

CLOSING THE GAP
BETWEEN REICH AND POOR:
WHICH SIDE IS THE
DEPARTMENT OF LABOR ON?

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From the socialistic point of view, our entire industrial system might be made to appear as one of unconscionable exploitation, but it is obvious that such a view would be of no value for practical legislative or judicial purposes. Given our capitalistic system as it is, exploitation or oppression as a subject of legislation must have reference to things not implied in the prevailing economic constitution.¹

In establishing the Department of Labor (DOL) in 1913,² Congress stated that its purpose “shall be to foster, promote, and develop the welfare of the wage earners of the United States.”³ The new Secretary of Labor in the Clinton Administration now has an opportunity to undo the damage done by a dozen years of de facto deregulation of labor standards by proemployer administrations. A test of the extent to which Robert Reich’s program differs from his predecessors’ presents itself in one small yet significant area in which he has as yet taken no initiative—employers’ efforts

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1. ERNST FREUND, *STANDARDS OF AMERICAN LEGISLATION* 121-22 (2d ed. 1965).

2. An Act to Create a Department of Labor, ch. 141, § 1, 37 Stat. 736 (1913) (codified at 29 U.S.C. § 551 (1988)).

3. *Id.* The rather limited ambit of the federal Department of Labor at that time can be gauged by the dogmatic view of Woodrow Wilson, the first President to appoint a Secretary of Labor, as expressed in a book that he had published as a professor but reprinted several times during his two terms, that Congress had no power to “regulate the conditions of labor in field and factory Back of the conditions of labor in the field and in the factory lie all the intimate matters of morals and of domestic and business relationship which have always been recognized as the undisputed field of state law” The opposed view he called “absurd extravagancies of interpretation.” WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 171, 179 (1908); see also Jonathan Grossman, *The Origin of the U.S. Department of Labor*, MONTHLY LAB. REV., Mar. 1973, at 3, 7. On Wilson’s tergiversations with regard to federal child labor legislation, see ARTHUR S. LINK, *WOODROW WILSON AND THE PROGRESSIVE ERA: 1910-1917*, at 59, 226-27 (1963).

to compel workers to work overtime without additional compensation by labeling them salaried managers.⁴

This managerial technique is particularly widespread in retail and service establishments, such as so-called convenience stores and fast-food restaurants, which, in general, prosper by virtue of paying the minimum wage or less. The retail and service industries, according to the DOL, alone account for two-thirds of all employees who are owed back minimum wages and half of those owed overtime wages.⁵ In addition, retail and service employers are unique in lawfully employing nearly 90,000 full-time students at 85 percent of the minimum wage.⁶

The imposition of mandatory unpaid overtime on restaurant workers who double as low-level supervisors is the paradoxical pendant to the proliferation of contingent employment in an industry whose "extraordinary profits . . . st[an]d like a giant inverted pyramid on the pinpoint of minimum wages."⁷ Recent Bureau of Labor Statistics wage surveys confirm that the minimum wage is the median wage in the fast-food industry.⁸ Even in large urban areas in the Northeast and West such as Philadelphia and San Francisco, the median wage is only marginally higher than the minimum wage of \$4.25⁹—\$4.50 and \$4.75 respectively.¹⁰ Working side by side

4. These efforts can be distinguished from the more blatant practice of requiring hourly employees to work overtime "off the clock." On the widespread use of this unlawful practice in the Food Lion chain, see *Problems in the Labor Department's Enforcement of Wage and Hours Laws: Hearings Before the Employment & Housing Subcomm. of the Sen. Comm. on Government Operations*, 102d Cong., 2d Sess. (1992); see also Reich v. Waldbaum, Inc., 833 F. Supp. 1037 (S.D.N.Y. 1993) (discussing this practice in the Waldbaum grocery stores).

5. U.S. EMPLOYMENT STANDARDS ADMIN., MINIMUM WAGES AND MAXIMUM HOURS UNDER THE FAIR LABOR STANDARDS ACT 17 tbl. 1, 19 tbl. 3 (1991) (data for 1990).

6. 29 U.S.C. § 214(b) (1988); U.S. EMPLOYMENT STANDARDS ADMIN., *supra* note 5, at 17 tbl. 1, 19 tbl. 3 (showing that 89,000 students were employed in 1989). On the federal lobbying efforts of McDonald's on behalf of subminimum wages for its employees (the so-called McDonald's Amendment), see *Bill to Repeal Subminimum Wage Provisions for Full-Time Students: Hearing on H.R. 12596 Before the Subcomm. on Labor Standards of the House Comm. on Education & Labor*, 94th Cong., 2d Sess. 9-12 (1977) (testimony of Rep. O'Hara); George Lardner, Jr., *Business Gets Cold Feet on Subminimum Wage*, WASH. POST, Mar. 20, 1981, at A1; JOHN F. LOVE, MCDONALD'S: BEHIND THE GOLDEN ARCHES 360-61, 369 (1986). On further efforts by fast-food restaurants to use students at 85 percent of minimum wage, see Paul Ingrassia, *Fast-Food Chains Act to Offset the Effects of Minimum-Pay Rise*, WALL ST. J., Dec. 22, 1977, at 1, 13.

7. MAX BOAS & STEVE CHAIN, *BIG MAC: THE UNAUTHORIZED STORY OF MCDONALD'S* 81, 95 (1977); see also WILLIAM T. ALPERT, *THE MINIMUM WAGE IN THE RESTAURANT INDUSTRY* (1986).

8. U.S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL COMPENSATION SURVEY: PAY ONLY: BELL COUNTY, TX—FAST FOOD RESTAURANTS (1993); U.S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL COMPENSATION SURVEY: PAY ONLY: HARRISON COUNTY, MS—FAST FOOD RESTAURANTS (1993); U.S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL COMPENSATION SURVEY: PAY ONLY: PHILADELPHIA COUNTY—FAST FOOD RESTAURANTS (1993); U.S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL COMPENSATION SURVEY: PAY ONLY: SAN FRANCISCO COUNTY—FAST FOOD RESTAURANTS (1993).

9. 29 U.S.C. § 206(a) (1988 & Supp. IV 1992).

10. See sources in note 8.

with upwards of 3,500,000 nonunionized students and other largely young and female part-time employees who are paid the minimum wage for minimal hours without any additional nonstatutory social wage supplements are so-called assistant managers.¹¹ "In many fast-food restaurants . . . sixteen-year-old employees are supervised by eighteen- or nineteen-year-old 'managers.'"¹² In exchange for a fixed weekly wage that may equate to less than the minimum wage with statutory overtime, assistant managers are required to perform both supervisory and grunt work for as many as seventy to eighty hours per week.¹³

If, for example, such a worker is paid a fixed weekly wage of \$260 for a workweek that fluctuates between forty and seventy hours, her hourly wage could range from \$6.50 to \$3.71. Even at the minimum wage of \$4.25 per hour, for a seventy-hour workweek she would be entitled to \$361.25, which includes the statutory 50 percent premium for all hours in excess of forty.¹⁴ By paying a fixed weekly wage, an employer can thus save more than \$100 per week.¹⁵ Litigation seeking back minimum and overtime

11. See, e.g., *Marshall v. Burger King Corp.*, 504 F. Supp. 404, 407-08 (E.D.N.Y. 1980), *aff'd*, 675 F.2d 516 (2d Cir. 1982); IVAN CHARNER & BRYNA FRASER, *FAST FOOD JOBS* 6, 35-36 (1984); ROBIN LEIDNER, *FAST FOOD, FAST TALK: SERVICE WORK AND THE ROUTINIZATION OF EVERYDAY LIFE* 44-85 (1993); ESTER REITER, *MAKING FAST FOOD: FROM THE FRYING PAN INTO THE FRYER* 159-60 (1991) (discussing the sole successful union organizing effort in the United States of one Burger King in Detroit); *Employee Relations in the Fast Food Industry*, RETAIL/SERVICES LAB. REP., June 10, 1985, at CC-1 (Spec. Supp.); Lawrence Katz & Alan Krueger, *The Effect of the Minimum Wage on the Fast-Food Industry*, 46 INDUS. & LAB. REL. REV. 6, 7 (1992); Alan B. Krueger, *Ownership, Agency, and Wages: An Examination of Franchising in the Fast Food Industry*, 106 Q.J. ECON. 75, 82-83 (1991); *SEIU Fails to Organize Ontario McDonald's*, DAILY LAB. REP., Mar. 1, 1994, at A-12 (noting that none of the 9,700 McDonald's restaurants in the United States is organized).

12. ELLEN GREENBERGER & LAURENCE STEINBERG, *WHEN TEENAGERS WORK: THE PSYCHOLOGICAL AND SOCIAL COSTS OF ADOLESCENT EMPLOYMENT* 81 (1986).

13. Managers at one chain of combination gasoline stations, convenience stores, and restaurants, who were required to live on the premises, alleged that they worked as many as 120 hours per week. As a result, their fixed salaries amounted to less than the minimum wage. *Murray v. Stuckey's, Inc.*, 939 F.2d 614, 616 (8th Cir. 1991), *cert. denied*, 110 S. Ct. 970 (1992).

14. 29 U.S.C. § 207(a)(1) (1988).

15. In fact, the employer would be saving even more because the overtime wage should be calculated on the basis of the employee's "regular rate," which in this case would be calculated by dividing the weekly salary of \$260 by the regular number of work hours per week, 40, for a "regular rate" of \$6.50 per hour. This higher figure results from the fact that the employer should not be permitted to avail itself of the "fixed salary fluctuating workweek" regulation, because its fixed salary does not guarantee the minimum wage for the longest workweek. 29 C.F.R. § 778.114(a) (1993). On the perverse consequences of such "bandit overtime," which authorizes employers to pay employees less per overtime hour the more overtime they work, see *Condo v. Sysco Corp.*, 1 F.3d 599 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1051 (1994) (holding that the fluctuating workweek is based on a permissible construction of the Fair Labor Standards Act); Christopher L. Martin, Robert J. Aalberts & Lawrence S. Clark, *The Fair Labor Standards Act and the Fluctuating Workweek Scheme: Competitive Compensation Strategy or Worker Exploitation?*, 44 LAB. L.J. 92 (1993) (arguing that the fluctuating workweek strategy negates the intent of the Fair Labor Standards Act); Telephone Interview with Nick Clark, Assistant General Counsel, United Food and Commercial Workers (Nov. 23, 1993) (labeling this practice "bandit overtime").

wages¹⁶ suggests dissatisfaction with these “chiseling” practices among workers¹⁷ rather than a “voluntary exchange” “provid[ing] gains from trade to both sides of the bargain.”¹⁸

How has the law come to condone and even facilitate such perverse compensation schemes, which, especially in the South and nonmetropolitan areas,¹⁹ amount to “payment to supervisory personnel up to assistant manager levels [of] below subsistence-level income”?²⁰ This question has become increasingly important as corporate bureaucratic controls have evolved, making possible “a vastly greater stratification of the firm’s workforce,” in which a “rapidly growing number of employees . . . supervise other workers”²¹

I

ORIGINS OF AN EXCLUSION

The Fair Labor Standards Act was designed “to extend the frontiers of social progress” Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to . . . frustrate the announced will of the people.²²

Ever since the federal wage and hour law (the Fair Labor Standards Act or FLSA) was enacted in 1938, it has, in a section entitled “Exemptions,” excluded from its protection “any employee employed in a bona fide executive . . . capacity . . . (as such terms are defined and delimited by regulations of the [Wage and Hour] Administrator).”²³ The choice of the term “Exemptions” as the title of the exclusions provision of the FLSA is

16. See, e.g., *Lyles v. K-Mart Corp.*, 519 F. Supp. 756 (M.D. Fla. 1981).

17. In his message to Congress in support of minimum wage legislation, President Roosevelt stated, “A self-supporting and self-respecting democracy can plead . . . no economic reason for chiseling workers’ wages” S. REP. NO. 884, 75th Cong., 1st Sess. 2 (1937).

18. Richard A. Epstein, *The Moral and Practical Dilemmas of an Underground Economy*, 103 YALE L.J. 2157, 2174 (1994).

19. U.S. DEP’T OF LABOR, EARNINGS DATA PERTINENT TO A REVIEW OF THE SALARY TESTS FOR EXECUTIVE, ADMINISTRATIVE AND PROFESSIONAL EMPLOYEES AS DEFINED IN REGULATIONS, PART 541, at 3, 30 tbl. 13, 32 tbl. 15 (1969).

20. CHRISTOPHER E. GUNN & HAZEL D. GUNN, *RECLAIMING CAPITAL: DEMOCRATIC INITIATIVES AND COMMUNITY DEVELOPMENT* 27 (1991).

21. RICHARD C. EDWARDS, *CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY* 135 (1979).

22. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (quoting President Roosevelt’s May 24, 1934, message to Congress on the minimum wage bill).

23. Fair Labor Standards Act, ch. 676, § 13(a)(1), 52 Stat. 1060, 1067 (1938) (codified as amended at 29 U.S.C. § 213(a)(1) (1988 & Supp. IV 1992)). The current version reads, “as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor], subject to the provisions of subchapter II of chapter 5 of Title 5 [the Administrative Procedure Act].” 29 U.S.C. § 213(a)(1) (1988 & Supp. IV 1992).

curious. An exemption is “[f]reedom from a general duty or service; immunity from a general burden, tax, or charge.”²⁴ Exclusions, in contrast, refer to the denial of a benefit or other desirable goods.²⁵ It is therefore the employer who is exempt—from the burden of paying the minimum wage or mandatory overtime. Conversely, the employee is excluded from these same protections. This Pickwickian sense of *exempt* may be a vestige of nineteenth-century American judicial contractarianism, which struck down, in the name of freedom to contract and freedom of contract, labor-protective statutes as unconstitutional interferences with employees’ “liberty to compete for employment upon unfavorable terms.”²⁶

This commingling of modern and premodern terms is exacerbated by the fact that federal labor regulations, employers, and commentators commonly refer to “nonexempt” and “exempt” employees.²⁷ Because most employees in the United States are protected by the FLSA,²⁸ and exclusions from coverage are to be construed narrowly in favor of inclusion, use of the paired categories *nonexempt* and *exempt* to designate the universe of affected workers inverts the purpose and spirit of the FLSA.²⁹ To characterize covered, protected workers negatively as nonexempt suggests a statutory baseline of exclusion—as if workers had the burden of rebutting a presumption that employers are exempt from complying with the Act unless and until proven subject to its duties.³⁰

Ironically, the source of this distortion may have been merely sloppy drafting. The original administration bill, as introduced by Senator Black, provided in its definitions section that “[e]mployee . . . shall not include any person employed in an executive, administrative, supervisory, or professional capacity”³¹ These workers (together with agricultural

24. BLACK’S LAW DICTIONARY 571 (6th ed. 1990).

25. See *id.* at 563.

26. FREUND, *supra* note 1, at 124. For an example of such judicial views, see *Godcharles v. Wigeman*, 6 A. 354 (Pa. 1886).

27. See, e.g., 29 C.F.R. § 541.101-102 (1993); SANFORD COHEN, LABOR LAW 61 (1964); E.M. GOTTLIEB, OVERTIME COMPENSATION FOR EXEMPT EMPLOYEES 9 (American Management Ass’n Research Study No. 40, 1960); DAVID A. WEEKS, OVERTIME PAY FOR EXEMPT EMPLOYEES 34-35 (Nat’l Indus. Conference Bd. Personnel Policy Study No. 208, 1967) (reproducing Allis-Chalmers’ overtime policy, which depends on whether an employee is “exempt” or “nonexempt”); Toby L. Parcel & Marie Sickmeier, *One Firm, Two Labor Markets: The Case of McDonald’s in the Fast-Food Industry*, 29 SOC. Q. 29, 42 (1988).

28. The DOL’s most recent estimate is that 80,685,000, or 71.2 percent, of the 113,299,000 employed wage and salary workers in the civilian labor force were covered by the minimum wage provisions of the FLSA in 1989. U.S. EMPLOYMENT STANDARDS ADMIN., *supra* note 5, 25 tbl. 7.

29. The universe is, strictly speaking, not exhausted by these two categories because, in addition to exemptions, the FLSA contains a definitions provision, which excludes other groups of workers from the statutory category of employees. 29 U.S.C. § 203(e)(4) (1988).

30. EDWARDS, *supra* note 21, at 133, reports the linguistic usage of *nonexempt* but mistakenly attributes it to managerial practices rather than to the law itself.

31. S. 2475, 75th Cong., 1st Sess. § 2(a)(7) (May 24, 1937).

laborers)³² constituted the totality of categorical exclusions. The bill also contained a provision titled “Exemptions from Labor Standards with Respect to Wages and Hours,” which required the proposed Labor Standards Board to issue a regulation providing that “any employer employing less than [blank] employees” should be deemed not to be violating the law by paying “an oppressive or substandard wage.”³³ In other words, the bill exempted small employers from the obligations imposed on larger employers. The radically revised bill that Black reported two months later, which more closely resembled the actual enactment, removed the named categories of workers from the definition of “employee” and transferred them to a section now titled simply “Exemptions.”³⁴ Unlike its predecessor, however, this new provision referred only to employees and not at all to their employers.³⁵

In spite of this infelicitous terminology, Congress did not intend to give employers free reign to deprive their employees of minimum wage and overtime rights by arbitrarily calling them *executives*.³⁶ It therefore required the DOL to issue regulations notifying employers and employees which groups of workers would be protected and which excluded. Since the word *executive*, which apparently originated in the United States in the twentieth century,³⁷ “designate[s] anyone who holds a high-ranking management position”³⁸ and thus “has status connotations,”³⁹ “[d]oubtless the main purpose of the definition was to avoid evasion of the statute by merely colorable titles given to employees by nominal classifications having no substantial basis in reality.”⁴⁰

Additional light is shed on the purpose of the exclusion of executive employees from the protections of the FLSA by its New Deal progenitor—the President’s Reemployment Agreement (PRA) of 1933.⁴¹ The National Industrial Recovery Act (NIRA) authorized the President “to enter into agreements with, and to approve voluntary agreements between and among”⁴² workers, unions, firms, and industrial associations if he believed that the agreements would effectuate the NIRA’s policy and were consistent with the industrial codes of fair competition required by the

32. *Id.*

33. *Id.* § 6(a).

34. S. 2475, 75th Cong., 3d Sess. §§ 3(e), 11(a) (July 8, 1937).

35. *Id.*

36. On possible employer abuse of the classification, see *Industry Warned Not to Cut Corners on Pay Rules*, NATION’S RESTAURANT NEWS, May 12, 1986, at 87.

37. 5 THE OXFORD ENGLISH DICTIONARY 522 (2d ed. 1989).

38. DALE S. BEACH, PERSONNEL: THE MANAGEMENT OF PEOPLE AT WORK 171 (4th ed. 1980).

39. *Id.*

40. *Jones v. Bethlehem-Fairfield Shipyard, Inc.*, 75 F. Supp. 86, 91 (D. Md. 1947).

41. *The President’s Reemployment Agreement*, 37 MONTHLY LAB. REV. 262 (1933).

42. National Industrial Recovery Act, ch. 90, § 4(a), 48 Stat. 195, 197 (1933) (repealed 1966).

NIRA.⁴³ President Roosevelt used the PRA as a temporary blanket code until individual codes of fair competition were adopted for each industry.⁴⁴ The agreements, which, unlike the codes of fair competition, were not legally enforceable, contained child labor, minimum wage, and maximum hours provisions.⁴⁵ They specified that the hours provisions, which, in an effort to reemploy the unemployed, limited an individual worker's workweek to forty hours, did not apply to "employees in a managerial or executive capacity, who now receive more than \$35 per week."⁴⁶ This salary was more than twice the weekly minimum wage (of \$15-\$16) guaranteed by the PRAs.⁴⁷ Executives and supervisors were also almost universally excluded from the hours provisions of the codes of fair competition on the ground that such limitations were "not appropriate" for them.⁴⁸

Despite the PRA's "Antisubterfuge" provision, which obligated employers not "to frustrate the spirit and intent of this Agreement which is . . . to increase employment by a universal covenant . . . and to shorten hours and to raise wages for the shorter week to a living basis,"⁴⁹ employers sought to give "meaningless titles to minor employees to exempt them from the hours provisions . . ." ⁵⁰ Consequently, Hugh Johnson, the National Recovery Administrator, found it necessary to issue a statement defining *manager* and *executive*. He declared that, in approving exceptions from the codes' maximum hours provisions, the National Recovery Administration did not intend "to provide for the exemption of any persons other than those who exercise real managerial or executive authority, which persons are invested with responsibilities entirely different from those of the wage earner and come within the class of the higher salaried employees."⁵¹ Johnson also emphasized that paying less than the threshold \$35 weekly salary created an irrebuttable presumption that the employee was not "exempt."⁵²

43. *Id.* See generally BERNARD BELLUSH, *THE FAILURE OF THE NRA 48-52* (1975) (discussing the history of the NIRA).

44. *The President's Reemployment Agreement*, *supra* note 41, at 262-63.

45. BLUE EAGLE DIV., NATIONAL RECOVERY ADMIN., *Official Explanation of the President's Reemployment Agreement*, in *WHAT THE BLUE EAGLE MEANS TO YOU AND HOW YOU CAN GET IT* 5, 5-8 (1933) [hereinafter NRA].

46. *Id.* at 6-7.

47. *Id.* at 7-8.

48. LEVERETT S. LYON, PAUL T. HOMAN, LEWIS L. LORWIN, GEORGE TERBORGH, CHARLES L. DEARING & LEON C. MARSHALL, *THE NATIONAL RECOVERY ADMINISTRATION: AN ANALYSIS AND APPRAISAL* 369, 382 (1935).

49. NRA, *supra* note 45, at 8.

50. U.S. BUREAU OF LABOR STATISTICS, BULL. NO. 616, *HANDBOOK OF LABOR STATISTICS* 502 (1936).

51. *National Recovery Administration*, 37 MONTHLY LAB. REV. 1039, 1083 (1933). Johnson also issued an interpretation that so long as an employee was receiving more than \$35 per week and acted "primarily, *although not wholly*, in a managerial or executive capacity," her employer would not forfeit its exemption. Interpretation No. 15, in NRA, *supra* note 45, at 17, 17 (emphasis added).

52. *National Recovery Administration*, *supra* note 51, at 1083.

Under the NIRA, then, both the salary level and the description of managerial duties established a clear divide between subordinate and superordinate employees. Although the PRA and the codes of fair competition, unlike the FLSA, did not expressly exclude managerial-executive employees from the minimum wage provisions, the salary test functioned under both regimes as a kind of super-minimum wage vis-à-vis any employer wishing to take advantage of the exemption. Moreover, whereas the FLSA merely gave employers a financial incentive to hire additional workers rather than to pay premium overtime to existing employees, the PRA sought to expand employment more directly by obliging employers not to work their employees more than forty hours.⁵³ Nevertheless, freeing employers from the restrictions on overtime work with respect to managerial employees had the same impact under both regimes: it weakened the re-employment effect and ensured that executive employees were both sufficiently well-paid and closely allied with capital that they could be remitted to their own devices in warding off exploitation.⁵⁴

The regulations that the DOL issued several days before the FLSA went into effect on October 24, 1938,⁵⁵ specified that a bona fide and hence excluded executive employee is engaged primarily in management, directs other workers, has authority to hire and fire, has discretionary powers, and does no substantial amount of work of the same kind as the employers' covered employees.⁵⁶ In addition to these criteria, which are collectively referred to as the *long test* and are basically still in effect today,⁵⁷ the DOL

53. Codes of fair competition did include premium overtime provisions. For a tabular overview, see *Summary of Permanent Codes Adopted Under NIRA up to November 8, 1933*, 37 MONTHLY LAB. REV. 1333 (1933).

54. A survey conducted in the latter half of the 1930s revealed a variety of overtime practices and compensation patterns for such employees, none of which included premium pay. *Overtime Work by Salaried Employees*, 46 MONTHLY LAB. REV. 479 (1938). A quarter century later, fewer than a tenth of firms paid exempt employees time and one-half for overtime. U.S. BUREAU OF LABOR STATISTICS, BULL. No. 1470, SUPPLEMENTARY COMPENSATION FOR NONPRODUCTION WORKERS, 1963, at 63 tbl. 28 (1965).

55. Fair Labor Standards Act, § 15(a). James A. Prozzi, erroneously states that the salary and duties tests were not introduced until 1940. James A. Prozzi, *Overtime Pay and the Managerial Employee: Still a "Twilight Zone of Uncertainty,"* 41 LAB. L.J. 178, 179 (1990). The fact that the regulations were issued before the bill went into effect underscores their importance.

56. 29 C.F.R. § 541.1, as published in 3 Fed. Reg. 2518 (1938).

57. The "no substantial amount of work" criterion was relaxed in 1940 to exclude executive employees "whose hours of work of the same nature as that performed by nonexempt employees do not exceed twenty percent of the number of hours worked in the workweek by the nonexempt employees under his direction." 29 C.F.R. § 541.1(f), as published in 5 Fed. Reg. 4077, 4077 (1940). In addition, a proviso made this criterion inapplicable to "an employee who is in sole charge of an independent establishment or a physically separated branch establishment." *Id.* Currently, after the incorporation of retail and service employment, the provision excludes an executive employee:

[w]ho does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely

prescribed a fixed salary level for such long-test executives, which the employer also had to satisfy. At \$30 per week, it was a little less than three times the minimum wage for a full workweek.⁵⁸

Within a few months, the same House Committee on Labor that had spearheaded passage of the FLSA reported out an amending bill that would have written directly into the Act "a guaranteed monthly salary of \$200 or more" for managerial employees.⁵⁹ That sum was chosen because any lower amount "would undoubtedly exempt a considerable number of salaried workers to whom the overtime benefits of the act should extend."⁶⁰ Although the amendment failed,⁶¹ it and other legislative proposals setting the salary threshold as high as \$350 per month⁶² underscored the importance that Congress attached to market-generated high salaries as evidence of the absence of exploitation.⁶³ Such salaries rendered legislative protection against (unpaid) long hours unnecessary.⁶⁴ Ten years later, the DOL echoed this concern when, in response to a petition filed by the left-wing United Electrical Radio & Machine Workers union to raise the salary test to \$500 per month,⁶⁵ it introduced, "for administrative convenience," a so-called short test in association with a higher ("upset") salary floor of \$100 per week.⁶⁶ The sole nonmonetary requirements attached to this

related to the performance of the [supervisory] work described in paragraphs (a) through (d) of this section.

29 C.F.R. § 541.1(e) (1993).

58. 29 C.F.R. § 541.1, as published in 3 Fed. Reg. 2518, 2518 (1938); *Andrews Defines Exemptions*, N.Y. TIMES, Oct. 20, 1938, at 1. In 1938 the minimum wage was \$11 per week. See *infra* table 1 accompanying note 89. Early on, the Wage and Hour Administrator emphasized to employers that, because the regulations were conjunctive, they could not secure the exemption merely by paying salaries in excess of the regulatory threshold. *Limits Exemption Under Wages Act*, N.Y. TIMES, Oct. 15, 1940, at 47. The DOL ultimately also extended identical exclusions of executive employees to public contracts under the Walsh-Healey Act, 41 U.S.C. §§ 35, 38 (1988). Supplement to Rulings and Interpretations No. 2, in WAGE AND HOUR MANUAL (BNA) 1117, 1181 (1944-45); 18 Fed. Reg. 1831 (1953).

59. H.R. REP. NO. 522, 76th Cong., 1st Sess. 8 (1939).

60. *Id.* at 9.

61. 84 CONG. REC. 6,620-22 (1939).

62. See Frank E. Cooper, *The Coverage of the Fair Labor Standards Act and Other Problems in Its Interpretation*, 6 LAW & CONTEMP. PROBS. 333, 348 (1939).

63. H.R. REP. NO. 522, *supra* note 59, at 8-9.

64. The Minimum Wage Study Commission erred in asserting that "[t]he current salary test as a basic criterion used to identify exempt workers implicitly introduces a minimum wage type concept in the administration of this provision which is counter to the original intent of the exemption." Conrad F. Fritsch & Kathy Vandell, *Exemptions from the Fair Labor Standards Act: Outside Salesworkers and Executive, Administrative, and Professional Employees*, in 4 MINIMUM WAGE STUDY COMM'N, REPORT OF THE MINIMUM WAGE STUDY COMMISSION 235, 240 (1981). The Commission immediately contradicted its own position by conceding that Congress excluded these workers because "they were believed to be typically earning salaries well above the minimum wage level" and that "[a] relatively low salary test . . . defeats the 'good faith' aspects of the test." *Id.* at 244.

65. 12 Fed. Reg. 6896 (1947).

66. 14 Fed. Reg. 5573, 5573 (1949) (to be codified at 29 C.F.R. § 541.1) (proposed Sept. 10, 1949).

short test were (and remain) that the employee's primary duty be management and that she customarily and regularly supervise at least two other employees.⁶⁷

In 1940, the DOL held extensive hearings on the exclusions of executive, administrative, and professional employees, culminating in the Stein Report, which contains the most detailed official explanation of the purpose of the exclusion and the crucial function of the salary test in distinguishing between protected and unprotected employees.⁶⁸ The DOL took as its point of departure its lack of "power to exempt *all* salaried workers"⁶⁹ since "there is little advantage in salaried employment if it merely serves as a cloak for long hours [and] may well conceal excessively low hourly rates of pay."⁷⁰ Indeed, the DOL heard testimony "that, as a result of the exemption from overtime payments accorded executives, employees in non-executive positions working the same number of hours and being paid at a lower rate will frequently surpass the executives in total compensation received."⁷¹ The failure to protect non-bona fide executive employees was rooted in "a serious misreading of the Act [that] assume[d] Congress meant to discourage long hours of work only where the wages paid were close to the statutory minimum. Living conditions can be improved and work spread even where wages are comparatively high."⁷² Moreover, the Stein Report concluded, "an astonishingly large percentage" of salaried white collar workers, many of whom were women, received low wages.⁷³

Finally, and most centrally, the Stein Report observed the special nature of executive employment:

The term "executive" implies a certain prestige, status, and importance. Employees who qualify under the definition are denied the

67. *Id.* at 5593; see also 40 Fed. Reg. 7092, 7092 (1975) (to be codified at 29 C.F.R. § 541.1). For a discussion of the long-test, see *supra* notes 56-58 and accompanying text.

68. WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, "EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL . . . OUTSIDE SALESMAN" REDEFINED: REPORT AND RECOMMENDATIONS OF THE PRESIDING OFFICER AT HEARINGS PRELIMINARY TO REDEFINITION (Stein Report) (1940) [hereinafter STEIN REPORT].

69. *Id.* at 8.

70. *Id.* at 7.

71. *Id.* at 7 n.25.

72. *Id.* at 8.

73. *Id.* at 8-9. In explaining why "the girl clerical worker . . . need[s] the protection of an overtime penalty," the Wage and Hour Administrator furnished the following description of her:

We all know her. We all like her. We know the sound of her high heels clicking in at 9 o'clock. . . . Your wife approves of the way she dresses and you know that is the highest compliment your wife can pay another woman. . . . She decorates the office and makes it a pleasanter place to work.

Philip B. Fleming, Two Years of the Wage and Hour Law: Administrative Reports to Industry, Address Before the American Congress of Industry (Dec. 12, 1940), in WAGE AND HOUR MANUAL (BNA) 70, 72 (1941).

protection of the Act. It must be assumed that they enjoy compensatory privileges and this assumption will clearly fail if they are not paid a salary substantially higher than the wages guaranteed as a mere minimum under Section 6 of the Act. In no other way can there be assurance that Section 13(a)(1) will not invite evasion of Section 6 and Section 7 for large numbers of workers to whom the wage and hour provisions should apply. Indeed, if an employer states that a particular employee is of sufficient importance to his firm to be classified as an "executive" employee and thereby exempt from the protections of the Act, the best single test of the employer's good faith in attributing importance to the employee's services is the amount of money he pays for them.⁷⁴

By periodically raising the mandatory minimum salary test in tandem with increases in the statutory minimum wage itself over the course of the next three and a half decades, the DOL adhered to the principle, "recognized . . . administratively and approved judicially"⁷⁵ and originally supported by most employer groups, that "the weightiest test is the amount of compensation paid by the employer."⁷⁶ During the first Nixon Administration, for example, the DOL noted:

If the salary tests are set at a level where virtually everyone who meets the other requirements for exemption has earnings in excess of that amount, and many nonexempt workers also have earnings in excess of that amount, then the tests are no longer a useful tool for separating those who are clearly nonexempt from those who are probably exempt.⁷⁷

Similarly, the Ford Administration DOL justified an interim increase in the executive salary threshold in the wake of increases in the minimum wage and the cost of living to ensure that the test remained "realistic and effective as qualifying requirements for exemption from the Act's monetary provisions."⁷⁸

Because Congress expressly delegated to the DOL the authority to fill the definitional gap, that is, to issue so-called legislative regulations elucidating the meaning of "bona fide executive," those regulations "have the force of law as much as though they were written in the statute."⁷⁹ Legislative regulations, however, "are as binding on the courts as if they had been

74. STEIN REPORT, *supra* note 68, at 19.

75. *Jones v. Bethlehem-Fairfield Shipyard, Inc.*, 75 F. Supp. 86, 91 (D. Md. 1947).

76. *Id.*; see also *Fritsch & Vandell*, *supra* note 64, at 243.

77. U.S. DEP'T OF LABOR, *supra* note 19, at 3.

78. 39 Fed. Reg. 29,603, 29,603 (1974); 40 Fed. Reg. 7091, 7091 (1975).

79. *Helliwell v. Haberman*, 140 F.2d 833, 834 (2d Cir. 1944).

directly enacted by Congress” only to the extent that they “are reasonable.”⁸⁰ Thus, if the DOL issues a regulatory definition that either is originally or, through the passage of time, becomes “arbitrary, capricious, or manifestly contrary to the statute,”⁸¹ a federal court must declare it invalid, and the agency must begin afresh. In particular, where “there is no longer a rational connection between the facts originally supporting the . . . exclusion . . . and the regulation as it operates today[, t]he original purpose of the regulation . . . become[s] so detached from actual effect . . . as to make the current regulation arbitrary and capricious”⁸²

II

OBSCURITY OF AN EXCLUSION

[W]here a regulation’s rationality is dependent on current socio-economic conditions periodic review is essential to preserve that rationality.⁸³

By 1978, after the ratio between the executive long-test salary level and the weekly minimum wage had fallen to its theretofore lowest point ever (1.5:1),⁸⁴ President Carter’s Wage and Hour Administrator announced that the interim salary test “no longer provide[s] basic minimum safeguards and protection for the economic position of the low paid executive . . . employees as contemplated by section 13(a)(1) of the Fair Labor Standards Act and current Department of Labor regulations.”⁸⁵ Because neither the proposed 1978 increase to \$225 (which would have raised the ratio to 2.1:1)⁸⁶ nor any other increase has ever again been implemented, when the minimum wage reached \$4.25 in 1991, the ratio fell to 0.9:1,⁸⁷ its current level. In other words, employers can perversely yet lawfully pay long-test executive employees salaries less than the minimum wage, while requiring them to work unpaid overtime.

Precisely such mathematical relationships underlay the DOL’s setting of the salary test during the thirty-five year period of its uncontested validity. Thus, in 1963 the Wage and Hour Administrator stated that setting the long-test salary level at eighty times the hourly minimum wage was “not unreasonable” but that a multiple of only sixty-four, that is, a ratio of 1.6:1,

which is no more than the minimum wage employees will earn for a 56-hour week, will not . . . be truly descriptive of the wages of

80. *Fanelli v. United States Gypsum Co.*, 141 F.2d 216, 218 (2d Cir. 1944).

81. *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

82. *Hazard v. Sullivan*, 827 F. Supp. 1348, 1354 (M.D. Tenn. 1993) (striking regulation governing family resource limit for Aid to Families with Dependent Children eligibility).

83. *Id.* at 1353.

84. See *infra* table 1 accompanying note 89.

85. 43 Fed. Reg. 14,688, 14,688 (1978).

86. *Id.*

87. See *infra* table 1 accompanying note 89.

executive . . . employees in retail and service establishments, nor will it serve as a useful criterion in identifying those who are employed in a bona fide executive . . . capacity.⁸⁸

The following example shows how the regulation, which may once have been reasonably designed to protect supervisory employees against inordinate overreaching, has, through the mere passage of time, become irrational. An "exempt" assistant manager, earning the \$155 per week long-test salary level in 1975, when the minimum wage was \$2.10 per hour, would have worked up to twenty-two hours of overtime before her salary failed to cover the minimum wage plus overtime. By 1991, the same "bona fide" executive would have reached this point after only 36.5 hours of straight time. Seen from a different perspective, by 1991, only a weekly salary of \$310, or double the long-test salary level, would have enabled her to work twenty-two hours of overtime without falling below the minimum hourly wage. Indeed, by the 1990s, even the short-test salary level, which was supposed to be high enough to avoid ambiguity in distinguishing bona fide from mala fide executives, had fallen to a mere 50 percent above the minimum wage.

Table 1 and Figure 1 show the course of the relationship between the minimum wage and the executive long- and short-test salaries from 1938 to the present.

88. 28 Fed. Reg. 7002, 7005 (1963).

TABLE 1: RATIO OF SALARY TESTS TO THE MINIMUM WAGE, 1938-91⁸⁹

Year	Long-Test Salary (\$/week)	Ratio to Minimum Wage	Short-Test Salary (\$/week)	Ratio to Minimum Wage	Minimum Wage (\$/week)
1938	30	2.7	n.a.	n.a.	11
1939	30	2.4	n.a.	n.a.	12.60
1940	30	2.5	n.a.	n.a.	12
1945	30	1.9	n.a.	n.a.	16
1950	55	1.8	100	3.3	30
1959	80	2.0	125	3.1	40
1961	80	1.7	125	2.7	46
1963	100	2.0	150	3.0	50
1967	100	1.8	150	2.7	56
1968	100	1.6	150	2.3	64
1970	125	2.0	200	3.1	64
1974	125	1.6	200	2.5	80
1975	155	1.8	250	3.0	84
1976	155	1.7	250	2.7	92
1978	155	1.5	250	2.4	106
1979	155	1.3	250	2.2	116
1980	155	1.25	250	2.0	124
1990	155	1.0	250	1.6	152
1991	155	0.9	250	1.5	170

89. U.S. DEP'T OF LABOR, *supra* note 19, 11 tbl. 1 (indicating long-test and short-test salary levels); 29 U.S.C. § 206 (a)(1) (various years) (minimum wage). The table includes every year in which either the minimum wage or the salary test was increased. The short-test was not introduced until 1950. The weekly minimum wage is computed as the product of the statutory hourly minimum wage and the maximum weekly number of preovertime hours, which was 44 in 1938-39, 42 in 1939-40, and 40 thereafter. The proposed increases, which the Reagan Administration suspended indefinitely, would have raised the long-test salary level to \$225 in 1981 and \$250 in 1983; the ratio to the minimum wage would have risen to 1.7 and 1.9, respectively. Similarly, the proposed increases in the short-test salary level to \$320 and \$345 in 1981 and 1983 would have raised the minimum wage ratio to 2.4 and 2.6, respectively.

Ratio of Long Salary Test to the Minimum Wage, 1938-91

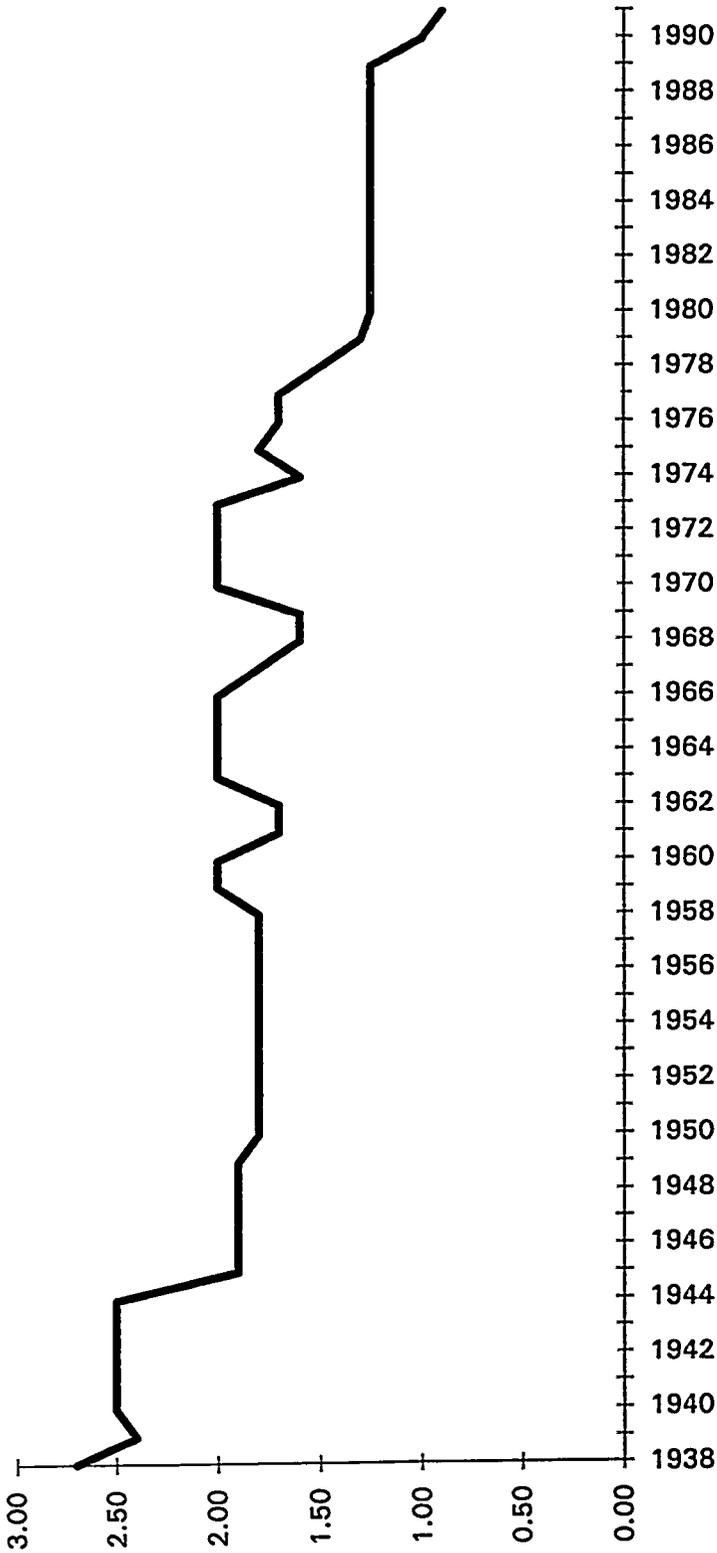


FIGURE 1

In spite of the manifest dysfunctionality of the 1975 interim long-test salary level, which had already “become obsolete”⁹⁰ by 1978, the Carter Administration, “[a]s a result of unexpected delays,”⁹¹ the cause of which it did not reveal,⁹² waited another three years before it issued a final rule.⁹³ In 1981, Donald Elisburg, the Assistant Secretary of Labor for Employment Standards Administration reiterated: “The purpose of the salary test has always been to prevent evasion of the FLSA by the designation of an excessive number of workers as executives . . . with minimal or nominal duties designed to barely meet the duties and responsibilities requirements of the exemption.”⁹⁴ Repeating the DOL’s forty-year-old position that the salary level (as opposed to the duties test)⁹⁵ is “the best single test” of employers’ bona fides in classifying their employees as executives, Elisburg observed that to fulfill that function, the salary test “ha[s] to be increased periodically to take into account the higher salary levels that . . . are in fact paid to bona fide executive . . . employees.”⁹⁶ Because the exclusion of managers had always been based on the fact that they enjoy “compensatory privileges and benefits which are superior to those of other employees,” the salary test level “must be periodically adjusted” to reflect not only increases in the minimum wage but also in the average salaries of executive employees.⁹⁷

In substituting a new long-test salary level of \$225 in 1981 and \$250 in 1983 for the old salary level, which it variously described as “seriously outdated,” “ineffective[],” and “virtually useless as a guide for employers and the Department of Labor in determining FLSA exemption status,”⁹⁸ the DOL urged employers to understand that the increase would enhance regulatory certainty: “Formerly, employers could rely on the salary test as a good indicator of whether an employee was likely to be exempt or not. Now that the test levels are lagging so far behind actual salaries, employers who do so could be misled into inadvertent noncompliance with the FLSA.”⁹⁹ The DOL apparently regards its own regulation as a guide for employers only,¹⁰⁰ showing no concern for whether the test reliably instructs employees as to whether they are lawfully or unlawfully exempt from the burden of being paid the statutory minimum wage and mandatory

90. 46 Fed. Reg. 3011, 3011 (1981).

91. *Id.* at 3012.

92. *But see infra* notes 104-05 and accompanying text.

93. 46 Fed. Reg. at 3012.

94. *Id.* at 3011.

95. *Id.*

96. *Id.*

97. *Id.* at 3016.

98. *Id.*

99. *Id.*

100. Employers, in turn, prefer self-help: “It is not customary . . . to ask the [DOL] to classify all of a firm’s employees, for . . . the agency is generally more liberal with overtime benefits than the average employer would be. Most employers classify their own personnel” GOTTLEB, *supra* note 27, at 7.

premium wages for overtime. Whether disingenuous or merely self-delusional, this obfuscatory assertion by the DOL makes no sense. By complying with an "obsolete" salary test, employers assumed and (continue to assume) no risk whatsoever of violating the FLSA—provided that their employees perform the aforementioned "minimal or nominal duties designed to barely meet the duties and responsibilities requirements of the exemption."¹⁰¹ Instead, employers gain the certainty of immunity from liability under the FLSA for extracting unpaid overtime hours from employees who have no alternatives.

That employers, in fact, take advantage in precisely this way of low-paid hybrid supervisor-grunts has become clear from reported litigation against Burger King Corporation. Its policy of requiring exempt assistant managers to spend more than half of their fifty-four-hour workweeks performing the same work as their supervisees was driven by the firm's desire to avoid paying premium overtime rates or any wages at all. One court characterized this "deliberate corporate policy" as follows: "Were the Assistant Managers to abstain from production work, more hourly employees would be needed, 'thereby "blowing payroll"—that is, spending more than the store's budgeted amount for hourly labor.'"¹⁰² Such practices directly subvert and invert the purpose of the mandatory overtime premium, which is to apply pressure on employers "to spread employment to avoid the extra wage."¹⁰³

The niceties of the calculus entering employers' decisions as to whether to comply with the FLSA were mooted, however, by the Carter Administration's waiting until the last week of its term to promulgate the new salary tests, which were set to go into effect on February 13, 1981.¹⁰⁴ The three-year delay under Carter stemmed from opposition by the President's Council on Wage and Price Stability, which had "slapped down" the original proposal in 1978 and even in 1981 was arguing for a

101. 46 Fed. Reg. 3011, 3011 (1981).

102. *Donovan v. Burger King Corp.*, 675 F.2d 516, 518-19 (2d Cir. 1982) (quoting the trial court opinion); *see also* *Donovan v. Burger King Corp.*, 672 F.2d 221 (1st Cir. 1982); *Marshall v. Erin Food Servs., Inc.*, 672 F.2d 229 (1st Cir. 1982). The DOL, in describing employers' choices after a higher salary test has gone into effect, stated that employers will pay the new rate "only if the resulting cost would be no more than paying this worker on an hourly basis with premium pay for overtime." 46 Fed. Reg. 3011, 3017 (1981).

103. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942).

104. The regulations were instead indefinitely suspended by the Reagan administration. At the end of Carter's term, when he finally agreed to the increase, there were, according to Donald Elisburg, so many last-minute regulations pending that it was not possible to ensure that the regulation would go into effect before Reagan took office. Telephone Interview with Donald Elisburg, Assistant Labor Secretary, U.S. Dep't of Labor (Nov. 17, 1993) (on his carphone in the Washington, D.C., area).

salary test of sixty times the minimum wage, or \$201.¹⁰⁵ Despite employers' "outraged protests"¹⁰⁶ and threats to sue to enjoin implementation of the regulation, Carter proceeded with the rule on January 7, 1981, the day after the Minimum Wage Study Commission had reported that employers violated the FLSA more often with regard to salaried than hourly-paid employees.¹⁰⁷

Employers' "infuriat[ion] at this and other lame-duck decrees,"¹⁰⁸ however, swiftly vanished as President Reagan, in one of his first official acts, issued a memorandum on January 29, 1981, postponing for sixty days all pending final regulations.¹⁰⁹ The same day, the DOL stayed the effective date of the regulation indefinitely, reopening the comment period.¹¹⁰ The new Secretary of Labor, Raymond Donovan, himself an executive of a construction firm, justified the suspension by reference to the "devastating" impact the increased salary test would have had on small businesses.¹¹¹ Donovan's efforts to eliminate such "unwarranted obstacles which cost the economy billions of dollars a year" were applauded by the Chamber of Commerce of the United States, which welcomed his "play[ing] hardball on regulatory reform."¹¹² In March, the DOL, in a spirit of Reaganomic marketization that echoed employers' complaints about the alleged burdensomeness of the salary test,¹¹³ specified that it was seeking public comments about "the probable economic impact of raising the salary tests to the revised levels."¹¹⁴

Not until Reagan's second term did the DOL publicly renew its interest in the salary tests.¹¹⁵ Deeming the intervening four years insufficient

105. *A Raise for Low-Level Bosses*, Bus. Wk., Jan. 19, 1981, at 24. According to Elisburg, the main force behind raising the level of the salary test, the White House and the Office of Management and Budget had caused the initial delay. The AFL-CIO's lukewarm support for what it viewed to be an inadequate increase left Elisburg with little political strength to fend off Administration opponents of any raise. Telephone Interview with Donald Elisburg, *supra* note 104. John Zalusky confirmed that unions were not satisfied with the proposed salary test regulation. Telephone Interview with John Zalusky, AFL-CIO Economist (Nov. 18, 1993).

106. *A Raise for Low-Level Bosses*, *supra* note 105, at 23.

107. *Id.* at 24.

108. *Industry Is Infuriated by Lame-Duck Decrees*, Bus. Wk., Dec. 15, 1980, at 33.

109. 46 Fed. Reg. 11,227 (1981).

110. 46 Fed. Reg. 11,972 (1981). Because the DOL failed to give the proper notice period or to solicit public comment on its decision to stay indefinitely (or effectively to repeal) the regulation, the stay is arguably invalid. 5 U.S.C. §§ 551(5), 553(b), (c) (1988).

111. Drew von Bergen, *Labor Secretary Starts Erasing Predecessor's Slate*, UPI, Feb. 11, 1981, available in LEXIS, Nexis Library, UPI file.

112. Philip Shabecoff, *Swift Attack on Regulations*, N.Y. TIMES, Feb. 13, 1981, at A15 (quoting Donovan and Mark de Bernardo, General Counsel to the U.S. Chamber of Commerce).

113. 46 Fed. Reg. 3010, 3011-12 (1981).

114. 46 Fed. Reg. at 18,998, 18,998-99 (1981).

115. According to the trade press, "Upon reflection, the Reaganites concluded that the Carter-proposed salary test increases were not so unreasonable after all." Ken Rankin, *Labor Dep't Quietly Shelves Plans to Rewrite Labor Practices Rules*, NATION'S RESTAURANT

for a review of the regulations, the DOL once again reopened the comment period. This time it expressly solicited comments on whether the test should be eliminated altogether.¹¹⁶ After the comment period was extended yet again in 1986,¹¹⁷ employers' organizations were unable to formulate a united deregulatory program. In the face of union demands for a doubling of the long-test salary level to \$320-\$325, the National Mass Retailing Institute urged elimination of the test altogether.¹¹⁸ The Association of General Merchandise Chains, however, declined to support elimination of the salary component of the test, in part for fear that the alternative would mean a "far more detailed and burdensome inquiry [by DOL enforcement agents] into exempt employees' duties and responsibilities." ¹¹⁹ Despite reports that the DOL was inclined to accommodate the employers' proposed relaxation of the duties test,¹²⁰ this clash of lobbyists did not produce any agency action.

Here, the extremes met as the "if it ain't broke, don't fix it" opposition to an increase in the salary test mounted by Burger King and other employers¹²¹ was matched by the relief expressed by the AFL-CIO that the dreaded "brutaliz[ation]" of the test by the Reagan Administration had never materialized.¹²² Nevertheless, inaction systemically favored (and favors) employers: under the regulatory status quo the salary test is further eroded by inflation and minimum-wage increases, creating a de facto enforcement vacuum. By the end of the Bush Administration, which posted a "Next Action Undetermined" notice in its semiannual DOL agenda,¹²³ proposed rulemaking was no longer even rumored.¹²⁴

NEWS, Nov. 7, 1983, at 6. DOL officials were said to be preparing a redraft, "probably containing several key concessions to restaurant industry lobbyists concerned over the Government's unwillingness to recognize more than one overtime-exempt manager per food-service unit." *Id.* But this proposal, too, was postponed as mysteriously as it was initiated. *Id.* Although only one employee per establishment may fall under the "in sole charge of an independent establishment" exemption, more than one may qualify under the duties test. 29 C.F.R. §§ 541.1(e), 541.113(d) (1993).

116. 50 Fed. Reg. 47,696, 47,696-97 (1985).

117. 51 Fed. Reg. 2525 (1986).

118. See *Labor Unions Press Feds for Higher Exempt Store Employee Wages*, DISCOUNT STORE NEWS, June 23, 1986, at 2.

119. *Id.* (quoting AGMC President Edward Borda).

120. *Id.*

121. *Industry Warned Not to Cut Corners on Pay Rules even Though Overtime Is 'Flawed' Says Burger King Official*, NATION'S RESTAURANT NEWS, May 12, 1986, at 87; see also *NRA Offers Changes on Overtime Requirements*, NATION'S RESTAURANT NEWS, Mar. 10, 1986, at 46.

122. *Labor Dep't Continues Protracted Review of FLSA Tests for White Collar Exemptions*, DAILY LAB. REP., Mar. 4, 1987, at A7.

123. 54 Fed. Reg. 44,836, 44,836-37 (1989); see also *id.* at 16,440, 16,443-44.

124. All the DOL could muster was a buried footnote stating that consideration of the salary tests "will be undertaken in connection with any future rulemaking." 57 Fed. Reg. 37,666, 37,666 n.1 (1992).

III CONSEQUENCES OF AN EXCLUSION

There is probably nothing more disturbing in the world than being an assistant manager of a restaurant working 60 or 70 hours a week—working for not much more than the minimum wage—and not having much hope of moving up.¹²⁵

By the early 1990s, approximately nine million private sector executive employees were excluded from the minimum wage and overtime (but not the sex discrimination)¹²⁶ provisions of the FLSA.¹²⁷ The most recent survey data¹²⁸ reveal that although women accounted for only 11 percent of all executive employees,¹²⁹ they constituted 26 percent of executive employees in the retail industry and 38 percent of the lowest-paid workers in this category.¹³⁰ In the service industry, women accounted for 53 percent of the lowest-paid “exempt” executives.¹³¹ Not surprisingly, service and retail industries also employed the largest proportion of low-paid “exempt” executives who worked overtime—rising in retail trade to two-thirds.¹³² Equally unsurprising was the “significant inverse relationship” between executives’ salary levels and the percentage of executive employees working overtime.¹³³

The liberal protective purposes of the FLSA require the courts to interpret exemptions narrowly and against employers¹³⁴ and require the Secretary of Labor to restrict the exemption to those who are “truly executives and not [mere] employees.”¹³⁵ The socioeconomic rationale for excluding bona fide executives is said to be that they are sufficiently well compensated and have sufficient control over their hours that they should not be entitled to subject their employers to an overtime penalty for hours worked

125. See *Discussion*, RESTAURANT BUS., May 1981, at 175 (statement by Robert Emerson).

126. Because bona fide executive employees are protected by the FLSA’s prohibition of sex discrimination (the Equal Pay Act), 29 U.S.C. § 206(d) (1988), their employers are required to make, keep, and preserve certain wage and hour records. 29 U.S.C. §§ 211(c), 213(a) (1988 & Supp. IV 1992); 29 C.F.R. §§ 516.2, 516.3 (1993).

127. In its most recent survey, the DOL reported that 14,102,000 private sector and 7,248,000 public sector executive, administrative, and professional employees were “exempt” in 1989. U.S. EMPLOYMENT STANDARDS ADMIN., *supra* note 5, 25 tbl. 7. In 1977, the DOL estimated that two-thirds of such employees were executives. Fritsch & Vandell, *supra* note 64, at 245.

128. Fritsch & Vandell, *supra* note 64, at 245 (data from 1977).

129. *Id.* at 245.

130. *Id.* at 248.

131. *Id.* (data from 1980).

132. *Id.* at 247.

133. *Id.* at 248, 262 tbl. C-5.

134. See, e.g., *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

135. *Ralph Knight, Inc. v. Mantel*, 135 F.2d 514, 517 (8th Cir. 1943).

at the executives' own discretion.¹³⁶ If, as the Wage and Hour Administrator who promulgated the executive employee regulations based on the Stein Report in 1940 noted, the regulations are based on a model where an exempt employee's "salary is so high that if he were paid time and a half for overtime, he would have serious doubts that he earned it,"¹³⁷ DOL's inaction has irrationally created a capacious category that sweeps in millions of workers whose salary and autonomy are far removed from that model. According to the most recent survey by the National Restaurant Association, one-quarter of all assistant managers at fast-food restaurants earn less than \$15,000 annually.¹³⁸ These overtime workers,¹³⁹ whose total weekly wage is merely \$200-\$300, are precisely the employees whom President Clinton's Wage and Hour Administrator had in mind when she conceded that "there's something wrong with" excluding from the FLSA workers who are just "one step above the cashier."¹⁴⁰

The DOL's failure to keep the definition current authorizes employers to subject mala fide executives to a greater degree of exploitation than their supervisees. This irrational and contra-statutory result of agency inaction gives a literal, albeit unintended, meaning to the Minimum Wage Study Commission's claim that the executive exclusion was rooted in the fact that these employees receive "compensatory privileges which made up for the lack of premium pay for overtime"—including the privilege of exercising "authority over others."¹⁴¹ In the real world, as Ronald Coase has observed, it is not usually necessary for real managers to pay "to exercise control over others," because they are paid to do so.¹⁴²

136. See, e.g., *Brock v. Claridge Hotel & Casino*, 846 F.2d 180, 184-85 (3d Cir. 1988); *Hearing on Fair Labor Standards Act: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education & Labor*, 102d Cong., 2d Sess. 76 (1992) (statement of Jonathan Hiatt, General Counsel, Service Employees International Union); GOTTLIB, *supra* note 27, at 5-6 ("[E]xempt personnel are paid for their long-term contribution to the company not directly measurable in hours" (quoting company response to questionnaire)). For a discussion of the rationale underlying the exclusion, see *supra* text accompanying notes 36-78.

137. Fleming, *supra* note 73, at 72.

138. Telephone Interviews with Information Services Agents, National Restaurant Association (Nov. 22-24, 1993) (citing NATIONAL RESTAURANT ASS'N, COMPENSATION FOR SALARIED PERSONNEL IN FOOD SERVICES 32 exhibit 38 (1991), which reveals that the 1990 average annual salary for an assistant unit manager in a fast-food restaurant ("limited menu no table service") at the upper quartile, median, and lower quartile (defined as the median of the lower half) was \$19,731, \$18,236, and \$15,000 respectively). For examples of salaries as low as \$10,000, see LEIDNER, *supra* note 11, at 53; Parcel & Sickmeier, *supra* note 27, at 39.

139. The National Restaurant Association confirmed that salaried assistant managers work up to eighty hours per week. Telephone Interview with Susan Aylward, Information Services Agent, National Restaurant Association (Nov. 24, 1993).

140. Telephone Interview with Maria Echaveste, Wage and Hour Administrator, U.S. Department of Labor (Nov. 22, 1993).

141. Fritsch & Vandell, *supra* note 64, at 243.

142. Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* (n.s.) 386, 390 (1937).

Even in the halcyon days of the late 1960s, a DOL study revealed that, in 19 percent of establishments, “the lowest paid exempt executive received a weekly salary that was below that of the highest paid nonexempt employee he supervised.”¹⁴³ Of the exempt executives who were being paid at exactly the long-test salary level, 41 percent received lower earnings than their covered supervisees.¹⁴⁴ Later, in 1981, *Business Week*, which reported that employers were “incensed” about being required to pay overtime to “trainee managers,” confirmed that “some hourly employees . . . do make more than some assistant managers who work long hours.”¹⁴⁵

The vast expansion of fast-food restaurants and convenience stores, two major employers of so-called assistant managers, may have intensified this pattern of compensation inversion.¹⁴⁶ In the 1980s “eating and drinking places” added almost two million new jobs, one-tenth of all new jobs in the United States and twice as many as any other industry, becoming the largest private-sector employer.¹⁴⁷ During this period the number of supervisory employees increased 61 percent, compared to a 41 percent increase in nonsupervisory workers.¹⁴⁸ From 1964 to 1992, supervisory employees in eating and drinking places more than quadrupled, from 126,000 to 634,000.¹⁴⁹ McDonald’s restaurants currently alone employ upwards of 40,000 assistant managers.¹⁵⁰

143. U.S. DEP’T OF LABOR, *supra* note 19, at 26, 33 tbl. 16.

144. *Id.* at 26.

145. *A Raise for Low-Level Bosses*, *supra* note 105, at 24.

146. According to a 1977 DOL survey, only 5 percent of the lowest-paid executives supervised employees earning more than they did. This survey may have been skewed by the fact that it excluded executives who were (unlawfully) paid less than the long-test salary level. Fritsch & Vandell, *supra* note 64, at 246, 253.

147. U.S. BUREAU OF LABOR STATISTICS, BULL. NO. 2403, CAREER GUIDES TO INDUSTRIES 106 (1992); Lois M. Plunkert, *The 1980’s: A Decade of Job Growth and Industry Shifts*, MONTHLY LAB. REV., Sept. 1990, at 3, 12 tbl. 5.

148. Calculated according to data in 2 U.S. BUREAU OF LABOR STATISTICS, BULL. NO. 2370, EMPLOYMENT, HOURS, AND EARNINGS: UNITED STATES, 1909-90, at 802-04 (1991) [hereinafter BULL. NO. 2370]; U.S. BUREAU OF LABOR STATISTICS, BULL. NO. 2429, EMPLOYMENT, HOURS, AND EARNINGS: UNITED STATES, 1991-93, at 394-95 (1993) [hereinafter BULL. NO. 2429].

149. Calculated according to data in 2 BULL. NO. 2370, *supra* note 148, at 802-04, and BULL. NO. 2429, *supra* note 148, at 394-95. The increase for nonsupervisory employees was 247 percent. The figures for supervisory employees were calculated as the difference between “all employees” and “nonsupervisory workers.” The Bureau of Labor Statistics did not begin publishing data on nonsupervisory employees in this industry until 1964. For an alternative estimate of 557,000 restaurant and food service managers in 1990, see U.S. BUREAU OF LABOR STATISTICS, BULL. NO. 2400, OCCUPATIONAL OUTLOOK HANDBOOK 58 (1992).

150. An average of fifty-five to sixty workers, including four to five assistant managers, work at each of the 9,200 McDonald’s restaurants in the United States. Eighty-five percent of these restaurants are franchises. Telephone interview with Ann Connolly, Public Affairs Department, McDonald’s Corp. (Nov. 22, 1993). On the possible problems with managers’ suing franchises or franchisors for overtime, see *Howell v. Chick-Fil-A, Inc.*, 127 Lab. Cas. (CCH) ¶ 33,051 (N.D. Fla. Oct. 29, 1993).

The pay and working conditions of supervisor-workers undermine employers' claims that the duties-salary test "does not affect poor people. We are talking about executives."¹⁵¹ What employers in fact are talking about is fending off a test that "would force" them to pay overtime.¹⁵² As a former assistant manager at Pizza Hut described the working life of an exempt executive:

"[T]he glow of being a manager and being in charge fades as you're mopping the floor at two o'clock in the morning. . . . As an assistant manager I was on a salary of \$175. The cooks were paid by the hour. You had a manager who scheduled you. He had a profit line to work out with his district manager. He could either put on the cook and pay him the minimum wage plus overtime, or he could schedule the assistant manager who had to work all those crazy hours without any overtime. I usually worked about fifty hours, but there were people working sixty or seventy hours because their manager scheduled them that way. The assistant managers were making less than the minimum wage. . . . As an assistant manager I generally spent the whole shift cooking. Late at night you generally just had a cook and a waitress. Somebody would have to mop the floor so I would do it. . . . It didn't matter who did it. The manager's job was to assign someone to do it, including himself. When you're young you have this concept of a manager. You sort of see him as a miniature Lee Iacocca, walking through the plant with his suit and tie on, directing people. After a while you realized you were a glorified cook."¹⁵³

These unstructured, unregulated, and often unpaid work schedules of many low-level executives mean that employers are able to preempt greater blocks of an employee's time, leaving an "exempt" executive with less time to use "effectively for his own purposes. It belongs to and is controlled by the employer."¹⁵⁴ This trend parallels a pattern that has become increasingly prevalent among hourly production and service employees whose employers require them to remain "on-call" at all times outside of their scheduled working hours, tethered to pagers or telephones, "not far

151. *Fair Labor Standards Amendments of 1973: Hearings on S. 1725 Before the Subcomm. on Labor of the Sen. Comm. on Labor & Public Welfare*, 93d Cong., 1st Sess. 107 (1973) (statement of Marjorie Geerlofs, Senior Vice-President, Bambergers Department Store).

152. *Fair Labor Standards Amendments of 1971: Hearings on S. 1861 Before the Subcomm. on Labor of the Sen. Comm. on Labor & Public Welfare*, 92d Cong., 2d Sess. 594 (1972) (statement of John Mahaney, Executive Director, Ohio State Council of Retail Merchants).

153. STAN E. LUXENBURG, *ROADSIDE EMPIRES: HOW THE CHAINS FRANCHISED AMERICA* 173 (1985) (quoting former Pizza Hut assistant manager).

154. 29 C.F.R. § 785.15 (1993).

removed from a prisoner serving a sentence under slightly relaxed house arrest terms."¹⁵⁵

Despite the fact that the duties portion of the long-test is already more lenient for the retail trade and service sectors, permitting executive employees to spend as much as 40 percent of their time on grunt work before they forfeit their bona fides,¹⁵⁶ employers complain that the restriction is discriminatory because their managerial employees, such as the one quoted above, must perform the same routine "nonexempt" work as their own subordinates¹⁵⁷ while they are engaged in supervising the latter.¹⁵⁸ Advocates of such manual-mental labor flexibility, which contravenes the Tayloristic scientific management principle of the "strictly executive" work of "functional bosses,"¹⁵⁹ must overcome a categorical obstacle in the form of the rigidly hierarchical division of labor associated with capitalism and labor standards legislation:¹⁶⁰ "Doing routine menial labor is not acting in an executive capacity."¹⁶¹ Because many assistant managers "roll up their sleeves and help with the cooking, clearing of tables, or other tasks" not only "[d]uring busy periods"¹⁶² or "[u]nder certain occasional emergency conditions,"¹⁶³ but as a matter of course, the DOL and the courts have frequently found that they are nonexempt employees and, as such, are entitled to back overtime wages.¹⁶⁴

155. *Bright v. Houston Northwest Medical Ctr. Survivor, Inc.*, 888 F.2d 1059, 1064 (5th Cir. 1989), *rev'd*, 934 F.2d 671 (5th Cir. 1991) (en banc); *see also* *Owens v. Local No. 169, Ass'n of Western Pulp & Paper Workers*, 971 F.2d 347 (9th Cir. 1992).

156. When Congress brought the bulk of retail and service employees under the FLSA in 1961, it permitted the executives among them to devote as much as 40 percent of their time to "activities not directly or closely related to the performance of executive . . . activities," whereas executives in all other industries are subject to the 20 percent limit. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9, 75 Stat. 65, 71 (1961) (codified as amended at 29 U.S.C. § 213(a)(1) (1988 & Supp. IV 1992)). On Senator Williams's unsuccessful effort to reduce the limit to 20 percent, *see* S. 1861, 92d Cong., 2d Sess., § 7(a)(2), in *BACKGROUND MATERIAL ON THE FAIR LABOR STANDARDS ACT AMENDMENTS OF 1972*, at 27, 55 (Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare ed., 1974).

157. 29 C.F.R. § 541.111(b) (1993).

158. *Stage Is Set for Overtime Pay Rules Struggle*, CHAIN STORE AGE EXECUTIVE, Aug. 1986, at 35.

159. FREDERICK W. TAYLOR, *SHOP MANAGEMENT* 98-100 (1911).

160. A similar pattern marks the National Labor Relations Act. The Taft-Hartley amendments to the NLRA expressly exclude supervisors—defined as those having authority, exercised with independent judgment, to hire, discharge, reward, and discipline other employees—from the definition of covered employee and thus exempt employers from the duty to bargain collectively with them. National Labor Relations Act, 29 U.S.C. §§ 152(3), (11), 164(a) (1988); *see also* Virginia A. Seitz, *Legal, Legislative, and Managerial Responses to the Organization of Supervisory Employees in the 1940s*, 28 AM. J. LEGAL HIST. 199 (1984).

161. *Wilkinson v. Noland Co.*, 40 F. Supp. 1009, 1011 (E.D. Va. 1941).

162. U.S. BUREAU OF LABOR STATISTICS, BULL. NO. 2350, *OCCUPATIONAL OUTLOOK HANDBOOK*, 56 (1990-91).

163. 29 C.F.R. § 541.109 (1993).

164. *See, e.g.,* *Donovan v. Burger King Corp.*, 672 F.2d 221 (1st Cir. 1982); *Donovan v. Burger King Corp.*, 675 F.2d 516, 518-19 (2d Cir. 1982); *Marshall v. Erin Food Servs., Inc.*,

As the owners of fast-food chains and their franchisees have grown more concerned that the demographic changes limiting the pool of teenagers available for low-wage work will reduce profits,¹⁶⁵ Wall Street has come to believe that low-level managers have become increasingly "crucial for success in fast food."¹⁶⁶ Yet where the "optimum salary differential"¹⁶⁷ between first-line supervisors and their subordinates becomes deranged, firms may find it difficult to maintain motivation and discipline.¹⁶⁸ One executive at a large defense products firm described the problem in the following way: "It's an awful situation when you have a man supervising 15 or 20 people and they are making more than he is."¹⁶⁹ A problem in motivation thus arises:

[M]anagers of most fast-food companies cannot be paid what they are really worth to their stores. Surely the entrepreneurial young person who works 80 or 90 hours per week for a salary of \$10,000 or \$12,000 per year is not receiving his or her full desserts. Enduring the gaff of dealing with the public, motivating teenage ingrates among his or her own employees, scrubbing the rest room floors, and receiving a wage that amounts to little more than the minimum wage when weekend and overtime hours are taken into account is not much of a job. However, some of the chains are still able to attract such people. How?

Much of the answer lies in the chains' ability to promise the hungry new store manager the opportunity to grow with the chain. In effect, the manager is told: "We'll pay you peanuts and make you work like a slave for now. But if you produce for us, in two years we'll have enough stores open to be able to make you a district manager, then a regional overseer, and then finally a state-wide warlord or whatever." The young store manager is paid with promises, so to speak. This is fine for everyone involved so long as the chain continues to grow and advancement remains possible.¹⁷⁰

672 F.2d 229 (1st Cir. 1982); *Dole v. Papa Gino's of Am., Inc.*, 712 F. Supp. 1038 (D. Mass. 1989).

165. ROBERT L. EMERSON, *THE NEW ECONOMICS OF FAST FOOD* 98-104 (1990).

166. LUXENBURG, *supra* note 153, at 172.

167. WEEKS, *supra* note 27, at 9.

168. When "faced with a problem of resolving a conflict between compensation theory and economic reality," some firms are forced "to overcome the reluctance to treat exempt staff in the same manner as those who are nonexempt." BURTON W. TEAGUE, *OVERTIME PAY PRACTICES FOR EXEMPT EMPLOYEES* at vi (Conference Board Rep. No. 797, 1981). But retail employers, the prime abusers of the exemption, succumb much less frequently to these pressures than do firms in other industries. *Id.* at 8 tbl. 2.

169. GOTTLIEB, *supra* note 27, at 13 (quoting an executive at a large defense-products firm).

170. ROBERT L. EMERSON, *FAST FOOD: THE ENDLESS SHAKEOUT* 188 (1979).

“But when the chain stops growing the manager is left without any motivation.”¹⁷¹ The partial collapse of this huge and profitable pyramiding transaction in the wake of the oversupply of fast-food restaurants may alter the structure of low-level managerial compensation and hasten reregulation of “exempt” managerial employees.¹⁷² Such a shakeout may also inject greater realism into entry-level quasi supervisors’ career path self-assessments, dissuading them from acquiescing in what the trade calls paying their dues in the hope of “ris[ing] to the chief executive’s slot”¹⁷³ or transmogrifying their \$12,000 annual salaries into the more than half-million dollar initial investment required to open a franchise restaurant.¹⁷⁴ If front-line supervisors’ so-called delayed-payment/bonding contracts¹⁷⁵ are widely perceived to have been camouflaged exploitation, there may be fewer assistant managers like the one at McDonald’s, who, ruefully agreeing that one of his hourly subordinates needed to work only forty-five hours to surpass his salary for as many as sixty-two hours, nevertheless justified the disparate treatment on the ground that, as a management trainee, he would “soon be earning a good deal more.”¹⁷⁶

In spite of this history of overreaching, the leading rationalist judge in the United States has opined that, if the original purpose of the overtime provision of the FLSA “was to prevent workers willing . . . to work abnormally long hours from taking jobs away from workers who prefer to work shorter hours,” it is “no longer very likely” that workers do so “out of desperation.”¹⁷⁷ Yet the Wage and Hour Administrator in the Ford Administration increased the short-test salary level (to \$250) precisely because “certain employers are utilizing the high salary test to employ otherwise nonexempt employees (i.e., those who perform work in excess of the 20 percent tolerance for nonexempt work or the 40 percent tolerance allowed in . . . retail and service establishments) for excessively long workweeks.”¹⁷⁸

171. LUXENBURG, *supra* note 153, at 172.

172. Krueger, *supra* note 11, at 79.

173. Don Jeffrey, *The Management Merry-Go-Round*, NATION’S RESTAURANT NEWS, Dec. 7, 1987, at F3.

174. See MCDONALD’S CORP., 1992 ANNUAL REPORT 6 (1993) (the conventional franchise arrangement requires an initial investment of approximately \$430,000 to \$560,000); Stephen Koepp, *Big Mac Strikes Back*, TIME, Apr. 13, 1987, at 59. In keeping with the industry’s apparent preference for unpaid labor, prospective franchisees are also required to work at a McDonald’s fifteen to twenty hours per week for two years as “volunteers.” *McDonald’s Corp. v. Miller*, No. 92-4811 (D.N.J. filed Nov. 17, 1992) (declaratory judgment action by McDonald’s against prospective but terminated franchisee who sought back minimum wages); Eric N. Berg, *An American Icon Wrestles with a Troubled Future*, N.Y. TIMES, May 12, 1991, § 3, at 1; Lisa Bertagnoli, *McDonald’s: Company of the Quarter Century*, RESTAURANTS & INSTITUTIONS, July 10, 1989, at 32, 38.

175. Krueger, *supra* note 11, at 75-76.

176. *A Raise for Low-Level Bosses*, *supra* note 105, at 24.

177. *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1176 (7th Cir. 1987) (Posner, J.).

178. 40 Fed. Reg. 7092 (1975). Since the statute does not regulate hours as such, the administrator’s characterization of the hours worked as “excessive” is extraordinary.

The corporate “shedding” of older workers in recent years has created additional cohorts of vulnerable labor market applicants.¹⁷⁹ Unlike their teenage competitors who still live at home, older workers are unable to survive on the income generated by the minimum wage at forty (or fewer) hours per week at McDonald’s, which is “inadequate to support one person, much less a family.”¹⁸⁰ Nonetheless, “[o]lder workers who compete with students for jobs cannot demand much more.”¹⁸¹

When fast-food chains such as McDonald’s, Burger King, and Kentucky Fried Chicken perceived a shortage of teenagers in the late 1980s, they “rapidly recogniz[ed] the benefits of hiring older workers.”¹⁸² Their diminished opportunities compel many of them to acquiesce in low-paid executive jobs precisely because the mandatory long hours are associated with salaries in excess of \$170 (that is, the weekly minimum wage) even though they include no overtime premium and may not even amount to the minimum wage for every hour worked.¹⁸³ In this regard, their “irrational” labor market behavior uncannily resembles that of migrant farm workers.¹⁸⁴

For these older workers, many of whom may have lost health care benefits, the need for additional income supplants the desire to avoid long hours. In other words, fear of unemployment or lower-waged employment causes even those who “are not the marginal, non-unionized workers for whom” alone, in Judge Posner’s mind, “the overtime provisions were designed”¹⁸⁵ to acquiesce in employers’ drives to “exploit[] employees in a transitional stage in their promotion from hourly worker to executive functions by obliging them to work both as an extra hand and as lower echelon management.”¹⁸⁶

The Acting Assistant Secretary of Labor for Employment Standards has conceded the “absurdity of having a salary test that’s lower than the

179. See, e.g., *They’ve Got to Eat, So Let Them Work*, *ECONOMIST*, Sept. 16, 1989, at 17, 18; Isabel Wilkerson, *Refugees from Recession Fill Hotel’s Payroll*, *N.Y. TIMES*, Mar. 1, 1992, § 1, at 1.

180. Koepp, *supra* note 174, at 59.

181. Peter T. Kilborn, *For Forlorn Millions, the Recession Goes On*, *N.Y. TIMES*, July 28, 1991, § 1, at 1.

182. Diane Duke, *Fast Food Firms Find Seniors Fit Recipe*, *AUSTIN BUS. J.*, Sept. 21, 1987, § 1, at 5; see also *Food Service Industry Representatives Explore Ways to Employ Older Workers*, *DAILY LAB. REP.*, July 29, 1987, at C1; Kevin Klose, *McDonald’s Woos Older Workers*, *WASH. POST*, Feb. 9, 1987, at A3; *McDonald’s Seeks Retirees to Fill Void*, *N.Y. TIMES*, Dec. 20, 1987, § 1, at 54.

183. The hourly earnings of an assistant manager receiving a salary of \$260 per week, for example, would fall below the minimum wage as soon as she worked sixty-two hours; see also *supra* notes 88-89, 139, 176 and accompanying text.

184. See MARC LINDER, *MIGRANT WORKERS AND MINIMUM WAGES: REGULATING THE EXPLOITATION OF AGRICULTURAL LABOR IN THE UNITED STATES 16-20* (1992).

185. *Mechmet v. Four Seasons Hotels Ltd.*, 825 F.2d 1173, 1177 (7th Cir. 1987).

186. *Marshall v. Burger King Corp.*, 504 F. Supp. 404, 411 (E.D.N.Y. 1980), *aff’d sub nom. Donovan v. Burger King Corp.*, 675 F.2d 516 (2d Cir. 1982).

minimum wage.”¹⁸⁷ Another high-ranking DOL official characterizes as “totally embarrassing” his agency’s having permitted the salary test level to become obsolete.¹⁸⁸ Taken together with the acknowledgment that “we’re not out there looking for section 541 violations,”¹⁸⁹ the DOL’s admissions underscore the invalidity of the current salary test level.

As a result of long-term agency neglect and political stalemate, the justification for what was once a reasonable regulation has, through the mere passage of time, “long since evaporated.”¹⁹⁰ The fact that the minimum wage has more than doubled during the intervening nineteen years has rendered the salary test an obsolete regulation so lacking in the requisite rationality and reasonableness as not merely to be “unrelated to the tasks entrusted by Congress” to the agency,¹⁹¹ but to have turned them on their head. The failure of other federal agencies to adjust similar monetary indexes for inflation during shorter periods has prompted courts to declare welfare regulations invalid.¹⁹² In all such cases, including ones involving the salary test, the Administrative Procedure Act’s mandate that federal courts invalidate agency regulations found to be “arbitrary, capricious, [or] an abuse of discretion”¹⁹³ operates because the regulations “are contrary to the intent of Congress.”¹⁹⁴

The most general legislative intent underlying the imposition of a wage floor, as the Supreme Court observed, remains that “[t]he community is not bound to provide what is in effect a subsidy for unconscionable employers.”¹⁹⁵ What was true, in that case, for a small-town hotel in Washington State underpaying a chambermaid during the Great Depression applies with much greater force to McDonald’s, one of the world’s largest corporations. This conclusion is particularly compelling in light of the fact that McDonald’s has “employed at one time or another . . . 7% of all current

187. Telephone Interview with John Fraser, Acting Assistant Secretary for Employment Standards, U.S. Department of Labor (Nov. 19, 1993).

188. Telephone Interview with Ray Kamrath, Wage and Hour Division, Office of Policy, Planning, and Review, U.S. Department of Labor (Nov. 8, 1993).

189. *Id.*

190. *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979).

191. *Walling v. Yeakley*, 140 F.2d 830, 832 (10th Cir. 1944) (quoting *Gray v. Powell*, 314 U.S. 402, 413 (1941)).

192. *Hazard v. Sullivan*, 827 F. Supp. 1348, 1354 (M.D. Tenn. 1993) (90 percent rise in costs over 10-year period invalidated Aid to Families with Dependent Children automobile asset limit); *Maine Ass’n of Interdependent Neighborhoods v. Petit*, 659 F. Supp. 1309, 1323 (D. Me. 1987) (141 percent increase in inflation over 14-year period invalidated Medicaid resources regulation).

193. 5 U.S.C. § 706(2) (1988).

194. *Stewart v. San Francisco*, 834 F. Supp. 1233, 1236 (N.D. Cal. 1993).

195. *West Coast Hotel v. Parrish*, 300 U.S. 379, 399-400 (1937).

U.S. workers, or about 8 million people,¹⁹⁶ and is the most profitable retail firm in the United States, with annual profits in excess of a billion dollars.¹⁹⁷

IV FUTURE OF AN EXCLUSION

[B]ecause in-person servers . . . need symbolic analysts more than symbolic analysts need them, the former have little political leverage over the latter. They cannot force symbolic analysts to share their income with them . . . because the other side lacks any political artillery.¹⁹⁸

Before his appointment as Secretary of Labor, Robert Reich agreed that “ [c]ompared to the old blue-collar jobs that have been lost, these [minimum-wage fast-food] jobs represent a serious setback.”¹⁹⁹ Reich has since acquired both the knowledge that his own department’s regulations authorize employers to pay workers less than the minimum wage and the power to terminate that subsidy by increasing the salary test level so as to dissipate societal concern with exploitation.

Recent congressional action setting the salary test level at 6.5 times the minimum wage (currently \$27.63) for computer systems analysts, software engineers, and computer programmers is one relevant model.²⁰⁰ Converted into weekly compensation based on a forty-hour workweek, this \$1,105 salary is high enough to generate \$15 per hour (straight-time) for executive employees working even seventy-four-hour weeks. Such a test emphatically certifies that the “noncommissioned officers of the industrial army, . . . the petty ‘managers’ of all sorts . . . enjoy . . . the privileges of exemption from the worst features of the proletarian situation.”²⁰¹

Action by individual states is another model. Unlike the DOL, some state agencies administering comparable state minimum wage provisions have continued to keep salary tests up-to-date.²⁰² In New Jersey, for example, the weekly executive salary threshold is \$400.²⁰³

196. Koepf, *supra* note 174, at 59; see also Ben Wildavsky, *McJobs: Inside America's Largest Youth Training Program*, POL’Y REV., Summer 1989, at 30.

197. *The Service 500*, FORTUNE, May 30, 1994, at 195, 200 (reporting annual profits of \$1.082 billion, which represented 14.6 percent of 1993 sales).

198. ROBERT B. REICH, *THE WORK OF NATIONS: PREPARING OURSELVES FOR TWENTY-FIRST CENTURY CAPITALISM* 299-300 (1991).

199. Koepf, *supra* note 174, at 59 (quoting Reich).

200. Pub. L. No. 101-583, § 2, 104 Stat. 2871 (1990) (codified at 29 U.S.C. § 213(a)(1) (Supp. IV 1992)); 29 C.F.R. §§ 541.3(a)(4), (e), 541.303 (1993); Andrew Pollack, *Computer Programmers to Lose Overtime Pay*, N.Y. TIMES, Jan. 28, 1991, at C3.

201. HARRY BRAVERMAN, *LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY* 407 (1974).

202. See, e.g., IOWA ADMIN. CODE r. 347-218.1(6) (1988).

203. See, e.g., N.J. ADMIN. CODE tit. 12, § 56-7.1(a)(6) (1991).

If there is a widespread social conviction that unlimited overtime constitutes intolerable overreaching, several reinforcing corrective programs are available. One would be a blanket elimination of the exclusion of executive, administrative, and professional employees from the overtime provision of the FLSA.²⁰⁴ Another would be congressional legislation of an across-the-board increase in the statutory overtime premium from 50 percent to 100 percent or more.²⁰⁵ Finally, in the spirit of the recent worldwide resurgence of interest in shorter hours as a means of combating unemployment, increasing leisure, or both,²⁰⁶ a return to the pre-New Deal state maximum hours statutes prohibiting workweeks beyond a specified length becomes imaginable.²⁰⁷ In contrast with these radical possibilities, a readjustment of the nineteen-year-old obsolete salary test level is merely the rankest reformism—even if it is calculated to “alienate the other interested parties”²⁰⁸ such as McDonald’s, which controls one-sixth of the entire fast-food market and two-fifths of the burger business.²⁰⁹

The Clinton Administration’s failure to undertake any initiative to raise the salary test level contrasts sharply with the alacrity with which the President himself asked Congress to raise another long unchanged threshold—social security coverage for domestic workers. The \$50 per quarter threshold became politically embarrassing for him when it was revealed that a number of his prominent nominees had violated the Internal Revenue Code by having failed to pay Federal Insurance Contributions Act taxes on behalf of their maids and nannies.²¹⁰ Clinton therefore immediately informed Congress that “[t]he financial threshold in the law is outdated, having remained unchanged for the past four decades. It is time to

204. 29 U.S.C. § 213(a)(1) (1988 & Supp. IV 1992).

205. See, e.g., *Minimum Wage-Hour Amendments, 1965: Hearings on H.R. 8259 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 89th Cong., 1st Sess. 2 (1965) (President Johnson’s proposal to Congress to increase the overtime rate to double time); Ronald G. Ehrenberg & Paul L. Schumann, *The Overtime Pay Provisions of the Fair Labor Standards Act*, in *THE ECONOMICS OF LEGAL MINIMUM WAGES* 264, 267 (Simon Rottenberg ed., 1981) (discussing congressional proposal to increase overtime rate to double time); RONALD G. EHRENBERG & PAUL L. SCHUMANN, *LONGER HOURS OR MORE JOBS? AN INVESTIGATION OF AMENDING HOURS LEGISLATION TO CREATE EMPLOYMENT* 131-39 (1982) (presenting evidence of effects of shifting premium rate to double time).

206. See, e.g., JULIET SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* (1991); Roger Cohen, *Europeans Consider Shortening Workweek to Relieve Joblessness*, N.Y. TIMES, Nov. 22, 1993, at A1.

207. See Elizabeth Brandeis, *Labor Legislation*, in 3 JOHN R. COMMONS, DON D. LESCOHIER & ELIZABETH BRANDEIS, *HISTORY OF LABOR IN THE UNITED STATES, 1896-1932*, at 399, 457-500, 540-63 (1935).

208. Telephone interview with Maria Echaveste, *supra* note 140.

209. Barnaby Feder, *McDonald’s Finds There’s Still Plenty of Room to Grow*, N.Y. TIMES, Jan. 9, 1994, § 3, at 5.

210. 26 U.S.C. § 3121(a)(7)(B) (1988); Richard L. Berke, *Judge’s Friends Try to Save Candidacy for High Court*, N.Y. TIMES, June 14, 1993, at A10; Gwen Ifill, *Defense Nominee*

amend the law.’²¹¹ Congressional inaction since 1950 with regard to this threshold has favored domestic workers—at least those who worked for the fewer than one-quarter of employers who complied with the law.²¹² Although it was on notice that as many as 300,000 (or two-fifths of all) domestic workers would lose benefits,²¹³ the House of Representatives promptly responded not only by raising the threshold to \$1,800 annually²¹⁴ but also by retroactively indexing the amount to 1951, thus relieving from liability any employer who had ever failed to pay taxes on wages below that amount during the intervening forty-three years.²¹⁵ If the Senate passes its

Didn't Pay Taxes for Housekeeper, N.Y. TIMES, Dec. 21, 1993, at A1; Michael Kelly, *Household Hiring Is Trickier with New Broom in Capital*, N.Y. TIMES, Feb. 12, 1993, at A1; Douglas Martin, *Illegal-Nanny Anxiety Afflicts Nation After Uproar over Baird and Wood*, N.Y. TIMES, Feb. 15, 1993, at A7; Eric Schmitt, *Explaining Tax Stance On Maid, Inman Says She Was "Contractor,"* N.Y. TIMES, Jan. 19, 1994, at A17; *Transcript of the Statement by Inman on His Decision to Withdraw*, N.Y. TIMES, Jan. 19, 1994, at A16.

211. Richard L. Berke, *Clinton Seeks Change in Tax Rule That Scuttled Baird Nomination*, N.Y. TIMES, Apr. 24, 1993, at A8 (quoting letter from Clinton to Senator Biden, Chairman of the Senate Judiciary Committee (Apr. 19, 1993)).

212. *Hearing on Proposals to Simplify and Streamline the Payment of Employment Taxes for Domestic Workers Before the Subcomm. on Social Security and the Subcomm. on Human Resources of the House Comm. on Ways & Means*, 103d Cong., 1st Sess. 5 (1993) (statement of Marshall Washburn, IRS); Michael Wines, *Panel Eases Employers' Tax on Domestic Workers*, N.Y. TIMES, May 12, 1993, at C18 (nat. ed.).

213. Michael Arnold, *Senate May Seek Different Solution on Tax Payments for Domestic Help*, WASH. POST, June 20, 1993, at A16; *Not the Zoe Baird Problem*, WASH. POST, May 3, 1993, at A18; *Ways and Means Outrage*, WASH. POST, May 13, 1993, at A26. Loss of coverage would result primarily from the fact that many household employees divide their time working for several employers, none of whom may pay them more than \$1,800. This outcome contradicts the original purpose of the low quarterly wage threshold. When Congress first covered domestic employees in 1950, it coupled the \$50 per quarter test with a requirement that the worker also be “regularly employed,” which it defined as working at least twenty-four days per quarter for an employer. In criticizing this provision, Senator Lehman observed:

[I]t would not cover the typical household worker who is hired to work by the day—in other words, the great number of people who work for the same employer on the same day each week, but on each day of the week for a different employer.

These people are just as regularly employed as those covered by H.R. 6000.

96 CONG. REC. 5989 (1950). Precisely in order to avoid this inequity, Congress removed the “regularly employed” test four years later. S. REP. NO. 1987, 83d Cong., 2d Sess. 7-8 (1954), reprinted in 1954 U.S.C.C.A.N. 3710, 3717. The trend away from residing in the employer’s house and toward part-time work, which was already observable in the late 1940s, has presumably intensified in recent years. *Amendments to Social Security Act: Hearings Before the House Comm. on Ways & Means*, 79th Cong., 2d Sess. 550 (1946) (statement of Margaret Plunkett, Chief, Division of Legislation, Women’s Bureau, U.S. Department of Labor).

214. Although this figure (which multiplies the 1950 threshold by a factor of nine) is defended on the ground that it merely adjusts the quarterly wage for inflation, the consumer price index (for all urban consumers) has increased less than six-fold since 1950. Calculated according to data in U.S. BUREAU OF LABOR STATISTICS, BULL. NO. 2340, HANDBOOK OF LABOR STATISTICS, 475 tbl. 113 (1989); *Current Labor Statistics*, MONTHLY LAB. REV., Nov. 1993, at 91, 125 tbl. 31.

215. H.R. 2264, 103d Cong., 1st Sess. § 13013 (1993).

own “ ‘Zoe Baird bill,’ ”²¹⁶ yclept the Occasional Employment Equity Act,²¹⁷ public assistance will once again subsidize the employers of many of the lowest paid workers in the United States,²¹⁸ who are unable to secure themselves financially against the vicissitudes of old age and unemployment.²¹⁹

When the President or the DOL concludes that the obsolescence of a statutory provision harms the interests of employers, the administration acts quickly to amend the law.²²⁰ It behooves Robert Reich to conclude that the salary test level is obsolete and to put an end to employer appropriation of unpaid labor by compelling workers to work supra-normal workweeks. Reich should act before the federal judiciary embarrasses him by declaring the current salary test level invalid.²²¹ And embarrassed he should be if, as the supreme “symbolic analyst” of labor standards in the United States, he fails to deploy on behalf of “in-person servers” the “political artillery” that he now plenipotentiarily commands.

216. DAILY TAX REP. (BNA), Nov. 22, 1993, at G-2 (quoting Senate Finance Committee aide). S. 1231, 103d Cong., 1st Sess. (1993), does not contain the antiworker provisions of the House bill.

217. S. 402, 103d Cong., 1st Sess. (1993).

218. U.S. BUREAU OF LABOR STATISTICS, EMPLOYMENT & EARNINGS, 245 tbl. 56 (Jan. 1994) (median weekly earnings of full-time private household workers were \$187 in 1993).

219. See 140 CONG. REC. 5278 (1974) (statement of Senator Williams describing the plight of domestic workers, who, because they are paid less than minimum wage, must rely on public assistance); 96 CONG. REC. 5989 (1950) (statement of Senator Lehman urging that domestic workers be included under the old age and survivors insurance programs of Social Security so as to obviate their need for public assistance).

220. The administration’s failure to update the salary test is made more stark by the DOL’s action amending its definition of what it means to be paid “on a salary basis.” 29 C.F.R. § 541.5d (1993). The DOL concluded that its former definition was in conflict with congressional intent as to public sector employees and promptly amended the definition. Under 29 C.F.R. § 541.118(a) (1993), an employer forfeits its exemption from the minimum wage and overtime provisions of the FLSA if it docks salaried employees for absences from work of less than a day for personal reasons. Some state and local government employers complained that compliance with this regulation would require them to violate state public accountability laws prohibiting payments to state and local government employees for time not worked that is not covered by accrued leave. 57 Fed. Reg. 37,666-77 (1992); *Hearing on the Fair Labor Standards Act: Hearing Before the Subcomm. on Labor Standards, Occupational Health and Safety of the House Comm. on Education & Labor*, 103d Cong., 1st Sess. 7-8 (1993).

221. As have many administrations before it, the Clinton Administration DOL has announced that § 541 is on its agenda. 58 Fed. Reg. 24,569, 56,587 (1993).