The Autocratically Flexible Workplace

A History of Overtime Regulation in the United States

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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.²


awareness of its path-breaking character or principled deviation from the overtime provision of the FLSA then being debated in Congress. Though it was subject to front-page treatment in the Philadelphia, Pittsburgh, and Harrisburg newspapers for more than a year, the 44-hour law has vanished from historical consciousness. And even contemporaneously, the Bureau of National Affairs’ weekly Labor Relations Reports/Reporter, 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.

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 Roosevelt’s urban coalition, especially by his second term, gave rise. 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, in 1934 Pennsylvania elected its first Democratic governor since 1890 and Democrats 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, Morries 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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5The title was changed with the issue of April 18, 1938.


resigned to run for governor.10

Of Earle, who quickly attracted considerable positive attention from the national press,11 and who, following a further $140,000 contribution to the Democratic Party,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."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 "tremendous 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."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:

10See "Labor Governor," *Time* 30(1):12 (July 5, 1937). See also Keller, *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](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 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-

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. 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, 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.” 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.

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.” 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 . . . .”

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.”

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20Keller, Pennsylvania’s Little New Deal at 192.
21A 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.
23Keller, 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."26

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."27

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 1935.28 Having already ordered a 40-hour week for state employees,29 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


28Commonwealth 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).

29Keller, 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

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34Bashore, “Role of State Labor Commissioners in the Improvement of Labor Legislation” at 167-68, 170 (quote).


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. 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.

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 professions.” Frey’s bill also provided for a 30-minute meal period after five hours of continuous labor. 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. 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 those stated in the schedule applying to him shall constitute prima facie evidence of violation of this act.” 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.

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.” To be sure, Pennsylvania’s women’s hour statute had contained a similar provision since 1913, as did other state women’s

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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.
45 It 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.’”52 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.”53

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 44.54 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.55 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.”56

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 days57—an amendment that the Senate had added to the women’s hours bill on May 12.58 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

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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.

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


55Keller, 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
cocrats 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.”

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.’” 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.

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. 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. 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.

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

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"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...."74

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),75 a strong supporter of the bill and chairman of the labor committee.76 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.77 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-

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.  

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."  

Improvements notwithstanding, *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." 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." *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." 

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

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“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

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85 Joseph Miller, “Phila. Water Plan, Control of Liquor Jam Closing Hours,” *Philadelphia Inquirer*, June 6, 1937, at 1:7-8, at 12:1 (Public Ledger) (erroneously reporting the vote as 132-54); *Legislative Journal* at 7387; Keller, *Pennsylvania’s Little New Deal* at 238.
89 “Deadlock Over 2 Bills Slows End of Assembly; 44-Hour Week Is Voted,”
"Earle’s Iron Fist Writes New Chapter in Legislature."90

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.”91 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)92 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”93—groups that had been and continue to be excluded from many other labor protective laws.94

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.”95 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-

91 No. 567, § 2 at 2766.
92 No. 567, § 3 at 2767.
93 No. 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.”
94 Agricultural 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).
95 No. 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.104

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.”105 In light of the U.S. Supreme Court’s decision in *A. L. A. Schechter Poultry Corp.*, 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,106 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.107

*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.”108 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.109

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.”110

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 1937.111 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.
precededness—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.\textsuperscript{121} 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.’’\textsuperscript{122}

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.’’\textsuperscript{123}

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.\textsuperscript{124} Then as background to the appeals procedure, Bashore made it clear

\textsuperscript{121}Robert Taylor, ‘‘44-Hour Laws Exempt Most $25 Workers,’’ \textit{Pittsburgh Press}, July 20, 1937, at 1:6, 4:5. Bashore’s announcement that he would also define the regulatory term ‘‘emergency’’ liberally pointed in the same direction.


\textsuperscript{124}Enactment of the two hours laws and a minimum wage law in 1937 necessitated creation of the Bureau of Hours and Wages, 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.125

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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127 Minutes 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.

128 Minutes 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, the press was also reporting that the law would undergo a court test before its effective date of December 1. Nor was the press merely reporting about the law: in mid-August the Pennsylvania Newspaper Publishers Association itself applied for an exemption.

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.” 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.”

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

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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

137Minutes of Special Meeting of Industrial Board, Harrisburg, Pennsylvania, August 30-31, 1937.
140Taylor, “‘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.142

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,143 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.”144

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

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.\footnote{Minutes of Industrial Board Meeting, Harrisburg, Pennsylvania, October 14, 1937, in Minute Books of the Industrial Board: Minute Book, 1937-38, Records of the Industrial Board, Record Group 16: Records of the Department of Labor and Industry, Pennsylvania State Archives, Harrisburg.} 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, \textit{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
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 common-sense 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

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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.”

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. 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 employes 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.”

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.”

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

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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.


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thousands of pages of testimony.156 From the outset 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.”157 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.”158

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.159

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.160 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.


159*“Furniture Firms Fear 44-Hr. Week,”* *Patriot*, Nov. 13, 1937, at 1:3, 4:7.

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.'" 164

John Edelman, the CIO's regional supervisor for Eastern Pennsylvania,

165Edelman (1893-1971), though born in the United States, grew up in England, where already as a teenager he was a union activist before returning to the United States in 1916. From 1926 to 1937 he was education and research director of the American Federation of Full-Fashioned Hosiery Workers; after working for the CIO from 1937 to 1939 and for the federal government during World War II, from 1945 to 1963 he was the Washington...
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 representative of the Textile Workers Union. Over the years he was also chairman of the board of the National Consumers' League and president of the National Council of Senior Citizens. "John W. Edelman, Former Head of Senior Citizens Unit, Dies," N.Y. Times, Dec. 28, 1971, at 33:1-2.

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-


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.
Pennsylvania 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.180 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.181 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 ‘[i]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 exemptions 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 Pennsylvania League of Third Class Cities—who had been mobilizing support for a test suit\(^ {187}\)—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 Congressman 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.’’\(^{187}\) 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 employees 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.’’\(^ {187}\) Secretary Bashore, referring to information brought out earlier by firemen, asked: ‘‘What do you call working an employee eighty-four hours a week?’’ Unfazed, Crosswaite shot back that the firemen ‘‘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.’’\(^ {188}\)

\(^{185}\)\textit{44 and Cities,} “\textit{Harrisburg Telegraph,} Nov. 27, 1937, at 6:1 (editorial).


\(^{188}\)\textit{CIO Speech Angers Borough Officials at 44-Hr. Hearing,} “\textit{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 talking." 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.\(^\text{189}\)

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\(^\text{190}\)—quickly assured the officials that municipalities would receive an exemption making the disruption of their budgets unnecessary, provided that they made all reasonable attempts to comply with the new law.\(^\text{191}\) Nevertheless, the decision to postpone enforcement by a month, instead 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.\(^\text{192}\)

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 administration began intensifying in tandem with the maturation of his own political aspirations. Margiotti had warned at and outside cabinet meetings that two provisions 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-

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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.

Industry Time to Fix Hours.”

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.

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.

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.”

Editorially piggybacking on this long piece, the newspaper predicted that Pennsylvania was “about to pay a heavy price for a careless piece of legislative

"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."\(^{199}\)

*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.\(^{200}\) 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.)\(^{201}\) 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."\(^{202}\)

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

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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.) 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. 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 application 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

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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.
208-44-Hr. Law Enforcement Delayed Month; Exempt Employers of 3 or Less.” *Patriot*, Nov. 30, 1937, at 1:4.
realization that strict enforcement would result in chaos affecting a million and a half jobs."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.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.”212

Some legislators were not amused by Bashore’s postponement. First-term Representative Isidor Ostroff, a Philadelphia lawyer and self-professed “100% Roosevelt Democrat,”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.214

Even the Harrisburg 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.215 But the Department’s decision to push back the law’s effective date of operation to January hardly mollified the editors of The Pittsburgh Press, which on the very day of the


212Bashore, “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....” Id. at 171.

213The Pennsylvania Manual at 873.


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."216

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.217

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.218 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."219

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-

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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 Schuykill county”—despite the fact that he was also the State Democratic Party secretary from 1935 to 1939—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.”

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.

IV

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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227Record at 1a, 151a, 332a, Holgate Bros. Co. v. Bashore, 331 Pa. 255 (1938).
furnish their services to the company on said schedule of hours."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{231}

In its Answer,\textsuperscript{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.\textsuperscript{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

\textsuperscript{228}Amended Bill in Equity, Record at 12a, 15a-16a.

\textsuperscript{229}Record at 16a-18a.

\textsuperscript{230}Record at 19a-20a; Holgate Bros. Co. v. Bashore, 45 Dauphin Cty. Rep. 274, 276-79 (1938).

\textsuperscript{231}"Start 44-Hour Test Suit; Ask Early Decision," Patriot, Dec. 9, 1937, at 1:7-8.

\textsuperscript{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.

\textsuperscript{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 "by distributing employment among a large number of workers...will increase employment...."234

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.235 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 competition236—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."237 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.238

After Bashore informed him that his firm had a right to appeal a hardship,239 Henretta replied that he would put the matter off to await Congress’s action con-

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234Answer, in Record at 28a-29a.
235Record at 145a.
236Letter from J. E. Henretta to James Lappan, director of Bureau of Hours and Minimum Wages (Oct. 8, 1937), in Record at 339a-341a.
237J. E. Henretta to Ralph Bashore (Aug. 20, 1937), in Record at 326a-327a.
238J. E. Henretta to Ralph Bashore (July 7, 1937), in Record at 322a-324a.
239Ralph 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 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,\(^{251}\) 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.\(^{252}\) 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.\(^{253}\) 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"\(^{254}\) 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."\(^{255}\) 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.\(^{256}\)

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-
"Pennsylvania of All Places"

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


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-
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 gantlet 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 la, 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,
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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,"

The defendants in their answer offered sophisticated socio-economic counter-arguments, 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

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Directory of Teachers in Member Schools: 1937-38, at 66; http://www.sddi.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

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 Fox, Additional Judge Karl Richards, and Sheely, specially presiding. Brief for Appellants, in Record at 7.
280The Pennsylvania Manual at 1023.
282Record at 161a.
a single-hour shift because it would not pay a “living wage.”

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 law—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.” 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 case may in part have been a function of the employers’ desire for an “exemption from effect...during the litigation period.” 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), 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.

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

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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

290 Record at 449a.
291 Record at 463a.
292 Record at 442a-443a. The trial testimony is confused, suggesting also that double time began on Saturday.
293 Harris 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.
294 Email 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.295

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.”296 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.”297 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.298

295MMA, Sept. 2, 1937 Executive Committee Minutes, Box 3, Folder 57
296MMA, Secretary’s Report for 1937 at 6 and Secretary’s Report for 1938 at 1, MMA, Box 1, Folder 22.
297H.B. Underwood Corporation v. Bashore, Bill in Equity, in Record at 54a, 55a, 56a.
298Underwood 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." 299

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. 300 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...." 301

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...." 303 Being confined to an eight-hour day and 44-hour week would leave

299 Record at 60a.
300 Record at 461a-462a.
301 Record at 467a.
302 Record at 499a (concerning plaintiff Adam Troska).
303 Boswell 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注— injected the issue of the unfair competition it would be facing against “mom and pop and children’s stores.” 311 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. 312 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.” 313 Apart from having failed to explain how compliance with the 44-hour law would have “increas[ed] 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. 316

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.” 317 The

310 The Grand Union Company v. Bashore, Bill in Equity, in Record at 110a, 113a.
311 Record at 578a (testimony of Samuel Winokur, secretary of Grand Union, Feb. 8, 1938).
312 Record at 113a-115a.
313 Record 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.
314 Record at 576a. Deputy Attorney General Friedman’s failure to pose this obvious follow-up question on cross-examination is puzzling.
315 Record at 588a, 581a.
316 Record at 575a-576a.
317 George W. Fisher, trading as Fisher’s Bakery v. Bashore, Bill in Equity, in Record at 72a, 73a.
318 Record 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.  

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.

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. Although the press reported that the Department of Labor and Industry was "doing little to enforce the law pending a decision on its validity," 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 work-sharing 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


324 C. W. Miller v. Bashore, Bill in Equity, in Record at 1018a-1024a (quote at 1023a).

The Dauphin County Court of Common Pleas held a hearing 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. 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.”

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.” 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.

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

\[\text{\textsuperscript{326}}\] Before President Judge Hargest, Additional Judge Fox, and President Judge Sheely, specially presiding. Record at 1029a.
\[\text{\textsuperscript{327}}\] C. W. Miller v. Bashore, Testimony (Feb. 10, 1938), in Record at 1029a-1044a.
\[\text{\textsuperscript{328}}\] C. W. Miller v. Bashore, Testimony (Feb. 10, 1938), in Record at 1036a.
\[\text{\textsuperscript{330}}\] Opinion 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."

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.

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.

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."

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. Lest anyone wondered why, in the face of such a generally prevailing 44- or even 40-hour week in Pennsylvania and neighboring

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331 Lush, "Court Enjoins Enforcement of 44-Hour Act."
334 Record at 592a-593a.
335 Record 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. Later, Bashore 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 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. Three days later, on March 21, Sheely followed it up with the formal adjudication, which The Pittsburgh Press's headline correctly interpreted as "Uphold[ing] State's Right to Fix Hours." Governor Earle, saying that "forty-four hours a week is long enough for anyone to work," ordered the attorney general to file an immediate appeal. 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. 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. 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).

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


354Adjudication 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).356

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.357

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

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.358

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.359

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.360

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.”361

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 methodology362—despite the fact that the plaintiffs’ own expert witness testified that their sources were “entirely satisfactory.”363 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

362As 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.
363Record at 917a (testimony of Willford I. King).
hours of work and health referred to factory and industrial workers, whereas the statute applied to almost all workers.\textsuperscript{364} 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."\textsuperscript{365} 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."\textsuperscript{366}

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."\textsuperscript{367}

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...."\textsuperscript{368} 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

\textsuperscript{364}Holgate Bros. Co. 45 Dauphin Cty. Rep. at 288-89.
\textsuperscript{365}Defendants' Exceptions, in Record at 994a, 1007a (quote).
\textsuperscript{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.
\textsuperscript{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.
\textsuperscript{368}Holgate Bros. Co., 45 Dauphin Cty. Rep. at 293.
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-

\textsuperscript{373}Holgate Bros. Co., 45 Dauphin Cty. Rep. at 299.
\textsuperscript{374}Pennsylvania Department of Labor and Industry, Biennium Report 1937-1938, at 95 (1939).
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

376 Factual Brief for Appellants at 148.
377 Pennsylvania 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.\textsuperscript{379}

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. The 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.\textsuperscript{380}

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.\textsuperscript{381} Among these workers were, according to a comprehensive but incomplete count, 735,200 workers in Pennsylvania covered by

\textsuperscript{379}Factual Brief for Appellants at 47.
\textsuperscript{380}Factual Brief for Appellants at 53, 55.
\textsuperscript{381}Factual Brief for Appellants at 59.
40- to 44-hour provisions in collective bargaining agreements. 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 counterattack 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.  
387 The brief itself presented material showing that collective bargaining agreements called for overtime at premium rates. Factual Brief for Appellants at 275-76.  
383 Factual Brief for Appellants at 110, 112.  
384 Factual Brief for Appellants at 111.  
385 Brief for Appellants at 93.  
386 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 enforcer 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 Pennsylvania,” whose location in small firms “in small towns scattered all over the countryside” 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

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393 Factual Brief for Appellants at 59-60.
394 Factual Brief for Appellants at 105-106.
395 Factual 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

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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.’"400 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.401 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.’"402

On June 30, just five days after Congress finally passed the FLSA, the court handed down its opinion unanimously affirming the original decrees.403 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 invit[ing]" the judiciary "at the outset to determine the validity" of the delegation clause.404 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

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.\textsuperscript{405} 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.\textsuperscript{406}

The \textit{Philadelphia Inquirer} emblazoned the outcome embodied in the court’s “uncompromising opinion” across two columns at the top of page one.\textsuperscript{407} Its in-depth analysis declared that the Supreme Court had “blasted the Earle Administration’s 44-hour week work law from the statute books....”\textsuperscript{408} Predictably, the \textit{Inquirer}’s editors were exultant that this “shining example of the sloppy law-making 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,”\textsuperscript{409} 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 \textit{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-

\textsuperscript{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.

\textsuperscript{406}Holgate Bros. Co. v. Bashore, 331 Pa. at 268-69. To Landon Storrs, \textit{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/fifty-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.\footnote{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."\footnote{411} 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."\footnote{411}

In its relatively lengthy report on the Supreme Court's decision, \textit{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.'"\footnote{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.\footnote{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 workers\footnote{414} made clear that the radical maximum hours statute would certainly either have been repealed outright, hedged with so many exemptions and ex-

ceptions as to lose its force, or, in the best case, transformed into an overtime
law.415 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),416 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.”417

In the event, male workers—the women’s 44-hour law had been left un-
scathed by the supreme court’s decision418—in Pennsylvania had to wait three
decades (until 1968) even for a state overtime law,419 and, at the beginning of the
twenty-first century, are still waiting for a general statutory rest period.420

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415 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
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416 Keller, Pennsylvania’s Little New Deal at 346.

417 U.S. Div. of Labor Standards, Proceedings of the Sixth National Conference on La-
bor Legislation: Washington, D.C., November 13, 14, 15, 1939, at 13 (Bull. No. 35,
1940).

418 “Hour Law Ruling Excluded Women.”

419 1968 Pa. Laws No. 5, sect. 4(a) at 11, 13.

420 House Bill 1252, which was introduced in the Pennsylvania House on April 2,
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