“Time and a Half’s the American Way”

A HISTORY OF THE EXCLUSION OF WHITE-COLLAR WORKERS FROM OVERTIME REGULATION, 1868-2004

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The Department of Labor has an especially heavy responsibility: within its ambit falls the United States Conciliation Service, the Bureau of Labor Statistics, the Immigration and Naturalization Service, the Children’s Bureau, the Women’s Bureau, and the United States Employment Service. Officials on these agencies have not been able to greatly assist labor’s fight for a full dinner pail but they have offered statistics from time to time to prove its emptiness.¹

The drafters of the FLSA in 1937-38 were hardly writing on a blank slate or operating in a regulatory vacuum when they inserted exclusions of administrative, executive, and professional employees into the bill. In fact, so many statutory models and examples of exclusion were available that it might even have qualified as the default or inertial choice, rejection of which would have required a powerful political or socio-economic reason or special legislative imagination. Unthinking preservation of the status quo was underwritten by four sources: state laws; federal bills and laws from the 1930s; National Recovery Administration industrial codes; and international labor conventions. This chapter deals with the first two, while the following two chapters are devoted to the latter two.

Before examining that body of state and federal legislation separately, it is necessary to mention the one cooperative federal-state New Deal regime that represented a different paradigm for dealing with white-collar workers. That system was Unemployment Insurance as embodied in the Social Security Act of 1935 and the coordinate state laws enacted during the next two years. It differed from European systems of the period, in which it was “usual to except from the compulsory provisions of the law at least those nonmanual workers who earn more than stipulated amounts per month or year. The underlying assumption is that such persons can maintain their independence.”² The U.S. federal (tax) component did not distinguish between manual and nonmanual workers.³ Initially it imposed the

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¹E. Pendleton Herring, *Public Administration and the Public Interest* 279 (1936).
³Nor did the federal old-age benefits provisions in Title II. Social Security Act, ch.
financing tax regardless of the size of the worker’s wage or salary.\textsuperscript{4} To be sure, in 1939 Congress imposed a $3,000 maximum on wages and salaries subject to the payroll tax in order to parallel the ceiling on covered wages subject to the tax for purposes of federal old-age benefits.\textsuperscript{5} The $3,000 ceiling on covered wages applied across the board, although it manifestly represented a stricter limit on the taxable salaries of higher-paid employees. Nevertheless, the fact of coverage of white-collar workers was in itself significant because it demonstrated legislatures’ recognition that these workers were also exposed to the vicissitudes of economic insecurity.

State and Federal Laws

Before government intervened with mandatory labor standards, premium over-

\textsuperscript{4}Social Security Act, § 901, 49 Stat at 639.

\textsuperscript{5}Social Security Act Amendments of 1939, ch. 666, Pub. L. No. 379, § 614, 53 Stat 1360, 1392-93. For the old-age benefits tax ceiling, see Social Security Act, § 811(a), 49 Stat at 639. According to the former chairman of the Social Security Board, “in retrospect it is clear the Board made a grievous error in not recommending instead that the maximum of $3,000 under the old age insurance system be removed so that there would be no maximum under either system. The imposition of a maximum not only has made the employee payroll tax regressive but has had a serious effect...in preventing a rise in the level of benefits commensurate with the rise in the general wage level.” Arthur Altmeyer, \textit{The Formative Years of Social Security} 97 (1968). Prior to 1939 five states imposed a ceiling on covered salaries for Unemployment Insurance taxes, but among them only New York totally excluded workers earning above that threshold: Kentucky, Massachusetts, Michigan, and Rhode Island capped covered wages at $2,600, $2,500, $3,000, and $3,000 respectively, whereas New York excluded from coverage altogether employees whose wage or salary exceeded $3,000. Millis and Montgomery, \textit{Labor’s Risks and Social Insurance} at 160-61.

time compensation had not been a typical employment practice in offices staffed by overwhelmingly nonunion white-collar workers. A survey conducted by the Women's Bureau of the U.S. Labor Department in 1931-2 of 34,000 women in 314 offices in seven cities (New York, Philadelphia, Chicago, St. Louis, Atlanta, Hartford, and Des Moines, with New York alone accounting for more than 40 percent of the total) disclosed that supper money was usually the only compensation for overtime work. In the mid-1930s, the American Management Association considered even supper money for overtime work harmful to morale: inasmuch as salaried office workers usually received their regular pay when they were legitimately absent and for an occasional day off for personal reasons, it was "only reasonable to assume that the salaried office employee will be willing to perform a reasonable amount of overtime work...." 

Prior to the FLSA, a number of states had maximum hours laws, applicable largely to women, that excluded from their coverage various discrete white-collar occupations. For example, as early as 1912, Virginia amended its 10-hour statute, specifying that bookkeepers, cashiers, office assistants, and stenographers were not subject to it. In 1913, Arizona, California, and Pennsylvania excluded nurses, while Texas excluded stenographers and pharmacists. Oklahoma excluded

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7 U.S. DOL, Women's Bureau, *The Employment of Women in Offices* 1-2, 15 (Bull. No. 120, 1934) (by Ethel Erickson). Interviews with management revealed widely disparate policies. In New York investigators heard managers state that their policy was to hire extra "help" at fiscal periods' special rush and that if continued overtime was necessary, to take on temporary "help." Id. at 31. In Atlanta, whereas an insurance company reported that when extra work came, it could lie over until the next day, a bank stated that it did not allow employees to leave until a balance had been struck in the transit and bookkeeping departments. Id. at 31, 66. A less scientific survey carried out in 1930-31 found that only 30.6 percent of women office workers were reimbursed for overtime work in any way. Interestingly, the median income of those who worked overtime was slightly less than those who did not. U.S. Women's Bureau, *Women Who Work in Offices* 12 (Bull. No. 132, 1935) (by Harriet Payne).


State and Federal Laws

stenographers, nurses, and pharmacists in 1915,12 and Nevada nurses in 1917.13 From a 1915 hours law applying to men and women in manufacturing and factories North Carolina excluded superintendents, overseers, and “office men.”14 A 1921 New Mexico hours law for women broadly excluded “females employed in offices, as stenographers, bookkeepers, clerks, or in other clerical work, and not required to do manual labor.”15 In 1933, North Carolina also excluded bookkeepers, cashiers, and office assistants from its 10-hour law for women, which covered clerks, saleswomen, and waitresses serving the public.16

A politically much more self-conscious legislative process finally emerged in 1935 when Arkansas attached an explanatory preamble to an amendment to its women’s hours statute:

Whereas the act governing the hours and working conditions of female laborers passed in 1915 does not meet the needs of women at the present time, and

Whereas at the time this act was passed there were so few women executives and managers that they were not given a separate classification from other female laborers; and

Whereas employers of some of the larger mercantile establishments in the state have stated that if they are required to classify all women employees as female laborers under the present law that [sic] they will have to dispense with the services of some of their best and highest salaried employees; and

Whereas the Federal Code does not differentiate between male and female employees but does differentiate between executives and employees; therefore, ...

Section 1. In order to meet the present needs of women holding responsible executive or managerial positions, that ...

“No females shall be employed in any manufacturing, mechanical, or mercantile establishment, laundry, or by any express or transportation company...for more than nine hours in any one day, or more than six days, or more than fifty-four hours in any one week....”

Provided...that these provisions shall not apply to female persons employed in an

Penal Code § 717, at 149 (1913); 1913 Cal. Stat. ch. 352, § 1, at 713, 714 (June 12); 1913 Pa. Laws ch. 466, § 3(c), at 1024, 1026 (July 25); 1913 Tex. Gen. Laws ch. 175, §§ 1 and 2a, at 421, 422 (Apr. 16); see also 1915 Tex. Gen. Laws ch. 56, § 1, at 105 (Mar. 15).

121915 Okla. Sess. Laws ch. 148, § 2, at 196, 197 (Mar. 13). Four years later stenographers were omitted from the excluded groups. 1919 Okla. Sess. Laws ch. 163, § 2, at 235 (Apr. 5).

131917 Nev. Stat. ch. 14, § 1, at 14, 16 (Feb. 14). From their women’s hours laws Illinois, Michigan, and Oregon also excluded nurses, while Wisconsin excluded pharmacists. Smith, State Labor Laws for Women at 3, 11, 14, 15.

141915 NC Sess. Laws ch. 148, § 2, at 232 (Mar. 8).

151921 NM Laws ch. 180, § 1, at 386 (Mar. 14).

State and Federal Laws

executive or managerial capacity who exercise real supervision and managerial authority with duties and discretion entirely different from that of regular salaried employees, and who receive as compensation for their labor thirty-five dollars per week, or more, exclusive of any and all bonuses and commissions.\(^17\)

The amendment went on to require any employer that wanted to avail itself of this exception to file a petition for exemption on its behalf and on behalf of the female executive or manager with the state Industrial Welfare Commission, which was obligated to issue a temporary permit and to hold a hearing on the merits, after which it could issue a waiver to the employee and employer.\(^18\) The legislature’s reference in this otherwise admirably transparent public policy statement to the “Federal Code” presumably meant the National Recovery Administration codes of fair competition, since no federal law regulated run-of-the-mill women workers’ hours in 1935. Many of the NRA codes did distinguish between executives and employees and excluded the former from their hours provisions. Indeed, the Arkansas amendment’s definition of excluded executives was taken almost verbatim from a 1933 NRA interpretation.\(^19\)

The legislative linkage to the NRA codes was neither coincidental nor idiosyncratic. In 1934 Labor Secretary Frances Perkins had called a National Conference on Labor Legislation, asking the governor of each state to appoint as delegates an official of the state department of labor and the state federation of labor; delegates from 39 states then met in Washington, D.C. in February.\(^20\) During the discussion on the limitation of hours of work, they repeatedly spoke of the need to coordinate state legislation with the NRA codes, especially with respect to enforcement.\(^21\) Most prominently the Arkansas Commissioner of Labor, E. I. McKinley, stated that his agency had “assumed that the difference between the wage paid by the employer and that fixed in the code was unpaid wage and ha[d] taken it to court. Since the N.R.A. has been in effect, there have been brought to


\(^18\)1935 Ark. Acts 150, §§ 2-4 at 426. The Arkansas Department of Labor’s next biennial report did not mention that any such permits or waivers had been issued (but it did list the child labor permits issued). Thirteenth Biennial Report of Department of Labor of the State of Arkansas 1936-1938, at 16 (n.d. [1938]).

\(^19\)See below ch. 7. Schechter v. United States, 295 U.S. 495 (1935), which held the National Industrial Recovery Act unconstitutional, was decided on May 27, two months after the Arkansas statute had been passed on March 20.


the attention of the labor department more violations of State laws than before and
we have had more prosecutions."^{22} The report of the Committee on Limitation of
Hours of Work—which was chaired by Elmer Andrews, Perkins' successor as New
York State Industrial Commissioner and the future first federal Wage and Hour
Administrator—made the connection even more specific:

In order to make more permanent the social and economic advantages of the limitation
of hours under which industry is operating under the N.R.A., the committee believes it is
desirable that State laws be made to conform as nearly as possible to the general standards
adopted in the codes. Not only as a protection to the workers, but in fairness to industry,
we believe that all States should have uniform regulations pertaining to the hours which
employees may work, so that industries in particular States may not have unfair advantage
over competitors in others.^{23}

The report, which was adopted, went on to recommend as among the general
standards for hours of labor for the states to incorporate in their laws that no
employer engaged in manufacturing, mining, or construction or employing more
than five persons "shall employ any person except in a supervisory capacity or as
outside salesman" more than 40 hours a week, "provided that this section shall not
apply to persons engaged in professional or agricultural employment...." The re­
port also recommended an exception for professional service and employment "in
a managerial capacity" to the prohibition of night work for women.^{24}

In spite of these interrelated national discussions, however, the immediate
occasion for the Arkansas legislative initiative remains unclear. The Arkansas
Commissioner of Labor made numerous recommendations for proposed legislation
in his biennial reports, but the reports for 1932-34 and 1934-36 did not mention
any need for such an amendment,^{25} which would, in any event, have been a curious
proposal for a defender of labor standards to pursue. It also seems counterintuitive
that owners of "the larger mercantile establishments" in Arkansas of all states
would have been the first to perceive the constraints of the 54-hour workweek for

^{22}Proceedings of the National Conference for Labor Legislation Held at Washington,
D.C. February 14 and 15, 1934, at 22.
^{23}Proceedings of the National Conference for Labor Legislation Held at Washington,
^{24}Proceedings of the National Conference for Labor Legislation Held at Washington,
D.C. February 14 and 15, 1934, at 67.
^{25}Eleventh Biennial Report of Bureau of Labor and Statistics of the State of Arkansas
1932-1934, at 11-17 (n.d.); Twelfth Biennial Report of Bureau of Labor and Statistics of
female executives as sufficiently severe to require a legislative remedy.\textsuperscript{26}

This link to the NRA’s exclusionary framework manifested itself in the North in 1935 when Massachusetts amended its law relating to the hours of labor of women and children in manufacturing and mercantile establishments, specifying that it “shall not apply to persons who may be declared by the commissioner to be employed in a supervisory capacity, or who may be serving exclusively as personal secretaries.”\textsuperscript{27} In 1937, in the weeks before the FLSA was introduced in Congress, other states acted. In March, North Carolina excluded from its maximum working hours laws for women and men “persons over eighteen years of age in bona fide office, foremanship, clerical or supervisory capacity, executive positions, learned professions, commercial travelers....”\textsuperscript{28} Adopting the terminology of the aforementioned NRA interpretation and the Arkansas statute, Ohio in amending its women’s hours law excluded “the work of females over twenty-years of age earning at least thirty-five dollars a week in bona fide executive positions where real supervisory and managerial authority are exercised with duties and discretion entirely different from that of regular salaried employees” as well as the employment of women in the “professions” of medicine, law, teaching, and social work.\textsuperscript{29} Colorado innovated in enacting a fair trade practices law regulating the cleaning and dyeing

\textsuperscript{26}The bill (S.B. 290) had been introduced on February 12 by state senator James Lavesque Shaver. “In the Senate, February 12, 1935,” \textit{Arkansas Gazette}, Feb. 13, 1935 (3:2-3, 7:6). As introduced the text was identical with the enactment. Senate Bill No. 290; digital photostat provided by David Ware, Arkansas Capitol Historian. It passed the Senate 10 days later by a vote of 29 to 1. “In the Senate, February 22, 1935,” \textit{Arkansas Gazette}, Feb. 13, 1935 (3:2-3). (According to the unpublished Senate Journal at 464, the vote was 28 to 1; digital photostat provided by David Ware.) The bills passed that day sparked little debate and most passed practically unanimously following explanation by their sponsors. “14 Bills Passed at Senate’s Session,” \textit{Arkansas Gazette}, Feb. 23, 1935 (3:1). On March 5 the bill passed the House 81 to 0. “In the House, March 5, 1935,” \textit{Arkansas Gazette}, Mar. 6, 1935 (5:2). Shaver was a member of a prominent eastern Arkansas family with links to plantation agriculture, whose direct constituents would presumably not have been intensely concerned with a statute from which agriculture was entirely excluded anyway. “Governor Vetoes County Turnback,” \textit{Arkansas Gazette}, Mar. 21, 1935 (1:6, 6:4); telephone interview with Arkansas Capitol Historian, David Ware, Little Rock (Aug. 11, 2004).

\textsuperscript{27}Mass Laws 1935, ch. 200, at 189, 191 (Apr. 23).

\textsuperscript{28}1937 NC Sess. Laws ch. 409, § 3, at 849, 850 (Mar. 23). Redundantly, the statute also excluded office and supervisory employees (along with repair crews and other employees) from the weekly hours maximum in emergencies. \textit{Id.}

\textsuperscript{29}1937 Ohio Laws Senate Bill 287, at 539, 540, creating § 1008-2 in the General Code (Apr. 28).
trade, the maximum hours provision of which did not apply to male or female executives earning $30 or more per week.\textsuperscript{30} In June, while FLSA hearings were being held in Washington, Pennsylvania both amended its women’s hours law to exclude the work of females over the age of 21 earning at least $25 in executive positions\textsuperscript{31} and enacted a radical maximum 44-hour law applicable to men and women, which, however, excluded employees in bona fide executive positions and learned professions earning at least $25 per week\textsuperscript{32}—as well as secretaries earning at least $25 a week and rendering private and confidential services to the aforementioned excluded executives.\textsuperscript{33} The following May, shortly before the FLSA was enacted, South Carolina amended its 12-hour-a-day and 56-hour-a-week law, which like the Pennsylvania statute, applied to men and women, but excluded bona fide executives and learned professions.\textsuperscript{34} In 1938 the Oklahoma Industrial Welfare Commission excluded: female office employees and one executive for each five full-time employees earning more than $25 per week from an order applying to retail, mercantile, and office employment; male and female executives and supervisors earning more than $30 weekly in wholesaling and distributing; and motor vehicle retail managers earning more than $30.\textsuperscript{35}

In the wake of the FLSA’s enactment, states continued to promulgate hours rules excluding some white-collar employees. For example, in the pre-World War II period, Maine amended its women’s hour law in 1941, going even farther than the FLSA in excluding females employed in an administrative, executive, professional, or supervisory position, or as a personal office assistant to an administrative, executive, professional, or supervisory employee, and earning an annual salary of at least $1200.\textsuperscript{36}

\textsuperscript{30}1937 Colo Sess Laws ch. 113, § 4.2(b), at 413, 418 (May 4). For emergency breakdown or repair work employers were required to pay at least time and a third. \textit{Id.} § 4.2(c).

\textsuperscript{31}1937 Pa. Laws No. 322, § 3(c), at 1547, 1550 (June 4).

\textsuperscript{32}1937 Pa. Laws No. 567, § 2(c), at 2766, 2767 (July 2). Although the general law was judicially invalidated, the women’s law survived. Marc Linder, \textit{The Autocratically Flexible Workplace: A History of Overtime Regulation in the United States} 151-241 (2002).

\textsuperscript{33}Linder, \textit{Autocratically Flexible Workplace} at 178, 189.

\textsuperscript{34}1938 S. Carolina Acts No. 943, § 1, at 1883, 1884 (May 11).


\textsuperscript{36}1941 Maine Laws ch. 294, at 380.
Precisely because they were largely components of maximum-hours laws, these exclusions disadvantaged white-collar workers relatively even more than they would have in the context of overtime laws, which would have permitted employers to work covered employees longer hours so long as they paid the overtime penalty; in the maximum-hours context, in contrast, only the white-collar workers could have worked overtime. In order to appreciate that the FLSA was not created entirely tabula rasa, it should also be noted that these laws excluded not only managerial/executive and professional employees, but, in Virginia, Texas, North Carolina, New Mexico, Massachusetts, and Pennsylvania, also those whom the FLSA would have classified as “administrative” employees, as well as other white-collar workers (such as stenographers) who, not being “bona fide” administrative employees, were clearly protected under the FLSA.

Federal Laws

Bankers’ hours are coming to industry—hours of bank executives, I mean, not those of bank clerks—and coming rapidly.37

The depth and longevity of the Great Depression gave rise to a wide range of interventions by the federal government to spur profitable production and defuse destabilizing unrest by reemploying the unprecedented millions of unemployed workers. A number of these programs focused on reducing working hours in order to reabsorb the disemployed through work-sharing.38 In this reemployment context, several programs had to confront the issue of whether to include white-collar workers.

Even before the advent of the New Deal, President Hoover had advocated the establishment of a federal lending entity to support economic recovery. The functions of the Reconstruction Finance Corporation, which Congress enacted in early


38The underlying mechanism was described by the director of the Division Industrial Hygiene of the New York State Department of Labor this way: “[T]he worker, at a disproportionate cost of energy, is getting an increased wage and keeping others out of badly needed jobs. Is this fair on the part of the employer? Is it fair on the part of the worker? Is it good for anything or anybody in these times when we must search the world for work in order to keep people from starving? Extreme use of overtime, at this time, is inexcusable.” J. D. Hackett, “Overtime,” IB 11(3):69 (Dec. 1931).
1932 to offer emergency financing for banks, railroads, life insurance companies, and other businesses, were expanded in the middle of that year when the legislature authorized the RFC to provide loans to state and local governments to construct self-liquidating public works projects.39 The focal congressional bill was H.R. 12353, which was introduced on May 27 by the Democratic House Majority Leader, Henry Rainey, to broaden the RFC’s lending powers and to create employment by authorizing public works. Its original version lacked a maximum hours provision and thus any exclusions from such a limitation.40 However, at the Ways and Means Committee hearings on the bill a few days later, William Connery, the chairman of the House Labor Committee, declared: “I would like the committee to put in some amendment to this bill for a 5-day week and 6-hour day on all Government work and all these Government projects...and even extend it to where the Reconstruction Finance Corporation is to make a loan...solely with the idea of putting more people to work.”41 Representative Fiorello LaGuardia also spoke in favor of the 30-hour week.42

Then Representative Heartsill Ragon of Arkansas, referring to such suggestions, asked Harry Kirk, representing the Associated General Contractors of America, whether it would be “practical” for a contractor on a public building to “use two sets of men a day....” Kirk not only testified that the five-day week and six-hour day would be possible in construction with two shifts, but mentioned that Colonel William Starrett, the contractor on the Empire State Building and then vice president at large of the AGCA, had toured the country in November and December 1931 advocating rotation of forces so as to employ the maximum number of men on construction projects; one of Starrett’s plans was two daily six-hour shifts. To be sure, Kirk added that Starrett had “emphasized that it would be hopeless to attempt to rotate the contractor’s supervisory forces.”43 This information prompted the following dialog:

Mr. Ragon. If we should put in any of these relief bills any such a provision as that, should

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42 *National Emergency Relief: Hearings Before the Committee on Ways and Means House of Representatives on H.R. 12353* at 92.
43 *National Emergency Relief: Hearings Before the Committee on Ways and Means House of Representatives on H.R. 12353* at 208-209.
we not put the qualifying term in there “where it is practical”? Mr. Kirk. [T]hat has been done in many...States—speaking again about State highway work—and they have made some exceptions.

Mr. Ragon: Key men, for instance, on the job?

Mr. Kirk. Yes. But the great bulk of the men would work shorter hours.

Mr. Ragon. They might have a superintendent of construction there who could not work shorter hours?

Mr. Kirk. Yes; they have tried to make the regulations reasonable.44

With this seed planted, the day after the hearings ended Rainey introduced H.R. 12445, the National Emergency Relief Act of 1932, with similar purposes, which included the provision that all contracts let for construction projects under this law “shall be subject to the conditions that...(except in executive and administrative positions), so far as practicable, no individual employed on such projects shall be permitted to work more than five days in any one week....”45 In the version of the bill introduced later in June, the 30 hours was substituted for five days as the maximum workweek,46 but Hoover vetoed the bill because the centralized financial power it conferred on the federal government was too great.47

In the new iterations of the bill that the Democrats immediately began crafting to accommodate Hoover’s objections the exclusion of executive and administrative positions from the 30-hour week was not only retained,48 but promptly extended to encompass supervisory positions as well.49 Thus the Emergency Relief and

44National Emergency Relief: Hearings Before the Committee on Ways and Means House of Representatives on H.R. 12353 at 209.


47In his veto message Hoover complained both that the bill would make possible “loans...for any conceivable purpose on any conceivable security to anybody who wants money” and that it would place government in business in such a way as to violate “the very principle of public relations upon which we have builded our Nation....” CR 75:15040-41 at 15041 (July 11, 1932).

48Senator Wagner introduced as an amendment in the nature of a substitute to The Emergency Relief and Construction Act of 1932, H.R. 9642, § 201(a) (72d Cong., 1st Sess., July 11, 1932), a provision that made all RFC loans for construction projects subject to the condition that “(except in executive and administrative positions), so far as practicable no individual employed on any such project shall be permitted to work more than thirty hours in any one week....”

49The version introduced in the Senate on July 12 added “supervisory.” H.R. 9642 (72d Cong., 1st Sess. July 12, 1932); CR 75:15097 (1932). See also H.R. 12946, § 7 (72d Cong., 1st Sess., July 12, 1932) (introduced by Rainey): “that (except in executive, administrative, and supervisory positions), so far as practicable, no individual directly em-
Construction Act, which was enacted on July 21, 1932, made all RFC loans for construction projects subject to the condition that “(except in executive, administrative, and supervisory positions), so far as practicable, no individual directly employed on any such project shall be permitted to work more than thirty hours in any one week....”\(^50\) Congress failed to identify or define the incumbents of these “administrative” positions who were excluded from the 30-hour week. Three years later, the New Deal Congress that enacted the Emergency Relief Appropriation Act of 1935 also provided that, with regard to construction of public highway and related projects, “preference in the employment of labor shall be given (except in executive, administrative, supervisory, and highly skilled positions) to persons receiving relief....”\(^51\) When President Roosevelt issued an executive order prescribing rules for working hours under this act, “supervisory and administrative employees” were excluded from the maximum daily and weekly hours of eight and 40, but the definition of “administrative employees” was now subject to at least some limitations since “clerical and other non-manual employees” were subject to that schedule, whereas manual labor’s maximum hours were eight per day and 130 per month.\(^52\) Thus the legislative and executive branches created a tradition on which they could draw in 1937-38, when they drafted, debated, and enacted the FLSA without revealing the characteristics of employees in an administrative capacity were who were excluded from that law’s overtime provision.

\(^{50}\)Emergency Relief and Construction Act of 1932, Pub. L. 302, ch. 520, 47 Stat 709, 712, § 201(a) (July 21, 1932). This Hoover-era statute is presumably the source of the identical exclusionary language (“those in executive, administrative and supervisory positions”)—or its verbatim adoption in the bill that Senator Wagner introduced on May 15, 1933 and that, as discussed below in ch. 7, became the NIRA—that a scholar discovered in an unpublished memorandum on maximum hours and minimum wages by one of President Roosevelt’s economic researchers, dated May 23, 1933, which was the earliest reference to such exclusions that she found in the Roosevelt administration’s archives. Deborah Malamud, “Engineering the Middle Classes: Class Line-Drawing in the New Deal Hours Legislation,” *Michigan LR* 96(8):2212-2321, at 2236 (Aug. 1998).


\(^{52}\)Executive Order No. 7046, Prescribing Rules and Regulations Relating to Wages, Hours of Work, and Conditions of Employment under the Emergency Relief Appropriation Act of 1935, Pt. II (a) and (b) (May 20, 1935).
Mr. Black. [W]hen I think of people in this Nation today... working 16 hours per day, with whirling machinery dinning into their ears, going home tired, worn out, and weary, going into their homes in such a condition that they can do nothing but retire and try to get a little sleep in order to forget the din and whirl in their ears, I do not apologize to the people of America for introducing a bill to use the arm of government to prevent that abuse, to prevent grinding down into human slavery men and women who are too weak and too helpless to protect themselves.

[The bills] offer to those who toil in mill and in factory, to those whose bodies have been drained until as you look at their faces you can see that the blood has been taken away, a shorter working period in order that they, too, may enjoy some of that leisure which should be granted to all when machines can take the place of human beings.53

Mr. Gore. What I think will happen is that hours will decrease, wages will decrease, work will speed up, and labor will be driven to perform as much work in 6 hours as in 8. The wage earners, threatened, frightened by the breadline, will attempt the task.54

With the AFL estimating that 13 to 14 million workers, a quarter of the labor force, were unemployed by the fall of 1932,55 three of its large departments—the building, metal, and union label trades—recommended, a few days before the organization’s annual convention, an aggressive campaign for the five-day week and six-hour day “not as a cure-all but as a stop-gap in which to start to take up the slack caused by technological unemployment.” And even the 30-hour week was not the goal, but “a halting place on the march to an undefined but still shorter work-week, which was regarded as imperative so long as technical progress continued to advance so rapidly.”56 In his keynote address to the convention in Cincinnati on November 21, President William Green called establishment of the

53CR 77:1295 (Apr. 5, 1933).
54CR 77:1296 (Apr. 5, 1933).
30-hour week "'a step in the right direction.'" In line with Green's promise that the convention—the dominant problem facing which was finding a solution to unemployment—would make a "valuable contribution toward 'the restoration of the impaired capitalistic structure,'" Ohio Governor George White "praised the American workingman for turning a deaf ear 'to the tenets of Leninism and communism'...."57

In the event, the Committee on Shorter Workday declared—in stilted language oddly juxtaposed to the "forceful methods" to which Green threatened to resort "to compel industry to give us this great reform"58—that a balance had to be achieved between increases in productive efficiency and average labor hours so as to provide a wider diffusion of work opportunities as well as to "grant the workers larger leisure as a condition precedent to enhancing consuming power." Opposing "the spread-work movement with its pay reduction policy," the committee recommended that the convention record itself "in advocacy of and as proposing to the country the universal adoption without delay of the six-hour day and five-day work week" with no reduction in pay; it also recommended that this objective be declared the AFL's "paramount purpose."59 In support of the proposal, Green opined that it was "quite impossible" for industry to provide 48 hours of work weekly for 50-55 million workers: "We have developed such mechanical technique as to make it impossible to absorb into industry the workers of the nation."60 The convention then adopted the motion unanimously.61

Barely three weeks later Senator Hugo Black introduced a short bill62 prohibiting the shipment in interstate commerce of any article produced in any mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment in the United States in which anyone was employed or permitted to work more than five

62 For the argument that the bill was Black's idea alone and was not introduced as a result of the AFL convention resolution, see Elizabeth Brandeis, "Organized Labor and Protective Labor Legislation," in Labor and the New Deal 193-237, at 199-202 (Milton Derber and Edwin Young eds. 1957).
days in a week or six hours in a day.\textsuperscript{63} Although Black’s original 30-hour bill did not apply to workers employed at workplaces other than those expressly mentioned—and thus for example excluded farmworkers\textsuperscript{64}—it would presumably have covered white-collar employees and not merely production workers at the specified industrial locations.\textsuperscript{65} After all, in August 1932, the president of the Chamber of Commerce of the United States, Henry Harriman, declaring that it was “better that 2,000 men work twenty-four hours a week than that 1,000 work forty-eight hours,” had informed a national radio audience that work-spreading “should be applied to ‘white-collar’ workers as well” as to manual labor and to commercial and banking as well as to industrial firms.\textsuperscript{66} Two weeks after Black, Massachusetts Democrat William Connery, the chairman of the House Labor Committee, introduced that chamber’s counterpart 30-hour bill, which also lacked any occupational exceptions.\textsuperscript{67}

\textsuperscript{63}S. 5267 (72d Cong., 2d Sess. Dec. 21, 1932). Enforcement took the form of a fine of at least $200 and/or imprisonment of at most three months. It took the national newspaper of record more than a week to take note: “Senate to Inquire into 5-Day Week,” \textit{NYT}, Dec. 29, 1932 (5:1-2). The bill did not set minimum wages, presumably out of deference to the AFL’s traditional opposition to such government measures applying to adult male workers. The unions that originally urged the AFL to adopt the 30-hour-week measure took the position that “wage rates must be left to negotiation, because the tendency always has been for wages to rise...when hours were shortened....” “Labor Plans Drive for Shorter Hours.” It is emblematic of the late-twentieth-century constricted policy universe that even the Congressional Research Service’s expert on the FLSA is unaware of the difference between a maximum-hours and an overtime-pay and therefore called Black’s 30-hour bills “overtime pay legislation....” William Whittaker, “The Fair Labor Standards Act: Analysis of Economic Issues in the Debates of 1937-1938” at 2 n.4 (CRS, 89-568 E, Oct. 10, 1989).

\textsuperscript{64}Black stated that he had excluded agriculture because it was at the mercy of the elements. \textit{CR} 77:1114 (Apr. 3, 1933).

\textsuperscript{65}When James Emery, the NAM general counsel, made this very point in his Senate testimony, no senator contradicted or questioned him about it. \textit{Thirty-Hour Work Week: Hearings Before a Subcommittee of the Senate Judiciary Committee on S. 5267}, at 189, 190 (72d Cong., 2d Sess. Jan. 5-19, 1933).


\textsuperscript{67}H.R. 14082 (72d Cong., 2d Sess. Jan. 6, 1933). In quick succession, Connery introduced slightly revised variants: H.R. 14105 (72d Cong., 2d Sess., Jan. 9, 1933), and H.R. 14518 (72d Cong., 2d Sess., Jan. 31, 1933). Whereas Black’s bill covered any person working in a covered workplace, Connery’s covered only those working “in the production of” articles shipped in interstate commerce. In addition, Connery’s bill differed
In the course of the hearings that Connery held on his bill in the second half of January, James Emery, general counsel of the NAM, basing himself on the bill’s ambiguous coverage of anyone “employed...to work in the production” of certain articles, made the crucial argument that the bill “does not apply merely to those who are engaged in the actual production of goods, to those employed in mechanical vocations or operations. It applies to...any person, who is permitted or required to work in the establishment, whether he be a superintendent, a foreman, an executive, a chemist, or an analyst....”68 Unfortunately, neither Connery nor any of the other committee members engaged Emery on this vital point because they (and he) were sidetracked by a distinct issue that he raised in the same context—namely, coverage of (blue-collar) workers engaged in emergency breakdown repairs. Connery and Georgia Representative Robert Ramspeck argued that since such repairs did not constitute production of merchandise, they would not be covered.69 Connery, in particular, used this ancillary issue to attack Emery for being “perfectly willing to work men 60 hours a week” and to impute to “the manufacturer” the desire “to have his men work 30 or 40 hours at a stretch to take care of difficulties such as you have in mind and pay them the same wages as for ordinary hours.”70

in bringing within its ban articles produced outside the United States. Of this aspect Connery said three years later that the NRA had come into existence because he had refused to remove from the 30-hour bill the provision barring the import of any article whose total landed cost was less than the cost of production of a similar article in the United States: “Perhaps I showed poor judgment at that time, I think I did. I should have done what I did last year and put a bill in the Ways and Means Committee calling for the same thing, and you would have had a 30-hour week today.... You would have had a 30-hour week, easy of administration, a flexible week, not a strict 30-hour week.... We will come to that next session, as sure as you and I are sitting here, and we will put a tax on the machinery, the power of machinery to stop the speed-up system and the stretch-out system.” Conditions of Government Contracts: Hearing Before a Subcommittee of the Committee on the Judiciary House of Representatives on H. R. 11554, at 284 (74th Cong., 2nd Sess. 1936).

69Six-Hour Day—Five-Day Week at 134-36.
70Six-Hour Day—Five-Day Week at 134. Connery exhibited a penchant for distracting exaggerations. When Emery predicted that enforcement would require a “vast army of inspectors,” Connery asserted that at the most it would require 48 inspectors for 48 states or one inspector per state. To Emery’s sarcastic reply, “I would admire his efficiency,” Connery made the following rejoinder, the truth of which history has not borne out: “It is common knowledge whether a concern is working more than 30 hours a week or any other number of hours. The employees will tell about that, and it would not be necessary to have
Undeterred, Emery persisted in calling to the committee’s attention that “this bill does not apply merely to the operating force of a factory or shop, merely to those to whom you would give work. This bill stops the work of executives, superintendents, foremen, chemists, of all who may be engaged in connection with any continuous process that must be observed and supervised with special care.”\(^\text{71}\)

The NAM, in other words, threw down the conceptual and political challenge that the 30-hour bill was designed to spread work only among traditional blue-collar workers. Emery was finally able to provoke debate on this claim by conjuring up the following scenario:

Mr. Emery. ...Where it [continuous process] involves, say, the work of a chemist and a scientific observation of the process, the fact that one person was permitted to work more than a specified time in a factory employing, say, 5,000 would damn the production of that whole establishment in connection with the products entering interstate commerce.

Mr. Ramspeck. Could not the concern affected employ two chemists?

Mr. Emery. One can pick up most any kind of chemist on the street, but the man trained all his life to observe a chemical process, is not so easily found.

Mr. Ramspeck. You know what we are trying to do, spread employment. ... The only way to effect the purpose of the bill is to work through interstate commerce. We do not transport stenographers’ notes or bookkeeping entries through interstate commerce.\(^\text{72}\)

Ramspeck thus appeared to acknowledge that ‘professionals’ such as chemists were covered by the 30-hour bill, impliedly because there were unemployed among them and the work-sharing triggered by the maximum-hours law could absorb them. However, Ramspeck failed to contradict Emery’s implicit contention that certain professionals were in such short supply that work-spreading would not apply to them (especially since none or only very few of them might be unemployed). More importantly still was Ramspeck’s apparent admission that, given the necessity of accommodating the Supreme Court’s narrow conception of interstate commerce, the bill’s correspondingly narrow conception of production for interstate commerce meant that white-collar office workers (exemplified by stenographers and bookkeepers) would not be covered, despite the fact that hundreds of thousands of them were unemployed and could be reemployed through work-sharing.

Although Connery’s Labor Committee reported his bill with the recommendation that it be passed,\(^\text{73}\) the session ended without action by the House.

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\(^{71}\)Six-Hour Day—Five-Day Week at 136.

\(^{72}\)Six-Hour Day—Five-Day Week at 136.

\(^{73}\)Prevent Interstate Commerce in Industrial Activities in Which Persons Are
Despite the various changes that the 30-hour bills underwent during March 1933 in the new Seventy-Third Congress, none as yet embodied any occupational exclusions. This blanket coverage crumbled on the Senate floor on April 3, 4, and 5, in the course of what turned out to be the most thorough debate that Congress has ever conducted on the exclusion of white-collar workers from hours legislation, which also had the virtue of making the legislative intent transparent.

Senator Arthur Vandenberg, about to become “unquestionably the leading conservative Republican in Congress during the New Deal,”75 was the key figure in creating exceptions to the bill, for which he was ultimately one of very few non-progressive Republicans to vote; and despite the fact that ten days later he voted to reconsider the bill in an effort to insert a provision prohibiting the importation of industrial goods produced outside the United States in establishments in which

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74For example, Black introduced a new bill, which added a preamble (implausibly) declaring that while millions of citizens were unemployed, “millions of others are working in factories and industrial establishments ten, twelve, thirteen, fourteen, and even sixteen hours per day.” S. 158 (73d Cong., 1st Sess., Mar. 10, 1933). The version of the bill reported out by the Judiciary Committee was subject to expiration after two years. S. 158 (73d Cong., 1st Sess., Mar. 30, 1933); Preventing Interstate Commerce in Articles Manufactured by Labor Employed More Than 5 Days per Week or 6 Hours per Day (S. Rep. No. 14, 73d Cong., 1st Sess., Mar. 30, 1933). Rep. Matthew Dunn (Dem. PA.) introduced a more expansive 30-hour bill that, untethered from interstate commerce, would have applied to “any trade, occupation, or branch of industry or labor...except in case of emergency where life or property is in imminent danger.” H.R. 4116 (73d Cong., 1st Sess., Mar. 23, 1933). Connery introduced a new bill that created the possibility of exemptions for the processing, canning, or packing of perishables if the Secretary of Labor found that it was necessary, “by reason of the seasonal character of the work required and the lack of available labor therefor,” to exceed the 30-hour maximum. H.R. 4557, § 3 (73d Cong., 1st Sess., Apr. 3, 1933). The House report accompanying its version of Black’s S. 158 offered no explanation of the exceptions. Thirty-Hour Week Bill (H. Rep No. 124, 73d Cong., 1st Sess., May 10, 1933).

75James Patterson, Congressional Conservatives and the New Deal: The Growth of the Conservative Coalition in Congress, 1933-1939, at 102 (1967). Vandenberg accepted several New Deal measures in 1933-34 to the extent that they “were designed to reestablish the old order, revive the market economy, and restore faith in traditional institutions.” C. David Tompkins, Senator Arthur H. Vandenberg: The Evolution of a Modern Republican, 1884-1945, at 97 (1970). “[G]uided by auto industry representatives,” he did oppose the right to collective bargaining embodied in § 7(a) of the NIRA, and by 1935 “vigorously opposed almost every significant New Deal measure” including the National Labor Relations Act and the FLSA. Id. at 100, 119 (quote), 121, 150.
any worker worked more than 30 hours per week—for which many opponents of
the bill voted—Vandenberg claimed that he would continue to support the Black
bill with or without this amendment.⁷⁶

Almost at the very outset of the Senate debate, Black informed his colleagues
that if there were exceptional circumstances in any industry, they should offer an
amendment. More specifically, in response to a query from Vandenberg, he con-
firmed that it would be possible to operate an emergency license system through
the Secretary of Labor.⁷⁷ In particular, Vandenberg believed that it would be im-
possible to can perishable fruits in northern Michigan “on the basis of the
undiluted formula” of Black’s bill. “On the other hand,” Vandenberg realized that
as soon as “exemptions or exceptions” are written, “we may have drawn the teeth
of the measure,” which he assured Black he had no interested in doing. Black
replied that since there were “probably” firms that could not procure labor within
the bill’s framework, he saw no reason not to authorize the Labor Secretary to issue
exemption permits, but he insisted that an exemption should not be issued merely
because complying with the 30-hour week “might cost a little more....”⁷⁸ Vanden-
berg contended that “it would be a physical impossibility to contemplate an ade-
quate labor [sic] on a staggered basis for just a few weeks or months of the year”
at the Michigan canneries, located as they were in isolated places;⁷⁹ if, on the other
hand, such labor were imported, housing would be insufficient for the short
period.⁸⁰ In addition to drafting an amendment for canneries, Vandenberg, without
identifying what kinds of workers he had in mind, also offered the general
exemption permit amendment to accommodate exceptional cases or ones “where
there may be an occasional expert whose labor has to be continuous....” Having
now presented “all of the legitimate exemptions,” he claimed that Black “agrees
that we have not invaded the legitimate and desirable objectives of the bill itself,”
and no one contradicted him.⁸¹ Chastened, perhaps, by Black’s admonition, Van-
denberg later stressed that the exemption permit would be confined to “unforeseen
circumstances” under which it would also be a “physical impossibility” to operate
within the bill’s general framework.⁸²

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⁷⁶CR 77:1810-12 (Apr. 17, 1933). Vandenberg had also voted for the amendment
when it was defeated 39 to 41 during the main debate. Id. at 1341-42. This provision was,
as already noted, embodied in the Connery bill.


⁷⁹CR 77:1195 (Apr. 4, 1933).


⁸¹CR 77:1178 (Apr. 4, 1933).

⁸²CR 77:1196, 1195 (Apr. 4, 1933).
State and Federal Laws

The cannery amendment, Vandenberg disclosed during debate, was the result of a conference that he had held on April 4 with Black and Senator Clarence Dill, Democrat of Washington—who at the time was also working with Connery on pension legislation and Black on railway labor legislation—and "represent[ed] a meeting of minds upon a formula which undertakes to provide legitimate exemptions and exceptions without invading the legitimate...purposes of the legislation." In a somewhat obscure supporting statement, Vandenberg then went on to argue that

there are certain exemptions in the bill, anyway; and the Senator from Alabama [Black] will correct me if I am wrong. It does not apply, for example, to executives or to office work; it does not apply to railroads; it does not apply, for example, to newspapers; it does not apply to agriculture. Therefore, if a further limited classification of exemptions is created, it is not necessarily in conflict with the genius of the legislation.

Presumably Vandenberg inferred the exclusion of railroads from the fact that, in the language of the Black bill, "no article or commodity" was "produced or manufactured" on a railroad, and the exclusion of agriculture from the fact that a farm was not comprehended within the scope of covered worksites—mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment." The interpretive exclusion of executives, office work, and newspapers, however, could not be achieved so readily, and thus required and received additional justification.

Further elucidation of the white-collar exclusion was facilitated by Republican Senator David Reed from Pennsylvania, an "extreme conservative" and "plutocrat," who knew that the average American did not want to be limited to 30 hours of work: "He is not a child to be nursed in such a way." In a wide-ranging attack, Reed, who claimed that the bill was "sentimentalism run mad" and "utterly unworkable," posed a number of questions to Black designed to uncover inconsistencies in the bill, not in order to improve it, but to obstruct its passage. When asked whether the bill covered newspapers—a worksite for a large number of

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84*CR* 77:1195 (Apr. 4, 1933).

85*CR* 77:1195.


87Warren, *Herbert Hoover and the Great Depression* at 90.

88*CR* 77:1191 (Apr. 4, 1933).

89*CR* 77:1282 (Apr. 5, 1933).
white-collar employees—Black immediately said no, but could find no better explanation than that “a newspaper” was not a factory or manufacturing establishment. When Reed then asked what the difference was between a job printer and a newspaper printer, Black could find no better explanation than that one worked in a (covered) workshop and the other in an (excluded) newspaper establishment. When Reed, finally tiring of the Socratic cat-and-mouse game, asked whether, since both employed printers and produced a printed product using ink and paper, the bill did not apply to newspapers as well, Black retreated to the drafter’s sheerest *ipse dixit*: “I never so intended.” Unimpressed by this home-made legislative history, Reed concluded that the outcome would ultimately hinge on judicial construction of “manufacturing establishment.”

Building on this stalemate, Reed then directly addressed the question of white-collar workers:

Has the Senator given any thought to the exclusion of managing officials and clerical workers from the terms of his bill? For example, it would be very difficult to have four general managers of a factory in order that each of them might have a 6-hour shift, and then, I presume we would have to have a fifth and sixth in order to relay on the sixth and seventh days of the week, if it were a continuous operation. Should not the directing officers of these establishments be excluded from this measure?

Black opined (without adding his definitive legislative intent) that the bill would not apply to such officers, observing that “such executives could be excluded” by making an application pursuant to Dill’s amendment. Dissatisfied with such a cumbersome process for the “hundreds of thousands...of requests” that would “come pouring in” for such a stereotypical exemption and that “would throw a terrible burden on the Secretary of Labor,” Reed urged Black “to make the exemption here, and not leave it to some bureaucrat to handle.” For his part, Black absolved himself of any blame by reminding his colleagues that back in February he had invited them to come forward, but that “[u]nfortunately...nobody presented any requests for exceptions of any kind whatever,” although Black had always realized that “there must be some exceptions in legislation of this character.”

Because both Reed and Black became preoccupied with excluding executive and managing officials, they never addressed Reed’s question concerning coverage of clerical workers, who could scarcely be viewed as the Vandenbergian “oc-

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90 *CR* 77:1196 (Apr. 4, 1933). In order to make “doubly sure,” Senator Tydings offered an amendment excluding newspapers, which was agreed to without debate. *Id.* at 1204, 124, 1283.

91 *CR* 77:1196 (Apr. 4, 1933).

92 *CR* 77:1196 (Apr. 4, 1933).
State and Federal Laws

When debate resumed on April 5, Reed reopened the matter of continuous process industry such as a blast furnace or chemical pulp mill with four shifts, where, if, “as very often happens,” the relief man did not get there because the street car was late or he was sick, either the law would be violated and every product of the factory would be embargoed or the blast furnace would be ruined.93 From these blue-collar workers Reed advanced again to the white-collar employees:

Take the superintendents and the clerical force and the accountants. Can there well be four shifts of such employees? How can a plant have four superintendents succeeding each other throughout the day? Yet this bill covers superintendents just as much as it covers common labor.94

Once again, Reed threw together big bosses and secretaries indiscriminately without offering any parade of horribles to explain why coverage of run-of-the-mill office workers would be infeasible and absurd. This time, however, Vandenberg brought the issue out into the open by submitting an amendment that he claimed was “in a sense clarifying, and in no degree in conflict with the original purpose of the bill. In fact, I have undertaken its preparation at the suggestion of the Senator from Alabama [Mr. Black], in consultation with the Senator from Massachusetts and the Senator from Connecticut, who are interested in the same point.”95

Mr. Vandenberg. It was not originally intended that the bill should apply to executives and supervisory officers in a business. It would be manifestly impossible to stagger general management or to stagger superintendents or to stagger private secretaries.

Mr. Norris. That will not be so difficult in a few days. [Laughter.]

Mr. Vandenberg. Well, using the word in the technical sense, the statement still remains. Therefore, in order to make it clear that the objective is fully covered, I am suggesting that...the following language be added:

except officers, executives, superintendents, and others in supervisory capacities, together with their clerical assistants.

I am inclined to believe that none of this group was ever intended to be covered within

93CR 77:1282 (Apr. 5, 1933).
94CR 77:1282 (Apr. 5, 1933).
95CR 77:1289 (Apr. 5, 1933). The Massachusetts Senator was David Walsh, who played a key role in federal hours legislation in 1935 and 1937-38; the Connecticut Senator was Augustine Lonergan, whose contribution is mentioned below.

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The origins of Vandenberg’s amendment to exclude, inter alia, certain administrative employees are political-economically most instructive. Although Vandenberg’s attitude to legislative regulation of labor-management relations was, according to his biographer, “conditioned by a genuine desire to satisfy the large labor population of Detroit and other Michigan industrial centers,” and he “publicly cultivated the labor vote with some success, he also sought to cooperate discretely with Michigan industrial leaders. Before voting for the Black Thirty Hour Week bill, he consulted with auto magnates Roy D. Chapin and Alfred P. Sloan....” Afterwards, “Vandenberg offered an amendment suggested by Sloan ‘to be sure that officers, executives, etc., were clearly exempted.’”

In fact, as the crucial Senate vote approached, Vandenberg had taken it upon himself to poll the Michigan automobile industry executives on their views of the 30-hour bill by sending them telegrams. On Saturday, April 1, he telegraphed Roy Chapin, the chairman of the Hudson Motor Car Company (and the last Secretary of Commerce in the Hoover administration): “Senate Judiciary Committee reports bill limiting all labor for next two years to six hour day and five day week. Purpose of bill is to force stagger in employment. I heartily favor idea but want to be sure of my ground. What would be effect on automotive industry[?] What is present average employment per day and per week [?]”

On Monday morning, April 3, Chapin telegraphed back that: “In talking with other members of industry, I find diversity of opinion. Will try to get you considered opinion of industry by tomorrow or Wednesday.”

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96 CR 77:1289. See also “Rise to 36 Hours Asked in Work Bill,” NYT, Apr. 6, 1933 (5:4).

97 Tompkins, Senator Arthur H. Vandenberg at 100.

98 Telegram from Sen. A H Vandenberg to Roy D Chapin (Apr. 1, 1933), in Roy Chapin Collection, Box 25, Folder: April 1-5, 1933, in BHL, University of Michigan, Ann Arbor, MI. In the quotation periods have been inserted instead of “STOP.” According to the BHL, which also houses Vandenberg’s papers, they contain no references to Black’s bill. Email from BHL (Dec. 19, 2003).

99 Telegram from Roy D. Chapin to Senator A. H. Vandenberg (Apr. 3, 1933), in Roy Chapin Collection, Box 25, Folder: April 1-5, 1933. Whether Chapin did in fact get Vandenberg such an opinion is unclear, but the National Automobile Chamber of Commerce in Washington, D.C. informed Chapin on April 4 that Vandenberg “would like to know whether there is any compelling reason in the automotive industry for a vote against the Black thirty-hour week bill....” If Chapin had any such reasons, he was asked to register them “without delay,” and Vandenberg would read them into the Congressional Record. Letter from National Automobile Chamber of Commerce to Roy D. Chapin (Apr.
Although the telegrams to Vandenberg ran the spectrum from outright approval to rejection of the bill as a whole, they agreed with regard to the white-collar exclusions. For example, Chrysler Corporation urged Vandenberg to oppose passage of the bill because it would “limit the earning power of men now satisfactorily employed” and “further harasses industry during this critical period by requiring experimentation with new operating conditions at a time when we companies are not able to make both ends meet under conditions with which they are experienced and familiar.” More specifically, however, Chrysler objected because the bill “makes no exception for men engaged in creative and executive work to whom the country must look for the industrial leadership to solve today’s problems.” Thus while regarding “the whole idea as unsound in principle we particularly urge that if experimented with at all its application should be restricted to only men employed at hourly rate of wages and applied on a yearly accumulative basis.” In contrast, the president of Packard Motor Car Company, Alvan Macauley, telegraphed back that “[t]he automobile industry is in hearty sympathy with any proper effort that will put more men back to work but we feel in principle the Black Five Day Labor Bill could be accepted only because of the grave national emergency existing.” In the limited time for discussion, Packard could not see what the bill’s results would be, “but we feel very strongly it should be amended...by limiting it to laborers and mechanics and allowing 36 hours per week....”

Chapin himself telegraphed on April 6 that, while the bill has worthiest of aim it is necessarily experimental and is bound to affect some businesses severely. If passed at all our recommendations are that it be restricted only to men employed on hourly basis that at least thirty-six hours be substituted for thirty that service operations of all sorts be excluded that authority be given Secretary of Labor for other exceptions and that it function on the basis of an annual average of at least thirty-six hours per week thus taking care of seasonal businesses...for which it would be utterly uneconomical and unfair to bring in additional and untrained labor supply for one to three months and then expect them to go back where they came from.

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4, 1933), in Roy Chapin Collection, Box 25, Folder: April 1-5, 1933.

100Mr. Hutchinson’s Telegram Chrysler (4-5-33), in Roy Chapin Collection, Box 25, Folder: April 1-5, 1933. Hutchinson was presumably B. Edwin Hutchinson, who had become president of Plymouth Motor Corp. in 1932. It is unclear why this telegram is in Chapin’s papers.

101Alvan Macauley to Senator Arthur Vandenberg (4:05 p.m. [n.d. but presumably Apr. 5, 1933]) (“Copy of Telegram Mr. Tibbetts Called In”). Tibbetts was presumably Milton Tibbetts who was a long-time Packard patent attorney.

102Telegram from Roy D. Chapin to Senator Arthur H. Vandenberg and Senator James
That same day Vandenberg typed, on Senate Committee on Foreign Relations letterhead, a two-page response to “My dear Roy,” explaining all that he had undertaken on behalf of the automobile firms. Because it is an extraordinarily rare extant record of a legislator’s privately explaining to a capitalist constituent exactly how and why he has amended a labor standards bill, and provides a key to understanding the real origins and purpose behind the white-collar exclusion, it deserves to be quoted at length:

The Black Bill presented an exceedingly perplexing contemplation. I was amazed that business men generally were paying absolutely no attention to it as it was starting on its way through the Senate. It was for this reason that I wired you. Apparently I stirred up considerable trouble for myself as a result. But I certainly did not want consideration to proceed with the whole thing in the dark. The first concrete message that came to me from the Motor Industry was from Mr. Sloan who seemed to feel that there was little actual damage threatened by the Bill during the two year emergency period of its life because we can scarcely hope to have gotten back beyond a thirty hour work week in this emergency period. I do not mean that he favored the Bill in any sense. His position was quite the contrary. But he seemed chiefly anxious to be sure that officers, executives, etc. were clearly exempted.

I had no other definite reactions from the Automotive Trade until yesterday and today when the messages began to arrive suggesting the desirability of putting the limitation upon a yearly basis and leaving the allocation to the option of the employer. But these suggestions arrived after we had been defeated on a close vote in an attempt to substitute the thirty-six hour week (with the allocation of time left to the option of the employer). I voted for this substitute; but it was defeated, and manifestly it was impossible to get a yearly allocation after failing to get a weekly allocation. It is entirely possible however that the Bill can be further amended in the House of Representatives.... The House is particularly responsive to the President and I think that if there are really any serious considerations in the Bill (during this two year emergency) that [sic] the Automotive Industry can make its position known to the President and to the members of the House.

Before these latter messages arrived I had already gone to work on other liberalizing amendments. In return for two very important liberalizing amendments I agreed to support the Bill. These amendments accordingly were accepted. One of them specifically exempts officers, executives, superintendents, and their clerical assistants from the terms of the Bill. Another amendment creates a general right of exemption license to be administered by the Secretary of Labor wherever conditions could in an Industry require the exemption. I felt that these two amendments - particularly the latter - represented the best possible contribution I could make to the practical phases of the Bill and to meet the general problem which you and your associates would confront under it.

Couzens (Apr. 6, 1933), in Roy Chapin Collection, Box 25, Folder: Correspondence April 1933, in BHL, University of Michigan, Ann Arbor, MI. Couzens, the senior Michigan senator, was himself a former high-ranking Ford Motor Company executive.
State and Federal Laws

There remains of course the fundamental questions whether the Bill is constitutional. I suppose the doubts are against it. I am told it will be promptly tested. The concensus [sic] of legal opinion seems to be that it will be knocked out by the Supreme Court on the same theory that the child labor law was knocked out.

The fundamental proposition was an exceedingly perplexing one - particularly in view of the perfectly enormous unemployment in Michigan. We have all favored the “share the work” movement. I have repeatedly spoken in favor of the shorter work week and the shorter work day. The combination of these circumstances left me in a position where to vote against the Bill would have been universally misunderstood and I think rightfully condemned in many quarters where I have discussed my shorter work week views. In spite of this fact I could not have voted for the Bill except as these amendments were put into it. I repeat that - in view of the wide margin favoring the Bill - I felt that the success of these amendments was the best possible contribution I could make.103

In the ensuing debate over these exclusions Black stated without explanation that “an exception of this kind should be adopted.”104 Senator Walsh, who approved of Vandenberg’s amendment “most heartily,” agreed with its author that it would also include operating owners, but they could not determine whether it also embraced a situation in which an owner and three employees agreed that they would all become partners.105 Missouri Democratic Senator Bennett Clark was in sympathy with the amendment’s general purposes, but was troubled that it seemed to include “an exemption of anybody in a supervisory capacity. Now, a machinist is a supervisor over a machinist’s helper. A bookkeeper is a supervisor over an assistant bookkeeper. It seems to me that by the use of this language we would exclude from the operation of this act thousands and thousands of working people.” Chiming in, Senator Huey Long offered an amendment striking “and others in supervisory capacities together with their assistants.” If, in his view, this phrase was not struck, “I should judge that out of a thousand employees there would be no difficulty in working seven or eight hundred of them.” And “anyway,” by previous amendment the Senate had already empowered the Labor Secretary to exempt officers, executives, and superintendents.106

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103 Letter from A. H. Vandenberg to Roy D. Chapin (Apr. 6, 1933), in Roy Chapin Collection, Box 25, Folder: Correspondence April 1933, in BHL, University of Michigan, Ann Arbor, MI.
104 CR 77:1289. Malamud, “Engineering the Middle Classes” at 2234-35, in concluding that Black sought to cover white-collar and salaried employees within the industries covered by his bill overlooked the fact that during the course of floor debate Black agreed to exclude many of them.
105 CR 77:1289-90.
106 CR 77:1290.
It had taken Long's intervention to make it dawn on Black, who admitted that he had not read Vandenberg's amendment when it was offered, that it "goes farther than the Senator from Michigan desires, and I think what he is after will be reached by agreeing to the amendment of the Senator from Louisiana. I believe the word 'supervisory' is of such an uncertain nature that not only would it be unwise to put it there because of those who might be included but on account of the uncertainty of the language, it might affect the legality of the bill." Vandenberg, asserting that he had borrowed that language from a suggestion by Senator Lonergan, in turn admitted that it "did not occur to me that it had within it the breadth which obviously does exist." Since Vandenberg had "no desire or disposition to open a back door to, this bill," he was "perfectly willing to eliminate the additional phrase... 'supervisory capacities', but" it seemed to him that the phrase... 'clerical assistants' should remain, for this reason:

I do not think a man should be expected to have a separate private secretary the last 2 hours in the day, and I do not think it is practicable to expect him to have an extra stenographer the last hour of the day, because that sort of service necessarily is personal and continuous.\(^{107}\)

No sooner had Vandenberg finally disclosed the reason for the exclusion of office workers (if not that he was acting as Sloan's messenger) than Huey Long declared that he did not object to leaving in the reference to "clerical assistants."\(^{108}\) But as Homer Bone, freshman Democrat from Washington State who was about to become an ardent New Dealer,\(^ {109}\) critically pointed out:

> [T]here is nothing in the amendment suggested by the Senator from Michigan...to distinguish between the private secretary of an executive officer of a big corporation and the thousands of clerks and stenographers...working in these big offices. In Chicago, at the end of the day, thousands of young men and women pour out of those offices, all a part of the clerical staffs of railroad companies and big organizations.... That is true in every great industrial center in this country. Unless some of this language is eliminated, or the meaning made very plain, we will remove from the scope and effect of this bill all of the clerical assistants in the hundreds of big offices in this country.

> If we want to vote for this measure with the understanding that we are removing from it all the clerks and stenographers, let us be very certain that we vote on it with that in mind.\(^{110}\)

\(^{107}\)CR 77:1290.

\(^{108}\)CR 77:1290.

\(^{109}\)"Ex-Senator Homer Bone Dies," NYT, Mar. 12, 1970 (41:4-5).

\(^{110}\)CR 77:1290.
Long then announced that Vandenberg was willing to insert “‘and their personal and immediate clerical assistants’; and we think that will cover it.” Bone also thought that it perhaps would, and so the amendment finally read “except officers, executives, and superintendents, and their personal and immediate clerical assistants,” which the Senate agreed to on a voice vote. Thus was forged the core of the future exclusion of administrative employees.

After four days of debate, on April 6, the Senate, by a vote of 53-30, passed the 30-hour bill with the aforementioned white-collar exclusions of “officers, executives, and superintendents, and their personal and immediate clerical assistants.” Passage by such a substantial majority had been made possible by the additional aforementioned exclusions of: milk and/or its products; commodities produced by a cannery or manufacturing plant by canning fish, sea food, fruits or vegetables; and newspapers and periodicals. Finally, a catch-all provision authorized the Secretary of Labor to issue exemption permits “upon the submission of satisfactory proof of the existence of special conditions in any other industry...making it necessary for certain persons to work more” than 30 hours.

In the interim between Senate passage of the Black 30-hour bill and House hearings on the Connery 30-hour bill in late April and early May, it became clear that the Roosevelt administration would not support them unless their hours limitations were made sufficiently “elastic” to permit 40-hour operation during a certain number of weeks per year subject to approval by a commission consisting of the Labor Secretary and employer and employee representatives. Pursuant to one plan that would have conferred power on the Labor Secretary to control production, regulate hours, and prescribe fair wages, executive and managerial officials would be excluded from the capping of weekly hours at 30 (or up to 40 in exceptional cases). At the same time reports began to surface of administration draft plans to inaugurate some kind of government control of production.

111 CR 77:1290-91.
112 CR 77:1350 (Apr. 6, 1933); “Senate Votes 30-Hour Work Week, 53-30,” NYT, Apr. 7, 1933 (1:3-4, 7:3-4).
113 Basil Rauch, A History of the New Deal 1933-1938, at 74 (1944), argued that Black’s bill had attracted little attention until April 1, when the Chamber of Commerce, opposing legislation, had recommended the temporary and voluntary adoption of the 40-hour week: “As if in defiance of the Chamber, the Senate suddenly passed the Black Bill....”
114 President Limits 30-Hour Week Bill,” NYT, Apr. 13, 1933 (2:1).
115 Miss Perkins Asks Industry Control,” NYT, Apr. 19, 1933 (2:2).
116 Arthur Krock, “‘War Board’ Proposed,” NYT, Apr. 14, 1933 (1:8); “Roosevelt Links Minimum Wage to Huge Job Drive,” NYT, Apr. 15, 1933 (1:8); Arthur Krock,
which over the next month evolved into the National Industrial Recovery Act.\textsuperscript{117}

Finally, in mid-April, employers' organizations, while continuing to resist imposition of 30-hour regimes, began to express willingness to accept some outside regulation. For example, the general manager of the Associated Industries of Massachusetts wrote to the general counsel of the NAM that there was a disposition on the part of many of its members to agree to a 40-hour week for an emergency period of one or two years. To be sure, he reported that leaders of shoe, paper, textile, leather, furniture, printing, rubber, and other industries found it possible to readjust their production methods on a 40-hour basis, "but the executives feel that managerial, office, sales and distribution forces should be exempted from its operation, as well as engineers, foremen, repairmen and watchmen, where in order to provide power and also insurance protection, anything less than the present schedule would be impossible without doubling the expense for wages."\textsuperscript{118}

The House Labor Committee hearings on the 30-hour bills lasting from April 25 to May 5 were best known for Labor Secretary Frances Perkins' repetition of her executive session testimony rejecting the flat 30-hour week as lacking "sufficient flexibility." Instead, she suggested a maximum of 40 hours, which could be used under certain conditions with a sliding scale between 30 and 40; a public hearing would have to show extraordinary need for 40; in addition to a cap of eight hours per day, Perkins also recommended a limit of perhaps ten 40-hour weeks a year.\textsuperscript{119} To be sure, the Black bill as passed by the Senate no longer lacked

\begin{itemize}
\item \textsuperscript{117}Hunnicutt, \textit{Work Without End} at 159-63, 172-73
\item \textsuperscript{118}Letter from D[?],[L?]. Stone, General Manager, Associated Industries of Massachusetts, to James Emery (Apr. 11, 1933), in Hagley Museum & Library, NAM Papers Box 851.2 (copy provided by Colin Gordon). Stone went on to state that the 30-hour week was impossible because, for example, dyeing required a moderate amount of overtime and workers would not respond to two-hour jobs. Moreover, he calculated that the Black bill would benefit only 6 percent of workers: 25 percent were agricultural and excluded; 25 percent in transport and excluded; 25 percent in other activities and excluded; of the remaining 25 percent, 5 percent were not affected; of the remaining 20 percent, 14 percent were working in establishments already on 30 hours.
\item \textsuperscript{119}Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557, at 4-5 (73d Cong., 1st Sess., Apr. 25 to May 5, 1933). Perkins insisted on a daily limit as well because "the reason why they [manufacturers] want shortened weekly hours instead of shortened daily hours is because they can take care of their production with the same number of people. In other words, it tends to defeat the purpose of the bill, which is to make more work for more people." She explained that studies showed that firms could produce as much in five days as in six without any increase in
\end{itemize}

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flexibility: its individual industry and white-collar exclusions together with its general exemption permit system (under the control of the Labor Secretary) permitted much of the elasticity that Perkins and Roosevelt demanded.120

In terms of the treatment of white-collar employees, however, Perkins’ testimony was overshadowed by that of two of the country’s most influential industrial managers—General Electric Company president Gerard Swope and General Motors Corporation president Alfred Sloan, Jr. Swope explained that two years earlier (April 1, 1931) GE had gone over to a five-day week and eight-hour day schedule that also encompassed all clerks, salesmen, and executives, although many of the most skilled employees worked only three or four days for lack of work. Swope was not opposed to mandatory shorter hours, but he believed that the Black-Connery bills were too rigid and failed to go far enough.121 Without disclosing or being asked why he advocated individual means-testing for hours regulation, Swope proposed a salary ceiling (and a rather low one, which was at odds with the universality he had touted at his own company), above which recipients could presumably be worked unlimited hours: “[T]he bill should cover all kinds of public and private employment (except agricultural and domestic workers), provided their earnings are less than $1,800 per annum or that they are employed at a rate which at full time would result in less than that income.”

work force. The weekly limit would result in employment of more people in some industries, but not in all: “In other words, the daily limitation is much more demanding of the employment of more people than is the weekly limitation of hours, although the weekly limitation is a great deal better than nothing.”  Id. at 19.

120 In light of the Roosevelt administration’s demand for elasticity and in the absence of any evidence to support the claim, the later allegation by Republican Representative Melvin Maas must be regarded as baseless that the only reason that the administration had not recommended “an arbitrary statutory prohibition against working over 40 hours [in 1937-8], which is what they were seeking, was because there were certain cases, particularly in the seasonal industries, where it was desirable for short periods to work over 40 hours, and they didn’t want to absolutely bar that, so they put in a penalty, and the purpose of the time and a half...was to create a competitive situation where one man could not abuse working overtime when all the rest of them were playing fair, because his costs would go up so high that in a competitive market he could not survive.”  Hearings on H.R. 6790, To Permit the Performance of Essential Labor on Naval Contracts Without Regard to Laws and Contracts Limiting Hours of Employment, to Limit the Profits on Naval Contracts, and for Other Purposes (Mar. 19, 1942), in Hearings Before the Committee on Naval Affairs of the House of Representatives on Sundry Legislation Affecting the Naval Establishment 1942, at 2771 (77th Cong., 2d Sess., 1942) (Comm. Print No. 205).

121 Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557, at 91, 115.
State and Federal Laws

Careful to secure for GE and other employers the “greater flexibility” that six-month hours-averaging conferred to get out orders, Swope suggested maximum working hours during any 26-week period of 832 or an average of 32 hours per week subject to a weekly and daily maximum of 48 and 8 hours, respectively.  

Sloan, who represented the National Automobile Chamber of Commerce (which comprised all U.S. automobile manufacturers except Ford), also focused on the need for “flexibility,” and, going even further than Swope, recommended averaging hours at 30 or 32 over an entire year subject to a 48-hour weekly maximum. However, unlike Swope, Sloan warned the committee that if its bill were enacted, GM workers’ annual hours would wind up being considerably lower. The GM president also came fully prepared to discuss exemptions (although he did not find it necessary to disclose that through Senator Vandenberg he had already succeeded in having his favored exemptions written directly into Black’s bill): “[T]here must be necessarily exemptions, and I have given quite a good deal of consideration to an effort to define them, in the hope that I might be useful.” Because industrial operations and classes of employees and conditions varied so much, it was hard to define an exemption “so that it provides the necessary flexibility and at the same time gives the maximum objective that you want; that is, the greatest amount of sharing work.” Without explaining why, Sloan, like Swope, suggested that “the most practical and definite way of determining that would be to confine the proposal to those employed in the actual production of the article or commodity.” And, again like Swope, he asserted without explanation that if the scope could be broadened to include all forms of employment (except agricultural and household workers) “the only practical way to make definite exemptions would be on a salary or wage basis predicated upon a certain amount or earning per year or employment at a definite rate which amounted to that total per year.”

122Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557 at 92, 116. Swope stated that by spreading work, the measure “will entail more work on the supervisory forces in industry and commerce and increase costs.” Id. The causality here is unclear: if the supervisors were earning more than $1,800, they would not have been entitled to overtime pay. Swope also insisted that in order to complete an order, at times GE would “have to have that toolmaker work 50 hours this week. ...We couldn’t put on more employees. We haven’t machinery enough, and it is an individual job.” Interestingly, Swope had to be informed by Congressman Griswold that the bill did not cover a toolmaker because he did not make anything entering interstate commerce. Id. at 116-17.

123Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557 at 772.

124Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557 at 790-91.
Sloan argued that the problem of achieving the maximum distribution of work while “providing for the essential exemptions...to make the plan practical” made it difficult to arrive at a definition that would be appropriate to differing conditions and employment classes in various industries:

However practical it may be—and it certainly is practical to deal with direct production under limited hours through the employment of additional shifts where circumstances justify it, it is entirely impractical to deal with other classes of employment on that basis. There never was a time when the problems of industry required as intense effort, as measured by hours of employment on the part of those charged with the responsibility of management, than [should be: as] right now for upon management depends the stabilization and, in a great many cases, the solvency of the institution....

In the case of the automotive industry it is necessary to maintain as an adjunct to production, large engineering staffs which, if independent, would themselves be large units of industry. Designers, engineers, and others composing such staffs required for the development of new models, constitute employment of a specific character. It cannot be taken care of on a shift basis. It is frequently a case of day and night work 7 days in the week because of the limited time and the absolute necessity of meeting a definite objective when the work must be completed—ready for production. The same thing, although more generally found in other cases of industrial production, applies to maintenance, repairs, and construction to include which within the scope of the limitation would involve industry in a great deal of complication and uncertainty.125

Sloan sought to construct engineers and designers as so creative as to be irreplaceable; in addition, they, together with maintenance, repair, and construction workers, were also to be excluded simply because they had to meet “a definite objective when the work must be completed....” How such deadlines distinguished them from millions of other workers who also had to meet deadlines, Sloan did not explain,126 but he by no means wished to limit exclusions from maximum

125 Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557 at 790.
126 In her testimony Perkins stated that there were very few cases even in continuous operation industries in which a non-fungible worker had to complete the operation: “[T]here are laboratories that are making wholly independent investigations in which they would, of course, be caught by the time clock with an experiment uncompleted. ... Of course...there are many chemists and other technical men out of work, and they would like to be included wherever possible.” Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557 at 22. When Harvey Kelly of the American Newspaper Publishers Association testified that newspaper publishers could not run two shifts because certain operations in the composing room are intricate so that, for example, the lay-out man could not come in at the end of a short period and take it up, Connery
hours to these few groups. One “very practical and clearly defined way of determining exemptions and one applicable to all forms of production, would be to limit the scope...to...[t]hose employed in actual production of the article or commodity.” It was also possible to “designate exemptions by type of employment”: “Executives, managers, superintendents, and overseers, their assistants and staffs, and also others engaged in a supervisory capacity; those engaged in the creation and development of new products, also those involved in maintenance, repairs, and construction.” Overall, then, Sloan expanded the exclusions that the Senate had created—at his behind-the-scenes behest—to include certain categories of professional employees (engineers and designers) and manual workers in certain non-direct-production areas; and although Sloan restored supervisors, whom the Senate had removed, he did not propose excluding all run-of-the-mill office employees.

That the Black and Connery 30-hours bills of 1933 were sidetracked by the end of April because the Roosevelt administration succeeded in shifting Congress’s focus to legislation that eventually became the National Industrial Recovery Act did not nullify the significance of these foregoing debates over the exclusion of white-collar workers from hours regulation. Not only did struggles over the NRA codes of fair competition reignite them, but over the next four years Black and Connery continued to introduce 30-hours bills, some of which applied to the codes themselves.

Post-NRA 30-Hour Bills and the Walsh-Healey Public Contracts Act

Profit is still the supreme business incentive. As a whole, business always has and probably always will consider profits more important than human welfare. Presumably, it will continue to oppose higher wages and shorter hours of service. Shorter hours, better wages, and better working conditions have never been achieved without the vigorous opposition replied: “We have had that same argument or plea from every single representative or manufacturer, every single witness, who has come here. They say that one workman cannot pick up the work started by another workman. I know that a linotype or a pressman can come into a shop and be told by a man on the job just how the job stands and then pick it up and go through with it. I have been in the shops and seen that done. I do not know about the pea pickers and some other industries, but I do know about this work.”

Id. at 700.

127Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557 at 790.
128Hunnicutt, Work Without End at 163, 172.
of business. ... The compulsory adoption of shorter hours for industrial workers without reduction of wages is considered by some of our powerful industrial and financial leaders as an unwarranted infringement upon the profits of the present and a menace to the profits of the future. Fundamentally the opposition to the pending bill is that of the privileged groups who object to the enjoyment of a fair share of our wealth by those who produce it. ... They should remember that often “greed devours itself.”

The Roosevelt administration viewed the NRA codes as the appropriate implementation of a shorter maximum-hours law, at least for the time being. In early 1934, for example, Labor Secretary Perkins told Connery’s House Labor Committee that “at this moment my own instinct would be to permit the code method of reducing hours to go on in this somewhat experimental and trial period.... [W]hen we get into the regulation of the hours, we are really on very tentative ground at this time, and we ought to keep the hours as flexible as possible in order that we may not undo the effect of the recovery programs, which so far has been very good on the plan of shortening the hours of labor.” At most she was willing to admit that “it would be wiser to express by resolution, perhaps, by Congress, the expectation that the codes should move as rapidly as possible toward a much shorter work week....” Then later, at “some time in the near future,” Congress and/or the States should establish a statutory maximum workweek for all occupations and not just the occupation commonly thought of as mechanical industry. To be sure, she argued that either this maximum—which she deemed necessary also for the individual worker’s health and welfare—should be high enough to permit flexibility or the law should authorize some government authority to fix variations in various industries and areas.

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129Thirty-Hour Week 3-4 (S. Rep. No. 367, 74th Cong., 1st Sess. 1935) (Judiciary Committee reporting out (again) Black’s bill, which would have applied to NRA codes).

130See below ch. 7.


132Thirty-Hour Week Bill: Hearings Before the Committee on Labor House of Representatives on H.R. 7202, H.R. 4116, and H.R. 8492, at 124-25. Perkins also favored a maximum workday (which the FLSA failed to impose): “The only way you can enforce any labor law that has to do with hours of labor is to fix a maximum working day. It is almost impossible to enforce a work week that does not run to a maximum on the day.” Whether the schedule consisted of five six-hour days, four eight-hour days, or four and a half eight-hour days was immaterial: “I think adjustment of that sort ought to be made
Black and Connery and others were not so sanguine about the achievements and prospects of the codes. Because the codes had resulted in furnishing employment to possibly two million additional workers, still leaving nine to ten million unemployed, Congress, in the view of the House Labor Committee, had to legislate a shorter workweek to employ six to seven million of "this army of unemployed" or to furnish pensions or unemployment insurance immediately:

[T]hrough the unwillingness of those whom General Johnson describes as the chiseling few, industry has utterly failed with the 40 hours' maximum working week and minimum—in too many cases maximum—wages of 30 cents per hour to absorb any appreciable number of the millions of unemployed. ... The committee feels that industrial leaders, interested principally in profits and fearful of the competition of those who have hesitated to comply with the restrictions contained in the codes of fair competition, promulgated by the National Recovery Administration, will not place their industries on a sufficiently shorter work week to absorb these millions of unemployed unless the necessary restriction is made the law of the land. 

Consequently, members of Congress continued to sponsor 30-hours bills—which opponents dismissed as "[c]onflict[ing] with laws of nature and economics"—including several that would have applied to the codes themselves. For example, in January 1934, Connery introduced a bill that imposed a 30-hour condition on all codes of fair competition but contained no exclusions of white-collar or any other workers. Later in 1934 and then again in 1935 he introduced similar bills. For his part, Black continued to introduce 30-hour bills that

dependent on the desires of the community." In the many communities where growing use of automobiles had made it possible to live considerable distances from workplaces, people "would get much more benefit and much more opportunity to enjoy modern civilization if they had 4 days of 8 hours each than if they had 5 days of 6 hours a day."

133E.g., Rep. Emanuel Cellar introduced H.R. 126 (74th Cong., 1st Sess., Jan. 3, 1935), which would have imposed a 30-hour week for federal government employees; where the needs of government service required overtime work, it was to be paid with time off with pay in the amount by which 30-hour weekly average was exceeded or for each hour of overtime in an amount equal to the proportional hourly compensation calculated on the annual salary.


137H.R. 8492 (73d Cong., 2d Sess., Mar. 6, 1934), added that no employee shall be
excluded “officers, executives, and superintendents, and their personal and immediate clerical assistants.” Black would also have required the codes of fair competition to contain a condition prohibiting employers from employing anyone (except these excluded groups) longer than 30 hours. Even as late as January 1937, just several months before they introduced the administration’s FLSA bills, Connery and Black introduced identical 30-hour bills containing the exclusion of “officers, executives, superintendents, and their personal and immediate assistants” (and authorizing the Labor Secretary to issue exemption permits on a showing of special conditions making it necessary for certain persons to exceed those hours).

Although 30-hour bills and perhaps any hours laws were anathema to big business, by 1936 some segments of it had also begun to recognize that “the tendency to lengthen working hours rather than to absorb the unemployed may increase the danger of federal legislation on working time or even a constitutional amendment to give the Government control over industry.” Such ambivalence employed for more than 30 hours in a week “by all his employers combined” and empowered a presidentially created Emergency Industrial Extension Board to grant extensions of up to three months to work 40 hours. H.R. 2746 (74th Cong., 1st Sess., Jan. 3, 1935) provided that exemptions could be granted to employers complying with a code of fair competition to work their employees an average of 40 hours a week for up to 90 days (§ 3). The bill, which covered producing, transporting, and distributing goods and services in or affecting interstate commerce, excluded agricultural and domestic workers and employees subject to the Railway Labor Act (§ 5).


140Letter from Edward Cowdrick (Secretary, Special Conference Committee) to Ernest Draper (Assistant Secretary of Commerce) (Dec. 20, 1935), in Violations of Free Speech and Rights of Labor: Hearings Before a Subcommittee of the Committee on Education and Labor United States Senate, Part 45: Supplementary Exhibits: The Goodyear Tire & Rubber Co.—The Special Conference Committee 16896 (76th Cong, 1st Sess, Jan. 16, 1936). Cowdrick insisted that Roosevelt’s “definite opposition” to the 30-hour bill and the Walsh government contract bill was among the steps that his administration would have to take to bring about “a reasonably cooperative working arrangement” between it and industry.

141“Excerpt from Minutes of Meeting of Special Conference Committee, New York, January 16-17, 1937,” in Violations of Free Speech and Rights of Labor: Hearings Before a Subcommittee of the Committee on Education and Labor United States Senate, Part 45: Supplementary Exhibits at 16863.
was ill designed to thwart passage of the last pertinent pre-FLSA federal hours statute, the Walsh-Healey Public Contracts Act,\(^\text{142}\) which provided that "no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of" any contract in an amount exceeding $10,000 between any manufacturer of or dealer in such items and the United States Government shall be permitted to work more than eight hours a day or 40 hours a week.\(^\text{143}\) To be sure, Congress also provided that if the government contracting agency found that the hours limitation "will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions...when justice or public interest will be served...." The statute required the Labor Secretary to set a rate of at least time and one-half for any hours she authorized in excess of the statutory maximum.\(^\text{144}\) The Labor Department then

\(^{142}\)On the origins of the law in Labor Secretary Perkins's office during the "period of doubt over NRA's future," see Frances Perkins, The Roosevelt I Knew 248 (quote), 249, 253 (1946).

\(^{143}\)An Act to Provide Conditions for the Purchase of Supplies and the Making of Contracts by the United States, Pub L. No. 846, ch. 881, § 1(a) and (b), 49 Stat. 2036, 2037 (June 30, 1936).

\(^{144}\)An Act to Provide Conditions for the Purchase of Supplies and the Making of Contracts by the United States, § 6, 49 Stat. at 2038-39. At a point when his bill lacked a flat 40-hour maximum—instead, the government would have set the hours in each contract—Senator Walsh stated at a committee hearing: "And why have we a maximum hour? Listening to these manufacturers, they would seem to forget what the purpose of the maximum hours is. It is to spread employment during this depression, to stop people being worked 56 hours and 60 hours and 48 hours, and try to get down to 40 hours, so they could employ more people.... I don't want to have this committee think, as was suggested on the floor, how unfair it would be if we put in the provision for 40 hours, as the 30-hour bill does. I can see how unfair it would be, in the face of a great divergence of codes, where the maximum hours varied from 30 to 48 hours.... It is impossible, of course—impossible—to write into a law that 40 hours shall be the maximum, as we would like to do, and give no discretion to anybody." Conditions of Government Contracts: Hearing Before the Committee on the Judiciary House of Representatives on S. 3055, at 112, 114 (74th Cong., 1st Sess. 1935). According to Rep. Francis Walter, in order to fix hours that would meet with everyone's approval, Congress obtained data from the DOL on average weekly hours showing that hours exceeded 40 only in one industry (paper and pulp, where they were 41). The legislators then fixed the week at 40 hours, leaving no discretion except where injustice might be done to manufacturer or government. CR 80:10004 (June 18, 1936). The complaint by the American Iron and Steel Institute that "[i]n a steel mill it is a practical impossibility to limit certain types of labor precisely to eight hours in any one day" was undercut by the conversion of the law from a maximum hours into an overtime regime. "Minimum Wage Bill Nears Fight in House," NYT, June 16, 1936 (5:6-8).
issued regulations stating that the hours provision applied “only to employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment” of the items under the contract and “shall not be deemed applicable to office or custodial employees.”\textsuperscript{145} Thus, anomalously, under the Walsh-Healey Act, supervisors were (at least initially) protected by the hours and/or overtime pay provision, whereas office workers were not.\textsuperscript{146}

The final unenacted measure that could have served as a model for the FLSA was the proposed National Textile Act, which would have created a kind of successor to the NRA codes for the textile industry, and on which congressional hearings were held in 1936 and 1937. In the 1936 bill, the flat ban on employing production employees more than 35 hours per week or more than 7 hours per day or clerical or office employees more than 40 hours weekly or 8 hours per day, did not apply to those engaged in a managerial or executive capacity at a salary of not less than $50.\textsuperscript{147} The 1937 bill excepted employees engaged in a managerial or executive capacity and receiving $40 or more per week from the mandatory time

\textsuperscript{145}Regulations for Administration of the Act of June 30, 1936, Public No. 846, 74th Congress, Part II, Art. 102, in FR 1:1405-1407 at 1406 (Sept. 19, 1936). “Office employees” were defined as “engaged exclusively in office work relating generally to the operation of the business and not engaged in the production of the materials, supplies, articles, or equipment required by the Government contract.” US DOL, Division of Public Contracts, \textit{Rulings and Interpretations under the Walsh-Healey Public Contracts Act: Rulings and Interpretations No. 1}, Section 3.e. at 6 (1937). This distinction is very similar to the so-called administration-production dichotomy, which became a key criterion in identifying administrative employees excluded from the overtime provision of the FLSA. See below chs. 14, 16, 17.

\textsuperscript{146}Not until 1953 did the DOL, in furtherance of its policy of establishing uniformity of administration of the Walsh-Healey Act and the FLSA, add bona fide executive, administrative, and professional employees to the group of excluded workers. \textit{FR} 18:1831-32 (1953). Currently, then, office and bona fide executive, administrative, and professional employees are excluded. 41 CFR § 50-201.101 (2002). For that reason the following judgment is difficult to understand. “Regulations under the Walsh-Healey Act afforded some grounds for anticipating that all employees might be deemed executive or administrative workers whose direct function was to give, or to supervise the carrying out of, general orders. Such expectation failed completely of realization.” Frank Cooper, “The Coverage of the Fair Labor Standards Act and Other Problems of Its Interpretation,” \textit{LCP}, 6(3):333-52 at 348 (Summer 1939).

\textsuperscript{147}H.R. 9072, § 19, in \textit{To Rehabilitate and Stabilize Labor Conditions in the Textile Industry of the United States: Hearings Before a Subcommittee of the House Committee on Labor on H.R. 9072, 74th Cong., 2d Sess. 3, 7 (1936). Interestingly, the hours limitation applied even to proprietors doing production work. \textit{Id.} § 3(5) at 3.
and a half provision for hours in excess of 7 per day or 35 per week. At one of the hearings on the bill, which took place just four days before the FLSA was introduced in May 1937, textile industry management, deploying the claim that the performance of uncompensated overtime work was part of the natural order of things for careerist executives, informed the House Committee on Labor that it was “unalterably opposed” to the provision, which revealed the drafters’ ignorance of “industrial mill management”:

In every mill there are large groups of persons in charge of certain departments covering minor operation [sic], as department managers or executives, where $40 per week would be excessively high, and yet the need for these department heads and managers working in excess of 40 hours per week must be apparent. The efficient department manager interested in his work and in the development of his department never quits when the whistle blows. In fact, very often his best work is done during the brief period after the other employees have left the mill. This is the period in which he plans his work and studies his operation.

It must be remembered that from these department managers and executives are frequently recruited the chief executives of the mills and their efficiency and development is controlled not by a desire to quit when the whistle blows, but to maintain contact with their work such hours as they find necessary for their own development.

The industry witness requested that the means-tested salary cut-off be set at no more than $35—the level that had been established by the industry’s NRA code.

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148H. R. 238, §§ 13(d) & (e), 75th Cong., 1st Sess. (Jan. 5, 1937).
149The same argument was advanced by employers at the regulatory hearings in 1940. See below ch. 12.
150To Regulate the Textile Industry: Hearings Before the Subcommittee of the House Committee on Labor on H.R. 238, Pt. 6, 75th Cong., 1st Sess. 391 (1937) (testimony of Clement Driscoll, executive director, American Lace Manufacturers Association).
151To Regulate the Textile Industry at 391.