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ARTICLES

ENGINEERING THE MIDDLE CLASSES: CLASS LINE-DRAWING IN NEW DEAL HOURS LEGISLATION

*Deborah C. Malamud**

The likely readers of this Article work for a living, or are studying with the hope that they will work for a living very soon. Unlike many other workers in this society, they do not (and will not) get paid time-and-a-half for overtime. In this Article, I tell the story of how upper-level white-collar workers — people like the intended readers of this Article — came to be exempt from the Fair Labor Standards Act's general overtime rules.¹ My purpose in telling this story is not to participate in the debate on whether the so-called “white-collar exemptions” to the Fair Labor Standards Act make

* Professor, University of Michigan Law School. B.A. 1977, Wesleyan; J.D. 1986, University of Chicago. — Ed. I dedicate this piece to Ted St. Antoine upon his retirement from law teaching, with thanks for the privilege of being his colleague. I have appreciated the opportunity to present this paper to the law school faculty workshops at Case Western Reserve, Harvard, Iowa, and Utah (as part of my visit as Howard H. Rolapp Distinguished Visiting Scholar), and at the 1996 annual meetings of the Law and Society Association and the International Network on Transformative Employment and Labor Law. Thanks to the many colleagues, at Michigan and elsewhere, who have commented on this project at its various stages, with special thanks to Catherine Fisk, Tom Green, Don Herzog, Morton Horwitz, Rick Lempert, Lea Vander Velde, and Jim Wooten. Thanks also to the librarians and archivists at the University of Michigan Law School, the National Archives, the Franklin Delano Roosevelt Presidential Archives, the Library of Congress Manuscripts Division, the Department of Labor, and the Archives of Labor History and Urban Affairs at the Walter P. Reuther Library at Wayne State University. Finally, my thanks to Jeannine Bell, Melissa Plotkin, and Abigail Carter for their able research assistance.

1. Marc Linder is the scholar who has most exhaustively studied the Fair Labor Standards Act (FLSA) and related legislation. See, e.g., MARC LINDER, *MIGRANT WORKERS AND MINIMUM WAGES: REGULATING THE EXPLOITATION OF AGRICULTURAL LABOR IN THE UNITED STATES* (1992); Marc Linder, *The Small-Business Exemption Under the Fair Labor Standards Act: The “Original” Accumulation of Capital and the Inversion of Industrial Policy*, 6 J.L. & POLY. 403 (1998); Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEXAS L. REV. 1335 (1987) [hereinafter Linder, *Farm Workers and the Fair Labor Standards Act*]; Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53 (1991); Marc Linder, *Closing the Gap Between Reich and Poor: Which Side Is the Department of Labor On?*, 21 N.Y.U. REV. L. & SOC. CHANGE 1 (1993-1994). The emphasis of Linder's work on exemption from hours regulations is on lower-level exemptions, through which agricultural and domestic workers — many of them black — have historically been excluded from protection. For a similar criticism of the FLSA for leaving many women workers without statutory protection, see Suzanne B. Mettler, *Federalism, Gender, & the Fair Labor Standards Act*, 26 POLITY 635 (1998).

sense, although I will close by suggesting why that question is harder than it appears.² Instead, my aim is to use the historical example of New Deal wage and hour legislation to shed light on how the law reflects and helps to shape the American concept of class.

The legal academy has generated a rich literature on the ways in which law and social practice interact in the creation and maintenance of social categories and hierarchies. Race and gender have been the dominant subjects in this literature.³ Class has been all but ignored.⁴ This should come as no surprise. We Americans do not accept class as a core part of either our identities or our social structure. Most of us believe that we are “middle class,” and that individuals can so easily move upwards into and within the middle classes that it makes little sense to think of Americans as divided by class at all.⁵ Just as class tends to be invisible to the American so-

2. The statutory exemption for “any employee employed in a bona fide executive, administrative, or professional capacity” is found in § 213 of the Fair Labor Standards Act of 1938, 29 U.S.C. § 213(a)(1) (1994). The implementing regulations are found at 29 C.F.R. §§ 541.0-315 (1997). For debate on the exemption, see, e.g., Nicholas Clark, *Fair Labor Standards Act Reform — It’s Not Broke, So Don’t Fix It*, 11 LAB. LAW. 343 (1996); Peter D. DeChiara, *Rethinking the Managerial-Professional Exemption of the Fair Labor Standards Act*, 43 AM. U. L. REV. 139 (1993); William J. Kilberg, *Reforming the Fair Labor Standards Act: For Congress and the Rest of Us*, EMPLOYEE REL. L.J., Spring 1996, at 1; Robert D. Lipman et al., *A Call for Bright-Lines to Fix the Fair Labor Standards Act*, 11 HOFSTRA LAB. L.J. 357 (1994); Lawrence Peikes, *Tightening the White-Collar Exemptions: The Courts Breathe New Life into the Fair Labor Standards Act*, 10 LAB. LAW. 121 (1994). In a recent decision, the Supreme Court held that the Wage and Hour Division of the Department of Labor has considerable discretion to interpret these exemptions, and sustained its interpretation of the “salary basis” test, one of the more controversial aspects of the exemption regulations. See *Auer v. Robbins*, 117 S. Ct. 905 (1997).

3. For representative critical race theory anthologies, see, e.g., CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995). For casebooks surveying the state of feminist jurisprudence, see, e.g., KATHARINE T. BARTLETT & ANGELA P. HARRIS, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY (2d ed. 1998); MARY BECKER ET AL., FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY (1994).

4. For a treatment of legal definitions of race and sexual orientation identities, see Kenneth Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263 (1995). This is not to say that the agenda of critical legal studies (CLS) did not include the exploration of class as a phenomenon contested in and through law. But Robert Gordon observed as late as 1989 — late in the history of CLS as a movement — that “[t]he Critics are still a long way from being able to deliver the brightest promises of their Critical program: thickly described accounts of how law has been imbricated in and has helped to structure the most routine practices of social life.” Robert W. Gordon, *Critical Legal Histories*, in CRITICAL LEGAL STUDIES 79, 102 (Alan C. Hutchinson ed., 1989). I consider work one of those routine practices, and see this article as part of that program — for all that it issues from a scholar lacking in movement credentials.

5. Some of the vast academic debate on the concept of class as it pertains to the middle classes and white-collar workers is surveyed in Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847 (1996). For an extremely helpful historical and comparative treatment, see JÜRGEN KOCKA, WHITE COLLAR WORKERS IN

cial eye, the American legal eye does not see the law as actively involved in creating and maintaining class lines. When American lawyers look for the hand of the law in the construction of social categories, we tend to look in equal protection theory (the creation of suspect classifications) and in antidiscrimination law (the creation of protected groups).⁶ Class seems invisible to American law because neither equal protection doctrine nor antidiscrimination law has accorded it legal significance.⁷

While class has not been recognized as a category in American civil rights jurisprudence, class line-drawing has long been a pervasive activity of the American legal system. At least since the New Deal,⁸ Congress and administrative agencies operating in the fields of labor, welfare, and tax law have routinely selected categories of people for coverage on the basis of class-like criteria — by which I mean social or economic criteria (such as occupation) that are part of the complex of social and economic distinctions referred to in popular or academic discourse as “class.”⁹ By moving from civil

AMERICA 1890-1940 (1980). Other significant historical, theoretical, and/or comparative treatments include ILEEN A. DEVAULT, *SONS AND DAUGHTERS OF LABOR: CLASS AND CLERICAL WORK IN TURN-OF-THE-CENTURY PITTSBURGH* (1990); RICHARD SOBEL, *THE WHITE COLLAR WORKING CLASS: FROM STRUCTURE TO POLITICS* (1989); ERIK OLIN WRIGHT, *CLASS COUNTS: COMPARATIVE STUDIES IN CLASS ANALYSIS* (1997); *SOCIAL CHANGE AND THE MIDDLE CLASSES* (Tim Butler & Mike Savage eds., 1995). For a discussion of the American rhetoric of class, including the treatment of white-collar and/or middle class workers, see Margo Anderson, *The Language of Class in Twentieth-Century America*, 12 *Soc. Sci. Hist.* 349 (1988).

6. This is beginning to change in the recent critical race theory literature, as the focus of critical race theory expands beyond what Juan Perea has termed the “black-white binary” and into new areas of social practice. See Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, jointly published as 10 *LA RAZA L.J.* 127 (1998) and 85 *CAL. L. REV.* 1213 (1998). For a leading example, see IAN F. HANEY-LÓPEZ, *WHITE BY LAW* (1996), which focuses on statutory immigration cases.

7. The exception was the effort to treat the poor as a suspect class — which, had it not failed, would have required courts to develop a constitutional definition of poverty. But the effort did fail. Compare Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 *HARV. L. REV.* 7 (1969) with *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). In any case, it is likely that the result of these efforts, had they succeeded, would have been the definition of *poverty* as a suspect classification. Heightened constitutional scrutiny might not have been brought to bear on government action that defines the lines that differentiate *non-poor* working people from one another.

8. I use the New Deal as a cutoff because the Depression led to an unprecedented broadening of the scope of social programs, and because of the New Deal heritage of so many existing social programs. The New Deal may also have been the first occasion for comprehensive governmental consideration of the economic problems of white-collar workers — although that claim is in need of further historical testing at the state and federal levels. Indeed, the Depression was a crucible for the definition of the federal government’s role in a wide range of areas. See Alan Brinkley, *The New Deal and the Idea of the State*, in *THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980*, at 85 (Steve Fraser & Gary Gerstle eds., 1989).

9. See Malamud, *supra* note 5, at 1854-56.

rights legislation to economic legislation, and from courts to administrative agencies, we can begin to see the role the law has played in constructing and maintaining American conceptions of class.

We are perhaps accustomed to thinking that the government defines “the poor” as a class in the course of enacting and implementing social welfare legislation.¹⁰ We are less accustomed to thinking that the law plays a role in the way we understand the middle classes — or, to address my readers more directly, the way we understand ourselves. There is, of course, a parallel here to the issue of the social and legal construction of race and gender. Traditionally, scholarship on race and gender and the law has focused on the law’s involvement in giving shape to *black* race and *female* gender. To use the language of linguistics for a moment, it is as if law were seen as doing its work only on the categories “marked” as somehow different or problematic. Restricting critical analysis to the “marked” categories leaves the “unmarked” categories — those in which power resides — seemingly as facts of nature rather than as products of culture. Just as race scholarship has now moved in the direction of problematizing “whiteness,”¹¹ I wish to problematize the American middle classes.

For scholars interested in the subject of class and the law — particularly insofar as the middle classes are concerned — the New Deal is a pivotal period.¹² The Depression had sweeping effects across the American class hierarchy, and the breadth of its effects was recognized by government administrators. In the words of Harry Hopkins, the director of the Federal Emergency Relief Administration (FERA), “the whole crowd is caught in this thing, the finest people in America.”¹³ “[D]octors [and] dentists,” “minis-

10. See, e.g., NATIONAL RESEARCH COUNCIL, *MEASURING POVERTY: A NEW APPROACH* (Constance F. Citro & Robert T. Michael eds., 1995).

11. For whiteness literature in history and the humanities, see, e.g., NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995); TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* (1992); DAVID ROEDIGER, *TOWARDS THE ABOLITION OF WHITENESS* (1994); DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991); *WHITE TRASH: RACE AND CLASS IN AMERICA* (Matt Wray & Annalee Newitz eds., 1997). As some of the titles cited reflect, the whiteness literature is deeply concerned with the role race has played in shaping the class-consciousness (or lack thereof) of white American workers. For critical race theory literature on whiteness, see *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR* (Richard Delgado & Jean Stefancic eds., 1997).

12. See KOCKA, *supra* note 5, at 203 (“Economic distress, unemployment, and public relief during the depression, which for the first time touched significant numbers in the middle class, stimulated public discussion of white collar workers at the very time that their middle class status was seriously threatened by that same crisis.”).

13. Harry L. Hopkins, NBC Radio Address (Oct. 10, 1933) (Roosevelt Archives, Papers of Harry Hopkins [hereinafter FDR, Hopkins Papers], Box 9, Speeches 1933-36).

ters,”¹⁴ “architects, engineers,”¹⁵ and “ever increasing numbers of people with clerical and professional training”¹⁶ found themselves unemployed and needing relief.¹⁷ Who were the “finest people”? Were *all* white-collar workers in this group, or only the fanciest among them? How was the line to be drawn? Were *only* white-collar workers in this group, or did the upper tier of skilled blue-collar workers qualify? Was their status as “the finest people in America” to be considered in determining whether and how to assist them? If so, the drawing of class lines — including class lines within the broad category of the American middle classes — would need to become a core part of the New Deal project. Would differential treatment always *benefit* the “finest people,” or would they sometimes be excluded from much-needed assistance on the grounds that their status as the “finest people” made assistance inappropriate? If that was the choice, would the “finest people” cling to their high status, or would they fight their classification as too “fine” to be helped?

Take, for example, the field activities of FERA. Lorena Hickok, a journalist who became a leading FERA investigator and

14. *Id.*

15. Proceedings, General Meeting, Federal Civil Works Administration (Nov. 15, 1933) (FDR, Hopkins Papers, Box 9, Speeches 1933-36); *see also* Harry L. Hopkins, NBC Radio Address (June 24, 1933) (FDR, Hopkins Papers, Box 9, Speeches 1933-36). For a discussion of Depression unemployment among engineers and scientists and their role in crystallizing the concept of work-spreading as a solution to the problem of unemployment, *see* BENJAMIN KLINE HUNNICUTT, *WORK WITHOUT END: ABANDONING SHORTER HOURS FOR THE RIGHT TO WORK* 267-88 (1988).

16. Memorandum from Jacob Baker, Director of Work Relief and Special Projects, to All Governors and State Emergency Relief Administrations (Oct. 30, 1933) (Roosevelt Archives, Official File 444, Federal Emergency Relief Administration [hereinafter FERA], Box 1, Chron 1/33-4/34) [documents in the Roosevelt Archives Official File collection hereinafter FDR/OF].

17. Hopkins noted in July 1933 that he was sure the problem of unemployment among such groups as teachers, nurses, photographers, actors, and musicians was greater than standard unemployment statistics showed. *See* Memorandum from Harry L. Hopkins to President Roosevelt (July 7, 1933) (FDR/OF 264, Unemployment, Box 1, May-Sept. 1933) (quoting William Green). He continued to express concern about unemployed professionals. *See, e.g.*, Memorandum from Harry L. Hopkins to President Roosevelt (Aug. 14, 1933) (FDR/OF 264, Unemployment, Box 1, May-Sept. 1933 folder) (discussing role for unemployed teachers); Press Release from Harry L. Hopkins to the Governors and State Emergency Relief Administrations (Aug. 19, 1933) (FDR/OF 444, FERA, Box 1, Jan. 1933 - Apr. 1934) (publicizing plan to provide “relief teachers” — unemployed teachers — to teach children in rural areas and adults in cities and rural areas). By June 1935, 40,000 teachers were employed in FERA’s adult education projects. *See* Memorandum from President Roosevelt to Elsie Long (June 29, 1935) (FDR/OF 444, FERA, Box 3, June-July 1935). Data made available by the American Federation of Labor (AFL) in 1934 on employment and unemployment levels in the United States from 1930 to 1933 showed that employment levels for “management and professional” employees exhibited the same pattern as for other types of employment during the period. *See* American Federation of Labor, Chart: Employment and Unemployment in the U.S. (n.d.) (FDR/OF 264, Unemployment, Box 1, May-Sept. 1933).

close confidant to Eleanor Roosevelt,¹⁸ filed a report for transmittal to President Roosevelt in April of 1934 “on the white collar picture in Alabama.”¹⁹ White-collar workers (Hickok specifically mentioned musicians, accountants, insurance managers, pharmacists, engineers, architects, small business owners, and clerks) presented two related problems to FERA field workers in Birmingham: how much aid to give them, and how to give it to them. As to amounts, Hickok observed:

They want to cling to some semblance at least of their normal standards of living. And we can't give them enough relief to make that possible. . . . We can provide overalls, but not tailored business suits. We can't keep those white collars laundered.²⁰

The problem was not merely — or even mostly — the lack of sufficient funds to accord higher hourly benefits for federal work relief to these white-collar workers. The problem was how to justify using the collar-color line in federal programs:

I don't see what we can do about it. We can hardly increase their allotments. Hardly, with the unions howling bloody murder for an increase both in hourly rate and number of hours per week for skilled labor. BUT — mark my words — you let the unions get away with it,

18. Lorena Hickok was assigned by the Associated Press to cover the Roosevelt presidential campaign. As of October 1932 she was assigned exclusively to cover Eleanor Roosevelt, who became her close friend. Hickok resigned from the Associated Press in June 1933 because she thought she had lost her objectivity, and in August 1933 became Chief Investigator for FERA. See Biographical Description of Lorena Hickok, 1893-1968 (n.d.) (Roosevelt Archives, Lorena Hickok Papers [hereinafter FDR, Hickok Papers]). Historians have differed in their accounts of the Hickok-Eleanor Roosevelt relationship, with some sidestepping the question of its sexual nature and others affirming it. Compare, e.g., JOSEPH P. LASH, *ELEANOR AND FRANKLIN* 349, 353-56 (1971) and DORIS FABER, *THE LIFE OF LORENA HICKOK, E.R.'S FRIEND* (1980) with 1 BLANCHE WIESEN COOK, *ELEANOR ROOSEVELT, 1884-1933, 478-80* (1992). For Hopkins's decision to transmit Hickok's field memoranda directly to Roosevelt and his serious consideration of them, see FABER, *supra*, at 143. See also *id.* at 7 (“In 1935 Hopkins told the President's wife that posterity would consider these vivid Hickok reports the best available history of the Depression, and his prediction appears to have been not far from the mark.”). Many of Hickok's reports are published in *ONE THIRD OF A NATION: LORENA HICKOK REPORTS ON THE GREAT DEPRESSION* (Richard Lowitt & Maurine Beasley eds., 1981).

19. Report from Lorena A. Hickok to Harry L. Hopkins (Apr. 2, 1934) [hereinafter Hickok Birmingham Report], attached to Memorandum from Harry L. Hopkins to President Roosevelt (Apr. 13, 1934) (FDR/OF 444, FERA, Box 1, Jan. 1933-Apr. 1934).

20. *Id.* at 2. But see Memorandum from Jacob Baker, Director of Work Relief and Special Projects, to All Governors and State Relief Administrators (Oct. 30, 1933) (FDR/OF 444, FERA, Box 1, Oct.-Dec. 1933) (stating that his office has always advised the states that they “are justified in taking account of the prior standard of living [of clerical and professional workers] in determining budget deficiencies”). The opposition of the term “men in overalls” (rather than the term “blue collar”) to the term “white collar” reflects the fact that “blue-collar is a post-World War II word; white-collar dates from around 1910.” MARGO ANDERSON CONK, *THE UNITED STATES CENSUS AND LABOR FORCE CHANGE: A HISTORY OF OCCUPATION STATISTICS, 1870 TO 1940*, at 162 n.21 (1980).

if you accede to that demand and fail to increase the allotments of the white collar people, too, you're going to have trouble.²¹

Just as the white-collar workers wanted federal relief programs to recognize their higher status, so did skilled manual workers.²² The administration of federal relief programs was becoming a field for contesting claims of class privilege.

Class was a battleground not only for the appropriate benefit levels for white-collar workers, but also — or perhaps even more so — for the appropriate methods for delivering benefits to them. Hickok described a state-level “Placement Bureau for Professional People,” which had been extended to “cover the whole white collar group.”²³ For these white-collar workers, every effort was made to preserve their dignity: for example, they received their benefits without needing to visit relief offices, and they were subject to fewer home visits by social workers than were ordinary relief recipients. Hickok observed:

This method of introducing white collar people to relief is about as painless as any could be But if we should adopt it as a national policy, I can see plenty of trouble ahead. From Union Labor. Ever let them get wind of the fact that we are granting to the white collar group any sort of privilege that we deny their skilled labor, and listen to the howl. And let skilled labor in, and then you'll get demands on behalf of unskilled labor. Well — we can't take EVERYBODY out of the intake.²⁴

Hickok saw in Alabama in the early days of FERA what became increasingly clear during the New Deal period. The government's broad power to determine which class differences mattered for the purposes of its programs was limited by the power of groups organized to protect their own interests. The programs that emerged from this contest delivered not only economic relief, but also powerful official messages about the nature of the American class system.

No one was sure how white-collar workers would come to view their own interests during the Depression. The early 1930s was a period of growing union activism and left-oriented political activity

21. Hickok Birmingham Report, *supra* note 19, at 3.

22. On the class position of skilled craftsmen, see, e.g., GAVIN MACKENZIE, *THE ARISTOCRACY OF LABOR: THE POSITION OF SKILLED CRAFTSMEN IN THE AMERICAN CLASS STRUCTURE* (1973). For a British study, see JOHN H. GOLDTHORPE ET AL., *THE AFFLUENT WORKER IN THE CLASS STRUCTURE* (1969).

23. Hickok Birmingham Report, *supra* note 19, at 3.

24. *Id.*

among white-collar workers.²⁵ Several months after Hickok filed her Alabama report, FERA commissioned a set of confidential reports on the situation of white-collar workers around the country. One such report — marked by Roosevelt's staff as an item to be placed at his bedside — examined the mood of white-collar workers on the West Side of Manhattan for signs of potential leftist activism. Wayne W. Parrish, the journalist who wrote the report, observed:

In this white collar neighborhood, those on relief are too depressed and "bowled over" by the shock of going on relief to take any action. Only the younger ones would follow a leader. Most still feel their problem [sic] are individual ones and don't blame anybody in particular. Relief checks are extremely inadequate for this white collar group, but [the] feeling is that if checks continue to come there will be no outward trouble, only serious psychiatric problems.²⁶

Few white-collar workers were sufficiently organized in the 1930s to participate in governmental debates on their place in the American class structure. Donald Richberg, a legal realist writer and union labor lawyer who became one of the framers and leaders of the National Recovery Administration (NRA), complained in 1931 about the "hordes of 'white collar men' who, lacking the vigor and self-reliance to organize themselves for self-improvement, give support to the claim that their services are not worth more than their miserable wages."²⁷ Although there were some exceptions (newspaper reporters most prominent among them), white-collar workers generally remained unorganized throughout the Depression.²⁸ They therefore left it to government actors to represent their interests in the ongoing debate on whether they were so inherently different from ordinary workers as to require differential treatment — for good or for ill — in New Deal programs.

The New Deal legislative innovation that occasioned the period's earliest and most sustained debate about the legal status of white-collar workers was the adoption of comprehensive wage and

25. See MICHAEL DENNING, *THE CULTURAL FRONT: THE LABORING OF AMERICAN CULTURE IN THE TWENTIETH CENTURY* 9 (1996).

26. Report of Wayne R. Parrish to Harry L. Hopkins 9 (Nov. 17, 1934), *attached to Memorandum from Harry L. Hopkins to Marguerite A. LeHand* (Dec. 10, 1934) (FDR/OE, FERA, Box 2). Parrish's report was forwarded to Roosevelt by Harry Hopkins with a cover note to Roosevelt's personal secretary stating: "The President was anxious to go over these, and I would appreciate it very much if you could give them to him tonight." *Id.* at 1. There is a notation on the top left corner of the page, in handwriting, presumably Miss LeHand's, with the word "Bedside."

27. Donald R. Richberg, *The Industrial Liberalism of Justice Brandeis*, 31 COLUM. L. REV. 1094, 1102 (1931).

28. For a discussion of exceptions, see DENNING, *supra* note 25, at 15; KOCKA, *supra* note 5, at 206-46 & tbl.4.6.

hour legislation. In the Fair Labor Standards Act of 1938 (FLSA), Congress exempted “executive, administrative, [and] professional” employees from the statute’s requirement that employers pay their employees an overtime premium for the hours they worked beyond the statutory maximum of forty hours per week.²⁹ The FLSA’s so-called “white-collar exemptions” — which are still in effect and are still the subject of controversy³⁰ — arose out of a prehistory of wage and hour regulation during the period of the National Recovery Administration.³¹ The purpose of this Article is to use the prehistory and early development of these so-called “white-collar exemptions” to explore the importance of the state as a locus for

29. See Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (1944). The exemption for “executive, administrative, [and] professional” employees is found in § 13 of the statute, 29 U.S.C. § 213(a)(1). The FLSA also contains minimum-wage provisions, but there are no upper-level exemptions to the minimum wage. The upper-level exemptions to the FLSA’s overtime provisions include an exemption for outside salesmen. That exemption originated at least in substantial part from the difficulty employers would face in monitoring the work of traveling employees, and thus has a different set of cultural resonances. It is for that reason not productive to include outside salesmen in this article’s discussion. A recent move to extend the exemption to certain *inside* salesmen — on the grounds that they are like professionals and that the work they do is no different from that of outside salesmen except for its location — would be of interest in a parallel study looking at current debates on upper-level exemptions. See The Sales Incentive Compensation Act, H.R. 1, 105th Cong. 1998; *Highlights*, Daily Lab. Rep. (BNA) No. 1135, at A-8 (June 12, 1998); for analysis, see, e.g., *FLSA: House Committee Agrees to Expand FLSA Exemptions for Sales Staff*, Daily Lab. Rep. (BNA) No. 63, at A-6 (Apr. 2, 1998).

30. Reform proposals are discussed in the literature cited *supra* note 2.

31. Similar themes can be explored in other New Deal programs. The New Deal statute whose class implications have been most thoroughly explored is the National Labor Relations Act, into which an express supervisory exemption was introduced in 1947 after a number of years of organizing efforts among supervisors. For the statutory provision, see 29 U.S.C. § 152(3) (1994); for the history, see Virginia A. Seitz, *Legal, Legislative, and Managerial Responses to the Organization of Supervisory Employees in the 1940’s*, 28 AM. J. LEGAL HIST. 199 (1984); for significant current case law, see *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994), and for academic critiques, see, e.g., Marion Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 MINN. L. REV. 953 (1990); George Feldman, *Workplace Power and Collective Activity: The Supervisory and Managerial Exclusions in Labor Law*, 37 ARIZ. L. REV. 525 (1995); Michael C. Harper, *Reconciling Collective Bargaining with Employee Supervision of Management*, 137 U. PA. L. REV. 1 (1988). As of 1947, the statute specifies that professionals have the choice of whether to organize in mixed units or units containing only professionals. See 29 U.S.C. § 159(b). For scholarly treatment, see David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?*, 99 YALE L.J. 689 (1990). And the Supreme Court in 1974 approved an extra-statutory “managerial” exemption. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); see also *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980); David M. Rabban, *Distinguishing Excluded Managers from Covered Professionals Under the NLRA*, 89 COLUM. L. REV. 1775 (1989). I am focusing on hours regulation rather than the regulation of unionization for four main reasons: (1) upper-level white-collar exemptions in hours regulation predate those under the NLRA; (2) their history and social significance are less known; (3) they arose within the administrative state over a short and well-defined period of time at the core of New Deal labor policy; and (4) class line-drawing in the field of hours regulation carries less of an implication of “class conflict” and — ironically, for that very reason — comes closer to speaking about class as most Americans understand it. See Malamud, *supra* note 5, at 1863-66.

debates about the American middle class and the role of the state as an intervenor in those debates.

Any effort to tell a story about the relationship between the middle classes and the state, of course, raises important antecedent questions about both parties to the relationship. Let us begin with the middle classes. To what extent was their identity and internal structure in question during the pre-New Deal period? How important was the collar-color line to the class system? Was the system stable or in flux? Did the lines drawn between different types of workers in the personnel practices of pre-New Deal industry — for example, the distinction between “hourly” work and “salaried” work — capture functional differences between jobs? For that matter, how were cultural distinctions between types of jobs related to observable functional distinctions between them? We shall see that the nature and scope of the middle classes and the significance of the collar-color line were contested and unsettled preceding the New Deal, that business practices often set out to manipulate worker self-conceptions rather than simply to follow them, and that the question of where to locate the line between ordinary and elite workers was subject to considerable controversy.

Turning from questions about the middle class to questions about the state, the task of drawing class lines for purposes of hours regulation was predominantly located within administrative agencies. How did the denizens of the New Deal administrative state understand their role — in general and with regard to issues of class? To what extent did many government actors’ Progressive and Legal Realist leanings influence how they saw their role and how they performed it? Did they come to the task with relevant expertise, and, if not, did they have the opportunity to develop expertise on the job? How did political and resource constraints shape their actions? We shall find that government actors were often stymied in their efforts — efforts their Progressive and Realist orientations demanded — to exercise independent judgment in the field of hours regulation. Although the regulation of working hours was a central part of the New Deal effort to alleviate unemployment, few administrators had prior relevant experience. Little objective information was available about the likely efficacy of hours restriction for different categories of jobs. Because white-collar workers were largely unorganized and unrepresented in public hearings, agency officials often were faced with the task of advocating for their interests without a clear picture of what those interests were. We shall see that government actors did exercise independ-

ent judgment in the face of insistent business-community pressure to exempt all white-collar workers from hours regulation — but doing so was a constant struggle.

In addition, the story of the white-collar exemptions readily serves as an occasion for asking a normative question. Is government involvement in class line-drawing a good thing? When the government draws class lines, it puts its imprimatur on a particular view of the social world. One would find government involvement a bad thing if one thinks the government is likely to be swayed by the agendas of powerful interest groups — or, alternatively, if one thinks it is important for rival social groups to fight it out in a private marketplace of ideas. Conversely, one would find government involvement in class line-drawing a good thing if one believes that the government has unique expertise, or that power inequalities will cause the business community's preferred map of the class structure to prevail over workers' interests unless the government intervenes. The historical narrative reveals that both scenarios are true to some extent in New Deal hours regulation. Sometimes the government employed expertise and used it to challenge the predominant views and practices of the business community. But sometimes the government capitulated to the business community, and in so doing made it more difficult for workers' alternative conceptions of the class structure to be heard in future years. We shall see from the example of New Deal hours regulation that government involvement in class line-drawing can be either a good thing or a bad thing. It depends on the approach the government actors take and the skill with which they execute it.

I focus particularly, then, on the government's various approaches to class line-drawing. The narrative reveals that government actors were best able to exercise independent judgment when they kept a clear focus on the relationship between the lines they were drawing and the ultimate goals of hours regulation. In contrast, they were generally less effective when they saw their mandate as the drawing of an all-purpose map, representing their perception of the class system. The contrast between the first approach (which I call "purposive") and the second (which I call "descriptive") is a recurrent theme of this Article. I suggest, at the end of the Article, that we should reevaluate the Fair Labor Standards Act and its white-collar exemptions in purposive terms.

I. PRE-FLSA ANTECEDENTS

A. *Wage and Hour Legislation and the "White-Collar Classes" Before the Great Depression*

For well over a hundred years before the New Deal, a social movement aimed to reduce the average weekly working hours of the American worker.³² The movement had four major goals: improving the health of the working classes by lessening the intensity of their exposure to workplace hazards; diminishing unemployment by spreading the available work among all those customarily employed in a particular field; increasing the leisure time of the working classes to facilitate their education and full participation as citizens; and establishing working hours as a sphere of worker control over the process of industrial production. Each justification has enjoyed different degrees of acceptance over time. The first, health, characterized pre-New Deal hours regulation; the second, work-spreading, was the central policy goal of the New Deal's hours policy; the third and fourth, leisure and worker control, have never been embraced by the federal government as a reason to shorten the American working day.³³

Almost all pre-New Deal legislation limiting the working hours of male workers applied only to "laborers, workmen, and mechanics."³⁴ White-collar workers were not covered.³⁵ There were many reasons for this restricted application of hours regulation. The most

32. For book-length studies of the history of American hours reform, see HUNNICUTT, *supra* note 15; TERESA ANNE MURPHY, *TEN HOURS' LABOR: RELIGION, REFORM, AND GENDER IN EARLY NEW ENGLAND* (1992); DAVID R. ROEDIGER & PHILIP S. FONER, *OUR OWN TIME: A HISTORY OF AMERICAN LABOR AND THE WORKING DAY* (1989); RONNIE STEINBERG, *WAGES AND HOURS: LABOR AND REFORM IN TWENTIETH-CENTURY AMERICA* (1982). For a historical study published in the 1930s, see MARION COTTER CAHILL, *SHORTER HOURS: A STUDY OF THE MOVEMENT SINCE THE CIVIL WAR* (1932).

33. For a defense of the leisure justification, and a history of its early ascendancy and later abandonment in favor of full-employment goals, see HUNNICUTT, *supra* note 15; MURPHY, *supra* note 32. On the issue of leisure as an issue in today's economy, see JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* (1991).

34. JOHN R. COMMONS & JOHN B. ANDREWS, *PRINCIPLES OF LABOR LEGISLATION* 265 (rev. enlarged ed. 1927) (citing the 1912 version of federal employment statute). Of course, limiting legislative protection to "laborers, workmen, and mechanics" provided some groups the opportunity to test the limits of the category. See KOCKA, *supra* note 5, at 161-64 (discussing successful demands by unionized draftsmen at war shipyards during World War I to be included in the "laborers and mechanics" classification). For an analysis of the coverage of early labor standards legislation, see STEINBERG, *supra* note 32, at 59-87.

35. Commons and Andrews note one exception: the Alaskan eight-hour law "covered all workers, including partners and corporation officials, except in certain emergencies," and was held unconstitutional in 1918 in federal court because

[T]he statute, applying as it did to all occupations alike, was not shown to be a health measure, but was a "meddlesome interference" with individual rights On similar grounds the Solicitor-general of the United States declined to allow the case to be appealed to a higher court, so that no final test was had on this, *the only enforceable univer-*

obvious was that pre-New Deal hours legislation was health-oriented, and the working conditions of white-collar workers were not as injurious to health as those of industrial workers. In addition, the two groups represented in the shorter-hours movement of the nineteenth and early twentieth century were skilled manual workers, represented through their labor unions, and unskilled industrial workers, represented by the middle-class reformers who took on their cause. White-collar workers were not organized into unions,³⁶ and white-collar reformers apparently did not see their own kind as overworked.

Indeed, male white-collar workers would have found working-hours regulation contrary to their own interest. They viewed themselves as occupying entry-level positions that would lead to jobs in the upper reaches of the business class. They took it for granted that they needed to work long hours to gain the training that would advance their careers.³⁷ Furthermore, they would have found shorter hours — and, worse, government intervention to secure shorter hours — inconsistent with the status they sought to maintain in their own and their employers' eyes. White-collar workers identified upwards with their bosses, not downwards with mere manual workers. Even if white-collar workers in fact *needed* shorter hours, their need to maintain their social status would have deterred them from seeking reform. This distinction between the instrumental (“what do we need? what is our problem, and what will solve it?”) and the symbolic (“what does it mean? what does it say about us and our place in society?”) permeates the discussion of hours regulation, both in my period of study and in this Article.³⁸ We shall have many occasions to return to it.

How accurate was the self-perception of the white-collar worker of the 1920s and 1930s? Was the white-collar group unified, in that the members of its lowest tier had more in common with its higher tiers than with the most affluent members of the blue-collar class?

sal eight-hour law covering private employment enacted in America up to the beginning of 1936.

JOHN R. COMMONS & JOHN B. ANDREWS, PRINCIPLES OF LABOR LEGISLATION 140 (4th rev. ed. 1936) (emphasis added).

36. See KOCKA, *supra* note 5, at 178 (noting that “[e]xcept for the large Brotherhood of Railway Clerks and the tiny RCIPA, at the end of the 1920s there were no white collar unions in the private sector”). For a study of white-collar unionization in the decade following the Depression, see NATIONAL INDUS. CONF. BD. INC., STUDIES IN PERSONNEL POLICY, No. 101, WHITE COLLAR UNIONIZATION (1949).

37. See DEVAULT, *supra* note 5; OLIVIER ZUNZ, MAKING AMERICA CORPORATE, 1870-1920, at 125-48 (1990).

38. I thank Don Herzog for putting the distinction in these terms.

Was the amount and pace of upward mobility from clerk to business-owner sufficient to justify the clerk's upward identification? These questions occupied a considerable amount of attention in the period, from a wide range of writers and scholars.³⁹

The upward identification of lower-level white-collar workers was, as University of Chicago economist Frank William Taussig explained in 1936, crucial to the operation of the American system of class stratification. Taussig recognized five "non-competing groups,"⁴⁰ which ultimately resolved into "the two great classes of the soft handed and the hard handed."⁴¹ The bottom three groups, unskilled, semiskilled, and skilled manual workers, identified with one another. The next group up the ladder, the lower middle class, was made up of "clerks, bookkeepers, salesmen, small tradesmen, railway conductors, foremen, superintendents, [and] teachers in the lower grades."⁴² Taussig observed that the lower middle class identified with the top group (the "well-to-do"),⁴³ and its "feeling of contempt for the manual laborers of all sorts, whether skilled or unskilled,"⁴⁴ was both central to its identity and dangerous to its economic health. The democratization of public secondary education meant that "[t]here [was] a plethora of persons qualified to do [lower middle class] work and a consequent tendency for their wages to fall rather than to rise. The earnings of a good mechanic [were] in the United States higher than those of the average clerk."⁴⁵ But the lower middle class failed to respond to market

39. See *infra* text accompanying notes 40-81.

40. 2 F.W. TAUSSIG, *PRINCIPLES OF ECONOMICS* § 47-6 (3d rev. ed. 1936). The five groups are: (1) "day laborers . . . who have nothing to offer but their bodily strength . . . [including] factory employees whose work is of the simplest sort"; (2) "those who, while not needing specialized skill, yet bear some responsibility and must have some alertness of mind" (for example, trolley motormen and miners); (3) "the aristocracy of the manual laboring class: the skilled workmen"; (4) "the group that approaches the well-to-do: the lower middle class, which avoids rough and dirty work, and aims at some sort of clerical or semi-intellectual occupation. Here are clerks, bookkeepers, salesmen, small tradesmen, railway conductors, foremen, superintendents, teachers in the lower grades"; (5) "the well-to-do — those who regard themselves as the highest class and certainly are the most favored class. Here are the professions, so called — the lawyers, physicians, clergymen; teachers of the higher grades; salaried officials, public and private, in positions of responsibility and power; not least, the class of business men and managers of industry, who form in democratic communities the backbone of the whole group." *Id.*

41. *Id.* § 47-6, at 144.

42. *Id.* § 47-6(4).

43. See *id.*

44. *Id.*

45. *Id.* § 47-7, at 147; accord KOCKA, *supra* note 5, at 178-81 (noting that in the 1920s many white-collar workers earned less than skilled manual workers and that widening access to commercial and technical education increased competition for white-collar jobs); see also DEVAULT, *supra* note 5, at 24-47 (discussing clerical education).

pressures in part because it carried the false hope that routine clerical work would someday lead to a professional or managerial job — “the alluring tho [sic] deceptive chance of a prize.”⁴⁶

Leon C. Marshall, a colleague of Taussig’s, also argued that the prevalent perception of the superiority of white-collar work was an impediment to the labor market’s capacity to allocate jobs according to natural abilities. In the mid-1920s, Marshall was a professor of political economy at Chicago; he went on to chair Chicago’s business school in the late 1920s, to join the Legal Realists at the Johns Hopkins Institute for the Study of Law, and then to play a number of important roles in the National Recovery Administration in the 1930s. Marshall was active throughout his career in writing educational materials on economics for use in secondary education. One of his efforts, *The Story of Human Progress: An Introduction to Social Studies*, echoed Taussig’s critique of class stratification. Marshall observed, for example, that “[b]ecause of a foolish prejudice, many persons go into ‘white collar jobs’ rather than into those requiring overalls.”⁴⁷ For Marshall, “[t]he fact that some jobs give the holder social position makes them attractive to certain persons.”⁴⁸ But as the phrase “foolish prejudice” sought to make clear, Marshall saw the influence of prestige as an unfortunate impediment to the project of “finding one’s place” in the economy based on natural abilities.⁴⁹

Sociologists Robert and Helen Lynd addressed the question whether white-collar workers in the 1920s and early 1930s were justified in thinking that they were on their way up the social ladder. Their famous “Middletown” studies,⁵⁰ comparing Muncie, Indiana,

46. TAUSSIG, *supra* note 40 § 47-7, at 144.

47. LEON C. MARSHALL, *THE STORY OF HUMAN PROGRESS: AN INTRODUCTION TO SOCIAL STUDIES* 407-08 (1925).

48. *Id.* at 408.

49. *See id.* at 407.

50. *See* ROBERT S. LYND & HELEN MERRELL LYND, *MIDDLETOWN: A STUDY IN AMERICAN CULTURE* (1929) [hereinafter LYND & LYND, *MIDDLETOWN*]; ROBERT S. LYND & HELEN MERRELL LYND, *MIDDLETOWN IN TRANSITION: A STUDY IN CULTURAL CONFLICTS* (1937) [hereinafter LYND & LYND, *MIDDLETOWN IN TRANSITION*]. Sociology as a field did not take up the problem of class as a major area of research interest until after World War I. *See* Howard E. Jensen, *Editorial Note* to MILTON M. GORDON, *SOCIAL CLASS IN AMERICAN SOCIOLOGY* vii (1950). Despite the fact that “[n]either of the Lynds was a sociologist or had primary training in sociology. . . . [Robert] Lynd became a ‘sociologist’ of the first order,” HOWARD W. ODUM, *AMERICAN SOCIOLOGY: THE STORY OF SOCIOLOGY IN THE UNITED STATES THROUGH 1950*, at 391-92 (1951), and the Lynds’ work is now and was in its time widely recognized as a major contribution to the field of sociology. The Lynds’ work “was an instantaneous success” both among popular readers and academics. *See* JOHN MADGE, *THE ORIGINS OF SCIENTIFIC SOCIOLOGY* 128 (1962). For further discussion of the Lynds, their background, and their influence, *see* GORDON, *supra*, at 63-84; MICHAEL D. GRIMES, *CLASS IN TWENTIETH-CENTURY AMERICAN SOCIOLOGY: AN ANALYSIS OF THEORIES AND*

in 1925 and 1935, suggest that the lower-level white-collar worker's sense that he was on an upward occupational trajectory was becoming increasingly unrealistic.

When the Lynds first visited Middletown in 1925, they concluded that the community had only two classes, a "working class" and a "business class," the latter of which included "an infinite number of gradations — all the way . . . from the retail clerk and cashier to the factory owner and professional man."⁵¹ Their classification system depended first and foremost on the line between those who "address their activities in getting their living primarily to *things*" and those who "address their activities predominantly to *people* in the selling or promotion of things, services, and ideas."⁵² This distinction was difficult to apply in practice. Is the cashier a cash-register operator who deals with things or a salesclerk who deals with people? How is one to deal with "users of highly-skilled techniques — architects, surgeons, chemists, and so on" who "address[s] their activities in getting a living more to things than people,"⁵³ but who were viewed by no one as members of the working class? To deal with the difficult or anomalous cases, the "twilight belt in which some members of the two groups overlap and merge,"⁵⁴ the Lynds relied considerably on criteria other than jobs' functional characteristics. They observed that "since it is the business interests of the city that dominate and give their tone, in the main, to the lawyer, chemist, architect, engineer, teacher, and even to some extent preacher and doctor," and "all their other activities would place them with the business class," placing them within the business class "by and large accurately represents the facts."⁵⁵

MEASUREMENT STRATEGIES 56-62 (1991) (noting that "[t]heir studies of 'Middletown' represent the first use of class as an organizing dimension in a holistic setting within American sociology and served as an important stimulus for subsequent research on the subject"); CHARLES HUNT PAGE, *CLASS AND AMERICAN SOCIOLOGY: FROM WARD TO ROSS* 216 n.7, 236, 252 (1964). The similar work of social anthropologist W. Lloyd Warner and his school on "Yankee City" falls just outside the time frame of this article. See, e.g., W. LLOYD WARNER & PAUL S. LUNT, *THE SOCIAL LIFE OF A MODERN COMMUNITY* (1941); W. LLOYD WARNER & J.O. LOW, *THE SOCIAL SYSTEM OF THE MODERN FACTORY — THE STRIKE: A SOCIAL ANALYSIS* (1947).

51. LYND & LYND, *MIDDLETOWN*, *supra* note 50, at 22-23.

52. *Id.* at 22.

53. *Id.* at 22 n.3.

54. *Id.* at 23.

55. *Id.* at 23 n.3; cf. MADGE, *supra* note 50, at 136 (noting the problems, "such as where one should place the dentist, who is obviously a professional man although he deals with things, that is, teeth, or the sculptor or musician, who equally deals with things," and noting with admiration that "[s]ensibly [the Lynds] decided not to be too pedantic about such cases but put them in with the business classes").

The Lynds returned to Middletown in 1935, during the Depression, and published the results of their second study in 1937.⁵⁶ They saw two major changes. The Middletown of 1925 was a place where the lines between the two classes were permeable. By 1935, that had changed. "Above the foreman's rung, the ladder is ceasing to be one ladder: there have virtually ceased to be rungs between the foreman and a higher section of the ladder beyond his reach where an entirely new set of personnel usually not recruited from working-class personnel begins."⁵⁷ This, they saw, interfered with America's "exuberant boast of a classless society."⁵⁸ The other significant change was that the business class itself was splintering. A small group at the top of the business class was becoming a "nascent 'upper class,'" while at the same time there was "the apparently clearer demarcation of another and larger group of families at the lower end of the business class as a Middletown 'middle class.'⁵⁹ This was a diverse group of "'small' white-collar folk — struggling manufacturers with no particular future, the smaller retailers and tradespeople, salesmen, officeholders, schoolteachers, and many of the growing group of hired professional assistants" who were hired directly by industry.⁶⁰ Civil servants, clerks and clerical workers were also part of this newly emerging class. The Lynds' observations in 1935 no longer supported their earlier view that a single business class reached down to include these workers, bound together by ties of sociality and expected mobility.⁶¹

In contemplating the emergence of a new and less-privileged middle class in Middletown, the key question for the Lynds was how this new middle class understood itself — whether it identified upwards (with the upper tier of the business class) or downwards (with foremen and skilled industrial workers and, below them, with semiskilled and unskilled workers). The Lynds noted the work of Lewis Corey, a Marxist who argued in 1935 that only self-delusion

56. See LYND & LYND, *MIDDLETOWN IN TRANSITION*, *supra* note 50.

57. *Id.* at 71.

58. *Id.* at 72-73 ("Should the long term trend actually prove to be toward the contracting of working class hopes to the permanent boundaries of nineteen dollar suits, \$2.50 shoes, and a second hand Chevie, while raises, promotions — all the things associated with 'going up in the world' — are largely confined to the three in each ten of Middletown's income earners who fall in the business class," then there will be "a system of social organization which no one in Middletown is today ready to call 'American.'")

59. *Id.* at 455.

60. *Id.* at 455-56.

61. The Lynds saw this trend as exacerbated by the Depression but not entirely determined by it. See *id.* at 72. This is in part because in the 10 years between the field work underlying the two volumes, Middletown first went through a period of boom before going through depression. See *id.* at xi.

kept the new propertyless middle classes in alliance with capital and that the Depression would fatally undermine this self-delusion.⁶² The Lynds rejected the notion that this process had begun. To the Lynds, members of the new Middletown middle class still identified with the upper classes.⁶³ But the Lynds saw the strain in the middle class's efforts to do so: "[They] think of themselves as part of the business class and cling hard to their status as white-collar folk — perhaps the harder because of their slowly growing sense of uneasiness as to their isolation"⁶⁴

The many tiers of white-collar workers were also a prevailing concern of Alba Edwards, the long-tenured director of the Census Bureau who was publishing on the subject in the 1930s. Edwards saw his project as no less than the drawing of a map of the American class system, expressed as a system of occupational classifications.⁶⁵ Edwards argued that "[a] man's occupation . . . indicates, with some degree of accuracy, the kind of associates he will have, the kinds of clothes he will wear, the kind of house he will live in, the kind of food he will eat, and the cultural level of his family."⁶⁶ The divisions he saw as most relevant to these issues were, first and foremost, the distinction between "head workers" and "hand workers," and then, among hand workers, distinctions based on level of

62. See LEWIS COREY, *THE CRISIS OF THE MIDDLE CLASS* 16 (1935). Lewis Corey was the nom de plume of Louis Fraina. See DENNING, *supra* note 25, at 99-100. Jürgen Kocka identifies Corey/Fraina as a "[r]elatively orthodox Marxist[]" who was influenced by the German literature on the "new middle classes" long before that literature had come to influence mainstream sociologists. See KOCKA, *supra* note 5, at 203-05. Denning refers to him as "one of the most important Western Marxists in the United States" and "the great theorist of the Popular Front social movement," particularly because of the attention he paid to the new middle classes. DENNING, *supra* note 25, at 99. For a discussion of Corey's book *The Crisis of the Middle Class*, see DENNING, *supra* note 25, at 101.

63. See LYND & LYND, *MIDDLETOWN IN TRANSITION*, *supra* note 50, at 460; accord Ralph G. Hurlin & Meredith B. Givens, *Shifting Occupational Patterns, in RECENT SOCIAL TRENDS IN THE UNITED STATES: REPORT OF THE PRESIDENT'S RESEARCH COMMITTEE ON SOCIAL TRENDS*, 268, 288-89 (Committee on Social Trends, Inc. ed., 1 vol. ed. 1934) [hereinafter RESEARCH COMMITTEE ON SOCIAL TRENDS] ("The clerical or white collar employees are quite as dependent upon modest earnings as industrial wage earners but they are commonly jealous of their status as a part of the middle class.").

64. LYND & LYND, *MIDDLETOWN IN TRANSITION*, *supra* note 50, at 460.

65. See JAMES G. SCOVILLE, *THE JOB CONTENT OF THE U.S. ECONOMY, 1940-1970*, at 5-6, 25 (1969).

66. CONK, *supra* note 20, at 26 (quoting U.S. BUREAU OF THE CENSUS, *SIXTEENTH CENSUS OF THE UNITED STATES, 1940: COMPARATIVE OCCUPATION STATISTICS FOR THE UNITED STATES*, at 2) (internal quotation marks omitted).

skill.⁶⁷ His classification scheme emerged in his academic writings in the 1930s, and was adopted in the 1940 census.⁶⁸

Edwards found clerical workers hard to classify because they were not “fully group conscious” — they did not have a ready category in which they placed themselves or through which they distinguished themselves from the “usually better-educated and better-paid professional workers and the less well-educated but better-paid skilled [industrial] workers”⁶⁹ between whom they stood in the status hierarchy. Edwards was able to account for the superiority of clerical work to skilled industrial work only by augmenting a purely occupational analysis with extrinsic demographic considerations: clerical workers were more likely to be native born than the industrial workers, and the increasing presence of women in some classifications of clerical work gave to offices a middle-class gentility lacking in industrial plants.⁷⁰ Sociologists Percy Davidson and H. Dewey Anderson complained in 1937 that Edwards had not overcome “the difficulty of discovering a reliable base for the vertical classification of labor,” and that the Edwards scale, while “ostensibly social-economic,” was “really occupational; or rather, it is both to an unknown degree.”⁷¹ The heterogeneity of broad occupational categories belied Edwards’s seemingly clean hierarchization of occupations. And the census’s recourse to ranking the qualities of jobs’ occupants instead of the functional characteristics of the jobs themselves made the data less useful for placing industrial organization on a “scientific” footing as, for example, writers in the fields of personnel management and engineering were trying to do.⁷²

67. Alba M. Edwards, *A Social-Economic Grouping of the Gainful Workers of the United States*, 28 J. AM. STAT. ASSN. 377 (1933).

68. For a pre-1940 publication of the scale, see *id.*; for its pre-1940 use, see PERCY E. DAVIDSON & H. DEWEY ANDERSON, OCCUPATIONAL MOBILITY IN AN AMERICAN COMMUNITY 8 (1937). For the use of the scale in the 1940 census, see CONK, *supra* note 20, at 62.

69. CONK, *supra* note 20, at 63 (quoting Edwards).

70. For statistics on the femaleness of the clerical workforce, see Alba M. Edwards, *The “White Collar Workers,”* 38 MONTHLY LAB. REV. 501 (1934). The gender-related class implications are drawn from ZUNZ, *supra* note 37, at 138-48. Feminization’s alteration of the class definition of occupations is a two-edged sword. Entry of women into an occupation in significant numbers tends to downgrade the occupation’s prestige and income earnings, while their initial entry serves to render rough, traditionally male occupations genteel — with the gentility of female manners being coded as middle class. The way this balanced in white-collar work was that women entered these jobs before marriage, but left them upon marriage (often by rule). They therefore came to dominate only the lower-level white-collar jobs, and men did not have to compete with them for advancement. For men’s occupational prestige, this was the best of both worlds — while it lasted.

71. DAVIDSON & ANDERSON, *supra* note 68, at 7-8.

72. See CONK, *supra* note 20, at 68-69.

It should come as no surprise that social scientists as early as the mid-1920s were questioning the status relations within the white-collar classes. Those questions were being explored in the literature and popular culture of the period as well. A leading example is the novel *Babbitt*, which Sinclair Lewis published in 1922.⁷³ *Babbitt* is the saga of the self-delusional white-collar man of modest property, the “Good Mixer” who asserts that you “couldn’t hire me to join” the elite club in town and who then immediately joins when asked.⁷⁴ The most important person in Babbitt’s life is his one male friend, the only person to whom he can admit that he’s always “blowing” to his wife and kids “about what a whale of a realtor I am, and yet sometimes I get a sneaking idea I’m not such a Pierpont Morgan as I let on to be.”⁷⁵ Yet for all his doubts, Babbitt insists that his son Ted be a “college man,” and rejects Ted’s plan to attend the School of Engineering by saying he’d “be in with a lot of greasy mechanics and laboring men.”⁷⁶ The first public sign to Babbitt’s social set that he has gone “nutty” is his willingness to view striking workers as “decent,”⁷⁷ and the sure sign of his return was when it could safely be said that “no one . . . was more violent regarding the . . . crimes of labor unions . . . than was George Babbitt.”⁷⁸ In the very last page of the book, Babbitt marks the small wisdom he has gained from his misadventures by admitting to Ted that “I’ve never done a single thing I’ve wanted to in my whole life” and consenting to Ted’s desire to take a factory job in order to “get into mechanics.”⁷⁹ *Babbitt* was an instant success, precisely because it depicted the man in the middle, who sees himself as “at once triumphantly

73. For earlier popular culture examples, see, e.g., STEVEN J. ROSS, *WORKING-CLASS HOLLYWOOD: SILENT FILMS AND THE SHAPING OF CLASS IN AMERICA* *iii*, 9, 14-15, 19-20, 175-80, 198-208 (1998) (exploring silent films and their audiences in the 1910s and 1920s, and discussing the class identity of white-collar workers as in flux during this period and as influenced by film images). Ross concludes on the basis of his study that “[t]he 1920s marked a turning point . . . in the formation of modern understandings of class and class relations. The proliferation of white-collar employees and the widespread participation of wage earners in a flourishing consumer economy created great confusion over modern class identities.” *Id.* at 175. The centrality of patterns of consumption in class definition in the period make clear the identity crisis that would have been suffered by white-collar workers in the Depression — when, in the already-quoted words of Lorena Hickok, they could no longer afford to “keep those white collars laundered.” See *supra* text accompanying note 20; see also CHRISTOPHER P. WILSON, *WHITE COLLAR FICTIONS: CLASS AND SOCIAL REPRESENTATION IN AMERICAN LITERATURE, 1885-1925* (1992).

74. SINCLAIR LEWIS, *BABBITT* 55 (1922); see also *id.* at 155.

75. *Id.* at 62.

76. *Id.* at 309.

77. *Id.* at 319.

78. *Id.* at 390.

79. *Id.* at 401.

wealthy and perilously poor,"⁸⁰ and who in the end learns that to be "one of the ruling caste of Good Fellows"⁸¹ is to rule nothing at all.

Thus, the 1920s and early 1930s were years in which the cultural and material status of white-collar work were in flux — and in which cultural and material criteria did not always coincide.⁸² Marshall and Taussig questioned the pro-white-collar ideology of the times, finding the ideology unjustified by an economic reality in which skilled manual labor rightly commanded higher wagers than did clerical work. The Lynds saw the supposed long-term benefit of lower-level white-collar work — upward mobility into business management and ownership — being undermined both by the Depression and by longer-term changes in job recruitment and community social life. Sinclair Lewis questioned whether what counted as white-collar success was worth having at all. Edwards's census work reflected the difficulties inherent in any attempt to chart a "socio-economic status" hierarchy in an environment in which deeply held cultural distinctions between different types of workers often failed to correspond to purely economic differences.

It comes as no surprise, in light of these observations, that white-collar workers did not mobilize to seek government protection from long working hours. The experts were only beginning to see that economic realities were changing, and even they were not sure where or how the lines of solidarity should be drawn. It was entirely too soon for white-collar workers to embrace the shift in perspectives that advocacy for government intervention would have required.

Given this turmoil within the white collar classes, how could government administrators effectively decide who needed govern-

80. *Id.* at 53.

81. *Id.* at 42. For the suggestion that *Babbitt* became too popular to be genuinely challenging to its readers, see WILSON, *supra* note 73, at 249.

82. The contested status of the upper-level white-collar worker in this period is discussed in a rich literature within the field of business history. See, e.g., REINHARD BENDIX, *WORK AND AUTHORITY IN INDUSTRY: IDEOLOGIES OF MANAGEMENT IN THE COURSE OF INDUSTRIALIZATION* 288-319 (1956); CHARLES PERROW, *COMPLEX ORGANIZATIONS: A CRITICAL ESSAY* 14-58 (3d ed. 1986); Sanford Jacoby, *American Exceptionalism Revisited: The Importance of Management*, in *MASTERS TO MANAGERS: HISTORICAL AND COMPARATIVE PERSPECTIVES ON AMERICAN EMPLOYERS* 173, 197 (Sanford Jacoby ed., 1991) [hereinafter *MASTERS TO MANAGERS*]. Taking this theme into the 1940s is HOWELL JOHN HARRIS, *THE RIGHT TO MANAGE: INDUSTRIAL RELATIONS POLICIES OF AMERICAN BUSINESS IN THE 1940s* (1982). The business history literature is very important because key debates "about the changes in status, technology and the occupational structure took place . . . in the journals of personnel managers and the engineering profession." CONK, *supra* note 20, at 69. For examples from the personnel literature of the 1920s and 1930s, see *infra* text accompanying notes 107-20. And on the general question of the self-understanding of white-collar workers, see C. WRIGHT MILLS, *WHITE COLLAR: THE AMERICAN MIDDLE CLASSES* (1951).

ment protection in the form of hours legislation? If the ladder from low-level white-collar workers into the upper ranks of professionals was disintegrating, should those lower-level workers be given — or forced to accept — the protection of hours legislation? Administrators could have determined that protection was necessary but inappropriate and inconsistent with peoples' perception of their own status and needs. Conversely, administrators could have determined that widely perceived distinctions along class lines had become inaccurate but that differences between upper and lower-level white-collar workers still reflected functional differences between jobs — differences that required separate treatment under hours legislation. As we shall see, administrators' programs were more successful the more directly they confronted these questions: Should legislation reflect existing perceptions of class, functional distinctions between categories of jobs, or some combination of the two?

Even if white-collar workers had been prepared to recognize that their upward mobility was rapidly diminishing, and to reassess the appropriateness of governmental intervention in their conditions of work on that basis, judicial constraints would have stood in their way. The doctrine of freedom of contract had been widely used by the courts as a constitutional obstacle to regulating the working hours of men outside of hazardous occupations.⁸³ It would have been difficult to argue that working long hours at white-collar work was hazardous to the health of male workers. For women, however, the picture was different: by 1923, some states had begun to restrict the hours of women in clerical work,⁸⁴ and some even restricted the hours of women in jobs classified as professional (largely nursing and teaching).⁸⁵ But there was a long-standing tradition of greater protectionism toward female workers — a protectionism that diminished women's ability to compete with men in the labor market. Protection of female white-collar workers was due to their gender, not to any broader but frustrated desire to regulate the hours of all white-collar workers.

B. *The Black Thirty-Hours Bill*

In March 1933, Senator (later Justice) Hugo Black proposed legislation to limit the hours of certain categories of workers to thirty

83. See NATIONAL INDUS. CONF. BD., RESEARCH REP. NO. 68, LEGAL RESTRICTIONS ON HOURS OF WORK IN THE UNITED STATES: A REFERENCE MANUAL 24 (1924).

84. See *id.* at 33 tbl.2 (1923 data) (9 states).

85. See *id.* at 38 tbl.2 (1923 data) (4 states).

hours per week.⁸⁶ In constitutional terms, Black's bill was bolder, in two respects, than previous hours legislation. First, Black's bill reached beyond manual workers. The bill provided that any "article or commodity" produced or manufactured in a "mine, quarry, mill, cannery, workshop, factory or manufacturing establishment" in which anyone was "employed or permitted to work" for more than thirty hours a week would be barred from interstate commerce.⁸⁷ The bill was limited to individuals working in the producer's establishment or under the producer's direct employ; it did not reach the employees of the shipper, the employees of the wholesalers and retailers who sold the goods, and so forth. But so long as the link to the producer of goods was present, the bill did not limit its thirty-hours requirement on the basis of the work the individual performed.

Second, Black abandoned health and safety as the rationale for hours regulation, in favor of work-spreading as a method of alleviating unemployment.⁸⁸ Black explained in the cover letter to Roosevelt transmitting the proposed legislation that the bill was based on "my belief that our unemployed cannot be put to work unless the National Government legally requires a shorter work week and a shorter work day."⁸⁹ Black reiterated this theme in his radio address to the nation in support of the bill,⁹⁰ in which he said that "[i]t is not just to continue to exact 50, 60, and even in some instances 70 hours work per week from men and women while others are driven into poverty and misery from unemployment."⁹¹ Making the breadth of the statute's reach perfectly clear, Black expressed concern with the conditions facing "salaried employees."⁹² Thus Black was prepared to go further than prior federal wage and

86. See S. 5267, 72d Cong. (1932); see also 76 CONG. REC. 820 (1932) (referring Black's bill to the Judiciary Committee).

87. S. 5267, 72nd Cong. (1932).

88. Black was directly influenced by the work of Arthur Dahlberg, an engineer whose writing on the subject was well-regarded in business circles. Dahlberg's most important work on the subject was ARTHUR DAHLBERG, *JOBS, MACHINES, AND CAPITALISM* (1932). For a discussion of Dahlberg and his influence, see HUNNICUTT, *supra* note 15, at 269-78.

89. Letter from Hugo Black to President Roosevelt, (Mar. 10, 1933) (FDR/OF 372, Hours of Labor, Box 1).

90. See Senator Hugo Black, Radio Speech Concerning S. 5267 (Jan. 9, 1933), in 76 CONG. REC. 1443 (1933).

91. *Id.*, in 76 CONG. REC. 1444 (1933). Black did place special emphasis on pressures on manual work, stressing "the increased productivity of machine America" and its failure to "absorb [its] displaced labor." *Id.*, in 76 CONG. REC. 1443 (1933). But if displaced manual work was his main concern, the rest of the address was not limited to that concern, and neither was the text of his bill.

92. See *id.*, in 76 CONG. REC. 1444 (1933).

hour regulation by covering white-collar and salaried employees working within the covered industries. That approach still left white-collar and salaried workers in commercial rather than extractive and manufacturing fields uncovered, but it was a step toward universal coverage.

President Roosevelt strongly opposed Black's bill, in large part because he rejected the economic theory upon which it was predicated. Black believed, as did a number of economists in his day, that the Depression was the result of capitalist overproduction, and that over the long term the economy would need to develop the capacity to achieve distributive fairness without new growth. Roosevelt would have no part of that economic philosophy.⁹³ Instead, Roosevelt developed the view that a system of federally sponsored private industrial planning could reverse the effects of the Depression without stunting economic growth. It was this planning approach that Roosevelt implemented in the National Industrial Recovery Act (NIRA), the linchpin of the early New Deal.⁹⁴

II. THE NATIONAL INDUSTRIAL RECOVERY ACT (1933-1935)

Even though the Roosevelt administration opposed the Black bill, wage and hour regulation was a core part of the administration's NIRA program from the start.⁹⁵ In the months between the defeat of the Black Thirty-Hours Bill and the enactment of the NIRA, key Roosevelt advisers began to formulate the administration's approach. In March, Roosevelt convened a conference "on

93. See FRANCES PERKINS, *THE ROOSEVELT I KNEW* 194 (1946); see also KENNETH FINEGOLD & THEDA SKOCPOL, *STATE AND PARTY IN AMERICA'S NEW DEAL* 10, 69-71 (1995).

94. For leading critiques of industrial planning under the NIRA, see G. WILLIAM DOMHOFF, *STATE AUTONOMY OR CLASS DOMINANCE? CASE STUDIES ON POLICY MAKING IN AMERICA* 101-16 (1996); FINEGOLD & SKOCPOL, *supra* note 93; ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* (1966); MICHAEL M. WEINSTEIN, *RECOVERY AND REDISTRIBUTION UNDER THE NIRA* (1980). For a contemporaneous critique, see LEVERETT S. LYON ET AL., *THE NATIONAL RECOVERY ADMINISTRATION: AN ANALYSIS AND AN APPRAISAL* (1935). For a study focusing on NRA labor policy, see DONALD R. BRAND, *CORPORATION AND THE RULE OF LAW* (1988). Efforts to achieve thirty-hours legislation continued during the NRA period. See, e.g., Partial Redraft of H.R. 8492 by Frances Perkins, Secretary of Labor; Donald Richberg, General Counsel of NRA; William Green, President of AFL; and Representative William Connery, Chairman of the House Labor Committee, *attached to* Letter from Isabella Greenway to Eleanor Roosevelt (May 16, 1934) (FDR/OF 372, Hours of Labor, Box 1) (setting thirty hours as the hours maximum for codified industries, with exceptions based on shown need).

95. The NRA also included § 7(a), which gave labor the right to organize. That provision was underenforced throughout the NIRA period. See, e.g., SIDNEY FINE, *THE AUTOMOBILE UNDER THE BLUE EAGLE: LABOR, MANAGEMENT, AND THE AUTOMOBILE MANUFACTURING CODE 75-95* (1963); R.W. Fleming, *The Significance of the Wagner Act, in LABOR AND THE NEW DEAL* 121, 126 (Milton Derber & Edwin Young, eds., 1957).

the emergency problems having to do with distress due to unemployment and the method of overcoming the same.”⁹⁶ The agenda listed “[s]hort hours as a means of further employment” as an item for discussion.⁹⁷ Donald Richberg⁹⁸ was among those invited to attend. By mid-April, Frances Perkins, Roosevelt’s Secretary of Labor, endorsed work-spreading as the theory behind hours regulation.⁹⁹

A. *The First Proposal for a White-Collar Exemption, and an Introduction to Government Class Line-Drawing*

In late May, Alexander Sachs, then a member of the Board of Directors of the Lehman [Brothers] Corporation who was also engaged in economic research for Roosevelt and who went on to become the first director of the NRA’s Division of Research and Planning, provided the administration with a detailed memorandum on “Suggested Maximum Working Time and Formula for Establishing Minimum Wage and Salary Rates.”¹⁰⁰ Sachs’s memorandum expressly exempted “those in executive, administrative and supervisory positions” from regulation.¹⁰¹ Already before the enactment of the NIRA, then, workspeading was recognized as the official rationale for restricting working hours, and the precedent was in place for excluding upper-level workers (however defined) from hours regulation.

The Sachs memorandum is the first reference I found in the Roosevelt administration archival record to an exemption for executives, administrators, and supervisors from wage and hour regulation. The fact that Sachs built an upper-level exemption into his proposed program so matter-of-factly raises a question challenging the very thesis of this Article. How can the regulation of working hours be viewed as a contested field for the middle classes if the exclusion of upper-level white-collar workers was sealed from the start?

96. Letter from Frances Perkins to Donald Richberg 1 (Mar. 22, 1933) (Papers of Donald Richberg, Library of Congress [hereinafter LC, Richberg Papers], Container 1, Correspondence Feb.-May, 1933).

97. *Id.* at 2.

98. For an introduction to Richberg, see *supra* text accompanying note 27.

99. See Letter from Frances Perkins to Editor, WASH. POST, Apr. 20, 1933, at 1 (FDR/OF 15, DOL, Box 1, 1933 folder).

100. Memorandum from Alexander Sachs to Administration 1 (May 23, 1933) (Alexander Sachs Papers, Roosevelt Archives [hereinafter FDR, Sachs Papers], Box 124, Labor: Wages, Hours, Stabilization).

101. *Id.* at 1.

As we shall see throughout this Article, the notion that upper-level white-collar workers ought to be exempted from hours legislation had the commonsense quality that marks all uncontested cultural propositions. But as is so often the case with seemingly uncontested social truths, on closer examination one finds little agreement as to what had been agreed upon, or why. Who are the upper-level white-collar workers who obviously ought to be exempted from hours regulation? The terms chosen to describe them were not uniform from one assertion of this obvious point to another. Precisely what makes the exempted group different? Should the exemption include *all* white-collar workers? Was the logic of exclusion in fact related to collar color? Was it related to income level so that the exclusion should also apply to well-paid skilled blue-collar workers? Or was it something unique to the top tier of white-collar workers that exempted them from hours regulation? These questions were sufficiently important to reveal the conceptually difficult and contested nature of the choices government actors were required to make.

So why did Sachs find it necessary to exclude upper-level workers, and why did he draw the class lines in precisely this way? His memorandum is silent on these questions: it simply takes the need for an exemption and the location of the boundary line between regulated and exempt workers for granted. But we ought nonetheless to pause here and explore the unspoken reasons that might have motivated Sachs to include this exemption.

It is useful, here and elsewhere, broadly to distinguish between the instrumental (talk and action aimed at identifying and solving problems) and the symbolic (talk and action aimed at describing or representing the world). I shall refer to instrumental approaches to class line-drawing as *purposive* and to symbolic approaches as *descriptive*. In exploring these approaches and their implications, let us not speak of Sachs in particular — since we do not know what he in particular was thinking. Let us speak instead of an ideal type of government expert going about the task of deciding the coverage boundaries of an administrative scheme. Call him the Reasonable Expert, or REX for short.

If REX's orientation were descriptive, his exemptions from hours legislation would correspond to the dividing lines that already exist in society. If certain types of employees are generally viewed as categorically different from ordinary employees, the descriptive approach would counsel that these differences ought to be observed in federal regulations. In this sense, the descriptive approach is

hierarchy-neutral; the government purports to be merely describing the social hierarchy that exists independent of the government's decision to describe it.

If there exists a consensus view of the class system "in the culture," REX's only task under the descriptive approach is to describe the consensus accurately — and to fight off the political and administrability concerns that might interfere with the achievement of accuracy. But what if REX, using his expert knowledge or his cultural antennae, discerns conflict in the culture about where the lines of stratification should be drawn? What if he determines that a previous consensus is eroding, and a new consensus is poised to take its place?¹⁰² What if he determines, indeed, that the culture is not even close to having a consensus view, and that different groups have their own distinct perspectives? REX might determine, in these circumstances, that he must add a crystal ball to his toolkit and predict which of the contested beliefs is most likely to emerge as the dominant one in the near future. If he did not feel comfortable with the business of cultural prediction, he might instead conclude that his job must be to *ignore* beliefs and instead to use his empirical skills and make his *own* determination of the true nature of the class structure on the basis of observable social facts — or on the basis of "scientific" inquiries by experts at the Census Bureau or elsewhere.¹⁰³ REX would experience his new system as *hierarchy-neutral* — based on objective fact — but those in society whose views conflicted with REX's map of the class system would reasonably be expected to disagree.

Faced with these problems, REX might well shy away from developing an objective account of the class system at all. He might instead take the view that where no consensus exists, politics or administrability are the proper tiebreakers. If REX chooses not to admit that he has failed to arrive at a sound descriptivist decision, however, those observing the process will wrongfully assume that REX's results are consistent with his descriptivist rhetoric. The government would inadvertently be placing its seal of approval on a

102. Cf. CONK, *supra* note 20, at 30 (attributing to Raymond Williams the distinction between "a residual cultural form and an emergent one").

103. As we have seen, any attempt to defer to the expertise of the census would merely build the same problems into REX's models, as the same struggle was taking place inside the Census Bureau. See *id.* at 44 (arguing that the census under Alba Edwards had merely "confound[ed] economic or technical classifications of the workforce with the general social or cultural divisions of the American population"). For a discussion of Alba Edwards and census occupational classification, see *supra* text accompanying notes 65-72.

classification scheme the descriptivist accuracy of which it could not defend.

The second broad approach to class line-drawing is the *purposive* approach. REX need not decide that his job is to discover pre-existing classification schemes “in the culture,” or even to find the most “accurate” description of the social world through an empirical analysis of the hard facts. Instead, he could decide that the government’s job is to adopt whatever classification scheme most closely fits the government’s substantive goals. Under this approach, REX would first conduct a careful analysis of the goals of the program he is administering. He would then determine whether there exist certain social groups that for some reason ought to be excluded from the program — for example, because they do not need what the program provides. In making this determination, REX might pay attention to culturally-salient distinctions between groups. But if he is doing his purposive job right, he would do so only if the culturally-salient distinctions happen to closely correspond to factors that are relevant to the government’s program. In the absence of a close correspondence, REX would recognize the need to identify program-salient distinctions on his own, through an independent empirical analysis of the social world. Once such distinctions were adopted, REX would have no reason to present them as anything but the product of the government’s own goal-oriented activity. The purposive expert would have good reason to hope that the government’s purposive classification scheme would be hierarchy-neutral — albeit in a different sense than a descriptivist classification scheme purports to be. Here, the hope would be that since the government’s classification scheme derives from the government’s purposive goals and makes no claim to be an all-purpose accurate map of the class system, it would have little effect on existing social hierarchies or cultural debates about them.

The purposive approach is not without its own predictable blind alleys, however. Determining the precise goals of a government program is not always easy, and goals often change even as the programs themselves remain the same. Purposive classification schemes can ossify and thus be rendered goal-inappropriate by the mere passage of time. Purposive classification schemes need to be tailor-made to particular government programs and thus are likely to be slow and expensive to develop. In the interim, sometimes the only way to get a program moving is to choose a classification scheme off the shelf, as it were, and hope that it can be improved over time. But since whatever off-the-shelf scheme is selected will

have its adherents within the regulated community, change for the sake of purposive accuracy may prove difficult to implement even after all the data are in.

Problems both of administrability and public acceptability might stand in the way of the government implementing a purposive classification scheme that is sufficiently complex to meet the government's goals. Indeed, if the scheme is complex, it will be less administrable and less acceptable to the public precisely to the degree that it deviates from culturally-based descriptive norms. Regulated groups never like seemingly arbitrary government action, but the incentive to protest is all the greater when the government's regulatory scheme is complex and compliance is therefore administratively burdensome. Furthermore, a purposive analysis may not in practice be able to stand aloof from public debates on class. The results of a purposive analysis may not in fact be all that different from the results reached by a process of description. For example, even if REX selected his class-ranking criterion purely for its purposive relevance, it might well prove to be the case that his selected criterion also plays a role as a marker of status within the culture. REX is, after all, a product of his culture; he knows intuitively that his results will have greater legitimacy if they *do* correspond to culturally-based understandings of the social world.

Why, then, was Sachs proposing to exempt certain white-collar workers from hours regulation? From a *purposive* standpoint, Sachs might have believed that executives, administrators, and supervisors were not suffering significant enough levels of unemployment to make it worth regulating their hours, but lower-level white-collar workers were. If so, his view would not have been the uniform view of Roosevelt's close advisers. Paul H. Douglas, a leading Progressive economist (and later U.S. Senator) who was a key policymaker on the issue of unemployment insurance,¹⁰⁴ had recommended as early as January 1933 that "[t]he present depression has thrown so many of the white-collared group out of their jobs and they have found their own resources so inadequate that there is justification for extending the upper limits" of unemployment insurance coverage to include some high-salaried white-collar workers.¹⁰⁵ Douglas noted that the coverage limit he advocated,

104. See PAUL H. DOUGLAS, *IN THE FULLNESS OF TIME: THE MEMOIRS OF PAUL H. DOUGLAS 70-77* (1972) (discussing his role and his policy conflicts with John Commons). For earlier comparative work by Douglas on the subject of unemployment, see PAUL H. DOUGLAS & AARON DIRECTOR, *THE PROBLEM OF UNEMPLOYMENT* (1931), which does not discuss issues of unemployment among white-collar workers.

105. PAUL H. DOUGLAS, *STANDARDS OF UNEMPLOYMENT INSURANCE* 51 (1932).

“those salaried workers who receive less than \$60 a week,” would “not only protect the clerks, stenographers, etc., but also the lower group of executives.”¹⁰⁶

Sachs might also have thought that the work of upper-level employees could not be spread. This view — that the work of upper-level workers is different from ordinary work in ways directly relevant to the possibility of work-spreading — would have resonated with significant traditions within the field of personnel management. After all, the tradition of paying white-collar workers on a salaried basis fostered the view that white-collar work could not be broken down into hourly units. By traditionally being paid on a “salary basis,” however, upper-level white-collar workers were no different from routine white-collar workers — a group Sachs did not propose excluding from hours regulation.

Furthermore, both for routine and supervisory white-collar work, tradition was changing in the 1920s and 1930s. The personnel literature of the 1920s and 1930s was replet with calls for subjecting routine white-collar work to the tools of personnel management. Examples include calls for the rationalization of white-collar pay scales,¹⁰⁷ the proper measurement of clerical production and the development of production standards and incentive pay schemes for clerical workers,¹⁰⁸ and the reversal of the “fallacious and misleading” tendency to rank clerical workers higher than manual workers based on the failure to recognize that “[t]here is no

106. *Id.* Douglas is here making recommendations for state and federal legislation. His \$60-a-week salary cutoff is quite high for his times: in his appendix, he includes the Ohio unemployment compensation statute, which excludes from the definition of “employee” (the covered group) “any person employed at other than manual labor at a rate of remuneration of two thousand dollars a year or more,” *id.* app. C, at 240, or \$38 dollars a week. Other unemployment insurance proposals expressly excluded upper-level workers. *See, e.g.*, Report of Unemployment Insurance Committee to Industrial Advisory Board (June 18, 1934) (FDR/OF 121a, Unemployment Insurance, Box 1, 1933-34) (proposing an exclusion for “professional people, such as physicians, lawyers, engineers,” *id.* at 8, and describing a proposed plan by the American Association of Social Security to exempt “non-manual workers with salaries of \$3,000 per year or more,” *id.* at 27). For a discussion of the problem of the economic situation of white-collar workers in the Depression, see KOCKA, *supra* note 5, at 194-95 (“American white collar workers were hit hard by the economic crisis, though somewhat later and on the whole a little less hard than manual workers. . . . On the other hand, blue collar workers gained more than white collar employees from the recovery of 1933/34 which was supported by the minimum wage and maximum worktime provisions of New Deal legislation.”).

107. *See* Charles J. McGuirk, *Am I Underpaying or Overpaying My Men?*, 57 *PRINTER'S INK*, Mar. 31, 1927, at 5, *excerpted in* 26 *MGMT. REV.* 159 (1927).

108. *See* George Filipetti, *Install[ment] Buying and Business Depressions*, 20 *MGMT. REV.* 15, 15 (1931); *see also* F.W. Pierce, *Basic Principles of Wage and Salary Administration*, 11 *PERSONNEL* 111, 112 (1935) (noting that one of the reasons traditionally “salaried” work was compensated on that basis was that “the companies have been slow to set up standards for this kind of work”).

more brain activity" in routine clerical work than in routine manual work.¹⁰⁹ Applying the tools of personnel management to routine white-collar work eroded the distinction between such white-collar workers and the blue-collar workers whose labor had long been grist for the mill of personnel science.

The nature of supervisory work was also being reassessed in this period, and it, too, was being brought under increasingly close management measurement and control. "Job analysis" was one of the central tools of Taylorite scientific management. By breaking jobs down into their component parts, management could assign and monitor each part to secure maximum effort and output,¹¹⁰ and could create scientifically based wage systems.¹¹¹ As one personnel author correctly noted in 1934, the use of scientific management techniques to manage the supervisory workforce was nothing new: "Of course, job analysis of executive positions really started in the factory with Taylor's work in functional foremanship. From there it spread to certain office and supervisory positions, and is today under serious consideration for all executive positions."¹¹² Articles in the 1930s described job analysis as useful for "not only routine positions, but those of assistant executives up to department heads."¹¹³

The leading example of the trend toward scientific control of supervisory workers was the famous industrial research program known as the Hawthorne Experiments, which began in 1927 at the Hawthorne Works of Western Electric Company in Chicago.¹¹⁴

109. See J.O. Hopwood, *Administration of Wages and Salaries*, 11 PERSONNEL 99, 105 (1935).

110. See RICHARD GILLESPIE, *MANUFACTURING KNOWLEDGE: A HISTORY OF THE HAWTHORNE EXPERIMENTS* 11 (1991).

111. See, e.g., NATIONAL INDUS. CONF. BD., INC., *SUPPLEMENTAL BONUSES FOR WAGE EARNERS, SUPERVISORS AND EXECUTIVES* (1927).

112. Pearce C. Kelley, *Selecting Executives*, 10 PERSONNEL 8, 14 (1934).

113. C.R. Dooley, *The Philosophy and Procedure of a Job Analysis*, 10 PERSONNEL 67, 67 (1934). See A.F. Kindall, *Job Description and Rating*, 14 PERSONNEL 122, 129 (1938) (finding its job analysis and rating program "adaptable to practically all jobs valued at \$4,000 a year or less"). "This includes factory, office, sales, clerical, salaried, and supervisory jobs held by men and women in all sections of the country." *Id.* With "[c]ertain adjustments," readers were assured, the system would work for higher-valued salaried jobs as well. See *id.*

114. The final report of the Hawthorne experiments is F.J. ROETHLISBERGER & WILLIAM J. DICKSON, *MANAGEMENT AND THE WORKER: AN ACCOUNT OF A RESEARCH PROGRAM CONDUCTED BY THE WESTERN ELECTRIC COMPANY, HAWTHORNE WORKS, CHICAGO* (1939). The results of the study were known in the literature long before the book was published. See GILLESPIE, *supra* note 110, at 196. The heavily psychological emphasis of the Hawthorne project contributed to the creation of a movement called "human relations." See PERROW, *supra* note 82, at 97 (discussing "Hawthorne and All That" in a chapter on "The Human Relations Model"). As Gillespie's study of the Hawthorne Experiments stresses, the basic thrust of the movement was that "workers . . . could be satisfied only if managers extended

The purpose of the project was to use the methods of experimental social science to determine the effects on productivity of such variables as shop lighting, hours of work, work schedules, and so forth. What the Hawthorne investigators found, instead, was that differences in methods of supervision, rather than differences in the material conditions of the test room, in fact caused the observed increases in output and improvements in attitude among the studied workers.¹¹⁵ The investigators turned their attention to methods for subjecting *supervisors* to the techniques of personnel science. What did it say about the status of lower-level supervisors when social scientific methods started being used to transform them into “natives” to be observed and measured?¹¹⁶ Indeed, in a classic example of a profession creating the need for its own services,¹¹⁷ one of the major uses of the new human relations technology was to address the supervisors’ very concern that their superior status was being undermined by changes in the industrial process.¹¹⁸ Thus, supervisory work was hardly immune from management control, and was not categorically different in that regard from lower-level white-collar work.

their control over the social organization of the workplace.” GILLESPIE, *supra* note 110, at 197. Thus the “scientific management” label, in the sense of the use of best-practice social and organizational techniques to impose bureaucratic control over workers and their work, is appropriate to the Hawthorne study.

115. See ROETHLISBERGER & DICKSON, *supra* note 114, at 88.

116. See GILLESPIE, *supra* note 110, at 200 (“They argued that the attitudes and complaints of workers and *supervisors* had to be analyzed in the same way that Radcliffe-Brown had studied the beliefs and sentiments of the Andaman Islanders.” (emphasis added)). Just as being subjected to the ministrations of personnel experts was a sign of diminished status, it was a sign of the superior status of foremen at Ford in the heyday of its experiments in welfare capitalism that “[they] won virtual exemption from the sociology department’s investigations.” ZUNZ, *supra* note 37, at 135.

117. This phenomenon is noted in that icon of the representation of work in 1990s American popular culture: the *Dilbert* corpus. See SCOTT ADAMS, *THE DILBERT PRINCIPLE: A CUBICLE’S-EYE VIEW OF BOSSES, MEETINGS, MANAGEMENT FADS & OTHER WORKPLACE AFFLICTIONS* 1 (1996) (“A major technology company simultaneously rolled out two new programs: (1) a random drug testing program, and (2) an ‘Individual Dignity Enhancement’ program.”).

118. Another factor tending to lower the self-perceived status of managers was the unionization of their plants. See JACOBY, *supra* note 82, at 197. For similar conclusions drawn from 1934-35 fieldwork focusing on a 1933 strike, see WARNER & LOW, *supra* note 50, at 187 (for dates of fieldwork, see *id.* at 5 n.3). In part due to unionization — or its avoidance — but also in part due to ideological trends within the field of personnel management itself, some personnel managers aimed to reorganize blue-collar work by adopting some of what had previously been the definitive markers of white-collar work: for example stable employment and well-established lines of promotion. See SANFORD JACOBY, *EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY, 1900-1945*, at 82 (1985) (noting the early work of the vocational guidance movement); *id.* at 255 (“The continuing irony in personnel management was that it best served the purpose of thwarting unionism by introducing the same reforms the unions sought.”).

Perhaps Sachs was motivated by a belief that upper-level white-collar work could not be spread among workers. Upper-level white-collar work was, after all, traditionally compensated on a salaried basis — suggesting that it cannot be broken into hourly increments and divided between two workers. If work-spreading can't work, no government purpose is served by requiring it.

Two factors weigh against using the wage/salary distinction as the basis for a purposive upper-level exemption. First, as already noted, lower-level white-collar workers were also traditionally paid salaries rather than hourly wages — rendering Sachs's exemption underinclusive if salary payment was taken as a sign that work cannot be spread. Second, there was no reason to assume that salaried jobs were functionally different from hourly jobs. The preservation of the wage/salary distinction throughout the 1920s and 1930s — and into the present — in the face of the increasing Taylorization of white-collar work did not necessarily reflect a belief in the indivisibility of white-collar work in general. The wage/salary distinction was in best practice¹¹⁹ largely a tool in a symbolic process. The business community wanted to rationalize white-collar work without undermining the Taylorized white-collar workers' upward class identification. Doing so required maintaining the distinction between salary work and wage work despite the erosion of the functional justification for the distinction.¹²⁰

Perhaps, though, Sachs was engaged in a descriptive rather than a purposive task when he decided that upper-level white-collar workers should be exempt from hours regulation. From a descriptive standpoint, Sachs might have operated on the assumption that it would be culturally inappropriate to subject upper-level employees to hours regulation, even if they could benefit from it in a narrow economic sense. Such an assumption was borne out by the experience of lower-level supervisors at the Hawthorne Works, who reportedly suffered a severe status loss in 1931 when their hours

119. For the underutilization of “best practice” techniques, see Daniel Nelson, *Scientific Management and the Workplace, 1920-1935*, in *MASTERS TO MANAGERS*, *supra* note 82, at 86-89; See also BENDIX, *supra* note 82, at 319; JACOBY, *EMPLOYING BUREAUCRACY*, *supra* note 118, at 154, 157; GERALD E. KAHLER & ALTON C. JOHNSON, *THE DEVELOPMENT OF PERSONNEL ADMINISTRATION, 1923-1945*, at 22-23 (1971) (noting the “elaborately organized personnel department described in the textbooks existed only in some of the large firms” in the 1920s).

120. See Pierce, *supra* note 108, at 112 (noting that the company is “working toward the definition of certain intermediate jobs in both the supervisory and clerical forces on fixed rate schedules without classifying them as wage-earners”). Similarly, the payment of salaries rather than hourly wages to foremen — whose status as white-collar workers has always been subject to question — was used as an indicator of their heightened status. See ZUNZ, *supra* note 37, at 136.

were cut (like the operators' but unlike the upper-level supervisors').

[They] could not understand why they were asked to take a . . . cut in hours when they, of all supervisors, could least afford it. They wished to know, "Where the hell does this company get this two-class system anyway?" Group chiefs argued against the "two-class system" on the ground that they were put on the same level as the operators. Some felt their social prestige had been injured. Friends and neighbors to whom they had proudly boasted of being supervisors at the Western Electric Co. would no longer believe them and taunted them by saying "Oh, I thought you were a supervisor, but I see your hours were cut like the operators'."¹²¹

It might have been obvious to Sachs that subjecting upper-level white-collar workers to hours regulation would have so undermined their claim to high status that they would have objected to it — even in the face of the economic need of the group as a whole.

It is impossible to know from Sachs's bare mention of an upper-level exclusion whether he was taking a purposive or descriptive approach to the problem. Even where the administrative record is clearer, it is not always easy to identify a predominant approach. But where the predominant approach *can* be identified, it will become possible to ask whether the difference between the purposive and descriptive approaches to class line-drawing carries any *normative* significance: whether one approach is in some sense (symbolic, instrumental, or both) better than the other. But that discussion must await the emergence of the issue of upper-level exemptions in a richer historical context.

B. *The Creation of the NRA (and a Brief Note on the Role of the Realists)*

The NIRA became law on June 16, 1933¹²² and called for the creation of the NRA. Roosevelt appointed General Hugh Johnson as NRA Administrator. Johnson was an industrial engineer by training, was widely acclaimed for his work on the World War I draft, and was a close associate of influential Progressive financier Bernard Baruch.¹²³ The NRA's staff included many prominent aca-

121. ROETHLISBERGER & DICKSON, *supra* note 114, at 340.

122. For the drafting of the statute, see, e.g., BERNARD BELLUSH, *THE FAILURE OF THE NRA 9-13* (1975); COLIN GORDON, *NEW DEALS: BUSINESS, LABOR, AND POLITICS IN AMERICA, 1920-1935*, at 171 (1994).

123. See FINEGOLD & SKOCPOL, *supra* note 93, at 92. Baruch was not flattering in his evaluation of Johnson. Baruch is described by Perkins as warning her: "He's been my number-three man for years. I think he's a good number-three man, maybe a number-two man, but he's not a number-one man. He's dangerous and unstable. . . . I'm fond of him, but do tell the President to be careful." PERKINS, *supra* note 93, at 200-01.

demics and lawyers with Progressive and Legal Realist leanings. Most prominent among them in the spheres of decisionmaking at issue in this Article were Donald Richberg, the NRA's first General Counsel and later head,¹²⁴ and Leon C. Marshall, the Director of the Review Division of the NRA who later became a member of the National Industrial Review Board, the body which took over the direction of the NRA upon Johnson's resignation in January 1934.¹²⁵ Thus, trends in Progressive and Legal Realist thought significantly influenced the New Deal class line-drawing enterprise.¹²⁶

One of the central aims of thirty years of Progressive and Legal Realist thought was to bring independent technical and scientific knowledge to bear on social problems.¹²⁷ These movements did

124. On the appointment of Richberg and the true nature of his role — far broader than the title General Counsel would suggest — see HUGH S. JOHNSON, *THE BLUE EAGLE FROM EGG TO EARTH* 201 (1935); see also HAWLEY, *supra* note 94; THOMAS E. VADNEY, *THE WAYWARD LIBERAL: A POLITICAL BIOGRAPHY OF DONALD RICHBURG* (1970). Richberg was a union-side labor lawyer, and Johnson's unfamiliarity with labor issues and lack of a base of support within the labor movement was one of the reasons he appointed Richberg. See BELLUSH, *supra* note 122, at 32-33; VADNEY, *supra*, at 121. But in the end, Richberg turned "away from labor influences in a gesture of fair-mindedness to all interests . . . [but] succumb[ed] to business influences — which, after all, were the stronger of the two in the NRA. . . . [a] point that Richberg failed to take adequate account of." VADNEY, *supra*, at 123.

125. See VADNEY, *supra* note 124, at 144. Marshall was one of two academics on this Board; the other was institutional economist and Yale Law School professor Walton Hamilton. See *id.* In addition, Paul Douglas was a member of the NRA's Consumer Advisory Board and also served briefly as a member of the code authority for the consumer finance industry. Both are described by Douglas as disheartening experiences. See DOUGLAS, *supra* note 104, at 64-65.

126. Of course, not all law schools and government agencies participated in Progressive and Realist trends to equal degrees. Yale and Columbia were the institutional "seedbed" of legal realism in law teaching, and progressive tendencies were strong at Harvard. See PETER H. IRONS, *THE NEW DEAL LAWYERS* 7 (1982). FINEGOLD & SKOCPOL, *supra* note 93, at 97, observe that "NRA lawyers were older, less frequently educated at Ivy League law schools, and more experienced in business and politics" than were the lawyers in more liberal agencies. See also IRONS, *supra*, at 30 (noting that although Blackwell Smith, who administered the NRA legal division, was a young Columbia law graduate, he "leaned toward older, experienced lawyers for responsible NRA posts . . . with prior business and political experience").

The leading studies of New Deal lawyers focus on lawyers in the private sector, see IRONS, *supra*, or on litigators within government, see RONEN SHAMIR, *MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL* (1995). They have less to offer with regard to government lawyers as negotiators and policymakers. On that issue, for a helpful insider account from a Yale-trained NRA lawyer who later joined the Yale faculty, see THOMAS I. EMERSON, *YOUNG LAWYER FOR THE NEW DEAL* 18-22 (1991). His experience suggests that the aspirations and frustrations of REX, my ideal typical New Deal expert, were alive and well in the NRA.

127. Also central was the Progressive/Realist view that in so doing, they were acting in the public interest rather than in the narrow self-interest of any one particular social group. An example is Donald R. Richberg's presentation of himself to Congress in testimony on the causes of the Depression. Richberg, by then a noted representative of union interests in the railroad industry, described himself as having no authority "save that of a life long advocate of public interests." See Testimony of Donald R. Richberg before the Committee on Finance, United States Senate, *Depression Causes and Remedies* 7 (Feb. 23, 1933) (LC, Richberg Papers, Container 43, Relief for Unemployment). For a fine account of the complexity of

not, of course, share internally or with each other precise conceptions of what "science" was or how it was to be integrated into the political process. But some form of faith in science characterized the critique both of corrupt democratic politics and of the abstraction and formalism of traditional legal thought.¹²⁸

In the Wilson and Hoover eras, the type of social knowledge most drawn upon by government was the knowledge of and from the world of business and industry. In the Wilson era, it was businessmen themselves who became involved in organizational reform as volunteers in the war effort. For Hoover, it was not the captains of industry but their engineer lieutenants who were the most useful — not a surprising assessment given the fact that Hoover was himself an engineer.¹²⁹ Precisely because the engineer drew his expertise from intimate involvement in the world of business and was dependent for his future insights and reputation on employment by or consultation with the business community, the independence of the engineer as social policymaker was never free from doubt. For this reason, Thorstein Veblen stressed the development of "moral responsibility on the part of the nation's new technological elite, its 'engineers,'" ¹³⁰ to foster their own independence of judgment. A new emphasis on "professionalism," including the formation of national organizations whose uniform standards were imposed upon the employers of professionals, helped to foster the belief that professionals could maintain their stance of being in industry but not

progressive lawyers' claim that lawyering for clients can be in the public interest, see Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 *YALE L.J.* 1445 (1996).

128. There is a huge literature on these issues. See, e.g., NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* (1995); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992); LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986); BARRY DEAN KARL, *THE UNEASY STATE: THE UNITED STATES FROM 1915-1945*, at 60-62 (1983) [hereinafter KARL, *UNEASY STATE*]; EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973); JOHN HENRY SCHLEGEL, 'AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE' (1995); SHAMIR, *supra* note 126, at 131-57; WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

129. See BARRY DEAN KARL, *EXECUTIVE REORGANIZATION AND REFORM IN THE NEW DEAL: THE GENESIS OF ADMINISTRATIVE MANAGEMENT, 1900-1939*, at 22 (1963) [hereinafter KARL, *EXECUTIVE REORGANIZATION*] (Hoover era); KARL, *UNEASY STATE, supra* note 128, at 39 (Wilson era). Hoover's confidence in engineers continued long past the end of his administration. See, e.g., *Calls Lag in Work Job for Engineers*, *N.Y. TIMES*, July 14, 1939, at 4 ("Former President Herbert Hoover suggested today that the engineers of the nation might succeed where economists, politicians and sociologists had failed in finding a solution to the unemployment problem He called engineers the world's 'troubleshooters,' 'the diagnosticians of industry,' and 'the third party between capital and labor.' 'Your profession is to make things work,' he said.").

130. KARL, *UNEASY STATE, supra* note 128, at 23 (quoting Veblen).

entirely of it.¹³¹ But in the end, it was the nature of scientific inquiry itself that was counted on as the check against bias. The very measurability of social phenomena meant that the scientific results derived from them could be verified and therefore trusted.

Engineering, with its ties to natural science, was not the only discipline conscripted into advancing social knowledge. The ideology of objective science that justified involving engineers in policymaking and implementation was readily carried over from engineering to economics and the other, even softer, social sciences.¹³² Advocates of social scientific approaches to law and government went so far as to assert that social scientists could be more objective than the engineers who had shaped economic policy in the Hoover era. One such advocate was Donald Richberg, whose legal writings and speeches placed him squarely in the Realist mode in the years prior to the NRA.¹³³ For Richberg, the institutional independence of social scientists — their location in universities rather than in the world of business — gave them the edge in their ability to claim intellectual independence.¹³⁴ He conceded that social scientific knowledge was not at an advanced state, but he had every confidence that with increased reliance on social scientific data would come convergence within the social sciences on the right answers to social problems. “[O]ut of a thousand [data] fragments can be built a fact — a thing that will work always exactly in the same

131. See *id.* at 53.

132. See *id.* at 72 (“It is possible to view Hoover’s faith in academic economics as naive, but the faith came naturally to a professional engineer, accustomed to calculating stresses and temperatures, and the social scientists shared his faith and aspired to make their new science as accurate and objective as his.”). For a full account of realism and the social sciences, see SCHLEGEL, *supra* note 128.

133. See, e.g., Donald Richberg, Speech to the California Conference on Social Work 21 (May 15, 1930) (transcript available in the Library of Congress Manuscripts Division, LC, Richberg Papers, Box 43, Speeches 1930-Feb. 1933) (“It is essentially the task of those who seek social progress to destroy th[e] ruling fiction [of private property], and all the fictions, the illusions, the superstitions that have been so sedulously implanted in the minds of men and women that they are blind to their own needs, uncertain of their own aspirations, unable to distinguish between the leadership that would enslave them and the leadership that would set them free.”); Donald Richberg, *Economic Illusions Underlying Law*, 1 U. CHI. L. REV. 96, 96 (1933) (“The ultimate sanction of law making rests upon the establishment of facts In the higher realms of legislative and judicial law making, it becomes a matter of grave importance that legislators and judges shall not declare that to be a fact which is not a fact, or declare that to be fixed and established which is uncertain and unpredictable. These preliminary observations may serve to introduce a brief criticism of the efforts of legislators and courts to write economic illusions into law.”).

134. See DONALD R. RICHBERG, *TENTS OF THE MIGHTY* 214 (1930). Richberg was not himself an academic but was enamored of the academics with whom he socialized in the University Club at the University of Chicago. He wrote, “It was enlightening to a man who worked in ‘the City’ to contrast the discussion of social problems in the down town lunch clubs with the analysis of similar issues at a professor’s dinnertable.” *Id.* at 216.

way under the same conditions — something which can be made and used.”¹³⁵ Richberg’s demand that “[t]he men who know must run the show” testified to his deep confidence in “the rising authority of scientific leadership.”¹³⁶

Social science’s mantle of objectivity was so capacious that legal thinkers of the period became strong advocates of interdisciplinary legal work.¹³⁷ At the Institute for Human Relations at Yale and the Johns Hopkins Institute for the Study of Law,¹³⁸ scientifically oriented legal realists sought institutional independence from law schools in research institutes dedicated to empirical social science research relating to the legal system.¹³⁹ The social science they sought out was, Morton Horwitz has argued, “the narrowest and most naively behavioralist versions of positivist social science.”¹⁴⁰

Believers in science had great confidence that the expert’s scientific contribution to policymaking could be independent of politics. Charles Merriam, a professor of political science at the University of Chicago and a leading Progressive era theorist of the relationship between science and government, for example, stressed that while science could serve politics, it could only do so if science was independent of politics.¹⁴¹ This meant, to Merriam, that social scientists’ investigations needed to be independent of any particular government program, lest the search for truth be unduly constrained.¹⁴² Most social scientists of the period thought that this independence from political taint was possible, that, as Purcell has observed, “they could remain scientifically neutral while developing workable techniques of social control.”¹⁴³

But this ideology of social science’s value-neutrality had intellectually powerful and influential critics. Robert Maynard Hutchins, who had embraced the social-scientific approach to law, became disillusioned with it when he started doing empirical work and realized that data were constrained by the data collectors’ assumptions, which were not themselves subject to scientific test-

135. *Id.* at 247.

136. *Id.* at 226, 252.

137. See PURCELL, *supra* note 128, at 78.

138. See KALMAN, *supra* note 128; SCHLEGEL, *supra* note 128 (chapters on Yale and Hopkins); TWINING, *supra* note 128, at 60-65. For a discussion of the Hopkins Institute, including Marshall’s role, see SCHLEGEL, *supra* note 128, at 147-210.

139. See SCHLEGEL, *supra* note 128, at 66.

140. HORWITZ, *supra* note 128, at 181.

141. See KARL, EXECUTIVE REORGANIZATION, *supra* note 129, at 71.

142. See *id.* at 262.

143. PURCELL, *supra* note 128, at 26.

ing.¹⁴⁴ Lon Fuller perceptively argued in 1934 that the Realists were so afraid of value choices that they believed that social reality, accurately analyzed, would provide its own values. As Horwitz puts it, Fuller saw that “in attempting to have law simply mirror society, Realism ended up endowing the Is with normative content” — or, even more specifically, “endow[ing] *economically dominant . . .* practices with undeserved normativity.”¹⁴⁵

Progressive and Legal Realist thinkers considered not only why social science should be brought to bear on contemporary problems, but also *how* it might best be brought to bear. They viewed the administrative agency as the institutional locus within government most likely to put social science research to optimal social use. James Landis, who championed the administrative state in his 1938 Storrs Lectures, claimed that in the administrative agency, unlike in the courts, “the calm of scientific inquiry” would reign.¹⁴⁶ This made the administrative agency the proper forum for developing the law away from the common law’s abstraction and formalism and towards the “completely adult” jurisprudence the Realists sought.¹⁴⁷ In Landis’s vision of the administrative agency, it would matter little whether Congress had given the agency clear guidelines within which to work. The mature administrator would see himself as having a set of real-world problems to solve, and would take his guidance from empirical knowledge of the world, not from the prior commands of Congress.¹⁴⁸

144. *See id.* at 142.

145. HORWITZ, *supra* note 128, at 211 (emphasis added); *see also* Lon Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 458, 461 (1934). Sometimes the constraints were as much institutional as intellectual; to get funding for the Hopkins institute, Walter Wheeler Cook had to promise that the Institute would not be seeking to change the existing social order, but would instead “accept the existing social and economic organization as a basic fact.” SCHLEGEL, *supra* note 128, at 155 (quoting Walter Wheeler Cook).

146. JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* (1938), *discussed in* HORWITZ, *supra* note 128, at 220, *and reprinted in part in* AMERICAN LEGAL REALISM 159-63 (William W. Fisher III et al. eds., 1993).

147. The phrase is Jerome Frank’s. *See* JEROME FRANK, *LAW AND THE MODERN MIND* 253 (1936).

148. James Landis wrote:

One of the ablest administrators that it was my good fortune to know, I believe, never read, at least more than casually, the statues [sic] that he translated into reality. He assumed that they gave him power to deal with the broad problems of an industry and, upon that understanding, he sought his own solutions. Limitations upon his powers that counsel brought to his attention, naturally, he respected; but there is an enormous difference between the legalistic form of approach that from the negative vantage of statutory limitations looks to see what it must do, and the approach that considers a problem from the standpoint of finding out what it can do.

LANDIS, *supra* note 146, *reprinted in part in* AMERICAN LEGAL REALISM 161 (William W. Fisher III et al. eds., 1993).

Here again, there were important dissenting views. Roscoe Pound's caustic response was that "the postulate of a scientific body of experts pursuing objective scientific inquiries is as far as possible from what the facts are or are likely to be."¹⁴⁹ His counterexample was the National Labor Relations Board — an agency that, already by 1938, was viewed as so political that it spoke for itself as a caution against undue confidence in agency "expertise."¹⁵⁰ If expertise was not the basis for agency action, then politics was, and there could be no justification for designing an administrative state that was not subject to strong legal checks and constraints.¹⁵¹

In sum, it was the deep faith of Progressive and Realist thinkers that social science, in proper alliance with the administrative state, could arrive at objectively correct answers to important questions of public policy — answers that drew their legitimacy from agency expertise rather than from the political process. But the calls for caution from Hutchins, Fuller, and Pound carried an important message. If the results of social science brought to the fore by administrative agencies were *not* in fact objective, if instead they were significantly colored by the political perspectives of the analysts, then the capacity of the administrative state to serve as a progressive force depended solely upon the political perspectives and personal experiences of key government actors. Perhaps this was the reason for the great public interest in the background of New Deal administrators — which, in the case of the NRA, took the unflattering form of reassurances from within the administration that Richberg was not a Jew.¹⁵² The possibility was recognized that for all its claimed expertise and objectivity, social science and Realist

149. Report of the Special Committee on Administrative Law, Recommendations [known widely as "The Pound Report"], 63rd Annual Report of the American Bar Association 331, 344 (1938); *see also id.* at 345 (noting that "in many fields of administration there is no particular expertness").

150. *See* HORWITZ, *supra* note 128, at 220.

151. The Taft-Hartley Act and the Administrative Procedure Act were both instantiations of this view, and were both enacted in 1947.

152. Johnson noted that:

It was . . . asserted that I had appointed too many Jews to important posts and Mr. Richberg was cited against me on that score . . . Just for the sake of the record, I must say that Mr. Richberg is not a Jew . . . I had several able Jews but they were the scant minority [of his staff] and every single one did an outstanding job. Not one was disloyal or self seeking.

JOHNSON, *supra* note 124, at 212-13. Johnson's suggestion, of course, is that the reader would have instinctively assumed otherwise. On the attractiveness of government service to Jewish lawyers in the New Deal period, see G. EDWARD WHITE, *Felix Frankfurter, the Old Boy Network, and the New Deal: The Placement of Elite Lawyers in Public Service in the 1930s*, in *INTERVENTION AND DETACHMENT: ESSAYS IN LEGAL HISTORY AND JURISPRUDENCE* 149 (1994).

lawyering might merely cloak the hegemonic worldview of the dominant class — or, worse, the worldview of a still-mistrusted minority — in the garments of scientific legitimacy.

What significance can one attach to the Realist/Progressive background of NRA officials? Richberg certainly brought his background into his conceptualization of the NRA's work. He lauded the NRA's "utilization of scientifically gathered and organized information as the basis for business policies, this intrusion of trained and impartial economists into the councils of business" — despite the business community's discomfort with giving a prominent role to "book learning."¹⁵³ Does that background suggest anything about the approach the NRA officials might have taken to the task of class line-drawing? After all, decisions about which classes of workers to subject to which New Deal labor policies were minor decisions when viewed against the complex backdrop of NRA industrial policy. It is safe to say that very few NRA administrators were appointed to their positions on the basis of past expertise in class line-drawing.¹⁵⁴ How would REX, our reasonable expert, respond to this situation?

One might expect to see several strands of principle and practice, at times harmonious and at times conflicting, woven together in REX's class line-drawing work. First and foremost, if he lacked prior experience or training on issues of class, he would have believed that it was his job to *develop* expertise on the subject by becoming intensely involved in factfinding. Furthermore, at least as a matter of preference, his orientation would be purposive. His man-

153. Donald R. Richberg, Address at Luncheon of Merchants' Association of New York 7 (July 6, 1933) (manuscript available in LC, Richberg Papers, Container 43, Speeches 1930-Feb. 1933). Richberg's support of "scientific" policies seemed to end at the door to his own department. He strongly objected, for example, to being required to conform the wages of his own professional and clerical employees to those mandated by the government's system of job classification. See Memorandum from Donald R. Richberg to Hugh Johnson 2 (Oct. 24, 1933) (LC, Richberg Papers, Container 45, Subject File: NRA, Memoranda Sept.-Nov. 1933) (complaining that "the classification attempted simmers down to a demand that [staff] be paid according to the judgment of someone by whom they are not employed and who is not held responsible for their work").

154. Although Marshall had written on the subject of class as an economist, see *infra* note 289, few NRA administrators had expertise even in the core NRA field of industrial planning. For the view that the NRA failed because of a failure of state autonomy and capacity — i.e., the NRA's failure to set independent goals and to muster the expertise necessary to carry them out — see FINEGOLD & SKOCPOŁ, *supra* note 93, at 10, 51-53, 64, 92-103. This critique may not apply with equal force to NRA labor policy in general. See BRAND, *supra* note 94, at 288 ("The most revealing characteristic of early New Deal labor policy is . . . that progressive political elites were actively shaping policy to fulfill their own ideologically defined purposes rather than passively responding to interest group demands."). In the area of the present study, it is more accurate to say that officials *aspired* to autonomy than to say they achieved it.

date, he would have assumed, was to identify and solve real-world problems. REX would become frustrated by politics — both by political interference in the factfinding process and by political pressure to resolve questions before the data were in. Whether REX could be an effective actor in the fast-moving world of the New Deal would depend upon how well he could function once it became clear that the environment of the administrative agency was hardly that of the pure scientific laboratory. Thus, when Frances Perkins recommended to Roosevelt in 1935 that he hire a political scientist, someone with expertise in the workings of the political system, the particular person she recommended was not lauded for his academic credentials or his methodological purity. She described him, instead, as “a real New Dealer but hard-headed and realistic. No ‘dreams of things to come’ for him. Just do it today stuff.”¹⁵⁵

Finally, at least if the critics of Legal Realism were correct, we can expect that REX would have significant cultural blind spots that would interfere with his class line-drawing work. REX would likely have a bit too much faith in his own objectivity, and would likely underestimate the level of vigilance he would need to exert to prevent the desires of the dominant classes from becoming law. His rhetoric would emphasize government independence. His reality would often fall short of the mark.

C. *Upper-Level Exemptions Under the NRA*

We now turn to the “do it today” stuff of class line-drawing under the NRA. The NIRA called for the formation of codes of fair competition in all industries, and required that all codes of fair competition comply with agreed-upon maximum hours and minimum wages. Although the NIRA did not itself specify the permissible wages and hours of labor, NIRA codes were to do so. “[S]preading work” was understood to be the major goal of NIRA hours regulation — rather than protecting “special types of workers” or eliminating “sweatshop conditions.”¹⁵⁶

155. Memorandum from Frances Perkins to President Roosevelt 2 (Mar. 12, 1935) (Roosevelt Archives, President’s Secretary’s File [hereinafter FDR/PSF], Box 57, Departmental File, Labor).

156. LYON ET AL., *supra* note 94, at 389-90. Work-spreading preceded the NIRA as the focus of administration hours policy. See, e.g., Letter from Frances Perkins to Donald R. Richberg (Mar. 22, 1933) (LC, Richberg Papers, Container 1, Correspondence Feb.-May 1933) (conveying President’s invitation to attend a conference on “[t]he emergency problems having to do with distress due to unemployment and the method of overcoming the same,” and listing “short hours as a means of further employment” on the agenda). Arthur Dahlberg, the engineer whose work on the concept of work-spreading as a solution to the

On the day the NIRA became law, President Roosevelt made a speech in which he outlined the statute's intended coverage: it would reach all business, and "[b]y 'business' I mean the whole of commerce as well as the whole of industry; by workers I mean all workers — *the white-collar class as well as the men in overalls.*"¹⁵⁷ Roosevelt's announced desire to protect "all workers" including the "white-collar class" raises the obvious question of how Roosevelt defined the "white-collar class," and whether Roosevelt used the term to include the "executive, administrative, and supervisory" workers Sachs's memo excluded. In an article the following year, census superintendent Alba Edwards excluded "managers, officials, and professional persons" from his definition of the "white-collar" classification.¹⁵⁸ Roosevelt might have meant the same, but we cannot be sure. Indeed, all that remains of Roosevelt's file labeled "white collar" is a designation on a list — the contents of the file were not preserved by the Roosevelt Archives.¹⁵⁹ It seems, however, that Roosevelt's own administrative staff had its doubts about the meaning of the term: an item cross-referenced to the white-collar file refers to it as the file on "the so-called 'white-collar' class."¹⁶⁰ The existence and scope of a "white-collar class" was,

unemployment problem influenced Hugo Black, *see supra* note 88, was by January 1934 on Sachs's staff at the NRA's Research and Planning section. *See* Note from Jacob Baker, Federal Emergency Relief Administration, to Col. Howe (Jan. 16, 1934) (FDR/OF 372, Hours of Labor, Box 1, 1934 folder) (referring to Dahlberg as a member of the NRA staff and as "one of the best men on the theory of shorter hours in the country").

157. National Recovery Administration Bulletin No. 1, Statement by the President of the United States of America Outlining Policies of the National Recovery Administration, in LEWIS MAYERS, *A HANDBOOK OF NRA LAWS, REGULATIONS, CODES 27* (1933), and in JOHNSON, *supra* note 10, at 439. I found no preliminary drafts of or background materials on this speech in the Roosevelt Archives. The speech itself is found in Roosevelt Archives, President's Personal Files [hereinafter FDR/PPF], Speech Files, Box 15, No. 637, at 2-3.

158. Alba Edwards, *The "White-Collar Workers,"* 38 MONTHLY LAB. REV. 501, 501 (1934). The term "white collar," as used here, "excludes, on the one hand, proprietors, managers, officials, and professional persons; and it excludes, on the other hand, the 'overalls and apron' workers — the skilled, the semiskilled, and the unskilled manual workers." *Id.*

159. Per Roosevelt Archives archivists, Dec. 1996. The listing for a "white-collar" file places it in Roosevelt's alphabetical files; not all materials in the alphabetical files were preserved. This brings to mind the following, in a letter from Roosevelt to Donald Richberg when the latter was ill:

I always remember President Wilson saying to me once — "Ninety-nine out of every one hundred matters which appear to you and me today as of vital Administration policy will be completely overlooked by history, and many other little things which you and I pay but scant heed to will begin to be talked about one hundred years from now."

Letter from President Roosevelt to Donald Richberg (Dec. 28, 1934) (FDR/PPF 2418, Donald Richberg). Pity the poor archivist with space constraints in light of this too-true observation.

160. *See* Memorandum from President Roosevelt to Harry Hopkins (Apr. 15, 1935) (FDR/OF 444, FERA, Box 2, Mar.-May 1935) (cross-referencing in handwriting to the file on "the so-called 'white-collar' class").

apparently, up for grabs — despite the fact that Roosevelt was making speeches promising to protect it.

1. *Outline of the Spheres of NRA Activity*

The core of administration policy under the NRA was the negotiation, approval, and enforcement of industrial codes.¹⁶¹ The first industrial code, the Cotton Textile Code, was approved on July 20, 1933.¹⁶² As we shall see, the status of white-collar and upper-level workers was debated during the cotton textile hearings, and the issue triggered Presidential intervention on behalf of the “white-collar classes.” It was not until later in 1933 that the NRA began work on the industrial code that would cause the greatest battles over the status of white-collar workers: the code for the Daily Newspaper Publishing Industry. There, we shall see, the impending code-making process triggered the formation of the Newspaper Guild, a union of newspaper editorial employees that organized to resist the treatment of its members as upper-level employees exempt from hours regulation.

Because not all industries were sufficiently well-organized or compliant to participate or succeed in rapid code-drafting, the administration quickly recognized that the industrial-code process could not stand alone. In the earliest days of the NRA, the administration developed a second, alternative strategy: the Blue Eagle. The idea was that President Roosevelt would promulgate a boiler-plate agreement — called the President’s Reemployment Agreement (the PRA) — which would specify minimum wages and maximum hours.¹⁶³ Any employer in a noncodified industry was eligible to sign the PRA. Employer participation was voluntary,

161. The code negotiation process was as follows:

The draft of a code was submitted to the N.R.A. by the trade association or associations within a particular industry. Public hearings were held before a deputy administrator, at which all parties concerned were privileged to appear and make suggestions for changes. The Labor Advisory Board, the Industrial Advisory Board, and the Consumer’s Advisory Board were also consulted. Thereupon, a final draft of a code was framed by the deputy administrator and submitted to the Administrator. If approved by him, it was then submitted to the President, and if, in turn, approved by the President, with or without modifications, was promulgated as a code applicable to the entire coverage of that industry.

BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LAB., *National Recovery Administration: Labor Aspects*, in BULLETIN No. 616, HANDBOOK OF LABOR STATISTICS 489, 505 (1936) [hereinafter *NRA: Labor Aspects*].

162. See Exec. Order Approving Code of Fair Competition for the Cotton Textile Industry, Approved Code No. 1 (July 9, 1933), *microformed on* Presidential Executive Orders and Proclamations, CIS No. 1933-51-1 (Congressional Info. Serv.) [hereinafter CIS].

163. According to Johnson, not more than 20% of industries and 10% of establishments were organized into trade associations, and the non-PRA code process presumed the existence of such associations to take the initiative in code drafting and to broker the appointment

but strongly encouraged through techniques of both persuasion and coercion. From the start, Roosevelt proposed “getting a list of the big companies who will sign up the voluntary agreements and release it for [the] morning papers and follow each day with a number of big companies[.] I think the little fellows will follow the leader.”¹⁶⁴ Signatories would be authorized to advertise their compliance by displaying the new Blue Eagle insignia in their shops and on their products. The NRA would then run an advertising campaign to encourage consumers to support the NRA by boycotting nonsignatory businesses. The Blue Eagle program got underway with the PRA’s promulgation eleven days after the President’s approval of the Cotton Textile Code.¹⁶⁵

In addition to their work drafting and administering industrial codes and the PRA, NRA officials were also involved in broader research and policymaking on labor issues. Independent policymaking had a slow start. From the very beginning of the NRA, the organization was criticized for the absence of a coherent strategy for policymaking on a centralized level. As early as one week after the enactment of the NIRA, officials elsewhere in the Roosevelt administration expressed concern that the NRA lacked a coherent economic policy. Top officials in the Commerce Department noted that there was a “need for settling at once at least the major questions of economic policy, both as to labor and industrial questions, which will have to be applied as soon as the administrator and his deputies begin to pass upon codes.”¹⁶⁶ There proved to be good reason for concern that “if some consideration is not given to these questions in advance and a body of principles adopted, one administrator may decide one basic question in one way and another in another way and there will be the danger of a good deal of confusion and appearance of disorder in the administration.”¹⁶⁷

of industry representatives to the code-enforcement authority. See JOHNSON, *supra* note 124, at 254.

164. Letter from President Roosevelt to General Hugh S. Johnson (July 25, 1933) (FDR/OF 466, NRA, Box 1, July 1933).

165. See A Plan to Raise Wages, Create Employment, and Thus Restore Business — The President’s Reemployment Agreement (July 27, 1933), *microformed on* CIS No. 1933-21-1 [hereinafter A Plan to Raise Wages].

166. Memorandum from John Dickinson, Assistant Secretary of Commerce, to President Roosevelt, prepared on request of Daniel C. Roper, Secretary of Commerce 3 (June 23, 1933) (FDR/OF 466, NRA, Box 1, June 1933 folder). Sour grapes may have played a part in Commerce’s pessimistic appraisal of the NRA’s competence. See FINEGOLD & SKOCPOŁ, *supra* note 93, at 56 (discussing Roosevelt’s decision not to place enforcement of the NIRA in the hands of the Department of Commerce).

167. Memorandum from John Dickinson, *supra* note 166, at 3-4.

In all of their labor-related activities, NRA officials were involved in formulating official representations of the class system. In the discussion that follows, I present the treatment of upper-level exemptions roughly chronologically — as reflected in the Cotton Textile Code, the PRA, the Daily Newspaper Code, and the labor policymaking activities of the Division of Review's policy office under the leadership of Leon C. Marshall.

2. *The Cotton Textile Code*

General Johnson approached the codemaking process by choosing one industry — the cotton textile industry — to focus on first, with the expectation that other industries would follow suit “and work out methods [for] . . . creating a shorter week and having the work shared.”¹⁶⁸ Three days after Roosevelt's “white collar classes” speech, Johnson had worked out the basic terms of the code with the industry (with some labor representation). Although he was “not completely satisfied with the code,” he declared it ready for public hearing and expedited action.¹⁶⁹ Johnson expected that “the first hearing was going to set the entire atmosphere of the administration of the act, and emphasized the fact that it should be very carefully conducted.”¹⁷⁰

A four-day public hearing on the proposed Cotton Textile Code was convened on June 28, 1933.¹⁷¹ As presented at the hearing, the draft Code provided for a maximum forty-hour workweek and exempted several types of employees: office and supervisory staff, repair shop crews, engineers,¹⁷² watchmen, electricians, and firemen.¹⁷³ I shall refer to all but the office and supervisory exemption as the exemption for “special crews.” There is a marked contrast between the hearing's approach to special crews and supervisory workers: the approach to special crews was purposive, while the approach to supervisory workers was descriptive. As we shall see, the purposive approach gave the officials presiding over

168. Discussion of Johnson's comments at meeting no. 1 of the Special Industrial Recovery Board 5 (June 19, 1933) (FDR/OF 466, NRA, Box 1, July 1933).

169. *See id.* at 6.

170. *Id.* at 10.

171. For the transcript, see National Archives, Record Group 9, National Recovery Administration [hereinafter NA/NRA], Records Maintained by the Library Unit, Transcripts of Hearings 1933-35, Entry 44 Box 73.

172. *See id.* at V-8 (June 27, 1933) (testimony of Robert Amory). From context, it appears that these engineers were shop-trained rather than college-trained.

173. It was the job of the “firemen” to maintain boiler and furnace fires — not, as in common parlance, to put them out. *See id.* at V-8 (June 27, 1933) (testimony of Robert Amory).

the hearing (Johnson and W.L. Allen, the NRA deputy administrator for the cotton textile industry) a far better basis for resisting the demands of the industry than did the descriptive approach.

Industry witness Robert Amory defended the special crews' exemption by pointing to the sporadic nature of demand and the skilled nature of the work — in particular, the employer-specific knowledge the work required. The unpredictability of demand made it obvious, at least to the industry, that it would be a waste of money to hire multiple crews, since most of the day was spent waiting for something to go wrong and being prepared to handle emergencies.¹⁷⁴ And, Amory argued, the need for knowledge of the particular shop's equipment meant that you couldn't expect a "green man" to be able to step in and do the work.¹⁷⁵ Johnson and Allen both resisted the notion that work-spreading could not succeed among these kinds of workers. Johnson demanded to know, for example, whether watchmen (who watch the machines to make sure they are functioning properly) are under a foreman, with the implication being that supervised work can be divided among a number of workers.¹⁷⁶ Amory insisted that although there is a foreman, each watchman is responsible for the whole of the job¹⁷⁷ — an organization that Johnson and Allen correctly sensed is inconsistent with normal workplace hierarchies. Amory further argued that these jobs are "supervisory"¹⁷⁸ — in the sense that these workers supervise mechanical processes and intervene only when they are in need of correction, rather than being "processed" as labor by those processes.¹⁷⁹ Johnson seemed to agree, characterizing the work as "an administrative, executive job," one that would take additional training.¹⁸⁰ But Johnson failed to see why the extra effort could not be made to train more workers to do special-crews' work. In purposive terms, Johnson failed to see why there was anything about

174. *See id.* at V-8 (June 27, 1933) (testimony of Robert Amory).

175. *See id.*

176. *See id.* at X-9 (June 27, 1933) (questioning of Robert Amory by Gen. Johnson).

177. *See id.* at X-9 (June 27, 1933) (testimony of Robert Amory).

178. "I know, I have been an engineer and firemen under automatic stokers, *and the job is purely a supervisory job*. It is hard work when something goes wrong; when anything does not go wrong it is a question of staying awake to watch the thing. We used to stay on the job 72 hours." *Id.* at V-10 (June 27, 1933) (testimony of Robert Amory) (emphasis added).

179. The "supervisory" concept was not infinitely malleable even for Amory. He suggested earlier in the hearing that the most skilled hands in charge of the warp tying machine — again, the skilled aristocracy of the mill — might be viewed as "supervisory," though he backed down from that usage as soon as he suggested it. *See id.* at H-8 (June 27, 1933) (testimony of Robert Amory).

180. *Id.* at X-10 (June 27, 1933) (testimony of Robert Amory).

the nature of special crews' work that made it ill-suited to work-spreading.

Amory's answer was that the extra training would put too much of a burden on "our supervisory men, who now work almost to the breaking point, [and] would have to work that many more hours and . . . be down at the mill at night."¹⁸¹ The most logical answer to *that* problem, over the long term, would of course be to hire more such "supervisory men." But Amory asserted that this was not possible: "Supervisory staff I am passing over; I assume we will have to use our regular men."¹⁸² Through his answer, Amory shifted the debate from the flexible nature of repair work and the scarcity of qualified repair men to the indivisibility of supervisory work. That move seemed to satisfy Johnson and Allen — or, at the very least, to silence them.

But why? There was an obvious response to Amory's assertion that it would not be possible to increase the size of the supervisory staff. After all, if a shop ran around the clock, the argument would never have been made that the *same* supervisor needed to be on the shop floor for twenty-four hours. Why, then, could the hours of supervisors not track the shift hours of the workers they supervised, with a short overlap for information-sharing? A purposive analyst would have asked that question — but it was not asked. The fact that Johnson and Allen failed to pursue this line of inquiry suggests that, where supervisors were concerned, they were prepared to abandon the purposive style of analysis motivating their independent-minded response to the proposed special crews' exemption. Perhaps they simply thought, on a descriptive level, that regulating the hours of supervisors would be in some sense inappropriate — for reasons too obvious to require discussion.

"Office workers" were also exempted from hours regulation by the Code as originally drafted, and no labor representatives came forward at the hearing to argue on their behalf. To the contrary. The most articulate labor representative at the hearing, William Batty of the New Bedford Textile Council, argued that "[s]ince the purpose of the Act is to spread employment it is clear that the opportunity here afforded to absorb unemployed mechanics, engineers, electricians, firemen, etcetera, should not be lost."¹⁸³ But he was prepared to make no such argument for office workers — nor

181. *Id.* at X-10 (June 27, 1933) (testimony of Robert Amory).

182. *Id.* at X-10; V-11 (June 27, 1933) (testimony of Robert Amory).

183. *Id.* at O-7 (June 28, 1933) (testimony of William E.G. Batty).

did he take the position that office workers were not facing unemployment. He simply stated that the exemption for office workers, like that for supervisors, was “legitimate”¹⁸⁴ — without explaining why work-spreading would not aid office workers.

Johnson spoke up — as did consumer advocates at the hearing — and demanded an explanation for the exclusion of office workers. Amory argued to Johnson that office clerks are “working 80 hours a week” and that doubling them up was not an option.¹⁸⁵ Johnson was not prepared to accept a broad exemption for office workers: “I think we have to undertake a little inconvenience. If officerworkers [sic] and the white collar class generally are exempted on account of the way they fit into the particular job we are going to very, very seriously impair the operations” of the NRA.¹⁸⁶ Here, Johnson was signaling that he was not prepared to entertain even well-founded purposive arguments about the indivisibility of white-collar work. Consumers’ advocate Lucy Mason invoked the President’s “white collared classes” speech, saying that “I think the President meant what he said when he said ‘including white collar workers.’”¹⁸⁷

In the end, the President *did* insist on extending maximum hours protection to office workers as a condition of approving the Cotton Textile Code.¹⁸⁸ He did not, however, insist on coverage for supervisors. As reflected in the final negotiations over the Cotton Textile Code, including white-collar classes came to mean including clerical workers but excluding supervisory workers.¹⁸⁹

The seemingly easy decision to exclude supervisory workers from hours restrictions did not end the controversy of supervisory

184. *See id.* at O-7 (June 28, 1933) (testimony of William E.G. Batty).

185. *See id.* at V-10 (June 27, 1933) (testimony of Robert Amory).

186. *Id.* at X-8 (June 27, 1933) (statement by Gen. Johnson).

187. *Id.* at 40 (June 29, 1933) (testimony of Lucy Mason).

188. He accepted unlimited hours for special crews, but insisted that they be paid time and a half for their overtime. *See* NA/NRA, Consolidated Approved Code Industries File [hereinafter NA/NRA/CACI], Box 1802, Code of Fair Competition for the Cotton Textile Industry as Approved by Executive Order, July 9, 1933, NRA Release No. 331, at 2(4) and 2(6).

189. *See* the negotiations between Johnson and George A. Sloan, the head of the Cotton Textile industry board, reflected in Transcript of Hearing 33 (June 30, 1933) (NA/NRA/CACI Entry 44 Box 73). Johnson, for the record, summed up their negotiations by saying that “on the question of exemptions of hours of labor which formerly applied to the white collared man, there is some provision to be worked out.” Sloan responded, “Yes sir. We state it should be worked out by July 30th as to office employees, with a view to bringing them within the provisions of the Code.” *Id.*; *see also* NRA Press Release No. 25 (June 30, 1933) (FDR/OF 466, NRA, Box 1, June 1933 folder) (describing two days of posthearing consultations between Sloan and NRA officials resulting in bringing office workers’ hours within the 40 hour provision).

workers under the Cotton Textile Code. Experience under the Code revealed that the exemption for supervisory workers was difficult to administer, because “supervisory” status was difficult to define.¹⁹⁰ In the course of enforcing the Code, the cotton textile industry code authority defined “supervisory staff” to include “all who direct the activity of others, such as executives, department heads, superintendents, paymasters, foremen, overseers and second hands.”¹⁹¹ Leon C. Marshall and his assistant, fellow economist Harry Weiss, took issue with this provision. Marshall reported to the Labor Advisory Board that “the definition of the supervisory staff seems to me to be not justifiable. It amounts to leaving the matter in the discretion of the mill management.”¹⁹² He objected, in this regard, to the open-endedness of the phrase “all who direct the activities of others” — an approach later codes had avoided. He was prepared to concede that the code authority was under no obligation to make changes to conform to other, later-enacted codes. But, Marshall argued, “in any event insistence upon the non-applicability of the provisions found in other codes does not relieve [the cotton textile industry code authority] from the obligation of defining ‘supervisory staff’ in such fashion that it will promote a cooperative spirit between management and workers.”¹⁹³

The difficulty of defining “supervisory” work was (and remains) a major problem for federal hours regulation. Indeed, the terms “supervisory” and “executive” have been subject to what now seem strange usages. Johnson, for example, was prepared to use the term to describe the fireman’s “supervision” of a furnace. It was often the case that government actors, like Marshall here, rejected an industry’s definition of “supervisory” status without stating their own view of what the correct definition should be. Marshall was not generally shy about drawing the line between right and wrong. But, as he noted, the NRA lacked the power to promulgate official definitions of supervisory status and to insist that already-promulgated

190. The definition of office workers was also a problem. Regarding “office” workers, an “explanation” tendered by the code authority in June 1934 categorized supply clerks and attendants in supply rooms as “office” employees. NRA officials objected to this interpretation, and it was rescinded. See Memorandum from C.W. Metcalf to R.I. Henry, President, Duncan Mills, Inc. (July 19, 1934) (NA/NRA/CACI, Entry 25, Box 1807, Litigation Memos, No. A-17).

191. Explanation of Cotton Textile Code provisions relative to wages and hours, compiled and revised by direction of Code Authority 21 (May 15, 1934) (NA/NRA/CACI, Entry 25, Box 1807, Cotton Textile Code).

192. Memorandum from Marshall to Ruth Reticker and Clarence Blau 2 (Aug. 16, 1934) (NA/NRA/CAF Entry 265, Leon C. Marshall Papers, Box 3).

193. *Id.*

industry codes be amended to include them.¹⁹⁴ Marshall did have a measure of power in his policymaking role; he could shape the position that NRA officials would take in subsequent code development and enforcement. But in order to exercise that power, Marshall thought it was necessary for the NRA to develop independent knowledge.¹⁹⁵ As we shall see, the agency never succeeded in doing so. Thus, for lack of both power and information, Marshall could not use the NRA's expertise to formulate any specific definition that would more accurately state what it meant to be a "supervisor" in the cotton textile industry.

With neither power nor expert knowledge, the best Marshall thought he could do was to defer to the judgment of the industry's own experts. At least he would then be able to keep the decisions out of the hands of the non-experts in the mills, who could never produce uniformity or the perception of fairness — both necessary for maintaining a "cooperative spirit" between workers and management. Marshall made no effort, however, to shape the industry experts' approach to the problem of defining supervisory work — something he might well have been able to use his position to do. He did not recommend to the industry that it take a hard purposive look at which types of upper-level workers fell beyond the reasonable reach of work-spreading. Nor did he refer the industry to potential status-based distinctions that could form the basis of a descriptive line-drawing approach (for example, distinctions between those who routinely perform manual tasks in the course of their working day and those who do not). Marshall was not sufficiently self-reflective about the fact that the experts' answers would depend upon their questions — whether the experts were inside or outside of government.

Turning to office workers, if Roosevelt and Johnson expected that the inclusion of office workers in the Cotton Textile Code's system of hours regulation would set the precedent for all codified industry, they were wrong. As late as March 1934, the NRA Conference of Code Authorities and Trade Association Code Committees included on its agenda a discussion about the "Possibilities of Increasing Employment by including under labor provisions of codes excepted classes of employees such as . . . Office Workers."¹⁹⁶

194. *See id.*

195. *See infra* text accompanying notes 263-68.

196. Agenda for the conference of the National Recovery Administration 3 (Mar. 5, 1934) (FDR/OF 466, NRA, Box 2, Jan.-Mar. 1933).

Without constant vigilance on the part of the administration, industries continued to exempt office workers from hours regulation.

Why was it so difficult to enforce the administration's stated policy of including office workers in the NRA's industry codes? Instrumental reasons certainly played a role. In many industries, office workers faced peak seasons — inventory periods, for example — and industries resisted being required to increase their permanent workforce to deal with temporary needs. Johnson provided a clear answer to that objection: industry would have to find a way to deal with the admitted inconvenience of NRA policy. Perhaps another reason for NRA underenforcement was administrability. Given the difficulty of defining (excluded) supervisory workers, it might have been easier for NRA administrators if the codes treated *all* white-collar workers as excluded. Administrators might have found it easier to determine white-collar as opposed to supervisory status from job titles or rudimentary job descriptions. Politics also likely played a part. Although consumer advocates were defending the rights of white-collar workers, the workers themselves were not organized — making their interests easier to ignore. But would NRA staffers ignore Roosevelt's announced policies merely because white-collar workers were not organized? The lack of unions to defend the interests of white-collar workers might, instead, have caused the NRA staff to see the defense of white-collar interests as part of their *own* job — as Johnson did at the cotton textile hearings. It might well be that the best explanation for why office workers were so often excluded from the hours regulation provisions of industry codes lies in the symbolic sphere. Despite Roosevelt's stated policies, NRA staffers may have subscribed to the view that office work carries too high a status to be subjected to hours limitations. One can hardly expect government actors to become advocates for a position they do not believe — especially in the absence of effective central policy oversight or interest-group pressure.

3. *Upper-Level Exemptions in the PRA*

Three major groups of employees were recognized in the PRA. One group, composed of factory workers, mechanical workers, and artisans, was assigned a maximum workweek of thirty-five hours and a maximum work day of eight hours, but could be required to work a maximum week of forty hours, without overtime, for up to six weeks in every year.¹⁹⁷ This gave employers the flexibility to

197. See A Plan to Raise Wages, *supra* note 165.

work their employees longer hours during seasonal peak periods. "Accounting, clerical, banking, office, service, or sales employees (except outside salesmen)" had a longer maximum work week — forty hours — but with no provision for seasonal peaks.¹⁹⁸ Their daily work hours were unrestricted.¹⁹⁹ The third group of employees — "registered pharmacists or other professional persons employed in their profession" (regardless of pay) and "employees in a managerial or executive capacity, who now receive more than \$35 a week" — was exempted from any maximum hours provision.²⁰⁰

Almost as soon as the PRA was promulgated, it became the subject of revision and interpretation by NRA officials, either across-the-board or in negotiations with particular businesses.²⁰¹ NRA interpretations of "other professional persons employed in their profession" reflected the difficulties of the line-drawing required by the PRA. For example, hospital technicians were grouped with nurses and doctors (including interns) as professionals, but engineers in radio and "other highly technical professions" were only *presumed* to be professionals, subject to employee disproof.²⁰² Newspaper reporters were deemed professionals, as were newspaper photographers, along with "rewrite men and other members of editorial staffs"²⁰³ — characterizations that were embattled from the start and became more so once the Daily Newspaper Code was developed. Embalmers were held to be professionals, while funeral directors were declared exempt without deciding whether they were professionals (who were exempt without regard to salary) or executives (who were exempt only if their

198. *See id.*

199. Note that the minimum wage under the PRA for these white-collar workers was *lower* than the minimum wage for the manual worker group — 37½ cents an hour as opposed to 40 cents an hour.

200. *See* NRA Bulletin No. 3, President's Reemployment Agreement 7 (July 20, 1933) (NA/NRA Consolidated Administrative File [hereinafter NA/NRA/CAF], Entry 27, Box 6860).

201. The PRA was amended, for example, to eliminate the "tolerance" for six yearly forty hour weeks for factory/mechanical employees, to permit instead two weeks of extended hours for year-end inventories at a time-and-a-half rate, and to alter the wage differentials for small communities. *See id.* at 7-8. At the same time, employers were securing individually-tailored alterations of the PRA's core wage and hour requirements, often with little scrutiny from the agency. Some of these changes entirely excluded office workers or subjected them to peak hours provisions. *See* NRA Press Release No. 180 (Aug. 4, 1933) (NA/NRA/CAF Box 6860, Entry 27). I found no PRA interpretations in the files on "executive" or "managerial" in the interpretations files.

202. *See* General Interpretations and Explanations of the President's Reemployment Agreement, made by the Policy Board and Authorized Councils and Officials 24-25 (n.d.) (NA/NRA/CAF, Entry 27, Box 6860) (citing NRA Bulletin No. 4, Interpretation No. 6).

203. *See id.* (citing NRA Bulletin No. 4, Interpretation No. 19).

salaries were \$35 a week or more).²⁰⁴ Nowhere did the NRA officials engaged in this line drawing articulate a set of overarching principles that could operate as a definition of “professional.”

The PRA was not promulgated as a set of mandatory minimum terms for industrial codes. Nonetheless, Johnson took the position that the minimum-salary approach to the definition of executives and managers was binding on all industry (including *codified* industries), an approach he deemed necessary “in order to prevent evasions and the giving of meaningless titles to minor employees to exempt them from the hours provisions”.²⁰⁵

There are provisions in various codes exempting from the limitation upon hours of those described as “managers” or “executives” and complaint has been received that in many instances employees are classified as “managers” or “executives” either for the purpose, or with the result, of exempting them from limitations upon hours. It has not been the intention of the Administration in approving such exceptions to provide for the exemption of any persons other than those who exercise real managerial or executive authority, which persons are invested with responsibilities entirely different from those of the wage earners and come within the class of the higher salaried employees.

It will be presumed that no employee receiving less than \$35 per week will be classified as a “manager” or “executive”²⁰⁶

Industry groups immediately complained, and, as was so often the case, the NRA capitulated. For example, when the secretary of the Cotton Textile Institute simply pointed out that “in cotton mills there are a good many overseers and second hands that direct the activity of others who are not paid as much as \$35 per week,”²⁰⁷ an NRA official told him that the new interpretation “is not meant to upset any present interpretation of the Cotton Textile Code.”²⁰⁸ The failure of the codes to adhere to the \$35 per week rule for exempt managers was criticized by the National Consumers’ League, which also saw the issue as one of “code evasion”:

In order to evade restrictions on working hours, many employers raise the wages of a worker a few dollars, give him a title of “executive,” and make him work unlimited hours. A South Carolina printing company has a number of operatives called “executives” paid between \$16 and \$18 a week, who work up to 70 hours a week, while

204. See *id.* (citing Card No. 1341).

205. *NRA: Labor Aspects*, *supra* note 161, at 502.

206. *Id.*

207. Letter from Paul B. Halstead to W.S. Nicholson (Nov. 1, 1933) (NA/NRA/CACI Entry 25, Box 1807, Cotton Textile).

208. Letter from W.S. Nicholson to Paul B. Halstead (Nov. 2, 1933) (NA/NRA/CACI Entry 25, Box 1807, Cotton Textile).

a department store in Ohio has “promoted” all the men in one department to executive rank in order to avoid the limited work week.²⁰⁹

The League’s proposal was that “[e]very class or group of employees should be covered by the hours provisions of codes, except executives and supervisors who receive \$35.00 or more per week.”²¹⁰ This wage minimum for upper-level status was thought to be sufficient to solve the problem of “evasion of the intent of codes through misleading classification of employees.”²¹¹

The opinion among those protective of labor interests, then, was that fraud and evasion could not be avoided without two elements that eventually became central to the FLSA approach to upper-level exemptions: a “duties” test — that is, a commitment on the part of the government to scrutinize the actual duties performed by someone whose job is labeled exempt — and a minimum-salary test — used to make sure that the employer’s representations that a job is highly valued is matched by its compensation. The political weakness of the NRA, resulting from the centrality of business voluntarism under the statutory scheme, meant that NRA officials did not have the power to insist on the duties and salary-minimum approach. But their *desire* to use those approaches reflected the view that government *should* be acting independent of the business community, by refusing to take employers’ labeling of their employees’ jobs as dispositive of their true nature. This independence was almost impossible to achieve in the political climate of the NRA code process.

In any event, wage-minimum requirements are imperfect mechanisms for restricting employers’ unilateral power to classify their employees. All a wage-minimum requires is that an employer pay an employee consistent with the employer’s desired categorization. The employer can be expected to take this opportunity when, and only when, its economic self-interest so dictates — meaning that the employer’s self-interest is still in control. If the NRA were aiming only to protect the economic interests of the *employed*, a demand for consistency would satisfy statutory aims: it would mean that employers would be free to call people executives as long as they paid them executive-level salaries. But the goal of hours regulation

209. Statement of Mary W. Dawson, National Consumer’s League, at the NRA Conference in Washington 2 (Feb. 28, 1934) (FDR/OF 466, NRA, Box 6, Codes Misc 1934, March 2, 1934).

210. National Consumer’s League’s Proposed Principles for Labor Provisions of NRA Codes 2 (Dec. 7, 1933) (FDR/OF 466, NRA, Box 6, Codes Misc 1934).

211. *Id.* at 3.

under the NRA was work-spreading. Allowing an employer to avoid hiring and training additional workers merely by raising the salaries of those workers it already employed would stand in the way of alleviating unemployment.

Duties requirements are better tailored than are minimum salary requirements to the goal of achieving government control over the job-classification process. But duties requirements are difficult to administer. While routine payroll records reflect weekly salaries, official job descriptions — if they exist — often fail to reflect the mix of tasks an employee in fact performs. A true check on employer power would require a duties test that was built on enforcement through on-site inspection or vigorous litigation, neither of which the NRA contemplated.

Throughout the PRA-triggered discussion of fraud, evasion, and the need to limit the exemption to “true” executives, NRA officials were never clear about *why* executives should be exempt. Was it because executive work was not amenable to work-spreading? Because executive unemployment was not enough of a problem to bother with? Because it would be inconsistent with the high status of executives to force them to punch a time clock? Or because executives were unrepresented in the political process? In other words, was the NRA’s approach here purposive, descriptive, or purely political? The lack of a clear focus likely would have undermined NRA enforcement efforts even if the agency had been given the power to have its way.

4. *Daily Newspaper Industry Code*

Newspaper reporters and photographers were active in shaping the legal treatment of white-collar workers, both under the NRA and, as we shall see later, under the FLSA. When the NRA began, editorial workers in daily newspapers (writers, editors, reporters, photographers) were not unionized — in sharp contrast to the successful unionization of the skilled blue-collar workers in the industry. On August 7, 1933, Heywood Broun, an influential and politically active leftist columnist,²¹² published a letter from a disgruntled newspaper reporter that put the status and economic future of editorial newspaper workers in the Depression directly at issue:

212. For a discussion of Broun’s radical activism and influence, see DENNING, *supra* note 25, at 14-15.

The men who make up the papers of this country would never look upon themselves as what they really are — hacks and white-collar slaves. Any attempt to unionize leg, rewrite, desk or makeup men would be laughed to death by these editorial hacks themselves. Union? Why, that's all right for 'dopes' like printers, not for smart guys like newspapermen.²¹³

In response to this letter, Broun committed himself to forming a union of newspaper editorial workers.²¹⁴ The NRA was an important part of his motivation as well. The agency scheduled hearings on a proposed industry code for the Daily Newspaper Industry for September 22, 1933, and Broun held the mass meeting that culminated in the founding of the Newspaper Guild on September 17 — in time for the Guild to participate in the planned hearing.²¹⁵

And participate the Guild did. The Guild's position was that editorial workers were in grave need of work-spreading, and that a forty-hour maximum week should apply to them as well as to production workers.²¹⁶ The proposed code said nothing specific about the hours of editorial workers. Instead, its Paragraph 8 exempted "professionals" and "executives" earning \$35 a week or more from hours regulation. Little was said at the hearing by industry witnesses about how far down the editorial ranks this exemption would go. Representations had been made that reporters would be subject to hours regulation, but as counsel for the Guild in New York pointed out, "a careful scrutiny of the code will reveal that that assumption is unwarranted by anything that is contained in the code itself."²¹⁷ The Guild had good reason to worry. The PRA's official interpretation had classified "newspaper reporters, editorial writers, rewrite men and other members of editorial staffs" as profession-

213. Script and Program for the Heywood Broun Memorial Meeting, Manhattan Center 5 (Feb. 12, 1940) (Roosevelt Archives, Gardner Jackson Papers, Box 12, Folder, Heywood Broun) (quoting letter).

214. For a discussion of the activity of other white-collar unions in the period, see DENNING, *supra* note 25, at 15; КОСКА, *supra* note 5, at 206-34. The Newspaper Guild was unique in its level of participation in the NRA process. In contrast, for example, the Retail Clerks' International Protective Association (RCIPA), a union of retail clerks that affiliated with the AFL in 1888, was not strong enough to play more than a "minor role" in the formation of the NRA Retail Code in 1933. See *id.* at 55 (formation); *id.* at 211 (NRA role).

215. On Broun's motivation, see Heywood Broun, *NRA Set Up a Spring Board and it Worked*, GUILD REP., Nov. 23, 1933, at 1 (on file in Wayne State University Archives of Labor and Urban Affairs, Newspaper Guild Papers [hereinafter WSU/Guild]) ("The National Recovery Act was the direct inspiration for the organization of the Newspaper Guild of New York.").

216. For discussions of work-spreading, see, e.g., Hearing on Code of Fair Practices and Competition for the Newspaper Publishing Industry (Code 507-1-05) 1392 (Sept. 22, 1933) [hereinafter Sept. 1933 Newspaper Hearing] (NA/NRA/CAF Entry 44, Records Maintained by Library Unit, Transcripts of Hearings, Box 95) (testimony of Lloyd White).

217. *Id.* at 1362 (testimony of Alexander Lindsey).

als.²¹⁸ It would have been foolish to trust that the Code would be different.

Guild witnesses objected on clearly purposive grounds to any provision that would exclude editorial workers from hours regulation.

Since the publishers have admitted the principle of the forty hour week in their proposed Code, any exemption of a particular group of their employees should be supported by a clear showing by these publishers of insurmountable technological or economic difficulties which would dictate such an exemption.

In the case of editorial workers this cannot be demonstrated from the facts of daily newspaper editorial operation.

Granting that the production of an editorial worker cannot be metered, we submit that the production of news and other editorial content does not differ from the production of any other commodity in its essentials or in the meaning of the Recovery Act.²¹⁹

To the Guild, the mere fact that editorial employees could not, "like mechanical and factory employees . . . start and stop with the whistle,"²²⁰ was not a sufficient functional justification for exempting them from hours regulation. In the view of Guild witnesses, if reporters (particularly on afternoon papers) were "working 70 hours a week when no emergency existed," "[t]he simple solution . . . is to hire reporters to absorb this excess work."²²¹

Guild witnesses conceded to the industry that *some* editorial workers ought not be subject to hours regulation. The question was drawing the line. Here again, the Guild's orientation was purposive. Guild witnesses harshly criticized the notion that *some* reporters were "professionals," and that they could be identified by high salary or by the possession of a by-line or by status as a columnist.²²² As to the boundaries of "executive" status, the Guild was willing to "except editors in chief and managing editors . . . because they are executives in fact," but found it inappropriate to exempt "sub-editors" because "[t]heir work can well be spread over a greater number of men."²²³

Guild witnesses also signaled that even if the classification scheme in the proposed code were understood in descriptive terms

218. NRA Press Release No. 147 (July 28, 1933) (NA/NRA/CAF Entry 27 Box 6860, PRA).

219. Sept. 1933 Newspaper Hearing, *supra* note 216, at 1393-94 (testimony of Lloyd White).

220. *Id.* at 1421 (testimony of Andrew Parker).

221. *Id.* at 1411 (testimony of Lloyd White).

222. *See id.* at 1419-21 (testimony of Andrew Parker).

223. *Id.* at 1395 (testimony of Lloyd White).

as embodying a set of status distinctions, the Guild was willing to make the status sacrifice necessary to come within NRA hours regulation. That stance transgressed cultural norms — so much so that the hearing transcript notes that many of the Guild’s witnesses’ comments were met with laughter. Among them were the following:

We object to being classified as professional men and women for the purpose of depriving us of the NRA.²²⁴

[Designating reporters who earn more than \$35 a week as professionals] is the highest compliment that has been paid to us since Edmund Burke looked above the clock in the House of Commons one day and dubbed us the Fourth Estate.²²⁵

We feel that we are members of a craft.

Professionals, as we understand it, are persons engaged in a life work which has some minimum requirements for entrance [sic] into it, some test for competency, and some examination, and perhaps even a code of ethics. Of these we have none. We have none except as the decency of the individual might dictate. . . .

. . . .

. . . . My own proposition is that we would like to be brought in as simple craftsmen and taken up on the heights of the Blue Eagle instead of being let down in the valley of ragged [sic] individualism.²²⁶

Why laughter? Part of the reason must have been that the very eloquence of the testimony belied the claim that the witnesses were simply “members of a craft.” But not all of the statements that triggered laughter had the self-aware and ironical turns of phrase that so often marked the Guild’s testimony. I suspect, then, that part of the laughter was *nervous* laughter — laughter at the awkwardness of white-collar workers violating the norms of social hierarchy by committing status *hara-kiri* on the witness stand. Their message was clear: false consciousness on the part of newspaper reporters was standing in the way of their economic interests. Witnesses commented that “newspaper men . . . have lived in an atmosphere of quixotism Their idealism has been their weakness to be exploited by the publishers,”²²⁷ and they have been “lulled to sleep by publishers who make them believe that their jobs are exalted.”²²⁸

The NRA response to the forceful participation of the Guild was to express frustration that so little information was available on

224. *Id.* at 1366 (testimony of Doris Fleeson, *New York Daily News*).

225. *Id.* at 1367 (testimony of Edward Angly).

226. *Id.* at 1367-68.

227. *Id.* at 1402-03 (testimony of Lloyd White).

228. *Id.* at 1419-20 (testimony of Andrew Parker).

editorial employees. The NRA's Division of Economic Research and Planning noted in a November report that salaried workers made up close to half of the newspaper workforce and that it was important to pay close attention to them. But the Division acknowledged that "there are no figures available reflecting employment conditions pertaining to office and editorial workers in the newspaper industry" and that "lacking any definite statistical basis it is impossible to make any estimate of the probable increase in employment that the adoption of the code provisions will entail."²²⁹ Furthermore, the proposed code would set not only maximum hours, but also minimum wages for different categories of employees in the industry. Little was known about existing and historic compensation levels for editorial workers. Absent better data, NRA officials felt helpless.

By December, the Newspaper Guild had succeeded in getting President Roosevelt's attention. Roosevelt was aware of the Guild's complaints that the proposed code as written did not substantiate Johnson's assurances that reporters would not be treated as "professionals."²³⁰ Roosevelt met with Guild leaders on December 11, 1933,²³¹ and with Broun on February 1, 1934.²³² Although Roosevelt approved the industry's proposed code on February 17, his executive order provided that additional work would be done to pin down the status of editorial employees: "[t]he determination of hours and wages for news department workers shall be made not later than 60 days hence."²³³ And in his public announcement, Roosevelt added the following:

The publishers of newspapers having a circulation of seventy-five thousand or more in cities of seven-hundred and fifty thousand population or more are requested to install a five day, forty hour week for their staff of reporters and writers with the purpose of giving employment to additional men and women in this field. A report on this will be made at the end of sixty days.²³⁴

229. Saul Nelson, *The Newspaper Industry* (1st ed. Nov. 11, 1933) (NA/NRA/CAF Entry 26, Box 6410, NRA Division of Economic Research and Planning).

230. See Memorandum from S.T.E. to Mr. McIntyre (Dec. 8, 1933) (FDR/OF 466, NRA, Box 5, Codes N) (noting upcoming meeting with the Guild).

231. See WSU/Guild, *What the Guild Told Roosevelt at a Tea Party*, GUILD REP., Jan. 12, 1934.

232. See Note Appended to Telegram from Heywood Broun to President Roosevelt (Feb. 1, 1934) (FDR/OF 466, NRA, Box 5, Codes N).

233. Executive Order, Code of Fair Competition for the Daily Newspaper Publishing Business, Feb. 17, 1934, CIS 1934-EO-6606-G.

234. Letter from President Roosevelt to General Hugh S. Johnson (Feb. 17, 1934) (FDR/OF 466, NRA, Box 5, Codes N).

In response to Roosevelt's request, the Guild and the Industry both went about the task of gathering data on the occupational and wage structure of editorial work. The Guild worked in cooperation with the NRA Division of Planning and Research in developing its data.²³⁵ In December and January — well off the sixty-day mark — a hearing was held at which conflicting data sets submitted by the Guild, the industry, and the Bureau of Labor Statistics²³⁶ were discussed and the proposals of the industry and the Guild were addressed.²³⁷ Thereafter, the Research and Planning Division continued to study the issue, and the proposed amendments were considered by NRA officials from February through April of 1935.

The Guild was relatively late in coming forward with its proposed amendments, submitting them on January 17. What the Guild proposed was a five-day, forty-hour week for editorial workers throughout the country, with exceptions for emergencies, and with premium pay for overtime. The Guild's hours proposal did not come as a surprise, given the tenor of its earlier testimony. The Guild's minimum wage recommendation was \$45 per week,²³⁸ which was in excess of what Guild witnesses had recommended in the initial hearings,²³⁹ in excess of the industry's proposal of a minimum wage ranging from \$12 to \$25 per week depending on city size,²⁴⁰ and was later characterized by the NRA's Research and

235. See Transcript of Public Hearing Called by the Code Authority of the Daily Newspaper Publishing Business 51 (Apr. 30, 1934) (NA/NRA/CAF Entry 44, Records Maintained by the Library Unit, Transcripts of Hearing, Box 96, Code 507-1-05) (testimony of Jonathan Eddy at the Waldorf Astoria in New York); see also Letter from Jack Tate to Jonathan Eddy (Dec. 20, 1934) (NA/NRA, Amendments, Box 1923) (referring to "the survey conducted by the Division of Research and Planning of the National Recovery Administration in cooperation with the Guild").

236. See Transcript of Hearing on Code of Fair Competition for the Daily Newspaper Publishing Industry (Dec. 5, 1934) (NA/NRA/CAF Entry 44, Records Maintained by the Library Unit, Box 95). The Bureau of Labor Statistics of the Department of Labor got involved in data-collection and analysis at the request of the Guild. See Letter from Jack Tate to Jonathan Eddy (Dec. 20, 1934), *supra* note 235, at 1.

237. See Transcript of Hearing on Code of Fair Competition for the Daily Newspaper Publishing Industry (Dec. 5, 1934), *supra* note 236.

238. For the proposal, see *Guild Seeks \$45 Minimum for News Men; Asks National Five-Day Week in Code Plan*, GUILD REP., Jan. 15, 1935 (NA/NRA/CACI, Amendments, Box 1923).

239. See Sept. 1933 Newspaper Hearing, *supra* note 216, at 1363 (testimony of Alexander Lindsey) (urging "a minimum scale for all newspaper writers, as follows: \$20 [per week] for all newspaper men of less than one year's experience; \$30 for all newspaper men having between one and two years of experience; and a minimum of \$40 for all newspaper men of over two years experience" on all papers).

240. See NRA Press Release No. 9685, Press Memo No. 1 (Jan. 17, 1935) (NA/NRA Consolidated Approved Industry Files, Amendments, Box 1923).

Planning Division as “far in excess of anything the publishers would agree to, if not in excess of a fair proposal.”²⁴¹

The Guild’s position on the minimum wage for editorial workers is of relevance to the hours-regulation inquiry because the Guild’s insistence on a high salary minimum may well have undercut its argument that editorial workers were ordinary workers with no special status.²⁴² Why might this have been the case? After all, there need not have been any contradiction between resisting professional status and insisting on high wages. At the 1933 hearings, Frank Morrison, the Secretary of the American Federation of Labor, had complained that editorial workers “on the average receive weekly salaries far below the wages paid to the skilled workers employed in the production of the same publications.”²⁴³ Seeking *parity* with skilled blue-collar workers would not undercut the Guild witnesses’ notion that “[n]ewspaper editorial knowledge is . . . the same type of knowledge as that possessed by the bricklayer who has learned by practice to build a wall to plumb.”²⁴⁴ But the reason Morrison gave for his demand for higher wages did not rest on parity with equivalent skills across the collar-color line. Instead, he drew on the perceived class superiority of the editorial workers. He noted the “higher degree of education required and the higher standard of living expected” of editorial workers when he said:

There is no more influential or more important body in our country than those who gather, write, or edit the news. The public look to them for unbiased reports of the doings of our everyday life. We expect them to be capable and fair. In order that these men and women may be able to live in decency and comfort it is essential that they receive a minimum weekly salary which will permit of their maintaining such a standard of living.²⁴⁵

Here the story is one of status, pure and simple, and is redolent of the Lynds’ argument that engineers, teachers, preachers, and so forth should be considered part of the business class because the “business interests of the city . . . dominate and give their tone to”

241. Letter from Spencer Reed, Chief, Unit 9, Research and Planning Division, to Gustav Peck, Assistant Administrative Officer, and Jack Tate, Administrator, Division VII (Mar. 22, 1935) (NA/NRA Consolidated Approved Industry File, Amendments, Box 1923).

242. To keep the scope of this article clear, I am not exploring the issue of maintaining appropriate “wage differentials,” particularly regarding “wages in the higher brackets.” But this was a question of pervasive concern throughout the NRA period and is an important part of the broader story of class line-drawing through New Deal programs. I hope to turn to it in subsequent writing.

243. Sept. 1933 Newspaper Hearing, *supra* note 216, at 1451 (testimony of Frank Morrison). The AFL represented five locals of newspaper writers.

244. *Id.* at 1402 (testimony of Lloyd White).

245. *Id.* at 1451-52 (testimony of Frank Morrison).

them.²⁴⁶ If the newsreading public — the middle-class public — is to trust newspaper reporting, it has to be able to see news reporters as members of their own class, and for this reason news reporters must be paid well enough to keep them middle class.

Indeed, testimony at the hearings on behalf of the Guild by Dr. Willard Bleyer, a journalism professor at the University of Wisconsin and a spokesman for the Council on Education for Journalism, underscored the status-based arguments in favor of a high wage for journalists.

It has been shown that representative newspaper editors of both large and small daily newspapers have gone on record, as favoring the recruiting of their news and editorial staffs from college graduates.

Any scale of minimum wages for news and editorial workers on daily papers must be sufficiently high to encourage young men and young women to obtain a college education

. . . .

The newspaper reading public is entitled to have the day's news, as 'the food of opinion,' gathered, written, and edited by mature, competent, well-educated reporters, correspondents, and copy readers, and to be protected against unsatisfactory reporting and editing by immature, half-educated youngsters.²⁴⁷

This testimony was far from the tone of the Guild's 1933 testimony, and made clear that the view of "newspapermen" as members of the working class was contested from within the academy by the contrary view of "journalism" as a budding profession.

It would have been *possible* for the NRA both to accept this justification for high wages and to accept the argument, where hours are concerned, that editorial workers are merely skilled craftsmen whose tool of choice is the pen rather than the trowel. The NRA could have done so by taking a descriptivist approach to wages and a purposive approach to hours. The NRA could have concluded that editorial work is just as susceptible to workspreading as is skilled manual work, even though editorial work is higher in social status and thus ought to command a higher wage.²⁴⁸

246. See discussion of LYNDE & LYNDE, *MIDDLETOWN* *supra* text accompanying notes 50-55.

247. NRA Press Release No. 9685, Press Memo No. 4, at 3 (Jan. 17, 1935) (NA/NRA Consolidated Approved Industry Files, Amendments, Box 1923); see also NRA Press Release No. 9685, Press Memo No. 5, at 3 (Jan. 17, 1935) (NA/NRA Consolidated Approved Industry Files, Amendments, Box 1923) (discussing statement by Mrs. Gladys Whitley Henderson, national president of Theta Sigma Phi, professional fraternity for women in journalism: "the proposed minimum wage is not even a decent living wage, much less an incentive for spending four years or more obtaining the academic and professional training that editors now demand").

248. Of course, it was not always clear that higher status meant that a job should receive higher pay. See NRA Press Release No. 9685, Press Memo No. 3, at 2 (Jan. 17, 1935) (NA/

But this would have required a degree of self-reflection about the different approaches to class line-drawing that was never achieved by the NRA. For this reason, the Guild's insistence on a high minimum wage undercut its position on the susceptibility of editorial workers to hours regulation.

In February, the Research and Planning Division wrote to the officials in charge of formulating the NRA's position on the amendments (Jack Tate, the Divisional Administrator in charge of the Graphic Arts Division of the NRA,²⁴⁹ and Gustav Peck, Assistant to the Administrative Officer), objecting to the industry's proposed hours provisions. The industry insisted on a maximum work week of forty-eight hours for small cities on the grounds that otherwise a reporter might have to be pulled from an assignment in midstream. This argument was deemed "specious," in that "many competent editorial men now out of work could be had when necessary," and that exceptions "could be granted to avoid proven hardship."²⁵⁰ The NRA's Labor Advisory Board also objected to the proposed amendment because of its failure to adopt a clear definition of covered "news department employees" and its failure to adopt a forty-hour limit on weekly work for news department employees in all markets.²⁵¹ Nonetheless, Tate recommended to the National Industrial Recovery Board in April that the amendments be approved without change — despite the contrary recommendation by his Review Officer that "[t]his amendment is not believed to be consistent with policy."²⁵²

Tate opened with the following comment — taking an official stand on the long-fought question of the craft versus professional nature of reporting:

NRA Consolidated Approved Industry Files, Amendments, Box 1923) (testimony of Guild Counsel Morris Ernst) ("We have heard that one of the reasons for a low wage scale is that there is romance in the business The man who owns the newspaper is not a competent judge of the romance. The workers would prefer a decent wage to romance — they can get the romance outside the office."). Alternatively, minimum wages could have been set solely on the basis of the ability of the industry to pay. *See id.*

249. Tate was a lawyer; he was identified as Division Counsel in May of 1934. Letter from Jack Tate to Solomon Barkin (May 2, 1934) (NA/NRA/CACI, Amendments, Box 1923).

250. Memorandum from Spencer H. Reed (Feb. 13, 1935) (NA/NRA/CACI, Code Histories, Box 1937).

251. *See* Memorandum from Clyde Mills to Jack Tate, Division Administrator (Mar. 2, 1935) (NA/NRA/CACI, Amendments, Box 1923).

252. Memorandum from Jack B. Tate to National Industrial Recovery Board 1 (Apr. 27, 1935) (NA/NRA/CACI, Amendments, Box 1923). For the Review Officer's memo, see Memorandum from Review Officer to Division Administrator, Graphic Arts Division (n.d.) (NA/NRA/CACI, Amendments, Box 1923, Serial No. 9190).

I think it is open to question whether a policy applicable to a manufacturing industry . . . should be considered as necessarily applicable to such an industry as that of newspaper publishing. . . . [T]he nature of the work done by News Department Employees is such that it may be considered as falling within an unchartered [sic] area between craftsmanship and a profession.²⁵³

For this reason, Tate rejected the Review Officer's insistence on the forty-hour week:

The Review Officer, in his first exception, recommends that any deviation from the strict policy of a 40 hour week . . . cannot be supported. I believe that no specific answer is possible to this exception, but the general arguments listed above do apply, in particular that argument having to do with the nature of the work done by these employees and the fact that such work is closer to a profession than a craft.²⁵⁴

The Review Officer also objected to the scope of the amendments' exemption of upper-level editorial workers. The amendment provided an exemption from hours regulation to "persons employed in a managerial, executive or personal capacity, to editorial writers, to employees on out-of-town assignments," and to certain correspondents.²⁵⁵ These exemptions were in fact broader than those listed in the original code. The Review Officer took the position that "[p]olicy demands that the employees enumerated in this section receive not less than \$35 per week before allowed exemption from the maximum hours provision."²⁵⁶ Tate's response was that "[i]t is my opinion that while such a minimum may be desirable for the majority of coded industries, it is not necessarily sound policy for this industry."²⁵⁷ The memorandum to Leon Marshall recommending approval made no mention whatsoever of the conflict over hours limits and hours exemptions.²⁵⁸ The amendment was approved by the National Industrial Recovery Board on May 2.²⁵⁹

Thus after two years of work, the Newspaper Guild failed to secure its desired combination of high status for purposes of the

253. Memorandum from Jack B. Tate to National Industrial Recovery Board, *supra* note 252, at 1.

254. *Id.* at 2.

255. *Id.*

256. Memorandum from Review Officer to Division Administrator, Graphic Arts Division, *supra* note 252, at 2.

257. Memorandum from Jack B. Tate to National Industrial Recovery Board, *supra* note 252, at 2.

258. See Memorandum from Gustav Peck to Leon C. Marshall 2 (Apr. 29, 1935) (NA/NRA/CACI, Amendments, Box 1923).

259. See Amendment to Code for the Daily Newspaper Publishing Business 1 (May 2, 1935) (NA/NRA/CACI, Amendments, Box 1923).

minimum wage and “ordinary worker” status for the purpose of hours regulation. The Guild did, however, provide a valuable counterweight to industry power. The Guild forced the industry and the NRA to take its claims seriously, as the length of the proceedings and the division of opinion among NRA officials attests.

D. *Upper-Level Exemptions in NRA Policymaking*

Johnson *thought* he had the process of policy development firmly in hand through his involvement in the promulgation of what he hoped would be a “model” code — the Cotton Textile Code. But his expectation that all industries would follow the template of the Cotton Textile Code proved to be wrong. Great variability developed in code approaches to wage and hour regulation.

Another reason for concern about too heavy reliance on the industry code process was the inadequate representation of labor interests in code making and code administration. The NRA was often criticized for failing to ensure that labor interests were represented.²⁶⁰ Indeed, the Department of Labor occasionally stepped in to ask the President directly to reject NRA codes that went too far in exempting categories of workers from hours regulations.²⁶¹ Secretary of Labor Perkins fought hard against the NRA’s bid to be given the power to approve, end, and modify codes without review by the President. She told Roosevelt in June 1934:

New problems are constantly arising, often intimately affecting labor . . . and, if past experience is any criterion, those new problems would be disposed of by rules promulgated by General Johnson with a minimum of study, thought, and discussion. The parties most vitally concerned might not even hear about it until after the regulation had come into effect.²⁶²

The NRA’s top officials were not inclined to see their job as one of facilitating adequate interest group representation. Instead, they continued to believe that independent governmental action was the way to assure the fairness of the NRA.

260. See, e.g., Summary of Telegram from William Connery, Representative from Boston and Chairman of the House Committee on Labor, to President Roosevelt (Nov. 26, 1933) (FDR/OF 466, NRA, Box 2, Nov.–Dec. 1933) (insisting that FDR “instruct Johnson to appoint a true representative of the organized industrial workers as co-administrator on each approved code”).

261. See, e.g., Memorandum from M.H.M. to President Roosevelt (Nov. 16, 1933) (FDR/OF 15, Department of Labor [hereinafter DOL], Box 1, 1933 folder) (noting that Frances Perkins called, asking Roosevelt to reject the Hotel Men’s code as allowing overly long hours and exempting certain classes of employees).

262. Memorandum from Frances Perkins to President Roosevelt (June 18, 1934) (FDR/OF, OF 466, NRA, Box 2, June-July 1934).

Leon C. Marshall, as a labor policymaker in the NRA's Review Office, made it his task to find a way to break through the barriers of NRA voluntarism using independent government fact-finding. When Marshall first came to the NRA's policy office, he believed it was essential that the government spearhead the development of a system of definition and classification of occupations through the use of job analysis. Without a thorough job analysis, Marshall argued, the NRA would be unable to maintain wage differentials between skilled and unskilled workers, stop evasions of wage and hour agreements, or institute collective bargaining. He called for the formation of an "impartial agency . . . under the jurisdiction of the United States Department of Labor," which would encourage and supervise industries in the job classification process.²⁶³ Marshall called for choosing a director of this job-classification agency "who has performed such work in industrial plants or at the very least has supervised such work."²⁶⁴ Staff working with Marshall contended that the process should include "definition and classification of all positions, even supervisory ones" not covered by wage provisions.²⁶⁵

There was certainly precedent for governmental use of job analysis. The Bureau of Labor Statistics had developed a job analysis for the Federal Employment Service as a method for the standardization and classification of occupations and pay rates in federal employment.²⁶⁶ Indeed, the Department of Labor eventually compiled a *Dictionary of Occupational Titles*, the first edition of which was published in 1939,²⁶⁷ that served — and continues to serve through later editions — as a comprehensive classification of all jobs in the American economy. But Marshall was not given authorization to initiate the work or exercise control over it. The response from higher levels of NRA management was that the issue

263. Definition and Classification of Occupations in Industries, *attached to* Memorandum from Stanley I. Posner to Leon C. Marshall § II-2 (Aug. 6, 1934) (NA/NRA/CAF Entry 265, Box 3, Files of Leon C. Marshall, Folder 62, Definitions, Classification, Explanation). I attribute this to Marshall from context.

264. *Id.*

265. Memorandum from C.R. Dooley to Leon C. Marshall (June 4, 1934) (NA/NRA/CAF Entry 265, Box 1, Files of Leon C. Marshall).

266. See DANIEL NELSON, *MANAGERS AND WORKERS: ORIGINS OF THE NEW FACTORY SYSTEM IN THE UNITED STATES, 1880-1920*, at 151 (1975); see also JACOBY, *supra* note 118, at 150.

267. DIVISION OF STANDARDS & RES., U.S. DEPT. OF LAB., *DICTIONARY OF OCCUPATIONAL TITLES* (1939) [hereinafter OCCUPATIONAL DICTIONARY].

was “very large” and that the Department of Labor rather than the NRA should head up any such effort.²⁶⁸

Even absent comprehensive government-generated data on occupational classification, however, Marshall was committed to centralizing NRA labor policy in his office. One of Marshall’s initiatives was the drafting by NRA officials of a “Basic Code,” a “best practice” code that could be recommended to newly codifying industries. Although Marshall had argued that the NRA should permit exemptions and exceptions only when they “fit[] into a coherent policy,”²⁶⁹ he never succeeded in stating a coherent policy on exemptions. Indeed, Marshall never articulated the policy underlying the exemptions he took for granted — in particular, the exemption for “the executive classes” that he invariably supported.²⁷⁰ He seemed supremely confident that such an exemption would not be unduly complex, despite all of the concerns with “fraud” and “evasion” that had followed “executive” exemptions from the earliest NRA experience.

Marshall’s initial draft of an hours provision — which left blank the number of hours in the maximum work week — called for exempting (without defining) “persons employed in a managerial or executive capacity who earn regularly \$35 per week or more,” certain emergency maintenance and repair crews, as well as “any other class of employees which the Administrator shall find” appropriate to exempt on the application of industry representatives.²⁷¹ He gave no guidance about when it would be “appropriate” to exempt other classes of employees. At times he relied on precedent from past codes and PRA substitutions, despite the fact that past code

268. See Note from Blackwell Smith to Leon C. Marshall (n.d.) *attached to* Memorandum (Aug. 8, 1934) (NA/NRA/CAF Entry 265, Box 3, File No. 62, Definition, Classification, Explanation). Blackwell Smith was second to Richberg in the office of General Counsel and, at this stage, was the person Marshall reported to on matters of labor policy. Thomas Emerson describes him as “an extremely able lawyer, keen, acute, skilled at negotiation and compromise, resourceful in thinking up ideas. He was not a torch-bearer and not adept in initiating policy. But in terms of carrying out policy and adjusting differences he showed unusual ability.” EMERSON, *supra* note 126, at 17.

269. Note from Leon C. Marshall, Some Notes on Labor Policy 2 (n.d.), *attached to* Note from Leon C. Marshall to Blackwell Smith (Aug. 6, 1934) (NA/NRA/CAF Entry 265, Papers of Leon C. Marshall, Box 2).

270. See Memorandum from Leon C. Marshall, Comments on NRA Operations with Particular Reference to Labor Situations 1 (n.d.) (NA/NRA/CAF Entry 265, Leon C. Marshall Papers, Box 2, Comments, No. 53) (including this as the only exemption in the simplest proposal he came forward with: “A simple statement of forty (40) hours per week, eight (8) hours per day, six (6) days in seven (7), with time and one-half for overtime, and with executive classes excepted”).

271. Draft of Basic Code, *attached to* Memorandum from Blackwell Smith to Leon C. Marshall et al. (June 12, 1934) (NA/NRA/CAF Entry 265, Leon C. Marshall Papers, Box 2).

practice was hardly the product of coherent policymaking. As one observer cautioned, substitutions to the PRA had been “forced through under pressure with a very small amount of time for consideration.”²⁷² The experience of the NRA under the Cotton Textile code reveals that the NRA was not able to force what it saw as optimal provisions into the industry codes. Why, then, should existing practice be the guide when determining current policy? Indeed, Marshall did not view precedent as the outer limit for the exemptions he was prepared to propose. One of his drafts of a maximum hours provision exempted “executives and supervisory employees and their secretarial assistants, foremen, and professional and scientific employees who receive regularly not less than \$35 a week.” This led the Labor Advisory Board to urge him to “[d]elete secretarial assistants, foremen and ‘scientific employees’ for which there are few precedents.”²⁷³

The tendency of Marshall’s classification decisions was to emphasize collar-color over the functional requirements of jobs or scarcity of qualified workers in deciding whether to allow employers greater flexibility in hours of work. For example, Marshall’s draft Basic Code permitted “office, clerical, or accounting employees” to work one forty-four-hour week per month because of the needs of the billing and inventory cycles, but allowed no similar exemption for factory employees on emergency maintenance or repair work.²⁷⁴ The Labor Policy Board criticized Marshall’s proposed one-week-per-month “tolerance” for clerical workers,

272. Memorandum from A. Heath Onthank, Assistant Review Officer, to Leon C. Marshall 4 (Oct. 22, 1934) (NA/NRA/CAF Entry 265, Leon C. Marshall Papers, Box 3) [hereinafter Onthank Memo].

273. Memorandum from Solomon Barkin, Labor Advisory Board, to Leon C. Marshall 7 (Oct. 1, 1934) (NA/NRA/CAF Entry 265, Leon C. Marshall Papers, Box 3) [hereinafter Barkin Memo]. It is hard to tell from the syntax here whether the \$35 per week requirement applied to all or just to the professional and scientific employees (which I suspect is the case). Barkin’s objection makes more sense if the exemption for foremen was not subject to the dollar minimum, since previous rulings under the PRA had placed foremen in the supervisory/executive category if their salaries were high enough. Similarly, A. Heath Onthank objected that this exemption

goes further than any past policy of which I am aware. Heretofore, it has been possible to exempt from hour restrictions executives and supervisory employees who receive regularly not less than \$35 per week. The present inclusion of the secretarial assistants of executives and supervisory employees and, in addition, foremen and professional and scientific employees broadens former exemptions. Onthank Memo, *supra* note 272, at 2. Onthank added, however, that he would not object so long as the newly excluded employees earned \$35 or more per week.

274. See Draft of Codification of Labor Policy 2-3, attached to Memorandum from Leon C. Marshall to Walton H. Hamilton (Aug. 24, 1934) (NA/NRA/CAF Entry 265, Leon C. Marshall Papers, Box 3). The PRA had also used the collar-color line in setting maximum hours, but it had in fact given employers greater flexibility in hours for blue-collar than for white-collar workers.

observing that it saw “no reason for an exemption to this class which has benefitted least from N.R.A.”²⁷⁵

Had the NIRA survived, there was a good chance that the collar-color approach would have carried the day. Leon C. Marshall was appointed by Roosevelt to serve on the National Industrial Recovery Board which took over running the NRA after Johnson’s resignation. Late in the life of the NIRA, the NIRB considered a proposed position statement that declared, *inter alia*, that there is “no generally accepted conclusion as to the wisdom or possibility of . . . limitation of hours of work for ‘white-collar’ workers.”²⁷⁶ That was a far cry from Roosevelt’s original insistence that the protections of the NRA were to be extended to the “white collar classes.”

In sum, the NRA’s consideration of upper-level exemptions shows that the agency never reached internal convergence on the proper approach to class line-drawing. In the end, the agency would likely not have had the power to impose the approach of its choosing on the industrial codes, where problems of capture by industry were so pervasive. But where those constraints were not present, in the PRA and in the agency’s policy planning, the agency never articulated a single clear policy on upper-level exemptions. Marshall’s greatest desire was to use “objective” data to draw up his own map of the class system. But when the data were unavailable, he embraced the business community’s contested beliefs as the government’s own and thus relied on the very line Roosevelt expressly rejected in his first speech on hours regulation.

E. *Lessons from the NIRA*

By the NIRA’s judicially mandated end, two years of experience under the statute had generated great variability in practice, but also a measure of consistency in excluding certain upper-level employees from statutory protection. There remained important disagreements as to who the “upper” workers were and whether it was in the end appropriate to protect any of them — including ordinary white-collar workers — through maximum hours legislation. Even Leon C. Marshall, who had some prior expertise on class issues and who was in the best position to make global labor policy judgments for the NRA, was never able to articulate where the lines should be

275. See Barkin Memo, *supra* note 273, at 7.

276. Draft of “Open letter addressed to a number of representative groups by the National Industrial Recovery Board,” 1, *attached to* Memorandum from Blackwell Smith to Williams (Nov. 24, 1934) (NA/NRA, Donald Richberg Subject File, Entry 3, Box 2).

drawn between different groups of employees, and, even more so, *why* they should be drawn.

Perhaps the NRA's failure to attain a coherent vision of which employees ought to be exempt from hours regulation was a result of its failure to secure the independent knowledge base Marshall strove for and never obtained. After all, the entire point of scientifically oriented Legal Realism was that correct policymaking would flow from the facts. That orientation left administrators without guidance if, as proved to be the case, they were required to act before the facts were in.

But suppose it had been otherwise. Suppose that Marshall had completed his job analysis in time to make "scientifically" grounded decisions across the range of NRA labor policy issues he faced. What might he have learned, and how might his approach to class line-drawing have changed as a result? The answer, I suspect, is that the job analysis of the American economy Marshall sought would not have answered any of the specific questions posed by a purposive approach to hours regulation.

Two major analyses of the structure of American occupations were undertaken in the 1930s: Alba Edwards's census and the Department of Labor's *Dictionary of Occupational Titles*. We have already seen that Edwards wrapped functional and status-related attributes of occupations into a single classification scheme, and that its utility to social scientists was consequently impaired. The *Dictionary of Occupational Titles* fared no better. The *Dictionary* was developed within the Department of Labor, as part of the Occupational Research Program of the Division of Standards and Research of the U.S. Employment Service, in order to aid in the appropriate job placement of workers left unemployed during the Depression.²⁷⁷ The *Dictionary* grew out of the "vocational guidance" movement that had the schools as its original locus, and aimed to render scientific the process of matching unemployed (or underemployed) workers with appropriate jobs.²⁷⁸ Like the census, the *Dictionary* claimed that it was evaluating occupations based on their required "skills and abilities." But within the vocational guidance movement, the appropriateness of jobs turned as much on their social status as on their functional characteristics. Recall that this was a tendency that Marshall criticized in his writings, precisely

277. The *Dictionary* was published after the enactment of the FLSA but before the promulgation of the 1940 amended upper-level exemption regulations discussed *infra*, notes 363-405.

278. On the vocational guidance movement, see, e.g., JACOBY, *supra* note 118, at 65-97.

because it made it impossible to match people to jobs based on objective factors.²⁷⁹ Thus, the *Dictionary* explained that “[n]o single criterion [was] followed in determining what constitutes a job classification. For some, it is the duties of the jobs; for others, the industrial surroundings or circumstances in which the jobs exist.”²⁸⁰ In that sense, the *Dictionary* was like the census in being unable to define “jobs” solely in relation to their functional characteristics.²⁸¹

In light of the 1930s census and *Dictionary* experiences, it seems exceedingly likely that an NRA-driven “job analysis” would *also* have intermixed functional and status considerations. For if it did *not* do so, too many “anomalies” would emerge — just as the Lynds found when trying to evaluate high-status workers like engineers and architects whose orientation is toward “things” rather than “people.” A governmental job analysis of the sort Marshall contemplated and that the census and *Dictionary* projects achieved *purports* to be a stand-alone, all-purpose snapshot of the occupational structure of the American economy. Although it is grounded in “expert” analysis of the skills and functions of different jobs, it aims to reflect intuitive understandings of the existing status hierarchy. It is thus a poor tool for answering the particular question raised by purposive hours regulation: how amenable are different tiers of white-collar work to work-spreading?

The purposive approach would ultimately have depended on the government’s capacity to distinguish between jobs that legitimately cannot be divided and jobs that are commonly *deemed* nondivisible — because of either the economic desires of employers or the status needs of employees — but are not so in fact. It might have been possible for NRA administrators to do independent factfinding on this question, but Marshall never proposed doing so. Instead, the closest the NRA came to securing the information required by a purposive approach was through the give-and-take of hearings — for example, in NRA cross-examination of industry witnesses at the Cotton Textile hearings about the divisibility of the work of special crews. But the purposive approach was all too rarely at the fore in

279. See *supra* text accompanying notes 47-48.

280. OCCUPATIONAL DICTIONARY, *supra* note 267, at xxi.

281. Later editions of the *Dictionary* have also been controversial. For a critique of the 1965 third edition of the *Dictionary*, which was based on a “functional job analysis” that turns on the degree to which people work with data, people, and things, see SCOVILLE, *supra* note 65, at 7-8; see also COMMITTEE ON OCCUPATIONAL CLASSIFICATION & ANALYSIS, NATIONAL RESEARCH COUNCIL, WORK, JOBS, AND OCCUPATIONS: A CRITICAL REVIEW OF THE DICTIONARY OF OCCUPATIONAL TITLES 188 (Ann R. Miller et al. eds., 1980) (critiquing third edition and noting sex bias in job ratings).

the NRA period. Within the code-making process, industry was in almost complete control of the factual record. Any real spirit of adversarialism in fact-gathering — which would have been necessary if NRA officials were to use the hearing process as its source of empirical evidence — was stymied by the lack of meaningful representation of workers in general, and of white-collar and upper-level workers in particular. Thus, it is no surprise that NRA labor policy combined an “I know it when I see it” quality with heartfelt calls for scientific analysis. Pound was right that administrative agencies were not necessarily places where the calm of scientific inquiry prevailed. Thus it was possible for a critic of the NRA to complain that the agency had failed to concern itself “with questions such as these: Is employment increasing? Are the unemployed being absorbed? Is purchasing power expanding?”²⁸² Events moved too quickly for genuinely purposive policymaking.

The NIRA materials suggest that, for the most part, NRA officials were engaged in a descriptivist project. At times, officials seemed to think that a pre-existing consensus existed and could safely guide their deliberations. For example, in the Cotton Textile hearings, Johnson seemed to think that the elevated status of supervisors was widely accepted and that the boundaries of the category were easy to draw. But only a few months later, Johnson made the aggressive attempt to impose the PRA’s definition of “executives,” with its duties and salary-minimum tests, on all industrial codes. That move acknowledged that there were disagreements between the administration and some industries regarding the category’s proper boundaries, and therefore that no easy consensus existed after all. Similarly, officials seemed to realize that whatever the traditional cultural saliency of the collar-color line, it was losing its descriptive accuracy.

In the early 1930s, a period in which there was growing awareness of flux in the class system in the United States, a careful descriptivist would have seen how anachronistic the traditional status lines between blue- and white-collar, supervised and supervisor, or hourly and salaried had become. But for some very good and persistent reasons, the circumstances of the NRA made it difficult for administrators to exercise the independence needed to engage in a *sensitive* descriptivist analysis. In part, the problem was that the business community spoke loudly, and only rarely did anyone

282. Press Release No. 3513, Press Memo No. 10, at 1 (Mar. 1, 1934) (LC, Richberg Container 47, Press Releases 2-3/1934) (describing testimony of Francis J. Gorman, United Textile Workers of America).

speak for the white-collar workers. When the only way a group can obtain a statutory benefit is to embrace the view that it has slipped in the status hierarchy, the decision to come forward is a difficult one — even once the group has surmounted the ordinary obstacles to political participation. The Newspaper Guild did so, but it was the exception. Thus, NRA officials bore on their own shoulders most of the burden of understanding the white-collar workforce.

Furthermore, resisting the business community's view of the world also carried with it a significant burden of administrability. A class system in flux tends to generate class lines that are fuzzy and therefore difficult to administer — hence the overriding concern with the possibility of “fraud” and “evasion” with regard to the “executive” exemption. But if the government could adopt a classification scheme that the business community supported, the very fact of that support would point toward a higher level of voluntary compliance.

Within the political constraints facing the NRA, then, it should not come as a surprise that it failed to achieve true independence of judgment on the question of exemptions from hours regulation. What seems remarkable in retrospect is that independent descriptivist judgment was *ever* exercised, and that the purposive approach was present at all. The question is thus whether the Department of Labor was able to improve on this situation in the formulation and enforcement of the Fair Labor Standards Act. We shall see that it was not. We shall see that the same constraints on independent factfinding and the same oscillation between purposive and descriptive approaches to class line-drawing continued to plague governmental class line-drawing in the sphere of hours-regulation under the FLSA.

III. THE EARLY YEARS OF THE FAIR LABOR STANDARDS ACT

The demise of the NRA left the federal government without a comprehensive program of wage and hour legislation. There were widespread calls for the introduction of new legislation, not least of all from businesses for which “the threat of the NRA paled beside the threat of no regulation at all,” and which saw in federal labor law “some means of compelling their market rivals (and themselves) to observe fair standards of competition.”²⁸³ For the Roosevelt administration, “the primary purpose was to make it possible for more workers to be added to the pay roll. It was thus

283. GORDON, *supra* note 122, at 201-02.

designed in part as a compulsory 'share-the-work' program."²⁸⁴ This continuity of goals made the FLSA the true heir to the NRA's program of hours regulation.

A. *Statutory Drafting and Passage (1937-1938)*

In preparation for the seventy-fifth Congress, which met in January 1937, intense activity took place behind the scenes in the Roosevelt administration (centering on Secretary of Labor Frances Perkins) and between Roosevelt and the chairmen of the House and Senate labor committees.²⁸⁵ By the end of April, a confidential draft had been produced. As drafted, the bill provided that employers would be "exempt" from the hours provisions of the act if they paid their workers time and one-half for overtime, but this "exemption" could be withdrawn administratively on an industry-by-industry basis.²⁸⁶ Unlike the PRA, the draft made no distinction between office and factory workers. The draft excluded from the definition of "employee" — and therefore from any protection under the statute — "any person employed in an executive or supervisory capacity."²⁸⁷ By May 12, the upper-level exclusion included "any person employed in an executive, *administrative*, [or] supervisory . . . capacity."²⁸⁸ The term "administrative" had not been common in the NRA industrial codes,²⁸⁹ although Alexander Sachs had used it in his pre-NRA memorandum, and the meaning

284. Paul H. Douglas & Joseph Hackman, *The Fair Labor Standards Act of 1938* (pt. 1), 53 POL. SCI. Q. 491, 491 (1938); accord Linder, *Farm Workers and the Fair Labor Standards Act*, *supra* note 1, at 1381.

285. See John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 463, 464 (1939).

286. See *id.* at 483.

287. Fair Labor Standards Bill, Confidential Revised Draft § 2(a)(7) (April 30, 1937) (National Archives, Record Group 174, Department of Labor, Records of Secretaries, Frances Perkins [hereinafter NA/DOL/Perkins], Box 12).

288. Fair Labor Standards Bill, Confidential Revised Draft § 2(a)(7) (May 12, 1937) (NA/DOL/Perkins, Box 12, FLS Bill, 1937) (emphasis added).

289. When Leon C. Marshall proposed conducting a comparative analysis of labor provisions in the industrial codes, his spreadsheet listed the most common exemptions. "Administrative" was not one of them. Exemption categories for hours were "executive and supervisors," "professional and technical," "all employees receiving more than stated salary," "office and clerical," "outside salesmen," "scarce, skilled or key worker," "continuous process operators," "repair and maintenance," "watchmen," "firemen," "electricians," "engineers," "cleaners and janitors," delivery, shipping and stock, child labor, auxiliary and general. My search of the records did not show completion of Marshall's study. His correspondence relating to the study is found in Office Files of Leon C. Marshall, File NA/NRA/CAF Entry 265, Box 3, Analysis (Various), No. 71, July 18, 1934. Another notation states that "[a]ll of this is turned over to [Harry] Weiss to push thru." Letter from Leon C. Marshall to Harry Weiss et al. 2 (Aug. 30, 1934) (NA/NRA/CAF, Entry 265, Office Files of Leon C. Marshall, Box 3, Misc. Letters, No. 72).

of the term was not immediately clear. But it did have precedent in post-NRA federal wage and hour policy: it appeared as a basis for exemption in an Executive Order under the Emergency Relief Appropriation Act.²⁹⁰ By May 20, the word “professional” had been added into the upper-level exclusion list.²⁹¹ It was in this form that the bill was introduced on May 24 as S. 2475 in the Senate by Senator Black, and by Rep. William P. Connery as H.R. 7200.

Almost immediately, the introduced bill began to provoke criticism within the Labor Department and in the labor movement. Katherine Lenroot, Director of the Children’s Bureau and a close adviser to Perkins, was opposed to the “supervisory” category that had been part of the original administration draft. She argued to Perkins that “it would be very undesirable to specify ‘supervisory’ as outside the definition of ‘employee.’ These exclusions should be very carefully limited to bona fide executives.”²⁹² The problem was exacerbated by the fact that the Black-Connery bill, unlike the PRA, contained no minimum salary required before a supervisor could be deemed an “executive” — although, of course, there was no guarantee that a salary line would serve to identify the “bona fide executive” as Lenroot meant the term. The “supervisory” language was eventually dropped from the bill.

The 1937 legislation died in the House Rules Committee. Perkins declined the invitation of her staff to take the lead in ap-

290. Exec. Order No. 7046 (1935) (“Proscribing Rules and Regulations . . . Under the Emergency Relief Appropriation Act of 1935”). The Executive Order is interesting for other reasons as well. The Order called for all work under the order to be on a monthly salary basis — an innovative step possibly aimed at fostering reliability of improved purchasing power — with differentials by region, size of community, and kind of work. Separate minimum wages were set for different categories of work: unskilled, intermediate work, skilled work, professional and technical work. Supervisory and administrative employees were not covered by the wages provision. The maximum hours provision set an eight-hour day and a forty-hour week, but exempted “supervisory and administrative employees.” Certain types of projects permitted a longer workweek “for manual labor” but not for “clerical and other non-manual employees.” This Executive Order combined a number of themes that had been debated during the NRA period: skill differentials, community-size differentials, distinctions between office and manual work. Not all of these distinctions found their way into the FLSA, although the “administrative” category did find its way in. Note that this was a program that had the relief of unemployment among technical and professional workers as one of its specific goals, which might be why their traditional mode of pay — salaried as opposed to hourly — was adopted under the Executive Order. It is not clear why “administrative and supervisory” workers were not seen as needing similar protection.

291. See Fair Labor Standards Bill, Confidential Revised Draft § 2(a)(7) (May 20, 1937) (NA/DOL/Perkins, Box 12, FLS Bill, 1937). At this point, a lower-level exclusion for agricultural workers had been introduced. The NRA codes had used lower-level exclusions as well — e.g., for “outside” workers in the cotton textile code. For more on lower level exclusions, see the many articles of Marc Linder on the subject, *supra* note 1.

292. Memorandum of Katherine Lenroot to Frances Perkins 1 (June 1, 1937) (NA/DOL/Perkins Box 12) (“Notes Regarding the Black-Connery Bill”).

pointing an internal committee within the department to draft a new bill.²⁹³ Instead, she waited while Representative Norton, the new House Labor chair after the death of Representative Connery, had the original House bill discharged from the Rules Committee.²⁹⁴ Subsequently a number of significant changes were made. One was the move from a true maximum hours bill to a bill that permitted unlimited overtime hours so long as a time-and-one-half wage premium was paid for overtime hours. One might have expected, from a purposive standpoint, that the addition of flexibility to permit employers to work their employees extra hours would have alleviated the need for upper-level exemptions. But the exemptions remained. As amended, the House passed the bill on May 24, 1938.²⁹⁵

None of the different FLSA drafts included special provisions for “white-collar workers” or “salaried workers.” While the legislation was being considered in the Senate, Perkins received an inquiry from Senator Sheppard, seeking to understand why, “[i]f a bill of this sort must be passed,” it could not “exempt from its provisions those who are employed on the basis of monthly wages and have it apply exclusively to those working on an hourly basis.”²⁹⁶ Her response was strangely literal:

If it were possible to avoid the wage and hour bill by employing on a monthly basis . . . many employers would no doubt hire on such a basis. In addition to affording protection to the flow of goods in interstate commerce, one of the purposes of wage and hour legislation is to spread employment and increase purchasing power. It is difficult to see why employees working on an hourly, daily, weekly or monthly basis should not be given the same protection against oppressive wages and oppressive hours of employment.²⁹⁷

Perkins, an experienced labor hand, must have understood that the division between “hourly” versus “salaried” workers was not merely random — that there was a tradition of paying factory workers of all skill levels on an hourly rate and office, supervisory, and professional staff regardless of duties on a salaried basis. What the Senator was in effect asking was whether it was necessary to adopt the same wage and hour provisions across the collar-color

293. See Memorandum from Mary La Dame to Frances Perkins (Nov. 8, 1937) (NA/DOL/Perkins Box 118).

294. See PERKINS, *supra* note 93, at 260.

295. See 83 CONG. REC. 7181, 7449-50 (1938).

296. Letter from Frances Perkins to Senator Sheppard 1 (May 17, 1938) (NA/DOL/Perkins, Box 10, Special File: Wage & Hour Bill, 1937-38) (quoting unnamed constituent) (internal quotation marks omitted).

297. *Id.* The question was forwarded by Sheppard, but asked by a constituent.

line. Perkins's answer, assuming that she must have understood the true nature of the question, was that the Roosevelt administration had strengthened its resolve that there was to be no collar-color distinction in the wage and hour laws.²⁹⁸

As signed by Roosevelt on June 25, 1938, the Fair Labor Standards Act contained a broad definition of "employee," but exempted from the statute's maximum-hour provisions "executive, administrative, and professional" employees. These terms were not defined. Instead, the statute expressly authorized the Department of Labor to issue regulations interpreting these terms — making the choice to locate the decision in the agency rather than in the courts. Responsibility for interpretation and enforcement of the FLSA was placed in the hands of the Department's new Wage and Hour Division.

B. *Model State Legislation (1938)*

The creation of the Wage and Hour Division did not mean that Perkins and her core advisors ceased their involvement in class line-drawing issues. During the period in which the Wage and Hour Division was preparing to promulgate its interpretive regulations, a related issue came to the fore in the upper levels of the Labor Department. The FLSA, due to constitutional constraints, could not reach purely intrastate activities. Interstate business, however, faced competition from intrastate enterprises that were not subject to the FLSA. The Labor Department thus hoped that states would follow Congress's lead and enact "little FLSA's,"²⁹⁹ modeled on the federal statute. By September 1938, a month before the FLSA's effective date, the Department of Labor had formed a committee to draft language for model state legislation supplementing the FLSA. The committee proceeded by reviewing each provision of the FLSA and proposing revisions that seemed appropriate for the states. This became an occasion for rethinking controversial provisions of the FLSA itself.

One participant, on the staff of the Bureau of Labor Standards, said of the FLSA's "executives" exemption: "I don't much like [it]; they would all be holding executive or supervisory positions and we would have to all the time determine whether they were or not, and

298. This strengthened resolve may have related to the fact that the economic situation of upper-level white collar workers was worsening through the Depression as they exhausted their savings.

299. The phrase is mine, parallel to "little Norris LaGuardia's."

there would be no workers.”³⁰⁰ This comment echoed Lenroot’s concern in the early stages of drafting the FLSA that only “bona fide executives” be exempted.³⁰¹ The problem was whether small-scale changes in the language of the exemption could meaningfully reduce the opportunities for fraud and evasion. Even if the term “supervisor” was eliminated, the term “executive” would remain problematic. As was the case under the NRA, the lack of a stable consensus on the boundaries of supervisory or executive work made it difficult for the government to draw clear and politically acceptable lines.

These criticisms reflected the view that the executive exemption was too broad. But the harshest criticism came from the other direction, once the model legislation was approved by the Department of Labor’s Fifth Annual National Conference of Labor Legislation. The approved draft had upper-level exemptions for employees “engaged in [an] executive or professional capacity”³⁰² — language more limited than the FLSA, which also had the less-precedented term “administrative” on the list. On a confidential basis, Perkins’s special assistant, Mary La Dame, asked Charles Wyzanski, Perkins’s former Solicitor of Labor who had returned to private practice (and later became an esteemed federal judge), to engage in a “critical review” of the model state statute.³⁰³ At a meeting, Wyzanski issued a sweeping critique that, while aimed at the state statute, would in some respects apply to the FLSA itself. Wyzanski stated that the state laws “should exempt employees in the higher wage brackets who are not in executive or administrative posts.”³⁰⁴ He thought it wrong that the proposal statute would not exempt “a purchaser of steel getting about \$8,000 whose only assistant may be a secretary, authority for whose employment and discharge rests with the personnel office.”³⁰⁵ Similarly, he contended

300. Transcript of Committee to Prepare Suggested Language for State Legislation Supplementing the Federal FLSA (Sept. 12, 1938) (NA/DOL/Perkins Box 103) (testimony of Pat Murphy).

301. See *supra* text accompanying note 292.

302. Reports of Committees and Resolutions Adopted by Fifth National Conference on Labor Legislation, Bulletin 25-a, at 7 (Nov. 14-16, 1938) (NA/DOL/Perkins, Box 45) (summarizing proposed bill).

303. See Letter from Mary La Dame to Charles Wyzanski (Dec. 13, 1938) (NA/DOL/Perkins Box 118).

304. Summary of Conference re: Draft of State FLS Bill 1 (Dec. 30, 1938) (NA/DOL/Perkins Box 118). Wyzanski apparently read the “executive or professional” language in the model state statute to include “administrative” employees.

305. Wyzanski didn’t seem to see the capacity of interpreting the term “administrative” to include such a worker — which is odd, since he went to the trouble of interpolating that term into the model state statute.

that “[t]he time and a half provisions should apply only to lower paid employees.”³⁰⁶ Wyzanski’s views met with considerable sympathy from inside the Department and led to suggestions that the approved model state statute ought to be revised at the next conference.³⁰⁷

Wyzanski and his supporters were not in the least motivated by the statutory goal of work-spreading. Why should the salary paid to a purchasing agent, to use Wyzanski’s example, bear any relationship to the question whether the work of purchasing could be done by more people working fewer hours? By recommending that the line be drawn solely on the basis of income, perhaps Wyzanski was adopting a purposive focus that emphasized increasing the purchasing power of the already-employed. Or perhaps Wyzanski was adopting a descriptive approach, based on the cultural instinct that a high-paid employee is a high-status employee, regardless of what he does for a living. One cannot be sure.

Exempting a broader range of employees on the basis of income alone, however, was not politically acceptable. Unlike during the NRA period, labor advocates showed signs of caring how upper-level exemptions were drawn. The AFL had promulgated a model state statute that included exemptions for “executives” and “professionals,” although not for “administrative” employees; the CIO’s promulgated version exempted only “executives.” The fact that the labor unions could not agree on language suggests that they, too, were perplexed by the line-drawing task. Indeed, the Labor Legislation conference was moving away from the use of exemptions altogether. It had a standing committee charged with expanding the application of the wage and hours laws to *all* employees.³⁰⁸ Absent a sound descriptivist or purposive basis for drawing lines, the “no upper-level exemptions” approach may have been the most sensible of all. But it never gathered support within the federal government.

306. Summary of Conference re: Draft of State FLS Bill, *supra* note 304, at 1.

307. *See id.* at 2.

308. *See* Report of Committee on State Wage and Hour Legislation, Adopted by Fifth National Conference on Labor Legislation 7 (Nov. 14-16, 1938) (NA/DOL/Perkins, Box 45). The following year, the Sixth National Conference on Labor Legislation proposed that serious consideration be given to removing “professionals” from the exempt category, as the CIO was proposing. Report of Committee on State Wage and Hour Legislation, Adopted by Sixth National Conference on Labor Legislation 1 (Nov. 13-15, 1939) (NA/DOL/Perkins, Box 45).

C. *Initial Interpretive Regulations (1938)*

Elmer Andrews, an engineer who was head of the New York Industrial Commission (the state's department of labor), was appointed administrator of the new Wage and Hour Division of the Department of Labor on July 15, 1938. New York labor interests approved of Andrews. The regional director of the American Federation of State, County, and Municipal Employees (the AFSCME) said he "found Commissioner Andrews a Progressive administrator interested in the problems of employees and sympathetic to the needs of trade unions inside and outside of his department."³⁰⁹ One of the most pressing items on his agenda was promulgating regulations to implement the upper-level exemptions.

Until a final draft of regulations issued from Andrews's office on October 19, 1938, there was much speculation and concern about the meaning of the upper-level exemptions — more so, perhaps, than their language warranted. For example, *The New York Times* reported on August 14 that, according to trade association representatives,

the chief problem as to procedure under the Wage and Hour Act . . . is whether or not the law applies to such employees as office and clerical workers, watchmen, firemen, outside workers, research workers, electricians, engineers, repair shop workers, maintenance men, etc. The law does not specifically answer this question, which, therefore, will depend on interpretation of the administrator and ultimately on court decisions.³¹⁰

All of the listed categories of workers had figured prominently in debates over exclusions from various NRA codes. Thus the issue for the business community was whether the Fair Labor Standards Act would be interpreted as continuing the NRA's approach to occupational classification. That end could have been accomplished in one of two ways — either by the Administrator through his interpretive regulations, or by the courts through a commerce-clause based restriction of the scope of the statute to "processed labor."³¹¹ Both seemed at least plausible.

309. Letter from Daniel Allen to President Roosevelt (July 19, 1938) (FDR/OF 3295, Wage & Hour Division, DOL Box 1, 1938 folder).

310. *Wage Law Evasion Seen in New Deal Plan*, N.Y. TIMES, Aug. 14, 1938, at III 8:8.

311. For the use of the term "processed labor" in the cotton textile hearings, see Transcript of NIRA Hearing No. 1 U-8 (June 27, 1933) (NA/NRA, Records Maintained By the Library Unit, Transcripts of Hearings 1933-35, Entry 44, Box 73). For the distinction between "direct" and "indirect" labor, with the latter category including "clerks, inspectors, tool crib men, repair operators, shipping-room employees, truckmen, drivers, firemen, [and] watchmen," see NATIONAL INDUSTRIAL CONFERENCE BOARD, SUPPLEMENTAL BONUSES FOR WAGE EARNERS, SUPERVISORS AND EXECUTIVES 53 (1927).

The reported reason for the business community's concern is telling:

Reuben C. Ball, secretary of the National Association of Hosiery Manufacturers, said that in the event that these workers are covered by the Wage and Hour Act, it may become necessary as a practical matter to employ more workers in such classification. Some of them may be working more than the maximum of forty-four hours provided in the law, and in such a case their employers would be required to pay them time and a half for any hours in excess of forty-four. It would be cheaper, he pointed out, to employ additional workers at regular rates than to pay the premium rates for overtime.³¹²

What this reveals, of course, is that at least some members of the business community understood that the logic of work-spreading did in fact apply to those categories of employees that had been frequently exempted from NRA hours regulations. Their position was that even with the flexibility to pay an overtime premium to avoid "doubling up," they would, in fact, find that the economics of the situation called for hiring additional workers. To the extent the NRA had been convinced otherwise in industry hearings, revised business opinion seemed to suggest it had been wrong — and that a purposive approach to exemptions that focused on work-spreading might, upon further investigation, reveal that the upper-level exemptions made no sense. But the exemptions had now been enacted into law by the FLSA. Administrators did not have the option of concluding that the exemptions had been a mistake.

The business community's view was, of course, that a wide range of white-collar workers should be exempted by the statute. Andrews himself did much to fuel speculation in the business community that he agreed. In September 1938, Andrews engaged in a question-and-answer session after a speech to the Southern States Industrial Council.³¹³ He was asked whether the Division had yet issued definitions of the upper-level exemptions. This was Andrews's response:

No. I have had that in mind more than anything else . . . I am very sympathetic toward your problem there, because I know a superintendent is not a clock watcher, nor does he punch a time clock. Certainly if he was the sort of fellow that you would take care of if he is sick or

312. *Wage Law Evasion Seen in New Deal Plan*, *supra* note 310, at 8:8.

313. This group later filed a petition to change the upper-level exemptions, which was one of the events leading to the 1940 hearings discussed below. See Department of Labor, Press Releases No. R-712 (Apr. 2, 1940) (National Archives, Record Group 155, Wage and Hour Division [hereinafter NA/W&H]).

knocked out, if you think enough of him for that, I think that really indicates he is a part of the executive family.³¹⁴

Andrews was described by *Business Week* early on in his administration as a “plain blunt man,”³¹⁵ and he clearly was not embarrassed to rely on the traditional status of white-collar jobs and evoke the symbols of their exalted status. Upper-level workers were traditionally treated with greater dignity and with a longer-term commitment from the employer. In return, the upper-level worker was expected not to be a “clock watcher” or a “clock puncher.” The upper-level worker was a noncommodified worker: his labor was total, not divisible into fungible hour-long bursts of energy to be channeled into pre-set processes. Andrews’s first and clearest instinct was that the FLSA, if applied to such workers, would demean them by recasting their labor as no different from that of the “processed labor” that draws its very definition from the clock.

Andrews was a good descriptivist, in the sense that he hit on an image — that of the clock-watcher — that was so strong an icon that it could be used in advertising. Consider the following *Business Week* advertisement, which, as it happens, ran in the middle of the magazine’s big story on the FLSA.³¹⁶ The advertisement is for Remington Noiseless Typewriters.³¹⁷ The ad depicts a standing female secretary and a male boss seated behind his desk. The clock on the wall shows that it is 5:05. The secretary is smiling and handing her boss her finished work. The caption: “We no longer watch the clock.” To be a clock watcher was the quintessential characteristic of ordinary workers. The aim of good business management was to get from your workers the kind of performance you expect from non-clock-watchers, without having to pay for it.³¹⁸ Without the distinction between those who live by the clock (secretaries) and those who do not (bosses) the advertisement would make no sense.³¹⁹

314. Press Releases, Transcript of the Record of the Question and Answer Period Following the Speech of Elmer F. Andrews . . . Before the Southern States Industrial Council, Birmingham, Alabama 3 (Sept. 29, 1938) (NA/DOL/W&H) [hereinafter Press Releases following Speech of Elmer F. Andrews].

315. *What’s What in Wage-Hour Law*, Bus. Wk., Oct. 15, 1938, at 17.

316. Bus. Wk., Oct. 15, 1938, at 20.

317. *Id.* Remington had a history of capturing cultural trends. For “Miss Remington” as a cultural icon of the working woman of the period, see ZUNZ, *supra* note 37, at 147.

318. See *supra* text accompanying notes 114-18 (discussing the Hawthorne experiments).

319. Note that office employees were traditionally salaried. The message is that a good manager knows that unless he does something about it, his lower-level clericals — particularly the women among them — will act like clock-watchers despite their salaried status, suggesting the downward movement in the cultural status of routine clerical work.

Unlike Marshall, then, Andrews did not manifest leanings toward basing exemption decisions on the functional properties of jobs. He saw class line-drawing as a common-sense enterprise, and his descriptivist common sense was that of the business community. Andrews's comfort with embedding the culture of the business community into law did not, however, carry the day. The regulations themselves, which were drafted by Division staff³²⁰ and promulgated on October 20,³²¹ took a far harder line than that signaled by Andrews's conciliatory tone.

In a move Landis would have approved, the regulations departed from the plain language of the statute. The statute lists "Executive, Administrative, and Professional" employees as the exempt categories of workers. The regulations defined only two exempt categories: "Executive and Administrative" (defined as a single category, with the term "Administrative" treated as a synonym for "Executive"), and "Professional."³²² The decision to write the word "Administrative" out of the statute reflected both a desire on the part of the drafters to keep the exemptions narrow and a concern with the administrability of the new term "Administrative," a term with no NRA track record from which to learn.

The definition of the "Executive and Administrative" employee was functionally oriented. Executives and administrators were required to have the power to hire and fire; they must manage an establishment or department; they must customarily direct the work of other employees; they must exercise discretion; and they must do substantially no work of a non-exempt nature.³²³ Wyzanski's purchasing agent would not have qualified. As to professionals, the regulations required that they have "educational training in a spe-

320. Drafting took place under the leadership of Rufus Poole. *See, e.g.* Minutes of Meeting 3 (July 28, 1938) (NA/DOL/Perkins Box 103, Wage & Hour, General) ("All members were instructed to leave any suggestions upon administration with Mr. Poole."). Poole was a 1927 graduate of the University of Chicago Law School, did post-graduate work on legislation under Dr. Ernest Freund, and was in private practice and in government in the Interior Department before joining the Department of Labor as Associate Solicitor and then the Wage and Hour Division as Assistant General Counsel. *See* Press Releases following Speech of Elmer F. Andrews, *supra* note 314. He guided the FLSA through Congress, *see* PERKINS, *supra* note 93, at 261, and also drafted the model state legislation discussed in the previous section, *see* Memorandum from V.A. Zimmer to Frances Perkins (Sept. 20, 1938) (NA/DOL/Perkins Box 103). Poole impressed Perkins early on, and she later urged his promotion to the Division's general counsel position. He was not promoted only because Andrews had promised the position to someone else. *See* Memorandum from Frances Perkins to Elmer F. Andrews (Apr. 29, 1939) (NA/DOL/Perkins Box 103, Wage & Hour Administration, Andrews); *accord What's What in Wage-Hour Law, supra* note 315, at 18.

321. 3 Fed. Reg. 2518 (Oct. 20, 1938).

322. *Id.*

323. *See id.*

cially organized body of knowledge,” as distinguished from both “a general academic education” and non-academic training.³²⁴ Professionals’ work needed to be “predominantly intellectual and varied . . . as opposed to routine mental, manual, mechanical or physical work.”³²⁵ The regulations required professionals to be engaged in the consistent exercise of discretion and judgment as to both the manner and the time of performance, and their work needed to be “of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.”³²⁶ Professionals were also not permitted to do a “substantial amount” of non-exempt work.

By distinguishing between lower-level and higher-level executives and professionals, the regulations took an aggressively independent stance. The regulations’ requirement that professionals actually be doing work that cannot be standardized by the clock was the most clearly purposive element in the exemption regulations — at least insofar as non-standardization suggests lack of amenability to work-spreading. Independence from industry was manifest at the descriptive level in the very fact that employers had to *prove* that particular employees actually possessed the status accoutrements of upper-level status (for example, supervisory authority, freedom from manual work, discretion). Yet in certain respects the regulations were less sure of themselves. First, the statutory minimum salary required to count as an “executive” was \$30 a week — \$5 a week lower than the minimum that had been stated under the NRA.³²⁷ Second, the regulations themselves announced that any party could apply for a revision of the regulations, and that “separate treatment for different industries and for different classes of employees may be given consideration.”³²⁸ It was as though the Division intended little more by these regulations than to foster debate. Rufus Poole, the lawyer most involved in their drafting, explained in a speech that the “professionals” category was “troublesome,” but that all the definitions “were worked out in conference with representatives of employers and employees.”³²⁹ Furthermore, he revealed,

324. *Id.*

325. *Id.*

326. *Id.*

327. *See id.*

328. *Id.*

329. Press Release, Transcript of Address by Rufus G. Poole before the Associated Industries of New York at its Annual Meeting 11 (Nov. 18, 1938) (NA/W&H Press Releases).

Those who did not like our definition did not take the view that they could write a better definition. There is a statutory duty on the Administrator to promulgate a definition. So we put out the best definition we could. . . . And we said that any aggrieved person could petition for a hearing to have the definition fixed up and if the Administrator found that there was justification in the petition, a hearing would be held. We tried to be fair to everyone.³³⁰

Basically, then, the Division's "line" on the regulations was to stress that they were a good-faith effort, and that the Division welcomed requests for revisions. As Andrews, the professional engineer, said in a later speech, the regulations "[are] not, in many ways, perfect, but as in the case of automobiles, refrigerators, and radios, the future should bring many improvements."³³¹

Even before the regulations were issued, interest groups entered into negotiations with the agency as to how they should be interpreted. For example, the Newspaper Guild — finding itself back at ground zero in the fight to avoid professional status — took the position that no employees within its jurisdiction were "professionals" for purposes of the Act. On October 15, only a few days before the regulations were released, Andrews met with a delegation from the Newspaper Guild that, *inter alia*, discussed "the reported efforts of organized publishers to exclude editorial workers from benefits of the act by having them declared 'professionals.'"³³² The Guild received assurances from Andrews that "Andrews' definition of professional employees definitely excluded any newspaper worker eligible to Guild membership from exemption."³³³

Andrews was not at all at home in the world of his Division's regulations. Andrews communicated to the business community that he shared its unhappiness with the strictness of the exemptions and made it clear that he continued to take the business community's views to heart. In mid-December, Andrews — true to the language and spirit of his Southern Industrial Council speech — said that "business men . . . see no reason why the men in the higher-range of income should be classed with those who punch the time clock. . . . They say that these men can go fishing when they like and have other advantages."³³⁴ Andrews hinted that business

330. *Id.*

331. Address to the Illinois Manufacturers Association 2 (Nov. 25, 1938) (NA/W&H Press Releases).

332. WSU/Guild, *Wage-Hour Talk Set With Andrews*, GUILD REP., Oct. 15, 1938, at 1.

333. WSU/Guild, *Andrews Rulings Seen Supporting Guild in Barring Professional Exemptions*, GUILD REP., Nov. 1, 1938, at 1.

334. *May Bar Overtime for High Pay Group*, N.Y. TIMES, Dec. 14, 1938, at 4:2.

objections may lead to a suggestion to Congress that employees be classified by income — that a straight compensation test be substituted for the functional “duties” tests in the regulations, so that all salaried employees — all employees who “d[o] not have to punch a time clock” — would be exempt if their incomes exceed the statutory minimum.³³⁵ The question, of course, was how high he would set the required income. On that would turn whether Andrews was in agreement with his regulation-drafting staff that only the higher-level employees within the “executive” or “professional” ranks ought to be exempt from the FLSA.³³⁶

Andrews was ambivalent about whether the changes he sought should be accomplished by legislative amendment or by regulation. At first he thought he should proceed administratively, by holding hearings and drafting revised regulations.³³⁷ But on March 4, 1939, he announced that he was leaning toward proposing an amendment to the FLSA to deal with the problem, and then requested a closed-door hearing before the House Labor Committee to consider a possible amendment “that ‘white collar’ workers . . . paid salaries above a certain level” would be exempt.³³⁸ Andrews must have known that the legislative route was risky. Legislation had already been introduced in the House to exempt all “clerical employees, such as bookkeepers, stenographers, pay-roll clerks, auditors, cost accountants, purchasing agents, statisticians, or other office help regularly employed on a straight salary basis and given vacations with pay” — a proposal that contained no salary minimum for the nonexempt class.³³⁹ Andrews likely concluded, however, that the constraints of the existing statutory language would not permit him to abandon a functional analysis based on the job categories “executive, administrative, and professional” in favor of a status-based system reflecting the traditional notion of white-collar privilege, shored up by a salary minimum.

The other vexing question was where to draw the salary line. Andrews remained adamant that “the low-paid white-collar group”

335. See *May Ease Wage Act on Well-Paid Jobs*, N.Y. TIMES, Dec. 23, 1938, at 4:4 (quoting Elmer F. Andrews).

336. Note that Andrews was not saying that income should be the sole determinant of coverage. Only among white-collar or salaried workers — he switched back and forth — would his proposed income test qualify employees for exemption.

337. See *2 Wage & Hour Report* (BNA); 3-4 (1940).

338. The discussions are described by Elmer F. Andrews, Address to Council for Social Progress (Apr. 5, 1939) (NA/W&H, Press Releases).

339. H.R. 4363, 76th Cong. (1939) (introduced by Rep. Cox on Feb. 21, 1939); see also S. 2022, 76th Cong. § 1 (1939) (introduced by Sen. Miller on Mar. 31, 1939).

needed statutory protection; they were deemed to be clock-watchers, Remington Noiseless Typewriters notwithstanding. But at what pay level did the high-paid white-collar worker begin? Vastly different numbers had been floated in discussions of a possible salary-level cap on FLSA coverage. On December 14, 1938, Andrews reported that in his travels, the amendment most frequently suggested to him by businessmen "was that salaried employees guaranteed \$150 a week or more and who have vacations with pay should be excluded from the [maximum-hours requirements]." ³⁴⁰ He reported a week later that in thinking of a cutoff he was "talking about the worker with a guaranteed monthly wage of \$300 to \$400 a month." ³⁴¹ In a divisional memorandum on the subject, which appeared to have been developed in anticipation of Andrews's proposed statutory amendment in March 1939, the dollar level was not specifically set; the memorandum said the number should be between \$200 and \$250 a month. Data developed within the division at the time suggested that "the \$200 exemption would apply to about 5% of the male clerical workers but to less than one-half of one percent of the female clerical workers;" the \$250 figure would exempt less than one percent of male clericals and no female clericals. ³⁴²

Andrews finally proposed \$200 as the cutoff. In a letter to the President, Andrews recommended that the FLSA be amended to include "[a]n exemption of all employees receiving a guaranteed monthly salary of \$200 (equivalent of \$2400 per year)." ³⁴³ He stated that the reason was "to prevent evasion of the wage and hour standards and also to avoid unnecessary hardship" — presumably to employers. ³⁴⁴ In discussions about the amendment, Andrews was characteristically noncommittal about the figure, suggesting almost immediately that \$200 might be too low. He did, nonetheless, fervently pursue his proposed \$200 cut-off in Congress.

Andrews's reform bill was soon overshadowed by more sweeping reforms to both upper- and lower-level exemptions proposed by

340. *May Bar Overtime for High Pay Group*, N.Y. TIMES, Dec. 14, 1938, at 4:4.

341. *May Ease Wage Act on Well-Paid Jobs*, N.Y. TIMES, Dec. 23, 1938, at 4:4.

342. Memorandum on High Salaried Employees tbl.4 (National Archives, Records Group 174, Department of Labor, Records of Assistant Secretaries, NC 58 Entry 43-44, Records of Assistant Secretary Charles McLaughlin, Box 9).

343. Letter from Elmer F. Andrews to President Roosevelt 1 (Mar. 14, 1939) (FDR/OF 3295, Wage & Hour Division, DOL, Box 1, 1939).

344. *Id.* He also noted that "[t]he Secretary of Labor has approved these amendments which were prepared with the advice and counsel of Mr. Benjamin Cohen." *Id.* For a discussion of Cohen, see WHITE, *supra* note 152, at 177-80, 189-90.

conservatives in Congress. Bills had been introduced that would have exempted all clerical workers regardless of salary, along with many other groups of employees. The most viable of all of these bills, proposed by Rep. Barden, would have exempted all workers receiving a guaranteed salary of \$150. Andrews complained that the Barden proposal went too far:

“[a] lower figure than \$200 would undoubtedly exempt a considerable number of salaried workers to whom the overtime benefits of the Act should extend.” Our studies indicate that employees in the salary classification from \$150 to \$200 a month have as much need for protection against long hours as any other class of workers. Furthermore, if this class of workers may be worked an unlimited number of hours without overtime compensation, the purpose of the bill to spread employment in this group will be defeated.³⁴⁵

But what about workers whose salaries were over \$200 a month? On what basis did he argue that those employees did *not* need the protection of the statute? None appears, in his speech or in the relevant archives. The studies to which he refers merely showed the percentage of clerical workers falling within specific salary ranges. Andrews did not propose any basis upon which to conclude that the work of the top five percent of male clerical workers was not susceptible to work-spreading. Despite a purposive vocabulary, little of the purposive approach was present in Andrews’s analysis.

Even as Andrews was opposing Barden’s bill, he encountered opposition to his own bill from organized labor. The Newspaper Guild was the major source of opposition.³⁴⁶ The status of newspapermen, and in particular of reporters, had been a theme from the beginning in the news coverage on Andrews’s proposed salary-based exemption.³⁴⁷ That should not be surprising; reporters, after all, were the ones doing the reporting. Andrews backed down as a result of the Guild’s opposition. Plain, blunt Andrews observed that “organized labor has done such a swell job of fighting my battle for me that I think it would be very unethical for me to press that amendment if they are opposed to it.”³⁴⁸

345. Letter from Elmer F. Andrews to Representative Mary T. Norton, Chairwoman, House Committee on Labor 2 (July 15, 1939) (FDR/OF 3295, Wage & Hour Division, DOL, Box 1, 1939 folder) (quoting Report of the Labor Committee on H.R. 5435).

346. See WSU/Guild, *Andrews Bars Change of Hours Act*, GUILD REP., Aug. 1, 1939, at 1.

347. See, e.g., *Amendment, Seeks to Avoid Sweeping Floor Revisions*, N.Y. TIMES, Mar. 16, 1939, at 7:4 (noting suggestions from Congress and the Labor Department “that ‘white-collar’ workers, which classification would include newspapermen and other groups paid salaries above a certain level” would be exempt).

348. WSU/Guild, *Andrews Bars Change of Hours Act*, GUILD REP., Aug. 1, 1939.

The Newspaper Guild's blockage of Andrews's white-collar amendment might be the first time a white-collar union won a political battle — and it was a battle to block legislation aimed at *valorizing* the traditional white-collar claim to superior status. The activism of the Newspaper Guild on this issue triggered coverage in the popular business press of the post-Wagner Act organizing success among some white-collar unions, with the Newspaper Guild described as “one of the most successful” among them.³⁴⁹ The literature reflected an understanding of why it was possible for such white-collar employees as reporters, teachers, and nurses to organize, while it remained the case that the office staffs of factories were unorganizable as a practical matter. “In the factory, the feeling that the white collar is superior to the overall — that class prejudice on which white-collar organization drives have frequently foundered in the past — is apt to militate against a successful campaign.”³⁵⁰ But the same was not true of fields in which white-collar workers predominate.³⁵¹ The collar-color line was thus being portrayed in the press as an inappropriate basis for understanding class hierarchy in predominantly white-collar sectors of the economy, while, at the same time, the business community and its congressional supporters continued to urge that collar-color should determine eligibility for overtime under the FLSA.

D. *First Regulatory Amendments (1940)*

Once the Roosevelt Administration succeeded in defeating the Barden Bill,³⁵² the Administration's reform activity shifted from the legislative to the administrative arena.³⁵³ The Wage and Hour Division's 1939 Annual Report, published on January 8, 1940, reported that the Division had a number of studies under way that might lead to recommendations for amendments, including a study

349. *White Collar Unions on Their Way*, Bus. Wk., Aug. 19, 1939, at 30.

350. *Id.* at 31.

351. *See id.*

352. The bill reared its head again in 1940, when as proposed, “[i]t would exempt all employees, including manual workers, receiving a guaranteed monthly salary of \$150 or more.” Letter from Frances Perkins to President Roosevelt (Apr. 16, 1940) (FDR/OF 3295, Wage & Hour Division, DOL, Box 1, 1940 folder).

353. There was concern that the Barden Bill would be brought back. Another bill was introduced by Rep. Kramer which would have exempted from the maximum hours provision any employee — regardless of collar color or duties — who earned the equivalent of \$200 a month and was guaranteed employment for at least 40 hours a week. *See* H.R. 8624, 76th Cong. (1940). Andrews's earlier \$200/month proposal had pertained only to white-collar workers.

on “the effect of the law on higher-paid salaried employees.”³⁵⁴ In response to a January 9, 1940 letter from a businessman expressing the view that “young men in an office or in a clerical capacity” should not be subject to maximum hours requirements, Perkins stated that “I think you will be interested to know that a committee has just been appointed to study revision of the rules and definitions of the Wage and Hour Act.”³⁵⁵ In early March, Perkins wrote to Philip Fleming, Andrews’s successor, that “before holding any public hearings,” it would be best for a departmental meeting to be held “to arrange a tentative program.”³⁵⁶ At some point in this process, industry groups began filing petitions to revise the regulations. Their proposed definitions differed from one another, but all went in the direction of broadening the exemptions. Even the business press seemed skeptical about the breadth of some of the recommended changes.³⁵⁷

The Wage and Hour Division’s plan was to schedule separate hearings for different industry groups, and the agency made clear that it was open to considering the use of different definitions for different industries. “There is such a wide variation in the work and functions performed by executive, administrative and professional employees in different industries, especially in the administrative and professional classes, that . . . a definition for one of these classifications in one industry is not necessarily to be treated as a precedent in others.”³⁵⁸ The first hearing was noticed in March 1940 and held in April of that year, focusing on the Wholesale and Distributive Trades. Next came Manufacturing and Extractive Trades in June; and then the two fields which likely held the largest number of white-collar workers, “Banking, Brokerage, Insurance, Financial and Related Institutions” and “Publication, Communication, Public Utility, Transportation, and Miscellaneous Industries” — both of which were noticed in June and held in July.³⁵⁹

354. WAGE & HOUR DIV., U.S. DEPT. OF LAB., FIRST ANNUAL REPORT OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION FOR THE CALENDAR YEAR 1939, at 129 (1940).

355. Letter from Barcalo Manufacturing Co. to Frances Perkins (Jan. 9, 1940) and Frances Perkins’s Response (Jan. 12, 1940) (NA/DOL/Perkins, Box 168, Wage & Hour Division, General 1940).

356. Memorandum (n.d.) (NA/DOL/Perkins, Box 168, Wage & Hour Division, General 1940).

357. See *Who’s an Executive?*, Bus. Wk., Apr. 20, 1940, at 34.

358. Press Release from U.S. Department of Labor, Wage and Hour Division, No. R-712, at 4 (Apr. 2, 1940) (NA/W&H, Press Releases).

359. United States Department of Labor, Wage and Hour Division, “Executive, Administrative, Professional . . . Outside Salesman Redefined,” Report and Recommendation of the

On the eve of the first scheduled hearing, representatives of the Newspaper Guild objected to the Division's plan to restrict testimony at each hearing to witnesses from the industries under consideration at the hearing. The Guild had apparently learned from the NRA the tendency of early precedents to become templates. In partial response to that objection, the Division decided to hold off on recommending any regulatory changes until all the hearings were complete.³⁶⁰

While these hearings were in progress, the House voted (by a close vote) to open the FLSA for amendments.³⁶¹ Barden once again proposed exempting all employees earning "a guaranteed monthly salary of \$150 or more," and the President issued a statement in opposition to the amendments and in support of the FLSA. The statement was exceedingly hesitant and measured, much in the spirit of Poole's earlier defenses of the initial regulations:

The Wages and Hours Act is in an evolutionary stage where we are learning by practical experience in the field as to whether and how it should be amended. It is too early to form definite conclusions except to note that on the whole the principle and objective are excellent and have done much to stabilize wages and hours and bring wages up for the lowest paid workers. It is being administered with discretion and no substantial groups of employers have been damaged In view of all the circumstances I think it would be a great mistake to adopt the Barden amendments. By another year we shall know a great deal more about the subject.³⁶²

There was here no overarching statement of a policy or purpose. The best Roosevelt could say after seven years of intensive focus on hours regulation was "give us another year to work it out."

Presiding Officer at Hearings Preliminary to Redefinition, Effective Oct. 24, 1940, at 1-2 [hereinafter Stein Report].

360. That decision was not entirely voluntary. Early in the process, the Newspaper Guild — the union that had scuttled Andrews' legislative proposal — objected to the segregation of the hearings by industry. Abraham Isserman of the Guild insisted on the right to testify at the Wholesale and Distributive Trades hearing, arguing that his union needed to be there to comment on "the question of linking up one or more of these definitions with monthly earnings of employees." As a result of Isserman's inquiry, the format of the hearings permitted non-industry organizations to file briefs, but not to submit evidence at the hearings outside their own industry. See Press Release from U.S. Department of Labor, Wage and Hour Division, No. R-712, *supra* note 358, at 3 (appending correspondence). Had the agency promulgated any regulatory changes before all parties were heard, surely there would have been major objections. By the time of the published Report and Recommendation, Presiding Officer Harold Stein reported that the division of hearings into industry groups was "purely for administrative convenience." Stein Report, *supra* note 359, at 1.

361. See Telegram from S.T. Early to President Roosevelt (Apr. 25, 1940) (FDR/OF 3295, Wage & Hour Division, DOL, Box 1, 1940 folder).

362. FDR/OF 3295, Wage & Hour Division, Box 1, 1940 folder, Apr. 25, 1940.

Ultimately, the Wage and Hour Division decided to promulgate uniform amended regulations for all industry groups. The presiding officer of the hearings, Harold Stein, heard 127 witnesses at the hearings, and received 180 briefs, written statements, and memoranda. The product of this process was a published and widely disseminated Report and Recommendation.³⁶³

Exempting all white-collar workers. The most dramatic change proposed by industry was to exempt all white-collar employees from hours regulation.³⁶⁴ Industry spokesmen argued that “compliance with the act may lead employers to change many of their employees from a weekly or monthly salary to a straight hourly pay basis.”³⁶⁵ In other words, by long-standing practice, white-collar workers were paid on a salaried rather than an hourly basis, and were not required to punch a time clock — a distinction that helped sustain the ideological position that even the most routine white-collar work is of high social status. Once employers were required to keep track of the hours of their non-exempt white-collar workers, employers argued, it would no longer make administrative sense to keep them on the salaried payroll; as a result, their social status would suffer.

Stein had a dual response to this argument, one purposive and one descriptive. On a purposive level, Stein presented evidence that regulating the hours of white-collar workers had in fact succeeded in shortening their hours and decreasing unemployment — meaning that work-spreading worked for white-collar workers.³⁶⁶ He also denied that paying overtime to white-collar workers necessitated switching to an hourly wage. Stein argued that “[it] does not appear why there should be a reluctance to make occasional or even frequent overtime payments to salaried workers Extra payments by way of bonuses have long been common and are not considered inconsistent with salaried status.”³⁶⁷ Here Stein failed to see that bonuses to salaried workers were *not* traditionally based on hours worked, and therefore did not turn salaried workers into “clock-watchers” the way federal hours regulation did.

363. See Stein Report, *supra* note 359. The briefs and hearing transcripts seem no longer to exist: neither the relevant collections in the National Archives or the Department of Labor has them, nor do the majority business and labor archives I contacted.

364. See *id.* at 6.

365. *Id.* at 7.

366. See *id.*

367. *Id.* at 7-8.

Another problem was also implicit in Stein's purposive response to the proposed collar-color line. In defending the statutory decision not to exempt all white-collar workers, Stein argued that white-collar workers could benefit from the statute's work-spreading goals. But what if it could have been shown that the statute's work-spreading goals *also* made good sense empirically for the categories of workers the statute clearly exempts? If by paying salaried workers overtime "[l]iving conditions can be improved and work spread even where wages are comparatively high,"³⁶⁸ and a relatively well-paid clerical worker can praise the statute for reducing long hours ("we . . . owe our leisure to the Wage-Hour Act"), why are there upper-level exemptions at all?³⁶⁹ Why does the logic of work-spreading and the preservation of leisure not apply across the board? A purposive analyst operating within an administrative agency must, at least to some degree, operate within the constraints of the statutory scheme. If the statutory scheme does not itself stand up to purposive analysis, the purposive analyst must either ignore the statute — as the initial regulations did when it came to interpreting the term "administrative employees" — or must justify the conflict between empirical realities and their statutory representation (or misrepresentation). It is perhaps for this reason that Stein quickly abandoned the purposive approach and moved to descriptive justifications for his position.

Stein's descriptive response to industry's argument that the payment of overtime would jeopardize the social status of white-collar workers. He provided data supporting the emergent view that the status of routine white-collar workers was in decline. He argued that 49.4 percent of clerical workers were women — an argument that, contrary to the business community's view, clerical work was not high-status³⁷⁰; that vacations with pay were not universal; that an "astonishingly large percentage of these workers" were paid low wages; and that working conditions in white-collar work were often unhealthful.³⁷¹ Stein thus replaced the image of the white-collar worker as the ambitious young man who volunteers to work unpaid overtime in order to move up by studying his employer's business³⁷² with the image of the female clerical worker working long hours in

368. *Id.* at 8.

369. *See id.*

370. *See id.* at 4. The status increase from feminization of the environment in white-collar settings was never enough to make up for the status-lowering effect of a predominance of women.

371. *See id.* at 9.

372. *See id.* at 7.

a dead-end, unsafe job. Stein's point was that the law could not ignore the substantial status rift that divides white-collar workers from each other.

But the problem implicit in Stein's descriptive defense was that it fueled the argument that the FLSA should only protect employees who worked in low-wage jobs in exploitative conditions. This was industry's view of the FLSA's goal, not the agency's. Undue reliance by the agency on the plight of low-wage white-collar workers would tend to support industry proposals to exempt all white-collar workers earning over a certain (relatively low) salary — the approach Andrews had abandoned under political pressure from the Newspaper Guild.

Defining "administrative" employees. Stein observed that the most frequent criticism of the original regulations was their failure to promulgate separate definitions for the separate statutory terms "executive" and "administrative."³⁷³ Stein rejected the notion that the Administrator had a statutory *obligation* to provide separate definitions, arguing on weak grounds that "'executive' and 'administrative' are used synonymously in common speech and in court decisions."³⁷⁴ He decided, however, that "the best conclusion" is that the two terms ought to be defined separately.

He took a descriptive approach to defining the term "administrative" by referring to its use in contemporary business practice. The term "executive," he explained, "applies with particular aptness to persons who are commonly called 'bosses,'"³⁷⁵ but there is another group of business employees to whom the term "administrative" could apply.

In modern business there has been an increasing use of persons whose authority is functional rather than departmental. Primarily they determine or affect policy or carry out major assignments rather than give orders to individuals. Examples of this type of employee are ex-

373. *Id.* at 3.

374. That seems a weak point, given how rarely the word "administrative" was used in wage and hour legislation, and given the presumed tendency of legislatures not to use redundant language in lists such as these. His authority was also weak. Stein relied on *Saint v. Allen*, 126 So. 548 (La. 1930), a case in which the term is used to say that the state highway department, an "administrative office," is in the executive branch of government, and which quotes references to the "administrative, legislative, and judicial functions" of government, as opposed to the usual "executive" functions. In *In re Heafy*, 285 N.Y.S. 188, 192 (1936), the issue again is branches of government: "When a judge appoints a clerk, he does an administrative or executive act, not a judicial act." These sources don't show an established practice of using the terms interchangeably in the employment setting.

375. Stein Report, *supra* note 359, at 4.

ecutive assistants, travelling inventory men, purchasing agents, tax experts, and safety directors.³⁷⁶

After observing that a “large group” of these employees are not “executives” in the narrow sense, Stein concluded that “it does no violence to the common understanding of the words to apply ‘executive’ to the person who is a boss over men and to apply ‘administrative’ to the person who establishes or affects or carries out policy but who has little or no authority over the specific actions of other individuals.”³⁷⁷

A sign of Stein’s discomfort with the new “administrative” category is that fact that he offered no purposive justification for the special treatment of “administrative” employees. Stein did not explain why it would not be worthwhile to use an overtime premium to encourage employers to hire as many purchasing agents or tax experts as are necessary to get the job done in forty hours per week; he offered no evidence that unemployment was significantly lower among administrative employees than among routine white-collar workers. Given the newness of the “administrative” category — its absence in occupational statistics and in the NRA codes — the empirical data necessary to launch a purposive analysis of the category would have been sorely lacking in any event.

Instead, Stein’s approach to this category of employees was descriptive. Stein’s assumption seems to have been that the administrative employee deserves to be on the “exempt” side of the line because “administrative” employees were recognized as more akin in status to executives and professionals than to ordinary white-collar workers. As confirmation, Stein noted that “in many businesses the weekly pay roll is characteristically the pay roll for the production, maintenance, and clerical workers, while the monthly pay roll is characteristically the pay roll for the company officials, executives, and administrative employees.”³⁷⁸ The message implicit in the “administrative” definition was that there existed a culturally recognized status distinction between factory and back office, or between staff work and line work, or between production and nonproduction functions, that warranted the drawing of an exemption line. The problem, however, was that many businesses used the salaried/hourly distinction to separate all white-collar from all blue-collar

376. *Id.*

377. *Id.* at 4-5. Later in the report, though, the description is no more specific than “persons performing a variety of miscellaneous but important functions in business.” *Id.* at 24.

378. *Id.* at 33.

workers. Why was payroll practice dispositive here, if it was ignored when it came to lower-level white-collar workers?

Precisely because the concept of the “administrator” was relatively new, Stein recognized that it would be difficult to tell the difference between a “bona fide” administrator and “a mere cog in a large industrial wheel.”³⁷⁹ Job titles would not suffice, Stein concluded, because depending on the size and nature of the business, people with the same job title — he gave the examples of “claims agent,” “statistician,” and “personnel director” — do vastly different types and levels of work.³⁸⁰ But beyond the requirement that the work be nonmanual in nature and that it require the exercise of discretion, Stein’s definition had few specifics.³⁸¹ Because of definitional uncertainty, Stein’s operational definition of “administrator” relied upon a high salary minimum as the “principa[l]” safeguard against abuse:³⁸² a salary minimum of \$200 per month, as opposed to the \$120 per month minimum for executives. Stein made every effort to be empirically rigorous in setting the minimum salary level for administrators. But the data available to him pointed to different answers, and in the end the best he could offer was a compromise solution.³⁸³

379. *Id.* at 25.

380. *See id.* at 24-25. Stein says elsewhere that “[t]itles can be had cheaply and are of no determinative value.” *Id.* at 25.

381. Subcategories of the definition exempted workers who “regularly and directly assist” administrative employees, so long as their work is sufficiently discretionary, thereby covering the executive secretary who is primarily valued for “her ability to distinguish between callers at the office and to carry out other special and important duties”; there was an exemption for employees whose discretionary work is “directly related to management policies” and another for heads of “functional departments” where the function of the department is “directly related to general business operations.” *Id.* at 27.

382. *See id.* at 26.

383. The only data available to him on “administrative” salaries came from the Federal Personnel Classification Board, which distinguished between “clerks” and “administrators” and provided data for federal employees in both categories. According to these data, which were already nine years out of date and failed to reflect intervening pay increases, “in Government practice the turning point between the clerk and the administrative official” was on average \$2700 per year (\$225 a month). Stein Report, *supra* note 359, at 31 & n.106. Stein feared, however, that in low-paying regions of the country, administrative employees would have far lower salaries than those paid by the federal government. *See id.* at 32. The alternative approach was to look at national average salaries of *non-exempt* white-collar occupations and set the minimum salary for “administrative” status above their level. In the interest of this kind of calculation, the Wage and Hour Division sponsored a study of clerical employee salaries. The study showed that 5% of stenographers earned over \$1,800 a year (\$150 a month) but only 1% earned over \$2,400 a year (\$200 a month). *See id.* at 31. Looking at bookkeepers, “one of the most routine of all the normal business operations,” *id.* at 32, only 8% of them earned more than \$200 a month, while almost 50% of accountants and auditors (groups that Stein wanted to exempt) made over \$200 a month. But Stein offered no explanation why the salary minimum should be set at a level at which only 50% of the accountants and auditors in the United States would qualify for exemption. Stein’s experience was that

Aside from the arbitrariness of the salary minimum, the weak definition combined with a salary minimum provides little defense against the claim that *all* white-collar workers earning over that salary minimum should be exempt. If the emergent concept of the “administrative employee” has so little specific content, why should such important policy consequences be made to turn on it? Why, instead, should the government not leave it to the market to identify the most important, highest-status white-collar jobs simply by setting levels of compensation for them? Absent a better purposive grounding, the treatment of administrative employees was inevitably incoherent.

Defining professional employees. The main criticism of the original regulations’ treatment of “professional” employees was their failure to include employees in “the more modern professions, in the quasiprofessions and in artistic callings,” who cannot be classed as either executive or administrative, but who are commonly thought to be akin to executive or administrative employees in social status.³⁸⁴ Stein noted that “profession” or “professional” were not yet precise cultural terms; he pointed out that in “common speech,” the term is “sometimes used humorously so as to apply to every occupation that man undertakes.”³⁸⁵ Again, then, the problem was how to pin down an emergent cultural phenomenon in legally administrable terms — how to “draw a line beyond which the term ‘professional’ may not be extended.”³⁸⁶

The proposed amended regulations distinguished between the “artistic” and the “learned” professions, applying some uniform requirements to all professionals and some distinct requirements to each category. Thus, for example, the uniform part of the regulation required that the work of the professional be “[p]redominantly intellectual and varied in character as opposed to routine.”³⁸⁷ The problem with this requirement was that many occupations traditionally viewed as “professions” did not meet it. What about the chemist who performs the same operation time and again, or the doctor who does twenty physical exams and performs the same tests

absent regional adjustments, no salary cutoff could serve as a good substitute for a meaningful definition of the category “administrative employees.”

384. See *id.* at 34; see also, e.g., RESEARCH COMMITTEE ON SOCIAL TRENDS, *supra* note 63, at 301 (noting “[i]nternal changes in the professional group,” including the steady growth of some of the older professions and the rapid expansion of newer ones, such as “[d]esigners, draftsmen, and inventors” and the new “profession of librarian”).

385. Stein Report, *supra* note 359, at 34.

386. *Id.*

387. *Id.* at 33.

and procedures at each — or, on the artistic side, the actor who performs the same role in a long-running Broadway play for two years? The answer Stein gave is that “the work of the true professional is inherently varied even though similar outward actions may be performed.”³⁸⁸ But would the agency be capable of recognizing work outside the well-established traditional professions that only *appeared* to be routine? Or was this flexibility intended to operate as a one-way ratchet, as an assurance that no occupation traditionally viewed as a profession would be ousted from the category?

Stein also compromised on the relationship of the professional’s work to the clock, the aspect of the definition with the greatest purposive implications. The original version of the regulation provided both that professional work must involve “the consistent exercise of discretion and judgment both as to the manner and time of performance” and that the professional employee’s results or output “cannot be standardized in relation to a given period of time.”³⁸⁹ Stein agreed to drop the first time requirement, because “a doctor or a lawyer or any other typical professional employee must frequently keep perfectly regular office hours or hours in court and cannot perform his work at will.”³⁹⁰ He did not see similar difficulties with the second time requirement. But the difficulties existed. If a lawyer works in court, then why is the day in court not a standardized unit of output? Or, for the doctor, why is the fifteen-minute office visit not a standardized unit of output? Stein did not address this, although his underlying assumption was most likely that the lawyer or doctor spends many hours in preparation for each increment of time spent in contact with the client. But, for all that preparation, the doctor does not get paid unless he interacts with the patient, and the preparation is amortized in the fee. The doctor is compensated for the office visit, not for the cure, and doctors who have lighter caseloads work fewer hours. Therefore, returning to purposive thinking for a moment, if doctors were not permitted to work as many hours, there would be room in the economy for more doctors. The belief that the professional’s work relates to time in a nonstandardized way was, and is, important on a cultural level. But even in the 1930s, it was possible to see an ele-

388. Stein Report, *supra* note 359, at 36. Another example was Stein’s agreement to delete from the uniform definition of “professional” the requirement that the professional’s work not be “subject to active direction and supervision,” because he saw that some “recognized professional occupations” would not qualify as professions if the requirement remained. *See id.* at 36-37.

389. *Id.* at 37.

390. *Id.*

ment of standardization in professional life — particularly for professionals working in-house in corporations under the control of bureaucratic work organization. Here again, Stein ignored the possibility that the assumptions behind both the status superiority of the professional and the inappropriateness of work-spreading policies to professionals were being undermined in emerging social practice.

One of Stein's innovations was the creation of the category of the "artistic professions." "Artistic" work was defined as being "original and creative" and the product of "invention, imagination, or talent."³⁹¹ Again, Stein started with and expanded upon the consensus he thought existed in the culture — that, for example, visual artists and musicians are "artists" rather than craftsmen. But why is a musician who plays the same charts in a dance band week after week an artist? Could that musician be distinguished from the symphony orchestra musician who plays the same symphonies year after year? As before, it seemed as though the statutory criteria were not to be used to oust "traditional" arts, but only to evaluate new ones. Thus, Stein said that it is "not believed" that animators are "creative," while it is believed that photographers are³⁹² — with no distinctions drawn among types of animators or types of photographers. Journalists and writers also presented categorization problems. Stein suggested that only the "persons holding the more responsible and better-paid positions in the editorial departments of newspapers or in advertising agencies" would qualify for the exemption.³⁹³ But Stein did not explain why only the minority of reporters depend on "invention, imagination, or talent," while all musicians, painters, and actors do, regardless of how aesthetically tawdry or repetitive or unchallenging their work.

Stein was not prepared to fashion a definition of the professional that would deal with all the obvious problems of categorization. Instead, he turned once again to a salary minimum, for all professions except law and medicine. This reflects the fact that, whether on purposive or descriptivist terms, Stein's careful analysis could not yield a definition of "professional" work that would stand on its own as the basis for an exemption.

Defining executive employees. Turning to the definition of "executive" employees, Stein's project was to determine what makes

391. *Id.* at 41.

392. *See id.*

393. *Id.*

for a “true executive” in light of changes in modern industrial practice. Because “the function of hiring is frequently delegated to a personnel department or director,” Stein determined that the regulations could no longer require executives to have the authority to hire.³⁹⁴ But he found it “difficult to see how anyone, whether high or low in the hierarchy of management, can be considered as employed in a bona fide executive capacity” if that person does not at least have the power to *recommend* hiring or firing.³⁹⁵ To Stein, executives were “bosses,” and a boss who had no power over the job tenure of his employees hardly seemed a boss at all. Yet a reader of contemporaneous personnel literature could easily envision the centralization of all hiring and firing recommendations through the use of standardized testing techniques. Again, Stein’s descriptivist reading of emerging cultural trends might have been too conservative — a conservatism perhaps necessitated by his need to defend a status-based statutory line between “executives” and other employees.

Similarly, Stein determined that a bona fide executive must be in charge of a “department or recognized subdivision thereof.” It was not sufficient for an employee to “supervise miscellaneous groups of employees not constituting a customarily recognized department or subdepartment of an establishment.”³⁹⁶ His reasons related solely to status. “It would seem improper to give as imposing a title as ‘executive’ to a person who supervises a collection of men performing a job, or a series of jobs, but whose responsibilities do not include the kind of permanent status that is properly associated with the management of a recognized department.”³⁹⁷ “Fundamentally and properly” a line must be drawn at “the supervision of a unit with a permanent status and function.”³⁹⁸ Stein insisted on this even though he recognized the growing practice in large departments of distributing “the supervision . . . among two or three employees, conceivably among more.”³⁹⁹ He did not explain why divided authority in an established department was necessarily of higher status than undivided authority over a series of flexibly organized workgroups.

394. *See id.* at 12.

395. *Id.*

396. *Id.* at 10.

397. *Id.* at 11.

398. *Id.*

399. *Id.* at 12.

As for the use of a salary minimum, Stein found that “[t]here was . . . surprisingly wide agreement that a salary qualification” is an “index to the ‘bona fide’ . . . executive character [of the employment]. . . . The basis of this agreement is easily explained. The term ‘executive’ implies a certain prestige, status, and importance.” If they are to be denied overtime pay, “[i]t must be assumed that they enjoy compensatory privileges and this assumption will clearly fail if they are not paid a salary substantially higher” than the minimum wage. “[T]he best single test of the employer’s good faith in attributing importance to the employee’s services is the amount he pays for them.”⁴⁰⁰

When it came to deciding the appropriate salary level, Stein’s initial inclination was to maintain “an adequate differentiation between the salary normally earned by a worker for a standard work-week who is employed as a craftsman or machine operator or tender and the salary of a person whose exemption is sought as an executive.”⁴⁰¹ But the salary level he chose — \$120 a month — fell far short of his stated goals because “the weekly earnings of a skilled craftsman who does no supervising work” were on the rise.⁴⁰² Stein came to hold the view that even in the absence of a substantial salary differential, executive work would retain its high status because it had non-wage “compensating advantages”: “authority over people, a privilege generally considered desirable to possess,” greater opportunity for promotion, paid vacation and sick leave, and greater job security during slow periods.⁴⁰³ But Stein failed to see the trend that many non-executive “salaried” workers received paid vacation and sick leave, that lower-level supervisors were closed out of promotions by the growing preference for placing college men in managerial jobs, and that many skilled workers with union representation were catching up with their bosses on the “comparative advantages” of employee benefits and layoff protection. His approach was descriptive, but his cultural antennae were weak. By assuming the comparative advantages without requiring employers to prove on a case-by-case basis both that these benefits were given to “executives” and that they were not given to ordinary workers, Stein failed to detect the trends that were undermining lower-level executives’ claims to high status.

400. *Id.* at 19.

401. *Id.* at 20.

402. *Id.* at 21.

403. *See id.* at 21-22.

Possibly because Stein recognized that he had failed to mount an adequate descriptivist justification for the executive exemption, he also attempted a purposive defense. He asserted that an overtime penalty for executives “would not usually have any considerable effect in spreading employment because in many instances the executive’s work cannot be shared.”⁴⁰⁴ But this contradicted his earlier observation that supervisory authority was often shared. He also asserted that executive work was less responsive to work-spreading incentives than was administrative or professional work.⁴⁰⁵ But he did not explain why, for example, the work of a company’s chief financial officer (an “administrative” position) is any more divisible than the work of its head of human resources (an “executive” position). The purposive justification for the executive exemption was offered almost as an afterthought and with little care.

In sum, Stein’s report was a serious effort to justify the Division’s position following weeks of arduous hearings. Only because of its seriousness and high quality does it serve as a useful basis for examining the different approaches to class line-drawing and their consequences. The strength of Stein’s descriptive approach is that he did achieve sufficient independence to resist reversion to an old and increasingly contested consensus on the high status of all white-collar work. In that sense, the report and regulations took a stance against the dominant views of the business community and thereby advanced public debate on the changing class order. But the weakness of Stein’s approach is that absent the capacity to do independent empirical work, the descriptive approach is only as good as the quality of the government’s cultural antennae. It is not easy to detect the emergence of new cultural understandings. Stein was quick to recognize new claims of high status by groups in society. He was far slower to recognize that social transformations were threatening the long-term ability of many traditional “executives” and “professionals” to sustain their existing claims of high social status.

Given the obviously time-consuming nature of the hearing process, the descriptive approach has another problem. When the social order is in flux, accurate descriptive maps can become inaccurate in short order. It is difficult to imagine frequent enough amendments to keep pace with the shifting distribution of supervisory authority, discretion, intellectuality, and bureaucratic control

404. *Id.* at 22.

405. *See id.*

within the American labor market. Within certain tolerances, these changes are not a problem; case-by-case adjudication under existing standards can resolve some of these issues. But more fundamental changes require rethinking the entire scheme — and that is difficult to accomplish when the relevant evidence is of a cultural nature and is therefore difficult to gather and interpret.

All in all, the public would have been better served had Stein been able to use a purposive approach. Had there been a commitment to purposive analysis, the Wage and Hour Division would have collected data to determine whether unemployment was a problem among certain types of executives, professionals, and administrators. Changes in the regulatory scheme could have been made on a pilot basis, if necessary, to determine whether in fact the employers of upper-level employees would respond to hours limitations by spreading work.⁴⁰⁶ Because the Division's decisions would have been so clearly based on a set of technical and quantitative judgments, they would have had far less impact on public conceptions of the changing class hierarchy than would explicitly cultural determinations by government agencies as to who is above whom in a universal status hierarchy.

The problem with a purposive approach would have been, and would now be, that the lessons to be learned from the data might push beyond the limits of the agency's authority. As we have seen, the FLSA itself was not the product of careful purposive analysis. The Division might have revealed, had it used a purposive approach, that there was no justification under a work-spreading theory for *any* exemption for executives, professionals, and administrators. What, then, could it have done, except appeal to the Department to sponsor legislation to repeal the exemptions or begin to articulate a new set of rationales for the statute and its exemptions and hope to prevail in the courts?

CONCLUSION

It was no small feat for New Deal government actors to resist industry efforts to saddle maximum hours laws with an anachronistic model of contemporaneous class structure — one in which the lines of relative privilege were drawn at the collar-color line. To

406. This is the claim the Newspaper Guild made in its criticism of the new rules: "Basing definitions on salary earnings appears to us to ignore one of the stated purposes of the FLSA, to spread employment, something which can be done . . . by limiting hours in the higher brackets as in the lower." WSU/Guild, *Pasche Assails Redefinitions in Hours Law*, GUILD REP., Nov. 1, 1940, at 1.

that extent, government actors successfully resisted embedding in the law an already-contestable orthodoxy of universal white-collar privilege that was coming under attack in both labor-union practice and in the technology of the bureaucratization of work. This is the value of a descriptive approach to class line-drawing, when it is done with a healthy measure of independence.

The upper-level exemption regulations are under attack today in large part because it is the *virtue* of sophisticated descriptivist approaches that they do not always comport with what powerful private interests put forward as “common sense.” The regulations reflect that by the late 1930s the highest-level executives, administrators, and professionals drew their high social status from their role as the engineers of the industrial process; the lower-level members of their ranks were, like ordinary workers, being engineered by it. The upper-level exemption regulations, in sum, were predicated on an understanding that if an upper-level line must be drawn, it needed to be drawn *within* the ranks of those who were viewed as professionals, executives, and administrators. That understanding is as appropriate today as it was in the 1930s, and it is no more popular with the business community today than it was in the 1930s. It should not be abandoned.

Over the years, the regulations have been subject to demands for simplification. To the extent those demands have been heeded, the result has been a movement away from precisely the aspects of the agency’s interpretations that were the most sensitive to emerging cultural trends. The creation in 1947 of an “upset test” — a higher salary level at which duties will no longer be closely scrutinized — has tended to place undue emphasis on income, while at the same time not diminishing the general view that being “exempt” means working in a job that has high social status. The “upset test” has also held the Wage and Hour Division hostage to successful Congressional efforts to thwart the increases in the upset salary levels necessary to reflect not only inflation, but also the increasing earnings inequalities between upper-level and lower-level white-collar workers.

As the upset salary levels have become less realistic bases for drawing class lines, entirely too much emphasis has been placed on the aspect of the regulations we have discussed the least: the requirement that exempt employees be paid on a “salary basis.” The salary-basis test provides, *inter alia*, that exempt employees who work on a particular day cannot be docked for hours not worked on that day. Its philosophy is tied to the claim that the work of true

upper-level employees is non-commodified, that it cannot be subjected to the time clock. Recall Andrews saying “they can go fishing when they want to.” But the trend that began in the 1920s and 1930s of imposing bureaucratic control on all forms of work means that employers have come to see *all* of their employees as working subject to the clock. Employers for years have been unprepared to allow all but their highest upper-level employees to take advantage of the flexibility that was customarily one of the “comparative advantages” of upper-level status. That is why employers object to being robbed of their ability to dock their upper-level workers’ pay for partial-day absences.

Perhaps the salary-basis test can be used to reverse this incursion into the privileges of upper-level status. But it is not the job of descriptivist government actors to *resist* cultural trends. If in fact business practice has succeeded in eroding this traditional accoutrement of upper-level status, such that we as a culture now readily accept the notion that upper-level employees file time reports and have fluctuating paychecks, then a descriptivist Wage and Hour Division must eventually yield. If it does not, then its actions appear arbitrary — a sure sign that it has lost whatever legitimacy comes from being able to claim that the law’s conception of class has its basis in the culture. This is another limitation, then, of the descriptivist approach.

One might ask, why is the business community able to implement its own view of upper-level employment if what it has chosen to do is rendered illegal by the FLSA? The government, after all, does not merely promulgate images of class. It promulgates regulations with all the force of law. The answer, of course, is that to the extent the law is enforced, it *does* provide a meaningful check on the ability of business to deviate from the government’s view of the true indicia of upper-level status. But the FLSA is, like so many laws, underenforced. And the enforcement of the upper-level exemptions requires individual employees to come forward and demand that they no longer be categorized as exempt — a change that is still experienced as a status loss. The Newspaper Guild remains in the vanguard in its willingness to take that position, but many white-collar workers cling fiercely to their claims to high status.

Let me close this discussion of the limits of the descriptivist approach with a true story. While I was writing this Article, a former star student of mine called to ask what she needed to do to enter the law-teaching market. This was a student who had been very anxious to get a quick start on her career as a management-side

labor lawyer in a large firm. When I asked her why she was unhappy in practice, part of her reason for wanting to leave was the long hours she was working. We then turned to talking about the teaching market, and — after disclosing that her hours would not necessarily get any shorter — I asked her whether she had in mind a possible topic for a “job talk” or a first article. She expressed interest, to my delight, in the white-collar exemptions to the FLSA. I asked her what position she would take, and she started to express her outrage at the thought that highly paid, high-status professionals and executives would ever expect to be paid overtime for their long hours of work. I pointed out to her that the theory behind the overtime premium was work-spreading and reminded her that she was about to leave law practice because of the long hours (which quieted her sense of outrage a bit).

I then asked my former student whether she'd given any thought to why lawyers are asked to work such long hours. Specifically, I asked her whether she thought it had to be this way, whether the nature of the work made it impossible to hire more lawyers at lower pay and allow them to work fewer hours. She answered (to my surprise, given her initial viewpoint) that the “it has to be this way” argument was utterly absurd. Without saying more, I encouraged her interest in the FLSA and in teaching. And I came away all the more convinced that as members of an elite which is clinging to its own elevated status, we cannot be trusted accurately to assess our own status demise. Descriptivism is attractive, but it asks more of government actors than their own biases permit them to deliver. It is far easier to see past those biases when the questions that are being asked are purposive — when they are self-consciously tailored to meet specific statutory goals.

The FLSA is long due for a purposive overhaul. If work-spreading remains the goal of the statute, there is grave reason to doubt that a time-and-a-half overtime premium is large enough to serve as a work-spreading incentive.⁴⁰⁷ I doubt that the framers of the FLSA would have ever imagined workers striking to avoid being forced to work excessive hours at the time-and-a-half rate.⁴⁰⁸ They did not anticipate that the high costs of employee training and of non-wage employee benefits such as health and pension plans would raise the costs of hiring additional workers to the point at

407. For a critical review of proposed legislation to increase the overtime premium, see RONALD G. EHRENBURG & PAUL L. SCHUMANN, *LONGER HOURS OR MORE JOBS? AN INVESTIGATION OF AMENDING HOURS LEGISLATION TO CREATE EMPLOYMENT* 133-37 (1982).

408. See, e.g., *Five Big Strikes: Issues, Outcomes*, *NEWSDAY*, Aug. 20, 1997, at A37.

which a time-and-a-half premium is the far cheaper choice for many employers. In that light, and in light of the growing tendency of employers to use part-timers and/or independent contractors to meet their labor needs, the FLSA as currently constituted may no longer be able to meet work-spreading goals.

If we are prepared to create a meaningful work-spreading incentive, the question of whether upper-level workers should be exempt should be reconsidered in its entirety. At least some "ordinary" work is regaining the exercise of autonomy and discretion through flexible specialization and cooperative management.⁴⁰⁹ At the same time, the well-publicized wave of layoffs of executive, administrative, and professional employees through corporate downsizing suggests that the use of "best practice" management techniques to control the work of upper-level employees is, to borrow a phrase, once again "taking the starch out of" upper-level white collar workers.⁴¹⁰ There is good reason to suspect, then, that the trend of convergence in the work structure and working conditions of upper-level and ordinary workers continues apace. The assumption that upper-level work is (and is uniquely) noncommodified and nondivisible deserves to be freshly reexamined.⁴¹¹

Finally, it is time to consider whether the FLSA should be shifted off of its work-spreading foundation and explicitly moved onto alternative moorings — for example, the protection, for *all* workers, of leisure or of their right to function simultaneously as workers, parents, and citizens.⁴¹² It is, in short, time to genuinely

409. Again, however, "best practice" is slower to disseminate in the world than in the literature. See, e.g., Paul Osterman, *How Common is Workplace Transformation and Who Adopts It? Internal Labor Market Innovations*, 47 *INDUS. & LAB. REL. REV.* 173 (1994).

410. Examples of journalistic and popular responses to white-collar downsizing in the 1990s abound. See, e.g., *More and More, Joblessness Wears a Business Suit*, *BUS. WK.*, Feb. 28, 1994, at 22; *White Collar Wasteland*, *U.S. NEWS & WORLD REP.*, June 28, 1993, at 42. There are likewise numerous claims within the business community that white-collar downsizing is necessary for economic growth, see, e.g., Edwin A. Finn, Jr., *White-Collar Bloat*, *FORBES*, Oct. 17, 1988, at 34; Thane Peterson, *Can Corporate America Get Out from Under its Overhead?*, *BUS. WK.*, May 18, 1992, at 102, and that the trend will be towards the erasure of "the rigid distinction between white- and blue-collar workers," see Richard Rosecrance, *Can We Make White-Collar Workers More Productive?*, *USA TODAY: THE MAGAZINE OF THE AMERICAN SCENE*, Sept. 1, 1991, at 37.

411. It might also be worth reconsidering other assumptions about the extent to which the responses of blue-collar and white-collar wages and working conditions to economic variables are similar. See, e.g., David G. Blanchflower & Andrew J. Oswald, *The Determination of White-Collar Pay*, 42 *OXFORD ECONOMIC PAPERS* 356 (1990) (examining British data).

412. An advantage of the purposive approach is that governmental definitions of social problems, once identified, can be changed. "[S]erious attention to a given definition is an outcome of significance, as it legitimates some strands of political argument, mobilizes some participants, and invites people to see public issues differently. In its multiple roles, problem definition constitutes a source of both stability and flexibility in the policy process." Janet A.

rethink the FLSA and its upper-level exemptions, not merely to “simplify” them or remake them to maximize employer “flexibility.”⁴¹³ As Hugh Johnson said at the cotton textile hearings, the government has the power to require employers to change their personnel practices to meet the public policy goals of government programs. When government goals change, it is legitimate for government demands on private actors to change as well.⁴¹⁴

In rethinking the FLSA from a purposive standpoint, we must be cognizant of the fact that revising the FLSA will require a new wave of class line-drawing. Whether motivated by a descriptivist or a purposive rationale, overtime exemptions send working people powerful messages about their class position — a message that is reiterated with every paycheck. True, purposive government regulation does not *set out* to map or to alter the class system or even to send any particular messages about class. But the messages we receive are not necessarily the ones the sender sent. The class structure of contemporary American society is at least as uncertain and contested as it was in the pre-New Deal period. Any government action that draws lines on the basis of class-like criteria — income, occupation, education level, and so forth — is likely to have a significant effect on how we experience and debate the issue of class.

Adopting a purposive approach thus does not get the government off of the cultural hook. The purposive legislature or agency must maintain a high level of cultural awareness in the course of program design and implementation. This means that someone in a position of authority must take on the job of understanding how the government’s regulatory scheme replicates or challenges existing cultural assumptions, and the extent to which it puts the government on one or another side in ongoing cultural debates. Where possible, these cultural insights should be taken into account in program design — for example, by avoiding drawing controversial lines that are of limited programmatic efficacy. More often, the government will not be able to avoid controversy. In such cases, the government must do everything it can to make clear to the regulated community that its classification scheme is “correct” only for the limited purposes for which it was designed. It is no news that the

Weiss, *The Powers of Problem Definition: The Case of Government Paperwork*, 22 POLY. SCI. 97, 118 (1989).

413. Here I allude to the proposed introduction of compensatory time under the Fair Labor Standards Act. See Working Families Flexibility Act, H.R. 1, 105th Cong. (1997).

414. An aggressive approach will, however, require a hefty budget for education and enforcement — something the Wage and Hour Division and the NRA have sorely lacked.

government needs to be vigilant about the unintended consequences of government programs. It may be news that sometimes those consequences are cultural. The purposive approach therefore must not be culture-blind. When done right, it is culturally aware, and for that reason adopts a posture of cultural self-restraint and political self-disclosure. The time has come to give it a try.