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Primacy of Collective Bargaining for Resolving Disputes Under the Fair Labor Standards Act

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THE PRIMACY OF COLLECTIVE BARGAINING FOR RESOLVING DISPUTES UNDER THE FAIR LABOR STANDARDS ACT

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No time is a good time needlessly to sap the principle of collective bargaining or to disturb harmonious and fruitful relations between employers and employees brought about by collective bargaining.[1]

—Justice Frankfurter

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[1] Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 477-78 (1948) (Frankfurter, J., dissenting).

INTRODUCTION

Congress designed the National Labor Relations Act (NLRA)[2] and the Fair Labor Standards Act (FLSA or Wage-Hour law)[3] to promote similar goals. In enacting the NLRA in 1935, Congress concluded that the economic well-being of workers would improve if they were allowed to bargain collectively through their own representatives.[4] Similarly, Congress fashioned the minimum wage and overtime provisions of the Wage-Hour law three years later to insure a decent living wage, prohibit interminable working hours, and spread employment opportunities.[5] These seemingly harmonious statutory goals conflict, however, when management and labor negotiate a collective bargaining agreement containing a provision that does not literally comply with the FLSA. Since 1938, the Supreme Court has only twice squarely addressed the conflict between the national policy favoring collective bargaining and the dictates of governmental wage and hour regulation under the FLSA.[6] Each time, a divided Court held that collectively bargained compensation arrangements must yield to the rigid rules of the FLSA.[7] This view demands close scrutiny today. Both of the post-1938 Supreme Court cases have been overturned by subsequent amendments to the FLSA.[8] In addition, since 1947 Congress and the Supreme Court have elevated the negotiation and enforcement of collective bargaining agreements to the pinnacle of our national labor policy.[9] The lower federal and state courts have responded to these events with a host of irreconcilable decisions that often undermine

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[2] Pub. L. No. 74-198, 49 Stat. 449 (codified at 29 U.S.C. §§ 141-187 (1976 & Supp. III 1979)).

[3] Pub. L. No. 75-718, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201-219 (1976 & Supp. III 1979)).

[4] *See* notes 12-22 and accompanying text *infra*.

[5] *See* notes 23-36 and accompanying text *infra*.

[6] Bay Ridge Operating Co. v. Aaron, 334 U.S. 446 (1948); Jewell Ridge Coal Corp. v. Mine Workers Local 6167, 325 U.S. 161 (1945).

[7] *See* notes 58-90 and accompanying text *infra*.

[8] *See* notes 91-99 and accompanying text *infra*.

[9] *See* notes 104-27 and accompanying text *infra*. The 1947 Taft-Hartley amendments to § 7 of the National Labor Relations Act also placed the employee's right *not* to join labor unions on an equal footing with the right to join labor unions and to bargain collectively with employers:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own

collective bargaining and ignore the federal policy favoring internal resolution of labor-management disputes. The Supreme Court recently granted a writ of certiorari in one of these cases—*Barrentine v. Arkansas-Best Freight System, Inc.*[10]

This Article examines the conflict between the NLRA and the FLSA and sets forth a basis for reconciling the general principles of collective bargaining with the often technical requirements of the Wage-Hour law. Section I reviews the policy objectives and implications of the duty to bargain under the NLRA and the goals and technical requirements of the overtime and minimum wage provisions of the FLSA. The early Supreme Court decisions are analyzed in Section II, followed by a discussion in Section III of the impact of legislation amending the FLSA and the enactment of section 301(a) of the Labor Management Relations (Taft-Hartley) Act of 1947. Recent lower court decisions illustrating the damage to national labor policy caused by judicial misunderstanding of the NLRA/FLSA relation are discussed in Section IV.

The Article then suggests an approach for resolving NLRA/FLSA conflicts. Subject to certain procedural safeguards, the literal requirements of the FLSA should not bind employers if they have negotiated a collective bargaining agreement with a properly certified representative of their employees. Courts should uphold collectively bargained compensation arrangements that reflect the legitimate needs of organized labor and industry even if their negotiated wage and hour formulae do not fully comply with the FLSA or its regulations. Subordinating the FLSA to the requirements of collective bargaining does not sacrifice the underlying objectives of the FLSA; indeed, Congress never intended the FLSA to interfere with collectively bargained labor agreements that do not comply with the FLSA.[11]

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choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities*. . . .

29 U.S.C. § 157 (1976) (emphasis added).

[10] 615 F.2d 1194 (8th Cir.), *cert. granted*, 49 U.S.L.W. 3245 (Oct. 6, 1980) (No. 79-2006).

[11] *See* notes 62, 68, 91-99 and accompanying text *infra*. This Article takes no position on whether continued enforcement of the FLSA's statutory and regulatory rules is necessary for nonunionized employees.

For the fiscal year ending September 30, 1980, the Department of Labor reported record recoupment of statutory wages owed under the FLSA. [1980] LAB. LAW REPORTS No. 448, at 2-3. The Wage-Hour Administration undeniably has recovered and remedied numerous violations of the statute and regulations. It is unclear, however, whether the stat-

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GOALS AND PURPOSES OF THE NLRA AND THE FLSA

A. *Economic Well-Being Through Collective Bargaining*

Congress designed the NLRA to promote collective bargaining, thereby enhancing the economic well-being of the worker and

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ute has achieved its goals of providing a minimal living wage, establishing reasonable work hours, and spreading employment opportunities.

A congressional study completed in 1967 concluded that hiring and training costs and the increased cost of fringe benefits which are not subject to the overtime pay requirement decreases the deterrent effect of the FLSA's overtime provisions and the likelihood employers will hire more workers. U.S. DEP'T OF LABOR, PREMIUM PAYMENTS FOR OVERTIME UNDER THE FAIR LABOR STANDARDS ACT (1967). A recent Bureau of Labor Statistics study reported that the vast majority of employees in medium and large private firms receive life, health, pension and accident sickness benefits that are fully funded by employers. In addition, a majority of these employees receive paid holidays, vacations, rest time and sick leave. [1980] DAILY LAB. REPT. (BNA) No. 126 at B-13 (June 27, 1980). At least in partial reaction to these job-benefits phenomena, in 1977 Congress established a Minimum Wage Study Commission to study the social, political and economic ramifications of the minimum wage, overtime pay and other requirements of the Act, including the issues of the effect of the minimum wage on unemployment and the exemptions from the Act's overtime pay requirements. 29 U.S.C. § 204 (Supp. II 1978). The report of the Minimum Wage Study Commission is due in May, 1981. [1980] DAILY LAB. REPT. (BNA) No. 192 at A-5 (Oct. I, 1980).

Commentators have also debated whether the FLSA's goals are served or frustrated by enforcement of the minimum wage and overtime provisions. For general readings and varying viewpoints on these issues, see M. FRIEDMAN, CAPITALISM AND FREEDOM 180-81 (1962); Ehrenberg, *The Impact Of The Overtime Premium On Employment And Hours In U.S. Industry,* 9 WEST. ECON. J. 199 (1971); Gailbraith & Morse, *Hire Or Overtime: A Best Bet Method,* 54 MANAGEMENT ACCOUNTING 42 (1972); Garbarino, *Fringe Benefits and Overtime as Barriers to Expanding Employment,* 17 INDUS. AND LAB. REL. REV. 426 (1964); Gramlich, *The Impact Of Minimum Wages On Other Wages, Employment And Family Incomes,* 2 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 409 (1976); Lundgren & Schneider, *A Marginal Cost Model For The Hiring-Overtime Decision,* 17 MANAGEMENT SCIENCE 399 (1971); McKenzie, *The Labor Market Effects of Minimum Wage Laws: A New Perspective,* 1 J. LABOR RESEARCH 255 (1980); Mincer, *Unemployment Effects Of Minimum Wages,* 84 J. POL. ECON. S87 (1976); Wallace & Spruill, *How To Minimize Labor Costs During Peak Demand Periods,* 52 PERSONNEL 61 (July-Aug. 1975); W. WILLIAMS, YOUTH AND MINORITY UNEMPLOYMENT, 95th Cong., 1st Sess. (Joint Comm. Print 1977) (95th Cong., 1st Sess., July 6, 1977).

achieve their objectives, organized labor's influence extends beyond those workers actually represented by labor unions:

> In connection with the data concerning the extent of union membership, one oversimplified assumption should be avoided, i.e., that the number or percentage of organized workers is an adequate index of the influence of organized labor. Such an assumption ignores the following factors: (1) Unorganized workers within a bargaining unit are directly affected by collective bargaining. (2) The bargain struck for a bargaining unit is likely to have important consequences for other employees of the same employer who are not represented by a union....
>
> Similarly, the bargain for an organized plant frequently will directly affect the terms of employment in unorganized plants of the same employer. (3) Enterprises wholly unorganized may be influenced by patterns set by organized

minimizing industrial strife.[12] The Act's underlying purpose was to promote industrial peace by establishing the framework for labor and management to collectively bargain their own agreement on the terms and conditions of employment rather than directly imposing these terms by government fiat.[13] The NLRA

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employers. (4) All enterprises, organized and unorganized, are affected by the impact of particular bargains on output and employment in the bargaining unit, which in turn affect the supply of labor elsewhere. (5) Finally, the economic power of particular unions is determined not by the extent of organization in general, but by factors such as the extent of organization of enterprises serving a given product market and the elasticity of the demand for the product involved.

B. MELTZER, LABOR LAW 49-51 (2d ed. 1977).

The FLSA's child labor provisions do not serve an economic goal as such but reflect a social judgment that goods produced by young children under intemperate conditions should not enter the stream of interstate commerce. Thus, these provisions are designed to prohibit employers from realizing profits through the exploitation of children. *See generally* 29 U.S.C. § 212 (1976); 29 C.F.R. § 570.1-.129 (1979).

[12] The denial by employers of the right of employees to organize and *the refusal by employers to accept the procedure of collective bargaining* lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

. . . .

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and *promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest*, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, *and by restoring equality of bargaining power between employers and employees.*

. . . .

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encouraging the practice and procedure of collective bargaining* and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

National Labor Relations Act of 1935, Pub. L. No. 74-198, § 1, 49 Stat. 449 (codified at 29 U.S.C. § 151 (1976)) (emphasis added). An additional paragraph was added by the Taft-Hartley amendments setting forth the congressional policy to eliminate certain labor organization tactics that obstruct commerce. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, tit. I, § 101, 61 Stat. 136 (codified at 29 U.S.C. § 151 (1976)).

[13] *See* Consolidated Edison Co. v. NLRB, 305 U.S. 206, 236 (1938); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41-42, 45 (1937). *See also* Teamsters v. Oliver, 358 U.S. 283, 304 (1959).

made the employer's refusal to bargain in good faith with the representatives of his employees an unfair labor practice in an effort to guarantee the right of collective bargaining.[14]

The principle of majority rule is "central to the policy of fostering collective bargaining."[15] If a majority of employees in a unit authorized for collective bargaining desire union representation, the NLRA permits the union to bargain with the employer as the exclusive representative of all unit employees, thereby imposing the majority's will on the minority.[16] The regime of majority rule secures for all unit members the benefits of collective strength and bargaining power with "full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority."[17] Thus, the Supreme Court has recognized that "[t]he complete satisfaction of all who are represented is hardly to be expected" under this system.[18]

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[14] National Labor Relations Act of 1935, Pub. L. No. 74-198, § 8(a)(5), 49 Stat. 452 (codified at 29 U.S.C. § 158(a)(5) (1976)). The 1947 Taft-Hartley amendments to the NLRA made a union's refusal to bargain in good faith an unfair labor practice. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, § 8(b), 61 Stat. 136 (codified at 29 U.S.C. § 158(b) (1976)).

[15] *See* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 62-65 (1975).

The minority's rights, however, are protected from majority abuse in three ways. First, the bargaining powers of authorized representatives are confined to a " 'unit appropriate' for the purposes of collective bargaining.' " Chemical Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 171 (1971) (quoting 29 U.S.C. § 159(a) (1970)). Second, the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 89-216, 79 Stat. 888 (codified in scattered subsections of 29 U.S.C.) created substantive provisions insuring internal union democracy. *See Emporium Capwell*, 420 U.S. at 65. Finally, and perhaps most significant, the union's duty of fair representation extends to all bargaining unit members and not just the politically successful majority. *See* text accompanying notes 120-27 *infra*.

[16] Section 9(a) of the NLRA establishes the statutory basis for the exclusive representation principle:

> *Representatives designated or selected* for the purposes of collective bargaining *by the majority of the employees* in a unit appropriate for such purposes, *shall be the exclusive representatives of all the employees* in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.
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> . . .

29 U.S.C. § 159(a) (1976) (emphasis added).

[17] Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 62 (1975); *accord* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967); Vaca v. Sipes, 386 U.S. 171, 182 (1967); J.I. Case Co. v. NLRB, 321 U.S. 332, 338-39 (1944).

[18] Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

Collective bargaining was further strengthened by section 8(d) of the Act,[19] which defines the scope of the duty to bargain:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .[20]

The courts and the National Labor Relations Board (NLRB) have broadly interpreted the terms "wages," "hours," and "other terms and conditions of employment." Most subjects concerning the employment relationship between employees and their employer are labelled by the courts and Board as mandatory subjects of bargaining; both management and labor are required to bargain about these subjects in good faith.[21] When either party fails to abide by this statutory obligation, the other may obtain relief from the NLRB or, in appropriate cases, the courts.[22]

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[19] 29 U.S.C. § 158(d) (1976).

[20] *Id.*

[21] NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348-49 (1958). *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW 496-531 (1976).

The duty to bargain extends only to mandatory subjects of bargaining. This duty does not include non-mandatory or "permissive" bargaining subjects. Permissive subjects typically concern the relationship between either the employer and a third person or the union and its employee members. Although they may be incorporated into the labor agreement, the parties are not obligated to discuss a non-mandatory provision, nor may a party bargain to impasse on a non-mandatory subject. *Wooster Div.*, 356 U.S. at 349; GORMAN, *supra*, at 498, 523.

[22] In refusal to bargain cases, the Board usually orders the recalcitrant party to cease and desist its unlawful conduct and to bargain in good faith. In appropriate cases, the Board may order the offending party to sign a contract, pay backpay to employees, reinstitute an operation improperly terminated without bargaining, or employ other "make whole" remedies. *See generally* GORMAN, *supra* note 21, at 532-39.

When a party unilaterally abrogates a provision of a labor agreement, the wronged party may file an unfair labor practice charge with the Board, sue directly in court, or, if the labor agreement contains a grievance-arbitration procedure, sue to compel arbitration or enforcement of an arbitrator's award. *See* notes 110-19 and accompanying text *infra*.

B. *Insuring Minimum Living Standards Through the Wage-Hour Law*

Commentators have described the Fair Labor Standards Act as the "original anti-poverty law."[23] Congress designed the Act to eliminate unfair competition based on labor conditions detrimental to a worker's minimum living standard.[24] Substandard wages were raised to a statutory minimum and employment opportunities were spread to more workers by requiring overtime pay for hours worked in excess of the statutory maximum.[25] Section 206 of the FLSA prescribes a statutory minimum wage for employers and employees covered by the statute.[26] Section 207 requires overtime pay calculated at one and one-half times the regular rate for covered employees working longer than forty hours per week.[27] The "regular rate" includes "all remuneration for employment paid to, or on behalf of, the employee," with cer-

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[23] Willis, *The Evolution Of The Fair Labor Standards Act*, 26 U. MIAMI L. REV. 607 (1972). For general discussions of the purposes and functions of the FLSA, see H. WECHT, WAGE-HOUR LAW (1951): L. WEINER, FEDERAL WAGE AND HOUR LAW (1977); Dodd, *The Supreme Court and Fair Labor Standards, 1941-1945*, 59 HARV. L. REV. 321 (1946); Foster, *Jurisdiction, Rights, and Remedies For Group Wrongs Under the Fair Labor Standards Act: Special Federal Questions*, 1975 WIS. L. REV. 295, 303; Comment, *Standards of Wilfulness Under the Fair Labor Standards Act*, 78 MICH. L. REV. 626 (1980); Comment, *Overtime Provisions of the FLSA: Unexpected Liability and Windfall Recovery*, 12 J. MAR. J. PRAC. & PRO. 581 (1979).

Critics today, however, have questioned whether the FLSA truly achieves these various antipoverty goals. *See* note 11 *supra*; notes 262-63 and accompanying text *infra*.

[24] The congressional declaration of policy provides:

> (a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.
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> (b) *It is declared to be the policy of this chapter*, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, *to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.*

29 U.S.C. § 202(a)-(b) (1976) (emphasis added).

[25] *See* Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 40 (1944); Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 576-78 (1942).

[26] 29 U.S.C. § 206(a)(1) (1976). The minimum wage in 1981 is $3.35.

[27] 29 U.S.C. § 207(a) (1976).

tain statutory exclusions.[28] The Act also sought to remove goods manufactured with oppressive child labor from interstate commerce.[29] In 1963, Congress amended the FLSA with the Equal Pay Act to prohibit wage discrimination based on sex.[30]

The Secretary of Labor, the Secretary's delegee (the Wage-Hour Administrator) and private individuals share responsibility for enforcing the FLSA. The Wage-Hour Administrator conducts periodic investigations of employers for FLSA compliance. Along with his general investigatory power, the Administrator may inspect and transcribe records and interview employees.[31] The Secretary of Labor is empowered to supervise the payment of back wages.[32] Employees may sue as individuals or as groups to recover unpaid wages and to obtain liquidated damages, attorneys' fees, and costs for FLSA violations.[33] If employees permit the Secretary to supervise the voluntary payment of unpaid wages, they waive their statutory right to sue for liquidated damages, attorneys' fees and costs.[34] Employee permission, however, is not a prerequisite for a suit brought by the Secretary of Labor. The Secretary may sue to recover unpaid wages and liquidated damages or petition for a wage order in an injunction suit without any specific request or grant of permission from the affected employees.[35] A suit by the Secretary terminates an employee's right to sue and recover liquidated damages.[36]

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[28] 29 U.S.C. § 207(e) (1976). Although its coverage is extensive, the FLSA is riddled with exemptions from the overtime and minimum wage requirements. *See* 29 U.S.C. § 213 (1976 & Supp. II 1978, Supp. III 1979); note 40 *infra*. For exemptions from the "regular rate," which is used to calculate overtime pay, see 29 U.S.C. § 207(e) (1976).

[29] *See* 29 U.S.C. § 212 (1976); note 11 *supra*. " 'Oppressive child labor' " is defined in the Act as the employment of children below ages specified by either statute or administrative regulations for various types of work. *See* 29 U.S.C. § 203(l) (1976).

[30] Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (1976)). Equal work is measured by similarities in "skill, effort, . . . responsibility, and . . . working conditions." 29 U.S.C. § 206(d)(1) (1976). The Equal Pay Act does, however, permit wage differentials that are based on seniority systems, merit systems, systems measuring earnings by quantity or quality of production and any factor other than sex. *Id.* This Article argues that the child labor and equal pay provisions of the FLSA should continue to override contrary arrangements contained in individual employment contracts and collective bargaining agreements. *See* note 206 and accompanying text *infra*.

[31] 29 U.S.C. § 211 (1976).

[32] 29 U.S.C. § 216(c) (1976).

[33] 29 U.S.C. § 216(b) (1976).

[34] 29 U.S.C. § 216(c) (1976).

[35] 29 U.S.C. §§ 216(c), 217 (1976).

[36] 29 U.S.C. § 216(b) (1976). For an excellent discussion of governmental and private remedies under the FLSA, see Foster, *supra* note 23, at 309-338.

C. *Interplay Between the NLRA and the FLSA*

Many workers are protected by both the NLRA and the FLSA.[37] Because labor unions have organized many such employees,[38] the potential for conflict is great. Certain employees, however, are protected by one statute but not the other. For example, supervisors, who are specifically excluded from NLRA coverage, may receive the benefits of FLSA coverage.[39] On the

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[37] The NLRA defines "employee" as follows:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, *but shall not include any individual* employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C. § 152(3) (1976) (emphasis added). The NLRA applies only where labor disputes affect interstate commerce. Nash v. Florida Indus. Comm'n, 389 U.S. 235, 237-38 (1967); Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 464 (1945).

Although the FLSA's definition of employee is slightly more complex, it essentially overlaps the NLRA definition. The FLSA initially defines employee to include "any individual employed by an employer." 29 U.S.C. § 203(e)(1) (1976). The minimum wage and overtime provisions, however, specifically apply to "employees who in any workweek [are] engaged in commerce or in the production of goods for commerce, or [are] employed in an enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. § 206(a) (Supp. III 1979) (minimum wage). *Cf.* 29 U.S.C. § 207(a) (1)-(2) (1976) (similar language for overtime requirement). Thus, the common definition of employee and the common relationship to interstate commerce provide a large degree of overlap between these two statutes.

[38] According to the United States Bureau of Labor Statistics, 20.3% of the total work force and 24.5% of the non-agricultural work force was unionized in 1976. BUREAU OF LABOR STATISTICS, DEPARTMENT OF LABOR, DIRECTORY OF NATIONAL UNIONS AND EMPLOYEE ASSOCIATIONS, 1977 61, tab. 6 (1979). Overall union membership decreased 1.4% between 1974 and 1976 from about 20.2 million to about 19.6 million. *Id.*

[39] The NLRA defines "supervisor" as follows:

> The term "supervisor" means any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11) (1976). Supervisors are not exempted from FLSA coverage unless they can also qualify as an executive, administrative, or professional employee. *See* 29 U.S.C. § 213(a)(1) (1976). Although a union cannot insist that the bargaining unit include supervisors, the NLRA permits employers to agree to their inclusion. 29 U.S.C. § 164(a) (1976).

other hand, executive, administrative, and professional employees are exempted from the FLSA's minimum wage and overtime pay requirements[40] but may be included in a bargaining unit approved under the NLRA.[41]

The interplay between the FLSA and the NLRA, although not exhaustive, is considerable. Accompanying every collective bargaining relationship is the obligation to bargain over the fundamental issues of wages and hours. This obligation is necessarily affected or influenced by the minimum wage and maximum hour provisions of the FLSA. Controversies between the parties to a labor agreement over wages and hours are usually resolved through contractual grievance procedures that often culminate in final and binding arbitration.[42] Neither the union nor the employer may obtain independent judicial review of a controversy that falls within the ambit of their collectively bargained grievance procedure without first exhausting those procedures.[43] The union's authority to negotiate agreements and process grievances under the collective bargaining agreement is similarly protected. Unless the union breaches its duty of fair representation, an employee may not obtain judicial review of either the union's or the employer's conduct until he exhausts the contract grievance procedures and the applicable intraunion remedies.[44]

In spite of our national labor policy's deference to collectively negotiated and administered labor contracts, the lower courts have recently created additional, but ill-conceived, exceptions to the exclusivity, exhaustion, and finality principles, reasoning that these doctrines have no application when FLSA issues are raised. These newly-fashioned exceptions do not properly resolve conflicts between the NLRA and the FLSA. Early Supreme Court de-

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[40] 29 U.S.C. § 213(a)(1) (1976). 29 U.S.C. § 213(b) (Supp. III 1979) contains the statutory exemptions from the overtime pay requirements. These exemptions include many significant (railroad employees) and many insignificant (maple syrup producers) occupations. Students, apprentices, and handicapped workers are at least partially exempt from the minimum wage provisions. 29 U.S.C. § 214 (1976 & Supp. III 1979).

[41] *See* 29 U.S.C. §§ 152(12), 159(b) (1976); *cf.* NLRB v. Yeshiva Univ., 444 U.S. 672, 681-82 (1980) (although professional employees covered by NLRA, an exemption may apply based on their status as supervisors or managers).

[42] Approximately 98% of major collective bargaining agreements (those covering 1000 or more workers) contain grievance procedures that provide for arbitration of disputes. *See* BUREAU OF LABOR STATISTICS, CHARACTERISTICS OF MAJOR COLLECTIVE BARGAINING AGREEMENTS, JANUARY 1, 1978 105, tab. 8.1 (1980). *See generally* M. BERNSTEIN, PRIVATE DISPUTE SETTLEMENT 271-72 (1968).

[43] *See* notes 113-27 and accompanying text *infra*.

[44] *See* notes 120-27 and accompanying text *infra*. The Supreme Court will soon consider whether an employer can raise as a defense in a § 301(a) suit the employee's failure to

cisions, pertinent legislative history, and later amendments to the FLSA demonstrate that the FLSA must yield to collectively negotiated agreements.

II

EARLY JUDICIAL RESOLUTION OF THE INTERPLAY BETWEEN THE NLRA AND THE FLSA

The pre-1947 Supreme Court decisions addressing the significance of unionization and the FLSA fall into two broad categories. The first, known as the portal-to-portal cases, dealt with compensable working time under the FLSA. The second category of cases concerned the method of computing overtime for compensable work.

A. *The Compensable Working-Time Decisions*

In *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local 123*,[45] the Court considered for the first time the meaning of compensable working time under the FLSA and the effect of a collective bargaining agreement that failed to incorporate the FLSA's compensable working time standard. Tennessee Coal brought an action for declaratory relief against Muscoda Local 123 to determine whether time spent by iron ore miners traveling underground to and from the "portal" of the mine to the "working face"[46] constituted compensable time under the FLSA.[47] Emphasizing the

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exhaust *intra*union remedies. *See* Clayton v. ITT Gilfillan, 104 L.R.R.M. 2118 (9th Cir. Apr. 14, 1980), *cert. granted*, 49 U.S.L.W. 3322 (Nov. 3, 1980) (No. 80-54).

[45] 321 U.S. 590 (1944).

[46] The "working face" is the place in the mine where the miners actually drill and load ore. The "face to face" basis of compensation, advocated by the employer, included only the time spent at the working face. The "portal-to-portal" basis, proposed by the union and the Wage-Hour Administrator, included time spent traveling between the "portal," or entrance to the mine, and the working face, as well as the time spent at the working face. *Id.* at 592 n.2.

[47] After May 5, 1941, the employer had paid its miners for travel time pursuant to a labor agreement that complied with the Wage-Hour Administrator's opinion tbat underground travel in iron ore mines was compensable work under the Act. *Id.* at 592 n.3; *see* note 70 *infra*. The dispute before the Court involved only employment during the period between the effective date of the Act (October 24, 1938) and the date the suit was initiated (April 1941). *Id.* at 592.

The Wage-Hour Administrator was allowed to intervene in this suit on behalf of the union. On March 17, 1941, the Administrator approved an informal report based on an investigation of the "hours worked" in underground metal mines in the United States. The report concluded that "[t]he workday in underground metal mining starts when the miner reports for duty as required at or near the collar [portal] of the mine and ends when he reaches the collar at the end of the shift." *Id.* at 600 (brackets in original).

"remedial and humanitarian" purpose of the Act, the Court held that because travel time from the mine's portal to its working face and back again benefitted the employer, it was compensable under the FLSA, even though the travel was not directly productive.[48] The Court rejected Tennessee Coal's arguments, based on existing collective bargaining agreements and "immemorial custom", that only time spent underground at the coal face was work time, because the district court had not specifically found that any such custom or collective provision existed.[49] Even if such findings had been made, they would not have affected the decision. The Court noted that pre-FLSA customs and agreements were established during an era of company-dominated unions rather than through free collective bargaining. Consequently, they bore little legal significance to the question before the Court:

> Likewise there was substantial, if not conclusive, evidence that prior to 1938 petitioners recognized no independent labor unions and engaged in no bona fide collective bargaining with an eye toward reaching agreements on the workweek. *Contracts with company-dominated unions and discriminatory actions toward the independent unions are poor substitutes for "contracts fairly arrived at through the process of collective bargaining."*
>
> But in any event it is immaterial that there may have been a prior custom or contract not to consider certain work within the compass of the workweek or not to compensate employees for certain portions of their work. *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.* Congress intended, instead to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. *Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights.*[50]

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[48] *Id.* at 597-99.

[49] *Id.* at 600-01.

[50] *Id.* at 601-03 (footnote omitted) (emphasis added). The Court also noted:

> Congress was not unaware of the effect that collective bargaining contracts might have on overtime pay. It expressly decided to give effect to two kinds of collective agreements, as specified in § 7(b)(1) and (2) of the Act. Cf. § 8(c). It thus did not intend that other collective agreements should relieve employers from paying for overtime in excess of an actual workweek of 40 hours, regardless of the provisions of such contracts.

Id. at 602 n.18.

Justices Frankfurter and Jackson filed separate concurring opinions. Justice Frankfurter agreed with the Court's holding affirming the lower court's judgment because there

Although its holding applied only to pre-FLSA agreements that were not produced by free collective bargaining, the Court, in unfortunate dicta, implied that all collective bargaining agreements were invalid if they did not strictly comply with FLSA standards of compensable working time.

The next Court decision addressing the significance of unionization in an FLSA context—*Brooklyn Savings Bank v. O'Neil*[51]—did not involve a compensable work issue. This case is important, however, because it contains the Court's first analysis of the FLSA's legislative history on the unionization issue—an analysis that the Court rejected a short time later in a compensable work case. The Court considered whether an employee's acceptance of a check tendered by the employer for overtime pay owed under the FLSA and the employee's execution of a release of any FLSA claims and damages barred a subsequent action for liquidated damages.[52] Based on the policy considerations under-

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was no evidence that Congress intended to give the term "workweek", as applied to the mining industry, a technical meaning. *Id.* at 603-04. Similarly, Justice Jackson accepted the Court's holding because the evidence disclosed no industry custom limiting compensable work to time spent at the coal face. *Id.* at 605.

Justice Roberts, joined by Chief Justice Stone, dissented. Recognizing the unfortunate implications of the Court's opinion on collective bargaining, Justice Roberts prefaced his dissent by emphasizing that the statutory purposes of the FLSA were limited to increasing employment, providing a fair day's pay for a fair day's work, reducing the average workweek, and preventing unfair competition by correcting inequalities in the cost of goods produced with subminimum wage labor. *Id.* at 606-07.

Justice Roberts argued that compensable work time could vary among industries, depending on the nature of the industry and the understandings of the parties. *Id.* at 608. Disputing the district court's findings of fact, Justice Roberts cited the previous attempts by the miners' union formally to obtain compensation for travel time, noting that no agreement had ever been reached. *Id.* at 610. Justice Roberts also disagreed with the Court's characterization of the union as employer-dominated; he observed that the union had been affiliated with the Congress of Industrial Organizations (CIO) before the FLSA's enactment. Accordingly, Justice Roberts attached little significance to the district court's finding that the union had not been certified by the National Labor Relations Board. *Id.* at 610-11, 615. Justice Roberts concluded by objecting to the district court's failure to find that compensation had historically been paid only for face-to-face work, *id.* at 616, arguing that the FLSA was not intended to designate as "work" those employee activities that neither employer nor employee considered work. *Id.* at 617.

[51] 324 U.S. 697 (1945).

[52] *Id.* at 701. The Court actually decided three cases in this consolidated action. In the first, Brooklyn Savings Bank paid statutory overtime compensation to an employee in return for his release of all FLSA rights. Because the sum paid by the bank did not include an amount for liquidated damages, which are recoverable under the Act, the employee sued. In the second case, the employer tendered a check for $500 to an employee for wages owed under the Act. In return, the employee released the employer from all statutory claims. Both the employer and the employee were aware, however, that more than $500 was due for minimum wages and overtime under the Act. After obtaining counsel,

lying the FLSA, the Court held that an *individual* employee could not waive the Act's minimum wage, overtime, and liquidated damages provisions by signing a release tendered by his employer.[53]

Individual waivers or releases of FLSA claims were not considered by Congress either in the text of the statute or in the legislative reports and debates.[54] Thus, the Court analyzed the general legislative policies behind the Wage-Hour law to answer the waiver question:

> The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population from sub-standard wages and excessive hours vent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce.[55]

In a footnote, the Court further explained that Congress enacted the FLSA to benefit the nonunionized, poorly paid worker: "The legislative debates indicate that the prime purpose of the legislation was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage."[56] The Court concluded that employees could not waive these statutory rights because it would encourage and *empower* employers to frustrate the FLSA's general policy of combatting substandard wages and excessive hours for unorganized workers.[57]

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the employee sued for the balance of statutory wages due under the Act and for liquidated damages. The third case presented the related issue of whether an employee could recover interest on unpaid statutory overtime and liquidated damages.

[53] *Id.* at 707.

[54] *Id.* at 705-06. The Court prefaced this discussion by noting the general rule that statutory rights conferred on a private party but affecting the public interest are unwaivable if the waiver violates the statutory policy. *Id.* at 704.

[55] *Id.* at 706-07.

[56] *Id.* at 707 n.18.

[57] *Id.* at 712-13. The court recognized, however, that a number of other statutes containing express provisions relating to waiver or settlement of claims have been strictly interpreted to protect the employee. *Id.* at 712 n.29. Chief Justice Stone and Justices Roberts and Frankfurter dissented from the Court's opinion because it completely prohibited the employer from obtaining a release of statutory liquidated damages. *Id.* at 719.

Despite the general policy recognized in *Brooklyn Savings Bank* emphasizing the application of the FLSA to unorganized workers, the Court held barely two months later in *Jewell Ridge Coal Corp. v. Mine Workers Local 6167*[58] that the FLSA's compensable time provisions superseded a contrary scheme collectively bargained by a powerful union on behalf of highly paid employees.[59] The Court granted certiorari in *Jewell Ridge Coal* to determine whether time spent traveling between the portal and the working face in bituminous coal mines was compensable under the FLSA. Although the Court acknowledged that working conditions were better than those in *Tennessee Coal*, it applied *Tennessee Coal* because portal to working face travel required mental exertion by employees that was controlled by their employer for his benefit.[60] Rejecting the employer's reliance on fifty years of universal custom and a bona fide collective bargaining agreement, the Court invoked the *Tennessee Coal* dictum prohibiting agreements that " 'allow an employer to claim all of an employee's time while compensating him only for a part of it.' "[61] The majority argued that the statutory goals of increasing employment opportunities and adequately compensating employees for their work required literal enforcement of the FLSA's compensable time notions, whether or not the employees were highly paid and represented by a strong union.[62]

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[58] 325 U.S. 161 (1945).

[59] *Id.* at 167-69.

[60] *Id.* at 163-66.

[61] *Id.* at 167 (quoting Tennessee Coal, Iron & R.R. v. Muscoda Local 123, 321 U.S. 590, 602 (1944)); *see* text accompanying note 50 *supra*.

The Court noted, as it had in *Tennessee Coal*, that it was not concerned about the use of "bona fide contracts or customs to settle difficult and doubtful questions as to whether certain activity or non-activity constitutes work." *Id.* at 169-70. *See also* Armour & Co. v. Wantock, 323 U.S. 126 (1944). The majority apparently decided that "bona fide" disputes concerning compensable working time are limited to situations where there is difficulty in computing actual working time as opposed to situations where travel time is arranged or arbitrarily fixed. 325 U.S. at 169-70.

[62] *Id.* at 167.

The Court dismissed as "indecisive" statements in the legislative history indicating that the FLSA was not designed to interfere with collective bargaining. *Id.* at 168. However, the Court quoted a passage from the legislative history concerning the effect of the FLSA on collective bargaining agreements indicating that the FLSA does *not* affect collective bargaining agreements unless the wage rates in the agreement were below statutory minimums. *Id.* at 168 n.1; *see* 81 CONG. REC. 7650 (1937) (remarks of Sen. Black concerning the Wage-Hour Board, which was the administrative agency originally envisioned to enforce the FLSA, but was later replaced in the statute by the Wage-Hour Administrator in the Department of Labor).

Justice Jackson, writing for the four dissenting Justices, attacked the majority's refusal to defer to the agreements between the "strong and powerful" United Mine Workers (UMW) and the employers that were based on a half century of custom in the industry.[63] He distinguished the *Tennessee Coal* labor agreements on the ground that they had been bargained by company-dominated unions,[64] and emphasized the uniformly high wages and seven hour workdays negotiated by the UMW.[65] Because the labor agreements had been produced by bona fide collective bargaining, the dissenters argued that the majority's holding conflicted with the employer's obligation under the NLRA to honor agreements made with the employees' bargaining representatives.[66]

Justice Jackson also cited "multiple examples" of Congress's " 'continuing intention not to interfere with the process of collective bargaining' " in the FLSA's legislative history.[67] One such example was the report of the Senate Committee on Education and Labor:

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

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The passage quoted by the Court, which is apparently the *only* passage in the legislative history indicating that the FLSA could override collective bargaining agreements, does not support the Court's holding. In that passage, Senator Black also stated:

> [T]he Board would have jurisdiction to [set the agreement aside], but under the provisions of the law it would be my judgment that the Board would be very reluctant, indeed, to attempt to interfere with a bona-fide agreement made between employer and employee.

325 U.S. at 168 n.I (quoting 81 CONG. REC. 7650 (1937)). Thus, the legislative history on which the Court relied would permit judicial interference with collective bargaining only when the agreement did not provide statutory minimum wages.

[63] *Id.* at 171-74.

[64] *Id.* at 174. Quoting from the district court's opinion, the dissent underscored the difference between the instant case and *Tennessee Coal*, where " 'the efforts of the men to organize their union present[ed] a pitiable picture of helplessness against the domination of the mining companies.' " *Id.* at 174-75 (quoting 53 F. Supp. 935, 948 (1944)).

[65] *Id.* at 173.

[66] *Id.* at 172. *See* NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952); J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

[67] 325 U.S. at 176 (quoting the district court's opinion, 53 F. Supp. 935, 944 (1944)).

tims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage.[68]

Legislative history also demonstrates that Congress respected specific requests by the UMW to refrain from enacting provisions

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[68] *Id.* at 176 (quoting S. REP. No. 884, 75th Cong., 1st Sess. 3-4 (1937)). *See also Joint Hearings Before the Senate Comm. on Labor and Education and the House Comm. on Labor*, 75th Cong., 1st Sess. 46-47 (1937) (statement of Ass't Atty. Gen. Jackson); *id.* at 181-83 (colloquy between Sec'y of Labor Perkins and Sen. Walsb); *id.* at 689-708 (statement of Mr. Fletcher). Mr. Fletcher's statement demonstrates that Congress considered, but did not enact, a proposal to exempt railroad employees from the FLSA. His proposal, which suggested that wage claims would be protected under the grievance procedures of the Railway Labor Act (RLA), was rejected because the RLA grievance procedures were not adequate to protect *non-unionized* railroad employees. *Id.*

Justice Jackson retreated somewhat from the breadth of the Senate committee's declaration. He noted later in his opinion that "no agreement could be validly bargained which provided for less than the minimum wages to be fixed by the proposed [Wage-Hour] Board or for more than the specified hours of labor." *Id.* at 177. Justice Jackson supported this argument by citing the same passage from the Senate debate relied on by the majority that outlined the proposed Wage-Hour Board's authority to set minimum wages. *Id.* at 176-77; *see* note 62 *supra*.

Justice Jackson also quoted, however, several of the "numerous passages" from the legislative history indicating that Congress never intended the FLSA to interfere with bona fide collective bargaining:

> Mrs. Norton.... It is not the intention of this amendment, or of the bill, to start fixing wages in all industries but only in those in whicb oppressive wages are being paid to a substantial portion of workers.... [82 CONG. REC. 1391 (1937) (remarks of Rep. Norton).]
>
> Mr. Randolph.... *It [the bill] is not concerned with that fortunate majority of the laboring classes whose collective bargaining power is sufficiently potent to insure the preservation of their industrial rights.*
>
> But it is concerned with those millions in industry who are unprotected and unorganized.... [82 CONG. REC. 1935 (1937) (remarks of Rep. Randolph) (emphasis added).]
>
> Mr. Curley.... There is no conflict of jurisdiction, under the provisions of this fair standards of labor bill, and the existing labor organizations of this country. [83 CONG. REC. 7285 (1938) (remarks of Rep. Curley).]
>
> Mr. Boileau.... What is more, *we are preserving for organized labor its right to bargain collectively and it will bargain for a higher wage than that.* [83 CONG. REC. 7290 (1938) (remarks of Rep. Boileau (emphasis added).]
>
> Mr. Allen.... This bill has a threefold purpose as I see it. First, it eliminates sweat shops.... *The bill does not affect organized labor,* but those 5,000,000 American working men and women who have not yet been benefited by organized labor. [83 CONG. REC. 7291 (1938) (remarks of Rep. Allen) (emphasis added).]
>
> Mr. Fitzgerald.... I would have you observe that this proposed legislation will not improve the wages and hours of the majority of workers, nor does it attempt to. For I am greatly pleased to say that the majority of workers do not need this legislation because they are receiving a living wage and are not forced to work unreasonable hours. [83 CONG. REC. 7310 (1938) (remarks of Rep. Fitzgerald).]

that would usurp collective bargaining in the coal industry.[69] The majority opinion was inconsistent with the UMW's recommendation to the Wage-Hour Administrator and the Administrator's own rulings approving methods for calculating working time on a face-to-face basis.[70]

The dissent's most pointed criticism of the majority's holding was that it "extends [an advantage] to a powerful group so plainly outside of the policy of the Act [as contrasted] with the treatment of groups that, being unprotected and unorganized, were clearly within it."[71] The Court had previously ruled that determinations of compensable working time for *unorganized* workers were subject, in part, to the agreement between the worker and employer,

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325 U.S. at 178 n.6 (quoting Jewell Ridge Coal Corp. v. Mine Workers Local 6167, 53 F. Supp. 935, *rev'd* 145 F.2d 10 (1944), *aff'd* 325 U.S. 161 (1945); *see* note 56 and accompanying text *supra* (legislative history discussed by Justice Reed in *Brooklyn Savings Bank*). These 1938 remarks parallel the early drafts of the FLSA that included specific provisions preventing the Act from interfering with collective bargaining unless a union was relatively weak and providing that collectively bargained wages and hours constitute prima facie evidence of FLSA compatibility. *See* S. REP. No. 884, 75th Cong., 1st Sess. (1937) (§ 5 Senate bill); H.R. REP. No. 1452 75th CONG. 1st Sess. (1937) (§ 5(b), (d) House bill). *See also* 82 CONG. REC. 1390 (1937) (remarks of Rep. Norton).

[69] 325 U.S. at 179-82 (Jackson, J., dissenting). The policy preamble to the Bituminous Coal Act of 1937, ch. 127, 50 Stat. 72 (repealed 1966), declared that the employees' right to bargain collectively in the coal industry is protected. In the hearings prior to the enactment of the FLSA, officials of the UMW testified extensively in favor of collective bargaining and in opposition to legislation that would set "fair" daily wages in the coal industry. *See Joint Hearings Before the Comm. on Education and Labor, United States Senate and the Comm. on Labor, House of Representatives,* 75th Cong., 1st Sess. 281 (1937). For a discussion of contemporary labor opinions on the FLSA at the time of its enactment, see Forsythe, *Legislative History Of The Fair Labor Standards Act*, 6 LAW & CONTEMP. PROB. 464, 467-68, 471, 476 (1939). *See also* Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage,* 101 MON. LAB. REV. 22 (June 1978).

[70] 325 U.S. at 182 (Jackson, J., dissenting). The dissent quoted a letter from officials of the United Mine Workers urging the Wage-Hour Administrator to accept the wages, hours, and definition of working time contained in the industry's Appalachian Agreement (which embodied the custom and traditions of the bituminous coal mining industry). The letter recounted the long history of collective bargaining between the UMW and the coal operators and the existing high wage rates. The letter described the relationship between the UMW and the coal operators as "collective bargaining in its complete sense." *Id.* at 183-87 n.9. The dissent also quoted from the July 18, 1940, ruling by the Wage-Hour Administrator that face-to-face computation of work time in the coal industry was reasonable. *Id.* at 188.

Justice Jackson also argued that the majority's interpretation would render the government's mining contracts unlawful. "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 illegal to agree that the travel time shall be fixed at any arbitrary figure which does not conform to the facts." *Id.* at 191.

[71] *Id.* at 192 (Jackson, J., dissenting).

but subsequently held in *Brooklyn Savings Bank* that individual workers could not waive FLSA rights.[72] In *Tennessee Coal*, however, the Court approved portal-to-portal pay for a group of organized workers represented by a company-dominated union notwithstanding a contrary labor agreement, and this holding was extended in *Jewell Ridge Coal* to cover a group of strongly represented union workers. Originally intended as a benefit for the unorganized worker, the Court made portal-to-portal pay available to organized and unorganized workers on the same terms—even though the unorganized workers lacked the ability to negotiate with their employer for other benefits.[73] Observing that the "ink [was] hardly dry" on *Brooklyn Savings Bank*'s declaration that the FLSA's "prime purpose" was to assist unorganized workers,[74] Justice Jackson concluded:

> We have just held [in *Brooklyn Savings Bank*] that the individual workman is deprived of power to settle such questions. . . . Now we hold collective bargaining incompetent to do so. It is 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. A genuinely collectively bargained agreement as to wages, hours or working conditions is not invalidated or superseded by this Act and both employer and employee should be able to make and rely upon them, and the courts in deciding such cases should honor them.[75]

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[72] *Id.* at 192-93 (Jackson, J., dissenting). *See* Skidmore v. Swift & Co., 323 U.S. 134, 136-37 (1944).

[73] The majority's holding eliminated the employer's wage flexibility, to the detriment of employees:

> The "face to face" method, whatever its other defects, is a method by which both operators and miners have tried to bring about uniformity of labor costs in the different unionized mines and to remove the operator's resistance to improved wage scales based on fear of competition. Under this decision there can be no uniform wage in this industry except by disregarding the very duty which this decision creates to pay each miner for his actual travel time. Thus, two men working shoulder to shoulder, but entering the mine at different portals must receive either different amounts of pay . . . or must stay at their productive work a different length of time. Thus, too, old mines which have burrowed far from their portals must shoulder greatly increased labor costs per ton. . . . Mining labor has tended to locate its dwellings near its work, and the closing of mines results in corresponding dislocations.

Id. at 194-95 (Jackson, J., dissenting).

[74] *Id.* at 192.

[75] *Id.* at 195. A contemporary commentator also struggled with the roughshod treatment given to collective bargaining agreements in *Tennessee Coal* and *Jewell Ridge Coal*. *See* Dodd, *supra* note 23, at 352-55, 362-67, 371.

B. *The Overtime Pay Decisions*

The Court decided several overtime pay cases[76] after *Jewell Ridge Coal*. In these decisions, which involved several collectively bargained overtime compensation schemes, the Court gave cursory consideration to the significance of the collective bargaining agreements.[77] The FLSA's impact on a collective bargaining

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[76] After the decision in *Jewell Ridge Coal*, the Court issued one additional significant compensable working time decision. In Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), the Court held that certain preliminary activities, such as putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, preparing equipment for productive work, turning on switches for lights and machinery, opening windows, and assembling and sharpening tools, were compensable work under *Tennessee Coal* and *Jewell Ridge Coal*. The Court reasoned that these activities involved physical exertion controlled or required by the employer for the employer's benefit. Moreover, because the activities were performed solely on the employer's premises and were necessary prerequisites to productive labor, they constituted compensable work. *Id.* at 692-93. The Portal-to-Portal Act of 1947 overturned both the *Mt. Clemens Pottery* and *Jewell Ridge Coal* decisions. *See* notes 91-93 and accompanying text *infra*.

[77] In Walling v. Harnischfeger Corp., 325 U.S. 427 (1945), the Court held that an employer could not exclude incentive bonuses from the statutory "regular rate of pay" which is the basis for computing overtime pay under the FLSA. In rejecting the employer's contention that the employees' contractual base rate should be equated with the statutory regular rate, the Court dismissed the collective bargaining agreement's significance with the maxim that "actual payments," and not contract nomenclature, should control. 325 U.S. at 430-31. Chief Justice Stone emphasized in his dissent that the wage arrangement had been achieved by collective bargaining. The employees were enjoying higher wages under this arrangement than they would working at the prevailing hourly rates of pay with time and one-half for overtime as required by FLSA. *Id.* at 434. Chief Justice Stone provided his own standard for testing collectively bargained wage arrangements against the FLSA:

> It is enough that the weekly wage is . . . mutually agreed upon in good faith, that it is intended to pay for time and overtime, and that it is sufficient in amount to pay for the first forty hours at a rate above the minimum wage prescribed by the statute and to pay for the overtime at one and one-half times that rate.

Id. at 439.

In Martino v. Michigan Window Cleaning Co., 327 U.S. 173 (1946), the Court considered a similar compensation arrangement providing overtime pay only for hours worked in excess of 44 per week. The Court noted in passing that a collective bargaining agreement was involved but, in purported reliance on *Brooklyn Savings Bank*, held that the contract did not bar the employees' right to recover statutory overtime. *Id.* at 177-78. The Court struck down another compensation formula contained in a collective bargaining agreement that inconsistently applied rates for base pay and overtime pay in 149 Madison Ave. Corp. v. Asselta, 331 U.S. 199, 202 (1947). The Court reached its result without addressing the policy concerns underlying collective bargaining and their proper relationship to the FLSA.

Justice Frankfurter suggested that the decisions in *149 Madison Ave.* and *Harnischfeger* were properly decided but for the wrong reasons. Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 488-89 (1948) (Frankfurter, J., dissenting). Where the collective bargaining agreement either mislabels the true circumstances of the employment relationship or fails to distinguish between "basic" hours and "overtime" hours, he argued that courts should not allow the labels attached by the parties to conceal the "true facts." *Id.* This circumstance is easily remedied, however, without completely usurping collective bargaining agreements

agreement was not addressed in detail until the Court's decision in *Bay Ridge Operating Co. v. Aaron*.[78] In *Bay Ridge*, a collective bargaining agreement between the International Longshoremen's Association and several stevedoring companies provided for "straight time hourly rates" for work done within a prescribed forty-four hour time schedule and "overtime hourly rates" at one and one-half times the contractual straight time rate for all other hours.[79] Numerous employees worked exclusively in the contractual overtime period but the contract provided no additional payment for non-straight time hours worked in excess of forty.[80] Several of these employees brought a class action under the FLSA seeking statutory overtime compensation at the rate of one and one-half times their contractual overtime rate of pay for work over forty hours. The district court granted judgment for the employers, emphasizing that the contractual overtime rates had been produced through bona fide collective bargaining.[81] The Second Circuit reversed.[82]

The Supreme Court affirmed in a five-to-three decision, concluding that the contractual overtime arrangement was nothing more than a shift differential under the FLSA.[83] The Act required employers to compensate employees at one and one-half

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by applying the bad faith standard of the duty of fair representation. *See* notes 244-53 and accompanying text *infra*.

During this period, the Court also struck down *individual* employment contracts that computed "the [statutory] regular rate of pay in a wholly unrealistic and artificial manner so as to negate statutory purposes." Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 42 (1944) (split-day plan designating first four hours worked as "base or regular rate" and second four hours as "overtime" paid at time and one-half regular rate). *See also* Walling v. Youngerman-Reynolds Hardware Co., 325 U.S. 419, 425 (1945) (contractual "regular rate" for overtime calculation below actual hourly earnings under incentive plan held invalid).

[78] 334 U.S. 446 (1948). The *Bay Ridge* case is discussed in Dabney & Dabney, *Regular Rate And The Bay Ridge Case: A Guide To Legislative Revisions*, 58 YALE L.J. 353 (1949); Farmer, *Overtime On Overtime: The Supreme Court Decision In The Bay Ridge Case*, 34 VA. L. REV. 745, 767 (1948) (criticizing *Bay Ridge* as providing windfalls to employees, unexpected financial liability for employers, and disrupting collective bargaining); Sanders, *Overtime Pay Under the Fair Labor Standards Act*, 2 VAND. L. REV. 379, 389-91 (1949) (*Bay Ridge* disturbed collective bargaining relationship, but Congress, not courts, should write exemptions to FLSA); Note, *Overtime on Overtime: Collective Bargaining v. the Fair Labor Standards Act*, 16 U. CHI. L. REV. 116 (1948); Comment, 1950 WIS. L. REV. 99.

[79] 334 U.S. at 451-52. The straight time rate schedule was essentially a day time schedule, covering the morning hours on Monday through Saturday, and the afternoon hours on Monday through Friday. Work during all other hours, *i.e.*, night time work, was compensated at overtime rates. *Id.*

[80] The relevant portions of the labor contract are set forth in 334 U.S. at 451-52 n.5.

[81] Addison v. Huron Stevedoring Corp., 69 F. Supp. 956 (S.D.N.Y. 1947).

[82] Aaron v. Bay Ridge Operating Co., 162 F.2d 665 (2d Cir. 1947).

[83] 334 U.S. at 466.

times their regular rate "for a workweek longer than forty hours."[84] At that time, however, Congress had not defined the term "regular rate" of pay. The Court held that Congress left this term undefined because it preferred a "judicial determination . . . whether . . . an employee receive[d his] full statutory excess compensation, rather than to impose a rule that in the absence of fraud or clear evasion employers and employees might fix a regular rate without regard to hours worked or sums actually received as pay."[85] The Court then analyzed the compensation scheme in the labor agreement, citing a previous decision that invalidated an artificial scheme designed to deprive unorganized employees of overtime wages: "[f]reedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes."[86] This analysis led the Court to hold that:

> [T]he regular rate . . . must reflect all payments which the parties have agreed shall be received *regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact.* Once the parties have decided upon the amount of wages and mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation [in the contract to the contrary].[87]

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[84] Section 7(a) of the FLSA provided that: "No employer shall . . . employ any of his employees . . . for a workweek longer than forty hours . . . unless such employee receives compensation for his employment in excess of [40] hours at a rate not less than one and one-half times the regular rate at which he is employed." 52 Stat. 1063 (current version at 29 U.S.C. § 207(a)(1) (1976 & Supp. III 1979)). Although this section has since been renumbered, the current version is essentially the same as that considered by the *Bay Ridge* Court. In the 1949 amendments to the FLSA, however, Congress further defined the term "regular rate of pay." 29 U.S.C. § 207(e) (1976) now provides: "As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee. . . ."

[85] 334 U.S. at 463.

[86] Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 42 (1944). The Court also cited Walling v. Youngerman-Reynolds Hardware Co., 325 U.S. 419, 424-25 (1945). The Court's reliance on *Youngerman-Reynolds* was decidedly misplaced. The employer in *Youngerman-Reynolds* agreed with his unorganized employees to use a contractually designated rate for calculating overtime. The actual rate of payment received by the employees was much greater than the stated contractual rate due to an incentive scheme that was also provided in the contract. Although the employer's failure to base overtime calculations on the actual rather than the stated rate violated § 7(a) of the FLSA, the *Youngerman-Reynolds* decision contained no discussion of the effect of collective bargaining agreements on the definition of the statutory rate of pay.

[87] 334 U.S. at 461 (emphasis added).

The Court then calculated the statutory regular rate of pay by dividing the employee's contractual "overtime hourly rate" received, *i.e.*, the "regular rate" of pay, by the number of hours worked. Statutory overtime for workweeks over forty hours was required at one and one-half times this figure. Although the Court stated that its computation excluded overtime payments built into the existing regular rate to avoid "overtime premium on overtime premium—a pyramiding that Congress could not have intended,"[88] the longshoremen neverthless received overtime on contractual overtime.

The Court minimized the significance of the collective bargaining agreement and rejected the union's argument supporting the stevedore companies:

> Although our public policy recognizes the effectiveness of collective bargaining and encourages its use, nothing to our knowledge in any act authorizes us to give decisive weight to contract declarations as to the regular rate because they are the result of collective bargaining. . . . A vigorous argument is presented for petitioners by the International Longshoremens Association that a collectively obtained and administered agreement should be effective in determining the regular rate of pay but we think the words of and practices under the contract are the determinative factors in finding the regular rate for each individual.[89]

Thus, without considering the FLSA's legislative history and relying on decisions ignoring the importance of a labor agreement in the FLSA context,[90] the majority opinion disregarded the national policy favoring collective bargaining and woodenly deferred to the dictates of the FLSA.

C. *Legislation Overturning* Jewell Ridge Coal *and* Bay Ridge

The *Bay Ridge* Court did not rely on its *Tennessee Coal* and *Jewell Ridge Coal* decisions because Congress had overturned them

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[88] *Id.* at 464. The Court stated:

> Where an employee receives a higher wage or rate because of undesireable hours or disagreeable work, such wage represents a shift differential or bigher wages because the character of the work done or the time at which he is required to labor rather than an overtime premium. Such payments enter into the determination of the regular rate of pay.

Id. at 468-69.

[89] *Id.* at 463-64. The Court cited two decisions—149 Madison Ave. Corp. v. Asselta, 331 U.S. 199, 204 (1947), and Walling v. Harnischfeger Corp., 325 U.S. 427, 432 (1945)—that gave cursory treatment to the effect of collective bargaining agreements. *See* note 77 *supra*.

[90] *See* 334 U.S. at 463-64.

by enacting the Portal-to-Portal Act of 1947.[91] Congress described the *Jewell Ridge Coal* decision as a "serious threat" to the principle of collective bargaining that created liabilities labor and management attempted to avoid through collective bargaining.[92] Congress eliminated *Jewell Ridge*'s detrimental impact on the process of voluntary collective bargaining[93] and limited judicial interference in compensable work time disputes by prohibiting suits to recover back pay or time spent "preliminary" or "postliminary" to the employee's "principle activities."[94]

Although the Portal-to-Portal Act nullified judicial decisions converting noncompensable time into compensable time, the *Bay Ridge* Court should have recognized that the congressional proclamation implied from the Portal Act concerning the primacy of collective bargaining was equally applicable for determining the

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[91] Pub. L. No. 80-49, 61 Stat. 84 (codified at 29 U.S.C. §§ 251-62 (1976)).

[92] H. REP. No. 71, 80th Cong., 1st Sess. (1947), *reprinted in* [1947] U.S. CODE CONG. & AD. NEWS 1029-1036. Along with *Tennessee Coal* and *Jewell Ridge Coal*, the Supreme Court's decision in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), was overruled by the Portal-to-Portal Act because it too imposed unforeseen liabilities on employers.

[93] The Portal-to-Portal Act's declaration of policy, codified at 29 U.S.C. § 251(a)-(b) (1976) (emphasis added), declares:

> (a) *The Congress finds that the Fair Labor Standards Act of 1938, as amended . . . has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities,* immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; . . . (4) *employees would receive windfall payments,* including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demand for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) *voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created*; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged. . . .
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> (b) It is declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) *to protect the right of collective bargaining;* and (3) to define and limit the jurisdiction of the courts.

See generally Cotter, *Portal to Portal Pay*, 33 VA. L. REV. 44 (1947); Note, *Good Faith Defenses Under the Portal-to-Portal Act* of 1947, 17 GEO. WASH. L. REV. 322 (1949); Note, *Fair Labor Standards Under the Portal to Portal Act*, 15 U. CHI. L. REV. 352 (1948).

[94] 29 U.S.C. §§ 252-254 (1976).

"regular rate" where collective agreements established a regular rate for computing overtime. This point was not ignored by Justice Frankfurter[95] who, dissenting in *Bay Ridge*, criticized the majority for disregarding congressional assurances that the FLSA would not interfere with free collective bargaining:

> Such assurances were necessary to allay the traditional hostility of organized labor to legislative wage-fixing. The Court now holds unlawful a collective agreement entered into by a strong union, governing the wide range of the longshoremen's employment relationships, and especially designed to restrict the hours of work and to require the same premium as that given by the statute for work done outside of normal hours but within the statutory limit. The Court substitutes an arrangement rejected both by the union and the employers as inimical to the needs of their industry and subversive of the process of collective bargaining under which the industry has been carried on.
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> . . . .
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> The traditional process of collective bargaining was not to be disturbed where it existed. It was to be extended by advancing the economic position of workers in non-unionized industries and in industries where unions were weak, by furthering equality in bargaining power. It certainly was not the purpose of the Act to permit the weakening of a strong union by eviscerating judicial construction of the terms of a collective agreement contrary to the meaning under which the industry had long been operating and for which the union is earnestly contending.[96]

Justice Frankfurter admonished the Court for its "doctrinaire" disregard of industrial realities that would inevitably spur Congress to undo the Court's "heedless" decision, just as Congress had overturned the Court's portal-to-portal decisions.[97] These words were indeed prophetic. Only one year later, Congress amended the FLSA specifically to overrule the *Bay Ridge* holding.[98] Adopting Frankfurter's rationale, Congress again em-

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[95] 334 U.S. at 483-84, 487.

[96] *Id.*

[97] *Id.* at 478.

[98] Act of July 20, 1949, Pub. L. No. 81-177, 63 Stat. 446 (repealed 1949). This Act, commonly referred to as the "Overtime on Overtime Bill," amended section 7(e) of the FLSA by adding:

> (e) For the purpose of computing overtime compensation payable under this section to an employee—
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> . . . .

phasized the primacy of collective bargaining, denounced windfall FLSA claims that usurped collective bargaining agreements, and restated that it intended the FLSA to aid and not supplant the principles of collective bargaining. So long as collective agreements were executed in good faith, they did not conflict with the underlying purposes of the FLSA.[99]

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(2) who, in pursuance of an applicable employment contract or collective bargaining agreement, is paid for work outside of the hours established in good faith by the contract or agreement as the basic, normal or regular workday (not exceeding 8 hours) or workweek (not exceeding 40 hours), at a premium rate not less than one and one half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek, the extra compensation provided by such premium rate shall not be deemed part of the regular rate at which the employee is employed and may be credited toward any premium compensation due him under this section for overtime work.

Act of July 20, 1949, Pub. L. No. 81-177, 63 Stat. 446 (repealed 1949). *See* note 99 *infra*. This provision is now codified at 29 U.S.C. § 207(e)(7) (1976).

[99] In S. REP. No. 402, 81st Cong., 1st Sess. (1949), *reprinted in* [1949] U.S. CODE CONG. & AD. NEWS 1617, 1623-24 (emphasis added), the House Committee on Labor and Public Welfare explained the rationale for the legislation retroactively overturning the *Bay Ridge* holding:

1. *The claims are in the nature of windfalls and in derogation of the collective bargaining agreements as understood in the past by the contracting parties.* The longshore contract involved in the Bay Ridge case specifically stated that all time not denominated straight time "shall be considered overtime and shall be paid for at the overtime rate." *Moreover, the denial of retroactive relief would, in effect, penalize the large bulk of employees who have chosen to abide by the terms of the collective agreement.* The inequity of allowing such claims to prevail is further aggravated by reason of the fact that the bulk of such claims arose from wartime exigencies which distorted normal work patterns.

2. The premium arrangements, understood by the contracting parties to conform to the statutory overtime requirements, were the result of *collective bargaining. There is no evidence that the bargaining was other than at arm's length.* It resulted in an arrangement which was highly advantageous to the employees covered by the collective agreement. As the district court found in the Bay Ridge case, there was 8-1/2 times as much contractual overtime as there was overtime measured by the number of hours in excess of 40 worked for one employer. *Further, to the extent to which the arrangement was intended to and did spread employment by encouraging the concentration of work in straight-time hours, it is consistent with one of the main purposes of the maximum hour provision of the Fair Labor Standards Act.*

3. *The House and Senate reports on the Fair Labor Standards Act strongly support the view that the act was intended to aid and not supplant the efforts of American workers to improve their position by self-organization and collective bargaining....*

Although the Overtime on Overtime Bill was repealed by the Act of October 26, 1949, Pub. L. No. 81-893, § 16(f), 63 Stat. 910 (current version at 29 U.S.C. § 207(e)(7) (1976), the provisions overturning the *Bay Ridge* decision were retained "to solve the identical problems Public Law 177 was intended to solve." CONF. REP. No. 1453, 81st Cong., 1st Sess. (1949), *reprinted in* [1949] U.S. CODE CONG. & AD. NEWS 2241, 2259-60.

III

SECTION 301(a) AND THE EMERGENCE OF GRIEVANCE ARBITRATION AS THE PREEMINENT INDUSTRIAL DISPUTE RESOLUTION MECHANISM

A. *Collective Bargaining and the FLSA Before Taft-Hartley and Section 301(a)*

Early Supreme Court decisions, FLSA legislative history, and subsequent congressional reversal of errant Supreme Court interpretations demonstrate that Congress never intended the FLSA to interfere with collectively bargained compensation arrangements even if such agreements varied from the literal requirements of the FLSA. On two occasions, Congress validated arrangements fashioned through collective bargaining that the Supreme Court had declared unlawful. Congress was not content merely to eliminate the potential future liability posed by these decisions. Instead, it amended the FLSA retroactively to validate arrangements held unlawful under these decisions irrespective of whether the arrangements were contained in a collective bargaining agreement or in an individual employment contract.[100]

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[100] Portal-to-Portal Act of 1947, Pub. L. No. 80-49 §§ 2, 3, 61 Stat. 86 (codified at 29 U.S.C. §§ 252, 253 (1976)) (providing retroactive relief from *Tennessee Coal* and *Jewell Ridge Coal* decisions); Act of October 26, 1949, Pub. L. No. 81-393, § 16(e), 63 Stat. 920 (current version at 29 U.S.C. § 207(e)(7) (1976)) (providing retroactive relief from impact of *Bay Ridge* decision).

Some commentators argued that the 1949 amendments encroached on the flexibility of labor and management in collective bargaining:

> [T]he very detail to wbich the Congress has now gone in defining terms will remove flexibility in labor-management practices or in collective bargaining. This particular amendment certainly represents a long step away from the viewpoint that the Act should deal only with basic minimum standards and not seek to control wage practices which result in payments to employees far in excess of any statutory minimum.

Smethurst & Haslam, *The Fair Labor Standards Amendments of 1949*, 18 GEO. WASH. L. REV. 127, 153 (1950). *See generally* Soule, *The Fair Labor Standards Amendments of 1949—Overtime Compensation*, 28 N.C.L. REV. 173 (1950); Note, *The Fair Labor Standards Amendments of 1949*, 34 MINN. L. REV. 670 (1950); Note, *1949 Amendments to the Fair Labor Standards Act*, 21 MISS. L.J. 265 (1950).

Smethurst's and Haslam's argument was implicitly recognized by the Supreme Court in Addison v. Holly Hill Fruit Prods., 322 U.S. 607, 617 (1944), when it considered whether certain employee classifications were exempt from FLSA coverage. It is undeniable, however, that the policies underlying Congress's repudiation of *Bay Ridge* and *Jewell Ridge Coal*, as expressed in the Conference Reports, would not permit the subordination of collective bargaining to the FLSA. Although the FLSA before *Bay Ridge* contained very detailed provisions, Congress nevertheless required in 1949 that the FLSA yield when it conflicted with a collective agreement. Furthermore, it is doubtful that Congress, after it

While limiting the government's ability to regulate wages and hours under the FLSA, Congress was laying the groundwork for the ascendancy of industrial self-government under the NLRA. Following the enactment of the Taft-Hartley amendments to the NLRA in 1947 (the Labor Management Relations Act),[101] the Supreme Court rendered a series of important decisions construing the amendments—particularly section 301(a)—that created the statutory basis for private enforcement of labor contract promises.[102] Since 1948, the Court has not decided whether collective bargaining agreements varying from the literal requirements of the FLSA are permissible and thus, it has not considered the impact of section 301(a) on this issue. The lower courts, however, have considered the FLSA/collective bargaining conflict in a number of contexts.[103] Although section 301(a)'s implications have been considered in some cases, the results, charitably described, are irreconcilable. These cases have generally ignored the historical development of the FLSA/collective bargaining relation, and thus have misperceived the underlying purposes of the FLSA and misapplied the policy underlying section 301(a). This section analyzes federal labor law and labor policy as generally developed under section 301(a), discussing two Supreme Court decisions that considered, but did not decide, the FLSA/collective bargaining issue.

B. *Protecting Collective Bargaining Rights Under Section 301(a)*

The National Labor Relations Act of 1935 (the Wagner Act) established a national policy promoting the negotiation of collective bargaining agreements embodying both the terms and conditions of worker employment and the bargaining obligations of employers.[104] The Labor Management Relations (Taft-Hartley) Act of 1947, which amended the Wagner Act, established statutory provisions for enforcing labor contract promises.[105] Taft-Hartley also established the Federal Mediation and

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had expressed its preference for enforcing privately negotiated labor agreements in the 1947 Taft-Hartley amendments, would authorize a single rule of thumb—the FLSA's detail prevails over the generalized principles of free collective bargaining—when it enacted the Portal-to-Portal Act.

[101] Pub. L. No. 80-101, 61 Stat. 136 (codified in scattered sections of 29 U.S.C. (1976)).

[102] *See* text accompanying note 109 *infra*.

[103] *See* notes 150-236 and accompanying text *infra*.

[104] *See* notes 12-22 and accompanying text *supra*.

[105] The Taft-Hartley Act's declaration of purpose enunciated the objective of reducing industrial strife through cordial contractual relations and peaceful dispute resolution. *See*

Conciliation Service to assist parties involved in labor disputes to settle their differences through mediation and conciliation.[106] The Act declared that "the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees,"[107] rather than by allowing government to establish the terms of employment for management and labor. A corollary to the congressional policy of favoring the settlement of issues through collective bargaining was Congress's preference for resolving differences arising under collective bargaining agreements through contractual grievance procedures. Section 203(d) of the Act declared that "[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."[108]

Section 301(a) of the Act provides the statutory basis for enforcing collectively-bargained contracts and dispute-resolution procedures:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.[109]

Section 301(a) is not merely a jurisdictional or procedural statute; the Court has interpreted Section 301(a) to authorize the federal courts to fashion a substantive body of federal law for the enforcement of collective bargaining agreements.[110] State courts are not prevented, however, from exercising their traditional

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Labor Management Relations (Taft-Hartley) Act of 1947, § 1, 29 U.S.C. § 141(b) (1976). *Cf.* Teamsters v. Oliver, 358 U.S. 283, 294 (1959) (collective bargaining agreements are "charters" for ordering of industrial relations). Section 7 of the NLRA, as amended by Taft-Hartley, also guaranteed to employees the right to refrain from collective activity. *See* note 9 *supra*.

[106] Labor Management Relations (Taft-Hartley) Act of 1947, § 203(a), 29 U.S.C. § 173(a) (1976).

[107] Labor Management Relations (Taft-Hartley) Act of 1947, § 201(a), 29 U.S.C. § 171(a) (1976). *See generally* 29 U.S.C. §§ 171(b)(c), 173(b)(c) (1976).

[108] Labor Management Relations (Taft-Hartley) Act of 1947, § 203(d), 29 U.S.C. § 173(d) (1976).

[109] 29 U.S.C. § 185(a) (1976).

[110] *See* Textile Workers v. Lincoln Mills, 353 U.S. 448, 455-57 (1957).

jurisdiction to enforce labor contracts. Employers, employees, and unions may bring section 301(a) suits to enforce collective bargaining agreements in either state or federal court.[111] Uniformity is maintained because state courts are obligated to apply both the federal rules of contract construction and federal substantive labor law.[112]

Applying section 301(a)'s implicit command to fashion a body of federal common law for labor relations, the Supreme Court has held that a no-strike obligation should be implied into labor agreements containing arbitration clauses.[113] This implicit no-strike obligation prohibits any strike over a dispute that is also covered by the contractual grievance procedure. Section 301(a) provides the mechanism for enforcing this obligation by allowing courts to grant injunctive relief against strikes over arbitrable issues, *i.e.*, strikes that breach the obligation to proceed under the grievance-arbitration clause.[114] In the famous *Steelworkers Trilogy*,[115] the Court held that collectively bargained grievance resolution procedures must receive the broadest possible interpretation. Although a party is not required to submit to arbitration disputes that he has not agreed to arbitrate, "[d]oubts should be resolved in favor of coverage."[116] Absent an express provision excluding a particular grievance from arbitration, "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."[117] Courts deciding arbitrability questions cannot weigh the merits of a particular grievance.[118] Courts can give "full play" to the policy set forth in section 203(d) only by submitting all claims to arbitration.[119]

Although individual employees are also permitted to enforce collective bargaining agreements by a section 301(a) suit,[120] the

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[111] Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

[112] Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 103-04 (1962); Smith v. Evening News Ass'n, 371 U.S. 195, 200-01 (1962).

[113] Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 382 (1974).

[114] *Id.* at 381; Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970). *See also* Drake Bakeries v. Local 50, Bakery Workers, 370 U.S. 254, 264 (1962).

[115] United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[116] United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 (1960).

[117] *Id.* at 585.

[118] United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960).

[119] *Id.* at 566. The arbitrator's award is enforceable unless it "manifests an infidelity to the collective bargaining agreement." United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597, 599 (1960).

[120] Smith v. Evening News Ass'n, 371 U.S. 195, 199-200 (1962).

exclusivity, exhaustion, and finality principles circumscribe their latitude to sue.[121] These principles are designed to allow the union and the employer to utilize fully their collectively bargained grievance resolution procedures without judicial interference.[122] Employees have no absolute right to force the employer and union to arbitrate a grievance.[123] Moreover, once a grievance has been processed through the final step of the grievance procedure, employees normally are barred by the arbitral finality rule from litigating this grievance in court.[124] The exclusivity, exhaustion, and finality rules do not apply, however, when the union breaches its duty of fair representation by either refusing to process a grievance for arbitrary, bad faith, or discriminatory reasons, or undermining the functioning of grievance procedures on grievances it has processed.[125] In such cases, the employee may sue

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[121] *See* notes 15-19 and accompanying text *supra*.

[122] In Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965), the Court held: "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress." *Id.* at 652 (emphasis in original).

The exclusivity principle allows the union to exercise considerable freedom when representing employees during contract negotiations. This freedom is circumscribed only by the obligation to act in good faith required by the duty of fair representation. *See* notes 125-27 and accompanying text *infra*. The exhaustion principle requires the employee to seek relief through the contractual grievance procedure before filing suit in court. Doubts are resolved in favor of requiring resort to the grievance procedure. Failure to exhaust contract remedies before suing in court generally requires dismissal of the claim. *Republic Steel*, 379 U.S. at 657-59.

[123] Vaca v. Sipes, 386 U.S. 171, 191 (1967).

[124] Hines v. Anchor Motor Freight Inc., 424 U.S. 554, 571 (1976).

[125] Id. at 567-69: Vaca v. Sipes, 386 U.S. 171, 186 (1967). The Supreme Court first articulated the union's duty of fair representation in Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944), a case decided under the Railway Labor Act. This duty was specifically extended to unions under the National Labor Relations Act in Wallace Corp. v. NLRB, 323 U.S. 248, 254-55 (1944). The duty is based upon the union's status as the exclusive bargaining agent for all unit employees in labor relations matters involving the employer. *See* 29 U.S.C. § 159(a) (1976). On the duty of fair representation generally, see Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEXAS L. REV. 1119 (1973); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); Cox, *Rights Under A Labor Agreement*, 69 HARV. L. REV. 601, 632-34 (1956); Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973); Lewis, *Fair Representation in Grievance Administration:* Vaca v. Sipes, 1967 SUP. CT. REV. 81; Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362 (1962); Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251, 257 (1977).

Legal scholars have argued, and the cases appear to recognize, that there is a legitimate distinction between fair representation in the contract negotiation context and in the contract administration, *i.e.*, grievance processing, context. The courts have applied a sub-

directly in court even if he has failed to exhaust the grievance procedure [126] or if an arbitrator has rendered an unfavorable ruling.[127]

Section 301(a)'s pivotal role in the negotiation and administration of collective bargaining agreements cannot be ignored when formulating the proper approach to the FLSA/collective bargaining relation. Where a union-employer relation exists, terms of employment affecting wages and hours are normally embodied in a collectively-bargained labor agreement. Congress has determined that disputes involving these agreements, which

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jective standard, focusing on the union's good faith and honesty of purpose in the collective bargaining context, when measuring conduct against the duty. *See* Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953). These concepts must be interpreted to prohibit decisions made on proscribed grounds, such as race; thus, a sincere belief that racial discrimination is permissible would still violate the duty of fair representation. The Supreme Court has further required the union to make a reasoned judgment on the merits of each particular claim when processing employee grievances. Vaca v. Sipes, 386 U.S. 171, 193-95 (1967). One commentator justified this dual approach as follows:

> First, the aggrieved employee has an arguably vested interest in the specific terms of a contract when grievance processing is involved. Second, the disposition of a grievance, especially one involving discipline or seniority, is of primary importance only to the affected employee. Third, because grievance disposition is of primary importance to the individual, the group interest is less important in contract administration than in collective bargaining where the union requires flexibility in order to adjust the competing interests of various subgroups. Finally, the proviso in section 9(a) [which allows individual employees to approach management with grievances] indicates a greater congressional concern for the individual in grievance processing than in contract negotiations.

Leffler, *Piercing The Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling*, 1979 ILL. L.F. 35, 44. *See also* T. BOYCE, FAIR REPRESENTATION, THE NLRB, AND THE COURTS 15-21, 29 (1978). These different approaches to the duty of fair representation do not reflect a judgment regarding the relative importance of contract negotiation vis a vis grievance handling. In contract negotiation, it is not meaningful to apply an arbitrariness standard when the union pursues one political objective or concern at the expense of others. It is likewise unmeaningful to consider a demand by one of the union's various sub-groups as "arbitrary" or "unreasonable." Positions held by sub-groups are simply political facts that the union must recognize and accommodate. *See* Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183, 197, 206-10 (1980). Moreover, unreasonable or arbitrary conduct is more easily identified in grievance handling because there are preexisting standards—contract terms—against which conduct may be measured.

[126] Vaca v. Sipes, 386 U.S. 171, 182-88 (1967). There is some dispute in the courts whether the jurisdictional basis of fair representation suits is § 301(a) or § 9(a) of the NLRA, 29 U.S.C. § 159(a) (1976) combined with 28 U.S.C. § 1337 (1976).

Although most fair representation suits are brought under § 301(a), those courts preferring § 9(a) and § 1337 as a jurisdictional basis point out that actions brought against the union alone under § 301(a) are improper because the union has not executed a collective bargaining agreement with its members. For an excellent discussion of this issue, see T. BOYCE, *supra* note 125, at 79-83.

[127] Hines v. Anchor Motor Freight Inc., 424 U.S. 554, 571-72 (1976).

often contain internal dispute resolution procedures,[128] should be settled by the parties pursuant to the policies and law developed under section 301(a). Congress did not intend the FLSA, on the other hand, to interfere with collective bargaining. Thus, wage and hour issues arising under collective agreements should be resolved under section 301(a) through contract negotiation and grievance procedures. Two Supreme Court decisions that indirectly affect this approach are discussed in the following subsection.

C. U.S. Bulk Carriers, Inc. v. Arguelles *and* Iowa Beef Packers, Inc. v. Thompson

The Supreme Court examined the relation between the national policy favoring resort to contractual grievance procedures and statutes granting independent rights in *U.S. Bulk Carriers, Inc. v. Arguelles*.[129] In that case, a divided Court held that section 301(a) did not abrogate the right of a seaman to sue for unpaid wages in federal court under a seaman's statute enacted in 1790.[130] The Court interpreted section 301(a) as merely providing an optional remedy supplementing the ancient seaman's statute and thus did not require exhaustion of the contractual grievance procedure. Justice Douglas, writing for the majority, characterized the Court's holding as "interstitial" legislation.[131]

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[128] *See* note 42 *supra*.

[129] 400 U.S. 351 (1971). The *U.S. Bulk Carriers* case is discussed in Drieson, *Arbitration and Seaman's Rights Under Collective Bargaining Agreements in the Wake of Arguelles*, 3 J. MAR. L. 429 (1972); Note, 59 B.U.L. REV. 157 (1971). *See also* Note, 18 WAYNE L. REV. 1465 (1972).

[130] 400 U.S. at 357. The seaman's statute, Act of July 20, 1790, § 6, 1 Stat. 133 (codified at 46 U.S.C. § 596 (1976) provides:

> The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court. . . .

46 U.S.C. § 596 (1976).

[131] 400 U.S. at 354-58 (footnote omitted).

He believed that section 301(a)'s silence on its relation to other remedies did not demonstrate that Congress intended to abrogate the seaman's ancient statutory remedy.[132]

In a separate concurring opinion, Justice Harlan disagreed with the Court's characterization of contractual grievance-arbitration procedures enforceable under section 301(a) as merely an alternative avenue for enforcing the wage payment rights established by the seaman's statute. He explicitly recognized the high priority of grievance-arbitration procedures in our national labor policy[133]—a preference also emphasized by the dissenting Justices.[134] Justice Harlan joined the Court's opinion, however, because the respondent seaman's claim to prompt payment of wages rested not " 'simply on the contract' " but on the statutory right created by the 1790 act.[135] Thus, the grievance-arbitration exhaustion requirement established under section 301(a) was inapplicable. Nevertheless, Justice Harlan urged the Court in future cases to "fashion the relationships among forums according to an analysis of the policies underpinning both [section] 301 and the federal statute the employee invokes" before determining whether the employee must exhaust the contractual grievance procedures as a prerequisite to suit under another statute.[136] Failure to make this analysis, he warned, would undercut the national policy favoring arbitration: "[I]t may well be that certain types of federal statutory benefits will lend themselves to arbitration or splitting without an unacceptable sacrifice in competing policy interests."[137]

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[132] *Id.* at 355-58. *But cf.* Sussa v. American Export Lines, Inc., 507 F.2d 1343 (2d Cir. 1974) (arbitration of wage claim bars subsequent action under seaman's statute).

[133] *Id.* at 359.

[134] Justices Brennan, Marshall and Stewart joined Justice White's dissenting opinion. The dissenters emphasized that the labor agreement demonstrated the parties' intention to resolve *all* disputes through the contractual grievance procedure. *Id.* at 373. The Court's decision in Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965), required employees to exhaust the contractual grievance procedure before suing the employer. 400 U.S. at 372-74. *Republic Steel's* exhaustion requirement recognized both the employer's interest in limiting the modes of redress and the union's interest in affording comprehensive protection to employees and the arbitration process. *Id.* at 376-77. The dissenters specifically approved several lower court decisions holding that employee claims for FLSA liquidated damages should be deferred to contractual grievance procedures before the court exercises its jurisdiction. *Id.* at 375 (citing Beckley v. Teyssier, 332 F.2d 495 (9th Cir. 1964); Evans v. Hudson Coal Co., 165 F.2d 970 (3d Cir. 1948); Donahue v. Susquehanna Collieries Co., 138 F.2d 3 (3d Cir. 1943)). The dissent did not refer, however, to *Jewell Ridge Coal* or *Bay Ridge* and their subsequent congressional repudiation.

[135] 400 U.S. at 362.

[136] *Id.* at 363.

[137] *Id.* at 366.

The Court addressed a similar issue involving an FLSA claim in *Iowa Beef Packers, Inc. v. Thompson*.[138] Several maintenance employees brought an action in the Iowa state courts without first attempting to exhaust contractual grievance procedures, claiming overtime compensation for time they allegedly spent on call during their lunch periods. Affirming the trial court's judgment for the employees, the Iowa Supreme Court held, in purported reliance on *U.S. Bulk Carriers*, that the FLSA's broad policy objectives allowed the workers to obtain compliance with the FLSA in court without first exhausting the contract grievance procedure, even though the dispute was "undoubtedly arbitrable."[139] In the Iowa court's view, the employees could elect to pursue either remedy; the general congressional policy favoring arbitration codified by the Taft-Hartley amendments must defer to antecedent FLSA provisions giving employees "strong and detailed rights in court."[140]

The Supreme Court granted certiorari to consider whether employees may sue to recover overtime withheld in violation of the FLSA even if the alleged statutory violation is also arbitrable under a collectively bargained grievance-arbitration procedure.[141] The Court later dismissed the writ of certiorari as improvidently granted, however, because the scope of the contractual grievance procedure was limited to violations of the agreement and thus did not cover the alleged statutory violation.[142] The Court specifi-

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[138] 405 U.S. 228 (1972). A student author has concluded that FLSA rights are entirely independent of the requirements of the Labor Management Relations Act. See Note, 18 WAYNE ST. L. REV. 1465, at 1476-78 (1972).

[139] 185 N.W.2d 738, 741-42 (Iowa 1971). The Iowa Supreme Court relied on the *U.S. Bulk Carriers* decision, reasoning that the FLSA's "elaborate" provisions, including the liquidated damages provision and the section authorizing the Secretary to supervise the payment of unpaid overtime, demonstrated Congress's intent to preserve for employees an independent right to bring FLSA court suits. *Id.*

[140] *Id.* Two justices dissented in *Iowa Beef*. Relying on the national policy favoring arbitration, exclusivity of grievance procedures, decisions by federal courts requiring stays of FLSA suits pending arbitration (*see* notes 80-86 and accompanying text *infra*), and the concurring opinion of Justice Harlan in *U.S. Bulk Carriers*, they limited *U.S. Bulk Carriers* to its peculiar facts and concluded that federal labor policy was best served by requiring exhaustion of contractual grievance procedures before hearing an FLSA action. *Id.* at 742-46.

[141] *See* 405 U.S. at 229.

[142] The Court's interpretation of the grievance procedure was too restrictive. Because "[t]he grievance thus pertained not to an alleged violation of the agreement but to an alleged violation of the [FLSA]," the grievance procedure was held inapplicable. *Id.* In the same paragraph, however, the Court noted that the employees "did not choose, as perhaps under the contract was open to them, to make the [issue] the basis of a grievance." *Id.* The Court subsequently declined to rule on that question. *See* text accompanying note 143 *infra*.

cally declined to decide whether "pursuit of the statutory remedy is . . . barred because [the employees] might have made the requirement to be on call the basis of a grievance for alleged violations of the lunch period or overtime provision of the collective-bargaining agreement."[143] The Court misperceived the issue. If the claim could have been the "basis of a grievance," then the Court erred by dismissing the writ without addressing this question because existing Court decisions absolutely require the arbitration of grievances before suing in court.[144] Similarly, the per curiam opinion neither attempted to reconcile its position with the rule that doubts about the scope of grievance-arbitration procedures should be "resolved in favor of coverage,"[145] nor referred to the *Jewell Ridge Coal* or *Bay Ridge* cases. The Court's narrow holding, based upon the language of the contractual grievance procedure, may improperly imply that exhaustion of contract procedures is required only if the agreement specifically requires processing FLSA disputes through the grievance procedure.

Except for the discredited *Jewell Ridge Coal* and *Bay Ridge* decisions, the Supreme Court has not squarely addressed either the permissibility of negotiating labor agreements that vary from the literal mandates of the FLSA or the prerequisites for establishing that a collective labor agreement violates the FLSA. Although the Court addressed an analogous issue in *U.S. Bulk Carriers,* it also has not decided the issue left unresolved by *Iowa Beef Packers*—whether exhaustion of contractual grievance procedures not explicitly applicable to FLSA disputes is a prerequisite to an FLSA court suit. Failure to require exhaustion where labor agreements contain more traditional grievance-arbitration procedures that do not explicitly cover FLSA disputes would be anomalous in light of

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The contract's arbitration clause covered a grievance " 'pertaining to a violation of the Agreement.' " *Id.* at 230 (Douglas, J., dissenting). Certainly the claim that the employer unilaterally eliminated coffee breaks and thus forced the employees to work more time without increasing their compensation states a "violation" of the labor agreement.

[143] 405 U.S. at 230-31. In his dissent, Justice Douglas, author of the majority opinion in *U.S. Bulk Carriers*, argued that the Court should have considered whether the national policy favoring arbitration must yield to accommodate independent actions for overtime violations of the FLSA. In his view, *U.S. Bulk Carriers* controlled the issue and required affirmance of the Iowa Supreme Court's decision. 405 U.S. at 231-32.

[144] *See* notes 120-27 and accompanying text *supra.*

[145] United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 (1960).

the federal labor policy developed by the Supreme Court under section 301(a).[146] Unfortunately, the lower courts have also failed to adequately address these issues.

IV

RECENT LOWER COURT DECISIONS: OPENING THE COURTROOM DOOR IN NEEDLESS DEROGATION OF COLLECTIVE BARGAINING

Although litigation involving FLSA/collective bargaining issues has steadily expanded, not a single lower court has issued a comprehensive opinion acknowledging the purposes of the FLSA and reconciling these purposes with the requirements of collective bargaining. Their analyses have been piecemeal in nature, resulting in divergent rules of decision divorced from the fundamental principles underlying the FLSA/NLRA relation. These cases encourage litigation, destabilize industrial relations, and hinder free collective bargaining. This section analyzes the recent lower court decisions, explaining their inconsistencies and concomitant adverse effects on collective bargaining.

A. *Background of Current FLSA/NLRA Disputes*

The FLSA/collective bargaining conflict usually involves a dispute over overtime pay and, occasionally, time worked; the disputes almost never involve sub-minimum wages. Some disputes arise where the collective bargaining agreement does not contain a contractual grievance procedure. When this occurs, courts must directly decide whether the policies of the FLSA or the NLRA should prevail. More commonly, however, the agreement contains a grievance procedure that may or may not apply to FLSA issues, making the issue more complicated.

Where the employee has initially sued in court, most courts have held that the employee has a right of action independent of the grievance-arbitration procedures.[147] The dicta in these cases suggest that this right exists even if the dispute had been previously processed through a grievance procedure. However, in every case to date, if the employee actually submitted his claim to

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[146] *Id.* Justice Douglas, however, stated in his *Iowa Beef Packers'* dissent that the usual requirement of resort to contractual grievance procedures would not apply to FLSA suits. 405 U.S. at 232.

[147] *See* notes 150-79 and accompanying text *infra.*

arbitration, the courts have held that this submission foreclosed a subsequent suit based on the FLSA.[148] Indeed, these cases suggest that the FLSA claim must be submitted under the grievance procedure. If the Secretary of Labor, rather than the employee, has filed the FLSA court suit, the only court that has considered this issue held that the Secretary's suit was not foreclosed by a prior unfavorable arbitration decision.[149] Thus, the reasoning of these cases, if not the results, is irreconcilable. A review of selected recent decisions—especially those that have carved out independent FLSA rights of action—reveals that the results are not guided by sound labor law considerations. They rely instead on such improper assumptions as the presumed restrictiveness of contractual grievance procedures, the alleged unwaivability and independence of FLSA rights, and the assumed applicability of cases decided under civil rights statutes.

B. *Absent or Inapplicable Contractual Grievance Procedures*

If the collective bargaining agreement contains no grievance procedure, courts usually hold that employees retain an independent right under the FLSA to recover statutorily required wage payments even though such payments either are not required by the labor agreement or have been exchanged for other concessions during contract negotiations. For example, in *Lerwill v. Inflight Motion Pictures, Inc.*,[150] the employer and union entered into a labor agreement containing an overtime pay provision. The union subsequently agreed to waive enforcement of the overtime provisions in return for a larger salary through an extended workweek. Two employees brought a class action suit under section 301(a) to recover overtime pay as provided in the labor agreement and allegedly required under the FLSA.[151]

The employer argued that the employees' potential cause of action under the FLSA barred their suit under section 301(a). The Ninth Circuit rejected this view[152] and held that the

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[148] *See* notes 192-224 and accompanying text *infra*.

[149] *See* notes 225-236 and accompanying text *infra*.

[150] 582 F.2d 507 (9th Cir. 1978).

[151] *Id.* at 510-11.

[152] The court disposed of the employer's first contention that the employees were not entitled to prosecute a section 301(a) action as individual union members by holding that employees may enforce their personal rights directly in court under section 301. *Id.* at 511. In addition, the court held that the employees were not required to exhaust grievance procedures because the labor agreement did not contain specific grievance procedures. *Id.*

employees could maintain their suit under either section 301(a) or the FLSA.[153] The court also rejected the employer's defense that the union had waived the contract's overtime provisions. Relying on the discredited *Tennessee Coal* decision, the court held that a union could not negotiate a labor agreement that violates the public policy set forth in the FLSA by waiving the overtime provisions in exchange for a larger salary.[154] Because of the alleged policy requirements of the FLSA, employees were therefore allowed to challenge the union's bargaining conduct through a section 301(a) suit and to improve, at their option, the benefits achieved through collective bargaining by suing under the FLSA.[155]

Although the labor agreement in *Lerwill* did not contain a grievance-arbitration procedure, other courts have held that such procedures either are inapplicable to FLSA disputes or do not foreclose an employee's right to bring an FLSA action. An example of this judicial misconstruction is the recent Ninth Circuit decision in *Leyva v. Certified Grocers of California, Ltd.*[156] Plaintiff employees filed suit against their employer, alleging violations of the collective bargaining agreement and FLSA overtime pay viola-

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[153] *Id.* at 513 (citing Leone v. Mobile Oil Corp., 523 F.2d 1153, 1157 (D.C. Cir. 1975), and U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 357-58 (1971)).

[154] *Id.* at 513-14. To buttress its conclusion, the court cited United States v. Barnette, 546 F.2d 187 (5th Cir.), *cert. denied*, 434 U.S. 822 (1977), and Robertson v. Alaska Juneau Gold Mining Co., 157 F.2d 876 (9th Cir. 1946), *cert. denied*, 331 U.S. 823, *vacated and remanded*, 331 U.S. 793 (1947). Neither case supports the court's result. *Barnette* involved an individual employment contract and *Alaska Juneau* was decided prior to the 1949 amendments overturning the *Bay Ridge* decision.

[155] This holding creates a disincentive for unions and employers to agree to wage or hour provisions desired by a majority of unit employees whenever the agreement may also violate an FLSA technical requirement. It is difficult to understand how this holding promotes national labor policy. *See also* Sturdivant v. Salt River Valley Water Users Ass'n, 249 F.2d 944 (9th Cir. 1957) (despite representation by strong union, time-worked formula in collective bargaining agreement must follow FLSA scheme); Landaas v. Canister Co., 188 F.2d 768 (3d Cir. 1951) (impermissible to eliminate attendance bonus from overtime pay calculation despite agreement by union and company and no evidence of company overreaching); Robertson v. Alaska Juneau Gold Mining Co., 157 F.2d 876 (9th Cir. 1946) (FLSA's public policy requires employers to pay liquidated damages even though employees, through union, forced unwilling employer to adopt illegal plan); Ciba-Geigy Corp. v. Textile Workers Local 2548, 391 F. Supp. 287 (D.R.I. 1975) (dicta) (union cannot agree to less than minimum wage); Merrill v. Exxon Corp., 387 F. Supp. 458 (S.D. Tex. 1974) (employer required to prove FLSA exemptions apply despite collective bargaining agreement regulating compensation of employee-trainees); Castro v. Central Aguirre Sugar Co., 208 F. Supp. 703 (D.P.R. 1962) (overtime and minimum wage action lies despite collective bargaining agreement regulating wage payments). *But see* Jackson v. Air Reduction Co., 402 F.2d 521 (6th Cir. 1968) (inequitable for employees and union to compel change in work schedule and then force company to pay FLSA penalty).

[156] 593 F.2d 857 (9th Cir.), *cert. denied*, 444 U.S. 827 (1979).

tions, and against their union, alleging breach of the duty of fair representation.[157] The Ninth Circuit held that the trial court properly stayed the contract claim pending arbitration,[158] but that the FLSA claim could not be stayed pending arbitration because the subject of this claim was not explicitly arbitrable under the collective bargaining agreement.

Although the court was "cognizant of the strong [federal] policy favoring arbitration of labor disputes,"[159] it emphasized the alleged "substantial differences" between the FLSA's substantive and procedural mechanisms and those mechanisms provided in the contract.[160] According to the *Leyva* court, these "substantial differences" demonstrated that the parties did not intend to substitute contractual arbitration procedures for judicial enforcement of statutory rights when the claims involved subjects covered by the FLSA.[161] The court reasoned that because the grievance-arbitration procedures in the labor agreement were not identical to the substantive and procedural provisions of FLSA, the employer had no right to stay FLSA claims pending arbitration of essentially the same issues under a labor agreement.[162]

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[157] *Id.* at 859. Plaintiffs sought unpaid overtime wages from their employer for a three year period prior to filing of the suit, an equal amount of liquidated damages, and attorneys' fees under the FLSA. The district court granted the employer's motion to stay both the FLSA and the contract claims until arbitration was completed pursuant to section 3 of the United States Arbitration Act, 9 U.S.C. § 3 (1976). *Id.* at 859-60.

[158] The employer argued that an addendum known as the Long Haul Agreement modified its labor agreement. Employees contended that the Long Haul Agreement was not a proper modification of the labor agreement because they had not ratified it. Further, they argued that the limited nature of the labor agreement's relief provisions permitted them to sue directly in court without going to arbitration. The court held that the district court properly stayed the contract action pending arbitration. Relying on United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960), the court reasoned that the employees were challenging only the validity of certain provisions of the contract, and not the validity of the arbitration clause itself. 593 F.2d at 859-61.

[159] *Id.* at 861.

[160] *Id.* at 862. The labor agreement limited compensation awards to a maximum of six months. In contrast, the FLSA permits employees to recover wages and damages for a two year period. The FLSA also provides for liquidated damages, costs, and attorneys' fees, "protections not expressly provided by the collective bargaining agreement." *Id.*

[161] *Id.* The court recognized that its interpretation of the arbitration provisions of the contract conflicted with its interpretation of similar language in Beckley v. Teyssier, 332 F.2d 495 (9th Cir. 1964). Because of alleged differences between the scope of the grievance procedures in *Certified Grocers* and *Beckley*, the court found it unnecessary to address the substantive holding of *Beckley* that required a stay of judicial enforcement pending the resolution of an arbitrable FLSA claim. 593 F.2d at 863. The *Beckley* case is discussed at notes 181-86 and accompanying text *infra*.

[162] The court also found support for its holding in *Iowa Beef Packers, U.S. Bulk Carriers* and Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). These decisions, the court claimed, also emphasized the difference between statutory and contractual rights. *But see*

C. *The Significance of Unutilized Grievance-Arbitration Provisions That Apply to FLSA Disputes*

The courts have followed three different approaches where contractual grievance procedures are available but not utilized to resolve FLSA disputes. Several courts have held that the FLSA claims may be brought directly in court without prior processing under the grievance procedure. Other courts have stayed FLSA claims pending arbitration under contractual grievance procedures. Finally, at least one court has held that prior resort to the grievance procedure is mandatory.

1. *Prior Resort To Grievance-Arbitration Procedures Not Required*

Leone v. Mobil Oil Corp.[163] exemplifies cases holding that FLSA suits are maintainable in court despite available contract grievance procedures. The employees in *Leone* brought suit claiming that their employer violated the FLSA by failing to compensate them for time they spent accompanying OSHA inspectors on a plant walkaround inspection.[164] The employer argued that "the suit [was] improper because the employees failed to exhaust the grievance procedure specified in the collective bargaining agree-

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notes 129-46 and accompanying text *supra*; notes 196-205 and accompanying text *infra*. The court noted the conflict in the federal appellate courts regarding the relationship between contractual grievance procedures and statutory actions brought under the FLSA. 593 F.2d at 863. *Compare* Evans v. Hudson Coal Co., 165 F.2d 970 (3d Cir. 1948) *and* Watkins v. Hudson Coal Co., 151 F.2d 311 (3d Cir. 1945), *cert. denied*, 327 U.S. 777 (1946) *and* Donahue v. Susquehanna Collieries Co., 138 F.2d 3 (3d Cir. 1943) (stay granted pending arbitration of FLSA claims) *with* Leone v. Mobil Oil Corp., 523 F.2d 1153 (D.C. Cir. 1975) (stay of FLSA claims pending arbitration refused). *See also* Bailey v. Karolyna Co., 50 F. Supp. 142, 144 (S.D.N.Y. 1943) (arbitration clause under collective bargaining agreement not related to plaintiff's claim under FLSA); City Bank Farmers Trust Co. v. O'Donnell, 179 Misc. 770, 771, 39 N.Y.S.2d 842, 843 (Sup. Ct. 1943) (not within scope of arbitration agreement); Garrity v. Bagold Corp., 180 Misc. 120, 121, 42 N.Y.S.2d 257, 258-59 (Sup. Ct. 1943) (dispute not within scope of arbitration clause); City Service Cleaning Contractors, Inc. v. Vanzo, 179 Misc. 368, 368, 39 N.Y.S.2d 24, 24 (Sup. Ct. 1942) (arbitration rights are remedial whereas FLSA rights are substantive). Even though it held that the employer was not entitled to a stay under the Arbitration Act, the court held that a trial court may properly stay an action to control its own docket. Therefore, the court remanded the case for consideration of whether the need for prompt payment of wages outweighed the benefit of staying the proceedings pending arbitration of the wage claim. 593 F.2d at 863-64.

[163] 523 F.2d 1153 (D.C. Cir. 1975). For a very perceptive critique of *Leone*, see Note, 10 GA. L. REV. 843 (1976). The student author argues that FLSA disputes should be subject to the exhaustion of contractual grievance procedures.

[164] Under the Occupational Safety and Health Act of 1970, employees or their authorized representatives are permitted to accompany an OSHA inspector during a walkaround inspection of a workplace. 29 U.S.C. § 657(e) (1976).

ment" before suing in court for compensable work time under the FLSA.[165] The D.C. Circuit held that prior submission of the employee's claim under the contractual grievance procedure was not a mandatory prerequisite to a court suit based on the FLSA claim.[166] The court grounded its holding in part on the Iowa Supreme Court's reasoning in *Iowa Beef Packers* that the FLSA preserves for employees an optional remedy distinct from the contract grievance procedure.[167] The *Leone* court also relied on *Alexander v. Gardner-Denver Co.*[168] In *Gardner-Denver*, an employee brought a court suit under Title VII of the Civil Rights Act of 1964, alleging that his employer had discriminatorily discharged him. Although this claim had been previously processed through the contractual grievance procedure and rejected by an impartial arbitrator, the Supreme Court held that the "distinctly separate nature" of contractual rights and rights under Title VII precluded waiver of Title VII rights through prior submission of a discrimination claim to arbitration.[169] The *Leone* court reasoned that "just as the right to be free from discrimination cannot be waived by collective bargaining . . . the principles of FLSA apply despite contrary custom or agreement."[170] Finally, the court decried what it termed the " 'heads-I-win, tails-you-lose' "[171] implications of Mobil's argument: employees would be required to exhaust contractual grievance procedures, but the union was not required to process all grievances filed by employees, foreclosing the employee from any relief.[172] Thus, the court held that individual employees retain the option to select judicial determination of wage claims under the FLSA.[173]

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[165] 523 F.2d at 1155.

[166] *Id.* at 1155-58.

[167] *Id.* at 1157.

[168] 415 U.S. 36 (1974).

[169] *Id.* at 50.

[170] 523 F.2d at 1158. The court also argued that requiring the exhaustion of grievance procedures would waste judicial time and prejudice the employee's statutory rights because arbitrators may disagree on whether they can enforce unlawful contract provisions. *Id.* The standards that arbitrators should utilize when statutory provisions overlap the contract are discussed at note 251 *infra*.

[171] 523 F.2d at 1159.

[172] 523 F.2d at 1159. It is difficult to understand why the court found this surprising. It is settled law that employees are required to exhaust contract grievance procedures even though unions are not required to process all grievances filed by employees. *See* Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965); notes 120-27 and accompanying text *supra*.

[173] The court ruled, however, that neither the FLSA nor the Occupational Safety and Health Act (OSHA) required compensation for employees who participate in an OSHA

Iowa Beef Packers and *Leone* were also relied on by the Michigan Court of Appeals in *Abbott v. Beatty Lumber Co.*[174] Plaintiff brought suit in state court alleging that his employer violated the FLSA by failing to pay overtime compensation. Although the contract contained an overtime clause embodying the FLSA standard and a grievance procedure, plaintiff did not submit his grievance under the collective bargaining agreement.[175] Noting with apparent approval the "judicial exception" terminating the right of employees to sue for overtime compensation where a prior submission to arbitration has been made,[176] the court nevertheless concluded that statutory entitlement to unpaid overtime compensation was unwaivable[177] and "wholly independent" of the provisions of any collective bargaining agreement.[178] Thus, the court held that plaintiffs were not required to exhaust contractual grievance procedures before bringing an FLSA action.[179]

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walkaround inspection. Moreover, this time was not "hours worked" under FLSA because the employees voluntarily participated in the inspection. *Id.* at 1159-64.

[174] 90 Mich. App. 500, 282 N.W.2d 369 (1979).

[175] *Id.* at 502-03, 282 N.W.2d at 370-71.

[176] *Id.* at 506, 282 N.W.2d at 372. The court did not attempt to reconcile its apparent approval of this "judicial exception" with the remaining portions of its opinion holding that FLSA rights were unwaivable.

[177] *Id.* at 507, 282 N.W.2d at 373. The court argued that the statute set out the exclusive circumstances when FLSA rights could be waived or terminated. *Id.* at 504, 282 N.W.2d at 371. The FLSA's enforcement provisions are discussed at notes 31-37 and accompanying text *supra*. Because no statutorily recognized waiver was made by either the employee or the Secretary of Labor, the employees were not required to exhaust contractual grievance procedures prior to instituting the court suit.

[178] *Id.* at 504, 282 N.W.2d at 371. To support its holding that FLSA guarantees are not superseded by collective bargaining agreements, the court mistakenly relied on *Brooklyn Savings Bank* and two lower court decisions involving individual employee waiver questions. The *Brooklyn Savings Bank* opinion expressly applies only to individual employment contracts and *not* to collective bargaining agreements. Indeed, *Brooklyn Savings Bank* stands for the opposite proposition: that relative bargaining power is an appropriate consideration for resolving FLSA issues. *See* notes 51-57 and accompanying text *supra*. The two lower court decisions relied on in *Abbott*—Mumbowar v. Callicott, 526 F.2d 1183, 1188 (8th Cir. 1975), and Marshall v. R & M Erectors, Inc., 429 F. Supp. 771, 780 (D. Del. 1977)—both apparently involved individual employment contracts. The effect of a collective bargaining agreement is not discussed in either opinion.

[179] 90 Mich. App. at 510, 282 N.W.2d at 374. For decisions in accord with the result in *Leone* and *Abbott*, see Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972) (union agreement to waive overtime pay violates duty of fair representation; exhaustion doctrine suspended); Ballard v. Consolidated Steel Corp., 61 F. Supp. 996, 997-98 (S.D. Cal. 1945) (agreement to arbitrate not conforming to statutory rights under FLSA void). *But see* Papadopoulos v. Sheraton Park Hotel, 410 F. Supp. 217 (D.D.C. 1976) (action under District of Columbia wage statute not governed by *Leone* choice of forum rule).

2. *Staying FLSA Suits Pending Arbitration*

Although the employer did not ask for a stay of the judicial proceedings pending submission of the dispute under the contract grievance procedure, the *Abbott* Court noted that several courts have stayed judicial proceedings in FLSA cases under either the United States Arbitration Act or section 301(a).[180] The Ninth Circuit stayed FLSA judicial proceedings pending grievance arbitration in *Beckley v. Teyssier*.[181] The collective bargaining agreement in *Beckley* provided that the grievance procedure applied to "[a]ll grievances or disputes . . . arising out of the interpretation or application of any of the terms or conditions of this Agreement."[182] The *Beckley* court's interpretation of the scope of the grievance procedure differed from the interpretation by the court in *Leyva v. Certified Grocers of California, Ltd.*:[183] the grievance procedure's coverage of FLSA claims was assumed rather than denied by a fictitious assumption about the parties' intent to avoid coverage. Because the plaintiff employees' claims for overtime compensation under the FLSA grew "out of the relation of employer and employee and necessarily involve[d] the application and interpretation of the contract provisions," the *Beckley* court held that the judicial proceedings were properly stayed pending arbitration.[184]

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[180] *Id.* at 509-10, 282 N.W.2d at 373-74. The *Abbott* court, however, noted that a stay would not prevent an employee from filing an FLSA suit. *Id.*, 282 N.W.2d at 373-74.

The United States Arbitration Act enforces contractual arbitration provisions contained in "any . . . contract evidencing a transaction involving commerce." 9 U.S.C. § 2 (1976). The Act allows the federal courts to "stay the trial of [an] action until such arbitration has been had in accordance with the terms of the agreement." *Id.* at § 3. The availability of the Act in labor disputes has not been settled by the courts. *See* Note, *supra* note 138 at 1473-78. Section 1 of the Act specifically precludes application "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 29 U.S.C. § 1 (1976). The courts, however, have interpreted § 3 apart from § 1. *See, e.g.*, Watkins v. Hudson Coal Co., 151 F.2d 311 (3d Cir. 1945), *cert. denied*, 327 U.S. 777 (1946). Thus, when the claim before the court is based upon federal subject matter jurisdiction arising under a statute other than the Arbitration Act (*e.g.*, the FLSA), the court may grant a stay under § 3 even though the court could not exercise jurisdiction over the claim solely on the basis of the Arbitration Act. *See, e.g.*, Beckley v. Teyssier, 332 F.2d 495 (9th Cir. 1964). Section 3 injunctions have been obtained in FLSA disputes when an individual employment contract providing dispute arbitration was involved. Donahue v. Susquehanna Collieries Co., 160 F.2d 661 (3d Cir. 1947). Injunctive relief under § 3 has been denied, however, when the contract is a labor agreement covered by the NLRA. *See* Metal Polishers Local 90 v. Rubin, 85 F. Supp. 363, 365 (E.D. Pa. 1949).

[181] 332 F.2d 495 (9th Cir. 1964).

[182] *Id.* at 496.

[183] 593 F.2d 857 (9th Cir.), *cert. denied*, 444 U.S. 827 (1979).

[184] 332 F.2d at 497.

The court refused to emasculate the contractual arbitration provision and it required arbitration of the FLSA claim in the first instance.[185] The *Leyva* court, on the other hand, refused to uphold a stay of FLSA claims because its narrow and unrealistic interpretation of the grievance procedure excluded any potential statutory dispute unless the relief sought was identical to that provided by contract.[186]

3. *Prior Resort to Grievance Procedures a Mandatory Prerequisite for Judicial Action*

In *State ex rel Nilsen v. Berry*,[187] the Oregon Supreme Court reached a conclusion opposite that of the courts in *Iowa Beef Packers, Leone,* and *Abbott* on the significance of unutilized grievance procedures. The state filed suit on behalf of several employees to recover overtime pay allegedly due under Oregon's wage payment law.[188] The court accepted the employer's affirmative defense, holding that substantive federal labor policy, as developed under section 301(a), superseded state wage payment laws[189] and that

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[185] *Id.; accord,* Wren v. Sletten Constr. Co., 429 F. Supp. 982 (D. Mont. 1977). Other courts adopted this approach even before section 301 was enacted. *See, e.g.,* Evans v. Hudson Coal Co., 165 F.2d 970 (3d Cir. 1948) (stay required because issue was arbitrable; arbitrator's province to correct statutory defects); Watkins v. Hudson Coal Co., 151 F.2d 311 (3d Cir. 1945) (employer entitled to stay of FLSA action pending arbitration even though compensation arrangement facially unlawful); Donahue v. Susquehanna Collieries Co., 138 F.2d 3 (3d Cir. 1943) (claim for unpaid overtime stems from employment relation; statutory remedies provided by FLSA not intended to choke arbitration). These cases were cited with approval in Wilko v. Swan, 346 U.S. 427, 431-32 (1953), where the Supreme Court recognized that arbitration is a useful avenue for resolving controversies based on statutes. *But see* Voutrey v. General Baking Co., 39 F. Supp. 974 (E.D. Pa. 1941) (denying stay of FLSA action for overtime to permit arbitration under state statute). *See also* Note, *Fair Labor Standards Act—Arbitration of Employees' Suits,* 13 FORDHAM L. REV. 109 (1944).

An issue left unresolved by the *Beckley* decision is the effect of an arbitrator's award in subsequent FLSA court proceedings. *See Abbott,* 90 Mich. App. at 507-08, 282 N.W.2d at 372-73 (implying that arbitrator can only adjudicate contract and not statutory claim).

[186] 593 F.2d at 861-62. The contract provided:

> Should any controversy, dispute or disagreement arise during the period of this Agreement, out of the interpretation or application of the provisions of this Agreement there shall be no form of economic activity by either party against the other . . . but the differences shall be adjusted [through grievance and arbitration].

Id. at 861 n.5 (quoting Wholesale Delivery Drivers Agreement, art. XVII).

[187] 248 Or. 391, 434 P.2d 471 (1967).

[188] The employees' assignment of this claim to the state was authorized by OR. REV. STAT. § 652.330(2).

[189] 248 Or. at 397-98, 434 P.2d at 474. The court relied on the Supreme Court's decision in Textile Workers v. Lincoln Mills, 353 U.S. 448, 455 (1957), which emphasized the federal policy to enforce labor agreements.

the employees must seek relief through the grievance procedures provided in the collective bargaining agreement.[190] The court also rejected the state's contention that employees possess an independent right to sue in court under the FLSA. Federal labor policy required arbitration of the employees' FLSA claims, the court held, even if the arbitration agreement conflicted with the FLSA.[191]

D. *The Impact of Prior Resort to Grievance-Arbitration on FLSA Rights*

Beginning with the Tenth Circuit's important decision in *Satterwhite v. United Parcel Service, Inc.*,[192] a separate line of decisions has held that submission of a claim to arbitration under a collectively bargained grievance procedure forecloses the right of an employee to sue his employer under the FLSA. Although factually distinguishable from the *Iowa Beef Packers-Leone* line of cases, the underlying policy considerations affecting these decisions are substantially the same, and thus, the results are irreconcilable.

In *Satterwhite,* employees sued their employer under the FLSA to recover overtime pay attributable to the employer's unilateral elimination of two paid-time coffee breaks. Prior to the FLSA suit, the union representing these employees and the employer arbitrated the dispute under the labor agreement's grievance procedure. The arbitrator, determining the validity of the employer's conduct under the labor agreement, held that the employer could not unilaterally eliminate the paid coffee breaks and that the employees were entitled to thirty minutes pay at straight time rates for each day worked during the pertinent period.[193] The employees sued under the FLSA to recover overtime pay at time and one-half for the coffee break periods.[194] Thus, the issue before the *Satterwhite* court was whether an arbi-

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[190] 248 Or. at 396, 434 P.2d at 474.

[191] *Id.* at 398, 434 P.2d at 475. The court did not discuss whether, after submitting the claim to arbitration, the employees could challenge the arbitrator's decision on the ground that it violated the FLSA.

[192] 496 F.2d 448 (10th Cir.), *cert. denied*, 419 U.S. 1079 (1974).

[193] *Id.* at 449.

[194] The district court dismissed the employees' suit, relying on the Tenth Circuit's decision in Alexander v. Gardner-Denver Co., 466 F.2d 1209 (1972), *rev'd*, 415 U.S. 36 (1974). The Tenth Circuit had held that an employee's prior submission of a discrimination claim to arbitration barred a subsequent suit under Title VII of the Civil Rights Act of 1964. During the pendency of the employees' appeal in *Satterwhite*, the Supreme Court reversed the Tenth Circuit's decision in *Gardner-Denver*. *See* notes 196-98 and accompanying text *infra*.

trator's award precluded the employees' statutory claim under the FLSA. The court held that the employees were barred from relitigating their FLSA claims after they had been submitted by their union to arbitration.[195]

The court first distinguished the Supreme Court's holding in *Gardner-Denver* that an arbitrator's resolution of a contractual claim does not bar a statutory claim on the same facts under Title VII.[196] The *Gardner-Denver* decision held that Title VII supplemented existing procedures to combat employment discrimination. Title VII rights were unwaivable, however, because they formed no part of the bargaining process.[197] The Court refused to defer to the arbitrator's Title VII award because that would usurp the federal courts' ultimate responsibility for enforcing Title VII.[198]

The *Satterwhite* court argued that Title VII and the FLSA differed significantly.[199] The Tenth Circuit recognized that Congress directly addressed the relation between the Wage-Hour law and collective bargaining in the FLSA's legislative history. The Portal-to-Portal Act's preamble rejected judicial interpretations in derogation of collective bargaining and declared that the congressional policy was "to protect the right of collective bargaining and . . . to define and limit the jurisdiction of the courts."[200] In contrast, the Supreme Court stated in *Gardner-Denver* that "Title VII does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements."[201] The *Satterwhite* court also noted that

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[195] 496 F.2d at 452.

[196] 415 U.S. 36, 46 n.6 (1974).

[197] *Id.* at 47-49. The Court also rejected application of the doctrine of election of remedies because Title VII rights were distinctly separable from contract rights. *Id.* at 49-51.

[198] *Id.* at 45. *See also* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

[199] The court first noted that the Gardner-Denver decision referred to the significant role played by private individuals in enforcing Title VII rights. *See* 415 U.S. at 48. In contrast, the *Satterwhite* court believed that private enforcement of FLSA rights was not the paramount enforcement mechanism. 496 F.2d at 450; *see* Employees Etc. v. Department of Public Health and Welfare, 411 U.S. 279, 286 (1973). Independent remedies under Title VII demonstrated a congressional intent to provide an alternative avenue of relief to supplement labor agreements; however, the absence of such procedures under the FLSA "suggest[ed] a greater reliance on contract remedies and a lesser emphasis on individual enforcement." 496 F.2d at 450. The argument that the FLSA does not provide for individual enforcement is tenuous. The Tenth Circuit's other attempts, however, to distinguish Title VII and FLSA rights, and their relationship to collective bargaining, are unassailable.

[200] 496 F.2d at 451 (quoting 2 U.S.C. § 251(b) (1976)); *see* note 93 *supra*.

[201] 415 U.S. at 47.

in certain circumstances good faith was a defense to an FLSA action but not to a Title VII suit.[202] The court recognized the most significant difference between Title VII and the FLSA—Congress did not intend the same treatment for wage disputes and racial disputes:

> Wages and hours are at the heart of the collective bargaining process. They are more akin to collective rights than to individual rights, and are more suitable to the arbitral process than Title VII rights. . . . "The specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land . . . [J]udicial construction has proven especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts." We are concerned with rate of pay, an issue which does not require, or lend itself to, public law considerations. The added fear expressed in Gardner-Denver that harmony between a union and an individual cannot be presumed "where a claim of racial discrimination is made," . . . has no pertinence here. One of the highest objectives of any union is to get all the money possible for all of its members.[203]

Other considerations not specifically discussed in *Satterwhite*, but addressed by the Supreme Court in its *Gardner-Denver* decision, also demonstrate that collective wage issues under the FLSA are distinguishable from claims under the civil rights statutes. In *Gardner-Denver*, the Court noted that a "union may waive . . . statutory rights related to collective activity, such as the right to strike."[204] The union cannot, however, waive individual rights conferred by Congress prohibiting discrimination because such rights are not rooted in the collective bargaining process.[205] Furthermore, Title VII's legislative history—unlike the FLSA's—"manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and

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[202] 496 F.2d at 450-51. *Compare* 29 U.S.C. § 259(a) (good faith defense in FLSA suit) *with* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (good faith invalid defense in Title VII actions).

[203] 496 F.2d at 451. The court recognized that emphasizing collective bargaining and the enforcement of collectively bargained labor agreements promoted the national interest in preserving industrial peace. *Id.* Ironically, the court cited *Brooklyn Savings Bank*, 324 U.S. 697 (1945), for the proposition that FLSA rights could not be waived by agreement. 496 F.2d at 451. It did not, however, discuss the relative bargaining power distinction drawn by the Supreme Court in *Brooklyn Savings Bank*. *See* notes 51-57 and accompanying text *infra*.

[204] 415 U.S. at 51.

[205] *Id.*

other applicable state and federal statutes."[206] The Title VII/FLSA analysis is far more complex than simply noting that one

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[206] *Id.* at 48 (footnote omitted); *see* Oubichon v. North Am. Rockwell Corp., 482 F.2d 596, 573 (9th Cir. 1973) (Congress enacted Title VII in part because grievance-arbitration machinery proved inadequate to protect employees from racial discrimination); 110 CONG. REC. 7205, 13,650-51 (1964); H.R. REP. No. 9247, 92d Cong., 1st Sess. (1971); H.R. REP. No. 238, 92d Cong., 1st Sess. 3 (1971).

The relationship between collective bargaining and suits brought under other anti-discrimination statutes should be analyzed similarly to Title VII actions. *See, e.g.*, Corning Glass Works v. Brennan, 417 U.S. 188 (1974) (action brought under FLSA's equal pay provisions challenging collective bargaining agreement's outmoded assumption that males should be paid more than females for same work); EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977) (judicially decreed affirmative action plan may override collective bargaining agreement under Equal Pay Act and Title VII), *cert. denied*, 438 U.S. 915 (1978); Phillips v. Carborundum Co., 361 F. Supp. 1016 (W.D.N.Y. 1973) (exhaustion of grievance-arbitration procedures not required before prosecuting Equal Pay Act claim).

Unfettered negotiation of employment conditions in labor agreements is arguably restricted by any statute—regardless of whether it is anti-discriminatory—that touches upon the employment relation, such as Title VII of the Civil Rights Act of 1964, the child labor provisions of the FLSA, the Occupational Safety and Health Act of 1970 (OSHA), the Employee Retirement Income Security Act of 1974 (ERISA), and even the National Labor Relations Act. The short answer is that the wage and hour provisions of the FLSA were intended to be treated differently from these other statutes. The negotiation of wages and hours forms the heart of the bargaining process. Wages and hours are also subjects that unions typically and competently address not only in contract negotiations but also in contract administration. Title VII considerations, on the other hand, are not entitled to this presumption of union competency.

Any perceived conflicts between collectively negotiated arrangements and the NLRA cannot stand as barriers to the establishment of terms and conditions best suited to the needs of management and labor where the FLSA is involved. The NLRA is a congressional judgment that seeks to facilitate employee choice by imposing certain rules that prohibit interference with employee choice. Because collective bargaining arises out of employee choice, unions cannot negotiate in the employees' best interests when employee choice has been undermined. Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 65 n.14 (1975); NLRB v. Magnavox Co., 415 U.S. 322 (1974). NLRA principles that override collectively bargained arrangements are thus best viewed as insuring that the needs of the parties are truly expressed.

Furthermore, the NLRA, unlike the FLSA, contains an explicit provision authorizing the National Labor Relations Board to enforce the NLRA irrespective of any private dispute resolution mechanism. *See* 29 U.S.C. § 160(a) (1976). Even though the NLRB has the power to intervene where statutory rights are at issue, it typically refrains under the *Collyer* and *Spielberg* doctrines of deferral. *See* Collyer Insulated Wire, 192 N.L.R.B. 837, 71 L.R.R.M. 1931 (1971) (NLRB deference proper in § 8(a)(5) case pending submission of contract dispute to arbitration, but jurisdiction retained); Spielberg Mfg. Co., 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955) (NLRB deference to arbitrator's award acceptable if proceedings are fair and regular, parties agree to abide by decision, and decision is not clearly repugnant to NLRA). *See generally* Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964) (grievance procedures further policies of NLRA; unfair labor practice rulings take precedence over arbitral decision). *But see* NLRB v. C & C Plywood Corp., 385 U.S. 421, 427 (1967) (NLRB does not have general jurisdiction over all alleged violations of collective bargaining agreement).

Although less obvious, questions arising under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1976), should be analyzed in the same way as those

right arises by contract and the other by statute. Both the congressional purposes and the right's collective or individual nature should be considered. Although it correctly analyzed the collective nature of the FLSA right in issue, the *Satterwhite* court significantly understated congressional assessment of the relationship between the FLSA and collective bargaining. As previously discussed, this assessment reveals that the *Satterwhite* court was more correct than it perhaps realized.

The *Satterwhite* holding was subsequently applied in *Atterburg v. Anchor Motor Freight, Inc.*,[207] and in the Eighth Circuit's recent decision, *Barrentine v. Arkansas-Best Freight System, Inc.*[208] Plaintiff employees in *Atterburg* sued their employer under the FLSA for minimum wages and overtime compensation. Some of the

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arising under civil rights statutes. Congress intended OSHA to protect individual employees from job-related injuries and to obviate the catastrophic wage loss that often accompanies industrial injuries. *See* Brennan v. Southern Contractors Serv., 492 F.2d 498, 501 (5th Cir. 1974); S. REP. No. 1282, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177; SENATE SUBCOMM. ON LABOR, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 142, 166, 297 (1971). Individual concerns are the focus in OSHA matters, and group, *i.e.*, union assistance is statutorily encouraged to achieve OSHA's objectives. The statute specifically authorizes employee representatives to assist OSHA officials who inspect workplaces, 29 U.S.C. § 657(c) (1976), allows unions to request inspections, *id.* § 657(f), and authorizes employee representatives to participate in administrative hearings concerning employer citations, *id.* § 659(c). Thus, OSHA complaint procedures supplement contractual remedies by procuring union assistance to effectuate the Act's objectives.

Nevertheless, OSHA procedures yield to contractual grievance-arbitration in one instance. If an employee who has been discharged for exercising his rights under the Act challenges the discharge under the collective bargaining agreement's grievance-arbitration procedures, the OSHA regulations provide, out of deference to the national policy favoring resolution of disputes under labor agreements, that the Secretary of Labor may defer to the arbitrator's decision in lieu of bringing his own court action under section 11(c), *id.* § 660(c). *See* 29 C.F.R. § 1977.18 (1979). One court has held, however, that an unfavorable arbitration award does not bar judicial relief by the Secretary of Labor under section 11(c). Marshall v. N.L. Indus. Inc., 618 F.2d 1220, 1122-23 (7th Cir. 1980) (OSHA rights extend beyond labor agreement; *Gardner-Denver* controls). *See also* Phillips v. Interior Bd. of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974) (arbitration of issues under Mine Safety Act controlled by *Gardner-Denver*), *cert. denied*, 420 U.S. 938 (1975).

When analyzing the impact of statutes on collectively negotiated compensation arrangements, courts should consider the congressional purpose, the union's competency to effectuate statutory goals, and the individual or collective nature of the right involved. This question cannot be answered by simply saying that one right is statutory, the other contractual, and thus the statutory right controls. The correct result is discerned only by reconciling the multi-faceted objectives of each statute involved with the requirements of free collective bargaining.

[207] 425 F. Supp. 841 (D.N.J. 1977).

[208] 615 F.2d 1194 (8th Cir.), *cert. granted*, 49 U.S.L.W. 3245 (U.S. Oct. 6, 1980) (No. 79-2006).

employees' claims had been previously processed through the grievance procedure, but the majority of claims had not. One of the issues before the district court was whether prior submission of these claims to arbitration under the contractual grievance procedure barred a subsequent independent suit in federal court under the FLSA.[209] Adopting the *Satterwhite* holding, the district court held that the FLSA claims were barred.[210] Moreover, the court reasoned that plaintiffs' failure to protest submission of their wage claims to arbitration demonstrated their *consent* to abide by the arbitrator's final determination even though the claims were apparently not arbitrable under the collective bargaining agreement.[211]

In *Arkansas-Best Freight*, plaintiff employees brought an action against their employer claiming wages for time spent making pre-trip safety inspections and transporting trucks to repair facilities, and against their union for breach of its duty of fair representation.[212] The agreement provided that disputes that reach the final step in the grievance procedure were to be decided by a joint employer-union grievance committee.[213] After the grievance

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[209] 425 F. Supp. at 842-43.

[210] *Id.* at 845.

[211] *Id.* at 844. *See* Amicizia Societa Navegazione v. Chilean Nitrate and Iodine Sales Corp., 274 F.2d 805, 809 (2d Cir.), *cert. denied,* 363 U.S. 843 (1960); Island Creek Coal Sales Co. v. Indiana-Kentucky Elec. Corp., 366 F. Supp. 350, 353 (S.D.N.Y. 1973), *aff'd mem.*, 498 F.2d 1396 (2d Cir. 1974).

The court also discussed the employees' assertion that the union hreached its duty of fair representation by arbitrarily processing tbeir claims. Because they failed to produce any evidence to substantiate this assertion, the court dismissed the duty of fair representation count. 425 F. Supp. at 846-47.

[212] An employee normally punched in when reporting to work and was paid at lower rates for time spent on preliminary office duties. After completing that work, the employee "'punched out'" and walked to his truck, where he made a mandatory pre-trip safety inspection. If the truck was in working order, the driver would begin his trip, earning pay at driving rates for all driving time. This practice was not challenged. If the preliminary safety inspection uncovered defects, the driver was required to take the equipment to the company's repair facility. At the repair facility, the driver would punch in again. After the equipment was repaired, the driver would punch out a second time and begin his road trip. The issue before the court concerned the company's failure to pay the drivers for the time spent between the first punch out and the second punch in. 615 F.2d at 1197.

[213] Id. at 1197. The court noted, but did not accept, the employees' argument that because the joint employer union grievance committee was susceptible to abuse and collusive secret agreements, individual employee interests may be sacrificed by arrangements that management and the union consider consistent with their own broader interests. *Id.* at 1201.

This method of grievance resolution has been both criticized and approved. *See* General Drivers Union Local 554 v. Young & Hay Transp. Co., 522 F.2d 562, 567 n.5 (8th Cir. 1975); Azoff, *Joint Committees as an Alternative Form of Arbitration Under the NLRA,* 47 TUL. L. REV. 325 (1973); Feller, *A General Theory of the Collective Bargaining Agreement,* 61 CALIF.

committee denied the employees' wage claims, the employees filed suit.[214]

In affirming the district court's order dismissing the complaint, the Eighth Circuit rejected plaintiffs' analogies to the *Gardner-Denver* decision, adopting the *Satterwhite* distinction between wage disputes and cases involving racial discrimination.[215] The court also relied on section 203(d) of the Labor Management Relations Act, which declares that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlements of grievance disputes."[216] Thus, where "employees knowingly and voluntarily submit their grievances to arbitration," a subsequent FLSA suit is barred.[217]

The *Arkansas-Best* court recognized the difficulty of reconciling its holding with the decisions in *Iowa Beef Packers* and *Leone*. Four of the six plaintiffs in *Arkansas-Best* had not filed grievances.

L. REV. 663, 836-38 (1973); *See generally* Hines v. Anchor Motor Freight, Inc. 424 U.S. 554 (1976); Humphrey v. Moore 375 U.S. 335 (1964); General Drivers Local 89 v. Riss & Co. 372 U.S. 517 (1963).

[214] The Portal-to-Portal claim was premised on the theory that the time spent by the employees between the first punch out and the second punch in was compensable time. Section 4(b) of the Portal Act provides:

> (b) Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—
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> (1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or
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> (2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

29 U.S.C. § 254 (b) (1976).

The employees also alleged that their union breached its duty of fair representation. The district court held that even though the employees' claim for compensable time might be valid under the contract, collective bargaining agreements are in certain respects *sui generis* because provisions relating to compensable working time cannot always be construed literally, particularly where the union has tolerated a variance from the contract language in the past. Thus, the court found that the union did not breach its duty of fair representation. 615 F.2d at 1198-99, 1202.

[215] *Id.* at 1200. In his dissenting opinion, Judge Heaney argued that the FLSA claim was not precluded by prior submission to arbitration unless the parties clearly and unequivocally authorized the arbitrator to decide the FLSA issue. *Id.* at 1203.

[216] 29 U.S.C. § 173(d) (1976).

[217] 615 F.2d at 1199; *accord*, Melanson v. John J. Duane Co., [1980] LAB. REL. REP. (24 Wage and Hour Cas.) 994 (D.Mass. Sept. 4, 1980); *cf.* Union de Tronquistas de Puerto Rico Local 901 v. Flagship Hotel Corp., 554 F.2d 8 (1st Cir. 1977) (claim under Puerto Rico's wage regulations barred by prior arbitration; *Satterwhite* applied).

The district court held that these four claims were not barred for failure to exhaust the contract grievance procedure; the court noted that filing a grievance would have been "futile" because the joint labor-management committee previously rejected the grievances filed by the other plaintiffs based on the same facts.[218] The district court decided, however, to treat the four plaintiffs " 'as though each of the[m] had actually filed grievances which were considered and denied.' "[219] This result is significant because it eliminates an important factual distinction—whether the claims were actually submitted under the grievance procedure—and thereby preserves the conclusiveness of negotiated remedies and extends the contractual preclusion of independent FLSA actions beyond situations in which a grievance is actually pursued through the grievance procedure.[220]

It was unnecessary, however, for the Eighth Circuit to adopt fully the trial court's reasoning. The employees' independent ability to pursue FLSA actions in court should not depend on whether they "voluntarily" submitted their wage claims under available grievance procedures. As the Supreme Court recognized in *Gardner-Denver*, the "actual submission" of a claim to grievance-arbitration does not alter the character of the right involved.[221] Because FLSA wage claims are inherently collective in nature and our labor policy requires resort to contractual grievance procedures before suing in court, employees should be required in every case to submit their wage complaints to available contractual grievance procedures before a court can adjudicate an FLSA suit. Courts should treat the "voluntariness" of grievance submission in an FLSA dispute no differently from any other grievance arising under the contract.[222] It was unnecessary for the *Arkansas-Best* court either to characterize the FLSA claims of the plaintiffs who did not file grievances "as though . . . [they] had

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[218] *Id.* at 1200-01.

[219] *Id.* at 1201.

[220] *Id.* at 1201.

[221] 415 U.S. at 52.

[222] The right to sue or arbitrate should not depend on judicial determination of whether the employee recited magic words of consent. The test of whether submission is required should be determined solely by the standard announced in United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 (1960): all "[d]oubts should be resolved in favor of coverage."

One court has applied this doctrine to hold that once otherwise non-arbitrable FLSA matters are submitted to arbitration, the employees are barred from pursuing an FLSA suit in court. Atterburg v. Anchor Motor Freight, 425 F. Supp. 841 (D.N.J. 1977).

actually filed grievances," or to consider such a filing "futile."[223] The plaintiffs failed to file grievances over their FLSA claims and thus they were barred by the grievance exhaustion rule from suing in court.[224]

E. *Suits by the Secretary of Labor And Prior Arbitral Determinations*

In *Marshall v. Coach House Restaurant, Inc.*,[225] the district court considered whether the Secretary of Labor was precluded from seeking injunctive relief and suing for overtime payments by a prior and binding arbitration between the employer and employees' union. Before the overtime grievance had been submitted to arbitration, the Department of Labor's Wage and Hour Division conducted a routine investigation of the employer to check for compliance with the FLSA, and found several alleged overtime and recordkeeping violations.[226] After the investigation, but before the Secretary filed suit, an arbitrator issued an award holding that the employer made proper overtime payments under the terms of the collective bargaining agreement *and* under the FLSA.[227]

The district court rejected the *Leone* argument that *Gardner-Denver* preserved the employees' option to bring independent FLSA suits, particularly when the claim had been previously submitted to arbitration.[228] Instead, the court accepted the *Satterwhite* analysis—that the national policy favoring arbitration assumes greater significance in FLSA than in Title VII disputes.[229] The court held, however, albeit most "reluctantly," that because the Secretary of Labor had not participated in the arbitration, the public interest protected by FLSA injunctive actions prevented the court from giving binding effect to prior arbitral awards when the Secretary initiated the suit.[230]

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[223] 615 F.2d at 1200-01.

[224] Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965).

[225] 457 F. Supp. 946 (S.D.N.Y. 1978).

[226] *Id.* at 948.

[227] *Id.* at 949.

[228] *Id.* at 950-51. *See* notes 163-73 and accompanying text *supra*.

[229] 457 F. Supp. at 950-51.

[230] *Id.* at 952. The court skirted the question of whether the Secretary's claim under section 16(c) of the FLSA, 29 U.S.C. § 216(c) (1976), which sought unpaid overtime on behalf of the employees, was barred by the arbitration award. Instead, the court emphasized that the policy behind the Secretary's section 17 action, 29 U.S.C. § 217 (1976), was to restrain improper wage payments. These injunctive suits, the court argued, promoted the public interest by depriving a violator of unlawfully withheld compensation and

The court recognized that its decision was "at odds with the strong federal policy favoring the resolution of labor disputes through collective bargaining and its concomitant—binding arbitration."[231] Indeed, the court noted that prior submission to arbitration was entirely proper and that the arbitrator possessed the "institutional competence" to decide FLSA wage claims.[232] The court's holding, however, created a no-win proposition for employers: "[i]f the employee wins in arbitration his employer is bound, but if the employer wins, his victory is illusory because the Secretary may seek *de novo* review in the courts."[233] The court invited the Department of Labor to resolve this conflict by participating in the arbitration of wage claims that implicate the FLSA.[234] Alternatively, the court challenged the Department of Labor to develop a policy of deferral to arbitration awards similar to that adopted by the National Labor Relations Board.[235] A deferral policy would encourage arbitration as the "crucial component of industrial self-government."[236]

F. *Summary Analysis of the Lower Court Cases*

Despite the disarray in the lower courts regarding the FLSA/collective bargaining relationship, certain conclusions are evident. Rules of decision based on early—but now discredited—Supreme Court statements about the relationship be-

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thus " 'protect[ed] complying employers from the unfair wage competition of the noncomplying employers.' " 457 F. Supp. at 952 (quoting S. REP. No. 145, 87th Cong., 1st Sess. 40, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 1620, 1659). The Senate report observed that § 17 actions were more effective for enforcing employee rights and deterring potential violators than § 16 actions, which allow recovery of back wages and liquidated damages. *Id.* Several courts have also accepted this assumption. *See* Hodgson v. Wheaton Glass Co. 446 F.2d 527, 532 (3d Cir. 1971); Wirtz v. Malthor, Inc., 391 F.2d 1, 3 (9th Cir. 1968); Hodgson v. Parke, 324 F. Supp. 1297, 1300 (S.D. Tex. 1971); Wirtz v. L. A. Swann Oil Co., 293 F. Supp. 211 (E.D. Pa. 1968).

[231] 457 F. Supp. at 952.

[232] *Id.* at 952-53; *accord*, Wilco v. Swan, 346 U.S. 427, 431-32 (1953); Evans v. Hudson Coal Co., 165 F.2d 970 (3d Cir. 1947).

[233] 457 F. Supp. at 953. The court further noted that Congress specifically freed the National Labor Relations Board from the preclusive effect of an arbitration decision. *See* 29 U.S.C. § 160(a). Even though the arbitral award was not held binding on the parties, the court noted that the award was admissible into evidence. 457 F. Supp. at 953 n.15.

[234] *Id.* at 952 n.14. This novel suggestion would permit the Secretary of Labor to inject his views concerning wages and hours into arbitration. It is difficult to see how this approach would resolve questions of the parties' intent, which is the basis for the arbitration in the first place. *See also* Trafalgar Shipping Co. v. Int'l. Mill Co., 401 F.2d 568, 572-73 (2d Cir. 1968).

[235] 457 F. Supp. at 953.

[236] 457 F. Supp. at 953. *See generally* note 206 *supra*.

tween the FLSA and collective bargaining (*Lerwill*) or that focus exclusively on the FLSA's remedial provisions to carve out a right of action irrespective of a collective bargaining agreement (*Iowa Beef Packers, Abbott,* and *Coach House Restaurant*), dramatically understate or simply ignore legislative and judicial guidance on this issue. Furthermore, cases that utilize fictions to thwart the application of contractual grievance procedures to wage and hour claims (*Leyva*) are inconsistent with the presumption favoring the use of grievance procedures and invite creative interpretations of labor agreements that ignore the parties' intent. Cases relying on analogous interpretations of civil rights statutes (*Leone*) that are inapposite to the FLSA/collective bargaining relation completely misperceive the issue. All of these cases promote the litigation of disputes that are best left to collective bargaining, thus undermining industrial stability and eroding the exclusivity, exhaustion, and finality principles of contract negotiation and administration.

Even those cases that base their decisions upon the perceived preeminence of collective bargaining (*Beckley, Satterwhite,* and *Arkansas-Best*) have not comprehensively analyzed the FLSA/collective bargaining relationship. Indeed, none has considered the issue in light of the legislative underpinnings of the FLSA and the demise of *Jewell Ridge Coal* and *Bay Ridge.* Without these fundamental considerations, a correct rule of decision is impossible to formulate.

Thus, the scope and stability of collective bargaining may depend on either the court in which an FLSA suit is filed or on whether the named plaintiff is an individual employee or the Secretary of Labor. This Article attempts to remedy this unacceptable state of affairs by suggesting a proper balance between the FLSA and the national policy favoring collective bargaining.

The Department of Labor and the courts have not considered an existing collective bargaining relationship as a bar to Labor Department lawsuits. *See, e.g.,* Marshall v. ITT Continental Baking Co., 26 Fed. R. Serv. 2d 887 (S.D.N.Y. 1978) (FLSA injunctive action challenging non-inclusion of certain payments in base wages under collective bargaining agreement); Hodgson v. Six Flags Over Georgia, Ltd., 69 Lab. Cas. ¶ 32,752 (N.D. Ga. 1972) (employer required to prove exemption from statutory requirements despite collective bargaining agreement); Wirtz v. William H. LaDew, Inc., 282 F. Supp. 742 (E.D. La. 1968) (despite collective bargaining relationship and employee overtime waiver, FLSA injunction action permissible); Mitchell v. Barbee Lumber Co., 35 F.R.D. 544 (S.D. Miss. 1964) (statutory minimum wages and overtime pay not subject to negotiation); Wirtz v. William M. Buckley, 47 Lab. Cas. ¶ 31,436 (D. Kan. 1963) (FLSA injunctive action permissible despite union agreement to waive overtime); Mitchell v. Feinberg, 123 F. Supp. 899 (E.D.N.Y. 1954) (compliance with collective bargaining agreement does not excuse FLSA overtime pay deficiencies).

V

THE PRIMACY OF COLLECTIVE BARGAINING

A. *The Presumptive Validity of Collectively Bargained Wage and Hour Formulae*

Congressional support of collective bargaining in FLSA matters[237] and collective bargaining's fundamental role in our national labor policy, codified by the Taft-Hartley amendments,[238] require that FLSA questions be resolved under standard contract negotiation and administration analyses whenever a collective bargaining relationship exists.[239] Labor unions are better able to police wage and hour schemes and protect the interests of their members than the Secretary of Labor. Although FLSA requirements are not always negotiated into a labor agreement, employee interests are protected by the NLRA's duty to bargain. This fundamental guarantee of free collective bargaining allows the union and employer to exchange wage and hour claims for other benefits deemed more valuable by the union and its members.[240] Collective bargaining subjects arguably covered by the FLSA should generally receive no special status.

This is not to suggest that wage computation or time-worked formulae in a labor agreement that vary from the FLSA's literal requirements should establish an absolute defense to an FLSA action. Courts should treat wage and hour matters incorporated into collective agreements as presumptively valid, subject to challenge only in carefully limited circumstances. Plaintiff employees should be permitted to challenge their union's—and their employer's—conduct involving FLSA matters only through a breach of contract action under section 301(a) that also alleges a breach of the

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[237] *See* notes 91-103 and accompanying text *supra*.

[238] *See* notes 104-27 and accompanying text *supra*.

[239] *See* notes 120-27 and accompanying text *supra*.

[240] At first blush, it might appear that this approach necessarily confers an unfair advantage on the unionized employer over his non-unionized counterpart. The unionized employer may, for example, negotiate less costly overtime rates in exchange for other benefits, such as higher hourly rates, desired by the union. The non-unionized employer, on the other hand, is forced to work within the rigid statutory framework of the FLSA.

This unfair advantage is illusory. The trade-off is that the non-unionized employer may reduce wages at will so long as they are above the statutory minimum. Apart from this minimum, the FLSA mandates only the formulae for determining overtime pay. The unionized employer, however, would commit an unfair labor practice by unilaterally changing wage rates. He can do so only after he has fulfilled his duty to bargain with the union representing the affected workers. Thus, although the unionized employer can bargain with the union to reduce overtime, the non-unionized employer may do so unilaterally as long as FLSA formulae are observed.

union's duty of fair representation. Generally, the courts should find a breach of the duty of fair representation only when it is established that the union acted in bad faith or without honesty of purpose by negotiating a compensation arrangement that does not comply with the FLSA.[241] Courts should require employees to resort to contractual grievance procedures in every case; otherwise, the validity of negotiated dispute resolution procedures is undermined. This approach, to paraphrase Justice Harlan,[242] allows the union and employer to split FLSA benefits without an unacceptable sacrifice to FLSA policy interests.

The Secretary of Labor should similarly establish that the union breached its duty of fair representation before he may sue for an FLSA violation. In overtime pay cases, however, the Secretary should meet one further requirement. His action either to recover FLSA wage deficiencies or to obtain injunctive relief should be dismissed unless he establishes that the collectively bargained overtime compensation arrangement is not "substantially equivalent" to statutorily required overtime.[243]

B. *Controlling Principles in Employee Wage Suits*

Justice Frankfurter suggested in his *Bay Ridge* dissent that wage agreements should be tested under a fair representation analysis.[244] He argued that literal compliance with the FLSA is not required; labor agreements are deemed legitimate so long as they are not an artifice or subterfuge designed to evade the FLSA.[245] Justice Frankfurter framed the union's FLSA obligation and its latitude to negotiate wage provisions as follows:

> Unless it be judicially established that union officers do not know their responsibility or have betrayed it, so that what ap-

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[241] Because the FLSA variance issue will always involve a contract term or practice expressly or impliedly agreed to by the union, the general standard of conduct that should apply is the contract negotiation analysis imported from fair representation cases. *See* note 125 and accompanying text *supra*. When the labor agreement contains a grievance procedure, the union's failure to process a FLSA claim should be tested under the duty of fair representation's grievance handling standard.

[242] "[I]t may well be that certain types of federal statutory benefits will lend themselves to arbitration or splitting without an unacceptable sacrifice in competing policy interests." U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 366 (1971) (Harlan, J., concurring).

[243] *Cf.* 29 U.S.C. § 207(g)(3) (1976) (allowing employer and employee agreement on "substantially equivalent" base rate for computing overtime). This theory is discussed in more detail at notes 266-73 and accompanying text *infra*.

[244] 334 U.S. 446, 479 (1948) (Frankfurter, J., dissenting). *See* notes 76-89, 96-98 and accompanying text *supra*.

[245] 334 U.S. at 487-88, 492.

> pears to be a contract on behalf of their men is mere pretense in that it does not express the true interests of the union as an entirety, this Court had better let the union speak for its members and represent their welfare, instead of reconstructing, and thereby jeopardizing, arrangements under which the union has lived and thrived and by which it wishes to abide.[246]

Absent proof of bad faith, collusion, or dishonesty by the union, courts should uphold wage arrangements that reflect the interests of the employees represented by the union.[247]

This FLSA/collective bargaining analysis comports with section 301(a)'s standard for valid contract negotiations: the union must bargain in good faith and with honesty of purpose.[248] This approach not only reconciles the FLSA/collective bargaining conflict with congressional intent but also promotes negotiation and enforcement of labor agreements under section 301(a). It also shields the sanctity of collective bargaining from unprincipled judicial attempts to carve out questionable FLSA theories of recovery. Challenges to wage settlements that allegedly do not comply with the FLSA would be scrutinized under the carefully developed section 301(a) doctrines of exclusivity, exhaustion, and finality—doctrines that the Supreme Court has held sufficient to protect the individual interests of organized employees as well as the institutional interests of unions and employers.[249] Dissident employees should possess no greater right to second-guess their statutory bargaining agents by suing under the FLSA for windfall recoveries over and above negotiated settlements than they do to challenge collective bargaining agreements. The careful balancing of individual employee rights, majority rule, and labor peace[250] under section 301(a) would thus be preserved on matters at the very heart of the collective bargaining relationship: the negotiation of wages and hours.

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[246] *Id.* at 493.

[247] Justice Frankfurter supported this proposition by citing two cases—Steele v. Louisville & N.R.R., 323 U.S. 192 (1944) and Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U.S. 210 (1944)—in which the Union's bad faith representation negated the binding effect of collective bargaining agreements. 334 U.S. at 493 n.10. In his dissent in Walling v. Harnischfeger Corp., 325 U.S. 427, 439 (1945), Chief Justice Stone also suggested that FLSA/collective bargaining questions should be resolved under a test of mutual good faith. *See* note 77 *supra.*

[248] *See* note 125 and accompanying text *supra.*

[249] *See* notes 120-27 and accompanying text *supra.*

[250] *See* notes 104-08 and accompanying text *supra.* Labor peace is also an objective of the FLSA. *See* 29 U.S.C. § 201 (1976).

Where the labor agreement does not contain a grievance procedure, employees may sue directly in court. A judicial determination of an FLSA violation in such cases, however, must also require a finding that the union violated its duty of fair representation by negotiating the disputed provision. The court should dismiss the FLSA claim if no such finding is made. Where the labor agreement provides a grievance procedure, a court should dismiss the FLSA claim if the grievance procedure has not been exhausted[251] unless the contract also contains a clause that specifically excludes the FLSA claim from the grievance procedure. Without such an explicit exclusion, all "[d]oubts should be resolved in favor of coverage"[252] because "only the most forceful evidence of a purpose to exclude the claim from arbitration [should] prevail."[253]

There are a number of factors courts should consider when examining the union's honesty of purpose and subjective good faith in negotiating the challenged provision.[254] One factor,

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[251] When considering FLSA claims, arbitrators should confine their review to an interpretation of the collective bargaining agreement. Arbitrators possess neither the jurisdiction nor the expertise to enforce statutory rights. They should not, therefore, refer to the statutory language to determine the validity of contractual wage and hour provisions. Their duty is to interpret the negotiated meaning of the contract language; once this meaning is ascertained, the FLSA issue will normally be settled.

Not all arbitrators, unfortunately, have recognized these limitations on their authority. *See, e.g.*, Pennsylvania Elec. Co., 47 Lab. Arb. & Disp. Settl. 526, 527 (1966) (Stein, Arb.); Youngstown Sheet and Tube Co., 14 Lab. Arb. & Disp. Settl. 752, 756 (1950) (Updegraff, Arb.). *But see* Hilo Transp. & Terminal Co., 33 Lab. Arb. & Disp. Settl. 541, 543 (1959) (Burr, Arb.); International Harvester Co., 17 Lab. Arb. & Disp. Settl. 29, 30 (1951) (Seward, Arb.); California Cotton Mills, 16 Lab. Arb. & Disp. Settl. 335, 337 (1951) (Marshall, Arb.). For an excellent general discussion of the scope of an arbitrator's authority to interpret statutes, see Edwards, *Labor Arbitration at the Crossroads; The 'Common Law of the Shop' v. External Law*, 32 ARB. J. 65 (1977). *See also* F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 321-34 (1973).

[252] United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 (1960).

[253] *Id.* at 585.

[254] The underlying premise that courts employ to analyze these factors is that unions should be permitted broad latitude in contract negotiations to fashion compensation arrangements best suiting their members' needs. Indeed, it is often difficult to adduce direct evidence that the union did not bargain honestly or that it conducted negotiations in bad faith.

Subject to the considerations discussed at note 125 *supra*, however, courts, in assessing the union's bargaining conduct, should consider a number of factors when an allegation is made that the union impermissibly compromised FLSA rights. The union's good faith might be demonstrated by a showing that FLSA rights were traded in arms-length negotiations for wage increases, for jobs in a failing business, or to satisfy other employment conditions peculiar to the industry and the employees within the bargaining unit. Good faith bargaining is inferrable from the union's demonstrated ability to represent employees, and to attain high wage scales and fringe benefits for bargaining unit members. Contract ratification votes are also significant evidence. Evidence of past literal compliance with the

however, should establish presumptive evidence of bad faith: sub-minimum wages. The FLSA embodies a social judgment that the price of labor in covered industries should not fall below a designated minimum.[255] The legislative debates indicate that Congress intended the FLSA to cover both weak unions and unorganized workers.[256] If wages are negotiated below the statutory minimum, the union should be regarded as a weak organization incapable of meaningful collective bargaining and thus qualified as a group that Congress intended the FLSA to protect. Its acquiescence to sub-minimum wages would then be subject to challenge in an FLSA court suit.[257]

Nearly all of the current FLSA/collective bargaining cases involve either compensable time or overtime pay disputes. Courts should analyze these cases under the fair representation paradigm and should distinguish them from hypothetical sub-minimum wage situations—where the FLSA presumptively applies—in several ways. First, although the FLSA's legislative history characterizes overtime pay as a penalty on the employer, no legislative debate or report discusses the relationship between overtime and collective bargaining agreements.[258] Second, by amending the FLSA, Congress implicitly approved the employer's time-worked and overtime pay arrangements—invalidated by the Court in

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FLSA and union awareness of employee needs could be considered as well. Labor agreements containing terms relatively close to the FLSA statutory minimums, however, require closer scrutiny, especially if the union recently negotiated provisions departing from the FLSA. Before recovery should be permitted against the employer, the FLSA plaintiff should be required to demonstrate that the union's departure from the FLSA was a betrayal of its duty fairly to represent the plaintiff.

[255] *See* notes 23-38 and accompanying text *supra*.

[256] Clearly, weak labor unions may be victimized in collective bargaining, as much as unorganized workers. *See* notes 55-57, 63-68, 96 and accompanying text *supra*.

[257] Evidence of subminimum wages should not, however, be considered per se unlawful. A union might breach its duty of fair representation by failing to agree to an arrangement reducing a costly item, such as excessively high overtime rates. If an employer could demonstrate that a variance from the FLSA's standards constituted the difference between a business surviving or failing, a union's failure to agree is challengeable in a fair representation action when the employees subsequently become unemployed. It is not inconceivable that a similar scenario might arise in a context of subminimum wages.

The Eighth Circuit recently noted that a union's failure to consider the impact of grievances on employees who did not file the grievance constituted a breach of its duty of fair representation. Smith v. Hussmann Refrigerator Co., 619 F.2d 1129, 1237 (8th Cir. 1980). In the FLSA context, if the union processes a grievance without considering the interests of the majority, which is satisfied with the contract's wage and hour provisions even though they are not in literal compliance with the FLSA, it will probably violate the duty of fair representation.

[258] *See* notes 62, 68 *supra*.

Jewell Ridge Coal and *Bay Ridge*—because they were developed in collective bargaining.[259] Third, the Portal-to-Portal Act specifically endorses collective bargaining[260] and implies that compensable working time questions are best left to the parties involved.[261]

Fourth, it is only conjecture that one of the ostensible goals of the FLSA's overtime provisions—spreading employment—is obtained by literal enforcement of the maze of overtime pay requirements. A number of studies indicate that overtime today, unlike 1938, is actually *cheaper* than recruiting, hiring and training new employees to perform work otherwise performed by employees already on the payroll.[262] Thus, the FLSA's public policy of spreading employment by imposing the "penalty" of overtime pay is tenuous at best. When employees, through their bargaining agent, agree to compensation arrangements that exclude certain overtime payments in exchange for other benefits, courts should not interfere with the parties' judgment of what is best for them.[263]

Finally, each of the foregoing arguments refers only to the FLSA. If one considers the preeminent federal policy favoring the negotiation and enforcement of collective bargaining agreements, any remaining doubt is dispelled that FLSA requirements must yield to agreements fashioned through collective bargaining. The union, as the employees' statutory agent, chooses from a number of options and variables when negotiating agreements with employers. Our labor policy holds that "the best interests of employers and employees can most satisfactorily be secured ... through ... collective bargaining between employers and the representatives of their employees"[264] The presumptive legitimacy accorded collectively bargained wage settlements must persist even if the settlement does not arguably comply with FLSA requirements.[265]

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[259] *See* notes 91-99 and accompanying text *supra*.

[260] *See* note 93 *supra*.

[261] *See* 29 U.S.C. § 251(b) (1976).

[262] *See* note 11 *supra*.

[263] The argument also applies to the FLSA's goal of eliminating excessive work hours. The union polices hours of work in the same way it polices wages and other terms and conditions of employment.

[264] 29 U.S.C. § 171(a) (1976).

[265] Decisions holding that unions representing public employees may bargain away constitutional entitlements are analogous to the argument that FLSA rights may be waived in collective bargaining. *See, e.g.*, Gorham v. Kansas City, 101 L.R.R.M. 2290 (Kan. Sup. Ct. 1979) (collectively bargained termination procedure prevails over due process hearing requirement); Antinore v. State, 49 A.D.2d 6, 371 N.Y.S.2d 213, *aff'd*, 40 N.Y.2d 921, 358 N.E.2d 268, 389 N.Y.S.2d 68, 389 N.Y.S.2d 576 (1976) (negotiated grievance procedure

C. *Suits by the Secretary of Labor and Section 7(g)(3) of the FLSA*

When the Secretary of Labor files an action to recover alleged FLSA-deficient wages or to obtain injunctive relief, courts should use the fair representation paradigm that has been suggested for employee wage suits. Despite the court's decision in *Coach House Restaurant*, collective agreements should not yield to FLSA concerns simply because the Secretary of Labor is the plaintiff.

The *Coach House* court's decision was misguided because it focused unduly on the FLSA's injunctive policy to protect complying employers from the unfair wage competition of noncomplying employers.[266] Although employee suits to recover unpaid FLSA wages clearly have the same deterrent effect on noncomplying employers as suits by the Secretary of Labor, the *Coach House* court stated that collective bargaining policies prevail in the employee suits but not in Secretary's suits.[267] The policy arguments in favor of collective bargaining are not diminished because the Secretary's name appears on the complaint or because the complaint seeks injunctive relief. Moreover, the NLRA's objective of promoting the economic well-being of workers through collective bargaining contains an implicit check on unfair wage competition similar to the check provided by the threat of the Secretary's suit. The cost to the employer of an agreement achieved with workers utilizing their collective strength in bargaining is probably *greater* than the cost of perceived litigation over these claims with the Secretary of Labor. Consequently, the unfair wage competition argument carries little, if any, weight in the unionized context.

One further restriction should also apply to suits brought by the Secretary for overtime pay. The Secretary should refuse to file overtime pay complaints unless the collectively bargained method of paying overtime is not "substantially equivalent" to the method allegedly required by the FLSA. The statutory "regular rate of pay" is defined as "all remuneration for employment paid to, or on behalf of, the employee," excluding certain specified payments.[268] Section 7(g)(3) of the FLSA permits employers and

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held to constitute waiver of certain procedural due process rights); Cary v. Board of Educ., 427 F. Supp. 945 (D. Colo. 1977) (right to academic freedom protected by first amendment waived by provision contained in collective bargaining agreement).

[266] *See* note 230 and accompanying text *supra*.

[267] 457 F. Supp. at 951.

[268] 29 U.S.C. § 207(e) (1976).

employees to establish their own "basic rate" for overtime pay purposes.[269] Payment of overtime at one and one-half times this basic rate satisfies the FLSA if certain prerequisites are met. These prerequisites include "substantial equivalence" between the basic rate and the regular rate, prior agreement by the affected employees, and prior authorization by the Secretary of Labor.[270] Basic rates under section 7(g)(3) may be established with individual employees or through collective bargaining.[271]

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[269] Section 7(g)(3) provides:

> (g) No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—
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> . . . .
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> (3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: Provided, That the rate so established shall be authorized by regulation by the [Secretary of Labor] as being *substantially equivalent* to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;
>
> and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) of this section are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

29 U.S.C. § 207(g)(3) (1976) (emphasis added).

[270] These prerequisites include the following:

> (1) The basic rate must be authorized by administrative regulations.
>
> (2) The basic rate must be substantially equivalent to the employee's average hourly straight time earnings for the particular work over a representative period of time.
>
> (3) The employee must agree to the establishment of a basic rate for overtime pay purposes, either individually or through a union contract.
>
> (4) The agreement between the employer and the employee must be entered into before the overtime work is performed.
>
> (5) The employer must enter in his records the date of the agreement and the period which it covers.
>
> (6) The employee's average straight time earnings must be not less than the legal minimum—the highest rate required by the FLSA or other federal, state or local law.
>
> (7) Extra overtime compensation must be paid on other additional pay—such as an incentive bonus or a shift differential—which is required to be included in the regular rate.

29 C.F.R. 548.200 (1979).

[271] Section 7(g)(3) does not distinguish between basic rate arrangements contained in a labor agreement and those contained in an individual employment contract. *See* note 269 *supra*.

Although its references to section 7(g)(3) are infrequent, the Wage-Hour Administration has not interpreted "substantial equivalence" of the basic rate to require literal equivalence with the statutory regular rate of pay.[272] Nor have distinctions been made between arrangements contained in individual employment contracts and those embodied in collective bargaining agreements. If departures from literal equivalence of the regular rate computation for unorganized employees are permitted, section 7(g)(3) also allows greater flexibility when a collective bargaining agreement is involved. Therefore, even if prior approval has not been sought from the Wage-Hour Administration, the Secretary, in deference to the policy of collective bargaining and in the interest of judicial economy, should formulate a policy of refusing to issue overtime pay complaints unless the substantial equivalence test of section 7(g)(3) has been violated.[273]

CONCLUSION

The National Labor Relations Act creates a sweeping obligation for employers and employee representatives to negotiate and bargain over all aspects of the terms and conditions of employment. Congress never intended the Fair Labor Standards Act to interfere with this obligation. On the contrary, the legislative his-

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[272] Departure from literal compliance is sanctioned by regulation when additional payments do not "increase the total compensation of the employee by more than 50 cents a week on the average for all overtime weeks." 29 C.F.R. § 548.3(e) (1979). The Administrator has explained that he tests the weekly effect on overtime and not the gross addition to the employees' weekly wage: "The exclusion of one or more additional payments under Section 548.3(e) must not affect the overtime compensation of the employee by more than 50 cents a week on the average for the overtime weeks." 29 C.F.R. § 548.305(c) (1979).

As early as 1964, the Wage-Hour Administrator issued an opinion letter holding that the regular rate of pay for FLSA overtime pay purposes need not include a negotiated yearly bonus of not more than $100.00 because its effect on overtime calculation was inconsequential. Op. Letter No. 307 of Wage-Hour Adm'r, [1961-66 Transfer Binder, Wages and Hours, Admin. Rulings] LAB. LAW REP. (CCH) ¶ 30,913 (November 4, 1964). Similar rulings were issued in Op. Letter No. 368 of Wage- Hour Adm'r, [1961-66 Transfer Binder, Wages and Hours, Admin. Rulings] LAB. LAW REP. (CCH) ¶ 30,980 (May 14, 1965) and in Op. Letter No. 515 of Wage-Hour Adm'r, [1961-66 Transfer Binder, Wages and Hours, Admin. Rulings] LAB. LAW REP. (CCH) ¶ 30,501 (October 4, 1966).

[273] In Marshall v. Coach House Restaurant, Inc., 457 F. Supp. 946, 953 n.15 (S.D.N.Y. 1978), the court suggested that the Secretary of Labor implement a policy of deference to arbitral awards similar to the National Labor Relations Board's deferral policy. This would unquestionably ameliorate many of the concerns expressed in this Article. *See* notes 206, 236 *supra*.

tory and subsequent amendments to the FLSA specifically recognize that collective bargaining plays a primary role in our national labor policy. The FLSA, unlike Title VII, must yield to that role. Moreover, the Taft-Hartley Act's elevation of negotiation and enforcement of labor agreements to the pinnacle of our national labor policy requires the analysis of FLSA disputes under the standard contract negotiation and administration principles utilized in fair representation cases. This approach best satisfies the concerns of both the FLSA and the NLRA "without an unacceptable sacrifice in competing policy interests."[274]

The suggested approach would also provide a guidepost for courts as they confront FLSA/collective bargaining questions. Decisions on this issue and its several variants are currently irreconcilable. These inconsistencies perpetuate the conventional wisdom that the FLSA must necessarily override or influence collective bargaining. They provide incentives for litigants and courts to carve out new and unwarranted exceptions to the exclusivity, exhaustion, and finality rules of contract negotiation and administration. By returning to the fundamental premises of the FLSA and the NLRA, courts could reconcile these statutes and avoid skewed results.

Finally, and not least important, enforcing the preeminent role of collective bargaining removes government from the business of regulating those who are best qualified to regulate themselves. Labor and management are in the best position to judge what industrial trade-offs suit their needs. If the union and employer consider higher wages and lower rates of overtime pay preferable to the FLSA's rigid statutory scheme, they should have the flexibility to embody that preference in their agreement. Although long-standing assumptions command deference,[275] the time is long overdue to step back and reconsider inelastic application of Depression-era legislation that fundamentally interferes with the policy of free collective bargaining, particularly when that

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[274] U.S. Bulk Carriers v. Arguelles, 400 U.S. 351, 366 (1971) (Harlan, J., concurring).

[275] The Supreme Court has stated that Congress is presumptively aware of an administrative or judicial interpretation of a statute and that the interpretation is adopted when the statute is reenacted without change. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1974); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). Longstanding interpretation should not, however, defer collective bargaining to FLSA dictates. Considered alone, the legislative history of the FLSA indicates that it was not intended to interfere with free collective bargaining. On the contrary, Congress's decision to overrule key decisions (*Bay Ridge* and *Jewell Ridge Coal*) demonstrates that collectively-bargained compensation arrangements should override the FLSA. The Taft-Hartley amendments and section 301(a) also support this argument.

legislation has been grossly misapplied to collective bargaining questions. Justice Stewart borrowed an aphorism from Justice Frankfurter when concurring in a decision that overturned a long-standing interpretation of the Norris-LaGuardia Act. That aphorism is equally appropriate here: " 'Wisdom too often never comes, and so one ought not to reject it merely because it comes late.' "[276]

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[276] Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 255 (1970) (Stewart, J., concurring) (quoting Henslee v. Union Planters Bank, 335 U.S. 595, 600 (Frankfurter, J., dissenting)).