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Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947

Marc Linder

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MARC LINDER*

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   * Visiting Prof. of Law, University of Iowa. B.A. University of Chicago, 1966; Ph.D. Princeton University, 1973; J.D. Harvard Law School, 1983. This Article is dedicated to the premier de minimis litigator in the United States, Israel Reyna, who cares about what the law does not. Fred Konefsky, Larry Norton, Michael Green, Pat Bauer, Herbert Hovenkamp, and Richard Matasar made valuable suggestions for improving the substance and organization of this Article.
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? After almost a half-century, it is difficult to recapture the intensity of a conflict—over what was after all only 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. . . ." 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 been unique in the postwar history of labor law.

3. Only occasionally does it occur that the subject matter of lawsuits in the courts becomes 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.

Axley, The Problem of Portal to Portal Pay, 1947 Wis. L. Rev. 163, 163. 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 S. FINE, FRANK MURPHY: THE WASHINGTON YEARS 332 (1984).

5. "It 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." Krock, Picard in Portal Test, N.Y. Times, Jan. 29, 1947, at 6, col. 4.
The fervor with which all parties invested this portal-to-portal dispute 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. When unions resisted, labor-management relations appeared to be rushing toward a fateful climax. Overshadowed historically, although not contemporaneously, by the debate over Taft-Hartley's incursions into the rights workers secured under the National Labor Relations Act, the Portal-to-Portal Act of 1947 (the "Portal-to-Portal Act") has receded into oblivion. Known today only to, and taken for granted by, specialists in labor-law litigation, the Portal-to-Portal Act's political and economic origins have become relegated to obscurity.


7. For an unusual portrait of the strikes of this period, see G. Lipsitz, CLASS AND CULTURE IN COLD WAR AMERICA: "A RAINBOW AT MIDNIGHT" (1981).


9. When 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 Subcomm. of the Senate Comm. on the Judiciary, 80th Cong., 1st Sess. 8 (1947) [hereinafter Portal to Portal Wages].

10. Emblematic of this political amnesia is that the major monograph devoted to labor problems during the first three years of the Truman administration never even alludes to the portal pay issue or legislation (although the bibliography includes a reference to a hearing and an article on the Portal-to-Portal Act). A. McClure, THE TRUMAN ADMINISTRATION AND THE PROBLEMS OF POSTWAR LABOR, 1945-1948, at 254, 257 (1969). The following major works on the Truman administration also fail even to mention the issue: A. Hamby, BEYOND THE NEW DEAL: HARRY S. TRUMAN AND AMERICAN LIBERALISM (1973); B. Cochran, HARRY TRUMAN AND THE CRISIS PRESIDENCY (1973); THE TRUMAN PRESIDENCY (M. Lacey ed. 1989). A biography of the general counsel of the United Automobile Workers during the period under review fails to mention the portal struggle. C. Johnson, MAURICE SUGAR: LAW, LABOR, AND THE LEFT IN DETROIT 1912-1950 (1988). None of the numerous articles on the controversy published by the New York Times was reprinted in an anthology including thirty pages of articles on labor from the reconversion period. See LABOR AND MANAGEMENT 164-97 (R.B. Morris ed. 1973). A major exception is J. Seidman, AMERICAN LABOR FROM DEFENSE TO RECONVERSION 259-61 (1976). At the other extreme, a major history of the working day misstated the practical impact of portal-pay suits, claiming that "[b]y January 1947, workers had won nearly $6 billion in over 1,500 such cases," when in fact they had merely filed these cases, ultimately prevailing in none. D. Roediger & P. Foner, OUR OWN TIME: A HISTORY OF AMERICAN LABOR AND THE WORKING DAY 266 (1989).
As an essay in disinterment and reform, this Article presents a comprehensive political, economic, and legislative history of the Portal-to-Portal Act, analyzing the unusual way in which litigation shaped the contours of the statute which the Portal-to-Portal Act amended, the Fair Labor Standards Act ("FLSA" or the "Act"). 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 unorganized workers. Ultimately the Portal-to-Portal Act’s restrictive impact has fallen on low-paid workers and extends far beyond the issue of walking time.

This analysis of the Portal-to-Portal Act begins with an economic and historical discussion of the significance of the definition of compensable worktime under protective statutory regimes (§ I). The relevance for the portal controversy of the trends in overtime during and immediately after World War II is reviewed in § II. Following this discussion is a study of two mining cases that crucially shaped the political and jurisprudential contours of the portal pay dispute (§ III). Attention then shifts to the major industrial portal suit, Anderson v. Mt. Clemens Pottery Company, in which the Supreme Court set the stage for mass litigation and congressional intervention (§ IV). § V offers a detailed legislative history of the Portal-to-Portal Act beginning with efforts at the state level to blunt the impact of FLSA by shortening the applicable statutes of limitations. § VI and § VII look at the contemporary significance of the Portal-to-Portal Act, from the relationship between mandatory norms under FLSA and consensual bargaining, to the most significant achievement of the Portal-to-Portal Act, the elimination of class actions. The lessons to be learned from the portal litigation of the 1940’s are summarized in § VIII.

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 Brown, Vested Rights and the Portal-to-Portal Act, 46 Mich. L. Rev. 723 (1948).
I. WHEN AND WHERE DOES THE WORKDAY BEGIN AND WHO DECIDES?

A. The Importance of Travel and Preparatory Time

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

The demand for so-called 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, the demand for travel and preparatory time appears as "righteous" resistance by employees against efforts by employers to avoid an obligation to pay for all the employees' time that the employers have at their disposal. Thus, rather than an example of haggling over terms, unions projected the portal pay issue as a form of theft. In this sense the controversy was a venerable one that differed little from the labor-capital controversy recounted by Karl Marx for his own period.14

In order to fully understand the significance of the Portal-to-Portal Act, it must be recalled that portal pay disputes arise peculiarly in statutory settings. Significantly, the most prominent portal pay cases involved piece-rate workers. Before the advent of FLSA, such workers had relatively little interest in whether they were paid specifically for portal type time. If these workers 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. If they did not have the bargaining power to achieve such adjustments, they had no other recourse.15

For example, under the English Factory Acts, which regulated and specified the hours during which women and children could be em-

14. Senator Pepper used this word to characterize one of the portal cases. 93 CONG. REC. 2301 (1947).
ployed, employers sought to begin the work day early and to keep the workers at work until 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”\(^1\) could cumulatively result in impressive profits: “Five minutes a day’s increased work, multiplied by weeks, are equal to two and a half days of produce in the year. . . .”\(^{18}\) And 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.\(^{19}\)

In the United States, the conflict over the compensability of walking time 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, establishments employing more than 2,500 wage earners increased their employment by almost eight-fold, while their share of all workers rose from 18.6 per cent to 48.8 per cent from 1939 to 1945.\(^{20}\) Even by 1947, when the effect of wartime concentration had in part dissipated in the wake of demobilization, the number of 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.\(^{21}\)

\(^{17}\) *Reports of the Inspectors of Factories for the Half Year Ending 31st October, 1856*, at 48 (C. 2153, 3 Parl. Pap. 1857 Sess. 1).

\(^{18}\) *Reports 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).

\(^{19}\) *Reports of the Inspectors of Factories for the Half Year Ending 31st October, 1856*, at 34 (C. 2153, 3 Parl. Pap. 1857 Sess. 1).

\(^{20}\) *Economic Concentration and World War II: Report of the Smaller War Plants Corporation to the Special Comm. to Study Problems of American Small Business*, S. Doc. No. 206, 79th Cong., 2d Sess., 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.

\(^{21}\) If the number of employees in manufacturing establishments can serve as an indicator of plant size, large plants (with more than 2,500 employees) developed as follows:
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.\(^{22}\) Almost one-third worked in steel mills and motor vehicle plants alone.\(^{23}\) This industrial structure, in turn, geographically concentrated almost two-thirds of these large-plant workers in the six states of Michigan, Pennsylvania, Ohio, New York, Illinois, and Indiana.\(^{24}\) By no coincidence, then, the bulk of the portal litigation arose in these industries and states.\(^{25}\) In addition, these large factories, as capital intensive and heavily organized, formed the focus of an intense conflict between the CIO and large capital.

Contemporary liberal and leftist\(^{26}\) commentators tended to argue that employers required an economic incentive to modify their plants so that workers might share in the economies of scale.\(^{27}\) The conservative business press, however, rejected this position. Thus 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

<table>
<thead>
<tr>
<th>Year</th>
<th>Plants</th>
<th>Total Employees in Plants</th>
<th>Average No. Employees in Large Plants</th>
<th>Employees in Plants as % of all Manufacturing 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>1958</td>
<td>533</td>
<td>2,654,500</td>
<td>4,980</td>
<td>17.2</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>1982</td>
<td>482</td>
<td>2,445,800</td>
<td>5,074</td>
<td>13.7</td>
</tr>
</tbody>
</table>


22. Calculated according to data in U.S. BUREAU OF THE CENSUS, 1 1947 CENSUS OF MANUFACTURES, Table 1, at 97-98 (1950).

23. Id. at 125, 136.

24. Id. at 143-44.


26. 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., Burstein, The Fair Labor Standards Act—A Legal and Economic Study, 6 LAW. GUILD REV. 576 (1946).

nonproductive costs. They can only be passed on to the consumer.”

Without acknowledging the disconfirmation, the magazine two years later reported that in response to portal suits, employers were relocating gates and eliminating waiting at time clocks. From a somewhat different perspective, the *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 a man actually spends handling the tools or running the machines. . . . Hourly 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.

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.” 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 used by employees 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. By way of contrast, under the earlier

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31. Morse, *supra* note 27, at 32.
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."\(^{32}\)

B. FLSA in the Travel and Preparatory Time Debate

Northern manufacturing corporations had by and large acquiesced in FLSA so long as they believed that its minimal standards would have little or no impact on their wage policies or managerial prerogatives. Since they already paid their employees wages far in excess of the new statutory minimum and premium pay for overtime, compliance with FLSA did not appear burdensome.\(^{33}\)

Implementation of FLSA, however, turned out to be trickier than envisioned. In order to determine the amount of wages owed, it was necessary to count the number of hours worked. Although the definition of an "hour" might be simple enough, that of "work" was fraught with dispute. 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 in 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 time? 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?\(^{34}\) Or did FLSA control the situation? And if so, who interpreted the law, the Wage and Hour Administrator or the courts? Such questions prompt the formulation of a labor-capital conflict in terms of whether the employer has breached a statutory obligation by failing to pay for all the hours worked or whether the employees have committed a breach of faith by abrogating longstanding customs in favor of demands for payment of time that traditionally was not expressly compensated.

\(^{32}\) Mezerik, supra note 27, at 122.


\(^{34}\) Frank 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." Sugar & Cooper, Pro and Con—"Portal to Portal" Pay Suits, 26 MICH. ST. B.J. 7, 11 (1947).
From the vantage point of large industrial capital, this entire line of inquiry was far more than it had signed up for in accepting FLSA. By the time the postwar wave of portal pay suits had acquired the status of a movement, capital was clearly not amused. The general counsel for Republic Steel Corporation told Congress that the “net effect” of the recent Supreme Court decisions had been,

to pervert the [A]ct from an instrument of righteous correction against sweatshop employers into an instrument to destroy the great majority of industrial employers in this country.... There is grim irony in the fact that the higher the wages paid by the particular employer, the more oppressive ate the provisions of the [A]ct as interpreted by the Supreme Court.35

The Business Advisory Council of the Department of Commerce, a group composed of representatives of the largest industrial entities in the United States such as General Motors, Du Pont, U.S. Steel, Ford, Alcoa, and Standard Oil of New Jersey, informed Congress that:

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 practices or customs governing 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 a half their usual rate when working more than 40 hours a week.36

Capital thus viewed the portal campaign as an attempt by unions not strong enough to achieve additional wage advances on their own to use the state—in the form of an administrative agency and the courts—to vindicate these wage 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 FLSA was meant to bolster37 were not participants in the litigation.38 Moreover, if labor prevailed on the portal claims, many employers would be

35. Portal to Portal Wages, supra note 9, at 52 (statement by Thomas Patton).
36. Id. at 615 (statement by Subcommittee of Business Advisory Council on Attitude of Industry on Portal to Portal, as submitted by William Foster, Undersecretary of Commerce).
37. 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).
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.39

Workers, especially in the early days of 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 the employer. FLSA promoted such thinking because the rights it conferred upon workers were a cake they could eat and still have. In other words, when it was to their advantage, employees could decline to vindicate "a demand for the 'last measurement of justice' to which [they] may be entitled."40 But since, as the Supreme Court was to rule, employees could not waive their rights under FLSA,41 they could always42 renege on such implied waivers and re-open the issue—even to the point of bankrupting the employer.43 It was this class bias inherent in the logic of 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 the statutory rights embodied in FLSA solely on low-paid and unorganized workers, whom they did not employ.44 The unionized employees, with whom employers did enter into binding agreements, Congress allegedly did not so privilege. So long as firms paid minimum wage and overtime, these workers could consent to any arrangements they wished, including customary practices as to when the workday and compensable work time began. This differ-

40. Portal to Portal Wages, supra note 9, at 658 (testimony of Arthur Pettit, attorney, Winthrop, Stimson).
41. See infra § VI.
42. That is, within the limitations period, which, before the Portal-to-Portal Act, was rather long in some states. See infra § V.
44. See infra § III.

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ence in portrayal of unionized employees and unorganized workers formed the core of the portal-pay dispute.

This core, however, was not always on public display because the unions failed to adopt or to project a consistent and principled position on their members' status under FLSA. Stymied in their initial collective bargaining efforts 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 claims. Unless they were to win on a 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, which 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, 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 animated the portal-to-portal controversy.

II. FROM THE FIGHT AGAINST, TO THE FIGHT FOR, OVERTIME

Remember, the long struggle for the 8-hour day was not a struggle for 8 hours of work. It was a struggle for 16 hours away from work.

The question of back wages for employees whose travel time did not extend their workweek beyond forty hours was "academic" because, with rare exceptions, the lowest hourly wage rate in the unionized industrial sector exceeded the FLSA imposed statutory minimum by the end of World War II. Portal litigation was therefore exclusively a creature of the maximum hours provision of FLSA. Whereas relatively few workers

45. The unresolved status of this conflict emerged at the National Labor-Management Conference convened by President Truman in November 1945, where 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." Div. Labor Standards, U. S. Dept. of Labor, Bulletin No. 77, The President's National Labor Management Conference November 5-30, 1945: Summary and Committee Reports 61 (1946).


47. Portal to Portal Wages, supra note 9, at 191-94 (testimony of Lee Pressman).
actually found their wages increased by the minimum wage provision of FLSA, many workers received overtime pay under FLSA by the time the militarization of the economy began to extend the normal work week beyond forty hours.\textsuperscript{48} Indeed, while the statutory minimum wage of thirty to forty cents per hour became moot during the war, when a tight labor market made fifty cents the de facto minimum,\textsuperscript{49} it was the longer work week that largely sustained the increase in real weekly earnings.\textsuperscript{50} Thus the average workweek for production workers in manufacturing industries rose by one-fifth, from 37.7 hours in 1939 to 45.2 hours in 1944.\textsuperscript{51} The transition from the Depression to a full-capacity war economy also transformed the functioning and socio-economic purposes behind mandatory overtime payments: "Union members had originally favored overtime pay as a means of sharing work. . . . In the 1940s, however, overtime pay was transformed into a means of increasing workers' earnings, rather than one of limiting the length of the workweek. The change took place during World War II, when workers started to rely on premium pay to keep pace with inflation."\textsuperscript{52}

\textsuperscript{48} Of the more than twelve million employees covered by FLSA in April 1939, the Department of Labor estimated that fewer than 700,000 were receiving less than the statutory minimum (thirty cents); of the 2,400,000 working overtime (then more than forty-two hours), 1,664,000 or slightly more than two-thirds were not receiving time and one-half. By far the largest industry that had to reduce hours or pay overtime was sawmills (with more than 100,000 such employees), followed by foundry and machine shops, and furniture manufacturing. See U. S. Dept. of Labor, First Annual Report of the Administrator of the Wage & Hour Division, For the Calendar Year 1939, at 36-43, 158-60 (1940).

\textsuperscript{49} See Amendment of the Fair Labor Standards Act of 1938: Hearings Before the Senate Comm. on Education and Labor, 79th Cong., 1st Sess., chart V at 860 (1945) (statement of Chester Bowles showing straight-time hourly rates of factory workers in the summer of 1945). Whereas in 1942 7,500,000 employees were being paid forty cents or less per hour, by the end of the war the National War Labor Board "automatically approved increases first up to 40 and later to 50 cents an hour." Seidman, supra note 10, at 129.

\textsuperscript{50} "Because most factory wage workers are working more intensely and for longer hours, they have been able to maintain their spendable earnings and to save." Tolles, Spendable Earnings of Factory Workers, 1941-43, 58 Monthly Lab. Rev. 477, 478 (1944).


\textsuperscript{52} R. Schatz, The Electrical Workers: A History of Labor at General Electric and Westinghouse 1923-1960, at 159 (1983). For an extended argument that the overtime provision of FLSA was intended by President Roosevelt as a diluted accommodation of the demand by the AFL for work sharing and a thirty hour work week and that the crucial turning point occurred in 1933 when those forces in the New Deal advocating increased production and employment prevailed over the continuing struggle for shorter hours, see B. Hunnicutt, Work Without End: Abandoning Shorter Hours for the Right to Work 147-208 (1988). The most important
Not surprisingly, some in Congress sought during World War II to curtail the right that millions of workers had recently secured to statutory premium pay for long hours.\(^5\) In part because statutory overtime could no longer fulfill the function of sharing work as full employment approached,\(^5\) a number of bills were offered in 1942 to relieve employers (and ultimately the Treasury, which was paying the bills submitted by war contractors) of the burden of premium pay.\(^5\) Senator O'Daniel of Texas seized the initiative in March by submitting a bill that would have eliminated all restrictions on hours of labor and provided the same wage for all hours.\(^5\) In explaining a later version of the bill, the senator engaged in no hyperbole when he stated that "[t]he change would please practically every employer of labor in America. They would rejoice at having the legislative shackles of premium pay for so-called overtime removed."\(^5\) O'Daniel's explanation of the effect of the elimination of pre-

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relevant legislative history may be consulted in *Thirty-Hour Work Week: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary*, 72d Cong., 2d Sess. (1933); *THIRTY-HOUR WEEK BILL*, H. R. Doc. No. 124, 73d Cong., 1st Sess. (1933); *Thirty-Hour Week Bill: Hearings Before the House Comm. on Labor*, 73d Cong., 1st Sess. (1933); *Thirty-Hour Week Bill: Hearings Before the House Comm. on Labor*, 73d Cong., 2d Sess. (1934). See also G. FARR, THE ORIGINS OF RECENT LABOR POLICY 59-76 (Univ. Colo. Studies Ser. in Econ. No. 3, 1959); S. VITTOZ, NEW DEAL LABOR POLICY AND THE AMERICAN INDUSTRIAL ECONOMY 73-96 (1987). When, in the wake of demobilization, the work week was shortened but inflation accelerated, many workers were still eager to work overtime. R. SCHATZ, THE ELECTRICAL WORKERS: A HISTORY OF LABOR AT GENERAL ELECTRIC AND WESTINGHOUSE 1923-1960, at 159. 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." W. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE NEW LEGALITY 1932-1968, at 162 (1970).


54. But see U.S. DEP'T. OF LABOR, FAIR LABOR STANDARDS IN WARTIME: ANNUAL REPORT, WAGE & HOUR DIVISION, PUBLIC CONTRACTS DIVISION, FOR THE FISCAL YEAR ENDED JUNE 30, 1942, at 3-4 (1943) (defending overtime provision as "attracting labor in a democratic way, without compulsion, to the war industries where it was needed"). The Wage and Hour Administrator devoted an extraordinary amount of space in his annual report for 1940 to refuting claims that the forty-hour week was inconsistent with national defense preparedness. U.S. DEP'T. OF LABOR, ANNUAL REPORT, WAGE & HOUR DIVISION, FOR THE FISCAL YEAR ENDED JUNE 30, 1940, at 1-72 (1941). In addition to discouraging longer workweeks, premium pay for overtime also is designed to compensate workers for the disproportional wear and tear caused by long hours. See Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173, 1176 (7th Cir. 1987).

55. For a very brief and uninspired account, see R. YOUNG, CONGRESSIONAL POLITICS IN THE SECOND WORLD WAR 59-61 (1956).

56. 88 Cong. Rec. 2380 (1942) (S. 2380).

57. Id. at 8705 (S. 2884).
mium pay was, however, novel. While the bill neither compelled workers to work overtime nor dealt with hourly wages at all, it did,

embrace the age-old, time-tested, true economic philosophy that an employee should be paid the full amount per hour that his services are worth for each and every hour he works, instead of being paid less per hour for earlier hours of the day when he is most efficient and productive, and more per hour for the later hours, when he may be fatigued and less productive, as our present 40-hour workweek law provides.58

Although ultimately neither O'Daniel's proposed amendment of § 7 of FLSA59 nor any competing proposal was adopted in 194260 or later,61 President Roosevelt did issue an executive order banning premium pay for work performed on Saturday or Sunday "except where such work is performed by the employee on the sixth or seventh day worked in his regularly scheduled workweek."62

As previously mentioned, large employers in general, but especially those that had entered into collective bargaining agreements, did not find compliance with FLSA burdensome because they were already paying in excess of the minimum wage and time and one-half for overtime.63 A

58. Id.
59. See id. at 8706 (text of proposed S. 2884).
60. Under S. 2232, submitted by Senator Reed of Kansas, premium pay would not have been mandatory until after forty-eight hours. Id. at 1328. Many of the other bills would have suspended all hours limitations for the duration of the war. H.R. 6616, 77th Cong., 2d Sess., 88 CONG. REC. 1381 (1942) (Smith, Va.); H.R. 6823, 77th Cong., 2d Sess., 88 CONG. REC. 2838 (1942) (Peterson, Ga.); H.R. 7731, 77th Cong., 2d Sess., 88 CONG. REC. 8491 (1942) (Ramspeck); H.R. 6689, 77th Cong., 2d Sess., 88 CONG. REC. 1771 (1942) (Lamberton); H.R. 6795, 77th Cong., 2d Sess., 88 CONG. REC. 2535 (1942) (Wickersham); H.R. 6826, 77th Cong., 2d Sess., 88 CONG. REC. 2838 (1942) (Colmer); H.R. 6835, 77th Cong., 2d Sess., 88 CONG. REC. 2838 (1942) (Thomas, Tx.); H.R. 7054, 77th Cong., 2d Sess., 88 CONG. REC. 4009 (1942) (Cole, N.Y.).
61. Senator O'Daniel continued to introduce his bill for several sessions as did other Congressmen. In the first session of the Seventy-Eighth Congress (1943) the following bills were offered: S. 190, 78th Cong., 1st Sess., 89 CONG. REC. 36 (1943); S. 237, 78th Cong., 1st Sess., 89 CONG. REC. 71 (1943); H.R. 992, 78th Cong., 1st Sess., 89 CONG. REC. 116 (1943); H.R. 1804, 78th Cong., 1st Sess., 89 CONG. REC. 894 (1943); H.R. 2071, 78th Cong., 1st Sess., 89 CONG. REC. 1525 (1943); H.R. 2107, 78th Cong., 1st Sess., 89 CONG. REC. 1636 (1943). In the first session of the Seventy-Ninth Congress (1945), the following bills were offered: S. 369, 79th Cong., 1st Sess., 91 CONG. REC. 370 (1945); H.R. 1194, 79th Cong., 1st Sess., 91 CONG. REC. 126 (1945). In the second session of the Seventy-Ninth Congress (1946), the following bills were offered: H.R. 6647, 79th Cong., 2d Sess., 92 CONG. REC. 6189 (1946). In the first session of the Eightieth Congress (1947), the following bills were offered: S. 160, 80th Cong., 1st Sess., 93 CONG. REC. 221 (1947).
number of decisions handed down by the United States Supreme Court in the 1940s, however, interpreting the “regular rate” to which the fifty per cent premium applied, did give them pause. Counsel for the National Association of Manufacturers (“NAM”), “the most influential ideological holding company for American industry,” expressed large capital’s exasperation with the enforcement priorities of the Wage and Hour Administrator when he urged the latter to focus on sweatshops rather than on regular-rate cases “where the wages and employment conditions are far superior to anything remotely intended to be covered by the wage-hour law.” When it finally dawned on large capital that relatively highly paid organized workers were also protected by FLSA, it began to lobby Congress to cut back on some of the Supreme Court’s expansive interpretations of the regular rate for overtime purposes. Thus in the course of testifying before Congress on the issue of portal pay in 1945, NAM advocated further changes in FLSA unrelated to that problem. Although echoing the views of Supreme Court dissenters in a number of FLSA cases to the effect that Congress never intended the Act to impinge on the outcomes of legitimate collective bargaining, NAM apparently never sought outright repeal of FLSA.

64. For analysis of the cases see Dodd, The Supreme Court and Fair Labor Standards, 1941-1945, 59 HARV. L. REV. 321 (1946).
65. See, e.g., Overtime-on-Overtime—Administrative Interpretations, 10 N.A.M. LAW DIGEST 57 (1948).
66. Kerr, Employer Policies in Industrial Relations, 1945 to 1947, in LABOR IN POSTWAR AMERICA 43, 47 (C. Warne ed. 1949). A sampling of radical contemporary opinion about NAM may be gleaned from Messiahs of Feudalism, 52 CHRISTIAN CENTURY 1615 (1935); The NAM through the Ages, 93 NEW REPUBLIC 184 (1937); Hirsch, What is Big Business Up To?, FORUM AND CENTURY, July 1938, at 3.
67. Regulating the Recovery of Portal-to-Portal Pay, supra note 16, at 448 (statement of Raymond Smethurst). Smethurst taught law at George Washington University and co-edited a casebook on FLSA. CASES ON THE FAIR LABOR STANDARDS ACT OF 1938 (FEDERAL WAGE AND HOUR LAW) (R. Smethurst & R. Haslam eds. 1949). Haslam was also counsel for NAM.
68. In the course of the post-Portal-to-Portal Act hearings on FLSA, Representative Owens (Rep. Ill.) suggested that premium overtime payments be calculated only on the minimum wage, leaving organized workers to bargain for their own overtime. 4 Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938: Hearings Before Subcomm. No. 4 of the House Comm. on Education and Labor, 80th Cong., 1st Sess. 2515-17 (1947). The Wage and Hour Administrator opposed such a change. Id. at 2611-12. Other changes in overtime, dealing with so-called overtime on overtime and irregularly scheduled hours, were enacted in the 1949 amendments to FLSA, ch. 352, § 1, 63 Stat. 446 (1949); ch. 736, § 7, 63 Stat. 912 (1949).
70. In various cases, Justices Roberts, Jackson, Stone, Frankfurter, and Burton stressed this point repeatedly without success. See infra §§ III and VI.
Demobilization in 1945 brought about a significant reduction in the length of the workweek and, concomitantly, of real earnings. For example, 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 hours). 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, inflation continued unabated, and thus 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.\(^7\) 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,\(^7\) the Truman administration was reporting that "it is plain that business in general is receiving exceptional profits."\(^7\)

Of particular relevance to the labor movement was the federal government's conclusion that in 1947 "profits on the whole were above the levels necessary to furnish incentives and funds for the expansion of busi-

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71. Derber & Netreba, *Money and Real Weekly Earnings During Defense, War, and Reconversion Periods*, 64 MONTHLY LAB. REV. 983, table 1 at 987, table 2 at 989, table 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 Epstein & Snyder, *Urban Price Trends*, in LABOR IN POSTWAR AMERICA 137, 143-44 (C. Warne ed. 1949).


ness 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 eighteen per cent 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 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 living standards for the working class, the labor movement, especially the CIO, may have viewed the mass filing of portal pay

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77. H.M. 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, forty per cent received below-pattern increases, while twenty per cent received no increase. The average for manufacturing as a whole was about eleven per cent. When the final waves of the first round had spread out by October 1946, the aggregate average reached 16.5 per cent. Id. at 122.
81. Significant 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 entitled Family Fortunes in the Wall Street Journal, which ran from December 18, 1946 to January 11, 1947.
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 generally regarded the litigation as a bargaining lever positioned to buttress demands for second-round wage increases. The CIO does not appear to have effectively projected the principle at stake in its campaign. In any event, the press did not report on explanations from labor’s side 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 the fall of 1946, even NAM recognized that “[t]here was 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 (the “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 the settlement 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.


85. Philip Murray, the president of the CIO, thus engaged in understatement when he said 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, Bus. Wk., Sept. 21, 1946, at 94, 95.

86. 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.

87. See infra § IV.


90. Id.
In addition to this retroactivity, 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 half-hour per shift of future overtime pay, the union decided to forego 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 UMWs membership in 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 FLSA to overrule the pro-labor decisions of 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, which they claimed was infiltrated by Communists. 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 a claim to back wages became too great to resist. Indeed, it has even been suggested that union lawyers, apprehensive of precisely the sort of congressional backlash that eventually ensued, unsuccessfully tried to channel the discontent.  

III. THE MINE OWNERS FAIL TO SAVE FACE-TO-FACE

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.

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 UM<sup>W</sup> designed to maneuver coal mine owners into raising wages outside the permissible limits of the so-called Little Steel formula, iron ore miners in Alabama were, in point of fact, the pioneers in the portal pay dispute.

The UM<sup>W</sup> did not achieve its organizing breakthrough in the Southern metal mines until the latter part of the 1930s, when it succeeded in organizing the miners at the Tennessee Coal, Iron and Railroad Co. ("TCIR"). By the beginning of World War II, the International Union of Mine, Mill and Smelter Workers had organized

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96. Telephone interview with Ernie Goodman, one of the chief portal-pay litigators in the 1940s (April 2, 1990).
not only TCIR, but also the Sloss-Sheffield and Republic Steel mines. These three companies, which owned the only substantial ore mines in Alabama, were all components of significant economic powers. 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 Corp. was affiliated with Allied Chemical & Dye Corp., one of the largest chemical producers.

Precisely because the unions confronted such strong opponents, they were unable to secure even partial travel time for such items as the trip out of the mines. The CIO, for example, lost a strike over this issue against Republic Steel between 1933 and 1935. 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, that the Southern iron ore companies began paying on a portal-to-portal basis. After the union, pursuant to FLSA, again demanded back wages on behalf of 6,000 employees for such work related travel time, which ranged from three minutes to forty minutes at the various mines, the employers filed a declaratory judgment action on April 1, 1941 in the federal district court for 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.

102. Id. at 96-107. Before 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, Muscoda. 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.

103. Petition for Writ of Certiorari at 10.

104. See E. ARMES, THE STORY OF COAL AND IRON IN ALABAMA 517-24, 356-57, 452-57 (1910); 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 Comm. on Education and Labor, 79th Cong., 1st Sess. 1092 (1945) (statement of David McDonald, Sec'y-Treas. United Steel Workers).


106. Petition for Writ of Certiorari at 12. Record at 76-77.

107. Record at 121.

108. In their original petitions the plaintiff-employers made the named-defendant employees 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 infra § VII.

109. Brief 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," states that, because portal-to-portal pay "was a complete change of opinion, the Administrator announced that he would
In retrospect it may have appeared that the plaintiff-employers made a tactical error in seeking "a rigid definition of working time favorable to them." But given the weight of the extraordinarily sympathetic facts in the miners' favor, especially in light of the conditions in which miners had to work, the companies had little choice but to try to deflect the court's attention from those facts. The trial judge wrote, however, that he was 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 the passengers." The court then proceeded to describe the miners' travel conditions in some detail, including the crowded cars, otherwise used for transporting iron ore and bearing remnants of muck, and the overhead dangers lurking in the humid and malodorous mines. The judge then promptly added that the recital was "not for the purpose of censure of the plaintiffs' manner of maintenance of their mines, for these conditions may well be normal conditions in iron ore mines and practically inevitable." 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." 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 busi-

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110. Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 137 F.2d 176, 183 (5th Cir.1943) (denying reh'g).
112. Id.
113. Id.
That control manifested itself, for example, in the imposition of discipline for infractions committed during the trip. The court then summarized the test as to whether travel time constituted compensable work time 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 employers' benefit and conditions peculiar to the occupation of mining."  

In addition to urging the trial court to formulate a rigid definition of working time, the mine owners also contended that the existence of a venerable tradition in the industry not to pay for such travel time should mandate a court decision in their favor. 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, as it had done with the demand for a rigid definition of work time, 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. 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 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 to and from their working stations does not indicate that they did not consider that time as working time." Thus, even if Congress had meant to exempt certain wage customs from 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. Here the court came perilously close to committing a petitio principii since it failed to demonstrate that Congress, through FLSA, specifically intended to cover such travel time.

In a very brief affirmance of the trial court's opinion and a denial of

114.  Id.
115.  Id. at 10.
116.  Id. at 7.
117.  Id. 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.
118.  40 F. Supp. at 8.
119.  Id.
the mine owners’ petition for rehearing, 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 miners’ working conditions without reference to any wider consequences for other types of employment.\textsuperscript{120} Though perhaps also prescient, the majority was specifically responding to the dire predictions voiced by the dissent.

The dissenter on the Fifth Circuit, Judge Sibley, 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 discomfort of the trip was reflected in the pay scales.\textsuperscript{121} Against that background, awarding double liquidated damages for time and a half for riding time would confer upon the miners three times the hourly rate for actual mining at the face. Finding this injustice shocking, Judge Sibley predicted that if triple back pay were imposed on all iron mines, “[m]any will go broke, or have to cease operations, causing a loss of jobs to their men.”\textsuperscript{122} 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.\textsuperscript{123}

The owners appealed the Fifth Circuit’s decision to the Supreme Court, and Justice Frank Murphy wrote the Court’s opinion. Justice Murphy’s decision 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 the peculiar context in which the opinion was embedded. Thus Murphy, whom \textit{Time} called “an eager beagle who is all heart-and-snuffles when-

\textsuperscript{120} Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 135 F.2d 320, 322 (5th Cir. 1943).

\textsuperscript{121} Id. at 324.

\textsuperscript{122} Id. at 325.

\textsuperscript{123} Id. 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.” Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 137 F.2d 176, 183 (5th Cir. 1943).
ever 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” to avoid the low mine ceilings: “Broken ribs, injured arms and legs, bloody heads often result; even fatalities are not unknown.” 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.

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, 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?”

Jackson’s austere and sanitized view of FLSA missed the point that Murphy was trying to give to the Act: that it was designed to provide statutory rights for employees, both organized and unorganized. 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.

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125. Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 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.
126. 321 U.S. at 596.
127. Id. at 604-05.
128. Fine, supra note 3, at 323 (quoting letter from Jackson to Murphy dated Mar. 2, 1944, in Jackson’s 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, 403-04. Later the Administrator determined that lunch periods of 30 minutes or more were not compensable even if taken underground. Wage and Hour Manual 241-42 (cumul. ed. 1944-45).
depiction of the travel conditions in the iron mines followed the almost endlessly quoted affirmation of 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 profit of others. Such a statute must not be interpreted in a narrow, grudging manner." 130

While sounding humanitarian tones, Murphy did not go beyond the lower courts' disposition of the employers' crucial claim of the existence of a contrary custom. 131 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." 132 In an obituarial appreciation, Archibald Cox, echoing Jackson's concurrence, regretted that Murphy had added this principle of statutory construction. 133 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." 134 Indeed, Fine conjectures 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?'" 135

Murphy answered his own question, though, 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." 136 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

130. 321 U.S. at 597.
131. 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 (citing 1 Comm. 77).
132. Id. at 603.
133. Cox, supra note 97, at 805.
134. Fine, supra note 3, at 322.
135. Id.
136. 321 U.S. at 603.
give rise to serious doubts as to whether certain activity or non-activity constitutes work or employment. 137 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.138

In a lengthy and acerbic dissent, in which Chief Justice Stone concurred, Justice Roberts 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." 139 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 the Court to treat as work what neither contract nor custom of the parties had ever so designated.140

It was on this issue of what Congress intended when it enacted FLSA that 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," 141 Roberts insisted that 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." 142 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,143 took the position that FLSA applied at best marginally to unionized workers

137. Id.
138. For this reason Cox's stricture appears misplaced when he states that: "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." Cox, supra note 97, at 809.
139. 321 U.S. at 606 (Roberts, J., dissenting).
140. Id. at 617.
141. Id. at 602.
142. Id. at 605-07.
143. Thus, for example, one of the petitioners had argued that 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, Muscoda.
already protected by collective bargaining agreements.\(^{144}\)

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"\(^{145}\) 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."\(^{146}\) The trouble with this framework is that where an unscrupulous employer had secured a vested right to require employees to perform uncompensated work through long years of acquiescence by its employees in superior power that then crystallized into custom, "(a) license (for) the kind of 'sweating'... FLSA was intended to halt" would develop.\(^{147}\) 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 passing FLSA. 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.\(^{148}\)

Roberts' first step in proving this contention 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.\(^{149}\) Although

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\(^{144}\) Justice Jackson clearly belonged to this wing. See E. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 245 (1958). Murphy sought to refute this claim by reference to specific provisions in FLSA giving effect to two kinds of collective agreements. 321 U.S. at 602 n.18.

\(^{145}\) Id. at 608.

\(^{146}\) Id.

\(^{147}\) Cox, supra note 97, at 804.

\(^{148}\) A 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 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, supra note 9, at 658 (testimony of Arthur Pettit).

\(^{149}\) 321 U.S. at 609.
the next portal case to reach the Supreme Court would discredit Roberts’
claim of better conditions in iron ore mines,\textsuperscript{150} the important point omitted
by the dissent\textsuperscript{151} 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 and power might plausibly be
drawn from the UMW’s pre-FLSA acceptance of face-to-face compensation
in coal mining,\textsuperscript{152} the lack of pre-FLSA “bona fide collective bar-
gaining” with recognized independent unions\textsuperscript{153} by the powerful iron ore
mine owners\textsuperscript{154} 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 a demand for portal pay until three days after the
appeals court issued its decision in \textit{Muscoda}. Glossing the UMW’s an-
nouncement 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,’”\textsuperscript{155} Roberts saw it as proof that the union understood
portal pay as a judicial declaration rather than a fact of industrial custom
or agreement.\textsuperscript{156} The dissent’s approach reveals that a segment of the
judiciary, like a segment of the employing class, was still unreconciled to
the sharp interventionist incursion into private agreements between those
of unequal bargaining power that FLSA represented. They did not un-
derstand nor accept that “FLSA is designed to defeat rather than imple-
ment contractual arrangements”\textsuperscript{157} and to impose instead by societal fiat
another standard, which the current structure of the labor market in that
industry would not have produced.\textsuperscript{158} In that sense, Roberts and Stone,
the only pre-New Deal holdovers on the Supreme Court, confused judi-
cial fiat with legislative directive.

\begin{itemize}
\item \textsuperscript{150} See infra § III.B.
\item \textsuperscript{151} 321 U.S. at 609-10.
\item \textsuperscript{152} See infra § III.B. on how Murphy finessed this issue in granting portal pay to coal miners
in \textit{Jewell Ridge}.
\item \textsuperscript{153} 321 U.S. at 601.
\item \textsuperscript{154} Roberts obscured this fact with various euphemisms for so-called agreements with com-
pany unions. See 321 U.S. at 611-12.
\item \textsuperscript{155} \textit{Id.} at 617 (citing no source for the quotation).
\item \textsuperscript{156} \textit{Id.} at 618.
\item \textsuperscript{157} Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J.,
concurring).
\item \textsuperscript{158} See Linder, \textit{The Minimum Wage as Industrial Policy: A Forgotten Role}, 16 J. LEGIS. 151
\end{itemize}
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.¹⁵⁹

A large portion of the World War II coal mining dispute involved the politically explosive conflict over portal-to-portal pay. That this battle erupted in wartime was no coincidence. For "[d]uring World War II the insatiable demand for coal forced the reopening of older 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."¹⁶⁰ By 1944, the President's Committee on Portal-to-Portal Travel Time in Bituminous-Coal Mining reported that nationally coal miners averaged almost one hour of portal travel daily.¹⁶¹ 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.¹⁶² 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-a-half rates applicable to the extra fifteen,"¹⁶³ 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.¹⁶⁴

Ironically, because the importance of portal pay in coal mining had virtually no counterpart elsewhere in the economy,¹⁶⁵ Lewis saw his portal

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¹⁶¹. MONTHLY LAB. REV., July 1944, at 81.

¹⁶². See Warne, Coal—The First Major Test of the Little Steel Formula, in 1 YEARBOOK OF AMERICAN LABOR: WAR LABOR POLICIES 278 (C. Warne ed. 1945); Daugherty & Derber, Wage Stabilization, in 1 YEARBOOK OF AMERICAN LABOR: WAR LABOR POLICIES 162 (C. Warne ed. 1945); SEIDMAN, supra note 10, at 109-30.

¹⁶³. See Warne, supra note 162, at 284.


¹⁶⁵. A possible exception was logging. See Proposed Amendments to the Fair Labor Standards Act: Hearings Before the House Comm. on Labor, 79th Cong., 1st Sess. 240 (1945) (statement of Reuben Haslam, assoc. counsel, NAM, that travel time issue was pressing into lumber industry).
pay campaign as helping his membership secure better wages without triggering the wave of inflationary wage demands that the Roosevelt administration feared.\textsuperscript{166}

The portal-to-portal dispute in the coal mining industry 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. When the dispute was certified to the National War Labor Board ("NWLB" or the "Board"), 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 or tonnage wage rates, in order that there may be no doubt that travel time has been included in the mine workers' compensation."\textsuperscript{167} The NWLB, without issuing a decision, directed the union to resume work under the terms of the old contract and negotiations. With such a decision the union struck, the federal government seized the mines, and work and negotiations were resumed—a cycle that repeated itself several times in 1943. In its next ruling, the NWLB ceded 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{168}

Thwarted in its efforts with one group of operators, the UMW then negotiated a portal agreement for a flat $1.25 per day with another group. When the two sides submitted their agreement to the NWLB for approval, the Board once again disapproved the portal pay provision on the same grounds.\textsuperscript{169} 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{170}

\begin{itemize}
  \item \textsuperscript{166} See ZIEGER, supra note 160, at 140.
  \item \textsuperscript{167} Coal Operators' Negotiating Committee of the Appalachian Joint Wage Conference v. UMW, 8 War Lab. Rep. 502, 509 (1943).
  \item \textsuperscript{168} Coal Operators' Negotiating Committee of the Appalachian Joint Wage Conference v. UMW, 9 War Lab. Rep. 112, 118 (1943).
  \item \textsuperscript{169} Illinois Coal Operators Assoc. v. UMW, 10 War Lab. Rep. 684, 684-86 (1943); \textit{id.} at 686, 770 (CIO and AFL members, dissenting).
  \item \textsuperscript{170} Illinois Coal Operators Assoc. v. UMW, 11 War Lab. Rep. 687, 688 (1943). The AFL
\end{itemize}
In the welter of these events, the second in the trilogy of portal pay cases to reach the Supreme Court, *Jewell Ridge*, like the iron-ore *Mus-coda* case, also originated as a declaratory judgment action—filed by an employer in July 1943 to test the legitimacy of the portal demand under FLSA. The 1000 employees at the Virginia mines traveled as much as eighty-eight minutes daily as far as five miles from portal to face.\(^1\) 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 "[w]e have busses that haul our employees from the surrounding country."\(^2\) Absent an obligation to pay for the time spent in such travel, the company conceded in trial testimony that it had not exhausted the possibilities for reducing the amount of travel time.\(^3\) The underground travel, or "man trips"—as distinguished from coal hauling—were, the mine superintendent testified, for the convenience of the company; otherwise, he said, the miners would work where coal was more easily mined.\(^4\) The company was even more to the point when it stated, "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 . . . [I]t wouldn't be practical to try to operate the mine . . . having to walk from the driftmouth in."\(^5\)

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 Corp.\(^6\) testified: "I don't think traveling is work. Because I elect

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 all prior claims. See *Warne*, *supra* note 162, at 299 n. 17.


172. *Record at 242, Jewell Ridge* (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 949-50.


174. *Record at 256*.

175. *Record at 257-59*.

176. 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
to live in Scarsdale, New 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." 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.178

Although the trial judge who ruled on the owners' request for injunctive relief 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," he found that they also benefited the workers themselves "by saving their time and energy, and thus increase their productiveness."179 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 productivity, thus leading to the conclusion that time spent working on the machine need not be compensated. Even Justice Murphy's eventual modification—"[e]xertion pursued necessarily and primarily for the benefit of the employer and his business"180—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,181 it is dissipated considerably

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177. Record at 164, Jewell Ridge.
178. Id.
179. 53 F.Supp. at 939.
181. It was precisely this slippery slope to "pillow-to-pillow" wage claims that opponents conjured up in order to discredit the narrower portal-pay demands. 93 CONG. REC. 1493 (1947) (Rep. Hobbs). See also Topics of the Times, N.Y. Times, Jan. 3, 1947, at 20, col. 4 (extended ad absurdum
once the travel is confined to the employer's premises, as it is in the trilogy of portal cases decided by the Supreme Court. This consideration is not legalistic, but rather reflects the employer's power to structure the arrangements and hence to reduce the time involved. Thus it is not so much that during the trip the employer controls the employee but rather the transportation itself that is relevant. Although in terms of cost analysis the employee might have an incentive to reduce such idle—albeit unpleasantly spent—time, he is foreclosed from reducing the distance traveled or the speed of the means of transport. Only if the employer

joke). Directly after the War a district court furnished the following socio-economic answer to the question of home-to-worksites travel:

The defendant then, if it did not furnish transportation, would have available to it as employees only those who had automobiles and thus 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 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. Unfortunately, with the same logic "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, 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.

182. 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." C. Goodrich, The Miner's Freedom: A Study of the Working Life in a Changing Industry 41, 43 (1925) (emphasis in original). Although mine operators do not appear to have challenged coverage under 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, supra note 16, at 236 (statement of Irving Richter, UAW); 4 Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938: Hearings Before Subcomm. No. 4 of the House Comm. on Education and Labor, 80th Cong., 1st Sess. 2846-48 (1947) (statement by group of Cleveland, Ohio firms). The Wage and Hour Administrator energetically opposed this effort. Id. at 2621.

183. 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).

184. Even in the absurd and unrealistic situation in which the miners were "permitted" to walk for hours from portal to face and back, although miners might be able to choose the speed at which
were 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.185

Finding that the transportation benefited the employees and the employer, that the supervision during the trip was limited to enforcement of safety rules, and that 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.186 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 Muscoda. For not only had face-to-face been the universal mode of payment in the bituminous coal industry for a half-century, but defendants, plaintiff's employees, 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.187 Weighty too in the judge's mind was the ore miners' concession in Muscoda that the UMW was a strong union with the power to paralyze production by strikes.188

In addition, the judge found significant a 1940 letter written jointly by the UMW and the mine owners to the Wage and Hour Administrator disavowing portal pay:

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. . . .

[1]Any 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 working 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 mine that there would be no basis on which any general wage scales

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they walked, they would not and could not determine where the portal and where the face were located. The same would be true of large factories.

187. Id. at 939-40.
188. Id. at 948-49.
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 the high rates of pay in the bituminous coal mines.  

In concluding the letter, the union and the operators urged the Wage and Hour 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 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.  

The judge also found significant that in first presenting its demand for portal pay at a wage conference in March 1943, the UMW "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. Lewis's

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189. Id. at 940-41. The history behind this letter may be recounted briefly. Early in its existence, the Wage and Hour Division had upheld portal-to-portal pay in the Cornucopia Gold Mine on the grounds that it had been a long-standing custom and tradition. Record at 683, 685, Jewell Ridge. In 1940, a Wage and Hour 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 Wage and Hour Division from time to time that they opposed any construction of 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, sent Wage and Hour Administrator Fleming a letter memorializing their joint position. 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 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." S. Alinsky, John L. Lewis: An Unauthorized Biography 352-53 (1949).  

190. 53 F. Supp. at 940-41.  

191. Id. at 941. Fleming later characterized his decision, which had been reached with considerable difficulty, as having been dictated by the unique length and uniformity of face-to-face compensation. Record at 692-96 (reproducing Fleming, Collar-to-Collar vs. Face-to-Face, 142 Engineering & Mining J. (April 1941)). 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 collective bargaining practices, had become untenable in the light of Muscoda. His failure to intervene in the coal case resulted solely from his desire not to influence the litigation. Memorandum for the Administrator of the Wage and Hours Division as Amicus Curiae at 2-3, 5, Jewell Ridge.  

192. 53 F. Supp. at 941.
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." 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.

In other words, all miners worked seven hours at the face, but some were required to travel longer than others. It is not clear why this differential in individual unpaid travel time should be less divisive than the differential in individual paid travel time.

Both the union’s demands at the wage conference and the Houck letter not only influenced the trial judge’s decision in Jewell Ridge but also allowed employers to convince the press and a majority of Congress that they were the aggrieved party in the portal-to-portal pay controversy. 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. Assuming that much of the non-mining population presumably regarded any sort of venturing into a coal mine as a harrowing prospect to be avoided at most if not all costs, management cannot be gainsaid a significant propaganda victory in convincing some segment of the public that miners ought not be paid for one hour a day they spent deep in the bowels of the earth.

The trial judge also made much of the UMW's alleged untrustworthiness in citing Lewis’s testimony at the FLSA hearings in 1937, when he opposed governmental interference with collective bargaining out-

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194. 53 F. Supp. at 952 n. 1.
195. 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.
comes in excess of statutory standards.\footnote{196} Cast as apostates, the UM\footnote{196} W 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, 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.”\footnote{197}

The union appealed the trial judge’s decision, and the Fourth Circuit reversed what it otherwise found a convincing decision on the basis of the supervening \textit{Muscoda} decision by the Supreme Court, which it found indistinguishable.\footnote{198} Neither of the possible exceptions to the principle that travel time is compensable work time mentioned by Justice Murphy in \textit{Muscoda}—the impossibility of precise computation of time or borderline cases—applied to the coal miners’ situation. Moreover, the appeals court appeared reassured that “[t]he 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.”\footnote{199} 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.\footnote{200}

Having achieved only two-thirds pay for travel time in 1943, Lewis

\footnote{196}. 53 F. Supp. at 943 (citing \textit{The Fair Labor Standards Act of 1937: Joint Hearings Before the Senate Comm. on Education and Labor and the House Comm. 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.

\footnote{197}. \textit{Id.} at 950.

\footnote{198}. Local No. 6167, UM\footnote{199} W 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 \textit{Muscoda} in March 1944.

\footnote{199}. 145 F.2d at 13.

\footnote{200}. 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. \textit{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 the position that travel time was not work time. Because the Association refused to join the agreement, the United States Government continued to operate the member mines. \textit{See} Warne, \textit{supra} note 162, at 297 n.15, 299 n.18.
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, conditions in the coal mines, though less burdensome than those under which iron ore miners traveled, 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 prominent in the resolution of the issue regarding for whose benefit the work was performed. 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 hurried zeal to vindicate the rights of the workingman, Murphy failed to think through this approach, which in its open-endedness might have been applicable to employees driving

202. See infra § VI.
203. See E. 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. Fine, supra note 3, 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.
205. Id. at 164-66.
206. Id. at 164.
207. The 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.
208. 325 U.S. at 161, 165, 166.
their own automobiles to work in heavy traffic on dangerous roads. What the opinion lacked in logic, it made up for in empathetic language. With this language 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 subterranean travel is not work is to ignore reality completely.209

As in Muscoda, Murphy once again rejected the argument that the mining industry's custom dictated that workers receive no pay for travel time.210 In Jewell Ridge, however, he emphatically added that not even the best employers were immune from FLSA'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 well paid or... represented by strong bargaining agents."211 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

209. Id. at 166.
210. 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.'" Id. at 192-93 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 137 (1944)). Absoluted out of context, this principle is clearly a misstatement of the law. In a number of important respects 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," Skidmore v. Swift & Co., 323 U.S. 134, 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. DEP'T. OF LABOR, FIRST ANNUAL REPORT OF THE ADMINISTRATOR OF THE WAGE & HOUR DIVISION FOR THE FISCAL YEAR 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 case. 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.
211. 325 U.S. at 167.
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."\(^{212}\) Returning to the principle of the case before him, however, Murphy concluded that "each of petitioner's miners receive his own reward according to his own labor."\(^{213}\)

The dissenters (and scholarly commentary) pounced on Murphy's contradiction between individualized portal-pay and collective bargaining agreements. 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 FLSA.\(^{214}\) Consequently, the Court had brought "into question the validity of all existing mine agreements".\(^{215}\)

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. . . .\(^{216}\)

Thus by unnecessarily suggesting that the Court might approve a

212. Id. at 170.
213. Id.
214. Id. at 188-91.
215. Id. at 188.
216. Id. 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.

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 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 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 FLSA, they did not join issue on the central claim raised by portal pay demands. This was the allegation 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.

IV. Mt. Clemens Pottery Company: The CIO Knocks at Industry's Door

After learning that the CIO would demand portal-to-portal pay in all American industries, the justice wrote his brother approvingly, "This case

217. See Dodd, supra, at 355.

218. 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.'" FINE, supra note 3, at 326.

219. 325 U.S. at 175-82. For a sophisticated analysis of the peculiarities of competition among coal producers, which unfortunately ends shortly before the period under discussion, see J. Bowman, Capitalist Collective Action: Competition, Cooperation, and Conflict in the Coal Industry (1989).

220. 325 U.S. at 177.

221. 325 U.S. at 172.

222. 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 325 U.S. at 183, 184 n.9; Record at 63-64, 612-13, 624-26, 630, Jewell Ridge.
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."}

A. Background of the Last of the Portal-to-Portal Trilogy

As indicated in § I and § II, portal litigation up to this point 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 more encompassing principle at stake, industrial employers and their counsel paid relatively little attention to these earlier portal decisions. The final case in the Supreme Court portal-to-portal trilogy, however, involved a medium-size factory like thousands of others in the United States. Precisely because of the factory's ordinarity and the near-universality of its compensation practices, a ruling that 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. . . ." The workers'
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." Indeed, when the Supreme Court remanded the case to the district court, the trial in the winter of 1947 was and has remained the most intensively and extensively reported in the entire half-century history of FLSA.

The Mt. Clemens Pottery Co., located a few miles north of Detroit, was "the largest manufacturer of dinner ware pottery in the United States." 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. While the average pottery establishment employed 131 wage earners, 1,250 worked at Mt. Clemens. Significantly for the overtime issue, ninety-five per cent of production workers were paid on a piece-work basis. 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." 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 pottery.

226. Record at 1497, Mt. Clemens.


228. Brief of Appellants at 6, Mt. Clemens.

229. STANDARD AND POOR'S CORPORATION, POOR'S FINANCIAL RECORDS, 1941 INDUSTRIAL MANUAL 2594 (1941); P. Taft, Appendix B, in HOW COLLECTIVE BARGAINING WORKS: A SURVEY OF EXPERIENCE IN LEADING AMERICAN INDUSTRIES 910 (H. Millis ed. 1942). Kresge did not sell Mt. Clemens Pottery, which had been established in 1914, until 1965. MOODY'S INVESTORS SERVICE, Inc., MOODY'S INDUSTRIAL MANUAL 1971, at 1332. The original complaint named Kresge as a defendant, but for reasons that are not clear from the record, plaintiffs voluntarily discontinued as to Kresge. Record at 7, Mt. Clemens; Anderson v. Mt. Clemens Pottery Co., 60 F. Supp. 146, 148 (E.D. Mich. 1943).


231. Record at 9, Mt. Clemens.

232. Record at 166.


234. Taft, supra note 229, at 910-11.
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 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. The gravamen of the complaint was,

that the defendant compels its employees to punch 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 went into effect on October 24, 1940. The plaintiffs' lead counsel stated

235. See Pottery Strike in Mt. Clemens, Detroit Free Press, Apr. 15, 1941, at 14, col. 4; Record at 26; Mt. Clemens Pottery Co. v. Anderson, 149 F.2d 461, 461 (6th Cir. 1945).
236. See Mt. Clemens Pottery Co., 46 NLRB 714 (1943); NLRB v. Mt. Clemens Pottery Co., 147 F.2d 262, 263-65 (6th Cir. 1945).
237. 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 do 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 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 FLSA. He therefore permitted all those claiming back wages for overtime in one classification. Record at 29-30. Approximately 300 employees were permitted to file designations. Mt. Clemens Pottery Co. v. Anderson, 149 F.2d at 461.
238. J.W. Howard, Jr., supra note 129, at 403; Fine, supra note 3, at 28; Bus. Wk., Feb. 8, 1947, at 8.
239. Record at 10.
240. Id. 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
that "this 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."\textsuperscript{242}

B. \textit{The Master's Report}

The court appointed a special master, Donald Quaife, who heard extensive testimony in 1942 and issued a report in March 1943.\textsuperscript{243} His unsympathetic attitude toward the workers' action was clearly expressed in his skepticism as to why no worker had ever complained about the "cheating" before suit was filed.\textsuperscript{244} The master 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.\textsuperscript{245} The implication here—that the union manufactured hypertechnical claims about which the workers had never articulated a felt need but which they cynically supported as a "'gravy train'"\textsuperscript{246}—was then largely adopted by employers and the press in the course of the portal and anti-portal movements. Because this employers' position implicitly underlay the master's report, it gained enhanced legitimacy as the debate proceeded.

In the alternative the plaintiffs argued that "at least the full time the employees were in the plant as shown by entries punched on the time

\textsuperscript{241} 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. \textit{Back-Pay Lawyer Advises Caution}, N.Y. Times, Dec. 29, 1946, § 1, 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).

\textsuperscript{242} Record at 382. Discrepancies crop up in the record as to the exact number of minutes involved. The complaint specifies 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 speaks of forty minutes. Record at 10-11.

\textsuperscript{243} Record at 143-217.

\textsuperscript{244} \textit{Id.} at 190.

\textsuperscript{245} \textit{Id.} at 191.

\textsuperscript{246} \textit{Exit Mount Clemens}, N.Y. Times, Apr. 4, 1947, at 22, col. 3.
clock cards should have been . . . credited to them, since they were required to go directly from the time clocks to their respective departments and immediately thereafter to work." In the company's version, by way of contrast,

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.

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 not credited to the employees could not be computed.

On this issue of travel time, the master found that after entering the production part of the plant, which encompassed more than eight acres, 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, in 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 hours working time. In this example the employee was not credited for a total of thirty-four minutes in which she was actually clocked in and on the premises. 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; the employees estimated the time spent walking to the more distant departments ranged from one-half to three minutes, while the em-

247. Record at 163.
248. Id.
249. Id.
250. This 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.
251. Record at 167.
252. Id. at 168.
employer's estimate varied between six and eight.\textsuperscript{253}

This difference in estimates is crucial for two reasons. First, it shows how minimal the walking time was by any calculation. 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 because 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 this 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.\textsuperscript{254} This formula tracked the guide articulated by the Wage and Hour Administrator.\textsuperscript{255} The master rejected this formula solely because 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 compensable.\textsuperscript{256} The master, though, 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."\textsuperscript{257}

\textsuperscript{253} Id. at 173-74.
\textsuperscript{254} Id. at 197.
\textsuperscript{255} \textit{BUREAU OF NATIONAL AFFAIRS, WAGE AND HOUR MANUAL}, Interpretative Bulletin No. 13, at 172-73 (1944-45) ("all time during which an employee is required . . . to be on the employer's premises"). More pertinently, a Wage and Hour 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.

\textsuperscript{256} Record at 197. 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 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. \textit{See Lofton v. Seneca Coal & Coke Co.}, 2 Wage & Hour Cas. (BNA) 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"), \textit{aff'd}, 136 F.2d 359 (10th Cir. 1943), \textit{cert. denied}, 320 U.S. 772 (1943).

\textsuperscript{257} Record at 199.
As to the preliminary work (that performed prior to 7:00 A.M.), 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.\(^{258}\)

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 although it denied that the so-called non-personal preparations were done at all before starting time.\(^{259}\)

The master found resolution of the issue of the compensability of preliminary activity difficult. For without benefit of pertinent case law, he was confronted with a conflict between a Wage and Hour Inspection Field Letter that "ma[de] it clear that the Administrator considers such work [non-personal preliminary duties] as part of the employment time" and differing industry customs.\(^{260}\) 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, evidence as to the amount of damages suffered must be reasonably definite and not based upon mere conjecture."\(^{261}\) If the 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 recollect—indepedently 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

\(^{258}\) Id. at 169.

\(^{259}\) Id. at 174.

\(^{260}\) Id. at 200.

\(^{261}\) Id. (citing several appellate and district court FLSA cases).
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 de minimis issue on which the case would ultimately hinge.

In order to reach his decision, the master tried to gain some perspective on standard industrial practice by devoting some attention to the testimony elicited by the parties' expert witnesses. He concluded that all expert witnesses 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 point of 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 workers punched time clocks directly in their departments to record the beginning of their work. Therefore, it would have been administratively possible for Mt. Clemens to record the actual starting times for workers who went directly to work rather than have them punch-in at the portal.

262. Id. at 201.
263. Id. at 202.
264. Id. at 170.
265. Id. at 171.
266. Id. at 1460-61.
267. 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 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
After hearing this testimony, and in addition to his ruling that preliminary activity was not compensable working time, the master 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.”

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.”

C. In the Lower Courts

When the master’s ruling was appealed by the employees of Mt. Clemens, the question before District Judge Picard was whether to approve the master’s report. If the workers’ account was correct, then, 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. Although Picard generally agreed with the master, certain details merited closer scrutiny, especially the finding that the time cards and calculations showed that,

inasmuch as Mt. Clemens conceded that workers had to punch in early in order to be in their departments by starting time. Id. at 173.

268. Id. at 214-15.
269. Id. at 217.
271. Id. at 148-49.
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 from 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.272

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.273

The crucial point 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 FLSA, of beginning piece work before the official starting hour. Before FLSA went into effect, such practices mattered less. Perhaps in the welter of disputed issues surrounding the union’s organizing campaign, the workers had more pressing issues to pursue. But since the employees’ claims to overtime pay were unwaivable under FLSA, they were free to “sav[e] up these claims like Octagon soap wrappers.”274 Clearly, though, 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.275

Picard ruled that the court would not “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.”276 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 was

272. Id. at 149.
273. Record at 1506, Mt. Clemens.
275. Mt. Clemens, 60 F. Supp. at 149.
276. Id. at 149-50.
credited to the employer. Thus Picard expressly denied the walking time.\textsuperscript{277} In addition, 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.\textsuperscript{278}

On appeal, the Sixth Circuit reversed and dismissed.\textsuperscript{279} The narrow ground of decision was the district court's requirement to accept the master's findings unless clearly erroneous. According to the Sixth Circuit, Judge Picard "applied an arbitrary formula" which "produced a judgment based upon surmise and conjecture" since the employees based their claims "on a mere estimated average of overtime worked."\textsuperscript{280}

D. Before the Supreme Court

In their petition to the Supreme Court for writ of certiorari, the employees argued that all the time they spent after clocking in bore all the indicia of work as articulated in the \textit{Muscoda} decision—that is, exertion on the employer's premises controlled or required by the employer necessarily and primarily for the employer's benefit.\textsuperscript{281} The question presented to the Supreme Court was, the plaintiffs implied, complicated by the district court since the trial judge:

\begin{quote}
\textit{did not base (his) 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...}\textsuperscript{282}
\end{quote}

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 this was not an "ordinary travel time case," then why had plaintiffs been arguing "throughout these proceedings... that because of the impossibility of calculating travel time to the

\begin{footnotes}
\textsuperscript{277} Id. at 150. Picard also allowed the employer five minutes for punching in after lunch, but denied recovery for punching out.
\textsuperscript{278} Record at 289, 297-305. One worker received as little as one cent in back wages.
\textsuperscript{279} Mt. Clemens Pottery Co. v. Anderson, 149 F.2d 461 (6th Cir. 1945).
\textsuperscript{280} Id. at 464-65.
\textsuperscript{281} Petition for Writ of Certiorari at 6, \textit{Mt. Clemens}.
\textsuperscript{282} Id. at 7-8.
\end{footnotes}
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”

The answer to this rhetorical question appears to be that the workers had never argued that this was a travel time case. Instead, they had pleaded the case as involving actual production work before the clock started (“jumping-the-gun”).284 When the Sixth Circuit, however, reversed Picard on the not-clearly-errorreous 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..."285 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.286

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.287 After clocking in, it took only thirty to ninety seconds “to get into productive activities.”288 In understating the travel time, the workers sought to convince the Court that it was not being called upon 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.289

The company, of course, took the opposite tack, emphasizing that, because its practice was “universal,” any ruling that it was in violation of FLSA would have equally broad consequences for all industry.290 Mt. Clemens sought to buttress this argument by suggesting that the clock-in

283. Id. at 8.
284. Indeed, 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.” Id. at 9.
285. Id. at 8.
287. Brief for Appellants at 8, 23, Mt. Clemens.
288. Id. at 8.
289. Id. at 9.
290. Brief for Respondent at 27, Mt. Clemens.
and payment arrangement was universal precisely because it was eminently reasonable:

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 plain 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.291

Misrepresenting the nature of the employees’ claim, the company then charged that:

Any requirement that an employee must be paid for the time spent 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 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.292

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

Bickering over such minutiae293 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 premises. . . . 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. . . .294

291. Id. at 96-97.
292. Id. at 97, 98.
293. The “minutiae” over which the CIO was “bickering,” according to 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.

“Portal-to-Portal” Wage-Hour Liabilities, supra note 224, at 3, 4.
294. 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.” Measurement of Trifles, TIME, Feb. 10, 1947 at 82 (quoting John Sonnett). See also Ruch, Picard Reopens Basic Portal Suit; U.S. Protests Pay, N.Y.
In his opinion for the Supreme Court, Justice Murphy reversed the Sixth Circuit by referring to the appeals court's 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" FLSA. Although an employee had the burden of proving that he had performed the work for which he alleged underpayment: "[t]he 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 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.

In the future, where an employer failed to keep adequate and accurate time records reflecting when the employee began his preliminary activities, all the 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 inference." 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 . . ." 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 near the beginning of Mt. Clemens immediately creates 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.


295. Id. at 686.
296. Id. at 687.
297. 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). Fair Labor Standards Act, 29 U.S.C. 215(a)(5), 216(a) (1965).
the inference to be drawn from the employee’s evidence.” Failure to do so would justify recovery “even though the result be only approximate.” This procedural innovation is the only pro-employee proposition of *Mt. Clemens* that survived the subsequent congressional backlash.

Having set forth this principle by way of prologue, the Court then 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. 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 Sixth Circuit’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.” 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 the time clock to the scheduled beginning of work was actually devoted to compensable activity. 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 any requirement by the employer that the employee actually be there. By the same token, Murphy implicitly declined the plaintiffs’ invitation to avail himself of the opportunity to implement the dictum in *Jewell Ridge* concerning the possibility of permitting an arbi-

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300. *Id.* at 687-88.

301. *Id.* at 688.

302. On the unsuccessful efforts to overturn this holding as well, see *infra* § 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 COLUM. L. REV. 355, 358 (1943).

303. 328 U.S. at 689.

304. *Id.*

305. 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. *Id.* at 690. Had the Court accepted the workers’ claim that they went to work immediately, such a calculation would not have been unfair.

306. *Id.*
trary aggregate average fixing of travel time rather than requiring individualized accounts.

The Court, though, did favor the plaintiffs on one point:

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.307

Ignoring the time spent in waiting to clock in as not having been pleaded,308 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 of the employer's business.309

According to the Court, however, the employees, while walking from the clocks to their work benches, 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 lim-

307. Id. at 690-91.

308. Id. at 691. In two cases, one decided before and the other after 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. 366 (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 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, Mt. Clemens. 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.

309. 328 U.S. at 691.
ited to the minimum time necessarily spent in walking at an ordinary rate along the most direct route" and should normally be easily calculable. 310 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. 311

While acknowledging that time spent walking from the clock to the work station was working time, Murphy also held that time spent both walking and in preliminary activities was subject to a de minimis rule so that "negligible" or "insubstantial and insignificant" periods of time need not be compensated: 312

The workweek contemplated by § 7(a) must be computed in 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. 313

Murphy was certain that this de minimis rule could "doubtless be applied to much of the walking time" involved in Mt. Clemens, leaving to Judge Picard to determine just how much. 314

The dissent by Justice Burton, with whom Justice Frankfurter concurred, 315 sought to re-focus the analysis on custom, contract, and collective bargaining, as had the dissent in Jewell Ridge. Instead of requiring employers to engage in the futility of recording small amounts of time spent in non-productive activities, "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." 316 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."\(^{317}\)

Workers could, it is true, try to secure portal pay or any other terms and conditions of employment through collective bargaining. FLSA, as the dissent failed to realize, was a recognition of the political and economic reality that certain 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 employers to their own devices in defining a statutory term such as compensable work would have marked a return to the pre-statutory period. Moreover, reliance on custom, contract, and bargaining would have reproduced precisely the conditions of unfair competition that enabled "chiseling" employers to underprice those employers who could not or did not wish to "sweat" their employees.\(^{318}\) If what Burton really meant was that FLSA was not designed to promote the marginal improvements in working conditions that strong unions had theretofore apparently preferred to trade off for other terms,\(^{319}\) he failed to explain how that result could be achieved without harming the unorganized workers (and more responsible employers) whom Congress indisputably wanted to help.

The outcry that the Court's decision to grant the Mt. Clemens workers wages for certain walking time eventually unleashed\(^{320}\) appears

\(^{317}\) Id. at 697-98.

\(^{318}\) "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 Linder, supra note 158, at 160-62. Even what may appear to the individual worker to be negligible unlawful deductions from compensable time can, when spread out over thousands of workers for long periods of time, aggregate to significant cost advantages. See supra § I.

\(^{319}\) 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.

\(^{320}\) Thus, for example, 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." 93 CONG. REc. 1514 (1947). Senator Wherry (Rep. Neb.) stated 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." Id. 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.W. Howard, Jr., supra note 129, at 405. In his capacity as director of the National Conference of Judicial Councils, Roscoe Pound, 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 Supreme Court's handling of the portal-to-portal
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 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 rule. The fact that this would aggregate forty hours a day or more for all the employees would not enter into consideration." 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).  

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. 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 lob-

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321. 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 E. Gressman (Apr. 9, 1990). Gressman, who is 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."  


323. In this sense, it may have been an exaggeration to speculate that the decision "would have caused radical changes in the payroll practices of American industry." Cox, supra note 97, at 807. Similarly, Frances Perkins, the Secretary of Labor under President Roosevelt, called the Supreme Court's decision a "'doctrinaire'...one that could not have been made by any one with practical knowledge of working conditions." Miss Perkins Urges Labor Facts Providing Ways to End Disputes, N.Y. Times, Jan. 16, 1947, at 4, col. 4. Arthur Krock immediately seized upon this remark. Krock, Miss Perkins Goes to the Root of the Decision, N.Y. Times, Jan. 17, 1947, at 22, col. 5. By way of contrast, Elmer Andrews, the first Wage and Hour Administrator, while surprised that his own portal interpretation for mining had been extended to less hazardous employment, nevertheless 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." Many Portal Suits Held Unwarranted, N.Y. Times, Jan. 5, 1947, § 3, col. 2.  

324. In commenting on NAM's petition for amicus status on remand, its counsel stated that: "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." NAM Gives Basis for Entering Portal Case; Says Back-Pay Plan Could Wreck Economy, N.Y. Times, Jan. 11, 1947, at 7, col. 5.
bying efforts on behalf of a portal amendment to FLSA would have been seriously undercut. As it was, however, employers were disposed "to fight every portal pay suit . . . in the firm belief that the Supreme Court will change its mind." \textsuperscript{325} In the meantime, critics of \textit{Mt. Clemens} tried to rework the salient points of the dissent into the language of amendatory bills. \textsuperscript{326}

\textbf{E. The Remand}

Events unfolded on two tracks after the Supreme Court denied a rehearing to Mt. Clemens on October 10, 1946. \textsuperscript{327} First, attention soon focused on the 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 \\textit{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. \textsuperscript{328} Conversely, the pace of litigation accelerated as unions began to fear that if they did not file promptly, their claims would be cut off. \textsuperscript{329} All of this strategic behavior must, moreover, be seen against the backdrop of the contemporaneous second round of postwar wage negoti-

\textsuperscript{325}. \textit{Bill to Wipe Out Portal Pay Suits Ready in Capital}, N.Y. Times, Jan. 2, 1947, at 1, col. 4. Employers hoped that the Court would change its mind in part through a change of Court personnel. \textit{Id.}

\textsuperscript{326}. The 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. \textit{See, e.g., H.R. 1041, 80th Cong., 1st Sess., 93 CONG. REC. 384 (1947) (Rep. Fernandez).}

\textsuperscript{327}. Anderson v. Mt. Clemens Pottery Co., 329 U.S. 822 (1946). In January 1947 Arthur Krock wrote in the \textit{New York Times} that lawyers suggested that before Congress acted, it would be best for the Supreme Court to rehear \\textit{Mt. Clemens}. Krock, \textit{The Long Trail to the Portal-to-Portal Suits}, N.Y. Times, Jan. 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, of course, also failed to state that by (unnamed) "lawyers" he in fact was referring to Justice Jackson, with whom he 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. \textit{See Gerhart, supra note 203, at 274.}

\textsuperscript{328}. Thus a Wall Street lawyer urged that: "[I]t 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. . . ." Cotter, \textit{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." \textit{Portal Pay Demands, If Awarded, Would Wipe Out Auto Industry, Warns Christopher of Packard}, Wall St. J., Jan. 11, 1947, at 2, col. 1.

\textsuperscript{329}. 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 state-
ations. For it was 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. By the same token, however, Edward Lamb, counsel for the employees in Mt. Clemens, warned unions that they risked restrictive congressional action if they filed suits for "fabulous and reckless" amounts.

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 to mobilize their various audiences for capitalist law reform. Throughout December 1946, the New York Times and the Wall Street Journal kept readers informed of the latest portal suits, highlighting the maximum but, in the reality of litigation, infeasible recoveries and furnished a running account of employers' associations' initiatives to overturn Mt. Clemens.

More important in manufacturing public opinion and the "hysteria" that might galvanize Congress into action, however, was the newspapers' constant and unswerving editorial promotion of management's position. Thus, for example, the New York Times, ignoring FLSA's purpose to negate contract in favor of uniform standards, edito-


333. See, e.g., Portal Pay Suits Exceed a Billion, N.Y. Times, Dec. 29, 1946, at 1, col. 8; Bethlehem Sued for $200,000,000, N.Y. Times, Dec. 29, 1946, at 3, col. 4; Portal Pay Suits Pass $900,000,000, N.Y. Times, Dec. 28, 1946, at 2, col. 4; 6 Billion Possible in Portal Claims, N.Y. Times, Dec. 22, 1946, at 3, col. 4 (suit by UAW members against Ford for $270,000,000); Asks $120,000,000 in Portal Pay Suit, N.Y. Times, Dec. 10, 1946, at 24, col. 5 (suit by USW members against U.S. Steel).


rialized 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{336} 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."\footnote{337} 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 indignantly—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.\footnote{338}

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.\footnote{339} 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.\footnote{340} Before the trial resumed, Picard dealt with a number of motions, all of which were


337. 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 E. Gerhart, supra note 203, at 274. The generally conservative positions that underlay Krock's indefatigable editorializing against portal pay may be gleaned from A. Krock, MEMOIRS (1968).


340. 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. J.W. Howard, Jr., supra note 129, at 403, incorrectly regarded Picard's apologia as "comic relief." It may have been self-serving, but it was nevertheless accurate.}
dutifully reported by the *Times*. Thus he granted the motion of the United States to enter an appearance as an amicus, which Attorney General Clark had filed in order to represent the government in its capacity as administrator of FLSA and as an affected party where cost-plus war contractors 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. 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 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 apology. 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, “[o]rdinarily this would have ended the case then and there.” But the

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344. *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. *U.S. Row Charged Over Portal Case*, N.Y. Times, Feb. 1, 1947, at 7, col. 5.


parties had inserted into the record evidence about walking and prelimi-
nary activities in order to bolster their contrary positions on the issue of
productive overtime. That is, the company overstated walking and pre-
liminary 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. . . . 347

Because Picard never instructed the master to compute the time em-
ployees spent walking and engaging in preliminary activities, he heard
new testimony on this point, which, as he had anticipated, was not credi-
ble since each side now had an incentive to reverse its position with re-
gard to exaggerating or understating the time consumed. The judge
concluded from this conflicting testimony that walking time was maxi-
mally three minutes.348 Picard found that preliminary activities
amounted to less than three minutes per day.349 Based on his review of
the meager precedents, Picard concluded that the walking time and pre-
liminary activities, taken together, were de minimis.350

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 percep-
tion that precisely because FLSA was "above all aimed to prevent ex-
ploration 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

347. Id. at 713.
348. Id. at 714-15.
349. 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." Id.
at 715.
350. Id. at 716-19.
Ridge] walking time of the type and amount involved in this case can be considered as compensable. .?"\textsuperscript{351} Picard's resolution of the de minimis issue based on this interpretation of the Supreme Court's portal trilogy appears misguided in the sense that the Court had been well aware not only of the vast difference in conditions between the halls at Mt. 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{352}

In dictum, Picard granted NAM its most urgently pleaded point: a rule of non-retroactivity. But this rule was not so generally formulated as NAM would have wished since Picard premised his decision on the company's reliance on the results of a compliance inspection by the Wage and Hour Division.\textsuperscript{353} Adding dictum to dictum, Picard came much closer to accommodating 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{354} In virtual disregard of the clear holding of the portal trilogy that FLSA takes precedence over industry custom, 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{355} Picard's belief that an award of retroactive damages under FLSA to employees would be so harsh that "a holding to the contrary would not be calamitous,"\textsuperscript{356} 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{357} 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

\textsuperscript{351} Id. at 719.
\textsuperscript{352} This cavalier attitude was also at odds with a colloquy that Picard had with 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.' " \textit{Drama of the Stopwatches, Bus. Wk.}, Feb. 8, 1947, at 17, 18.
\textsuperscript{353} 69 F. Supp. at 720.
\textsuperscript{354} Id. at 720.
\textsuperscript{355} Id.
\textsuperscript{356} Id. at 721.
\textsuperscript{357} Id. at 722.
still accepted, although the Supreme Court had precluded him from awarding them a recovery.\textsuperscript{358} And while these plaintiffs might not have been worthy of portal pay, Picard held out the prospect that sometime a portal suit might prevail.\textsuperscript{359}

F. The Reaction to the Remand

Reactions to Picard's ruling were predictable. The plaintiffs' counsel, Lamb, announced immediately that they planned to appeal, adding, however, that in several respects \textit{Mt. Clemens} was not a true portal case. Consequently, the facts did "not justify compensation comparable to that which" existed in heavy industry.\textsuperscript{360} 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";\textsuperscript{361} 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.\textsuperscript{362} Undeterred, the CIO, viewing Picard's decision as inconsistent with the Supreme Court ruling, filed new suits.\textsuperscript{363} The \textit{New York Times}, which made the dismissal the lead article\textsuperscript{364} and published the entire opinion (including footnotes),\textsuperscript{365} 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... ."\textsuperscript{366} The next day it offered further reflection on the matter:

\begin{quote}
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.\textsuperscript{367}
\end{quote}

\begin{footnotes}
\textsuperscript{358} \textit{Id.}
\textsuperscript{360} \textit{Appeal is Planned on Portal Decision}, \textit{N.Y. Times}, Feb. 9, 1947, at 16, col. 4.
\textsuperscript{361} \textit{U.S. News & World Rep.}, Feb. 7, 1947, at 34.
\textsuperscript{363} \textit{UAW Sues Again Despite Portal Ban}, \textit{N.Y. Times}, Feb. 11, 1947, at 20, col. 5.
\textsuperscript{365} \textit{N.Y. Times}, Feb. 9, 1947, at 26-27.
\end{footnotes}
Several days later it 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 captured the mood best in the wake of Picard's failure to convince any of the parties to abandon the fight: "[I]n the portal-to-portal cause celebre, how and what the formerly obscure Detroit judge reasoned 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."

The appeal of Picard's remand decision was filed by the union 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. In the meantime Attorney General Clark announced 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 Gwynne promptly declared that it would have no effect on the legislative process.

370. 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).
V. "(W)ait for that nice new Republican Congress to come riding to the rescue"^378

A. Precursors of the Portal-to-Portal Act

As Representative Gwynne declared, Congress was ready to put an end to the portal suits. In order to understand this congressional reaction, however, a look at some of the actions taken prior to the passage of the Portal-to-Portal Act are necessary.

1. *State Statutes of Limitations.* Because Congress failed to provide for a specific statute of limitations in which workers could file claims for back wages under FLSA, courts had to apply what they considered the most analogous state statute of limitations. Thus 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 FLSA in 1938, these periods of limitation varied from one year to twelve years.^379

The legislative genesis of the core of the Portal-to-Portal Act can be traced back to a movement to shorten the limitations period. Several states during World War II enacted statutes of limitation that discriminated against wage claims in general and FLSA overtime and liquidated damages in particular.^380 Overtime was a particular animus of employers simply because the vast majority of all FLSA violations involved premium pay rather than minimum wages or child labor.^381 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 FLSA's "defeat in practice."^382 And shortly

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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..."

These efforts had been made possible by Congress's omission of a limitations period in FLSA itself.

A review of the most prominent state laws highlights the shortest limitations periods imposed by the states. 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. By way of contrast, actions to recover regular wages, which could be brought for six years after accrual 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." 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 FLSA and hence with Congress's commerce power. In 1947 the legislature amended the statute to extend the limitations period to one year for future and past claims. 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 legislature...

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384. Apparently the first bill to establish a limitations period was introduced only a few months after 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.
385. 1943 Or. Laws 265.
386. OR. [Limitations of Actions] § 1-204 (Consol. 1939).
389. 1947 Or. Laws 492.
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. . . ."390 The law was held invalid as to FLSA and discriminatory against federally granted rights.391 In the midst of 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.392 After a federal district court upheld the statute,393 it was preempted by the new Portal-to-Portal Act.394

Although a number of states continued to enact short statutes of limitations395 even while Congress was debating and after it passed the Portal-to-Portal Act,396 the rude judicial reception accorded them397 induced NAM to curtail these efforts during 1946 in favor of a congres-sional campaign.398 Now that labor, capital, and the executive and legislative branches of the federal government agreed that a uniform national limitations period was a desideratum since conflicting court interpretations led to confusion,399 the primary stumbling block, as the failure

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390. 1943 Iowa Acts 267, § 1.
392. 1945 Iowa Acts 222. Already existing claims had to be brought within six months of enactment. Id.
394. This preemption dealt with 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 1002 (8th Cir. 1947).
396. 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 333. The Idaho Hours Worked Act, though not applicable to FLSA, declared it "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." 1947 Idaho Sess. Laws ch. 267, § 2.
397. 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, 65 F. Supp. 67 (W.D. S.Car. 1946).
to enact any of the legislative initiatives in the Seventy-Ninth Congress demonstrated, was disagreement over the appropriate length of that period.

2. *A Federal Statute of Limitations.* 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 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 need to be 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 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 concepts of work time, over-all coverage, and [that] the Administrator's authority 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 em-


402. 91 Cong. Rec. 2927 (1945). Two other bills were offered with a six-month period of limitation. S. 760, 79th Cong., 1st Sess., 91 Cong. Rec. 2386 (1945) (Johnson); H.R. 3079, 79th Cong., 1st Sess., 91 Cong. Rec. 4006 (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.

403. See 91 Cong. Rec. 2927-29 (1945) (setting forth applicable laws). The bill provided for a two-year period in public actions.

404. *Id.* at 2927.

ployer was sued under 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. Gwynne did not explain why wage contracts should be treated differently than other contracts. 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 counsel for NAM, Raymond Smethurst, whose statement was not confined to complaints about the limitations period or even portal pay issues under FLSA. He 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. NAM took the position that during the coming "difficult period of reconversion . . ., enactment of a limiting statute could provide an important and needed stimulant to postwar business venture and risk taking. NAM was therefore grateful for

406. 91 Cong. Rec. 2926 (1945).
407. 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.
408. Limiting the Time for Bringing Certain Actions Under the Laws of the United States: Hearing Before Subcomm. No. 4 of the House Comm. on the Judiciary, 79th Cong., 1st Sess. (1945)[hereinafter Limiting the Time for Bringing Certain Actions Under the Laws of the United States]. The chairman of the subcommittee, Representative Hobbs of Alabama, was arguably the most vociferous opponent of FLSA at the time of the portal-pay hearings in 1947. According to a union newspaper: "The bill was drafted in such broad terms in order to have it referred to the ultra-reactionary Judiciary Committee, which is notoriously hostile to labor." House Bill Gives Business Crooks License To Steal, LABOR, Nov. 24, 1945.
410. Limiting the Time for Bringing Certain Actions Under the Laws of the United States, supra note 408, at 21-22.
411. Id. at 32.
the “partial corrective” that Gwynne’s bill provided as to future claims. But NAM further argued that:

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.\textsuperscript{412}

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 NAM’s proposals.\textsuperscript{413}

Considerable interest attaches to 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.\textsuperscript{414} Walling himself suggested a three-year limitations period.\textsuperscript{415} He also used the opportunity to re-urge Congress to confer authority on him to define FLSA’s terms and to 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. As an enforcement agency, the Wage and Hour Division 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. 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.\textsuperscript{416}

\textsuperscript{412} Id.
\textsuperscript{413} Id. at 38-40 (statement of James Haley).
\textsuperscript{414} Id. at 149.
\textsuperscript{415} Id. at 155.
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 [wa]s to permit the Administrator to protect those employers who follow his interpretation in good faith." If, in addition, Congress amended 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, "justice would be served." Walling's initiative turned out to be doubly ironic. First, this strongly pro-employer measure—it was after all the penal aspect of the retroactivity that incensed employers—was not even offered by employers, but rather by the Administrator himself. 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 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. Specifically, 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 done or omitted 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 omission, be amended, rescinded, or be determined by judicial authority to be invalid or of no legal effect.

Whereas Walling had merely proposed excusing employers from liability for 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

417. Limiting the Time for Bringing Certain Actions Under the Laws of the United States, supra note 408, at 146.
418. Id. at 154.
420. Id. at 1.
Labor both expressed strong opposition to the committee's bill\textsuperscript{421} as did several Democratic members of the committee.\textsuperscript{422} Although H.R. 2788 was to be given two hours of debate, the House leadership did not call it up.\textsuperscript{423} 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."\textsuperscript{424} 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."\textsuperscript{425} And the following March, the Senate Judiciary Committee, too, reported H.R. 2788 favorably, this time with a two-year limitations period.\textsuperscript{426} Truman's new Attorney General, Tom Clark, found this period "somewhat brief," instead suggesting five years.\textsuperscript{427}  

At the same time that Gwynne's statute of limitations bill was working its way through the judiciary committees, the labor committees in both chambers were also considering amendments to FLSA. Indeed, a struggle was emerging over which committee should have jurisdiction over the bill.\textsuperscript{428} The major FLSA bills in 1945, which were largely designed to raise the minimum wage,\textsuperscript{429} both contained provisions stating that an action by an employee to recover liability for unpaid minimum wages or unpaid overtime compensation may be brought within

\textsuperscript{421} \textit{Id.} at 7-9.  
\textsuperscript{422} \textit{Id.} at pts. 2 and 3.  
\textsuperscript{423} 91 CONG. REC. 10946 (1945) (statement of Rep. Gwynne).  
\textsuperscript{424} \textit{Id.} at 10947 (exchange between Representatives Gwynne and Horan). Two years later Gwynne protested to the Methodist Federation for Social Service that the purpose of the portal bill was not to weaken FLSA but "to remove the inequities and injustices which are jeopardizing [sic] the very existence of the Act itself." Letter to Jack McMichael (Mar. 1, 1947) (copy in author's possession).  
\textsuperscript{425} \textit{Id.}  
\textsuperscript{426} S. REP. No. 1395, 79th Cong., 2d Sess. 2 (1946).  
\textsuperscript{427} \textit{Id.} at 6. Clark also proposed an extended period for causes of action that had already accrued. \textit{Id.}  
\textsuperscript{428} 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.R. REP. No. 1141, 79th Cong., 1st Sess. 2, pt. 2 (1945).  
\textsuperscript{429} 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, \textit{The Minimum Wage}, 112 ATLANTIC MONTHLY 289, 296 (1913).
five years after accrual of liability.\textsuperscript{430} 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 the courts discretion to reduce or to eliminate liquidated damages where the employer showed that his violation had not been willful and that he had acted in good faith.\textsuperscript{431} 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.\textsuperscript{432} In the meantime, in May, the House, after extended debate over the length of the limitations period,\textsuperscript{433} passed H.R. 2788 with a two-year period.\textsuperscript{434} 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 and any chance for passage of a federal statute of limitations.\textsuperscript{435}

Since these early Congressional bills were exclusively statutes of limitations with no reference to portal issues,\textsuperscript{436} it was with some justification that NAM could later assert that the Portal-to-Portal Act would


\textsuperscript{431} 92 CONG. REC. 2245, 3205 (1946). For the debate over whether the period should be one, two, three, or five years, see \textit{id.} at 3187-89. 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 forests 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. \textit{id.} at 5296 (colloquy between Representatives Gwynne and Savage).

\textsuperscript{432} \textit{id.} at 10,372-73. 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.

\textsuperscript{433} \textit{id.} at 5290-5305. The supporters of a short period competed with one another in telling war stories about "outrageous suits... which shock our sense of justice." \textit{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 FLSA. \textit{id.} at 5297-98.

\textsuperscript{434} \textit{id.} at 5305-06.

\textsuperscript{435} \textit{id.} at 10,487.

\textsuperscript{436} Conversely, in 1941 bills were introduced in both houses providing that 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., 87 CONG. REC. 1581 (1941) (Sheppard); H.R. 5268, 77th Cong., 1st Sess., 87 CONG. REC. 5916 (1941) (Patton).
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 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 of Mt. Clemens, Hoffman would also have excluded from the workweek any time spent walking from the time clock. Hoffman portrayed his bill as a means of dealing with a situation which was "an invitation to unscrupulous lawyers and racketeering labor leaders" and "unscrupulous blackmailers." The New York Times, for which no anti-portal pay legislation was too radical,

440. Wolman Predicts One More Pay Rise, N.Y. Times, Dec. 6, 1946, at 3, col. 5 (statement by Raymond Smethurst, counsel to NAM). Monsanto Chemical Co., for example, which was a defendant in a portal suit, wrote a letter to the Senate Judiciary Committee stating that portal legislation was the first problem the new Congress should attack. Portal-to-Portal Wages, supra note 9, at 801 (1947).
442. Leviero, Bill to Wipe Out Portal Pay Suits Ready in Capital, 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 CONG. REC. 298 (1947). During the debates he called Murphy the "CIO's Santa Claus." Id. at 1562.
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.”

Beginning on the opening day of the first session 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. Perhaps the most extraordinary piece of legislation was proposed by Senator O’Daniel in the form of an amendment to the Internal Revenue Code. O’Daniel’s proposal 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. By January 15, the Senate Judiciary Committee 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.

The accelerated pace of congressional action went hand in hand with the stepped-up portal litigation. Workers had filed 727 portal suits in federal courts during the last six months of 1946, but in January 1947 alone an additional 1,186 were recorded. The closer Congress ap-

446. The bills were apparently referred to the Judiciary rather than to the Labor Committee because such action involved the limitation of courts’ jurisdiction. See Ray, The Portal to Portal Act of 1947, 20 TENN. L. REV. 151, 153 (1948) (Associate Solicitor, U.S. Dept. of Labor). Some bills were referred to the labor committees, but never advanced. See, e.g., H.R. 1041, 80th Cong., 1st Sess. (1947). 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 FLSA. 93 CONG. REC. 2369 (1947).
447. Portal-to-Portal Wages, supra note 9, at 8.
448. Exempting Employers from Liability for Portal-to-Portal Wages in Certain Cases, S. REP. NO. 48, 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.

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peared to be moving to closing the portal permanently, the more actions were filed.\textsuperscript{449} And as reports circulated that the defendants' total liability was approaching $6 billion,\textsuperscript{450} 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,\textsuperscript{451} declared at the outset of the Senate hearings that:

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 . . . threaten the very existence of thousands of business[es]. . . .\textsuperscript{452}

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 already noted, it entered the \textit{Mt. Clemens} proceedings on remand in order to persuade Picard to dismiss the suit on de minimis grounds.\textsuperscript{453} Second, reports began appearing that the Treasury would provide partial financial relief to affected employers. In late December the \textit{New York Times} editorialized about "[t]wo 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. The other was the renegotiation of

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\textsuperscript{449} Regulating the Recovery of Portal-to-Portal Pay, supra note 16, at 174-75 (testimony of Lee Pressman, General Counsel, CIO).

\textsuperscript{450} S. REP. No. 48, 80th Cong., 1st Sess. 2 (1947). 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 \textit{New York Times} quoted "[i]ndustry leaders" as citing the same figure.

\textsuperscript{451} 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 a substitute amendment to Senator Wiley's bill, S. 70. Portal-to-Portal Wages, supra note 9, at 11-12.

\textsuperscript{452} Portal-to-Portal Wages, supra note 9, at 17.

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government war contracts to take into account the new state of facts. 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. 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.

Corporations, to be sure, were "greatly pleased" by this Treasury ruling, 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." Although these steps by the Truman administration have been interpreted as part of its effort to forestall portal legislation, the contemporary view appears much more plausible that the Treasury ruling was "likely to . . . spur Congressional action to block further portal-to-portal pay suits . . . in order to save the Government from raids on the Treasury. . . ." As the Attorney General's intervention in *Mt. Clemens* had already suggested to large capital, which was the primary object of the suits, the Administration's sympathies lay with capital in regard

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460. *Treasury Rules Industry Can Charge Funds Paid in Portal Suits Against Federal Taxes*, Wall St. J., Jan. 23, 1947, at 3, col. 1. Still more puzzling for its indirectness was that the government was, according to a 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. White, *Federal Policy Under Fire in War-Job Portal Pay Suits*, N.Y. Times, Jan. 9, 1947, at 1, col. 6.

to the future of portal claims. Management, however, 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. *House Bill: De Facto Repeal of 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 debate. The bill on which the House Judiciary Committee, of which Gwynne was chairman, held hearings was Gwynne's H.R. 584, entitled "[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 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 between employees and employers, 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:

1. creating a one-year statute of limitations;
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";
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";

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462. *Regulating the Recovery of Portal-to-Portal Pay, supra* note 16, at 1. 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.R.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, supra* note 16, at 4.

464. Id. § 1.
465. Id. § 2(a). Claims that had already accrued had to be filed within ninety days of the Act's effective date unless the action would have been barred by any other applicable (presumably state) statute of limitations. Id. § 2(b).
466. Id. § 2(e)(1).
467. Id. § 2(e)(2).
4. permitting all claims to be “waived, compromised, adjusted, settled, or released”;

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”;

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”;

7. withdrawing from the courts jurisdiction to “entertain, proceed with, impose liability in or enter judgment” on any actions already filed “except in accord with the conditions and limitations therein prescribed” 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”; 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.

This comprehensive catalogue of amendments, though packaged as merely undoing the effects of the Supreme Court’s portal trilogy, not only transcended the portal issue, but effectively eliminated the mandatory and uniform character of 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 for which they did not agree or were not accustomed to pay. Thus to take an extreme example that would fit comfortably within the words and intent of Gwynne’s bill:

468. Id. § 2(f).

469. Id. § 2(f). Attorneys who charged or received fees beyond these limits were guilty of a misdemeanor and subject to fine and imprisonment.

470. Id. § 2(h).

471. Id. § 3(a).

472. Id. § 3(c).

473. Included in the House hearings is a document entitled, APPENDIX TO STATEMENT BEFORE SUBCOMMITTEE OF THE HOUSE COMMITTEE ON THE JUDICIARY [Committee Print], dated February 1947, which is labelled H.R. 584 as introduced by Gwynne on January 7, 1947, but includes a number of specifically marked omissions and insertions. Regulating the Recovery of Portal-to-Portal Pay, supra note 16, at 334. The status of this version and the role it may have played in the legislative process are unclear. It did make a number of significant changes the language of which is puzzling. In a separate definitions section it defined “‘work,’ ‘employment’ or ‘hours of labor’” to mean only activities for which custom, practice, or express agreement required payment. Id. at 335. Yet a new section entitled, “Additional Provisions With Respect to Actions Based upon Activities or Time Not Constituting Work,” which imposed very severe evidentiary burdens on plaintiffs, seems supererogatory since such claims would by definition not have been actionable. Id. at 337.
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 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. 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’ representatives offering strong support and unions’ representatives offering 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.

This position, which echoed the moral indignation expressed by employers, had secured the AFL editorial praise. Yet at the hearings, the AFL representative, largely avoiding the claim that portal suits had “struck ‘below the belts’ of employers,” 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, derived in part

475. Interestingly, NAM denied its support to the “effective though drastic course” of totally repealing FLSA in order to avoid any constitutional defects retroactively nullifying portal claims. Regulating the Recovery of Portal-to-Portal Pay, supra note 16, at 419 (statement of Raymond Smethurst, counsel, NAM).
476. Id. at 74 (testimony of Walter Mason, national legislative representative, AFL, citing Green’s statement of Jan. 14).
480. Regulating the Recovery of Portal-to-Portal Pay, supra note 16, at 78, 83 (testimony of
from its fear that such innovations would grandfather in customs and practices in violation of FLSA that unorganized workers would be powerless to overcome. The radically abbreviated limitations period, which obviously affected all FLSA claims adversely, also troubled the AFL.

The star witness for the CIO was its general counsel, Lee Pressman. His 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 "[t]he profits of not a single American corporation have been diminished by any judgment so far rendered in any [portal] lawsuit." If the committee was really interested in dealing with portal problems, Pressman suggested, it would investigate "the hardships which are 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. 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.

By the same token, Pressman 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 portal litigation had insured that some version of an antilabor portal bill would pass both houses, the CIO was "seeking a way out of


482. Id. at 81.

483. See generally, CURRENT BIOGRAPHY 1947, at 528-30 (1948). According to N. LICHTENSTEIN, LABOR'S WAR AT HOME: THE CIO IN WORLD WAR II 143 (1982), during World War II the legitimacy of the Communist Party among the highest echelons of the CIO was such that Pressman was an open fellow traveler. Pressman himself stated in 1950 that he had joined a Communist group for one year in 1934. Lee Pressman, Labor Lawyer, and Ex-C.I.O. Counsel, Dies, N.Y. Times, Nov. 21, 1969, at 47, col. 1.


485. Id. at 131.

486. Id. at 141.

487. 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.
this muddle without losing face.”

Thus, for example, he thought worthy of consideration Gwynne’s offhand suggestion to permit settlements of FLSA claims subject to approval by the Wage and Hour Administrator. That non-hazardous walking time similar to that in Mt. Clemens was not the CIO’s highest priority emerged from another colloquy between Pressman and Gwynne in which the congressman pressed the former 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 that he would “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.”

Following the House hearings, the subcommittee prepared another draft, H.R. 2157, which it reported to the House. 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) 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 H.R. 2157 was somewhat less radical than the previous bill, H.R. 584, they were both prominent in their 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]” FLSA: “Why do not the proponents of the bill honestly say they want to kill the


489. Regulating the Recovery of Portal-to-Portal Pay, supra note 16, at 160. The 1949 FLSA amendments included such a provision. See infra § VI. At the Senate hearings, Pressman testified that it would be proper for Congress to amend FLSA to permit compromises of all portal-to-portal back wages through collective bargaining. Portal to Portal Wages, supra note 9, at 218 (1947). During the debates, Senator Pepper echoed this position. See 93 Cong. Rec. 2301 (1947).


491. 93 Cong. Rec. 1489 (1947) (statement of Rep. Michener, chairman of Judiciary Comm.). 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.

492. Id. at 1489 (statement of Rep. Gwynne).
Fair Labor Standards Act?" In particular, the minority saw the use of "custom or practice" as a guide to compensability as enabling the new employer "to write the law for himself" and thus undermining uniformity of standards among already existing employers. 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 Walter, a Democratic supporter of 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 point of 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 of the spirit of the bill. 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, the minority members urged, Congress should deal with the issue prospectively either by writing into FLSA a definition of work or by empowering the Wage and Hour Administrator to issue binding regulations.

The committee recommended passage of H.R. 2157 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 two extreme positions

were stated at the outset by representatives from Illinois. The Republi-

can Allen denied that the bill was antilabor, while the Democrat

Sabath, who had served since 1907, called it "as vicious as any other

antilabor bill ever brought to this House." While a number of Demo-

crats excoriated the bill as a direct attack on FLSA itself, others would

not have opposed legislation confined to the portal issue—at least 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 majori-

ties. Among the more significant amendments, two would have ex-

tended the limitations period to two and three years respectively.

Representative Javits' amendment to focus relief from portal claims to

employers on collective bargaining agreements also failed.

As indicated by the vote on H.R. 2157, the voting patterns of the

Eightieth Congress were deeply impressed with the party and sectional

results of the 1946 congressional elections, which in effect sealed the de-

mise of the New Deal coalition. It was the first (and last) Congress

since the Hoover administration in which the Republican Party con-

trolled both chambers by a significant majority. In addition, the influ-

ence of the South on the Democratic delegation reached a high point as a

consequence of Democratic candidates gaining their largest share of

Southern seats since 1921 while, in the wake of massive Republican vic-

tories in recently Democratic districts in the North, Southern Demo-

crats represented the largest share of Democratic congresspersons since


501. 93 CONG. REC. 1484 (1947).

502. Id. at 1485.

503. Representatives Norton and Welch, for example, took this position. Id. at 1503, 1513.

504. Representative McCormack, the minority whip, typified this group. Id. at 1558. Represent-

tive Celler appeared to fall between these two groups of Democrats. Id. at 1495.

505. The motion to recommit with instructions to report the bill back with a two-year limita-

tions period was defeated on a vote of 219 to 42. Id. at 1573.

506. For a description of the less significant ones, see 3 CONG. Q. 44-45 (1947).

507. The first was defeated on a 124 to 73 vote, the second 145 to 40. 93 CONG. Q. at 44.

508. The division vote was 131 to 53. 93 CONG. REC. 1571 (1947). 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.


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.

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 joined them. Overall, more than six times as many representatives voted for the bill as against it (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 for it. 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 against the bill, 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. Senate Bill: Let Bygones Be Bygones.

More persons than the employer and the employee are interested in a labor
contract; public interest is also involved.\footnote{520}

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 employers from their liability for liquidated damages.\footnote{521}

Although Wiley's bill was marred by a serious drafting defect inasmuch as it failed to define "productive work,"\footnote{522} 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,\footnote{523} offered an amendment to S. 70 in the form of a substitute.\footnote{524} Capehart's bill was much longer and detailed. It contained a preamble of findings\footnote{525} 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

\footnote{520}{93 CONG. REC. 2178 (1947) (Sen. Donnell).}
\footnote{521}{Portal-to-Portal Wages, supra note 9, at 3.}
\footnote{522}{Unlike H.R. 89, which listed very specific activities. Id. at 5.}
\footnote{523}{CONG. DIRECTORY, 80th Cong., 1st Sess. 32 (1st ed. 1947).}
\footnote{524}{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, supra note 9, 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. at 3-5, 38-40.}
\footnote{525}{Id. at 38.}
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 of limitations.\textsuperscript{526}

Though much broader in scope than Wiley's bill, Capehart's amendment was far less reaching than Representative 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 employee plaintiffs. And third, Capehart did not limit the award of attorneys' fees. For these reasons, NAM, while appreciative of Capehart's efforts, preferred the Gwynne bill.\textsuperscript{527}

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."\textsuperscript{528} 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 \textit{Mt. Clemens}, including a restoration of the customary rules of the burden of proof.\textsuperscript{529} The Chamber of Commerce went even further, advocating a prohibition on class suits or the assignment of claims.\textsuperscript{530}

Like the representative of the Chamber of Commerce,\textsuperscript{531} NAM's counsel opposed conferring expanded rule-making power on the Wage and Hour Administrator to define working time.\textsuperscript{532} 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

\textsuperscript{526} \textit{Id.} at 38-40.
\textsuperscript{527} 9 N.A.M. L. DIG., Jan. 1947, at 3-4 (Supp. No. 2).
\textsuperscript{528} \textit{Portal-to-Portal Wages, supra} note 9, at 616 (Statement by Subcomm. of Business Advisory Comm. on Attitude of Industry on Portal to Portal).
\textsuperscript{529} \textit{Id.} at 111, 114 (testimony of Raymond Smethurst).
\textsuperscript{530} \textit{Id.} 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. \textit{Id.} at 135.
\textsuperscript{531} \textit{Id.} at 127 (testimony of Thomas Howard, Manufacture Dep't).
\textsuperscript{532} \textit{Id.} at 112.
largest corporations in the United States,\textsuperscript{533} believed that the Administrator "should be given power to issue authoritative definitions of the general terms used in the statute."\textsuperscript{534} Although many employers may have instinctively objected to authorizing New Deal bureaucrats to interpret the intent of an anti-labor Republican Congress,\textsuperscript{535} it is unclear that any fundamental principle was at stake in choosing between agency and judicial enforcement.\textsuperscript{536} For, after all, even such binding regulations would have been subject to judicial review. Since the entire portal dispute erupted over unfavorable 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 eventually settled on—reliance on the relatively detailed catalogue of excluded activities that a Republican Congress could dictate to agency and courts.

Precisely such a detailed catalogue 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 him to write down what he thought the bill should include.\textsuperscript{537} Pettit offered an unusual amalgam of modest and radical proposals. Thus 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.\textsuperscript{538} 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.\textsuperscript{539} Although Congress ultimately chose not to adopt these more

\textsuperscript{533} See id. at 609-14.

\textsuperscript{534} Id. at 620 (statement of William Foster, Undersecretary of Commerce, speaking on behalf of the Business Advisory Council).

\textsuperscript{535} Senator Eastland unsuccessfully tried to elicit from Undersecretary Foster an acknowledgment that agencies invariably exceed their authority. Id. at 620. Significantly, the CIO representative, Lee Pressman, did not oppose giving the Administrator rule-making power. Id. at 221.

\textsuperscript{536} But see Mezerik, Time Is Money, NATION, Feb. 1, 1947, at 121, 122 (speculating that management preferred the courts at least until a Republican administration came to power).

\textsuperscript{537} 93 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, supra note 9, at 637.

\textsuperscript{538} Id. at 645.

\textsuperscript{539} Id. at 645-48.
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 off the point at which employer overreaching began.

While Wiley and Capehart's bills were being debated and amended, H.R. 2157 was committed and recommitted to the Senate Judiciary Committee on March 3, 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. The Senate committee report 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. In justifying the need for intervention, the committee speculated that pending litigation would adversely affect labor-management relations. The committee argued that 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. 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.

The Senate version of H.R. 2157, as reported by the committee, differed fundamentally from the House version in that it gutted FLSA only retroactively. Like the House bill, it virtually wiped out all existing claims and not merely those related to portal issues, but left 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

540. Id. at 655.
541. Id. at 658.
544. Id. at 39-40.
545. Id. at 42-43.
546. The bill will be cited from the Congressional Record because it was not printed in the report.
other important ways that both favored and disadvantaged employees.\textsuperscript{547}
For example, it provided for a two-year limitations period (§ 9),\textsuperscript{548} 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{549}

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 claims, § 6 of the bill made the following portal-to-portal activities noncompensable (unless compensable on the basis of contract,\textsuperscript{550} 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... .\textsuperscript{551}

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

\textsuperscript{547} 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. See 93 Cong. Rec. 2084-86 (1947).

\textsuperscript{548} It also provided for a 120-day grace period to file accrued claims.

\textsuperscript{549} 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 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 were essentially an effort to overturn the Supreme Court's ruling on the burden of proof.

\textsuperscript{550} 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, 80th Cong., 1st Sess. 48 (1947).

\textsuperscript{551} 93 Cong. Rec. 2376 (1947). The bill used quotation marks to indicate that the provision was to be inserted as a new § 7A of FLSA.
(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 occurring prior and subsequent to the workday, such as the preliminary activities which were involved in the Mt. Clemens case. . . .

Since the above-cited provisions of § 6 of the Senate version of H.R. 2157 were adopted intact in the Portal-to-Portal Act, these specifications made clear that the scope of noncompensable portal activities was meant to be very broad. 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.

553. Ch. 52, § 4(a), 61 Stat. 84, 87 (1947) (current version at 29 U.S.C. § 254(a) (1990)).
554. 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.
555. 93 CONG. REC. 2121 (1947) (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 busses the employer did not own. Id. Sen. Murray regretted that H.R. 2157 "would make noncompensable many burdensome activities performed for the employer by employees in the lumbering, smelting, 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. Id. at 2238.
In contrast, the Senate 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. . . .

(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 gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.556

Of overriding significance in the same context was the committee's declaration that the existing and unamended provisions of FLSA would continue to control the compensability of all future claims for activities occurring within the workday. The report added the very important statement that "the same will be true as to waiting periods during a production break-down and to other waiting periods during the workday."557 The retention of this protection under FLSA allayed the worst fears that unions had expressed on behalf of unorganized workers.558

The minority members of the Senate Judiciary Committee559 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.560 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?"561 And even among strong unions, such as the UMW, H.R. 2157 would permit owners to

556. S. REP. NO. 48, 80th Cong., 1st Sess. 48 (1947). 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. 4389 (1947).
557. S. REP. NO. 48, 80th Cong., 1st Sess. 48 (1947). 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. See 93 CONG. REC. 4389-90.
558. See id. at 2132 (statement of Sen. Donnell). The unionists were unable to avert the withdrawal of such protection for existing claims.
559. These included one Republican, Sen. Langer, who eventually voted against the bill. The two Southern Democrats did not join the minority. Id. at 2375.
561. Id. at 6.
rebargain the portal wages they had already been compelled to pay through litigation. 562

With their opposition voiced, 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. 563 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. 564 The Senate debates regarding the above portal bills 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 FLSA. 565 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 existed in the first place. 566 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 Don-

562. Id. at 8-9.
563. Id. at 9.
564. 93 Cong. Rec. 2289 (1947).
565. S. Rep. No. 48, pt. 2, 80th Cong., 1st Sess. 2 (1947). In a more alarmist charge, Senator McCarran asserted that: “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. 2245 (1947). Although this 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. See id. at 2297-98.
566. Id. at 2125, 2130. See id. at 2130 (1947).
nells 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 production line was down. If this lack of compensation 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:

If this lack of compensation 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.

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. 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." Although no Democrat had charged that the majority was acting arbitrarily when it did the bidding of any official of the Standard Oil Co. who happened to drop off a memo, the monologue left no doubt about the intended effect of the majority bill on existing claims.

About the corresponding effect of the McCarran-McGrath bill (the minority bill) much more doubt obtained, especially among Democrats. The authors asserted that by inserting the phrase "not compensable

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567. Senators Donnell, Cooper, and Eastland were in charge of drafting the Senate bill. Id. at 2133-35.

568. At the Senate hearings, a representative of the Amalgamated Clothing Workers Union testified that, although there were no portal problems in garment 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, supra note 9, at 160-61 (testimony of John Abt, special counsel).

569. Id. 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. Id. at 2362.

570. Id. at 2132.
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.” Thus, for example, whereas the majority bill would eliminate a claim for minimum wage in connection with a piece-rate contract not specifying any hours, the McCarran-McGrath bill would not. 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 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 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

572. Id. at 2290 (statement of Sen. McCarran).
573. Id.
574. Id. at 2291. 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.” Id. at 2303-04. Senator Johnston (Dem. S.C.), who had worked in a cotton mill and represented workers in wage and hour suits, offered a concrete example. See id. at 2371.
575. Id. at 2291.
576. Id. at 2292. Senators 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.
578. Id. 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. Id.
defeated several other amendments.\textsuperscript{579} These included one to raise the minimum wage to sixty cents per hour.\textsuperscript{580} 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 required of production workers" without compensation,\textsuperscript{581} another unsuccessful amendment proposed language permitting portal suits covering preliminary or postliminary activities "normally engaged in during the working day."\textsuperscript{582}

Further factional maneuvering emerged over the length of the limitations period. Senator 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.\textsuperscript{583} 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.\textsuperscript{584} 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; despite the movement toward shorter state limitations periods,\textsuperscript{585} 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 eighty-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.\textsuperscript{586}

\textsuperscript{579} 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. \textit{Id.} at 2367.

\textsuperscript{580} It was defeated 57-32 on a vote to table. \textit{Id.} at 2368-69 (introduced by Sen. Myers, Dem. Pa.).

\textsuperscript{581} \textit{Id.} at 2259 (statement of Sen. McGrath, Dem. R.I.).

\textsuperscript{582} It was rejected 50-39. \textit{Id.} at 2367 (introduced by Kilgore, Dem. W. Va.).

\textsuperscript{583} \textit{Id.} at 2184, 2273-74 (statements by Sen. Holland, Dem. Fla.).

\textsuperscript{584} Since "the members of organized labor hardly need the protection of" FLSA, McGrath coyly added that if the latter's protection were destroyed, "we will drive more and more Americans to the necessity of joining labor unions; not that perhaps any of us have any objection to that. . . ." \textit{Id.} at 2256 (statement by Sen. McGrath, Dem. R.I.).

\textsuperscript{585} Interestingly, most of the states that shortened the limitations period had no experience of their own with administering or enforcing minimum wage laws. \textit{Id.} at 2256-57.

\textsuperscript{586} \textit{Id.} at 2257.
After Senator 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 fifty-one Republicans faced forty-five Democrats, and all twenty-two Southern senators 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 against it; all eighteen Democratic supporters were Southerners.


Portal-Pay Ban As Finally Passed Is A Paradise for Chiselers.

On 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 conference committee 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 con-

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587. The vote on the bill was 40 to 23. Bizarrely, McCarran, whose own amendment included a three-year period, voted for the bill. Id. at 2277.

588. The vote was 61 to 28. Id. at 2367-68 (introduced by Sen. Magnuson, Dem. Wa.). The votes for the bill were artificially inflated by the votes of Holland and Wilson (Rep. Ia.), who were presumably swayed by the desire to preserve their states' very short limitations periods. 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 FLSA.


590. One Democratic supporter was from Maryland. The two Republicans were Aiken of Vermont and Langer of North Dakota. 93 CONG. REC. 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).


593. The House managers were Michener, Gwynne, Goodwin (Rep. Mass.), and Walter. The Senate's managers were Wiley, Donnell, Cooper, and Eastland (Dem. Miss.).

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, 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 FLSA would then have been reduced to something akin to common-law breaches of contract. The Senate bill closely resembled the House bill with regard to existing claims, but differed radically from the House version in that it restricted 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 FLSA.

Yet in incorporating the language of both bills that defined the "custom or practice" that would mandate compensation as that of the individual employer, the conference rejected testimony that such a criterion would favor bad employers and undermine the uniformity of

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596. H.R. 2157, § 3.
597. 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. See, 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 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. v. Dutton. 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).
598. 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 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. See H.R. CONF. REP. NO. 326, 80th Cong., 1st Sess. 9 (1947).
600. Id. at 85, 87.
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 activities and thus created an industry-wide standard different from that to which "chiseling" employers adhered, it is puzzling why Congress elected to adopt the establishment-based construction "custom or practice." Although 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," 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:

"[T]here 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 the economies of scale of which were in part based on the uncompensated time workers had to spend walking across huge internal spaces, this was a conscious investment decision by management. The mere fact that employees could not muster the strength to compel compensation before the enactment of FLSA, did not create any moral—let alone legal—entitlement on the part of employers to preserve such costless operations under FLSA. Donnell's only justification of the employers' 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 ac-
tually collected data on wages in plants “across the street” from each
other with varying amounts of walking time. If, ceteris paribus, the simi-
larly situated workers with greater portal time actually received higher
hourly or piece rates, then the 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 repre-
sentative 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, includ-
ing liquidated damages, very difficult, the House conferees were also
unable to persuade their Senate counterparts to extend the right to com-
promise to future claims. But the House managers did achieve partial
success on a related issue. While the Senate bill had no provision con-
cerning liquidated damages, the House bill had conferred discretion on a
court that found that the employer’s violation “in bad faith and without
reasonable ground” to award liquidated damages was not to exceed the
underlying back wages. The compromise consisted in shifting the bur-
den to the employer to show that his actionable act or omission was in

607. Act of May 14, 1947, ch. 52, § 6(a), 61 Stat. at 87-88 (1947). 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. Id. § 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.
Id. § 6(c).
608. Id. § 8.
609. For analysis of the collective action provisions, see infra § VII.
610. See infra § VI.
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).
“good faith” and “that he had reasonable grounds for believing” that it did not violate FLSA.613

Both bills 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 invalidated.614 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.615 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.616 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.”617 A distinct class bias inheres in this good-faith reliance provision in that 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 opinion of the Administrator.”618

5. In Lieu of a Veto: Presidential Legislative History. President Truman took the entire ten days granted him by the Constitution619 to sign the bill during which he received conflicting advice from his advisers and cabinet members.620 While his special counsel, Clark Clifford, urged him to veto the bill and to specify the kind of bill he wanted, the Senate

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613. Act of May 14, 1947, ch. 52, § 11, 61 Stat. 84, 89 (1947). 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. R. REP. No. 71, 80th Cong., 1st Sess. 8 (1947).


615. See H. R. CONF. REP. No. 326, 80th Cong., 1st Sess. 16-17 (1947).


619. During this period a group of liberal reformers and academics, including Elizabeth Brandes, 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. A2172-73 (1947).
Minority Leader, Barkley, convinced Truman that Congress would not approve more favorable legislation. While Secretary of Labor Schwel-
lenbach and the vice chairman of the Council of Economic Advisers, Leon Keyserling, kept urging disapproval, Secretary of Commerce Harri-
man, Secretary of the Navy Forrestal, and Attorney General Clark all favored approval. In finally signing the bill, Truman, an historian of
the Eightieth Congress has argued, was motivated by the political judg-
ment that,

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 af-
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.

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. Thus, “Truman’s approval of the portal bill marked the end of his appeasement strategy.” That end was foreshad-
owed by what may have been a unique presidential exercise in creating legislative history. For in his message to Congress transmitting his ap-
proval he instructed Congress (and the courts) as to what Congress
had meant by certain provisions. In particular Truman insisted that the legislatiye 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.

Congress was not amused. Even Senator McGrath, a Democratic

622. Id. at 45-46.
623. Id. at 46.
624. One court actually took notice. In Mauro v. Slaughter & Co., 14 Lab. Cas. (CCH) ¶ 64,299, at 72,720-21 (S.D.N.Y. 1948), the judge cited Truman’s message as authority for the propo-
sition that Congress did not mean to void existing nonportal claims not based on contract, custom, or practice. In point of fact, Truman did not even take that position.
625. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING HIS AP-
1st Sess. 2 (1947).
opponent of the bill and Truman's former Solicitor General and future Attorney General, found it necessary to tell his colleagues that presiden-
tial statements did not become part of the legislative history. 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. For
Donnell replied that if an employee sewing in a factory prior to enact-
ment 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 cus-
tom required payment, the employer would not be liable for back
wages.

VI. 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.

One tension that runs throughout the congressional and judicial dis-
putes over portal pay is the relationship of FLSA to collective bargain-
ing. Although FLSA was designed to pre-empt individual or collective
adhesion contracts in favor of statutory standards in order to afford
workers who were not in a strong bargaining position vis-a-vis their em-
ployers to receive adequate compensation for their work, many congress-
men and members of the judiciary believed that organized workers were
at best inadvertent and marginal beneficiaries of FLSA.

One member of the judiciary who took this latter position was Jus-
tice Jackson. Two years after his dissent in Jewell Ridge, Jackson re-

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626. 93 Cong. Rec. 6262 (1947).
627. Id. at 7541. Donnell also contradicted Truman on another point that undermined enforce-
ment of FLSA: an employer did not have to show that he had relied on an affirmative action by an
administrative agency. The ruling or policy on which the employer relies “may consist solely of the
absence of action.” Id.
629. Jewell Ridge Coal Corp. had unsuccessfully petitioned the Court for rehearing on unusual
grounds. It challenged Justice Black’s qualification to hear the case both because he had been the
most active sponsor of FLSA as a Senator and because he had been a law partner with respondents’
chief counsel. Petition for Rehearing at 2-3, Jewell Ridge Coal Corp. v. Local No. 6167, UMW, 325
U.S. 161 (1945). 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
turned to the subject of the relationship between FLSA and collective bargaining in a non-portal case, insisting that 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, according to Justice Jackson, by rejecting both approaches, "foreclosed every means by which any claim, however dubious, under this statute [FLSA] or under the Court's elastic and somewhat unpredictable interpretations of it, can safely or finally be settled, except by litigation to final judgment."^{630}

Jackson's irritation in *Jewell Ridge*, which demonstrates the dimensions of the tension between those who believed FLSA trumped contract and those who did not, had been triggered by two decisions,^{631} *Brooklyn Savings Bank v. O'Neil* and the companion case of *Dize v. Maddrix*.^{632} These two cases effectively precluded employees from ever waiving their rights to liquidated damages under FLSA by preventing an employee from entering into a purely private settlement agreement with an employer for back wages releasing him from all other claims.

In *Brooklyn Savings Bank* the employer, more than two years after termination of employment, computed the statutory overtime due an employee 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.^{633} The Supreme Court thus had to resolve "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)."^{634} In the factually variant companion case of *Dize v. Maddrix*, the employer, after discharging the worker, tendered him back wages that both parties knew

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631. Jackson voted with the majority in the first and did not participate in the second.
632. 324 U.S. 697 (1945) (includes the companion case of *Dize v. Maddrix*).
633. *Id.* at 700.
634. *Id.* at 699.

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 (unsuccessfully) 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. See, e.g., *Jackson Attacks Black for Judging Ex-Partner's Case*, N.Y. Times, June 11, 1946, at 1, col. 6; *Text of Jackson's Statement Attacking Black*, *id.* at 2, col. 3; L. Wood, *Split of Jackson and Black Long Widening in Capital*, *id.* at 2, col. 4.
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 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.\footnote{635}

Before proceeding to the central issue, the \textit{Brooklyn} 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.\footnote{636} Because the Court decided that "the release was not given in settlement of a bona fide dispute between employer and employee,"\footnote{637} 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. . . ."\footnote{638}

In the absence of specific consideration and resolution of the issue by Congress, the Court explored the broader legislative policy behind the provision.\footnote{639} Generally 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. . . ."\footnote{640} 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."\footnote{641} 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

\footnote{635}{\textit{Id.} at 701-02.}
\footnote{636}{\textit{Id.} at 703.}
\footnote{637}{\textit{Id.}}
\footnote{638}{\textit{Id.} at 714.}
\footnote{639}{The pertinent statutory language of § 16(b) reads as follows:
\begin{quote}
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.
\end{quote}
Fair Labor Standards Act, ch. 676, § 16(b), 52 Stat. 1060, 1069 (1938).}
\footnote{640}{324 U.S. 697 at 706.}
\footnote{641}{\textit{Id.} at 707.}
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.642

The Court also emphasized that "[t]he 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 liability for liquidated damages by taking advantage of the needs of his employees tends to insure compliance in the first place."643 Finally, the Court mentioned that one of 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."644 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."645

The following term the Court seized the opportunity to revisit the issue of whether employees could bargain away rights under the statute 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.646 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 reduc-

642. Id. at 707-08.
643. Id. at 709-10.
644. Id. (footnote omitted).
645. Id. at 711.
tion 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.\textsuperscript{647}

Extending that incompetence from individual workers to organized labor, did not, in Jackson's view, redound to the latter's benefit, for as he had written in dissent in \textit{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."\textsuperscript{648} The subtext here was that while the pro-labor majority of the Court may have intended to confer a benefit on unions by permitting them unilaterally to avoid collective bargaining agreements that did not comply with the overtime provisions of 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 \textit{Portland Terminal} served to remind Democrats that it was now legitimate for New Dealers to question the Court's pro-union bias.

As indicated in § V, the Portal-to-Portal Act as enacted 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 he had reasonable grounds for believing that his act or omission was not a violation of" FLSA, the court has discretion to award less than full liquidated damages.\textsuperscript{649} In a suit solely for liquidated damages, the "act or omission" in question would refer to the failure or refusal\textsuperscript{650} to pay liquidated damages. If the

\textsuperscript{647} \textit{Id.} at 116 (footnote omitted). 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." \textit{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. \textit{Bracey v. Luray}, 68 F. Supp. 701 (D. Md. 1946), \textit{aff'd}, 161 F.2d 128 (4th Cir. 1947), \textit{cert. denied}, 332 U.S. 790 (1947).

\textsuperscript{648} \textit{Jewell Ridge Coal Corp. v. Local No. 6167, UMW}, 61 F.2d 128 (4th Cir. 1947).


\textsuperscript{650} 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." \textit{Exempting Employers From Liability for Portal-to-Portal Wages in Certain Cases}, S. REP. NO. 48 PART 2, 80th Cong., 1st Sess. 5 (1947).
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 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 assur-
ance 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 attor-
ney’s fees.651

Consequently, Congress again amended FLSA in 1949 to provide
for involvement by the United States Department of Labor (“DOL”):

The Secretary is authorized to supervise the payment of the unpaid
minimum wages or the unpaid overtime compensation owing to any em-
ployee. . . , 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 un-
paid overtime compensation and an additional equal amount as liquidated
damages.652

In the end, then, provided that workers avoid intercèssion by the
DOL,653 no waiver or release given in a purely private agreement with
the employer can be effective.654 Congress, then, contrary to Justice
Jackson’s view, appears to have realized that statutory norms should take
precedence over contract.

2249.
(1988)).
653. Where 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).
654. Lynn’s Food Stores, Inc. v. United States, 679 F.2d 1350 (11th Cir. 1982).
VII. 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 join a union in order to get a contract and thereby protect their rights.655

In addition to displaying the tension between statute trumping and collective bargaining, the Portal-to-Portal Act exerted its most decisive and lasting impact on capital-labor relations in the unorganized sector by prohibiting the use of what today would be 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, but has injured unorganized workers, who, deprived of the opt-out class action, are remitted to a very ineffectual means of pressuring employers to comply with FLSA. This congressional action also laid the basis for excluding 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.656

The development of such actions under 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,657 which had gone into effect only the month before FLSA in 1938.658 At that time, Rule 23 provided that, where the re-

655. 93 CONG. REC. 2374 (statement of Sen. Aiken).
657. See, e.g., Loehr v. First Nat'l 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 questions 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?”
658. The Federal Rules of Civil Procedure went into effect three months after the adjournment
quirements of numerosity and adequacy of representation were met, so-called spurious class actions 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." 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 FLSA actions pursuant to Rule 23(a)(3). Indeed, doubt attached to whether suits under FLSA even rose to the level of spurious class actions inasmuch as the "common question" or "common relief" might be lacking for individual violations of minimum wage or overtime provisions; these actions might, it was said, merely be amenable to permissive intervention.

In determining whether FLSA expansively authorized the "virtual representation" of unnamed employees 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," courts 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 wage and maximum hours provisions of FLSA went into effect on October 24, 1938, 120 days after its date of enactment (June 25, 1938). See Fair Labor Standards Act, 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).

659. 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." Moore & Cohn, Federal Class Actions, 32 ILL. 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. See Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 GEO. L.J. 551, 571-72 (1937); Moore & Cohn, Federal Class Actions—Jurisdiction and Effect of Judgment, 32 ILL. L. REV. 555, 556 (1937).


661. Poole, Private Litigation Under the Wage and Hour Act, 14 Miss. L.J. 157, 165 (1942).


were ostensibly guided 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 FLSA or not) was the notion that "to afford the absentees all the benefits of winning but to impose upon them none of the burdens of losing" was simply not fair to employers. 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 FLSA actions to named plaintiffs, intervenors, and consensoers who joined the action before the trial on the merits.

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

668. Id. at 711.
669. Id. 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. See Foster, Jurisdiction, Rights, and Remedies for Group Wrongs Under the Fair Labor Standards Act: Special Federal Questions, 1975 Wisc. L. Rev. 295, 325 (supporting the Kalven-Rosenfield position).
670. Roberts v. Western Airlines, 425 F. Supp. 416, 419 (N.D. Cal. 1976) (one of the primary purposes of the 1966 amendments of the Federal Rules of Civil Procedure "was to eliminate this type of 'one way intervention' in spurious class actions").
when an early 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 FLSA because such class actions would have nullified § 16(b).\(^{671}\) But the court also held 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.”\(^{672}\)

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. If an employee was not adequately represented, then he would not have been bound by the decision.\(^{673}\) 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 any 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\(^{674}\) opted for this restrictive approach,\(^{675}\) confining and as-

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\(^{672}\) *Id.* at 490.

\(^{673}\) *See Comment, FLSA Class Action Limited to Employees Giving Assent*, 55 HARV. L. REV. 688, 689 (1942).

\(^{674}\) Only 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., 20 Ohio Op. 196, 199, 1 Wage & Hour Cas. (BNA) 1068, 1071 (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., 22 Ohio Op. 488, 2 Wage & Hour Cas. 884 (C.P. Athens County, 1942). In Cissell v. Great Atl. & Pac. 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 subsequent settlement was agreed upon in fear of losing his
simulating such actions to the mere device for permissive joinder\(^676\) that spurious class actions had been designed as under the original Rule 23(a).\(^677\) 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."\(^678\)

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

job." The court held that the settlement was "binding upon him as one of the class for whom the plaintiff professed to act as authorized by the very statute which gives him the claim now sued upon . . . If he elects to take its benefits, he must accept its restrictions also." It is unclear whether Shain, which was decided by the same judge, was meant to overturn Cissel.

\(^675\) For a comprehensive overview of the case law, see Pentland v. Dravo Corp., 152 F.2d 851, 853-56 (3d Cir. 1945).


\(^677\) See 2 J. MOORE & J. FRIEDMAN, MOORE'S FEDERAL PRACTICE § 23.04-(3), at 2241 (1938).

\(^678\) Pentland v. Dravo Corp., 152 F.2d at 853. Zechariah Chafee, Jr., elaborated on this intermediary status of FLSA:

In other types, it is usually not worth while to have a class suit at all unless everybody is bound. Here it may be. Congress has set up an easy way for starting a suit for each of a considerable number of people with rather small means to claim some money. It saves expenses to pool. But they might never sue if it were necessary to sign everybody up first. So a few can begin it. Once a bandwagon gets moving, others can jump on it if they want to. Still they may not want to. . . . The very support Congress gives their claims indicates an unwillingness to let them be barred by what somebody else does.

So a suit under the Fair Labor Standards Act is usually treated as an Invitation To Come In. This is the best opportunity I know for this type of class suit. . . . The outsiders hear about the victory and come around asking for money too. Most of the decisions say they get nothing. It is too late. This is tough on them, but fairer than barring them if they stay out and the class is defeated. Coming in is somewhat like starting a new separate suit and probably will be barred after the period of the Statute of Limitations even if the class suit started in time. The proceeding is really an informal substitute for permissive intervention. . . . Perhaps the Invitation To Come In should be confined to a few situations where a statute, like the Fair Labor Standards Act, expressly authorizes a class suit. . . .

CHAFEE, SOME PROBLEMS OF EQUITY 274-75, 283 (1950). Chafee does not appear to have been aware of the Portal-to-Portal Act and its consequences for class actions under FLSA. For an earlier use of the notion of invitation in a non-FLSA context, see Blume, The "Common Questions" Principle in the Code Provision for Representative Suits, 30 Mich. L. Rev. 878, 898 (1932).
could have led to effective implementation of the representative actions authorized in section 16(b).\textsuperscript{679}

Employees' attorneys did indeed prosecute the portal litigation in a very conservative manner. Thus one of the leading plaintiffs' attorneys has 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, were reluctant to embarrass themselves.\textsuperscript{680}

The opt-in approach may also simply have been dictated by the reality 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.\textsuperscript{681} Those members who wished to name the representative as their agent had to sign authorization cards, which were filed with the complaint.\textsuperscript{682} Recovery then ran only to those filing authorizations.\textsuperscript{683} The outright prohibition of these representative actions under the Portal-to-Portal Act,\textsuperscript{684} even though they had been rather cumbersome procedural devices, was clearly designed as an attack on union-organized litigation.\textsuperscript{685}

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

\textsuperscript{679} Foster, supra note 669, at 324 n.103.


\textsuperscript{681} Lee 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 the Recovery of Portal-to-Portal Pay, supra note 16, at 166.

\textsuperscript{682} Thus 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. Times, Dec. 29, 1946, at 3, col. 4. See also Rules Individuals Must Sign, Wall St. J., Feb. 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).

\textsuperscript{683} Regulating the Recovery of Portal-to-Portal Pay, supra note 16, at 175 (testimony of Lee Pressman).

\textsuperscript{684} The Portal-to-Portal Act amended § 16(b) by eliminating the grant of authority to file representative actions. Portal-to-Portal Act of 1947, Ch. 52, § 5(a), 61 Stat. 84, 87 (1947). The repeal did not affect representative actions. Id. § 5(b).

\textsuperscript{685} See 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.
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.” To collective actions Donnell had no objections, provided that consents, in the manner of an opt-in class action, 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 and then 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.”

Donnell found such a situation unfair because such employees would not have had any obligation before entering the suit. 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,

[o]bviously . . . 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 then 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 . . .

Certainly there is no injustice in that, for if a man wants to join in the suit, why should he not give his consent, in writing . . .?

This entire line of argument makes sense only if interpreted as motivated by a general animus against what in 1966 became Rule 23(b)(3) class actions. For under Rule 23(b)(3), the plaintiff’s own affirmative

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686. 93 Cong. Rec. 2182 (1947). Although Donnell did not state openly that he had unions in mind, Senator McGrath asked him whether NAM engaged in champerty when it informed members of recent Supreme Court rulings entitling them to certain rights. Id. at 2093.
687. Id. at 2182.
688. Id.
689. 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 millions of Americans who do not even know they are represented. . . .” Id. at 2250. 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 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
duties to prove numerosity, typicality, and adequacy of representation, in connection with the motion for class certification, bring to light all the information about which Donnell complained. With such protections now in place under Rule 23(b)(3), the basis of the Portal-to-Portal Act’s policy supporting the restrictions on opt-out class actions 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 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 today be better situated had Congress totally abolished class actions under FLSA in 1947. For when the class ac-
tion 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 FLSA. If the collective action provision of FLSA had been repealed, Rule 23(b)(3) would have created parity between employees under FLSA and other litigants. But the Advisory Committee working on Rule 23(b)(3) made it clear that the amendments were not intended to affect § 16(b) of FLSA. 695

One scholar has taken the position that the Advisory Committee acted wisely "because the cumbersome procedure for determining the scope of the 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." 696 This judgment, however, rests on an overestimation of the efficacy of enforcement by the DOL. Moreover, both the absolute and relative volume of DOL litigation decreased markedly in the 1970s and 1980s. Thus the DOL's share of all FLSA cases filed in federal court declined from almost four-fifths in the mid-1970s to forty-five per cent by 1989. This decline has chiefly resulted from a massive absolute decrease in litigation brought by the DOL, the volume of which in the late 1980s amounted to little more than one-third of the peak attained in the early 1970s. 697

Experience in representing very low-paid employees with high turnover 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 makes opt-out class actions available to such workers, thereby overcoming the restrictive individualistic framework imposed by the consent requirement, 698 can the original vision of joint public-private enforcement of FLSA 699 come into its own.

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696. Foster, supra note 669, at 342.
697. Calculated according to data in ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table C (various years).
699. See Kalven & Rosenfield, supra note 667, at 721.
VIII. CONCLUSION

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. ⁷⁰⁰

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 of embarrassing the employer, and with the mistaken idea that the union was going to make bargaining capital out of it"? ⁷⁰¹ Although it is possible that the CIO instigated the litigation campaign, it is just as plausible that the unions, in responding 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 ⁷⁰² into a bargaining tradeoff for higher wages. But regardless of whether the unions' role was primary or mediatory, they must bear the historical responsibility for failing to anticipate the outcome.

By filing portal pay suits, the CIO not only offered employers an occasion for attacking FLSA frontally, but also unwittingly undermined whatever political-economic momentum had built up during the war for expanding the scope and coverage of the Act. Thus employers not only succeeded in delaying an increase in the minimum wage until 1950 and scuttling organized labor's more far-reaching amendments proposed during the 79th Congress, ⁷⁰³ but also enacted their own agenda for defusing 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.

While Mt. Clemens may not be an illustration of the maxim that Hard Cases Make Bad (Statutory) Law, union leaders and counsel

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⁷⁰¹ 93 Cong. Rec. 2098, 2372 (1947).
⁷⁰² This is not to say that the workers brought these suits on their own—they did not. The mere fact, however, that the unions filed the suits for the workers does not resolve the issue of who induced whom.
⁷⁰³ See supra § V.A.2.
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, the litigation should have focused on prospective relief, not on retroactive pay. 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, but it also would 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 hazardous walking time in the steel mills might have been the ideal vehicle.\(^7\) 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 in fact proposed—that FLSA compromises be permitted within the framework of bona fide collective bargaining.\(^5\)

The opportunistically instrumental attitude that the CIO and its constituent unions adopted toward FLSA deprived them of the long-term strategic perspective that could have contributed toward a transfor-

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704. The 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 Representative Gwynne to acknowledge that he advocated payment for many of the activities. *Regulating the Recovery of Portal-to-Portal Pay, supra* note 16, at 103-05, 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. Senator Pepper stated that when he worked in a steel mill, he had to walk three-quarters of a mile from the gate to the workplace, which he thought should have been compensable. 93 CONG. REC. 2306 (1947).

705. *See supra* § V. 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).
mation of 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 NAM and large industrial capital did, the unions framed the portal struggle as one over wages instead of raising the issue expressly of what was compensable work and who made that determination. The reason for this failure lay in the CIO's ambivalence toward FLSA. Like large employers, the industrial unions had viewed FLSA as largely directed at aiding low-paid workers in their struggles with 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 tested the outer limits of 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 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.

When demands that are not thought through strategically backfire, the primary victims of the unanticipated legislative intervention may not be the initiators. In the case of the portal pay movement, unionized workers formed the almost exclusive support for portal pay, but low-paid unorganized employees have ultimately paid the price for the congressional reaction. Consequently, even in the post-Portal-to-Portal Act era, unions can seek to achieve their goals through collective bargaining; 706

706. In point of fact, however, the large industrial unions that were in the forefront of portal litigation do not have portal-pay provisions in their contracts. Thus 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 requir-
atomized employees, however, have few statutory rights beyond an abridged FLSA on which to rely.

More ironic still is that even the untoward outcome itself has deviated significantly from the results that the CIO feared most. For while waiting time (including downtime) during the workday has remained compensable in the typical industrial setting,\(^{707}\) as have many so-called preliminary, preparatory, and postliminary activities to the extent that they are integral to the employees' principal activity,\(^{708}\) 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 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,\(^{709}\) no longer

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707. 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.

708. 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 Barrentine 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 Department of Labor had hoped shortly after the Portal-to-Portal Act went into effect. See W. 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 PROCEEDINGS OF NEW YORK UNIVERSITY FIRST ANNUAL CONFERENCE ON LABOR 541, 572 (1948). For examples of such cases see E.I. Du Pont de Nemours & Co. v. Harrup, 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).

709. "[T]he conclusion is inescapable that Congress was interested less in curing union abuses than in using them as an excuse for weakening the organized labor movement." J. SEIDMAN, AMERICAN LABOR FROM DEFENSE TO RECONVERSION 268 (1953). B. BERNSTEIN, AMERICA IN WAR AND...
serves its original vindictive anti-union purpose, it should be repealed. Once that repeal has been accomplished, it may become possible to demarginalize FLSA, restoring to it the potential that it once possessed for empowering low-paid workers to embark upon self-organization.

Peace: The Test of Liberalism, in TOWARDS A NEW PAST: DISSENTING ESSAYS IN AMERICAN HISTORY 289, 290, 303 (1969), 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 H. Sitkoff, Years of the Locust: Interpretations of the Truman Presidency Since 1965, in THE TRUMAN PERIOD AS A RESEARCH FIELD: A REAPPRAaisal, 1972, at 75, 85 (R. Kirkendall ed. 1974).

710. Ironically, Congress repeatedly heard that the unorganized would bear the brunt of the amendments. See, e.g., 93 CONG. REC. 2265 (1947) (statement by Sen. Thomas, Dem. Ut.). 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. See id. at 2098 (statement of Sen. Donnell, Senate Floor Leader). 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. at 2098.