwards tried to seize the rhetorical initiative in a colloquy with the former president of the Alaska Senate, Oliver Hubbard, by suggesting that somehow the legislature had had no popular mandate to craft the statute that it did:

120“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 34-35.
121“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 91-92.
MR. FAULKNER: Governor, I might call your attention to this fact, that at the time the question of a general eight-hour law was submitted to the people by the legislature, no specifications were made as to what kind of a law it was to be and the people could not at that time, people who voted on the law, tell what kind of a law the legislature would pass. That is, they did not have this kind of a law in contemplation and could not have had at the time they voted upon it.

SENATOR HUBBARD: Don’t you think that the act of 1915 settled it? The legislature had no power to pass any law except one that conformed exactly to what the people voted for.

MR. FAULKNER: I am referring to the question submitted to the people.

SENATOR HUBBARD: You refer to the referendum?

MR. FAULKNER: Yes; the ballot provided for or against a general eight hour law.

SENATOR HUBBARD: Well, isn’t that plain enough? It was a general eight-hour law without any qualifications, restrictions, limitations or anything else, and the clause which was put in at the request of the Department of the Interior and the Council of National Defense at the time it was passed could not, in my opinion, have been put in there by the legislature for the reason that it was not in keeping with the instructions of the people.

MR. FAULKNER: I would also like to have this in the record: that there is not another State in the Union that has such a law as this, and this kind of a law has never been enacted in any other country and it has never been tested.

SENATOR HUBBARD: Well, some people or some state or territory have always got to pass the first law of any kind.122

When Senator Hubbard sought to legitimize the general eight-hour law by reference to the eight-hour laws for miners that the legislature had enacted in 1913 and 1915, Faulkner baited him, asking why, if labor was so sure of the law’s validity, it did not seek a court test. (Those in Juneau demanding that their opponents arrest violators were apparently unaware that an arrest warrant had already been issued in the Northern Commercial Company case in Fairbanks despite the fact that a widely reported judicial hearing in the case would take place only several days later.)123 A labor representative tried to avoid this treacherous terrain by proposing to Faulkner that the law be left as it was until the next session of the legislature (in 1919), at which time, “if there’s something in that law that the workmen are radically opposed to,” it could be amended. Faulkner, in turn,

122“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 100.

123See below. Two days after the close of the governor’s hearings, Strong telegraphed the U.S. attorney in Fairbanks asking for the status of the case. Roth wired back the same day that after two days of constitutional argument the court said that the decision would rendered the following week. The evening of the day the decision was handed down, Roth wired Strong that the law had been held unconstitutional. Governor Strong to U.S. Attorney Roth, Feb. 23, 1918; Roth to Strong, Feb. 23, 1918; Roth to Strong, Feb. 27, 1918; in Record Group 101, File Code 156, Box 152-7, Alaska State Archives.
The Autocratically Flexible Workplace

preempted that offer (which presumably referred to permitting premium overtime work) by declaring that the law was obviously void because the legislature lacked any power to regulate the hours of labor absent some relationship to health or life: "The legislature of the Territory of Alaska nor of any other state has any right to tell me that if I want to employ a stenographer more than eight hours and I am willing to pay her for more than eight hours labor and she is willing and it doesn't interfere with her health, that they can tell me that she can't work more than eight hours." F. Harrison, the labor representative, apparently nonplussed by Faulkner's analysis, waxed sarcastic: "It is not very often that you find the best legal talent of the country talking for the workingmen."124

Senator Hubbard—who believed that it had been a "serious mistake" to suspend the law with respect to fishing because fish prices were high enough to enable employers "easily [to] meet any emergency in either wages or employees"125—was forced to reveal still more about the hidden legislative history in a colloquy with Robert Capers, the lawyer representing the Kennecott Copper Corporation and the Copper River & Northwestern Railroad. These two enterprises, together with the Alaska Steamship Company, were the key components of the Guggenheim-Morgan Alaska Syndicate. When Capers (who also represented all these companies in litigation)126 complained on behalf of the copper trust's railroad that operating conditions in Alaska required it to violate the law, Hubbard seemingly lost his patience: "Why didn't you make your kick before? ... Where were you when this matter was being submitted and where were you when the legislature was passing upon it that you didn't come down here and show the necessity for changing it? You have had your opportunity." At first Capers tried to avoid the senator's rebuke by asking him "a question or two" about the legislative history. When Hubbard insisted that at the referendum the people had voted for "a general eight-hour law for all wage and salary earners," Capers asked whether the legislature would not also have enacted a general eight-hour law if it had provided, as did the Adamson law, "that eight hours shall constitute a basis for a day's pay and that overwork shall be compensated for as overtime...." To Hubbard's lame protest that "[t]hat is not the law," Capers replied: "There isn't in the history of the United States a law like this." But when the senator insisted that the railroad and mining companies and all Alaskans knew what the law covered, Capers repeated that a "great many laws could be general

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124"Hearings Before the Governor of Alaska on the Eight-Hour Law" at 100-103.


Territorial Alaska’s Absolute Universal Eight-Hour Law

93
eight-hour laws.”\(^{127}\)

When Capers expressed his belief that the people had thought they were voting for an eight-hour cum premium overtime law—his only evidence being that he himself had voted for the law having “no idea whatever that the legislature would pass a law of the class that it did”\(^{128}\)—adding that any law that “says to you, or myself or to Mr. Faulkner that they shall not work overtime is invalid,”\(^{129}\) he triggered a dialog that quickly elicited from him an astounding admission concerning employers’ lobbying strategy:

SENATOR HUBBARD: Well, why didn’t make your kick before it was passed?\(^{127}\)

MR. CAPERS: Well, because we didn’t think that the legislature would be so crazy as it afterwards developed to be.

SENATOR HUBBARD: Well, that’s all right. I want to say to you on that question of craziness that the legislature had this matter under discussion for a good while...and everyone had an opportunity to come and be heard...but not a single person came before that legislature or before any committee and made any such suggestion as you are making here now.\(^{127}\)

MR. CAPERS: What suggestion?\(^{127}\)

SENATOR HUBBARD: That it’s not valid and that there isn’t another State that has such an eight-hour law and that we had no power to pass it, and that we should have passed a...law providing that eight hours shall constitute the basis of a day’s wage and that overtime shall be allowed and that additional time may be worked and so on. ... I want to say to you that the members of that legislature, if they had passed a different law, would not have been keeping faith with the people. That’s what I say to you, Mr. Capers, and you may think that is crazy or not crazy. We wrote a law as nearly conforming to the act of 1915 as it was possible for us to write and we passed it, and the people who are here now, claiming that it should be set aside almost a month after it...went into force...did not come here than and show any defects in it or why it ought not be passed as the people had voted it; neither did they go to the people of the Territory through their press and say to the people, “This law is inadvisable; it will not work. Do not pass it. ... This isn’t the kind of law you want.” ... I say to you that no member of the legislature could have done otherwise; if any member...would have voted any differently, he would have been a traitor to the people.\(^{130}\)

Since employers regarded the eight-hour law as “crazy,” when Capers asserted that employers nourished “no particular antagonism to the general principles of eight-hour legislation,” and that “[w]e are not taking from them

\(^{127}\)“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 109-12.

\(^{128}\)“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 185.

\(^{129}\)“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 112.

\(^{130}\)“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 112-14.
\[\text{workers} \] the principle of the eight-hour law,"\textsuperscript{131} he manifestly meant the unprincipled eight-hour day extended by consensual overtime work.

Having elicited from Hubbard that he was a practicing attorney, Capers kept pressing him to explain why he had not investigated the constitutionality of the bill he had supported. The ensuing colloquy suggests that labor and capital might have known all along that the law would be held invalid:

\begin{quote}
\text{SENATOR HUBBARD: I see. Your sarcasm is beautiful, but it isn't sound.... It wouldn't have made any difference, Mr. Capers, if I looked into it thoroughly. ... I suppose you think I should have look[ed] it up like a professional lawyer and come down here and sa[id] to the members of the legislature: "Boys, I have looked this thing up. It's not valid; it's not legal. We can disrespect the people and their votes and cast it aside, because I'm a lawyer, I'm a great lawyer, and I have looked it up and it isn't valid."}

\text{MR. CAPERS: No, but you could have inquired into it.}

\text{SENATOR HUBBARD: Well, if you had inquired into this question then...you wouldn't have to come down here now to beg the Governor to overturn a law that has only been in operation a month. Were you asleep?}

\text{MR. CAPERS: No, but I thought you were on the job.}\textsuperscript{132}
\end{quote}

This debate about the law's validity had to be broken off at this point because Governor Strong had grown impatient with it as not germane to the purpose of the hearing. He did confirm, however, that no public discussion had taken place before or after the referendum: "Apparently it was accepted as a matter of course." Indeed, Strong observed that he had never heard anything about the law until 30 days before it was to go into effect, when he "began to be deluged with appeals to suspend the law."\textsuperscript{133} To be sure, the governor's account may not have been accurate. In March he received a letter from a consulting mining engineer in Philadelphia stating that when he had called on Strong in the fall of 1917, the governor "indicated that there wa[s] a clause in the law, which permitted you to practically abrogate this section...altho you did not commit yourself at that time...."\textsuperscript{134}

The failure of employers' representatives to contradict Hubbard's and Strong's charges that they had never protested against the bill before it was

\textsuperscript{131}``Statement of R. E. Capers,'' in ``Hearings Before the Governor of Alaska on the Eight-Hour Law'' at 185-196 at 185, 187.

\textsuperscript{132}``Hearings Before the Governor of Alaska on the Eight-Hour Law'' at 115. Hubbard may in fact have been regarded as a legal authority since he had held important positions in the Justice Department in Washington, D.C. in the 1880s and 1890s and later in the Interior Department. \textit{Who's Who in Alaska Politics} at 47-48.

\textsuperscript{133}``Hearings Before the Governor of Alaska on the Eight-Hour Law'' at 116.

\textsuperscript{134} Letter from H. W. DuBois to Governor Strong, Mar. 14, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives.
enacted is puzzling. After all, the Anchorage Daily Times had reported on the "pyrotechnics" that were touched off in the House of Representatives on April 18, 1917, when "Judge John Winn, practicing lawyer of Juneau, dramatically declared, holding high in the air the bill, 'It is pernicious from every standpoint and not a single plausible excuse can be given for the bill.'" He then foretold of the "great calamity" for the territory's canny interests and the country's food supply if the bill were passed. Winn even claimed that if referred to the electorate, the bill would be voted down as heavily as the referendum had passed in 1916. Royal Gunnison, a Juneau lawyer representing the Pacific Fisheries Association, a former district judge, and Robertson's law partner,135 also addressed the House, submitting an amendment that would have exempted the canny industry.136 At the very least, then, the fishing industry had loudly resisted inclusion.137

In spite of the governor's admonition, the issue arose again the next day when Joseph Murray, a miner-lawyer who had been a member of the House of Representatives when it passed the eight-hour law in 1917, spoke up on behalf of miners.138 The information he presented was arguably even more startling than Hubbard's. He revealed that he and other legislators had tried "to figure out some scheme whereby we would have a legitimate eight-hour law and still give the labor [sic] the opportunity of working overtime, at his election, without any risk if he didn't so elect; but after giving it a good deal of thought and after talking to other members and the men around this town of judgment and skill and brains, we couldn't figure any system of overtime." Murray's view that the law should not be suspended, but merely modified to provide for premium overtime wages,140 inspired Capers to subject him to the same grilling that Hubbard had undergone the previous day. His responses suggested that a more cynical attitude toward the bill had prevailed in the House than in the Senate:

MR. CAPERS: You are an attorney, I believe?

MR. MURRAY: Yes.

MR. CAPERS: Did you ever consider the validity of this act before it was passed?

137 Unfortunately, the lack of a transcript of the legislative debates makes it impossible to flesh out the full scope of what employers and legislators said about the law.
138 Who's Who in Alaskan Politics at 70.
139 "Hearings Before the Governor of Alaska on the Eight-Hour Law" at 135.
140 Although his statement is not clear, it seems that Murray believed that the entire overtime debate was "only a question of mathematics as to whether that scale would be changed." "Hearings Before the Governor of Alaska on the Eight-Hour Law" at 135.
MR. MURRY[sic]: Oh, yes.
MR. CAPERS: What is your view?
MR. MURRAY: I think it is doubtful. No eight-hour act like this has ever been sustained.

MR. CAPERS: Do you think, Mr. Murray, that you could have passed an unquestionable and valid eight-hour law? Or could you have improved on it?

MR. MURRAY: Well, I don't think so. There has never been any general eight-hour law sustained in the United States. Every other law like it has been sustained under the police power....

MR. CAPERS: Do you think that you could have complied with the instruction given you and have passed a valid law that would have made those necessary exceptions?

MR. MURRAY: No; I tried that. Mr. Capers.

MR. CAPERS: Wherein did you fail?

MR. MURRAY: Well, to begin with, there were other lawyers in the legislature besides myself. ... I consulted with the Attorney General and I took the floor, and I tried to have as many special bills passed under the police power as possible; for instance, the eight-hour act for women; the eight-hour act for underground placer mines, and the eight-hour act for surface work, and I stayed on the floor, and in talking with the attorneys around Juneau, none of them thought that the act would be sustained, and for that reason I wanted as many of them passed under the police power as possible.141

Although Strong finished his report to the interior secretary on February 25, four days after the hearings had ended, the Interior Department could scarcely wait. The very day he completed it, the department telegraphed: "can you not wire brief statement in code as to conclusions and recommendations...."142 The next day Strong had to telegraph back that it was not feasible to wire his conclusions and recommendations "owing to varied interests represented at hearings and ramifications of statements and testimony," but advised Lane that it would be in the mail together with the stenographic transcript in two days.143 The fact that the district court held the statute unconstitutional on February 27, the day after Strong had dispatched his telegram, may have lessened Secretary Lane's interest in the report.144 Strong himself understood which way the judicial wind was blowing:

141"Hearings Before the Governor of Alaska on the Eight-Hour Law" at 136-37.
142Meyer to Governor Strong, Feb. 25, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives.
143Governor Strong to Secretary Interior, Feb. 26, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives.
144A month after he had submitted his report, Strong responded to an inquiry from a firm of consulting mining engineers with offices in Philadelphia and Paris about the eight-hour law that he was not at liberty to disclose his hearing findings, which he assumed would be "made public in due course" by the interior secretary or the Council of National Defense. Governor to H. W. DuBois, Philadelphia, Mar. 28, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives.
on receiving a telegraphic inquiry on February 27 as to the exempt status of mills manufacturing airplane spruce, Strong wired back instead that the law had been held invalid.\footnote{145}

Based on the hearings and his experience, Governor Strong believed that "there is some difference of opinion among the working people. Some are in favor of overtime while others are emphatically against it."\footnote{146} His forthright report to the interior secretary rested largely on his finding that, contrary to employers' claims, the labor shortage was no more acute in Alaska than elsewhere in the United States, and "that if an eight-hour day were guaranteed the workers in Alaska with a fair scale of wages, a sufficient supply of labor...will be available to meet the demands of the various industries."\footnote{147} The decline in Alaska's population—from 64,356 in 1910 to 55,036 in 1920\footnote{148}—was misleading in the sense that most of the cannery workers were "imported"\footnote{149} and thus not included in the census enumerations. In 1913, for example, 5,000 of the 13,000 cannery workers were Chinese and Japanese "brought up from Seattle, San Francisco, and Portland in the summer time...and then ship[ped] back...."\footnote{150}

Strong's seemingly prolabor stance must be gauged against the background of his prior suspension of the law as to fisheries, which by 1917 were the territory's largest industry, and the fact that the other major industry, mining,\footnote{151} was subject to a special eight-hour law not affected by the controversy surrounding the general eight-hour law. Strong also rejected opponents' allegations that those voting in favor of the eight-hour bill in 1916 had not understood the referendum. On the contrary, during the eighteen months the matter was before

\footnote{145J. J. Daley and H. Shattuck to Governor Strong, Feb. 26, 1918, and Strong to Shattuck, Mar. 1, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives. For similar correspondence, see telegram from Ketchikan Iron Works to Governor Strong, Feb. 22, 1918, and Strong to Ketchikan Iron Works, Mar. 1, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives.}

\footnote{146"Hearings Before the Governor of Alaska on the Eight-Hour Law" at 218.}

\footnote{147Letter from Governor Strong to Secretary of the Interior at 5.}


\footnote{149\textit{The Encyclopædia Britannica: The New Volumes} 30:102-104 at 104 (12th ed. 1922), s.v. "Alaska."}

\footnote{150\textit{The Building of Railroads in Alaska} at 15 (testimony of Alaska congressional Delegate James Wickersham). Into the 1920s, these groups continued to account for 30 percent of fisheries workers. \textit{Biennial Report of the Territorial Labor Commissioner to the Governor of Alaska 1921-22} n.p. (1923), in Record Group 101, Ser. 130, Box 221, Alaska State Archives.}

\footnote{151Gruening, \textit{The State of Alaska} at 208-10.}
the public, he wrote, "no opposition to the proposal was indicated by the newspaper press or politicians, or others. I have, therefore, to conclude that when the people voted for this measure, they knew exactly what they were voting for."\footnote{Letter from Governor Strong to Secretary of the Interior at 9.}

This assertion may have been somewhat facile since public discussion of an eight-hour law had not dwelt on what became the statute’s two principal features—coverage of businessmen and the absence of a provision for overtime work and pay.

Strong’s recommendation to the secretary of the interior that no further suspension of the law be authorized (except with regard to the infant agricultural industry) was largely rooted in his pragmatic attitude toward avoiding labor unrest during the war. He reported to Lane that employers’ agitation in favor of suspending the law had sparked a unionization movement all over Alaska which, in Strong’s view, "will not end until every town and hamlet where any considerable amount of labor is employed, is organized...." Conflating Alaska’s unique law with other hours laws, he emphasized that suspension would bring about strikes and “chaotic conditions” in all industries.\footnote{Letter from Governor Strong to Secretary of the Interior at 10.}

Labor in Alaska knows that the demand for an eight-hour day is nation-wide, for the workers regard it as an accepted national policy. Therefore...labor professes to see in the effort being made to set aside the Territorial 8-hour law, a deliberate design on the part of the employers to demand in its stead a ten-hour work day or more, all under the cover of patriotism, but really that their profits may be increased at the expense of the country and of labor. I make no comment on this phase of the Alaska labor situation, but I know that the feeling exists. Alaska labor...states unequivocally that it is willing to serve the Government in any capacity, to work such hours and for such pay as the Government may justly determine, but it is unwilling to serve public corporations or private employers on terms dictated or influenced by them.\footnote{Letter from Governor Strong to Secretary of the Interior at 9.}

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The governor’s hearings coincided with other important developments driving toward a denouement. On February 4, 1918, Thomas Riggs and William Edes, members of the federal Alaskan Engineering Commission (which was charged with oversight of the planning and construction of federally owned railroads in the territory),\footnote{Thomas Riggs, Jr., “The Government Railroad in Alaska—What Two Years and Limited Funds Have Accomplished,” 73(19) Engineering Record 600-603 (May 6, 1916); Joshua Bernhardt, The Alaskan Engineering Commission: Its History, Activities and} submitted to the Interior Department, which had
jurisdiction over Alaska, their “Memorandum Regarding Effect of Territorial Eight Hour Law,” stating their reasons for opposing the law, which overlapped with employers’ views. Organized labor in Alaska, which considered Riggs anti-labor and opposed his appointment as governor, was informed of this letter in March by the chairman of the U.S. Senate Committee on the Territories and published it to support its position.\textsuperscript{156} By February 6, the Interior Department had already sent a copy of the memorandum to Governor Strong.\textsuperscript{157} The statute in their opinion “will practically destroy many industries in the territory” and exacerbate a scarcity of labor in a place where “the active working season...is practically only six to seven months, and work during that period should be ‘speeded up’ rather than ‘slowed down’...” Riggs and Edes predicted impracticality of enforcement, especially on railroads, which would have to carry extra crews in case of delay since railway delays would not meet the statutory definition of putting life or property in danger. The labor shortage, in turn, might make it “extremely difficult to put on additional crews of stevedores.” They also called attention to the fact that the statute made no provision for payment for overtime: “We venture the opinion that many of the people of Alaska when voting for such a law thought it would mean considerable extra pay for some extra hours, and would be considerably surprised to learn that such is not the case.” Riggs and Edes also noted that the “humanitarian object of the law” would conflict with the work patterns of men who worked eight hours for the railways and additional hours elsewhere. Finally, they based their recommendation that the Interior Department suspend the law on their opinion that most of the laboring population of Alaska with the exception of those doing underground work in mines, would prefer to work over eight hours during the long days if by so doing they got additional compensation.

The application of the law, especially at this time when supplies of copper and other ore are necessary for carrying on the activities of the war, would in our opinion be very disastrous.\textsuperscript{158}

\textsuperscript{156}“Labor Unions Wage War Against Riggs,” Anchorage Daily Times, Mar. 11, 1918, at 1, col. 5; “Union Workers Oppose Riggs for Governor,” Anchorage Daily Times, Mar. 12, 1918, at 1, col. 1; “Organized Labor Vigorously Oppose Riggs for Gov’,” Daily Nome Industrial Worker, Mar. 13, 1918, at 1, col. 1.

\textsuperscript{157}Letter from Assistant to the Secretary of the Interior to Governor Strong (Feb. 6, 1918), in Record Group 101, File Code 156, Box 159, Alaska State Archives.

\textsuperscript{158}Wm. C. Edes and Thomas Riggs, Jr., “Memorandum Regarding Effect of Territorial Eight Hour Law,” Record Group 101, File Code 156, Alaska State Archives (Feb. 4, 1918). The version published in the newspaper deviated slightly from the original; “Of Course He Is in Favor of Enforcing 8 Hr. Law ‘Nit’,” Daily Nome Industrial Worker, Apr. 8, 1918, at 1, col. 4-6.
After months of efforts devoted to promoting Strong’s reappointment and undermining Riggs’s appointment, Wickersham was “shocked” to read in the morning newspapers on March 7 that Wilson had nevertheless appointed Riggs. \(^{159}\) In response to attacks by Alaska labor unions against him for opposing the eight-hour law, Riggs insisted to the Committee on the Territories, which was holding hearings on his nomination, that he favored the law with “price-and-a-half for overtime work.” \(^{160}\) In his diary, Wickersham sneered that Riggs, a “good Guggenheim Republican,” \(^{161}\) “will do what the Big Interests want done.” \(^{162}\) Specifically, Riggs “will suspend the law—of course—if requested.” \(^{163}\) Despite the attacks on Riggs for being “too friendly towards the Guggenheims and other big concerns,” \(^{164}\) his answer apparently satisfied the senators: Strong, who had incurred the enmity of fellow Democrats for having helped certify Wickersham as winner of the 1916 election for congressional delegate against the Democrat Charles Sulzer—in April 1917 the Democratic Party central committee had voted not to endorse Strong for reappointment—withdrawed from consideration, and in April was succeeded by Riggs as territorial governor. \(^{165}\)

### VI

More important than the Edes-Riggs memorandum was the fact that just weeks after the law had gone into effect, a test case had been argued and decided involving the Northern Commercial Company, a large and powerful quasi-monopolistic mercantile enterprise with stores and operations throughout Alaska, which was so widely resented that it had antagonized even many employers. \(^{166}\)

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\(^{161}\) Wickersham, “Diaries,” Apr. 13, 1918.

\(^{162}\) Wickersham, “Diaries,” Mar. 12, 1918.

\(^{163}\) Wickersham, “Diaries,” Mar. 11, 1918.

\(^{164}\) “Senate Committee Investigating Riggs,” *Daily Nome Industrial Worker,* Mar. 18, 1918, at 1, col. 4. Riggs had also married the daughter of Frederick Coudert, a very prominent New York international corporate lawyer. 2(19) *Alaska Railroad Record* 145 (Mar. 19, 1918).


\(^{166}\) Foster, “Syndicalism Northern Style” at 137, 141 n.46. The Northern Commercial Co. was not represented at the governor’s hearings. For an uncritical company history, see L. D. Kitchener, *Flag over the North: The Story of the Northern Commercial Company* (n.d. [ca. 1954]).
On January 22, 1918, just three weeks after the law went into effect, the Justice’s Court\textsuperscript{167} for the Fairbanks Precinct issued an arrest warrant to the U.S. marshall for the Northern Commercial manager in Fairbanks because one of its salaried employees had been hired to work more than eight hours per day and had in fact worked more than eight hours the previous day although neither life nor property had been in imminent danger.\textsuperscript{168} The manager was arrested the next day, but the government dismissed the charges against him, and on January 24 the court, despite the company’s plea that the statute was unconstitutional and void, found Northern Commercial guilty and fined it $250.\textsuperscript{169} On appeal to the district court, the employer further alleged that the act was void because the legislature had not complied with the congressional Organic Act by virtue of failing to give the bill the requisite number of readings.\textsuperscript{170}

In mid-February, in the midst of Governor Strong’s hearings on suspension of the law, District Court Judge Charles Bunnell held two days of hearings in Fairbanks, which were closely followed and widely reported. Bunnell, who had come to Alaska in 1900 as a teacher, left that occupation to practice law and engage in business, owning a lumber company and sheet metal works, and serving as president of the Valdez Chamber of Commerce. He was also active in the Democratic Party, becoming its unsuccessful candidate for delegate to Congress in 1914 against Wickersham, who was not alone in his belief that President Wilson had appointed Bunnell as district judge of the Fourth Division in 1915 as a reward for having run against him. Wickersham, a Progressive, also believed that “Big Interests” (meaning the Guggenheim-Morgan syndicate) had lobbied the Attorney General on Bunnell’s behalf.\textsuperscript{171}

\textsuperscript{167} On the Justice’s Court, see Act of June 6, 1900, ch. 786, §§ 944-1014, 31 Stat. 321, 480-89.

\textsuperscript{168} United States v. Northern Commercial Co. and George Coleman, Complaint, No. 934 Cr. (Commissioner’s & Ex Officio Justice of the Peace Court, Fairbanks Precinct, 4th Judicial Div., Terr. Alaska, Jan. 22, 1918); Warrant of Arrest, in Nat. Archives, Pacific Alaska Reg., Record Group, No. 21, Box No./Location 34 (01/10/08(2)), File: Case # 762.

\textsuperscript{169} United States v. Northern Commercial Co., Transcript, in Nat. Archives, Pacific Alaska Reg., Record Group, No. 21, Box No./Location 34 (01/10/08(2)), File: Case # 762.

\textsuperscript{170} United States v. Northern Commercial Co., Second Amended Demurrer (D. Alaska, 4th Div., Feb. 13, 1918), in Nat. Archives, Pacific Alaska Reg., Record Group, No. 21, Box No./Location 34 (01/10/08(2)), File: Case # 762.

\textsuperscript{171}Cashen, \textit{Farthest North College President} at 29-30, 39-79, quote at 63; Atwood, \textit{Frontier Politics} at 281. Wickersham mentioned among Bunnell’s advocates Wilds Richardson, chairman of the Alaska Road Commission, whom he accused of being a Syndicate lobbyist. Stears, “The Morgan-Guggenheim Syndicate” at 320. As a result of Judge Bunnell’s involvement in certifying the results of the 1916 election for Alaska delegate to Congress, which was contested by Wickersham, the latter mobilized his supporters to induce the Judiciary Committee not to confirm Wilson’s appointment of Bunnell (1878-1956) to a second four-year term in 1919, and he served as a recess appointee until 1921, at which time he became the founding president of the Alaska
Bunnell, as already noted, was no stranger to eight-hour law adjudication, having just 16 months earlier held invalid, on the thinnest of formal-technical grounds, the 1915 act amending the 1913 eight-hour law to include underground placer mining. Why, given Bunnell’s proven jurisprudentially narrow mind in eight-hours adjudication, the United States chose to bring its test case in the Fairbanks Division is puzzling, since it presumably could also have found violations by Northern Commercial or other employers in the other judicial divisions.

The press noted that the new eight-hours case “means more to the country than any put to the test in several years” and that it was believed that whichever side lost would take the matter to the U.S. Supreme Court. The case was also “awaited with a great deal of interest, as almost everyone in the territory is anxious to learn whether or not the law will stand the test.” On February 27, in a decision that he read for 45 minutes to a “courtroom...well filled with spectators, men from all walks of life, all interested in the outcome of the case,” and that was reported in a front-page banner headline in the territorial press, Judge Bunnell struck the law down as “plainly and palpably beyond all question in violation of the Fourteenth Amendment to the Constitution.” First, the judge

Agricultural College and School of Mines and then of the University of Alaska from its founding in 1935 to 1949. Id. at 93-103; In re Wickersham, 6 Alaska 167 (4th Div. 1919); Wickersham, “Diaries,” Dec. 7 and 12, 1918; Subcommittee of the Senate Judiciary Committee, “Nomination of Charles E. Bunnell as United States District Judge for the Fourth Judicial Division of the Territory of Alaska” (unpub., Dec. 31, 1920-Jan. 5, 1921); 3 Who Was Who in America (1951-1960) at 121 (1966); “Biographical Outline: Charles Ernest Bunnell,” in Alaska and Polar Regions Archives, Rasmuson Library, University of Alaska Fairbanks. In the 1914 election, Wickersham received almost twice as many votes as Bunnell in all of Alaska and almost three times as many in the Fairbanks Judicial Division, where Wickersham had been and Bunnell was about to become district judge. Fairbanks Daily News-Miner, Nov. 7, 1916, at 4, col. 3. Governor Strong apparently adopted a hands-off attitude toward appointment of a judge for the Fourth Division. Shortly after Bunnell’s appointment he replied to a correspondent who had urged him to give favorable consideration to someone else that: “Mr. Bunnell is a young man of more than ordinary ability, a good lawyer, I understand, and a man of probity in every way, and I venture to predict that he will give general satisfaction.” Letter from Governor to T. H. Deal, Jan. 8, 1915, in Record Group 101, Ser. 130, File 52, Box 129, Alaska State Archives.


176 United States v. Northern Commercial Co., slip. op. at 17 (Decision on Demurrer, D. Alaska, 4th Div., Feb. 27, 1918), in Nat. Archives, Pacific Alaska Reg., Record Group No. 21, Box No./Location 34 (01/10/08(2)), File: Case # 762.
denied that the law derived any validity from the majority referendum vote in its favor. Indeed, the very fact that the Alaska Organic Law did not provide for such referenda created a "suspicion" in Bunnell's mind that a legislature that attempted to act beyond its powers "was actuated by some undisclosed motive."\(^\text{177}\)

With rhetorical flourish Bunnell portrayed the statute's uniqueness:

Although ably assisted by counsel... I confess myself unable to find, and counsel are unable to produce any act of any legislative body in the United States which, from the standpoint of word use and word construction, belongs in a class with this act. It is fairly entitled to the unique distinction of being alone though in a multitude.\(^\text{178}\)

Bunnell failed to document this uniqueness adequately, but he did emphasize that the law expanded the meaning of "employment" by construing it to include performance of labor or services even by a partner. He went on to locate the act's unconstitutionality in its indiscriminately limiting the hours of all wage and salary earners without showing that the working conditions of clerks, carpenters, and cooks made regulation of their hours as reasonable as those of miners; it was also defective because it failed to provide for overtime payment for emergency work. The court ruled that to use the state police power to deprive a carpenter of the right to work four hours on a neighbor's house after having worked eight hours that same day for a contractor directly violated the Fourteenth Amendment to the U.S. Constitution.\(^\text{179}\)

Within days after Bunnell had handed down his decision, the government secured a new indictment against the Northern Commercial Company, this time for an eight-hours violation committed on March 4.\(^\text{180}\) Later that month Bunnell disposed of the case in a reported decision adopted almost verbatim from the previous case.\(^\text{181}\) On March 5, one of Lane's assistants requested Wickersham to prepare a brief in opposition to suspension of the law, which Wickersham filed with Lane on March 11 although he believed that Lane would nevertheless

\(^{177}\)United States v. Northern Commercial Co., slip. op. at 4-5.

\(^{178}\)United States v. Northern Commercial Co., slip. op. at 5. Curiously, this passage was absent from Bunnell's second opinion a month later, which largely recycled the first opinion.


\(^{180}\)United States v. Northern Commercial Co., Indictment, No. 764 Cr. (D. Alaska Terr., 4th Jud. Div., Mar. 5, 1918), in Nat. Archives, Pacific Alaska Reg., Record Group, No. 21, Box No./Location 34 (01/10/08(2)), File: Case # 764. This time the same manager whom the government had dismissed as a defendant in the first case appeared not only as a defendant, but also as the employee whom the company had unlawfully employed more than eight hours. Possibly this modification was a response to Bunnell's ruling in the first case that "[o]bviously, under the law the one performing the labor or services is liable." United States v. Northern Commercial Co., slip op. at 8.

The ambivalence that purported supporters of the law displayed was captured by an editorial in the *Alaska Daily Empire* at this juncture that focused on the question of overtime. The newspaper, which proclaimed that it "has always observed the eight-hour day"—to be sure, paying for the extra work when employees worked more than eight hours—started from the proposition that Alaskans "are unequivocally committed to the principle that eight hours shall constitute a day's work in Alaska." However, the editor felt that the inhibitions against "over-time" in the present law are too drastic. In a country that is far away from centers where extra men can be secured to take care of a rush of work the only way that the output of a concern that depends upon skilled workmen can make its production elastic is to permit men to work "over-time" in cases of emergency. ... The Empire believes that the time has not arrived in Alaska for prohibiting skilled men from working "over time" for extra pay when it would be for the interest of both employer and employee for them to do so.

In most of the States where they have passed laws limiting the "over-time" that men may work the limit applies to the week rather than the day. Under the present law in Alaska men are permitted to work eight hours a day for seven days a week. It would fit the situation better to make the week the unit, and prohibit more than 56 hours work in any one week.\(^{185}\)

On April 12, the Alaska Labor Union requested that the Justice Department appeal the decision,\(^{186}\) on April 22 the U.S. Attorney General Thomas Gregory directed Rinehart Roth, the U.S. District Attorney for the Fourth Judicial District, to seek a writ of error, and on May 4 Roth petitioned for and Bunnell issued an order allowing a writ of error so that the government could appeal the decision.

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\(^{182}\)Wickersham, "Diaries," Mar. 5, 6, 11, 1918.

\(^{183}\)Telegram from Franklin K. Lane to Governor of Alaska, Apr. 4, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives.

\(^{184}\)Territory of Alaska, Governor's Office, Executive Order, Apr. 5, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives. See also "Received from Governor Strong; Via Yesterday's Mail," *Daily Nome Industrial Worker*, Feb. 28, 1918, at 5, col. 1; *Report of the Governor of Alaska*, in 2 *Reports of the Department of Interior for the Fiscal Year Ending June 30, 1918: Indian Affairs Territories*, at 565 (65th Cong., 3d Sess., H. Doc. No. 1455, 1919).

\(^{185}\)"The Eight-Hour Question," *Alaska Daily Empire*, Apr. 6, 1918, at 2, col. 1.

\(^{186}\)"Supreme Court to Make Review Alaska 8 Hour," *Alaska Daily Empire*, May 8, 1918, at 2, col. 7.
to the U.S. Supreme Court. But five days later the U.S. Solicitor General, John W. Davis, informed Roth that on further reflection he had convinced the Justice Department that the writ of error “could not be successfully prosecuted.” The same day Gregory informed Roth that he was revoking his telegram of April 22, which had directed him to seek a writ of error.

Riggs, who had become governor on April 12, also involved himself in the litigation on May 9, wiring Judge Bunnell for information about the status of the case. On receiving word from Bunnell the next day of Gregory’s revocation, Riggs immediately wired to Interior Secretary Lane: “Desirable this question be settled. Shall we proceed in perfecting appeal?” Three days later Lane’s office replied rather dismissively to Riggs that, given the revocation, “no further action on the part of the Governor of Alaska or this Department is necessary on any of the applications presented to the Department for suspension of the operation of the act above-mentioned.” Riggs, however, driven by public and personal agendas, was not so easily dismissed. He informed the interior department that:

The District Attorney of this Division holds that this case does not cover the whole question and is applicable only in this one special instance, and that any number of cases may still be brought under the law. This office is constantly in receipt of requests for advice regarding the legality of the law and I have even been threatened with prosecution by certain members of the local union owing to the fact that my household servants are on duty more than eight hours during the calendar day. [T]he District Attorney and...the Attorney General for the Territory...are positive in their statements that the law should be definitely settled one way or the other. In consequence, the Attorney General of the Territory has wired the Attorney General of the United States requesting that an appeal be entered.

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187 Nat. Archives, Pacific Alaska Reg., Record Group, No. 21, Box No./Location 34 (01/10/08(2)), File: Case # 764. Roth had made the nominating speech for Bunnell as Democratic congressional delegate in 1916. Atwood, Frontier Politics at 281.

188 Letter from Jno. W. Davis to R. F. Roth, May 9, 1918, in Charles E. Bunnell Papers, Box 1, Folder 5, Alaska and Polar Regions Archives, Rasmuson Library, U. Alaska Fairbanks.

189 Telegram from Gregory to Roth, May 9, 1918, in Bunnell Papers, Box 1, Folder 5.

190 Governor Riggs to Judge Bunnell, May 9, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives.

191 Judge Bunnell to Governor Riggs, May 10, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives.

192 Governor Riggs to Secretary Interior Lane, May 11, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives.

193 Letter from E. C. Bradley, Assistant to the Secretary, to Governor Riggs, May 14, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives.

194 Governor to E. C. Bradley, May 28, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives. Based on the Justice Department’s position, the Interior
The Autocratically Flexible Workplace

Attorney General George Grigsby of the Territory of Alaska had indeed requested that the Justice Department not dismiss the appeal, but Solicitor General Davis rejected the request because the Department saw no basis to support the statute's validity:

The statute...forbids the employment of all wage-earners and salary-earners for more than eight hours in any day except in cases where life or property is in imminent danger. It is not limited in any way to unhealthful, hazardous, or exacting occupations, nor to children, women, or other classes demanding special care or protection. It has no such ostensible relation to the public health as the statutes upheld in Holden v. Hardy...and Bunting v.Oregon.... That the right to earn a living is a property right and one which cannot be taken away without due process of law or adequate justification under the police power is axiomatic.195

In the pithier language of the Nome Industrial Worker, the Justice Department deemed the eight-hour law invalid because it "applies to all whether working for themselves or for others and it is this amnibus [sic] feature that is disliked."196

A few days later Davis disposed of the governor's request in a letter to the Interior Department: "We cannot concur in the suggestion of Gov. Riggs that the law can be definitely settled only by a submission of the matter to the Supreme Court of the United States. There are many questions, of course, which reach a final settlement without the adjudication of that tribunal."197 By indirection the Justice Department appeared to be suggesting to Riggs that he would have to find other ways for putting the quietus on rambunctious labor unions than frivolous political appeals to the Supreme Court. Attorney General Gregory himself was preoccupied at the time with prosecuting the International Workers of the World and others for making remarks interpretable as claims that World War I was being fought ""for the so-called capitalist class....""198

Arguably the most astute legal question at this time was posed by the socialist Nome Industrial Worker, the newspaper of Local 240 of the International Union of Mine, Mill and Smelter Workers (formerly Western Federation of Miners).199

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195 Letter from Assistant Secretary to Governor Thomas Riggs, Jr., June 15, 1918, in id.
196 "Present Status Eight Hour Appeal," Tri-Weekly Nome Industrial Worker, July 4, 1918, at 1, col. 4.
197 Letter from Jno. W. Davis to S. G. Hopkins, Asst. Sec'y of the Interior, June 12, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives.
199 As of the issue of July 9, 1917, the paper’s masthead stated that the local’s parent
Territorial Alaska's Absolute Universal Eight-Hour Law

In a telegram to Attorney General Grigsby on May 15, the paper asked: "Is Bun­nell's decision binding from legal point view other three divisions, Territory." Grigsby was presumably less impressed with the Industrial Worker's self-inspiring observation that "[w]e realize most effective way to enforce eight hour law is for workers organize," but the next day he did answer the question straightforwardly: "Improper for me to express opinion on validity, believe law should be tested on Bunnell's decision. Not binding on any other three Divisions. But in view of attitude of Department of Justice, Attorneys might regard it as authority."200 Since Nome was located in the Second Judicial Division and thus outside of Bunnell's jurisdiction, workers there were free to consider the law still valid.

The radical labor movement's reaction to the judicial repeal of the eight-hour law can be gauged by the Industrial Worker's stream of editorials over the following months directing a barrage of insults at "the ever accommodating Judge Bunnell one of the brightest ornaments of the democratic machine in the Fourth Division."201 The newspaper espoused a countermodel of statutory and constitutional legitimation: "ORGANIZE AND YOU SHALL BE THE ONES WHO SHALL DECLARE SAID LAWS CONSTITUTIONAL."202 In an editorial repeatedly using the key Marxist term, "labor power," the Industrial Worker put newly arrived miners on notice that the eight-hour law "HAS BEEN DECLARED CONSTITUTIONAL BY ORGANIZED LABOR."203 An article hailing ditch men who had quit in solidarity with the eight-hour strike urged miners to "[t]ell the boss or anybody else that you intend to abide by the eight hour law which has been adopted by ORGANIZED LABOR. (Regardless of the opinion of the likes of Judge Bunnell...)."204

In spite of its insistence that placer miners had not gained the eight-hour day because instead of relying on themselves, they had "relied upon a legislature which is attached to the interests of the bosses,"205 the paper declared:

Beyond anything that has occurred in recent years the enforcement of the general

union was the IUMMSW.

200 "Miners Union Wired Grigsby-He Replied," Tri-Weekly Nome Industrial Worker, May 16, 1918, at 1, col. 5-6.
202 "Mr. Working Man," Tri-Weekly Nome Industrial Worker, June 6, 1918, at 2, col. 1.
204 "Several Ditch Men Quit Work," Tri-Weekly Nome Industrial Worker, May 16, 1918, at 1, col. 4 at 6.
205 "Mr. Working-Man," Tri-Weekly Nome Industrial Worker, May 14, 1918, at 2, col. 1 at 3.
eight hour law is most correctly to be considered the most important one to the working class the population within the Territory has faced since Alaska was purchased from Russia. ...

Bunnell’s decision ought to be self evident to the working-class that the only way to enforce such a law is to thoroughly organize, and convince Bunnell and the likes of him that his decision is not worth the paper it is written upon.

It challenges the standing of corporation satellites to attempt to legislate for the small minority as against the rights of the workers who perform the functions of producing for a bunch of a worthless parasites.206

VII

Considerable light is shed on the fate of Alaska’s eight-hour law by Governor Riggs’s first annual report, in which he repeated publicly the fears he had expressed internally to the Wilson administration about the consequences for the political legitimation of the territorial government of failing to reach closure:

An attempt was made to have an appeal perfected on writ of error. By order of the Attorney General of the United States the district attorney of the fourth judicial district was not permitted to enter the appeal and all district attorneys of the four judicial divisions instructed not to enter any suit under the act. Later the attorney general of the Territory essayed to appear for the United States...but this attempt was also denied by the Department of Justice. The striking miners’ union at Nome contended that the Attorney General had no authority to deny an appeal and remained on strike throughout the entire placer mining season, at the same time expressing a determination to maintain the law until definitely expunged from the statute books by a decision of the highest court. A conciliator of the Department of Labor sent to Nome...was unable to arrange an agreement between the gold mining operators and the strikers, the strikers holding out for an eight-hour day...and the principal operators holding firm to a longer day on a straight hourly basis without the time-and-a-half overtime feature, on the ground that placer mining with all the additional war-time costs would be unprofitable. An expression from various Alaskan unions showed considerable variance of opinion. The sentiment for a straight eight-hour day and for an eight-hour day with time-and-a-half overtime...being about equally divided, as is the sentiment regarding the validity of the court’s decision. It is to be regretted that an appeal was not allowed to be taken as, until the question is settled definitely for all time, there will be a recrudescence of labor disturbance. ... Unless the legislature of the Territory will voluntarily amend the law or unless the Department of Justice will allow an appeal, I look for continued labor unrest.207


207Report of the Governor of Alaska, in 2 Reports of the Department of Interior for the Fiscal Year Ending June 30, 1918: Indian Affairs Territories, at 565 (65th Cong., 3d Sess., H. Doc. No. 1455, 1919). For an almost identical account, see 1 Reports of the
Riggs’s interest in Supreme Court review may also have been a function of his own desire for definitive repeal of the law, but he did not wait for that eventuality to begin conducting his wartime campaign against so-called idlers and slackers and the Wobblies. Thus after the Navy had dispatched four ships in June at his request to forestall I.W.W. agitation among cannery workers, the governor received a telegram in July from the chairman of the Selective Service Board in Nome wanting to know whether he could reclassify the striking gold miners (whom Riggs had discussed in his annual report) and draft them for refusing work in an industry essential to the war effort. Without any mention of the eight-hour law that the miners were trying to enforce, Riggs instructed him to consult the district attorney if the situation required “immediate action” against “idlers.” The next day the governor wired the Nome Industrial Worker in the same matter that, since the eight-hour law had been “construed both by the courts and by the department of Justice...to be unconstitutional and District Attorneys instructed from Washington not to prosecute under it,” gold miners “dissatisfied with existing conditions should sink personal grievances to assist the smooth running of industry from a patriotic standpoint.” That same day, however, Riggs was apparently sufficiently unsure of himself that his office telegraphed the Provost Marshal General in Washington asking whether he had been correct in advising the Nome Selective Service Board that gold miners striking for an eight-hour day under a law declared unconstitutional were “idlers.” Although Riggs promptly wired the board in Nome that a draft “registrant who ceases work on account of a strike for a declared cause must not be classed as an idler nor has [sic] classification changed,” he conveniently failed to disabuse the Industrial Worker of his earlier erroneous interpretation. Amusingly, the governor’s abiding concern with labor unrest prompted him to use the same law to pressure employers that he castigated striking gold miners for seeking to uphold. In June, he sent admonishing letters to fishing employers that were taking advantage of the suspension of the eight-hour law, which in the

Department of Interior for the Fiscal Year Ended June 30, 1918, at 142 (1919).
208“Naval patrol for Alaskan Coast,” Tri-Weekly Nome Industrial Worker,” May 28, 1918, at 1, col. 1; Stewart, “The Alaskan Home Front During World War I” at 16-17.
209Telegram from Governor Riggs to [Carl] Lomen, July 15, 1918, in Record Group 101, Ser. 440, Box 90, Alaska State Archives.
210Telegram from Governor Riggs to Industrial Worker, Nome, July 16, 1918, in Record Group 101, Ser. 440, Box 90, Alaska State Archives.
211Telegram from Finnegan, Executive Officer, to Crowder, July 16, 1918, in Record Group 101, Ser. 440, Box 90, Alaska State Archives.
212Telegram from Governor Riggs to [Carl] Lomen, July 19, 1918, in Record Group 101, Ser. 440, Box 90, Alaska State Archives.
213Stewart, “The Alaskan Home Front During World War I” at 18.
meantime had become unenforceable (but not in the First Judicial Division in which their businesses were located), although Riggs, like the miners he was berating, was wont to inform correspondents that “the law as passed is still upon the statute books”:214

It has been brought to my attention that the men in your employ are working ten hours a day without additional compensation for two hours' overtime. The intention of the Council of National Defense and the Secretary of the Interior was not to do away with the basic principle of an eight-hour day in connection with the fisheries, but to lessen the hardships entailed by the Territorial law. Your scale of wages should be at the rate of an eight-hour day, with time and a half for overtime.

Will you kindly advise me if my information is correct and, if so, if you will not take steps to amend your schedule to the eight-hour basis, as contemplated by the various proclamations.215

To be sure, it is unclear what proclamations Riggs meant since Governor Strong’s proclamations suspending the law as to fisheries contained no such statements concerning overtime, while the proclamations issued by President Wilson in March and April 1917 applied only to government contracts.

In contrast, the Nome Industrial Worker at this time was heaping abuse on proponents of overtime. In an editorial, the miners union found it “amusing to hear those scab apologists insist that the eight hour day is all right, but a man should be let work overtime. In point of fact everyone is willing to concede the eight hour day 'in principle' but they want to work ten or twelve, with overtime at straight time.”216

The most tantalizing evidence that Riggs had joined with other officials in an effort to deal with the aftermath of Judge Bunnell’s decision is a letter that he received, on official stationery of the Department of Justice/Office of Clerk of the District Court for the Territory of Alaska, from Judge Bunnell’s clerk, Joseph E. Clark. Since district court judges appointed their clerks and Bunnell had appointed Clark, who had previously been chief deputy clerk,217 to the much sought after post in 1915,218 he was presumably acting under Bunnell’s instructions.219

214 Governor to Mrs. Alice M. Veatch, Aug. 1, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives.

215 Governor to Northland Dock Co. and New England Fish Co., Ketchikan, June 21, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives.


217 Alaska Reports ix (appointed July 1, 1913).

218 Cashen, Farthest North College President at 69-70.

219 Act of June 6, 1900, ch. 786, § 6, 31 Stat. 321, 323. On the clerk's duties and powers, see id., §§ 7, 730, 31 Stat. at 324, 447. That a federal district court clerk was not
Dated August 20, 1918, this extraordinary letter raises more questions than it answers. Clark informed the governor that he had enclosed a copy of the decision and Davis’s letter to Grigsby, which “[w]e” had intended but omitted to give Riggs before he left Fairbanks. (Clark was sufficiently prominent in Fairbanks that the local paper mentioned only him and his wife along with the mayor and his wife as having been in the receiving line at a reception for Riggs a few days earlier.) The clerk then observed that it was “apparent” to him that Bunnell’s decision, based on Supreme Court precedent, together with the Attorney General’s position, “ought to settle for the time at least, the question of a General 8-hour law.” In a puzzling non sequitur referring to the Adamson Act, which was merely an overtime law, Clark then added: “We all know that the Democratic [sic] party is on record as being in favor of the 8-hour law, as was proven by the 8-hour railroad law passed in 1916.” Clark deepened the mystery by disclosing: “We are taking the meat of Judge Bunnell’s decision, having the same published, together with letters of the Attorney General on this subject, and will mail to every voter in the Fourth Division and will send a supply to the Second Division.” Finally, Clark told Riggs that “[w]e” would like to know what Charles Sulzer, Alaska’s Democratic delegate to Congress, said in reply to Riggs before “the pamphlet is printed,” but noted that they would proceed in any event, adding that he did not believe that Riggs had raised the eight-hour question in his letter.

Who “we” were, who was paying for the pamphlet, whether it was ever printed and distributed, and, above all, what the purpose of this campaign was all remain unclear. Since newspapers had lavished front-page banner headlines on the law and Bunnell’s opinion, and since Alaska workers and labor unions had been actively engaged in campaigns to enact and preserve the law, it seems unlikely that the pamphlet could have been designed to serve a purely informational purpose. After all, in Nome, the seat of the Second Division, the Industrial Worker had just lambasted Bunnell for having declared the law unconstitutional “by a piece of trickery” in these terms: “Such a travesty of justice has often been observed as this parasitic decision of Bunnell’s apparently given for the
unsophisticated working class to take for granted if they are boneheads enough to so do."  

Did Bunnell and Riggs intend to convince voters of the constitutional hopelessness of any legislative intervention? Or, on the contrary, did they hope to persuade workers to support enactment of a watered-down, constitutionally valid, overtime law at the next legislative session in 1919? This latter possibility is consistent with an initiative that Riggs undertook two weeks after receiving Clark's letter, sending telegrams to labor unions, asking: "Is the sentiment of your union in favor of an eight hour day only or eight hour day with overtime at increased rate of pay."  

According to an alternative interpretation, advanced by the chief archivist at the Alaska State Archives, Clark "slipped into a party voice and expressed his intentions to send the information regarding the law and judicial decision as a Democratic Party publication. Bunnell's opinion and decisions by the Department of Justice not to pursue an appeal would not have been popular among the party faithful in the division." This scenario implies that Bunnell was not involved in the plan of his clerk, who might even have been engaged in an act of disloyalty toward his superior. However, in light of District Judge Bunnell's commanding position within the Democratic Party in dispensing political patronage jobs, it seems unlikely that he could have been kept in the dark about this unconventional yet public project. Moreover, the fact that Clark did not resign his position until May 1919—and then only to enter the automobile business in Colorado—at which time the Fairbanks Daily News-Miner's reports depicted him as a hail fellow well met, does not suggest that Bunnell had fired Clark.

That Riggs and his associates were pursuing an accommodationist rather than a confrontational course is also strongly corroborated by the governor's public

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224 Telegram from Riggs Governor, Sept. 8, 1918 (handwritten draft), in Record Group 101, File Group 156, Box 159, Alaska State Archives.

225 Email from John Stewart to author, Apr. 10, 2000.

226 Cashen, Farthest North College President at 63-70. As Governor Strong informed a correspondent who had sought his help in obtaining a position at the time of Bunnell's appointment: "I do not care to suggest the name of anyone for the positions mentioned by you, or for any other position within the gift of Judge Bunnell, as I feel that he should be given a free hand in the selection of the men who will serve under him. There should be a number of positions within the gift of Mr. Bunnell, both clerkships and commission-erships, and you ought to land one of them." Letter from Governor to B. J. McGinnis, Jan. 7, 1915, in Record Group 101, Ser. 130, File 52, Box 129, Alaska State Archives. See also Letter from Governor to L. F. Protzman, Jan. 14, 1915, in id.

Territorial Alaska’s Absolute Universal Eight-Hour Law

preoccupation with the anarchy that labor radicals might rain down on Alaska at any moment. In his second annual report to the Secretary of the Interior for 1918-19, Riggs lamented:

The resident workingman is of the very highest type—capable, energetic, and thrifty—but unfortunately Alaska during the past year has received many immigrants of the most undesirable type. The I.W.W. and advocates of soviet rule have been most active in agitating disturbance. The lack of police protection is well known, and the radicals work openly in their efforts to disorganize industry. Unfortunately, there are very large numbers of ignorant, illiterate laborers of foreign extraction in the Territory, and in many places the seeds of sedition, skillfully sown, have fallen on fertile soil. Except for the mounting cost of living, there seems to be little dissatisfaction among the wage earners, practically all agitation emanating from that class who are denunciatory of all vested interests but whose hands show no signs of callus.  

In contrast, Wickersham, during his election campaign against Sulzer, enthusiastically supported the eight-hour law, attacked Bunnell for having “obligingly” declared it unconstitutional, and “paid his compliments to this moral cowardice upon the part of Sulzer” for refusing to take a stand on the grounds that it was improper to do so while the suspension was under consideration.  

As late as October 1918 Governor Riggs seemed tentative in informing an out-of-state lawyer who had inquired as to whether the eight-hour law was still in effect that an appeal of the decision holding it unconstitutional “to the present time...has been denied.” In the event, “no final test was had on this, the only enforceable universal eight-hour law covering private employment enacted in America” before or since the enactment of the FLSA.

VIII

At the beginning of the next legislative session in 1919, Governor Riggs announced that he would submit the letter he had received from the U.S. solicitor general explaining why the Justice Department had concluded that an appeal of Bunnell’s decision would be a “mere waste of time and money.” Nevertheless, Riggs, who regretted having to observe that to a small part of the Alaskan popu-

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229“Wick Opens Up G.O.P. Campaign” at 4, col. 2.
lation "the Red Flag and its teachings of tyrannical and chaotic Bolshevism represent an end to be attained, no matter through what means," declared that the legislature should consider a new eight-hour bill that could pass constitutional muster "to the end that, if possible, the desire of the electorate at the election of 1916 may be complied with."

In fact, five days later an eight-hour law was the very first bill introduced in that session of the Alaska House of Representatives. The *Alaska Daily Empire* underscored its importance by printing the entire text the next day. Seeking to avoid the constitutional pitfalls that had tripped the 1917 law, its authors, Representatives John Dunn and George Pennington, chose to dilute it in several significant ways. First, although House Bill No. 1 still covered adult males, it was now restricted to persons who were "hired [or] permitted to work for wages," thus presumably excluding business partners. Second, the bill was careful to declare as interlocking Alaskan public policies that: no such workers were to work "for longer hours...or days of service than is consistent with his or her health and physical well-being and the ability to promote the general welfare by his or her increasing usefulness as a healthy and intelligent citizen"; and working any person more than eight hours daily "in any mill, sawmill, lumber yard, manufacturing, mercantile or mechanical establishment, or office, or store, or any express or transportation company, or telephone company, laundry, hotel or restaurant, is injurious to the physical health and well-being of such person, and tends to prevent him or her from acquiring that degree of intelligence that is necessary to make him or her a useful and desirable citizen." Third, the bill excepted from the eight-hours maximum "watchmen and employees when engaged in making necessary repairs or in case of emergency." And finally, the most radical element of the 1917 law was deleted by a proviso "that employees may work overtime conditioned that payment be made for such overtime at the rate of time and one-half the regular wage."

Two days after the bill’s introduction, a mass meeting at Labor Union Hall in Juneau unanimously voted in favor of the bill as well as one extending coverage to the canneries. That some workers were prepared to recede from their maximalist demands was clear from remarks made at the meeting. For example, a member of the Cooks and Waiters Union approved of the new overtime provision

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234 House Bill No. 1, §§ 1-2, Territory of Alaska, Fourth Session, Alaska State Archives, Records of the Territorial Legislature, Record Group 34, 1919, Series 30, Box 5180; *The Journal of the House of Representatives of the Fourth Legislative Assembly of the Territory of Alaska* at 56-57.
on the grounds that "limiting...men to an eight-hour day would not be practicable in Alaska." Even greater skepticism was expressed by former Senator Hubbard, who doubted the new bill’s constitutionality although he supported the effort. The bill’s co-author, Representative Dunn—a Denver lawyer who had been prospecting in Alaska since 1905—seemed on firmer jurisprudential footing when he urged its constitutionality on the grounds that it followed the Oregon overtime law, which had been upheld by the U.S. Supreme Court. The fact that a fishermen’s representative who had supported the absolute eight-hour law at the governor’s hearing a year earlier now called the Dunn-Pennington bill a "masterpiece" suggests that at least part of the labor movement had abandoned hopes of combating a mandatory longer workday through state intervention. Although several locals of the Alaska Labor Union did endorse the Dunn-Pennington bill, the *Nome Industrial Worker* reported that "no union locals affiliated with the American Federation of Labor has [sic] given its endorsement to the bill in its present emasculated condition."

That compromised condition appears to have corresponded to Representative Pennington’s own politics. On the one hand, just the previous year he had joined a labor union at the age of 62, believing: "Capitalists are blind if they cannot see and understand the forces working about them." He warned employers that if they failed to recognize workers’ "rights, backed by justice, then they are manufacturing the very kind of men which they so much seem to fear." On the other hand, the day after introducing H.B. 1, Pennington, in conformity with the legal landscape of the lower 48 states, also filed his anti-Bolshevik "Bill to Guard Alaska Against Unamericanism," which criminalized the use of any flag to symbolize a purpose to overthrow or to advocate overthrowing the government of the United States or Alaska "by the general cessation of industry...."

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240 See, e.g., Murphy, *World War I and the Origin of Civil Liberties in the United States*.

agreed not to include canneries in the bill because he and Dunn believed that it was "possibly" just to do so since those employers had already made their contracts; nevertheless, he told the mass meeting that if workers wanted to include the fishermen, he was "willing to go down to defeat with the bill on that proposition...."242 Excluding the canneries was tantamount to gutting the law: in 1919 the fishing industry employed 28,500 workers (90 percent of them in salmon canneries) at a time when the entire population of Alaska was only 55,000.243

At the beginning of April, Dunn presented to the Committee on Labor, Capital and Immigration a telegram from laborers in Anchorage supporting his bill with amendments to include canneries, and the committee promptly adopted the amendment, which also provided for coverage of logging camps.244 The Committee of the Whole issued a report recommending that the bill pass with these amendments. It also recommended that the chairmen of the Committees on Labor, Capital and Immigration and Judiciary and Federal Relations be required to submit the amended bill to Alaska’s attorney general for his opinion on its legality and constitutionality.245

The day after receiving the chairmen’s request, Attorney General Grigsby sent the chairmen a comprehensive 13-page legal analysis of the bill—the full text of which was published in the Juneau newspaper246—concluding that most of the bill could pass constitutional muster. Grigsby instructed the legislature that no hours law had “ever been upheld on the theory that the constitutional right of all persons to contract freely is subject to regulation at the hands of a legislative majority regardless of the character of the employment which is the subject of the contract.”247 Based on the U.S. Supreme Court’s decision upholding the Oregon hours law in 1917,248 Grigsby concluded that H.B. 1, which he regarded as “prac-
tically a duplicate” except as to the occupations covered and limitation of hours, would be upheld if it were limited to mills, factories, and manufacturing, saw mills, fisheries, logging camps, laundries, and transportation companies. But as to lumber yards, hotels, restaurants, telephone companies, offices, and stores, he believed that “whatever degree of unhealthiness is attached to such occupations is too remote to justify the exercise of the police power.”249 By “including almost every known occupation, ranging from that of a logger in the woods to a lawyer’s or doctor’s clerk,” the legislature ran the risk that “courts might say that it is an attempt, in the guise of a health and public welfare law, to enact a general eight hour law.” Indeed, Grigsby speculated that “a general eight hour law such as passed by the Legislature in 1917, preceded by a like legislative declaration as to its intent and purpose would...stand as good as chance of being upheld” as H.B. 1. Consequently, the Alaska attorney general concluded that in order to avoid a court ruling that voided the entire bill, elimination of the aforementioned occupations bearing no direct relation to health or welfare “would leave the proposed Act unobjectionable.”250

Three days after Grigsby responded, Territorial Governor Riggs informed the Labor Committee chairman that he had received the following message from the Attorney General in Washington, A. Mitchell Palmer (to whom the chairmen had telegraphed the bill at Grigsby’s request)251:

Department unwilling to express its opinion as to whether proposed eight-hour bill will be held constitutional, but is willing to assure you that if lower court holds it unconstitutional, it will direct an appeal to be taken to the Supreme Court of the United States and will make every effort to uphold constitutionality of statute.252

As constitutionally more tenable bills wended their way through the legislature, negative pro-business voices began to be heard. The Alaska Daily Empire, which a year earlier had attacked the law (after Bunnell struck it down) for ban-

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249 Letter from Attorney General George Grigsby to James Bogan and John Dunn at 11, 8.

250 Letter from Attorney General George Grigsby to James Bogan and John Dunn at 12-13 [as a result of a typo, page 11 and the following page are both paginated as page 11].

251 Report of Standing Committee (Apr. 12, 1919), in Records of the Territorial Legislature, Record Group 34, Series 30, Box 5180, Alaska State Archives; The Journal of the House of Representatives of the Fourth Legislative Assembly of the Territory of Alaska at 135.

252 Letter from Governor Thomas Riggs, Jr. to J. J. Bogan, chairman, House Committee on Labor, Capital and Immigration (Apr. 11, 1919), in Records of the Territorial Legislature, Record Group 34, Series 30, Box 5180, Alaska State Archives.
ning overtime work, now that the offending provision had been eliminated, discovered a new flaw: "where labor cost is the principal item in manufacturing cost, it is not practical to pay time and a half for overtime, because the cost of the manufactured article would thereby be forced so high that the selling price would have to be so advanced that the market would be destroyed."253 Some Alaska capitalists joined the Daily Empire in attacking what they regarded as "straight-jacket laws."

The substitute bill, as recommended by the Committee on Labor, Capital and Immigration and designed to accommodate Grigsby's criticisms and suggestions,255 passed the House 14-2 in April.256 Even this diluted bill, however, was defeated in the Senate 6-2, where some senators argued that it would destroy the fishing industry, "which pays most of the Territorial taxes."257 Representatives Dunn and Pennington introduced a second eight-hour bill designed to cover those industries (lumber yards, mercantile establishments, logging camps, offices, stores, express companies, telephone companies, laundries, hotels, and restaurants) coverage of which had been deemed questionable.258 It passed the House unanimously, but was defeated 6-2 in the Senate.259

The pressure to deviate from the absolutist law of 1917 was further evidenced by Senate Bill No. 19, which was even titled, "An Act to establish a general eight hour day and to provide for the payment of overtime." It made eight hours a day's labor (except for farming and domestic service and hazardous occupations manufactured article would thereby be forced so high that the selling price would have to be so advanced that the market would be destroyed."253 Some Alaska capitalists joined the Daily Empire in attacking what they regarded as "straight-jacket laws."

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256 Substitute House Bill No. 1, Territory of Alaska - Fourth Session [no date], in Records of the Territorial Legislature, Record Group 34, Series 30, Box 5180, Alaska State Archives; The Journal of the House of Representatives of the Fourth Legislative Assembly of the Territory of Alaska at 196; "Eight-Hour Bill Is Passed by Lower House," Alaska Daily Empire, Apr. 21, 1919, at 2, col. 5.

257 HB1, in Records of the Territorial Legislature, Record Group 109, 1919 Bill Docket, Alaska House of Representatives, Alaska State Archives; The Senate Journal of the Fourth Legislative Assembly of the Territory of Alaska 119 (1919); "8 Hour Law May Not Pass Senate," Weekly Nome Industrial Worker, Apr. 26, 1919, at 1, col. 4 (quote).

258 House Bill No. 39, Record Group 01/03, Ser. 30, Box 5180, Alaska State Archives. At the time of the bill's second reading laundries were deleted. The Journal of the House of Representatives of the Fourth Legislative Assembly of the Territory of Alaska at 226.

otherwise regulated) unless the employer and employee signed an agreement designating other hours as a day's labor, in which case an overtime premium was not statutorily required; only where they failed to sign such an agreement was time and one-half mandated for hours in excess of eight. It too was defeated 6-2. Yet another Senate bill, S.B. 54, limited overtime work (to be paid at time and a half) to making necessary repairs and emergencies when life or property was in imminent danger. Finding that “the recent actual experience of mankind” showed that “in general employment, longer hours of work in any one day than eight hours does not increase the amount of work done, but tends to impair the health and happiness of the individual, and render him less fit as a citizen and elector,” the bill declared it as the territory’s public policy to “promote the general health, physical well-being, and happiness of laborers by limiting” the workday to eight hours. However, the bill stated that this policy did not apply to certain industries by reason of climate, seasonality, or occasional employment; they included some of the territory’s biggest employers such as fishing and canning, longshoring, transportation, and placer mining. The fact that the bill passed the Senate 5-3 reflected the influence of the fishing industry. Indeed, Senator James Heckman, who introduced the bill, was a “successful salmon packer” and merchant, who had been connected with the industry since 1888.

The intensity of labor-capital conflict in the Senate was captured by its members’ reaction to a telegram sent to its chairman on April 22 by the mayor of Alaska’s leading fishing center, the extreme southern town of Ketchikan, the Deep Sea Fishermen’s Union, and a local of the Alaska Labor Union: “If Victory Loan to be success here eight hour bill Dunn-Pennington must pass with no restrictions political suicide for senators opposing so far as concerns labor.”

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262 Senate Bill No. 54, §§ 1-3 (Sen. Heckman), in Records of the Territorial Legislature, Record Group 34, Series 30, Box 5180, Alaska State Archives. The Senate and House Journals in places refer to this bill as having been introduced by Sen. Frawley. *The Senate Journal of the Fourth Legislative Assembly of the Territory of Alaska* at 173; *The Journal of the House of Representatives of the Fourth Legislative Assembly of the Territory of Alaska* at 248, 350.

263 *The Senate Journal of the Fourth Legislative Assembly of the Territory of Alaska* at 117.


265 *The Senate Journal of the Fourth Legislative Assembly of the Territory of Alaska* at
The Senate immediately adopted a report of its special committee, which first characterized the "threat" as "a direct offer to purchase the vote of this body," and then initiated criminal prosecution:

We could overlook the efforts of the signers...to intimidate members of this body but when such an attempt at intimidation is accompanied with the intimation that the authors will oppose the success of the Victory Loan now offered by our Government, we cannot reach any other conclusion than that the parties thereto are making threats that very closely touch the border line of conspiracy or treason....

And we further recommend that the above telegram be turned over to the United States District Attorney to deal with as the law may direct.266

In contrast, labor's political strength in the House may have been decisive in the failure of the House and Senate conferees to agree on a final version.267 On the penultimate day of the legislative session, the House, by a vote of 12-4, amended Senate Bill No. 54 to reincorporate all the excluded occupations (except agriculture and domestic service),268 “Dunn and Pennington refusing to budge an inch. ‘We will not yield a word,’ said Mr. Pennington. Nor a ‘coma [sic],’ added Mr. Dunn.”269 Thus ended the Alaska labor movement’s attempt to achieve a state-enforced general eight-hour day.

In his annual report to the Interior Department Governor Riggs remarked that the eight-hour bills had failed to pass in 1919 because “too many toes were trodden” in an attempt to keep the bills as general as possible. The fish packers, for example, who were “the ones really aimed at,” denied the possibility of an eight-hour day on the grounds that “when a run of fish is on plants must operate more hours to prevent the spoiling of the raw material; the fishermen themselves asserting their absolute inability to comply with an eight-hour law, for the reason

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266 The Senate Journal of the Fourth Legislative Assembly of the Territory of Alaska at 107.

267 Senate Bill No. 54, in Records of the Territorial Legislature, Record Group 109, 1919 Bill Docket, Alaska Senate, Alaska State Archives; The Journal of the House of Representatives of the Fourth Legislative Assembly of the Territory of Alaska at 318, 321, 322, 326; The Senate Journal of the Fourth Legislative Assembly of the Territory of Alaska at 150; "Eight Hour Bill Is Passed by the Senate Members”; “Measures for 8-Hour Day in Hopeless Shape,” Alaska Daily Empire, Apr. 30, 1919, at 2, col. 5.

268 The Journal of the House of Representatives of the Fourth Legislative Assembly of the Territory of Alaska at 264, 300.

269 "Fourth Legislature Comes to an End After Being in Session for 33 Hours, Making Record for Alaska Sittings," Alaska Daily Empire, May 2, 1919, at 1, col. 1, 2. Wickersham, who did not mention passage of the eight-hour law in 1917 in his diaries, happened to be in Juneau the day after the legislature adjourned and noted that it had “failed to pass any 8 Hour Law....” Wickersham “Diaries,” May 3, 1919.
that almost all of them are share workers.” Ironically, the governor concluded his account by observing that many industries had voluntarily adopted the eight-hour day with success.270

The forces pushing for some kind of hours regulation did not abandon their efforts. At the fifth legislative session in 1921 they undertook a more cautious overtime initiative. Although it, too, applied to adult men, House Bill No. 6 from the outset confined its scope to any mill, saw mill, factory, laundry, manufacturing establishment, or open-cut or open-pit quarry or mine. It was also more circumspect in attempting to anticipate any judicially constructed constitutional obstacles to hours regulation. Unlike earlier bills, it stated that “climatic and living conditions” in Alaska made employment in the named industries for more than eight hours a day “injurious to the health of both men and women...and greatly increase the likelihood of injury....” The bill then characterized these facts as justifying the territory’s “exercise of its police power...to discourage the employment” of men or women in those industries for more than eight hours.271

The bill sought to insure judicial approval by offering employers even more daily overtime than the Oregon law, which permitted three hours and was upheld by the U.S. Supreme Court. H.B. 6 permitted employees to work as many as four hours of overtime at time and one-half.272 Finally, the bill made each violation of the act a misdemeanor punishable by a fine of between $100 and $500 or imprisonment in federal jail for a period of between 30 days and six months.273

In the course of further deliberations, the bill’s scope was expanded by inclusion of surface placer mines. In addition, for the first time an Alaska overtime bill made payment of overtime wages a civil obligation enforceable in a contract action.274 Immediately before the House of Representatives passed the bill with these amendments by a vote of 15 to 1, it received the attorney general’s opinion as to its constitutionality. Despite the strong similarity to the Oregon law, he viewed the bill as “certainly very close to the line....” He thought that “the chances are that it will be upheld but we have nothing to spare, because it must be remembered that we have the history of legislation on the eight hour question.
against us in this Territory in our effort to uphold the validity of the law."

In the Senate, Luther Hess, vice president of the First National Bank of Fairbanks and "one of the most extensive holders of mining ground in the whole territory," introduced as a substitute for H.B. 6 an even more permissive version of his unsuccessful overtime bill (S.B. 19) from the previous session. Whereas the earlier bill at least mandated time and a half for overtime work beyond eight hours daily where the employer failed to obtain its employees' signature to an agreement stipulating to a longer workday, Hess's new bill merely required employers, in the absence of such an agreement, to pay overtime wages "at the rate of wages agreed upon; or if there is no agreement as to wages, at the rate of wages paid for like service in the community where the labor was performed." This watered down version of an already diluted overtime bill passed the Senate by an overwhelming 7-1 majority.

Although even the House overtime bill was far removed from the radical intervention in the labor market embodied in the 1917 law, the Senate bill constituted such a meaningless labor standard that it was no surprise that the House voted 11-4 not to concur in it. A conference committee was unable to reach agreement, but a free conference committee (of which neither the House nor Senate bill author was a member) voted 5-1 in favor of the Senate substitute. The agreement, however, was short-lived: the whole House disavowed its own managers, voting 9-5 against the Senate substitute, thus bringing to a close eight years of efforts to legislate the eight-hour day in Alaska.

After the defeat of the initiatives of 1917, 1919, and 1921, no eight-hour bill was introduced during the 1923 session. Not only did Alaska's legislature never again enact a general absolute eight-hour law, it did not even enact an overtime law until 1955. And so far removed from workers' and legislators' concerns

275 The Journal of the House of Representatives of the Fifth Legislative Assembly of the Territory of Alaska at 179.
277 Territory of Alaska, Fifth Session, In the Senate, Substitute for House Bill No. 6, § 2 (Rep. Hess), in Record Group 01, Ser. 30, Box 5181 (Legislative Bills and Resolutions, 1921-25), Alaska State Archives.
278 The Senate Journal of the Fifth Legislative Assembly of the Territory of Alaska 173 (1921).
279 The Journal of the House of Representatives of the Fifth Legislative Assembly of the Territory of Alaska at 242.
280 Unlike a conference committee, a free conference committee is free to suggest new amendments that are clearly germane.
281 The Journal of the House of Representatives of the Fifth Legislative Assembly of the Territory of Alaska 308-309, 360.
282 1955 Alaska Sess. Laws, ch. 185 at 372 (providing for time and a half for hours
of those early years is the current overtime law that—despite its unusual retention of Alaska’s quondam tradition of mandating premium pay after eight hours per day—its express public policy fails to make any reference to the goal of a shorter workday. Instead, the legislative policy has been diluted to a mere matter of money—namely, “to establish...overtime compensation standards for workers at levels consistent with their health, efficiency and general well-being....”

\[\text{283}\text{Alaska Stat. }\text{§ }23.10.060(b) (2000).}\]

\[\text{284}\text{Alaska Stat. }\text{§ }23.10.050 (2000).\text{ When adopted in 1959, this policy appears to have been taken verbatim from a New Mexico statute. 1959 Alaska Sess. Laws ch. 171, }\text{§ }1,\text{ at 248; 1955 N.M. Laws ch. 200, }\text{§ }1,\text{ at 459.}\]
Montana’s Constitutionalization of the Eight-Hour Day

In the minds of many the present widespread evil of unemployment is so great as to require or justify extraordinary measures by government. Revolution even is feared by some as a consequence of failure or inability to alleviate it.¹

Montana, which like other western mining states, had a tradition going back to the late nineteenth century of legally mandating eight-hour days at the behest of a strong miners’ movement,² seized the initiative to establish a general eight-hour day when its voters narrowly approved a constitutional amendment in 1936 extending an earlier eight-hour cap for mines and smelters to all nonagricultural employees. Constitutional action to regulate all nonagricultural male workers’ hours in Montana had originated at the nadir of the depression in 1933. On November 10, Democratic Governor Frank Cooney—who as lieutenant governor had become governor by virtue of a deal with the governor who resigned so that Cooney could appoint him to succeed a senator who had just died³—called an extraordinary session of the legislature to respond to the “[g]reat distress” that had left many of the state’s citizens “in want for the necessities of life, and many...without employment, without means of support and unable to care for themselves and their families....” Noting that the “nation-wide economic depression has created a serious emergency in this state, due to widespread unemployment and consequent indigence and dependence of a large portion of the people of the state,” the governor declared that “it is imperative that legislation be enacted immediately to relieve the needy and destitute citizens of this state from want and deprivation....”⁴ In addition to a series of direct relief, public works,

¹State v. Henry, 37 N.M. 536, 545 (1933).
²Elizabeth Brandeis, “Labor Legislation,” in Don Lescohier et al., History of Labor in the United States, 1896-1932, at 3:399-697, at 551-52, 562. The 1897 statute covered hoisting engineers in mines with more than 15 underground employees; the first statute to cover miners was enacted in 1901. 1897 Laws of Montana, H.B. No. 22, at 67; 1901 Laws of Montana H.B. No. 1 at 62. The 1897 law did not apply to engineers who temporarily operated machinery more than eight hours “when from sickness or other unforeseen cause the person regularly employed is unable to operate the same.” 1897 Laws of Montana, H.B. No. 22, § 2, at 67-68.
⁴“By the Governor of the State of Montana: A Proclamation,” in 1933-34 Laws of...
and tax programs, Cooney singled out for special mention enactment of "a law limiting the hours of labor."\(^5\)

In December the legislature did enact a law prescribing eight hours as a day’s work and 48 hours as a week’s work in all cities and towns with a population of 2,500 or more for all persons employed in retail stores and wholesale warehouses as well as those employed in delivering goods in both sectors. The legislature imposed a fine ranging between $50 and $600 on those convicted of having committed the misdemeanor of violating the provision.\(^6\)

The legislature’s rather circumscribed intervention can in part be explained by the presence on the books of several statutes, some dating back decades, limiting the workday of adult men to eight hours in several of the state’s most important and dangerous and unhealthful industries—underground mining and smelters had been subject to the eight-hour regime since 1901\(^7\)—in addition to three statutes enacted during the regular 1933 legislative session establishing the eight-hour day in strip mines, cement plants, quarries, hydroelectric dams, and sugar mills. Like the older acts, but unlike the law covering retail and wholesale firms, these three provided for exceptions in the case of emergencies.\(^8\) Moreover, since 1905 the legislature had imposed the eight-hour day on "all works and undertakings carried on or aided by any municipal, county, or state government.\(^9\)" In light of the fact that the constitutionality of hours laws covering men in non-dangerous occupations and industries had not yet been definitively affirmed by the courts\(^10\)—the New Mexico Supreme Court, for example, in September 1933 had struck down a recently enacted, less ambitious eight-hour-day and 48-hour-week law covering men in mercantile establishments on the grounds that it deprived employers and employees of due process\(^11\)—the Montana legislature had acted boldly.

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5"By the Governor of the State of Montana: A Proclamation" at 3.
61933-34 Laws of Montana, ch. 8, § 1-2 at 37-38. Registered and assistant pharmacists were excluded from the act.
81933 Laws of Montana, chs. 76, 77, and 90 at 141, 142, 160.
9Revised Codes of Montana § 3079 (1935). In 1943 this statute was amended to provide "except in cases of emergency when life or property are in danger." Revised Codes of Montana Annotated, § 41-1121 (1947).
10See Harry Millis and Royal Montgomery, Labor’s Progress and Some Basic Labor Problems 526 (1938).
111933 N.M. Laws, ch. 149 at 296; State v. Henry, 37 N.M. 536 (1933). The law permitted work in excess of eight hours daily in emergencies provided that weekly hours did not exceed 50 hours and all hours beyond 48 were paid at time and a half. 1933 N.M. Laws ch. 149, § 2 at 297.
Two years later the legislature voted to submit to the electorate a state constitutional amendment significantly expanding the eight-hour day beyond "all works or undertakings carried on or aided by any municipality, county or state government, and on all contracts let by them, and in mills and smelters for the treatment of ores, and in underground mines," which had been anchored in Article XVIII, section 4 of the constitution since 1904. In March 1935 the legislature decided that at the general election on November 3, 1936, the electorate would determine whether the new provision should be amended to read:

A period of eight hours shall constitute a day's work in all industries, occupations, undertakings and employments, except farming and stock raising; provided, however, that the Legislative Assembly may by law reduce the number of hours constituting a day's work whenever in its opinion a reduction will better promote the general welfare, but it shall have no authority to increase the number of hours constituting a day's work beyond that herein provided.

The antagonists in the public debate over the amendment did not engage each other's strongest arguments. Based, presumably, on the provision authorizing the legislature to "regulate the number of hours Montana people may work," opponents asserted that while the measure might be referred to as providing an eight-hour day, "in reality it would result in a six-hour day being fastened on Montana enterprise." Others stressed that the amendment did not provide for "emergency overtime work under any conditions" and that until other states adopted similar provisions, Montana ran the competitive risk of driving away industry.

Labor advocates, in contrast, tended both to make light of and/or ignore their adversaries' points and to downplay the significance of the amendment. For example, in the run-up to the referendum, B. I. Steinmetz, president of the Cas-

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12 The amendment was enacted in 1903 and approved at the general election of 1904. 1903 Laws of Montana ch. 49, at 108; State v. Livingston Concrete Bldg. & Mfg. Co., 34 Mont. 570, 580 (1906).

13 1935 Laws of Montana ch. 172, § 4, at 352, 353. At the same session the legislature subjected motor bus drivers to the eight-hour regime, creating an exception "in case of delay due to accident or unpassable roads, or abnormal road conditions, snow blockades...." Revised Codes of Montana § 3069.1 (1935).


cade County Trades and Labor Assembly, in a talk to a group of miners (implicitly) sought to pooh-pooh the claim that the amendment would make emergency overtime impossible:

Has anyone ever heard of a surgeon having to quit when the whistle blew. Did anyone ever attempt to stop a deputy in pursuit of a criminal, when the whistle blew? Ridiculous. Yet that is exactly what the opponents would have you believe [if] you did not use the brains God gave you. The adoption of the eight-hour constitutional amendment will benefit business, benefit you and eliminate the Wall street exploitation of our manpower and natural resources.17

Presumably, however, “the great corporations, banks and interlocking ‘trusts’ under the domination of Wall street,” which Steinmetz called “the opponents of this mildly progressive legislation,”18 were less concerned about surgeons and sheriffs and more concerned about the state’s interference with employers’ decisions as to when run-of-the-mill workers had to work overtime.

Steinmetz viewed the amendment as of limited reach because it merely served to deprive “the unfair exploiter of our young man and womanhood” of “the technicality” it used to defend itself when charged with having violated one of the existing eight-hour laws—namely, those statutes’ alleged unconstitutionality. Despite expressing disbelief that the “august” Montana legislature would ever “attempt to lead the nation in the establishment of a shorter work day,” Steinmetz overoptimistically argued that the language about reducing the workday was merely “in the amendment so that Montana legislators may not be handicapped when and if the federal government ever adopts the inevitable nationwide movement for a shorter workday.”19

That more than a few “independent” businessmen must have joined with the “reactionary forces” of Wall Street and believed the “‘bogey man’ stories of the ruin which confronts” them20 is manifest from the narrow margin—105,407 for

18“Eight-Hour Plan Defended in Address by Steinmetz.”
19“Eight-Hour Plan Defended in Address by Steinmetz.” The fear that a state supreme court might hold an eight-hour law for adult men unconstitutional in a state lacking a constitutional provision specifically authorizing it was not outlandish: in 1899 the Colorado Supreme Court had struck down a law protecting workers in mines and smelters on the grounds that it did not protect the public health and that the police power could not properly be applied “to protect a man against himself.” In re Morgan, 26 Colo. 415, 427 (1899).
20“Eight-Hour Plan Defended in Address by Steinmetz.”
and 101,438 against\textsuperscript{21}—by which the electorate adopted the amendment, which went into effect on December 2, 1936.\textsuperscript{22}

In 1904 a section 5 had already been added to Article XVIII of the state constitution mandating that: “The legislature by appropriate legislation shall provide for the enforcement of this article.” Interestingly, whereas the legislature had already enacted an eight-hour law with penalties for underground mines and smelters at its previous session in 1901,\textsuperscript{23} after 1936 it never enacted legislation to enforce the expanded applicability of the eight-hour day to the wide swaths of the economy that had not previously been affected by the aforementioned piece-meal legislation. The Montana constitutional provision failed to attract much national attention, and even the principal journal of the U.S. Bureau of Labor Statistics, while briefly mentioning the constitutional amendment, under the heading “Miscellaneous,” in its overview of state legislation for 1936, did not include it in a detailed tabular listing of state legislation for men in 1938.\textsuperscript{24}

Although the interventionist anti-market principle underlying the constitutional maximum hours mandate was potentially powerful, its empirical sweep was limited by the industrial and occupational distribution of the male labor force in Montana.\textsuperscript{25} First, the agricultural exclusion eliminated more than one-fifth of all gainful male employees as recorded at the 1930 census and one-seventh of employed males in 1940; second, an indeterminate but significant proportion of male workers were covered by the various eight-hours statutes: miners alone accounted for one-ninth of all male workers in 1930 and one-eleventh in 1940, while the various manufacturing branches such as smelting, sugar refining, and

\textsuperscript{21}Montana Constitutional Convention Commission, \textit{Montana Constitutional Convention 1971-1972: Constitutional Amendments 1889-1971}, at 8 (Constitutional Convention Research Memorandum No. 2, n.d. [1972?]). The Montana newspaper with the most intensive coverage of the state legislature, \textit{Great Falls Tribune}, did not even report the result of the referendum until ten days after the election, when it devoted part of a non-evaluative editorial to the adoption of the amendment according to as yet unofficial returns. “The Referendums,” \textit{Great Falls Tribune}, Nov. 13, 1936, at 4:2. The national newspaper of record, according to its own index, devoted one premature sentence to the issue two days after the election: “In Montana defeat threatened a proposal to place in the State Constitution a regulation for an eight-hour day in industry.” “Results in West on Referenda Issues,” \textit{N.Y. Times}, Nov. 5, 1936, at 14:5-6.

\textsuperscript{22}1937 Laws of Montana at 721.

\textsuperscript{23}1901 Laws of Montana H.B. No. 1, at 62.


\textsuperscript{25}Women’s and children’s hours were already capped by other statutes. Revised Codes of Montana §§ 3076, 3095 (1935).
cement production, as well as transportation, wholesale and retail trade, and government encompassed additional workers.  

Going back to 1906, a series of Montana Supreme Court decisions and, as far back as 1943, attorney general opinions provided authoritative absolutist interpretations of the constitutional and statutory eight-hour provisions as principled maximum-hours regimes that were expressly declared irreconcilable with mandatory or voluntary overtime schemes. The first judicial decision was handed down in 1906 dealing with the aforementioned eight-hour law of 1905. The defendant-employer, which had suffered and permitted its employees to work more than eight hours daily on a municipal construction project, argued that the law was too vague to be enforceable because it failed to make clear whether it was directed at the employer, the worker, or both, too indefinite to be interpretable as forbidding employment of more than eight hours, and unconstitutional and void. The Supreme Court specified as “the evil” the statute meant to suppress “the continuous employment of workingmen for such length of time as to imperil their lives or health”; “or it may have been the purpose of the state to stamp with its approval the view now entertained by many that...the general welfare of workingmen, upon whom rests a portion of the burdens of government, will be best served if labor performed for eight hours continuously be taken as the measure of a full day’s work; that the restriction of a day’s work to that number of hours will so far promote the morality and improve the physical and intellectual condition of workingmen as to enable them the better to discharge the duties of citizenship.” In a startling non sequitur, the court concluded that since the law’s purpose was conserving the worker’s health—and “not to curtail his capacity to earn money or to set bounds upon the greed of his employer”—it was broad enough to include both employer and worker as misdemeanants.

Interestingly, the court rejected the defendant’s argument that the law was “exceedingly harsh and arbitrary” because it limited the working hours of hourly paid workers: since sparing workers “overwork” and affording them “ample time for rest, recreation, and their physical and mental improvement” was the goal, it was irrelevant whether they worked by the hour or day. Moreover, although the

26 Calculated according to U.S. Bureau of the Census, Fifteenth Census of the United States: 1930: Population, vol. IV: Occupations, by States tab. 4 at 922-25, tab. 11 at 930-31 (1933); idem, Sixteenth Census of the United States: 1940: Population, vol. III: The Labor Force, Pt. 3: Iowa-Montana, tab. 10 at 978-81 (1943). The data in the text have been adjusted to deduct farm proprietors and unpaid family members on farms, but not to deduct nonagricultural proprietors and unpaid family members, who are not visible in the census data. These adjustments presuppose that the constitutional eight-hour day did not apply to non-employees, although the provision was not expressly limited to employees.  

The Autocratically Flexible Workplace

court agreed that the law "would be more consonant with our ideas of a reason-
able regulation if provisions had been made" for emergencies where life or prop-
erty was at risk, the judiciary was not empowered to thwart legislative policy
unless its operation were so unreasonable that it could not be assumed that the
legislature had intended such an effect. This seemingly broad deference to the
legislature at the outset of the <em>Lochner</em> era was, to be sure, rooted in the court's
own caveat that state interference with adult men's hours would be impermissible
outside of the public sector and health- or life-imperiling conditions in the private
sector.29

Seven years later, in a wrongful death action brought against a copper mining
company by the widow of a shift boss who was killed while working the second
of two back-to-back shifts in violation of the eight-hour statute, the defendant
conceded that the worker was working pursuant to a company order that shift
bosses remain on the job until relieved by their successor even in the absence of
a statutory "emergency" imminently endangering life or property. However,
because the plaintiff both conceded that the worker's own negligence had caused
his death and failed to allege that overwork had caused his exhaustion, the court,
while not contesting that work beyond eight hours was a proximate cause of
death, built on the previous case by denying recovery on the grounds that the
worker was equally at fault in violating the statute.30 (The court did not overrule
this case and doctrine until 1987, when it "recognize[d] the extreme compulsion
which normally rests upon the employee to comply with such requirements on the
part of his employer").31

In a 1938 case upholding the constitutionality of the 1933 law imposing the
eight-hour day on stores, the Montana Supreme Court, while agreeing with the
parties that the eight-hour constitutional amendment of 1936 was not controlling,
nevertheless "ascribe[d] to it some significance in the sense that it served to dis-
close the existence of a public purpose or policy of the state." What that purpose
or policy was the court failed to reveal, but it seemed relieved that it was "not
here called upon to decide whether the provision is self-executing," especially
since the amendment "did not attempt to set up methods of enforcement, or pro-
vide penalties for violation thereof"; nor did the court draw any conclusion from
the legislature's failure to comply with the constitutional directive to enact en-
forcement provisions.32 In rejecting Safeway Stores, Inc.'s contestation of the

28 State v. Livingston Concrete Bldg. & Mfg. Co., 34 Mont. at 578-79.
29 State v. Livingston Concrete Bldg. & Mfg. Co., 34 Mont. at 584.
32 State v. Safeway Stores, Inc., 106 Mont. 182, 199 (1938). See also "Eight Hour
eight-hour law's constitutionality, the Supreme Court continued its traditional strict deference to the legislature, even though it conceded: "No one can say positively whether the Act was passed in an attempt to adjust unemployment by creating more jobs, to promote health, or whether it was simply for the general prosperity and welfare of the state as a whole." Referring to the aforementioned gubernatorial proclamation calling the extraordinary session of 1933-34, the court declared: "We are not called upon to say precisely what the object really was, so long as any of these purposes might reasonably have been accomplished by the Act."  

The Montana Supreme Court revealed a not uncommon shaky understanding of the difference between maximum-hours and overtime laws in a case brought in 1940 by Butte Miners Union No. 1 against Anaconda Copper Mining Company to test whether the maximum workday of eight hours authorized by state law and constitutional provision included the up to 90 minutes a day the miners spent being transported between the mouth and face of the mine and obtaining and returning tools and equipment. If, as the miners contended, the more encompassing portal-to-portal (or collar-to-collar) framework was the proper interpretation, then Anaconda was unlawfully requiring them to work as many as nine and a half hours a day, and the miners sought an injunction to prohibit future violations.

The Montana Supreme Court chose to resolve this portal-to-portal dispute, which assumed epic proportions in mines and large plants in the 1930s and 1940s throughout the United States, by reference to the FLSA and a recent opinion issued pursuant to it by the federal Wage and Hour Administrator. The court saw itself compelled to take this step because, once the U.S. Supreme Court had ruled that congressional interstate commerce power extended the reach of the FLSA to mining, "the federal statute supersedes state jurisdiction to the extent of any inconsistency, but where not inconsistent the state and federal provisions jointly govern." In its search for possible inconsistency, however, the Montana Supreme Court elided the subtle but fundamental question of the reconcilability of a maximum-hour and an overtime regime by asserting that the FLSA and the state law and constitutional provision had been enacted "for the same general purposes...setting standards of...maximum hours per week...." The Montana court arrived at this conclusion by asserting: "There is no inconsistency between state laws which fix the maximum day's work at eight hours, and the federal law

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33State v. Safeway Stores, Inc., 106 Mont. at 201.
34Butte Miners Union No. 1 v. Anaconda Copper Mining Co., 112 Mont. 418 (1941).
35See Marc Linder, "Moments Are the Elements of Profit": Overtime and the Deregulation of Working Hours under the Fair Labor Standards Act 268-400 (2000).
36Butte Miners Union No. 1 v. Anaconda Copper Mining Co., 112 Mont. at 431.
37Butte Miners Union No. 1 v. Anaconda Copper Mining Co., 112 Mont. at 429.
which does not absolutely fix the maximum week’s work at forty hours, but indirectly does so by requiring pay for the excess period at one and one-half times the regular rate.”

The potential fundamental inconsistency between a state statute and constitution that prohibited overwork and a federal statute that in effect encourages workers to work overtime by authorizing and requiring their employers to pay premium rates did not interest the court, which instead focused on the subsidiary issue of whether it would be inconsistent to apply the broad portal-to-portal rules to the FLSA and the narrow face-to-face rules to the state law. The court found that chaos would result because, even though five eight-hour days at the face of the mine would be lawful under state law, “they would constitute more than the lawful work week under the federal law without the payment of the increased wage for the excess hours....” Here the court appeared to forget that the miners were not asking for premium overtime pay for the hours beyond eight (or forty), but for an injunction to restrain Anaconda from overworking them. That the court was also forgetting its aforementioned precedents concerning the statute’s and the constitution’s purpose in limiting working hours emerges from its further reasoning that “it would, therefore, be necessary to limit the work week to less than five such full work days of eight hours at the working face. That would hardly be practicable, for the operator would be compelled to limit the work week, either to four such working days, or to four and a fraction. The first would constitute an even shorter work week in days than is contemplated by the law, and would possibly shorten it too much for efficient production and the earning of a living wage, which were undoubtedly considered by the Congress in enacting the law. And the second would undoubtedly be even more unsatisfactory, since the direct non-productive time expended other than at the working face would be practically the same for a fractional day as for a full one, and thus would occasion a much greater proportionate loss of directly productive time.” The inconsistency that would result from adopting two different methods of measuring working time in the mines was, in the court’s view, “especially important, since section 18 of the federal Act...indicates that the Act shall supersede state laws establishing...a higher maximum workweek.”

More relevantly, what section 18 of the FLSA in fact mandates is that no FLSA provision “shall excuse noncompliance with any...State law...establishing a maximum workweek lower than” FLSA’s. The real difficulty here, which the Montana Supreme Court failed to confront, was whether it was constitutional

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38Butte Miners Union No. 1 v. Anaconda Copper Mining Co., 112 Mont. at 431.
39Butte Miners Union No. 1 v. Anaconda Copper Mining Co., 112 Mont. at 432.
40Butte Miners Union No. 1 v. Anaconda Copper Mining Co., 112 Mont. at 432.
under the supremacy clause of the U.S. Constitution for the Montana state law:
(1) to penalize—indeed criminalize—an employer’s exercise of its privilege
under the FLSA to require workers to work more than 40 hours weekly when the
firm did so by also requiring workers to work more than 8 hours daily; and (2) to
prevent workers from exercising their right under the FLSA to be paid time and
a half for weekly hours of work beyond 40.42

The key interpretive ambiguity in the FLSA is that the use of the term “max­
imum workweek” in section 18 is a misnomer, just like the use of “Maximum
Hours” as the title of the overtime section. Although they were frequently used
in state hours laws for women and children (and men in dangerous occupations
such as mining) to characterize absolute bans on work beyond a fixed number of
hours, in the FLSA both merely mean the maximum number of hours beyond
which employers are required to pay overtime premiums.43

Without being sensitive to this conflation, federal courts have nevertheless
interpreted section 18 of the FLSA in various subtly, but importantly, distinct
ways. The Ninth and Second Circuits have focused on overtime, the former
stating that “Congress has specifically allowed states to enforce overtime laws more
generous than the FLSA,”44 while the latter found that “§ 18(a) of the FLSA...ex­
plicitly permits states to mandate greater overtime benefits.”45 In contrast, the
First and D.C. Circuits have stressed the reduced workweek, the former mis­
leadingly holding that “Section 218(a) simply makes clear that the FLSA does not
preempt any existing state law that establishes a higher minimum wage or a
shorter workweek than the federal statute,”46 while the latter referred to the
“lower maximum workweek” as an example of a state law “extend[ing] benefits
to employees given lesser benefits or none by FLSA.”47 Finally, at least one
district court has melded the two objectives: “[T]he FLSA expressly provides that
it does not preempt any applicable state law that establishes lower maximum
hours and higher rates of overtime pay than the FLSA.”48

There can be little doubt that what Congress had in mind with the term
“maximum workweek” in section 18 was a situation in which a state enacted a

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42 In other words, since Montana did not per se limit workweeks, it would have been
lawful for employers to require workers to work 56 hours per week provided that they
worked eight hours daily seven days a week.

43 See below ch. 9. The current version of the FLSA also uses “maximum workweek”
twice in subsections of section 7 in the same sense. 29 U.S.C. §§ 207(b)(2) and (e)(5).

44 Pacific Merchant Shipping Ass’n v. Aubry, 918 F.2d 1409, 1422 (9th Cir. 1990).


46 Cosme Nieves v. Deshler, 786 F.2d 445, 452 (1st Cir. 1986).


The Autocratically Flexible Workplace

law that required employers to pay premium overtime after 39 or fewer hours.49 After all, it does not seem plausible that anyone in 1938 would have contended that the FLSA preempted the exercise of state police powers prohibiting the employment of women more than a fixed number of hours, and there is no evidence that Congress ever took notice of the obscure constitutional provision in Montana.50 Nevertheless, despite this contextual clarity, indisputably the text of the FLSA uses a term that has another meaning.51

Under federal pre-emption jurisprudence, "state action must ordinarily be invalidated if its effect is to discourage conduct that federal action specifically seeks to encourage."52 The question here then becomes: What does the FLSA overtime provision seek to encourage? If the answer is a workweek not in excess of 40 hours and the spreading of employment, then the two laws would not be in conflict: whereas Congress chose to use a financial disincentive, the state legislature used a criminal sanction, to achieve the same result. But if the answer is giving employers the financial flexibility to determine the optimally profitable workweek and workers payment of a premium wage for overtime hours, then the two laws would be in conflict. To be sure, the first description appears to capture the FLSA's primary purpose, whereas the second focuses merely on that statute's strategy. But a law whose overtime provision self-contradictorily imposes a disincentive on the employer and an incentive on the worker is slippery to conceptualize; it would have been especially so if an employer and its employees had jointly filed suit contesting the validity of the state provision on the grounds that it deprived the employer of its privilege to employ workers 168 hours a week so long as it paid the time and a half rate and the workers of their right to higher weekly wages in the form of hefty overtime income regardless of the negative effect on work-sharing.

The Montana Supreme Court also failed to appreciate that once travel time had been deemed to be work, the production-profit-wage-price matrix had to be readjusted to reflect the fact that either employers or consumers (of copper) had been getting a free ride on the uncompensated 60- to 90-minute daily trips that miners had been forced to take between face and portal.

49Although section 18 does not address the issue, presumably it would also not preempt a state law that, for example, prescribed double-time wages after 40 hours.

50The 1937 Pennsylvania 44-hour statute had already been invalidated before Congress passed the FLSA in June 1938. See below ch. 7.

51Under one canon of statutory construction, if the text is clear and unambiguous on its face, there is no need to examine the legislature's purpose in enacting the provision in order to understand it. Application of this canon is complicated here by the fact that within the FLSA the term “maximum workweek” unambiguously means one thing, whereas it takes on a different meaning as it is applied to other statutes.

52Laurence Tribe, American Constitutional Law 482-83 (2d ed. 1988 [1978]).
In any event, since the court was powerless to reform federal law, it saw as "our only alternative to avoid a chaotic condition under our dual form of government...to adopt" the federal portal-to-portal approach. The court conceded that such a step would have been difficult in the absence of the federal initiative, especially since employers and workers had agreed on face-to-face and the state legislature had on several occasions rejected portal amendments. Nevertheless, executing an abrupt about-face, the court found that the statutory and constitutional purposes of protecting the health and promoting the welfare of workers "would seem to depend, not merely on the time devoted directly to the production of ore at the working face, but to the time spent under the employer's orders, both directly and indirectly, for that end. The statutes are to be liberally construed with a view to effect their objects..., and that would not necessarily seem to be done by limiting their application to the time actually spent at the working face without regard to necessary incidental and preliminary matters, such as procuring tools and equipment and in awaiting and making use of the employer's transportation facilities under the employer's orders or direction, as distinct from time expended for the employees' own purposes and benefit."54

In reversing the lower court's dismissal of the plaintiffs' suit, the Montana Supreme Court rejected Anaconda's argument that the court's aforementioned precedents to the effect that the fact that workers were equally culpable in violating the statute deprived them of certain remedies. Implicitly upholding that reasoning for other kinds of actions, the court ruled that it had never applied such a waiver to actions for future injunctive relief, because the defendant had not been prejudicially misled concerning the future and "a public question of great important" was at stake.55

The Montana Supreme Court's revival of the union's suit in state district court leaves an intriguing mystery in its wake: If the state law was now to follow the federal law's portal-to-portal interpretation, it becomes unclear how the court imagined that the workers could ever prevail on their injunction suit to enforce the rigid eight-hour day without triggering precisely the impracticable and "unsatisfactory" consequences of lower efficiency, production, and wages depicted by the court. If work at the face were lowered from eight to six and a half hours so that travel and tool-fetching time did not extend the workday beyond eight hours, output would have been reduced, but wages would have remained unchanged. (Although miners' wages were so far in excess of the minimum wage that they could have been reduced without violating the minimum wage provision of the FLSA, it is unlikely that as a political matter workers would have ac-

53Butte Miners Union No. 1 v. Anaconda Copper Mining Co., 112 Mont. at 433.
54Butte Miners Union No. 1 v. Anaconda Copper Mining Co., 112 Mont. at 433.
55Butte Miners Union No. 1 v. Anaconda Copper Mining Co., 112 Mont. at 435.
The Autocratically Flexible Workplace

quiesced in such action.) Consequently, either profits would have to have been
cut or prices increased. Under these circumstances, it seems far more likely that
the court did not envision the union's suit as really aimed at enforcing the state-
imposed eight-hour day, but rather as part of the mine unions' nationwide
strategy of establishing portal-to-portal working time measurement as the basis
for forcing employers to pay premium overtime under the FLSA.56

Within two years of the Butte Miners' Union decision, the Montana Attorney
General was also called upon to issue two opinions affirming the inflexible
character of the state's maximum hours regime. On June 18, 1943, Attorney
General R. V. Bottomly issued an opinion to the county attorney of Cascade
County in response to the latter's question concerning the legality of the county
commissioners' paying a county employee time and a half for work in excess of
eight hours daily. Based on the constitutional provision and the eight-hour statute
covering government employees, which made violations misdemeanors, and the
legal principle that contracts violating statutes were void and unenforceable, the
attorney general concluded that the county commissioners were without power
to contract for services covered by the statute for more than eight hours per day
and that any money paid under such a contract would constitute an illegal ex-
penditure of public funds.57

In the next opinion, issued to the same county attorney on August 12, 1943,
in regard to the legality of a school board's employing a janitor in excess of eight
hours, the attorney general underscored the force of the constitution's across-the-
board eight-hour day by declaring that it had "effected a repeal" of the 1905
eight-hour law, which had, inter alia, excepted from coverage employees in
school districts other than in first-class districts. Thus the constitution had ex-
panded statutory protection.58 Ironically, then, not only had the legislature not,
as the attorney general had erroneously stated in the previous opinion, "[i]n
pursuance to the constitutional mandate...provided for the enforcement of the
article" in the form of the eight-hour statute covering government employees,59
but the constitution itself had to compensate for the legislature's failure even to
amend its 30-year-old non-conforming eight-hours statutes, let alone to enact new
supporting legislation.

Another three decades passed before the Montana Supreme Court was called
upon to revisit these issues. In Glick v. Montana Dept. of Institutions plaintiffs

56See Linder, "Moments Are the Elements of Profit" at 285-310. The briefs in the
case before the Montana Supreme Court, available from the State Law Library of Montana
in Helena, shed no light on the question of the union's real motivation.
had been employed as live-in staff at a state children's center working 65- to 75-hour five-day weeks. The question under the FLSA overtime provision was whether in calculating their regular rate for overtime purposes the denominator should be 40 hours, as the trial court determined based on the Montana constitutional and statutory eight-hour day, or their actual hours worked, as the defendant State of Montana argued based on U.S. Supreme Court precedent. The Montana Supreme Court characterized the question as a "novel" one involving the relationship between the FLSA and Montana law. Other than declaring that "we have constitutional and statutory authority on the eight hour day that cannot be disregarded," the Montana Supreme Court failed to explain how it regarded that law in deciding to uphold the trial judge's ruling. The court's entire reasoning, such as it was, consisted in quoting a recent New Jersey case cited by plaintiffs that had ruled that when section 18 of the FLSA specifies that the FLSA does not excuse noncompliance with any state law establishing a maximum workweek lower than the FLSA's, the term referred to the maximum number of non-overtime hours. The conclusion, however, that the FLSA authorizes enforcement of state overtime laws that are more favorable to workers than the FLSA nevertheless fails to deal with the more fundamental question as to whether the FLSA also authorizes enforcement of a state maximum-hours law that prohibits and criminalizes an employer's privilege under the FLSA to employ workers for more than 40 hours weekly at time and a half and deprives workers of their correlative right under the FLSA to be paid such premiums.

Especially since the constitutional provision was inflexible and did not even contain any exceptions for emergencies, as did the statutes imposing the eight-hour day on underground mines and smelters, it seems implausible that employers would have found the rigid restriction acceptable. That the provision remained unchanged in the constitution for almost four decades, until the constitution was rewritten in 1972, seems to be largely attributable to its nonenforcement—perhaps even with respect to those industries, such as underground mines, in which it was statutorily enforceable. Indeed, as a legal matter, it is unclear whether the Montana Department of Labor and Industry would have had the power to enforce a constitutional provision that was not only not self-effectuating, but that expressly mandated the legislature to enact supporting legislation,

60Glick v. Montana Dept. of Institutions, 162 Mont. 82, 86-89 (1973). Though decided in 1973, after the legislative conversion of the eight-hour statutes into mere overtime regimes in 1971 and the adoption of a watered-down version of the constitutional provision in 1972, the decision mentioned neither since the actionable events had taken place between 1967 and 1969.


which it failed to do.\textsuperscript{63}

David L. Holland, a union-side lawyer in Butte with an impressive memory who began practicing law in 1949 and was a member of the constitutional convention in 1972, could recall no case in all his years of representing workers in which employees or a union attacked involuntary overtime based on the constitutional provision. He also observed that the Montana Department of Labor would never have intervened (or even been informed of a violation of the statute or constitution) in cases in which union workers voluntarily worked overtime—and he reported that in the vast majority of instances workers wanted the additional work. He did relate one case in which a union employer asked workers to work overtime and, extraordinarily, no one volunteered; when the firm finally ordered one worker to work the overtime and he refused, he was fired. Holland represented the worker before an arbitrator, who decided that although the employer had the right, based on the collective bargaining agreement, to require the worker to work overtime, the penalty had been too severe and the arbitrator reduced it to a week’s suspension. Of overriding significance here was that, according to Holland, neither the eight-hour constitutional provision nor the eight-hour statute played any part.\textsuperscript{64}

The Montana Legislative Council (a statutory bipartisan committee of the legislature originally designed as that body’s research arm) in its 1968 report to the legislature on the state constitution concluded that the provision should be repealed without any basis other than that the entire article on labor should be repealed because its subjects were “statutory in nature” and “should be regulated by legislative enactment.” The Council added in a comment that “[o]nly one of the six constitutions used for comparative purposes has a provision on the length of a working day.”\textsuperscript{65} In fact, although several state constitutions had an eight-hour provision relating to one or a few industries, Montana’s quasi-universal provision was unique.\textsuperscript{66}

The very spirited and extensive debate about amending the eight-hour provision in 1972 at the Constitutional Convention—the delegates to which were not permitted to be professional politicians—took on a surreal tinge by virtue of

\textsuperscript{63}Telephone interview with Kevin Braun, Chief Counsel, Montana Department of Labor and Industry, Helena, MT (Oct. 19, 2001).

\textsuperscript{64}Telephone interview with David Holland, Butte, MT (Oct. 18, 2001). Holland’s sharp memory was on display when he remembered off the top of his head the name of the 1941 Butte Miners case that raised but did not resolve the issue.

\textsuperscript{65}Montana Legislative Council, \textit{The Montana Constitution: A Report to the Forty-First Legislative Assembly 77} (Oct. 1968).

\textsuperscript{66}Columbia University Legislative Drafting Research Fund, \textit{Index Digest of State Constitutions} 591 (2d ed. 1959). The Council itself cited this publication.
the fact that one year earlier the state legislature had made the issue moot by effectively transforming the maximum-hours constitutional provision into a mere overtime law. Long after most states had already acted, in 1971 Montana finally enacted a minimum wage and overtime law, which, like the FLSA, provided for overtime after 40 hours. Oddly, although the state had until then lacked any overtime regulation—and, as already noted, the Attorney General as early as 1943 had issued opinions holding that contracts providing for work in excess of eight hours were illegal, void, and unenforceable—the preamble to the statute declared it to be the legislature's policy "(1) to establish...overtime compensation standards for workers at levels consistent with their health, efficiency, and general well-being; (2) to safeguard existing...overtime compensation standards which are adequate to maintain the health, efficiency, and general well-being of workers against the unfair competition of...hour standards which do not provide such adequate standards of living; and (3) to sustain purchasing power and increase employment opportunities."68

Pat McKittrick, a member of the legislature from 1971 to 1977 (and Speaker of the House in 1976-77) and a sponsor of the bill, observed in retrospect that many legislators had felt the same way about the constitutional provision that the attorney general did later—namely, that it lacked legal force. Although he had not been aware of it at the time, when told thirty years later that the legislature had never complied with its constitutional mandate to enact legislation in support of the provision, McKittrick, a labor lawyer, suspected that since the constitution was not self-effectuating, the force of the provision was possibly even weaker than legislators had imagined in 1971.69 Jim Murry, who was executive-secretary of the Montana State AFL-CIO from 1966 to 1991, characterized the unions' drive for an overtime law in 1971 as an effort both to secure statutory premium overtime pay and to retain the constitutional protection.70

The more important question, especially in light of the attorney general's opinion of 1943 declaring that the constitutional provision expanded the eight-hour statute, was why, at least during the brief interim until the new constitution went into effect, the overtime statute was not unconstitutionally invalid. After all, the constitution prohibited the legislature from increasing the number of hours constituting a day's work beyond eight. McKittrick, the law's sponsor, reported that in any event no one raised the issue at the time.71 This view is mirrored in

681971 Laws of Montana ch. 417, § 1, at 1534.
69Telephone interview with Pat McKittrick, Great Falls, MT (Oct. 22, 2001).
71Telephone interview with Pat McKittrick (Nov. 1, 2001).
the extensive contemporaneous reporting on the legislative progress of the bill in the *Great Falls Tribune*, then and now providing the most comprehensive coverage of the state legislature. The newspaper's considerable number of articles on the bill over a four-month period scarcely ever even mentioned the fact that the proposal also included an overtime provision, let alone that it might conflict with the constitutional provision. Of nine articles, only two mentioned the overtime provision even in passing (one signaling merely that farmworkers were not covered by it).  

At the Constitutional Convention, the Public Health, Welfare, Labor, and Industry Committee was chaired by George Heliker, an economics professor at the University of Montana and a Democrat, who was a teachers union activist who worked closely with the AFL-CIO and, according to Michael McKeon, one of the youngest delegates as a 25-year-old recent law school graduate, would not have taken any steps without consulting with the union leadership. As McKeon observed, looking back after three decades, the real agenda for the state AFL-CIO, which was very powerful and carefully choreographed debate on the labor issues, at the constitutional convention was trying to lock in overtime premiums. On January 26, 1972, the committee held a public hearing devoted to the labor article of the constitution at which the Commissioner of the Department of Labor Industry, Sidney Smith, and Murry, the leader of the state AFL-CIO, testified. Both stressed the same point in their prepared remarks. Smith advocated retention of the hours provision: “Eight (8) hours should constitute a day’s work to protect the health and safety of the workers. If longer hours are necessary, the overtime hours should be on a voluntary basis.” This eight (8) hour provision was also placed in the Constitution after many years of effort by the laboring forces in Montana. Therefore, great weight should be given to this effort when

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73 Telephone interview with Michael McKeon, Butte, MT (Oct. 18, 2001). McKeon reported that he, George Heliker, and several other members spoke and acted largely in coordination with the AFL-CIO’s plan. Heliker was unable to recall any details of the convention. Telephone interview with George Heliker, Poston, Oct. 19, 2001). Murry, the leader of the state AFL-CIO, confirmed McKeon’s account. Telephone interview with Jim Murry, Clancy, MT (Oct. 19, 2001).
you are considering this section." Murry, after disavowing any "desire to try to write a new labor code through this convention," stated: "The eight-hour day has now won universal acceptance. I need not remind you that many of our union members will consider its removal as an antagonistic act. To amend and make overtime permissive would preserve and make workable its intent."

Both witnesses, literally in other words, recognizing the unworkability of an inflexible maximum hours provision—which apparently had never existed in Montana anyway—were in effect pleading for a conversion of the inflexible maximum hours provision not into a mere overtime provision, like the 1971 overtime statute, but one that would confer on workers the right to refuse employers' orders to work overtime. This strategy to salvage something valuable from what the labor movement itself apparently accepted as a no longer tenable rigid maximum hours approach seemed to gain some headway when the committee met on February 2, 1972: the consensus of opinion was that section 4 was "probably statutory but might have to be retained because of public opinion." But this initial glimmer of success was quickly extinguished: at its February 10 meeting, the committee heard chairman Heliker give the report of the subcommittee on the labor article of the constitution, stating the subcommittee's "feeling...that while section 4 was recognized as doing some damage as it stands they did not feel they could amend it to solve the problems and could create more." Thereupon the committee voted to adopt the report.

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77 Minutes of the Twenty Fifth Meeting of the Public Health Welfare, Labor and Industry Committee (Feb 10, 1972), in Montana Historical Society, Montana State Archives, Record Series 22: Constitutional Convention, Folder No. 4-8: Minutes, Feb. 10-16, 1972: Public Health Welfare Labor & Industry Committee. The vote was 5-3,
After the committee voted 6-2 (with Joseph McCarvel a Democrat and locomotive engineer and Charles Mahoney, a Republican and former rancher opposed), to propose deleting the provision, a revised section was introduced on the floor by independent motion by McCarvel, who, again according to McKeon, would not have taken this step without the AFL-CIO's approval. McCarvel's amendment, on which the committee had taken no action but with which chairman Heliker, who had voted with the committee majority to repeal, now concurred, was then taken up. McCarvel's proposal read: "A period of 8 hours shall...constitute a day's work in all industries, occupations, undertakings, and employments, except farming and stockraising, and except when an employee voluntarily agrees to work longer than the prescribed 8 hours; provided, however, that the Legislative Assembly may by law reduce the number of hours constituting a day's work whenever, in its opinion, a reduction will better promote the general welfare."

McCarvel justified his proposal on the grounds that: "The thing that made that law ineffective was that if a man worked over 8 hours, it was in violation of it; and if he was required to work over 8 hours, it was in violation of it. That is why this amendment...reads that an employee voluntarily agrees to work longer. I think this will take care of this article....."

At this point chairman Heliker spoke up to relate what the committee had learned at its hearings and what additional information he had received in the interim that had prompted him to change his mind about repealing the eight-hour provision. Witnesses at the hearings had disclosed "certain problems with this section as it had been previously written":

However, I think the committee was generally of the feeling that if acceptable language could be found that would solve those problems, we were not adverse to keeping the section. We were not persuaded...that we had found that language. ... That language is the language which Mr. McCarvel now suggests; and it would remove practically all protection for workers in nonunion situations, whereas it may be argued that the worker under

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80 Telephone interview with McKeon.


union management contract needs no such protection. Well, we have found since—I've had a lot of correspondence and phone calls on this—that that statement simply isn't true; that, as a matter of fact, the provision as it is in the old Constitution has been used by certain unions and individuals to protect members of weak unions, in some cases, and in other cases, members of strong unions who do not have any contractual protection, against compulsory overtime. Now, the fact is, of course, that for most employees this is no great problem. Most employees...want all the overtime they can get. But there are certain employees, for certain reasons—all kinds of reasons, and many of them very good reasons—who resist compulsory overtime beyond 8 hours a day. And this provision in the old Constitution has, as a matter of fact, been used. I have a couple of letters right here in front of me—one from the Hotel and Restaurant Employees Union—where they cite specific examples of using this provision to set an employer right who was working a girl washing dishes for 15 hours a day; and in another case, where workers in a sawmill resisted compulsory overtime and used this provision to combat it. I have a whole sheaf of grievance forms from the Anaconda smelter in Anaconda, where the company disciplined employees, or threatened discipline, for refusing overtime. And these grievances were settled by the unions on the basis that the disciplinary action was withdrawn when the union called the company's attention to this constitutional provision.84

Heliker then concluded that the language proposed by McCarvel ("and except when an employee voluntarily agrees to work longer than the prescribed 8 hours") would both "cure" the problem that such a worker was violating the law and be used in "a significant number of situations" to "protect workers who wish to avoid compulsory overtime."85

Intriguingly, Murry, who had been the AFL-CIO leader at the time of the convention, remarked three decades later that his organization would have been instrumental in mobilizing such a letter-writing and phone-in campaign, yet not only did he have no recollection of such a drive, but the very existence of such a protective impact of the constitutional provision came as a surprise to him, as it did to David Holland.86

One delegate perceived that McCarvel's approach was "exceptionally dangerous to labor" because "when a man...applies for a job, his employer could require him to work any period of time—12 hours, 10 hours, 14 hours—and the guy that's looking for a job is going to have to sign that agreement and not going to have any choice. The Constitution makes it permissible—the Legislature could not prohibit it. So you're creating the exact opposite of what you want to create. You want to protect labor, but you're not protecting labor by this clause because...you're making it constitutionally legal for any employer to require any

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86 Telephone interview with Jim Murry.
employee to work any period of time. And I submit the man that’s looking for a job doesn’t have any choice: he’s got to sign that agreement.”

All Heliker could counterpose to this revelation that the amended provision would in effect repeal the 36-year-old constitutional ban on compulsory overtime was: “There’s just no way of coping with the problems except to put in that clause.”

Oddly, neither delegate understood that the legislature had made the whole discussion moot by legalizing overtime in 1971.

Nor did another delegate, who pointed out that some workers in Montana “just can’t stand the physical strain for longer periods [than eight hours] in some heavy industries. Some employers either force employees to quit or they fire them, if they refuse to work over 8 hours. This usually happens to an employee when he’s at an age when it is hard to get another job. If most of the people would adhere to an 8-hour day, the unemployment rate in our state, I feel, would not be so great.”

Despite having had an inflexible maximum-hours provisions in the state constitution since 1936, some delegates failed even to understand the fundamental difference between the maximum-hours and overtime regimes. Thus when one (lawyer) delegate asked whether employers would have to pay time and a half for two hours daily if they adopted a four-day week, ten-hour day system, William Swanberg, a committee member who was also a lawyer, replied that the language “8 hours shall constitute a day’s work” (which was unchanged by the proposed amendment) “doesn’t say that there’ll be overtime or no overtime for these extra 2 hours. It’s just one of those ambiguities that a court would have to thrash out. It’s not our intent that overtime be paid for those extra 2 hours on any one day, but we don’t say that in here.” In fact, the Montana Supreme Court and the attorney general had made it clear for decades that working more than eight hours per day was unlawful. The chairman of the convention, Leo Graybill, another lawyer, echoed the prevailing ignorance by observing that workers in the hypothetical situation “could work at straight time under the section, but not under the existing federal and state law.”

In fact, since both the FLSA and the Montana overtime provisions were triggered by work in excess of 40 hours per

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Montana's Constitutionalization of the Eight-Hour Day

week, workers employed ten hours daily four days a week would not be entitled to any premium overtime pay.

The conflation of maximum hours and overtime was again on display when a delegate proposed an amendment mandating the legislature to enact a statute prescribing an overtime rate of pay in the absence of collective bargaining on the grounds that the nonunion worker would then be protected from "being abused in the overtime situation." 93 Only one delegate seemed to focus on the original meaning of the constitutional provision when he buttressed his support with the pathos-laden claim that "slavery went out a long time ago, or should have if it hasn’t, and this is a basic human right...." 94 Even a Republican employer—a construction contractor who observed self-ironically that "a big contractor’s lobby put me in here"—who anti-paternalistically opposed any provision, argued that workers "don’t always have to be protected," manifestly believing that the provision would enforce an eight-hour day. 95

Delegate McKeon was alone in offering even the semblance of a recognition of the interaction with statutory action in the field. After informing the convention that "Labor very much wants this in the Constitution" because the fight for the eight-hour day was still being fought against companies like Anaconda that were "coercing employees to work longer than 8 hours in conditions which are terribly unhealthy to the employee," he explained that retention of a constitutional mandate was important: "the statutes right now which provide for the 8-hour day are only written because we have the constitutional provision, and I fear what might happen to these statutes if we remove from the Constitution the mandate for an 8-hour day." 96 The cogency of this analysis was, however, once again undermined by the fact that the new overtime statute had already preempted the constitutional right to an eight-hour day. Heliker offered additional spurious justification for McCarvel’s amendment by asserting that "not everyone is covered by these laws...." 97 In fact, apart from the fact that farmworkers were excluded from both, neither protected workers from being forced to work more than eight hours.

Another delegate (also a lawyer), who had voted for repeal in committee because the members had been unable to formulate "a short sentence" to deal

with all problems and wound up voting against the final amendment on the floor, claimed that one of the unintended consequences of the provision had been that “behold, anybody that was working beyond the 8-hour day, voluntarily or otherwise, was outside the terms of the Constitution and couldn’t collect his workmen’s compensation if the injury occurred during that period. And so, as a matter of fact, everybody had to start lying. They had to say that the injury occurred, not beyond the 8-hour period, but at the seven-and-a-half hour times. And this is not a good situation.”

Yet another delegate purported to oppose McCarvel’s amendment because it failed to prevent workers from working 16 hours a day at two unrelated jobs. McCarvel himself justified his proposal on the grounds that it would immunize against discipline workers’ discretionary refusal to work overtime that might injure their health: “No one knows from day to day how you will feel, whether you feel like working more than 8 hours or not, and that is why the voluntary provision is put in here.”

On a quasi-test vote on the principle of an eight-hour day, the delegates voted 65-27 in favor. To be sure, as already noted, the floor debate strongly suggests that virtually no delegate understood that a “principle” is precisely what the new provision lacked—it had been drained of meaning and converted into a meaningless symbol that in addition delegates had, by means of mutual mistake, been lulled into viewing as conferring on workers a veto power over employers’ coercive demands for overtime work. McCarvel then accepted three amendments to eliminate “flaws” in his proposal: 1. the addition of “maximum” to define an eight-hour day to accommodate a Pickwickian critique suggesting that workdays of fewer than eight hours would be unconstitutional; 2. conversion of the legislature’s power to reduce the eight-hour day into a power to “change” it; and 3. elimination of the exception for workers who voluntarily agree to work more than eight hours in order to do away with the risk that a new employee might be coerced into working longer hours in order to be hired. The convention by a vote of 74 to 13 then adopted this final version, which (still) reads: “Eight-hour day. A maximum period of 8 hours shall constitute a regular day’s work in all industries and employments, except in agriculture and stockraising. The Legislature may, however, change this maximum whenever, in its opinion, the change will

better promote the general welfare.” 102 At the very last moment a delegate, speaking on behalf of construction contractors, sought reconsideration of the provision on the grounds that “some restrictions...will raise havoc with the construction industry in general” because at the time of bidding firms would not know whether the workers “care to work over 8 hours....”103 But the response that the new amendment was “a liberalized thing,” under which the employer and the employee were no longer in violation of the constitution when the latter worked more than eight hours terminated the brief rearguard movement for reconsideration.104

The demise of Montana’s eight-hour norm was declared most succinctly in the Department of Labor and Industry’s overtime rules as early as 1972: “Since there is no absolute limitation on the number of hours that an employee may work in any workweek, he may work as many hours a week as he and his employer see fit, so long as the required overtime compensation is paid him....”105

As late as 1974, the Montana attorney general in a very summary opinion declared, based on the statute and constitution, that it was not lawful for counties to schedule employees for four ten-hour days.106 It was not until 1977 that the attorney general officially announced the demise of the state’s unique constitutional mandate. In that year the Department of Natural Resources and Conservation asked Attorney General Mike Greely whether it was lawful for a state agency to permit an employee to work more than eight hours per day. The attorney general noted that, while the aforementioned state supreme court cases from 1906 and 1913 “appear to preclude a state employee from working more than eight hours a day,” as a result of the 1971 overtime law “the welfare of the working person has changed dramatically”; consequently, those early cases had to be reevaluated. From the policy preamble to the overtime law Greely drew the lesson that “the Legislature considers overtime to be proper and consistent with the best interests of employees if the workers are adequately compensated for such extra work.” He also concluded that in Glick the state supreme court had “overruled by implication its earlier decisions and currently finds it permissable [sic] for state employees to work in excess of eight hours per day.”107

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102Montana Constitutional Convention: 1971-1972: Verbatim Transcript VI:2340-42. Of those opposed, nine were Republicans, three Democrats, and one Independent.


In 1980 and 1981 Attorney General Greely issued two more opinions which were even more far-reaching in their revisionist interpretation of Montana law. In response to a question from a county attorney as to whether local law enforcement agencies and their employees could agree to schedule four ten-hour days, the attorney general observed that forty years earlier, in its Anaconda decision, the supreme court, in holding that there was no inconsistency between the state overtime and the FLSA, “implicitly recognizes that the eight-hour day statute does not bar an employee from working more than eight hours if he is compensated for the excess under an applicable overtime statute.” He then proceeded to overrule the previous opinion, which had denied counties’ authority to schedule four ten-hour days, on the grounds that it was inconsistent with Anaconda and Glick, which had held that the eight-hour law “is not an absolute prohibition against working more than eight hours in one day, but rather is merely descriptive of the length of a work-day under normal conditions.” Greely then added the startling conclusion: “These holdings appear to nullify the plain meaning of the eight-hour day statute. However, they constitute the definitive construction of the statute by the Montana Supreme Court, and I am therefore bound to follow them.” Nevertheless, he observed: “It would be appropriate for the Legislature to amend the strict language of section 39-4-107...to make it compatible with current employment practices and court interpretations.”

The next year Greely went even further in an opinion triggered by a city attorney’s question as to whether a municipal fire department could lawfully schedule consenting employees to work 24 hours on and 72 hours off when the result was workdays in excess of eight hours and workweeks in excess of 40 hours. He now argued that in contrast to the turn-of-the-century state system of promoting workers’ safety and well-being through criminalization of overtime work, the FLSA in 1938 “changed the direction of the law by creating the now well-known system under which workers are not prohibited from working more than the statutory maximum hours, but rather are granted additional compensation at a higher rate for the additional work.” Since federal law, by virtue of the supremacy clause, controls in the face of any inconsistency with state law, “Montana’s provisions for criminal penalties for such conduct may not be applied to employees and employers covered by the FLSA.” Even with regard to public employees (who at that time were) not covered by the FLSA, however, Greely declared that the state’s own overtime law was “obviously inconsistent” with the criminal penalties in the older eight-hour law that was still on the books. Since it was “ridiculous to suggest that Legislature intended” both to prohibit overtime work by means of criminal sanctions and to enforce premium wage rates for the same work, Greely was unable to “escape the conclusion” that the two “simply

cannot be reconciled” and that the 1971 overtime law “implicitly repealed” the earlier criminal penalties.109 The attorney general had obviously caught the legislature in a self-contradiction, even if his own interpretation of the supremacy clause’s power to elevate the FLSA over the state maximum-hour law lacked the subtlety to deal with the crucial issue of whether in fact section 18 of the FLSA may itself have made federal deference appropriate if a flat eight-hour day was more favorable to covered workers than the FLSA’s unlimited overtime regime.

The first regular legislative session following the issuance of these opinions enacted “An act to promote the general welfare in implementation of article XII, section 2, of the Montana Constitution by allowing employees of municipal and county governments to agree to work more than 8 hours a day”—a title that might have unleashed gales of Homeric laughter among the advocates of the constitutionally protected eight-hour day—which amended the statute to codify the attorney general’s recommendation by repealing the criminal penalty.110

The final attorney general opinion on eight-hours laws in the twentieth century came in 1993 as a response to a county attorney’s question as to whether the criminal provision in the 1933 statute imposing the eight-hour day on strip mining applied to an employer that scheduled its employees for four-day ten-hour workweeks. The United Mine Workers had entered into a collective bargaining agreement with Decker Coal Company providing for five eight-hour days, but also giving the employer discretion to schedule four ten-hour days. When Decker opted for this latter schedule, the UMW objected on the grounds of another provision in the agreement that relieved either side of the duty to comply with a provision that violated state or federal law. Persuaded that “criminal penalties for overtime work are vestiges of an earlier era of labor management relations,” Attorney General Joseph Mazurek declined to overrule or modify the aforementioned opinions of the 1970s and 1980s, which employers and employees had relied on in structuring work schedules.111

The current Montana Labor Standards Bureau Chief, John Andrew, confirms not only that the constitutional eight-hour day has lacked any force since 1971, but that even between 1936 and 1971, without legislative reinforcement, the provision was not self-effectuating. He relates that his predecessor in the 1970s, when contacted by workers who complained of being compelled to work longer than eight hours, would try to jaw-bone employers, but that ultimately his enforcement posture was based on bluff. Moreover, even today, the individual statutes still on the books imposing the eight-hour day on underground mines and smelters have become moot: Andrew observes that his bureau is constrained by

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110 1983 Laws of Montana ch. 640 at 1538.
the aforementioned attorney general opinions holding that they have been superseded by the 1971 overtime law. Their only potential usefulness, in Andrew's opinion, might be developed in a workers compensation case involving a worker injured as a result of fatigue during his tenth or twelfth hour on the job: although no such use has been made of it, he speculates that a lawyer might successfully use it as the basis of a claim of reckless neglect in order to escape from the confines of the workers compensation law and into a tort suit.\textsuperscript{112}

\textsuperscript{112}Telephone interview with John Andrew, Helena, MT (Oct. 22, 2001).
JUST ABOUT WASHED UP!

Labor Dept.

44 HOUR WEEK LAW

[Cartoon image of a woman standing in front of a washing machine, holding up a piece of cloth that says "44 HOUR WEEK LAW" and "PESTIGRANTS"]
At exactly the same time that Congress began working on an overtime bill in May 1937, the Pennsylvania legislature produced a counterpart in the form of a compulsory, quasi-universal eight-hour day and 44-hour week. It was arguably even more comprehensive than the Alaska territorial statute of 1917. Ironically, its principal self-limitation—the delegation to the state Department of Labor and Industry of blanket power to deviate from this rigid schedule whenever “strict application...imposes an unnecessary hardship and violates the intent and purpose” of the law3—was also its undoing because such conferral of authority on an administrative agency was judicially held to run afoul of the constitutional separation of powers.

The Pennsylvania law, though held unconstitutional only a few weeks after it went into effect, was enveloped in a series of fascinating debates in a variety of forums that thoroughly discussed many of the contested dimensions, purposes, and potential unintended consequences of governmental hours regulation in ways that both transcended and illuminate the federal congressional debate. Because the law actually went into effect and an enforcement mechanism was put in place, employers that were subject to it did not have the luxury of only scoring ideological debating points; their very detailed and specific practical objections to the country’s only generally applicable anti-overtime statute raised numerous questions that even today advocates of such regulation cannot ignore.

Remarkably, as radical and unprecedented as this state hours statute was, even the leading historian of the Pennsylvania Little New Deal that created it devoted a mere paragraph to it in a 400-page doctoral dissertation without any...
awareness of its path-breaking character or principled deviation from the over-
time provision of the FLSA then being debated in Congress.\(^4\) Though it was sub-
ject to front-page treatment in the Philadelphia, Pittsburgh, and Harrisburg news-
papers for more than a year, the 44-hour law has vanished from historical con-
sciousness. And even contemporaneously, the Bureau of National Affairs' week-
ly Labor Relations Reports/Reporter;\(^5\) which offered the most comprehensive
coverage of national and state wage and hour law, did not even begin reporting
on the law, which it recognized as “the first State law setting up a maximum work
week of general application,” until its constitutionality had been challenged.\(^6\)

The maximum hours law was part and parcel of Pennsylvania's so-called
Little New Deal, which was one of several such state programs to which Roose-
velt's urban coalition, especially by his second term, gave rise.\(^7\) Pennsylvania,
long a Republican stronghold, underwent electoral transformations in 1934 and
1936. Although Roosevelt had lost the state’s popular vote to Hoover in 1932,\(^8\) in
1934 Pennsylvania elected its first Democratic governor since 1890\(^9\) and Demo-
crats gained control of the lower house of the legislature for the first time since
1877.

The new governor, George H. Earle, III (1890-1974), whose picture adorned
the cover of Time in July 1937, was unique among prominent New Deal
politicians in having, like Roosevelt, been born with a silver spoon in his mouth
and “brought up in the stodgiest of rich, conservative societies,” in Earle's case
“on Philadelphia's ‘Main Line,’ among Pews, Biddles, Cadwaladers, Morrices
and other families found in the Social Register and the upper brackets of the
income tax.” Unlike Roosevelt, however, he had been a life-long Republican, “a
young socialite who loved polo ponies and show dogs, dinner parties and fine
wines,” and “inherited a sugar fortune...” He did not become a Democrat until
1932 when he supported Roosevelt and contributed $35,000 to his presidential
campaign; this conversion yielded a diplomatic appointment to Austria, which he

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version reprinted the author's Columbia University doctoral thesis with a Foreword
updating the literature.

\(^5\)The title was changed with the issue of April 18, 1938.

\(^6\)“First State Hour Law of General Application,” Labor Relations Reports 1:500-501
(Jan. 10, 1938). Oddly, this very brief article referred back to an earlier one as dealing
with the law, but the latter did not, though it analyzed state labor laws enacted since Sept.
(Oct. 11, 1937).

\(^7\)William Leuchtenberg, Franklin D. Roosevelt and the New Deal: 1932-1940, at 187-


resigned to run for governor.\textsuperscript{10}

Of Earle, who quickly attracted considerable positive attention from the national press,\textsuperscript{11} and who, following a further $140,000 contribution to the Democratic Party,\textsuperscript{12} had been nominated and elected governor of Pennsylvania in 1934, it was said in May 1937, when reports of his presidential aspirations began to surface: "No one outside the Federal Administration itself has identified himself more closely with the President's policies than the Pennsylvania Governor. He has linked himself closely with organized labor."\textsuperscript{13} In a speech on June 2, 1937, before the Southern Society of Washington—which "official circles regarded as his opening bid for the Democratic Presidential nomination in 1940"—he "emphasized his liberal labor views in a discussion of the "'terrible menace of the machine [which] has in many ways been the curse of our civilization, simply because we have not yet learned to use it for the public good.'" The two main problems created by the machine were "'tremendously increased unemployment'" and the concentration of "'vast wealth in a very few hands. Wealth is power, both economic and political. That power, unwisely or greedily used, is a direct threat to the entire principle of democracy and a direct invitation to Fascism or Communism. If our system of democratic government is to survive, we must have a great many little capitalists, not just a few big ones.'"\textsuperscript{14}

Earle's populist New Deal approach can be gleaned from his campaign warm-up speech for Roosevelt in Pittsburgh in the fall of 1936. He told the crowd that Roosevelt "has decreed that your children shall enjoy equal opportunity with the sons of the rich." Then Governor Earle appeared to call the roll of the people's enemies:

\textsuperscript{10} "Labor Governor," \textit{Time} 30(1):12 (July 5, 1937). See also Keller, \textit{Pennsylvania's Little New Deal} at 123-25. After his term as governor (1935-39), Earle, who had lost the election for U.S. senator in 1938, served in several diplomatic posts until the end of World War II, when he left government service. Http://www.phmc.state.pa.us/bah/DAM/mg/mg342.htm.


There are the Mellons, who have grown fabulously wealthy from the toil of the men of iron and steel, the men whose brain and brawn have made this great city; Grundy, whose sweatshop operators have been the shame and disgrace of Pennsylvania for a generation; Pew, who strives to build a political and economic empire with himself as dictator; the du Ponts, whose dollars were earned with the blood of American soldiers; Morgan, financier of war.15

In its drive to gain political control, the Democratic Party made intense and successful efforts in 1934 to win workers’ support; in turn, organized labor hoped to persuade the party to implement its demands: “The Little New Deal set out to redeem the party’s pledges and free the Pennsylvania worker from industrial serfdom. In 1934 the Democratic platform had emphasized matters of interest to the worker. The first eight items of the twenty listed in that document dealt exclusively with the working man’s demands and grievances. ... The platform adopted by the party placed greater emphasis on the needs of labor than on any other item.”16 In addition to a minimum wage-maximum hours law, the agenda included unemployment insurance, a broader workers compensation law, abolition of sweatshops and the coal and iron police, and the incorporation of the federal National Industrial Recovery Act’s labor rights into state law. The new administration’s pro-labor orientation was further embodied in Thomas Kennedy, the secretary-treasurer of the United Mine Workers. Elected as lieutenant governor on the same ticket with Earle, Kennedy presided over the state senate.17

In presenting his new administration’s labor program to the legislature on January 28, 1935, Earle attacked the “selfish minority reaping easy and high profits through its ability to exploit humanity.” In contrast, he declared: “The farsighted business man who appreciates how essential labor’s purchasing power is to him, must be protected by law from unrestrained competition in the labor market by men who have neither the heart to pay decent wages nor the brains to see that danger to all of us looms in the oppression of labor.”18 Such gubernatorial speeches, in which he argued that the government was “morally obligated to put to an end exploitation of our own people by these parasites of business,” constituted a stunning transformation of politics in Pennsylvania, where, according to a long article about Earle in Collier’s, people not so many years earlier had been arrested for uttering such sentiments.19 In urging reduction of maximum working hours for women from 54 to 40, Earle declared after the Senate Repub-

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16Keller, Pennsylvania’s Little New Deal at 183-84, 144.
17Keller, Pennsylvania’s Little New Deal at 144-45.
18Keller, Pennsylvania’s Little New Deal at 184.
19Davenport, “Pennsylvania of All Places” at 11.
licans had refused to lower the cap below 48 hours that there was no reason why women should be required to work such long workweeks when statewide more than 150,000 women were looking for work.\textsuperscript{20} Depression-era work-sharing was thus apparently uppermost in the governor’s mind in seeking to impose a fixed workweek.

After the Republican-controlled senate had frustrated enactment of the vast bulk of Earle’s far-reaching labor agenda during the 1935 session,\textsuperscript{21} he promised the following year that if the Democrats gained control of both houses, “we will write upon Pennsylvania’s statute books more real liberal and social legislation than this State has seen in the last hundred years.”\textsuperscript{22} The 1936 elections did in fact mark a historic transfer of power: while Roosevelt was carrying the state by a large majority, the Democrats increased their lead in the state House of Representatives to about three-fourths and finally gained control of the Senate for the first time since 1871, achieving a two-thirds majority. With the Democratic party now in control of the executive and enjoying its first solid control of the legislature since 1845, Earle pressed ahead with his agenda in 1937.\textsuperscript{23}

Less than a week after the election, John A. Phillips, the president of the Pennsylvania Federation of Labor, predicted to the Third National Conference on Labor Legislation that by the time of the next Conference in 1937, “Pennsylvania will point the way to the other States in advanced labor legislation.”\textsuperscript{24} Not only did the 1937 legislative session produce a greater volume of legislation—as measured by two fat session law volumes totalling more than 3,000 pages—than any other session before or since, but Earle was able to congratulate it “upon the epoch-making nature of its achievements . . . .”\textsuperscript{25}

Keeping his word, Phillips was in fact able to report to the Fourth National Conference on Labor Legislation in October 1937: “This program of labor legislation that was enacted at the 1937 session of the General Assembly of Pennsylvania is the most comprehensive that has ever been enacted in any single session of any legislature in the entire history of the United States.” Phillips’s

\textsuperscript{20}Keller, \textit{Pennsylvania’s Little New Deal} at 192.

\textsuperscript{21}A nonadministration bill introduced already on January 5 by two House Democrats (Scanlon and Falkenstein) would have made it “unlawful for any employer to employ any person for a period in excess of thirty-five hours in any one week.” It was referred to the Labor Committee, which took no further action on it. House Bill No. 56.

\textsuperscript{22}Lawrence Davies, “Promise to Labor Is Kept by Earle,” \textit{N.Y. Times}, June 13, 1937, sect. IV at 10:5.

\textsuperscript{23}Keller, \textit{Pennsylvania’s Little New Deal} at 150, 183-97, 238, 262.


exuberance about the pro-labor orientation of the Pennsylvania state government reached its high point when he declared of the state federation of labor: “We are almost a sort of sub-State department.”

Several months after the session adjourned, Earle’s Secretary of Labor and Industry, Ralph Bashore, too, boasted to the Convention of the International Association of Governmental Labor Officials of the panoply of labor laws just enacted regulating maximum hours, labor relations, injunctions, minimum wages, workers and unemployment compensation, home-work, occupational diseases, accident reporting: “Pennsylvania stands out today among progressive liberal States that have written into their history effective legislation to help the weak against the strong, and to curb the greed of a few at the expense of many. Once it was an industrial barony controlled by a few men, who listened neither to counsel nor advice but followed blindly their own selfish interests.”

II

The Republicans’ control of the senate may explain why the Democrats did not file a maximum hours bill covering men as well as women in 1935. Having already ordered a 40-hour week for state employees, Governor Earle proposed the maximum hours bill for the 1937 session. As the *Harrisburg Telegraph* reported under a six-column (inside) headline on March 20, Secretary of Labor Bashore revealed that his department was preparing a bill that would probably be introduced on March 22 establishing “a forty-hour work week for all workers in Pennsylvania” except domestic workers, agricultural field workers, and certain professional and executive employees. Bashore announced that “[w]hile primarily...intended to apply to those engaged in manual occupations,” it would also “tentatively” include “white collar workers” (or “toilers” as the *Telegraph* styled them). That work-spreading was the underlying point of the proposal was clear from Bashore’s statement that it was the Earle administration’s “opinion that it is inconsistent to permit excessive hours while large numbers of our workers

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28 Commonwealth of Pennsylvania, *Index to the Legislative Journal Session of 1935*. Jay Craig of the Pennsylvania Senate Library confirmed that no such bill was filed in 1935. Telephone interview (Oct. 11, 2001).

29 Keller, *Pennsylvania’s Little New Deal* at 265.
remain idle.” He then mentioned two additional public policy reasons: “reports from economists and labor authorities show that shorter hours create higher wages, and...health authorities point out that a shorter working week promotes higher health standards.”

On March 22, Bashore stated that the administration would introduce the bill that week, but in fact it was not introduced by first-term Senator Edward Frey of Pittsburgh until April 26. Although the reason for the month-long delay is not clear, in its report on the bill the next day, The Pittsburgh Press stated without explanation that, despite the call for a maximum hours law in the party platform, after Bashore’s announcement of the bill “the administration declined to sponsor it and it apparently had been abandoned.”

Like the other labor proposals that session, the maximum hours bill was intensively and systematically lobbied for by the Department of Labor and Industry, 15 to 20 of whose officials were “active...all over the legislative halls....” The original bill, designed to create a “40-hour week for Pennsylvania’s working man,” was titled, “An Act To protect the public health and welfare by regulating employment in this Commonwealth with respect to hours and conditions of employment; providing for certain exceptions; imposing duties, liabilities, and conditions on employers; defining the powers and duties of the Department of Labor and Industry...; and providing penalties.” After inserting the broadest coverage definition available by making the key term “employ” include “permit or suffer to work,” the bill provided that “no employer shall employ any person for more than forty hours in any one week or eight hours in..."
any one day or on more than five days in any period of seven consecutive days."
Where the work was not continuous, but fell into two or more periods, the eight
hours had to be performed within a ten-hour period.37 The purpose of this last
provision was to prevent the spread of the workday over such a long period that
the point of giving workers "one long period for rest and relaxation" would not
be subverted.38

To be sure, the bill’s coverage was not universal, but the only exclusions
were “employment in agricultural field occupations or in domestic service in
private homes or...work of persons over twenty-one years of age earning at least
thirty-five dollars a week in bona fide executive positions or learned pro-
fessions.”39 Frey’s bill also provided for a 30-minute meal period after five hours
of continuous labor.40 Procedurally, the bill required employers to post each
worker’s schedule of maximum hours during each day of the week, the total
number of hours, and the meal periods. The employer was not authorized to
change this posted schedule without the approval of the Department of Labor and
Industry.41 In order to reinforce the fixity of this schedule, the bill specified that
the mere “presence of any employee at the place of employment at any other
hours then [sic] those stated in the schedule applying to him shall constitute
prima facie evidence of violation of this act.”42 The only flexibility that the bill
allowed for with regard to posted scheduling affected places of employment
where the character of the work made it “difficult to fix the hours of employment
weekly in advance”; in those cases the employer was permitted to apply to the
Department for a permit dispensing with the scheduling requirement, the granting
of which was discretionary with the agency.43

Even more radical was the prohibition on the individual worker’s ability to
circumvent the law by working at two or more totally disassociated firms: “A
person may be employed in more than one place of employment, provided the
aggregate number of hours such person is employed does not exceed eight in any
one day, or forty-four in one week.”44 To be sure, Pennsylvania’s women’s hour
statute had contained a similar provision since 1913,45 as did other state women’s

37 The General Assembly of Pennsylvania, File of the Senate, No. 1075, Session of
1937, Printer’s No.—756, sect. 2 at 2 (Apr. 26, 1937).
38"Earle Urges 40-Hour Work Week in State."
39§ 2(c) at 3.
40§ 3 at 3.
41§ 5(a) at 3-4.
42§ 5(b) at 4.
43§ 5(c) at 4-5.
44§ 2 (a) at 2.
45It read: “Whenever any female shall be employed or permitted to work in, or in
hours laws. Although this provision may have been admirably suited to implementing possible legislative goals of work sharing and avoidance of overwork, since penalties appeared to be directed exclusively at employers, it is unclear how the legislature contemplated enforcing the provision, how employers were supposed to acquire knowledge of their employees' other jobs, and whether all employers who employed a worker whose aggregate hours exceeded the statutory limit would be liable. Nevertheless, the fact that the legislature was willing to

connection with, more than one establishment in any one week or in any one day, the aggregate number of hours during which she shall be employed or permitted to work in, or in connection with, such establishments shall not exceed the number of hours prescribed in this section for such females in any one week or any one day.” 1913 Pa. Laws No. 466, § 3(b) at 1024, 1026. The 1937 amendments merely specified the new hours of limits of 44 and 8. 1937 Pa. Laws No. 322, § 3(b) at 1547, 1549. It was not repealed until 1988. 1988 Pa. Laws No. 80, § 12 at 475, 480.

E.g., Delaware and New Hampshire enacted women’s hours statutes in 1913 and 1917, respectively, prohibiting the employment of female employees by multiple employers for more hours than they were permitted to work for a single employer. 27 Del. Laws ch. 175, § 2 at 424, 425 (1913), repealed by 55 Del. Laws ch. 218 at 618 (1965); 1917 N.H. Laws 196:1, at 750, 751, repealed by 1989 N.H. Laws 53:2 at 60.

Ontario law expressly dealt with the issue of knowledge with respect to child labor: “A young person shall not, to the knowledge of his employer, be employed in a shop who has been previously on the same day employed in any factory as defined by The Ontario Factories’ Act for the number of hours permitted by the said Act, or for a longer period than will complete such number of hours.” An Act to Regulate the Closing of Shops and the Hours of Labour therein for Children and Young Persons, § 3(4), Ontario Stat. 1888, ch. 33, at 80, 84. Later, after that law was consolidated with the Factories Act, the provision was expanded to read: “no child, youth, young girl or woman who has been previously on any day employed in any factory or shop for the number of hours permitted by this Part shall, to the knowledge of the employer, be employed on the same day in any other factory or shop, and no such person who has been so employed in a factory or shop for less than such number of hours shall be employed in any other factory or shop on the same day for a longer period than will complete such number of hours.” An Act for the Protection of Persons Employed in Factories, Shops and Office Buildings, § 32(c), Rev. Stat. Ontario 1914, ch. 229, at 3047, 3057. As late as 1964 Ontario law prohibited any young person from working and any person from “knowingly permit[ting] a young person to work for more than the maximum hours determined by this Act in any day, notwithstanding that the work is performed in more than one industrial undertaking.” An Act to Amend the Hours of Work and Vacation with Pay Act, § 2, Stat. Ontario 1964, ch. 42, at 159, 159.

An attorney with the legal office of the Pennsylvania Department of Labor and Industry concurred in this view of the provision’s practical enforcibility. Telephone interview with Richard Lengler, Harrisburg (Nov. 19, 2001). The Department of Labor and Industry does not appear to have issued any regulations relating to this prohibition,
countenance the possibility that low-wage workers would be denied access to a second job to make ends meet underscores how vital a concern the spreading of work was during the Depression.

Violations of the law constituted misdemeanors. In addition, violation of the hours or posting provisions carried with it a fine of between $25 and $200 and/or up to 60 days of imprisonment, whereby a violation with respect to each employee constituted a separate offense; in addition, where the Department informed the employer of a violation, penalties attached for each day thereafter for which the employer continued to violate the law.49

The bill was front-page news in Pennsylvania newspapers from its birth until its definitive death at the hands of the Pennsylvania Supreme Court some 14 months later. The proposed law’s radical and unprecedented features were never hidden from view. Already on April 29, The Pittsburgh Press, under the title, “Don’t Go Too Far,” editorialized that the sweeping law was “more drastic than any law elsewhere in this country....” As it would do repeatedly over the next year, the paper warned against the risks associated with winning the race to the top of labor standards in a federal system: “Perhaps as a national policy, applying to everybody, it might succeed; but for a single state it will merely put the residents of that state at tremendous disadvantage in competition with those of other states.”50

On May 1, Secretary of Labor Bashore—nothing in whose prosaic official biographical sketch (including membership in the American Legion and Kiwanis Club and presidency of a county fair association) suggested that he harbored the slightest radical leanings51—stating that the administration strongly urged passage, “emphasized that the trend in Pennsylvania industries is to increase the

but the question-and-answer section of its pamphlet on the 44-hour laws issued in August 1937 included this exchange: “May an employe work for more than one employer? Yes. But the total hours worked must not be more than 44 in any one week, or 8 in any one day.” 44 Hour Week Laws: Laborgraphic, Aug. 1937, at 7. On the absence of any regulation, see “Regulations Approved by Industrial Board Promulgated by Secretary of Labor and Industry: Woman’s 44 Hour Week Law (Complete to Nov. 1, 1937),” in Pennsylvania’s Labor Program: The Laborgraphic, Oct. 1937, at 19-27.

49§§ 10-11 at 7-8.

50“Don’t Go Too Far,” Pittsburgh Press, Apr. 29, 1937, at 16:1. The National Consumers’ League, one of the premier agitators on behalf of hours legislation, took the position (at least for the South) that pushing for the enactment of 40- as opposed to 48-hour laws in state legislatures was a mistake because fear of the consequences of interstate commerce and competition would kill them. Landon Storrs, Civilizing Capitalism: The National Consumers’ League, Women’s Activism, and Labor Standards in the New Deal Era 165 (2000).

hours of employment rather than the number of workers." Instead, "there should be a greater spread of employment...that is one of the reasons that actuated the Administration and the Department to seek remedial legislation." In May, Bashore also wrote a brief but combative and partisan foreword to the Department's new monthly publication, Laborgraphic, reflecting the substance and image of the Little New Deal: "In 1934 the administration pledged to Labor and Industry progressive labor laws in keeping with modern industrial conditions. The mandate of the people in favor of these reforms has been blocked until this year by a reactionary opposition. This year our administration will enact them into law."

Concurrently, the legislature was also considering amendments to the statute capping women's hours at 54 hours; in early May the Senate Labor and Industry Committee increased the administration's proposed 40 hours to 44. That the legislators and governor insisted on keeping the women's and universal hours bills separate clearly suggests that they were not entirely persuaded that the latter would survive judicial scrutiny. For example, the Harrisburg Patriot reported: "Constitutionality of the hour-fixing proposal as far as men are concerned is doubtful, attorneys and labor leaders point out."

In order to secure passage, Senator Frey had to propose numerous amendments that significantly diluted the bill's rigor. To begin with, at the bill's second reading and consideration on May 20, the Senate agreed to Frey's floor motion to increase the workweek from 40 to 44 hours and from five to five and a half days—an amendment that the Senate had added to the women's hours bill on May 12. The Senate also agreed to Frey's motion to add the crucial delegation of power provision that proved to be the law's ultimate downfall: "where the

52 "Earle to Approve Ban on Sweatshops," Philadelphia Inquirer, May 2, 1937, at A7:2. According to this newspaper account, the bill was introduced on the basis of the U.S. Supreme Court's decision upholding the constitutionality of the National Labor Relations Act on April 12 (NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)). Previously, the Earle administration had not been "sure the bill would be found constitutional." Since this case primarily turned on the sufficiency of the congressional commerce power as a basis of the act and had nothing to do with whether the legislature might constitutionally include male workers within its mandatory labor standards, it is unclear what force the decision had for the state law.

53 Pennsylvania Labor and Industry Department, Laborgraphic, May 1937, [n.p. (inside front cover)].


55 Keller, Pennsylvania's Little New Deal at 266.


strict application of the schedule of hours provided for by this section imposes an
unnecessary hardship and violates the intent and purpose of this Act the Depart­
ment of Labor and Industry with the approval of the Industrial Board may make
alter amend and repeal general rules and regulations prescribing variations from
said schedule of hours Provided that if it should be held hereafter by the courts
of this Commonwealth that the power herein sought to be granted to the said
Department of Labor and Industry is for any reason invalid such holding shall not
be taken in any case to affect or impair the remaining provisions of this section.”
Finally, the Senate also adopted Frey’s amendment deleting the limitation on the
spread of the eight-hour day to a period of ten continuous hours. 59
But in the “most tempestuous scenes of this session,” Frey and other sup­
porters of “the universal short week bill” failed to prevent a coalition of Dem­
ocrats and Republicans who sought to choke off amendments to the bill. Frey
and the others were seeking to filibuster to gain more time to find additional
supporters of his amendment, which would have modified the aforementioned
change he had written into the bill. The new amendment (which ultimately
became section 11 of the statute) would have “suspended the operation of the
entire 44-hour bill if courts declared this discretionary power for the department
was unconstitutional.” 60
Having hit a snag, the bill was put on the postponement calendar with its en­
actment doubtful and hazardous. 61 But when the Senate resumed consideration
of the bill on May 24, Frey offered additional amendments diluting the law. The
Senate agreed to his motion to decrease the threshold earnings level for excluded
executives from 35 to 25 dollars per week. 62 More fateful was Frey’s motion to
amend the act’s constitutionality section. It now declared section 2(b) of the act,
which delegated power to the Department of Labor and Industry to make rules
prescribing variations where the strict adherence to the hours schedule would im­
pose unnecessary hardship, “not to be severable from the other provisions of this
act and in the event the provisions of such subsection are held to be uncon­

59 Commonwealth of Pennsylvania, Legislative Journal 5114 (1937). The previous
day, May 19, Frey had stated in debate that his bill “has no connection with” the other bill
limiting women workers’ hours, pointing to the delegation amendment as an important
difference between the two bills. Commonwealth of Pennsylvania, Legislative Journal
4865 (1937). To be sure, in the end, both laws were subjected to this proviso. Act No.
322, § 2 at 1549.
60 “Senate Chokes Off Work Bill Changes,” Philadelphia Inquirer, May 22, 1937, at
61 Commonwealth of Pennsylvania, Legislative Journal 5116 (1937); Kermit
stitutional it is hereby declared that the legislative intent is that the entire provisions of this act shall not be in force or effect.” It is difficult to avoid the suspicion that this escape clause—which lacked a counterpart in the otherwise similar women’s 44-hour bill—may have been calculated to appease opponents who were confident that this non-severability provision would guarantee that the law would never survive judicial scrutiny.

In explaining this amendatory process several months later, Secretary Bashore, permitting himself considerable hyperbole, reported to the Convention of the International Association of Governmental Labor Officials: “The hotels and restaurants in Pennsylvania had probably the hardest lobby to overcome of any in the State. They attempted by every means to defeat our purposes. As a matter of fact, when the bill came out of the senate we did not recognize it. Everybody was excepted, so that nobody could tell whether it was a 70-hour bill or a 30-hour bill, and who was in it and who was out, and this was due entirely to the hotel lobby.”

At this late and crucial stage on May 24—the very day on which the congressional FLSA bills were introduced in the Senate and House—Governor Earle addressed a joint legislative session reminding members: “For the first time within the memory of living man the liberal Democratic forces of our Commonwealth today have control of both executive and legislative branches of our State government. When we came into office in 1935 we were crippled by a reactionary Republican majority in the State Senate.” Earle then specifically urged the legislators to pass the party’s labor agenda, including the maximum 44-hour-week bill “by which employment may be spread and the health of our working people protected....”

On May 25 the Senate, in which the Democrats held a 34-16 majority, approved the bill with Frey’s amendments by a vote of 27-15. Not a single Republican voted in favor of the bill; four Democrats (including the president pro tempore) voted against it.

The next day The Pittsburgh Press characterized the vote as having “tight-
ened the State’s grip on privately employed labor.”68 The following day, referring to the aforementioned provision in the bill making a worker’s presence at his place of employment outside of his posted hours prima facie evidence of a violation, the paper printed a three-column front-page article headlined, “Drastic ‘44-Hour Law’ Would Penalize Boss for Workers Who ‘Hang Around.’”69 The newspaper failed to point out that legislatures had been adopting such provisions for decades in order to thwart various employer ploys to circumvent prohibitions on employing women and children more than a fixed number of hours.70

Beginning that same day, the paper published largely repetitive negative editorials on the bill on three consecutive days. Warning that “State Hour Bill May Prove Costly Error,” The Pittsburgh Press called the “drastic” bill typical of the “excessive labor legislation” being produced by the 1937 session of the legislature.71 The next day the paper editorialized that the Frey bill was “an amazing document.” It correctly observed that not only did the law include no provision for overtime, even at premium rates, but it also failed to provide for emergencies except the “clumsy” method of petitioning the Department of Labor and Industry, which would be unable to make a decision until the emergency were long past.72 That the editors’ opposition to the proposed law bordered on a campaign was reflected in the third editorial, “Rushing Headlong into a Vital Experiment,” which faulted the legislature for launching “the greatest industrial experiment ever attempted by any individual state” “without even holding a hearing” or “waiting to see what Congress does” on the national level. It foresaw an “unworkable” law that would especially handicap small employers, and alleging a real shortage of some kinds of skilled labor (in part because of union restrictions on apprenticeships), criticized the bill for making no exemption for overtime work even at overtime rates where the employer could not find enough skilled workers. The Pittsburgh Press also astutely predicted the unconstitutional delegation problem.73

The Harrisburg Patriot argued editorially that opponents of the Senate bill were less concerned about the limitation on the number of hours and days of work

“Pennsylvania of All Places”

“than the bill’s refusal to specify certain reasonable exceptions and exemptions. This attitude may well kill the effectiveness of the measure” and trigger “an early drive for its repeal...” Beyond this apparent dissatisfaction with the hardship amendment as a substitute for specific statutory exemptions, the newspaper, after making an obligatory nod to the traditional wisdom that the laws of economics are stronger than the laws of men, asserted the inevitability of reduced production’s following in the wake of reduced work time; consequently, the increased leisure would not benefit the workman, who ultimately would have been better off with a longer workweek and “more money in the sock at the end of the month....”

The amendatory process to dilute the bill continued on its second and third readings in the House from June 1 to 5 under the leadership of Representative John Yourishin (a former miner who had been a United Mine Workers district secretary-treasurer for 20 years), a strong supporter of the bill and chairman of the labor committee. The first significant changes took the form of deletions of three provisions offensive to employers: the prohibition on changing work schedules without approval of the Department of Labor and Industry; the presumption of a violation of the law created by the presence of a worker at the place of employment outside of his posted working hours; and the requirement that employers keep time records stating the number of hours worked by each employee on each day of the week, including starting and stopping times and meal periods and wages. Yourishin also successfully opposed an amendment offered by E. Kent Kane, one of the few Republicans who would shortly vote for the bill, who wanted to exclude from coverage all transportation workers and especially truck drivers, whose hours it would be “practically impossible” to conform to the pro-

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74 “The ‘Base’ Is Economic,” *Patriot*, June 2, 1937, at 14:1 (editorial). This editorial contains two typos that make important sentences nonsensical; paraphrase has been used here to reconstruct the obvious intended sense.

75 *The Pennsylvania Manual* at 900.

76 *The Pennsylvania Manual* at 916. It is not completely clear how, as a Republican in a House three-fourths controlled by Democrats, Yourishin came to be committee chairman. The House archivist speculated that Yourishin, who ran (and lost) as a Democrat in 1938, may have already changed parties; she also stated that during the Depression a number of legislators who were formally Republicans supported Democratic programs. Finally, she noted that, because of the inconvenience associated with long trips, many legislators were not eager to be chairmen. Telephone interview with Heidi Mays, Harrisburg (Nov. 7, 2001).

posed law. Yourishin assured members that the Department of Labor and Industry, “which is a regulatory department, to take care of business and industry,” “will grant exemptions, and all of the exemptions that may be sought by industry or by any particular business can be gotten through” it.\textsuperscript{78}

Despite these amendments, the press reported that there were grave doubts about the law’s constitutionality and that a court test was already regarded as “certain.”\textsuperscript{79} Improvements notwithstanding, \textit{The Pittsburgh Press} declared the bill “unworkable and preposterous.” The paper struck close to home in its choice to lead its parade of horribles: “If your plumbing breaks you can’t get a plumber, unless you are fortunate enough to locate one who hasn’t worked eight hours.” Moreover, if the plumber did not finish the emergency job within eight hours, he would have to quit. The editors concluded that invalidation might ultimately be the welcome route by which the Earle administration could escape from its “folly.”\textsuperscript{80} The reference to a self-employed plumber may have been completely out of place, since non-employees were not subject to the law, but the paper’s more general point of inflexibility remained.

Of still greater significance was the last major amendment inserted on June 3 by Yourishin in the House, which prospectively required the Department of Labor and Industry to conform the hours schedule to any regulations to be established by federal law: “provided that with respect to any industry whose schedule of hours is established by Federal regulation the schedule to be fixed by the Department of Labor and Industry...shall conform to the schedule established by any such Federal regulatory body.”\textsuperscript{81} \textit{The Pittsburgh Press} now had to concede that the law no longer jumped the gun on federal action, but it urged that with everything uncertain, it would be best to wait. Moreover: “Although it is the greatest social and economic experiment ever attempted in Pennsylvania, not even one public hearing on the measure was held.”\textsuperscript{82}

A robust and wide-ranging debate took place in the House during consideration on final passage on June 5. Republican Representative Ellwood Turner, who would vote against House Bill No. 2487, argued that while no one opposed limiting hours of work, the bill did not attend to all the “complications” of business. To buttress his point he read at length from the aforementioned editorial.

\textsuperscript{78}Commonwealth of Pennsylvania, \textit{Legislative Journal} 6721-22 (1937).
\textsuperscript{80}“Still a Bad Bill,” \textit{Pittsburgh Press,} June 2, 1937, at 18:3.
“Rushing Headlong into a Vital Experiment” in *The Pittsburgh Press*, a newspaper he characterized as supporting the Earle administration.83

Representative Yourishin focused on the work-sharing basis of the law by pointing out that labor advocated not only the 44-hour bill, but also 30-hour bill “because...that is the only way that the slack can be taken up in the country, by putting men that are idle back to work.” He also argued that the amendment requiring conformity with any eventual federal regulation took care of Turner’s criticism that the bill was jumping the gun on national legislation. But that argument, as Turner observed, would not apply during the interim before such federal legislation went into effect: until then, Pennsylvania would be “out of line....” Yourishin also assured legislators that the Department of Labor and Industry would grant exemptions to employers operating under collective bargaining agreements that provided for emergency overtime work for repairs when it was not possible to secure a replacement for a key employee. Finally, Yourishin knew and felt “sure” that continuous-process industries that could not conform to a five and one-half day schedule would also receive an exemption. Unanswered was Turner’s further objection that the claim that the 44-hour week would create jobs was “rather far fetched” because Yourishin had already conceded that it was “a rarity” for workweeks to exceed 44 hours anyway.84

The Republican minority in the House (in which Democrats held 154 of 208 seats) futilely battled against the bill, which passed 132-34.85 Only 11 Republicans voted for the bill, while 10 Democrats voted against.86 The same day the Senate then unanimously (36-0) concurred in the House amendments.87 Just hours after the legislature adjourned, Governor Earle in a statewide broadcast put the new labor laws, including the provision of “‘a 44-hour maximum work week for men, women and children in industry and commerce,’” at the top of the list of accomplishments illustrating that “‘Government of the heart has been substituted for Government by greed.’”88 The *Philadelphia Inquirer* reported the passage in a four-column banner headline on the front page,89 observing that

...
“Earle’s Iron Fist Writes New Chapter in Legislature.”

The statute, which was approved by Governor Earle on July 2, 1937 and was to become effective on December 1, 1937, specified that: “Except as hereinafter provided, no employer shall employ any person for more than forty-four hours in any one week, or eight hours in any one day, or on more than five and one-half days in any period of seven consecutive days.” The only workers expressly excluded from the reach of this maximum hours provision and the statute’s only other substantive provision (requiring a continuous 30-minute meal period after five hours of continuous labor) were those engaged in “employment in agricultural occupations, or in domestic service in private homes,” as well as “persons” over 21 years old earning at least 25 dollars a week engaged in “work” “in bona fide executive positions, or learned professions”—groups that had been and continue to be excluded from many other labor protective laws.

The legislature delegated to an administrative agency the power to relax the monolithic severity of the maximum hours regulation: “Where the strict application of the schedule of hours provided for by this section, imposes an unnecessary hardship and violates the intent and purpose of this act, the Department of Labor and Industry, with the approval of the Industrial Board, may make, alter, amend and repeal general rules and regulations prescribing variations from said schedule of hours.” This statutory intent and purpose was, since the statutory text included no such reference, presumably the bare mention of protecting public health and welfare in the act’s title. In addition, in anticipation of eventual federal action—after all, the Roosevelt administration’s FLSA bill was intro-

Philadelphia Inquirer, June 6, 1937, at 1:5-8 (Public Ledger).


91No. 567, § 2 at 2766.

92No. 567, § 3 at 2767.

93No. 567, § 2 (c) at 2767. It is unclear whether the use of “work” was intended to cover a larger group than that embraced by “employment.”

94Agricultural workers were excluded from the FLSA until 1966; many remain excluded from its minimum wage and all from its overtime provision; domestic workers were excluded until 1974; bona fide executives and professionals whose salaries exceed a certain low threshold have been excluded from the outset. Marc Linder, Migrant Workers and Minimum Wages: Regulating the Exploitation of Agricultural Labor in the United States (1992); idem “Moments Are the Elements of Profit”: Overtime and the Deregulation of Working Hours Under the Fair Labor Standards Act ch. 2 (2000).

95No. 567, § 2 (b) at 2767. The Department of Labor was also empowered to issue permits relieving applying employers of the duty to post each employee’s weekly schedule in advance where, owing to the character of the work, it was difficult to fix hours ahead of time. Id. § 5 at 2767-68.
duced on May 24, in the midst of the Pennsylvania legislature’s proceedings on the maximum hours bill—the legislature provided that “with respect to any industry whose schedule of hours is established by Federal regulation, the schedule to be fixed by the Department of Labor and Industry, with the approval of the Industrial Board, shall conform to the schedule established by any such Federal regulatory body.” The Industrial Board was an administrative board within the Department of Labor and Industry consisting of the Secretary of Labor as the chairman and four other members. As of 1937, three of these four were required to be an employer of labor, a wage earner, and a woman. Its duties included: holding hearings concerning the application of the labor laws and making recommendations to the Department after such hearings; and approving, disapproving, and suggesting regulations.

The import of this deference to or acquiescence in eventual federal regulation may have been to subvert the whole innovative point of the new law. As the Philadelphia Inquirer reported in its lengthy summary of the legislature’s last-minute action before adjournment on June 5: “Just before the [44-hour] bill was passed there was inserted an amendment permitting over-time in line with the Federal law on the same subject.” Since by this time it was clear that whatever federal wage and hour legislation passed, it would contain a flexible overtime provision and no rigid maximum-hours cap for adult workers, and since no one realized that it would be more than 16 months before the FLSA would go into effect, it is possible that the Pennsylvania legislature enacted the law believing that the hours limit would quickly be mooted. (To be sure, the Department of Labor and Industry later cogently argued that the delegation provision did not apply to the statutorily prescribed hours, but only to variations from them that the Department chose to grant; thus, instead of delegating power to the federal government, the proviso in fact delegated to the Department “the power to ascertain whether or not Federal regulations are of such nature that a variation conforming to them would be in keeping with the nature and purpose of the 44-Hour Week Law.” Consequently, the Department was authorized not to adopt a variation conforming to a Federal regulations if it would violate the intent and purpose

96 No. 567, § 2 (b) at 2767.
98 1929 Pa. Laws No. 175, sect. 2214, at 177, 290.
of the state law.)

On the Monday following adjournment the previous Saturday, the *Philadelphia Inquirer* editorialized that, in spite of the marginalization of the Republicans "into the position of an impotent minority," the session produced "much that should be in the interests of the public good." It singled out social legislation as "one of the high points.... Modern in thought, in keeping with the spirit of the times, devoted to the welfare of the workers, this item...merits commendation." After characterizing the hours bill for women and children as "[o]f great help" to them, the newspaper argued that the "companion bill" limiting male employees to 44 hours a week is equally meritorious.... It is afflicted, however, with numerous provisions that may handicap its operation.

Fortunately, this measure was amended at the last minute to permit employment beyond the 44-hour limit in emergencies and during peak periods. Until that change was made, overtime was prohibited; no one could work more than 8 hours in any day five days a week, and four hours on a sixth day.

Even in its amended shape this bill has questionable features. It bears the earmarks of too-hasty drafting and too little consideration.

The *Inquirer's* editorial position is puzzling. To begin with, the editors were simply mistaken about the statute's containing a provision permitting overtime during emergencies and peak periods. Presumably this misconception derived from a front-page article in the previous day's paper asserting that in addition to empowering the Department of Labor and Industry to grant exemptions, "[p]rovisions are also contained in the bill to permit employment over 44 hours a week in cases of emergency and during 'peak' periods." However, the law, the text of which the *Inquirer* printed in its entirety directly beneath this claim, included no such provision. Unless there was a private, but widely-known, secret understanding that the administratively granted exemptions and the expected enactment of permissive federal overtime regulation, to which the state law would defer, would make the hours cap moot, it is difficult to understand why the editors would have advanced such mild-mannered complaints about a law that employers must have viewed as an impossibly restrictive straitjacket that undermined their authority vis-à-vis their workers and put them in an uncompetitive position vis-à-

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100 Brief for Appellants at 147-49, Holgate Bros. Co. v. Bashore, 331 Pa. 255 (1938). Interestingly, the example that the Department chose to illustrate its power to reject adoption was a hypothetical federal regulation fixing weekly hours at fewer than 44.
102 Miller, "Phila. Water Plan, Control of Liquor Jam Closing Hours" at 12:1.
vis producers in other states. After all, in 1931, when the legislature rejected a proposal by the Public Education and Child Labor Association of Pennsylvania to limit the weekly working hours of children under 16 years of age to 44, but did debate bills lowering the hours from 51 to 48 (and to 44 hours for women): “Industrial interests fought bitterly against them. Condemning the ‘fanatics’ behind this legislation, the State Chamber of Commerce rallied employers to testify against reduction of hours on the basis that it would work extreme hardship on the employers and disrupt their schedules to comply with the proposed changes.”

To be sure, Pennsylvania was hardly dealing with the question of emergencies under an hour statute in a vacuum. Legislative policy and custom on the matter were sufficiently consolidated that by 1938 the Fifth National Conference on Labor Legislation (which had been called by the U.S. Department of Labor) adopted a model state fair labor standards act containing a provision stating that the mandated time and a half compensation for overtime beyond the specified hours:

shall not apply to any employee employed in such extraordinary emergencies as those resulting directly from fire, flood, storm, or similar natural forces, or epidemic of illness or disease, which require employment in excess of the hours specified...in order that life, health, or property may be preserved; Provided, however, that the employer shall pay each employee so employed at not less than his regular rate of pay for each hour employed in excess of the hours specified...; Provided, further, that in each such case the employer shall immediately notify the commissioner of such excess employment in such manner as the commissioner may require.

Thus the model law, in addition to authorizing emergency overtime work, did not even require premium compensation for it.

In a boilerplate severability provision, the Pennsylvania legislature also provided that if any section of the statute other than section 2 (b) were found unconstitutional, its intent was that “this act would have been adopted had such unconstitutional provision not been included,” and that it was therefore impermissible for any judicial holding as to such a provision to impair any other sections. However, the administrative delegation of powers in section 2 (b) was expressly “declared not to be severable from the other provisions of this act, and

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103 Keller, Pennsylvania's Little New Deal at 55.
in the event the provisions of such subsection are held to be unconstitutional, it is hereby declared that the legislative intent is that the entire provisions of this act shall not be in force or effect." In light of the U.S. Supreme Court's decision in *A. L. A. Schechter Poultry Corp.* v. United States, 295 U.S. 495, 541-42 (1935), which just two years earlier had struck down the centerpiece of the New Deal, the National Industrial Recovery Act, on the grounds of a delegation of legislative power to an administrative agency in violation of the separation of powers, it is difficult to view this provision as anything but an open invitation to employers to file a test case to have the whole regulatory scheme struck down. After all, in the 1935 legislative session, even Earle's solidly Democratic House declined to pass only one of the governor's labor bills—a state version of the National Industrial Recovery Act—on the grounds that the U.S. Supreme Court had just declared it unconstitutional.

*The Pittsburgh Press* continued its barrage of editorial criticism after passage of the bill, which, having failed to try to recognize the best known facts of industrial life such as emergencies, made Bashore "almost an industrial czar." In this very dark cloud the newspaper could discern but one silver lining: "The fact that it is probably illegal is perhaps the best feature of the bill." Two weeks after the governor signed the bill, the paper was more convinced than ever that it was "A Hopeless Muddle": "No other state has ever attempted anything quite as drastic as what Pennsylvania is about to do." In tandem with its concern, however, grew its conviction that no court would ever uphold the law.

Once Governor Earle had signed it into law, the newspaper conjectured that his administration's strategy of reducing unemployment by making it necessary for employers to hire additional workers might bring about the revival of National Recovery Administration codes as state officials began considering working schedules: "It was believed some industries, which found it possible to shorten hours by NRA codes, may agree or be called upon to agree, to work similar hours under the law."

The daily and periodical press outside Pennsylvania took extensive notice of the huge volume of legislation, especially in the social and labor fields, enacted in the commonwealth in 1937. Interestingly, however, even those articles that made special mention of the 44-hour law by and large failed to note its un-

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105 No. 567, § 11 at 2769.
107 *Keller, Pennsylvania's Little New Deal* at 186 n.12.
preceded newness—in particular, its inflexible prohibition of all overtime work and its inclusion of adult men.112

III

As soon as the governor signed the bill on July 2—on which occasion The New York Times did specify its unusual features without, however, explaining that they made the law unique113—and for the following five months until it went into effect, employers inundated the Department of Labor and Industry with requests for exemptions and variations. The application form for variations required the employer to describe the hardship claimed and to state the alternative hours sought in addition to information about the occupations involved and the name (if any) of the workers’ organization and the employer’s trade association.114 Although the Department, “[w]herever possible,” sought to “establish standards for industry groups, rather than for individual establishments,” it announced that “recognition will be taken of circumstances or conditions peculiar to an individual plant.” And in keeping with the basic purpose of the maximum hours law, the Department expressly put employers on notice that it “will not consider that an unnecessary hardship is imposed, if the grounds for appeal consist solely of a protest against the employment of additional persons.”115

Already on June 16, even before the governor had signed the bill, Bashore brought three high-ranking department officials to a meeting of the Industrial Board (an until then little known body appointed by the governor)116 to discuss new legislation including the 44-hour bill.117 As early as July 10, the president of the First National Bank of Pittsburgh, according to The New York Times, informed the Pennsylvania Bankers Association that the law “would interfere seriously with the operations of Pennsylvania banking institutions.” Frank Brooks expressed the hoped that the fixed maximum of 44 hours “might be

114The Department printed a copy of the form in Laborgraphic, August 1937, at 22.
suspended for banks” and that it might be averaged over a month to accommodate “unusual peaks” such as paydays and end-of-month statements. Without any explanation of its relevance, the Times also quoted the president of the Bankers Association as warning that the law “would mean ‘the changing of the watchman’s hours of duty at midnight, which is a dangerous thing to do.’”

On July 12, Bashore announced that the department and the Industrial Board would hold numerous hearings before taking action. Banks stated that they wanted a ruling permitting them to average employees’ hours over a month, thus dispensing them from complying with the daily and weekly maximums, provided that the hours averaged out to 44 weekly for the whole period. No lawsuit had been filed yet, but the press reported that one probably would be after regulations had been promulgated and that it would focus on the legality of the legislature’s delegation of power to the administrative agency. The state’s willingness to accommodate employers was in evidence early on when Bashore announced that the law would defer to existing collective bargaining agreements until they expired, thus permitting their overtime provisions to continue in force. Although he disavowed any authority to make regulations on his own initiative—as opposed to those based on employers’ applications—Bashore stated that the department would try to draft the regulations for the women’s 44-hour law, which went into effect on September 1, so that they would also apply to the general law.

At the same time, Bashore was also engaged in a kind of Machiavellian bureaucratic guerrilla warfare on behalf of a more stringent enforcement of the law. In the latter part of July he released what may have been a trial balloon giving an advance interpretation to the effect that virtually everyone paid more than $25 a week would be excluded from the law. The announcement came as an “astonishing surprise to legislative leaders who [had] guided the bills through the recent session.” Bashore declared that the department’s definition of bona fide executive “will be broad enough to cover practically every case in which a person is earning more than $25 a week.” The press reported that it was understood that behind this “‘wide open’” interpretation stood a belief that such a loose definition would lead to a wage increase for those earning less than $25; that is to say, the regulatory interpretation would in effect be used as a minimum wage law to bring up salaries in the lower brackets and employers would raise wages in order to escape the 44-hour restriction. By this logic, employers might prefer

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increasing the wages of experienced workers to hiring new employees. To be sure, this strategy would have turned the law and its purposes on their head by frustrating the expansion of employment through work-sharing and lengthening rather than shortening the workweek. No wonder, then, that Senator John H. Dent, a former United Rubber Workers Union official who had introduced the women’s 44-hour bill, immediately responded that Bashore’s interpretation would “defeat the purpose of the law.” Dent, declaring that “[t]hat was not the intention of the legislature at all,” stated that it had meant only full-fledged executives with the power to hire and fire. If the Department of Labor and Industry went ahead with its interpretation nonetheless, “[a]ll the Legislature’s work will have been a waste of time. ... Why, under that interpretation, even the present 54-hour law for women could be violated. By making a girl “executive” [sic] at $25 a week, employers could keep her at work any number of hours.”

Editorially The Pittsburgh Press sympathized with Bashore’s goal of increasing extremely low wages; ironically, the paper also viewed it as the most sensible decision he could make under the circumstances: “The more people exempted from its [the law’s] provisions the less chance of creating business chaos which strict enforcement of the act would have brought.” At the same time, however, the editors saw Bashore’s initiative as a startling illustration of the impermissible grant of legislative powers: “By a slight twist of the wrist, as it were, the 44-hour bills...have been changed from maximum-hours laws to minimum-wage laws.” Such legislation was the product of a body “making a play for labor votes...passing almost anything that certain labor politicians handed to it.”

On July 28, Bashore called a special meeting of the Industrial Board to “discuss procedure for handling appeals for variation in schedules of hours established” under the new hours laws, particularly under the women’s law, which was to go into effect in a month. In addition to high-ranking department officials, Bashore also brought two officials from the U.S. Department of Labor. As the first item of business, Bashore announced that a new bureau had been formed within the Department and designated the Bureau of Hours and Minimum Wages. Then as background to the appeals procedure, Bashore made it clear

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124 Enactment of the two hours laws and a minimum wage law in 1937 necessitated creation of the Bureau of Wages and Hours, which studied the petitions for variations
that his approach would not be adversarial or confrontational:

Mr. Bashore stated his conviction that the policy of the Department in administration of this act should be one of earnest effort to meet the practical problems of industry and labor. He also indicated that the Department would endeavor to obtain the confidence of both employers and labor so that a feeling of antagonism is not generated against these two new labor laws. He further indicated his belief that the filing of a petition for variation should automatically act as a stay on efforts of the Department to place into effect the strict schedule of hours provided by the new laws to the end that unreasonable hardship is not invoked on any employer or employe.1 25

The Board then proceeded to approve one key definition. After “considerable discussion” it defined an “executive” as “one who is responsible for managing a business or a subdivision thereof and who directs or supervises subordinates” (thus revealing Bashore’s threat to define the term expansively as a bluff). No action was taken on a proposed definition of “learned professions” or of “peak periods” (which was deemed better dealt with through individual petitions), while action was deferred on that of an “emergency” as “a situation resulting from fire, flood, storm, epidemic of sickness, or other similar causes which requires [sic] labor for longer than eight hours per day or forty-four hours per week in order that life, health or the public service may be preserved.” The Board also instructed the Bureau of Hours and Minimum Wages to consider other issues such as “which employees shall be affected, whether it is service or machine breakdown, also whether destruction of property can be included.”126

Following the appearance of two officials of the Hotel and Restaurant Em-

submitted to the Industrial Board and held conferences and hearings with petitioning employers. The Bureau also visited petitioners in an attempt to “solve the problem for the employer without the necessity of an exception.” Pennsylvania Department of Labor and Industry, Biennium Report 1937-1938, at 93-104 (quote at 95) (1939).

125Minutes of Special Meeting of Industrial Board, Harrisburg, Pennsylvania, July 28, 1937.

126Minutes of Special Meeting of Industrial Board, Harrisburg, Pennsylvania, July 28, 1937. According to a newspaper account, the Board also decided that machine breakdowns qualified as emergencies only if they involved serious loss of working time by other employees if they were not corrected immediately, but no such decision appears in the minutes. Robert Taylor, “Hour-Exempt Firms Told to Pay Overtime,” Pittsburgh Press, July 29, 1937, at 1:1. The regulatory definition of “emergency” was applied in later Rule G-2, which permitted employers to employ workers “whose duties are directly connected with such emergency” to work more than 8 hours a day or 44 hours a week. Regulations • Interpretations • Definitions Approved by Industrial Board and Promulgated by Secretary of Labor and Industry, Approved December 9, 1937, General 44 Hour Week Law and Woman’s 44 Hour Week Laws, in Laborgraphic, Dec. 1937, at 18, 19.
ployees International Alliance who presented an appeal for a variation of scheduled hours for their industry, but were informed that they had to submit a specific appeal which the Board would study, the Board then approved several substantive regulations. In addition to prescribing generally that “[t]he eight hours of work permitted by law shall be performed within ten consecutive hours,” in what would become a general principle transforming the maximum-hours regime into a mere overtime law, the Board approved the following seasonal rule for the canning industry:

For one period in the year, not to exceed twelve weeks, employees engaged in canning, drying or packing fruits and vegetables may be employed for not more than ten hours in any one day, or more than fifty-four hours in any one week or more than six days in any seven. All hours worked over eight in any day or over forty-four in any week shall be paid for at the rate of time and a half the regular rate whether that rate be based on time or piece work.127

Finally, after not approving regulations designed to permit six-hour shifts, the Board immunized employers against enforcement for any violations based on the terms of union contracts antedating the effective date of the women’s hour law:

Existing contracts involving hours of work in excess of those allowed by law can be permitted to stand until their termination provided that they were negotiated prior to September 1, 1937 and are the result of bona fide collective bargaining...and further provided that...the schedules of hours shall revert to the prescribed schedules set forth in the laws and regulations administered by the Department after termination of existing contracts.128

As the summer wore on and the effective date (September 1) of the women’s 44-hour law approached—the regulations for which the department announced would be applied to the general 44-hour law as well129—employers’ complaints

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127Minutes of Special Meeting of Industrial Board, Harrisburg, Pennsylvania, July 28, 1937. In the final Rule S-4 the specific hours limit for canning was removed. Regulations • Interpretations • Definitions Approved by Industrial Board and Promulgated by Secretary of Labor and Industry, Approved December 9, 1937, General 44 Hour Week Law and Woman’s 44 Hour Week Laws, in Laborgraphic, Dec. 1937, at 18, 25; Commonwealth of Pennsylvania, Department of Labor and Industry, “Rules and Regulations of the Department of Labor and Industry, as Approved by the Industrial Board, with respect to the General and Woman’s 44-Hour Week Laws” (Dec. 29, 1937), reprinted in Holgate Bros. Co. v. Bashore, Brief for Appellants at 218.

128Minutes of Special Meeting of Industrial Board, Harrisburg, Pennsylvania, July 28, 1937.

129“State Studies Regulation of Women’s Work,” Pittsburgh Press, Aug. 10, 1937,
and the contours of the regulatory regime became clearer. At the beginning of August it was announced that the Industrial Board would study the question of continuous-operations industries at its August 11 meeting. In the meantime, the glass industry was asking for a variation because it operated on six-hour shifts, of which workers worked 13 every two weeks, thus averaging 39 hours per week; if the industry went over to a five-day week, then workers would get only 30 hours. Despite this flurry of preparation and accommodation, and while the Department was predicting that the law would yield jobs for 75,000 workers, 130 the press was also reporting that the law would undergo a court test before its effective date of December 1.131 Nor was the press merely reporting about the law: in mid-August the Pennsylvania Newspaper Publishers Association itself applied for an exemption.132

In August the Department also devoted the entire issue of its magazine Laborgraphic to the two 44-hour laws, which Bashore on the inside front cover characterized as protecting the health of employed workers and “provid[ing work for others who are unemployed.”133 And despite the focus on accommodation, the publication’s question-and-answer section forthrightly advised employers concerning what was arguably the statute’s most intrusive provision: “May an employee work for more than one employer? Yes. But the total hours worked must not be more than 44 in any one week, or 8 in any one day.”134

At its regular meeting on August 18, the Industrial Board took action on several of its earlier definitions and rules. To the definition of “executive” it added that such a person had to earn at least $25 per week. It also unanimously approved this regulation allowing the exclusion of secretaries to executives: “Secretaries who are exempt under the labor laws of the Commonwealth are not subject to the hour provisions of these laws provided they earn at least twenty-five dollars per week.” The Board then approved this coordinate definition: “A secretary is a person who renders services which are of a private and confidential nature and are a component part of the work of an executive as defined in the regulations of the Department.” The Industrial Board also adopted minor changes in the definition of “emergency” (adding “Acts of God” and destruction of property), and reduced the permissible ceiling on seasonal canning from 54 to 48

133 Laborgraphic, Aug. 1937, at 1.
On the eve of the effective date of the women’s 44-hour law, the Industrial Board held a special two-day meeting on August 30-31, attended again by high-ranking Department officials as well as one from the U.S. Department of Labor. The Board’s actions were focused on the adoption of general regulations and consideration of petitions for variations. The actions under the first heading (all of which were adopted unanimously) included: the half-day of work could be increased from four to five hours in any week in which employees worked fewer than 44 hours; employers were authorized to permit employees to work six consecutive hours if they were then dismissed for the day and allowed a 15-minute rest period during the workday; and employers employing workers on a full-time regular schedule of five consecutive days per week were authorized to permit them to work not more than nine hours in any one day, but not beyond 44 hours in any week.

The petitions for variations were dealt with on an industry basis. With regard to a large number of petitions that the Bureau of Hours and Minimum Wages had grouped under the classification “manufacturing,” the Board, after “considerable discussion,” concluded that employers whose problems had been resolved by means of general regulations should be so notified, whereas those with “more complicated” problems should be informed that the Board would have to study them further, but that in the interim any schedule of hours exceeding 44 per week “should be deemed a violation of the law.” After denying a request by hairdressers for a variation, the Board unanimously approved a regulation permitting laundries to work their employees up to ten hours on one selected day within a 44-hour week, provided that those additional hours were paid at time and a half the regular rate. Similarly, the Board unanimously approved a regulation authorizing retail trade employers to permit their employees to work up to ten hours on Saturday and any day immediately preceding a legal holiday on which employees were not permitted to work, provided that all hours beyond eight on such long days were paid at time and a half. Another regulation authorized hospitals, until the end of the current fiscal year, to permit employees to work as many as ten hours a day and 48 hours a week. Also unanimously approved was a regulation


permitting banks (until such time as the Board completed a study of banks’ problems in conforming to the law) to employ employees (who were paid on an annual salary basis and were not laid off without pay during slack periods) up to ten hours a day and 54 hours a week, provided that these hours averaged 40 (instead of 44) per week over a 13-week period. Based on information gathered at a public meeting, the Board rescinded the canning regulation that it had approved on July 28 and revised on August 18 and unanimously approved a new regulation permitting canning employers during the season to employ workers beyond the statutory hours, provided that all daily hours beyond eight were paid at time and a half, employees were allowed a half-hour lunch period for each five hours of employment, and that all work took place between 6 a.m. and 10 p.m. The Board also unanimously approved a regulation recommended by the Bureau of Hours and Minimum Wages authorizing newspaper publishers to permit workers to work more than eight hours a day, within a 44-hour week, to “prevent a sudden and unreasonable termination of service to the public,” provided time and a half was paid for hours beyond eight daily. Finally, a similar regulation was approved for public utilities, which, however, capped daily hours at ten.137

On September 1, as the women’s 44-hour law went into effect, the Department of Labor and Industry’s warning against chiseling was front-page news: whenever the Department granted an employer an exemption from the eight-hour day, it would have to pay time and a half “‘as a means of self-enforcement and the prevention of abuse by sharply increasing the cost to employers.’”138 (An employer who asked at a Pennsylvania Electrical Association convention where the Industrial Board derived its power to condition an exemption on the payment of time and a half, received no satisfactory answer.)139 Moreover, whenever the Department permitted an employer to average its employees’ hours over a period longer than a week, that average would be 40 hours (instead of 44), thus extracting a price from employers for the added flexibility.140 A week later, Bashore threatened to seek minimum wage legislation if employers continued to reduce wages in response to the shorter hours brought about by the women’s 44-hours

137 Minutes of Special Meeting of Industrial Board, Harrisburg, Pennsylvania, August 30-31, 1937.
140 Taylor, “‘No Chiseling on Hours Law,’ State Warns.” Bashore also called it “demand[ing] from the employer some penalty, as it were, so as to be able to better enforce the act.” Bashore, “Role of State Labor Commissioners in the Improvement of Labor Legislation” at 171.
law. Bashore's concerns may have been similar to those voiced by reformers a few years earlier, who had warned that reducing hours under the National Recovery Administration codes without increasing wage would undermine the objective of spreading employment since the affected workers would simply look for another job in order to make ends meet.

After instructing the Bureau of Hours and Minimum Wages at its regular monthly meeting on September 23 to draft a proper regulation allowing overtime in the event of an emergency and another covering machine breakdown, the Industrial Board at its special meeting on September 29 revised the regulation concerning emergencies to read: "In any situation falling within the interpretation of an emergency...employers may permit employes whose duties are directly connected with such emergency to work more than eight hours in one day and more than five and one-half days in one week and more than forty-four hours a week for the period of the emergency." With regard to machine breakdowns, the Board approved this regulation: "Employers may permit employes to work beyond the maximum daily hours when it appears that such employment was to make up time lost in the same week resulting from alterations, repairs or accidents to machinery or plant upon which they are employed and dependent for employment; provided that no stopping of machinery for less than thirty consecutive minutes shall justify such overtime employment, nor shall such overtime employment be legal unless a written report of the same is sent to the Secretary of Labor and Industry; and further provided that no employe shall be permitted to work more than two hours overtime during any one day, or more than forty-four hours per week."

At the same meeting, after representatives of Sears, Roebuck and Company appeared to explain their "need for additional time over" that provided by the law for periods of three weeks before Christmas, two weeks before Easter, and two weeks of inventory, the Board requested that the Bureau of Hours and Minimum Wages present at a later meeting a general regulation for mail order houses

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142 Storrs, *Civilizing Capitalism* at 103.
providing for time and one-half for all overtime.\textsuperscript{145}

At its regular monthly meeting on October 14, the Industrial Board, in response to petitions involving peak periods, approved a regulation under the women's law authorizing manufacturing and retail trade employers to permit employees during inventory and seasonal peak periods to work up to ten hours a day and 48 hours a week for up to five weeks per year, provided that the employers filed the proposed schedule in advance with the Secretary of Labor and paid time and a half for all hours beyond eight per day or 44 per week.\textsuperscript{146} The Board then informed the Department that it would not consider any further regulations concerning the women's hour law because it needed to focus on preparing proper regulations applying to the general hours law.

A few weeks before the general law was to go into effect, The Pittsburgh Press chose to illustrate the complications associated with compliance by reference to one of the state's and country's largest employers, the steel industry: “On the surface, the State law limiting the week to 44 hours should exert no undue hardship on steel manufacturers, fabricators and processors” because a preponderant majority either were operating under a 40-hour contract with the Steel Workers Organizing Committee (SWOC) or had “arbitrarily” established a 40-hour week in conformity with the trend. The problem was that the average weekly hours of 39.9 included tens of thousands of workers working 48 hours; alone in the period from April to September 1937 they had worked a total of 28 million overtime hours for an additional $25 million. From the newspaper's perspective: “The question which plagues these men is: Will the 44-hour law require them to split this 60-million-dollar-a-year melon with someone else?” The SWOC, in turn, claimed that the 1,200,000 hours of overtime worked weekly by 160,000 workers (at least until the recent slump) was “negligible.” Since a fundamental purpose of the maximum hours legislation was to spread employment, the paper conjectured that the Industrial Board might not be very receptive to the steel industry's proposal to average the hours worked in continuous operations on a monthly basis. Where a crew worked 40 hours three weeks and 48 hours the fourth week, it would average only 42 hours; that regime might not violate the spirit of the law, but “there is evidence that the Board might regard it as out of harmony with the intent.” If the principle that the Board had imposed on the banks—permitting them to work women 10 hours a day and 54 hours a week, but

\textsuperscript{145}Minutes of Special Meeting of Industrial Board, Harrisburg, Pennsylvania, September 29, 1937.

as a "‘tax’" capping the 13-week average at 40 hours—were applied to the steel industry, employers, wedged between the law and collective bargaining agreements, would be slow to take advantage of the exemption: With the agreements requiring overtime premiums after eight hours and the law limiting the workweek to an average of 40 hours over 13 weeks, the return in man-hours would be the same, but the expense might be considerably greater. For one large steel company the newspaper offered a possible "‘out’": if the employer could persuade the Board that, given the shortage of labor, work was "‘unspreadable’" among the skilled workers who were averaging four hours of overtime weekly costing $1.25 million a month. For all these reasons, The Pittsburgh Press argued, steel companies and workers had been singled out as "‘guinea pigs’ in the nationwide experiment with maximum hours legislation."

There is little doubt that the Pennsylvania statute will have received a vigorous practical workout by the time Congress...is ready to start writing Federal wage and hour regulations. The Washington lawmakers are expected to profit by Pennsylvania’s experience.147

Since there was no "nationwide experiment with maximum hours legislation"—which was in fact confined to Pennsylvania—and by October 1937 it was obvious that Congress would enact only an overtime law, which would exert only a financial disincentive on employers, The Pittsburgh Press was misinformed and Congress and the federal regulators would have nothing to learn from experience with the state law. Moreover, given the generosity with which the Industrial Board was already planning to hand out hardship exemptions, there was little enough left of a maximum hours law from which another legislature could learn anything anyway.

As the day approached on which the general hours law was to take effect, the head of the Bureau of Hours and Minimum Wages within the Department of Labor and Industry, James Lappan, sought to calm down employers, who had already filed hundreds of petitions. Addressing the Pittsburgh Chamber of Commerce at the end of October, he stressed that he was not thinking in terms of penalties and fines; rather, he would serve in a "‘missionary’" capacity in order to get the plan underway efficiently. Despite the effort to focus on the commonsense policy that he would pursue, Lappan did not attempt to hide the rigorous restrictions imposed by the new law. Thus, when asked about people who worked eight hours for one employer and then additional hours for another employer on the same day, Lappan did not flinch from declaring that (under this very unusual provision in the law, which, surprisingly, was never amended in the

legislature and appears not to have inspired any editorial ire or employer complaints), the second employment would be forbidden.\textsuperscript{148} And when another questioner said that compliance with the law would force the owner of a small 24-hour restaurant to hire additional workers with the likely result that his profits would be seriously curtailed or he would be driven out of business, Lappan forth­rightly replied that one of the reasons for the law was to provide for additional employment; nevertheless, he added that if an employer would be driven out of business, he could file a petition with the department for a hardship variation.\textsuperscript{149}

By November, Bashore was constrained to admit that he had been bluffing: the intent of the law was to maintain wages while re-employing the unemployed (of whom there more than one million in Pennsylvania or 10.2 percent of the total population)\textsuperscript{150}—and in fact during the first two months the women's 44-hour law was in effect, employment in the affected trades had risen 10 to 15 percent—he lacked the power to prevent employers from lowering wages when the workweek dropped from 48 to 44 hours. At the same time, the head of the State Federation of Labor, John Phillips, denied that the unions feared heavy losses resulting from the compulsory abolition of overtime: Labor wanted to spread employment and restricting individual working hours was one way to achieve that goal.\textsuperscript{151}

On the eve of the effective date of the new law, Bashore admitted "the law standing alone will not bring about the results he so fondly desires. He said it

\textsuperscript{148}Even the employers' briefs submitted to the Supreme Court, which railed against the law for regulating "adult males capable of contracting concerning their own services," never mentioned it. For example, plaintiffs complained that the law "bears heavily upon the employees themselves, and in the most arbitrary and discriminatory manner, in that many of them are engaged in seasonal occupations whereby they must work overtime a portion of the year at increased wages in order to make enough money to support their families during the balance of the year when work is slack." The brief is remarkable for having come tantalizingly close to the provision without raising the obvious parallel issue of denying workers the right to work more than eight hours for several employers: "The act prevents a man from working more than eight hours for any employer. It does not prevent him from working eight hours for himself and thereafter working eight hours in the same day for an employer." Brief for Appellees at 16-19. Holgate Bros. Co. v. Bashore, 331 Pa. 255 (1938). Since the provision prevented low-wage workers from making ends meet by working at several jobs, it suggests how strongly the legislature prioritized work-sharing.


should be fortified by a minimum wage law, because under the system about to become operative, many workers engaged upon an hourly basis, will find their income lessened." Specifically, Bashore conceded that "some workers will get reduced wages, but that would be corrected if we had a minimum wage law. There was a minimum law introduced at the last session, but it was lost in the shuffle. I am going to recommend that a similar bill be included in the program if a special session of the legislature is called by the Governor."\(^\text{152}\)

With regard to the same predicament under the women's 44-hour law Bashore had not been bluffing because in 1937 the legislature had in fact enacted a minimum wage law for women, which created wage boards to establish minimum fair wages for women in various industries.\(^\text{153}\) As a result, Bashore was able to announce in October 1937 that since the effective date of the women's 44-hour law on September 1, "reports have reached this Department that certain employers, while reducing the working hours of their employees in accordance with the law have, at the same time, cut weekly wages. Such wage cutting violates the intent of wage and hour legislation. Where investigation discloses that wages being paid in any occupation are below the minimum fair wage recommended by the wage board making the investigation, immediate action will be taken."\(^\text{154}\)

This aspect of the general 44-hour law, according to *The Pittsburgh Press*, had prompted fears (presumably among employers) that the law might "become a fruitful source of industrial complaints, due to the Labor Department's decision that it cannot prevent reductions of pay in the cases of workers who are now employed more than 44 hours and whose hourly earnings are not changed when their length of employment is reduced."\(^\text{155}\)

For a week, from November 12 to 19, the Industrial Board held hearings on employers' requests for exemptions and variations from the statute that generated

\(^{152}\)John Cummings, "44-Hour Law Puts Fate of Industries in Dictator's Hands," *Philadelphia Inquirer*, Nov. 30, 1937, at 1:1-2, at 27:1. House Bill 330, which was introduced on Jan. 26, 1937, by Representative Falkenstein, would have authorized the Department of Labor and Industry to establish a minimum fair wage standard for men, women, and minors by means of wage boards. It was referred to the Committee on Labor and Industry and no further action was taken on it. Commonwealth of Pennsylvania, *Legislative Journal* 206 (1937). Falkenstein also introduced a 35-hour bill, which also died in committee. *Id.* at 43. Under the FLSA, which included a minimum wage, some employers who had been paying workers more than the minimum wage reduced the wage to the minimum wage in order to comply with the overtime provision without incurring increased wage costs. See below ch. 8.


The Autocratically Flexible Workplace

thousands of pages of testimony. The out set the *Harrisburg Telegraph* welcomed the hearings, praising the Department for having wisely adopted the same course it had successfully pursued in connection with the women's hours law: "Vast readjustments hav[ing] been necessitated," the hearings recognized "the right of appeal before an act goes into effect." The possibility that employers had not yet decided to acquiesce in the finality of the new law was raised by the *Telegraph's* report of predictions made on the first day of the hearings that "the Board was likely to hear plenty about the law next year and that it might be a subject of legislative battling in 1939."

The structure of contested positions was adequately captured by the opening day of hearings on the wood-working industries. Furniture employers asserted that skilled workers were so scarce that reducing the workweek from 56 or 52 to 44 hours would cripple output during peak seasons and place the industry "at the mercy of ruthless competition from other states" not subject to hours regulation. One employers' representative urged the Department to make the law contingent on the establishment of federal wage regulation. In contrast, workers charged that small furniture manufacturers were stifling reemployment by seeking exemptions from the 44-hour week.

At one hearing printing industry employers pointed to the need for dealing with peak periods and asked for 13-week averaging of hours; others expressed fears of loss of business to neighboring Ohio. At another hearing employers

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156 "State Board Hears Appeals on Hours Law," *Pittsburgh Press*, Nov. 18, 1937, at 18:1. The testimony was transcribed, but according to Jonathan Stayer of the Pennsylvania State Archives, the records have not survived. Robert Taylor, "Hours Relaxed for Aluminum, Steel Workers," *Pittsburgh Press*, Nov. 21, 1937, at 7:1; telephone interview with Stayer, Harrisburg (Oct. 24, 2001). Nevertheless, in 1939 the Department of Labor and Industry listed among its "Miscellaneous Publications" available free of charge: *Minutes of Public Hearings on Woman’s Forty-four-Hour Week Law and the General Forty-four-Hour Week Law—1937*. Pennsylvania Department of Labor and Industry, *Biennium Report 1937-1938*, at 169 (1939). Unfortunately, if the publication actually ever existed, it has disappeared from the bibliographic face of the earth: neither the Pennsylvania State Library nor the Pennsylvania State Archives nor the Pennsylvania Department of Labor and Industry nor the Pennsylvania Senate Library has a catalog entry for it; it also does not appear in the electronic library catalogs of the University of Pennsylvania, Pennsylvania State University, University of Pittsburgh, the Library of Congress, or in any included on RLIN or OCLC.


asked for exemptions for watchmen, truck drivers, engineers, and firemen. In the welter of all these requests for variations, Secretary Bashore "indicated that 'extreme flexibility'" would characterize administration of the law, while members of the Industrial Board stated that the hours established in bona fide labor agreements would take precedence. Flexibility was also the watchword when the question was raised at a hearing on personal services as to "what would happen if the time limit on a barber came when he was in the midst of shaving a customer." (As Bashore declared a few days later: "'We're going to be reasonable about enforcing this law. Any such service may be completed, whether it's a hairdresser, a barber, a waiter or other classification in service occupations.") After employers made it clear at the hearings that lunch and rest periods prescribed by the law were one of their chief objections, Bashore told representatives of railroads and bus lines: "I think we can very easily allow a 30-minute lunch and rest period to be broken up into lay-over at the end of bus and street car lines." When textile employers requested 10-hour days within the limits of 44-hour weeks and exemptions for maintenance workers, watchmen, and powerhouse employees, the Textile Workers Organizing Committee opposed any exemption and demanded shorter hours and higher pay for these groups. When Western Union and its rival, the Postal Telegraph Company, jointly petitioned for exemptions to work employees in small towns more than 44 hours, the AFL and the CIO resisted. Noting that Postal Telegraph had gone behind the women's 44-hour law when it went into effect and cut wages, the CIO representative demanded strict enforcement. In one of the more flamboyant presentations, the representative of drillers and tool dressers employed by the Pennsylvania Natural Gas Men's Association requested 48-hour and seven-day weeks in case of cave-ins—otherwise "you'd have to have two or three State dicks with shotguns to enforce the law and one of them would probably be shot the first day." John Edelman, the CIO's regional supervisor for Eastern Pennsylvania,
opposed paper manufacturers’ request for exemptions for emergencies, but stated that the union would not object to the extension of hours in the case of emergencies, provided that all industries be required to report all such emergencies “to prevent chiseling employers from taking advantage of exemptions.” The AFL and the CIO joined forces in demanding strict enforcement of the law against hotels and restaurants, whose representatives had pleaded large indebtedness and overhead as grounds for granting them exemptions. While waiters, bartenders, cooks, elevator operators, and busboys from various AFL unions testified that their conditions had improved under contracts calling for 48-hour weeks and would be improved further under the statutory 44-hour week, Edelman charged: “The hotel men are taking their rotten investments out of the workers’ hide.”

At the hearing on retail and wholesale businesses, the hearing examiner “caused broad smiles...by dropping hints as to likely exemptions” in the form of “a series of ‘ifs’” such as: “If in the case of outside salesmen and like problems, the board should continue the 44-hour law with an unlimited day, would that solve your problem?” At the final day of hearings, eighteen of the biggest steel firms filed a joint petition requesting exemptions from schedule posting and lunch hour requirements for various workers, which the CIO challenged on the grounds that the industry had instituted numerous layoffs just in the months since the law had been enacted.

The Philadelphia Inquirer asserted that “[l]abor chieftains of the craft union persuasion are not friendly to the law,” which drew its main labor support from the CIO. Nevertheless, employees who testified opposed nearly every one of the scores of employer applications. Edelman of the CIO appeared at every meeting to oppose all variations except for “‘real emergencies’” and held out for time and a half compensation for all overtime hours. The tenor of the hearings, according to a report in The Pittsburgh Press, was to permit overtime work during emergencies and peak periods provided that time and a half were paid. To be sure, some union representatives sought greater accommodations on behalf of employers. Laundry workers organized by a union affiliated with the AFL
wanted a 48-hour week and a maximum workday of 12 hours. The Aluminum Workers of America requested a variation from the 30-minute lunch period rule on the grounds that compliance with it in this continuous process industry would cause shutdowns and lower by $300,000 the annual wages of 3,000 workers. Window cleaners joined with their employers in seeking 10-hour days and weekly hours averaged over three months. Restaurants requested 48-hour weeks and barbers 54 hours. The Pennsylvania oil industry demanded total exemption because compliance would cause a "real hardship" and the added cost could not be passed on to consumers.171

As the hearings ended, the Harrisburg Telegraph saluted them as a site of displaced class struggle:

Before the hearings...passed a procession of influential men in the greatest of Pennsylvania industries, winding up with the spokesmen for the vast iron and steel interests. In many respects, chiefly personnel, the hearings were remarkable. Literally billions and billions of invested capital were represented and militant labor groups contested their application.172

Following an all-day conference on the exceptions requested by employers, the Industrial Board issued several fundamental regulations on November 22, which were adopted verbatim from the regulations that had been issued under the women’s 44-hour law. In addition to the aforementioned definitions of "executive" and "secretary," the Board specified that such secretaries were not subject to the hours provision if they earned at least $25 per week. Employers were deemed to be in compliance if they employed workers six days a week for six hours a day, provided that they were then dismissed and not permitted to work any other part of the day and were allowed a 15-minute rest period. Existing labor agreements permitting hours exceeding those of the statute were permitted to continue until their termination provided that they had been negotiated before December 1, 1937, and were the result of bona fide collective bargaining, and that the schedule of hours reverted to the statutorily required after the agreement expired. Minors under 18 years of age were not subject to any of the variations granted for employees over the age of 18.173

171“State Board Hears Appeals on Hours Law” (quote); “Ifs’ Brings Smiles in 44-Hour Hearing” (quote).
Bashore sought to reassure employers that his rulings would be reasonable and flexible and that “we certainly do not intend to stifle business enterprise.” He explained the law’s two main objectives as protecting public health and welfare “by preventing employers from working employes an unreasonably long number of hours” and creating jobs. Or as he varied the description of the guidelines the Department was following: relieving unemployment and insuring that regulations did not cause more unemployment. Bashore reinforced his image of reasonableness by announcing that the statutory category of excluded learned professions would encompass more occupations than medicine, law, and the ministry: “We also must consider the creative workers, the writers, the artists and other occupations in which brain-work cannot sensibly be regulated by law.” But contrary to his promise that a list would soon be issued, the Board never resolved the issue.

On November 23 Attorney General Charles Margiotti issued an opinion in response to a question from Bashore that significantly heightened the tension over the new law and gave employers powerful new allies in their opposition to the 44-hour week. Margiotti conceded that the fact that the same session of the legislature expressly had amended the special hours law for women to apply to the Commonwealth and its political subdivisions, whereas it had remained silent on the issue in the general hours law, could be taken as creating a presumption that the latter did not apply to governments. Nevertheless, with respect to a statute “of the type of” the latter, “we feel that any such presumption is overwhelmed by the fact that the legislature certainly intended the Commonwealth to act as an example in safeguarding the welfare of its employes. ... Any other result could only be attained by resort to rules of construction whose application in the circumstances would be highly artificial.” This feeling was based on the view that the law “is all inclusive in its terms and its purpose and objective are entirely clear. It certainly occupies a high position among the beneficial and humanitarian statutes which have been enacted in the Commonwealth of Penn-

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176 44-Hr. Law Not to Hurt Industry, Bashore Says.”
177 1937 Pa. Laws, No. 322, sect. 1 at 1547, 1548. In the same opinion Margiotti concluded in response to another question from Bashore that the general law did not by implication operate to repeal all or a portion of the women’s law; rather, “the legislature likely felt that...it would be most expedient...to allow Act No. 322 to stand as an exception to that act insofar as its provisions supply [sic] those of Act No. 567.” 1937 Att’y Gen. Op. No. 232, at 65, 69.

sylvania from time to time. The benefits which it is designed to confer should be conferred upon the employes of the Commonwealth and its political subdivisions as well as upon employes in general."178 As if inviting a lawsuit, the attorney general observed: "Of course local authorities may if they wish contest the decision in the courts."179

With the law due to go into effect in a week, the reaction was immediate, predictable, and worthy of front-page headlines: "Faced with the possibility of a tremendous increase in payrolls," municipalities "throughout the state prepared to fight the ruling." In Philadelphia, the state’s largest city, 4,500 police were scheduled to work 48 hours a week, while firemen were on duty up to 84 hours weekly; for 1938, the city estimated that it would cost two million dollars to limit these workers’ weekly hours to 44. Other municipal workers, especially in the public works department, also worked more than 44 hours; clerks, most of whom worked less than 40 hours, were the chief exception. Mayor S. Davis Wilson, declaring that he was "very much in favor of the law," announced that Philadelphia had "already taken steps to comply, but we cannot do so 100 per cent because of financial conditions." The city had, for example, created 338 new positions for firefighters in the 1938 budget so that they would work "only" 72 hours with a 24-hour rest period. Bizarrely, a week later, the mayor was saying that the city could comply with the law at least as of January 1, 1938, when the budget provided for filling 300 police vacancies, without any additional financial burden. And the very next day, at an Industrial Board hearing for municipalities, Wilson bluntly declared: "The law is unconstitutional anyway. Why worry about it?"182 The city of Pittsburgh, too, sought exemptions with regard to police and firemen.183 The police and firefighters themselves adamantly opposed any effort to exclude them from the protection of the new law.184 This confusion prompted the Harrisburg Telegraph on November 27 to urge a court test of what "folk" in


183 "City to Fight Shorter Week for Employees," Pittsburgh Press, Nov. 26, 1937, at 1, col. 4.

“official, business and industrial circles...have come to calling...‘old 44.’”185 Two
days later the paper divulged the existence of a multi-pronged movement of
municipalities and businesses headed toward such a lawsuit. Indeed, it noted that
reports had been circulating since the women’s law went into effect in September
that the general law would be contested; it was only the Board’s “[t]actfulness”
in conducting the hearings in November that had “headed off what looked like
preliminaries in a court action.” Industrial employers were merely waiting to
gauge the “tenor” of the Board’s rulings on petitions for variances and exemp­
tions before filing suit.186

An Industrial Board hearing on November 30 designed to solicit the views
of municipal representatives on the 44-hour law heard the president of the Penn­
sylvania League of Third Class Cities—who had been mobilizing support for a
test suit187—demand an exemption for a whole year in order to prepare financially
for compliance. Various city officials’ claims that they were unable to comply
provoked contradiction from employees in attendance. A Democratic Congress­
man from Pittsburgh, Henry Ellenbogen, declared that that city was in fact able
to comply; he then called on some policemen and firemen, who “urged they ‘be
given a chance to see their families once in a while.’” The comments by David
Kanes, the regional representative of the State, County and Municipal Workers
of America, a CIO affiliate, perceptibly heated up the clash between labor and
management: “Many government departments in their labor policies are far
below the standards set in industry. How can government urge industry to
establish better working conditions, shorter hours and a living wage if it itself
continues to maintain sweatshop conditions? The people of Pennsylvania would
not tolerate a work week of seventy-two hours for employes of many government
institutions.” When Thomas Crosswaite, president of the State Association of
Boroughs, protested that municipal government was “‘not operated for profit’”
and that there were “‘no sweatshops.’” Secretary Bashore, referring to infor­
mation brought out earlier by firemen, asked: “‘What do you call working an em­
ployee eighty-four hours a week?’” Unfazed, Crosswaite shot back that the fire­
men “‘loaf’ most of the time they are on duty,” especially since a borough often
had only one fire a week: “‘The municipal employees are not overworked.’” Bashore also spoke up for the law when he called working watch engineers at a
city sewage disposal plant worked ten hours a day seven days a week “unfair.”188

186iCities and Industry May Join to Test 44-Hour Act,” Harrisburg Telegraph, Nov.
187iLeague of Third Class Cities May Test 44-Hr. Week,” Patriot, Nov. 27, 1937, at
1:8.
188iCIO Speech Angers Borough Officials at 44-Hr. Hearing,” Patriot, Dec. 1, 1937,
Toward the end of the day, the meeting "broke out into disorder" as city
officials responded to remarks by John Edelman, the CIO’s regional director from
Philadelphia: "I am shocked at the attitude of most of the people here today. The
_city officials knew this law was coming, but they did nothing about it, because
they thought it would be declared unconstitutional, so why worry about it."
Some of the 150 city officials in attendance promptly "rose in a body and stalked
out of the room. Others hissed and booed until Edelman was forced to stop talk-
ing." When rhetorically challenged to justify his presence there, Edelman replied
that he represented "the vast majority of wage earners of Pennsylvania" and that
he was "fighting against exemptions for small communities," where the CIO
had some members. 189

In spite of his critical comments and questions, Bashore—who had endeared
himself to some editorial pages by promising to issue "sane" interpretations and
not to be a bull in a china shop 190—quickly assured the officials that munici-
palities would receive an exemption making the disruption of their budgets un-
necessary, provided that they made all reasonable attempts to comply with the
new law. 191 Nevertheless, the decision to postpone enforcement by a month, in-
stead of forestalling conflict between municipal employers and their employees
and unions, had turned the November 30 public hearing on the law’s applicability
to local government into an even more contentious forum and made the move
toward judicial resolution seem even more likely. 192

At the same November 30 hearing Attorney General Margiotti’s version of
the genesis of the statute was brought to light as his clash with the Earle ad-
ministration began intensifying in tandem with the maturation of his own political
aspirations. Margiotti had warned at and outside cabinet meetings that two pro-
visions of the draft bill were unconstitutional and would not withstand judicial
scrutiny. In order to avoid subjecting employers and workers to burdensome
adjustments, he had urged that a friendly test suit be brought before the Supreme
Court long before the law’s effective data. Governor Earle agreed as to the
propriety of this procedure, but according to Margiotti’s version, Bashore’s in-

189 "CIO Speech Angers Borough Officials at 44-Hr. Hearing" at 1:8. See also
1:1.
192 "New 44-Hour Act Heads for Courts As Cities Protest,” Harrisburg Telegraph,
fluence interfered. Though persuaded of the law’s unconstitutionality, Margiotti and others sympathized with its general aim, while fearing that it would disadvantage Pennsylvania vis-à-vis neighboring states. In Margiotti’s scenario, Bashore himself had proposed the bill at a cabinet meeting during the early stages of the legislative session about the time the cabinet abolished the procedure under which the Attorney General’s office drafted administration bills; instead, each department chief took over that responsibility. At the cabinet meeting Bashore explained his bill “as a bid to consolidate the labor vote on the Democratic side of the political fence.” The first constitutional infirmity adduced by Margiotti seemed outdated even in 1937 (and in fact the Pennsylvania Supreme Court never decided the issue): the proposed law “would deprive a worker of his constitutional right to bargain with an employer for any number of hours which the worker was willing to sell his services.” The second constitutional issue was the delegation of power to an administrative agency to set aside arbitrarily provisions of a legislative enactment. To be sure, the Pennsylvania Supreme Court ultimately invalidated the law on this basis; however, Margiotti’s version of the legislative history suffers from the flaw that the original bill as it was introduced in the senate lacked such a provision, which was not added until the floor debate. At a later cabinet meeting, Bashore gave Margiotti a revised draft, which the attorney general, following “quite an argument” with Bashore, still insisted did not pass constitutional muster. For his part, Bashore—who had taken the responsibility for “piloting the bill” through the legislature—contrary to an agreement to institute a friendly test suit, “proceeded to do all in his power to avoid a showdown.”

With only a week to go before the law’s effective date of December 1 and the Industrial Board still facing a “deluge of requests for special consideration,” it weighed “a possible blanket extension of time for enforcement . . . .” At the same time “Bashore indicated small employers would get a ‘break,’ declaring: ‘Consideration is being given to the fact that it might be in the interest of good administration of this law to grant employers of three or less employees a longer span of hours than 44.”' Two days before Thanksgiving the headline of the lead article on the front page of The Pittsburgh Press read: “State to Give In-

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193 John Cummings, “Bashore Accused of Blocking 44-Hour Test,” Philadelphia Inquirer, Dec. 1, 1937, at 1:4, at 32:3. This article erroneously claims that Oregon was the only statute with a similar law. In fact, the Oregon law applied only to manufacturing and merely limited overtime to three hours daily beyond a normal 10-hour day. See below ch. 7.

dustry Time to Fix Hours."\textsuperscript{195}

The petition by 18 steel companies for an exemption from the 30-minute lunch period rule (as well as for repairs and maintenance) on the grounds that workers had sufficient idle time during the day to eat appeared assured of success since Bashore had already stated that he would ease that rule for continuous-process industries and not require stoppage of work where employees received actual rest during the workday.\textsuperscript{196}

With three days to go before December 1, the Sunday edition of The Pittsburgh Press announced in a five-column front-page headline: "State Struggles Desperately to Beat 44-Hour Law Deadline":

Three days hence Pennsylvania employers will be called on to put into effect the biggest labor experiment in the nation's history, except NRA. But not until around midnight next Tuesday will they know how to do it, and even then there will be thousands of questions to be answered....

Pennsylvania, like numerous other states, already has a law limiting the hours of employment for women.

But when the general 44-hour act becomes effective Wednesday it will be the first time such legislation has ever been attempted in this country for all workers, both men and women.\textsuperscript{197}

The paper noted that some of the state's largest industries contended that the law would "hamper or make impossible standard methods of operating." In spite of the obvious impossibility of completing its "huge" task on time, it was doubted that the Department of Labor would delay the law's effective date; the probability of granting "wholesale exemptions" was also slim as was the issuance of "blanket exemptions" to industries whose problems were not resolvable before December 1. All that the paper could report definitely was that among employers' representatives who had descended on Harrisburg to secure decisions for their particular problems "there continued to be wide discussion of the probability of suits to determine the constitutionality of the act. But no definite plans for an attack had been announced."\textsuperscript{198}

Editorially piggybacking on this long piece, the newspaper predicted that Pennsylvania was "about to pay a heavy price for a careless piece of legislative

\textsuperscript{198}Taylor, "State Struggles Desperately to Beat 44-Hour Law Deadline."
The Autocratically Flexible Workplace

grandstanding": “Only after the law had been passed and the thousand complexities of modern business began to be revealed did the politicians who had enacted it begin to have any comprehension of the seriousness of what they had done.”

The Pittsburgh Press continued to devote front-page space to a report at the end of November that the Industrial Board was holding a “last-minute” meeting to sift through the reports on various industries prepared by the Bureau of Hours and Minimum Wages. To “establish proper rules and regulations for the guidance of the Department in administering” the general 44-hour law, the Board held a marathon special three-day meeting from November 29 to December 1, which, ironically, on its first day began at 10 a.m. and did not adjourn until 11:35 p.m., and was interrupted on November 30 for a public hearing that the Department held concerning the coverage of municipal employees. (That same day Bashore announced a sweeping temporary exemption for government employers until their next budget was set if compliance would lead to a decline in service or an increase in taxes.) The first part of the agenda was devoted to reaffirming the previously approved definitions of “executive” and “secretary” and amending the definition of “emergency” to include among the ends justifying longer hours “that normal employment may be uninterrupted.”

The second part of the agenda dealt with general regulations (already adopted under the women’s 44-hour law), some of which were merely reaffirmed, while others were amended. Overall they significantly watered down the law’s scope. The five-day week regulation was amended to authorize employers employing workers on a regularly scheduled five-day basis to permit them to work up to ten hours a day within a 44-hour week without having to pay overtime for daily hours above eight. The regulation for seasonal and inventory periods was amended to include all industries (permitting employment up to 10 hours per day and 48 hours per week for as many as five weeks per year) and to exclude from the time and a half provision salaried employees whose compensation was constant throughout the year and not subject to deductions for holidays, vacations, sickness, and other temporary causes. Employers of outside salesmen were relieved of any hours limitations. Another regulation was approved authorizing employers

to employ watchmen, janitors, stationary engineers, firemen, boilermen, and furnacemen more than eight hours a day and up to 48 hours a week. (While realizing that employers' contention that watchmen's jobs "required very few hours of continuous application" and that therefore a 44-hour week was not necessary to avoid fatigue was "possibly true," Bashore nevertheless recognized that watchmen had to be in attendance over a long stretch of hours depriving them of his freedom for rest, recreation, and attending on their families.)\(^{203}\) Where a shortage of skilled workers existed in any industry, another regulation empowered the Department of Labor and Industry, pursuant to an employer's request, to permit a variation from the statutorily prescribed hours, provided that time and a half was paid for the excess hours. Under the regulation for meal and rest periods, employers could permit employees to work without the required 30-minute period in continuous- or shift-operation manufacturing, in industries in which processing of products once begun had to be completed without delay to avoid spoilage, and with respect to employees who performed their work away from the employer's premises, provided they were given time to eat without endangering their health. The regulation for continuous operations in manufacturing (such as the steel, aluminum, and glass industries of Western Pennsylvania) and public utilities authorized employers to work employees one additional shift per cycle, provided that at least eight hours intervened between shifts and that such change in shifts did not result in each employee's working more than 44 hours per week averaged over 20 weeks. Where a shift worker's failure to report to work "would result in the unemployment of others in that shift or in the possible destruction of property or failure of service or result in danger to employees, an employer may employ a worker from the previous shift...until the absent employee is replaced. This replacement must be made as soon as possible." Similarly, where employers granted paid vacations to shift workers, they were authorized to work the remaining workers one additional shift per week during the vacation period. Hotels and restaurants were authorized to employ service (except housekeeping) employees beyond eight hours daily (within a spread of 13 hours) and up to 48 hours during a six day week, provided that they paid time and a half.\(^ {204}\) Under a special administrative ruling for ship repair, employers operat-


\(^{204}\) Ironically, back in September, Bashore had boasted to an international convention of government labor officials that, because hotel and restaurant employers had fought hardest to defeat the hours law, "when we came to write their regulation [under the women’s 44-hour law], we wrote it strictly, 44 hours a week and 8 a day, with a maximum spread of 10 hours." Bashore, "Role of State Labor Commissioners in the Improvement of Labor Legislation" at 173.
ing on a full-time regular 40-hour schedule were authorized to employ workers additional hours per day and week, provided that hours beyond eight daily and 40 weekly were paid at time and a half and Sunday work at twice the regular rate. Of great significance was the regulation authorizing employers of three or fewer persons to work them up to nine hours per day and 54 hours per week pending the Department’s study of the “probably effect of a strict applica-tion of the schedule of hours....” Even this concession—which did not apply to chains with three or fewer employees in a store—was a compromise since small employers, who allegedly could not afford the shorter hours as easily as large firms, had asked for 60- and even 90-hour weeks.

After having approved all these definitions, rules, and regulations, as time was running out, “[c]onsiderable discussion arose between the members of the Board and officials of the Department” concerning the “impossibility of em­ployers being able to conform to” the law and its regulations by December 1:

In an effort to relieve employers of the great difficulties which will be encountered in revising work schedules, the Board decided to approve the following regulation and instructed the publicity branch of the Department to send immediate notice to the press:

Employers affected by the General Law and the regulations of the Department are advised that they have until Monday, January 3, 1938 to conform to the hours set forth in the law and regulations.

In spite of having received more than 5,000 applications for exemptions, Bashore implausibly declared that “not one industrial firm indicated that it would protest the validity of the law.”

The Harrisburg Telegraph explained the postponement as a result of the state government’s having been “[m]oved suddenly by a storm of protest from industry and municipal officials....” In contrast, The Pittsburgh Press’s two-column front-page article saw the Board’s delaying action merely as a function of its having been “[b]uried under an avalanche of requests for exemptions and the

205 Minutes of Special Meeting of Industrial Board, Harrisburg, Pennsylvania, November 29-30, and December 1, 1937.
207 Minutes of Special Meeting of Industrial Board, Harrisburg, Pennsylvania, November 29-30, and December 1, 1937.
realization that strict enforcement would result in chaos affecting a million and a half jobs."\textsuperscript{210} A few days later Bashore pointed out that he had not postponed the act’s effective date; rather, under the state administrative code, the Industrial Board’s regulations became effective 30 days after adoption. In this case, the additional time to come into strict conformity was designed to give employers that had requested exceptions an opportunity to adjust.\textsuperscript{211}

The cumulative impact of these general and special accommodations of employer requests subverting the principle of a maximum hours regime made a mockery of Bashore’s boast to an international convention of governmental labor officials back in September: “The more conferences and hearings we held on the subject the more we came to the conclusion that the closer we stuck to the exact provisions of the bill, limiting variations very little, the better off we would be.”\textsuperscript{212}

Some legislators were not amused by Bashore’s postponement. First-term Representative Isidor Ostroff, a Philadelphia lawyer and self-professed “100% Roosevelt Democrat,”\textsuperscript{213} expressed his “amazement and dismay” over Bashore’s move, adding: “The Legislature contemplated the creation of more work just before the holidays. Many workmen have been notified they can come to work Dec. 1 to take up jobs created by cutting the work week to 44 hours.” Other lawyers charged that Bashore’s lengthening of the working hours of employees in businesses with three or fewer employees was contrary to the act.\textsuperscript{214}

Even the Harrisburg \textit{Patriot}, which felt there could be no “no quarrel with any statute that aims to end the barbarous and unhealthful hours of labor, nor the unconscionable greed back of such slavery,” welcomed the month’s delay on the grounds that gradualism would produce better results vis-à-vis businesses that had never been subject to any restraints with regard to hours.\textsuperscript{215} But the Department’s decision to push back the law’s effective date of operation to January hardly mollified the editors of \textit{The Pittsburgh Press}, which on the very day of the


\textsuperscript{212}Bashore, “Role of State Labor Commissioners in the Improvement of Labor Legislation” at 170. At that time, when banks were still the only such example, Bashore asserted that “we do not believe in averaging....” \textit{Id.} at 171.

\textsuperscript{213}The \textit{Pennsylvania Manual} at 873.


The Autocratically Flexible Workplace

The announcement lamented the imposition of restrictions on industry that had never been attempted in any other state: "It must be evident by this time, even to those who sincerely believe in a shortened work week imposed by law, that this is the strangest act ever passed by the Legislature." To be sure, employers had complained while the bill was still pending, but the legislators did not listen, thinking instead that "all you had to do was to limit the work week to 44 hours.... The details, they apparently believed, would work themselves out."  

On December 1 The Pittsburgh Press was manifestly relieved to inform readers on its front page that "Pennsylvania's greatest labor experiment...became effective today, but in theory only." Nevertheless, that theory was tempered with more than enough reality as Secretary Bashore announced that those industries whose situations the Industrial Board had already dealt with were expected to comply at once and were already covered. These industries included some manufacturing, public utilities, mail order and retail firms, canneries (whose hours were extended from 6 a.m. to 10 p.m.), banks (which were permitted to work employees 10 hours a day and 54 hours a week, provided that hours averaged 44 over 13 weeks), newspapers (which were free to work employees more than eight hours a day, provided that total weekly hours did not exceed 44 on six days), and brokerage houses.  

Neither the delay nor the far-reaching exemptions and variations were able to appease the editors of The Pittsburgh Press, which already on December 2 charged that the Department of Labor and Industry was unable to answer all the questions concerning "this so-called law [which] is not a law in the accepted sense of the word." The paper therefore urged the attorney general to ask the state supreme court to take original jurisdiction of a test case. Rather than finding comfort in all the accommodations being issued by Bashore, The Pittsburgh Press became increasingly incensed: "It's just like having the Legislature in perpetual session, enacting new acts daily to apply to specific industries." Bashore's industriousness merely reinforced the newspaper's view that: "This is the most amazing delegation of legislative powers in the state's history."  

At the eastern end of the state, the Philadelphia Inquirer found even less solace in the postponement than its Pittsburgh competitor. The headline of its two-column front-page article announcing the delay succinctly launched the newspaper's campaign: "44-Hour Law Puts Fate of Industries in Dictator's Hands." The opening sentence continued in the same vein: "Industrial dictator-
ship in Pennsylvania, scheduled to start at midnight tomorrow, has been deferred in its practical application until Jan. 3.” Bashore, whom the article characterized as “until a few years ago a rather obscure lawyer practicing in Schuylkill county”—despite the fact that he was also the State Democratic Party secretary from 1935 to 1939220—was pronounced “the industrial czar.” Bashore, who estimated that the law affected 1,500,000 of the state’s 2,750,000 gainfully employed, pooh-poohed reports that the law might prompt some industries to leave the state; his confidence was rooted in the fact that those, like textiles, that might consider migrating were already operating on a 40-hour week. Interestingly, rather than viewing Bashore’s regulations and variations as a principled attempt to water down a maximum hours law into an overtime law, the Inquirer identified his “[c]hief aim” as avoiding a judicial test of the law’s constitutionality (despite his claim that he had not heard anyone threaten to file such a suit): “For this reason they have avoided controversies, have placated employers by promising such ‘modifications’ as will meet their needs.” With about 80 percent of all employer applications having been approved, the newspaper astutely concluded that “the new law becomes an 80 per cent. dead letter at its outset.” Apparently, however, employers nourished other fears—in particular of the possibility of “sharp practices in the enforcement” and “a cracking down process which will disorganize their plants.” Then, too, some employers might have been “keeping in mind the circumstance that Mr. Bashore is in a receptive mood for the Democratic nomination for Governor.”221

On the same day that it was announced that employers with union collective bargaining agreements would be exempt until the contracts expired, it was also reported that a “rising tide of protest from service employees at hotels and restaurants” had been checked when the Industrial Board ruled that they could work six-day 48-hour weeks with time and a half for the hours beyond those permitted in the statute.222

The Pittsburgh Press’s wish for a test case quickly came true. Already on December 5, it reported “the State’s huge program of work regulation was headed

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toward the courts” as former State Bar Association president and former deputy attorney general Sterling McNees would be filing an equity suit in Dauphin County (in which the state capital Harrisburg was located) the following week. Although McNees declined to confirm the identity of his client “in testing the greatest labor experiment in the State’s history,” the newspapers conjectured that the suit’s sponsor was Holgate Brothers Manufacturing Company, one of the country’s biggest wood specialty firms. The prospect presumably pleased Attorney General Margiotti, who had already expressed the opinion that the law “probably is unconstitutional,” and had been advocating a court test for months. Finally, The Pittsburgh Press was able to take solace that “only the Supreme Court can end the chaos which this strange and unworkable measure has created.” On December 6, even before the suit had been filed, the CIO regional director, John Edelman, had already telegraphed Margiotti requesting permission to intervene as a co-defendant.

Employers had appeared to be heeding one lawyer’s advice that they cooperate to secure reasonable regulations rather than adopting the usual position of ignoring a law until the courts had held it constitutional. Yet, they were in fact pursuing a two-track strategy and it did not take employers long to accept the legislature’s invitation to test the law’s constitutionality. On December 8, 1937—at which time the Industrial Board still had 1,400 applications on file from private employers—Holgate Bros. Company, the world’s largest manufacturer of brush handles, which also produced brush blocks, educational toys, and wood specialties, and whose factory in Kean in northwestern Pennsylvania employed more than 500 workers, filed a bill in equity in the court of Common Pleas in Dauphin County against Secretary of Labor and Industry Bashore and the members of the Industrial Board. Most of Holgate’s employees worked 50 hours a week (five nine-hour days and five hours on Saturday), while watchmen, firemen, and stationary engineers worked 70 to 84 hours, but, the plaintiff insisted, the work was “healthful” and the employees “are entirely satisfied and fully contented with their existing schedule of hours and desire to continue to

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227 Record at 1a, 151a, 332a, Holgate Bros. Co. v. Bashore, 331 Pa. 255 (1938).
furnish their services to the company on said schedule of hours."228

The firm alleged that it had filed a petition on November 12, 1937 for a variance, but that it had never received any notice of a hearing or action on its petition and had never had an opportunity to present evidence to the Department of Labor and Industry concerning the hardships that the application of the law would impose on the firm and its employees. Because its chief competitors were located in other states, which lacked such an hours law, and the cost of labor was the principal cost component, Holgate claimed that its superior machinery and efficiency would no longer permit it to overcome its competitors' lower wages and that it would be required to leave Pennsylvania.229 The company therefore requested that the statute be held unconstitutional on the grounds that it would work a deprivation of plaintiff's property and liberty without due process or compensation, was an improper exercise of the police power, and constituted an unlawful delegation of legislative power to the Department and the Industrial Board in violation of the state constitution.230

At Attorney General Margiotti's request, Judge William Hargest refused to grant Holgate an injunction restraining enforcement of the act on the grounds that, after filing his objections to the bill, Margiotti would be making an immediate application to the state Supreme Court asking that it hand down a decision, if possible, by January 1.231

In its Answer,232 the Department of Labor and Industry's chief argument was that the constitutionality of the statute had to be determined by reference to its effect on employers in general and not on a particular employer. Factually, it denied that Holgate had ever filed a petition for a variance and pointed out that the firm's president, co-plaintiff Henretta, had appeared at one of the Industrial Board's hearings and testified about the firm's circumstances.233 In support of its position that the law was a valid exercise of the police power, the Department succinctly but comprehensively laid out the socio-economic underpinnings of the maximum hours statute. The statute: was "necessary...to protect society against the undesirable consequences of improvements in technological processes"; eliminated "unfair sweatshop competition and bargaining exploitation in the labor

228 Amended Bill in Equity, Record at 12a, 15a-16a.
229 Record at 16a-18a.
232 On Dec. 9, 1937, the Department had filed an answer raising preliminary objections, and then filed its answer to the amended bill in equity, which was filed on Jan. 14, 1938, on Jan. 15. Record at 1a-2a.
233 Answer, in Record at 23a-27a.
market, benefiting both employers and workers by establishing a uniform, fair standard of hours”; “made possible equitable distribution of leisure which may be devoted to education and recreation”; and “[b]y distributing employment among a large number of workers...will increase employment.”

Considerable light is shed on the leadership role taken by Holgate Bros. Company—whose sensitivity to alleged wage increases was rooted in the fact that labor costs accounted for 60 percent of its total costs—in attacking the maximum hours law by its aggressively antiunion attitude. This stance was self-documented in the correspondence between J. E. Henretta—the president and a substantial stockholder of the firm, who was co-plaintiff—and Bashore (and the director of the Bureau of Hours and Minimum Wages) extending from July 7 to October 8, 1937; submitted as Plaintiff’s Exhibit No. 1, the letters were presumably designed to demonstrate how concerned Holgate was about being competed out of business by its chief competitors in Maine, Vermont, and New Hampshire—they faced no in-state competition—which were not subject to the 44-hour law or the new workers compensation law in a “narrow margin profit” industry, “so narrow, that even in normal times and normal conditions there is a high mortality among the concerns working in wood.” In the very first of his letters to Bashore, written just five days after the governor had signed the law, Henretta initiated a series of threats to move out of state. Because Holgate would have to cut its hours of operations from 50 to 44:

the additional cost of compliance would...make it necessary that a new location for our factories outside the Commonwealth be selected. [W]e trust that you will make note of this fact so that when we take active measures toward moving our factories this step will not be in any way connected with labor trouble. We have had no labor difficulties whatever except for a day and a half in 1933, but with the epidemic of organization efforts put forth, with the apparent support of the Government, State and Federal, no one can tell how soon we may be involved and one of the purposes of this letter is to make record [sic] with your Department of the fact that it is the definite policy of our company to move our factories outside the State.

After Bashore informed him that his firm had a right to appeal a hardship, Henretta replied that he would put the matter off to await Congress’s action con-

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234 Answer, in Record at 28a-29a.
235 Record at 145a.
236 Letter from J. E. Henretta to James Lappan, director of Bureau of Hours and Minimum Wages (Oct. 8, 1937), in Record at 339a-341a.
237 J. E. Henretta to Ralph Bashore (Aug. 20, 1937), in Record at 326a-327a.
238 J. E. Henretta to Ralph Bashore (July 7, 1937), in Record at 322a-324a.
239 Ralph Bashore to J. E. Henretta (July 12, 1937), in Record at 325a.
cerning a wage and hour law: “If Congress adjourns without action or passes a law...more favorable to manufacturing...than any which will be enforced in...Pennsylvania,” he would contact Bashore again.\textsuperscript{240} After Henretta requested an application form and Bashore sent him one,\textsuperscript{241} Henretta wrote Bashore a long letter of lament instead of filing an application. His principal complaint was that, based on what he had been able to learn, even when the Department permitted longer hours, “it is necessary to pay time and a half. This additional expense we fear our industry can not assume.” Consequently, it did “not seem a possibility” that Bashore was in a position to grant Holgate’s request, which would have been a modification putting the firm “on a basis of equality” with its out-of-state competitors. The 12 percent reduction in weekly hours from 50 to 44 meant a decline in the rate of return on a lower utilization of capital, which might be counteracted by putting on an extra crew; Holgate was doing so, “but no night shift in a wood-working establishment has ever been found to be anywhere near so productive as a day shift.” The problem was simple: “Men want higher wage for night work....” Although it might be true that a national wage and hour law would eliminate “discrimination between working people in Pennsylvania and other states,” it would leave untouched “the grievous discrimination between the American working man and cheap labor abroad.” In a non sequitur, Henretta then closed with his refrain: “With the above facts in mind . . . , we have decided not to file the application but rather to seek at once a location where a branch factory can be established.”\textsuperscript{242} Since logic would have dictated that the new location be in some cheap-labor country, it was curious that Henretta informed Bashore, who had in the meantime replied that he was treating Henretta’s letter “as a type of appeal for variation of the strict application of the schedule of hours” with a view to recommending a variation “if at all possible within the intent of the act,”\textsuperscript{243} three weeks later that the choice was between New Hampshire and Vermont. Nevertheless, he was still hoping “that the many disadvantages of manufacturing, particularly in the narrow margin industries operating in Pennsylvania after December 1st will be so clearly brought to the attention of the Governor that a special session of the Legislature will be called to correct a law which will inflict a very serious blow on industry in this Commonwealth.”\textsuperscript{244}

In his last letter, to James Lappan, the director of the Bureau of Hours and Minimum Wages, Henretta in effect raised the issue of the consequences for

\textsuperscript{240} J. E. Henretta to Ralph Bashore (undated), in Record at 325a-326a.

\textsuperscript{241} J. E. Henretta to Ralph Bashore (Aug. 20, 1937), in Record at 326a-328a; Ralph Bashore to J. E. Henretta (Sept. 1, 1937), in Record at 330a.

\textsuperscript{242} J. E. Henretta to Ralph Bashore (Sept. 9, 1937), in Record at 331a-334a.

\textsuperscript{243} Ralph Bashore to J. E. Henretta (Sept. 21, 1937), in Record at 335a-336a.

\textsuperscript{244} J. E. Henretta to Ralph Bashore (Sept. 30, 1937), in Record at 336a-337a.
individual firms of Pennsylvania's winning the race to the top in labor standards. Henretta conceded that by means of "improved machinery, methods and a more efficient plant," Holgate had for years been able to overcome the low wages its New England competitors paid. However, claiming that the reduction of the workweek to 44 hours was "in almost all wood-working industries...a distinct innovation," he argued that "the question" had become whether the firm could "absorb the increased labor cost provided for in the 44-Hour Law...." In any event, Holgate "did not see how it is possible for our factory to operate 44 hours a week and continue in competition with factories...operating 50 hours and more per week and paying considerably lower wages...."245

In addition to filing an answer on December 9 contending that the law constituted a lawful exercise of the police power and did not unconstitutionally delegate legislative power, the attorney general, in front of reporters, telephoned Acting Chief Justice William Schaffer—Chief Justice John Kephart had not yet returned from Sweden, where he had been on a visit as part of Governor Earle's entourage—stating that he wanted to petition the Supreme Court to remove the suit from Dauphin County; Schaffer granted him permission to do so before the Court on December 10. Margiotti argued that because of the "'great public interest'" in the law, extended hearings before the lower court should be avoided and the Supreme Court should hear the case at once. He added that the law should and could have been tested before December 1, and that he would have done so, "but 'generally I don't test acts of a particular department unless the department requests it.'" Since Secretary Bashore had contended that labor and industry generally favored the law, there had been no test case. At the same time. Margiotti publicly explained that he had expressed the opinion that the 44-hour bill was of questionable constitutionality before it was introduced and that it "'probably could not be sustained'" before the Supreme Court after it was passed. but that he nevertheless recommended that the governor approve it "'because of its widespread beneficial effect.'" Although he had not altered his view, he would still defend the law and would ask the Supreme Court to take original jurisdiction so that a decision could be handed down by January 3. To that end he had asked labor to join the Commonwealth in sustaining the law's constitutionality. As part of that effort, reports had already surfaced that Secretary Bashore was also preparing an "economic brief" to submit to the Court.246

In the meantime, the State was mobilizing support in favor of the law. Labor,

245J. E. Henretta to James Lappan (Oct. 8, 1937), in Record at 339a-341a.
which according to The Pittsburgh Press, had been "luke-warm" about the law while it was before the legislature, was now lining up in its defense. According to Bashore, unions representing 100,000 employees would ask to become intervenors in the action.247

Litigation, however, did not immediately put the maximum hours law in abeyance. At its regular monthly meeting on December 9, the Industrial Board issued its twenty-eighth regulation; covering outside work (such as construction) subject to weather-induced interruptions, it gave employers the flexibility to average workers' 44 weekly hours over a month.248

The Philadelphia Inquirer and the New York Times reported that on December 10 the state Supreme Court did agree to take original jurisdiction of the cases filed in equity, but that immediate hearings were postponed until January 3, 1938, so that the parties could agree on the facts.249 According to the Harrisburg newspapers, however, the Court in fact "deferred formal acceptance...of jurisdiction...but indicated it would hear the suit when new plaintiffs had been given a chance to file briefs." This apparently serendipitous outcome supervened because a lawyer unexpectedly appeared on behalf of a hundred small industries requesting to intervene in order to be able to show how the law would affect them. Attorney General Margiotti argued that since the test suit was based on the law's constitutionality, he doubted whether "we need any facts," but Acting Chief Justice Schaffer thought it important to have the additional bills and directed Margiotti to confer with the plaintiffs' lawyer and appear later. The lack of internal cohesion in the Commonwealth's overall approach was underscored by the attorney general's reply to Justice William Linn's question as to the source of Secretary Bashore's power delaying enforcement—namely, that he lacked any such authority.250


249 "High Court to Sift State 44-Hour Act," Philadelphia Inquirer, Dec. 11, 1937, at 2:8; "Speeds 44-Hour Week Law Test," N.Y. Times, Dec. 11, 1937, at 21:7. It is unclear on what basis the Supreme Court could have taken original jurisdiction. Under article V, section 3 of the state constitution, the Court "shall have original jurisdiction in cases of injunction where a corporation is a party defendant, habeas corpus, mandamus to courts of inferior jurisdiction, and quo warranto as to all officers of the commonwealth whose jurisdiction extends over the state, but shall not exercise any other original jurisdiction." The case did not fall under any of these rubrics.

250 "Court Delays in 44-Hr-Week Test," Patriot, Dec. 12, 1937, at 1:3, 2:8 (quotes);
The Pittsburgh Press welcomed a speedy decision, while Bashore announced the next day that the Supreme Court action would halt any prosecutions under the law until after the Court had rendered its decision, though he would continue administering the law and drafting rules. Employers were thus enabled to "gamble" on the chance that the law will be invalidated, if they wish to maintain working schedules not sanctioned by the law. In the meantime, Bashore had already begun devoting considerable time to conferring about the preparation of the economic brief to justify the law as a means of spreading employment and reducing relief rolls. Bashore also put employers on notice that he would hold off on prosecutions until after the court's decision on the law's constitutionality, but only with regard to employers who made a good-faith effort to comply—others would be prosecuted. However, Bashore's announcement that no further extensions would be allowed and that he "was going to crack down" on those who could but did not comply during the "grace' period" prompted the Dauphin County Court at the end of the year to threaten to issue a preliminary injunction if the state "cracked down" on Holgate Brothers Manufacturing Company or any of the 235 intervenor-companies. Moreover, the court indicated that any effort to enforce the law against any other employer "would bring that company into Court to join in the test suit." President Judge William Hargest informally advised Bashore that he could not prosecute people involved in disputes over the 44-hour law until the courts had decided its validity.

At year's end unexpected support for the new law surfaced: Citing no source, even of its direct quotations, The Pittsburgh Press reported on its front page:

Jobs of thousands of working women in Pennsylvania are at stake in the coming Supreme Court test of the State's general 44-hour law.

One result of the court test may be to place large numbers of working women in an "economic straitjacket" by limiting their hours of work and placing them at a disadvantage with men in bidding for jobs. ...

If the general 44-hour law is nullified, there will be no legal restriction on the work-
ing hours of men, but women will be limited by a separate law—not involved in the coming test case—to a work-week of 44 hours.

Women's organizations warned of such a possibility when the women's 44-hour law was under consideration in the Legislature, arguing that any drastic restriction on working hours of women without similar restriction for men, may favor the employment of men in many lines of work.

"If you make it impossible for a woman to work longer than 44 hours a week and leave men free to work any hours, the result will be that employers will replace their women workers with men," the Legislature was told.

The argument would apply particularly to the "service industries" who are affected most by the 44-hour laws—such as restaurants, laundries, stores and other non-manufacturing industries.257

The newspaper failed to identify the complainants, but their complaint was identical to the anti-protectionist feminist-libertarian agenda that the National Woman's Party advocated at that time.258 (Republican Frederick Gelder did make similar comments on the floor of the Pennsylvania Senate, asserting that the bill was "not in the interest of the feminine part of the population," whom employers would replace with men at time and a half.)259 To be sure, the complaint and the article were misleading in the sense that the 1937 amendments to the 1913 law, while reducing the normal working limits from six days, 54 hours a week, and 10 hours a day to five and a half days, 44 hours a week, and eight hours a day, nevertheless permitted a wide variety of circumstances under which employers were authorized to stretch women's hours beyond these limits. For example, during weeks in which a legal holiday occurred and was observed by a firm, women could legally work more than eight hours on three days, provided they did not work more than two hours of overtime per day or 44 hours per week. Women could also lawfully work up to two hours of overtime per day (within the 44-hour week) to make up for time lost in the same week resulting from the alteration, repairs, or accidents to machines on which they worked. None of the restrictions applied to women working in the canning industry, a growing and major Pennsylvania industry at the time. In addition, the act itself did not apply to women working in agriculture or domestic service, as nurses, or as executives if they earned at least $25 weekly.260

The Autocratically Flexible Workplace

Interestingly, although the "women's hour law is clearly constitutional, in the opinion of legal experts," it contained the identically same delegation clause that the courts found unconstitutional in the general hours law. Even if employers had been disposed to contest the validity of the clause in the women's hours law, they might have been deterred from doing so by the fact that the legislature declared the clause severable; consequently, if the provision had been judicially invalidated, women's employers, as The Pittsburgh Press observed, would have been “compelled to observe the strict terms of the law, with no variations or exemptions of any kind." This crucial strategic difference between the two statutes, once again, raises the question of whether the Pennsylvania legislature may have passed the general hours law with the expectation—if not the intention—that it would be struck down by the courts.

While awaiting the Supreme Court hearing in early January, the Industrial Board continued to meet during the last days of 1937 to consider problems not yet dealt with by its regulations. On December 28, the Board granted exceptions to the milk, radio broadcasting, and laundry industries, office businesses, outside construction, and non-profit entities. In construction, for example, where inclement weather caused delays, employers were permitted to have workers make up the loss of time during five successive weeks, provided that they did not work more than 10 hours a day six days a week. In offices, employers operating on weekly schedules of 40 or fewer hours were permitted to employ employees who were on annual salary (and not laid off without pay during slack periods) up to 10 hours a day and 54 hours a week, provided the total did not exceed 520 hours over 13 weeks. Laundries and dry cleaners were authorized to work employees up to 10 hours a day within a six-day 44-hour week. The same rule applied to milk plants, except that 48-hour weeks were authorized where necessary to avoid curtailment of public service. Finally, charitable, educational, and welfare non-profit institutions were, until January 1, 1939, permitted to work their employees up to ten hours a day (within a 13-hour spread) within a six-day 48-hour week.

Bashore was also reported to be busy preparing for litigation. Feeling that the state Supreme Court would "give credence to the economic arguments, as distinguished from the legal ones," he had secured the services of Leon Hender-

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261 Taylor, “44-Hour Law Test Imperils Women’s Jobs.”
263 Taylor, “44-Hour Law Test Imperils Women’s Jobs.”
son, a nationally known economist with the National Recovery Administration and the Works Progress Administration, to present economic arguments on the basis of which the Court could uphold the law.266 Just a few months earlier, in June 1937, Henderson had been one of the first witnesses to testify at the congressional hearings on the FLSA, at which time he estimated: "If a rigid 40-hour week, a flat 40-hour week without permission of overtime were invoked, at least a million and a half people would go back to work...."267

The 44-hour law was, in the view of the Philadelphia Inquirer, the most important case on the Supreme Court calendar on January 3, 1938; the problem, however, was that there was "no actual suit at hand to test" its constitutionality. "So urgent is the need for decision..., however, the Supreme Court has informed Attorney General Margiotti it will hear arguments as soon as he and attorneys for the opposition can get together on the case. At Margiotti's request, the customary gauntlet of lower court decision [sic] will not have to be run."268 But at the Supreme Court hearing on January 3, Margiotti disclosed that they could not proceed as planned because in the meantime other people had more facts they wanted to bring in.269 Moreover, Chief Justice Kephart "protested against piling test cases into the court without first having them passed on by lower tribunals."270 The court did, however, grant the petition of 48 international and local labor unions to intervene as party defendants and to present the socio-economic facts underlying the statute.271 The intervening labor unions were represented by Alexander Hamilton Frey, a professor of business associations and labor law at the University of Pennsylvania, who was also a member of the national executive board of the left-wing National Lawyers Guild.272

267Fair 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. 167 (1937). To be sure, Henderson sowed confusion by asserting immediately thereafter that, if industry were confronted with such a standard, he assumed that it would "use the key workers...and pay time and a half." Id.
271Record at 1a, 31a-35a.
272Frey (1898-1981), had an unusual educational background for a law professor of the time: he had a J.S.D. from Yale and had been a Carnegie Endowment Fellow in International Law for two years. After law school, he practiced at a Wall Street corporate law firm and taught at Yale Law School. Association of American Law Schools,
At the same time, Bashore gave notice that “regardless of the suit, the act is now in full force and effect and no further extensions will be granted.”273 The Department would invoke the law in the face of “wilful and flagrant” violations, but not against hospitals and charitable institutions where funds were short, provided they did their best.274 Not until mid-January, after Margiotti had failed to achieve an agreed-upon stipulation of the facts, did the Supreme Court direct that the facts of the case first be threshed out in Dauphin County Court. On January 15, the attorney general answered the plaintiff’s amended bill in equity and the case was underway. Once the county court had settled all the disputed points not bearing directly on the validity of the act, it was to be taken to the Supreme Court.275 By this point, however, enforcement officials were not talking to the press, which speculated that in this “trying situation” data were being assembled with the notion of prosecuting in the future if the law were upheld.276 It was especially the question as to how the State, which fancied that its “[i]ndustrial [p]rominence” had turned it into a “[t]esting [g]round,” was administering the law during the pendency of the litigation over its validity that formed the focus of inquiries from other state governments.277

The defendants in their answer offered sophisticated socio-economic counterarguments, asserting that the law was a valid exercise of the police power because it was:

necessary in order to protect society against undesirable consequences in improvements in technological processes and to maintain the present standard of living of workers in Pennsylvania and to raise such standard of living; that there is a relationship between hours of employment, productivity, poverty and human suffering, and such legislation will bring about higher efficiency in industry thereby reducing costs and increasing production and by reducing the number of hours of employment will make possible equitable distribution of labor which may be devoted to education and recreation and by distributing

Directory of Teachers in Member Schools: 1937-38, at 66; http://www.ssdifi.rootsweb.com/cgi-bin/ssdi.cgi.


employment among a large number of workers will increase employment and decrease the relief load; that there is a direct relationship between hours of employment, and health, efficiency, productivity, and safety of employees and the general welfare of all workers throughout the Commonwealth.\(^{278}\)

Press coverage of the trial was extensive and high-profile. It was held before W. C. Sheely—"a 'pinch-hitter' for the busy Dauphin county judges"\(^{279}\)—a Democrat who had been elected to an 11-year term as President Judge of Adams and Fulton counties in 1935.\(^{280}\) On January 17, the opening day of the test suit, as if it were conveying the conclusion of a dispassionate expert, rather than the self-interested testimony of the president of named plaintiff Holgate Brothers, the *Philadelphia Inquirer* headlined an article at the top center of page one "State Warned of New Exodus over Hour Law."\(^{281}\) Plaintiff James Henretta testified that if the workday were reduced from nine to eight hours:

> The cost would be increased, because one of two things must follow: either...it will be necessary for you to accept a reduced production for your factory with the same equipment, or you must add other employes, and that is not feasible for...several reasons: one is that you cannot get the skilled men to set machines up, to supervise the work, to assure you the accuracy necessary in our work...so that it would be necessary for us, if we took eight hours instead of nine hours, to take off one hour of production from our factory which would very seriously cripple our profits, and, in other words, it would cost us more to produce the same amount of goods with the same investment, the same overhead—in fact the same overhead would be increased materially at the same time.\(^{282}\)

When his attorney asked Henretta why Holgate did not add another eight-hour shift, Henretta testified that the firm had tried it during the past year "because of rush orders only to find that the skilled foremen, the trained men, some of whom we have been training for twenty years, can't be picked up on the street...." He added that during non-rush periods Holgate's sales did not warrant running a second shift, whereas it would not be possible to find workers who would work

\(^{278}\)Holgate Bros. Co. 45 Dauphin Cty. Rep. at 278.

\(^{279}\)*Margiotti Upholds State 44-Hour Act in Answer to Suit,* *Philadelphia Inquirer*, Jan. 16, 1938, at 1:4. After testimony was taken, argument was held before the court en banc consisting of President Judge of Dauphin County, William Hargest, Additional Judge John Fox, Additional Judge Karl Richards, and Sheely, specially presiding. Brief for Appellants, in Record at 7.

\(^{280}\)The Pennsylvania Manual at 1023.

\(^{281}\)*Ramsey,* "State Warned of New Exodus over Hour Law" at 1:4.

\(^{282}\)Record at 161a.
a single-hour shift because it would not pay a "living wage."²⁸³

When Deputy Attorney General Edward Friedman, whose cross-examination technique was steeped in sarcasm throughout the proceedings, asked President Henretta to elaborate on his previous testimony that if the firm were required to comply with the law—in fact, it had never complied with the law²⁸⁴—it would have to buy new machines and build a new factory in order to produce the same output in eight hours as previously in nine, he tried to trap the plaintiff by asking: "Therefore, it would be a very great calamity if your business increased, the same calamity that occurred to you by the enforcement of this 44-Hour Law?" But instead of eliciting an answer from Henretta, Friedman merely succeeded in provoking Judge Sheely to interpose himself: "Not necessarily a calamity; the fact that there is a saturation point, and he is at that point for both purposes."²⁸⁵ This intervention would also be reflected in the written opinion, which one-sidedly reflected the plaintiff’s position and did not at all credit the Department’s efforts to undermine Holgate’s logic.

Not surprisingly, large numbers of employers wanted to join the proceedings as plaintiffs; 700-800 of them filed petitions to intervene. This “simply unprecedented” number of intervenors in a Pennsylvania case²⁸⁶ may in part have been a function of the employers’ desire for an “exemption from effect...during the litigation period.”²⁸⁷ Even as the Holgate trial was proceeding, the court permitted five other firms to file their own bills of equity raising essentially the same issues as Holgate Bros. Company: Boswell Lumber Company, H. B. Underwood Corporation (a machinery and machine-tool maker and repairer), Fisher’s Bakery, the City of Philadelphia, Trustee (which managed a college, hospital, power plants, and buildings),²⁸⁸ and Grand Union Company (a retail grocery business). The court in its opinion recited the additional plaintiff-employers’ testimony on the law’s impact on them as findings of fact.²⁸⁹

On January 19, Boswell and Underwood filed their bills and on February 2 and 3 the former’s president and the latter’s superintendent testified at the

²⁸³Record at 162a.
²⁸⁴Record at 244a.
²⁸⁵Record at 240a-241a.
²⁸⁸Its chief complaint was that the reduction in the hours and wages of hourly employees would lead to “dissatisfaction...inefficiency and detriment to said trusts.” City of Philadelphia v. Bashore, Bill in Equity, in Record at 92a, 98a.
Holgate trial. Underwood, which at one time was "known as the largest engine repair shop in the world," sought to persuade the court that its highly skilled specialist employees were essentially all involved in emergency work, which frequently required the self-same workers, who could not be relieved by others, to work very long hours, which would make it impossible for the firm to comply with the new law. The emergencies were not Underwood's, but those of its large-scale industrial customers, whose plants could not resume operations unless and until Underwood had completed repairs of their breakdowns. It was thus tactically clever to select Underwood as a plaintiff as a potentially compelling example of a firm needing the kind of flexibility that a maximum-hours regime could not accommodate. Unlike Holgate Bros., Underwood also projected itself as a fair and well-paying employer that paid time and a half for all work performed weekdays between 5 p.m. and 8 a.m. and double time Sundays.

Underwood was a member of the Metal Manufacturers Association (MMA) of Philadelphia, and owing to Howell John Harris's prodigious researches in that organization's archives, the private reactions to the prospect of enforcement of the 44-hour maximum hours law of employer-members of at least one trade association are accessible. Underwood was a classic family-owned flexible-specialty shop, with 50 employees in 1937 (down from 129 in 1922), which performed emergency work with a cadre of flexible skilled workers, specializing in the repair of refrigeration compressors at breweries and other large, complex, on-site jobs. On August 31, 1937, the president and secretary of the association went to Harrisburg to talk to Department of Labor and Industry lawyers about exceptions to the law, under which it would otherwise be impracticable for MMA members to operate. At the September 2 special executive committee meeting it was also noted that the secretary would coordinate these efforts with those of other Pennsylvania trade associations. The main focus of the discussion at the executive committee was the complaint that so much of the work of the metal industry was either emergency in nature, resulting from breakdowns, or work that

290Record at 449a.
291Record at 463a.
292Record at 442a-443a. The trial testimony is confused, suggesting also that double time began on Saturday.
293Harris devoted only two lines to the issue at the end of his book: "When the Pennsylvania maximum-hours law was passed in 1937...the MMA negotiated exemptions for members who needed them." Howell John Harris, Bloodless Victories: The Rise and Fall of the Open Shop in the Philadelphia Metal Trades, 1890-1940, at 431 (2000). Nevertheless, he very generously emailed all his extensive relevant archival notes. Exact citations to the archival materials are given here, although they have been used only second-hand as filtered through Howell's notes.
294Email from Howell John Harris (Oct. 2, 3, 14, 2001).
would hold up employment in the firm’s plant or its customer’s. The range of members’ reactions was broad. One said he expected he would ignore the law, while another said that unless satisfactory exceptions were granted, his firm would file a bill in equity and for that reason he had secured a skeleton draft of such a bill from the MMA’s attorneys. When he asked the committee members whether they would like to him to read to them the constitutional violations on which the suit would rest, they expressed the view that it would be bad for the MMA to foster a suit and poor tactics to encourage a member in doing so, while recognizing a member’s individual right to file suit if it saw fit.\footnote{MMA, Sept. 2, 1937 Executive Committee Minutes, Box 3, Folder 57}

The MMA’s Secretary’s Reports for 1937 and 1938 noted that the association had sought exceptions for 138 member-companies with 38,000 employees, and that the required exceptions had been secured in January 1938 so that “there were practically no hardships imposed on our industry.”\footnote{MMA, Secretary’s Report for 1937 at 6 and Secretary’s Report for 1938 at 1, MMA, Box 1, Folder 22.} Thus despite membership in an employers organization that was striving to reach an accommodation with the state, Underwood, which by its own account was a model employer operating under conditions making it as deserving of an administrative variance as any firm imaginable, instead chose to join those seeking to destroy the statute altogether.

According to Underwood’s pleadings, its business was making emergency and general power-plant repairs. Because the supply of its “highly skilled men” was not elastic, they “must work harder during busy times if the demand is to be met and the full employment given, of which the industry is capable.”\footnote{H.B. Underwood Corporation v. Bashore, Bill in Equity, in Record at 54a, 55a, 56a.} Pulling out all the rhetorical stops, Underwood described itself as operating in a “key industry” furnishing

specialized and individualized goods and services...nearly all of them to unpredictable but imperative time requirements. Many of the industry’s processes can no more be reasonably interrupted than can an appendectomy. The industrial necessities of continuity of operation and promptness of furnishing goods and services inhere not only in the processes themselves, some of which will hurry for no man, but also in the necessities of all other industry that its productive machinery be promptly and continuously replenished, serviced and repaired. This is an economic impossibility under the Pennsylvania 44-Hour Act.

Plaintiff is known as a “trouble shooter.” It specializes in emergency repair work, which requires prompt and continued work on the part of plaintiff’s employees so that the plants of plaintiff’s customers may be in operation with a minimum of delay. Naturally, such work requires plaintiff’s employees on many occasions to work longer than 8 hours per day.\footnote{Underwood v. Bashore, Bill in Equity, in Record at 59a-60a.}
Underwood’s bill in equity then proceeded to depict a “typical case” involving a call on a Saturday afternoon from a large Philadelphia manufacturing firm about the breakdown of one of its large presses. Although they had already worked four hours that day, Underwood called in two of its employees at 6 p.m., who then worked 13 and 18 hours straight, respectively, until Sunday morning, making it possible for the customer to reopen Monday morning and avoiding a situation in which “many of the customer’s employees would have been thrown out of work for several days....” Because the two workers “are specialists, as are all of plaintiff’s employees,” the “work they were doing was such that another man could not come in and carry on where they had let off.”

At trial on February 3, Underwood’s superintendent George Flannigan, Jr., sought to bolster that latter claim by testifying that it was not “practical” to perform this kind of work in shifts because “when a man starts that particular job he will want to go through with it or he should go through with it without changing over and putting another man on....” But under cross-examination he was constrained to admit that “[m]any times” in his experience one worker had completed another’s job. Judge Sheely revealed his inability to grasp the purpose and functioning of the maximum hours law when he sustained the plaintiff’s objection to Deputy Attorney General Friedman’s question as to whether Underwood had ever requested that any union furnish the firm with “these expert machinists.” Sheely ruled the question irrelevant despite the defendant’s explanation that the information was relevant to Flannigan’s assertion that the firm’s “principal difficulty in complying with the 44-Hour Week Law is the impossibility of obtaining a sufficient number of men to do the work they do....”

Another strategically clever choice—by employers and Judge Sheely, who denied a motion to consolidate cases that would not “assist us”—of a plaintiff was Boswell Lumber Company, whose 45 employees cut standing timber, transported it to the mill, and manufactured logs and lumber. The firm sought to convince the court that seasonal and (bad) weather-related conditions made it impossible to comply with a law that permitted no overtime. It claimed that when bad weather prevented cutting, the mill also had to be shut down and the lost time could be made up only by working more than eight hours on other days: “This particular overtime cannot be eliminated by the hiring of additional men because the necessity therefor arises at unpredictable times, is frequently of short duration....” Being confined to an eight-hour day and 44-hour week would leave

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299Record at 60a.  
300Record at 461a-462a.  
301Record at 467a.  
302Record at 499a (concerning plaintiff Adam Troska).  
303Boswell Lumber Company v. Bashore, Bill in Equity, in Record at 36a, 37a-39a.
Boswell “unable satisfactorily to meet the demands of its customers....”304

Less persuasive was its technological argument:

The number of men who can be simultaneously employed in the mill is limited by the number and size of the machines..., and consequently production cannot be increased merely by hiring additional men to work during regular hours. Since storage facilities at the plaintiff’s mill are extremely limited, the operation of the mill must be synchronized with the felling of timber and the transportation thereof to the mill. The plaintiff’s log train crew and timber cutting crews cannot operate except in the daytime and during that period they are generally able to cut and haul only as much timber as the mill can saw during a single full time shift. It would therefore be impossible (even if justified by the demands of customers) for plaintiff to operate two regular full time shifts at its mill.305

Finally, Boswell pleaded that it was impossible to avoid working its truck drivers who delivered timber in unfavorable weather and traffic or to distant customers more than eight hours per day; log train crews (who, interestingly, were paid by the trip and not the hour) also faced allegedly unavoidable overtime.306 To be sure, such claims were in part undermined a few days later under cross-examination when Boswell’s president D. F. Mullane testified both that very long trips were “unusual emergencies” (and thus presumably would have qualified for a variance) and that the extent of the increased cost caused by compliance with the law would be payment of the hotel bill for the truck driver so that he would not have to drive back to the mill the same day.307 (In contrast, Underwood paid for their repair workers’ hotel rooms when they had to travel.)308 Revelatory of Judge Sheely’s cramped view of what the maximum hours law was all about was his refusal on the grounds of irrelevancy to require Mullane to answer Deputy Attorney General Friedman’s question concerning these truck drivers: “And, of course, you think there is nothing unreasonable about requiring a man to work twenty hours continuously?”309

Grand Union’s bill in equity (filed on January 24), which was largely boiler-plate—though it did possess the epistemological humility merely to “allege[] upon information and belief, that its employees are satisfied and contented with

Boswell also claimed that working more than eight hours on other days would extend the workweek beyond 44 hours, but how it arrived at that conclusion is unclear.

304 Record at 43a.
305 Record at 39a.
306 Record at 40a-41a.
307 Record at 395a (quote), 406a-407a.
308 Record at 471a.
309 Record at 406a.
their existing schedule of hours”—injected the issue of the unfair competition it would be facing against “mom and pop and children’s stores.” It claimed that the 38 of its 56 Pennsylvania stores that had three or fewer employees would be “required to compete with stores on a basis unfair and prejudicial to it” because, whereas its employees worked on average 56 hours per week and would be limited to 44 hours under the law, individual store owners with three or fewer employees would, by virtue of the Department’s Rule G-13, be permitted to employ their workers 54 hours per week. To be sure, at trial on February 8, a Grand Union officer was unable to offer convincing testimony as to why its individual male employees had to work “the full store hours”—7:30 a.m. to 6 p.m. weekdays and until 9 p.m. Saturdays—“except time out for meals.” Apart from having failed to explain how compliance with the 44-hour law would have “increased the cost of the salaries in the stores”—after all, store hours would have remained unchanged—the firm’s admission that it was able to hire sufficient part-time workers to staff stores Saturdays, when it did half of its weekly business, objectively undermined its claim that the law would force it to close stores.

Employers attacking the maximum hours law found a representative of a small sole proprietorship in Fisher’s Bakery, which filed its suit on January 31, 1938. A hand-craft shop in Huntingdon, a small town in Central Pennsylvania, it had been in business for 45 years and employed only 27 workers, none of whom was unionized because, as the owner put it during his trial testimony, “that is something we don’t have in our town, union, we are back in the sticks.” The

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30The Grand Union Company v. Bashore, Bill in Equity, in Record at 110a, 113a.
31Record at 578a (testimony of Samuel Winokur, secretary of Grand Union, Feb. 8, 1938),
32Record at 113a-115a.
33Record at 574a (testimony of Samuel Winokur). As an illuminating (and apparently unusual) contrast, a large department store in Harrisburg ran full-page advertisements in the local newspapers in mid-December declaring its adherence to shorter hours and its opinion that “it is impossible to maintain long store hours and give due consideration to all classes of employees.” The store insisted that its schedules for years had “closely approached the goal set by recent legislation.” E.g., “Why Bowman’s Maintains Shorter Store Hours,” Patriot, Dec. 14, 1937, at 5.
34Record at 576a. Deputy Attorney General Friedman’s failure to pose this obvious follow-up question on cross-examination is puzzling.
35Record at 588a, 581a.
36Record at 575a-576a.
37George W. Fisher, trading as Fisher’s Bakery v. Bashore, Bill in Equity, in Record at 72a, 73a.
38Record at 504.
pith of Fisher’s complaint was that enforcement of the law with respect to his employees who worked more than 50 hours weekly would compel him either to liquidate his business and dismiss all his employees or to curtail the business by dismissing the large majority of his employees and confining himself to production only of as much as his own two stores could sell (and abandoning his wholesale trade). The reasons for this outcome were that: first, the supply in his community of the “highly skilled labor” his business required had been exhausted by him and his competitors; second, even if he could secure additional skilled workers, the increased costs would render him unable to compete with more heavily mechanized firms; and, third, peak demands for his perishable product on Saturdays and holidays meant that his employees had to work longer hours those days than was permitted by the law.319

Expectations of an expeditious determination of the law’s constitutionality by the Supreme Court were frustrated when early on in the testimony a two-week adjournment ensued after plaintiff’s attorney explained that he was unable to proceed in the face of the judge’s decision to exclude the testimony of a Holgate employee as to why he preferred to work more than 44 hours and to sustain the defendant’s objection that another witness was not competent to answer questions concerning the reasons for the rise in Holgate’s input prices. As a result of the postponement, some believed that the case would not reach the Supreme Court before the spring.320

When testimony resumed on February 2, a former deputy attorney general requested permission to file a taxpayers’ suit seeking an injunction that would give immunity to all taxpayers who would otherwise be affected by the law.321 Although the press reported that the Department of Labor and Industry was “doing little to enforce the law pending a decision on its validity,”322 the Industrial Board met twice during the pendency of these suits to approve additional regulations. At a special meeting on February 3, 1938, the Board heard complaints from an electrical workers’ representative about violations of the 44-hour law by a contractor on the Pennsylvania Railroad electrification project that “appeared to be very antagonistic and make no effort to comply,” instead working

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319Record at 77a-78a. The bankruptcy of labor-intensive firms and the taking over of their market share by firms using labor-saving technology would contradict the worksharing goals of a maximum hours regime.
employees six days a week and ten hours a day. The Board requested that the Bureau of Hours and Minimum Wages “check up with” the employer and “endeavor to have them follow out the spirit and intent of the law.” The Board also heard from a representative of the Union News Agency who requested a modification of hours on the grounds that 199 of the company’s 224 locations in Pennsylvania were merely news stands of which 161 were operated at a loss: “Mr. LeBrum said that his case presents a very strong argument against the constitutionality of the Act because there can be no reasonable application of the law unless the Department grants a very general modification. He further stated that if the Department would agree to grant an acceptable variation they would be willing to withdraw from the interveners in the present action before the Dauphin County Court.” Despite facing more than 700 intervening employers in the suit, the Board decided that the Department should assign an investigator to the problem and submit recommendations to the Board.323

On February 7 the aforementioned taxpayer law suit was filed in Dauphin County Court of Common Pleas by C. W. Miller, a grocer who was subject to the state mercantile tax, claiming that the act was unconstitutional and that the costs of administering it increased the costs of state government, “which either results in increasing the taxes of the taxpayers of Pennsylvania or prohibits a decrease to the extent that these funds are expended for the aforementioned purposes” and thus imposed on the taxpayers “the burden of a useless, illegal, and unjustifiable expenditure.” The suit asked that the court declare the act unconstitutional, preliminarily, and later permanently enjoin Bashore and the Board from enforcing or spending any state funds on the act.324

At its regular monthly meeting on February 10 the Board approved its last administrative rulings under the general hours law. One determined that caretakers without regular hours whose employment included residence on the employer’s premises as partial compensation “are considered to be supervisors of their own employment and, therefore, not within the scope of the schedule of hours provided by law,” while the other brought federal highway projects within the scope of the law.325

324C. W. Miller v. Bashore, Bill in Equity, in Record at 1018a-1024a (quote at 1023a).
The Dauphin County Court of Common Pleas held a hearing326 that same day on Miller’s suit at which it granted the motion of John Phillips, the president of the Pennsylvania Federation of Labor (who was also the labor member of the Industrial Board), to intervene on behalf of the defendants.327 In spite of the fact that the Board was meeting that same morning and approving new regulations, Austin Staley, the Deputy Secretary of the Department of Labor and Industry, testified under oath at the hearing that as far as he knew the Department “[a]t the present time” was not spending any time on the 44-hour law: “Since this suit, as you know, has been started it has caused quite a bit of confusion in the Department so far as the policy of administration of the 44-Hour Law is concerned, and they were really at a loss to know whether or not...the Industrial Board should function on the 44-Hour Law applications.”328

It was once again front-page news when on February 16 “[t]he intricate State machinery which for two and one half months has been requiring Pennsylvania business to limit the activity of its male workers to 44 hours a week was abruptly halted...by a sweeping preliminary injunction issued by a 36-year-old Democratic judge.”329 It was not the court’s function to decide on the act’s constitutionality in the context of a request for a preliminary injunction, but merely to “determine whether there is a serious or grave constitutional question involved.” Quoting language from the famous Schechter case decided by the U.S. Supreme Court in 1935, it found such a question in section 2(b), which empowered the Department to prescribe variations without supplying any standards for determining an “unnecessary hardship” or “what violates the intent and purpose of the act.” It therefore enjoined the Department and the Board from carrying out or enforcing any of the law’s provisions and from spending any of its time or the Commonwealth’s funds on such activities until further order of the court.330

Governor Earle denounced the temporary injunction, directing Attorney General Margiotti to file an immediate appeal with the Supreme Court. John Edelman, the CIO’s regional director in Philadelphia, declared both that the injunction was “‘making monkeys out of the Legislature’” and that “‘the law hasn’t

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326Before President Judge Hargest, Additional Judge Fox, and President Judge Sheely, specially presiding. Record at 1029a.
327C. W. Miller v. Bashore, Testimony (Feb. 10, 1938), in Record at 1029a-1044a.
328C. W. Miller v. Bashore, Testimony (Feb. 10, 1938), in Record at 1036a.
330Opinion and Decree of Court, Miller v. Bashore, in Record at 1044a-1050a. Without any explanation the court asserted that the Department had contended that the delegation in section 2(b) was “mere surplusage.” Id. at 1047a. It is unclear what this phrase means.
been particularly effective anyway, due to employer opposition."331 The dispute between the CIO and the Department of Labor and Industry that the injunction had exacerbated was sharpened a few days later when Edelman, arguing that the injunction did not apply to the statute itself, but only to exemptions from it, called on the State to continue to enforce it. When Secretary Bashore pointed out that the injunction prevented his department from spending any money on enforcement until the courts had resolved the question of its constitutionality, Edelman replied that he would ask the attorney general to issue a ruling on the matter.332 Thus, in spite of all the rules that the Department issued during the brief period while the act was valid and in effect (from December 1, 1937 or January 3, 1938 to February 16, 1938), the statute was “[n]ever fully enforced” because of the looming omnipresence of judicial invalidation from the outset.333

Between February 16 and 23 the defendant Department of Labor and Industry put on a stellar cast of economists to testify about the need for and consequences of the general 44-hour week law. The most salient aspect of that testimony was its exclusive focus on the length of the workday (or workweek) and its complete neglect of the issue of depriving employers of the flexibility of requiring their workers to work overtime. Instead, apart from discussing the direct relationship between hours of work and sickness and injuries, the experts were called on to demonstrate that the volume and duration of unemployment had such a negative impact on wage rates and work standards that the ensuing drop in purchasing power and profits would trigger further increases in unemployment “to such an extent as possibly to bring about a complete paralysis of economic activity, in the absence of such a law as the general 44-Hour Law.” At the same time, the economists also presented evidence showing that the law gave employers little occasion to complain since, on the one hand, shorter hours did not “necessarily” increase unit costs of production because of their “affect [sic] upon productive efficiency of workers and management,” and, on the other, “the great majority” of employers and workers “already observe standards of forty-four hours or less.”334

A considerable volume of data was presented by Edward Berman (associate editor of the American Economic Review) showing that only 5 percent of manufacturing employees in Pennsylvania worked more than 44 hours weekly during the first half of 1937.335 Lest anyone wondered why, in the face of such a generally prevailing 44- or even 40-hour week in Pennsylvania and neighboring

331Lush, “Court Enjoins Enforcement of 44-Hour Act.”
334Record at 592a-593a.
335Record at 595a, 632a-635a.
states, a law was needed at all, Solomon Barkin (who had been an economist for various New Deal agencies) testified that there were "individual concerns within the state that do not comply with the prevailing standards." With regard to the effects of the mandatory shorter week, the economists did not deny so much the existence of a race to the bottom as the fact that there was a bottom at all in the sense that they argued that the number of workers affected by interstate relocations of manufacturing operations was tiny (less than 0.2 percent annually between 1928 and 1933) and that the states bordering Pennsylvania, even though they lacked 44-hour laws, had "a great deal of 44-hour practice" and would scarcely attract firms in search of cheap labor. Thus, in the view of Columbia University economics professor Carter Goodrich, who concluded that "a supply of skilled high-standard intelligent labor is probably more often a determining factor in location than a supply of cheap and low-standard labor," the new law would not cause industrial flight in large part because "industry is a great deal harder to move than people...." And the "negligible number of cases" of migration caused by the law "would be ones in which the industry in question was of very doubtful value to the state...."

The sense of the testimony of J. Raymond Walsh of Harvard University was that rather than employers' bearing the burden, some of the "very small" number of workers whose hours were reduced to 44 would experience a decline in weekly wages if their wage rates were not increased proportionately. The expert witnesses reached this conclusion because they were optimistic that employers were able to "find means of cheapening their methods of production to offset the increase in costs which might result from increases in wages and shortening of hours."

As the Holgate suit concluded on March 4, the plaintiff's attorney, in support of his request for a permanent injunction, told the court—despite the fact that the Pennsylvania law was and would remain unique—that "the litigation was being watched outside the State as a possible precedent for the entire Nation to follow in similar labor legislation."

The next two weeks, ending the very same day that Judge Sheely issued his decision in the Holgate Brothers Company case, was taken up with a political intermezzo sparked by a conflict between Attorney General Margiotti, who was a candidate for the Democratic nomination for governor, and the Earle ad-

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336 Record at 846a-47a, 859a (quote).
337 Record at 874a-875a (testimony of Carter Goodrich).
338 Record at 875a, 871a, 870a.
339 Record at 830a-831a.
340 Record at 851a (testimony of Solomon Barkin).
ministration. Initially the dispute focused on the revelation that Bashore had put three lawyers (Gilbert Kraus, Philip Dorfman, and Alexander Frey) who had represented the labor union-intervenors in the litigation on the State payroll at $25 per day without the attorney general’s approval, which was required by state law. Bashore defended his action on the grounds that he had not hired them as lawyers, but to tie in the department’s economic brief—which had been drafted by Leon Henderson, who had been an economic adviser to the National Democratic Committee in 1936—with the legal arguments. Margiotti also used the occasion to cast further aspersion on the drafting of the 44-hour bill, charging that Deputy Secretary of Labor Austin Staley and Deputy Attorney General Manuel Kraus had drafted the law in less than five minutes by taking a copy of the women’s 44-hour law and “wherever it read ‘woman’ they changed the word to ‘person.’” In contrast, Bashore stated that Deputy Attorney Generals Russell Shockley and Manuel Kraus had drafted the bill, which Chief Deputy Attorney General Edward Friedman, then acting as Attorney General, declared constitutional at a caucus of Democratic senators who had been called to the governor’s office. Earle appeared on the verge of demanding Margiotti’s resignation over his accusations, asserting that if legislation had been improperly drafted, it had been Margiotti’s fault for having absented himself from Harrisburg, while the attorney general promised that, if elected governor, he would not give the people “‘unconstitutional gold bricks” or “a program of law suits. Labor and business will get results, not injunctions.” Earle put an end to the contretemps the next day, certifying Margiotti’s belief in his administration’s “liberal objectives.” Though the governor refrained from disclosing the grounds for his reversal, its effect was to leave “Bashore in the middle as a whipping boy for the Administration,” just as the trial court handed down its decision invalidating the 44-hour law and permanently enjoining its enforcement.

On March 18 an eight-column banner headline in the *Harrisburg Telegraph*

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announced that Judge Sheely had issued a brief decree\textsuperscript{348} holding the law, which "affects nearly all the male workers in the Commonwealth of Pennsylvania," unconstitutional and enabling the defendant to take an immediate appeal of the decision to the Supreme Court.\textsuperscript{349} Three days later, on March 21, Sheely followed it up with the formal adjudication,\textsuperscript{350} which The Pittsburgh Press's headline correctly interpreted as "Uphold[ing] State's Right to Fix Hours."\textsuperscript{351} Governor Earle, saying that "[f]orty-four hours a week is long enough for anyone to work," ordered the attorney general to file an immediate appeal.\textsuperscript{352} Perceiving that "an atmosphere of uncertainty now hangs over Pennsylvania because of the 44-hour week law," The Pittsburgh Press could hardly wait for the outcome of a speedy appeal.\textsuperscript{353} The same day, the court, relying on the decision that day in Holgate Bros. Co. v. Bashore, also made permanent the preliminary injunctions issued in Miller v. Bashore.\textsuperscript{354} The same day the Supreme Court indicated that it would try to hear arguments in the case the week of April 11 or 18 (though in fact the hearing did not take place until May 23).\textsuperscript{355}

The Dauphin County Court included among its findings of fact a broad array of the plaintiff's allegations. Holgate Bros., which had filed a petition for a variance from the maximum hours regulation but never received a notice of a hearing (because none was ever held), felt it would be adversely affected by the new law because it operated its factory 9 hours a day and a half days per week, few of its employees would have been excluded by virtue of being executives earning at least $25.00 per week, and some of its employees such as watchmen, firemen, and engineers worked 70 to 84 hours weekly; 300 of the firm's employees were subject to the law. The law's adverse impact would have resulted from the fact that the firm's products, which were of low value and 60 percent of the cost of which was labor, competed directly with similar products manufactured

\textsuperscript{348}"44-Hour Work Week Ruled Void by Dauphin County," Harrisburg Telegraph, Mar. 18, 1938, at 1:1-8.

\textsuperscript{349}Decree of Court, Holgate Bros. Co. v. Bashore, in Record at 951a (quote); "Pennsylvania 44-Hour Law Held Illegal," Pittsburgh Press, Mar. 18, 1938, at 1:1.


\textsuperscript{351}"Court Upholds State's Right to Fix Hours," Pittsburgh Press, Mar. 21, 1938, at 5:1.


\textsuperscript{354}Adjudication and Decree of Court, Miller v. Bashore, in Record at 1055a-1062a.

in states without hours laws and would have to rise in price materially. Holgate Bros. sought to explain why it was not feasible for it to conform to the maximum hours regulation. First, it "requires highly trained workers, who can be developed only after years of effort, and there is no readily available supply of such additional competent men." Second, "demand for the company’s products is insufficient to warrant the addition of another eight-hour shift and its requirements cannot be met if one hour is taken from its present schedule." Third, even if the company could adapt to an eight-hour day, "much expensive new machinery, a new building, and additions to the power plant" would be required. The plaintiff also sought to undermine the law’s rationale by asserting that: its employees’ work was "in no manner unhealthful nor is it unduly hazardous but, on the contrary, the...work constitutes healthful employment performed in a healthful environment under approved sanitary conditions and in compliance with standard safety regulations"; the work, "under the existing scale of hours" was not "detrimental to the health, morals, safety, or welfare of [its] employees or of the public.” To buttress this allegation the firm pointed out that most accidents at the plant occurred in the morning (when the workers were presumably at their freshest and not, as the defendant would have contended, during overtime hours, although the superintendent of the plant could not explain why).

As fact Judge Sheely found Boswell Lumber Company’s allegation that it would be impossible for it to operate the railroad it used for transporting logs from the woods to its mill because the round trip frequently lasted more than eight hours. Similarly, the truck drivers who delivered some of the firm’s finished product often had to go on trips lasting more than eight hours; likewise, certain of Boswell’s employees had to perform four extra hours of work to make repairs twice a week while the mill was not operating. Because it was not possible to hire additional workers to work only four hours per week, the firm would have to suspend operations two hours earlier twice a week, thus increasing unit production costs.

The court also included among its findings of fact Underwood’s allegation that its workers who repaired machines at customers’ plants often worked more than eight hours in order to enable the plants to resume operations as quickly as possible; the firm could not effect repairs as expeditiously if it hired additional workers “because much of the work...is so delicate and complicated that the men could not work in relays but those who commence a task must finish it.” Furthermore, Underwood could not retain enough skilled workers to perform repairs on an eight-hour basis “because it can only supply sufficient work for the men it now employs and that only by permitting them to work long hours at

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increased pay when a breakdown is being repaired in view of the fact that at other times there is little work for them to do.” It would be “extremely difficult” for Underwood to obtain workers with the requisite skills, but even if it could hire them, it could not retain them because it would not be able to offer them overtime work at higher wages.\footnote{Holgate Bros. Co., 45 Dauphin Cty. Rep. at 283-84.}

Judge Sheely also found as fact that Fisher’s Bakery’s bakers worked 54 hours weekly and that it would be “inconvenient if not impossible” to operate this continuous process on a 44-hour basis unless it opted for labor-saving mechanization (75 percent of the work was done by hand), thus resulting in discharges.\footnote{Holgate Bros. Co., 45 Dauphin Cty. Rep. at 285-86.}

The court accepted as fact the claim of the City of Philadelphia, Trustee, that complying with the statute would increase payroll costs, which would have to be taken from the charitable trusts.\footnote{Holgate Bros. Co., 45 Dauphin Cty. Rep. at 286-87.}

Finally, Sheely found as fact that Grand Union employed 279 workers (of whom 263 were men) in 57 stores in Pennsylvania, 185 of whom were not executives earning more than $25 weekly; the male employees worked nine and a half hours Monday through Friday and 12 hours Saturdays for a total of 58 to 60 hours weekly. Compliance with the law would increase its wage costs (which constituted 45 percent of total costs) and in response it would try to “impose additional duties on the [presumably excluded] managers”; it would also hire additional part-time “help,” but such workers were “not permanent, dependable or satisfactory since they lack the experience which is required of a successful salesman and they are constantly seeking other employment.”\footnote{Holgate Bros. Co., 45 Dauphin Cty. Rep. at 287.}

The defendant Department of Labor and Industry’s case was considerably weakened by Judge Sheely’s decision to exclude all of its expert witness testimony concerning the relationship between hours worked and health or sickness and injuries. Some was excluded because the experts lacked personal knowledge of the data collection methodology—despite the fact that the plaintiffs’ own expert witness testified that their sources were “entirely satisfactory.”\footnote{Record at 917a (testimony of Willford I. King).}

Some was excluded because the hours and health data did not refer to the same group of workers. And finally, some was excluded because the relationship between

\footnote{As the defendant noted in its brief before the Supreme Court, the rule of evidence that an opinion based on others’ opinion is inadmissible was inapplicable to official statistics: “Could anything be more absurd than to require an acknowledged expert to refrain from expressing an opinion based upon information contained...in census reports or mortality tables merely because he had not personally collected and correlated the data?” Brief for Appellees at 85-86.}
hours of work and health referred to factory and industrial workers, whereas the statute applied to almost all workers. Sheely even refused the Department's request for such a fundamental finding of fact that "there was an unprecedented, large amount of unemployment in Pennsylvania at the time of the passage of this act." Despite these adverse rulings, Sheely did "take judicial notice of the fact that too long hours and too short rest periods in any occupation will, in the course of time, be injurious to the health and welfare of the employee. The regulation would, therefore, have a real relation to the protection of the health of the employees." A "real" relation, however, did not suffice: it also had to be "substantial" in order to "validate an Act which interferes with the general right of the individual to be free in his person and in his power to contract in relation to his own labor." The judge imposed yet a further restriction by ruling that "a substantial relationship between the hours of labor and the health and safety of the workers in some occupations [will not] be sufficient to validate an act regulating the hours of labor in all occupations." 

Because the health and accident risks in various occupations were not reasonably similar, Sheely ruled that blanket regulation of all "cannot be a valid regulation." He derived this conclusion from "the fact"—of which he again took judicial notice—"that employment for more than eight hours per day under healthful conditions and in occupations involving no substantial manual effort, or continuous effort, is not injurious to the health, safety, or the welfare of the worker."

Sheely also found the statute defective on the grounds of inflexibility: "at the end of the eight-hour day, the employee is required to cease work regardless of the circumstances or emergencies then existing. No provision whatever is made for overtime. Under this prohibition the truck driver would be required to leave his truck on the highway and find his way home...." He therefore held that: "A statute arbitrarily limiting hours of labor rigidly with no provision giving the employer an opportunity to adjust his business to the schedule permitted by the statute without unnecessarily increasing costs, and which gives the employee in

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365 Defendants' Exceptions, in Record at 994a, 1007a (quote).
366 Holgate Bros. Co. 45 Dauphin Cty. Rep. at 292. Despite this stress on interference with a person's freedom to contract with regard to his labor, Sheely had sustained the Department's objection to Holgate's presenting testimony by its employees concerning their preference for their longer hours to the 44-hour week. Record at 320a-21a.
367 Holgate Bros. Co., 45 Dauphin Cty. Rep. at 293. The judge added that the case in this respect was similar to the 1918 Alaska case, United States v. Northern Commercial Co. See above ch.5.
seasonal occupations no opportunity to extend his labor beyond a limited period is unreasonable and capricious.\textsuperscript{369}

Because the court acknowledged that the legislature itself had recognized this rigidity and had for that very reason delegated power to the Department of Labor and Industry to "overcome the unreasonable, arbitrary and capricious effect of the statute," the court then turned to issue of delegation.\textsuperscript{370} The validity of such delegation was immediately suspect because the Department was empowered to "completely nullif[y]" the legislation by approving a workday or workweek of any length. "The law then would be, not what the legislature prescribed, but what the Department deemed proper." Sheely cited as the best illustrations of unlawful delegation the actual variations granted by the Department, such as permitting employers of three or fewer workers to work them 54 hours per week and excluding entirely secretaries earning more than $25 weekly and working for excluded executives.\textsuperscript{371} Judge Sheely found that the legislature's failure to impose standards on the agency or even to prescribe administrative machinery for holding hearings left the statute subject to the same criticism that prompted the U.S. Supreme Court to invalidate the National Industrial Recovery Act.\textsuperscript{372}

In the end, then, Judge Sheely found the statute unconstitutional and enjoined its enforcement on the grounds that it: deprived plaintiffs of their liberty and property without due process or just compensation; was an improper exercise of the police power; and constituted an unlawful delegation of legislative power to the Department of Labor and Industry.\textsuperscript{373} The law then was invalidated before it "had become fully operative."\textsuperscript{374}

In order to bolster its position that the 44-hour law was a proper exercise of the police power, the defendant submitted to the Pennsylvania Supreme Court a 350-page "factual brief," studded with dozens of tables and charts. Prepared under the direction of Leon Henderson and a number of noted economists (some of whom had testified at trial) such as Walsh, Berman, and Robinson Newcomb, it is perhaps the most sophisticated set of economics arguments on behalf of a general hours law ever submitted to a court in the United States and much more subtle than the testimony heard by the Congress considering the FLSA in 1937-38. Indeed, the Department later boasted that the "factual brief was so comprehensive as to be of tremendous value to other states and the Federal Govern-
ment if there should be a challenge of hours legislation."^375 Ironically, the only aspect of the law for which the factual brief offered no support was the flat ban on overtime. In fact, the Department of Labor was so far removed from facing up to the uniqueness of the statute that it audaciously and untruthfully asserted:

The 44-hour law of Pennsylvania is manifestly reasonable, compared with hour legislation elsewhere in the United States, and with a pending wage-hour bill in the Congress of the United States. ... The Pennsylvania law makes no radical departure from standards laid down in existing American legislation.^376

Even a year after the statute had been invalidated, the Department persisted in propagating this apologia: "That Pennsylvania was reasonable in the establishment of a forty-four hour maximum is borne out by the action of the Federal Government in the Wage and Hour Law.... This law sets a maximum forty-four hour week."^377

The specific contentions that the factual brief sought to support were: (1) the adjustment of working hours served the social purposes of health conservation, greater efficiency of production, and better distribution of purchasing power; (2) work hours were intimately associated with workers' susceptibility to illness and accidents; (3) a "ceiling of hours must be proposed...to prevent degradation of labor standards and purchasing power in the present era of depressed employment"; (4) reducing hours to 44 would not necessarily increase production costs because shorter hours were offset by greater hourly output; and (5) the 44-hour week was not unreasonable because this maximum was higher than that of many states.^378

Perhaps the most remarkable characteristic of the Department's economic brief was its straightforward use of the then new Keynesian theory of stagnation to justify the statute:

The most compelling social reason for the 44-hour law is that we are facing an era of permanently depressed employment. .... Evidence accumulates from all sides that both the United States and other countries in an advanced stage of economic development are facing a condition of chronic underemployment of the working population. In a work (The General Theory of Employment, 1936) which created a profound impression in the scientific world, Professor

^376Factual Brief for Appellants at 148.
^377Pennsylvania Department of Labor and Industry, Biennium Report 1937-1938, at 94.
John Maynard Keynes has traced this condition to the "propensity to save" which has been developed through the mechanism of the profit system and which now outruns our capacity to provide channels for new investment.\footnote{Factual Brief for Appellants at 47.}

Nevertheless, the Department of Labor and Industry did not contend that the 44-hour law was intended as a solution for the primary condition of permanently depressed employment. It is intended to protect the State of Pennsylvania from the disastrous secondary consequences of this condition. Given the fact of depressed employment, given the likelihood of a permanent labor surplus...the equilibrium or bargaining relations between employers and workers is permanently disturbed. The worker is unable to demand conditions of hours and wages...in keeping with his present-day capacities to produce. The employer takes advantage of his weakness, particularly in the unorganized industries, to impose long hours and thus depress the amount of purchasing power that is given to labor per unit of labor. \[T\]he situation is made worse by the fact that the ability of the employer to impose long daily hours on the worker accustoms him to run his plant at irregular intervals and to make a profit or break even at partial operation. The average working hours in Pennsylvania during 1936 and 1937...were well under 40 hours. This average, however, conceals a degradation of hour and wage standards that has taken place. For it is the long hours in the period a worker is actually fully employed that determines the low wage standard upon which business and industry today find it profitable to operate.

In short, as long as a labor surplus exists and as long as the state does not set up any limits as to hours, we shall see a natural tendency to transform American levels of prosperity, based on American hours standards, into something resembling oriental levels of prosperity based on coolie standards and coolie hours of labor. We may see a condition where business will operate at 30 to 50 percent capacity, and will employ labor at the rate of sixty, seventy and eighty hours a week but only a third or one-half of the days or weeks in the year.\footnote{Factual Brief for Appellants at 53, 55.}

While avoiding any discussion of the inflexibility of a regime prohibiting overtime, the Department of Labor and Industry’s factual brief devoted considerable attention to a series of empirical arguments designed to demonstrate that a 44-hour week would not “impose an unreasonable burden” on employers because “the great majority of Pennsylvania’s industrial workers, as well as many...retail employees...already enjoy a standard equal to, or better than, that contemplated by” that law.\footnote{Factual Brief for Appellants at 59.} Among these workers were, according to a comprehensive but incomplete count, 735,200 workers in Pennsylvania covered by
40- to 44-hour provisions in collective bargaining agreements. To be sure, the Department failed to add that most of these agreements, unlike the statute, presumably also provided for overtime work and premiums. The Department also adduced "[t]he astonishing fact" that its own sample encompassing 1,676 establishments employing 417,880 workers "revealed that only 5 percent of the workers and 12.4 percent of the plants had an average work week in excess of 44 hours during [each of] the first six months of 1937." These data prompted the Department to remark: "There seems to be conclusive evidence that the law disturbs the working relations of but a small minority of the wage earners in the major Pennsylvania industries." Again, this conclusion pertained solely to the issue of the general length of the workweek and did not deal with the inflexibility of prohibiting overtime work.

In its legal brief, however, the Department of Labor and Industry did deal with this issue. First, it criticized both the plaintiffs and the lower court for asserting that the law imposed an absolute prohibition on hours longer than eight per day or 44 per week: "This is exactly what the statute does not purport to do. The statute merely establishes that prima facie" these hours "are the maximum hours of labor consistent with public health and welfare, but that wherever this standard ‘imposes an unnecessary hardship and violates the intent and purpose’ of the act,” the Department might grant variations, which “are an integral and inseparable part of the statute.” Second, the legal brief, combining a counter-attack on the plaintiffs’ substantive and procedural claims, argued that the legislature was

well aware...that certain types of labor, especially in emergencies, could not be adequately performed within the prescribed limits and that their adequate performance might be so publicly important as to justify a variation from the normal standards. Consequently, the Legislature sought to inject a degree of flexibility into the proposed statute to take care of these conditions. But it realized that, not being in constant session, it was not equipped to determine the facts of every situation in which, within the intent and purpose of the act, a variation from the norm might be justifiable. So it wisely stipulated that the Department of Labor and Industry and the Industrial Board...might grant variations.... To deny this power would be to rule that nothing which is unknown, uncertain or varying can be the subject of legislation.

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382 Factual Brief for Appellants at 267-74.
383 The brief itself presented material showing that collective bargaining agreements called for overtime at premium rates. Factual Brief for Appellants at 275-76.
384 Factual Brief for Appellants at 110, 112.
385 Factual Brief for Appellants at 111.
386 Brief for Appellants at 93.
387 Brief for Appellants at 96, 107-108.
The final and major step in the Department’s legal argument sought to hoist the plaintiffs by their own petard by focusing on the employers’ assertion that the act was “rigid” because “it contains no provision for overtime.” In fact, the Department and the Board were empowered to grant “overtime” in appropriate instances, i.e. to grant the privilege of employing workers more than eight hours per day where unnecessary hardship would otherwise be entailed. What form of statute meeting the needs of public health and welfare would these plaintiffs prefer? Would they be better pleased with a law establishing a truly rigid eight-hour day and containing no provision for variation? Would they prefer a law establishing an invariable basic eight-hour day but permitting “overtime” at a scheduled increase in compensation? Clearly a general provision for “overtime” transforms hour legislation into a thinly-disguised wage bill; in effect the Legislature says to employers, “You may consistently work your employees excessive hours, detrimental to both public health and welfare, if you only pay them enough.” As a matter of fact, the statute in question is as mild as any such legislation feasibly could be and still accomplish the objectives of promoting public health and welfare. Obviously, the real objections of the plaintiffs are not to the terms of this act, but to any form of regulation of hours of employment.

Here the Department of Labor and Industry put its finger on the crucial question in an unadorned and eloquent fashion, but apparently without realizing that it could not have it both ways: This rare public admission by a labor standards agency that a mere overtime law was self-defeating because additional money could not compensate for loss of time, health, and leisure (or fulfill the goal of spreading work) was an extraordinary critique of the FLSA and all similar laws, but it disingenuously failed to explain that the Pennsylvania law was in fact unique.

So disingenuous were the Department’s lawyers that they even misleadingly quoted from the Oregon hours statute—which was the example par excellence of a thinly disguised premium-overtime wage law masquerading as a maximum hours law—in an effort to claim for the Pennsylvania law the imprimatur of the U.S. Supreme Court, which in *Bunting v. Oregon* had upheld the Oregon law as conforming to due process requirements. The Department’s legal brief asserted that that decision:

is an important authority also indicating with much persuasiveness that the [44-hour] statute does not violate the due process clause in the Pennsylvania Constitution. The Oregon statute...provided: “No person shall be employed in any mill, factory or

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388 Brief for Appellants at 99.
389 Brief for Appellants at 99-100.
390 On this case, see below ch. 8.
manufacturing establishment in this State more than ten hours in any one day * * *” Thus, we have a law applying to men and women alike and applicable to all industry and not limited to the so-called dangerous employments.391

The omitted text signalled by the asterisks read: “provided, however, employees may work overtime not to exceed three hours in any one day, conditioned that payment be made for said overtime at the rate of time and one-half the regular rate.”392 If the Pennsylvania statute had contained such an overtime escape clause, employers and the press would have found it much more difficult to attack it as inflexibly unworkable and, consequently, it is very unlikely that it would have provoked the kind of intransigent judicial resistance that led to its rapid demise. But the absence of such an overtime clause was precisely what made the law unique. The difficulty faced, but never adequately resolved, by the Department was to structure its intervention pragmatically without sacrificing the statute’s profoundly anti-overwork orientation. The legal brief’s cri de coeur about what practicable alternative the plaintiffs might suggest, though rhetorically directed at employers, was in reality a camouflaged admission that the legislature had put the Department in an untenable situation by enacting a uniquely radical piece of hours regulation without making it clear to the public exactly how invasive of capitalist prerogatives and methods the law was. If the Department had set about granting variations strictly, it would inevitably have run into a solid wall of employer and journalistic resistance; if, on the other hand, it had striven to confer as much flexibility as possible on employers, it would have transformed the maximum hours regime into a mere overtime law, which would have failed to achieve the legislature’s ostensible purposes spreading work and ensuring adequate time away from the workplace.

Contrary to the Department’s rhetorical question, most employers would, did, and still do prefer overtime laws to rigid or flexible administratively regulated maximum hours laws. And although the 44-hour law may well have been “as mild as any such legislation feasibly could be,” it was nevertheless unprecedented and invasive. If, on the one hand, the Department had adhered to its published definition and regulation of “emergencies,” it would not have been able to authorize employers to work overtime to meet unexpected increases in demand that firms assume they have a right to meet; in that case, the law would have revealed itself as interventionist and disruptive of the ordinary processes of capital accumulation. If, on the other hand, the Department had bent the regulation to permit run-of-the-mill overtime work, it would—since it generally made time and a half a precondition of granting such variations—have been undermining the

391 Brief for Appellants at 179.
392 1913 Or. Laws. Ch. 102, § 2.
purposes of the statute in precisely the way its legal brief pointed out traditional overtime laws did.

In order to make the law more palatable, defendant Bashore contradicted en­
forcer Bashore by asserting in the factual brief that since the statute prescribed only maximum hours and not minimum wages:

The law in no wise requires that the reduction of weekly hours should be accompanied by an increase in hourly wage rates so as to keep the weekly pay unchanged. Whether in a given case the reduction of hours is to be accompanied by a reduction in weekly pay or by an increase in hourly rates and the maintenance of the previous weekly pay depends entirely upon the employer’s bargaining relations with his employees. The law has nothing to say.393

At the same time Bashore conceded that the 44-hour law was enacted “to protect the weakest low-paid unorganized and exploited workers in Pennsyl­
vania,” whose location in small firms “in small towns scattered all over the coun­
tryside” made “union organization and union activity impossible.” Only “State action” was “likely” to enable these workers to secure shorter hours.394 By the same logic, Bashore could have added that such weak and atomized workers would be unable to negotiate higher wage rates; consequently, their shorter hours would translate into lower weekly wages and annual incomes. Whether this outcome would tend to make the law more palatable to the affected workers, Bashore did not say.

The Department's factual brief, however, did shed more light on the question by developing the thesis that the law also represented a long-term state industrial restructuring policy. Some of these workers working more than 44 hours were employed in Pennsylvania’s “many submarginal industries which have survived chiefly because labor could be secured to work excessively long hours at low rates of pay. If one or two of these submarginal industries should disappear as a result of the 44-hour week, it will be an indication that they should have been abandoned long ago, and that the population of the State will, in the long run, be better off since the labor these industries now employ will sooner or later be transferred to other more progressive branches of manufacturing.”395

Here the Department of Labor and Industry distinguished between two types of employers. Those in the first group, which worked their employees more than 44 hours in “irregular peaks,” might in fact experience an increase in labor costs

393Factual Brief for Appellants at 59-60.
394Factual Brief for Appellants at 105-106.
395Factual Brief for Appellants at 97-98. On minimum wage laws as industrial policy, see Marc Linder, Migrant Workers and Minimum Wages: Regulating the Exploitation of Agricultural Labor in the United States 95-123 (1992).
as a result of having to comply with the 44-hour law because they “arbitrarily concentrate the working of their employees into a few months of the year and expect them to shift for themselves or be supported from public funds during the period of slack employment. Such employers obviously deserve no sympathy, for it is to the social interest to remove this form of social parasitism, as the law specifically contemplates, by forcing employers to stabilize employment as far as possible over the various months of the year.”

The second group consisted of hundreds of honest and conscientious proprietors employing but a few hundreds of workers and engaged in productive enterprises whose capital is so small that they are unable to provide the mechanical and other appliances needed to increase the productivity of their labor force, and who, therefore, may make little or no profits even though they compel their workers to labor long hours at low wage rates per hour. In the long run the fate of these establishments is sealed. They are doomed to disappear. The machine industry has long since promised the eradication of such handicraft vestiges of another day.

It is conceivable that the 44-hour law will promote their disappearance. If this occurs it merely hastens an inevitable process of extinction, the only difference being that the demise is sudden rather than drawn out through a long period of industrial illness, during which the exploited workers, as well as the proprietors and society, suffer hardship.

On May 23, 1938, two months after the trial judge issued his ruling, the Pennsylvania Supreme Court heard oral argument on the defendants’ appeal from the decree restraining them from enforcing the maximum hours law. The justices’ comments from the bench left little doubt about the outcome. Indeed, a month later, when the decision was handed down, the supervisor of the Philadelphia area branch of the Bureau of Hours and Minimum Wages observed that those judicial remarks (as well as the court’s complexion) had prompted his organization to expect an adverse decision. The Philadelphia Inquirer’s reporter was so impressed by how “outspoken in their criticism of the act” the justices were that he concluded that they had “strongly indicated... they would scrap” the law. Seemingly echoing the Inquirer’s own campaign to brand Bashore an industrial “dictator” and “czar,” Chief Justice John W. Kephart called the law “‘the greatest delegation of power to one man ever attempted in this State.’” In response to Alexander Frey’s argument that the law was a valid exercise of the police power, Kephart charged that the exercise could be so “‘arbitrary...that the Secretary of Labor and Industry could close up certain plants and

396 Factual Brief for Appellants at 60-61.
397 Factual Brief for Appellants at 131.
allow others to operate. That is the way I feel about it, Professor.’” Frey made no friends when he offered the realist jurisprudential suggestion that the Court itself was “‘to some extent on trial’” in the sense that “this law is admittedly an experiment approved by the Legislature and that the court could find legal justification to decide this case either way.’ ‘I don’t think so,’ put in Justice William B. Linn.” The court’s rigid ideological bias was perhaps most clearly on display in the questioning to which the justices subjected Professor Frey concerning the experts whom the state had retained to draft its economic brief in support of the law. After Justice William Schaffer had asked: “‘Are they people who ever had to face a payroll?,’” Chief Justice Kephart—a member of the Court since 1919, who had previously been a corporation lawyer and corporate director—interjected: “‘The opinion of men who have spent their whole lives in the factories and mills hold [sic] a great deal of weight when you compare it with that of men who have sat in class rooms instructing students.’” In this regard, the Supreme Court was echoing the plaintiffs’ trial attorney, who had repeatedly grilled the Department of Labor and Industry’s lead economist-witness as to whether he had ever managed a business or operated a manufacturing establishment. Justice Schaffer interjected his own version of realist jurisprudence by answering his rhetorical question about the exemption of agriculture: “‘Maybe farmers were exempted because they wouldn’t stand for such regulation.’”

On June 30, just five days after Congress finally passed the FLSA, the court handed down its opinion unanimously affirming the original decrees. Because the court identified delegation as the statute’s fatal unconstitutionality, it did not reach the additional grounds relating to the police powers and due process on which the lower court had rested its finding of unconstitutionality. The Supreme Court interpreted the legislature’s anti-severability clause as “impliedly inviting” the judiciary “at the outset to determine the validity” of the delegation clause. The Court identified the fatal flaw, as in *Schechter Poultry Corp.*, as the lack of any policy, standards, or boundaries to fetter the agency’s discretion.

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401 Record at 606a.
402 “‘Hours’ Power Hit by Kephart,” *Pittsburgh Press*, May 23, 1938, at 1:5.
403 Under article V, section 2 of the state Constitution, Supreme Court justices were elected to 21-year terms. One member, H. Edgar Barnes, who had originally been appointed by Governor Earle to fill a vacancy caused by a justice’s death in 1935, was then elected later in 1935. Earle had earlier appointed Barnes, who was chairman of the Democratic State Finance Committee, Secretary of Revenue and Secretary of the Commonwealth of Pennsylvania. *The Pennsylvania Manual* at 1011-12.
to shorten hours to six or extend them to twelve per day. The Court found an even more palpable constitutional violation in the mandatory conformity to any future federal hours regulation—at least beyond the field of interstate commerce, which is exclusively within the state’s province.

The *Philadelphia Inquirer* emblazoned the outcome embodied in the court’s “uncompromising opinion” across two columns at the top of page one. Its in-depth analysis declared that the Supreme Court had “blasted the Earle Administration’s 44-hour week work law from the statute books....” Predictably, the *Inquirer*’s editors were exultant that this “shining example of the sloppy lawmaking that has distinguished the Earle Administration” had been found illegal. Although the editors granted that the law had been “[m]eritorious in its basic purpose of fixing maximum hours for men,” they offered no constitutional means of achieving that objective. Since a statute that would have prescribed in detail the grounds for conferring hardship and emergency exemptions would have been difficult to imagine other than in the form of incorporating something like the regulations that Bashore promulgated, the *Inquirer*’s failure to have made such a proposal suggests that the newspaper in fact did not favor any kind of maximum-hours law for men and at most would have accepted an overtime law.

In his obituary of the 44-hour law on the day the state supreme court an-

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405 Holgate Bros. Co. v. Bashore, 331 Pa. at 263-65. The Department had argued persuasively that the policy of the 44-hour law was, unlike those of the NIRA, narrow and restricted, and that the agency’s discretion was neither vague nor indefinite. Brief for Appellants at 135-44.

406 Holgate Bros. Co. v. Bashore, 331 Pa. at 268-69. To Landon Storrs, *Civilizing Capitalism: The National Consumers’ League, Women’s Activism, and Labor Standards in the New Deal Era* 323-34 n.9 (2000), this decision is an example of how “[s]tate court rulings on labor laws were very unpredictable in this period.” In a two-sentence summary all four of the author’s factual statements are false: “In 1938 the Pennsylvania Supreme Court struck down an eight-hour day/forty-four-hour week law for men but left intact the parallel law for women. Either the employers who brought suit challenged only the minimum wage principle for men, or the women’s bill was drafted more carefully.” In fact, the general 44-hour law applied to women; the women’s statute, which dated back to 1913, was not being litigated; the general 44-hour law contained no minimum-wage provision; the women’s hours law was virtually identical.


nounced its demise, Secretary Bashore charged that the decision “strikes a blow at the efforts of the Administration to remedy sweatshop activities in industry in Pennsylvania.” He added that the new FLSA—which he implausibly claimed was “‘modelled to a great extent after our own 44-hour law and regulations’”—would not cover intrastate commerce.410 Two days later Bashore extended his critique by observing: “‘Most of Pennsylvania’s workingmen will not be affected by” the FLSA, which...[b]y itself...without State legislation will be practically non-effective in this State.’” The reason was obvious: “‘coal and steel, which employ the big percentage of workers in Pennsylvania, already are governed by union contracts which are in most part less than 44 hours and above the 25 cents an hour minimum fixed in the Federal act. ... The industries that need such a law the most—laundries, hotels and restaurants—the service indus­tries—are purely intrastate and will not be affected by the Federal law.’”411

In its relatively lengthy report on the Supreme Court’s decision, The New York Times suggested that labor may not have been in deep mourning over a law that had “never” gone into effect: “So many exemptions were provided, however, that some labor leaders who had supported it originally said later that the measure was ‘shot full of holes.’”412 At its first regular monthly meeting following the invalidation of the law, the Industrial Board, taking note that the Supreme Court had declared the general 44-hour law unconstitutional, proceeded without further comment to reaffirm those rules under the general law that should be applicable to the women’s 44-hour law.413

Judicial invalidation of the maximum-hours law in 1938 merely anticipated what the legislature itself would doubtless have done in 1939 had the statute still been on the books. Once the Republican Party regained control of the governorship and both houses of the legislature in the 1938 elections, it was in a position to undo much of the pro-labor legislation that the four-year Little New Deal had achieved, especially during the 1937 legislative session. The pro-employer amendments that were enacted in 1939 to the Little Wagner Act, the workers compensation law, the anti-injunction law, and the hours law for female workers414 made clear that the radical maximum hours statute would certainly either have been repealed outright, hedged with so many exemptions and ex-

414Keller, Pennsylvania’s Little New Deal at 343-99, esp. at 384-90.
ceptions as to lose its force, or, in the best case, transformed into an overtime law. As Lewis Hines (who as the AFL's director of organization had appealed to Pennsylvania workers in 1938 to vote for the Republican party to prevent "Communist-controlled" CIO leadership in the state), the new Secretary of Labor and Industry, told the National Conference on Labor Legislation in 1939: "during the administration previous to this one I am sorry to say we made too much progress. We were given certain labor laws for political reasons; laws that did not work."

In the event, male workers—the women's 44-hour law had been left unscathed by the supreme court's decision—in Pennsylvania had to wait three decades (until 1968) even for a state overtime law, and, at the beginning of the twenty-first century, are still waiting for a general statutory rest period.

In 1939, Representative Falkenstein introduced House Bill 708, which would have established a 7-hour day and 35-hour week (for the same employees covered by the 44-hour law) and created the Employment Commission (consisting of the Secretary of Labor and Industry as chairman, the Secretary of the Department of Commerce, and five gubernatorial appointees including two each to represent organized labor and industry) empowered to make regulations and to issue permits to employers to dispense with the schedule required if the character of the work made it difficult to fix the hours of employment. No action was taken on the bill after it was referred to the Committee on State Government. Telephone interview with Jay Craig, Pennsylvania Senate Library (Dec. 12, 2001). The Pennsylvania State Library and Pennsylvania State Archives both lack a copy of this bill, which librarians there surmise was not kept because it died in committee and was not sent to the Senate. Fax from Randall Tenor, Pennsylvania State Library (Dec. 13, 2001). Its content has been taken from the account in Wage and Hour Reporter 2:245 (May 15, 1939).

Keller, Pennsylvania's Little New Deal at 346.


"Hour Law Ruling Excluded Women."

1968 Pa. Laws No. 5, sect. 4(a) at 11, 13.

House Bill 1252, which was introduced in the Pennsylvania House on April 2, 2001, would have entitled workers to a 30-minute rest or meal period after five hours of continuous work, but no further action was taken on it.
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....

1Letter from Philip Fleming (Wage and Hour Administrator) to J. Capper (May 18, 1940), in 86 Cong. Rec. A3787, A3789 (1940).
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.”3 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.”4 To be sure, this public relations effort may have been facilitated by the act itself, whose overtime provision is conveniently mislabeled, “Maximum Hours.”5

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

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

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7 As 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 overtime. 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.).


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.”11 Similarly fanciful is the leftist pathos that the FLSA “made the eight-hour day and forty-hour week the law of the land”12 or “part of the social contract.”13 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.”14 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,”15 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

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 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).


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).


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. 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. The 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.

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]).
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. 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.

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.)

A labor standards bill that Secretary of Labor Perkins had her department’s solicitor, Charles Gregory, draft in 1935 also provided for administrative discre-
tion in setting the overtime premium. 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.

Unlike the maximum-hours statutes that prohibited work beyond a certain number of daily or weekly hours, 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. 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"—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." The administration bill introduced on May 24, 1937, contained identical language.  

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26 Act 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.

27 See above ch. 4.

28 Ronald 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."


30 Confidential 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),
tion's FLSA bill that was introduced in the Senate and House on May 24, 1937, contained identical language.\(^3\) 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."\(^2\)

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.\(^3\) 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.\(^4\) 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.\(^5\)

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

75th Cong., 1st Sess.

3\(^{2}\)S. 2475, § 6(b), 75th Cong., 1st Sess. (May 24, 1937).


3\(^{2}\)E.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).

4\(^{2}\)82 Cong. Rec. 1591 (Dec. 15, 1937). The amendment, which was offered by Rep. Griswold (D. Ind.), was defeated 162-131. Id. at 1604.

5\(^{2}\)81 Cong. Rec. 7952-54 (July 31, 1937).
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.\footnote{Public Opinion: 1935-1946, at 290 (quote), 292 (Hadley Cantril ed., 1951).}

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.”\footnote{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. 158 (1937).}

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.”\footnote{“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.} (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....”\footnote{“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.})

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.”\footnote{Orme 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).} 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.”\footnote{William McPherson, Labor Relations in the Automobile Industry 71, 72 (1940).}
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

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

43 See below ch. 17.

44 E.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).

45 Overnight 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).

46 As Edward Denison, The Sources of Economic Growth in the United States and the Alternatives Before Us 39 (1962), noted: “It is at least doubtful that standard weekly hours
Nevertheless, it cannot be anchored in the most authoritative texts such as the House and Senate reports or the FLSA bills.\textsuperscript{47} That this goal was in the air is obvious from a \textit{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 \textit{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.”\textsuperscript{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....\textsuperscript{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

\textsuperscript{47}For 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, \textit{Work Sharing: Issues, Policy Options and Prospects} 120-36 (1981).


\textsuperscript{49}21 Cong. Rec. 9300-9301 (1890).
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...."\(^{52}\) 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\(^{53}\)—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."\(^{54}\)

Night work had proliferated in cotton manufacturing in the twentieth century

\(^{51}\)81 Cong. Rec. 7941 (July 31, 1937).
\(^{52}\)82 Cong. Rec. 1695 (Dec. 16, 1937).
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 social 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."56 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

56To Regulate the Textile Industry: Hearings Before the Subcommittee of the House Committee on Labor, 75th Cong., 1st Sess., pt. 3 at 178 (1937).
57To Regulate the Textile Industry at 178.
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. 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.

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

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58 82 Cong. Rec. at 1696 (Rep. Smith, Conn.).
59 82 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 wage 61 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." 62 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

61 See below ch. 10.
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 unenforceable. 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

68See below ch. 9.
69FLSA, § 18.
would also have been empowered to "prevent the circumvention or evasion" of its orders.\textsuperscript{70} 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."\textsuperscript{71}

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."\textsuperscript{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."\textsuperscript{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

\textsuperscript{70}S. 2475, § 12(6) and (7) (May 24, 1937).
\textsuperscript{71}S. 2475, § 12(6) (May 24, 1937).
\textsuperscript{73}"Message from the President," in 82 Cong. Rec. 9, 11 (1937).
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.”

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. 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. 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.”

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.”

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

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”\(^7\) 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.\(^8\)

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.\(^9\)

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\(^7\)Ernst Freund, *The Police Power: Public Policy and Constitutional Grounds* 301 (1904).

\(^8\)Supplemental 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).


\(^\)Brandeis, “Labor Legislation” at 681.
Employers’ Struggle Against Statutorily Imposed Premium Overtime Wages for Non-Minimum Wage Workers: 1938-1942

Another difference of opinion which might be clarified by court action hinges on the question of hours. This controversy, if it is a controversy, seems rather strange in view of the statute’s moderate hour provision. The Act does not even satisfy the perennial demand of labor—the 8-hour day. The Act does not tell the employer what hours in any day he may work his men. It simply says...he shall not work his employees more than 44 hours without paying them time and a half for overtime. In fact, the overtime provision is where the rub comes in. There has been much talk about ways and means of an employer working his men more than 44 hours without paying them any more than they were paid prior to the effective date of the Act.1

The Wage and Hour Division (WHD) engaged in extensive public education during the run-up to the act’s date of effectiveness. Two national radio networks gave the Wage and Hour Administrator, Elmer Andrews,2 fifteen minutes the night before and a third broadcast a program the next day.3 Yet even before the FLSA went into effect at 12:01 a.m., Monday, October 24, 1938, the WHD had received “[e]vidence of employer resistance” from several states.4 Already a week earlier an employer had telegraphed the WHD seeking the general counsel’s blessing for his “‘painless compliance’” scheme to lower “the hourly wage of every worker in his place, from president to office boy, to 25 cents an hour for the first 44 hours and 37½ cents overtime” and to guarantee the difference between that amount and the weekly compensation prior to October 24.5

Such reports prompted Andrews to declare preemptively: “‘Millions of Americans look forward to Monday...as the beginning of a new advance in the

2Elmer Andrews (1890-1964), had, before Roosevelt appointed him the first Wage and Hour Administrator, been the New York State industrial commissioner. Who Was Who in America (1961-1968) at 4:31 (1968).
5“FLSA and ‘Painless’ Compliance,” Wage and Hour Reporter 1:375 (Nov. 21, 1938).
nation's offensive against exploitation and hardship. These millions welcome the opportunity to help inoculate our economic system against the virus of sweatshops. Unfortunately, however, there is a small and scattered minority who apparently are unwilling or incapable of contributing to the common good. These delinquents, whose number and importance are magnified by their isolation, resort to subterfuge in an effort to camouflage their selfishness and blame the Fair Labor Standards Act for their own anti-social conduct.\textsuperscript{6} The intensity and longevity of this important conflict contradicts the later scholarly claim that "[f]or several months, Andrews enjoyed his honeymoon."\textsuperscript{7}

Roosevelt himself may have been disappointed that the bill "had been so watered down in its long journey through Congress that it could have little impact on the national economy,"\textsuperscript{8} but employers, who had failed to voice such apprehensions at the hearings in 1937, feared a "very violent" "shock." For example, Benjamin Anderson, Jr., the economist of the Chase National Bank, conceded in an address to the Chamber of Commerce of Kansas City, on December 14, 1938, that at 48 or 50 hours, overtime was a "serious burden" warranting labor unions' "good rule" of time and a half to protect workers' health. But a mandatory 50 percent premium for hours above 40 "creat[ed] an inelasticity" which could plunge the next business upturn into a "needlessly violent and premature crisis." Anderson found the FLSA altogether "unfortunate," but especially could not "contemplate with equanimity" a 50-percent overtime penalty after a mere 40 hours for all industry within two years.\textsuperscript{9}

The chief dispute on the eve of October 24 was the payment of overtime to salaried employees.\textsuperscript{10} The Bureau of National Affairs' (BNA) authoritative \textit{Wage and Hour Reporter} argued that "[t]he root of the controversy" stemmed from a statement that Administrator Andrews had made before the Southern States Industrial Council in Birmingham on September 29. It is implausible that Andrews' statement provided anything but a pretext for employers' resistance that would have emerged anyway, especially since the WHD's official Interpretative Bulletin No. 4 ("Maximum Hours and Overtime Compensation"), published on


\textsuperscript{8} James MacGregor Burns, \textit{Roosevelt: The Lion and the Fox} 343-44 (1956).


\textsuperscript{10} On employers' coordinated efforts from 1938 to 1940 to amend the FLSA to broaden the exclusion of white-collar workers, see Marc Linder, "\textit{Moments Are the Elements of Profit}: Overtime and the Deregulation of Working Hours Under the Fair Labor Standards Act" ch. 2 (2000).
October 21, contradicted Andrews’ statement, which he himself later disowned ("certain impromptu remarks I made...in reply to random questions asked me at the end of the speech"). Indisputably, however, Andrews had put his foot in his mouth in the following colloquy:

Q.—Many clerical and non-supervisory employees are on a monthly or weekly wage basis. Is it necessary for such wages to be recalculated to an hourly basis and time and one-half paid for hours over forty-four?

MR. ANDREWS—... Clerical forces, we all feel, are included in the Act. But I cannot see where there is going to be any practical difficulty there because your clerical force in any plant of any consequence certainly is earning on a basis of more than 25 cents an hour, weekly wages divided by the hours they work. If they are well above 25 cents an hour, it seems to me that there would not be much question about time and a half for overtime, because you could figure in that weekly wage that time and a half over the 44 hours had been given consideration as remuneration for their full week’s work."

That Andrews’s slip was not inadvertent was clear from his answer to a similar question in Birmingham that was not trotted out in the later debate. In response to a question concerning overtime liability for office employees of steamship companies who were paid more than the statutory minimum wage, Andrews replied: "They still get enough wages, I am sure, that if you want to break it up into so much per hour, so much for time and a half, it would still work out." Nevertheless, those who wanted to make much ado of these ignorant off-the-cuff remarks ignored the disclaimer that the BNA had appended to their publication already three weeks after the Birmingham meeting: "it should be kept in mind that the Administrator’s answers are not final on any point and that he reserves the right to ‘change his mind’...." They also conveniently overlooked Andrews’s own self-deprecating admission at Birmingham about a similar gaffe he had committed soon after his appointment as deputy labor commissioner in New York State.

Employers’ focus on the FLSA’s overtime premium in the period immediately after enactment was driven by the fact that more than four times as many workers were affected by it than by the minimum wage provision. In 1938, an estimated 1,384,000 workers were covered and working more than 44 hours; by

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14"Some Employers’ Questions Answered" at 196.
15"Some Employers’ Questions Answered" at 194.
1939, 1,751,000 workers were predicted to be covered and working more than 42 hours, and by 1940, 2,184,000 workers. In contrast, in 1938 only 300,000 workers were earning less than the minimum wage of 25 cents, while the Wage and Hour Administrator predicted that by 1939 550,000 would be earning less than the minimum wage of 30 cents. The manufacturing industries with the greatest overtime liability were food, lumber, and textiles.16

During the congressional hearings on the FLSA, it had been the very rare employer who, when asked by Senator Hugo Black whether “there should be any permission to work longer than 40 [hours] on payment of overtime,” replied, as did Donald Comer, president of Avondale Mills and former president of the American Cotton Manufacturers Association: “No. Get another man.”17 Employers launched a many-sided campaign against the overtime provision of the FLSA as soon as the law went into effect.18 During its very first week, enforcement officials were occupied with employers’ efforts to achieve costless compliance with the overtime rule. An Ohio steel foundry, for example, planned to cut the hourly wage from 70 to 40 cents, on which time and a half would be paid, and then add back a 30-cent an hour bonus.19 A trade association suggested to its members that they could achieve costless compliance by reducing the hourly wage of an employee who worked 48 hours from 50 cents to 46 cents. However, if the worker insisted on his old 50-cent wage, employers should offer him only 40 hours, leaving him with a total weekly wage of $20: “‘Naturally employees are going to be quite willing to take the slight hourly rate cut and a full weekly pay envelope rather than contribute $4 for the privilege of having an extra day off with nothing to do but spend his money.’”20

Remarkably, unions had long been aware that such evasions were predictable. As far back as 1912, when Congress was in the final throes of a two-decade debate on an eight-hour law for federal government contractors’ employees that did not provide for overtime work, N. P. Alifás, the president of a government


18Carroll Daughterty, who had been the chief economist of the BLS and WHD, incorrectly stated in his labor economics textbook: “Under the business conditions of 1938 and 1939 most employers seemed to have no great difficulty in adjusting their operations to the Act’s requirements. But the rise in business activity caused by the government’s expenditures for national defense in 1940 led some employers to begin agitating for modification of the Act’s hours provisions.” Carroll Daughterty, *Labor Problems in American Industry* 1:191 (1944 [1941]).


20“Complaint Form; First Violations Reported,” *Wage and Hour Reporter* 1:291, 292 (Nov. 7, 1938).
Employers' Struggle Against Premium Overtime Wages 267

machinists union local, testified against employers' request for overtime on the grounds that it would be misused:

[I]f a manufacturer secured a contract...he could very easily evade the law like this: For instance, here is John Smith who gets $3.60 for a nine-hour day. That is 40 cents an hour. The employer might say: "Mr. Smith, we have secured this contract from the Government on condition that we work the men an eight-hour day, and with the provision that the men are to be allowed to work overtime." He may also say: "I secured this contract on a very low bid. You know there is a great deal of competition among employers, and, Mr. Smith, you have been in the habit of working nine hours for me for $3.60; surely you will be willing to help me overcome the technicality of this law, and instead of 40 cents an hour accept 38 cents an hour for the eight hours, and accept time and a half for the extra hour, or 57 cents, which will make just $3.61 instead of $3.60 as heretofore."21

Significantly, Alifas then added what no one criticized about the FLSA a quarter-century later: the existence of such a permissive overtime provision "would be dangerous, as it would utterly nullify the real intention of the law. It is just such contractors as the one cited here that make a rigid law necessary...."22

One of the more primitive evasions was reported on the front page of The New York Times just a few weeks after the FLSA went into effect: some employers stamped or printed a waiver of overtime payments on pay checks on the assumption that workers' acceptance of the check would act as a waiver of their FLSA rights.23 The two chief thrusts to employers' resistance, however, were economic and legal. The former focused on readjusting wages and hours to avoid the bite of the overtime premium. The object of litigation was to secure rulings that the overtime premium was applicable only to the minimum wage in opposition to the WHD's interpretation that section 7 of the FLSA clearly makes the employee's "regular rate" and not the minimum wage the base for the overtime premium.24

The WHD's first line of defense against this attack was reliance on section 18 of the FLSA: "No 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

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22Eight-Hour Law: Hearings Before the Senate Committee on Education and Labor, 62d Cong. at 372 (1912).

23"Workers Cannot Waive Wages Act Hours; Andrews Warns Employers Not to Try Idea," N.Y. Times, Nov. 21, 1938, at 1:2.

this Act, or justify any employer in increasing hours of employment maintained
by him which are shorter than the maximum hours applicable under this Act." 25
At his Birmingham question and answer session on September 29, Andrews had
also put his foot in his mouth on this issue. When asked whether an employer
paying higher wages than his competitor could reduce wages "to meet the com­
petitive situation where he observes the minimum," the Wage and Hour Ad­
ministrator replied:

I have heard of that in some of the communications industries, that that is being con­
templated. Of course, the Act contains a pious wish that that should not be done. I think
it is not going to make for any happier industrial relationship...between employer and em­
ployee. I think it is economically unsound and pretty generally unfair, but that is all I can
say about it. 26

Andrews's infamous "pious wish" may have been as accurate a label as could
be placed on section 18, which clearly differed, for example, from a 1970 Ontario
hours law that explicitly prohibited employers from reducing a worker's regular
rate to comply with the premium overtime wage provision. 27 But the WHD was
not deterred from dressing up the wish in the agency's initial (and ambiguous)
interpretation. In Interpretative Bulletin No. 4 of October 21, the WHD asked
and answered hypothetical questions about the regular rate against the back­
ground of section 18. If an employer, who before the FLSA went into effect had
employed his workers for 48 hours at a flat hourly rate well in excess of the 25­
cent minimum wage, reduced its employees' wage rate to an amount still above
the minimum wage so that their total weekly wages including time and a half for
overtime remained the same, the WHD was not yet prepared to "give any definite
interpretation" of the applicability of section 18. It merely pointed out that "it is
not safe to assume that a section of an Act of Congress is meaningless," and
speculated that if the same employer tried to use the section to "justify" the wage
reduction in negotiations with its employees, a court "might" be warranted in
holding that the reduction "is not really a reduction in legal contemplation," and
that therefore the regular rate remained the pre-FLSA higher rate. 28

In mid-November 1938, the WHD's assistant general counsel informed the
Fifth National Conference on Labor Legislation that "if the effect of what the em­
ployer does is to reduce the hourly wage being received at the time the act went

1938).
27See below ch. 17.
28Wage and Hour Div., Interpretative Bull. No. 4, in BNA, Wage and Hour Reference
Employers' Struggle Against Premium Overtime Wages

into effect, he is violating the spirit of the act. We cannot assume that Congress put that in there for nothing, and I think that the employer who engages in such a practice is running a big risk of having to pay twice the amount which he was paying at the time to his employees...."  

Nevertheless, not wanting to take any chances, the Conference incorporated into the model state wage and hour bill that it adopted a provision "[w]ith the hope of effecting a more certain limitation of hours and of preventing evasion of overtime compensation through such devices as reduction of basic wage rates...." The provision required the state labor commissioner to issue regulations including "such partial or total restrictions or prohibitions on the employment (notwithstanding the payment of time and one-half the regular rate of pay) of employees in excess of the hours specified in section 4 (a) as he finds necessary to prevent the circumvention of the intent of section 4 (a) to reduce hours of labor by the reduction in wage rates to avoid the penalizing effect of the overtime compensation provisions, or by other devices."  

The possible interpretations of section 18 had not passed unnoticed in the press when it suddenly appeared in the bill as it emerged from the House-Senate conference committee. The Times was immediately, and remained for years, exercised over this "potential joker." It conceded in June 1938 that it had probably been inserted "with the best of intentions"—namely, to assuage fears that the statutory minimum wage would tend to become the maximum and maximum hours the minimum. However, the editors speculated that the "ambiguous sentence...may prove to be a very mischievous joker. There will be those who will try to interpret it to mean that all existing wages above the minimums now fixed and all existing hours below the maximums now existing must be frozen at their present levels—or that all existing wages can only move in one direction—upward. Such an interpretation...would paralyze the American economy." Two months later, repeating much of its earlier editorial verbatim, the Times saw its premonitions coming true as the national director of the Congress of Industrial Organizations (CIO) asserted that two large employers intended to use the FLSA as a cover for reducing wages in tandem with reducing weekly hours from 48 to 40. To be sure, the paper found a silver lining in the CIO's lament that the lack of an enforcement provision in section 18 gave employers a "'technical loop-

The National Association of Manufacturers (NAM) immediately launched an aggressive campaign to undermine the effectiveness of the overtime provision with respect to employees whose hourly wage exceeded the new statutory minimum. It also contended that there was “a serious legal question” as to whether salaried employees were covered by the overtime provision at all. Through its general counsel, John Gall, the NAM called attention to Andrews’ admission that section 18 “was nothing more than a ‘pious hope’ on the part of Congress.” Gall also pointed out that even if an employer wished to respect the spirit of a provision that lacked any sanction, section 18 did not refer to wage rates, but merely “a wage”; consequently, so long as the total weekly pay was not reduced, employers could comply with the alleged spirit of the law despite reducing wage rates. Moreover, Gall argued that the FLSA permitted employers to pay salaried employees for more than 44 hours weekly at their existing weekly compensation provided that the base hourly rate did not fall below 25 cents and the overtime rate was at least 37.5 cents. The NAM argued that “if the employer could not modify the basic rate so as to work salaried employes for the same weekly hours as before, at the same total compensation, the employer was ‘forever prevented from lowering a present wage rate even if it resulted in no lowering of total compensation.’” Gall asserted that if the NAM’s view did not prevail, “‘unscrupulous’ employers would have an incentive to fire their existing employees and hire new ones at the lower, minimum rates of 25 and 37.5 cents.”

The Wage and Hour Administrator, perceiving this interpretation as a direct threat to the new law’s effectiveness, struggled to draw out Congress’s intent from the overtime provision:

“Congress refrained from taking the more drastic step of prescribing an absolute maximum work week, but made it unlawful for an employer to work an employe for longer than forty-four hours a week unless such employe receives compensation...in excess of the hours above specified at a rate not less than one and a half times the regular rate at which he is employed...

“Congress thus made it economically disadvantageous to an employer to maintain a work week in excess of forty-four hours. The expectation evidently was that this provision would tend to bring down the customary work week to forty-four hours. The question now is whether this expectation can be defeated by various devices, with the probable result the coming Congress will renew consideration of more far-reaching proposals.”


35“Disputes Hirers on Overtime Law,” *N.Y. Times*, Nov. 6, 1938, at 2:1. Even the liberal economist and later Senator Paul Douglas agreed with the NAM that it would be
Employers’ Struggle Against Premium Overtime Wages

In the weeks following the FLSA’s effective date (Oct. 24, 1938), high ranking WHD officials attended numerous employers’ meetings to discourage them from running afoul of section 18. Calvert Magruder, the agency’s general counsel, warned the annual meeting of the Manufacturers’ Association of Connecticut against “the effort to make a huge joke of the overtime provisions....” Speaking to the Executives Association of Greater New York on November 16, Paul Sifton, the deputy Wage and Hour administrator (and former leftist playwright), also advised against reducing the hourly base rates of employees working more than 44 hours: “The work week is not merely to be shortened for the lowest-paid workers, but for all industry, and if devices for circumventing the overtime provisions are permitted, then the act’s intent falls down.”

In an appearance at the same time before the Structural Clay Products Industry, George McNulty, the WHD’s associate general counsel, included among the “obvious subterfuges” reducing employees’ hourly rate to 25 cents, but guaranteeing them their old total pay, reducing base wages only during peak periods so that employees would receive the same total wages as during normal weeks, and declaring that henceforth workweeks would be 56 hours in order to calculate a lower hourly rate. McNulty also categorized as a subterfuge the then proliferating ruse of lowering the hourly rate from well above 25 cents to an amount still above 25 cents, but calibrated exactly so that, despite complying with the new time and a half rule, employers could continue to employ workers for 48 hours weekly without having to pay any more than before the act went into effect. He warned employers that even in the unlikely case that the bookkeeping schemes they were devising for “juggling purported regular hourly rates” were later found to be legal, “is it wise to assume that Congress will sit supinely by?”

If a huge joke is made of Section 7 (which sets the maximum hours), Mr. McNulty said he doubted that ‘Congress will join in the laughter. Passage of the Black-Connery Thirty-Hour Bill was once seriously considered and may be again.... If flexibility is incompatible with enforcement, then Congress may well vote for enforcement without flexibility.’


Industry Warned on Wage ‘Juggling,’” N.Y. Times, Nov. 18, 1938, at 40:1. The WHD’s assistant general counsel Rufus Poole stated that employers asked the division for
A few days later, the *Times* reported on its front page, the Wage and Hour Administrator said flatly that any employers reducing wages to 25 cents an hour "as a result of the act were acting in a 'most illegal manner.'" However, despite his assurance that the intent of the act was to prevent wages from being reduced to the minimum wage, Andrews revealed some legal uncertainty when he added that he was considering suggesting a clarifying amendment to Congress "to be sure that the penalty applies to all sections where penalties should apply...." Yet even in the absence of such congressional action, Andrews was eager to litigate such reductions: "In our opinion it is illegal.... You can say it just as often as you want to. It would tickle me to death. So many people say it can be done."39

Contrary to a popular misconception, employer resistance was not confined to the South. In 1940, for example, a large employer association in New York was indicted for having conspired to effect an industry-wide violation of the FLSA.40 The stratagems used by employers, large and small, to avoid the financial bite of the overtime law is nicely captured by some of the high-profile litigation. One such case arose two days before the FLSA went into effect when a superintendent of the General Mills plant at Larrowe, Ohio, near Toledo, met, on instructions from the company main office, with the watchmen, who had been working 56 hours weekly at 60 cents per hour for total weekly wages of $33.60, and advised them that "under the statute the company could put on other men to do the work as watchmen for 60 cents an hour instead of paying overtime of 90 cents to the present employees for a large part of the work."41 He explained that they could either work 40 hours at the same hourly wage or, if they wished to continue working a 56-hour week, at a reduced hourly wage of 52.5 cents for the first 40 hours and time and a half for the remaining 16 hours, leaving their total wages unchanged. Since the 40-hour option would have left them with only 71 percent of their then weekly wage—but would have required the employment of at least two other watchmen—the workers "were willing to work 56 hours 'if it was legal' for the company to make such an arrangement." In their FLSA suit against General Mills, Samuel Williams and his coworkers demanded the statutory time and a half overtime based on their real regular rate, which had been 60 cents an hour, during more than two years. In mid-1941 Judge Frank Picard (who would shortly achieve national fame as the trial judge in the Mt. Clemens Pottery

its opinion about lowering wages to maintain a constant total weekly wage after premium overtime more often than any other question. BNA, *Wage and Hour Manual* 112-13 (1940 ed.).


40 Richter, "Four Years of the Fair Labor Standards Act" at 99.

41 General Mills v. Williams, 132 F.2d 367, 368 (6th Cir. 1942).
portal-to-portal case) formulated the point of the litigation this way: "There is no denying that this was an attempt, by contract, to circumvent the purpose of the Fair Labor Standards Act by reducing wages, maintaining the same number of hours and giving the workman the same pay he was receiving before the act went into effect. No one disputes this, and the question simply is: Did the defendant company have the right to enter into a contract with its men previous to the effective date of the Fair Labor Standards Act as long as the minimum rate paid was not below the rate set by the act?"

From the FLSA's finding of "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," and its declared policy of eliminating those conditions "without substantially curtailing employment or earning power," Picard concluded that Congress condemned long hours not so much as being unhealthful but as generating unemployment: "Congress...anticipated that many industrial leaders would not be adverse to giving more employment as long as it didn't cost anything and to meet any possible circumvention the policy of the Act itself enunciated the doctrine that the eventual change to a 40-hour week should be made generally without affecting the 'earning power' of the workers of the United States." Picard saw this congressional intent buttressed by section 18, which "notifies the employer that nothing in the act 'justifies' him in reducing a wage paid by him which is in excess of the applicable minimum wage...."

Focusing on what he regarded as the economic realities, Picard found nothing ambiguous in section 18:

It clearly shows that Congress, composed of men the majority of whom had reason to believe from past experience that there would always be a few employers who would not enter into the spirit of the intention of such legislation, had in mind that minority and desired to place a barrier against the very thing that happened here. If all industrial leaders had reduced the wage rate in anticipation of this act, they would probably have found

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42See Linder, "Moments Are the Elements of Profit" ch. 3.

43Williams v. General Mills, Inc., 39 F. Supp. 849, 850 (N.D. Ohio, 1941). The plaintiffs were members of an AFL union, but the union, preoccupied with the plant's larger departments, apparently did not intervene. Id. Judge Picard was a federal district judge in Michigan, but heard this case in the Western Division of the Northern District of Ohio. The following year, citing his decision in this case, he handed down a similar ruling in Anuchick v. Transamerican Freight Lines, Inc., 46 F. Supp. 861, 866 (E.D. Mich. 1942). Plaintiffs' lawyer, Edward Lamb, was also a high-profile portal-pay litigator, whom the chairman of the House Un-American Activities Committee accused of being a communist. See Linder, "Moments Are the Elements of Profit" ch. 3.

44FLSA, § 2, 52 Stat. at 1060.

45Williams v. General Mills, 39 F. Supp. at 851. Picard offered no evidence for his claim that: "Except in certain fields of industrial endeavor, very few who have studied the problem contend that 48 hours or more of labor per week are detrimental to health." Id.
their men willing to work overtime to get the same wages. Congress knew that. They sought to prevent the act's frustration because the evil was not so much in the length of time men worked but, with nine, ten or twelve million unemployed..., the problem was to cut into that unemployment without financially hurting industry or its employees. It was hoped to cut at least four or five millions from the unemployment ranks. This it appears was the big objective of the...Fair Labor Standards Act.46

In response to General Mills's defense that Congress attached no remedy to violations of section 18, Judge Picard stated merely that congressional intent had to be derived from the act as a whole; in that sense he concluded that employers and employees were not privileged to contract for a nominal regular rate regardless of the real rate in order to nullify the overtime provision. Finally, Picard, reaching far beyond the statute, refused to enforce a contract that was against public policy because it was based on coercion of the employees by the employer and simultaneously “almost amounted to a conspiracy between the men and the company against an act of Congress—the men conspired to keep others out of work and the company to refrain from paying higher wages.” Despite the workers' quasi-conspiracy to hog rather than share work, Picard awarded them their overtime pay and damages.47

Picard's vindication of section 18 in General Mills v. Williams was, however, short-lived: in December 1942 the Sixth Circuit Court of Appeals reversed the lower court decision on the basis of the Supreme Court's June 1942 decision in Walling v. A. H. Belo, which had ruled that the FLSA in general and section 18 in particular does not prevent employers from contracting to employ their employees at the same wage so long as the new rate exceeds the statutory minimum.48

A number of similar complaints reached the courts in the early 1940s, producing divergent outcomes. In one of the earliest, Gurtov v. Volk, decided less than four months after the FLSA went into effect by the Small Claims Part of the Municipal Court of New York City in Brooklyn, plaintiff-shipping clerk had been earning $12 for 50 hours of work or 24 cents an hour. In contemplation of the FLSA, the employer raised his wages on July 15, 1938 to $15 weekly, which remained his wage until he left defendant's employ in December. The court ruled

48General Mills, Inc. v. Williams, 132 F.2d at 369-70; Walling v. A.H. Belo Corp., 316 U.S. 624, 630 n.6 (1942); see also below ch. 10. Almost half a century after this battle was lost, John Owen, Reduced Working Hours: Cure for Unemployment or Economic Burden? 47 (1989), still mistakenly believed that “the FLSA specifically prohibits reducing hourly wages below the rate paid before the law went into effect. It is likely that a new reduction in the standard work-week would be accompanied by a similar prohibition.”
against the worker's claim for time and one-half on the grounds that it was unreasonable to regard the overtime provision as a "penalty against employers who, in apparent good faith, have paid wages in excess of the amount prescribed by the act. Such employers appear to be exempt from the operation of the statute."49 This decision was flawed by the incorrect assumption that overtime is due only on the minimum wage and the failure to compute the regular rate on which overtime was due, which here at the very least would have been 30 cents ($15/50 hours), thus producing overtime wages of 90 cents per week (15 cents x 6 hours).

As a federal judge observed two years later, the employers "insist if, what defendants were paid can be so allocated as to cover the statutory minimum for the statutory maximum hours and, in addition, one and one half for all overtime, that such a salary meets the requirements of the law. ... The proposition seems very plausible, but, unless such was an arrangement agreed to by the parties...it is not compliance, because perchance it might figure out that way. ... It is not enough that the salaries...may be allocated or spread so as to cover the minimum and one and a half for overtime. It may even exceed the 30¢ minimum and the 45¢ for overtime and yet be a violation of the law."50

In another early federal court case, from May 1940, an oil refinery worker who had been receiving a fixed monthly salary of $150 told his employers a week after the FLSA went into effect that he wanted the benefit of shorter hours conferred by the new law; his foreman informed him that shorter hours would bring lower pay in their wake, but no changes ever took place. The federal court in Abilene, Texas, found for the defendant-employer on the grounds that the pay exceeded the minimum wage and overtime (on the minimum wage) for the number of hours worked.51

A complaint based directly on section 18 was filed in Maryland federal court by a hosiery knitter whose piece rate had amounted to the comparatively high weekly wage of $40 before the FLSA went into effect. At that time the Easton Hosiery Mills lowered his piece rate by five cents in order to finance the wage increase that the employer had to implement to comply with the FLSA vis-à-vis the low-wage helpers. The court dismissed the complaint because section 18 provided no relief, Congress did not intend to freeze wages above the minimum, and, even if it did so intend, it lacked the power to do so. The court noted that the original FLSA bill had authorized administrative action to prevent precisely what Easton Hosiery Mills had done, but the House had deleted the provision, and a proposed amendment to achieve the same end was not adopted. The court conceded that the legislative proponents intended section 18 to serve as a mandate

and not a mere policy statement, but they had failed to embody that intent in any statutory language.52

Another high-profile judicial decision arose out of a complaint filed by the WHD against a Minnesota manufacturing firm that on the eve of the FLSA had employed 18 workers working 50 to 56 hours a week at hourly rates varying between 45 and 80 cents. In the interim between enactment of the FLSA and October 25, 1938, the employer told the employees that with low profits it would have to adjust wages to comply with the new law. To avoid premium overtime rates, it would have to reduce hours to 44, but since it wished to maintain the workers' weekly wages, it planned to lower hourly wages by 10 cents; it would pay time and a half on the lower rate, and if the total still failed to reach their present wages, it would make up the difference with a weekly bonus or gratuity. In response to the workers' hostile reaction, the employer stated that it would drop the plan and reduce their hours to 44. Because the workers objected to a loss of wages and were willing to continue the long work weeks, they were unwilling to agree to the alternative proposal; although they feared that the bonus scheme was illegal, they ultimately accepted it. The court in Fleming v. Carleton Screw Products Company agreed with the WHD's argument that the new wage rates were fictitious, the pre-FLSA rates being the real regular rates; to accept the employer's defense that it was free to agree with its employees to hold them harmless while protecting itself against higher overtime costs would have nullified the FLSA's purpose of making long hours more expensive and thus creating more employment by cutting those hours.53 On appeal, the Eighth Circuit expressly rejected the employer's claim that the FLSA does not apply to employers paying in excess of the minimum wages and one and one-half times that minimum for overtime hours.54 The Sixth Circuit came to a similar conclusion in a suit against the Continental Baking Company.55

Despite employers' campaign of civil disobedience, Major A. L. Fletcher, the Assistant Administrator in Charge of Cooperation and Enforcement, expressed the belief in early December 1938 that the FLSA might yet be "properly administered by capital, labor" and the WHD.56 And in spite of this organized resistance to the overtime law, the Wage and Hour Administrator assured the

52Remer v. Czaja, 36 F. Supp. 629 (D. Md. 1941). The court's reasoning compelled it to reject the WHD's interpretation of the regular rate as meaning the wage in effect when the Act went into effect and requiring ignoring reductions in violation of section 18 in computing overtime wages. Interpretative Bull. No. 4.
54Carleton Screw Products Co. v. Fleming, 126 F.2d 537 (8th Cir. 1942).
55Bumpus v. Continental Baking Co., 124 F.2d 549 (6th Cir. 1941).
Employers' Struggle Against Premium Overtime Wages

NAM that only a "delinquent minority" who "contaminated the whole business community" had prevented businessmen from eliminating the "evils of sweatshops, of unfair competition and of low purchasing power" and had made necessary "some sort of compulsion,...the power of organized society applied through legislation...." Yet Andrews himself found the controversy that the NAM and employers had provoked odd since the FLSA's hour provision is permissive and does not even prescribe the eight-hour day. (In fact, the president of the AFL had alluded to the need for overtime pay after eight hours as an aside at the 1937 FLSA hearings, and at the end of 1938 the Textile Workers Organizing Committee proposed amending the FLSA to provide penalty overtime pay after eight hours daily and four hours on Saturdays, but it was not enacted then or since.)

By mid-1939, when deputy administrator Sifton addressed the Iowa Bankers Association, the WHD, while still insisting that lowering the wage rate to cancel the effect of the overtime premium ran contrary to congressional expectations of employment spreading and increased purchasing power, seemed almost to be reduced to pleading with employers, on moral rather than legal or economic grounds, not to litigate the force of section 18. In a puzzling non sequitur, Sifton asked employers, in view of the uncertainty of predicting judicial outcomes: "If you win, will it be worth it?"

Other employers organizations were not content with legislating or litigating the details of federal wage-hour regulation. At the end of April 1939 the Chamber of Commerce of the United States demanded congressional repeal of "curbs on business" including the FLSA. By early 1940, claiming that "[f]ew legislative enactments have produced greater confusion or have been more bitterly criticized," the Committee on Manufacture of the Chamber of Commerce also called for outright repeal. Dissatisfied with the mere "palliatives" that the scores of proposed amendments might have constituted, the committee recommended relegating to the states all regulation of wages, hours, and working conditions to prevent the "oppression" of "special classes of workers...." Significantly, the

57 "Mr. Andrews' Address to N.A.M.,” Wage and Hour Reporter 1:413 (Dec. 19, 1938) (address of Dec. 9, 1938).
58 Andrews, "FLSA Problems for Congress or the Courts" at 419.
62 "Chamber Demands Congress Repeal Curbs on Business," N.Y. Times, May 1, 1939, at 1:5.
overtime provisions, especially their application to office and salaried workers, were at "the heart of the Committee's objections" to the FLSA. With respect to employees who were accorded "privileges" such as paid vacations and sick leave, the Chamber asserted a generally held view that mandatory overtime pay was "inequitable to the employer and...tend[ed] to restrict the opportunities of the worker to improve his status."63

In light of employers' single-minded attack on the scope of the overtime provision, it seems odd that the Wage and Hour Administrator reassured the NAM in late 1940 that protest about the 40-hour week stemmed from journalists and academics, "not from manufacturers. Perhaps this is the reason: In 1909 average weekly hours worked in factories were 53; in 1929, 46 hours; in 1939, 38 hours. The 40-hour week had arrived in manufacturing industries long before the law made it mandatory."64 Yet despite the fact that in 1939 fewer than one-eighth of covered workers were working more than 44 hours and thus benefiting from the overtime provision—in contrast to only 3 percent of covered workers whose wages were lifted by the 25-cent minimum wage65—a wide cross-section of employers had resolved to undo the new law.

Although the WHD had insisted that reducing wage rates in order to offset the overtime penalty was "contrary to the purpose of the Act," by the time of World War II it was constrained to concede that because "no penalty is provided in the Act for action contrary to its purpose in this respect," the division "does not...proceed against an employer who reduces a rate of pay to avoid the effect of the overtime penalty."66

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64 Philip Fleming, Address before the NAM, New York City, Dec. 12, 1940, in 86 Cong. Rec. 6963 (1940).
The Supreme Court Spreads Confusion Instead of Employment

The only reason that the administration did not recommend an arbitrary statutory prohibition against working over 40 hours, which is what they were seeking, was because there were certain cases, particularly in the seasonal industries, where it was desirable for short periods to work over 40 hours, and they didn't want to absolutely bar that, so they put in a penalty, and the purpose of the time and a half...was to create a competitive situation where one man could not abuse working overtime when all the rest of them were playing fair, because his costs would go up so high that in a competitive market he could not survive.¹

At the time of the congressional debates over the FLSA in 1937-38, large employers in general, and especially those that had entered into collective bargaining agreements, had not anticipated that compliance with the law would be burdensome; after all, most of them were already paying time and one-half for overtime and more than the minimum wage.² For example, General Motors adopted time and a half for hours over eight per day and forty per week in November 1936, while Chrysler followed suit in 1937.³ At the FLSA hearings that year the Commissioner of Labor Statistics told Congress that the industries, such as automobiles, steel, and agricultural implements, with the greatest employment were working more than 40 hours and were “for the most part paying overtime rates.”⁴

Employers’ position toward statutorily imposed overtime penalties, as the preceding chapter revealed, soon changed. Counsel for the NAM expressed large capital’s exasperation with the WHD’s early enforcement priorities when he urged

¹Hearings 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. 2771 (1942) (testimony of Rep. Melvin Maas (Rep. Minn)).
it to focus on sweatshops rather than on regular-rate cases "where the wages and employment conditions are far superior to anything remotely intended to be covered by the wage-hour law." When large firms finally realized that relatively highly paid organized workers were also protected by the FLSA, they began to lobby Congress to cut back on the Supreme Court's expansive interpretations of the regular rate for overtime purposes. Yet while echoing the views of Supreme Court dissenter in a number of the FLSA cases to the effect that Congress never intended the Act to impinge on the outcomes of legitimate collective bargaining, the NAM, unlike the Chamber of Commerce of the United States, apparently did not seek outright repeal of the FLSA.

Capital's litigation strategy against statutory overtime premiums culminated in two U.S. Supreme Court cases decided on the same day in June 1942. The most straightforward legal gambit was the ultimately unsuccessful claim that "the regular rate" on which overtime had to be paid was merely the minimum wage. In Missel v. Motor Overnight Transportation Co., Administrator Andrew's loose lips in his 1938 Birmingham talk came back to haunt workers as the press declared that the federal district court had adopted the "Birmingham Doctrine" when it ruled in 1941 that a salaried employee being paid considerably more than the minimum wage for indefinite hours was entitled only to time and one-half calculated on the statutory minimum wage. William Missel, a rate clerk and dispatcher for a trucking company between 1937 and 1940, had been paid a weekly salary of $25.50 and later $27.50 for a workweek varying between 40 and 75 hours. The trial court rejected Missel's claim that his regular rate was to be calculated by dividing his salary by the maximum number of non-overtime hours in effect at the time. The trial judge's reasoning was shaped by his unsubstanc-

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6In various cases, Justices Roberts, Jackson, Stone, Frankfurter, and Burton stressed this point repeatedly without success. See Marc Linder, "Moments Are the Elements of Profit": Overtime and the Deregulation of Working Hours Under the Fair Labor Standards Act ch. 3 (2000).

7In the course of testifying before Congress on the issue of portal pay in 1945, the NAM advocated furtheging changes in the FLA unrelated to that problem. Limiting the Time for Bringing Certain Actions under the Laws of the United States: Hearing Before Subcomm. No. 4 of the House Comm. on the Judiciary, 79th Cong., 1st Sess. 21-23 (1945) (testimony of Raymond Smethurst, counsel, NAM); Portal to Portal Wages: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary, 80th Cong., 1st Sess. 106-107 (1947) (testimony of Raymond Smethurst, counsel NAM).


Supreme Court Spreads Confusion Instead of Employment

The amicus brief submitted by the American Trucking Associations had apparently persuaded the judge that the plaintiff-worker's position was a parade of horribles: "According to plaintiff's contention, it would make no difference whether he was paid $27.50 or $1,000 a week, he would always be underpaid and the employer would always owe him money for every minute over straight-time hours that he might be required to be on duty."

The widespread support in the press for employers' implausible claim that "the regular rate" on which the time and one-half premium had to be paid was merely the minimum wage rate seems especially odd in light of the fact that Representative Hartley, one of the most extreme northern opponents of the FLSA, had expressly declared during the House floor debates that the FLSA would not affect only the lower wage scales "inasmuch as requirement for payment of time and a half for overtime is based upon the regular rate of pay whether that be 40 cents an hour or $1 an hour." Yet the NAM, through its general counsel, began, almost immediately after the enactment of the FLSA, propagating the position that employers were required to pay the 50 percent premium only on the minimum wage.

As the principal test cases were pending in the Supreme Court in 1941, Modern Industry, a management magazine, observed that the Court "may soon decide whether the Fair Labor Standards Act is primarily a minimum wage law or a maximum hours law. ... The outcome is of interest to an estimated 1.5 million white-collar workers getting more than the statutory minimum. If the decision stands, the Wage and Hour Division contends, it will largely eliminate the law's benefits for them and will make it chiefly a minimum wage law."

The Fourth Circuit—which asserted that the magazine was referring to Missel despite the article's express reference to Walling v. A. H. Belo Corp., which was decided against the Wage and Hour Administrator without the predicted dire consequences—cited this article as evidence of the importance of the question.
and the need for granting the Administrator amicus status.\textsuperscript{16} The strongest policy argument that the appellate court devised in reversing the trial judge and refuting employers' claim that the "regular rate" meant the minimum wage was based on the underlying congressional intent to discourage excessively long hours: "Such a construction would wholly defeat this policy, for if an employee was getting a fairly high wage, one and one-half times the minimum would in such a case be less than the actual wage the employee was receiving.... This would encourage rather than discourage overtime, and the plain purpose of Congress...would be defeated."\textsuperscript{17}

Despite this astute policy logic, the court's reasoning made no sense when it asserted: "That the overtime provisions of the Act are aimed at re-employment and designed for economic and social purposes, as well as to protect the health or welfare of the employees, seems obvious from the omission of any absolute limitation upon weekly hours of work if properly compensated, and the absence of any limitation upon daily hours."\textsuperscript{18} On the contrary, all of these goals would be more straightforwardly achievable if the 40-hour-week were rigidly capped.

When employers finally appeared before the U.S. Supreme Court, the forum they had been seeking, the United States had already entered World War II and the work-sharing purposes born of the Depression had become largely irrelevant. The defendant and the American Trucking Associations as amici curiae made the most of this turn of economic events. The association attacked the claim that premium overtime was designed to spread work for "all classes" by pointing out that although the FLSA was permanent legislation, Congress could not have "contemplated a permanent unemployment problem with respect to all classes of employees" as opposed to the unskilled.\textsuperscript{19} Overnight Motor Transportation Company argued that the chief legal question was whether the Fourth Circuit had erred in ascribing "dual class coverage" to the FLSA by concluding that the overtime provision "went beyond the class scope of the minimum wage provisions and was intended to spread employment and raise wages among all classes of employees regardless of income."\textsuperscript{20} The employer's overriding claim was that the FLSA without any doubt "was intended to be a 'poor man's' law."\textsuperscript{21} (Ironically, the heads of the AFL and the CIO had also favored a FLSA bill that would have

\textsuperscript{17}Missel v. Overnight Motor Transp. Co., 126 F.2d at 106.
\textsuperscript{18}Missel v. Overnight Motor Transp. Co., 126 F.2d at 104.
\textsuperscript{21}Brief for Petitioner at 21, Overnight Motor Transp. Co. v. Missel.
covered only low-paid and nonorganized workers.)\(^2^2\) The employers association, too, harped on the theme that the FLSA was directed at "the underprivileged," but also tried out the ad absurdum argument that Congress could not possibly have meant to require employers to pay overtime to highly paid employees because such an obligation would perversely discourage them from paying more than the minimum wage.\(^2^3\)

When asked by Justice Hugo Black, one of the authors of the FLSA, what his claim was, counsel for the association at oral argument responded: ""Section 7 is not meant to apply to employees who are paid more than the minimum rates. If Section 7 were applied to all upper bracket white-collar employees it would bring the Act into a field for which Congress never intended to legislate. Section 7 is to be construed in the light of Section 6 which refers primarily to the submerged classes....""\(^2^4\)

The Supreme Court then ruled with only one dissent that the regular rate did not mean the minimum wage. Its supporting analysis has survived and flourished as the locus classicus of congressional intent on the overtime provision. In refutation of the employer's claim that it was unconstitutional to regulate the wages of workers whose pay equaled the minimum or whose hours were not injurious to health, the Court used the opportunity to hold constitutional the regulation of hours for purposes other than health:

Long hours may impede the free interstate flow of commodities by creating friction between production areas with different length workweeks, by offering opportunities for unfair competition through undue extension of hours, and by inducing labor discontent apt to lead to interference with commerce through interruption of work. Overtime pay probably will not solve all problems of overtime work, but Congress may properly use it to lessen the irritations.\(^2^5\)

Thus, although the Supreme Court agreed with the Fourth Circuit that work-sharing and combating unemployment was one of the law's main purposes, it did not share the appellate court's erroneous notion of the comparative efficacy of overtime penalties and absolute hours caps: "The existence of such a purpose is no less certain because Congress chose to use a less drastic form of limitation than outright prohibition." The Court, perhaps inadvertently, then revealed the specific conditions under which the premium might function adequately: "In a


The Autocratically Flexible Workplace

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."

The Supreme Court had squelched employers' quest for a minimalist overtime premium—nevertheless, more than 30 years later a federal judge dismissed an overtime suit filed by the Department of Labor on these same grounds—but it approved their other favored construction of the statutory term "regular rate" on which the overtime premium was due. Where firms paid a fixed weekly wage for variable or fluctuating hours, the hourly regular rate was to be determined by dividing the wage by the total number of hours worked (rather than, for example, by 40 hours)—a procedure which the WHD had approved since 1939. The Court conceded that using this method, "the longer the hours, the less the rate and the pay per hour," but, without offering reasons, it asserted that this outcome "is not an argument...against" the method. In particular, the Court failed to justify a definition that "does not fully effectuate the legislative policy of making overtime cost half as much again per hour as straight time."

In the other outstanding overtime test case of 1942 the employer, A.H. Belo Corporation, expressly argued that it had "never urged the interpretation many times put forward,...and sometimes sanctioned,...that 'regular rate' means the minimum legal rate specified in Section of the Act...." Instead, the case involved the narrower issue of whether employers violated the FLSA when they paid workers far in excess of the minimum wage, but set a fictitious hourly wage for variable hours, and guaranteed a fixed weekly amount so that the overtime penalty did not kick in until workers had worked more than 54 hours. Belo, publisher of the Dallas Morning News and other periodicals, had been paying almost all of its employees as much as or more than the FLSA minimum wage for

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27 Despite the clear holding in Overnight Motor Transportation Company, another employer raised the same defense before the Supreme Court later in 1942, which the Court ruled "merits but slight consideration." Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88, 93 (1942).
28 In Brennan v. Lauderdale Yacht Basin, Inc., 493 F.2d 188, 189 (5th Cir. 1974), the court of appeals had to reverse a judge who had held: "These people are not the people that [the FLSA] was designed to protect.... If Mr. Johnson had been paid the minimum wage, assuming he worked 50 hours a week, [for] 42 weeks out of the year, he was paid so far in excess of any standard hourly wage, at twice the minimum. His overtime was way over what the minimum overtime would be."
29 WHD, Interpretative Bull. No. 4, § 12, in BNA, Wage and Hour Manual 95, 97 (1940 ed.).
a long time before 1938. Like many other employers, however, it too wished to avoid having to pay additional wages without violating the FLSA. The regional WHD office took the position that Belo’s arrangement violated the act because the regular rate, on which overtime was due, by law had to be calculated by dividing the guaranteed weekly wage by the number of hours worked, whereas Belo failed to pay such overtime.33

The trial judge, as was not uncommon in the early years of the FLSA, was openly hostile to the anti-contractarian underpinnings of the statute and aggressively ideological: “I cannot conceive of a law...that would unsettle amicability between employer and employees by interfering with their agreement, provided such agreement is equal to, or, in excess of, the legal requirement with reference to pay.” The judge justified his single-minded focus on the minimum wage by stripping the FLSA of its hours regulation aspect: “[T]his statute does not prevent overtime. It does not say that a full-grown man or woman employee shall not work overtime. It...merely pretends to be and is a statute against less than a minimum wage.”34 His syntax already frayed, the judge then descended into an at times incomprehensible rant without ever identifying the substance of the dispute between Belo and the WHD:

I don’t know that the court is concerned with this, but when...the government has a right to go and figure, even to go into the office of the employer and find out whether the employer is treating his employee correctly...., if and when that results, in an almost endless burden, to seek to put into effect a plan that has been detailed to the court, and which disappears if carried to excessive length, I cannot believe that that construction should be indulged in. It emasculates the right of contract. ... It makes vassals of employee and employer and leaves us hanging by the thumbs at the mercy of the construction of the government as to what we mean when we contract....

These two suits spark from a clash in systems. Neither is perfect. One fixes the independent week for the sine quo [sic] non. The other fixes the will of the contracting parties, provided, such will is above the denials of the law, as the summum bonum. One includes the right to say when payrolls shall be made. The other views the regularity of pay checks as the most important. One is cumbersome and irregular. The other is simple and regular. One is the child of unauthorized regulation. The other is the child of liberty. One deals only in dollars and cents. The other with happiness of employer and employee, vacations, pay when sick, or, absent, as well as with dollars and cents. Neither system is fixed by statute.35

It was not until the case came before the Fifth Circuit, which agreed with the

trial court that Belo's payment plan carried out the letter and purpose of the statute, that the precise nature of the dispute became clear. The appellate judges appeared irritated by the WHD's hardline stance toward an employer which, if it merely "changed the form of its employment contracts to conform to [the WHD's] view,...could have paid its employees considerably less than it did, and still have been within the law...." Instead, the WHD "has brought this case and has stood throughout, upon the bold proposition, that where weekly salaries are paid, no matter how large the salary or how it was arrived at or agreed to, the 'regular rate'...must always, and can only, be determined, by dividing the weekly compensation, by the total number of hours the employee actually works during each week, and employer and employee cannot contract otherwise." Likewise, the Fifth Circuit looked askance at the WHD's inability to identify "words in the act" which prohibit employers from doing what Belo did, and at the WHD's insistence on supporting its position only by reference to the FLSA's purpose of penalizing and limiting overtime. The appeals court was offended by the administrator's view that Belo's pay scheme must be unlawful if it enabled the employer to continue to work its employees overtime without increasing wages above their pre-FLSA levels. For this very reason the court could not agree with the WHD that Belo "must be required to pay more than it agreed to pay and its employees agreed to receive, because the pay which by the agreement was fixed to cover both regular and overtime, must...be considered as covering only regular time, and for the overtime worked, there must be additional compensation."36

In contrast, the appellate court found that, because the statutory term "regular rate at which he is employed" was not ambiguous, it was unnecessary to examine the FLSA's purposes or legislative history. Rather, the Fifth Circuit thought the term straightforward: the WHD's approach was acceptable only in the absence of an express hourly rate within an agreement for a weekly salary; but when the contract established such a rate, it was erroneous to assume that the wage was not intended to cover the overtime as well. But even if the statutory term were ambiguous, resort to underlying policy would not aid the WHD's position because the FLSA's policy statement in section 2 "says nothing about spreading the work or reducing hours of working." The Fifth Circuit then virtually drained the overtime provision of any significance by asserting:

the complete absence from the act of any prohibition against or limitation upon working extra hours, any prohibition against or limitation upon the making of agreements by employers with their employees, the expressions in Section 2, and particularly the provisions of Section 8, would compel us to conclude, that the purpose of the act is to establish and gradually raise minimum wages, that the overtime provisions in it are inserted not at all

36Fleming v. A. H. Belo Corp., 121 F.2d 207, 210-11 (5th Cir. 1941).
to discourage or limit overtime work but as a part of the scheme to raise substandard wages by providing a definite pay for overtime work when such work is required; and that nothing in it purports to or does at all impair the right of employer and employee to contract as they have done here.37

Ultimately the Fifth Circuit lapsed back into the trial judge’s libertarian rhetoric, accusing the Wage and Hour Administrator of construing the FLSA so as to place employers and employees in tutelage vis-à-vis him:

It may be admitted that there is a section of opinion in this country and in the Congress, sufficiently collectivistic to prefer the tutelary system for which the administrator contends, and that if they had had sufficient voting power, they would have so provided in the law. It must be conceded however on the other hand that there is another section of opinion both in the nation and in the Congress, which is not so collectivistic and still believes in reasonable freedom of contract. It is just because of this fact, that legislation is compromise, that the views of the proponents and of the opponents, as to the purposes and effect of the legislative act, are never regarded as of value in a construction of it, and that it is settled law that statutes must be construed in accordance with the intent of the legislature as expressed in the language of the act as a whole. Its meaning may not be sought by the courts in the vague penumbrae of the wishes and desires of its proponents or its opponents as these are expressed in debates.38

When the Supreme Court docketed the case, Colonel Philip Fleming, the Wage and Hour Administrator,39 calling it the most important test yet of the FLSA, warned that if Belo prevailed, employers all over the United States would use the arrangement to evade overtime obligations.40 Before the Supreme Court Belo sought to contextualize the purposes of the overtime law during world war. The employer accused the WHD of seeking to achieve an objective “square in the face of the needs of national defense upon which our very existence as a free people depends. Such supposed objective is to discourage or prohibit work over 40 hours a week, with design to ‘spread’ employment, although the nation’s interest cries out for more production, more work and longer hours, to the fullest

37Fleming v. A. H. Belo Corp., 121 F.2d at 211-12.
38Fleming v. A. H. Belo Corp., 121 F.2d at 213.
39Fleming, who had been a district engineer in the U.S. Army working on the construction of locks and dams, “had not been in any way active, or even interested, to be frank about it, in the long legislative fight that led to the enactment” of the FLSA prior to his appointment in 1939. Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938: Hearings Before Subcommittee No. 4 of the House Committee on Education and Labor, 80th Cong., 1st Sess. 751-52 (1947). After leaving the WHD in 1941, Fleming (1887-1955) was federal works administrator until 1949. Who Was Who in America (1951-1960) at 3:288 (1966).
extent consistent with the maintenance of the standards of health and pay prescribed by the Act...."\(^{41}\)

Moreover, even in the depressed economy of the 1930s, Belo argued, Congress expected work-spreading to be "kept within very modest limits" and to take place principally in the lowest paid and unskilled employments, where the labor product in dollar value is so low that the employer cannot afford the added overtime wage. It was known that in the skilled employments... overtime rates would be paid in lieu of curtailing hours. Indeed, it was known that in the skilled employments overtime pay, and even the precise formula of time and one-half, had already become a traditional policy.\(^{42}\)

The Supreme Court's five to four decision was the first to explain precisely what Belo had in fact done. In anticipation of the FLSA, Belo informed its employees that "[i]n order to conform our employment arrangements to the scheme of the Act without reducing the amount of money which you receive each week, we advise you that from and after October 24, 1938, your basic rate of pay will be" 67 cents per hour for the first 44 hours and not less than time and a half for additional hours, "with a guaranty on our part that you shall receive weekly, for regular time and for such overtime as the necessities of the business may demand," not less than $40. Belo thus set the hourly rate at 1/60th of the guaranteed weekly wage, as a result of which employees had to work more than 54.5 hours before their wages would exceed the guarantee. The Supreme Court conceded that the point of Belo's plan was to "permit as far as possible the payment of the same total weekly wage after the Act as before. But nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum required by the Act."\(^{43}\)

After in effect rejecting the WHD's position that Congress had intended to require employers to pay more for exercising their privilege to work their employees overtime than they had before the FLSA went into effect, the Court relegated to a footnote its relegation of section 18 to the dust heap of legal history: "Whatever the legal effect of this language, it is certainly not a prohibition and the Administrator does not rely upon it." The court then further tweaked the Administrator by asserting that the Fifth Circuit's finding that Belo's effort to maintain employees' weekly incomes (or, more realistically, Belo's wage costs) at pre-FLSA levels "gains support" from the fact that Belo was formulating the

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Supreme Court Spreads Confusion Instead of Employment

The focus of the Court’s statutory interpretation was “the regular rate” for overtime purposes, which Congress had failed to define. Whereas Belo argued that the regular rate was clearly 67 cents per hour, the WHD called that rate meaningless; instead, it viewed the agreement as one for a fixed weekly salary of $40 regardless of fluctuations in hours (up to 55 hours). The WHD therefore argued that the regular rate in fact had to be recalculated weekly by dividing the $40 guaranty by the number of hours worked; for any hours worked beyond 44, employees would then be entitled to 150 percent of that rate. Belo’s $30,000 to $60,000 back overtime wage liability can be exemplified this way: if a worker worked 50 hours, his regular rate that week would be 80 cents; for the first 44 hours, his wage would have amounted to $35.20, while his six hours of overtime would have entitled him to an additional $7.20, for a total of $42.40, leaving him underpaid by $2.40. The Court agreed that the difficulty in the case stemmed from the guarantee, but it rejected the WHD’s argument that the guarantee was inconsistent with and overrode the 67-cent hourly calculation. The majority reasoned, first, that indisputably real overtime kicked in again after 55 hours; and second, even with regard to the hours between 44 and 55, when wages were determined by the guarantee, if 67 cents was considered the regular rate, then the worker was actually being paid more than 150 percent overtime; however, neither such overpayments nor fluctuations in the overtime premium were prohibited by the FLSA, provided that the rate never fell below 150 percent. The Court did not deny the force of the WHD’s view that the 67-cent wage was artificial, but the parties may well have intended the “flexibility” that it generated in the overtime rate “[i]f it was the only means of securing uniformity in weekly income.” Moreover, since weekly hours fluctuated drastically, the “regular rate” would always have been “‘irregular’” both arithmetically and with respect to the parties’ ability to foresee or plan on it.

Ultimately, the majority was swayed by the perception that the arrangement was “mutually satisfactory” to Belo and its employees, whereas the WHD’s approach “as a practical matter eliminates the possibility of steady income to employees with irregular hours.” Presuming that Congress had intentionally refrained from defining “the regular rate” precisely because employment relationships were so manifold and “unpredictable,” the majority revealed its bias in favor of promoting consumer instalment buying and against the statute’s anticontractualism:

Where the question is as close as this one, it is well...to afford the fullest possible scope

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44 Walling v. A. H. Belo Corp., 316 U.S. at 630 n.6.
The Autocratically Flexible Workplace

to agreements among the individuals who are actually affected. This policy is based upon a common sense recognition of the special problems confronting employer and employee in businesses where the work hours fluctuate from week to week and from day to day. Many such employees value the security of a regular weekly income. They want to operate on a family budget, to make commitments for payments on homes and automobiles and insurance.46

Little wonder that Belo received 10,000 inquiries for copies of its contract the month the Supreme Court handed down its decision.47

The four dissenters regarded the contracts as agreements for weekly wages for variable hours with additional hourly compensation once the employees worked more than an ascertainable number of hours—namely, the number needed for the wages to reach the weekly guarantee, which was the “dominating feature,” without which “the adoption of a low hourly rate would encounter the full weight of employee bargaining power. The guaranty avoids this conflict by fixing the minimum weekly wage.” In effect, Belo paid 73 cents an hour for hours up to 54.5 and $1.00 an hour thereafter “expressed in the circumlocution of time and a half 67 cents....” So long as the weekly guarantee and the real overtime rate remained unchanged, the base hourly rate, the hours for which that rate was paid, and the alleged overtime premium were mere bookkeeping conveniences that could vary without affecting total earnings. Consequently, the number of hours that employees had to work to earn the guarantee could be increased by manipulating the other variables: “By such a verbal device, astute management may avoid many of the disadvantages of ordinary overtime, chief of which is a definite increase in the cost of labor as soon as the hours worked exceed the statutory workweek. If the intention of Congress is to require at least time and a half for overtime work beyond a fixed maximum...40, 42 or 44 hours...., that intention is frustrated by today’s holding. ... Because there is no increase in labor cost between the statutory maximum and the hours contracted for (54 ½), the employer has a financial inducement to require hours beyond the statutory maximum.”48

Commenting on the inconsistencies between Overnight Motor Transportation and Belo, the editors of The New York Times once again lambasted the law for creating absurdities by extending to higher-paid employees an overtime provision “designed to protect submarginal workers,” and called for revision of the FLSA.49 In the wake of these twin decisions, some defendant-employers sought to justify

their overtime practices of paying fixed weekly wages for fluctuating hours as
governed by Belo, while the WHD and aggrieved workers argued that Overnight
Motor Transportation was controlling. In the event, only employers that failed
to include an hourly rate or to indicate an upper limit on the length of the work­
week and to repeat the talismanic words that the employee was to be paid time
and a half the regular rate for overtime (or stated a contractual regular rate
"completely unrelated to the payments actually and normally received each
week") wound up owing back overtime wages.50

In 1947, in the midst of congressional turmoil over making significant
revisions to the FLSA, the Supreme Court upheld the vitality of Belo against
another challenge by the WHD. The Halliburton Oil Well Cementing Company,
which before enactment of the FLSA had paid its oil well service workers fixed
monthly salaries, adopted a weekly guarantee like Belo's, which the Wage and
Hour Administrator pressured it to abandon in 1942, but which it reinstated later
that year after the Supreme Court upheld Belo's plan. Halliburton issued con­
tracts agreeing to pay the workers a regular basic hourly rate for the first 40
hours, and guaranteeing a specified weekly amount for regular time and such
overtime as the business required. Although the regular rate exceeded the
minimum wage, it "was always so related to the guaranteed flat sum that the
employee became entitled to more than the guarantee only in weeks in which he
worked more than 84 hours."51

Despite the fact that the wage plan was more egregious than Belo's, not only
because the real overtime threshold was 30 hours higher, but because in 20
percent of the workweeks, the employees worked more than 84 hours, the Court
upheld Halliburton's arrangement because it did not differ materially from Belo's
and Congress had never intervened to modify the overtime provision during the
five years since that case had been decided.52

50 E.g., Walling v. Stone, 131 F.2d 461 (7th Cir. 1942); Seneca Coal & Coke Co., v.
Lofton, 136 F.2d 359 (10th Cir. 1943); Walling v. Youngerman-Reynolds Hardwood Co.,
325 U.S. 419, 425 (1945) (quot). In this last case, the employer contractually specified
an hourly rate above the statutory minimum, but below the workers' actual regular rate
based on their guaranteed piece rates. James Durkin, national representative of the
United Office and Professional Workers of America, testified at a FLSA hearing in 1945 that
under a "monstrous formula" sanctioned by WHD Interpretative Bulletin No. 4, an office
worker with a fixed weekly salary of $40 for a fluctuating work week would find his
hourly rate plummeting from $1 to 66.6 cents when his hours rose from 40 to 60. Pro­
posed Amendments to the Fair Labor Standards Act: Hearings Before the House Com­
mittee on Labor, 79th Cong., 1st Sess. 413 (1945). This outcome was lawful only if the
employer placed an upper limit on the number of weekly hours.


52 Walling v. Halliburton Oil Well Cementing Co., 331 U.S. at 21 n.8, 25.
Workers During World War II:
From the Struggle Against Overtime Work to the
Struggle for Overtime Premiums

[1]n the past...say 15 years ago, we didn't have any cases of suspensions or discharges for refusal to work overtime. In the past I'm told, and I find it hard to believe, but overtime at Chevron U.S.A. was a privilege.

If they had an employee that they felt was abusing sick time, had an absentee problem, they would tell him he couldn't work any more overtime. Now, it's reversed. Overtime is looked on by the company more or less as a duty. If you want to get out of it, you better have a damned good reason....

Ironically, the onset of the reversal of the secular decline in the length of the workweek coincided with the enactment of the FLSA and advent of World War II: "The goal of the 40-hour week had not yet been attained by 1940...when the defense program got underway" and working hours increased again. In this most tangible sense, the FLSA's mere financial disincentive to deter overtime work did not live up to the standard set by the nineteenth-century British factory laws, which, as even Marx admitted, by forcibly limiting the working day, curbed "capital's urge for boundless draining of labor power."

Whereas relatively few—and almost no organized—workers actually found their wages increased by the FLSA's minimum wage provision, many workers began receiving overtime pay by the time the militarization of the economy extended the normal workweek beyond forty hours. Of the 12.5 million employees covered by the FLSA in April 1939, the Department of Labor estimated that fewer than 700,000 were receiving less than the 30-cent minimum wage to go into effect on October 24, 1939; but of the 2,400,000 employees working overtime (more than forty-two hours weekly as of October), 1,664,000, or slightly more than two-thirds, were not receiving time and one-half pay. By far the largest industry that had to reduce its hours or pay overtime was sawmilling (which employed more than 100,000 such workers), followed by knit goods (47,000), cotton goods (42,300).

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foundry and machine shops (41,000), and furniture manufacturing (35,400).4

Indeed, while the statutory minimum wage of thirty to forty cents per hour became moot during the war, when a tight labor market made fifty cents the de facto minimum,5 it was the longer workweek that largely sustained the increase in real weekly earnings.6 Thus the average workweek for production workers in manufacturing industries rose by one-fifth, from 37.7 hours in 1939 to 45.2 hours in 1945.7 Overtime compensation peaked at $12 billion in 1943, $3.6 billion of which represented premium rates. In the machinery industry, overtime wages accounted for 27 percent of total wages. At the end of the war it was estimated that if the 40-hour week were restored with no change in wage rates, wages would fall by 16 percent overall and by more than one-third in war industries with the longest hours.8

The transition from depression to a full-capacity war economy, characterized by the conversion to continuous, 168-hour per week production,9 also transformed the functioning and socio-economic purposes behind mandatory overtime payments. Whereas until 1940 the primary purpose of penalty premium rates was to discourage overtime, labor relations scholars have concluded that since World War II they “have come to be regarded by most workers as a special form of compensation offering an attractive form of compensation for additional income rather than as a protection against long or undesirable hours.” Automobile industry management before the war, for example, had felt that workers were “becoming more eager for a chance to increase their annual earnings by working longer hours” and that they would “eventually be pressing for a mitigation of the restrictions on hours in the agreements and the act,” but that the UAW’s policy of permitting the

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4First Annual Report of the Administrator of the Wage and Hour Division, United States Department of Labor, For the Calendar Year 1939, at 36-43, 158-60 (1940).

5Amendments of the Fair Labor Standards Act of 1938: Hearings Before the Senate Committee on Education and Labor, 79th Cong., 1st Sess. chart V at 860 (1945) (statement of Chester Bowles showing straight-time hourly rates of factory workers in the summer of 1945). Whereas in 1942 7,500,000 employees were paid forty cents or less per hour, by the end of the war the National War Labor Board “automatically approved increases first up to 40 and later to 50 cents and hour.” Joel Seidman, American Labor from Defense to Reconversion 129 (1976 [1953]).

6"Because most factory wage workers are working more intensely and for longer hours, they have been able to maintain their spendable earnings and to save.” N. Arnold Tolles, “Spendable Earnings of Factory Workers, 1941-43,” Monthly Lab. Rev. 58:477-89 at 478 (1944).


unemployed to retain membership created strong rank-and-file pressure for shorter hours and work-sharing.\textsuperscript{10} After the war, automobile collective bargaining agreements even came to safeguard a worker's right to overtime.\textsuperscript{11} This transformation of overtime pay "into a means of increasing workers' earnings...took place during World War II, when workers started to rely on premium pay to keep pace with inflation."\textsuperscript{12} Perversely, the very "form of the limitation on hours" that Congress adopted "opened the way to hours far in excess of the standard...." Consequently, during the 1940s and 1950s, as George Brooks, the research director of the International Brotherhood of Pulp, Sulphite and Paper Mill Workers, explained to the Conference on Shorter Hours of Work sponsored by the AFL-CIO in 1957, "the basic meaning and purpose of the law was twisted and changed. It no longer was a standard for hours worked, but a means of increasing income through premium rates." The use of cost-plus contracts during World War II and the progressive reduction of labor costs as a proportion of total costs in the wake of capital intensification of manufacturing conspired to deprive premium rates of their deterrent effect: "Employers did not care. The war-time experience and collective bargaining...have combined to change the whole concept of overtime rates from the idea of a penalty to the idea of privilege. The typical senior worker or the worker 'fortunate' enough to get extra hours regards them as a plum.... In all industries...there has been a concerted effort to increase the...penalty payments, not with the idea of preventing longer hours...but...of increasing income during prosperous times." Indeed, Brooks reported that in his own industry, where paper mills established 36-hour schedules, employees worked 42 hours including six at overtime rates.\textsuperscript{13} Not surprisingly, some in Congress during the war sought to curtail the right that millions of workers had recently secured to premium pay for over-hours.\textsuperscript{14} Statutory overtime could no longer fulfill the function of sharing work as full employment approached during rearmament in 1940-41, but the Wage and Hour Administrator devoted an extraordinary amount of space in his annual report for 1940 to refuting claims that the forty-hour week was inconsistent with national

\textsuperscript{10}William McPherson, \textit{Labor Relations in the Automobile Industry} 71 (1940).


\textsuperscript{13}George Brooks, "Historical Background," in AFL-CIO, \textit{The Shorter Work Week} 7-19 at 16-17 (1957).

\textsuperscript{14}For a rhetorical description and denunciation of the anti-FLSA drive, see 93 \textit{Cong. Rec.} 2266 (1947) (statement of Sen. Thomas, D. Ut.).
defense preparedness, and two years later continued to defend the overtime provision as "attracting labor in a democratic way, without compulsion, to the war industries where it was needed." President Roosevelt's insistence during one of his fireside chats in 1940 that the emergency did not "justify making the workers of our nation toil for longer hours than now limited by statute" was unintentionally ambiguous since, as Secretary Perkins explained in 1942 to a congressional panel considering a wartime ban on overtime rates for naval contractors, the FLSA "permits unlimited hours per day and per week...." Little wonder that the Times was amused by the flip-flop executed during the war by liberals who, in response to proposals for a longer 48-hour week, argued that the overtime provisions did not regulate or limit hours at all, but merely prevented exploitation.

Ideologically, then, the war was a propitious time for employers to urge that "the penalty for overtime should be canceled during the emergency to encourage a longer work week." The chairman of General Motors, Alfred P. Sloan, Jr., advocated this course: "[I]f we increase the work week and pay a penalty, the result is to increase wages about 8 per cent. We get nothing for this 8 per cent because efficiency, manifestly, is not increased, therefore the result is a step toward inflation. ... Frankly, I do not believe in "something for nothing"...." The Wage and Hour Administrator heaped ridicule on Sloan's proposal by focusing on the ratio between GM's most recent annual profit of $183,000,000 and payroll of $386,000,000: "Which is the more inflationary, an 8 per cent increase for the workers or profits almost half as large as total payroll?"

A number of bills were introduced in 1942 to relieve employers (and ultimately the Treasury, which was paying the bills submitted by war contractors) of the burden of premium pay. Senator O'Daniel of Texas seized the initiative in March with a bill that would have eliminated all restrictions on hours of labor and

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17Fireside Chat of May 26, 1940, in The Public Papers and Addresses of Franklin D. Roosevelt: 1940 Volume: War—And Aid to Democracies 230-40 at 237 (1941).
18Hearings 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. 2627 (1942).
21For a brief and uninspired account, see Roland Young, Congressional Politics in the Second World War 59-61 (1956).
provided the same wage for all hours.\textsuperscript{22} In explaining a later version of the bill, the senator may not have been indulging in hyperbole when he stated: "The change would please practically every employer of labor in America. They would rejoice at having the legislative shackles of premium pay for so-called overtime removed."\textsuperscript{23} O'Daniel's explanation of the effect of the elimination of premium pay was novel: while the bill neither compelled workers to work overtime nor dealt with hourly wages at all, it did

embrace the age-old, time tested, true economic philosophy that an employee should be paid the full amount per hour that his services are worth for each and every hour that he works, instead of being paid less per hour for earlier hours of the day when he is most efficient and productive, and more per hour for the later hours, when he may be fatigued and less productive, as our present 40-hour workweek law provides.\textsuperscript{24}

O'Daniel failed to explain why workers would willingly work overtime hours when their productivity was lower and thus employers should have paid them less or why employers prior to the FLSA voluntarily paid premium wages to induce workers to work additional hours during which both knew that their productivity declined. As a stevedoring company president observed just a few years later, although he "quite assuredly" would work his employees more overtime if the premium were only five cents an hour, "we basically want to work the maximum amount of straight time.... [I]f we are working men for eight hours and have to lap into overtime, we get less work performed. There is a fatigue proposition which you cannot escape. The productivity after a certain number of hours is on the downhill."\textsuperscript{25}

Labor relations realpolitik under the special balance of forces created by world war compelled employers to approach the issue of overtime undogmatically. After all, as \textit{Business Week} noted, even nonunion employers "might hesitate to abandon policies shaped by the 40-hour law" because they feared that such a reversion to longer hours without premium pay would merely provoke

\begin{footnotes}

\textsuperscript{22} 88 Cong. Rec. 2380 (1942) (S. 2373).

\textsuperscript{23} 88 Cong. Rec. 8705 (1942) (S. 2884).

\textsuperscript{24} 88 Cong. Rec. 8705 (1942). Decades earlier, Alfred Marshall, who codified Anglo-American neoclassical economics, had offered an inverted subjectivist last-hour fable: "[M]ost persons...are glad when the hour for stopping arrives: perhaps they forget that the earlier hours of work have not cost them as much as the last: they are rather apt to think of nine hours' work as costing them nine times as much as the last hour; and it seldom occurs to them to think of themselves as reaping a producer's surplus or rent, through being paid for every hour at a rate sufficient to compensate them for the last, and most distressing hour." Alfred Marshall, \textit{Principles of Economics} 438 (8th ed. 1969 [1890]).

\textsuperscript{25} Testimony of Frank W. Nolan, Transcript of Record at 124, Bay Ridge Operating Co. v. Aaron, 334 U.S. 446 (1947).

\end{footnotes}
unionization efforts. While testifying in 1942 before the House Naval Affairs Committee on these FLSA bills, William Witherow, the president of the NAM, "the most influential ideological holding company for American industry," revealed what was at stake if equilibrium were disturbed:

One provision of the bill...would deal with one of the Nation's most vexing problems—one that has caused the most vehement, spontaneous outpouring of public resentment for many years—the questions of overtime pay after 40 hours of work.

It is obviously impossible to reconcile the spirit of the law that admittedly was designed to discourage utilization of manpower for more than 40 hours each week with a Nation-wide demand for all-out production effort. All the rhetoric in the world cannot disguise the fact that the two ideas just do not "jibe" with each other. ... And there is no question that of the two the public prefers the all-out production effort....

Nevertheless, Witherow had to concede that, given "the practical realities of employment relations," neither he nor anyone else could unambiguously answer the question as to whether abandoning the overtime premium would speed production. The NAM president finally fleshed out the reason for his reluctance to attack overtime pay:

For many months employees in many industries have been used to weekly pay checks considerably higher than before, primarily because of high overtime rates. To decrease this weekly pay check by the amount of overtime in it—without simultaneously freezing wage rates at their existing levels—would have one definite tendency. In all probability, there would be a widespread demand by unions throughout the country for an increase in basic hourly rates to a point off-setting the loss of overtime. This would normally stimulate increased labor difficulties and even if it did not increase strikes, it would increase the time management would be forced to take from our all-important projection job in order to sit around the negotiation table. I cannot believe that this would help production.

The NAM's forthright acknowledgment that the campaign to suspend overtime premiums might easily turn into a Pyrrhic victory—an acknowledgment that the chairman of the War Production Board and the president of the CIO also made,

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26 "40-Hour Fight?" Bus. Wk., May 17, 1941, at 45, 47.
28 Hearings on H.R. 6790 at 2843.
29 Hearings on H.R. 6790 at 2843.
30 Hearings on H.R. 6790 at 2844.
albeit indirectly—was in large part dictated by the fact that Congress rather than millions of individual consumers was footing the bill for war production. That employers did not, however, intend to play dead was obvious from Witherow's remark before the Naval Affairs Committee that "abandoning the 40-hour overtime is far less important at this time as a step to speed up production than several other constructive measures," chief among which was eliminating the closed shop. Large corporations' reluctance to force the issue of overtime was probably also dictated by the realization that premium overtime payments were more than compensated for by the savings inherent in operating expensive capital equipment longer workweeks. Eighty years after Karl Marx had recognized this positive impact of longer hours, even at higher overtime wages, on the rate of profit, the Bureau of Labor Statistics published the results of its study of large corporations producing war-related output revealing the profit-enhancing effect of overtime.

The NAM's logic also implicitly raised the larger inverse question: Does the introduction of overtime work and pay tend to depress basic wage rates? This same question was raised at the same hearings by Secretary of Labor Perkins, whose testimony impressively resembled Witherow's. She argued that if Congress eliminated overtime premiums and thus reduced total weekly wages, "[i]t will be just as natural as getting up in the morning to increase basic wage rates if this little extra, which comes in the form of overtime pay and which has been just about enough to meet the increases in the cost of living, is taken away from them at this time." Indeed, Perkins went far beyond employers in her idiosyncratic praise of overtime, warning that if labor markets and unions reacted by pushing up basic wage rates, "the country would be left with a rigid structure of high wages...instead of the present flexible system which now exists where a man makes more money if he works longer, and less when he works less." Perkins saw overtime premiums as stabilizing wartime employment and combating dysfunctional turnover by enabling workers with "rather comfortable incomes" to reassure themselves: "Well, I make out pretty well where I am with the overtime." The Labor Secretary's testimony culminated in her inadvertent confirmation of the nineteenth-century labor movement's critique of systematic overtime's Sisyphean character: "It is unfortunate for those workers who are able to maintain a subsistence substandard of living only by virtue of getting some overtime pay, if the trend to inflation is

31Hearings on H.R. 6790 at 2576, 2770 (statement of Donald Nelson and testimony of Philip Murray).
32Hearings on H.R. 6790 at 2845.
attacked primarily by eliminating those premium rates for overtime.”35

Perkins’s 1942 testimony was astounding in another respect as well: while Belo and Overnight Motor Transport were pending before the Supreme Court, she furnished employers with high authority for their campaign to downgrade the FLSA to a statute in aid of marginal workers. When asked whether the theory behind the law was work-spreading, she replied that her congressional testimony in 1937 “was primarily that it was a minimum-wage law. It was a minimum-wage law which had features which regulated the hours, in order that your minimum wages might not become maximum wages.” Secretary Perkins went on not only to emphasize that “we all were very careful to urge Congress not to put any absolute daily or weekly limitation upon the number of hours,”36 but to refabricate an entirely new economic policy basis for this effort to avoid undue rigidity that in fact she had never articulated at the 1937 hearings:

We also pointed out that this type of legislation, providing only for time and a half for overtime, and not limiting the hours of labor, would be extremely useful in case we had one of those high production periods by which American industry has been characterized, where there was a shortage of labor; and that it would be stabilizing because of the fact that it would permit for those brief periods working overtime and paying extra money, and at the same time would provide a natural ladder through which to ascend from the high income levels to the lower income levels that were necessary in a depressed period.37

After hearing this claim for the first time, Carl Vinson, chairman of the House Committee on Naval Affairs, reminded Perkins that “the theory upon which we enacted the bill was that that would penalize the employer and spread employment, and therefore if he did not spread the employment, he would be penalized to the extent of time and a half for overtime,” and added that she “was proceeding on a different theory, in that the time and a half overtime supplements the weekly pay envelope.” Trapped by her own opportunistic ad hoc support for overtime premiums at a time when they could no longer help spread work, the Secretary of Labor sought refuge in feigned ignorance of congressional intent: “I do not know, of course, what was the prevailing view in the mind of the Members of Congress who voted for the bill,” and asseverated (“I am sure that I presented that point of view at that time”) that even in 1937 she had advocated passage also on the grounds that the bill would “increase wages in proportion to the increase in work without creating a rigid wage structure.”38

35Hearings on H.R. 6790 at 2631-32.
36Hearings on H.R. 6790 at 2637-38.
37Hearings on H.R. 6790 at 2638.
38Hearings on H.R. 6790 at 2638. For Perkins’ 1937 statement and testimony, see Fair Labor Standards Act of 1937: Joint Hearings at 173-211.
The Autocratically Flexible Workplace

For wholly unrelated reasons The New York Times editors persisted in attacking overtime premiums during the war:

What possible defense, other than a cynically political one, can be made for retaining the legally mandatory time-and-a-half rates beginning at forty hours, now that employers are virtually ordered to work men a minimum of forty-eight hours? The present time-and-a-half provisions cannot be defended even on grounds of "social justice." ... Their result is to give the smallest increases to those who already have the smallest wages, and the biggest increases to those who already have the biggest wages.39

Ultimately neither Senator O'Daniel's proposed amendment of section 7 of the FLSA40 nor any competing proposal was adopted in 194241 or later,42 but in 1942 President Roosevelt did issue an executive order—which did not affect the overtime provision of the FLSA—banning premium pay for work performed on Saturday or Sunday, "except where such work is performed by the employee on the sixth or seventh day worked in his regularly scheduled workweek."43 And in early 1943 the president issued another executive order stating that no place of employment would be deemed making an effective utilization of manpower if its workweek was less than 48 hours.44 In spite of the fact that the order required employers faced with labor shortages not to hire new workers when they could meet their labor needs by working their current employees 48-hour weeks,45 the federal government enforced an overtime law originally designed to spread em-

40 See 88 Cong. Rec. 8706 (1942) (text of proposed S. 2884).
41 Under S. 2232, submitted by Senator Reed of Kansas, premium pay would not have been mandatory until after forty-eight hours. 88 Cong. Rec. 1328 (1942). Many of the other bills introduced in 1942 would have suspended all hours limitations for the duration of the war. H.R. 6616 (Smith, Va.); H.R. 6823 (Peterson, Ga.); H.R. 7731 (Ramspeck); H.R. 6689 (Lamberton); H.R. 6795 (Boren); H.R. 6796 (Wickersham); H.R. 6826 (Colmer); H.R. 6835 (Thomas, Tx.); H.R. 7054 (Cole, N.Y.).
42 Senator O'Daniel continued to introduce his bill for several sessions as did other Congressmen. In the first session of the Seventy-Eighth Congress (1943) the following bills were offered: S. 190 (O'Daniel); S. 237 (Reed); H.R. 992 (Colmer); H.R. 1804 (Smith); H.R. 2071 (Russell); H.R. 2107 (Curtis); in the first session of the Seventy-Ninth Congress (1945): S. 369 (O'Daniel); H.R. 1194 (Russell); in the second session of the Seventh-Ninth (1946): H.R. 6647 (Dondero); and in the first session of the Eightieth Congress: S. 160 (O'Daniel).
ployment. Looking back in 1946, ex-Secretary of Labor Perkins was completely justified in remarking that the overtime provision had been “flexible enough to make it possible to work more than forty hours when necessary, as it was during the war.”

On the Waterfront: Overtime on Overtime?

[The profit motive doesn’t seem to be working to prevent the use of a great deal of overtime.]

Employers in certain industries, but especially longshore, stevedoring, and shipping, effectively deployed the press to depict another Supreme Court decision, issued in June 1948, as unleashing a multi-billion-dollar apocalypse just like the one they had conjured up with regard to the so-called portal-to-portal suits filed by unions in 1946-47 over firms’ failure to count the time it took workers to walk from the factory gate to their work stations as compensable working time. As with the portal-pay dispute, employers succeeded in securing quick congressional action to resolve the matter in their favor. In Bay Ridge Operating Company v. Aaron the Court held that the statutory regular rate on which time-and-a-half overtime had to be paid included time-and-a-half premium wages that longshore-men were paid for working shifts outside the core daytime hours, regardless of how many hours they worked. The International Longshoremen’s Association (ILA) joined forces with employers to denounce the lawsuits for overtime that had been brought by individual members of the ILA. As ILA president-for-life Joseph Ryan testified at trial, “our Council went on record as being opposed to trying to get time and a half on time and a half, as it might wipe out all of the gains we had made for our men over a period of 25 years.”

About 400 longshoremen and ILA members filed two test suits in October 1945 against two stevedoring companies (one of which, Huron Stevedoring Corporation, was a subsidiary of Grace Lines) for $800,000 in back overtime. The nub of the complaint was that during World War II they had worked 66- to 70-hour weeks on the night shift in the Port of New York without receiving any overtime premium because the employers had taken the position that the $1.875 night shift rate was 150 percent of the regular (day-shift) rate of $1.25. A secondary issue involved day workers who worked a standard 44-hour week with no...
overtime for the last four hours. 5

Initially the stevedoring companies prevailed at trial before federal judge Simon Rifkind, himself a New Deal insider. 6 The trial was notable both for the extensive testimony of two prominent scholars about the history of overtime work and for the fact that U.S. government lawyers represented defendant-employers because the federal government would ultimately have been liable for any judgments since the longshoremen had loaded and unloaded ships operating under wartime cost-plus contracts. The federal government’s interest in the outcome was intensified by the more than 200 additional suits that had been filed in the interim. 7 At issue was the collective bargaining agreement between the ILA and the defendant employers, which provided for two classes of pay: a straight-time hourly rate of $1.25 for all work performed between 8 a.m. and noon and from 1 p.m. to 5 p.m., Monday through Friday, and from 8 a.m. to noon Saturday, and a so-called overtime rate of $1.875 for work performed at any other time regardless of how many hours the employees worked during those other times. This arrangement had been in effect for decades; the only change that the parties made after the FLSA went into effect was relabeling: wages for the core hours were called “straight time” and all others “overtime rates.” 8

Ryan testified at trial that:

we did not need the Fair Labor Standards Act. We were able to collective [sic] bargain, and by that bargaining made an eight-hour day and time and a half for overtime.... We have that without the Fair Labor Act. The only place it helped us was if a fellow was


7Aaron v. Bay Ridge Operating Co., 162 F.2d 665, 668 n.5 (2d Cir. 1947); Petition for Writs of Certiorari at 16.

8Aaron v. Bay Ridge Operating Co., 162 F.2d at 672 (Finding of Fact No. 33).
fortunate enough to work eight hours a day, Monday, Tuesday, Wednesday, Thursday and Friday, that before the Fair Labor Act he had to work Saturday morning for four hours at the single rate of pay. After the Fair Labor Act came in, if a man could work those times—it is very seldom a man works five straight days of eight hours, but if we worked five days, previous to last October [1945], before the Fair Standards Act came in, Saturday morning, due to our 44-hour contract, we had to work four hours on Saturday at the straight pay. When the Fair Standards Act came in, if we worked one hour on Saturday morning..., we got time and a half, provided we had the 40 hours in the previous five days.9

In fact, however, as Ryan was forced to admit on cross-examination, for seven years the ILA had acquiesced in employers’ refusal to pay such Saturday morning overtime.10 And the plaintiffs were also correct in charging that all that the ILA and the employers had “sought to do...from 1938 on was to perpetuate the prestatutory wage pattern without adjusting their employment relations in any wise to the statutory requirements.”11

The plaintiff-workers—whom the ILA president mischaracterized at trial as “non-union members who do not know anything about how our organization was built up”12—argued that since the higher rate was merely a shift differential for inconvenient night and weekend work, they were entitled to time and a half for any hours above 40. ILA president Ryan sought at trial to characterize the wage-hour structure as driven by anti-overtime sentiments:

Our objective was to de-casualize longshore work as much as possible, to have the work done in the daytime as much as possible, and make it as expensive for the employers as possible on Sunday. ... We wanted to work in the daytime. We figured we lived only once. We want the daytime when every man who wants to work wants it done in the daytime and not during overtime. The employers would say it cannot be done in the steamship industry. I think we have proven for them that after 30 years of negotiating many of the things they said could not be done in the industry, when they found it too expensive to do it any other way, have been done.13

Rifkind saw a “certain plausibility” in both positions: on the one hand, workers who worked only nights received no premium pay after 40 hours; on the other hand, the agreement established a regular rate, of which the employers paid time

9Testimony of Joseph B. Ryan, Transcript of Record at 189-90, Bay Ridge Operating Co.
10Testimony of Joseph B. Ryan, Transcript of Record at 190-95, Bay Ridge Operating Co.
11Brief for Respondents at 76-77.
12Testimony of Joseph B. Ryan, Transcript of Record at 177, Bay Ridge Operating Co.
13Testimony of Joseph B. Ryan, Transcript of Record at 173, Bay Ridge Operating Co.
and a half both for hours beyond 40 and, although the FLSA did not even require it, also for certain shift work. In seeking to reconcile three national policies (the NLRA, FLSA, and the wartime need for maximum production), Rifkind put great store by Ryan's testimony about the ILA's goals as well as by his statement that the suit "'might wipe out all of the gains we have made for our men over a period of 25 years,'" during which there had been no strikes.14

Rifkind's decision was driven by his perception that the collectively bargained wage system was the "natural development of a long history" and "not an artificial rearrangement of pre-F.L.S.A. rates of compensation in order to avoid additional compensation."15 He offered examples of superior terms of employment embodied in other collective bargaining agreements to buttress his claim that application of the plaintiffs' approach "would create havoc with established labor relations, put collective bargaining in the category of a device for obtaining money under false pretenses and probably strain the resources of a substantial proportion of American industry."16 The first example involved a regular contractual workweek of 36 hours, although the actual workweek was longer than 40 hours. The workers therefore received time and a half for all hours beyond 36, although the FLSA overtime requirement did not kick in until they had worked 40 hours. Because the average rate for 40 hours included time and a half for four hours, the workers' overtime rate, which was calculated as 150 percent of the straight-time rate for 36 hours, did not include the contractual overtime for hours 36 to 40. Nevertheless, Rifkind saw nothing in the FLSA to foreclose such "bona fide" union contracts. In the other example, a collective bargaining agreement provided for daily time and one-half overtime for hours beyond eight regardless of whether the workers worked 40 hours during that week. In weeks in which they worked five ten-hour days, they therefore received overtime for eight hours included within the first 40 hours, and the rate for hours in excess of 40 (all worked on the fifth day) was less than 150 percent of the average rate for the first 40 hours because it was calculated on the basis of the straight-time rate excluding the contractual overtime premium. Again, Rifkind concluded that applying plaintiffs' approach would merely deter employers from entering into such agreements in the first place.17

Finally, Rifkind was persuaded by the voluminous expert testimony that the premium was not merely a shift differential, which traditionally ran to only 5 to 15 cents per hour and was not designed to deter employers from operating, but to attract workers to work during less desirable hours without inhibiting the work.

The longshoremen’s 50 percent premium was designed to deter and largely succeeded in “curtailing...abnormal hours.”

Judge Rifkind had in fact been misled by the trial testimony of the eminent labor historian and economist Philip Taft. Testifying on behalf of the defendant employers, Taft, in response to a question as to whether “overtime” had had a generally accepted meaning before the FLSA, stated that it described “excess time...” After the judge sustained plaintiffs’ objection to a follow-up question on the grounds that it was unclear, Rifkind himself intervened to help clarify the concept. Taft bluntly denied that “the idea of excessivity [was] an essential element of overtime” before the FLSA. Instead, he argued that it was “made up of two specific ideas, one arising in excess of a particular sequence, and the other may be a specific enumeration of hours.” When Rifkind then asked him whether he meant that overtime before 1938 had meant “time in excess of a stipulated period, or...any time, whether in excess of not in excess, which was penalized...in the method of payment.” Taft replied that the “two concepts were usually joined together.” Yet when the judge asked whether the second concept was ever found without the first, Taft could not recall. But when Rifkind asked the logical follow-up question as to whether “excessivity was always an element of the overtime,” Taft’s replied incoherently: “Only in the sense that the definition was there.” Rifkind nevertheless adopted Taft’s opinion in his findings of fact which stated that although “excess time” had generally been the meaning of “overtime” before the FLSA, the “idea of excessivity...was not an indispensable element of the concept of overtime as understood,” which also included “hours outside of a specified clock pattern.”

The plaintiffs identified the self-contradictory structure of the employers’ and the ILA’s rhetoric by underscoring that Ryan’s testimony concerning the union’s purpose in demanding higher rates for night and weekend work “contemplate[d] no deterrent against working long or excessive hours; it merely reflects the natural human desire to work by day and retire at night. But petitioners, following the line of their experts’ testimony, urge that overtime as understood in American industry has always included, as an alternative concept, hours outside a basic clock pattern.” But, the plaintiffs noted, contrary to Taft’s testimony, “virtually all collective contracts include excessivity as an essential element in the computation of overtime.” Although the workers argued forcefully that the 50-percent premium for night work was compensation for its “general undesirability” and not for

19 Transcript of Record at 325-27, Bay Ridge Operating Co.
20 Findings of Fact 28 (a), Transcript of Record at 604-605, Bay Ridge Operating Co.
21 Brief for Respondents at 66-67.
excessivity of hours, they failed, as far as Judge Rifkind was concerned, to rebut the quantitative argument that 50 percent was otherwise never found as the hallmark of a mere shift premium.22 In fact, a BLS survey of collective bargaining agreements in effect in the second half of 1946 revealed no shift differentials remotely approaching those at issue in the longshore case: many amounted to only a few cents, and none exceeded 15 percent.23

The unanimous Second Circuit decision in June 1947 reversing the district court, though written by the premier realist judge, Jerome Frank, oddly refrained from addressing any of Rifkind’s real-world concerns about the potential for undermining collective bargaining and the negotiation of terms superior to those required by the FLSA. Instead, it bloodlessly ruled that the regular rate could not be determined by collective bargaining agreements, but only as an “‘actual fact’”;24 the regular rate was therefore to be calculated by dividing total compensation by total hours worked.25

After the Second Circuit panel handed down its decision, the workers’ lawyers estimated that total back overtime claims for the industry could range between $25 million and $50 million.26 Two months later, in August 1947, the same lawyers filed two additional suits against 60 stevedoring companies listing 3,000 stevedores as plaintiffs. They deviated from the usual procedure of waiting until the Supreme Court had ruled on the test cases because the Portal-to-Portal Act, which would go into effect on September 12, had cut the statute of limitations to two years and would have excluded all the world war claims.27 In its amicus brief in Bay Ridge Operating Company before the Supreme Court, the NAM had asserted that if plaintiffs prevailed, the ensuing litigation might exceed the volume spawned by the Mt. Clemens Pottery Company portal-pay decision.28

In June 1948, the Supreme Court upheld the workers’ claims and rejected the position advocated by the United States and the ILA. The majority, agreeing with the Second Circuit on the regular rate as an actual fact, ruled that it can be calculated by dividing weekly compensation by hours worked unless the compensation

22Brief for Respondents at 76.
24Aaron v. Bay Ridge Operating Co., 162 F.2d at 668 (citing 149 Madison Avenue Co. v. Asselta, 331 U.S. 199 (1947)).
27“3,000 Stevedores Sue for Millions,” N.Y. Times, Aug. 17, 1947, at 16:7. See also Linder, ”Moments Are the Elements of Profit” ch. 3.
includes an overtime premium since “Congress could not have intended” a pyramid ing of overtime on overtime, which would have “expanded extravagantly” the scope of liability contemplated by Congress.\textsuperscript{29} Without any reasoning, the Court rejected Rifkind’s conclusion that the night premium was too large to have been merely a shift premium; it found that the size of the differential “cannot change the fact that large wages were paid for work in undesirable hours...or because the contracting parties wished to compress the regular working days into the straight time hours as much as possible.” They therefore did not fall under the rubric of an overtime premium, which the majority held to be “an additional sum received by an employee for work because of previous work for a specified number of hours in the workweek or workday” whether specified by statute or contract.\textsuperscript{30}

In an adroitly argued dissent, Felix Frankfurter, joined by Justices Jackson and Burton, provided the sociological underpinning for Judge Rifkind’s view that employers should not be deterred from entering into legitimate collective bargaining agreements that offered workers terms superior to those of the FLSA by fears of back overtime liability for wages neither party had ever contemplated paying. Having learned the recent lesson of the portal-pay dispute, Frankfurter warned that Congress would not suffer yet “another doctrinaire construction by the Court of the Fair Labor Standards Act in disregard of industrial realities.” Accusing the majority of abstractly treating the FLSA’s words “as though they were parts of a cross-word puzzle” rather than “the means by which Congress sought to eliminate specific industrial abuses,” Frankfurter charged that the Court had totally disregarded the struggle of a “strong union” against “anarchic exploitation of the necessities of casual labor....” Instead, the majority, getting an arithmetical answer to its own arithmetical question, “substitut[e]d an arrangement rejected both by the union and the employers as inimical to the needs of their industry and subversive” of collective bargaining.\textsuperscript{31}

Frankfurter argued that since the collective bargaining agreement’s objectives of discouraging overwork and underemployment were congruent with the FLSA’s, Congress did not authorize the courts to weaken a strong union by undermining its contracts. The dissent also criticized the majority for subjecting collective contracts “to the hazards of self-serving individualism” of a few union members in the absence of any judicially established evidence that the union officials had ignored or betrayed their responsibility and negotiated a sham con-

\textsuperscript{29}Bay Ridge Operating Co. v. Aaron, 334 U.S. at 464, 465.

\textsuperscript{30}Bay Ridge Operating Co. v. Aaron, 334 U.S. at 469, 475, 471.

\textsuperscript{31}Bay Ridge Operating Co v. Aaron, 334 U.S. at 478, 479, 484 (Frankfurter, J., dissenting).
tract that did not serve the interests of the union as a whole.  

These barbs resembled the reproach that the ILA's amicus brief had directed at the plaintiffs for wanting to repudiate what the collective bargaining agreement had established as regular and overtime rates, which were "far higher than those required" by the FLSA. The plaintiffs were then cast in the role of selfish and self-destructive ingrates: "Without collective bargaining these very plaintiffs who now seek overtime and overtime rates ranging up to $3.75 per hour...might, like millions of other American workers, still be working at the $.40 per hour minimum provided by the Act."33

Curiously, neither Frankfurter nor the majority nor the Second Circuit judges ever alluded to the ILA's extremely undemocratic structure. The entire sociological edifice of Frankfurter's critique should have collapsed under revelation of the fact that the ILA was autocratically run by Joseph Ryan—also known as "King Ryan" after he had himself made president for life in 194334—a corrupt right-winger in cahoots with mobsters and employers.35 Only the plaintiffs in their Supreme Court brief, and even then only indirectly, hinted at the ILA's less than militant democracy. But even while citing secondary authorities that criticized the central institution of longshore industrial relations, the shape-up, as propagating ""favoritism, bribery, and demoralization,"" the plaintiffs rushed to disavow any ""purpose...to advance social reform....""36

Evidence establishing the ILA's undemocratic structure and policies was abundantly available. Studying the ILA for Fortune in 1951, future Harvard University sociology professor Daniel Bell, concluded that the union was one of few in the United States to "encourage cutthroat competition among men for jobs or tolerate a condition of job insecurity."37 From World War I until the end of World War II, the ILA had engaged in a "pattern of economic accommodation...which worked to the benefit of the shipowners and the union barons and against the interest of the men."38 Ryan could truthfully boast at trial that there

32Bay Ridge Operating Co v. Aaron, 334 U.S. at 485-87, 492-93 (Frankfurter, J., dissenting).
33Brief on behalf of ILA as Amicus Curiae in Support of Petitioners' Petition for Writs of Certiorari at 8-9.
36Brief for Respondents at 18-19.
38Bell, "The Racket-Ridden Longshoremen" at 197.
was “never a strike since 1907 until 1945,”39 but the collective bargaining agreements that the union secured “brought few benefits other than miniscule [sic] hourly wage increases for the men. ... The few rebellions...where the Communists sought to gain a foothold...were dealt with summarily.”40 Rebellious members often “get conked on the head.”41 The ILA, as a sociological study of the longshore unions found, “distinguished itself as one of the least effective unions in the country. Judged even by the minimal standards of business unionism, the ILA was an abject failure....”42

This cozy relationship was, according to Bell, threatened by the overtime lawsuits, which “scared the steamship operators” not only on account of the potentially large back-wage liability, but because the need to open the books to determine who was owed how much in wages “might reveal the extent of payroll padding, duplicate hiring, and other practices which, since the government was paying all bills during this period on a cost-plus basis, could only have been conducted on a collusive basis. The shipping companies demanded, therefore, that the union waive all claims for overtime pay.” After several twists and turns, including the first strike in the ILA’s history in 1948, the union and the employers agreed to urge Congress to overrule the Supreme Court’s Bay Ridge Operating Company: “It was a rare act of ‘sacrifice’ on the part of a union: abandoning several millions of dollars of legally entitled back pay...to ensure labor-management ‘harmony’.”43 A few years later even the conservative AFL could no longer ignore the overwhelming evidence and expelled the ILA for its connections to mobsters and acceptance of bribes from employers.44

Representative Angier Goodwin (R. Mass.) quickly became the chief congressional sponsor of amending the FLSA to wipe out any liability for the shipping companies. In July 1947, just a few weeks after the Second Circuit had issued its decision, Goodwin introduced a bill whose long preamble was taken

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39Testimony of Joseph Ryan (1946), Transcript of Record at 174, Bay Ridge Operating Co.

40Bell, “The Racket-Ridden Longshoremen” at 197.


43Bell, “The Racket-Ridden Longshoremen” at 199-201. For a more benign account of the ILA’s position, stressing that the contract gave longshoremen more than the FLSA would have given them, and that the ILA’s cooperation with employers in opposing the suits and urging congressional amendment of the FLSA was merely an effort to preserve the integrity of its collective bargaining agreements along the same lines pursued by other unions, see Vernon Jensen, Strife on the Waterfront: The Port of New York Since 1945, at 54-64 (1974).

44Kimeldorf, Reds or Rackets? at 15.
verbatim from the Portal-to-Portal Act, which had been enacted two months earlier, replete with references to "immense" liabilities, serious impairment of capital resources, "financial ruin of many employers," "windfall payments," "champertous practices," and "Nation-wide industrial conflict." Without making any reference to longshoremen, Goodwin's bill would have disposed of "pyramidized overtime compensation" simply by entitling "employers and their employees" to fix regular and overtime rates "individually" or through collective bargaining and then prohibiting the use of such a contractual overtime rate in computing the FLSA regular rate. Goodwin would also have wiped out liability retroactively by depriving the courts of jurisdiction over any actions not in conformity with the new definition of "regular rate," even if those cases had been filed before the new law's effective date.

After Congress had taken no action on Goodwin's bill in the first session of the Eightieth Congress, on April 20, 1948, before the Supreme Court had decided the case, Goodwin, conjuring up exactly the same astronomical figure that he and others had bandied about a year earlier during the portal-pay hysteria, declared to the House of Representatives that (unnamed) "[s]tatisticians have calculated" that a potential liability of "$6,000,000,000. I repeat, $6,000,000,000" loomed like a "monstrous and destructive Frankenstein," bringing with it "ruin and bankruptcy for management in many lines of business." Certifying the correctness of each other's figures, he and Representative Rankin (D. Miss.) engaged in a colloquy creating the "astounding" factoid that $6 billion exceeded the value of the entire wheat and cotton crops.

At a joint conference in New York two weeks later, which urged Congress to intervene to ward off a "catastrophe of national proportions," Representative Goodwin announced that more than fifty industries were threatened by the $6-billion liability. The ILA's lawyer, Louis Waldman, sermonized that the "whole commercial and social structure of the country...was based upon the concept of freedom of contract, which could not be had without good faith.... He contended that 'the good faith of American labor in dealing with its employers has been thwarted as a result'" of WHD interpretations and court decisions.

Even before the Supreme Court published its *Bay Ridge Operating Company* decision, legislators had initiated the process to relieve employers of past and future liability. Although Senator Ball's omnibus FLSA revision bill, which in-

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46 H.R. 4387, § 2.
47 H.R. 4387, § 4.
49 94 Cong. Rec. 4652-54 (1948).
cluded an anti-overtime-on-overtime provision, had been introduced earlier in the session.\textsuperscript{51} On May 12, 1948, Goodwin introduced a bill devoted exclusively to this issue. It would have redefined “regular rate” to exclude any overtime premium, which was defined to include payment “because the employee has previously worked a specified number of hours during a specified period or because of the time of day or the day of the week or year the work is performed.”\textsuperscript{52} A week later Goodwin availed himself of yet another forum at a hearing on his bill before a subcommittee of the House Judiciary Committee apparently attended only by Representative John Gwynne, the leading House figure in the previous year’s enactment of the Portal-to-Portal Act. Having learned the value of rhetorical overkill in winning that battle, Goodwin, who stressed the “disturbing parallel” to the portal-pay litigation, declared: “There is no more important problem facing American industry today than that raised by a recent judicial interpretation” of the FLSA.\textsuperscript{53} Senator Wiley, who had also played a leading role in the portal-pay legislation in 1947, filed the companion bill in the Senate.\textsuperscript{54}

Pro-labor congressmen belittled Goodwin’s legal analysis, predictions, and data. On May 20, Representative Francis Walter (D. Pa.)—just beginning his career as a leading red hunter with the House Committee on Un-American Activities—\textsuperscript{55} expressed surprise before the House that anyone could argue that longshoremen’s wages fell under the overtime rubric. Moreover, the Portal Act, which Congress had just passed the previous year, would considerably reduce any liabilities by virtue of its short statute of limitations and the defense it offered employers who relied in good faith on the Administrator’s interpretation. In addition to pointing out that, since the longshoremen’s wage system was unique, other industries were unaffected, Walter stressed that Goodwin’s bill and others

\begin{quote}
\textsuperscript{51}S. 2386, 80th Cong., 2d Sess. (Mar. 25, 1948). Ball’s bill inserted a very lengthy definition of “regular rate” into the definitions section of the FLSA, which would have excluded from “normal, straight-time compensation and...credited to overtime compensation...overtime premiums paid for work performed in excess of the normal weekday or workweek scheduled in good faith by established practice or a collective-bargaining agreement” as well as overtime premiums for work performed on weekends and holidays. \textit{Id.} § 2(n). Ball’s bill never got out of committee, and Ball, a Republican from Minnesota, lost his seat in the 1948 election.

\textsuperscript{52}H.R. 6534, § 4, 80th Cong., 2d Sess. (1948). The overtime rate also had to be at least one and a half times any lower rate “not proved to be a fictitious rate established by custom or individual labor contract, payable for the same work at other hours of the day or on other days, and include[] any other true overtime rate.”

\textsuperscript{53}Transcript of Proceedings, House Committee on the Judiciary, Subcommittee No. 2, H.R. 6534, at 10, 6-7 (May 20, 1948) (unpublished).

\textsuperscript{54}S. 2728, 80th Cong., 2d Sess. (May 24, 1948). Senator Butler filed an identical bill, S. 2832, on June 8.

\textsuperscript{55}David Caute, \textit{The Great Fear: The Anti-Communist Purge Under Truman and Eisenhower} 92, 377, 386 (1979), discusses Walter’s efforts to undermine the left-wing United Electrical Workers.
\end{quote}
were in reality designed to “stampede[ ]” Congress into adopting legislation that “would deprive 20,000,000 workers of the overtime benefits” of the FLSA by permitting employers to “select...anything you wish to be called the regular rate of pay so long as it is 40 cents or more an hour.”

In July 1948, employers “breathed a little easier” when the WHD issued an official interpretation indicating that Bay Ridge Operating Company “wasn’t as far-reaching as many had feared at first.” Under the new interpretation—good-faith reliance on which would protect employers under the Portal-to-Portal Act—if premium pay for weekend, holiday, or night work was paid only after workers had already worked a specified number of hours or days under some bona fide standard, it qualified as overtime compensation and could be excluded from the calculation of the regular rate. By August 1948, Ryan appeared even more eager to resolve the issue than the employers. Quoting Representative Fred Hartley, Jr., whose infamous anti-labor bill had just been enacted, he called for a special session of Congress to resolve the question of overtime rates for night workers.

The CIO unions took a different approach than the ILA and the AFL to the “smear campaign...coined ‘overtime on overtime,’ which is deliberately designed to mislead and confuse the issue.” Whereas the AFL supported the proposed amendment of the FLSA as “forestalling a chaotic situation in many industries,” the UAW, though deciding not to file any suits, at the same time declared that it would contest any moves by employers to use Bay Ridge Operating Company as a pretext for eliminating premium pay for weekends or holidays or shift differentials. The CIO also attacked AFL unions like the ILA by observing that “we do not believe that unions should be able to trade away time and a half for work after 40 hours in order to get some other benefit. ... We believe that the undermining of uniform overtime standards will again encourage chiselers to gain a competitive advantage at the expense of their employees’ wages and living

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56Cong. Rec. 6204 (1948). Lawyers for the plaintiff-stevedores had stated at the time they filed two additional suits in 1947 that “virtually no overtime is accumulated by longshoremen during peace times.” “3,000 Stevedores Sue for Millions.”


standards."

During negotiations to settle the East Coast dock strike in late 1948, Secretary of Labor Tobin promised stevedoring employers that the Truman administration would submit legislation to Congress overruling the Supreme Court's decision. Expediting its passage as a separate FLSA amendment ahead of enactment of a long overdue increase in the minimum wage, Democrats early in the Eighty-First Congress, control of which had passed back to them with Truman's election, filed a bill in the House to overrule Bay Ridge Operating Company. Limited to longshore and construction work, and also purely prospective, H.R. 858 was passed by the House in February. Executing the Truman administration's position that quick action was necessary "to remove serious difficulties in the maintenance of desirable labor standards arrived at through collective-bargaining agreements, and in order to prevent labor disputes," the Senate Labor Committee, amended the bill both to extend its reach to all of industry and to make it retroactive, as Congress had done with the portal-pay claims two years earlier. Significantly, one of the reasons Congress adduced for treating the two disputes similarly was the fact that "in both cases, the filing of suits was deplored by responsible A. F. of L. officials...." The electricians unions, for example, declared that it would not oppose employers' efforts to override Bay Ridge Operating Company "because it is not our policy to seek gains beyond our agreements." Indeed, the ILA's general counsel coyly testified before Congress that the union did not sponsor retroactivity, but "if the employers can persuade Congress to incorporate retroactivity...we do not oppose it." The CIO, in con-

66 S. 336, 81st Cong., 1st Sess. (1949), from the beginning had applied to all industries, but not retroactively.
67 See Linder, "Moments Are the Elements of Profit" ch. 3.
70 To Clarify the Overtime Compensation Provisions of the Fair Labor Standards Act of 1938, as Amended at 40 (testimony of Louis Waldman).
Overtime on Overtime

contrast, did not support the bill because "there was no reason why this overtime problem should be dealt with in advance of modernizing the Wage and Hour Act generally to give relief to the millions of workers who were denied adequate wage and hour protection." The CIO would not have objected to a purely prospective bill limited to longshoring, but it also stressed that the impact of Bay Ridge Operating Company had been vastly exaggerated: the Portal-to-Portal Act would wipe out some claims anyway, while others would not stand up because relatively few longshoremen were employed for more than 40 hours by the same employer.71

The Senate passed the so-called overtime-on-overtime bill in May and the customarily choreographed bombastic debates were staged in the House. Proponents of the bill accused some of the lawyers behind the litigation of being communists and characterized the suits themselves as "one of the largest and most vicious rackets in the history of the country and the legal profession."72 After differences were resolved in conference, President Truman signed it into law in August.73 The amended FLSA provided that with respect to overtime payable to an employee who is paid for work on weekends, holidays, or the sixth or seventh day of a workweek at a premium rate not less than 1.5 times "the rate established in good faith for like work performed in nonovertime hours on other days," or who is paid for work outside the basic, normal, or regular workday (up to eight hours) or workweek (up to 40 hours), at a premium rate at least 1.5 times the rate established for like work performed during such workday or -week, the additional compensation of such a premium rate does not count as part of the regular rate.74 The amendment also eliminated employers' liability in any FLSA suits filed before or after the new law went into effect, provided that the compensation paid met the new standard.

Later, in 1949, when the FLSA was comprehensively revised, this first amendment was repealed75 and subsumed within the new subsection of the act defining "regular rate" for the first time. Henceforward employers could lawfully exclude from the regular rate and credit against their statutory overtime liability...

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71 To Clarify the Overtime Compensation Provisions of the Fair Labor Standards Act of 1938, as Amended at 201-202 (statement of Irving Levy, general counsel, UAW, representing the CIO).


the following categories of premium wages:

extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours;

extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a)).

The longshoremen’s litigation and its congressional consequences raised the same issues that the portal-pay dispute had generated in 1947: what happens when highly paid unionized workers take the initiative in pushing back the outer limits of labor standards legislation the primary beneficiaries of which Congress had never intended them to be? Like the workers demanding to be paid for the time they had to devote to their employers’ enterprise in walking to and from their work benches, the longshoremen had a compelling case: they could plausibly argue that they were being deprived of their statutory premium for the double burden of working extra-long hours at night. Their “regular rate” was manifestly the night rate at which they worked and not the lower day rate at which they did not work; under the FLSA, therefore, they seemed squarely entitled to the overtime premium on the night rate. Nevertheless, their congressional opponents had little rhetorical difficulty in lumping them together with portal-pay litigants as pursuing claims totally lacking in “moral substance.”

In contrast, the dispute over Belo plan wages for salaried employees working

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76Fair Labor Standards Amendments of 1949, § 7(d)(5-7), 63 Stat. at 914 (codified at 29 U.S.C. § 7(e) (5-7)).
77See Linder, “Moments Are the Elements of Profit” ch. 3.
78The Supreme Court faulted the U.S. government’s argument for treating “of the entire group of longshoremen instead of the individual workmen... The straight time hours can be the regular working hours only to those who work in those hours.” Bay Ridge Operating Co. v. Aaron, 334 U.S. at 473.
7995 Cong. Rec. at 9493 (Rep. Werdel citing magazine article).
irregular hours did not appear politically misguided. It not only focused on a perceived injustice to overtime workers, but was not confined to union workers; moreover, the campaign to prohibit or at least limit such plans was undertaken primarily not by unions, but by the Labor Department, which supported the shipping employers (and the ILA) in the longshoremen cases. That the Labor Department and workers also lost this battle does not undermine the judgment that, unlike the portal-pay dispute, it was not a self-destructive contest.

What New Deal insider-judges Rifkind and Frankfurter were really saying was that the longshoremen and their lawyers underrated the importance of Realpolitik: not only had the Congress in 1937-38 not intended the FLSA to give such additional legislative leverage to strong unions, but neither the Republican Eightieth Congress nor, as it turned out, the Eighty-First, governed by a Republican-Southern Democratic coalition, would ever put up with such legalistic readings. Because a quasi-monopolistic (albeit undemocratic and corrupt) union had cut a long-term and stable deal with employers to secure relatively high wages for their members, Rifkind and Frankfurter were willing to bend the FLSA to avoid a super-contractual wage their political sense told them Congress had never contemplated. They may also have speculated that the litigation strategy would have been futile in any event since employers, had they been forced to pay significant additional sums in the future for night-overtime, might merely have bargained for lower base rates to hold themselves harmless. Ironically, however, unlike the portal-pay plaintiffs, the longshoremen’s judicial victory would have been less costly to their employers since night-overtime was largely a creature of World War II and did not represent a major future liability.

The most untoward consequence of the longshoremen’s litigation was the political space that it fruitlessly occupied that could otherwise have been devoted to more vital struggles to expand the FLSA for workers for whom the FLSA was clearly designed. Two of the most important efforts that were crowded out of the legislative agenda in 1949 were raising the minimum wage to $1.00 (instead of 75 cents), for which, for example, the Americans for Democratic Action was lobbying,80 and which Congress did not enact for another six years,81 and extending minimum wage coverage to farmworkers in so-called industrial agriculture82—a measure that did not become law until 1966.83

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Taking Care of Business:
Congress Cuts Overtime Coverage in 1949

Henry Ford announced yesterday that his contribution to the Wilson campaign would be a country-wide eight-hour day propaganda. This will be spread from every point where there is a Ford agency.... "I am in favor of the passage of a Federal law that will make eight hours the national working day. ... There is no business where the employees cannot be worked eight hours a day and no more," he said. "If they can't do it, then the business is not properly managed."

World War II and Democratic control of Congress frustrated employers' initial efforts to revise the FLSA overtime provision. When Republicans gained control of the Eightieth Congress in 1947, big business's priorities were legislative intervention to put a stop to the thousands of portal-pay suits that had been filed for travel and wash-up time under the FLSA,2 and enacting the Taft-Hartley amendments to undermine union power under the National Labor Relations Act. Once those missions had been accomplished, employers turned their attention to other restrictions on their ability to deploy labor as they saw fit. Thus despite widespread wartime coverage in the business press of findings that longer work-weeks led to less than proportional increases in output,3 demonization of the 40-hour week became a propagandistic priority among large employers in 1947.

Hearings on FLSA revision held by the House Labor Committee late that year gave a good sense of what firms found restrictive about the law and how far they intended to roll back labor standards legislation. Representative Owens (R. Ill.), taking up the cause that employers had lost in 1942, suggested that premium overtime payments be calculated only on the basis of the minimum wage, leaving organized workers to bargain for any additional overtime.4 The Wage and Hour Administrator devoted 10 small-print pages to criticizing various proposals by employers ranging from outright repeal of the overtime provision, reducing the regular rate to the statutory minimum wage, and extending the non-overtime


2See Marc Linder, "Moments Are the Elements of Profit": Overtime and the Deregulation of Working Hours Under the Fair Labor Standards Act ch. 3.


workweek to 48 hours, to excluding piece-rate workers from overtime coverage.\(^5\)
A submission by a group of nineteen manufacturing companies in Cleveland employing more than 50,000 workers reveals the depth of the resentment harbored by unreconstructed northern industrial employers:

Unfortunately, many people have forgotten, and a large majority of people have never known, that the effect of the overtime-pay provisions of the Federal Fair Labor Standards Act was to place a limit on the number of hours that the productive facilities of this Nation might be worked. ...

Whatever arguments might have existed in 1938 for sharing the work no longer exist now. With prices...already too high because of shortages of goods, and with many nations...in desperate circumstances and crying out for the goods we might produce, it outrages every economic law to continue with a Government-imposed penalty to prevent the operation of this Nation’s productive facilities more than 40 hours a week.\(^6\)

To underscore just how superfluous the FLSA’s regulation of overtime had become, the Cleveland manufacturers told a tale of a golden age of bilateral negotiational harmony long before the FLSA had been enacted and “unions had attained their present great bargaining power.” Even back then it was employers’ practice to pay premium rates when they wanted work done after regular working hours.

The custom began years ago when working hours were 10 or more a day. A rush order or an emergency situation would arise requiring work past the customary hours. The employer would ask an individual employee, or a group of employees, to work overtime to meet the situation. Frequently the men would say they wanted to go home. Then an informal bargaining process would begin, in which the employer attempted to induce the men to stay by offering a premium of time and one-tenth, or time and one-fourth. The point was thus voluntarily determined at which the disinclination of men to work was overcome by their desire for additional money.\(^7\)

Since such voluntary premium rates had been “part of the fabric of custom throughout American industry,” even in nonunion plants, before the FLSA’s enactment in 1938, the custom, in the Cleveland employers’ view, would have spread by 1947, “with unions having grown to be the power they are....” But these manufacturers preferred bargaining to congressional imposition of premium


rates because it was less arbitrary and more flexible. More importantly, they charged, the function of premium rates—"induc[ing] men to do that which they ordinarily would not want to do, namely work overtime"—had been turned on its head: building trades unions in Cleveland, using "duress and threat of strike," had negotiated double-time rates for Saturday work and "then turned around and informed the contractor that unless he scheduled the tradesmen to work Saturdays on a regular basis, the men would not work the other days of the week." The next step in this union plot was "obvious": "Assured of Saturday work at double time, some men then take a day off in the middle of the week, but still draw 6 days’ pay for working only 5."8

But the Cleveland manufacturers did see a ray of hope in the silent compulsions of the labor market: "With today’s high living costs, there are many workmen who would be glad to gain extra money by working five and a half or six-hour days at straight time. It is their right to so elect. This would give them extra money with which to pay bills...." Unfortunately, the FLSA stood in the way of such a consensual extension of the normal workweek to 48 hours. Why that ancient custom of paying more to induce men to work more than they cared to was suddenly no longer in play, the manufacturers did not reveal. All they knew was that the mandatory FLSA overtime premium "in...most cases...absolutely bars employers from scheduling their operations more than the statutory maximum without penalty. Thus, men lose wages, and the Nation loses goods."9

How, when all U.S. manufacturers faced exactly the same overtime cost structure and—with much of rest of the industrial world lying in ruins—produced half of world manufacturing output,10 a slightly higher wage bill could possibly generate such disastrous consequences, the Cleveland employers did not bother to explain.

Dubious, apparently, of the likelihood of direct repeal of the overtime provision, the Cleveland group sought a legislative second-best: it urged Congress to enact a special provision permitting 48-hour workweeks at straight-time rates in any establishment in which a majority of employees authorized such an extension. The manufacturers sought to ward off any claims that they were merely demanding longer hours at lower pay by observing that "large number of workmen already accept work outside of their employment after working hours and on Saturdays to augment their regular incomes." Since they were willing to work for a second employer at straight-time wages (which were probably lower than those of their primary job), why should they be deprived of this same opportunity

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10W. S. Woytinsky and E. S. Woytinsky, World Population and Production: Trends and Outlook 1004-1005 (1953).
for an additional eight hours with their primary employer? After all: "Large numbers of American workmen are thrifty and industrious. Why deny them the right to utilize fully their time in the establishment where unquestionably they are paid the most, and deny their regular employer the use of his best trained and most competent help?"  

Without realizing it, the Cleveland employers had called attention to an inconsistency in overtime regulation that the 1937 Pennsylvania 44-hour-week, following the model of some women's and child labor laws, had avoided. By failing to conceptualize the 40-hour week as applying to all work performed by an employee for all of his or her employers, and by permitting individual workers to work 40 hours for one employer and additional hours for one or more other employers without triggering any overtime penalty for any employer, Congress undermined the penalty's macroeconomic work-spreading impact, while depriving workers of protection against the health and safety consequences of overwork as well as of the premium wages that allegedly compensate them for subjection to this burden.

Other employer groups were not so timid as the Clevelanders. An umbrella organization of 46 industrial associations, including numerous state, local, and manufacturing associations spread all over the United States, urged outright repeal of the statutory overtime premium. Denying any desire to "'chisel,'" the group asserted that the FLSA simply "does invade the right of employer and employee to arrive at a more satisfactory arrangement than the law requires...." And in the wake of the launching of the Marshall Program and "'our crying need today...for production, more production, more production," it concluded that "the whole problem of overtime can be approached more intelligently through employment contracts than by statute."

During the second session of the Eightieth Congress in 1948, employers shifted their focus toward raising the threshold triggering overtime or eliminating the premium altogether. The NAM urged the "very drastic change" that anything above the minimum wage exceeded "the field which...the statute should have anything to do with." It clearly voiced employers' increasing irritation that "[m]ost of the problems in the last 6 years have been concerned with employees who receive double, or three or four times" the minimum wage and "this hair-

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12See above ch. 7.


splitting” over whether overtime had to be paid on bonuses and other fringes.15 Before those plans could succeed, however, President Truman’s surprise victory over Dewey and the Democrats’ majority in the Eighty-First Congress emboldened labor and its legislative supporters to push for higher FLSA standards and broader coverage. But labor unions overestimated their congressional strength and in the end their drive to “modernize” the FLSA in the wake of the transition of the U.S. economy from depression to international domination16 was thwarted by a pro-employer Republican-Southern Democrat coalition, which blocked efforts not only to expand FLSA coverage, but also to undo Taft-Hartley.17

In March 1948, the management magazine Modern Industry published a debate between Secretary of Labor Lewis Schwellenbach and a right-wing economist, Lewis Haney, over suspension of the statutory overtime premium. Noting that “[m]any employers are emphatically in favor of tossing it into the ashcan,” the magazine asked whether Joe Worker and management would benefit from a reduction in overtime pay.18 Conjuring up an “inflation emergency,” Haney’s diatribe culminated in the assertion that a 40-hour week with time and a half thereafter was “the essence of inflation.” Reluctant to advocate a “disastrous deflation in dollar wages,” he viewed increased output without a wage increase as the only solution: “all laborers who can do so” had to be “allow[ed] and encourag[ed]...to work longer hours at their regular rate of pay. ... It took over 45 hours a week to win the war.... It will take much more than 40 hours to win the peace.”19

The seriousness with which capital was pursuing a rollback of the FLSA was signaled by the forceful advocacy of the 45-hour week by the president of General Motors, Charles E. Wilson. Delivering a talk entitled, “Can We Win the Peace with the Forty-Hour Week?” to the Cleveland Chamber of Commerce in April 1948, he reproached labor for having “made a ‘sacred cow’ of the forty-hour week when it was meaningless, when the welfare of the country was at stake.” Wilson insisted that he was not “advocating a plan that would reduce the compensation workmen are now receiving for forty-five hours. ... I am not advo-

Congress Cuts Overtime Coverage in 1949 323
cating more work for the same pay. I am advocating more pay for more work.”20 Since the FLSA’s much ballyhooed flexibility already permitted workweeks of any length, provided that employers paid time and a half, Wilson’s rhetoric made little sense. Lesser capital demanded even more. The National Small Business Men’s Association proposed outright repeal of the FLSA.21

While capital was demanding more work, the AFL returned to its Depression-era theme of work-spreading. In January 1949, its Shorter Work-day Committee warned that when the Marshall Plan and rearmament no longer sufficed to “‘carry us along,’” it would press for the thirty-hour week.22 By September, the AFL Executive Council reported to the organization’s annual convention that a shorter standard work day and week were needed. Viewing the long-term and postwar sweep of U.S. economic development as shaped by a persistent gap between strong productivity increases and lagging (working-class) income resulting in debilitating periodic unemployment, the AFL argued: “‘While shorter hours alone cannot perform the full task of the expansion of job opportunities that will be needed in an ever-growing degree, it can make a very important contribution to the achievement of that aim. It is furthermore an entirely worthwhile end in itself, and a historic one for labor.’” 23

The pro-labor Democrats expeditiously held hearings at the end of January and beginning of February 1949 on the administration’s bill, H.R. 2033,24 and reported out a revised bill, H.R. 3190 (introduced by the chairman of the House Labor Committee, Representative Lesinski) in March. The bill, which was never enacted and failed even to reach the House floor, revealed unions’ overoptimism. The committee’s point of departure was the conviction that employers had succeeded in frustrating the attainment of the overtime provision’s three objectives—shortening the workweek for workers’ health, efficiency, and well-being, spreading work, and compensating workers for the burdens of long weeks—“by the use of two devices which have been held by the courts not to violate the present act, although their effect is to deny to an employee the full 50 percent premium for overtime work.... This bill would outlaw these devices.” The Belo plan was defective in the committee’s view because the “fact that the employee is paid time and one-half this [contractually assigned] rate...when he works in excess of the number of hours covered by the guaranty does not...justify failure

to pay full time and one-half for each hour after 40, based on the pay to which the employee is entitled when he works only 40 hours.\textsuperscript{25}

The other device, which the Supreme Court had upheld in \textit{Overnight Motor Transportation Co. v. Missel}, had, according to the House Labor Committee report, “been variously described as ‘Chinese overtime,’ the galloping rate,’ or the ‘fluctuating workweek.’”\textsuperscript{26} The name “coolie or Chinese overtime,” the president of the Office Employees International Union (AFL) explained to Congress, derived from the fact that the more hours an employee worked during a week, the lower his hourly pay.\textsuperscript{27} Under this arrangement, workers were paid a fixed straight-time weekly salary regardless of how many hours they worked so that their regular rate, on which the overtime rate was based, decreased as the workweek increased. As the Committee noted: “The curious result of this method of calculation is that this employee, who would earn $1.25 an hour at straight time if he worked only 40 hours, can average only 78 cents an hour for the entire workweek, including overtime pay, if he works twice as long. It is apparent that the objectives of the act’s overtime provisions are defeated by such a scheme.”\textsuperscript{28}

The Wage and Hour Administrator, William McComb, attacked such wage payment practices. He testified before the committee that “under such agreements, an employee may be worked for 50, 60, 70, or more hours a week without any premium pay being paid for the excess hours.” He urged Congress to correct the situation because the Supreme Court had upheld these plans on the grounds that the legislature had failed to prohibit them.\textsuperscript{29} The AFL joined the attack on “Chinese overtime, under which salaried employees are systematically deprived of their rightful overtime compensation.” To “correct this injustice,” the AFL proposed that salaried workers’ regular basis be calculated by dividing their weekly salary by no more than 40 hours and their monthly salary by no more than 173 hours.\textsuperscript{30} The CIO also supported an amendment to remove the “injustice” caused by \textit{Belo}, which had opened the way to “tricky evasion of the overtime provisions.”\textsuperscript{31}


\textsuperscript{26} H. Rep. No. 267 at 19.


\textsuperscript{28} H. Rep. No. 267 at 19.


\textsuperscript{31} Amendments to the Fair Labor Standards Act of 1938: Hearings Before the House
The committee bill would have adopted the AFL’s proposal by providing that “any salaried employee...employed in excess of forty hours in any workweek shall be paid for each such hour in excess of forty, in addition to his salary for forty hours of work, at a rate not less than one and one-half times the hourly rate obtained by dividing his weekly salary by not more than forty....” The proposal, however, was not enacted, and the WHD promulgated an interpretative regulation, sustained by the courts, approving this practice, which three business school professors later characterized as “for all purposes, negat[ing] the intent of the FLSA.”

The original House and Senate administration omnibus FLSA revision bills contained no amendment dealing with Belo plans. But the next version of the Democratic House bill would have authorized Belo plans if they paid a regular rate of $1.50 an hour—that is, twice the proposed minimum wage of 75 cents. The committee would have permitted the Labor Secretary to authorize “bona fide agreements for a guaranteed weekly wage in limited circumstances where the committee believes that collective bargaining and the payment of a genuine and sufficiently high rate of pay (at least $1.50 an hour) will obviate evasion and circumvention of the overtime provisions.” Consequently, the bill approved by the House Labor Committee was intended to prevent the use of these devices, which the Office Employees International Union—itself “part of the free enterprise team”—testified that Bank of America, the country’s largest, still used. Pro-business legislators derided this move as designed to make Belo-type wage plans “virtually unusable.”

As a result of complicated parliamentary procedures, a bill sponsored by a
coalition of Republicans and Southern Democrats prevailed.\textsuperscript{40} As enacted, the 1949 FLSA amendments wrote the Belo plan directly into the FLSA as an approved form of overtime payment. Under the new section it became and remains lawful for an employer to employ an employee more than 40 hours a week pursuant to a "bona fide individual contract" or collective bargaining agreement, if the employee’s duties necessitate irregular hours, and the contract specifies a regular rate not less than the statutory minimum wage and compensation of not less than time and a half that rate for all hours beyond 40 and "provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified."\textsuperscript{41} As the U.S. Department of Labor notes in its regulations, such an approved guaranteed wage plan entitles an employer to work employees overtime "without increasing the cost to the employer, which he would otherwise incur under the Act."\textsuperscript{42}

At least one state took notice: the Alaska Department of Labor issued a regulation that expressly makes the Belo plan’s guaranteed weekly pay for variable hours, as approved by the FLSA, one of the "not acceptable methods of complying" with that state’s overtime law.\textsuperscript{43} In upholding the validity of the regulation, the Alaska Supreme Court agreed with the state’s argument that the result of the Belo plan—that a worker’s average hourly wage decreases as his overtime hours rise—"contravenes the policies of requiring increased compensation and promoting the spreading of employment."\textsuperscript{44}

\textsuperscript{40}BNA, \textit{The New Wage and Hour Law} 5-10 (1949).
\textsuperscript{41}Fair Labor Standards Amendments of 1949, Pub. L. No. 393, § 7(e), 63 Stat. 910, 914 (codified at 29 U.S.C. § 7(f)).
\textsuperscript{42}29 C.F.R. § 778.404 (1999).
Unsuccessful Congressional Initiatives to Raise the Overtime Premium or Lower the Overtime Threshold: The 1950s to 1970s

Whether the premium is 200 or 500 percent does not make more people with the necessary abilities available for employment.¹

In our plant... an employee gets three hours pay just for coming to work on short notice. Most overtime situations make an employee eligible for a meal paid for at the company's expense. ... I can assure you that this penalty by itself is enough to make even the most generous plant manager shudder when he considers the need for overtime. This is adequate incentive to discourage businesses from working unnecessary overtime. In other words, gentlemen, I can assure you that we work overtime only when we believe the work must be done, and overtime is the only way to achieve it. ... I believe we are reasonable men, and we conduct our businesses accordingly.²

I

Comforted perhaps by the congressional relaxation of overtime standards enacted in 1949, by the early 1950s, the business press began taking a positive view of “Premium Pay Fattening Take-Home Wage,”³ which had “helped to prop up consumer buying for a long time.” Indeed, as firms cut workweeks “back to the peacetime standard of 40 hours” after the Korean war, the accompanying decline in income not only presented workers with “a new problem: how to live without overtime pay in the manner to which they have become accustomed,”⁴ but also became “a business factor to be watched.”⁵ By the mid-1960s, it was reported that in “many companies overtime has been so much prized by workers that it has had to be allocated by some rationing device such as seniority.”⁶

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²[California] Senate Committee on Industrial Relations, Interim Hearings on AB 1295—Mandatory Overtime 1:224 (testimony of Doug Bockstanz, resident mgr., Crown Zellerbach Los Angeles mill).
⁵Neil Chamberlin, The Labor Sector: An Introduction to Labor in the American Econ-
The Autocratically Flexible Workplace

If the FLSA overtime provision was originally designed as a work-sharing mechanism to combat unemployment, as the social wage rose from 5 percent in 1938 to 20, 30, and 40 percent of payroll costs in the postwar decades, the 50 percent premium became less effective in deterring firms from relying on overworking current employees in preference to hiring additional ones. (However, the 50 percent premium was and remains higher than the rates established by law or collective agreements in many European countries, which rely more heavily on mandatory norms than financial disincentives to prohibit overwork.)

The diminished impact of the 50-percent overtime penalty in the wake of the increasing nonwage share of the social wage is illustrated by the steel industry. In 1940, when the hourly wage was 84 cents and social wage benefits only 7 cents, the overtime premium of $1.26 strongly encouraged steel companies to hire new workers at 91 cents per hour. By 1993, when the hourly wage had risen to $15.78, overtime wages of $23.67 served to deter firms from hiring new permanent workers at an hourly cost (including benefits) of $31.73. Despite the $5 an hour overtime penalty that the United Steelworkers negotiated with employers to be paid into a career development fund for every hour in excess of 56 per week, overtime accounted for 15 to 20 percent of all working hours in 1994. Even an employer adamantly opposed to the 1977 California anti-mandatory overtime bill conceded that with weekly fixed costs of $97.12 per employee, a straight-time hourly wage rate of $6.20, and overtime of $9.30, "it is cheaper for us to work a regular employee 30 overtime hours a week than it is to hire an


7Hours of Work: Hearings Before the Select Subcommittee on Labor of the House Committee on Education and Labor, 88th Cong., 1st Sess., Pt. 1, tab. 31 at 95 (1963); see also below ch. 16. In the People’s Republic of China, the overtime premium amounts to 300 percent of regular wages when workers are required to work on statutory holidays such as Spring Festival. Lådōngfá [Labor Law], § 44 (July 5, 1994); Gōngmín láođōng quanji yìbō hū zhìshì shòuce 56-67 (Jing Tào and Zhēng-xiāo Yuǎn, 1999); “Chúnjie jiābān gōngzī yǒu bāozhū”, Yangze Wànbào, Feb. 19, 2000, at C4.

additional employee to do that work." Yet others insisted that at union time-and-a-half and double-time rates, "overtime is largely self-policing." Periodically, unions' concern with the sharp increases in unemployment has given rise to new drives for a shorter workweek. Yet employers in the United States and elsewhere have long suspected that shorter-hours campaigns were "merely a pretense for raising wages by applying overtime rates earlier." As long ago as 1786, employers charged that London bookbinders' willingness to work overtime contradicted their claims of fatigue and revealed that behind the demand for reduced hours lay a desire for greater income.

Perhaps the most startling example of what a union with control of the labor market could achieve in terms of short hours cum overtime was offered by Local 3 of the International Brotherhood of Electrical Workers in New York City. Known journalistically as a "cradle-to-grave" "welfare state" and "an island of socialism in a sea of capitalistic electrical enterprise," the local, through collective bargaining, had by 1936 already achieved a 30-hour week, which at the time of World War II was increased to 35 hours, including one hour of mandatory overtime. This regime was still in effect in January 1962, when Local 3 struck for a 20-hour week as part of a spread-the-work campaign designed not to absorb then unemployed electricians—in fact there was a shortage of electricians in New York City—but to ward off the future labor-saving consequences of the intro-

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10[California] Senate Committee on Industrial Relations, *Interim Hearing on AB 1295—Mandatory Overtime* at 1:260 (testimony of James Watson, vice pres., Hunt-Wesson Foods). According to Watson, in the food processing industry fringe benefit costs such as life insurance and vacation were paid on the basis of number of hours worked in the sense that they were a percentage of gross earnings including overtime. *Id.* at 260-61.

11Gary Cross, *A Quest for Time: The Reduction of Work in Britain and France, 1840-1940*, at 187 (1989) (referring to France in the early twentieth century). In the 1930s, too, it was "sometimes alleged that the real objective of the short work week is not so much to reduce actual working hours as to place labor in a position to extract extra pay for overtime, computed on a shorter standard week." Brookings Institution, *The Recovery Problem in the United States* 521 (1936).


duction of automatic machinery.\textsuperscript{16} Although the union leadership denied that it was fighting for overtime pay, some electricians admitted that if the standard daily work schedule fell to four hours, they would still work seven hours. Ironically, the electricians and union officials themselves feared that, since it was "'only human nature'" to take a second job just to keep occupied,\textsuperscript{17} the intensified job competition caused by such moonlighting might require government intervention "'protecting people from these moonlighters'" and to "'restrict men from looking for second and third jobs.'"\textsuperscript{18} It did not gain the 20-hour week, but beginning in July 1962, Local 3 entered into a two-year collective bargaining agreement with electrical contractors in New York City that called for a five-hour day plus one hour of mandatory overtime—"'the shortest work week ever negotiated by any American union.'"\textsuperscript{19} Despite efforts to restrict overtime, electricians generally worked a seventh hour at overtime rates as well. Although this additional overtime work appears to have been largely the result of the heavy concentration of scheduled vacations during the peak summer building months and by the winter of 1962-63 hundreds of (out-of-town) electricians were laid off,\textsuperscript{20} the \textit{Wall Street Journal} called the arrangement an "overtime bonanza."\textsuperscript{21}

President Kennedy publicly "regretted" the electricians' shorter workweek because it was not rooted in productivity increases. More importantly, he insisted that the "many obligations" the United States faced domestically and abroad made the 40-hour week the "national goal."\textsuperscript{22} In turn, the business press reported, the union movement itself was generally "embarrassed" by Local 3's great leap on the grounds that it might actually slow down labor's progress in reducing the workweek.\textsuperscript{23}

\textsuperscript{16}"Father of the Twenty-Five Hour Week," \textit{Fortune} 65(3): 189-90, 194 (Mar. 1962).


Skeptics in the 1950s and 1960s could also hardly be reassured by the best-known example of short hours in manufacturing—the 36-hour week of unionized rubber workers in Akron, 10 to 20 percent of whom held a second full-time job and another 30 to 40 percent a part-time job.24 Because moonlighting by short-week workers undermined not only other workers’ labor market position,25 but also the legitimacy of the campaign for reduced working time, the AFL-CIO quickly asserted that the issue had been “grossly exaggerated. The basic reason for dual job-holding stems from a desire for added income and—this is most important—it is hardly at all related to a reduction in working hours without a cut in weekly pay.”26 The president of the United Steelworkers, David McDonald, sought to shift the blame onto employers by arguing that the whole problem of moonlighting could be “swiftly corrected” if firms “exercise their social responsibilities” by simply asking job applicants whether they already had a job and not hiring them if they did.27 And the admission by Harry Bridges, president of the International Longshoremen’s and Warehousemen’s Union and arguably the country’s most prominent left-wing union official, to the Wall Street Journal that “large numbers of our members, especially younger men who’ve accustomed themselves to a six or even seven-day week and the fat paychecks it brings ‘would certainly disagree with’” Bridges’ preference to raise overtime rates to induce employers to hire more workers, cast doubt on grassroots support for the AFL-CIO’s campaign.28

24Woodrow Ginsburg and Ralph Bergmann, “The Worker’s Viewpoint,” in AFL-CIO, The Shorter Work Week 36-42 at 38 (1957); Gabriel Kolko, “High Pay and a ‘Six-Hour Day’ in Akron,” New Republic 134(7):10-11 (Feb. 13, 1956); “Akron Rubber Union Gives Up Short Day,” Bus. Wk., Apr. 21, 1956, at 45; Harvey Swados, “Less Work—Less Leisure,” Nation 186(8):153-58 at 156 (Feb. 22, 1958); Sebastian de Grazia, Of Time, Work, and Leisure 64-65 (1964 [1962]). Benjamin Hunnicutt, Kellogg’s Six-Hour Day 137 (1996), characterizes moonlighting as merely “the media ‘take’ on the shorter-hours story during the fifties, as reporters copied each other’s explanation that workers wanted to work six hours so that they could work another job as well. The wildest reports...asserted that 33 percent of the workers on the short shift had second jobs in Akron....” Nevertheless, Hunnicutt fails to offer empirical evidence refuting the reports, several of which were written by the United Rubber Workers itself or leftists.


28“Firms Say Double Time Pay for Extra Hours Wouldn’t Boost Hiring,” Wall St. J., Jan. 23, 1964, at 1:6, at 16:5. A similar split between union leaders and members arose two years later when many workers agreed to employers’ requests to give up some of their vacation for double-time wages. Unions opposed such arrangements because they feared
The basis for some automobile workers' resistance to the UAW's efforts to reduce overtime was not difficult to grasp: loss of premium wages was "actually worse than a layoff." Whereas the union contract secured workers 95 percent of their take-home pay for up to a year—during which they were "free to loaf or pick up temporary work"—eliminating overtime could bring about wage reductions of as much as 50 percent for those working 70 hours a week and being paid double time on Sundays and triple time on contractual holidays.29

In spite of the contentiousness of the issue within the union movement, at the annual convention of the AFL in 1953, its Shorter Work Week Committee recommended lowering the overtime threshold to 35 hours under the FLSA.30 A number of liberal and pro-union Democratic legislators promptly began introducing a series of congressional bills to revise the overtime provision accordingly. In 1954, Senator James Murray and Representative Lee Metcalf, both of Montana, introduced identical bills lowering the time-and-a-half premium-pay threshold to 37.5 and then 35 hours over four years.31 At the AFL's annual convention later in 1954, the Executive Council reported that the Murray-Metcalf bills included changes suggested by the AFL and in accordance with action taken at the 1953 convention, and that they would be reintroduced in 1955.32 At the convention in 1954, one year before the AFL merged with the CIO, the Shorter Work Week Committee, ostensibly alarmed by a rise in unemployment and involuntary part-time employment brought on by rising productivity, again recommended the 35-hour overtime threshold, which it equated with a legislative "mandate" of a shorter workweek, despite its view that the record of the (Republican-controlled) Eighty-Third Congress gave little if any reason to expect passage of such an amendment; consequently, it recommended placing "primary emphasis" on "militant and intelligent collective bargaining...."33 The Executive Council and the convention went on record in support of amending the FLSA to reduce, within

that employers would resist demands for longer vacations in the future on the grounds that workers did not really want all the vacation they already had; in addition, since long vacations, like overtime premiums, were intended to spread work, trading them in for overtime was self-defeating. Frederick Klein, "Firms Offer Employees [sic] Double Wages If They Give Up Some Vacation," Wall St. J., May 24, 1966, at 1:6, at 14:2.


two years, from 40 to 35 hours the trigger for the time-and-a-half premium.34

In 1955, with the Democrats once again in control of the Eighty-Fourth Congress, Senator Murray, as the AFL had announced, reintroduced his bill;35 another bill was filed that would have required daily time-and-a-half payments after eight hours of work.36 At a FLSA hearing that year focused on increasing the minimum wage and expanding coverage, George Meany, the president of the AFL, testified in passing that although little progress in reducing the workweek had been achieved since 1929: "In the past year or two...American workers have once again given increased attention to the possibility of greater leisure through reduced hours of work. A number of our affiliated unions are giving this objective priority in collective bargaining. In some industries, notably women's clothing and printing, the 35- or 37½-hour week is already more common than a 40-hour week.” Referring to the AFL’s recommendation at its 1954 convention, Meany rather perfunctorily urged Congress to make a start “toward reducing the 40-hour standard” in the FLSA.37

At the outset of the Eighty-Fifth Congress in 1957, Senator Pat McNamara of Michigan assumed the leadership on the overtime question, introducing the by now standard AFL bill lowering the threshold to 35 hours in two stages and over four years.38 The same year saw numerous identical bills introduced in the House of Representatives, where Elmer Holland and John Dent of Pennsylvania and James Roosevelt of California would continue to submit such bills into the 1960s.39 Roosevelt and Dent refiled them in 1959, while Holland’s bill would have instituted the 35-hour threshold within one year.40 By 1959, when John F. Kennedy, the chairman of the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, was chairing yet another round of FLSA hearings, he observed that of the many bills pending before the committee “several demand special consideration, for they push back what might be called the frontiers in the wage and hour field.” Here he singled out McNamara’s aforementioned bill.41

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41To Amend the Fair Labor Standards Act: Hearings Before the Subcommittee on
Even as a presidential candidate, however, Kennedy emphatically rejected a reduction in the workweek. In a campaign speech at the annual convention of the United Steelworkers of America on September 19, 1960, he made it clear that such an initiative was inconsistent with his cold war priorities. He raised only to dismiss the suggestion of union president David McDonald "that the only way to meet the problem of overabundance is to have a 32-hour week." Kennedy favored a "different solution. I would prefer the solution of this economy going ahead at such full blast that in 40 hours a week we barely produce what we can consume, that at the time when we have a productive race with the Soviet Union, I would like to see economic and fiscal policies by this Government will be directed toward stimulating the economy so that the steel industry works full time." 

Nevertheless, at the outset of the Kennedy administration, indeed, even before his inauguration in 1961, numerous bills lowering the overtime threshold were introduced, the boldest, Representative Holland's, reducing the overtime trigger to 32 hours. In August 1962, the AFL-CIO Executive Council announced that achievement of the 35-hour week and double-time for additional hours was the organization's next major goal. Big Business was not amused. The chairman of the board of Dow Chemical Company, Carl Gerstacker, countered that unions were marching in the wrong direction: "We should be talking about a 50-hour week, rather than a twenty-hour or a 30-hour week, which in the present state of affairs is so much tommyrot and a national danger." 

II

Although none of the shorter-hours campaigns bore fruit, the 1963-65 push during the Kennedy-Johnson administrations came closest to marshalling executive and congressional support. Without any backing from President Kennedy, who saw a reduction in work-time as a distant goal which had to be subordinated to the need to increase production in the struggle against communism, several

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44*"Shortest Workweek in History?" Newsweek, Aug. 27, 1962, at 65.

bills were again introduced in the House in early 1963 to lower to 32 or 35 hours the trigger for the overtime premium. Another bill would have lifted the premium to 100 percent in industries "of major economic importance," including mining, communications, public utilities, wholesale trade, construction, and manufacturing. The House Select Subcommittee on Labor held more than two weeks of hearings on the various bills. Unions welcomed the initiative, but were skeptical of the efficacy of the proposed overtime penalty: after all, the UAW Skilled Trades Conference had passed a resolution in December 1962 calling for double-time for the first two hours, triple-time thereafter, double-time for Saturday work, triple-time for Sunday work, and triple-time plus holiday pay on holidays. The business press seriously monitored the initiative from the outset. While Business Week correctly predicted that the debate over a short workweek would be the merest "chin music," the Wall Street Journal reported on it extensively and editorialized repeatedly against it. In addition to bemoaning the further state infringement of "managerial prerogatives," the Journal editors, ever solicitous of workers' rights, intoned: "By what theory of freedom does the Government presume to tell a man he can't work as much as he wants and make as much as an employer is willing to pay?"

The drive to update the overtime provision received strong support from a Bureau of Labor Statistics (BLS) study conducted in May and published in August 1963. The timing was hardly coincidental: BLS commissioner Ewan Clague had testified before Congress in June on the "seeming paradox" of the coexistence of large volumes of overtime and unemployment. The unprecedented study revealed that only 4.5 million or 29.4 percent of 15.2 million wage and salary workers working 41 hours or more at one job reported receiving premium pay for overtime. Interestingly, across the board, the longer the hours worked, the lower the proportion of workers reporting premium pay—even when "exempt" professional, technical, managerial, and sales workers were excluded. In construction fully 61 percent of "nonexempt" workers failed to receive premium pay.

46H.R. 355 (Holland, 32 hours), H.R. 3102 (Powell, 35 hours), H.R. 3320 (Libonati, 35 hours), H.R. 9075 (Roosevelt, 35 hours), H.R. 9525 (Roosevelt, 35 hours), 88th Cong., 1st Sess. (1963).
pay as did 26.4 percent of their manufacturing counterparts. Viewed occupa-
tionally, 48.8 percent of all blue-collar workers, including 60.4 percent of
nonfarm laborers, were not paid for their overtime hours.\textsuperscript{54}

The rather lengthy article that \textit{The New York Times} devoted to the survey
quoted Department of Labor officials as “surprised” by the findings, which they
conceded could not be fully explained by exemptions from the FLSA, although
they declined to conclude that the act “was being violated on any widespread
basis” without further information.\textsuperscript{55} Further surveys conducted in May 1964 and
May 1965 confirmed the original findings and added new details without shed-
ing any light on violations. In 1964, of manufacturing operatives 3.0 percent in
motor vehicles, 10.2 percent in other durable goods, and 15.7 percent in non-
durable goods worked overtime, but did not receive premium pay; similarly, 22.5
percent of laborers in manufacturing and 35.9 percent of construction craftsmen
failed to be paid premium rates for their overtime hours.\textsuperscript{56}

In mid-November, a week before President Kennedy’s assassination, George
Meany alerted the AFL-CIO’s annual convention to a possible “national catas-
trophe” brought on by a “‘mad race to produce more and more with less and less
labor.’” \textit{The Wall Street Journal} interpreted the speech, which posited the 35-
hour week and double pay for overtime as the main answer, as reflecting “the
state of near-panic among many union officials over what they see as the almost
endless job-displacing impact of the present pace of automation.”\textsuperscript{57} Significantly,
the convention resolution in favor of these two changes in the FLSA overtime
provision was focused exclusively on unemployment, virtually dismissing any
other basis for shorter hours: “We do not claim that the present standard work-
week is hazardous to individual health and safety. In most industries, this is not
the case. But mass unemployment is hazardous to the health and safety of the
economy....”\textsuperscript{58} At the House Select Subcommittee on Labor hearings in Decem-
ber 1963, Andrew Biemiller, the director of the AFL-CIO’s department of legis-
lation, took this disclaimer even further, demonstratively renouncing an appeal
to any of the other grounds on which the labor movement had been basing its
demand for shorter hours since the nineteenth century. Instead, remarkably, the
union movement’s chief lobbyist rested the entire argument on the potentially

\textsuperscript{54}Blackwood and Kalish, “Long Hours and Premium Pay,” tab. 5 and 3 at x, viii.
\textsuperscript{57}AFL-CIO President Describes Automation As ‘Curse to Society,’” \textit{Wall St. J.}, Nov.
\textsuperscript{58}\textit{Proceedings of the Fifth Constitutional Convention of the AFL-CIO: Daily Pro-
ceedings} 1:442 (1963).
refutable empirical claim that a 35-hour week and double-overtime wages would absorb some significant proportion of the "grim" unemployment that had been haunting the United States for six years:

We in the AFL-CIO do not claim it is an unreasonable standard on most jobs. We do not assert that a 40-hour week is exhausting; or that it leaves too little time for cultural pursuits or self-improvement; or that it inhibits the proper development of family life.

Our task would be easier if we could make and support such claims. Unfortunately we must appeal to reason, to intelligence, rather than to emotion.

In urging a shorter workweek we are not fighting against exploitation or inhumanity. We are fighting for the preservation of the American economic system. Our allies are not the sob sisters, but the economists. I wish it were the other way around; the sob sisters reach a larger audience.59

Biemiller was willing to make the success of the campaign contingent on a single economic variable, even though he was constrained to concede both that "some overtime is obviously unavoidable and would be worked even at double time" and that no one knew what its share of total overtime hours was,60 and the AFL-CIO admitted that the "'moonlighting' issue cannot be dismissed."61

The AFL-CIO had made it clear in early 1962 that its demand for a shorter workweek and less overtime was purely conjunctural and driven solely by the impact of unemployment. It had let it be known then that it had drafted a kind of sliding-scale formula under which the 40-hour week would be retained during periods of full employment, cut back as unemployment rose, and restored when full employment returned.62 In other words, organized labor's position was that the length of the workweek should be adjusted to insure full employment.63

By the time the House Select Subcommittee on Labor hearings were over in December 1963, a new phase had begun with the intervention of President Johnson. As 1964 opened, Secretary of Labor Willard Wirtz floated the notion to the press that raising the overtime premium might be a partial solution to the problem of unemployment since the volume of overtime equated to almost a million full-time jobs.64 In his State of the Union address to Congress five days later, Johnson

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62Raskin, "If We Had a Twenty-Hour Week" at 15.

63"Even Labor Has Doubts About 25-Hour Week" at 36.

The Autocratically Flexible Workplace

bluntly rejected the 35-hour week as a way of reducing unemployment (then numbering 4 million) because it would increase costs, lower competitiveness, and share rather than create jobs. But he was “equally opposed to the 45- or 50-hour week in those industries where consistently excessive use of overtime causes increased unemployment.” He therefore recommended legislation creating a tripartite industry committee to determine in which industries an increased penalty overtime rate would spur job creation without unduly increasing costs. Modest as the recommendation was, The New York Times called it “by far the most radical” of Johnson’s anti-poverty proposals. A few days later in his annual Economic Report, Johnson repeated his opposition to “forcing the standard work week down to 35 hours.” Then on January 31, identical administration bills (S. 2486 and H.R. 9802) were introduced in both Houses of Congress mandating not less than double overtime for hours beyond the number (but not fewer than 40) specified by the tripartite committees in industries affected by “substantial and persistent overtime” and in which the higher penalty rate “would increase employment opportunities...without excessive costs.” The enhanced penalty would not apply if the excessive overtime hours was “required only by reason of a period of extraordinary emergency or “unusually compelling need,” as those terms were defined by the Secretary of Labor.

Despite massive amounts of overtime at automobile plants in 1963 and unions’ loudly declared intention to make excessive overtime a major point in collective bargaining negotiations in 1964, the business-oriented press reported that “[u]ntil President Johnson put overtime in the headlines, many people were not aware that it was developing into an issue.” And despite Johnson’s rejection of labor’s demands for a lower weekly threshold for overtime—as early as March 1964 the Wall Street Journal was reporting that the AFL-CIO’s opposition to the tripartite committees had effectively killed the bill—employers let it be known that they intensely resented Johnson’s indirect support for demands by the UAW and other unions for double overtime in upcoming negotiations.

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ing to the automobile manufacturers was a UAW bargaining proposal giving workers the option not to work overtime. As one GM production worker explained to *U.S. News & World Report*: “If they left it up to us...they’d never get enough guys to get the line moving. As it is now, they can barely get enough on Saturday nights.”

Other employers, including David Rockefeller, opposed the whole proposal. The president of the NAM, who told a Congressman that “[i]f your daddy wanted to work 72 hours I should not deny him,” objected to any statutory overtime premium, though he was constrained to admit that “[o]ne and half times is what we have learned to live with.” Most firms understood the public relations game well enough to avoid knee-jerk ideological reactions. For example, Caterpillar Tractor Company made a virtue of an alleged necessity by asserting that its reasons for scheduling overtime instead of hiring additional workers when the volume of orders increased, but it did not know how long the increase would last, were “more humanitarian” than economic: “In our opinion, it is socially ill advised and morally wrong to induce men and women and their families to move from one place or job to another if the transfer does not offer a reasonable chance of permanence and stability.” Other firms, however, succumbed to the temptation to let down their ideological masks. Ex-Cell-O Corporation, a leading manufacturer of precision machine tools and machines, lambasted the legislative proposal on the grounds that it would “remove key management decisions from corporate management, and centralize this responsibility in the Department of Labor.” The firm instinctively knew which way the ill wind was blowing:

The Government now tells us what we can spend our money on, through the allowance or disallowance of corporate expenses for tax purposes. The Government tells us our minimum rates of pay. ... The Government regulates our relationships with our employees. The Government cuts itself in for half of our profits; and, now it is extending its power

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to regulate the amount of overtime and over-time pay in our plants. Gentlemen, it seems obvious to us that we are rapidly approaching the time when American industry will be nationalized.\textsuperscript{76}

This type of rhetoric comported well with the intransigence that Ex-Cell-O was about to exhibit in its six-year struggle with the UAW, which prompted a National Labor Relations Board trial examiner to issue an unprecedented order for compensatory relief to remedy the employer's refusal to bargain collectively with the union.\textsuperscript{77}

Employers' self-interest also impelled them to give voice to the undeniably self-contradictory feature of a statutory premium overtime regime that organized labor rarely conceded. As Virgil Day, General Electric's vice president in charge of labor relations, put it: "Increasing the incentive to want more overtime on the part of those presently employed works at cross purposes with the objective of providing employment for more people."\textsuperscript{78} The closest that Labor Secretary Wirtz came to sounding a note of candor in this regard was his cautiously formulated concession that the overtime premium "has always been realistically and analytically a proper figure only in terms of employer cost, not in terms of employee compensation."\textsuperscript{79}

During 1964 the House Labor Subcommittee held three weeks of hearings, which triggered intense national debate, on which the press reported extensively. The UAW, which stood at the forefront of the campaign to modernize the "antiquated" overtime penalty deterrent by increasing it to 100 percent,\textsuperscript{80} also insisted on working class solidarity as the driving force behind it.\textsuperscript{81} (Ironically, 30 years


\textsuperscript{77}The Board eventually ruled that it lacked the statutory authority to impose such a remedy. Ex-Cell-O Corp., 185 NLRB 107 (1970).


\textsuperscript{80}Overtime Penalty Pay Act of 1964: Hearings Held Jointly Before the General Subcommittee on Labor and Select Subcommittee on Labor of the House Committee on Education and Labor, 88th Cong., 2d Sess., Pt. 2 at 780 (1964) (testimony of Leonard Woodcock, vice pres., UAW). For illustrative calculations of the cost of overtime and hiring additional workers, see id. Pt. 1, tab. 6 at 24 (data furnished by Labor Secretary Wirtz).

\textsuperscript{81}For an argument that in the 1950s and 1960s the UAW president Walter Reuther successfully deflected rank and file calls for shorter hours (a 30-hour week with 40 hours' pay), see Ronald Edsforth, "Why Automation Didn’t Shorten the Work Week: The Politics of Work Time in the Automobile Industry," in Autowork 155-79, at 160-75.
later, modernizing the "[h]opelessly outdated" depression-era FLSA for "today's fast-paced, information-based society" became the watchword of employers seeking not to increase the overtime penalty, but to eliminate it altogether either through hours-averaging over several weeks or time-off.)

Leonard Woodcock, UAW vice president and later president, testified about his own personal experience of working at the nadir of the Great Depression in 1933 when, as a result of the implementation of the National Industrial Recovery Act code in the automobile industry, he saw his weekly hours drop from 84 to 40, while his hourly wage rose from 45 to 60 cents: "Now it is true my total wage was sharply reduced, but I certainly had no feeling of compunction about that because of the fact that we put on in that plant some 200 additional workers." He also reported to the House Labor Subcommittee how surprised and impressed he had been by a recent survey revealing "the substantial feeling of shame that our members had at being forced to work overtime when their neighbors were out of work."  

Woodcock's insistence that "the forcing of overtime work is immoral" provoked one Congressman to engage him in Socratic dialog concerning the complex and ticklish relationship between working-class morality and individual workers' self-interest in still larger overtime premiums:

MR. FRELINGHUYSEN. Would you mind a brief interruption...with respect to the immorality of overtime? If it is immoral to work overtime, if there are those unemployed who would be qualified to work, how does increasing the penalty make it moral or is it still immoral even though the penalty is doubled? I am not sure I follow your reasoning. If it is immoral I should think we might forbid it rather than increasing the penalty.

MR. WOODCOCK. The purpose of the penalty is to be a deterrent toward the working of overtime.

MR. FRELINGHUYSEN. But it still is immoral, is that right?

MR. WOODCOCK. It is immoral to require some Americans to work against their will beyond 40 hours when their neighbors and friends are totally without work and in want.

MR. FRELINGHUYSEN. Is it immoral if they want to work overtime?

MR. WOODCOCK. The record shows they do not want to work overtime when others are out of work.

MR. FRELINGHUYSEN. If it is immoral might we not consider forbidding it?

MR. WOODCOCK. I don't see how you could put industry in such a straitjacket. The testimony has been—and we concede some overtime on occasion is necessary and flat prohibition would put a straitjacket on—would be entirely impractical. This is why we need an economic deterrent that will insure that the overtime that is worked is actually

(Robert Asher and Ronald Edsforth eds. 1995).


83Overtime Penalty Pay Act of 1964: Hearings Held Jointly Before the General Subcommittee on Labor and Select Subcommittee on Labor of the House Committee on Education and Labor, Pt. 2 at 834.
necessary and unavoidable, but wipe out the great excess of overtime which is unnec-

A suspicion of evasiveness seemed to cling to Woodcock's responses. The failure of nerve to express support for the venerable model of a strict eight-hour day or 40-hour week (with exceptions only for emergencies) and the surprising sympathy with employers' operational imperatives and support for a free-market financial incentive rather than use of the state's police powers left the impression that the UAW could not afford to deprive even some of the country's highest paid manufacturing workers of access to more work at yet higher wages. Much later in his testimony Woodcock was able to dispel that impression (objectively if not intentionally) by reminding Senator Taft that the UAW had long been on record as "willing to have the extra penalty deterrent, the difference between the time and a half and double time...used for other purposes." Woodcock refused, however, to include relief of employers' unemployment compensation payments among those purposes. The UAW's credibility was, however, enhanced by a resolution that it passed at its nineteenth constitutional convention in 1964 condemning moonlighting: "As it is immoral for an employer to deny job oppor-

Automobile management also sought to hoist supporters of the mono-pur-

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84 Overtime Penalty Pay Act of 1964: Hearings Held Jointly Before the General Sub-

85 Overtime Penalty Pay Act of 1964: Hearings Held Jointly Before the General Sub-


88 For example, Rep. Dent stated that "[o]vertime pay was never intended to be a bonus
Unsuccessful Congressional Initiatives to Raise the Overtime Premium

Given the alleged objectives and premises of the bill, it was really illogical to frame a proposal making overtime less attractive to business, but at the same time making it more attractive to labor. A logical proposal would make overtime less attractive to both business and labor. This could be done by requiring that penalty pay for overtime should not be given to the worker, but should be used for the benefit of the unemployed.

While we do not advocate such a proposal, it would coincide precisely with the stated objectives of the administration.... However, it would not provide the windfall that H.R. 9802 does for the workers continuing to be employed overtime at the higher penalty rate. I suspect there would be little enthusiasm for any proposal from which the windfall was missing.89

Representative O’Hara, one of the chief sponsors of the overtime initiative in the 1960s, responded that Yntema had a “terrific idea... that had not occurred to me.... But, by George, there is not any good reason why the extra half should go to the worker. As a matter of fact, there might be some good reasons why it should not. [W]hen the time arrives, I am going to revive the Yntema amendment to H.R. 9082 to pay that extra half...[to] some sort of fund to provide for training or retraining of workers...."90

If the only purpose of the overtime penalty were in fact to encourage employers to absorb the unemployed rather than to overwork the already employed, Yntema’s ironic logic would be unexceptionable. Employers had demonstrated its validity—if not its practical effectiveness—during World War II, when they deployed it to contest the continued compulsory payment of overtime premiums when there were no more unemployed for firms to absorb. Oddly, its force failed to prompt supporters of an increase in the penalty rate in the 1960s to admit, even rhetorically, that the premium had also always served to guarantee workers’
freedom from (alienated) labor, to preserve their health, and to compensate them for the shortening of their working lives. Such an argument would have helped deflate employers’ claim that the amendment was merely a disingenuous covert attempt to raise wages, but perhaps its evocation of Marxist class struggle was too high a rhetorical price to pay. Unions’ failure to develop this perspective was so much the more puzzling since such a taint did not deter Malcolm Denise, vice president in charge of labor relations at Ford Motor Company, from supplying the missing historical testimony: “I do not think that it can be legitimately said that the sole purpose of the Fair Labor Standards Act of 1938 was to spread employment. The drive for shorter working hours in this country has a long history. Its history was concerned with the health and welfare of people and their working and living lives.” Since the labor movement in the nineteenth and early twentieth century had pressed for an absolute limit of eight hours of work per day and not for overtime premiums, the AFL-CIO’s newfound preference for flexible financial incentives may have caused it to suppress the reality of its traditions.

After the bills failed to be enacted, Representative O’Hara and Senator McNamara, who had introduced them, filed stripped-down versions in 1965, which simply raised the overtime premium across the board to 100 percent. The Johnson administration then supported a new initiative, which took into account the uniform opposition that “virtually all the witnesses” had directed at the previous bills. Armed with new data from 1964 showing that 3.5 million employees worked five or more hours of overtime weekly for a total of 19.6 million hours, and that much of the overtime was being performed on a “fairly standard recurring basis...in occupations in which there is presently a surplus of manpower” (that is, a higher proportion of low-paid workers in almost all industries worked overtime than of higher-paid workers), Secretary of Labor Wirtz, “acting...from a kind of hardheaded idealism,” proposed a two-tiered overtime premium. S. 1986 and H.R. 8259 would have phased in over three years a higher 100-percent premium applying to hours above 48, 47, 46, and finally 45 hours, below which the old 50-percent penalty would have applied. The impact of double-time would have been further softened by a provision permitting employers to pay the lower rate when the overtime work (beyond 45 hours) was “required only by reason of a period of extraordinary emergency or unusually compelling need” as defined

by the Secretary of Labor.\footnote{S. 1986, § 404(a), 89th Cong., 1st Sess. (May 18, 1965).}

Wirtz was even receptive to liberal Republican Senator Jacob Javits’s suggestion—which would have tested unions’ commitment to the underlying principle of work-sharing—that some administrative machinery be created exempting employers from the higher penalty rate if they could prove that its imposition would increase costs without leading to increased hiring.\footnote{Amendments to the Fair Labor Standards Act: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Pt. 1, 89th Cong., 1st Sess. 353-57, 386-407 (1965) (statements and testimony of Hubert Kertz, vice pres. of operations, Am. Tel. & Tel. Co., and Eugene Stewart, special counsel, Am. Paper Institute); Amendments to the Fair Labor Standards Act: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Pt. 2, 89th Cong., 1st Sess. 1089-1101, 1202-11 (1965) (written statements of Virgil Day, vice-pres., G.E., and of the Rubber Manufacturers Assoc.).} Numerous firms and industries, such as General Electric and the telephone, paper and rubber industries, inundated the congressional labor committees with evidence purporting to prove precisely such futility.\footnote{“The Big Debate About Double Pay for Overtime,” U.S. News & World Report, July 26, 1965, at 73.}

Both the House and Senate labor committees heard extensive testimony in 1965, much of which replicated what they had heard in 1963 and 1964. The threat that the amendment might be adopted was serious enough to prompt \textit{U.S. News & World Report} to declare (hyperbolically as it turned out): “The day may not be too far away when employers will be required by law to pay double-time rates for overtime work. But before that day comes...the issue is sure to bring on one of the biggest fights in the history of labor legislation.”\footnote{“The Big Debate About Double Pay for Overtime,” U.S. News & World Report, July 26, 1965, at 73.} Many employers sought to portray the move for a higher overtime penalty both as a transparent grab for higher wages by well-paid union members and a singularly counter-productive mechanism for reducing unemployment. For example, the National Electrical Contractors Association (NECA), long a staunch advocate of collective bargaining, told the House Labor Committee that in the electrical contracting industry and generally in construction it was “a well-known fact that...overtime jobs attract skilled workers. Once these workers are employed on the job, they wish to work as much overtime as is possible and at the same time restrict the employer from employing additional workmen.” Indeed, the association’s public relations director testified that an electrician’s double-time hourly wage of $9.42 “would seriously be personally attractive enough to me to make me want to enter the industry tomorrow, on the union side.” From the NECA’s perspective, the enhanced overtime penalty was doomed to failure because it prompted responses
from labor and capital diametrically opposed to those presumed by the underlying policy: instead of showing solidarity by sharing work with their unemployed brethren, employed craftsmen would monopolize it, while firms, instead of hiring additional workers, would automate any labor task that could lend itself to automation. Other industries, such as petroleum refining (with above-average benefit costs), offered data to undermine the claim that the 50-percent penalty rate did not suffice to give them an incentive to prefer hiring additional workers to overtime.

The industry widely viewed as the chief abuser of overtime went to great pains in its testimony to undermine the economic underpinnings of the demand for a higher penalty by emphasizing "why overtime is not readily convertible into more jobs." First, however, the automobile manufacturing firms stressed that the three-year agreement they had just entered into with the UAW had been preceded by extensive negotiations over the union's demand for double- and triple-time, which it finally abandoned in favor of other demands, such as inducements to early retirement and more holidays, vacation, and relief time, designed to spread employment. The auto firms were not amused that the UAW was now seeking to achieve through lobbying what it had lacked the power to gain through negotiations. The main burden of the Automobile Manufacturers Association's testimony was the assertion that the vast majority of overtime work resulted from emergencies, retooling and model changeovers, cyclical and seasonal production patterns, and changes in customer preferences, which were "[q]uite obviously...inherent rigidities...that cannot be legislated out of existence." Furthermore, in many instances the overtime was being performed by skilled craftsmen, of whom the firms complained of suffering a serious shortage. Moreover, that a considerable proportion of overtime work was already being compensated at 100 percent under the UAW contract demonstrated that "there is no practical alternative regardless of how high the penalty." Indeed, John Bugas, a Ford vice president and former head of the FBI's office in Detroit who had helped make

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100 Minimum Wage-Hour Amendments, 1965, at 1755 (statement of John Bugas, vice pres., Ford Motor Co.).
Ford's primitive red-baiting practices more sophisticated after World War II,\textsubscript{103} testified that, despite the focus of congressional attention on the allegedly increasing impotence of the overtime penalty to induce employers to hire additional workers in the face of the expanding quasi-fixed benefits, in fifteen years of attending monthly scheduling meetings, he could not recall a single instance in which Ford had opted for overtime because it was cheaper: "We make the decision on overtime on completely different bases."\textsuperscript{104} And finally, Bugas claimed on behalf of the auto manufacturing employers that they "would run into tremendous resistance" if they tried to reduce overtime in favor of additional hiring because the "vast majority—almost an infinitesimal minority do not like overtime, but the vast majority likes overtime. ... In tribute to the American worker he is a pretty industrious character if he gets paid for it."\textsuperscript{105}

To be sure, the UAW offered rebuttals of all these arguments in its own written submissions. Its counter-propaganda was especially effective in establishing that most overtime was systematic and long-term and had nothing to do with emergencies, cyclicity, or shortages of skilled craftsmen, and least plausible in distancing itself from the overtime system and denying complicity by its own members in its survival.\textsuperscript{106} But because the congressional committees, as is almost always the case in such hearings,\textsuperscript{107} failed to arrange for direct confrontation between these diametrically opposed points of view, and, many of the underlying data were either uniquely within the firms' possession or interpretable only by reference to arcane details of collective bargaining agreements, the dispute remained practically unresolvable.

Following the lengthy hearings on the overtime issue, Congress decided not to enact the proposals. Insisting that their absence reflected not "a negative view towards their advisability," but a "prudent, cautious approach to an important proposal that deserves further serious consideration,"\textsuperscript{108} Congress retained only a slight trace in the landmark FLSA amendments of 1966 of the fervor that had once attached to the issue. It instructed the Secretary of Labor to submit the

\begin{thebibliography}{9}
\bibitem{Minimum Wage-Hour Amendments, 1965, at 1790 (testimony of John Bugas).}
\bibitem{Minimum Wage-Hour Amendments, 1965, at 1800-1801 (testimony of John Bugas).}
\bibitem{Amendments to the Fair Labor Standards Act: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Pt. 1, 89th Cong., 1st Sess. 236-80 (1965) (comments of UAW).}
\bibitem{Congressional hearings were not always aseptic. In the late nineteenth and early twentieth centuries high-ranking representatives of labor and capital frequently cross-examined one another.}
\end{thebibliography}
following year a "complete study of present practices dealing with overtime payments for work in excess of forty hours per week and the extent to which such overtime work impedes the creation of new job opportunities in American industry." Since congressional concern was directed at the flagging deterrence generated by the overtime penalty, the legislature expected the Labor Department's study of excessive hours to enable Congress to judge whether a higher penalty rate would "curtail long workweeks and create additional jobs." The Department's agnosticism served to maintain the status quo. Despite the evidence that the overtime penalty had lost much of its deterrent value, the Secretary of Labor found it "difficult...to develop with any degree of certainty any reliable estimate of the number of jobs which could be created if the original effectiveness were restored. More important, it is difficult to insure that there would not be a temporary reduction in total productive potential during the transition period if a stricter standard were applied." Consequently Secretary Wirtz proposed no legislative changes. And as the Vietnam war drove the unemployment rate down to its lowest rate (3.8, 3.6, and 3.5 percent in 1967, 1968, and 1969) since the Korean war, unemployment and its possible exacerbation by overtime work drifted out of public consciousness and discourse—until the next depression phase of the business cycle.

III

In the midst of the overtime hearings, the Wall Street Journal devoted a long front-page article in 1964 to detailing employers' denials that the proposed double-time would spread employment. While some firms conceded that even double-time would be cheaper than "handing out fringe benefits new workers would have to be given," others asserted that double-time might even motivate them to lay workers off. A construction association went so far as to doubt that even triple-time would preclude the continued use of overtime. The only hint that human volition might be able to prevail over the compulsions of capital valorization came from a manager who stated that he would react to mandatory double-time not by hiring additional workers, but by stretching out schedules and making customers wait longer. Why, then, the world of widget production could not

also be slowed down to accommodate workers’ desire for more time away from alienated labor, was not explained.

Yet the very next year, the *Wall Street Journal* was reporting that “[h]eavy overtime boosts absenteeism and quality control problems in the auto industry.” Suddenly management recognized the human costs associated with overwork: “Monday absenteeism has shot up as one effect of the continuous Saturday work, a Buick official reports,” while Ford had to “enlarge[ ] its quality control force to correct mistakes caused by workers weary from long hours.”

Three months later, with similar evidence accumulating throughout industry, “many factory managers now believe the regular overtime they have long scheduled to keep production ahead of swelling orders is both costly and inefficient.” Having discovered that overtime “is a heavy cost burden...breeds absenteeism and hurts production efficiency as workers tire,” “bosses” suddenly found it possible to implement measures that employers had told the newspaper in 1964 were impossible. They included different scheduling methods, upgrading unskilled workers, hiring new workers, expanding capacity, and buying labor-saving machinery. Moreover, all these efforts “‘to wash out the premium-time problem’...would surely be much intensified if Congress” enacted the double-time amendment.

Indeed, within three months the *Wall Street Journal* reported that “[m]ore and more companies” were hiring additional workers and expanding facilities “to cut time-and-a-half overtime pay premiums. Even at this late date, when the prospect of passage of an overtime amendment appeared remote, “[m]any employers sa[id] pending legislation to require double pay for overtime adds urgency to their control efforts.”

Two years later yet another front-page *Journal* piece chronicled the proliferation of overtime cutbacks motivated by the perception that fatigue...
and absenteeism were wasteful and inefficient.117

As the business cycle drove relentlessly toward its next high point in 1972-73118 and workers in some key automobile plants had been working seven days a week for months, *Newsweek* reported that UAW members began wearing "Overtime: ASK ME Don’t Tell Me" buttons. One worker explained the libertarian message this way: "[A] guy ought to have the right to say ‘no’ once in a while. A guy gets to be 55, and those extra hours are murder.” But management rejected even this mild-mannered plea for recognition of the mortal human heart that beats deep within the commodity labor power: "[A]utomakers maintain that they simply could not carry out a rational production plan if workers had the right to walk off the job at the end of their regular shifts. ... ‘You could have half a dozen guys who say they won’t work and shut a whole plant down,’ GM vice president George B. Morris Jr. contends. ‘It’s giving them a hell of a weapon.’” Faced with such intransigence, UAW president Leonard Woodcock and vice president Douglas Fraser tried to make the demand more "palatable" by offering the availability of a new component of the reserve army: “UAW retirees could serve as a stand-by work force at plants where there is a problem in filling overtime schedules.”119

Renewed union interest in amending the FLSA’s overtime provision was in fact sparked by the next expansion of the conventional reserve army of the unemployed during the recession of 1974-75.120 Although this drive did not find expression in a congressional bill until the late 1970s, the prestigious journal *Industrial Relations* published an article in 1975 arguing that it had become “particularly important in light of the recent strong efforts by labor unions to gain the right for workers to reject unwanted overtime work” for firms with large and uncontrollable fluctuations in demand to hire “employees with a high propensity to work overtime....”121 The bill introduced by Representative Conyers from Detroit on March 22, 1978 (H.R. 11784) sought to restore the work-spreading impact of the FLSA by normalizing the workweek at 37.5 hours by 1980 and 35 hours by 1982 and penalizing overtime at 100 rather than 50 percent. More innovative was the bill’s ban on mandatory overtime: “No employer shall knowingly permit any employee to perform work for which the employee is entitled under this section to receive compensation at the rate of pay applicable for overtime employment

unless the employee gives his or her consent to perform such work.” To discourage employers from unlawfully compelling workers to work overtime, Conyers inserted a liquidated damages provision making employers liable for an amount equal to three times the regular rate at which the workers were employed.122 To anticipate charges that the bill would place a straitjacket on enterprise, the bill—like the 1937 Pennsylvania 44-hour week law123—also authorized the Secretary of Labor to issue regulations to permit such exceptions to the ban on mandatory overtime “as may be necessary to deal with emergency situations (as determined by such Secretary) in which the production in an establishment would be severely jeopardized if no such exceptions existed.”124

Without explaining why it was not feasible or desirable to prevent workers from undermining their own labor standards by working 60 hours a week while millions were unemployed, Conyers himself acknowledged that to achieve the bill’s objective—namely, to dampen employers’ tendency to increase overtime among those already on the payroll rather than hiring additional workers during the recession and early recovery phases of the business cycle—it was necessary to apply sanctions against employers because “[n]o one wishes to curb an individual’s choice of how much and for whom he or she works.”125

Conyers’ pragmatism contrasted sharply with the startling proposal that the Teamsters president, James Hoffa, had made to Congress 14 years earlier. He had insisted that reducing the workweek or work year would not significantly redistribute work “unless there is a penalty imposed on moonlighting in the form of double time payments by the first and second employer after 32 hours or 1,600 hours per year.” Hoffa had not explained why it would not have been more efficacious to penalize moonlighting by penalizing moonlighters directly rather than offering them further incentives in the form of double overtime.126 Here, in any event, the extremes met: back in 1964 a Republican Representative from Nebraska had proposed (perhaps tongue in cheek) that if the overtime premium was really intended to spread employment, it would be most effectively applied by giving the second employer of a prospective moonlighter the choice between paying him the premium for all hours worked or hiring an unemployed worker.

123See above ch. 7.
124H.R. 11784, § 3(a)(10).
at a straight-time rate.\textsuperscript{127}

Three weeks after introducing H.R. 11784, Conyers participated in a conference in Dearborn, Michigan, called by the All Unions Committee to Shorten the Work Week. Dissatisfied with longer vacations and more holidays and personal days as a means of spreading work, 700 union officials from 25 unions, led by UAW members, supported Conyers’ bill. What \emph{The New York Times} called the “less-work ethic” was unacceptable to management, especially since the All Unions Committee proposal envisioned no pay cut. As one industrial relations manager observed: “I don’t mind paying a higher wage if I’m getting productivity for it, but we’re standing strongly against this time not worked.”\textsuperscript{128} This adamance apparently impressed some AFL-CIO officials such as UAW president Douglas Fraser, who told the conference that the history of the American labor movement suggested that picket lines and not Congress would be the source of a shorter workweek.\textsuperscript{129} What Fraser failed to acknowledge was that in a socio-economy as balkanized and labor markets as heterogeneous as those of the United States, reliance on unions’ individual strength in preference to society-wide norms imposed on the employing and employed classes would merely widen the gap between the organized and atomized strata. The consequence would be various types of paid time-off, for example, for UAW workers that low-paid non-union workers could scarcely imagine.

After Congress took no action on Conyers’ bill in the 95th Congress, he reintroduced it essentially unchanged (the times at which the reduced workweeks became effective were moved back one year) on February 1, 1979 as H.R. 1784.\textsuperscript{130} Conyers once again emphasized that the FLSA’s 50-percent overtime penalty had lost its effectiveness in encouraging employers to hire additional workers.\textsuperscript{131}

The Labor Standards Subcommittee of the House Education and Labor Committee did hold three days of hearings in October 1979, but no further congressional action was taken. The testimony at the 1979 congressional hearings was nevertheless enlightening. The UAW representative offered a breakthrough friendly amendment to the bill that would have required employers to pay the entire increase in the overtime penalty as a tax into the Unemployment Insurance fund: “Besides the virtue of reducing the scheduling of overtime by employers


\textsuperscript{131} 125 Cong. Rec. 7609 (1979).
without increasing its desirability to workers, such a procedure would also ex-
plicitly link the problems of overtime and unemployment. It would...make those
employers whose actions increase joblessness bear a disproportionate share of the
cost of maintaining the unemployed." The UAW and employers had pointed
to the rationality of such a suggestion during the hearings in the 1960s, but they
had not highlighted its effectiveness in making the connection transparent.

Employers were especially sensitive to the bill's deprivation of their power
to force employees to work overtime. While the NAM tersely charged that the
provision would "inhibit operations and scheduling," the representative of the
Chamber of Commerce of the United States, its deputy chief economist, offered
arguments that were both mutually inconsistent and unprecedented. First, Robert
Landry asserted that congressional conversion of mandatory into voluntary over-
time would be an "intrusion...into the system of individual agreements between
the nearly 80 percent of the work force that is not organized and their employers."
According to this logic of "individual agreements" between large corporations
and its individual employees, it is puzzling that the Chamber chose not to reject
the label "mandatory" altogether. Instead, Landry went on to charge that Con-
gress would merely create antagonisms among workers by enabling one to hold
an entire factory hostage: "Placing a voluntary overtime clause in the law means
that one worker by refusing overtime may deprive perhaps 100 persons of over-
time and the extra income that they desire if they are involved in an assembly-line
operation where each person is essential to the task." 

The representative of 35 of the country's largest food and hotel companies
seemed almost incensed over ignorant congressional meddling in his members' prerogatives: "Who knows when a busload of hungry people will pull into one of
our restaurants unannounced? We are not going to turn them away. At those
times, our staff must remain on the job, even though they might have worked
more than 8 hours on that particular day. ... Do we have to obtain that person's
permission to conduct our business?" Bruce Cotton, the president of the Food
Service and Lodging Institute, not only found it part of the natural order of things
that consumers' purchasing power imperiously overrode workers' conviction that
the restaurant's posted hours should be taken seriously, but combined inconsistent
arguments by claiming that "[i]f there is a valid reason for refusal, the employer

132 To Revise the Overtime Compensation Requirements of the Fair Labor Standards
Act of 1938: Hearings Before the Subcommittee on Labor Standards of the House
Committee on Education and Labor, 96th Cong., 1st Sess. 43 (1980) (statement of Ken
Morris, member, UAW International Exec. Bd.).

133 To Revise the Overtime Compensation Requirements of the Fair Labor Standards
Act of 1938 at 236 (letter from Kimberly Johnson-Smith, labor relations director, NAM,
Nov. 5, 1979).

134 To Revise the Overtime Compensation Requirements of the Fair Labor Standards
will invariably accept it and look for someone else” and complaining that the FLSA amendment would make it necessary for employers to “obtain the employee’s consent—and we would assume that would be in writing—before scheduling overtime.”135

When Conyers reintroduced the bill in 1985, this time proposing to phase in a 32-hour workweek over eight years, it prompted little resonance.136 Thus more than a grain of truth lay in employers’ later claims that “[e]ven when the Democrats controlled the House and the Senate and the White House, the issue [of forced overtime] was never even on their radar screen.”137 Though it remains unenacted, Conyers’ proposal of a 100-percent overtime penalty was hardly unprecedented. As far back as 1891, the Nebraska legislature had enacted a law that required employers working their employees beyond eight hours per day to “pay as extra compensation, double the amount per hour as paid for the previous hour.”138 This penalty was interpreted as pyramiding so that each overtime hour had to be compensated at double the rate of the previous one. Such progressive penalization of overwork offended the Nebraska Supreme Court, which promptly held the act unconstitutional as paternalistic interference with contracts.139

135 To Revise the Overtime Compensation Requirements of the Fair Labor Standards Act of 1938 at 167 (statement of Bruce Cotton). The president of the Southern California Restaurant Assoc. used similar rhetoric at the 1977 hearings in California when he asked: “if the second shift waitress...calls in sick just before the start of her shift, are we to tell waiting customers that we can’t take care of them because the waitress didn’t want to work a little overtime?” Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime: Appendices at 284 (statement of Stanley Stockton).


138 1891 Neb. Laws ch. 54, § 3 at 361, 362. The contemporaneous draft eight-hours bill of the Social Democratic Federation in Britain also proposed double time. Sidney Webb and Harold Cox, The Eight Hours Day 164 (1891).

Part V

The Right to Refuse

Remember, the long struggle for the 8-hour day was not a struggle for 8 hours of work. It was a struggle for 16 hours away from work.¹

State Laws Prohibiting Mandatory Overtime Work

The states have tried not to differentiate their hours of work and overtime laws from the FLSA and those of other nearby states. With the possible exception of California, no state has wanted to be an innovator in this area, preferring instead to let the federal government or the market take the lead.¹

Frankly, we would prefer that all overtime be voluntary, however, we don’t believe that we can survive with that. That’s basically what it boils down to....²

I

If, as Justice Louis Brandeis argued during the Great Depression, “it is one of the happy incidents of the federal system that a single courageous State may...serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country,”³ state efforts to win the race to the top of labor standards (without risking interstate capital flight) by limiting overtime work have—all too predictably in a federal system—been rare and their fruits meager. Indeed, in 2002 eighteen states still lack a run-of-the-mill overtime pay law.⁴

Apart from Oregon’s 1913 statute covering factory workers,⁵ the best-known ungendered, quasi-maximum hours law from the pre-FLSA period, which remains, with several crucial amendments, on the books, and the three failed or feckless pieces of legislation in Alaska, Montana, and Pennsylvania,⁶ states, to the extent that they have addressed the question at all, have favored the libertarian approach of conferring on individual workers the right to refuse employers’ demands to work overtime without exposing themselves to any discipline or detri-

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⁵See above ch. 8.
⁶See above chs. 5-7.
The Autocratically Flexible Workplace

ment. With the sole exception of a bill enacted in Maine in 2000, which is so narrow and timid as to be virtually meaningless in the real world beyond setting a precedent, none of these initiatives has been enacted. Employers' successful resistance to and arguments pressed against them merit chronicling and analysis. Finally, although these right-to-refuse bills of general applicability have failed at the turn of the millennium one occupational group especially oppressed by mandatory overtime work, nurses, has succeeded in securing passage of hybrid legislation in a growing number of states; to justify a laissez-faire regime permitting nurses to decide for themselves whether they are too tired to work safely at premium overtime rates, these laws self-contradictorily use the nineteenth-century principle of prohibiting certain occupational groups whose fatigue could injure the public from working more than a set number of hours.

The Oregon law limits the working day of workers (but not of managers, supervisors, or foremen) in mills, factories, and manufacturing establishments to ten hours plus three hours of overtime compensated at time and a half. In 1923 the legislature limited working hours in sawmills and logging camps to eight hours daily and 48 hours weekly (with numerous occupational exceptions), but also suspended enforcement until California, Washington, and Idaho enacted similar laws (which they never have). In 1989, the law was amended so as not to apply to unionized employees whose collective bargaining agreement limits the required hours of work and provides for overtime payments. The minimum civil penalty for employing a worker more than 13 hours in a day is $500 per day for the first offense and $1,000 for additional offenses. Although manufacturing competitors in no other states are statutorily limited to 13-hour days, Oregon factory owners have manifestly learned to live with the restriction. The current Oregon Wage and Hour Administrator reports that in her quarter-century with the Bureau of Labor and Industries she has never heard of employer efforts to induce the legislature to repeal the provision or to suspend it until neighboring states enact similar laws. Neither she nor a Wage and Hour claims examiner could recall any complaints against employers for requiring workers to work more than 13 hours, though some are filed against employers that unlawfully fail to pay time and a half for hours 11 to 13.

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7 Or. Rev. Stat. §§ 652.010(2), 652.020(1), (3) and (4), 652.030 (1999); Or. Admin. R. § 839-001-0125(1)(j) (2001). A similarly structured California statute that granted unionized mines a 12-hour variance from an eight-hour law (which was later amended to permit nonunion mines to operate longer hours where a two-thirds majority of the workers votes to do so) was upheld in Viceroy Gold Corp. v. Aubry, 75 F.3d 482 (9th Cir. 1996).


9 Telephone interview with Christine Hammond, Portland, OR and Jo Ann DuVall, Eugene, OR (Dec. 17, 2001). Such nonpayment of overtime premiums occurs despite the fact that the Bureau is empowered to waive and has waived the employer’s obligation to pay time and a half if it will not prejudicially affect the interests of the public or the af-
State Laws Prohibiting Mandatory Overtime Work

Despite the long-running success of Oregon's modest maximum-hours law, states have instead focused on libertarian right-to-say-no initiatives. The highest-profile political struggle erupted in 1977 over a bill filed in the California Assembly that simply provided: "No employee shall be terminated from his or her employment for refusal to work overtime." The bill was amended repeatedly over the following several months. First, workers were protected from any kind of adverse disciplinary actions, while businesses with five or fewer employees, much of agriculture, railways, and work performed in emergencies endangering public health and safety were exempted; overtime was defined as work performed "over and above...the normal hours in a working week." Then the agricultural and small-business exemptions were deleted, but a broad and amorphous exemption was added for "emergencies due to unavoidable and unforeseeable circumstances which cause significant disruption of usual operations." This new exemption was then tightened somewhat by substituting "extreme" for "significant." Finally, on June 23, the small-business exemption was written back into the bill, this time, however, raised 10-fold to exempt employers employing 50 or fewer employees, leaving only 5 percent of private employers and 65 percent of the employees covered.

The following day the California Assembly passed this amended bill by a margin of 43 to 29, but employers and their representatives were outraged. As one Assemblyman, who regarded it as "the most antibusiness bill that has been considered by this Legislature," put it: "We might as well put up a sign that says, "Business not welcome. The Legislature of the State of California will run your business.""

At the Senate Industrial Relations Committee hearing in November 1977, the bill's author summed up the fundamental issue: "Simply, do people have the right..."
to say no to an order that they have to work beyond the normal work day. Does an employee have the right to say, ‘I’m exhausted.’, or ‘It’s my son’s birthday.’, or ‘I have to pick my kids up.’...without the fear of being fired? Should people be allowed to control their own time? [T]his legislation protects that basic right.”¹⁶

One of the most telling objections that employers raised to the bill was its capacity to undermine their coercive authority. As the California Laundry and Linen Supply Association complained: “All employees who work five and one-half or six days, could literally ‘go on strike’ any time they had a real or imagined ‘grievance.’ They simply refuse to work on Saturday, and management could not, under AB 1295, discipline them! [T]hey can all refuse overtime work and literally ‘shut down’ our plants. This would not be a ‘strike,’ but our entire plant of employees exercising their ‘right’ not to work overtime, granted them by AB 1295.”¹⁷

The industrial relations director of another large firm inadvertently specified workers’ real grievance—namely, that the employer had violated the central norm establishing that the clock objectively determines when enough is enough: “It would be very difficult to operate the business if the threat existed that all employees could walk off the job at the end of a work day regardless of the amount of work which remains to be done.” Where that work is shipping “toys and sundries to drug and discount stores in 13...states” from a distribution center, it is clear both that no emergency warranted compelling employees to work against their will and that entrusting to management the decision as to how much of an in principle endless “amount of work remains to be done” underwrites workplace autocracy.¹⁸ A vice president of Hunt-Wesson Foods painted an even more disturbing scenario for management, which at the same time gave substance to workers’ seemingly rhetorical lamentations about involuntary servitude: “For the most part, there are no replacements available for skilled employees. If overtime were not required, key skilled employees could easily shut down any one or more of our operating plants by refusing overtime work.”¹⁹ Viewed in this way, employers’ intense opposition to the bill was self-explanatory: the proposed law


¹⁸Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime at 1:281-82 (statement of Thomas Colbert, ind. rels. dir., Foremost-McKesson).

¹⁹Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime at 1:258 (testimony of James Watson).
would have overridden employers’ economically coercive counterpower to nullify workers’ superior labor market position.

Unionized employers also resented the fact that a mandatory overtime law, by creating a background institutional entitlement that unions would otherwise have to make collective bargaining concessions to secure, would enable unions to have their cake and eat it too.\(^{20}\) (By this logic, the notion that “[i]f the Legislature begins removing items from the collective bargaining arena, the process itself is threatened,”\(^ {21}\) should have precluded Congress from enacting the FLSA three years after the NLRA.)\(^ {22}\) Indeed, employers were especially indignant that the proposed law went far beyond what unions demanded during collective bargaining. The manager of the Crown Zellerbach paper mill in Los Angeles praised the “responsible recognition” that the workers’ union had displayed in the most recent bargaining by requesting merely that: “‘No employee shall be required to work more than 11 consecutive days without a day off. No employee shall be required to work more than one double shift per week, 16 hours, or more than three 12 hour shifts, or no more than a combined total of three overtime days in any one week.’” To be sure, the manager’s characterization of what could be regarded more as a plea for mercy than a demand as “a far cry from the proposed legislation” elicited this barbed rejoinder from the committee chairman: “On that point, sir, that’s also a far cry from what exists in that agreement which you currently have.”\(^ {23}\)

Unions, in contrast, complained that employers sometimes used mandatory overtime to stockpile output before the expiration of collective bargaining agreements to undermine strikes.\(^ {24}\) However, unions also made themselves vulnerable to a serious objection from legislators by conceding that many workers relied on overtime pay. Thus after a Communications Workers of America (CWA) official representing telephone company workers observed that “[m]ost of our members...want the overtime because they’ve got themselves in that economic situa-

\(^{20}\)Senate Committee on Industrial Relations, *Interim Hearing on AB 1295—Mandatory Overtime: Appendices* at 220 (Zechar).

\(^{21}\)Senate Committee on Industrial Relations, *Interim Hearing on AB 1295—Mandatory Overtime* at 1:281 (statement of Thomas Colbert, ind. rels. Dir., Foremost-McKesson).

\(^{22}\)Indeed, the U.S. Supreme Court has ruled that even with respect to federal preemption and the NLRA, states are free to regulate employment conditions even though such a statute “gives employees something for which they otherwise might have to bargain. ... Both employers and employees come to the bargaining table with rights under state law that form a ‘“backdrop”’ for their negotiations....” Fort Halifax Packing Co. v. Coyne, 482 U.S. 1,21 (1987).

\(^{23}\)Senate Committee on Industrial Relations, *Interim Hearings on AB 1295—Mandatory Overtime* at 1:225 (testimony of Doug Bockstanz and Sen. Bill Greene).

tion where it's now a necessity. It's their overtime, so they get it,” the chairman of the Senate Industrial Relations Committee asked him why the legislature should impose a solution on employers “if the workers themselves cannot come to an acceptable agreement to the point of being able to have a united position in dealing with management....” The CWA’s unresponsive answer urged the legislature to act on the grounds that the unionized business sector was reluctant to negotiate on this matter because it did not want to have to face competition from nonunion firms that operated with a free hand regarding overtime.25

Employers, too, were guilty of self-contradictory logic when they warned legislators that the proposed law, by making “overtime labor less reliable than it is right now,” would cause “prudent businessmen to reduce their dependence on overtime labor. This means there would be less overtime available for workers who depend on it to meet their obligations.” When this veiled threat to eliminate voluntary along with mandatory overtime made no impression on the committee, the Crown Zellerbach paper mill manager virtually accused workers of forcing him to require overtime, lamenting: “This is not my policy to work overtime. As a matter of fact, my policy is to work less and less overtime. However, there are a large number of people who depend on overtime wages because of the financial situations they’ve gotten themselves into.”26

After 30 hours of hearings, the bill’s author was compelled to dilute the bill to keep it alive in the senate committee, thus turning what had originally been a 15-word bill into six pages of largely procedural safeguards for employers. In addition to limiting coverage to firms with more than 100 employees and sun-setting the provision after three years, Assemblyman Tom Bates reduced workers’ self-empowerment to the right to file a complaint with the state labor commissioner if the workers had previously filed a grievance or complaint with the employer and the parties had made a serious effort to resolve it. The commissioner was required to investigate complaints that workers had been “forced to work overtime by their employer on regular, recurring, and frequent bases as a term or condition of employment.” At hearings that the commissioner was authorized to hold he was required to take testimony and make findings on whether the employer had: made a serious attempt to create a voluntary overtime system and to find additional workers for overtime not coverable on a voluntary basis; used forced overtime in an arbitrary and capricious way; and taken his employees’ personal concerns into account. After completing a lengthy administrative procedure saturated with due process for employers, the commissioner was autho-

25Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime at 1:127-28 (Ken Major, Cal. area dir., CWA, and chairman Senator Bill Greene).

26Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime at 1:227, 230 (testimony of Doug Bockstanz).
rized to grant an exemption from working overtime—and even this exemption might "permit the employer to work employees forced overtime under emergency conditions"—or issue a cease and desist order requiring the employer to give employ­ees at least 48 hours' advance notice of the requirement to work overtime, to create a voluntary overtime system, or to try to hire additional workers. A lengthy appeal process then became available to employers. But after business lobbyists argued that even this diluted provision would "interfere with management's right to require employes [sic] to work overtime when necessary," the senate committee rejected the bill four to two.\(^{27}\) Thus collapsed the major labor­atory experiment in the country's most populous state to confer a modicum of protection on workers against mandatory overtime.

In spite of the defeat of the California initiative, legislators in several other states sought to enact related legislation. On March 21, 1979, a bill, sponsored by 12 representatives, was introduced in the Wisconsin Assembly that would have prohibited employers from disciplining or terminating any employee for refusing to work more than eight hours of overtime in any week or more than 100 hours in a calendar year. Employers of fewer than 20 employees would have been exempt; the ban would also not have applied to emergencies endangering public health or safety or to those "due to unavoidable and unforeseeable circumstances causing a severe disruption of usual operations." The state Department of Industry, Labor and Human Relations was authorized to investigate complaints and issue enforcement orders.\(^{28}\) In connection with a mandatory fiscal estimate submitted three weeks later, the department estimated that it was currently receiving 170 calls per month on this issue.\(^{29}\) After a public hearing was held on the bill on April 24, 1979, the chief sponsor offered a substitute amendment that eliminated the weekly overtime standard and the small-employer exemption, authorized the department to award reinstatement with back pay and to assess forfeitures against offending employers of not more than $100 (per day of continuing violations), but the bill nevertheless died in the Assembly on April 3, 1980.\(^{30}\)


\(^{28}\)State of Wisconsin, 1979 Assembly Bill 328.


A related effort at the same time in neighboring Illinois received even shorter shrift: introduced on April 4, 1979, House Bill 1519 would have amended the state minimum wage and premium overtime law to prohibit employers from suspending, discharging, or otherwise disciplining any employee for refusing to work overtime hours (generally more than 40 per week). Though radical within the scope of its coverage, the bill would not have protected any of the large number of workers (including farm laborers, government employees, and executive, administrative, and professional employees) who were also excluded from the overtime premium provision.31 However, the bill was tabled by a 15-0 vote of the Labor and Commerce Committee three weeks later.32

An in some respects radical bill, very similar to the Wisconsin proposal, was introduced in the New Jersey Senate on January 24, 1980. Eugene Bedell’s proposed law would have made it illegal for employers to terminate or discipline in any other manner any employee for refusing to work overtime. Senate Bill No. 887 broadly defined “overtime” as work over and above the employee’s “normal daily hours of work...which in no event shall exceed eight hours per day, unless otherwise specified by a valid collective bargaining agreement.” This expansive protection for nonunion workers was limited by several exceptions, the most important of which exempted all employers of 50 or fewer employees and excluded all executive, administrative, and professional employees. In addition, the law would not have applied to overtime work performed during emergencies in which public health or safety was endangered or those resulting from “unavoidably unforeseeable circumstances which cause extreme disruption of usual operations.” Finally, the bill would have provided for enforcement by conferring a private right of action on employees to sue employers for damages resulting from unlawful termination or disciplinary action; in addition to the greater of actual damages or $1,000 in statutory damages, Senate Bill No. 887 would have awarded costs and reasonable attorneys’ fees to employees who prevailed.33 Thus, significantly, the bill did not directly enjoin employers from firing employees for refusing to work overtime, but merely sought to impose financial disincentives on firms.

The Senate, Labor, Industry and Professions Committee held a hearing on the bill in the industrial city of Linden in May 1980.34 Despite the deference paid by

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32Illinois Legislative Reference Bureau, Legislative Synopsis and Digest: Final Volume 2: 1979, at 2028.
33New Jersey Senate Bill No. 887 (Jan. 24, 1980).
34Public Hearing Before Senate Labor, Industry and Professions Committee on S-887 (An Act to prohibit employers from terminating or otherwise disciplining employees for refusal to work overtime and providing penalties therefor, and supplementing Title 34 of the Revised Statutes): held May 8, 1980, City Hall, Linden, New Jersey ([1980]); Robert
the bill to collective bargaining agreements, many large unionized employers vigorously testified against state intervention, adamantly insisting "that it is absolutely necessary that management retain the right to take action for refusal to work overtime whenever it is necessary."\textsuperscript{35} General Motors, which operated a plant in Linden, took an especially hard-line position, asserting at every turn the quasi-natural inevitability of its overtime regime: "by the very nature of the entire process of building automobiles, overtime is inherent, it is unavoidable...."\textsuperscript{36} Consequently, state intervention to make overtime voluntary with each individual employee was "unrealistic. It must be done, it cannot be optional. ... Half an assembly line cannot elect to work and the other half elect not to work, and both have their way." Moreover, General Motors alleged that such a law "would place the power in the hands of very few individuals to thwart the will and desire of the vast majority of their fellow employes [sic] who do want to work the premium hours, and in many instances to work even full straight time." Perversely, General Motors sought to support its implausible claim that there was "no evidence showing that overtime has been a hardship on employes any more than has the requirement to report during regular working hours" with the argument that overtime enabled the many workers whom GM put on short-time and lay-off to work a 2000-hour year; in this way, the corporation sought to turn compulsory overtime work against its opponents by arguing that overtime served "the important function [of] accomplish[ing] precisely what has been frequently urged..., that is to stabilize employment...."\textsuperscript{37}

In contrast, the New Jersey Business and Industry Association complained that the bill was "extremely discriminatory" because it left management in unionized firms "free to make such [overtime] assignments," whereas similar arrangements between nonunion employers and their individual employees would be "null and void," thus placing "the employer and the operation of his business at the discretion of the employee."\textsuperscript{38} The largely nonunion hotel and restaurant industries sought to justify legislative inaction by suggesting parity between overtime rules laid down by management and individual workers. Just as any agree-

\textsuperscript{35}Public Hearing Before Senate Labor, Industry and Professions Committee on S-887 at 63 (William Sailer, general manager, governmental affairs, Public Service Electric & Gas Co.).

\textsuperscript{36}Public Hearing Before Senate Labor, Industry and Professions Committee on S-887 at 28x (statement of General Motors Corp.).

\textsuperscript{37}Public Hearing Before Senate Labor, Industry and Professions Committee on S-887 at 26x-27x (statement of General Motors Corp.).

\textsuperscript{38}Public Hearing Before Senate Labor, Industry and Professions Committee on S-887 at 49x (written statement).
ment by an employee at the time of hire to work the overtime that employer may “from time to time” call on him to perform should be honored, so, too: “If the prospective employee tells the employer that under no circumstances will he ever work more than eight hours a day, or more than 40 hours a week...and if the employer agrees to that, then that understanding should prevail. We don’t think that New Jersey needs a state law to interfere with...such agreements....” Conjuring up the best of all possible worlds, the New Jersey State Chamber of Commerce deployed an assertion that by logical extension would eliminate the need for any labor standards legislation: “Poor [employer overtime] practices are self-correcting.”

In the midst of this barrage of employers’ solid opposition, even the bill’s chief sponsor got cold feet. Despite his conviction that something was “wrong” “if we have to force people to work overtime when they don’t want to in order to stay competitive,” Senator Bedell admitted: “I still don’t know; I have not made up my mind yet whether this legislation is the way or not.” Apparently neither he nor his colleagues were persuaded by the refutation of the necessity of overtime work offered by one telephone company worker who explained that her employer mandated two-day service for customers who merely wanted a phone of a different color:

But is it really important to force people to work overtime so that you can have an outside jack by your pool? Is it critical that you have one at your cabana at the beach club? These are the kinds of things that we are forced to work overtime for....

Unsurprisingly, the bill died in committee without any further legislative action. Public recognition of workers’ persistent resentment of mandatory overtime re-emerged at the turn of the millennium as several states took tentative and largely unsuccessful steps toward restraining employers from imposing supernormal workweeks on unwilling workers. In January 1999 a bill was introduced in the West Virginia legislature amending the time and a half for overtime provision in the state minimum wage and maximum hours law to provide “that an employee has the right to decline to work longer than the forty hours in any

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40Public Hearing Before Senate Labor, Industry and Professions Committee on S-887 at 34 (testimony of James Morford, director, governmental relations, N.J. State Chamber of Commerce).

41Public Hearing Before Senate Labor, Industry and Professions Committee on S-887 at 36.

42Public Hearing Before Senate Labor, Industry and Professions Committee on S-887 at 47 (testimony of Barbara Brenner).
workweek.”43 A management-side law firm warned employers that the bill “takes away your right to require an employee to work overtime even when the request is crucial to productivity and overall business success.”44 In the event, the legislature adjourned in June without having taken any action on the bill; the bill was reintroduced in 2000 and 2001, but no action was taken.45

However, a more timid bill introduced a week later in January in Maine ultimately made history. The concrete occasion for the legislative initiative was the exasperation of workers at the Poland Springs bottling plant in Poland, Maine, who for four months or more in 1997 had been required to work 12- and 16-hour shifts seven days a week without any days off. The plant was organized by the United Food and Commercial Workers, but the collective bargaining agreement “allows workers to log more than 100 hours in a week....”46

The bill that was promptly introduced in the Maine Senate—by the senator representing the county in which the Poland Springs plant was located—amended the state maximum hour and overtime law so that an “employer may not require an employee to work overtime in violation of the following limitations: A. An employer may not require an employee to work more than 32 overtime hours in any one calendar week; and B. An employer may not require an employee to work overtime on more than 6 days in a calendar week.” The bill excluded seasonal workers, but defined “overtime” to include more than eight hours in a day as well as more than 40 in a week.47 This extraordinarily generous treatment of employers may be contrasted with similar regimes in Western Europe, where employers are permitted to employ workers during limited overtime hours over a week, month, or year.48

Three weeks later, the Joint Standing Committee on Labor held a hearing on the bill. The director of the state Bureau of Labor Standards testified that his agency “often receive calls...from workers who want to know if their employer can fire them if they refuse to work mandatory overtime, even mandatory overtime that to most people would seem extreme. The answer at present is YES....” The director reported that while the workers might consider their situation “unfair,” the agency was also concerned “from a workplace safety perspective” be-

43West Virginia House Bill 2018, 74th Legislature, 1999 (Lexis).
45West Virginia House Bill 2018, 75th Legislature, 2000 (Lexis); West Virginia House Bil 2344, 76th Legislature, 2001 (Lexis).
48See below ch. 16.
cause workplace injuries increase as the result of fatigue caused by "excessive hours on the job." The agency supported the bill, but suggested an "exemption for essential workers in public emergency situations." Much of the testimony furnished by employers focused on the need for exemptions for emergency state work such as snowplowing. Surprisingly, even the submission of the National Federation of Independent Business, while not supportive, did not denounce the bill as the end of the world for free enterprise.

In committee, the amendatory process quickly watered down an already exceedingly deferential bill and accommodated many of the aforementioned concerns. The limit on overtime was stretched to 96 hours over three weeks, and that on daily overtime was deleted. Exemptions were added for public emergencies, essential services, and health and safety considerations. It is unclear whether a newspaper was speaking tongue in cheek when it reported that under the bill "Maine workers will be limited to 96 hours of mandatory overtime within any three-week period..." Another amendment enabled employers to request emergency waivers for up to three weeks for unforeseen or uncontrollable circumstances that would otherwise harm their firms.

Basic criticisms of the bill made during the Senate floor debates were directed at the effort to "micromanage business" and "dictate" to manufacturers and labor: "The employees' overtime provides them an opportunity of an income that is not part of an annual salary and that they can purchase the extras in life [with] that they couldn't have. ... Why don't we let them [manufacturers] run their business the way they feel is most efficient and is in the best interests of both their employees and their financial standings." Another senator, after confessing that "[i]t sort of boggled the imagination as to why any sane, rational, economically motivated employer would continue that practice [of paying time and a half for long hours instead of hiring additional workers] for any great length of time particularly against the will of those who were employed," answered his own question by noting that benefit packages made it cheaper or at least competitive vis-à-vis hiring additional workers. But the senator's opposition to the bill rested on the calculation that "we are not yet at the point where the fringe benefit packages...customarily made available to employees will induce employ-

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49Testimony of Alan Hinsey (Feb. 12, 1998) (furnished by Maine Law and Legislative Reference Library from the Labor Committee files).
54Legislative Record, S-2177 (Sen. Mitchell, Mar. 27, 1998).
ers to exploit this situation to a degree that it requires us to take legislative action to correct the vice.” Moreover, even where such expensive benefits are available, intervention would probably not be called for since those firms are likely to be unionized.\textsuperscript{55}

The bill’s sponsor, John Cleveland, made a crucial point that he apparently did not need to draw out for the members: “it puts no limitation whatsoever on voluntary overtime. An individual may work as many hours as they choose in a voluntary situation and many individuals choose to do that for a number of reasons.”\textsuperscript{56} Such a take-it-or-leave-it norm is both in its own right inconsistent with, and so open to employer abuse as to be unimaginable in, any modern labor-protective statute. Such libertarianism would make it possible for employers, for example, to pressure workers into waiving their rights under minimum wage, overtime, safety and health, and social insurance laws. It was precisely the kind of provision that doomed nineteenth-century protective laws to meaninglessness. In this so-called pre-enforcement stage, maximum hours statutes were “unenforceable because they set standards which were to prevail only in the absence of an agreement to the contrary between the employer and the employee.” Such laws might forbid employers to “‘compel’” women to work beyond a certain number of hours, but the ‘woman who wished to hold her job must perforce express willingness to work longer hours. But in the eyes of the law she was under no compulsion.”\textsuperscript{57}

After having made such concessions, Cleveland finally responded to the aforementioned call for a continuation of the at-will regime: “I think we have to recognize that these employees are human beings. They have families. They have children. They have community responsibilities. ... Is that the kind of society, at the end of the 20th century that we really want from people who work for a wage. That employers ought to be able to demand from them anything that they want? That they ought not to be able to live a life to help raise their children, to participate in their community but rather to be used more as slaves to meet the production schedule...?”\textsuperscript{58} The Senate then passed the bill 22 to 13.\textsuperscript{59} A smaller majority, 76-68, prevailed three days later in the House,\textsuperscript{60} where the debate was more attentive to employers’ complaints that the bill “would put such a string around them that there are occasions when they wouldn’t be able to get

\textsuperscript{55}Legislative Record, S-2176 (Sen. Mills, Mar. 27, 1998).

\textsuperscript{56}Legislative Record, S-2176 (Sen. Cleveland, Mar. 27, 1998).


\textsuperscript{58}Legislative Record, S-2178-79 (Sen. Cleveland, Mar. 27, 1998).

\textsuperscript{59}Legislative Record, S-2180 (Mar. 27, 1998).

\textsuperscript{60}Legislative Record, H-2024 (Mar. 30, 1998).
essential work completed...."61

The governor’s veto was curious in that he criticized the bill both for denying employers flexibility and making Maine less attractive to high-wage employers—an argument he perversely used the same day in vetoing an increase in the state minimum wage to $5.40 an hour—and for still permitting employers to require employees to work as many as 96 overtime hours every three weeks. When the Senate fell one vote short of the two-thirds majority needed to override the veto, employers survived their closest brush ever with even the feeblest of interferences with their unfettered control over the length of the working day.62

But two years later, on May 5, 2000, the more than century-long struggle for a general limit on overtime work finally took “a very small step” when the governor signed an even weaker bill prohibiting employers from requiring employees to work more than 80 overtime hours every two weeks—a burden described by Senator Neria Douglass as the limit beyond which workers are “probably dead on their feet.”63 In addition to excluding farm and seasonal workers and even low-paid executive employees (whose annualized salary was 3000 times the state minimum hourly wage), and excepting work performed in response to an emergency declared by the governor, essential services for the public such as utility and telecommunication service, snowplowing, and road maintenance, and work necessary to protect the public health or safety “when the excess overtime is required outside the normal course of business,” the law also exempted annual maintenance work (for up to four consecutive weeks) to propitiate the paper industry.64 As a Republican senator (and former trucking employer) at the next (120th) legislative session summarized the progress that the law had achieved: previously there had been “limitless mandatory overtime. A hospital, a dairy farmer, a trucking operation could say ‘you’ve to work forever.’ The 119th said ‘no, that’s not fair to the workers. We’re going to say 80 hours in two weeks is enough.’”65

64An Act to Limit Mandatory Overtime, 1999-2000 Me. Legis. Serv. ch. 750 (codified at 26 Me. Rev. Stat. Ann. § 603). The paper industry provision excepted “[a]n employee who works for an employer who shuts down an operation for annual maintenance or work performed in the construction, rebuilding or repair of production machinery and equipment, including machine start-ups and shutdowns related to such activity. This exception applies to contractors of the employer that are providing services related to the activities in this paragraph.” 26 Me. Rev. Stat. Ann. § 603(3)(H).
65Legislative Record S-762 (May 15, 2001). Since farmworkers were excluded from coverage, dairy farmers could continue to require their employees to work “forever.” Sen. W. Tom Sawyer, Jr., revealed that a nurse had once told him that she had made her hus-
Not satisfied with this extraordinarily meager beginning, nine months later Senator Douglass introduced An Act to Improve Limits on Mandatory Overtime, which would have reduced the amount of mandatory overtime from 80 to 60 hours every two weeks. Unlike his predecessor three years earlier, at the public hearing before the Joint Standing Committee on Labor on March 27, 2001, even the director of the Maine Bureau of Labor Standards had nothing good to say about the proposed reduction: “Maine is the only state that has a statutory limit on overtime. The federal Fair Labor Standards Act likewise contains no limit on overtime hours. This bill then seeks to add to what is already a unique restriction that employers in other states don’t have to contend with.” Since the law had been in effect for only eight months, its impact had not yet been assessed. Director Michael Freitt and his agency did not “yet know whether the law restricts employers in any significant way or whether it provides any real benefit to employees.” In opposing the amendment, the Maine State Chamber of Commerce not only saw no need to reduce the mandatory overtime ceiling, but asserted that the original law had been a reaction to allegations concerning “a single employer site” and to its knowledge “there are no other outstanding single sites with concerns with regard to excessive mandatory overtime.” The Chamber’s representative then went on, self-contradictorily, to insist that employers had to retain the power to compel overtime:

Let me make it clear that the Maine Chamber of Commerce is not in any way advocating that employers force their employees to work long periods of excessive overtime. If employers do so, they face increased risk of workplace accidents due to fatigue, declining employee moral and even a loss of production capabilities. However, having said that, there will be times when some employers may require their employees to work some mandatory overtime.

An association of construction firms was much more precise about its objections to the lower ceiling on mandatory overtime, revealing that some employers are acutely aware of how crucially reliant the implementation of their extraordinary overtime demands is on a labor market unencumbered by state-enforced labor norms. Associated Contractors of Maine testified that when firms faced

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66 State Laws Prohibiting Mandatory Overtime Work

67 Testimony of Michael Freitt (Mar. 27, 2001). (furnished by Maine Law and Legislative Reference Library from the Labor Committee files).

68 Testimony of Peter Gore on behalf of the Maine State Chamber of Commerce (undated) (furnished by Maine Law and Legislative Reference Library from the Labor Committee files).
completion deadlines on road paving projects:

it is completely normal for paving crews to work 13 to 14 hours, 6 days a week. In one week, that’s 84 hours, 44 of which is overtime. Double that, and you’ve got 88 hours of overtime.

Obviously, in the previous scenario, the current limit of 80 hours for mandatory overtime is exceeded. But workers are paid time and a half and most are more than happy to earn all that overtime pay in a concentrated period of time because their work is primarily seasonal. But what if one or a group of the workers in the paving crew decided they did not want to work on Saturday? The law says they can’t be forced to, but where does that leave the contractor? That could seriously affect the ability of the contractors to meet the completion deadlines. Under the current limit of 80 hours, there is less chance of that happening than if the limit was reduced to 60 hours.69

After the joint committee by a 7-6 straight party-line vote recommended passage on May 1, 2001,70 Republicans generally rehearsed employers’s arguments during the brief Senate debate on May 8, 2001, but Senator Peter Mills added two points. First, he argued that neither the law nor the proposed amendment targeted the real “abuse,” which was not 60 or 80 hours of overtime bi-weekly, but “the working of a double shift at a time when someone may not be up to doing it. If you have somebody working a 12 hour shift, and the replacement doesn’t come in, it’s not uncommon in the paper industry, for someone to work the next 12 hours as well; so they are working 24 hours in 24 hours time.” Having “personally handled cases” as an attorney involving workers working 24 or 36 hours straight, “maybe under conditions of no sleep and duress,” he had never understood how the bill “would actually work in practice.” Despite his “real concern,” however, he did not offer an amendment to “address the real problem.” Second, Mills’s antipathy to the law was exacerbated by the fact that “the problem was presented to us by people who were in organized bargaining units.” As legislators had been saying for decades, he did not believe that it was the legislature’s role to “rewrite an employment contract that the bargaining parties for some reason haven’t been able to write for themselves.”71

The bill’s sponsor, Senator Douglass, presumably trying to make a virtue out of a necessity in justifying a potentially radical intervention that in its initial stages was riddled with inconsistencies, especially a libertarianism directly at odds with the principle of compulsory labor norms, conceded: “Quite frankly, the

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69Testimony of Associated Constructors of Maine, Inc. (Mar. 27, 2001) (furnished by Maine Law and Legislative Reference Library from the Labor Committee files).
70http://janus.state.me.us/legis/bills/DividedReport.asp?id=1086&SESSION=FIRST+REGULAR.
71Legislative Record S-645-646 (May 8, 2001).
amount of time that was designated as being over the limit, 80 hours in a 2 week consecutive period, was grabbed out of the air. It had no basis in studies, it had no real discussion in so far as negotiations go because, in general, there were folks who were simply opposed to the concept and those who were in favor of it.” Without pointing to any studies that supported the choice of 60 hours, Douglass merely called it a “public policy statement” that it was “important for us to protect our citizens and the citizens who might be hurt by that employee who is working tired.”

Senator Douglass’s reasoning failed to convert any Republicans, and with three Democrats voting No, the bill was defeated 20-15. The following day the House engaged in an even briefer debate, the chief contribution to which was made by Democratic Representative George Bunker, Jr., a self-employed owner of an investigation agency, who defended the proposal as the “decent, right thing to do”—enabling workers who can be fired for refusing to work 60 or 80 hours of overtime every two weeks to say: “I am just too tired. I just wouldn’t do well at my job. Please let me go home. This is permissive folks. It allows a competent decision to be made by that employee and he or she cannot be disciplined for getting tired and have to go home or having to take care of the children, daycare or running to the doctor’s office.” The bill then passed the House 89-53, but the sub-veto-level vote did not persuade the Senate to adopt a motion to recede, which failed 14-21, and the effort died, leaving in place the only generally applicable law in the history of the United States empowering workers to veto employers’ demands to work overtime, but only under such extreme circumstances that very few, if any, workers will ever be able to take advantage of it.

Perhaps in response to growing worker and union complaints about the large increase in overtime work during the 1990s, by the end of the decade several states had begun considering anti-overtime legislation. Pennsylvania joined their ranks in October 1999, when 28 legislators introduced the Restricted Overtime Act in the House. This short and modest bill would have afforded employees not subject to a collective bargaining agreement the right to refuse to work more than 16 hours of overtime (beyond 40 hours) per week. Employers declined to testify at the hearings in January 2000, but the Pennsylvania Chamber of Business and Industry submitted a letter that rejected such “unwarranted intrusions into
employee/employer relationships," and disingenuously suggested that the issue be addressed at the federal level to avoid causing Pennsylvania firms a competitive disadvantage.\(^79\) Without identifying or justifying the philosophy, the antiunion Associated Builders & Contractors insisted: "As a philosophical matter, employees who want to work overtime should be encouraged to do so."\(^80\)

Several union officials and members did testify. Like their counterparts elsewhere, workers focused on family values, expressing resentment at not being able to attend children's skating parties or to tuck their children in bed.\(^81\) AFL-CIO officials and rank-and-file members stressed that they did not wish to restrict voluntary overtime.\(^82\) Indeed, one long-year GTE telephone installer and repairman, who in the previous eight months had worked the maximum number of overtime hours (12) permitted by the union contract every week and during seven weeks had been "forced" to work beyond the cap, testified that he and his coworkers would change their plans if the company just asked them as they formerly had done. "But when you're told as a slave that you will do it...it's a click in the switch."\(^83\) Although no hostile legislator asked whether unions would support a bill that merely required employers to ask employees politely to work overtime, the Republican chair of the House Labor Relations Committee raised the same question that had arisen at the hearings in California in the 1970s: if overtime "is that big of a problem, then perhaps maybe this issue should take precedence over some of the other issues that are negotiated on behalf of the workers."\(^84\)

Since the bill excluded places of employment under union contract, union witnesses raised the issue on their own, one rightly pointing out that even where unions do bargain over the issue, unionized employers still had to compete against nonunion firms that can work their employees "excessively...." Thus what both union workers and employers needed was "a fair and even field" where

\(^79\)Letter from Fred Sembach, vice president, government affairs, Pennsylvania Chamber of Business and Industry, to Joseph Gladeck, Jr., chairman, House Labor Relations Committee, Jan. 18, 1999 [sic; should be 2000]. See also "Bills Would Limit Overtime and Require Breaks," Pittsburgh Post-Gazette, Jan. 23, 2000, at B3 (Westlaw).


\(^82\)House of Representatives, Commonwealth of Pennsylvania, [Hearing on] House Bills 1940 and 1941, at 8, 52 (testimony of Teresa Ruhl, regional COPE director, Penn. AFL-CIO, and Linda Sanders, UNITE member).

\(^83\)House of Representatives, Commonwealth of Pennsylvania, [Hearing on] House Bills 1940 and 1941, at 38, 58 (quote) (testimony of Homer Beard).

State Laws Prohibiting Mandatory Overtime Work

"across the state everybody could only work 16 hours overtime...." The other explanation offered by unions as to why legislation was necessary, even in the unionized sector, to eliminate compulsory overtime was the failure of collective bargaining to resolve the matter to workers’ liking. The president of a United Steelworkers (USW) local at a Bethlehem Steel plant explained that "[e]ven in a long and historic contractual relationship between the steel industry and my union," in the course of which the USW had negotiated overtime penalties, voluntary overtime preferences, overtime rotations, and temporary transfer programs, no matter what level of relief or flexibility we have provided the steel industry, the demand for complete and total authority to be able to require unlimited overtime as the boss desires never recedes and is insatiable. ...

If the management's...quest for unfettered overtime assignment rights exists in this kind of industry with a powerful and well-established union, what do you imagine is the situation for people in nonunion, management-dominated workplaces?

I can tell you that my direct experience in working with people trying to organize a union is the situation has become a form of wage slavery.

Perhaps prompted by this confessed impotence, the Pennsylvania legislature, while not taking any other action toward enactment that session, was presented with a bill in 2001 that simply entitled employees (regardless of whether they worked under collective bargaining agreements) to refuse to work more than eight hours of overtime beyond the 40-hour week without being subject to termination or discrimination based on that refusal. Again, however, the legislature took no action on the bill. Nor was any action taken on a bill introduced the same day that would have increased the overtime premium to 100 percent for all weekly hours beyond 48.

A much more ambitious initiative to curtail overtime began occupying the Washington State legislature in the year 2000. Senator Darlene Fairley, the Democratic chair of the Labor Committee, introduced a bill whose underlying legislative intent found that employers' practices of requiring workers to work long days and even longer weeks:

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The Autocratically Flexible Workplace

hurt working families, make affordable child care difficult to find, and lead to higher
stress levels and industrial injury and occupational disease rates. These practices limit
employment opportunities to a smaller number of workers rather than extend employment
opportunities to a larger number of workers. Thus, it is the intent of the legislature that
workers not be required to work overtime.90

As recommended by the Labor Committee, the bill would have prohibited
employers from requiring employees to work more than eight hours a day or 40
hours per week unless they worked on a four-day, 10-hour schedule. Among the
bill's numerous excluded workers were those performing emergency work (such
as utility, fire, police, and medical personnel) and those packing or processing
perishable agricultural products. The bill would also have permitted employers
to petition for a variance if more than 80 percent of their affected employees
voted in a secret ballot to approve a written proposal to work longer hours, but
in no event more than 12 hours per day or 42 hours per week for four consecutive
weeks. The bill would also have excluded the many workers already excluded
from the state's overtime law, including farm workers, executive, administrative,
and professional employees, news carriers, seamen, and workers on state-oper­
ated ferries. Finally, the bill would also have offered a closely hedged-in ex­
emption for continuous production operations in two important industries in
Washington—primary metal processing and paper products. Firms would have
been permitted to require employees to work part of the next shift if: the need
arose as a result of an unanticipated event such as employee sickness or emer­
gency repair of machinery (but not because of a need to increase production to
meet increased market demand), and the unanticipated event halted or might halt
the continuous production operation; the employer in good faith exhausted rea­
sonable attempts to find volunteers from the next shift; the employees in question
had critical skills and expertise required for the work; and the employer, pursuant
to the employees' request, helped them get safe transportation home after the
shift and to address child care or other family obligations successfully. A final
limitation on the continuous operation exemption would have prohibited employ­
ers from requiring employees to work more than 12 consecutive hours or two
straight shifts, or from requiring more than 16 overtime hours in any calendar
month.91 Again, workers at the legislative hearings focused on overtime work's
interference with their families, while employers bemoaned that the bill would

same time to provide overtime pay for software developers and engineers and related
workers self-contradictorily uses the same language in its preamble to justify imposition

91 Washington, Sen. Bill 6120 (introduced Jan. 10, 2000, and recommended by
committee Jan. 28, 2000). The bill was pre-filed on Dec. 8, 1999.
State Laws Prohibiting Mandatory Overtime Work

deprive them of taking advantage of the “edge” they had in access to the world’s best workforce. The bill died in the Rules Committee in February 2000.

The movement re-emerged in the Illinois legislature in 2001 when a Mandatory Overtime Limitation Act bill was filed. Its express purpose was to “reduce excessive amounts of mandatory overtime which increase stresses on family life, jeopardize the health and safety of employees, and undermine the effectiveness of workplace operations.” It would have prohibited employers from requiring employees to work more than 48 hours per week (or 12 hours per day). It would have created exceptions for work performed pursuant to officially declared emergencies as well as for the performance of essential services such as snowplowing, road maintenance, and utility and telecommunication service. But even in these exceptional cases employers would have been required to pay double-time wages. No action, however, was taken on the bill after it was referred to committee.

One group of workers that has begun to achieve some successes in combating mandatory overtime is nurses, who in 2001-2002 induced the legislatures in Maine, Oregon, New Jersey, Washington, and Minnesota to enact laws conferring various levels of protection against the imposition of unwanted overtime. Superficially, this campaign resembles successful instrumental efforts in the late nineteenth and early twentieth century to cap the hours of (de facto adult male) workers in occupational groups (such as railway employees, and street railway and bus drivers) in which fatigue could cause injuries to the public and not merely the workers themselves. Most pertinent in this context were turn-of-the-century laws limiting the workdays and workweeks of pharmacists and drug clerks. For example, the California legislature characterized a 1905 statute that limited the hours (to 10 per day and 60 per week) of those selling drugs or “compounding physicians’ prescriptions” as “a measure for the protection of public health....”

A nurse testifying in 2002 in favor of a bill banning mandatory overtime for nurses before the Senate Labor and Commerce Committee of the Washington State legislature sought to link the struggles: “Is it legal for truck drivers to keep driving when they are too tired? We need laws to protect the public from the


951905 Cal. Stat. ch. 34, § 1, at 28.
danger of nurses falling asleep at the wheel."96 Her point was well taken, but the bill, unlike those older laws, in no way prohibited fatigued nurses from voluntarily working overtime.97 Similarly, a bill introduced in Congress, the Safe Nursing and Patient Care Act of 2001, which would prohibit requiring a nurse to work beyond his or her shift, 12 hours per day, or 80 hours every two weeks (except during declared states of emergency)98 in institutions receiving payments under the Medicare program, includes the finding: "The widespread practice of requiring nurses to work extended shifts and forego days off causes nurses to frequently provide care in a state of fatigue, contributing to medical errors and other consequences that compromise patient safety."99 Likewise, in introducing the bill, its chief sponsor, Representative Fortney Pete Stark stressed: "Mandatory overtime is dangerous for patients plain and simple."100 Equally characteristically, these most recent initiatives are permissive and libertarian rather than mandatory and coercive: whereas the earlier laws prohibited employers from requiring or permitting workers to work beyond the hours threshold and thus withdrew from needy workers the right to undermine societally established norms,101 "nurses would be allowed to continue to volunteer for overtime if and when they


97 To be sure, the rigor of the federal law limiting train engineers' working hours leaves much to be desired. Pat Gilbert, "Train Engineers Overworked? Heavy Overtime Raises Safety Issue," Bergen County Record, Aug. 11, 1996 (Electric Library).

98 H.R. 3238, § 3 (107th Cong., 1st Sess., Nov. 6, 2001). The companion Senate bill is S. 1686. Two other bills that would amend the FLSA to prohibit employers from requiring registered nurses (and other health care employees except physicians) to work more than eight hours a day or 80 hours every two weeks (absent a natural disaster or a governmentally declared state of emergency) are the Registered Nurses and Patients Protection Act, H.R. 1289, and Patient Care Employees Protection Act, H.R. 1902, 107th Cong., 1st Sess., Mar. 29 and May 17, 2001. The original version of the bill is H.R. 5179, 106th Cong., 2d Sess (2000). Nurses and other hospital employees are already treated differently under the FLSA § 7(j): by agreement, two-week pay periods are permissible, provided that employees are paid overtime for any hours beyond eight per day or 80 per two weeks.

99 H.R. 3238, § 2(4).


101 E.g., 1905 Cal. Stat. ch. 34, § 2, at 28-29; 1900 N.Y. Laws ch. 453, at 1126 (regulating hours of pharmacists in New York City).
feel they can continue to provide safe, quality care...."102

Against the background of several high-profile strikes and under nationwide pressure from the American Nurses Association,103 state nurses associations, and nurses unions to prevent hospitals from imposing huge amounts of overtime on nurses “to cover routine personnel shortages” and “threaten[ing] nurses who question this practice with the possibility of losing their jobs or their license under the pretext of patient abandonment,”104 legislators in a large number of state legislatures in 2001-2002 introduced bills—many of them with identical language—prohibiting mandatory overtime. Bills in the states (California, Colorado, Connecticut, Florida, Hawaii, Illinois, Iowa, Kentucky, Maryland, Missouri, New York, Ohio, Pennsylvania, Rhode Island, West Virginia, and Wisconsin) that have not yet enacted them were generally similar to the pattern of the congressional bill in advancing protection of the public as the objective, but at the same time privileging nurses to work voluntarily as many hours as they wished.105

In the words of a proposed amendment of Pennsylvania’s Professional Nursing Law: “Only individuals are capable of determining their capacity to work beyond their predetermined, regular work schedule.”106 Although workers may be in a much superior position to judge their own work capacity than their employers, it is unclear why society is not in a better position to override the decisions of employers and workers that may be tainted by short-term monetary considerations.

102147 Cong. Rec. at E 2007 (Stark).


105Cal. S.B. 1027 (2001) (40 hours); Colo. S.B. 134 (2002) (scheduled daily shift, or 12 hours during 24-hour period, or 80 hours in 2 weeks); Conn. H.B. 5698 (2001) (40 hours); Fla. H.B. 1799 and S.B. 2326 (2002) (scheduled daily shift, or 12 hours during 24-hour period, or 80 hours in 2 weeks); Hawaii H.B. 842 (2001) (40 hours); Ill. H.B. 859 and 1955 and S.B. 555 (2001) (40 hours); Iowa H.B. 2237, H.B. 2324, and S.B. 2126 (2002) (scheduled daily shift, or 12 hours during 24-hour period, or 80 hours in 2 weeks); S.B. 2127 (2002) (“agreed upon assignments”); Ky. H.B. 732 (2002) (regularly scheduled daily work shift or 40 hours in one week); Md. H.B. 42 (2001) (40 hours); Mo. H.B. 1923 (2002) (scheduled daily shift, or 12 hours during 24-hour period, or 80 hours in 2 weeks); N.Y. A.B. 7127 and S.B. 3515 (2001) and N.Y. A.B. 9731 (2002) (40 hours); Ohio H.B. 78 (2001) (agreed upon, predetermined regularly scheduled full-time work week or 18 consecutive hours); Pa. S.B. 1102 (2001) (regular shift, 12 hours in 24-hour period, or 80 hours in 14 days); R.I. H.B. 5394 (June 20, 2001) (60 hours, but requiring more than 60 hours is not a violation provided that the work is “required and directly related to the direct care of a particular patient” and is not required on a regular basis); R.I. S.B. 209 (June 27, 2001) (predetermined scheduled work shift of 8, 10, or 12 hours or eight hours of overtime in a 30-day period); W.Va. H.B. 2829 and S.B. 265 (2002) (agreed to, predetermined scheduled work shift of 8, 10, or 12 hours not to exceed 40 hours per week); Wisc. A.B. 457 and S.B. 211 (2001) (40 hours).

not germane to the question of the best possible patient care. To be sure, a few (as yet unenacted) bills did set a very generous limit on nurses’ voluntary overtime, prohibiting them from working more than 16 hours in a 24-hour period.107

The first two states that enacted such laws had to set generous limits for employers. Once again, Maine was the first state to legislate. Under the original bill, whose chief sponsor was herself a nurse education consultant, a licensed nurse “or a person employed by a licensed, certified or registered provider of mental or physical health care in the public or private sector or any business establishment providing health care services, who provides direct care to patients, in the exercise of professional judgment regarding the performance of giving quality care to patients, may not be disciplined if that person refuses to work overtime.”108 The bill was revised in committee to require that such care-giver “has determined, in the exercise of professional judgment, that that person, due to fatigue or other factors, may not be able to provide quality care to that person’s patients during those overtime hours.”109 Immediately after the legislature passed that version by three votes short of a veto-proof majority in the Senate (21-14) and a veto-proof majority in the House (99-43) on May 8-9, 2001,110 the governor was noncommittal on whether he would sign it.111

However, on May 15 the Senate reconsidered the bill and considered an amendment offered by Senator W. Tom Sawyer, Jr. (a retired businessman)112 that “critics maintained would have essentially gutted the bill’s original intent.”113 It would have required that, in addition to the objecting nurse, his or her supervisor also “determined, in the exercise of professional judgment, that that person, due to fatigue or other factors, may not be able to provide quality care to that person’s patients during those overtime hours.” In addition, it would have required that “[o]ther staff of equivalent qualifications is available to ensure adequate patient staffing and quality care.”114 Senator Sawyer described his motivation for submitting the amendment in terms reminiscent of the aforementioned complaints lodged by California employers about a state law that would have given workers

109Committee Amendment A (S-114).
112http://www.state.me.us/legis/senate
114Amendment S-186.
generally the right to refuse overtime work.\textsuperscript{115} “I am truly worried that in no instance do we allow a single individual the opportunity or the option of closing down a floor, closing down an emergency room.”\textsuperscript{116} The bill’s sponsor, Senator Pendleton, noted that the amendment did “exactly opposite of what we were hoping to do and puts everything back the way it was. It requires that a supervisor be involved in the decision of whether you’re too tired to do extra hours after you’ve done your full shift. That’s how things are done now.”\textsuperscript{117} And Senator Jill Goldthwait, herself a registered nurse, observed that the amendment “ask[s] another person to make a judgment about how tired someone is. I can’t imagine how that judgment can be made accurately when you’re a separate person.”\textsuperscript{118} The Senate then defeated the amendment by the narrowest possible vote (17-17).\textsuperscript{119}

The following day Governor Angus King announced that he had “‘some problems with the bill.’” First, he was not sure that a nurse’s right to refuse overtime in the first hours after eight “‘comports with what the bill purports to say which is that tiredness is the issue.’” Perhaps even more important to the governor was the need not to encourage the others: “‘It’s also been my experience that once you take a step like this, I can guarantee that in the next Legislature there will be three more bills for mandatory overtime limitations for some profession. I’m just not sure the state needs to step in and make the rules.’”\textsuperscript{120} With the Maine State Nurses Association declining comment on whether it could mobilize a two-thirds majority to override a potential veto,\textsuperscript{121} the Legislature decided to recall the bill from the governor’s desk to thwart that veto. Specifically, Governor King’s objection was that the bill “‘didn’t focus on fatigue. I don’t know exactly what the number [of hours is], but I would like to see them work on a proposal that reflects the reality of fatigue and some objective standard.’”\textsuperscript{122} The compromise “brokered” by the governor and worked out between nurses’ and hospitals’ representatives\textsuperscript{123} eviscerated nurses’ entitlements sufficiently that Senator Sawyer could truthfully boast that it “does a nice job of

\textsuperscript{115}See above ch. 15.

\textsuperscript{116}Legislative Record at S-760 (May 15, 2001).

\textsuperscript{117}Legislative Record at S-760 (May 15, 2001).

\textsuperscript{118}Legislative Record at S-761 (May 15, 2001).

\textsuperscript{119}Legislative Record at S-763 (May 15, 2001).

\textsuperscript{120}Higgins, “King Handed Bill Barring Forced OT.”

\textsuperscript{121}Higgins, “King Handed Bill Barring Forced OT.”


attending to the concerns of employers that regularly schedule overtime as a matter of course.”

Thus as enacted by the governor on June 13, 2001: “A nurse may not be disciplined for refusing to work more than 12 consecutive hours. A nurse may be disciplined for refusing mandatory overtime in the case of an unforeseen emergent circumstance when overtime is required as a last resort to ensure patient safety. Any nurse who is mandated to work more than 12 consecutive hours...must be allowed at least 10 consecutive hours of off-duty time immediately following the worked overtime.”

Two weeks later the governor of Oregon signed a modest bill that will go into effect on October 1, 2002. Oregon hospitals will be barred from requiring nurses to work more than two hours beyond a regularly scheduled shift or more than 16 hours in a 24-hour period.

In contrast, the third state to act, New Jersey, although it took more than three years, enacted a more radical anti-mandatory overtime statute. The inception of legislative struggle in New Jersey can be dated to October 1, 1998, when Patients First, a coalition of several unions and other organizations, held a rally at the statehouse in Trenton to push for stricter patient care standards at hospitals and nursing homes. Among the demands was one for a ban on mandatory overtime, which “makes health care workers prone to mistakes.” State Senator Joseph Vitale told those present that he planned to introduce a bill dealing with their demands. On March 15, 1999, he introduced two related bills, one of which would have required the Commissioner of Health and Senior Services to adopt regulations providing for a series of minimum staffing ratios at hospitals. The other bill—which was co-sponsored by the Republican Senate Majority Leader, John Bennett, who continued his co-sponsorship until the bill became law almost three years later—would have amended the state Wage and Hour Law to prohibit health care facilities from requiring hourly employees to accept work in excess of eight hours daily or 40 hours weekly, “except in the case of an unforeseen emergent circumstance when the overtime is required only as a last resort....” The prohibition of mandatory overtime—voluntary overtime work was expressly permitted—was designed “to safeguard their [the workers’] health, efficiency, and general well-being as well as the health and general well-being of the persons to whom these workers provide services.” An identical bill was introduced in

124 Legislative Record at S-1106 (June 6, 2001).
the Assembly in May, but the legislature adjourned before further action could be taken. New bills were then introduced in both Houses on January 11, 2000. On June 29 a slightly different Assembly substitute bill—which was sponsored by the Republican Speaker of the Assembly, Jack Collins, who would also sponsor the bill the next year—passed both Houses virtually unanimously, thus becoming the first such bill to be passed in the United States. Only two significant changes were made: instead of a maximum eight-hour day, a mutually agreed-upon predetermined scheduled work shift of 8, 10, or 12 hours was permissible within the framework of a 40-hour week; and the effective date was postponed until one year after enactment.

This relatively smooth legislative course was in part a function of the fact that, when the New Jersey Hospital Association (NJHA) realized that, with even the non-labor oriented Republican leadership of the Senate and the Assembly supporting the bill, it was "not stoppable," the organization decided not to oppose the bill in order not to antagonize the sponsors and undermine its own efforts to lobby for more favorable provisions. In the event, however, after discovering that many of its members opposed the bill, the NJHA eventually changed its position. According to Senator Vitale, the NJHA, after promising neutrality in exchange for his promise to hold off on proposed legislation prescribing staffing levels, which the hospitals opposed even more adamantly, "in secret" began intensively lobbying the governor, which resulted in her vetoing the bill.

Despite the overwhelming legislative majority, on September 21, 2000, Republican Governor Christine Whitman conditionally vetoed the bill, recommending several crucial changes (which the legislature could have adopted before returning the amended bill). Although she shared nurses’ concerns that excessive overtime may result in an unsafe work environment for employees, and place in jeopardy the patients whom they serve, I am troubled...that this bill limits its focus to banning mandatory overtime, and is silent concerning the issue of excessive voluntary overtime. For example, the bill would prohibit a hospital from requiring a nurse from working one additional hour of mandatory overtime to avoid temporary short staffing, but it would not prohibit the same nurse from working an unlimited number of voluntary overtime hours. The potential threat to patient and employee safety due to overtired employees occurs regardless of whether excessive hours are considered mandatory or

133 Telephone interview with Betsy Ryan, general counsel, New Jersey Hospital Association, Princeton, NJ (Feb. 4, 2002).
134 Telephone interview with Sen. Vitale.
Whitman therefore recommended deleting the prohibition of mandatory overtime and substituting instead a provision authorizing the Commissioner of Health and Senior Services, in consultation with the Commissioner of Labor, to "adopt, following a public hearing, regulations establishing the maximum hours for a work day or work week," and to empower the commissioner to permit work in excess of the maximum hours in case of unforeseen emergencies.\textsuperscript{136}

Regardless of whatever plausibility may have inhered in the substance of the governor's recommendation, Senator Vitale, the bill's chief sponsor, believes that the concern she expressed about voluntary overtime was disingenuous and functioned as a smokescreen to soften her real intention, which was to prevent enactment of any regulation of overtime.\textsuperscript{137}

Nurses' reaction was immediate and entirely negative.\textsuperscript{138} The "outraged" president of one local hospital workers union argued: "Although the governor's veto may protect the pockets of hospitals and nursing homes, it will only exacerbate the current staffing crisis and further drive down the level of patient care."\textsuperscript{139} The nurses' animus toward Whitman's recommendation was summed up by Jeanne Otersen, the policy director of the Health Professionals and Allied Employees (HPAE), New Jersey's largest nurses' union: Whitman "has said to the (health care) industry the practice of forcing people to stay 16 hours a day is okay."\textsuperscript{140} The basis for this criticism apparently rested on the belief, as the Bergen County \textit{Record} editorialized, that the governor's proposal would be acceptable only if all overtime were "voluntary. Otherwise, a nursing home or hospital could avoid hiring more workers by insisting that everyone else work the longer hours on a regular basis or risk losing their jobs. The 40-hour work week could be left in the dust."\textsuperscript{141} The \textit{New York Times} agreed that under Whitman's regime nurses "would be required to continue to work overtime when ordered to by their

\textsuperscript{135}Governor's Conditional Veto Message (Sept. 21, 2000), on http://www.njsna.org/office_of_the_governor.htm.

\textsuperscript{136}Governor's Conditional Veto Message (Sept. 21, 2000).

\textsuperscript{137}Telephone interview with Senator Joseph Vitale, Trenton, NJ (Feb. 4, 2002).

\textsuperscript{138}Colleen Diskin, "Veto Keeps Forced OT in Health Care: Whitman Irks Unions, Nursing Home Activists," (Bergen County) \textit{Record}, Sept. 22, 2000, at A1 (Lexis).

\textsuperscript{139}Barbara Rosen, letter to editor, (Bergen County) \textit{Record}, Oct. 5, 2000, at L10 (Lexis) (pres., Health Professionals and Allied Employees Local 5091).

\textsuperscript{140}Donna Leusner, "Whitman Vetoes Ban on Nurses' Forced OT: Governor Wants Voluntary Shifts Limited Too as Health Unions Cite Tired Employees," (Newark) \textit{Star-Ledger}, Sept. 22, 2000 (Westlaw).

\textsuperscript{141}"Nurses and Overtime: They Are Often Forced to Work Long Hours," (Bergen County) \textit{Record}, Sept. 25, 2000, at L2 (Lexis).
bosses...."142

While the governor’s spokeswoman was characterizing her approach as “broader...in applying the bill to voluntary overtime as well as mandatory overtime,” another nurse was able to identify a gap in the otherwise impeccable logic of Whitman’s ostensible attack on the libertarian approach to overtime: “‘When you plan on overtime, you plan to be rested and have your children or elderly parent cared for.... When the supervisor comes to a nurse after a 12-hour shift and states: ‘Your relief is not coming, you have to stay another four or more hours,” a cascade of events, not to mention exhaustion, can (affect) your ability to perform your duties.’”143

Although this objection is not without force—and was in part accommodated by the ultimate enactment, which requires employers, in case of lawful emergency overtime, to give employees time to arrange for care of family members144—it remains unclear how nurses, any more than automobile assembly line workers, could pre-store enough rest to work through 16-hour days at peak performance except on a very occasional basis. The arduous burden associated with extraordinarily long workdays also raises the presumption that the decision nevertheless to undergo such ordeals is driven by financial considerations, which are precisely the forces that compulsory labor standards are designed to prevent from triggering a race to the bottom. Indeed, Otersen of the HPAE, the chief union lobbyist for the bill, concedes that she intentionally avoided confronting that aspect of the governor’s recommendation because a significant proportion of the union’s membership working voluntary overtime does so to make ends meet and would have objected to any bill that prohibited the practice. When, Otersen reports, Governor Whitman’s conditional veto, so to speak, “called the union’s bluff,” the HPAE, in turn, sought to call her bluff by broaching the subject of a bifurcated overtime limit, under which voluntary overtime would have been capped separately, but, since the administration’s real agenda was killing any overtime bill rather than reaching a compromise, the initiative was never taken up.145

This interlude underscores that, in spite of the real and important differences between voluntary and involuntary overwork in terms of co-determination at the workplace and workers’ ability to plan their lives outside the workplace, all overtime work tends to degrade labor standards and working conditions. If nurses take seriously their lobbying claim that their hours must be capped for the same reason that maximum hours are legally imposed on air traffic controllers,146 air-

143Leusner, “Whitman Vetoes Ban on Nurses’ Forced OT” (quoting Susan Weiss).
145Telephone interview with Jeanne Otersen, Emerson, NJ (Feb. 5, 2002).
plane pilots,\(^{147}\) flight attendants,\(^{148}\) train employees,\(^{149}\) and truck drivers\(^{150}\)—namely, that because fatigue can cause injury and death to others, “abusive use of overtime...is a matter of public health safety”\(^{151}\)—it is unclear on what principled basis nurses believe that, unlike transportation workers, they should remain entitled to decide for themselves whether they would like to violate those societally created norms in order to “make extra money”\(^{152}\) by means of overtime premiums—a point of view with which even Otersen and Senator Vitale were unable to disagree.\(^{153}\)

The decision not to seek to override the governor’s conditional veto, despite virtually unanimous passage of the bill, was dictated by party politics: the leadership of the Republican-controlled legislature, according to Senator Vitale and lobbyist Otersen, signaled that it would not permit the process to go forward because the politically acceptable quota of overrides of the Republican governor had already been filled.\(^{154}\)

Early in 2001, as supporters were introducing their bills again in the wake of Governor Whitman’s departure to head the federal Environmental Protection Agency, the NJHA, together with nursing homes and assisted living facilities, began registering their objections publicly.\(^{155}\) The NJHA’s general counsel did not blink at reducing the entire dispute to its core of naked power: “‘We are concerned if we remove mandatory overtime from our arsenal, we may have no nurses on some floors.’”\(^{156}\)

The bill as introduced once again by Senator Vitale differed somewhat from the bill that Whitman had conditionally vetoed. Forgoing regulation of the length

\(^{147}\) Commercial airline pilots are prohibited from flying more than a fixed number of hours per day, week, month, and year. 14 C.F.R. § 121.471 (2001).


\(^{150}\) Truck drivers are prohibited from driving more than fixed number of hours per day and week. 49 C.F.R. §§ 395.1 and 395.3 (2001).


\(^{153}\) Telephone interviews with Otersen and Sen. Vitale.

\(^{154}\) Telephone interview with Sen. Vitale.


of the workday, it narrowed the focus to the 40-hour week, this time, however, expanding the scope of the "unforeseeable emergent circumstance" to include "an unpredictable or unavoidable occurrence at unscheduled intervals relating to health care delivery that requires immediate action." At the same time, it narrowed the scope of the exceptional use of mandatory overtime by stipulating that it not be "used to fill vacancies resulting from chronic short staffing...."157

Despite the legislature's inability to determine the total number of overtime hours—voluntary, mandatory, or pursuant to a collective bargaining agreement—worked at affected health care units, the number of additional workers who would have to be hired to compensate for the ban on mandatory overtime, or whether employers would be able to hire a sufficient number to compensate,158 the Senate passed the bill 37-0 on June 28 and the Assembly by a vote of 72-4 on December 10, 2001. As enacted, the law contained a number of important revisions made by the Senate Health Committee and Budget and Appropriations Committee in March and June, respectively, that induced employers to adopt a position of neutrality on passage.

First, the law does not apply to on-call time—employers' appropriation of which is a proliferating method of forging the 24-hour workday159—defined as "time spent by an employee who is not currently working on the premises of the place of employment, but who is compensated for availability, or as a condition of employment has agreed to be available, to return to the place of employment on short notice if the need arises."160 To be sure, the law does not "permit an employer to use on-call time as a substitute for mandatory overtime."161 Second, employers' right to avail themselves of the emergency escape clause is conditioned on their first having "exhausted reasonable efforts to obtain staffing."162 The underlying reasonableness standard is conceived quite broadly, requiring that an employer "shall: a. seek persons who volunteer to work extra time from all available qualified staff who are working at the time of the unforeseeable emergent circumstance; b. contact all qualified employees who have made themselves available to work extra time; c. seek the use of per diem staff; and d. seek personnel from a contracted temporary agency when such staff is permitted by law.
The Autocratically Flexible Workplace

or regulation. In order to discourage employers from abusing the emergency clause, they are required to document in writing, for review by the Labor and Health Departments, their exhaustive reasonable efforts. In addition, to deal with one of nurses’ (and other workers’) most frequently voiced complaints, even under the emergency provision the law requires employers to give an employee the “necessary time, up to a maximum of one hour, to arrange for the care of the employee’s minor children or elderly or disabled family members.” The “reasonable efforts” clause, however, does not apply in the event of an officially declared emergency, disaster, or catastrophic event that “substantially affects or increases the need for health care services.” This definition was acceptable to union leaders, “who had feared that hospitals would invoke the emergency clause whenever workers called out sick.”

The reason, according to Senator Vitale, that the NJHA ultimately became reconciled to the partial abolition of mandatory overtime was his credible threat to pass even less acceptable legislation. Nevertheless, the NJHA’s general counsel observed that many hospitals remain opposed to the legislation because they believe that it will deprive them of an important managerial tool.

When the acting governor finally signed the bill into law on January 2, 2002, it was only one year until the country’s most rigorous ban on forced overtime for nurses would go into effect.

Finally, in March 2002 Washington and Minnesota became the fourth and fifth states to enact a law shielding nurses from unwanted overtime. In Washington, too, the legislative process exacted a toll in the form of diluting the protection initially offered by the first bill. In this case, the House bill introduced in January 2001 provided for only one exception to the prohibition on forcing employees to work overtime or discriminating against them for refusing to work overtime (defined as hours worked beyond an agreed-on, regularly scheduled shift or workweek)—an unforeseen emergency. The enforcement procedure empowered investigators to suspend or revoke the license of any health care facility that committed seven or more violations if investigators found “an ongoing

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168 Telephone interview with Sen. Vitale.
169 Telephone interview with Betsy Ryan.
pattern of deliberate violations....” In any lawsuit brought for violating the pro-
hibition, the mere fact that any employee had worked in excess of forty hours per
week constituted a prima facie violation. In order to rebut this presumption, the
employer would have had to prove both that an emergency had occurred and that
overtime had been “required only as a last resort at the time the employee was
forced or compelled to work.” The bill encouraged workers to be vigilant by en-
titling the employee who made the initial report of a violation leading to san­
tions against the employer to receive 20 percent of the fine.171

After this bill made no progress, a bill was introduced in the Senate in
January 2002 that within six weeks passed both chambers by large majorities
once amendments had been added that made the limits on overtime more palat­
able to employers. While not “actively” opposing the bill, the Washington State
Hospital Association sought to persuade the legislature that its members should
not be treated as rapacious profit-making employers: “‘Hospitals are not factories
pushing their workers to increase their output of widgets to increase the bottom
line.’”172

As enacted, the law sets out in the preamble that, against the background of
a critical shortage of health care workers and the need to safeguard the workers’
health and efficiency and patients’ safety, required overtime should be limited as
a matter of public policy.173 Affording employers some flexibility, the legis­
lature defined overtime as hours beyond 12 in a 24-hour period or 80 hours within
two weeks.174 The statute also expanded the class of exempt emergencies by in­
cluding “any unforeseen disaster or other catastrophic event which substantially
affects or increases the need for health care services.”175 Excluded from overtime
were both any work caused by pre-scheduled on-call time and any situation in
which an employee is required to complete a patient care procedure already in
progress “where the absence of the employee could have an adverse effect on the
patient.”176 Most importantly, the ban on overtime also does not apply where the
employer documents that it has used “reasonable efforts to obtain staffing.”177
The employer can satisfy this requirement by: seeking workers to volunteer to
work extra hours from among all available qualified employees who are working;
contacting “qualified employees who have made themselves available to work

172Queary, “Nurses Seek Right to Refuse Overtime” (quoting testimony of Lisa
Thatcher before the Senate Committee on Labor and Commerce on Jan. 28, 2002).
174Wash. S.B. 6675, § 2(4).
175Wash. S.B. 6675, § 2(7).
176Wash. S.B. 6675, § 3(3)(d).
177Wash. S.B. 6675, § 3(3)(c).
extra time”; seeking per diem staff; and seeking employees from a temporary agency if such a procedure is permitted by law or any applicable collective bargaining agreement, and if the employer “regularly uses a contracted temporary agency.” In addition to these striking accommodations, the law also made the prohibition on overtime more acceptable to employers by jettisoning all of the aforementioned innovative and strict enforcement provisions of the House bill, although it does impose a fine for violations rising from $1,000 to $5,000 for repeat violators.

The Minnesota statute, against which only one legislator voted, is of the decidedly weak and narrow variety. It prohibits employers from taking action against a nurse for failing to “accept an assignment of additional consecutive hours... in excess of a normal work period,” which is defined as up to 12 hours consecutive hours “consistent with a predetermined work shift.” In addition, the protection is conditioned on the nurse’s declining to work “because doing so may, in the nurse’s judgment, jeopardize patient safety.” Moreover, the emergency exemption is broadly phrased to include a period when replacement staff cannot report for the next shift and increased patient need resulting from unusual, unpredictable, or unforeseen circumstances including adverse weather.

Thus with varying degrees of success and rigor organized nurses have initiated a movement to confer on one occupational group a statutory right to refuse to work overtime, while reserving to themselves the prerogative to work overtime at premium rates if they so choose regardless of whether they are fatigued. Because the campaign and the legislation are explicitly founded on the health and safety consequences for non-workers of nurses’ overtime-induced fatigue, rather than setting a precedent for others, they hearken back to a confining nineteenth-century tradition lacking the kind of broad principle needed to apply the right to refuse to the vast majority of workers whose long overtime hours ruin only their own physical and mental health (or, in the worst case, the safety of their co-workers).

178 Wash. S.B. 6675, § 2(6).
180 "Governor Ventura Signs Ban on Mandatory Overtime," PR Newswire, Mar. 25, 2002 (Lexis).
181 Minn. S.B. 2463, § 3 (2002).
Part VI

Foreign Exemplars of "Flexibility"

We haven’t seen labour legislation in the province of Ontario talk about 60 hours since the master and servant legislation of 1884 to 1944.... I’ve got to tell you, I’m surprised you didn’t name Bill 147 the Master and Servant Act, because that’s the kind of world it creates.¹

The European Union:
Unemployment, Shorter Hours, and
More Overtime Work

Given the varied demands to schedule production efficiently in an uncertain world, there is now a growing recognition among Europeans that legal statutes may provide very blunt and inflexible measures...¹

There is no common concept of the notion of overtime. In recent years, particularly with the increased use of flexible working time arrangements, the notion of overtime has become blurred.²

Because weekly working hours have been reduced in many European countries in the wake of the huge rise in unemployment since the 1970s,³ European workers are entitled to much longer annual paid vacations,⁴ and the United States is the only country in which the downward trend in average annual hours worked was reversed in the early 1980s, U.S. workers at the turn of the millennium were working the greatest number of hours annually in the advanced industrial world—some 200 to 600 hours more than their counterparts in Western Europe and even 130 more than Japanese workers, whose annual hours fell by almost 200 during the 1990s. Thus while workers in the United States worked on average 1,979 hours in 2000, Norwegians worked only 1,376 hours.⁵ Although a real gap remains even if the focus is limited to full-time workers, a significant portion of the difference is a statistical result of the large increase in the part-time em-

⁴Zeijen, “The Regulation of Individual Employment Relationships” tab. 6 at 50.
The Autocratically Flexible Workplace

ployment of women in Europe. Similarly, the trajectories of the regulation of overtime work in the United States and Europe, have not in recent years diverged quite so sharply as working-time curves.

Employers everywhere prize the multidimensional flexibility that overtime work permits, but workers in Europe have been somewhat more successful than their counterparts in the United States—which is "unusual" for its "willingness...to allow employers complete latitude in lengthening the workweek"—in preventing employers from imposing it. For most of the twentieth century, legislation and collective bargaining agreements in many European countries capped the number of hours and/or overtime hours that an individual employee was permitted to work during a given period (day, week, month, or year). By the end of World War I, Czechoslovakia, Finland, Greece, Great Britain, Norway, and Switzerland had instituted such statutory overtime caps, while Czechoslovakia, Finland, the Netherlands, Poland, and Switzerland required employers to secure permits from state authorities. The Netherlands, for example, began requiring employers in 1919 to obtain the labor inspectorate's permission to work overtime. This policy was strengthened after World War II when rigid controls became part of a centralized wage policy; the labor inspectorate issued permits only for short periods and "only if there is a convincing reason why overtime cannot be avoided."

Nevertheless, although an International Labour Office (ILO) report in the 1970s asserted that annual statutory limits on overtime work in Finland, Norway, Spain, and Switzerland ranging from 60 to 220 hours made "extensive and continuous recourse to [overtime] impossible," the upper range corresponded

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to more than four hours of overtime per week all year round. And even these generous limits were and are often exceeded. In Finland, for example, it was reported in 2001 that 10 percent of employers, not satisfied with the annual ceiling of 250 hours (which local negotiations can raise to 330), unlawfully worked employees additional hours.12

Some European national laws fix both annual and daily, weekly, or monthly overtime limits: “In this way, individual workers are not able to work overtime on a regular basis.” A few set only an annual limit, thus granting employers “maximum flexibility in the performance of overtime....”13 One such country is Sweden, under whose 1982 Working Time Law firms are permitted to employ workers up to 50 hours of overtime per month with an annual ceiling of 200 hours. In addition to a separate provision for two days of emergency or disaster overtime, Swedish law permits labor unions to agree to extra overtime and, in the absence of such agreement, the state Labor Market Administration can authorize 150 hours annually of extra overtime.14 In contrast, Austria’s Working Time Law permits, in cases of “increased need for labor,” five hours of overtime per week in addition to 60 overtime hours within a calendar year, resulting in an annual total of 320 hours.15 In some countries, such as Portugal—where overtime work is limited to 200 hours per year—overtime is paid on a progressive scale with the penalty rate increasing with the number of daily overtime hours.16 The former socialist countries, including the Soviet Union and the German Democratic Republic, created the strictest regimes, which prohibited economic overtime and permitted only emergency overtime.17

In contrast, in the United Kingdom, which, until recently, had been the only country in Western Europe (other than Denmark) with “no legislative hindrances


to overtime for men,” and has also witnessed a decline in the strength of its
unions, overtime work had, according to an ILO publication, become so “popular
with the workers” that employers feared that if they failed to offer enough, many
of their workers would move to firms that did. Consequently, “many firms in
their advertisements for workers, emphasise the weekly earnings secured with
customary overtime....”18 The founding conference of the Independent Labour
Party in 1893 may have formulated the abolition of overtime as the very first
element of its party program,19 but at the end of the 1960s, the Royal Commission
on Trade Unions and Employers’ Associations, seeking an explanation as to why
male workers were still working 46-47 hour weeks when the standard collect­
vatively-bargained workweek had fallen to 40, concluded that “overtime is widely
used in Britain to give adult males levels of pay which they and those who ar
range the overtime regard as acceptable.”20

To be sure, the alleged popularity of overtime in Britain is largely a function
of low wages—with the highest incidence of overtime found in the lowest-paid
industries and occupation21—as overtime pay remains “a major factor in family
budgets,” just as real-wage losses in the United States since the 1970s have been
found to explain the lack of pressure by workers to reduce the workweek.22 These
interrelationships replicate the causality that Marx, building on the factory in­
spectors’ reports from the 1840s to the 1860s, uncovered: “the low price of labor
during the so-called normal working time forces the better-paid overtime on the
worker if he at all wants to wangle a sufficient wage.” Britain’s failure to

18Evans, Hours of Work in Industrialised Countries at 106, 100. For an ethnography
of British industrial overtimers, see Ferdynand Zweig, The Worker in an Affluent Society:
Family Life and Industry 70-76 (1961). See also “The Canker of Overtime,” (London) Times,
Oct. 26, 1954, at 9, col. 6-7; Alastair Evans and Stephen Palmer, Negotiating
Management Today, Apr. 1966, at 99-103, 168, asserted that workers on the shop
floor were largely responsible for setting off a uncontrollable process resulting in a great
volume of overtime in Britain. By virtue of their control over the pace of their work they
were able to slow down work during regular hours, thus necessitating overtime; because
they were so unproductive, their low wages also required them to work overtime. He also
claimed that workplace culture was more attractive to many workers than being at home.

19Independent Labour Party, Report of the First General Conference 10 (1893); David

20Royal Commission on Trade Unions and Employers’ Associations, 1965-1968,

21E. G. Whybrow, Overtime Working in Britain: A Study of Its Origins, Functions and
Methods of Control 60-63 (Royal Commission on Trade Unions and Employers’
Associations, Research Papers 9, 1968); H. Clegg, The System of Industrial Relations in
Great Britain 183-84 (1973 [1972]).

22Jill Rubery, Simon Deakin, and Sara Horrel, “United Kingdom,” in Times Are
Changing: Working Time in 14 Industrialised Countries 261-87 at 280 (Gerhard Bosch
et al. ed., 1994) (quote); Gerhard Bosch, Peter Dawkins, and François Michon, “Working
Time in 14 Industrialised Countries: An Overview,” in Times Are Changing 1-45 at 38.
The European Union

397

legislate on behalf of adult men (and enactment of the FLSA's free-market penalty/premium-overtime provision as opposed to a maximum-hours law) undermined the applicability to Britain and the United States of Marx's conclusion that state limitation of the working day "put an end to such fun." Judge-made law provided British workers with very meager protection against overtime,24 but one case in the early 1990s—which commentators view as creating "the new contractual approach"25—did find that a hospital was under a duty not to injure a resident physician's health by working him excessively long hours beyond his normal workweek.26

Because the Danish model of labor relations is centered on collective agreements between "the social partners" and not on legislation, Denmark, too, has lacked state regulation of overtime work.27 Most collective agreements deal with the question and the vast majority of workers are union members and/or are covered by collective agreement (but a greater proportion of those who are not work overtime); unless a contract specifies otherwise, employees are obligated to work overtime if the employer requests it. If an agreement fails to specify limitations, employees are obligated to work according to the employer's directions, but case law holds employers in breach if they systematically use overtime; as a result, employers are not permitted to base their production plans on overtime. Provisions in many agreements entitling workers to 24 to 48 hours' notice merely entitle them to a bonus if employers fail to furnish proper notice. The overtime premium ranges from 50 to 100 percent, but many employers fail to pay anything

24Rojot and Blanpain "General Report" at 47.
The Autocratically Flexible Workplace

at all for overtime work. In April 1981 the Danish government introduced a bill in parliament to limit overtime to 100 annual hours per worker, but, despite a provision for modification by collective bargaining agreements, the employers association thwarted enactment.

The adoption by the Council of the European Union of its Working Time Directive on November 23, 1993 (with which member states were given three years to comply, although the United Kingdom, which opposed and challenged the Directive, did not issue implementing regulations until 1998) modified the legal regulation of overtime throughout the EU, but especially in Britain, where the average workweek was longest, the incidence of overtime work highest, and the Conservative government’s opposition to state intervention most intense. (Unlike a regulation, which is “binding in its entirety and directly applicable in all Member States,” a directive, under the Treaty Establishing the European Economic Community, “shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”)

The timidity of the EU’s initial foray into supra-national regulation of working time was visible from the outset. In the Council’s Recommendation to the member states in 1975 that they attain the principle of the 40-hour week by the end of 1978 by legislation or labor-management collective agreements, the “normal working week” was defined as “the period to which provisions for overtime do not apply.” The EU’s interest in the “Reduction and Reorganization of Working Time” was and remains in part a response to the massive and unprecedented increase in unemployment that has overwhelmed the individual national governments since the 1970s. As the Commission of the European Communities declared in a memorandum on working time at the end of 1982: “Unemployment is the most pervasive problem currently facing the economies of the Commu-
In 1970 the overall unemployment rate in the Community was 2% and it had risen to 6.2% by 1980. Now, towards the end of 1982, it is already over 10%, meaning that more than 11 million people are unemployed. The Commission then went on to draw the connection to shorter hours:

In the light of this bleak medium-term outlook, there has been increasing interest (which is shared by the Commission) in the possibilities for offering employment to a larger number of people which may be created by various ways of reorganising working time, including in particular reducing the working time of individual employees. Apart from the hardships which unemployment brings to those out of work, the risk it poses to the social fabric and its democratic institutions is real. Among other policy responses to the unemployment problem, the Commission believes that there is an urgent need for a new approach to the question of reducing and reorganising working time which recognises the positive contribution it can make.

Shortly thereafter a commentary in a Commission periodical, calling the level of unemployment “completely untenable in the long run,” reinforced the message: “From what we know at present...there is no alternative to a radical reduction in working time.”

Three years earlier, in its Resolution of December 18, 1979, the Council of the European Communities, predicting an exacerbation of employment problems in the decade ahead, had declared that “measures to adapt working time might be integrated...as ancillary measures in support of policies to improve the employment situation.” Of especial relevance here were the guidelines concerning systematic overtime that the Council included in its Resolution. It considered that “limits should be applied to the systematic use of overtime, due account being taken of the necessary flexibility in the production process of the undertaking and of the situation on the labour market.” In light of the member states’ different situations, it recommended, alluding presumably to national labor market structures that enabled some low-wage workers to subsist only by virtue of working significant amounts of overtime, “gradual implementation of this principle...taking into account the problems which could arise...for low-paid workers.” Finally, it suggested the partial adoption of the principle of compensatory time-off as “one appropriate method of achieving such limitation” of systematic overtime.

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34 Commission of the European Communities, Memorandum on the Reduction and Reorganisation of Working Time 1 (COM (82) 809 final, 1982).


In a similar vein, in 1983 the Commission submitted to the Council a draft recommendation declaring that the reduction and reorganization of working time could continue to contribute to improved living and working conditions, especially for people performing burdensome or hazardous work, but it could do so fully only if "accompanied by an appropriate limitation of systematic overtime." Moreover, the draft emphasized that the "recognized need for flexibility in certain types of production processes...is no justification for systematic overtime." However, the limits of the Commission's own interventionism were visible in its concession that: "Consideration should be given to measures to protect the interests of the low paid for whom systematic paid overtime has in fact become part of normal income."

Because Prime Minister Margaret Thatcher's Conservative Government deemed the draft recommendation incompatible with its deregulatory program, the United Kingdom vetoed it in 1984, thereby delaying the issuance of a Directive by a decade. During that period there was considerable disagreement among the European Parliament, the Commission, and the Council and further propitiation of the United Kingdom. For example, in spite of all the aforementioned discussion of the need to limit systematic overtime, the Commission ultimately concluded that the subject was "best dealt with by the two sides of industry and by national provisions."

The Single European Act of 1986 created a turning point in the formulation of European Community policy on working time. It added Article 118a to the Treaty Establishing the European Economic Community, which provided that "Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers," and directed the Council to achieve this objective "by means of directives, minimum requirements for gradual implementation" under a qualified majority procedure. This process made it "possible to resurrect" the earlier movement for working time regulation under the rubric of health and safety issues, thus circumventing the requirement of unanimity in the Council and the United King-

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39 Working Time: The Law and Practice at 3.


42 Single European Act, Art. 21, in Official Journal of the European Communities No L 169/1-29 at 9 (June 29, 1987). Under the qualified majority procedure the votes of the member states with the largest populations are weighted more heavily.

dom's veto.\footnote{Catherine Barnard, \textit{EC Employment Law} 379 (2d ed. 2000).}

The adoption in 1989 of a Community Charter of the Fundamental Social Rights of Workers marked a further step in the direction of supra-national regulation of working hours. The Commission's first draft of May 30, 1989 declared that the "development of a single European labour market must lead to an improvement in the living and working conditions of workers in the European Community, this process resulting from an approximation of these conditions... This approximation relates first and foremost to the organization and flexibility of working time, particularly by establishing a maximum duration of working time per week."\footnote{Preliminary Draft Community Charter of Fundamental Social Rights (presented by the Commission), COM(89) 248 final, at 8 (May 30, 1989).} The Commission's next draft of October 2, 1989 added that this process would also concern "systematic overtime."\footnote{Community Charter of Fundamental Social Rights - Draft - (Presented by the Commission), COM(89) 471 final, at 10 (Oct. 2, 1989).} The Action Programme relating to the Charter that the Commission issued on November 29, 1989 reiterated that with regard to the maximum duration of work and systematic overtime it was "important that certain minimum requirements be laid down at Community level" in order to ensure that firms' competitive practices "not have an adverse effect on the wellbeing and health of workers."\footnote{Communication from the Commission Concerning Its Action Programme Relating to the Implementation of the Community Charter of Basic Social Rights for Workers, COM(89) 568 final, at 19, 18 (Nov. 29, 1989).} Nevertheless, the Community Charter of the Fundamental Social Rights of Workers that the heads of government of the European Community's member states making up the European Council adopted on December 9, 1989 omitted the reference to systematic overtime.\footnote{Community Charter of the Fundamental Social Rights of Workers, Title I, Art. 7, in \textit{Social Europe}, 1/90 at 46-50 at 48.} The European Parliament, which "deplore[d] the watering down of many points in the amended text," specifically declared that Article 118a "should constitute the natural legal basis for...the...reduction of working hours, in particular as regards maximum working hours...overtime."\footnote{Resolution on the Community Charter of Fundamental Social Rights, in \textit{Official Journal of the European Communities} No C 323/44-48 at 45, 47 (Dec. 27, 1989).}

Despite the fact that the Charter was not legally binding and thus constituted merely so-called soft law, its emphasis on the improvement of living and working conditions "enabled the Commission to conceive a directive on working time, not as a job creation measure but a health and safety matter," thus bringing it under Article 118a and the qualified majority procedure.\footnote{Barnard, \textit{EC Employment Law} at 403.}
The Proposal for a Council Directive concerning Certain Aspects of the Organisation of Working Time, submitted by the Commission on August 3, 1990, lacked a general maximum hours provision; instead, it merely stated that the "performance of overtime must not interfere with the minimum rest periods" prescribed elsewhere in the Proposal, which amounted to 11 consecutive hours per 24 hours and one day of rest on average every seven-day period calculated over a reference period of a maximum of 14 days. The Council then requested from the Economic and Social Committee (which is composed of "representatives of the various categories of economic and social activity, in particular, representatives of producers, farmers, carriers, workers, dealers, craftsmen, professional occupations and representatives of the general public" appointed by the Council) an Opinion of the Proposal, which the Committee adopted by a 91 to 42 majority on Dec. 13, 1990. Its comment on the overtime provision, which the Committee characterized as permitting overtime, provided that it did not encroach on the minimum rest periods, was simply: "This sweeping overtime provision needs to be reviewed." On February 20, 1991, the largely consultative European Parliament amended the Proposal by adding this recital to the preamble: "Whereas it is recognized that many Community workers are driven to work long hours, mainly in order to achieve a decent level of income, even though the nature and duration of such extra work may have an impact upon their health and safety and that of their fellow workers." However, the Council incorporated no such recognition that low wages drove workers' acquiescence in overtime work in the final Directive. The European Parliament also amended the overtime provision by adding that the performance of overtime "must not lead to the working time exceeding the average 48 hours per week calculated over a reference period of not more than 14 days." Although the Council did adopt the average 48-hour workweek in the final Directive, the reference period was much longer, thus permitting employers to retain extensive control over the organization of working hours.

Based on almost 15 years of preliminary drafts, the Directive, as a result of

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52Treaty Establishing the European Economic Community, Art. 193.
54Official Journal of the European Communities No C 72/87.
56On the legislative history, see James Mackley, "The Making of the Working Time
efforts by the other member states to meet the demands of the United Kingdom, which opposed it, became, in the words of a semi-official EU document, "a rather tortuous and difficult instrument, not uniformly progressive and containing a lot of exceptions and possibilities for derogations."57 The Directive was "emasculated" and turned "minimalist" in large part in order to accommodate the U.K. government's strenuous objections to what it viewed as an effort to limit overtime and share work to reduce unemployment—the number of unemployed in the EU peaked at more than 18 million in 199458—masquerading as a safety and health measure (in order to avoid the U.K.'s veto).59 Indeed, the U.K.'s arguments to that effect in its unsuccessful application to the European Court of Justice requesting that the Directive be annulled either in its entirety or with respect to its maximum hours provision60 were reminiscent of those advanced by the Dauphin County Court in invalidating the Pennsylvania 44-hour law 60 years earlier.61

At the time the Directive was adopted, the various member states' overtime regulatory regimes varied "enormously."62 According to the Commission, of the member states with relevant legislation in 1992, five imposed annual limits on the number of overtime hours: Greece (150), Spain (80), France (130), Ireland (240), and Portugal (160). In the remaining countries, the permissible limits on overtime hours were set at 65 hours per three months in Belgium; two hours a day on up to 30 days in Germany; two hours a day in Luxembourg; and between 30 minutes and 3.5 hours per day in the Netherlands.63 The Directive, however, "does not try to reconcile" these varying regimes, "but simply requires overtime to be

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59Working Time: The Law and Practice at 1-12 (quotes at 8).

60United Kingdom v. Council of the European Union (C-84/94) [1997] IRLR 30.

61See above ch. 7. Although the conceptualization of the regulation of working hours as embraced by that of workplace health and safety is unexceptionable, the Council's litigation position denying that the Directive was directed at any other objectives seems disingenuous: "It is true that the incidence of reductions in working time on job creation was an idea which appeared in the seventies, as is apparent in particular from a resolution and a recommendation of the Council.... However, that hypothesis depended on the various economic factors being taken into account, an approach not involved in the Directive." United Kingdom v. Council of the European Union (C-84/94) [1997] IRLR at 37. The European Court of Justice rejected the politically scripted and empirically untenable positions of both litigants, ruling in favor of the Council on the grounds that the Directive pursued "various objectives"; consequently, "contrary to what the United Kingdom seems to suggest, the organisation of working time is not designed solely and exclusively as an instrument of employment policy." Id. at 47.

62Barnard, EU Employment Law at 410.

63Zeijen, "The Regulation of Individual Employment Relationships" table 4 at 41.
included in the calculation of the maximum forty-eight-hour week. Since the average workweek in most of the EU countries is considerably lower—in 1994, the year after the Directive was adopted, the average usual workweek of full-time employees in the EU was 40.3 hours, ranging from 38.2 in Belgium to 43.6 in the United Kingdom—the modest provision in the Directive raises, without resolving, "the question of how to reduce the dependency of certain sections of industry and services on systematic overtime."

The Directive's limited contribution to restraining employers' reliance on overtime work has been structurally reinforced by the EU's economic policy focus on enhancing firms' "flexibility" and "competitiveness." Even the Commission, which unsuccessfully urged the Council to deal with systematic overtime, emphasized in its 1989 Action Programme that the "flexibility...of working time enables firms to undertake the internal organization of work and production, which is an important factor in the adaptation of firms to the terms of competition and the improvement of their competitiveness." An increase in plant operating hours and in the proportion of shift-workers has been a goal and consequence of the proliferation of "flexibilization arrangements." In other words, as the Organisation for Economic Co-operation and Development observed, "[f]lexibility is understood from the point of view of the firm, in the sense of working arrangements designed to meet the needs of the business, which allow hours to vary in ways which are not possible through the use of fixed-hours working" and entails "unsocial hours' working" for workers.

To be sure, employer-oriented flexibility is not without its legal limits. Though not decided under the Working Time Directive, the European Court of Justice, in a minor victory for workers, interpreted the Council Directive on an Employer's Obligation to Inform Employees of the Conditions Applicable to the Contract or Employment Relationship, which states that "[a]n employer shall be obliged to notify an employee...of the essential aspects of the contract or employment relationship," to include the obligation to inform workers of the employ-
er’s overtime working arrangements, despite the fact that the minimum requirements prescribed by the Directive failed to mention overtime, but only “the length of the employee’s normal working day or week.”

The reorientation of EU policy toward flexibility and competitiveness had been prefigured by a similar trend in the labor law of several member states. An outstanding example is Belgium, which amended its basic labor standards law in 1985 and 1987, enacting laws “aimed at strengthening Belgium’s competitiveness” by allowing “deviation from protective standards” that limited daily and weekly working hours. This transition was made possible by labor unions’ having “adopted a more realistic approach to the problems raised by growing international competition and the need to have a more flexible environment for business.” As a result, collective bargaining agreements are permitted, for example, to prescribe 12-hour working days, provided that the normal average working time is observed within a reference period extending from three months to a year.

Article 6 of the EU Directive dealing with “maximum weekly working time” provides:

Member states shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers: 1. the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry; 2. the average working time for each seven-

Inform Employees of the Conditions Applicable to the Contract or Employment Relationship, art. 2(1), in Official Journal of the European Communities L 288/32-35 at 33 (Oct. 18, 1991). The Directive requires that the mandatory information be given to the employee in writing no later than two months after employment begins. Id. art. 3.


Loi du 16 mars 1971 sur le travail.


Loi du 17 mars 1987 relative à l’introduction de nouveaux régimes de travail dans les entreprises.


day period, including overtime, does not exceed 48 hours.\textsuperscript{79}

To be sure, the title of Article 6 is "rather misleading" because it does not limit any specific workweek to 48 hours, but merely the average workweek.\textsuperscript{80} Although the 48-hour maximum still authorizes considerable overtime since the statutory workweek in no member state exceeds 48 hours and average actual weekly hours have been reduced to about 40, codifying the principle that overtime is legally limitable is, nevertheless, important.\textsuperscript{81} However, the EU Directive is severely flawed by its partial exclusion of transport workers\textsuperscript{82} and above all by the enormous leeway it affords member states and employers to subvert the hours cap. In particular, it authorizes governments to establish a so-called reference period of up to four months during which the average of 48-hour weeks is formed,\textsuperscript{83} and to derogate from Article 6 altogether when "the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of...managing executives or other persons with autonomous decision-taking powers...."\textsuperscript{84} This four-month reference period grants employers much greater flexibility than even the most capacious recent (unsuccessful) Republican congressional proposals in the United States, which have not even tried to extend the period beyond four weeks, despite the fact that, unlike the European statutes, the FLSA does not impose a maximum


\textsuperscript{80}\textit{Working Time: The Law and Practice} at 81.


workweek, but merely requires overtime premiums.\textsuperscript{85} When the United Kingdom, where a “long hours culture” has forged by far the longest workweek in the EU—in 1994 the U.K. was the only EU country in which the modal range of working time for male employees in industry and services exceeded 40 hours, in Britain’s case amounting to 50 hours and over\textsuperscript{86}—finally promulgated implementing regulations in 1998, it made full use of this provision, granting employers a 17-week reference period within which to meet the 48-hour weekly average.\textsuperscript{87}

Even greater laxity has been introduced by the so-called opt-out provision—the scope of which had been insisted on by the U.K. government while the Directive was being negotiated and of which only the United Kingdom has made use—which permits member states not to apply Article 6 for seven years (until 2003), when the Council must reexamine the issue. During this period, member states must, however, “ensure that: no employer requires a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference period [of four months], unless he has first obtained the worker’s agreement to perform such work, [and] no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work...”\textsuperscript{88}

Such language prompted the British Trades Union Congress (TUC) to conclude that “bad employers will try and intimidate their staff.”\textsuperscript{89} The Working Time Regulations issued by the U.K. Labour Government in 1998 took full advantage of this opt-out provision, providing that the hours limitation “shall not apply in relation to a worker who has agreed with his employer in writing that it should not apply in his case”; the employer was then required to maintain records for each such worker including the terms of the opt-out and the number of hours worked.\textsuperscript{90} However, the 1999 amendment relieved employers of the obligation to maintain these detailed informational records.\textsuperscript{91}
The TUC charged that the other EU member states had been willing to grant this opt-out concession to the U.K.’s Conservative Government only on the condition that employers would be subject to “more onerous record keeping requirements.” The lifting of these requirements, according to the TUC, will make it “difficult if not impossible to police those workplaces where workers have ‘opted-out’ from the 48 hour week.” Moreover, soon after the regulations went into effect, reports began surfacing of workers’ being pressured or coerced into opting out of their right to be protected under the law.

The Labour Government’s 1999 amendments to the regulations also made the derogation provision considerably more favorable to employers by adding this language: “Where part of the working time of a worker is measured or predetermined or cannot be determined by the worker himself but the specific characteristics of the activity are such that, without being required to do so by the employer, the worker may also do the work the duration of which is not measured or predetermined or can be determined by the worker himself,” the maximum workweek provision “shall apply only to so much of his work as is measured or predetermined or cannot be determined by the worker himself.” Again, as the TUC has pointed out, this change departs from the original intent of applying the derogation only to “genuinely ‘autonomous’ workers” who “genuinely control their own working time.” The amendment “will have the effect of removing virtually all salaried workers doing unpaid voluntary overtime from the scope of the Regulations.” The TUC fears such an outcome because the phrase “without being required to do so by the employer” could be interpreted to cover situations in which employers assign a task and specify a deadline and workers feel compelled to work beyond contractual hours to get the work done. The amendment, as TUC Deputy General Secretary Brendan Barber observed, ignores the fact that: “Many white collar workers are trapped in a long hours culture where no-one tells them to work specific hours but the pressure of work, job insecurity and peer groups pressure leaves them no choice.” The anticipated consequence is that with such “voluntary overtime” qualifying as “unmeasured” and outside the scope of the regulations and thus not counting as working time toward the 48-

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hour limit, when the individual opt-out provision expires in 2003, "salaried workers in the UK will be the only people in the whole EU who can lawfully work more than an average of 48 hours a week." 99

The United Kingdom remains an outlier, but an incipient trend in the application of flexible working time systems in other countries has been "the elimination of recorded overtime, even though employees work longer hours than are stipulated in their contracts." 100 Several other EU member states have also done little to inhibit the imposition of overtime work. 101 Indeed, in Austria, from 1987 to 1997, the proportion of male employees working overtime rose from 23 percent to 37 percent, while the share among women almost doubled, increasing from 12 percent to 23 percent. 102

The German Working Time Law, which was enacted in 1994, states in principle that daily working time may not exceed eight hours, but it permits 10-hour days (and thus 60-hour weeks since Sunday employment is permitted only under restricted circumstances), provided that the average workday does not exceed eight hours over a period of six calendar months or 24 weeks 103—a proviso that does not even meet the Working Time Directive’s 4-month reference period rule. 104 This new regime prompted the leading labor law treatise to observe that now "practically all forms of working time flexibilization are possible." 105

The Netherlands’ Working Time Law of 1996 provides for a maximum work shift of nine hours and a maximum workweek of 45 hours, so long as these hours do not exceed an average of 40 hours per week during a period of 13 weeks. 106 Moreover, the Dutch law "explicitly allows for negotiations by which the standard regulations can be avoided to a large extent." 107 Under this negotiated provision, it is lawful for those working under a collective agreement to work 10-hour shifts averaging 50 hours per week over four weeks and 45 hours over 13

99 TUC, Six Days a Week.
101 For a list of legislated limits on maximum weekly hours in- and excluding overtime, see Employment Outlook, July 1998, tab. 5.10 at 168.
weeks. Pursuant to the standard provision, overtime resulting from "an unforeseen modification of circumstances, incidentally and not periodically" and extending the work shift to 11 hours and the workweek to 54 hours is lawful, provided that these hours do not exceed an average of 45 hours per week for a period of 13 weeks. Under the counterpart negotiated provision, it is lawful to extend work shifts to 12 hours and workweeks to 60 hours, so long as the average workweek does not exceed 48 hours over a 13-week period. Five years after the law went into effect it was "clear that the new license for 'flexibility' is being perceived by employees as, first and foremost, a boon for employers."

In Spain, where the 1995 Workers' Statute Act sets the maximum normal workweek at 40 hours averaged over an entire year, overtime (horas extraordinarias), performance of which "shall be voluntary" unless it is agreed on in a collective or individual contract, is statutorily capped at 80 hours per year. Excluded from this annual limit is work performed to prevent or repair unforeseen damages or other extraordinary and emergency damages.

In November 1998, the Italian Parliament updated a 1923 law by enacting a government decree-law restricting overtime work in the industrial sector. Under the new provision, when weekly working time exceeds 45 hours—the statutory norm became 40 hours in 1997—firms are obligated to inform the local office of the Ministry of Labour within 24 hours of beginning the work; this obligation is designed to discourage overtime work, which is capped at 80 hours per quarter and 250 hours per year. Such overtime work is permissible only: for exceptional technical-production necessities which it is impossible to meet by hiring other workers; in cases of force majeure or dangers or damage to people or production; for trade fairs or shows associated with production activity; or in all cases provided for by national collective bargaining agreements. In the absence of a collective bargaining agreement regulating overtime, the law deems overtime work to be voluntary and employers are not empowered to require employees to perform such work without their agreement. Outside of industry, overtime

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108Arbeidstijdenwet, art. 5:7.2-.3.
109Arbeidstijdenwet, art. 5:9.1.
110Arbeidstijdenwet, art. 5:9.2-.3. Under both overtime provisions, the limits for night-work shifts are lower.
112Ley del Estatuto de los Trabajadores of March 24, 1995, § 34.1.
113Ley del Estatuto de los Trabajadores § 35.4. The clause concerning individual contracts could render the voluntariness moot.
114Ley del Estatuto de los Trabajadores § 35.2-.3.
The European Union

(beyond eight hours daily and 40 hours weekly) is statutorily limited to two hours per day and 12 hours per week, but its regulation in collective bargaining agreements varies widely.\footnote{116} Whereas the law made the performance of overtime work optional for the individual worker, union collective agreements have tended to make it compulsory for workers; the annual volume of such collectively agreed-on overtime has ranged between 100 and 280 hours in recent years.\footnote{117}

Arguably the most extensive revamping of national hours regulation in recent years has taken place in France, where the so-called loi Aubry I of 1998 and loi Aubry II of 2000\footnote{118} have phased in the 35-hour week (beginning in 2000 for employers employing more than 20 workers and in 2002 for smaller employers) with a complex set of supporting rules capping overtime at 130 hours per year. The new regime, which was initially justified as a tool for combatting unemployment, does not mean that 35 hours will become the universal workweek, but that that limit will define the threshold for calculating overtime.\footnote{119} However, the limit applies only to overtime hours performed at the employer’s request; if a worker ‘voluntarily’ opts to work overtime hours, they do not count toward the limit. Furthermore, an employer is entitled to require its workers to perform overtime up to the statutory 130-hour limit; workers have no right to refuse to perform overtime within the limit and any such refusal may not only trigger dismissal for misconduct, but also deprive the worker of the benefit of a notice period or a severance payment. Employers are also free to require workers to work up to whatever limit is established by collective agreements, many of which set the cap far below 130 hours.\footnote{120} A few months after the law went into effect, one-fourth of workers reported working more than 35 hours per week, most stating that the excess hours were unpaid.\footnote{121}


\footnote{117}Treu and Pero, “Italy” at 458-60, tab. 2 at 490.

\footnote{118}Loi no 98-461 du 13 juin 1998 d’orientation et d’incitation relative à la réduction du temps de travail; Loi no 2000-37 du 19 janvier 2000 relative à la réduction négociée du temps de travail. The laws are named for the Minister of Employment and Solidarity Martine Aubry.


\footnote{120}Antoine Vivant, “France,” in EU & International Employment Law at 29-32.

\footnote{121}“Most Workers Feel 35-Hour Week Has Improved Quality of Life,” European Industrial Relations Rev., No. 329:7 (June 2000).
This laxness in the EU member states' regulation of overtime work has not escaped the attention of the Commission of the European Communities. In its report on the state of implementation of the Working Time Directive, issued at the end of 2000, it observed that in some countries, "due to the structure of the national legislation on the limits on working time, which differentiates between regular working time and overtime without setting an absolute limit over a given reference period, there is a risk that the average weekly working time of 48 hours is not always respected. This risk is particularly acute in situations where a major proportion of the overtime allowed is worked during a short reference period."122

This laxness in enforcing even the generous hours standard set by the EU makes it implausible that the member states will zealously implement the Commission's vague, but potentially invasive aspirational guideline concerning the applicability of the Directive to workers working for two or more employers concurrently. To be sure, the Commission must acknowledge that the Directive does not "expressly" deal with the question of whether its hours limits "are absolute limits in the sense that the hours worked for two or more employers should be added together...or whether the limits are set for each employment relationship separately." Nevertheless, in light of "the need to ensure that the health and safety objective of the Working Time Directive is given full effect, the Commission considers that Member States' legislation should provide for appropriate measures in order to ensure that the limits on average weekly working time...are, as far as possible, respected in the case of workers working concurrently" for two or more employers.123 Against the background of their "flexibility"-driven agendas, it seems unlikely that European national governments are in fact willing, for the sake of the workers' own health and safety (as well as in order to make more jobs accessible to the millions of unemployed), to take the radical step of prohibiting low-wage workers from working at more than one full-time job to make ends meet.124


124In response to the growth of industrialization associated with World War II, India enacted a new Factories Act after independence under which: "No adult worker shall be required or allowed to work in any factory on any day on which he has already been working in any other factory, save in such circumstances as may be prescribed." Factories Act, 1948 (Act No. 63 of 1948), § 60. Curiously, one Indian labor law scholar glossing this provision asserted without any supporting evidence: "Double employment of labour is prohibited in most of the advanced countries, as it adversely affects the health and well-being of the workers." Suresh Srivastava, Labour Law in Factories, Mines, Plantations, Transport, Shops and Other Industrial Establishments 128 (1992).
Ontario: A Mirror for the Future of Hours Law in the United States?

This bill is so damaging and your arguments are so stupid that it boggles the mind that you’ve been given the power to make this the law without anybody having a say. Who in their right mind is going to say to their boss, “Yes, over the next four weeks I want to work a little bit of overtime, but let’s make sure we use that new law that guarantees I don’t get paid overtime rates for it. What do you say we do that?”

I am surprised at the number of people who take for granted that they have a job. I am saying this in regards to...Toyota employees upset about having to work mandatory overtime.

Do these people not understand that if you don’t get the product out when it is needed by consumers, that they will look elsewhere? ...

When these people have no job, maybe they will think that the overtime wasn’t such a big deal after all....

It could be worse; they could be working in some other country for next to nothing, working seven days at [sic] week for 12 or 14 hours.

A sense of the kind of working-hours regime that employers in the United States have had in mind in urging Congress to amend the FLSA to raise the premium-overtime threshold from 40 hours per week to 80 hours every two weeks or 160 hours every four weeks may be gleaned from the amendments to the Employment Standards Act (ESA) that the ruling Progressive-Conservatives pushed through Ontario’s legislature in 2000. It is suggestive of the role that the United States has come to play as the tempting bottom of advanced capitalist labor stand-

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3See above ch. 1 and below ch. 18.
dards that Ontario employers have “indicated that they could lose business to the United States...if they were hampered with more restrictions on their use of overtime.” They also used the threat of U.S. competition as grounds for requesting special permits for additional overtime hours to meet increased demand—that is, until the amended statute did away with the need to obtain government permission to work overtime altogether.

Ironically, the Tories were purportedly inspired to bestow on employers the privilege of overtime-averaging over several weeks—which would enhance firms’ flexibility and lower their wage costs, while reducing workers’ freedom and lowering their incomes—by congressional Republicans’ failed efforts in the United States. However, the root notion of enhancing employers’ flexibility in utilizing their human and capital resources by modifying protective hours legislation was in no way devised by the Republican Party or U.S. firms, and, as already discussed, in fact animated reform discussions in the European Union beginning in the late 1970s. Indeed, legislators and administrators in Ontario themselves had been acutely aware of the need to propitiate employers by offering them exemptions from the first general maximum hours law enacted in 1944, just as their counterparts in Pennsylvania had been in 1937.

The recent course of overtime and maximum hours regulation in Ontario is especially interesting because it is the sole Canadian jurisdiction to combine a maximum hours provision with a right to refuse to perform overtime work. As a result, it sheds important light on the difficulties inherent in crafting and administering maximum hours regulation that confers real protection on workers without antagonizing employers sufficiently to provoke them into exercising their power to neutralize the law. By the same token, the fact that a significantly higher proportion of Ontario’s workers are covered by collective bargaining agreements, a much larger proportion of which afford workers some rights to re-

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6 See above ch. 16.

7 See above ch. 7.


9 Although Ontario recorded the second lowest rate (27.9 percent) of employees covered by collective bargaining agreements of all Canadian provinces in 2001, the rate nevertheless exceeded that of the state (New York) with the highest rate of employees represented by unions (27.7 percent) in 2001 in the United States, where the aggregate national rate was only 14.8 percent compared to 32.2 percent for Canada as a whole.
fuse to work overtime than in the United States,¹⁰ means that a weakening of the U.S. hours law might well produce more detrimental consequences for U.S. workers who are protected only by the financial disincentive that FLSA’s overtime provision exerts on employers. Finally, because Ontario accounts for about 40 percent of all employees in Canada,¹¹ a country in which labor law is highly decentralized and national labor law plays a minor role, Ontario’s labor law transcends the provincial.¹²

II

Employers in Ontario in search of greater “flexibility” at the end of the twentieth century faced greater statutory obstacles than their U.S. counterparts because, since World War II, the province had had on the books a law resembling a maximum-hours regime. Enacted under a newly elected minority Conservative government (facing the social-democratic Co-operative Commonwealth Federation as the official opposition party)¹³ in 1944—until then the Factories Act of

¹⁰ In 1984, 49.6 percent of collective bargaining agreements in Ontario contained some provision authorizing workers to refuse to work overtime; more than half the workforce was covered by union agreements. Working Times: The Report of the Ontario Task Force on Hours of Work and Overtime, tab. 9.1 at 73, 142. In the late 1990s in Canada as a whole, only 8.4 percent of workers covered by major collective bargaining agreements had an unconditional right to refuse overtime, while 23.6 percent had a conditional right, triggered, for example, by having worked a certain amount of overtime. Canadian Labour Congress, “Creating More and Better Jobs Through Reduction and Redistribution of Working Time” 10 (1998), on http://www.clc-ctc.ca/policy/jobs/create.html. For the U.S. data, see above ch. 2.

¹¹ In the first half of 2001, Ontario accounted for 5,036,000 of Canada’s 12,628,000 employees. Statistics Canada, Perspectives on Labour and Income: The Online Edition: Fact-Sheet on Unionization, tab. 1 at 4.


1884 had made it unlawful to employ children or women more than 10 hours a day or 60 hours a week— the Act Respecting Hours of Work and Vacations with Pay in Industrial Undertakings also applied to men, encompassed, in addition to industry, "all work in or about any business, trade, or occupation," \(^{15}\) and provided that "the working hours of an employee in any industrial undertaking shall not exceed eight in the day and forty-eight in the week." \(^{16}\) Since more than one-half of covered workers were working longer weekly hours at the time, the law "required a substantial reduction" in working hours and "a significant adjustment of practices in industry." \(^{17}\)

Although the statute clearly sought to achieve more than one objective, John Kinley, one of the principal researchers for the Ontario Task Force on Hours of Work and Overtime, was surely not wrong to characterize its maximum-hours component "as an instrument of employment policy" to deal with the consequences of a fall in demand after the war. \(^{18}\) Such regulation of working hours as a means of redistributing and increasing employment had been considered by the government of Ontario as early as 1935, after related federal legislation had been invalidated, but it never went beyond the stage of draft legislation. \(^{19}\) In 1925 the Supreme Court of Canada had held that any obligations that Canada had assumed by virtue of having ratified conventions adopted by the International Labour Organization of the League of Nations in 1919 dealing, inter alia, with hours of labor, were properly discharged by bringing the convention before the Lieutenant-Governor of each province for legislative action (except for matters concerning employees of the Dominion). \(^{20}\) Nevertheless, during the Great Depression, in a burst of "Tory radicalism," \(^{21}\) the Conservative Prime Minister Robert Bennett, a former corporation lawyer, after five years in office, in 1935 pushed through a New Deal-like program (which, however, did not even formally seek to promote unionization), including a maximum-hours law and other labor laws

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\(^{15}\)Ontario Regulation 8/44, § 1(a), in Ontario Gazette 77:736 (1944).


\(^{18}\)Kinley, *Evolution of Legislated Standards on Hours of Work on Overtime* at 12.

\(^{19}\)Kinley, *Evolution of Legislated Standards on Hours of Work and Overtime* at 12.

\(^{20}\)In re Legislative Jurisdiction over Hours of Labor, [1925] Canadian Supreme Court Reports 505.

of national scope, in order to deal with the "'crash and thunder of toppling capitalism."'22 The hours law created a maximum eight-hour day and 48-hour week subject to a series of expansive exceptions, including hours-averaging.23 Although Bennett had aimed at a reform to bring about "the end of laissez faire,"24 it was the Tory government that the electorate brought about the end of a few months later; the Liberals, who gained a lopsided parliamentary majority, referred the case to the Privy Council, which held the labor laws beyond the Parliament's constitutional powers.25

At the outset of the legislative debate on the 1944 bill, Charles Daley, the provincial Labour Minister, declared: "I think the purpose behind this bill is quite obvious. As regards hours of work, I think, when possible,—possibly not altogether during the war period—in these days of high speed activity in industry, eight hours a day is plenty for anybody to work." Indeed, Daley was "not prepared to disagree" with other legislators who thought a 48-hour week "too long" and 40 hours "plenty" and even mentioned the possibility of a 30-hour week.26 Fatigue and leisure, however, were not the only purposes the government had in mind in shortening the workday. Daley was also "thinking of the possibility at the termination of the war, that, no matter how optimistic we are, there is no doubt bound to be a surplus of labour over jobs for certain periods and I think it would be well to establish a forty-eight hour week. It certainly would not inter-

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26 Ontario Legislative Assembly, Hansard: Official Report of Debates 3:2269-70 (21st Legislature, 1st Sess. 1944). Doggedly and generously, Ted Tjaden, the coordinator for information services at the Bora Laskin Law Library of the University of Toronto, located, copied, and made available the relevant pages from a rare copy at the Ontario Legislative Library of the Hansard transcript of debates, which, fortunately, "officially began in Ontario in 1944. These first Hansard reports covered the first session of the 21st parliament and were prepared by shorthand writers and typewritten. Onion-skin carbon copies were made for distribution only to the Premier, each cabinet minister and for the party leaders. Previous to these official reports of debates there were some legislature records and parliamentary events reported through the newspapers. After complaints about the inadequacy of onion-skin copies, Hansard started distributing the records in copied form during 1945 and 1946." http://www.ontla.on.ca/hansard/about_hansard/index.htm.
fere with any hours of labour that are below that.” 27 Leslie Frost, the provincial Treasurer added that the intention underlying the bill was “that when the war is over we will spread the labour that there is as far as it will go [in] what I believe anybody will consider a reasonable way....”28

When the leader of the opposition, Edward Jolliffe, pointed out that the bill failed to protect workers whose weekly hours would be reduced because they exceeded 48 from a parallel reduction in weekly wages,29 Attorney General Leslie Blackwell admitted the possibility of such “disadvantageous results on the question of wages,” but tried to make a virtue of the “necessity of extreme flexibility” embedded in the bill by voicing the government’s intent that “re­adjustment takes place...in the usual way by collective bargaining.”30 Thus instead of incorporating a proposed clause that would have prohibited employers (for example, in the long-hour, low-wage textile industry) from reducing workers’ wages,31 the government chose to permit collective bargaining and the private labor market to work out the accommodation of the new maximum hours by promoting a maximum of regulatory elasticity for firms. Indeed, as Kinley noted, “the government’s reliance on flexibility in application of the hours standard became such a refrain in the debates that it prompted both the Opposition and the responsible Minister to express concern that employers might attempt to...circumvent...the intent of the legislation.” To the extent that “overzealous application” of the ceiling interfered with the statutory re-employment objectives, “sensitive administration” became the order of the day.32

Although the 1944 legislation was “motivated by a desire to share the work among the returning troops” demobilized after World War II, postwar “pros­perity...led to a reduction in the need for worksharing...so that the rationale for the legislation tended to focus on the safety net for the unprotected” with “little individual or collective bargaining power.”33 By the 1970s, the statute bestowed on

32 Kinley, Evolution of Legislated Standards on Hours of Work in Ontario at 13.
employers a total of five different means of avoiding the rigors of a maximum hours regime: workdays in excess of eight hours, 100-hour annual permits; special permits, industry permits, and hours averaging.

From the outset, the 1944 hours statute had provided for three kinds of exceptions to its ceilings. First, where the Industry and Labour Board was of the opinion that it was "not feasible to apply" the statutory hours limit, the Board was empowered to "authorize such daily and weekly limit of working hours in the industrial undertaking...or by any class or group of employees, as may be agreed upon in writing between organizations of...the employees and employers affected."34 Second, exceptions were permitted for specified emergencies: "The limit of hours of work...may be exceeded in case of accident, or in case of work urgently required to be done to machinery or plant, or in case of force majeure, but only so far as may be necessary to avoid serious interference with the ordinary working of the undertaking."35 Finally, the Board was also authorized to make regulations "prescribing industrial undertakings and branches thereof in which" the eight-hour day and 48-hour week "may be exceeded either by specified times or under specified conditions or generally, prescribing, in each case, the maximum of such excess...."36

The regulations issued in 1944 dealt with the various patterns of overtime. The first two applied to longer days. First, initiating what would become a venerable regulatory tradition that downplayed the importance of strictly enforcing the eight-hour day,37 one provision permitted employers that "by custom or practice" had established workweeks of no more than 48 hours but with workdays of more than eight hours to continue those daily hours until the Board ordered otherwise.38 Second, firms that reduced the number of hours in the workweek to comply with the law but wanted to establish a week of fewer than six days were permitted to

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34 An Act Respecting Hours of Work and Vacations with Pay in Industrial Undertakings, §4 at 108.
35 An Act Respecting Hours of Work and Vacations with Pay in Industrial Undertakings, § 6 at 108. These emergency provisions have "not proved to be contentious and there are no significant decisions" interpreting them. R. Parry, Employment Standards Handbook 5-5 (1986).
36 An Act Respecting Hours of Work and Vacations with Pay in Industrial Undertakings, § 10(b) at 110.
38 Ontario Regulation 8/44, § 2(1).
adopt workdays in excess of eight hours with the Board's approval. The third
exception, headed "special circumstances," in language that years later would be
incorporated into the successor statute, permitted overtime work in excess of the
daily or weekly maximums "where the Board was satisfied that the nature of the
work or the perishable nature of the raw material being processed requires such
extended...hours." The fourth exception—and the only one labelled "overtime"
proper—permitted an employer, with the Board's prior written consent, to "adopt
one or more overtime work periods" up to an annual limit of 120 hours (which
was computed in such a manner that the overtime hours performed by one worker
reduced the number of overtime hours that an employer was permitted to adopt).

Of greatest interest in this context, the regulations provided—apparently with
respect only to this annually limited overtime—that: "The granting by the Board
of a permit to an employer to work overtime shall not preclude an employee from
refusing to work overtime." Finally, with regard to the statutorily permissible
emergency overtime, the regulations required employers to report such work to
the Board "forthwith...stating the reason therefor," and excluded such overtime
from the 120-hour annual limit.

The most significant means of creating flexibility for employers was the
elaborate permit system, which initially granted employers, "automatically...upon
request," without an accompanying explanation as to why the excess working
time was needed, 120 annual hours of overtime per worker; this permit remained
valid until and unless the administrator revoked it. The overtime—which was
now called "excess working hours"—ceiling was lowered to 100 hours, effective
1946, and liberally reconfigured so that employers were privileged to extract this
number of hours from "each employee," with the Board’s approval. The Labour
Ministry regarded this “buffer arrangement” as a vital part of flexible maximum
hours regulation because “a fixed standard...without a zone of tolerance would
simply lead to extensive noncompliance....” The new regulations issued in 1945
established the system for the rest of the century in a number of other respects as

39 Ontario Regulation 8/44, § 2(2).
40 Ontario Regulation 8/44, § 3.
41 Ontario Regulation 8/44, § 4(1)-(2).
42 Ontario Regulation 8/44, § 4(3).
43 Ontario Regulation 8/44, § 5(1).
44 Ontario Regulation 8/44, § 5(2).
47 Kinley, Current Administration of Legislated Standards on Hours of Work and Overtime, at 20.
well. They introduced the exclusion from hours regulation of numerous professions such as doctors, lawyers, nurses, architects, accountants, and engineers, in addition to workers employed in farming, commercial fishing, steamship and railway operations, fire departments, funeral directing, and embalming, and as stevedores and domestic employees. The Industry and Labour Board also bifurcated the excess working hours system by creating a separate classification of workers encompassing stationary engineers, watchmen, firemen, shippers, “and other persons engaged in non-productive work,” whom employers were permitted, with the Board’s approval, to employ up to 12 additional hours every week above and beyond the ceiling of 48.

Later, the Ontario government expanded the scope of permissible overtime by issuing permits to whole industries to exceed the statutory limits and special permits (authorizing up to 100 additional hours but also even more hours if the first set was insufficient) when “the nature of the work” or perishable nature of raw materials being processed required excess hours. Two of the factors that the Employment Practices Branch (EPB) later took into consideration in determining whether the work required special excess hours were whether denial of a permit would just cause the employer to contract out the work or “go south of the border” instead of generating new employment. Although “[t]he strongest ground for securing this ‘Special Permit’ is a well-documented labour shortage,” in the course of the postwar period, other factors such as unforeseen levels of demand for a firm’s product became recognized reasons for granting the permit. Most commonly firms adduced high product demand and lack of capacity to expand their workforce as reasons for needing overtime. “However,

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48 Ontario Regulation 92/45, § 2.
49 Ontario Regulation 92/45, § 5(1)(a). Later the Board also set the maximum number of hours permitted to elapse between the beginning and the end of the daily work period in restaurants at 12. Regulations 144, § 7(1), in Consolidated Regulations of Ontario, 1950, 1:687, 688.

52 Kinley, Evolution of Legislated Standards on Hours of Work and Overtime at 27.
53 Kinley, Current Administration of Legislated Standards on Hours of Work and Overtime at 23.
the clinching argument for a permit is that ‘if we don’t get it we will move the...jobs...out of the country to maintain our competitive position.” Consequently, in this context the Labour Ministry’s decision concerning whether to withhold or issue a permit tended to focus on the maximum hours provision’s goal of creating jobs.54

The transition from an hours of work (and paid vacation) law to a more comprehensive employment standards code was marked by the addition in 1964 of a mandatory 30-minute eating period so that no worker would work more than five consecutive hours without a break.55 Then in 1968, in lieu of implementing long-standing suggestions for the 40-hour week,56 the new Employment Standards Act (ESA) for the first time supplemented the regulatory system with a time-and-a-half overtime penalty for weekly hours beyond 48 (reduced to 44 in 1973, where it remains)57 and on public holidays.58 Unlike the U.S. Congress when it enacted the FLSA,59 the Ontario legislature prohibited employers from reducing a worker’s regular rate in complying with the new overtime provision.60 But the new statute also further enhanced employers’ flexibility by entitling firms, with the approval of the Director of Employment Standards, to extend the workday beyond eight (limited in 1974 to 12) hours, provided that the weekly total of 48 was not exceeded.61

Even more flexibility for employers was facilitated by a 1968 regulation authorizing hours-averaging designed “to coincide with the introduction of the

54Kinley, Current Administration of Legislated Standards on Hours of Work and Overtime at 23, 25.


56Kinley, Evolution of Legislated Standards on Hours of Work and Overtime at 11.


59See above ch. 9.


This regulation, which prefigured both the Republicans' hours-averaging proposals in the United States and the mechanism actually enacted in Ontario in 2000, excluded any employee from the applicability of the premium overtime requirement "who, under any agreement or arrangement with his employer that is approved by the Director, has his hours of work averaged over an extended period for the purpose of determining his overtime hours of work and is paid an amount of not less than one and one-half times his regular rate for each overtime hour worked in excess of forty-eight as determined on that basis."\(^{62}\)

After the overtime-premium threshold was lowered to 44 hours, the ESA was amended to authorize promulgation of a regulation "providing for and requiring the approval of the Director of any agreement or arrangement between an employer and an employee or his agent providing for the averaging of daily hours of work for a work week or daily or weekly hours of work over a longer period of time than a work week."\(^{64}\) The regulation issued in 1975 differed from the earlier one in providing: "Where, under an agreement or arrangement between an employee and an employer approved by the Director, a period of two or more work weeks is the period in which the hours of work of an employee may be averaged for the purpose of determining the hours of work in each work week in the period," the eight-hour day and 48-hour week maximums did not apply.\(^{65}\) In addition, the time-and-a-half overtime premium for weekly hours worked in excess of 44 did not apply to a workweek in which the averaged hours did not exceed 44.\(^{66}\)

By the mid-1980s, the Ministry was granting about 200 such averaging arrangements annually, largely in hospitals, hotels, service stations, and other places of employment in which "work stations have to be covered for periods that are not compatible with" the eight-hour day or 48-hour week. As a precondition, the Labour Ministry required employers to furnish evidence of employee ap-


\(^{63}\)Reg. 244, § 2(2), in Revised Regulations of Ontario, 1970, 1:1455. This regulation (originally O. Reg. 366/68) was presumably based on Employment Standards Act, 1968, § 29(1)(f), Ontario Stat. 1968, at 163, which broadly empowered issuance of a regulation "exempting any class of employers or employees from the application" of the act.


\(^{65}\)Regulation 325, § 2(2)(a), Revised Regulations of Ontario, 1990, 3:498, 498. It was originally issued as Ontario Regulation 803/75.

\(^{66}\)Regulation 325, § 2(2)(b).
The Autocratically Flexible Workplace

Under the ESA in effect until 2001, the Director continued to be empowered to "issue a permit" to employers authorizing their employees to work a maximum of 100 hours per year in excess of eight hours per day or 48 hours per week. In addition, under an updated version of the bifurcated approach of 1946, the Director was authorized to issue permits for 60-hour weeks "in the case of an engineer, firefighter, full-time maintenance worker, receiver, shipper, delivery truck driver or the driver's helper, watchman or...other person who, in the opinion of the Director, is engaged in a similar occupation...." Based on a 50-week year, these permits thus enabled employers to work such employees "a substantial 600 hours of overtime per year." The Act prohibited employers from requiring or permitting workers, and workers from working or agreeing, to work more than the prescribed maximum hours. To be sure, it took the government 42 years to bring its one and only prosecution under this section—which is unusual among modern labor protective statutes in its stringent application to the protected class of workers as well and also resulted only in one prosecution—which was dismissed.

The ESA also continued in force workers' entitlement to refuse to work even those additional hours that their employer had been authorized by the Director to request them to work: "The issuance of a permit under this section does not require an employee to work any hours in excess of those prescribed by section 17 or approved under section 18 without the consent or agreement of the employee or the employee's agent to hours in excess of eight in the day or forty-eight in the week." To be sure, the EPB took the position that workers did not possess un-

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67 Kinley, Current Administration of Legislated Standards on Hours of Work and Overtime at 28.
limited freedom to change their minds: for example, if a worker consented to work excess hours on a particular occasion and then failed to report for work, he or she might be properly subject to disciplinary action including termination.  

Over the years the Director of Employment Standards generously issued permits. Indeed, in the mid-1980s, one close student of the Employment Standards Branch concluded that, despite its orientation toward information, investigations, and audits, its “primary focus in the administration of the 8-hour day and 48-hour week maximum is on permitting exceptions to it.” By 1990 the Labour Ministry had issued a total of 37,500 100-hour permits. Employers were not even required to offer an explanation of their need for such permits; nor were hours worked under the statute’s emergency exemption charged against these 100 hours, which by the mid-1980s amounted province-wide to a total of more than 1.2 million overtime hours.

In addition, industry permits—which “evolved as an administrative convenience” during the act’s first years—covering 26 industries, including (in descending order of the number of employees) retail stores, hotels and restaurants, highway transport, auto repair and gas stations, mining, building supply, baking, logging, and taxis, offered additional hours for certain classes of employees. In the mid-1980s the 865,000 workers in these industries accounted for about one-fourth of the 3.5 million employees covered under the law and one-third of the 2.6 million not excluded from the hours provisions. In all of these industries, the maximum workday was extended from eight to ten hours. Industry permits “establish substantially less favourable working conditions” than the statute’s provisions themselves and exacerbated this outcome by “tend[ing] to remove the employer subject to them from close scrutiny by the Employment Standards Branch.” And since one of the chief reasons industry permits were granted in the first place was “the insistence of industry organizations on securing special treat-


75 Kinley, Current Administration of Legislated Standards on Hours of Work and Overtime at 13.

76 Papp, “Paying the Price for Hard Work.”


78 Kinley, Current Administration of Legislated Standards on Hours of Work and Overtime at 18.

ment," a vicious circle of suspect employer motive, inferior conditions, and lack of enforcement was set in motion.

Finally, the special permits issued where the Director was “satisfied that the work or the perishable nature of raw materials being processed” required additional hours provided “the residual flexibility that may be necessary once the annual 100-hour permit is exhausted and additional hours are still required.” The special permits were most commonly granted to firms that needed to meet an increased demand; automobile manufacturers—Ontario’s largest manufacturing industry, by far its largest exporter, and second in North American only to Michigan in automobile output—were the heaviest users, their primary reason, perversely, being the need to accommodate the restrictions on hiring part-time workers in collective bargaining agreements.

In contrast, the emergency provisions of the act, which were carried over intact to the ESA and “remove[ ] the right of an employee to refuse work,” have been interpreted narrowly. In particular the clause authorizing employers to exceed the statutory maximum hours “in case of work urgently required to be done to machinery or plant,” was interpreted by the Employment Standards Branch to exclude rush orders, inventory taking, absenteeism, avoidance of loss of business, uneven patterns in deliveries. The Branch also required employers to account in detail for the alleged urgency in case their decision is later challenged.

The very fact that the regulatory framework, and especially the 48-hour maximum, remained basically unchanged over more than half a century meant that the relationship between that standard and the prevailing normal hours of work changed radically. In the mid-1940s, when about one-half of the workforce worked in excess of 48 hours per week, the statutory maximum operated to reduce the workweek; decades later, however, when the same 48-hour maximum

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80 Kinley, Current Administration of Legislated Standards on Hours of Work and Overtime at 27.


was well in excess of the most usual regular hours of 40 if not fewer, "the system for permitting excess hours [wa]s serving different purposes than it did when put in place" and the maximum "may...[have] be[en] an invitation to exceed normal or regular hours of work."

Thus despite the appearance that the "standard was an absolute prohibition," from the outset the hours-ceiling was not absolutely fixed. In Kinley's words: "The high level of anxiety in industry and the government of the day over the practicality of a comprehensive maximum hours standard ensured that arrangements for granting overtime permits and other devices for relaxing the standard were put in place quickly." He argued that the degree to which the government pursued "the doctrine of 'flexible administration'" in the ensuing decades in an effort to make sure that the provision not become "unduly disruptive" raised a question as to whether the maximum hours standard was in fact even "a standard like the others" in the statute. Kinley also viewed the issuance of excess hours permits as a kind of realpolitik designed to lessen pressure from employers for additional outright exemptions from the statute. Looking back at the 1944 statute more than four decades later, the Task Force itself articulated it as a quasi-universal principle of systems that regulate overtime directly by means of quantitative restrictions rather than indirectly through financial disincentives that the greater the "stringency" of the hours maximums, the greater the need to offset it with "flexibility" created by exemptions: "Thus, some of what the legislation gave with one hand was taken away by the other."

In 1986, when unemployment in Ontario persisted at 7 percent, the minority Liberal provincial government began considering whether revamping the overtime law might create employment for some of the jobless by reducing excessive

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87 Kinley, *Current Administration of Legislated Standards on Hours of Work and Overtime* at 17-18.
88 Kinley, *Evolution of Legislated Standards on Hours of Work and Overtime* at 15.
90 Kinley, *Current Administration of Legislated Standards on Hours of Work and Overtime* at 14.
overtime. This initiative was prompted by the social-democratic New Demo-
crats—who, with their ally the United Steelworkers, were demanding union veto
power over any applications for overtime beyond four hours per week and 100
annually—with whose assistance the Liberals had been able to form a gov-
ernment in 1985. To this end it created the Ontario Task Force on Hours of Work
and Overtime, whose hearings triggered “frantic buzzings of alarm in business
circles....” The Canadian Manufacturers Association adamantly insisted to the
Task Force that “[r]estricting the employer’s flexibility in responding to changing
circumstances...would affect Ontario’s ability to compete in the international
arena....” The Manufacturers Association together with the Toronto Board of
Trade and the Canadian Chamber of Commerce argued that overtime gave em-
ployers “essential flexibility to meet urgent and unpredictable work require-
ments....” Indeed, the Chamber of Commerce went so far as to propose that, “in
a renewed spirit of free enterprise, Ontario should abolish all restrictions on al-
lowable hours of work.”94 Although the Task Force in 1987 recommended mak-
ing overtime voluntary after 40 hours rather than 48,95 neither the Liberal
government (1985-90) nor the New Democratic government (1990-95) included
any pertinent changes among the many amendments to the ESA that were enacted
at every legislative session from 1986 to 1992 and in 1995.96 In particular the
leftist New Democrats, instead of carrying out a thoroughgoing reform of the
ESA, injected “a bit more equity into the legislation,” but also cut back the
Labour Ministry’s personnel, thus leaving “even fewer resources for enforce-
ment.”97

1986, at A14 (Lexis) (quotes); Kinley, Current Administration of Legislated Standards
on Hours of Work and Overtime at 7.
95 Working Times: The Report of the Ontario Task Force on Hours of Work and Over-
time at 129.
96 An Act to Amend the Employment Standards Act, Ontario Stat. 1986, ch. 51 at 539;
An Act to Amend the Employment Standards Act, Ontario Stat. 1987, ch. 30 at 309; An
Act to Amend the Employment Standards Act, Ontario Stat. 1988, ch. 7 at 47; An Act to
Amend the Employment Standards Act, Ontario Stat. 1989, ch. 4 at 29; An Act to Amend
the Employment Standards Act with respect to Pregnancy and Parental Leave, Ontario
Stat. 1990, ch. 26 at 469; An Act to Amend the Employment Standards Act to Provide for
an Employee Wage Protection Program, Ontario Stat. 1991, ch. 16 at 77; An Act to
97 Judy Fudge, “Flexibility and Feminization: The New Ontario Employment Stan-
chief innovation was a wage protection program for workers with outstanding claims
against insolvent employers, which the Progressive-Conservatives promptly abolished.
When the Progressive Conservatives, who had controlled the provincial government from 1943 to 1985, regained power in 1995, their Common Sense Revolution** "platform might have seemed normal in Texas or Iowa: drastic deregulation, government downsizing, welfare bashing, massive tax cuts...." Both they and their business supporters were determined to increase rather than decrease working hours. In particular, General Motors of Canada Ltd., the country's largest industrial employer, soon began complaining to the new Tory government about "facing serious competitive disadvantages, including restrictions on how many hours the company can make employees work," which gave "rivals in bordering U.S. states an edge." After the president of the company had met with the Labor Minister, the Canadian Auto Workers (CAW) charged that GM has asked for an increase in the limit on the compulsory workday from 8 to 10 hours and the workweek from 48 to 56 hours.100

Although "Chrysler Canada and a few other companies...cautioned the government that it may be swinging too far to the right" in dismantling labor law protections,101 in May 1996 the Conservative government at first proposed that employers and unions be authorized to ignore the hours law, a proposal that labor feared as creating pressures that "many unions will not be able to resist...." At the time, Labour Minister Elizabeth Witmer expressed the hope that this new "flexibility" could eventually be extended to nonunion workplaces as well.102 The proposed provision would have permitted collective bargaining agreements to prevail over an employment standard "if the collective agreement confers greater rights relating to hours of work, overtime pay, public holidays, vacation with pay and severance pay than the Act confers, when those matters are assessed together."103

The proposal, according to one left-wing columnist for the daily Toronto Star, was the creature of "thinkers of the new right," to whom "any employment

101Van Alphen, "GM Says It's Hurt by Limit on Hours of Work."
The Autocratically Flexible Workplace

standards at all are by definition a nefarious form of government intervention in the private marketplace." The effect of the proposal would have been to "remove the floor from collective bargaining at a time when unions are fighting for their lives. Weak unions will find it more difficult to resist bargaining away even minimum standards."\textsuperscript{104} Even newspaper editorial writers worried about the consequences of "encouraging companies and unions to trade off standards that together were meant to impose a broad range of social (and family) values on the conditions of work," especially where "employers are able to 'negotiate' with a gun to their employees' heads..."\textsuperscript{105} If an employer could plausibly argue, for example, that greater severance pay outweighed the elimination of overtime pay, then unionized workers would have to decide whether to strike or accept the new "package," whereas in the past the statutory floor would have outlawed the employer's proposal.\textsuperscript{106}

Following public hearings in August, Witmer withdrew the section permitting waiver of statutory standards on the grounds that it would be revived later in the year when she launched "a more comprehensive review of the act."\textsuperscript{107} Seeking to preempt such legislation and to outflank General Motors' lobbying, the CAW proposed that the existing statutory hours standard be incorporated directly into their collective bargaining agreement.\textsuperscript{108} In the event, however, the Act to Improve the Employment Standards Act that passed in 1996 lacked the waiver provision.\textsuperscript{109}

Early in 1997 the Conservatives undertook a new initiative to deregulate hours. In connection with the party's anti-red-tape campaign, a committee of its members of parliament proposed lengthening the workweek to 50 hours or to 200 hours over four weeks and eliminating the requirement that employers obtain permits to work employees 100 hours of overtime annually. The reform was required because: "'Given the challenge many companies face in trying to improve

\begin{itemize}
\item \textsuperscript{104} Thomas Walkom, "Ontario Workers' Hard-Won Rights Are on the Block," \textit{Toronto Star}, May 16, 1996, at A29 (Westlaw).
\item \textsuperscript{105} "Tories Tear the Guts Out of the Labor Act," \textit{Toronto Star}, May 21, 1996, at A21 (editorial) (Lexis).
\item \textsuperscript{107} "Delay Study of Job Rules, Tories Urged: Hearings Called a 'Sham' After Major Change Is Withdrawn," \textit{Toronto Star}, Aug. 20, 1996, at B3 (Lexis).
\end{itemize}
productivity and maximize efficiencies so as to compete in a global economy, the need to adjust work schedules in response to market fluctuations is becoming a vital component to success." Indeed, the only hours limits that the Red Tape Review Commission wished to impose were those "subject to empirical evidence on health and safety risks associated with overtime hours worked." Because, as one Toronto newspaper editorialized, "[h]ard-pressed" workers in the 1990s were accepting or even asking for overtime in order to "make up losses in their real incomes," it "would be fine" with the Tories "if a worker was willing to work 72 hours a week," provided he "could do so without falling flat on his face." 

In August 1998 the Tories "launched the second phase of the Employment Standards Act reform process" by circulating a discussion paper entitled "The Future of Work in Ontario." Its basic premise was that "[n]ew trade rules, investment policies and technological change have led to greater competition from producers in other countries. Firms need the flexibility to respond to competitive pressures. New technologies and the development of delivery systems that require an immediate response to new orders have affected the way in which work is done and added to the need for flexibility." This characteristically one-sided managerial conception of "flexibility" was tempered only by the unmediated insight that workers "want standards that...help them to balance work, family and other needs" and the equally unmediated question: "Can hours of work flexibility help to address needs of working parents?" The discussion paper was so lacking in specificity as to proposed statutory amendments that a contemporaneous commentator divined that only after "private discussions...at the Ministry level over the next couple of years" would legislative changes take place.

In the run-up to the provincial elections in June 1999, the Tories issued a "Blueprint" in April, which added a modicum of detail to their plans. Against the background of the party's objective to "restore the balance of power between unions and employers," the "Blueprint" argued: "With the way the workplace is changing, more workers and companies want to set up arrangements other than the traditional Monday to Friday work week. We'll give workers and employers

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114 Boniferro, "The Future of Work in Ontario."
more flexibility in designing work arrangements to meet their needs, such as flex-time or four-day weeks."115 Apart from such innocuous-sounding changes Labor Minister Jim Flaherty assured unions that his party was planning "no other labour law changes": "we have written down what we intend to do."116

A year after their re-election with 59 of 103 seats in the Legislative Assembly,117 on July 26, 2000 the Conservatives began preparing the public for their real plans for amending the ESA. Declaring that the "workplaces and workers of Ontario are flexible, modern, and adaptable.... We need laws that give them the ability to respond quickly to emerging economic opportunities,"118 Labour Minister Chris Stockwell released the government's consultation paper on reforming employment standards, which was designed to form the basis for province-wide public discussions in August and September.119 The paper, after noting that the Red Tape Commission had found that 500 Ontario businesses and institutions it had surveyed "identified reform of the ESA as a top priority to improve the province's competitive status as a place to invest," argued that the "current hours of work standards...do not always accommodate the needs of employers to run their businesses in a way that meets market pressures, new manufacturing processes or the intensive requirements of high technology industries. The hours of work standards also do not accommodate the needs of employees to vary working hours according to individual preference or to balance work and family responsibilities."120 The consultation paper then put the public on notice that the government saw the solution to these problems in: eliminating the permit system; increasing the maximum workweek to 60 hours, which in addition could be averaged over three weeks; and subjecting overtime premiums to three-week averaging as well. Although the new standards "would require the employee's agreement,"121 the paper did not reveal how a 60-hour week would accommodate work-

121Ministry of Labour, Time for Change at 7.
ers' needs to control their time.

The Ontario Federation of Labour (OFL) took the proposed changes very seriously. Chiding those who were wont to give the ESA short shrift because they "don't think legal entitlements are important" or "think such standards are of little importance to unionized workers who collectively bargain working conditions," the Federation stressed that the presence of compulsory labor standards meant there was "less incentive for employers to try to defeat or decertify a union. These laws also form the 'floor' so unionized workers don't have to start from scratch when negotiating their collective agreement."\textsuperscript{122}

The OFL's response to the government's proposal to make changes in the workweek contingent on workers' agreement was to ask "who is kidding who? While the government says that employees would have the right to refuse to work more than 48 hours a week, how many employees can freely choose not to do what their employers want and still maintain a good working relationship?\textsuperscript{123} Instead, the OFL advocated premium overtime for and a right to refuse to work hours in excess of 40 per week.\textsuperscript{124} On behalf of its 170,000 Ontarian members, the CAW, which, however, was especially concerned about the 81 percent of the workers in the province's private sector who were not members of any union,\textsuperscript{125} pointed out that the proposed overtime averaging "may eventually eliminate overtime pay as a brake on excessively long hours."\textsuperscript{126}

In initiating a series of public consultations in August and September on the Tories' proposed changes, Labour Minister Stockwell justified the need for them on the grounds that "at work, there are more demands for flexibility because of market pressures, new manufacturing processes or intensive requirements of high-technology industries and the trend toward 24-hour-a-day, 7-day-a-week business hours."\textsuperscript{127} The amendments to the ESA that the government introduced


\textsuperscript{124}"Submission by the Ontario Federation of Labour on the Consultation Paper" at 4.

\textsuperscript{125}Letter from CAW President Buzz Hargrove to Premier Mike Harris and Labour Minister Chris Stockwell, re Bill 147 (Nov. 30, 2000), on http://www.caw.ca/campaigns&issues/ongoingcampaigns/ontarioemployment/hargroveletter.asp.


in parliament on November 23, 2000 were, according to Stockwell, designed to "'reflect the realities of 21st-century workplaces.'" In refutation of Stockwell's insistence that any changes in working hours made by the bill were contingent on workers' agreement, David Christopherson, the labor critic (spokesperson) of the opposition New Democratic Party (NDP), reminded him during the first reading of the bill "of the reality of the workplace. You make it sound as if being at work is belonging to some kind of social club where everybody sits around and is palsy-walsy. The fact of the matter is that it's very difficult for a lot of people to say no to a boss who pressures them to work overtime." When another NDP member of parliament, Shelley Martel, charging that the bill would "force workers to choose between their families and their jobs," asked Stockwell: "What planet are you living on, Minister?" he, pointing out that the NDP had done nothing when it was in power to abolish the permit system, replied that he lived on Earth and invited her to "visit it once in a while." As ultimately enacted, the new law—which, according to the Labour Ministry, was needed to replace a law that "no longer suited the way people really work in Ontario"—eliminated the governmental overtime permit system. Instead, although the normal workday and workweek remain eight and 48 hours, respectively, now: "An employer may permit an employee to work up to a specified number of hours in excess" of those limits if "the employee agrees to work those hours" and "the employee will not work more than 60 hours or such other number of hours as are prescribed in a work week." And employers may work employees even beyond this 60-hour threshold if "the employee agrees to work those hours" and the Director of Employment Standards approves the agreement.

129Ontario Legislative Assembly, Official Report of Debates (Hansard), 37th Parl. Sess. 1 (Nov. 23, 2000), on http://www.ontla.on.ca/hansard/house_debates/37_parl/session1/1107.htm#P658_160214 (no pagination). This belligerent heckling style characteristic of the Westminster form of parliamentary government is nevertheless embedded in a system that makes the outcome of legislative debates a foregone conclusion where, as with the Tories in Ontario, the government has a substantial parliamentary majority. Moreover, despite the aggressive tone of the colloquies, very few members of the legislature were actually present at the debates. Telephone interview with Mary Gellatly, Community Legal Worker, Parkside Community Legal Services, Toronto (Feb. 26, 2002).
131An Act to Revise the Law Relating to Employment Standards, § 17. (1) at 817.
133Ontario Regulation 285/01: Exemptions, Special Rules and Establishment of Mini-
Though not expressly, the new law in effect limits the length of the workday to 13 hours because it requires employers to give workers “a period of at least 11 hours free from performing work in each day,” but even this protection “does not apply to an employee who is on call and called in during a period in which the employee would not otherwise be expected to perform work for his or her employer.”

Although 44 hours remains the statutory threshold for time-and-a-half premium overtime wages, firms have attained much greater latitude to demand additional hours by means of the averaging mechanism that Republicans led by Senator Ashcroft had unsuccessfully tried to push through Congress in the 1990s: “if the employee and the employer agree to do so, the employee’s hours of work may be averaged over a period of not more than four weeks for the purpose of determining the employee’s entitlement, if any, to overtime pay.” In other words, an employer who previously was required to pay the overtime penalty after 44 hours in any week, can now work employees as many as 60 hours a week without incurring any overtime liability, provided that the worker’s total hours over four weeks do not exceed 176. For nonunion workers such averaging agreements can last as long as two years and are renewable; once they agree to averaging, however, workers who change their mind are locked into it unless the employer agrees to revoke the agreement. The statute even permits the government to make a regulation permitting hours-averaging periods of more than four weeks, the only condition attached by the regulation being approval by the Director of Employment Standards.

As the Liberal Party’s parliamentary labor spokesperson at the bill’s third reading sarcastically described the interaction of the two provisions permitting employees to agree to 60-hour weeks and to average weekly hours for purposes of calculating overtime premiums:


\[\text{135 An Act to Revise the Law Relating to Employment Standards, § 22. (2), at 819.}\]

\[\text{136 An Act to Revise the Law Relating to Employment Standards, §§ 22. (3) and (4), at 819.}\]

\[\text{137 An Act to Revise the Law Relating to Employment Standards, § 22. (6), at 819-20.}\]

\[\text{138 An Act to Revise the Law Relating to Employment Standards, § 141. (1) 7, at 886.}\]

You’ve got to wonder, who is asking for this? Certainly we don’t know, because we’ve had no public hearings, who has come forward. But somehow I don’t think the single mom working at Tim Hortons was knocking on Mike Harris’s door and saying, “Premier, please, give me a 60-hour workweek. I’m not working long enough,” or, “Premier, please, limit my overtime. I want to work 60 hours without overtime.” I’m sure there’s a lineup at the Premier’s door of working people who wanted these changes. I’m sure that’s what’s driving and motivating this government. It is not the corporations or their Bay Street friends, of course not; it’s working people. ... Of course they want to be screwed out of 25 hours of overtime in a month, because they make way too much money.\(^140\)

Although the new statute\(^141\) in general entitles a worker to revoke his or her agreement to work more than 48 hours by giving the employer two weeks’ written notice,\(^142\) it carves out a special exemption—which was not in the original bill, but was added by the Tories at the time of the bill’s second reading\(^143\)—for any such agreement “that was made at the time of the employee’s hiring and that has been approved by the Director,” making it “irrevocable unless both the employer and the employee agree to its revocation.”\(^144\) This potentially far-reaching regulation would thus imprison newly hired workers for the duration of their employment in an “agreement” that an overreaching employer may have foisted on them at an especially vulnerable moment in their working lives. It would subvert a labor-protective regime by permitting an employer’s unilaterally imposed condition of employment to trump a societal norm. This predictably biased recreation of pseudo-voluntarism among the nonorganized underlies management-side lawyerly acclamation of the new ESA as giving “employers and employees more autonomy to determine certain aspects of their relationship...by eliminating the requirement for Ministry of Labour approval for certain working relationships.”\(^145\)

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\(^{140}\)Ontario Legislative Assembly, *Official Report of Debates (Hansard)*, Dec. 19, 2000 (Dominic Agostino). Tim Hortons is a large coffee and donut shop chain owned by Wendy’s International; Bay Street is Toronto’s financial district.


\(^{142}\)An Act to Revise the Law Relating to Employment Standards, § 17(3), at 817.

\(^{143}\)Ontario Legislative Assembly, Bill 147, Second Reading, on http://www.ontla.on.ca/documents/Bills/37_Parliament/Session1/b147rep_e.htm.


\(^{145}\)*The Employment Standards Guide: Adapted from the Ontario Ministry of Labour*
One possible constraint on employers' use of at-the-time-of-hire adhesion agreements is the guideline on agreements that "permit employers and employees to agree to vary from the legislative minimum standard and agree to a different standard" that the Ministry of Labour published on the day on which the new ESA went into effect. One of the relevant factors in determining whether such an agreement is enforceable is: "Whether the employee was coerced into making the agreement." The Ministry guidelines state: "An agreement will be invalid if an employee entered into it because his or her employer: threatened to fire him or her; threatened to reduce his or her hours of pay; penalized the employee's co-workers because they had refused to enter into the agreement, and the employee entered into the agreement to avoid being similarly penalized." Although these examples refer to those already in an employer's employ, the principle fully applies to job applicants as well. The analogous threat to prospective employees is the warning that they will not be hired unless they agree to work excess hours; this threat to withhold a livelihood is just as perniciously coercive as the threat to terminate one. Moreover, if employers' recourse to this type of coercion were upheld as consistent with the ESA, it would eventually, through attrition, enable firms to create a workforce consisting wholly of employees who had waived their right to refuse to work beyond the normal eight-hour day or 48-hour week.

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Interpretation Guide A-33 (Eric Roher ed. 2001 [1997]).


147 ESA Alert: News Bulletin of the Employment Standards Work Group 2:8 (Apr. 2002). Although the anti-coercion principle of contract law may be more encompassing than the anti-reprisal principle of labor law, the latter also applies here: "No employer...shall intimidate, dismiss or otherwise penalize an employee or threaten to do so...because the employee...asks the employer to comply with this Act and the regulations,...makes inquiries about his or her rights under this Act,...[or] exercises or attempts to exercise a right under this Act...." An Act to Revise the Law Relating to Employment Standards, § 74(1)(a), at 846-47.

148 To be sure, as with the enforcement of any ban on discrimination, there may be evidentiary barriers to proving an employer's illicit motive where the alleged discriminator is too sophisticated to blurt out the real reason in front of witnesses and is able to specify other plausible reasons for nor hiring a worker who insisted on her right to work only normal hours. Such complications, however, cannot justify failure to enforce the ban. Ronald 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 221 (1981), express "serious doubts as to whether" a law requiring employers to obtain workers' consent to working overtime "would be enforceable; employers could presumably still require willingness to work mandatory overtime as a condition of employment, and if this was agreed to at the date of hire, it is hard to see what the net effect of the legis-
Parallel to this prospective irrevocability provision, the regulations also include a grandfather clause that confers quasi-parity on employers who had entered into similar at-the-time-of-hire agreements with employees under the old statute which, but for this exemption, the workers would presumably have been entitled to revoke with two weeks’ notice under the new law. This provision carries over to the new ESA section 18 of the old ESA, which enabled employers to extend the regular workday beyond eight hours, as long as the workweek did not exceed 48 hours. Labelled “Exemption Re Certain Existing Arrangements: Existing arrangements for long shifts,” it provides that the clause in the new ESA prohibiting an employer from requiring or permitting an employee to work more than “eight hours in a day or, if the employer establishes a regular work day of more than eight hours for the employee, the number of hours in his or her regular work day,”

(1)...does not apply with respect to the class of employees each of whom,
(a) has an arrangement described in subsection (2) with an employer to whom a permit was issued under section 18 of the Employment Standards Act; and
(b) is not required by the employer to work more than 10 hours a day.

(2) The arrangement
(a) provides that the employee is willing to work, at the employer’s request, more hours per day than the number of hours in his or her regular work day;
(b) was made at or before the time of the employee’s hiring and before September 4, 2001; and
(c) has not been revoked by the mutual consent of the employer and employee.

(3) The terms of the arrangement need not be reduced to writing.

149 One of the drafters of the new ESA regulations was very helpful in making sense of this convoluted and opaque provision, which even he, before refamiliarizing himself with it, was unable to understand. Telephone interview with John Hill, solicitor, Labour Services Branch, Ontario Ministry of Labour, Toronto (Mar. 20, 2002).


Although the actual universe of employers and "class of employees" affected by this regulation are not clear, it permits employers that had government approval under the old ESA to adopt a regular workday of more than eight but fewer than 12 hours to adopt a 10-hour day under the new ESA, provided that each worker in "the class" in question had expressed a willingness, orally or in writing, to work such additional hours at the time he or she was hired and before the new ESA went into effect, and that the employer had not in the meantime released the workers from this arrangement.

Presumably this grandfather clause was designed to aid nonunion employers in retaining law-backed power to impose longer workdays, and one such prominent firm was acutely aware of the privilege bestowed and made sure its workers were too.\(^{153}\) In a notice concerning the new ESA issued to employees in January 2002, the Human Resources Manager of Toyota Motor Manufacturing Canada Inc., immediately after declaring that "TMMC focus has always been to manage a successful business that meets our customers’ needs by scheduling well balanced hours of work that considers both T/Ms [team members] and the market demand for our product," stressed: "Employers can require workdays of up 10 hours a day and not to exceed 48 hours in the week."\(^{154}\) Many workers at Toyota’s only assembly plant in Ontario have concluded that the government added the grandfather clause at Toyota’s request.\(^{155}\) Whether Toyota actually lobbied

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\(^{153}\) Toyota management appears, however, to be selective with regard to what it wants employees to know. When one employee (who filed a complaint with the Ministry of Labour about Toyota’s requiring him to work excess hours against his will) told his employee relations representative that the company’s human resources manual does not specify how many sick days an employee is allowed, she informed him that the manual states policies, whereas the specifics are contained in the policy guidelines, which are “not available to team members,” because if they “knew what the guidelines were...then some people would abuse them” and management’s “ability to be ‘flexible’ in their application” would be limited. Email from David Leaman (Apr. 3, 2002).

\(^{154}\) Notice to All Team Members. From: Lynn Haley, HR Mgr. Date: January 2002. RE: Employment Standards Act - Hours of Work. A copy was furnished by the CAW. On Aug. 6, 1988, the Ministry of Labour issued Toyota an “Approval to adopt a regular work day under section 18,” allowing “production employees to adopt 10 hour shifts including one half-hour eating period after not more than five consecutive hours of work.” Approval Number 105801. Bizarrely, the approval has the employees “adopt[ing]” the excess hours, although it is the employer that section 18 of the old ESA authorized to “adopt a regular day of work in excess of eight hours....”

\(^{155}\) Telephone interviews with Tom Rooke, organizer, CAW, Cambridge, Ontario (Mar. 19, 2002), and Ron DeRuyter, business reporter, Kitchener-Waterloo Record, Kitchener, Ontario (Mar. 21, 2002). One of the workers who filed a complaint against Toyota for violating his right to refuse to work overtime stated that already on the day...
The Autocratically Flexible Workplace

for or merely received this benefit as a gift from the Tory government, management at Toyota's Cambridge plant takes the position that, based on the "agreements" that the company required workers to sign at the time they were hired before September 4, 2001, the regulation gives it the right to "force" workers to work ten-hour days.  

More than five months after the act went into effect (ironically on Labor Day, September 4, 2001) the Ministry of Labour had received only two requests to approve prospective irrevocable at-time-of-hire agreements: both were from the automobile manufacturing industry and both were approved. Toyota management confirmed that it had received such approval, and the CAW surmised that the other firm must be Honda, which owns the only other nonunion automobile manufacturing plant in Ontario, since unionized firms' collective bargaining contracts would make such agreements unnecessary. To be sure, union officials suspect that typically employers would not bother to seek approval or even formal written agreement from employees. Despite the potentially overwhelming significance of this imposition, neither the president nor the research director of the OFL, which led the opposition against the bill, was even aware of its existence, believing erroneously that the clause merely dealt with Sunday work.

The one innovation in the bill that incontestably favors workers is the strong anti-retaliation provision empowering the administrative agency officer to reinstate workers without court enforcement. As the labour minister touted this

(April 5, 2000) that Ontario Premier Mike Harris visited the Toyota plant (for Toyota's announcement that it would begin production of a Lexus SUV), word circulated among the employees that he had promised Toyota management that the firm would be permitted to retain under the new ESA whatever working hours system it had had under the old ESA. Telephone interview with David Leaman, Guelph, Ontario (Mar. 28, 2002).


Telephone interview with Suzanne Craig, Provincial Specialist on Hours, Employment Practices Branch, Ontario Ministry of Labour, Toronto (Feb. 11, 2002), who did not identify the firms.

Telephone interview with Greig Mordue.

Telephone interview with Tom Rooke.

Telephone interviews with Wayne Samuelson (president) and Chris Schenk (research director), OFL, Toronto (Feb. 11, 2002).

Telephone interviews with Wayne Samuelson and Chris Schenk. Although aware that the provision was not widely known, the Provincial Specialist on Hours, Employment Practices Branch, Ontario Ministry of Labour, observed of the union's ignorance: "That's not funny." Telephone interview with Suzanne Craig, Toronto (Feb. 11, 2002).

revision, which even the OFL welcomed,\textsuperscript{163} during the bill’s second reading:

under the old legislation [t]he inspector could go out there and make a finding that you should rehire this person. All the employer had to do was submit a request to the Ontario Labour Relations Board and then they’d have a hearing, and the hearing would take up to six months to be heard. Under the old legislation, that employee would be out of work, without pay, without any form of support, unable to buy their groceries, unable to pay their rent for six months, even though they’re right as rain. Under the new provision, an employer may still appeal the decision of the inspector to the Ontario Labour Relations Board, but that employee, after that inspector makes that decision, goes back to work the next day.\textsuperscript{164}

As potentially radical as the new law is, it nevertheless fell “far short of the anti-union package sought by many members of the Tory caucus, and by party insiders....” On the other hand, the party welcomed unions protests because they “enable[d] the government to tell its supporters that it is still fighting to roll back the protections enjoyed by organized labour....”\textsuperscript{165}

Five months after the Act went into effect, the Ministry of Labour reported that no worker had yet filed a complaint about having been intimidated by an employer into signing a 60-hour-week agreement.\textsuperscript{166} OFL officials speculated that nonunion workers are simply too vulnerable to complain about virtually any labor law violation until they have left the employ of the firm in question.\textsuperscript{167} However, Parkdale Community Legal Services in Toronto did receive reports of workers at nonunion workplaces who had been intimidated by employers into signing such agreements.\textsuperscript{168} Whether the anti-reprisal provision in the new statute will prove to provide an adequate legal basis for reinstating workers who have been fired by employers that are sophisticated enough to avoid divulging the real (unlawful) reason for terminating workers who try to exercise their right to refuse to work overtime under their quasi-at-will employment regimes remains to be seen. (The ESA requires employers to give workers termination notice ranging from one week to eight weeks, depending on their length of employment, but does not


\textsuperscript{164}Ontario Legislative Assembly, Parliamentary Debates, 37th Parl. Sess. 1 (Dec. 11, 2000).


\textsuperscript{166}Telephone interview with Suzanne Craig, Provincial Specialist on Hours, Employment Practices Branch, Ontario Ministry of Labour, Toronto (Feb. 7, 2002).

\textsuperscript{167}Telephone interviews with Wayne Samuelson and Chris Schenk.

\textsuperscript{168}Telephone interview with Mary Gellatly.
The Autocratically Flexible Workplace

otherwise constrain employers’ power to fire—except that the ESA makes it unlawful to fire workers for exercising their rights under the ESA.)

But before being tested with regard to its capacity to protect workers from retaliation by employers that seek to conceal their violation of the new law, the ESA was finally subjected to a direct confrontation in February 2002, when two workers at the Toyota factory in Cambridge, Ontario—which in 1998 had recorded the fewest worker-hours per vehicle of any assembly plant in North America—filed complaints with the Labour Ministry about being required to work weekday overtime despite the fact that they had not agreed to any such arrangement. The previous summer the CAW had failed in its campaign to organize the plant, which is located in the southern part of the province not far from Niagara Falls and employs 3,200 workers. The mandatory overtime regime, which according to the company is “required” by the high sales of the cars produced there, imposes an additional 90 minutes daily, Monday through Thursday, on day-shift workers and two hours on the night-shift. Toyota defends the compulsory system, which it instituted in January 2002 and has enforced on an “almost-daily basis,” on the grounds that “we have a production plan to meet and we have to meet it.”

To observers it was clear that the company’s approach “reflects” the changes in the ESA that went into effect in 2001. As a local newspaper editorialized: “Overtime used to be voluntary at Toyota, but Ontario’s new workplace legislation has tilted the scales somewhat in favour of employers, which can now—generally and broadly speaking—insist on overtime activity.” Employers no longer need government-issued permits, but they must still secure the workers’ agreement to extend the workweek to 60 hours. And although workers are generally entitled to revoke such agreements, the new ESA, as noted earlier, privileges employers to lock employees into consents they gave at the time of hire. Toyota, all of whose North American plants are nonunion, is acutely aware of this provision. Ironically, Toyota Motor Manufacturing Canada Inc.’s manager of cor-

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173 DeRuyter, “Some Workers Upset by Forced Overtime.”
porate affairs, Greig Mordue, when asked whether the company regarded workers’ statutory right to refuse overtime as restrictive, replied that “this is one of those strange twists where it would almost be easier to work with a union,” because then Toyota would need to deal with only one party rather than 3,200 individual employees.175 In spite of this attractive aspect of collective bargaining, Toyota insisted during the unsuccessful organizing campaign in 2001 “that it would be in the best interests of the workers and the company if they voted against a union.”176

Toyota’s corporate affairs manager also offered the company’s legal interpretation of the aforementioned regulatory grandfather clause:

the probationary contracts employees sign when they are hired by Toyota constitute irrevocable agreements because employees are told they will have to work overtime.

“There is a series of means by which people would clearly understand upon their hiring that overtime is a pretty consistent and regular requirement of this particular auto plant.”177

The complaining workers have argued that whatever adhesion agreements the employees may have had to sign at the time of hire requiring them to “support scheduled overtime” are no longer valid because they were contracts of employment for the position of full-time probationary team member and as such expired, together with their probation period, after six months. Moreover, even if the contracts were still valid, the workers argue that they fail to satisfy the elements of specificity relating to hours that the Ministry of Labour has prescribed since they specifically refer to overtime as “hours in excess of...40 hours per week....”178 According to the Ministry’s guidelines on the formal requirements of enforceability of such agreements, the terms must be clear and specific, and the employee must understand the consequences of entering into the agreement. The Ministry especially cautions that the word “overtime” should be avoided because the statutory overtime threshold of 44 hours is different from the excess hours threshold of 48.179

But even if Toyota eventually were to lose on the issue of the irrevocability
of the so-called agreement, management knows that it "has other options." In particular, Toyota knows that the right to refuse overtime extends only to statutory overtime beyond eight hours daily or 48 hours weekly; where, however, for example, the normal workweek is 40 hours, workers would have no right under the ESA to refuse to work overtime hours 41 to 48 if the employer scheduled them for a sixth day of the week and thus avoided exceeding the daily eight-hour maximum. Under the ESA employers have always been allowed to schedule six eight-hour days without government permits or employees' consent. Toyota believes that such a six-day week is "less appealing" to the workers: "Our people prefer, by and large, to work a little additional overtime during the week so they don't have to come in on Saturdays." In other words, if workers fail to "support our hours of work" and refuse to agree to work compressed five-day, 48-hour weeks, Toyota will deprive them of their two-day weekends, which for decades has seemed to be an irrevocable working-class achievement. During its organizing drive, the CAW had warned Toyota workers that without a union in place to contest such plans, the company would avail itself of the revised ESA to impose overtime on them, but some had argued: "No, Toyota won't do that."¹⁸⁰

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The situation at Toyota¹⁸¹ makes it clear that no meaningful assessment of the effect of the new amendments is possible without first determining the real-world impact of the right to refuse overtime work under the old ESA. Judging by the volume of administrative hearings, arbitrations, and court decisions, the issue of whether workers have agreed to work the additional hours that permits authorized employers to employ them has been litigated frequently. Why an analysis must distinguish between unionized and non-unionized workers is explained in the leading treatise on the Ontario statute:

Whether an employee or his agent has consented or agreed to work additional hours as provided for in a permit is a more controversial issue in unionized workplaces than in non-unionized workplaces. In a non-unionized workplace, each employee has an individual contract of employment with the employer. Each employee deals with the employer on an individual basis in all respects of his employment, including consenting or refusing to work additional hours.... Conversely, in a unionized workplace, there is no room left for individual negotiation and agreement between the employee and the employer, subject to the provisions of the collective agreement. ... The collective agreement...can

¹⁸⁰ DeRuyter, "Some Workers Upset by Forced Overtime."
¹⁸¹ The processing of the complaints against Toyota, including a scheduled hearing, was delayed by a strike of the Ontario Public Service Employees Union that lasted from Mar. 13 to May 6, 2002.
contain an agreement on behalf of the employees to work additional hours.... In such a case, the union has acted as the agent, in law, of the employees as permitted by s. 20(3) of the Act.182

Although the interpretive complications introduced by the presence of a collective bargaining agreement are undeniable, the more important difference between the two sectors lies in the lack of countervailing worker power in the atomized sector. This difference is presumably also reflected in the fact that “few, if any” complaints about violations of the maximum hours standard were ever filed by unorganized workers as opposed to unions.183 The apparent absence of any reported administrative tribunal or court decisions dealing with disputes from the nonunion sector is, therefore, hardly surprising. And this lack of enforcement and litigation is thoroughly consistent with Kinley’s conclusion that, despite workers interest in “having a legal right to refuse work in excess of the maximum hours standard...there is no clear evidence that it is of practical benefit to unorganized workers, especially those in relatively small establishments.”184

This divergence between union and nonunion workers in the corpus of reported dispute resolution regarding the right to refuse overtime work is extraordinary: after all, it is unorganized workers who have only statutory protection to rely on in seeking to fend off overreaching employers, while unions, with their strength in numbers and collectively bargained rules, tend to regard state-enforced labor standards as primarily designed for non-members or, at best, as creating a floor which they can take for granted and about which it is not necessary to negotiate. This attitude is also fully consistent with the position taken by the OFL vis-à-vis the amendments to the ESA’s hours provisions proposed and enacted by the Conservatives in 2000—namely, that it was nonunion workers who would “face unsocial hours...and health and safety risks associated with extensive or periodic overtime.”185 In fact, however, the reported cases make it clear that it is unions that have used the interaction of the ESA and collective bargaining agreements to enable members to refuse overtime demands in ways that would not have been possible had they had to rely solely on their contracts.

The explanation for the lack of litigation surrounding unorganized workers’ right to refuse overtime is straightforward: there was nothing to litigate because

183Kinley, Current Administration of Legislated Standards on Hours of Work in Ontario at 11.
184Kinley, Evolution of Legislated Standards on Hours of Work and Overtime at 28.
The Autocratically Flexible Workplace

the Employment Standards (later: Practices) Branch took the position that: "The only remedy for a Part IV [i.e., hours of work] non-monetary violation, is a prosecution pursuant to s. 78(1) of the Act." Because the ESA gave workers a right to appeal only decisions by the Branch denying their claims that employers owed them back wages, the EPB argued that it could not secure them reinstatement and that the only recourse open to the agency was prosecuting employers, who, upon conviction, could be subject to a monetary penalty and prison sentence. In fact, however, such prosecutions under any provisions of the ESA were extremely rare—one official stated that there had been fewer than a handful in the past decade—because the Ministry of Labour believed that prosecutions were not an efficient use of its resources. According to the Ministry itself: "To our knowledge, a jail term has been imposed only twice against an individual charged under the ESA."

To be sure, another approach was also available. From its original enactment, the ESA prohibited employers from dismissing or threatening to dismiss, intimidating, or coercing any employee “because the employee has sought the enforcement of this Act.” A worker who tried to assert his statutory right to refuse to work overtime was arguably seeking to enforce the statute, though the new ESA of 2000 makes this connection even clearer by prohibiting employers from penalizing any worker because he or she asked the employer to comply with the statute, made inquiries about his rights under it, filed a complaint with the government, or exercised or tried to exercise his or her rights under it, and even places the burden on the employer to prove that he did not contravene the act.

Upon conviction, the original 1968 statute mandated that “the magistrate...shall...order the employer to reinstate the employee in his employ...”; after 1974, mandatory judicial reinstatement was made permissive.

In fact, such prosecutions were so rare that the Labour Ministry’s own Policy and Interpretation Manual refers to them hypothetically: “To obtain a conviction

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188Telephone interview with Suzanne Craig, provincial hours specialist, Employment Practices Branch, Ontario Ministry of Labour, Toronto (Feb. 26, 2002).
189The Employment Standards Guide: Adapted from the Ontario Ministry of Labour Interpretation Guide ¶19.4.1 at 19-10. Literally one single employer was charged twice.
Ontario

447

under s. 76(1), the Crown would have to prove its case beyond a reasonable doubt, which is the standard of proof in criminal or quasi-criminal cases,...that there was a reprisal by the employer...."194 The Labour Ministry deemed this standard of proof too great a barrier because the government would have been put to the test of proving the employer's retaliatory state of mind "beyond a reasonable doubt."195 With the enforcement agency exercising such self-restraint, it is hardly surprising that Kinley observed in the 1980s that it "may be exceedingly difficult to ensure" that unorganized workers are not penalized for exercising their right to refuse to perform overtime. Despite this lack of enforcement, workers who were excluded from the statute were concerned about being deprived of the right to refuse, while the suggestion of granting them that right created "deep anxiety" for their employers in such exempt industries as farming and fishing.196

In the one reported tribunal case that could have raised the issue of the right of nonunion workers to refuse overtime the employer and the EPB agreed that the issue before the referee was the extent to which the workers' individual contracts of employment obligated them to work overtime.197 Because the (unexplicated basis for the) EPB's conclusion that statutory protection was unavailable itself suggests that the government enforcers take a broad view of employers' prerogatives and a correlatively narrow view of workers' rights to refuse, the case is worth examining in detail.

The two employees involved, who had worked as warehousemen in North Bay for the Outboard Marine Corporation of Canada (a subsidiary of a U.S. firm) since 1972 and 1978, respectively, had no written contract, but their normal working hours were Monday to Friday 8:30 a.m. to 5:30 p.m. with an hour for lunch. The more senior employee had worked overtime Saturdays in 1972-74,

194 The Employment Standards Guide: Adapted from the Ontario Ministry of Labour Interpretation Guide ¶19.2.2 at 19-5. The Ministry mentions only case (R. v. Hartro Office Systems) in which an employer was convicted under this section because "the only logical explanation of the reason for the employee's dismissal was that he filed a complaint under the Act." Id. The case, however, had nothing to do with the refusal to work overtime. Van Duyvenvoorde, [1996] O.E.S.A.D. No. 133 (involving the same parties and discussing the decision of Sept. 7, 1994 in the Provincial Division of the Ontario Court).

195 Telephone interview with John Hill.

196 Kinley, Evolution of Legislated Standards on Hours of Work and Overtime at 28. On the exclusion of employment in commercial fishing and agriculture, see Ontario Regulation 285, §§ 3(e) and (i), in Ontario Rev. Reg. 1980, 3:277, 278.

but later both had worked overtime only sporadically. Nevertheless, on cross-examination they conceded that reasonable amounts of overtime continued to be a part of their jobs. In 1985, however, the district manager informed them that the closing of another depot would result in additional orders that had to be filled during the peak summer season, which the manager wanted to deal with by hiring two additional workers, but that the head office had denied that request, “at least until the existing employees were already working a reasonable amount of overtime.”  

May 16, 1985 (which the decision fails to mention was a Thursday) was the first day the senior employee was asked to stay to work overtime; having planned to watch a hockey game on television, he refused. Indicating that “he might be required to stay and work overtime 3 or even 4 nights a week with a total of 6 to 8 over-time hours a week,” management suggested that “he ought to give some thought to what his priorities were.” The worker then decided to “give it a try” and did work that night, but the next day he told management that he had changed his mind and would not be prepared to work any overtime. At the hearing he testified that at that point the warehouse had been in “‘chaos,’” his “‘nerves were shot,’” and he was having difficulty dealing with the pressure. In response to the district manager’s admonition that taking that position could jeopardize his job, he offered to wind up his employment that day, but the manager replied that he should remain working there but also look for a job elsewhere.  

The junior employee was first asked to stay and work overtime on May 19, 1985. Being in a rehabilitation program for alcoholics and attending Alcoholics Anonymous meetings three or four times a week, he declined; when asked the next day to reconsider, he replied that he and his wife felt (and his doctor agreed) that he should avoid the additional strain of overtime.  

After both workers continued to refuse to work overtime, ten days later the company’s assistant personnel director traveled to North Bay to try to talk them out of their position. The junior employee, Richard Cuthbertson, was well prepared for the conversation: he “had a booklet from the Employment Standards Branch, and it appears likely that it was Mr. Cuthbertson who raised the question of ‘daily’ overtime, pointing out that the company could not require an employee to work more than 8 hours in a day.” The assistant personnel director “agreed with that, but pointed out that that could simply mean having to schedule Saturday overtime.” In response Cuthbertson stated that he had decided not to work any overtime. The other employee also made his refusal final and both were terminated that day. At the hearing neither contested statements in their “‘exit in-  

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198 Outboard Marine Corp. of Canada at 5.
199 Outboard Marine Corp. of Canada at 5-6.
200 Since May 19, 1985 was in fact a Sunday, the date may be a typographical error.
201 Outboard Marine Corp. of Canada at 6-7.
that they acknowledged that overtime work was required, but that they
did not want to work it, and preferred to seek work elsewhere. 202

The case came to the EPB not on the hours issue, but on the question of
whether Outboard Marine had violated the ESA by failing to give the workers the
eight and four weeks’ notice (or pay in lieu), respectively, on termination to
which they were statutorily entitled, unless they had been “guilty of wilful mis­
conduct or disobedience...that has not been condoned by the employer.” 203 The
referee decided that the workers had in fact been willfully disobedient because
they had refused to “give the situation a try, to see if the demands that it produced
upon them were (adopting their own test) in fact unreasonable. Rather, each took
the position...that they were not prepared to work any overtime because of the
concern each...had for the impact that overtime might have on their personal
lives.” To be sure, from an individual employee’s perspective “there may be any
number of reasons why a particular job may become unsatisfactory.... But the
company having had the contractual right to require some overtime...the decision
to refuse to work any overtime at all was not one” the workers “were entitled to
make and insist on retaining their current job....” 204

Regardless of whether the unwritten and (presumably unilaterally imposed)
individual employment contract entitled the workers or the employer to refuse or
demand the performance of overtime work, the question is why the workers’ en­
titlement to termination notice was not decided on the basis of the employer’s
unlawful demand that they work more than eight hours per day against their will.
It is true that, since their normal workweek was only 40 hours, if the employer
had demanded that they, and they had refused to, work Saturday overtime of up
to eight hours, they would have had no basis under the ESA to refuse, and in that
case the interpretation of the reasonableness of their refusal under the contract
would have been relevant. But their refusal to work overtime on Saturdays was
merely speculative because the employer had not yet made that demand: they
were in fact fired for having refused to work more than eight hours on their
regular work days. Once they had refused, it became unlawful for the employer
to insist that they choose between overtime and their job; in fact, the statutory
entitlement to say No was designed precisely to override employers’ overwhelm­
ning power to make good on such a demand. The EPB’s decision, in agreement
with the employer, to frame the issue as non-statutory was especially ironic in
light of Cuthbertson’s express reliance on the EPB’s own publication as authority
for his refusal to work more than eight hours.

202 Outboard Marine Corp. of Canada at 7-8.
1153.
204 Outboard Marine Corp. of Canada at 10-11.
In contrast to the absence of cases from the nonunion sector, the number of union-sector reported disputes is large. Though considerable, the volume of arbitral decisions regarding overtime is small as a proportion of all arbitrations and even declined as overtime rose, from 7.7 percent in 1975 to 3.6 percent in 1983. Moreover, reflecting “the ambivalent attitude of employees to overtime,” compulsory overtime accounted for only 14 percent of all reported arbitration awards between 1980 and 1986, compared to the 25 percent accounted for by the entitlement to and distribution of overtime.

In order to understand the surprising “revolution” that the statutory right to refuse to work hours in excess of eight per day or 48 per week brought about in unionized workplaces, it must be borne in mind that, in the absence of statutory intervention or specific treatment in a collective bargaining agreement, Canadian labor arbitrators “are generally agreed that...the employer has the right to schedule overtime assignments as required and that such assignments are to be regarded as being compulsory,” though even then a worker “may still be exonerated for a refusal to work an overtime assignment if...he had a legitimate and reasonable personal excuse....” Once the legislature intervenes, however, and imposes maximum daily or weekly hours, the compulsory overtime regime in unionized workplaces becomes unlawful unless the union as the workers’ agent has agreed to employers’ overtime requirements. The question in arbitrations and court cases—generated by grievances filed by workers who either were disciplined for refusing to work overtime or obeyed the order and grieved afterward—has centered on what type of contractual language qualifies as adequate consent where employers had valid overtime permits. Despite an early “landmark” decision on the matter by the Supreme Court of Canada, the reported de-

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205 Working Times at 74-75.
207 Working Times, tab. 9.3 at 75.
210 For a case involving an employer that lacked such a permit, see National Starch and Chemical Co. (Canada) Ltd. and Canadian Union of Distillery Workers, 11 Labour Arbitration Cases (2d) 288 (1976).
decisions, though predominantly requiring specificity in collective bargaining agreements and thus upholding workers' right to refuse—at least apart from cases involving statutory emergencies—have remained conflicting.

In the final years of the Hours of Work and Vacations with Pay Act (1966-68), several arbitrations inaugurated discussion of the possible impact of the statutory imposition of maximum hours on workers' obligation to perform compulsory overtime under collective bargaining agreements and arbitrators' jurisdiction to interpret such agreements in part by reference to the statute. The issue first arose in two (unreported) arbitrations involving the Ford Motor Company and the UAW, in which the union argued that, because the employer's overtime demands violated the statute, the workers could not be disciplined for refusing to obey them.

In another Hours of Work Act arbitration in 1968, the last year that law was in effect, J. A. Wilson Display Ltd. suspended for one day without pay three workers who had refused to work overtime on short notice to deal with a production bottleneck. One of the workers, who was also president of the Electrical Workers local union executive, gave as her reason for refusing her feeling that she should not work overtime while co-workers were laid off. Despite the fact that the collective bargaining agreement merely stated that its normal hours of work provision "shall not be construed as...limiting the right of the Company to request any employee to work any specified number of hours either per day or per week," a majority of the arbitration board interpreted "request" as intending compulsory performance of overtime work. The board then rejected the union's argument that the suspensions violated the Hours of Work Act, thus entitling the

212 Why, despite so many adverse decisions, firms continue to litigate this issue is unclear. Canadian counsel to the United Steelworkers, the union that has most frequently challenged employers with regard to the issue of consent under the ESA in reported arbitrations, speculated that employers' adamance may simply be rooted in its sensitiveness to all matters impinging on management rights. Telephone interview with Paula Turtle, Canadian counsel, United Steelworkers, Toronto (Feb. 27, 2002).


214 Parry, Employment Standards Handbook at 5-8, asserts that "conflicting arbitral decisions appear to be rooted in opposing philosophical opinions" without identifying them.

215 In the first case, the arbitrator "Judge Lang applied the Act...to the collective agreement. That award was quashed on certiorari by the Ontario Court of Appeal apparently because it did not decide the question before the board and the case was returned for arbitration by Judge Fuller. That second decision involved limited terms of reference and is not relevant here." International Union of Electrical Workers, Local 566, and J. A. Wilson Display Ltd., 19 Labour Arbitration Cases 352, 358 (1968).
workers to refuse to engage in acts that would make them co-participants in the illegality. It took the position that the statute’s penalty for employees who violated the law did not apply to workers who were not voluntarily working overtime, but only under a disciplinary threat. Procedurally the board ruled that the collective bargaining agreement provision denying the board any jurisdiction to change any of its provisions was precise enough to prohibit the board from considering an alleged statutory breach.\textsuperscript{216}

A major step toward acceptance of the subordination of collective bargaining agreement arbitrations to statutory hours regulation was marked by Professor Paul Weiler’s (quasi-reported) 1969 decision in a dispute between Lake Ontario Steel Company Ltd. and the United Steelworkers of America involving two-day suspensions of two workers who had refused to work overtime.\textsuperscript{217} Management had instructed the workers near the end of their shift to work about one hour of overtime on a rush order that otherwise (because of a mill changeover) could not have been completed for three days. Because failure to complete the order that day would, in addition, have caused cancellation of a later shift and might have required some steel to be scrapped (and in fact the lack of a full complement of workers caused the overtime work to take 15 minutes longer), Weiler held the employer’s scheduling of overtime to be reasonable, but nevertheless found it difficult to characterize the circumstances as constituting an “emergency in the sense of an unforeseeable, fortuitous occurrence,” especially since the firm’s announced policy had alerted workers to the possibility of required overtime in connection with every Friday night shutdown. Although the collective bargaining agreement did not expressly state whether overtime was mandatory or voluntary, Weiler noted the longstanding arbitral presumption that “overtime is compulsory...in the absence of a reasonable excuse.” After observing that the two afore-mentioned Ford Motor Company arbitration decisions had concluded that the maximum hours provision in the Hours of Work Act served to reverse that presumption, Weiler pointed out that the same arbitrator who had taken the opposite position in \textit{J. A. Wilson Display Co. Ltd.} had in an earlier (unreported) case involving the USW and Lake Ontario Steel Company “in principle” held the statute to “make overtime voluntary.” Consequently, Weiler concluded that because “prima facie an employee has the right to refuse to work overtime,” he could not be disciplined for insubordination. Moreover, dismissing the implausible reason that one of the workers had given the foreman for not wanting to work overtime, Weiler held that the “real justification” was the worker’s belief that overtime was

\textsuperscript{216}International Union of Electrical Workers, Local 566, and J. A. Wilson Display Ltd., 19 Labour Arbitration Cases at 353 (quote), 354-61.

\textsuperscript{217}Though not reported in Canadian arbitration reports, the USW published it in its \textit{Union-Management Arbitration Cases}.
voluntary and that the earlier arbitration decision “must have been” the “basis” on which the workers had “relied.” Finally, in addition to rejecting the employer’s claim that the work fell within the statutory emergency overtime provision, Weiler ruled that even if it had been possible to construe the situation as an emergency, the workers’ behavior had failed to rise to the level of the statutorily required “serious interference with the ordinary working of the undertaking.”

In the wake of the enactment of the ESA in 1968, the first arbitral interpretation of the interaction between the new law and collective bargaining agreements lacked analytic subtlety. In the 1971 case of United Steelworkers, Local 2894, and Galt Metal Industries Ltd., which the Supreme Court of Canada eventually decided, a shop steward had informed his supervisor several hours ahead of time that he intended to leave at 4:30 p.m. rather than work overtime until 5:00 p.m. because he had already worked 48.75 hours that week and, by virtue of the ESA, could not be compelled to work any longer; for leaving at 4:30 p.m. the employer suspended him for three days. Because the collective bargaining agreement provision defining the standard workweek as consisting of five eight-hour days and specifying overtime rates contained no “limitation upon the power of the company to schedule overtime,” the arbitrator concluded that under the management rights clause giving the employer the right to schedule its operations as it deemed advisable, “it is beyond dispute that...overtime is compulsory.”

After the union pointed to the aforementioned arbitration decisions from the 1960s under the repealed Hours of Work Act stating that overtime provisions in collective bargaining agreements had to be read subject to that statute, the arbitrator tentatively assumed that he had jurisdiction to interpret the new ESA, despite the fact that the collective bargaining agreement limited his authority to interpreting the latter’s express language. The arbitrator then observed that, since the older act lacked the language under which a worker was not required to work hours in excess of the maximum hours without the consent or agreement of the employee’s agent, those earlier arbitration decisions had to be read with that

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220Ironically, a quarter-century later the Conservatives amended the ESA to make it enforcible through arbitration against unionized firms as if it were part of the collective bargaining agreement; workers were deprived of the right to file complaints with the Labour Ministry and were bound by their union’s decision as to whether to seek enforcement of alleged violations. An Act to Improve the Employment Standards Act, § 18, Ontario Stat. 1996, ch. 23, at 685, 689-92. These amendments were then carried over to the new ESA. An Act to Revise the Law Relating to Employment Standards, §§ 99-101, at 857-60.
significant distinction...in mind." The effect of those additional words, in the arbitrator's view, was "to leave the question as to whether overtime is voluntary or compulsory for determination under the collective agreement.... That being so, the finding made earlier herein that the collective agreement provides that overtime is compulsory remains unaffected by" the ESA.221

Because that approach clearly rendered the ESA nugatory, it opened the way to judicial revision. As Galt Metal Industries was wending its way through the judicial system, Professor Weiler issued a reported arbitration decision in 1972 upholding an arbitration board's jurisdiction to consider the ESA in evaluating discipline meted out to workers for refusing to work overtime, but nevertheless effectively negating the ESA's impact on collective agreements. Weiler found that the overtime provision in the collective bargaining agreement did confer power on management to schedule compulsory overtime because it provided that where the company "may require an employee to perform in excess of his regularly scheduled hours, the Company will undertake to give him reasonable advance notice...."222 Weiler then found that it was permissible to use the ESA to interpret the agreement in order to avoid illegal outcomes, especially since a worker "would be committing a personal offence" by obeying an unlawful order to work overtime and such obedience is not a defense to a criminal charge. The employer had a valid overtime permit and the workers in question had not yet worked their 100 annual overtime hours, but the question still remained as to whether the union as their agent had given its consent or agreement to compulsory performance of overtime work by virtue of the collective bargaining agreement. In his short-circuited argument, Weiler asserted that although the ESA "is not artistically drafted to make the answer clear, we would answer in the affirmative" because the board had already determined that the contract contained an "explicit 'agreement' for compulsory overtime." He did, however, leave open the question, not raised by the case in his view, of whether the mere "implication that the reserved powers of management to schedule compulsory overtime are continued" would also satisfy the ESA's requirement of union agreement.223

In the meantime, the arbitration award in Galt Metal Industries had been quashed by a judge who held that management's normal right to demand over-
time work had been limited by the ESA: the employee was entitled to determine whether to agree to longer hours. Since the collective agreement did not contain such a consent, the arbitrator had impermissibly varied the agreement by reading that consent into it.\textsuperscript{224} The Ontario Court of Appeal set aside that order without indicating how it would have decided the case had it been construing the disputed language. Instead, it merely ruled that the law in Ontario clearly precluded finding legal error in an arbitration award where the issue in dispute was a matter of construction and the language would reasonably bear that construction.\textsuperscript{225}

Then in 1974 the Supreme Court of Canada found that “the arbitrator did not find in the agreement anything which could be construed as a specific consent to overtime beyond the statutory limit of 48 hours.... What he relied on was an agreement that the Company could require overtime work beyond the total of 40 hours per week stipulated in the collective agreement.”\textsuperscript{226} In contrast, the Supreme Court held that the requisite consent or agreement must relate specifically to the performance of work by the employee beyond the normal statutory limits. There is no such consent or agreement to be found in...the collective agreement. ... By the operation of the statute, the right to require overtime beyond 48 hours per week from any individual employee had been taken away from the employer and became subject to the rights of the employee under s. 11(2).\textsuperscript{227}

Because the Court found that nothing in the contract could “possibly be construed” as satisfying the statutory requirement of consent or agreement, it left undecided the question as to “whether this particular consent can be given by a collective agreement.”\textsuperscript{228} Thus, apart from this much more expansive issue of whether any contract could embody the requisite consent, Supreme Court laid down what seemed to be a clear guideline for understanding the interaction between the ESA’s right to refuse overtime and the overtime provisions of a collective bargaining agreement.

Nevertheless, as the leading Canadian treatise on labor arbitration noted, “the issue of what may properly be characterized as consent has already been and will likely continue to be a matter of some debate.”\textsuperscript{229} Initially, and until about 1980, arbitration boards and courts applied the Supreme Court’s guideline strictly. For

\textsuperscript{224}McLeod v. Egan, 46 Dominion Law Reports (3d) 150, 154 (Sup. Ct. Canada 1974) (paraphrasing the judge’s opinion).
\textsuperscript{225}McLeod v. Galt Metal Industries Ltd., 2 Ontario Reports 602 (1972).
\textsuperscript{226}McLeod v. Egan, 46 Dominion Law Reports (3d) at 154.
\textsuperscript{227}McLeod v. Egan, 46 Dominion Law Reports (3d) at 155.
\textsuperscript{228}McLeod v. Egan, 46 Dominion Law Reports (3d) at 155.
\textsuperscript{229}Brown and Beatty, \textit{Canadian Labour Arbitration} at 454.
example, in a case involving a collective bargaining agreement that the arbitrators viewed as making overtime "compulsory," they nonetheless recognized that that finding was not "dispositive" of the issue because the contract was subject to the ESA. The collective bargaining agreement did not purport to express the worker's or the union's consent to work hours beyond those permitted by the ESA; instead, it "merely preserves the prerogative of management to schedule employees as it deems proper." Because the agreement lacked the requisite specific reference to the ESA, the "Act takes precedence over such general provision."230

Another arbitration board found that a collective bargaining agreement provision in which the union agreed that "the proper operation of the business will require overtime work periodically and that the employees will cooperate fully in the matter" did not constitute the statutorily required consent.231 The Ontario Divisional Court even expressed "considerable doubt" as to whether "the required consent can be given in a collective agreement...."232 Yet another arbitration board that found that a collective bargaining agreement providing that overtime was voluntary only for weekends lacked the requisite specificity, also ruled that, where an employee had answered No to a question on his job application form asking whether he objected to overtime work, the form failed to "disclose with sufficient specificity that the employee...in effect waives his rights under" the ESA, which "are not to be lightly taken away...."233

Finally in 1980-81234 an influential arbitration (Algoma Steel Corp.) and court decision (Walker Exhausts), both involving the United Steelworkers, rejected the position that to constitute consent a collective bargaining agreement had to refer specifically to the ESA.235 After several arbitrations had adopted this new po-

230 Adams Mine Cliffs of Canada Ltd and United Steelworkers, 8 Labour Arbitration Cases (2d) 204, 208, 210 (1975).
231 Dominion Stores Ltd and Retail, Wholesale and Department Store Union, Local 545, 17 Labour Arbitration Cases (2d) 52, 54 (quote), 57 (1977).
233 Dashwood Industries Ltd. and United Brotherhood of Carpenters and Joiners, Local 3054, 24 Labour Arbitration Cases (2d) 237, 240 243, 244 (1979).
234 An earlier arbitration, Ingersoll Cheese Co. and Amalgamated Meat Cutters and Butcher Workmen of North America, Local 458, 10 Labour Arbitration Cases (2d) 268, 272 (1975), had ruled against a worker on the grounds that, by virtue of his conduct and the long established practice in his department of working overtime, he had "tacitly consented to work overtime when he accepted the assignment to work" in that department and "knew what was expected of him."
235 Algoma Steel Corp. v. United Steelworkers of America, Local 2251, 28 Labour Arbitration Cases (2d) 31 (1980); Walker Exhausts and United Steelworkers of America. Local 2894, 32 Ontario Reports 507 (Divisional Ct. 1981).
sition, in 1998 the Ontario Arbitration Board in *Ontario Hydro* ruled that both the Supreme Court and the *Walker Exhaunts* court had held that "the language relied upon as constituting consent or agreement must evidence a clear intent to relinquish the statutory right of affected employees to refuse work beyond the statutory maximum." To be sure, such intent could be evidenced by a reference to the statute, the hours permit, or "to the specific hours beyond the statutory maximum that are compulsory," but: "Language that simply makes overtime compulsory, where either the daily or weekly hours of work are less than the statutory maximum, is not sufficiently specific and, therefore, is equivocal with respect to whether the intent was to give up the statutory right to refuse work beyond the statutory maximum."

In 2001 another arbitrator was called on to interpret contract language that expressly and precisely confirmed the employer's power to impose overtime work: for example, the rather detailed hours provisions in the collective bargaining agreement between DDM Plastics, Inc. and the International Association of Machinists (IAM) stated that it was "understood that Customer and business requirements may make it necessary to work hours other than" the normal eight-hour day, "which shall not constitute...a limitation upon the scheduling of employees for work." More specifically, the contract provided: "The parties recognize that the needs of the Business will require overtime work and it is understood that employees will work overtime as required by the Company." Moreover, whenever all employees declined the employer's request to work overtime on a rotational system, "the company shall have the right to require overtime commencing with the employee with the least seniority." Nevertheless, building on *Ontario Hydro* 's "unanswerable" analysis and reasoning, the arbitrator found the alleged waiver of statutory rights too ambiguous or equivocal to meet the test set by the ESA. In allowing the union's grievance, which raised the question of the employer's violation not of the contract but of the ESA, the arbitrator stressed:

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239 DDM Plastics Inc. and International Association of Machinists and Aerospace Workers, Local 2792, 94 Labour Arbitration Cases (4th) at 228, 229.
Given the public interest component of the principle of a maximum 48-hour workweek, it seems to me reasonable to expect that any derogations from that principle that are allowed by Ontario legislation should be narrowly construed and strictly proved. It is one thing for an arbitrator to conclude that a bargaining agent has implicitly agreed to forego rights provided for in the collective agreement, since the bargaining agent and the employer created those rights in the first place, but quite another...to conclude that statutory rights, enacted in the public interest and with underpinnings in public international law [as expressed in Canada’s ratification of the International Labour Organization’s Hours of Work Convention], have been waived.\footnote{DDM Plastics Inc. and International Association of Machinists and Aerospace Workers, Local 2792, 94 Labour Arbitration Cases (4th) at 228-29.}

To be sure, the IAM had unambiguously consented to mandatory overtime, but the contract failed to address the issue expressly of whether mandatory overtime beyond 48 hours weekly was permissible or not. And although there was some extrinsic evidence that, under the employer’s just-in-time system producing bumpers for the automobile industry, “the parties must have envisaged that employees would be subject to more mandatory overtime, including overtime that would lead to workweeks of more than 48 hours.” such an invitation to the arbitrator to find an implied term by which the union consented to waive the workers’ statutory rights fell far short of the requisite express waiver.\footnote{DDM Plastics Inc. and International Association of Machinists and Aerospace Workers, Local 2792, 94 Labour Arbitration Cases (4th) at 229.}

In another case in 2001, an arbitrator further weakened the force of Walker Exhausts by interpreting it to mean that “to override an employee’s statutory right to refuse overtime, the language must unequivocally evidence such an intention”; and to the extent that there was a line of cases asserting that the requisite consent could be found in a compulsory overtime clause making no reference to the ESA, the hours permit, or any other wording “specifically ousting an employee’s statutory right not to work more than forty-eight hours in a week,” he also declined to follow it.\footnote{Petro Canada Lubricants and Communications, Energy and Paperworkers Union of Canada, Local 593, ¶15 (O.L.A.A. No. 236, No. A/Y001807, 2001) (Arbitrator Jules Bloch) (Quicklaw).} Thus despite the fact that workers for at least 10 years had been voluntarily working overtime beyond the maximum prescribed in any permits, a collective bargaining agreement that merely provided that “[o]vertime work will be performed by employees when required to maintain efficient operations” failed to satisfy the standard of specificity.\footnote{Petro Canada Lubricants and Communications, Energy and Paperworkers Union of Canada, Local 593, ¶¶10, 4 (quote), 16.}
Overall, then, the Employment Standards Act has empowered individual organized workers to resist employers’ imposition of overtime work under collective bargaining agreements that, standing alone, lacked terms favorable enough to have produced the same protective outcomes. However, unionized workers have not succeeded in expanding the right to refuse into a collective right to refuse overtime work that exceeds the statutory maximum but is covered by a government permit. Thus, for example, a Canadian Automobile Workers local acknowledged this gap when it distributed a circular to members advising them that while they retained the “personal” right to refuse to work overtime, “such individual decisions are much different than refusing to work overtime as a group,” which “would be a violation of...The Labour Relations Act and is not supported by the Union.” Consequently, union workers have failed to overcome the prohibition in the Ontario Labour Relations Act of union bans on overtime work—which have been interpreted as strikes during the pendency of a collective bargaining agreement.

In contrast, nonunion workers in Ontario appear to have been able to make little if any use of their statutory right to refuse to work overtime, in large part because the provincial Ministry of Labour has not sought to secure judicial reinstatement of workers who were fired for having exercised that right. On the other hand, by generously and automatically permitting employers to exceed the eight and 48-hour maximums, the statute and the Labour Ministry facilitated a level of working-time “flexibility” that, at least in the de facto unprotected nonunion sector, may have left firms as well-positioned as if there had been no maximum hours law at all. The principal remaining constraint—the obligation to pay time and a half after 44 hours—is not only less onerous than the 40-hour threshold in the United States, but has in part been eliminated by the hours-averaging amendments introduced in 2000.

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245 The Labour Relations Act, § 1(1), Rev. Ontario Stat. 1990, ch. L.2, at 851, 853, defines a strike as including a refusal to work or to continue to work by employees in combination or in concert or in accord with a common understanding.


The right to refuse to work overtime, as the example of more than a half-century of experience in Ontario demonstrates, is not an unambiguously positive instrument of achieving a normal working day or week. Because the laissez-faire underpinnings of the right to say no are inextricably linked to the right to say yes, its libertarianism not only makes it possible for workers to become complicit in the race to the bottom that compulsory labor norms are designed to prevent, but also makes effective enforcement against employers intent on using subterfuges to transmogrify coercion into consensualism difficult and sometimes impossible. These perverse outcomes should be contrasted with the operation of an absolute maximum-hours law, which is designed to create an “overwhelming societal obstacle” to such transgressions.\(^{248}\)

The question raised in 1987 about the maximum hours standard by Kinley, the Ontario Task Force on Hours of Work and Overtime researcher, has thus proved to be prophetic:

Reduced hours of work in the community, exemptions, and permits to exceed the hours standard have reduced its relevance to such an extent as to render it of no effect across much of Ontario industry. Might a guideline more relevant to existing conditions reinforced by a strong premium rate policy be a more effective approach to hours control?\(^{249}\)

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\(^{249}\) Kinley, *Current Administration of Legislated Standards on Hours of Work and Overtime* at 29.
Part VII

Conclusion

"In the long run," warns Inland Steel Vice President William Caples, "anything that becomes expensive, we eliminate—we engineer it out." The risk is that such [increased overtime] penalties might provide the impetus for new breakthroughs in automation that would make unemployment even worse.¹

Overtime is [a] normal part of business life and you can’t price it out of existence.²

Increased Velocity of Throughput and Autocratic Flexibility

The type of overtime...we're opposing is the oppressive type that goes far beyond the employee's obligation to his employer. ... The type of overtime that...makes the employee feel more like an indentured servant than a free man.1

The fact that the process of weakening hours laws in Europe and Canada during the past two decades in the name of creating more “flexible” workplaces that can then compete more robustly in an international economy has been as inexorable as globalization itself strongly suggests that pressure may mount to dilute the FLSA's overtime compensation provision too. One possible explanation for the failure thus far to revamp that law is that, unlike hours regulation in most other countries, the FLSA has never imposed on employers any non-monetary constraints on the length of the workday or workweek. Thus facing only the premium overtime rate for weekly hours beyond 40 and a much smaller unionized sector than their counterparts in other advanced capitalist countries (with the exception of France),2 U.S. employers have presumably been subjected to less intense competitive pressure to reduce the cost of overtime premiums. Nevertheless, a congressional drive, begun in the 1990s, to introduce hours-averaging in order to eliminate some liability for overtime premiums, which firms have achieved in Europe and Canada, will doubtless remain on employers' agenda.

Conversely, it is equally certain that nothing remotely approaching a congressional majority exists for shortening the workweek, let alone for protection against forced overwork, even if hedged with exceptions for employer emergencies. Equally unthinkable is serious congressional consideration of a free-market alternative that would raise the overtime premium to double- or triple-time in order to test how commercially important the overwork is to the buyers of the products in such putatively urgent demand and, derivatively, to the buyers of the labor that must produce them. These questions are so distant from public concerns or the AFL-CIO's agenda that it has been years since even dead-on-arrival pro forma bills on these issues have been introduced in Congress. Ideological

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1 [California] Senate Committee on Industrial Relations, Interim Hearings on AB 1295—Mandatory Overtime 133 (Nov. 7, 1977) (statement of Ian McIntyre, Communication Workers of America, legislative and political chairman, Southern California).

momentum has shifted so far in capital's favor that the labor movement would consider itself fortunate if it can stave off attempts to repeal the FLSA's existing overtime pay provisions.³

However, the brute fact that no legislative majority yet exists for protecting workers against forced overwork does not necessarily speak against advocating such intervention before its time. But it also does not immunize advocates from the need to learn from past legislative-judicial fiascoes. Chief among these were the Alaska eight-hour law of 1917-18 and Pennsylvania's 44-hour law of 1937-38, the only general-application state maximum-hours laws ever enacted (and almost enforced) in the United States.⁴ Although the laws foundered judicially and constitutionally on issues (deprivation of due process and impermissible delegation of legislative power to an administrative agency) that would no longer be likely to lead to invalidation, the manifold practical—in contradistinction to the intense and widespread ideological—objections to them voiced by employers would have to be taken into account by any new initiative to restrain employers from imposing overwork on their employees. Even if the Pennsylvania Department of Labor and Industry erred in seeking to accommodate numerous industries by issuing a confusing thicket of regulations tailored to meet their alleged individual special needs, no maximum-hours law can avoid the issue of providing for emergencies that justify exceptions to the workday and workweek caps. Such clauses would have to be carefully worded to confine the set of triggering events to those that result from various natural catastrophes or would result in imminent injury to life or significant physical assets (which would, in turn, jeopardize future employment) if work were to cease.⁵

Abundant historical experience in Britain and the United States has shown that unless such terms as "emergencies" are precisely defined, "advantage may easily be taken of the exception to permit unnecessary overtime."⁶ British hours

³Shortly after Clinton's election, stating that such legislation had a chance of enactment under an executive and legislature controlled by Democrats, the AFL-CIO announced that it would push the new administration to amend the FLSA to raise the overtime premium to 100 percent. David Francis, "Are Those Working Overtime Whistling?" Christian Sci. Monitor, Apr. 2, 1993, at 8 (Lexis). Nothing came of this initiative.

⁴See above chs. 5 and 7.

⁵The leading leftist labor law scholar in Germany considers a complete prohibition of overtime "illusory" since the situation may arise in almost all plants that suddenly additional work has to be performed and no additional workers are available or able to do it. He also believes that emergency clauses are no solution because employers would almost always find a way to construct an emergency together with a work force interested in overtime payments. He views as the only legal and economic solution making overtime "drastically" more expensive through collective bargaining, 120 per cent being a plausible penalty rate. Wolfgang Däubler, Das Arbeitsrecht: Ein Leitfaden für Arbeitnehmer 2:84-85 (1979).

⁶John Commons and John Andrews, Principles of Labor Legislation 121 (4th ed. 1936
statutes for women and children in textile factories, the country's most important in the nineteenth century, absolutely prohibited overtime, while later laws governing various other industries permitted overtime "by reason of press of work arising at certain recurring seasons of the year, or by reason of the liability of the business to a sudden press of orders arising from unforeseen events," or even when the process in which children or women were employed was "in an incomplete state at the end of the period of employment" of the protected workers. Advocates of strict enforcement criticized such permissiveness and unionists argued that such partial exemptions were self-fulfilling prophecies: sudden spurts in orders were the result of customers' very knowledge of this overtime provision. Yet even as late as the British Factories Act of 1961, employers were permitted to deal with the "pressure of work in any factory...by the overtime employment of women and young children" up to six hours per week and 100 hours per year.

Historical models for more rigorous definitions of emergency provisos are also available. As long ago as 1913, Oregon prohibited a workday in excess of eight hours for governmental work except for "necessity, emergency, or where the public policy absolutely requires it," and then created a presumption that none of them existed "when other labor of like skill and efficiency, which has not been employed full time, is available." Oregon's current maximum hours regulations specify that: "When the normal production process is interrupted by a breakdown of machinery or unexpected absences of employees, life and property are not normally threatened with harm or destruction. For this reason, the exemption is not applicable to normal routine operational occurrences." The attorney general of Arizona has interpreted that state's "emergency where life or property is in imminent danger" exception in its eight-hour law for miners narrowly so that the loss of revenue arising from the halting of production would not in itself justify working more than eight hours; moreover, the emergency would have to be so unforeseen, unexpected, and threatening as to "place a reasonable and prudent
man to the instant defense of either life or property.\textsuperscript{13}

Since many life- and property-threatening catastrophes would be unpredictable and supervene without notice, (nonunion) employers\textsuperscript{14} might have to be permitted, in the first instance, to declare such emergencies on their own, subject to review by the labor standards agency.\textsuperscript{15} For example, an early Colorado law prescribing a strict eight-hour day for mines and smelters required employers to submit a report within ten days detailing the circumstances creating the alleged emergency.\textsuperscript{16} In order to deter employers from frivolously declaring emergencies, such a provision would have to include significant financial penalties for wilful and/or repeated false declarations as well as a private right of action for the affected workers to sue employers for having deprived them of their statutorily guaranteed freedom from wage labor.

Even if the question of emergencies can be resolved, no rigorous maximum-hours norm is feasible unless it applies generally across product and labor markets, thus depriving employers of the argument that if they fail to meet some sudden spike in demand, other firms will and will also eventually drive them out of business. In turn, however, this type of rigorous regulation presupposes the social acceptance of the notion that the time-sensitive aggregated whims of consumers (and firms) do not automatically trump the norm of a standard, fixed, known, and limited workday and workweek, which is subordinated to other life


\textsuperscript{14}In Germany, works councils have co-determination rights (provided that no statutory or collective bargaining provision is involved) with respect to the “beginning and end of daily working hours...as well as the distribution of working hours among the individual days of the week.” Betriebsverfassungsgesetz, vom 15. Jan. 1972, § 87(1)2., Bundesgesetzblatt I:13, 30. The practical significance of this empowerment is, however, limited by the works councils’ ambiguous position, which may lead them to “agree to patterns of promoting the competitiveness of the company, even if in terms of social policy there may be doubts as to whether such an agreement is reasonable.” M. Weiss, “Germany,” in Legal and Contractual Limitations to Working Time in the European Union 333-65 at 357 (2d rev. ed.; R. Blanpain et al. eds. 1997).

\textsuperscript{15}In smaller (or very well staffed) jurisdictions the labor standards agency may be able to make determinations in real time. For example, the Labour Services Branch in the Yukon does provide instantaneous (but nonbinding) telephonic responses to questions from employees as to whether they have statutory “just cause” to refuse to work overtime. Telephone interview with Lee Ann Campbell, Employment Standards Officer, Labour Services Branch, Whitehorse, Yukon Terr. (Jan. 31, 2002). According to Theodore Kheel, who was director of the office of impartial review of the electrical industry of New York in the early 1960s, the mechanism established by the collective bargaining parties for reviewing construction firms’ requests to work emergency overtime was “effective in preventing extra overtime.” Hours of Work: Hearings Before the Select Subcommittee on Labor of the House Committee on Education and Labor, 88th Cong., 1st Sess., Pt. 2, at 547-52 at 548 (1964) (reprinting Theodore Kheel, “Report of Findings and Recommendations”).

Increased Velocity of Throughput and Autocratic Flexibility

needs outside the sphere of for-profit production.

Employers’ claim—which is applicable to all mandatory labor norms—that the imposition of limits on overtime work would have untoward and unfair competitive consequences is of such overriding importance that it must be answered directly. That Big Business takes it seriously was made abundantly clear by its representatives at the congressional hearings in the mid-1960s on the Johnson administration’s proposal to increase the overtime penalty rate to 100 percent.17

Owens-Illinois Glass Company, for example, submitted testimony that first articulated the overarching principle of capitalist economies and then illustrated it by reference to the firm’s corrugated box division:

Overtime is often necessary as a result of rush orders. The meeting of such rush orders has long been a trademark of this Nation’s competitive economy. Need it be stated, if one does not fill a customer’s rush order, that order, as well as the customer’s future orders, whether rush or not, will be taken to a competitor who will.

... Customers of corrugated boxes require and demand quick service. It is not unusual for a customer to call late one afternoon for a truckload of boxes to be delivered the next morning; in such event, it is often necessary to hold over printing and finishing crews beyond their scheduled hours in order to make the delivery. Again, many times it is necessary to operate on Saturday to meet Monday morning rush deliveries as a result of Friday afternoon orders. ... Simply stated, we have no alternative other than to attempt to meet such rush orders through overtime if we intend to retain the business of such customers.18

Looking at the question from the perspective of costs, the Aluminum Company of America came to the same dog-eat-dog conclusion: “With present wages and costs already so high that they impair our opportunity to make any reasonable profit in many of our product lines, we might...have to forego customer orders requiring special treatment or fast delivery rather than pay the double overtime required to do the job.”19

Finally, General Electric’s vice president for labor relations, Virgil Day, a prominent figure in formulating large employers’ postwar national labor policy, presented the point dramatically:

17See above ch. 14.


The reasons for overtime are many, and they differ from one period of business and defense activity to another and from one plant and product situation to another. But one reason stands out. It is this. Customer orders and delivery dates are not spread evenly over the hours of a day or the days of a week or the weeks of a year. Customers “want what they want when they want it” without regard to whether their orders add up to a regular or very irregular daily, weekly, or yearly work schedule.20

These high-profile corporate managers were making two interrelated but distinct points. One was the claim that if the state deprived these employers of the power to force (“hold over”) workers to work longer hours than they want to work in order to satisfy unexpected demand, other firms would fill those orders and permanently take market share away from companies unable to compel overtime. There is a straightforward and complete answer to this complaint: By applying labor norms universally, the state can avoid such skewed competitive consequences. Whether the subject is child labor, minimum wages, safety and health regulations, or overtime, the purpose of imposing national standards on all employers is, in the rhetoric of the New Deal, precisely to prevent “chiseling” employers from gaining an unfair competitive advantage. Thus, if no employer is permitted to work employees more than 40 hours per week, no corrugated box producer need worry that it will lose market share because a competitor can “hold over” its employees.21

Employers’ other argument, however, cannot be reduced to a matter of regulating competition and is not answered by reference to the creation of universally applicable norms. This other claim, which does not apply to monetary standards such as minimum wages, in effect insists that taking away firms’ prerogative to compel overtime would detrimentally alter the very character of American capitalism by suppressing one of its most fundamental long-term efficient features—namely, ratcheting up the overall systemic “velocity of throughput.”22 Although overtime work is not the only possible method of meeting unexpected demand, others, such as operating additional shifts or continuous production, require unsocial night or rotating shifts—by 1997 two-fifths of workers in the


21The only objection to this answer is that such national labor norms cannot protect firms from competitors in other countries that are not subject to U.S. laws. This objection either proves too much—it would doom all labor standards legislation—or can be met by introducing labor norms into international trade rules. There is also the subsidiary empirical consideration that it seems unlikely that firms in the United States would seek to fill rush orders for (for example) corrugated boxes from producers in Asia, thus incurring significant air freight costs.

22Alfred D. Chandler, Jr., The Visible Hand: The Managerial Revolution in American Business 244 (1978 [1977]).
United States worked evenings, nights, weekends, or rotating shifts, while only 32.8 percent of women and 26.5 percent of men worked Monday through Friday, 35 to 40 hours per week on a fixed daytime schedule—may be as detrimental to workers' health and safety as overwork. Still others, such as producing for inventory, may introduce risks and inefficiencies.

There is no doubt that a socioeconomic system that elevates production and profit above all other values can underwrite 24-hour-a-day consumerism in ways that are foreclosed to other modes of production. As a physician observed of the implications for the expansion of wage labor of a new drug that may "ultimately make regular sleep unnecessary": "Even as sleep disorders increase, firms are pushing their employees to disrupt their normal sleep patterns in order to provide services around the clock. A fitness center that is open twenty-four hours a day, or a restaurant that can deliver in the early morning, or a brand manufacturer that can take orders and ship clothes and shoes and backpacks and watches whatever the hour may enjoy a significant advantage over its competitors." For those who have welcomed or at least acquiesced in the recreation of society as one gigantic 'convenience' store, whose wealth appears as an "enormous collection" of instantaneously and continuously available commodities and commodified services, the question is whether they have so fully accepted wage work and consumption as their sole life activities that they are willing to permit nonstop consumerism to dictate nonstop work.

A libertarian alternative to an absolute maximum-hours statute is the just-say-no model, which theoretically entitles individual workers to refuse employers' demands to work overtime without subjecting themselves to any workplace penalties. In addition to Ontario, the profoundly flawed character of whose legislation and enforcement of such a right has already been examined, two Canadian provinces and one territory have implemented this approach by embedding a right to refuse in non-maximum-hours overtime laws. In yet another province the government is empowered to require employers to reduce hours of work that are excessive or detrimental to workers' health or safety. None has proved successful.

Saskatchewan enacted a right to refuse in 1976-77 prohibiting employers from requiring employees to work more than 44 hours per week (which amounts to four hours of statutory overtime) without their consent: "Where an employee

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26See above ch. 17.

27Although employers are otherwise required to pay time-and-one-half rates for all
refuses to work or to be at the disposal of an employer contrary to the employer’s requirement...and where no emergency circumstances exist, no disciplinary action shall be taken against the employee by the employer.”28 The emergency circumstances—the existence of which it is the employer’s burden to prove—are defined, rather loosely, as “any sudden or unusual occurrence or condition that could not, by the exercise of reasonable judgment, have been foreseen by the employer.”29 Whatever the legislative formulation, the fecklessness of the law can be gauged by the admission of the senior labor standards officer in the Regina office that the provincial Department of Labour has received no complaint from a worker during the quarter-century the right to refuse has been in effect.30

Similarly, since 1977 Manitoba’s Employment Standards Act has declared that “the management rights of an employer do not include an implied right to require an employee to work overtime.”31 In 1998 this limitation was considerably restricted by a capacious provision permitting employers to “require overtime if an occurrence interrupts or threatens to interrupt work urgently required to be done in respect of the business of the employer to the extent necessary to avoid serious interference with the ordinary operation of the business.”32 Even this paper right to refuse to work overtime, however, has been called “innocuous” by the executive director of Manitoba’s Employment Standards Division, who has explained that employers have neutralized the workers’ right merely by the device of requiring employees at the time of hire to sign an agreement that they are willing to work longer hours when required.33

In 1992 the Yukon Territory amended its Employment Standards Act to empower employees who had been requested to work beyond their regularly sched-
uled shift without at least 24 hours’ notice to refuse to work the additional hours except in emergencies. Even where employees had been given the requisite 24-hour notice, they were still permitted to refuse to work the additional hours if they had their own “emergency.” On request of the employer or the employee, the Labour Services Branch was authorized to determine what an emergency was.34 Three years later, these safeguards were repealed in favor of a broader provision: “An employee may refuse to work overtime for just cause but is required to state the refusal and the cause for refusing to the employer in writing.”35 At the same time the legislature provided that: “An employee who considers that he or she is being required to work hours which are excessive or which are detrimental to his or her health or safety may file a complaint” with the director of Employment Standards; if, after inquiry, the director agrees with the worker, he is empowered to order the employer to limit daily hours to eight or weekly hours to 40.36 Thus far, however, workers have not tried to avail themselves of this protection.37

Finally, in British Columbia “an employer must not require or directly or indirectly allow an employee to work excessive hours or hours detrimental to the employee’s health or safety.”38 If the Director of Employment Standards determines that a worker is in fact working excessive hours, “the director can require the employer to reduce the number of hours.” If the employer fails to comply, the remedy is a penalty and triple-time overtime.39 However, workers in British Columbia have also not yet successfully availed themselves of this protection. In the one pertinent case, which the worker lost on factual grounds, it was held that the criteria for determining whether a worker could rightfully refuse work for the reason that his health was at risk include: the honesty and reasonableness of the worker’s belief; whether he communicated it reasonably to his supervisor; and whether the danger was sufficiently serious to justify the worker’s action.40 Otherwise enforcement officials report that they cannot recall ever having pro-

37 One reason for this failure to take advantage of the protection may lie in the availability of a similar protection in the territorial workers compensation law. Telephone interview with Lee Ann Campbell, Employment Standards Officer, Labour Services Branch, Justice Dept., Whitehorse, Yukon Terr. (Feb. 1, 2002).
pressed a complaint under this section, which is "little used if ever." The Program Advisor at the Employment Standards Branch could not recall any case involving its interpretation or application in his more than 22 years there.41

The current version of the provision goes back to the 1946 amendments to the Hours of Work Act, which stated that where the Board of Industrial Relations "is satisfied that extra working-hours are necessary to overcome emergent conditions that may arise from time to time and that such extra working-hours are not imical to the interests of the employee," it may permit the worker to work longer than 44 hours.42 From 1923 to 1980 the Hours of Work Act was, on the surface, a maximum-hours statute, but in practice it permitted employers as much overtime as they needed; in contrast, since 1980 the Employment Standards Act has been a mere overtime law, under which employers can require workers to work overtime, provided that they pay time and a half after 40 hours and double time after 48 hours.43 Whatever potential force the "excessive" hours provision has may vanish after the new Liberal government, which occupies 77 of 79 seats in the provincial legislature, revises the ESA in 2002 to create greater "flexibility."44 The amendments' radical character was signalled by the Labour Ministry's Discussion Paper, which contemplated excluding from coverage "workers who request [sic] their employer, or agree to their employer's request, for work arrangements that operate outside the requirements of the Act."45 The first installment, Bill 48, passed on May 30, 2002, repealed the double-time pay for long weeks and authorized averaging 40-hour weeks over four weeks and 160 hours.46

These weaknesses in the only relevant provincial laws prompted the authors of a prominent employment law treatise to observe that the "lack of an effective right to refuse overtime...is a major gap in Canadian hours of work legislation."47

41 Telephone interview with Terry Hughes, Employment Standards Branch, Ministry of Skills Development and Labour, Victoria, British Columbia (Feb. 12, 2002); telephone interview with Graeme Moore, Surrey, British Columbia (Feb. 13, 2002).
In 1994, the Advisory Group on Working Time and the Distribution of Work established by the Canadian Minister of Human Resources Development recommended that “employees be given the right to refuse overtime work after the legislated standard work week of 40 hours and that this right be incorporated into employment standards legislation,” but no progress toward this objective has been made. The Advisory Group’s recommendation was all the more remarkable because it was ostensibly the outcome of balancing “two competing pressures”—“the principle that an individual should have the right to accept or to refuse to work overtime” and the fact that “many companies, for very sound economic reasons, must respond to consumer demand and competitive pressures by extending their hours of operation.” Since the recommendation failed to strike a balance, it is unclear how the Advisory Group imagined that it was accommodating what it acknowledged as employers’ “legitimately requiring safeguards to ensure that...unexpected increases in demands can be met.”

To be sure, implementation of this right to refuse would leave both firms and advocates of strict labor standards dissatisfied. Whereas employers would object that in cases where either everyone must or no one can work overtime, such a regime would enable hold-outs effectively to veto overtime for a majority that has agreed to perform it, proponents of mandatory standards would liken the race-to-the-bottom consequences of this approach to those that would be triggered if desperate workers were free to opt out of minimum-wage requirements.

It was precisely such libertarian debasement of labor standards that prompted the Fabian Society in Britain in 1890 to propose an eight hours bill that dealt with the predicament of a majority “compelled to work against their wish...by the obstinacy or disloyalty of the minority....” Under the bill, whenever it had been proved to the satisfaction of the Home Secretary (who administered the factory acts) that a majority of workers in any trade or occupation in the United Kingdom favored a fixing by law of the maximum weekly working hours in their trade or occupation, he was required to declare such a maximum, employer violations of which would then have triggered fines. In order to ascertain the workers’ desires, the Home Secretary was empowered to conduct a public inquiry or a poll. Such a procedure could be triggered either by a request by a labor union or by the official’s own belief that “excessive” working hours prevailed. In the first case, where the workers took the initiative of approaching the government, the clause would have promoted organizing and made state aid “conditional upon the workers first using their opportunities of self-help”; in the second case, the government would have intervened for the “relief of those exceptionally unfortunate

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workers who, by their condition or the circumstances of their employment, are hindered from associating for the purpose of discussing their position.” The Fabians regarded it as one of the chief virtues of this approach that the “clause could not practically be put in force until a prolonged discussion had convinced a considerable majority of the workers of its advantage; and by that time the minority would have become prepared to acquiesce in the law, and the employers would have been able to make arrangements to avoid any inconvenience from the change.”

The only problem with such a thoroughly democratic, participatory, and majoritarian process for establishing industry- or occupation-wide working-time norms is that it transcends Congress’s political-economic horizons. One imaginable compromise between what remains of the labor movement and employers eager to be rid of what they regard as invasively detailed overtime regulations for administrative, executive, and professional workers would be the elimination of all exclusions and exemptions in favor of coverage of all employees whose weekly or hourly wage or salary fell below a certain high level. Yet even this reform, which would be far from optimal for white-collar workers, offer manual workers nothing, and fail to satisfy many employers, is very unlikely, at least standing alone, to attract broad and intense enough employer support to galvanize congressional action.

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50 Fabian Society, An Eight Hours Bill 7-8 (Fabian Tracts No. 9, May 1890).
52 An organization of the senior human resources executives of more than 200 of the largest corporations in the United States has put forward $40,000 as such a coverage threshold. The Fair Labor Standards Act: White-Collar Exemptions in the Modern Workplace: Hearing Before the Subcommittee on Workforce Protections of the House Committee on Education and the Workforce, 106th Cong., 2d Sess. 124 (2000) (written statement of Labor Policy Association). A current debate in British Columbia offers a sense of the unrealistically low levels that the government and employers in the United States might envision. In a discussion paper of possibilities for revising the provincial Employment Standards Act, the new Liberal government proposed various monetary thresholds (converted here to U.S. dollars): four times the minimum wage ($20.36) per hour or $37,224 per year; twice the average industrial wage ($22.40) per hour or $40,923 per year; or a set $38,202 per year. British Columbia, Ministry of Skills Development and Labour, Fair and Effective: A Review of Employment Standards in British Columbia at 1. Calling these thresholds “simply too high,” a coalition of provincial employers instead proposed the average industrial wage of $12.10 per hour or $25,468 per year. This group asserted that the rationale of “basic minimum standards to ensure that employees are not taken advantage of by employers who seek to impose unacceptable terms...loses its legitimacy when applied to employees” earning such an average, “who, by virtue of the skills and experience they bring with them to the job, are able to negotiate their terms and conditions of employment on a relatively even footing with the employer.” Coalition of BC Businesses, Labour Policies that Work: A New Vision for BC: Response to Fair and Effective: A Review of Employment Standards in British Columbia 10, 11 (Dec. 2001), on http://www.cfib.ca/legis/bcyukon/index.asp.
Increased Velocity of Throughput and Autocratic Flexibility

A more plausible legislative scenario would be the success of the potent employer lobby in finally extending the "revolution" of "total quality management," as the Flexible Employment, Compensation, and Scheduling Coalition explained to Congress in 1996, to the "one last bastion which remains untouched—the laws governing the workplace. Nowhere is this more devastating than the wage and hour laws that continue to impose mid-20th century strictures on a workplace racing into the next millennium."53 The legislative result might be implementation of the "greater flexibility in employment standards"54 that has swept Europe and Canada. Employers in the United States have given this regime the innocuous-sounding description of "releasing employers and employees from the strict overtime rules that presently restrict their ability to experiment with non-traditional, flexible work arrangements."55 This reorientation may take the form of the abolition of the 40-hour week even as an aspirational norm and its replacement by some variant of an 80-hour, 2-week or 160-hour, 4-week pay period, during which firms would be privileged to employ workers as many or as few hours per week as fit the firms' production schedules without incurring any overtime liability, provided that they remained within the 80-hour or 160-hour limit for the two or four weeks.56

Whatever the shape of the next phase in the struggle over working hours, so long as workers and unions implicitly accept profitability and instantaneous satis-

faction of consumer demand as the social economy’s supreme ordering principles, depriving capital of its status as “economic Juggernaut” and sole authorized interpreter of human needs will remain—to vary the Wage and Hour Administrator’s 1938 dictum—an impious wish.

As the watchwords of their patiently and strategically conducted campaign to dismantle the remnants of societal regulation of working hours employers have rhetorically appropriated “flexible” and “flexibility” in their almost universally accepted positive senses. After all, it would seem quixotic, if not reactionary, to declare opposition to the ability to respond to changing or new situations. But not all changes are for the good, and re-imposition of ten- or twelve-hour workdays and 50- or 60-hour workweeks (with or without overtime premiums) represents precisely the kind of class-biased change that the antagonistic capital-labor relationship inherently recreates. At the same time, employers have been careful to keep at bay the other, less flattering, meaning of their slogan: to be willing or ready to yield to the influence of others—tractable, manageable, governable, pliant, docile. Yet the ultimate question in the struggle over the control of working time is whether workers will bend to capital’s demands or whether capitalism will prove to be flexible enough to accommodate the extraction of surplus value to the needs of the human creators of profit—and, if it is incapable of such flexibility, whether workers will replace it with a society in which production no longer dictates to other life spheres.

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57 John Maynard Keynes, “The Economic Consequences of Mr. Churchill,” in idem, Essays in Persuasion 244-70 at 261 (1963 [1925]).
58 See above ch. 9.
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Index

Adamson Act, 60, 92
Advisory Group on Working Time and the Distribution of Work, 473
A. H. Belo Corp., 284-91
Akron, 331
A. L. A. Schechter Poultry Corp. v. United States, 222, 238
Alaska
- absolute universal eight-hour law in, 41, 69-123, 151, 357, 464
- Chinese workers in, 77, 97
- eight-hours law for miners in, 69-75
- fisheries in, 76-79, 87, 119-20
- overtime law of, 122-23
Alaska Daily Empire, 104, 114, 117
Alaska Labor News, 84
Alaska Labor Union, 83, 86-87, 104, 119
Alaska Steamship Co., 92
Alaska Supreme Court, 326
Alaskan Engineering Commission, 98
Albania, 6
Alberta, 9
Algoma Steel Corp., 456
Alifas, N. P., 266-67
All Unions Committee to Shorten the Work Week, 352
Aluminum Company of America, 467
Aluminum Workers of America, 189
Amalgamated Society of Engineers, 46
American Cotton Manufacturers Association, 266
American Federation of Labor (AFL), 19, 188, 241, 310, 323
- position of on FLSA, 282-83, 313, 324-25, 332-33
- position of on overtime and unemployed, 42, 43
- position of on overtime work, 25, 42, 43
- Shorter Work-day Committee of, 323
- Shorter Work Week Committee of, 332
American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), 294, 331, 336-37, 338, 344, 374, 463
American Nurses Association, 379
American Trucking Associations, 281, 282
Americans for Democratic Action, 317
Americans with Disabilities Act, 39-40
Anaconda Copper Mining Company, 131, 132, 135, 145
Anchorage Chamber of Commerce, 83
Anchorage Daily Times, 95
Anchorage Sunday Times, 79, 84
Anderson, Benjamin, Jr., 264
Anderson v. Mt. Clemens Pottery Co., 307
Andrew, John, 149-50
Andrews, Elmer, 246, 263-65, 268, 272, 277, 280, 289
Annual vacations, 393
Annual working hours, 393
Arbitration: and right not to work overtime, 36-39, 450-58
Arizona: eight-hour law for miners, 464-65
Ashcroft, John, 14, 435
Associated Builders & Contractors, 374
Associated Contractors of Maine, 372
AT&T/Lucent Technologies, 18-19
Australia, 9
Australian Council of Trade Unions, 9
Australian Industrial Relations Commission, 9
Austria, 395, 409
Index

Automobile Manufacturers Association, 346
Avondale Mills, 266

Baker, Newton, 81
Bakery and Confectionary Workers Union, 11
Ball, Joseph, 311
Ballenger, Cass, 16
Bank of America, 325
Barber, Brendan, 408
Barkin, Solomon, 224
Barkley, Alben, 255
Bashore, Ralph, 156, 157, 160-61, 163, 173, 174, 175, 176, 178, 180-81, 184-85, 187, 190, 193-95, 197, 198, 199, 200, 201, 204, 205, 206, 207, 208, 210, 212, 221, 223, 225, 236, 239-40
Bates, Tom, 362
Bay Ridge Operating Company v. Aaron, 302-17
Bedell, Eugene, 364, 366
Belgium, 403, 404, 405
Bell, Daniel, 309-10
BellSouth, 34
Belo plan, 316-17, 325
approval of by Congress, 325-26
ban on in Alaska, 326
unsuccessful Democratic bill to outlaw, 323-24
Bennett, John, 382
Bennett, Robert, 416-17
Bergen County Record, 384
Berman, Edward, 223, 230
Bethlehem Steel Co., 18, 48, 375
Biemiller, Andrew, 336-37
Black, Hugo, 60, 258, 266, 283
Blackwell, Leslie, 418
Boswell Lumber Company, 214, 217-18, 227
Bottomly, R. V., 136
Bradley, P. E., 88
Brandeis, Elizabeth, 245
Brandeis, Louis, 30, 357
Breaks, 6

Bridges, Harry, 331
British Columbia, 10, 471-72
Brookings Institution, 15
Brooks, Frank, 173
Brooks, George, 294
Bugas, John, 346-47
Building trades: and overtime, 25, 45
Bulwinkle, Alfred, 255, 257
Bunker, George, Jr., 373
Bunnell, Charles, 74, 75, 78, 101-105, 107, 110, 111-12, 117
Bunting v. Oregon, 234, 262
Bureau of National Affairs (BNA), 59, 152, 264-65
Burton, Harold, 308
Business Week, 258, 296, 335
Butte Miners Union No. 1, 131
Butte Miners Union No. 1 v. Anaconda Copper Mining Co., 131-36, 148

California
law in limiting working time of pharmacists, 377
overtime law in, 63
unenacted bill to entitle workers to refuse overtime work, 328, 359-63
California Industrial Welfare Commission, 63
California Laundry and Linen Supply Association, 360
California Senate Committee on Industrial Relations, 50, 359, 362
Canada, 4, 50, 413-60
arbitration about overtime in, 39, 450-58
laws to restrict overtime in, 9-10, 469-73
Canadian Auto Workers (CAW), 31, 429, 430, 433, 440, 442, 444, 459
Canadian Chamber of Commerce, 428
Canadian Labour Congress (CLC), 12
Canadian Manufacturers Association, 428
Capers, Robert E., 92-96
Carnegie Steel Co., 18
Index

Cassone Bakery, 11
Caterpillar Tractor Co., 339
Chamber of Commerce of the United States, 353
urges repeal of FLSA, 277-78, 280
Chase National Bank, 264
“Chinese” overtime, 324
Christopherson, David, 434
Chrysler Corp.: adoption by of time and a half for overtime, 279
City of Philadelphia, 214, 228
Clague, Ewan, 335
Clark, Joseph, 110-112
Cleveland Chamber of Commerce of, 322
opposition of industrial employers in to overtime premiums, 319-21
Cleveland, Jennie, 74
Cleveland, John, 369
Cohen, Benjamin, 250
Collier’s, 154
Collins, Jack, 383
Colorado, 39, 47, 466
Colorado Fuel and Iron Co., 47
Comer, Donald, 266
Commission of the European Communities, 398-402, 412
Communication Workers of America (CWA), 34, 361-62
Community Charter of the Fundamental Social Rights of Workers, 401
Conference on Shorter Hours of Work, 294
Congress of Industrial Organizations (CIO), 187-88, 223, 269
position of on FLSA, 282-83, 297, 313, 314-15, 324
Connery, William, 60
Consumers’ movement, 3-4
Continental Baking Co., 276
Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week, 67
Convention of the International Association of Governmental Labor Offi-
cials, 156, 163, 246
Conyers, John, 350-52, 354
Cooney, Frank, 124
Copper River & Northwestern Railroad, 92
Corcoran, Thomas, 250
Corrigan, Philip, 79
Cotton, Bruce, 353
Cotton goods industry, 292
Council of National Defense, 77-78, 79, 81, 86
Council of the European Union, 398-402,
and Directive on an Employer’s Obligation to Inform Employees of the Conditions Applicable to the Contract or Employment Relationship, 404
See Working Time Directive
Crosswaite, Thomas, 192
Crown Zellerbach Corp., 361, 362
Cuthbertson, Richard, 448-49
Czechoslovakia, 394

Daily Nome Industrial Worker, 73, 76, 106, 107, 109, 110, 111, 115
Daley, Charles, 417-18
Dallas Morning News, 284
Davis, John W., 105, 106, 111
Day, Virgil, 17-18, 340, 467
DDM Plastics, Inc., 457
Decker Coal Company, 149
Deep Sea Fishermen’s Union, 120
Denise, Malcolm, 344
Denmark, 395, 397-98
Dent, John, 175, 333
Dictionary of Trade Products, Commercial, Manufacturing, and Technical Terms, 23
District of Columbia: eight-hour law in, 63
Dorfman, Philip, 225
Douglas, Neria, 370, 371, 372-73
Dow Chemical Co., 334
Downey, Wallace, 54
Du Pont, Alfred I., 16
Du Pont, Irénée, 17
Dual job-holding, 330-31, 351
Dunn, John, 114-16, 120

Earle, George H., III, 152-56, 163, 167, 168, 172, 193, 206, 222, 225, 226
Easton Hosiery Mills, 275
Echaveste, Maria, 49
Economic Report of the President, 338
Economy Act, 254
Edelman, John, 187-88, 193, 202, 222-23
Edes, William, 98-100
Eight-hours laws for employees of government contractors, 48, 54-55, 61, 254, 266, 465
Eight-hours movement, 5
Ellenbogen, Henry, 192
Emergencies: as exceptions to anti-mandatory overtime laws, 351
Employers
fears of of overtime regulation as undermining authority, 353-54
legislative campaign by against FLSA overtime provision, 318-26
litigation campaign by against FLSA overtime provision, 263-91
resistance by to paying overtime to salaried employees, 270, 279-83
Engels, Friedrich, 16
Europe: overtime regulation in, 393-412
European Council, 401
European Court of Justice, 403, 404
European Parliament, 400, 401, 402
European Union (EU), 414
unemployment in, 398-99, 403
Working Time Directive of, 398-412
Ex-Cell-O Corp., 339-40
Executives Association of Greater New York, 271
Fabian Society, 473-74
Fair Labor Standards Act (FLSA), 13, 131, 144, 148, 211, 238, 240, 245-354

as lacking maximum-hours provision, 42, 133-34, 152, 234, 397, 406-407, 415, 463
as only for “marginal” workers, 290, 299
legislative history of, 245-62
overtime provision of, 10, 137, 463-64
policies of, 10
proposed hours-averaging under, 14-15, 413
section 18 of, 132-34, 137, 149, 259, 267-78, 288
Fairbanks Daily News-Miner, 74, 75, 112
Fairley, Darlene, 375
Family Friendly Workplace Act, 48
Farmworkers: exclusion of from FLSA, 317
Fatigue, 5, 30-32
Faulkner, Herbert, 88-89, 90-91
Finland, 394-95
First National Bank of Pittsburgh, 173
Fisher’s Bakery, 214, 219-20, 228
Flaherty, Jim, 432
Flannigan, George, Jr., 217
Fleming, Philip, 287
Fleming v. Carleton Screw Products Co., 276
Fletcher, A. L., 276
Flexibility, 3, 4, 394, 399, 400, 401, 404, 405, 406, 409, 410, 412, 414, 415, 418, 422, 426, 431-32, 459, 463, 475-76
Flexible Employment, Compensation, and Scheduling Coalition, 13, 475
Florida Power & Light Co., 40
Fluctuating workweek, 324
Food Service and Lodging Institute, 353
Ford Motor Co., 50, 451, 452
opposition by to further regulation of overtime, 342-44
overtime work at, 37-38, 346-47, 349
Fortune, 309
Forty-hour week
Index

Greece, 394, 403
Greely, Mike, 147-49
Gregg, Judd, 14-15
Gregory, Charles, 249
Gregory, Thomas, 104-106
Grigsby, George, 106, 107, 111, 116-17
GTE, 35, 374
Guggenheim-Morgan Syndicate, 70, 71, 92, 101
Gunnison, Royal, 95
Gurtov v. Volk, 274
Gwynne, John, 312

H. B. Underwood Corporation, 214-17, 227-28
Halliburton Oil Well Cementing Co., 291
Haney, Lewis, 322
Hargest, William, 203, 208
Harris, Howell John, 215
Harrisburg Patriot, 161, 164, 199
Harrisburg Telegraph, 156, 186, 189, 191, 198, 225
Harrison, F., 92
Hartley, Fred, Jr., 281, 313
Health Professionals and Allied Employees (HPAE), 384-85
Heckman, James, 119
Heliker, George, 140, 141, 142, 143, 144, 145
Henderson, Leon, 210-11, 230, 252
Henretta, J. E., 203-206, 213-14
Hess, Luther, 122
Hines, Lewis, 241
Hinrichs, F. A., 256
Hoffa, James, 125
Holgate Bros. Co. v. Bashore, 202-40
Hours-averaging, 14, 405-407, 409-10,
Index

417, 423, 432, 435, 459, 463, 475
Hours of work
  and neoclassical economics, 29
  and struggles over length of, 27-29
Howell, Sylvester, 74
Hubbard, Oliver, 90-95, 115
Hunt-Wesson Foods, Inc., 360
Huron Stevedoring Corp., 302
Hutchison, Kay Bailey, 14-15

Illinois: unenacted bill in entitling workers to refuse overtime work, 364, 377
Independent Labour Party, 396
Industrial Relations, 350
Intensity of labor, 5
International Association of Machinists, 11, 457-58
International Brotherhood of Electrical Workers, 35
  Local 3 of and short workweeks with overtime, 329-30
International Brotherhood of Pulp, Sulphite and Paper Mill Workers, 294
International Labour Office, 394, 396
International Labour Organization, 67, 416
International Longshoremen’s and Warehousemen’s Union, 331
International Longshoremen’s Association (ILA): and role in overtime on overtime dispute, 302-17
International Union of Mine, Mill and Smelter Workers, 106
International Workers of the World (IWW), 78, 109
Iowa Bankers Association, 277
Ireland, 403
Italy, 410-11

J. A. Wilson Display Co. Ltd., 451
J. A. Wilson Display Co. Ltd., 452
Jackson, Robert, 308
Japan
  annual working hours in, 393
  Labor Standards Law in, 7
  overtime regulation in, 7
Javits, Jacob, 345
Jevons, William Stanley, 13
Johnson, Lyndon, 337-38
Johnson administration, 334, 344, 467
Johnston, Olin, 66
Jolliffe, Edward, 418
Just-in-time production, 4

Kane, E. Kent, 165
Kanes, David, 192
Kansas, 63
Keller, Kent, 256-57
Kellogg Co., 257
Kennecott Copper Corp., 85, 92
Kennedy, John F., 330, 333-34, 336
Kennedy, Thomas, 154
Kennedy administration, 334
Kephart, John, 206, 211, 237-38
Kerr, T. Michael, 49
Ketchikan Power Co., 82
Keynesian theory of stagnation, 231
King, Angus, 381
Kinley, John, 416, 418, 427, 445, 447, 460
Kirk, William, 76
Knit goods industry, 292
Kraus, Gilbert, 225
Kraus, Manuel, 225

Labor Policy Association, 13
Labor Relations Reports/Reporter, 152
Labor standards legislation
  alleged obsolescence of, 4
  and international competition, 17-18
Labor unions:
  arbitration by of disputes about overtime work, 36-39, 450-59
  demands of for overtime penalties’ premiums, 44-46
  policies of toward overtime work, 42-46
  time and a half in contracts of, 59-60
See also AFL; AFL-CIO; UAW
Laborgraphic, 161, 178
Lake Ontario Steel Company Ltd., 452
Landry, Robert, 353
Lane, Franklin, 77, 78, 81, 82, 83, 84, 85, 86, 96, 98, 103, 105
Lappan, James, 183-84, 205
Legal day’s work statutes, 13, 23-24, 42
Lesinski, John, 323
Libertarianism, 3, 460, 469-73
Linn, William, 207, 238
“Little” National Recovery Act, 256
Lochner v. New York, 68, 130
Long working hours
and family values, 30
as promoting accumulation, 5
changing basis of worker opposition to, 29-35
in U.S., 7
Longshoremen: and dispute over overtime on overtime, 302-17
Luxembourg, 403
Machinists, 55
Magruder, Calvert, 271
Mahoney, Charles, 142
Maine
law of entitling nurses to refuse mandatory overtime, 380-82
law of limiting mandatory overtime hours, 358, 367-73
Maine State Chamber of Commerce, 371
Maine State Nurses Association, 381
Maloney, Francis, 251
Mandatory overtime work, 25, 34, 36
laws to limit, 350-51, 357-90
laws to limit for nurses, 377-90
Manitoba, 10, 470
Manufacturers’ Association of Connecticut, 271
Margiotti, Charles, 190, 193-94, 202, 203, 206, 207, 211, 212, 222, 224-25
Marshall, Alfred, 296 n. 24
Martel, Shelley, 434
Marx, Karl: analysis of overtime by, 27-29, 32, 292, 298, 396-97
Maximum-hours laws
abuse of emergency clauses under, 464-65
as absent in U.S., 6
as applied to men, 27
as distinguished from overtime law, 5, 234-36, 251-52
as misnomer in FLSA, 5
emergencies as exceptions to, 44, 45, 46, 125, 126, 130, 137, 164, 167, 170-71, 172, 176, 178, 181, 188, 196, 229, 233, 235, 239, 419, 426, 464-66
employer opposition to, 61
for air traffic controllers, 386
for airplane pilots, 386
for bakers in New York, 67
for flight attendants, 386
for miners, 46, 47-48, 68-75
for railway employees, 377, 386
for truck drivers, 377, 386
for women, 62-64, 65
in Alaska, 41
in Europe, 393-412
in North Carolina, 64-65
in Ontario, 415-59
in Pennsylvania, 41
in South Carolina, 66-67
prohibition by of working more than maximum for 2 or more employers, 158-60, 183-84, 321, 412
Mazurek, Joseph, 149
McCarvel, Joseph, 142, 143, 145, 146
McComb, William, 324
McDonald, David, 331, 334
McKeon, Michael, 140, 142, 145
McKinley, William, 254
McKittrick, Pat, 139
McNamara, Pat, 333, 344
McNee, Sterling, 202
McNulty, George, 271
Meany, George, 333, 336
Metal Manufacturers Association (MMA), 215-16
Metcalf, Lee, 332
Microsoft Corp. 40
Miller, C. W., 221
Index

Miller v. Bashore, 226
Mills, Peter, 372
Miners: maximum hours laws for, 46, 47-48, 67-68
Minimum wage, 317
Minnesota: law limiting mandatory overtime for nurses, 390
Missel, Walter, 280
Missel v. Overnight Motor Transportation Co., 280-84
Mississippi, 64
Mitchell, John, 53
Modern Industry, 281, 322
Montana, 124-50
constititution of, 124-28, 137
Constitutional Convention of, 138-47
Department of Labor and Industry of, 137-38, 147
8-hour laws of, 124-50, 357
hours laws of for miners, 124
workforce composition of, 128-29
Montana Legislative Council, 138
Montana Supreme Court, 129, 130-32, 134-35, 136-37, 144, 148
Moonlighting, 330-31, 337, 351
Mordue, Greig, 443
Morris, George B. Jr., 350
Mt. Clemens Pottery Co., 272-73, 307
Mullane, D. F., 218
Murray, James, 332, 333
Murray, Joseph, 95-96
Murry, Jim, 139, 141, 143
National Association of Manufacturers (NAM), 54, 277, 278, 297-98, 307, 353
campaign of against FLSA overtime provision, 270, 279-80, 321, 339
National Conference on Labor Legislation, 155, 171, 241, 268-69
model state wage and hour bill of, 269
National Cotton Mule Spinners, 42
National Electrical Contractors Association (NECA), 345
National Federation of Independent Business, 368
National Industrial Recovery Act (NIRA), 154, 172, 230, 341
overtime provisions in industry codes under, 248-49
National Labor Relations Act (NLRA), 318, 361
lack of right not to work overtime under, 35
National Labor Relations Board, 35, 340
National Metal Trades Association, 54
National Recovery Administration, 181, 211, 249, 252
National Small Business Men's Association, 323
National Woman's Party, 209
National working-time regime, 6
Nebraska, 354
Nelson, Donald, 247
Netherlands, 394, 403, 409-10
New Hampshire, 13
New Jersey
law in restricting mandatory overtime for nurses, 382-88
unenacted bill in to entitle workers to refuse overtime work, 364-66
New Jersey Business and Industry Association, 365
New Jersey Hospital Association, 383, 386, 388
New Jersey State Chamber of Commerce, 366
New Mexico Supreme Court, 125
New York State
legal day's work statute of, 23-24, 42
maximum hours law of for bakers, 67
editorial opposition of to FLSA, 252, 254, 269, 290, 295, 300, 352
New Zealand:
Factories Act of, 10, 27
Index

Minimum Wage Act of, 9
overtime regulation in, 9
Newcomb, Robinson, 230
Newfoundland, 9
Night shift, 255-58
North Carolina, 64-65, 66
Northern Commercial Co., 91, 100-104
Northern Telecom Canada Ltd., 12
Northwest Territories, 9
Norton, Mary, 257
Norway
annual working hours in, 393
overtime regulation in, 394
Nurses: and legislation entitling refusal of mandatory overtime by, 358, 377-90
in Congress, 378
in Maine, 380-82
in Minnesota, 390
in New Jersey, 382-88
in Oregon, 382-88
in Pennsylvania, 379
in Washington, 388-90
O’Daniel, Wilbert (Pappy), 295-96, 300
Office Employees International Union, 324, 324
O’Hara, James, 343, 344
Ontario, 413-60
Act to Improve the Employment Standards Act of, 430
Co-operative Commonwealth Federation in, 415
Employment Practices Branch of, 421, 425, 446, 447, 449
Employment Standards Act (ESA) of, 12, 268, 422-24, 426, 428, 431-60
Employment Standards Act (ESA) 2000 of, 413, 433-45
Factories Act of, 415-16
hours-averaging in, 414, 417, 423, 432, 435, 459
hours law of, 9-10
Hours of Work and Vacations with Pay in Industrial Undertakings
Act of, 416-22, 451-53
Industry and Labour Board of, 419, 421
Liberal government of, 417, 427
Limitation of Hours of Work Act of, 416-17
maximum-hours law in, 414, 416
New Democratic government of, 428
overtime permits in, 419-21, 424-26
Policy and Interpretation Manual for ESA in, 446
premium overtime pay in, 435, 459
Progressive-Conservatives (Tories) in, 413-14, 429-32
Red Tape Review Commission of, 431, 432
right to refuse overtime in, 414, 420, 424-25, 436-60, 469
unions’ use of ESA to refuse to work overtime in, 444-45, 450-60
work-spreading purpose of maximum hours law in, 253, 416-18
Ontario Arbitration Board, 457
Ontario Court of Appeal, 455
Ontario Federation of Labour, 433, 440, 441, 445
Ontario Hydro, 457
Ontario Labour Relations Act, 459
Ontario Task Force on Hours of Work and Overtime, 416, 427, 428, 460
Oregon
eight-hour law for government work of, 465
hybrid maximum-hour/overtime law of, 30, 116-17, 121, 234, 261-62, 357-59, 465
law of limiting mandatory overtime for nurses, 382
Oregon Supreme Court, 261
Organisation for Economic Co-Operation and Development, 404
Ostroff, Isidor, 199
Index

Otersen, Jeanne, 384-86
Outboard Marine Corporation of Canada, 447-49
Over-hours, 26
Overnight Motor Transportation Co., 282
*Overnight Motor Transportation Company v. Missel*, 258-59, 280-84, 299, 324

Overtime:
- concept of, 23-25
- multiple meanings of, 3
- word in various languages, 23 n.4

Overtime “hogs,” 32, 43

Overtime on overtime dispute, 302-17

Overtime penalty/premium
- and definition of “regular rate,” 267, 282-84, 291
- and fluctuating hours, 284-91
- as self-defeating, 234
- at double time, 335, 338, 344, 350, 463, 467
- correlation of with union membership, 51
- diminishing deterrence of, 328-29
- employers’ campaign against, 62, 263-78, 318-26
- exclusion of white-collar workers from, 6-7, 474
- expected deterrent value of, 252, 257
- judicial denial of under maximum hours laws, 46
- number of workers covered by under FLSA, 265-66
- payment of into unemployment insurance fund, 342-43, 352-53
- transformation of from employer disincentive to worker incentive, 45-46
- unsuccessful efforts to increase and lower overtime threshold, 327-54

Overtime regulation
- and compulsory collectivism versus voluntarism, 52

and Democrats, 48-49, 51
and 19th-century British labor unions, 52-53
as free-market mechanism, 13
before the FLSA, 59-68
changed purpose of during World War II, 292-301
in Europe, 393-412
purposes of under FLSA, 344
states lacking, 357
under collective bargaining agreements, 36
work-spreading as purpose of under FLSA, 252-54, 258-59, 344

Overtime wages
- analysis of by Karl Marx, 27
- and building trades, 45
- and increase in total wages during World War II, 293
- and maintenance of living standards, 48-49
- economists’ view of, 26
- employers’ efforts to limit by lowering regular rate, 263-78
- impact of loss of on income, 332
- self-contradictions of, 11-12, 41-55

Overtime work
- advantages of to employers, 43
- and basic or normal workday, 23
- and compulsion to keep capital in motion, 16, 18-19
- and need for leisure, 30
- and unemployment, 33, 43, 335, 348
- as increase in labor supply, 43
- as market failure, 29
- as overwork, 26
- at World Trade Center after Sept. 11, 2001, 349 n.115
- concept of, 23-26
- correlation of with union membership, 51
- costs of, 26
- in department stores, 26-27
percentage of workers working and not paid for, 51, 292, 335-36
refusal to perform, 31, 32-33
right to refuse, 10
right to refuse under collective bargaining agreements, 29-30, 37
strikes against, 33-34, 35-36
systematic, 25, 400, 404
trends in weekly hours of, 32, 293
union agreements limiting, 33-35, 43-45
workers' desire for, 11-12

Overwork, 23

Owens, Thomas, 318
Owens-Illinois Glass Company, 467

Palmer, A. Mitchell, 117
Parkdale Community Legal Services, 441
Pendleton, Peggy, 381
Pennington, George, 114-16, 120

Pennsylvania
application of 44-hour law of to public employees, 191-93
bill in limiting mandatory overtime for nurses, 379
Bureau of Hours and Minimum Wages of, 175, 176, 179, 180, 181, 183, 196, 204, 205, 221, 237
child labor law of, 171
Democratic Party of, 154-56
Department of Labor and Industry of, 151, 169, 173, 200, 203, 215, 222, 223, 228-36, 238, 464
forty-four law of, 41, 151-241, 351, 357, 403, 414, 464
judicial invalidation of 44-hour law of, 201-40
lack of rest period law in, 241
Little New Deal of, 151-56, 240
Little Wagner Act of, 240
overtime law of, 241
prohibition by of working more than 44 hours for two employers, 158-60, 321
unenacted bill of entitling workers to refuse mandatory overtime, 373-75
women's hours law in, 154-55, 158-59, 161, 177, 184, 209-10, 241
Pennsylvania Bankers Association, 173-74
Pennsylvania Chamber of Business and Industry, 374
Pennsylvania Federation of Labor, 155, 184, 222
Pennsylvania Natural Gas Men's Association, 187
Pennsylvania Newspaper Publishers Association, 178
Pennsylvania Railroad, 220
Pennsylvania State Association of Boroughs, 192
Pennsylvania Supreme Court, 160, 194, 210-11, 220, 237-40
Perkins, Frances, 245-46, 249, 252, 295, 298-99, 301
Philadelphia Inquirer, 167, 169, 170, 188, 200, 201, 207, 211, 213, 237, 239
Phillips, John A., 155, 184, 222
Picard, Frank, 272-74
Pittsburgh Chamber of Commerce, 183
Poland, 394
Poland Springs Corp., 367
Portal-pay dispute, 302, 316, 318
Portal-to-Portal Act, 307, 311, 312, 315
Portugal, 395, 403
Postal Telegraph Company, 187
President's Reemployment Agreement (PRA), 248
Privy Council, 417
Index

Public Education and Child Labor Association of Pennsylvania, 171

Québec, 253

Railway workers, 60
Rankin, John, 311
Regular rate, 282-84, 289, 316, 318, 422
Rice, Jesse, 90
Rifkind, Simon, 303-308, 317
Riggs, Thomas, 98-100, 106, 108-114, 117, 120

Right-to-refuse mandatory overtime legislation, 357-90
in British Columbia, 471-72
in California, 359-63
in Canada, 469-73
in Illinois, 364
in Maine, 367-73
in Manitoba, 470
in New Jersey, 364-66
in Ontario, 414, 420, 424-25, 436-60, 469
in Pennsylvania, 373-75
in Saskatchewan, 469-70
in Washington, 375-77
in West Virginia, 366-67
on Wisconsin, 363
in Yukon Territory, 470-71

Robertson, Ralph, 87-88, 90
Rockefeller, David, 339
Roosevelt, Franklin D., 60, 152, 153, 155, 250, 300
and FLSA, 245, 259, 260-61, 264
and limiting hours, 248
and long hours, 251, 295
on overtime premiums, 249
Roosevelt, James, 333
Roth, Rinehart, 104-105
Royal Commission on Trade Unions and Employers’ Associations, 396
Rubber workers: and short workweeks with overtime, 331
Ryan, Joseph, 302-305, 309, 313

Safe Nursing and Patient Care Act of 2001, 378
Safeway Stores, Inc., 130
Salaried employees:
and lack of overtime compensation, 26
employers’ campaign against paying overtime to, 270, 280-83
Saskatchewan, 10, 469-70
Sawmilling, 292
Sawyer, W. Tom, Jr., 380, 381
Schaffer, William, 206, 238
Schwellenbach, Lewis, 322
Sears, Roebuck and Company, 181
Shafer, Paul, 257-58
Sheely, W. C., 213, 214, 217, 224, 226, 227-30
Shockley, Russell, 225
Shulman, Harry, 38, 42
Sifton, Paul, 271, 277
Single European Act, 400
Sloan, Alfred P., Jr., 295
Smith, Sidney, 140
Socialist party, 71
South Carolina, 64
South Korea
Labor Standards Act in, 8
overtime regulation in, 7-8, 14
Southern States Industrial Council, 264
Soviet Union, 395
Spain, 394, 403, 410
Staley, Austin, 222, 225
Stark, Fortney Pete, 378
State, County and Municipal Workers of America, 192
Steel Workers Organizing Committee (SWOC), 182
Steinmetz, B. I., 126-27
Stockwell, Chris, 432, 433, 434
Strong, John F. A., 72, 75, 77, 81, 82, 83, 84, 85, 86, 87, 89, 94, 96, 97, 98, 99, 100, 101, 110
Structural Clay Products Industry, 271
Sulzer, Charles, 100, 111, 113
Sundback, John, 79
Supreme Court of Canada, 416, 450, 453, 455, 457
Index

Survey, 76
Swanberg, William, 144
Sweden, 395
Switzerland, 394

Taft, Philip, 43-44, 306
Taft, Robert, 342
Taft-Hartley Amendments, 318
Texas, 63
Textile industry, 255-57
Textile Workers Organizing Committee, 187, 277
Thatcher, Margaret, 400
Thirty-Hour Bill, 60-61
Times (London), 25
Tobin, Maurice, 314
Toronto Board of Trade, 428
Toronto Star, 429
Toyota Motor Manufacturing Canada, Inc., 439-40, 442-44
Tracy, E.E., 89
Trades Union Congress, 407-408
Treaty Establishing the European Economic Community, 398
Truman, Harry, 315, 322
Turner, Ellwood, 166, 167

Unemployment compensation: right to after termination for refusal to work overtime, 39
Union News Agency, 221
Skilled Trades Conference of, 335
United Food and Commercial Workers, 367
and FLSA overtime decisions by, 246, 253, 258-59, 280-91, 324
maximum-hours law for miners and hours laws for women and children, 464-65
laissez-faire in, 8
length of workweek in, 396, 404, 407
overtime regulation in, 394-97
United Mine Workers (UMW), 53, 60, 149, 154
US West, 34
U.S. Congress: and legislative cut-backs in FLSA overtime coverage, 318-26
U.S. Department of Justice, 104, 106, 107, 114
U.S. Department of Labor (DOL), 36, 175, 179, 259, 284, 292, 336, 348
role of in Belo case, 317, 326
U.S. Department of the Interior, 81, 96, 99, 120
U.S. Food Administration, 81
U.S. House of Representatives Committee on the Territories, 70
Economic Opportunities Committee, 17
Judiciary Committee, 312
Labor Committee, 18, 54, 252, 256, 318, 323, 335, 336, 337, 340, 345, 352
Naval Affairs Committee, 297-99
Workforce Protections Subcommittee, 16
U.S. Industrial Commission, 42, 55
U.S. News & World Report, 339, 345
U.S. Senate:
Committee on the Territories, 99, 100
Labor Committee, 55, 61, 252, 314, 333, 345
U.S. Steel Corp., 48
U.S. Supreme Court, 24, 131, 137, 172, 222, 230, 299
FLSA overtime decisions by, 246, 253, 258-59, 280-91, 324
...
<table>
<thead>
<tr>
<th>Index</th>
</tr>
</thead>
<tbody>
<tr>
<td>decision by, 68</td>
</tr>
<tr>
<td>on purpose of overtime premium, 283-84</td>
</tr>
<tr>
<td>Oregon overtime law decision by, 116-17, 121, 262</td>
</tr>
<tr>
<td>overruled by Congress in overtime on overtime case, 310-17</td>
</tr>
<tr>
<td>overtime on overtime decision of, 302, 307-309</td>
</tr>
<tr>
<td>United Steelworkers (USW), 328, 331, 334, 375, 428, 452, 456</td>
</tr>
<tr>
<td>United Steelworkers, Local 2894, and Galt Metal Industries Ltd., 453-54</td>
</tr>
<tr>
<td>Unsocial hours of work, 6, 468-69</td>
</tr>
<tr>
<td>Utah: maximum hours law for miners, 46, 67-68</td>
</tr>
<tr>
<td>Vacations, 6</td>
</tr>
<tr>
<td>Velocity of throughput, 468</td>
</tr>
<tr>
<td>Vinson, Carl, 299</td>
</tr>
<tr>
<td>Vitale, Joseph, 382, 383, 386, 388</td>
</tr>
<tr>
<td>Wage and Hour Administrator, 131, 246, 270, 276, 278, 281, 287, 294, 295, 318, 476</td>
</tr>
<tr>
<td>Wage and Hour Division (WHD), 263, 264, 267-68, 271, 276, 277, 278, 279, 284, 285-91, 311, 313, 325</td>
</tr>
<tr>
<td>Wage and Hour Reporter, 264</td>
</tr>
<tr>
<td>Waldman, Louis, 311</td>
</tr>
<tr>
<td>Walker Exhausts, 456, 457, 458</td>
</tr>
<tr>
<td>Walling v. A. H. Belo Corp., 274, 281, 284-91, 299, 324</td>
</tr>
<tr>
<td>Walsh, J. Raymond, 224, 230</td>
</tr>
<tr>
<td>Walsh-Healey Government Contracts Act, 250</td>
</tr>
<tr>
<td>Walter, Francis, 312</td>
</tr>
<tr>
<td>War Production Board, 247, 297</td>
</tr>
<tr>
<td>Washington State, 40</td>
</tr>
<tr>
<td>law of limiting mandatory overtime for nurses, 377, 388-90</td>
</tr>
<tr>
<td>unenacted bill of entitling workers to refuse overtime, 375-77</td>
</tr>
<tr>
<td>Washington State Hospital Association,</td>
</tr>
<tr>
<td>Webb, Beatrice and Sidney, 16</td>
</tr>
<tr>
<td>analysis of overtime by, 52-53</td>
</tr>
<tr>
<td>Weiler, Paul, 452, 453, 454</td>
</tr>
<tr>
<td>West Virginia: unenacted bill of entitling workers to refuse overtime work, 366-67</td>
</tr>
<tr>
<td>Western Federation of Miners, 71, 73, 78, 79, 106</td>
</tr>
<tr>
<td>Western Union, 187</td>
</tr>
<tr>
<td>Whitman, Christine, 383-87</td>
</tr>
<tr>
<td>Wickersham, James, 70, 71, 74, 82, 100, 101, 103, 113</td>
</tr>
<tr>
<td>Wiley, Alexander, 312</td>
</tr>
<tr>
<td>Williams, Samuel, 272</td>
</tr>
<tr>
<td>Wilson, Charles E., 322-23</td>
</tr>
<tr>
<td>Wilson, S. Davis, 191</td>
</tr>
<tr>
<td>Wilson, Woodrow, 62, 101</td>
</tr>
<tr>
<td>Wirtz, Willard, 337, 340, 344, 348</td>
</tr>
<tr>
<td>Wisconsin: unenacted bill of entitling workers to refuse overtime work, 363</td>
</tr>
<tr>
<td>Witherow, William, 297-98</td>
</tr>
<tr>
<td>Witmer, Elizabeth, 429, 430</td>
</tr>
<tr>
<td>Women: hours laws for, 62-64, 65, 67</td>
</tr>
<tr>
<td>Woodcock, Leonard, 341-42, 350</td>
</tr>
<tr>
<td>Workers: change in attitudes of toward overtime, 292-301</td>
</tr>
<tr>
<td>Working Time Directive, 8, 398-412</td>
</tr>
<tr>
<td>Workplace Flexibility Act, 14</td>
</tr>
<tr>
<td>World War I, 62, 76</td>
</tr>
<tr>
<td>World War II, 418</td>
</tr>
<tr>
<td>changed function of overtime premium during, 252, 282, 292-301</td>
</tr>
<tr>
<td>unsuccessful congressional efforts during to suspend FLSA overtime provision, 294-301</td>
</tr>
<tr>
<td>Wyoming, 63</td>
</tr>
<tr>
<td>Yntema, Theodore, 342-43</td>
</tr>
<tr>
<td>Ynurishin, John, 165-67</td>
</tr>
<tr>
<td>Yukon Territory: law restricting overtime in, 10, 470-71</td>
</tr>
<tr>
<td>Zimbabwe, 6</td>
</tr>
</tbody>
</table>
That the trend during the past two decades to weaken hours laws in Europe and Canada—in the name of creating more “flexible” workplaces that can compete more fiercely in a world economy—has been as inexorable as globalization itself suggests that pressures will mount to dilute an already weak U.S. overtime law. Such “flexibility,” one-sidedly serving firms’ needs, may, thanks to bills before Congress, eventually legalize 60-hour workweeks without premium pay. As millions of workers are being forced to work overtime without a right to refuse except at the risk of losing their jobs, The Autocratically Flexible Workplace: A History of Overtime Regulation in the United States is the most comprehensive account of the subject ever written. Complementing the author’s “Moments Are the Elements of Profit”: Overtime and the Deregulation of Working Hours Under the Fair Labor Standards Act, it expands the social and labor history of overtime regulation. It focuses on the irrationality of regulating working hours by means of overtime premiums, which encourage workers to overwork without being large enough to deter firms from requiring employees to work unlimited hours. Instead, the book re-examines maximum-hours laws, which prohibit employment beyond a set number of hours. Case studies, based on never-before-used archival materials, uncover a body of state maximum-hours legislation—invalidated by judicial doctrines no longer an obstacle today—far more radical than any national labor standards. While highlighting the most recent state legislative efforts to entitle workers to refuse to work overtime, the book also documents employers’ determined opposition.

Marc Linder, professor of labor law at the University of Iowa, has also represented migrant farmworkers on behalf of Texas Rural Legal Aid. The Michigan Law Review has called him “the scholar who has most exhaustively studied the Fair Labor Standards Act...and related legislation.” Among his books are Wars of Attrition: Vietnam, the Business Roundtable, and the Decline of Construction Unions; Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time; Migrant Workers and Minimum Wages: Regulating the Exploitation of Agricultural Labor in the United States; and The Employment Relationship in Anglo-American Law.