“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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How Working Off the Clock Came to Be Legal:
The Portal-to-Portal Act of 1947

[M]oments are the elements of profit....

1. Legal Amnesia

We are then confronted with the question of whether this court should lend its aid to a practice that deprives any working man of...the only thing he has to sell—his hours or minutes of labor.

Should workers walk from the plant gate to their work stations on their own time? Or should employers who benefit from the economies associated with huge factories compensate employees for the five, ten, or fifteen-minute walk? More than half a century later, it is difficult to recapture the intensity of a conflict—over what was after all a minor aspect of the federal wage and hour law—which The New York Times called “one of the greatest legal-economic controversies in American history,” while others, including a Supreme Court justice, compared it to the Dred Scott case in terms of the public attention it had generated.

In particular, the attention that employers and the press lavished on the trial of one such monetarily insignificant “portal-to-portal” claim in federal court in 1947 has


4 The author of the Supreme Court portal-pay cases, Frank Murphy, wrote his brother that “not even Dred Scott, the Dartmouth College case, and Marbury v. Madison had caused ‘as much interest and excitement’ as the Mt. Clemens opinion.” 3 Sidney Fine, Frank Murphy: The Washington Years 332 (1984). In the same vein, a law review commentator noted: “Only occasionally does it occur that the subject matter of lawsuits in the courts becomes a matter of great public concern to the entire body politic. Among these in the past are the Dred Scott decision, the Gold Clause cases, and perhaps, the NRA case. [T]he course of the present cases on so-called portal to portal pay has attracted wide public attention and much daily comment in the press. These conditions bring to the fore the effect of political and economic conditions and relationships on judicial decisions in a much more forceful way than ordinarily occurs even in cases in which the court’s decision between private litigants has a profound effect on political and economic history.” Ralph Axley, “The Problem of Portal to Portal Pay,” 1947 Wisc. L. Rev. 163, 163.
been unique in the post-World War II history of labor law.5

This dispute owed the fervor with which all parties invested it to the fact that it coincided with—and was a sideshow of—the campaign that capital conducted between 1945 and 1947 to reclaim the power, sovereignty, and control that it had been forced to cede to labor and the state during World War II.6 When unions resisted,7 “labor-management relations appear[ed] to be rushing toward a fateful climax.”8 Overshadowed historically, though not contemporaneously, by the debate over Taft-Hartley’s incursions into the rights that workers had secured under the National Labor Relations Act,9 the Portal-to-Portal Act of 1947 has receded into oblivion. Known today only to—and taken for granted by—specialist labor-law litigators, the Act’s political-economic origins have become relegated to obscurity. Emblematic of this political amnesia is the fact that the major monograph devoted to labor problems during the first Truman administration never even alludes to the portal pay issue or legislation.10

5It has been years since a Federal district judge, with one exception [the John L. Lewis contempt case], has found himself in a situation with such grave possibilities.” Arthur Krock, “Picard in Portal Test,” N.Y. Times, Jan. 29, 1947, at 6, col. 4.


7For an unusual portrait of the strikes of this period, see George Lipsitz, Class and Culture in Cold War America (1981).


9When the Republican-dominated Eightieth Congress convened in January 1947, Senator Wiley, the chairman of the Senate Judiciary Committee, stated that his portal-pay hearing “was the first subcommittee hearing held under the auspices of the Republican Party since 1933 on a matter of national importance.” Portal to Portal Wages: Hearings Before a Subcommittee of the Senate Committee on the Judiciary, 80th Cong. 1st Sess. 8 (1947).

10Arthur McClure, The Truman Administration and the Problems of Postwar Labor, 1945-1948, at 254, 257 (1969) (the bibliography includes a reference to a hearing and an article on the Portal-to-Portal Act). Indeed, Truman himself in his memoirs fails to refer to the issue. 1-2 Harry Truman, Memoirs (1955-56). Robert Donovan, Conflict and Crisis: The Presidency of Harry S Truman, 1945-1948 (1977), not only never mentions the portal-to-portal dispute, but incorrectly asserts that “the Republican assault upon New Deal labor policy got off to a hot start April 17,” id. at 299, when the House passed the Hartley bill, although the House had already passed the portal bill in February. The following major works on the Truman administration also fail even to mention the issue: Alonzo Hamby, Beyond the New Deal: Harry S. Truman and American Liberalism (1973); Bert Cochran,
This chapter presents a comprehensive political-economic legislative history of the Portal-to-Portal Act,\(^{11}\) analyzing the unusual way in which litigation shaped the contours of the statute which the Portal Act amended, the Fair Labor Standards Act (FLSA). As part of a larger wartime and postwar labor conflict, the portal suits were both a calculated effort to maximize bargaining pressure on big business and a hapless venture by the Congress of Industrial Organizations (CIO) to secure large recoveries from employers without due consideration of the possible reactions by capital and the state or of the repercussions for the unorganized. In the event, the Portal Act’s restrictive impact has not only fallen on the low-paid, but also extended far beyond the issue of walking time.

The analysis begins with an economic-historical discussion of the significance of the definition of compensable worktime under protective-statutory regimes (§ 2). The relevance for the portal controversy of the trends in overtime work, wages, and profits during and immediately after World War II is reviewed in § 3. Then follow studies of two mining cases that crucially shaped the political and jurisprudential contours of the portal-pay dispute (§ 4). Attention then shifts to the major industrial portal suit, the Supreme Court’s decision in which set the stage for mass litigation and congressional intervention (§ 5). § 6 then offers a detailed legislative history of the Portal Act beginning with efforts at the state level to blunt the impact of the FLSA by shortening the applicable statutes of limitations. After a brief examination of the relationship between mandatory norms under the FLSA and consensual bargaining (§ 7), the ironic twists inhering in what turned out to be the most important achievement of the Portal Act, the elimination of class actions,

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\(^{11}\)One aspect of the Portal-to-Portal Act that will not be analyzed is its constitutionality, which was upheld in Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), cert. denied, 335 U.S. 887 (1948). Among the numerous articles appearing on this issue is worth mentioning, Ray Brown, "Vested Rights and the Portal-to-Portal Act," 46 Mich. L. Rev. 723 (1948).
form the subject of § 8. The lessons to be learned from the portal litigation are summarized in § 9.

2. When and Where Does the Workday Begin and Who Decides?

Most of these actions have been entered into...against employers always ready and willing to chisel a little free work from the men and women who work for them.12

Workers' demands to be compensated for travel and preparatory time is at first sight merely "[o]ne of the eternal conflicts out of which life is made up," namely "that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return...."13 More particularly, it appears as "righteous"14 resistance against efforts by employers to avoid an obligation to pay for all of their workers' time they have at their disposal. Thus rather than an example of higgling over terms, unions projected the portal pay issue as a type of theft. In this sense the controversy was a venerable one that differed little from that recounted by Karl Marx for Victorian Britain.15

Portal-pay disputes are especially liable to arise under wage and hour statutes; significantly, the most prominent portal-pay cases involved piece-rate workers. Before the advent of the FLSA, workers in the United States may have had relatively little interest in whether they were paid specifically for portal-type time: if they were members of the stronger trade unions, they may have succeeded in negotiating enhanced piece rates that reflected or somehow accommodated travel time and preliminary and postliminary activities.16 If they did not have the bargaining power to achieve such adjustments, most had no other recourse. Ironically, in the pre-FLSA period many workers were less preoccupied with the

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14 Senator Pepper used this word to characterize one of the portal cases. 93 Cong. Rec. 2301 (1947).
question of compensation for the walk between factory gate and bench and much more concerned with the reality of being fined or forbidden access to the plant for part or all of the day for having arrived even a few minutes late.17 Underground miners in the United States as well as in Europe and Australia in the late nineteenth and early twentieth century were almost alone in having achieved a modicum of statutory protection against employer overreaching in an industry that imposed the longest and most brutal workplace travel-time and, not surprisingly, gave rise to the portal-to-portal controversy under the FLSA.18

Under the English Factory Acts, which regulated and specified the hours during which women and children could be employed, employers sought to jump the gun at the beginning of the day and to keep the workers at work after the end of the statutory working day. The factory inspectors in the 1850s reported how “snatching a few minutes” or the “petty pilferings of minutes”19 could cumulatively result in impressive profits: “Five minutes a day’s increased work, multiplied by weeks, are equal to two and half days produce in the year.”20 Under a similar Massachusetts statute the factory inspectors reported in 1886 that “where the engine is started several minutes before schedule time, complaints are made that the women...go to work five or ten minutes before the proper time, thus gaining one or two hours a week.”21 Then as now:

The profit to be gained by it appears to be, to many, a greater temptation than they can resist; they calculate upon the chance of not being found out; and when they see the small amount of penalty and costs, which those who have been convicted have had to pay, they find that if they should be detected there will still be a considerable balance of gain.22


18See below § 4.


20Reports of the Inspectors of Factories for the Half Year Ending 31st October, 1851, at 5 (C. 1396, 23 Parl. Pap. 1852). “‘If you will allow me,’ said a highly respectable master to me, ‘to work only ten minutes in the day over time, you put one thousand a year in my pocket.’” Reports of the Inspectors of Factories for the Half Year Ending 31st October, 1856, at 48 (C. 2153, 3 Parl. Pap. 1857 Sess. 1).


The conflict over the compensability of workers' time in the United States intensified as firms, in order to take advantage of economies of scale and vertical integration, invested their capital in larger and larger plants, the layout of which required workers to walk long distances from the initial entry point to their individual work station. The mammoth military production facilities built during World War II reinforced this trend. In the metal products industries, for example, on which war production had its greatest impact, the number of establishments employing more than 2,500 wage earners increased sixfold from 1939 to 1945, while their employment rose almost eightfold and their share of all metal products workers rose from 18.6 per cent to 48.8 per cent. Even by 1947, when the effect of wartime concentration had in part been dissipated in the wake of demobilization, the number of all manufacturing plants in this largest category had increased by 186 per cent vis-à-vis 1939, while the number of workers employed in them had risen by 208 per cent. With the number of employees in manufacturing establishments serving as an indicator of plant size, Table 3-1 shows the employment trend in large plants (with more than 2,500 employees) between 1929 and 1992.

At the height of the portal controversy in 1947, more than two-thirds of all workers employed in these largest plants were concentrated in the transportation equipment, primary metals, machinery, and electrical machinery industries (in that order). Indeed, almost one-third worked in steel mills and motor vehicle plants alone. This industrial structure, in turn, geographically concentrated almost two-thirds of the large-plant workers in the six states of Michigan, Pennsylvania, Ohio, New York, Illinois, and Indiana (in that order). By no coincidence, then, the bulk of the portal litigation arose in these industries and states. As capital intensive and heavily organized plants, they formed the focus of an intense conflict between the CIO and large capital.

23U.S. Senate, Economic Concentration and World War II: Report of the Smaller War Plants Corporation to the Special Comm. to Study Problems of American Small Business, 79th Cong., 2d Sess., Sen. Doc. No. 206, Table C-6 at 337 (1946). The largest subgroups within this industrial classification were aircraft production and shipbuilding. For data on the subgroups, see id., table C-4 at 330-36.

24Calculated according to data in U.S. Bureau of the Census, 1 Census of Manufactures: 1947, Table 1 at 97-98 (1950).


26U.S. Bureau of the Census, 1 Census of Manufactures: 1947 at 143-44.

Table 3-1: Employment in Manufacturing Establishments with 2,500 or More Employees (Large Plants), 1929-92

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of large plants</th>
<th>Total employees in large plants</th>
<th>Average number of employees in large plants</th>
<th>Employees in large plants as % of all mfg. employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>1929</td>
<td>195</td>
<td>910,740</td>
<td>4,670</td>
<td>11.5</td>
</tr>
<tr>
<td>1939</td>
<td>176</td>
<td>824,532</td>
<td>4,685</td>
<td>10.5</td>
</tr>
<tr>
<td>1947</td>
<td>504</td>
<td>2,541,700</td>
<td>5,043</td>
<td>17.8</td>
</tr>
<tr>
<td>1954</td>
<td>533</td>
<td>2,876,100</td>
<td>5,396</td>
<td>18.4</td>
</tr>
<tr>
<td>1958</td>
<td>533</td>
<td>2,654,500</td>
<td>4,980</td>
<td>17.2</td>
</tr>
<tr>
<td>1963</td>
<td>544</td>
<td>2,898,600</td>
<td>5,328</td>
<td>17.9</td>
</tr>
<tr>
<td>1967</td>
<td>674</td>
<td>3,628,800</td>
<td>5,384</td>
<td>19.6</td>
</tr>
<tr>
<td>1972</td>
<td>582</td>
<td>2,926,800</td>
<td>5,029</td>
<td>16.2</td>
</tr>
<tr>
<td>1977</td>
<td>581</td>
<td>2,911,100</td>
<td>5,010</td>
<td>15.7</td>
</tr>
<tr>
<td>1982</td>
<td>482</td>
<td>2,445,800</td>
<td>5,074</td>
<td>13.7</td>
</tr>
<tr>
<td>1987</td>
<td>421</td>
<td>2,304,300</td>
<td>5,473</td>
<td>13.0</td>
</tr>
<tr>
<td>1992</td>
<td>342</td>
<td>1,804,200</td>
<td>5,275</td>
<td>10.6</td>
</tr>
</tbody>
</table>


Contemporary liberal and leftist commentators tended to argue that employers required an economic incentive to modify their plants so that workers might share in the economies of scale. For example, Percival and Paul Goodman in Communitas, their well-known critique of city planning published in 1947, observed that the "universal and obvious assumption" that the huge wartime concentration of workers in mammoth industrial plants was technically efficient:

That is, the part of the left that had not rejected FLSA as having shown the fallacy of trying to solve economic problems with social welfare measures because the Act did not thoroughly revalue wage-price relationships, redistribute national income, or deal with the root problems of technological, seasonal, and cyclical unemployment. See, e.g., Herbert Burstein, "The Fair Labor Standards Act—A Legal and Economic Study," 6 Law. Guild Rev. 576 (1946).

happens to be false, because it fails to consider what is by far the chief social expense in all large-scale production. This is labor time.

Let us regard the matter on its crudest level. Which is cheaper to transport, men or material?

Where the plant is concentrated, and a great many workers are employed in the same place the bulk of workers must live away and commute. But if the plant were scattered, the workers could live near their jobs, and it would be the processed materials that would have to be brought to several places for manufacture. Which is cheaper to transport, living men twice daily or materials and mechanical parts...twice a week?

Which transport is easier to schedule so that there is no delay or interruption? The time of life of a piece of metal is not consumed while it waits for its truck: a piece of metal does not mind being compressed like a sardine. In a populated community, the supply trucks move at a convenient hour, but the fleet of trams and busses gorge and disgorge at 8:00-9:00 A.M. and at 4:00-5:00 P.M. Suppose that many of the workers travel by automobile; then there is mass parking, with one shift leaving while another is arriving, and the factory area must be still larger to allow for parking space. Next, after one gets to the area, there is the problem of walking to the work station: it is not unusual for the round trip to consume up to three-quarters of an hour. During part of the shifting, the machinery stands still.

To be sure, most of the consumption of labor time and nervous energy is not paid for by the capitalists, and the roads and franchises that make commutation possible are part of the social inheritance, paid for by the masses. But from the point of view of the social wealth, the expense must be added to the production, even though it does not technically appear in the price. From the point of view of the worker, his time is bound and useless even though it is not paid for. If parts of this expense, of time and effort, were made to appear as an item on the pay roll (as in the celebrated portal-to-portal demands of the mine workers), there would soon be better planning.

The conservative business press, however, rejected this position. As early as 1944, Business Week asserted that “time spent in travel or in changing clothes is not productive time. There is no way for alert management to absorb nonproductive costs. They can only be passed on to the consumer.” Without acknowledging the disconfirmation, two years later the magazine reported that in response to portal suits, employers were relocating gates and eliminating waiting

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31 Business Week, Oct. 7, 1944, at 123. In the very next issue, Warner & Swasey, a machine manufacturer that later became a defendant in a portal-pay suit, published an advertisement on the inside front cover sounding the same theme. Id., Oct. 14, 1944.
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at time clocks.\textsuperscript{32} From a somewhat different perspective, the \textit{Wall Street Journal} editorialized on the subject repeatedly. Its basic insight was that since workers produced nothing while engaged in portal-to-portal travel:

For the long run future it may make little difference in total wages whether they are reckoned on the basis of the time a man spends in the plant or on the basis of the time he actually spends handling the tools or running the machines... [H]ourly rates reckoned on the longer period will for the long run be lower than those reckoned on a shorter period. If the union leaders think that they can fool their following into believing they are getting something for nothing, they have a low opinion of the intelligence of the followers.\textsuperscript{33}

The implication was that the immediate result of the imposition of portal pay would be a redistribution of income from profit to wages, which, because the total income generated by the firm (or the economy) was not increased, would, through the mechanisms of equilibrium, work itself back to the status quo ante. With the wage-profit ratio relatively immutable, the unchanged wage bill would merely translate into a lower hourly rate for a longer workweek.

What this much-ado-about-nothing analysis overlooked was that, once travel time became compensable, the innovations that firms undertook to reduce such time would lower unit labor cost and result in productivity increases "as real as those due to the introduction of new labor-saving machinery."\textsuperscript{34} Moreover, once those changes took place, the travel time saved could be devoted to directly productive labor, thus enhancing total output. In the alternative, workers could use the freed-up time as additional leisure. In effect, then, the half-hour they used to spend unnecessarily in portal-to-portal travel could be used in self-directed pursuits. In the latter case, to be sure, until the capital investment in these innovations was amortized, either the firm or the consumer would bear the costs of the workers' extra free time. In contrast, under the earlier regime, workers had disproportionately borne the costs of the inefficient layout of mines, mills, and plants in the form of curtailed leisure. Eventually, however, "the extra cost of portal-to-portal pay, spread over the entire wage bill, will be a small matter, as is now the cost of social security, which in its day, according to the N.A.M. [National Association of Manufacturers], promised revolution and bankruptcy."\textsuperscript{35}

Northern manufacturing corporations had largely acquiesced in the FLSA so long as they believed that its minimal standards would have little or no impact on

\textsuperscript{32}Business Week, Nov. 23, 1946, at 102, 104. The Nation, Dec. 28, 1946, at 759, included a similar report.


\textsuperscript{34}Morse, "Economic Aspects of the Portal-to-Portal Pay Question" at 32.

\textsuperscript{35}Mezerik, "Time Is Money" at 122.
their wage and hour policies or managerial prerogatives. Since they were already paying their employees higher wages than the new statutory minimum and premium pay for overtime, compliance did not initially loom as burdensome. Nevertheless, as soon as the FLSA went into effect, employers of all sizes and in all regions began engaging in legal and extra-legal resistance to compliance with the premium overtime provision.

In addition to this broad-based campaign to undermine the overtime provision altogether, a narrower dispute erupted over the compensability of the time that workers were engaged in certain activities. In order to determine the amount of wages owed, it was necessary to count the number of hours worked. Perhaps no worker had seriously urged that the FLSA clock started running the moment she walked out the front door of her house, but did it begin as soon as she walked through the employer’s front door? Or did the employee have to make it all the way to her work station before her time was her employer’s? And who had the final authority to make that determination? Was it within the sole discretion of the employer to set those bounds? Did pre-FLSA customs carry over? Did the agreement of the parties prevail—even where there was no bargaining because of the employer’s overwhelming power? Or did the new statute control the situation? And if so, who interpreted the law—the Wage and Hour Administrator or the courts? Such questions prompted the articulation of a labor-capital conflict in terms of whether the employer had breached a statutory obligation by failing to pay for all the hours worked or whether the employees had committed a breach of faith by abrogating long-standing customs in favor of demands for payment of time that traditionally was not separately compensated.

From the vantage point of large industrial capital, this entire line of inquiry seemed far more than it had bargained for in accepting the FLSA. By the time the postwar wave of portal-pay suits had acquired the status of a movement, such employers had lost their patience. The general counsel for Republic Steel Corporation, for example, declared to Congress that the “net effect” of the recent Supreme Court decisions had been


37See above chapter 1.

38Frank Cooper, who represented the employer in the major industrial portal-pay case, stated “that the definition of the phrase ‘hours worked’ belongs at the bargaining table.” Maurice Sugar and Frank Cooper, “Pro and Con—‘Portal to Portal’ Pay Suits,” 26 Mich. St. B.J. 7, 11 (1947).
the more oppressive are the provisions of the act as interpreted by the Supreme Court.\textsuperscript{39}

More emphatically and specifically still, the Business Advisory Council of the Department of Commerce, a group composed of representatives of the country’s and world’s largest industrial firms such as General Motors, Du Pont, U.S. Steel, Ford, Alcoa, and Standard Oil of New Jersey, informed Congress:

Industry has felt from the beginning that the construction put upon the Fair Labor Standards Act by the Supreme Court was a complete misinterpretation of congressional intent. Businessmen do not believe that Congress intended to make any radical change in the practice or customs regarding the relationship between employer and employee as to when his compensation started or how much it should be provided that the statutory minimum wage were paid and that employees received time and one half their usual rate when working more than 40 hours a week.\textsuperscript{40}

As capital viewed the portal campaign, unions that were not strong enough to achieve additional wage advances on their own had appealed to the state to vindicate those claims for them. Ironically, argued capital, the statutory basis for this interference with the free operation of the labor market and the contest between labor and capital had not even been designed to aid unions, whereas the low-paid unorganized workers whom the FLSA was meant to bolster paternalistically\textsuperscript{41} were not participants in the litigation.\textsuperscript{42} Moreover, if labor prevailed on this claim, many employers would be compelled to restructure the layout of their plants in order to reduce their liability for portal wages. Not only had management not foreseen such an incursion into its sphere of dominion, but, depending on the technology of each factory and industry, such encroachment could lead to significant shifts in competitiveness among reputable employers. Yet

\textsuperscript{39}Portal to Portal Wages: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary, 80th Cong., 1st Sess. 52 (1947) (statement by Thomas Patton).

\textsuperscript{40}Portal to Portal Wages: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary, 80th Cong., 1st Sess. 615 (1947) (Statement by Subcommittee of Business Advisory on Attitude of Industry on Portal to Portal, as submitted by William Foster, Undersecretary of Commerce).

\textsuperscript{41}For a clear statement of the motivations behind paternalistic labor legislation, see Robertson v. Baldwin, 165 U.S. 275, 287 (1897) (treating seamen “as deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults,” Congress enacted a wage payment statute on their behalf).

\textsuperscript{42}Lee Pressman, general counsel of the CIO and an organizer of the litigation campaign, testified before Congress that he knew of no portal suits brought by unorganized workers. Regulating the Recovery of Portal-to-Portal Pay, and For Other Purposes: Hearings before Subcomm. No. 2 of the House Comm. on the Judiciary, 80th Cong., 1st Sess. 166 (1947).
the FLSA was designed to suppress exclusively "unfair methods of competition."43

Workers, especially in the early days of the FLSA and in the context of organizing campaigns in the wake of the depression, may have tended to view statutory overtime claims as part and parcel of an overall bargaining process, which might have to be traded off for more important concessions from employers. The FLSA promoted such thinking because, when it was to their advantage, employees could decline to vindicate "a demand for the 'last measure of justice' to which [they] may be entitled."44 But since, as the Supreme Court was to rule, employees could not waive their rights under the FLSA,45 they could always46 renege on such implied waivers and re-open the issue—even to the point of bankrupting the employer.47 It was this class bias inherent in the logic of the FLSA that infuriated employers in the portal-pay controversy. In order to subvert this policy of unilateral rights, employers (and their dissenting supporters on the Supreme Court) sought to drive a conceptual and statutory wedge between unorganized and organized employees. Because it was undisputed that federally granted statutory rights preempted contractual agreements, unionized employers argued that Congress had really intended to confer such rights solely on low-paid and unorganized workers, whom they did not employ.48 They argued that Congress had not granted similar entitlements to the unionized employees, with whom employers did enter into binding agreements. In the firms' view, so long as the workers received minimum wage and premium overtime, they could lawfully consent to any arrangements they wished—including customary practices as to when the workday began and compensable work time began. Such was the core of the portal-pay dispute.

This core, however, was not always on public display because unions failed to adopt or project a consistent and principled position on their members'—as contradistinguished from unorganized workers'—status under the FLSA. Stymied in their initial efforts through collective bargaining to secure wages for all the time their members placed at the disposal of their employers, unions appealed to the Wage and Hour Administrator and finally to the federal courts to vindicate these


45See below § 7.

46 That is, within the limitations period, which before the Portal-to-Portal Act, was rather long in some states. See infra § 6.


48 See above chapter 1.
claims. Unless they were to win on a (legislatively reversible) technicality, unions had to legitimate their position by reference to socially recognized moral grounds. If they permitted their adversaries to stake out higher moral ground, the CIO should have anticipated ultimate defeat. Capital, in contrast, compelled to cast its postwar struggle to recover supremacy at the point of production as righteous resistance to judicial perversion of congressional intent and of employers’ just expectations as well as to reneging labor unions, directed its appeal to the new Republican majority in Congress. It was this struggle between labor and capital over the possible new contours of their relationship in the postwar period, as displaced to the plane of legislation, interpretation, implementation, litigation, adjudication, and renewed litigation, that informed the portal-to-portal controversy.

The unresolved status of this conflict crystallized in November 1945 at the National Labor-Management Conference convened by President Truman. The committee on Management’s Right to Manage was unable to reach agreement because the labor members, while conceding that “[t]he functions and responsibilities of management must be preserved if business and industry is to be efficient...and provide more good jobs,” thought “it unwise to specify and classify” them or “to build a fence around the rights and responsibilities of management on the one hand and the unions on the other.”

3. Wages and Profits During Demobilization After World War II

We in the trade-union movement have always recognized that in reducing hours while we have not permitted a reduction of the hourly rates, we did not earn as much as we did when the hours were longer. However, we recognize that through organization we can step up the rate at another time. The reduction of hours is the most basic thing and the most worth-while thing for working men and women to fight for. It seems to me that the only answer to these men who find themselves in the position of having their earnings reduced by a cut in hours is that they must join a union.

Because, with rare exceptions, the lowest hourly wage rate in the unionized industrial sector exceeded the statutory minimum by the end of World War II, the question of back wages for employees whose travel time did not extend their workweek beyond forty hours was “academic.” Portal litigation was therefore

51 Portal to Portal Wages: Hearings Before a Subcommittee of the Senate Committee on
exclusively a creature of the overtime provision of the FLSA. Demobilization in 1945 brought about a significant reduction in the length of the workweek and, concomitantly, of real earnings. In the core sectors of military production, durable goods manufacturing, the organizing base of the CIO, average weekly hours plummeted by one-seventh from April 1945 (46.5 hours) to June 1946 (39.8). As a result of postwar inflation, real weekly earnings of workers in these industries declined during this period by one-sixth. Although the length of the workweek leveled off by the beginning of 1947, with inflation unabated, real earnings continued to decline, so that by the height of the portal-pay movement in February, real weekly earnings in durable goods manufacturing had dropped by 21.8 per cent since the end of the war in Europe. While workers’ real wages were falling and labor was unable to persuade either the Democratic-controlled Seventy-Ninth or the Republican-controlled Eightieth Congress to raise the minimum wage, the Truman administration was reporting that “it is plain that business in general is receiving exceptional profits.”

When, in the wake of demobilization, the workweek was shortened but

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52Milton Derber and Sidney Netreba, “Money and Real Weekly Earnings During Defense, War, and Reconversion Periods,” 64 Monthly Lab. Rev. 983, tab. 1 at 987, tab. 2 at 989, tab. 3 at 996 (1947). For all manufacturing the corresponding decline was 16.6 per cent. A similar trend was reported for net spendable weekly earnings of manufacturing workers (a category which takes into account social security taxes). See Lenore Epstein and Eleanor Snyder, “Urban Price Trends,” in Labor in Postwar America 137, 143-44 (C. Warne ed. 1949).


inflation accelerated, many workers were still eager for overtime premiums. In this context it is therefore wrong to view the CIO’s demand for portal pay as motivated by an interest “in shortening the working day by compelling employers to recognize that the day began from the moment the laborer came onto the premises until the moment he left.”

Of particular relevance to the labor movement was the Council of Economic Advisers’ conclusion that in 1947 “profits on the whole were above the levels necessary to furnish incentives and funds for the expansion of business and to promote the sustained health of the economy.” These economic relationships fit well into the CIO’s position that industry’s increased profits could comfortably accommodate wage increases. In the so-called first-round of postwar wage increases, which extended from the end of the war in Japan to the spring of 1946, the pattern called for a rise of about 18 percent in weekly earnings. But with the increase in the cost of living advancing more rapidly than the pattern increase of the first round, pressure built up for a second round of increases in the spring of 1947, which merely “offset advances in consumer prices that followed the lifting

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60H. Douty, “Review of Basic American Labor Conditions,” in Labor in Postwar America 109, 121 (C. Warne ed. 1949). Forty per cent of manufacturing workers received increases in excess of the pattern, 40 percent received below-pattern increases, while 20 percent received no increase; the average for manufacturing as a whole was about 11 percent. When the final waves of the first round had spread out by October 1946, the aggregate average reached 16.5 percent. Id. at 122.
62According to John Dunlop, “The Decontrol of Wages and Prices,” in Labor in Postwar America 3, 5, a wage increase had become “necessary both from considerations of politics
of price controls subsequent to the ‘first round’ of wage raises.”

In the interim between the first and second round, in late 1946, a time of sharply contested claims to postwar national income and of notable reductions in working class living standards, the labor movement—especially the CIO—may have viewed the mass filing of portal-pay suits as furnishing additional bargaining strength. Although the CIO publicly asserted that portal pay was a completely separate issue from general wage increases, the press largely regarded the litigation as a bargaining lever positioned to buttress demands for second-round wage increases. The CIO did not effectively project the principle at stake in its campaign. In any event, the press failed to report on labor’s explanations comparable to the pithy and easily comprehensible value-laden broadsides from employers denouncing portal claims as essentially parasitic.

By the time the Supreme Court had disposed of its final FLSA-portal case in and industrial relations” and “was essential, given the temper of wage earners and the facts of labor organizations.” Barton Bernstein, “The Truman Administration and Its Reconversion Wage Policy,” 6 Lab. Hist. 214 (1965), argues that the framework policy provided by the federal government was inept. See also Craufurd Goodwin and R. Stanley Herren, “The Truman Administration: Problems and Policies Unfold,” in Exhortation and Controls: The Search for a Wage-Price Policy 1945-1971, at 9-48 (Craufurd Goodwin ed. 1975).


64Significant light was shed on the class-differential impact of demobilization and inflation on the real standards of living of representative classes in an eight-part front-page series in the Wall Street Journal, which ran from December 18, 1946 to January 11, 1947.


68Philip Murray, the president of the CIO, thus engaged in understatement that the organization was “interested in the application of portal-to-portal pay for all American industry. The C.I.O. intends to find out why the portal-to-portal provisions in the Fair Labor Standards Act which have long benefited the miners have not been made applicable to other wage earners.” “Door-to-Door Pay,” Business Week, Sept. 21, 1946, at 94, 95.

69The NAM, for example, saw portal pay demands as opening the way to new possibilities of “obtaining more pay without more work.” “NAM Group Seeks Labor Acts’ Repeal,” N.Y. Times, Dec. 23, 1946, at 1, col. 2, at 12, col. 4.
the fall of 1946, even the NAM recognized that "[t]here [wa]s no question that time spent in a manufacturing establishment walking from a time clock to the place of employment, to the bench" was compensable. Yet only one portal-pay settlement was prominently reported in the fall of 1946. Involving Dow Chemical in Michigan and District 50 of the United Mine Workers (UMW), it was reached without resort to litigation once it became "obvious to the company that the union could collect portal-to-portal pay for its members by going to court, if necessary, under the precedent set in the Mt. Clemens case." Business Week expressly characterized it as "A Second-Round Solution," which, if widely applied, might "eliminate the threat of serious strikes without sharply boosting hourly rates." Against the background of a six-year state statute of limitations, the agreement provided for $360 in back wages to each of 11,000 present and former employees. In addition to this retroactivity—which management generally found the most unacceptable aspect of portal-pay claims—future relief was offered in the form of portal pay for walking from the clockroom to the lockers, clothes changing, and showering (if necessitated by chemical operations). In exchange for this almost half-hour per shift of future overtime pay, the union forwent its demand of a twenty-cent general wage increase. Although by the end of 1946 Business Week reported that "[m]anagement recently learned with considerable interest" of the Dow-UMW settlement, it appears to have served at best as a negative object lesson to employers.

Ironically, the Dow-UMW agreement interested unions—in particular, the CIO—a good deal more. Its general counsel, Lee Pressman, later told Congress that the fact that the UMW belonged to the AFL created a competitive situation, which the CIO unions felt compelled to match. When the CIO approached employers on the issue in the context of collective bargaining, however, they responded that negotiations had become unnecessary because Congress would soon amend the FLSA to overrule the prolabor decisions by the Supreme Court.

Congressional proponents of strict anti-portal legislation insisted that the wave of portal litigation was a conspiracy carefully orchestrated by the CIO, verged on champerty, and was infiltrated by Communists. For example, Representative J.

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70 See below § 5.
73 "A Second-Round Solution."
74 Business Week, Sept. 21, 1946, at 84.
75 Business Week, Nov. 2, 1946, at 84.
Parnell Thomas (who the following year was convicted of taking kickbacks from his staff and imprisoned) asserted: "As chairman of the Committee on Un-American Activities, I am in possession of certain information dealing with the inspiration of the original portal-to-portal pay suit.... The individual who is credited with concocting the idea of these suits, and the lawyer who brought the original action...both have long records of Communist affiliation." Representative Rankin, another formidable member of that committee, charged that the portal litigation was a Communist plot to bankrupt the United States.

Though protestations that the CIO unions were passively following their membership may, in light of the obvious tactical collective bargaining consequences, seem difficult to credit, some plausibility attaches to the claim that in fact once the inexorable logic of the Supreme Court portal decisions became widely disseminated by the very media that editorially fulminated against it, the pressure from the rank-and-file who "wanted theirs" became too great to resist. Indeed, one of the chief portal-pay litigators even suggested that union lawyers, apprehensive of precisely the sort of congressional backlash that eventually ensued, unsuccessfully tried to channel the discontent.

4. Mine Owners Fail to Save Face-to-Face

In a way it is even humiliating to watch coal-miners working. It raises in you a momentary doubt about your own status as an "intellectual" and a superior person generally. For it is brought home to you...that only because miners sweat their guts out that superior persons can remain superior. You and I and the editor of the Times Lit. Supp., and the Nancy poets and the Archbishop of Canterbury and Comrade X, author of Marxism for Infants—all of us really owe the comparative decency of our lives to poor drudges underground, blackened to the eyes, with their throats full of coal dust, driving their shovels forward with arms and belly muscles of steel.

To grasp the seminal role that miners played in the struggle for portal pay it is necessary to gain a sense of the extraordinary travails that they undergo just getting to the face where they mine. No one has conveyed that sense more poignantly than

78 Cong. Rec. at 538. Thomas was referring to Ben Riskin, the former research director of the International Union of Mine, Mill and Smelter Workers, and CIO counsel Lee Pressman. Forty years later Riskin was "in his own words, proudest of 'helping to win the "portal to portal" decision establishing the 8-hour day for all underground miners in the U.S.'" 2 The Cold War Against Labor 823 (A Ginger and D. Christiano eds. 1987).
79 Cong. Rec. at 1511.
81 George Orwell, The Road to Wigan Pier 31 (1966 [1937]).
George Orwell in *The Road to Wigan Pier*. Writing of his visits to British coal mines in the 1930s, Orwell noted that a nonminer would probably have to see several mines before understanding mining “because the mere effort of getting from place to place makes it difficult to notice anything else.”

The descent itself was a disorienting experience:

You get into the cage, which is a steel box about as wide as a telephone box and two or three times as long. It holds ten men, but they pack like pilchards in a tin, and a tall man cannot stand upright. The steel door shuts upon you, and somebody working the winding gear above drops you into the void. ... In the middle of the run the cage probably touches sixty miles an hour; in some of the deeper mines it touches even more. When you crawl out at the bottom you are perhaps four hundred yards under ground. That is to say you have a tolerable-sized mountain on top of you; hundreds of yards of solid rock...suspended over your head and held back only by wooden props as thick as the calf of your leg.

Because Orwell had imagined that miners worked but a few yards from where the cage disgorged them, he was surprised by “the immense horizontal distances” that had to be traversed before they even got to work. Though a mine shaft was initially sunk near a coal seam, as the latter was worked out and others opened, the face of the mine would eventually be one to five miles distant from the pit bottom:

“But these distances bear no relation to distances above ground. For in all that mile or three miles..., there is hardly anywhere...a man can stand upright.”

Orwell then described the exertions necessary to move those three miles:

At the start to walk stooping is rather a joke, but it is a joke that soon wears off. ... You have not only got to bend double, you have also got to keep your head up all the while so as to see the beams and girders and dodge them.... You have, therefore, a constant crick in the neck, but this is nothing to the pain in your knees and thighs. After half a mile it becomes (I am not exaggerating) an unbeatable agony. ... Your pace grows slower and slower. You come to a stretch of a couple of hundred yards where it is all exceptionally low and you have to work yourself along in a squatting position. [T]here is another low stretch of a hundred yards and then a succession of beams which you have to crawl under. You go down on all fours; even this is a relief after the squatting business. But when you come to the end of the beams and try to get up again, you find that your knees have temporarily struck... and refuse to lift you. ... But finally you do somehow creep as far as the coal face. You have gone a mile and taken the best part of an hour; a miner would do it in not much more than twenty minutes.

What I want to emphasize is this. Here is this frightful business of crawling to and fro, which to any normal person is a hard day’s work in itself; and it is not part of the miner’s work at all, it is merely an extra, like the City man’s daily ride in the Tube. The

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82Orwell, *Road to Wigan Pier* at 21.
83Orwell, *Road to Wigan Pier* at 22.
84Orwell, *Road to Wigan Pier* at 22-23.
miner does that journey to and fro, and sandwiched in between there are seven and a half hours of savage work.... A miner’s working shift...doesn’t sound very long, but one has got to add on to it at least an hour a day for “travelling,” more often two hours and sometimes three. Of course, the “travelling” is not technically work and the miner is not paid for it; but it is as like work as makes no difference.85

Miners’ ability to persuade legal decisionmakers that their deep conviction that this travel constituted work should also be the law under the FLSA was the question that triggered the portal-to-portal struggle. They had succeeded as early as 1912 in Arizona, when the state legislature enacted an eight-hours law for miners that included portal time.86 In the version on the books at the time of the FLSA controversy, the Arizona law provided that for all persons engaged in work in underground mines the “period of employment...shall not exceed eight hours within any twenty-four hours, and the said eight hours shall include the time employed, occupied or consumed, in descending to and ascending from the point or place of work in any underground mine....”87 The FLSA, however, was not a

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85Orwell, *Road to Wigan Pier* at 24, 26.
861912 Ariz. Sess. Laws ch. 28 at 59, 60.
87Ariz. Code § 56-115 at 634 (1939). This provision is still on the books. Ariz. Rev. Stats. Ann. § 23-282 (1995). Nevada’s 1927 eight-hour law for miners included the time spent going from face to surface but not from surface to face. 1927 Nev. Stat. ch. 105 at 186. The legislature included all portal-to-portal time in the eight hours in 1949, and then excluded all portal time in 1993. 1949 Nev. Stat. ch. 126 at 197; 1993 Nev. Stat. ch. 273 at 821. As an early example of a state hours law excluding portal time, in 1913 Alaska’s first territorial legislature enacted an eight-hour law for mines providing that the limit of eight hours referred only to work actually performed at the face. 1913 Alaska Sess. Laws ch. 29, § 2 at 35, 36. As early as 1884, Austria-Hungary enacted a portal-to-portal statute limiting the length of a miner’s daily shift to twelve hours (of which the “real” work time was limited to ten hours), and defining the beginning and end of this shift as the descent into and completed ascent from the pit of the mine, respectively. Gesetz vom 21. Juni 1884, über die Beschäftigung von jugendlichen Arbeitern und Frauenpersonen, dann über die tägliche Arbeitsdauer und die Sonntagsruhe beim Bergbau, § 3, in Reichsgesetzblatt für die im Reichsrathe vertretenen Königreiche und Länder 367 (1884). The 1908 British eight-hours law for coal miners applied to a workman below ground “for the purpose of his work, and of going to and from his work, and measured the period by reference to the time at which “the last workman in the shift leaves the surface and the first workman in the shift returns to the surface.” Coal Mines Regulation Act, 1908, § 1(1)-(2), 8 Edw. 7, ch. 57, at 320. The importance that miners attached to the portal-to-portal issue is reflected in the law’s authorizing them to appoint and station someone “to be at the pit head, at all times when workmen are to be lowered or raised, for the purpose of observing the times....” Id. § 2(2) 322. According to E.H. Phelps Brown, *The Growth of British Industrial Relations: A Study from the Standpoint of 1906-14*, at (1974 [1959]), this statute failed to secure eight hours “‘bank to bank’”: it included travel underground, but excluded winding times, which added
A. Muscoda and the Alabama Iron Ore Miners

Certain activities are plainly "work".... Other activities fall in the hazy penumbra; neither common understanding nor a priori reasoning will tell us whether they are work or not. [U]nderground travel in iron mines fell into the former category.... But walking to one's work place through a yard and factory cannot be said to be so plainly "work" that there is no room for a contrary understanding.88

Organized miners furnished a powerful initial impetus to the movement for portal-to-portal pay. Although accounts of this conflict have usually focused on the alleged wartime political machinations of John L. Lewis and the UMW designed to maneuver coal mine owners into raising wages outside the permissible limits of the so-called Little Steel formula (that is, wage increases designed to keep pace with cost-of-living increases since January 1, 1941),89 in fact, iron ore miners in Alabama90 were the portal-pay pioneers. The UMW did not achieve its organizing breakthrough in the Southern metal mines until the latter part of the 1930s,91 when it succeeded in organizing the miners at the Tennessee Coal, Iron, and Railroad Company (TCIR).92 By the beginning of World War II, the International Union of Mine, Mill and Smelter Workers had organized not only a half-hour to the time spent below ground. In Parliament in 1993, "Shouts of 'shame' met Mr Eggar's [the Energy Minister's] disclosure that a 1908 Act limiting the time miners spend underground to 7.5 hours plus one hour 'winding time is to be repealed from 20 November." Stephen Goodwin, "Inside Parliament: Rebels Display Little Fight over New Threat to Mines," Independent, Oct. 21 1993, at 6 (Lexis). In the Australian state of Victoria, the eight hours also ran between the time when the miner began to descend and when he returned to the surface. Coal Mines Regulation Act 1928, § 7(1), Vict. Acts, No. 3657, at 514, 516.

90The Red Mountain mines near Birmingham recorded the second largest production in the United States although the output was far inferior to that of the Mesabi range in Minnesota. Tennessee Coal, Iron, & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944), Record at 4023.
TCIR, but also the Sloss-Sheffield and Republic Steel mines.\textsuperscript{93} These three companies, which owned the only substantial ore mines in Alabama,\textsuperscript{94} were all components of still more powerful enterprises. TCIR had been acquired by the largest steel producer, U.S. Steel, in 1907, while Republic was the third largest steel producer in the United States; Sloss-Sheffield Steel & Iron Corporation was affiliated with Allied Chemical & Dye Corporation, one of the largest chemical producers.\textsuperscript{95}

Precisely because the unions faced such strong opponents, they were unable to secure even partial travel time (for the trip out); the CIO union, for example, lost a strike over this issue against Republic Steel after one such failed effort between 1933 and 1935.\textsuperscript{96} It was only in compliance with the "Modified Portal to Portal Wage-Hour Opinion" issued by the Wage and Hour Administrator on March 23, 1941, stating that effective May 1, 1941 the compensable workday began when the miner reported at the collar of the mine,\textsuperscript{97} that the Southern iron ore companies began paying on a portal-to-portal basis. After the union again demanded back wages on behalf of 6,000 employees for such work (travel) time, which ranged from three minutes to forty minutes at the various mines,\textsuperscript{98} the employers filed a declaratory judgment action\textsuperscript{99} on April 1, 1941 in the federal district court for

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  \item \textsuperscript{93}Regensburger, "Emergence of Industrial Unionism in the South," at 96-107. Before the FLSA went into effect, none of the mine owners had entered into contracts with the unions. TCIR's first contract took effect in October 1938, Sloss-Sheffield's a year later. Brief for Wage and Hour Administrator-Intervener, at 26, Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944). Republic had never executed a written agreement with the Smelters Union before the case went to trial. Brief for Petitioner Republic Steel Corp., at 8, Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944).
  \item \textsuperscript{94}Petition for Writ of Certiorari, at 10, Tennessee Coal, Iron, & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944).
  \item \textsuperscript{95}Ethel Armes, The Story of Coal and Iron in Alabama 517-24, 452-57, 356-57; Poor's Financial Records: 1941 Industrial Manual 2858, 3231, 2147, 2149. A union official stated in another context that TCIR was both "the single most profitable operation" of U.S. Steel and "the most profitable in the entire steel industry," Amendments of the Fair Labor Standards Act of 1938: Hearings Before the Senate Committee on Education and Labor, 79th Cong., 1st Sess. 1092 (statement of David McDonald, Sec'y-Treas. United Steel Workers).
  \item \textsuperscript{96}Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590, 611-12 (1944).
  \item \textsuperscript{97}"Overtime and Records for Miners," 3 Wage & Hour Reporter 466, 467 (Oct. 21, 1940); "Hours of Work in Metal Mines," 4 Wage & Hour Reporter 137 (May 24, 1941); Petition for Writ of Certiorari, at 12; Record at 76.
  \item \textsuperscript{98}Record at 121, 3587.
  \item \textsuperscript{99}In their original petitions the plaintiff-employers made the named-defendant employees
Moments Are the Elements of Profit

Northern Alabama to test the Administrator's ruling, which had formed the basis of an agreement into which the parties entered on May 5, 1941.100

In retrospect the plaintiff-employers may have made a tactical error in seeking "a rigid definition of working time favorable to them,"101 but given the weight of the extraordinarily sympathetic facts in the miners' favor, the companies had little choice but to try to deflect the court's attention from those facts. The trial judge was, however, as he wrote not without a trace of irony, unable to oblige the employers' request for a declaration "without consideration of the actual conditions" of transportation "because transportation in the abstract might be construed to be a restful and pleasurable activity for passengers." The court then proceeded to describe those conditions in some detail: The crowded cars, otherwise used for transporting iron ore and bearing remnants of muck, were very crowded, causing the miners to crouch lying on top of one another; overhead dangers lurked in the humid and malodorous mines. The judge then promptly added that the recital was "not for the purpose of censure" of the employers, "for these conditions may well be the normal conditions in iron ore mines and practically inevitable."

class representatives of all their employees. Record at 34, 123, 183. This point does not appear to have been litigated. Ironically, the Portal-to-Portal Act banned opt-out class actions, although even earlier the courts refused to permit employees to prosecute such actions. See below § 8.

100Brief for Petitioner TCIR, at 5, 9; Muscoda, 321 U.S. at 592 n.3, 613. The Wage and Hour Administrator intervened in the action. Record at 304. In recounting these events, the dissent, citing the aforementioned "Modified Portal to Portal Wage-Hour Opinion," stated that, because portal-to-portal pay "was a complete change of opinion, the Administrator announced that he would not seek to compel restitution...." 321 U.S. at 613. Since Congress did not authorize the DOL to collect back wages under the FLSA until 1949, the Wage and Hour Administrator would not have been empowered to compel restitution. Ch. 736, § 14, 63 Stat. 919. Indeed, the Administrator urged Congress repeatedly to grant him such authority. Proposed Amendments to the Fair Labor Standards Act: Hearings Before the House Committee on Labor, 79th Cong., 1st Sess. 867 (1945) (statement by Metcalfe Walling); 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. 2280 (1947) (statement by Metcalfe Walling, former Adm'r). Before 1949, the Administrator could seek to collect back wages (but not liquidated damages) by means of consent judgments into which employers were often willing to enter for fear of a more unpleasant alternative—namely, criminal process under § 16(a) or an injunction of the interstate shipment of goods under § 17. See Allan Tepper, Consent Judgments and Contempt Cases under the Fair Labor Standards Act of 1938," 22 B. U. L. Rev. 390, 391-92 (1942); G. W. Foster, Jr., "Jurisdiction, Rights, and remedies for Group Wrongs under the Fair Labor Standards Act: Special Federal Questions," 1975 Wisc. L. Rev. 295, 311-13.

101Tennessee Coal, Iron and R. Co. v. Muscoda Local No.123, 137 F.2d 176, 183 (5th Cir.1943) (denying reh'g).
Though of little comfort to employers whose capital was immobilized in iron ore mining, the court underscored its narrowly fact-specific holding by referring to the conditions as “clearly...peculiar to the occupation of the men.”\textsuperscript{102} It then set forth as additional criteria for determining whether travel time was compensable the employer’s strict control and supervision of the workers “clearly exercised in the interest of efficient operation of their mining business.” That control manifested itself, for example, in the imposition of discipline for infractions committed during the trip. The court then summarized the three-part test as whether the transportation “bears in a substantial degree every indicia of worktime: supervision by the employer, physical and mental exertion, activity necessary to be performed for the employer’s benefit....”\textsuperscript{103}

The other contention pressed by the mine owners that was destined to become prominent in the debate over portal pay centered on the existence of a venerable tradition in the industry not to pay for such travel time. Ancillary to this claim was the argument that the custom was of a kind that Congress must have adopted in the FLSA overtime provision. The court disposed of this position on three levels. Empirically, it found no evidence of such a custom inasmuch as the workers were compensated on a tonnage or shift rather than an hourly basis.\textsuperscript{104} In tension with this conclusion was the finding in the alternative that even if there were such a custom, “the methods of payment of wages were clearly dictated almost entirely by the employers. The employees worked on the best terms they could obtain and the fact that they could not obtain terms that would compensate them for time spent in travelling underground...does not indicate that they did not consider that time as working time.” The negative inference that the court drew from the miners’ pre-FLSA unsuccessful efforts to secure travel time pay as to their subjective attitude towards continued non-payment served to deny the existence of a valid custom as lacking “unhampered consent.” Thus even if Congress had meant to exempt certain wage customs from the FLSA, its intent with regard to such unilaterally imposed wage schemes could not be divined. Finally, and potentially much more broadly, the trial judge suggested that it would be a mockery of an avowedly remedial statute if an occupational custom were permitted to avoid a congressional mandate.\textsuperscript{105} Here the court came perilously close to committing a petitio principii


\textsuperscript{103}40 F. Supp. at 10.

\textsuperscript{104}40 F. Supp. at 7. Before the Supreme Court, Republic Steel made the ambiguous statement that although the wages were paid on a tonnage basis, “the rates of pay were fixed on evaluations made on the hourly basis.” Brief for Petitioner Republic Steel Corp. at 7. TCIR also used a combination of tonnage, task, and incentive rates. Brief for Respondents at 12-15.

\textsuperscript{105}Muscoda, 40 F. Supp. at 8.
Moments Are the Elements of Profit since it had failed to demonstrate that Congress specifically intended to cover such travel time.

In a very brief affirmance, the Fifth Circuit rested its decision on the trial court’s last point. More ominously, however, but with a possible nod to the controversy that was about to be unleashed, the appeals court stressed that its task was to limit itself to the facts and issues of the case without reference to any wider consequences. Though perhaps also prescient, the majority was specifically responding to the dire predictions voiced by the vigorous dissent.

The dissenter stressed three equitable points in favor of the employers. First, even collective bargaining agreements with strong unions excluded travel pay. Second, the travel arrangements were “primarily for the benefit of the miner.” And third, the danger and/or discomfort of the trip was reflected in the pay scales. Against that background, awarding double liquidated damages for time and one-half for riding time would confer upon the miners three times the hourly rate for actual mining at the face. Finding this “injustice...shocking,” the dissenter predicted that if triple back pay were imposed on all iron mines, “[m]any will go broke, or cease operations, causing a loss of jobs to their men.” As an illustration of the hardship to be expected, one of the old mines owned by the defendants required 1.5 hours of travel time or nearly one-quarter of the seven-hour work day. A further specter was conjured up in the form of the inevitable application of the ruling to coal mines.

In denying the employers’ petition for rehearing, the Fifth Circuit rejected their claim that it was upholding the portal-to-portal theory as a matter of law. Rather, they were reaping what they had sown inasmuch as they requested a pro-employer “rigid definition of working time”: “They now chide us for laying down such a definition against them.”

The Supreme Court decision written by Frank Murphy arguably represents the all-time high point of sympathetic FLSA jurisprudence—albeit one that did not pass unchallenged even at the time by part of the Court. Present-day mantra-like formulaic citations to key pithy passages of this opinion virtually never reveal their peculiar context. Thus Murphy, whom Time called “an eager beagle who is all heart-and-snuffles whenever the legal hunt picks up the scent of something human,” described the miners as crowded into ore box cars “covered with muck” in which they are forced to ride “in a close ‘spoon-fashion,’ with bodies contorted and heads drawn in” to avoid the low mine ceilings: “Broken ribs,

106 Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 135 F.2d 320, 322 (5th Cir. 1943).
107 135 F.2d at 324.
108 135 F.2d at 325.
109 137 F.2d at 183.
injured arms and legs, bloody heads often result; even fatalities are not unknown.\textsuperscript{111} At 3,000 to 12,000 feet in the “malodorous shafts,” produced by “human sewage resulting from a complete absence of sanitary facilities,” the “subterranean walks are filled with discomforts and hidden perils” including “exposed high voltage electric cables and wires” and falling rocks.\textsuperscript{112}

Justice Jackson, who concurred in Murphy’s opinion on the grounds that the case posed no question of law or one “with a very obvious answer” because, absent a “very exceptional showing of error,” the Supreme Court was bound to uphold the courts below, which had found that the travel was work for which no evidence of a custom excluded compensation,\textsuperscript{113} regarded Murphy’s rhetorical flourishes as unnecessary to the holding. Thus privately Jackson suggested to Murphy that the odor in the mines was irrelevant: “‘Would it alter the rights any...if the mine smelled sweet as new-mown hay?”'\textsuperscript{114}

Jackson’s austere and sanitized view of the FLSA missed the point that Murphy was trying to give to the act. For the decidedly humanitarian tone and texture of the portal-to-portal decisions handed down by the Supreme Court are not coincidentally the product of Justice Murphy, who, his biographers agree, was guided by sympathy for the working class: “Faced with a choice, he simply could not square hazardous travel in coal mines with physical reality or Christian compassion.”\textsuperscript{115} Nor was it coincidental that hard upon the graphic depiction of the travel conditions in the iron mines followed the almost endlessly quoted affirmation of the FLSA as “remedial and humanitarian in purpose. We are not dealing here with mere chattels or articles of trade but with rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and

\textsuperscript{111}321 U.S. at 595 n.9 and 596. The employers, workers, and the intervener all submitted as exhibits photographs of the miners in the open-top cars that strongly convey the human-haulage aspects of the transportation. See Record at 4466-67, 4509-12, 4537, 4608.

\textsuperscript{112}321 U.S. at 596.

\textsuperscript{113}321 U.S. at 604-605.

\textsuperscript{114}Sidney Fine, \textit{Frank Murphy: The Washington Years} 323 (1984) (citing letter from Jackson to Murphy dated Mar. 2, 1944, in Jackson papers). That a plausible answer to Jackson’s rhetorical question might have been Yes, emerges from a release by the Wage and Hour Administrator, who had not yet determined whether, because of the very unfavorable and hazardous conditions in the mines, the half-hour miners took to eat underground was compensable. Petition for Writ of Certiorari, at 42; Record at 397-98, 403-404. Later the Administrator determined that lunch periods of 30 minutes or more were not compensable even if taken underground. BNA, \textit{Wage and Hour Manual} 241-42 (cumul. ed. 1944-45).

profit of others. ... Such a statute must not be interpreted in a narrow, grudging manner.”

Beyond the lower courts’ disposition of the employers’ crucial claim of the existence of a contrary custom, Murphy did not go. Murphy’s innovation, which triggered considerable scholarly criticism, focused not on the existence of custom, but on its irrelevance: “But in any event it is immaterial that there may have been a prior custom.... The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee’s time while compensating him for only a part of it.” In an obituarial appreciation, Archibald Cox, echoing Jackson’s concurrence, regretted that Murphy had added this principle of statutory construction. And Murphy’s principal biographer characterized the guideline as “a policy statement that went beyond the facts in Muscoda and was probably what provoked Frankfurter to send Murphy a cautionary note after he had read the slip opinion.” Indeed, the biographer conjectured that Murphy himself “was not as certain about his policy as the opinion indicated” in light of his having written in the margin of the slip opinion opposite the passage in question: “Regardless of well established understandings as to what constitutes compensable work?”

Such criticism is puzzling since Murphy answered his own question by carefully circumscribing the potential expansiveness of his ruling: “This does not foreclose, of course, reasonable provisions of contract or custom governing the computation for work hours where precisely accurate computation is difficult or impossible.” Since the travel time in the iron ore mines could easily be calculated, however, Muscoda was not a hard case for Murphy. Nor was it one of those “borderline cases where the other facts give rise to serious doubts as to whether certain activity or non-activity constitutes work or employment.” Ironically, by virtue of his censured emphasis on the harsh conditions of the ore miners, Murphy furnished the very grounds for distinguishing this case from those in which employees encountered pleasant conditions of portal-to-portal travel.

116 321 U.S. at 597.
117 His major addition consisted in what may have been an ironic citation of Blackstone to the effect that custom “must have been peaceable and acquiesced in; not subject to contention and dispute.” 321 U.S. at 602 n.17.
118 321 U.S. at 602.
121321 U.S. at 603.
122 For this reason Cox’s stricture appears misplaced: “Even in the hands of the most pragmatic of judges the phrases used to explain one decision are apt to be applied as formulas in later cases, divorced from their practical background.” “The Influence of Mr. Justice
In a lengthy and acerbic dissent, in which Chief Justice Stone concurred, Justice Roberts frontally attacked the opinion on several levels. To Murphy’s compassion Roberts counterposed the argument that the compensability of travel time “should be approached not on the basis of any broad humanitarian prepossessions we may all entertain, not with a desire to construe legislation so as to accomplish what we deem worthy objects, but” in an effort strictly to divine congressional intent. Thus “merely because the court thought that such activity imposed such hardship on him [the employee] or involved conditions so deleterious to his health or welfare that he ought to be compensated for them” did not empower it to treat as work what neither contract nor custom of the parties had ever so designated.

If, however, Congress shared Murphy’s humanitarian vision of the FLSA, his search for and application of that intent would be impeccably traditional. Here the confrontation between majority and dissent became pointed. Whereas Murphy viewed Congress as wanting “to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act,” Roberts insisted that the FLSA’s “sole purpose was to increase employment, to require a fair day’s pay for a fair day’s work by raising the wages of the most poorly paid workers and reducing the hours of those most overworked, and thus correct inequalities in the cost of producing goods and prevent unfair competition in commerce.” The difference in emphasis bore significant public policy consequences. For as was to become clear in this dissent and other dissents in portal-pay and overtime cases, one wing of the Supreme Court, reflecting the views of large capital, took the position that the FLSA applied at best only marginally to unionized workers already protected by collective bargaining agreements.

In the specific setting of the case, Roberts sought to reinforce his insistence that “Congress expected the provisions of the Act to be fitted into the prevailing practices and understandings as to what constituted work in various industries”


123 321 U.S. at 606.
124 321 U.S. at 617.
125 321 U.S. at 602.
126 321 U.S. at 606-607.
127 For example, one of the petitioners had argued that the FLSA was not intended “to revolutionize conditions in industry which had been established by collective bargaining.” Brief for Petitioner Sloss-Sheffield Steel & Iron Co. at 35-36. Justice Jackson clearly belonged to the pro-capital wing. See Eugene Gerhart, America’s Advocate: Robert H. Jackson 245 (1958). Murphy sought to refute this claim by reference to specific provisions in the FLSA giving effect to two kinds of collective agreements. 321 U.S. at 603 n.18.
128 321 U.S. at 608.
by reference to the parallel and related immunization of union contracts from scrutiny under FLSA. In the less successful part of his argument, Roberts circularly defined statutorily compensable work as "the actual service rendered to the employer for which he pays wages in conformity to custom or agreement." The trouble with this framework is that where an unscrupulous employer had secured a vested right, through long years of acquiescence by its employees in superior power that then crystallized into custom, to require employees to perform uncompensated activities for its benefit: "To give controlling effect to custom or agreement in these situations would license the kind of 'sweating' the FLSA was intended to halt." Even if an adjudicator were not concerned with the effect of such practices on the employees, elimination of their untoward competitive impact on non-sweating employers was indisputably congressional intent. In order to avoid this pitfall, the dissent was compelled to argue that the custom of face-to-face pay, that is, compensation only for work performed at the face of the mine to the exclusion of travel time, was the product not of naked power, but of the give-and-take of legitimate collective bargaining.

Roberts' first step was to sanction the drawing of inferences for custom in iron ore mines from the experience in coal mining based on the similarity of physical conditions. Although the next portal case to reach the Supreme Court would discredit Roberts' claim of better conditions in iron ore mines, the important point elided by the dissent was the vast difference in union strength between coal miners on the East Coast and ore miners in Alabama. Thus whereas some inference as to bargaining trade-offs might plausibly be drawn from the UMWW's pre-FLSA acceptance of face-to-face compensation in coal mining, the lack of

129321 U.S. at 608.
131A Wall Street lawyer, a partner in the law firm of the former Secretary of War, Henry Stimson, who played an important part in giving shape to the Portal-to-Portal Act, later used precisely such language of "friendly and ungrudging relations" in arguing that even where an employee was not paid for nineteen minutes of what was indisputably preliminary or postliminary work, there was no injustice because "in most cases, nothing more is involved than the normal give and take which is required of normal life. Legislation should not be designed to bring out and develop the worst features in mankind. Mere picayuneness is not to be affirmatively developed by the holding out of a governmental shield to encourage and protect a demand for the 'last measure of justice' to which one may be entitled." Portal to Portal Wages: Hearings Before a Subcommittee of the Senate Committee on the Judiciary, 80th Cong., 1st Sess. 658 (1947) (testimony of Arthur Pettit).
132321 U.S. at 609.
133See below § 4.B.
134321 U.S. at 609-10.
135See below § 4.B. on how Murphy finessed this issue in granting portal pay to coal
pre-FLSA "bona fide collective bargaining" with recognized independent unions \(^{136}\) by the powerful iron ore mine owners \(^{137}\) rendered any comparison between the two unpersuasive.

The connection to the coal miners' claims for portal pay appeared particularly pernicious and unjust to the dissenters, who noted that the UMW had not raised such a demand until three days after the appeals court issued its decision in Muscoda. Glossing the UMW's announcement that it desired "to take advantage of the law which, under the Alabama decision, grants them the right to be paid for the time they are in the mines," \(^{138}\) Roberts saw it as proof that the union understood portal pay as a judicial declaration rather than a fact of industrial custom or agreement. \(^{139}\) The dissent's approach reveals that a segment of the high judiciary, like a segment of the employing class, was still unreconciled to the state's incursion into private agreements between those of unequal bargaining power that FLSA represented. They did not understand or accept that the "FLSA is designed to defeat rather than implement contractual arrangements" \(^{140}\) and to impose instead by societal fiat another standard, which the current structure of the labor market in that industry would not have produced. \(^{141}\) In that sense, Roberts and Stone, the only pre-New Deal holdovers on the Supreme Court, confused judicial fiat with legislative directive.

B. Jewell Ridge: John L. Lewis and the Coal Miners

In every democratic country engaged in World War II, the coal mining industry was the center of bitter and prolonged labor dispute. The United States was no exception. \(^ {142}\)

Politically explosive conflict over portal-to-portal pay formed no small part of that wartime dispute. That this battle erupted in wartime was no coincidence. For "during World War II the insatiable demand for coal forced the reopening of older

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\(^{136}\) 321 U.S. at 601.

\(^{137}\) Roberts obscured this fact with various euphemisms for so-called agreements with company unions. See Muscoda, 321 U.S. at 611-12.

\(^{138}\) 321 U.S. at 617 (citing no source for the quotation).

\(^{139}\) 321 U.S. at 618.

\(^{140}\) Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J., concurring).

\(^{141}\) See Linder, "The Minimum Wage as Industrial Policy: A Forgotten Role."

mines whose tunnels stretched well back into the hills. Entrance-to-face time lengthened, lengthening in turn the work day of the miner by as much as two hours.”143 By 1944, the President’s Committee on Portal to Portal Travel Time, which Roosevelt had created on November 8, 1943, to collect “more exact information as to the actual travel time” and the “possibility of reducing travel time” in bituminous coal mines,144 reported that nationally coal miners averaged almost one hour of portal travel daily.145 At the same time and to some extent relatedly, the UMW had launched an attack on the Roosevelt administration’s imposition of a wage stabilization program.146 Although the mine owners viewed the UMW’s demand for portal pay in 1943 as “a subterfuge which would compel the operators to give 50 hours of pay for 35 hours of work—with time-and-one-half rates applicable to the extra fifteen”147—it was a subterfuge with a difference:

The figure of two dollars a day that Lewis initially demanded at the beginning of negotiations was set by the January wildcatters, not by the union’s economists after scrutiny of cost-of-living indexes. Indeed, Lewis called upon W. Jett Lauck, K.C. Adams and Percy Tetlow to develop a statistical justification for this sum. Likewise, when Lewis, following the advice of Lauck, decided to achieve the wage advance through the subterfuge of portal-to-portal pay, he stumbled on to a genuine rank-and-file grievance.148

Ironically, because the importance of portal pay in coal mining had virtually no counterpart elsewhere in the economy,149 Lewis saw his portal-pay campaign as

144 Letter from President’s Committee on Portal to Portal Travel Time to Mr. President [Roosevelt], at 1, 2, in Franklin D. Roosevelt Library, File: President’s Committee on Portal to Portal Travel Time, 220.5.10 (Feb. 2, 1944).
145 The average travel time amounted to 59.55 minutes for 152,575 coal miners engaged in production at the face, and 57.29 minutes for 220,417 UMW members in 1,430 mines producing 92.8 percent of the coal produced in UMW mines. President’s Committee on Portal to Portal Travel Time [“Final Report”], tab. 4 & 5, in Franklin D. Roosevelt Library, File: President’s Committee on Portal to Portal Travel Time, 220.5.10 (May 24, 1944). See also Monthly Lab. Rev., July 1944, at 81.
147 Warne, “Coal—the First Major Test of the Little Steel Formula” at 284.
149 A possible exception was logging. See Proposed Amendments to the Fair Labor Standards Act: Hearings Before the House Committee on Labor, 79th Cong., 1st Sess. 240 (1945) (statement of Reuben Haslam, assoc. counsel, NAM, that travel time issue was pressing into lumber industry).
helping his membership without triggering the wave of inflationary wage demands that the Roosevelt administration feared.\textsuperscript{150}

The dispute that arose when the UMW presented its demand for an across-the-board increase of two dollars per day at the wage conference with the mine operators in March 1943 was certified to the National War Labor Board (NWLB). The NWLB agreed in principle "that any payment for travel time should be so designated and paid for as an item separate and apart from hourly tonnage rates, in order that there may be no doubt that travel time has been included in the mine workers' compensation"\textsuperscript{151} without issuing any concrete decision. After being directed by the NWLB to resume work under the terms of the old contract and negotiations, the union struck; the federal government then seized the mines, and work and negotiations were resumed—a cycle that repeated itself several times in 1943. In its next ruling, the NWLB conceded the UMW the right to demand portal pay, but rejected the specific demand for equal pay for unequal travel times as "plainly and unmistakably a demand for an 'indirect wage increase in violation of the wage stabilization policies'...."\textsuperscript{152} Thwarted in its efforts with one group of operators, the union then negotiated a portal agreement for a flat $1.25 per day with another group. When the two sides submitted it to the NWLB for approval, the Board once again disapproved the portal-pay provision on the same grounds.\textsuperscript{153} The Board finally approved a second agreement between the same parties that provided for an eight and one-half hour day inclusive of travel time; all these hours were to be compensated at straight-time rates with time-and-one-half for overtime. Although the NWLB characterized the provision as a "true" portal pay method, it seemed to have suspended disbelief, ultimately granting its approval "because we are convinced that when travel time is paid for the economic inducement imposed on the operators will lead them to reduce the travel time...."\textsuperscript{154}

\textsuperscript{150}Zieger, John L. Lewis at 140.

\textsuperscript{151}Coal Operators' Negotiating Committee of the Appalachian Joint Wage Conference v. UMW, 8 War Lab. Rep. 502, 509 (1943).

\textsuperscript{152}Coal Operators' Negotiating Committee of the Appalachian Joint Wage Conference v. UMW, 9 War Lab. Rep. 112, 118 (1943).


\textsuperscript{154}Illinois Coal Operators Assoc. v. UMW, 11 War Lab. Rep. 687, 688 (1943). The AFL members of the Board dissented on the grounds that although the majority indicated that travel time was work time, the majority approved only half-time pay for the travel. Id. at 693-94. After another round of government seizure, the agreement concluded between Lewis and Secretary of Interior Ickes was adopted in December 1943 by operators accounting for two-thirds of coal output; the collective bargaining agreement provided for eight hours of productive work and forty-five minutes of travel time daily, with the latter compensated at two-thirds the rate of the former. The owners also agreed to pay each employee forty dollars in settlement of all portal claims that had accrued after April 1, 1943 in return for dropping
In the welter of these events, the second in the trilogy of portal-pay cases to reach the Supreme Court also originated as a declaratory judgment action—filed by an employer in July 1943 to test the legitimacy of the portal demand under the FLSA. The thousand employees at the Virginia mines travelled as much as eighty-eight minutes daily as far as five miles from portal to face.\textsuperscript{155} Transportation of the miners by the mine owner not only within but also to the mine played a major part in the overall mobilization of the labor force; as described by management, this activity bore strong resemblance to the transportation of machinery or raw materials. Thus plaintiff-employer’s superintendent testified at trial that “\textit{[w]e have busses that haul our employees from the surrounding country.”}\textsuperscript{156} Absent an obligation to pay for the time spent in such travel, the company conceded both in its complaint and in trial testimony that it had not exhausted the possibilities for reducing the amount of travel time.\textsuperscript{157} The underground travel, or “man trips”—as distinguished from coal hauling—were, the mine superintendent testified, for the convenience of the company; otherwise the miners would go work where coal was more easily mined.\textsuperscript{158} The company was, even more to the point, “very much interested in how a man gets there. If a man has to walk there, he isn’t worth anything when he gets there. The idea is to get him there able to work. ... It wouldn’t be practical to try to operate the mine...having to walk from the driftmouth in.”\textsuperscript{159}

As to the level of exertion required of the miners during travel, a former miner who had risen to the presidency of the United Eastern Coal Sales Corporation\textsuperscript{160} testified: “I don’t think traveling is work. Because I elect to live in Scarsdale, New York, all prior claims. \textit{See} Colston Warne, “Coal—the First Major Test of the Little Steel Formula,” in \textit{1 Yearbook of American Labor: War Labor Policies} 278, 297-99.

\textsuperscript{155}Jewell Ridge Coal Corp. v. Local No. 6167 UMW, 53 F. Supp. 935, 937 (W.D. Va. 1943); Record at 6 (Complaint), Jewell Ridge Coal Corp. v. Local No. 6167, UMW, 325 U.S. 161 (1945).

\textsuperscript{156}Record at 242 (emphasis added). Although the issue was not pursued on appeal, the district court inquired whether the 400 miners were entitled to portal pay for the time spent on the buses and trucks to the mine. 53 F. Supp. at 949.

\textsuperscript{157}Record at 5, 245.

\textsuperscript{158}Record at 256.

\textsuperscript{159}Record at 157-58, 259.

\textsuperscript{160}Since it was obvious that Jewell Ridge was a test case, other entities sought to intervene as plaintiffs in the proceedings. In ruling on the Southern Coal Producers’ Association’s motion, the district court conceded that as a matter of abstract fairness the employer’s bargaining representative should be permitted to intervene because its counterpart, the UMW, was a defendant. But doubting its power to make the employees of intervenor’s members in other jurisdictions parties defendant without their consent, the court denied the motion but permitted entry as amicus. Jewell Ridge Coal Corp. v. Local No. 6167 UMW, 3 F.R.D. 251, 253, 255 (W.D. Va. 1943).
York, and take the 8:22 every morning...isn't any reason why my salary should be raised above the fellow who lives in the apartment house right across the street from the Graybar building.\(^1\) When challenged as to the differences between his mode of transportation and that of his erstwhile colleagues, he replied:

There isn't any more difference relatively than to try to stand up in a coach train from New York to Washington and you sitting in your comfortable seat in a Pullman. ... You can't run Pullman trains in a coal mine, but there isn't any more discomfort in a ride in a trip of mine cars at the rate of six miles an hour than there is sitting in that chair.\(^2\)

The trial judge recognized that the man trips were necessary for the successful operation of the mines and benefited the company by "promoting safety, orderliness and increased productiveness," but he found that they also benefited the workers themselves "by saving their time and energy, and thus increase their productiveness."\(^3\) This reasoning cannot, at first sight, be denied a certain logic. There is virtually no facility that employers confer on their employees that does not simultaneously benefit both. But it is precisely that characteristic that points up the inherent untrustworthiness of "benefit" as a criterion of compensability. For employers could argue that the provision of machinery at the workplace also benefits the workers by saving their time and energy and increasing their productiveness; consequently, time spent working on the machine would not need to be compensated. Even Justice Murphy's eventual modification—"[e]xertion pursued necessarily and primarily for the benefit of the employer and his business"\(^4\)—does not explain how to determine which party is benefited more.

Although this indeterminacy becomes particularly acute in the case of transportation furnished by the employer from the employee's permanent residence to the employer's door—it was precisely the slippery slope to "pillow-to-pillow" wage claims that opponents conjured up to discredit the narrower portal-pay demands\(^5\)—it is dissipated considerably once the travel is confined to the

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\(^1\)Record at 164.

\(^2\)Record at 164.

\(^3\)53 F. Supp. at 939.

\(^4\)Jewell Ridge Coal Corp. v. Local No. 6167, UMW, 325 U.S. 161, 165 (1945).

\(^5\)93 Cong. Rec. at 1493 (Rep. Hobbs). See also "Topics of the Times," N.Y. Times, Jan. 3, 1947, at 20, col. 4 (an extended ad absurdum joke). Directly after the War a district court furnished the following socio-economic answer to the question of home-to-worksit travel: "The defendant then, if it did not furnish transportation, would have available to it employees only those who had automobiles and thus [sic] able to furnish their own transportation. Necessarily then, in obtaining employees, the defendant, in place of having access to a restricted and unlimited labor market, would have access only to a restricted and limited labor market.... It cannot be said that...the facility was not provided primarily for the benefit of the defendant in carrying on its business, and without which it probably could not
employer’s premises, as it is in the trilogy of portal cases decided by the Supreme Court. This consideration is not legalistic; rather, it reflects the employer’s power to structure the arrangements and hence to reduce the time involved.\textsuperscript{166} Thus it is not so much the fact that during the trip the employer controls the employee, but rather the transportation itself that is relevant.\textsuperscript{167} For in terms of cost analysis, although the employee might have an incentive to reduce such idle—albeit unpleasantly spent—time, he is foreclosed from changing the distance travelled or the speed of the means of transport.\textsuperscript{168} Conversely, only if the employer were be carried on at all.... [A]ny choice the employees had was a ‘Hobson’s’ choice.” Walling v. Anaconda Copper Mining Co., 66 F. Supp. 913, 918 (D. Mont. 1946). In other words, the workers could either accept the facilities or not work for the company at all. With the same logic, however, “employee” and “employer” would be interchangeable. Thus workers without access to automobiles would have been participants in a restricted labor market, while the company was faced with a Hobson’s choice of offering transportation or not operating a mine at all. This problem appears largely confined to infrastructurally underdeveloped areas that are further characterized by many low-income residents whose numbers exceed the opportunities for local employment. When a firm then seeks to exploit some natural resource there, the workers’ penury would in the normal case presumably permit the employer to dictate whether travel time was paid. In the alternative, if the anticipated duration of the exploitation warranted it, the state, in an effort at community development, could either require such firms to build housing closer to the employment site or to establish public transportation or subsidize either or both.

\textsuperscript{166}The time appeared long past in which mine owners contended that they could not control face workers, who set their own starting and stopping times and saw their “boss less often than once a day.” Carter Goodrich, \textit{The Miner’s Freedom} 43, 41 (1925). Although mine operators do not appear to have challenged coverage under the FLSA on the grounds that miners were independent contractors, other employers were seeking to raise this claim in the 1940s. See Regulating the Recovery of Portal-to-Portal Pay, and for Other Purposes: Hearings Before Subcommittee No. 2 of the House Committee on the Judiciary, 80th Cong., 1st Sess. 236 (1947) (statement of Irving Richter, UAW); 4 \textit{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. 2846-2848 (1947) (statement by group of Cleveland, Ohio firms). The Wage and Hour Administrator energetically opposed this effort; \textit{id.} at 2621.

\textsuperscript{167}To the extent, however, that management already places workers under its command even before the travel begins, this rationale supersedes the considerations discussed in the text. Thus it was held that the FLSA clock started running at the portal of a silver mine because that was “where the workmen are to appear at a specified time...under the control and direction of” the employer. Sunshine Mining Co. v. Carver, 41 F. Supp. 60, 66 (N.D. Idaho 1941).

\textsuperscript{168}Even in the situation (described by Orwell for Britain) in which the miners are “permitted” to walk for hours from portal to face and back, although miners might be able to choose the speed at which they walked, they would not and could not determine where the
obligated to pay for the travel time, would it have an incentive to restructure the worksite in such a way as to reduce the time and hence the wage outlay. Indeed, the NWLB ultimately approved a portal-pay settlement in the coal industry precisely on these grounds.\footnote{\textsuperscript{169}}

Finding that the transportation benefited the employees and the employer, the supervision during the trip was limited to enforcement of safety rules, and the travel was less hazardous than other coal mining operations, the trial judge concluded that none of the travel time met the criteria of compensability.\footnote{\textsuperscript{170}} Of far greater consequence for the future course of portal pay, however, was the court's discussion of the role of custom and agreement, which had played a subordinate part in \emph{Muscoda}. For not only had face-to-face been the universal mode of payment in the bituminous coal industry for a half-century, but plaintiff's employees, the defendants, had been organized and represented since 1933 by the UMW, all of whose post-FLSA collective bargaining agreements had been premised on face-to-face arrangements.\footnote{\textsuperscript{171}} Weighty too in the judge's mind was the fact that the ore miners in \emph{Muscoda} had, precisely in order to avoid the taint associated with a certain embarrassing historical problem in coal mining, conceded in their appellate brief that the UMW was a strong union with the power to paralyze production by strikes.\footnote{\textsuperscript{172}}

It was precisely that embarrassing letter written jointly by the UMW and the mine owners to the Wage and Hour Administrator in 1940 disavowing portal pay that proved the miners' downfall before the district court. The story may be recounted briefly. Early in its existence, the Wage and Hour Division (WHD) had upheld portal-to-portal pay in the Cornucopia Gold Mine on the grounds that it had been a long-standing custom and tradition.\footnote{\textsuperscript{173}} In 1940, a WHD investigation of a coal mine in Pennsylvania concluded that face-to-face compensation was proper, but added that if the Cornucopia rule were applicable, the coal mine would owe $70,000 in back wages. After the mine owner brought this information to President Lewis's attention, both the UMW and the mine operators told the WHD from time to time that they opposed any construction of the FLSA requiring travel pay. Then on July 7, 1940, the Appalachian Joint Conference Negotiating Committee and the director of the legal department of the UMW, Earl Houck,\footnote{\textsuperscript{174}} sent Wage

\footnote{\textsuperscript{170}}53 F. Supp. at 939.
\footnote{\textsuperscript{171}}53 F. Supp. at 939-40.
\footnote{\textsuperscript{172}}53 F. Supp. at 948-49.
\footnote{\textsuperscript{173}}Record at 683, 685.
\footnote{\textsuperscript{174}}Houck's letter was approved by UMW vice-president Philip Murray while Lewis was sick. When the operators released this letter to embarrass Lewis in connection with the
and Hour Administrator Fleming a letter memorializing their joint position. The key portions of the letter stated:

The uniform high rates of pay that have always been included in the wage agreement of the mining industry contemplate the employee's working day beginning when he arrives at his usual working place. Hence travel time was never considered as a part of the agreement or obligation of the employer to pay for since the eight-hour day was established in the industry—April 1, 1898.

[A]ny ruling requiring such a change in the custom, tradition and contract provision so as to change the work day from “seven hours' work at the usual work places” to any new standard...and to the adjustment of wage rates made necessary thereby, would create so much confusion...as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States. Such a ruling...moreover would establish such diversity of time actually spent at productive work as between different bituminous coal mines and within each mines that there would be no basis on which any general wage scales would be predicated, collective bargaining would therefore be rendered impossible,...and the very purpose of the Fair Labor Standards Act would be defeated...[which] was passed...to aid workers in industries that had unreasonably long hours and unreasonably low rates of pay, as contrasted with the short hours and high rates of pay in the bituminous coal mines.

In conclusion, the union and the operators urged the Administrator to issue a supplement to his Interpretative Bulletin No. 13 stating that the definition of working time set forth in the Appalachian Agreement, which embodied the custom and traditions of the industry, complied with the FLSA and Bulletin No. 13 on the grounds that “reasonable standards agreed upon between the employer and the employee will be accepted for the purposes of the Act.” The Administrator replied to Houck on July 18, 1940, that face-to-face compensation “would not be unreasonable,” repeating this position in a public statement a few days later.

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Jewell Ridge litigation, “Lewis repudiated the letter, saying that neither Houck nor any other employee of the United Mine Workers was authorized to speak for the policy, principles, or purposes of the organization.” Saul Alinsky, John L. Lewis: An Unauthorized Biography 352-53 (1949).


17653 F. Supp. at 941.

17753 F. Supp. at 941; the entire letter is reproduced at 53 F. Supp. 950-53 n.l. Fleming later characterized his decision, which had been reached with considerable difficulty, as having been dictated by the unique venerability and uniformity of face-to-face compensation. Transcript at 692-95 (reproducing Fleming, “Collar-to-Collar vs. Face-to-Face,” 142 Engineering & Mining J. (April 1941)). See also “Mining Determination,” 3 Wage & Hour Reporter 332, 333 (Aug. 5, 1940). In the memorandum submitted to the Supreme Court as amicus in Jewell Ridge, Fleming stated that his earlier distinction between metal and coal mining, which had not been guided by legal principles but by his reluctance to disturb
In first presenting its demand for portal pay at a wage conference in March 1943, the UMW, according to the trial judge, "only contended for it then as an additional basis for its demand for a general wage increase to all mine workers" of two dollars per day.\footnote{53 F. Supp. at 941-42.} Lewis's biographers have explained his supra-individual approach to portal pay as rooted in the assumption "that travel time would have to be calculated on an individual basis for each miner. The union naturally wanted to avoid the divisiveness this would foster among the rank and file. The union also feared that in establishing travel time in line with the Fair Labor Standards Act, which also provided for the forty-hour week, the mine workers would weaken their claim to a seven-hour day."\footnote{Dubofsky and Van Tine, \textit{John L. Lewis} at 421-22.} What remains puzzling about this explanation is that the Houck letter had indicated that the man trips are scheduled to leave the...opening of the mine at a certain hour, so that all the employees will reach their working places by the hour at which work regularly begins at the working places throughout the mine, and these trips are also scheduled to leave the inside of the mine...at the conclusion of the seven-hour period of work at the working places.\footnote{53 F. Supp. at 940.} In other words, all miners worked seven hours at the face, but some were required to travel longer than others. Why should this differential in individual unpaid travel time be less divisive than the differential in individual paid travel time?\footnote{Presumably miners did not rotate with regard to closer and more remote working places, for in that case there would have been no individuation problems in calculating portal pay.}

The embarrassment to which divulgence of the Houck letter was designed to expose Lewis and the UMW was not confined to them. For in the course of the portal-to-portal controversy this incident, which appears to have been peculiar if not unique to coal mining, was transformed by management (and in part by the AFL) into the archetypical breach of contractual good faith and integrity by CIO unions that delegitimated collective bargaining. More important still, capitalizing on this account, employers were able to convince the press and a majority of Congress that they were the aggrieved party: wresting that role away from workers who alleged that they were being robbed of compensation for precious minutes of work, capital successfully projected an image of well-paid workers who were trying to snooker their employers into paying triple back wages for time that they had solemnly covenanted to be noncompensable. If much of the non-mining population regarded venturing into a coal mine as a harrowing prospect to be collective bargaining practices, had become untenable in the light of \textit{Muscoda}. His failure to intervene in the coal case resulted solely from his desire not to influence the litigation. Memorandum at 2-3, 5.
avoided under any circumstances, management cannot be gainsaid a significant propaganda victory in having convinced some segment of the public that it was just for miners not to be paid for one hour a day they spent deep in the bowels of the earth.

The trial judge also made much of this alleged untrustworthiness in citing Lewis' testimony at the FLSA hearings in 1937, when he had opposed government interference with collective bargaining outcomes in excess of statutory standards. Cast as apostates, the UMW defendants failed, finally, to impress the court with their amended answer, which contended that when their collective bargaining agreement expired at the end of March 1943, the FLSA (and portal-to-portal principles) began to control. Rejecting as irrelevant the union’s disclaimer of any overtime that had accrued before April 1, 1943, the district judge pointed out the inconsistency: “If the Fair Labor Standards Act...required the inclusion of travel time as work time, it did so irrespective of contract, and if there was a contract to the contrary, the contract would be ineffective as against the Act.”

On appeal, the Fourth Circuit reversed what it otherwise found a convincing decision on the basis of the Supreme Court’s supervening Muscoda decision, which it found indistinguishable. Neither of the possible exceptions mentioned by Murphy—the impossibility of precise computation of time or borderline cases—applied to the coal miners’ situation. Moreover, the appeals court appeared reassured by the fact that the “disturbing effect of the decision here will not be so great as it otherwise would, in view of the fact that, by agreement between the miners and operators, the portal to portal system...has now been adopted in the industry.” Consequently, the overtime claims for the period between April 1, 1943 and June 20, 1943, which amounted to a mere $40 per miner, constituted what had been awarded other miners as a result of settlement of portal claims.

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182 53 F. Supp. at 943-44 (citing The 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. 281 (1937). To be sure, Lewis was testifying about the powers of a labor standards board to set wages in various industries, a provision that was ultimately not enacted.

183 53 F. Supp. at 950.

184 Local No. 6167, UMW v. Jewell Ridge Coal Corp., 145 F.2d 10, 11 (4th Cir. 1945). The district court decision had been handed down in January 1944, the Supreme Court decision in Muscoda in March 1944.

185 145 F. 2d at 13, 15. The dissenter was considerably less persuaded by the voluntary nature of such settlements, pointing out that strikes had led to an agreement between Lewis and the Secretary of the Interior including portal-pay provisions to which the greater part of the industry yielded. Id. at 15. Jewell Ridge remained in litigation because the Southern Coal Producers’ Association, of which Jewell Ridge was a member, refused to participate in the Ickes-Lewis agreement of November 3, 1943, which coal operators accounting for two-thirds of national output had accepted; the Southern Coal Producers’ Association adhered to
Having achieved only two-thirds pay for travel time in 1943, Lewis demanded the full rate for all travel time (including time and one-half after seven hours in the mine) when negotiations over renewal of the contract began on March 2, 1945. A week later the Supreme Court heard oral argument in *Jewell Ridge*. As the familiar scenario of walkouts by the miners and government seizure of the mines was replayed, pressure, Justice Jackson later alleged, was exerted on Justice Murphy to hand down an opinion quickly in order to influence the outcome of the negotiations in favor of the UMW. Writing for the majority, Murphy framed the sole issue on appeal as whether *Muscoda* was controlling. Making short shrift of the petitioner's and the district court's reasoning, he summarily found that underground travel in bituminous coal mines satisfied the three elements of compensable work set forth in *Muscoda*: 1. physical or mental exertion (whether burdensome or not); 2. exertion controlled or required by the employer; and 3. exertion pursued necessarily and primarily for the benefit of the employer and his business. Thus, for example, though less burdensome than the conditions under which the iron ore miners travelled, those in the coal mines caused the workers to watch out for low and falling ceilings. The lack of subtlety characteristic of the opinion, large parts of which consisted merely of quotations from *Muscoda*, was most conspicuous in the resolution of the for-whose-benefit prong of the work test. Asserting that the answer was "too obvious to require extended discussion," Murphy noted that the workers "do not engage in this travel for their own pleasure or convenience" but only as "a necessary prerequisite to the extraction of coal...which is the prime purpose of petitioner's business." In his zeal to vindicate the rights of the workingman, Murphy failed to think through this

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187See below § 7.

188See Eugene Gerhart, *America's Advocate: Robert H. Jackson* 247-51 (1958). The Chief Justice originally assigned the opinion to Jackson, but when Reed switched his vote, Black assigned it to Murphy. 3 Fine, *Frank Murphy* at 325. Although Murphy apparently did not expedite issuance of the decision, which was handed down May 7, 1945, the UMW achieved all its bargaining objectives later that month.

189325 U.S. at 164-66.

190325 U.S. at 164.

191The mechanical quality of the opinion raises the question as to why the Court did not merely deny the petition for certiorari or issue a summary affirmance.

192325 U.S. at 165, 166.
approach, which in its open-endedness might have been applicable to employees
driving their own automobiles to work in heavy traffic on dangerous roads. What
the opinion lacked in logic, it packed in the empathetic language that runs like a
red thread through Murphy’s FLSA opinions. Here Murphy effectively subverted
the plausibility of any argument that such extraordinary travel on the employer’s
premises might nevertheless be noncompensable:

Those who are forced to travel in underground mines in order to earn their livelihood are
unlike the ordinary traveler or ordinary workman on his way to work. They must journey
beneath the crust of the earth, far removed from the fresh and open air and from the
beneficial rays of the sun. ... From the moment they enter the portal until they leave they
are subjected to constant hazards and dangers; they are left begrimed and exhausted by
their continuous physical and mental exertion.

To conclude that such subterraneous travel is not work is to ignore reality completely. 194

Once again Murphy rejected the defense of custom by citing Muscoda. 195 This
time, however, he emphatically added that not even the best employers were
immune from the Act’s injunction to pay for all time worked: “Conversely,
employees are not to be deprived of the benefits of the Act simply because they are

194 325 U.S. at 166.
195 In his dissent, Jackson criticized the majority for its neglect of a recent unanimous
opinion by Jackson in which the Court had held that a determination of whether waiting time
was compensable working time involved “‘scrutiny and construction of the agreements
between the particular parties’”; “‘The law does not impose an arrangement upon the parties.
It imposes upon the courts the task of finding what the arrangement was.’” 325 U.S. at 192-
93 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 137 (1944)). Absolutized out of
context, this principle is clearly a misstatement of the law. In a number of important respects
the FLSA certainly does “impose an arrangement upon the parties.” The parties cannot, for
example, agree that the hourly wage will be less than the statutory minimum. It may,
nevertheless, be reasonable, where employees are “on call” for such extended periods of time
that they are permitted to sleep and to eat and otherwise to engage in “pursuits of a purely
private nature which would presumably occupy the employees’ time whether they were on
duty or not,” 323 U.S. at 139, to permit agreements to provide “compensation for a
reasonable portion of time in addition to” the actual physical work insofar as the “employee
gives more to his employer than actual physical labor. He gives his time—for he is not free
to sell it elsewhere.” U.S. DOL, First Annual Report, Wage and Hour and Public Contracts
Divisions, For the Fiscal Year Ended June 30, 1939, at 13 (1940). Ironically, however, that
principle was mere dictum in Skidmore because the agreement called for no compensation
for pure on-call waiting time; had that arrangement been controlling, Jackson would not have
reversed and remanded the cause. In any event, the majority in Jewell Ridge impliedly
resisted Jackson’s bid to extend the principle beyond the very narrow and unusual sphere of
24-hour on-call work.
well paid or...represented by strong bargaining agents.”196 Presumably because Lewis's wage demands never envisioned individualized portal pay, Murphy stated in dictum that the Court was not foreclosing “the validity of agreements whereby, in a bona fide attempt to avoid complex difficulties of computation, travel time is averaged or fixed at an arbitrary figure and underground miners are paid on that basis rather than according to their individual travel time.”197 Returning to the principle of the case before him, however, Murphy concluded: “Thus shall each of petitioner's miners receive his own reward according to his own labor.”198

The dissenters (and scholarly commentary) pounced on the contradiction between these two approaches. Jackson, joined by Chief Justice Stone, Roberts and Frankfurter, wrote a dissent three times as long as the majority opinion, detailing the history of the portal pay controversy in coal mining. Pointing out that the industry now operated under a portal-pay scheme (as part of the Ickes-Lewis agreement), worked out as a result of the federal government's seizure of the mines in 1943, which in effect (prospectively) credited each miner with forty-five minutes of travel time regardless of his actual time so spent, Jackson noted that the collective bargaining agreements based on this scheme did not even purport to comply with the FLSA.199 Consequently, the Court had brought “into question the validity of all existing mine agreements”.200

If it is illegal for the operators and the miners by collective bargaining to agree that there shall be no travel time, it is obviously equally illegal to agree that travel time shall be fixed at an arbitrary figure which does not conform to the facts. ... Moreover, the averaging means that a part of the travel time earned by one miner is taken away from him and given to another who has earned less than the average, a procedure utterly unwarranted in the statute.201

196 325 U.S. at 167.
197 325 U.S. at 170.
198 325 U.S. at 170.
199 325 U.S. at 188-91.
200 325 U.S. at 188.
201 325 U.S. at 191. Even a sympathetic labor law scholar could not discern “any intellectually satisfying basis” for the corner Murphy had argued himself into: “[T]he union and the operators have for some years mutually agreed that in this industry underground travel shall not be treated as work. These agreements have, since the effective date of the Act, been either valid or invalid. To say that they were invalid is to say that the Court would have been obliged to strike them down at the insistence of an individual employee even though both the union and the operators had been urging the Court to sustain them. ... It is difficult to believe that a majority of the members of the Court would have held the agreements invalid if the case had come before them prior to the date of the union's change of front.” E. Merrick Dodd, “The Supreme Court and Fair Labor Standards, 1941-1945,” 59 Harv. L. Rev. 321, 354-55 (1946).
Thus by unnecessarily suggesting that the Court might approve a pseudo-portal-pay arrangement that clearly contradicted the principle of individuation set forth in his opinion, Murphy unwittingly confirmed that there might after all be practical reasons for deviating from the FLSA in the coal industry. He thereby made it easier for opponents of portal pay to attack its underpinnings.

Jackson also devoted considerable attention to showing that both the legislative history of the FLSA and the contemporaneously enacted Bituminous Coal Act evinced an intent to stabilize the industry by collective bargaining. While the dissenters conceded that Congress intended to invalidate collective bargaining agreements that failed to secure employees minimum wages or overtime in compliance with the standards set by the FLSA, they did not join issue on the central claim raised by portal-pay demands—that the face-to-face method did not compensate the miners for all the hours they worked. To be sure, the dissent sought to undercut this argument by pointing out that counsel for the union had noted that "the wage scale was fixed at a level intended indirectly to compensate travel time." But this response was irrelevant because its cogency was confined to minimum wage claims, whereas the portal-pay cases were all based on overtime.

5. Mt. Clemens Pottery Company: The CIO Knocks at Industry’s Door

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203 This outcome is puzzling in light of the fact that Murphy removed his initial statement that the Court was not adjudicating the validity of agreements to average rather than to individuate travel time "after Rutledge pointed out to him that this assertion seemingly contradicted his 'basic premise that contract cannot make work not work.'" 3 Fine, Frank Murphy at 326.
204 325 U.S. at 175-82. For a sophisticated analysis of the peculiarities of competition among coal producers, which ends shortly before the period under discussion, see John Bowman, Capitalist Collective Action: Competition, Cooperation, and Conflict in the Coal Industry (1989).
205 325 U.S. at 177.
206 325 U.S. at 172.
207 The reason that this issue was never joined may lie in the relatively abstract plane on which the Supreme Court disposed of the case, which did not require it to delve into the mundane empirical intricacies of the prevailing wage system at the Jewell Ridge mines. Some confusion may have enveloped the overtime issue as a result of the fact that although the 1940 Houck letter indicated that miners were paid eighty cents per hour for a thirty-five hour week, the miners at Jewell Ridge were paid according to piece (tonnage) rates. These rates were apparently designed to secure parity with the hourly guarantee, which may have operated as a floor. See Jewell Ridge, 325 U.S. at 184 n.9; Record at 63-64, 612-13, 624-26, 630.
After learning that the CIO would demand portal-to-portal pay in all American industries, the justice wrote his brother approvingly, "This case may be the turning point in the economy of the country. I did not write it to unstabilize conditions in this country, but I did write it to make secure the rights of man. ... History...will record that it has made a step forward for those who toil by the sweat of their brow for their bread."208

The portal litigation until this point had dealt with underground (mining) or outdoor (forestry) places of production, which created unusual problems of access and uncommonly extended and hazardous travel. Unable to discern a deeper or more encompassing principle at stake, industrial employers and their counsel paid relatively little attention to these earlier portal decisions.209 The final case in the Supreme Court trilogy, however, involved a medium-size factory like thousands of others in the United States. Precisely because of this ordinariness and the near-universality of the compensation practices there, a ruling that the FLSA had been violated "would mean that nearly every plant in the country would be in violation of the law and that billions of dollars in retroactive payments and liquidated damages could now be assessed against thousands of companies."210 The workers'

208 Fine, Frank Murphy at 332.

209 A significant exception was a memorandum from NAM's law department of Nov. 3, 1944—that is, after the Supreme Court's Muscoda decision but before it reversed the Fourth Circuit in Jewell Ridge—predicting that the Wage and Hour Administrator would use the miner cases "...to regard as work-time the time spent by employees traveling anywhere on company property." "'Portal-To-Portal' Wage-Hour Liabilities," 9 N.A.M. Law Digest 3 (Supp. No. 1, Dec. 1946) (quoting memorandum). With hindsight, a leftist lawyer saw a meaning to employers' general blindness: "Since the adoption of this Act industry not only has demonstrated concerted opposition to it, but has maintained a strikingly consistent record for guessing wrong on almost every legal issue the cases have presented. Perhaps this is understandable when one recalls the multitude of prior decisions of the federal courts effecting the invalidation or emasculation of practically every labor enactment which had come out of Congress." Maurice Sugar, "The Truth About 'Portal to Portal,'" 7 Law. Guild Rev. 23, 23 (1947). In contrast, Arthur Krock, a leading political columnist for The New York Times, found an excuse for lack of journalistic foresight in a similar judicial failing. Arthur Krock, "Even the Dissenters Didn't See It Coming," N.Y. Times, Dec. 26, 1946, at 24, col. 5. To be sure, counsel for Tennessee Coal, Iron & Railroad Co. had argued to the trial court: "Doesn't everyone know that for all times in all plants, almost without exception, men go to the gates of plants, and even punch the clock, but their time at work does not begin until they get to their work benches...no matter how far the gate is from the place of work?" Record at 3492, Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944).

210 Brief for Respondent at 98, Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946). It is in the nature of tactical posturing that in opposing the workers' petition for writ of certiorari, the respondent-employer had argued that "The Decision Is Not of Importance in the Administration of the Act." Brief for Respondent in Opposition at 15.
Moments Are the Elements of Profit

counsel was therefore hardly exaggerating when he asserted that it was "the most important case pending under the Wage and Hour law in the United States today."211 Indeed, when the Supreme Court remanded the case to the district court, the trial in the winter of 1947 became and has remained the most intensively and extensively reported on in the entire history of the FLSA.212 What turned out to be ironic was that six years of litigation through the entire federal judicial system never clarified whether this crucial case had ever raised a portal issue.

The Mt. Clemens Pottery Co., located a few miles north of Detroit, was "the largest manufacturer of dinner ware pottery in the United States."213 Acquired by S.S. Kresge in 1920, it was at the time of the litigation a wholly owned subsidiary of Kresge, whose chain stores it supplied.214 While the average pottery establishment employed 131 wage earners,215 1,250 worked at Mt. Clemens.216 Significantly for the overtime issue, ninety-five per cent of production workers were paid on a (group) piece-work basis.217 Pottery as a whole, though "a small and relatively unimportant industry...has considerable importance in the union-management relations field because nation-wide collective bargaining has been notably successful since 1905 in its major division, general ware...."218 Mt. Clemens fell outside that framework as nonunion in the late 1930s, but in the summer of 1940 the CIO Federation of Glass, Ceramic and Silica Sand Workers announced plans to organize unorganized sections of pottery manufacture; by the next year, Mt. Clemens was the most important local CIO industrial union in

211Record at 1497.
213Brief of Appellants at 6.
216Record at 8.
217Record at 166.
On April 16, 1941, a few days after an organizational strike began in the midst of efforts by Mt. Clemens to form a company union, suit was filed in federal district court in Detroit by seven employees on behalf of themselves and "in behalf of all others similarly situated" and by Local 1083, United Pottery Workers of America, which was designated a representative by various of its members. The case came before Judge Frank Picard, who had been Justice Murphy's former campaign manager when Murphy was candidate for governor of Michigan and who owed his appointment to the federal bench in 1939 to Murphy. Picard, who had unsuccessfully run for the U.S. Senate in 1934, was a sufficiently well-known political figure that he was named by respondents in Gallup polls in November 1937 and January 1938 in response to a question as to their preference for the Democratic candidate for president in 1938 if Roosevelt did not run. The gravamen of the complaint was "that the defendant compels its employees to punch

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220 "Pottery Strike in Mt. Clemens," Detroit Free Press, Apr. 15, 1941, at 14, col. 4; Record at 26 (affidavit of Charles Doll, general manager); Mt. Clemens Pottery Co. v. Anderson, 149 F.2d 461, 461 (6th Cir. 1945).
221 NLRB v. Mt. Clemens Pottery Co., 147 F.2d 262, 263-65 (6th Cir. 1945).
222 Record at 7. Steve Anderson, the eponymous plaintiff of the case, was the president of the local. Id. at 119. The class allegations in the complaint did not track the statutory language precisely. The collective action prong of § 16(b) authorizes employees to sue on behalf of themselves and "other employees similarly situated," while the representative action prong authorizes employees to "designate an agent or representative to maintain such action for and in behalf of all employees similarly situated." Why representatives are called upon to represent "all" similarly situated is unclear. See Rufus Poole, "Private Litigation under the Wage and Hour Act," 14 Miss. L.J. 157, 164 n.43 (1942). The trial judge denied a motion to dismiss the class action on the grounds that if a narrow interpretation were given to such suits, few could be brought under the FLSA. He therefore permitted all those claiming back wages for overtime in one classification. Record at 29-30 (Order of June 13, 1941). Approximately 300 employees were permitted to file designations. Mt. Clemens Pottery Co. v. Anderson, 149 F.2d at 461.
223 J. Woodford Howard, Jr., Mr. Justice Murphy: A Political Biography 403 (1968); Sidney Fine, Frank Murphy: The Detroit Years 28 (1975); Business Week, Feb. 8, 1947, at 8.
a time clock and in such a procedure deliberately falsifies the records of the time worked by its employees. That the said employees work 14 minutes in advance of the time shown on the clocks in the morning of each working day."

The workers further alleged that the company clocked them out before they actually finished working before lunch and repeated the same procedure after lunch and at the end of the workday. Consequently, the plaintiffs pleaded, they were owed back wages and liquidated damages totalling $100,000 for overtime for forty minutes per day or three and one-quarter hours per week since the forty-hour provision of FLSA had gone into effect on October 24, 1940. Or as their lead counsel phrased it at a hearing: "[T]his company gyps each employee out of approximately 56 minutes of pay a day. ... Almost $1,000 a day they are taking out of the payroll of these employees."

The court appointed a special master, Donald Quaife, who heard extensive testimony in 1942 and issued a report in March 1943. He expressed his unsympathetic attitude toward the action most clearly in his skepticism as to why

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225 Record at 10.
226 Record at 10-12. The plaintiffs also made overtime allegations for the period from Oct. 24, 1938 to Oct. 24, 1939, when the overtime provision of FLSA was triggered after forty-four hours, and from Oct. 24, 1939 to Oct. 24, 1940, when it kicked in after forty-two hours. Id. at 8-9. Their allegation that they had worked forty-five hours weekly for the defendant contradicted their other claim that they had worked three and one-quarter hours beyond forty. Finally, allegations were also made for some employees for minimum wages. Id. at 9-11. The following calculation underscores how even minimal individual claims can over time cumulate to a considerable liability—just as they once constituted a considerable source of savings—for a large employer. If the sum requested, $100,000, included liquidated damages, then the underlying back wages amounted to $50,000, or $40 for each of 1,250 employees. For the entire two and one-half years (from the day the FLSA went into effect until the day the suit was filed), this sum equalled thirty-one cents per week per employee. At the initial minimum wage of twenty-five cents per hour, this amount represented 2.5 hours weekly; at the later minimum wage of forty cents per hour, 1.5 hours. If the workers' regular rate of pay was higher, then even fewer hours of back wages would have been at issue.

227 Edward Lamb stated during the litigation that he practiced law for the fun of it in "the largest non-paying practice" in the United States. "Back-Pay Lawyer Advises Caution," N.Y. Times, Dec. 29, 1946, at 3, col. 1. J. Parnell Thomas, the chairman of the House Committee on Un-American Activities, alleged in one of the few outbursts of red-baiting during the portal debates that Lamb "has followed the Communist party line and has associated himself with numerous Communist fronts...." 93 Cong. Rec. 539 (1947).

228 Record at 382. Discrepancies cropped up in the record as to the exact number of minutes involved. The complaint specified fourteen, ten, fourteen, and fifteen minutes at the four clock-ins and clock-outs, which add up to fifty-three minutes, although the complaint then spoke of forty minutes. Record at 10-11.

229 Record at 143-217.
How Working Off the Clock Came to Be Legal

no worker had ever complained about the “cheating” before suit was filed.230
While appreciating the intimidating force exerted by possible dismissal, he noted
that the workers had complained about other practices. The master therefore
concluded that “[p]erhaps the true explanation” was that it had “never occurred to”
the plaintiffs before suit was filed that Mt. Clemens was deliberately underpaying
them.231 The implication here—that the union manufactured hypertechnical claims
about which the workers had never articulated felt needs but which they cynically
supported as a “‘gravy train’”232—was then largely adopted by employers and the
press in the course of the portal and anti-portal movements. This stance
overlooked the fact that, because the FLSA had just been enacted, piece-rate
workers were unaccustomed to having their time, let alone all their time, expressly
kept track of and compensated. Because this employers’ position implicitly
underlay the master’s report, which the Supreme Court found not to be clearly
erroneous, it gained enhanced legitimacy as the debate proceeded.

The master reported that plaintiffs contended in the alternative—if their 56-
minute claim was not sustained—that “at least the full time the employees were in
the plant as shown by entries punched on the time clock cards should have been,
but was not, credited to them, since they were required to go directly from the time
clocks to their respective departments and immediately thereafter to work.”233 In
contrast, in the company’s version, “the employees were given a fourteen minute
period to check in and out.... It is claimed, however, that while they were
permitted to come in fourteen minutes early, they were under no compulsion to do
so, the only requirement being that they be at their place of work, ready to work,
at the established starting time, and their time being their own until then.”234 Mt.
Clemens argued in the alternative that even if the master found in favor of the
plaintiffs, they could have no judgment because the amount of working time that
had not been credited to them could not be computed.235

The master found that after entering the production part of the plant, which
encompassed more than eight acres,236 the workers punched in at the rate of twenty-
five per minute, after which they walked to their work place for distances ranging
from 130 to 890 feet. Although the company did not permit the workers to punch
in more than fourteen minutes before what it called the starting time,237 in

230Record at 190.
231Record at 191.
233Record at 163.
234Record at 163.
235Record at 163.
236This area is the equivalent of a square with sides of 200 yards, although the plant was
actually nearly a quarter-mile long. Brief for Respondent at 34.
237Record at 167.
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computing the hours worked on the basis of the time-clock cards, Mt. Clemens figured the time "from the succeeding even quarter hour after employees ring in to the quarter hour immediately preceding the time they punch out. Thus, for example, an employee whose card is punched in at 6:46 A.M., out at 12:03 P.M., in at 12:50 P.M., and out again at 4:07 P.M. is credited with eight working hours."238

In this example, therefore, the employee was, as the master did not trouble to state, credited with a total of thirty-four minutes fewer than she was actually on the premises and clocked in. The parties agreed that the employer did not consider the time spent walking from the time clocks to the work place working time and that such walking took place before the regular starting time. The parties also agreed that the time spent walking to the closer departments was one or two minutes; to the more distant departments the employees' estimates ranged from one-half to three minutes, while the employer's varied between six and eight.239

This latter fact is crucial for two reasons. First, it shows how minimal the walking time was by any estimate; and second, it underscores the perverse underlying structure of the dispute before the trial court—one that would later be inverted and cause considerable confusion as to what the case was all about. Because the workers' central claim went to the issue of the compensability of pre-7:00 a.m. work at their individual work place and the parties agreed that the dispute involved a maximum of fourteen minutes, it was in the employees' interest to understate the amount of walking time in order to maximize the amount of time they could have devoted to such work; conversely, it was in the employer's interest to exaggerate the amount of walking time in order to minimize the amount of potentially compensable time spent in pre-7:00 a.m. work.

The master touched on, but never dispositively resolved the issue of walking time. The plaintiffs contended that the proper standard was that "all time spent by the employee on the employer's premises at the request of the latter" was compensable.240 This formula tracked the guide articulated by the Wage and Hour Administrator.241 The master rejected this formula solely by virtue of the fact that he believed that he had found an example that refuted its literalness—namely, that lunch time, even where it had to be eaten on the employer's premises, was not

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238Record at 168.
239Record at 173-74.
240Record at 197.
241Interpretative Bulletin No. 13, ¶ 2 in BNA, Wage and Hour Manual 172 (cumul. ed. 1944-45 [July 1939]) ("all time during which an employee is required...to be on the employer's premises"). More pertinently, a WHD official testified that he had told Mt. Clemens in 1939 "that time spent on the premises by any employees who were required to be there by the company was to be considered as hours worked, regardless of whether they worked or not." Record at 1324.
compensable. Yet this case makes little if any sense. For other than in the instance of those who live on the employer’s premises, there would be a presumption that any order not to leave the premises for lunch was based on the employer’s desire to keep the employee within hailing distance. Subject to such a restriction, the employee would have a valid claim to compensation for lunch time. In any event, the master offered no principled resolution of the issue of walking time, merely stating that in view of the workers’ knowledge of the custom and practice not to credit them for that time, “it would seem that defendant’s practice...was not improper under the Act.”

As to the preliminary work, the master found that:

Practically all of the workmen in the plant had certain duties to perform after arriving at their departments previous to the commencement of actual production. Two kinds of activity are embraced under this heading: (1) personal preparations, such as putting on aprons or overalls, removing shirts, taping or greasing arms, putting on finger cots; (2) activity of a non-personal nature, involving the preparation of equipment for commencement of production work, such as turning on switches for lights and machinery, opening windows and assembling and sharpening tools.

The plaintiffs testified that they performed two to three minutes of preliminary work each day “immediately upon arrival in the department.” The company conceded that so-called personal preliminary activities did take place before the established starting time; the company denied that the so-called non-personal preparations were performed at all before starting time, or in the alternative, for more for than a minute.

Even bracketing the factual dispute over its duration, resolution of the issue of the compensability of preliminary activity caused the master “more difficulty.” For without benefit of pertinent case law, he was confronted with a WHD Inspection Field Letter that “made it clear that the Administrator considers such work [non-personal preliminary duties] as part of the employment time” and with conflicting industry customs. Ultimately the master found it unnecessary to reach the issue “in view of another principle of law which is applicable here...which requires that in order for the Court to render a judgment for damages in favor of a plaintiff,

242Record at 197.
243See Lofton v. Seneca Coal & Coke Co., 2 Wage & Hour Cas. 669, 675 (N.D. Okla. 1942) (half-hour lunch period compensable where employee required to remain at his place of work “so that defendant received the benefit of his presence”), aff’d, 136 F.2d 359 (10th Cir. 1943), cert. denied, 320 U.S. 772 (1943).
244Record at 199.
245Record at 169.
246Record at 174.
247Record at 200.
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evidence as to the amount of damages suffered must be reasonably definite and not based upon mere conjecture. If the flat claim of fifty-six minutes per day or the contention that all the punched time on the cards constituted work time had been credible, then there would have been no impediment. Computing overtime, however, on the basis of a finding that the employees worked more time than credited to them but less than that shown on the time cards would be speculative and unreliable because the plaintiffs kept no time records and could not collect—indeed, independently of the time cards—when they arrived at their departments or began preliminary work on any given day. The master therefore felt compelled to deny recovery on this claim. But even if the plaintiffs had been able to overcome this hurdle, he added, they would still have had to deal with “counterbalancing time not worked by employees when they quit and cleaned up in advance of the established quitting time.” Finally, the master cautioned that even if the plaintiffs had been able to avoid all these problems, the amount recovered “would be very small, inasmuch as such time under the most liberal estimates could not have aggregated over one-half hour per week, and in most instances there was a greater margin than that between the weekly working time credited to the employees and the statutory period for payment of straight time.” In other words, the master in dictum developed the issue of de minimis on which the case would ultimately hinge.

In order to gain some perspective on standard industrial practice, the master also devoted some attention to the testimony elicited by the parties from their expert witnesses. He concluded that all had agreed that it was a “practically universal[]” custom in manufacturing plants with time clocks that:

If an employee arrives early in his department, his time is his own until the regular starting time. The punched entries on the time cards show the time the employees enter and leave the production part of the plant, but do not show the time they commenced and stopped work; and the time worked is not computed directly according to these entries, since it is obvious that they will practically always show more time than is actually worked. Instead, if the punch-in time is prior to the beginning of the shift it is assumed that the employee started at the regular starting time....

In fact, however, one of the plaintiffs’ expert witnesses, the director of research of the UAW, had responded directly to a question by the master that in some plants

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248Record at 200 (citing several appellate and district court FLSA cases).
249Record at 201. Both employers’ representatives and the U.S. government later adopted this argument. See below.
250Record at 202.
251Record at 170.
252Record at 171.
How Working Off the Clock Came to Be Legal

workers punched time clocks directly in their departments to record the beginning of their work.\textsuperscript{253} In other words, it would have been administratively possible for Mt. Clemens to record the actual starting times for workers who went directly to work.\textsuperscript{254}

The master thus made four pertinent summary findings of fact. First, the workers had never objected to, but had acquiesced in, the practices over which they eventually sued. Second, the workers neither were required to work nor did they in fact work fifty-six uncredited minutes daily. Third, the workers were instructed to be in their departments “ready to work and with personal preliminary duties performed, by the established starting time.” And fourth, the workers failed to prove that they were required to report in advance of the starting time, that they performed other than preliminary work before that time, “or that they worked continuously from the time they punched their cards in to the time they punched out.”\textsuperscript{255} The master also made three pertinent summary conclusions of law. First, the plaintiffs had the burden of proof to show that the company failed to compensate them for some of their work. Second, plaintiffs failed to carry that burden “with the possible exception of preliminary work.” And third, a computation of the time spent in such preliminary work “cannot be made except upon a speculative basis, and accordingly forms no basis for recovery of overtime pay.”\textsuperscript{256}

The question that lay before district judge Picard was whether to approve the master’s report.\textsuperscript{257} If the workers’ account were correct, Picard wrote, the court would be “face to face with a method of employer domination and unfairness that, to say the least, would be most reprehensible,” whereas upholding the employer’s version—that since the work was done by crews on a piece rate, it was important that the whole crew be at work on time—would lead to a conclusion that its procedures had been reasonable.\textsuperscript{258} Although Picard agreed with the master “in the main,” certain details merited closer scrutiny, in particular the fact that the time

\textsuperscript{253}Record at 1460-61.

\textsuperscript{254}To be sure, this arrangement would have eliminated the problem of non-payment for preliminary work, but would not have dealt with walking time from the gate. Since that distance would presumably have been fixed, however, it would not have been difficult to ascertain a reasonable amount of time to walk it and to factor that time into the computation of working time. In that case, then, it would not have mattered how early workers had arrived at the outside gate—they would have been paid only for the walking time to their work bench. This consideration is important inasmuch as Mt. Clemens conceded that workers had to punch in early in order to be in their departments by starting time. Record at 173.

\textsuperscript{255}Record at 214-15.

\textsuperscript{256}Record at 217.


\textsuperscript{258}60 F. Supp. at 148-49.
cards and calculations showed that

[b]y eight minutes to seven but a few stragglers were left. [T]he preparation even after
punching the clock wouldn’t take more than one or one and a half minutes and to the
farthest point in the plant from the time clock wouldn’t take more than 2 minutes. It is
apparent, therefore, that practically every member of the entire shift was ready to work at
5 to 7 minutes before the hour and it does not seem probable that with compensation set
by piece work, and the crew ready...these employees didn’t start to work immediately. In
fact, it appears that this was encouraged by the company as being mutually beneficial.259

Or as Picard phrased it somewhat more informally at a hearing several months
later:

Now, I know what went on out there. I do think that if they got down there, the bunch of
them, being on piece work, that they jumped the gun, and I do think that the people were
as much a party to it as the management. The management encouraged it; and I would like
to penalize the management for doing it. But I have got to go on your proof.260

Crucial here is that Picard, who clearly maintained strong sympathies for the
workers, viewed their whole overtime claim as based on the practice, which
presumably antedated the FLSA, of beginning piece work before the official
starting hour. Before the wage and hour law went into effect, such practices
mattered less. Perhaps in the welter of disputed issues surrounding the union’s
organizing campaign, the workers had had more pressing issues to stress. But
since their claims were unwaivable within the statute of limitations, they were free
to “sav[e] up these claims like Octagon soap wrappers.”261 But just as clearly,
Picard was of the opinion that neither walking from the clock nor preliminary work
was the real abuse in this case. Rather,

when a crew was ready to work they might jump the gun. In the experience of this court
that’s just exactly what would happen 99 times out of 100 on piece work and it was one
of the practices that the Wages and Hours Act sought to discourage both on the part of the
employer and employee. To us it is obvious that...an attempt was made either by the
company itself or by certain foremen in currying favor with the employer, to circumvent
the spirit of the Wages and Hours Act.262

In other words, having decided that Mt. Clemens was not a portal-pay case at
all, Picard ruled that the court would not “lend its aid to a practice that deprives

259 60 F. Supp. at 149.
260 Record at 1506.
262 60 F. Supp. at 149.
any working man of...the only thing he has to sell—his hours or minutes of labor." He therefore held to be compensable all the time shown by time cards over and above five minutes for punching in and two minutes for walking to the work place—a total of seven minutes, which he credited to the employer. Thus Picard expressly denied the walking time.

In 1944, Judge Picard awarded the approximately 300 named plaintiffs and intervenors a de minimis recovery of $1,207.87 in overtime and an equal amount in liquidated damages in addition to $2,000 in attorney fees.

On appeal, the Sixth Circuit reversed and dismissed. The narrow ground of decision was the fact that the master’s findings were all supported by substantial evidence, which the district court was required to accept unless they were clearly erroneous, just as an appeals must accept the findings of a district court. Instead, Judge Picard “applied an arbitrary formula,” which “produced a judgment based upon surmise and conjecture” because the employees based their claims “on a mere estimated average of overtime worked.”

In their petition for writ of certiorari, the employees argued that all the time they spent after clocking in bore all the indicia of work—that is, exertion on the employer’s premises controlled or required by the employer necessarily and primarily for the employer’s benefit. The question presented to the Supreme Court was, the plaintiffs implied, complicated by the fact that the district court did not base its judgment for the plaintiffs upon a ruling that the time spent by the employees in checking through the time clocks or in going to their work places was strictly working time. Instead the District Court indicated that time spent in these activities should be credited to the employer and deducted from the time shown on the time cards. The Circuit Court..., however, in treating this case as an ordinary travel time case, misconstrued the District Court’s decision....

The plaintiffs’ formulation was, to say the least, disingenuous. First, Picard had expressly ruled that punching in and walking were not compensable. Second, given the procedural grounds on which the Sixth Circuit reversed the trial court, it was immaterial whether it viewed travel time as crucial or not. And finally, if Anderson v. Mt. Clemens Pottery Co. was not an “ordinary travel time case,” then

263 60 F. Supp. at 149-50.
264 60 F. Supp. at 150. Picard also allowed the employer five minutes for punching in after lunch, but denied recovery for punching out.
265 Record at 289, 297-305. One worker received as little as one cent in back wages.
266 Mt. Clemens Pottery Co. v. Anderson, 149 F.2d 461 (6th Cir. 1945).
267 149 F.2d at 464, 465.
268 Petition for Writ of Certiorari at 6.
269 Petition for Writ of Certiorari at 7-8.
why had plaintiffs been arguing “throughout these proceedings...that because of the impossibility of calculating travel time to the exact second the reviewing court should compel a modification of the trial court’s decision [and give] the employees full recovery from the employer for the amounts shown on the time cards”?270

The answer to this rhetorical question appears to be that the workers had never argued that *Mt. Clemens* was a travel time case; instead, they had pleaded the case as involving actual production work before the clock started (“jumping-the-gun”) and preliminary activities.271 However, when the appeals court reversed Picard on the not-clearly-erroneous standard, plaintiffs’ counsel may have believed that the easiest way to persuade the Supreme Court to grant certiorari was to assert that *Mt. Clemens* presented the question that the Court had left open in *Jewell Ridge* concerning “the validity of agreements whereby, in a bona fide attempt to avoid complex difficulties of computation, travel time is averaged or fixed at an arbitrary figure....”272 Although this argument appears misguided since the “arbitrary” element had allegedly been introduced by Judge Picard—and not by the parties, as in *Jewell Ridge*—the Court did grant certiorari.273

In their brief, the workers offered a rather different view of the daily work routine than the decisions below had disclosed. Now they asserted that all their personal preliminary activities (including clothes changing) took place even before they clocked in.274 After clocking in, it took only thirty to ninety seconds “to get into productive activities.”275 In understating the travel time, the workers sought to convince the Court that it was not being called on to work a revolution in industrial practices, for the “case reveal[ed] a curious and an unusual situation in employer-employee relations in the United States” in that the company required the employees to clock in “as much as fourteen minutes before the regular starting time” but paid them only from the succeeding quarter hour.276

The company, of course, took the opposite tack, emphasizing that, because its practice was “universal,” any ruling that it was in violation of the FLSA would have equally broad consequences for all industry.277 *Mt. Clemens* sought to buttress this argument by suggesting that the clock-in and payment arrangement was universal precisely because it was eminently reasonable:

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270Petition for Writ of Certiorari at 8.

271Indeed, the plaintiffs argued to the Supreme Court that because the Sixth Circuit had misinterpreted the decision below, it had left “the law as to working time in our industrial plants in a state of uncertainty.” Petition for Writ of Certiorari at 9.

272Petition for Writ of Certiorari at 8.


274Brief for Appellants at 8, 23.

275Brief for Appellants at 8.

276Brief for Appellants at 9.

277Brief for Respondent at 27.
One of the practical realities of operating a factory is that it is impossible for a group of one thousand or more individuals to arrive at their places of work simultaneously. It is in recognition of this fact that all plants have developed a custom of opening their doors and permitting employees to enter fifteen or thirty minutes before starting time. The objective is to have everyone in the plant ready to go to work at starting time. To do this the individuals who lead the parade must enter the plant earlier than others.

Misrepresenting the nature of the employees' claim, the company then charged:

Any requirement that an employee must be paid for the time getting into the plant would be directly at odds with the practice that has prevailed in plants all over the country for many years. It would mean that nearly every such plant in the country would be in violation of the law and that billions of dollars in retroactive payments and liquidated damages could now be assessed against thousands of companies.

Finally, the employer developed an argument designed to put unions on notice that if they pushed this game too far, capital could respond in ways that might make the recovery of portal wages very unpleasant and expensive for employees:

Bickering over such minutiae was not contemplated when the Fair Labor Standards Act was adopted. If employees were given a right to insist upon such a demand, employers would doubtless counter with requirements that employees must start work and become subject to strict control of management from the very moment they enter the company's promises. Any such requirement would retard the development of the beneficent practices of allowing rest periods, and time off for a "snack" on the job, and the privilege of quitting work a few minutes before quitting time when convenient.

Such a retaliatory countermove was perhaps the only one still available to Mt.

\[\text{278} \text{Brief for Respondent at 96-97.}\]

\[\text{279} \text{Brief for Respondent at 97, 98.}\]

\[\text{280} \text{Brief for Respondent at 98. Remarkably, on remand before Judge Picard a year later, the Department of Justice expressly adopted this argument. In seeking to save labor from the consequences of its own imprudence, the Assistant Attorney General told Picard that "[o]n the facts of this case the play is not worth the candle." } \text{Time, Feb. 10, 1947 at 82 (quoting John Sonnett); see also Walter Ruch, "Picard Reopens Basic Portal Suit; U.S. Protests Pay," } \text{N.Y. Times, Jan. 31, 1947, at 1, col. 5, at 4, col. 3. The "minutiae" over which the CIO was "bickering," according to the NAM, included \"(1) changing clothes, (2) checking equipment, (3) taking medical examinations, (4) figuring earnings from piece rate tickets, (5) preparing reports, (6) walking...to and from work on company premises, (7) waiting for work, (8) waiting to get paid, (9) eating meals "on duty," and (10) resting for periods not exceeding 20 minutes." } \text{""Portal-to-Portal" Wage-Hour Liabilities," 9 N.A.M. Law Digest 3, 4 (Supp. No. 1 Dec. 1946).}\]
Clemens once it had conceded both that performance of non-personal preliminary activities was compensable working time and that the cost to it of computing how long an employee was in the plant would exceed the benefit to the workers.

Viewed against the strongly empathetic descriptions of the conditions under which the miners travelled from portal to face in Justice Murphy’s opinions in Muscoda and Jewell Ridge, the sharply contrasting language toward the beginning of Mt. Clemens immediately created the expectation of a different approach and outcome:

The employees...walk to their working places along clean, painted floors of the brightly illuminated and well ventilated building. They are free to take whatever course through the plant they desire and may stop off at any portion of the journey to converse with other employees and to do whatever else they may desire.

And indeed little else in the opinion recalls the humanitarian images of those earlier cases. Instead, the lever Murphy used to reverse the appeals court was its approval of the master’s imposition on the workers of “an improper standard of proof...that has the practical effect of impairing many of the benefits of” the FLSA. Although an employee had the burden of proving that he had performed the work for which he alleged underpayment: “The remedial nature of this statute and the great public policy which it embodies...militate against making that burden an impossible hurdle.” This equitable readjustment of the evidentiary burdens was buttressed by the employer’s obligation under § 11(c) of the FLSA to keep time records. The Court thus disapproved of the Sixth Circuit’s solution of penalizing the employee for the employer’s violation of the recordkeeping provision.

For the future, whenever an employer failed to keep adequate and accurate time records reflecting when the employee began his preliminary activities, all the

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281 Respondent’s Reply to Brief of Wage and Hour Division at 4. The Wage and Hour Administrator appeared as amicus in order to underscore its position “that both the ‘personal’ and ‘non-personal’ duties constitute employment compensable under the Act,” a view as to which it had consistently “advised numerous employer associations and labor unions in various industries.” Brief for L. Metcalfe Walling, Adm’r of the Wage & Hour Div., U.S. DOL, as Amicus Curiae at 3, 7. The Administrator also noted that he had not yet taken a position on the compensability of walking time from fences to working places in normal peacetime operations. Id. at 8 n.6.

282 Brief for Respondent at 99.


284 328 U.S. at 686.

285 328 U.S. at 687.

286 To be sure, this violation did not give rise to a private right of action; but the Administrator could seek criminal sanctions under § 215(a)(5) and § 216(a).
employee would be required to produce was "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable evidence."\textsuperscript{287} Such a showing—and the Court held that Picard's "arbitrary formula" did not meet that standard—sufficed to shift the burden to the employer either to produce counter-evidence of the real amount of work performed or "to negative the reasonableness of the inference to be drawn from the employee's evidence."\textsuperscript{288} Failure to do so would justify recovery "even though the result be only approximate."\textsuperscript{289} This procedural innovation is the only pro-employee proposition of \textit{Mt. Clemens} that survived the congressional backlash.\textsuperscript{290}

Having set forth this principle by way of prologue, the Court proceeded to eliminate most of the workers' claims. First, Murphy upheld the circuit court's ruling that Picard had erred in failing to accept the master's fact finding that the workers did not perform unpaid "actual productive work" before scheduled hours.\textsuperscript{291} This ruling was crucial insofar as the only sympathy Picard had expressed for the workers was that the company made pieceworkers "jump the gun." With the guts of the case now ripped out, Picard's decision on remand was virtually preordained. Second, Murphy implicitly upheld the appeals court's characterization of Picard's judgment as based on an "arbitrary formula" by ruling that the workers had not proved "that they were engaged in work from the moment they punched in...to the moment when they punched out."\textsuperscript{292} By this formulation the Court presumably meant, more specifically, that they had not proved how much of the maximum of fourteen minutes allotted to them to get from punch-in to the scheduled beginning of work was actually devoted to compensable activity.\textsuperscript{293} Moreover, the Court rejected the argument that mere presence on the employer's premises, as reflected on time clock records, should start the FLSA clock absent

\textsuperscript{287}328 U.S. at 687.
\textsuperscript{288}328 U.S. at 687-88.
\textsuperscript{289}328 U.S.. at 688.
\textsuperscript{290}On the unsuccessful efforts to overturn this holding as well, see below § VII. Remarkably, the only authority the Supreme Court cited for this point was a student note. The student, in turn, had bottomed the proposed law reform on courts' "inherent equitable powers to draw from the refusal to keep records, consequences similar to those explicitly drawn, by the Federal Rules of Civil Procedure, from the refusal to produce them." Note, "Determination of Wages under Fair Labor Standards Act," 43 \textit{Colum. L. Rev.} 355, 358 (1943).
\textsuperscript{291}328 U.S. at 689.
\textsuperscript{292}328 U.S. at 689.
\textsuperscript{293}This conclusion flows from the Court's rejection of the assumption that it would be "unfair" to credit the first person past the clock with more compensable time than the last person. \textit{Id}. at 690. Had the Court accepted the workers' claim that they went to work immediately, such a calculation would not have been unfair.
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any requirement by the employer that the employee actually be there.\textsuperscript{294} By the same token, Murphy implicitly declined the plaintiffs' invitation to avail himself of the opportunity to implement the dictum in \textit{Jewell Ridge} concerning the possibility of permitting an arbitrary aggregate average fixing of travel time rather than requiring individualized accounts.

Only on one point of proof did the Court favor the plaintiffs—namely:

that it was necessary for them to be on the premises for some time prior and subsequent to the scheduled working hours. The employer required them to punch in, walk to their work benches and perform preliminary duties during the 14-minute periods preceding productive work; the same activities in reverse occurred in the 14-minute periods subsequent to the completion of productive work. Since the statutory workweek includes all time during which an employee is necessarily required to be on the employer's premises...the time spent in these activities must be accorded appropriate compensation.\textsuperscript{295}

Ignoring the time spent waiting to clock in as not having been pleaded,\textsuperscript{296} the Court certified the time spent walking on Mt. Clemens's premises after clocking in as working time, estimated at "2 to 12 minutes daily, if not more," because it was under the complete control of the employer, being dependent solely upon the physical arrangements which the employer made in the factory. ... Without such walking...the productive aims of the employer could not have been achieved. The employees' convenience and necessity...bore no relation whatever to this walking time; they walked on the employer's premises only because they were compelled to do so by the necessities

\textsuperscript{294}328 U.S. at 690.
\textsuperscript{295}328 U.S. at 690-91.
\textsuperscript{296}328 U.S. at 691. In two cases, one decided before and the other after \textit{Mt. Clemens}, recovery for clock-waiting time was denied on de minimis grounds. Cameron v. Bendix Aviation Corp., 65 F. Supp. 510 (E.D. Pa. 1946); McIntyre v. Joseph E. Seagram & Sons, Inc., 72 F. Supp. 372 (W.D. Ky. 1947). It is unclear why the workers did not assert a claim for this time since the Administrator had ruled "that if the employer requires the employees to punch a time clock and the employee is required to be present for a considerable period of time before doing so, such time will be considered hours worked." Interpretative Bulletin No. 13 at ¶ 3 in BNA, \textit{Wage and Hour Manual} 173 (cumul. ed. 1944-1945 [originally issued July 1939]). Even the master had interpreted this provision to mean that "the employer would seem to be obligated to have sufficient clocks so the employees would not be required to wait an unreasonable time to punch in or out." Record at 197. Since the Supreme Court found that a minimum of eight minutes was needed for the workers to get by the clock, 328 U.S. at 683, and since all the indicia of work and control by and benefit for the employer spelled out by the court with regard to walking also applied fully to waiting to clock in, the employees would presumably have been entitled to recover. In the ensuing wave of litigation, the CIO did follow up this cue.
of the employer’s business.297

According to the Court, however, the employees while walking from the clocks to their work benches at Mt. Clemens did attend to their own “convenience.” The time consumed by such purely personal detours and frolics was to be deducted to arrive at the compensable time, which “was limited to the minimum time necessarily spent in walking at an ordinary rate along the most direct route” and should normally be easily calculable.298 The Court, in other words, was not only instructing Picard to make such calculations on remand, but also issuing a guideline to all employers for establishing such standards for their employees.

With regard to preliminary activities, the Court invalidated the master’s distinction between compensable non-personal and non-compensable personal ones. They were all compensable work because the employees undertook them “necessarily and primarily for the employer’s benefit” rather than solely for their own convenience.299

Having given workers their only due, however, Murphy promptly took most of it back in the form of the other enduring holding of Mt. Clemens: time spent both walking and in preliminaries was subject to a de minimis rule so that “negligible” or “insubstantial and insignificant” periods of time need not be compensated.300

The workweek contemplated by § 7(a) must be computed in the light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.301

In Mt. Clemens, Murphy was certain that this de minimis rule could “doubtless be applied to much of the walking time,” leaving it to Judge Picard to determine just how much.302

The dissent by Burton, with whom Frankfurter concurred,303 sought to re-focus

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297328 U.S. at 691.  
298328 U.S. at 692.  
299328 U.S. at 693.  
300328 U.S. at 692, 693.  
301328 U.S. at 692.  
302328 U.S. at 692.  
303Jackson, who was chief U.S. prosecutor at the Nuremberg trials at the time, did not take part. He attacked Justice Black publicly the day after Mt. Clemens was handed down. See below § 7.
the analysis on custom, contract, and collective bargaining. Instead of requiring employers to engage in the futility of recording small amounts of time spent in non-productive activities, he pointed out that “the obvious, long established and simple way to compensate an employee for such activities is to recognize those activities in the rate of pay for the particular job. These items are appropriate for consideration in collective bargaining.”304 Moreover, there was “no evidence that Congress meant...to set aside long established contracts or customs which had absorbed in the rate of pay of the respective jobs recognition of whatever preliminary activities might be required of the worker by that particular job.”305

Workers could, it is true, try to secure portal pay or any other terms and conditions of employment through collective bargaining. The FLSA, however, was a recognition of the political and economic reality that many workers were not able to obtain certain levels of compensation by such methods; consequently, Congress compelled all concerned parties to comply with standards set by society at large. To remit employees to their own devices in defining as central a statutory term as compensable work would have marked a return to the pre-statutory period. Moreover, reliance on custom, contract, and bargaining would have reproduced precisely those conditions of unfair competition that enabled “chiseling” employers to underprice those employers who could not or did not wish to “sweat” their employees.306 If what Burton really meant was that the FLSA was not designed to promote the marginal improvements in working conditions that strong unions had previously apparently preferred to trade off for other terms,307 he failed to explain how that result could be achieved without harming the unorganized workers (and more law-abiding employers) whom Congress indisputably wanted to support.

The Court’s decision unleashed an outcry. Representative Vorys (Rep. Ohio) called it “the most outrageous and unconscionable instance of judicial usurpation of the law-making power that I have ever seen.”308

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304 328 U.S. at 697.
305 328 U.S. at 698.
306 “I think the opportunity for evasion in the Fair Labor Standards Act comes...in determining the amount of time that shall be put in, in order to secure the minimum wage. The opportunity for chiseling there, is an opportunity to chisel upon the hours worked....” 93 Cong. Rec. 2251 (1947) (Sen. McGrath). For the use and meaning of these terms in the various FLSA congressional debates, see Marc Linder, “The Minimum Wage as Industrial Policy: A Forgotten Role,” 16 J. Legis. 151, 160-62 (1990). Even what may appear to the individual worker to be negligible unlawful deductions from compensable time can, when spread out of over thousands of workers for long periods of time, aggregate to significant cost advantages. See above § 2.
307 Since the work-spreading goal of premium pay for overtime was macroeconomic, it was designed to apply to all workers including members of the strongest unions.
308 93 Cong. Rec. at 1514.
Neb.) declared that the effect of *Mt. Clemens* had been “to pervert the act from an instrument of righteous correction into an instrument to destroy those very employers who have attempted conscientiously to obey the mandates of the act.” Roscoe Pound, the director of the National Conference of Judicial Councils, former dean of the Harvard Law School, and arguably the most prominent law professor in the United States, who had turned to the right in the 1930s, charged that decisions such as *Mt. Clemens* threatened to transform the United States into an “autocracy.” The New York Times quoted Pound as contending that the Supreme Court’s handling of the portal-to-portal case was an example of spurious interpretation in which judicial statesmanship was conspicuously exhibited.310 Frances Perkins, Roosevelt’s Secretary of Labor, called the Supreme Court’s decision a “‘doctrinaire’...one that could not have been made by any one with practical knowledge of working conditions.”311 Even Elmer Andrews, the first Wage and Hour Administrator, expressed surprise that his own portal interpretation for mining had been extended to less hazardous employment, though he concluded that “[t]here can be no moral disagreement with” the Supreme Court’s decision because *Mt. Clemens* obliged its employees to work almost fifteen minutes “getting ready to do more work.”312

Yet these denunciations appear strangely inappropriate. After all, the de minimis condition imposed such narrow limits on recoveries that it would be difficult to sustain politically relevant sympathy for employers sued for any surviving claims for substantial periods of time. Given the individual nature of the rights created by the FLSA, the de minimis exception contained a very favorable twist for employers: “The walking time of some employees conceivably could be as little as two minutes a day and this might be disregarded under the de minimis...”

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309 Cong. Rec. at 2195. One of Murphy’s biographers echoed these sentiments twenty years later in calling the portal-pay trilogy “Frank Murphy’s closest brush with abuse.” J. Woodford Howard, Jr., *Mr. Justice Murphy: A Political Biography* 405 (1968).


313 According to Eugene Gressman, who was Murphy’s clerk from 1943 to 1948, the de minimis doctrine was injected into the opinion precisely because Murphy believed that there was a difference between conditions in mines and factories. Telephone interview with Eugene Gressman, April 9, 1990. Gressman, the longest-serving Supreme Court clerk in modern times, was so closely involved in writing Murphy’s opinions that he was jocularly called “Mr. Justice Gressman.”
rule. The fact that this would aggregate forty hours a day or more for all the employees would not enter into consideration.⁴ Even the evidentiary adjustment that the Court made in favor of employees was arguably nothing more than a negative incentive to employers to comply with their recordkeeping obligations under § 11(c). In this sense, Archibald Cox may have been exaggerating when he speculated that the decision "would have caused radical changes in the payroll practices of American industry."⁵

Indeed, had the Court framed its ruling purely prospectively, it might have deprived employers and their congressional advocates of any moral basis for overturning Mt. Clemens. Intriguingly, the NAM counsel, in commenting on the organization's petition for amicus status on remand, observed: "Application of the principle of prospective rather than retroactive effect to this case and to all portal-to-portal cases would go a long way toward clearing up the great uncertainty and public concern created by the litigation. Our remedy is one which would reduce the portal-to-portal controversy, however it is finally decided, to dimensions which could be handled without danger of disrupting the whole national economy."⁶ By the same token, had the CIO restricted its litigation campaign to enforcing the new ruling only prospectively, the financially fueled fervor that triggered impressive lobbying efforts on behalf of a portal amendment to the FLSA would have been seriously undercut. In the event, however, employers were disposed "to fight every portal pay suit...in the firm belief that the Supreme Court will change its mind."⁷ In the meantime, critics of Mt. Clemens tried to rework the salient points of the dissent into the language of amendatory bills.⁸

After the Supreme Court's denial of a rehearing to Mt. Clemens on October 10, 1946,⁹ events unfolded on two tracks. First, attention focused on the

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⁵Cox, "The Influence of Mr. Justice Murphy on Labor Law" at 807.


⁷Anthony Leviero, "Bill to Wipe Out Portal Pay Suits Ready in Capital," N.Y. Times, Jan. 2, 1947, at 1, col. 4, at 6, col. 5. Employers hoped that the Court would change its mind in part through a change of personnel. Id.

⁸The notions of contract and custom found their way into virtually all of the bills. Several incorporated Burton's phrase concerning the absorption of preliminary activities in the rate of pay. See, e.g., H.R. 1041, 80th Cong., 1st Sess. (1947) (Rep. Fernandez).

⁹Anderson v. Mt. Clemens Pottery Co., 329 U.S. 822 (1946). In January 1947 Arthur Krock noted that lawyers suggested that before Congress acted, it would be best for the Supreme Court to rehear Mt. Clemens. Arthur Krock, "The Long Trail to the Portal-to-Portal Suits," N.Y. Times, January 10, 1947, at 20, col. 5. Krock did not explain on what grounds a second petition for rehearing might have a greater chance of success. Krock also failed to state that by (unnamed) "lawyers" he in fact was referring to Justice Jackson, with whom he
How Working Off the Clock Came to Be Legal

proceedings on remand before Judge Picard. Second, employers and their associations awaited the outcome of the congressional elections in November to determine whether legislative overruling of Mt. Clemens might be feasible. Once the magnitude of the Republican victory became clear, employers were less inclined to work out settlements with unions and more inclined to wait for the new Congress to take care of the matter. Thus a Wall Street lawyer urged that it “is not recommended that actions be brought by the employer for declaratory judgments to determine its liability. [T]he new Congress may well rectify the inequities which presently exist. The employer might do well just prayerfully to sit tight....”

Conversely, the pace of litigation accelerated as unions began to fear that if they did not file promptly, their claims would be cut off.

All of this strategic behavior must be seen against the backdrop of the contemporaneous second round of postwar wage negotiations, which made it clear to all concerned that if the employees ultimately prevailed in the litigation, unions could use the pressure of out-of-court settlements to bargain for larger wage increases. Nevertheless, Edward Lamb, counsel for the employees in Mt. Clemens, warned unions that they risked restrictive congressional action if they had a private conference on January 7, 1947. The contents of the memorandum Krock made of Jackson’s remarks at that conference are virtually identical with that of his article. See Eugene Gerhart, America’s Advocate: Robert H. Jackson 274 (1958).

George Cotter, “Portal to Portal Pay,” 33 Virg. L. Rev. 44, 67 (1947). The president of Packard Motor Co. appears to have adopted this fatalistic-reverential pose: “There is nothing we in industry can do or say. The issue is now a legal fact and the answer to it all is in the hands of Congress. We can only wait to see what they will do.” “Portal Pay Demands, If Awarded, Would Wipe Out Auto Industry, Warns Christopher of Packard,” Wall St. J., Jan. 11, 1947, at 2, col. 1.

Lee Pressman, CIO general counsel and one of the architects of the portal-pay legal campaign, testified before Congress that filings mounted “when some Congressmen started making statements that ‘As soon as we get into Washington, there is going to be a law wiping out past claims.’” Regulating the Recovery of Portal-to-Portal Pay, and For Other Purposes: Hearings Before Subcommittee No. 2 of the House Committee on the Judiciary, 80th Cong., 1st Sess. 174 (1947).


Not until January 1947 did the proceedings on remand resume in Judge Picard's court. Out of court, however, the general and business press as well as the law reviews joined in the campaign to educate and mobilize their various audiences for capitalist law reform. Throughout December 1946, \textit{The New York Times} and \textit{Wall Street Journal} kept readers informed of the latest portal suits, highlighting the maximum but, in the reality of litigation, infeasible\footnote{See, e.g., "Industry Payment on Portal Suits Seen Fraction of Vast Union Claims," \textit{Wall St. J.}, Dec. 30, 1946, at 2, col. 2.} recoveries,\footnote{See, e.g., "Asks $120,000,000 in Portal Pay Suit," \textit{N.Y. Times}, Dec. 10, 1946, at 24, col. 5 (suit by USW members against U.S. Steel); "6 Billion Possible in Portal Claims," \textit{N.Y. Times}, Dec. 22, 1946, at 3, col. 4 (suit by UAW members against Ford for $270,000,000); "Portal Pay Suits Pass $900,000,000," \textit{N.Y. Times}, Dec. 28, 1946, at 2, col. 4; "Bethlehem Sued for $200,000,000," \textit{N.Y. Times}, Dec. 29, 1946, at 3, col. 4.} and furnished a running account of employers associations' initiatives to overturn \textit{Mt. Clemens}.\footnote{See, e.g., "Business Confused by Wage Decision," \textit{N.Y. Times}, Dec. 18, 1946, at 47, col. 3; "Business Starts Campaign To Limit Portal Suit Costs," \textit{N.Y. Times}, Dec. 24, 1946, at 1, col. 5 (U.S. Chamber of Commerce drafts four amendments); John Morris, "Republicans Back Quick Bill To Curb Suits for Portal Pay," \textit{N.Y. Times}, Dec. 27, 1946, at 1, col. 2; "GOP Drive Grows to Curb Pay Suits," \textit{N.Y. Times}, Dec. 28, 1946, at 2, col. 2.} For example, the \textit{Times} front page declared on December 29: "Portal Pay Suits Exceed a Billion."\footnote{Portal Pay Suits Exceed a Billion,\textit{ N.Y. Times}, Dec. 29, 1946, at 1, col. 6.} More important, however, in manufacturing public opinion and the "hysteria"\footnote{Picard Hits Hysteria,\textit{ N.Y. Times}, Dec. 24, 1946, at 10, col. 3.} that might galvanize Congress into action, however, was the newspaper's constant and unswerving editorial promotion of management's position. Thus the \textit{Times}, ignoring the fact that the whole point of the FLSA was to negate contract in favor of uniform standards, editorialized that the portal-pay suits, which were "apparently to be used as a lever for one of the largest mass wage demands in the nation's history," were "a peculiarly disturbing and harassing type of wage demand" because they retroactively inserted provisions into agreements never intended by the parties and were "capricious" because they were related not to intent but to the nature of the industry and its geographic location.\footnote{The Portal-to-Portal Issue,\textit{ N.Y. Times}, Dec. 24, 1946, at 16, col. 1 (editorial). See also "Retroactive Relief?" \textit{N.Y. Times}, Dec. 28, 1946, at 14, col. 2 (editorial on reopening government contracts).} Conveniently ignoring that tucked away in a \textit{Times} article was the account that, having been put on notice by advisory opinions from the Wage and Hour Administrator since 1940, "[s]ome employers protected themselves accordingly but..."
the majority of them apparently did not do so,"330 the Times's chief editorial page columnist, Arthur Krock, secretly echoing the sentiments of Justice Jackson, warned that "the largest sum of money ever transferred from one pocket to another in this country will have changed hands without a word or a line of authorization by Congress in the statute thus interpreted."331

The Wall Street Journal tended to glide off into its wonted histrionic tone:

If anyone were to assert that the motive behind these numerous suits to collect from employers some billions of retroactive pay was the overthrow of private ownership and its replacement by communism, the charge would be indignant—though perhaps not unanimously—denied by organized labor's spokesmen. Few unionists, we take it, have that purpose in mind. But the fact is that, whatever their aim, the general success of these suits could help mightily to bring about that result.332

Even before Picard reopened the proceedings he had already become something of a press celebrity, granting frequent interviews, presumably to absolve himself of any responsibility for the "hysteria" caused by Mt. Clemens.333 His primary message was that he was amazed at what had become of his original ruling, which did not deal with portal issues at all, but with a claim for overtime for actual productive work.334 Before the trial resumed, Picard dealt with a number of motions, all of which were dutifully reported by the Times. Thus he granted the motion of the United States to enter an appearance as an amicus, which Attorney General Tom Clark had filed to represent the government in its capacity as administrator of the FLSA and as an affected party where cost-plus war contractors

331Arthur Krock, "The Long Trail to the Portal-to-Portal Suits," N.Y. Times, Jan. 10, 1947, at 20, col. 5. For evidence that these remarks were actually Jackson's, see Gerhart, America's Advocate at 274. The generally conservative positions that underlay Krock's indefatigable editorializing against portal pay may be gleaned from Arthur Krock, Memoirs (1968).
332"Portal Pay," Wall St. J., Dec. 24, 1946, at 4 col. 1 (editorial). The reasoning behind this dire prediction ran this way: Because the smaller firms would not be able to pay, "a real concentration of 'economic power'" would result leading to greater governmental control and even nationalization. The Journal, however also published several more sober editorials on the possible economic consequences of portal pay. See "'Walking Time' Pay," Wall St. J., Nov. 6, 1946, at 6, col. 2; "Portal-to-Portal," Wall St. J., Dec. 18, 1946, at 6, col. 1.
334"Overtime Is Basis of Portal Claims," N.Y. Times, Dec. 23, 1946, at 11, col. 1. The president of the Michigan CIO Council agreed. Id. Howard, Jr., Mr. Justice Murphy at 403, incorrectly regarded Picard's apologia as "comic relief." It may have been self-serving, but it was nevertheless accurate.
might seek reimbursement for additional wages awarded through portal-pay litigation. Picard also prompted objections from the defendant by appearing *sua sponte* at the Mt. Clemens plant with a stop-watch to compute travel time. The NAM was also permitted to enter as an amicus, its chief position being that the court should deny retroactive force to any ruling.

In the days before Picard reopened the hearing, the United States also began adopting a harder line as amicus, urging dismissal of the claims unless the workers could show that they were really substantial and "not against the public interest." The Government reinforced its role by successfully petitioning the court for status as an intervenor, which would then permit it to appeal any ruling.

Picard, well aware of the attention being focused on him, prefaced his opinion of February 8, 1947 with an apologia. The case, he noted, did not originate as a claim for walking time or preliminary activities, but solely for unpaid overtime for actual production labor, which Picard believed the workers had been required to perform before and after their scheduled hours. When the Supreme Court sustained the Sixth Circuit's ruling that he was bound by the master's conclusion to the contrary, "ordinarily this would have ended the case then and there." But the parties had inserted into the record evidence about walking and preliminary activities in order to bolster their contrary positions on the issue of productive

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338 William White, "Government Asks Portal Case Ban: Origin 'Trifling,'" *N.Y. Times*, Jan. 24, 1947, at 1, col. 8. Lamb, the workers' attorney, charged that the Department of Justice's "'vendetta against organized labor'" had put it in conflict with the Wage and Hour Administrator. Although Walling denied the charge, he did state that he had long taken the position that employees should be paid for make-ready time required by the employer. Walter Ruch, "U.S. Row Charged over Portal Case," *N.Y. Times*, Feb. 1, 1947, at 7, col. 5.


overtime; that is to say, the company overstated walking and preliminary activity time in order to undermine the workers' claim to wages for actual work, whereas the workers understandably minimized that time. But it was not the Supreme Court that raised the portal issue; rather:

It's here because defendant company oversold its defense before the master four years ago in explaining why its employees reported 14 minutes before starting hours. This was quickly taken advantage of by plaintiffs in the interim between the Court of Appeals and the Supreme Court. [W]hen the Supreme Court held that this Court was wrong in granting overtime for what we believed was real production labor, it found itself in the position where it must in all fairness at least inquire into the extent of walking time and preliminary activities to which defendant company was apparently admittedly subjecting its employees....

Because Picard had never instructed the master to compute the time spent walking and engaged in preliminary activities, he heard new testimony on this point, which, as he had anticipated, was not credible since each side now had an incentive to reverse its position with regard to exaggerating or understating the time consumed. The judge concluded from this conflicting testimony that walking time was maximally three minutes. With regard to preliminary activities, Picard found that they amounted to less than three minutes per day. Based on his review of the meager precedents, Picard concluded that the walking time and preliminary activities, taken together, were de minimis. In a largely incoherent analysis Picard sought to deal with the Supreme Court’s reference to two to twelve minutes of walking time. But his conclusion that even the maximum individual daily walking time of 6.2 minutes was de minimis appeared dictated instead by his perception that precisely because the FLSA was “above all aimed to prevent exploitation of the laborer who under dire requirement of providing necessities of life...might make any kind of a [sic] bargain in order to get a job,...how can anybody claim that...[under Muscoda or Jewell Ridge] walking time of the type and amount involved in this case can be considered compensable...?” Picard’s resolution of the de minimis issue based on this interpretation of the Supreme Court’s portal trilogy was misguided in the sense that the Court had been well aware not only of the vast difference in conditions between the halls at Mt.

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341 69 F. Supp. at 713.
343 Contrary to the Supreme Court’s opinion, Picard did not consider what the master had called personal activities (such as putting on aprons) as preliminary; similarly, the nonpersonal preliminary or make-ready activity was “part of the job and was considered in the rate of pay.” 69 F. Supp. at 715.
345 69 F. Supp. at 719.
Clemens and the mine shafts, but also of the minimal dimensions of the portal time at stake in the case. Had these factors been dispositive, Murphy would not have bothered to remand the case.\textsuperscript{346}

In dictum, Picard granted the NAM (amicus curiae) its most urgently pleaded point: a rule of non-retroactivity. But it was not so generally formulated as the NAM would have wished: Picard bottomed it on the company’s reliance on the results of a WHD compliance inspection.\textsuperscript{347} Adding dictum to dictum, Picard came much closer to accommodating the NAM’s position by insisting that “any industry” in “the general field of manufacture” would have been warranted in ignoring “such a narrow, picayunish, meager” amount of portal time before the Supreme Court had spoken in \textit{Mt. Clemens}.\textsuperscript{348} In virtual disregard of the clear holding of the trilogy, Picard seemed almost overeager to make amends with the business world that had castigated him: “Custom and usage should be considered. ... Otherwise there can be no stability in an industrial world when tomorrow may see some new interpretation of the workweek that would disrupt our entire economic structure.”\textsuperscript{349} To adhere to such a position even with regard to the underlying back wages without liquidated damages where, by his own admission, “a holding to the contrary would not be calamitous,”\textsuperscript{350} seemed even to Picard so harsh that he justified it by absurdist metaphor: “we should look upon labor and industry as...husband and wife where the give and take is not all on one side.”\textsuperscript{351} In a final act of self-defense he also expressed “some regrets for the original plaintiffs,” whose version of not having been paid for jumping the gun he still accepted, although the Supreme Court had precluded him from awarding them a recovery.\textsuperscript{352} And while these plaintiffs might not have been worthy of portal pay, Picard held out the prospect that somewhere sometime some portal suit might prevail.\textsuperscript{353}

Reactions to Picard’s ruling were predictable. Plaintiffs’ counsel, Lamb, 

\textsuperscript{346}This cavalier attitude was also at odds with a colloquy that Picard had with the NAM’s counsel at the remand proceedings in which he “wormed from” the attorney “the statement that the segments of employees’ time that he did not want counted as meriting payment might amount to $75 a year. ‘Is $75 de minimis to you?’ asked Picard. And when Crow replied, ‘No, I don’t think so,’ Picard added, ‘I’d like that in the record.’” “Drama of the Stopwatches,” \textit{Business Week}, Feb. 8, 1947, at 17, 18.

\textsuperscript{347}69 F. Supp. at 720. The record factually contradicted Picard’s statement.

\textsuperscript{348}69 F. Supp. at 720.

\textsuperscript{349}69 F. Supp. at 720.

\textsuperscript{350}69 F. Supp. at 721.

\textsuperscript{351}69 F. Supp. at 722.

immediately announced that they planned to appeal, adding however, that in several respects Mt. Clemens was not a true portal case; consequently, the facts did "not justify compensation comparable to that which" existed in heavy industry. If shortly before Picard handed down his decision, Representative Hartley was of the opinion that the Supreme Court decision "threatens the structure of our free-enterprise system," as soon as Picard's ruling became public, Senator Taft and others, supported by employers, announced the Republicans' intention of legislating an end to the suits. Undeterred, the CIO, viewing Picard's decision as inconsistent with the Supreme Court ruling, filed new suits.

The New York Times, which made the dismissal its lead article and published the entire text of the opinion (including footnotes), exulted in three editorials. Expressing great relief, it hoped that organized labor had learned its lesson "that wages ought to be adjusted by collective bargaining, not by fantastic proceedings at law." The next day it offered further reflection on the matter:

As a legal exercise this case will probably fascinate students of jurisprudence for years to come. ... But as a symbol it will serve its purpose. It should lead to a legislative clarification of the Fair Labor Standards Act and to a decision by the unions to fix wages by fair negotiation and not by gymnastics in the courts.

Several days later the newspaper of record praised Picard for "having done much to abate the portal-to-portal hysteria and to restrict that principle to its fair and proper sphere." Business Week best captured the mood in the wake of Picard's failure to convince any of the parties to abandon the fight: "in the portal-to-portal cause celebre, how and what the formerly obscure Detroit judge ruled was itself de minimis. The stock market's reaction to his decision seemed appropriate. It sold off. There was a widespread recognition that the portal-to-portal issue was still far from settled."

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363 Business Week, Feb. 15, 1947, at 86.
The appeal was filed with the Sixth Circuit in March, but two weeks later, when the CIO realized that further prosecution of the case was becoming counterproductive, the plaintiffs moved to dismiss. That realization was promoted by Attorney General Clark's announcement that he would seek expedited review by the Supreme Court before the appeals court acted. As grounds for his action he alleged that the district court portal cases "threaten[ed] to embarrass court procedure, and to interrupt industrial relations while the nation is passing from war to peace manufacture." The Sixth Circuit quickly dismissed the appeal per curiam, and a week later the Supreme Court dismissed the government's petition on Clark's motion. If the unions believed that voluntary dismissal would appease the anti-portal-pay forces, or if the Truman administration believed that strong government intervention before the Supreme Court would make possible a new decision accommodating employers' concerns about "the expense, difficulty and possible disruption of industrial peace incident to the keeping of records of short intervals of time," Representative John Gwynne promptly declared that it would have no effect on the legislative process.

6. "Wait for That Nice New Republican Congress to Come Riding to the Rescue"

You are advised...that travel time has been reduced in recent months. The proposal to measure it and the possibility of having it paid for in wages appears to operate automatically to reduce it.

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364 The plaintiffs' attorney, Lamb, stated that the Attorney General was "seeking to scuttle the entire Wage and Hour Act by a savage attack" on the case. "Exit Mount Clemens," N.Y. Times, Apr. 4, 1947, at 22, col. 3 (editorial).
368 Anderson v. Mt. Clemens Pottery Co. (United States, Intervenor), 162 F.2d 200 (6th Cir. 1947).
370 Wood, "High Court Action on Portal Asked at 8, col. 6 (quoting Clark's petition).
373 Letter from President's Committee on Portal to Portal Travel Time to Mr. President [Roosevelt], at 2, in Franklin D. Roosevelt Library, File: President's Committee on Portal
A. Precursors of the Portal-to-Portal Act

1. State Statutes of Limitations

Because Congress had failed to provide for a specific statute of limitations in the FLSA, courts had to apply what they considered the most analogous state statute of limitations of the state. In the absence of a uniform national standard, a patchwork of limitations—and hence of rights and liability—arose not only among the states, but even within a state, as courts disagreed over the applicable state statute. As of the date of enactment of the FLSA in 1938, these periods of limitation varied from one year to twelve years.\(^3^{74}\)

The legislative genesis of the core of the Portal-to-Portal Act can be traced back to a movement to shorten the limitations period; during World War II several states enacted statutes of limitation that discriminated against wage claims in general and FLSA overtime and liquidated damages in particular.\(^3^{75}\) Overtime was the special animus of employers simply because the vast majority of all FLSA violations involved premium pay rather than minimum wages or child labor.\(^3^{76}\) As early as 1943, the Wage and Hour Administrator warned of the adverse enforcement impact of such laws, which he characterized as "State Efforts at Nullification" aimed at the FLSA's "defeat in practice."\(^3^{77}\) And shortly before the war ended in Europe, the press reported that a "successful and little-known behind-the-scenes campaign is well under way in many states to hamstring time-and-a-half payment for overtime work...."\(^3^{78}\) These efforts had been made possible by

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\(^{375}\)Harry Weiss, "Minimum Labor Standards," in 1 *Yearbook of American Labor: War Labor Policies* 198, 209, conjectured that "[i]ncreased liability of employers under the Act may have been responsible for" the wave of state legislation.


Congress's omission of a limitations period in the FLSA itself. 379

It is instructive to review the most prominent state laws, which imposed the shortest limitations period. In Oregon the legislature, citing an "emergency," acted in March 1943 to limit "[r]ecovery for overtime or premium pay...required or authorized by any statute...to...work performed within six months" before the suit for future claims and only ninety days for past claims. 380 In contrast, actions to recover regular wages, which could be brought for six years after accrual, 381 remained unaffected. Employees promptly challenged the statute in state and federal court. The Oregon Supreme Court struck down the statute in 1945 on the grounds that "legislation manifestly hostile to the exercise of rights granted by a federal statute cannot stand." 382 In reliance on this decision, the Ninth Circuit affirmed the judgment of a federal district court that the law "unreasonably interferes with the normal operation" of the FLSA and hence with Congress's commerce power. 383 In 1947 the legislature amended the statute to extend the limitations period to one year for future and past claims. 384 Enactment of the Portal-to-Portal Act with its own limitations period several weeks later made moot the state law's constitutionality as to future claims.

The Iowa legislature, which acted a week after Oregon's in 1943, took a different tack. It imposed the six-month limitations period on "all cases wherein a claim...has arisen or may arise pursuant to the provisions of any Federal statute wherein no period of limitation is prescribed...." 385 The law was held invalid as to the FLSA and discriminatory against federally granted rights. 386 In the midst of

campaign and a contemporaneous one for state "right-to-work" laws organized by the Christian America Association and Fight For Free Enterprise, Inc., both of which were designed to circumvent a federal legislature deemed impervious to anti-labor initiatives.

379 The first bill to establish a limitations period appears to have been introduced only a few months after the FLSA went into effect. In the first session of the Seventy-Sixth Congress (March 13, 1939) Senator Wiley offered S. 1765, which would have provided for a four-year period within which to recover double liability (that is, liquidated damages) for minimum wage or overtime. Some irony attaches to this sponsorship inasmuch as Wiley was the chief Senate supporter of the portal bill with its much shorter limitations period in 1947.

380 1943 Or. Laws ch. 265.
381 § 1-204 O.C.L.A.
382 Fullerton v. Lamm, 163 P.2d 941, 945 (Or. 1945), reh'g denied, 165 P.2d 63 (1946), rev'g Fullerton v. Lamm, 9 Lab. Cas. ¶ 62,495 (Or. Cir. Ct. 1944).
384 1947 Or. Laws ch. 492.
385 1943 Iowa Acts ch. 267 § 1.
386 Kappler v. Republic Pictures Corp., 59 F. Supp. 112 (S.D. Iowa 1945), aff'd, Republic Pictures Corp. v. Kappler, 151 F.2d 543 (8th Cir. 1945), aff'd per curiam, 327 U.S. 757,
these judicial proceedings, the Iowa legislature, too, repealed its earlier statute, enacting a new one with a two-year period for future claims for wages without reference to federal statutes.\textsuperscript{387} After a federal district court upheld the statute,\textsuperscript{388} it too was preempted by the new Portal-to-Portal Act.\textsuperscript{389}

Although a number of states continued to enact such statutes of limitations\textsuperscript{390} even while Congress was debating and after it passed the Portal-to-Portal Act,\textsuperscript{391} the rude judicial reception accorded them\textsuperscript{392} induced the NAM to curtail these efforts during 1946 in favor of a congressional campaign.\textsuperscript{393} Now that labor, capital, and the executive and legislative branches of the federal government agreed that a uniform national limitations period was a desideratum,\textsuperscript{394} the primary stumbling block, as the failure to enact any of the legislative initiatives in the Seventy-Ninth Congress showed,\textsuperscript{395} was disagreement over the appropriate length

\textbf{reh’g denied, 327 U.S. 817 (1946).}

\textsuperscript{387}1945 Iowa Acts ch. 222. Already existing claims had to be brought within six months of enactment.


\textsuperscript{389}This preemption applied to future claims; under § 6 of the Portal-to-Portal Act, which provided for the possible applicability of state statutes of limitations for already existing claims, the Iowa statute was upheld in Kendall v. Keith Furnace Co., 162 F.2d 1004 (8th Cir. 1947).


\textsuperscript{391}Perhaps the most remarkable such statute was a Massachusetts act that provided that recovery of back wages “based upon any judicial interpretation of a state or federal statute differing from or overruling a previous interpretation of the same” had to be brought within one year after that interpretation or, if it was an already existing interpretation, within one year after enactment. 1947 Mass. Acts ch. 333. The Idaho Hours Worked Act, though not applicable to FLSA, declared it to “contrary to the public policy of the State of Idaho for persons now to sue for attorneys’ fees, liquidated damages, and alleged overtime for non-productive work performed during the war....” 1947 Idaho Sess. Laws ch. 267, § 1. The act then set forth a checklist of noncompensable activities to be excluded from the definition of “hours worked.” § 2.

\textsuperscript{392}For example, a South Carolina statute imposing a one-year limitation on federal wage claims was held invalid. Rockton & Rion Ry. v. Davis, 159 F.2d 291 (4th Cir. 1946), aff’g Davis v. Rockton & Rion R.R., 65 F. Supp. 67 (W.D. S. Car. 1946).


\textsuperscript{394}E.g., Thirty-Third Annual Report of the Secretary of Labor for the Fiscal Year Ended June 30, 1945, at 10-11 (1945).

\textsuperscript{395}Earlier Representative Costello (Dem. Cal.) repeatedly undertook unsuccessful efforts
of that period.

2. A Federal Statute of Limitations

After the "dime-an-hour" bloc failed to gut the FLSA with a six-month statute of limitations before the war, the drive for a uniform but quick federal cutoff for FLSA claims started in earnest in 1945. The chief advocate of such an abbreviated period of limitations in the Seventy-Ninth Congress was Representative Gwynne, a Republican from Iowa, who feared that the United States was "becoming a socialistic nation." On March 28, as the U.S. and Red Armies were approaching each other in Germany, he introduced H.R. 2788, which would simply have amended the Judicial Code so that, absent a specific limitations provision, an action to recover damages would have to have been brought within one year "unless a shorter time be fixed in any applicable State statute." H.R. 2788 was interesting for two reasons. First, it was not limited to the FLSA, but would have applied to numerous federal commercial statutes. Second, brevity, not uniformity, was its goal. Gwynne himself underscored this point by reference to the need to protect employers against double damages "for events which were lawful when they occurred but unlawful in retrospect" by virtue of the fact that "the concepts of work time, over-all coverage, and the Administrator's authority ...

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396Wage and Hour Administrator Elmer Andrews applied this term to the forces that were seeking to exclude groups of workers from FLSA coverage following its enactment. "Andrews Shifts on 'White Collar,'" N.Y. Times, July 21, 1939, at 5, col. 1.


39991 Cong. Rec. 2927 (1945). Two other bills were offered with a six-month period of limitation. S. 760, 79th Cong., 1st Sess. (1945) (Johnson); H.R. 3079, 79th Cong., 1st Sess. (1945) (Chenoweth). Both sponsors represented Colorado, one of the states that had enacted a short statute of limitations designed to apply solely to federal statutes.

400See 91 Cong. Rec. 2927-29 (setting forth applicable laws). The bill provided for a two-year period in public actions.
are constantly being enlarged by new interpretation." Since "a legal right is a law suit won, and a legal duty, a law suit lost," Gwynne’s animus is difficult to locate systemically. He sought to motivate his legislation by way of a case, "beg[ging] for correction," from Iowa, in which an employer was sued under the FLSA for overtime wages and liquidated damages three years after the employment had been terminated and six years after the cause of action had accrued. Characterizing Iowa’s six-month statute of limitations—without revealing its length—as “reasonable,” Gwynne was disturbed that, despite the employee’s laches, the court instead applied Iowa’s five- or ten-year statute of limitations for contracts. Why wage contracts should be treated differently than other contracts, Gwynne did not explain. Moreover, although it may be uncommon for employees to wait three years after the termination of the employment relationship before filing, the purpose and effect of the bill was to shorten the period for current employees who were intimidated by the possibility of retaliation.

In June and July 1945, a subcommittee of the House Judiciary Committee held hearings on H.R. 2788. The first witness was the NAM counsel, Raymond Smethurst, whose statement was not confined to complaints about the limitations period or even portal-pay issues under FLSA. He also expressed employers’ concerns about the expansion of coverage resulting from judicial interpretations of the statutory term, “commerce,” as well as about the Supreme Court’s recent ruling that employees’ waivers of their damages claims pursuant to an agreement with an employer were void. The NAM took the position that during the coming “difficult period of reconversion” a statute of limitations would promote “an

401 91 Cong. Rec. 2927.
402 Jerome Frank, Courts on Trial: Myth and Reality in American Justice 9 (1973 [1949]).
403 91 Cong. Rec. 2926.
404 The case Gwynne was referring to was Keen v. Mid-Continent Petroleum Corp., 58 F. Supp. 915, 63 F. Supp. 120 (N.D. Iowa 1945). Since the employer was a Delaware corporation operating a refinery in Oklahoma and merely distributing oil products in Iowa (and represented by Oklahoma counsel), it seems improbable that Gwynne was merely engaged in energetic constituent service.
405 Limiting the Time for Bringing Certain Actions under the Laws of the United States: Hearing Before Subcommittee No. 4 of the House Committee on the Judiciary, 79th Cong., 1st Sess. (1945). The chairman of the subcommittee, Representative Hobbs of Alabama, was arguably the most vociferous opponent of the FLSA at the time of the portal-pay hearings in 1947.
406 Business Week later commented that the NAM’s testimony “did take on a significant propaganda aspect.” “Shorter Weeks,” Business Week, June 16, 1946, at 98, 102.
407 Limiting the Time for Bringing Certain Actions under the Laws of the United States at 21-22.
important and needed stimulant to postwar business venture and risk taking."408

The NAM was therefore grateful for the "partial corrective" that Gwynne's bill provided as to future claims. But:

The Bill does not meet the equally serious need for reducing liabilities which may already have accrued under recent administrative rulings and judicial decisions.

4. It is recommended, therefore, that the bill be amended (a) to include actions for penalties or wage adjustment not now clearly covered; (b) to reduce the period within which such...actions must be brought; (c) to provide the same treatment for actions which have already accrued...as is provided for future claims....

5. If the committee decides...that a reasonable time should be allowed for filing of accrued actions, we urge that such period should not exceed 90 days, and as to such actions, that a maximum period of recovery be provided not to exceed a period of 1 year prior to the effective date of the limiting statute.409

In light of the recent portal-to-portal decisions by the Supreme Court in favor of miners, it came as no surprise that the representative of the National Coal Association supported the NAM's proposals.410

Of considerable interest was the testimony of the Wage and Hour Administrator, Metcalfe Walling, who sharply criticized the bill's permissive provisions with regard to state statutes of limitations as undermining nationally uniform standards.411 Walling himself suggested a three-year limitations period.412

He also used the opportunity to urge Congress again to confer authority on him to define the FLSA's terms and issue interpretations with the force of substantive law subject to judicial review. The Administrator shrewdly couched this plea in such a manner as to address employers' concerns about retroactive liability. For an enforcement agency, the WHD had been peculiarly handicapped by Congress:

The year 1938—that in which the Fair Labor Standards Act was enacted—was a year in which the tide of hostility to so-called "administrative absolutism"...was already rising. It is not surprising, therefore, that in the Fair Labor Standards Act Congress confined the powers of the Administrator of the Wage and Hour Division within very narrow limits.

408 Limiting the Time for Bringing Certain Actions under the Laws of the United States at 32.
409 Limiting the Time for Bringing Certain Actions under the Laws of the United States at 32.
410 Limiting the Time for Bringing Certain Actions under the Laws of the United States at 38-40 (statement of James Haley).
411 Limiting the Time for Bringing Certain Actions under the Laws of the United States at 149.
412 Limiting the Time for Bringing Certain Actions under the Laws of the United States at 155.
He has no rule-making power except with respect to minor matters, no power to hear and
decide cases, and no power to initiate litigation except in injunction cases.413

Since Walling conceded that even with such powers, he might be overruled by
a court, in which case an employer might be liable despite an initially favorable
ruling by the Administrator, his "cure was to permit the Administrator to protect
those employers who follow his interpretation in good faith."414 If, in addition,
Congress amended the FLSA to provide for "simple restitution of wages owed
without liquidated damages where the violation is not willful" or the employer had
followed the Administrator's interpretation, Walling argued, "justice would be
served."415 Walling's initiative turned out to be doubly ironic. First, this strongly
pro-employer measure—after all, it was the penal aspect of the retroactivity that
incensed employers—was not even offered by employers, but rather by the Admin­
istrator himself; and second, Congress ultimately adopted Walling's proposal as to
good faith and willfulness—without conferring any additional powers on the
Administrator.

In October, the House Judiciary Committee, through Representative Hobbs,
reported favorably on H.R. 2788, amending it to incorporate the NAM's proposal
on already existing claims. Indeed, much of the report's explanatory section was
taken almost literally from Smethurst's testimony. The Judiciary Committee also
inserted a more radical version of the Administrator's suggested provision on
eliminating liability for good faith reliance on administrative rulings.416 Specifi­
cally, the committee's bill read:

That causes of action which had accrued prior to the passage of this Act, and which had
not become barred by any applicable statute of limitation may be maintained if commenced
within six months after the date of enactment: Provided further, That no liability shall be
predicated in any case on any act..committed in good faith in accord with any regulation,
order, or administrative interpretation or practice, notwithstanding that such regulation,
order, interpretation, or practice may, after such act or commission, be amended,
rescinded, or be determined by judicial authority to be invalid or of no legal effect.417

Whereas Walling had merely proposed excusing employers from liability for

413E. Merrick Dodd, "The Supreme Court and Fair Labor Standards, 1941-1945," 59
414Limiting the Time for Bringing Certain Actions under the Laws of the United States,
at 146.
415Limiting the Time for Bringing Certain Actions under the Laws of the United States at
154.
416H. Rep. No. 1141: Limiting the Time for Bringing Certain Actions under the Laws of
liquidated damages where they had followed the Administrator's ruling, the committee bill would apparently have abolished liability even for the underlying back wages. The Attorney General and the Secretary of Labor both expressed strong opposition to the committee's bill as did several Democratic members of the committee.

Although a rule was reported for H.R. 2788 providing for two hours of debate, the House leadership did not call it up. In November 1945, however, Gwynne did have the opportunity to speak on the bill, at which time he assured his colleagues that there was "[n]ot the slightest reason" to consider the bill "antilabor." On a more candid note, he kept his bill's chances alive by stating that he was "not quarreling with anyone who thinks the statute of limitations should be a little longer." And the following March, the Senate Judiciary Committee, too, reported H.R. 2788 favorably, this time with a two-year limitations period. Truman's new Attorney General, Tom Clark, found this period "somewhat brief," instead suggesting five years.

At the same time that Gwynne's statute of limitations bill was wending its way through the Judiciary Committees, the Labor Committees in both chambers were also considering amendments to the FLSA. Indeed, a struggle was emerging over which committee should have jurisdiction over the bill. Both major FLSA bills in 1945, which were largely designed to raise the minimum wage, contained

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421 91 Cong. Rec. at 10947 (exchange between Representatives Gwynne and Horan).
422 91 Cong. Rec. at 10947.
424 S. Rep. No. 1395 at 6. Clark also proposed an extended period for causes of action that had already accrued. Id.
425 Two Democratic members of the House Judiciary Committee expressed minority views to the effect that it would be more appropriate for the House Labor Committee to consider the question "than to legislate in the blunderbuss manner proposed in this bill." H. Rep. No. 1141, Pt. 2, 79th Cong., 1st Sess. 2 (1945).
426 In cautioning against "[a] too rapid increase in the minimum wage," Senator Taft made the important point that "[t]he difficulty is that the less efficient producers and the small industries are driven out of business and the industry is likely to be concentrated in the large mass production units and the monopolistic companies in the industry." 92 Cong. Rec. 2493 (1946). This argument echoed the largely forgotten criticism which the leading marginalist in the United States had directed at populist advocates of state minimum wage laws decades earlier. J.B. Clark, "The Minimum Wage," 112 Atlantic Monthly 289, 296 (1912).
provisions for a five-year period of limitations. The Senate debated and, in April, passed S. 1349, the Fair Labor Standards Amendments of 1946, which included a two-year limitations period and conferred on courts discretion to reduce or to eliminate liquidated damages when the employer showed that its violation had not been willful and that it had acted in good faith. In July, the Senate, at the request of a bipartisan group of Senators, briefly returned to H.R. 2788, amending it to provide for a three-year period. In the meantime, in May, the House, after extended debate over the length of the limitations period, passed H.R. 2788 with a two-year period. When Representative Hobbs the next day sought unanimous consent by the House to concur in the Senate amendments, objections by three prolabor Congressmen effectively killed the bill.

Since these early congressional bills were exclusively statutes of limitations with no reference to portal issues, it was with some justification (and as much as

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428 92 Cong. Rec. 2245, 3205 (1946). For the debate over whether the period should be one, two, three, or five years, see id. at 3187-3189. Senator Cordon of Oregon sponsored a short period on behalf of lumber employers who had apparently been sued for unpaid travel time by employees whom they had transported to the woods during the war. The debate in the House brought out the fact that such workers had not been driven from home, but rather had first driven to company property before they were transported further. 92 Cong. Rec. 5296 (1946) (colloquy between Representatives Gwynne and Savage).

429 92 Cong. Rec. 10372-10373 (1946). Causes that had accrued eighteen months or more before enactment were required to be filed within six months after enactment. The bill also eliminated liability for violations committed in good faith reliance on administrative rulings.

430 92 Cong. Rec. 5290-5305 (1946). The supporters of a short period competed with one another in telling war stories about “outrageous suits...which shock our sense of justice.” Id. at 5293 (Representative Hancock). Among the new arguments offered, the most interesting stemmed from Representative Feighan, who pointed out that if the short limitations period made it impossible for employees to bring suit (because “the poorly paid, unorganized workers...who would not get their 40 cents an hour and overtime if it were not for this law” would not normally file suit until they had been laid off or found a new job), they could not act as private attorneys general, thus imposing on the taxpayer additional expenditures for enforcement of the FLSA. Id. at 5297-5298.


432 92 Cong. Rec. 10487 (1946).

433 Conversely, in 1941 bills were introduced in both houses providing that the FLSA shall not be interpreted to require employers to pay employees amounts greater than those agreed on, but these bills contained no limitations period. S. 1015, 77th Cong., 1st Sess. (1941) (Sheppard); H.R. 5268, 77th Cong., 1st Sess. (1941) (Patton).
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Schadenfreude as hindsight would permit) that the NAM could later assert that the Portal-to-Portal Act would have been unnecessary had an earlier bill been enacted. By the same token, since even in the latter part of 1946 unions’ demand for retroactivity was more important to “a large segment of management” than for portal pay as such, it was not a foregone conclusion that congressional action would necessarily go beyond achieving a compromise on a limitations period.

B. The Portal-to-Portal Act of 1947

Of course, Mr. Speaker, I am sorry that this remarkable law [FLSA] may be utilized against those unfortunate companies...which made millions during the war, and barely succeeded in accumulating profits, surplus, and reserves amounting to 26 billions of dollars; and I know it would cost them something if that law...were to remain in force.

1. Preliminary Skirmishes

Even before the Eightieth Congress convened on January 3, 1947, Republican Congressmen, reacting to employers’ complaints that “‘invisible bankruptcy’” hovered over industry, began floating specific proposals to amend the FLSA. Thus already on December 27, Representative Hoffman of Michigan was reported to have drafted two amendments designed to make only “productive” work compensable. Tracking the language descriptive of precisely the preliminary activities at issue in Mt. Clemens, Hoffman would also have excluded from the workweek any time spent walking from the time clock. Hoffman motivated his bill as a means of dealing with a situation which was “‘an invitation to unscrupulous lawyers and racketeering labor leaders’” and “‘unscrupulous

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blackmailers.\textsuperscript{439} The New York Times, for which no anti-portal-pay legislation was too radical, placed its imprimatur on Hoffman’s proposal as “the most forthright,” while warning unions that the further filing of suits “would play into the hands of the reactionary element.”\textsuperscript{440}

Beginning on the opening day of the Eightieth Congress, a flood of anti-portal bills was introduced. Most embodied provisions similar to what eventually became the principal House and Senate bills.\textsuperscript{441} Perhaps the most extraordinary piece of legislation was proposed by Texas Senator O’Daniel in the form of an amendment to the Internal Revenue Code. It would have imposed a 100 per cent income tax on all portal suit recoveries and entitled payors to deduct such amounts from their income taxes.\textsuperscript{442} By January 15, the Senate Judiciary Committee\textsuperscript{443} was already holding hearings—the first, boasted chairman Wiley, “held under the auspices of the Republican Party since 1933 on a matter of national importance.”\textsuperscript{444} The accelerated pace of congressional action went hand in hand with the stepped-up portal litigation. After workers had filed 727 portal suits in federal courts during the last six months of 1946, alone in January 1947 an additional 1,186 were

\textsuperscript{439}Anthony Leviero, “Bill to Wipe Out Portal Pay Suits Ready in Capital,” \textit{N.Y. Times}, Jan. 2, 1947, at 1, col. 4. Even before the formal House debates on the portal bill began, Representative Hoffman expressed strong animus against “Judge” Murphy, recalling his role as Governor of Michigan at the time of the sit-down strikes at General Motors, when he “left the sit-down strikers in possession of private property....” 93 \textit{Cong. Rec.} 298 (1947). During the debates he called Murphy the “CIO’s Santa Claus.” \textit{Id.} at 1562.


\textsuperscript{441}See S. 307 (Wilson); S. 557 (Wilson); H.R. 89 (Hoffman); H.R. 233 (Dondero) (providing for thirty-day limitations period in actions for overtime and liquidated damages and no liability for violations of FLSA pursuant to a collective bargaining agreement); H.R. 477 (Smith, Va.); H.R. 613 (Price, Fl.); H.R. 776 (Buck); H.R. 957 (Jennings); H.R. 1041 (Fernandez); H.R. 1046 (Hoffman); H.R. 1194 (Hoffman); H.R. 1277 (Hartley); H.R. 1440 (Fernandez).


\textsuperscript{444}The bills were apparently referred to the Judiciary rather than to the Labor Committee because they provided for limitation of courts’ jurisdiction. See Jeter Ray, “The Portal to Portal Act of 1947,” 20 \textit{Tenn. L. Rev.} 151, 153 (1948) (associate solicitor, U.S. DOL). Some bills were referred to the labor committees, but never advanced. \textit{E.g.}, H.R. 1041. Sen. Taft, the chairman of the Labor and Public Welfare Committee, stated that the Senate bill was initially referred to his committee, but that he had not objected to its having been placed under the jurisdiction of the Judiciary Committee since it seemed to involve constitutional issues rather than questions directly related to the FLSA. 93 \textit{Cong. Rec.} 2369.
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recorded. The closer Congress appeared to be moving to closing the portal permanently, the more actions were filed. And as reports circulated that the defendants' total liability was approaching $6 billion, Congress, in turn, felt that much more obliged to act quickly to stave off the purportedly looming mass bankruptcies that would halt the postwar reconversion process. Thus Senator Capehart, who filed the first Senate portal bill on January 6, declared at the outset of the Senate hearings:

This problem might not be so urgent if it were merely a question of an economic struggle between two parties, one of which wants the money and the other of which has the money. But these so-called portal-to-portal suits in fact...threaten the very existence of thousands of businesses.

The Truman administration in December 1946 and January 1947 undertook to exert some influence over the eventual shape of the Republicans' amendatory legislation in two ways. First, as noted, it entered the Mt. Clemens proceedings on remand in order to persuade Picard to dismiss the suit on de minimis grounds. Second, reports began appearing that the Treasury would provide partial financial

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445 S. Rep. No. 48: Exempting Employers from Liability for Portal-to-Portal Wages in Certain Cases, 80th Cong., 1st Sess. 2 (1947). During the remaining five months of the fiscal year ending June 30, 1947, only 326 more portal suits were filed, producing a total of 2,239. Enactment of the Portal-to-Portal Act in May radically reduced filings; in the following four years 44, 13, 5, and 13 portal suits were filed respectively. These data are taken from the corresponding Annual Report of the Director of the Administrative Office of the United States Courts, Table C 2. The Administrative Office, which until then had not published more detailed data on FLSA cases, calculated these figures by asking the district clerks “to include cases brought under Sections 7 and 16 of the Fair Labor Standards Act seeking compensation for unpaid minimum wages or unpaid overtime compensation in which the question is raised as to whether the employee’s compensation has included pay for all the time during which he was necessarily required to be on the employer’s premises or at his prescribed work place.” S. Rep. No. 48 at 2.


447 S. Rep. No. 48 at 2. This sum was presumably calculated from the amounts alleged under the rubric “amount demanded” on the civil cover sheets. Interestingly, more than a month earlier The New York Times quoted “[i]ustry leaders” as citing the same figure. “6 Billion Possible in Portal Claims,” N.Y. Times, Dec. 22, 1946, at 3, col. 4.

448 S. 49 was referred to the Labor Committee, but when it was later decided that the Judiciary Committee would have jurisdiction over all portal bills, Capehart was compelled to offer it as an amendment to Senator Wiley’s bill, S. 70. Portal to Portal Wages at 11-12.

449 Portal to Portal Wages at 17.

450 See above § 5.
relief to affected employers. In late December The New York Times editorialized (without attribution) about "two possible avenues" of such relief. One involved re-opening back corporate income tax statements for the years of high wartime taxation so that refunds could be made to recapture the retroactive wage payments compelled by portal litigation (or settlements). The other was the renegotiation of government war contracts to take into account the new state of facts.\footnote{451} The next day the Times reserved the lead-article column of its Sunday business section for "an authority on taxation," who explained how the carry-back provisions of the wartime excess profits tax might work.\footnote{452} Then, as if by coincidence, two weeks later the Treasury Department issued a ruling in reply to an inquiry by the "M. Company," which had agreed to pay its employees back portal wages, that it could recalculate its tax liability in effect by writing off both back portal wages and liquidated damages against the war years of high profits and taxes in which the labor was performed.\footnote{453}

Corporations, to be sure, were "greatly pleased" by this ruling,\footnote{454} but the Times warned that the resulting decline in federal revenues by two to three billion dollars "would make it virtually impossible to reduce income tax rates, as the Republicans have proposed."\footnote{455} Although these steps by the Truman administration have been interpreted as part of its effort to forestall portal legislation,\footnote{456} the contemporary view is much more plausible that the Treasury ruling was "likely to...pur congressional action to block further portal-to-portal pay suits...in order to save the Government from raids on the Treasury."\footnote{457} Why, in light of the fact that such action by the Republican congressional majority seemed a foregone conclusion in any event, the Truman administration found it necessary to apply this indirect pressure, remains unclear.\footnote{458} For the Attorney General's intervention in Mt.


\footnote{456}See Susan Hartmann, \textit{Truman and the 80th Congress} 41 (1971).


\footnote{458}Still more puzzling for its indirectness was that the government was, according to a
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Clemens had already suggested to large industrial capital—which was the primary object of the suits—where the Administration’s sympathies lay with regard to the future of portal claims, while management presumably understood that Truman could not afford to jeopardize the electoral support of organized labor by additionally associating his administration with retroactive antilabor legislation.

2. The House De Facto Repeals Fair Labor Standards

Although the House began holding hearings on the portal issue on February 3, several days after the Senate had already concluded its hearings, it had issued its committee report, debated, and voted on its bill before the Senate opened floor debate. The bill on which Subcommittee No. 2 of the House Judiciary Committee, of which Gwynne was chairman, held hearings was Gwynne’s H.R. 584, “A bill to define the jurisdiction of the courts, to regulate actions arising under the laws of the United States, and for other purposes.” The findings and purposes section of H.R. 584, which applied to the FLSA, the Walsh-Healey Act, and the Davis-Bacon Act, emphasized that because the administration and interpretation of these statutes had disregarded custom, practice, and agreement, they interfered with collective bargaining and created “windfalls of unearned compensation to employees.” To eliminate such “inequities and hardships,” H.R. 584 limited actions by:

Senate investigation, forcing war contractors to settle for full payment of all portal claims, with the resulting liability passed on to the government under cost plus fee contracts.


Regulating the Recovery of Portal-to-Portal Pay, and for Other Purposes: Hearings Before Subcommittee No. 2 of the House Committee on the Judiciary, 80th Cong., 1st Sess. 1 (1947) (hereinafter Regulating the Recovery of Portal-to-Portal Pay). For Gwynne’s explanatory remarks when he introduced the bill on January 7, 1947, see 93 Cong. Rec. 153-54 (1947). Also subject of the hearings was H.J. Res. 91, “To prohibit suits for recovery of portal-to-portal pay.” Introduced by Representative Knutson, it would have applied retroactively and prospectively, defining “portal-to-portal pay” as “pay for the time during which an employee is required to be on the employer’s premises...and is not engaged in productive work” unless contract or industry custom provided otherwise. Regulating the Recovery of Portal-to-Portal Pay at 4.

§ 4.

§ 1.
1. creating a one-year statute of limitations (§ 2(a));
2. prohibiting actions based on any act done or omitted “in good faith consistent with or in reliance on any administrative regulation, order, ruling, interpretation, enforcement policy, or practice notwithstanding that after such act or omission” any of the foregoing “is modified, rescinded, or declared by judicial authority to be invalid” (§ 2(e));
3. prohibiting actions based on an employer’s failure to pay an employee for activities other than those “which at the time of such failure were specifically required to be paid for either by custom or practice of such employer at the plant...or by express agreement” (§ 3);
4. permitting all claims to be “waived, compromised, adjusted, settled, or released” (§ 2(f));
5. limiting attorneys’ fees, which were made permissive rather than mandatory, to five per cent of the amount recovered, subject to a maximum of $5,000 “to be paid out of but not in addition to the amount of the judgment” (§ 2(g));
6. placing the burden of proof on the plaintiff, whereby “the failure of the defendant to produce records not required, at the time the transactions...occurred, by published regulations authorized by statute shall give rise to no prejudicial inference affecting liability or the measure...of damages” (§ 2(h));
7. withdrawing from the courts jurisdiction to “entertain, proceed with, impose liability, or enter judgment” on any actions already filed “except in accord with the Act’s conditions” and except with regard to “actions upon which final judgment” had been entered prior to the Act’s effective date “and from which no appeal had been or could be taken” (§ 3(a)); and
8. making the award of penalties or actual, liquidated, or compensatory damages contingent on an express judicial finding that the underlying violation “was in bad faith and without reasonable grounds,” in which case the court was granted discretion to award penalties or damages (§ 3(c)).

This comprehensive catalog of amendments, though packaged as merely
undoing the effects of several Supreme Court decisions, not only transcended the portal issue, but effectively eliminated the mandatory and uniform character of the FLSA's standards. The bill's linchpin in this respect was § 3, which both retroactively and prospectively relieved employers of all liability for any wages that they did not agree or were not accustomed to pay. Thus to take an extreme example that would have comfortably fit within the words and intent of Gwynne's bill: if an employer's practice was not to pay his employees for their first hour's work and he had never expressly agreed to do so, that flagrant violation of the FLSA would no longer be actionable. In a feat of legislative overkill, the bill's other provisions served to wipe out any claims that for any reason whatsoever might have slipped through the principal barrier. The NAM's designation of Gwynne's bill as the most favorable to employers was therefore scarcely surprising.

Testimony at the hearings was predictable, with employers offering strong support and unions vehement opposition. Of interest were the nuances separating the positions of the AFL and CIO. Earlier in January, both the president of the AFL, William Green, and the president of its Metal Trades Department, John Frey, denounced portal suits as dishonoring collective bargaining agreements:

To inject now the question of back pay for portal-to-portal time would be an admission that when wage agreements were signed by trade union representatives, they had been insincere during negotiations and had held mental reservations....

Our trade union movement has no assets more valuable than its agreements with employers and the integrity which is involved.

Perhaps the most pointed rejection came from the Amalgamated Meat Cutters and Butcher Workmen of North America, whose president and secretary-treasurer announced in the union's monthly magazine:

very severe evidentiary burdens on plaintiffs, seems supererogatory since such claims would by definition not have been actionable. *Id.* at 337.


467 Interestingly, the NAM denied its support to the "effective though drastic course" of totally repealing FLSA in order to avoid any constitutional defects arising from retroactively nullifying portal claims. *Regulating the Recovery of Portal-to-Portal Pay* at 419 (statement of Raymond Smethurst, counsel, NAM).


When we decided that we were entitled to extra pay for changing into and out of clothes, for the sharpening of tools and for many other so-called “portal-to-portal” issues, we negotiated for them in good faith. Our employers conceded these “portal-to-portal” issues reluctantly, but the fact remains that a bargain had been made. Each agreement specifically defines the understanding reached. Law suits against employers who acted in good faith in...signing contracts with our organization ought not now, in our opinion, suffer the embarrassment of long legal controversy in matters which neither side could foresee....

We are not unmindful that there are certain gentlemen of the legislature in our nation’s capital and in our several states that have in mind to curb the present rights of organized labor. ... Large corporations whose interests are more in profit than in the advancement of human welfare will fight side by side with those legislators who are anti-labor. ...

Our International Union, therefore, WILL NOT and our local unions SHOULD NOT engage in “portal-to-portal” suits against our friendly employers which might cause them, perhaps in retaliation, to also join the forces of those who would enslave us.470

This position, which echoed the moral indignation expressed by employers, had secured the AFL editorial praise.471 Yet at the hearings, the AFL representative, largely avoiding the claim that portal suits had “struck ‘below the belts’ of employers,”472 stressed the inequity stemming from the physical expansion of plants, which required workers to walk up to a half-mile for fifteen or twenty minutes. That the AFL opposed not only H.R. 584 but any portal legislation,473 derived in part from its fear that such innovations would grandfather in customs and practices in violation of the FLSA that unorganized workers would be powerless to overcome.474 The radically abbreviated limitations period, which obviously affected all the FLSA claims and claimants adversely, also troubled the AFL.475

The star witness for the CIO476 was its general counsel, Lee Pressman.477 His

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472Commercial and Financial Chronicle, Jan. 23, 1947, at 494 (quoting Earl Jimerson, president, Amalgamated Meat Cutters). Jimerson & Gorman, “Portal-to-Portal,” stated that the union could “look back with pride that we have never struck below the belt.”
474Regulating the Recovery of Portal-to-Portal Pay at 79.
475Regulating the Recovery of Portal-to-Portal Pay at 81.
476The representative of the United Steel Workers-CIO offered such a vivid picture of the long and dangerous walk that steelworkers were required to take—across railroad tracks and under overhead cranes—from the plant gate to the open hearth that he even succeeded in prompting Gwynne to acknowledge that he advocated payment for many of the activities.
responses were as aggressive as the committee members' questions were belligerent. In order to deflate the bathos surrounding employers' complaints, Pressman opened by remarking that the "profits of not a single American corporation have been diminished by any judgment so far rendered in any [portal] lawsuit."47 If the committee were really interested in dealing with portal problems, Pressman suggested, it would investigate "the hardships imposed upon working people" in large industrial plants such as steel mills. It would, moreover, discover that where portal-pay obligations are imposed on employers, as in iron ore mining, it had proved possible for them to reorganize their operations more efficiently to increase employees' leisure as well as to reduce their own liabilities.479 Pressman also provoked Gwynne by pointing out to him that his bill was so capacious that logically it would absolve an employer from liability who customarily turned back the clock so that his employees were never recorded as or paid for working overtime.480

By the same token, the CIO representative displayed a willingness to accommodate employers and congressmen on a number of portal issues. This more conciliatory attitude may have been dictated by the recognition that since the litigation had insured that some version of an antilabor portal bill would pass both houses,481 the CIO was "seeking a way out of this muddle without losing face."482 Thus, for example, he thought worthy of consideration Gwynne's offhand suggestion to permit settlements of the FLSA claims subject to approval by the Wage and Hour Administrator.483 That non-hazardous walking time as in Mt.

_id. at 103-105, 109-10 (testimony of David McDonald, sec'y-treasurer, USW). McDonald stressed that in such large and highly integrated plants companies "have wrung from the workers an increased contribution to the companies' profits." _id. at 112.


478Regulating the Recovery of Portal to Portal Pay at 115.

479_Id._ at 131.

480_Id._ at 141.

481_Time_ quoted Pressman as saying: "They are fantastic, local lawyers have gone hogwild. Suits for these incredible sums have fanned the flames of antiunionism." _Time_, Jan. 27, 1947, at 83.


483Regulating the Recovery of Portal-to-Portal Pay at 160. The 1949 FLSA amendments included such a provision. See above § IV. At the Senate hearings, Pressman testified that
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Clemens was not the CIO's highest priority emerged from another colloquy between Pressman and Gwynne in which the congressman pressed the CIO lawyer to concede that there was "quite a jump" from not paying blast furnace workers for time spent changing clothes to the practice at Mt. Clemens. Pressman retorted: "I will be glad to draft an amendment to take care of that situation, if you will agree with me that these things are times worked. Your bill does not do that."484

Following the House hearings, the subcommittee prepared another draft, after which the full House Judiciary Committee wrote the bill, H.R. 2157, which it reported to the House.485 The principal changes vis-à-vis H.R. 584 were as follows: 1. the grace period during which already accrued portal claims could be brought was extended from ninety days to six months (§ 2(b)); 2. the statute of limitations was not tolled as to any individual claimant (in a class or representative action)486 until he was named as a party (§ 2(c)); 3. the good-faith reliance provision was clarified as an employer's affirmative defense (§ 2(e)); 4. the limitation on the employer's liability for the employee's attorneys' fees was eliminated; and 5. the imposition of the burden of proof on the employee was eliminated.

Although somewhat less radical than the previous bill, H.R. 2157, like H.R. 584, was most prominent for its undifferentiated applicability retroactively and prospectively. This feature, taken together with the sharp restrictions of numerous enforcement and recovery provisions having nothing to do with portal issues, led the minority members of the committee to accuse the majority of "emasculat[ing]" the FLSA: "Why do not the proponents of the bill honestly say they want to kill the Fair Labor Standards Act?"487 In particular, the use of "custom or practice" as a guide to compensability the minority saw as enabling the new employer "to write the law for himself" and undermining uniformity of standards among already existing employers.488 An especially poignant example of this generous legislative conferral of self-help power upon employers emerged inadvertently in the course of the House debates. Representative Francis Walter, a Democratic supporter of

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484 "Regulating the Recovery of Portal-to-Portal Pay" at 170.
485 93 Cong. Rec. at 1489 (statement of Rep. Michener, chairman of Judiciary Comm.).
486 The bill that the committee reported on February 25 as H.R. 2157 was identical with the H.R. 2157 that Gwynne had introduced the previous day.
a portal bill, in responding to a question as to whether "custom or practice" that was "bad or in error...would be a defense," granted that the issue had "caused the committee a great deal of trouble":

[C]ustom and practice...means a custom and practice not in violation of the law. Certainly no employer could, for example, compel an employee to get to this place of his business an hour before he punches the clock and because he had done that for a while relieve himself of his responsibility to comply with the law by saying, "That is the custom and practice of my business." No court would uphold any arrangement of that sort. Certainly that is work under any of the definitions of the courts and we have to rely on a common-sense interpretation of that language.

In fact, as Walter was constrained to concede, the "custom or practice" language was so capacious that it literally encompassed the aforementioned sham, thus remitting workers to the courts for an interpretation that would have comported better with the spirit behind the language that Walter himself was unable to express. Unfortunately for the employees, the legislative history was so replete with vindictiveness, that the literal interpretation in fact coincided with the spirit of the bills.

The minority members took the position that, because most of the existing claims would be subject to de minimis dismissals, Congress should leave their resolution to the courts. Instead of succumbing to the "great hysteria" over portal suits, Congress should deal with the issue prospectively either by writing into the FLSA a definition of work or by empowering the Wage and Hour Administrator to issue binding regulations.

The committee recommended passage on February 25, and the bill was referred to the Committee of the Whole House for four hours of debate on February 27 and 28. The extremes were stated at the outset by two representatives from Illinois. The Republican Leo Allen denied that the bill was antilabor, while the Democrat Adolph Sabath, who had served since 1907, called

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49093 Cong. Rec. at 1497.
492The minority proposed language tracking that of Murphy's opinions: "in order to be deemed compens-able...activities must be conducted under the control, direction, or requirement of the employer and must be primarily for the benefit of the employer." H. Rep. No. 71 at 17.
49593 Cong. Rec. at 1494.
it "as vicious as any other antilabor bill ever brought to this House." A number of Democrats excoriated the bill as a direct attack on the FLSA itself, but others would not have opposed legislation confined to the portal issue if a longer limitations period had been inserted.

All ten amendments to H.R. 2157 as well as a motion to recommit were rejected by large majorities. Among the more significant ones, two would have extended the limitations period to two and three years respectively. Representative Javits's amendment to focus relief from portal claims to employers on collective bargaining agreements also failed.

The voting patterns of the Eightieth Congress were deeply impressed with two interrelated facts of the party and sectional results of the 1946 congressional elections that sealed the demise of the New Deal coalition. It was the first Congress since the Hoover administration in which the Republican Party controlled both chambers by a significant majority; the influence of the South on the Democratic delegation reached a high point as a consequence of the fact that Democratic candidates gained their largest share of Southern seats since 1921, while, in the wake of massive Republican victories in recently Democratic districts in the North, Southern Democrats represented the largest share of Democratic representatives since 1921. Of the 188 Democrats who faced 245 Republicans in the House, 103 (or fifty-five per cent) represented the South and accounted for all but two seats in the eleven Southern states.

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496 93 Cong. Rec. at 1495.
497 Representatives Norton and Welch, for example, took this position. 93 Cong. Rec. at 1503, 1513.
498 Representative McCormack, the minority whip, typified this group. 93 Cong. Rec. at 1558. Representative Celler appeared to fall between these two groups of Democrats. 93 Cong. Rec. at 1495.
499 The motion to recommit with instructions to report the bill back with a two-year limitations period was defeated on a division vote 219 to 42. 93 Cong. Rec. at 1573.
500 For a description of the less significant ones, see 3 Cong. Q. 44-45 (1947).
501 The first was defeated on a division 124 to 73, the second 145 to 40. 93 Cong. Q. at 44.
502 The division vote was 131 to 53. 93 Cong. Rec. at 1571. Although Javits explained the purpose of his amendment in such language, its text contained the same reference to "custom or practice" as the principal bill. Id. at 1565.
The roll-call vote on February 28 in the House on H.R. 2157 revealed a rigid party-section pattern. While the Republican majority may have functioned as the transmission belt for implementing the agenda articulated by large corporate employers, the entire Southern delegation, but virtually no other Democrats, joined them. Overall, more than six times as many representatives voted yea as nay (345-56). Of the 241 Republicans who voted, 236 or ninety-eight per cent supported H.R. 2157. Although 109 or sixty-eight per cent of the Democrats who voted supported H.R. 2157, ninety of those supporters were Southerners; an additional thirteen represented Border states. No Southerner opposed the bill while only three Northern Democrats voted yea. The fifty-one Democrats who opposed the bill were geographically concentrated, thirteen representing New York City alone. Five Democrats each from Illinois and California voted nay, as did three each from Massachusetts, Michigan, Ohio and Pennsylvania, and two each from New Jersey and Rhode Island. Not surprisingly, this Democratic opposition roughly coincided with the geographic concentration of the portal litigation.

3. The Senate Lets Bygones Be Bygones

More persons than the employer and the employee are interested in a labor contract; public interest is also involved.

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506 93 Cong. Rec. at 1573.
507 In this regard it outdid the votes a few weeks later on Taft-Hartley. See Harry Millis and Emily Clark Brown, From the Wagner Act to Taft-Hartley 371-92 (1950) (chapter written by Seymour Mann).
508 On Southern Democratic-Republican congressional voting alliances in the 1930s and 1940s, see V.O. Key, Jr., Southern Politics in State and Nation 345-82 (1949).
509 The five who opposed the bill were Javits of New York, Brophy and Hull of Wisconsin, Meade of Kentucky, and Welch of California. Neither Brophy, who had been a mechanic, nor Meade was reelected, while Hull had previously been elected as a Progressive. See Biographical Dictionary of the United States Congress 1774-1989, Sen. Doc. No. 100-34, 100th Congress, 2d Sess. 678, 1230, 1487 (Bicentennial ed. 1989).
510 Vito Marcantonio, the American Labor Party member from New York City, also voted nay.
511 No member of the nine-person delegation from Brooklyn, all of whom were Democrats, voted yea. Seven voted nay, one (Delaney) was paired against, and one did not vote. Similarly, all of the Democratic representatives from Manhattan and the Bronx voted nay.
512 The other ten Democratic votes each represented a different state.
513 See above § 2.
514 93 Cong. Rec. at 2178 (Sen. Donnell).
The Senate hearings, which lasted from January 15 to January 30, concerned S. 70, which Senator Wiley, the chair of the Judiciary Committee, had introduced. A relatively short piece of legislation, it chiefly took the form of an amendment of the overtime provision of FLSA. The bill defined "work week" to include "only the time during which an employee is engaged in productive work" unless it is compensable pursuant to agreement or custom. It then prohibited all future claims for back wages for time spent in other than productive work. In addition, S. 70 offered an affirmative defense to employers against liability for liquidated damages if they could show that their failure to pay was "a bona fide error made in good faith." Wiley’s bill, finally, also permitted employees to release their employers from their liability for liquidated damages.  

Although this bill was marred by a serious drafting defect inasmuch as it failed to define "productive work," it otherwise introduced relatively modest changes into FLSA. Its key provision was purely prospective, while the good faith and waiver provisions were confined to liquidated damages.

Senator Capehart, a manufacturer, offered an amendment to S. 70 in the form of a substitute. Capehart’s bill was much longer and detailed. It contained a preamble of findings similar to that which was ultimately adopted in the Portal-to-Portal Act. It went far beyond Wiley’s bill in a number of crucial respects. In particular, Capehart’s bill: 1. was retroactive as well as prospective; 2. applied to minimum wages as well as to overtime; 3. excluded from custom or practice any payments made by an employer in order to conform to any judicial decisions or administrative rulings; 4. made an award of liquidated damages contingent on a finding that the violation was in bad faith and without reasonable grounds, thus reversing the burden of proof; 5. offered relief from liability for any act or omission done in good-faith reliance on any act of the Wage and Hour Administrator even if the latter were held invalid; 6. extended the waiver or release provision to cover back wages in addition to liquidated damages; and 7. inserted a one-year limitations period for future claims together with a three-month grace period for existing claims insofar as the latter were not barred by any other applicable statute.

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516 Unlike H.R. 89, which listed very specific activities. Id. at 5.


518 Capehart had introduced his bill, S. 49, before Wiley, but after it had been referred to the Labor Committee, it was decided that the Judiciary Committee would handle all the portal bills; he was therefore constrained by parliamentary rules to offer his bill as an amendment. Portal to Portal Wages at 11-12. In the midst of the Senate hearings, on January 18, Capehart introduced a modified version of his amendment. It is this second version that is discussed in the text. The two versions are at id. 3-5, 38-40.

519 Portal to Portal Wages at 38, § 1.
of limitations.520

Though much broader in scope than Wiley’s bill, Capehart’s bill was less far-reaching than Gwynne’s H.R. 584. First, whereas Gwynne permitted courts great discretion with regard to awarding liquidated damages, Capehart’s bill required courts to award full liquidated damages if they awarded any. Second, Capehart’s bill contained no provision comparable to the heavy burden of proof that Gwynne imposed on plaintiffs. And, third, Capehart did not limit the award of attorneys’ fees. For these reasons, the NAM, while appreciative of Capehart’s efforts, preferred the Gwynne bill.521

Employers did not present a completely unified or uniform position at the Senate hearings. In part because of doubts concerning the constitutionality of a retroactive ban on claims, there was “some difference of opinion between corporation lawyers” “[a]s to the remedies for the situation.”522 The NAM’s counsel emphasized the need for a one-year limitations period, relief from liquidated damages for non-willful violations, and generally a rollback of the law to its state before the Supreme Court had decided Mt. Clemens, including a restoration of the customary rules of the burden of proof.523 The Chamber of Commerce of the United States went even further, advocating a prohibition on class suits or the assignment of claims.524

Like the Chamber’s representative,525 the NAM’s counsel opposed conferring expanded rule-making power on the Wage and Hour Administrator to define working time.526 In contrast, the Business Advisory Council of the Department of Commerce, the members of which were largely the high-ranking officers and managers of the country’s largest corporations,527 believed that the Administrator “should be given power to issue authoritative definitions of the general terms used in the statute.”528 Although many employers may have instinctively objected to authorizing New Deal bureaucrats to interpret the intent of an antilabor Republican

520 Portal to Portal Wages at 38-40.
522 Portal to Portal Wages at 616 (“Statement by Subcomm. of Business Advisory Comm. on Attitude of Industry on Portal to Portal”).
522 Portal to Portal Wages at 111, 114 (testimony of Raymond Smethurst).
524 Portal to Portal Wages at 133. It was unclear whether ignorance or disingenuousness underlay the Chamber’s contention that compromising claims was not problematic because employees did not bring suits alone but through a union lawyer. Id. at 135.
525 Portal to Portal Wages at 127 (testimony of Thomas Howard, Manufacture Dept.).
526 Portal to Portal Wages at 112.
527 See Portal to Portal Wages at 609-14.
528 Portal to Portal Wages at 620 (statement of William Foster, Undersecretary of Commerce, speaking on behalf of the Business Advisory Council).
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Congress, it is unclear that any fundamental principle was at stake in choosing between agency and judicial enforcement. After all, even such binding regulations would have been subject to judicial review. Since the entire portal dispute erupted over unfavorable court—in particular Supreme Court—decisions, employers may have perceived themselves as facing a Hobson's choice. In this sense, the optimal solution for them may have been the one actually adopted: reliance on the relatively detailed catalog of excluded activities that this Republican Congress then and there could dictate to agency and courts.

Precisely such a step was suggested by Arthur Pettit, an attorney in the corporate law firm of Winthrop, Stimson, of which the former Secretary of War was an eponymous partner. Senator Capehart deemed his testimony so interesting that he asked Pettit to write down what he thought the bill should include. Pettit offered an unusual amalgam of modest and radical proposals. On the one hand, he opposed using the individual plant as the standard for judging the existence of a custom or practice because it would merely favor bad employers, cause discontent among employees, and undermine FLSA's uniform standards. On the other hand, in order to eliminate existing claims not based on custom or practice, he proposed repealing the minimum wage, overtime, and private right of action provisions of FLSA on the grounds that those claims constituted a burden on commerce. Should the Supreme Court then hold such a repeal unconstitutional, Pettit advocated as a fallback position a prohibition on collective and representative actions. Although Congress ultimately chose not to adopt these more radical proposals, it did incorporate his recommendation for dealing with future claims by inserting specific exclusions into the act such as walking, riding, traveling, and incidental work activities before and after the scheduled work period. In fact, Congress went even further by omitting Pettit's limitation of such noncompensable portal time to periods shorter than twenty minutes, which Pettit believed marked

529 Senator Eastland unsuccessfully tried to elicit from Undersecretary Foster an acknowledgment that agencies invariably exceed their authority. Portal to Portal Wages at 620. Significantly, the CIO representative, Lee Pressman, did not oppose giving the Administrator rule-making power. Id. at 221.

530 But see A. Mezerik, "Time is Money," Nation, Feb. 1, 1947, at 121, 122, who speculated that management preferred the courts at least until a Republican administration came to power.

531 Cong. Rec. 2131 (1947) (statement of Sen. Donnell). Donnell stated at the hearings that Pettit had also spoken to him personally after one of the hearings and interested him in Pettit's suggestions. Portal to Portal Wages at 637.

532 Portal to Portal Wages at 645.

533 Portal to Portal Wages at 645-48.

534 Portal to Portal Wages at 655.
off the point at which employer overreaching began.\textsuperscript{535}

H.R. 2157 was committed and recommitted to the Senate Judiciary Committee on March 3,\textsuperscript{536} which issued its report on March 10 offering a much more detailed overview of the portal litigation and the legal issues surrounding the proposed legislation than the House report. It devoted a great deal of space to presenting data on the volume of litigation, documenting the orchestration of the portal campaign by the CIO, and sketching the worst-case financial impact of the lawsuits on firms and the federal government.\textsuperscript{537} In justifying the need for intervention, the committee speculated that pending litigation would adversely affect labor-management relations; for if employers postponed entering into new collective bargaining agreements because of the threat of portal liability, employees would resent the delay, while employers would develop ill-will toward their employees on account of the unfounded portal claims.\textsuperscript{538} The report also implied that Judge Picard’s dictum to the effect that he was not holding all portal claims nonactionable had not obviated the need for congressional action.\textsuperscript{539}

The Senate version of H.R. 2157, as reported by the committee, differed fundamentally from the House version in that it gutted the FLSA only retroactively. Like the House bill, it virtually wiped out all existing claims and not merely those related to portal issues, but left the FLSA intact, albeit impaired, for the future, by exempting from the portal ban future activities taking place during (as opposed to before or after) the normal workday (§ 6). The committee rewrote the bill in a number of other important ways that both favored and disadvantaged employees.\textsuperscript{540} For example, it provided for a two-year limitations period (§ 9),\textsuperscript{541} but banned representative actions and required the plaintiffs in collective actions to file written consents (§ 8). But more importantly, the Senate bill, unlike the House version, sharply distinguished between existing and future claims; specifically, it did not extend the pro-employer provisions regarding attorneys’ fees, liquidated damages, the burden of proof, and the compromise and settlement of claims to future actions (§§ 2-6).\textsuperscript{542}

\textsuperscript{535}Portal to Portal Wages at 658.
\textsuperscript{536}Senate Journal, Mar. 3, 1947, at 120-21.
\textsuperscript{538}S. Rep. No. 48 at 39-40.
\textsuperscript{539}S. Rep. No. 48 at 42-43.
\textsuperscript{540}Senator Wiley presented a useful detailed point-by-point tabular comparison of the two bills during the Senate debates. Unfortunately, it contains a transposition making §§ 4(b) and 4(c) of the Senate bill appear as provisions of the House bill. 93 Cong. Rec. at 2084-86.
\textsuperscript{541}It also provided for a 120-day grace period to file accrued claims.
\textsuperscript{542}Like the House bill, the Senate version contained separability provisions (§ 4) that served to eliminate any existing claims that for any reason survived their intended destruction.
In explaining this latter provision, the committee report furnished what would become very important pieces of legislative history with regard to specifying the types of portal activities for which employers were to be relieved of liability. Thus with regard to future—as contradistinguished from existing—claims, § 6 of the bill made the following portal-to-portal activities noncompensable (unless compensable on the basis of contract, custom, or practice):

"(a) walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

"(b) activities which were preliminary to or postliminary to said principal activity or activities which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities...."

The committee report, after noting that the bill did "not define what constitutes work," appended this nonexhaustive "list of noncompensable activities...outside the employee’s workday":

(1) Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer’s plant, mine, building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out. Examples of this are (a) walking or riding from the plant gate to the employee’s lathe, workbench, or other actual place of performance of his principal activity or activities; (b) riding on busses from a town to an outlying mine; (c) riding on busses or trains from an assembly point to a particular site at which a logging operation is being conducted.

(2) Checking in or out and waiting in line to do so, changing clothes, washing up or showering, waiting in line to receive pay checks, and the performance of other activities

by § 3. The separability section included provisions on attorney’s fees and burden of proof that were even more pro-employer than the corresponding provisions of H.R. 584, which had been eliminated from H.R. 2157. The first would have prohibited courts from awarding any attorney’s fee (§ 4(b)), while the second deprived employees of the benefit of any inferences in proving the extent of their claims (§ 4(c)). The latter provisions was essentially an effort to overturn the Supreme Court’s ruling on the burden of proof.

Although the report expressly stated that § 6 relieved employers of liability for travel time from the portal to the face of a mine, the committee took notice of the fact that because the then effective UMW collective bargaining contract provided for such portal pay, the liability of employers party to that contract would not be affected by § 6. S. Rep. No. 48 at 48.

93 Cong. Rec. at 2376. The bill used quotation marks to indicate that the provision was to be inserted as a new § 7A of the FLSA.
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occurring prior and subsequent to the workday, such as the preliminary activities which were involved in the Mt. Clemens case.\footnote{545}

Since the above-cited provisions of § 6 of the Senate version of H.R. 2157 were adopted intact in the Portal-to-Portal Act,\footnote{546} these specifications made clear that the scope of noncompensable portal activities was meant to be very broad.\footnote{547} The drafters of the bill insisted on comprehensive exclusions because they believed that unions' portal suits had confronted employers with a slippery slope to bankruptcy:

[Un]less we draw a line and say, "Before this line items shall not be compensable unless by contract or custom," we are in constant danger of an ever-expanding application of the doctrine of portal-to-portal pay so as to run not merely from the portal of the employer's premises to the place of work, but from the portal of the employee's home, or perhaps from his dining table.\footnote{548}

In contrast, the committee indicated that it also intended to give the term "principal activity," which overlapped with the compensable "workday," a broad scope:

(1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease, or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity.\footnote{549}

\footnote{545}{S. Rep. No. 48 at 47.}
\footnote{546}{Ch. 52, § 4(a), 61 Stat. 84, 87 (1947) (current version at 29 U.S.C. § 254(a)).}
\footnote{547}{The Wage and Hour Administrator incorporated them literally into the portal-to-portal interpretative bulletin that he issued on Nov. 18, 1947. 12 Fed. Reg. 7655 (1947) (codified at 29 C.F.R. § 790.7). For illustrations of the equally broad judicial interpretations holding travel time noncompensable, see Carter v. Panama Canal Co., 463 F.2d 1289 (D.C. Cir. 1972) (walk from check-in point to locomotives along canal); Ralph v. Tidewater Constr. Co., 361 F.2d 806 (4th Cir. 1966) (trip from shore out to work site in bay); Dolan v. Project Constr. Corp., 558 F. Supp. 1308 (D. Colo. 1983) (trip from main camp to construction site). To be sure, the last-cited case appears wrongly decided even under the Portal-to-Portal Act because the workers were required to check in at the camp and were not permitted to use their own transportation.}
\footnote{548}{93 Cong. Rec. at 2121 (statement of Sen. Donnell). Donnell was reacting to testimony by mining employers to the effect that potash miners in New Mexico had sued for portal pay for a twelve-mile trip to the mines during which they read and slept in buses the employer did not own. \textit{Id.} Sen. Murray regretted that H.R. 2157 "would make noncompensable many burdensome activities performed for the employer by employees in the lumbering, smeltering, and petroleum-refining industries" in Montana; he mentioned in particular the more than one hour per day that loggers travelled through "trackless forests" with their saws and axes. 93 Cong. Rec. at 2238.}
(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees...and who during such 30 minutes distributes clothing...at the workbenches of other employees and get machines in readiness for operation by other employees, such activities are among the principal activities of such employee.549

Of overriding significance in the same context was the committee’s declaration that the existing and unamended provisions of the FLSA would continue to control the compensability of all future claims for activities occurring within the workday. The report illustrated this intent by reference to rest and lunch periods; it then added the very important statement: “and the same will be true as to waiting periods during a production breakdown and a production break-down and to other waiting periods during the workday.”550 The retention of this protection under the FLSA allayed the worst fears that unions had expressed on behalf of unorganized workers.551 The practice of not paying employees for the time they waited for work during the workday had been widespread before the enactment of the FLSA. For example, when future Teamsters president Jimmy Hoffa worked at a Kroger’s warehouse in Detroit in 1931, loaders had to spend as many as 80 hours a week at the workplace to get their 48 hours because the employer paid only for the time they actually spent loading.552

The minority members of the Senate Judiciary Committee553 agreed “that portal-to-portal relief was necessary,” but objected to the majority’s approach because it unnecessarily destroyed existing non-portal claims and lowered FLSA standards for future claims.554 In particular the minority emphasized that the majority bill created the danger that contract would “supersede the statutory standards”; for “[a]s between employer and an unorganized employee at the lower end of the wage scale, who will influence the custom or practice or contract which will determine which is compensable and which is not?”555 And even among strong unions, such as the UMW, H.R. 2157 would permit owners to renegotiate

549 S. Rep. No. 48 at 48. In explaining the conference report to the House, Gwynne incorrectly asserted that even for the future the laying out of garments to work on would not be compensable. See 93 Cong. Rec. at 4389.
550 S. Rep. No. 48 at 48. In explaining the conference report to the House, Walter incorrectly stated that even as to the future, claims for stand-by time would not be compensable. 93 Cong. Rec. at 4389-90.
551 93 Cong. Rec. at 2132 (statement of Sen. Donnell). The unionists were unable to avert the withdrawal of such protection for existing claims.
553 These included one Republican, Sen. Langer, who eventually voted against the bill. The two Southern Democrats did not join the minority.
the portal wages they had already been compelled to pay through litigation.\textsuperscript{556}

The minority members announced a four-point substitute amendment that would have: 1. barred recovery for portal claims that had already accrued but for other types of FLSA violations; 2. permitted compromise of existing portal claims; 3. established a three-year statute of limitations; and 4. relieved employers of future liability for acts occasioned by adherence to written regulations or interpretations of the Wage and Hour Administrator.\textsuperscript{557} When Senators McCarran and McGrath introduced this substitute amendment during the debates, it included several additional elements: 1. the elimination of representative actions; 2. a requirement that any plaintiff to a class action file a written consent, at which time the action would have been deemed to have begun as to that claimant; and 3. a six-month grace period during which to file already accrued causes of action unless barred by applicable shorter periods of limitations.\textsuperscript{558}

The Senate debates were much more extensive than those in the House, occupying six days between March 14 and March 21. Here, too, by large majorities all amendments were rejected. An interesting alignment of forces emerged in the course of debate over the effect of the majority and minority bills on existing claims. The minority contended that the majority bill “wiped out” not just existing portal claims, but all existing claims of violations of the FLSA.\textsuperscript{559} This part of the debate was not contentious because the Republican floor leader, Senator Donnell, virtually boasted that in order to wipe out all existing portal claims, the majority had found it necessary to “wipe out some rights here and there” that should not have been eliminated.\textsuperscript{560} While the subcommittee was preparing preliminary drafts, it took the position that no existing claims, unless based on contract or custom, should be compensable regardless of whether the time at issue took place before, during, or after the scheduled workday. But then Senator Donnell\textsuperscript{561} invited several AFL and CIO officials to confer with him privately, at which time they brought to his attention the plight of garment factory workers who might have to wait two hours without compensation when the

\textsuperscript{556} S. Rep. No. 48, Pt. 2 at 8-9.
\textsuperscript{558} 93 Cong. Rec. 2288.
\textsuperscript{559} S. Rep. No. 48, Pt. 2, at 2. In a more alarmist charge, Senator McCarran asserted: “For the future...the language of the majority bill means that no employee has any rights under the Fair Labor Standards Act which his employer is not willing he should have.” 93 Cong. Rec. at 2245. Although this assertion may have been true of portal claims (as well as of the House bill in its entirety), it was not true of other future claims. Senators Cooper and McGrath made this point at length. 93 Cong. Rec. at 2297-98.
\textsuperscript{560} 93 Cong. Rec. at 2130, 2125.
\textsuperscript{561} Senators Donnell, Cooper, and Eastland were in charge of drafting the Senate bill.
production line was down.\textsuperscript{562} If that practice was custom in the plant and no contract contradicted it, the proposed bill would have legalized the employer's policy. In order to deal with such problems, the subcommittee redrafted the bill to strike only (existing) portal claims involving periods before and after the normal workday. But then

[a] gentleman by the name of Finlay, who is associated with the Standard Oil Co. of New Jersey...came to Washington and left a memorandum with us, followed by a letter, taking the position pretty generally that if we should not legislate with reference to the period...between whistle and whistle, we would still leave unattained our objective to wipe out the portal-to-portal suits.\textsuperscript{563}

Therefore, in order to insure that claims for walking time back and forth to the cafeteria were wiped out, the subcommittee returned to its original twenty-four-hour per day conception, thus sacrificing the garment workers.\textsuperscript{564} Senator Donnell then stated that he had recounted this private legislative history in such detail because it was important to show that when Congress wiped out non-portal claims, it was "not acting capriciously or arbitrarily, but within its sound discretion in...demolishing the portal-to-portal cases."\textsuperscript{565} Although no Democrat had charged that the majority was acting arbitrarily when it did the bidding of any official of the Standard Oil Company who happened to drop off a memo, the monolog left no doubt about the intended effect of the majority bill on existing claims.

About the corresponding effect of the McCarran-McGrath bill much more doubt obtained—especially among Democrats. The authors asserted that by inserting the phrase "not compensable working time," their amendment wiped out all existing claims involving the issue of compensable working time (including portal claims), but would not "touch claims which do not in any way involve the question of whether the nature of the activities engaged in was such as to be considered work."\textsuperscript{566} Thus, for example, whereas the majority bill would have eliminated a claim for minimum wage in connection with a piece-rate contract not

\textsuperscript{562} At the Senate hearings, a representative of the Amalgamated Clothing Workers Union testified that, although there were no portal problems in garments factories where its members were employed, unorganized workers faced a problem with regard to "enforced unproductivity" or downtime where they worked on a piece rate. Portal to Portal Wages at 161 (testimony of John Abt, special counsel).

\textsuperscript{563}\textit{Cong. Rec.} at 2132.

\textsuperscript{564}\textit{Cong. Rec.} at 2132. Sen. Donnell stated later, however, that these union representations had persuaded the subcommittee to insure that "the compensation for the iniquitous practices of an employer" be preserved. 93 \textit{Cong. Rec.} at 2362.

\textsuperscript{565}\textit{Cong. Rec.} at 2132.

\textsuperscript{566}\textit{Cong. Rec.} at 2290 (statement of Sen. McCarran).
specifying any hours, the McCarran-McGrath bill would not have. Senator Barkley, the Democratic minority leader, offered a hypothetical situation in which an employer required employees to show up thirty minutes before starting time to sharpen tools, an activity for which neither contract nor custom mandated payment. He then asked McCarran whether, if the employer coerced the employees to obey him for fear that they would lose their job, they could recover under McCarran’s bill. McCarran, agreeing that there were many such cases in the United States, was constrained to concede that such workers would be left unprotected. When Senator Cooper, a leading Republican supporter of the majority bill, asked McCarran how his bill then really differed from the majority’s, the latter sought refuge, like Representative Walter, in the spirit of the FLSA. At that point, Senators Cooper and McGrath joined to “make contribution [sic] to the legislative history” by emphasizing that the bill was intended not only to preserve all the protections of the FLSA for the future for activities during the workday proper, but also to create an expansive compensable universe of “principal activities.”

After this comforting exchange, the Senate rejected the McCarran-McGrath amendment 53 to 35. In quick succession the chamber also defeated several other amendments, including one to raise the minimum wage to sixty cents per hour. In an effort to prevent employers from reorganizing work activities in order “to throw all of the nonprincipal activities at the beginning or end of the day” so that “[j]anitorial...services, normally performed by other workers could be

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567 93 Cong. Rec. at 2290.
568 Senator Pepper, perhaps the most radical opponent of portal legislation in the Senate, added that in the South, when “workers are required to be present 30 minutes ahead of time,” economic compulsion reinforced the employer’s demand—as evidenced by the fact that only forty per cent of families in the United States “had total liquid savings of as much as $40.” 93 Cong. Rec. at 2303-2304. Senator Johnston (Dem. S.C.), who had worked in a cotton mill and represented workers in wage and hour suits, offered a concrete example. 93 Cong. Rec. at 2371.
569 93 Cong. Rec. at 2291.
570 Senator Barkley and McCarran may also have been speaking past each other since their colloquy seemed to be based on the assumption that the inquiry concerned past and future claims whereas McCarran’s amendment did not apply to future claims.
571 See 93 Cong. Rec. at 2296-99.
572 93 Cong. Rec. at 2366. Eight Southern Democrats voted with the Republicans against the amendment; the same two Republicans who ultimately voted against the majority bill, supported the amendment.
573 It was defeated 57-32 on a vote to table. 93 Cong. Rec. at 2368-2369 (introduced by Sen Myers, Dem. Pa.). The Senate rejected by a vote of 50 to 39 Holland’s amendment to exclude the Walsh-Healey and Bacon Act from the operation of the bill. 93 Cong. Rec. at 2367.
required of production workers” without compensation, another unsuccessful amendment proposed language permitting portal suits covering preliminary or postliminary activities “normally engaged in during the working day.”

Further factional maneuvering emerged over the issue of the length of the limitations period. Holland, a Southern Democrat backing portal legislation, proposed an amendment permitting applicable state statutes of limitations with periods between one and two years to remain in force on the grounds that they had stifled portal litigation. McGrath responded for the liberal Democrats by noting that the limitations issue was completely extraneous to the portal problem since the majority bill had effectively eliminated such claims for the past. He emphasized instead that a short period would undermine enforcement to the detriment especially of low-paid unorganized workers. He then presented data showing that when FLSA was originally enacted, ninety-five per cent of covered employees worked in states with applicable statutes of limitations of at least three years; and even despite the movement toward shorter state limitations periods, almost three-fifths of covered workers worked in states with periods of at least five years. Thus the two-year period in the majority bill would reduce the rights of eight-eight per cent of all covered workers, while under the House version of one year, ninety-five per cent would lose and none would gain.

After Holland’s amendment was defeated, the liberals sought to maintain the status quo, which was more favorable to employees, by an amendment deleting the limitations period altogether and reinstating applicable state provisions. In an important test of labor’s strength on an issue that related only to the viability of non-portal FLSA rights, more than two-thirds of those voting rejected the amendment.
On the final roll-call vote in the Senate, where 51 Republicans faced 45 Democrats, and all twenty-two Southern senators, representing almost half of the Democratic contingent, were Democrats, the sharp divide along party-sectional lines was only slightly less prominent than in the House. The Senate passed H.R. 2157 on March 21 by a 64 to 24 vote. Forty-six Republicans supported the bill and only two voted nay; all eighteen Democratic supporters were Southerners.

4. Compromise in Conference: Flaying But Sparing the FLSA

Portal-Pay Ban as Finally Passed Is a Paradise for Chiseler

The same day that the Senate passed its version of H.R. 2157, it informed the House that it wanted a conference, which the House on March 25 agreed to hold. The committee of conference issued its report on April 29 recommending a bill that represented an amalgam of each house’s bill. On May 1, 1947, both chambers agreed to the conference report.

By far the most important product of the conference was the abandonment by the House of its undifferentiated treatment of existing and future claims. Had the House prevailed on the key provision in its bill, the FLSA would have been virtually repealed since H.R. 2157, which was not confined to portal claims, eliminated statutory standards in favor of contract, custom, or practice. Violations of the FLSA would then have been reduced to something akin to common-law

Wilson had introduced S. 307, which was the counterpart to the bill introduced by Gwynne, who also represented Iowa, a state whose legislature had pioneered in the field of short limitations periods for the FLSA.


Including one from Maryland. The two Republicans were Aiken of Vermont and Langer of North Dakota. 93 Cong. Rec. at 2375 (1947). Three Southern Democrats opposed the bill, while the most impassioned opponent of the anti-portal legislation, Pepper of Florida, did not vote. The three were Olin Johnston (S.C.), Lister Hill (Ala.), and John Sparkman (Ala.). On the backgrounds of these racist prolabor senators, see Current Biography 1951, at 310 (1952) (Johnston); Current Biography 1943, at 297 (1944) (Hill); Current Biography 1950, at 539 (1951) (Sparkman).


The House managers were Michener, Gwynne, Goodwin (R. Mass.), and Walter; the Senate’s were Wiley, Donnell, Cooper, and Eastland (D. Miss.).


breaches of contract. The Senate bill closely resembled the House bill with regard to existing claims, but differed radically from the House version in restricting the relief that it granted employers from liability for future claims solely to portal claims, which it sought to identify through examples. By adopting the language of the Senate provision virtually intact, the conference salvaged the FLSA.

Yet in incorporating the language of both bills that defined the "custom or practice" that would mandate compensation as that of the individual establishment, the conference rejected testimony that such a criterion would favor bad employers and undermine the uniformity of the FLSA standards and colleagues' recommendations that at the very least an industry-wide standard be applied in order to avoid rewarding unscrupulous employers in perpetuity either through grandfathering in their practices or encouraging them to create "dummy" entities that would be free to establish new practices. Unless many firms in the industries that were the objects of portal suits actually were paying for portal

589 The courts recognized that the all-encompassing nature of the relief that was carried over to § 2 of the Portal-to-Portal Act was not limited to portal claims. E.g., Steiner v. Mitchell, 350 U.S. 247, 255-56 (1956) (dictum); Cities Service Defense Corp. v. Dutton, 240 F.2d 113, 115-17 (8th Cir. 1957), cert. denied, 355 U.S. 828 (1957); Bauler v. Pressed Steel Car Co., 182 F.2d 357 (7th Cir. 1950); Seese v. Bethlehem Steel Co., 74 F. Supp. 412, 416 (D. Md. 1947), aff'd, 168 F.2d 58 (4th Cir. 1948); Miller v. Howe Sound Mining Co., 77 F. Supp. 540 (E. D. Wash. 1948); Kemp v. Day & Zimmerman, Inc., 33 N. W. 2d 569, 591 (Iowa 1948). The only contrary opinion included in the national reporter system was Central Missouri Tel. Co. v. Conwell, 170 F.2d 641, 645 (8th Cir. 1948), which held that because the Portal-to-Portal Act did not repeal the overtime provision of the FLSA, plaintiffs were not required to plead a contract, custom, or practice to support a claim for compensation for nonportal normal worktime. The Eighth Circuit impliedly overruled this decision in Cities Service Defense Corp. The courts were swayed by § 2(d) of the Portal-to-Portal Act, which withdrew from the courts jurisdiction of actions for liability not authorized under § 2(a).

590 Although § 2 of the Senate bill, unlike the House bill, referred to "[r]elief from portal-to-portal claims," § 5 circularly defined "portal-to-portal activities" as meaning "those activities which section 2...provides shall not be a basis of liability" under the FLSA. Since the more substantive illustrations of portal activities in § 6, which governed future claims, did not apply to past claims under § 2, the Senate bill appeared to offer employers relief from all liability for past claims. As the discussion in the text of the Senate debates indicates, the bill's supporters conceded that they had sacrificed existing nonportal claims in order to insure that all existing portal claims were wiped out. The conference report came to the same conclusion. H. Conf. Rep. No. 326 at 9.

591 Ch. 52, § 4, 61 Stat. 84, 86-87.
592 §§ 2(a)(2) and 4(b)(2), 61 Stat. at 85, 87.
593Portal to Portal Wages at 645 (testimony of Arthur Pettit).
activities and thus created an industry-wide standard different from that to which “chiseling” employers adhered, it is puzzling why Congress elected to adopt establishment-based “custom or practice.” Although the fact that the findings and policy section of the conference bill adopted the language in the Senate bill concerning the “gross inequality of competitive conditions between employers and between industries” suggests that members had thought about the issue, its meaning is unclear. Senator Donnell, whose exposition of the bill alone occupied two and one-half days of the Senate’s debate time, cast some light on the matter by stating that, unless Congress took action with regard to future claims, there is grave likelihood of continued inequality of competitive conditions as between employers, and between industries, due to the fact, as between employers, that one employer may have a plant physically so located that his portal time is greater than that of an employer across the street, who because of his physical location, does not find the same necessity for long walking spaces for employees.

Underlying Donnell’s analysis was a conception of plant layout as a kind of natural catastrophe or gift wholly independent of human intervention. If some firms built very large plants whose economies of scale were in part based on the uncompensated time workers had to spend walking across huge internal spaces, such construction design was a conscious investment decision by management. The mere fact that employees could not muster the strength to compel compensation before the enactment of the FLSA, did not create any moral—let alone legal—entitlement on the part of employers to preserve such costless operations under the FLSA. Donnell’s only justification of the employer’s and Congress’s position was a circular or vacuous one:

[I]t is the view of well-informed individuals that there is compensation granted to every employee in the performance of his duties, if in computing the hourly figure or the price per piece of his product, the fact that he did the walking or did the preliminary activities had been taken into account.

Donnell might have lent empirical support to his claims had he actually collected data on wages in plants “across the street” from each other with varying amounts of walking time. If, ceteris paribus, the similarly situated workers with greater portal time actually received higher hourly or piece rates, then the

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595§ 1(a)(3), 61 Stat. at 84.
59693 Cong. Rec. at 2122.
597Even the AFL recognized this state of affairs. See Portal to Portal Wages at 145 (statement of Walter Mason, nat. leg. representative, AFL).
59893 Cong. Rec. at 2090.
proponents of portal legislation would have succeeded in cutting the moral ground from under the CIO's claims. If, as seems more in accord with the real workings of the labor market, such time was not compensated at either plant, then the moral and economic foundations of the employers' position would have collapsed.

The House conferees yielded on another important point—the one-year period of limitations—by accepting the Senate bill's provision of a two-year period for future claims. In addition, the Senate ban on representative actions, to which there was no House counterpart, was adopted in the act. Despite the congressional uproar over the Supreme Court decisions making the compromise of any claims, including liquidated damages, very difficult, the House conferees were also unable to persuade their Senate counterparts to extend the right to compromise to future claims. But the House managers did achieve partial success on a related issue. While the Senate bill had had no provision concerning liquidated damages, the House bill had conferred discretion on a court that found that the employer's violation "was in bad faith and without reasonable ground" to award liquidated damages not to exceed the underlying back wages. The compromise consisted in shifting the burden to the employer to show that his actionable act or omission was in "good faith" and "that he had reasonable grounds for believing" that it did not violate FLSA.

Both bills had had provisions relieving employers of liability where the act or omission in question was in good-faith reliance on an administrative regulation, order, interpretation, or ruling even where such regulation was later judicially

599 § 6(a), 61 Stat. at 87-88. All existing claims had to be filed within the shorter of two years after the cause accrued or the period prescribed by the applicable state statute of limitations. § 6(b). This rule was subject to a grace-period proviso that, if a cause was filed within 120 days of the enactment of the Portal-to-Portal Act, the action could have accrued more than two years earlier if the applicable state limitations period extended that far back. § 6(c).

600 § 8(a).

601 For analysis of the collective action provisions, see below § 8.

602 See below § 7.

603 § 3, 61 Stat. at 86. The Act contained a further limitation found in neither the House nor Senate bill: an existing claim could be compromised only "if there exists a bona fide dispute as to the amount payable" and if the compromise amounts to at least the minimum wage or time and one-half. Id. § 3(a).

604 H.R. 2157, § 2(g).

605 § 11, 61 Stat. at 89. Congressional interest in this issue had been sparked by a judicial ruling that, although it would be "a keen injustice for employers bewildered by strange legislation and confused by divergent authority in the courts" to face additional liquidated damages where their violation had been committed in good faith, such "harshness" was mandatory. Missel v. Overnight Motor Transp. Co., 126 F.2d 98, 111 (4th Cir. 1942), aff'd, 316 U.S. 572, 581-84 (1942). On congressional interest, see H. Rep. No. 71 at 8.
invalidated. 606 The minor differences between them were compromised by not requiring the administrative ruling as to existing claims to be in writing or to be issued by the Wage and Hour Administrator. 607 The managers narrowed the scope of this relief by noting that an employer's reliance on the statement of an individual agency official that was not in fact the agency's interpretation would not affect his liability. 608 Moreover, one of the conferees explained to the House that the defense did not apply where the "employer had knowledge of conflicting rules and chose to act in accordance with the one most favorable to him." 609 A class bias inheres in this good-faith reliance provision since it in effect makes the Administrator's interpretations "binding on employees but not on employers." For while the employer is protected, no employee can "perform certain activities with the assurance that he will be compensated in accordance with the written opinions of the Administrator." 610

5. In Lieu of a Veto: Presidential Legislative History

President Truman took the entire ten days granted him by the Constitution 611 to sign the bill during which he received conflicting advice from his advisers and cabinet members. 612 While his special counsel, Clark Clifford, urged him to veto the bill and to specify the kind of bill he wanted, the Senate Minority Leader, Barkley, convinced Truman that Congress would not approve more favorable legislation. While Secretary of Labor Schwellenbach and the vice chairman of the Council of Economic Advisers, Leon Keyserling, kept urging disapproval, Secretary of Commerce Harriman, Secretary of the Navy Forrestal, and Attorney General Clark all favored approval. 613 In finally signing the bill, Truman, an historian of the Eightieth Congress has argued, was motivated by the political judgment that

606 The provision was contained in § 2(e) of the House bill and § 10 of the Senate bill.
611 Art. I, § 7, cl. 2.
612 During this period a group of liberal reformers and academics, including Elizabeth Brandeis, Paul Douglas, Walter Gellhorn, and Hubert Humphrey, sent Truman a letter in which they couched their opposition to H.R. 2157 in terms of the adverse competitive impact it would have on scrupulous employers. See 93 Cong. Rec. at A2172.
613 Susan Hartmann, Truman and the 80th Congress 44 (1971).
the issue was not one on which substantial public opinion demanded a veto. Unorganized workers were politically inarticulate, and a large part of the population, forgetting about the unorganized workers whom the bill affected, viewed the extravagant portal claims as another attempt by powerful unions to line their pockets at the expense of consumers. Thus Truman found no compelling reason to abandon his conciliatory posture.614

In signing the bill, Truman avoided antagonizing Congress at a time when his foreign policy initiatives were pending, and preserved his option to veto Taft-Hartley. In the event: "Truman’s approval of the portal bill marked the end of his appeasement strategy."615 That end was foreshadowed by what may have been a unique presidential exercise in creating legislative history. In his message to Congress transmitting his approval he instructed Congress (and the courts)616 as to what Congress had meant by certain provisions. In particular Truman insisted that the legislative history of § 4, dealing with future claims,

shows that the Congress intends the words “principal activities” are to be construed liberally to include any work of consequence performed for the employer, no matter when the work is performed. We should not lose sight of the important requirement under the act that all “principal activities” must be paid for, regardless of contract, custom, or practice. I am sure the courts will not permit employers to use artificial devices such as the shifting of work to the beginning or the end of the day to avoid liability under the law.617

Congress was not amused. Even Senator McGrath, a Democratic opponent of the bill and Truman’s former Solicitor General and future Attorney General, found it necessary to inform his colleagues that presidential statements did not become part of the legislative history.618 On a more specific note, Senator Donnell, answering on behalf of the Judiciary Committee, left no doubt that Truman was right about one matter—it was unorganized workers who would bear the brunt of the Act. Donnell observed that if an employee sewing in a factory prior to enactment had not been compensated for the time she spent waiting for the production line to start up again during the day and no contract or custom required

614Hartmann, *Truman and the 80th Congress* at 45-46.
615Hartmann, *Truman and the 80th Congress* at 46.
616One court actually took notice. In Mauro v. Slaughter & Co., 14 Lab. Cas. ¶ 64,299 at 72,720-21 (S.D.N.Y. 1948), the judge cited Truman’s message as authority for the proposition that Congress did not mean to void existing nonportal claims not based on contract, custom, or practice. In fact, Truman did not even take that position.
61893 Cong. Rec. at 6262.
payment, the employer would not be liable for back wages.619

7. The Unwaivability of Liquidated Damages: Statute Trumps Bargaining

[W]e hope that organized labor will realize that wages ought to be adjusted by collective bargaining, not by fantastic proceedings at law, and that this famous issue will be remembered only as a historical curiosity.620

One tension running throughout the congressional and judicial disputes over portal pay involved the relationship of the FLSA to collective bargaining. Although the FLSA was designed to preempt individual or collective adhesion contracts in favor of statutory standards in order to enable workers lacking a strong bargaining position to receive adequate compensation for their work, many member of Congress and the judiciary believed that organized workers were at best inadvertent and marginal beneficiaries of the FLSA.621

Justice Jackson was a prominent advocate of this position. As a coda to his dissent in Jewell Ridge,622 two years later Jackson returned to the subject of the

61993 Cong. Rec. at 7541. He also contradicted Truman on another point that undermined enforcement of the FLSA; an employer did not have to show that he had relied on an affirmative action by an administrative agency: that ruling or policy “may consist solely of the absence of action.” Id.


621See above chapter 1.

622Jewell Ridge Coal Corp. had unsuccessfully petitioned the Court for rehearing on unusual grounds. It challenged Black’s qualification to hear the case both because he had been the most active sponsor of the FLSA as a Senator and because he had been a law partner with respondents’ chief counsel. Petition for Rehearing at 2-3. The chief counsel, Crompton Harris, had also represented the union in Muscoda. Although the Court denied the petition without a statement of the reasons, Jackson, concurring in the denial, wrote that since the Court was without authority to exclude a Justice from sitting in any case, the complaint was improperly addressed to the Court. Jewell Ridge Coal Corp. v. Local No. 6167, UMW, 325 U.S. 897 (1945). Jackson’s irony became apparent a year later when, unable to repress his animus against Black any longer, Jackson, while on leave at Nuremberg as chief prosecutor for the United States, castigated Black for having judged his ex-partner’s case as well as for having (unsuccesfully) tried to influence the outcome of a coal strike by urging Murphy to hand down the decision in favor of the miners without waiting for the opinion or dissent. The press prominently reported on the unusual eruption. “Jackson Attacks Black for Judging Ex-Partner’s Case,” N.Y. Times, June 11, 1946, at 1, col. 6; “Test of Jackson’s Statement Attacking Black,” id. at 2, col. 3; Lewis Wood, “Split of Jackson and Black Long Widening in Capital,” id. at 2, col. 4.
relationship between the FLSA and collective bargaining in a non-portal case, insisting that the FLSA was not intended to regulate labor relations except as to minimum wages and overtime. Instead, under the National Labor Relations Act (NLRA), employers and employees could give expression to their needs and customs. This division of labor could best be effectuated without strife by giving decisiveness in borderline cases either to the NLRA or to the Wage and Hour Administrator’s rulings. In Jewell Ridge, however, the Court, by rejecting both approaches, “foreclosed every means by which any claim, however dubious, under this statute or under the Court’s elastic and somewhat unpredictable interpretations of it, can safely or finally be settled, except by litigation to final judgment.”

Jackson’s irritation had been triggered by two decisions, whose cumulative impact was to preclude employees from ever waiving their rights to liquidated damages under the FLSA by entering into a purely private settlement agreement with an employer for back wages releasing him from all other claims. In Brooklyn Savings Bank v. O’Neil, the Supreme Court resolved “the question whether an employee subject to the terms of the Act can waive or release his right to receive from his employer liquidated damages under § 16(b).” More than two years after termination of the employment, the employer computed the statutory overtime due the worker and offered it to him in exchange for a release of all his FLSA rights. After accepting the money, the worker sued for liquidated damages. In the factually variant companion case of Dize v. Maddrix, the employer, after discharging the worker, tendered him back wages that both parties knew to be less than the minimum and overtime wages due. The worker accepted the money and signed a general release of all his rights under the FLSA. He then hired a lawyer to secure the balance. When the employer tendered that sum before suit was filed, the worker refused it because the offer did not include liquidated damages. In both cases the employers claimed that the release was a defense to the subsequent actions brought solely for liquidated damages.

Before proceeding to the central issue, the Court examined the question of whether the releases were “given in settlement of a bona fide dispute between the parties with respect to coverage or amount due under the Act or whether it constituted a mere waiver” of FLSA rights. Because the Court decided that “the release was not given in settlement of a bona fide dispute between employer and

624 Jackson voted with the majority in the first and did not participate in the second.
625 And the companion case of Dize v. Maddrix, 324 U.S. 697 (1945).
626 324 U.S. at 699.
627 324 U.S. at 700.
628 324 U.S. at 701-702.
employee," it did not reach the issue of "what limitation, if any, § 16(b) of the Act places on the validity" of a settlement made "in consideration of a bona fide compromise...."

The pertinent statutory language of § 16(b) read as follows:

Any employer who violates the provisions of § 6 or § 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation...and in an additional equal amount as liquidated damages.

In the absence of specific consideration and resolution of the issue by Congress, the Court explored the broader legislative policy behind the provision. Generally the FLSA "was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required Federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency...." The court was of the opinion that the same policy considerations that prohibited waiver of statutory wages by agreement on the grounds that it "would nullify the purposes of the Act," "also prohibit waiver of the employee's right to liquidated damages." The Court then sketched a very expansive view of the congressional purpose behind the provision of liquidated damages as a recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living "necessary for health, efficiency, and general well-being of workers"...that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being. Employees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their well-being and efficiency until such sums are paid at a future date. The same policy which forbids waiver of the statutory minimum...requires that reparations to restore damage done by such failure to pay on time must be made to accomplish Congressional purposes. Moreover, the same policy which forbids employee waiver of the minimum statutory rate because of inequality of bargaining power, prohibits these same employees from bargaining with their employer in determining whether so little damage was suffered that waiver of liquidated damage is called for.

The Court also emphasized that the "private-public character" of the right to liquidated damages precluded waiver, which would undermine the intended "deterrent effect": "Knowledge on the part of the employer that he cannot escape

629 324 U.S. at 703.
630 324 U.S. at 714.
631 324 U.S. at 706.
632 324 U.S. at 707.
633 324 U.S. at 707-708.
liability for liquidated damages by taking advantage of the needs of his employees tends to insure compliance in the first place." Finally, the Court recurred to the fact that one of the FLSA’s functions is to protect employers that can maintain profitability without having to resort to certain kinds of exploitation from wage-chiseling competitors: “An employer is not to be allowed to gain a competitive advantage by reason of the fact that his employees are more willing to waive claims for liquidated damages than are those of his competitor.”634 Thus even where he has paid all back wages but in an untimely fashion, “the employer shall be liable for liquidated damages in an amount equal to minimum wages overdue; liability is not conditioned on default at the time suit is begun.”635

The following term the Court seized the opportunity to revisit the issue that had been left open in Brooklyn Savings Bank. Making very short shrift of the employer’s argument, it held that “the remedy of liquidated damages cannot be bargained away by bona fide settlements of disputes over coverage” or hours of work or rates of pay.636 In support the Court cited the reasoning of Brooklyn Savings Bank. Specifically:

the purpose of the Act, which...was to secure for the lowest paid segment of the nation’s workers a subsistence wage, leads to the conclusion that neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage. Such a compromise thwarts the public policy of minimum wages, promptly paid...by reducing the sum selected by Congress as proper compensation for withholding wages.637

Extending that incompetence from individual workers to organized labor, did not, in Jackson’s view, redound to the latter’s benefit; as he had written in dissent in Jewell Ridge, it was “hard to see how the long-range interests of labor itself are advanced by a holding that there is no mode by which it may bind itself to any specified future conduct, however fairly bargained.”638 The subtext here was that while the pro-labor majority of the Court may have intended to confer a benefit on

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634324 U.S. at 710.
635Id. at 711.
637328 U.S. at 116. In dictum the Court modified the absolute quality of the ineffectiveness of waivers by noting that “the requirement of pleading the issues and submitting the judgment to judicial scrutiny may differentiate stipulated judgments from compromises by the parties.” Id. at 113 n.8. In a later case it was held that once a claim goes to final judgment, the employee can compromise by accepting his full back wages and attorney’s fees but only nominal liquidated damages where the employer is insolvent. Bracey v. Luray, 68 F. Supp. 701 (D. Md. 1946), aff’d, 161 F.2d 128 (4th Cir. 1947), cert. denied, 332 U.S. 790 (1947).
638325 U.S. at 195.
unions by permitting them unilaterally to avoid collective bargaining agreements that did not comply with the overtime provisions of the FLSA, this one-sided flexibility would eventually provoke damaging countervailing measures by management.

Coming on the eve of congressional debate on the portal-to-portal bill in February 1947, Jackson's concurrence in *Portland Terminal* served to remind Democrats that it was now legitimate for New Dealers to question the pro-union bias of the Court. Such doubts were particularly apposite where the Court sought to clothe "a powerful group so plainly outside of the policy of the Act" with a "coat [that] ill fits the United Mine Workers." The dissenters' tenaciously propagated position—that organized workers were at best inadvertent and marginal beneficiaries of the FLSA whose statutory claims should be taken cum grano salis—underlay much of the advocacy by large capital and the Republican congressional majority of restrictive portal-pay legislation. Large northern manufacturing corporations, which had initially acquiesced in the FLSA in the belief that its minimal standards would have no impact on their wage policies or operations, had been organizing resistance to its overtime provision since 1938. When the CIO began filing portal-pay overtime suits against them, these employers finally succeeded in teaching unions a lesson in expeditious legislative overruling.

The Portal-to-Portal Act eventually granted employers a limited defense against mandatory liquidated damages. Where an employer can show "that the act or omission giving rise to such action was in good faith and that it had reasonable grounds for believing that its act or omission was not a violation of" the FLSA, the court has discretion to award less than full liquidated damages. In a suit solely for liquidated damages, the "act or omission" in question would refer to the failure or refusal to pay liquidated damages. If the late payment of wages was unreasonable or not in good faith, then the award of liquidated damages would be automatic and ministerial. If, however, the employer could show good faith and reasonableness with regard to the late payment of wages, then he could a fortiori

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639 Jewell Ridge Coal Corp., 325 U.S. at 192 (Jackson, J., dissenting).
640 And unwittingly confirmed by the Houck letter.
641 See above chapter 1.
643 Presumably demand for payment of liquidated damages would be no more a prerequisite for filing suit than demand for back wages. "A right to sue for compensation vests whenever the pay period passes and the employer fails to pay the amounts required by law. Thereafter nothing further need happen. The cause of action has matured." S. Rep. No. 48 Part 2: Exempting Employers from Liability for Portal-to-Portal Wages in Certain Cases, 80th Cong., 1st Sess. 5 (1947).
show them with regard to the failure to pay liquidated damages—although even then the court would have discretion to award full liquidated damages.

Even after enactment of the portal legislation, Congress remained concerned about the declining volume of voluntary restitution of back wages. Of the causes of this decline:

Undoubtedly one of the most important...is the fact that an employer who pays back wages which he withheld in violation of the act has no assurance that he will not be sued for an equivalent amount plus attorney’s fees under the provisions of section 16(b) of the act. One of the principal effects of the committee proposal will be to assure employers who pay back wages in full under the supervision of the Wage and Hour Division that they need not worry about the possibility of suits for liquidated damages and attorney’s fees.644

Consequently, Congress again amended the FLSA in 1949 to provide for involvement by the DOL:

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee..., and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b)...to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages.645

In the end, then, provided that workers avoid intercession by the DOL,646 no waiver or release given in a purely private agreement with the employer can be effective.647 Congress, then, contrary to Jackson’s view, appears to have realized that statutory norms should take precedence over contract.

8. The Elimination of the Class Action That Never Was

[If we were to enact this legislation...it would probably be the greatest boon to labor unions they have had in many years, because it would force the unorganized employees to

646Where a worker signed a receipt and accepted the check tendered by the employer for the amount determined by the DOL to be owed and then, on advice of counsel returned the check without having cashed it, it was held that the waiver was effective. Sneed v. Sneed’s Shipbuilding, Inc., 545 F.2d 537 (5th Cir. 1977).
647Lynn’s Food Stores, Inc. v. United States, 679 F.2d 1350 (11th Cir. 1982).
join a union in order to get a contract and therefore protect their rights.\footnote{\textsuperscript{662}}

The Portal-to-Portal Act has exerted its most decisive and lasting impact on capital-labor relations in the unorganized sector by prohibiting the use of what today are called opt-out class actions. This result is ironic because the unions had not conducted the portal litigation in the form of such class actions—although congressional animus against that procedural form was based on the mistaken impression that they had done so. Moreover, the prohibition has not vitally injured unions, which can continue to resolve FLSA-type claims collectively through a grievance-arbitration system, whereas unorganized workers, deprived of the opt-out class action, are remitted to a very ineffectual means of pressuring employers to comply with the FLSA. Further irony inheres in the fact that this empirically unfounded congressional action laid the basis for excluding the FLSA claimants from the benefits of the expanded class action procedures introduced by the Federal Rules of Civil Procedure twenty years later.

The original FLSA of 1938 provided for two varieties of collective actions. For violations of the minimum wage or overtime provisions an action could be maintained

by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated.\footnote{\textsuperscript{663}}

The development of such actions under the FLSA was hampered by a judicial bias against this procedural innovation as well as by the courts' perplexity as to whether actions brought pursuant to § 16(b) were additionally subject to the limitations of Rule 23(a) of the Federal Rules of Civil Procedure,\footnote{\textsuperscript{664}} which had gone into effect only the month before FLSA in 1938.\footnote{\textsuperscript{665}} Rule 23 provided at that

\begin{quote}
\textsuperscript{662}93 Cong. Rec. at 2374 (Senator Aiken).
\textsuperscript{663}Ch. 676, § 16(b), 52 Stat. 1060, 1069 (1938).
\textsuperscript{664}See, e.g., Lofther v. First Nat. Bank of Chicago, 45 F. Supp. 986 (N.D. Ill. 1941). Smith v. Stark Trucking, Inc., 53 F. Supp. 826, 828 (N.D. Ohio 1943), was unusual in recognizing that "it would be purposeless to discuss the question whether this is a true class action as prescribed in Rule 23.... Confusion might arise from an unnecessary discussion of the applicability of Rule 23. The question for decision is: Does the instant suit follow the pattern delineated in the Act itself?"
\textsuperscript{665}The Federal Rules of Civil Procedure went into effect three months after the adjournment of the second regular session of the seventy-fifth Congress. Fed. R. Civ. P. 86, as published in 308 U.S. 645, 766 (1939). The third session (which was the second regular session) of Congress adjourned on June 16, 1938. See 82 Cong. Rec. 3 (1937); 83 Cong. Rec. 9612, 9699 (1938). The Rules therefore went into effect Sept. 16, 1938. The minimum
time that, where the requirements of numerosity and adequacy of representation were met, so-called spurious class actions\textsuperscript{666} could be brought "when the character of the right sought to be enforced for or against the class is...several, and there is a common question of law or fact affecting the several rights and a common relief is sought."\textsuperscript{667} Because judgments in spurious class actions included only those who intervened before a trial on the merits, "no material advantage" would have accrued to employees from bringing the FLSA actions pursuant to Rule 23(a)(3).\textsuperscript{668} Indeed, doubt attached to whether suits under the FLSA even rose to the level of spurious class actions inasmuch as the "common question" or "common relief" might be lacking; they might, it was said, merely be amenable to permissive intervention.\textsuperscript{669}

In determining whether the FLSA expansively authorized the "virtual representation" of unnamed employees\textsuperscript{670} or was merely designed to enable relatively impecunious workers to avoid unnecessary litigation costs by "join[ing] a series of separate law suits into one proceeding,"\textsuperscript{671} courts were ostensibly guided

wage and maximum hours provisions of the FLSA went into effect on October 24, 1938, 120 days after its date of enactment (June 25, 1938). \textit{See} ch. 676, §§ 6(b) and 7(d), 52 Stat. 1060, 1063, 1064 (1938). As late as March 1947, an employer, arguing that § 16(b) had gone into effect on June 25, 1938, moved to dismiss a representative action on the grounds that § 16(b) conflicted with and had been repealed by Rule 23(a). The motion was denied. McNichols v. Lennox Furnace Co., 7 F.R.D. 40, 41-42 (N.D.N.Y. 1947).

\textsuperscript{666}Original Rule 23(a) distinguished among true, hybrid, and spurious class actions. The first is one in which "but for the class action device the joinder of all interested persons would be essential." James Moore and Marcus Cohn, "Federal Class Actions," 32 \textit{III L. Rev.} 307, 314 (1937). The second group involves a specific property, but the members' interests are several. In the spurious class action, a common question of law or fact unites the class, but the members' rights are several. Moore, who was the research assistant to the reporter for the Advisory Committee on Rules for Civil Procedure, drafted an unadopted version of Rule 23 that specifically provided that the judgment would be conclusive on the class in true class actions, but only on the parties in the other two. \textit{See} James Moore, "Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft," 25 \textit{Geo. L.J.} 551, 571 (1937); James Moore and Marcus Cohn, "Federal Class Actions—Jurisdiction and Effect of Judgment," 32 \textit{III L. Rev.} 555, 556 (1937).


\textsuperscript{668}Rufus Poole, "Private Litigation under the Wage and Hour Act," 14 \textit{Miss. L.J.} 157, 165 (1942) (ass't solicitor, DOL).


\textsuperscript{670}Kuligowski v. Hart, 2 Wage & Hour Cas. 931, 934 (Ohio C.P., Cuyahoga County, 1942).

by their solicitude for the rights of employers and of unnamed plaintiffs. The more radical position rejected the legitimacy of any class action by denying Congress the power "to force one to become a plaintiff against his will or without his consent, or to select for him an agent or attorney to represent him."

The more moderate position merely denied that Congress intended to permit the adjudication or preclusion of claims without an employee’s knowledge. The other due process barrier to judicial acceptance of class actions (whether under the FLSA or not) was the notion that it "just isn’t cricket" "to afford the absentees all the benefits of winning but to impose upon them none of the burdens of losing." In other words, it was not fair to the defendant to permit members to participate after a decree had been rendered "even though, had the suit been unsuccessful, they would not have been bound by it." Despite the lack of "complete symmetry between binding the defendant to a favorable decree and binding the absentee to an unfavorable decree," the courts took a very dim view of such one-way intervention. Consequently, even before the 1947 amendments, the courts limited participation in the FLSA actions to named plaintiffs, intervenors, and consenter who joined the action before the trial on the merits.

Possible movement toward a conception of class actions under the FLSA that might have transcended the scope of Rule 23(a)(3) emerged when an early

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675Kalven and Rosenfield, “The Contemporary Function of the Class Suit” at 711.
676Kalven and Rosenfield, “The Contemporary Function of the Class Suit” at 713. Kalven and Rosenfield explained the difference this way: “[T]he defendant has been afforded his day in court; he has had the opportunity to present his case fully in his own right, and he has lost. He has no more reason to relitigate the entire controversy against the absentee members than he has to do so against the immediate plaintiff. But it cannot be said that the absentee has had his day in court to a comparable degree. ... The defendant cannot properly complain about the way in which he is treated; he can complain only that the absentees are not subjected to the risk of losing the case. But to the extent that the risk of losing would be greater on them because they are merely represented, it is only fair that they are not equally subjected to that risk.” Id. To the extent that the representation was adequate (and free), this argument appears to have justified the need for opt-out class actions rather than for one-way intervention. G.W. Foster, Jr., “Jurisdiction, Rights, and Remedies for Group Wrongs Under the Fair Labor Standards Act: Special Federal Questions,” 1975 Wisc. L. Rev. 295, 325, supported the Kalven-Rosenfield position.
677Roberts v. Western Airlines, 425 F. Supp. 416, 419 (N.D. Cal. 1976) (one of primary purposes of 1966 amendments of the Federal Rules of Civil Procedure “was to eliminate this type of ‘one way intervention’ in spurious class actions”), indicates that this view has survived.
influential district court decision, *Shain v. Armour & Co.*, held that general principles of class actions that disqualified suits in which claims were distinct and the subject of independent suits, even though a common question of law was involved, did not govern the FLSA because they would have nullified § 16(b). But the court quickly stifled such a possibility by holding that only where the interests of the named and unnamed plaintiffs were so common and united as to entitle the former to stand in judgment for the latter would constitutional due process requirements permit making the judgment res judicata for the whole class. FLSA cases, however, did not meet that requirement because “different members of a class are free to either assert rights or to challenge them as their individual judgments dictate and the interests of the representatives of the class are not necessarily or even probably the same as those whom they are deemed to represent.”

The cogency of this ruling was weakened by the observation that if fairness was the problem, the threshold requirement of adequate representation would have avoided it. For those not adequately represented would not have been bound. The inability of the class representative to demonstrate typicality of claims would have compelled the same result. The *Shain* court’s ruling on the unnamed class members’ freedom to join or not could have formed the basis of a notice and opt-out procedure that would have addressed the judicial antipathy to one-way intervention. In the event, even before the Portal-to-Portal Act eliminated whatever expansive potential FLSA class actions may ever have had, the courts in non-portal litigation had almost unanimously opted for this restrictive approach, confining

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67940 F. Supp. at 490.


681Only one (semi-reported) decision appears to have approved the bringing of a FLSA action on behalf of other employees without naming them on the grounds that the “Act was intended to and does link together all employees who are not paid according to its provisions and as to them creates a question of common interest. Each is given the right to have his claim presented in the action of a fellow employee.” Clint v. Franklin Bargain House, Inc., 1 Wage & Hour Cas. 1068, 1071, 20 Oh. Op. 196 (C.P. Lucas County, 1941). Intriguingly, the plaintiffs’ counsel was Edward Lamb, who represented the workers in Mt. Clemens Pottery Co. Another semi-reported Ohio case in obscure language permitted a FLSA action to go forward on behalf of undisclosed others. Potts v. Stedman Co., 2 Wage & Hour Cas. 884, 22 Oh. Op. 488 (C.P. Athens County, 1942). In Cissell v. Great Atlantic & Pacific Tea Co., 37 F. Supp. 913, 914 (W.D. Ky. 1941), an individual plaintiff, who, though unnamed, had shared in a settlement in a previous case, sued the employer for an additional amount on the grounds that the previous judgment “was not binding as to him because he was not a party to that suit and...the settlement was agreed upon in fear of losing his job.” The court held that the settlement was “binding upon him as one of the class for whom the plaintiff professed
and assimilating such actions to the mere device for permissive joinder\textsuperscript{683} that spurious class actions had been designed as under the original Rule 23(a).\textsuperscript{684} The most capacious gloss the courts were willing to put on workers' § 16(b) rights was the Third Circuit's holding that even subject to the aforementioned limitations, the spurious class action implemented an important statutory purpose insofar as "employees, if they wish, can join in their litigation so that no one of them need stand alone in doing something likely to incur the displeasure of an employer. It brings something of the strength of collective bargaining to a collective lawsuit."\textsuperscript{685}

For a comprehensive overview of the case law, see Pentland v. Dravo Corp., 153 F.2d 851, 853-56 (3d Cir. 1945).

\textsuperscript{685}See 2 James Moore and Joseph Friedman, Moore's Federal Practice § 23.04-(3) at 2241 (1938).

Chafee does not appear to have been aware of the Portal-to-Portal Act and its consequences for class actions under the FLSA. For an earlier use of the notion of invitation in a non-FLSA context, see William
Against this precedential background it is scarcely surprising that
a reading of the opinions in the period leaves one suspicious that attorneys for plaintiffs
in these private representative actions lacked the resources or the time to frame up
suggestions, built around available precedents, that could have led to effective
implementation of the representative actions authorized in section 16(b).686

Employees’ attorneys did indeed prosecute the portal litigation in a very
conservative manner. One of the leading plaintiffs’ attorneys indicated that, to the
best of his knowledge, all the suits were filed as opt-in collective actions because
counsel, uncertain how far the courts would let them push FLSA class actions,
which were an innovation even under the Federal Rules of Civil Procedure, were
reluctant to embarrass themselves.687

The opt-in approach may also simply have been dictated by the fact that
virtually all of the portal suits were brought by unionized workers as representative
actions naming a union official as the representative, who was not required to be
an affected employee or a real party in interest.688 Those members who wished to
name the representative as their agent had to sign authorization cards, which were
filed with the complaint.689 Recovery then ran only to those filing authorizations.690
The outright prohibition of these representative actions under the Portal-to-Portal
Act,691 even though they had been rather cumbersome procedural devices, was

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Blume, “The ‘Common Questions’ Principle in the Code Provision for Representative Suits,”

686Foster, “Jurisdiction, Rights, and Remedies for Group Wrongs Under the Fair Labor
Standards Act” at 324 n.103.


688Lee Pressman, the CIO general counsel who coordinated the portal litigation, testified
before Congress that he knew of no portal suits brought by unorganized workers. Regulating
No. 2 of the House Comm. on the Judiciary, 80th Cong., 1st Sess. 166 (1947).

689Thus when Pressman filed a portal suit against Bethlehem Steel, he attached a 535-page
“brief” containing the names of 13,000 workers. “Bethlehem Sued for $200,000,000,” N.Y.
1, 1947, at 2, col. 6 (court ruling that unless union submits signed declarations of 5,286
employees of Campbell Soup Co. within twenty days, they will be dismissed).

690Regulating the Recovery of Portal-to-Portal Pay, and For Other Purposes: Hearings
Before Subcommittee No. 2 of the House Committee on the Judiciary, 80th Cong., 1st Sess.
175 (1947) (testimony of Lee Pressman).

691The Portal-to-Portal Act amended § 16(b) by eliminating the grant of authority to file
representative actions. Ch. 52, § 5(a), 61 Stat. 84, 87 (1947). The repeal did not affect
pending representative actions. Id. § 5(b).
Moments Are the Elements of Profit

clearly designed as an attack on union-organized litigation.692

The driving force behind the congressional animus against class actions in 1947 was expressed most clearly by the Senate floor leader, Senator Donnell, in explaining the Senate bill to the members. He justified the prohibition of representative actions on the grounds that an “outsider, perhaps someone who is desirous of stirring up litigation without being an employee at all,” might create “unwholesome champertous situations.”693 To collective actions Donnell had no objections—provided that consents were filed. The need for consents he explained by way of a story involving an employee who files a suit on behalf of himself and all other employees of the United States Steel Corporation; three years later, after the statute of limitations has run, some of the employees come forward and say: “Now, we will ratify what this man did in filing suit for us 3 years ago, and although we would be barred by limitations if we filed our suit ourselves at the time we now come into court, nevertheless, since he instituted the suit for us 3 years ago, we now join in that suit.”694 Donnell found such a situation unfair because such employees would not have had any obligation before entering. Once the new consent provision became operative, it would no longer “be possible for 10,000 men to wait 3 years, with the employers not knowing how many thousands of dollars or millions of dollars...of claims will be asserted against them” and then to come forward after they would otherwise have been time-barred. For Donnell, then,

obviously...this is a wholesome provision, for it is certainly unwholesome to allow an individual to come into court alleging that he is suing on behalf of 10,000 persons and actually not have a solitary person behind him, and later on have 10,000 men join in the suit, which was not brought in good faith, was not brought by a party in interest.695

Certainly there is not injustice in that, for if a man wants to join in the suit, why should he not give his consent, in writing...?695

This entire line of argument makes sense only if interpreted as motivated by

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692See Note, “Fair Labor Standards under the Portal to Portal Act,” 15 U. Chi. L. Rev. 352, 360 (1948). The Supreme Court got this piece of history wrong when it recently stated that the Portal-to-Portal Act abolished representative actions in part in response to “excessive litigation spawned by plaintiffs’ lacking a personal interest in the outcome” and required employees to file written consents. Hoffmann-LaRoche, Inc. v. Sperling, 110 S. Ct. 482, 488 (1989). It was not such bogus litigation that Congress meant to eliminate, but rather lawsuits in which unions all too diligently signed up all too many members.

69393 Cong. Rec. at 2182. Although Donnell did not state openly that he had unions in mind, Senator McGrath asked him whether the NAM engaged in champerty when it informed members of recent Supreme Court rulings entitling them to certain rights. Id. at 2093.

69493 Cong. Rec. at 2182.

69593 Cong. Rec. at 2182.
How Working Off the Clock Came to Be Legal

a general animus against what in 1966 became Rule 23(b)(3) class actions. For discovery and the plaintiff's own affirmative duties to prove numerosity, typicality, and adequacy of representation in connection with the motion for class certification, would bring to light all the information about which, Donnell complained, the disingenuous litigant was intentionally keeping the employer in the dark. With such protections in place, the basis of the policy supporting the restrictions on opt-out class actions in the Portal-to-Portal Act collapses.

In the event, the Portal-to-Portal Act outlawed opt-out class actions by inserting a requirement that written consents be filed:

The second sentence of section 16(b) of the Fair Labor Standards Act...is amended to read

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696 Thus Senator McGrath, whose knowledge appears to have been formed solely by newspaper accounts, charged that the portal suits were "representative of thousands or perhaps even millions of Americans who do not even know they are represented." 93 Cong. Rec. 2250 (1947). Although McGrath appears to have been misinformed, even if he had been correct, his accusation amounts to nothing more than a bias against Rule 23(b)(3) class actions. In her zeal to advocate an expansion of class actions under the FLSA, one author has misunderstood the radical character of the Portal-to-Portal Act. The amendments were not designed to address "[t]he confusion surrounding the binding effect of class actions judgments" or to clarify the procedures; nor is it the case that Congress did not intend to limit non-representative class actions. See Barbara McAdoo, "The Class Action Notice Under the FLSA: Denial is a Threat to Effective Remedies in ADEA Actions," 91 Dick. L. Rev. 357, 361, 369 (1986). On the contrary, Congress knew exactly how the CIO had used class actions and wanted to prevent any repetition. Elizabeth Spahn, "Resurrecting the Spurious Class: Opting-In to the Age Discrimination in Employment Act and the Equal Pay Act through the Fair Labor Standards Act," 71 Geo. L.J. 119, 129-30 (1982), similarly underestimates the restrictive political-economic motivations underlying introduction of the mandatory opt-in provision. This repressive intent is accurately depicted in Dolan v. Project Constr. Corp., 725 F.2d 1263, 1266-67 (10th Cir. 1984).

697 Or as an early FLSA case held with regard to named class members: "If the evidence does not sustain the allegation that the other plaintiffs are similarly situated..., they will be dismissed...." McReynolds v. Louisville Taxicab & Transfer Co., 5 F.R.D. 61, 62 (W.D. Ky. 1942).


699 Walter Gellhorn, a law professor at Columbia University, misunderstood the meaning of the prohibition on assignment of claims in the Gwynne bill, which he interpreted as barring the pooling of claims. N.Y. Herald Tribune, Feb. 28, 1947 (letter), reprinted in 93 Cong. Rec. A927-28 (1947). This provision, which reappeared as § 2(e) of the Portal-to-Portal Act as applied only to existing claims, was designed merely to make it "impossible for anyone (even though permitted to do so under State law) to buy existing claims which were not compensable under contract, custom, or practice, with the hope of compromising such claims at a profit...." H. Conf. Rep. No. 326: Portal-to-Portal Act of 1947, 80th Cong., 1st Sess. 11 (1947).
as follows: "Action to recover such liability may be maintained...by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."  

Ironically, employees might have been better situated had Congress totally abolished class actions under the FLSA in 1947. For when the class action provisions of the Federal Rules of Civil Procedure were liberalized in 1966, an opportunity was lost to lay the groundwork for the rehabilitation of class actions under the FLSA. If the collective action provision of the FLSA had been repealed, Rule 23(b)(3) would have created parity between employees under the FLSA and other litigants. But the Advisory Committee made it clear that the amendments were not intended to affect § 16(b) of the FLSA.

One scholar has taken the position that the Advisory Committee acted wisely "because the cumbersome procedure for determining the scope of judgment in advance of deciding...the employer’s liability under the Act would be no improvement over the group remedies available now to the Secretary of Labor under section 16(c) and section 17 of the Act." This judgment rests on an overestimation of the efficacy of enforcement by the DOL. Moreover, both the absolute and relative volume of DOL litigation has plummeted catastrophically since the early 1970s. As seen in Table 3-2, the number of FLSA cases filed by the DOL peaked at 1,721 in 1970; by 1997, it had shrunk by 92 percent to a mere 143. Since the overall volume of FLSA filings declined by only 25 percent (from 2,176 to 1,633) during those years, the DOL’s share fell from 79 percent to 9 percent.

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700 § 5(a), 61 Stat. at 87. A separate rule governed the applicability of the new statute of limitations to pending collective actions was provided for in § 8 of the Portal-to-Portal Act.

701 In explaining the new rule for determining when an action begins for purposes of the statute of limitations, the conference committee spoke of “a collective or class action” interchangeably, merely distinguishing “a collective action” as one “brought by an employee or employees for and in behalf of himself or themselves and other employees similarly situated” from “a class action” as “described in Rule 23 of the Federal Rules of Civil Procedure.” H. Conf. Rep. No. 326 at 14. Such language misleadingly creates the impression that litigants could elect between the two procedures. In referring to “a collective or class action instituted under” the FLSA, however, § 7 of the Portal-to-Portal Act itself suggests that the two terms are used synonymously. The federal courts are in agreement that class actions brought under Rule 23 and the FLSA are “mutually exclusive and irreconcilable.” La Chapelle v. Owens-Illinois, Inc., 513 F.2d 286, 289 (5th Cir. 1975).


703 Foster, “Jurisdiction” at 342.

704 Calculated according to data in Annual Report of the Director of the Administrative
Gauged against this background of inaction, the warning that the Wage and Hour Administrator issued to the NAM in 1940 seems almost comic:

The day I was sworn in...I issued a statement which was widely published. It advised employers to “put their houses in order” because this law was going to be enforced.

I warned employers to straighten themselves out under this law before amounts due their workers accumulated to financially embarrassing sums. ...

If you are not sure that you are in compliance with this law...my advice to you is make sure.

Because our inspector will soon be around. ... Enforcement of this act is as certain as death or taxes.

I commend this law to you. Its provision of a 40-hour week with an overtime penalty is enforcing the employment of America. And the minimum wage is filling many a Christmas stocking that otherwise would have hung empty.705

Experience in representing very low-paid employees with high turn-over rates such as migrant farm workers indicates that it is precisely such workers, whom the DOL fails to reach, whose peripatetic living conditions frequently disable them from opting in to class actions. Yet only if Congress—like some states706—makes opt-out class actions available to such workers, thereby overcoming the restrictive individualistic framework imposed by the consent requirement,707 can the original vision of joint public-private enforcement of the FLSA708 come into its own.

9. Lessons and Consequences

In the field of wage legislation, the Portal-to-Portal Pay Act is as severe a blow to workers’ rights as the Taft Hartley Act is in the field of industrial relations.709

What can be learned from the struggle over portal-to-portal pay? Was Senator Aiken, one of two Senate Republicans to vote against the bill, right in saying “that labor was extremely unwise in starting the portal-to-portal suits...for the purpose...”

Office of the United States Courts, Table C 2 (various years).

705Philip Fleming, Address Before the NAM, New York City, Dec. 12, 1940, in 86 Cong. Rec. at A6963, A6965 (1940).


708Kalven and Rosenfeld, “The Contemporary Function of the Class Suit” at 721.

of embarrassing the employer, and with the mistaken idea that the union was going to make bargaining capital out of it." It is not clear that the CIO instigated the litigation campaign. It is just as plausible that unions, in response to a growing demand by industrial workers for back wages in the wake of the Supreme Court Mt. Clemens decision, sought to reshape an otherwise uncoordinated proliferation of suits into a bargaining tradeoff for higher wages. But regardless of whether the unions’ role was primary or mediatory, they bear the historical responsibility for failing to anticipate the outcome.

By offering employers, including the country’s largest industrial corporations, a motive and a basis for attacking the FLSA frontally, the CIO unwittingly undermined whatever political-economic momentum had built up during the war for expanding the scope and coverage of the Act. Thus employers succeeded not only in delaying an increase in the minimum wage until 1950 and scuttling organized labor’s more far-reaching amendments proposed during the 79th Congress, but also in enacting their own agenda for defusing the FLSA’s potential for inflicting significant financial losses on employers. Employers were able to achieve this end through the abbreviated limitations period and the effective elimination of class actions. The latter was particularly important because, in addition to their economic impact, class actions could have served as vehicles for politically mobilizing unorganized workers around issues of basic working conditions—including that of who controls the length of the compensable working day.

Even if it were unfair to categorize Mt. Clemens under the heading, Hard Cases Make Bad (Statutory) Law, union leaders and counsel should nevertheless have taken greater care to distinguish between the theatrical-symbolic and the monetary-redistributional goals of the litigation. Had they emphasized this distinction to employers, workers, legislators, and the public at large, unions could have exerted greater leverage over the early postwar wage-bargaining process. Such a campaign would, hindsight teaches, have benefited immensely from two tactical innovations. First, if the chief purpose was to improve working conditions in the long run, litigation should have focused on prospective relief. Not only would this approach have completely eliminated the basis of the financial hysteria and moral indignation that employers and legislators were able to project so effectively, it would also have sustained a much more sympathetic political movement. This focus on better working conditions could have been coordinated with the second tactic—bringing a test case, with facts considerably more egregious than those in Mt. Clemens, requesting prospective declaratory relief. The very lengthy and

710 Cong. Rec. at 2372, 2098.
711 Although the workers did not bring these suits on their own, the mere fact that the unions filed the suits for the workers does not resolve the issue of who induced whom.
hazardous walking time in the steel mills might have been the ideal vehicle. David McDonald, the then secretary-treasurer and later president of the United Steel Workers, painted such a vivid picture for the House Judiciary Committee of the long and dangerous walk that steelworkers were required to take, across railroad tracks and under overhead cranes, from the plant gate to the open hearth that he succeeded in prompting even Representative Gwynne to acknowledge that he advocated payment for many of the activities. Significantly, McDonald stressed that in such large and highly integrated plants firms "have wrung from the workers an increased contribution to the companies' profits." In the end, without any congressional intercession on which to rely, large corporate employers might have been forced not only to acquiesce in future portal pay (or equivalent arrangements), but also to concede greater wage increases in exchange for an understanding that unions would bring no suits for back portal wages. In this connection, the CIO should have generously offered to sponsor the FLSA amendment that Lee Pressman had proposed—that FLSA compromises be permitted within the framework of bona fide collective bargaining.

The opportunistically instrumental attitude that the CIO and its constituent unions adopted toward the FLSA deprived them of the long-term strategic perspective that could have contributed to a transformation of the FLSA from a minimally intrusive regime into one that might have intervened much more significantly into managerial prerogatives in the nonunion sector. Because they failed to recognize the ultimate stakes as the NAM and large industrial capital did, the unions were unable to structure the portal litigation in such a way as to raise the issue expressly of what was compensable work and who made that determination. The reason for this failure lay in the CIO's ambiguous attitude toward the FLSA. Like the large unionized employers, the industrial unions had viewed that statute as largely directed at aiding the low-paid in their struggles with their chiseling employers. Because the CIO either subordinated the portal suits to its postwar bargaining campaign or viewed them as an expeditious and relatively costless means of securing back wages to compensate for current inflation, it failed to develop a sustained interest in an incremental litigation strategy that would have

713 See Regulating the Recovery of Portal-to-Portal Pay, and For Other Purposes: Hearings Before Subcommittee No. 2 of the House Committee on the Judiciary, 80th Cong., 1st Sess. 103-105, 109-10, 112 (quote) (1947). Senator Pepper stated that when he worked in a steel mill, he had had to walk three-quarters of a mile from the gate to the workplace, which he thought should have been compensable. 93 Cong. Rec. at 2306.

714 See above § 6. In the continued absence of such a statutory provision, the Supreme Court has held that, because, even under a collective bargaining agreement, FLSA rights devolve on employees as individuals rather than as members of a labor union, they are neither waivable nor barred by previous unsuccessful submission to arbitration. Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 739-46 (1981).
tested the outer limits of the FLSA.

Had the unions proceeded in this fashion, confining themselves to prospective relief, they might have been in a position to settle the principle that the decision as to when and where the workday begins was not only not within the discretion of the employer, but was not even committed to agreement by both parties. Reserved for determination by the courts (and the Wage and Hour Administrator) as a mandatory norm and withdrawn from the bargaining process, the definition of worktime might have encroached upon the unchallenged power of nonunion employers unilaterally to establish working conditions beyond the statutory minimum wage and overtime. But the industrial unions showed little interest in the FLSA for its own sake (or for that of the unorganized work force that depended on it) precisely because they were confident that they were strong enough to achieve these goals, at least for their own members, through collective bargaining.

In the event, the initiators and intended beneficiaries of the inadequately thought-through portal-pay demands did not turn out to be the primary victims of the unanticipated legislative intervention. Unionized workers were the virtually exclusive supporters of portal pay, but low-paid unorganized employees have ultimately paid the price for the congressional reaction. Consequently, even under the Portal Act, unions can seek to achieve their goals through collective bargaining; atomized employees, however, have few statutory rights beyond an abridged FLSA on which to rely.

In fact, however, the large industrial unions in the forefront of portal litigation do not have portal-pay provisions in their contracts. Under the master contracts of the United Automobile Workers (UAW), United Electrical, Radio, and Machine Workers (UE), and United Steelworkers of America (USW), the employer does not pay for the time during which the employee walks from the outer gate of the plant to the work department. At least in the electrical industry, the problems may have been alleviated by a shift to smaller plants requiring less walking time. In the electrical machinery/equipment industry, employees working in the largest plants (establishments with 2,500 or more employees) as a share of all employees declined from 33.2 per cent in 1947 to 23.4 per cent in 1982, as the average number of employees in these largest plants declined from 5,325 to 4,389; by 1992, such establishments, with an average of 4,330 employees, accounted for only 13.2 percent of employees. The trend in primary metals was similar: establishments with 2,500 or more employees, which averaged 5,553 employees in 1947 and accounted for 37.4 percent of total industry employment, witnessed significant deconcentration; by 1982, they averaged 4,763 employees and accounted for 27.3 percent of employment; ten years later, the corresponding figures were only 4,130 and 16.8 percent. Automobile plants did not experience such deconcentration. In 1947, transportation equipment establishments with more than 2,500 employees employed on average 6,069 employees and accounted for 59.1 percent of industry employment; by 1982, such plants had grown to an average of 6,547 employees and accounted for 56.6 percent of employment; by 1992, such establishments,
employing on average 6,806 employees, still accounted for 51.2 percent of all industry employment. The UMW, by contrast, has preserved portal pay in all its contracts, including those controlling surface mining, despite periodic efforts by owners to eliminate portal provisions. Because travel time can consume as much as three hours daily roundtrip, miners feel so strongly about it that portal wages have become traditional even in nonunion mines.

Ironically, even the untoward outcome itself has deviated significantly from the results that the CIO feared most. Generally, waiting time (including downtime) during the workday has remained compensable in the typical industrial setting, as have certain so-called preliminary, preparatory, and postliminary activities to the extent that they are integral to the employees’ principal activity. But many

715 Calculated according to data in U.S. Bureau of the Census, 1 Census of Manufactures: 1947, Table 1 at 98 (1950); U.S. Bureau of the Census, 1982 Census of Manufactures, General Summary, Pt. 2, Table 1 at 1-5, 1-6 (1985); U.S. Bureau of the Census, 1992 Census of Manufactures: Subject Series: General Summary, tab. 1-4 at 1-180, 1-181 (1996).

716 Telephone interviews on June 18, 1990 with the following members of union research departments: Larian Angelo (UE); Michael Cannon (UAW); and Ed Ghering (USW); Don Wallace (UMW). For an example of travel time between a copper mine and the company office for which an arbitrator found that workers were entitled to an overtime premium under a USW collective bargaining agreement but not under the Portal Act, see Silver Bell Mining and United Steel Workers, Local 6705, 112 Lab. Arb. (BNA) 1175 (1999).

717 See, e.g., Mireles v. Frio Foods, Inc., 899 F.2d 1407, 1411-14 (5th Cir. 1990). To the extent that the court denied the workers compensation for waiting time during the workday in this case, the decision was based on considerations—namely, that the workers could use longer periods of time effectively for their own purposes—unrelated to the Portal-to-Portal Act.

718 The Supreme Court has interpreted the principal-integral-preliminary-activity nexus broadly in favor of workers. See Steiner v. Mitchell, 350 U.S. 247 (1956); Mitchell v. King Packing Co., 350 U.S. 260 (1956). See also Barrente v. Arkansas-Best Freight System, Inc., 750 F.2d 47, 50 (8th Cir. 1984) (“The legislative history of the Portal-to-Portal Act and decisions construing it...make clear that the terms ‘principal activity or activities,’ which must be paid for, are to be read liberally”). To be sure, the lower courts have not always interpreted the provision quite so expansively as the solicitor of the DOL had hoped shortly after the Portal-to-Portal Act went into effect. See William Tyson, “The Portal-to-Portal Act of 1947—Its Effect on Determination of Time Worked Under the Fair Labor Standards Act After May 14, 1947,” in Proc. of the N.Y.U. First Annual Conf. on Labor 441, 472 (1948). For examples of such cases, see E.I. Du Pont de Nemours & Co., 227 F.2d 133 (4th Cir. 1955); Hodgson v. Katz & Besthoff, #38, Inc., 365 F. Supp. 1193 (W.D. La. 1973) (preliminary activities of cashiers not compensable). More recently, courts, while requiring meat slaughterhouses to pay workers for the time they spend sharpening knives, waiting for sharpened knives and donning personal protective equipment, have held that the Portal Act exempts these employers from liability for paying workers for donning clean white outer garments even though the employers required them to wear such clothing pursuant to U.S.
employers still demand more free labor. In one of the more comically disingenuous requests of this type, the Associated Builders and Contractors, a militantly antiunion organization, urged Congress to legalize such time filching:

Hourly employees may sometimes desire to perform preparatory activities in anticipation of their normal duties, such as arriving at their work station early, getting their tools lined up for the day’s work, reviewing the day’s schedule, and so on. The current definition of “employ” discourages (indeed prohibits) self initiation by hourly workers who wish to put forth extra effort in furtherance of their own skills and careers.\textsuperscript{719}

The most egregious cases have upheld employers’ power to impose extraordinarily onerous noncompensable travel on workers. For example, Grand Union, a supermarket chain, was permitted by the Second Circuit to “make unreasonable travel time not compensable simply by making it a regular part of the employee’s job.”\textsuperscript{720} Grand Union had required a refrigerator mechanic to travel five and one-half to nine and one-half hours daily between his house and its many stores in the New York-Connecticut area without compensation even though he transported company equipment and it reimbursed him for mileage and gasoline. Despite the fact that the worker would have faced these enormous distances regardless of where he had chosen to live, the court, while conceding that his “situation strikes us as inequitable,” saw no way to generate a different outcome under the Portal-to-Portal Act.\textsuperscript{721} Indeed, so strong was the Portal Act’s ideological pull on the judicial mind that the appeals panel failed even to mention that the employer had made a mockery of the FLSA by requiring the worker to store hundreds of pounds of its equipment and materials at his house.\textsuperscript{722} If the worker had picked up Grand Union’s equipment anywhere except at his own house, the FLSA clock would have begun running as soon as he arrived at that pick-up location.\textsuperscript{723} It is scarcely imaginable that any judge would have relieved Grand Union of liability if it had engaged in the analogously unlawful act of requiring its butchers to store company knife sharpeners at home so that they could sharpen


\textsuperscript{720}Kavanagh v. Grand Union Co., 192 F.3d 269, 276 (2d Cir. 1999) (Korman, Dist. J. dissenting).

\textsuperscript{721}Kavanagh v. Grand Union Co., at 272.

\textsuperscript{722}Kavanagh v. Grand Union, Motion for Rehearing and Rehearing en Banc at 2 (Nov. 29, 1999); Telephone interview with attorney Tara Kavanagh and plaintiff David Kavanagh, Bellport, N.Y. (Nov. 7, 1999).

\textsuperscript{723}29 C.F.R. § 785.38 (1999).
their knives at home off the clock.

In reaching a similar anti-worker conclusion, the Fifth Circuit\textsuperscript{724} could not even discern inequity in relieving an employer of liability for the five hours daily that he “hauled” migrant farmworkers between El Paso and the chile pepper fields of New Mexico despite the fact that the workers could not have chosen to live close to the fields since the farmers refused to provide housing in this remote area lacking the population base for the peak needs of a seasonal harvest and the infrastructure for the requisite rental housing, which this subminimum-wage work force could not afford anyway. The unpaid traveling and waiting time that adds up to an eighteen-hour day\textsuperscript{725} is made possible by the Portal-to-Portal Act, which makes a self-fulfilling prophecy of agricultural economists’ claim that the farm labor market “is an open, ready access market for the salvage of zero and low opportunity cost time.”\textsuperscript{726}

No matter how outrageous such overreaching may be, it is Congress’s preclusion of the opt-out class action that has had the most enduring and deleterious impact on the minimum wage workers who continue to litigate under the FLSA. At the same time, the absolute prohibition of representative actions, which was manifestly directed against the industrial unions, has not prevented unions from pursuing their remedies through collective bargaining and arbitration. Because the Portal-to-Portal Act, unlike Taft-Hartley,\textsuperscript{727} no longer serves this original vindictive anti-union purpose,\textsuperscript{728} it should be repealed. Once that repeal

\textsuperscript{724}Vega v. Gasper, 36 F.3d 417 (5th Cir. 1994). But see Morillion v. Royal Packing Co., 2000 Cal. Lexis 2061 (Cal. Sup. Ct., Mar. 27, 2000) (decided under California state law but holding that farmworkers who were required to meet at a certain place to be driven in employer’s buses to fields and were subject to discipline if they failed to arrive at departure place on time or drove to fields in their own vehicles were subject to an employer’s control and thus entitled to wages for the travel time).

\textsuperscript{725}For a detailed discussion of the facts, see Marc Linder, \textit{Migrant Workers and Minimum Wages: Regulating the Exploitation of Agricultural Labor in the United States} 6-11 (1992).

\textsuperscript{726}Varden Fuller & Willem van Vuuren, “Farm Labor and Labor Markets,” in \textit{Size, Structure, and Future of Farms} 144-70 at 154 (A. Ball & Early Heady eds. 1972).

\textsuperscript{727}“[T]he conclusion is inescapable that Congress was less interested in curing union abuses than in using them as an excuse for weakening the organized labor movement.” Seidman, \textit{American Labor from Defense to Reconversion} at 268. Barton Bernstein, “America in War and Peace: The Test of Liberalism,” in \textit{Towards A New Past: Dissenting Essays in American History} 289, 290, 303 (B. Bernstein ed. 1969 [1967]), cautions that neither businessmen nor Congress meant to destroy unions in 1946-47, but merely to weaken them. For a different perspective, which places more responsibility on Truman, see Harvard Sitkoff, “Years of the Locust: Interpretations of the Truman Presidency Since 1965,” in \textit{The Truman Period As a Research Field: A Reappraisal, 1972}, at 75, 85 (Richard Kirkendall ed. 1974).

\textsuperscript{728}Ironically, Congress repeatedly heard that the unorganized would bear the brunt of the
has been accomplished, it may become possible to demarginalize the FLSA, restoring to it the potential that it once possessed for empowering low-paid workers to embark upon self-organization.  

Rather than applaud this result, supporters of the bill suggested that in this instance part of the baby ("injustice") would have to be thrown out with the bath water. 93 Cong. Rec. at 2265 (statement by Sen. Thomas, Dem. Ut.). Thus when Senator Aiken asked Senator Donnell how a poor and unorganized worker would be able to go to the expense of showing the statutorily requisite custom or practice in order to prevail on a claim, Donnell replied that "any plaintiff in any case must make out his case, no matter how rich or how poor he may be." Id.

### Table 3-2: Civil FLSA Cases Commenced in U.S. Courts, 1941-98

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Moments Are the Elements of Profit

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Source: Office of Public Affairs, Administrative Office of the United States Courts, Judicial Business of the United States Courts, tab. C 2 (in the Report for 1944 and 1943 the data were published at Table 6; for 1942 at Table 7) (1941-1998). This publication was formerly titled, Annual Report of the Director of the Administrative Office of the United States Courts.

Note: For the years 1947 to 1951, the private litigant cases included a separate rubric for portal-to-portal cases (which numbered 2239, 44, 13, 5, and 13 for the five years). They are combined here. From 1961 forward the cases are broken down according to U.S. plaintiff and defendant and private litigant cases, with a total of all cases specifically stated; from 1941 to 1960 the rubrics include only U.S. plaintiff and private litigant cases; these have been added here on the assumption that they encompass all the cases.