“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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Within a short space of time, industry and commerce in the United States have changed from a situation in which there was very little legislative intervention with regard to hours of work to one in which every industry or trade is, or is about to be, subject to maximum hours of work proposed by the industry and approved by the President. The change is indeed a great one, as in January 1933...only two states...had Acts limiting the hours of work of males in private employment.¹

Because the hundreds of codes of fair competition issued and administered under the aegis of the National Recovery Administration between 1933 and 1935 represented by a wide margin the most extensive involvement of the federal government with the exclusion of white-collar workers from hours regulation prior to the FLSA, examination of the positions adopted by employers, unions, and the NRA toward these exclusions is crucial to an analysis of the understandings that capital, labor, and the administrative, legislative, and judicial branches of government may have developed of the need for exempting firms from the regulation of overtime work by and pay for some workers.

In particular, a good sense of the spectrum of views that labor representatives developed concerning whether it was necessary to include white-collar workers (and if so which ones) in industry-level hours provisions can be gained by scrutinizing their public statements and silences at the code hearings. Although the hearing transcripts were not published, unlike the Wage and Hour Division hearings on the white-collar exclusions from the FLSA that were held in 1940 and to which the press paid modest attention, except when publishers’ own interests were at stake regarding the classification of reporters,² the NRA public code hearings—especially those on the cotton textile industry and other early ones on major industries—were page-one headline news and “occasions for considerable pomp and circumstance.” However, in spite of their function as mechanisms of transparency, they were also interludes between preliminary conferences and “the

²On the 1940 hearings, see below ch. 12.
The National Industrial Recovery Act and an Overview of the Codes

There seems to be no one basis for occupational exemption. The groups excepted from maximum hours ran the entire gamut of occupations. At one extreme were executives and professional and technical employees who are supposed to derive certain satisfactions from their work which compensate in some measure for the long hours which they may put in. At the other extreme were cleaners, janitors, and outside workers—occupations which in some industries fall to the lot of ill-paid Negro workers.

The National Industrial Recovery Act, which Congress passed in June 1933, authorized the president, on application by a trade or industrial association, to approve a code of fair competition for a trade or industry, and, as a condition of his approval of any such code, to impose conditions for the protection of employees. The NIRA also required every code to contain a condition that “employers shall comply with the maximum hours of labor...approved or prescribed by the President.” Roosevelt—whose 1932 national Democratic Party platform had promised

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3Leverett Lyon et al. The National Recovery Administration: An Analysis and Appraisal 108 (1935). According to a more jaundiced view, the early code hearings were “the so-called goldfish bowl,” which merely exposed to view the pressure groups working off steam in public for a brief period....” Louis Stark, “A Penetrating Appraisal of the NRA’s Worth,” NYT, May 26, 1935 (sect. 6, at 4:1-4 at 1).


6NIRA, § 7(a), 48 Stat. at 199. This section was most famous for giving workers “the right to organize and bargain collectively through representatives of their own choosing.” See generally, Lewis Lorwin and Arthur Wubnig, Labor Relations Boards: The Regulation of Collective Bargaining Under the National Industrial Recovery Act (1935). A possibly unique bureaucratic glitch in the code formation process for one small industry, Rayon and Synthetic Yarn Producing, shed revealing light on the divergent scopes of coverage under § 7(a) of the NIRA as between its collective bargaining and wage and hour provisions. Unlike other codes, the employers’ proposed code, instead of excluding executive, administrative, supervisory, technical, and outside sales employees from the hours provision expressly, defined “employees” in the definitions section of the code as excluding them.
the “spread of employment by a substantial reduction in the hours of labor” — himself explained the principle behind the hours provision the day the proposed legislation was introduced in Congress: “My first request is that the Congress provide for the machinery necessary for a great cooperative movement throughout all industry in order to obtain wide reemployment, to shorten the working week, to pay a decent wage for the shorter week, and to prevent unfair competition and disastrous overproduction.”

Immediately after signing the measure into law, Roosevelt left nothing to the imagination as to the NIRA’s purpose and mechanisms: “[T]he first part of the Act proposes to our industry a great spontaneous cooperation to put millions of men back in their regular jobs this summer. The idea is simply for employers to hire more men to do the existing work by reducing the work-hours of each man’s week and at the same time paying a living wage for the shorter week.”

Three days after the NIRA’s enactment, the NRA made the following changes to the code:

As Deputy Administrator W. L. Allen explained to a member of the code authority, when the NRA was negotiating the code with the employers, the NRA legal department had not yet been organized to assist Allen, but in the meantime had reviewed the proposed code; as far as the lawyers were concerned, this structure, which effectively excluded these “classes” from the wage and hour provisions, was not problematic as to those sections, since the employers had not contemplated regulating the wages and hours of the excepted classes; however, in terms of the code’s right-to-organize and collective bargaining provision, the effect of the proposed code as written was to exclude the exempted class of employees from it, whereas “obviously the statute contemplates the mandatory provisions as applying to all employees.” Consequently, the NRA changed the definition to include all “all persons employed in the conduct of the rayon and synthetic yarn producing industry” (Art. IV) and transferred the exclusion directly to the hours provision. Letter from W. L. Allen Deputy Administrator to E. R. Van Vliet (Aug. 11, 1933), in A. Henry Thurston and F. C. Lee, “History of the Code of Fair Competition for the Rayon and Synthetic Yarn Producing Industry” 70 (Aug. 2, 1935), in NAMP, Microcopy No. 213: DSNRA 1933-36 (1953): Roll 136: Code 14: Rayon and Synthetic Yarn Producing Industry. The proposed code and the code historians’ comment on the change are in id. at 81-82, 12. The question of managerial coverage under § 7(a) does not appear to have been resolved by the National Labor Board or the National Labor Relations Board under the NIRA, but when the Chain Store Managers and Clerks Union sought to represent managers and clerks at a grocery chain, the NLRB did not even raise the issue of the managers’ eligibility. Eagle Grocery Co., Decisions of the National Labor Relations Board 2:450-51 (May 4, 1935).

9“Presidential Statement on N.I.R.A.—‘To Put People Back to Work,’” in The Public
point qualitatively and quantitatively: "An average work week should be designed so far as possible to provide for such a spread of employment as will provide work so far as practical for employees normally attached to the particular industry." And as Hugh Johnson, the NRA Administrator, added a few days later in a nationwide radio address:

The way to work our factories and farms is to see to it that people who work get enough for their labor to buy what they need of the labor of other.

Well, how are we going to do that now, with 12,000,000 out of jobs and not enough business to hire any more men? The answer of the Roosevelt plan is: split up the existing work to put more men on the payroll and raise the wages for the shorter working-shift so that no workers is getting less than a living wage.

How seriously Roosevelt meant to shorten the workweek is unclear in light of the revelation by his Labor Secretary, Frances Perkins, that at this time he "could not feel that a reduction to thirty hours a week was essential even for the health and welfare of the people. 'Is there any harm,' he would say, 'in people working an eight-hour day and forty-eight hours a week?'"

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10NRA, Basic Codes of Fair Competition 3 (Bull. No. 2, June 19, 1933).


13Frances Perkins, The Roosevelt I Knew 194 (1946). The 48-hour week appeared to have enjoyed canonical status with Roosevelt, especially during World War II. At his press conference on July 17, 1940, he related that Wage and Hour Administrator Philip Fleming in a letter on the matter of the longer workweek had pointed out that a British munitions study from World War I had showed that if the total production index was 110 at 66 hours, it was 111 at 55 hours and 109 at 45.5 hours. Complete Presidential Press Conferences of Franklin D. Roosevelt Vol.16: July, 1940—December, 1940, at 31-32 (1972). Then at a press conference on April 7, 1942, he said: "I have been giving a good deal of study to certain...studies...in regard to the output of the human being. And I have never seen that stressed. During the World War and after it -- Oh, for ten years -- a great many studies have been made in -- here, and in Great Britain, and on the Continent of Europe, as to...the number of hours per week which, week in and week out, will turn out the most goods. ... It was found definitely...that everybody is agreed that the average human being in industry turns out more goods, week in and week out, when they work 48 hours a week than when they work 60 hours a week. That is something that the people of this country ought to examine and get into their heads. I think it was Mr. (Henry) Ford,
One example of the seriousness with which the work-sharing approach was taken—and which radically distinguished the NIRA from the FLSA—was that numerous codes contained a provision including within the maximum weekly hours those that the employee worked in other plants or industries.\textsuperscript{14} In fact, a great man years ago, who said that over 48 hours -- or it may have been over 44 hours, I don’t know which -- anyway, it was [sic] reasonably small number of hours -- anything over that...does not increase the total stuff he turns out with his hands. Saying which, write your stories.” \textit{Id.}, Vol. 19: January, 1942—June, 1942, at 267. Finally, on November 6, 1942, he responded to the information that Senator O’Daniel had introduced a bill to repeal the 40-hour week: “We haven’t got a 40-hour week. We haven’t got a 40-hour week.” The most important war production was operating on a 48-hour basis. When told that O’Daniel wanted a 6-day week and 12-hour day, the president observed that “after the first few weeks or the first few months, you don’t get any more production with a very, very long week -- with a lot of overtime -- than you do in a shorter week. Now...people ought to recognize it. But it is a fact that has been proved in England, over here, and in Germany. ... 48 hours seems to me to be in most industries...a pretty good maximum for steady month in, month out production, giving you at the end of the year certainly as much as 56 hours, and at cheaper cost, and certainly more...production than anything over 56 hours a week.” \textit{Id.}, Vol. 20: July 1942—December, 1942, at 204-205, 206, 216.

\textsuperscript{14}E.g., Code No. 164: Knitted Outerwear Industry (Dec.18, 1933), Art. III, § (a), in NRA, \textit{Codes of Fair Competition}, 4:199-209 at 203 (1934). On the prevalence of the provision, see Reticker, \textit{Labor Provisions in Codes} at 183. To be sure, several codes contained a proviso “that if any employee works for more than one employer for a total number of hours in excess of such maximum without the knowledge or connivance of any one of his employers, such employer shall not be deemed to have violated the section.” Code No. 156: Rubber Manufacturing Industry (Dec. 15, 1933), Art. V, § 5, in \textit{id.} at 69-83 at 78. See also Code No. 445: Baking Industry (May, 28, 1934), Art. IV, § 3, in NRA, \textit{Codes of Fair Competition}, 11:1-23 at 11 (1934). At the House Labor Committee hearings on Connery’s 30-hour bill in April, when one congressman asked Labor Secretary Perkins whether the Labor Department would be able to control the situation if workers worked five hours in one industry and then five in another industry or plant, Perkins replied that in some localities and industries it would destroy the purpose of bill: “I am told there is a plan to do so in certain textile towns.” \textit{Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557}, at 18-19 (73d Cong., 1st Sess., Apr. 25 to May 5, 1933). Later, Representative Kent Keller (Dem. Ill.) related that a taxicab driver had told him that he worked 30 hours for an electric company and then drove taxis evenings and weekends; Keller then found out that “such is being done by employees of the Government generally, many of them owning their own cars and renting them out and driving them in the evenings and on Saturdays and Sundays. It seems to me that some direct, specific remedy to prevent that should be arrived at.” Perkins stated that she had not thought of this scenario, but only of movement from one mill to another within the same industry. When the country’s highest labor standards enforcer opined that
because, as the AFL complained at the time, workers were virtually always ignored in setting up industry-level code authorities,15 "business domination of the code-writing process was virtually inevitable...[and g]enerally speaking...the wage-and-hour provisions were riddled with exceptions and loopholes..."16 Specifically, "in nearly every code," as the principal contemporaneous scholarly study of the National Recovery Administration concluded, "the so-called basic week is qualified by exceptions—by various types of provisions designed to secure elasticity."17

These elasticities (or, as they would be called today, flexibilities) were of four types: hours-averaging; general overtime; periods of various types during which basic hours could be exceeded; and permanent exceptions of certain occupational classes from basic hours.18 Of 695 codes, supplements and divisions, exceptions to the hours provisions were permitted: in 113 for hours-averaging;19 in 174 for general overtime;20 in 378 for peak and seasonal periods; in 394 for emergency

"[o]bviously, it is drastic to think about preventing people from earning a few pennies," Keller had to remind her that: "On the other hand, several hundred Government employees drawing salaries from the Government and doing this same thing, interferes with others making a living. I do not think such should be permitted." Unbowed, Perkins replied that "[p]erhaps they are earning only $900 a year and have 5 children," prompting Keller to conclude the discussion by pointing out: "If that is true, the Government should pay wages high enough to make that unnecessary." Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557, at 24.


17Lyon et al., The National Recovery Administration at 365.

18Lyon et al., The National Recovery Administration at 369-86.

19Lyon et al., National Recovery Administration at 369-70. Because averaging did not easily lend itself to enforcement and also caused irritation, the NRA in mid-1934 issued a policy precluding further inclusion of averaging provisions in codes. Id. at 374; Margaret Schoenfeld, "Analysis of the Labor Provisions of N.R.A. Codes," MLR 40 (3):574-603 at 585 (Mar. 1935).

20Of the 174 codes with general overtime pay provisions, 84 provided for time and a third and 81 time and a half; 104 codes permitted unlimited hours, while 20 permitted fewer than 48, and 50 codes 48 or more hours. Four-fifths of the workers under overtime pay systems were covered by 11 codes (trucking alone accounting for 1.2 million). Lyon et al., National Recovery Administration at 375-76. The degree of elasticity made possible by these overtime pay systems was, in the view of a Brookings Institution study, "quite modest," applying at most to one-fifth of the workers under codes. The authors did not find it easy to account for this result on rational grounds: "In part it doubtless reflects the
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repairs and maintenance; in 30 for continuous process operators; in 579 for outside salesmen; in 683 for executives and supervisors; in 290 for office and clerical employees; and in 278 for professional and technical employees. Of the 290 codes excluding office and clerical workers, 58 placed no limits on their hours, 81 hostility of certain business elements to overtime rates of pay....” In part it also reflected the determination to spread employment, and in part it grew out of “a fear of some of the labor group that payment of overtime rates tends to react unfavorably upon basic rates.” Id. at 377. In contrast, an NRA study noted that the declining adoption of general overtime provisions in the codes over time “might seem to indicate a dissatisfaction” with them on the NRA’s part: “Labor was, of course, vocal in code negotiations in protesting overtime provisions as interfering with the Administration’s reemployment aims, but no general NRA policy developed as a result.” Reticker, Labor Provisions in the Codes at 93. Reticker also concluded that although time and a half during “normal times...would not be a significant deterrent [sic] because it would be cheaper than hiring part-time workers in a somewhat restricted labor market,” with the unlimited labor supplies of the mid-1930s, “overtime rates probably were a significant deterrent [sic].” Id. at 93 n.***. The fact that, despite the availability of a one-and-a third overtime provision for certain workers in the PRA, “few codes used it,” meant, in the view of Charles Roos, an NRA economist who was hostile to the program from the employer’s perspective, that “the vast majority of the hour provisions, as written by the NRA, were almost completely unenforceable; it was to the advantage of both employers and employees to disregard them in cases of rush orders....” Code makers did not adopt overtime pay, according to Roos, because unions, in objecting, stated that foremen, who did not personally have to meet added costs, worked employees overtime rather than going to the trouble of hiring additional employees. “Yet it seems the real ground for opposition was that labor wished to legislate power into the hands of the unions so that they could thereby obtain monopolistic control of wages; its leaders therefore fought all attempts to prescribe flexible hours even though they promised the worker extra pay. Moreover, the opposition was not confined to labor; industries also refused to accept the provision for the different reason that they preferred to insert exceptions in the codes to avoid the expense of overtime pay.” Charles Roos, NRA Economic Planning 138-39 (1937). Roos failed to notice that his logic compelled the conclusion that capital and not unions prevailed on this matter. After his forced resignation as NRA administrator, Hugh Johnson expressed his view to Congress that in any revised NIRA: “Provision should be made in all cases for time and a half for overtime.” Investigation of the National Recovery Administration: Hearings Before the Committee on Finance United States Senate, Part 6, at 2453 (74th Cong., 1st Sess., Apr. 13-18, 1935).


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set their maximum hours at 48 and over, 26 at 41 to 47 hours, and 126 at 40 hours or under. From the fact that the modal hours-averaging period in codes with special provisions for office and clerical workers was about a month compared with three months for general code provisions, one NRA study concluded that the special provisions had been designed to meet employers’ need “for elasticity to cover the end-of-the-month peak in office overtime.”

Thus, virtually all codes excluded executive or supervisory employees—46 of them without even requiring payment of a specified (typically $35) weekly salary—on the ground that there was a “consensus of opinion” that such hours limitations were “not appropriate” for them; they were, in the even less enlightening locution of an NRA economist, exempted “for reasons that should be clear.” Somewhat under one-half excluded professional employees and office or clerical employees from the basic protection against overlong hours. In articulating exclusions from the overtime provision of the FLSA, therefore, its drafters and Congress had at their disposal a rich set of empirical experiences to draw on. There is, however, no evidence that they ever evaluated the purposes or effects of those exclusions from the codes on the excludees. (Nor, apparently, did the International Labor Organization, which, in a jarringly uncritical conceptualization for the world’s premier labor standards setting entity, declared that a “total exemption in favour of employees engaged in executive or managerial capacities is to be found in the P.R.A. [President’s Reemployment Agreement] and in most codes....”) One lesson, however, that could have been learned from the NRA

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22NRA, Tabulation of Labor Provisions in Codes at tab. VIII. For a somewhat different breakdown showing the same features, see Reticker, Labor Provisions in the Codes, tab. 35 at 129, who stated that of 578 codes 326 contained special provisions relating to office and clerical workers, of which 224 provided for longer hours than the codes’ basic provisions.

23Reticker, Labor Provisions in the Codes, tab. 38 at 133, tab. 14 at 72.

24Reticker, Labor Provisions in the Codes, at 131 (quote).

25Calculated according to Leon Marshall, Hours and Wages Provisions in NRA Codes, tab. A-I to A-XI, at 32-73 (1935). According to an alternative NRA calculation, only nine of 578 codes lacked an exclusion of executives and supervisors from the hours limitation provision; of the 569 codes with the exclusion, 524 permitted unlimited hours above a certain wage, while the other 45 did not even impose this requirement. Reticker, Labor Provisions in the Codes, tab. 44 at 156.

26Lyon et al., The National Recovery Administration at 382.

27Roos, NRA Economic Planning at 140. Roos also observed that: “NRA shorter-hours rules, of course, did not apply to research workers because it was believed impossible to divide up creative work.” Id.

28“Hours of Work Provisions under the National Industrial Recovery Act” at 99. On
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involved some employers' strategy of "making wage-earners 'executives' to escape limitations on working hours."29

Some codes sought to avoid this abuse of making run-of-the-mill employees executives or supervisors "overnight" by limiting the number or proportion of workers who were permitted to work longer hours.30 For example, the Ice Industry Code limited those exercising supervisory functions and excluded from the hours provisions to one-seventh of all employees in manufacturing or distribution.31 The Retail Food and Grocery Trade Code limited the number of executives, proprietors, and partners working more than the maximum hours to one-fifth of employees in establishments with fewer than 20 employees and one-eighth in those with more.32

Contrary to scholarly assertion, it is untrue that the NRA codes contained no exclusions of administrative employees.33 Indeed, the NIRA itself excluded administrative employees, albeit not in its Title I, which dealt with industrial recovery and the codes of fair competition, but in Title II, which authorized construction of public works to stimulate recovery and employ the unemployed: "All contracts let for construction projects and all loans and grants pursuant to this title shall contain such provisions as are necessary to insure that "(except in executive, administrative, and supervisory positions), so far as practicable and feasible, no individual directly employed on any such project shall be permitted to work more than thirty hours in any one week."34 These exclusions were contained in the original admin-

the President's Reemployment Agreement, see below.

30Reticker, Labor Provisions in the Code at 165.
istration bill\textsuperscript{35} that Senator Wagner introduced on May 15\textsuperscript{36} and remained unchanged through the enacted version.\textsuperscript{37} This legislative history forged a model for

\textsuperscript{35}On the complex and tangled pre-legislative history, see Roos, \textit{NRA Economic Planning} at 36-54; Arthur Schlesinger, Jr., \textit{The Coming of the New Deal} 87-102 (1959); Hawley, \textit{The New Deal and the Problem of Monopoly} at 19-52; Robert Himmelberg, \textit{The Origins of the National Recovery Administration: Business Government, and the Trade Association Issue, 1921-1933}, at 181-218 (1993 [1976]); Bernard Bellush, \textit{The Failure of the NRA} (1975); Colin Gordon, \textit{New Deals: Business, Labor, and Politics in America, 1920-1935}, at 166-203 (1994). Derivative and lacking in new insights is Rhonda Levine, \textit{Class Struggle and the New Deal: Industrial Labor, Industrial Capital, and the State} 64-91 (1988). The plan offered by Gerard Swope, president of General Electric Co., was an early adumbration of an NRA-like regime. “Swope Offers Plan to Unify Industries,” \textit{NYT}, Sept. 17, 1931 (1:4). In early 1933, a special committee of the Chamber of Commerce of the United States, whose members were heads of large corporations, proposed that federal government authority to protect industry be used to enforce standards for maximum hours and minimum wages agreed on by the majority of enterprises in an industry and accepted by a federal agency as necessary in the public interest. “From the Report of the Committee on Working Periods in Industry of the Chamber of Commerce of the United States” at 4 (undated), in Hagley Museum & Library, Willis F. Harrington Papers, Box 17 (copy furnished by Colin Gordon); “Working Periods in Industry—Report of Special Committee,” in \textit{Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557} at 226-29. Although the committee did not identify the groups it may have had in mind, it argued that: “Because of the necessity for wide variations in hours of work...for different groups of employees within single industries, and for different fields of business, no State or national legislative measures should establish permanent, fixed standards for maximum hours of work...which would apply to all wage earners....” “Urge 40-Hour Week as Work Maximum,” \textit{NYT}, Apr. 2, 1933 (12:3-6 at 6). The president of the Chamber of Commerce, Henry Harriman, also voiced NRA-like views at a congressional hearing on the 30-hour bill. “H. I. Harriman Asks Industry Control,” \textit{NYT}, Apr. 28, 1933 (14:5).

\textsuperscript{36}S. 1712, § 205 (73d Cong. 1st Sess., May 15, 1933). The language was identical to that used in the Emergency Relief and Construction Act of July 21, 1932; see above ch. 6. The fact that Wagner had introduced his bill on May 15 renders moot the point of chronological priority that Malamud, “Engineering the Middle Classes” at 2236, made concerning the discovery of an archival memorandum dated May 23 using the same language.

later New Deal white-collar statutory exclusions by failing to shed any light whatsoever on the purpose of the exclusions or how an administrative position differed from an executive or supervisory one.

Among the industries whose code provisions on hours expressly excluded "administrative" employees were the electrical manufacturing, rayon and synthetic yarn producing, cement, chemical manufacturing, railway car building, fishery, and machinery and allied products industries. In addition, all, with the exception of the chemical industry, which—despite the Labor Advisory Board's request that it be added—set forth no salary limit, conditioned the exclusion on a minimum weekly salary of $35.

At the chemical manufacturing code hearing on September 14, 1933, there was considerable discussion of the exclusions from the hours provisions, but none pertaining to administrative employees. The following May, after the code had been approved, the NRA issued an official code interpretation of the four categories mentioned in the Article II(a): "[a]ny person employed in an executive, admin-


45Memorandum from LAB (J. S. Gould) to Deputy Administrator Charles Martin on Chemical Manufacturing Code as Revised Dec. 18, 1933 (Dec. 26, 1933), in NAMP, Microcopy No. 213: DSNRA 1933-36 (1953), Roll 23: Code 275: Chemical Manufacturing Industry. The LAB mentioned the $35 salary level with respect to managerial and executive employees; it is unclear whether administrative employees were intentionally or inadvertently omitted.
istrative, supervisory and/or technical (not to include skilled operating labor nor professionally trained laboratory workers) capacity...."46

Of greatest interest here is the NRA's "rule of reason" interpretation of "administrative capacity," which even under the FLSA the DOL failed to define until 1940, when it issued expansively pro-employer regulations, which, over the ensuing decades, enabled firms lawfully not to pay overtime to millions of their workers. Unlike the three other groups, the NRA advised that those included under the administrative category "should be strictly limited." It also imposed a $35 minimum salary.47 It then went on to observe:

It is impossible to lay down any general definition which would be applicable to all companies which are members of the Chemical Alliance. Perhaps the best method of indicating the personnel which may be included under the category is to give examples such as:

1) Plant managers  
2) Chief accountants  
3) Office managers  
4) Department managers  
5) Credit managers  
6) Division heads

In companies where a large number of persons are employed the immediate assistants of the above categories may be included under those employed in an administrative capacity.48

46Code No. 275: Chemical Manufacturing Industry (Feb. 10, 1934), Art. II(a), in NRA, Codes of Fair Competition, 6:396.

47NRA, Code of Fair Competition for the Chemical Manufacturing Industry, Official Code Interpretation No. 275-8 (May 11, 1934) (issued by George L. Berry, Division Administrator), in NAMP, Microcopy No. 213: DSNRA 1933-36 (1953), Roll 23: Code 275: Chemical Manufacturing Industry. Berry was the long-time president of the Printing Pressmen's union. Approval of the interpretation was recommended by Deputy Administrator Joseph Battley on the same document; Battley's interpretation of July 13, 1934, which was presumably identical, was in turn approved by the Division of Research and Planning and the Code Authority. Memorandum on Chemical Manufacturing Industry Code; Interpretation of July 13, 1934, from G. K. Hamill, Division of Research and Planning, to Capt. Joseph F. Battley, Deputy Administrator (July 16, 1934); Memorandum on Chemical Manufacturing Industry Code, Interpretation of Article II, Section (a), from Geo. H. Mead, Administration Member, Code Authority, Chemical Mfg. Industry, to Deputy Administrator Jos. F. Battley (July 27, 1934), in id.

48NRA, Code of Fair Competition for the Chemical Manufacturing Industry, Official
With the exception of chief accountants and credit managers, the assignment of the other managers and heads to the administrative rather than to the executive or supervisory categories is puzzling. One reason may lie in the special focus of the NRA’s definition of “executive capacity,” which did not refer to executives in their function as bosses of other workers, but as “officials...who take part in developing the policies to be followed and who make final decisions concerning management problems.” (In addition, “the immediate assistants of the executives who are required by the nature of their duties to work in close cooperation with the executives”and were paid more than $35 weekly could also be included under this rubric.) In contrast, a supervisor was defined as a hands-on boss, “whose major responsibilities and duties consist of directing the work of others....” The NRA commented that the category should be limited to persons such as plant foremen, supervisors of fleets of truck drivers, heads of stenographic departments, and head draftsmen. Presumably the plant, office, department, and division managers classified as administrative employees were not situated high enough in the corporate hierarchy to be executives, but were either too high in the hierarchy or too distant from hands-on bossing to qualify as supervisors. Although their relatively prominent positions strongly suggest that the NRA viewed them as executive-like administrators and not as clerical-like administrative employees, the NRA’s history of the chemical manufacturing code exaggerated in asserting that the interpretation had had the effect of clarifying a provision “whose meaning was somewhat doubtful.”

The President’s Reemployment Agreement

The problem of the so-called employee or white-collar worker which so bothered early generations of Marxists, and which was hailed by anti-Marxists as a proof of the falsity of the “proletarianization” thesis, has thus been unambiguously clarified by the polarization of office employment and the growth at one pole of an immense mass of wage-workers. The apparent trend to a large nonproletarian “middle class” has resolved itself into the creation of a large proletariat in a new form. In its conditions of employment, this working population has lost all former superiorities over workers in industry, and in its scales of

Code Interpretation No. 275-8.


Before scrutinizing the provisions of individual codes, it is necessary to examine the exclusion of white-collar employees from the President’s Reemployment Agreement, into which the NIRA authorized the President to enter with, and to approve between and among workers, unions, firms, and industrial associations, if he believed that such agreements would effectuate the NIRA’s policy and were consistent with the industrial codes of fair competition required by the NIRA. President Roosevelt used the PRA as a temporary blanket code to gain more time to draft and adopt individual codes of fair competition for each industry. The PRAs, which went into effect on September 1, 1933—and were, unlike the codes of fair competition, not legally enforcible—contained child labor, minimum wage, and maximum hours provisions. Shortly before the PRA was issued on July 20, 1933, the NRA indicated that “differences in the conditions of employment would be recognized, and that distinct compacts were contemplated for industrial labor and the white-collar worker.” NRA Administrator Hugh Johnson verified reports that “distinctive wage and hour scales were under consideration for laborers and white collar workers. It is his contention that all classes of workers must share proportionately in the new purchasing power if the maximum benefits are to accrue.” Although the PRA neither quite lived up to the Times headline (“White Collar Code and One for Labor, Washington’s Plan”) nor enabled the excluded white-collar workers to benefit at all, it did specify that the hours provisions, which, in an effort to reemploy the unemployed, limited the workweek of an individual factory or mechanical worker or artisan to 35 hours until December 31, 1933, but gave employers the right to work them 40 hours a

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53“The President’s Reemployment Agreement,” MLR 37:262, 263 (1933); Bellush, Failure of the NRA at 48-52. According to Basil Rauch, The History of the New Deal 1933-1938, at 93-95 (1944), the stock market crash in July and the probability of companies’ evading those provisions of the NIRA that were unfavorable to them prompted the NRA to launch its campaign for immediate compliance with minimum-wage and maximum hour rules.
week for any six weeks until then, limited the workday to eight hours. In contrast, employers agreed “[n]ot to work any accounting, clerical, banking, office, service, or sales employees (except outside salesmen) in any store, office, department, establishment, or public utility” more than 40 hours per week. These maximum hours did not, however, apply to “registered pharmacists or other professional persons employed in their profession” or to “employees in managerial or executive capacity, who now receive more than $35 per week.” The term “professional persons” was interpreted to include doctors, lawyers, and nurses, as well as newspaper reporters, editorial writers, rewrite men, and other members of editorial staffs, interns, hospital technicians, and research technicians. This salary was about two to three times the weekly minimum wage of $12-$15 for covered white-collar workers (depending on the size of the city) guaranteed by the PRAs.

Despite the PRA’s “antisubterfuge” provision, which obligated employers not “to frustrate the spirit and intent of this Agreement which is...to increase employment by a universal covenant..., and to shorten hours and to raise wages for the shorter week to a living basis,” employers sought to give “meaningless titles to minor employees to exempt them from the hours provisions....” Consequently, National Recovery Administrator Johnson soon found it necessary to issue a state-

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57President’s Reemployment Agreement, ¶ 3, in NRA, Bulletin No. 3: The President’s Reemployment Program 7 (1933).
58President’s Reemployment Agreement, ¶¶ 2, 4, in The President’s Reemployment Program at 7. The maximum hours limitation also did not apply to “very special cases where restrictions of hours of highly skilled workers on continuous processes would unavoidably reduce production but, in any such special case, at least time and one-third shall be paid for hours worked in excess of the maximum.” Id. at ¶ 4. Bizarrely, the aluminum industry code, which paid time and a half for overtime for continuous operations, denied overtime pay to workers who were held over because of lack of relief by another employee. Code No. 464: Aluminum Industry (June 26, 1934), Art. 3(g), in NRA, Codes of Fair Competition, 12:113-29 at 122 (1934).
59“Official Explanation of the President’s Reemployment Agreement,” in NRA, Bulletin No. 4: What the Blue Eagle Means to You 5-11 at 7 (1933).
60“Interpretations of the President’s Reemployment Agreement,” in NRA, Bulletin No. 4: What the Blue Eagle Means to You 12-20 at 17.
61President’s Reemployment Agreement, ¶¶5-6, in The President’s Reemployment Program at 7-8
62President’s Reemployment Agreement, ¶8, in The President’s Reemployment Program at 8.
ment defining “manager” and “executive.” He declared that in approving exceptions for such persons from the codes’ maximum hours provisions, the NRA did not intend “to provide for the exemption of any persons other than those who exercise real managerial or executive authority, which persons are invested with responsibilities entirely different from those of the wage earner and come within the class of the higher salaried employees.” Johnson also used the opportunity to emphasize that paying less than the threshold $35 weekly salary created an irrebuttable presumption that the employee was not an “exempt” “manager or ‘executive.’” Why he did not issue a counterpart definition for so-called administrative employees is unclear. That, however, the NRA maintained a breathtakingly generous categorization of white-collar workers emerged from its release in late July of PRA interpretations declaring: “The ‘white collar’ worker class limited to 40 work hours a week includes maintenance forces such as charwomen, window cleaners [sic], & c.”

Under the PRA, then, the salary level and the description of managerial duties were supposed to establish a clear divide between protected and unprotected employees. Although the PRA and the codes of fair competition, unlike the FLSA, did not expressly exclude managerial-executive employees from the minimum wage provisions, the high salary test functioned under both regimes as a super-minimum wage vis-à-vis any employer wishing to take advantage of the exemption. Moreover, whereas the FLSA merely gave employers a financial incentive

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64MLR 37:1083 (1933). This narrow definition was similar to the one used in the Retail Food and Grocery Trade code, which, after defining “executive” as “an employee responsible for the management of a business or a recognized subdivision thereof,” in its hours provision suggested that each establishment had only one excludible executive: “an establishment which operates a grocery and meat department as separate departments shall be permitted to exempt one worker in addition to the proprietor or executive...from all restrictions upon hours....” Code No. 182: Labor Provisions for the Retail Food and Grocery Trade (Nov. 15, 1933), Art. II, § 5, Art. V, § 2(c), in NRA, Codes of Fair Competition, 3:633-43 at 637-39.

65MLR 37:1083 (1933). Johnson also issued an interpretation to the effect that so long as he was receiving more than $35 per week, the employee could act “primarily, although not wholly, in a managerial or executive capacity” without causing his employer to forfeit its exemption. “Interpretations of the President’s Reemployment Agreement,” in NRA, Bulletin No. 4: What the Blue Eagle Means to You 12-20 at 17. For an example of a code that excepted all employees receiving more than $35 per week and executives and managerial and supervisory staffs from any hourly limitations, see Code of Fair Competition for the Automobile Manufacturing Industry, § III, in NRA, Codes of Fair Competition 1:251-57 at 253, 255 (1933).

to hire additional workers rather than to pay premium overtime to existing employees, the PRA sought to expand employment more directly by obliging employers not to work their workers more than forty hours. Nevertheless, freeing employers from this restriction with respect to their managerial employees weakened the reemployment effect under both regimes.

Textiles and Clothing

[T]he main office where the clerks sat around at old chewed-up desks getting sore about their wages, instead of going straight into White Collar Heaven....

The exclusions of white-collar employees from the codes of fair competition were, as already adumbrated, extensive, varied, and pervasive. The very first code that Roosevelt approved, that for the cotton textile industry, initially excluded office and supervisory staffs together with repair crews, engineers, electricians, firemen, shipping, watching, and outside crews, and cleaners from its 40-hour week. In transmitting the proposed code and his report on it to Roosevelt, NRA Administrator Hugh Johnson commented: "The exception of office and supervisory staff from the hour provisions is inconsistent with the principle of the President’s statement of June 16, 1933, which requires inclusion of the ‘white collar’ class within all benefits of the Act, and an agreement to remedy this defect was reached." Johnson was referring to Roosevelt’s statement accompanying his signing into law of the NIRA, which included a backward glance at his inaugural address laying down the proposition that “nobody is going to starve in this country.” Roosevelt then added that it seemed equally plain to him that “no business which depends for existence on paying less than living wages to its

67 Codes of fair competition did include premium overtime provisions. For a tabular overview, see “Summary of Permanent Codes Adopted Under NIRA Up to November 8, 1933,” MLR 37:1333 (1933).
68 Richard Bissell, 7½ Cents 6 (1953).
69 [NRA Administrator] Hugh Johnson to the President (July 9, 1933), in Code No. 1: Cotton Textile Industry, in NRA, Codes of Fair Competition, 1:3 (1933). On the numerous structural advantages that cotton textile firms enjoyed vis-à-vis labor in the code creation process, see Louis Galambos, Competition and Cooperation : The Emergence of a National Trade Association 203-26 (1966).
70 [NRA Administrator] Hugh Johnson to the President (July 9, 1933), in Code No. 1: Cotton Textile Industry, in NRA, Codes of Fair Competition, 1:12 (1933).
workers has any right to continue in this country. By ‘business’ I mean the whole of commerce as well as the whole of industry; by workers I mean all workers, the white collar class as well as the men in overalls; and by living wages I mean more than a bare subsistence level—I mean the wages of decent living.”

To be sure, Roosevelt’s focus on living wages hardly seemed directed at protecting highly paid executives, let alone shortening their hours, but, nevertheless, when he approved the cotton textile code on July 9, 1933, his executive order subjected this approval to several conditions, one of which was that “office employees be within the benefits of the code.” Despite the presidential order, the final code (which Roosevelt approved on July 17, three days before releasing the PRA), while limiting the weekly hours of other employees to 40, subjected office employees to the first hours-averaging of any code—40 over a period of six months.

One of the numerous studies that the NRA Division of Review performed after the NIRA had been struck down frankly described the dispute over the insertion of an hours provision for office workers in the cotton textile code: “Since the schedule of hours of the Cotton Textile code had been dictated by the desire to

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72 Malamud, “Engineering the Middle Classes” at 2254, overlooked these limitations to Roosevelt’s allusion to white-collar workers. Because one of Roosevelt’s files is cross-referenced “the so-called ‘white-collar’ class,” Malamud speculated that “Roosevelt’s own administrative staff had its doubts about the meaning of the term....” Id. In fact, the expression “so-called white-collar” remained in common usage for decades. Labor Secretary Perkins used it in 1943 and the Times quoted a congressional report as using it as late as 1961. Frances Perkins, Letter to the editor, NYT, Nov. 20, 1943 (12:6); “Youth Crime Rate Called Alarming,” NYT, Aug. 28, 1961 (27:4).

74 Application to the President by the Cotton Textile Industry Committee for Final Approval of the Code of Fair Competition for the Cotton Textile Industry, in Code No. 1: Cotton Textile Industry, in NRA, Codes of Fair Competition, 1:22. The supplementary code (called Schedule A) read: “On and after July 31, 1933, the maximum hours of labor for office employees in the cotton textile industry shall be an average of forty hours a week over each period of six months.” “Cotton Men Adopt a Pay Slash Curb,” NYT, July 18, 1933 (13:1). Overall, though ostensibly a victory for labor, the cotton textile code was “actually...a humiliation for the United Textile Workers of America, the only union with pretensions of speaking for workers in the entire industry.” Irving Bernstein, A History of the American Worker 1933-1941: Turbulent Years 301 (1971). In contrast, Donald Richberg, the NRA’s general counsel, called the textile code “a landmark in industrial conditions in this country.” Investigation of the National Recovery Administration: Hearings Before the Committee on Finance United States Senate 48 (74th Cong., 1st Sess. Mar. 7-13, 1935).
limit production, and since there was no desire to limit the production of office workers, the President’s suggestion was not acceptable to the proponents of the code. Accordingly, a week later the Cotton Textile Industry Committee asked for and secured Roosevelt’s approval of the provision averaging 40 hours over six months: “Thus the Administration had committed itself to looser hours for office workers than for mill workers.”

The first industry to go through the code process, cotton textiles were a “sick industry,” subject to “overcapacity, declining demand, and intense competition for a shrinking market.” The very day that Roosevelt signed the NIRA, the Cotton Textile Industry Committee declared its belief that “the revolutionary reduction of individual working hours and resulting spread of employment that will be effected by the proposed code is a constructive and far-reaching method of dealing with this as with numerous other problems in the industry growing out of the present emergency.” Three days later, against the background of textile production “greatly in excess of any possible consumption, and...a glutted market in the near future...unless stabilized conditions are brought about quickly,” NRA Deputy Administrator William Allen, a former chairman of Sheffield Steel Company and director of American Rolling Mills Company, recommended a hearing for the industry at as early a date as possible: with mills demanding 60 hours or more per week from employees and several strikes having been called, any delay in approving the code would be very disturbing.

The opening session on June 27, 1933, of the textile code hearing, which 800

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75 Reticker, Labor Provisions in the Codes at 126.
76 Hawley, The New Deal and the Problem of Monopoly at 220.
78 “Washington Picks Recovery Boards and Chief Experts,” NYT, June 20, 1933 (1:4, 7:2). As even the distinctly pro-employer NRA study by the Brookings Institution conceded, most deputy administrators, who were charged with submitting completed codes with recommendations, “were drawn from the ranks of business occupations. By virtue of training and inclination they were therefore sympathetic with the business point of view. This fact undoubtedly colored their views of what the proper content of a code was. ... It has been alleged that some of them were ‘planted’ to protect the interests of groups of large enterprises. ... It is true that some of them, as well as higher officials, were on temporary loan from business employments, and that most of them expected to return to private employment after a temporary tenure at the NRA.” Lyon et al., National Recovery Administration at 136.
spectators attended, was, according to the Times, "[h]ailed as one of the most significant assemblages in the history of this country...."80 The hearings' governing spirit and attitude that the NRA wished to project was embodied with all imaginable clarity in a remarkable quasi-directive that Allen, the presiding officer, issued at the beginning of the second day of the cotton textile hearings:

Before proceeding with the meeting, there is one statement I would like to make, particularly to the newspapermen. [T]his conference and hearing is being carried on for the purpose of ascertaining the facts, and certainly insofar as the actions yesterday would indicate, there was no spirit of fight or animosity. I think it is very proper until such animosities are disclosed, if they are, we are entirely in order in soliciting your support in anything that you may present to the public in keeping away from a portrayal of this situation as being a fight between capital and labor.81

As George Sloan, the president of the Cotton Textile Institute, presented the employers' proposed code, Administrator Johnson was brought up short by its definition of "employees" as including "all persons employed in the conduct of such [cotton textile] operations." Falling into the unthinking custom of referring to non-production workers in non-commercial terms, Johnson asked: "Does that mean office help?" Cutting to what was presumably the quick of Johnson's question, Sloan replied: "General, that is answered in clause 3 where we say that so far as the 40 hour is concerned, it excepts office and supervisory staff...."82 Johnson's Deputy Allen sought to move on to the next clause in the code, but Johnson's attention was riveted on the excluded employees:

General Johnson: No, I have another question. In other words, that of course does not affect the minimum wage, because...employers of the cotton textile industry shall not operate on a schedule of hours of labor for their employees—except repair shop crews, engineers, electricians, firemen, office and supervisory staff, shipping, watching and outside crews and cleaners—in excess of 40 hours per week. When you speak of the minimum wage, you do not except those people but they are not on the same basis of

80"Cotton Industry Opposed by Labor on Its Trade Code," NYT, June 28, 1933 (1:6). Administrator Johnson was somewhat less effusive in declaring that it "may prove one of the most momentous meetings of this kind that has ever been held anywhere" without revealing what "kind" he meant. NRA, HCFC, Hearing No. 133: Cotton Textile, NRA Release No. 13 at 1 [no pagination] (June 27, 1933) (Film No. 22).

81NRA, HCFC, Hearing No. 133: Cotton Textile, NRA Release No. 16 at 3 (June 28, 1933).

82NRA, HCFC, Hearing No. 133: Cotton Textile, NRA Release No. 14 at 52 (June 27, 1933).
spreading work, although they are on the same basis of minimum wage, is that right?
Mr. Sloan: Well, yes, but their wage would be much higher than this minimum. The minimum wage would apply, but the hours would not apply... 83

After Johnson had been seemingly mollified that those excluded from the hours provision were covered by the minimum wage provision and earned a much higher salary anyway, Sloan handed off the code presentation to Robert Amory, the president of the National Association of Cotton Manufacturers, who guessed that, apart from shipping, two to three percent of cotton textile employees fell within the exclusions. 84 Amory explained why each subgroup had to be excluded beginning with repair shop crews, who might be put on a standard 40-hour week, but "it is obvious in the case of a breakdown you could not tell what you want your repair crew to do, and you could not get in outsiders, because they would not know how to do that particular job or repair, so there must be a certain amount of flexibility." 85 The same considerations applied to engineers, electricians, and firemen; this last group in particular, though not involving "much work," required "a great deal of knowledge and experience," and, at least in Massachusetts, a license. Consequently: "You could not double them up suddenly and get the licensed firemen...and the job is purely a supervisor job...." 86

Moving on to office workers, Amory testified that "the word 'office' in most mills refers to a very few people, it covers the paymaster and cost clerk in some mills. Our cost clerks are working 80 hours a week trying to figure out under the code; there is only one of him; you cannot double him up." He then proceeded to declare watchmen nonfungible, individually irreplaceable, and in need of long training periods: "Watchmen the same way. In a big plant to educate a new watchman is a six month's job before he knows all the corners he has to go around and pull his time clock,...know where there are fire sprinkler valves, and you have to trust him not leave a valve in a dangerous condition...." Even Amory was hard-pressed to construct a justification for shipping clerks: "I do not know exactly why that was put in, but I think the same thing applies, and you probably have an average of 40 hours a week, but in heavy shipping periods you might want crews

84 NRA, HCFC, Hearing No. 133: Cotton Textile, NRA Release No. 14 at 54 (June 27, 1933).
to work overtime for the time being and work slack the next week.” For the final group the justification was so self-explanatory that he did not even attempt to reveal it: “Supervisory staff I am passing over: I will assume we will have to use our regular men.”87 (After the cotton textile industry code’s approval, the code authority defined supervisory staff to include “all who direct the activity of others, such as executives, department heads, superintendents, paymasters, foremen[,] overseers and second hands.”)88

After Amory had completed his survey, Johnson intervened, but his declarations were at times obscure. He began by noting: “I think we have to undertake a little inconvenience. If office workers and the white collar class generally are exempted on account of the way they fit into the particular job we are going to very, very seriously impair the operations.” Equally obscurely, given the total exclusion, Amory retorted: “I do not propose that they should be left out entirely.” He seemed to hint that the exclusions were merely a temporary phenomenon caused by the code authority’s tight schedule: “We have to have the trained men so that they know where all of the pipes go and where all of the valves are, and where all of the wires go. To say we have to put it [a repair gang] suddenly on a 40 hour basis and put in green men—well, I would not sleep nights if we did that.”89 Johnson and Amory then segued into an oddly disjointed colloquy about watchmen: in response to the employers’ renewed assertion that they had to possess firm-specific detailed knowledge, which could not be imparted in six weeks, the NRA Administrator opined: “That is an administrative, executive job.” Since watchmen, though not production workers, are more akin to manual than office employees, it is unclear in what possible sense they could be administrative let alone executive employees. And in fact, Johnson, executing an about-face, then claimed, based on army experience, that they could be trained in much less than two weeks, though he offered employers three. This generosity failed to propitiate Amory, who complained that such a procedure “would mean that our supervisory men, who now work almost to the breaking point, would have to work that many more hours....” Nevertheless, he, too, did an about-face, conceding that Johnson

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was right that “the work should be spread out” and assuring the NRA that the committee had no intention not to do so. In turn, Johnson acknowledged that employers needed “flexibility,” but insisted that he did “not think much of the argument that the banks...do not have to play [sic] and most of the old merchandising industries do not have to pay. I think if we are going to start out here we have to apply this to everybody.”

Despite this exclusion of office workers from the hours provision of the original cotton textile industry code, and despite the apparent possibility that the exclusions would be narrowed before being finalized, none of the numerous labor representatives testifying at this particular hearing took up the cudgels for them (although their counterparts did, as will be seen below, at many hearings in other industries). These acquiescent labor officials ranged all the way from AFL president William Green, Sidney Hillman (the president of the Amalgamated Clothing Workers, member of the Labor Advisory Board, and influential New Dealer), and Thomas McMahon, the president of the United Textile Workers of America, to June Croll, a representative of the Communist-affiliated National Textile Workers Union, who, according to The New York Times, “protested against the code from every angle, saying that it was totally inadequate for the workers.”

One labor representative, William Batty, secretary of the New Bedford, Massachusetts Textile Council, did point out that: “Since the purpose of the Act is to spread employment it is clear the opportunity here afforded to absorb unemployed mechanics, engineers, electricians, firemen, etc., should not be lost.” However, the other group of excluded workers he was more than willing to sacrifice: “We submit that the only legitimate exception to the maximum hours are the office and supervisory staff.” This labor representative, too, received high marks from the Times, which commented that he had “received several rounds of applause from the audience for the presentation of his case in the interest of the cotton mill workers. He exhibited ready knowledge of the technical points involved and was ever ready with some

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91NRA, HCFC, Hearing No. 133: Cotton Textile, 104-15 (June 28, 1933).
92NRA, HCFC, Hearing No. 133: Cotton Textile, 126 (June 28, 1933).
93NRA, HCFC, Hearing No. 133: Cotton Textile, 39-68 (June 28, 1933).
96NRA, HCFC, Hearing No. 133: Cotton Textile, 80 (June 28, 1933).
factual statement relating to working conditions, duties of workers and labor stress.\(^97\) A Machinists union official demanded time and a half for repair shop crews,\(^98\) while an Electrician’s official protested the exclusion of electrical workers.\(^99\)

Senator Hugo Black himself, the eponymous congressional advocate of the AFL’s 30-hour bill, also appeared at the hearing to urge that, regardless of the length of the maximum workweek, all codes should also include a maximum number of daily hours because a 40-hour week with no daily maximum would lead to reemploying one million workers compared to four times as many in combination with an eight-hour maximum.\(^{100}\) Black, who had agreed to relax his 30-hour bill to exclude some white-collar workers,\(^{101}\) also failed to promote their coverage under the cotton textile code.

Although Maud Younger, the chairman of the National Woman’s Party, which opposed labor laws that covered only women, failed to mention office workers in her testimony,\(^{102}\) Lucy Mason,\(^{103}\) the general secretary of the National Consumers’ League, was the sole witness who did. The NCL, which was originally founded to combat the exploitation of women workers, but later also advocated wage and hour regulation for men as well, had developed a special expertise in the cotton textile industry and southern labor conditions in general. Mason, who, interestingly, had supported herself as a legal stenographer, and in 1937 went to work for the CIO’s Textile Workers Organizing Committee in the South,\(^{104}\) testified that “I think that the President meant what he said when he said ‘including white collar workers.’”\(^{105}\) In keeping with the NCL’s opposition to discrimination in labor standards legislation, Mason then observed:

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\(^{97}\)“Cotton Mills Put a Child Labor Ban into Textile Code,” \textit{NYT}, June 29, 1933 (1:5, 6:5-6).

\(^{98}\)\textit{NRA, HCFC}, Hearing No. 133: Cotton Textile, 100 (June 28, 1933) (H. J. Carr, general vice president, IAM).

\(^{99}\)\textit{NRA, HCFC}, Hearing No. 133: Cotton Textile, 103 (June 28, 1933) (Joseph McDonagh, IBEW).

\(^{100}\)\textit{NRA, HCFC}, Hearing No. 133: Cotton Textile, 96-97 (June 28, 1933).

\(^{101}\)See above ch. 6.

\(^{102}\)\textit{NRA, HCFC}, Hearing No. 133: Cotton Textile, 29-33 (June 28, 1933).


\(^{105}\)\textit{NRA, HCFC}, Hearing No. 133: Cotton Textile, 40 (June 28, 1933).
The proposed code excludes from the maximum hours regulations repair shop crews, engineers, electricians, firemen, office and supervisory staff, shipping, watching and outside crews and cleaners. The exclusion of this large group of workers is in plain violation of the act’s intent to spread employment among all types of workers.

Adverting to the ‘grave yard’ shift, last week in Detroit I met a white-collar worker who had worked 36 + 39 hours consecutively in the automobile industry, with only breaks for meals.106

On June 30, two days after the end of the first NRA code public hearing, the Cotton Textile Industry Committee passed a resolution authorizing its president, Sloan, to make a statement on the code organization’s behalf to the NRA to this effect: “An arrangement will be worked out by July 30, 1933, regarding office employees, with a view to bringing them within the hours provisions of the Code, with due allowance for the flexibilities called for.”107 Adopting as his own employers’ self-regarding demand for flexibility, Deputy Administrator Allen the next day recommended that immediate steps be taken to include office workers within the code’s hour provisions and that instructions be issued to include all other excepted employees within those sections “as promptly as possible with due allowance for flexibility.”108

When additional hearings were held on October 9, 1933—“invade[d]” by many of the textile strikers from Paterson, New Jersey109—on modifications to the cotton textile code, Francis Gorman, international second vice president of the UTWA, continued the tradition of union disregard of white-collar workers. While four members of the NTWU again ignored them altogether,110 Gorman listed among the code’s defects its exclusion of too many groups from the maximum hours provision; though mentioning supervisory staff in addition to the blue-collar

106NRA, HCFC, Hearing No. 133: Cotton Textile, 40-41 (June 28, 1933).
groups, he omitted office workers. And even when he noted that since the 40-hour week was not putting the unemployed back to work, the week should be reduced to 30 hours for everyone in the finishing, dyeing, and thread departments, and later in the whole industry, with no exceptions or exemptions (other than for emergencies at time and a half), he still failed to include office workers.  

And even for production workers, the attempt to obtain wide reemployment in cotton textiles was, according to the International Ladies’ Garment Workers’ Union’s lawyer, Elias Lieberman, an “absolute failure.” The seeming advantage of introducing a 40-hour week has resulted in a disadvantage to the workers, owing to the wholesale evasion by the employers of the provision prohibiting the speed-up of the employees.

Other codes followed in the exclusionary tracks laid by the cotton textile code. Like the PRA, which “profoundly affected later codes in the matters covered and the phraseology used,” the cotton textile code established patterns that exerted powerful influence on later codes. The very first group of codes

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112Lieberman was the “ILGWU legal representative in Washington at all NRA and NLRB hearings on our cases. Here was a labor lawyer who had learned about industrial conflict from the bottom up. Born in Russia, he had come to this country as a student. Becoming a waistmaker, he joined our Local 25, and was its first ‘clerk.’ In those days that job combined the duties of manager, business agent, secretary, and office staff. Lieberman also was the first manager of our union’s weekly publication, Justice, and its counterparts in Yiddish and Italian. Working by day, he studied law at night....” http://dwardmac.pitzer.edu/Anarchist_Archives/bright/pesotta/chap27.htm

113NRA, HCFC, Hearing No. 130: Cotton Garment, 478 (June 19, 1934).

114Ironically, LAB chairman Leo Wolman telegraphed Johnson at the outset of the code process that with respect to the 40-hour week, which was too long to absorb the unemployed, LAB members were “reassured by statement of General Johnson that decision in this industry [cotton textile] will not constitute precedent for others.” Telegram from Leo Wolman to General Hugh Johnson (July 8, [1933]), in NAMP, Microcopy No. 213: DSNRA 1933-36 (1953), Roll 40: Code 1: Cotton Textile Industry. Unintended irony also attaches to the statement that: “[I]f Roosevelt and Johnson expected that the inclusion of office workers in the Cotton Textile Code’s system of hours regulation would set the precedent for all codified industry, they were wrong. ... Without constant vigilance on the part of the administration, industries continued to exempt office workers from hours regulation.” Malamud, “Engineering the Middle Classes” at 2262-63. Since the maximum workweek for office employees was 40 hours averaged over six months, not only was there no limit on weekly hours, but no overtime premium was paid for hours beyond 40.

115Lyon et al., National Recovery Administration at 306.

116Lyon et al., National Recovery Administration at 304.
approved by Roosevelt in the summer of 1933 also discriminated against white-collar workers. Just days after the finalization of the cotton textile code, the president approved the wool textile code, which imposed a blanket exclusion from its 40-hour rule on office and supervisory staff.\textsuperscript{117} The coat and suit industry code prohibited a schedule of more than 35 hours except for clerical and service employees working in office and shipping departments; non-manufacturing employees were not permitted to work more than 40 hours. No overtime work was permitted unless the Administrator granted an extension of hours in the busy season if he concluded that labor in the industry was fully employed and conditions made it advisable.\textsuperscript{118} While the code for the electrical manufacturing industry excluded executive, administrative, and supervisory employees from its 40-hour week limitation,\textsuperscript{119} and the rayon and synthetic yarn producing industry excluded executive, administrative, supervisory, and technical employees,\textsuperscript{120} the iron and steel industry code excluded executives and supervisors and their staffs from the 40-hour average over six months subject to a 48-hour/6-day limit.\textsuperscript{121} The hosiery industry code also contained a provision permitting the averaging of office employees' 40-hour week over six months.\textsuperscript{122}

Oddly, at the rayon and synthetic yarn producing hearings, which took place less than a month after her appearance at the cotton textile hearings, Lucy Mason failed even to ask exactly who "administrative" employees were, let alone to raise any objections to their exclusion or that of any of the other categories of white-collar employees. Instead, on behalf of the NCL—which she described as an "organization whose purpose is to arouse the consumer sense of responsibility for conditions under which the workers are employed in industry and distribution"\textsuperscript{123}—she "want[ed] to congratulate the industry in [sic] including all em-

\begin{itemize}
\item\textsuperscript{117} Code No. 3: Wool Textile Industry (July 26, 1933), Art. III, in NRA, \textit{Codes of Fair Competition}, 1:33-41 at 39.
\item\textsuperscript{118} Code No. 5: Coat and Suit Industry (Aug. 4, 1933), Third, in NRA, \textit{Codes of Fair Competition}, 1:51-58 at 53.
\item\textsuperscript{119} Code No. 4: Electrical Manufacturing Industry (Aug. 4, 1933), \S\ 4(b), in NRA, \textit{Codes of Fair Competition}, 1:43-50 at 47.
\item\textsuperscript{121} Code No. 11: Iron and Steel Industry (Aug. 19, 1933), Art. IV, \S\ 2, in NRA, \textit{Codes of Fair Competition}, 1:171-207 at 183.
\item\textsuperscript{123} NRA, \textit{HCFC}, Hearing No. 387: Rayon and Synthetic Yarn Producing 77 (July 27, 1933) (Film No. 59).
\end{itemize}
ployees except the salary roll in the code on the subject of maximum hours of work...."124 Her rather gentle criticism was largely confined to admonishing the industry for its "unwise laxity"125 in subjecting all employees covered by the 40-hour week to the "flexible provision" of hours-averaging over four weeks.126 In her report on the code following revision based on the findings at the hearing, Rose Schneiderman of the LAB (who was president of the Women's Trade Union League) failed to mention the matter of hours at all.127

The evolution of the coat and suit industry code was atypical. The code that the three employers' associations in the trade submitted on July 13, 1933 stated that employers "shall not operate on a schedule of hours of labor for their employees, except employees working in office and shipping departments, in excess of...30...hours per week. Overtime is expressly prohibited."128 It thus failed to limit hours for white-collar workers at all. Although the code's main features had been worked out in negotiations with the ILGWU, the union not only broke with the employers over the issue of piece work, but began to prepare a strike of 85,000 workers just hours after presentation of the code.129 When, a week later, on the eve of the code hearing, the ILGWU became the first union to offer its own code,130 the hours provision was identical with the employers' except that it substituted 30 for 40 hours, thus again leaving white-collar workers unprotected.131

At the hearing on July 20, at which attention was focused on the question of absorbing the unemployed by eliminating overtime and reducing hours, no one raised the issue of white-collar workers—not even Morris Hillquit, the ILGWU's

124NRA, HCFC, Hearing No. 387: Rayon and Synthetic Yarn Producing 79 (July 27, 1933).
125NRA, HCFC, Hearing No. 387: Rayon and Synthetic Yarn Producing 81 (July 27, 1933).
129"Cloak Code Filed, Sets 40-Hour Week," NYT, July 14, 1933 (1:7, 10:2); "Garment Workers Vote for a Strike," NYT, July 14, 1933 (10:8).
130"Rival Code Offered by Garment Union," NYT, July 20, 1933 (1:2).
attorney, who for decades had been the Socialist Party's leading theoretician.\textsuperscript{132} The following and final day's hearing saw the ILGWU president, David Dubinsky, testify on a wide range of issues, but neither he nor any other witness (including Louis Hyman, president of the Communist Needle Trade Workers Industrial Union) even alluded to the problem.\textsuperscript{133} Over the next two weeks a series of intensive negotiations, in part brokered by the NRA, succeeded in averting a strike and reaching a compromise code, which included the 35-hour week for manufacturing workers.\textsuperscript{134} Since the parties' rival proposed codes had ignored clerical workers, it was, in the wake of the debacle over the cotton textile code, presumably under the NRA's guidance\textsuperscript{135} that the clerical and service workers in office and shipping departments, reappearing subsumed under "[n]on-manufacturing employees," were finally subject to a 40-hour limit.\textsuperscript{136}

Practical experience with this restriction over the next few months apparently prompted dissatisfaction among employers, which requested amendments of this and other code provisions. The employers proposed to add a provision that modified (but in fact negated) the prohibition on non-manufacturing employees' working more than 40 hours a week by permitting certain of these employees, including shipping clerks and "clerical help," to work overtime under rules issued by the code authority.\textsuperscript{137} The neglect characteristic of the union's attitude toward white-collar workers' hours at the original coat and suit code hearings in July 1933 was transformed into unprecedentedly passionate concern at the hearing the following May on modification of the code requested by the code authority. One of these proposals was described by an NRA Deputy Administrator as "a minor

\textsuperscript{132}NRA, \textit{HCFC}, Hearing No. 103: Coat and Suit Industry 35-48 (July 20, 1933) (Morris Hillquit) (Film No. 13). Hillquit died a few months later.

\textsuperscript{133}NRA, \textit{HCFC}, Hearing No. 103: Coat and Suit Industry 1006-1034 (Dubinsky), 1041-50 (Hyman) (July 21, 1933). No representative of the Labor Advisory Board testified.

\textsuperscript{134}"Moving to Avert Garment Strike," \textit{NYT}, July 22, 1933 (5:6); "Unable to Agree on Garment Code," \textit{NYT}, July 24, 1933 (8:1); "Cloak Code Ends Threat of Strike," \textit{NYT}, Aug. 7, 1933 (1:5).

\textsuperscript{135}Unfortunately, as the NRA's own history of this code revealed, there was no record of these post-hearing negotiations and what was discussed was not revealed. Walter Simon, "History of the Code of Fair Competition for the Coat and Suit Industry" at 23-24 (Nov. 11, 1935), in \textit{NAMP}, Microcopy No. 213: \textit{DSNRA 1933-36}, Roll 28 (1953).

\textsuperscript{136}"Text of Compromise Code for the Cloak Trade," \textit{NYT}, Aug. 7, 1933 (2:2-5 at 2).

change...."138 By permitting non-manufacturing employees to "work overtime under such rules and regulations as the Code Authority shall prescribe,"139 employers, who controlled the code authority, thus proposed to arrogate to themselves the power that the original code had conferred on the NRA Administrator. Alexander Prinz, representing the code authority, did not even find it necessary to offer a detailed explanation:

You all know the purpose of that. It is a seasonal business. There comes a time when the work cannot be done properly in 35 hours.

And there is a further little additional help in there, whereby you can stretch the hours, making them start at 8 a.m. and quit at 6 p.m. There is a stretch of more than 7 hours there. You can use any 7 that you want. It is purely a service proposition, and is needed in the industry.

That is all there is to say on it.140

Since the original code limited clerical workers to 40 and not 35 hours, there was more to say on it and labor representatives immediately objected. When the ILGWU's lawyer, Lieberman, went on the offensive by proposing that the 40-hour week for non-manufacturing employees be confined to five days, Prinz rejoined that in that case "the agreement might as well be thrown out...."141 The reason for the code authority's sharp rejoinder was revealed by Dubinsky, the union's president, who pointed out that as a result of the absence, even in the original code, of a limit on the number of days that non-manufacturing workers were permitted to work, they worked nights, Saturdays, and more than 60 hours a week. This revelation appeared to have caught off guard the presiding officer, Earl Howard, a professor at Northwestern University and former executive secretary of the Chamber of Commerce of the United States and vice president of Hart Schaffner & Marx,142 who replied: "That is not a question to be discussed here. It is to be assumed that these provisions of the code—I do not think we need to discuss here whether or not the code is enforced. It can be assumed that the code will be enforced." But then he backtracked, conceding that if experience showed that provisions were "more or less unenforceable, that is a proper topic as to whether

138NRA, HCFC, Hearing No. 103: Coat and Suit Industry: Modification 7 (May 4, 1934) (Morris Greenberg) (Film No. 13).
139NRA, HCFC, Hearing No. 103: Coat and Suit Industry: Modification at 14 (Alexander Prinz of the Code Authority).
140NRA, HCFC, Hearing No. 103: Coat and Suit Industry: Modification at 15.
141NRA, HCFC, Hearing No. 103: Coat and Suit Industry: Modification at 16-17.
we should enforce it on that point or not." This concession gave Dubinsky his opening, allowing him to make it clear to Howard that the lack of a five-day limitation in the code was the equivalent of not having the 40-hour week provision either.¹⁴³

The ILGWU's sudden concern for white-collar workers puzzled Howard, who prompted the following extraordinary colloquy:

Deputy Howard: What is your interest in these non-manufacturing employees, Mr. Dubinsky?

Mr. Dubinsky: They are the most oppressed and the most exploited people in the industry, and the most unfortunate element in the industry.

Deputy Howard: Are they elements of your organization?

Mr. Dubinsky: No, sir, they are not. They are the underdogs, and I am taking their part. The employers would not, and I considered it my duty to take their part. Some of them have organized themselves into a union, and it seems that our employers cannot listen to reason unless they get it with a whip over their heads, and then they listen to reason. Because they are not organized, that is why they should be exploited more than the other elements in the industry. It is unjust and unfair.¹⁴⁴

Dubinsky then went on to specify that "these shipping clerks" had complained to the code authority, before which they had a hearing, but because they had no union, they were "sidetracked."¹⁴⁵ Seemingly in disbelief that the code authority had been "delinquent in securing compliance" with the hours provision for white-collar workers, Howard demanded "to know exactly what the facts" were. Harry Uvalier, a representative of the code authority confirmed that Dubinsky was "correct": "because of the indefiniteness in the hours and the provisions governing the non-manufacturing employees, very little could be done by the Code Authority to enforce the provision." When Uvalier added that the code authority had taken "that into consideration when it submitted its proposed amendment," Howard instead pressed him to explain why it had been difficult to secure compliance.¹⁴⁶

It was impossible to police the area 24 hours a day, and since the code provided that a worker may work 40 hours in any one week, if anyone was found violating the code, or at least if we suspected they were violating the code, we were told that these workers, even if they worked until 10 o'clock at night did comply with the 40 hour provision. We were told that although they worked 12 or 15 hours in any particular day, they did not work the

¹⁴³NRA, HCFC, Hearing No. 103: Coat and Suit Industry: Modification at 19.
¹⁴⁴NRA, HCFC, Hearing No. 103: Coat and Suit Industry: Modification at 20.
¹⁴⁵NRA, HCFC, Hearing No. 103: Coat and Suit Industry: Modification at 20-21.
¹⁴⁶NRA, HCFC, Hearing No. 103: Coat and Suit Industry: Modification at 21-22.
next day or the third day. So it was actually—it would actually require a policeman constantly in each place to check up on the actual hours that these non-manufacturing employees put in.\textsuperscript{147}

Uvalier tried to convince Howard that the code authority, which wanted to accommodate employers that needed to work these employees on Saturday, regarded the proposed 8 a.m. to 6 p.m. schedule as a check on such non-compliance, but declared that if the NRA insisted on a five-day limitation, “we will do it.”\textsuperscript{148} Uvalier, however, had spoken out of turn: no sooner had he made this concession than Maxwell Copelof of the Merchants Ladies Garments Association objected that its members’ businesses could not function very well unless closing Saturdays became a “universal rule,” which would not necessarily result from codifying a five-day rule “because the executives will be working and the salesmen will be working.” In response, however, to a surprised Howard’s question as to whether he could operate Saturdays without the non-manufacturing employees, Copelof hedged, stating that since they could not offer the service to the retail trade, a strict five-day week would curtail their business.\textsuperscript{149}

In an effort to break this impasse, Rose Schneiderman of the Labor Advisory Board, who was certain that under the proposed code non-manufacturing employees would wind up working 54 hours a week, suggested that Saturday work be permitted if those workers got another weekday off. In any event, “with the thousands of white collar workers out of work, who are being supported by the taxes of the citizens of the country...they have a right to be considered for reemployment and perhaps they need one and one-half shipping clerks, instead of one; but it certainly can be done within five days, and if more than 8 hours a day is necessary then we must specify the numbers of hours that the non-manufacturing group is permitted to work...overtime, and they should be remunerated for their overtime...at time and one-third and one-half, as is usual in all of the codes.”\textsuperscript{150}

Deputy Administrator Howard, picking up on Schneiderman’s point, asked the employers to comment on the proposal to employ more non-manufacturing employees and stagger their time so that six days’ work could be performed without any individual worker’s working more than five. The coat and suit employers’ response was familiar: like every other white-collar worker, shipping clerks were irreplaceable: “These shipping clerks have a specific, peculiar kind of work to do;

\textsuperscript{147}NRA, \textit{HCFC}, Hearing No. 103: Coat and Suit Industry: Modification at 22-23 (Uvalier).
\textsuperscript{148}NRA, \textit{HCFC}, Hearing No. 103: Coat and Suit Industry: Modification at 24.
\textsuperscript{149}NRA, \textit{HCFC}, Hearing No. 103: Coat and Suit Industry: Modification at 26.
\textsuperscript{150}NRA, \textit{HCFC}, Hearing No. 103: Coat and Suit Industry: Modification at 27-28.
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and to put a new person in for a day or two, or for a week or two, or for a moment, or for a month, means that you cannot properly conduct the affairs of your business in the height of the season, and it gives no employment to anybody.” Imposing the Dubinsky-Schneiderman plan would be an “unnecessary restriction” at cross-purposes with the NRA, whereas Saturday work was “forcing no hardship on these people....”151 And Copelof, the wholesalers’ representative, reinforced the claim of the counterproductiveness of work-spreading by asserting that, because in small firms there was just one receiving clerk or bookkeeper or stenographer, adding employees would hamper the business.152

After Prinz, under attack by Schneiderman, had agreed that the proposal should be modified to make clear that the non-manufacturing workers could not work more than eight hours a day, Howard requested an amended amendment, which Prinz then offered: “That it shall not be more than eight hours a day—that is the regular employment—and overtime, subject to the rules and regulations as the Code Authority may submit.” Howard decided to leave the amendment in that form for the time being, ruling that the wording would be furnished later.153

In the interim, at the end of May and beginning of June, the ILGWU held its biennial convention in Chicago, at which the left-wing Local 22 offered a resolution declaring that in light of the fact that many thousands of shipping clerks in women’s garment shops were totally unorganized and subject to long hours and courageous efforts were being made in New York City to organize them into the Ladies Garment Shipping Clerks Union, the ILGWU should charter the union. The ILGWU convention leadership opposed the resolution on the grounds of unexplained complications; instead, it was able to have the matter merely referred to the incoming general executive board.154

In the event, the amended code that Administrator Johnson approved in August 1934155 failed to embody all the proposals that labor had made during the hearing.

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151NRA, HCFC, Hearing No. 103: Coat and Suit Industry: Modification at 28-29 (Prinz).
152NRA, HCFC, Hearing No. 103: Coat and Suit Industry: Modification at 31.
153NRA, HCFC, Hearing No. 103: Coat and Suit Industry: Modification at 31.
155The Associated Press had reported on the day of the hearing (May 4) that members of the code authority had advised the Administrator that they had come to a “virtual agreement on all major proposals for amending the code,” although organized labor objected to a provision permitting jobbers to change their agreements with contractors. “Suit Men Agree on Code,” NYT, May 5, 1934 (6:7).
in May. The new hours provision now read:

Except as hereinafter provided, non-manufacturing employee shall be permitted to work in excess of...40...hours in any one...week, not more than...8...hours in any one...day. Such hours shall not commence earlier than 8:00 a.m., nor end later than 6:00 p.m. Certain non-manufacturing employees, such as night watchmen, porters, shipping clerks and clerical help, may be permitted to work overtime under such rules and regulations as the Code Authority shall prescribe, with the approval of the Administrator, provided that...shipping clerks ...shall not work more than 45 hours per week, nor more than 9 hours in any one day, nor more 6 days in any 7 day period and that clerical help shall not work more than 40 hours per week averaged over a 5 week period.\footnote{Code No. 5—Amendment No. 1: Coat and Suit Industry, Art. III (Aug. 20, 1934), in NRA, \textit{Codes of Fair Competition}, 15:355-72 at 359 (1934).}

In other words, what had been a flat 40-hour week under the original code turned into a 45-hour week for shipping clerks and unlimited workweeks for clerical workers, subject only to five-week averaging; totally ignored was Schneiderman’s demand for overtime rates. This disregard of labor’s interests was especially poignant in an industry that was 90 percent unionized and in light of \textit{The New York Times}’s contemporaneous praise for the coat and suit code as “perhaps the one in which labor comes nearest to parity with the employing groups...”\footnote{Robert. Duffus, “Coat and Suit Industry Is at Peace Under Code,” \textit{NYT}, Aug. 12, 1934 (sect. 8, 6:1-3). In its lengthy article devoted to the publication of the amended code, the newspaper failed even to mention the changes in the hours provision. “New Code Is Issued for Suit Industry,” \textit{NYT}, Aug. 23, 1934 (24:1). The outcome in the coat and suit industry, despite the strength of the ILGWU, should be contrasted with this conclusory assertion by the former principal economist and director of research on policy matters of the Research and Planning Division of the NRA, who was a hostile participant-observer: “As for labor, it always demanded and received shorter hours.... In all these bargainings the President’s thesis that hours had to be shortened...and the NRA’s threats to invoke the licensing provision hung like guillotine knives over the heads of industry. Consequently, every code as first submitted guaranteed some reduction in hours.... The bargaining with labor was over further concessions. When an industry in which unions predominated refused to yield to labor’s demand or vacillated too long, a strike call was sounded, and generally such threats were sufficient to force rapid compromises. In other industries a more perfunctory fight for shorter hours...was made; and consequently concessions to labor were smaller. However, even here labor’s demands had to be met in part to avoid unionization.” Roos, \textit{NRA Economic Planning} at 69.}

In the period between the hearing in May and approval of the amended code in August 1934, not all NRA officials involved in the process were satisfied with this provision. For example, the review officer—an official tasked with determin-
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ing whether codes conformed to NRA policy—recommended that the five-week averaging arrangement for clerical workers be revised to make the hours for these employees definite and in conformity with NRA policy. Bizarrely, three weeks later, although the wording had not been changed, the acting division administrator declared that the provision had been amended to meet the review officer’s exception and now conformed to present policy.

The code authority, however, was not confused. In its enforcement and inspection report issued just a week after the NRA had approved the amendments, it referred to the many complaints it had received from non-manufacturing employees about hours of work: the fact that the original code had set the hours at 40 but failed to specify any limitations to work had made the 40-hour week practically impossible to enforce. Nor was the code authority optimistic that the new provision would bring about an improvement: “While the amended code is more specific on the subject, the problem still presents considerable difficulties as to enforcement, unless the Code Authority should formulate and adopt very definite rules and regulations on the subject.” That the code authority apparently failed to act was revealed by the fact that at a meeting of the code authority (on which two ILGWU members sat) seven months later and only two months before the Supreme Court declared the NIRA unconstitutional, the Shipping Clerks Union appeared to present amendments and Isidore Nagler, an ILGWU vice president, proposed regulations limiting shipping clerks’ working time, which the code authority did not accept. Instead, it merely adopted a resolution to enforce the existing regulations for non-manufacturing employees and appointed a committee to draft rules and regulations concerning the hours provision that had been approved in August 1934.

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158 Lyon et al., *National Recovery Administration* at 64-65.
159 Review Officer to Division Administrator Division 5 on Amended Code for the Coat and Suit Industry (July 17, 1934), in *NAMP*, Microcopy No. 213: DSNRA 1933-36, Roll 27.

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That Dubinsky and the ILGWU had not spoken disingenuously on behalf of the shipping clerks at the code hearing in May 1934 became clear in the course of that summer. On July 12 leaders of the needle trades unions, including Dubinsky and Lieberman, met with the New York state director of the National Emergency Council (a body that President Roosevelt had created at the end of 1933 to coordinate the activities of the various federal economic recovery agencies), declaring "unanimously that there was widespread non-compliance relative to shipping clerks, who were found to be overworked." A year later, the Ladies Apparel Shipping Clerks Union, Local 19,953, AFL, claiming to represent 15,000 shipping clerks (including packers, porters, sorters, charge clerks, order clerks, errand boys, and "push" boys) in the Manhattan garment district, voted to strike in protest against $10 to $14 in weekly wages for 72 hours and more of work. As the strike progressed, the ILGWU contributed money to the striking union and ordered truck drivers not to make deliveries to struck plants. Then more than 15,000 cloak and dress workers walked out, declaring that they would not return until the shipping clerks' demands for shorter hours and other changes had been met. When Dubinsky announced that the ILGWU would pressure the employers to come to terms with the shipping clerks, *The New York Times* stated that "it will be the first time that a big labor organization has intervened to force a settlement of a strike conducted by a union not affiliated with it. The Ladies Apparel Shipping Clerks Union...is expected...[to] affiliate with the I.L.G.W.U. after a strike settlement is obtained." In the event, the shipping clerks settled for a $15 minimum weekly wage for a 44-hour week, but failed to gain employer recognition. Explaining this failure as resulting from the lack of an effective organization, Dubinsky declared that the ILGWU would make sure that employers adhered to the agreement. Eighteen years later, Dubinsky authorized a drive by the ILGWU to organize all the shipping clerks in the New York dress industry in a new Local 60-A Shipping Clerks Union.

The hearing on the proposed wool textile code, which simply excluded office (and supervisory) staff from its 40-hour standard, saw UTWA president

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164 "Codes Called Aid to Needle Trades," *NYT*, July 13, 1934 (24:4).
McMahon testify again; he proposed a 30-hour week, but not for office workers.\footnote{National Recovery Administration Codes of Fair Competition, Hearing No. 543: Wool Textile 71-117, 275-97, 303-304, at 73 (July 24, 1933) (Film No. 75).} Ann Burlak of the Communist NTWU, a very feisty witness—a “fiery” 21-year-old organizer soon to be “acclaimed by her followers as the ‘Joan of Arc’” of the silk strike in Patterson, New Jersey\footnote{“Strikers Combine Patterson Forces,” \textit{NYT}, Sept. 28, 1933 (6:2).}—who repeatedly refused to be intimidated by Deputy Administrator Arthur Whiteside, a “thorough Tory,” former president of the Wool Institute,\footnote{Unofficial Observer, \textit{The New Dealers} 47-48 (1934).} and president of Dun and Bradstreet, criticized virtually every aspect of the code, including its discrimination against women and blacks, but not that against white-collar workers.\footnote{National Recovery Administration Codes of Fair Competition, Hearing No. 543: Wool Textile at 130-43 (July 24, 1933). See also “Wool Code Terms Opposed by Labor,” \textit{NYT}, July 25, 1933 (14:5).} Nor did either of her testifying comrades.\footnote{National Recovery Administration Codes of Fair Competition, Hearing No. 543: Wool Textile 144-49 (July 24, 1933) (Simon Haryegian and Gus Gosslein).} Nevertheless, at the end of the final hearing, Whiteside called the final product “the finest piece of sportsmanship that I have seen exhibited in Washington since I have been here.”\footnote{National Recovery Administration Codes of Fair Competition, Hearing No. 543: Wool Textile at 307 (July 25, 1933). The only relevant amendment made by employers at the hearing was insertion into the hours provision of a prohibition, designed to prevent speed-ups, on requiring workers to work in excess of practices prevailing on July 1 without the Administrator’s approval. \textit{Id.} at 302; Code No. 3: Wool Textile Industry (July 26, 1933), Art. III, in National Recovery Administration Codes of Fair Competition, 1:39. See also “2 Textile Groups End Code Hearings,” \textit{NYT}, July 26, 1933 (15:5). A half-year later the NRA approved an amendment to the code that limited the exclusion from the hours provision of office employees to those receiving more than $30.00 per week; no office employee receiving $30.00 or less was permitted to be employed more than 48 hours in any one week subject to a 13-week, 40-hour average. Code No. 3—Amendment No. 1: Wool Textile Industry, Art. II (Jan. 23, 1934), in National Recovery Administration Codes of Fair Competition, 5: 679-83 at 683 (1934). It is unclear why this change was made. Johnson’s report to Roosevelt stated that the amendments had been presented by the industry at a hearing on December 8, 1933. \textit{Id.} at 681. Although a wool textile code hearing did take place on that date, it was very brief and the transcript discloses no discussion of office workers’ hours. National Recovery Administration Codes of Fair Competition, Hearing No. 543: Wool Textile (Dec. 8, 1933). The Consumers’ Advisory Board objected to the amendment on procedural grounds because it had not been published before the hearing as a matter to be taken up at the hearing. The Board recommended that it be raised at a later hearing after proper notice. M. S. Massel (attorney, Consumers’ Advisory Board), to R. B. Ludlum, Jr. (deputy administrator) (Dec. 27, 1933); Memorandum from Executive Officer to Administrator, Subject: Summary of Amendment to the Wool Textile Industry (Jan. 9, 1934), in \textit{NAMP}, Microcopy No. 213:}
At the hosiery industry code hearing on August 10, 1933, Emil Rieve, the
president of the American Federation of Full Fashioned Hosiery Workers, testified
that labor had been consulted in the drafting of some of the code provisions, but
since the entire code had been changed in the interim, the union took exception to
a number of provisions, including one that limited the 40-hour week to employees
"in productive operations." His objection had been prompted by employers' prac­
tice of making workers work two or three additional hours doing repairs. But
neither Rieve nor Sidney Hillman, the Labor Advisory Board member present at
the hearing, said anything about the hours of office workers.\(^{177}\)

After a Seventh Day Adventist had testified about the problems the code would
cause for members of his religion, and the hearing officer, Deputy Administrator
Professor Lindsay Rogers, who was the head of the Department of Public Law and
Jurisprudence at Columbia University and owed his NRA appointment to his
having once been chief executive of the National Wholesale Women's Wear
Association,\(^{178}\) asked in vain whether anyone wanted to make a similar statement
with respect to Orthodox Jews, before inquiring whether anyone else wished to
speak on behalf of labor. Timidly, one would-be witness began to ask: "If I am in
order," when Rogers peremptorily interrupted: "I do not know whether you are in
order or not; who are you and for what purpose do you arise?" After the speaker
had revealed his name to be Ernest Hall, Rogers asked whether he was a manu­
facturer: "No, I represent the bookkeepers, stenographers, and accountants union
of New York." Apparently incredulous, Rogers asked: "And you object to certain
provisions of this proposed Code?"\(^{179}\) The following colloquy then ensued:

Mr. Hall: Well, I wanted information as to what the industry is going to do for the office
workers. We have a code in too and nothing has been said as to their conditions in this
industry.

Deputy Rogers: This is a code for the industry rather than for bookkeepers and stenog­
raphers; Mr. Constantine, suppose you read the section of the Code which is applicable.

Mr. [Earl] Constantine [chairman of the hosiery industry code authority]: I think...he will
probably find his answer in Section 3 of Article IV, which states that...the maximum hours
of labor for office employees...shall be an average of 40 hours per week, over each period
of six months. That is in substance giving him the same limit of working hours..., but not

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\(^{177}\)NRA, *HCFC*, Hearing No. 224: Hosiery Industry 50-51 (Aug. 10, 1933) (Film No.
39). On the original proposed code, see "Hosiery Code Sets Limit of Two Shifts," *NYT*,
July 27, 1933 (10:2).

\(^{178}\)William Freeman “Lindsay Rogers, Law Professor at Columbia, Dies,” *NYT*, Nov.

necessarily holding it rigidly to 8 hours a day, five days a week, because as the gentleman himself must understand, at the end of the month and beginning of the month there is always a peak of work in the office and then it departs down into the valley....

Deputy Rogers: What is the minimum wage provision for office help in the hosiery industry?

Mr. Constantine: There is no provision.

Mr. Hall: I simply wanted to say, Mr. Chairman, gentlemen and ladies, that we have always observed a 39 hour week all through the United States and a minimum scale of $21.

Deputy Rogers: As you said a moment ago, you are presenting your own code.... [H]as it been presented yet?

Mr. Hall: Well, it has been presented, surely; we are waiting for a hearing.

Deputy Rogers: I trust you will get your hearing.

Mr. Hall: I thought I would embrace the opportunity to talk.

Deputy Rogers: You have embraced the opportunity and you have gotten your viewpoint.

Mr. Hall: All right.180

Both the hosiery employers and the NRA kept their word: the code as adopted retained the provision on which the code authority chairman had lectured Hall. That Rogers, an experienced labor arbitrator in the clothing trades, displayed such an openly dismissive and sarcastic attitude toward interloping office workers who, though not involved in production, nevertheless had the gall to take umbrage at the code’s discriminatory treatment of them, captured a vital dimension of white-collar workers’ second-class citizenship under the NRA codes.181 Amusingly, Rogers praised himself in his own obituary notice for having recognized, as deputy administrator for the daily newspaper code, that “organized white-collar employees were as much entitled to a hearing as were typesetters....”182

On January 30, 1935, a year and a half after the hosiery code hearing, the National Industrial Recovery Board, which replaced the lone NRA administrator in September 1934,183 held a policy hearing in Washington184 which three repres-
tatives of white-collar workers attended to express the view that office workers had "not derived any real benefits from any of the codes...." Walter M. Cook, representing the Bookkeepers, Accountants, and Stenographers Union, Local 12646, AFL, which had been organized in 1910, told the Board that it was with regard to office workers that the NRA had "missed its greatest opportunity for increasing employment" by approving codes that failed to reduce the workweek below the pre-NRA custom of 39-42 hours, while 800,000 of four million office workers were unemployed. \(^{185}\) Cook reported that of 639 codes and supplements: only 13 gave office workers less than 40 hours; 449 specified 40 hours; 123 an average of 40 hours (adding "that when hours are averaged as they are in the Stock Exchange and Banking Codes, over a four months [sic] period, they mean very little"); 70 codes set workweeks of 40-48 hours, four of 50-56 hours; and 10 set no limits at all. Disaggregating the data and examining the industries with the largest employment of office workers, Cook found that the situation was even worse: in the retail and wholesale trades employing 600,000 office employees (as of 1930) the hours ranged from 40 to 56; in banks and brokerage houses with 350,000, codes set weekly hours at 40 to 44 hours averaged over three to four months; the printing, publishing, and engraving codes called for 40 to 48 hours for 100,000 workers. Finally, three major employers of white-collar workers had not even been codified: the telephone and telegraph industry with 325,000 workers; insurance companies with 300,000; and public utilities with 55,000.\(^{186}\)

A month later, the NRA approved an amendment to the hosiery code that limited clerical and office workers to 40 hours per week, except that during six weeks of the first and second half of the year they were permitted to be employed up to an additional eight hours per week at time and a half. In addition, the code now specified that supervisory, managerial, and executive employees regularly earning more than $35 or more weekly were excluded from the hours provision, but that supervisors earning less than $35 weekly but not less than 50 cents an hour could not work more than 44 hours a week.\(^{187}\) These changes had originated at a

\(^{185}\)"The N.R.A. and the Office Worker," *Ledger*, 1(2):11-12 (Feb. 15, 1935). The two other representatives at the hearing appeared on behalf of 127,000 office workers in the YMCA. A year earlier, at a so-called field day for criticism of the NRA, Cook had urged on behalf of office workers that hours be reduced from 40 to 35 to absorb the unemployed. "Johnson Meets NRA Critics, Proposes 12-Point Revision," *NYT*, Feb. 28, 1934 (1:8, 11:1-6 at 4).

\(^{186}\)"The N.R.A. and the Office Worker." The two other representatives at the hearing appeared on behalf of 127,000 office workers in the YMCA.

The proposed amendments altered one provision to exclude “employes who discharge executive or managerial duties” and received more than $35 per week, while another provision permitted the extension of the working time of supervisors, foremen, shipping forces, and other non-production workers beyond 40 hours “when or where required.” In addition, the overtime rate for these workers was set at the regular rate for hours 40-44 and time and a half for hours above 44. If by 1934 it was not entirely unexpected that the Machinists Union protested the exclusion from the maximum hours provision of a large variety of non-production blue-collar workers (and shipping clerks), astonishingly, the AFL’s representative at the hearing, Fred Hewitt, who was also editor of the *Machinists Journal*, submitted a supplementary brief, which went further than the employers’ proposed or the approved amendment in excluding white-collar employees from hours limitations by excepting not only executives and supervisors, but also those employed in an administrative capacity and their immediate assistants, as well as salaried technical men and field service engineers receiving at least $35 a week. Like many before and after him, Hewitt did not define “administrative capacity” or explain why such workers should have to work unlimited hours.

The rayon and silk dyeing and printing industry—which employed only about 20,000 workers—permitted itself the flexibility of working “office staff” (excluding executives) 40 hours a week averaged over six months; although this average was subject to a weekly ceiling of 48 hours, even it could be ignored “in cases of emergency,” which were, however, not defined. At the hearing on November 10, 1933, Francis Gorman, vice president of the UTWA and Labor Advisory Board representative, devoted some of his wide-ranging criticism to the treatment of office workers, which, to be sure, he undermined by yielding on the main point before he had even begun. Thus, after conceding that their maximum hours “may well need to be 48 hours per week to take care of the periodic peaks in office work,” he asked why their hours had to be “averaged over such a long

189 NRA, *HCFC*: Hosiery at 73-74 (Mar. 9, 1934).
190 NRA, *Hearings on the Codes of Fair Competition*: Hosiery at 84-85 (Mar. 9, 1934) (David Kaplan, International Association of Machinists).
191 NRA, *HCFC*: Hosiery at 100, 148-49 (Mar. 9, 1934).
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period as six months....” As far as the union was concerned, one month or six weeks seemed to “meet all the needs of the situation and would certainly be easier to administer....”194 Gorman’s advocacy on behalf of office workers derived from his overall concern to limit exemptions to as few as possible as part of realizing the UTWA’s second-best plan—necessitated by recognition that the desired 30-hour week was not currently feasible—to make the 40-hour week the industry’s “real standard....” That concern rested on the dual foundation that “[e]xemptions make the hours limitations so much more difficult to enforce” and that widespread unemployment still prevailed. But whereas office workers fit only under the first heading and joblessness impliedly constituted no problem for them, “[u]nemployment exists among engineers, electricians, machinists, firemen, maintenance and transportation crews as well as among the productive workers. These workers have become the ‘forgotten man’ in some of the Codes. It is just as important to absorb the unemployed among these exempted workers as among the productive workers. Therefore, their hours should be made as short as possible, considering their special functions in the organization.”195

In the event, however, Gorman succeeded on none of these fronts: like the employers’ proposal, the approved code included six-month hours-averaging for office workers, 48-hour weeks for the blue-collar non-productive workers, and no time-and-a-half compensation for production workers whom employers were permitted to work up to two hours of overtime daily in certain continuous operations.196 After the hearing the LAB informed the NRA Division Administrator that it could not approve the code unless the hours-averaging for office workers were restricted to 12 weeks and the 48-hour maximum were stripped of its exceptions.197 But the deputy administrator ignored this protest on the incoherent grounds that the code’s provisions did not permit employees to work “an excessive number of hours, as this is a service industry not having direct control of their production.”198

194NRA, HCFC, Hearing No. 386: Rayon and Silk Dyeing and Printing 75 (Nov. 10, 1933) (Film No. 59).

195NRA, HCFC, Hearing No. 386: Rayon and Silk Dyeing and Printing at 73.


198Deputy Administrator Herbert Marrow to Administrator Johnson (Dec. 8, 1933);
The code for the men’s clothing industry was the first to exclude from its hours provision (36 hours per week and eight per day) “employees engaged in bona fide managerial or executive capacities....” In contrast, the code subjected office staff (together with various categories of blue-collar non-production workers such as repair shop crews) to a 40-hour week averaged over an entire year. Unfortunately, the code hearing shed no light on the meaning of “bona fide,” which was presumably designed to exert a limiting impact on the scope of the white-collar exclusions under the FLSA, but which was not included in the employers’ proposed code for the men’s clothing industry, which referred to office and supervisory employees. At the hearings, Sidney Hillman, president of the Amalgamated Clothing Workers and representative of the Labor Advisory Board, while insistent on a 35-hour week for production workers, failed to address the white-collar exclusions at all. Secretaries together with factory department heads and executives earning more $35 a week were excluded from the hours provision of the cotton garment code, which created a 40-hour week averaged over three months for office employees (including accounting, clerical, and stenographic “help”).


NRA, HCFC, Hearing No. 288: Men’s Clothing 22 (July 26, 1933) (Film No. 50).


NRA, HCFC, Hearing No. 288: Men’s Clothing (July 27, 1933).

Code No. 118: Cotton Garment Industry (Nov. 17, 1933), Art. III.C., in NRA, Codes of Fair Competition, 3: 77-102 at 92. Manufacturing employees were subject to a 40-hour week without averaging. Id. Art. III.A at 91. Unfortunately, the 76-reel microfilm collection of the hearings lacks the transcript of the original code hearings of Aug. 3-4, 1933. The only relevant testimony in a later hearing from 1934 (over reopening the code to determine whether the 40-hour week could be reduced) was the reply by Ralph Hunter, the chairman of the Cotton Garment Code Authority, to a question from NRA division administrator Sol Rosenblatt as to whether he had any recommendations concerning maximum hours for non-manufacturing employees except office employees: “It should never have been written into the Code.” NRA, HCFC, Hearing No. 130: Cotton Garment
Exclusionary provisions were also found in the earliest codes of smaller clothing industries. For example, in the corset and brassiere industry the maximum hours provision of 40 hours did not apply to executives, executives’ assistants, office workers, or shipping clerks. Labor representatives had an opportunity to raise this issue at the code hearing on August 7, 1933. Lieberman, the ILGWU attorney, did object that the influence of the cotton textile code was evident in the employers’ request for a 40-hour week for production workers regardless of unemployment in the industry, but he failed to mention the white-collar workers. The presiding officer, NRA Deputy Administrator Earl Howard, had to ask Lieberman directly whether there were any objections to the exemptions for executives and executive assistants, and even then the ILGWU attorney ignored the issue, replying: “There would only be, so far as we are concerned, the question of outside employees....” The matter, however was not dropped because Rose Snyder, representing the Labor Advisory Board, finally asked: “How about office workers? Doesn’t the President [Roosevelt] expect office workers to benefit by shorter hours and by increased wages?” Turning to Waldemar Kops, president of the Corset and Brassiere Association of America, Howard asked: “Why do you exempt them?” Kops had a ready reply:

We had a long discussion about that.... I think most of our office workers work fewer hours than the factory does. ... I think that [is] the rule.

It happens in running any business there are some times at the end of the month when statements must be made out, or when a particular problem in the production department of getting up a production schedule must be made up, and the work of the factory is


NRA, HCFC: Hearing No. 128: Corset and Brassiere 66 (Aug. 7, 1933) (Film No. 19).

NRA, HCFC: Hearing No. 128: Corset and Brassiere at 97.

It is possible that the Labor Adviser was really Rose Schneiderman, who is mentioned in the NRA “History” as having been present at the hearing. B. E. Oppenheim and A. Feibel, “History of the Code of Fair Competition for the Corset and Brassiere Industry” at 5 (Oct. 10, 1935), in NAMP, Microcopy No. 213: DSNRA 1933-36, Roll 35 (1953).

NRA, HCFC: Hearing No. 128: Corset and Brassiere at 99.
continued, so that these people must work longer than their average hours. That is why they were included. Actually the practice is to work less hours in the office than in the factory.  

Neither Snyder nor Lieberman requested any data in support of what sounded suspiciously like self-interested speculation; they also failed to ask the obvious question as to why a penalty should not have been imposed to discourage employers from requiring office workers to work overtime. When Kops’s response prompted no further objection and the point was exhausted, the representative of the Industrial Advisory Board seized the initiative by eliciting from Kops the information that, unlike the factory workers, the office force was paid when they were “sick or otherwise.”

Four days after the hearing Labor Adviser Rose Schneiderman wrote a letter to LAB chairman Leo Wolman reporting on amendments to the labor section of the code that she had made and that had been incorporated into the code, but mentioned nothing about the white-collar exclusions.

Two years later, however, after the NIRA had been struck down by the Supreme Court, the NRA’s own “History” of the corset and brassiere code included a section on “undesirable” provisions, which said of the white-collar exclusions: “This very apparently includes too many exceptions to the maximum hour provisions of the Code and is not in accord with the present policy of the Administration.”

As the patterns already established by the first codes revealed, some exclusions included a salary criterion in addition to the occupational identifier, while others did not. Under the dress manufacturing industry code, work in mechanical processes of manufacture was limited to 35 hours even for employers and anyone “operating on his own account,” while all other employees (except foremen and executives receiving $35 or more per week) were prohibited from working more than 40 hours per week; both blue- and white-collar workers were allowed to work additional hours during six weeks in any one season at time and a half. Cutters, who were paid $45 and sample makers who received $30 for 35 hours were not excluded.

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210 NRA, HCFC: Hearing No. 128: Corset and Brassiere at 99-100. In the transcript Kops’s name is consistently misspelled “Kopps.” See “W. Kops, 55, Dies,” NYT, Jan. 14, 1945 (40:3).

211 NRA, HCFC: Hearing No. 128: Corset and Brassiere at 100.

212 Letter from Rose Schneiderman to Leo Wolman (Aug. 11, 1933), in NAMP, Microcopy No. 213: DSNRA 1933-36, Roll 35.


214 Code No 64: Dress Manufacturing Industry, Art. III.1-.3 (Oct. 31, 1933) in NRA,
Many a highly paid executive frequently pitches in and does a substantial amount of work of the same nature as that performed by non-executive employees, without losing his executive status by any common conception of that status. If [GM president] Mr. [William] Knudson [sic; should be Knudsen] decided he wanted to work one day a week on the assembly line, would anyone challenge his status as a bona fide executive of General Motors? 

Because of the key position it occupied in the U.S. economy and of expectations of the central role it would play in overcoming the depression, considerable attention was paid to the formulation of the automobile code. In the automobile manufacturing industry the firms represented on the code committee agreed from the start both that some form of hours-averaging was necessary to give them enough "flexibility in the handling of their labor force" to cope with fluctuations in production and that some employees "vital" to the production

*Codes of Fair Competition*, 2:77-95 at 88. At the public hearings no one (including ILGWU president David Dubinsky, LAB representative Rose Schneiderman, who did deal with it at other hearings, and two representatives of the Communist Needle Trades Workers Industrial Union, Irving Potash and attorney Boudin) raised the subject of the working hours for white-collar workers. NRA, *HCFC*, Hearing No. 153: Dress Manufacturing (Aug. 23-24, 1933) (Film No. 25). Outside the textile and clothing industries, the code for the retail trade, which defined executives as responsible for the management of a business or a recognized subdivision, allowed executives receiving more than $35 per week in cities of more than 500,000 in population, down to $25.00 in cities of under 25,000 population (with 10 percent lower wages permitted in the South) to work in excess of the specified hours. If, in a further complicating restriction, a workplace had 20 or fewer workers, not more than one worker in five could work unrestricted hours; if more than 20, one in eight among those over 20 could work unrestricted hours. In addition, professional persons were not subject to the hours restriction. Code No. 60: Retail Trade (Oct. 21, 1933), in NRA, *Codes of Fair Competition*, 2:27-45, at 31, 33-35, 40-48 (1934).

process had to be exempt.\textsuperscript{216} Similarly, the initial automobile manufacturing code, which provided for an average week of 35 hours (averaged over the period from September 5 to December 31, 1933) and a maximum week of 48 hours for factory workers, and a 40-hour average and 48-hour maximum for office and other salaried employees receiving less than $35 weekly, excluded from these limitations employees receiving more than $35 a week and executives, managers, and supervising staffs; this “noncontroversial total exemption”\textsuperscript{217} was inserted “[i]n order that production and employment for the main body of employees may be maintained with as few interruptions as possible....”\textsuperscript{218}

The course of the code hearings in an industry deemed by the NRA key to the entire recovery effort\textsuperscript{219}—“It is generally recognized and conceded that the Automobile Manufacturing Industry has established itself as the one to lead all others out of the depression”\textsuperscript{220}—revealed how undemocratically the code process was structured.\textsuperscript{221} Almost three weeks before the hearing, the National Automobile Chamber of Commerce announced that its members had agreed on a code, which set the maximum average weekly hours for production workers at 35 and maximum hours for “white-collar” workers at 40.\textsuperscript{222} At the hearing on August 18, 1933, Donaldson Brown, vice president of General Motors and chairman of the code committee, explained that factory workers would work no more than 35 hours per week averaged over the life of the code subject to a maximum of 48 hours, whereas the corresponding limits for office and other salaried employees receiving less than $35 weekly would be 40 and 48 hours.\textsuperscript{223} In his lengthy counter-


\textsuperscript{217}Fine, \textit{The Automobile under the Blue Eagle} at 66.


\textsuperscript{221}The NRA code historian for this industry remarked after the termination of the NRA that it was a unique peculiarity of the automobile code that “an employee may work 84 hours per week for six months and then be compelled to be idle the following six months.” Everitt, “History of the Code of Fair Competition for the Automobile Manufacturing Industry” (n.p.) (Preface).

\textsuperscript{222}“Code Is Approved by Auto Chamber,” \textit{NYT}, Aug. 1, 1933 (12:2).

\textsuperscript{223}NRA, \textit{HCFC}, Hearing No. 32: Automobile Manufacturing 18-19 (Aug. 18, 1933) (Film No. 3).
presentation (accompanied by a substantial brief), AFL President Green proposed a 30-hour week for factory workers with time and a half for additional hours up to a maximum of 35. The AFL proposal would also have permitted the exemption of factory executives who were salaried and working full time in a supervisory capacity, whereas: "Office and salaried employees receiving less than $35 a week shall be employed not more than 40 hours in any one week, and not more than 35 hours a week, on the average, for any three month period." Thus the AFL proposed to retain the disadvantages that the companies had imposed on white-collar workers, although it would have lowered the hours for both groups.

It is important to note that, according to the employers' proposed and NRA-approved code, white-collar workers could be required to work longer hours than factory workers even though their salaries were lower. Thus, whereas the minimum weekly salary of an office or salaried employee working 40 to 48 hours ranged between $14 and $15, depending on the size of the community in which the plant was located, the minimum wage of factory employees varied between 40 and 43 cents an hour, which at 35 hours worked out to between $14 and $15.05, but at 40 hours equaled from $16 to $17.20.

The AFL's failure to achieve the relatively modest gains it had demanded on behalf of white-collar workers did not reflect the organization's lack of interest in nonproduction workers; rather, it was continuous with the labor movement's weakness vis-à-vis large industrial capital and the New Deal administration's refusal to subvert employers' power. This lopsided factory labor-management relationship was visible, for example, in the AFL's inability to secure its radical demand for establishment of a tripartite planning and coordinating committee, consisting of equal numbers of representatives of labor, management, and the NRA, which would have to approve increases in line speeds and regulate overtime work. Similarly, the AFL was not even able to secure approval of its demand for premium overtime pay as a deterrent and a powerful incentive for employers to spread work, despite the fact that, as Green noted, such extra pay was familiar in the industry. (A pre-Depression BLS survey had found that 55 of 94 establishments reported paying higher than regular rates for overtime.) In fact, a few

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224NRA, HCFC, Hearing No. 32: Automobile Manufacturing at 181-236.
225NRA, HCFC, Hearing No. 32: Automobile Manufacturing at 56.
226NRA, HCFC, Hearing No. 32: Automobile Manufacturing at 57.
228NRA, HCFC, Hearing No. 32: Automobile Manufacturing at 60-63.
229NRA, HCFC, Hearing No. 32: Automobile Manufacturing at 69-70.
230US BLS, Wages and Hours of Labor in the Motor-Vehicle Industry: 1928, at 15-16 (Bull. No. 502, 1930). This survey was one of several conducted by the BLS, the others
months later automobile manufacturing employers were able to obtain approval from the NRA to increase factory workers’s average workweek from 35 to 40 hours; and when, following the emergence of a more militant labor force in the industry, in 1935, a few months before the U.S. Supreme Court held the NIRA unconstitutional, the code was amended to provide for time and a half, the penalty/premium did not kick in until a worker had worked 48 hours in a week.

**Heavy Industry**

“You’d be amazed at how many useless white collar people there are. We’re going to get rid of them.”

At the electrical manufacturing industry code hearings in July 1933 neither AFL President William Green nor any of the other union officials testifying asked what an “administrative” employee was let alone raised the issue of the exclusion of executive, administrative, and supervisory employees from the hours provision when it was read into the record. The closest approach to the subject occurred at the end of the hearing with the (presumably) mock refusal of Charles Keaveney,


international vice president of the International Brotherhood of Electrical Workers, to accede to the request by presiding officer Allen to meet with him on a Saturday. Observing that the union did not work Saturdays, Keaveney asked Allen whether he was paid overtime; when Allen replied that he had no such rule, Keaveney told him that he “ought to get [him]self regulated.” However, given “[t]he lack of penalty [sic] overtime provision,” even to workers under the electrical manufacturing industry code who may have thought that they had gotten themselves regulated it later “became evident due to the lack of enforcement that overtime could be worked with impunity” and employers did not have to employ more workers.

The hearing a few days later on the code for the iron and steel industry, which was hailed by NRA Administrator Johnson as “of course an important day in the development if this whole idea,” saw AFL President Green submit labor’s own code, which, in order to effectuate the NIRA’s goal of reemployment, imposed a 30-hour maximum week, subject to an exception “to a fair and reasonable extent” for executives and those employed in supervisory or technical capacities and in

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236 NRA, HCFC, Hearing No. 159: Electrical Manufacturing at 1054-55 (July 21, 1933) (Film No. 26).


238 McKittrick et al., “History of the Code of Fair Competition for the Electrical Manufacturing Industry” at 289. The example of the Emerson Electric Co. (St. Louis) illustrated the problem for white-collar workers. The company, allegedly to deal with peak office work, employed office workers beyond the 40 hours permitted by the code on a straight salary with no additional pay. The employer argued that “since these employees were paid a guaranteed weekly wage, were given supper money when required to work overtime, and were given two weeks vacation with pay each year, as well as being permitted reasonable absence for sickness without losing pay, it was not equitable that the company be asked to reimburse these employees with additional pay for excess hours.” The NRA viewed the case as “one of the few examples of actual industrial self-government,” by which members of an industry “dealt with one of their number unofficially, and on friendly terms, for the purpose of ameliorating a controversial situation.” The result was that the office workers were “reimbursed for excess hours worked and a general industry understanding was reached to the effect that office employees would not be employed in excess of forty hours a week. So far as is known, this arrangement was adhered to by the Industry merely on the basis of a gentlemen’s agreement.” Id. at 115-16.

239 NRA, HCFC, Hearing No. 245: Iron and Steel Industry 2 (July 31, 1933) (Film No. 41).
emergency work. But neither Green nor officials of the Amalgamated Association of Iron, Steel and Tin Workers, an AFL craft union, or of the Communist-affiliated Steel and Metal Workers Industrial Union (SMWIU) who testified, nor Secretary of Labor Perkins who submitted an analysis of the code, objected to the potential sweep of the white-collar exclusions. Instead, the focus was on the exception for emergency workers. Thus, John Maldon, the national secretary-treasurer of the SMWIU, argued that a section of the proposed code exempted from hours regulation both those employed on emergency work and, in effect, practically everybody else that the employers see fit to exempt.

Creating a 40-hour week averaged over six months and enforced only "insofar as practicable" and so long as employees qualified for the work were available and having due regard for product demand was "obviously no limitation at all." Moreover, even if the maximum hours provision had been enforced, it would have been unacceptable to the SMWIU if the result had merely been that speed-ups, which were already excessive, caused the same amount of work to be done in shorter hours. To be sure, the employers' code authority and the NRA no more accepted the union's demand that permission to work emergency workers beyond the maximum hours be granted only with the consent of the workers' elected committees than they deleted from the final code any of the weasel words that Maldon had criticized.

The paper and pulp industry code adopted one of the more complex hours provisions, which permitted extensive hours-averaging for production workers, subject to time-and-a-third payments to some of them. While no limitations applied to executives, "their personal secretaries," or supervisory employees receiving more than $35 weekly, the code conferred enormous additional flexibility on employers, which were authorized to average office workers' 40-hour weeks over an entire calendar year, subject only to a further average of not more than 48 hours during any 13-week period.

Although the Times reported that "[o]nly scattered opposition was evidenced to the...maximum-hour provisions" at the code hearing on September 14, 1933,

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241 NRA, HCFC, Hearing No. 245: Iron and Steel Industry at 29, 46.
242 "Analysis of Steel Code by Secretary of Labor Frances Perkins Before the National Recovery Administration, Monday Morning July 31," in NRA, HCFC, Hearing No. 245: Iron and Steel Industry [separately paginated].
243 NRA, HCFC, Hearing No. 245: Iron and Steel Industry at 51-53 (discussing Art. IV, § 3).
244 Code No. 120: Paper and Pulp Industry (Nov. 17, 1933), Art. IV, § 1, in NRA, Codes of Fair Competition, 3:115-73 at 121, 116.
the Federation of Architects, Engineers, Chemists and Technicians, which had been formed barely three weeks earlier, made an appearance to propose that: no employee-technicians (most of whom were chemists or engineers) be employed more than six hours a day or five days a week; no overtime work be performed except in extreme emergencies; and all time worked in excess of scheduled hours be subject to double-time—the very same demands made by FAECT that same day at the chemical manufacturing code hearing. In vain, objections were also raised to the exclusion of “easily replaceable” blue-collar non-production workers and to the averaging of production workers’ hours over many months. No witness, however, addressed the question of office workers’ hours, and perhaps for that very reason the exclusion of office workers earning less than $35 weekly became even more discriminatory on the way from proposed to approved code. In the employers’ proposed code, whereas office or salaried employees receiving $35 or more per week had, like executives, been excluded altogether, other office workers had been subject to a 40-hour week averaged over (only) three months—as opposed to the whole year of averaging in the approved code.

These even more expansive exclusions were adopted despite the objections of the LAB, which pointed out that there was little reason for excepting office or salaried employees from the prescribed maximum hours: “The degree of unemployment among ‘white-collar’ workers has been deplorably high. Office and salary workers are not less in need of positions than are other classifications of labor.” Moreover, the LAB warned, since “the common practice of industry” had been to employ its office and salaried employees shorter weekly hours than its

246 “A Brief History,” BFAECT 1(1):2-3 at 2 (Feb. 1934). It was formed Aug. 23, 1933.
247 NRA, HCFC, Hearing No. 336: Paper and Pulp 62, 66 (Sept. 14, 1933) (Leo Hirsch) (Film No. 56).
248 See below.
250 In a letter to the LAB chairman, the AFL president vigorously protested against the code provisions, but said nothing about white-collar workers. Letter from William Green to Leo Wolman (Nov. 3, 1933), in NAMP, Microcopy No. 213: DSNRA 1933-36 (1953), Roll 124: Code 120: Paper and Pulp Industry.
252 At a later hearing the LAB representative proposed a 36-hour week averaged over four weeks and subject to a maximum of 40 hours in any one week, but this proposal was never adopted. NRA, HCFC, Hearing No. 336: Paper and Pulp 161 (Feb. 13, 1934) (J.L. Donovan).
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manufacturing employees: “Reversal of this practice will certainly cause dissatisfac­tion in the case of office and salaried workers.”253 The LAB’s proposed revisions may have been responsible for the removal of the higher-paid office employees (except personal secretaries) from the blanket exclusion in the code as adopted, but the LAB was unable to protect any of the office workers from the expansive hours-averaging provision.254

The baseline limitation in the chemical manufacturing industry employers’ proposed code was a self-generous 40-hour week averaged over four months subject to a 48-hour maximum; it covered production workers as well as accounting, clerical, office, and sales employees, but excluded all those employed in an executive, administrative, supervisory, or technical capacity.255 Befitting an industry that purportedly employed more technicians than any other,256 the Federation of Architects, Engineers, Chemists and Technicians appeared to “denounce” this provision “as particularly offensive to employee professionals” because it failed to limit the hours of “technical men, notwithstanding the fact that the 40-44 hour week has long since prevailed in the industry for this type of worker—and because the widespread unemployment calls for a sharp cut in hours in order to re-employ all unemployed professionals in industry.”257 Instead, the FAECT proposed a 30-hour week for technicians; overtime work would be permitted only in extreme emergencies and then only at double-time rates.258 This position was reinforced by the Labor Advisory Board representative, who observed that he had argued at the preliminary hearing that technical employees in the lower grades such as laboratory assistants should be subject to the general hours provision, whereas it was “perfectly clear that your chief chemist, even a chief plant chemist, can not


254 Berry and Barkin (LAB) to Mr. Pickard (Deputy Administrator), “Labor Provisions of the Code of Fair Competition Proposed by the Paper and Pulp Industry” (n.p. [11, 15, 16]).

255 NRA, HCFC, Hearing No. 89: Chemical Manufacturing 20 (Sept. 14, 1933) (Film No. 11). Although the LAB had pointed out that averaging hours over four months was dangerous, would lead to abuse, and should be deleted, it was not. Memorandum from Gould to Martin (Dec. 26, 1933). Nevertheless, the chairman of the LAB, Leo Wolman, approved the code. Leo Wolman to [Hugh] Johnson (Feb. 8, 1934), NAMP, Microcopy No. 213: DSNRA 1933-36 (1953), Roll 23: Code 275: Chemical Manufacturing Industry.

256 NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 66.

257 NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 51 (J. Jay).

258 NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 56 (J. Jay).
be limited in time. He is on duty for 24 hours every day in the year, if neces­
sary....” He also expressed the hope that if the chemical industry accepted this
approach, other industries such as cement and steel would follow.259

W. B. Bell (of American Cyanamid Co.), the president of the Chemical
Alliance, the employers’ organization that submitted the proposed code, disagreed:
his company did not employ anyone in the laboratory “unless we think he has in
him the making of a first class research worker.”260 But although he conceded that
only technicians with “scientific backgrounds, and that sort of thing” “should be
exempted,”261 he insisted that in chemical manufacturing: “You just cannot stop
cooking some of this stuff at the end of eight hours” and “any particular cook,
having worked 10 hours today will, in the course of a period be provided
for,...giving an average of 40 for the week.”262 When reminded by the presiding
officer, Deputy Administrator Major General Clay Williams, former Chief of
Ordnance during World War I263 who knew the chemical industry “inside and
out,”264 that the federal government was able to operate on “absolutely a flat eight
hour day, and we can not work the men overtime, except in an emergency, and we
have to prove to the Legal Department that it is an emergency when we do it,”265
Bell vented an opinion that not every employer was willing to be associated with
at a time of unprecedented unemployment: “Major, do you know what I would do?
I would make all of these technical men work 56 hours. I can [sic; must be: cannot] think of anything that would go further to put this country on its feet and
a full recovery program, than to make the technical men of this country work
overtime. That may be a very radical statement. But the chemical industry...under-

259NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 63, 64 (Dr. Eckel). The
NRA did eventually adopt an approach similar to the LAB’s, when it defined those
employed in a technical capacity as “limited to persons trained in the sciences engaged on
research or other work requiring scientific training. In general, such employees should be...capable of working without immediate supervision and...have had several years
training, whether in universities or colleges or in actual work. This category should
include engineers who are qualified as such, sales engineers, process advisors and trained
technicians engaged in conducting field tests. This category should not include ordinary
draftsmen, assistants in laboratories who perform chiefly manual labor, etc.” NRA, Code
of Fair Competition for the Chemical Manufacturing Industry, Official Code Interpretation
No. 275-8.

260NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 65 (W. Bell).

261NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 84 (W. Bell).

262NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 87-88 (W. Bell).

263“Washington Picks Recovery Boards.”


265NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 88.
lies the other industries. ... My suggestion was that you write into the code a provision by which our technical men be required to exceed the minimum. I am aware that this is not in the minds of this Board, but this is a very peculiar industry.”

In advocating the feasibility of a “straight 8-hour day” for technicians, Williams was careful to emphasize that that approach would not “interfere with the progress in industry, or interfere with the inventive spirit, or interfere with the work of your research laboratories...because this limitation does not apply to those men, and they are the ones, as I understand it, who contribute to progress in any industry.” In the event, in this particular instance, labor was able to achieve a small post-hearing success: the final approved code excepted “nonprofessionally trained laboratory workers” from the exclusion.

When Williams also pointed out that under yet another exception that the employers had granted themselves, average weekly hours could reach 48 on continuous operations where an adequate supply of qualified labor was unavailable and restricting hours would unavoidably reduce production, the Labor Advisory Board representative observed that the only way to limit such overtime would be to force employers to pay overtime—a measure that in his opinion “would be an improvement on most of those clauses.” Such a possibility immediately prompted Bell to opine that “we all know very well what would be the result of that. That would result in our people all trying for overtime, because the overtime would be so exceedingly profitable that they would be absolutely inefficient.” When Williams again intervened, noting that other employers took the diametrically opposite view that “overtime is a stimulous [sic] to the management to make them watch the operations more closely, and see that no overtime is necessary,” Bell retorted that “[i]t certainly is that, but unfortunately it is not a sufficient stimulous [sic],” suggesting the possibility that he considered that penalty rates beyond time and a half would be sufficient. This ambiguity did not need to be resolved since the NRA approved the clause just as the employers had.

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266NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 89-90 (W. Bell).
267NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 91.
269NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 92.
270NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 93 (Dr. Eckel).
271NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 93, 94.
Likewise, the day after the chemical manufacturing hearing, several labor representatives opposed the proposed hours provisions in the cement code, but none even alluded to the exclusion of administrative employees. David Kaplan, speaking on behalf of the AFL, criticized the proposed code for permitting the 36-hour week to be averaged over six months subject to a limit of 42 hours in any one week, and requested instead a maximum 30-hour week. (Bizarrely, he wished to substitute “Clerical employees are permitted to work no more than 40 hours in any one week” for “Clerical employees are limited to 40 hours in any one week.”) Kaplan urged the 30-hour week on the grounds that the NIRA’s “major purpose” in providing maximum hours “is to make possible the reemployment of the workers in that industry who lost their jobs during the depression.” The cement industry, like all others covered by the act, was “charged with the responsibility of providing employment for as many workers as were actively engaged in production in the industry in 1929.” This exclusive focus on production workers, which was in no way prescribed by the NIRA, may in its own right explain the labor movement’s failure to exert itself on behalf of nonproduction workers. In any event, Kaplan’s citation of partial employment and unemployment data to support the argument that an average 36-hour week would be considerably less efficacious than a maximum 30-hour week failed to persuade the NRA, whose administrator was content to approve the industry’s code in spite of the fact that Johnson recognized that it would “cause absorption” of only about one-fourth of the number of workers.

272 Code No. 275: Chemical Manufacturing Industry, Art. II(d), in NRA, Codes of Fair Competition, 6:397.

273 The NRA did adopt several suggestions submitted by the LAB, including time-and-one-third overtime pay for production workers and conditioning exemption of supervisory employees on payment of a $35 weekly salary. Leo Wolman (LAB chairman) to [Malcolm] Pirnie (deputy administrator) on the Code of Fair Competition for the Portland Cement Industry (Oct. 30, 1933); Deputy Administrator Malcolm Pirnie to Administrator Johnson: Report on the Code of Fair Competition for the Cement Industry (Nov. 11, 1933), in NAMP, Microcopy No. 213: DSNRA 1933-36 (1953), Roll 23: Code 128: Cement Industry. Interestingly, Wolman himself wrote at the beginning of 1934 that, whereas limitation of the workday and workweek had won almost general acceptance, “the unsettled question” was the amount of the overtime penalty, with employers insisting on time and a third and labor on time and a half. Leo Wolman, “Labor under the NRA,” in America’s Recovery Program 89-103 at 93 (Clair Wilcox et al. eds. 1934).

274 NRA, HCFC, Hearing No. 88: Cement 13-14 (Sept. 15, 1933) (Film No. 11).

275 NRA, HCFC, Hearing No. 88: Cement at 14.

276 NRA, HCFC, Hearing No. 88: Cement at 14-18.
of cement workers who had lost their jobs between 1928 and 1932.\textsuperscript{277} The FAECT, which appeared on behalf of technical-professional workers at several hearings, protested the proposed code’s exclusion of technical employees from its hours limitation. For its part, the union proposed a maximum 30-hour week and six-hour day for technicians subject only to an exception for “extreme emergency” and double time for all additional hours.\textsuperscript{278}

Following another hearing in July 1934,\textsuperscript{279} the white-collar exclusions underwent further amendment, which, however, was not approved by the NRA until May 11, 1935, two weeks before the Supreme Court struck the statute down. Whereas previously no “executive, administrative, supervisory, or technical employees” paid at least $35 weekly were covered by the hours provision,\textsuperscript{280} now the universe of excluded workers was extended to “[p]ersons in a managerial, executive, supervisory or technical capacity and their immediate assistants (excluding skilled production workers)” paid at least $35.\textsuperscript{281} In addition, whereas hours-averaging was, in accord with NRA policy, abolished for production workers,\textsuperscript{282} it was introduced for the first time for clerical and office workers, whose previous 40-hour week was now subject to averaging over five weeks and a weekly maximum of 48 hours.\textsuperscript{283} This latter change was made despite a memorandum from an NRA review officer stating that, although NRA policy allowed clerical employees’ hours to be averaged over up to five weeks in order that end-of-the-month billing peaks could be expeditiously performed, the (general) eight-hour tolerance (embedded in the 48-hour maximum) was contrary to policy and should

\begin{footnotesize}
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\item \textsuperscript{277}Code No. 128: Cement Industry, in NRA, \textit{Codes of Fair Competition}, 3:326-27. The assertion by the Labor Advisory Board’s representative, Dr. E. Eckel, that the many detailed objections raised by the AFL “can be ironed out without any great difficulty” was, given the NRA’s cavalier dismissal of labor’s demands in the more than hundred codes that it had already approved, naive. NRA, \textit{HCFC}, Hearing No. 88: Cement at 59.
\item \textsuperscript{278}NRA, \textit{HCFC}, Hearing No. 88: Cement at 27-30 (A. Passman).
\item \textsuperscript{279}Unfortunately, the microfilm collection of the NRA Hearings on the Codes of Fair Competition lacks the transcript of the July 11, 1934 cement code hearing.
\item \textsuperscript{280}Code No. 128: Cement Industry, Art. III.B.3, in NRA, \textit{Codes of Fair Competition} at 329.
\end{itemize}
\end{footnotesize}
be amended.284

At the machinery code hearing an AFL representative also paid attention to the exclusion of white-collar workers from the hours provision of the proposed code, but his objections did not bring about their elimination from the final approved code. The labor movement, according to K.C. Davison, wished to point out "the imposing list of exceptions":

"Seasonal or peak demands, emergency maintenance, highly skilled workers, executives, administrators, supervisory and technical employees and their respective staffs, travelling salesmen and service employees, watchmen and firemen."

Thus, a substantial proportion of these employees are permitted unlimited hours. With this large number of exceptions it seems unnecessary to have any maximum hours written in the Code. We suggest that the list of exceptions be materially reduced and that reduction should conform to the needs of the industry....285

We would interpose no objection to a limited allowance above the maximum hours established by the Code, but all such time should be at overtime rates of not less than time and one-half. We are not arguing for putting more money in the pockets of the wage earner by this method. We regard an overtime provision as a penalty. The penalty should be high enough to make the practice prohibitive....285

The AFL representative then suggested Labor's own code provisions, which excluded from the hours limitation travelling salesmen, executives, and supervisors (but not administrative employees) earning $35.00 or more weekly.286 Dr. John O'Leary, president of the Machinery and Allied Products Institute, stated that industry would consider the suggestions,287 but the final approved code encompassed the same broad groups as the proposal that the AFL had criticized.288 The only relevant change involved the initial wording of the exception: "executives, administrative, supervisory and technical employees and members of their

285NRA, HCFC, Hearing No. 277: Machinery and Allied Products 51 (Dec. 21, 1933) (Film No. 48).
286NRA, HCFC, Hearing No. 277: Machinery and Allied Products at 61.
287NRA, HCFC, Hearing No. 277: Machinery and Allied Products at 68.
288Code No. 347: Machinery and Allied Products Industry, Art. 3, § 2(a), in NRA, Codes of Fair Competition, 8:246. To be sure, other AFL proposals were also rejected, including subjection to the maximum hours limit of employers who personally perform manual labor. NRA, HCFC, Hearing No. 277: Machinery and Allied Products at 63.
At a conference of basic code representatives of the machinery and allied products industry with representatives of labor and the LAB on February 6, 1934: “A great deal of discussion developed on the point of omitting the works [sic; must read: words] ‘and their respective staffs’ in the $35 class as the labor representatives contended the Code as presented excepted too many employees from the hour provisions. This was finally left for the consideration of the industry overnight.”  

Unfortunately, the extant summary of the following day’s conference made no further reference to this point, but the appearance in March in the final approved code of somewhat different wording (“executives, those employed in a supervisory or administrative capacity or their immediate assistants...being paid...$35.00...or more per week”) suggests that the adoption of “immediate assistants”—recalling the Sloan-Vandenberg addition to Black’s 30-hour bill a year earlier—instead of “respective staffs” may have been designed as a very minor accommodation of labor’s objection to the more expansive nature of the earlier variant. The LAB, in any event, offered no objection to any version of the white-collar exclusions.

De facto exclusion of administrative employees was embedded in codes that, like the aforementioned iron and steel code, also excluded the staffs or immediate assistants of excluded executives and supervisors (subject to satisfying the $35

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292The LAB did state that it did not approve the labor provisions unless certain changes (such as lowering the weekly hours threshold at which engineers and firemen became entitled to overtime pay) were made, but they were not adopted either. Leo Wolman (chairman, LAB) to W. A. Harriman (div. admr): Code of Fair Competition for the Machinery and Allied Products Industry, revision of Mar. 1, 1934 (Mar. 3, 1934); Alvin Brown (LAB) to General Johnson through Mr. [Edw. F.] McGrady, Subject: Code for the Machinery and Allied Products Industry (Mar. 9, 1934), in NAMP, Microcopy No. 213: DSNRA 1933-36 (1953), Roll 103: Code 347: Machinery and Allied Products Industry.
salary level). Such codes included those of the non-ferrous foundry, aluminum industries, and machinery and allied products industries. Other codes, such as the rubber manufacturing, rubber tire manufacturing, and aluminum industries, went so far as to exclude from their hours provisions all clerical employees whose weekly salary exceeded $35. Other expansive exclusions were contained, for example, in the can manufacturing industry code, which excluded research technicians and those employed in any other capacity of sole responsibility.

The Labor Advisory Board representative at the rubber manufacturing code hearing did insist that because such excluded groups as shipping crews, electricians, watchmen, elevator operators, firemen, engineers and maintenance men were “victims of unemployment in the same way that other workers” were, they should be covered by the maximum hours provision, but he failed to mention white-collar employees, and the LAB promptly approved the code following the

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296 NRA, HCFC, Hearing No. 412: Rubber Manufacturing 104 (Oct. 25, 1933) (Film No. 64) (Dr. A. Howard Myers). The only significant change that the employers’ proposed hours for white-collar workers underwent after the hearing was an increase from $30 to $35 in the salary level for totally excluded managerial, executive, supervisory, and technical employees. NRA, *Proposed Code of Fair Competition for the Rubber Manufacturing Industry As Revised October 20, 1933 for Public Hearing on October 25, 1933*, Art. V.A.4 at 6 (1933); L. L. Krentalin, “History of the Code of Fair Competition for the Rubber Manufacturing Industry” at 27 (May 20, 1936), in *NAMP*, Microcopy No. 213: DSNRA 1933-36 (1953), Roll 151: Code 156: Rubber Manufacturing Industry. The original proposed code of Sept. 26, 1933 did not contain any regulation of lower-paid
Similarly, the general president of the Shoe Workers Protective Union, who testified that he expected that the payment of time and a half for overtime would mean that it would be worked only infrequently, did not apply it to office work.

The code hearing for the rubber tire manufacturing industry, which took place on October 20, 1933, was notable for testimony by AFL President William Green, who mounted what was perhaps the most forthright, radical, and eloquent plea on behalf of hours parity for white-collar workers that has ever been presented at a public labor standards hearing. Amusingly, the account in the national newspaper of record failed even to report Green’s presence, although it mentioned far less significant testimony. The tire hearing took place about three weeks after Green had served a “virtual ultimatum on the Recovery Administration” that: “Unless further revision of maximum hours provided in codes reduces the work week to five days of about six hours each, organized labor will be compelled to go before Congress at the next session and support a thirty-hour bill....”

white-collar workers’ hours; only after a formal pre-hearing conference on Oct. 4, did the provision appear in the proposed code (which was retained in the approved code) permitting 40-hour weeks averaged over a month for accounting, clerical, and office workers subject to a 48-hour maximum. Krentalin, “History” at 20; NRA, Proposed Code of Fair Competition for the Rubber Manufacturing Industry As Revised October 20, 1933 for Public Hearing on October 25, 1933, Art. V.A.3 at 5; Proposed Code of Fair Competition for the Rubber Manufacturing Industry As Submitted September 26, 1933, Art. V.A at 5 (1933).


298NRA, HCFC, Hearing No. 412: Rubber Manufacturing at 122 (John Nolan).


300"Tire Makers Point to $33,000,000 Tax," NYT, Oct. 21, 1933 (7:4). Similarly, the official NRA code history also ignored Green’s plea on behalf of white-collar workers; it stated that discussion and testimony regarding hours at the hearing had centered on the 36-hour week plus 104 annual hours without overtime pay. G. S. Earseman, “History of the Code of Fair Competition for the Rubber Tire Manufacturing Industry” at 13 (Sept. 1935), in NAMP, Microcopy No. 213: DSNRA 1933-36 (1953), Roll 151: Code 174: Rubber Tire Manufacturing Industry.

301Louis Stark, “Green Threatens Plea to Congress,” NYT, Sept. 28, 1933 (1:2).
the NIRA was, according to The New York Times, "[m]anifestly...in part a result of the campaign" for the 30-hour week that the AFL had vigorously supported in Congress, "[t]hat campaign had come to grief because there was no agreement between capital and labor as to how much should be paid for the shorter week. Capital, with some exceptions, was reluctant to increase the hourly rate much or any. Labor wanted the same pay for the short week that it had been receiving for the long." The Times viewed the NRA's policy as shortening the workweek in each industry to reemploy all those who had been attached to it, while fixing wages "at the level which the industry can reasonably be expected to bear."302

Whereas production workers would be limited to 36 hours per week plus an addition 104 hours annually,303 the employers' code authority proposed permitting accounting, clerical, office, service, and (inside) sales employees to work 40 hours a week averaged over a month, subject to a maximum of 48 hours in any one week. The Rubber Manufacturers Association justified these extended hours for white-collar workers on the grounds that, as long as business was conducted on a monthly basis with respect to billing and similar procedures, it was impossible to flatten out the work load throughout the month—unless temporary workers were hired for one or two weeks each month and then laid off again.304

After an AFL representative on the LAB had counterproposed a 30-hour week with time and a half for the 104 additional hours in order to discourage overtime work,305 Green took as his point of departure the fact that there were still 10 million unemployed four months after the NIRA had been signed.306 He therefore proposed a 30-hour week and six-hour day not only for factory workers, but all employees, including office workers, supervisors, maintenance crews, engineers, firemen, electricians, tire testers, and shipping crews. When it was necessary for the operation of a particular job, as a result of the specific character of the work, be it mechanical, manufacturing, or office work, the employee would be permitted

Ironically, Green made this threat at the annual convention of the Metal Trades Department of the AFL, at which the individual unions had protested efforts to organize mass-production industries along vertical lines, thus interfering with the "property rights" of the old-line craft unions. Id.

302R[obert] Duffus, "We Begin Our Greatest Labor Experiment," NYT, Aug. 6, 1933 (sect. 9, 1:1-8 at 5-6).
303NRA, HCFC, Hearing No. 413: Rubber Tire Manufacturing 48 (Oct. 20, 1933) (Film No. 65) (Art. IV).
304NRA, HCFC, Hearing No. 413: Rubber Tire Manufacturing at 23-24 (A. L. Viles, general manager, Rubber Manufacturers Association).
305NRA, HCFC, Hearing No. 413: Rubber Tire Manufacturing at 78 (F. L. Phillips).
306NRA, HCFC, Hearing No. 413: Rubber Tire Manufacturing at 116.
to work overtime, but subject to several conditions: a maximum of six overtime hours in any week; a maximum of 120 hours (including overtime) in any four consecutive weeks; time and a half pay for all hours beyond six per day and 30 per week and double time on Sundays and holidays; a prohibition on overtime work when another worker of the same classification competent to perform the task was working fewer than 30 hours per week (except where such work was necessary for completion of a particular job). Green allowed for further flexibility by permitting maintenance and repair crews to work more than six weekly overtime hours in the case of emergencies. In addition, technical men earning more than $35 a week and shift foremen would be permitted to work as many as 40 hours per week. Finally, all overtime hours had to be reported monthly to the Code Authority to enable it to establish rules to eliminate overtime.307

Green then explained why the AFL's program was not merely for blue-collar workers:

I am intentionally providing the same short hours for the white-collar workers as for the factory workers.

Mr. Administrator, I think that we have all been neglecting the white-collar workers. Time was when they worked shorter hours than the man in overalls.

However, with the coming of the five day week during the depression, we have gradually accepted the idea that office workers should work a longer week because the telephone must be answered, orders must be acknowledged, and planning and scheduling activities must be carried forward on all business days.

To effectuate the purposes of the National Industrial Recovery Act, the hours of these workers must also be reduced and the slack of unemployment in this field be taken up.

It is difficult to secure detailed figures on unemployment among office workers, but every employer, every employment office, every employment agency, every high school testifies to the large number available.

All during the depression, our public schools have been turning out thousands of young people trained to do office work, and eager to find work.

The President's Reemployment Agreement with its temporary standard of forty hours per week has not sent them back to work. Why not try thirty hours and see what that will do to take up the slack of unemployment?

The provisions suggested for flexibility of hours will take care of the office workers' peaks of work due to monthly reports.308

Green went on to propose what later would be called a Fordist program for the tire and automobile industries, which focused on lowering hours to thirty so that

307NRA, HCFC, Hearing No. 413: Rubber Tire Manufacturing 118-19.
308NRA, HCFC, Hearing No. 413: Rubber Tire Manufacturing 126-27 (Oct. 20, 1933) (Film No. 65).
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workers could use more time to drive cars. Drawing out the logic of this position, he pointed out that as tire manufacturing productivity rose strongly in the late 1920s and early 1930s, wages did not rise, but the tire companies did not gain either: "You gave it away." While conceding that higher wages would lead to higher prices, he conjectured that it seemed "likely" that the industry could pass some of the increased cost on to consumers. In addition to a minimum wage of $18 a week (or 60 cents an hour) for factory and office workers, remarkably the AFL president urged the highly interventionist step (obviously dictated by the re-employment campaign) of freezing the highest line speeds, which would be registered with the Code Authority and could not be increased without its approval.

Although the final code as approved by the NRA and Roosevelt adopted none of Green's proposals, the rubber tire manufacturing industry was not one in which discrimination against white-collar workers resulted from benign or malevolent neglect by the labor movement.

At the aluminum industry code hearing, the employers' proposed code excluded from the hours provision employees receiving $35 or more weekly and employees employed in an executive, supervisory, or technical capacity and their immediate staffs. The representative of the Union of Aluminum Workers (AFL), Boris Shishkin, who was alive to the need to abolish piecework and incentives as subverting the reemployment process in production, urged a 30-hour week, counterproposed that no employee employed in clerical or office work—which was

309NRA, HCFC, Hearing No. 413: Rubber Tire Manufacturing at 128-31.
310NRA, HCFC, Hearing No. 413: Rubber Tire Manufacturing at 141-42.
311NRA, HCFC, Hearing No. 413: Rubber Tire Manufacturing at 133. To be sure, since Green proposed that the National Code Authority for this industry consist of eight industry members plus three non-voting members representing the NRA, consumers, and labor (the latter chosen by the LAB from nominations submitted by the AFL), the principal result would have been exposing increased line speeds and their impact of employment to public debate rather than prohibiting such increases. Id. at 143.
312In retrospect, the NRA code history asserted that the exceptionally severe technological displacement in the industry had made it a "foregone conclusion" that the code's maximum hours would not bring about a considerable increase in employment of factory workers. Earseman, "History of the Code of Fair Competition for the Rubber Tire Manufacturing Industry" at 54.
314NRA, HCFC, Hearing No. 14: Aluminum at 81-82, 74 (Sept. 28, 1933).
not even mentioned in the proposed code—unless employed in a managerial or executive capacity earning more than $35 per week, be permitted to work more than 40 hours a week or seven hours a day.\textsuperscript{315} Unsurprisingly, however, neither the employer-monopolized code authority nor the NRA and Roosevelt adopted his proposal.\textsuperscript{316} Indeed, the exclusions in the approved code became even more expansive, permitting employers to require clerical and office workers to work not only 40 hours a week and eight hours a day, but even 48 hours one week every month without having to pay an overtime penalty, in addition to excluding even clerical employees earning at least $35 weekly from any hours limitations.\textsuperscript{317} The LAB, too, had declared that it could not approve the code's labor provisions unless the blanket exclusion of “persons engaged in a...clerical...capacity” receiving at least $35 a week and the “immediate assistants” of all those engaged in a “managerial, executive, clerical or supervisory capacity” (also earning at least $35) were deleted.\textsuperscript{318} Notwithstanding negative reports of this and other advisory boards, however, the deputy administrator in charge of the code, feeling that further conferences would only serve to widen the breach between the parties, recommended adoption of the code so that the industry could operate under the code, which could then be modified based on experience or changed circumstances.\textsuperscript{319} No such modification ever occurred.

\textbf{Newspaper Reporters}

Because he is unorganized, therefore impotent in his individuality, the white collar man as a class, and the class includes newspaper editorial workers, has been an especial victim of the deflationary era.\textsuperscript{320}

\begin{itemize}
\item \textsuperscript{315}NRA, \textit{HCFC}, Hearing No. 14: Aluminum at 75 (Sept. 28, 1933).
\item \textsuperscript{316}“Johnson Approves the Aluminum Code,” \textit{NYT}, June 28, 1934 (2:3).
\item \textsuperscript{317}Code No. 470: Aluminum Industry, Art. III(b) and (d), in NRA, \textit{Codes of Fair Competition}, 12:121-22.
\item \textsuperscript{318}Leo Wolman (Chairman, LAB) to K. M. Simpson (Division Administrator), Subject: Proposed Code of Fair Competition for the Aluminum Industry as revised April 23, 1934, at 1-2 (May 16, 1934), in \textit{NAMP}, Microcopy No. 213: DSNRA 1933-36, Roll 3: Code 470: Aluminum Industry.
\item \textsuperscript{320}NRA, \textit{HCFC}, Hearing No. 143: Daily Newspaper Publishing Business at 1404 (Sept. 22, 1933) (Lloyd White, managing editor of \textit{Cleveland Press} and president of the
National Recovery Administration Codes of Fair Competition

[We reporters...would at times look down upon the members of the typographical union who were making it possible for the dear public to read our masterpieces. But when it came to Saturday night our trade union brothers had the laugh on us. Their collars...might not be so white,...their pay envelope was far fatter, their hours shorter and the boss would think twice before asking them to work overtime. Overtime meant a lot of money out of the coffers of the newspapers.]

Perhaps the most high-profile exclusion of professional employees appeared in the daily newspaper business code. Because it had long been customary for reporters to work extended hours without additional pay or compensatory time off, “protection against abuses of the overtime system” was one of their chief goals. The antagonists’ unique positions in the media fairly preordained extensive press coverage. Thus as early as President Roosevelt’s press conference on July 26, 1933, one potential covered employee asked: “Can you tell us whether the news writers will be placed under a code or not?” To which Roosevelt replied: “Let us take a vote on it. (Laughter).” The follow-up query prompted a response only from the questioner’s colleagues: “I understand they are placed in the category of white collar workers? (Laughter)”

Two days later, the NRA general counsel Donald Richberg, when asked by newspaper reporters whether they were professionals, replied: “I’ve heard it argued both ways, but I’ll leave it to you to decide’....” Three days later the NRA issued new interpretations of the PRA, stating that (in addition to interns, nurses, and hospital and research technicians) newspaper reporters, editorial writers, rewrite men, and other editorial staff members fell within the meaning of its excluded professional persons. The next day Johnson characterized this

Cleveland Editorial Employees’ Assoc.) (Film No. 23).


322Although Representative Connery, who was leading the campaign for a 30-hour bill in the House, stated to a publishers’ representative at a hearing on his own bill on May 4 that it would not apply to newspaper reporters, the reason was that they did not produce or manufacture in a factory. Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557, at 699 (73d Cong., 1st Sess. 1933).


325“NRA to Leave Pay in Higher Scales to the Employer,” NYT, July 29, 1933 (1:1).

326“New Exemptions from NRA Code,” NYT, Aug. 1, 1933 (10:3).
reference to reporters as a "slip," which was "subject to reversal." Two days later, the materially interested publisher of *The New York Times* was doubtless relieved to able to report that: "In regard to news forces, the present intention of the administration was described as leaving to each publisher the decision on bringing them under a work-week limit. ... If publishers wish to take the stand that their reporters are professional men, it was indicated today that there was little prospect that the administration would feel called upon to interfere."

Thereupon the American Newspaper Publishers Association was emboldened to offer a code that it hoped would enable members to operate under a modified version of the PRA. Although the text itself did not identify the "professional persons employed in their profession," who, unlike managerial, executive, and supervisory employees, were not subject to a $35 weekly salary requirement, the Associated Press reported that editors and reporters were excepted "as members of a profession." Doubtless looking over its shoulder, the ANPA conceded that daily newspapers "have no desire to set for themselves any threadbare arguments" alleging, as many other trade associations had, that this particular industry was "peculiar," but then proceeded to assert that (despite the proposed exclusion of reporters from the maximum hours provision) they had already "substantially maintained" the NRA's aforementioned principle of calibrating the length of the workweek in order to spread employment sufficiently to employ the entire contingent of workers normally attached to that industry. This code, whose predecessors Johnson had already rejected as unsatisfactory and which unsurprisingly one-sidedly favored its drafters' interests, was also rejected

330 “Text of Code Offered by Daily Newspaper Publishers,” *NYT*, Aug. 9, 1933 (2:2-6 at 4). ANPA's legal counsel, Elisha Hanson, implausibly asserted that the classification of reporters drawing more than $35 a week as professionals "is not of our liking any more than theirs [reporters']. In fact, we were utterly amazed during the progress of our negotiations to hear of a ruling by the NRA that all reporters were professional men." NRA, *HCFC*, Hearing No. 143: Daily Newspaper Publishing Business 1439-40 (Sept. 22, 1933) (Film No. 23).
333 “Publishers Offer a Newspaper Code.”
334 For example, it recited that the code's purpose was not to require the payment of "punitive overtime rates," and that in any city lacking a surplus of labor essential to the production of a daily newspaper, the code’s maximum hours did not apply. “Text of Code
by him in part because of "its failure to provide a short work-week for reporters." A week later, however, he approved it (but only as a temporary PRA code) after revisions, including a 40-hour week for reporters receiving less than $35 per week.\(^{335}\)

The code hearings on September 22-23, 1933, gave articulate journalists a national platform to mock publishers’ profit-driven professionalism rhetoric designed to deprive reporters of protection against overwork while their colleagues remained unemployed.\(^{336}\) This dispute was in an important sense the origin of the employer tradition that consolidated itself five years later under the FLSA and continues to the present of rejecting workers’ entitlement to hours protection based solely on invoking a word ("professional") and pinning that title on them without reference to any underlying public policy. Thus, for example, Elisha Hanson, who remained the ANPA’s principal legal authority on and driving force in resisting white-collar coverage under the FLSA,\(^{337}\) found it sufficient to refer to the publishers’ aforementioned proposed exclusion as “the usual exception paragraph covering professional persons” without any accompanying explanation.\(^{338}\)

The Guild of New York Newspaper Men and Women had been founded a few days before the hearing to urge adoption of an NRA code providing for a five-day week for all newspaper writers and “desk men, except authentic executives and those engaged in supplying syndicate material.”\(^ {339}\) Doris Fleeson,\(^{340}\) a staff reporter at the New York *Daily News*—a “progressive”\(^{341}\) newspaper on which “[n]ot even executives are deprived of the five day week” and both the city and managing editor\(^{342}\) worked five days under this employment-increasing regime—did not re-

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\(^{335}\)“Newspaper Code Altered for NRA,” *NYT*, Aug. 9, 1933 (2:2-6 at 6).

\(^{336}\)For press coverage, see “News Men Demand 5-Day Week in Code,” *NYT*, Sept. 23, 1933 (8:1-3); “Newspaper Unions Ask 30-Hour Week,” *NYT*, Sept. 24, 1933 (30:1).

\(^{337}\)Leab, *A Union of Individuals* at 38.

\(^{338}\)NRA, *HCFC*, Hearing No. 143: Daily Newspaper Publishing Business 1220 (Sept. 22, 1933) (Film No. 23).

\(^{339}\)“News Writers Form Guild Under NRA,” *NYT*, Sept. 18, 1933 (4:4-5). Haywood Broun, the founder of the organization and later president of the American Newspaper Guild and a syndicated columnist, testified that columnists did not need to be under the 40-hour week rule “since they work five or six hours a week at the present time.” NRA, *HCFC*, Hearing No. 143: Daily Newspaper Publishing Business at 1375 (Sept. 22, 1933).


\(^{342}\)Another witness advocated excepting editors-in-chief and managing editors “be-

Another reporter proposed in the alternative that if publishers desired sole discretion in order to avoid disruption, reporters should be paid time and a third for overtime work. *Id.* at 1434-35 (Andrew Parker). This overtime rate was the same that publishers had proposed for highly skilled workers on continuous process. "Text of Code Offered by Daily Newspaper Publishers." While assuring the NRA that "[n]o newspaperman objects to working long hours in a real emergency," Lloyd White argued that "the emergency shall be real and not an executive whim," the best protection against which was "punitive" time-and-a-third overtime compensation or an equivalent of time off. *Id.* at 1410 (Sept. 22, 1933). Given the rather accommodating stance that the Guild took on long hours, it is unclear whether the *Times* was spreading a canard when it later reported, without a source, that: "It is said to be the desire of the guild that any one [sic] not actually owning a share in a newspaper work under hours restrictions. It is suggested that if news executives 'pile up' time they receive a sabbatical year off." "Roosevelt Delays on Newspaper Code," *NYT*, Dec. 24, 1933 (16:5). Arthur Krock, the Washington correspondent of *The New York Times*, took much glee in arguing that the time-off approach was not viable, for example, in reporting on NRA labor issues because they had been arising daily for months and would continue to do so indefinitely, and reporters had had to become such specialists that only by employing "two men for every one-man task," and thus forcing bankruptcy, could the problem be eliminated. Arthur Krock, "Reporters' Five-Day Week Offers a Problem," *NYT*, Mar. 16, 1934 (20:5). ANPA had tried out this argument at the House Labor Committee hearings on Connery's 30-hour bill in May. *Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557* at 684 (Harvey Kelly, chairman, Special Standards Committee, ANPA).

Many decades later it occurred to a judge in a FLSA overtime case involving newspaper reporters that: "The issue of whether an employee is an exempt professional forces the opposing parties into paradoxical positions: The management argues that the employee’s work is distinct and creative, and thus does not merit overtime pay; the worker maintains that he deserves overtime pay because his work is routine and non-specialized. Both parties are compelled to make arguments contrary to their customary economic
opposed coverage under an eight-hour law because hospital doctors had told them that it would "debas[e] their noble profession to include them under a law that would be enforced by the Bureau of Labor. Many women were honestly incensed by the bureau's action [in introducing the bill], believing that it took from them their professional standing." \(^{345}\)

If Fleeson seemed to conflate professional status with the markers of self-employment, Edward Angly, \(^{346}\) a reporter for the New York *Herald Tribune*, after sarcastically equating the proposed code's designating them as professionals with Burke's dubbing them the Fourth Estate, proceeded to an occupational-sociological analysis:

We do not feel we are professionals, and we should like to have that stricken from the code. We feel that we are members of a craft.

Professionals, as we understand it, are persons engaged in a life work which has some requirements for entrance [sic] into it, some test for competency, and some examination, and perhaps even a code of ethics. Of these we have none. (Laughter) \(^{347}\)

Reverting to the sarcastic mode, Angly proposed striking the clause designating them as professionals and "permitting us to work as long as we like...." Instead, reporters wanted to be brought in as "simple craftsmen (laughter) and taken up on the heights of the Blue Eagle instead of being left down in the valley of ragged individualism. (Laughter and applause.)" \(^{348}\)

In a derisively playful manner that disappeared from organized labor's formal

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\(^{345}\)Katherine Edson [Commissioner, Cal. State Industrial Welfare Commission], "Student Nurses and the Eight-Hour Law in California," *Survey* 31(7):499-500 at 499 (Jan. 24, 1914). Eighty years later, a large group of operating room nurses at the University of Iowa Hospitals and Clinics who were dissatisfied with their employer's overtime pay policies but were profoundly conflicted by the thought of securing overtime pay under the FLSA only at the price of having to disavow the word that their union had drilled into their heads for decades as the absolute foundation of their working lives, told the author indignantly: "If we are 'professionals,' then why are we made to account for every minute of our time?" Meeting, Aug. 13, 1994.


National Recovery Administration Codes of Fair Competition

and bureaucratic post-World War II criticisms of employers’ demands for expanded exclusions of the white-collar workers from the FLSA, further scorn was heaped on the ANPA’s relentless campaign to drive reporters out of the code’s hours provision as professionals by the Cleveland Editorial Men’s Association, whose lawyer, Marvin Harrison, observed that “[W]e in Ohio know a great deal about professional persons. We, within the last year, have added the real estate agents and insurance agents, and we have [added] licensed and tagged funeral directors and barbers to the professionals, so if we include farmers and pedestrians we would have everyone now professionalized in Ohio.” In a similar vein, Andrew Parker, a reporter at the Philadelphia Record who objected to the discriminatory imposition of a $35 salary level criterion—he counterproposed $100—related that when his own publisher had conceded that although he felt that men in the higher brackets should not be subject to the code’s maximum hours, he had also added: “‘I can’t think of any good reason for feeling that way....’” To underscore the arbitrariness of the $35-salary marker of professionalism, Frank Morrison, the AFL secretary, pointed out that professional journalists’ salaries were far lower than that of the skilled workers employed in the production of those same newspapers. He therefore proposed $75 as the appropriate salary in tandem with a proviso that the weekly minimum salary be no less than the wages paid to the highest class of skilled mechanics employed in producing the same publication.

The most sustained and broadest criticism of the professional exclusion came from Lloyd White, managing editor of the Cleveland Press and president of the Cleveland Editorial Employees Association, who emphasized that the newspaper


350 NRA, HCFC, Hearing No. 143: Daily Newspaper Publishing Business at 1419-21 (Sept. 22, 1933). To be sure, Stern was an unorthodox publisher, who boasted of having overridden his penny-pinching executives and made sure that his employees were paid for overtime work. J. David Stern, Memoirs of a Maverick Publisher 284-85 (1962). He was the first publisher to enter into a collective bargaining agreement with the Guild (in 1934) and resigned in protest from ANPA in 1936. Edwin Emery, History of the American Newspaper Publishers Association 227, 235 (1970 [1950]). The contract with the Record excluded from the five-day, 40-hour week editorial workers earning $4,500 or more annually and any “employees who in the opinion of the Publisher and the Guild are doing highly skilled and specialized work of such a nature that it cannot reasonably be performed by temporary substitutes.” “Text of Philadelphia Guild Contract,” EP 66(48):20 (Apr. 14, 1934) (¶ 10).

industry, like any other, lent itself to fulfilment of the NIRA’s goal of reducing the hours of the employed in order to reemploy the unemployed—in this case, “the thousands of editorial workers who have been forced to the streets by newspaper mergers and in consequence also of a general program of operative retrenchment in which the publishers have participated with industry generally...and compelled their staffs to work longer hours....” White attacked the exclusion of professionals as linked to a $35-a-week salary on the grounds that the criterion would justify excluding “virtually every skilled artisan in the unionized crafts,” especially since

[n]ewspaper editorial knowledge is...the same type...as that possessed by the bricklayer who has learned by practice to build a wall to plumb.

Editorial workers are not professional men, but skilled artisans and hired hands.

This attempt by the A. N. P. A. to describe them otherwise has no other justification...than a knowledge that the men and women who write and edit their papers do not work with a trowel.

The first inkling that the ideology of professionalism may also have gained a grip on reporters’ consciousness that interfered with their own and their co-workers’ welfare came from Paul Anderson, a reporter at the *St. Louis Post Dispatch*, who represented Washington, D.C. correspondents. He testified that he knew of no class of worker needing protection of an NRA code more than reporters, who, being individualistic and incapable of concerted action, needed to be protected from their own enthusiasm. In particular, it was all well and good for reporters to insist on being permitted to stay with their story night and day, but precisely for that reason some other reporter was unemployed.

In December 1933 the LAB sent a memorandum to Lindsay Rogers, the hearing officer, informing him that it objected to the exemption for persons employed in a professional capacity (as well as the comp-time off provision, which it believed should have been time and a half). The objections were in vain: when

President Roosevelt approved the daily newspaper publishing business code in February 1934, the 40- to 48-hour provision, exactly like that of the code that the ANPA had proposed half a year earlier, excluded "professional persons employed in their professions" (as well as persons employed in a "managerial or personal capacity"). Roosevelt, who vacillated between not wanting to alienate the working press (whose leaders were among the very few affected workers who ever had the opportunity to discuss their code with the president several times) and publishers, included in his executive order approving the code sarcastic language to the effect that the constitutionally protected freedom of expression did not afford publishers "freedom to work children, or do business in a fire trap," but confined to a nonbinding letter to Administrator Johnson the mere "observation[ ]" that publishers of newspapers with a circulation of 75,000 or more in cities of 750,000 population or more were "requested to install a five-day, forty-hour week for their staff of reporters and writers with the purpose of giving employment to additional men and women in this field." Significantly, both at this time and earlier, the leading trade magazine, Editor & Publisher, published articles detailing how several big city dailies had successfully gone over to a five-day, 40-hour-week system, under which reporters who worked long hours one week took vacation the next week. The Guild, which regarded Roosevelt's request as a victory, soon

357 Code No. 288: Daily Newspaper Publishing Business (Feb. 17, 1934), Art. III, § 1, in NRA, Codes of Fair Competition, 7:69-84, at 80 (1934). See also "Text of the Code for Daily Newspapers as Finally Approved by President Roosevelt," NYT, Feb. 20, 1934 (8:1-8). The 40-hour week applied only to cities of over 50,000 population; for smaller cities the maximum was 44 or 48 hours.

358 At a meeting on December 11, 1933, Guild leaders complained to Roosevelt that the code failed to define "news department workers" or to specify hours for editorial employees, for whom they demanded a five-day week. "What the Guild Told Roosevelt at a Tea Party," GR 1(3):1:2 (Jan. 12, 1934). On another meeting on Nov. 5, 1934, see "Officers Tell Guild Needs to Roosevelt," GR 1(13):1:1, 6:1-2 (Nov. 15, 1934).

359 Leab, A Union of Individuals at 114.

360 Code No. 288: Daily Newspaper Publishing Business (Feb. 17, 1934), in NRA, Codes of Fair Competition, 7:70. One publisher testified before a Senate committee in 1934 that he would be a hypocrite if the "board of health ordered me to clean up my toilets and I claimed that it was interfering with freedom of the press." Stern, Memoirs of a Maverick Publisher at 21-22.


reported that a number of New York City newspapers were complying with the request.364

The newly founded American Newspaper Guild, as the Times had reported anticipatorily two months earlier while Roosevelt was considering the code, “lost its first test” insofar as most newspaper writers “are not considered laborers but professionals.”365 More tests, however, awaited the Guild. In May 1934, the code authority, as the approved code had authorized it,366 submitted to the NRA a schedule of maximum hours for news department workers, which included new language excluding from the 40- to 48-hour week reporters on out-of-town assignment and correspondents employed outside of the place of publication (unless they worked in a bureau with two or more correspondents).367 In response, the Guild, which regarded the proposal as “so objectionable as to be almost inconceivable,”368 submitted a survey it had conducted showing that the proportion of editorial employees working more than 40 hours weekly had fallen from 1930 to 1934 from 88 percent to 54 percent, and that two-thirds of editorial employees were paid nothing for overtime, while one-quarter were given time off.369 For a

magazine also reported that Roosevelt had stated in an offhand way that, to a “reasonable degree,” it would be permissible for reporters to work more than 40 hours in a week and accumulate credits toward vacation. George Manning, “President’s Approval of Dailies’ Code Raises New Questions for Publishers,” EP 66(41):3-4 (Feb. 24, 1934). At the same time an Associated Press report recounted an informal discussion that Roosevelt had conducted (with unidentified persons) in which he purportedly stated that “using men sixty-five or seventy hours a week and permitting them to accumulate long vacations” would not “work so well.” “Asks Jobs by Press Code,” NYT, Feb. 22, 1934 (19:3).


366"Text of the Code for Daily Newspapers as Finally Approved by President Roosevelt” (Art. III, §1, para 2).


368Leab, A Union of Individuals at 197 (quoting ANG correspondence).

final code hearing in early 1935, the Guild then proposed a 40-hour 5-day maximum workweek for news department employees—defined as including anyone regularly employed in gathering or writing, editing, or preparing, directing preparation of, or helping to prepare material for newspaper publication, including clerical employees, all of whom had to be paid at least $45 weekly—which could be exceeded in emergencies if compensated for by one and a half hours off for every hour of overtime.370

On March 2, 1935, the LAB sent a 12-page memorandum to Jack B. Tate, the NRA Graphic Arts administrator, explaining that, since the publishers’ proposed amendments were “deficient” and the Guild’s, though “more flexible,” could not be approved, it was submitting its own substitute. Its proposals included an hour and a half off for every overtime hour (beyond 8 or 40) worked. In contrast to the employers’ compensatory time off proposal, which was “relatively worthless because no definite time limit is set during which the time must be granted,” the LAB argued that it was “not advisable to require overtime to be taken until at least” eight hours had been accumulated. The punitive character of the time and a half provision was not designed to give employees a vacation once a month, but to prevent overtime and to provide employment: there would be little reemployment if publishers were permitted to adjust employees’ hours as they saw fit without incurring any penalty. In addition, the LAB insisted that the exclusion of out-of-town reporters was unacceptable.371

Six weeks later Tate recommended to the National Industrial Recovery Board that the publishers’ proposed amendments to the code be approved. Although he reported that the LAB had withheld its approval and dealt with two of its objections, he failed even to mention its central criticisms and proposals relating to overtime.372 The NRA Review Officer then informed Tate that the amendments that he had approved were not consistent with NRA policy; specifically, the officer agreed with the LAB’s objections to the overtime provisions and declared that policy demanded that the exclusion of certain workers (including the out-of-town reporters) be conditioned on payment of at least a weekly salary of $35.373

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371Memorandum from Clyde Mills, LAB, to Jack B. Tate at 1-3, 8-9, 12 (Mar. 2, 1935), in NAMP, Microcopy No. 213: DSNRA 1933-36, Roll 44.
373Alvin Brown, Review Officer, to Division Administrator, Graphic Arts Division
position that Tate developed in rebutting this view to the NIRB was remarkable for its willingness to move to new argumentative terrain. Tate contended that it was open to question whether a policy applicable to a manufacturing industry, for example, should be considered as necessarily applicable to such an industry as...newspaper publishing. In general, all labor provisions in approved codes have as their basis the concept of workers engaged in production with machines. The mechanical employees in the newspaper publishing industry are so considered and the labor provisions in this code are so drawn; but the nature of the work done by News Department Employees is such that it may be considered as falling within an unchartered area between craftsmanship and a profession.374

Without explicating the basis for his dichotomous treatment of blue- and white-collar workers, Tate conceded that the review officer’s objections were “undoubtedly sound,” but not “when the nature of the work done by the employees covered by the proposed amendment is properly considered.” Again, conceding that “no specific answer is possible to” the review officer’s exception to the amendments’ deviation from the strict policy of the 40-hour week, Tate conjured up the black box of work that is “closer to a profession than a craft” without explaining why reporters should work longer workweeks or why the imperatives of reemploying their out-of-work colleagues should not assert themselves.375

When the NIRB approved the amendments to the code in May, just a few weeks before the Supreme Court declared the NIRA unconstitutional, the definition of news department employees subject to the 40- to 48-hour week tracked the publishers’ proposal by excluding persons employed in a managerial, executive, or personal capacity, editorial writers, employees on out of town assignment, and correspondents (unless employed in a permanent bureau of at least two full-time correspondents).376 As the Guild sarcastically observed: “News

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374 Jack B. Tate to NIRB at 1 (Apr. 27, 1935), in NAMP, Microcopy No. 213: DSNRA 1933-36, Roll 44.
375 Jack B. Tate to NIRB at 2 (Apr. 27, 1935), in NAMP, Microcopy No. 213: DSNRA 1933-36, Roll 44.
376 Code No. 288—Amendment No. 2: Daily Newspaper Publishing Business, Art. III (May 2, 1935), in NRA, Codes of Fair Competition, 23:55-58 at 58 (1935). This wording suggests that classification as “professional” no longer excluded all reporters. The trade’s leading magazine accepted this interpretation: “Code Wage Changes Accepted by NRA,” EP 67(52):28 (May 11, 1935). See also Emery, History of the American Newspaper Publishers Association at 226. The term “editorial writers” was usually synonymous with “news department”; if it was used in that sense here, then the references to correspondents
department employes will get the ‘benefit’ of these...hours for about six weeks.”

White-Collar Industries

The code minimums usually relate to workers employed directly in manufacturing or productive processes. The “white-collar” workers scattered through thousands of business establishments, poorly organized, considered for the most part in the category of “general overhead” rather than “direct production cost,” were to a large extent an afterthought. Most of the codes do not classify clerical workers according to occupation but merely lump accountants, bookkeepers, stenographers and office and clerical help in one category, with a single minimum-wage provision.

It is instructive to compare the treatment of white-collar workers in manufacturing and allied industries with that accorded them in such virtually purely white-collar businesses as banking, investment banking, and stock exchanges. Given the almost uniform lack of success which labor had in pressing demands in mass production industries, it is hardly surprising that these political-economically powerful industries that had been barely touched by unionism did not have to make concessions to labor after they had formulated codes that one-sidedly served their own interests.

Bankers were the first to go through a code hearing. On September 28, 1933, the American Bankers Association presented its code, which self-generously proposed a 40-hour week averaged over 13 weeks. This ample basic flexibility was then considerably widened by the supplementary provisions. First, in areas in which seasonality of business “making necessary the moving of some product within a limited period imposes upon banking facilities an unusual demand, employees of banks subject to such peak demand may work...48...hours per week for a period not to exceed...16...consecutive weeks.” Second, all employees “required
to perform extra work or observe later hours in connection with periodic examination by Federal or State banking authorities, over which the bank has no control either as to the time of occurrence or as to the duration, shall be exempt during such periods" from the aforementioned hours limitations. Third, employees in banks in towns of less than 2,500 population employing no more than two persons in addition to executive officers were also excluded as were employees in a managerial or executive capacity "or in any other capacity of distinction or sole responsibility" receiving more than $35 weekly.379

Five days before the hearing took place, Joel Berrall of the LAB sent a memorandum to Deputy Administrator A. D. Whiteside pointing out that the proposed 40-hour week was “[o]bviously...too long to re-absorb a significant number of white collar workers who have lost their jobs as a result of the depression and of the enormous number of bank failures since 1929.” The 13-week averaging “cannot be allowed” because it would permit “banks to work regular employees over time [sic] during temporary peaks without adding a single member to their staffs. It is our contention that it is socially desirable that every business should take on part-time workers and relieve the community of the burden of caring for the unemployed during the peak periods when it is most able to do so.” To be sure, Berrall conceded, banks, like any business had to have “flexibility,” but time and a half for overtime would permit banks to “retain key men as long as necessary during such peaks” but would also give them an “incentive to taking [sic] on part-time workers for routine work.”380

Unsurprisingly, bankers’ overreaching prompted sharp opposition from labor. Rose Schneiderman of the Labor Advisory Board straightaway made “a plea to the bankers to lead the way in doing something for the long neglected and long-suffering white collar workers.”381 In light of the fact that more than 20 percent of office workers had lost their jobs between 1929 and 1932, with even more unemployed since then, she could not understand how a workweek longer than 35 hours would alleviate unemployment.382 Because governmental examinations were a regular part of banks’ operations, Schneiderman found it so incomprehensible and “wholly unjust” that the employees should bear their cost that she hoped the proposal would be withdrawn.383 The representative of the AFL, Annabel Lee

379NRA, HCFC, Hearing No. 39: Bankers 10-11 (Sept. 28, 1933) (Film No. 4).
381NRA, HCFC, Hearing No. 39: Bankers at 65.
382NRA, HCFC, Hearing No. 39: Bankers at 65, 67.
383NRA, HCFC, Hearing No. 39: Bankers at 70-71.
Glenn, who spoke on behalf of stenographers, typists, bookkeepers, clerks, and other office workers who were members of Federal labor unions affiliated with the AFL, beyond agreeing with Schneiderman about examination work, objected to the hours-averaging. Instead, she proposed a seven-hour day and 35-hour week, with time and a half for longer hours, but urged that new workers be hired at rush times. Since every bank employee occupied a position of "distinction" and "responsibility," Glenn asked,

why should an employee be penalized because he is getting a salary of $35 per week, which in itself is no very high wage. Surely such an employee should be protected from exploitation and should come under the same limitation of hours of work as any other employee, or receive additional consideration at a rate of time and a half for overtime.

The rather lengthy account of the hearing in the Times, which mentioned Schneiderman and Glenn, but failed to explain the hours provisions or their criticism of them, bizarrely asserted that "no substantial opposition" had developed, but correctly predicted that the code would quickly "be whipped into shape." Five days after the hearing, Deputy Administrator Whiteside wrote a memorandum to Johnson reporting that at the hearing the LAB and AFL had "presented a plea for white collar workers generally. Conceding that banking employees received higher comparative wages, they requested the bankers, in substance, to lead the way in doing something for this class. To that end they suggested voluntary changes in the proposed Code providing shorter hours with overtime pay in rush periods." Nevertheless, Whiteside concluded that the code complied with the NIRA and recommended approval. Disregarding his Labor Advisers' objections, the previous day LAB chairman Leo Wolman had already approved the code's labor provisions. Thus despite the fact that all of the bankers' aforementioned extraordinary self-serving hours provisions remained unchanged, and totally ignoring labor's objections, NRA Administrator Johnson

384 NRA, HCFC, Hearing No. 39: Bankers at 72-75.
385 NRA, HCFC, Hearing No. 39: Bankers at 75.
388 Leo Wolman to A. D. Whiteside (Oct. 2, 1933), NAMP, Microcopy No. 213, DSNRA 1933-36, Roll 10. Thomas Emerson, who later became one of the leading legal-academic advocates of civil liberties, approved the code on behalf of the NRA Legal Division. Thomas I. Emerson to A. D. Whiteside (Sept. 20, 1933), in id.
claimed that the "concessions and the shortening of hours" in the code would "bring about additional employment...."389

A sense of the distinctly non-paternalistic approach of banks toward their employees can be gleaned from correspondence preserved in the NRA archives. For example, just days after the code had been approved, the Banking Code Committee received an inquiry from the Montclair Trust Company as to whether a bank could take credit for "time out taken by an employee due to Holidays, Illness and Vacation, deducting these hours from the average for the thirteen-week period in order to ascertain the overtime due, if any...." The committee straightforwardly commented that, given the code's employment-increasing objective, it could be assumed that the drafters of the maximum-hours provision included usual holidays and paid vacations in the 40-hour calculation. After all: "If this were not the intention and the employees were required to make up such time, holidays and vacations would have no meaning as a rest period free from labor." However, in spite of this basic insight and without explanation, not only did the committee leave the treatment of sick days to the employer's discretion, but it soon reversed its aforementioned opinion on the treatment of holidays as well, expressing the feeling that the bank should be given credit for holidays for purposes of hours-averaging: "It can be readily understood that in the case of single day holidays affecting all of the bank employees, the entire work of the bank becomes necessarily congested on the succeeding business day, and [sic] for which the bank might reasonably be entitled to some leeway."390

In January 1934 a bank employee in Queens working 39.5 hours a week as a floorman for $100 a month wrote to Administrator Johnson to explain that when a national holiday is celebrated, "[m]y employer claims that I owe him for this time." Henry J. Oestreich wanted Johnson to tell him whether the bank was "living up to the code.... It is not so much...the hours that is troubling me but if an employer displays a NRA sign he should live up to it."391 A month later, presumably in response to Oestreich's question, the LAB Interpretations Committee, taking a more pro-employer position than the bankers themselves on the Banking Code Committee, informed an assistant deputy administrator dealing with


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the banking industry that the answer to whether employees on a monthly salary had to "make up days lost to legal holidays" turned exclusively on whether they had been required to do so before the code's adoption.\footnote{A. Howard Meyers to Myron F. Ratcliffe (Feb. 10, 1934), in NAMP, Microcopy No. 213, \textit{DSNRA 1933-36}, Roll 10.} Or, as the NRA put it two months later in an interpretation that was emblematic of the agency's timid attitude toward a whole range of labor-management relations, "the intention of the Code is not to change established customs of employers with respect to legal holidays."\footnote{Myron Ratcliffe and Charles Eastman, "Code History: Code of Fair Competition for Bankers" at 40 (Mar. 20, 1936) (referring to interpretation of Apr. 30, 1934), in \textit{NAMP}, Microcopy No. 213, \textit{DSNRA 1933-36}, Roll 10.}

The labor provisions in the stock exchange and investment banker codes coincided with one another, in Johnson's words, "because of the inseparable relationship of the two businesses."\footnote{Code No. 141: Investment Bankers (Nov. 27, 1933), in \textit{NRA, Codes of Fair Competition}, 3:509-16 at 511.} At the hearing on October 17, 1933, the stock exchange firms packaged their basic "maximum hours" proposal as "a 40-hour week, except that in order to meet contingencies which cannot be anticipated and over which the employers have no control and in order to consummate contracts for the purchase and sale of securities and commodities the said hours...may be increased but not to exceed a total of 44 hours per week averaged over a period of 4 months without overtime." The employers asserted that 40 hours was "an irreducible weekly minimum"\footnote{\textit{NRA, HCFC}, Hearing No. 466: Stock Exchange Firms 38-39 (Oct. 17, 1933) (Raoul Desvemine) (Film No. 69).} and that sudden and unexpected fluctuations made it "impossible to employ additional help so as to clear the transactions with the speed required by Stock Exchange Rules and the general nature of the business." Without explaining why firms could not simply lease more telephones, they claimed that the physical equipment they used such as phones "only permit the effective work by a certain number of persons...."\footnote{\textit{NRA, HCFC}, Hearing No. 466: Stock Exchange Firms at 44 (Desvemine).} The stock exchange firms illustrated, as the bankers had not, whom they meant by employees in a capacity of "distinction or sole responsibility": senior employees in charge of various special services who needed to complete transactions had to remember many details and be so well versed in the business that they acted "almost instinctively. It would be utterly impossible...to allow these employees...to consider the day's work closed and endeavor to fill their places with other employees. They must, in view of the nature of their responsibility, continue to work...until the day's trans-
actions are completed.” In effect categorizing them as what would under the FLSA be known as administrative employees, the stock exchange firms included them with what, after the NRA codes had barely been in existence for three months, employers already felt justified in calling “the customary exemptions of executives, managers, partners, etc., for, in many respects, the nature of their employment is very much of the same type that is expected from a manager, although it cannot strictly be so classified.”

Labor representatives were not impressed by these justifications. E. J. Tracy of the AFL, who characterized most of the industry’s employees as “clerical employees of one form or another,” spoke with reference to “that vast unorganized group of workers....” In particular he objected to the averaging scheme, under which an employee might be required to give 64 hours of overtime during four months—“over a week and a half of the employee’s time granted gratuitously to the employer.... We protested vigorously time and again over those average hours, we feel it is wrong, it is stopping up reemployment..., and we would like to see it stopped...as soon as it can be.” Having made similar protests “continuously before all of the boards,” Tracy cut short his remarks, declaring frankly that labor was not satisfied that the NRA was meeting its responsibility.

Representing the Labor Advisory Board, William Calvin (who was also assistant to the secretary of the AFL’s Hotel Trades Department) complained not only that 44 hours were too many, but that employers had submitted no evidence to indicate to what extent unemployment would be relieved by such a long workweek. Doubting that it would restore a single person to employment and refusing to approve such a long week in the face of 10 million unemployed, he advocated a 30-hour week plus double time for additional hours “to make it more profitable to employ additional help rather than work regular employees overtime.”

Yet more specific criticism came from Joel Berrall of the Labor Advisory Board, who, several days before the code hearing, wrote a memorandum to Deputy Administrator Whiteside pointing out that the $35 weekly salary identifying excluded executives and managers was “not high enough to guarantee the Administration against the chiselling employers who may create a title for some relatively unimportant employee now receiving more than $35 per week in order

397NRA, HCFC, Hearing No. 466: Stock Exchange Firms at 45 (Desvemine). To be excluded these employees also had to receive more than $35 weekly.
398NRA, HCFC, Hearing No. 466: Stock Exchange Firms at 110.
399NRA, HCFC, Hearing No. 466: Stock Exchange Firms at 112.
400NRA, HCFC, Hearing No. 466: Stock Exchange Firms at 113.
401NRA, HCFC, Hearing No. 466: Stock Exchange Firms at 121, 139 (quote).
to exempt him or her from the maximum hours provision....” Instead, he proposed a minimum weekly salary level of $45.402 At the hearing, against a background of “a great number of experienced employees ready and willing to jump into a part-time job when a part-time boom may develop,” Berrall proposed a 35-hour week with overtime permitted “only when no other part or full time help is available, and then only at a time and one half rate which will act as an incentive to good management to seek out this extra help from the list of those laid off since 1929.”403 With custom and data showing that the average workweek in brokerage houses was 40 hours, Berrall called employers’ 40-hour proposal a “joke” in the face of a million unemployed office workers and left it to his listeners to devise an epithet for the 44-hour averaged week without overtime.404 The Labor Advisory Board was willing to accommodate the “flexibility” it conceded as an “undeniable necessity” in an industry that probably owed its existence to temporary fluctuations in economic activity. Not only would it exempt executives and the “indispensable minimum of key men,” but it “permitted extreme latitude” in daily hours, requiring time and a half—than which there was “no better way of forcing management to do the thing which the country expects of it”—only on a weekly basis. Berrall contrasted this rule with employers’ time and one-third proposal, which would have kicked in only after 48 hours (and at the end of each four-month period for hours in excess of the 44-hour average), and would not have amounted to much of a penalty on wages as low as $14 a week or 35 cents an hour.405 As Berrall had noted in his memo to Whiteside, averaging hours over four months would not induce employers during peak periods to hire the plenty of unemployed brokerage clerks in New York City.406

Ignoring all these objections, Wolman, the chairman of the LAB, quickly approved the code’s labor provisions.407 In recommending that Roosevelt approve the stockbrokers’ and investment bankers’ codes, Administrator Johnson highlighted this payment of overtime (without mentioning its rate), but then quickly added that it was “of minor importance”408 given the “common knowledge that

403 NRA, HCFC, Hearing No. 466: Stock Exchange Firms at 146-47.
404 NRA, HCFC, Hearing No. 466: Stock Exchange Firms at 148.
405 NRA, HCFC, Hearing No. 466: Stock Exchange Firms at 149-50.
406 Berrall to Whiteside at 1 (Oct. 13, 1933).
408 Code No. 141: Code of Fair Competition for Investment Bankers (Nov. 27, 1933),
Stock Exchange firms are exceptionally generous in bonus distributions to employees during active markets. How useful this generosity was likely to be to office workers remained doubtful in light of the employers’ claim that “[c]ontrary to common belief, the brokerage business is not highly lucrative,” with all New York Stock Exchange firms having lost money during the preceding three years.

That the labor representatives’ criticisms and proposals had little chance of being adopted was foreshadowed by the comments of the presiding officer, Deputy Administrator Arthur Whiteside, the president of Dun & Bradstreet, who, while admitting that “[i]t may be that the codes have been giving too long working hours” and that the NRA might be “required to moderately step into the hours of work to bring back employment,” cautioned that reemployment had to be accomplished “without undue hardship or without very great additional burden to any industry or trade.” And in fact, scarcely two weeks later Roosevelt approved the stock exchange firms’ code without any changes having been made to the hours provisions.

With the president’s approval of the identical rules in place two days before the hearing on the investment bankers’ code, the outcome was a foregone conclusion. Nevertheless, labor representatives persisted, as a Brookings Institution study put it, in “striking an attitude.” A researcher from the Women’s Bureau of the DOL pointed out that since hours for clerical workers had been much shorter than for industrial workers, reemployment might require setting maximum hours at a lower than the industrial level. Moreover, since one-fourth of female and one-half of male office workers were paid $150 or more per month, raising the exemption level from $35 to $50 would also accelerate reemployment. The representative of the Bookkeepers, Stenographers and Accountants

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409 Code No. 95: Code of Fair Competition for Stock Exchange Firms (Nov. 4, 1933), in NRA, Codes of Fair Competition, 2:481-87 at 482.

410 "Brokers Tell NRA of Lost Business,” NYT, Oct. 18, 1933 (5:3-5). Disregarding labor enforcers’ universally registered perception of the lack of correlation between few complaints and few violations, the NRA’s in-house history of the code concluded from the small number of complaints that it was evident that employers had “universally complied” with the hours provision. William R. Clark, “History of the Code of Fair Competition for the Stock Exchange Firms” at 51 (Jan. 1936), in NAMP, Microcopy No. 213: DSNRA 1933-36, Roll 164: Code 95: Stock Exchange Firms Industry.

411 "Washington Picks Recovery Boards and Chief Experts.”

412 NRA, HCFC, Hearing No. 466: Stock Exchange Firms at 156, 157.

413 Lyon et al., National Recovery Administration at 443.

414 NRA, HCFC, Hearing No. 244: Investment Bankers 25, 26, 29 (Nov. 6, 1933)
Union, referring to a 1928 survey showing that 64 percent of firms did not pay for overtime, urged an end to this "abuse" and imposition of time and a half after 35 hours as a means of increasing employment.415

The Labor Advisory Board, complaining that the hours-averaging procedure was very difficult to control and that white-collar workers "were more exploited by being forced to work extra time without overtime payment than...the majority of factory workers," proposed a maximum 42-hour week and nine-hour day subject to time and a half after 35 and seven hours, respectively, and inapplicable to managers and executives receiving at least $50 a week.416 The NRA's Division of Research and Planning, objecting to Whiteside that the exceptions to the hours provision were too broad, asked the obvious question as to the meaning of "in any capacity of distinction or sole responsibility,"417 but these objections, like labor's, were fruitless: three weeks later President Roosevelt approved the investment bankers' code with its hours provisions intact.

One white-collar industry, however, constituted an exception to this sequence of bootless interventions by labor advocates: real estate brokerage, which in 1933 employed about 30,000 people, more than half of whom were commission employees, down from about 38,000 and 23,000, respectively, in 1928.418 The code as proposed by employers was, like that of the other white-collar industries, exceedingly self-generous. Accounting, clerical, inside sales, and office employees' 40-hour week was subject to averaging over 13 weeks and one further exemption: "Where cases of peak or seasonal (Spring and Fall Renting Seasons) requirements impose upon the Real Estate Brokerage Industry an unusual demand, employees...may work 48 hours per week for a period not to exceed 12 consecutive weeks." Like the other white-collar industries, employees in a "capacity of distinction or sole responsibility" were totally excluded.419

(Ethel Erickson) (Film No. 41).

415NRA, HCF, Hearing No. 244: Investment Bankers at 29-30 (Evelyn Wright).
416NRA, HCF, Hearing No. 244: Investment Bankers at 36-37 (Walter Cook).
417James E. Hughes, Division of Research and Planning, to A. D. Whiteside (Nov. 1, 1933), Code 141: Investment Bankers Industry, in NAMP, Microcopy No. 213, DSNRA 1933-36 (1953), Roll 79.
418Code No. 392: Real Estate Brokerage Industry (Apr. 9, 1934), in NRA, Codes of Fair Competition, 9:259-71 at 260 (1934). The figure of 30,000 referred to those employed by members of the National Association of Real Estate Boards; it was estimated that total industry employment was 50,000. Roy Wenzlick and Arthur Fridinger, "Real Estate Brokerage Industry" (n.p.) (Jan. 15, 1934), in NAMP, Microcopy No. 213: DSNRA 1933-36 (1953), Roll 137: Code 392: Real Estate Brokerage Industry.
419NRA, HCF, Hearing No. 390: Real Estate Brokerage 7-8 (Jan. 10, 1934) (Film
National Recovery Administration Codes of Fair Competition

Joel Berrall, the Labor Advisory Board representative who had failed to effect change at the stock exchange hearings, had apparently not expected to fare any better with the real estate brokers: at the hearings on January 10, 1934, he lamented that although he had pointed out his objections to the code proposal regarding office workers to the employers’ representatives at a conference a month earlier, unfortunately none of them had been met by the time of the hearing.420 Berrall focused first on the 13-week averaging procedure, which he characterized as “almost impossible to enforce” because it interfered with employee self-enforcement: “no employee will be able to tell whether he has worked an average of 40 hours or not unless he keeps note of his hours every day for 13 weeks. Not one in a hundred workers would do it. And even if they did, I hardly need tell you what the result would be if they disputed their employers[‘] word at the end of the 13 weeks.”421

Berrall recognized that he was “running up against the argument” that office workers’ hours had never before been “definitely limited. They have always worked overtime if the work was there to do...and were compensated for this overtime by being given vacations with pay and also paid while they were sick.” However, reemployment was the NIRA’s “primary business,” and “some adjustments, which will be inconvenient and disrupting temporarily, will have to be made.” Since 40 hours was at that time the typical workweek for clerical employees, it could not relieve unemployment, which was “very nearly as acute among this class of workers as it is among manual workers.” Since, according to a 1932 NICB survey, 800,000 of the four million office workers enumerated by the 1930 census were unemployed, and since very few codes provide less than a 40-hour week for office workers, the NRA had “done practically nothing for the ‘white collared’ worker.” Because “the place to begin to do something for the white collared worker, of course, is in an industry like this one where they predominate,” Berrall recommended a 35-hour, 5-day week. And in order to preempt the objection that he was not accommodating the need for “flexibility for the busy spring and fall renting season,” he proposed permitting employees to work two hours beyond the seven-hour limit one day a week, provided that they were either given equivalent time off so that the weekly limit of 35 hours was not exceeded or paid time and a half for hours beyond seven or 35.422

Remarkably, the “Code was revised during the recess of this hearing,”423 as a

No. 59).

420NRA, HCFC, Hearing No. 390: Real Estate Brokerage at 56-57 (Jan. 10, 1934).
421NRA, HCFC, Hearing No. 390: Real Estate Brokerage at 57-58 (Jan. 10, 1934).
422NRA, HCFC, Hearing No. 390: Real Estate Brokerage at 58-60 (Jan. 10, 1934).
423Code No. 392: Real Estate Brokerage Industry (Apr. 9, 1934), in NRA, Codes of
result of which the 13-week averaging was deleted and an eight-hour ceiling added to the 40-hour limit. Instead of an explicit and limited seasonal deviation, the approved code permitted employees to work beyond these daily and weekly limits up to 48 hours "[i]n cases of necessity and when additional labor is not available or temporary substitution is found impracticable," provided that they were paid at a one-and-a-third overtime rate.\textsuperscript{424} Perhaps real estate brokerages agreed to make these revisions because, as Johnson noted in his report to Roosevelt, there was "no real labor problem" in the industry since most offices were not working longer than 40 hours\textsuperscript{425} anyway.

\section*{Industries with Strong Union Influence on the Codes}

Mr. Wharton [president of the Machinists union] asserted that labor's part in the making of the codes was "insignificant," and that the conviction was growing in its ranks that the policy of the NRA, "which is glorified by the term 'industrial self-government,' is in reality promoting the establishment of a system of industrial feudalism, a dominion of industry by employers and for employers."\textsuperscript{426}

A final test of unions' ability and/or willingness to press demands for shorter hours on behalf of white-collar workers under the NRA codes can be conducted through the real estate brokerage industry.

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\textit{Fair Competition, 9:260.} The hearing transcript ended with the hearing officer's informing the code's proponents that "[w]e can only act as gentlemen when we meet with gentlemen" and declaring a recess sine die. \textit{NRA, HCFC,} Hearing No. 390: Real Estate Brokerage at 125 (Jan. 10, 1934).
\end{flushright}

\textsuperscript{424}Code No. 392: Real Estate Brokerage Industry (Apr. 9, 1934), Art. III, §§ 1-2, in \textit{NRA, Codes of Fair Competition, 9:264.} The language exempting employees in a capacity of "distinction or sole responsibility" was also deleted.

\textsuperscript{425}Code No. 392: Real Estate Brokerage Industry (Apr. 9, 1934), in \textit{NRA, Codes of Fair Competition, 9:261.} The NRA in-house code history also opined that no real labor problems had necessitated code control. Moreover, since two-thirds of the employees worked outside of offices and much of their work was done after the clients' office hours, compliance would have resulted in a material reduction in office workers' hours and little change for salesmen and collectors. Effie Lee Moore, "History of the Code of Fair Competition for the Real Estate Brokerage Industry" at 54-56, 64 (Feb. 24, 1936), in \textit{NAMP,} Microcopy No. 213: \textit{DSNRA 1933-36} (1953), Roll 137: Code 392: Real Estate Brokerage Industry.

\textsuperscript{426}"Mrs. Pinchot Calls NRA a Labor Farce," \textit{NYT,} Mar. 1, 1934 (1:7, 13:2-6 at 3).
by comparing the codes of the few unions in the few industries in which unions exercised real collective bargaining strength that was then embodied in codes. At the time of the NIRA’s enactment, many union leaders had hoped that before issuing labor standards, the NRA would request employers and employees to confer and execute collective agreements. These union officials were, however, as the contemporaneous and encyclopedic Brookings Institution study noted, “soon disillusioned. During the very first day of the NRA, the Administrator ruled that it was not necessary for code labor standards proposed by employers...to be the outcome of collective negotiations between employers and organized employees. The privilege of formulating and presenting labor standards, in the first instance, was to be the exclusive prerogative of the employers.”427 In substance, this judgment did not differ fundamentally from that expressed by left-wing Local 22 of the ILGWU: despite the fact that the international had achieved greater representation on code authorities than any other union, the local offered a resolution at the 1934 convention declaring (with a bow to Marx) that since code authorities were the executive committees of powerful employers’ trade associations, union leaders had undermined their organizations’ independence by serving on them, especially in a minority position.428 The head of the local, Charles Zimmerman, a former Communist who had broken with the Communist Party to return to the ILGWU as one of “the foremost anticommunist tacticians in the American labor movement,”429 was also not substantively transcending the Brookings report when he told the convention that the NRA was not an attempt at industrial democracy, but an effort to stabilize the shaky foundations of the capitalist system.430

Only a handful of code labor provisions were determined largely by collective bargaining: regional agreements under § 7(b) of the NIRA (such as the Appalachian agreement supplementary to the bituminous coal industry and in the building trades); codes incorporating terms of previous agreements (such as in the coat and suit, dress manufacturing, men’s clothing, and legitimate theater industries). In these “special” codes, based on direct collective bargaining, the length of the maximum workweek was, in the view of the Brookings study, clearly

427 Lyon et al., National Recovery Administration at 427.
defined, exceptions were rigidly restricted, and no allowance was ordinarily made for averaging maximum hours over a period of weeks or months. In the normal codes, on the other hand, it was "extremely difficult, as a rule, to discover just how long the maximum workweek is supposed to be; exceptions and exemptions abound; seasonal and emergency variations are permitted; the maximum allows for averaging over a period of weeks and months." To determine whether a violation had taken place under such codes "would call for complex and drawn out computations."

The AFL and the LAB, which spoke for it, demanded that union members be represented on all code authorities so that organized labor could watch over the enforcement of labor provisions and collective bargaining requirements. However, with few exceptions, employer associations opposed such participation, insisting that code authorities were agencies for governing industry, which was exclusively an employer prerogative: "In this matter, as in others," according to the Brookings study, "the NRA hastened to adjust itself to the balance of capital-labor power in the various codified industries. As a result, organized labor secured code authority representation only in very few codes." This higher level of involvement occurred largely in industries in which unions were fairly strong and had, for years, also made common cause with a dominant group of unionized employers against other groups of anti-union employers. In January 1935, of 775 approved basic and supplementary codes, no more than 26 allowed for labor representation on code authorities, some of which governed small and insignificant industries. Of these, 15 were branches of the clothing industry: coat and suit, dress, men's, millinery, blouse and skirt, leather and wool knit glove, ladies handbag, infants and child's wear, cotton cloth glove, men's neckwear, cotton garment, hosiery, light sewing, pleating, hat manufacture; five were in the amusement industry: legitimate theater, burlesque theater, radio broadcasting, motion picture, motion picture laboratory; and six in miscellaneous industries: bituminous coal, brewing, transit, refractories, Nottingham lace curtain, and Schiffli hand machine embroidery. Of Morris Hillquit's view of this representation in the case of the ILGWU one of the union's historians wrote: "The old Socialist was modifying his view of 'the state.' As a Marxist, he continued to believe that 'the state is the Executive Committee of the

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431 Lyon et al., *National Recovery Administration* at 430-31, 440.
432 Lyon et al., *National Recovery Administration* at 441.
433 Lyon et al., *National Recovery Administration* at 458.
434 Lyon et al., *National Recovery Administration* at 459 and 459 n.33. In four industries (coat and suit, legitimate theater, dress, and Nottingham lace curtain) unions had enough bargaining strength to get this participation written into the code itself. *Id.* at 459-60 and 460 n. 34.
ruling class.' But, he added with a twinkle, ‘the working class is now getting a few seats in the Executive Committee.'\textsuperscript{435} In the vast majority of industries, however, the NRA blocked organized labor’s efforts to participate fully in industrial self-government.\textsuperscript{436}

Of the 26 codes that provided for labor representation on the code authority, 21\textsuperscript{437} discriminated against clerical-office employees vis-à-vis production workers with respect to regulation of hours—whether in terms of the length of the maximum workday or workweek, hours-averaging, lower overtime rates, or the exclusion of administrative or confidential employees or assistants. Of the five,\textsuperscript{438} mostly small, industries whose codes did not discriminate against office workers (other than executives, managers, or supervisors), only the transit industry capped general office employees’ hours at a lower level than that of blue-collar workers.\textsuperscript{439}

Summary

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Today...[t]he office is highly mechanized.... There are countless inventions to replace skill by speed. Technology has taken charge of the office just as it has taken charge of the factory. And hand in hand with technology have come the problems which have long been associated with the industrial worker—low wages for unskilled workers; long hours; overtime; rush seasons; piece work; unemployment; over-supply of labor in the market and

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\item \textsuperscript{435}Gus Tyler, \textit{Look for the Union Label: A History of the International Ladies’ Garment Workers’ Union} 176 (1995).
\item \textsuperscript{436}Lyon et al., \textit{National Recovery Administration} at 461. According to Louis Stark, “Labor Wins Place on Code Boards,” \textit{NYT}, Dec. 5, 1933 (2:1), Johnson “capitulated in ‘principle’ to the demand by organized labor that labor be represented on code authorities.”
\item \textsuperscript{437}Bituminous coal, blouse and skirt, burlesque theater, brewing, coat and suit, cotton garment, dress, hat, hosiery, infant and childwear, ladies handbag, light sewing, men’s clothing, men’s neckwear, millinery, motion pictures, Nottingham lace curtain, pleating, radio broadcasting, refractories, and Schiffli hand machine embroidery. Radio broadcasting is classified here because it excluded announcers as managerial employees. Code No. 129: Radio Broadcasting Industry (Nov. 27, 1933), Art. III, § 2(a), in NRA, Codes of Fair Competition, 3:353-64 at 358. This classification was contested by a union at the 1940 white-collar hearings. See below ch. 12.
\item \textsuperscript{438}Cotton cloth glove, leather and wool knit glove, legitimate theater, motion picture laboratories, and transit.
\item \textsuperscript{439}Code No. 28: Transit (Sept. 18, 1933), Art. III, in NRA, \textit{Codes of Fair Competition}, 1:371-79 at 375-76.
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blind alley jobs with little or no chance for promotion. The clerical worker with her white collar used to feel herself superior to her sisters in the factories. ... Today she knows that she is in the same boat with the industrial worker and that the problems of the two groups are practically the same. Her hands may be cleaner when she leaves the office but she works as long if not longer today and her wages are as low if not lower. ... Because of the tremendous over-supply of clerical workers...wages are being cut and women are being made to work long hours without overtime pay; without any protection from the law (except in rare instances)....

One principal reason for the exclusion of white-collar workers from the codes’ protective hours provisions was that in some industries no one advocated their interests at code hearings because labor unions, preoccupied with their own blue-collar members’ interests, either passively acquiesced in management’s exclusion of office workers or tacitly traded them off. Nevertheless, the history of the NRA codes shows that, in contrast to the situation surrounding the FLSA, when neither the labor movement nor any other organization protested the exclusion of white-collar workers from the law’s overtime provision, the AFL at some code hearings vigorously protested their exclusion from the hours provisions of the codes. However, even when union or Labor Advisory Board representatives advocated coverage, they were, in most instances, institutionally too weak to overcome employer resistance aided and abetted by the NRA’s indifference or support.

In establishing the machinery of the codes of fair competition, Roosevelt determined that after a trade association had prepared a code, a public hearing would be held on it at which “every affected labor group,” whether organized or not, would be “fully and adequately” represented in an advisory capacity by a representative of the Labor Advisory Board, which was appointed by the Labor Secretary. The LAB, according to a critical contemporaneous study by the Brookings Institution, had a real albeit small voice in determining labor standards


441An NRA study took an altogether too narrow view in applying the following judgment only to the unlimited hours for office workers in the Bituminous Coal, Retail Solid Fuel, and Graphic Arts codes: “It would seem that the labor unions which participated in the code making for these latter codes neglected the office workers in their industries.” Reticker, Labor Provision in the Codes at 141.

442“Text of President’s Statement on Recovery Act Policies,” NYT, June 17, 1933 (2:2-6 at 5).
in most normal codes: "On the whole, however, the LAB was ineffective" because
the NRA tried to push through codes as quickly as possible and in most situations
"resistance by employers was a much more important factor to reckon with than the
possible resistance of labor"; because prior to the NIRA unions had organized only
small segments of industry (primarily the railroads and the building, printing,
needle, various skilled metal trades), in most industries workers "were unable to
exert much direct pressure upon their employers. For this reason they were also
unable to exert much pressure upon the NRA.... In other words, the continuous
effort of the NRA to adjust itself to the balance of power in capital-labor relations
reflected itself in the code labor provisions which were finally approved. In most
cases, therefore, the Labor Advisory Board could not accomplish much more than
rendering service and striking an attitude." The LAB brought about minor
modifications and established limits beyond which the NRA could not yield
without running the risk that organized labor might withdraw its cooperation. But:
"Only in the unionized industries was the Labor Advisory Board able to shape
labor provisions and to reinforce collective bargaining in accordance with the
desires of the labor groups...." Moreover, in the crucial post-hearing "negotia-
tions with the NRA administrators, business clearly held the upper hand."

In fact, few if any industrial unions were organizing white-collar workers as

443 Lyon, National Recovery Administration at 442-43. Labor Secretary Perkins also
conceded that the LAB "was not in a strong position when it came to pressing the point of
view of the workers in the consideration of the codes. There was relatively little
organization in the large manufacturing and distributive industries where codes were
needed most.... [R]epresentation of working people through their own organizations was
pathetically limited." Frances Perkins, The Roosevelt I Knew 213-14 (1946). At a Senate
hearing two months before the NIRA was declared unconstitutional, Donald Richberg,
NRA general counsel testified that not a single code had been adopted in the form it in
which it had been presented: "it was subjected to fire from the Labor Advisory Board."
Senator Costigan's response that the impression prevailed that the LAB and the
Consumers' Advisory Board had not been successful in their efforts to obtain concessions
prompted Richberg to assert that the impression was "contrary to the fact, because I know
it was otherwise." In final analysis "the result would be somewhat in the nature of a
compromise, and very seldom were the entire recommendations of the Labor Board...ever
accepted." Investigation of the National Recovery Administration: Hearings Before the
Committee on Finance United States Senate, 74th Cong., 1st Sess. 47 (Mar. 7-13, 1935).
Although Elizabeth Brandeis, "Organized Labor and Protective Labor Legislation," in
Labor and the New Deal 193-237, at 206 (Milton Derber and Edwin Young eds., 1957),
may have been right in calling labor's participation at the public code hearings "largely
window dressing," it is not, as shown above, correct to state that "labor's part was virtually
limited to an appearance...just to give approval of the draft."

444 Himmelberg, Origins of the National Recovery Administration at 211.
early as 1933 when the codes were being negotiated. Indeed, white-collar unions were themselves a rarity at that time, and, where in existence, often focused on organizing the insurance industry, which never underwent codification under the NRA.445 In the 1930s, industrial unionists commonly “lumped [office workers] together with management, and office-workers in general were viewed as potential spies for management. ... Male unionists evidently saw nothing wrong with signing contracts through the 1930s and 1940s which exchanged gains for blue-collar members for agreements eliminating office-workers’ bargaining rights.” Even later in the 1930s, with the exception of a few progressive locals of the UAW and United Electrical Workers, “few CIO unions included clerical workers in their contracts, and therefore these industrial union monopolies were tantamount to a ‘no-union’ policy for clerical workers employed by manufacturing firms.”446

The blatant discrimination against white-collar workers in the NRA codes is ironic in light of the fact that even before the first code of fair competition was approved, Donald Richberg, the NRA’s general counsel, had stated with regard to white-collar employees’ status under the NIRA that “the ‘white collar’ worker was one of the great concerns of the administration and this group had the right to be heard before the adoption of any code.”447 The Bookkeepers, Stenographers, and Accountants Union was so “encouraged” by Richberg’s statement that it requested

445In 1923, the Bookkeepers, Stenographers and Accountants Union, Local 12,646 AFL, received a surprise gift of $1,000 from a former member who “unexpectedly came into a large inheritance after marriage” toward the goal of $100,000 to help organize 500,000 “‘white collar’ workers” including bank clerks. “Gives $1,000 to Aid White Collar Union,” NYT, Sept. 10, 1923 (19:4). In 1927, the BSAU announced that it would seek 10,000 office workers—“of whom more than 7,000 were said to be girls”—at Metropolitan Life Insurance Company as members of their “‘white collar’ workers’ union”; among its demands was payment for overtime. Haley Fiske, the president of the company, said that the announcement was made periodically in an attempt to persuade “our people to join a union they laugh at.” “Union to Invade Insurance Field,” NYT, Oct. 17, 1927 (42:1). In 1943, the successor to the BSAU, the UOPWA, signed the largest union contract ever for white-collar employees when it entered into a national agreement with the Prudential Insurance Company affecting 18,000 workers. “Prudential Signs with Office Union,” NYT, Feb. 4, 1943 (19:5):

446Sharon Strom, “‘We’re No Kitty Foyle’s’: Organizing Office Workers for the Congress of Industrial Organizations, 1937-50,” in Women, Work and Protest: A Century of US Women’s Labor History 206-34 at 213 (Ruth Milkman ed. 1985). The UAW was the first major CIO union to try to organize clerical workers, but not until 1941 and then only halfheartedly. Id. at 214. See also below ch. 14.

a hearing on behalf of 500,000 white collar workers in New York City offices and four million altogether in the United States.\textsuperscript{448}

The maximum hours provisions were openly driven by the need for reemployment, but even then employers were given considerable flexibility—in many cases much more so than the FLSA later offered (for example, regarding hours-averaging)—which was not monocausally rooted in absorbing the unemployed, but also had to confront the reality that one condition from which labor unrest resulted was "the duration, extent and intensity of the labor exacted from" workers.\textsuperscript{449} Nor may it be overlooked that since about 90 percent of all workers subject to the NRA's jurisdiction worked under codes providing for at least a 40-hour week, "for the most part the codes did not establish basic hours maxima which were greatly lower than the hours actually being worked. ... The codes did not, therefore, immediately force any widespread additional sharing of work," although they did halt the tendency prevailing in early 1933 to lengthen the workweek, and, consequently, "more workers shared in such work as was available" while the codes were in effect.\textsuperscript{450} Indeed, one NRA retrospective concluded that the "bewildering variety of provision[s]" created a situation in which in general "hundreds of thousands of employees were working long hours under the so-called 40-hour codes,"\textsuperscript{451} while for office workers in particular the NRA did little to change working hours despite the considerable unemployment to which this group was exposed.\textsuperscript{452}

Although he did not have the discriminatory treatment of white-collar workers in mind, the historian of the automobile industry under the NRA was inadvertently right in speculating: "It is not easy to generalize about the N.I.R.A. since its history is so much a history of individual codes..., but if the experience of the automobile manufacturing industry is typical, the statute had a more enduring impact on the nation's industries and particularly on employer-employee relations than has generally been recognized."\textsuperscript{453}

\textsuperscript{448}"Accountants' Code Has 35-Hour Week," \textit{NYT}, July 11, 1933 (4:4). It does not appear that any such hearing was ever held or that any code was ever approved for white-collar workers.

\textsuperscript{449}Lyon et al., \textit{National Recovery Administration} at 546.

\textsuperscript{450}Harry Millis and Royal Montgomery, \textit{Labor's Progress and Some Basic Labor Problems} 482-83, 484 (quotes) (1938).

\textsuperscript{451}Reticker, \textit{Labor Provisions in the Codes} at 170.

\textsuperscript{452}Reticker, \textit{Labor Provisions in the Codes} at 138.

\textsuperscript{453}Fine, \textit{Automobile Under the Blue Eagle} at 429-30.
By the mid-1930s the ILO had also turned its focus on professional workers, on whose unemployment, as an aspect of world economic depression, the rearrangement of working hours would have a positive effect. Nevertheless, since the "overcrowding of the professions" had reached such a "critical" stage that the ILO sought a safety valve: "It would be well to give increasing facilities for the settlement of professional workers in colonies and undeveloped countries."\textsuperscript{163}

\textsuperscript{163}ILO, Minutes of the Seventy-Fourth Session of the Governing Board 136-37 (Feb. 20-22, 1936).