

RETHINKING THE MANAGERIAL- PROFESSIONAL EXEMPTION OF THE FAIR LABOR STANDARDS ACT

PETER D. DECHIARA*

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* Attorney, Cohen, Weiss and Simon, New York City. I would like to thank Sara J. Horowitz, Thomas N. Ciantra, Michael G. Dzialo, and Russell Hollander for their helpful comments. The views expressed herein are my own, not those of Cohen, Weiss and Simon.

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INTRODUCTION

The Fair Labor Standards Act of 1938 ("FLSA" or "the Act")¹ stands as one of the cornerstones of federal labor legislation, establishing for a broad range of workers federally mandated minimum wage and premium wage rates for overtime work.² The Act, however, exempts from its coverage all employees who work in a "bona fide executive, administrative, or professional capacity."³ This Article argues that the FLSA exemption for managerial and professional employees has no legitimate rationale, and that Congress should amend the FLSA so that it reaches such employees. Specifically, this Article proposes that the FLSA be amended to require employers to provide their managerial and professional employees with compensatory time off from work ("comp time") for hours worked beyond a standard workweek.⁴

Limiting the excessive hours now worked by most managerial and professional employees would produce tangible benefits by: (1) reducing the growing problem of white-collar unemployment by requiring employers to increase hiring, (2) increasing productivity by reducing the strain of overwork, and (3) enriching the lives of the

1. 29 U.S.C. §§ 201-219 (1988).

2. See *infra* note 45 and accompanying text.

3. 29 U.S.C. § 213(a)(1).

4. Legal literature on the FLSA is sparse, but interest in work hours appears to be growing among economists, historians, and other commentators who write about the workplace. See, e.g., BENJAMIN K. HUNNICUTT, WORK WITHOUT END: ABANDONING SHORTER HOURS FOR THE RIGHT TO WORK 240-49 (1988) [hereinafter HUNNICUTT, WORK WITHOUT END] (discussing historical and political background to passage of FLSA); ROSABETH M. KANTER, WHEN GIANTS LEARN TO DANCE: MASTERING THE CHANGES OF STRATEGY, MANAGEMENT AND CAREERS IN THE 1990s 267-80 (1989) (examining causes for recent increase in white-collar workers' hours); DAVID R. ROEDIGER & PHILIP S. FONER, OUR OWN TIME: A HISTORY OF AMERICAN LABOR AND THE WORKING DAY 243-77 (1989) (discussing history of labor's efforts for shorter work hours); JULIET B. SCHOR, THE OVERWORKED AMERICAN 66-67 (1991) (discussing increase in hours worked by Americans); John L. Zalusky, The United States—The Sweatshop Economy: The Case for Fewer Hours of Work and More Leisure Time 5 (Jan. 6, 1993) (unpublished manuscript presented to meeting of Industrial Relations Research Association, on file with *The American University Law Review*) (arguing for shorter working hours and more leisure time).

This Article draws on the insights contained in these works. In particular, the reform proposed here builds on the work of Schor and Kanter. See *infra* text accompanying notes 314-16. Unlike those works, however, this Article attempts to provide an analysis not only of relevant social and economic conditions, but of the legal landscape as well.

affected employees by providing them with meaningful amounts of time away from the job to devote to family or other pursuits. Congress never made explicit its reasons for exempting managerial and professional employees when it enacted the FLSA in 1938. The Act's framers may have felt that the privileged position of managers and professionals in the workforce, along with the bargaining power such employees supposedly enjoyed,⁵ made government regulation of their work hours unnecessary. The Act's framers may even have feared that the courts would deem such government regulation unconstitutional.⁶

Today, managerial and professional employees still constitute a privileged stratum of the workforce, generally enjoying wages and benefits superior to those of the rank and file.⁷ Over the last fifty years, however, legal, social, and economic developments have greatly strengthened the case for regulating their work hours. As the U.S. economy has grown more competitive, American employers have responded by laying off workers while demanding more effort from those they continue to employ. In this move to create leaner, more cost-effective operations, employers have not spared their managerial and professional employees.⁸ As a result, significant numbers of managers and professionals go jobless while those with jobs strain under employer demands for excessive hours.⁹ These twin problems of unemployment and overwork for the managerial-professional class cannot be easily overlooked; while managerial and professional employees constituted a slim portion of the labor force when Congress enacted the FLSA, the last fifty years have seen their ranks swell to the point where they now constitute over one-quarter of the entire paid workforce.¹⁰

At the time Congress passed the FLSA, managerial and professional employees who lacked sufficient bargaining power to resist long hours of work at least had the option of organizing collectively under the

5. See *infra* notes 177-78 and accompanying text.

6. See *infra* text accompanying note 171.

7. See *infra* note 179 and accompanying text.

8. See, e.g., *Companies Need Guidance on Downsizing*, 138 Lab. Rel. Rep. (BNA) 481 (Dec. 16, 1991) (discussing companies' downsizing and increased workload for remaining white-collar employees); Gail Bronson & Robert S. Morse, *What Executives Are Getting Paid These Days*, U.S. NEWS & WORLD REP., Oct. 17, 1983, at 72 (discussing white-collar cutbacks as companies more carefully scrutinize needs); Louis Uchitelle, *Strong Companies Are Joining Trend to Eliminate Jobs*, N.Y. TIMES, July 26, 1993, at A1, A1 (discussing current trends in corporate America's downsizing of management-level workforce and its impact on remaining workers); see also *infra* notes 134-38 and accompanying text.

9. See *infra* notes 117-33 and accompanying text.

10. See *infra* notes 83-86 and accompanying text.

protection of federal labor law.¹¹ Indeed, many managers and professionals exercised that option.¹² Since passage of the Act, however, labor law protection for such organizing efforts has been substantially scaled back. Within a decade after the enactment of the FLSA, Congress amended the National Labor Relations Act (NLRA)¹³ to eliminate labor law protection for supervisory employees in the private sector.¹⁴ The U.S. Supreme Court later eliminated such protection for all private sector managerial employees, including those with no supervisory functions.¹⁵ At the same time, in the public sector, the number of jurisdictions allowing collective bargaining by supervisors has dwindled.¹⁶ Although professionals still enjoy nominal labor law protection for their organizing efforts, the managerial exception to the NLRA has placed such protection in doubt for all but those with the lowest level jobs.¹⁷

Another major development supporting the amendment proposed here has been the entry of substantial numbers of women into the managerial and professional workforce.¹⁸ At the time of the FLSA's enactment, nearly three-quarters of managers and professionals in the workforce were male.¹⁹ Almost all of the wives of these employees stayed home and took care of domestic responsibilities such as raising children, thus making it possible for their husbands to spend long hours at the office when necessary.²⁰

Today, by contrast, women constitute nearly one-half of all managerial and professional employees.²¹ These female managers and professionals, unlike their male predecessors, typically do not have a spouse staying home to provide childcare and other domestic labor.²² Indeed, the reality is that female managers and professionals bear nearly the entire burden of their families' childcare duties.²³ Employer demands for excessive work hours threaten to drive away

11. See *infra* notes 191-93 and accompanying text.

12. See *infra* notes 191-93, 201-04 and accompanying text.

13. 29 U.S.C. §§ 151-169 (1988).

14. See *infra* note 205 and accompanying text.

15. See *infra* notes 211-14 and accompanying text.

16. See *infra* notes 198-99 and accompanying text.

17. See *infra* notes 215-24 and accompanying text.

18. See *infra* notes 101-04 and accompanying text.

19. See *infra* note 101 and accompanying text.

20. See *infra* notes 102-03 and accompanying text.

21. See *infra* note 104 and accompanying text (discussing changes in gender roles since 1940).

22. See *infra* notes 107-09 and accompanying text (discussing domestic burdens on female managers and professionals).

23. See *infra* notes 108-09 and accompanying text (describing "double load" of workplace and home responsibilities on working women).

those female managers and professionals who now struggle to balance workplace and family responsibilities.²⁴ By making jobs more manageable, a statutory limit on excessive work hours would help women keep their jobs. Such a limit would not only help maintain the sexual integration of the managerial and professional workforce, but would even help women earn promotions to upper management, where they are now significantly underrepresented.²⁵

Amending the FLSA to mandate comp time for managers and professionals would undoubtedly add to the labor costs borne by employers. Such an amendment would in effect set a ceiling on the total hours employers could work their managerial and professional employees. Employers seeking additional work could no longer just demand more hours from their current employees; they would have to hire more workers.²⁶ Unscrupulous managers and professionals might further increase these costs by deliberately slowing their work speed, or even lying about the number of hours worked, in order to generate unearned comp time.²⁷ Despite these costs and potential abuses, however, the social benefits to be gained, as is discussed in greater detail below, clearly justify regulating the hours of managerial and professional employees.²⁸

Part I of this Article discusses the history of hours regulation leading up to the enactment of the FLSA in 1938, and the development of the Act's managerial-professional exemption since then. Part II discusses the past and present state of the managerial-professional workforce, including the size and composition of the workforce, the hours worked by managerial and professional employees, and the prevalence of unemployment among them. Part III explores why Congress may have written the managerial-professional exemption into the Act in 1938, and whether any legitimate reasons justify the exemption today. Finally, Part IV recommends that Congress amend the FLSA to require employers to provide managerial and professional employees with comp time for hours worked beyond a statutorily determined standard workweek.

24. See *infra* notes 247-53 and accompanying text.

25. See *infra* notes 105-06 and accompanying text (discussing glass ceiling phenomenon).

26. See *infra* note 257 and accompanying text (anticipating negative reaction of employers to prospect of hiring more workers rather than demanding more hours from current employees, but noting that this employer opposition would not justify congressional inaction).

27. See *infra* notes 290-91 and accompanying text (discussing potential "theft" of overtime compensation and difficulty of monitoring work of managers and professionals).

28. See *infra* notes 260-84 and accompanying text.

I. BACKGROUND

A. *The History of Hours Regulation Prior to 1938*

The idea of mandating time off from work for a period of rest dates back to at least the advent of the ancient Hebrew Sabbath.²⁹ In the United States, efforts to reduce the length of the workday can be traced at least back to 1791, when carpenters in Philadelphia struck for a ten-hour day.³⁰ As the nation industrialized, unions continued to struggle for shorter hours.³¹ Indeed, some of the most significant events in American labor history, such as the Haymarket riot and the great steel strike of 1919, arose out of workers' efforts to limit the workday.³² Unionists were not the only advocates for a shorter workday; reform politicians, social critics, and intellectuals also endorsed a cap on work hours.³³ Indeed, from the beginning of the nineteenth century until the end of the 1930s, the reduction of worktime remained one of the nation's most pressing social issues.³⁴ Advocates of the limited workday, both inside and outside the labor movement, claimed that restricting work hours would have a number of benefits, including: (1) constricting the supply of labor and thereby raising wages; (2) spreading work among more individuals, thereby reducing unemployment; (3) reducing job fatigue, thereby making workers more productive and less prone to dangerous accidents; and, most important to many, (4) increasing the amount of time workers have to devote to activities outside of work, such as

29. See *Exodus* 20:9-10 ("Six days you shall labor and do all your work, but the seventh day . . . you shall not do any work."); see also THE TORAH: A MODERN COMMENTARY 548 (W. Gunther Plaut ed., 1981) (describing Sabbath commandment as Israel's "most original contribution to world law").

30. See SCHOR, *supra* note 4, at 3.

31. See MARION C. CAHILL, SHORTER HOURS: A STUDY OF THE MOVEMENT SINCE THE CIVIL WAR 31-58 (1932) (discussing labor agitation for shorter hours in period following Civil War through 1931); WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 37 (1991) (noting that in late nineteenth century, labor movement's "central goal was to legislate a shorter day"); Richard L. Rowan, *The Influence of Collective Bargaining on Hours*, in HOURS OF WORK 18-23 (Clyde E. Dankert et al. eds., 1965) (discussing historical agitation for eight-hour workday by labor movement). See generally ROEDIGER & FONER, *supra* note 4, at vii-277 (recounting struggle for shorter workweek by American labor movement).

32. See HUNNICUTT, WORK WITHOUT END, *supra* note 4, at 1 (noting that issue of shorter work hours became vital to formation of labor movement in period from early nineteenth century through Great Depression).

33. See HUNNICUTT, WORK WITHOUT END, *supra* note 4, at 1-2, 15 (explaining that issue of shorter work hours gained support from politicians, intellectuals, and social critics who believed that work performance would improve and that workers with more leisure time would be healthier, more moral, and more civic-minded).

34. See SCHOR, *supra* note 4, at 3-4 (noting that since 1930s, there has been little attention to issue from government, academia, or civic organizations).

raising a family or engaging in educational, religious, political, or other nonwork activities.³⁵

In the late nineteenth and early twentieth centuries, numerous states responded to agitation for shorter hours by passing legislation limiting the number of hours employers could work their employees per day.³⁶ Such statutes, however, ran contrary to the reigning constitutional doctrine of freedom of contract, which generally prohibited governmental intrusion into the employment relationship.³⁷ According to the prevailing view, most workers could bargain for themselves and therefore did not need statutory protection.³⁸ In general, prior to the New Deal, the only hours statutes that could withstand constitutional scrutiny were those that limited the work hours of women and children, or the hours of men whose jobs created a hazard to themselves or to the public.³⁹

35. See CAHILL, *supra* note 31, at 37-65 (discussing history of labor movement in nineteenth and early twentieth centuries); ROEDIGER & FONER, *supra* note 4, at ix, 196, 244-45 (providing historical background to movement for shorter work hours and discussing labor's role in movement); Benjamin K. Hunnicutt, *The End Of Shorter Hours*, 25 LAB. HIST. 373, 388 (1984) (discussing benefits of shorter hours: decreased work, higher wages, expansion of employment, reduction of unnecessary production and surpluses, and guarantee of minimum living standards for greater number of people); Ray Marshall, *The Influence of Legislation on Hours*, in HOURS OF WORK 50-51 (Clyde E. Dankert et al. eds., 1965) (summarizing arguments espoused by labor for shorter work day).

36. See, e.g., ARIZ. REV. STAT. ANN. §§ 3098-3100 (1913) (limiting to eight hours of work per day all electric light and power plant employees); COLO. REV. STAT. §§ 3921-3923 (1908) (limiting work by mechanics, laborers, and workers on all state public works projects). See generally HUNNICUTT, WORK WITHOUT END, *supra* note 4, at 20-21 (discussing state law limits on work hours for women, men in hazardous occupations, and railroad workers).

37. See, e.g., *Adair v. United States*, 208 U.S. 161, 173 (1908) (asserting that general right to contract in relation to business is protected by 14th Amendment and that any legislation that disturbs right of employer and employee to contract "is an arbitrary interference with the liberty of contract which no government can legally justify in a free land"), overruled by *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), and overruled by *Texas & N.O.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548 (1930); *Lochner v. New York*, 198 U.S. 45, 53 (1905) (striking down New York statute regulating hours of bakery employees on ground that "[t]he statute necessarily interferes with the right of contract between the employer and employees"), overruled by *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952). See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 572 (2d ed. 1988) (citing *Coppage v. Kansas*, 236 U.S. 1 (1915)) (noting that government restriction of terms of personal employment contract was seen as substantial impairment of liberty).

38. See *Lochner*, 198 U.S. at 57 (implying that bakers are fully capable of asserting their rights and caring for themselves without protective arm of legislature); see also Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 877 (1987) (recounting that Court in *Lochner* believed that "bakers were of full legal capacity" and did not need protection of state).

39. See FORBATH, *supra* note 31, at 180-81, 190-91 (listing nineteenth and early twentieth century judicial decisions on statutes regulating work hours); NATIONAL INDUS. CONFERENCE BD., LEGAL RESTRICTIONS ON HOURS OF WORK IN THE UNITED STATES: A REFERENCE MANUAL 24-25 (1924) (stating that unless occupation ordinarily performed by men was particularly hazardous, regulation would not withstand constitutional scrutiny); *Laws Limiting Hours of Employment for Men, as of January 1, 1938*, MONTHLY LAB. REV., Feb. 1938, at 462, 462 (noting that most labor laws regulated employment of women and minors); see also *Baltimore & Ohio R.R. v. ICC*, 221 U.S. 612, 619 (1911) (upholding federal statute regulating hours of railroad employees in light

Not until the economic crisis of the Great Depression did the Federal Government attempt to regulate hours for workers generally. The first attempt came with the passage of the National Industrial Recovery Act (NRA)⁴⁰ during President Franklin Roosevelt's first term. The NRA authorized employers and employees in any trade or industry to establish codes of fair competition which would fix, *inter alia*, maximum hours of work for employees in that trade or industry.⁴¹ Codes established under the NRA set legal limits on the workweek for employees in numerous industries.⁴² However, the short life of the NRA, and the codes promulgated under it, ended in 1935 when the Supreme Court declared the statute unconstitutional on the grounds that Congress had impermissibly regulated intrastate commerce and had also improperly surrendered its legislative power to the executive branch.⁴³

B. *The Fair Labor Standards Act*

The Roosevelt administration's second attempt to win broad hours regulation came to fruition in 1938 with the passage of the FLSA.⁴⁴ In addition to setting a nationwide minimum wage and prohibiting "oppressive" child labor, the FLSA required employers to pay employees covered by the Act a premium overtime wage of not less than one and one-half times the employee's regular hourly wage for each hour worked beyond the standard workweek.⁴⁵ The purpose

of "dangers incident to the strain of excessive hours of duty"); *Muller v. Oregon*, 208 U.S. 412, 423 (1908) (upholding Oregon statute limiting workday for female factory employees).

40. National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933).

41. *See id.* § 7(a), 48 Stat. at 198-99 (providing that "employers shall comply with the maximum hours of labor, minimum rules of pay, and other conditions of employment, approved or prescribed by the President").

42. *See id.* § 3, 48 Stat. at 196-97 (granting to President authority to approve industrial codes of fair competition upon application by "one or more trade or industrial associations or groups"); *see also* HUNNICUTT, *WORK WITHOUT END*, *supra* note 4, at 175-88 (commenting on attempts under NRA to effect codes of fair competition in broad range of industries). The NRA codes excluded professionals and executives who earned more than a certain amount per week. *See* ORME W. PHELPS, *THE LEGISLATIVE BACKGROUND OF THE FAIR LABOR STANDARDS ACT 26* (1939) (discussing exemptions from maximum hours of labor approved by President, including "registered pharmacists or other employed professional people" and "executives getting over \$35 a week").

43. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935).

44. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201-219 (1988)). *See generally* JOSEPH P. LASH, *DEALERS AND DREAMERS: A NEW LOOK AT THE NEW DEAL 334-41* (1988) (discussing political and legal maneuvers behind passage of FLSA); WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL: 1932-1940*, at 261-63 (1963) (discussing conservative opposition to federal wage-and-hour regulation).

45. *See* Fair Labor Standards Act of 1938, ch. 676, §§ 6, 7, 12, 52 Stat. at 1062-64, 1067 (setting forth minimum wage provision, overtime pay provision, and child labor provision). Originally set at 44 hours, the standard workweek is now set at 40 hours. § 7(a), 52 Stat. at 1063.

of the Act's overtime provision, according to subsequent judicial interpretation, was: (1) to reduce unemployment by encouraging employers to hire more workers instead of requiring their current employees to work excessive hours, and (2) to compensate employees for the burden of working excessive hours.⁴⁶ As economists Ronald Ehrenberg and Paul Schumann have explained:

[T]he provisions of the act can be rationalized in terms of the divergence between private and social costs. Even if employers and their employees in the 1930s were satisfied with long workweeks, their private calculations ignored the social costs borne by the unemployed. The time and a half rate for overtime can be thought of as a tax to make employers bear the full marginal social cost of their hours decisions; it was meant to reduce the use of overtime hours. . . . Furthermore, if employees were not satisfied with long workweeks during the 1930s but, because of market imperfections, did not have the freedom to choose employment with employers who offered shorter workweeks, the direct payment of the tax to employees who worked long workweeks can be understood as an attempt to remedy this imperfection.⁴⁷

C. *The Managerial-Professional Exemption*

The FLSA, however, did not apply to all employees.⁴⁸ The managerial-professional exemption, contained in section 13(a) of the Act, excluded from coverage "any employee employed in a bona fide executive, administrative, [or] professional capacity."⁴⁹ This statutory exemption for managers and professionals has remained unchanged since 1938, except for a 1966 amendment that broadened the exemption to include "any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools."⁵⁰

Shortly before the Act took effect in 1938, the Wage and Hour Division of the Department of Labor⁵¹ issued its first regulations interpreting the exemption. In this first set of regulations, the

46. *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 423-24 (1945); *Brennan v. Western Union Tel. Co.*, 561 F.2d 477, 482 (3d Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978); *Conway v. Takoma Park Volunteer Fire Dep't, Inc.*, 666 F. Supp. 786, 790 (D. Md. 1987), *dismissed*, 838 F.2d 465 (4th Cir. 1988).

47. RONALD G. EHRENBERG & PAUL L. SCHUMANN, *LONGER HOURS OR MORE JOBS? AN INVESTIGATION OF AMENDING HOURS LEGISLATION TO CREATE EMPLOYMENT* 3-4 (1982).

48. *See* Fair Labor Standards Act of 1938, § 13, 52 Stat. at 1065-66.

49. § 13(a), 52 Stat. at 1065.

50. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, sec. 214, § 13(a)(1), 80 Stat. 830, 837 (codified as amended at 29 U.S.C. § 213(a)(1) (1988)).

51. The Wage and Hour Division itself came into being with the passage of the Act. *See* 29 U.S.C. § 204(a) (1988).

Division defined "executive" and "administrative" employees as those who direct the work of others.⁵² It defined "professional" employees as those whose work requires "educational training in a specially organized body of knowledge."⁵³

Two years later, in 1940, the Wage and Hour Division expanded its definitions of managerial and professional employees after receiving a barrage of criticism from employers who complained that the original definitions were too narrow.⁵⁴ Unlike the original regulations, the new regulations included a definition for "administrative" employees separate from that of "executive" employees in order to exempt from the Act employees, such as assistants to executives, who exercised discretion on the job and acted as part of management but did not necessarily direct the work of others.⁵⁵ The new regulations also expanded the definition of "professional" employee to include not only those in learned professions, but those engaged in a field of "artistic endeavor."⁵⁶

Since 1940, the Wage and Hour Division's definitions of managerial and professional employees have remained largely unchanged.⁵⁷ Currently, an employee earning more than \$250 per week falls within the definition of "executive" if the employee's "primary duty consists

52. See 3 Fed. Reg. 2518 (1938) (defining primary duties of executives and administrators as directing work of other employees and possessing authority to hire and fire); see also *Andrews Defines Exempt Employees*, N.Y. TIMES, Oct. 20, 1938, at 1, 4 (reporting on initial regulations under FLSA).

53. *Andrews Defines Exempt Employees*, *supra* note 52, at 1.

54. See, e.g., *Who's an Executive?*, BUS. WK., Apr. 20, 1940, at 34, 34 (reporting that leaders of wholesale distributive trades "descended on Washington" to convince Wage and Hour Administrator to broaden definition of "executive" under FLSA). See generally WAGE & HOUR DIV., U.S. DEP'T OF LABOR, PUB. NO. 1412, "EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL . . . OUTSIDE SALESMAN" REDEFINED, EFFECTIVE OCT. 24, 1940, REPORT AND RECOMMENDATION OF THE PRESIDING OFFICER AT HEARINGS PRELIMINARY TO REDEFINITION (1940) [hereinafter 1940 REPORT].

55. See 1940 REPORT, *supra* note 54, at 4, 27 (noting that although terms "executive" and "administrative" are vague and overlapping, common understanding will not be confused if "executive" is applied to bosses over persons, and "administrative" to persons who establish or carry out policy). Compare 29 C.F.R. § 541.1 (1943) (defining "executive" as one whose primary duty consists of management, and who directs work of two or more persons, has hiring and firing authority, exercises discretionary powers, and spends more than 80% of work time performing such duties, while receiving salary of more than \$55 per week) with 29 C.F.R. § 541.2 (1943) (defining "administrative" employee as one whose primary duty consists of office or non-manual fieldwork related to management policies, and who exercises discretion and independent judgment, assists executives, performs under only general supervision, devotes 80% of work time to these functions, and receives no less than \$75 per week).

56. 29 C.F.R. § 541.3 (1943) (defining "professional" as employee who works at job requiring advanced learning or original and creative capacity in field of recognized artistic endeavor, consistently exercises discretion and independent judgment, works in field that is intellectual and varied in character, spends 80% of workday in such activities, and receives not less than \$75 per week).

57. See 29 C.F.R. § 541.119(a) (1992) (retaining basic language of 1940 regulations but changing base salary qualification to \$250 per week).

of the management of the enterprise in which employed or of a customarily recognized department or subdivision thereof and includes the customary and regular direction of the work of two or more other employees."⁵⁸ An employee earning more than \$250 per week falls under the definition of "administrative employee" if the employee's "primary duty consists of either the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers."⁵⁹ A "professional" is an employee earning more than \$250 per week "whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning" or "work requiring invention, imagination, or talent in a recognized field of artistic endeavor."⁶⁰ If an employee earns less than \$250 per week, a more extensive test, known as the "long test,"⁶¹ applies to determine whether she or he is an executive, administrative, or professional employee.⁶² An employee who meets the long test can be deemed an executive or administrative employee even if paid as little as \$155 per week,⁶³ or, in the case of a professional, as little as \$170 per week.⁶⁴

Under the Wage and Hour Division's definition, the exemption for executives "extends from the president of a large and complex corporate structure down to the foreman in charge of a very minor

58. *Id.*

59. *Id.*

60. 29 C.F.R. § 541.315(a) (1992). Similar regulations exempt from the FLSA managerial and professional employees of the Federal Government. See 5 C.F.R. §§ 551.204-206 (1992) (exempting federal executive, administrative, and professional employees from FLSA). Congress extended the FLSA to cover federal employees in 1974. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, sec. 6(a)(1), § 3(d), 88 Stat. 55, 58 (codified as amended at 29 U.S.C. § 203(e)(2)(A) (1988)). See generally *American Fed'n of Gov't Employees v. Office of Personnel Management*, 821 F.2d 761, 769 (D.C. Cir. 1987) (discussing need for consistent application of FLSA).

61. See 29 C.F.R. §§ 541.1-3 (1992) (providing detailed analytical checklists for determining employee's executive, administrative, professional, or outside salesman status). See generally *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1227 n.35 (5th Cir. 1990) (noting that "long test," unlike "short test," "specifically limit[s] the amount of time an employee may spend on nonexempt work and still qualify for the exemption").

62. See 29 C.F.R. §§ 541.1-3 (1992) (establishing long tests for executive, administrative, and professional employees). One criterion under the long test for executives, for example, is that the employee "has the authority to hire or fire." *Id.* § 541.1(c).

63. See 29 C.F.R. § 541.1(f) (1991) (establishing minimum salary for executive employee); 29 C.F.R. § 541.2(e)(1) (1992) (establishing minimum salary for administrative employee).

64. See 29 C.F.R. § 541.3(e) (1991) (establishing minimum salary for professional employee). One hundred seventy dollars per week, at 40 hours per week, breaks down to \$4.25 per hour, the federal minimum wage. See 29 U.S.C. § 206(a)(1) (Supp. III 1991) (establishing minimum wage at \$4.25 per hour as of March 31, 1991). These salary minima are so low that, as early as 1981, the Wage and Hour Division considered them "seriously outdated." 46 Fed. Reg. 3016 (1981). A Reagan administration order, which is still in place, has kept these minima frozen. See 46 Fed. Reg. 11,972 (1981) (staying indefinitely effective date of regulation changes).

department.⁶⁵ Indeed, court decisions have made it clear that front-line supervisors do not enjoy FLSA coverage.⁶⁶ The exemption for administrative employees also covers a wide range of jobs, including bank teller,⁶⁷ insurance adjuster,⁶⁸ dispatcher for a tugboat company,⁶⁹ postal inspector,⁷⁰ salesperson,⁷¹ editorial assistant,⁷² and investigator in a public defender's office.⁷³ The professional exemption includes not only employees who practice in what have traditionally been considered the learned professions, but also game wardens,⁷⁴ airplane pilots,⁷⁵ pharmacists,⁷⁶ physicians' assistants,⁷⁷ nurses,⁷⁸ paralegals,⁷⁹ and even student research assistants.⁸⁰

65. 1940 REPORT, *supra* note 54, at 4.

66. *See, e.g.,* *Cobb v. Finest Foods, Inc.*, 755 F.2d 1148, 1150-51 (5th Cir. 1985) (holding that employee who trained new cooks, had no direct supervision, had discretion in setting work schedule, had salary comparable to other managers, and exercised discretion over hot food section of kitchen was manager under FLSA managerial exemption); *Guthrie v. Lady Jane Collieries, Inc.*, 722 F.2d 1141, 1145-47 (3d Cir. 1983) (applying long test to determine that nine foremen who had responsibility for safety conditions, worked free from supervision, and were considered management by union, were managers under FLSA exemption even though they did not exercise great discretion or receive much greater pay than rank and file); *Donovan v. Burger King Corp.*, 672 F.2d 221, 286-87 (1st Cir. 1982) (upholding determination that under short test, assistant managers at Burger King making more than \$250 per week were managers under FLSA); *Tobin v. Kansas Milling Co.*, 195 F.2d 282, 286-87 (10th Cir. 1952) (determining under long test that elevator foreman and miller were executives under FLSA); *Juiner v. Macon*, 647 F. Supp. 718, 723 (M.D. Ga. 1986) (finding that under long test, transit supervisors who had discretion over hiring and firing were executives under FLSA); *Fight v. Armour & Co.*, 533 F. Supp. 998, 1004-05 (W.D. Ark. 1982) (deciding that foreman of shipping and receiving department was executive under FLSA); *Marshall v. Hendersonville Bowling Ctr., Inc.*, 483 F. Supp. 510, 516-18 (M.D. Tenn. 1980) (holding that employees who supervised pinchasers at bowling alley were exempt under FLSA), *aff'd*, 672 F.2d 917 (6th Cir. 1981).

67. *Wage & Hour Op. Ltr.* (Nov. 5, 1943).

68. *Lab. L. Rep. (CCH)* ¶ 30,551, at 41,948 (Mar. 14, 1967).

69. *See* *Donovan v. Flowers Marine, Inc.*, 545 F. Supp. 991, 993-94 (E.D. La. 1982) (extending administrative exemption to tugboat dispatcher using long test).

70. *See* *Dymond v. United States Postal Serv.*, 670 F.2d 93, 95-96 (8th Cir. 1982) (applying short test to include postal inspectors within ambit of administrative exemption of FLSA).

71. *See* *Cote v. Burroughs Wellcome Co.*, 558 F. Supp. 883, 885-87 (E.D. Pa. 1982) (including "detail person" for pharmaceutical company within administrative exemption of FLSA).

72. *See* *Ricci v. El Mundo, Inc.*, 85 F. Supp. 82, 83-84 (D.P.R. 1949) (including first assistant to editor-in-chief of newspaper within FLSA administrative exemption).

73. *Lab. L. Rep. (CCH)* ¶ 30,952, at 42,474-75.

74. *See* *Martin v. Wyoming*, 770 F. Supp. 612, 618 (D. Wyo. 1991) (using long test to place state game wardens within professional exemption), *aff'd sub nom. Reich v. Wyoming*, 993 F.2d 739 (10th Cir. 1993); *infra* notes 93-96 and accompanying text (discussing *Martin v. Wyoming*).

75. *See* *Paul v. Petroleum Equip. Tools Co.*, 708 F.2d 168, 173-74 (5th Cir. 1983) (including airplane pilots within scope of FLSA professional exemption). For a discussion of this case, see *infra* notes 97-99 and accompanying text.

76. *Lab. L. Rep. (CCH)* ¶ 30,996.47, at 40,569 (Dec. 9, 1965).

77. *Lab. L. Rep. (CCH)* ¶ 30,926, at 42,439 (May 10, 1974).

78. *Lab. L. Rep. (CCH)* ¶ 30,589, at 41,986-87 (May 25, 1967).

79. *See* *Marianne M. Jennings, The Paraprofessional and the Overtime Exemptions Under the Fair Labor Standards Act—Do They Apply?*, 22 LAW OFF. ECON. & MGMT. 315, 315-27 (1981) (discussing FLSA status of paraprofessionals in law office and concluding that exemptions should cover these employees so that their field will develop its "full potential").

II. THE MANAGERIAL-PROFESSIONAL WORKFORCE, PAST AND PRESENT

A. *The Size and Composition of the Managerial-Professional Workforce*

When Congress enacted the FLSA in 1938, the managerial-professional workforce constituted a small portion of the entire wage-earning population of the United States. In 1940, professional and technical employees combined amounted to fewer than four million individuals, or less than 7.5 percent of the workforce.⁸¹ Managerial employees, at approximately 3.5 million, constituted just over seven percent of the workforce.⁸²

Since 1938, the ranks of the managerial-professional workforce have grown significantly, both in absolute numbers and as a portion of the workforce.⁸³ In 1991, the nearly sixteen million professional employees in the United States constituted approximately fourteen percent of the workforce, while the approximately fifteen million managerial employees constituted approximately thirteen percent.⁸⁴ Together, the two groups now make up well over one-quarter of the nation's wage earners.⁸⁵ Indeed, by 1989, the number of managerial, professional, and technical workers in this country exceeded the number of blue-collar workers.⁸⁶

A number of factors have contributed to this growth. First, the traditional professions have expanded their ranks.⁸⁷ Institutions that employ large numbers of professionals, such as hospitals and

80. Wage and Hour Op. Ltr. No. 650 (Sept. 13, 1967); Lab. L. Rep. (CCH) ¶ 30,800, at 42,192-93 (May 23, 1968).

81. See U.S. BUREAU OF THE CENSUS, THE STATISTICAL HISTORY OF THE UNITED STATES 140-45 (1976) (indicating that in 1940, professional and technical employees constituted 7.49% of total workforce and that professionals alone numbered 3,879,000).

82. See *id.* at 141 (indicating that 7.2% of wage-earning population, or 3,770,000 persons, were managerial employees).

83. See HARRY BRAVERMAN, LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY 403-09 (1974) (discussing "rapid growth" of managerial-professional workforce).

84. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1992, at 392 (indicating that 16,058,000 professionals amounted to 13.7% of workforce and that 14,954,000 managers amounted to 12.8% of workforce).

85. *Id.* (indicating that in 1991, number of professionals and managers in U.S. workforce totaled 31,012,000).

86. See Samuel M. Ehrenhalt, *Economic and Demographic Change: The Case of New York City*, 116 MONTHLY LAB. REV. 40, 45-46 (Feb. 1993) (indicating that by 1989 United States had 4.5 million more managerial, professional, and technical workers than blue-collar workers).

87. See DEPARTMENT OF PROFESSIONAL EMPLOYEES, AFL-CIO, SALARIED AND PROFESSIONAL WOMEN: RELEVANT STATISTICS 19 (1988) [hereinafter PROFESSIONAL EMPLOYEES DEPARTMENT] (observing that in 1955-56 academic year, 8262 law degrees and 6810 medical degrees were awarded, compared to 35,844 law degrees and 15,338 medical degrees in 1985-86 academic year).

universities, have grown tremendously since World War II.⁸⁸ In some cases, technology has created new professions. In 1990, for example, Congress passed legislation requiring the Secretary of Labor to promulgate regulations exempting from the FLSA "computer systems analysts, computer programmers, software engineers, and other similarly skilled professional workers."⁸⁹

Moreover, the process of "professionalization" has converted what were previously considered nonprofessional occupations into what are today considered professions. Professionalization occurs when practitioners of a particular occupation establish educational standards for entry into the field, organize a professional association, develop a code of ethics, and take other measures to raise the occupation's stature.⁹⁰ Even at the time the FLSA was enacted, professionalization was enlarging the ranks of the professions. In its 1940 report on the managerial-professional exemption, the Wage and Hour Division wrote that "[t]he field of the professions is an expanding one and twenty years from now professions whose members will qualify will no doubt be found in occupations not recognized as professions today."⁹¹ As an example, the report cited accountancy, whose members previously had been trained on the job, but which, with the advent of the certified public accountant examination and other measures, had undergone the process of professionalization.⁹²

A more recent example of professionalization can be seen in *Martin v. Wyoming*,⁹³ a 1991 case holding state park game wardens to be professionals exempt from the FLSA.⁹⁴ In reaching its holding, the Wyoming federal district court noted that before 1965 game wardens generally lacked college degrees, but that the state had since required wardens to earn a bachelor's degree in wildlife management, wildlife biology, or a related field.⁹⁵ The court also relied on a Wyoming

88. See Marina Angel, *Professionals and Unionization*, 66 MINN. L. REV. 383, 385-86 (1982) (discussing growth of nonprofit institutions and noting that large number of their employees are professionals and white-collar workers).

89. Act of Nov. 15, 1990, Pub. L. No. 101-583, sec. 2, § 13(a)(1), 104 Stat. 2871, 2871 (codified as amended at 29 U.S.C. § 213(a)(1) (Supp. II 1990)).

90. See RONALD M. PAVALKO, *SOCIOLOGY OF OCCUPATIONS AND PROFESSIONS* 34-38 (2d ed. 1988) (discussing process of professionalization).

91. 1940 REPORT, *supra* note 54, at 35.

92. 1940 REPORT, *supra* note 54, at 35.

93. 770 F. Supp. 612 (D. Wyo. 1991).

94. *Martin v. Wyoming*, 770 F. Supp. 612, 618-19 (D. Wyo. 1991) (concluding that state met its burden of showing that wardens' work was professional in that it required advanced knowledge in field of science, consistent exercise of discretion and judgment, and salary of at least \$250 per week).

95. *Id.* at 614.

game warden manual, which described "wildlife management" as a "professional reality," and noted that "[t]he straight enforcement man of yesterday has become an old-fashioned fellow in sophisticated wildlife circles."⁹⁶

Paul v. Petroleum Equipment Tools Co.,⁹⁷ which held an airplane pilot to be an exempt professional under the Act,⁹⁸ provides another example of professionalization. As in *Martin*, the court in *Paul* alluded to the occupation's nonprofessional past, but found that education and training requirements have transformed the occupation at issue into a bona fide profession. The Court of Appeals for the Fifth Circuit wrote, "Whatever the circumstances in the barnstorming days," pilots now need "extensive, formal and specialized training."⁹⁹ Similarly, professionalization has also transformed the status of formerly nonprofessional assistants, such as paralegals and physicians' assistants.¹⁰⁰

Not only have the ranks of the managerial-professional workforce grown, but they have changed in composition, most notably by an increase in female members. In 1940, nearly three-quarters of the nation's managerial and professional employees were male.¹⁰¹ Moreover, the vast majority of the wives of managers and professionals stayed home,¹⁰² providing child care and performing other domestic chores. Indeed, during the 1930s, public opinion strongly opposed married women working for wages, especially if their husbands earned

96. *Id.* at 615. The manual stated:

For many years a Wyoming game warden's role in wildlife management was considered to be limited to enforcement work. . . . When wildlife management became a professional reality, the assigned activities of the game warden were expanded to include management work, in addition to enforcement duties. . . . The straight enforcement man of yesterday has become an old-fashioned fellow in sophisticated wildlife circles.

Id.

97. 708 F.2d 168 (5th Cir. 1983).

98. *Paul v. Petroleum Equip. Tools Co.*, 708 F.2d 168, 174-75 (5th Cir. 1983) (stating that pilots of commercial aircraft that require capital outlays of over \$1 million have been almost universally deemed exempt professionals and do not need protection of overtime wage rates).

99. *Id.* at 173.

100. See Jennings, *supra* note 79, at 326-27 (noting that paralegals and medical technologists must have specialized intellectual instruction in addition to degree); Lab. L. Rep. (CCH) ¶ 30,926 (stating that physician assistants are exempt from minimum wage and overtime requirements if they meet certain criteria).

101. See U.S. BUREAU OF THE CENSUS, *supra* note 81, at 139-40 (providing statistics of major occupational groups by gender).

102. In 1940, only 13.7% of the wives of professional and semi-professional men worked for pay as did only 15% of the wives of proprietors, managers, and officials. See Winifred D. Wandersee, *The Economics of Middle-Income Family Life: Working Women During the Great Depression*, in *DECADES OF DISCONTENT: THE WOMEN'S MOVEMENT 1920-1940*, at 45, 54-55 (1987) (discussing stigma placed on households of most white Americans when wife worked).

a decent living.¹⁰³

Today, women constitute over forty percent of the nation's managerial employees and over fifty percent of the nation's professional employees.¹⁰⁴ Despite the enormous increase in the numbers of female managers, however, women hold only a tiny fraction of the top positions in business.¹⁰⁵ For example, the Department of Labor recently examined ninety-four large companies and found that women constituted only 6.6 percent of senior management.¹⁰⁶

Moreover, unlike their male predecessors, female managers and professionals generally do not have a spouse at home performing the domestic chores; by and large, men continue to leave childcare and other domestic tasks to women.¹⁰⁷ This failure by men to share equitably in child-rearing has created what has been described as an "overload" on women who earn a salary and also care for a family.¹⁰⁸

103. See ALICE KESSLER-HARRIS, *A WOMAN'S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES* 68 (1990) (explaining that efforts to reduce unemployment during Great Depression included passage of laws that discriminated against married women, as well as public pressure encouraging employers to fire married women); SUSAN WARE, *HOLDING THEIR OWN: AMERICAN WOMEN IN THE 1930s* 27 (1982) (discussing 1936 Gallup poll that showed that 82% of Americans believed wives should not work if their husbands had jobs).

104. See U.S. DEP'T OF COMMERCE, *supra* note 84, at 392 (listing percentage of employees by sex, occupation, race, and Hispanic origin). By the mid-1980s, according to one report, women made up 94.3% of nurses, 44.9% of accountants and auditors, 27.5% of university and college teachers, 18% of lawyers, 17.6% of physicians, and 6% of engineers. PROFESSIONAL EMPLOYEES DEPARTMENT, *supra* note 87, at 10. Another report showed that women accounted for 41% of life scientists, 23% of chemists, 38% of economists, 27% of pharmacists, and 57% of psychologists. *Women and Minorities: Their Proportions Grow in the Professional Workforce*, MONTHLY LAB. REV., Feb. 1985, at 49, 49-50.

105. See H.R. REP. NO. 102-40(I), 102d Cong., 1st Sess. 19 (1991), *reprinted in* 1991 U.S.C.A.N. 549, 557 (discussing difficulties encountered by women and minorities in advancing to senior management positions); see also Glass Ceiling Act of 1991, Pub. L. No. 102-166, § 202(a)(1), 105 Stat. 1081, 1081 (1991) (finding that "despite a dramatically growing presence in the workplace, women and minorities remain underrepresented in management and decisionmaking positions in business").

106. See Marshall J. Breger, *The Department of Labor's Glass Ceiling Initiative: A New Approach to an Old Problem*, 43 LAB. L.J. 421, 421-22 (1992) (discussing "glass ceiling" for women and minorities).

107. See Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 2(a)(5), 107 Stat. 6, 7 (1993) (stating that "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women"); Daisy Quarm, *Sexual Inequality: The High Cost of Leaving Parenting to Women*, in *WOMEN IN THE WORKPLACE: EFFECTS ON FAMILIES* 187, 191 (Kathryn M. Borman et al. eds., 1984) (finding that although working women do less housework than women with no outside employment, men's contribution to household chores remains minimal).

108. See Jeylan T. Mortimer & Glorian Sorensen, *Men, Women, Work, and Family*, in *WOMEN IN THE WORKPLACE: EFFECTS ON FAMILIES* 139, 151 (stating that women face "possible work overload resulting from their dual responsibilities"); Quarm, *supra* note 107, at 191 ("The fact that women have changed their productive roles without men changing their reproductive roles is placing a great burden on many women.").

Rosabeth Moss Kanter writes:

The new workforce contains an ever higher proportion of women with even greater education and even greater aspirations, along with a higher proportion of men married

Economist Juliet Schor has described the burden on working women as a "double load" of workplace and home responsibilities, making "[m]any working mothers live a life of perpetual motion, effectively holding down two full-time jobs."¹⁰⁹

B. *The Nature of Managerial and Professional Work*

Evidence suggests that not only has the size and composition of the managerial-professional workforce changed, but so has the nature of the work. The late twentieth century has witnessed more and more professionals working as employees of large bureaucratic institutions,¹¹⁰ positions that allow them less autonomy and that make them subject to management's efforts to routinize and rationalize their work.¹¹¹ According to Professor David Rabban, "As organizations have grown larger and more complex, bureaucrats have imposed more restrictions on the working conditions of practicing professionals. . . . Professional work of all kinds has become increasingly specialized, simplified, and stratified."¹¹² As early as 1964, one commentator, describing the degradation of engineering work, wrote:

[The engineer] often works in a factory-like environment, a large drafting room, and may be subject to factory-like discipline[;] . . . his discretion is called for much less than he would like; he must work on a rather limited portion of a total project; and he feels that he is making very little contribution to knowledge.¹¹³

Front-line supervisory employees too have suffered a deterioration of their autonomy and authority. Scientific management techniques

to such women. But the very people who are pressing for higher-level positions may also carry with them heavier outside-of-work demands, particularly centering on family responsibilities.

KANTER, *supra* note 4, at 292.

109. SCHOR, *supra* note 4, at 20.

110. See STANLEY ARONOWITZ, *FALSE PROMISES: THE SHAPING OF AMERICAN WORKING CLASS CONSCIOUSNESS* 306 (1973).

111. See BRAVERMAN, *supra* note 83, at 211, 408 (discussing "rationalization" process of breaking down managerial and professional jobs into simple steps); see also ARONOWITZ, *supra* note 110, at 305-06 (discussing limited authority of professionals such as engineers and scientists).

112. David M. Rabban, *Distinguishing Excluded Managers from Covered Professionals Under the NLRA*, 89 COLUM. L. REV. 1775, 1846 n.330 (1989) (explaining that influence of professionals has significantly eroded, in part because what was once considered professional work is now being performed by employees with no special training).

113. George Strauss, *Professional or Employee-Oriented: Dilemma for Engineering Unions*, 17 INDUS. & LAB. REL. REV. 519, 523 (1964) (discussing engineers in large corporations who must check with supervisor before leaving work area and who have coffee breaks closely monitored); see also Vincent Lombardi & Andrew J. Grimes, *A Primer for a Theory of White-Collar Unionization*, MONTHLY LAB. REV., May 1967, at 46, 47 (stating that task specialization has made work of engineers "routinized and specialized so that exercise of judgment is reduced to a level at which substitution can easily be made").

and centralized administration have eliminated their discretion over personnel matters, such as hiring and firing, as well as over determining how work on the shop floor is to be done.¹¹⁴ In *Donovan v. Burger King Corp.*,¹¹⁵ for example, the First Circuit found that a detailed company operating manual strictly governed the work of assistant managers at the restaurant chain, providing them with rigid, step-by-step instructions on matters such as employee training, inventory, and food production, and "admitting of little or no variation."¹¹⁶

Even more notable than this decline in stature is the excessive number of hours worked by managerial and professional employees, who, as a group, work more hours than employees in any other occupational category.¹¹⁷ Since the passage of the FLSA, managers' and professionals' work hours have increased,¹¹⁸ especially in recent years.¹¹⁹ One 1979 study found that managers frequently put in 60- to 70-hour work weeks,¹²⁰ and in 1990, the *New York Times* reported that managers' average weekly hours had increased sharply from just a decade earlier.¹²¹ As *Fortune* magazine recently noted, "At many companies the kind of punishing hours once reserved for crises have become the standard drill. A whole generation of managers have grown up who never had a 40-hour workweek . . ."¹²² Profession-

114. 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, 204-05 (1984) (explaining that although manufacturing supervisors used to have complete control over operations, materials, and personnel, increasing standardization of operations reduced supervisor's role).

115. 672 F.2d 221 (1st Cir. 1982).

116. *Donovan v. Burger King*, 672 F.2d 221, 223 (1st Cir. 1982); see also *Russell v. Mini Mart, Inc.*, 711 F. Supp. 556, 559 (D. Mont. 1988) (noting that store manager was required to follow detailed company guidelines); Jane Slaughter, *What Women Workers Won in the Reagan-Bush Era: More Public Support on Issues, Few Actual Gains*, LAB. NOTES, Jan. 1993, at 8, 9 (noting bank managers' loss of status and autonomy).

117. See SCHOR, *supra* note 4, at 68 (explaining that salaried employees work significantly longer hours than workers paid on hourly basis, and that half of all salaried workers are managers and professionals, who tend to work longest hours of all).

118. See Mary T. Coleman & John Pencavel, *Changes in Work Hours of Male Employees, 1940-1988*, 46 INDUS. & LAB. REL. REV. 262, 282 (1993) (reporting trend for both sexes toward increasing work hours for well-educated portion of workforce).

119. See KANTER, *supra* note 4, at 268 (noting that Americans in "better" jobs are working longer hours than ever); Nancy D. Holt, *Are Longer Hours Here to Stay? Quality Time Losing Out*, A.B.A.J., Feb. 1993, at 62, 64 (reporting that American Bar Association study found that number of lawyers working more than 200 hours per month jumped from 35% in 1984 to 50% in 1990).

120. See DIANE R. MARGOLIS, *THE MANAGERS: CORPORATE LIFE IN AMERICA* 58 (1979) (explaining findings based on 81 interviews with managers and spouses who lived in suburban town and worked for Fortune 100 company).

121. Peter T. Kilborn, *The Work Week Grows; Tales from the Digital Treadmill*, N.Y. TIMES, June 3, 1990, at E1.

122. Brian O'Reilly, *Is Your Company Asking Too Much?*, FORTUNE, Mar. 12, 1990, at 38, 39 (discussing effects of exhaustion and disillusionment on work ethic among professionals).

als, too, now put in excessive hours, averaging 52.2 hours per week.¹²³ Many routinely work seventy to eighty hours per week.¹²⁴

These long hours take a toll on employees' personal relationships and their nonwork interests.¹²⁵ Family demands in particular make many managers and professionals feel that their jobs require too much of their time.¹²⁶ As one commentator has written, "[A]s work demands threaten to get out of control, life itself threatens to get out of balance."¹²⁷

Ironically, while many managerial and professional employees work excessive hours, many others have no work at all. Unemployment among managers and professionals is nothing new. During the Great

123. See KANTER, *supra* note 4, at 268 (discussing Harris poll findings that those in most desirable occupations often work longest hours). For figures on the increased workweek of professionals, see Kilborn, *supra* note 121, at E3 (providing statistics on percentage of Americans working more than 49 hours per week by job classification and gender).

124. See SCHOR, *supra* note 4, at 68 (stating that medical residents, corporate attorneys, and investment bankers are often expected to work 70 to 80 hours per week, and even longer during hectic periods). Schor writes that:

High-powered people who spend long hours at their jobs are nothing new. Medical residents, top corporate management, and the self-employed have always had grueling schedules. But financiers used to keep bankers' hours, and lawyers had a leisured life.

Now bankers work like doctors, and lawyers do the same.

Id. at 18; see also ANNE B. FISHER, WALL STREET WOMEN 166 (1990) (noting that prior to deregulation of financial industry in 1975, Wall Street had "languid country-club pace," but that work pace increased thereafter).

This increase in the working hours of managers and professionals constitutes just part of the increase in hours Americans generally have experienced in the last 25 years. See SCHOR, *supra* note 4, at 29 (estimating that in 1987, average employed American worked 163 more hours, or equivalent of one extra month, than in 1969). This recent increase in working hours is part of a long-term trend. For a century prior to World War II, the hours of American workers decreased. However, in the 40 years after the war, this downward trend ceased. See John D. Owen, *Worktime Reduction in the U.S. and Western Europe*, 111 MONTHLY LAB. REV., Dec. 1988, at 41, 42. Now, for the first time since the nineteenth century, working hours are actually increasing.

125. See KANTER, *supra* note 4, at 285 ("[Overwork] has important human consequences. The spillover into personal life threatens relationships that are not easily accommodated to the demands of the workplace.").

126. See O'Reilly, *supra* note 122, at 44 (suggesting that companies be flexible with workers' hours because lack of normal family life is one reason most employees feel that their job is too demanding); see also FISHER, *supra* note 124, at 168-69 (discussing 1987 survey of Wall Street financiers who were advanced in their careers, most of whom stated that they would not choose same career if given opportunity to start over because rewards were not worth such great personal sacrifices); *supra* notes 107-09 and accompanying text (discussing double burden faced by many women having full-time careers as well as full responsibility for household chores and childrearing).

The phenomenon of overworked employees seeking more family time can be seen in studies from the 1920s of steelworkers after the shift from the 12-hour to the 8-hour day. Historian Benjamin Hunnicutt writes that "[w]orkers with the 8-hour day naturally turned their attention to the most basic of social institutions, the family." HUNNICUTT, WORK WITHOUT END, *supra* note 4, at 116.

127. KANTER, *supra* note 4, at 268.

Depression, job loss ravaged the ranks of the professions.¹²⁸ Some unemployed professionals obtained jobs with government work programs, such as the Works Progress Administration.¹²⁹ Professional associations, however, generally reacted to the threat of unemployment by seeking to limit entry into the field rather than by seeking to increase the number of jobs.¹³⁰

Today, unemployment continues to pose a threat. Though not as severe as the Great Depression, recent recessions have caused significant job loss among managers and professionals.¹³¹ Over forty percent of the jobs lost in the 1991 recession, for example, were managerial-professional jobs.¹³² As the *New York Times* reported, that recession "cut a mean swath through the white-collar workforce," causing severe unemployment, particularly among young professionals.¹³³

In addition to economic downturns, structural changes in the economy have aggravated unemployment for managers and professionals. During the last decade, many large corporations, faced with increased international competition and the threat of hostile takeovers, sharply reduced the ranks of their managerial employees,

128. See HUNNICUTT, *WORK WITHOUT END*, *supra* note 4, at 267 (explaining that American scientists were "particularly hard hit" by unemployment during Depression); Lombardi & Grimes, *supra* note 113, at 47 (noting that approximately one-third of engineers experienced unemployment at least once from 1929 to 1934, while many graduates seeking to enter engineering field remained unemployed for extensive period during those years); *Remedies for Unemployment Among Professional Workers*, 33 INT'L LAB. REV. 304, 305 (1936) [hereinafter *Remedies for Unemployment*] (stating that "in the majority of countries unemployment is rife among professional workers").

129. See *Remedies for Unemployment*, *supra* note 128, at 327 (explaining that in United States, government-sponsored social hygiene program provided employment to 10,000 nurses); *White-Collar Work Under the W.P.A.*, MONTHLY LAB. REV., Dec. 1937, at 1364 (stating that in January 1936, 12% of those employed on W.P.A. rolls were white-collar workers, including physicians, nurses, teachers, and librarians).

130. See John A. Garraty, *Unemployment During the Great Depression*, 17 LAB. HIST. 133, 136-37 (1976). Garraty notes:

In most countries doctors, lawyers, teachers, and other professionals sought to restrict entry into the universities, to stiffen examinations, to discriminate against women, especially married women, and to obtain stronger legal protection for professional titles of all sorts.

Id.

131. See Janice Castro, *Where Do They Go from Here?*, TIME, Feb. 11, 1991, at 66, 66 (noting that since 1982 recession, "[o]rganizations under stress are finding that they must abandon their traditional sense of loyalty to [middle-management] employees").

132. Kenneth Labich, *The New Unemployed*, FORTUNE, Mar. 8, 1993, at 40, 46; see also Ivan Peterson, *White Collars and Mortarboards Are No Shield in This Recession*, N.Y. TIMES, Jan. 25, 1992, at 25 (stating that "recessions that used to spell trouble mostly for factory workers are now also disrupting the lives of the educated and professional elite").

133. Jane Gross, *Graduates March down Aisle into Job Nightmare*, N.Y. TIMES, Jan. 9, 1992, at A16 (noting that "only the cream of the crop of young lawyers, bankers, engineers, professors, journalists and the like are finding the sort of jobs they expected").

laying off managers by the thousands.¹³⁴ In total, an estimated 1.5 million middle-managers lost their jobs in the 1980s.¹³⁵ Between 1981 and 1986 alone, as American companies tried to reduce layers of bureaucracy, more than 780,000 supervisors and section chiefs lost their jobs, as did many assistant division heads, assistant directors, and assistant managers.¹³⁶ Professionals suffered as well.¹³⁷ As one commentator notes, "Massive layoffs and terminations caused by the recession and the excesses of the eighties have created a phenomenon that this generation, at least, has not seen before—hard-core, long-term unemployed professionals."¹³⁸

While many managers and professionals suffer from long work hours or unemployment, it is important to note that most receive relatively high pay compared to the rest of the workforce.¹³⁹ In 1988, the median weekly pay for managerial and professional employees was \$552, while for technical, sales, and administrative support workers it was \$347; for operators, fabricators, and laborers, \$313; and for service workers, \$245.¹⁴⁰ Moreover, the gap between managerial-professional pay and the pay of other employees has increased.¹⁴¹ In fact, outrageously high compensation packages for

134. See AMANDA BENNETT, *THE DEATH OF THE ORGANIZATION MAN* 114 (1990) (discussing cutbacks in corporations that had never before laid off any employees and explaining that reductions are caused in part by recessions, company mergers, and changing economies); see also O'Reilly, *supra* note 122, at 41 (noting that position of managers changed significantly due to global competition, rapid innovation, and uncertainty).

135. See KEVIN PHILLIPS, *THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH* 21 (1990) (noting that CEOs generally prospered in 1980s but that job security was growing concern for those on lower levels).

136. See ROBERT B. REICH, *THE WORK OF NATIONS* 213-14 (1991) (discussing loss of routine production jobs for lower and middle management caused in part by shift of such jobs from advanced to developing nations).

137. See Guy Halverson, *Professionals Join Ranks of Nation's Unemployed*, CHRISTIAN SCI. MONITOR, Mar. 29, 1991, at A1, A2 (explaining that structural reorganization in professions such as finance and banking have resulted in large layoffs); Amy Saltzman et al., *Girding for a Pink Slip*, U.S. NEWS & WORLD REP., Jan. 14, 1991, at 54 (stating that white-collar professionals who escaped layoffs suffered by manufacturing workers during past recessions are no longer immune, and that virtually no new jobs would be created in 1991 for professionals in finance, insurance, and real estate).

138. Patricia C. Slovak, *Unemployed Professionals: The New EEO Issues*, in PROCEEDINGS OF NEW YORK UNIVERSITY 44TH ANNUAL CONFERENCE ON LABOR 391, 391 (1991). Increasingly, professional jobs once held by Americans have moved abroad. See G. Pascal Zachary, *Like Factory Workers, Professionals Face Loss of Jobs to Foreigners*, WALL ST. J., Mar. 17, 1993, at A1 (noting that "U.S. companies are increasingly hiring highly skilled workers in Asia, the former Soviet bloc and Europe to perform jobs once reserved for American professionals").

139. See REICH, *supra* note 136, at 205-06 (finding that in 1987, average male with college degree earned approximately \$50,000 per year, while average male high school graduate earned approximately \$28,000, and average male high school dropout earned approximately \$16,000).

140. See U.S. DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 168 (1989).

141. See REICH, *supra* note 136, at 206 (stating that from 1980 to 1990, wage gap between average male college graduate and average male high school graduate nearly doubled); Peter Passell, *The Wage Gap: Sins of Omission*, N.Y. TIMES, May 27, 1992, at D2 (noting increasing wage

top-level executives¹⁴² have triggered calls for reform.¹⁴³

Not all managerial and professional employees, however, receive high pay. Managers or professionals in occupations that have recently undergone professionalization, or those in routine managerial positions at the bottom of the corporate hierarchy, generally do not receive high pay compared to the rest of the workforce.¹⁴⁴ Indeed, as noted above, Wage and Hour Division regulations allow a worker to be deemed an executive, administrative, or professional employee even if she or he earns barely more than the minimum wage.¹⁴⁵

III. POSSIBLE REASONS FOR THE MANAGERIAL-PROFESSIONAL EXEMPTION

Having examined certain pertinent characteristics of the managerial-professional workforce, this Article now explores why the FLSA exempts such employees from its coverage. No ready answer exists. The legislative history of the Act contains no explanation for the managerial-professional exemption. The Senate and House bills that were to become the FLSA contained the exemption when they were introduced,¹⁴⁶ and no debate or discussion of the exemption took place while the bills were under consideration.¹⁴⁷ Since 1938, a few courts and commentators have offered explanations for the exemp-

gap for both sexes between college and high school graduates).

142. See, e.g., GRAEF S. CRYSTAL, IN SEARCH OF EXCESS 27-28 (1991) (noting that average American CEO made \$2.8 million in 1990, 120 times salary of average factory worker); see also Louis Uchitelle, *No Recession for Executive Pay: Wages at the Top Grew by 8% in 1990*, N.Y. TIMES, Mar. 18, 1991, at D1 (remarking that "[i]n the midst of a recession, with layoffs rising and corporate profits weak, pay in 1990 for the nation's top executives rose by bigger percentages than the wages of any other group of salaried American workers").

143. See Charles M. Yablon, *Overcompensating: The Corporate Lawyer and Executive Pay*, 92 COLUM. L. REV. 1867, 1869 & n.4 (1992) (exploring possibility that growing public and institutional investor concern over amount and structure of executive salaries may lead to tightening restrictions governing such compensation); Bevis Longstreth, *CEO Pay: Don't Let the Government Decide*, WASH. POST, Mar. 17, 1992, at A17 (outlining problems of excessive executive pay). The Securities and Exchange Commission has proposed revisions to its executive compensation disclosure rules. See 58 Fed. Reg. 42,882 (1993) (summarizing and explaining proposed changes to 17 C.F.R. §§ 229.402, 228.402 (1992)).

144. See JOHN W. WRIGHT & EDWARD J. DWYER, THE AMERICAN ALMANAC OF JOBS AND SALARIES 263, 414, 433, 479 (1990) (finding that in 1989, assistant branch managers at small banks averaged \$17,900 in earnings, executive housekeepers in small hotels averaged \$15,301, starting paralegals averaged \$17,200, and registered nurses in Florida state hospitals could earn as little as \$15,330).

145. See *supra* notes 63-64 and accompanying text.

146. See S. 2475, 75th Cong., 1st Sess. § 2(a)(7) (1937); H.R. 7200, 75th Cong., 1st Sess. § 2(a)(7) (1937); see also John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 483 (1939) (explaining general classes of exemptions in original bill).

147. See *Joint Hearings Before the Comm. on Education and Labor on S. 2475 and H.R. 7200*, 75th Cong., 1st Sess. 45 (1937) [hereinafter *Joint Hearings*] (failing to discuss exemption for managers and professionals).

tion,¹⁴⁸ but such explanations are sparse and necessarily speculative. This Article examines several reasons why Congress in 1938 may have exempted managerial and professional employees from the Act's coverage, and explores whether such possible justifications remain valid today.

A. *FLSA Protection Only for the Most Exploited Workers?*

One possible explanation for the managerial-professional exemption is that the Act was designed to protect only America's most exploited workers. Because managers and professionals tend to enjoy superior privileges, pay, and benefits,¹⁴⁹ excluding them from coverage arguably accorded with the Act's overall purpose. Indeed, several years after enactment of the FLSA, the Supreme Court wrote that "the prime purpose of the legislation was to aid the unprotected, unorganized and lowest paid of the nation's working population."¹⁵⁰

Nonetheless, the view that Congress passed the FLSA to protect the poorest workers ignores certain key facts about the Act. First, as originally enacted, the FLSA provided no protection for the most exploited workers in America: agricultural laborers and domestic workers.¹⁵¹ Second, the Act covered, and continues to cover, the most privileged portions of the blue-collar workforce: highly paid skilled craft workers,¹⁵² as well as those relatively fortunate blue-

148. See *infra* notes 177-79 and accompanying text (providing court and commentator justifications for exempting managers and professionals from FLSA).

149. See *supra* notes 139-43 and accompanying text.

150. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1945) (noting that certain employees lacked adequate bargaining power with their employers and thus were unable to secure subsistence wages for themselves).

151. For the Act's exemption of agricultural workers, see Fair Labor Standards Act of 1938, ch. 676, § 13(a)(6), 52 Stat. 1060, 1067. The irony of the Act's failure to cover farm workers did not go unnoticed during congressional debates over the FLSA bill. Representative Fred Hartley stated, "We are told that this measure will raise the wages and lower the working hours of the exploited workers of America. If that is the case then why is it that the poorest paid labor of all, the farm laborer . . . has been omitted from this bill?" 83 CONG. REC. 9257 (1938) (statement of Rep. Hartley).

For the argument that the FLSA's exclusion of agricultural workers constituted racial discrimination, see Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1371-80 (1987) (arguing that New Deal legislation, including FLSA, purposely preserved South's plantation system, and therefore constituted unconstitutional racial discrimination).

Congress extended coverage of the FLSA to agricultural workers in 1966, see Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, secs. 203-204, 302, §§ 13(a)(6), 13(a)(10), 6(a), 80 Stat. 830, 833-36, 838 (codified at 29 U.S.C. §§ 206, 207, 213 (1988)), and to domestic workers in 1974, see Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, sec. 7, § 2(a), 88 Stat. 55, 62 (codified at 29 U.S.C. §§ 202, 206, 207, 213 (1988)).

152. See 29 C.F.R. § 541.119(c) (1992) ("Mechanics, carpenters, linotype operators, or craftsmen of other kinds are not exempt . . . no matter how highly paid they might be.") (emphasis added).

collar employees who still enjoy union protection.¹⁵³ As the Supreme Court made clear early on: “[E]mployees are not to be deprived of the benefits of the Act simply because they are well paid or because they are represented by strong bargaining agents.”¹⁵⁴ Because Congress gave FLSA protection to the relatively privileged and highly paid elite of the blue-collar workforce, it is not at all self-evident that exempting the managerial-professional workforce due to its generally privileged status comports with the Act’s purpose.¹⁵⁵

B. Constitutionality

The drafters of the FLSA may have exempted managerial and professional employees because they feared that including them under the Act’s coverage would have been unconstitutional. Those in the Roosevelt administration who drafted the Act clearly crafted it to survive constitutional scrutiny, hoping their bill would escape the fate of the NRA.¹⁵⁶ However, most of the constitutional issues the FLSA raised, such as Congress’ power to regulate intrastate economic activity, had no bearing on whether the Act covered managerial and professional employees.¹⁵⁷

One constitutional issue, however, did potentially bear on the managerial-professional exemption: namely, whether the FLSA violated the constitutional rights of employer and employee to contract freely for the purchase and sale of labor. As noted above, courts in the early twentieth century generally had held that statutes that regulated employees’ hours violated the constitutional doctrine

153. See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 741 n.18 (1981). As of 1990, only 15% of the private-sector workforce enjoyed union protection. See *infra* note 283.

154. *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 167 (1945).

155. This is especially so because, as noted above, many managers and professionals do not enjoy particularly high pay or status. See *supra* notes 144-45 and accompanying text (explaining that managers in variety of fields earn less than \$20,000 per year).

156. See George E. Paulsen, *Ghost of the NRA: Drafting National Wage and Hour Legislation in 1937*, 67 SOC. SCI. Q. 241, 241 (1986) (discussing debate within Roosevelt administration over constitutionality of wage-and-hour regulation and over economic and social consequences of establishing fixed minimum wage and maximum hour standards for all industries). See generally HUNNICUTT, *WORK WITHOUT END*, *supra* note 4, at 242 (discussing talks between President Roosevelt and union leaders concerning wage-and-hour legislation).

157. For a discussion of these constitutional issues, see *Joint Hearings*, *supra* note 147, at 3 (statement of Assistant Attorney General Robert H. Jackson) (outlining different judicial theories of commerce power on which FLSA was based); Robert L. Stern, *An Opinion Holding the Act Constitutional*, 6 LAW & CONTEMP. PROBS. 433, 434 (1939) (arguing that FLSA regulations bearing on intrastate commerce are not unconstitutional because producers with substandard labor conditions often have advantage over competitors in interstate market); Note, *The Fair Labor Standards Act of 1938*, 27 GEO. L.J. 459, 468-71 (1939) (concluding that Act’s delegation of power to Wage and Hour Division to administer FLSA is constitutional because mandated wage rates will not curtail employment or give advantage to particular groups).

of freedom to contract, except in limited cases where the affected employees were women or children, or were men with exceptionally hazardous jobs.¹⁵⁸ The FLSA, which applied to a broad spectrum of employees, including adult males with ordinary jobs, extended far beyond the constitutional constraints set forth in these early cases, and thereby ran afoul of this traditional jurisprudence.

However, constitutional jurisprudence, particularly concerning the government's right to regulate the employment relationship, had changed markedly just prior to the enactment of the FLSA. In *West Coast Hotel Co. v. Parrish*,¹⁵⁹ a decision issued while the Roosevelt administration was drafting the FLSA bill,¹⁶⁰ the Supreme Court significantly broadened the range of permissible employment regulation by upholding a Washington State minimum wage statute for women and children¹⁶¹ simply on the ground that it was "reasonable in relation to its subject and . . . adopted in the interests of the community."¹⁶²

In *Virginian Railway Co. v. System Federation Number 40*,¹⁶³ decided on the same day as *West Coast Hotel*, the Supreme Court upheld the constitutionality of the Railway Labor Act,¹⁶⁴ a federal statute that protects the right of railroad employees to organize and bargain collectively.¹⁶⁵ The Court in *Virginian Railway* specifically rejected the argument that the statute violated an employer's right under the Fifth Amendment to contract freely, writing that "the Fifth Amendment, like the Fourteenth, . . . is not a guarantee of untrammelled freedom of action and of contract. In the exercise of its power to regulate commerce, Congress can subject both to restraints not shown to be unreasonable."¹⁶⁶ The following month, in *NLRB v. Jones &*

158. See *supra* note 39 and accompanying text.

159. 300 U.S. 379 (1937).

160. See Forsythe, *supra* note 146, at 465.

161. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (stating that Constitution does not recognize absolute liberty and that state can protect against "evils which menace the health, safety, morals and welfare of the people"). At issue in *West Coast Hotel* was whether a chambermaid could recover the difference between the amount of wages paid to her under her employment contract and the larger sum required by state minimum wage for women. *Id.* at 380.

162. *Id.* at 391; see Sunstein, *supra* note 38, at 876 (discussing shift in constitutional doctrine from *Lochner* to *Parrish*).

163. 300 U.S. 515 (1937).

164. Railway Labor Act of 1926, ch. 347, 44 Stat. 577, as amended by Railway Labor Act of 1934, ch. 691, 48 Stat. 1185 (codified as amended at 45 U.S.C. §§ 151-188 (1988)).

165. 45 U.S.C. § 152.

166. *Virginian Ry. v. System Fed'n No. 40*, 300 U.S. 515, 558 (1937). The Court stated that the statute's command to negotiate for the settlement of labor disputes, given in the exercise of commerce power, is not so arbitrary or unreasonable that it infringes on due process. *Id.* at 559.

Laughlin Steel Corp.,¹⁶⁷ the Supreme Court upheld the constitutionality of the National Labor Relations Act (NLRA),¹⁶⁸ a federal statute that protects the right of private-sector employees generally to organize and bargain collectively.¹⁶⁹ In *Jones & Laughlin*, the Court repeated its position that reasonable government regulation of the employment relationship did not infringe on the constitutional rights of either employer or employee.¹⁷⁰

The permissive reasonableness test articulated in *West Coast Hotel* and *Virginian Railway*, and the approval of a labor statute applying to adult workers generally in *Jones & Laughlin*, provided strong constitutional authority for the FLSA.¹⁷¹ While these 1937 Supreme Court decisions may have given proponents of the FLSA some confidence that Congress could broadly regulate wages and hours, the Act's proponents nonetheless may have felt that extending coverage to managerial and professional employees would have gone too far. Arguably, even a Supreme Court newly converted to the idea of broad government regulation of the employment relationship may have questioned the reasonableness of regulating the hours of that elite stratum of the workforce.

Even in 1938, however, FLSA coverage for managers and professionals most likely would have been held constitutional. Indeed, in *United States v. Darby*,¹⁷² the 1941 Supreme Court decision holding the FLSA constitutional, the Court rejected a Fifth Amendment challenge to the Act, and broadly wrote that it was no "longer open to question that it is within the legislative power to fix maximum hours."¹⁷³ Such unqualified language strongly suggests that the Court would have upheld the Act regardless of which category of employees it covered.¹⁷⁴

Even if constitutional concerns did lead the Act's drafters to add the managerial-professional exemption, no such constitutional concerns could justify maintaining the exemption today. The

167. 301 U.S. 1 (1937).

168. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1988)).

169. *Id.* § 157.

170. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 32-34 (1937).

171. See *Joint Hearings*, *supra* note 147, at 5; Stern, *supra* note 157, at 443; Note, *supra* note 157, at 476 (arguing that FLSA did not violate due process because power to restrict liberty interest to protect public welfare extends to contracts between employer and employee).

172. 312 U.S. 100 (1941).

173. *United States v. Darby*, 312 U.S. 100, 125-26 (1941).

174. Those looking for further support for the constitutionality of FLSA coverage for managers and professionals could have pointed to the fact that, at that time, the NLRA provided protection for supervisors and for professional employees. See *infra* notes 200-02 and accompanying text.

judiciary now exercises almost no substantive constitutional scrutiny over Congress' regulation of the economy.¹⁷⁵ Accordingly, the courts would have no grounds to strike down an FLSA provision regulating the work hours of managers and professionals.

C. *Do Managerial and Professional Employees Need Government Regulation of Their Work Hours?*

The most commonly expressed justification for the FLSA's managerial-professional exemption is simply that managerial and professional employees do not need the government to regulate their work hours.¹⁷⁶ This notion can be parsed into two separate components. First is the idea that managerial and professional employees do not need government regulation because they have sufficient bargaining power on their own to withstand demands from their employers to work excessive hours.¹⁷⁷ As one commentator explained, "Perceiving relatively equal bargaining power between the two parties, Congress saw no need to invade the right of employer and manager to fix contracts of employment."¹⁷⁸ The second component is the idea that excessive hours do not constitute a problem for managerial and professional employees because they enjoy certain privileges on the job, along with relatively high levels of pay and benefits.¹⁷⁹ As explained below, neither of these two

175. See TRIBE, *supra* note 37, at 582 (noting "virtually complete judicial abdication" of role in scrutinizing economic regulations).

176. See *Wirtz v. Patelos Door Corp.*, 280 F. Supp. 212, 216 (E.D.N.C. 1968). The *Wirtz* court explained:

[The FLSA] was meant to secure to certain members of the American labor force, who could not sufficiently protect themselves, relief from substandard wages and excessive hours. Aimed primarily at protecting the ordinary workingman, the Act included provisions exempting certain employees from its coverage, among them bona fide executives, the reason for the executive exemption being that such an employee is not ordinarily within the group that requires such protective legislation.

Id. (emphasis added).

177. See Harry Rebhuhn, Note, *Overtime Compensation Under the Fair Labor Standards Act: The Status of Managers Performing Strike Duty*, 55 S. CAL. L. REV. 965, 974 (1982) (stating that reason for FLSA's managerial exemption is managers' strong economic bargaining power).

The Supreme Court wrote in *Brooklyn Savings Bank* that Congress enacted the FLSA out of "a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945). Although the Court did not address the relative bargaining power of exempt employees, its logic suggests that managerial and professional employees do not need FLSA protection because they have sufficient bargaining power.

178. Rebhuhn, *supra* note 177, at 974.

179. See *Marshall v. Western Union Tel. Co.*, 621 F.2d 1246, 1250-51 (3d Cir. 1980). In *Marshall*, the Third Circuit observed:

[G]ranting managerial employees exempt status must have been a recognition that they are seldom the victims of substandard working conditions and low wages.

arguments justifies maintaining the managerial-professional exemption.

1. *Do managerial and professional employees have sufficient bargaining power?*

Clearly, employers today demand long hours of their managerial and professional employees.¹⁸⁰ Indeed, they have every incentive to do so. Because managerial and professional employees receive fixed salaries,¹⁸¹ which do not vary by the hours worked, employers face no costs, and only stand to gain, by requiring long hours of work.¹⁸² In addition to the incentive built into the fixed-salary pay structure, recent developments in the economy, such as increased international competition, deregulation, and mergers, have fueled the demand for long hours.¹⁸³ In response to the newly competitive environment, companies have pruned the ranks of their managerial and professional employees, and have required remaining employees to shoulder a larger load.¹⁸⁴

Congress apparently acted on this basic principle of industrial organization, realizing that compensation and working conditions of managerial employees normally would be significantly above those of the hourly wage earner. Therefore, there was no need for Congress to be concerned about the number of hours worked

Id. at 1250; *see also* 46 Fed. Reg. 3016 (Dep't Labor, Wage & Hour Div. 1981) (stating that managerial-professional exemption "stemmed from the recognition that such personnel have special work responsibilities, compensatory privileges and benefits which are superior to those of other employees"); 1940 REPORT, *supra* note 54, at 19 ("The term 'executive' implies a certain prestige, status, and importance. Employees who qualify under the definition are denied the protection of the act. It must be assumed that they enjoy compensatory privileges."); James A. Prozzi, *Overtime Pay and the Managerial Employee: Still a "Twilight Zone of Uncertainty"*, 41 LAB. L.J. 178, 179 (1990) (stating that Congress exempted managerial and professional employees because they do not need overtime pay and have other privileges); *May Ease Wage Act on Well-Paid Jobs*, N.Y. TIMES, Dec. 23, 1938, at 40 (quoting administrator of Department of Labor's Wage and Hour Division as approving exemption for well-paid white-collar employees because employee in this category "has a certain amount of discretion and . . . does not have to punch a time clock").

180. *See* KANTER, *supra* note 4, at 269 (identifying major reason for overwork of managers and professionals as employers' efforts to consume more and more of their employees' time).

181. *See* 29 U.S.C. § 213 (1988) (providing that employees must receive fixed salary in order to fall within managerial-professional exemption); *see also* Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 617 (2d Cir. 1991) (holding that employees are not within exception if they are docked pay for missing fractions of hours); Donovan v. Carls Drug Co., 703 F.2d 650, 652 (2d Cir. 1983) (holding that pharmacists paid hourly rate do not fall within managerial exemption).

182. *See* SCHOR, *supra* note 4, at 68 (noting that for salaried workers, "[e]xtra hours are . . . gratis to their employers"); *see also* KANTER, *supra* note 4, at 270 (commenting that managerial and professional employees she studied "were acutely aware that their especially long hours were not tied to any additional compensation" and that this was "sore point" for them).

183. *See* BENNETT, *supra* note 134, at 114-16 (explaining that companies feel long hours are necessary to keep up with competition and market changes).

184. *See* BENNETT, *supra* note 134, at 204-09 (describing examples of managers who survived layoffs only to see their workloads increase significantly); SCHOR, *supra* note 4, at 70 (stating that pressure on professionals to work longer hours in recent years "has come largely from companies, in response to market conditions"); Gross, *supra* note 133, at A16 (reporting that

It also appears clear that most managers and professionals lack sufficient bargaining power to resist employer demands for longer hours. Indeed, the very fact that such employees work excessive hours¹⁸⁵ attests to their lack of bargaining power.¹⁸⁶ The threat of unemployment makes managers and professionals eager to comply with, or even exceed, their employers' demands; fearing for their jobs, many managers and professionals now work long hours simply to demonstrate their value to the company.¹⁸⁷ As Professor Rosabeth Kanter has explained, recent changes in American businesses have "multiplied the pressures people feel to prove they are contributing—to prove that their job 'adds value' in case the company plays musical chairs with the structure."¹⁸⁸ In such an environment, an employer can easily replace any given managerial or professional employee: according to Juliet Schor, "For every aspiring manager determined to limit his or her hours, there are usually many more willing to give the company whatever time it demands."¹⁸⁹ The simplification of many professional and managerial jobs, and the corresponding loss of stature suffered by employees holding such jobs,¹⁹⁰ can only serve to reduce further the bargaining power of managers and professionals.

A clear sign that individual managerial and professional employees lack sufficient bargaining power to limit their work hours can be seen in the efforts by many such employees over the years to assert their bargaining power collectively through labor unions. In certain industries, such as printing, railroads, construction, and maritime, supervisors belonged to unions as far back as the nineteenth century.¹⁹¹ Following the enactment of the NLRA, supervisory

growing number of companies, as they cut back on costly experienced employees, are asking younger workers to do more for same amount of pay); see also O'Reilly, *supra* note 122, at 40 (noting that 77% of CEOs polled in 1990 agreed that American corporations would have to work their managers harder in order to compete internationally).

185. See *supra* notes 117-24 and accompanying text.

186. One could argue, of course, that managers and professionals work long hours due to their own inclinations. However, the abundant evidence that managerial and professional employees want more time away from the job, see *infra* notes 243-54 and accompanying text, undermines this argument.

187. See Kilborn, *supra* note 121, at E3 (stating that in 1980s, many companies eliminated entire layers of middle management and that those employees remaining fear loss of their jobs).

188. KANTER, *supra* note 4, at 267.

189. SCHOR, *supra* note 4, at 71.

190. See *supra* notes 110-16 and accompanying text.

191. See Philomena Marquardt, *Foreman's Association of America: Conditions Leading to Formation of Union*, MONTHLY LAB. REV., Feb. 1946, at 241, 241; Seitz, *supra* note 114, at 211 (noting existence of supervisory unions as early as 1880s).

unions sprang up throughout basic industry.¹⁹² Professionals in a number of fields, such as engineers, nurses, scientists, and lawyers, also began to unionize.¹⁹³

One of the reasons managerial and professional employees have sought to unionize is to set rules regulating their hours. As one of their central goals, supervisory and professional employee unions generally seek to regulate the work hours and workloads of the employees they represent.¹⁹⁴ For example, unionized legal services lawyers and social workers have negotiated limits to their caseloads, unionized medical interns have negotiated the maximum number of nights that they must work each month, unionized teachers have negotiated class size, and unionized nurses have negotiated limits on consecutive workdays and numbers of shifts.¹⁹⁵

While unions constitute effective vehicles for increasing employee bargaining power, too few managerial and professional employees enjoy union representation to alter the conclusion that, for the most part, managers and professionals lack sufficient bargaining power to limit their work hours. In the private sector, only one in ten professionals bargains collectively,¹⁹⁶ while supervisors and other managerial employees have no legally protected right to organize.¹⁹⁷ Unions do represent supervisors and professionals in the public sector, but not all states allow collective bargaining by public-sector employees,¹⁹⁸ and among those that do, the trend has been toward

192. See Charles T. Joyce, *Union Busters and Front-Line Supervisors: Restricting and Regulating the Use of Supervisory Employees by Management Consultants During Union Representation Election Campaigns*, 135 U. PA. L. REV. 453, 469 n.92 (1987) (attributing growth of supervisory unions to supervisors' desire to protect their independence and authority); Seitz, *supra* note 114, at 199-200 (describing advent of managerial unions in mass-production industries).

193. See Sar A. Levitan & Frank Gallo, *Collective Bargaining and Private Sector Professionals*, MONTHLY LAB. REV., Sept. 1989, at 24, 24.

194. See ARONOWITZ, *supra* note 110, at 312 (reporting that, through unions, professionals "have increasingly concentrated on more pay for fewer hours and smaller workloads"); Frances Bairstow & Leonard Sayles, *Bargaining over Work Standards by Professional Unions*, in INDUSTRIAL RELATIONS RESEARCH ASSOCIATION, COLLECTIVE BARGAINING AND PRODUCTIVITY 103, 112 (1975) (noting that reduction of weekly working hours is common negotiating item for unions representing professional employees).

195. See David M. Rabban, *Is Unionization Compatible with Professionalism?*, 45 INDUS. & LAB. REL. REV. 97, 103 (1991); see also Bairstow & Sayles, *supra* note 194, at 110-11 (noting that research scientists have negotiated education leave and time off for career development); Strauss, *supra* note 113, at 523 (noting that engineers' unions negotiate for overtime pay for their members).

196. See Levitan & Gallo, *supra* note 193, at 24 (noting that proportion has not changed for over two decades and is unlikely to change significantly in future).

197. See *infra* text accompanying notes 200-233 (discussing history of supervisors' loss of right to organize).

198. See Joel M. Douglas, *Collective Bargaining and Public Sector Supervisors: A Trend Towards Exclusion?*, 47 PUB. ADMIN. REV. 485, 485 (1987) (observing that 10 states deny public-sector employees right to bargain collectively).

denying supervisors the right to organize.¹⁹⁹

a. The loss of the right to organize

In 1938, when Congress enacted the FLSA, one arguably could have justified the managerial-professional exemption on the ground that even if managers and professionals lacked sufficient bargaining power individually to limit their hours, the National Labor Relations Act (NLRA) gave them the opportunity to boost their bargaining power through unionization. At the time, the NLRA covered both professionals and supervisors.²⁰⁰ In 1936, in its first decision concerning professionals, the National Labor Relations Board (NLRB) held that the NLRA protected a group of engineers, reasoning that "the engineers have need of organized strength in common with all wage earners."²⁰¹ The NLRA also provided protection to the organizing efforts of front-line supervisors. As the Supreme Court wrote in 1946, "Though the foreman is the faithful representative of the employer in maintaining a production schedule, his interests properly may be adverse to that of the employer when it comes to fixing his own wages, hours, seniority rights or working conditions."²⁰²

Under the legal protection of the NLRA, unions representing supervisors grew rapidly, spurred in part by supervisors' grievances over excessive work hours and uncompensated overtime work.²⁰³ By 1946, the two largest supervisors unions had a combined membership of over 100,000.²⁰⁴ The next year, however, Congress enacted the Taft-Hartley amendments to the NLRA, amendments that, among other things, removed legal protection for organizing by supervisors.²⁰⁵ The Taft-Hartley amendments effectively destroyed private-

199. See generally *id.* (documenting trend toward denying supervisors right to bargain collectively).

200. See Angel, *supra* note 88, at 416-34.

201. *In re Chrysler Corp.*, 1 N.L.R.B. 164, 171 (1936) (noting that nonunion designers, engineers, and other professional workers were dissatisfied with working conditions and were in conflict with management).

202. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 489-90 (1947) (holding no basis exists in NLRA to deny supervisors statute's protection).

203. See Marquardt, *supra* note 191, at 241 (explaining that in 1941, foremen at Ford Motor Company complained about six- and seven-day work weeks and increased daily hours); Seitz, *supra* note 114, at 207-08 (detailing foremen's reasons for starting labor unions, such as fact that they received fixed salaries, while rank-and-file employees enjoyed shift premiums and overtime pay).

204. See Joyce, *supra* note 192, at 469 n.93 (stating that thousands of supervisors also belonged to rank-and-file unions).

205. See Labor Management Relations (Taft-Hartley) Act of 1947, ch. 120, sec. 101, § 2(3), 61 Stat. 136, 137-38 (excluding supervisors from definition of "employee" under NLRA) (codified as amended at 29 U.S.C. § 152(3) (1988)). For a discussion of the exclusion of supervisors by the Taft-Hartley amendments, see Angel, *supra* note 88, at 426.

sector supervisors unions.²⁰⁶

Interestingly, the rationale used to justify the FLSA's managerial-professional exemption—namely, that such employees have sufficient bargaining power to protect themselves²⁰⁷—also served as a principal rationale for removing the legal protection for supervisors' organizing efforts.²⁰⁸ By the 1940s, however, front-line supervisors lacked the power to protect themselves. The advent of scientific management and centralized administration in large industrial plants had effectively removed supervisors' discretion and decisionmaking authority on the shop floor, leaving them with little control over their working conditions.²⁰⁹ In fact, unionization among supervisors began, in large part, because of this change in their status.²¹⁰ The proponents of the Taft-Hartley amendments, however, ignored this reality.

In 1974, the Supreme Court, in *NLRB v. Bell Aerospace Co.*,²¹¹ ruled that not only supervisors, but all managerial employees—including those who perform no supervisory functions—lack the protection of the NLRA.²¹² In *Bell Aerospace*, the Court considered whether the NLRA protected the organizing efforts of a group of buyers in a company's purchasing and procurement department.²¹³ After examining the Taft-Hartley amendments, the Court concluded that Congress never intended the unionization of employees "who formulate and effectuate management policies, yet have no supervisory responsibilities."²¹⁴

The NLRA's managerial exemption has not only precluded unionization by private-sector managers, it has also severely restricted unionization among professionals. In its 1980 decision *NLRB v. Yeshiva University*,²¹⁵ the Supreme Court, following its decision in *Bell Aerospace*, held that professionals who exercise any measurable degree of managerial authority lose the protection of the NLRA.²¹⁶ In

206. See Charles P. Larrowe, *A Meteor on the Industrial Relations Horizon: The Foreman's Association of America*, 2 LAB. HIST. 259, 294 (1961).

207. See *supra* notes 177-78 and accompanying text.

208. Seitz, *supra* note 114, at 240 (citing *Hearings Before the Comm. on Labor and Public Welfare, U.S. Senate, on S.55 and S.J. Res. 22 and All Other Bills and Resolutions Referred to the Comm. Having the Object of Reducing Industrial Strife in the United States*, 80th Cong., 1st Sess. 239 (1947)).

209. See Seitz, *supra* note 114, at 204-05.

210. See Seitz, *supra* note 114, at 209.

211. 416 U.S. 267 (1974).

212. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

213. *Id.* at 294-95.

214. *Id.* at 289 n.18 (stating that if Congress had intended NLRA coverage for such employees, it would have expressly stated it).

215. 444 U.S. 672 (1980).

216. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 682-90 (1980).

Yeshiva, the Court held that the full-time faculty of a private university did not fall within the NLRA's coverage because the faculty performed functions such as deciding what courses to offer and what teaching methods to use.²¹⁷ According to Justice Powell, the only professionals who fall under the NLRA's protection are those "whose decision making is limited to the routine discharge of professional duties in projects to which they have been assigned."²¹⁸

The *Yeshiva* decision stands as a roadblock to the organizing efforts of large numbers of professional employees.²¹⁹ The managerial exemption to the NLRA has excluded from the statute's coverage not only college faculty, but also physicians and dentists,²²⁰ nurses,²²¹ newspaper editors,²²² and engineers,²²³ and has cast doubt on the statute's coverage of many other professional employees.²²⁴

Even professionals not exempt from NLRA coverage due to the managerial exemption are now more likely to be deemed exempt as supervisors. For example, in a 1989 case, *Detroit College of Business*,²²⁵ the NLRB abandoned its rule that a professional had to spend at least fifty percent of his or her worktime supervising others to be deemed a supervisor.²²⁶ Rejecting that standard, the NLRB held that "coordinators" at a business college, who spent most of their time teaching and doing other nonsupervisory work, were nonetheless supervisors,²²⁷ and therefore not entitled to the protection of the NLRA, because they spent a fraction of their time evaluating the work of

217. *Id.* at 674.

218. *Id.* at 690.

219. See Levitan & Gallo, *supra* note 193, at 32 (explaining that *Yeshiva* decision "impedes collective action by professionals in securing workplace rights afforded to other employees"); see also Angel, *supra* note 88, at 456 (explaining that antitrust and First Amendment decisions have further restricted professionals' attempts to unionize).

220. See *FHP, Inc.*, 274 N.L.R.B. 1141, 1143 (1985) (holding that part-time physicians and dentists are excluded from NLRA).

221. See, e.g., *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076, 1080 (6th Cir. 1987) (finding that nursing home's practical nurse is supervisor, and thus not eligible for NLRA protection); *NLRB v. American Medical Servs., Inc.*, 705 F.2d 1472, 1474-75 (7th Cir. 1983) (holding nurses not protected when they enjoy discretionary powers and authority to discharge other employees); *Lincoln Lutheran of Racine, Wisconsin, Inc.*, 290 N.L.R.B. 1077, 1082 (1988) (holding nurses to be supervisors and thus not protected by NLRA).

222. See *NLRB v. Medina County Publications, Inc.*, 735 F.2d 199, 207 (6th Cir. 1984) (holding that sports editor of newspaper is supervisor under NLRA).

223. See District No. 1, *Pacific Coast Marine Eng'rs*, 287 N.L.R.B. 628, 639-44 (1987) (denying engineers protection under NLRA because they direct others during their shifts).

224. See Rabban, *supra* note 112, at 1859 (noting that *Yeshiva* casts doubt on unionization eligibility of countless professionals and employees); see also Note, "Managerial Employee": A Label in Search of a Meaningful Definition, 48 U. CIN. L. REV. 435, 491 (1979) (remarking that NLRA's managerial exemption probably excludes many lawyers from coverage).

225. 296 N.L.R.B. 318 (1989).

226. *Detroit College of Business*, 296 N.L.R.B. 318, 320-21 (1989).

227. *Id.* at 320.

adjunct faculty.²²⁸

Graduate students and medical interns constitute another group of individuals who do professional work but who have been denied protection under the NLRA.²²⁹ The NLRB has denied medical interns and residents coverage under the NLRA in part precisely to prevent such professional workers from bargaining collectively to limit their work hours.²³⁰ Despite acknowledging in *St. Clare's Hospital & Health Care Center*²³¹ that "[r]esidents and interns work notoriously long hours," the NLRB accepted the hospital's argument that it needed such long hours for proper training and patient care.²³² The NLRB therefore ruled against NLRA coverage on the ground that work hours "could become bargainable should the [interns and residents] be afforded collective bargaining rights."²³³

b. *Professional associations*

While relatively few professionals, especially in the private sector, enjoy union representation, many belong to professional associations that purport to represent their interests.²³⁴ Professional associations, however, generally do not help professional employees limit their work hours. Unlike labor unions, which concern themselves primarily with bargaining over wages, hours, and other terms and conditions of employment, professional associations tend to address issues such as requirements for entry into the profession, standards for professional conduct, and other issues affecting the profession as a whole.²³⁵

228. *Id.*; see also *Trustees of Boston Univ.*, 281 N.L.R.B. 798, 860 (1986) (determining that college faculty members are supervisors based entirely on fact that upon receiving research grants, they hire and oversee work of research assistants).

229. See *St. Clare's Hosp. & Health Care Ctr.*, 229 N.L.R.B. 1000, 1004-05 (1977) (holding paid medical interns, residents, and clinical fellows not employees for purposes of NLRA); *Leland Stanford Junior Univ.*, 214 N.L.R.B. 621, 623 (1974) (holding paid research assistants studying toward graduate degree not employees under NLRA). Ironically, student research assistants are denied professional employee status under the NLRA even though they are considered professionals under the managerial-professional exemption of the FLSA. See *supra* note 80 and accompanying text (discussing Wage and Hour Division statement that student research assistants are professionals).

230. *St. Clare's Hosp.*, 229 N.L.R.B. at 1003.

231. 229 N.L.R.B. 1000 (1977).

232. *St. Clare's Hosp. & Health Care Ctr.*, 229 N.L.R.B. 1000, 1003-05 (1977).

233. *Id.* at 1003. Recently, members of the medical establishment have criticized the notion that overworking interns and residents promotes quality patient care or that it is needed to properly train aspiring physicians. See Karen Ritchie, *Professionalism, Altruism, and Overwork*, 13 J. MED. & PHIL. 447, 447 (1988) (arguing that overworking residents is both unethical and detrimental to residents and patients).

234. See Levitan & Gallo, *supra* note 193, at 24.

235. See Levitan & Gallo, *supra* note 193, at 24-25; see also Bairstow & Sayles, *supra* note 194, at 107. Prior to its transformation into a collective bargaining agent for teachers, the National Education Association (NEA) acted as a professional association. See MARJORIE MURPHY, *BLACKBOARD UNIONS: THE AFT & THE NEA, 1900-1980*, at 226-27 (1990). In 1938, the NEA

Indeed, professional associations tend to be dominated by the elite of the profession, individuals who are either high-level managers or not employees at all, and who therefore do not share the concerns of lower-level professionals about workplace issues.²³⁶ Moreover, professional associations promote an ideology of professionalism that is implicitly contrary to, if not explicitly hostile to, bargaining collectively over issues such as wages and hours.²³⁷ As Sar Levitan and Frank Gallo have observed, "Many associations have appealed—at least publicly—to the traditional high sounding ideals of the profession. Appeals for pay increases and improved working conditions fit uneasily into such rhetoric" ²³⁸

Because most managerial and professional employees individually lack sufficient bargaining power to avoid excessive hours, and because

sent a representative to testify before Congress concerning the pending Fair Labor Standards bill. *Joint Hearings*, *supra* note 147, at 415. Tellingly, the representative addressed only child labor issues and did not say a word about the wages, hours, and working conditions for teachers. *See id.* at 415 (statement of Dr. Howard A. Dawson).

236. *See* Strauss, *supra* note 113, at 524 (stating that engineering associations "are dominated by people already well up in the management hierarchy. They may speak up for the interests of the profession as a whole . . . but they are less likely to represent the economic interests of individual professionals, particularly those in the lower ranks."). Similarly, prior to the mid-1960s, school administrators, not rank-and-file teachers, dominated the NEA. *See* MURPHY, *supra* note 235, at 228 (noting that American Federation of Teachers criticized NEA for being dominated by administrators).

Late eighteenth-century and early nineteenth-century craft associations provide an historical parallel to the modern professional association. Like today's professional associations, these craft associations included members throughout the occupational hierarchy, including both master craftsmen and journeymen. *See* SEAN WILENTZ, *CHANTS DEMOCRATIC: NEW YORK CITY AND THE RISE OF THE AMERICAN WORKING CLASS, 1788-1850*, at 13-60 (1984) (detailing rise of craft associations in New York City). The masters who dominated the craft associations claimed to speak on behalf of all the members of the craft. *Id.* at 42 (stating that master craftsmen claimed "with all apparent sincerity to have the interests of all mechanics at heart"). Eventually, the journeymen left the craft associations and formed labor unions, after realizing that their status as employees gave them an interest in improving working conditions that ran counter to the interests of the masters. *Id.* at 56-59. Interestingly, one of the major goals of these early crafts unions was to limit the length of the workday. *Id.* at 232.

237. *See generally* MAGALI S. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977) (discussing ideology of professionalism). Larson argues that professionalism and concern over professional status "works as a preventive against the unity—and the unionization—of professional workers . . ." *Id.* at 236. A former president of the National Society of Professional Engineers expressed a view commonly held by adherents to the ideology of professionalism when he wrote that "[o]ne cannot be a professional and belong to a union." Levitan & Gallo, *supra* note 193, at 30.

For an example of medical associations opposing the organizing efforts of members of their professions, see Mario F. Bognanno et al., *Physicians' and Dentists' Bargaining Organizations: A Preliminary Look*, *MONTHLY LAB. REV.*, June 1975, at 33, 34 (noting that American Medical Association and American Dental Association strongly opposed unionization because "it would be the very antithesis of individualism"). After years of hostility to the idea of unions representing lawyers, the legal establishment finally acquiesced in the early 1970s, begrudgingly stating in the Code of Professional Responsibility that union membership for lawyers was "not necessarily improper." Levitan & Gallo, *supra* note 193, at 25.

238. Levitan & Gallo, *supra* note 193, at 32.

most have no organization advocating on their behalf for limited hours, one cannot justify the failure to regulate their work hours by arguing that such employees have the ability, without government intervention, to avoid excessive work.

2. *Do managers and professionals need limited work hours?*

The proposition that managerial and professional employees do not need limited hours because they enjoy higher salaries, better working conditions, and more privileges than other employees is also flawed. First, advocates of this proposition ignore the fact that many managers and professionals enjoy little autonomy and prestige on the job²³⁹ and receive low wages.²⁴⁰ More important, they ignore one of the main purposes of limiting work hours: employees need limited work hours so that they can spend more time away from work with family or in nonvocational activities.²⁴¹ High pay, good working conditions, and privileges on the job may make work more tolerable, or even enjoyable, but they have no bearing on the amount of time a managerial or professional employee can spend away from the workplace.²⁴²

There is abundant evidence that many managers and professionals seek more time away from work. A 1990 survey by the American Bar Association, for example, found that about half of the lawyers in private practice said that they did not have enough time for themselves or their families.²⁴³ A study of work conditions in the finance industry found that professionals there too seek more time with friends and family.²⁴⁴ Indeed, surveys of employees in all occupational groups have shown that many, if not most, would exchange some future earnings for the chance to spend more time away from work and with their families.²⁴⁵ These surveys suggest that managers

239. See *supra* notes 187-90 and accompanying text.

240. See *supra* notes 144-45 and accompanying text.

241. See *supra* note 35 and accompanying text.

242. To a certain extent, of course, high pay *can* increase the amount of time an employee devotes to preferred activities when not at work. For example, better-paid employees can more likely afford to pay others to perform necessary domestic chores, thus freeing up their own time for other activities.

243. See Holt, *supra* note 119, at 64. Holt quotes a management consultant as stating that "[y]ou can make the firm a better place to work. But once you go beyond a certain number of hours, over a period of years, with no time for yourself or your family, your quality of life is still bad." *Id.*

244. See FISHER, *supra* note 124, at 148 (discussing relentlessly hectic hours of work on Wall Street); cf. ROEDIGER & FONER, *supra* note 4, at 275 (noting air traffic controllers' desire to reduce their working hours).

245. See ANN HARRIMAN, *THE WORK/LEISURE TRADE OFF: REDUCED WORK TIME FOR MANAGERS AND PROFESSIONALS* 91 (1982) (citing evidence that "significant numbers of employees, in every age and occupational category, would choose to trade some portion of

and professionals would likely make such an exchange because, compared to rank-and-file employees, they would be more likely able to afford to sacrifice some earnings.²⁴⁶

Female managers and professionals in particular seek more time away from the workplace because they often must attend to family responsibilities in addition to their jobs.²⁴⁷ Indeed, women seek to avoid demands for excessive hours not only to make it easier to meet family responsibilities, but simply to retain their jobs.²⁴⁸ While long work hours combined with family demands can constrain the careers of both partners in a two-career couple,²⁴⁹ it is usually the woman who feels the social pressure to sacrifice her salaried work for the sake of family responsibilities.²⁵⁰ In her study of professional women, Alice Yohalem notes that "strong social pressures beyond the labor market often persuade women to modify or abandon their career goals after marriage or childbirth."²⁵¹ Thus, the excessive hours required in managerial and professional jobs threaten to undermine the legal, political, and social victories women have won in their

present or future income for some additional nonwork time"); SCHOR, *supra* note 4, at 148 (citing 1989 poll in which 80% of those surveyed responded that they would prefer career path that allowed them more time with their families even if it slowed their career advancement).

246. One telling reflection of the desire of managers and professionals for fewer work hours can be seen in the popularity of a recent career manual focusing entirely on advising managers and professionals how to shift to a career path that will provide them with more free time. See AMY SALTZMAN, *DOWNSHIFTING: REINVENTING SUCCESS ON A SLOWER TRACK* (1991) (giving advice on how to select career to have more time for self); see also DIANE S. ROTHBERG & BARBARA E. COOK, *PART-TIME PROFESSIONAL* (1985) (providing advice for professionals seeking part-time positions).

247. See SCHOR, *supra* note 4, at 72; *supra* notes 107-09 and accompanying text (discussing familial burdens on working women).

248. See generally Mortimer & Sorensen, *supra* note 108, at 148 (describing pressure on women to spend more time at home).

249. See Mortimer & Sorensen, *supra* note 108, at 148 (explaining that where both members of couple have managerial or professional career, couple may "feel extreme pressure of time, trying to meet all the demands of two careers plus household and child care duties. Consequently, both spouses may feel that their productivity and occupational achievement is constrained by home responsibilities . . .").

250. See O'Reilly, *supra* note 122, at 44 (noting that women are much more likely than men to let family demands affect their careers); see also Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 2(a)(5), 107 Stat. 6, 7 (1993) (to be codified at 29 U.S.C. § 2601) (reporting congressional finding that responsibility for family caretaking "affects the working lives of women more than it affects the working lives of men"); ROEDIGER & FONER, *supra* note 4, at 276 (arguing that many women feel pressured to work part time in order to devote more time to family); Mortimer & Sorensen, *supra* note 108, at 148 (stating that "[c]areer demands . . . may pose particular problems for mothers, who feel the opposing demands of their children's needs"). Moreover, women who express the need for more time away from the job "may be particularly vulnerable to charges of lack of professionalism." HARRIMAN, *supra* note 245, at 88.

251. ALICE M. YOHALEM, *THE CAREERS OF PROFESSIONAL WOMEN: COMMITMENT AND CONFLICT* 28 (1979).

efforts to enter such occupations.²⁵² Moreover, as long as female managers and professionals drop out of the workforce, the underrepresentation of women in the higher ranks of management will continue.²⁵³

Clearly, the decent salaries and working conditions enjoyed by many managerial and professional employees, both male and female, cannot substitute for time away from the workplace. Good working conditions therefore cannot justify the failure to regulate the work hours of managerial and professional employees.²⁵⁴

D. *The Cost to Employers Versus the Social Benefits of Hours Regulation*

Congress may have exempted managerial and professional employees from the FLSA simply because it did not want to impose upon employers the cost of compensating such employees for overtime hours worked. Employers opposed the enactment of the FLSA in large part because of the costs the Act would impose on their operations.²⁵⁵ Given employers' resistance to increased costs, their resistance to paying overtime compensation to managerial and professional employees, had it been proposed, would likely have been intense. Indeed, shortly after the Act's passage, the Wage and Hour

252. See KANTER, *supra* note 4, at 293 (explaining that excessive hours present "the danger of excluding half the workforce—women—from the better jobs. While equal employment opportunity policies open up hopes of high positions for women, new work systems . . . may increase barriers to getting them.").

253. See ROEDIGER & FONER, *supra* note 4, at 276 (warning that unless men take more responsibility for childcare, women will be unable to compete equally for promotions).

Marshall Breger suggests that one reason for the underrepresentation of women in top management is that women exercise their "personal choice" to pursue the "Mommy Track," rather than climb the corporate ladder. Breger, *supra* note 106, at 422. Excessive employer demands on female managers, however, when coupled with the burden of family responsibilities, tend to make such a "personal choice" less than voluntary. *Id.*

254. The recent passage of the Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993) (to be codified at 29 U.S.C. § 2601), demonstrates the obsolescence of the notion that managers and professionals have no need for government regulation of their work time. That statute, which gives employees the right to 12 weeks of unpaid leave from work to care for a newborn child or sick family member, § 102(a)(1), 107 Stat. at 9, contains no exemption for managers or professionals. § 101(2), 107 Stat. at 7-8. It seems clear that in framing the legislation, Congress did not subscribe to the view that managers and professionals have sufficient bargaining power to negotiate such a leave for themselves, nor that the benefits and privileges such employees receive on the job would make such a leave unnecessary.

255. See, e.g., *Joint Hearings, supra* note 147, at 537-38, 652, 765 (reporting statements by garment industry employers' organization, by National Association of Manufacturers, and by President of Southern States Industrial Council that FLSA would substantially increase labor costs); *id.* at 936 (statement of George H. Davis, President, U.S. Chamber of Commerce) (suggesting that FLSA could impose uncertainty on commercial venturers and increase labor costs); see also JAMES A. HODGES, *NEW DEAL LABOR POLICY AND THE SOUTHERN COTTON TEXTILE INDUSTRY 1933-1941*, at 180 (1986) (reporting that congressional representatives from Southern states who opposed Fair Labor Standards bill "feared that higher labor standards would handicap the development of southern industry by removing the South's great advantage, cheap labor").

Administrator reported that most of the employer comments he had received concerned how broadly the Wage and Hour Division would interpret the managerial and professional exemption.²⁵⁶

No doubt today employers would continue to oppose application of the FLSA to managerial and professional employees, complaining that the overtime compensation would be too costly. The proposal presented in this Article would require employers to provide their managerial and professional employees with comp time, rather than overtime pay, and thus would not increase the incomes earned by managers and professionals. Nonetheless, mandated comp time would increase employers' costs by forcing them to hire more employees.²⁵⁷ This increased cost to employers, however, does not justify the failure to regulate the work hours of managers and professionals.

In enacting the FLSA, Congress implicitly decided that the social costs of failing to regulate the hours of employees outweighed the cost to employers that such regulation would produce. In part, enactment of the FLSA represented a determination that the high social cost of unemployment justified imposing extra costs on those employers who aggravated unemployment by requiring their employees to work excessive hours.²⁵⁸ It also represented a determination that the heavy burden borne by those employees required to work excessive hours justified imposing the extra costs of overtime compensation on their employers.²⁵⁹ This same calculus, which produced FLSA regulation for employees now covered by the Act, applies equally to managers and professionals.

First, as noted above, managerial and professional employees, like other employees, suffer from unemployment.²⁶⁰ Unemployment in the managerial-professional workforce places a strain on the public treasury by reducing tax revenues while increasing the amount of unemployment compensation benefits the government pays.²⁶¹

256. See *May Bar Overtime for High Pay Group*, N.Y. TIMES, Dec. 14, 1938, at 4. A 1940 lobbying effort by representatives of wholesale distributors provides one example of employer concern over the costs of pay for managers and professionals. According to a *Business Week* report, the representatives complained that the Wage and Hour Division's narrow interpretations of the managerial-professional exemption "only serve to burden the wholesale trades by increasing high wages paid department heads," and that the wholesale industry employers could not "stand increased costs in the face of growing competition." *Who's an Executive?*, *supra* note 54, at 37.

257. See *infra* text accompanying note 263.

258. See *supra* note 46 and accompanying text.

259. See *supra* note 46 and accompanying text.

260. See *supra* notes 128-38 and accompanying text.

261. See David R. Francis, *Are Those Working Overtime Whistling?*, CHRISTIAN SCI. MONITOR, Apr. 2, 1993, at 8.

Moreover, it puts significant financial and psychological strains on the unemployed individuals and their families.²⁶² Were employers required, as this Article proposes, to provide time off for overtime hours worked, many employers would need to increase their hiring. Indeed, economists Ronald Ehrenberg and Paul Schumann have estimated that tens of thousands of new jobs would be created by a reduction in the overtime hours worked by managerial and professional employees.²⁶³ The benefit to society and to unemployed workers from this increase in jobs would largely justify the cost to employers created by eliminating the Act's managerial-professional exemption.

Second, restricting work hours for managers and professionals would produce substantial benefits for those already employed. Managers and professionals would have more time to spend with their families and in nonwork pursuits, time that many such employees now lack.²⁶⁴ The reduction of work hours would benefit female managers and professionals in particular by permitting them to juggle workplace and family responsibilities more easily, thus helping them to keep their jobs and even gain promotions.²⁶⁵ The benefit to society alone of creating a more even gender balance in the managerial-professional workforce would justify the increased costs to employers.

Moreover, restricting the work hours of managers and professionals would provide benefits beyond those traditionally used to justify FLSA coverage. Restricting work hours would increase productivity.²⁶⁶ Excessive hours tend to decrease morale, increase errors, and lower

262. See generally CARRIE R. LEANA & DANIEL C. FELDMAN, *COPING WITH JOB LOSS: HOW INDIVIDUALS, ORGANIZATIONS, AND COMMUNITIES RESPOND TO LAYOFFS* 45-75 (1992) (discussing employee reactions to unemployment); PAULA G. LEVENTMAN, *PROFESSIONALS OUT OF WORK* 133-66 (1981) (discussing plight of unemployed professionals); Labich, *supra* note 132, at 42 (noting that depression, alcoholism, and marital stress often accompany unemployment).

263. See EHRENBERG & SCHUMANN, *supra* note 47, at 46. According to their study, if the more than 500,000 professional and technical employees who worked overtime in May 1978 had worked 20% fewer hours, more than 25,000 new jobs might have been created. *Id.* Similarly, if the more than 300,000 managers and administrators who worked overtime during that month had worked 20% fewer hours, approximately 17,000 new jobs might have been created. *Id.*; see also Zalusky, *supra* note 4, at 1 (estimating that limiting all employees to forty hours per week would create seven million new jobs).

264. See *supra* notes 125-27, 243-46 and accompanying text.

265. See *supra* notes 247-53 and accompanying text.

266. See Marshall, *supra* note 35, at 50-51 (arguing that limiting work hours will reduce fatigue and lead to increased productivity). Prior to the FLSA, the desire to increase workers' productivity and decrease accidents helped fuel the century-long drive to limit the length of the workday. *Id.*; see also CAHILL, *supra* note 31, at 31-58 (discussing goal of labor unions, after Civil War, to shorten workday); ROEDIGER & FONER, *supra* note 4, at 244-45 (noting that demand for shorter work hours was great during 1930s).

work efficiency.²⁶⁷ In fact, a recent study by the Japanese Government found that Japanese managerial employees work less productively than their counterparts in other advanced economies in part because they work excessive hours.²⁶⁸ Because excessive hours tend to lower productivity, the U.S. economy would benefit if managers and professionals had more time off, during which time other, rested employees performed the work.²⁶⁹ Upon returning to their jobs after comp time, managers and professionals would approach work fresh, with both more vitality and a greater ability to produce for the employer.²⁷⁰

Regulating the hours of managerial and professional employees would also benefit less privileged workers by reducing pressure on the rank and file to work excessive hours. To a certain extent, the long hours managers and professionals work create pressure on employees lower in the hierarchy to increase their hours.²⁷¹ This downward pressure most directly affects those who work closely with managers and professionals, such as secretaries, clerical workers, and paraprofessionals.²⁷² Eventually, the pressure spreads throughout an organiza-

267. See Ritchie, *supra* note 233, at 449 (noting that patient care suffers when medical residents work long hours because "fatigued residents make more errors than those who are well-rested"); Kilborn, *supra* note 121, at E3 (remarking that excessive hours of work do not benefit economy because after certain number of hours on job, "many people are just spinning their wheels," and suggesting that long work hours are leading to low morale because "the quickening pace . . . is burning them out"); Ford S. Worthy, *Executive Life: You're Probably Working Too Hard*, FORTUNE, Apr. 27, 1987, at 133, 140 (commenting that "[o]verdoing it is not only harmful to your health but often hazardous to the quality of your work. There's a point at which anyone's performance starts to fade.").

268. See SCHOR, *supra* note 4, at 154. The study revealed that Japanese office employees work almost six weeks more per year than those in the United States. *Id.* A bill to reduce the workweek is currently pending before the Japanese parliament. *Bill Would Encourage Japanese to Work Less*, Daily Lab. Rep. (BNA) No. 42, at A17-A18 (Mar. 5, 1993).

269. See Diane S. Rothberg, *Part-Time Professionals: The Flexible Work Force*, PERSONNEL ADMIN., Aug. 1986, at 29, 31-32 (suggesting use of part-time professionals to relieve those full-time professionals, especially women with children, who need reduced hours "to recharge their energies and motivation"). Of course, regulating the work hours of managers and professionals might harm the short-term profitability of individual firms, due to the increased costs associated with increased hiring. But as Robert Reich amply demonstrates, it is workers' productivity, not the profitability of firms, that ultimately determines a nation's standard of living. See REICH, *supra* note 136, at 244.

270. See Rothberg, *supra* note 269, at 32 (explaining that reduced work hours will enable many professionals to bring renewed energy and enthusiasm to jobs).

271. See KANTER, *supra* note 4, at 269.

272. See Kilborn, *supra* note 121, at E3 (noting that because executives and professionals are working longer hours, "the secretaries and clerks who tail alongside them" are increasingly working longer than 40-hour weeks); see also Jennings, *supra* note 79, at 327 (remarking that "[t]o be able to share in the tasks and experiences of the professional, the paraprofessional must be permitted to work with the professional, not only during work hours, but also during those times when the professional is required to work overtime").

tion, even to blue-collar workers.²⁷³ As Juliet Schor notes, in recent years "the longer schedules penetrated far down the corporate ladder, through middle management, into the secretarial pool, and even onto the factory floor itself."²⁷⁴ Limiting the hours of managers and professionals would reduce the pressure on lower-level employees to work longer hours and would thereby help alleviate the stress excessive work places on these workers.²⁷⁵

Amending the FLSA as this Article proposes might also spur those remaining professionals still protected by the NLRA to engage in collective bargaining, the encouragement of which constitutes one of the central tenets of this country's labor policy.²⁷⁶ Regulating the work hours of professional employees might promote their unionization by countering the ideology of professionalism, which stands as a principal obstacle to the unionization of professionals.²⁷⁷ The ideology of professionalism teaches professionals to cherish their privileged status²⁷⁸ and to give unstintingly of their time to their employer.²⁷⁹ FLSA regulation would undermine that aspect of the professional ideology that demands unlimited work hours. Once

273. See KANTER, *supra* note 4, at 273 (discussing increased pressures on blue-collar workers resulting from business reform strategies undertaken in 1970s and 1980s).

274. SCHOR, *supra* note 4, at 20.

275. See SCHOR, *supra* note 4, at 10-13 (discussing impact of excessive hours on rank-and-file employees, and, in particular, citing debilitating levels of stress, sleep deficits, and neglect of family as among health and social problems generated by overwork). The long history of efforts by the labor movement to shorten the workday, see *supra* notes 30-32 and accompanying text, shows the widespread desire among the rank and file to avoid excessive hours.

276. See generally 29 U.S.C. § 151 (1988) ("It is declared hereby to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining . . ."). For a discussion of the benefits of collective bargaining, including more equitable distribution of income and increased efficiency, see RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 14-17 (1984). See also Note, *One Strike and You're Out? Creating an Efficient Permanent Replacement Doctrine*, 106 HARV. L. REV. 669, 676-78 (1993) (discussing how unions benefit economy).

277. See Levitan & Gallo, *supra* note 193, at 35-36. According to Levitan and Gallo:

The American labor movement has had limited success in enticing professional organizations to join the house of labor and individual private sector association members have, with few exceptions, shunned collective bargaining. . . . The issue of "professionalism" remains a stubborn impediment to bargaining by associations whose memberships are concentrated in the private sector. The stumbling block is that many professionals believe that bargaining would cause conflict between managers and professionals. Proponents of bargaining counter that some conflict of interest is inherent in an employment relationship, and that professionals are hurting themselves in believing otherwise. But beyond a declaration in favor of collective action, the AFL-CIO has not undertaken a serious drive to organize professionals, possibly reflecting a belief that such an attempt would be futile.

Id.; see also Strauss, *supra* note 113, at 522-24 (discussing problems of engineering union's effort to organize).

278. See LARSON, *supra* note 237, at 236 (describing ideology of professionalism).

279. See HARRIMAN, *supra* note 245, at 86 (noting that despite professionals' desire to spend more time away from work, professionalism dictates that their time belongs to employer).

professionals learn that, despite the ideology of professionalism, they have a right not to work excessive hours, they might seek further rules regulating the workplace and might even decide to seek a collective bargaining agent.²⁸⁰

Moreover, simply having managerial and professional employees spend more time away from the workplace might promote their unionization. Commentators have suggested that one of the effects, if not the purposes, of requiring long hours of managerial and professionals is to create an attachment to the job which trumps other aspects of the employees' lives. Diane Margolis, in her study of managerial employees, writes that corporate employers create "work situations that put the corporation into competition with other institutions or persons who might lay claim on the man. These competitors . . . are in fact intentional enforcers or tests of the man's loyalty to the corporation."²⁸¹ In a similar view, Karen Ritchie writes, concerning the medical profession, that "one [possible] purpose of residency is to limit [the resident's] interaction with others enough so that the resident is forced to identify primarily with the profession and to absorb its values."²⁸² Government-mandated time off would give the overworked manager or professional some psychological distance from the job and from the employer, a psychological distance that is often necessary before an employee can become receptive to the idea of unionization.

The unionization of professionals, and of public-sector managerial employees in jurisdictions where allowed, would provide a boost to the ailing labor movement.²⁸³ The presence of professionals and managers not only would augment the ranks of the labor movement, it would infuse the movement with highly skilled and educated individuals who would be valuable allies to their trade-union colleagues.²⁸⁴

280. Cf. ARONOWITZ, *supra* note 110, at 306 (noting "mild tendency" among professionals to unionize in industries where manual workers have organized).

281. MARGOLIS, *supra* note 120, at 63; see also LARSON, *supra* note 237, at 236 (noting that universal norm for professionals and managers is to be committed and loyal to organization).

282. Ritchie, *supra* note 233, at 451.

283. See PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 9-10 (1990) (noting that by 1990, union membership had declined to such extent that unions represented approximately same proportion (15%) of private-sector workforce as when Congress enacted NLRA in 1935). See generally MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES 115-52 (1987) (discussing decline in unionization due to changes in economy and in social composition of labor force).

284. See FREEMAN & MEDOFF, *supra* note 276, at 244-45 (suggesting that white-collar workers could begin revival of labor movement).

E. *The Feasibility of Regulating the Work Hours of Managerial and Professional Employees*

One could attempt to justify the FLSA's managerial-professional exemption by arguing that regulating the work hours of such employees would simply not be feasible. Concededly, an *absolute ban* on overtime work by managerial and professional employees would not work. Many tasks performed by managers and professionals cannot be confined to certain fixed hours, but frequently spill over into evenings and weekends.²⁸⁵ For example, in a case concerning medical interns and residents, the NLRB wrote that "[u]nfortunately, medical emergencies do not always conveniently occur between the hours of 9 a.m. and 5 p.m., Monday through Friday."²⁸⁶ Moreover, these tasks usually do not permit an easy substitution of personnel; efficiency usually demands that the same individual who begins the task sees it through to completion. Again, medical interns and residents serve as an example: "continuity of care is important—the best person to care for [patients] at night is the one who has been providing that care during the day."²⁸⁷

While an absolute ban on overtime would be unworkable, the FLSA, as it now stands, does not impose such a ban; it simply creates a financial disincentive to working covered employees beyond forty hours per week. Nor would the comp time amendment proposed here ban overtime work by managerial and professional employees. The amendment would allow an employer to demand overtime, but it would also require the employer to provide the employee with an equivalent amount of time off at some later date.

If the FLSA regulated the hours of managerial and professional employees, the employer would need to record the hours that such employees work to determine the amount of overtime they perform. This recordkeeping obligation, while an additional burden on employers, would not constitute an obstacle to the amendment proposed in this Article. The FLSA now requires employers to record the hours worked by covered employees.²⁸⁸ For those managers and professionals who work standard shifts, the recordkeeping burden would be slight; the employer would only need to note any additional

285. See Kilborn, *supra* note 121, at E3 (reporting that approximately 57% of surveyed executives average 6-20 hours in excess of 40-hour workweek).

286. St. Clare's Hosp. & Health Care Ctr., 229 N.L.R.B. 1000, 1003 (1977).

287. Ritchie, *supra* note 233, at 448.

288. See 29 U.S.C. § 211(c) (1988) (mandating that "[e]very employer subject to any provision of this chapter . . . shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment").

hours worked beyond the employee's shift. Recordkeeping would be more difficult for those, such as college professors, who do not work any set hours in any set place. Nonetheless, such employees could simply track their own hours—spent researching, writing, and meeting with others, for example—just as private-sector lawyers do now, and inform the employer of the hours they have worked.²⁸⁹

Unscrupulous managerial and professional employees might lie to their employers about the hours that they have worked and claim overtime compensation to which they are not entitled.²⁹⁰ Monitoring the hours worked by managers and professionals to prevent the "theft" of overtime compensation could pose a problem for employers because such employees often work beyond the range of supervision—while on business trips, for example. Moreover, much of what managers and professionals do constitutes mental labor, so even when they work within the employer's purview, their work, unlike that of machine operators, for instance, takes place invisibly.²⁹¹ Arguably, if managers and professionals inflated their work hours, they could cheat their employers.

This possibility fails, however, to justify maintaining the Act's managerial-professional exemption. Many employees now covered by the Act conceivably can cheat when reporting their hours. Seamstresses²⁹² or telemarketing employees,²⁹³ who work at home, or drivers on the road,²⁹⁴ for example, work beyond the scope of their employers' immediate supervision. Congress regulated the hours of such employees despite the prospect of cheating. Furthermore,

289. For examples of how lawyers keep records of hours worked, see *Palila v. Hawaii Dep't of Land & Natural Resources*, 118 F.R.D. 125, 127 (D. Haw. 1987); *In re Photon, Inc.*, 26 B.R. 693, 698 (Bankr. D. Mass. 1982). For a judicial finding regarding the hours worked by a professor, see *Savinger v. United States*, 18 Cl. Ct. 704, 707 (1989) ("[W]hether Professor Savinger was engaged in coaching, recruiting, teaching, coordinating the efforts of his colleagues, or supervising the intramural activities, his time spent . . . was in excess of 40 hours/week.") (footnote omitted).

290. *But cf. Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946) (noting that employee seeking to obtain overtime compensation under FLSA "has the burden of proving that he performed work for which he was not properly compensated").

291. See *Savinger*, 18 Cl. Ct. at 707 n.3 (noting that "[t]he professional nature of Professor Savinger's positions understandably makes some of his job aspects . . . not as readily identifiable as if he were working on an assembly line").

292. See, e.g., *Silent Woman, Ltd. v. Donovan*, 585 F. Supp. 447, 452 (E.D. Wis. 1984) (holding that seamstresses working at home were employees under FLSA and were responsible for setting and recording weekly hours).

293. See, e.g., *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1389 (3d Cir. 1985) (holding that telemarketing researchers, conducting telephone solicitations at home, were nonexempt employees under FLSA).

294. See, e.g., *Wirtz v. Osceola Farms Co.*, 372 F.2d 584, 587 (5th Cir. 1967) (holding that tractor or semitrailer tractor drivers transporting natural sugarcane from independent growers are covered by FLSA).

managers and professionals would have a strong incentive not to inflate their reported work hours because inflating their hours would create the impression that it took them a long time to perform their assigned work. Such apparently low productivity would displease the employer, and displeasing the employer is something that managers and professionals, most of whom are eager for career advancement, try to avoid.

Even if managers and professionals did occasionally cheat, such cheating probably would not outweigh the cheating committed by employers. In nonunion workplaces where employees do not feel secure enough to demand their due, employers often deny employees benefits to which they are legally entitled.²⁹⁵ In particular, many employers deny their employees overtime pay required by the FLSA.²⁹⁶ Such cheating by employers would likely occur even regarding the FLSA overtime rights of managerial and professional employees.

In addition to simply lying about their work hours in order to obtain comp time, managers and professionals might manipulate the pace of their work. By definition,²⁹⁷ managers and professionals enjoy at least some discretion in determining how to perform their work, including when and how long to work on a particular project.²⁹⁸ By working more slowly, a manager or professional could conceivably generate comp time because at the slower pace, completion of a given task might require work beyond the standard workweek. Clearly, such a deliberate manipulation of the pace of work, in order to generate comp time, would be unfair to employers.

This potential problem, however, also fails to justify the managerial-professional exemption. First, many employees now covered by the Act have some control over the pace of their work,²⁹⁹ yet the possibility of such employees manipulating their workspeed did not

295. See SCHOR, *supra* note 4, at 143; WEILER, *supra* note 283, at 157-59.

296. See EHRENBERG & SCHUMANN, *supra* note 47, at 82-83 (asserting "highly conservative estimate" that 10% of employers fail to comply with Act's overtime provision); *Overtime Violators?*, WALL ST. J., Mar. 9, 1993, at A1 (reporting that approximately 46% of 600 companies surveyed denied secretaries overtime pay, even though 27% of companies believed that at least some of these secretaries were not exempt from FLSA).

297. See 29 C.F.R. § 541.107(a) (1992) (listing "customary exercise of discretion" as requirement of FLSA's professional employee exemption); *id.* § 541.305(a), (b) (noting that professional employee status requires "consistent exercise of discretion and judgment").

298. According to the U.S. Department of Labor's Wage and Hour Division, discretion "implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision." 29 C.F.R. § 541.207(a) (1992).

299. See, e.g., *Dalheim v. KDFW-TV*, 706 F. Supp. 493, 496-98 (N.D. Tex. 1988) (holding that FLSA covers television reporters despite their control and influence over news story), *aff'd*, 918 F.2d 1220 (5th Cir. 1990).

stop Congress from providing them with coverage under the FLSA. Second, given that most managerial and professional employees now work excessive hours,³⁰⁰ attempts by such employees to stretch their work over a longer period seems unlikely. Indeed, it would seem particularly pointless for employees to work extra hours deliberately if the FLSA simply mandated that their employers compensate them for those extra hours with an equivalent amount of time off, as this Article advocates. Finally, as mentioned previously with respect to cheating on hours, most managers and professionals probably would not deliberately slow the pace of their work because low productivity would displease their employers and thus hurt their career opportunities.

Another possible objection to providing FLSA coverage to managers and professionals would be that employers might lack control over the amount of comp time such employees earn. For example, if a particular project unexpectedly became more time-consuming and required an employee to work overtime, the employer, under this proposal, would have to provide that employee with comp time at some later date, even if the employer had not planned to provide the employee with time off. The possibility of such occurrences, however, does not justify failing to amend the FLSA.³⁰¹ Any extra work performed by an employee on a given project presumably benefits the employer, particularly if the employer bills the customer or client based on the number of hours the employee worked on the project. Under current law, it is the managerial or professional employee who bears the risk that a given task will take extra hours to complete because the employee receives no additional compensation for the extra hours. The amendment proposed in this Article would properly shift that risk to the employer, the party that stands to gain from the extra work.

Furthermore, the employer would not completely lack control over the amount of comp time earned. If the employer were truly determined to deny a particular employee comp time, the employer could order the employee to cease working on the task and assign the task to another employee, or contract with another firm to complete the work. In short, no overtime work would be compensable unless

300. See *supra* text accompanying notes 117-24.

301. It is relevant to note that federal employees may receive premium pay even for those overtime hours which "cannot be controlled administratively." 5 U.S.C. § 5545(c)(2) (1988); see, e.g., *Battenfield v. United States*, 648 F.2d 1194, 1196 (9th Cir. 1980) (holding that INS border patrol agents are entitled to "administratively uncontrollable" overtime compensation for overtime hours spent monitoring and responding to criminal behavior, even though hours required for such work could not "be reasonably predicted").

approved by the employer.³⁰²

In evaluating the feasibility of regulating the work hours of managers and professionals, it is helpful to note that such regulation already exists. In Germany, Sweden, and certain Canadian provinces, for example, the statute governing work hours applies to professionals as well as nonprofessionals.³⁰³ Moreover, in the United States, certain employers, by agreement with their employees, provide comp time to their professional workers. Both the Legal Aid Society of New York and the National Labor Relations Board, for example, provide comp time to their staff attorneys who perform certain assignments outside of regular working hours.³⁰⁴ Finally, one should note that federal legislation requiring employers to grant managerial and professional employees time off already exists, albeit in limited circumstances: the Family and Medical Leave Act of 1993, which provides employees the right to twelve weeks leave from work to care for a newborn child or sick family member,³⁰⁵ contains no exemption for managerial and professional employees.³⁰⁶

IV. PROPOSAL

The regulation of managers' and professionals' work hours would be feasible and would produce tangible benefits.³⁰⁷ In the absence of a legitimate reason for failing to do so, Congress should enact such regulation. This Article does not propose, however, that the FLSA require employers to pay managerial and professional employees extra wages for overtime hours worked, as the Act now requires for covered employees. Rather, the FLSA should require employers to compensate managers and professionals for hours worked beyond a statutorily

302. See *Gaines v. United States*, 158 Ct. Cl. 497, 498 (1962) (noting that, for overtime work to be compensable, employer must authorize it).

303. See 5 *INTERNATIONAL ENCYCLOPEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS* 66, 83 (1987) (discussing work hours limitations in West Germany and Sweden); GARY E. MURG & JOHN C. FOX, *LABOR RELATIONS LAW: CANADA, MEXICO AND WESTERN EUROPE* 175, 180 (1978) (observing that limitations on work hours apply to all employees in Canadian provinces of New Brunswick, Ontario, and Quebec and in Canada's Northwest Territories and Yukon Territory).

304. See 1988-1990 Collective Bargaining Agreement Between the Legal Aid Society and the Association of Legal Aid Attorneys, District 65, U.A.W., at 37-38 (on file with *The American University Law Review*); 1989-1992 Agreement Between the General Counsel of the National Labor Relations Board and the NLRB Union, Covering Field Office Professional Employees, at 151 (on file with *The American University Law Review*) (providing "compensatory leave" for overtime hours worked).

305. See Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 102(a)(1), 107 Stat. 6, 9 (1993).

306. See § 101(2), 107 Stat. at 7-8 (defining eligible employees for medical and family leave).

307. See *supra* text accompanying notes 263-70 (discussing benefits associated with regulation of managerial-professional work hours, such as reduced unemployment, increased productivity, and improved quality of life).

defined standard workweek by providing them with comp time.

Compensating overworked managers and professionals with comp time instead of overtime pay has advantages in addition to those already discussed.³⁰⁸ First, it would probably save employers money because the high wages earned by most managers and professionals³⁰⁹ would make overtime rates prohibitive. Indeed, it was precisely in order to save public employers money that Congress allowed state and local governments to meet their FLSA obligations by providing their employees with comp time rather than with overtime pay.³¹⁰ While reducing the financial burden on employers, the provision mandating comp time would not create a hardship for most managerial and professional employees, because, as noted, such employees are generally well-paid.³¹¹

Mandating comp time rather than overtime pay would also help ensure the success of the desired goal: reducing the work hours of managerial and professional employees. If the FLSA required overtime pay, employers might still choose to continue to work their managers and professionals excessive hours and simply incur the cost of the overtime pay. The promise of overtime pay at premium rates might even entice many managers and professionals, interested in padding their paychecks, to *increase* their hours of work.³¹² Such an increase would only aggravate problems such as unemployment for other managers and professionals. Mandating comp time for managerial and professional employees would help ensure that their

308. See *supra* notes 271-84 and accompanying text.

309. See *supra* notes 139-43 and accompanying text (indicating that managers and professionals typically receive higher salaries than other types of employees).

310. See Todd D. Steenson, Note, *The Public Sector Compensatory Time Exception to the Fair Labor Standards Act: Trying to Compensate for Congress's Lack of Clarity*, 75 MINN. L. REV. 1807, 1844 (1991) (explaining that congressional enactment of comp time was designed to reduce state's burden of complying with overtime requirements of FLSA); see also S. REP. NO. 159, 99th Cong., 1st Sess. 8 (1985), reprinted in 1985 U.S.C.C.A.N. 651, 655-56 ("The Committee recognizes that the financial costs of coming into compliance with the FLSA—particularly the overtime provisions of section 7—are a matter of grave concern to many states and localities."). The provision allowing such payment of comp time can be found at 29 U.S.C. § 207(o)(1) (1988).

311. See *supra* notes 139-43 and accompanying text (noting that managerial and professional employees generally earn higher pay than other employees). As noted above, not all managerial-professional employees enjoy high wages. See *supra* notes 144-45 and accompanying text. Those that receive low wages should receive extra pay, rather than time off, for overtime hours worked. To ensure that these employees are entitled to overtime pay, the minimum salary levels in the Wage and Hours regulations, which are now scandalously low, should be raised to such levels that no employee earning significantly less than the average managerial-professional wage could be deemed an executive, administrative, or professional employee under the Act. See *supra* notes 63-64 and accompanying text (discussing minimum salaries for executive, administrative, and professional employees).

312. See, e.g., SCHOR, *supra* note 4, at 141 (noting that overtime provision of FLSA—originally designed to reduce excessive hours—now frequently encourages covered employees to work long hours in order to maximize their pay).

total work hours decrease.³¹³

At least two other commentators have recently called for comp time for managerial and professional employees. Rosabeth Kanter, in her study of modern American business, urges companies voluntarily to give their managers and professionals time off in order to "make space for" their personal lives.³¹⁴ Juliet Schor goes beyond suggesting that employers voluntarily provide such periods of "relaxation and renewal," and calls for a legal mandate requiring employers to provide their salaried employees with comp time.³¹⁵

The proposal in this Article differs from Schor's recommendation, however, in that Schor would allow the employer to determine the length of the standard workweek for managerial and professional employees.³¹⁶ This Article proposes that Congress, not employers, establish a standard workweek, hours beyond which would be deemed overtime. If employers could determine the length of the standard workweek, they could use their superior bargaining power³¹⁷ to set excessively long standard workweeks. Such overly long standard workweeks would effectively deny employees comp time because all the employees' work hours would fall within the employer-determined standard week. The length of the standard workweek, therefore, should be set by legislation. Congress, however, need not be insensitive to the needs of employers. Congress could, and probably should, set the standard workweek at greater than the forty hours now set for covered employees. Moreover, different standard workweeks could be created for different types of managers and professionals.

CONCLUSION

In response to increased competition in the American economy, employers in recent years have reduced their managerial and

313. See SCHOR, *supra* note 4, at 143 (noting that one byproduct of shifting toward comp time would be reduction in number of hours worked by employees).

314. KANTER, *supra* note 4, at 359. Kanter suggests that one cannot expect many people or companies to tolerate reduced hours every day or every week. Instead, time-out should be organized around . . . the rhythms of projects. Periods of intense work should be matched by periods of relaxation and renewal. . . . [T]hese moments should mark a clear ending of one intense effort and a pause for personal life before beginning the next.

Id.

315. See SCHOR, *supra* note 4, at 142-43 (arguing for comp time instead of overtime pay for hours worked in excess of company-determined and government-enforced standard).

316. See SCHOR, *supra* note 4, at 142.

317. See *supra* notes 181-90 and accompanying text (explaining that managers and professionals lack bargaining power relative to their employers).

professional staffs while demanding excessive hours of the managers and professionals that they continue to employ. These measures have not only aggravated white-collar unemployment, but have sharply reduced the amount of time that employed managers and professionals can devote to their families and other nonwork pursuits. In particular, employers' demands for excessive hours have made it exceedingly difficult for women with family responsibilities to maintain managerial or professional jobs, let alone to advance in the management hierarchy.

No good reason exists to maintain the FLSA's managerial-professional exemption. Clearly, no constitutional restraint would prevent regulating the work hours of managers and professionals. Moreover, the notion that managerial and professional employees have no need for such regulation rests on a pair of misconceptions: first, that managers and professionals have sufficient bargaining power to limit their hours; and second, that their relatively high pay and superior benefits make more time away from the job unnecessary. Regulating the work hours of managers and professionals would impose a cost on employers, but the overall benefits to be gained, such as reducing unemployment, increasing productivity, and enriching the lives of affected employees, would more than justify the increased costs.

Requiring comp time for managers and professionals, instead of overtime pay, would be the better legislative solution. Comp time would probably impose fewer costs on employers than would overtime pay, and it would ensure that the excessive hours worked by managerial and professional employees are in fact reduced. Accordingly, Congress should amend the FLSA to require employers to provide time off to their managerial and professional employees for hours worked beyond a statutorily defined standard workweek.

