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VESTED RIGHTS AND THE PORTAL-TO-PORTAL ACT

Ray A. Brown*

THE Portal-to-Portal Act of 1947 attempts, by new and retroactive definitions of what constitutes working time of an employee under the Fair Labor Standards Act of 1938, to deprive employees of claims under that earlier act, to which the Supreme Court of the United States has held they were entitled. This article will discuss whether this can be done under the due process clause of the Fifth Amendment.

I

THE LEGISLATIVE AND JUDICIAL HISTORY OF THE PORTAL-TO-PORTAL ACT

A proper understanding of this question necessitates a review of the legislative and judicial history which led to the enactment of the act here under consideration.

The Fair Labor Standards Act applicable to employees “engaged in [interstate] commerce or in the production of goods for [interstate] commerce” provides certain minimum wages and certain maximum hours of work. Section 7 (a) of the act provides: “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 the hours above specified at a rate not less

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4 The Portal-to-Portal Act also in separate sections alters the Fair Labor Standards Act as to future claims. Since the right of Congress to alter that act as to the future cannot be questioned, these sections of the Portal-to-Portal Act will not be discussed herein.


than one and one-half times the regular rate at which he is employed." Section 16 of the act provides that any employer who violates the provision of section 7 "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." Actions to recover under the act "may be maintained in any court of competent jurisdiction." Such suits may be brought by an individual employee in behalf of all other employees similarly situated, or the individual employee may designate an agent or representative to bring such suits. Criminal penalties are also added for wilful violations of the act. The sole pertinent clarifying provisions are the succinct statements: "'Employee' includes any individual employed by an employer”; "'Employ' includes to suffer or permit to work.”

Tennessee Coal Co. v. Muscoda Local was a declaratory action to determine whether the "workweek" of iron miners under the overtime pay provisions of section 7 (a) of the act included the time spent by the miners in travelling underground from the portal of the mine to and from the face of the vein, where the actual labor of mining the coal was performed. The majority of the Court, in an opinion by Mr. Justice Murphy, answered this question in the affirmative. Admitting that the words of the act gave no decisive answer to the question, it said that the "issue can be resolved only by discarding formalities and adopting a realistic attitude, recognizing that we are dealing with human beings and with a statute that is intended to secure to them the fruits of their toil and exertion.” The transportation of men from the portal of the mine to the working face was partially in conveyances furnished by the employer and partially on foot. The trips were uncomfortable and hazardous. Such travel bore no relation to the personal needs of the miners but was for the benefit of the employers and necessary for the conduct of mining operations.

In the situation presented, the Court defined work or employment as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and pri-

7 There are certain exceptions to this section which, however, do not affect the problem here under consideration.
9 52 Stat. L. 1060 (1938), 29 U.S.C. (1940) § 203 (e), (g).
10 321 U.S. 590, 64 S.Ct. 698 (1944).
11 Id. at 592.
12 Id. at 594-598.
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13 Under this definition, underground travel was held to be part of the workweek, and since such travel time had not been included in the forty-hour workweek of the employees they were entitled under the act to over-time pay and liquidated damages. This conclusion was contested by the employers on the ground that "immemorial custom and agreements arrived at by the practice of collective bargaining" had established the time spent at the face of the workings as the "working time" in the industry. To this contention the opinion gave several answers. First, the trial court as a matter of fact had found to the contrary on this issue. Second, the unions involved in the collective bargaining transactions were company dominated and the agreements, therefore, could not be treated as voluntary understandings by the men of what constitute the workweek. Third, even if the prior custom and practice were established, it could not control the intent of the Fair Labor Standards Act "to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act." The concurring opinions of Justices Frankfurter and Jackson take the position that what constitutes "work" in a particular industry is in its essence a question of fact, depending upon the circumstances and common understanding in the industry involved. The findings of fact of the district court, affirmed by the circuit court of appeals, on the question should be accepted. Justice Roberts and Chief Justice Stone dissented. They agree with the concurring justices that what constitutes compensable "work" in a given industry depends on the understanding in that particular industry. A lengthy review of the evidence in the case convinced them that the workweek did not include the underground travel time and that the district court's findings of fact did not permit the contrary conclusion.

This case was followed by Jewell Ridge Corporation v. Local No. 6167. The district court in this case found as a fact that underground travel time in bituminous coal mines was not included in the forty hour workweek of the miners. The circuit court of appeals reversed.
on the authority of the *Tennessee Coal and Iron Co.* case. The Supreme Court, in a five to four decision, affirmed the court of appeals. The distinction between the two cases was that in the latter case the underground travel was "neither painful nor unduly uncomfortable and is less hazardous than other phases of mining operations," and that in this case collective bargaining agreements between the operators and the United Mine Workers, not a company controlled union, had established the workweek as the time spent at the face of the vein. The majority of the court adhered to the declarations of the prior case. Neither collective bargaining agreements nor accepted custom could affect the duty of the court to apply the Fair Labor Standards Act uniformly. A public statement of the Wage and Hour Administrator issued July 18, 1940\(^\text{19}\) that he would accept the practice in bituminous coal industry of computing working time as the hours spent at the face of the ore was summarily disposed of as "legally untenable."\(^\text{20}\) Four justices dissented from the majority decision principally on the ground that it was not the intent of the Fair Labor Standards Act to interfere with the processes of collective bargaining as long as the agreement was not contrary to the specific provisions of the act as to wages and hours.

These preceding cases involved situations more or less peculiar to the mining industry. *Anderson v. Mt. Clemens Pottery Co.*,\(^\text{21}\) the last of the cases here to be considered, however, concerned an ordinary manufacturing corporation and conditions typical of industry in general. The case was a suit by an individual employee in behalf of himself and his co-employees to recover overtime pay and liquidated damages under sections 7 (a) and 16 of the act. The employer's plant extended over eight acres of ground and there were 1200 employees.\(^\text{22}\) Near the entrance was a time clock, at which the men checked in and out. It took the men, however, from one-half to three minutes to walk from the clock to their places of work. On arrival at such places an additional three to four minutes was consumed in preparing for work—putting on aprons, turning on lights, opening windows and the like. At the close of actual work similar time was consumed by the men in necessary postwork activity and in returning to the time clock. In figuring the working hours of the men the employer's practice was

\(^{19}\) 3 W. H. REP. 332 (1940).


\(^{21}\) 328 U.S. 680, 66 S.Ct. 1187 (1946).

\(^{22}\) Although there was a union in the plant, it did not appear that collective bargaining had covered the method of figuring working time.
to fix the time of *commencing* work at the nearest quarter hour *subsequent* to that punched on the clock, and similarly to fix the time of *ending* work at the nearest quarter hour *preceding* that at which the clock was punched. The majority of the Court held that under the definition of working time in the *Tennessee Coal and Iron* and *Jewell Ridge* cases, the time spent by the men in walking to and from the clock and the time spent in preliminary and postliminary working activities must be included in the "workweek" of the employees under section 7 (a) of the act. Justices Burton and Frankfurter dissented on the ground that, in view of the short periods of time involved, the determination of what constitutes a "workweek" should be left to "long established contracts or customs." They considered that, particularly in small businesses, the "special stop-watch recording" seemingly required by the majority opinion would be "highly impractical and the penalties ... for a neglect to do so would be unreasonable."

Soon following the decision of the Supreme Court in this last case, a large number of suits were brought by employees claiming under that decision recovery of portal-to-portal pay. The administrative
office of the United States Courts reported that in the United States courts alone between July 1, 1946 and January 31, 1947, 1,913 such suits were brought for an aggregate amount of $5,785,000,000. Of these suits, 1,186 with aggregate damages claimed of $3,087,095,003, were commenced in January, 1947. 25 In some of such suits the damages claimed exceeded the working capital of the defendants. 26 The employers became alarmed and several bills were introduced into Congress to remedy the situation, and also to make other changes in the Fair Labor Standards Act. Protracted hearings were held by the Senate and House Committees. 27 In these hearings the representatives of the employing interests claimed that the decision in the *Mt. Clemens* case flagrantly misconstrued the intent of the Fair Labor Standards Act and disregarded the common understanding of employers and employees alike as to what constituted compensable working time; that this decision came as an utter surprise to both employer and employees, giving a "windfall" to the latter and threatening the former with financial ruin. 28 Testimony of the officials of the Army and Navy Departments of the government, and of the Bureau of Internal Revenue, indicated also that the government finances would be severely affected because of these suits for added compensation, under cost plus war contracts and for tax deductions under the Internal Revenue Code. The representatives of labor, on the other hand, denied that the decision in the *Mt. Clemens* case was any surprise to the employers. They claimed it was clearly foreshadowed by the Court's definition of em-


26 Hearings before Sub-Committee of Sen. Comm. on Judiciary on S. 70, 80th Cong., 1st sess., pp. 49, 65, 92 (1947). The suits against twelve leading aircraft manufacturers were said to total $461,000,000. The working capital of the defendants was said to be but $366,365,000.

27 Hearings before a subcommittee of the Senate Committee on the Judiciary, 80th Cong., 1st sess., on S. 70, Jan., 1947; Hearings before Subcommittee 2 of House Committee on Judiciary on H.R. 584, 2157 and H. J. Res. 91, Feb., 1947.

28 It was contended that the suits actually commenced were but a small fraction of those that might be brought. It was estimated that the entire amount of claims possible under these decisions might aggregate forty billions of dollars. Hearings before Subcommittee 2 of House Committee on Judiciary on H.R. 584 and H. J. Res. 91, 80th Cong., 1st sess., at p. 381 (1947). The position of industry on these bills may be gleaned by the articles of Messrs. Smethurst and Haslam, "'Portal to Portal' and Other Retroactive Liabilities," 15 Geo. Wash. L. Rev. 131 (1947), and Cotter, "Portal to Portal Pay," 33 Va. L. Rev. 44 (1947).
employment in the *Tennessee Coal and Iron Co.* case and by repeated interpretations of the Wages and Hours Administrator. They contended, therefore, that the plight in which industry found itself was due to its intransigent refusal to accept the clear requirements of the act. Labor also argued that the claimed danger to the employers' financial security by the suits pending was much magnified. The amounts stated in the suits represented merely maximum estimates of the employees' hopes, and it was reasonable to suppose that actual recovery would be much under the stated claims. Lastly, they contended that any act of Congress depriving employees of their right to recover overtime pay, under the principles declared by the Supreme Court would, if retroactive, be clearly unconstitutional under the Fifth Amendment.

The arguments of industry's representatives prevailed with the majority of both the Senate and the House committees, and bills were reported out designed to prevent employees from bringing suits against employers based in the portal-to-portal principle. Both committees stressed the magnitude of these suits and their possible serious effect on the economy not only of industry but of the government itself. The bill which was reported out, H. R. 2157, was long and vigorously debated by Congress. The larger part of the argument against the bill concerned, however, sections thereof altering certain provisions of the Fair Labor Standards Act for the future, it being charged that the employing class was seizing the present opportunity generally to weaken that act, contrary to the interests of the working class. Few denied that the pending and possible future suits on the portal-to-portal claims were serious problems in the national economy. The bill was passed by Congress and approved by the President May 14,
President Truman’s message considered the bill’s primary purpose to be to “eliminate the immense potential liabilities which have arisen because of the portal-to-portal claims.”

II

The Portal-to-Portal Act

Section 1 of the act contains the “Findings and Policy” of Congress. It finds that the Fair Labor Standards Act “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. . . .” The payment of such liabilities would seriously affect the financial stability of many employers, curtailing employment, and constituting “a substantial burden on commerce and a substantial obstruction of the free flow of goods in commerce.” The Public Treasury would be seriously affected by tax refund claims and by claims under war contracts. The “courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged.” As far as the employees are concerned, they “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.” The purpose of the act is therefore declared to be “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.”

Part II of the act, consisting of sections 2 and 3, relates solely to “Existing Claims.” Section 2 is the decisive one: “No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or

Amendments by the Senate to H.R. 2157 necessitated a conference committee and it was the revised conference bill which ultimately passed both houses and was signed by the President.

93 Cong. Rec. 5418 (May 14, 1947).

The Walsh-Healey Act, 49 Stat. L. 2036 (1936), 41 U.S.C. (1940) §§ 35-45 and the Bacon-Davis Act, 49 Stat. L. 1011 (1935), 40 U.S.C. (1940) § 276 (a) (c), provide that contracts between the government and private contractors to furnish supplies and materials, or to construct or repair or alter public buildings, shall
after the date of the enactment of this Act), on account of the failure of such employer . . . to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—(1) an express provision of a written or un-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or (2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity. . . . ”

Sub-section (c) provides that “in determining the time for which an employer employed an employee there shall be counted . . . only that time during which the employee engaged in activities which were compensable” as above provided. Sub-section (d) provides that no court, state or federal, shall have jurisdiction to enforce any liability, civil or criminal, in respect to claims for minimum wages or overtime pay, unless the activity for which compensation is claimed meets the requirements set forth in section (a) above.

It will be seen that these sections, if constitutional, preclude employees from recovering minimum wages or overtime pay in respect to travel or activities preliminary or postliminary to productive work, unless such travel and activities were made compensable by contract or custom. They abrogated and are intended to abrogate the holdings of the Court in the Tennessee Coal and Iron, the Jewel Ridge and Mt. Clemens Pottery cases.

contain provisions as to the minimum wages, and as to the former act, maximum hours, of the employees engaged in such contracts. In case of breach of such provisions by the contractor the government may by suit or by withholding payments to the contractor collect from the contractor the underpaid wages and pay the same to the employees of the contractor. In addition, the government may cancel the contract and secure new contracts for the supplies, the added cost, if any, to be charged against the contractor. The constitutional right of Congress to alter retroactively these acts is not as question-able as in the case of the Fair Labor Standards Act, since in form, at least, they amount to mere waivers by the government of its contract rights. This article discusses, therefore, only the operation of the Portal-to-Portal Act on the Fair Labor Standards Act.

The above sections are the heart of the Portal-to-Portal Act as far as past claims are concerned. Other provisions relating to past claims forbid the assignment of claims not based on “an activity” as above defined [§ (2) (e)]; allow compromises of claims under the Fair Labor Standards Act, “if there exists a bona fide dispute” except that the compromise cannot be based on a wage rate less than that specified in the act; and permit the employee to waive his right to liquidated damages under that act (§ 3). These latter provisions are to avoid Brooklyn Bank v. O’Neil, 324 U.S. 697, 65 S.Ct. 895 (1945) and Schulte, Inc. v. Gangi, 328 U.S. 108, 66 S.Ct. 925
III

THE CONSTITUTIONAL QUESTION

Whether the Portal-to-Portal Act, insofar as it applied to past claims, was within the constitutional power of Congress was extensively considered both in committee and on the floor of Congress. Interested parties filed memoranda presenting arguments for and against the validity of the proposed act. This article will discuss the major ones.

A. In General

A deep-seated antipathy to retroactive laws undoubtedly exists. It is felt that legislation is properly directed to the future, and not to depriving persons of rights, either in tangibles or intangibles, previously lawfully acquired. On the philosophic side, this antipathy

(1946), holding that claims under the act can neither be compromised nor the right to liquidated damages waived.

Section 6 provides a new statute of limitations. The Fair Labor Standards Act contains no statute of limitations, but the limitations applicable are those of the state of the forum. Loggins v. Steel Construction Co., (C.C.A. 5th, 1942) 129 F. (2d) 118. This resulted in greater diversity. Accordingly, as to future claims the Portal-to-Portal Act enacts a two year statute of limitations (§ 6a). Past claims are barred by a two-year statute or by the applicable state statute, whichever is shorter, provided, however, that if the two-year statute applies, the claimant shall have 120 days after the enactment of the act to commence action [§§ 6 (b) (c)]. Whether these subsections standing alone are constitutional depends on whether the courts will hold 120 days a reasonable time in which to commence suit. See Reid v. Solar Corp., (D.C. Iowa 1946) 6 W. H. Cas. 508, and notes, 49 A.L.R. 1263 (1927), 120 A.L.R. 765 (1939).

Section 9 of the act precludes recovery of claims where the employer's failure to pay was due to good faith reliance on an administrative ruling or order.

Section 11 permits a court to refuse to award liquidated damages where the employer's failure to pay was in good faith and on reasonable grounds. If the liquidated damages could be considered penalties, this provision would be constitutional. Norris v. Crocker, 13 How. (54 U.S.) 429 (1851); United States ex rel. Rodriguez v. Weekly Publications, (D.C. N.Y. 1944) 54 F. Supp. 476. However, it is held that the double recovery provision of § 16 of the Fair Labor Standards Act is not a penalty but liquidated damages. Overnight Motor Co. v. Missel, 316 U.S. 572, 62 S.Ct. 1216 (1942).

In these ancillary provisions lurk interesting constitutional questions of which limitations of time and space prevent discussion herein.

38 A short discussion is contained in the report of the Senate and House Judiciary Committees, [S. Rep. 48, 80th Cong., 1st sess., p. 43 (1947); H. Rep. 584 and H. J. Res. 91, 80th Cong., 1st sess., p. 6 (1947)]. Extensive memoranda were submitted by the National Association of Manufacturers and the Congress of Industrial Organizations. The author expresses his thanks to these organizations for furnishing him copies thereof. A memorandum of Dean Emeritus Henry M. Bates of the Michigan Law School supporting the constitutionality of the proposed bill was also inserted in the Congressional Record, 93 Cong. Rec. 2306 (March 19, 1947).
has been explained by the need to recognize and protect the social interest in the security of acquisitions and transactions. It finds expression in the provisions of the Constitution of the United States prohibiting legislation impairing the obligation of contracts and, in the criminal field, prohibiting *ex post facto* laws. A not inconsiderable number of states have constitutional provisions against retroactive laws. The doctrine that previously vested rights cannot be destroyed by subsequent legislative acts is forcefully affirmed by Mr. Justice Swayne in *Osborn v. Nicholson* in the following language:

“This is a principal of universal jurisprudence. It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a flood tide of intolerable evils. It would be contrary to ‘the general principles of law and reason’ and to one of the most vital ends of government.”

Although, as will be later argued, the Portal-to-Portal Act, as applied to its particular facts, may be sustained, the presumption would seem to be against its validity. Numerous decisions, federal and state, have held it beyond the constitutional power of the legislature to deprive a person of a right of action previously vested. *Steamship Co. v. Joliffe* was a writ of error to the California court. A statute of the state provided that when a licensed pilot offered his services to a vessel and his services were declined, he should nevertheless collect one-half the scheduled fee. While the case was pending before the Supreme Court of the United States, California repealed the statute. The Court nevertheless held that the repeal did not affect the claimant’s right of recovery. “The claim of the plaintiff below for half-pilotage fees, resting upon a transaction regarded by the law as *quasi-contract*, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute,

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40 See Constitution of Missouri, Art. II, § 15 (1875): “No law . . . retroactive in its operation . . . can be passed by the General Assembly.” For further references, see 2 SUTHERLAND, STATUTORY CONSTRUCTION, 3d ed., 119 (1943).
41 13 Wall. (69 U.S.) 654 at 662 (1871).
42 Id. at 662. The case, together with White v. Hart, 13 Wall. (60 U.S.) 646 (1871), held that neither a state statute nor the Thirteenth Amendment prohibiting slavery deprived the holder of a note, previously lawfully executed for the purchase price of a slave, of his right to recover on the note.
43 See infra, p. 736.
44 2 Wall. (69 U.S.) 450 (1864).
and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute." In *Ettor v. Tacoma*, a statute of the State of Washington made the city liable for consequential damage in grading streets, thus extending the general rule. With this statute in force the defendant city graded a street damaging plaintiff's property. Then the city repealed the statute allowing recovery for damages. It was held that such repeal could not prevent recovery by plaintiff in a subsequent action. "The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation." *Forbes Boat Line v. Board of Commissioners* was a suit to recover canal tolls paid by plaintiff to defendant under protest, the statute at the time exempting plaintiff from tolls. An action was brought to recover the tolls unlawfully exacted. While the case was still before the courts, the legislature passed a statute purporting to validate the collection. It was held that the legislature lacked the constitutional power to deprive plaintiff of his cause of action. *Lynch v. United States* was a suit to recover amounts claimed due under a term life insurance policy issued under the War Risk Insurance Act of 1917. The insured veteran had died while totally disabled and under the terms of the policy, as issued, the beneficiary was entitled to recover the face amount of his policy. Then, in 1933, Congress as a part of a general economy measure repealed "all laws granting or pertaining to yearly renewable term insurance." It was held that this did not preclude the beneficiary from recovering in a subsequent suit the amount of the insurance. The beneficiary had a vested contract right with the United States, which Congress could not abrogate.

45 Id. at 457, 458. This decision was rendered prior to the Fourteenth Amendment and apparently rests on the contract clause of the federal Constitution. Although this clause applies to the states and not to the federal government, it has since been established that the due process clause of the Fifth Amendment prohibits Congress from impairing the obligation of contracts. *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565 (1912); *United States v. Northern Pacific Ry. Co.*, 256 U.S. 51 at 64, 41 S.Ct. 439 (1921); *Lynch v. United States*, 292 U.S. 571 at 578, 54 S.Ct. 840 (1934); *Perry v. United States*, 294 U.S. 330 at 353, 55 S.Ct. 432 (1935); *Continental Bank v. Rock Island Ry.*, 294 U.S. 648 at 680, 55 S.Ct. 595 (1935).

46 228 U.S. 148, 33 S.Ct. 428 (1913).
47 Id. at 156.
50 Other cases holding that a statute cannot abrogate previously vested rights are: *Osborn v. Nicholson*, 13 Wall. (80 U.S.) 654 (1871); *Angle v. Chicago, St. Paul Ry.*, 151 U.S. 1 at 19, 14 S.Ct. 240 (1894), right of action for tort; *Choate v.*
In some of these cases the previous right was based on contract, while the right of employees to recover minimum wages and overtime pay is a statutory right based on the Fair Labor Standards Act. A brief survey of the above cited authorities shows clearly, however, that the principle forbidding retroactive annulment of previously existing rights extends not only to rights secured by contract but also to rights acquired by non-consensual transactions. It has, however, been asserted that when a right is based on statute, the legislature which granted the right may even retroactively take it away.\(^{51}\) California cases cited for the proposition are based on a provision of the California Code that all statutes are subject to repeal unless otherwise expressly provided, and "persons acting under any statute act in contemplation of this power of repeal."\(^{52}\) Norris v. Crocker\(^{58}\) and United States ex rel. Rodriguez v. Weekly Publications,\(^{64}\) which have also been cited, were suits to re-


\(^{51}\) See 1 SUTHERLAND, STATUTORY CONSTRUCTION, 3d ed., 524 (1943). Cf., however, p. 526, stating that this rule does not apply where the rights are vested.


\(^{58}\) 13 How. (54 U.S.) 429 (1851).

\(^{64}\) (C.C.A. 2d, 1944) 144 F. (2d) 186.
cover statutory penalties. The penalty is imposed in the interest of the state and not of the individual and therefore the state may at any time prior to judgment change its policy. Of a similar character are statutes authorizing condemnation of land for public purposes. The repeal of the statute, prior to final judgment, abrogates the right. It has also been held that grants of mere gratuities by the government may be annulled prior to actual payment. The author believes that it is not a universal or even general principle that rights based on statute may at any time be abrogated. Steamship Co. v. Joliffe, Ettor v. Tacoma, Asiatic Petrol Co. v. Collector and many of the state cases previously cited involved claims based on statutory provisions, and yet they were held immune from abrogation. Minimum wages and overtime pay under the Fair Labor Standards Act are not penalties or privileges. Of course, it is a matter of public concern, and yet their recovery indubitably enures to the private benefit of the employee. It is unlike the taking of property under eminent domain statutes, which can be sustained only when a direct public benefit is involved. This brings us to another argument advanced to support the Portal-to-Portal Act.

B. The Commerce Power

Granting the truth of the assertion in section 1 of the act that the portal-to-portal suits burden interstate commerce, the situation clearly comes within the general competence of Congress under the commerce clause of the federal Constitution. From this it is argued that, in order to protect that commerce, Congress may destroy the employees' previously vested rights of action. It is of course true that rights of property, and a cause of action is certainly no more than that, may subsequently be restricted by legislation lying within recognized governmental powers. Thus an owner's right to use his real estate for any purpose he may desire may lawfully be restricted by a subsequent

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58 2 Wall. (69 U.S.) 450 (1864).
60 297 U.S. 666, 56 S.Ct. 651 (1936).
61 See note 50, supra.
zoning law, even though the effect may be to diminish the value of his property.\textsuperscript{62} The continuation of existing property uses, found to be detrimental to the public health and safety, may also under the police power be prohibited.\textsuperscript{63} In cases of this type, however, the legislation does not, as does the Portal-to-Portal Act, attempt to take away \textit{all} the owner's rights to his property, but merely limits his enjoyment of them in the future. It may be granted that the question is one of degree, but in constitutional law, questions of degree often determine the point at issue. Cases are extremely rare which sustain complete destruction of private rights, even though a public purpose may be served thereby. In \textit{Pennsylvania Coal Co. v. Mahon},\textsuperscript{64} a coal company had leased its surface rights to coal lands, expressly reserving the right to mine the coal and providing that the surface lessee assumed the risk of any damage resulting therefrom. Then the Pennsylvania legislature passed a statute forbidding all mining of anthracite coal which caused the subsidence of dwellings owned by others. The Court held the statute unconstitutional. The effect of it was to deprive the owner of the coal of all its value. When a statute goes that far, the state must proceed under eminent domain, paying for what it has taken.\textsuperscript{65} The recent case of \textit{Fleming v. Rhodes}\textsuperscript{66} does seem at first glance, however, to support the right of government to abrogate completely existing rights of action. In the interim between the expiration of the Emergency Price Control Act on June 30, 1946 and the enactment of the Price Control Extension Act, on July 25, 1946, a landlord secured a judgment for eviction of his tenant. On the enactment of the later act, the price administrator brought a bill to enjoin the landlord from enforcing his judgment. The Court sustained the injunction. It was held unnecessary to consider the retroactive features of the Extension Act. The action of the administrator was merely as to \textit{future} proceedings. "Federal regulation of future action based upon rights

\textsuperscript{64} 260 U.S. 393, 43 S.Ct. 158 (1922). The opinion by Justice Holmes states excellently the proposition stated immediately above by this author.
\textsuperscript{65} In Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246 (1928), however, the court sustained a Virginia statute requiring the destruction of red cedar trees, which communicated a rust to apple orchards, a valuable industry of the state. The case does show that the police power may extend to complete and uncompensated destruction of private property, but it should be noticed that the cedar trees were physically destroying the apple trees. There is presented, therefore, something of an analogy to the abatement of a nuisance.
\textsuperscript{66} 331 U.S. 100, 67 S.Ct. 1140 (1947).
previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that the provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts. Were it otherwise the paramount powers of Congress could be nullified by 'prophetic discernment.' The rights acquired by judgment have no different standing.”

Taken literally, the above language sustains section 2 of the Portal-to-Portal Act, which merely prevents courts in the future from entertaining jurisdiction of suits based on the congressionally repudiated portal-to-portal suits. Such an inference, however, would almost completely nullify the protection the court has thrown about property rights under the due process clause. The effect of most of the statutes held unconstitutional because retroactively destroying previously vested rights is merely to prevent future actions to enforce them. But the value of a right of action depends entirely on the power to enforce it. Taking away the remedy destroys the right, and as will be seen below, many statutes directed in words at the future remedy have been held unconstitutional for that reason. The true explanation of Fleming v. Rhodes seems to be this. Neither the Emergency Price Control Act of 1942, nor the Price Control Extension Act of 1946, took away from the landlord all his property in the leasehold. They limited those rights by fixing the rents he could charge and his right to repossession. The validity of such emergency legislation is established.

The judgment that the landlord had obtained in this case merely affirmed these rights and was no more immune from this over-riding power of Congress than were his original rights. Therefore, the decision does not necessarily sustain the Portal-to-Portal Act, which does not merely limit the employee's right. It destroys it.

It is well settled that rights obtained by private contracts between

67 For this last, the court cited Wright v. Union Central Life Ins. Co., 304 U.S. 502, 58 S.Ct. 1025 (1938), holding that § 75 (c) of the Bankruptcy Act constitutionally permitted the extension of the period of redemption from a mortgage foreclosure even though resting on a prior judgment for foreclosure.

68 See supra, pp. 733-736.

69 See also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158 (1922).


71 Fleming v. Rhodes may also have been influenced by the circumstance that when the landlord received his judgment for eviction it was generally known that Congress would extend the Price Control Act. The landlord's "forehanded" attempt to thwart subsequent legislation may not have been regarded as an interest deserving much protection.
individuals, though expressly protected by the contract clause of the Constitution,\(^{72}\) may be abrogated by subsequent legislation lying within granted governmental powers. Thus a gold clause in railroad bonds was held nullified by the Joint Resolution of June 5, 1933, enacted under the power of Congress to regulate the currency.\(^{78}\) Also, a contract between a railroad and an injured employee granting the latter a lifetime pass could not be enforced when Congress later under the commerce clause prohibited a pass of that nature.\(^{74}\) These decisions, however, rest on considerations not applicable to the rights of action vested in the employees under the Fair Labor Standards Act. The contract cases rest on the sound proposition that individuals by private contracts cannot secure exemption from the general operation of subsequent legislative enactments under undisputed governmental powers.\(^{75}\) The right of employees to recover minimum wages and overtime pay under the Fair Labor Standards Act is not based on contract with the employers, but on the act of Congress. That this is an important distinction is shown by *Perry v. United States*\(^{78}\) holding that gold payment clauses in the government’s own bonds may not be abrogated by Congress.\(^{77}\)

C. Emergency Legislation

The Portal-to-Portal Act (section 1) declares an emergency, and *Home Building & Loan Association v. Blaisdell*\(^{78}\) supporting mortgage moratorium legislation is relied upon to support the annulment

\(^{72}\) See supra, note 45, for cases holding that the due process clause of the Fifth Amendment prevents Congress from impairing the obligation of contracts.


\(^{75}\) See Hughes, J, in Philadelphia, B. & W. R. Co. v. Schubert, 224 U.S. 603 at 613-614, 32 S.Ct. 589 (1912). “To subordinate the exercise of the Federal authority to the continuing operation of previous contract, would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose, by prophetic discernment to bring within the range of their agreements.”

\(^{78}\) 294 U.S. 330, 55 S.Ct. 432 (1935).

\(^{77}\) This was declared by the Court though recovery was denied on other and somewhat dubious grounds.

\(^{79}\) 290 U.S. 398, 54 S.Ct. 231 (1934).
of the portal-to-portal suits. The Blaisdell case does not go that far, however. In the first place the mortgage moratorium statute there sustained was for the period of the emergency only, while the Portal-to-Portal Act is a permanent enactment. In the second place the mortgage moratorium statute did not destroy the mortgagee's right to collect his debt, or to take the mortgaged property in satisfaction thereof. It merely postponed it, the mortgagor in the meantime being required to pay a reasonable rent. Emergency rent regulation sustained in Block v. Hirsh\(^79\) and in Marcus Brown Holding Co. v. Feldman\(^80\) was of similar limited duration and operation. When so-called emergency legislation has been of indefinite operation, or when it has operated to destroy and not merely postpone a right it has been declared unconstitutional.\(^81\) The Portal-to-Portal Act is of permanent operation and it destroys and not merely postpones the portal-to-portal suits. The Blaisdell decision does not support it.

The writer does not contend that the government, acting under its police power or in an emergency may never destroy previously vested property rights. The common law recognized that private property could be demolished without right to compensation, when necessary to stop a conflagration.\(^82\) Disease-spreading red cedar trees could also be cut down to save the dominant apple industry.\(^83\) Yet these are exceptional cases. In general, the Fifth Amendment provides that private property shall not be "taken" for public use without compensation. This applies even to a taking under the war power.\(^84\) Unless the portal-to-portal claims come, as the author believes, under the qualification made below,\(^85\) if it is necessary to preserve commerce and the public treasury that these claims be destroyed, the government, and not the individual claimants should stand the cost.

\(^79\) 256 U.S. 135, 41 S.Ct. 458 (1921).
\(^80\) 256 U.S. 170, 41 S.Ct. 465 (1921).
\(^81\) W. B. Worthen Co. v. Thomas, 292 U.S. 426, 54 S.Ct. 816 (1934), state statute exempting proceeds of life and disability insurance policies from seizure under judicial process unanimously held unconstitutional when applied to prior debts; Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 55 S.Ct. 854 (1935), Frazier-Lemke amendment to the Bankruptcy Act, depriving mortgagee of right to hold lien until debt is paid, and of right to have mortgaged property sold at public sale at which mortgage could bid, unanimously held contrary to due process of law; Treigle v. Acme Homestead Assn., 297 U.S. 189, 56 S.Ct. 408 (1936), state statute depriving members of building and loan association of previously granted rights to withdraw their shares held unconstitutional.
\(^82\) Bowditch v. Boston, 101 U.S. 16 (1879).
\(^83\) Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246 (1928).
\(^85\) See infra, p. 745.
D. Jurisdiction of Courts

The Portal-to-Portal Act attempts to achieve its ends by denying jurisdiction to both federal and state courts of suits for minimum wages and overtime compensation, unless the claims are based on contract or custom as provided in section 2(a) of the act. It is true that under Article III of the Constitution Congress has the power to regulate the jurisdiction of the federal courts. It also seems that Congress may limit the power of state courts to deal with claims based on federal statutes. These principles, however, cannot sustain the present enactment. In the first place, the Portal-to-Portal Act is not a jurisdictional act, but a direction to the courts to decide suits for minimum wages and overtime compensation by specified criteria. The distinction is shown by United States v. Klein. Klein sued the United States in the Court of Claims for the value of certain property taken by the Union armies during the Rebellion. The statute permitted such suits where it was shown that the claimant had not aided the Rebellion. In the instant case, Klein had given aid, but had subsequently been pardoned by the President. The Court of Claims entered judgment for claimant relying on the pardon to wipe out claimant’s previous disability. While the case was pending on appeal Congress enacted that the pardon should not authorize a recovery and that the Supreme Court should have no jurisdiction of the appeal, unless it were shown that the claimant had never aided the enemy. The Supreme Court, however, took jurisdiction of the appeal. The Act of Congress was not a jurisdictional act but an attempt to prescribe how the court should decide the case. This Congress could not do. The Court took jurisdiction and affirmed the court below.

86 See supra, p. 730.
87 McNulty v. Batty, 10 How. (51 U.S.) 72 (1850); Ex parte McCardle, 7 Wall. (74 U.S.) 506 (1869); In re Hall, 167 U.S. 38, 17 S.Ct. 723 (1897); Kline v. Burke Construction Co., 260 U.S. 226 at 234, 43 S.Ct. 79 (1922), dictum.
89 13 Wall. (80 U.S.) 128 (1871).
90 "Undoubtedly the legislature has complete control over the organization and existence of that court [i.e., the Court of Claims] and may confer or withhold the right of appeal from its decisions. . . .

"But the language of the proviso shows plainly that it does not intend to withhold jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court has adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. . . .

"The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

"It seems to us that this is not an exercise of the acknowledged power of Con-
Payne v. Griffin\(^91\) is also persuasive. This was a suit in the district court for damages for violation of regulations under the Emergency Price Control Act. The defendant contended that the act was unconstitutional. The plaintiff replied that section 204 (d) of the act took from the court jurisdiction to consider its constitutionality. This, Judge Deaver denied, saying: "A district court can entertain only such cases as Congress gives it jurisdiction to try. Jurisdiction to try any case may be withheld altogether. But once Congress confers jurisdiction to try a case, it cannot withhold power to decide the case according to the applicable law. . . . The distinction is that, while Congress can determine what cases a court can try, it cannot direct what law shall control the decision."\(^92\) The Portal-to-Portal Act does not take away from the courts jurisdiction to try claims for wages. It prescribes how they must be decided.

In the second place, if a claimant's right to recover a previous claim is a vested right, it cannot be taken away by subsequent legislation, as was held in Steamship Co. v. Joliffe,\(^93\) Ettor v. Tacoma,\(^94\) and comparable cases.\(^95\) It is clear that the legislature may not abrogate that right by the simple device of denying to its courts jurisdiction to enforce the claim. In Angel v. Bullington,\(^96\) the defendant, a citizen of North Carolina, had given notes secured by a mortgage on Virginia land to plaintiff, a citizen of the latter state. The mortgage was foreclosed by power of sale and a deficiency resulted. The plaintiff brought suit in a North Carolina court to recover the deficiency. That state, however, had a statute providing that, when mortgaged property had been sold under power of sale, the mortgagee "should not be entitled to a deficiency judgment on account of such mortgage." The North Carolina court\(^97\) held for the defendant on the ground that the state of the forum had denied to its courts jurisdiction of such suits. The Supreme Court of the United States held the statute of North Carolina unconstitutional as applied to the situation. "A State cannot escape its constitutional obligations by the simple device of denying jurisdiction to make exceptions and prescribe regulations to the appellate power." United States v. Klein, 13 Wall. (60 U.S.) 128 at 145-146 (1871).

92 Id. at 591.
93 2 Wall. (69 U.S.) 450 (1864).
95 See, supra, notes 48-50.
97 Bullington v. Angel, 220 N.C. 18, 16 S.E. (2d) 411 (1941).
in such cases to Courts otherwise competent."\(^{98}\) The North Carolina court "could not put a federal claim aside, as though it were not in litigation, by the talismanic word 'jurisdiction.'"\(^{99}\) It is also a fundamental tenet of constitutional law that state statutes taking away, or seriously restricting the remedy to enforce previous contracts are unconstitutional as impairing the obligation of contracts.\(^{100}\) For similar reasons the Frazier-Lemke Act of Congress was unconstitutional under the due process of law clause of the Fifth Amendment.\(^ {101}\) *Brinkerhoff-Faris Co. v. Hill*\(^ {102}\) clearly shows that the government may not deprive a claimant of an existing cause of action by denying to its courts jurisdiction of the cause. The plaintiff brought a bill in the lower court of Missouri to restrain the collection of certain taxes claimed to violate equal protection under the federal Constitution. Such a suit was a recognized remedy under the state decision then in effect. On the appeal, however, the Supreme Court of the state held, reversing the prior decisions, that the bill would not lie, because the plaintiff had an adequate remedy by petitioning the State Tax Commission for relief. In a unanimous decision the Supreme Court of the United States held that the plaintiff had been denied due process of law. "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."\(^ {103}\) We repeat, that if it is held that the right of employees to recover claims arising under the Fair Labor Standards Act as construed by the court in the

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The actual decision in the principal case was for the defendant on the ground that the North Carolina judgment was res judicata.

\(^{100}\) *White v. Hart*, 13 Wall. (71 U.S.) 646 (1871), in this case the constitution of Georgia provided: "no court or officer shall have—jurisdiction to try or give judgment on or enforce any debt the consideration of which was a slave or the lien thereof"; *Van Hoffman v. Quincy*, 4 Wall. (71 U.S.) 535 (1867); *W. B. Worthen v. Thomas*, 292 U.S. 426, 54 S.Ct. 816 (1934);


\(^{102}\) 281 U.S. 673, 50 S.Ct. 451 (1930).

\(^{103}\) Id. at 682. In *Ettor v. Tacoma*, 228 U.S. 148, 33 S.Ct. 428 (1913), the Court also said (p. 156): "The necessary effect of the repealing act . . . was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right."
Mt. Clemens Pottery case is a vested right, Congress may not abrogate it by the simple device of withholding from all courts jurisdiction to enforce such claims. Due process of law in the Fifth Amendment places the same limitations on Congress in this respect as the Fourteenth Amendment, the full faith and credit and the contract clause place on the state legislatures.  

E. The Judicial Power

Protestants of the constitutionality of the Portal-to-Portal Act have contended that the above discussed feature represents an attempt by Congress to exercise judicial powers, and so violates the doctrine of separation of powers implicit in the federal Constitution. Reliance is had on Justice Holmes’s often cited definitions of judicial and legislative powers in Prentis v. Atlantic Coast Line: “A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. . . . Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter. . . .” Because Part I of the act relates to situations arising prior to its enactment, the conclusion is drawn that it is an unconstitutional exercise of judicial power by Congress. This will not do. Such a conclusion would invalidate all retroactive legislation. As will shortly be seen, retroactive legislation is often sustained.

A more serious contention is that the act in question is an attempt by Congress to prescribe to the courts how and on what criteria they must decide suits pending before them. In United States v. Klein just discussed the Supreme Court struck down the act of Congress which directed the courts not to consider in pending claims the effect of the President’s pardon. The Court held that this attempt of Congress to

104 Cases cited to support this power are distinguishable. Where the suit is against the state or the United States, the right to sue may be abrogated, since a sovereign government may at any time withdraw its consent to be sued. Lynch v. United States, 292 U.S. 571 at 581, 54 S.Ct. 840 (1934). The portal-to-portal suits are not against the United States. In re Hall, 167 U.S. 38, 17 S.Ct. 723 (1897) did not involve a vested right but a gratuity. Ex parte McCardle, 7 Wall. (U.S.) 506 (1869) did not take away all right to sue but merely the right to appeal, and the right to appeal is not a constitutional right. Similarly, Bowles v. Willingham, 321 U.S. 503, 64 S.Ct. 641 (1944) did not take away the right to contest the orders of the Price Administrator. It restricted that right to proceedings before the Emergency Court of Appeals.

105 211 U.S. 210 at 226, 29 S.Ct. 67 (1908).

106 Supra, p. 741.
dictate the court's basis of judgment was unconstitutional. So in the instant statute Congress is endeavoring to direct the courts in pending suits to eliminate from consideration all activities of employees not included in the "workweek" by contract or custom. Viewed solely in this light the Portal-to-Portal Act may well fall. But that act is not merely a direction to the courts how to decide existing action. Section 2 also prescribes a general rule. It is an act of legislation, even though retroactive. If not invalid, because of due process of law requirements, the court must apply it. Certainly the doctrine that forbids the legislative body to prescribe to the courts how they must decide pending causes of action does not preclude the legislature from changing the law. The power to make law rests with the legislature and, in theory at least, not in the courts. In a number of the cases to be considered in the next subsection of this article it will be found that the courts have frequently applied, even in pending litigation, new rules of law promulgated by the legislature.

F. "Equitable" Considerations

Although, as we have seen, retroactive statutes, that is, those applying to past transactions, are inherently suspect, and when they deprive persons of previously "vested rights" are generally invalid, it by no means follows that all retroactive statutes are unconstitutional. So-called curative statutes, which validate retroactively defects in previous real estate transfers; in transactions of private and municipal corporations; in tax levies; and even in judicial proceedings are exceedingly common and have been generally upheld. It has been held also that new statutes, which validate contracts, invalid when entered into because of non-compliance with some legal requirement, are

107 In reference to the Klein case the Court has recently said [Pope v. United States, 323 U.S. 1 at 8, 65 S.Ct. 16 (1944)] "Decision was rested upon the ground that the judicial power over the pending appeal resided with this Court in the exercise of its appellate jurisdiction, and that Congress was without constitutional authority to control the exercise of its judicial power and that of the court below by requiring this Court to set aside the judgment of the Court of Claims by dismissing the suit."

108 Supra, p. 730.

109 Reference may be here made to the holding under the Erie Railroad v. Tompkins doctrine that the federal courts, even in the course of litigation must apply new state court decisions changing previous doctrine. Can it be contended that the state courts are dictating to the federal courts the manner in which they are to decide particular cases? See Huddleston v. Dwyer, 322 U.S. 232, 64 S.Ct. 1015 (1944).

110 See supra, pp. 732-736.

111 See 2 SUTHERLAND, STATUTORY CONSTRUCTION, 3d ed., 136-160 (1943) for a collection of cases.
neither impairments of the obligation of contracts nor contrary to due process of law. In *McNair v. Knott*, a national bank had deposited with a state, securities to secure the deposit with it of state funds. Doubt was raised whether such deposits were not ultra vires under the national banking statutes. To remove the doubt Congress passed a retrospective statute affirming the power of the banks to make such deposits. The bank, however, brought suit to recover the deposits made, claiming that they were ultra vires and illegal when made, and that Congress could not retroactively make them legal. The Supreme Court rejected the contention. "Placing the stamp of legality on a contract voluntarily and fairly entered into by parties for their mutual advantage takes nothing away from either of them. No party who has made an illegal contract has a right to insist that it remain permanently illegal.—No person has a vested right to be permitted to evade contracts which he has illegally made." Retroactive legislation has also been held constitutionally adequate to annul pending causes of action, and even judgments, by the operation of the ratification principle. Thus a claim to recover taxes levied ultra vires by a subordinate governmental unit was held legally abrogated by a later act of the higher legislative body ratifying the act of the subordinate.

Since, therefore, some retroactive statutes are unconstitutional deprivations of property, and some are not, the question is whether any principle exists to determine which is which. The writer believes that a principle, simple in statement though somewhat difficult in application, does exist. If the retroactive statute defeats claims based on the reasonable expectations of the parties at the time the legal transaction occurred, the statute constitutes an unconstitutional deprivation of property without due process. On the other hand, if the statute

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112 302 U.S. 369, 58 S.Ct. 245 (1937).
113 Id. at 102. See also Satterlee v. Matthewson, 2 Pet. (27 U.S.) 380 (1829); Watson v. Mercer, 8 Pet. (33 U.S.) 88 (1834), holding such statutes not to impair the obligation of contracts.
In Addison v. Holly Hill Co., 322 U.S. 607, 64 S.Ct. 1215 (1944), the Court held that the Wage and Hour Administrator who had made an ultra vires regulation as to coverage under the Fair Labor Standards Act could retroactively substitute a new and valid regulation which would govern the claim then under litigation. See also Securities and Exchange Comm. v. Chenery Corp., 332 U.S. 194, 67 S.Ct. 1575 (1947).
115 See 2 SUTHERLAND, STATUTORY CONSTRUCTION, 3d ed., 117-129 (1943); Smith, "Retroactive Laws and Vested Rights," 5 TEX. L. REV. 231 (1927), 6 TEX. L. REV. 409 (1928), where the question is discussed.
merely carries out those reasonable expectations it is valid.\textsuperscript{118} Some-
what less analytically it has been said that retroactive statutes are valid
when they are not “contrary to the justice and equity of the case.”\textsuperscript{117}

These principles are proven and exemplified in the decided cases. It will be noticed that in some of the cases the effect of the retroactive statute is to defeat an existing cause of action. In others the effect is to deprive a party of a defense to the action, which, but for the statute, he would have had. From the constitutional standpoint the writer sees no distinction between the two types of statutes. In both cases the ultimate effect is to deprive the party affected of money or other property. Practically speaking, it is immaterial whether the injury is inflicted by depriving the party of a previously existing claim, or whether its effect is to impose upon him a liability, which but for the statute, he would not have had.

\textit{Goshen v. Stonington}\textsuperscript{118} is the pioneer case. It appeared that in Connecticut many persons in good faith and in supposed compliance with the statute of the state, had had marriages solemnized by ordained but itinerant ministers. Later “on a close investigation of the subject, under the prompting scrutiny of interest, it was made to appear, that there had been an honest misconstruction of the law. . . .”\textsuperscript{119} Only marriages performed by clergymen “settled” in a particular locality were legal. Then the legislature passed a statute validating such mar-
rriages, the effect of which, in the instant case, was to impose upon the defendant township liability for the support of a pauper, which but for the statute would not have rested on it. The court upheld this retro-
active law, saying: “. . . laws of a retroactive nature, affecting the rights of individuals, not adverse to equitable principle, and highly promotive of the general good, have often been passed, and as often approved.”\textsuperscript{120} The purpose of the statute was “to quiet controversy, and promote the public tranquility.” It was within the power of the legislature “to furnish a remedy coextensive with the mischief.”\textsuperscript{121}

\textsuperscript{118} 4 Conn. 209 (1822).
\textsuperscript{119} Id. at 226.
\textsuperscript{120} Id. at 221.
\textsuperscript{121} Id. at 226. See Wister v. Foster, 46 Minn. 484, 49 N.W. 247 (1891), sustaining statute validating deed of a supposed single woman which was invalid when made because the divorce which she had obtained was void for lack of proper publica-
tion. The court observed (p. 486) that the statute “merely gives effect to the inten-
Another leading case is *Danforth v. Groton Water Co.* The plaintiff brought action against defendant for the taking of certain water rights. Judgment was entered for defendant because the plaintiff had not complied with the statute by applying to the county commissioners for an assessment of damages. While the case was pending on appeal before the Supreme Court the legislature enacted a statute providing that no pending action should be dismissed solely on the ground that no prior application had been made to the commissioners. The court in an opinion by Justice Holmes sustained the statute and plaintiff's claim. The claim was a just one. The defendant's defense was based on a technicality, and the Court, quoting from Cooley's *Constitutional Limitations*, said "a party has no vested right in a defense based on an informality not affecting its substantial equities."

The recent Supreme Court case of *Chase Securities Corp. v. Donaldson* both in decision and in the language of the opinion is pertinent. The action was to recover the purchase price of securities
which had been sold the plaintiff without having been registered under
the Minnesota Securities Act. The Supreme Court of the state, reversing
the lower court, held that the action was barred by the then exist­
ing statutes of limitation. While the case was pending on remand,
the legislature lifted the bar of the statute, and judgment was then
rendered for plaintiff. The Supreme Court of the United States held
that the statute, even though it deprived the defendant of his pre­
viously judicially sustained defense, was not contrary to due process.
A statute lifting the bar of the statute of limitations is not uncon constitu­
tional.126 The Court quotes with approval Justice Holmes opinion in
Danforth v. Groton Water Co.;127 "The Fourteenth Amendment does
not make an act of state legislation void merely because it has some
retrospective operation. What it does forbid is taking of life, liberty
or property without due process of law. . . . Assuming that statutes
of limitation, like other types of legislation, could be so manipulated
that their retroactive effects would offend the Constitution, certainly
it cannot be said that lifting the bar of a statute of limitations so as to
restore a remedy lost through mere lapse of time is per se an offense
against the Fourteenth Amendment. Nor has the appellant pointed out
special hardships or oppressive effects which result from lifting the
bar in this class of cases with retrospective force. This is not a case
where appellant's conduct would have been different if the present
rule had been known and the change foreseen. It does not say, and
could hardly say, that it sold unregistered stock depending on a statute
of limitation for shelter from liability. The nature of the defenses
showed that no course of action was undertaken by appellant on the
assumption that the old rule would be continued."128

126 When title to land has been acquired by adverse possession for the period of
the statute of limitations the result is doubtless different. It is so assumed in Campbell
128 325 U.S. 304 at 315, 65 S.Ct. 1137 (1945) (italics supplied). The opinion
re-affirms Campbell v. Holt, 115 U.S. 620, 6 S.Ct. 209 (1885), also sustaining
(2d) 676 (1940) is in accord. Paramino Lumber Co. v. Marshall, 309 U.S. 370, 60
S.Ct. 600 (1940), sustained on similar grounds a private act of Congress ordering
the Employees Compensation Commission to re-open a claim for compensation, though
the same had previously been decided against claimant and the statute of limitations
had run.

Previous usury statutes relieving the borrower from paying legal interest, may also
be retroactively abrogated. The lender may then recover legal interest since this was
not contrary to the intent of the borrower. Ewell v. Daggs, 108 U.S. 143, 2 S.Ct. 408
(1883); Mechanics Bank v. Allen, 28 Conn. 97 (1859). This latter case is similar
to the portal-to-portal situation in that at the time of the transaction there was honest
The general principle of these cases is well expressed in the Ohio Constitution\textsuperscript{129} which after prohibiting “retroactive laws” provides that the legislature “may, by general laws authorize courts to carry into effect, upon such terms as may be just and equitable, the manifest intention of the parties, and officers, by curing omissions, defects and errors in instruments and proceedings arising out of their want of conformity with the laws of this state.”

Although the above-cited decisions sustained statutes retroactively abrogating defenses, statutes have also been sustained which have abrogated previously existing causes of action. In \textit{McFadden v. Evans-Snider-Buel Co.}\textsuperscript{130} one \textit{A}, in Indian Territory had given a chattel mortgage on certain cattle. Under existing law this mortgage was void because \textit{A} was not a resident of the territory. In that situation the plaintiff, a prior judgment creditor of \textit{A}, although he had knowledge of the mortgage, attached the cattle for his debt. Then Congress passed an act validating the chattel mortgage, thus depriving plaintiff of his attachment. The Court upheld the act of Congress and the judgment below giving priority to the mortgage. The plaintiff was not a bona fide purchaser. He parted with no money or other property in reliance on the invalidity of the mortgage. \textit{Graham v. Goodcell}\textsuperscript{131} involved suits to recover of the United States taxes alleged to have been collected illegally. A statute of Congress banned the collection of taxes after five years from the date of the return, and provided that taxes paid thereafter could be recovered by the taxpayer. At this time there was uncertainty whether this statute prohibited collection of taxes by the distress process, and many taxes, not shown to be illegal per se, were collected under this process. Then the Supreme Court held that the limitation did apply to collections by distraint. Accordingly, actions were brought by taxpayers to recover the taxes so paid. In this juncture Congress passed an act prohibiting such suits. The Court held the statute valid. After reviewing former decisions the Court said: “It is apparent, as a result of the decisions, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for doubt whether under the applicable law the charges were usurious. \textit{Brearley School v. Ward}, 201 N.Y. 358, 94 N.E. 1001 (1911), sustains a New York statute retroactively subjecting to execution property previously exempt. The court said, at p. 372, that “a party has no vested right in a defense to a contract which he has actually made and which he is under a moral obligation to perform, though the law at the time makes such contract void.”

\textsuperscript{129} Art. II, § 28 (1851).
\textsuperscript{130} 185 U.S. 505, 22 S.Ct. 758 (1902).
\textsuperscript{131} 282 U.S. 409, 51 S.Ct. 186 (1931).
transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice. Where the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting to administer the law in the name of the Government, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy causes of action which would otherwise exist. Decision was therefore rendered for the defendant.

Another example of retroactive statutes supported on grounds of reason, equity and justice occurs in connection with the occupying claimant statutes. At the common law the successful claimant of land secured not only the land but profits and the improvements placed thereon by the adverse possessor. *Mills v. Geer* sustained a retroactive occupying claimant's act depriving the plaintiff of these ancillary rights. The common law doctrine enabled the recoverer of the land to "reap the fortune placed upon it and turn the purchaser out a pauper." The retroactive statute "is not an interference with private property, is remedial in its nature for the purpose of enforcing natural right and equity."

*National Carloading Corporation v. Phoenix El Paso Express* which has been frequently cited in support of the Portal-to-Portal Act, is in line with the principles herein discussed. The plaintiff, express company, brought an action, as was its right and duty, to recover the difference between the charge collected for carriage, and the higher charge which it claimed its tariffs on file with the Interstate Commerce

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132 Id. at 429.
133 Cf. People ex rel. Beck v. Graves, 280 N.Y. 405, 21 N.E. (2d) 371 (1939), holding unconstitutional a retroactive interpretative amendment of the tax laws. The dissent of Lehman, Crane and O'Brien is in accord with the "equitable" principles of the cases here discussed.
134 111 Ga. 275, 36 S.E. 688 (1900).
135 Id. at 289. See accord: Bacon v. Callender, 6 Mass. 303 (1810); Fee v. Cowdry, 45 Ark. 410 (1885).
136 See Guardian Depositors Corp. v. Powers, 296 Mich. 553, 296 N.W. 675 (1941), sustaining a retroactive statute providing that where a suit was brought to collect the deficiency resulting from a mortgage foreclosure sale, the debtor could set off against the deficiency the difference between the sale price and the actual value of the land. The court said, at p. 561: "No one has a vested substantive right to more than his due."
137 142 Tex. 141, 176 S.W. (2d) 564 (1944), cert. den., 322 U.S. 747, 64 S.Ct. 1156 (1944).
Commission required. The lower charge had been made under joint tariffs filed by the defendant, a freight forwarder. Subsequent to the charge the United States Supreme Court held that freight forwarders were not under the Motor Carriers Act, with the result that the lower tariff of the forwarder was voided. The plaintiff's action was therefore properly grounded. Pending the suit, however, Congress amended the act, expressly validating retroactively the tariffs previously filed by the forwarders. The court held that the statute constitutionally defeated the plaintiff's action. Although many of the reasons given in the opinion for supporting the statute are broader than the authorities sustain, the decision is justified by the reason that Congress has authority "to validate voluntary transactions between parties which at the time they were entered into were by statute invalid or illegal. . . ." 137

IV

Conclusion

It is the writer's opinion that the principles of the cases just discussed will support the Portal-to-Portal Act. This conclusion is dependent, however, on sustaining the "findings" in section one that the Court's interpretation of the Fair Labor Standards Act was contrary to "long established customs, practices, and contracts between employers and employees" and resulted in imposing "wholly unexpected liabilities" on the employers and in conferring on the employees "windfall payments, for activities performed by them without any expectation of reward. . . ." 138 It is clear from the cases that the mere fact that the Portal-to-Portal Act takes away the employee's causes of action does not necessarily make it unconstitutional. 139 Statutes imposing on defendants liabilities for which they were previously free have also been sustained and, as has been said, the fundamental constitutional objection to retroactive legislation is the same in both types of statutes. The author believes that the distinction between the unconstitutional and the constitutional retroactive statute is as we have

137 Id. at 150.
138 See also in accord the memorandum of Dean Bates introduced in the Congressional debate, 93 Cong. Rec. 2306 (March 19, 1947).
139 See McFaddin v. Evans-Snider-Buel Co., 185 U.S. 505, 22 S.Ct. 758 (1902); Graham v. Goodcell, 282 U.S. 409, 51 S.Ct. 186 (1931); National Carloading Corporation v. Phoenix Express, Inc., 142 Tex. 141, 176 S.W. (2d) 564 (1944), and the other cases referred to in the notes to these cases.
indicated. In *Steamship Co. v. Joliffe*, *Ettor v. Tacoma*, *Forbes Boat Line v. Board of Commissioners* and *Lynch v. United States* the liability of the obligee was clear under the existing law. The claimants had "reasonable expectations" that the obligation would be fulfilled. In the cases supporting the constitutionality of the retroactive statutes, on the other hand, the claimants, or defendants as the case might be, did not at the time of the transactions involved, reasonably rely on the claims or defenses which the retroactive statutes struck down. Therefore, in the language of the opinions it was not inequitable or unjust to deprive them thereof. This is particularly illustrated by the *National Carloading Corporation* case. The Phoenix Express charged the defendant what it reasonably expected was the lawful tariff. By subsequent judicial decision it transpired that it had a claim for a larger sum. The retroactive act of Congress depriving it of this larger claim was not therefore unconstitutional. Again, assuming that Congress is right as to the unexpected character of the portal-to-portal claims, the analogy of the case is perfect.

The Portal-to-Portal Act in section 2, *seems based squarely on the distinction drawn. If the "activity" of the employee was compensable either by contract or custom, then the Portal-to-Portal Act does not affect it, and minimum wages and overtime pay can be collected. If neither by contract nor custom was the activity regarded as compensable then pay therefore could not reasonably have been expected, and recovery of minimum wages and overtime pay cannot be had. Under the decided cases this seems permissible. The writer claims no special competence to decide whether the portal-to-portal cases, particularly the *Mt. Clemens Pottery* decision did, as section 1 of the Portal-to-Portal Act affirms, impose "wholly unexpected liabilities" upon the employers and reward the employees with "windfall payment," or whether, as opponents of the

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140 2 Wall. (69 U.S.) 450 (1864).
141 228 U.S. 148, 33 S.Ct. 428 (1913).
142 258 U.S. 338, 42 S.Ct. 325 (1922).
144 Supra, p. 730.
145 By a literal following of the words of section 2 it would be possible for an employer by contract to exclude from compensable worktime, activities of his employees, which were clearly for the employer's benefit and entitled to compensation. The legislative history of the act shows, however, that Congress's intent was merely to cover the doubtful situations presented in the portal-to-portal cases. The act can reasonably be so interpreted. See the message of President Truman accompanying his approval of the act, 93 Cong. Rec. 5418 (May 14, 1947).
act asserted, the liabilities, which the portal-to-portal suits seek to enforce should clearly have been foreseen. Doubtless the courts can give weight to the Congressional finding that the former represents the true state of affairs. Also the very circumstance that portal-to-portal suits aggregating over five billion dollars in claims followed immediately after the decision of the Mt. Clemens case on June 10, 1946 seems to indicate that the employees then, for the first time, realized the treasure that lay before them. Doubtless also the courts will not be insensitive to the claimed injury to the economy of industry and the government that would result should these claims succeed. The writer will not, however, attempt the role of a prophet. He merely states his belief that, should the Supreme Court be so minded, ample grounds exist to support the retroactive feature of the Portal-to-Portal Act.

147 Supra, p. 728.

See 60 Harv. L. Rev. 1353 (1947).