THE AUTOCRATICALLY FLEXIBLE WORKPLACE

A HISTORY OF OVERTIME REGULATION IN THE UNITED STATES

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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."  
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. 

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—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. 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...." 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—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—the Montana legislature had acted boldly.

5 "By the Governor of the State of Montana: A Proclamation" at 3.
6 1933-34 Laws of Montana, ch. 8, § 1-2 at 37-38. Registered and assistant pharmacists were excluded from the act.
7 1901 Laws of Montana, H.B. No. 1, at 62.
8 1933 Laws of Montana, chs. 76, 77, and 90 at 141, 142, 160.
9 Revised 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).
10 See Harry Millis and Royal Montgomery, Labor's Progress and Some Basic Labor Problems 526 (1938).
11 1933 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-
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

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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—by which the electorate adopted the amendment, which went into effect on December 2, 1936.22

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 1901,23 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 1938.24

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.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

21Montana Constitutional Convention Commission, 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, 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,” 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,” N.Y. Times, Nov. 5, 1936, at 14:5-6.

221937 Laws of Montana at 721.

231901 Laws of Montana H.B. No. 1, at 62.


25Women’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.\textsuperscript{26}

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 subserved 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.\textsuperscript{27}

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 were worked by the hour or day. Moreover, although the

\textsuperscript{26}Calculated according to U.S. Bureau of the Census, \textit{Fifteenth Census of the United States: 1930: Population}, vol. IV: \textit{Occupations, by States} tab. 4 at 922-25, tab. 11 at 930-31 (1933); \textit{idem, Sixteenth Census of the United States: 1940: Population}, vol. III: \textit{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.

\textsuperscript{27}State v. Livingston Concrete Bldg. & Mfg. Co., 34 Mont. 570, 576-77 (1906).
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court agreed that the law "would be more consonant with our ideas of a reason­able regulation if provisions had been made" for emergencies where life or prop­erty 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 Lochner 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.

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. (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”).

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 dis­close 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 pro­vide penalties for violation thereof”; nor did the court draw any conclusion from the legislature’s failure to comply with the constitutional directive to enact en­forcement provisions. 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.
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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33 State v. Safeway Stores, Inc., 106 Mont. at 201.
34 Butte Miners Union No. 1 v. Anaconda Copper Mining Co., 112 Mont. 418 (1941).
36 Butte Miners Union No. 1 v. Anaconda Copper Mining Co., 112 Mont. at 431.
37 Butte Miners Union No. 1 v. Anaconda Copper Mining Co., 112 Mont. at 429.
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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.
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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 "maximum 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...explicitly permits states to mandate greater overtime benefits."45 In contrast, the First and D.C. Circuits have stressed the reduced workweek, the former misleadingly holding that "Section 218(a) simply makes clear that the FLSA does not preemp[t] 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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42In 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.

43See 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).

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


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


law that required employers to pay premium overtime after 39 or fewer hours.\textsuperscript{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.\textsuperscript{50} Nevertheless, despite this contextual clarity, indisputably the text of the FLSA uses a term that has another meaning.\textsuperscript{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."\textsuperscript{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.

\textsuperscript{49} Although 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.

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

\textsuperscript{51} Under 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.

\textsuperscript{52} Laurence Tribe, \textit{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.”

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.

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-

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53 Butte Miners Union No. 1 v. Anaconda Copper Mining Co., 112 Mont. at 433.
54 Butte Miners Union No. 1 v. Anaconda Copper Mining Co., 112 Mont. at 433.
55 Butte Miners Union No. 1 v. Anaconda Copper Mining Co., 112 Mont. at 435.
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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.\(^\text{56}\)

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 expenditure of public funds.\(^\text{57}\)

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 “effect[ed] 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 expanded statutory protection.\(^\text{58}\) 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,\(^\text{59}\) 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

\(^{56}\)See 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,

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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.
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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.67 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).72

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.73

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 [sic] work to protect the health and safety of the workers. If longer hours are necessary, the overtime hours should be on a voluntary bases [sic]. 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, with
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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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

86Telephone 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.”87 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.”88 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.”89

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.90 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.”91 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.”92 In fact, since both the FLSA and the Montana overtime provisions were triggered by work in excess of 40 hours per

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 con­
struction 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 pro­
vision 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 con­
vention 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 con­
stitutional 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

(Cates).
(Bates).
J. Studer).
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."98

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.99 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."100

On a quasi-test vote on the principle of an eight-hour day, the delegates voted 65-27 in favor.101 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

98 Montana Constitutional Convention: 1971-1972: Verbatim Transcript VI:2320 (William Swanberg). Chairman Heliker later contradicted Swanberg, alleging that "that never was a problem." Id. at 2325.
better promote the general welfare.” 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....” 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.

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....”

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. 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 permissible [sic] for state employees to work in excess of eight hours per day.”

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

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

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

Labor Dept.

44 HOUR WEEK LAW

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