"Moments Are the Elements of Profit"

Overtime and the Deregulation of Working Hours Under the Fair Labor Standards Act

Marc Linder

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Overtime over Time: 
The Long and Unfinished Road from the 
Realm of Necessity to the Realm of Freedom

The saying goes that “the loyal union man, out for a good time, not only expects a good time, but a time and a half.”¹

The concept of “overtime” implies a normal or basic workday or workweek, but the loss in English of the synonymy between it and “overwork”² (or, in the even more pathos-generating older term, “overtoil”),³ still preserved in other languages,⁴ clothes abnormally long working time with such a self-explanatory


²The first modern use of “Over-time” and “Over-work” cited in the Oxford English Dictionary is Peter Simmonds, The Dictionary of Trade Products, Commercial, Manufacturing, and Technical Terms (1858), which (though by no means the first use) defines the two terms (in one entry) as “extra labour done beyond the regular fixed hours of business.” Id. at 269; 7 Oxford English Dictionary 331, 338 (1961 [1933]). The New Zealand Factories Act, 1894, which for the first time permitted overtime, at premium rates, for women and children, used an unusual hybrid term: “The Inspector shall keep a list of the names of all those women or young persons for whom permission to work overtime has been granted, and shall note against the name of each the hours of overtime worked by him or her, so that the full amount of overwork-time be not in any case exceeded.” The Factories Act, 1894, § 55, N.Z. Stat., No. 31, at 144-45. Prof. David McCabe, a historian of labor relations, testified at an important FLSA-overtime trial in 1946 that the first use of the word “overtime” in the United States that he could recall was a resolution of the iron moulders at their 1876 convention; “overwork” was the preferred term until the 1880s. Testimony of David McCabe, Transcript of Record at 419, in Bay Ridge Operating Co. v. Aaron, 334 U.S. 446 (1947). New York State’s legal day’s work statute of 1897 did not “prevent an agreement for overwork at an increased compensation....” 1897 N.Y. Laws, ch. 415, § 3 at 461, 463. According to a computer database search, only one court has used the word “overwork” in a FLSA case since World War II except for quoting from a 1942 U.S. Supreme Court case, which in turn was quoting from President Roosevelt’s message. Overnight Motor Transportation Co. v. Missel, 316 U.S. 572, 578 (1942). And even that one court used “overwork” merely in citing the plaintiffs’ complaint and did not adopt the term. Association of Court Reporters of Superior Court v. Superior Court for the District of Columbia, 424 F. Supp. 90, 91 (D.D.C. 1976).


patina that it is workers’ resistance to, rather than employers’ demand for, overtime work that seems to require justification. In the words of one economist: “The existence of ‘overtime unemployment’—that is, of offers to work at premium rates that are not taken up—is evidence of disequilibrium of some kind.” But generally economists perceive the best of all possible equilibria: “Premium rates of time and one-half or double time are more than adequate to offset any natural disinclination to work overtime....”

In contrast, the fundamental purpose behind the struggle for the normal workday of eight hours or workweek of 40 hours lay in withdrawing all time beyond that norm from the economic play of forces and economic calculations—whether by employers or workers—and committing it exclusively to workers’ nonproduction-oriented personal development. No matter what the length of the workday, as the AFL Executive Council declared in 1919, “sufficient remuneration should be received by the workers to make it possible to live comfortably without working overtime....” Normalization of the workday also means knowing in the morning whether capital will demand overwork later that day. In this important sense, universalist, collective, and egalitarian elements prevailed with regard to the distribution of work within the working class as a whole and avoidance of the creation of subclasses of overworked and unemployed workers.

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

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5Frederic Meyers, “The Economics of Overtime,” in Hours of Work 95-110 at 95 (Clyde Denkert et al. eds. 1965).
6Albert Rees, The Economics of Trade Unions 147 (1962).
Workers resisted systematic overtime because it "reduced the normal day to a nullity."  A century later, the discourse had been purged of any trace of conflict. Operating with a presumption that work schedules constitute an "optimum for the majority of workers," blackboard economics posits that "overtime pay will always induce the typical worker to offer his services beyond the standard schedule...." Indeed, economists are puzzled by those who prefer more leisure, chalking it up to "inertia, or lack of other opportunities...."13

Such economists also ignore the costs to workers of overwork. If a collectively bargained or statutorily imposed overtime rule is required to bring about a substitution of unemployed workers at straight-time wages for already employed workers at premium rates, they infer an increase in unit labor costs "since presumptively employers would have substituted additional workers for additional hours of existing workers even without such a rule if such a course would have been efficient."14 Overlooked is the cost of the shortened working lives of workers, which overtime premiums cannot internalize.

1. What is a Normal Workday? From Surplus Value to Family Values

This is a family values law. It gives somebody out there that doesn’t dare to say, I don’t want to work because I will lose my job, a chance to do so.15

Labor Unions over a century ago fought for the 40-hour workweek. What we are seeing today is workers working 60-hour weeks. There should be a healthy balance: eight hours of work, eight hours of sleep and eight hours with the family.16

Historically the concept of overtime ("over-hours" in nineteenth-century Britain)17 did not arise until coercive collective action, either through labor unions or the state, had created a normal or standard working day. And even then,

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14Meyers, “The Economics of Overtime” at 106.


workers paid by the hour or the piece did not initially benefit from the normalization if employers continued to work them at the regular rate; only workers receiving a fixed daily wage for a day’s work consisting of a variable number of hours could gain—provided that the employer did not lower the day wage.18

The advantages of overtime work to employers paying workers on a daily or weekly basis can be illustrated today in terms of salaried employees who are required to work unlimited hours for a fixed salary.19 The impact of an atomized labor market, unregulated by the state, on the length of the working day is also exemplified by the situation of 10,000 low-paid female department store employees in New York City around the time of World War I:

“Most of us think that the girls’ work...is over at 6 o’clock, but this is not true. It is the custom to keep the girls until 7, 8, 9, 10 and later to sort stock, to put things in order, to change departments. In most of the stores they receive nothing for this overtime, but in some of them they are given 35 cents for supper money. One store pays 17 cents an hour for overtime.”20

The change that labor standards legislation could bring about was documented in New Zealand at the end of the nineteenth century, when adult men were excluded from the Factories Act. As the Department of Labour there observed: “If a woman works overtime she had not only to be paid for it, but a minimum wage for it is fixed, and the employer is liable to suffer for a breach of the law if such wage is not paid. The man, on the contrary, may be worked not only outrageously long hours at his ordinary day’s work, but kept on at overtime, without pay, till either his strength or his patience is exhausted.”21

Karl Marx provided an economic analysis of this regime in the 1860s. Assuming that the average workweek consisted of six 12-hour days and that 10 of those 12 hours were devoted to creating the value that reproduced the worker, leaving the capitalist with two hours of surplus value, Marx set a hypothetical case in which the workday was extended by one hour or six hours weekly. Since

18Webb and Webb, History of Trade Unionism at 333 n.3; Robert Leiter, “The Principle of Overtime,” 2 Lab. Law J. 24-30 at 24 (June 1951). As late as 1920 the Webbs wrote that some unorganized workers in Britain “are still required to work longer hours to cope with a press of orders without getting any additional pay for the extra labor.” Sidney Webb and Beatrice Webb, Industrial Democracy 329 n.1 (1920 [1897]).

19See below chapter 2.


these six hours were all devoted to creating surplus value, the capitalist was getting a very good deal: otherwise he would have to pay wages to an additional worker for three days or three additional workers for one day to extract six hours of surplus value. That European workers as late as 1880 did not always receive premium wages for overwork is clear from a questionnaire that Marx devised: "Are extra wages—and which—paid in case of overtime?"

Marx also furnished a general framework for understanding struggles over the length of the workday or workweek. On the surface, this struggle centers on the conflict between the buyer and the seller of a commodity which generates special problems because, unlike the situation with a general run-of-the-mill commodity, the body and mind of the human seller of labor power cannot be separated from its daily use by the buyer. Since the law of exchange of commodities, however, does not recognize any special rules for this particular exchange, the capitalist buyer tries to extract the greatest possible profit from the use of the worker's labor power for the day's or week's worth he has bought. The question then becomes: how long is a workday or workweek? Since the human seller lives beyond the day, he must make sure that he sells his only commodity for a price high enough to enable him to reappear at work the next day with his labor power in a condition of strength and health that meets the standards set by his competitors. But the worker as a rational labor market participant must also exercise sufficient foresight to husband his only economic asset for a lifetime—or at least the standard working life of his type of labor. If the daily value of his commodity equals its lifetime value divided by 30 years or approximately 10,000 workdays, then he must make sure that overlong workdays and workweeks do not force him to expend so much additional energy that he uses up 1/5,000 or 1/3,333 of his lifetime supply for only 1/10,000 of its lifetime value. For this reason socialist unions regarded eight-hour laws as "life lengthening" acts.

The worker therefore regards such overwork as crossing the line from the capitalist's rightful use to plundering of his labor power and, as such, a breach of their contract and of the law of the exchange of commodities. His demand for a workday or workweek of normal length—defined by its compatibility with a

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


healthy 30-year worklife—is as rightful as the capitalist’s demand that the worker work as long as possible each day and week. Because the capitalist is not a slaveholder, he has no (capital-) invested interest in the length of the worklife of his individual employees: “A quick succession of unhealthy and short-lived generations will keep the labour market as well supplied as a series of vigorous and long-lived generations.”26 Thus as long as the employer can find equivalent replacements in the labor market when he needs them, this private contractual dispute cannot be resolved between individual buyer and seller. The resulting “antinomy” of right against right27 must, Marx argued, be decided by “the respective powers of the combatants.” But since “in its merely economic action capital is the stronger side,” a class-wide settlement of the hours issue was possible only through “general political action,” which meant “legislative interference” under pressure from the working class.28 Consequently, the normalization of the workday and workweek appears historically as a struggle between the “aggregate capitalist, i.e., the class of capitalists, and the aggregate worker, or the working class.”29

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

The sea change in the conflict over a shorter workweek is captured by the current union refrain that “‘[t]he question is...[s]hould workers be forced to work or should they be given the choice to spend time with their families?’”31 This individualistic “family values” public relations approach stands in sharp contrast to the nineteenth- and early twentieth-century collectivist context, when labor “predicated its demand for leisure as a means to the creation of a better social order. To produce intelligent citizens, essential to the existence of a democracy, everybody should have sufficient leisure to permit attendance at night schools,

26Karl Marx, Value, Price and Profit 57 (Eleanor Marx Aveling ed. 1935 [1865]).
271 Marx, Das Kapital at 249.
291 Marx, Das Kapital at 249.
time for reading, discussion, and attendance at political meetings."  

Around the time of the Civil War, the eight-hours movement was in part driven by the demand that a bright line be drawn between the time during which workers were wage-slaves to capital and the time during which they were free. The thousand-page brief that Louis Brandeis, Felix Frankfurter, and Josephine Goldmark produced in support of the 1913 Oregon ten-hour law when its constitutionality was attacked before the U.S. Supreme Court collected massive evidence on the detrimental impact of long hours on workers' health, safety, morals, and citizenship.

Press accounts of long workweeks have been common for years, even decades, though they appear in cycles. Often they have one-sidedly focused on factory workers who volunteer to work "unbelievable amounts of overtime"—upwards of 80 hours a week—over months and even years in order to achieve six-figure annual incomes to finance consumption patterns otherwise unattainable for the manual working class. Such presentations do mention the disruptive impact such total absorption by work can exert on workers' family lives and also allude to the greater exposure to injuries associated with the attendant fatigue, but they insist on the consensual nature of the choices. Even the United Automobile Workers (UAW), arguably the country's strongest union and collective bargaining partner of the automobile manufacturers, which have adamantly insisted on the practice for decades, is said not to "press too hard because its members tend to enjoy the extra income from those overtime hours more than they're distressed by having to work them." The president of one Ford UAW local in Michigan estimated in 1999 that "probably 70 percent of my people would be pretty upset if the UAW helped get restrictions on overtime." Such attitudes underscore how profound the sea change has been since the AFL representative told Congress in 1948 that the FLSA "was established to reduce unemployment and put everybody on a 40-hour week. ... [T]he intent of the act is not to give the worker more money for overtime but to reduce unemployment."
Nevertheless, by the end of the 1990s, employers' unrelenting appropriation of their employees' time began "wearing down" assembly line workers, making "many fatigued workers finally...ready to value a normal workweek more than the considerable financial incentives...." Average weekly overtime in manufacturing in the mid- and late 1990s reached their highest levels since the Bureau of Labor Statistics (BLS) began collecting such data in 1956. Prior to 1993, the highest average weekly level of overtime in manufacturing had been 4.1 hours at the height of the Vietnam War boom in early 1966; from January 1993 on, the figure virtually never fell below 4 hours, reaching annual averages between 4.4 and 4.8 hours from 1995 through 1998, and exceeding five hours in some months. As corporate strategies polarized the labor force into "overtimers" and "temps"—already Marx had observed that such terms reduced workers to nothing but "personified labor time"—reporters could point to the self-identified "greedy" "overtime hogs" and those who "are grabbing all the hours they can...merely to stay afloat in a time of stagnating wages."

At times the press also turns its attention to overtime imposed by employers on unwilling workers, who are fired for refusing to work. Such accounts raise the question as to how much has changed with regard to control over the length of the workweek exerted by the compulsions of spontaneous labor markets and employers' autocracies since the middle of the nineteenth century, when British factory inspectors reported on (and Marx immortalized) adult male cotton spinners who preferred to work 10-hour days for less wages, but were compelled to work as many as five hours of overtime daily lest they be forced to change places with the unemployed. The *Wall Street Journal*, for example, in the wake of the Reagan depression of the early 1980s, quoted a worker bemoaning the

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

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


41 Marx, *Das Kapital* at 301.
irony that at the end of the twentieth century ""we’re working the same hours our grandfathers worked."" The reporters were even alive to the need to educate the paper’s typical readers that not all overtime is created equal:

Americans with steady, white-collar jobs, many of whom also work 50 to 60 hours a week, often without extra pay, may find it hard to identify with factory workers bitter about working overtime following a recession when many were laid off. But office work tends to be more interesting than running a stamping press. And office workers are free to sit down, take a few minutes for coffee and, if necessary, slip out to the dentist.42

Until the 1990s, governmental concern with and union opposition to overtime work were largely rooted in fears of exacerbating already high levels of unemployment. More recently, the trigger has been its coercive character and corrosive impact on workers’ lives. The declining volume of unemployment in the mid- and late 1990s brought on a resurgence of and opposition to overtime. While firefighters allege in a lawsuit that extended forced overtime violates the constitutional prohibition against involuntary servitude,43 workers scheduled for only four hours of work daily complain that they are not even permitted to call home or take a break when the boss informs them at the end of their workday: ""You can’t leave, it’s busy, I got to hold you over...three hours...."" This version of compulsory overtime is especially insidious because it enables employers “to hold the people over at no extra cost....”44

In the 1990s, resistance, especially in the automobile industry, periodically took the form of strikes. In 1994, for example, General Motors workers in Flint, Michigan, who had been working six days a week as long as 11 and a half hours a day for two years, struck, demanding that the company hire additional workers. The psychological and physical toll that such unrelenting work had taken caused the modal middle-aged workers to realize that even $60,000 annual incomes could not make them "bounce back" from injuries or fatigue as they could when they were younger; they simply needed more non-worktime.45 An agreement was reached in this instance, but the UAW continues to regard GM’s overtime levels as “relentless” as the company insists on reducing its unionized workforce.

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41 Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime 289-90 (Nov. 8, 1977) (statement of Frank Bradburn, Retail Clerks Union, Local 770).
through attrition.\textsuperscript{46}

Ironically, even the compellers at times recognize the irrationality of compulsory overtime from their own perspective in confrontation with workers acting as rational owners of the commodity labor power seeking to preserve its long-term value against opportunistic depredations by employers\textsuperscript{47}: “Prolonged overtime often cuts productivity...because workers pace themselves to be able to stand the extra hours.”\textsuperscript{48} One company that relentlessly imposes overtime on its employees, US West, seemed to portray itself as its own hapless victim when it asserted that it was “just as interested in reducing mandatory overtime because it wants its employees to be rested and refreshed when they begin work.” The US West case is especially important because it reveals that although forced overtime has become a “‘big flashpoint’” for unions, even strong unions such as the Communication Workers of America (CWA) have been relatively powerless to resist employers’ demands. In 1998, when the union made overtime a key issue because members “‘were missing Little League games and sometimes even church services,’” the best the CWA could achieve after a two-week strike by 35,000 workers was capping mandatory overtime at 16 hours weekly in 1999 and 8 hours in 2000, and a guarantee of at least one five-day week per month in 1999 and two in 2001.\textsuperscript{49} When the same issue confronted members of the International Brotherhood of Electrical Workers employed by GTE, one local union business manager said “he would settle only reluctantly for limiting the amount of required overtime to 16 hours a week. ‘This bothers all unions.... Our forefathers in the labor movement died to get the 8-hour work day.’”\textsuperscript{50}

Resistance to demands for overtime has been undermined by administrative and judicial rulings, dating back to the inception of the National Labor Relations Act (NLRA), vindicating employers’ claims that, just as “[f]ailure to work overtime hours is the same as failure to work regular straight-time hours,”\textsuperscript{51} employers’ autocratic rule applies to both. The National Labor Relations Board disqualifies such a refusenik as seeking to “dictate the terms of his employment” and thus engaging in “unprotected insubordination” leaving him “legitimately


\textsuperscript{47}1 Marx, Das Kapital at 568-70.

\textsuperscript{48}Stricharchuk and Winter, “Worked Up.”

\textsuperscript{49}“Mandatory Overtime Seen as Key Bargaining Issue” at 436.


\textsuperscript{51}Van Dorn Co., 48 Lab. Arb. (BNA) 925, 926 (1967).
subject to discipline.”

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

One point virtually everyone agrees on is that: “Employers can force their employees to work overtime—no matter how much they object.” Employees, according to the U.S. Department of Labor (DOL), “must work as many extra hours as their employers demand or face losing their jobs. ... ‘(Labor laws) don’t give employees any protection if they refuse to work overtime,’ Richard Backer, assistant district director for the U.S. Department of Labor, said....” The more aseptic version in the DOL regulations explains: “Since there is no absolute limitation...on the number of hours that an employee may work in any workweek, he may work as many hours a week as he and his employer see fit” so long as the

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52Mead Corp.-Publishing Paper Div.-Escanaba, 275 NLRB 323, 324 (1985). See also Poppin Fresh Pies, Inc., 256 NLRB 233, 234 (1981), in which a Spanish-speaking married couple at a pie factory were fired for refusing to work overtime because the employer had not paid them properly for previous overtime: “I no work no more overtime for this company, this company no pay overtime, and me and Hortencia is going la casa” (Member Jenkins, concurring in part and dissenting in part).

53C.G. Conn, Ltd. v. NLRB, 108 F.2d 390, 397 (7th Cir. 1939). See also NLRB v. Mt. Clemens Pottery Co., 147 F.2d 262 (6th Cir. 1945). First Nat. Bk. Omaha v. NLRB, 413 F.2d 921 (8th Cir. 1969), upheld the same principle, but enforced the Board’s order of reinstatement both because the employer had committed the form error of not replacing the women who walked off the job in the middle of their involuntary overtime before they had returned to work the next morning and the weight of the evidence did not support the employer’s claim that “the girls intended to walk off the job again if their overtime demands were not met....” Id. at 924.

required overtime compensation is paid. Under state labor laws, too, "adult employees can be required to work overtime as long as they're paid time and a half for more than a 40-hour week...." A Washington state labor official offered this explanation of employer behavior: "If I have two employees, I have to pay two Labor and Industries coverage, two medical-care payments, two Social Security.... If I can take one employee and work the heck out of him, then my overall costs are going to be down."56

To be sure, workers under union collective bargaining agreements may grieve particularly egregiously motivated dismissals. For example, a telephone repairman with 24 years of seniority won his arbitration 18 months after he had been discharged for refusing to work overtime on the grounds that as a divorced parent with sole custody he had to pick up his two children after school; the employer had found the "excuse" unreasonable on the grounds that he could have made other arrangements.57 However, for the overwhelming majority of workers in the United States, who lack union representation, no such protection from autocratic employers is available.

But even in the unionized sector, in 1980 only 19.3 percent of major collective bargaining agreements conferred on 21.6 of all workers covered by such contracts the right to refuse overtime.58 In the mid-1970s, fewer than 5 percent of a sample of collective bargaining agreements entitled workers to refuse overtime without limitations, while another 19 percent permitted them to do so under certain conditions such as a reasonable excuse or the availability of a replacement worker.59 And "[i]n the absence of an express contractual stipulation or a binding prior understanding, arbitrators universally rule that management has the right to require employees to work reasonable amounts of overtime."60

58Calculated according to BLS, Characteristics of Major Collective Bargaining Agreements, January 1, 1980, tab. 4.1 at 61 (Bull. 2095, 1981). Major agreements were defined as covering 1,000 or more workers. According to a 1970 survey, only 18 percent of workers reported that they could not refuse to work overtime without being penalized. University of Michigan Survey Research Center, Survey of Working Conditions: Final Report on Univariate and Bivariate Tables, tab. 7.14 at 231 (1971).
60Roger Abrams and Dennis Nolan, "Time at a Premium: The Arbitration of Overtime and Premium Pay Disputes," 45 Ohio St. L. J. 837, 845 (1984). See also Marvin Hill, Jr. and Anthony Sinicropi, Management Rights: A Legal and Arbitral Analysis 513 (1986) ("Management's right to require that an employee work overtime has been consistently recognized by arbitrators"). For proof that arbitrators have not universally vindicated employers' power to compel overtime work, see Connecticut River Mills, Inc. 6 Lab. Arb.
A case involving a strong union that failed to negotiate any express limitation on overtime illustrates both the power that even unionized firms may retain and the modicum of freedom that counter-organization secures unionists. In 1947 the Ford Motor Company announced at one of its plants that, beginning six days later, workers would work nine hours daily until further notice. Near the end of the very first day of the new schedule, “Supervision instructed the employees to continue working until the production schedule for that day was completed.” Two workers who refused to remain at work beyond the already lengthened workday were initially discharged but then reinstated with a three-day lay-off penalty. After asserting that the amount of overtime requested would not have endangered the workers’ health, the high-profile arbitrator, Harry Shulman, rejected the UAW’s argument that work beyond the standard 40-hour week was optional with the workers: it flew in the face of an express contractual provision—only recently added—according to which Ford “retains the sole right...to determine the starting and quitting time and the number of hours to be worked.” Despite this clear basis, Shulman also found that a worker’s refusal to work overtime may be justified under certain circumstances:

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

Despite the fact that management had handed down its order shortly before quitting time, Shulman ruled that one of the workers was unjustified in refusing to work without offering any reason; nevertheless, the arbitrator’s award reduced his suspension without pay to one day. Shulman then rescinded Ford’s punishment of the other worker altogether because overtime work would have

(BNA) 1017, 1019 (1947), in which the arbitrator held that under a contract providing that an 8-hour day, 40-hour week “shall be in effect without revision,” work beyond these hours was “solely within the discretion of the employee” even where workers had been working 6-day, 48-hour weeks for some time; employers who required scheduling flexibility would have to include express language in their contracts.

61Ford Motor Co., 11 Lab. Arb. (BNA) at 1159.
caused him to lose his ride home with another worker and to take public transportation, which would have taken a substantially longer amount of time, which was also disproportionate to the amount of overtime. The arbitrator added that if Ford had given the worker notice a day or two earlier, the case would have been different.63

This arbitral mercy, based on the common law of the unionized shop, continues to characterize arbitrations, which subject managerial prerogatives in this area to a reasonableness criterion: employers' power to order overtime may be overridden where the extended work period is unreasonably long, inconsistent with workers' health, safety, and endurance, or is imposed under unreasonable circumstances.64 This sphere of autocracy tempered by reasonableness may be contrasted with the fate of workers in the union-free sector. When a key punch operator was told on a Thursday that mandatory overtime was scheduled for Saturday, she reminded her supervisor that she would not be able to work because she had planned a birthday party for her husband. Working for a nonunion firm, Deborah Butler could not challenge her discharge; instead, her legal dispute focused merely on whether she was entitled to unemployment compensation. Under Colorado law, as in many other states, resolution of that question pivoted on whether organizing her spouse's birthday party constituted good cause for refusing mandatory overtime; that standard was defined by reference to "compelling personal reasons affecting either the worker or his immediate family."65 The court glossed those reasons by adopting phraseology from other courts: "quitting must be for such a cause as would, in a similar situation, reasonably motivate the average able-bodied and qualified worker to give up his or her employment with its certain wage rewards in order to enter the ranks of the unemployed." ... While claimant understandably desired to give the birthday party for her husband, we do not think a reasonable person would refuse to work overtime and thereby sacrifice employment for this reason.66

Employers' entitlement to exact overtime is so deeply anchored in the

63Ford Motor Co., 11 Lab. Arb. (BNA) at 1160-61. In contrast, in a nonunion case involving a minimum wage worker who sought unemployment benefits after quitting a job which for three months had required four hours of commuting daily on public transportation following the demise of his truck which he could not afford to repair, the court ruled that such commutes in the Los Angeles area were too common to make the claimant's travel time unreasonable. Zorrero v. Unemployment Ins. App. Bd., 47 Cal.App.3d 434 (1975).


Overtime over Time

judicial mind that even a worker who had been injured on the job and whose physician suggested that he not work more than eight hours a day was denied relief under the Americans with Disabilities Act (ADA) after his employer had rejected his request that it accommodate his disability by not assigning him overtime. A federal appeals court held that the Florida Power & Light Company's "aggressive same-day" policy of meeting consumer demand by connecting and disconnecting electric meters within 24 hours made the performance of mandatory overtime an essential function of the job by creating fluctuating production requirements so that the worker, who could not work overtime, failed to meet the ADA's threshold requirement and therefore suffered no unlawful discrimination when he was fired.67 Thus an employer's prestatutory power to force workers to work overtime instead of hiring additional workers trumps this protective statute: the company can bootstrap itself into the privilege of firing workers injured on the job who can no longer work 216 overtime hours per year simply by understaffing the workplace in terms of the long-term health of its employees.68

2. The Self-Contradictions of Overtime Premiums

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

Those standing on the side listened and snickered. One of them asked him: "So according to what you said, your spears are the sharpest and your shields are the strongest. What happens if your spear is used to pierce your shield?" Disconcerted, the man could not give an answer.69

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

67Davis v. Florida Power & Light Co., 205 F.3d 1301 (11th Cir. 2000).

68To be sure, the ADA regulations state that a "job function may be considered essential...because of the limited number of employees available among whom the performance of that job function can be distributed." 42 CFR § 1630.2(n)(2)(ii) (1999). But the definition is circular if "can" merely means that the employer has for reasons of profitability decided not to hire additional workers.

69The Book of Han Fei Zi (3rd century B.C.).
That someone can favor a friend by seeing that he gets overtime work may sound at first like a teacher's keeping the good boys after school to write on the blackboard one hundred times, "I have been a good boy."\textsuperscript{70}

If an hours law is aimed at creating macrosocial norms such as shielding life spheres from the demands of production, preserving workers' health, or spreading employment, it must withhold from individual workers the decision whether to overwork or not. In particular, an overtime premium law like the FLSA is addressed to the employer, who, as Shulman recognized, "must determine whether the overtime work is worth the greater cost to him. ... No deterrence is accomplished by leaving the choice with the employee for whom the premium must act as an encouragement rather than as a deterrence."\textsuperscript{71} In the early twentieth century, unionists saw the need to educate the "'over-time hogs,' who have no concern in the organization other than the amount of money in their pay envelopes."\textsuperscript{72} Thus union officials who concede that "where people want to voluntarily work overtime, that's their determination to make,"\textsuperscript{73} have already abandoned the compulsory-collectivist principle that they would never consider yielding with regard to minimum wages.

Since not even the AFL-CIO believes in the existence of significant congressional support for the double or triple overtime penalty that would be needed to restore its deterrent value, its function may have degenerated into a mere entitlement to a modest premium for overwork. Many current defenders of the overtime premium, accordingly, advocate its retention on the grounds of its efficacy in preserving living standards especially for low-paid workers. Such friends of labor are unaware that the argument was long ago a favorite among labor's enemies, who used it to attack unions' advocacy of eight-hour laws without overtime. For example, in 1912, when Congress, after two decades of union urging, enacted such a statute to cover government contracts, The New York Times taunted labor: "Overtime is forbidden, although extra pay at higher rates is a boon to the wage-earner. ... Eight hours' work and eight hours' pay are not attractive under the present narrow margins of wages above the cost of living. For some there is no such margin, and any such reduction of pay would be...a

\textsuperscript{70}Sebastian de Grazia, Of Time, Work, and Leisure 131 (1964 [1962]).
\textsuperscript{71}Ford Motor Co., 11 Lab. Arb. (BNA) at 1159-60.
\textsuperscript{73}[California] Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime at 18 (William Robertson, exec. sec'y-treas., L.A. Cty. Fed. Lab.).
calamity for them....”

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

the very workers who currently rely most heavily on overtime pay are the employees most vulnerable to coercion and retaliation by their employer.

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

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

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

77Friedman, “Time Short for 40-Hour Weeks?” (quoting Maria Echaveste).
compensated when they are required to work long hours. For many workers, overtime pay is an important part of their income that helps them make ends meet. ... Average weekly overtime hours have been at or near record levels for much of the 1990s. [O]vertime hours and overtime pay have become increasingly important to many workers...as the amount of overtime work has trended upward.78

Employers, too, have used the same argument to attack legislative efforts to put an end to mandatory overtime. As the Ford Motor Company informed the California Senate Committee on Industrial Relations a quarter-century ago: “in the automotive industry, a substantial number of employees [sic] look upon overtime pay as being an integral part of their paycheck or earning capacity. Indeed, our experience at Ford is that substantially all of our overtime grievances are submitted by employees who believe that they have been improperly denied overtime as opposed to protesting the fact that if it is scheduled, they were required to work.”79

Even a resolutely pro-labor economist who has untiringly defended the FLSA against employer attacks, loses sight of logic in asserting: “When an employer insists on long hours per week, the costs spill over onto family and parenting time, student time, leisure, and volunteer time. In a sense, the overtime premium makes employers bear more of the social spillover costs imposed by their own hours decisions.”80 It is unclear what “sense” Lonnie Golden can mean since no matter how much money the premium redistributes from the employer to the overtime worker, it cannot restore to the worker the lost time that he will never be able to spend in these nonproduction activities.

Regardless of whether reliance on overtime premiums is a rational means of raising the annual incomes of low-wage workers, it is irreconcilable with using the statutory overtime penalty to discourage overtime work and promoting work sharing. In the context of an unprincipled Democratic opposition to Republican efforts to dismantle the New Deal, promoting the overlong workweeks that the labor movement struggled for decades to abolish does not even provoke demands for an explanation as to why the traditional goals of shorter hours and work sharing should be sacrificed for marginal increases in weekly wages that tendentially depress hourly wage rates.

Evidence of the perverse result of relying on overtime to bolster low-wage


79Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime: Appendices at 225, 227 (Halton Axtell, industrial relations mgr., Ford Motor Co. San Jose assembly plant).

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

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

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

As Sidney and Beatrice Webb explained a century ago, the failure to proceed along such lines results in an inexorable drift toward longer hours if not lower wage rates. The history of British union agreements regarding overtime work in the nineteenth century, which bears startling resemblances to the late-twentieth-

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84George Howell, Trade Unionism: New and Old 79, 78 (1891).
century experience in the United States, revealed that when the employer had been deprived of the unilateral power to extend the working day as he wished, he insisted, "in conceding a customary fixed working day," that workers accommodate him with respect to emergencies and sudden rush orders by working beyond the usual hours. Unable to refute this claim, union leaders turned the concession into "a source of extra wages" for their members by negotiating for higher time and a quarter or time and a half rates.

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

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

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

Moreover, when bad times come, and the demand for a particular kind of labor falls off, there is an almost irreversible tendency for the amount of overtime to increase. The employers see in it a chance of reducing the cost of production by spreading the heavy items of rent, interest on machinery, and office charges over more hours of work. The workmen are tempted to make up, by extra labor, their drooping weekly earnings. Exactly at the moment when the community needs...ten per cent less work from its...building operatives, a large number of these are pressed and tempted to give ten per cent more work—to the end that nearly twenty per cent of the trade can find no employment whatever! ... Even the employers are now beginning to object to the arrangement. They
feel that it is unbusinesslike to pay higher rates for tired work.85

Significantly, the Webbs told a similar cautionary tale about statutory hours regulation. When Parliament extended the ten-hours regime from textile and allied industries to other factories and workshops, it failed to retain the scheme of rigidly fixed uniform hours: “Endeavours were made, by sanctioning overtime under certain conditions,...to meet the varying circumstances of different industries.” The result, they reported, was that the “overtime regulations hailed as one of the sensible advantages of the Act of 1878, have gone far to neutralise any regulation of hours at all.” In the end, overtime seldom remained the exception that the law contemplated.86

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

The ideal of an agreement upon the working day should be to limit its length to a reasonable number of hours, while at the same permitting the employer in cases of emergency to keep his men at work for a longer period. It has been shown in practice, however, that where overtime is paid for at the same rate as ordinary time, so-called emergencies multiply, overtime is resorted to systematically, and the normal working day is broken down. The men who have thus secured an eight-hour day find that they are regularly working eight hours per day plus, say, two hours overtime, and after a few years, they may receive for their ten hours no more, if not actually less, than formerly for their eight hours of work. To remedy this evil and to avert this peril, trade unionists have in many cases been obliged to charge for overtime at a considerably higher rate, such as time and a quarter, time and a half, or double time. This is fair to the wage earner, since the last hour of work is harder for him than any other, whereas to the employer, who pays most for this last hour, it is the least valuable, since the workman is tired. Theoretically, therefore, the employer will work overtime only in especially good seasons or in emergencies. In actual practice, however, overtime, even when paid for at a higher rate, tends often to become systematic and to lengthen the working day without permanently increasing wages. Consequently, unions have frequently been compelled to prohibit overtime entirely, to limit the maximum amount of overtime per week or month, or to make other provisions that overtime, while serving the employer’s purpose, may not be used to break down the standard working day.87


Moments Are the Elements of Profit

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

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

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

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

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

Gompers had also expressed the labor movement’s adamant opposition to

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*Eight Hours for Laborers on Government Work: Hearings Before the House Committee on Labor, 57th Cong., 1st Sess. 92 (1902).
overtime two years earlier to the U.S. Industrial Commission. Outlining the same reequilibration process, he added that “after a while it happens that overtime—overwork—becomes the rule and is no longer overwork.”

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

3. Overtime Regulation Before the FLSA

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

Applying financial disincentives to employers in the form of overtime penalties was not the only method available to Congress to limit the workweek

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when it was considering the FLSA in 1937-38. To be sure, in 1916 Congress enacted the Adamson law establishing eight hours as the basic workday for workers operating railways and requiring additional compensation for overtime, but 20 years later Congress could simply have prohibited employing any worker for more than a specified number of hours per day or week.

One such counter-model available to Congress was Senator Hugo Black's 30-hour bill, which would have denied access to the channels of interstate commerce to any products produced in establishments that employed anyone more than five days per week or six hours per day, and which the Senate passed by a large majority in 1933. The New Deal, according to one interpretation, rejected this approach that year when the forces advocating increased production and employment prevailed over the continuing campaign for shorter hours; the overtime provision of the FLSA, on this view, was later intended by President Roosevelt as a diluted accommodation of the demand by the AFL for work sharing and a 30-hour work week. The 30-hour bill that Representative Connery introduced in the House in 1937 made the proposal more flexible by authorizing the Secretary of Labor to exempt employers from the law with respect to certain employees if the employer could prove that special conditions required them to be employed more than five days or six hours.

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95 This approach was reminiscent of the program of the Boston Eight-Hour League, which in 1872 proposed amending the patent law so that a patent would be forfeited if the firm that produced the patented product worked any of its employees more than eight hours. Marion Cahill, Shorter Hours: A Study of the Movement Since the Civil War 39 (1932).
97 H.R. 1606, § 1, 75th Cong., 1st Sess. (Jan. 5, 1937). Black's bill that had passed the Senate 53-30 in 1933 included an amendment to the same effect. This approach resembled that of a World War I-era bill that prohibited shipment in interstate commerce of any commodity produced in any lumber mill, logging camp, or woodworking establishment on which "any labor employed has been permitted to work more than eight hours in any day," but authorized the secretary of labor to permit labor to be employed more than eight hours in emergencies as determined by him. H.R. 11599, 65th Cong., 2d Sess. (1918).
In addition to such rigid or flexible maximum 30-hour bills, Congress could also have looked to an array of federal and state statutes that for decades had limited the daily hours of labor on government work to eight with no provision for overtime work, subject only to exceptions for emergencies. For example, in 1892 Congress enacted such a law on behalf of laborers and mechanics employed by the United States or any contractor or subcontractor on public works of the United States, making violation of the law a misdemeanor.\(^9\) Twenty years later, Congress enacted a similar law for the benefit of employees of federal government contractors, imposing a contract penalty for violations of five dollars per day per worker.\(^9\)

Not surprisingly, such regimes were anathema to employers, who saw them as an opening wedge to “enforcing in private employment a universal eight-hour day, and a rigid eight-hour day at that, not one in which double pay for overtime was to be allowed, but one in which...no...laborer...would be permitted to sell more than eight hours of his own skill and labor...no matter what his necessities might be....”\(^10\) During the many congressional hearings on such proposals during the 1890s and early 1900s, employers’ representatives made it clear that the bills’ denunciation and prohibition of overtime “of course creates an absolute revolution in every industrial establishment in this country where Government work is performed.”\(^11\) Yet the Senate Education and Labor Committee, in reporting out the bill that was enacted in 1912, not only mocked the objection that it was “revolutionary,” but declared that whatever “inconvenience” the eight-hour day might cause employers was “of minor importance compared to the general benefit...for laborers. We believe it means better work, better citizens, and in the end better for society.”\(^12\)

To be sure, during World War I, Congress authorized the president with respect to national emergencies to suspend the two eight-hour laws for work


\(^9\)Act of June 19, 1912, ch. 174, 37 Stat. 137. See generally, H. Rep. No. 165: The Eight-Hour Law, 62d Cong., 1st Sess. (1911); Cahill, Shorter Hours at 261-67. For earlier statutes, see Matthew Kelly, “Early Federal Regulation of Hours in the United States,” 3 (3) Indus. & Lab. Rel. Rev. 362-74 (Apr. 1950). In addition, in 1936 South Carolina enacted a statute that absolutely prohibited employers from employing employees more than 40 hours per week in textile mills, but it did not go into effect because it was conditioned on the enactment of similar legislation in North Carolina and Georgia. 1936 S.C. Acts No. 832 at 1568.


\(^11\)H.R. 11651—Eight Hours for Laborers on Government Work: Hearings Before the House Committee on Labor 60 (59th Cong., 1906) (testimony of Lewis Payson, former Republican Representative from Illinois, representing employers).

performed for the U.S. Navy or under War Department contracts for constructing military buildings or public works for purposes of national defense, and to authorize payment of time and a half for work beyond eight hours.103 Once President Wilson’s executive orders inaugurated this wartime overtime regime,104 employers complained not about the universal eight-hour day—which had ceased to be a threat—but about the market-induced compulsion to pay premium overtime to workers engaged in civilian work in a factory that was also engaged in government work. The federal government itself took this objection seriously since the application of the overtime regulation to the many dual-purpose firms “would have the effect of disturbing the conditions in their factories, upsetting the well-developed organization of some of the most important factories of the country....” Because the federal government could not attain its goal of standardizing war-related wage scales without also standardizing overtime wages, it faced a dilemma, which it never resolved: “On the one hand it is desirable to eliminate a great cause of labor trouble, put an end to a sense of injustice in the workers resulting from what must to them appear to be an arbitrary discrimination.... On the other hand, it is very important in this crisis not to interfere with the normal and effective flow of the production of the supplies needed by the Army.”105

Some state laws limiting the hours of female workers in effect when Congress was debating the FLSA imposed absolute caps on the workday and/or workweek, while others permitted overtime work.106 (Thirty years later, in the wake of the enactment of federal antidiscrimination legislation and the failure of state legislatures to re-enact gender-neutral hours law, the United States lost “even the limited protection against hours deemed long enough to be hazardous to the health of women....”)107 The statute for the District of Columbia, which Congress enacted in 1914, was of the first type, rigidly limiting female workers’ daily hours to eight.108 To prevent overtime from undermining the laws’ purpose, some states provided for time and a quarter, time and a half, and/or double time,

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while others authorized daily overtime so long as the weekly total did not exceed the maximum; other states confined overtime to a certain number of days, while still others required employers to prove to a state agency that irreparable injury would result without overtime. California, for example, prescribed a maximum eight-hour day, six-day, 54-hour week in the fruit and vegetable canning industry, but permitted longer hours in emergencies if one and one-quarter the minimum rate was paid for all daily hours up to 12 and double-time for hours beyond 12. Indeed, the California Industrial Welfare Commission, in justifying the switch from a limit of 10 hours per day and time and a quarter overtime and a limit of 72 hours per week to nine hours per day and time and a quarter overtime up to 12 hours and double time thereafter, argued that it has taken a long step in more drastically penalizing overtime than by the legal limitation of seventy-two hours per week. Double time rate, except as an emergency measure, is practically prohibitive. With juries of men in country districts whose fruit may perish if not canned, conviction for violation of the limitation of hours law is most difficult to achieve, some canners even saying they were willing to pay a $50 or $100 fine if necessary to save their fruit.109

The Texas 9-hour day/54-hour week law permitted longer hours in extraordinary emergencies, but only with the employee’s consent and at double-time rates. A Kansas six-day, 54-hour week regulation permitted one 10-hour working day per week provided the weekly limit was not exceeded. Under Wyoming’s eight and one-half hour law, overtime was authorized only in emergencies and if time and one-half was paid for daily overtime. Finally, the weekly hours laws for textile workers in Georgia, Mississippi, and South Carolina imposed various limitations on overtime. In South Carolina, 60 hours of overtime were permitted annually to make up for time lost by accidents or other unavoidable causes, but this time had to be made up within three months. The Mississippi statute permitted indefinite overtime for emergencies or public necessity.110

Historical experience in Britain and the United States had shown that unless such terms as “emergencies” were precisely defined, “advantage may easily be

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

110 For an overview of the overtime provisions state by state, see U.S. Women’s Bureau, Labor Laws for Women in the States and Territories, charts II-VI at 17-31 (Bull. No. 98, 1932).
taken of the exception to permit unnecessary overtime. British hours statutes for women and children in textile factories, the country’s most important in the nineteenth century, absolutely prohibited overtime, while later laws governing various other industries permitted overtime during seasonal rush orders or unforeseen events. Advocates of strict enforcement criticized such permissiveness, and unionists argued that such partial exemptions were self-fulfilling prophecies: sudden spurts in orders were the result of customers’ very knowledge of this overtime provision. In New Zealand, too, after the Factories Act was amended in 1894 to permit some overwork by women and boys under 16 years of age in exchange for a premium, legislative expectations were disappointed: “When trade was brisk the employers paid the extra money rather than delay to execute orders.”

Perhaps the best-known statute imposing an absolute limit on hours—apart from New York’s 1897 60-hour bakeries statute struck down by the U.S. Supreme Court’s infamous *Lochner* decision in 1905 as exceeding the police power—had been enacted in Utah in 1896 and provided: “The period of employment of workingmen in all underground mines or workings shall be eight hours per day, except in cases of emergency where life or property is in imminent danger.” Identical language prohibited work beyond eight hours in “smelters and all other institutions for the reduction or refining of ores or metals,” and violations of either provisions were declared misdemeanors. The statute’s renown arose from a employer’s challenge to its constitutionality on the grounds that it deprived him of his property without due process of law and interfered with employers’ and employees’ freedom to contract. The U.S. Supreme Court upheld its constitutionality as a reasonable exercise of the police power to protect

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1142 Reeves, *State Experiments in Australia and New Zealand* at 42.
115 *Lochner v. New York*, 198 U.S. 45 (1905). The New York labor law provided: “No employé shall be required or permitted to work in a...bakery...more than sixty hours in any one week, or more than ten hours in any one day....” 1897 N.Y. Laws ch. 425, art. 8, § 110.
116 1896 Utah Laws ch. 72. The “emergency where life or property is in imminent danger” exception, adopted by other states, was interpreted narrowly. In Arizona, for example, the attorney general ruled that the loss of revenue arising from the halting of production would not in itself justify working more than eight hours; moreover, the emergency would have to be so unforeseen, unexpected, and threatening as to “place a reasonable and prudent man to the instant defense of either life or property.” Ariz. Op. Atty. Gen. No. 73--17.
the health of workers exposed to especially dangerous work environments, but it also went much further:

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

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

Employers did indeed make such superficially anti-paternalistic arguments on behalf of their workers. At the same time that mine and metals employers were unsuccessfully attacking the Utah statute, their counterparts in Colorado succeeded in thwarting the will of the vast majority of the electorate, which had voted in favor of an eight-hours law. One of the arguments that the chairman of the board of the powerful Colorado Fuel and Iron Company used to oppose it was the alleged injustice it did to miners who would have been deprived of the opportunity to work overtime so that they could earn enough money to educate their sons and elevate them to higher social positions. A representative of the Bethlehem and United States Steel companies, attributing the meteoric rise of some managers to the college educations that they had been able to finance with overtime earnings, went so far as to assert before Congress in 1902 that the ban on overtime work in a proposed eight-hours law for workers on government works was actually designed to prevent such careers.... It is to compel men to remain on the same dead level, to prevent men from having the opportunity to rise above their fellow-men. That is the purpose, the direct purpose...of the bill. It is to say to one man of somewhat superior natural ability, “You shall not go faster than your brother who has not the mental capacity

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that you have. ... If you have more muscle, you must not be permitted to exert it.\footnote{Eight Hours for Laborers on Government Work: Hearings Before the House Committee on Labor, 57th Cong., 1st Sess. 93 (1902) (testimony of Joseph McCammon).}

In 1912, a perennial congressional employer-witness against overtimeless eight-hour bills for federal government works alleged: "On one occasion I declared that I could go before the people of my district and defeat...the Member from that district, if he supported a bill of this character, and that I would make the contest with him over the question whether or not he was in favor of striking down the rights of the American workingman to work overtime for overtime pay, which is the very purpose of this bill."\footnote{Eight-Hour Law: Hearings Before the Senate Committee on Education and Labor, 62d Cong. 12 (1912) (statement of Daniel Davenport, American Antiboycott Assoc.).}

The overtime approach also differed fundamentally from the aspirations expressed in older labor discourse. At its 1887 annual convention, for example, the AFL had advised strongly against overtime work, which interfered with the eight-hour movement, while many workers were unemployed: "It is an instigator of the basest selfishness, a radical violation of union principles...."\footnote{American Federation of Labor, History, Encyclopedia, Reference Book 309 (1919) (citing the Report of the Proceedings of the AFL from 1887 at 43, although there is no such page in that report and this passage also appears nowhere else in that publication).} In the late nineteenth century, unions began prohibiting their members from working overtime while other members were unemployed, as well as demanding that employers distribute overtime to the unemployed.\footnote{30th Annual Report of the Massachusetts Bureau of Statistics of Labor: March 1900, at 79 (1900) (Lowell Spinners Union).} Others, like the National Cotton Mule Spinners, did not shy away from "censur[ing] all those who are guilty of working overtime without a protest."\footnote{30th Annual Report of the Massachusetts Bureau of Statistics of Labor: March 1900, at 141 (referring to Lowell).} The U.S. Industrial Commission reported in 1901 that only a few unions "felt themselves strong enough to forbid overtime absolutely" to their members by means of fines and other sanctions.\footnote{Reports of the Industrial Commission on Labor Organizations, Labor Disputes, and Arbitration, and on Railway Labor XVII-XVIII (57th Cong., 1st Sess., H. Doc. No. 186, 1901).}

Behind these demands lay the insight that overtime work enables employers to increase the supply of labor without increasing the supply of laborers so that this artificial oversupply, by increasing the number of unemployed, depresses the wage level of the employed.\footnote{Karl Marx, Zur Kritik der politischen Ökonomie (Manuskript 1861-1863), in II:3.6 Karl Marx [and] Friedrich Engels, Gesamtausgabe (MEGA) 1910 (1982).} By 1919, when premium overtime rates had appeared in the contracts of virtually all AFL international unions, the AFL
convention declared that overtime work should be discouraged and penalized by demands for double time.\footnote{Report of the Proceedings of the Thirty-Ninth Annual Convention of the American Federation of Labor 450-51, 454 (1919).} A decade later, the convention, which found it contrary to union principles that some workers engaged in avoidable overtime while others were unemployed, recommended the abolition of overtime wherever possible and its use only for reasons beyond the control of management and workers.\footnote{Report of the Proceedings of the Forty-Ninth Annual Convention of the American Federation of Labor 378 (1929).}

Looking back at the history of overtime in 1947, labor historian and economist Philip Taft testified at trial in one of the most important FLSA overtime cases that the desire for additional compensation had never been a general principle: "the one predominant feeling—it is a feeling because it is not a worked out intellectual concept—of labor throughout its history, is the fear of unemployment, even in good times; as you examine the conventions of the different unions..., you find this constantly repeated over and over again, that we do not want overtime. We want to reduce the hours of labor to spread the work."\footnote{Testimony of Prof. Philip Taft, Transcript of Record at 346-47, Bay Ridge Operating Co. v. Aaron, 334 U.S. 446 (1947). Taft stressed that economists did not accept the underlying view that the amount of labor is limited. Id. at 329.} Indeed, at the time Taft was testifying some collective bargaining agreements still instantiated this venerable demand: "Except in cases of emergency, there shall be no regularly scheduled overtime in a classification as long as any employee on the company’s pay roll in that classification who is qualified to perform the work, remains laid off without being given the opportunity of returning to work."\footnote{BLS, Collective Bargaining Provisions: Hours of Work, Overtime Pay, Shift Operations 66 (Bull. No. 908-18, 1950).} The trial judge even adopted Taft’s position as a finding of fact: "The purpose of the demand of organized labor in American industry for penalty compensation for overtime was...prompted by the laborers’ desire for a shorter work day, and was not generally intended as a method of increasing earnings."\footnote{Findings of Fact 28 (c), Transcript of Record at 605, Bay Ridge Operating Co.}

For decades unions, with varying degrees of success, had included overtime penalties in collective bargaining agreements to discourage employers from working employees overlong bargaining hours where they could not be prohibited outright.\footnote{E.g., Report of the Eight-Hour Commission 481-82 (1918) (on railway unions). For a collection of overtime provisions in collective bargaining agreements from various trades, see Supplemental Memorandum for Defendant in Error 4-6, Bunting v. Oregon, 243 U.S. 436 (1917). According to Merle Vincent, “Time and Money,” 30 (11) Survey Graphic 621-23, 654-55, at 621-22 (Nov. 1941), time and a half overtime had prevailed in the electrical, cement, paper and pulp, furniture, printing, and machine trades prior to...}
Fewer contracts imposed absolute bans or requirements that each instance of overtime be authorized by the union.132 In congressional hearings on bills to prohibit overtime (except for emergencies) and mandate the eight-hour day on government works, union leaders were interrogated by employers' spokesmen as to why they sought by legislation what they themselves did not include in their own private-sector contracts. Unionists repeatedly testified that their contracts permitted overtime only in "extraordinary emergencies," which in some instances only the union shop steward was authorized to declare. Under such circumstances, overtime was "almost wiped out" because "[t]here is nobody who cares to pay time and half time." One union official testified in 1904 that his union's entire 800 members did not work a total of even 10 hours' overtime annually.133 Samuel Gompers added that the bill provided for overtime for the government "in cases of emergency, of war, flood, and so forth; while with the employer we can make no such provisions, because the employer has no war."134

In the early twentieth century unions protested against overtime work out of collective-compulsory principle. Gompers repeatedly declared to congressional committees considering a ban on overtime work on government works that "we want no overtime. We want no man to have even the opportunity of overtime...unless there be an extraordinary emergency...."135 When a Congressman asked him whether unions were opposed to workers' "having the privilege of working overtime for extra pay," Gompers rejected the premise; instead, he urged enactment of "a law to prevent the employers of labor either directly or indirectly making conditions such as to compel the workmen to work more than eight hours a day by any species of inducement that shall have the general tendency to

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132Testimony of Prof. Philip Taft, Transcript of Record at 329-30, Bay Ridge Operating Co. A few minutes later, however Taft testified that "there is no union contract that I know—there may be some—that explicitly prohibits work beyond a certain time, because there may be a job that is in the middle, you may spoil materials, you may require the filling of an order.... I know of no single contract where it is absolutely prohibited, and that certainly would be a very foolish clause...." Id. at 357, 384. In fact, a BLS study of overtime provisions in collective bargaining agreements in force at precisely the time of Taft's testimony offered examples of absolute bans. BLS, Collective Bargaining Provisions: Hours of Work; Overtime Pay; Shift Operations 64 (Bull. No. 908-18, 1950).

133Eight Hours for Laborers on Government Work: Hearings Before the House Committee on Labor, 58th Cong. 418 (1904) (testimony of Herman Schulteis, Knights of Labor, and Milford Spohn, chairman, legis. comm., Central Labor Union, Washington, D.C.).

134Hours of Labor for Workmen, Mechanics, etc., Employed upon Public Works of the United States: Hearings Before the House Committee on Labor, 56th Cong. 1st Sess. 413 (1900).

135Eight Hours for Laborers on Government Work: Hearings Before the House Committee on Labor, 58th Cong. 458 (1904).
increase the hours of labor.”

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

However, the whole point of penalty overtime rates was turned on its head in the nineteenth century as employers came to accept shorter standard workweeks in return for overtime. For example, among construction workers in Britain in the second half of the nineteenth century: “Overtime was converted from a disincentive on the employer to an incentive for the men.” Consequently, “where there were no restrictions on overtime work the determination of the hours of work was in effect returned to the individual bargain where each individual’s leisure was purchasable at some premium rate of pay. Thus the overtime rate became one of the means through which the employer could undermine the union attempts to restrict supply. Ironically the unions had originally pressed for its introduction as part of their effort to restrict supply.” Instead of deterring employers from overworking employees, premium rates became “a means of inducing employees to spend longer hours at work.”

For example, the machinists union, which was adamantly opposed to systematic overtime in the mid-nineteenth century, by 1874 saw no remedy for it, and by the

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137 For the example of London masons in 1853, see M. Bienefeld, Working Hours in British Industry: An Economic History 85 (1972).
138 William Haber, Industrial Relations in the Building Trades 228-30 (1930).
139 H.R. 15651: Eight Hours for Laborers on Government Work: Hearings Before Subcommittee No. 1, House Committee on Labor 31 (60th Cong., 1908) (testimony of Joseph Richardson, D.C. Bldg. Trades Employers Assoc.).
140 H.R. 15651: Eight Hours for Laborers on Government Work at 148 (testimony of W. Post, vice president of Post and McCord, largest steel erector in the United States).
142 Bienefeld, Working Hours in British Industry at 209.
beginning of the twentieth century had deleted the term from its vocabulary as it was constrained to accept collective bargaining agreements that not only permitted up to 40 overtime hours per month, but included "urgency and emergency" clauses that could be interpreted broadly enough "to make overtime practically unlimited." 

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

"Had the employe the right to waive this protection, both for himself and the state, it can readily be seen that it rests entirely with him to abrogate the operation of the law, and to cause it to become a dead letter. He may make the period of employment eight, ten, twelve or any greater number of hours, at his option, with the result that the conditions of relating to the period of employment in mines and mills would now exist as before enactment of this law—a matter purely of contract between the parties." 

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

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

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143Jefferys, Story of the Engineers at 36, 90, 148, 158 (quotes).
144Short v. Bullion-Beck & Champion Mining Co., 57 P. 720, 721 (Utah 1899).
146"Work Week and Overtime Pay in Contracts," 1 Labor Relations Reports 97 (Sept. 27, 1937).
organizing vastly expanded in 1936-37 did the practice of overtime rates spread with it.\textsuperscript{147} As late as the 1920s, for example, thousands of automobile workers worked forced overtime without premium wages.\textsuperscript{148} And members of the United Mine Workers in the crucial Appalachian area did not secure premium overtime pay until 1937, tonnage and piecerate workers not gaining time and a half rates until 1943.\textsuperscript{149}

4. The Legislative History and Purposes of the FLSA Overtime Provision

According to Mr. Justice Murphy, the purpose of the overtime provisions was twofold: “to spread employment by placing financial pressure on the employer through the overtime pay requirement...and...to compensate employees for the burden of a workweek in excess of the hours fixed in the Act.” ... The learned Justice’s statement fails to dispel a lingering doubt as to whether Congress in 1938 actually regarded workweeks over forty hours as burdensome.\textsuperscript{150}

Enactment of the FLSA overtime provision was accompanied by a sea change in public evaluation of hours regulation. In the 1920s, a standard international text on state regulation of working time noted that rules merely governing premiums for overtime were not of a fundamental character.\textsuperscript{151} As late as 1935, Elizabeth Brandeis, one of the country’s leading experts on and advocates of labor standards legislation, frankly characterized state hours laws similar to what would soon be enacted under the FLSA as “of the unenforceable type permitting overtime for extra pro rata pay.”\textsuperscript{152} Yet, three years later President Roosevelt

\textsuperscript{147}Testimony of Prof. David McCabe, Transcript of Record at 420-21, Bay Ridge Operating Co.


\textsuperscript{152}Elizabeth Brandeis, “Labor Legislation,” in 3 John Commons et al., History of Labor in the United States, 1896-1932, at 397-697 at 551 (1935). Even a critical leftist seemed unaware of the contradiction between confirming that an 1868 statute limiting the workday on government contracts to eight hours was ineffective because it permitted agreements to work overtime and asserting that the FLSA did not interfere with overtime
tried to persuade the millions of listeners to his fireside chat on the eve of the FLSA’s enactment that the new law “sets...a ceiling over hours of labor.”\textsuperscript{153} To be sure, this public relations effort may have been facilitated by the act itself, whose overtime provision is conveniently mislabeled, “Maximum Hours.”\textsuperscript{154}

Despite such misleading cues, Frances Perkins, the Secretary of Labor during the entire Roosevelt administration and one of the most ardent advocates of the FLSA, unambiguously vindicated employers’ power to make their employees work unlimited hours under the new law:

It has been said that one reason for the collapse of the French Republic was the adoption of the 40-hour week. The French 40-hour-week law was a rigid statute which prohibited all overtime beyond 40 hours, not only for the individual worker but also for the entire industrial establishment. ... The American hour laws, however, were very carefully framed to avoid this rigidity, and any employer in the land can legally and automatically ask his employees to work as many hours beyond 40 as he cares to without asking permission of the Government so long as he pays the overtime rate of time and one-half.\textsuperscript{155}

Perkins was wrong about France,\textsuperscript{156} but she stated the record correctly for the United States, and her Wage and Hour Administrator\textsuperscript{157} and the U.S. Supreme work.

\textsuperscript{153}Public Papers and Addresses of Franklin D. Roosevelt: 1938: The Continuing Struggle for Liberalism 391, 392 (1941 [June 24, 1938]).


\textsuperscript{156}As Perkins herself knew or should have known, at the same time she made this statement her own Wage and Hour Administrator was publishing a detailed account of the French hours law concluding that the “frequently repeated statement that the French 40-hour law contributed to the defeat of France by bringing about curtailment of production, is subject to correction in the light of history. The act was fully in effect but a short time, liberal provision was made for the exemption of defense industries, and even general relaxations were permitted many months before the outbreak of war....” U.S. DOL, WHD, Annual Report for the Fiscal Year Ended June 30, 1940, at 63 (1941). A decree of Nov. 12, 1938, not only made a worker’s refusal to work overtime in the interest of national defense a breach of contract, subjecting him to forfeiture of unemployment benefits for six months, but criminalized any attempts to induce others not to work overtime. \textit{Id.} at 57.

\textsuperscript{157}“It is clear that there is no absolute limitation upon the number of hours that an employee may work. If he is paid time and a half for overtime, he may work as many hours a week as he and his employer see fit.” WHD, Interpretative Bull. No. 4 (Dec. 20, 1939 [Oct. 21, 1938]), reprinted in BNA, \textit{Wage and Hour Manual} at 95 (1940 ed.).
Court agreed.¹⁵

In the face of the FLSA’s manifestly permissive regulation of hours, both the Right and the Left have perpetuated myths about workers’ statutory entitlement to the 40-hour week. Disconnected from reality is a Republican congressman’s recent assertion that the “rights” to the minimum wage and 40-hour workweek created by the FLSA “have become as ingrained as constitutional guarantees.”¹⁵⁹ Similarly fanciful is the leftist pathos that the FLSA “made the eight-hour day and forty-hour week the law of the land....”¹⁶⁰ Much closer to the mark was the characterization by Donald Nelson, chairman of the War Production Board, in opposition to efforts by employers to suspend the overtime law during World War II: “It governs wages rather than the hours in which a man may work.”¹⁶¹ More accurate, too is a later scholar’s judgment that the FLSA “did not really establish the forty-hour week norm so much as it buttressed management’s insistence that there be no further reductions in weekly work time standards”¹⁶² even if employers did not support the FLSA’s creation of that norm.¹⁶³

Some of the confusion that has fogged over understanding of the purposes of the overtime penalty/premium can be lifted by scrutinizing the FLSA’s legislative history. The immediate precedents for the overtime provision under the FLSA were the President’s Reemployment Agreement (PRA or blanket code), with which Roosevelt asked employers to comply in July 1933 pending adoption of codes for their industries, and various industry codes promulgated under the National Industrial Recovery Act (NIRA) in 1933 and 1934.¹⁶⁴ The PRA

¹⁵⁹¹⁴² Cong. Rec. E 1789 (Sept. 27, 1996) (Rep. Thomas Petri, R. Wis.). Similarly, Rep. Wood (D. Mo.) was wrong in asserting at the 1937 FLSA hearings that “this bill would take away from the employee the right to work for as low wages as he pleased and for as many hours as he pleased.” Fair Labor Standards Act of 1937: Joint Hearings Before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st Sess. 139 (1937). He was right about the minimum wage, but not about long hours.
¹⁶¹Hearings on H. R. 6790, to Permit the Performance of Essential Labor on Naval Contracts Without Regard to Laws and Contracts Limiting Hours of Employment, to Limit the Profits of Naval Contracts, and for Other Purposes Before the House Committee on Naval Affairs, 77th Cong., 2d Sess. 2576 (1942).
¹⁶⁴The PRA and the codes were precursors to the FLSA overtime provision also with respect to the exclusion of executive employees; see below chapter 2.
provided that employers would not, for example, work any factory worker more than 35 hours per week, but conferred the right on them to work a maximum workweek of 40 hours during a period of six weeks; however, this provision did not apply to "very special cases where restrictions on hours of highly skilled workers on continuous processes would unavoidably reduce production but, in any such special case, at least time and a third shall be paid for hours worked in excess of the maximum."  

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Under the codes:

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

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

Of the small number of codes that did not provide for overtime pay, a few either prohibited such employment or made no allowance for employment beyond the scheduled maximum.  

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President Roosevelt himself commended the use of overtime premiums under the codes. In a statement on the extension of the automobile manufacturing code in 1935, he highlighted as one of the code’s most important advances the establishment of the “principle” of payment of time and a half for overtime in excess of 48 hours, which “will benefit the employees through additional compensation for any necessary overtime work and deter the employment of workers in any unnecessary overtime.” 167 (The automobile code did not

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166 BLS, Handbook of Labor Statistics: 1936 Edition at 523. Without any evidence, the Office of National Recovery Administration, Div. of Review, Work Materials No. 35: The Content of NIRA Administrative Legislation, Part B: Labor Provisions in the Codes 81 (written by Ruth Reticker) (Spec. Studies Sect., Feb. 1936) claimed: “Historically, overtime rates were provided in union agreements for work beyond certain specified hours known as the basic day or basic week. This was primarily a wage device, intended to increase pay rather than to limit hours. In the NRA codes the purpose of the overtime provision seems to have been to provide some elasticity for employers who were reducing basic hours to the NRA standards, an elasticity protected against abuse by the requirement of penalty rates for overtime hours.”
167 “Statement by the President on the Extension of the Automobile Code,” in 4 Public Papers and Addresses of Franklin D. Roosevelt: The Court Disapproves: 1935, at 70, 71 (1938 [Jan. 31, 1935]). Roosevelt characterized the “payment of overtime where permitted in exceptional circumstances, such as extraordinary seasonal demand” as having
originally provide for premium overtime and even the amended version was to little effect since the weekly hours could be averaged over the entire model year.)

A labor standards bill that Secretary of Labor Perkins had her department's solicitor, Charles Gregory, draft in 1935 also provided for administrative discretion in setting the overtime premium. And less than a year before Congress began debating the FLSA it enacted the Walsh-Healey Government Contracts Act, which prohibited the employment of any person in excess of eight hours per day or 40 hours per week under any contract with the United States for the manufacture or furnishing of any materials in an amount exceeding $10,000, but authorized the Secretary of Labor to permit longer hours for which time and a half was mandatory.

Unlike many of the aforementioned statutes that prohibited work beyond a certain number of hours, from its very earliest drafts the FLSA merely required employers to pay workers a 50 percent premium for overtime hours. Despite the enormous changes that the bill underwent over more than a year, this provision was a constant. In the confidential draft that President Roosevelt's legislative brain-trusters, Thomas Corcoran and Benjamin Cohen, prepared on April 30, 1937—as the bill's congressional opponents never ceased repeating, the bill was filled with "Cohenisms and Corcoranisms"—a section headed, "Exemptions from fair labor standards," provided that "the maintenance...of an oppressive or substandard work week shall not be deemed to constitute a substandard labor condition if the employees so employed receive additional compensation for such overtime employment at the rate of one and one-half times the regular hourly rate at which such employees are employed." The administration's FLSA bill that was introduced in the Senate and House on May 24, 1937, contained identical language. Indeed, President Roosevelt himself, in his message to Congress

been established as one of the policies implementing the principles underlying the NRA. "The President Hails the First N.R.A. Code," in 2 Public Papers and Addresses of Franklin D. Roosevelt: The Year of Crisis: 1933, at 275, 277 (note) (1938 [July 9, 1933]).

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


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


S. 2475, § 6(b), 75th Cong., 2d Sess. (May 24, 1937).
accompanying the bill, optimistically stated that "permitting longer hours on the payment of time and a half for overtime, it should not be difficult to define a general maximum working week." 174

All later versions of the House and Senate FLSA bills during 1937 and 1938 included either language identical with that of the original bill or some variant of this time and one-half for overtime provision. 175 An unsuccessful House floor amendment filed on behalf of the AFL would simply have made it unlawful to employ anyone for more than eight hours a day or 40 hours a week and permitted "emergency work" in excess of such hours for which employers were required to pay time and one half. 176 And a Senate floor amendment would have imposed absolute limits on the length of the workweek. Introduced by Senator Francis Maloney (D. Conn.), it would have required the proposed Labor Standards Board to take a census of unemployment; if it counted more than 8 million unemployed, it would have been required to set the working week at 30 hours; at the other end of the spectrum, if fewer than 2 million people were unemployed, the working week had to be established at 40 hours. Without debate the amendment was defeated 45 to 37, with the strongest FLSA supporters generally opposing it.177

The earliest FLSA draft bills also enforced compliance by means of the same financial disincentive. Any employee employed for more hours per week than the maximum work week required by a labor standard order "shall be entitled to receive as reparation from his employer additional compensation for the time that he was employed in excess of such maximum work week at the rate of one and one-half times the agreed wage at which he was employed or the minimum wage, if any, for such time established by this act or by an applicable labor standard order, whichever is higher, less the amount actually paid to him for such time by the employer."178

Contemporaries were not confused about the distinction between a 40-hour week law and an overtime law. In sharp contrast to the permissive hours regulation scheme that Congress was preparing, a majority of the population favored caps on working hours. Public opinion polls revealed that in July 1937, 60 percent of those surveyed thought that "the federal government ought to set a limit on the number of hours employees should work in each business...." Some

175E.g., S. 2475, § 6(a), 75th Cong., 2d Sess. (House bill, Dec. 17, 1937); S. 2475, § 5, 75th Cong., 3d Sess. (House bill, Apr. 21, 1938).
17682 Cong. Rec. 1591 (Dec. 15, 1937). The amendment, which was offered by Rep. Griswold (D. Ind.), was defeated 162-131. Id. at 1604.
177 81 Cong. Rec. 7952-54 (July 31, 1937).
insight into the class-based conflict over hours is furnished by the fact that in May 1937, just a week before the FLSA bill was introduced in Congress, when 58 percent of respondents favored such limits, 68 percent of Democrats agreed as opposed to only 34 percent of Republicans. Indeed, just a few months earlier, 65 percent of respondents expressed themselves in favor of the thirty-hour week. According to a survey conducted in May 1942, 84 percent of respondents knew that a 40-hour week in a plant meant merely that the employees had to be paid overtime—not that they could not work there more than 40 hours.179

Although the distinction between a ban and a financial disincentive was well known, it was widely assumed that the overtime deterrent would be effective. The New York Times, which was militantly skeptical of the FLSA, editorialized: “The House wage-hour bill, it is true, does not absolutely prohibit a working week in excess of forty hours, but provides that hours in excess of that must be paid for at the rate of one and one-half times the regular rate. For many marginal firms and others this will be equivalent to prohibition, particularly in view of the increases in regular hourly rates by the bill.”180 (During World War II, when the work-spreading argument had lost its vitality and Secretary Perkins defended the overtime premium instead on the grounds that it did not really restrict hours, the Times pointed out that this claim ignored the law’s purpose of making overtime “prohibitively costly...”))181

In 1939 a scholar confirmed that few doubted that “both the expected and the probable effect of the hours provision...will be to restrict working hours to the maximum permitted at straight time.”182 A contemporaneous study of the automobile industry confirmed that the “overtime differential makes extra work so costly as to be impractical except under very unusual conditions.” With respect to the FLSA and to even stricter provisions in collective bargaining agreements, management “would like to be able to operate 45 or 48 hours a week during 20 weeks each year without paying overtime rates. This would enable them to rely more completely on their best employees, and there would be less need for the temporary hiring of less efficient men. ... Such a change is now impossible owing both to union attitudes and to the Wage-Hour Act.”183
Moments Are the Elements of Profit

Identifying Congress's precise intent in enacting the overtime penalty is not simple. The Supreme Court's interpretation from the early 1940s, which has been repeated ad nauseam ever since, that spreading employment was the principal goal—occasionally the Court added that the overtime penalty was also designed to compensate workers "for the burden of a workweek beyond the hours fixed in the Act"—is, to be sure, neither implausible nor bereft of a basis in the legislative history. Nevertheless, it cannot be anchored in the most authoritative texts such as the House and Senate reports or the FLSA bills.

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

Nor can it be denied that work-spreading had been a venerable goal of government hours legislation. Indeed, its impeccable conservative pedigree was on display as far back as 1890, when future president William McKinley, then

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

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

186 As Denison, The Sources of Economic Growth in the United States at 39, noted: "It is at least doubtful that standard weekly hours would have been set where they were if the reduction had not been expected to result in more employment rather than entirely in less work being done."

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

Republican leader of the House of Representatives, spoke in favor of an absolute eight-hours bill governing laborers and mechanics employed by the Federal government or by contractors on public works:

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

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

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

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

A seemingly persuasive piece of legislative history supporting the work-spreading interpretation arose during the House floor debates in December 1937. Representative Alfred Bulwinkle (D. N.C.) offered an amendment that would have prohibited the employment of any employee between midnight and 6 o'clock in the morning in any manufacturing industry that did not require continuous production unless the employee was paid time and a half. Bulwinkle explained that the amendment's purpose was to eliminate the graveyard shift in several industries, chiefly textiles, because "largely but not altogether chiselers, carry this night work on, which is detrimental to the health of the employees.

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18921 Cong. Rec. 9300-9301 (1890).
19081 Cong. Rec. 7941 (July 31, 1937).
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and...to industry...."\textsuperscript{191} The provision was in fact taken from a textile bill—hearings on which had been going on when the FLSA was introduced in May and which was shelved to make way for the FLSA\textsuperscript{192}—in which it was designed to "take the profit out of the graveyard shift...and yet permit its use whenever a special seasonal profit would justify the payment of time and a half."\textsuperscript{193}

Night work had proliferated in cotton manufacturing in the twentieth century from two sources: "when business was good each mill hastened to get as much of the market as possible when the getting was good, and when business was bad the spreading of the overhead costs over a greater volume of production meant that in the depressed market of slim margins the double-shift mill had a slight edge over the single-shift mill." Even after the World War I textile boom had subsided, southern mills retained the night shift, despite workers' aversion, higher wage rates, and lower productivity, because continuous operation reduced unit costs. The resulting overproduction led to losses, but the logic of competition prevented individual firms from eliminating night work and individual states from banning it unless their competitors did likewise.\textsuperscript{194}

The importance, if not the quantification, of these microeconomic factors was present to mind when the House Labor Committee held hearings, just 12 days before the FLSA bill was introduced, on a so-called little National Recovery Act bill to regulate the textile industry. The subcommittee chairman, Representative Kent Keller (D. Ill.), who was opposed to graveyard shifts on economic and social grounds, was reluctant to enact an outright ban because "it may limit a manufacturer who has necessarily to deal with a temporary condition, such as a shift in styles. If we should allow that practice in a case like that, a manufacturer could afford to work that shift and labor would also be benefited. The operator certainly would not use the graveyard shift unless it paid to do so."\textsuperscript{195} Keller then asked the chief economist of the BLS, F.A. Hinrichs, whether imposing time and a half for all hours worked between 11 p.m. and 7 a.m. would discourage night work while permitting it where profitable:

Mr. Hinrichs. I am quite sure that the payment of penalty overtime rates rather than

\textsuperscript{191}82 Cong. Rec. 1695 (Dec. 16, 1937).


\textsuperscript{194}Herbert Lahne, \textit{The Cotton Mill Worker} 143-44 (1944).

\textsuperscript{195}To Regulate the Textile Industry: Hearings Before the Subcommittee of the House Committee on Labor, 75th Cong., 1st Sess., pt. 3 at 178 (1937).
the fixing of flat maxima gives a larger degree of flexibility. There ought to be a sufficient penalty so that the practice would be indulged in only under the most favorable market circumstances. I should say that normally the payment of 50 percent more than the going rate for labor would effectively bar the use of such overtime. One could not produce for stock under those conditions.

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

MR. HINRICH. The only reason I hesitate to answer in the affirmative absolutely is that I do not know the exact amount by which the overhead of a mill will be reduced by three rather than two shifts. I do not know the balance between the cut in overhead and the increase in 50 percent in labor costs; but a 50-percent increase in labor costs, if not offset, would be a complete barrier.196

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

One congressman immediately opposed the Bulwinkle amendment because it abandoned “the theory behind” the FLSA: by seeking to curtail production, it would merely promote capital intensification on the other two shifts employing the same number of workers.197 This objection prompted the chair of the House Labor Committee, Representative Mary Norton (D. N.J.), to reply that evidence available to the committee contradicted that claim: “In fact, it has been proven to us that if we could do this it would do more to spread employment than any other thing concerned in the bill. That is the purpose of the bill—to try to spread employment.” Several representatives were understandably puzzled by how preventing overproduction by eliminating one-fourth of the aggregate working time available to the entire covered working class (as opposed to shortening some

196To Regulate the Textile Industry at 178.
19782 Cong. Rec. at 1696 (Rep. Smith, Conn.).
workers' working days) could possibly be consistent with work sharing; nevertheless, the amendment was agreed to, although the House bill itself was not passed.198

The dubious work-sharing capacity of the anti-graveyard shift proposal was underscored later in the debate when Michigan Representative Shafer successfully prevailed on the House to exempt the food processing industry from the provision in order not to disadvantage the Kellogg plant in Battle Creek, which had converted its three eight-hour shifts to four six-hour shifts during the Depression to combat unemployment. Shafer feared that the Bulwinkle amendment would make Kellogg "close down one of these shifts, thereby causing a number of men to lose their jobs." When another congressman, who was skeptical of the Bulwinkle amendment itself, asked whether the same argument did not apply to any manufacturing process using a night shift but lacking a great excess of machinery on which the discharged workers could work during the day, Shafer agreed, but his amendment was nevertheless agreed to.199

Employers' later efforts to persuade the courts that the FLSA overtime premium applied only to the minimum wage were also not totally bereft of a purchase in the legislative history. Perhaps the most powerful evidence supporting their view was found in the report issued by the Senate in July 1937 recommending passage of an amended FLSA bill:

The right of individual or collective employees to bargain with their employers concerning wages and hours is recognized and encouraged by this bill. It is not intended that this law shall invade the right of employer and employee to fix their own contracts of employment, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-working-hour industrial workers, who are the helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage.200

This explanation clearly eschewed any policy of creating an across-the-board norm for the length of the workweek or of work sharing. Its only motivation was combating impoverishment among sweated workers. The House report a month later added the goal of expanded purchasing power, but also emphasized that the bill "only attempts in a modest way to raise the wages of the most poorly paid workers and to reduce the hours of those most overworked."201

Even the single most important textual warrant in the legislative history

198 82 Cong. Rec. at 1696-97.
offers only tenuous support for the U.S. Supreme Court’s assertion in 1942 that
the statutory overtime premium was designed to apply “financial pressure...to
spread employment to avoid the extra wage.... In a period of widespread
unemployment and small profits, the economy inherent in avoiding extra pay was
expected to have an appreciable effect in the distribution of available work.”

Though the Court cited no source to document its assertion, the Fourth Circuit,
on whose opinion it relied heavily, pointed to President Roosevelt’s message to
Congress in connection with the introduction of the FLSA bill on May 24, 1937,
for its claim that: “It seems plain from the legislative history of the Act that...one
of the fundamental purposes of the Act was to induce worksharing and relieve
unemployment by reducing hours of work.” Yet Roosevelt had merely said:
“We know that overwork and underpay do not increase the national income when
a large portion of our workers remain unemployed. Reasonable and flexible use
of the long-established right of government to set and change working hours can,
I hope, decrease unemployment in those groups in which unemployment today
principally exists.” Yet this presidential hope raises more questions than it
answers. In particular it fails to explain why workers who are not underpaid
should receive a state mandated overtime premium and what the purpose of the
mandatory premium vis-à-vis groups not suffering from unemployment or at
times when unemployment in general was low.

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

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204 S. Rep. No. 884 at 3.
205 FLSA, § 18.
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been empowered to "prevent the circumvention or evasion" of its orders.\textsuperscript{206} Significantly, even this provision, which had teeth but was deleted before enactment, revealed the FLSA's intended limitations when it went on to confine the Board's power to establish minimum wage standards to those that "will affect only those employees in need of legislative protection without interfering with the voluntary establishment of appropriate differentials and higher standards for other employees in the occupations to which such orders relate."\textsuperscript{207}

Just a few days before Senator Black's labor committee redrafted the bill as a whole in mid-1937, \textit{Business Week} portrayed employers as too preoccupied with their rebellious workers to focus on the potentially disastrous statute: "Little imagination is necessary to translate the effect of this provision and others on labor costs, manufacturing costs, and price levels, but most industrialists do not appear to be concerned, either because they are too busy or because they are afraid to turn their back on their employees and come to Washington when labor trouble looms so large at home."\textsuperscript{208}

President Roosevelt himself could have served as a prime witness for those arguing for a minimalist interpretation of the FLSA. In a fireside chat to the nation on October 12, 1937, explaining why he was calling an extraordinary session of Congress for the next month, Roosevelt, after mentioning "the millions of men and women and children who still work at insufficient wages and overlong hours," stated: "I am a firm believer in fully adequate pay for all labor. But right now I am most greatly concerned in increasing the pay of the lowest-paid labor...." More specifically he added: "A few more dollars a week in wages, a better distribution of jobs with a shorter working day will almost overnight make millions of our lowest-paid workers actual buyers of billions of dollars of industrial and farm products."\textsuperscript{209} Then on November 15, 1937, the opening day of the extraordinary session, in his message to Congress Roosevelt focused his labor agenda on the proposition that the "exploitation of child labor and the undercutting of wages and the stretching of the hours of the poorest-paid workers in periods of business recession have a serious effect on purchasing power." He therefore characterized as the "two immediate purposes" of the proposed legislation "banish[ing] child labor and protect[ing] workers unable to protect themselves from excessively low wages and excessively long hours."\textsuperscript{210}

\textsuperscript{206}S. 2475, § 12(6) and (7) (May 24, 1937).

\textsuperscript{207}S. 2475, § 12(6) (May 24, 1937).

\textsuperscript{208}"Wage-Hour Fate—and Politics," \textit{Bus. Wk.}, July 3, 1937, at 24.


\textsuperscript{210}"Message from the President," in 82 Cong. Rec. 9, 11 (1937).
Roosevelt’s State of the Union address to Congress on January 3, 1938, shifted the emphasis somewhat toward long hours generally. He noted that the minimum wage and maximum hours provisions promulgated under industry codes pursuant to the NIRA had proved their social and economic worth, and insisted that “the people of this country, by an overwhelming vote, are in favor of having the Congress—this Congress—put a floor below which industrial wages shall not fall, and a ceiling beyond which the hours of industrial labor shall not rise.” Concealing the fact that no FLSA bill imposed such a ceiling on hours, he then returned to the perspective of impoverishment by referring to those who opposed wage and hour legislation on the grounds that it would impede the flow of capital to and foster its exodus from localities that survived “only because of existing low wages and long hours.” Roosevelt rejected such growth strategies: “In the long run the profits from child labor, low pay, and overwork inure not to the locality or region where they exist but to the absentee owners who have sent their capital into these exploited communities to gather larger profits for themselves.” He argued that new firms would be more likely to bring “permanent wealth” to communities that insisted on “good pay and reasonable hours” because the workers would be more efficient and happier. Finally, resuming the minimalist theme, the president sought to reassure Congress that the FLSA did not aim for “drastic change”: “We are seeking, of course, only legislation to end starvation wages and intolerable hours; more desirable wages are and should continue to be the product of collective bargaining.”

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

Accordingly, the Oregon Supreme Court, in passing on the law’s

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211 Cong. Rec. 8, 9 (1938).
212 Its fame was a result of the fact that the U.S. Supreme Court upheld its constitutionality despite its limitation on the hours of adult men. Bunting v. Oregon, 243 U.S. 425 (1917).
213 1913 Or. Laws ch. 102, § 2.
214 1913 Or. Laws ch. 102, § 3.
constitutionality, elaborated on the legislative policies in a manner wholly unlike later judicial interpretation of the FLSA. It divined that “the legislative mind” viewed long hours as increasing the risk of injuries in factories with high-powered machinery, but it also observed that “a man who day in and day out labors more than 10 hours must not only deteriorate physically, but mentally. The safety of a country depends upon the intelligence of its citizens, and if our institutions are to be preserved the state must see to it that the citizen shall have some leisure which he may employ in fitting himself for those duties which are the highest attributes of good citizenship.”215

The problem with this pathos-radiating rhetoric is that it failed to deal with the obvious fact that employers were privileged to work their employees 13 hours—and thus expose them to greater risks of injury and make them unfit for good citizenship—provided that they paid time and a half for the last three hours. As the leading turn-of-the-century treatise on the police power observed, “where the time for all street railroad employees is fixed at ten hours per day, with the right to work overtime for special compensation, the justification on the ground of public safety evidently fails. If safety or health really forbid excessive work, special compensation does not remove the objection, and the fact that it is allowed indicates that the restriction rests on economic grounds.”216

More puzzling was the success with which Felix Frankfurter, who represented the state of Oregon, persuaded the U.S. Supreme Court in Bunting v. Oregon to uphold the statute as regulating health and hours rather than wages. Frankfurter’s argument that it was “an hours law and not at all a wage law” was implicitly based on his contention that there was so little overtime work in Oregon industry that the law made little difference. The overtime provision “merely...allow[ed] for a limited and reasonable flexibility in time of unusual business pressure,” but “even now, when employers do not have to pay time and a half, over 93 per cent find it unprofitable to employ men beyond ten hours as a normal standard.” His assertion that the statute was reasonable in “safeguarding abuse of the exception by the punitive provision”217 reveals that an overtime law would cease being reasonable if its punitive provision no longer deterred employers. The U.S. Supreme Court accorded only “a certain verbal plausibility” to the employer’s contention that the law was intended to permit 13 hours’ work

215State v. Bunting, 139 P. 731, 735 (Or. 1914).
217Supplemental Memorandum for Defendant in Error at 1-2, Bunting v. Oregon, 243 U.S. 436 (1917). Frankfurter incorrectly reported his own data, which in fact showed that in 1909 93.7 percent of industrial workers in Oregon were employed less than 10 hours a day. Supplemental Brief for Defendant in Error upon Re-Argument at 63, Bunting v. Oregon, 243 U.S. 436 (1917).
for 14 and a half hours’ pay; that the legislature chose to “achieve its purpose through the interest of those affected” rather than by a “rigid prohibition” was not fatal.218

Oddly, although labor standards advocates characterized the Oregon statute as “of a very ineffective type” for permitting three hours of overtime at time and a half, the FLSA was not attacked for permitting 16 hours a day of premium overtime.219

5. Employers’ Struggle Against Statutorily Imposed Premium Overtime Wages for Non-Minimum Wage Workers: 1938-1942

Another difference of opinion which might be clarified by court action hinges on the question of hours. This controversy, if it is a controversy, seems rather strange in view of the statute’s moderate hour provision. The Act does not even satisfy the perennial demand of labor—the 8-hour day. The Act does not tell the employer what hours in any day he may work his men. It simply says...he shall not work his employees more than 44 hours without paying them time and a half for overtime. In fact, the overtime provision is where the rub comes in. There has been much talk about ways and means of an employer working his men more than 44 hours without paying them any more than they were paid prior to the effective date of the Act.220

The Wage and Hour Division (WHD) engaged in extensive public education during the run-up to the act’s date of effectiveness. Two national radio networks gave the Wage and Hour Administrator, Elmer Andrews,221 fifteen minutes the night before and a third broadcast a program the next day.222 Yet even before the FLSA went into effect at 12:01 a.m., Monday, October 24, 1938, the WHD had received “[e]vidence of employer resistance” from several states.223 Already a week earlier an employer had telegraphed the WHD seeking the general counsel’s blessing for his “painless compliance” scheme to lower “the hourly wage of every worker in his place, from president to office boy, to 25 cents an hour for the

221Elmer Andrews (1890-1964), had, before Roosevelt appointed him the first Wage and Hour Administrator, been the New York State industrial commissioner. 4 Who Was Who in America (1961-1968) at 31 (1968).
223Wage-Hour Law: Variety of Interpretations As Strict Enforcement Is Promised,” 1 Wage and Hour Reporter 233 (Oct. 24, 1938)
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first 44 hours and 37½ cents overtime” and to guarantee the difference between that amount and the weekly compensation prior to October 24.224

Such reports prompted Andrews to declare preemptively: “‘Millions of Americans look forward to Monday...as the beginning of a new advance in the nation’s offensive against exploitation and hardship. These millions welcome the opportunity to help inoculate our economic system against the virus of sweatshops. Unfortunately, however, there is a small and scattered minority who apparently are unwilling or incapable of contributing to the common good. These delinquents, whose number and importance are magnified by their isolation, resort to subterfuge in an effort to camouflage their selfishness and blame the Fair Labor Standards Act for their own anti-social conduct.”225 The intensity and longevity of this important conflict contradicts the later scholarly claim that “[f]or several months, Andrews enjoyed his honeymoon.”226

Roosevelt himself may have been disappointed that the bill “had been so watered down in its long journey through Congress that it could have little impact on the national economy,”227 but employers, who had failed to voice such apprehensions at the hearings in 1937, feared a “very violent” “shock.” For example, the economist of the Chase National Bank, Benjamin Anderson, Jr., conceded that at 48 or 50 hours, overtime was a “serious burden” warranting labor unions’ “good rule” of time and a half to protect workers’ health. But a mandatory 50 percent premium for hours above 40 “creat[ed] an inelasticity” which could plunge the next business upturn into a “needlessly violent and premature crisis.” Anderson found the FLSA altogether “unfortunate,” but especially could not “contemplate with equanimity” a 50-percent overtime penalty after a mere 40 hours for all industry within two years.228

The chief dispute on the eve of October 24 was the payment of overtime to salaried employees.229 The BNA’s authoritative Wage and Hour Reporter argued that “[t]he root of the controversy” stemmed from a statement that Administrator Andrews had made before the Southern States Industrial Council in Birmingham on September 29. It is implausible that Andrews’ statement provided anything

224"FLSA and ‘Painless’ Compliance," 1 Wage and Hour Reporter 375 (Nov. 21, 1938).


227James MacGregor Burns, Roosevelt: The Lion and the Fox 343-44 (1956).

228"Banker’s View of Wage-Hour Act,” 1 BNA, Wage and Hour Reference Manual 13­14 (1939) (address to the Chamber of Commerce of Kansas City, Dec. 14, 1938).

229On employers’ coordinated efforts from 1938 to 1940 to amend the FLSA to broaden the exclusion of white-collar workers, see below chapter 2.
but a pretext for employers' resistance that would have emerged anyway, especially since the WHD's official Interpretative Bulletin No. 4 ("Maximum Hours and Overtime Compensation"), published on October 21, contradicted Andrews' statement,230 which he himself later disowned ("certain impromptu remarks I made...in reply to random questions asked me at the end of the speech").231 Indisputably, however, Andrews had put his foot in his mouth in the following colloquy:

Q.—Many clerical and non-supervisory employees are on a monthly or weekly wage basis. Is it necessary for such wages to be recalculated to an hourly basis and time and one-half paid for hours over forty-four?

MR. ANDREWS—... Clerical forces, we all feel, are included in the Act. But I cannot see where there is going to be any practical difficulty there because your clerical force in any plant of any consequence certainly is earning on a basis of more than 25 cents an hour, weekly wages divided by the hours they work. If they are well above 25 cents an hour, it seems to me that there would not be much question about time and a half for overtime, because you could figure in that weekly wage that time and a half over the 44 hours had been given consideration as remuneration for their full week's work.232

That Andrews's slip was not inadvertent was clear from his answer to a similar question in Birmingham that was not trotted out in the later debate. In response to a question concerning overtime liability for office employees of steamship companies who were paid more than the statutory minimum wage, Andrews replied: "They still get enough wages, I am sure, that if you want to break it up into so much per hour, so much for time and a half, it would still work out."233 Nevertheless, those who wanted to make much ado of these ignorant off-the-cuff remarks ignored the disclaimer that the BNA had appended to their publication already three weeks after the Birmingham meeting: "it should be kept in mind that the Administrator's answers are not final on any point and that he reserves the right to 'change his mind'...." They also conveniently overlooked Andrews's own self-deprecating admission at Birmingham about a similar gaffe that he had committed soon after his appointment as deputy labor commissioner in New York State.234

233"Some Employers' Questions Answered" at 196.
234"Some Employers' Questions Answered" at 194.
Employers’ focus on the FLSA’s overtime premium in the period immediately after enactment was driven by the fact that more than four times as many workers were affected by it than by the minimum wage provision. In 1938, 1,384,000 workers were covered and working more than 44 hours; by 1939, 1,751,000 workers were predicted to be covered and working more than 42 hours, and by 1940, 2,184,000 workers. In contrast, in 1938 only 300,000 workers were earning less than the minimum wage of 25 cents, while the Wage and Hour Administrator predicted that by 1939 550,000 would be earning less than the minimum wage of 30 cents. The manufacturing industries with the greatest overtime liability were food, lumber, and textiles.  

During the congressional hearings on the FLSA, it had been the very rare employer who, when asked by Senator Hugo Black whether “there should be any permission to work longer than 40 [hours] on payment of overtime,” replied, as did Donald Comer, president of Avondale Mills and former president of the American Cotton Manufacturers Association: “No. Get another man.” Employers launched a many-sided campaign against the overtime provision of the FLSA as soon as the law went into effect. During its very first week, enforcement officials were occupied with employers’ efforts to achieve costless compliance with the overtime rule. An Ohio steel foundry, for example, planned to cut the hourly wage from 70 to 40 cents, on which time and a half would be paid, and then add back a 30-cent an hour bonus. A trade association suggested to its members that they could achieve costless compliance by reducing the hourly wage of an employee who worked 48 hours from 50 cents to 46 cents. However, if the worker insisted on his old 50-cent wage, employers should offer him only 40 hours, leaving him with a total weekly wage of $20: “Naturally employees are going to be quite willing to take the slight hourly rate cut and a full weekly pay envelope rather than contribute $4 for the privilege of having an extra day off with nothing to do but spend his money.”

Remarkably, unions had long been aware that such evasions were predictable.
As far back as 1912, when Congress was in the final throes of a two-decade debate on an eight-hour law for employees of federal government contractors that did not provide for overtime work, N. P. Alifas, the president of a government machinists union local testified against employers' request for overtime on the grounds that it would be misused:

If a manufacturer secured a contract...he could very easily evade the law like this: For instance, here is John Smith who gets $3.60 for a nine-hour day. That is 40 cents an hour. The employer might say: "Mr. Smith, we have secured this contract from the Government on condition that we work the men an eight-hour day, and with the provision that the men are to be allowed to work overtime." He may also say: "I secured this contract on a very low bid. You know there is a great deal of competition among employers, and, Mr. Smith, you have been in the habit of working nine hours for me for $3.60; surely you will be willing to help me overcome the technicality of this law, and instead of 40 cents an hour accept 38 cents an hour for the eight hours, and accept time and a half for the extra hour, or 57 cents, which will make just $3.61 instead of $3.60 as heretofore."

Significantly, Alifas then added what no one would criticize about the FLSA a quarter-century later: the existence of such a permissive overtime provision "would be dangerous, as it would utterly nullify the real intention of the law. It is just such contractors as the one cited here that make a rigid law necessary...."

One of the more primitive evasions was reported on the front page of The New York Times just a few weeks after the FLSA went into effect: some employers stamped or printed a waiver of overtime payments on pay checks on the assumption that workers' acceptance of the check would act as a waiver of their FLSA rights. The two chief thrusts to employers' resistance, however, were economic and legal. The former focused on readjusting wages and hours to avoid the bite of the overtime premium. The object of litigation was to secure rulings that the overtime premium was applicable only to the minimum wage in opposition to the WHD's interpretation that section 7 of the FLSA clearly makes the employee's "regular rate" and not the minimum wage the base for the overtime premium.

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242 "Workers Cannot Waive Wages Act Hours; Andrews Warns Employers Not to Try Idea," N.Y. Times, Nov. 21, 1938, at 1, col. 2.

The WHD’s first line of defense against this attack was reliance on section 18 of the FLSA: "No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act."\(^{244}\)

At his Birmingham question and answer session on September 29, Andrews had also put his foot in his mouth on this issue. When asked whether an employer paying higher wages than his competitor could reduce wages "to meet the competitive situation where he observes the minimum," the Wage and Hour Administrator replied:

I have heard of that in some of the communications industries, that that is being contemplated. Of course, the Act contains a pious wish that that should not be done. I think it is not going to make for any happier industrial relationship...between employer and employee. I think it is economically unsound and pretty generally unfair, but that is all I can say about it.\(^{245}\)

Andrews’s infamous “pious wish” may have been as accurate a label as could be placed on section 18, but the WHD was not deterred from dressing it up in the agency’s initial (and ambiguous) interpretation. In Interpretative Bulletin No. 4 of October 21, the WHD asked and answered hypothetical questions about the regular rate against the background of section 18. If an employer, who before the FLSA went into effect had employed his workers for 48 hours at a flat hourly rate well in excess of the 25-cent minimum wage, reduced its employees’ wage rate to an amount still above the minimum wage so that their total weekly wages including time and a half for overtime remained the same, the WHD was not yet prepared to “give any definite interpretation” of the applicability of section 18. It merely pointed out that “it is not safe to assume that a section of an Act of Congress is meaningless,” and speculated that if the same employer tried to use the section to “justify” the wage reduction in negotiations with its employees, a court “might” be warranted in holding that the reduction “is not really a reduction in legal contemplation,” and that therefore the regular rate remained the pre-FLSA higher rate.\(^{246}\)

In mid-November 1938, the WHD’s assistant general counsel informed the Fifth National Conference on Labor Legislation: “if the effect of what the employer does is to reduce the hourly wage being received at the time the act

\(^{244}\)Fair Labor Standards Act of 1938, § 18, 52 Stat. at 1069.


went into effect, he is violating the spirit of the act. We cannot assume that Congress put that in there for nothing, and I think that the employer who engages in such a practice is running a big risk of having to pay twice the amount which he was paying at the time to his employees...."

The possible interpretations of section 18 had not passed unnoticed in the press when it suddenly appeared in the bill as it emerged from the House-Senate conference committee. The Times was immediately and remained for years exercised over this "potential joker." It conceded in June 1938 that it had probably been inserted "with the best of intentions"—namely, to assuage fears that the statutory minimum wage would tend to become the maximum and maximum hours the minimum. However, the editors speculated that the "ambiguous sentence...may prove to be a very mischievous joker. There will be those who will try to interpret it to mean that all existing wages above the minimums now fixed and all existing hours below the maximums now existing must be frozen at their present levels—or that all existing wages can only move in one direction—upward. Such an interpretation...would paralyze the American economy." Two months later, repeating much of its earlier editorial verbatim, the Times saw its premonitions coming true as the national director of the Congress of Industrial Organizations (CIO) asserted that two large employers intended to use the FLSA as a cover for reducing wages in tandem with reducing weekly hours from 48 to 40. To be sure, the paper found a silver lining in the CIO’s lament that the lack of an enforcement provision in section 18 gave employers a "technical loophole."

The NAM immediately launched an aggressive campaign to undermine the effectiveness of the overtime provision with respect to employees whose hourly wage exceeded the new statutory minimum. It also contended that there was "a serious legal question" whether salaried employees were covered by the overtime provision at all. Through its general counsel, John Gall, the NAM called attention to Andrews’ admission that section 18 "was nothing more than a 'pious hope' on the part of Congress." Gall also pointed out that even if an employer wished to respect the spirit of a provision that lacked any sanction, section 18 did not refer to wage rates, but merely "a wage"; consequently, so long as the total weekly pay was not reduced, employers could comply with the alleged spirit of the law despite reducing wage rates. Moreover, Gall argued that the FLSA permitted employers to pay salaried employees for more than 44 hours weekly

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at their existing weekly compensation provided that the base hourly rate did not fall below 25 cents and the overtime rate was at least 37.5 cents. The NAM argued that "if the employer could not modify the basic rate so as to work salaried employees for the same weekly hours as before, at the same total compensation, the employer was ‘forever prevented from lowering a present wage rate even if it resulted in no lowering of total compensation.’" Gall asserted that if the NAM’s view did not prevail, "'unscrupulous'" employers would have an incentive to fire their existing employees and hire new ones at the lower, minimum rates of 25 and 37.5 cents.250

The Wage and Hour Administrator, perceiving this interpretation as a direct threat to the new law’s effectiveness, struggled to draw out Congress’s intent from the overtime provision:

"Congress refrained from taking the more drastic step of prescribing an absolute maximum work week, but made it unlawful for an employer to work an employe for longer than forty-four hours a week unless such employe receives compensation...in excess of the hours above specified at a rate not less than one and a half times the regular rate at which he is employed....

"Congress thus made it economically disadvantageous to an employer to maintain a work week in excess of forty-four hours. The expectation evidently was that this provision would tend to bring down the customary work week to forty-four hours. The question now is whether this expectation can be defeated by various devices, with the probable result the coming Congress will renew consideration of more far-reaching proposals."251

In the weeks following the FLSA’s effective date (Oct. 24, 1938), high ranking WHD officials attended numerous employers’ meetings to discourage them from running afoul of section 18. The agency’s general counsel, Calvert Magruder, warned the annual meeting of the Manufacturers’ Association of Connecticut against “the effort to make a huge joke of the overtime provisions....”252 Speaking to the Executives Association of Greater New York on November 16, Paul Sifton, the deputy Wage and Hour administrator (and former leftist playwright), also advised against reducing the hourly base rates of

251"Disputes Hirers on Overtime Law," N.Y. Times, Nov. 6, 1938, at 2, col. 1. Even the liberal economist and later Senator Paul Douglas agreed with the NAM that it would be "very dubious public policy" to enforce section 18 because its effect would be to "freeze existing wage scales at their present levels and prevent any future reductions, whether caused by a depression, a fall in prices...." Paul Douglas and Joseph Hackman, "The Fair Labor Standards Act of 1938: III," 54 Pol. Sci. Q. 29, 35 (1939).
252Calvert Magruder, “What Did Congress Intend? Mr. Magruder’s View,” 1 Wage and Hour Reporter 357, 358 (Nov. 14, 1938) (address delivered Nov. 10).
employees working more than 44 hours: "The work week is not merely to be
shortened for the lowest-paid workers, but for all industry, and if devices for
circumventing the overtime provisions are permitted, then the act’s intent falls
down."

In an appearance at the same time before the Structural Clay Products
Industry, George McNulty, the WHD’s associate general counsel, included
among the "obvious subterfuges" reducing employees’ hourly rate to 25 cents
but guaranteeing their old total pay, reducing base wages only during peak
periods so that employees would receive the same total wages as during normal
weeks, and declaring that henceforth workweeks would be 56 hours in order to
calculate a lower hourly rate. McNulty also categorized as a subterfuge the then
proliferating ruse of lowering the hourly rate from well above 25 cents to an
amount still above 25 cents, but calibrated exactly so that, despite complying with
the new time and a half rule, employers could continue to employ workers for 48
hours weekly without having to pay any more than before the act went into effect.
He warned employers that even in the unlikely case that the bookkeeping
schemes they were devising for "juggling purported regular hourly rates" were
later found to be legal, "is it wise to assume that Congress will sit supinely by?"
If a huge joke is made of Section 7 (which sets the maximum hours), Mr.
McNulty said he doubted that ‘Congress will join in the laughter. Passage of the
Black-Connery Thirty-Hour Bill was once seriously considered and may be
again.... If flexibility is incompatible with enforcement, then Congress may well
vote for enforcement without flexibility.’’

A few days later, the Times reported on its front page, the Wage and Hour
Administrator said flatly that any employers reducing wages to 25 cents an hour
"as a result of the act were acting in a 'most illegal manner.'" However, despite
his assurance that the intent of the act was to prevent wages from being reduced
to the minimum wage, Andrews revealed some legal uncertainty when he added
that he was considering suggesting a clarifying amendment to Congress “to be
sure that the penalty applies to all sections where penalties should apply....” Yet
even in the absence of such congressional action, Andrews was eager to litigate
such reductions: “In our opinion it is illegal.... You can say it just as often as

Sifton, who together with his wife had written the play 1931, later became a lobbyist for
liberal causes. “Paul F. Sifton, 74, Ex-Lobbyist, Reuther Aide and Writer, Dead,” N.Y.

WHD assistant general counsel Rufus Poole stated that employers asked the division for
its opinion about lowering wages to maintain a constant total weekly wage after premium
overtime more often than any other question. BNA, Wage and Hour Manual 112-13
(1940 ed.).
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Contrary to a popular misconception, employer resistance was not confined to the South. In 1940, for example, a large employer association in New York was indicted for having conspired to effect an industry-wide violation of the FLSA. The stratagems used by employers, large and small, to avoid the financial bite of the overtime law is nicely captured by some of the high-profile litigation. One such case arose two days before the FLSA went into effect when a superintendent of the General Mills plant at Larrowe, Ohio, near Toledo, met, on instructions from the company main office, with the watchmen, who had been working 56 hours weekly at 60 cents per hour for total weekly wages of $33.60, and advised them that "under the statute the company could put on other men to do the work as watchmen for 60 cents an hour instead of paying overtime of 90 cents to the present employees for a large part of the work." He explained that they could either work 40 hours at the same hourly wage or, if they wished to continue working a 56-hour week, at a reduced hourly wage of 52.5 cents for the first 40 hours and time and a half for the remaining 16 hours, leaving their total wages unchanged. Since the 40-hour option would have left them with only 71 percent of their then weekly wage—but would have required the employment of at least two other watchmen—the workers "were willing to work 56 hours 'if it was legal' for the company to make such an arrangement." In their FLSA suit against General Mills, Samuel Williams and his coworkers demanded the statutory time and a half overtime based on their real regular rate, which had been 60 cents an hour, during more than two years. In mid-1941 Judge Frank Picard (who would shortly achieve national fame as the trial judge in the Mt. Clemens Pottery portal-to-portal case) formulated the point of the litigation this way: "There is no denying that this was an attempt, by contract, to circumvent the purpose of the Fair Labor Standards Act by reducing wages, maintaining the same number of hours and giving the workman the same pay he was receiving before the act went into effect. No one disputes this, and the question simply is: Did the defendant company have the right to enter into a contract with its men previous to the effective date of the Fair Labor Standards Act as long as the minimum rate paid was not below the rate set by the act?"

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256Richter, "Four Years of the Fair Labor Standards Act" at 99.
257General Mills v. Williams, 132 F.2d 367, 368 (6th Cir. 1942).
258See below chapter 3.
259Williams v. General Mills, Inc., 39 F. Supp. 849, 850 (N.D. Ohio, 1941). The plaintiffs were members of an AFL union, but the union, preoccupied with the plant's larger departments, apparently did not intervene. Id. Judge Picard was a federal district judge in Michigan, but heard this case in the Western Division of the Northern District of
From the FLSA’s finding of “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers,” and its declared policy of eliminating those conditions “without substantially curtailing employment or earning power,” Picard concluded that Congress condemned long hours not so much as being unhealthful but as generating unemployment: “Congress...anticipated that many industrial leaders would not be adverse to giving more employment as long as it didn’t cost anything and to meet any possible circumvention the policy of the Act itself enunciated the doctrine that the eventual change to a 40-hour week should be made generally without affecting the ‘earning power’ of the workers of the United States.” Picard saw this congressional intent buttressed by section 18, which “notifies the employer that nothing in the act ‘justifies’ him in reducing a wage paid by him which is in excess of the applicable minimum wage....”

Focusing on what he regarded as the economic realities, Picard found nothing ambiguous in section 18:

It clearly shows that Congress, composed of men the majority of whom had reason to believe from past experience that there would always be a few employers who would not enter into the spirit of the intention of such legislation, had in mind that minority and desired to place a barrier against the very thing that happened here. If all industrial leaders had reduced the wage rate in anticipation of this act, they would probably have found their men willing to work overtime to get the same wages. Congress knew that. They sought to prevent the act’s frustration because the evil was not so much in the length of time men worked but, with nine, ten or twelve million unemployed..., the problem was to cut into that unemployment without financially hurting industry or its employees. It was hoped to cut at least four or five millions from the unemployment ranks. This it appears was the big objective of the...Fair Labor Standards Act.

In response to General Mills’s defense that Congress attached no remedy to violations of section 18, Judge Picard stated merely that congressional intent had to be derived from the act as a whole; in that sense he concluded that employers and employees were not privileged to contract for a nominal regular rate

Ohio. The following year, citing his decision in this case, he handed down a similar ruling in Anuchick v. Transamerican Freight Lines, Inc., 46 F. Supp. 861, 866 (E.D. Mich. 1942). Plaintiffs’ lawyer, Edward Lamb, was also a high-profile portal-pay litigator, whom the chairman of the House Un-American Activities Committee accused of being a communist. See below chapter 3.

260FLSA, § 2, 52 Stat. at 1060.

261Williams v. General Mills, 39 F. Supp. at 851. Picard offered no evidence for his claim: “Except in certain fields of industrial endeavor, very few who have studied the problem contend that 48 hours or more of labor per week are detrimental to health.” Id.

regardless of the real rate in order to nullify the overtime provision. Finally, Picard, reaching far beyond the statute, refused to enforce a contract that was against public policy because it was based on coercion of the employees by the employer and simultaneously “almost amounted to a conspiracy between the men and the company against an act of Congress—the men conspired to keep others out of work and the company to refrain from paying higher wages.” Despite the workers’ quasi-conspiracy to hog rather than share work, Picard awarded them their overtime pay and damages.263

Picard’s vindication of section 18 in General Mills v. Williams was, however, short-lived: in December 1942 the Sixth Circuit Court of Appeals reversed the lower court decision on the basis of the Supreme Court’s June 1942 decision in Walling v. A. H. Belo, which had ruled that the FLSA in general and section 18 in particular did not prevent employers from contracting to employ their employees at the same wage so long as the new rate exceeds the statutory minimum.264

A number of similar complaints reached the courts in the early 1940s, producing divergent outcomes. In one of the earliest, Gurtov v. Volk, decided less than four months after the FLSA went into effect by the Small Claims Part of the Municipal Court of New York City in Brooklyn, plaintiff-shipping clerk had been earning $12 for 50 hours of work or 24 cents an hour. In contemplation of the FLSA, the employer raised his wages on July 15, 1938 to $15 weekly, which remained his wage until he left defendant’s employ in December. The court ruled against the worker’s claim for time and one-half on the grounds that it was unreasonable to regard the overtime provision as a “penalty against employers who, in apparent good faith, have paid wages in excess of the amount prescribed by the act. Such employers appear to be exempt from the operation of the statute.”265 The defect in this decision was the incorrect assumption that overtime is due only on the minimum wage and the failure to compute the regular rate on which overtime was due, which here at the very least would have been 30 cents ($15/50 hours), thus producing overtime wages of 90 cents per week (15 cents x 6 hours). As a federal judge observed two years later, the employers “insist if, what defendants were paid can be so allocated as to cover the statutory minimum for the statutory maximum hours and, in addition, one and one half for all


264General Mills, Inc. v. Williams, 132 F.2d at 369-70; Walling v. A.H. Belo Corp., 316 U.S. 624 (1942). Almost half a century after this battle was lost, John Owen, Reduced Working Hours: Cure for Unemployment or Economic Burden? 47 (1989), still mistakenly believed that “the FLSA specifically prohibits reducing hourly wages below the rate paid before the law went into effect. It is likely that a new reduction in the standard workweek would be accompanied by a similar prohibition.”

Overtime over Time

overtime, that such a salary meets the requirements of the law. ... The proposition seems very plausible, but, unless such was an arrangement agreed to by the parties...it is not compliance, because perchance it might figure out that way. ... It is not enough that the salaries...may be allocated or spread so as to cover the minimum and one and a half for overtime. It may even exceed the 30¢ minimum and the 45¢ for overtime and yet be a violation of the law."266

In another early federal court case, from May 1940, an oil refinery worker who had been receiving a fixed monthly salary of $150 told his employers a week after the FLSA went into effect that he wanted the benefit of shorter hours conferred by the new law; his foreman informed him that shorter hours would bring lower pay in their wake, but no changes ever took place. The federal court in Abilene, Texas, found for the defendant-employer on the grounds that the pay exceeded the minimum wage and overtime (on the minimum wage) for the number of hours worked.267

A complaint based directly on section 18 was filed in Maryland federal court by a hosiery knitter whose piece rate had amounted to the comparatively high weekly wage of $40 before the FLSA went into effect. At that time the Easton Hosiery Mills lowered his piece rate by five cents in order to finance the wage increase that the employer had to implement to comply with the FLSA vis-à-vis the low-wage helpers. The court dismissed the complaint because section 18 provided no relief, Congress did not intend to freeze wages above the minimum, and, even if it did so intend, it lacked the power to do so. The court noted that the original FLSA bill had authorized administrative action to prevent precisely what Easton Hosiery Mills had done, but the House had deleted the provision, and a proposed amendment to achieve the same end was not adopted. The court conceded that the legislative proponents intended section 18 to serve as a mandate and not a mere policy statement, but they had failed to embody that intent in any statutory language.268

Another high-profile judicial decision arose out of a complaint filed by the WHD against a Minnesota manufacturing firm that on the eve of the FLSA had employed 18 workers working 50 to 56 hours a week at hourly rates varying between 45 and 80 cents. In the interim between enactment of the FLSA and October 25, 1938, the employer told the employees that with low profits it would have to adjust wages to comply with the new law. To avoid premium overtime rates, it would have to reduce hours to 44, but since it wished to maintain the

268Remer v. Czaja, 36 F. Supp. 629 (D. Md. 1941). The court's reasoning compelled it to reject the WHD's interpretation of the regular rate as meaning the wage in effect when the Act went into effect and requiring ignoring reductions in violation of section 18 in computing overtime wages. Interpretative Bull. No. 4.
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workers’ weekly wages, it planned to lower hourly wages by 10 cents; it would pay time and a half on the lower rate, and if the total still failed to reach their present wages, it would make up the difference with a weekly bonus or gratuity. In response to the workers’ hostile reaction, the employer stated that it would drop the plan and reduce their hours to 44. Because the workers objected to a loss of wages and were willing to continue the long work weeks, they were unwilling to agree to the alternative proposal; although they feared that the bonus scheme was illegal, they ultimately accepted it. The court in Fleming v. Carleton Screw Products Company agreed with the WHD’s argument that the new wage rates were fictitious, the pre-FLSA rates being the real regular rates; to accept the employer’s defense that it was free to agree with its employees to hold them harmless while protecting itself against higher overtime costs would have nullified the FLSA’s purpose of making long hours more expensive and thus creating more employment by cutting those hours.269 On appeal, the Eighth Circuit expressly rejected the employer’s claim that the FLSA does not apply to employers paying in excess of the minimum wages and one and one-half times that minimum for overtime hours.270 The Sixth Circuit came to a similar conclusion in a suit against the Continental Baking Company.271

Despite employers’ campaign of civil disobedience, Major A. L. Fletcher, the Assistant Administrator in Charge of Cooperation and Enforcement, expressed the belief in early December 1938 that the FLSA might yet be “properly administered by capital, labor” and the WHD.272 And in spite of this organized resistance to the overtime law, the Wage and Hour Administrator assured the NAM that only a “delinquent minority” who “contaminated the whole business community” had prevented businessmen from eliminating the “evils of sweatshops, of unfair competition and of low purchasing power” and had made necessary “some sort of compulsion,...the power of organized society applied through legislation....”273 Yet Andrews himself found the controversy that the NAM and employers had provoked odd since the FLSA’s hour provision is permissive and does not even prescribe the eight-hour day.274 (In fact, the president of the AFL had alluded to the need for overtime pay after eight hours

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270Carleton Screw Products Co. v. Fleming, 126 F.2d 537 (8th Cir. 1942).
271Bumpus v. Continental Baking Co., 124 F.2d 549 (6th Cir. 1941).
273“Mr. Andrews’ Address to N.A.M.,” 1 Wage and Hour Reporter 413 (Dec. 19, 1938) (address of Dec. 9, 1938).
274Andrews, “FLSA Problems for Congress or the Courts” at 419.
as an aside at the 1937 FLSA hearings, and at the end of 1938 the Textile Workers Organizing Committee proposed amending the FLSA to provide penalty overtime pay after eight hours daily and four hours on Saturdays, but it was not enacted then or since.276

By mid-1939, when deputy administrator Sifton addressed the Iowa Bankers Association, the WHD, while still insisting that lowering the wage rate to cancel the effect of the overtime premium ran contrary to congressional expectations of employment spreading and increased purchasing power, seemed almost to be reduced to pleading with employers, on moral rather than legal or economic grounds, not to litigate the force of section 18. In a puzzling non sequitur, Sifton asked employers, in view of the uncertainty of predicting judicial outcomes: “If you win, will it be worth it?”277

Other employers organizations were not content with legislating or litigating the details of federal wage-hour regulation. At the end of April 1939 the Chamber of Commerce of the United States demanded congressional repeal of “curbs on business” including the FLSA.278 By early 1940, claiming that “[f]ew legislative enactments have produced greater confusion or have been more bitterly criticized,” the Committee on Manufacture of the Chamber of Commerce also called for outright repeal. Dissatisfied with the mere “palliatives” that the scores of proposed amendments might have constituted, the committee recommended delegating to the states all regulation of wages, hours, and working conditions to prevent the “oppression” of “special classes of workers....” Significantly, the overtime provisions, especially their application to office and salaried workers, were at “the heart of the Committee’s objections” to the FLSA. With respect to employees who were accorded “privileges” such as paid vacations and sick leave, the Chamber asserted a generally held view that mandatory overtime pay was “inequitable to the employer and...tend[ed] to restrict the opportunities of the worker to improve his status.”279

In light of employers’ single-minded attack on the scope of the overtime provision, it seems odd that the Wage and Hour Administrator reassured the NAM

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278 “Chamber Demands Congress Repeal Curbs on Business,” *N.Y. Times*, May 1, 1939, at 1, col. 5.

279 “Case for Repeal of Wage-Hour Law,” 3 *Wage and Hour Reporter* 47, 49, 50 (Feb. 5, 1940).
in late 1940 that protest about the 40-hour week stemmed from journalists and academics, "not from manufacturers. Perhaps this is the reason: In 1909 average weekly hours worked in factories were 53; in 1929, 46 hours; in 1939, 38 hours. The 40-hour week had arrived in manufacturing industries long before the law made it mandatory." Yet despite the fact that in 1939 fewer than one-eighth of covered workers were working more than 44 hours and thus benefiting from the overtime provision—in contrast to only 3 percent of covered workers whose wages were lifted by the 25-cent minimum wage—a wide cross-section of employers had resolved to undo the new law.

Although the WHD had insisted that reducing wage rates in order to offset the overtime penalty was "contrary to the purpose of the Act," by the time of World War II it was constrained to concede that because "no penalty is provided in the Act for action contrary to its purpose in this respect," the division "does not...proceed against an employer who reduces a rate of pay to avoid the effect of the overtime penalty."282

6. The Supreme Court Spreads Confusion Instead of Employment

Perhaps Congress should have gone further and prohibited any employee from working over 42 hours in any event. This, however, it did not see fit to do. ... True, the detriment to well-being of workers exists as much in a case where overtime is worked and paid for as where it is worked without being paid for. Had it desired to do so, Congress might have absolutely forbidden the employment of any worker beyond a certain number of hours.... Presumably, however, it felt it more desirable to attempt to achieve the same result by merely imposing a penalty for the overtime....283

The only reason that the administration did not recommend an arbitrary statutory prohibition against working over 40 hours, which is what they were seeking, was because there were certain cases, particularly in the seasonal industries, where it was desirable for short periods to work over 40 hours, and they didn't want to absolutely bar that, so they put in a penalty, and the purpose of the time and a half...was to create a competitive situation where one man could not abuse working overtime when all the rest of them were playing fair, because his costs would go up so high that in a competitive market he could

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280Philip Fleming, Address before the NAM, New York City, Dec. 12, 1940, in 86 Cong. Rec. at 6963.
282BNA, Wage and Hour Manual 233 (1944-1945 ed.).
283Letter from Philip Fleming (Wage and Hour Administrator) to J. Capper (May 18, 1940), in 86 Cong. Rec. A3787, A3789.
At the time of the congressional debates over the FLSA in 1937-38, large employers in general, and especially those that had entered into collective bargaining agreements, had not anticipated that compliance with the law would be burdensome; after all, most of them were already paying time and one-half for overtime and more than the minimum wage. For example, General Motors adopted time and a half for hours over eight per day and forty per week in November 1936, while Chrysler followed suit in 1937. At the FLSA hearings that year the Commissioner of Labor Statistics told Congress that the industries, such as automobiles, steel, and agricultural implements, with the greatest employment were working more than 40 hours and were “for the most part paying overtime rates.”

Employers’ position toward statutorily imposed overtime penalties, as the preceding section revealed, soon changed. Counsel for the NAM expressed large capital’s exasperation with the WHD’s early enforcement priorities when he urged it to focus on sweatshops rather than on regular-rate cases “where the wages and employment conditions are far superior to anything remotely intended to be covered by the wage-hour law.” When large firms finally realized that relatively highly paid organized workers were also protected by the FLSA, they began to lobby Congress to cut back on the Supreme Court’s expansive interpretations of the regular rate for overtime purposes. Yet while echoing the views of Supreme Court dissenters in a number of the FLSA cases to the effect that Congress never

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284Hearings on H. R. 6790, to Permit the Performance of Essential Labor on Naval Contracts Without Regard to Laws and Contracts Limiting Hours of Employment, to Limit the Profits of Naval Contracts, and for Other Purposes Before the House Committee on Naval Affairs, 77th Cong., 2d Sess. 2771 (1942) (testimony of Rep. Melvin Maas (Rep. Minn)).


intended the Act to impinge on the outcomes of legitimate collective bargaining, the NAM, unlike the Chamber of Commerce of the United States, apparently did not seek outright repeal of the FLSA.

Capital's litigation strategy against statutory overtime premiums culminated in two U.S. Supreme Court cases decided the same day in June 1942. The most straightforward legal gambit was the ultimately unsuccessful claim that "the regular rate" on which overtime had to be paid was merely the minimum wage. In Missel v. Motor Overnight Transportation Co., Administrator Andrew's loose lips in his 1938 Birmingham talk came back to haunt workers as the press declared that the federal district court had adopted the "Birmingham Doctrine" when it ruled in 1941 that a salaried employee being paid considerably more than the minimum wage for indefinite hours was entitled only to time and one-half calculated on the statutory minimum wage. William Missel, a rate clerk and dispatcher for a trucking company between 1937 and 1940, had been paid a weekly salary of $25.50 and later $27.50 for a workweek varying between 40 and 75 hours. The trial court rejected Missel's claim that his regular rate was to be calculated by dividing his salary by the maximum number of non-overtime hours in effect at the time. The trial judge's reasoning was shaped by his unsubstantiated interpretation of the FLSA's "underlying purpose" as merely to raise minimum wages gradually: "the overtime provisions...were not inserted...to discourage or limit overtime work, but merely as an essential part of a plan to raise sub-standard wages by providing definite pay for overtime work...."

The amicus brief of the American Trucking Associations had apparently persuaded the judge that the plaintiff-worker's position was a parade of horribles: "'According to plaintiff's contention, it would make no difference whether he was paid $27.50 or $1,000 a week, he would always be underpaid and the employer would always owe him money for every minute over straight-time hours that he might be required to be on duty.'"

This point repeated without success. See below chapter 3.

In the course of testifying before Congress on the issue of portal pay in 1945, the NAM advocated forthcoming changes in the FLSA unrelated to that problem. Limiting the Time for Bringing Certain Actions under the Laws of the United States: Hearing Before Subcomm. No. 4 of the House Comm. on the Judiciary, 79th Cong., 1st Sess. 21-23 (1945) (testimony of Raymond Smethurst, counsel, NAM); Portal to Portal Wages: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary, 80th Cong., 1st Sess. 106-107 (1947) (testimony of Raymond Smethurst, counsel NAM).


The widespread support in the press for employers' implausible claim that "the regular rate" on which the time and one-half premium had to be paid was merely the minimum wage rate seems especially odd in light of the fact that Representative Hartley, one of the most extreme northern opponents of the FLSA, had expressly declared during the House floor debates that the FLSA would not affect only the lower wage scales "inasmuch as requirement for payment of time and a half for overtime is based upon the regular rate of pay whether that be 40 cents an hour or $1 an hour." Yet the NAM, through its general counsel, began almost immediately after the enactment of the FLSA propagating the position that employers were required to pay the 50 percent premium only on the minimum wage.

As the principal test cases were pending in the Supreme Court in 1941, Modern Industry, a management magazine, observed that the Court "may soon decide whether the Fair Labor Standards Act is primarily a minimum wage law or a maximum hours law. ... The outcome is of interest to an estimated 1.5 million white-collar workers getting more than the statutory minimum. If the decision stands, the Wage and Hour Division contends, it will largely eliminate the law's benefits for them and will make it chiefly a minimum wage law."

The Fourth Circuit—which asserted that the magazine was referring to Missel despite the article’s express reference to Walling v. A. H. Belo Corp., which was decided against the Wage and Hour Administrator without the predicted dire consequences—cited this article as evidence of the importance of the question and the need for granting the Administrator amicus status. The strongest policy argument that the appellate court devised in reversing the trial judge and refuting employers' claim that the "regular rate" meant the minimum wage was based on the underlying congressional intent to discourage excessively long hours: "Such a construction would wholly defeat this policy, for if an employee was getting a fairly high wage, one and one-half times the minimum would in such a case be less than the actual wage the employee was receiving.... This would encourage rather than discourage overtime, and the plain purpose of Congress...would be defeated."

Despite this astute policy logic, the court's reasoning made no sense when it

28, 1941).

295 Cong. Rec. 9258 (1938).


asserted: “That the overtime provisions of the Act are aimed at re-employment and designed for economic and social purposes, as well as to protect the health or welfare of the employees, seems obvious from the omission of any absolute limitation upon weekly hours of work if properly compensated, and the absence of any limitation upon daily hours.”\(^{301}\) On the contrary, all of these goals would be more straightforwardly achievable if the 40-hour-week were rigidly enforced.

When employers finally appeared in the forum they had been seeking, the U.S. Supreme Court, the United States had already entered World War II and the work-sharing purposes born of the Depression had become largely irrelevant. The defendant and the American Trucking Associations as amicus curiae made the most of this turn of economic events. The association attacked the claim that premium overtime was designed to spread work for “all classes” by pointing out that although the FLSA was permanent legislation, Congress could not have “contemplated a permanent unemployment problem with respect to all classes of employees” as opposed to the unskilled.\(^{302}\) Overnight Motor Transportation Company argued that the chief legal question was whether the Fourth Circuit had erred in ascribing “dual class coverage” to the FLSA by concluding that the overtime provision “went beyond the class scope of the minimum wage provisions and was intended to spread employment and raise wages among all classes of employees regardless of income.”\(^{303}\) The employer’s overriding claim was that the FLSA without any doubt “was intended to be a ‘poor man’s’ law.”\(^{304}\) (Ironically, the heads of the AFL and the CIO had also favored a FLSA bill that would have covered only low-paid and nonorganized workers.)\(^{305}\) The employers association, too, harped on the theme that the FLSA was directed at “the underprivileged,” but also tried out the ad absurdum argument that Congress could not possibly have meant to require employers to pay overtime to highly paid employees because such an obligation would perversely discourage them from paying more than the minimum wage.\(^{306}\)

When asked by Justice Hugo Black, one of the authors of the FLSA, what his claim was, counsel for the association at oral argument responded that the overtime provision “applies only to employees who do not receive the 30-cent minimum and 45 cents for overtime as declared in the Act. Section 7 is not


\(^{304}\) Brief for Petitioner at 21, Overnight Motor Transp. Co. v. Missel.


meant to apply to employees who are paid more than the minimum rates. If Section 7 were applied to all upper bracket white-collar employees it would bring the Act into a field for which Congress never intended to legislate. Section 7 is to be construed in the light of Section 6 which refers primarily to the submerged classes...."\(^{307}\)

The Supreme Court then ruled with one only dissent that the regular rate did not mean the minimum wage. Its supporting analysis has survived and flourished as the locus classicus of congressional intent on the overtime provision. In refutation of the employer's claim that it was unconstitutional to regulate the wages of workers whose pay equaled the minimum or whose hours were not injurious to health, the Court used the opportunity to hold constitutional the regulation of hours for purposes other than health:

Long hours may impede the free interstate flow of commodities by creating friction between production areas with different length workweeks, by offering opportunities for unfair competition through undue extension of hours, and by inducing labor discontent apt to lead to interference with commerce through interruption of work. Overtime pay probably will not solve all problems of overtime work, but Congress may properly use it to lessen the irritations.\(^{308}\)

Thus, although the Supreme Court agreed with the Fourth Circuit that work-sharing and combating unemployment was one of the law's main purposes, it did not share the appellate court's erroneous notion of the comparative efficacy of overtime penalties and absolute hours caps: "The existence of such a purpose is no less certain because Congress chose to use a less drastic form of limitation than outright prohibition." The Court, perhaps inadvertently, then revealed the specific conditions under which the premium might function adequately: "In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work."\(^{309}\)

The Supreme Court may have squelched employers' quest for a minimalist overtime premium\(^{310}\)—nevertheless, more than thirty years later a federal judge

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\(^{307}\) "Argument Before High Court on Overtime Rate," 5 Wage and Hour Reporter 265, 267 (Apr. 13, 1942).


\(^{310}\) Despite the clear holding in Overnight Motor Transportation Company, another employer raised the same defense before the Supreme Court later in 1942, which the Court ruled "merits but slight consideration." Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88, 93 (1942).
dismissed an overtime suit filed by the DOL on these same grounds—but it approved their other favored construction of the statutory term “regular rate” on which the overtime premium was due. Where firms paid a fixed weekly wage for variable or fluctuating hours, the hourly regular rate was to be determined by dividing the wage by the total number of hours worked (rather than, for example, by 40 hours)—a procedure of which the WHD had approved since 1939. The Court conceded that under this method “the longer the hours, the less the rate and the pay per hour,” but, without offering reasons, it asserted that this outcome “is not an argument...against” the method. In particular, the Court failed to justify a definition that “does not fully effectuate the legislative policy of making overtime cost half as much again per hour as straight time.”

In the other outstanding overtime test case of 1942 the employer, A.H. Belo Corporation, expressly argued that it had “never urged the interpretation many times put forward,...and sometimes sanctioned,...that ‘regular rate’ means the minimum legal rate specified in Section of the Act....” Instead, the case involved the narrower issue of whether employers violated the FLSA when they paid workers far in excess of the minimum wage, but set a fictitious hourly wage for variable hours, and guaranteed a fixed weekly amount so that the overtime penalty did not kick in until workers had worked more than 54 hours. Belo, publisher of the Dallas Morning News and other periodicals, had been paying almost all of its employees as much as or more than the FLSA minimum wage for a long time before 1938. Like many other employers, however, it too wished to avoid having to pay additional wages without violating the FLSA. The regional WHD office took the position that Belo’s arrangement violated the act because the regular rate, on which overtime was due, was by law had to be calculated by dividing the guaranteed weekly wage by the number of hours worked, whereas Belo failed to pay such overtime.

The trial judge, as was not uncommon in the early years of the FLSA, was openly hostile to the anti-contractarian underpinnings of the statute and

311 In Brennan v. Lauderdale Yacht Basin, Inc., 493 F.2d 188, 189 (5th Cir. 1974), the court of appeals had to reverse a judge who had held: “These people are not the people that [the FLSA] was designed to protect... If Mr. Johnson had been paid the minimum wage, assuming he worked 50 hours a week, [for] 42 weeks out of the year, he was paid so far in excess of any standard hourly wage, at twice the minimum. His overtime was way over what the minimum overtime would be.”

312 WHD, Interpretive Bull. No. 4, § 12, in BNA, Wage and Hour Manual 95, 97 (1940 ed.).


aggressively ideological: "I cannot conceive of a law...that would unsettle amicability between employer and employees by interfering with their agreement, provided such agreement is equal to, or, in excess of, the legal requirement with reference to pay." The judge justified his single-minded focus on the minimum wage by stripping the FLSA of its hours regulation aspect: "[T]his statute does not prevent overtime. It does not say that a full-grown man or woman employee shall not work overtime. It...merely pretends to be and is a statute against less than a minimum wage."317 His syntax already frayed, the judge then descended into an at times incomprehensible rant without ever identifying the substance of the dispute between Belo and the WHD:

I don't know that the court is concerned with this, but when...the government has a right to go and figure, even to go into the office of the employer and find out whether the employer is treating his employee correctly,... if and when that results, in an almost endless burden, to seek to put into effect a plan that has been detailed to the court, and which disappears if carried to excessive length, I cannot believe that that construction should be indulged in. It emasculates the right of contract. ... It makes vassals of employee and employer and leaves us hanging by the thumbs at the mercy of the construction of the government as to what we mean when we contract....

These two suits spark from a clash in systems. Neither is perfect. One fixes the independent week for the sine quo [sic] non. The other fixes the will of the contracting parties, provided, such will is above the denials of the law, as the summum bonum. One includes the right to say when payrolls shall be made. The other views the regularity of pay checks as the most important. One is cumbersome and irregular. The other is simple and regular. One is the child of unauthorized regulation. The other is the child of liberty. One deals only in dollars and cents. The other with happiness of employer and employee, vacations, pay when sick, or, absent, as well as with dollars and cents. Neither system is fixed by statute.318

It was not until the case came before the Fifth Circuit, which agreed with the trial court that Belo's payment plan carried out the letter and purpose of the statute, that the precise nature of the dispute became clear. The appellate judges appeared irritated by the WHD's hardline stance toward an employer which, if it merely "changed the form of its employment contracts to conform to [the WHD's] view,...could have paid its employees considerably less than it did, and still have been within the law...." Instead, the WHD "has brought this case and has stood throughout, upon the bold proposition, that where weekly salaries are paid, no matter how large the salary or how it was arrived at or agreed to, the 'regular rate'...must always, and can only, be determined, by dividing the weekly

compensation, by the total number of hours the employee actually works during each week, and employer and employee cannot contract otherwise." Likewise, the Fifth Circuit looked askance at the WHD's inability to identify "words in the act" which prohibit employers from doing what Belo did, and at the WHD's insistence on supporting its position only by reference to the FLSA's purpose of penalizing and limiting overtime. The appeals court was offended by the administrator's view that Belo's pay scheme must be unlawful if it enabled the employer to continue to work its employees overtime without increasing wages above their pre-FLSA levels. For this very reason the court could not agree with the WHD that Belo "must be required to pay more than it agreed to pay and its employees agreed to receive, because the pay which by the agreement was fixed to cover both regular and overtime, must...be considered as covering only regular time, and for the overtime worked, there must be additional compensation."319

In contrast, the appellate court found that, because the statutory term "regular rate at which he is employed" was not ambiguous, it was unnecessary to examine the FLSA's purposes or legislative history. Rather, the Fifth Circuit thought the term straightforward: the WHD's approach was acceptable only in the absence of an express hourly rate within an agreement for a weekly salary; but when the contract established such a rate, it was erroneous to assume that the wage was not intended to cover the overtime as well. But even if the statutory term were ambiguous, resort to underlying policy would not aid the WHD's position because the FLSA's policy statement in section 2 "says nothing about spreading the work or reducing hours of working." The Fifth Circuit then virtually drained the overtime provision of any significance by asserting that

the complete absence from the act of any prohibition against or limitation upon working extra hours, any prohibition against or limitation upon the making of agreements by employers with their employees, the expressions in Section 2, and particularly the provisions of Section 8, would compel us to conclude, that the purpose of the act is to establish and gradually raise minimum wages, that the overtime provisions in it are inserted not at all to discourage or limit overtime work but as a part of the scheme to raise substandard wages by providing a definite pay for overtime work when such work is required; and that nothing in it purports to or does at all impair the right of employer and employee to contract as they have done here.320

Ultimately the Fifth Circuit lapsed back into the libertarian rhetoric of the trial judge, accusing the administrator of construing the FLSA so as to place employers and employees in tutelage vis-à-vis him:

319Fleming v. A. H. Belo Corp., 121 F.2d 207, 210-11 (5th Cir. 1941).
320Fleming v. A. H. Belo Corp., 121 F.2d at 211-12.
It may be admitted that there is a section of opinion in this country and in the Congress, sufficiently collectivistic to prefer the tutelary system for which the administrator contends, and that if they had had sufficient voting power, they would have so provided in the law. It must be conceded however on the other hand that there is another section of opinion both in the nation and in the Congress, which is not so collectivistic and still believes in reasonable freedom of contract. It is just because of this fact, that legislation is compromise, that the views of the proponents and of the opponents, as to the purposes and effect of the legislative act, are never regarded as of value in a construction of it, and that it is settled law that statutes must be construed in accordance with the intent of the legislature as expressed in the language of the act as a whole. Its meaning may not be sought by the courts in the vague penumbras of the wishes and desires of its proponents or its opponents as these are expressed in debates.321

When the Supreme Court docketed the case, Colonel Philip Fleming, the Wage and Hour Administrator,322 calling it the most important test yet of the FLSA, warned that if Belo prevailed, employers all over the United States would use the arrangement to evade overtime obligations.323 Before the Supreme Court Belo sought to contextualize the purposes of the overtime law during world war. The employer accused the WHD of seeking to achieve an objective “square in the face of the needs of national defense upon which our very existence as a free people depends. Such supposed objective is to discourage or prohibit work over 40 hours a week, with design to ‘spread’ employment, although the nation’s interest cries out for more production, more work and longer hours, to the fullest extent consistent with the maintenance of the standards of health and pay prescribed by the Act....”324

Moreover, even in the depressed economy of the 1930s, Belo argued, Congress expected work-spreading to be “kept within very modest limits” and to take place principally in the lowest paid and unskilled employments, where the labor product in dollar value is so low that the employer cannot afford the added overtime wage.

321Fleming v. A. H. Belo Corp., 121 F.2d at 213.

322Fleming, who had been a district engineer in the U.S. Army working on the construction of locks and dams, “had not been in any way active, or even interested, to be frank about it, in the long legislative fight that led to the enactment” of the FLSA prior to his appointment in 1939. Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938: Hearings Before Subcommittee No. 4 of the House Committee on Education and Labor, 80th Cong., 1st Sess. 751-52 (1947). After leaving the WHD in 1941, Fleming (1887-1955) was federal works administrator until 1949. 3 Who Was Who in America (1951-1960) at 288 (1966).


It was known that in the skilled employments...overtime rates would be paid in lieu of curtailing hours. Indeed, it was known that in the skilled employments overtime pay, and even the precise formula of time and one-half, had already become a traditional policy.\textsuperscript{325}

The Supreme Court's five to four decision was the first to explain precisely what Belo had done. In anticipation of the FLSA, Belo informed its employees that "[i]n order to conform our employment arrangements to the scheme of the Act without reducing the amount of money which you receive each week, we advise you that from and after October 24, 1938, your basic rate of pay will be" 67 cents per hour for the first 44 hours and not less than time and a half for additional hours, "with a guaranty on our part that you shall receive weekly, for regular time and for such overtime as the necessities of the business may demand," not less than $40. Belo thus set the hourly rate at 1/60th of the guaranteed weekly wage, as a result of which employees had to work more than 54.5 hours before their wages would exceed the guarantee. The Supreme Court conceded that the point of Belo's plan was to "permit as far as possible the payment of the same total weekly wage after the Act as before. But nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum required by the Act."\textsuperscript{326}

After in effect rejecting the WHD's position that Congress had intended to require employers to pay more for exercising their privilege to work their employees overtime than they had before the FLSA went into effect, the Court relegated to a footnote its relegation of section 18 to the dustheap of legal history: "Whatever the legal effect of this language, it is certainly not a prohibition and the Administrator does not rely upon it." The court then further tweaked the administrator by asserting that the Fifth Circuit's finding that Belo's effort to maintain their employees' weekly incomes (or, more realistically, Belo's wage costs) at its pre-FLSA levels "gains support" from the fact that Belo was formulating the plan at the very time that Andrews made his ill-fated Birmingham faux pas.\textsuperscript{327}

The focus of the Court's statutory interpretation was "the regular rate" for overtime purposes, which Congress had failed to define. Whereas Belo argued that the regular rate was clearly 67 cents per hour, the WHD called that rate meaningless; instead, it viewed the agreement as one for a fixed weekly salary of $40 regardless of fluctuations in hours (up to 55 hours). The WHD therefore argued that the regular rate in fact had to be recalculated weekly by dividing the

\textsuperscript{327} Walling v. A. H. Belo Corp., 316 U.S. at 630 n.6.
$40 guaranty by the number of hours worked; for any hours worked beyond 44, employees would then be entitled to 150 percent of that rate. Belo’s $30,000 to $60,000 back overtime wage liability can be exemplified this way: if a worker worked 50 hours, his regular rate that week would be 80 cents; for the first 44 hours, his wage would have amounted to $35.20, while his six hours of overtime would have entitled him to an additional $7.20, for a total of $42.40, leaving him underpaid by $2.40. The Court agreed that the difficulty in the case stemmed from the guarantee, but it rejected the WHD’s argument that the guarantee was inconsistent with and overrode the 67-cent hourly calculation. The majority reasoned, first, that indisputably real overtime kicked in again after 55 hours; and second, even with regard to the hours between 44 and 55, when wages were determined by the guarantee, if 67 cents was considered the regular rate, then the worker was actually being paid more than 150 percent overtime; however, neither such overpayments nor fluctuations in the overtime premium were prohibited by the FLSA provided that the rate never fell below 150 percent. The Court did not deny the force of the WHD’s view that the 67-cent wage was artificial, but the parties may well have intended the “flexibility” that it generated in the overtime rate “[i]f it was the only means of securing uniformity in weekly income.” Moreover, since weekly hours fluctuated drastically, the “regular rate” would always have been “‘irregular’” both arithmetically and with respect to the parties’ ability to foresee or plan on it.328

Ultimately, the majority was swayed by the perception that the arrangement was “mutually satisfactory” to Belo and its employees, whereas the WHD’s approach “as a practical matter eliminates the possibility of steady income to employees with irregular hours.” Presuming that Congress had intentionally refrained from defining “the regular rate” precisely because employment relationships were so manifold and “unpredictable,” the majority revealed its bias in favor of promoting consumer instalment buying and against the statute’s anti-contractualism:

Where the question is as close as this one, it is well...to afford the fullest possible scope to agreements among the individuals who are actually affected. This policy is based upon a common sense recognition of the special problems confronting employer and employee in businesses where the work hours fluctuate from week to week and from day to day. Many such employees value the security of a regular weekly income. They want to operate on a family budget, to make commitments for payments on homes and automobiles and insurance.329

Moments Are the Elements of Profit

Little wonder that Belo received 10,000 inquiries for copies of its contract the month the Supreme Court handed down its decision.330

The four dissenters regarded the contracts as agreements for weekly wages for variable hours with additional hourly compensation once the employees worked more than an ascertainable number of hours—namely, the number needed for the wages to reach the weekly guarantee, which was the "dominating feature," without which "the adoption of a low hourly rate would encounter the full weight of employee bargaining power. The guaranty avoids this conflict by fixing the minimum weekly wage." In effect, Belo paid 73 cents an hour for hours up to 54.5 and $1.00 an hour thereafter "expressed in the circumlocution of time and a half 67 cents...." So long as the weekly guarantee and the real overtime rate remained unchanged, the base hourly rate, the hours for which that rate was paid, and the alleged overtime premium were mere bookkeeping conveniences that could vary without affecting total earnings. Consequently, the number of hours that employees had to work to earn the guarantee could be increased by manipulating the other variables: "By such a verbal device, astute management may avoid many of the disadvantages of ordinary overtime, chief of which is a definite increase in the cost of labor as soon as the hours worked exceed the statutory workweek. If the intention of Congress is to require at least time and a half for overtime work beyond a fixed maximum...40, 42 or 44 hours..., that intention is frustrated by today's holding. ... Because there is no increase in labor cost between the statutory maximum and the hours contracted for (54 ½), the employer has a financial inducement to require hours beyond the statutory maximum."331

Commenting on the inconsistencies between Overnight Motor Transportation and Belo, the editors of The New York Times once again lambasted the law for creating absurdities by extending to higher-paid employees an overtime provision "designed to protect submarginal workers" and called for revision of the FLSA.332 In the wake of these twin decisions, some defendant-employers sought to justify their overtime practices of paying fixed weekly wages for fluctuating hours as governed by Belo, while the WHD and aggrieved workers argued that Overnight Motor Transportation was controlling. Only employers that failed to include an hourly rate or to indicate an upper limit on the length of the work week and to repeat the talismanic words that the employee was to be paid time and a half the regular rate (or stated a contractual regular rate "completely unrelated to the

payments actually and normally received each week”) for overtime wound up owing back overtime wages.333

In 1947, in the midst of congressional turmoil over making significant revisions to the FLSA, the Supreme Court upheld the vitality of Belo against another challenge by the WHD. The Halliburton Oil Well Cementing Company, which before enactment of the FLSA had paid its oil well service workers fixed monthly salaries, adopted a weekly guarantee like Belo’s, which the Wage and Hour Administrator pressured it to abandon in 1942, but which it reinstated later that year after the Supreme Court upheld Belo’s plan. Halliburton issued contracts agreeing to pay the workers a regular basic hourly rate for the first 40 hours, and guaranteeing a specified weekly amount for regular time and such overtime as the business required. Although the regular rate exceeded the minimum wage, it “was always so related to the guaranteed flat sum that the employee became entitled to more than the guarantee only in weeks in which he worked more than 84 hours.”334

Despite the fact that the wage plan was more egregious than Belo’s not only because the real overtime threshold was 30 hours higher, but because in 20 percent of the workweeks, the employees worked more than 84 hours, the Court upheld Halliburton’s arrangement because it did not differ materially from Belo’s and Congress had never intervened to modify the overtime provision during the five years since that case had been decided.335

7. The Workers: From the Struggle Against Overtime Work to the Struggle for Overtime Premiums

[I]n the past...say 15 years ago, we didn’t have any cases of suspensions or discharges for refusal to work overtime. In the past I’m told, and I find it hard to believe, but overtime at Chevron U.S.A. was a privilege.

333E.g., Walling v. Stone, 131 F.2d 461 (7th Cir. 1942); Seneca Coal & Coke Co., v. Lofton, 136 F.2d 359 (10th Cir. 1943); Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 425 (1945) (quote). In this last case, the employer contractually specified an hourly rate above the statutory minimum, but below the workers’ actual regular rate based on their guaranteed piece rates. James Durkin, national representative of the United Office and Professional Workers of America, testified at a FLSA hearing in 1945 that under a “monstrous formula” sanctioned by WHD Interpretative Bulletin No. 4, an office worker with a fixed weekly salary of $40 for a fluctuating work week would find his hourly rate plummeting from $1 to 66.6 cents when his hours rose from 40 to 60. Proposed Amendments to the Fair Labor Standards Act: Hearings Before the House Committee on Labor, 79th Cong., 1st Sess. 413 (1945). This outcome was lawful only if the employer placed an upper limit on the number of weekly hours.


335Walling v. Halliburton Oil Well Cementing Co., 331 U.S. at 21 n.8, 25.
Moments Are the Elements of Profit

If they had an employee that they felt was abusing sick time, had an absentee problem, they would tell him he couldn’t work any more overtime. Now, it’s reversed. Overtime is looked on by the company more or less as a duty. If you want to get out of it, you better have a damned good reason... 

Ironically, the onset of the reversal of the secular decline in the length of the workweek coincided with the enactment of the FLSA and advent of World War II: “The goal of the 40-hour week had not yet been attained by 1940...when the defense program got underway” and working hours increased again. In this most tangible sense, the FLSA did not live up to the standard set by the nineteenth-century British factory laws, which, as even Karl Marx admitted, by forcibly limiting the working day, curbed capital’s urge for boundless draining of labor power.

Whereas relatively few—and almost no organized—workers actually found their wages increased by the minimum wage provision of the FLSA, many workers began receiving overtime pay by the time the militarization of the economy extended the normal work week beyond forty hours. Of the more than twelve million employees covered by the FLSA in April 1939, the DOL estimated that fewer than 700,000 were receiving less than the statutory minimum (thirty cents); but of the 2,400,000 working overtime (then more than forty-two hours), 1,664,000, or slightly more than two-thirds, were not receiving time and one-half. By far the largest industry that had to reduce hours or pay overtime was sawmills (with more than 100,000 such employees), followed by foundry and machine shops, and furniture manufacturing.

Indeed, while the statutory minimum wage of thirty to forty cents per hour became moot during the war, when a tight labor market made fifty cents the de facto minimum, it was the longer workweek that largely sustained the increase in real weekly earnings. Thus the average workweek for production workers in

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3362 [California] Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime 350 (testimony of Ruth Bennett, Local 1-5, Oil, Chemical, and Atomic Workers, Chevron U.S.A. Richmond, Cal. refinery).

337 J. Frederic Dewhurst et al., America's Needs and Resources 568 (1947).

3381 Marx, Das Kapital at 253.

339 See First Annual Report of the Administrator of the Wage and Hour Division, United States Department of Labor, For the Calendar Year 1939, at 36-43, 158-60 (1940).

340 See Amendments of the Fair Labor Standards Act of 1938: Hearings Before the Senate Comm. on Education and Labor, 79th Cong., 1st Sess. chart V at 860 (1945) (statement of Chester Bowles showing straight-time hourly rates of factory workers in the summer of 1945). Whereas in 1942 7,500,000 employees were being paid forty cents or less per hour, by the end of the war the National War Labor Board “automatically approved increases first up to 40 and later to 50 cents and hour.” Joel Seidman, American Labor from Defense to Reconversion 129 (1976 [1953]).

341 Because most factory wage workers are working more intensely and for longer
manufacturing industries rose by one-fifth, from 37.7 hours in 1939 to 45.2 hours in 1945. Overtime compensation peaked at $12 billion in 1943, $3.6 billion of which represented premium rates. In the machinery industry, overtime wages accounted for 27 percent of total wages. At the end of the war it was estimated that if the 40-hour week were restored with no change in wage rates, overall wages would fall by 16 percent and by more than one-third in war industries with the longest hours.

The transition from depression to a full-capacity war economy, characterized by the conversion to continuous, 168-hour per week production, also transformed the functioning and socio-economic purposes behind mandatory overtime payments. Whereas until 1940 the primary purpose of penalty premium rates was to discourage overtime, labor relations scholars have concluded that since World War II they “have come to be regarded by most workers as a special form of compensation offering an attractive form of compensation for additional income rather than as a protection against long or undesirable hours.” Automobile industry management before the war, for example, had felt that workers were “becoming more eager for a chance to increase their annual earnings by working longer hours” and that they would “eventually be pressing for a mitigation of the restrictions on hours in the agreements and the act,” but that the UAW’s policy of permitting the unemployed to retain membership created strong rank-and-file pressure for shorter hours and work-sharing. After the war, automobile collective bargaining agreements even came to safeguard a worker’s right to overtime. This transformation of overtime pay “into a means of increasing workers’ earnings...took place during World War II, when workers started to rely on premium pay to keep pace with inflation.”

Perversely, the very “form of the limitation on hours” that Congress adopted “opened the way to hours far in excess of the standard....” Consequently, during

hours, they have been able to maintain their spendable earnings and to save.” N. Arnold Tolles, “Spendable Earnings of Factory Workers, 1941-43,” 58 Monthly Lab. Rev. 477, 478 (1944).


McPherson, Labor Relations in the Automobile Industry at 71.


the 1940s and 1950s, as George Brooks, the research director of the International Brotherhood of Pulp, Sulphite and Paper Mill Workers, explained to the Conference on Shorter Hours of Work sponsored by the AFL-CIO in 1957, "the basic meaning and purpose of the law was twisted and changed. It no longer was a standard for hours worked, but a means of increasing income through premium rates." The use of cost-plus contracts during World War II and the progressive reduction of labor costs as a proportion of total costs in the wake of capital intensification of manufacturing conspired to deprive premium rates of their deterrent effect: "Employers did not care. The war-time experience and collective bargaining...have combined to change the whole concept of overtime rates from the idea of a penalty to the idea of privilege. The typical senior worker or the worker 'fortunate' enough to get extra hours regards them as a plum.... In all industries...there has been a concerted effort to increase the...penalty payments, not with the idea of preventing longer hours...but...of increasing income during prosperous times." Indeed, Brooks reported that in his own industry, where paper mills established 36-hour schedules, employees worked 42 hours including six at overtime rates.348

Not surprisingly, some in Congress during the war sought to curtail the right that millions of workers had recently secured to premium pay for over-hours.349 Statutory overtime could no longer fulfill the function of sharing work as full employment approached during rearmament in 1940-41, but the Wage and Hour Administrator devoted an extraordinary amount of space in his annual report for 1940 to refuting claims that the forty-hour week was inconsistent with national defense preparedness,350 and two years later continued to defend the overtime provision as "attracting labor in a democratic way, without compulsion, to the war industries where it was needed."351 President Roosevelt's insistence during one of his fireside chats in 1940 that the emergency did not "justify making the workers of our nation toil for longer hours than now limited by statute"352 was unintentionally ambiguous since, as Secretary Perkins explained in 1942 to a congressional panel considering a wartime ban on overtime rates for naval

349 For a rhetorical description and denunciation of the anti-FLSA drive, see 93 Cong. Rec. 2266 (1947) (statement of Sen. Thomas, D. Ut.).
352 Fireside Chat of May 26, 1940, in The Public Papers and Addresses of Franklin D. Roosevelt: 1940 Volume: War—And Aid to Democracies 230-40 at 237 (1941).
contractors, the FLSA "permits unlimited hours per day and per week."353 Little wonder that the *Times* was amused by the flip-flop executed during the war by liberals who, in response to proposals for a longer 48-hour week, argued that the overtime provisions did not regulate or limit hours at all, but merely prevented exploitation.354

Ideologically, then, the war was a propitious time for employers to urge that "the penalty for overtime should be canceled during the emergency to encourage a longer work week." The chairman of General Motors, Alfred P. Sloan, Jr., advocated this course: "[I]f we increase the work week and pay a penalty, the result is to increase wages about 8 per cent. We get nothing for this 8 per cent because efficiency, manifestly, is not increased, therefore the result is a step toward inflation. ... Frankly, I do not believe in "something for nothing"...." The Wage and Hour Administrator heaped ridicule on Sloan's proposal by focusing on the ratio between GM's most recent annual profit of $183,000,000 and payroll of $386,000,000: "Which is the more inflationary, an 8 per cent increase for the workers or profits almost half as large as total payroll?"355

A number of bills were introduced in 1942 to relieve employers (and ultimately the Treasury, which was paying the bills submitted by war contractors) of the burden of premium pay.356 Senator O'Daniel of Texas seized the initiative in March with a bill that would have eliminated all restrictions on hours of labor and provided the same wage for all hours.357 In explaining a later version of the bill, the senator may not have been indulging in hyperbole when he stated: "The change would please practically every employer of labor in America. They would rejoice at having the legislative shackles of premium pay for so-called overtime removed."358 O'Daniel's explanation of the effect of the elimination of premium pay was novel: while the bill neither compelled workers to work overtime nor dealt with hourly wages at all, it did embrace the age-old, time tested, true economic philosophy that an employee should be paid the full amount per hour that his services are worth for each and every hour that he works, instead of being paid less per hour for earlier hours of the day when he is most efficient and productive, and more per hour for the later hours, when he may be fatigued.

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353*Hearings on H. R. 6790, to Permit the Performance of Essential Labor on Naval Contracts Without Regard to Laws and Contracts Limiting Hours of Employment* at 2627.


356For a brief and uninspired account, see Roland Young, *Congressional Politics in the Second World War* 59-61 (1956).


and less productive, as our present 40-hour workweek law provides.359

Decades earlier, Alfred Marshall, who codified Anglo-American neoclassical economics, had offered an inverted subjectivist last-hour fable: “[M]ost persons...are glad when the hour for stopping arrives: perhaps they forget that the earlier hours of work have not cost them as much as the last: they are rather apt to think of nine hours’ work as costing them nine times as much as the last hour; and it seldom occurs to them to think of themselves as reaping a producer’s surplus or rent, through being paid for every hour at a rate sufficient to compensate them for the last, and most distressing hour.”360

O’Daniel failed to explain why workers would willingly work overtime hours when their productivity was lower and thus employers should have paid them less or why employers prior to the FLSA voluntarily paid premium wages to induce workers to work additional hours during which both knew that their productivity declined. As a stevedoring company president observed just a few years later, although he “quite assuredly” would work his employees more overtime if the premium were only five cents an hour, “we basically want to work the maximum amount of straight time.... [I]f we are working men for eight hours and have to lap into overtime, we get less work performed. There is a fatigue proposition which you cannot escape. The productivity after a certain number of hours is on the downhill.”361

Labor relations realpolitik under the special balance of forces created by world war compelled employers to approach the issue of overtime undogmatically. After all, as Business Week noted, even nonunion employers “might hesitate to abandon policies shaped by the 40-hour law” because they feared that such a reversion to longer hours without premium pay would merely provoke unionization efforts.362 While testifying in 1942 before the House Naval Affairs Committee on these FLSA bills, William Witherow, the president of the NAM, “the most influential ideological holding company for American industry,”363 revealed what was at stake if equilibrium were disturbed:

One provision of the bill...would deal with one of the Nation’s most vexing

35988 Cong. Rec. 8705 (1942).
361Testimony of Frank W. Nolan, in Bay Ridge Operating Co. v. Aaron, Transcript of Record at 124.
362“40-Hour Fight?” Bus. Wk., May 17, 1941, at 45, 47.
problems—one that has caused the most vehement, spontaneous outpouring of public resentment for many years—the questions of overtime pay after 40 hours of work.

It is obviously impossible to reconcile the spirit of the law that admittedly was designed to discourage utilization of manpower for more than 40 hours each week with a Nation-wide demand for all-out production effort. All the rhetoric in the world cannot disguise the fact that the two ideas just do not "jibe" with each other. ... And there is no question that of the two the public prefers the all-out production effort.364

Nevertheless, Witherow had to concede that, given "the practical realities of employment relations," neither he nor anyone else could unambiguously answer the question as to whether abandoning the overtime premium would speed production.365 The NAM president finally fleshed out the reason for his reluctance to attack overtime pay:

For many months employees in many industries have been used to weekly pay checks considerably higher than before, primarily because of high overtime rates. To decrease this weekly pay check by the amount of overtime in it—without simultaneously freezing wage rates at their existing levels—would have one definite tendency. In all probability, there would be a widespread demand by unions throughout the country for an increase in basic hourly rates to a point off-setting the loss of overtime. This would normally stimulate increased labor difficulties and even if it did not increase strikes, it would increase the time management would be forced to take from our all-important projection job in order to sit around the negotiation table. I cannot believe that this would help production.366

The NAM’s forthright acknowledgment that the campaign to suspend overtime premiums might easily turn into a Pyrrhic victory—an acknowledgment which the chairman of the War Production Board and the president of the CIO also made, albeit indirectly367—was in large part dictated by the fact that Congress rather than millions of individual consumers was footing the bill for war production. That employers did not, however, intend to play dead was obvious from Witherow’s remark that “abandoning the 40-hour overtime is far less important at this time as a step to speed up production than several other constructive measures” before the Naval Affairs Committee chief among which was eliminating the closed shop.368 Large corporations’ reluctance to force the issue of overtime was probably also dictated by the realization that premium overtime payments were more than

364Hearings on H.R. 6790 at 2843.
365Hearings on H.R. 6790 at 2843.
366Hearings on H.R. 6790 at 2844.
367Hearings on H.R. 6790 at 2576, 2770 (statement of Donald Nelson and testimony of Philip Murray).
368Hearings on H.R. 6790 at 2845.
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compensated for by the savings inherent in operating expensive capital equipment longer workweeks. Eighty years after Karl Marx had recognized this positive impact of longer hours, even at higher overtime wages, on the rate of profit, the BLS published the results of its study of large corporations producing war-related output revealing the profit-enhancing effect of overtime.

The NAM’s logic also implicitly raised the larger inverse question: Does the introduction of overtime work and pay tend to depress basic wage rates? This same question was raised at the same hearings by Secretary of Labor Perkins, whose testimony impressively resembled Witherow’s. She argued that if Congress eliminated overtime premiums and thus reduced total weekly wages, “[i]t will be just as natural as getting up in the morning to increase basic wage rates if this little extra, which comes in the form of overtime pay and which has been just about enough to meet the increases in the cost of living, is taken away from them at this time.” Indeed, Perkins went far beyond employers in her idiosyncratic praise of overtime, warning that if labor markets and unions reacted by pushing up basic wage rates, “the country would be left with a rigid structure of high wages...instead of the present flexible system which now exists where a man makes more money if he works longer, and less when he works less.” Perkins saw overtime premiums as stabilizing wartime employment and combating dysfunctional turnover by enabling workers with “rather comfortable incomes” to reassure themselves: “‘Well, I make out pretty well where I am with the overtime.’” The Labor Secretary’s testimony culminated in her inadvertent confirmation of the nineteenth-century labor movement’s critique of systematic overtime’s Sisyphean character: “It is unfortunate for those workers who are able to maintain a subsistence substandard of living only by virtue of getting some overtime pay, if the trend to inflation is attacked primarily by eliminating those premium rates for overtime.”

Perkins’s 1942 testimony was astounding in another respect: while Belo and Overnight Motor Transport were pending before the Supreme Court, she furnished employers with high authority for their campaign to downgrade the FLSA to a statute in aid of marginal workers. When asked whether the theory behind the law was work spreading, she replied that her congressional testimony in 1937 “was primarily that it was a minimum-wage law. It was a minimum-wage law which had features which regulated the hours, in order that your minimum wages might not become maximum wages.” Secretary Perkins went on not only to emphasize that “we all were very careful to urge Congress not to put any absolute daily or weekly


371 Hearings on H.R. 6790 at 2631-32.
limitation upon the number of hours,” but to refabricate an entirely new economic policy basis for this effort to avoid undue rigidity that in fact she had never articulated at the 1937 hearings:

We also pointed out that this type of legislation, providing only for time and a half for overtime, and not limiting the hours of labor, would be extremely useful in case we had one of those high production periods by which American industry has been characterized, where there was a shortage of labor; and that it would be stabilizing because of the fact that it would permit for those brief periods working overtime and paying extra money, and at the same time would provide a natural ladder through which to ascend from the high income levels to the lower income levels that were necessary in a depressed period.373

After hearing this claim for the first time, Carl Vinson, chairman of the House Committee on Naval Affairs, reminded Perkins that “the theory upon which we enacted the bill was that that would penalize the employer and spread employment, and therefore if he did not spread the employment, he would be penalized to the extent of time and a half for overtime,” and added that she “was proceeding on a different theory, in that the time and a half overtime supplements the weekly pay envelope.” Trapped by her own ad hoc opportunistic support for overtime premiums at a time when they could no longer help spread work, the Secretary of Labor sought refuge in feigned ignorance of congressional intent: “I do not know, of course, what was the prevailing view in the mind of the Members of Congress who voted for the bill,” and asseverated (“I am sure that I presented that point of view at that time”) that even in 1937 she had advocated passage also on the grounds that the bill would “increase wages in proportion to the increase in work without creating a rigid wage structure.”374

For wholly unrelated reasons The New York Times editors persisted in attacking overtime premiums during the war:

What possible defense, other than a cynically political one, can be made for retaining the legally mandatory time-and-a-half rates beginning at forty hours, now that employers are virtually ordered to work men a minimum of forty-eight hours? The present time-and-a-half provisions cannot be defended even on grounds of “social justice.” ... Their result is to give the smallest increases to those who already have the smallest wages, and the biggest increases to those who already have the biggest wages.375

372Hearings on H.R. 6790 at 2637-38.
373Hearings on H.R. 6790 at 2638.
374Hearings on H.R. 6790 at 2638. For Perkins’ 1937 statement and testimony, see Fair Labor Standards Act of 1937: Joint Hearings at 173-211.
Ultimately neither O'Daniel's proposed amendment of section 7 of FLSA nor any competing proposal was adopted in 1942 or later, but in 1942 President Roosevelt did issue an executive order, which did not affect the overtime provision of the FLSA, banning premium pay for work performed on Saturday or Sunday "except where such work is performed by the employee on the sixth or seventh day worked in his regularly scheduled workweek." And in early 1943 he issued another order stating that no place of employment would be deemed making an effective utilization of manpower if its workweek was less than 48 hours. Despite the fact that the order required employers faced with labor shortages not to hire new workers when they could meet their labor needs by working their current employees 48 hours, the federal government enforced an overtime law originally designed to spread employment. Looking back in 1946, ex-Secretary of Labor Frances Perkins was completely justified in remarking that the overtime provision had been "flexible enough to make it possible to work more than forty hours when necessary, as it was during the war."

8. On the Waterfront: Overtime on Overtime?

The profit motive doesn't seem to be working to prevent the...use of a great deal of

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376 See 88 Cong. Rec. 8706 (1942) (text of proposed S. 2884).
377 Under S. 2232, submitted by Senator Reed of Kansas, premium pay would not have been mandatory until after forty-eight hours. 88 Cong. Rec. 1328 (1942). Many of the other bills introduced in 1942 would have suspended all hours limitations for the duration of the war. H.R. 6616 (Smith, Va.); H.R. 6823 (Peterson, Ga.); H.R. 7731 (Ramspeck); H.R. 6689 (Lambertson); H.R. 6795 (Boren); H.R. 6796 (Wickersham); H.R. 6826 (Colmer); H.R. 6835 (Thomas, Tx.); H.R. 7054 (Cole, N.Y.).
378 Senator O'Daniel continued to introduce his bill for several sessions as did other Congressmen. In the first session of the Seventy-Eighth Congress (1943) the following bills were offered: S. 190 (O'Daniel); S. 237 (Reed); H.R. 992 (Colmer); H.R. 1804 (Smith); H.R. 2071 (Russell); H.R. 2107 (Curtis); in the first session of the Seventy-Ninth Congress (1945): S. 369 (O'Daniel); H.R. 1194 (Russell); in the second session of the Seventh-Ninth (1946): H.R. 6647 (Dondoro); and in the first session of the Eightieth Congress: S. 160 (O'Daniel).
383 Perkins, The Roosevelt I Knew at 266.
A third Supreme Court decision, issued in June 1948, was inflated by employers in certain industries, but especially longshore, stevedoring, and shipping, into another financial apocalypse of portal-pay magnitude. In *Bay Ridge Operating Company v. Aaron* the Court held that the statutory regular rate on which time-and-a-half overtime had to be paid included time-and-a-half premium wages that longshoremen were paid for working shifts outside the core daytime hours regardless of how many hours they worked. The International Longshoremen’s Association (ILA) joined forces with employers to denounce the lawsuits for overtime that had been brought by individual members of the ILA. As ILA president-for-life Joseph Ryan testified at trial, “our Council went on record as being opposed to trying to get time and a half on time and a half, as it might wipe out all of the gains we had made for our men over a period of 25 years.”

About 400 longshoremen and ILA members filed two test suits in October 1947 against two stevedoring companies (one of which, Huron Stevedoring Corporation, was a subsidiary of Grace Lines) for $800,000 in back overtime. The nub of the complaint was that during World War II they had worked 66- to 70-hour weeks on the night shift in the Port of New York without receiving any overtime premium because the employers had taken the position that the $1.875 night shift rate was 150 percent of the regular (day-shift) rate of $1.25. A secondary issue involved day workers who worked a standard 44-hour week with no overtime for the last four hours.  

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385See below chapter 3.


387Testimony of Joseph B. Ryan, Transcript of Record at 183, *Bay Ridge Operating Co.*

388“Dock Workers Sue for $800,000 Pay,” *N.Y. Times*, Oct. 5, 1945, at 14, col. 6. Intriguingly, the plaintiffs’ lawyers were members of the firm of Goldwater and Flynn; Edward J. Flynn was leader of the Bronx Democratic Party (1922-53), chairman of the Democratic National Committee (1940-42), and President Roosevelt’s long-time confidant, while Ryan, the ILA president, had long been a leading figure in Tammany Hall. *1 Amendments to the Fair Labor Standards Act of 1938: Hearings Before the House Committee on Education and Labor*, 81st Cong., 1st Sess. 619 (1949) (testimony of Julius Bagley, attorney representing plaintiff-ILA members); Alfred Clark, “Monroe Goldwater Is Dead at 95,” *N.Y. Times*, Nov. 24, 1980, at D11, col. 1 (Lexis); Harold Faber, “Papers of Flynn Go to Hyde Park,” *N.Y. Times*, May 20, 1984, sect. 1, pt. 2, at 48, col. 4 (Lexis); Daniel Bell, “The Racket-Ridden Longshoremen: The Web of Economics and Politics,” in *idem, The End of Ideology: On the Exhaustion of Political Ideas in the Fifties* 175-209 at 194 (rev. ed. 1966 [1960]). Much of Bell’s essay, but not the material on the overtime issue, was taken from Daniel Bell, “Last of the Business Rackets,” *43 Fortune* 89-91, 194-
Initially the stevedoring companies prevailed at trial before federal judge Simon Rifkind, himself a New Deal insider. The trial was notable both for the extensive testimony of two prominent scholars about the history of overtime work and for the fact that U.S. government lawyers represented defendant-employers because it would ultimately have been liable for any judgments since the longshoremen had loaded and unloaded ships operating under wartime cost-plus contracts. The federal government's interest in the outcome was intensified by the more than 200 additional suits that had been filed in the interim. At issue was the collective bargaining agreement between the ILA and the defendant employers, which provided for two classes of pay: a straight-time hourly rate of $1.25 for all work performed between 8 a.m. and noon and from 1 p.m. to 5 p.m., Monday through Friday, and from 8 a.m. to noon Saturday, and a so-called overtime rate of $1.875 for work performed at any other time regardless of how many hours the employees worked during those other times. This arrangement had been in effect for decades; the only change that the parties made after the FLSA went into effect was relabeling: wages for the core hours were called "straight time" and all others "overtime rates." 

Ryan testified at trial that:

we did not need the Fair Labor Standards Act. We were able to collective [sic] bargain, and by that bargaining made an eight-hour day and time and a half for overtime. ... We have that without the Fair Labor Act. The only place it helped us was if a fellow was fortunate enough to work eight hours a day, Monday, Tuesday, Wednesday, Thursday and Friday, that before the Fair Labor Act he had to work Saturday morning for four hours at the single rate of pay. After the Fair Labor Act came in, if a man could work those times—it is very seldom a man works five straight days of eight hours, but if we worked five days, previous to last October [1945], before the Fair Standards Act came in, Saturday morning, due to our 44-hour contract, we had to work four hours on Saturday at the straight pay. When the Fair Standards Act came in, if we worked one hour on Saturday morning..., we got time and a half, provided we had the 40 hours in the previous five days.

203 (June 1951).


390Aaron v. Bay Ridge Operating Co., 162 F.2d 665, 668 n.5 (2d Cir. 1947); Petition for Writs of Certiorari at 16.

391Aaron v. Bay Ridge Operating Co., 162 F.2d at 672 (Finding of Fact No. 33).

392Testimony of Joseph B. Ryan, Transcript of Record at 189-90, Bay Ridge Operating Co.
In fact, however, as Ryan was forced to admit on cross-examination, for seven years the ILA had acquiesced in employers' refusal to pay such Saturday morning overtime.\footnote{Testimony of Joseph B. Ryan, Transcript of Record at 190-95, Bay Ridge Operating Co.} And the plaintiffs were also correct in charging that all that the ILA and the employers had "sought to do...from 1938 on was to perpetuate the prestatutory wage pattern without adjusting their employment relations in any wise to the statutory requirements."\footnote{Brief for Respondents at 76-77.}

The plaintiff-workers—whom the ILA president mischaracterized at trial as "non-union members who do not know anything about how our organization was built up"\footnote{Testimony of Joseph B. Ryan, Transcript of Record at 177, Bay Ridge Operating Co.}—argued that since the higher rate was merely a shift differential for inconvenient night and weekend work, they were entitled to time and a half for any hours above 40. ILA president Ryan sought at trial to characterize the wage-hour structure as driven by anti-overtime sentiments:

Our objective was to de-casualize longshore work as much as possible, to have the work done in the daytime as much as possible, and make it as expensive for the employers as possible on Sunday. ... We wanted to work in the daytime. We figured we lived only once. We want the daytime when every man who wants to work wants it done in the daytime and not during overtime. The employers would say it cannot be done in the steamship industry. I think we have proven for them that after 30 years of negotiating many of the things they said could not be done in the industry, when they found it too expensive to do it any other way, have been done.\footnote{Testimony of Joseph B. Ryan, Transcript of Record at 173, Bay Ridge Operating Co.}

Rifkin saw a "certain plausibility" in both positions: on the one hand, workers who worked only nights received no premium pay after 40 hours; on the other hand, the agreement established a regular rate, of which the employers paid time and a half both for hours beyond 40 and, although the FLSA did not even require it, also for certain shift work. In seeking to reconcile three national policies (the NLRA, FLSA, and the wartime need for maximum production), Rifkind put great store by Ryan's testimony about the ILA's goals as well as by his statement that the suit "'might wipe out all of the gains we have made for our men over a period of 25 years,'" during which there had been no strikes.\footnote{Addison v. Huron Stevedoring Corp., 69 F. Supp. 956, 957, 958 (S.D.N.Y. 1947).}

Rifkind's decision was driven by his perception that the collectively bargained wage system was the "natural development of a long history" and "not an artificial rearrangement of pre-F.L.S.A. rates of compensation in order to
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He offered examples of superior terms of employment embodied in other collective bargaining agreements to buttress his claim that application of the plaintiffs' approach "would create havoc with established labor relations, put collective bargaining in the category of a device for obtaining money under false pretenses and probably strain the resources of a substantial proportion of American industry." The first example involved a regular contractual workweek of 36 hours although the actual workweek was longer than 40 hours. The workers therefore received time and a half for all hours beyond 36, although the FLSA overtime requirement did not kick in until they had worked 40 hours. Because the average rate for 40 hours included time and a half for four hours, the workers' overtime rate, which was calculated as 150 percent of the straight-time rate for 36 hours, did not include the contractual overtime for hours 36 to 40. Nevertheless, Rifkind saw nothing in the FLSA to foreclose such "bona fide" union contracts. In the other example, a collective bargaining agreement provided for daily time and one-half overtime for hours beyond eight regardless of whether the workers worked 40 hours during that week. In weeks in which they worked five ten-hour days, they therefore received overtime for eight hours included within the first 40 hours, and the rate for hours in excess of 40 (all worked on the fifth day) was less than 150 percent of the average rate for the first 40 hours because it was calculated on the basis of the straight-time rate excluding the contractual overtime premium. Again, Rifkind concluded that applying plaintiffs' approach would merely deter employers from entering into such agreements in the first place.

Finally, Rifkind was persuaded by the voluminous expert testimony that the premium was not merely a shift differential, which traditionally ran to only 5 to 15 cents per hour and was not designed to deter employers from operating, but to attract workers to work during less desirable hours without inhibiting the work. The longshoremen's 50 percent premium was designed to deter and largely succeeded in "curtailing...abnormal hours."

The judge was misled by the trial testimony of the eminent labor historian and economist Philip Taft. Testifying on behalf of the defendant employers, Taft, in response to a question as to whether "overtime" had had a generally accepted meaning before the FLSA, stated that it described "excess time...." After the judge sustained plaintiffs' objection to a follow-up question on the grounds that it was unclear, Rifkind himself intervened to help clarify the concept. Taft


\[401\] Addison v. Huron Stevedoring Corp., 69 F. Supp. at 961. Philip Taft testified to this effect about shift premiums; Transcript of Record at 332, 338, Bay Ridge Operating Co.
Overtime over Time

bluntly denied that “the idea of excessivity [was] an essential element of overtime” before the FLSA. Instead, he argued that it was “made up of two specific ideas, one arising in excess of a particular sequence, and the other may be a specific enumeration of hours.” When Rifkind then asked him whether he meant that overtime had meant before 1938 “time in excess of a stipulated period, or...any time, whether in excess of not in excess, which was penalized...in the method of payment,” Taft replied that the “two concepts were usually joined together.” Yet when the judge asked whether the second concept was ever found without the first, Taft could not recall. But when Rifkind asked the logical follow-up question as to whether after all “excessivity was always an element of the overtime,” Taft’s replied incoherently: “Only in the sense that the definition was there.”

Rifkind nevertheless adopted Taft’s opinion in his findings of fact, which stated that although “excess time” had generally been the meaning of “overtime” before the FLSA, the “idea of excessivity...was not an indispensable element of the concept of overtime as understood,” which also included “hours outside of a specified clock pattern.”

The plaintiffs identified the self-contradictory structure of the employers’ and the ILA’s rhetoric by underscoring that Ryan’s testimony concerning the union’s purpose in demanding higher rates for night and weekend work “contemplate[d] no deterrent against working long or excessive hours; it merely reflects the natural human desire to work by day and retire at night. But petitioners, following the line of their experts’ testimony, urge that overtime as understood in American industry has always included, as an alternative concept, hours outside a basic clock pattern.” But, the plaintiffs noted, contrary to Taft’s testimony, “virtually all collective contracts include excessivity as an essential element in the computation of overtime.”

Although the workers argued forcefully that the 50-percent premium for night work was compensation for its “general undesirability” and not for excessivity of hours, they failed, as far as Judge Rifkind was concerned, to rebut the quantitative argument that 50 percent was otherwise never found as the hallmark of a mere shift premium. In fact, a BLS survey of collective bargaining agreements in effect in the second half of 1946 revealed no shift differentials remotely approaching those at issue in the longshore case: many amounted to only a few cents, and none exceeded 15 percent.

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402Bay Ridge Operating Co., Transcript of Record at 325-27.

403Findings of Fact 28 (a), Transcript of Record at 604-605, Bay Ridge Operating Co.

404Brief for Respondents at 66-67.

405Brief for Respondents at 76.

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The unanimous Second Circuit decision in June 1947 reversing the district court, though written by the premier realist judge, Jerome Frank, oddly refrained from addressing any of Rifkind's real-world concerns about the potential for undermining collective bargaining and the negotiation of terms superior to those required by the FLSA. Instead, it bloodlessly ruled that the regular rate could not be determined by collective bargaining agreements, but only as an "actual fact"; the regular rate was therefore to be calculated by dividing total compensation by total hours worked.

After the Second Circuit panel handed down its decision, the workers' lawyers estimated that total back overtime claims for the industry could range between $25 million and $50 million. Two months later, in October 1947, the same lawyers filed two additional suits against 60 stevedoring companies listing 3,000 stevedores as plaintiffs. They deviated from the usual procedure of waiting until the Supreme Court had ruled on the test cases because the Portal-to-Portal Act, which would go into effect in September, had cut the statute of limitations to two years and would have excluded all the world war claims. In its amicus brief in Bay Ridge Operating Company before the Supreme Court, the NAM had asserted that if plaintiffs prevailed, the ensuing litigation might exceed that spawned by the Mt. Clemens Pottery Company portal-pay decision.

In June 1948, the Supreme Court upheld the workers' claims and rejected the position advocated by the United States and the ILA. The majority, agreeing with the Second Circuit on the regular rate as an actual fact, ruled that it can be calculated by dividing weekly compensation by hours worked unless the compensation includes an overtime premium since "Congress could not have intended" a pyramiding of overtime on overtime, which would have "expanded extravagantly" the scope of liability contemplated by Congress. Without any reasoning, the Court rejected Rifkind's conclusion that the night premium was too large to have been merely a shift premium; it found that the size of the differential "cannot change the fact that large wages were paid for work in undesirable hours...or because the contracting parties wished to compress the regular working days into the straight time hours as much as possible." They

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407 Aaron v. Bay Ridge Operating Co., 162 F.2d at 668 (citing 149 Madison Avenue Co. v. Asselta, 331 U.S. 199 (1947)).
410 "3,000 Stevedores Sue for Millions," N.Y. Times, Aug. 17, 1947, at 16, col. 7. See also below chapter 3.
411 Brief of the National Association of Manufacturers as Amicus Curiae at 7, Bay Ridge Operating Co. v. Aaron, 334 U.S. 446 (1948). See also "Overtime-on-Overtime—Administrative Interpretations," 10 N.A.M. Law Digest 57 (1948).
therefore did not fall under the rubric of overtime premium, which the majority held to be “an additional sum received by an employee for work because of previous work for a specified number of hours in the workweek or workday” whether specified by statute or contract.

In an adroitly argued dissent, Felix Frankfurter, joined by Justices Jackson and Burton, provided the sociological underpinning for Judge Rifkind’s view that employers should not be deterred from entering into legitimate collective bargaining agreements that offered workers terms superior to those of the FLSA by fears of back overtime liability for wages neither party had ever contemplated paying. Having learned the recent lesson of the portal-pay dispute, Frankfurter warned that Congress would not suffer yet “another doctrinaire construction by the Court of the Fair Labor Standards Act in disregard of industrial realities.” Accusing the majority of abstractly treating the FLSA’s words “as though they were parts of a cross-word puzzle” rather than “the means by which Congress sought to eliminate specific industrial abuses,” Frankfurter charged that the Court had totally disregarded the struggle of a “strong union” against “anarchic exploitation of the necessities of casual labor....” Instead, the majority, getting an arithmetical answer to its own arithmetical question, “substitute[d] an arrangement rejected both by the union and the employers as inimical to the needs of their industry and subversive” of collective bargaining.

Frankfurter argued that since the collective bargaining agreement’s objectives of discouraging overwork and underemployment were congruent with the FLSA’s, Congress did not authorize the courts to weaken a strong union by undermining its contracts. The dissent also criticized the majority for subjecting collective contracts “to the hazards of self-serving individualism” of a few union members in the absence of any judicially established evidence that the union officials had ignored or betrayed their responsibility and negotiated a sham contract that did not serve the interests of the union as a whole.

These barbs resembled the reproach that the ILA’s amicus brief had directed at the plaintiffs for wanting to repudiate what the collective bargaining agreement had established as regular and overtime rates, which were “far higher than those required” by the FLSA. The plaintiffs were then cast in the role of selfish and self-destructive ingrates: “Without collective bargaining these very plaintiffs who now seek overtime and overtime rates ranging up to $3.75 per hour...might, like millions of other American workers, still be working at the $.40 per hour...
minimum provided by the Act."416

Curiously, neither Frankfurter nor the majority nor the Second Circuit judges ever alluded to the ILA's extremely undemocratic structure. The entire sociological edifice of Frankfurter's critique should have collapsed under revelation of the fact that the ILA was autocratically run by Joseph Ryan—also known as "King Ryan" after he had himself made president for life in 1943417—a corrupt right-winger in cahoots with mobsters and employers.418 Only the plaintiffs in their Supreme Court brief, and even then only indirectly, hinted at the ILA's less than militant democracy. But even while citing secondary authorities that criticized the central institution of longshore industrial relations, the shape-up, as propagating "favoritism, bribery, and demoralization," the plaintiffs rushed to disavow any "purpose...to advance social reform...."419

Evidence establishing the ILA's undemocratic structure and policies was abundantly available. Daniel Bell, later a world-famous sociologist, studying the ILA for *Fortune* in 1951, concluded that the union was one of few in the United States to "encourage cutthroat competition among men for jobs or tolerate a condition of job insecurity."420 From World War I until the end of World War II, the ILA engaged in a "pattern of economic accommodation...which worked to the benefit of the shipowners and the union barons and against the interest of the men." Ryan could truthfully boast at trial that there was "never a strike since 1907 until 1945,"421 but the collective bargaining agreements that the union secured "brought few benefits other than miniscule [sic] hourly wage increases for the men. ... The few rebellions...where the Communists sought to gain a foothold...were dealt with summarily."422 Rebellious members often "get conked on the head."423 The ILA, as a sociological study of the longshore unions found, "distinguished itself as one of the least effective unions in the country. Judged

416Brief on behalf of ILA as Amicus Curiae in Support of Petitioners' Petition for Writs of Certiorari at 8-9.
419Brief for Respondents at 18-19.
421Testimony of Joseph Ryan (1946), Transcript of Record at 174, Bay Ridge Operating Co.
422Bell, "The Racket-Ridden Longshoremen" at 197.
even by the minimal standards of business unionism, the ILA was an abject failure...."\textsuperscript{424}

This cozy relationship was threatened, according to Bell, by the overtime lawsuits, which "scared the steamship operators" not only on account of the potentially large back wage liability, but because the need to open the books to determine who was owed how much in wages "might reveal the extent of payroll padding, duplicate hiring, and other practices which, since the government was paying all bills during this period on a cost-plus basis, could only have been conducted on a collusive basis. The shipping companies demanded, therefore, that the union waive all claims for overtime pay." After several twists and turns, including the first strike in the ILA's history in 1948, the union and the employers agreed to urge Congress to overrule the Supreme Court's \textit{Bay Ridge Operating Company}: "It was a rare act of 'sacrifice' on the part of a union: abandoning several millions of dollars of legally entitled back pay...to ensure labor-management 'harmony.'"\textsuperscript{425} A few years later even the conservative AFL could no longer ignore the overwhelming record and expelled the ILA for its connections to mobsters and acceptance of bribes from employers.\textsuperscript{426}

Representative Angier Goodwin (R. Mass.) quickly became the chief congressional sponsor of amending the FLSA to wipe out any liability for the shipping companies. In July 1947, just a few weeks after the Second Circuit had issued its decision, Goodwin introduced a bill whose long preamble was taken verbatim from the Portal-to-Portal Act, which had been enacted two months earlier, replete with references to "immense" liabilities, serious impairment of capital resources, "financial ruin of many employers," "windfall payments," "champertous practices," and "Nation-wide industrial conflict."\textsuperscript{427} Without making any reference to longshoremen, Goodwin's bill would have disposed of "pyramided overtime compensation" simply by entitling "employers and their employees" to fix regular and overtime rates "individually" or through collective bargaining and then prohibiting the use of such a contractual overtime rate in computing the FLSA regular rate.\textsuperscript{428} Goodwin also wiped out liability


\textsuperscript{425}Bell, "The Racket-Ridden Longshoremen" at 199-201. For a more benign account of the ILA's position, stressing that the contract gave longshoremen more than the FLSA would have given them, and that the ILA's cooperation with employers in opposing the suits and urging congressional amendment of the FLSA merely constituted an effort to preserve the integrity of its collective bargaining agreements along the same lines pursued by other unions, see Vemon Jensen, \textit{Strife on the Waterfront: The Port of New York Since 1945}, at 54-64 (1974).

\textsuperscript{426}Kimeldorf, \textit{Reds or Rackets?} at 15.

\textsuperscript{427}H.R. 4387, § 1, 80th Cong., 1st Sess. (1947).

\textsuperscript{428}H.R. 4387, § 2.
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retroactively by depriving the courts of jurisdiction over any actions not in conformity with the new definition of "regular rate" even if those cases had been filed before the new law's effective date.429

After Congress had taken no action on Goodwin's bill in the first session of the Eightieth Congress, on April 20, 1948, before the Supreme Court had decided the case, Goodwin, conjuring up exactly the same astronomical figure that he and others had bandied about a year earlier during the portal-pay hysteria,430 declared to the House of Representatives that (unnamed) "[s]tatisticians have calculated" that a potential liability of "$6,000,000,000. I repeat, $6,000,000,000" loomed like a "monstrous and destructive Frankenstein," bringing with it "ruin and bankruptcy for management in many lines of business." Certifying the correctness of each other's figures, he and Representative Rankin (D. Miss.) engaged in a colloquy forging the "astounding" factoid that $6 billion exceeded the value of the entire wheat and cotton crops.431

At a joint conference in New York two weeks later, which urged Congress to intervene to ward off a "'catastrophe of national proportions,"' Representative Goodwin announced that more than fifty industries were threatened by the $6-billion liability. The ILA's lawyer, Louis Waldman, sermonized that the "whole commercial and social structure of the country...was based upon the concept of freedom of contract, which could not be had without good faith... He contended that 'the good faith of American labor in dealing with its employers has been thwarted as a result" of WHD interpretations and court decisions.432

Even before the Supreme Court published its Bay Ridge Operating Company decision, legislators had initiated the process to relieve employers of past and future liability. Although Senator Ball's omnibus FLSA revision bill, which included an anti-overtime-on-overtime provision, had been introduced earlier in the session,433 on May 12, 1948, Goodwin introduced a bill devoted exclusively to this issue. It would have redefined "regular rate" to exclude any overtime premium, which was defined to include payment "because the employee has previously worked a specified number of hours during a specified period or

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430 93 Cong. Rec. 1497 (1947).
431 94 Cong. Rec. 4652-54 (1948).
433 S. 2386, 80th Cong., 2d Sess. (Mar. 25, 1948). Ball's bill inserted a very lengthy definition of "regular rate" into the definitions section of the FLSA, which would have excluded from "normal, straight-time compensation and...credited to overtime compensation...overtime premiums paid for work performed in excess of the normal weekday or workweek scheduled in good faith by established practice or a collective-bargaining agreement" as well as overtime premiums for work performed on weekends and holidays. Id. § 2(n). Ball's bill never got out of committee, and Ball, a Republican from Minnesota, lost his seat in the 1948 election.
because of the time of day or the day of the week or year the work is performed.” Goodwin availed himself of yet another forum at a hearing on his bill before a subcommittee of the House Judiciary Committee apparently attended only by Representative John Gwynne, the leading House figure in the previous year’s enactment of the Portal-to-Portal Act. Having learned the value of rhetorical overkill in winning that battle, Goodwin, who stressed the “disturbing parallel” to the portal-pay litigation, declared: “There is no more important problem facing American industry today than that raised by a recent judicial interpretation” of the FLSA. Senator Wiley, who had played a leading role in the portal-pay legislation in 1947, filed the companion bill in the Senate.

Pro-labor congressmen belittled Goodwin’s legal analysis, predictions, and data. On May 20, Representative Francis Walter (D. Pa.)—just beginning his career as a leading red hunter with the House Committee on Un-American Activities—expressed surprise before the House that anyone could argue that longshoremen’s wages fell under the overtime rubric. Moreover, the Portal Act, which the Congress had just passed the previous year, would considerably reduce any liabilities by virtue of its short statute of limitations and the defense it offered employers who relied in good faith on the Administrator’s interpretation. In addition to pointing out that since the longshoremen’s wage system was unique, other industries were unaffected, Walter stressed that Goodwin’s bill and others were in reality designed to “stampede[]” Congress into adopting legislation that “would deprive 20,000,000 workers of the overtime benefits” of the FLSA by permitting employers to “select...anything you wish to be called the regular rate of pay so long as it is 40 cents or more an hour.”

In July 1948, employers “breathed a little easier” when the WHD issued an official interpretation indicating that Bay Ridge Operating Company “wasn’t as far-reaching as many had feared at first.” Under the new interpretation—good-

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434 H.R. 6534, § 4, 80th Cong., 2d Sess. (1948). The overtime rate also had to be at least one and a half times any lower rate “not proved to be a fictitious rate established by custom or individual labor contract, payable for the same work at other hours of the day or on other days, and includes any other true overtime rate.”


438 94 Cong. Rec. 6204 (1948). Lawyers for the plaintiff-stevedores had stated at the time they filed two additional suits in 1947 that “virtually no overtime is accumulated by longshoremen during peace times.” “3,000 Stevedores Sue for Millions.”
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faith reliance on which would protect employers under the Portal-to-Portal Act—if premium pay for weekend, holiday, or night work was paid only after workers had already worked a specified number of hours or days under some bona fide standard, it qualified as overtime compensation and could be excluded from the calculation of the regular rate. By August 1948, Ryan, the ILA president, appeared even more eager to resolve the issue than the employers. Quoting Representative Fred Hartley, Jr., whose infamously anti-labor bill had just been enacted, he called for a special session of Congress to resolve the question of overtime rates for night workers.

The CIO unions took a different approach than the ILA and the AFL to the “smear campaign...coined ‘overtime on overtime,’ which is deliberately designed to mislead and confuse the issue.” Whereas the AFL supported the proposed amendment of the FLSA as “forestall[ing] a chaotic situation in many industries,” the UAW, though deciding not to file any suits, at the same time declared that it would contest any moves by employers to use Bay Ridge Operating Company as a pretext for eliminating premium pay for weekends or holidays or shift differentials. The CIO also attacked AFL unions like the ILA by observing that “we do not believe that unions should be able to trade away time and a half for work after 40 hours in order to get some other benefit.... We believe that the undermining of uniform overtime standards will again encourage chislers to gain a competitive advantage at the expense of their employees’ wages and living standards.”

During negotiations to settle the East Coast dock strike in late 1948, Secretary of Labor Tobin promised stevedoring employers that the Truman administration would submit legislation to Congress overruling the Supreme Court’s decision. Expediting its passage as a separate FLSA amendment ahead of enactment of a long overdue increase in the minimum wage, Democrats early in the Eighty-First
Congress, control of which had passed back to them with Truman's election, filed a bill in the House to overrule Bay Ridge Operating Company. Limited to longshore and construction work, and also purely prospective, H.R. 858 was passed by the House in February. Executing the Truman administration's position that quick action was necessary "to remove serious difficulties in the maintenance of desirable labor standards arrived at through collective-bargaining agreements, and in order to prevent labor disputes," the Senate Labor Committee, amended the bill both to extend its reach to all of industry and to make it retroactive, as Congress had done with the portal-pay claims two years earlier.

Significantly, one of the reasons Congress adduced for treating the two disputes similarly was the fact that "in both cases, the filing of suits was deplored by responsible A. F. of L. officials...." The electricians unions, for example, declared that it would not oppose employers' efforts to override Bay Ridge Operating Company "because it is not our policy to seek gains beyond our agreements." Indeed, the ILA's general counsel coyly testified before Congress that the union did not sponsor retroactivity, but "if the employers can persuade Congress to incorporate retroactivity...we do not oppose it." The CIO, in contrast, did not support the bill because "there was no reason why this overtime problem should be dealt with in advance of modernizing the Wage and Hour Act generally to give relief to the millions of workers who were denied adequate wage and hour protection." The CIO would not have objected to a purely prospective bill limited to longshoring, but it also stressed that the impact of Bay Ridge Operating Company had been vastly exaggerated: the Portal-to-Portal Act would wipe out some claims, while others would not stand up because relatively few workers were employed for more than 40 hours by the same employer.

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448 S. 336, 81st Cong., 1st Sess. (1949), from the beginning had applied to all industries, but not retroactively.
449 See below chap. 3.
452 To Clarify the Overtime Compensation Provisions of the Fair Labor Standards Act of 1938, as Amended at 40 (testimony of Louis Waldman).
453 To Clarify the Overtime Compensation Provisions of the Fair Labor Standards Act of 1938, as Amended at 201-202 (statement of Irving Levy, general counsel, UAW.
The Senate passed the so-called overtime-on-overtime bill in May and the customarily choreographed bombastic debates were staged in the House. Proponents of the bill accused some of the lawyers behind the litigation of being communists and characterized the suits themselves as "one of the largest and most vicious rackets in the history of the country and the legal profession."454 After differences were resolved in conference, President Truman signed it into law in August.455 The amended FLSA provided that with respect to overtime payable to an employee who is paid for work on weekends, holidays, or the sixth or seventh day of a workweek at a premium not less than time and one-half, "the rate established in good faith for like work performed in nonovertime hours on other days," or who is paid for work outside the basic, normal, or regular workday (up to eight hours) or workweek (up to 40 hours), at a premium rate at least one and one-half times the rate established for like work performed during such workday or -week, the additional compensation of such a premium rate does not count as part of the regular rate.456

Later in 1949, when the FLSA was comprehensively revised, this first amendment was repealed457 and subsumed within the new subsection of the act defining "regular rate" for the first time. Henceforward employers could lawfully exclude from the regular rate and credit against their statutory overtime liability the following categories of premium wages:

- extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours...

- extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

- extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a)[)], where such

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456Act of July 30, 1949, § 1, ch. 352, 63 Stat. 446, 446.
premium rate is not less than one and one-half times the rate established in good faith by
the contract or agreement for like work performed during such workday or workweek.458

The longshoremen litigation and its congressional consequences raised the
same issues that the portal-pay dispute had generated in 1947: what happens
when highly paid unionized workers take the initiative in pushing back the outer
limits of labor standards legislation the primary beneficiaries of which Congress
had never intended them to be?459 Like the workers demanding to be paid for the
time they had to devote to their employers’ enterprise in walking to and from
their work benches, the longshoremen had a compelling case: they could
plausibly argue that they were being deprived of their statutory premium for the
double burden of working extra-long hours at night. Their “regular rate” was
manifestly the night rate at which they worked and not the lower day rate at
which they did not work; under the FLSA, therefore, they seemed squarely
entitled to the overtime premium on the night rate.460 Nevertheless, their
congressional opponents had little rhetorical difficulty in lumping them together
with portal-pay litigants as pursuing claims totally lacking in “moral
substance.”461

In contrast, the dispute over Belo plan wages for salaried employees working
irregular hours did not appear politically misguided. It not only focused on a
perceived injustice to overtime workers, but was not confined to union workers;
moreover, the campaign to prohibit or at least limit such plans was undertaken
primarily not by unions, but by the DOL, which supported the shipping
employers (and the ILA) in the longshoremen cases. That the DOL and workers
also lost this battle does not undermine the judgment that, unlike the portal-pay
dispute, it was not a self-destructive contest.

What New Deal insider-judges Rifkind and Frankfurter were really saying
was that the longshoremen and their lawyers underrated the importance of
Realpolitik: not only had the Congress in 1937-38 not intended the FLSA to give
such additional legislative leverage to strong unions, but neither the Republican
Eightieth Congress nor, as it turned out, the Eighty-First governed by a
Republican-Southern Democratic coalition would ever put up with such legalistic
readings. Because a quasi-monopolistic (albeit undemocratic and corrupt) union

458Fair Labor Standards Amendments of 1949, § 7(d)(5-7), 63 Stat. at 914 (codified at
29 U.S.C. § 7(e) (5-7)).

459See below chapter 3.

460The Supreme Court faulted the U.S. government’s argument for treating “of the
entire group of longshoremen instead of the individual workmen.... The straight time
hours can be the regular working hours only to those who work in those hours.” Bay
Ridge Operating Co. v. Aaron, 334 U.S. at 473.

46195 Cong. Rec. at 9493 (Rep. Werdel citing magazine article).
had cut a long-term and stable deal with employers to secure relatively high wages for their members, Rifkind and Frankfurter were willing to bend the FLSA to avoid a super-contractual wage their political sense told them Congress had never contemplated. They may also have speculated that the litigation strategy would have been futile in any event since employers, had they been forced to pay significant additional sums in the future for night-overtime, might merely have bargained for lower base rates to hold themselves harmless. Ironically, however, unlike the portal-pay plaintiffs, the longshoremen’s judicial victory would have been less costly to their employers since night-overtime was largely a creature of World War II and did not represent a major future liability.

The most untoward consequence of the longshoremen’s litigation was the political space that it fruitlessly occupied that could otherwise have been devoted to more vital struggles to expand the FLSA for workers for whom the FLSA was clearly designed. Two of the most important efforts that were crowded out of the legislative agenda in 1949 were raising the minimum wage to $1.00 (instead of 75 cents), for which, for example, the Americans for Democratic Action was lobbying and which Congress did not enact for another six years and extending minimum wage coverage to farmworkers in so-called industrial agriculture—a measure that did not become law until 1966.

9. Taking Care of Business: Congress Cuts Overtime Coverage in 1949

Henry Ford announced yesterday that his contribution to the Wilson campaign would be a country-wide eight-hour day propaganda. This will be spread from every point where there is a Ford agency.... “I am in favor of the passage of a Federal law that will make eight hours the national working day.... There is no business where the employees cannot be worked eight hours a day and no more,” he said. “If they can’t do it, then the business is not properly managed.”

The war and Democratic control of Congress frustrated employers’ initial efforts to revise the FLSA overtime provisions. When Republicans gained

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control of the Eightieth Congress in 1947, big business’s priorities were legislative intervention to put a stop to the thousands of portal-pay suits that had been filed for travel and wash-up time under the FLSA, and enacting the Taft-Hartley amendments to undermine union power under the NLRA. Once those missions had been accomplished, employers turned their attention to other restrictions on their ability to deploy labor as they saw fit. Thus despite widespread wartime coverage in the business press of findings that longer workweeks led to less than proportional increases in output, demonization of the 40-hour week became a propagandistic priority among large employers in 1947.

Hearings on FLSA revision held by the House Labor Committee late that year give a good sense of what firms found restrictive about the law and how far they intended to roll back labor standards legislation. In the course of the FLSA hearings, Representative Owens (R. Ill.), taking up the cause that employers had lost in 1942, suggested that premium overtime payments be calculated only on the basis of the minimum wage, leaving organized workers to bargain for any additional overtime. The Wage and Hour Administrator devoted 10 small-print pages to criticizing various proposals by employers ranging from outright repeal of the overtime provision, reducing the regular rate to the statutory minimum wage, extending the non-overtime workweek to 48 hours, to excluding piece-rate workers from the overtime provision. A submission by a group of nineteen manufacturing companies in Cleveland employing more than 50,000 workers reveals the depth of the resentment harbored by unreconstructed northern industrial employers:

Unfortunately, many people have forgotten, and a large majority of people have never known, that the effect of the overtime-pay provisions of the Federal Fair Labor Standards Act was to place a limit on the number of hours that the productive facilities of this Nation might be worked. ...

Whatever arguments might have existed in 1938 for sharing the work no longer exist now. With prices...already too high because of shortages of goods, and with many nations...in desperate circumstances and crying out for the goods we might produce, it outrages every economic law to continue with a Government-imposed penalty to prevent

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467 See below chap. 3.
the operation of this Nation's productive facilities more than 40 hours a week.471

To underscore just how superfluous the FLSA overtime provision was, the Cleveland manufacturers told a tale of a golden age of bilateral negotiational harmony long before the FLSA had been enacted and "unions had attained their present great bargaining power." Even back then it was employers' practice to pay premium rates when they wanted work done after regular working hours.

The custom began years ago when working hours were 10 or more a day. A rush order or an emergency situation would arise requiring work past the customary hours. The employer would ask an individual employee, or a group of employees, to work overtime to meet the situation. Frequently the men would say they wanted to go home. Then an informal bargaining process would begin, in which the employer attempted to induce the men to stay by offering a premium of time and one-tenth, or time and one-fourth. The point was thus voluntarily determined at which the disinclination of men to work was overcome by their desire for additional money.472

Since such voluntary premium rates had been "part of the fabric of custom throughout American industry" even in nonunion plants before 1938, it would be even more the case by 1947 when unions "had grown to be the power they are...." But the Cleveland manufacturers preferred bargaining to congressional imposition of premium rates because it was less arbitrary and more flexible. More importantly, they charged, the function of premium rates—"induc[ing] men to do that which they ordinarily would not want to do, namely work overtime"—had been turned on its head: building trades unions in Cleveland, using "duress and threat of strike," had negotiated double-time rates for Saturday work and "then turned around and informed the contractor that unless he scheduled the tradesmen to work Saturdays on a regular basis, the men would not work the other days of the week." The next step in this union plot was "obvious": "Assured of Saturday work at double time, some men then take a day off in the middle of the week, but still draw 6 days' pay for working only 5."473

But the Cleveland manufacturers did see a ray of hope in the silent compulsions of the labor market: "With today's high living costs, there are many workmen who would be glad to gain extra money by working five and a half or six-hour days at straight time. It is their right to so elect. This would give them

extra money with which to pay bills....” Unfortunately, the FLSA stood in the way of such a consensual extension of the normal workweek to 48 hours. Why all of a sudden that ancient custom of paying more to induce men to work more than they cared to was no longer in play, the manufacturers did not reveal. All they knew was that the mandatory FLSA overtime premium “in...most cases...absolutely bars employers from scheduling their operations more than the statutory maximum without penalty. Thus, men lose wages, and the Nation loses goods.”

How, when all U.S. manufacturers faced exactly the same overtime cost structure, and, as much of rest of the industrial world lay in ruins, they produced half of world manufacturing output, a slightly higher wage bill could possibly generate such disastrous consequences, the Cleveland employers did not bother explaining.

Dubious, apparently, of the likelihood of direct repeal of the overtime provision, the Cleveland group sought a legislative second-best: it urged Congress to enact a special provision permitting 48-hour workweeks at straight-time rates in any establishment in which a majority of employees authorized such an extension. The manufacturers sought to ward off any claims that they were merely demanding longer hours at lower pay by observing that “large number of workmen already accept work outside of their employment after working hours and on Saturdays to augment their regular incomes.” Since they were willing to work for a second employer at straight-time wages (which were probably lower than those of their primary job), why should they be deprived of this same opportunity for an additional eight hours with their primary employer? After all: “Large numbers of American workmen are thrifty and industrious. Why deny them the right to utilize fully their time in the establishment where unquestionably they are paid the most, and deny their regular employer the use of his best trained and most competent help?”

Other employer groups were not so timid as the Clevelanders. An umbrella organization of 46 industrial associations, including numerous state, local, and manufacturing associations spread all over the United States, urged outright repeal of the statutory overtime premium. Denying any desire to “chisel,” the group asserted that the FLSA simply “does invade the right of employer and employee to arrive at a more satisfactory arrangement than the law requires....” And in the wake of the launching of the Marshall Program and “[o]ur crying need today...for production, more production, more production,” it concluded that “the

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475 W. S. Woytinsky and E. S. Woytinsky, World Population and Production: Trends and Outlook 1004-1005 (1953).

whole problem of overtime can be approached more intelligently through employment contracts than by statute.”  

During the second session of the Eightieth Congress in 1948, employers shifted their focus toward raising the threshold triggering overtime or eliminating the premium altogether. The NAM urged the “very drastic change” that anything above the minimum wage exceeded “the field which...the statute should have anything to do with.” It clearly voiced employers’ increasing irritation that “[m]ost of the problems in the last 6 years have been concerned with employees who receive double, or three or four times” the minimum wage and “this hair-splitting” over whether overtime had to be paid on bonuses and other fringes.

Before those plans could succeed, however, President Truman’s surprise victory over Dewey and the Democrats’ majority in the Eighty-First Congress emboldened labor and its legislative supporters to push for higher FLSA standards and broader coverage. But labor unions overestimated their congressional strength and in the end their drive to “modernize” the FLSA in the wake of the transition of the U.S. economy from depression to international domination fell victim to a pro-employer Republican-Southern Democrat coalition, which thwarted not only efforts to expand FLSA coverage, but also to undo Taft-Hartley.

In March 1948, the management magazine Modern Industry published a debate between Secretary of Labor Lewis Schwellenbach and a right-wing economist, Lewis Haney, over suspension of the statutory overtime premium. Noting that “[m]any employers are emphatically in favor of tossing it into the ashcan,” the magazine asked whether Joe Worker and management would benefit from a reduction in overtime pay. Conjuring up an “inflation emergency,” Haney’s diatribe culminated in the assertion that a 40-hour week with time and a half thereafter was “the essence of inflation.” Reluctant to advocate a “disastrous deflation in dollar wages,” he viewed increased output without a wage

increase as the only solution: "all laborers who can do so" had to be "allow[ed] and encourag[ed]...to work longer hours at their regular rate of pay. ... It took over 45 hours a week to win the war.... It will take much more than 40 hours to win the peace."483

The seriousness with which capital was pursuing a rollback of the FLSA was signaled by the forceful advocacy by the president of General Motors, Charles E. Wilson, of the 45-hour week. Delivering a talk entitled, "Can We Win the Peace with the Forty-Hour Week?" to the Cleveland Chamber of Commerce in April 1948, he reproached labor for having "made a 'sacred cow' of the forty-hour week when it was meaningless, when the welfare of the country was at stake." Wilson insisted that he was not "advocating a plan that would reduce the compensation workmen are now receiving for forty-five hours. ... I am not advocating more work for the same pay. I am advocating more pay for more work."484 Since the FLSA's much ballyhooed flexibility already permitted workweeks of any length provided that employers paid time and a half, Wilson's rhetoric made little sense. Lesser capital demanded even more. The National Small Business Men's Association proposed outright repeal of the FLSA.485

While capital was demanding more work, the AFL returned to its Depression-era theme of work-spreading. In January 1949, its Shorter Work-day Committee warned that when the Marshall Plan and rearmament no longer sufficed to "'carry us along,'" it would press for the thirty-hour week.486 By September, the AFL Executive Council reported to the organization's annual convention that a shorter standard work day and week were needed. Viewing the long-term and postwar sweep of U.S. economic development as shaped by a persistent gap between strong productivity increases and lagging (working-class income) resulting in debilitating periodic unemployment, the AFL argued: "'While shorter hours alone cannot perform the full task of the expansion of job opportunities that will be needed in an ever-growing degree, it can make a very important contribution to the achievement of that aim. It is furthermore an entirely worthwhile end in itself, and a historic one for labor.'" 487

The pro-labor Democrats expeditiously held hearings at the end of January and beginning of February 1949 on the administration's bill, H.R. 2033,488 and

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488Amendments to the Fair Labor Standards Act of 1938: Hearings Before the House
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reported out a revised bill, H.R. 3190 (introduced by the chairman of the House Labor Committee, Representative Lesinski) in March. The bill, which was never enacted and failed even to reach the House floor, revealed unions' overoptimism. The committee's point of departure was the conviction that employers had succeeded in frustrating the attainment of the overtime provision's three objectives—shortening the workweek for workers' health, efficiency, and well-being, spreading work, and compensating workers for the burdens of long weeks—"by the use of two devices which have been held by the courts not to violate the present act, although their effect is to deny to an employee the full 50 percent premium for overtime work... This bill would outlaw these devices." The Belo plan was defective in the committee's view because the "fact that the employee is paid time and one-half this [contractually assigned] rate...when he works in excess of the number of hours covered by the guaranty does not...justify failure to pay full time and one-half for each hour after 40, based on the pay to which the employee is entitled when he works only 40 hours."489

The other device, which the Supreme Court upheld in Overnight Motor Transportation Co. v. Missel, had, according to the House Labor Committee report, "been variously described as 'Chinese overtime,' the galloping rate,' or the 'fluctuating workweek.'"490 The name "coolie or Chinese overtime," the president of the Office Employees International Union (AFL) explained to Congress, derived from the fact that the more hours an employee worked during a week, the lower his hourly pay.491 Under this arrangement, workers were paid a fixed straight-time weekly salary regardless of how many hours they worked so that their regular rate, on which the overtime rate was based, decreased as the workweek increased. As the House Labor Committee noted: "The curious result of this method of calculation is that this employee, who would earn $1.25 an hour at straight time if he worked only 40 hours, can average only 78 cents an hour for the entire workweek, including overtime pay, if he works twice as long. It is apparent that the objectives of the act's overtime provisions are defeated by such a scheme."492

The Wage and Hour Administrator, William McComb, attacked such wage payment practices. He testified before the committee that "under such agreements, an employee may be worked for 50, 60, 70, or more hours a week

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without any premium pay being paid for the excess hours.” He urged Congress to correct the situation because the Supreme Court had upheld these plans on the grounds that the legislature had failed to prohibit them.\footnote{Amendments to the Fair Labor Standards Act of 1938: Hearings Before the House Committee on Education and Labor, 81st Cong., 1st Sess. 55 (1949).} The AFL joined the attack on “Chinese overtime, under which salaried employees are systematically deprived of their rightful overtime compensation.” To “correct this injustice,” the AFL proposed that salaried workers’ regular basis be calculated by dividing their weekly salary by no more than 40 hours and their monthly salary by no more than 173 hours.\footnote{Amendments to the Fair Labor Standards Act of 1938: Hearings Before the House Committee on Education and Labor, 81st Cong., 1st Sess. 328-29 (1949) (statement of Walter Mason, national legislative representative, AFL).} The CIO also supported an amendment to remove the “injustice” caused by Belo, which had opened the way to “tricky evasion of the overtime provisions.”\footnote{Amendments to the Fair Labor Standards Act of 1938: Hearings Before the House Committee on Education and Labor, 81st Cong., 1st Sess. 276 (1949) (statement of Irving Levy, general counsel, CIO).}

The committee bill would have adopted the AFL’s proposal by providing that “any salaried employee...employed in excess of forty hours in any workweek shall be paid for each such hour in excess of forty, in addition to his salary for forty hours of work, at a rate not less than one and one-half times the hourly rate obtained by dividing his weekly salary by not more than forty....”\footnote{§ 7(c), in H. Rep. No. 267 at 5. The provision would not have applied to workers paid at least $1.50 per hour pursuant to a collective bargaining agreement.} The proposal, however, was not enacted, and the WHD promulgated an interpretative regulation, sustained by the courts, approving of this practice, which three business school professors later characterized as “for all purposes, negat[ing] the intent of the FLSA.”\footnote{C.F.R. § 778.114 (1998); Condo v. Sysco Corp., 1 F.3d 599 (7th Cir. 1993); Dufrene v. Browning-Ferris, Inc., 2000 U.S. App. Lexis 4271 (5th Cir. Mar. 20, 2000); Christopher Martin, Robert Aalberts, and Lawrence Clark, “The Fair Labor Standards Act and the Fluctuating Workweek Scheme: Competitive Compensation Strategy or Worker Exploitation?” 44 Labor L.J. 92-100 at 100 (Feb. 1993) (quote).}

The original House and Senate administration omnibus FLSA revision bills contained no amendment dealing with Belo plans.\footnote{H.R. 2033, 81st Cong., 1st Sess. (Jan. 31, 1949) (introduced by Rep. Lesinski); S. 653, 81st Cong., 1st Sess. (Jan. 27, 1949) (introduced by Sen. Thomas).} But the next version of the Democratic House bill would have authorized Belo plans if they paid a regular rate of $1.50 an hour—that is, twice the proposed minimum wage of 75 cents.\footnote{H.R. 3190, § 7(c), 81st Cong., 1st Sess. (Mar. 3, 1949) (introduced by Rep. Lesinski).} The committee would have permitted the Labor Secretary to authorize “bona fide
agreements for a guaranteed weekly wage in limited circumstances where the committee believes that collective bargaining and the payment of a genuine and sufficiently high rate of pay (at least $1.50 an hour) will obviate evasion and circumvention of the overtime provisions."\textsuperscript{500} Consequently, the bill approved by the House Labor Committee was intended to prevent the use of these devices, which the Office Employees International Union—its part of the free enterprise team—testified that Bank of America, the country’s largest, still used.\textsuperscript{501} Pro-business legislators derided this move as designed to make Belo-type wage plans “virtually unusable.”\textsuperscript{502}

As a result of complicated parliamentary procedures, a bill sponsored by a coalition of Republicans and Southern Democrats prevailed.\textsuperscript{503} As enacted, the 1949 FLSA amendments wrote the Belo plan directly into the FLSA as an approved form of overtime payment. Under the new section it is lawful for an employer to employ an employee more than 40 hours a week pursuant to a “bona fide individual contract” or collective bargaining agreement, if the employee’s duties necessitate irregular hours, and the contract specifies a regular rate not less than the statutory minimum wage and compensation of not less than time and a half that rate for all hours beyond 40 and “provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.”\textsuperscript{504} As the DOL notes in its regulations, such an approved guaranteed wage plan entitles an employer to work employees overtime “without increasing the cost to the employer, which he would otherwise incur under the Act.”\textsuperscript{505}

At least one state took notice: the Alaska Department of Labor issued a regulation that expressly makes the Belo plan’s guaranteed weekly pay for variable hours, as approved by the FLSA, one of the “not acceptable methods of complying” with that state’s overtime law.\textsuperscript{506} In upholding the validity of the regulation, the Alaska Supreme Court agreed with the state’s argument that the result of the Belo plan—that a worker’s average hourly wage decreases as his overtime hours rise—“contravenes the policies of requiring increased compensation and promoting the spreading of employment.”\textsuperscript{507}

\textsuperscript{500}H. Rep. No. 267, 81st Cong., 1st Sess. at 19.

\textsuperscript{501}3 Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938: Hearings Before Subcommittee No. 4 of the House Committee on Education and Labor at 1577, 1575.

\textsuperscript{502}95 Cong. Rec. at 11892, A5233.

\textsuperscript{503}BNA, The New Wage and Hour Law 5-10 (1949).

\textsuperscript{504}Fair Labor Standards Amendments of 1949, Pub. L. No. 393, § 7(e), 63 Stat. 910, 914 (codified at 29 U.S.C. § 7(f)).

\textsuperscript{505}29 CFR § 778.404 (1999).


\textsuperscript{507}Dresser Industries, Inc., v. Alaska Dept. of Labor, 633 P.2d 998, 1006 (Alaska
10. Unsuccessful Efforts to Raise the Overtime Premium or Lower the Overtime Threshold: The 1960s and 1970s

"In the long run," warns Inland Steel Vice President William Caples, "anything that becomes expensive, we eliminate—we engineer it out." The risk is that such [increased overtime] penalties might provide the impetus for new breakthroughs in automation that would make unemployment even worse.508

Whether the premium is 200 or 500 percent does not make more people with the necessary abilities available for employment.509

In spite of these legislative cutbacks, by the early 1950s, the business press began taking a positive view of "Premium Pay Fattening Take-Home Wage,"510 which had "helped to prop up consumer buying for a long time." Indeed, as firms cut workweeks "back to the peacetime standard of 40 hours" after the Korean war, the accompanying decline in income not only presented workers with "a new problem: how to live without overtime pay in the manner to which they have become accustomed," but also became "a business factor to be watched."511 By the mid-1960s, it was reported that in "many companies overtime has been so much prized by workers that it has had to be allocated by some rationing device such as seniority."512

If the overtime provision was originally designed as a work-sharing mechanism to combat unemployment, as the social wage rose from 5 percent in 1938 to 20, 30, and 40 percent of payroll costs in the postwar decades,513 the 50


percent premium became less effective in deterring firms from relying on overworking current employees in preference to hiring additional ones. (However, the 50 percent premium was and remains higher than the rates established by law or collective agreements in most European countries, which rely more heavily on mandatory norms than financial disincentives to prohibit overwork.)

The diminished impact of the 50 percent overtime penalty in the wake of the increasing nonwage share of the social wage is illustrated by the steel industry. In 1940, when the hourly wage was 84 cents and social wage benefits only 7 cents, the overtime premium of $1.26 strongly encouraged steel companies to hire new workers at 91 cents per hour. By 1993, when the hourly wage had risen to $15.78, overtime wages of $23.67 served to deter firms from hiring new permanent workers at an hourly cost (including benefits) of $31.73. Despite the $5 an hour overtime penalty that the United Steelworkers negotiated with employers to be paid into a career development fund for every hour in excess of 56 per week, overtime accounted for 15 to 20 percent of all working hours in 1994. Even an employer adamantly opposed to the 1977 California anti-mandatory overtime bill conceded that with weekly fixed costs of $97.12 per employee, a straight-time hourly wage rate of $6.20, and overtime of $9.30, “it is cheaper for us to work a regular employee 30 overtime hours a week than it is to hire an additional employee to do that work.” Yet others insisted that at union time and a half and double-time rates, “overtime is largely self-policing.”


514 Hours of Work: Hearings Before the Select Subcommittee on Labor of the House Committee on Education and Labor, 88th Cong., 1st Sess., Pt. 1, tab. 31 at 95 (1963); see also below section 13. In the People’s Republic of China, the overtime premium amounts to 300 percent of regular wages when workers are required to work on statutory holidays such as Spring Festival. Láodòngfá [Labor Law], § 44 (July 5, 1994); Gòngmín láodòng quányì bāohù zhì shì shòucè 56-67 (Jing Táo and Zhèng-xiāo Yuán, 1999); “Chūnjìe jiābān gōngzǐ yǒu biáoqǔ,” Yangze Wānbào, Feb. 19, 2000, at C4.


5162 [California] Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime 565 (testimony of Dale Zechar, dir., ind. rels. Davis-Walker Corp.).

5171 Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime at 260 (testimony of James Watson, vice pres., Hunt-Wesson Foods). According to Watson, in the food processing industry fringe benefit costs such
Periodically unions' concern with the sharp increases in unemployment has given rise to new drives for a shorter workweek. Yet employers in the United States and elsewhere have long suspected that shorter-hours campaigns were "merely a pretense for raising wages by applying overtime rates earlier."\(^{518}\) As long ago as 1786, employers charged that London bookbinders' willingness to work overtime contradicted their claims of fatigue and revealed that behind the demand for reduced hours lay a desire for greater income.\(^{519}\) Perhaps the most startling post-World War II example of what a union with a strong labor market position can achieve in terms of short hours cum overtime was Local 3 of the International Brotherhood of Electrical Workers in New York City, whose members in 1961 were working under a 30-hour per week contract not including five hours of guaranteed overtime, when they demanded a 20-hour week as part of a spread-the-work campaign to ward off the labor-saving consequences of the introduction of automatic machinery. Although the union leadership denied that it was fighting for overtime pay, some electricians admitted that if the standard daily work schedule fell to four hours, they would still work seven hours. Ironically, the electricians and union officials themselves feared that, since it was "'only human nature'" to take a second job just to keep occupied,\(^{520}\) the intensified job competition caused by such moonlighting might require government intervention "'protecting people from these moonlighters'" and to "'restrict men from looking for second and third jobs.'"\(^{521}\)

Skeptics in the 1950s and 1960s could hardly be reassured by the best-known example of short hours—the 36-hour week of unionized rubber workers in Akron, of whom 10 to 20 percent held a second full-time job and another 30 to 40 percent a part-time job.\(^{522}\) Because moonlighting by short-week workers

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Note: The text contains references to various sources, which are not fully transcribed. For a complete citation, please refer to the original document.
undermined not only other workers’ labor market position, but also the legitimacy of the campaign for reduced working time, the AFL-CIO quickly asserted that the issue had been “grossly exaggerated. The basic reason for dual jobholding stems from a desire for added income and—this is most important—it is hardly at all related to a reduction in working hours without a cut in weekly pay.” And the admission by Harry Bridges, president of the International Longshoremen’s and Warehousemen’s Union and arguably the country’s most prominent left-wing union official, to the Wall Street Journal that “large numbers of our members, especially younger men who’ve accustomed themselves to a six or even seven-day week” and the fat paychecks it brings ‘would certainly disagree with’” Bridges’ preference to raise overtime rates to induce employers to hire more workers, cast doubt on grassroots support for the AFL-CIO’s campaign.

The basis for some automobile workers’ resistance to the UAW’s efforts to reduce overtime was not difficult to grasp: loss of premium wages was “actually worse than a layoff.” Whereas the union contract secured workers 95 percent of their take-home pay for up to a year—during which they were “free to loaf or pickup temporary work”—eliminating overtime could bring about wage reductions of as much as 50 percent for those working 70 hours a week and being

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525 Firms Say Double Time Pay for Extra Hours Wouldn’t Boost Hiring,” Wall St. J., Jan. 23, 1964, at 1, col. 6, at 16, col. 5. A similar split between union leaders and members arose two years later when many workers agreed to employers’ requests to give up some of their vacation for double-time wages. Unions opposed such arrangements because they feared that employers would resist demands for longer vacations in the future on the grounds that workers did not really want all the vacation they already had; in addition, since long vacations, like overtime premiums, were intended to spread work, trading them in for overtime was self-defeating. Frederick Klein, “Firms Offer Employees [sic] Double Wages If They Give Up Some Vacation,” Wall St. J., May 24, 1966, at 1, col. 6, at 14, col. 2.
paid double time on Sundays and triple time on contractual holidays.\textsuperscript{526}

Although none of the shorter-hours campaigns bore fruit, the 1963-65 push during the Kennedy-Johnson administrations came closest to marshalling executive and congressional support. Without any backing from President Kennedy, who saw a reduction in worktime as a distant goal, several bills were filed in the House in early 1963 to lower to 32 or 35 hours the threshold at which the overtime premium was triggered.\textsuperscript{527} Another bill would have lifted the overtime premium to 100 percent in industries "of major economic importance," including mining, communications, public utilities, wholesale trade, construction, and manufacturing.\textsuperscript{528} The House Select Subcommittee on Labor held more than two weeks of hearings on the various bills.\textsuperscript{529} While \textit{Business Week} correctly predicted that the debate over a short work week would be the merest "chin music,"\textsuperscript{530} unions welcomed the initiative, but were skeptical of the efficacy of the proposed overtime penalty: after all, the UAW Skilled Trade Conference had passed a resolution in December 1962 calling for double-time for the first two hours, triple-time thereafter, double-time for Saturday work, triple-time for Sunday work, and triple-time plus holiday pay on holidays.\textsuperscript{531}

The drive to update the overtime provision of the FLSA received strong support from a BLS study conducted in May and published in August 1963. The timing was hardly coincidental as BLS commissioner Ewan Clague had testified before Congress in June on the "seeming paradox" of the coexistence of large volumes of overtime and unemployment.\textsuperscript{532} The unprecedented study revealed that only 4.5 million or 29.4 percent of 15.2 million wage and salary workers working 41 hours or more at one job reported receiving premium pay for overtime. Interestingly, across the board, the longer the hours worked, the lower the proportion of workers reporting premium pay—even when "exempt" professional, technical, managerial, and sales workers were excluded. In construction fully 61 percent of these "nonexempt" workers failed to receive


\textsuperscript{530}Overtime in Midst of Job Famine," \textit{Bus. Wk.}, Nov. 2, 1963, at 54.

\textsuperscript{531}"Unions Mount Attack on Overtime," \textit{Bus. Wk.}, Jan. 26, 1963, at 64.

\textsuperscript{532}James Blackwood and Carol Kalish, "Long Hours and Premium Pay," 10 (2) \textit{Employment and Earnings} iii (Aug. 1963).
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premium pay as did 26.4 percent of their manufacturing counterparts. Viewed occupationally, 48.8 percent of all blue-collar workers, including 60.4 percent of nonfarm laborers were not paid for their overtime hours. The rather lengthy article that The New York Times devoted to the survey quoted DOL officials as “surprised” by the findings, which they conceded could not be fully explained by exemptions from the FLSA, although they declined to conclude that the act “was being violated on any widespread basis” without further information.

By the time the hearings were over in December 1963, a new phase had begun with the intervention of President Johnson. As 1964 opened, Secretary of Labor Willard Wirtz floated the notion to the press that raising the overtime premium might be a partial solution to the problem of unemployment since the volume of overtime equated to almost a million full-time jobs. In his State of the Union address to Congress five days later, President Johnson bluntly rejected the 35-hour week as a way of reducing unemployment (then numbering 4 million) because it would increase costs, lower competitiveness, and share rather than create jobs. But he was “equally opposed to the 45- or 50-hour week in those industries where consistently excessive use of overtime causes increased unemployment.” He therefore recommended legislation creating a tripartite industry committee to determine in which industries an increased penalty overtime rate would spur job creation without unduly increasing costs. Modest as the recommendation was, The New York Times called it “by far the most radical” of Johnson’s anti-poverty proposals. A few days later in his Economic Report, Johnson repeated his opposition to “forcing the standard work week down to 35 hours.” Then on January 31, identical administration bills were introduced in both Houses of Congress mandating double overtime for hours beyond the number (but not fewer than 40) specified by the tripartite committees in industries affected by substantial and persistent overtime. The enhanced penalty did not apply if the overtime resulted from an extraordinary emergency or “usually compelling need....”

Despite massive amounts of overtime at automobile plants in 1963 and unions’ loudly declared intention to make excessive overtime a major point in

533Blackwood and Kalish, “Long Hours and Premium Pay,” tab. 5 and 3 at x, viii.
534“Overtime Is Paid to Less Than 33%,” N.Y. Times, Aug. 16, 1963, at 25, col. 5. The DOL apparently never did a follow-up study to generate the requisite data.
537Eileen Shanahan, “President Seeks a Cut in Overtime,” N.Y. Times, Jan. 9, 1964, at 1, col. 7.
1964 collective bargaining, the business-oriented press reported that "[u]ntil President Johnson put overtime in the headlines, many people were not aware that it was developing into an issue." And despite Johnson's rejection of labor's demands for a lower weekly threshold for overtime, employers let it be known that they intensely resented Johnson's indirect support for the UAW's and other unions' demands for double overtime in upcoming negotiations. More threatening to the automobile manufacturers was a UAW bargaining proposal giving workers the option not to work overtime. As one GM production worker explained to *U.S. News & World Report*: "If they left it up to us...they'd never get enough guys to get the line moving. As it is now, they can barely get enough on Saturday nights."

Other employers such as David Rockefeller, unsurprisingly, opposed the whole proposal. The president of the NAM, who told a Congressman that "[i]f your daddy wanted to work 72 hours I should not deny him," objected to any statutory overtime premium, though he was constrained to admit that "[o]ne and half times is what we have learned to live with." During 1964 the House Labor Committee held three weeks of hearings, which triggered intense national debate, on which the press extensively reported.

The UAW, which stood at the forefront of the campaign to modernize the "antiquated" overtime penalty deterrent by increasing it to 100 percent, also insisted on working class solidarity as the driving force behind it. (Ironically,)

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546 For an argument that in the 1950s and 1960s Walter Reuther, the UAW president, successfully deflected rank and file calls for shorter hours (specifically a 30-hour week
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30 years later, modernizing the "[h]opelessly outdated" depression-era FLSA for "today's fast-paced, information-based society" became the watchword of employers seeking not to increase the overtime penalty, but to eliminate it altogether either through a 160-hour four-week pay period or time-off. Leonard Woodcock, UAW vice president and later president, testified about his own personal experience of working at the nadir of the Great Depression in 1933 when, as a result of the implementation of the National Recovery Act code in the automobile industry, he saw his weekly hours drop from 84 to 40, while his hourly wage rose from 45 to 60 cents: "Now it is true my total wage was sharply reduced, but I certainly had no feeling of compunction about that because of the fact that we put on in that plant some 200 additional workers." He also reported to the House Labor Committee how surprised and impressed he had been by a recent survey revealing "the substantial feeling of shame that our members had at being forced to work overtime when their neighbors were out of work."  

Woodcock's insistence that "the forcing of overtime work is immoral" provoked one Congressman to engage him in Socratic dialog concerning the complex and ticklish relationship between working-class morality and individual workers' self-interest in still larger overtime premiums:

MR. FRELINGHUYSSEN. Would you mind a brief interruption...with respect to the immorality of overtime? If it is immoral to work overtime, if there are those unemployed who would be qualified to work, how does increasing the penalty make it moral or is it still immoral even though the penalty is doubled? I am not sure I follow your reasoning. If it is immoral I should think we might forbid it rather than increasing the penalty.

MR. WOODCOCK. The purpose of the penalty is to be a deterrent toward the working of overtime.

MR. FRELINGHUYSSEN. But it still is immoral, is that right?

MR. WOODCOCK. It is immoral to require some Americans to work against their will beyond 40 hours when their neighbors and friends are totally without work and in want.

MR. FRELINGHUYSSEN. Is it immoral if they want to work overtime?

MR. WOODCOCK. The record shows they do not want to work overtime when others are out of work.

MR. FRELINGHUYSSEN. If it is immoral might we not consider forbidding it?

MR. WOODCOCK. I don't see how you could put industry in such a straitjacket. The testimony has been—and we concede some overtime on occasion is necessary and flat prohibition would put a straitjacket on—would be entirely impractical. This is why we

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with 40 hours' pay), see Edsforth, "Why Automation Didn't Shorten the Work Week" at 160-75.


need an economic deterrent that will insure that the overtime that is worked is actually necessary and unavoidable, but wipe out the great excess of overtime which is unnecessary.549

A suspicion of evasiveness seemed to cling to Woodcock’s responses. The failure of nerve to express support for the venerable model of a strict eight-hour day or 40-hour week (with exceptions for emergencies) and the surprising sympathy with employers’ operational imperatives and support for a free-market financial incentive rather than use of the state’s police powers left the impression that the UAW could not afford to deprive even some of the country’s highest paid manufacturing workers of access to more work at yet higher wages. Much later in his testimony Woodcock was able to dispel that impression (objectively if not intentionally) by reminding Senator Taft that the UAW had long been on record as “willing to have the extra penalty deterrent, the difference between the time and a half and double time...used for other purposes.” Woodcock refused, however, to include relief of employers’ unemployment compensation payments among those purposes.550 The UAW’s credibility was, however, enhanced by a resolution that it passed at its nineteenth constitutional convention in 1964 condemning moonlighting: “As it is immoral for an employer to deny job opportunities to unemployed workers by scheduling avoidable overtime work, so it is equally immoral in a time of high unemployment for a worker who already has a full-time job to deny an unemployed worker his right to employment by working at a second job....”551

Automobile management also sought to hoist supporters of the monopurposive theory of the overtime penalty with their own petard. Ford Motor Company vice president Theodore Yntema asked why, if proponents assert that its purpose is not to compensate workers, but to discourage employers from offering overtime,552 workers should receive the premium payment:


550Overtime Penalty Pay Act of 1964: Hearings Held Jointly Before the General Subcommittee on Labor and Select Subcommittee on Labor of the House Committee on Education and Labor, Pt. 2 at 834. Woodcock was referring to collective bargaining demands, but seemed amenable to extending the principle to statutory regulation.


552For example, Rep. Dent stated that “[o]vertime pay was never intended to be a bonus for the worker on the job....” Overtime Penalty Pay Act of 1964: Hearings Held Jointly Before the General Subcommittee on Labor and Select Subcommittee on Labor of the House Committee on Education and Labor, Pt. 1 at 27.
Given the alleged objectives and premises of the bill, it was really illogical to frame a proposal making overtime less attractive to business, but at the same time making it more attractive to labor. A logical proposal would make overtime less attractive to both business and labor. This could be done by requiring that penalty pay for overtime should not be given to the worker, but should be used for the benefit of the unemployed.

While we do not advocate such a proposal, it would coincide precisely with the stated objectives of the administration.... However, it would not provide the windfall that H.R. 9802 does for the workers continuing to be employed overtime at the higher penalty rate. I suspect there would be little enthusiasm for any proposal from which the windfall was missing.\textsuperscript{553}

Representative O’Hara, one of the chief sponsors of the overtime initiative in the 1960s, responded that Yntema had a “terrific idea... that had not occurred to me. ... But, by George, there is not any good reason why the extra half should go to the worker. As a matter of fact, there might be some good reasons why it should not. [W]hen the time arrives, I am going to revive the Yntema amendment to H.R. 9082 to pay that extra half...[to] some sort of fund to provide for training or retraining of workers....”\textsuperscript{554}

If the only purpose of the overtime penalty were in fact to encourage employers to absorb the unemployed rather than to overwork the already employed, Yntema’s ironic logic would be unexceptionable. Employers had demonstrated its validity—if not its practical effectiveness—during World War II when they deployed it to contest the continued compulsory payment of overtime premiums when there were no more unemployed for firms to absorb. Oddly, its force failed to prompt supporters of an increase in the penalty rate in the 1960s to admit, even rhetorically, that the premium had also always served to guarantee workers’ freedom from (alienated) labor, to preserve their health, and to compensate them for the shortening of their working lives. Such an argument would have helped deflate employers’ claim that the amendment was merely a disingenuous covert attempt to raise wages, but perhaps its evocation of Marxist class struggle was too high a rhetorical price to pay. Unions’ failure to develop this perspective was so much the more puzzling since such a taint did not deter Malcolm Denise, vice president in charge of labor relations at Ford Motor


\textsuperscript{554}\textit{Overtime Penalty Pay Act of 1964: Hearings Held Jointly Before the General Subcommittee on Labor and Select Subcommittee on Labor of the House Committee on Education and Labor}, Pt. 1 at 294. Intriguingly, an economic stabilization and unemployment compensation plan advocated by the president of the General Motors Holding Corp., Albert Deane, during the Great Depression would have required employers to pay double overtime, but the worker would have received only time and a half, with the remainder paid as a tax to a national employment fund. See Hunnicutt, \textit{Work Without End} at 232-35.
Company, from supplying the missing historical testimony: "I do not think that it can be legitimately said that the sole purpose of the Fair Labor Standards Act of 1938 was to spread employment. The drive for shorter working hours in this country has a long history. Its history was concerned with the health and welfare of people and their working and living lives." Since the labor movement in the nineteenth and early twentieth century had pressed for an absolute limit of eight hours of work per day and not for overtime premiums, the AFL-CIO's newfound preference for flexible financial incentives may have caused it to suppress the reality of its traditions.

After the bills failed to be enacted, Representative O'Hara and Senator McNamara, who had introduced them, introduced stripped down versions in 1965, which simply raised the overtime premium across the board to 100 percent. The Johnson administration then supported a new imitative, which took into account the uniform opposition that "virtually all the witnesses" had directed at the previous bills. Armed with new data from 1964 showing that 3.5 million employees worked five or more hours of overtime weekly for a total of 19.6 million hours, and that much of the overtime was being performed on a "fairly standard recurring basis...in occupations in which there is presently a surplus of manpower" (that is, a higher proportion of low-paid workers in almost all industries worked overtime than of higher-paid workers), Secretary of Labor Wirtz, "acting...from a kind of hardheaded idealism," proposed a two-tiered overtime premium. S. 1986 and H.R. 8259 would have phased in over three years a higher 100-percent premium applying to hours above 48, 47, 46, and finally 45 hours, below which the old 50-percent penalty would have applied. The impact of the double-time would have been further softened by a provision permitting employers to pay the lower rate when the overtime work (beyond 45 hours) was "required only by reason of a period of extraordinary emergency or unusually compelling need" as defined by the Secretary of Labor.

Wirtz was even receptive to liberal Republican Senator Jacob Javits's suggestion—which would have tested unions' commitment to the underlying principle of work sharing—that some administrative machinery be created exempting employers from the higher penalty rate if they could prove that its

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imposition would increase costs without leading to increased hiring. Numerous firms and industries, such as General Electric and the telephone, paper and rubber industries, inundated the congressional labor committees with evidence purporting to prove precisely such futility. Both the House and Senate labor committees heard extensive testimony in 1965, much of which replicated what they had heard in 1963 and 1964. The threat that the amendment might be adopted was serious enough to prompt U.S. News & World Report to declare (hyperbolically as it turned out): "The day may not be too far away when employers will be required by law to pay double-time rates for overtime work. But before that day comes...the issue is sure to bring on one of the biggest fights in the history of labor legislation." Many employers sought to portray the move for a higher overtime penalty both as a transparent grab for higher wages by well-paid union members and a singularly counterproductive mechanism for reducing unemployment. For example, the National Electrical Contractors Association (NECA), long a staunch advocate of collective bargaining, told the House Labor Committee that in the electrical contracting industry and generally in construction it was "a well-known fact that...overtime jobs attract skilled workers. Once these workers are employed on the job, they wish to work as much overtime as is possible and at the same time restrict the employer from employing additional workmen." Indeed, the association’s public relations director testified that an electrician’s double-time hourly wage of $9.42 "would seriously be personally attractive enough to me to make me want to enter the industry tomorrow, on the union side." From the NECA’s perspective, the enhanced overtime penalty was doomed to failure because it prompted responses from labor and capital diametrically opposed to those presumed by the underlying policy: instead of showing solidarity by sharing work with their unemployed brethren, employed craftsmen would monopolize it, while firms, instead of hiring additional workers, would automate any labor task that could lent itself to automation. Other industries, such as petroleum


refining (with above-average benefit costs), offered data to undermine the claim that the 50-percent penalty rate did not suffice to give them an incentive to prefer hiring additional workers to overtime.563

The industry widely viewed as the chief abuser of overtime went to great pains in its testimony to undermine the economic underpinnings of the demand for a higher penalty by emphasizing "why overtime is not readily convertible into more jobs."564 First, however, the automobile manufacturing firms stressed that the three-year agreement they had just entered into with the UAW had been preceded by extensive negotiations over the union's demand for double- and triple-time, which it finally abandoned in favor of other demands, such as inducements to early retirement and more holidays, vacation, and relief time, designed to spread employment. The auto firms were not amused that the UAW was now seeking to achieve through lobbying what it had lacked the power to gain through negotiations.565 The main burden of the Automobile Manufacturers Association's testimony was the assertion that the vast majority of overtime work resulted from emergencies, retooling and model changeovers, cyclical and seasonal production patterns, and changes in customer preferences, which were "[q]uite obviously...inherent rigidities...that cannot be legislated out of existence." Furthermore, in many instances the overtime was being performed by skilled craftsmen, of whom the firms complained of suffering a serious shortage. Moreover, that a considerable proportion of overtime work was already being compensated at 100 percent under the UAW contract demonstrated that "there is no practical alternative regardless of how high the penalty."566 Indeed, John Bugas, a Ford vice president and former head of the FBI's office in Detroit who had helped make Ford's primitive red-baiting practices more sophisticated after World War II,567 testified that, despite the focus of congressional attention on the allegedly increasing impotence of the overtime penalty to induce employers to hire additional workers in the face of the expanding quasi-fixed


benefits, in fifteen years of attending monthly scheduling meetings, he could not recall a single instance in which Ford had opted for overtime because it was cheaper: "We make the decision on overtime on completely different bases." And finally, Bugas claimed on behalf of the auto manufacturing employers that they "would run into tremendous resistance" if they tried to reduce overtime in favor of additional hiring because the "vast majority—almost an infinitesimal minority do not like overtime, but the vast majority likes overtime. ... In tribute to the American worker he is a pretty industrious character if he gets paid for it."

To be sure, the UAW offered rebuttals of all these arguments in its own written submissions. Its counter-propaganda was most effective in establishing that most overtime was systematic and long-term and had nothing to do with emergencies, cyclicity, or shortages of skilled craftsmen, and least plausible in distancing itself from the overtime system and denying complicity by its own members in its survival. But because the congressional committees, as is almost always the case in such hearings, failed to arrange for direct confrontation between these diametrically opposed points of view, and, many of the underlying data were either uniquely within the firms’ possession or interpretable only by reference to arcane details of collective bargaining agreement, the dispute remained practically unresolvable.

Following the lengthy hearings on the overtime issue, Congress decided not to enact the proposals. Insisting that their absence reflected not “a negative view towards their advisability,” but a “prudent, cautious approach to an important proposal that deserves further serious consideration,” Congress retained only a slight trace in the landmark FLSA amendments of 1966 of the fervor that had once attached to the issue. It instructed the Secretary of Labor to submit the following year a “complete study of present practices dealing with overtime payments for work in excess of forty hours per week and the extent to which such overtime work impedes the creation of new job opportunities in American industry.”

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571 Congressional hearings were not always aseptic. In the late nineteenth and early twentieth centuries high-ranking representatives of labor and capital frequently cross-examined one another.
generated by the overtime penalty, the legislature expected the DOL’s study of excessive hours to enable Congress to judge whether a higher penalty rate would “curtail long workweeks and create additional jobs.” The DOL’s agnosticism served to maintain the status quo. Despite the evidence that the overtime penalty had lost much of its deterrent value, the Secretary of Labor found it “difficult...to develop with any degree of certainty any reliable estimate of the number of jobs which could be created if the original effectiveness were restored. More important, it is difficult to insure that there would not be a temporary reduction in total productive potential during the transition period if a stricter standard were applied.” Consequently Secretary Wirtz proposed no legislative changes. And as the Vietnam war drove the unemployment rate (3.8, 3.6, and 3.5 percent in 1967-69) to its lowest rate since the Korean war, unemployment and its possible exacerbation by overtime work drifted out of public consciousness and discourse—until the next depression phase of the business cycle.

In the midst of the overtime hearings, the Wall Street Journal devoted a long front page article to detailing employers’ denials that the proposed double time would spread employment. While some firms conceded that even double time would be cheaper than “handing out fringe benefits new workers would have to be given,” others asserted that double time might even motivate them to lay workers off. A construction association went so far as to doubt that even triple time would preclude the continued use of overtime. The only hint that human volition might be able to prevail over the compulsions of capital valorization came from a manager who stated that he would react to mandatory double time not by hiring additional workers, but by stretching out schedules and making customers wait longer. Why then the world of widget production could not also be slowed down out of deference to workers’s desire for more time away from alienated labor, was not mentioned.

Yet the very next year, in mid-1965, the Wall Street Journal reported that “many factory managers now believe the regular overtime they have long scheduled to keep production ahead of swelling orders is both costly and inefficient. Having discovered that overtime “is a heavy cost burden...breeds absenteeism and hurts production efficiency as workers tire,” “bosses” suddenly found it possible to implement measures that employers had told the newspaper in 1964 were impossible. They included different scheduling methods, upgrading

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unskilled workers, hiring new workers, expanding capacity, and buying labor-saving machinery. Moreover, all these efforts "to wash out the premium-time problem...would surely be much intensified if Congress" enacted the double-time amendment.578 Two years later yet another front-page Journal piece chronicled the proliferation of overtime cutbacks motivated by the perception that fatigue and absenteeism were wasteful and inefficient.579

Renewed union interest in amending the overtime provision was in fact sparked by the next expansion of the reserve army of the unemployed during the recession of 1974-75,580 which found expression in a congressional bill in the late 1970s sponsored by Representative Conyers from Detroit. The bill (H.R. 11784) that he introduced on March 22, 1978, sought to restore the work-spreading impact of the FLSA by normalizing the workweek at 37.5 hours by 1980 and 35 hours by 1982 and penalizing overtime at 100 rather than 50 percent. Of perhaps greater significance was the bill's ban on mandatory overtime: "No employer shall knowingly permit any employee to perform work for which the employee is entitled under this section to receive compensation at the rate of pay applicable for overtime employment unless the employee gives his or her consent to perform such work." To discourage employers from unlawfully compelling workers to work overtime, Conyers inserted a liquidated damages provision making employers liable for an amount equal to three times the regular rate at which the workers were employed.581 To anticipate charges that the bill would place an straitjacket on enterprise, the bill also authorized the Secretary of Labor to issue regulations to permit such exceptions to the ban on mandatory overtime "as may be necessary to deal with emergency situations (as determined by such Secretary) in which the production in an establishment would be severely jeopardized if no such exceptions existed."582

Without explaining why it was not feasible or desirable to prevent workers from undermining their own labor standards by working 60 hours a week while millions were unemployed, Conyers himself acknowledged that to achieve the bill's objective—to dampen employers' tendency during the recession and early recovery phases of the business cycle—it was necessary to apply sanctions against employers because "[n]o one wishes to curb an individual's choice of how


582 H.R. 11784, § 3(a)(10).
much and for whom he or she works." Conyers’ pragmatism contrasted sharply with the startling proposal that the Teamsters president, James Hoffa, had made to Congress 15 years earlier. He had insisted that reducing the workweek or work year would not significantly redistribute work “unless there is a penalty imposed on moonlighting in the form of double time payments by the first and second employer after 32 hours or 1,600 hours per year.” Hoffa did not bother to explain either how an employer would know whether an employee simultaneously worked elsewhere or why it would not be more efficacious to penalize moonlighting by penalizing moonlighters directly rather than offering them further incentives in the form of double overtime. A rare note of candor in this context had been sounded in 1965 by Labor Secretary Wirtz, who conceded that the overtime premium “has always been realistically and analytically a proper figure only in terms of employer cost, not in terms of employee compensation.”

Three weeks later Conyers participated in a conference in Dearborn, Michigan, called by the All Unions Committee to Shorten the Work Week. Dissatisfied with longer vacations and more holidays and personal days as a means of spreading work, 700 union officials from 25 unions, led by UAW members, supported Conyers’ bill to reduce the standard workweek to 35 hours by increasing the overtime penalty to 100 percent. What The New York Times called the “less-work ethic” was unacceptable to management, especially since the All Unions Committee proposal envisioned no pay cut. As one industrial relations manager observed: “I don’t mind paying a higher wage if I’m getting productivity for it, but we’re standing strongly against this time not worked.” This adamance apparently impressed some AFL-CIO officials such as UAW president Douglas Fraser, who told the conference that the history of the American labor movement suggested that picket lines and not Congress would be the source of a shorter workweek. What Fraser failed to acknowledge was that in an socioeconomic as balkanized and labor markets as heterogeneous as

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those of the United States, reliance on unions' individual strength in preference
to society-wide norms imposed on the employing and employed classes would
merely widen the gap between the organized and atomized strata. The
consequence would be various types of paid time-off, for example, for UAW
workers that low-paid nonunion workers could scarcely imagine.

After Congress took no action on Conyers' bill in the 95th Congress, he
reintroduced it essentially unchanged on February 1, 1979 as H.R. 1784 (the
times at which the reduced workweeks became effective were moved back one
year).\footnote{588} He again emphasized that the 50 percent overtime penalty had lost its
effectiveness in encouraging employers to hire additional workers.\footnote{589}

The Labor Standards Subcommittee of the House Education and Labor
Committee held three days of hearings in October 1979, but no further
congressional action was taken. (When Conyers reintroduced the bill in 1985,
this time proposing to phase in a 32-hour workweek over eight years, it prompted
little resonance.)\footnote{590} More than a grain of truth lay in employers' later claims that
"[e]ven when the Democrats controlled the House and the Senate and the White
House, the issue [forced overtime] was never even on their radar screen."\footnote{591}

The testimony at the 1979 congressional hearings was nevertheless
enlightening. The UAW representative offered a friendly amendment to the bill
that would have required employers to pay the entire increase in the overtime
penalty as a tax into the Unemployment Insurance fund: "Besides the virtue of
reducing the scheduling of overtime by employers without increasing its
desirability to workers, such a procedure would also explicitly link the problems
of overtime and unemployment. It would...make those employers whose actions
increase joblessness bear a disproportionate share of the cost of maintaining the
unemployed."\footnote{592} The UAW and employers had pointed to the rationality of such
a suggestion during the hearings in the 1960s, but they had not highlighted its
effectiveness in making the connection transparent.

Employers were very sensitive to the bill's deprivation of their power to force
employees to work overtime. While the NAM tersely charged that the provision

\footnote{588}{H.R. 1784, 96th Cong., 1st Sess. (1979).}
\footnote{589}{125 Cong. Rec. 7609 (1979).}
\footnote{590}{H.R. 2933, 99th Cong., 1st Sess. (1985).}
\footnote{591}{Kevin Galvin, "Some Workers Protest Rise in Forced Overtime," Chattanooga Free
Commerce vice president).}
\footnote{592}{To Revise the Overtime Compensation Requirements of the Fair Labor Standards
Act of 1938: Hearings Before the Subcommittee on Labor Standards of the House
Committee on Education and Labor, 96th Cong., 1st Sess. 43 (1980) (statement of Ken
Morris, member, UAW International Exec. Bd.).}
would "inhibit operations and scheduling," the representative of the Chamber of Commerce of the United States, its deputy chief economist, offered arguments that were both mutually inconsistent and unprecedented. First, Robert Landry asserted that congressional conversion of mandatory into voluntary overtime would be an "intrusion...into the system of individual agreements between the nearly 80 percent of the work force that is not organized and their employers." According to this logic of "individual agreements" between large corporations and its individual employees, it is puzzling that the Chamber chose not to reject the label "mandatory" altogether. Instead, Landry went on to charge that Congress would merely create antagonisms among workers by enabling one to hold an entire factory hostage: "Placing a voluntary overtime clause in the law means that one worker by refusing overtime may deprive perhaps 100 persons of overtime and the extra income that they desire if they are involved in an assembly-line operation where each person is essential to the task."

The representative of 35 of the country's largest food and hotel companies seemed almost incensed over ignorant congressional meddling in his members' prerogatives: "Who knows when a busload of hungry people will pull into one of our restaurants unannounced? We are not going to turn them away. At those times, our staff must remain on the job, even though they might have worked more than 8 hours on that particular day. ... Do we have to obtain that person's permission to conduct our business?" Bruce Cotton, the president of the Food Service and Lodging Institute, not only found it part of the natural order of things that consumers' purchasing power imperiously overrode workers' conviction that the restaurant's posted hours should be taken seriously, but combined inconsistent arguments by claiming that "[i]f there is a valid reason for refusal, the employer will invariably accept it and look for someone else" and complaining that the FLSA amendment would make it necessary for employers to "obtain the employee's consent—and we would assume that would be in writing—before scheduling overtime."

Conyers' proposal of a 100-percent overtime penalty was hardly un-

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593To Revise the Overtime Compensation Requirements of the Fair Labor Standards Act of 1938 at 236 (letter from Kimberly Johnson-Smith, labor relations director, NAM, Nov. 5, 1979).


595To Revise the Overtime Compensation Requirements of the Fair Labor Standards Act of 1938 at 167 (statement of Bruce Cotton). The president of the Southern California Restaurant Assoc. used similar rhetoric at the 1977 hearings in California when he asked: "if the second shift waitress...calls in sick just before the start of her shift, are we to tell waiting customers that we can't take care of them because the waitress didn't want to work a little overtime?" Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime: Appendices at 284 (statement of Stanley Stockton).
precedented. As long ago as 1891, the Nebraska legislature had enacted a law that required employers working their employees beyond eight hours per day to "pay as extra compensation, double the amount per hour as paid for the previous hour." This penalty was interpreted as pyramiding so that each overtime hour had to be compensated at double the rate of the previous one. Such progressive penalization of overwork offended the Nebraska Supreme Court, which promptly held the act unconstitutional as paternalistic interference with contracts.

11. "We Didn’t Think that the Legislature Would Be So Crazy": The Alternative Model of Maximum Hours Legislation—Territorial Alaska’s Absolute Universal Eight-Hour Law

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

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

The eight-hour statute—prohibiting overtime work except when life or property was in imminent danger—covering all workers (including adult men and business partners) enacted by the Alaska territorial legislature in 1917 is the most radical piece of hours regulation in the history of the United States. Workers, especially miners, in this frontier society had been agitating for the eight-hour day for a number of years in the face of mine owners’ insistence on 10-hour days

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5961891 Neb. Laws ch. 54, § 3 at 361, 362. The contemporaneous draft eight-hours bill of the Social Democratic Federation in Britain also proposed double time. Webb and Cox, The Eight Hours Day at 164.


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

599Letter from Alaska Territorial Governor J. F. A. Strong to the Secretary of the Interior at 7 (Feb. 25, 1918), in Record Group 101: Territorial Governor, Series 130: General Correspondence, Box 159, File Code 156: Eight-Hour Workday Law, Alaska State Archives.
on the grounds that short seasons (lasting from May to October) required full use of every day. Understandably, miners were not keen on exposing themselves to punishing long days on hands and knees in damp permafrost mining operations, and expressly made the argument that such long workdays would shorten their working lives.\footnote{James Foster, "Syndicalism Northern Style: The Life and Death of WFM No. 193," \textit{5 Alaska Journal} 130-41 (Summer 1975); James Foster, "The Western Federation Comes to Alaska," \textit{66(4) Pacific Northwest Q.} 161-73 at 167 (Oct. 1975). Foster, "Syndicalism Northern Style" at 132, asserts that by 1907 the eight-hour-day had become "almost universal" except in mining, but evidence presented below shows that the shorter workday did not prevail in the canneries, the other major employing industry.}

The gold rush of the late 1890s had made Alaska the last frontier that "attracted rugged individualists with no capital but their hands, their courage, and a winter’s grubstake, to wring an independent fortune from the Territory’s gravels." However, within a few years, large monopolies turned "these little men" into "sullen wage-workers...." The salmon trust, for example, “brought home to residents that corporation control meant Asiatic labor” by staffing its floating canneries anchored in the territory’s harbors with Hindus, Filipinos, and Chinese. Supreme among these monopolies was the so-called Guggenmorgen or Morganheim syndicate.\footnote{Harvey O’Connor, \textit{The Guggenheims: The Making of an American Dynasty} 258-60, 257 (1937). See also John Davis, \textit{The Guggenheims: An American Epic} 100-108 (1978).}

The Guggenheim family and the House of Morgan, the owners of this combination, as James Wickersham, Alaska’s leading politician and for many years its delegate to Congress,\footnote{Although Wickersham was widely held to be the Syndicate’s staunchest foe, in 1906 and 1907 the Guggenheim-Morgan interests asked him to be their general counsel in Alaska; he declined because he refused to be subservient to the Guggenheims’ corporation general counsel in Seattle, but when asked whether he would consider that position, he said yes. Evangeline Atwood, \textit{Frontier Politics: Alaska’s James Wickersham} 137, 146 (1979) (not revealing why the deal was not consummated).} explained to the House Committee on the Territories in 1913, “have thrown out their tentacles along the coast in Alaska, have secured a monopoly of our coal, copper, and transportation, and they are in control of the three principal gateways to the interior of Alaska. They control the transportation in Alaska; they control the situation with respect to railroad building in Alaska; they control the fisheries in Alaska; they control the copper of Alaska....”\footnote{The Building of Railroads in Alaska: Hearings Before the House Committee on the Territories on Bills H. R. 1739, H. R. 1806, and H. R. 2145, 63d Cong., 1st Sess. 411 (1913). For a contemporaneous study documenting and economically conceptualizing the position of the Guggenheim-Morgan syndicate, see Edgar Salin, \textit{Die wirtschaftliche Entwicklung von Alaska (and Yukon Territory): Ein Beitrag zu Geschichte und Theorie der Konzentrationsbewegung} (1914).} Not surprisingly, the Guggenheim-Morgan syndicate also "wielded tremendous influence in Washington on all matters pertaining to Alaska..."
and its business associates in the territory were influential in local politics.\textsuperscript{604}

The eight-hour day had become such a mainstream demand among the monopolies’ proletarianized workers on the last frontier—the vast majority of whom were unmarried men\textsuperscript{605}—that during the 1908 election campaign for congressional delegate all candidates agreed on the need for it; similarly, during the run-up to the elections for the first territorial legislature in 1912, party platforms also endorsed an eight-hour day.\textsuperscript{606} Wickersham and his followers saw the congressional grant of home rule as undermining the Syndicate’s political power, but others took a jaundiced view of the legislature’s limited taxing powers and lack of control over such key industries as railroads and fishing, for which the salmon canneries had successfully lobbied.\textsuperscript{607} Despite its initial opposition to home rule, such restrictions meant that the Syndicate “existed quite comfortably under territorial government.”\textsuperscript{608}

Indeed, the “Alaska syndicate came out the winner in Alaska’s first Senate” by virtue of the election of four “corporate-oriented candidates” who could “kill an undesirable piece of legislation” in that eight-member chamber.\textsuperscript{609} Nevertheless, miners, who together with mine owners predominated among the legislators at that first legislative session in 1913,\textsuperscript{610} succeeded in enacting an eight-hour law for employment in underground mines and smelters and related operations on the grounds that it was “injurious to health and dangerous to life

\textsuperscript{604}William Cashen, Farthest North College President: Charles E. Bunnell and the Early History of the University of Alaska 28 (1972)

\textsuperscript{605}In 1910, white males outnumbered white females five to one in the total population; 71 percent of white men over the age of 15 were unmarried. 3 Bureau of the Census, Thirteenth Census of the United States Taken in the Year 1910: Population 1910, tab. 11 at 1139, tab. 15 at 1142 (1913). See also John Whitehead, “Dan Sutherland: Gold Rush Pioneer and Politician,” 10 (1) Alaska History 1-5 at 1 (Spr. 1995). The 1910 census counted 38,350 occupied males and only 1,723 occupied females over the age of ten; in 1920 the corresponding figures were 24,712 and 2,085. Only 12 female miners were returned at the 1910 census compared to 11,372 men; in 1920, the figures were 20 and 5,287. 4 Bureau of the Census, Fourteenth Census of the United States Taken in the Year 1920: Population: 1920: Occupations, tab. 2 at 1262 (1923).


\textsuperscript{609}Foster, “Syndicalism Northern Style” at 140; Ernest Gruening, The State of Alaska 159 (1968 [1954]).

\textsuperscript{610}Foster, “Syndicalism Northern Style” at 140; Ernest Gruening, The State of Alaska 159 (1968 [1954]).


\textsuperscript{609}Atwood, Frontier Politics at 267.

\textsuperscript{610}Gruening, The State of Alaska at 160.
and limb." The legislature also enacted an eight-hour law that year for all work performed by contract for the territory or any municipality; longer workdays were permitted only "in cases of extraordinary emergency such as danger to life or property." The strong presence in Alaska of the radical Western Federation of Miners and the Socialist Party, which inscribed the eight-hour day in its platform in 1912, may have helped drive the legislation forward.613

The territorial governor's message to the second session of the legislature in 1915—which, as the result of the departure of most of the corporate-oriented senators, Wickersham "could control"—recommended extension of the eight-hour law to placer mines. Governor John Strong, himself a former Alaskan miner,615 justified his view by reference to the general experience "that a man who works eight hours a day will do as much work as he who works ten hours, and he will probably do it better." Contentious debate saw both a repetition of the mine employers' argument that shorter hours were incompatible with a short season and a testimonial by at least one of the legislators who had been a miner of his experience of spending 10 hours in the muck and mud. Finally, the legislature amended the 1913 eight-hour law to include underground placer mining.

Concurrently with this debate over miners the legislature was also considering a more general eight-hour law. The first such bill was timid: it would have limited the workweek in laundries to 48 hours and conferred the eight-hour day on female workers in hotels, restaurants, bakeries, and telephone and telegraph exchanges. The House of Representatives then recommitted the bill

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6111913 Alaska Sess. Laws ch. 29, § 1 at 35, 36. The statute included an exception for emergencies, urgent necessity, and days on which shift changes were made; it did not include within the eight hours travel to or from the face. Id. § 2 at 36.

6121913 Alaska Sess. Laws ch. 7, § 2 at 8.


614Atwood, Frontier Politics at 286-87.

615Gruening, The State of Alaska at 166.


6181915 Alaska Sess. Laws ch. 6 at 6.

619"Several Cases of Employment Affected," Alaska Daily Empire, Mar. 11, 1915, at 1, col. 3.
to the Labor, Capital, and Immigration Committee, instructing it to include all industries. Just two days before the session was to end, the press reported that absent some unforeseen event, the House would pass a universal eight-hour bill, but the next day the House defeated the bill 9 to 6.

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

Workers and labor unions displayed considerable enthusiasm for the referendum. Even the Nome local of the Western Federation of Miners, whose Industrial Worker took a jaundiced view of capitalist political institutions, carried a streamer at the top of the front page during the run-up to the election urging workers to vote Yes. For these socialists, an eight-hour law "means more leisure for the worker; it means more rest and more time to fit oneself for the

620"Hanging Abolished; 8-Hour Day for All Industries Favored," Alaska Daily Empire, Apr. 21, 1915, at 1, col. 1.
621"General 8-Hour Bill May Pass," Alaska Daily Empire, Apr. 27, 1915, at 3, col. 5. In the very next column to this report the main newspaper of the capital, Juneau, printed a restaurant advertisement dressed up like a news article which mocked the proposed eight-hour law: A pro-eight-hour legislator is arrested by the sheriff for working his servants overtime whom he had sent to take his sick mother-in-law to the doctor; when the dog sled breaks down, they have to work more than eight hours, but the mother-in-law is nevertheless stranded in the blizzard. "Legislative Doings," Alaska Daily Empire, Apr. 27, 1915, at 3, col. 4.
622"Universal 8-Hour Bill Lost," Alaska Daily Empire, Apr. 28, 1915, at 1, col. 3.
struggle for existence, so that we may learn to work and act that this existence will be no longer a struggle....” The industrial democracy to which the organization aspired would “not be hastened by keeping men and women with their noses to the grindstone, so that they know little of actual happenings, less of themselves....”626 The day before the election, the paper, while bemoaning that non-workers, who tended to accept employers’ viewpoint, were entitled to vote, conceded that some employers had recognized that shorter hours were “a business proposition because they got more out of the workers.” But the Industrial Worker added that workers had their own reasons for wanting the shorter workday, including the resulting reduction in unemployment and competition.627

Interest in the referendum was intensified when, just two weeks before the election, the district court for the Fourth Judicial Division sitting in Fairbanks, on formal-technical grounds barely comprehensible to non-lawyers, invalidated the 1915 act that had amended the 1913 eight-hour law for miners to cover underground placer mining.628 The case arose when, at the request of the United States, a grand jury indicted Sylvester Howell and Jennie Cleveland in July 1916 for having employed a worker in April for ten hours per day in underground placer mining workings in the absence of any imminent danger to life or property. In their defense, the employers raised the constitutional claim that the act was void as special legislation (presumably because it applied only to mining), but the court chose not to reach this issue. Instead, the judge accepted the defendants’ argument that the title and body of the 1913 act limited its scope to lode mining, and, since the title of the 1915 amendment failed to extend the scope of the act, it was not germane to the act’s subject matter other than lode mining, and therefore placer mining had never been validly subject to the law.629

Despite sustaining the employers’ position, the judge, Charles Bunnell, who would play an even more prominent part in the struggle over the general eight-hour law in 1918, stressed that it was only with “the greatest reluctance” that courts invalidated laws enacted to protect workers engaged in hazardous occupations. Nevertheless, they were “compelled” to do so because of the legislature’s failure to formulate the title of the 1915 amendment to expand the scope of the law.630 Two years later, in a speech during his congressional delegate campaign, Wickersham, who himself had for years been the district

630United States v. Howell, 5 Alaska at 582.
judge sitting in Fairbanks, called Bunnell’s decision “the silliest rot he had ever read in a judicial decision...”

Public interest in the eight-hour law was signaled by the fact that on the same day that Bunnell read his decision aloud in court, the Fairbanks Daily News-Miner, under a screaming banner headline, “8-Hour Law Unconstitutional,” reprinted virtually the entire text. In a somewhat smaller font, the newspaper added the more colorful sub-headline: “Not Worth the Paper It's Written On.” In case readers failed to turn to the inside pages, the editors helpfully summarized the day’s editorial at the top of the article in large bolded type: “After Balling Upp [sic] Mineowners and Mineworkers Alike for a Year and Making Nothing But Trouble, Submitted to the Courts It Is Discovered That Alaska’s 8-Hour Law Was Never a Law In Fact and Never Binding Upon Anybody Unless They Thought So.” Beyond expressing its glee about the law’s demise, the newspaper astutely observed that the decision was of “the greatest importance” not just to the litigants, but to “the whole Territory, as it is likely that similar decisions will be rendered by other courts in the other divisions, if the matter ever comes up there.” (Curiously, two years later, in the aftermath of Bunnell’s decision striking down an eight-hour law, almost none of its supporters raised the converse question—whether it was still valid in Alaska’s other three judicial divisions.) Without offering any supporting examples, the News-Miner editorialized that the statute had proved “an undesirable restriction upon laboring man and employer...resulting in an entire season’s loss and annoyance to all of them....”

Despite telegraph and telephone, news of the ruling moved slowly across the tundra. A whole month elapsed before the main newspaper down in Anchorage printed long excerpts from the decision, and six weeks before the Industrial Worker out in remote Nome could discharge its anti-capitalist bile. Throwing up its hands, the paper charged that it was

no use a layman discussing the relative merits of a judicial decision. These later [sic] day judges have a theologian of the middle ages...beaten a city block when it comes to splitting hairs, and the only interesting feature...is that the successful hair splitting on the bench is generally performed when some labor law is to be thrown out. ...

These decisions like Bunnell’s, these foolishly drawn up laws which the Bunnells tear up so easily, serve to show the worker that such scraps of paper are just scraps of paper

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and no more, when the economic power behind the legislators and the judges will have them so act. But when a labor organization, exerting its economic might and through the legislation enacted in the Union Hall, passes its eight hour law, there is a cast iron code that all the judges from hell to breakfast cannot tear with their long lean claws, try they ever so hard.635

Despite, or perhaps because of, Bunnell's ruling, more than 85 percent of voters in the referendum, led by the miners, favored the proposition at the general election in November 1916.636 The following March, Governor Strong, in his message to the legislature at the beginning of its third session, reminded its members to "give careful consideration to this important matter, and to take such action as will carry out the expressed mandate of the people."637

The legislature did consider the matter, but not with the alacrity that the socialist Industrial Worker thought appropriate in light of the fact that the minority in the referendum "was so small that one could almost say the eight hour day demand was unanimous...."638 A steady stream of mockery about the "Solons" and how they "shirk eight hour day" appeared in the paper for weeks.639

But the bill that the Senate began considering in March was identical to the one that labor organizations had sought to introduce, and even the cynical Industrial Worker gave little chance of passage to an amendment to exempt the all-important fish canneries,640 whose association telegraphed the legislature urging exemption on the grounds of "absolute necessity for safety of the country" of salmon production during World War I, which the United States had just entered.641 During the legislative debate dire predictions were made of "the great calamity that would result" especially with respect to the cannery interests and


636The vote was 10,416 in favor and 1,782 opposed. "Complete Returns of November Election as Reported upon by Territorial Canvassing Board," Alaska Daily Empire, Mar. 2, 1917, at 2, col. 4. On the miners' leading role in the struggle for eight-hour legislation, see "Maloney on Eight Hour," Alaska Daily Empire, Feb. 9, 1918, at 4, col. 1 (reprinting editorial from Nenane News).


Patriotism, however, was not the fishing industry's real motivation. Rather, the canneries were impelled by the need to ward off interference with their practice of requiring employees to work extraordinarily long hours. Just a few months before the legislative debates, William Kirk, the general secretary of United Charities of Rochester, had published an article in Survey exposing these patterns. At one salmon cannery he met a 10-year-old boy whose job was "to watch an interminable row of cans as they passed him on a traveling belt. Every minute or so he would take out a bent can. For 10 cents an hour, and usually for ten hours a day, and six days a week, he had his eyes fixed on the can chute. Sometimes, he said, he worked ten and a half hours a day and sometimes as many as thirteen." At another cannery, children 10 to 12 years old were working from seven in the morning until six and often nine in the evening, including Sundays. Often men and boys worked seven days a week, 14 or 14 and a half hours daily. A group of Hawaiian workers were paid a fixed $180 for the season to work seven days a week, 11 hours a day, with overtime (work after 6 p.m.) paid at 15 cents an hour. The canneries were especially partial toward Chinese workers: "they are industrious and tractable. They have such a low standard of living that they are willing to work excessively long hours without grumbling...." Better even than Chinese workers, however, was machinery that did the work of 20 workers disassembling salmon by hand; the machine was known as the "iron Chink."

Salmon cannery owners, however, did not need to rely solely on their own telegrams: they were influential enough to secure intervention by higher power-holders. In the midst of the legislative deliberations, Territorial Governor Strong transmitted to the legislators a telegram that he had received from Interior Secretary Franklin K. Lane—who had jurisdiction over Alaska—requesting, on behalf of the salmon packing industry, inclusion in the law of a clause authorizing...
waiver of the eight-hour provision by the governor if a national emergency were declared by the interior secretary or the Council of National Defense.\textsuperscript{646} The Council, which was established by Congress in 1916 to coordinate resources, consisted of several cabinet secretaries and worked through a huge network of state and local organizations; it asked all state legislatures to delegate to the governors the power to suspend or modify state labor laws during the war when the Council requested such suspension or modification.\textsuperscript{647} The local councils of defense in Alaska, whose members were commonly “leading citizens of the community” associated with fishing or mining, sought to combine their call for longer workdays with combating the influence of the International Workers of the World in those industries.\textsuperscript{648} Two days after receiving Lane's telegram, the Alaska House of Representatives added the suspension provision to the bill.\textsuperscript{649} Even on the eve of final passage, the Nome newspaper of the Western Federation of Miners pilloried the senators for “pulling off a good josh on their constituents” by considering yet another referendum despite the more than ten to one majority in the original referendum: “Anything to avert this labor legislation in the interest of the higher-ups.”\textsuperscript{650} A few days later the Senate did pass a bill providing for an expression of voter opinion on whether the general eight-hour law for all wage and salary earners should be amended to exclude industries operating only during the short summer seasons, such as placer mines, canneries, and agriculture (as well as clerks), but the House did not concur.\textsuperscript{651}

The legislature, however, did act. First, after the Alaska attorney general had filed an opinion with the House that the legislature’s power to limit miners’ hours was “no longer a mooted question,”\textsuperscript{652} the legislature enacted a new special eight-
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hour law for miners not vulnerable to the defects that had prompted Judge Bunnell to strike down the 1915 act. Then the legislators, by a vote of 6-0 in the Senate and 14-2 in the House, enacted an unprecedented universal absolute eight-hour law. In the House, the bill had been introduced by Philip Corrigan, the chairman of the Committee on Labor, Capital, and Immigration, and a former miner, socialist, and president of Nome Local 240 of the Western Federation of Miners; in the Senate, another former miner, Swedish-born John Sundback, filed the bill. (After being informed by the Attorney General that such a bill would not affect the general eight-hour law, the House passed an eight-hour law for women in numerous industries, but refused to concur in the Senate amendment to exclude “Natives or mixed blood during the salmon canning season,” and the bill died.)

The new law’s central provision read:

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

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

Opinion on 8-Hour Bill,” Anchorage Daily Times, Apr. 5, 1917, at 2, col. 2

653 1917 Alaska Sess. Laws ch. 4 at 3.

654 The Senate Journal of the Third Legislative Assembly of the Territory of Alaska at 117; The Journal of the House of Representatives of the Third Legislative Assembly of the Territory of Alaska at 183.


658 1917 Alaska Sess. Laws ch. 55 at 116. The legislature also voted on May Day to appropriate funds to pay overtime wages to its own employees. House Concurrent Res.
“One of the most discussed provisions of the law” and one that made it unique was the ban on work beyond eight hours even by business partners. The Anchorage Sunday Times, focusing on the issue of unfair intra-capitalist competition, editorialized that since the law did not impose such a ban “where a man is sole owner of his business,” he “alone will have the right to work as long as he wishes, while the one which is owned by two partners, even though both are not there, will be unable to work more than eight hours.” Despite almost unanimous votes in both chambers on final enactment, this particular provision was subject to considerable controversy. The Committee of the Whole of the House had recommended adoption of a proviso “that the period of employment prescribed by this Act shall not apply to Superintendents, Managers, Bosses, Foremen, or other executives of any partnership, association or corporations when acting as such.” After the House struck “Bosses,” it did adopt this amendment, but the Senate did not agree to it. A further motion in the House to strike the language imposing coverage on partners and corporate officers failed by a vote of 4-12. That even the senators were plagued by some doubts as to the bill’s constitutionality was signaled by their having voted twice to defer consideration of it until they received the attorney general’s opinion.

Notably, employers undertook no public campaign to persuade Congress to exercise its power to repeal the eight-hour law. Their low profile during the legislative debates may not have been irrational. First of all, firms, and especially canneries, may have been relying on the suspension mechanism during the war years. Second, the other large employing industry, mining, was already largely subject to a special eight-hour law. The new law did apply for the first time to surface placer mining and dredges, but the number of newly covered workers was No. 7, in 1917 Alaska Sess. Laws at 226.


660Legislative history analysis is, unfortunately, impeded by the fact that not all of the bills and amendments from the 1913, 1915, or 1917 legislative sessions have survived. Telephone interview with Judy Skagerberg, Alaska State Archives, Juneau (March 2000).

661The Journal of the House of Representatives of the Third Legislative Assembly of the Territory of Alaska at 170-71 (House Bill No. 28); The Senate Journal of the Third Legislative Assembly of the Territory of Alaska at 183, 196, 222. The House acted in the same vein when it voted to narrow the scope of coverage by substituting “all wage earners and salary earners” for “all labor or services.” This language was enacted, but a further House proviso “that this Act shall not be construed to prohibit extra hours of employment necessitated by a change of shift” was not. The Journal of the House of Representatives of the Third Legislative Assembly of the Territory of Alaska at 170.

662The Senate Journal of the Third Legislative Assembly of the Territory of Alaska at 81, 108 (Senate Bill No 13).

663In establishing a territorial legislature in Alaska, Congress reserved to itself the right to disapprove any statutes enacted there. Act of Aug. 24, 1912, ch. 387, § 20, 37 Stat. 512, 518.
"small as compared with the other mining industries."664 And finally, some employers may have assumed that a judge sympathetic to their interests might declare the law unconstitutional.

The first possibility was highlighted in the governor's annual report for 1917, which reminded the interior secretary that the governor was authorized to suspend the law if the secretary requested him to do so.665 Predictably, as January 1, 1918, the effective date of the law, approached, employers began urging the authorities to make use of this mechanism. On December 4, the Interior Department wired Strong that a lumber mill company in Wrangell had petitioned the secretary to suspend the law "alleging enforcement will necessitate discontinuance [sic] of business...." The department instructed the governor to "take up matter with company, ascertain facts and submit your recommendation on application."666 Three days later, Newton Baker, the Secretary of War and chairman of the Council of National Defense, requested that Strong suspend the law as to the salmon industry for the duration of the war. Enforcement of the eight-hour law, according to Baker, "would either materially increase the cost or decrease the output of canned salmon, a most essential article of diet of our army our navy our civilian population and our allies...."667 The pressure on the governor mounted three days later when he received an almost identical telegram from Interior Secretary Lane, who added that Herbert Hoover of the U.S. Food Administration concurred in the request.668

On December 15, 1917, Strong issued a proclamation suspending the eight-hour law not only as to the salmon fisheries and canneries, as Baker and Lane had requested, but also to "any manufacturing industry...whose products are necessary to the proper preparation of salmon as a food supply...."669 After this first suspension, the governor seized the initiative two weeks later, recommending that Lane request him to suspend the law as to taking, preparing, and curing all other

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664Report of the Territorial Mine Inspector to the Governor of Alaska for the Year 1917, at 11-12 (1918).


666From Meyer Asst. to the Secretary to Governor Strong, Dec. 4, 1917, in Record Group 101, File Code 156, Box 152, Alaska State Archives.


668Telegram from Secretary Lane to Governor Strong, Dec. 10, 1917, in Record Group 101, File Code 156, Box 152, Alaska State Archives.

Lane took a week to reply to Strong’s telegram, stating merely that he had “no request [for] suspension” regarding those industries, but asking for Strong’s view regarding suspension of the law in mining. One possible reason for the alacrity with which Strong complied with Lane’s requests was the governor’s knowledge that Alaska Democrats at that very moment were lobbying the Wilson administration not to reappoint him in 1918 because he had failed to side with the Democratic candidate in the aftermath of the contested election for congressional delegate against Wickersham. 

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

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

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670 Telegram from Governor Strong to Secretary Interior, Dec. 28, 1917, in Record Group 101, File Code 156, Box 152, Alaska State Archives.

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


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

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

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

676 Letter from Governor to Secretary of the Interior, Dec. 21, 1917, in Record Group 101, File Code 156, Box 152, Alaska State Archives. Strong did not explain how
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In December 1917 and January 1918 the governor was bombarded with telegrams from capital and labor. The Ketchikan Power Company was perhaps most vigorous in not only requesting total suspension during the war, but also "feel[ing] this is an unjust law for Alaska and should never have been placed on the records."677 Workers, in contrast, were concerned about enforcement of the new eight-hour law: as early as December 3, 1917, the Alaska Labor Union wired Strong that 2,000 members had unanimously passed a resolution demanding that the statute not be rescinded.678 Governor Strong, mindful of union opinion and that the legislature had unanimously passed a law strongly approved by the people in a referendum, decided not to heed the call by the Anchorage Chamber of Commerce for suspension of the law altogether during the war.679

Nevertheless, the future of the eight-hour law became dimmer on New Year's Day 1918, when Interior Secretary Lane telegraphed Strong that the Anchorage Chamber of Commerce and the Cordova Council of Defense had requested general suspension and asked the governor to "wire me your views as to whether or not necessity exist [sic] for such action."680 Strong's negative reply the following day was firm: "[I]t is my opinion that no necessity exists for general suspension.... This office has received but few requests for such action, and many against it. Labor organization protests have been especially numerous."681

Strong's personal views about the law may have been accurately reflected in his assurance to a private correspondent in early January that it was his "honest conviction that nothing would be gained by the general suspension of the law, and that includes the mining industry of the Territory. A general 8-hour law is being adopted all over the country, and the people of the Territory might just as well make up their minds that the day of the 8 hours has come and is here to stay." He buttressed this belief by reference to his own observations in the printing and newspaper business (he had been editor of the Nome Nugget and Alaska Daily

seasonality was relevant if canneries could operate on two or three shifts.


680Telegram from Franklin K. Lane to Hon. J F A Strong, Jan. 1, 1918, in Record Group 101, File Code 156, Box 159, Alaska State Archives.

681Telegram from Strong, Governor to Secretary Interior, Jan. 2, 1918, in Record Group 101, File Code 156, Box 159, Alaska State Archives.
Empire), which had taught him that printers became physically exhausted by ten
hours of work and that they could do as much work and more cheerfully in eight
hours. To be sure, Strong’s optimism may have been the result of his lack of
familiarity with details of the various laws; in any event, contrary to his view, the
absolute eight-hour day for adult males (including business partners) with no
provision for overtime work had not yet come. Indeed, more than 80 years later
it had still not arrived.

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

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

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

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682 Letter from Governor Strong to Dr. Aline Bradley (Jan. 9, 1918), in J. F. A. Strong
Papers, Box 1 Folder 25, Alaska and Polar Regions Archives, Rasmuson Library,
University of Alaska at Fairbanks (“personal and confidential”).

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

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

685 “Stores Will Close at Six Every Night,” Anchorage Sunday Times, Dec. 30, 1917,
at 1, col. 1.


film where he would have to "put in overtime laughing."688

On January 10, Lane returned to the issue of the lumber industry and Strong’s letter of Dec. 21, this time requesting further investigation and a definite recommendation concerning the company’s claim that it was unable to supply spruce for airplanes.689 A week later Strong replied, tacitly reversing himself, now advising against suspension because he was convinced that Alaska mills did not manufacture lumber suitable for airplanes.690 Despite his resistance to further suspensions, employers’ demands for a free hand with regard to the length of the workday became more intense. On January 15, the Guggenheim Kennecott Copper Corporation, “the greatest copper trust in the world”691—which the previous summer had accomplished the difficult task of breaking a strike by recruiting miners in Alaska in the midst of an alleged labor shortage692—stressing the interest of the United States Government in its output, wired Strong that in the “present National emergency it does not seem advisable that our plant should be subject to a sixteen hour shutdown and production stopped simply because mechanics...are not allowed by law to work even an hour overtime....”693 The copper trust’s influence was magnified during World War I during which production in Alaska recorded huge increases and far surpassed gold mining in value.694 Two days later, the manager of a large mining company sought to sway the governor by charging that only “certain of the unions or socialistic class” opposed the nationwide movement to suspend eight-hour laws for non-underground mining operations, while “all real Americans, whether laborers or otherwise” supported it.695 Then on the January 19, Interior Secretary Lane wired

689Telegram from Secretary Lane to Gov. Strong, Jan. 10, 1918, in Record Group 101, File Code 156, Box 159, Alaska State Archives.
690Telegram from Governor Strong to Secretary Interior, Jan. 19, 1918, in Record Group 101, File Code 156, Box 159, Alaska State Archives.
691The Building of Railroads in Alaska at 407 (testimony of James Wickersham, Alaskan Delegate to Congress).
693Telegram from E. T. Stannard, manager, to Governor Strong, Jan. 15, 1918, in Record Group 101, File Code 156, Box 159, Alaska State Archives.
694The value of copper produced in Alaska rose from $2.8 million in 1914 to $29.4 million in 1916, declining to $24.4 million in 1917 as a result of “labor troubles at the Kennecott-Bonanza mine.” The value of gold production held steady in the range of $16-17 million. Annual Report of the Territorial Mine Inspector to the Governor of Alaska: 1921, at 77-78 (n.d. [1922]); Report of the Territorial Mine Inspector to the Governor of Alaska for the Year 1917 at 6 (quote).
695Letter from B. L. Thane (Alaska Gastineau Mining Co.) to Hon. J. F. A. Strong, Jan. 17, 1918, in Record Group 101, File Code 156, Box 159, Alaska State Archives.
Strong, again conveying requests to suspend the law as to railroads and steamships based on claims of labor shortages and prohibitive increases in operating expenses.  

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

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

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696 Telegram from Franklin K Lane Secy to Governor Strong, Jan. 19, 1918, in Record Group 101, File Code 156, Box 159, Alaska State Archives.

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


701 Telegram from Ryus to Governor J F A Strong, Feb. 3, 1918, in Record Group 101,
Thousands attended mass meetings under the auspices of the Alaska Labor Union to oppose abrogation of the law.\textsuperscript{702} These protest meetings captured the prevailing sentiment concerning overtime work. At one meeting in Juneau the night before the hearings began, a petition was debated including a proposal to provide workers with the option of working more than eight hours. Although the meeting had “started off like an old maids’ tea party,” the optional overtime proposal “immediately brought out a storm of protest” and it was voted down. Equally interesting was the discussion of a proposal to petition the governor to mandate time and a half for overtime work by fishermen, who, as a result of the governor’s suspension of the new law as to them, were “required to work as long as the employer deems necessary.” A representative of the fishermen, however, urged those attending not to take any action that might confuse the two issues: “‘If the workers of this and other sections will stand solidly behind the eight-hour law as it now stands, the fishermen will take other means of protecting themselves.’”\textsuperscript{703}

The hearings, which extended over more than two weeks, received broad coverage in the territorial press, the opening day, for example, being reported in a banner headline in the Juneau paper.\textsuperscript{704} Mining, fisheries, logging, and shipping employers were most heavily represented at the hearings.\textsuperscript{705} Much more interesting than employers’ and workers’ predictably stylized and empirically unverifiable responses to Governor Strong’s call to focus on the question of whether Alaska was suffering from a labor shortage were the class divisions on the issue of whether workers should be permitted to work overtime.\textsuperscript{706} Employers favored antipaternalistic arguments. Ralph Robertson, one of the territory’s leading corporate lawyers and acting as agent of several companies,\textsuperscript{707} asserted:

\textsuperscript{702}“Eight Hour Law Mass Meeting Anchorage,” \textit{Daily Nome Industrial Worker}, Feb. 1, 1918, at 1, col. 4.

\textsuperscript{703}“Action Taken Last Night at Mass Meeting,” \textit{Alaska Daily Empire}, Feb. 5, 1918, at 6, col. 3-4.

\textsuperscript{704}“Hearings Begin on 8-Hour Law,” \textit{Alaska Daily Empire}, Feb. 5, 1918, at 1.

\textsuperscript{705}For the list of the companies (including Kennecott Copper Co.) testifying in favor of suspension, see Letter from Governor Strong to Secretary of the Interior at 2; “Hearings Before the Governor of Alaska on the Eight-Hour Law (Chapter 55, Session Laws of Alaska): Feb. 5 to 21, 1918” [unpaginated].

\textsuperscript{706}“Hearing on 8-Hour Law Continued,” \textit{Alaska Daily Empire}, Feb. 6, 1918, at 2, col. 4.

\textsuperscript{707}Robertson was also a U.S. Commissioner in Juneau in 1913, territorial director of the U.S. Employment Service from 1917 to 1919, mayor of Juneau from 1920 to 1923, and president of the Juneau Chamber of Commerce, in addition to presiding over Juneau’s leading corporate law firms into the 1960s. 4 Alaska Reports viii (1914); \textit{The American Bar: A Biographical Directory of Contemporary Lawyers of the United States and Canada}, at 1166 (1926).
"If a man wants to work overtime, he is entitled to it, but this law prohibits them from working their men over eight hours or paying them for it, no matter what proportion of the profits they are willing to give." Moreover, employers insisted that some "men want to work overtime; they demand the right to work overtime, and they do work overtime." Ironically, in comparison with Alaska's absolute eight-hour law, a statute that forced employers to pay premium overtime began to look appealing. According to Robertson:

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

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

708“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 6. A typo in the transcript makes it appear as if Governor Strong made this statement, but it is clear from the context that Robertson’s name was inadvertently omitted.

709“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 192 (Robert Capers referring to longshoremen). For hearing testimony of longshoremen who worked 36 hours without any overtime, see id. at 201 (E. E. Allen).

710“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 8 (Robertson).

711“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 51.

712Faulkner, who had been a U.S. marshall in Juneau, also engaged in a long corporate law career. 3 Alaska Reports vi; The American Bar: The Professional Directory of Leading Lawyers Throughout the World 1529 (39th ed. 1957); Who’s Who in Alaskan Politics at 28-29; Atwood, Frontier Politics at 303. Faulkner and Robertson were the leading business lawyers in Juneau. Pamela Chavez, “Seizing the Frontier: Alaska’s Territorial Lawyers” 41 (MS, n.d. [1984]).
objection to that kind of a proposition for this reason: that if they don't want to work more than eight hours, they don't have to.”713 The credibility of his call for replacing mandatory labor standards with a consensual race to the bottom may, however, have been tarnished by his historically suspect claim that “the mining companies do not want to force the men to work more than eight hours. It would be a ridiculous proposition to say that they could force any man to work more than eight hours.”714

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

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

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

MR. TRACY: Yes.

GOVERNOR STRONG: Absolutely?

MR. TRACY: Absolutely. Although I agree with Mr. Bradley—I believe there's times when it is absolutely necessary to work overtime, and then there's times when it's required—when it's absolutely necessary—that some of the boys would also like to put in a couple of extra hours. I know—-at least, I feel that way about it, that if I don't work overtime, I am only causing myself a hindrance, but if I don't want to work overtime, with the 8-hour law, then I've got some protection, because just the minute there is plenty of men come into the country and we get a little overabundance, the boss comes along and says, “Here, we would like to have you work a couple of hours overtime.” Well, maybe I have something special to do.... If I don't work that two hours overtime, I roll up my blankets and get out. That's the way it works every place I ever been.715

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

713“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 68.
714“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 72.
715“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 57.
Even more revealing than the overtime debate, however, was the explanatory light that the testimony shed on the legislature’s puzzling enactment of such a radical maximum hours law. The antagonistic colloquies between representatives of capital and pro-labor former and current state legislators finally brought to light what public debate had failed to articulate in 1916-17—namely, that participants in the legislative process had been fully aware of the radical and unique character of their universal absolute eight-hour law.

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

MR. ROBERTSON: In what states do they have it?
MR. RICE: I don’t remember them all—Washington has an eight-hour law.
MR. FAULKNER: One like this?
MR. RICE: No---
Mr. FAULKNER: Their 8-hour law applies to hazardous occupations. Isn’t that it?
MR. RICE: Well, I won’t state.
MR. FAULKNER: Do you know any state where they have a general 8-hour law like this[?]
MR. RICE: No; there is no states, but the employers are giving their employees an 8-hour law.
MR. FAULKNER: Do you know of any place where they have a law like this[?]
MR. RICE: No, this law is very rigid, and it’s for a good cause. The workingman doesn’t need to work more than 8 hours a day. If he can’t make a living in 8 hours, he might as well not live.717

Later, when Faulkner observed that the manager of a steamship company office would be violating the law if he worked more than eight hours in order to perform the work of other employees who had left and couldn’t be immediately replaced, a labor representative asked him and the other employer representatives opposed to the law why they had not raised such issues before the legislature acted.718 Faulkner did not respond immediately, but shortly afterwards tried to

716*“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 218 (S. E. Mandle).
717*“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 34-35.
718*“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 91-92.
seize the rhetorical initiative in a colloquy with the former president of the Alaska Senate, Oliver Hubbard, by suggesting that somehow the legislature had had no popular mandate to craft the statute that it did:

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

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

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

SENATOR HUBBARD: You refer to the referendum?

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

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

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

SENATOR HUBBARD: Well, some people or some state or territory have always got to pass the first law of any kind.719

When Senator Hubbard sought to legitimize the general eight-hour law by reference to the eight-hour laws for miners that the legislature had enacted in 1913 and 1915, Faulkner baited him, asking why, if labor was so sure of the law’s validity, it did not seek a court test. (Those in Juneau demanding that their opponents arrest violators were apparently unaware that an arrest warrant had already been issued in the Northern Commercial Company case in Fairbanks despite the fact that a widely reported judicial hearing in the case would take place only several days later.)720 A labor representative tried to avoid this

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719"Hearings Before the Governor of Alaska on the Eight-Hour Law" at 100.
720See below. Two days after the close of the governor’s hearings, Strong telegraphed the U.S. attorney in Fairbanks asking for the status of the case. Roth wired back the same day that after two days of constitutional argument the court said that the decision would rendered the following week. The evening of the day the decision was handed down, Roth wired Strong that the law had been held unconstitutional. Governor Strong to U.S. Attorney Roth, Feb. 23, 1918; Roth to Strong, Feb. 23, 1918; Roth to Strong, Feb. 27,
treacherous terrain by proposing to Faulkner that the law be left as it was until the next session of the legislature (in 1919), at which time, "if there's something in that law that the workmen are radically opposed to," it could be amended. Faulkner, in turn, preempted that offer (which presumably referred to permitting premium overtime work) by declaring that the law was obviously void because the legislature lacked any power to regulate the hours of labor absent some relationship to health or life: "The legislature of the Territory of Alaska nor of any other state has any right to tell me that if I want to employ a stenographer more than eight hours and I am willing to pay her for more than eight hours labor and she is willing and it doesn't interfere with her health, that they can tell me that she can't work more than eight hours." F. Harrison, the labor representative, apparently nonplussed by Faulkner's analysis, waxed sarcastic: "It is not very often that you find the best legal talent of the country talking for the workingmen."

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

1918; in Record Group 101, File Code 156, Box 152-7, Alaska State Archives.

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


compensated for as overtime....” To Hubbard’s lame protest that “[t]hat is not the law,” Capers replied: “There isn’t in the history of the United States a law like this.” But when the senator insisted that the railroad and mining companies and all Alaskans knew what the law covered, Capers repeated that a “great many laws could be general eight-hour laws.”

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

SENATOR HUBBARD: Well, why didn’t make your kick before it was passed?[

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

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

MR. CAPERS: What suggestion?[

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

[724]“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 109-12.

[725]“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 185.

[726]“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 112.

[727]“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 112-14.
Since employers regarded the eight-hour law as "crazy," when Capers asserted that employers nourished "no particular antagonism to the general principles of eight-hour legislation," and that "[w]e are not taking from them [workers] the principle of the eight-hour law," he manifestly meant the unprincipled eight-hour day extended by consensual overtime work.

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

SENATOR HUBBARD: I see. Your sarcasm is beautiful, but it isn’t sound.... It wouldn’t have made any difference, Mr. Capers, if I looked into it thoroughly.... I suppose you think I should have looked it up like a professional lawyer and come down here and said to the members of the legislature: “Boys, I have looked this thing up. It’s not valid; it’s not legal. We can disrespect the people and their votes and cast it aside, because I’m a lawyer, I’m a great lawyer, and I have looked it up and it isn’t valid.”

MR. CAPERS: No, but you could have inquired into it.

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

MR. CAPERS: No, but I thought you were on the job.

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

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729 “Hearings Before the Governor of Alaska on the Eight-Hour Law” at 115. Hubbard may in fact have been regarded as a legal authority since he had held important positions in the Justice Department in Washington, D.C. in the 1880s and 1890s and later in the Interior Department. Who’s Who in Alaska Politics at 47-48.
730 “Hearings Before the Governor of Alaska on the Eight-Hour Law” at 116.
731 Letter from H. W. DuBois to Governor Strong, Mar. 14, 1918, in Record Group
The failure of employers' representatives to contradict Hubbard's and Strong's charges that they had never protested against the bill before it was enacted is puzzling. After all, the Anchorage Daily Times had reported on the "pyrotechnics" that were touched off in the House of Representatives on April 18, 1917, when "Judge John Winn, practicing lawyer of Juneau, dramatically declared, holding high in the air the bill, 'It is pernicious from every standpoint and not a single plausible excuse can be given for the bill.'" He then foretold of the "great calamity" for the territory's cannery interests and the country's food supply if the bill were passed. Winn even claimed that if referred to the electorate, the bill would be voted down as heavily as the referendum had passed in 1916. Royal Gunnison, a Juneau lawyer representing the Pacific Fisheries Association, a former district judge, and Robertson's law partner, also addressed the House, submitting an amendment that would have exempted the cannery industry. At the very least, then, the fishing industry had loudly resisted inclusion.

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

101, File Group 156, Box 159, Alaska State Archives.


734Unfortunately, the lack of a transcript of the legislative debates makes it impossible to flesh out the full scope of what employers and legislators said about the law.

735Who's Who in Alaskan Politics at 70.

736"Hearings Before the Governor of Alaska on the Eight-Hour Law" at 135.

737Although his statement is not clear, it seems that Murray believed that the entire overtime debate was "only a question of mathematics as to whether that scale would be changed." "Hearings Before the Governor of Alaska on the Eight-Hour Law" at 135.
MR. CAPERS: You are an attorney, I believe?
MR. MURRAY: Yes.
MR. CAPERS: Did you ever consider the validity of this act before it was passed?
MR. MURRAY: Oh, yes.
MR. CAPERS: What is your view?
MR. MURRAY: I think it is doubtful. No eight-hour act like this has ever been sustained.

MR. CAPERS: Do you think, Mr. Murray, that you could have passed an unquestionable and valid eight-hour law? Or could you have improved on it?
MR. MURRAY: Well, I don’t think so. There has never been any general eight-hour law sustained in the United States. Every other law like it has been sustained under the police power....

MR. CAPERS: Do you think that you could have complied with the instruction given you and have passed a valid law that would have made those necessary exceptions?
MR. MURRAY: No; I tried that Mr. Capers.
MR. CAPERS: Wherein did you fail?

MR. MURRAY: Well, to begin with, there were other lawyers in the legislature besides myself. ... I consulted with the Attorney General and I took the floor, and I tried to have as many special bills passed under the police power as possible; for instance, the eight-hour act for women; the eight-hour act for underground placer mines, and the eight-hour act for surface work, and I stayed on the floor, and in talking with the attorneys around Juneau, none of them thought that the act would be sustained, and for that reason I wanted as many of them passed under the police power as possible. 738

Although Strong finished his report to the interior secretary on February 25, four days after the hearings had ended, the Interior Department could scarcely wait. The very day he completed it, the department telegraphed: “can you not wire brief statement in code as to conclusions and recommendations....”739 The next day Strong had to telegraph back that it was not feasible to wire his conclusions and recommendations “owing to varied interests represented at hearings and ramifications of statements and testimony,” but advised Lane that it would be in the mail together with the stenographic transcript in two days.740 The fact that the district court held the statute unconstitutional on February 27, the day after Strong had dispatched his telegram, may have lessened Secretary Lane’s interest in the report.741 Strong himself understood which way the judicial

738“Hearings Before the Governor of Alaska on the Eight-Hour Law” at 136-37.
739Meyer to Governor Strong, Feb. 25, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives.
740Governor Strong to Secretary Interior, Feb. 26, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives.
741A month after he had submitted his report, Strong responded to an inquiry from a firm of consulting mining engineers with offices in Philadelphia and Paris about the eight-hour law that he was not at liberty to disclose his hearing findings, which he assumed
wind was blowing: on receiving a telegraphic inquiry on February 27 as to the exempt status of mills manufacturing airplane spruce, Strong wired back instead that the law had been held invalid.\(^\text{742}\)

Based on the hearings and his experience, Governor Strong believed that "there is some difference of opinion among the working people. Some are in favor of overtime while others are emphatically against it."\(^\text{743}\) His forthright report to the interior secretary rested largely on his finding that, contrary to employers’ claims, the labor shortage was no more acute in Alaska than elsewhere in the United States, and "that if an eight-hour day were guaranteed the workers in Alaska with a fair scale of wages, a sufficient supply of labor...will be available to meet the demands of the various industries."\(^\text{744}\) The decline in Alaska's population—from 64,356 in 1910 to 55,036 in 1920\(^\text{745}\)—was misleading in the sense that most of the cannery workers were "imported"\(^\text{746}\) and thus not included in the census enumerations. In 1913, for example, 5,000 of the 13,000 cannery workers were Chinese and Japanese "brought up from Seattle, San Francisco, and Portland in the summer time...and then ship[ped] back...."\(^\text{747}\)

Strong’s seemingly prolabor stance must be gauged against the background of his prior suspension of the law as to fisheries, which by 1917 were the territory’s largest industry, and the fact that the other major industry, mining,\(^\text{748}\) was subject to a special eight-hour law not affected by the controversy surrounding the general eight-hour law. Strong also rejected opponents’

\(^{742}\)J. J. Daley and H. Shattuck to Governor Strong, Feb. 26, 1918, and Strong to
Shattuck, Mar. 1, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives. For similar correspondence, see telegram from Ketchikan Iron Works to Governor Strong, Feb. 22, 1918, and Strong to Ketchikan Iron Works, Mar. 1, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives.

\(^{743}\)"Hearings Before the Governor of Alaska on the Eight-Hour Law" at 218.

\(^{744}\)Letter from Governor Strong to Secretary of the Interior at 5.


\(^{746}\)30 The Encyclopaedia Britannica: The New Volumes 102-104 at 104 (12th ed. 1922), s.v. “Alaska.”

\(^{747}\)The Building of Railroads in Alaska at 15 (testimony of Alaska congressional Delegate James Wickersham). Into the 1920s, these groups continued to account for 30 percent of fisheries workers. "Biennial Report of the Territorial Labor Commissioner to the Governor of Alaska 1921-22" n.p. (1923), in Record Group 101, Ser. 130, Box 221, Alaska State Archives.

allegations that those voting in favor of the eight-hour bill in 1916 had not understood the referendum. On the contrary, during the eighteen months the matter was before the public, he wrote, “no opposition to the proposal was indicated by the newspaper press or politicians, or others. I have, therefore, to conclude that when the people voted for this measure, they knew exactly what they were voting for.”

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

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

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

The governor’s hearings coincided with other important developments driving toward a denouement. On February 4, 1918, Thomas Riggs and William Edes, members of the federal Alaskan Engineering Commission (which was charged with oversight of the planning and construction of federally owned railroads in the territory), submitted to the Interior Department, which had

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749Letter from Governor Strong to Secretary of the Interior at 9.
750Letter from Governor Strong to Secretary of the Interior at 10.
751Letter from Governor Strong to Secretary of the Interior at 9.
jurisdiction over Alaska, their "Memorandum Regarding Effect of Territorial Eight Hour Law," stating their reasons for opposing the law, which overlapped with employers' views. Organized labor in Alaska, which considered Riggs antilabor and opposed his appointment as governor, was informed of this letter in March by the chairman of the U.S. Senate Committee on the Territories and published it to support its position. By February 6, the Interior Department had already sent a copy of the memorandum to Governor Strong. The statute in their opinion "will practically destroy many industries in the territory" and exacerbate a scarcity of labor in a place where "the active working season...is practically only six to seven months, and work during that period should be 'speeded up' rather than 'slowed down'...." Riggs and Edes predicted impracticality of enforcement, especially on railroads, which would have to carry extra crews in case of delay since railway delays would not meet the statutory definition of putting life or property in danger. The labor shortage, in turn, might make it "extremely difficult to put on additional crews of stevedores." They also called attention to the fact that the statute made no provision for payment for overtime: "We venture the opinion that many of the people of Alaska when voting for such a law thought it would mean considerable extra pay for some extra hours, and would be considerably surprised to learn that such is not the case." Riggs and Edes also noted that the "humanitarian object of the law" would conflict with the work patterns of men who worked eight hours for the railways and additional hours elsewhere. Finally, they based their recommendation that the Interior Department suspend the law on their opinion that most of the laboring population of Alaska with the exception of those doing underground work in mines, would prefer to work over eight hours during the long days if by so doing they got additional compensation.

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

Organization (1922).

"Labor Unions Wage War Against Riggs," Anchorage Daily Times, Mar. 11, 1918, at 1, col. 5; "Union Workers Oppose Riggs for Governor," Anchorage Daily Times, Mar. 12, 1918, at 1, col. 1; "Organized Labor Vigorously Oppose Riggs for Gov'" Daily Nome Industrial Worker, Mar. 13, 1918, at 1, col. 1.

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

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

More important than the Edes-Riggs memorandum was the fact that just weeks after the law had gone into effect, a test case had been argued and decided involving the Northern Commercial Company, a large and powerful quasi-monopolistic mercantile enterprise with stores and operations throughout Alaska, which was so widely resented that it had antagonized even many employers. On January 22, 1918, just three weeks after the law went into effect, the Justice's Court for the Fairbanks Precinct issued an arrest warrant to the U.S. marshall

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760 Wickersham, "Diaries," Mar. 11, 1918.
761 "Senate Committee Investigating Riggs," Daily Nome Industrial Worker, Mar. 18, 1918, at 1, col. 4. Riggs had also married the daughter of Frederick Coudert, a very prominent New York international corporate lawyer. 2(19) Alaska Railroad Record 145 (Mar. 19, 1918).
762 Territory ex rel. Sulzer v. Canvassing Board, 5 Alaska 602 (1st Div. 1917); Alaska Labor News, Apr. 14, 1917, at 7, col. 2 (untitled); "Strong Out of Race," Daily Nome Industrial Worker, Mar. 25, 1918, at 1, col. 1; Atwood, Frontier Politics at 320; Stewart, "The Alaskan Home Front During World War I" at 10-12.
763 Foster, "Syndicalism Northern Style" at 137, 141 n.46. The Northern Commercial Co. was not represented at the governor's hearings. For an uncritical company history, see L. D. Kitchener, Flag over the North: The Story of the Northern Commercial Company (n.d. [ca. 1954]).
764 On the Justice's Court, see Act of June 6, 1900, ch. 786, §§ 944-1014, 31 Stat. 321,
for the Northern Commercial manager in Fairbanks because one of its salaried employees had been hired to work more than eight hours per day and had in fact worked more than eight hours the previous day although neither life nor property had been in imminent danger.\textsuperscript{765} The manager was arrested the next day, but the government dismissed the charges against him, and on January 24 the court, despite the company’s plea that the statute was unconstitutional and void, found Northern Commercial guilty and fined it $250.\textsuperscript{766} On appeal to the district court, the employer further alleged that the act was void because the legislature had not complied with the congressional Organic Act by virtue of failing to give the bill the requisite number of readings.\textsuperscript{767}

In mid-February, in the midst of Governor Strong’s hearings on suspension of the law, District Court Judge Charles Bunnell held two days of hearings in Fairbanks, which were closely followed and widely reported. Bunnell, who had come to Alaska in 1900 as a teacher, left that occupation to practice law and engage in business, owning a lumber company and sheet metal works, and serving as president of the Valdez Chamber of Commerce. He was also active in the Democratic Party, becoming its unsuccessful candidate for delegate to Congress in 1914 against Wickersham, who was not alone in his belief that President Wilson had appointed Bunnell as district judge of the Fourth Division in 1915 as a reward for having run against him. Wickersham, a Progressive, also believed that “Big Interests” (meaning the Guggenheim-Morgan syndicate) had lobbied the Attorney General on Bunnell’s behalf.\textsuperscript{768}

\textsuperscript{765}United States v. Northern Commercial Co. and George Coleman, Complaint, No. 934 Cr. (Commissioner’s & Ex Officio Justice of the Peace Court, Fairbanks Precinct, 4th Judicial Div., Terr. Alaska, Jan. 22, 1918); Warrant of Arrest, in Nat. Archives, Pacific Alaska Reg., Record Group, No. 21, Box No./Location 34 (01/10/08(2)), File: Case # 762.

\textsuperscript{766}United States v. Northern Commercial Co., Transcript, in Nat. Archives, Pacific Alaska Reg., Record Group, No. 21, Box No./Location 34 (01/10/08(2)), File: Case # 762.

\textsuperscript{767}United States v. Northern Commercial Co., Second Amended Demurrer (D. Alaska, 4th Div., Feb. 13, 1918), in Nat. Archives, Pacific Alaska Reg., Record Group, No. 21, Box No./Location 34 (01/10/08(2)), File: Case # 762.

\textsuperscript{768}Cashen, Farthest North College President at 29-30, 39-79, quote at 63; Atwood, Frontier Politics at 281. Wickersham mentioned among Bunnell’s advocates Wilds Richardson, chairman of the Alaska Road Commission, whom he accused of being a Syndicate lobbyist. Stearns, “The Morgan-Guggenheim Syndicate” at 320. As a result of Judge Bunnell’s involvement in certifying the results of the 1916 election for Alaska delegate to Congress, which was contested by Wickersham, the latter mobilized his supporters to induce the Judiciary Committee not to confirm Wilson’s appointment of Bunnell (1878-1956) to a second four-year term in 1919, and he served as a recess appointee until 1921, at which time he became the founding president of the Alaska Agricultural College and School of Mines and then of the University of Alaska from its founding in 1935 to 1949. \textit{id.} at 93-103; In re Wickersham, 6 Alaska 167 (4th Div. 1919); Wickersham, “Diaries,” Dec. 7 and 12, 1918; Subcommittee of the Senate Judiciary Committee, “Nomination of Charles E. Bunnell as United States District Judge for the
Bunnell, as already noted, was no stranger to eight-hour law adjudication, having just 16 months earlier held invalid, on the thinnest of formal-technical grounds, the 1915 act amending the 1913 eight-hour law to include underground placer mining. Why, given Bunnell's proven jurisprudentially narrow mind in eight-hours adjudication, the United States chose to bring its test case in the Fairbanks Division is puzzling, since it presumably could also have found violations by Northern Commercial or other employers in the other judicial divisions.

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

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Fourth Judicial Division of the Territory of Alaska" (unpub., Dec. 31, 1920-Jan. 5, 1921); 3 Who Was Who in America (1951-1960) at 121 (1966); "Biographical Outline: Charles Ernest Bunnell," in Alaska and Polar Regions Archives, Rasmuson Library, University of Alaska Fairbanks. In the 1914 election, Wickersham received almost twice as many votes as Bunnell in all of Alaska and almost three times as many in the Fairbanks Judicial Division, where Wickersham had been and Bunnell was about to become district judge. Fairbanks Daily News-Miner, Nov. 7, 1916, at 4, col. 3. Governor Strong apparently adopted a hands-off attitude toward appointment of a judge for the Fourth Division. Shortly after Bunnell's appointment he replied to a correspondent who had urged him to give favorable consideration to someone else that: "Mr. Bunnell is a young man of more than ordinary ability, a good lawyer, I understand, and a man of probity in every way, and I venture to predict that he will give general satisfaction." Letter from Governor to T. H. Deal, Jan. 8, 1915, in Record Group 101, Ser. 130, File 52, Box 129, Alaska State Archives.

773United States v. Northern Commercial Co., slip. op. at 17 (Decision on Demurrer, D. Alaska, 4th Div., Feb. 27, 1918), in Nat. Archives, Pacific Alaska Reg., Record Group No. 21, Box No./Location 34 (01/10/08(2)), File: Case # 762.
such referenda created a "suspicion" in Bunnell's mind that a legislature that attempted to act beyond its powers "was actuated by some undisclosed motive."774

With rhetorical flourish Bunnell portrayed the statute's uniqueness:

Although ably assisted by counsel...I confess myself unable to find, and counsel are unable to produce any act of any legislative body in the United States which, from the standpoint of word use and word construction, belongs in a class with this act. It is fairly entitled to the unique distinction of being alone though in a multitude.775

Bunnell failed to document this uniqueness adequately, but he did emphasize that the law expanded the meaning of "employment" by construing it to include performance of labor or services even by a partner. He went on to locate the act's unconstitutionality in its indiscriminately limiting the hours of all wage and salary earners without showing that the working conditions of clerks, carpenters, and cooks made regulation of their hours as reasonable as those of miners; it was also defective because it failed to provide for overtime payment for emergency work. The court ruled that to use the state police power to deprive a carpenter of the right to work four hours on a neighbor's house after having worked eight hours that same day for a contractor directly violated the Fourteenth Amendment to the U.S. Constitution.776

Within days after Bunnell had handed down his decision, the government secured a new indictment against the Northern Commercial Company, this time for an eight-hours violation committed on March 4.777 Later that month Bunnell disposed of the case in a reported decision adopted almost verbatim from the previous case.778 On March 5, one of Lane's assistants requested Wickersham to prepare a brief in opposition to suspension of the law, which Wickersham filed with Lane on March 11 although he believed that Lane would nevertheless

774United States v. Northern Commercial Co., slip. op. at 4-5.
775United States v. Northern Commercial Co., slip. op. at 5. Curiously, this passage was absent from Bunnell's second opinion a month later, which largely recycled the first opinion.
777United States v. Northern Commercial Co., Indictment, No. 764 Cr. (D. Alaska Terr., 4th Jud. Div., Mar. 5, 1918), in Nat. Archives, Pacific Alaska Reg., Record Group, No. 21, Box No./Location 34 (01/10/08(2)), File: Case # 764. This time the same manager whom the government had dismissed as a defendant in the first case appeared not only as a defendant, but also as the employee whom the company had unlawfully employed more than eight hours. Possibly this modification was a response to Bunnell's ruling in the first case that "[o]bviously, under the law the one performing the labor or services is liable." United States v. Northern Commercial Co., slip op. at 8.
suspend the law. In spite of Bunnell’s decision, on April 4, Interior Secretary Lane requested that the governor suspend the law as to fertilizer oil and other fish industry by-products; the next day Strong ordered the suspension under the law that had just been declared invalid.

The ambivalence that purported supporters of the law displayed was captured by an editorial in the *Alaska Daily Empire* at this juncture that focused on the question of overtime. The newspaper, which proclaimed that it “has always observed the eight-hour day”—to be sure, paying for the extra work when employees worked more than eight hours—started from the proposition that Alaskans “are unequivocally committed to the principle that eight hours shall constitute a day’s work in Alaska.” However, the editor

felt that the inhibitions against “over-time” in the present law are too drastic. In a country that is far away from centers where extra men can be secured to take care of a rush of work the only way that the output of a concern that depends upon skilled workmen can make its production elastic is to permit men to work “over-time” in cases of emergency. ... The Empire believes that the time has not arrived in Alaska for prohibiting skilled men from working “over time” for extra pay when it would be for the interest of both employer and employee for them to do so.

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

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

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780 Telegram from Franklin K. Lane to Governor of Alaska, Apr. 4, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives.
781 Territory of Alaska, Governor’s Office, Executive Order, Apr. 5, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives. See also “Received from Governor Strong; Via Yesterday’s Mail,” *Daily Nome Industrial Worker*, Feb. 28, 1918, at 5, col. 1; Report of the Governor of Alaska, in 2 Reports of the Department of Interior for the Fiscal Year Ending June 30, 1918: Indian Affairs Territories, at 565 (65th Cong., 3d Sess., H. Doc. No. 1455, 1919).
to the U.S. Supreme Court. But five days later the U.S. Solicitor General, John W. Davis, informed Roth that on further reflection he had convinced the Justice Department that the writ of error "could not be successfully prosecuted...." The same day Gregory informed Roth that he was revoking his telegram of April 22, which had directed him to seek a writ of error.

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

The District Attorney of this Division holds that this case does not cover the whole question and is applicable only in this one special instance, and that any number of cases may still be brought under the law. This office is constantly in receipt of requests for advice regarding the legality of the law and I have even been threatened with prosecution by certain members of the local union owing to the fact that my household servants are on duty more than eight hours during the calendar day. [T]he District Attorney and...the Attorney General for the Territory...are positive in their statements that the law should be definitely settled one way or the other. In consequence, the Attorney General of the Territory has wired the Attorney General of the United States requesting that an appeal be entered.
Attorney General George Grigsby of the Territory of Alaska had indeed requested that the Justice Department not dismiss the appeal, but Solicitor General Davis rejected the request because the Department saw no basis to support the statute's validity:

The statute...forbids the employment of all wage-earners and salary-earners for more than eight hours in any day except in cases where life or property is in imminent danger. It is not limited in any way to unhealthful, hazardous, or exacting occupations, nor to children, women, or other classes demanding special care or protection. It has no such ostensible relation to the public health as the statutes upheld in Holden v. Hardy...and Bunting v. Oregon.... That the right to earn a living is a property right and one which cannot be taken away without due process of law or adequate justification under the police power is axiomatic. 792

In the pithier language of the Nome Industrial Worker, the Justice Department deemed the eight-hour law invalid because it "applies to all whether working for themselves or for others and it is this amnibus [sic] feature that is disliked." 793

A few days later Davis disposed of the governor's request in a letter to the Interior Department: "We cannot concur in the suggestion of Gov. Riggs that the law can be definitely settled only by a submission of the matter to the Supreme Court of the United States. There are many questions, of course, which reach a final settlement without the adjudication of that tribunal." 794 By indirection the Justice Department appeared to be suggesting to Riggs that he would have to find other ways for putting the quietus on rambunctious labor unions than frivolous political appeals to the Supreme Court. Attorney General Gregory himself was preoccupied at the time with prosecuting the International Workers of the World and others for making remarks interpretable as claims that World War I was being fought "for the so-called capitalist class...." 795

Arguably the most astute legal question at this time was posed by the socialist Nome Industrial Worker, the newspaper of Local 240 of the International Union of Mine, Mill and Smelter Workers (formerly Western Federation of Miners). 796

Department informed Riggs that it was not "practicable" for it to do anything else. Letter from Assistant Secretary to Governor Thomas Riggs, Jr., June 15, 1918, in id.

792Letter from Jno. W. Davis to George B. Grigsby, June 8, 1918, in Bunnell Papers, Box 1, Folder 5.

793"Present Status Eight Hour Appeal," Tri-Weekly Nome Industrial Worker, July 4, 1918, at 1, col. 4.

794Letter from Jno. W. Davis to S. G. Hopkins, Asst. Sec'y of the Interior, June 12, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives.


796As of the issue of July 9, 1917, the paper’s masthead stated that the local’s parent
Moments Are the Elements of Profit

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

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

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

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union was the IUMMSW.

797 "Miners Union Wired Grigsby-He Replied," *Tri-Weekly Nome Industrial Worker*, May 16, 1918, at 1, col. 5-6.


Beyond anything that has occurred in recent years the enforcement of the general eight hour law is most correctly to be considered the most important one to the working class the population within the Territory has faced since Alaska was purchased from Russia.

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

It challenges the standing of corporation satellites to attempt to legislate for the small minority as against the rights of the workers who perform the functions of producing for a bunch of a worthless parasites.803

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

An attempt was made to have an appeal perfected on writ of error. By order of the Attorney General of the United States the district attorney of the fourth judicial district was not permitted to enter the appeal and all district attorneys of the four judicial divisions instructed not to enter any suit under the act. Later the attorney general of the Territory essayed to appear for the United States...but this attempt was also denied by the Department of Justice. The striking miners' union at Nome contended that the Attorney General had no authority to deny an appeal and remained on strike throughout the entire placer mining season, at the same time expressing a determination to maintain the law until definitely expunged from the statute books by a decision of the highest court. A conciliator of the Department of Labor sent to Nome...was unable to arrange an agreement between the gold mining operators and the strikers, the strikers holding out for an eight-hour day...and the principal operators holding firm to a longer day on a straight hourly basis without the time-and-a-half overtime feature, on the ground that placer mining with all the additional war-time costs would be unprofitable. An expression from various Alaskan unions showed considerable variance of opinion. The sentiment for a straight eight-hour day and for an eight-hour day with time-and-a-half overtime...being about equally divided, as is the sentiment regarding the validity of the court's decision. It is to be regretted that an appeal was not allowed to be taken as, until the question is settled definitely for all time, there will be a recrudescence of labor disturbance. ... Unless the legislature of the Territory will voluntarily amend the law or unless the Department of Justice will allow an appeal, I look for continued labor unrest.804


Riggs's interest in Supreme Court review may also have been a function of his own desire for definitive repeal of the law, but he did not wait for that eventuality to begin conducting his wartime campaign against so-called idlers and slackers and the Wobblies. Thus after the Navy had dispatched four ships in June at his request to forestall I.W.W. agitation among cannery workers, the governor received a telegram in July from the chairman of the Selective Service Board in Nome wanting to know whether he could reclassify the striking gold miners (whom Riggs had discussed in his annual report) and draft them for refusing work in an industry essential to the war effort. Without any mention of the eight-hour law that the miners were trying to enforce, Riggs instructed him to consult the district attorney if the situation required "immediate action" against "idlers." The next day the governor wired the Nome Industrial Worker in the same matter that, since the eight-hour law had been "construed both by the courts and by the department of Justice...to be unconstitutional and District Attorneys instructed from Washington not to prosecute under it," gold miners "dissatisfied with existing conditions should sink personal grievances to assist the smooth running of industry from a patriotic standpoint." That same day, however, Riggs was apparently sufficiently unsure of himself that his office telegraphed the Provost Marshal General in Washington asking whether he had been correct in advising the Nome Selective Service Board that gold miners striking for an eight-hour day under a law declared unconstitutional were "idlers." Although Riggs promptly wired the board in Nome that a draft "registrant who ceases work on account of a strike for a declared cause must not be classed as an idler nor has [sic] classification changed," he conveniently failed to disabuse the Industrial Worker of his earlier erroneous interpretation.

Amusingly, the governor's abiding concern with labor unrest prompted him to use the same law to pressure employers that he castigated striking gold miners for seeking to uphold. In June, he sent admonishing letters to fishing employers that were taking advantage of the suspension of the eight-hour law, which in the meantime had become unenforceable (but not in the First Judicial Division in

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805 "Naval patrol for Alaskan Coast," *Tri-Weekly Nome Industrial Worker,* May 28, 1918, at 1, col. 1; Stewart, "The Alaskan Home Front During World War I" at 16-17.

806 Telegram from Governor Riggs to [Carl] Lomen, July 15, 1918, in Record Group 101, Ser. 440, Box 90, Alaska State Archives.

807 Telegram from Governor Riggs to Industrial Worker, Nome, July 16, 1918, in Record Group 101, Ser. 440, Box 90, Alaska State Archives.

808 Telegram from Finnegan, Executive Officer, to Crowder, July 16, 1918, in Record Group 101, Ser. 440, Box 90, Alaska State Archives.

809 Telegram from Governor Riggs to [Carl] Lomen, July 19, 1918, in Record Group 101, Ser. 440, Box 90, Alaska State Archives.

810 Stewart, "The Alaskan Home Front During World War I" at 18.
which their businesses were located), although Riggs, like the miners he was berating, was wont to inform correspondents that "the law as passed is still upon the statute books".811

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

Will you kindly advise me if my information is correct and, if so, if you will not take steps to amend your schedule to the eight-hour basis, as contemplated by the various proclamations.812

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

In contrast, the Nome Industrial Worker at this time was heaping abuse on proponents of overtime. In an editorial, the miners union found it "amusing to hear those scab apologists insist that the eight hour day is all right, but a man should be let work overtime. In point of fact everyone is willing to concede the eight hour day 'in principle' but they want to work ten or twelve, with overtime at straight time."813

The most tantalizing evidence that Riggs had joined with other officials in an effort to deal with the aftermath of Judge Bunnell's decision is a letter that he received, on official stationery of the Department of Justice/Office of Clerk of the District Court for the Territory of Alaska, from Judge Bunnell's clerk, Joseph E. Clark. Since district court judges appointed their clerks and Bunnell had appointed Clark, who had previously been chief deputy clerk,814 to the much sought after post in 1915,815 he was presumably acting under Bunnell's instructions.816 Dated August 20, 1918, this extraordinary letter raises many more

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

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


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

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

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

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

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a menial servant was signaled by his substantial salary, which at $3,500 in 1918 was about half of Judge Bunnell’s and 70 percent of the Fairbanks U.S. Attorney’s. U.S. Dept. of Justice, Register of the Department of Justice and the Courts of the United States 55 (26th ed. 1918).


818Letter from J. E. Clark to Thomas Riggs, Jr., Aug. 20, 1918, in Record Group 101, File Group 156, Box 159, Alaska State Archives. The Fourth Division, headquartered in Fairbanks, covered much of the interior, while the Second Division, with its seat in Nome, covered the western part of Alaska.

819“Mr. Wage Worker Organize,” Tri-Weekly Nome Industrial Worker, June 11, 1918, at 2, col. 1, at 3.
given for the unsophisticated working class to take for granted if they are boneheads enough to so do."  

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

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

That Riggs and his associates were pursuing an accommodationist rather than

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821 Telegram from Riggs Governor, Sept. 8, 1918 (handwritten draft), in Record Group 101, File Group 156, Box 159, Alaska State Archives.
822 Email from John Stewart to author, Apr. 10, 2000.
823 Cashen, Farthest North College President, 63-70. As Governor Strong informed a correspondent who had sought his help in obtaining a position at the time of Bunnell's appointment: "I do not care to suggest the name of anyone for the positions mentioned by you, or for any other position within the gift of Judge Bunnell, as I feel that he should be given a free hand in the selection of the men who will serve under him. ... There should be a number of positions within the gift of Mr. Bunnell, both clerkships and commisionerships, and you ought to land one of them." Letter from Governor to B. J. McGinnis, Jan. 7, 1915, in Record Group 101, Ser. 130, File 52, Box 129, Alaska State Archives. See also Letter from Governor to L. F. Protzman, Jan. 14, 1915, in id.
a confrontational course is also strongly corroborated by the governor’s public preoccupation with the anarchy that labor radicals might rain down on Alaska at any moment. In his second annual report to the Secretary of the Interior for 1918-19, Riggs lamented:

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

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

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

At the beginning of the next legislative session in 1919, Governor Riggs announced that he would submit the letter he had received from the U.S. solicitor general explaining why the Justice Department had concluded that an appeal of Bunnell’s decision would be a “mere waste of time and money.” Nevertheless, Riggs, who regretted having to observe that to a small part of the Alaskan population “the Red Flag and its teachings of tyrannical and chaotic Bolshevism represent an end to be attained, no matter through what means,” declared that the

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826“Wick Opens Up G.O.P. Campaign” at 2.  
827Letter from Governor Riggs to Robert Welch, Oct. 14, 1918, in Record Group 101, File Code 156, Box 159, Alaska State Archives.  
legislature should consider a new eight-hour bill that could pass constitutional muster “to the end that, if possible, the desire of the electorate at the election of 1916 may be complied with.”

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

Two days after the bill’s introduction, a mass meeting at Labor Union Hall in Juneau unanimously voted in favor of the bill as well as one extending coverage to the canneries. That some workers were prepared to recede from their maximalist demands was clear from remarks made at the meeting. For example, a member of the Cooks and Waiters Union approved of the new overtime provision on the grounds that “limiting...men to an eight-hour day would not be practicable in Alaska.” Even greater skepticism was expressed by former Senator


831House Bill No. 1, §§ 1-2, Territory of Alaska, Fourth Session, Alaska State Archives, Records of the Territorial Legislature, Record Group 34, 1919, Series 30, Box 5180; The Journal of the House of Representatives of the Fourth Legislative Assembly of the Territory of Alaska at 56-57.
Hubbard, who doubted the new bill's constitutionality although he supported the effort. The bill's co-author, Representative Dunn—a Denver lawyer who had been prospecting in Alaska since 1905832—seemed on firmer jurisprudential footing when he urged its constitutionality on the grounds that it followed the Oregon overtime law, which had been upheld by the U.S. Supreme Court.833 The fact that a fishermen's representative who had supported the absolute eight-hour law at the governor's hearing a year earlier now called the Dunn-Pennington bill a "masterpiece"834 suggests that at least part of the labor movement had abandoned hopes of combating a mandatory longer workday through state intervention. Although several locals of the Alaska Labor Union did endorse the Dunn-Pennington bill, the Nome Industrial Worker reported that "no union locals affiliated with the American Federation of Labor has [sic] given its endorsement to the bill in its present emasculated condition."835

That compromised condition appears to have corresponded to Representative Pennington's own politics. On the one hand, just the previous year he had joined a labor union at the age of 62, believing: "Capitalists are blind if they cannot see and understand the forces working about them." He warned employers that if they failed to recognize workers' "rights, backed by justice, then they are manufacturing the very kind of men which they so much seem to fear."836 On the other hand, the day after introducing H.B. 1, Pennington, in conformity with the legal landscape of the lower 48 states,837 also filed his anti-Bolshevik "Bill to Guard Alaska Against UnAmericanism," which criminalized the use of any flag to symbolize a purpose to overthrow or to advocate overthrowing the government of the United States or Alaska "by the general cessation of industry...."838 He had also agreed not to include canneries in the bill because he and Dunn believed that it was "possibly" just to do so since those employers had already made their

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837 See, e.g., Murphy, World War I and the Origin of Civil Liberties in the United States.
contracts; nevertheless, he told the mass meeting that if workers wanted to include the fishermen, he was “willing to go down to defeat with the bill on that proposition.” Excluding the canneries was tantamount to gutting the law: in 1919 the fishing industry employed 28,500 workers (90 percent of them in salmon canneries) at a time when the entire population of Alaska was only 95,000.

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

The day after receiving the chairmen’s request, Attorney General Grigsby sent the chairmen a comprehensive 13-page legal analysis of the bill—the full text of which was published in the Juneau newspaper—concluding that most of the bill could pass constitutional muster. Grigsby instructed the legislature that no hours law had “ever been upheld on the theory that the constitutional right of all persons to contract freely is subject to regulation at the hands of a legislative majority regardless of the character of the employment which is the subject of the contract.” Based on the U.S. Supreme Court’s decision upholding the Oregon hours law in 1917, Grigsby concluded that H.B. 1, which he regarded as

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839“Mass Meeting Is Held over Eight-Hour Law.”
841The Journal of the House of Representatives of the Fourth Legislative Assembly of the Territory of Alaska 118 (1919).
844Letter from Attorney General George Grigsby to James Bogan and John Dunn at 3 (Apr. 8, 1919), in Records of the Territorial Legislature, Record Group 34, Series 30, Box 5180, Alaska State Archives.
845Bunting v. Oregon, 243 U.S. 426 (1917); see also the discussion above in section 4. Interestingly, Josephine Goldmark of the National Consumers’ League, one of the leading advocates of labor standards legislation, had sent Governor a copy of that organization’s
"Moments Are the Elements of Profit"

practically a duplicate except as to the occupations covered and limitation of hours, would be upheld if it were limited to mills, factories, and manufacturing, saw mills, fisheries, logging camps, laundries, and transportation companies. But as to lumber yards, hotels, restaurants, telephone companies, offices, and stores, he believed that "whatever degree of unhealthiness is attached to such occupations is too remote to justify the exercise of the police power." By "including almost every known occupation, ranging from that of a logger in the woods to a lawyer's or doctor's clerk," the legislature ran the risk that "courts might say that it is an attempt, in the guise of a health and public welfare law, to enact a general eight hour law." Indeed, Grigsby speculated that "a general eight hour law such as passed by the Legislature in 1917, preceded by a like legislative declaration as to its intent and purpose would...stand as good as chance of being upheld" as H.B. 1. Consequently, the Alaska attorney general concluded that in order to avoid a court ruling that voided the entire bill, elimination of the aforementioned occupations bearing no direct relation to health or welfare "would leave the proposed Act unobjectionable." By

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

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

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

brief in defense of the Oregon law. Letter from Governor Strong to Josefine Goldmark, Jan. 28, 1918, in Record Group 101, File Code 156, Box 159, Alaska State Archives.

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

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

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

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

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

The pressure to deviate from the absolutist law of 1917 was further evidenced by Senate Bill No. 19, which was even titled, "An Act to establish a general eight hour day and to provide for the payment of overtime." It made eight hours a day's labor (except for farming and domestic service and hazardous occupations...
otherwise regulated) unless the employer and employee signed an agreement
designating other hours as a day’s labor, in which case an overtime premium
was not statutorily required; only where they failed to sign such an agreement was
time and one-half mandated for hours in excess of eight. It too was defeated
6-2.

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

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

857Senate Bill No. 19 (Sen. Hess), in Records of the Territorial Legislature, Record
Group 34, Series 30, Box 5180, Alaska State Archives. The full text was published in
col. 3.

858SB19, in Records of the Territorial Legislature, Record Group 109, 1919 Bill
Docket, Alaska Senate, Alaska State Archives; The Journal of the Senate of the Fourth
Legislative Assembly of the Territory of Alaska at 118; “Eight-Hour Bill Is Passed by the
Senate Members,” Alaska Daily Empire, Apr. 28, 1919, at 2, col. 4.

859Senate Bill No. 54, §§ 1-3 (Sen. Heckman), in Records of the Territorial Legislature,
Record Group 34, Series 30, Box 5180, Alaska State Archives. The Senate and House
Journals in places refer to this bill as having been introduced by Sen. Frawley. The Senate
Journal of the Fourth Legislative Assembly of the Territory of Alaska at 173; The Journal
of the House of Representatives of the Fourth Legislative Assembly of the Territory of
Alaska at 248, 350.

860The Senate Journal of the Fourth Legislative Assembly of the Territory of Alaska at
117.

861“Legislature as It Will Be Made Up at Next Term,” Fairbanks Daily News-Miner,
Nov. 13, 1916, at 3, col. 2.
restrictions political suicide for senators opposing so far as concerns labor.\(^{862}\)
The Senate immediately adopted a report of its special committee, which first characterized the “threat” as “a direct offer to purchase the vote of this body,” and then initiated criminal prosecution:

> We could overlook the efforts of the signers...to intimidate members of this body but when such an attempt at intimidation is accompanied with the intimation that the authors will oppose the success of the Victory Loan now offered by our Government, we cannot reach any other conclusion than that the parties thereto are making threats that very closely touch the border line of conspiracy or treason....
> And we further recommend that the above telegram be turned over to the United States District Attorney to deal with as the law may direct.\(^{863}\)

In contrast, labor’s political strength in the House may have been decisive in the failure of the House and Senate conferees to agree on a final version.\(^{864}\) On the penultimate day of the legislative session, the House, by a vote of 12-4, amended Senate Bill No. 54 to reincorporate all the excluded occupations (except agriculture and domestic service),\(^{865}\) “Dunn and Pennington refusing to budge an inch. ‘We will not yield a word,’ said Mr. Pennington. Nor a ‘coma [sic],’ added Mr. Dunn.”\(^{866}\) Thus ended the Alaska labor movement’s attempt to achieve a state-enforced general eight-hour day.

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

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\(^{862}\)The Senate Journal of the Fourth Legislative Assembly of the Territory of Alaska at 106.

\(^{863}\)The Senate Journal of the Fourth Legislative Assembly of the Territory of Alaska at 107.

\(^{864}\)Senate Bill No. 54, in Records of the Territorial Legislature, Record Group 109, 1919 Bill Docket, Alaska Senate, Alaska State Archives; The Journal of the House of Representatives of the Fourth Legislative Assembly of the Territory of Alaska at 318, 321, 322, 326; The Senate Journal of the Fourth Legislative Assembly of the Territory of Alaska at 150; “Eight Hour Bill Is Passed by the Senate Members”; “Measures for 8-Hour Day in Hopeless Shape,” Alaska Daily Empire, Apr. 30, 1919, at 2, col. 5.

\(^{865}\)The Journal of the House of Representatives of the Fourth Legislative Assembly of the Territory of Alaska at 264, 300.

\(^{866}\)“Fourth Legislature Comes to an End After Being in Session for 33 Hours, Making Record for Alaska Sittings,” Alaska Daily Empire, May 2, 1919, at 1, col. 1, 2. Wickersham, who did not mention passage of the eight-hour law in 1917 in his diaries, happened to be in Juneau the day after the legislature adjourned and noted that it had “failed to pass any 8 Hour Law....” Wickersham “Diaries,” May 3, 1919.
asserting their absolute inability to comply with an eight-hour law, for the reason that almost all of them are share workers.” Ironically, the governor concluded his account by observing that many industries had voluntarily adopted the eight-hour day with success.867

The forces pushing for some kind of hours regulation did not abandon their efforts. At the fifth legislative session in 1921 they undertook a more cautious overtime initiative. Although it, too, applied to adult men, House Bill No. 6 from the outset confined its scope to any mill, saw mill, factory, laundry, manufacturing establishment, or open-cut or open-pit quarry or mine. It was also more circumspect in attempting to anticipate any judicially constructed constitutional obstacles to hours regulation. Unlike earlier bills, it stated that “climatic and living conditions” in Alaska made employment in the named industries for more than eight hours a day “injurious to the health of both men and women...and greatly increase the likelihood of injury....” The bill then characterized these facts as justifying the territory’s “exercise of its police power...to discourage the employment” of men or women in those industries for more than eight hours.868

The bill sought to insure judicial approval by offering employers even more daily overtime than the Oregon law, which permitted three hours and was upheld by the U.S. Supreme Court. H.B. 6 permitted employees to work as many as four hours of overtime at time and one-half.869 Finally, the bill made each violation of the act a misdemeanor punishable by a fine of between $100 and $500 or imprisonment in federal jail for a period of between 30 days and six months.870

In the course of further deliberations, the bill’s scope was expanded by inclusion of surface placer mines. In addition, for the first time an Alaska overtime bill made payment of overtime wages a civil obligation enforceable in a contract action.871 Immediately before the House of Representatives passed the bill with these amendments by a vote of 15 to 1, it received the attorney general’s opinion as to its constitutionality. Despite the strong similarity to the Oregon law, he viewed the bill as “certainly very close to the line....” He thought that “the chances are that it will be upheld but we have nothing to spare, because it

868Territory of Alaska, Fifth Session, House Bill No. 6, § 1, in Record Group 01, Ser. 30, Box 5181 (Legislative Bills and Resolutions, 1921-25), Alaska State Archives. Rep. George Getchell, who introduced the bill, had been a mining engineer and became Juneau’s chief of police after leaving the House. Who’s Who in Alaska Politics at 34.
869House Bill No. 6, § 2.
870H.B. 6, § 3.
871The Journal of the House of Representatives of the Fifth Legislative Assembly of the Territory of Alaska 169 (1921).
must be remembered that we have the history of legislation on the eight hour question against us in this Territory in our effort to uphold the validity of the law.\textsuperscript{72}\textsuperscript{72}

In the Senate, Luther Hess, vice president of the First National Bank of Fairbanks and “one of the most extensive holders of mining ground in the whole territory,”\textsuperscript{73}\textsuperscript{73} introduced as a substitute for H.B. 6 an even more permissive version of his unsuccessful overtime bill (S.B. 19) from the previous session. Whereas the earlier bill at least mandated time and a half for overtime work beyond eight hours daily where the employer failed to obtain its employees’ signature to an agreement stipulating to a longer workday, Hess’s new bill merely required employers, in the absence of such an agreement, to pay overtime wages “at the rate of wages agreed upon; or if there is no agreement as to wages, at the rate of wages paid for like service in the community where the labor was performed.”\textsuperscript{74}\textsuperscript{74} This watered down version of an already diluted overtime bill passed the Senate by an overwhelming 7-1 majority.\textsuperscript{75}\textsuperscript{75}

Although even the House overtime bill was far removed from the radical intervention in the labor market embodied in the 1917 law, the Senate bill constituted such a meaningless labor standard that it was no surprise that the House voted 11-4 not to concur in it.\textsuperscript{76}\textsuperscript{76} A conference committee was unable to reach agreement, but a free conference committee (of which neither the House nor Senate bill author was a member)\textsuperscript{77}\textsuperscript{77} voted 5-1 in favor of the Senate substitute. The agreement, however, was short-lived: the whole House disavowed its own managers, voting 9-5 against the Senate substitute, thus bringing to a close eight years of efforts to legislate the eight-hour day in Alaska.\textsuperscript{78}\textsuperscript{78}

After the defeat of the initiatives of 1917, 1919, and 1921, no eight-hour bill was introduced during the 1923 session. Not only did the Alaska legislature never again enact a general absolute eight-hour law, it did not even enact an

\textsuperscript{72}The Journal of the House of Representatives of the Fifth Legislative Assembly of the Territory of Alaska at 179.


\textsuperscript{74}Territory of Alaska, Fifth Session, In the Senate, Substitute for House Bill No. 6, § 2 (Rep. Hess), in Record Group 01, Ser. 30, Box 5181 (Legislative Bills and Resolutions, 1921-25), Alaska State Archives.

\textsuperscript{75}The Senate Journal of the Fifth Legislative Assembly of the Territory of Alaska 173 (1921).

\textsuperscript{76}The Journal of the House of Representatives of the Fifth Legislative Assembly of the Territory of Alaska at 242.

\textsuperscript{77}Unlike a conference committee, a free conference committee is free to suggest new amendments that are clearly germane.

\textsuperscript{78}The Journal of the House of Representatives of the Fifth Legislative Assembly of the Territory of Alaska 308-309, 360.
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over time law until 1955. And so far removed from workers' and legislators' concerns of those early years is the state's current overtime law that—despite its unusual retention of Alaska's quondam tradition of mandating premium pay after eight hours per day—its express public policy fails to make any reference whatsoever to the goal of a shorter workday. Instead, the legislature's policy has been diluted merely to a matter of money—namely, "to establish...overtime compensation standards for workers at levels consistent with their health, efficiency and general well-being,..."

12. The Right to Say No: State Laws Limiting Mandatory Overtime

Remember, the long struggle for the 8-hour day was not a struggle for 8 hours of work. It was a struggle for 16 hours away from work.

Frankly, we would prefer that all overtime be voluntary, however, we don't believe that we can survive with that. That's basically what it boils down to...

Later legislative initiatives in other states, only one of them successful, sought either to limit the extent of mandatory overtime or to entitle workers to refuse it without jeopardizing their employment. The most high-profile political struggle erupted in 1977 over a bill filed in the California Assembly that simply provided: "No employee shall be terminated from his or her employment for refusal to work overtime." The bill was amended repeatedly over the following several months. First, workers were protected from any kind of adverse disciplinary actions, while businesses with five or fewer employees, much of agriculture, trains, and work performed in emergencies endangering public health and safety were exempted; overtime was defined as work performed "over and

8791955 Alaska Sess. Laws, ch. 185 at 372 (providing for time and a half for hours beyond 40 weekly or eight daily with numerous exclusions).
881Alaska Stat. § 23.10.050 (2000). When this policy was adopted in 1959, it appears to have been taken verbatim from a four-year old New Mexico statute. 1959 Alaska Sess. Laws ch. 171, § 1, at 248; 1955 N.M. Laws ch. 200, § 1, at 459.
above...the normal hours in a working week..." Otherwise, the agricultural and small-business exemptions were deleted, but a broad and amorphous exemption was added for "emergencies due to unavoidable and unforeseeable circumstances which cause significant disruption of usual operations." This new exemption was then tightened somewhat by substituting "extreme" for "significant." Finally, on June 23, the small-business exemption was written back into the bill, this time, however, raised 10-fold to exempt employers employing 50 or fewer employees, leaving only 5 percent of private employers and 65 percent of the employees covered.

The following day the California Assembly passed this amended bill by a margin of 43 to 29, but employers and their representatives were outraged. As one Assemblyman, who regarded it as "the most antibusiness bill that has been considered by this Legislature," put it: "We might as well put up a sign that says, "Business not welcome. The Legislature of the State of California will run your business.""

When the Senate Industrial Relations Committee held a hearing in November 1977, the bill's author summed up the fundamental issue: "Simply, do people have the right to say no to an order that they have to work beyond the normal work day. Does an employee have the right to say, 'I'm exhausted.', or 'It's my son's birthday.', or 'I have to pick my kids up.'...without the fear of being fired? Should people be allowed to control their own time? [T]his legislation protects that basic right."

One of the most telling objections that employers raised to the bill was its capacity to undermine their coercive authority. As the California Laundry and Linen Supply Association complained: "All employees who work five and one-half or six days, could literally 'go on strike' any time they had a real or imagined 'grievance.' They simply refuse to work on Saturday, and management could not, under AB 1295, discipline them! [T]hey can all refuse overtime work and literally 'shut down' our plants. This would not be a 'strike,' but our entire plant...

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of employees exercising their ‘right’ not to work overtime, granted them by AB 1295.”

The industrial relations director of another large firm inadvertently specified workers’ real grievance— namely, that the employer had violated the central norm establishing that the clock objectively determines when enough is enough: “It would be very difficult to operate the business if the threat existed that all employees could walk off the job at the end of a work day regardless of the amount of work which remains to be done.” Where that work is shipping “toys and sundries to drug and discount stores in 13...states” from a distribution center, it is clear both that no emergency warranted compelling employees to work against their will and that entrusting to management the decision as to how much of an in principle endless “amount of work remains to be done” underwrites workplace autocracy. A vice president of Hunt-Wesson Foods painted an even more disturbing scenario for management, which at the same time gave substance to workers’ seemingly rhetorical lamentations about involuntary servitude: “For the most part, there are no replacements available for skilled employees. If overtime were not required, key skilled employees could easily shut down any one or more of our operating plants by refusing overtime work.” Viewed in this way, employers’ intense opposition to the bill was self-explanatory: the proposed law would have overridden employers’ economically coercive counterpower to nullify workers’ superior labor market position.

Unionized employers also resented the fact that a mandatory overtime law, by creating a background institutional entitlement that unions would otherwise have to make collective bargaining concessions to secure, would enable unions to have their cake and eat it too. (By this logic, the notion that “[i]f the Legislature begins removing items from the collective bargaining arena, the process itself is threatened,” should have precluded Congress from enacting the

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892 Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime at 281-82 (statement of Thomas Colbert, ind. rels. dir., Foremost-McKesson). 

891 Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime at 258 (testimony of James Watson).

894 Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime: Appendices at 220 (Zechar).

891 Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime at 281 (statement of Thomas Colbert, ind. rels. Dir., Foremost-McKesson).
Indeed, employers were especially indignant that the proposed law went far beyond what unions demanded during collective bargaining. The manager of the Crown Zellerbach paper mill in Los Angeles praised the "responsible recognition" that the workers' union had displayed in the most recent bargaining by requesting merely that: "No employee shall be required to work more than 11 consecutive days without a day off. No employee shall be required to work more than one double shift per week, 16 hours, nor more than three 12 hour shifts, or no more than a combined total of three overtime days in any one week." To be sure, the manager's characterization of what could be regarded more as a plea for mercy than a demand as "a far cry from the proposed legislation" elicited this barbed rejoinder from the committee chairman: "On that point, sir, that's also a far cry from what exists in that agreement which you currently have."

Unions, in contrast, complained that employers sometimes used mandatory overtime to stockpile output before the expiration of collective bargaining agreements to undermine strikes. However, unions also made themselves vulnerable to a serious objection from legislators by conceding that many workers relied on overtime pay. Thus after a CWA official representing telephone company workers observed that "[m]ost of our members...want the overtime because they've got themselves in that economic situation where it's now a necessity. It's their overtime, so they get it," the chairman of the Senate Industrial Relations Committee asked him why the legislature should impose a solution on employers "if the workers themselves cannot come to an acceptable agreement to the point of being able to have a united position in dealing with management...." The CWA's unresponsive answer urged the legislature to act on the grounds that the unionized business sector was reluctant to negotiate on this matter because it did not want to have to face competition from nonunion firms that operated with a free hand regarding overtime.

Employers, too, were guilty of self-contradictory logic when they warned

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896 Indeed, the U.S. Supreme Court has ruled that even with respect to federal preemption and the NLRA, states are free to regulate employment conditions even though such a statute "gives employees something for which they otherwise might have to bargain.... Both employers and employees come to the bargaining table with rights under state law that form a "'backdrop'" for their negotiations...." Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21 (1987).

897 [California] Senate Committee on Industrial Relations, Interim Hearings on AB 1295—Mandatory Overtime at 225 (testimony of Doug Bockstanz and Sen. Bill Greene).

898 Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime at 448 (testimony of John Irving, pres., Machinists Union, San Diego Cty).

899 Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime at 127-28 (Ken Major, Cal. area dir., CWA, and chairman Senator Bill Greene).
legislators that the proposed law, by making “overtime labor less reliable than it is right now,” would cause “prudent businessmen to reduce their dependence on overtime labor. This means there would be less overtime available for workers who depend on it to meet their obligations.” When this veiled threat to eliminate voluntary along with mandatory overtime made no impression on the committee, a Crown Zellerbach paper mill manager virtually accused workers of forcing them into requiring overtime, lamenting: “This is not my policy to work overtime. As a matter of fact, my policy is to work less and less overtime. However, there are a large number of people who depend on overtime wages because of the financial situations they’ve gotten themselves into.”

After 30 hours of hearings, the bill’s author was forced to dilute the bill to keep it alive in the senate committee, thus turning what had originally been a 15-word bill into six pages of largely procedural safeguards for employers. In addition to limiting coverage to firms with more than 100 employees and sunsetting the provision after three years, Assemblyman Tom Bates reduced workers’ self-empowerment to the right to file a complaint with the state labor commissioner if the workers had previously filed a grievance or complaint with the employer and the parties had made a serious effort to resolve it. The commissioner was required to investigate complaints that workers had been “forced to work overtime by their employer on regular, recurring, and frequent bases as a term or condition of employment.” At hearings the commissioner was authorized to hold he was required to take testimony and make findings on whether the employer had: made a serious attempt to create a voluntary overtime system and to find additional workers for overtime not coverable on a voluntary basis; used forced overtime in an arbitrary and capricious way; and taken his employees’ personal concerns into account. After completing a lengthy administrative procedure saturated with due process for employers, the commissioner was authorized to grant an exemption from working overtime—and even this exemption might “permit the employer to work employees forced overtime under emergency conditions”—or issue a cease and desist order requiring the employer to give employees at least 48 hours advance notice of the requirement to work overtime, to create a voluntary overtime system, or to try to hire additional workers. A lengthy appeal process then became available to employers. But after business lobbyists argued that even this diluted provision would “interfere with management’s right to require employees [sic] to work overtime when necessary,” the senate committee rejected the bill four to two.  

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900 Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime at 227, 230 (testimony of Doug Bockstanz).

901 Jerry Gillam, “Senate Panel Rejects Bill to Forbid Forced Overtime,” L.A. Times, May 19, 1978, § 1, at 3, col. 5-6; Cal. Leg. A.B. No. 1295 (amended in Senate May 8, 1978). The newspaper account stated that the business exemption threshold was 100
collapsed one of the major legislative efforts to offer a modicum of protection to workers against mandatory overtime.

In the wake of the defeat of the California overtime initiative, legislators in several other states sought to enact related legislation. On March 21, 1979, a bill, sponsored by 12 representatives, was introduced in the Wisconsin Assembly that would have prohibited employers from disciplining or terminating any employee for refusing to work more than eight hours of overtime in any week or more than 100 hours in a calendar year. Employers of fewer than 20 employees would have been exempt; the ban would also not have applied to emergencies endangering public health or safety or to those “due to unavoidable and unforeseeable circumstances causing a severe disruption of usual operations.” The state Department of Industry, Labor and Human Relations was authorized to investigate complaints and issue enforcement orders. In connection with a mandatory fiscal estimate submitted three weeks later, the department estimated that it was currently receiving 170 calls per month on this issue. After a public hearing was held on the bill on April 24, 1979, the chief sponsor offered a substitute amendment that eliminated the weekly overtime standard and the small employer exemption, authorized the department to award reinstatement with back pay and to assess forfeitures against offending employers of not more than $100 (per day of continuing violations), but the bill nevertheless died in the Assembly on April 3, 1980.

A related effort at the same time in neighboring Illinois received even shorter shrift: introduced on April 4, 1979, House Bill 1519 would have amended the state minimum wage and premium overtime law to prohibit employers from suspending, discharging, or otherwise disciplining any employee for refusing to work overtime hours (generally more than 40 per week). Though radical within the scope of its coverage, the bill would not have protected any of the large number of workers (including farm laborers, government employees, and executive, administrative, and professional employees) who were also excluded from the overtime premium provision. However, the bill was tabled by a 15-0 vote.

...
vote of the Labor and Commerce Committee three weeks later.\textsuperscript{906}

An in some respects radical bill, very similar to the Wisconsin proposal, was introduced in the New Jersey Senate on January 24, 1980. Eugene Bedell's proposed law would have made it illegal for employers to terminate or discipline in any other manner any employee for refusing to work overtime. Senate Bill No. 887 broadly defined "overtime" as work over and above the employee's "normal daily hours of work...which in no event shall exceed eight hours per day, unless otherwise specified by a valid collective bargaining agreement." This expansive protection for nonunion workers was limited by several exceptions, the most important of which exempted all employers of 50 or fewer employees and excluded all executive, administrative, and professional employees. In addition, the law would not have applied to overtime work performed during emergencies in which public health or safety was endangered or those resulting from "unavoidable[e] and unforeseeable circumstances which cause extreme disruption of usual operations." Finally, the bill would have provided for enforcement by conferring a private right of action on employees to sue employers for damages resulting from unlawful termination or disciplinary action; in addition to the greater of actual damages or $1,000 in statutory damages, Senate Bill No. 887 would have awarded costs and reasonable attorneys' fees to employees who prevailed.\textsuperscript{907} Thus, significantly, the bill did not directly enjoin employers from firing employees for refusing to work overtime, but merely sought to impose financial disincentives on firms.

The Senate, Labor, Industry and Professions Committee held a hearing on the bill in the industrial city of Linden in May 1980.\textsuperscript{908} Despite the deference paid by the bill to collective bargaining agreements, many large unionized employers vigorously testified against state intervention, adamantly insisting "that it is absolutely necessary that management retain the right to take action for refusal to work overtime whenever it is necessary."\textsuperscript{909} General Motors took an especially hard-line position, asserting at every turn the quasi-natural inevitability of its overtime regime: "by the very nature of the entire process of building

\textsuperscript{906}Illinois Legislative Reference Bureau, \textit{Legislative Synopsis and Digest: Final Volume 2}: 1979, at 2028.

\textsuperscript{907}New Jersey Senate Bill No. 887 (Jan. 24, 1980).

\textsuperscript{908}Public Hearing Before Senate Labor, Industry and Professions Committee on S-887 (An Act to prohibit employers from terminating or otherwise disciplining employees for refusal to work overtime and providing penalties therefor, and supplementing Title 34 of the Revised Statutes): held May 8, 1980, City Hall, Linden, New Jersey ([1980]); Robert Misseck, "Unions, Industry Clash on Overtime Measure," (Newark) \textit{Star-Ledger}, May 9, 1980, at 32, col. 5.

\textsuperscript{909}Public Hearing Before Senate Labor, Industry and Professions Committee on S-887 at 63 (William Saller, general manager, governmental affairs, Public Service Electric & Gas Co.).
automobiles, overtime is inherent, it is unavoidable...."910 Consequently, state intervention to make overtime voluntary with each individual employee was "unrealistic. It must be done, it cannot be optional. ... Half an assembly line cannot elect to work and the other half elect not to work, and both have their way." Moreover, General Motors alleged that such a law "would place the power in the hands of very few individuals to thwart the will and desire of the vast majority of their fellow employees [sic] who do want to work the premium hours, and in many instances to work even full straight time." It perversely sought to support its implausible claim that there was "no evidence showing that overtime has been a hardship on employees any more than has the requirement to report during regular working hours" with the argument that overtime enabled the many workers whom GM put on short-time and lay-off to work a 2000-hour year; in this way, the corporation sought to turn compulsory overtime work against its opponents by arguing that overtime served "the important function [of] accomplish[ing] precisely what has been frequently urged..., that is to stabilize employment...."911

In contrast, the New Jersey Business and Industry Association complained that the bill was "extremely discriminatory" because it left management in unionized firms "free to make such [overtime] assignments," whereas similar arrangements between nonunion employers and their individual employees would be "null and void," thus placing "the employer and the operation of his business at the discretion of the employee."912 The largely nonunion hotel and restaurant industries sought to justify legislative inaction by suggesting parity between overtime rules laid down by management and individual workers. Just as any agreement by an employee at the time of hire to work the overtime that employer may "from time to time" call on him to perform should be honored, so, too: "If the prospective employee tells the employer that under no circumstances will he ever work more than eight hours a day, or more than 40 hours a week...and if the employer agrees to that, then that understanding should prevail. We don't think that New Jersey needs a state law to interfere with...such agreements...."913 Conjuring up the best of all possible worlds, the New Jersey State Chamber of Commerce deployed an assertion that by logical extension would pooh-pooh the

910Public Hearing Before Senate Labor, Industry and Professions Committee on S-887 at 28x (statement of General Motors Corp.).

911Public Hearing Before Senate Labor, Industry and Professions Committee on S-887 at 26x-27x (statement of General Motors Corp.).

912Public Hearing Before Senate Labor, Industry and Professions Committee on S-887 at 49x (written statement).

913Public Hearing Before Senate Labor, Industry and Professions Committee on S-887 at 72-73 (testimony of Clark Martin, representing New Jersey Restaurant Association, Hotel/Motel Association, and Milk Industry Association).
need for any labor standards legislation: "Poor [employer overtime] practices are self-correcting."914

In the midst of this barrage of employers' solid opposition, even the bill's chief sponsor got cold feet. Despite his conviction that something was "wrong" "if we have to force people to work overtime when they don't want to in order to stay competitive," Senator Bedell admitted: "I still don't know; I have not made up my mind yet whether this legislation is the way or not."915 Apparently neither he nor his colleagues were persuaded by the refutation of the necessity of overtime work offered by one telephone company worker who explained that her employer mandated two-day service for customers who merely wanted a phone of a different color:

But is it really important to force people to work overtime so that you can have an outside jack by your pool? Is it critical that you have one at your cabana at the beach club? These are the kinds of things that we are forced to work overtime for....916

Unsurprisingly, the bill died in committee without any further legislative action.

Public recognition of the persistent resentment of mandatory overtime resurfaced at the turn of the millennium as several states took tentative and largely unsuccessful steps toward restraining employers from imposing supernormal workweeks on unwilling workers. In January 1999 a bill was introduced in the West Virginia legislature amending the time and a half for overtime provision in the state minimum wage and maximum hours law to provide "that an employee has the right to decline to work longer than the forty hours in any workweek."917 A management-side law firm warned employers that the bill "takes away your right to require an employee to work overtime even when the request is crucial to productivity and overall business success."918 In the event, the legislature adjourned in June without having taken any action on the bill; the bill was reintroduced in January 2000, but no action was taken.919

A more timorous bill introduced a week later in January in Maine made more

914Public Hearing Before Senate Labor, Industry and Professions Committee on S-887 at 34 (testimony of James Morford, director, governmental relations, N.J. State Chamber of Commerce).

915Public Hearing Before Senate Labor, Industry and Professions Committee on S-887 at 36.

916Public Hearing Before Senate Labor, Industry and Professions Committee on S-887 at 47 (testimony of Barbara Brenner).

917West Virginia House Bill 2018, 74th Legislature, 1999 (Lexis).

918Steptoe & Johnson, "Do Employees Have the Right to Decline Overtime?" West Virginia Employment Law Letter, Feb. 1999 (Lexis).

919West Virginia House Bill 2018, 75th Legislature, 2000 (Lexis).
Overtime over Time

progress. The concrete occasion for the legislative initiative was the exasperation by workers with the Poland Springs bottling plant in Poland, Maine, who for four months or more in 1997 had been required to work 12- and 16-hour shifts seven days a week without any days off. The plant was organized by the United Food and Commercial Workers, but the collective bargaining agreement “allows workers to log more than 100 hours in a week....”

The bill that was promptly introduced in the Maine Senate—by the senator representing the county in which the Poland Springs plant was located—amended the state maximum hour and overtime law so that an “employer may not require an employee to work overtime in violation of the following limitations: A. An employer may not require an employee to work more than 32 overtime hours in any one calendar week; and B. An employer may not require an employee to work overtime on more than 6 days in a calendar week.” The bill excluded seasonal workers, but defined “overtime” to include more than eight hours in a day as well as more than 40 in a week. This extraordinarily generous treatment of employers may be contrasted with similar regimes in Western Europe, where employers are permitted to employ workers during very limited overtime hours over a week, month, or year. For example, in Germany, the new working time law permits employees to work only two hours’ overtime for 30 days a year.

Three weeks later, the Joint Standing Committee on Labor held a hearing on the bill. The director of the state Bureau of Labor Standards testified that his agency “often receive calls...from workers who want to know if their employer can fire them if they refuse to work mandatory overtime, even mandatory overtime that to most people would seem extreme. The answer at present is YES....” The director reported that while the workers might consider their situation “unfair,” the agency was also concerned “from a workplace safety perspective” because workplace injuries increase as the result of fatigue caused by “excessive hours on the job.” The agency supported the bill, but suggested an “exemption for essential workers in public emergency situations.” Much of the testimony furnished by employers focused on the need for exemptions for emergency state work such as snowplowing. Surprisingly, even the submission of the National Federation of Independent Business, while not supportive, did not

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923 Testimony of Alan Hinsey (Feb. 12, 1998) (furnished by Maine Law and Legislative Reference Library from the Labor Committee files).
denounce the bill as the end of the world for free enterprise.924

In committee, the amendatory process quickly watered down an already modest bill and accommodated many of the aforementioned concerns. The limit on overtime was stretched to 96 hours over three weeks, and that on daily overtime was deleted. Exemptions were added for public emergencies, essential services, and health and safety considerations.925 It is unclear whether a newspaper was speaking tongue in cheek when it reported that under the bill “Maine workers will be limited to 96 hours of mandatory overtime within any three-week period....”926 Another amendment enabled employers to request emergency waivers for up to three weeks for unforeseen or uncontrollable circumstances that would otherwise harm their firms.927

Basic criticisms of the bill made during the Senate floor debates were directed at the effort to “micromanage business” and “dictate” to manufacturers and labor: “The employees’ overtime provides them an opportunity of an income that is not part of an annual salary and that they can purchase the extras in life that they couldn’t have. ... Why don’t we let them [manufacturers] run their business the way they feel is most efficient and is in the best interests of both their employees and their financial standings.”928 Another senator, after confessing that “[i]t sort of boggled the imagination as to why any sane, rational, economically motivated employer would continue that practice [of paying time and a half for long hours instead of hiring additional workers] for any great length of time particularly against the will of those who were employed,” answered that benefit packages made it cheaper or at least competitive vis-à-vis hiring additional workers. But the senator’s opposition to the bill rested on the calculation that “we are not yet at the point where the fringe benefit packages...customarily made available to employees will induce employers to exploit this situation to a degree that it requires us to take legislative action to correct the vice.” Moreover, even where such expensive benefits are available, intervention would probably not be called for since those firms are likely to be unionized.929

The bill’s sponsor, John Cleveland, made a crucial point that he apparently did not need to draw out for the members: “it puts no limitation whatsoever on voluntary overtime. An individual may work as many hours as they choose in a

924Letter from David Clough, state director, NFIB (Mar. 10, 1998).
929Legislative Record, S-2176 (Sen. Mills, Mar. 27, 1998).
voluntary situation and many individuals choose to do that for a number of reasons."\textsuperscript{930} Such a provision would be so open to abuse as to be unimaginable in any modern labor-protective statute. It would make it possible for employers, for example, to pressure workers into waiving their rights under minimum wage, overtime, safety and health, and social insurance laws. It was precisely the kind of provision that doomed nineteenth-century protective laws to meaninglessness.

In this so-called pre-enforcement stage, maximum hours statutes were “unenforcible because they set standards which were to prevail only in the absence of an agreement to the contrary between the employer and the employee.” Such laws might forbid employers to “compel” women to work beyond a certain number of hours, but the “woman who wished to hold her job must perforce express willingness to work longer hours. But in the eyes of the law she was under no compulsion.”\textsuperscript{931}

After having made such crucial concessions, Cleveland finally responded to the aforementioned call for continued laissez-faire: “I think we have to recognize that these employees are human beings. They have families. They have children. They have community responsibilities. ... Is that the kind of society, at the end of the 20th century that we really want from people who work for a wage. That employers ought to be able to demand from them anything that they want? That they ought not to be able to live a life to help raise their children, to participate in their community but rather to be used more as slaves to meet the production schedule...?”\textsuperscript{932} The Senate then passed the bill 22 to 13.\textsuperscript{933} A smaller majority, 76-68, prevailed three days later in the House,\textsuperscript{934} where the debate was more attentive to employers’ complaints that the bill “would put such a string around them that there are occasions when they wouldn’t be able to get essential work completed....”\textsuperscript{935}

The governor’s veto was curious in that he criticized the bill both for denying employers flexibility and making Maine less attractive to high-wage employers—an argument he perversely used the same day in vetoing an increase in the state minimum wage to $5.40 an hour—and for still permitting employers to require employees to work as many as 96 overtime hours every three weeks. When the Senate fell one vote short of the two-thirds majority needed to override the veto, employers survived their closest brush ever with even the feeblest of

\textsuperscript{930} Legislative Record, S-2176 (Sen. Cleveland, Mar. 27, 1998).
\textsuperscript{931} Brandeis, “Labor Legislation” at 625, 626.
\textsuperscript{932} Legislative Record, S-2178-79 (Sen. Cleveland, Mar. 27, 1998).
\textsuperscript{933} Legislative Record, S-2180 (Mar. 27, 1998).
\textsuperscript{934} Legislative Record, H-2024 (Mar. 30, 1998).
\textsuperscript{935} Legislative Record, H-2023 (Rep. Treadwell, Mar. 30, 1998).
interferences with their unfettered control over the length of the working day.936

But the more than century-long struggle for a general limit on overtime work finally took “a very small step” on May 5, 2000, when the governor signed an even weaker bill prohibiting employers from requiring employees to work more than 80 overtime hours every two weeks—a burden described by one senator as the limit beyond which workers are “probably dead on their feet.” In addition to excluding farm and seasonal workers and even low-paid executive employees, the law exempted annual maintenance work to propitiate the paper industry.937

Pennsylvania joined the ranks of states considering anti-overtime legislation in October 1999, when 28 legislators introduced the Restricted Overtime Act in the House. This short and modest bill would afford employees not subject to a collective bargaining agreement the right to refuse to work more than 16 hours of overtime (beyond 40 hours) per week.938 Employers declined to testify at the hearings in January 2000, but the Pennsylvania Chamber of Business and Industry submitted a letter that rejected such “unwarranted intrusions into employee/employer relationships,” and disin-genuously suggested that the issue be addressed at the federal level to avoid causing Pennsylvania firms a competitive disadvantage.939 Without identifying or justifying the philosophy, the antiunion Associated Builders & Contractors insisted: “As a philosophical matter, employees who want to work overtime should be encouraged to do so.”940

Several union officials and members did testify. Like their counterparts elsewhere, workers focused on family values, expressing resentment at not being able to attend skating parties with or to tuck their children in bed.941 AFL-CIO union officials and rank-and-file members stressed that they did not wish to restrict voluntary overtime.942 Indeed, one long-year GTE telephone installer and

936Legislative Record, S-2497-98 (Apr. 8, 1998); A. Jay Higgins, “3 Labor Bills Fall in Legislature: Democrats’ Support Not Enough to Override Governor’s Veto,” Bangor Daily News, Apr. 9, 1998 (Lexis).


938House Bill 1941 (Oct. 6, 1999).


repairman, who in the previous eight months had worked the maximum number of overtime hours (12) permitted by the union contract every week and during seven weeks had been “forced” to work beyond the cap, testified that he and his co-workers would change their plans if the company just asked them as they formerly had done. “But when you’re told as a slave that you will do it...it’s a click in the switch.” Although no hostile legislator asked whether unions would support a bill that merely required employers to ask employees politely to work overtime, the Republican chairperson of the House Labor Relations Committee raised the same question that had arisen at the hearings in California in the 1970s: if overtime “is that big of a problem, then perhaps maybe this issue should take precedence over some of the other issues that are negotiated on behalf of the workers.”

Since the bill excluded places of employment under union contract, union witnesses raised the issue on their own, one rightly pointing out that even where unions do bargain over the issue, unionized employers still had to compete against nonunion firms that can work their employees “excessively....” Thus what both union workers and employers needed was “a fair and even field” where “across the state everybody could only work 16 hours overtime....” The other explanation offered by unions as to why legislation was necessary, even in the unionized sector, to eliminate compulsory overtime was the failure of collective bargaining to resolve the matter to workers’ liking. The president of the United Steelworkers (USW) local at a Bethlehem Steel plant explained that “[e]ven in a long and historic contractual relationship between the steel industry and my union,” in the course of which the USW had negotiated overtime penalties, voluntary overtime preferences, overtime rotations, and temporary transfer programs,

no matter what level of relief or flexibility we have provided the steel industry, the demand for complete and total authority to be able to require unlimited overtime as the boss desires never recedes and is insatiable. ...

If the management[s]...quest for unfettered overtime assignment rights exists in this kind of industry with a powerful and well-established union, what do you imagine is the situation for people in nonunion, management-dominated work places?

I can tell you that my direct experience in working with people trying to organize a

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union is the situation has become a form of wage slavery.\textsuperscript{947}

Despite this confessed impotence, the Pennsylvania legislature has neither amended the bill to include unions nor taken any other action toward enactment.

A much more ambitious initiative to curtail overtime began occupying the Washington State legislature in the year 2000. Senator Darlene Fairley, the Democratic chair of the Labor Committee, introduced a bill whose underlying legislative intent finds that employers' practices of requiring workers to work long days and even longer weeks

hurt working families, make affordable child care difficult to find, and lead to higher stress levels and industrial injury and occupational disease rates. These practices limit employment opportunities to a smaller number of workers rather than extend employment opportunities to a larger number of workers. Thus, it is the intent of the legislature that workers not be required to work overtime.\textsuperscript{948}

As recommended by the Labor Committee, the bill would have prohibited employers from requiring employees to work more than eight hours a day or 40 hours per week unless they work on a four-day, 10-hour schedule. Among the bill's numerous exceptions are workers performing emergency work (such as utility, fire, police, and medical personnel), and those packing or processing perishable agricultural products. The bill would also have permitted employers to petition for a variance if more than 80 percent of their affected employees voted in a secret ballot to approve a written proposal to work longer hours, but in no event more than 12 hours per day or 42 hours per week for four consecutive weeks. The bill would also have excluded the many workers already excluded from the state's overtime law, including farm workers, executive, administrative, and professional employees, news carriers, seamen, and workers on state-operated ferries. Finally, the bill would also have offered a closely hedged-in exemption for continuous production operations in two important industries in Washington—primary metal processing and paper products. Firms would have been permitted to require employees to work part of the next shift if: the need arose as a result of an unanticipated event such as employee sickness or emergency repair of machinery (but not because of a need to increase production to meet increased market demand), and the unanticipated event halted or may halt


the continuous production operation; the employer in good faith exhausted
gerated attempts to find volunteers from the next shift; the employees in
question had critical skills and expertise required for the work; and the employer,
pursuant to the employees' request, helped them get safe transportation home
after the shift and to address child care or other family obligations successfully.
A final limitation on the continuous operation exemption would have prohibited
employers from requiring employees to work more than 12 consecutive hours or
two straight shifts, or from requiring more than 16 overtime hours in any calendar
month.949 Again, workers at the hearings focused on overtime work's
interference with their families, while employers bemoaned that the bill would
deprive them of taking advantage of the "edge" they had in access to the world's
best workforce.950 The bill died in February 2000 in the Rules Committee.

13. Europe—You Have It Better, But Not Much

In our plant...an employee gets three hours pay just for coming to work on short
notice. Most overtime situations make an employee eligible for a meal paid for at the
company's expense. ... I can assure you that this penalty by itself is enough to make even
the most generous plant manager shudder when he considers the need for overtime. This
is adequate incentive to discourage businesses from working unnecessary overtime. In
other words, gentlemen, I can assure you that we work overtime only when we believe the
work must be done, and overtime is the only way to achieve it. ... I believe we are
reasonable men, and we conduct our businesses accordingly.951

Employers throughout the capitalist world prize the multidimensional
flexibility that overtime work permits, but workers in European countries with
strong or quasi-universal organization have been somewhat more successful than
their U.S. counterparts in preventing employers from imposing it. For most of
the twentieth century collective bargaining agreements and legislation in many
European countries have capped the number of hours that an individual employee
may work during a certain period (day, week, month, or year). By the end of
World War I, Czechoslovakia, Finland, Greece, Great Britain, Norway, and
Switzerland had instituted such statutory overtime caps, while Czechoslovakia,

949Washington, Sen. Bill 6120 (introduced Jan. 10, 2000, and recommended by
committee Jan. 28, 2000). The bill was pre-filed on Dec. 8, 1999.
950Karen Gaudette, "Workers Seek Ban on Mandatory TO," Columbian, Jan. 14, 2000,
at A1 (Westlaw).
951[California] Senate Committee on Industrial Relations, Interim Hearings on AB
1295—Mandatory Overtime at 224 (testimony of Doug Bockstanz, resident mgr., Crown
Zellerbach Los Angeles mill).
Finland, the Netherlands, Poland, and Switzerland required employers to secure permits from state authorities. The Netherlands, for example, began requiring employers in 1919 to obtain the permission of the labor inspectorate to work overtime. This policy was strengthened after World War II when rigid controls became part of a centralized wage policy; the labor inspectorate issued permits only for short periods and "only if there is a convincing reason why overtime cannot be avoided."

Statutory limits in Austria, Finland, Norway, Spain, and Switzerland ranging from 60 to 220 hours made "extensive and continuous recourse to [overtime] impossible." The former socialist countries, including the Soviet Union and the German Democratic Republic, created the strictest regimes, which prohibited economic overtime and permitted only emergency overtime. In some countries, such as Portugal, overtime is paid on a progressive scale with the penalty rate increasing with the number of daily overtime hours. The new Labor Time Law in Germany permits workers to work 2 hours of overtime a day on 30 days during the year with a maximum work day of 10 hours.

In the United Kingdom, which has witnessed a decline in the strength of its unions and until recently had been the only country in Western Europe (other than Denmark) with "no legislative hindrances to overtime for men," it had become so "popular with the workers" that employers feared that if they failed to offer enough overtime, many of their workers would move to firms that did. Consequently, "many firms in their advertisements for workers, emphasise the weekly earnings secured with customary overtime...." Case law provided British workers with very meager protection against overwork by prohibiting employers from working employees hours so long that their health was injured.

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952 League of Nations, Report on the Eight-Hours Day or the Forty-Eight Hours Week 40-47 (1919)
956 Rojot and Blanpain, "General Report" at 49, 46-47.
958 J. Rojot and R Blanpain, "General Report," in Legal and Contractual Limitations at 3, 47. The only such decision seems to be Johnstone v. Bloomsbury Health Authority, [1991] ICR 269 (C.A.), which found that a hospital was under a duty not to injure a resident physician's health by working him excessively long hours beyond his normal workweek.
To be sure, the alleged popularity of overtime in Britain is largely a function of low wages— with the highest incidence of overtime found in the lowest-paid industries and occupation—as overtime pay remains “a major factor in family budgets,” just as real wage losses in the United States since the 1970s have been found to explain the lack of pressure by workers to reduce the workweek. These interrelationships replicate the causality that Marx, building on the factory inspectors’ reports from the 1840s to the 1860s, uncovered: “the low price of labor during the so-called normal working time forces the better-paid overtime on the worker if he at all wants to wangle a sufficient wage.” Enactment of free-market overtime laws (as opposed to maximum-hours laws) undermined Marx’s conclusion that state limitation of the working day “put an end to such fun.”

Although Denmark, too, until recently lacked state regulation of overtime work, most collective agreements deal with the question; unless a contract specifies otherwise, employees are obligated to work overtime if the employer requests it. If an agreement fails to specify limitations, employees are obligated to work according to the employer’s directions, but case law holds employers in breach if they systematically use overtime; as a result, employers are not permitted to base their production plans on overtime. Provisions in many agreements entitling workers to 24 to 48 hours’ notice merely entitle them to a bonus if employers fail to furnish proper notice. The overtime premium ranges from 50 to 100 percent, but many employers fail to pay anything at all for overtime work. In April 1981 the government introduced a bill in parliament to limit overtime to 100 annual hours per worker. Despite a provision for modification by collective bargaining agreements, the employers association thwarted enactment.

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961 Marx, Das Kapital at 569-70.

962 An older temporary overtime law was generous to employers. Lov om Forbud mod Overarbejde, Act of May 7, 1937, in ILO, Legislative Series, 1937—Den. 3.


The promulgation by the Council of the European Union of its Working Time Directive on November 23, 1993 (with which member states were given three years to comply, although the United Kingdom, which opposed and challenged the Directive, did not issue implementing regulations until 1998) modified the legal regulation of overtime throughout Europe, but especially in Britain, where the average workweek was longest, the incidence of overtime highest, and state intervention absent. Article 6 of the Directive on maximum weekly working time provides:

Member states shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers: 1. the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry; 2. the average working time for each seven-day period, including overtime, does not exceed 48 hours.

Although the 48-hour maximum still authorizes considerable overtime since the statutory workweek in many European countries is 40 hours and the average workweek has been reduced to fewer than 40, codifying the principle that overtime is legally limitable is, nevertheless, important. The EU directive is additionally flawed by its exclusion of transport workers and the considerable leeway it affords member states and employers. For example, it authorizes governments to establish a so-called reference period of up to four months during which an average of 48-hour weeks is formed, and to derogate from Article 6 altogether when “the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of...managing executives or other persons with autonomous decision-taking powers....” The 17-week reference period grants employers much greater flexibility than even the most capacious recent Republican congressional measures.
proposals, which dared not extend the period beyond four weeks.  

Even greater laxity has been introduced by the so-called opt-out provision—the scope of which had been insisted on by the U.K. government when the Directive was negotiated and of which only the U.K. has made use—which permits member states not to apply Article 6 for seven years (until 2003), when the Council must reexamine the issue. During this period, member states must, however, “ensure that: no employer requires a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference period [of four months], unless he has first obtained the worker’s agreement to perform such work, [and] no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work....” Such language prompted the British Trades Union Congress to conclude that “bad employers will try and intimidate their staff.”

14. A Realistically Bleak Conclusion

The type of overtime we’re opposing is the oppressive type that goes far beyond the employee’s obligation to his employer. ... The type of overtime that...makes the employee feel more like an indentured servant than a free man.

At the conclusion of this historical overview of overtime work, it is chastening to realize that nothing remotely approaching a congressional majority exists for shortening the workweek or increasing the overtime penalty, let alone for protection against forced overwork even hedged with exceptions for employer emergencies. These problems are so distant from public concerns or the AFL-
Moments Are the Elements of Profit

CIO’s agenda that it has been years since even dead-on-arrival pro forma bills on these issues have been introduced in Congress.977 The pendulum has swung so far to capital’s side that the labor movement considers itself fortunate if it can stave off attempts to repeal the FLSA’s existing overtime pay provisions. The limited legislative commitment to capping working hours is suggested by the fact that in the year 2000 eighteen states still lack an overtime law.978

Against this bleak political background, a lesson is to be learned from the Portal-to-Portal Act debacle. In enabling big business to trump the CIO’s opportunistic litigation strategy in 1947, Congress wound up punishing the mass of unorganized workers who were and remain far more reliant on the FLSA for shoring up their weak labor-market power than unionists, who had merely opportunistically made use of the FLSA to gain bargaining leverage over large industrial firms.979 Similarly, in the 1990s, the rhetorical animus of the anti-FLSA big business coalition is not directed against lawsuits by assistant managers in fast food restaurants working 70 hours a week for little more than the minimum wage. Rather, the Fair Labor Standards Act Reform Coalition’s claim, strongly reminiscent of the rhetoric of 1947, is:

Today’s law unjustly enriches those at the top of the income scale. Disgruntled employees, with the help of the plaintiffs’ bar, are taking advantage of these dated statutory provisions. Workers with incomes in the high five-figures or even greater—rocket scientists who train NASA mission control personnel and producers and writers of the NBC nightly news, to name just a few—have used the FLSA to demand time-and-one-half overtime premiums based on their already high rates of pay. The economic impact is staggering: billions of dollars of potential private sector liability for employee windfalls.... There are several changes that could bring the FLSA back in line with its original purpose of protecting those with inadequate bargaining power. First, employees above a certain income level should automatically be excluded from the FLSA’s hourly wage and overtime mandates.980

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977 Shortly after Clinton’s election, stating that such legislation had a chance of enactment under an executive and legislature controlled by Democrats, the AFL-CIO announced that it would push the new administration to amend the FLSA to raise the overtime premium to 100 percent. David Francis, “Are Those Working Overtime Whistling?” Christian Sci. Monitor, Apr. 2, 1993, at 8 (Lexis). Nothing came of this initiative.


979 See below chapter 3.

Before a market-knows-best Republican president signs a FLSA dismantlement bill passed by a like-minded Republican Congress, the labor movement might consider compromising with big business: trading a single-criterion high salary-level ceiling for double overtime (one-half being designated for the Unemployment Insurance fund) for all remaining covered workers might be the biggest fraction of a loaf that an increasingly nonunionized labor force may be able to secure for a long time. Admittedly, however, even this reform, which would be far from optimal for workers and fail to satisfy employers, is very unlikely to be enacted.

Yet in the absence of such legislation, the potent employer lobby may get its way in extending the “revolution” of “total quality management” to the “one last bastion which remains untouched—the laws governing the workplace. Nowhere is this more devastating than the wage and hour laws that continue to impose mid-20th century strictures on a workplace racing into the next millennium."981 The result may be the abolition of the 40-hour week even as an aspirational norm and its replacement by some variant of a 160-hour, 4-week pay period, during which firms would be privileged to employ workers as many or as few hours per week as fits the firms’ production schedules without incurring any statutory overtime liability provided that they remained within the 160-hour limit for the four weeks.982

Whatever the shape of the next phase of the struggle over the length of the workday, so long as workers and unions accept profitability and consumer demand as the social economy’s highest ordering principles, depriving capital of its status as the sole authorized interpreter of the market’s commands will remain—to vary the Wage and Hour Administrator’s 1938 dictum—an impious hope.

