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ARTICLES

REVITALIZING THE FLSA

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Eight hours for work, eight hours for rest, eight hours for what we will.

–Labour movement anthem (circa 1880s)¹

A self-supporting and self-respecting democracy can plead no . . . economic reason for chiseling workers' wages or stretching workers' hours.

–President Franklin D. Roosevelt (1937)²

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1. ANDERS HAYDEN, SHARING THE WORK, SPARING THE PLANET: WORK TIME, CONSUMPTION, & ECOLOGY 1 (1999); see also EARL R. BECKNER, A HISTORY OF LABOR LEGISLATION IN ILLINOIS 178-80 (1929) (discussing post-Civil War efforts by workers to achieve an eight-hour work day in Illinois, including organizing eight-hour movements, eight-hour leagues, proposing a labor party, and the passage of the Eight Hour Work Day Act of 1867).

2. Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, MONTHLY LAB. REV. (June 1978) (quoting Franklin D. Roosevelt, PUBLIC PAPERS, VI 209-14 (1937)), available at <http://www.dol.gov/asp/programs/history/flsa.htm>.

Overwhelming workloads, job insecurity, and conflicting job responsibilities in the nation's workplaces pose a threat to the health of workers

—National Institute of Occupational Safety and Health (1999)³

I. INTRODUCTION

At the turn of the twentieth century, one of America's most pressing social issues was the reduction of worktime. Workers desired more freedom (time) from their jobs for personal, home, community, and cultural life. They were also concerned about unemployment, arguing that employers should "spread the work" by employing more people working shorter hours, rather than employing fewer people working longer hours. Mass movements for shorter work hours culminated in the enactment of state and federal maximum hours labor standards⁴ during the Progressive and New Deal Eras of the late nineteenth and early twentieth centuries. There were two models. The standards either prohibited an employer from employing a worker over a maximum number of hours per day or week, or required overtime pay (150% of an employee's regular rate of pay) when the employer employs the worker over the maximum number of hours per day or week.⁵

The primary federal statute setting maximum hours labor standards is the Fair Labor Standards Act of 1938 (FLSA).⁶ In part, the FLSA provides workers with unwaivable substantive rights to a standard

3. *Increasing Workloads, Job Insecurity Threaten Workers' Health, NIOSH Says*, 28 O.S.H. Rep. (BNA) (Jan. 6, 1999) (reporting the release of *Stress . . . At Work* (NIOSH, Jan. 1999)) (internal quotation marks omitted).

4. Labor standards are "minimum term" laws: laws which attempt to force employers to meet some external (as opposed to contractual) standard on wages, hours, or other conditions of employment [Such laws] impose[] liability standards that differed from the common law, which supplied the background rules for the employment relationship, when it was enacted.

Keith N. Hylton, *Labor and the Supreme Court: Review of the 1996–1997 Term*, 13 LAB. LAW. 263, 269 (1997); see also James J. Brudney, *The Changing Complexion of Workplace Law: Labor and Employment Decisions of the Supreme Court's 1999–2000 Term*, 16 LAB. LAW. 151, 154–56 (2000) (noting that the Rehnquist Court has increased its focus on "statutes addressing the right to minimum levels of compensation, benefits, or safety and health protection" and has paid less attention to labor-management relations and race or sex discrimination).

5. See *infra* Part II. (discussing short hours movements and the Progressive and New Deal Eras' political responses).

6. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2001)).

national minimum hourly wage (initially \$0.25 per hour, currently \$5.15 per hour) and overtime pay over forty hours in a workweek. These standards address the “evil of ‘overwork’ as well as ‘under pay.’”⁷ They also contain numerous narrow exemptions. The white-collar exemptions garner the most scrutiny of all the exemptions, excluding “any employee employed in a bona fide executive, administrative, or professional capacity” from minimum wage and overtime pay.⁸ Historically, white-collar employees were high paid individuals in managerial positions, close to owners, many who would eventually operate their own businesses.⁹ The FLSA charges the U.S. Department of Labor (USDOL) with the duty to promulgate rules delineating and defining the white-collar exemptions.¹⁰

Paradoxically, the first half of the twentieth century also saw widespread predictions that work would disappear and that technological and economic progress would steadily reduce work hours. Social critics such as George Bernard Shaw predicted a two-hour workday by the twenty-first century.¹¹ Experts estimated that by the 1990s, the United States would have either a twenty-two hour workweek, a six-month work year, or standardize the retirement age at thirty-eight. Academia developed leisure studies programs to prepare for the onslaught of free time that would otherwise stultify the masses.¹²

The United States, at the beginning of the twenty-first century, has turned the twentieth century work hours/technological and economic progress conundrum on its head. The nation is currently confronting technological, political, social, and economic changes paralleling the

7. See *infra* Parts II.B.3., III.A.-B. (reviewing the FLSA).

8. 29 U.S.C. § 213(a)(1) (2001).

9. See *infra* Part III.C.1. (discussing white-collar employees).

10. See *infra* Part III.C.2. (discussing the development of the rules delineating and defining the white-collar exemptions).

11. BENJAMIN KLINE HUNNICUTT, KELLOGG’S SIX-HOUR DAY 1, 4, 220 n.7 (1996) (discussing the “threat of leisure” in the 1920s); see also Robert D. Putnam, *Foreword* to JOHN P. ROBINSON & GEOFFREY GODBEY, TIME FOR LIFE, at xv (1997) (discussing a 1964 Life magazine article “wringing its hands over the prospect that time-saving technologies and economic progress would leave the nation with time on its hands and little to do”); JULIET B. SCHOR, THE OVERWORKED AMERICAN 4 (1991) (discussing the “leisure scare” of the first half of the twentieth century).

12. SCHOR, *supra* note 11; see also ACAD. OF LEISURE SCI., ACADEMY OF LEISURE SCIENCES “WHITE PAPERS” ON LEISURE, RECREATION AND TOURISM, at <http://www.eas.ualberta.ca/elj/als/als1.html> (last visited Sept. 7, 2001) (outlining the activities of the Academy, an organization formed by educators to further the intellectual advancement of leisure science); BENJAMIN KLINE HUNNICUTT, WORK WITHOUT END: ABANDONING SHORTER HOURS FOR THE RIGHT TO WORK 268 (1988) (discussing the “[t]hreat of science” whereby scientists were singled out as scapegoats for the depression during the 1930s, creating “[t]echnological unemployment[]”).

eras that produced maximum hour labor standards.¹³ Technological and economic progress has, however, increased, not decreased, work hours. Home computers and faxes, voice and e-mail, beepers, and cell and car phones have lured workers into a 24/7 marketplace workweek.¹⁴ Non-marketplace household work hours have also increased as washing machines, vacuum cleaners, and other labor saving devices created higher expectations for household cleanliness.¹⁵

There are no mass movements today addressing increasing work hours. Instead, the issue has become a staple of mass media and academic debate. This is particularly true regarding the phenomenon called “time-squeeze,” the shortage of leisure time resulting from long work hours. In addition, there is substantial debate regarding, and

13. JILL ANDRESKY FRASER, WHITE-COLLAR SWEATSHOP: THE DETERIORATION OF WORK AND ITS REWARDS IN CORPORATE AMERICA 20 (2001) (comparing changes in the workplace during the 1990s to the industrial revolution); ROBERT WILLIAM FOGEL, THE FOURTH GREAT AWAKENING & THE FUTURE OF EGALITARIANISM 23-25, 40, 51-59, 102-04, 113-17, 124-29 (2000) (discussing cycles of technological and economic change, urbanization, cultural transformations, political crises, and religious awakenings, such as the social gospel—the Third Awakening—response to the urban crisis between the 1890s and 1920s). Drawing parallels between the United States in 1900 and 2000, AFL-CIO President John J. Sweeney stated at the 2000 American Bar Association annual meeting that: “‘once again we’re in great economic transition’ . . . ‘from national to global, from industrial to information age, from the assembly line to the Internet’ . . . [O]nce again, new technologies are ‘changing the way we live and work, and once again the transition is being driven by great corporations and big banks.’” *Employment, Labor Laws Interdependent, ABA Told: AFL-CIO’s Sweeney Urges Strengthening Labor Laws at ABA Meeting*, 164 Lab. Rel. Rep. (BNA) 412, 413 (July 24, 2000). *But see* ROBERT J. GORDON, DOES THE “NEW ECONOMY” MEASURE UP TO THE GREAT INVENTIONS OF THE PAST?, (Nat’l Bureau of Econ. Research, Working Paper No. 7833, 2000), at <http://www.nber.org/papers/w7833> (arguing that computers and the internet fall short in their impact on American living standards during the second half of the twentieth century, compared to how electricity, motor and air transportation, motion pictures, radio and indoor plumbing transformed life between 1860 and 1900).

14. FRASER, *supra* note 13, at 10, 81, 83, 200 (examining the link between technology, the 24/7 work environment and stress); *see also* ROBERT B. REICH, THE FUTURE OF SUCCESS 117-18 (2000) (discussing the intrusiveness of technology); HAYDEN, *supra* note 1, at 1-12 (examining the interrelationship among economic development, consumption, overwork, and environmental destruction); Charles Piller, *Erasing Our Sense of Place the Relentless, 24/7 Electronic Communications Lifestyle May Be Fragmenting Human Contact, Eroding Feelings of Belonging and Attachment that Many Consider Cornerstones of Happiness and Community*, CHI. TRIB., Nov. 13, 2000. *See infra* Part IV.B.2.b. (discussing time deepening). *But see generally* JEREMY RIFKIN, THE END OF WORK: THE DECLINE OF THE GLOBAL LABOR FORCE AND THE DAWN OF THE POST-MARKET ERA (1995) (arguing the world is becoming polarized into irreconcilable forces, the information elite who control and manage the high-tech global economy, and the growing number of workers permanently displaced by sophisticated computers, robotics, telecommunications, and other cutting-edge technologies; redefining the individual in a workless world, society should develop a “third sector” of volunteer service workers to restore communities and build a sustainable culture).

15. SCHOR, *supra* note 11, at 83-105 (discussing overwork in the household).

empirical evidence supporting, the thesis that Americans have become “overworked” since the 1970s.¹⁶

There is also a growing body of research arguing that time-squeeze and overwork are better understood by examining the household, not the individual, level.¹⁷ “Dual-earner” households (working couples) currently outnumber “single-earner” households. This trend corresponds with the dramatic increase of women in the workforce. In addition, dual-earner households work more combined hours than the sum increase of working spouses.¹⁸ This development escapes the protective scope of the FLSA maximum hours labor standards. The standards, their white-collar exemptions, and the USDOL’s regulations delineating and defining the exemptions, were designed to address the single-earner household model. Under this model, a breadwinner (particularly exempt white-collar male employees) perform long hours of marketplace work, enabled by a stay-at-home spouse (female) performing the non-marketplace work for the household.¹⁹ This model has a detrimental effect on many dual-earner households where both partners are often exempt white-collar workers who come home from their first shift marketplace work hours to a second shift of non-marketplace household work.²⁰

While Americans work double shifts (market and non-market work), trying to balance their jobs and personal lives, and the media and academia ponder the existence of time-squeeze, Congress debates the continued relevance of overtime pay under the FLSA. The most vocal proponents for revamping the maximum hours labor standards argue business and labor must form a new paradigm recognizing the need for flexibility to address the rapid changes in employment and the economy

16. See *infra* Parts IV.-V. (reconciling empirical studies confirming the continuing relevance of maximum hours labor standards).

17. ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* 197-259 (1997) (discussing the implications and alternatives to “time bind,” e.g., the absence of a “work-life balance”); see also Laura Leete, *History and Housework: Implications for Work Hours and Family Policy in Market Economies*, in *WORKING TIME: INTERNATIONAL TRENDS, THEORY AND POLICY PERSPECTIVES* 251-261 (Lonnie Golden & Deborah M. Figart eds., 2000) (describing how market economies have created a time bind for parents, making it increasingly difficult for them to raise children and be economically productive). See generally ANN OAKLEY, *WOMAN’S WORK: THE HOUSEWIFE, PAST AND PRESENT* (Vintage Books ed., 1976) (1974) (analyzing women’s roles in pre-industrial, industrial and post-industrial society, and the myths of “the woman’s place,” e.g., the division of labor by sex and motherhood).

18. See *infra* Part IV.B.4. (discussing time-squeeze as a household issue).

19. See *infra* Part IV.B.4. (discussing the mismatch between work hours behavior and preference).

20. See *infra* Part IV.B.4.b. (discussing work patterns and preferences).

that have occurred since the enactment of the FLSA. The existing model is an outdated system produced from an agrarian and manufacturing economy. They further argue that the USDOL must comprehensively review and adjust the regulations for the white-collar exemptions. The current “regulatory structure is a minefield which employers attempting to create more efficient workplaces cross at their peril.”²¹

Opponents of changing maximum hours labor standards respond that the politics of overtime have not changed in over sixty years. Employers seek more exemptions from, and workers seek more inclusion within, the labor standards. The standards are not broken—so do not fix them.²²

This article comprehensively reviews the FLSA maximum hours labor standards and proposes statutory changes. It does this by examining the original rationales of maximum hours labor standards, reviewing empirical research corroborating their continued relevance, and outlining proposed changes to the FLSA that reconfirm and advance their policies and purposes. This analysis shows that the underlying policies and purposes of minimum wage and overtime pay are as relevant today and in the foreseeable future as they were when first enacted over sixty years ago.

The article contains six parts. To begin, Part II examines the historic origins of maximum hours labor standards. In particular, it reviews the short hours movements in American history, judicial review of shorter hours legislation, and the evolution of federal maximum hours labor standards, leading to and including the FLSA. Part III reviews the FLSA minimum wage and overtime provisions as maximum hours labor standards, and the development of the regulations for the white-collar exemptions. It also examines legislative studies, arguments and proposals for revising the FLSA.

Parts IV and V surveys and reconciles the literature on time-squeeze. This literature confirms that, while Americans may have forgotten the rationales for maximum hours labor standards, the standards are as vital today (if not more so) as they were at the turn of the twentieth century. Specifically, Part IV sets forth the “overworked American” thesis, reviewing mass media treatment and academic literature on the issue. Part V reviews the “overworked American” thesis in light of studies addressing work time preference and occupational

21. Subcomm. ON OVERSIGHT & INVESTIGATION OF THE HOUSE COMM. ON EDUC. & THE WORKFORCE, 106 CONG., AMERICAN WORKER PROJECT: SECURING THE FUTURE OF AMERICA'S WORKING FAMILIES 79 (Aug. 3, 1999) [hereinafter, AWP REPORT].

22. See *infra* Part III.C.3. (discussing the politics of the white-collar exemptions).

stress, time-use data, growth in the contingent workforce, employee insecurity, wage stagnation, and the effectiveness of maximum hour labor standards in reducing work hours and spreading the work.

Part VI proposes adjusting the statutory framework to revitalize the FLSA maximum hours labor standards. This proposal includes amendments to: (1) replace the current minimum wage standard with a living wage that automatically increases annually with the consumer price index; (2) cap work hours and replace the three white-collar exemptions with one exemption for the top 10% of an employer's workforce, analogous to the "key employee" exemption under the Family Medical Leave Act of 1993 (FMLA);²³ and (3) require employers to provide employees with four weeks of paid vacation per calendar year. This framework reconfirms the policies and purposes of maximum hours labor standards, protecting individuals and dual-earner households squeezed for time, and provides employers and the judiciary with clear, comprehensive, and up-to-date standards.

II. HISTORIC ORIGINS OF MAXIMUM HOURS LABOR STANDARDS

Before comprehensively reviewing and revising the FLSA maximum hours labor standards, "[i]t is worth recalling that the vision of working less and living more has strong historical roots."²⁴ Maximum hours labor standards arose from the "short hours movements" of the late nineteenth and early twentieth centuries.²⁵ The short hours movements were a major source of worker solidarity and growth of the United States labor movement, embracing workers' desire for personal freedom (time) from industrial order, and freedom for home life and cultural matters outside wage and job concerns.²⁶

23. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601-2654 (2001)).

24. HAYDEN, *supra* note 1, at 44 (describing the vision of "working less and living more," as a "[f]uture with a [h]istory").

25. BECKNER, *supra* note 1, at 178 (outlining the movements in Illinois for a shorter legal work day and work week); HUNNICUTT, *supra* note 11, at 46-59 (discussing scholarly literature on the cultural history of work time); SCHOR, *supra* note 11, at 72-76 (same); *see also* Jerry Useem, *Welcome to the New Company Town*, FORTUNE 68 (Jan. 10, 2000) (noting that "[o]verwork didn't always seem so inevitable[;] [i]n the early part of the century, reducing work hours was issue No. 1 for labor unions, culminating in 1938 with the passage of the Fair Labor Standards Act and the 40-hour workweek").

26. HUNNICUTT, *supra* note 11, at 49 (arguing that shorter hours was the broadest, most inclusive, labor issue; wages divided workers by skill, sex and ethnicity); *see also* SAR A. LEVITAN & RICHARD S. BELOUS, *SHORTER HOURS, SHORTER WEEKS: SPREADING THE WORK TO REDUCE UNEMPLOYMENT* 29-30 (1977) (discussing the evolving debate for shorter hours); SCHOR, *supra* note 11, at 72-73 (discussing

The laws enforcing maximum hours labor standards were Progressive and New Deal Era political responses²⁷ to the “labor question,” e.g., how should society respond to the protracted and often violent struggle between labor and capital that occurred during the late nineteenth and early twentieth centuries.²⁸ The labor question in the United States was distinguishable from that in Europe by the absence of a viable labor and/or socialist political party and the “greater frequency and bitterness of industrial conflict.”²⁹ It was also an urban phenomenon. Robert William Fogel noted in his 2000 book, *The Fourth Great Awakening & the Future of Egalitarianism*:

In an agrarian world populated by property owners who abhorred any infringement on property rights, it had been relatively easy to make strikes illegal and to use troops to suppress them under state anticonspiracy laws. But, in the new urban world, the great majority of the laboring population owned relatively little property and were thought to be open to anarchistic and syndicalist notions imported from Europe. In such a world, old methods of containing labor strife seemed inadequate.³⁰

Examples of the United States’ close brush with class warfare during this period include the railway strike of 1877, the Haymarket Square riot of 1886, the Homestead strike of 1892, the Pullman strike and boycott of 1892, the anthracite strike of 1902, the garment workers’ uprisings of

the struggle for shorter hours, ranging from artisans and craftsmen resisting longer work hours in the 1780s to the post-civil war eight hour movements tying shorter hours to greater pay).

27. See, e.g., RICHARD HOFSTADTER, *The Meaning of the Progressive Movement, Introduction to THE PROGRESSIVE MOVEMENT 1900–1915* 1-15 (1963) (discussing the meaning of the Progressive Movement). See generally HERBERT G. GUTMAN, *WORK, CULTURE, AND SOCIETY IN INDUSTRIALIZING AMERICA* 1-119 (First Vintage Books ed. 1977) (1966) (examining working class American experiences between 1815–1919); ARTHUR M. SCHLESINGER, JR., *THE COMING OF THE NEW DEAL* 1-23 (1959) (describing the “hundred days”).

28. See, e.g., DAVID RAY PAPKE, *THE PULLMAN CASE: THE CLASH OF LABOR AND CAPITAL IN INDUSTRIAL AMERICA*, at xii (1999). Papke defines the terms “labor” and “capital” in the following manner:

“Capital” came increasingly to stand not merely for stock but for the owners of large enterprises, in particular corporations. “Labor” came to stand for associations of workers, for brotherhoods, and ultimately for unions. The struggle between “capital” and “labor” was therefore one between wealthy heads of industry and the variously organized men and women employed to do hard and dirty work.

Id.

29. SEYMOUR MARTIN LIPSET & GARY MARKS, *IT DIDN’T HAPPEN HERE: WHY SOCIALISM FAILED IN THE UNITED STATES* 28 (2000) (examining American exceptionalism to explain the special character of the American left, and how the legacy of socialism’s failure in the United States shapes the current political order).

30. FOGEL, *supra* note 13, at 23.

1909–1911, and the steel strike of 1919.³¹ With the labor question as an ongoing concern, the Progressive Era (1890–1914) and the New Deal Era (1933–1938) were periods of tumultuous technological, social, and economic change.

Progressivism was a middle-class response (often initiated by social settlements such as Hull-House in Chicago³²) to urban crisis (“Chicago, which did not even exist in 1800, had a population of 1.7 million in 1900, which ranked it fifth in the world”³³) and concomitant political and social inequities during a period of economic prosperity.³⁴ The New Deal was a response to serious economic depression.³⁵ The political generation that matured during the age of the labor question in the Progressive Era (such as future Supreme Court Justice Felix Frankfurter³⁶ and Labor Secretary Frances Perkins³⁷) became leading

31. See, e.g., SAMUEL P. HAYS, *THE RESPONSE TO INDUSTRIALISM: 1885–1914* 37-47 (1957) (discussing the railway strike of 1877, the Haymarket Square riot of 1886, the Homestead strike of 1892, the Pullman strike of 1894, and federal and state political responses). See generally LAWRENCE GOODWYN, *THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA*, at vii (1978) (discussing the “largest democratic mass movement in American history”); J. ANTHONY LUKAS, *BIG TROUBLE: A MURDER IN A SMALL WESTERN TOWN SETS OFF A STRUGGLE FOR THE SOUL OF AMERICA* 274-85 (1997) (focusing on the mining wars in Colorado and Idaho during the turn of the twentieth century as a vehicle for examining the period in U.S. history when the collision between labor and capital came closest to class warfare); DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865–1925* (1987) (analyzing the six decades between the abolition of slavery and the closing of mass immigration in the United States).

32. See generally ALLEN F. DAVIS, *SPEARHEADS FOR REFORM: THE SOCIAL SETTLEMENTS AND THE PROGRESSIVE MOVEMENT 1890–1914* (1967) (discussing the influence and impact of the settlement movement). See also JANE ADDAMS, *TWENTY YEARS AT HULL-HOUSE WITH AUTOBIOGRAPHICAL NOTES* 117-35 (1990); BECKNER, *supra* note 1, at 162, 255, 259, 261, 264-65, 389 (discussing the impact of Hull-House in Illinois labor standards legislation); Felix Frankfurter, *Foreword* to JOSEPHINE GOLDMARK, *IMPATIENT CRUSADER*, at vii (1953) (discussing Ms. Kelley’s work at Hull-House and as Illinois’ first Chief Factory Inspector); LUKAS, *supra* note 31, at 314-16, 483-91 (discussing the relationships between the Chicago social justice movement, settlement houses, organized labor, middle class reformers, and Clarence Darrow).

33. FOGEL, *supra* note 13, at 53 (discussing urban explosion and the benefits and costs of modern economic growth).

34. HOFSTADTER, *supra* note 27, at 6-7 (comparing the Progressive and New Deal Eras); see also Shelton Stromquist, *Class Wars: Frank Walsh, the Reformers, and the Crisis of Progressivism*, in *LABOR HISTORIES: CLASS, POLITICS AND THE WORKING-CLASS EXPERIENCE* 97-124 (Eric Arnesen et al. eds., 1998) (discussing the class conflict existing within the U.S. Commission on Industrial Relations as it held hearings between 1913 and 1915 to determine the “causes of industrial unrest”).

35. HOSFTADTER, *supra* note 27, at 6-7.

36. See, e.g., MAX LERNER, *NINE SCORPIONS IN A BOTTLE: GREAT JUDGES AND CASES OF THE SUPREME COURT* 127-31, 161-66 (1994) (providing personal observations of Felix Frankfurter before and during his tenure on the U.S. Supreme Court). See generally FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* (Peter Smith ed., 1963) (1930) (addressing the scope of injunctions, and the enforcement and regulation thereof, in labor controversies).

labor reformers during the New Deal Era,³⁸ developing labor standards to create stability under changing conditions.³⁹

Fighting for worker control over time (work hours and free time), labor activists and reformers argued that shorter work hours would protect public health and safety (reducing occupational injuries by reducing worker fatigue), welfare (reducing labor strife and providing workers with more time for personal, home, community, and cultural life) and morals (eradicate overwork and sweatshops). The following discusses the short hours movements and the Progressive and New Deal Eras' political responses to the movements. It also examines judicial review of short hours standards and the evolution of federal maximum hours labor standards, leading to and including the FLSA.

A. THE SHORT HOURS MOVEMENTS

Serious public consideration for shorter work hours began in the United States during the close of the colonial period when journeymen sought to limit the workday to twelve or fourteen hours.⁴⁰ Employers consistently opposed shorter work hours and traditional work habits throughout the nation's history, fearing the loss of their competitive positions within and outside the country.⁴¹

37. See, e.g., SCHLESINGER, *supra* note 27, at 298-301 (discussing Frances Perkins' work before and during her tenure in Franklin D. Roosevelt's cabinet).

38. See, e.g., Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1403-10 (1993) (discussing "progressive policy entrepreneurs" in and out of the New Deal government); see also EILEEN BORIS, *HOME TO WORK: MOTHERHOOD AND THE POLITICS OF INDUSTRIAL HOMEWORK IN THE UNITED STATES* 201-04 (1994) (discussing "the New Deal network of women" and their development of labor standards under the National Recovery Administration); DAVIS, *supra* note 32, at 242-45 (discussing the settlement movement's impact on the New Deal); FOGEL, *supra* note 13, at 25 (arguing that the Social Gospelers of the 1890s through 1920 provided "both the ideological foundation and the political drive for the labor reforms of the 1930s, 1940s, and 1950s"); STEVE FRASER & GARY GERSTLE, *THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980* 56 (1989) (discussing the evolution of the 'labor question' from the Progressive to the New Deal Era).

39. See, e.g., HAYS, *supra* note 31, at 140-62, 188-93 (analyzing the Populist-Progressive Era as a period of political adjustment and response to industrialism); see also U.S. DEP'T OF LABOR, *TWENTY-FIVE YEARS OF SERVICE 1913-1938* 1-8 (1938) [hereinafter *TWENTY-FIVE YEARS OF SERVICE*] (discussing the origin and objectives of the USDOL).

40. DALE YODER, *LABOR ECONOMICS AND LABOR PROBLEMS* 281-82 (2d ed. 1939) (discussing historic working hours); see also HERBERT APPLEBAUM, *THE AMERICAN WORK ETHIC AND THE CHANGING WORK FORCE* 1-50 (1998) (discussing the American work ethic during the colonial period).

41. LEVITAN & BELOUS, *supra* note 26, at 30; see also SCHOR, *supra* note 11, at 73-74; YODER, *supra* note 40, at 282; David Brody, *The Expansion of the American Labor Movement: Institutional Sources of Stimulus and Restraint*, in *THE AMERICAN LABOR MOVEMENT* 119-37

By the early nineteenth century, protesting artisans, craftsmen, mechanics, and workers formed labor unions and political parties advocating a shorter hour (from ten hours to eight hours) day.⁴² This was part of a struggle against the discipline of time (symbolized by the mill clock) and the growing ethics of commercialism.⁴³ Craftspersons upheld the traditions of their trade and asserted their independence from time discipline by enforcing their stint (production quota) and work rules (rules specifying who would perform which work, how, when, and at what pace it would occur) through collective action—construction is the only major industry today where skilled workers still control their own work pace.⁴⁴ Motivated by exhaustion, women working in textile mills joined the movement in the 1840s.⁴⁵

After the Civil War, the connection between wages and hours worked (the wage system)⁴⁶ revived the question Americans thought “had been resolved by slave emancipation—the question of buying, selling, and owning human property.”⁴⁷ Wage contracts were thus viewed differently than other bargains; a free person’s labor was distinct

(David Brody ed., 1971) (discussing the two growth periods in U.S. trade unionism, 1897–1904, which represented one-tenth of the work force, and 1935–1945, which represented one-fourth of the workforce; the National Association of Manufacturers’ open shop attack on organized labor beginning in 1903; and the public authorities’ attack on unions, including courts using injunctive powers to stop boycotts and strikes); Julie Greene, *Dinner-Pail Politics: Employers, Workers, and Partisan Culture in the Progressive Era*, in *LABOR HISTORIES: CLASS, POLITICS AND THE WORKING-CLASS EXPERIENCE* 76-78 (Eric Arnesen et al. eds., 1998) (discussing the ascension of the National Association of Manufacturers as the principal employer association fighting the AFL’s 1894–1905 campaign for federal eight-hour day legislation, and as the leader of the “nation’s anti-union movement” by 1904).

42. APPLEBAUM, *supra* note 40, at 83-89 (discussing artisans in the nineteenth century and their work ethic of independence); *see also* YODER, *supra* note 40, at 282 (discussing early agitation for shorter work hours).

43. APPLEBAUM, *supra* note 40, at 83-84.

44. *Id.* at 85-87, 91-108 (discussing protests to nineteenth century changes, the factory system, and laborers and manual workers in the nineteenth century); *see also* MONTGOMERY, *supra* note 31, at 22-57 (discussing craft unionism among iron and steel workers during the last quarter of the nineteenth century). Applebaum observed in today’s construction industry that

the predominance of skilled labor, small size of most construction firms, and worker control of the work process, all lead to a large measure of autonomy for the construction worker that limits the ability of contractors to subject the work process to the kind of regimentation present in factory production.

HERBERT APPLEBAUM, *CONSTRUCTION WORKERS, U.S.A.* 67 (1999) (discussing the independence and autonomy of today’s construction workers).

45. SCHOR, *supra* note 11, at 72-73.

46. HAYS, *supra* note 31, at 32-37 (discussing workers’ response to the wage system by organizing unions).

47. AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 60-97 (1998) (analyzing the post-bellum debate on the labor question).

from the self, otherwise a person's sale of his/her time was analogous to wage slavery.⁴⁸

In 1886, Samuel Gompers (the leader of the Federation of Organized Trades and Labor Unions—the predecessor of the American Federation of Labor) called for a nationwide strike by all workers on May 1st to “achieve the shorter workweek—ten hours’ pay for eight hours’ work.”⁴⁹ Approximately 250,000 workers participated in what became the first general strike in the history of the international labor movement. In total, there were more than 1500 strikes and lockouts nationwide during 1886 involving over 600,000 workers, “most of them fighting for the eight-hour day.”⁵⁰

By 1903, Chicago, Illinois, rivaled London, England, as the “trade union capital of the world.”⁵¹ For example, approximately 80,000 workers participating in the May 1, 1886, general strike, paraded up Michigan Avenue in Chicago for the eight hour day.⁵² This strike occurred at the same time as a protracted strike by workers at the McCormick Reaper Works in Chicago, who won an eight-hour day with ten-hours pay on May 3, 1886.⁵³ The labor organizer, Mother (Mary Harris) Jones, graphically described the events in her autobiography:

The first of May, which was to usher in the eight-hour day uprising, came. The newspapers had done everything to alarm the people. All over the city there were strikes and walkouts. Employers quaked in their boots. They saw revolution. The workers in the McCormick Harvester Works gathered outside the factory. Those inside who did

48. *Id.* at 97; see also REICH, *supra* note 14, at 90-92 (reviewing the “wage system” debate, ranging from an 1840s track comparing wages to slavery, a circa 1860s analysis of wage work as “morally acceptable only as a step toward economic independence,” to organized labor’s post-Civil War fight against, and ultimate acceptance of, the wage system, as long as it secured a “larger share for labor”).

49. DONALD L. MILLER, CITY OF THE CENTURY: THE EPIC OF CHICAGO AND THE MAKING OF AMERICA 473 (1996) (discussing 1886, “known in American labor history as the year of the great uprising”); see also Irwin Yellowitz, *Samuel Gompers: A Half Century in Labor's Front Rank*, 112 MONTHLY LAB. REV. 27-29 (July 1989) (discussing Gompers’ belief and advocacy regarding shorter work hours and the benefits that would accrue to workers), available at <http://stats.gov/opub/mlr/1989/07/contents.htm>.

50. MILLER, *supra* note 49, at 473.

51. MONTGOMERY, *supra* note 31, at 269 (stating that Chicago had 243,000 trade union members by September 1903).

52. MILLER, *supra* note 49, at 475; at 475; DOUG NELSON, LABOR BATTLEGROUND: THE STREETS OF CHICAGO 34 (1996) (discussing the events surrounding the Haymarket Square riot).

53. MILLER, *supra* note 49, at 474-75 (discussing the violent confrontation between 200 police—Police Captain John Bonfield’s “clubbers”—and strikers); see also NELSON, *supra* note 52, at 36-39 (discussing the “McCormick incident” and providing copies of the fliers—in English and German—calling for revenge and a May 4th protest rally in Haymarket Square).

not join the strikers were called scabs. Bricks were thrown. Windows were broken. The scabs were threatened. Some one [sic] turned in a riot call.

The police without warning charged down upon the workers, shooting into their midst, clubbing right and left. Many were trampled under horses' feet. Numbers were shot dead. Skulls were broken. Young men and young girls were clubbed to death.⁵⁴

On May 4, 1886, 2500 people rallied at Haymarket Square in Chicago to protest the police brutality at the McCormick Reaper Works. A force of 167 riot-trained police, who marched into the crowd with their guns drawn dispersed the protesters. Someone threw a bomb at the police. In the ensuing gunfire exchange between the police and protesters seven police officers were killed, sixty more were injured ("many from friendly fire"), with an equal amount of civilian casualties.⁵⁵ Mother Jones recalled the events after the riot:

The city went insane and the newspapers did everything to keep it like a madhouse. The workers' cry for justice was drowned in the shriek for revenge. Bombs were "found" every five minutes. Men went armed and gun stores kept open nights. Hundreds were arrested. Only those who had agitated for an eight-hour day, however, were brought to trial and a few months later hanged.⁵⁶

The U.S. Army subsequently established a military post twenty-five miles north of Chicago to suppress future labor uprisings in the city.⁵⁷ Railroad connections and a lakefront road (Sheridan Road) provided rapid troop deployment from the fort to Chicago, later used in 1894 during the Pullman Strike⁵⁸ (one year after Governor John Altgeld pardoned the activists implicated for the Haymarket Square riot who were not executed).⁵⁹

54. AUTOBIOGRAPHY OF MOTHER JONES 20 (Mary Field Parton ed., 1970) (1925) [hereinafter MOTHER JONES] (discussing the Haymarket Tragedy).

55. MILLER, *supra* note 49, at 475-76 (describing the Haymarket Square riot and subsequent events); *see also* NELSON, *supra* note 52, at 39-46 (same).

56. MOTHER JONES, *supra* note 54, at 21-22.

57. BECKNER, *supra* note 1, at 62-63 (discussing the 1887 Illinois legislation permitting the United States to acquire lands to build Fort Sheridan and the U.S. Senate resolution accepting the land).

58. MILLER, *supra* note 49, at 544 (discussing troop deployment from Fort Sheridan); *see also* PAPKE, *supra* note 28, at 31 (same).

59. HAYS, *supra* note 31, at 46 (describing how Governor Altgeld attracted labor votes to the Democratic Party in the 1896 elections because he pardoned the Haymarket anarchists and protested

As late as 1915, “the Illinois State Federation of Labor endorsed the eight-hour day ‘by any means we can get it’”⁶⁰ The Saturday and Sunday Sabbath closing and eight-hour day initiatives advanced by Illinois barbers, garment workers, and downtown Chicago store clerks were replaced by the “one day’s rest in seven movement” promoted by organized labor.⁶¹ The later movement also addressed concerns over unemployment.⁶² Reformers believed that the economy could spread employment to more individuals if employers scheduled more employees to work shorter hours, rather than fewer employees to work longer hours.⁶³ This theme resurfaced during subsequent periods of worker insecurity in the 1950s, 1970s, and 1990s.⁶⁴

B. EVOLUTION OF FEDERAL MAXIMUM HOURS LABOR STANDARDS

This section examines the evolution of federal maximum hours labor standards from the early 1800s to the passage of the FLSA in 1938. It shows that the original purpose of these standards was to cap work hours. The FLSA stopped federal progress towards lowering the ceiling on maximum hours, replacing hours limits with financial disincentives such as minimum wage and overtime pay.

President Cleveland’s use of federal troops during the Pullman Strike). *See generally* WALDO R. BROWNE, *ALTGELD OF ILLINOIS: A RECORD OF HIS LIFE AND WORK* (1924) (providing a friendly biography of the first Democrat elected as governor in Illinois since the Civil War).

60. THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 236 (1992) (discussing how State Federations of Labor endorsed and campaigned for labor standards while the national AFL opposed such legislation).

61. BECKNER, *supra* note 1, at 186; *see also* HUNNICUTT, *supra* note 11, at 57.

62. BECKNER, *supra* note 1, at 186-87; *see also* HUNNICUTT, *supra* note 11, at 49-50, 53.

63. HUNNICUTT, *supra* note 11, at 53-54; *see also* SCHLESINGER, *supra* note 27, at 91 (discussing U.S. Senator (later Justice) Hugo Black’s 1933 bill for a thirty-hour week to halt attacks on labor standards and to force employers to hire more employees, later amended to become the FLSA); NAT’L INDUS. CONFERENCE BD., *SHORTER WORK PERIODS IN INDUSTRY* 50 (1932) (discussing shorter hours in the context of rapid technological change, an economic depression, and the fear of a permanent labor surplus).

64. *See generally* THE SHORTER WORK WEEK 1 (1957) (debating the merits of shorter hours). *See* SUBCOMM. ON SHORTENED WORKWEEK OF THE HOUSE LABOR & COMMERCE COMM., 80th Gen. Assem. (Ill. Sept. 15-20, 1977) (taking testimony from labor and business leaders on H.B. 298, legislation setting the standard workweek for both government and private employment at not more than four days of eight hours each); LEVITAN & BELOUS, *supra* note 26, at 1 (arguing that there was not enough forty-hour per week jobs for the labor force); *see also infra* Part VI.D. (discussing worker insecurity during the 1990s).

1. EARLY 1800s THROUGH THE PROGRESSIVE ERA

The federal government began regulating maximum work hours in 1840 by placing its employees on a ten-hour day. It reduced daily hours for its workforce to eight in 1868.⁶⁵ Labor Day became a federal holiday in 1894 (states began enacting labor day legislation in 1887).⁶⁶ The labor movement pressed for the holiday to further “the ongoing struggle to capture more time ‘for what we will.’”⁶⁷ In addition, “having a Monday off along with a Sunday created the only two-day weekend in an entire year for a huge segment of the working population.”⁶⁸

In 1913, Congress created the U.S. Department of Labor (USDOL) by transferring four bureaus (Labor Statistics, Immigration, Naturalization, and Children’s) from the old Department of Commerce and Labor (DCL) created in 1903.⁶⁹ Organized labor was not satisfied with the subordination of labor issues within the DCL. Samuel Gompers, president of the American Federation of Labor, stated:

“We want a department in the Government of the United States that shall be distinctly a labor department, dealing with the labor questions and all that comes directly under that term,” because wage earners “are the only people in all the country whose special rights and interests have no voice in the councils of the President.”⁷⁰

In 1915, Congress enacted the Merchant Marine Eight-Hour Day Act.⁷¹ The measure was repealed in 1983.⁷² The U.S. Code still provides, in part, an eight-hour day for seamen working on towing and merchant vessels in voyage or on anchor watch on the Great Lakes and certain

65. See, e.g., Howard D. Samuel *Troubled Passage: The Labor Movement and the Fair Labor Standards Act*, 123 MONTHLY LAB. REV. 32, 33 (Dec. 2000) (discussing organized labor’s pre-New Deal involvement in maximum hours labor legislation), at <http://stats.bls.gov/opub/mlr/2000/12/art3abs.htm>; see also YODER, *supra* note 40, at 282 (same).

66. Michael J. Goldberg, *Law, Labor, and the Mainstream Press: Labor Day Commentaries on Labor and Employment Law, 1882–1935*, 15 LAB. LAW. 93, 121 (1999) (discussing the legalization of Labor Day).

67. *Id.* at 119 & n.147 (observing that “[t]he slogan, ‘Eight hours for work, eight hours for rest, and eight hours for what we will,’ captured the spirit of the movement for a standard working day of eight hours”).

68. *Id.* at 120 (internal quotation marks omitted).

69. U.S. DEP’T OF LABOR, HISTORICAL SKETCH OF THE DEPARTMENT OF LABOR, at <http://www.dol.gov/asp/programs/history/sketch.htm> (last visited Sept. 12, 2001).

70. TWENTY-FIVE YEARS OF SERVICE, *supra* note 39, at 2 (internal quotations omitted).

71. Merchant Marine Eight-Hour Day, Pub. L. No. 63-302, 38 Stat. 1164 (1915) (codified as amended at 46 U.S.C. § 673 (2001)).

72. Act of Aug. 26, 1983, Pub. L. No. 98-99, 97 Stat. 549.

tributaries (separate standards for oceangoing vessels) and limits labor on Sunday and certain holidays to only necessary work.⁷³

In 1916, Congress enacted the Adamson Act, providing an eight-hour day for railroad workers.⁷⁴ President Wilson avoided a national railroad strike by going before both houses of Congress asking for the law. Congress passed the legislation within a week, and President Wilson signed the measure into law, two days prior to the strike deadline.⁷⁵ In 1917, the Adamson Act withstood constitutional challenge in *Wilson v. New*,⁷⁶ “as necessary in the interest of public safety.”⁷⁷ Congress added its provisions to another title under the U.S. Code, repealing the statute in 1996.⁷⁸

National labor standards reform “ground to a halt” during the economic boom of the 1920s.⁷⁹ Analogous to the economic boom of the 1990s, less government and states’ rights dominated the regulatory approach to social issues during this period.⁸⁰ The Association of Governmental Labor Officials (AGLO—an amalgamation of the Association of Chiefs and Officials of Bureaus of Labor and the International Association of Factory Inspectors)⁸¹ exchanged information

73. 46 U.S.C. § 8104 (2001) (containing provisions concerning working hours and conditions of watches); OFFICE OF THE LAW REVISION COUNSEL, *at* <http://law2.house.gov/uscode/cgi/fastweb.exe> (last visited Sept. 7, 2001) (supplying historical and revisional notes).

74. Adamson Act, ch. 436, § 1, 39 Stat. 721 (1916) (codified as amended at 45 U.S.C. § 65 (2001)).

75. MONTGOMERY, *supra* note 31, at 368 (discussing the history of the Adamson Act).

76. 243 U.S. 332, 335-36 (1917) (upholding the Adamson Act).

77. YODER, *supra* note 40, at 291 (discussing the Adamson Act).

78. Act of Oct. 11, 1996, Pub. L. 104-287, § 5(56)(A), 110 Stat. 3394 (codified as amended at 49 U.S.C. §§ 28301, 28302 (2001)). *See also id.* § 10(b), 110 Stat. 3401 (Oct. 11, 1996) (repealing the Adamson Act).

79. BORIS, *supra* note 38, at 151 (describing the political climate regarding labor standards during the 1920s).

80. Compare JUDSON MACLAURY, HISTORY OF DEPARTMENT OF LABOR, 1913-1988, ch. 2: THE 1920S AND THE START OF THE DEPRESSION, 1921-1933 (1988) (describing the USDOL during the 1920s as a reflection of the Administration’s and Nation’s “desire for less government,” the antithesis of the activism, and “explosion of government programs and government regulation of the economy” under President Wilson’s administration), *available at* <http://www.dol.gov/dol/asp/public/programs/history/dolchp02.htm> with *infra* Part III.D.3. (discussing the current politics of the white-collar exemptions).

81. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, PROCEEDINGS OF THE NATIONAL CONFERENCES ON LABOR LEGISLATION: 1934-1955, at vii-x (1992) (discussing the history and development of the National Association of Governmental Labor Officials—the volume was published in commemoration of the seventy-fifth anniversary of the organization).

and “maintained structures of reform that the crisis of the Great Depression would activate.”⁸²

2. THE NEW DEAL ERA

From 1933 through mid-1935, the National Recovery Administration (NRA) limited the hours of labor per industry, nationally or regionally, to an eight-hour day, forty-hour week (with further reductions from thirty-eight to thirty-five hour weeks)⁸³ under regulations it promulgated (the NRA code)⁸⁴ pursuant to the National Industrial Recovery Act (NIRA).⁸⁵ These measures were temporary emergency actions designed to “provide employment for the large portion of the working population which ha[d] been forced out of work due to the depression and before that to technological changes.”⁸⁶

82. BORIS, *supra* note 38, at 151. State governments continue to exchange information and enforce labor standards, such as minimum wage and overtime laws, statutes requiring rest breaks during a workday and one day of rest during a calendar week, and the timely and complete payment of wages or final compensation. The National Association of Governmental Labor Officials (NAGLO) is AGLO’s successor organization. NAGLO, at <http://www.naglo.org> (last visited Sept. 12, 2001). In addition, career state and territorial labor officials have met since 1976, under the auspices of the Interstate Labor Standards Association (ILSA), to “encourage and assist in improving the administration of the laws and regulations (rules) by exchanging information in the area of labor standards.” ILSA, at <http://www.ilsa.net/start.html> (last visited Sept. 6, 2001); *see also* U.S. DEP’T OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, WAGE AND HOUR DIVISION: STATE LABOR OFFICES/STATE LAWS, at <http://www.dol.gov/dol/esa/public/programs/whd/state/state.htm> (last visited Sept. 10, 2001) (providing information on state wage and hour laws); NAT’L LABOR MGMT. ASS’N, LINKS TO FEDERAL AND STATE DEPARTMENTS OF LABOR, at <http://www.nlma.org/lbrdepts.htm> (last visited Sept. 6, 2001) (providing links to federal and state departments of labor homepages).

83. YODER, *supra* note 40, at 284-85 (discussing the impact of the NRA codes and providing a chart on the changes of working hours reported by the National Industrial Conference Board); BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, PROCEEDINGS OF THE SECOND NATIONAL CONFERENCE ON LABOR LEGISLATION: 1935 59-62 (1936), *reprinted in* PROCEEDINGS OF THE NATIONAL CONFERENCES ON LABOR LEGISLATION (1992) [hereinafter SECOND NATIONAL CONFERENCE] (providing Secretary Perkins’s statements on the impact of the NRA codes regulating work hours).

84. *See, e.g.*, NAT’L ARCHIVES & RECORDS ADMIN., RECORDS OF THE NATIONAL RECOVERY ADMINISTRATION [NRA]: (RECORD GROUP 9), 1927-37, at <http://www.nara.gov/guide/rg009.html> (last visited Sept. 6, 2001) (providing internet access to NRA textual records).

85. Act of June 16, 1933, ch. 90, 48 Stat. 195, 196 (codified as amended at 15 U.S.C. § 703 (2001)).

86. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, PROCEEDINGS OF THE NATIONAL CONFERENCE ON LABOR LEGISLATION: 1934 18 (1934), *reprinted in* PROCEEDINGS OF THE NATIONAL CONFERENCES ON LABOR LEGISLATION (1992), [hereinafter NATIONAL CONFERENCE: 1934] (providing the conference colloquy on “desirable hours legislation”); *see also* BORIS, *supra* note 38, at 204-39 (discussing the need for and the impact of NRA labor standards).

Under this rubric, U.S. Labor Secretary Frances Perkins advocated for the states to enact their own one-day, rest-in-seven, daily, and weekly work hour limitation laws,⁸⁷ and for the United States to adopt the International Labor Organization's (ILO)⁸⁸ Forty-Hour Week Convention (treaty).⁸⁹ The USDOL advanced the first objective by facilitating the drafting and administration of uniform state labor legislation through its Bureau of Labor Standards⁹⁰ and participating in the National Conference of Labor Legislation.⁹¹ The USDOL advanced the second goal by representing the United States in the ILO.⁹² Secretary Perkins viewed universal adoption of the ILO convention as a practical method of achieving shorter work hours. It relieved concerns over "foreign competition by countries who have longer hours of work" and provided an alternative to the obstacles involved in enacting federal and state standards.⁹³

87. See, e.g., NATIONAL CONFERENCE: 1934, *supra* note 86, at 18 (discussing the introduction of the ILO's hours of work convention and the need for state legislation).

88. The ILO was created in 1919 by the Versailles Peace Treaty. The ILO serves four purposes: (1) humanitarian—a large number of people worked under conditions "involving . . . injustice, hardship and privation"; (2) political—unimproved working conditions could "create social unrest, even revolution"; (3) economic—failure of any nation to adopt humane working conditions puts those adopting such reforms at a competitive disadvantage; and (4) peace—"universal and lasting peace can be established only if it is based upon social justice." INT'L LABOR ORG., ILO HISTORY [hereinafter ILO HISTORY], at <http://www.ilo.org/public/english/about/history.htm> (last visited Sept. 10, 2001).

89. *Convention No. 47: Convention Concerning the Reduction of Hours of Work to Forty a Week*, 1 INT'L LAB. CONVENTIONS & RECOMMENDATIONS: 1919-1991 195 (1992).

90. See, e.g., TWENTY-FIVE YEARS OF SERVICE, *supra* note 39, at 30-34 (describing USDOL services to improve labor standards).

91. The National Conference on Labor Legislation was a series of annual meetings facilitated by the USDOL's Bureau of Labor Standards between 1934 and 1954. State labor commissioners and union leaders gathered to discuss their experiences and to keep up-to-date on labor standards. 30TH ANNIVERSARY OF THE BUREAU OF LABOR STANDARDS 81-90 (U.S. Dep't of Labor, Bull. No. 272, Nov. 17, 1964).

92. See, e.g., TWENTY-FIVE YEARS OF SERVICE, *supra* note 39, at 6 (discussing international labor conditions).

93. SECOND NATIONAL CONFERENCE, *supra* note 83, at 61-63 (discussing progress on state legislation and the universal adoption of the ILO work hours convention). There is a renewed international interest in labor standards. It is motivated by "growing popular anxieties in the industrialized countries over the process of globalization," rather than the "labor question" that fueled the original development of labor standards during the Progressive and New Deal Eras. Eddy Lee, *Globalization and Labour Standards: A Review of Issues*, 136 INT'L LAB. REV. 173, 176 (1997). Management's and labor's response to globalization is, nonetheless, substantially similar to their reaction against comparable conditions during the late 1890s and early twentieth century. For example, employer concerns today about competition from low-wage countries parallel anxieties over "foreign competition" during the 1930s. See also Owen E. Herrstadt, *Voluntary Corporate Codes of Conduct: What's Missing?*, 16 LAB. LAW. 349, 349-51 (2001) (reviewing flaws in the codes and encouraging corporations to increase worker protection). Workers are worried that increased "globalization will lead to downward pressures on labour standards" (a race to the

By mid-1935, the U.S. Supreme Court held in *A.L.A. Schechter Poultry Corp. v. United States*⁹⁴ that the NIRA was an unconstitutional delegation of legislative authority to the executive branch.⁹⁵ President Roosevelt subsequently terminated the NRA and transferred its

bottom). Lee, *supra* note 93, at 181; *see also* BARRY BLUESTONE & BENNETT HARRISON, GROWING PROSPERITY: THE BATTLE FOR GROWTH WITH EQUITY IN THE TWENTY-FIRST CENTURY 252-56, 309 n.19 (2000) (describing how to take labor rights and standards global, and characterizing the ILO as “toothless”). *See generally* Barry LaSala, *NAFTA & Worker Rights: An Analysis of the Labor Side Accord After Five Years of Operation and Suggested Improvements*, 16 LAB. LAW. 319 (2001) (criticizing the lack of Mexican labor law enforcement under the side accord and suggesting an arbitration system to resolve these labor disputes); *Trumka Urges Trade Pact With Workers’ Rights: FTAA Agreement Must Be Open to National Debate, Trumka Says*, 167 Lab. Rel. Rep. (BNA) 123, 124 (May 28, 2001) (quoting AFL-CIO Secretary-Treasurer Richard L. Trumka, stating that union members and their families “insist on internationally recognized, core worker rights—those embodied in the International Labor Organization’s Declaration on Fundamental Principles and Rights at Work—in any new trade or investment accords”). Protests against globalization by labor and environmental activists (such as the December 1999 protests against the World Trade Organization in Seattle, Washington) are more analogous to the anticorporate insurgency of the 1890s than a post-modern update of the 1960s. *See* Michael Kazin, *Say No to W.T.O.*, N.Y. TIMES (op-ed), Dec. 5, 1999, at 17 (making the analogy).

94. 295 U.S. 495 (1935).

95. *Id.* at 536-51 (invalidating sections 703-712 of the NIRA). John Ely, in discussing the nondelegation doctrine, notes that

it struck down laws . . . for passing the decision authority on to other persons without a “standard” or “intelligible principle” to guide their policy choices. . . . [It] became identified with others that were used in the early thirties to invalidate reform legislation, such as substantive due process and restrictive interpretation of the commerce power. . . . Since that time Congress has quite commonly by statute said to administrative officials . . . “Find the problems in this area and solve them”. . . .

JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 132 (1980). *But see* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2363-72 (2001) (discussing the nondelegation doctrine in context with the emergence of the Presidential administration, whereby the regulatory activity of the executive branch agencies are an extension of the President’s own policy and political agenda); Richard J. Pierce, Jr., *The Inherent Limits on Judicial Control of Agency Discretion: The D.C. Circuit and the Nondelegation Doctrine*, 52 ADMIN. L. REV. 63, 64 (2000) (arguing that the D.C. Circuit’s decision in *American Trucking Associations v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), which found that the EPA’s national ambient air quality standards were an unconstitutional interpretation of the Clean Air Act under the nondelegation doctrine, was “profoundly antidemocratic”; a broad delegation of authority is “symptomatic of a basic characteristic of our political system: Presidential elections matter”); Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051, 1076-78 (1999) (discussing proposals to revive the nondelegation doctrine in context with the ossification of rulemaking, and increased Presidential control over agency rulemaking, leading to heightened tension in the “institutional competition between Congress and the President”); *The Supreme Court, 1997 Term – Leading Cases*, 112 HARV. L. REV. 122-32 (1998) (criticizing the Court’s application of the nondelegation doctrine to invalidate the Line Item Veto Act in *Clinton v. New York*, 524 U.S. 417 (1998)).

functions to other agencies under executive order.⁹⁶ Following the demise of the NRA code

[a] twelve hour day and seven day week [was] not unusual in restaurants, trucking service, gas filling stations, and retail stores A large chain store in Atlanta, Georgia, was requiring employees to work from 63 to 70 hours a week . . . and similar reports came from stores in other industrial centers. A knitting mill company in Long Island City, N.Y., lengthened its working week to 60 to 72 hours when no longer bound by the NRA code.⁹⁷

In 1935, Congress enacted a forty-hour, five-day week for postal workers.⁹⁸ State leaders like Martin Durkin, Director of the Illinois Department of Labor, promoted Secretary Perkins' recommendations for United States ratification of the ILO Forty-Hour Week Convention and for state maximum hours laws.⁹⁹

In 1937, in *West Coast Hotel v. Parrish*,¹⁰⁰ the U.S. Supreme Court upheld the State of Washington's minimum wage law for women and minors as a constitutionally reasonable exercise of state police powers to protect the health of women.¹⁰¹ In pertinent part, the statute empowered a commission to ascertain the wages of women, and if it found the wages paid to women in any occupation, trade, or industry were "inadequate to supply them necessary cost of living and to maintain the workers in health," the Commission could fix a minimum wage to affect this purpose.¹⁰² The court emphasized the need for minimum wage regulation:

The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless [sic] against the denial of a living wage is not only detrimental to their health and well-being but casts a direct burden for their support upon

96. See, e.g., OFFICE OF THE LAW REVISION COUNSEL, at <http://law2.house.gov.usc.htm> (last visited Sept. 6, 2001) (providing NRA codification history, including the omission of 15 U.S.C. §§ 703-712 from Title 15 of the U.S. Code, and Exec. Ord. No. 7252 (Dec. 21, 1935), and Exec. Ord. No. 7323 (Mar. 26, 1936)).

97. LABOR RESEARCH ASS'N, LABOR FACT BOOK III 63-64 (1936) [hereinafter LABOR FACT BOOK III]. The Labor Research Association is a New York City-based non-profit corporation providing research and educational services for trade unions. LABOR RESEARCH ASS'N, at <http://www.laborresearch.org> (last visited Sept. 7, 2001).

98. YODER, *supra* note 40, at 290.

99. SECOND NATIONAL CONFERENCE, *supra* note 83, at 101 (providing the report of the Conference Committee on Hours of Labor; Director Durkin was the committee chair).

100. 300 U.S. 379 (1937).

101. *Id.* at 398-99.

102. *Id.* at 387 (quoting the Minimum Wages for Women as amended).

the community. What these workers lose in wages the taxpayers are called upon to pay.¹⁰³

West Coast Hotel signaled a significant theoretical shift during the New Deal Era, recognizing that government, through inaction (relying on “traditional market mechanisms within the common law framework”) or action (enforcing labor standards), is making a choice to either subsidize “unconscionable employers,” or a living wage for workers, respectively.¹⁰⁴ As background, the Judiciary had been “at odds with the Progressive era” over similar legislation.¹⁰⁵ This conflict was epitomized by the U.S. Supreme Court’s 1905 decision, *Lochner v. New York*,¹⁰⁶ invalidating a New York statute prohibiting employers from working bakers more than sixty hours per week.¹⁰⁷

For the *Lochner* Era judiciary, “[i]t was neutrality that the due process clause commanded, and neutrality was served only by the general or ‘public’ purposes comprehended by the police power.”¹⁰⁸ Common law categories were natural (pre-political) constructs forming the baseline “from which to measure deviations from neutrality, or self-interested ‘deals.’”¹⁰⁹ Under this logic, maximum hours legislation was unprincipled and partisan, rather than neutral, and therefore invalid.¹¹⁰ Popular opinion viewed such reasoning to reflect the courts’ “*laissez faire* philosophy” and “general lack of interest and insufficiency of knowledge upon the subject of the effect of long hours of employment.”¹¹¹ As a lesson of the Civil War

103. *Id.* at 399.

104. Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 880-81 (1987).

105. LUKAS, *supra* note 31, at 280 (discussing the Supreme Court’s “landmark decisions” breaking the Pullman strike and invalidating federal income tax measures, maximum hours legislation, statutes protecting union activities, and blocked enforcement of laws governing railroad rates); see also Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 354-62 (1916) (analyzing state and federal decisions invalidating maximum hours legislation between 1875 and 1915).

106. 198 U.S. 45 (1905).

107. *Id.* at 64-65 (holding that the right of contract (in particular, the right to buy and sell labor) is a part of the liberty protected by the Due Process Clause of the Fourteenth Amendment).

108. *Lochner’s Legacy*, *supra* note 104, at 878 (footnote omitted) (describing the *Lochner* Court’s approach to reviewing economic legislation); see also Akhil Reed Amar, *The Supreme Court 1999 Term - Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 123 (2000) (observing that the “origins of substantive due process doctrine are not particularly admirable – *Dred Scott* and *Lochner* haunt this swamp”); Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19, 76 (2000) (describing the *Lochner* Court’s concept of “Fairness” as “Darwinistic,” in which the “economic hierarchy was not only immutable, but fair, appropriate, and optimal; government could intervene if, and only if, the externalities caused by the hierarchy’s operation created a nuisance for society”).

109. *Lochner’s Legacy*, *supra* note 104, at 879.

110. *Id.*

111. BECKNER, *supra* note 1, at 190 (emphasis added).

(e.g., the evils of slavery), such logic exposed market defects (unfettered buying and selling of labor producing coercion and dominance rather than protecting self-ownership and self-direction, e.g., freedom) requiring government protection of workers (minimum wage and maximum hours regulations).¹¹²

In 1908, the U.S. Supreme Court upheld the constitutionality of the Oregon ten-hour day law for women in *Muller v. Oregon*.¹¹³ The Court, however, never overruled *Lochner*.¹¹⁴ It simply changed its “understanding of facts” as the justification of constitutional change.¹¹⁵ In 1917, the Supreme Court upheld a ten-hour day statute for male and female manufactory workers in *Bunting v. Oregon*.¹¹⁶ The Court did not mention *Lochner*.

Under the *West Coast Hotel* and *Bunting v. Oregon* labor standards baseline, the common law appeared less natural and inviolate.¹¹⁷ As President Franklin Roosevelt opined, “[w]e must lay hold of the fact that economic laws are not made by nature. They are made by human

112. See, e.g., CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 11-46 (1990) (providing a historical overview of the regulatory state).

113. 208 U.S. 412 (1908). After *Muller*, nineteen states and the District of Columbia enacted new maximum hours laws for women. Between 1909 and 1917, twenty states either decreased the legal working hours for women or widened the protective scope of their maximum hours statutes. By 1921, forty-one states in total enacted women’s hours laws. SKOCPOL, *supra* note 60, at 321-421 (discussing maternalistic social policy breakthroughs of the Progressive Era); see also Morton J. Horwitz, *The Supreme Court, 1992 Term - Forward: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 52-57 (1993) (discussing Justices Brandeis’s and Cardozo’s, Professor Pound’s, and Presidents Theodore Roosevelt’s and Wilson’s post-*Lochner* efforts to develop and advance a theory of a historically changing constitution). Eight years after *Muller*, Felix Frankfurter stated: the *Muller* case is “epoch making,” not because of its decision, but because of the authoritative recognition by the Supreme Court that the way in which Mr. Brandeis presented the case—the support of legislation by an array of facts which established the *reasonableness* of the legislative action, however it may be with its wisdom—laid down a new technique for counsel charged with the responsibility of arguing such constitutional questions, and an obligation upon courts to insist upon such method of argument before deciding the issue. Frankfurter, *supra* note 105, at 365. See generally Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495 (1908) (discussing legislative power to pass maximum hours laws).

114. *Lochner’s Legacy*, *supra* note 104, at 919 (concluding that the *Lochner* Era should be understood as a “warning about constitutional doctrine that defines neutrality in terms of the perpetuation of current practice, and that treats government conduct tending to sustain it as ‘inaction’ invariably escaping legal sanction, and government conduct proposing change as ‘action’ tending to raise legal doubts”); Horwitz, *supra* note 113, at 98, 99-117 (arguing that *Lochner* has returned: “Perhaps Roscoe Pound’s characterization of the *Lochner* Court comes closest to capturing the present moment—this is a court trapped in the grips of mechanical jurisprudence”).

115. *Planned Parenthood v. Casey*, 505 U.S. 833, 863 (1992) (explaining the factual assumptions made by the *Lochner* Court).

116. 243 U.S. 426, 438 (1917).

117. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-5 - 8-7 (1978).

beings.”¹¹⁸ The baseline thus shifted from the common (contract) law to a system of labor standards (statutes and regulations) addressing wages, hours, and other conditions of employment.¹¹⁹

3. FAIR LABOR STANDARDS ACT

The forty-hour workweek for most workers was “established by legislative fiat.”¹²⁰ The last act of the New Deal,¹²¹ the FLSA created, in part, a minimum national standard for hourly wages (section 6) and the maximum number of hours an employer could employ an individual per week (section 7(a)) before it paid the worker a penalty (overtime pay—150% of the employee’s regular rate of pay).¹²²

The initial twenty-five cent per hour minimum wage rate provided by the FLSA was below the hourly rate contained in most union contracts.¹²³ Only 300,000 of the twelve million workers first covered by the statute received a raise in pay.¹²⁴ From the beginning, the statute “flatly exempted ‘any employee employed in agriculture.’”¹²⁵ The maximum hours figure was forty-four hours per week during the first year of the Act, forty-two hours in the second year, and forty hours per week thereafter.¹²⁶ A byproduct of this standard was the two-day

118. 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 657 (1938).

119. *Lochner’s Legacy*, *supra* note 104, at 881.

120. LEVITAN & BELOUS, *supra* note 26, at 30 (discussing arguments over shorter hours since the New Deal); *see also* Samuel, *supra* note 65, at 34 (discussing organized labor’s initial ambivalence towards the passage of the FLSA and its post-World War II support for the statute and efforts to raise the minimum wage).

121. *See, e.g.*, FRASER & GERSTLE, *supra* note 38, at 76; *see also* Harris, *supra* note 108, at 116-41 (reviewing the political history of the FLSA). *See generally* HUNNICUTT, *supra* note 12, at 159-249 (discussing President Roosevelt’s efforts to substitute the Black-Connery 30 Hour Week Bill with the FLSA and public works construction).

122. *See, e.g.*, *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (discussing the central aim of the FLSA).

123. BORIS, *supra* note 38, at 274 (describing the FLSA as a statute “developed out of the political compromise that characterized Roosevelt’s second term”); *see also* U.S. DEP’T OF LABOR, HISTORY OF FEDERAL MINIMUM WAGE RATES UNDER THE FAIR LABOR STANDARDS ACT, 1938–1996, at <http://www.dol.gov/dol/esa/public/minwage/chart.htm> (last visited Sept. 5, 2001).

124. BORIS, *supra* note 38, at 274; *see also* Harris, *supra* note 108, at 163 (arguing that the FLSA “codified the conception of Competitive Fairness to ameliorate cutthroat competition between employers in increasingly national product markets, rather than assuring Bargaining Fairness and a living wage for all workers”).

125. Patrick M. Anderson, *The Agricultural Employee Exemption From the Fair Labor Standards Act of 1938*, 12 HAMLIN L. REV. 649, 651 (1989) (quoting 29 U.S.C. § 213(a)(6) (1982)).

126. 29 U.S.C. § 207 (2001).

weekend for leisure (echoing the eight-hour movements' maxim),¹²⁷ the “state of being’ in which one is free to do whatever he or she wants to do.”¹²⁸ It was also assumed “that all men should be wage earners; women with young children should not be working.”¹²⁹

Under the labor standards baseline, the U.S. Supreme Court, in *United States v. Darby*,¹³⁰ (citing *West Coast Hotel* and *Bunting*) upheld the constitutionality of the minimum wage and maximum hours standards contained in the FLSA.¹³¹ In part, the Court determined that the statute’s minimum wage and maximum hours provisions represented a constitutional exercise of Congress’s commerce power and did not violate the Due Process Clause of the Fifth Amendment of the U.S. Constitution.¹³² The FLSA record keeping requirement was also a valid Congressional exercise of commerce power, “a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it.”¹³³

The FLSA linkage of wages with hours as an “either/or choice” signaled an ideological and rhetorical shift in the debate regarding labor and capital.¹³⁴ Essentially, “[w]age labor was accepted as a system, and many workers took the American dream to be not economic independence but rather an elevated level of consumption.”¹³⁵

During the second half of the twentieth century, the pursuit of the “good job” and commercialism replaced the nonpecuniary realms as a worker’s source of status and self-fulfillment.¹³⁶ A “longer-hours trend” began to surface in the late 1970s when workers labored long hours to

127. See *supra* Part II.A.

128. Shannon Mullen, *Waning Weekends: Schedules Blur Lines Between Work and Play*, CHI. SUN-TIMES, Apr. 18, 1999, at 39 (citing the Aristotelian definition of leisure and how it is commonly confused “with recreation or time off from work, even if that time is spent doing chores”); see also Barbara Brotman, *On the First Day They . . . ; On the Second Day They . . . ; On the Third Day They . . . ; Rested*, CHI. TRIB., Apr. 11, 1999, § 13 (Family), at 1 (discussing the benefits of a thirty to thirty-five hour full-time workweek and its byproduct—a three-day weekend providing two days for chores and one full day of leisure).

129. REICH, *supra* note 14, at 92 (discussing Secretary Perkins’s reports on social protection efforts).

130. 312 U.S. 100 (1941).

131. *Id.* at 100.

132. *Id.* at 115-16, 118, 121.

133. *Id.* at 124-25.

134. See, e.g., FRASER & GERSTLE, *supra* note 38, at 56-57 (discussing the eclipse of the labor question and the ascendancy of organized labor); HUNNICUTT, *supra* note 11, at 147-49 (describing the enactment of the FLSA as a watershed event).

135. PAPKE, *supra* note 28, at 99 (discussing “the ‘taming’ of the American labor movement”).

136. See, e.g., HUNNICUTT, *supra* note 11, at 182 (discussing the idealization of work, e.g., “the good job”); SCHOR, *supra* note 11, at 107-30 (discussing the “work-and-spend” cycle).

avoid falling behind as wages stagnated and declined. By the late 1990s, however, workers began seeking a “work-life balance,” attempting to allot more time for family and community in lives consumed by the “world of work and money.”¹³⁷

III. DEVELOPMENT AND CURRENT POLITICS OF THE FAIR LABOR STANDARDS ACT

“After more than sixty years, the Fair Labor Standards Act (FLSA) remains the primary federal statute setting the minimum wage and maximum hour standards applicable to most American workers.”¹³⁸ These standards create minimum substantive rights that an individual cannot waive for, or release to, an employer, except through judicially approved stipulated judgments or settlements supervised by the USDOL.¹³⁹ This section examines the minimum wage as a maximum hours labor standard, the policies underlying overtime pay, and the development of the regulations for the white-collar exemptions. It also

137. James Lardner, *World-Class Workaholics: Are Crazy Hours and Takeout Dinners the Elixir of American's Success?*, U.S. NEWS & WORLD REP. (Dec. 20, 1999), available at http://usnews.com/usnews/search/magazine_search.htm (cover story examining historic and current work hour trends and the impact of overwork on individuals, families and communities); see also FRASER, *supra* note 13, at 22 (describing work in the technology and financial services sectors: “The long hours aren’t because we want to outshine everybody; we want to keep up with everybody”); John Leland, *To Loaf or Not to Loaf: After Eight Years of Clinton-Era Workaholism, a Nation Considers Kicking Back*, N.Y. TIMES, Dec. 17, 2000, § 6 (Magazine), at 25-26 (asking the question, “[a]re you lazier now than you were eight years ago?” and suggesting that the U.S. electorate, “like dogs and their owners . . . resemble their leaders,” by voting for a President “who raised coasting to a form of personal expression,” over “the energizer veep” who “earnestly promis[ed] to continue the legacy of those workaholic Clinton years”); John D. Solomon, *A Trickle-Down Theory for a Shorter Workday*, N.Y. TIMES, Apr. 1, 2001, § 3, at 4 (noting that “Attorney General John Ashcroft joked that his boss [President Bush] was committed to working ‘24/7 – 24 hours a week, 7 months a year’”); *infra* Parts IV., V. (analyzing the “Overworked American” thesis).

138. HEALTH, EDUC., & HUMAN SERV. DIV., GEN. ACCOUNTING OFFICE, REPORT TO THE SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE, U.S. HOUSE OF REPRESENTATIVES, FAIR LABOR STANDARDS ACT: WHITE-COLLAR EXEMPTIONS IN THE MODERN WORK PLACE 1 (Sept. 30, 1999) (GAO/HEHS-99-164) [hereinafter GAO REPORT, WHITE-COLLAR] (urging the USDOL to revise the white-collar tests).

139. 29 U.S.C. § 216(b), (c) (2001); *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 704 (1945) (stating “a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy”); D.R. Rimmer, Annotations, *Settlement of Back Wage Claims Under § 16(b), (c) of Fair Labor Standards Act (29 USCS § 216(b), (c))*, 65 A.L.R. FED. 698, 700 (1983) (collecting and analyzing decisions of §§ 16(b), (c)); see also *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 737 (1981) (holding that a union member did not lose his right to make a claim under the FLSA because he was covered by a collective bargaining agreement).

examines legislative studies, arguments and proposals for revising the FLSA, and the USDOL's response to legislative initiatives. This examination illustrates the need to reconfirm the policies and purposes of maximum hours labor standards, and the certainty that maintaining the status quo condemns the standards to continuing erosion, covering fewer and fewer workers.

A. THE MINIMUM WAGE

The FLSA minimum wage provision (section 6) is a maximum hours labor standard with a three-part purpose of supporting a minimum living standard, redistributing wealth, and shortening the workweek. Addressing the first goal, a historic purpose for the minimum wage standard is to maintain a minimum standard of living, lessen the need for government aid to families, and prevent disputes between employers and organized labor.¹⁴⁰ In 1996, FLSA section 6 covered 7.9 million workers, 64.9% of the national workforce. Approximately three-fourths of the workers excluded from the standard were exempt from the statute under the white-collar exemptions.¹⁴¹ Focusing on workers who have permanently left school, William J. Carrington and Bruce C. Fallick observed in their article, *Do Some Workers Have Minimum Wage Careers?*,¹⁴² that

upon leaving school, the vast majority of workers quickly move into wage ranges well above the minimum wage. Thus, minimum wages have virtually no effect on the careers of most workers. However, we identify a nontrivial fraction of workers that spend substantial portions of their post-school career on minimum or near-minimum wage jobs. For example, we estimate that more than 8 percent of workers spend at least 50 percent of their first 10 post-school years working in jobs paying less than the minimum wage plus \$1.00. We find that workers with such minimum wage careers are largely drawn from demographic groups with generally low wages: women, minorities, and the less-educated. Thus, while relatively few in number, there is an identifiable

140. 29 U.S.C. § 202(a) (2001).

141. EMPLOYMENT STANDARDS ADMIN. WAGE & HOUR DIV., U.S. DEP'T OF LABOR, MINIMUM WAGE AND OVERTIME HOURS UNDER THE FAIR LABOR STANDARDS ACT 12 (Jan. 2001) [hereinafter 2001 FLSA REPORT] (reporting legislative developments and FLSA coverage and compliance).

142. William J. Carrington & Bruce C. Fallick, *Do Some Workers Have Minimum Wage Careers?*, 124 MONTHLY LAB. REV. 17 (May 2001), available at <http://www.bls.gov/opub/mlr/2001/05/art2abs.htm>.

subpopulation of workers whose lifetime income and employment is likely to be associated with minimum wages. For individuals in this group, minimum wages do not have merely transitory effects.¹⁴³

As for the second and third goals, studies by the National Bureau of Economic Research (NBER)¹⁴⁴ and the Jerome Levy Economics Institute at Bard College (JLEI) suggest that the minimum wage should be viewed broadly as a method to redistribute income and shorten the workweek.¹⁴⁵ In separate working papers, Dora L. Costa (NBER) and Oren M. Levin-Waldman (JLEI) observed that the minimum wage has a greater impact in southern and other right-to-work states with lower wage structures than it does in regions with high union density.¹⁴⁶ Specifically, Costa found evidence that the initial drop in work hours (1938–1950), resulting from the FLSA, was greater in the South than the North because southern employers were less able to adjust straight-time wages—the FLSA raised wages in the South more than it did in the North.¹⁴⁷ This imbalance helps explain Levin-Waldman’s observation that the political opposition to the minimum wage is greater in the South and other right-to-work states.¹⁴⁸

143. *Id.* at 17.

144. NBER is a private non-profit corporation established in 1920 to study (and advise government regarding) economic conditions. See Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 ADMIN. L. REV. 859, 866 (2000) (discussing economist Wesley Mitchell’s formation of NBER, and how “NBER joined Brookings [the Brookings Institute] as part of the three-cornered relationship among private dollars, private advice, and official action”).

145. OREN M. LEVIN-WALDMAN, THE MINIMUM WAGE AND REGIONAL WAGE STRUCTURE: IMPLICATIONS FOR INCOME DISTRIBUTION 1-2 (The Levy Econ. Inst. of Bard Coll., Working Paper No. 267, 1999) (reviewing literature and census data regarding who earns the minimum wage), available at <http://www.levy.org/docs/wrkpap/papers/267.html>; see also Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 990-91 (2001) (observing that the distribution of income matters to social welfare, notably because “redistributing income from the rich to the poor will tend to raise social welfare, assuming that the marginal utility of income is greater for the poor than for the rich”). See generally DORA L. COSTA, HOURS OF WORK & THE FAIR LABOR STANDARDS ACT: A STUDY OF RETAIL & WHOLESALE TRADE, 1938–1950 (Nat’l Bureau of Econ. Research, Working Paper No. 6855, 1998), available at <http://www.nber.org/papers/w6855> (comparing workers in the wholesale trade covered by the FLSA with workers in the retail trade who were not originally covered by the statute).

146. LEVIN-WALDMAN, *supra* note 145, at 4-15 (reviewing regional wage structures).

147. COSTA, *supra* note 145, at 12-24 (analyzing the impact of the FLSA on average weekly hours by examining trends in the retail and wholesale trades between 1935 and 1950).

148. LEVIN-WALDMAN, *supra* note 145, at 15-16 (discussing the implication of the right to work on minimum wage).

The minimum wage has failed to keep pace with increasing prices, poverty thresholds, and average wages.¹⁴⁹ As a result, the minimum wage cannot achieve its three-part purpose. Specifically, Congress last increased the minimum wage rate from \$4.25 per hour to \$4.75 beginning October 1, 1996, and \$5.15 per hour on September 1, 1997.¹⁵⁰ This modest rate increase “nudged up hourly wages at the low end of the pay scale.”¹⁵¹

The inflation-adjusted (real) value of the minimum wage has dropped steadily from its peak in the late 1960s to its current real value—18% below what it was in 1979.¹⁵² Skill-based wage inequity (unequal distribution of wages between educated and less-educated workers) is similar to levels present on the eve of World War II.¹⁵³ Because the minimum wage rate is “so low,” eleven states and the District of Columbia set minimum wage rates greater than the federal rate.¹⁵⁴ A nationwide survey of small businesses conducted by the JLEI in 1999 found that 60% of small businesses indicated that they would not be affected by a \$7.25 per hour living wage.¹⁵⁵ More than 75% of the small businesses responded that even a \$6.00 minimum wage would not affect their employment practices.¹⁵⁶

More than forty cities and counties have passed “living wage” ordinances¹⁵⁷ requiring their contractors to pay their workers between

149. See, e.g., 2001 FLSA REPORT, *supra* note 141, at 14-16 (reviewing the minimum wage and key economic indicator from 1969 through 1999).

150. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 2104, 110 Stat. 1928-29 (“Minimum Wage Increase Act of 1996”).

151. Louis Uchitelle, *The Sounds of Silence*, N.Y. TIMES, Dec. 19, 1999, § 4, at 4.

152. BLUESTONE & HARRISON, *supra* note 93, at 191-94 (discussing the long-term inequality in wages generated by the “Wall Street” model for economic growth).

153. ROBERT A. MARGO, THE HISTORY OF WAGE INEQUALITY IN AMERICA, 1920 TO 1970 10 (The Levy Econ. Inst. of Bard Coll., Working Paper No. 286, 1999) (placing the recent rise in wage inequality into a long-term historical context), available at <http://www.levy.org/docs/wrkpap/papers/286.html>; see also THOMAS PIKETTY & EMMANUEL SAEZ, INCOME INEQUALITY IN THE UNITED STATES, 1913-1998 27-30, 32-33 (Nat’l Bureau of Econ. Research, Working Paper No. 8467, 2001) (reviewing evidence of a U-shaped pattern of top income and wages shares over the twentieth century, and how wage inequality is currently higher than before WWII), at <http://www.nber.org/papers/w8467>.

154. U.S. DEP’T OF LABOR, MINIMUM WAGE LAWS IN THE STATES, at <http://www.dol.gov/dol/esa/public/minwage/america.htm> (last visited Sept. 7, 2001) (stating the minimum wage and premium pay provision, if any, in each state).

155. OREN M. LEVIN-WALDMAN, THE MINIMUM WAGE CAN BE RAISED: LESSONS FROM THE 1999 LEVY INSTITUTE SURVEY OF SMALL BUSINESS 5 (The Levy Econ. Inst. of Bard Coll., Policy Notes 1999/6, 1999) (arguing “that the bold step should be taken now, especially while the economy continues to be strong”), available at <http://www.levy.org/docs/pn/99-6.html>.

156. *Id.* (suggesting that “[a]t the very least the minimum wage could be raised to \$6.00”).

157. Uchitelle, *supra* note 151, at 4.

\$6.05 per hour (Milwaukee, Wisconsin) to \$10.75 per hour (San Jose, California),¹⁵⁸ and \$13.00 per hour with paid benefits or \$14.00 per hour without benefits (Santa Cruz, California).¹⁵⁹ Nonetheless, living wages like the \$7.60 per hour wage rate Chicago, Illinois, adopted in July 1998, at best, merely provides a paycheck-to-paycheck existence at one-third of the average income in Illinois.¹⁶⁰ Living wage ordinances have critics. For example, opponents to the San Antonio, Texas, living wage for businesses receiving city tax incentives (\$9.27 per hour for non-manufacturing jobs, and \$10.21 per hour for manufacturing jobs) assert that the “city-wide public good of tax incentives may outweigh the community-based public good of higher wages.”¹⁶¹ Five states (Arizona, Colorado, Louisiana, Missouri and Utah) have adopted laws prohibiting

158. NAT’L INTERFAITH COMM. FOR WORKER JUSTICE, GIVING LIFE TO A LIVING WAGE: FACTS AND RESOURCES FOR LIVING WAGE CAMPAIGNS, at <http://www.nicwj.org/pages/materials.lw.html> (last visited Sept. 6, 2001) (listing the communities that passed living wage laws).

159. *Santa Cruz, Calif. Adopts ‘Living Wage’ Measure: City Employees, Contractors Will Receive Nation’s Highest Living Wage*, 165 Lab. Rel. Rep. (BNA) 312 (Nov. 6, 2000).

160. See, e.g., Monica Davey, *Legislators Call for ‘Livable Wage’: New Study Shows Job Growth Highest at the Lowest Levels*, CHI. TRIB., Dec. 9, 1998, § 2, at 7 (citing the report, “Working Hard, Earning Less,” produced by the National Priorities Project and Jobs with Justice); Lisa Black & Diane Struzzi, *Living With a ‘Livable Wage’: Could You Live on Less than \$33,000 a Year—the So-Called ‘Livable Wage’? These Families Do, but Just Scrape By*, CHI. TRIB., Dec. 11, 1998, § 1, at 1 (describing the pay-check to pay-check existence of a family of four living on an income one-third less than the average Illinois family income of \$47,978); Barbara B. Buchholz, *While It Won’t Make These Employees Rich; Recipients of the Controversial Living Wage Say Every Little Bit Helps*, CHI. TRIB., Oct. 8, 2000, § 6, at 1 (discussing the impact of the Chicago living wage ordinance on affected workers and surveying the debate for and against the measure). The U.S. Census Bureau reports that the 1998 to 1999 median household income in Illinois is \$45,262. The national figure is \$40,816. U.S. CENSUS BUREAU, INCOME OF HOUSEHOLDS BY STATE, tbl.D (1999) (providing household income per state for the year 1999), available at <http://www.census.gov/hhes/income/income99/99tabled.html>; see also William Neikirk & Frank James, *Average Family Wages Top \$40,000: Boom Pushes Income Higher, Poverty Lower*, CHI. TRIB., Sept. 27, 2000, § 1, at 1 (discussing how economic expansion has halted wage inequality trend); Bonnie Miller Rubin & Kathy Bergen, *Average Family Wages Top \$40,000: Income Up, But Not All Feeling Flush*, CHI. TRIB., Sept. 27, 2000, § 1, at 1 (discussing how the median income is not all that bad if you don’t have a family to support); KELLIE C. GERMOND, ILL. DEP’T OF LABOR, PROGRESS OF WOMEN AND MINORITIES IN THE ILLINOIS WORKFORCE 6 (Apr. 2000) (annual report to the Illinois General Assembly examining state and national figures).

161. Georgette C. Poindexter, *Economic Development and Community Activism*, 32 URB. LAW. 401, 402-03, 407 (2000) (discussing the San Antonio living wage ordinance advanced by a church-based organization from the “*Chicano barrios of San Antonio*”); see also DAVID NEUMARK, LIVING WAGES: PROTECTION FOR OR PROTECTION FROM LOW-WAGE WORKERS? 26 (Nat’l Bureau of Econ. Research, Working Paper No. 8393, 2001) (concluding that living wage laws help low-wage workers and families when they cover employers receiving business assistance from a city), available at <http://www.nber.org/papers/w8393>.

living wage ordinances. Similar legislation was defeated in 2001 in Michigan, South Carolina and Virginia.¹⁶²

Even though the minimum wage currently fails its historic purpose of providing a living wage, the Bureau of Labor Statistics estimated that 4.4 million hourly workers earned at or below (1.6 million earning at, and 2.8 million earning below) the \$5.15 hour minimum wage rate in 1998.¹⁶³ This number is 6.2% of the hourly workers in the United States.¹⁶⁴ There are 71.4 million individuals (61.2% of all wage earners) who are hourly workers.¹⁶⁵ Retail and the service trades employ 75% of the low-wage workers.¹⁶⁶

B. OVERTIME PAY

The FLSA overtime pay provision (section 7(a)) is not simply a “scheme to raise substandard wages.”¹⁶⁷ The U.S. Supreme Court explained in its 1942 opinion, *Overnight Motor Transportation Co. v. Missel*:

Of course, this was one effect of the time and a half provision, but another and an intended effect was to require extra pay for overtime work by those covered by the Act even though their hourly wages exceeded the statutory minimum. The provision of § 7(a) requiring this extra pay for overtime is clear and unambiguous. It calls for 150% of the regular, not the minimum, wage. By this requirement, although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the Act. In a period of widespread unemployment and small profits the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was a part of the plan from the

162. V. Dion Haynes, ‘Living-Wage’ Laws Prompt Debate Over Fairness, CHI. TRIB., June 3, 2001, § 1, at 9; see also *Missouri Hotel & Motel Ass’n v. City of St. Louis*, 7 Wage & Hour Cas. 2d (BNA) 218, 233-37 (Mo. Cir. Ct. 2001) (holding the City of St. Louis living wage ordinance unconstitutionally vague); *Missouri Court Invalidates St. Louis Living Wage Ordinance; Group Vows to Secure Passage of Improved Wage Law for City*, 55 Union Lab. Rep. (BNA) 243 (Aug. 2, 2001) (discussing *Missouri Hotel & Motel Ass’n*).

163. *4.4 Million Paid At, Below Minimum Wage, BLS Says: DOL’s Herman Reaffirms Clinton Support for Raising Minimum Wage*, 161 Lab. Rel. Rep. (BNA) 507, 507-08 (Aug. 16, 1999).

164. *Id.* at 508.

165. *Id.*

166. *Id.*

167. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577 (1942) (superceded by statute).

beginning. “A fair day’s pay for a fair day’s work” was the objective stated in the Presidential message which initiated the legislation. That message referred to a “general maximum working week,” “longer hours on the payment of time and a half for overtime” and the evil of “overwork” as well as “underpay.” The message of November 15, 1937 calling for the enactment of this type of legislation referred again to protection from excessive hours.¹⁶⁸

In 1996, the overtime pay provisions of the FLSA applied to seventy-four million workers, 60.5% of the national workforce. Approximately 48.3 million workers, who were excluded from the provisions, were exempt under the white-collar exemptions.¹⁶⁹ The Employment Policy Foundation (EPF), a conservative employer-sponsored think tank,¹⁷⁰ estimates that \$19 billion of required overtime goes unpaid.¹⁷¹ Business ethicists acknowledge that employers’ refusal to pay overtime has become a standard and largely invisible policy that predominantly affects women in secretarial, sales assistance, and service technician positions.¹⁷² This refusal to pay overtime supports organized labor’s claim that the USDOL “has only about 900 investigators, [resulting in] ‘rampant violations’ of the FLSA, particularly in nonunion settings.”¹⁷³ *Business Week* observed in 2001 that a growing number of white-collar workers were filing suit for overtime pay:

It’s not surprising that people are starting to seek revenge. The lawsuits come at a time when many of the overtired and overworked, now

168. *Id.* at 577-78 (footnotes omitted).

169. 2001 FLSA REPORT, *supra* note 141, at 12 (discussing FLSA coverage).

170. Merrill Goozner, *Minimum Wage Debate Reopens: The Issue Is About Working Women, Advocates Will Argue to Congress*, CHI. TRIB., Oct. 12, 1999, § 1, at 1 (surveying studies on raising the minimum wage; the article described the EPF as “a business-backed conservative think tank whose main mission is opposition to minimum-wage increases”); *see also Hastert Move May Spur Minimum Wage Hike Bill: Despite Foot-Drugging, Bipartisan Support for Raise Exists, Spokesman Says*, 165 Lab. Rel. Rep. (BNA) 19, 22 (Sept. 4, 2000) (noting that the EPF was “funded by employers in the hospitality, manufacturing, and retail industries”).

171. Martin Malin, Editorial, *Premium Pay or Comp Time?*, CHI. SUN-TIMES, Sept. 21, 1996, at 14.

172. Marjorie Kelly, *Unpaid Overtime: Refusal to Pay Overtime is Becoming Standard, if Quiet, Policy at Many Corporations, It’s Illegal, It’s Also Largely Invisible*, BUS. ETHICS, July/Aug. 1998, at 12-13.

173. ‘Huge Upsurge’ Seen in Wage-Hour Class Actions: Enforcement of FLSA Has Become a ‘Major Component’ in Organizing, 166 Lab. Rel. Rep. (BNA) 442, 443 (Apr. 9, 2001); *see also* Jenny B. Davis, *Still Working After All These Years: Cases Raising Fair Labor Standards Act Issues Are on the Rise*, A.B.A. J. 67 (Oct. 2001) (observing that, while “the law has never fallen out of use . . . federal judicial statistics show a marked increase in employee suits claiming FLSA violations since 1998[;] [a]nd, lawyers on both sides of the labor law bar generally expect the uptick to continue through 2001 and beyond”).

fearful of losing their jobs in the slowdown, are becoming fed up [S]ome allege that all those record-breaking productivity gains of the New Economy came not just on technology's back but also on theirs, especially since the boom was largely achieved without having to dole out big wage hikes to the rank-and-file.¹⁷⁴

As a result, some businesses are quietly restructuring jobs and changing their compensation structure to comply with overtime requirements.¹⁷⁵

C. THE WHITE-COLLAR EXEMPTIONS

White-collar employees have been excluded from the FLSA's protective scope since its enactment in 1938.¹⁷⁶ At the time, white-collar workers were a small and exclusive class, identifiable as high-level and highly paid executives and administrators, and independent and/or self-employed professionals who were generalists in their fields. Times have changed. The ranks of white-collar employees currently swell the United States workforce. There is little difference today between white-collar managers and administrators and blue-collar workers. Professionals have lost their independence, becoming salaried specialists working within private and public bureaucracies. The existing regulatory environment (ossifying the USDOL regulations addressing the white-collar exemptions) effectively enlarges the scope of workers unprotected by the maximum hours labor standards.

This section discusses the term "white-collar," examines the evolution of the USDOL regulations delineating and defining the white-collar exemptions, and reviews Congressional studies and current overtures regarding the FLSA and its white-collar exemptions.

1. WHITE-COLLAR EMPLOYEES

Section 13(a) of the FLSA provides eleven categories of workers that employers are exempt from paying both the minimum wage rate and overtime compensation.¹⁷⁷ The diversity of such workers includes employees of amusement or recreational establishments and baby-

174. *Revenge of the "Managers:" Many So-Called Supervisors Are Suing for Overtime Pay*, BUS. WK., Mar. 12, 2001, available at http://www.businessweek.com/magazine/content/01_11/b3723096.htm.

175. *Id.*

176. 29 U.S.C. § 213(a) (2001).

177. *Id.*

sitters.¹⁷⁸ An area of historic concern involves the “so-called ‘white-collar’ exemptions”¹⁷⁹ (section 13(a)(1)), excluding “any employee employed in a bona fide executive, administrative, or professional capacity” from the minimum wage and overtime pay.¹⁸⁰ The term “white-collar” broadly refers to

office, technical, administrative, and professional workers. It is a carryover from the past when clerks and office workers were people in managerial positions in enterprises and firms. They were close to owners, were usually well paid, and many eventually went into their own businesses. They were middle class in income, outlook, attitude, and life style. This is no longer true. Most white-collar workers today are workers, not middle-class managers. In income and life style they are closer to blue-collar workers than to owners, and most of them earn less than unionized blue-collar factory workers and skilled craftsmen. Most office work is repetitive, manual, monotonous, and mechanical rather than intellectual and mentally creative.¹⁸¹

Post-World War II sociologists and social commentators often remark that there is little difference between white-collar and blue-collar workers.¹⁸² For example, Susan Faludi in her 1999 book, *Stiffed: The Betrayal of the American Man*, noted that “[t]he aerospace system was set up the same way as the work programs of the thirties and forties, as the WPA was set up by the Democrats—to set up jobs. All they did is take a blue-collar network and restructure it to advance a white-collar one.”¹⁸³

178. *Id.* § 213(a)(3), (15).

179. GAO REPORT, WHITE-COLLAR, *supra* note 138, at 1.

180. 29 U.S.C. § 213(a)(1) (2001).

181. APPLEBAUM, *supra* note 40, at 168 (discussing white-collar and professional workers in the twentieth century); *see also* JOHN KENNETH GALBRAITH, THE AFFLUENT SOCIETY 334-48 (1958) (discussing labor, leisure, and the “new class,” e.g., white-collar workers); JEREMY ATTACK ET. AL., RISING WAGE DISPERSION ACROSS AMERICAN MANUFACTURING ESTABLISHMENTS, 1850–1880 3, 24-25 (Nat’l Bureau of Econ. Research, Working Paper No. 7932, 2000) (discussing the “de-skilling” of manufacturing jobs as creating wage inequities between a large number of unskilled manufacturing workers and “white collar workers – the educated labor of the period”), *available at* <http://www.nber.org/papers/w7932>; MARGO, *supra* note 153, at 9 (discussing antebellum white-collar workers: “Nineteenth century clerks (almost all of whom were male) were frequently involved with accounting and management tasks of the enterprises; they were, in other words, the ‘educated’ workers of their day, on a fast track to upper levels of management”).

182. SUSAN FALUDI, *STIFFED: THE BETRAYAL OF THE AMERICAN MAN* 76-80 (1999) (characterizing white-collar employees collectively as bureaucrats, and individually as the “new [l]ittle [m]an,” referencing David Riesman, *The Lonely Crowd: A Study of the Changing American Character* (1961), William Hollingsworth Whyte, *The Organization Man* (1957), and C. Wright Mills, *White Collar: The American Middle Classes* (1956)).

183. *Id.* (internal quotations omitted).

Jill Andresky Fraser explained in her 2001 book, *White-Collar Sweatshop: The Deterioration of Work and Its Rewards in Corporate America*, that two types of white-collar workers emerged during the early post-war economy—the corporate executive at the top of the ladder who ran the business, and the “man in the gray flannel suit” in middle management and administrative functions.¹⁸⁴ Between 1948 and 1969, overwork was confined to the executives at the top of the ladder. Middle management and administrative employees typically worked between nine and five and within clearly delimited boundaries.¹⁸⁵

Professional employees comprised less than 3–4% of the workforce through most of American history.¹⁸⁶ Until the mid-1800s, professionals were primarily concentrated in three occupations: theology, law, and medicine. These three fields accounted for approximately two-thirds of the graduates from American colleges and universities. By 1900, the fields of “engineering, the sciences, education, and a variety of commercial occupations” had overtaken the original three professions and absorbed the majority of college graduates.¹⁸⁷ The growth in professional occupations was a response to business demands (the marketplace demanded an expertise in new technologies, the humanities, social sciences, and business management) and government needs for experts to administer programs developed by movements for social reform.¹⁸⁸ “[G]overnment today employs one-fifth of all physical scientists, one-third of all life scientists, three-eighths of all mathematicians, and more than a quarter of all social scientists.”¹⁸⁹

There were approximately 3.7 million professional workers in the United States when Congress enacted the FLSA in 1938.¹⁹⁰ Women were entering the professions at a faster rate than men.¹⁹¹ The generally recognized definition of a professional worker was an individual possessing

enough general education to enable him to apply it to many different situations, which may be unlike each other. The skilled mechanic possesses training in a given craft. The engineer, on the other hand,

184. FRASER, *supra* note 13, at 108.

185. *Id.*

186. FOGEL, *supra* note 13, at 67 (discussing the rise of the professional class).

187. *Id.*

188. *Id.* at 70, 71.

189. *Id.* at 73.

190. LABOR FACT BOOK III, *supra* note 97, at 107-08 (analyzing census data addressing the number and type of professional workers entering the workforce between 1920 and 1935).

191. *Id.*

possesses a background of scientific knowledge sufficient to enable him to design the production processes.

More than half of all professional workers to-day [sic] are salaried employees of public or semi-public institutions—schools, hospitals, libraries, churches, research foundations and government bureaus. Self-employed practitioners such as doctors, dentists, private-duty nurses . . . depend for their existence upon the ability of workers to earn wages above mere subsistence. The remainder of the professional workers are those serving profit-making business[es] directly either on a salary or on a fee basis, such as engineers, accountants and lawyers.¹⁹²

Since the 1950s, professionals have shifted away from independent and/or self-employed generalists (such as doctors living in neighborhoods and lawyers as sole-practitioners) to salaried specialists working within government and corporate bureaucracies where administrators and managers make policy and budget decisions (such as doctors working in HMOs).¹⁹³ Many have addressed their loss of independence with a traditionally blue-collar response—they organized labor unions.¹⁹⁴

Between 1998 and 2008, employment in professional specialty occupations is expected to increase by 5.3 million workers—rising from 14.1% to 15.6% of the total United States workforce.¹⁹⁵ Approximately “two-thirds of the job growth is expected among teachers, librarians, and counselors; computer, mathematical and operations research occupations; and health assessment and treating occupations.”¹⁹⁶

192. *Id.* at 107.

193. *See, e.g.*, APPLEBAUM, *supra* note 40, at 172 (reviewing recent census material and related writings on the characteristics of professional workers).

194. *See, e.g.*, *Professional, Technical Organizing Up, Study Says: Union Representation Up 23% Among Professional Jobs, AFL-CIO Finds*, 166 Lab. Rel. Rep. (BNA) 313 (Mar. 12, 2001) (observing that “in 1999, 50 percent of all those represented by unions wore white collars and their numbers are growing”); Todd A. Lyon, *Union Docs: The AMA, the HMOs, and Physicians’ Rights to Collectively Bargain*, 89 ILL. B.J. 138 (Mar. 2001) (arguing that the new physician labor organizations will upgrade working conditions and improve health care in the face of HMOs’ growing power); Sarah A. Klein, *AMA to Establish National Collective Bargaining Unit*, 42 AM. MED. NEWS, July 5, 1999 (discussing the American Medical Association’s vote to form a labor organization representing employed physicians and residents), available at http://www.ama-assn.org/sci-pubs/msjama/articles/vol_281/no_27/union.htm.

195. Douglas Braddock, *Occupational Employment Projections to 2008*, 122 MONTHLY LAB. REV. 54 (Nov. 1999) (finding that occupations requiring an associate degree or higher education, accounting for one-fourth of all jobs in 1998, will account for 40% of total job growth between 1998 and 2008), available at <http://www.bls.gov/opub/mlr/1999/11/contents.htm#Articles>.

196. *Id.* at 52-53.

Between 1991 and 1997, there has been a 28% increase in professional employment among women nationally, compared to an 18% increase among men.¹⁹⁷ Women comprise 51% of the professional employees in the United States private sector, and 61.3% of the professional employees in the Illinois public sector.¹⁹⁸

2. THE WHITE-COLLAR EXEMPTION RULES

Section 13(a)(1) charges the USDOL with the duty to promulgate rules delineating and defining the scope of the white-collar exemptions.¹⁹⁹ Between 1938 and 1954, the USDOL established legislative and interpretative regulations providing a “long test” (a rigorous test addressing employees who earn at least \$155—for executive and administrative employees, \$170 for professionals—but less than \$250 per week on a salary or fee basis)²⁰⁰ and a “short test” (addressing employees earning at least \$250 per week on a salary or fee basis)²⁰¹ for the white-collar exemptions.²⁰²

197. GERMOND, *supra* note 160, at 13 (examining occupational concentration of demographic groups).

198. *Id.* at 12, 47.

199. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 13(a)(1), 52 Stat. 1067.

200. 29 C.F.R. § 541.1(a)-(f) (defining executive employees); § 541.2(a)-(e)(1) (2001) (defining administrative employees); § 541.3(a)-(e) (2001) (defining professional employees).

201. § 541.1(f) (referring to executive employees); § 541.2(e)(1)-(2) (referring to administrative employees); § 541.3(e) (referring to professional employees).

202. § 541 (“[d]efining and delimiting the terms ‘any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman’” in §§ 541.0-541.502). The legislative regulations are at §§ 541.5a-541.6. The interpretative rules are at § 541.99 and §§ 541.600-541.602; *see also* GAO REPORT, WHITE-COLLAR, *supra* note 138, at 14-15 (discussing the few statutory and regulatory changes in the white-collar exemptions since 1954). Courts and commentators have struggled for over fifty years “to identify, and to apply, criteria that are appropriate to distinguish between legislative rules and interpretive rules.” Richard J. Pierce, Jr., *Distinguishing Legislative Rules From Interpretive Rules*, 52 ADMIN. L. REV. 547, 547-48 (2000) (arguing the case law is “characterized by a great deal of unnecessary confusion and inconsistency”). The U.S. Supreme Court provided a definitive statement on the level of deference entitled to agency interpretations of statutes and regulations. *Christensen v. Harris County*, 529 U.S. 576, 581-82 (2000) (addressing the USDOL’s opinion letter interpreting its regulations implementing section 207(o) of the FLSA). The Court held that interpretations contained in opinion letters, policy statements, agency manuals, and enforcement guidelines warrant respect, not “*Chevron*-style deference, . . . but only to the extent that . . . [they have] the ‘power to persuade.’” *Christensen*, 529 U.S. at 587; *see also* Robert A. Anthony & Michael Asimov, *The Court’s Deferences – A Foolish Inconsistency*, 26 ADMIN. & REG. L. NEWS, Fall 2000, at 10 (arguing that the *Skidmore-Christensen* standard should apply to all agency interpretations contained in nonlegally binding formats); Brudney, *supra* note 4, at 184 (arguing that the *Christensen* did not advance the purpose of section 207(o) of the FLSA); William

Since 1954, changes in the regulations and interpretations have primarily involved adjusting the salary level (1958, 1963, 1970, and 1975) and addressing statutory amendments, such as the repeal of a separate retail trade exemption and the inclusion of an exemption covering certain high-paid computer professionals.²⁰³ In 1981, a Presidential order stopped the USDOL's last attempt to increase the salary level.²⁰⁴ The order essentially ossified²⁰⁵ the salary level (the \$13,000 per year salary threshold for the "short test" is only \$1.10 per hour above the current federal \$5.15 per hour minimum wage for a forty-hour workweek),²⁰⁶ qualifying more employees for the white-collar exemptions as inflation continues to minimize the test.²⁰⁷

For example, the U.S. General Accounting Office states that 30% of the full-time workforce in 1975 was automatically nonexempt, e.g., paid under the \$155 per week salary threshold for the long test.²⁰⁸ This figure was only 1% in 1998, virtually nullifying the long test.²⁰⁹ In 1975, approximately 40% of the full-time workforce could qualify with the application of the short duties test.²¹⁰ In 1998, that figure was 91%.²¹¹

Funk, *Supreme Court News: Interpretive Rules and Statements of Policy Do Not Qualify for Chevron Deference*, 25 ADMIN. & REG. L. NEWS, Summer 2000, at 9 (discussing *Christensen*); *The Supreme Court, 1999 Term – Leading Cases*, 114 HARV. L. REV. 179, 369-79 (2000) (describing *Christensen* as a decision that limits the power of guidance documents as instruments of regulation).

203. GAO REPORT, WHITE-COLLAR, *supra* note 138, at 15-16.

204. *Id.* at 15.

205. Commentators recognize rulemaking has become time consuming, burdensome and unpredictable. As a consequence, administrative agencies often use alternative vehicles to make policy statements, such as adjudicating individual disputes and non-binding policy statements like guidances, operating manuals, and press releases. Robert A. Anthony, "Well You Want the Permit, Don't You?": Agency Efforts to Make Non-Legislative Documents Bind the Public, 44 ADMIN. L. REV. 31, 35-38 (1992) (discussing agency use of permit processing to set policy); Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43, 51-65 (1992) (discussing legislative action to prohibit agencies from enforcing guidelines, criteria, bulletins, manuals, instructions, orders, or standards unless they are legislative rules); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60-66 (1995) (describing the source of ossification); Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 165-70 (2000) (discussing the trend toward setting regulatory policy by less formal methods, such as guidance documents, instead of adjudicatory proceedings and rulemaking); Patricia M. Wald, *Judicial Review: Talking Points*, 48 ADMIN. L. REV. 350, 353 (1996) (noting that the D.C. Circuit remanded 46% of the major rules it reviewed for reconsideration during one year).

206. GAO REPORT, WHITE-COLLAR, *supra* note 138, at 25-28 (discussing the impact of inflation on salary test levels).

207. *Id.* at 25 (highlighting that "[i]nflation [h]as [e]ffectively [e]liminated [i]mportant [a]spects of the [r]egulatory [t]ests").

208. *Id.* at 28.

209. *Id.*

210. *Id.*

211. GAO REPORT, WHITE-COLLAR, *supra* note 138, at 28.

Due to the current invalidity of the long test,²¹² this article concentrates on the application of the short test.

The nullification of the long test is further verified by James Smith in his 2000 article, *Supervisory Duties and the National Compensation Survey*.²¹³ Smith analyzed wage differences between workers relative to their degree of supervisory duties.²¹⁴ The analysis showed that the average hourly wage for workers in all industries with no supervisory responsibilities was \$13.64.²¹⁵ The hourly wages for individuals with varying degrees of supervisory duties ranges from team leaders at \$19.58, to first, second, and third line supervisors at \$22.16, \$35.15, and \$60.76, respectively.²¹⁶

The short test contains two separate tests, the salary basis test and the primary duties test. An employer must meet both tests to establish that it is exempt from overtime pay requirements²¹⁷ (doctors, lawyers, teachers, and certain computer professionals may be paid on an hourly basis).²¹⁸ As a rule, “FLSA exemptions are to be ‘narrowly construed against . . . employers’ and are to be withheld except as to persons ‘plainly and unmistakably within their terms and spirit.’”²¹⁹ An employer therefore has the burden of proving the exemption through “clear and affirmative evidence.”²²⁰ This inquiry is fact intensive.²²¹ When the application of the exemption is in doubt, the employer has not satisfied its burden.²²² Given the purpose of minimum wage and overtime (protecting workers from the “evil of ‘overwork’ as well as

212. *Shaw v. Prentice Hall Computer Publ'g, Inc.*, 151 F.3d 640, 643 n.2 (7th Cir. 1998) (observing that that “low threshold has rendered the long test generally inapplicable in today’s dollars”).

213. James Smith, *Supervisory Duties and the National Compensation Survey*, 5 COMP. & WORKING CONDITIONS, Spring 2000 (analyzing supervisor pay in the civilian economy), available at <http://www.bls.gov/opub/cwc/2000/Spring/art2abs.htm>.

214. *Id.* at 11-13.

215. *Id.* at 11.

216. *Id.*; see also *id.* at 10, 14 nn.5-8 (discussing the “nine generic leveling factors” this study used to assess the duties and responsibilities of a job and defining the terms team leader, and first-, second-, and third-line supervisors).

217. *Bankston v. Illinois*, 60 F.3d 1249, 1252-53 (7th Cir. 1995) (relying on *Barner v. City of Novato*, 17 F.3d 1256, 1259-60 (9th Cir. 1994)).

218. 29 C.F.R. § 541.3 (2001).

219. *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)); see also *Klein v. Rush-Presbyterian-St. Luke’s Med. Ctr.*, 990 F.2d 279, 282 (7th Cir. 1993) (exemptions are “to be narrowly construed against employers”).

220. *Clark v. J.M. Benson Co.*, 789 F.2d 282, 286 (4th Cir. 1986) (quoting *Donovan v. United Video, Inc.*, 725 F.2d 577, 581 (10th Cir. 1984)).

221. See, e.g., Mark J. Ricciardi & Lisa G. Sherman, *Exempt or Not Exempt Under the Administrative Exemption of the FLSA . . . That Is the Question*, 11 LAB. LAW. 209, 211 (1995).

222. See, e.g., *Clark*, 789 F.2d at 286.

‘underpay’”),²²³ the white-collar exemptions are appropriately narrow and difficult to circumvent.

3. CURRENT POLITICS OF THE WHITE-COLLAR EXEMPTIONS

The FLSA and the USDOL regulations for the white-collar exemptions have recently come under considerable scrutiny. This section highlights two Congressional studies and current overtures regarding the FLSA and the white-collar exemptions and the minimum wage standard.

a. GAO REPORT

In September 1999, the GAO issued a report to Representative Cass Ballenger (R.-N.C.) and Representative Bill Goodling (R.-Pa.)²²⁴ titled *Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place*.²²⁵ The GAO report provided a thorough examination of the history and application of, and complaints regarding, the regulations for the white-collar exemptions. It did not provide specific recommendations.

The report noted that “[n]early everyone we talked to—employers, employees, and experts—agreed that the current salary-test levels are too low and should be increased to higher, more reasonable levels. However, they disagreed sharply on whether the duties tests should remain the same after the salary-test levels were raised.”²²⁶ Referencing *Donovan v. Burger King Corp.*,²²⁷ the GAO opined that eliminating the salary basis test could “further weaken the protection offered to the lower-income supervisor who is required to work a 60-hour work-week.”²²⁸ Raising the salary thresholds, however, would add complexity to the regulatory test by making the long-test applicable to more employees.²²⁹

As background, the U.S. Circuit Court of Appeals for the Fifth Circuit, in *Donovan*, held that low-paid assistant managers employed by a fastfood restaurant chain were exempt executives under the FLSA. The

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

224. Representatives Ballenger and Goodling were co-chairs of the Subcommittee on Workforce Protections, Committee on Education and the Workforce. GAO REPORT, WHITE-COLLAR, *supra* note 138, at 1.

225. *Id.*

226. *Id.* at 32.

227. 672 F.2d 221 (1st Cir. 1982).

228. GAO REPORT, WHITE-COLLAR, *supra* note 138, at 35.

229. *Id.*

court found that the workers spent more than 40% of their time in routine production tasks performed by their crews and that their discretion was highly prescribed by detailed procedural manuals.²³⁰ Nonetheless, the court opined that the workers were “in charge” during their shifts.²³¹

The low-income supervisors discussed in *Donovan* have little in common with the owners of the enterprises they work for, as originally contemplated by the term “white-collar.”²³² Julio Juan Cammarota (Center for Working Families, University of California at Berkeley) addressed this issue in his research on how the fast-food industry increases quality of service while operating with mostly low wage workers (earning no more than \$2.00 above minimum wage) and “only a handful of higher paid supervisors.”²³³ Cammarota argues that the industry accomplishes this goal by “‘pushing’ the possibility of advancement without any real capacity to promote.”²³⁴ Characterizing this approach as a “myth of an internal market” Cammarota observed that supervisors motivate low-wage workers by inundating them with the possibility of corporate promotion and access to the American dream: “After at least five to six years of fast-food management experience and severely low-wages [sic], a top salary level of \$40,000 is possible.”²³⁵

The GAO report concluded by calling for the USDOL to “comprehensively review the regulations . . . and make necessary changes to better meet the needs of both employers and employees in the modern work place.”²³⁶ The conclusion was tempered, however, by an acknowledgement that the conflicting and competing interests of employers and employees make any resolution difficult.²³⁷

230. *Donovan*, 672 F.2d at 228.

231. *Id.* at 227 (applying the “sole charge” exemption at 29 C.F.R. § 541.113, and holding that “the person ‘in charge’ of a store has management as his[her] primary duty, even though [s/he] spends the majority of his[her] time on non-exempt work and makes few significant decisions”); see also *Murray v. Stuckey’s Inc.*, 939 F.2d 614, 617-18, 620 (8th Cir. 1991) (applying the “sole charge” exemption at 29 C.F.R. § 541.113, and determining that managers of highway convenience stores who spend 60%–95% of their time in non-management duties were exempt executives because they were in sole charge of an independent establishment or a physically separated branch establishment).

232. See *supra* Part III.C.1. (discussing the evolution of the term “white collar”).

233. JULIO JUAN CAMMAROTO, NOW SERVING ADVANCEMENT POSSIBILITIES: THE TIME-PRESSURED WORK AND FAMILY LIVES OF MIDDLE-CLASS MANAGERS OF FAST-FOOD RESTAURANTS, (Center for Working Families, Univ. of Cal., Berkeley, Working Paper No. 12, 1999), available at <http://workingfamilies.berkeley.edu/papers.html>.

234. *Id.* at 4.

235. *Id.*

236. GAO REPORT, WHITE-COLLAR, *supra* note 138, at 35.

237. *Id.* at 4, 30.

Ever since the FLSA was enacted, the interests of employers in expanding the white-collar exemptions as broadly as possible have competed with those of employees in limiting use of the exemptions. In 1940, for example, DOL reported that groups representing employers argued for broader use of the exemptions to allow management training, to increase flexibility in work-hour scheduling, and to ensure a stable weekly pay for employees. At the same time, employee representatives argued against broader use of the exemptions, trying to reduce the potential for abuse and exploitation of workers.²³⁸

The USDOL responded to the GAO report, in part, by noting that “[t]he views of interested parties are intractably held on opposite sides of the various issues under these regulations. Given the current regulatory environment, this greatly diminishes the prospects at the executive agency level for successfully implementing consensus changes as the GAO recommends.”²³⁹

On May 3, 2000, the House Education and the Workforce Subcommittee on Workforce Protections convened a hearing in response to the GAO report.²⁴⁰ Basing her testimony on the report, Cynthia M. Fagnoni of the GAO recommended that the “Secretary of Labor comprehensively review the regulations and adjust the entire regulatory structure as needed, carefully balancing the needs of employers for clear and unambiguous regulatory standards with those of employees for fair treatment in the work place.”²⁴¹ Representative Ballenger, co-chairperson of the subcommittee, acknowledged the “competing interests” involved in changing the white-collar regulations, and “the difficulty of finding agreement on appropriate and useful changes to the law.”²⁴² Representative Major Owen (D.-N.Y.), the ranking Democrat on the subcommittee, noted that the USDOL’s failure to update the salary threshold has “contributed to the severe erosion of the FLSA’s overtime

238. *Id.* at 6 (providing background).

239. *Id.* at 53 (reproducing the USDOL’s letter in response to the GAO’s draft report).

240. *DOL Will Look at FLSA’s ‘White-Collar’ Exemption: Comprehensive Changes to Regulation Not Expected, Agency Says*, 164 Lab. Rel. Rep. (BNA) 80, 81 (May 15, 2000) [hereinafter *Look at FLSA’s ‘White-Collar’ Exemption*].

241. CYNTHIA M. FAGNONI, U.S. GEN. ACCOUNTING OFFICE, FAIR LABOR STANDARDS ACT: WHITE-COLLAR EXEMPTIONS NEED ADJUSTMENTS FOR TODAY’S WORK PLACE 2 (May 3, 2000) (GAO/T-HEHS-00-105).

242. *Hearing on the Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place* (2000) (statement of The Honorable Cass Ballenger, Chairman, Subcommittee on Workforce Protections, Opening Statement), at <http://edworkforce.house.gov/hearings/106th/wp1Flsawhitecollar5300/osballenger.htm>; see also *Look At FLSA’s ‘White-Collar’ Exemption*, *supra* note 240, at 83 (quoting Rep. Ballenger).

provisions.”²⁴³ He also observed that the “politics of overtime issues have not changed in 60 years—employers are still seeking to exempt as many workers as possible . . . while those who represent workers are seeking to include as many workers as possible in those protections.”²⁴⁴

b. AMERICAN WORKER PROJECT

After eighteen months and \$1.4 million,²⁴⁵ Representative Peter Hoekstra (R.-Mich.)²⁴⁶ issued a report in August 1999, titled *Securing the Future of America's Working Families*.²⁴⁷ The report began with the rhetorical question, “[a]re the laws developed in a different [New Deal] Era appropriate to maintain and strengthen the position of the American worker in the next millennium?”²⁴⁸ Addressing the FLSA, the report found that the statute imposed “antiquated definitions of exempt and non-exempt workers” that hampered “[h]igh-tech and other American industries.”²⁴⁹

The sum total of this regulatory structure is a minefield which employers attempting to create more efficient workplaces cross at their peril. So-called “exempt” employees, often referred to as “white collar employees” include professionals, executives, administrators, and outside sales persons. These workers are the foundation on which the economy is growing—they account for nearly 40% of the workforce—and yet they are wholly irrelevant under the outdated FLSA structure. Non-exempt employees basically include all other employees, a total 60.5 percent of America’s wage and salary workers. The FLSA minimum wage and overtime provisions apply *only* to these non-exempt employees.

Under the FLSA, all non-exempt employees that work over forty hours per week must be paid overtime. . . . While this provision helps prevent exploitation of workers, it also discourages flexible work schedule

243. *Look at FLSA's 'White-Collar' Exemption*, *supra* note 240, at 82-83.

244. *Id.* at 83.

245. *Labor Law Reforms Aim to Ease Business Costs: Report Recommends Changes to Allow U.S. Workers 'to Compete Effectively'*, 166 Lab. Rel. Rep. (BNA) 429, 429-30 (Aug. 2, 1999) [hereinafter *Labor Law Reforms*] (calling the report a “controversial congressional review of U.S. labor law”).

246. Representative Hoekstra was the Chair of the House Education and Workforce Subcommittee on Oversight and Investigations. *Id.*

247. AWP REPORT, *supra* note 21.

248. *Id.* at VII.

249. *Id.* at IX.-X. (stating findings and recommendations).

options for non-exempt employees. Employees do not have the option to take time off instead of overtime pay.²⁵⁰

Juxtaposing New Deal Era economics with the late 1990s “new economy” (thirty-two million businesses failed in 1932 and 25% of the working population was unemployed in 1933, compared to thirteen million new jobs created between 1993 and 1999),²⁵¹ the report recommended legislation updating and adding flexibility to the white-collar exemptions, and enacting comp-time legislation for the private sector to seek legislative flexibility in an employee’s use of time. It also recommended “persistent” Congressional oversight of the USDOL’s enforcement of the FLSA.²⁵² The USDOL criticized the report as “anti-worker,” saying that its proposals would undermine the forty-hour workweek.²⁵³

On June 9, 2000, Representative Hoekstra stated at a labor-management relations conference in Washington, D.C., that the “global marketplace and workplace today are vastly different from the agrarian and manufacturing economy that spawned” the nation’s current labor laws.²⁵⁴ He saw no signs, however, of any changes in the “current model of an outdated system.” Neither pro-management nor pro-labor forces had the votes to move their positions forward. Historically, labor laws change only during times of crisis.²⁵⁵

250. *Id.* at 87 (discussing how to make flexible workplaces by updating the FLSA).

251. *Id.* at 115 (posing public policy recommendations).

252. AWP REPORT, *supra* note 21, at 108 (making recommendations under the heading, “Making America the Most Effective Work Environment in the World: Ten Priorities”); *see also* Nicholas Clark, *Fair Labor Standards Act Reform—It’s Not Broke, So Don’t Fix It*, 11 LAB. LAW. 343, 351 (1996) (counsel for the United Food & Commercial Workers International Union arguing proposed Republican FLSA reforms “are regressive attempts to eliminate the forty hour week as the standard for the vast majority of working Americans”); Christopher S. Miller & Roland M. Juarez, *Keeping Track of Comp Time Is a Full-Time Job* (presented to the ABA Federal Labor Standards Legislation Committee, Mid-Winter Meeting, Feb. 1997) (discussing the current state of the law and the opposing arguments regarding comptime legislation); Daniel V. Yager & Sandra J. Boyd, *Reinventing the Fair Labor Standards Act to Support the Reengineered Workplace*, 11 LAB. LAW. 321, 321, 339 (1996) (attorneys from the Labor Policy Association, an advocacy organization of human resource executives, compares the FLSA to the “Dead Sea Scrolls” and the rules governing the white-collar exemptions as “prehistoric wall carvings”).

253. *Labor Law Reforms*, *supra* note 245, at 430 (quoting a USDOL spokesperson).

254. *Job Safety, Other Significant Labor Changes Unlikely in Near Future*, *GOP Chairman Says*, 30 O.S.H. Rep. (BNA) (June 16, 2000) (discussing Rep. Hoekstra’s comments at a conference sponsored by the American Bar Association, the National Labor Relations Board, and the Association of Labor Relations Agencies).

255. *Id.*

c. RECENT OVERTURES

On November 30, 2000, the USDOL published its unified regulatory agenda in the *Federal Register*. The agenda described twenty priority items, including the Wage and Hour Division's longstanding effort to update and clarify its rules delineating and defining the white-collar exemptions.²⁵⁶ The USDOL plans to develop regulatory alternatives to the current salary level, the salary basis test, and to comprehensively overhaul the primary duties test, after consulting with affected interest groups.²⁵⁷ It is the USDOL's belief that regulatory, not legislative, change is "the appropriate response to the concerns raised."²⁵⁸ The agenda noted that

[s]ome 32 million employees are estimated to be within the scope of these regulations. Legal developments in court cases are changing the guiding interpretations under this exemption and creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices. Clear, comprehensive, and up-to-date regulations would provide for central, uniform control over the application of these regulations and ameliorate many concerns.²⁵⁹

The USDOL anticipated issuing a notice of proposed rulemaking in September 2001.²⁶⁰

On February 7, 2001, Senator Edward Kennedy (D.-Mass.) introduced Senate Bill 277, the Fair Minimum Wage Act of 2001. In pertinent part, the bill would increase the federal minimum wage from \$5.15 to \$6.65 in three annual increments.²⁶¹ The Bureau of National Affairs reported "President Bush has said he favors a minimum wage proposal that would give individual states the ability to determine their

256. *DOL to Issue Top Items' Final Rules by Early '01: Child Labor, Recordkeeping, Minor Protections Priority, Agency Says*, 165 Lab. Rel. Rep. (BNA) 462-63 (Dec. 11, 2000) [hereinafter *DOL Rulemaking*]; see also DOL Regulatory Plan Preamble: Statement of Regulatory Priorities, 64 Fed. Reg. 63,975 (Nov. 22, 1999), available at <http://www.dol.gov/asp/regs/unifiedagenda/plan.htm>.

257. *Defining and Delineating the Term "Any Employee Employed in a Bona Fide Executive, Administrative, or Professional Capacity"* (ESA/W-H) [Proposed Rule Stage], at <http://www.dol.gov/dol/esa/public/regs/unifiedagenda/1215aa14.htm> (last visited Jan. 2, 2001) (discussing regulatory alternatives to legislative proposals addressing the current rules delineating and defining the white-collar exemptions).

258. *Id.*

259. *Id.* (discussing the anticipated costs and benefits of the planned rulemaking).

260. *DOL Rulemaking*, *supra* note 256, at 463 (discussing long-range priorities).

261. Fair Minimum Wage Act of 2001, S. 277, 107th Cong. (2001).

own wage rates, but would not allow the rate to drop below \$5.15 per hour.”²⁶² On February 26, 2001, President Bush established the “Interagency Working Group on Federalism,” bringing together the heads of the executive department and agencies (including the Secretary of Labor) to identify initiatives such as transferring “[f]ederal endeavors which may more appropriately be carried out by [s]tate or local authorities.”²⁶³

On March 20, 2001, Representative Judy Biggert (R.-Ill.) stated at a human resource management conference that the “time and circumstances are right” for “comp-time legislation.”²⁶⁴ Speaking at the same conference, Representative John Boehner, Chair of the House Committee on Education and the Workforce (R.-Ohio), stated that he hoped to engage business and labor in a long-term project (at least five years) to overhaul the FLSA.²⁶⁵ Congress has also advanced legislation to create new exemptions for indoor salespeople, licensed funeral directors, and licensed embalmers, and broaden the exemption for computer related occupations.²⁶⁶

262. *Democrats Introduce Wage Hike Legislation: Sen. Edward Kennedy (D.-Mass.) Promises Early Senate Action*, 166 Lab. Rel. Rep. (BNA) 220, 221 (Feb. 19, 2001); *see also Wage Hike Vote Postponed Until Fall; Republicans to Offer Substitute Measure*, 15 Lab. Rel. Week (BNA) 836 (July 12, 2001) (observing that “Republicans likely will attempt to amend the measure to include several tax cuts for small businesses”); Minimum Wage State Flexibility Act of 2001, H.R. 1441, 107th Cong. (2001), *available at* <http://thomas.loc.gov>; COMM. ON EDUC. & THE WORKFORCE, SUMMARY OF THE IMPACT OF PRESIDENT BUSH’S BUDGET ON WORKPLACE ISSUES, *at* <http://edworkforce.house.gov/issues/107th/workforce/sotuw22801.htm> (last visited Sept. 9, 2001) (discussing President Bush’s belief “that if the minimum wage is increased, it must be done prudently[;] [c]ommunities should have some flexibility to ensure that any increase would not hurt employment in rural or economically depressed areas”).

263. Press Release, Office of the Press Secretary, The White House, Memorandum for the Heads of Executive Departments & Agencies, Subject: Interagency Working Group on Federalism (Feb. 26, 2001), *at* <http://www.whitehouse.gov/news/releases/2001/02/print/20010226-13.html>.

264. *Boehner to Work with DOL to Clarify FMLA: Addressing Act’s Amendments in Congress “Risky,” Committee Chair Says*, 166 Lab. Rel. Rep. (BNA) 367, 368 (Mar. 26, 2001) (quoting Rep. Biggert).

265. *Id.*

266. Sales Incentive Compensation Act, H.R. 2070, 107th Cong. (June 6, 2001), *available at* <http://thomas.loc.gov>; H.R. 648, 107th Cong. (Feb. 14, 2001), *available at* <http://thomas.loc.gov> (amending FLSA § 13(a) to insert an exemption for “any employee employed as a licensed funeral director or a licensed embalmer”); H.R. 1545, 107th Cong. (Apr. 24, 2001), *available at* <http://thomas.loc.gov> (amending FLSA § 13(a) to insert an exemption for certain computer professionals); *see also FLSA Exemption for Inside Sales Reps Urged*, 167 Lab. Rel. Rep. (BNA) 205 (June 18, 2001) (describing the house subcommittee colloquy on the measure; proponents characterize the legislation as a narrow bill, addressing “those who by reason of their specialized and technical knowledge of their products or services and their relationship with their customers, meet the conditions laid out in the bill,” and opponents who argue that “[t]he sole effect of this bill is to require workers to work longer hours for less money”); EPF NEWS RELEASE: ‘INSIDE SALES’ REFORM BILL IS A NARROW EXEMPTION, ABOUT 10.5 PERCENT OF INSIDE SALES WORKERS

IV. THE “OVERWORKED AMERICAN” THESIS

The amount of time people spend at their jobs can be an important social and economic indicator of a society's quality of life. . . . “[T]he regulation of working time is an aspect which has a direct and measurable impact on workers' health, level of strength and fatigue, on the establishment's productivity and costs, and on the society's general quality of life.” Thus, one of the central arguments of the rising quality of life in 20th century Western countries has been the reduction in the hours people spend at work.²⁶⁷

We have lost sight of the original policies and purposes behind the FLSA maximum hours labor standards.²⁶⁸ People fought and died for the right to shorter work hours, protecting the public's health, safety, welfare, and morals. Their efforts to improve society's quality of life culminated in the passage of the FLSA.²⁶⁹

The underlying policies and purposes of the FLSA maximum hours labor standards (working less, living more, and spreading the wealth) are as relevant and vital today (if not more so) as they were when enacted in 1938. In particular, the popular media and academia have given significant attention to the notion that Americans today are overworked, want to pursue a “life style,” are feeling exhausted, and are distressed that they are spending more hours working and less time with their families.²⁷⁰

WOULD BE AFFECTED BY LEGISLATION NOW BEFORE CONGRESS (June 27, 2001) (arguing that the legislation will increase incentive pay and total income for women and younger employees, asserting that “[e]mployers tend to limit the work hours of inside sales workers to avoid paying overtime”), at <http://www.epf.org/media/newsrelease/2001/nr20010627.htm>. *But see Hill Watchers Foresee Little Activity on Labor Law Front*, 167 Lab. Rel. Rep. (BNA) 436, 436-37 (Aug. 20, 2001) (quoting Deron Zeppelin, Director of Government Affairs for the Society for Human Resource Management: “[m]ost members of Congress, believe it or not, do not like to vote on these issues, period[;] [i]t is not fun to be labeled either anti-worker or pro-business[;] [m]ost of them will run for the hills before they have to vote on them”).

267. John P. Robinson & Ann Bostrom, *The Overestimated Workweek? What Time Diary Measures Suggest*, 117 MONTHLY LAB. REV. 11, 11 (Aug. 1994) (quoting Mata-Greenwood, *An Integrated Framework for the Measurement of Working Time* (ILO, Working Paper No. 92-2, 1992)).

268. *See supra* Part III.C.3. (discussing the current politics of the white-collar exemptions).

269. *See supra* Part II. (reviewing the historic origins of maximum hours labor standards).

270. ANTHONY BARKUME ET AL., U.S. DEP'T OF LABOR, REPORT ON THE AMERICAN WORKFORCE 1999, ch. 3: HOURS OF WORK 80-81 (1999) (addressing the demands that evolving labor markets place on workers' time).

Studies show that time-squeeze is not “an urban myth.”²⁷¹ The paradoxes of the current United States labor market include increased involuntary part-time employment, overemployment, and the demand by employers and workers for flexible hours.²⁷² Taking a long-term view of the work hours debate, the most favorable post-World War II work hours estimates appear positive only when compared to work hours during the mid-1800s—a period when people worked the longest hours in history. Examining eight centuries of annual work hours (using English research for pre-capitalism statistics), researchers estimate that people worked 1620 hours per year in 1200 and 1980 hours in 1600, 3650 hours in 1850, and 1949 hours in 1987.²⁷³ Thomas Geoghegan observed in 2000:

“Even in this boom most of the celebration is that wages have stopped falling for the bottom half[.] . . .

Surveys show people are working longer hours and not necessarily getting paid for it. Vacations have become shorter and are getting more so. There is less sick pay offered and more independent contractors. . . .

“This is in good times[.] . . . Wait till bad times. It’s not going to be pretty. The whole structure is so rickety and people are really stretched out.”

“Between the impossible political scenario and the economic scenario, something’s going to give at some point.”²⁷⁴

271. Compare Gregg Easterbrook, *A Hazard of Good Fortunes: America Is in the Best Shape It Has Ever Been. So Why All the Grousing?*, N.Y. TIMES, Mar. 11, 2001, § 6 (Magazine), at 22 (citing Robinson and Godbey’s findings to counter the prevailing notion of “time-bind”), and *infra* Part IV.B.2.b. (discussing Robinson and Godbey’s “time deepening” hypothesis), with *infra* Parts IV.A. & B.1., 3.-4., and V. (reviewing the “overworked American” thesis).

272. Lonnie Golden, *The Economics of Worktime Length, Adjustment, and Flexibility: A Synthesis of Contributions from Competing Models of the Labor Market*, 54 REV. SOC. ECON. 1, 35-39 (Spring 1996) (reviewing and applying neoclassical, institutionalist, and radical political economy paradigms, suggesting legislation is necessary to equalize the bargaining leverage of capital over labor).

273. SCHOR, *supra* note 11, at 43-45 (attacking the “myth” that capitalism reduced human toil).

274. Terry Carter, *A Labor of Law*, 86 A.B.A. J. 54, 61 (Apr. 2000) (quoting Thomas Geoghegan); see also THOMAS GEOGHEGAN, *THE SECRET LIVES OF CITIZENS: PURSUING THE PROMISE OF AMERICAN LIFE* 232-33 (Pantheon Books 1998) (referring to the promise described in Herbert Croly’s 1989 book, *THE PROMISE OF AMERICAN LIFE*, that the standard of living must

Analogous to the original maximum hours labor standards from the late nineteenth and early twentieth centuries, market defects (such as the imbalance of power favoring management over labor) once again require government intervention to protect workers from overwork and underpay. As Robert Reich observed in his 2000 book, *The Future of Success*,²⁷⁵ this is a societal, not a personal, struggle:

To view the struggle for a better balance between paid work and the rest of life only as a personal one, waged in private, is to ignore the larger trends that are tipping the scales. It's not just a personal choice; not simply a matter of personal balance. It's also a question of how work is—and should be—organized and rewarded. It's a question of a balanced society.²⁷⁶

Maximum hours labor standards have also become increasingly important as greater numbers of people move from Welfare to Work (WtW) pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.²⁷⁷ From the beginning, studies have shown that WtW will become more difficult when the economy slows and the most employable clients are employed.²⁷⁸ Empirical evidence shows that

continuously grow; the American electorate will become disengaged and stop voting if elected officials stop promising).

275. REICH, *supra* note 14.

276. *Id.* at 5; *see also id.* at 232 (developing the argument that balancing work and life is a societal rather than individual choice); HAYDEN, *supra* note 1, at 107-09 (describing “a tool box for reducing and redistributing working time,” including: legislation, financial incentives policies, collective bargaining; agreement among government business and labor, and, individual choice); *infra* nn.355, 635 and accompanying text (discussing Schor’s description of the “overworked American” thesis as a “prisoner’s dilemma[]” requiring “intervention on a social level,” and Handel’s suggestion that government can best serve workers by providing a minimum wage of real value and protecting unions, thus creating a balance of power between labor and management, respectively).

277. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

278. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, WELFARE REFORM: INFORMATION ON FORMER RECIPIENTS’ STATUS 27 (Apr. 1999) (GAO/HEHS-99-48) (observing that “many families who leave welfare find jobs that are low-paying”); BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001) (living on no fewer than two \$6 to \$8 an hour jobs throughout the United States, Ehrenreich found that the cost of living in America is too high for women facing welfare time limits); JEFFREY GROGGER, THE EFFECTS OF TIME LIMITS AND OTHER POLICY CHANGES ON WELFARE USE, WORK, AND INCOME AMONG FEMALE-HEADED FAMILIES 37 (Nat’l Bureau of Econ. Research, Working Paper No. 8153, 2001) (concluding that “[t]ime limits have substantial effects on welfare use but smaller effects on employment, suggesting that time limits primarily move families off of the welfare rolls who were previously combining work and welfare”), available at <http://www.nber.org/papers/w8153>; Brodsky, *infra* note 449, at 31 (reviewing past attempts at large-scale national job creation programs); Susan Chandler & Teresa Puente, *Pay at Most New Jobs Doesn’t Cut It, Group Says*, CHI. TRIB., Dec. 8, 1998, at 3 (discussing the report, “Working Hard, Earning Less: The Story of Job Growth in Illinois”); Jason

employers are working incumbent employees longer hours rather than participating in WtW programs to hire new unskilled employees.²⁷⁹ These results are contrary to the complementary public policies that it is better for people to: (1) work less than more hours; and (2) work than to be on welfare (e.g., “spread the work”). Revitalizing the FLSA by increasing the minimum wage, making it more difficult for employers to adjust their straight time wages to meet the standard, plus capping work hours and tightening any exemption to the standard, may be the incentives employers need to hire workers from WtW programs, rather than increasing their current employees’ hours.

Ultimately, the United States can readily afford the protection shorter work hours provides society. Regulations balancing labor, management, and public interests have historically had a “miniscule” impact on business productivity growth, and profits, while furthering broad societal concerns.²⁸⁰ More importantly, the dynamic United States economy can readily afford the cost—a low price for social and personal

DeParle, *Bold Effort Leaves Much Unchanged for the Poor*, N.Y. TIMES, Dec. 30, 1999, at A1 (suggesting that Wisconsin’s antiwelfare program shows the nation what to expect from Welfare-to-Work—no change in the lives of the poor); Peter B. Edelman, *Recent Developments: Welfare Reform Symposium*, 50 ADMIN. L. REV. 579 (1998) (providing critical review of The Personal Responsibility and Work Opportunity Reconciliation Act of 1996); Merrill Gozner, *Leaving the Dole: Many Call, Few Chosen: Welfare to Work Plans Scarce, Demand Great*, CHI. TRIB., July 20, 1997, at 4 (stating Ohio, with an industrial and employment profile similar to Illinois, has 324,800 individuals seeking 80,500 low-skilled jobs); Sandra Jones, *Hiring Gets Tougher in Welfare Jobs Effort*, CHI. SUN-TIMES, Oct. 11, 1998, at 41A (reporting employers confront poorer job skills and overwhelming social issues); John McCarron, Commentary, *Squeeze Play: Studies Warn of Trouble Ahead with Welfare Reform*, CHI. TRIB., July 24, 2000, at 15 (discussing a Brookings Institution 1998 report finding that minorities have a difficult time making the transition from welfare to work); Richard A. Melcher, Commentary, *Welfare Reform: Tougher Times Ahead*, BUS. WK., May 5, 1997, at 42 (May 5, 1997) (stating that “[w]hen the economy slows, and the most employable clients have jobs, real problems will surface”); Bonnie Miller Rubin, *Jumping off the Fast Track: Career Success Was Once a Big Part of the American Dream. Now, More and More People Are Waking Up to a Nightmare*, CHI. TRIB., Jan. 22, 1995, (Magazine) at 10 (discussing how shorter work hours may provide more jobs and reduce welfare); Somini Sengupta, *Living on Welfare: A Clock Is Ticking*, N.Y. TIMES, Apr. 29, 2001, at 1 (discussing difficulties in finding and getting to work in rural communities, and the uncertainty of what happens when lifetime limits on cash benefits end); Editorial, *Urban Companies Hurting Welfare-to-Work Initiatives*, CRAIN’S CHI. BUS., Apr. 10, 2000, at 10 (criticizing Chicago-based companies because nearly 60% of 7598 businesses said they would not hire public aid recipients, only 28% said they would).

279. See *infra* Parts IV.B.3.b., V.B. (addressing policy considerations of Bluestone and Rose, and surveying time-use data, respectively).

280. BLUESTONE & HARRISON, *supra* note 93, at 55 (showing that the lack of production growth in American business between 1973 and 1995 was caused by the “near total collapse in the nation’s technological and organizational prowess after 1973,” not the new regulations the business community complained “bitterly” were hurting their profits and productivity); see also YODER, *supra* note 40, at 293-302 (providing a 1930s perspective on short hours legislation).

tranquility.²⁸¹ Maximum hours labor standards clearly did not inhibit growth in productivity and profits during the 1990s²⁸² (the nation's longest running period of economic expansion).²⁸³ This result should not be surprising. The standards were designed to provide stability during periods of economic prosperity, as well as during hard times.²⁸⁴ Widespread employer cheating on overtime pay, however, may have also contributed to this result.²⁸⁵

This section sets forth the “overworked American” thesis, reviewing and reconciling conflicting mass media treatment and academic literature on the issue. In particular, it examines four directions of scholarship, reviewing the debate on trends in work hours, and the link between work hours and psychological motivations or preferences of workers. While Americans may have forgotten the rationales for maximum hours labor standards, the standards are as relevant today as they were at the turn of the twentieth century.

A. POPULAR PERCEPTION OF TIME-SQUEEZE

Time-squeeze, the shortage of time resulting from long work hours, became the staple of news magazines, business publications, major newspapers, and television networks in the early 1990s.²⁸⁶ Reminiscent of Thoreau's call to “simplify, simplify,”²⁸⁷ the *Utne Reader* observed in 1991 that some Americans were trading their high incomes and long work hours for simpler lives with fewer material possessions,²⁸⁸ a trend

281. REICH, *supra* note 14, at 247 (outlining proposals for “a new, balanced society”).

282. See *supra* Part III.C.3.b. (reviewing the AWP).

283. Julie Hatch & Angela Clinton, *Job Growth in the 1990s: A Retrospect*, 123 MONTHLY LAB. REV. 3, 3 (Dec. 2000) (describing the economy during 1992–1999 as the “longest running expansion in the Nation's history”), available at <http://stats.bls.gov/opub/mlr/2000/12/artlabs.htm>; Jennifer L. Martel and David S. Langdon, *The Job Market in 2000: Slowing Down as the Year Ended*, 124 MONTHLY LAB. REV. 3, 3 (Feb. 2001) (describing how the unemployment rate was at a 31-year low and that the job market entered “an unprecedented 10th year of expansion”), available at <http://www.bls.gov/opub/mlr/2001/02/art1full.pdf>.

284. Compare *supra* Part II. (discussing the Progressive and New Deal Era origins of maximum hours labor standards) with Part III.C.3.b. (AWP critique of the FLSA as New Deal Era legislation designed to address the economy of the 1930s, not the “[new] millennium”).

285. See *supra* notes 170–74 and accompanying text (discussing unpaid overtime and subsequent litigation).

286. SCHOR, *supra* note 11, at 17–18 (discussing media coverage of time-squeeze in the early 1990s).

287. HENRY DAVID THOREAU, *WALDEN AND CIVIL DISOBEDIENCE* 63 (Sherman Paul ed., 1960) (1965).

288. Brad Edmondson, *Remaking a Living: Americans Hope to Cut Back on Their Work. It Won't Be Easy, But it Could Be Wonderful*, UTNE READER 66 (July/Aug. 1991) (noting that “work has never been the focal point of most American's lives”).

later called “voluntary simplicity” and “downshifting.”²⁸⁹ A 1995 *Newsweek* cover story described the United States as “becoming a nation of the quick, or the dead-tired.”²⁹⁰ A 1997 *U.S. News* cover story reported that shorter work hours boost productivity.²⁹¹ *Business Week* reported in 1997 about the struggle of juggling work and family²⁹² and the sharp increase in work hours in the service and manufacturing sectors, evidencing “anemic” productivity gains.²⁹³ In 1998, the magazine

289. Lawrence W. Page, *Balance Work With Some Playtime*, YOUNG L.J. 72 (Sept. 1998) (discussing how to have “a life and a career”); see also Keir Graff, *Is This Revolution for Real?*, CHI. TRIB., Feb. 4, 2001, at 10 (examining an emerging subculture bound by shared values, such as ecology, personal relationships, peace, social justice, spirituality, and consistency between speech and deed); Diana Kunde, *Getting off the Ladder: Corporate Climb Losing Its Appeal for Some Professionals*, CHI. TRIB., June 21, 1998, at 3 (describing downshifting as a transitory phase for aging baby boomers); Jim Ritter, *More Isn’t Always Better*, CHI. SUN-TIMES, May 29, 2000, at 6 (discussing downshifting and simplicity circles); Juliet Schor, *Why (and How) More People are Dropping out of the Rat Race*, WORKING WOMAN 14 (Aug. 1995) (citing personal debt as the primary reason that people do not cut back on work hours).

290. LynNell Hancock et al., *Breaking Point*, NEWSWEEK 56 (Mar 6, 1995); see also Steven Greenhouse, *Running on Empty: So Much Work, So Little Time*, N.Y. TIMES, Sept. 5, 1999, § 4, at 1 (noting that “[f]or many Americans, the 40-hour week has become a fond memory”).

291. Amy Saltzman, *When Less is More*, U.S. NEWS (Oct. 27, 1997) (indicating that 62% of managers polled by *U.S. News* said “shorter work hours would give employees an incentive to be more productive [on the job] and would have little effect on [the country’s overall] standard of living”), available at <http://www.usnews.com/usnews/issue/97/1027/27work.htm>.

292. Keith H. Hammonds et al., *Work & Family: Juggling Both Is an Endless Struggle—and Companies Aren’t Helping Much*, BUS. WK. (Sept. 15, 1997) (finding that “[t]he most dissatisfied workers are those who must care for elderly parents”); see also Keith Hammonds et al., *The Daddy Trap: Men Face Greater Expectations at Home. But Work Isn’t Giving Them the Slack They Need*, BUS. WK. 56, 59 (Sept. 21, 1998) (noting that “[m]en may be willing to try flextime, but they rarely take parental leave—or quit for a few years”); Carol Kleisman, *Odd Hours: Moving to an Around-the-Clock Economy*, CHI. TRIB., Jan. 28, 1996, at 1 (stating that “non-traditional hours are being created to meet the needs of industry, not of workers”); Betsy Morris et al., *Is Your Family Wrecking Your Career? (and Vice Versa)*, FORTUNE (Mar. 17, 1997) (stating “[t]he dirty little secret is this: For all its politically correct talk, your company doesn’t much like your kids”), available at http://byu.edu/course/Acc630/Materials/Articles_files/is_your_family_wrecking_fortune; Judith Warner, *Why We Work: It’s Not for SUVs and Fancy Houses. And It’s Not Unbridled Ambition. The Reason Mothers Work Is Because We Need to . . . in Every Sense of the Word*, WORKING MOTHER 64 (Sept. 2001) (discussing the disconnect between real motherhood and the cult of motherhood, and its consequences—“record numbers of women in the workforce, but too many of our institutions are still mired in the 1950s, when middle-class and upper-class women who had kids stayed home”).

293. Gene Koretz, *How Many Hours in a Workweek?*, BUS. WK. 28 (June 16, 1997) (examining 1976–1993: The implication of increased work hours “for the nation’s productivity record are profound[;] [t]hat’s because productivity numbers are based on workweek reports derived from the Labor Dept.’s establishment survey rather than its household survey”[;] if the household numbers are correct, then productivity gains would be even lower than current reports); see also Gene Koretz, *Overtime vs. New Factories: Why Industrial Building Has Ebbed*, BUS. WK. 34 (May 4, 1998) (demonstrating that industry avoided spending “probably billions of dollars on new plants” by working employees overtime; “6% of vehicles assembled in North America last year resulted from overtime production—equivalent to the output of an additional 4.4 auto plants running on straight time”).

discussed Ernst & Young's ban on weekend work as an effort to retain women and save money by preventing turnover.²⁹⁴

The New York Times reported in 1999 that the work hours of approximately 16% of all workers (salaried employees) are underreported by the U.S. Bureau of Statistics (the Current Employment Statistics (CES) survey examines payroll records, not actual work hours, for its productivity calculations),²⁹⁵ thus "exaggerating the nation's productivity growth and hourly wages."²⁹⁶ In 1998, ABCNews.com conducted an on-line poll on striking a balance between work and the rest of life, finding that free time "comes in small packages," providing little opportunity to do more than watch television.²⁹⁷ A March 2000 *USA Weekend* cover story explored the growing resentment among "nonparents" over "family-friendly" benefits and work hours reserved only for parents.²⁹⁸

294. Keith H. Hammonds & Gabrielle Saveri, *Accountants Have Lives, Too, You Know*, BUS. WK. 88 (Feb. 23, 1998). There is also an "increasing discontent among corporate and law firm attorneys with the time they must spend on their work. . . . On average, attorneys work 54 hours per week, . . . 10 more hours than those in the general work force." Martha Neil, *Toil Taking Toll, Lawyers Tell Surveyors*, CHI. DAILY L. BULL., Aug. 22, 2000, at 1 (finding that almost 50% of the attorneys surveyed spend more time at professional matters, and less time at personal concerns than five years ago; conversely, 50% of working adults in all industries currently report better work and personal life balances than five years ago).

295. BARKUME, *supra* note 270, at 81-82 (comparing CES and CPS surveys).

296. Louis Uchitelle, *At the Desk, Off the Clock and Below Statistical Radar*, N.Y. TIMES, July 18, 1999, § 3, at 4 (noting that the fastest growing sector in the work force—approximately 40%, up from 32% in 1982—is workers on fixed salaries, such as managers, administrators, engineers, technicians, lawyers, researchers, programmers, and consultants); *see also* Louis Uchitelle, *More Work, Less Play Make Jack Look Better Off*, N.Y. TIMES, Oct. 5, 1997, § WK, at 4 [hereinafter Uchitelle 1997] (noting that "[o]ften, higher income is not the result of pay raises but of extra time on the job"); *Worker Output Up as Debate Rekindled*, CHI. TRIB., Aug. 8, 2001, § 3, at 3 (observing that "revisions to Labor Department records for the past five years revealed growth wasn't as dazzling as previously thought, rekindling the debate over whether the economy had entered into a golden era of productivity growth in the late 1990s").

297. Randy Stearns, *Obsessed with Work?*, ABCNews.com, at http://moreabcnews.go.com/sections/us/work/work_obsessed.html (last visited Sept. 21, 2001) (polling Americans around the country about work and free time and finding that "'[f]ree time' now comes in small packages: long enough to surf the Web or watch a little TV maybe, but not enough to enjoy the fruits of our labor"); *see also* James E. Challenger, *Time, Not Pay, Drives Today's Job Changers*, CHI. SUN-TIMES, Oct. 8, 2000, at 5 (discussing how more experienced managers and executives are seeking a work/family balance; "a growing number of employees, particularly white-collar workers in the increasingly high-productivity '24/7' workforce, are now putting time over money as their No. 1 job priority").

298. Julia Lawlor, *Parents vs. Non-Parents @ Work*, CHI. SUN-TIMES, Mar. 10-12, 2000, (Magazine), at 6 (noting that "the resentment is even more acute among younger people—single, childless workers are the fastest-growing segment of the workforce—who value self-directed activities outside the office more than their work-obsessed boomer elders do"); *see also* Susan Dodge, *Employers Catch Flak for Pro-Family Policies*, CHI. SUN-TIMES, July 23, 2000, at 32A (noting that a growing number of workers without children are demanding equal treatment on the

The *Chicago Tribune* reported in 2000 how the United States' work-and-spend culture is getting worse.²⁹⁹ The newspaper also reported that the United States is stingy regarding paid holidays and vacation time (seven public holidays and two to four weeks of paid vacation) compared to the fifteen nations in the European Union (averaging ten holidays and four to six weeks vacation)—the United Kingdom is closest to the United States, with eight public holidays and four to five weeks of paid vacation.³⁰⁰ The *ABA Journal* reported in 2001 about a groundswell in the legal community for law firms to follow the work-family balance advanced by accounting firms in the mid-1990s.³⁰¹ Finally, a 2001 issue of *BusinessWeek Online* contained an interview with the leader of an informal interfaith group of Christian, Jewish, and Moslem clergy, and like-minded scholars and activists, who argue that

the American way of busy-ness has gotten out of hand. . . . Americans of all classes—whether wealthy professionals on call 24/7 or low-wage employees who have to moonlight to make ends meet—are working overly long hours. The result, they say, is too little time left over for family, community, and spiritual life.³⁰²

job; calling subsidized day care, flexible hours, and other parental perks discriminatory); Bonnie Miller Rubin, *Workers with Kids Aren't Only Ones Who Want a Break*, CHI. TRIB., Mar. 16, 1998, at 1 (discussing how childless employees ask corporate America to understand that they, too, need a little flexibility in the workplace); Sue Shellenbarger, *Work & Family: What Workers Do to Help Out Aging Relatives*, S.F. EXAMINER & CHRON., July 19, 1998, at CL 31 (discussing elder care as a workplace concern).

299. Barbara Brotman, *On Balance, We're out of Whack*, CHI. TRIB., July 5, 2000, at 1 (referencing Juliet Schor); see also *Spending: How Americans Part with Their Money*, N.Y. TIMES, Oct. 15, 2000, § 6 (Magazine) (providing a collection of articles addressing how Americans live and the cost of being alive).

300. Ray Moseley, *Europe's Vacation Season Only a Dream for Americans*, CHI. TRIB., Aug. 7, 2000, at 1 (noting that in November 1999, the European Commission began requiring a minimum four week paid vacation for full- and part-time employees, up from three weeks; the United States does not require employers to provide paid vacation time to their employees).

301. Terry Carter, *Your Time or Your Money: Groundswell Supports Less Billable Hours, Alternate Tracks to the Top*, 87 A.B.A. J. 26, 26 (Feb. 2001) (noting that "the new focus that big money has put on long hours might also be a tipping point for long-running quality-of-life arguments").

302. "There Is a Serious Downside to Overworking People": Rabbi and Social Activist Arthur Waskow Talks About the Toll Taken by Long Hours on the Job and the Importance of Downtime, BUS. WK (Jan. 30, 2001) (referring to interview with Rabbi Waskow), available at http://www.businessweek.com/careers/content/jan2001/ca20010130_980.htm.

B. ACADEMIC LITERATURE

“[T]he public fascination with the time-squeeze suggests that the idea of overwork rings true with many Americans.”³⁰³ There is extensive academic literature supporting their concern. The United States introduced the forty-hour workweek with the FLSA in 1938, “long before most European nations reached the same standard.”³⁰⁴ Times have changed. The ILO reported in 1999 that “U.S. workers put in the longest hours on the job in industrialized nations,” increasing their annual hours per person from 1883 hours in 1980 to 1996 hours in 1997, an almost 4% increase.³⁰⁵ These hours are the “equivalent of almost two working weeks more than their counterparts in Japan,” whose work hours have declined more than 10% from 2121 hours in 1980 to 1889 hours in 1995. Steady or decreasing work hours is the worldwide trend. For example, workers in the United Kingdom put in 1775 hours in 1980 and 1731 hours in 1997.³⁰⁶ Canadian workers’ annual work hours declined by a full workweek in the last decade, from 1784 hours in the 1980s to 1732 hours in 1996.³⁰⁷ U.S. workers are currently more productive than workers in other industrialized countries. Developed and developing countries are catching up. By reducing work schedules, labor productivity growth in Western Europe, Asia (excluding Japan), and Canada is increasing at a faster rate than in the United States.³⁰⁸

Academic literature on time-squeeze is dominated by three themes. First, scholars re-estimate and debate trends in individual aggregate work hours and the merits of various data sets and weighting methods.³⁰⁹ For example, international comparison of work hours is difficult because countries apply different data collections and processing procedures to

303. MARIN CLARKBERG & PHYLLIS MOEN, THE TIME-SQUEEZE: THE MISMATCH BETWEEN WORK-HOURS PATTERNS AND PREFERENCES AMONG MARRIED COUPLES 8 (Cornell Employment & Family Careers Inst., Working Paper No. 99-04, 1999) (providing background to the time-squeeze debate), available at <http://www.lifecourse.cornell.edu/archives/workpapr/wp9904.pdf>.

304. HAYDEN, *supra* note 1, at 124 (noting that Paul Lafargue’s 1883 denunciation “of the ideology of work . . . favourably compared ‘the American, free and lazy’ to the oppressed and work-obsessed European labourer”).

305. Press Release, International Labour Organization, Americans Work Longest Hours Among Industrialized Countries, Japanese Second Longest, Europeans Work Less Time, but Register Faster Productivity Gains, New ILO Statistical Volume Highlights Labour Trends Worldwide (Sept. 6, 1999) (announcing a study examining eighteen key indicators of the labor market (KILM)), available at <http://www.ilo.org/public/english/bureau/inf/pr/1999/29.htm>. The KILM homepage is located at <http://www.ilo.org/public/english/employment/strat/kilm/index.htm>.

306. *Id.*

307. *Id.*

308. *Id.* (discussing the “[p]roductivity [p]uzzle”).

309. CLARKBERG & MOEN, *supra* note 303, at 8.

estimate hours worked.³¹⁰ Countries like the United States (using Current Population Surveys (CPS)), the United Kingdom, and Canada estimate hours actually worked. Most other countries, however, evaluate hours paid, such as usual hours, unusual (overtime) hours, and hours not worked (encompassing vacation, holidays, and sick time).³¹¹ In addition, scholars strenuously debate the accuracy of data and methods for estimating work hours, analyzing and comparing studies using CPS, Panel Study of Income Dynamics (PSID) and time-use survey (time diaries) data sets.³¹²

Second, the scholars debating the first theme link their findings to psychological motivations or preferences of workers.³¹³ The explanations include that individuals are working longer to earn more money to spend on consumer goods, or to protect themselves from growing job instability, and that people feel rushed (though they are working fewer hours), because they are doing more things simultaneously.³¹⁴ Third, other researchers relate time-squeeze to the family context, observing that many of the individuals analyzed in the first two themes are members of dual-earner households.³¹⁵ These workers prefer working fewer hours. Together, dual-earner couples hold three jobs—their separate workday employment (with increased work hours) and their shared household work.³¹⁶

The following reviews four directions of scholarship on the “overworked American” thesis. It begins with Juliet Schor’s findings that Americans perform an extra month of work because they are trapped in a “cycle of work-and-spend.” It proceeds with studies by John P. Robinson, Ann Bostrom, and Geoffrey Godbey that, while the tempo of life has increased, workers have gained approximately five hours per week of free time, instead of experiencing “time famine.” Thereafter, this sections discusses the analysis of Barry Bluestone, Bennett Harrison, and Stephen Rose, that growing job instability has created a

310. Bart van Ark & Robert H. McGuckin, *International Comparisons of Labor Productivity and Per Capita Income*, 122 MONTHLY LAB. REV. 35-38 (July 1999) (evaluating a new cross-national study revealing differences in economic performance and living standards that are quantitatively and qualitatively large across countries and regions), available at <http://www.bls.gov/opub/mlr/1999/07/art3abs.htm>.

311. *Id.*

312. See *infra* Part V.B. (reviewing academic research on the “Overworked American” thesis). There is a debate over what counts as work time: “Martin Luther got all his best ideas on the toilet; is that work?” Uchitelle 1997, *supra* note 296, at 4 (citation omitted).

313. CLARKBERG & MOEN, *supra* note 303, at 8.

314. See *infra* Part IV.B.2.b. (reviewing academic research on time-squeeze).

315. CLARKBERG & MOEN, *supra* note 303, at 9.

316. *Id.* at 8-10.

“feast and famine” cycle, producing sixty-six additional annual hours of work for individuals and 684 hours for dual-income families. It concludes with the Cornell Employment and Family Careers Institute’s hypothesis that time-squeeze is a family and household issue, rather than a question of whether individual Americans work longer hours.

1. JULIET SCHOR: THE OVERWORKED AMERICAN

Juliet Schor of Harvard University argues that Americans work the equivalent of an extra month a year because they are trapped in the “insidious cycle of work-and-spend,”³¹⁷ “capitalism’s squirrel cage.”³¹⁸ The following section reviews Schor’s work hours estimates and “work-and-spend cycle” hypothesis.

a. THE EXTRA MONTH OF WORK

Schor’s 1992 book, *The Overworked American: The Unexpected Decline of Leisure*, sparked the debate on whether and why Americans are working longer hours today than they have been in the past.³¹⁹ Calibrating her work hour estimates to compensate for business cycles, unemployment, and underemployment and overemployment, Schor used Current Population Survey (CPS) data to calculate annual hours for the period of 1969 through 1987, and the University of Michigan’s 1975 and 1981 time diaries to create predicted estimates for household hours.³²⁰

The CPS is the nation’s primary source for labor statistics. Since 1940, the U.S. Census Bureau conducts the CPS for the Bureau of Labor Statistics. The Census Bureau asks approximately fifty thousand

317. SCHOR, *supra* note 11, at 107, 108 (describing how Americans spend three to four times more time shopping than their western European counterparts—“the shop ‘til you drop syndrome”).

318. *Id.* at 117 (challenging the “folklore” that Americans may not like materialism, but there is little they can do about it).

319. *Id.* at 4; *see also* BARKUME, *supra* note 270, at 80 (discussing Schor’s book as the study for academics to either follow or challenge); BARRY BLUESTONE & STEPHEN ROSE, THE UNMEASURED LABOR FORCE: THE GROWTH IN WORK HOURS 22 (The Levy Econ. Inst. of Bard Coll., Public Policy Brief No. 39, 1998) (“Our research was initially motivated by the debate set off by Juliet Schor’s book *The Overworked American.*”); HUNNICUTT, *supra* note 11, at ix (acknowledging that “[w]ith *The Overworked American*, Juliet Schor, more than any other writer, advanced the study of work and leisure[;] I am indebted to her for making our topics issues of considerable public and academic interest”).

320. SCHOR, *supra* note 11, at 167-74 (discussing method of statistical calculations and the merits of various data sets; and, anticipating the debate with John Robinson regarding the application of time-use surveys).

households per month³²¹ to (for example) estimate their weekly hours and weeks of work with questions like, “how many hours did you work last week?”³²² The time diaries were part of an international comparative project in time-use, asking several thousand respondents to record how they spent their time every fifteen minutes for a twenty-four hour period.³²³ Schor explained her choice of data and methods in a 1997 paper, *Civic Engagement & Working Hours: Do Americans Really Have More Free Time Than Ever Before?*:

[W]e used CPS data to construct annual hours of paid work. . . . For household hours we created predicted estimates from the 1975 Michigan Time Diary Survey and the CPS. (Time diaries provide the only existing estimates of household hours.) Using the 1975 survey, we constructed an econometric model to predict average amounts of weekly housework for various demographic and socioeconomic groups. Taking the coefficients from that model, we applied them to the CPS in order to construct trends in household work. We reasoned that because trends in housework are largely driven by demographic and socioeconomic trends, and because the CPS is the more accurate reflector of demographic and socioeconomic trends, this was the preferable method.³²⁴

Schor estimated that “the average employed person [eighteen years of age and older] is now on the job an additional 163 hours, or the equivalent of an extra month a year.”³²⁵ Specifically, she found, in the aggregate, fully employed men and women, ages eighteen years and older, worked 1786 hours in 1969, and 1949 hours in 1987, totaling 163 more hours of work in 1987 than 1969.³²⁶ Men gained an additional ninety-eight hours of work during the same period, working 2054 hours

321. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR & U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CURRENT POPULATION SURVEY—DESIGN & METHODOLOGY 1-1 - 2-5 (Technical Paper No. 63, 2000) (providing background and history of the CPS), available at <http://www.bls.census.gov/cps/tp/tp63.htm>. See generally *Labor Force Statistics from the Current Population Survey*, at <http://www.bls.gov/cps/home.htm> (last visited Sept. 26, 2001) (providing news releases, data, publications, and links to related programs).

322. Juliet B. Schor, *Civic Engagement and Working Hours: Do Americans Really Have More Free Time than Ever Before?* (Paper Prepared for the Conference on Civic Engagement in American Democracy) (Sept. 26-28, 1997), available at <http://www.silcom.com/~rdb/swt/putok.htm>.

323. *Id.* at 17 n.1.

324. *Id.* at 17 n.2; see also *id.* at 5 (discussing how to calibrate estimates of hours worked to compensate for labor market and macroeconomic conditions).

325. SCHOR, *supra* note 11, at 29.

326. *Id.* at 29 tbl.2.1.

in 1969 and 2152 hours in 1987.³²⁷ Women obtained 305 additional hours of work, working 1406 hours in 1969 and 1711 hours in 1987.³²⁸ Men and women also worked 39.8 hours per week, in the aggregate, in 1969 and 40.7 hours in 1987.³²⁹ In particular, men worked 43.0 hours per week in 1969 and 43.8 hours in 1987; and, women worked 35.2 hours per week in 1969 and 37.0 hours per week in 1987.³³⁰ All participants worked 43.9 weeks per year in 1969 and 47.1 weeks in 1987.³³¹ On a gender basis, men worked 47.1 weeks per year in 1969 and 48.5 weeks in 1987.³³² Women worked 39.3 weeks in 1969 and 45.4 weeks in 1987.³³³

Schor attributed two-thirds of the total increase in hours to more steady year-round work, especially for women who began taking less time off for childbirth and are less likely now to stop working during summer recess to care for children.³³⁴ In addition, more employees were moonlighting (seven million Americans, approximately 6% of the workforce, admitted they were moonlighting, working two or more jobs, in 1989; the real numbers are probably higher) and more companies were working employees overtime rather than employing new workers.³³⁵

In addition, U.S. workers began receiving less paid time off during the 1980s (vacation time, holidays, sick pay, and other paid absences), reversing a thirty year trend in gains. Schor attributed this trend to employer cost cutting measures, retirement of senior workers (such benefits are generally based on seniority), and increased use of contractors, temporary workers, and part-time employees.³³⁶ This diminution in paid time off is exacerbated by the growth of the service sector, employing workers for a shorter duration.

Schor also explored the hours of unpaid housework (childcare and other domestic work) to obtain a complete picture of the changes in leisure time for employed Americans, eighteen years and older.³³⁷ In the aggregate, men and women spent one hour less at household work in

327. *Id.*

328. *Id.*

329. *Id.* at 30 tbl.2.2.

330. SCHOR, *supra* note 11, at 30 tbl.2.2.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.* at 30.

335. SCHOR, *supra* note 11, at 31 (reviewing reasons for additional hours of labor).

336. *Id.* at 32-33 (discussing “[t]he [s]hrinking [v]acation”).

337. *Id.* at 34-38 (analyzing time-squeeze at home).

1987 than they did in 1969, performing 889 hours of household work in 1969 and 888 hours in 1987.³³⁸ The aggregate figures result from men performing more household work than women during this period.³³⁹

Specifically, men increased their rate of housework by sixty-eight hours, performing 621 hours of household work in 1969 and 689 hours in 1987.³⁴⁰ Conversely, women spent 145 fewer hours of housework, performing 1268 hours in 1969 and 1123 hours in 1987.³⁴¹ Schor attributed the changes in domestic labor to the “social changes of recent decades—women’s employment, reduced marriage rates, lower births, and changes in gender roles—[which] have substantially decreased women’s ability, need, and willingness to perform household work.”³⁴²

Combining their employment hours and their household hours, men and women in the aggregate worked 162 more hours in 1987 than they did in 1969.³⁴³ In the aggregate, men increased their total work hours by 166, and women by 160.³⁴⁴

b. CYCLE OF WORK-AND-SPEND

“I never knew how poor I was until I had a little money.”³⁴⁵

Schor observes that the United States is the most consumer-oriented society in history. Shopping, once a purely utilitarian task, has become a leisure activity. Going to the mall is weekend entertainment. Increased consumption has not made Americans happier. The further Americans get from onerous conditions of the past (obtaining running water and electrical appliances that eliminate exhausting, often backbreaking labor), “the more ambiguous are the effects of additional commodities. The less ‘necessary’ and more ‘luxurious’ the item, the more difficult it is automatically to assume that consumer purchases yield intrinsic value.”³⁴⁶

338. *Id.* at 35 tbl.2.3.

339. *Id.*

340. SCHOR, *supra* note 11, at 35 tbl.2.3.

341. *Id.*

342. *Id.* at 35.

343. *Id.* at 35 tbl.2.3. (1949 market hours in 1987 + 888 house work hours = 2,837 total work hours in 1987; 1,786 market hours in 1969 + 889 housework hours = 2675 total work hours in 1969; 2837 - 2675 = 162).

344. *Id.* at 35.

345. SCHOR, *supra* note 11, at 114 (quoting a banker).

346. *Id.* at 115.

“Consumerism is not an ahistorical trait of human nature, but a specific product of capitalism.”³⁴⁷ The 1920s were watershed years in the development of the current materialist culture.³⁴⁸ The “‘psychology of scarcity’ gave way to the ‘psychology of abundance.’ . . . Thrift and sobriety were out; waste and excess were in.”³⁴⁹ The decade heralded the “American dream,” a phenomenon of yearning for more material goods, and complaining about items that Americans cannot afford.³⁵⁰ This expression of discontent was created by manufacturers, an explosion of consumer credit (fostering “a climate of instant gratification, expanding expectations, and, ultimately, materialism”), and for the first time, advertisements targeting the middle class on a psychological level to purchase goods they did not need.³⁵¹ Consumerism is ultimately premised on dissatisfaction.³⁵² “As much as one has, it is never enough.”³⁵³

Schor contends that “[w]ork-and-spend is driven by [the nation’s] productivity growth.”³⁵⁴ Post-World War II productivity provided for either increased income or reduced work hours. Raising income has become the “default option.”³⁵⁵ Annual pay increases set off the consumption cycle to spend the additional income.³⁵⁶ Consumption keeps pace with productivity.³⁵⁷ The social pervasiveness of the work-and-spend cycle makes it difficult for individuals to deviate from the status quo.³⁵⁸ She submits that “[w]here Prisoner’s Dilemmas and vicious cycles exist, change requires intervention on a social level—from government, unions, professional associations, and other collective organizations.”³⁵⁹

Schor proposed a solution to the “Prisoner’s Dilemmas” in her 1994 article (“an addendum” to *The Overworked American*),³⁶⁰ *Worktime*

347. *Id.* at 117.

348. *Id.*

349. *Id.* at 117-18.

350. SCHOR, *supra* note 11, at 118-19.

351. *Id.* at 119, 118-19.

352. *Id.* at 122.

353. *Id.* (discussing the pitfalls of consumerism: it is a “vicious pattern of wanting and spending which failed to deliver on its promises”).

354. *Id.* at 126 (discussing the “cause[] of the work-and-spend cycle”).

355. SCHOR, *supra* note 11, at 126.

356. *Id.* at 127.

357. *Id.* at 126-27.

358. *Id.* at 133 (discussing the social nature of work-and-spend).

359. *Id.* at 136.

360. Brian Alexander Langille, *The Overworked Canadian?*, 70 CHI.-KENT L. REV. 173, 178-79 (1994).

*in Contemporary Context: Amending the Fair Labor Standards Act.*³⁶¹ As background, Schor argued that: “[T]he FLSA contributed to longer, not shorter, hours for American workers. That is because the premium pay provisions became attractive to workers, particularly males. . . . Economic research has shown that where overtime is frequent, employers reduce the base wage, so that workers do not end up receiving higher wages overall.”³⁶²

Applying her thesis, Schor proposed five amendments to the FLSA:³⁶³ (1) phase in a reduction of the forty-hour workweek to thirty-two (without cutting pay), and eliminate premium pay for overtime (replacing it with compensated time off); (2) require employers to permit employees to trade wages for time off, e.g., “buy” vacation days, sabbaticals, and parental leave; (3) cover salaried employees, under the FLSA, allowing employers to exempt the top 20% of their workforce and require alternative standard weekly and annual hours for the exempt class plus comp-time if they are needed to work more than the standards; (4) require employers to provide permanent workers (after one year of service) with four weeks of paid vacation per year, and pay a vacation tax into a vacation bank to fund paid vacation for their contingent workers; and, (5) create a legal right to free time and choice of work hours, prohibiting employers from discriminating against employees who refuse to work nights and weekends, and request job sharing and fewer hours.

2. JOHN P. ROBINSON, ANN BOSTROM, AND GEOFFREY GODBEY: THE SURPRISING WAYS AMERICANS USE THEIR TIME

John P. Robinson, Ann Bostrom, and Geoffrey Godbey (of the University of Maryland, Georgia Tech University, and Pennsylvania State University, respectively) argue that individuals overestimate their working hours in the CPS surveys, but give true information when they fill out time diaries.³⁶⁴ Their research suggests that Americans have gained an average of five hours per week in free time between 1965 and

361. Juliet B. Schor, *Worktime in Contemporary Context: Amending the Fair Labor Standards Act*, 70 CHI.-KENT L. REV. 157 (1994).

362. *Id.* at 164.

363. *Id.* at 167-71.

364. See generally ROBINSON & GODBEY, *supra* note 11, at 59-85 (1997) (comparing time diary and CPS data); Robinson & Bostrom, *supra* note 267, at 16-20.

1985.³⁶⁵ Americans are not experiencing “time famine,” they are encountering “time deepening.”³⁶⁶ The following reviews their time use estimates and their time deepening hypothesis.

a. TRENDS IN THE USE OF TIME

Robinson and Godbey opined in their 1997 book, *Time For Life: The Surprising Ways Americans Use Their Time*, that

Americans currently have close to a 50-50 split of time between work and play, in their waking hours free of other personal care The old union slogan heard early in the twentieth century may have arrived unannounced: 8 hours for work, 8 hours for sleep, 8 hours for what we will.³⁶⁷

Robinson and Godbey reached this opinion after analyzing the National Time Diary Studies conducted by the University of Michigan in 1965 and 1975, and by the University of Maryland in 1985.³⁶⁸ Time diaries provide cross-sectional accounts on what Americans do during a particular twenty-four hour period, midnight-to-midnight.³⁶⁹ Specifically, participants describe in their own words where they spent their time, who they were with, what they were doing in conjunction with those activities, and how they felt about what they were doing.³⁷⁰ The research examines four types of time: (1) paid work (contract time); (2) household/family care (committed time); (3) personal time (including sleeping, eating, and grooming); and, (4) free time.³⁷¹ The sample size of the 1965 survey was 1244 individuals ranging from eighteen to sixty-five years of age.³⁷² The 1975 study surveyed 2406 people ages eighteen and over.³⁷³ The 1985 time diaries study surveyed 50,358 individuals, ages twelve and over.³⁷⁴

Robinson and Godbey did not use CPS data in their research. In his 1994 *Monthly Labor Review* article with Bostrom, *The Overestimated Workweek? What Time Diary Measures Suggest*, and again in his 1997

365. ROBINSON & GODBEY, *supra* note 11, at 126-27 tbl.6.

366. *Id.* at 35-56 (analyzing “time deepening” and interpreting “time famine”).

367. *Id.* at 293 (discussing the structure and trends on how time is spent).

368. *Id.* at 57-78 (discussing methodology for measuring time-use).

369. *Id.* at 5, 63-67.

370. ROBINSON & GODBEY, *supra* note 11, at 63-67.

371. *Id.* at 11.

372. *Id.* at 72 exhibit 1.

373. *Id.*

374. *Id.*

book with Godbey, Robinson expressed concern over the “built-in bias toward overreporting” in time estimate questions composing the CPS data.³⁷⁵ For example, there is a “tendency to assume we spend a good deal of time behaving admirably and little time with less admirable behavior is strong.”³⁷⁶ Americans underestimate the amount of time they watch TV on an average day, but will report a higher number when asked how much time they spent watching it today.³⁷⁷ Similarly, respondents may overestimate or underestimate their work hours to portray themselves as either hardworking or not obsessed with work, easy-going, or family oriented.³⁷⁸ Detailed diaries provide lower estimates of work time:

First, like most activities, work can be combined with other activities. For instance, during work hours, one can take care of personal business or pay bills, socialize (as in leaving work early with work colleagues to go to a restaurant or bar), or read the newspaper. While most workers may report this simply as work, other workers may report it for what it was (as encouraged by the time-diary format)—that is, not as work but as household work, social life, or reading. Second, people who work long hours may be subject to distorted perception, particularly because those longer hours involve less-regular work schedules in relation to other workers. That makes the reporting task more difficult, because these respondents have fewer solid “anchor points” or time markers around which to base their estimates. They work during hours of the day and week when others do not, and they are therefore less able to include them accurately in their brief estimates.³⁷⁹

Comparing time diary and CPS data, Robinson and Bostrom noted that there was an increasing proportion of workers estimating that they are working longer hours in their CPS responses.³⁸⁰ The diaries suggest that workers rarely work more than a fifty-five to sixty-hour week.³⁸¹ Those estimating a sixty-hour or more workweek are “on the job averaging closer to 53-hour weeks.”³⁸²

375. ROBINSON & GODBEY, *supra* note 11, at 59; *see also* Robinson & Bostrom, *supra* note 267, at 18-19.

376. ROBINSON & GODBEY, *supra* note 11, at 61.

377. *Id.* at 60.

378. Robinson & Bostrom, *supra* note 267, at 12.

379. ROBINSON & GODBEY, *supra* note 11, at 85-86.

380. Robinson & Bostrom, *supra* note 267, at 19.

381. *Id.*

382. *Id.*

Robinson and Godbey also noted that women, moreso than men, overestimate their hours in fifty-plus-hour workweeks, while men, moreso than women, overestimate their work hours when working part-time jobs.³⁸³ Robinson and Godbey attribute these results to “general traditional role expectations and experiences of men and women.”³⁸⁴

Reviewing U.S. Census Bureau reports for demographic trends, Robinson and Godbey observed that more women have entered the workforce since 1960.³⁸⁵ Thirty-four percent of women worked full-time in 1960, compared to 60% in 1990.³⁸⁶ Women working as “stereotypical full-time housewi[ves]” dropped from 30% in 1970 to 14% in 1990.³⁸⁷ The percentage of men with the role as worker, spouse, and parent dropped from 44% in 1970 to 36% in 1990; the percentage of unmarried male and female workers rose between 1970 and 1990, from 11% to 21% for men and 10% to 16% for women.³⁸⁸ The percentage of employed unmarried mothers rose from 6% to 9% during the same period.³⁸⁹

Addressing an overall trend in work time, time diaries suggest that employed women worked six hours fewer per week in 1985 than 1965, declining from 36.8 hours to 30.8 hours, totaling 38% of all paid work in 1985, compared to 29% in 1965.³⁹⁰ Employed men worked 6.8 fewer hours per week, declining from 46.5 hours in 1965 to 39.7 hours in 1985.³⁹¹ Men are, however, putting more hours into housework, but not enough to offset their decreased paid work hours.³⁹² These figures represent the eighteen to sixty-four year old workforce.³⁹³ Diary work hours include coffee breaks and second jobs, and exclude work commutes and lunch breaks.³⁹⁴

The time diaries further show that Americans have forty hours (4%) of free time during a 168 hour week.³⁹⁵ Specifically, 75% of their time (60% of their waking hours) are occupied in nonfree activities, thirty hours in paid work time and commuting, twenty-four hours in

383. ROBINSON & GODBEY, *supra* note 11, at 91-92.

384. *Id.* at 91.

385. *Id.* at 8.

386. *Id.*

387. *Id.* at 9.

388. ROBINSON & GODBEY, *supra* note 11, at 9.

389. *Id.*

390. *Id.* at 94, 95 tbl.2.

391. *Id.*

392. *Id.* at 94.

393. ROBINSON & GODBEY, *supra* note 11, at 94.

394. *Id.*

395. *Id.* at 118-20.

household/family care, and seventy-four hours of personal care.³⁹⁶ On average, men and women have gained five hours of free time per week since 1965.³⁹⁷ Two-thirds of the gain, however, occurred during the weekdays, not weekends or vacation time, fracturing the time into short periods less conducive to leisure pursuits.³⁹⁸

b. TIME DEEPENING

*“In the mind-set of the victim, the message that Americans are working longer hours is very attractive. It is less attractive to point out that people choose to devote their gained free time to watching television.”*³⁹⁹

Robinson and Godbey identify an emerging “psychology of entitlement.”⁴⁰⁰ Related to the victim mind-set, many Americans believe that their standards of living and mobility will increase infinitely and consumption of goods is open-ended.⁴⁰¹ An insatiable desire to have and do has led to “time deepening,” a condition where people speed-up activities so they can do more—and relatively shallow—things simultaneously, rather than making “either-or” choices.⁴⁰² The tempo and duration of people’s activities through time deepening creates a feeling of always being rushed, working longer and harder, and running out of time.⁴⁰³

Time deepening has at least four elements:⁴⁰⁴ (1) speeding-up activities (e.g., visiting a national park without getting out of the car); (2) substituting leisure activities that take longer with one that take less time (e.g., shopping instead of writing poetry); (3) doing more than one activity at once (e.g., watching television, reading the paper, and eating breakfast); and, (4) undertaking leisure activities with more precise regards to time (e.g., planning an evening on the town with friends where there is only a five minute tolerance between activities).

396. *Id.* (168 hours - 128 hours = 40 hours).

397. *Id.* at 127.

398. ROBINSON & GODBEY, *supra* note 11, at 310-11.

399. *Id.* at 304.

400. *Id.* at 44.

401. *Id.*

402. *Id.* at 39.

403. ROBINSON & GODBEY, *supra* note 11, at 48.

404. *Id.* at 39.

As experiences become more commodified, “[m]any Americans have become virtual walking resumes defining themselves only by what they do.”⁴⁰⁵ As a result, “the line between free time and work is largely irrelevant—to do nothing is to be nothing, and both work and free-time activity are important in defining who we are.”⁴⁰⁶ The goal of free time in America has become recreation, activities that refresh, divert, or otherwise “re-create [people] for work again.”⁴⁰⁷

Technology contributes to the speed-up of life, allowing Americans to be more efficient (doing more in less time). Efficiency is no friend of leisure: “In the ancient Greek notion of leisure, contemplation was an ideal. Later, ‘leisure’ was thought of as ‘pastimes,’ but one cannot ‘pass’ the time if efficiency is the primary goal. One can only ‘spend,’ ‘invest,’ and ‘save’ it, or one will surely ‘lose’ it.”⁴⁰⁸

To slow the pace of life, Robinson and Godbey suggest, in part, that society should tax consumption more, reward workers for their excellence and importance (rather than counting their hours worked), unplug the telephone, and roam without an agenda.⁴⁰⁹

3. BARRY BLUESTONE, BENNETT HARRISON, AND STEPHEN ROSE: THE UNMEASURED LABOR FORCE

Barry Bluestone, Bennett Harrison, and Stephen Rose (of Northeastern University, New School of Social Research, and the Educational Testing Service, respectively) determined that the hours for prime-age workers (twenty-five to fifty-four years of age) has increased sixty-six hours in annual work, the equivalent of 1.5 weeks of full-time work per year, between 1966 and 1989.⁴¹⁰ In addition, work hours for dual-income families have increased by 684 hours or four months of full-time work during the 1970s and 1980s.⁴¹¹ This research suggests that:

[b]ecause of growing job instability, workers face a “feast and famine” cycle: They work as much as they can when work is available to

405. *Id.* at 44.

406. *Id.* at 45.

407. *Id.* at 124, 123-35 (discussing trends in free time from 1965 to 1985).

408. ROBINSON & GODBEY, *supra* note 11, at 45.

409. *Id.* at 318.

410. Barry Bluestone & Stephen Rose, *Overworked and Underemployed: Unraveling an Economic Enigma*, AM. PROSPECT (Mar. – Apr. 1997), available at <http://www.prospect.org/print/V8/31/bluestone-b.html>.

411. *Id.* at 12; BLUESTONE & HARRISON, *supra* note 93, at 92-93; BLUESTONE & ROSE, *supra* note 319, at 25-27 (applying new estimates using PSID).

compensate for short workweeks, temporary layoffs, or permanent job loss that may follow. What's more, while American families as a whole are putting in more time, that work isn't producing significant increases in living standards. For the typical two-breadwinner household, having both parents work longer hours may not mean an extra trip to Disney World or nicer clothes for school; more likely, it means keeping up car payments or just covering the costs of food and housing.⁴¹²

The following is a review of the research on time use estimates and the "feast and famine" hypothesis.

a. OVERWORKED AND UNDEREMPLOYED

Analyzing 1967–1989 Panel Study of Income Dynamics (PSID) data, Bluestone and Rose found that Americans are overworked and underemployed in their 1997 article, *Unraveling an Economic Enigma: Overworked and Underemployed* and in their 1998 public policy brief, *The Unmeasured Labor Force: The Growth in Work Hours*.⁴¹³ Bluestone and Harrison republished and expanded the findings in their 2000 book, *Growing Prosperity: The Battle for Growth with Equity in the 21st Century*.⁴¹⁴ Their research confirms Schor's identification of a statistically significant upward trend, albeit lower, in annual work hours, and contrasts with Robinson's and Bostrom's conclusion that work hours have been static since 1965.⁴¹⁵

The PSID is an annual survey collected by the Institute for Social Research, University of Michigan. Rather than extrapolating population trends from one to two week "snap shot" surveys of several thousand random individuals like time diaries studies,⁴¹⁶ the PSID is an ongoing longitudinal study of Americans and their families, surveying approximately 60,000 individuals and their families over as much as thirty years of their lives.⁴¹⁷ In part, the PSID asks questions to ascertain

412. Bluestone & Rose, *supra* note 410.

413. *Id.*

414. BLUESTONE & ROSE, *supra* note 319, at 3; BLUESTONE & HARRISON, *supra* note 93, at 92.

415. BLUESTONE & ROSE, *supra* note 319, at 26 (reviewing the "overall upward trend in annual hours for prime-age workers as a group").

416. *Id.* at 25.

417. *An Overview of the Panel Study of Income Dynamics*, at <http://www.isr.umich.edu/src/psid/overview.html> (last visited Sept. 7, 2001) (discussing the PSID sample, data collection, core content, supplements, file structure, data dissemination and use, key contribution of the PSID, new directions, and references).

annual work hours. For example, the survey asks workers to recall the number of days they were on vacation, sick leave, strike, or family medical leave. It also asks about regular work hours per week, weeks worked on primary jobs, and hours worked on up to three other jobs held during the year. Bluestone and Rose acknowledge that the PSID “suffers from recall problems as does the CPS survey.”⁴¹⁸ They note, however, that “the greater detail on each job and annual working time presumably permits better estimates than can be obtained from the CPS survey.”⁴¹⁹ Bluestone and Rose, used the PSID data to compare two ten-year periods (1969–1979 and 1979–1989).⁴²⁰ They also combined PSID and CPS data to ascertain work hour trends after 1989 (observing a clear correlation between the two data series), producing a full 1967–1995 data series.⁴²¹

Controlling the PSID data for business cycles, Bluestone and Rose ascertained that individual Americans collectively worked 3.3 more hours each year between 1967 and 1989, totaling sixty-six additional hours in annual work.⁴²² In addition, prime-age working couples averaged 3450 hours of combined employment in 1988, up from 2850 in 1967. As a result, a “typical dual-earner couple . . . was spending an additional day and a half on the job *every* week.”⁴²³

Specifically, the material standard of living of working couples (as a group) increased slightly more than 1% per year. This increase came from their extended work hours, not improved wages.⁴²⁴ Addressing the correlation between wage stagnation and long hours, Bluestone and Harrison state:

Real (inflation-adjusted) hourly wages of production and nonsupervisory workers peaked in 1973. Since then, the average wage has declined from \$8.55 (in 1982 dollars) to \$7.43 in 1996. Even with the recent recovery of the economy, wage rates continued to stagnate for the most part. Between 1991 and 1997, the real average wage rose by just \$0.02 per hour. In such a long-term wage climate, workers *need* to work longer simply to pay the bills.⁴²⁵

418. BLUESTONE & ROSE, *supra* note 319, at 25.

419. *Id.*

420. *Id.*

421. *Id.* at 31.

422. *Id.* at 26.

423. BLUESTONE & ROSE, *supra* note 319, at 28.

424. *Id.* at 29.

425. BLUESTONE & HARRISON, *supra* note 93, at 94.

Families headed by high school drop-outs earned 8% less per year after increasing their annual work hours by approximately 12%. Families headed by high school graduates and individuals with some college education increased their annual earnings by 4% after increasing their work hours by 16.0%–17.4%. The combined real earnings of college educated couples increased by nearly one-third between 1973 and 1988. These couples increased their work hours by the same percentage as the less educated couples.⁴²⁶ Bluestone and Harrison observed:

As before, we were producing more to satisfy our continuing appetite for more consumption, but we were now doing so only by sacrificing leisure time. For most Americans, working longer hours did no more than compensate for shrinking wages. Seven out of ten dual-earner families were caught in an *Alice in Wonderland* world where they had to run faster and faster just to stay in the same place. . . .⁴²⁷

Closer scrutiny of the data also discloses a 1.6% increase in labor supply from incumbent workers (an annual increase of thirty-two hours) between the last business cycle peaks in 1989 and 1995.⁴²⁸ For example, prime-age workers averaged 46.0 weeks of work per year when the unemployment rate was 5.8% in 1979. They worked 46.8 weeks when unemployment was 6.2% in 1987. This data showed that “by 1987 a portion of the overall labor supply ‘lost’ to unemployment was being made up for by the increased time those who were working [incumbent workers] were contributing to the labor market.”⁴²⁹ Bluestone and Harrison observed that currently

[p]rime-age men . . . who had reduced their average hours almost steadily during the 1970s, now reversed course, increasing their annual work time by more than 25 hours, or 1.2 percent. Prime-age women increased their annual work time by a staggering 128 hours during the decade. This 8.9 percent increase in annual hours was equivalent to each woman already in the workforce putting in more than three additional full-time workweeks per year.⁴³⁰

As a trend, average weekly hours increased following the 1975 recession, falling back to their 1975 level in 1979. Incumbent workers therefore did not add to the labor supply during the economic recovery.

426. BLUESTONE & ROSE, *supra* note 319, at 29-30.

427. BLUESTONE & HARRISON, *supra* note 93, at 88.

428. BLUESTONE & ROSE, *supra* note 319, at 32.

429. *Id.* at 33.

430. BLUESTONE & HARRISON, *supra* note 93, at 88.

Conversely, the recoveries following the 1981–1982 and 1991 recessions show a dramatic increase in average weekly hours.⁴³¹ Incumbent worker hours between 1982 and 1995 provided approximately “15 percent of the hours available from new workers.”⁴³²

Simultaneously, there is also a significant level of underemployment in the labor market. One in every six workers is a part-time employee, one-fourth of them doing so involuntarily.⁴³³ The total number of involuntary part-time employees increased from 19% to 29% between 1973 and 1993; a disproportionate share of this involuntary part-time workforce is male.⁴³⁴ More than 6% of the workforce works two or more jobs.⁴³⁵ One out of nine workers is self-employed.⁴³⁶ Between 1982 and 1995 the temporary workforce tripled to 1.4 million workers. Manpower, Inc., a temporary staffing service, was the largest employer in the United States in 1995, submitting more W-2 forms to the Internal Revenue Service than any other firm.⁴³⁷

b. FEAST AND FAMINE

As job stability has declined, workers are doing everything they can to protect themselves from interruptions in their earnings. Working as much as they can when employment is available is one strategy that many workers and families have apparently adopted. Hence, as economic growth accelerates and jobs become available, workers expand their hours of work to meet the demand. Simply put, there is a good deal more supply out there than current labor market statistics imply.⁴³⁸

Turning to the “full longitudinal capacity of the PSID,” Bluestone and Rose identified that workers felt more insecure about their jobs by the 1980s.⁴³⁹ In particular, there was a significant decrease in employment continuity between the 1970s and 1980s (working at least fifty weeks at thirty-five hours per week in eight out of ten years, and not less than one thousand hours in any single year), employment

431. BLUESTONE & ROSE, *supra* note 319, at 34 (examining hours of work by sex and race).

432. *Id.* at 35.

433. Bluestone & Rose, *supra* note 410.

434. *Id.*

435. BLUESTONE & HARRISON, *supra* note 93, at 92.

436. *Id.*

437. Bluestone & Rose, *supra* note 410.

438. BLUESTONE & ROSE, *supra* note 319, at 45.

439. *Id.* at 40, 41.

connection; and, increased variance in interyear work hours (marked by increased moonlighting and underemployment).⁴⁴⁰ Bluestone and Harrison noted that, during the deep recessions of the 1980s, no more than 24% of the workers surveyed by the International Survey Research Company (surveying workers at 444 large companies) were worried about losing their jobs.⁴⁴¹ The number rose to 46% by 1996.⁴⁴²

Bluestone and Rose argue that falling unemployment rates do not equate to a labor shortage and wage-price inflation.⁴⁴³ The Bureau of Labor Statistics “counts anyone working *one hour or more* for pay as in the labor force and employed.”⁴⁴⁴ These statistics mask the available labor supply provided by incumbent workers increasing their work hours, who are motivated by job insecurity and stagnant wages.⁴⁴⁵ Job insecurity, which is a result of industrial restructuring, downsizing, and mass layoffs, leads incumbent workers to work as many available hours as possible, anticipating possible job loss.⁴⁴⁶ Wage stagnation leads families to work more hours to maintain their living standard. This scenario has provided enough additional labor supply to meet increased labor demand, “keeping any potential wage-led inflation under control.”⁴⁴⁷

Addressing policy considerations, Bluestone and Rose suggest that stagnant wages and job insecurity may limit the success of Welfare-to-Work, driving employers to work incumbent employees longer hours rather than hire new unskilled employees. As background, the 1996 passage of the Personal Responsibility and Work Opportunity Reconciliation Act⁴⁴⁸

transformed the U.S. welfare system into a work-based one. The Act requires most recipients to either find work or lose welfare benefits after not more than 2 consecutive years on welfare. Many former welfare recipients are finding jobs. . . . However, a number of experts have highlighted two potential problems: the low employability of

440. *Id.* at 40-41.

441. BLUESTONE & HARRISON, *supra* note 93, at 94.

442. *Id.*

443. BLUESTONE & ROSE, *supra* note 319, at 17.

444. *Id.*

445. *Id.*

446. *Id.* at 40.

447. *Id.* at 47.

448. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

those remaining on welfare and the negative impact of an economic downturn on the ability of many welfare recipients to find jobs.⁴⁴⁹

Bluestone and Rose postulate that the current labor market is not tight enough to press employers to participate in Welfare-to-Work programs.⁴⁵⁰ As a result, legislatures will need to revisit their assistance programs in the near future to help former recipients who are unable to support themselves in the workforce.⁴⁵¹

With global competition, technological change, weakened unions, and industrial deregulation, Bluestone and Rose do not foresee any change in the climate of job insecurity, job instability, or stagnate wages in the near future. They argue for “reward[ing] hardworking Americans with faster growth and the prospect of rising wage rates” to make the enormous personal, family, and community costs resulting from overwork to “not have been totally in vain.”⁴⁵²

4. CORNELL EMPLOYMENT AND FAMILY CAREERS INSTITUTE: MISMATCH BETWEEN WORK HOURS TRENDS AND WORK PREFERENCES

Phyllis Moen, Marin Clarkberg, and their colleagues at the Cornell Employment and Family Careers Institute (Cornell Institute),⁴⁵³ argue that time squeeze is a family and household issue, rather than a question of whether individual Americans are working longer hours. More women are participating in the workforce,⁴⁵⁴ which means that more workers are married to each other: “Indeed, even if we work *fewer* hours today than our fathers worked 30 years ago, the fact that we increasingly find ourselves in households in which there is no stay-at-home partner suggests that time pressures may figure more prominently today than ever before.”⁴⁵⁵

449. Melvin M. Brodsky, *Public-Service Employment Programs in Selected OECD Countries*, 123 MONTHLY LAB. REV. 31, 31 (Oct. 2000) (arguing that public-service employment programs may be the only effective way to aid less-skilled and less-educated long-term unemployed individuals), available at <http://www.bls.gov/opub/mlr/mlrhome.htm>.

450. BLUESTONE & ROSE, *supra* note 319, at 49.

451. BLUESTONE & HARRISON, *supra* note 93, at 250.

452. BLUESTONE & ROSE, *supra* note 319, at 50.

453. CORNELL EMPLOYMENT AND FAMILY CAREERS INST., *at* <http://www.blcc.cornell.edu/cci/cci.html> (last visited Sept. 9, 2001).

454. CLARKBERG & MOEN, *supra* note 303, at 4-5.

455. *Id.* at 5.

The Cornell Institute further conceptualizes “‘time squeeze’ as simply working more than one prefers.”⁴⁵⁶ This analysis suggests that jobs involving forty-five plus hour weeks do not reflect employee preferences, but are products of workplace constraints. Such constraints include “structural lag” (embodied by the sixty plus year old single-earner model codified in the FLSA white-collar exemptions),⁴⁵⁷ and the “rat race model” (career building employees working long hours because employers “over value the tendency to work hours”).⁴⁵⁸

The following section reviews the Cornell Institute’s estimates of workhour trends and its structural lag and rat race hypotheses.

a. TRENDS IN WORK HOURS

Analyzing 1972–1996 national data from the General Social Survey (GSS), the Cornell Institute finds that dual-earner couples are currently working harder than ever. These finds are set forth in the Cornell Institute’s 1999 working paper, *The Time-Squeeze: The Mismatch Between Work-Hours Patterns and Preferences Among Married Couples*,⁴⁵⁹ and a paper for the USDOL’s 1999 conference, “Futurework: Trends and Challenges for Work in the 21st Century,” *The Time-Squeeze in American Families: From Causes to Solutions*.⁴⁶⁰

The GSS provides self-reporting work hours data from a nationally-representative sample of approximately 1500 workers interviewed nearly every year since 1972.⁴⁶¹ Specifically, the GSS is a numeric data set designed as part of a program of social indicator research. It is maintained by the Social Sciences and Humanities Library of the University of California, San Diego. The National Opinion Research Center conducted the GSS annually between 1972 and 1992 (except during 1979, 1981, and 1992—a supplement was added in 1992), and biennially beginning in 1994.⁴⁶²

There were over thirty million dual-earner households in America during 1998, increasing approximately 20% since 1986. In 1999, “dual-

456. *Id.*

457. *Id.* at 10, 11.

458. *Id.* at 10, 12.

459. CLARKBERG & MOEN, *supra* note 303, at 3.

460. Marin Clarkberg, *The Time-Squeeze in American Families: From Causes to Solutions*, at <http://www.dol.gov/dol/asp/public/futurework/conference/families/couples.htm> (last visited Sept. 6, 2001).

461. CLARKBERG & MOEN, *supra* note 303, at 9.

462. *General Social Survey: GSS Study Description*, at <http://www.norc.org/projects/gensocl.asp> (last visited Sept. 25, 2001).

earner households outnumber[ed] breadwinner-homemaker households nearly 3-to-1.”⁴⁶³ The combined work hours of dual-earner couples is currently greater than the sum increase of working spouses. For example, “employed men married in dual-earner households experience larger increases in work hours than other men.”⁴⁶⁴ Conversely, young adults, breadwinner-married men, and single men have experienced a decline in work hours.⁴⁶⁵

b. WORK PREFERENCES

The Cornell Institute argues that the structure and culture of work does not necessarily reflect work hour preferences in the workforce.⁴⁶⁶ The Cornell Institute examined the link between preferences and behavior by analyzing the two waves (1987–1988 and 1992–1994) of the National Study of Families and Households (NSFH).⁴⁶⁷

The NSFH is housed at the Center for Demography and Ecology at the University of Wisconsin, Madison.⁴⁶⁸ The first wave is comprised of interviews with 13,007 respondents from a national sample.⁴⁶⁹ This sample includes a cross-section of 9637 households, plus an oversampling of African-Americans and Mexican-Americans, Puerto Ricans, single-parent families, families with step-children, cohabiting couples, and recently married individuals.⁴⁷⁰ The second wave included face-to-face personal interviews with surviving members of the original sample.⁴⁷¹ Focusing on the dynamics of time-squeeze on married couples, the Cornell Institute limited its analysis of the NSFH data set to persons subject to interviews, who were married to each other, at both

463. Clarkberg, *supra* note 460.

464. *Id.*

465. CLARKBERG & MOEN, *supra* note 303, at 9-12.

466. *Id.* at 10.

467. *Id.* at 13-14.

468. NAT'L SURVEY OF FAMILIES AND HOUSEHOLDS, NSFH WORKING PAPERS (Ctr. for Demography and Ecology, Univ. of Wis.-Madison), at <http://www.ssc.wisc.edu/cde/nsfhw/home.htm> (last visited Dec. 25, 2001).

469. JAMES A. SWEET & LARRY L. BUMPASS, THE NATIONAL SURVEY OF FAMILIES AND HOUSEHOLDS—WAVE 1 AND 2: DATA DESCRIPTION AND DOCUMENTATION (Ctr. for Demography and Ecology, Univ. of Wis.-Madison), available at <http://ssc.wisc.edu/nsfh/home.htm> (last visited Sept. 9, 2001).

470. *Id.*

471. *Id.*

waves.⁴⁷² As a result, the Cornell Institute's subsample was comprised of 4554 couples, totaling 9108 interviews.⁴⁷³

The data shows that part-time work rarely occurs in stable marriages. One in six couples would prefer that “*both* partners worked part-time—a substantially greater percentage than the one in fifty couples who actually do work such schedules.”⁴⁷⁴ The Cornell Institute found that there was a strong association with working longer hours and wanting to work less.⁴⁷⁵ Forty-four percent of men and 34% of women are working substantially longer hours than they would like.⁴⁷⁶ In addition, many women who want to work limited hours chose to leave or not enter the workforce rather than face their only other option—working forty or more hours per week.⁴⁷⁷

The Cornell Institute explains this behavior by applying the “structural lag” and “the rat race” models.⁴⁷⁸ Addressing structural lag,

social institutions—as habitualized, sanctioned and legitimized patterns of action—are resistant to change. When demographic, social or economics conditions change rapidly—as we’ve witnessed with the explosive increase in married women’s labor force participation—the relatively entrenched nature of social institutions means that a mismatch develops between existing social structures and desired or socially “optimal” practices.⁴⁷⁹

The Cornell Institute notes that workplace practices remain organized as if workers have no family responsibilities:⁴⁸⁰

The Fair Labor Standards Act of 1938 is a case in point. Among other things, the FLSA defined the standard 40-hour work week and mandated special overtime compensation while exempting professional occupations from its purview. The FLSA is perennially touched-up but its character remains fundamentally unchanged for over sixty years, despite both a massive shift from breadwinner/homemaker to dual-earner families and, with increasing professionalization, an increasing proportion of the labor force

472. *Id.*

473. CLARKBERG & MOEN, *supra* note 303, at 14.

474. *Id.* at 16.

475. *Id.* at 18.

476. *Id.*

477. *Id.* at 26.

478. CLARKBERG & MOEN, *supra* note 303, at 26-27.

479. Clarkberg, *supra* note 460 (discussing the “Great Structural Lag”) (citation omitted).

480. CLARKBERG & MOEN, *supra* note 303, at 11.

exempted from it's [sic] protections. As a result of this and other forms of institutional inertia, organizational policies and expectations regarding work hours are predicated on an outdated template where privileged professionals can be assumed to have a wife taking care of home life.⁴⁸¹

The rat race model suggests employers reward long hours as an indicator of employee "quality" in the absence of good measures of output volume or quality.⁴⁸² As a result, employees (especially those in a career building phase) "have an incentive to work long hours, even if they prefer some reduced hours schedule."⁴⁸³ This model applies more to white-collar, than blue-collar, occupations where output is more difficult to measure.⁴⁸⁴ Ironically, this condition is driven by workers who prefer to work fewer hours:

[A]n increase in the supply of such workers serves to increase the number of workers who are, at least during early career development years, "masquerading" as workers who prefer long hours, in turn "raising the bar" on the acceptable work hours for "quality" employees.⁴⁸⁵

Under the conditions described in the structural lag and the rat race models

workers are constrained to work more hours than they perceive as optimal. The consequences of this may include both overworked workers, who are straining to meet employer expectations, as well as a growing population of "underemployed"—men and women who would prefer to work *some* hours, but who are currently out of the labor market because they are unwilling to put the long hours required by available jobs.⁴⁸⁶

The Cornell Institute concludes that it is time to reevaluate the FLSA white-collar exemptions. There are currently no cultural and legal protections from required overtime for the large and growing pool of professional employees. This lack of protection results in an enormous

481. Clarkberg, *supra* note 460.

482. *Id.*

483. CLARKBERG & MOEN, *supra* note 303, at 12.

484. *Id.* at 20.

485. *Id.* at 12.

486. *Id.* at 13.

cost on a personal (quality of life) and societal level (overworked families struggle to outsource home and child care with mixed results).⁴⁸⁷

V. COMPARATIVE ANALYSIS ON THE “OVERWORKED AMERICAN” THESIS

There has been significant attention given to the commercialization of United States culture.⁴⁸⁸ Corroborating Schor’s argument that Americans work approximately one extra month per year because they are trapped in a “work-and-spend” cycle is, however, beyond the scope of this article. This section reviews the “Overworked American” thesis discussed in Part IV in light of studies (primarily from the BLS, GAO, JLEI, NBER, and the U.S. Census Bureau) addressing worktime preference and occupational stress, time-use data, growth in the contingent workforce, employee insecurity (fear of unemployment), wage stagnation, and the effectiveness of maximum hours labor standards to reduce work hours and spread the work. Time-squeeze exists—and maximum hours labor standards are as relevant today, and in the foreseeable future, as they were when enacted over sixty years ago as a means to advance society’s quality of life.

487. Clarkberg, *supra* note 460 (discussing solutions for time-squeeze).

488. JULIET B. SCHOR, *THE OVERSPENT AMERICAN: UPSCALING, DOWNSHIFTING, AND THE NEW CONSUMER* 25-109 (1998) (identifying and describing the “new consumerism” whereby Americans spend to compete for status, aspiring for lifestyles of upper middle class and wealthy, instead of taking their cues from people with similar incomes, e.g., Americans are no longer trying to “keep up with the Joneses”—people they know—but with characters they view on television); *see also* DAVID BROOKS, *BOBOS IN PARADISE: THE NEW UPPER CLASS AND HOW THEY GOT THERE* 54-102 (2000) (discussing status identification through consumption by the new educated elite—the bohemian bourgeoisie, e.g., bobos); THOMAS FRANK, *ONE MARKET UNDER GOD: EXTREME CAPITALISM, MARKET POPULISM, AND THE END OF ECONOMIC DEMOCRACY*, at xiv (2000) (postulating that “American leaders in the nineties came to believe that markets were a popular system, a far more democratic form of organization than (democratically elected governments”); David George, *Driven to Spend: Longer Work Hours as a Byproduct of Market Forces*, in *WORKING TIME: INTERNATIONAL TRENDS, THEORY AND POLICY PERSPECTIVES* 127-42 (Lonnie Golden & Deborah M. Figart eds., 2000) (discussing “work-to-spend” versus “spend-to-work”); HAYDEN, *supra* note 1, at 30-60 (arguing that working and consuming less will help workers in the northern hemisphere live more and save the planet); HUNNICUTT, *supra* note 11, at 21-27 (discussing the origins of “Liberation Capitalism” and the “New Economic Gospel of Consumption” in the 1930s); ROBINSON & GODBEY, *supra* note 11, at 44, 304-05 (discussing open-ended consumption).

A. WORK TIME PREFERENCE AND OCCUPATIONAL STRESS

In 1980, Dr. Fred Best of the National Commission for Employment Policy issued a report titled *Exchanging Earnings for Leisure: Findings of the Exploratory National Survey on Work Time Preference*.⁴⁸⁹ Based on a national survey conducted by Louis Harris and Associates in August 1978,⁴⁹⁰ Best found that

[p]revailing work time conditions are at variance with preferences of today's workers. An overwhelming majority of American workers state a willingness to forego most of future pay raises for more time away from work if given some choice concerning the specific forms of potential free time. A solid majority of workers would give up at least 2 percent of current earnings for their choice among five different forms of free time, and about one-fourth claimed a desire to forego 10 percent or more of their income for time Specifically, extended periods away from work, such as vacations and sabbaticals, elicited considerably greater desire to exchange income for leisure than did short-range gains of time, such as reduced workweeks and workdays.⁴⁹¹

Twenty years later, prevailing work time conditions continued to be at variance with workers' preferences. In March 1999, Linda Rosenstock, Director of the National Institute of Occupational Safety and Health (NIOSH), stated at a conference sponsored by NIOSH and the American Psychological Association that "[l]onger work hours, fears of downsizing and a nationwide shift toward more demanding service jobs are prompting new concerns over workplace stress and its association with adverse health effects such as heart disease."⁴⁹² Director Rosenstock emphasized that more attention should be paid to stress associated with work in low wage jobs (those paying an average of \$5.70 per hour in 1992–1993).⁴⁹³ She noted that many individuals engaged in such work "are employed in part-time jobs in addition to their full-time jobs: there are currently 7.9 million 'multiple job-holders' in the United States, and 55 percent of them combine several part-time jobs to reach full-time employment."⁴⁹⁴

489. Fred Best, *Exchanging Earnings for Leisure: Findings of an Exploratory National Survey on Work Time Preferences*, R & D MONOGRAPH 79 (1980).

490. *Id.* at 51 (describing the survey data and approach to analysis).

491. *Id.* at 2-3.

492. Dean Scott, *Stress: Longer Hours, Growth in Service Jobs Stressing Workforce*, NIOSH *Head Says*, 28 O.S.H. Rep. (BNA) 1124 (Mar. 17, 1999).

493. *Id.*

494. *Id.*

Director Rosenstock's comments followed NIOSH's January 1999 release of its report, *Stress . . . At Work*.⁴⁹⁵ The study highlighted causes of job stress (defined as "the harmful physical and emotional responses that occur when the requirements of the job do not match the capabilities, resources, or needs of the worker")⁴⁹⁶ and outlined steps to prevent it. Early warning signs of job stress are headaches, sleep disturbances, difficulty in concentrating, a short temper, an upset stomach, job dissatisfaction, and low morale.⁴⁹⁷ NIOSH warned that job stress has been "associated with increased absenteeism, tardiness, and intentions by workers to quit their jobs—all of which have a negative effect on the bottom line."⁴⁹⁸ The report suggested that employers can help alleviate stress by identifying stress factors in the workplace, and by designing and implementing an array of changes such as providing workers with clearly defined roles and expectations in line with their individual abilities.⁴⁹⁹

Examining the changing needs in occupational safety and health, the Bureau of National Affairs observed in May 1999 that the Occupational Safety and Health Administration (OSHA) and state agencies will confront new challenges as American workers face a future "of longer hours, harried working conditions, and increasing isolation."⁵⁰⁰ The Bureau based its opinion on studies (including NIOSH's January 1999 report) addressing the increased number of employees working from home, trends toward longer workweeks, and stress as an occupational hazard.⁵⁰¹ The report buttressed its opinion with statements by Martha Kent (OSHA Director of Safety Standards):

[I]n some ways, the conditions facing future workers may be worse even than those that workers faced in preindustrial America. In pre-industrial times, people worked long hours, but there was "a lot of variation so they didn't have to do that intensive repetitive work and have to sustain it for very long periods of time."⁵⁰²

495. Steven Sauter et al., *Stress . . . At Work* (DHHS (NIOSH) Publ'n No. 99-101, Jan. 1999), at <http://www.cdc.gov/niosh/stresswk.html>.

496. *Id.*

497. *Id.* (discussing job stress and health).

498. *Id.* (discussing stress, health and productivity).

499. *Id.* (describing how to change the organization to prevent job stress).

500. *American Workers Face Future of Long Hours, Faster Pace, Increasing Isolation*, 28 O.S.H. Rep. (BNA) 1536 (May 19, 1999) (addressing workplace stress).

501. *Id.*

502. *Id.*

The report also included Kent's observation that twelve-hour shifts are typical in many of today's production jobs. Kent, nonetheless, stated that it is unclear how such long work hours will affect the aging workforce physically (e.g., aging people recover more slowly from chemical exposure or repetitive motion "due to normal wear and tear") and psychologically.⁵⁰³

Timothy Webster and Bruce Bergman echoed NIOSH's findings in their 1999 *Compensation and Working Conditions Online* article, *Occupational Stress: Counts and Rates*.⁵⁰⁴ Webster and Bergman estimated that there were 3418 stress related work absences in 1997.⁵⁰⁵ The median absence was twenty-three days away from work to recuperate from occupational stress. Finance, insurance, real estate and services had a higher percentage of occupational stress cases than their percentage share of all injuries and illnesses. The opposite was true for all other industries. The risk of job stress was higher for white-collar workers than their risk for all other injuries and illnesses. The opposite was true for service and blue-collar workers.⁵⁰⁶

B. TIME-USE DATA

Time-use data "can be used to answer questions on a broad range of economic and sociological issues."⁵⁰⁷ In pertinent part, it provides quantifiable measures to assess changes in quality of life.

For example, stories in the popular press report that some individuals have quit high salary jobs that require long working hours to take lower paying jobs with fewer hours. While these people consider themselves "better off," any objective measure of income or earnings would indicate that these individuals are "worse off." Data from a time-use survey that is linked to a household survey, such as the CPS, would permit analysts to account for the increase in nonmarket

503. *Id.*

504. Timothy Webster & Bruce Bergman, *Occupational Stress: Counts and Rates*, 4 COMPENSATION & WORKING CONDITIONS 38 (Fall 1999), available at <http://www.bls.gov/opub/cwc/1999/Fall/brief4.htm>.

505. *Id.* at 40.

506. *Id.*

507. Mary Joyce & Jay Stewart, *What Can We Learn From Time-Use Data?*, 122 MONTHLY LAB. REV. 3, 3 (Aug. 1999) (discussing the application of time-use data to measure real income, well-being, education and training, policy and business cycle changes, and timing of activities), available at <http://stat.bls.gov/opub/mlr/1999/08/contents.htm>.

production [nonmarket household work] and leisure time when assessing changes in quality of life.⁵⁰⁸

Research using time-use data generally shows a modest increase in work hours, supporting the “Overworked American” thesis.⁵⁰⁹ This research includes five reports from the EPF downplaying increased overtime hours as being neither extensive nor dramatic and a matter of choice for most working Americans.⁵¹⁰ The following text reviews examples of the research.

Philip L. Rones, Randy E. Ilg, and Jennifer M. Gardner of the Bureau of Labor Statistics (BLS) observed, in their 1997 *Monthly Labor Review* article analyzing CPS data, *Trends in Hours of Work Since the Mid-1970s*,⁵¹¹ that while the average length of the workweek for most workers did not change between 1976 and 1993, there was a significant increase of persons working very long workweeks (over forty-nine hours per week), and a decline in persons working the standard forty-hour week.⁵¹² This increase occurred in every occupation. It was most prevalent in management, professional, administrative, sales, and

508. *Id.* at 5.

509. BLUESTONE & ROSE, *supra* note 319, at 22-23 (discussing new estimates of working time). See generally BARKUME, *supra* note 270, at 80-126 (comparing research using CPS, PSID, time-diary and CES data, and discussing overall trends in hours worked).

510. EMPLOYMENT POLICY FOUND., ISSUE BACKGROUNDER: THE MYTH OF THE “OVERWORKED AMERICAN” (July 16, 1998) (noting that “[m]ost data series show that average hours of work have not increased dramatically in recent years,” and criticizing Schor’s analysis by citing research done by Bluestone and Rose, and Robinson and Godbey), at <http://www.epf.org/research/newsletters/1998/b980716.aspx#980716>; see also EMPLOYMENT POLICY FOUND., EMPLOYMENT TRENDS: VIRTUALLY NO CHANGE IN HOUSEHOLD WORKING HOURS 1, 3 (Nov. 30, 2000) (arguing that: (1) dual-earner married couples with children work hours increased by twenty-three minutes per day – split between the couple – since 1980; and, (2) some time pressures, like rush-hour commuting, are not from the workplace), at <http://www.epf.org/research/newsletters/2000/et20001130.pdf>; EMPLOYMENT POLICY FOUND., ISSUE BACKGROUNDER: THE TRUE STORY BEHIND OVERTIME HOURS 1 (Oct. 11, 2000) (countering media coverage regarding overtime work), at http://www.epf.org/_ibackgrounder/Overtime_Hours_102000.pdf; EMPLOYMENT POLICY FOUND., POLICY BACKGROUNDER: TIME CAN BE MORE IMPORTANT THAN MONEY: BRING THE FAIR LABOR STANDARDS ACT INTO THE 21ST CENTURY 4 (May 2, 2001) (advocating for amending the FLSA to permit private sector comp-time, arguing that women – especially mothers – need flexible work hours to address the demands of home and work life), at <http://www.epf.org/research/newsletters/2001/pb20010502.pdf>; KRISHNA KUNDU, EMPLOYMENT POLICY FOUND., HOURS OF WORK: A MATTER OF CHOICE FOR MOST WORKING AMERICANS (Oct. 1999) (countering the ILO’s 1999 Labor Day press release discussed *supra* notes 305 to 308 and accompanying text), at <http://www.epf.org/ff/ff991014.htm>.

511. Philip L. Rones et. al., *Trends in Hours of Work Since the Mid-1970s*, 120 MONTHLY LAB. REV. 3 (Apr. 1997), available at <http://www.bls.gov/opub/mlr/1997/04/art1full.pdf>.

512. *Id.* at 5.

technical jobs, where it affected women more than men.⁵¹³ More dramatic, however, was the growing trend of women working year-round, adding 233 hours of work per year between 1976 and 1993; and, men saw a one hundred hour increase in their average annual work hours during the same period.⁵¹⁴

Under this analysis, the findings of Schor, Robinson, Bostrom, and Godbey are easily reconcilable. Schor focuses on annual hours of work, finding most of the increase in hours from an increase in weeks worked, not hours worked per week. Robinson, Bostrom, and Godbey focus on hours worked per week.⁵¹⁵ It is also important to recognize that Robinson, Bostrom, and Godbey observed an increased proportion of workers reporting that they worked longer hours. Their estimates suggest that these individuals were overworked, working close to fifty-three hours (rather than sixty hours as reported) per week, e.g., thirteen (not twenty) hours above the standard forty hour workweek.⁵¹⁶

In addition, Mary Joyce and Jay Stewart reported in their 1999 *Monthly Labor Review* article, *What Can We Learn from Time-Use Data?*,⁵¹⁷ that much of “the discrepancy between the time-use diaries [Robinson, Bostrom and Godbey] and CPS [Schor] estimates of the length of the workweek may be a statistical artifact resulting from random measurement error in both measures.”⁵¹⁸ Robert Drago, Robert Caplan and David Costanza suggested in their 2000 final report for the Alfred P. Sloan Foundation, *The Time, Work & Family Project: A Study of Teachers*,⁵¹⁹ that the problem is calculating synthetic workweeks from time-diaries:

[E]stimates of working time gotten by asking individuals about their typical workweek may *not* be inflated for those who work long hours. That is, Robinson and Bostrom’s result may be due to problems inherent in the calculation of synthetic workweeks with time diary data If this conclusion is correct, then it is synthetic workweek

513. *Id.* at 7-9.

514. *Id.* at 10-13.

515. See BLUESTONE & ROSE, *supra* note 319, at 24; Schor, *supra* note 322.

516. See *supra* Part IV.B.2.a. (discussing trends in the use of time).

517. Joyce & Stewart, *supra* note 507, at 4-5 (discussing how to verify and interpret existing data series).

518. *Id.* at 4 (citing Jerry A. Jacobs, *Measuring Time at Work: Are Self-Reports Accurate?*, 120 MONTHLY LAB. REV. 42 (Dec. 1998), available at <http://www.bls.gov/opub/mlr/1998/12/art3full.pdf>).

519. ROBERT DRAGO ET AL., THE TIME, WORK & FAMILY PROJECT: A STUDY OF TEACHERS 64-66 (Final Report for the Alfred P. Sloan Found., Feb. 2000) (reviewing time-diary research on teachers), available at <http://lsir.la.psu.edu/workfam/teachers.pdf>.

calculations from time diaries which should be avoided, and we should instead rely upon standard survey estimates of the usual or typical workweek⁵²⁰

Note, however, the definitions of work-time Robinson, Godbey, and Schor use in their respective studies are not reconcilable. Schor's analysis covers all time when workers are officially on the job, while, Robinson and Godbey subtract "on-the-job leisure," such as time at work when employees congregate at the water cooler, make personal telephone calls, balance their checkbooks, or use the restroom.⁵²¹ Schor's measurement of work time is more analogous to the FLSA concept of compensable hours worked than Robinson and Godbey's measurement. Hours subject to the FLSA "includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace."⁵²² The FLSA covers short durations (five to twenty minutes) such as rest periods, coffee breaks and waiting time, and unauthorized work, (even when prohibited) when the employer had actual or constructive knowledge of the employee's activities.⁵²³

Summing up the significance of the work hours debate, Schor observed that the controversy is not merely academic. It has important political, social, and gender implications.

If time-squeeze is only a "perceptual" or "entitlement" problem it can be solved merely by lowering expectations By contrast, if work has indeed become more demanding, crowding out family and community time, there is a larger public interest involved. Achieving a sustainable and optimal balance between various uses of time will

520. *Id.* at 66 (footnote omitted).

521. *See generally* Schor, *supra* note 322; ROBINSON & GODBEY, *supra* note 11, at 85-86.

522. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946); *see also* 29 C.F.R. § 785.7 (2001).

523. *Anderson*, 328 U.S. at 690-91 (holding that time spent in preliminary and subsequent duties to productive work are compensable work hours); *see also* *Aeromotive Metal Prod., Inc. v. Wirtz*, 312 F.2d 728, 729 (9th Cir. 1963) (holding that a mid-morning fifteen-minute rest break was compensable hours worked). *But see* *Lee v. Coahoma County*, 937 F.2d 220, 225 (5th Cir. 1991) (holding that county deputies' twenty-minute lunch break was not compensable working time). The employer allowed them to go where they pleased for the break, paid their travel time to and from the location for lunch, and called them back to work only upon an occasional emergency. *Id.* For a discussion on the "[w]aiting [t]o [b]e [e]ngaged [d]octrine" and "on-call policies," see Christopher S. Miller et al., *The Impact of Electronic Paging and On-Call Policies on Overtime Pay Under the FLSA*, 11 LAB. LAW. 231, 232 (1995).

require fundamental restructuring of the basic institutions which govern market, household and community work.⁵²⁴

BLS research also corroborates the “feast and famine” hypothesis of Bluestone, Harrison, and Rose. For example, Ron L. Hetrick observed in his 2000 *Monthly Labor Review* article analyzing the Current Employment Statistics (CES) data, *Analyzing the Recent Upward Surge in Overtime Hours*, that manufacturing employers, during the economic expansion of the 1990s, were more likely than in the economic expansions of the 1960s and 1980s to increase overtime hours among existing employees than to hire new workers.⁵²⁵ Specifically, overtime increased from 1.6 hours per week in March 1991 to 4.9 hours per week in March 1997; this was the highest level of overtime the BLS reported since it began publishing the CES in 1956.⁵²⁶ The overtime hours were a direct substitute for employment.⁵²⁷ Employment increased at approximately 4% during the 1990s, while increasing 15% and 5% during the 1960s and 1980s, respectively.⁵²⁸ Hetrick also observed that the 1990s increase in overtime was a cushion against job loss in 1998:

In fact, had overtime not been reduced by 0.4 hour in 1998, instead of a loss of nearly a quarter-million jobs in manufacturing, the loss would have been closer to 400,000. Manufacturing employment continued to decline in 1999, while overtime hours held steady, rising slightly by the end of the year.⁵²⁹

In addition, BLS research supports the observations of dual-earner households by Schor, Bluestone, Harrison, Stone, and the Cornell Employment and Family Careers Institute. Using CPS data,⁵³⁰ the BLS stated in the *Report on the American Workforce 1999*⁵³¹ that married couples spent approximately “fourteen more hours working per week in

524. Juliet B. Schor, *Working Hours and Time Pressure: The Controversy About Trends in Time Use*, in *WORKING TIME: INTERNATIONAL TRENDS, THEORY AND POLICY PERSPECTIVES* 82-83 (Lonnie Golden & Deborah M. Figart eds., 2000).

525. Ron L. Hetrick, *Analyzing the Recent Upward Surge in Overtime Hours*, 123 MONTHLY LAB. REV. 30, 31-32 (Feb. 2000), available at <http://www.bls.gov/opub/mlr/2000/02/art3full.pdf>.

526. *Id.* at 30.

527. *Id.* at 31-33.

528. *Id.* at 33.

529. *Id.*

530. The BLS acknowledged the “measurement error problems associated with the CPS.” BARKUME, *supra* note 270, at 83. The BLS nonetheless used CPS data because it: (1) contains a wealth of information on demographic characteristics (enabling trend analysis for various subgroups); and (2) allows long-term trend analysis because the BLS has asked the same weekly hours questions for many years. *Id.*

531. *Id.*

1998 than they did in 1969 and 717 more hours working per year in 1997 than they did in 1969.⁵³² Married couples with children under six experienced the largest increase, with their combined work hours rising from 52.3 hours per week in 1969 to 68.3 hours in 1998.⁵³³ There has also been a steady increase where both spouses work more than forty hours per week.⁵³⁴ Married couples in the lowest 10% of the income spectrum worked less in 1997 than they did in 1979; married couples in the middle of the distribution increased their combined work hours the most, but did not experience the largest increase in income. Instead, income grew faster at the top of the income distribution, and “declined in real terms” for married couples at the bottom of the distribution.⁵³⁵

The report further corroborated the thesis advanced by Schor, Bluestone, Harrison, and Stone that Americans are both overworked and underemployed. Specifically, the BLS reported that the average workweek for individual workers decreased from 40.0 to 39.2 hours between 1967 and 1998; the BLS identified that the decrease was most likely due to increased female participation in the workforce, because women typically “work fewer hours than their male counterparts.”⁵³⁶ Conversely, between 1983 and 1993, the proportion of employees reporting that they worked more than forty hours per week rose from 32.4% to 38.4% among men, and from 14.1% to 19.9% for women.⁵³⁷ The BLS also observed that workers age twenty-five to fifty-four showed a 10% increase (53% to 63%) in that proportion of workers who worked full-time year-round between 1969 and 1997; and, the entire gain was among women.⁵³⁸ Men in the lowest decile of the earning distribution are “working less and earning considerably less today than they did years ago. In contrast, men at the middle of the distribution are working slightly more and making less and men at the upper end are working more and making more.”⁵³⁹ Women, however, are “working more and earning more in 1997 than they did in 1979” across the income spectrum.⁵⁴⁰

The U.S. Census Bureau further reinforces the observations of working women and dual-earner households by Schor, Bluestone,

532. *Id.* at 100.

533. *Id.*

534. *Id.* at 101.

535. BARKUME, *supra* note 270, at 100-01.

536. *Id.* at 84.

537. *Id.*

538. *Id.* at 95-96.

539. *Id.* at 96.

540. BARKUME, *supra* note 270, at 96.

Harrison, Stone, and Cornell Employment and Family Careers Institute. Using June 1998 CPS data, Amara Bachu and Martin O'Connell showed in their 2000 report, *Fertility of American Women: Population Characteristics*,⁵⁴¹ that 59% of the women with infants under the age of one in 1998 (3.7 million working mothers) were in the labor force, almost double the 31% of the participation rate in 1976; 36% were working full-time, 17% were employed part-time, and 6% were actively seeking work.⁵⁴² Bachu and O'Connell suggest that this phenomenon may account for why child care issues have been a key component of family policy legislation in recent years.⁵⁴³ Labor force participation among women with infants is higher for women with one or more years of college (68%) than for women who were not high school graduates (39%).⁵⁴⁴

In addition, families with children where both spouses worked became the majority of U.S. families for the first time in 1998; in fact, in 1998, 14.3 million of the 28.3 million married-couple families, or 51%, compared to only 8.3 million, or 33.3%, in 1976. In 1998, 24% (6.8 million) of U.S. families were married couples with children where only the husbands worked.⁵⁴⁵ This is down from 43% (or eleven million) in 1976.⁵⁴⁶ Dual-employed couples with no children increased from 3.0 to 4.2 million couples between 1976 and 1987.⁵⁴⁷ There was no significant change by 1998.⁵⁴⁸ "In general, wives of childless couples tend to be younger . . . [;] [a]bout 43% of childless dual-employed couples had wives who were under age 30 compared with only 17% of couples with children."⁵⁴⁹ Childless dual-employed couples also have higher joint levels of education, with 31% graduating from college, compared to dual-employed couples with children (17%) and couples with children where only the husband was employed (17%).⁵⁵⁰ Childless dual-employed couples were also more likely than dual-employed couples with children to both be employed in professional or managerial

541. Amara Bachu & Martin O'Connell, *Fertility of American Women: Population Characteristics*, (Sept. 2000) (using 1998 CPS data), at <http://www.census.gov/prod/2000pubs/p20-526.pdf>.

542. *Id.* at 2, 8, 10.

543. *Id.* at 8.

544. *Id.* at 9, 10 tbl.F.

545. *Id.* at 12.

546. Bachu & O'Connell, *supra* note 541, at 12.

547. *Id.*

548. *Id.* at 9, 11, 12.

549. *Id.* at 12.

550. *Id.*

occupations, 24% compared to 16%, respectively.⁵⁵¹ Sixty percent of the childless couples had incomes of \$50,000 or more, compared with 54% of families with children.⁵⁵² Dual-employed couples had distinctly higher incomes compared with families where only the husbands worked (55% earning \$50,000 and over, compared to 40%).⁵⁵³

Providing a long-term view on the overworked American thesis, Dora L. Costa shows in her NBER working paper, *The Wage and the Length of the Work Day: From the 1890s to 1991*, that the unequal distribution of hours in the 1890s equalized income between the lowest and highest paid workers.⁵⁵⁴ In the 1890s, the lowest paid employees worked approximately two hours longer per day than the highest paid workers – women in the bottom earning decile worked 10.06 hours per day in the 1890s and the top decile worked 7.97 hours.⁵⁵⁵ By 1973, however, an employee in the bottom decile worked 7.36 hours per day and an employee in the top decile worked 7.50 hours; and, in 1991, an employee in the bottom decile worked 6.67 hours per day while an employee in the top decile worked 8.14 hours.⁵⁵⁶ In weekly terms for dual-earner households, couples in the bottom earning decile in 1973 worked 44.01 hours per week (41.39 hours by husbands and 2.63 hours by wives) and 68.14 per week in the highest earning decile (45.66 hours by husbands and 22.48 hours by wives).⁵⁵⁷ By 1991, 26% of the earnings inequality between the top and bottom deciles among men was attributable to the highest paid employees working more hours than the lowest paid employees.⁵⁵⁸ Households in the top earning decile worked 70.83 hours per week (47.95 hours by husbands and 22.88 hours by wives), while households in the lowest earning decile worked 52.45 hours per week (38.24 hours by husbands and 14.20 by wives).⁵⁵⁹

551. Bachu & O'Connell, *supra* note 541, at 12.

552. *Id.*

553. *Id.*

554. DORA L. COSTA, *THE WAGE AND THE LENGTH OF THE WORK DAY: FROM THE 1890S TO 1991* 2 (Nat'l Bureau of Econ. Research, Working Paper No. W6504, 1998), available at <http://papers.nber.org/papers/w6504>.

555. *Id.* at 8-9, 9 tbl.3.

556. *Id.* at 9, 9 tbl.3.

557. *Id.* at 25, 25 tbl.11.

558. *Id.* at 24-25.

559. COSTA, *supra* note 554, at 25, 25 tbl.11.

C. THE CONTINGENT WORKFORCE

The growth of the contingent workforce discussed by Schor, Bluestone, Harrison and Stone has attracted significant debate over whether the phenomenon is symptomatic of an erosion of the post-war social compact. For example, Robert B. Reich (former Secretary of Labor under President Clinton) argues that one provision of the social compact—"[a]s companies do better, their workers should, too"⁵⁶⁰—has been unraveling since the late 1970s:

Profitable companies now routinely downsize their work forces, or they resort to what might be called "down-waging" and "down-benefiting." Layoffs in the current expansion are occurring at an even higher rate than in the expansion of the eighties. Companies are replacing full-time workers with independent contractors, temporary workers and part-timers; they are bringing in new full-time workers at lower wage scales than current workers, or are subcontracting the work to smaller firms offering lower wages and benefits. Employer-provided health benefits are declining across the board, and health costs are being shifted to employees in the form of higher co-payments, deductibles and premiums. Defined-benefit pension plans are giving way to 401 (k) plans without employer contributions, or to no pensions at all.⁵⁶¹

The Bureau of National Affairs reported in 2000 that outsourcing and contingent work in the private and public sectors are developing trends for the beginning of the twenty-first century.⁵⁶² Unions have

560. Robert B. Reich, *Broken Faith: Why We Need to Renew the Social Compact*, at <http://past.thenation.com/issue/980216/0216reic.htm> (last visited Sept. 7, 2001).

561. *Id.*; see also Gillian Brock, *Comments on "Temporary Employment and the Social Contract"*, ONLINE J. OF ETHICS 1 (1996) (arguing the temporary employment phenomenon is "morally impermissible, irrespective of cost implications"), at http://www.stthom.edu/cbes/oje/articles/brock_on_steverson.html; FRASER, *supra* note 13, at 46-74 (discussing the hiring of young contingent employees, job loss and downward mobility for older employees, and stagnant wages exacerbated by decreasing benefits); Brian K. Steverson, *Temporary Employment and the Social Contract*, ONLINE J. OF ETHICS 1 (1996) ("The phenomenon of temporary employment represents, as Secretary of Labor Reich has put it, a 'fraying of the social contract.'"), at <http://www.stthom.edu/cbes/oje/articles/steverson.html>.

562. *Technological Changes Transforming Employment: Outsourcing and Contingent Work Called Trends in 21st Century*, 163 Lab. Rel. Rep. (BNA) 18 (Jan. 10, 2000) (arguing that "[r]evolutions in information technology, the advent of electronic commerce, and chronic shortages of skilled workers are transforming the very nature of work and the structure of the workforce"); see also *Public Employers Moving to Temporary Workers: Use of Temps Attacked By Unions & May Inspire Litigation*, 163 Lab. Rel. Rep. (BNA) 22 (Jan. 10, 2000) (noting that in "an era of budget reductions and workforce downsizing, public employers faced with the ever-rising cost of employee

responded to these trends by increasing their drive to organize temporary workers, especially in the high technology industry. They point to a “widening class chasm” where 27% to 40% of the Silicon Valley’s job growth is in part-time work with wages and benefits dramatically below those of the full-time workforce.⁵⁶³ Long-term temporaries (employees working for temporary agencies at companies for six months to ten years) are suing to obtain company benefits.⁵⁶⁴ Employee advocates are lobbying for better benefits and an employer’s code of conduct on the state and federal level.⁵⁶⁵ Academics argue that “as a matter of fairness and equity, those who work side by side, on the same project or job, under the same supervisor should receive the same benefits, and these ethical issues may eventually translate into legal doctrine.”⁵⁶⁶ In the alternative, employer advocates, such as the EPF, state that temporary employment helps the economy and is neither cheap labor nor growing.⁵⁶⁷ In addition, “long-terms temps” and “[h]igh-tech workers who are independent contractors or agency temps” are rare.⁵⁶⁸

benefits increasingly have moved toward the use of temporary or contract workers to whom they pay reduced or no benefits”).

563. Joel Kotkin, *Unions See Fertile Fields at Lower End of High Tech*, N.Y. TIMES, Sept. 26, 1999, § 3, at 4 (asking, “[a]re temporary workers a booming area’s proletariat?”); see also FRASER, *supra* note 13, at 140-45 (examining the use of contingent labor in the Silicon Valley and Seattle).

564. Merrill Goozner, *Longtime Temps Want Some Perks: Now Some Are Suing Companies for Benefits*, CHI. TRIB., June 22, 1999, § 1, at 1 (noting that approximately one-fourth of all temporary employees have worked at the same workplace for more than one year); see also FRASER, *supra* note 13, at 141 (observing that approximately 200,000 “permatemps” work in large corporations like Hewlett-Packard, Intel, AT&T, and Microsoft).

565. Aaron Bernstein, *The Workplace: A Leg Up for the Lowly Temp, Advocates are Lobbying for Better Benefits and an Employers’ Code of Conduct*, BUS. WK. (June 21, 1999), at http://www.businessweek.com/1999/99_25b3634132.htm.

566. Steven J. Arsenault et al., *An Employee by Any Other Name Does Not Smell as Sweet: A Continuing Drama*, 16 LAB. LAW. 285, 305 (Fall 2000) (discussing the legal and ethical issues regarding the contingent workforce).

567. KRISHNA KUNDU, EMPLOYEE POLICY FOUND., TEMPORARY WORK: A CATALYST FOR A STRONGER ECONOMY 2 (June 15, 2000) (arguing that temporary staffing is not growing in relation to traditional permanent jobs and that it “benefits employees by facilitating entry into traditional permanent employment or the transition between permanent jobs”), at <http://www.epf.org/etrend/2000/et200000615.pdf>; see also MAX R. LYONS, EMPLOYEE POLICY FOUND., TEMPS: TEMPEST IN A TEAPOT (Feb. 1999) (noting that “nearly half of temps have health insurance coverage, primarily from their parents’ or spouses’ plans”), at <http://www.epf.org/ff/ff990202.htm>.

568. MAX R. LYONS, EMPLOYEE POLICY FOUND., LONG-TERM TEMPS: A RARE BREED (July 12, 1999) (using BLS data to argue that approximately 63% of all temporary employees work at an assignment for fewer than six months, 17% work at an assignment for less than one year, and 12% for more than two years), at <http://www.epf.org/research/newsletters/1999/b990712.asp>; see also EMPLOYEE POL’Y FOUND., HIGH-TECH INDEPENDENT CONTRACTORS AND AGENCY TEMPS: WHO THEY ARE AND HOW THEY WORK 1-3 (Jan. 23, 2001) (using CPS data), at <http://www.epf.org/media/newsreleases/2001/nr20010124.htm>. But see Linda Stockman Vines,

Research on the growth of the contingent workforce corroborates the thesis advanced by Schor, Bluestone, Harrison, and Stone that Americans are both overworked and underemployed.⁵⁶⁹ The following reviews examples of the research.

Patrick Bollé observed in his 1997 *International Labour Review* article, *Perspectives, Part-Time Work: Solution or Trap?*,⁵⁷⁰ that part-time employment is worth encouraging when it is freely chosen and protected by law.⁵⁷¹ Bollé's theory tracks the ILO Part-Time Work Convention (Convention No. 175, effective February 28, 1998),⁵⁷² providing minimum standards for part-time employment, such as proportionate remuneration and nondiscrimination in job promotions and advancement.⁵⁷³ Bollé notes that deteriorating employment conditions for part-time employees "can lead, through a 'leveling-down' process, to a deterioration in the situation of their full-time fellow workers."⁵⁷⁴

Part-time work helps people strike a balance between the time they spend earning a living and the time they wish or need to devote to other activities. It also enables employers to achieve higher productivity by providing greater flexibility in adjusting work hours to business requirements.⁵⁷⁵ Echoing the concerns expressed in the Cornell Employment and Family Careers Institute's analysis of the structural lag and rat race models,⁵⁷⁶ Bollé warns that

[w]omen should not be forced to choose between full-time employment and unemployment as the only alternatives on offer Policies designed to promote part-time work by lowering its cost below that of full-time employment are likely to have the perverse effect of increasing the proportion of involuntary part-time workers, i.e. underemployment with adverse consequences both social—

Make Long-Term Temporary Workers Part of the Team, 42 HR MAG. 65 (1997) ("Strictly from the employer's standpoint, '[u]sing long-term temporaries instead of full-time hires is a great way [for the organization] to boost the staff during busy times and downsize—without pain—during lean times.'").

569. See *supra* Part V.A., B.

570. Patrick Bollé, *Perspectives: Part-Time Work: Solution or Trap?*, 136 INT'L LAB. REV. 557 (1997).

571. *Id.* at 578.

572. PART-TIME WORK CONVENTION, INT'L LABOUR ORG., 1994, available at <http://ilolex.ilo.ch:1567/scripts/. . . ry=C175&query0=C175&submit=Display>.

573. Bollé, *supra* note 570, at 558-77 (discussing Convention No. 175 and ILO reports addressing part-time work).

574. *Id.* at 566.

575. *Id.* at 568.

576. See *supra* Parts III.B.4.b., IV.A. (discussing how the structure and culture of work does not necessarily reflect work hour preferences in the workforce).

especially for women and other workers already at a disadvantage on [sic] the labour market—and economic, depressing demand, growth and employment.⁵⁷⁷

In June 2000, the United States General Accounting Office (GAO) issued a report to Senators Edward M. Kennedy (D.-Mass.) and Robert G. Torricelli (D.-N.J.) titled *Contingent Workers: Income & Benefits Lag Behind Those of Rest of Workforce*.⁵⁷⁸ The GAO found that contingent workers were 5% of the workforce when examining only temporary and on-call workers, and almost 30% when including independent contractors, self-employed workers and part-time wage and salaried employees (a decrease from 32.3% to 29.9% since 1995).⁵⁷⁹ Certain industries and communities rely heavily on agency temps. For example, temporary employment by high-tech companies in the Silicon Valley area of California increased by more than 100% (1.6% to 3.3% of the total workforce) between 1984 and 1995. Total employment in the Silicon Valley grew by only 4% during the same period. In 1997, there were two hundred temporary help agency offices in the Silicon Valley, placing over ten thousand agency temps each week.⁵⁸⁰

Demographically, direct-hire temps and standard part-time workers are typically younger (under twenty-five) than other categories of contingent workers, while more self-employed workers and independent contractors are older (fifty-five years of age and older). Seventy-one percent of contract company workers are male, compared to 56% of the standard full-time workforce. Seventy percent of standard part-time workers are women, compared to 44% of all standard full-time workers. “Most agency temps, on-call workers and day laborers would prefer permanent jobs, while most independent contractors, self-employed workers and standard part-time workers prefer their current work arrangements.”⁵⁸¹

Except for contract company and self-employed workers, contingent workers are more likely than traditional full-time employees to have low family incomes, many of which are below the federal poverty threshold. For example, approximately 30% of agency temps have family incomes below \$15,000, compared with 7.7% of standard

577. Bollé, *supra* note 570, at 578.

578. GEN. ACCOUNTING OFFICE, *CONTINGENT WORKERS: INCOME AND BENEFITS LAG BEHIND THOSE OF REST OF WORKFORCE* (June 30, 2000) (GAO/HEHS-00-76) [hereinafter GAO].

579. *Id.* at 4, 10, 11, 15.

580. *Id.* at 16.

581. *Id.* at 12.

full-time workers.⁵⁸² In addition, most contingent workers are less likely than the rest of the workforce to receive pension benefits and health insurance through their employers.⁵⁸³

The Bureau of Labor Statistics (BLS) stated in the *Report on the American Workforce 1999*⁵⁸⁴ that “[m]ost temporary help workers have full-time jobs and work less than a year in an assignment.”⁵⁸⁵ The report defines contingent workers to include individuals hired into temporary positions, self-employed, part-time workers, people involved in home-based work, and independent contractors.⁵⁸⁶ The largest component of the personnel supply service industry is temporary help agencies. Businesses are increasingly turning to personnel supply firms for workers. Historically, employers looked to temporary help for seasonal and fluctuating workloads. Recently, employers have begun to use personnel service firms for project-based assignments to cut costs, and to screen for potential permanent employees.⁵⁸⁷

Specifically, the BLS observed that

[h]elp supply services employment grew from 0.6 percent of the total private economy in 1982 to 2.7 percent in 1998—a rate of growth surpassing even computer and data processing employment.

. . . [T]he majority of temporary help workers are women.

. . . The proportion of male workers grew as blue-collar positions increased from 9 percent of all temporary help workers in 1983 to 23 percent in 1993. . . .” [O]ver 41 percent of male temps are operators, fabricators and laborers, whereas more than fifty percent of women temps work in administrative support functions.⁵⁸⁸

The percentage of all temp employees performing service work increased from 39% to 42% from 1995 to 1997.⁵⁸⁹ Twenty-seven percent

582. *Id.* at 18-19.

583. GAO, *supra* note 578, at 19-21, 24-25.

584. KENT KUNZE ET AL., DEP'T OF LABOR, REPORT ON THE AMERICAN WORKFORCE 1999, ch. 1: “JUST-IN-TIME” INVENTORIES AND LABOR: A STUDY OF TWO INDUSTRIES, 1990-98 5 (1999) (studying two industries, automobile-manufacturing cluster, and the temporary help supply industry), available at <http://www.bls.gov/opub/rtaw/pdf/rtaw1999.pdf>.

585. *Id.* at 18.

586. *Id.*

587. *Id.*

588. *Id.* at 20.

589. KUNZE, *supra* note 584, at 20.

of the temporaries in manufacturing positions were women in 1997, up from 26% in 1995.⁵⁹⁰

The unemployment rate of those working in the personnel supply industry is usually three times the rate for all workers in private industry.⁵⁹¹ In 1995, 42% of temps were at their current assignment less than three months, 72% less than nine months, and 16% spent more than a year in the current assignment.⁵⁹² As for remuneration, temps earned 86% of the hourly nonsupervisory wage in 1982 (\$5.97 per hour) and less than 80% of wages in all services (\$10.18) in 1998 per hour.⁵⁹³ They generally receive few benefits.⁵⁹⁴

These findings are supported by a wide range of BLS research. For example, Katie Kirkland showed in her 2000 *Monthly Labor Review* article, *On the Decline in Average Weekly Hours Worked*,⁵⁹⁵ that the disproportionate growth of part-time jobs in the retail trades and services led to the decline in CES measurements of the private sector workweek over the last thirty-five years.⁵⁹⁶ Julie Hatch and Angela Clinton observed in their 2000 *Monthly Labor Review* article, *Job Growth in the 1990s: A Retrospect*,⁵⁹⁷ that temporary employment was a driving force behind job growth in the 1990s:

Employment in the business services grew more than any other industry group during the decade. . . . Business services accounted for approximately a third of all job growth in the services division. Topping the list of most jobs added and third in growth rate, personnel supply services, which includes both traditional employment agencies and help supply firms (primarily temporary help agencies), accounted for half the strength in business services.⁵⁹⁸

Hatch and Clinton also found that firms during the 1990s expanded their demand for temp workers from clerical and menial tasks (as typified during the 1980s) to services requiring high skills in finance, healthcare, telecommunication and information technology.⁵⁹⁹

590. *Id.* at 19-20.

591. *Id.* at 21.

592. *Id.*

593. *Id.*

594. KUNZE, *supra* note 584, at 21.

595. Katie Kirkland, *On the Decline in Average Weekly Hours Worked*, 123 MONTHLY LAB. REV. 26 (July 2000), available at <http://www.bls.gov/opub/mlr/2000/07/art3abs.htm>.

596. *Id.* at 28-30.

597. Hatch & Clinton, *supra* note 283.

598. *Id.* at 13.

599. *Id.*

Jerome E. King stated in his 2000 *Compensation and Working Conditions* article, *Part-time Workers' Earnings: Some Comparisons*⁶⁰⁰ that "economy-wide earnings for full-time workers averaged \$15.77 versus \$8.89 per hour for part-time workers."⁶⁰¹ Part-time private sector work is concentrated in healthcare, teaching (except in colleges and universities), social science and urban planning, handlers, equipment cleaning, helpers and laborers, protective services, and cleaning and building services.⁶⁰² Public sector part-time workers are concentrated in writing, entertaining, athletics, professional occupations, transportation and material moving, and personal services.⁶⁰³ Part-time earnings are derived from their full-time counterpart, receiving a higher percentage of total compensation in wages and salary than corresponding full-time workers.⁶⁰⁴ Part-time jobs in the healthcare fields typically pay higher average hourly wages than their full-time counterparts.⁶⁰⁵ This echoes the findings contained in Michael K. Lettau's 1995 BLS working paper, *Compensation in Part-Time Jobs versus Full-Time Jobs: What if the Job is the Same?*⁶⁰⁶ that part-time employees receive a lower wage rate, and even lower benefits per hour, than the full-time employee he or she works "side-by-side" with at the workplace.⁶⁰⁷

Steven Hipple observed in his 1998 *Monthly Labor Review* article, *Contingent Work: Results From the Second Survey*,⁶⁰⁸ that contingent workers in 1997 were "more likely than noncontingent workers to hold more than one job" and that younger workers are more happy with temp work than older workers.⁶⁰⁹ Hipple verified his 1998 findings in a 2001 *Monthly Labor Review* article, *Contingent Work in the Late-1990s*,⁶¹⁰ explaining that "[d]espite the economic expansion that continued into the late-1990s, both the number of contingent workers and the proportion of total employment composed of such workers changed little

600. Jerome E. King, *Part-Time Workers' Earnings: Some Comparisons*, 5 COMP. & WORKING CONDITIONS 27 (Summer 2000), available at <http://www.bls.gov/opub/cwc/cwccurr.htm>.

601. *Id.* at 27.

602. *Id.* at 28.

603. *Id.*

604. *Id.* at 32.

605. King, *supra* note 600, at 32.

606. MICHAEL K. LETTAU, COMPENSATION IN PART-TIME JOBS VERSUS FULL-TIME JOBS: WHAT IF THE JOB IS THE SAME? (Dep't of Labor, Working Paper No. 260, 1994).

607. *Id.* at 29.

608. Steven Hipple, *Contingent Work: Results From the Second Survey*, 121 MONTHLY LAB. REV. 22 (Nov. 1998), available at <http://www.bls.gov/opub/mlr/1998/11/contents.htm>.

609. *Id.* at 26.

610. Steven Hipple, *Contingent Work in the Late-1990s*, 124 MONTHLY LAB. REV. 3 (Mar. 2001), available at <http://www.bls.gov/opub/mlr/2001/03/contents.htm>.

between 1997 and 1999.”⁶¹¹ Sharon R. Cohany noted in her 1998 *Monthly Labor Review* article, *Workers in Alternative Employment Arrangements: A Second Look*,⁶¹² that 84% of independent contractors prefer their employment arrangements to traditional jobs.⁶¹³ Marisa DiNatale confirmed Cohany’s 1998 findings in her 2001 *Monthly Labor Review* article, *Characteristics of and Preference for Alternative Work Arrangements, 1999*⁶¹⁴ noting: “There is a clear dichotomy between independent contractors and contract company workers on one hand, and temporary agency workers and on-call workers on the other, in terms of arrangement preferences. The former group overwhelmingly prefers to be in their arrangements, while the latter group prefers traditional arrangement.”⁶¹⁵ Finally, Marianne A. Feber and Jane Waldfogel reported in their 1998 *Monthly Labor Review* article, *The Long-Term Consequences of Nontraditional Employment*⁶¹⁶, that wages and benefits tend to be lower than average for men, but not for women, who once worked temporary jobs.⁶¹⁷

D. WORKER INSECURITY AND WAGE STAGNATION

During the late 1990s, Federal Reserve Board Chairman Alan Greenspan often linked worker insecurity to low levels of inflation in the United States, noting that it “is one of the reasons consumer price increases have remained so tame, despite very tight labor markets.”⁶¹⁸ A closer review of this phenomenon discloses that job “churning” (employers “firing and hiring at the same time, dumping outmoded or redundant employees and adding new ones with very different skills”)

611. *Id.* at 23.

612. Sharon R. Cohany, *Workers in Alternative Employment Arrangements: A Second Look*, 121 MONTHLY LAB. REV. 28 (Nov. 1998), available at <http://www.bls.gov/opub/mlr/mlrhome.htm>.

613. *Id.*

614. Marisa DiNatale, *Characteristics of and Preference for Alternative Work Arrangements, 1999*, 124 MONTHLY LAB. REV. 28 (Mar. 2001), available at <http://www.bls.gov/opub/mlr/2001/03/contents.htm#Articles>.

615. *Id.* at 49.

616. Marianne A. Feber & Jane Waldfogel, *The Long-Term Consequences of Nontraditional Employment*, 121 MONTHLY LAB. REV. 3 (May 1998), available at <http://www.bls.gov/opub/mlr/1998/05/contents.htm>.

617. *Id.* at 5-8.

618. *Job Insecurity, Uncertainty Still High, Greenspan Says*, 160 Lab. Rel. Rep. (BNA) 22 (Feb. 22, 1999); see also Gene Koretz, *Which Way Are Wages Headed? A Key: Worker Views of Job Security*, BUS. WK. 26 (Sept. 21, 1998) (noting that “[m]any observers, including Federal Reserve Board Chairman Alan Greenspan, have attributed slow wage growth in the current expansion to ‘greater worker insecurity’[:] [i]f workers become more secure and less docile, so the reasoning goes, inflationary pressures will escalate”).

became a prevalent trend, and a significant source of worker insecurity, during the 1990s high-tech led economic boom: “Layoffs, which normally fade during good times, remain widespread.”⁶¹⁹ Simultaneously, wages stagnated during the 1990s, rising modestly and unevenly by 1998.⁶²⁰ Wages dropped in 2001, as workers faced another round of layoffs during the economy slowdown.⁶²¹

For example, AT&T cut 58,000 jobs from its workforce since 1996, trimming accountants, managers, telephone operators, and repair employees.⁶²² At the same time, AT&T hired more than ten thousand salespersons, software developers, and internet specialists.⁶²³ Income at the top fifth of families increased by 33%, while average income for families in the bottom fifth of the income scale fell 5% between the late 1970s and late 1990s.⁶²⁴ Middle-income families, “stuck in place for a decade, their incomes even losing ground to inflation through part of the 1990s . . . wonder why they have to struggle so hard just to pay the bills.”⁶²⁵

The churning of the workplace, wage stagnation, and unequal wage distribution attracted considerable debate and study (similar to the contingent workforce debate discussed in Part V.B.) over whether the trends were symptomatic of an erosion of the post-war social compact. This material corroborates the “feast and famine” thesis advanced by Bluestone, Harrison and Stone, linking increased work hours to incumbent employees protecting themselves from growing job insecurity and stagnant wages by working as many hours as possible during

619. Patrick Barta, *The Churning of the Workforce: In These Boom Times, Layoffs are a Thing of the Past, Right? Wrong; Many Companies Use the Revolving Door Strategy, Firing and Hiring at the Same Time*, CHI. TRIB., Mar. 26, 2000, at 1.

620. Aaron Bernstein, *The Wage Squeeze*, BUS. WK. 54 (July 17, 1995); see also Christopher Farrell et al., *A Rising Tide for Workers*, BUS. WK. 72 (Aug. 31, 1998).

621. Louis Uchitelle, *Another Sign of Slowdown: Smaller Paychecks*, N.Y. TIMES, Apr. 8, 2001, § 3, at 4 (discussing data sets and anecdotal evidence); see also FRASER, *supra* note 13, at 40 (examining wage stagnation and declining earnings for young workers); Barbara B. Buchholz, *Another Round of Stress: Layoff Survivors Have Even More to Worry About than if They'll Be Next*, CHI. TRIB., Apr. 29, 2001, § 6, at 1 (discussing coping mechanisms for “survivor guilt”); Eric Wahlgren, *The Salary Squeeze Is On: The Switch From “Name Your Price” to “Take It or Leave It” Has New Employees Taking It – and Making Lifestyle Changes*, BUS. WK. (May 31, 2001) (noting that “[w]e’re back to 1997 wages[;] [t]hey are not taking it well, but their other choice is not to work”), at http://www.businessweek.com/careers/content/may2001/ca20010531_156.htm.

622. Barta, *supra* note 619, at 3.

623. *Id.*

624. Richard W. Stevenson, *In a Time of Plenty, The Poor Are Still Poor*, N.Y. TIMES, Jan. 23, 2000, at 3 (indicating that “[w]hile the nation’s poverty rate has declined, it has yet to fall below the 12% barrier, as it did in previous economic expansions”).

625. Louis Uchitelle, *The American Middle, Just Getting By*, N.Y. TIMES, Aug. 1, 1999, § 3, at 1 (describing how “budget constrained” middle-income families were during the 1990s).

economic growth. The following provides an overview of the topic and discusses empirical reports addressing the issues.

1. OVERVIEW

In June 1998, Thomas Kochan of MIT told members of the national Industrial Relations Research Association (as its president elect) that the social contract in the workplace was broken and “‘Washington seems oblivious’ to the problems this has caused.”⁶²⁶ Kochan defined the social contract as “the mutual expectation and obligation that workers, employers and the broad society held for work. That contract allowed for shared prosperity . . . and the notion that if employees were loyal to their employers they would be rewarded with long-term employment.”⁶²⁷

Kochan observed that “although unemployment is low, workers have much more insecurity about their jobs than in the past.”⁶²⁸ He further noted that “[w]e ‘simply can’t go back to the old system,’ . . . which was not perfect anyway and excluded groups like the poor and many women who were expected to stay home . . . while their husbands worked.”⁶²⁹ Kochan challenged society to look beyond the traditional structure of unions predicting unions of the future will be “full-service” organizations and question whether the current corporate model of shareholder maximization is the best model.⁶³⁰

In December 1998, *Business Week* reported that there was 50% more workers displaced by large-scale job cuts during 1998 than in 1997.⁶³¹ It also reported BLS figures indicating that workers between forty-five to sixty-four years of age suffered the most economic pain from job churning.⁶³² In particular, two-thirds of the older workers laid off between 1995 and 1997 were back at full-time jobs.⁶³³ Forty percent of these workers took pay cuts.⁶³⁴ The *Chicago Tribune* reported in August 1999 that “[e]mployees were devastated by the lack of loyalty

626. *Redefining Employment Social Contract Urged: Fair Treatment and Property Right to a Job Is Said to Be ‘Up for Grabs’*, 158 Lab. Rel. Rep. (BNA) 177 (June 8, 1998).

627. *Id.*

628. *Id.*

629. *Id.*

630. *Id.* at 177, 178.

631. Gene Koretz, *Downsizing’s Economic Spin . . . : Job Creation Outruns Layoffs*, BUS. WK. 30 (Dec. 28, 1998) (reporting figures provided by the outplacement firm Challenger, Gray & Christmas Inc.).

632. Gene Koretz, . . . *And Its Impact on Job-Losers: Older Workers Still Take a Big Hit*, BUS. WK. 30 (Dec. 28, 1998).

633. *Id.*

634. *Id.*

and in response their loyalty, too, disappeared. Companies felt the backlash”⁶³⁵ In March 2000, the *New York Times* discussed the issue of poverty in the boom economy of the late 1990s:

Today’s accumulation of enormous wealth is unparalleled since the last Gilded Age. But the Gilded Age of a century ago brought in its wake a wave of progressive reform and public investment—in parks, libraries, schools, and municipal projects. Today’s gilded age, by contrast, hasn’t generated any comparable resolve to ease the effects of inequality by strengthening public institutions.⁶³⁶

The EPF countered the source of the *Business Week* articles, arguing that there was no clear connection between downsizing, job insecurity, and wages.⁶³⁷ The foundation also challenged a 1996 *Business Week* article about the disappearing social contract and job insecurity, arguing that economic and job insecurity is low and has decreased considerably over the last few years.⁶³⁸

2. WAGE ISSUES

Empirical research supports the popular perception, and the feast and famine thesis, regarding the negative impact of stagnant wages and wage inequality during the 1990s. For example, Women Work! (a national network for women’s employment) released a study in 1998 revealing that the 1990s economic boom had done little to improve

635. Carol Kleiman, *The New Loyalty: A Work in Progress*, CHI. TRIB., Aug. 15, 1999, at 1; AON CONSULTING, AMERICA @ WORK: A FOCUS ON BENEFITS AND COMPENSATION 2, 24, 25, 32 (1998) (interviewing 1800 workers to find that American workers are less committed to their employers, face more job stress, want more time for their personal lives, and will switch jobs for relatively small increases in pay); see also FRASER, *supra* note 13, at 32, 43 (examining social Darwinism in the workplace, and the use of fear as management tool, during the 1990s); Debra Baker, *Cash-and-Carry Associates*, A.B.A. J. 40 (May 1999) (describing how “[b]lessed by high salaries and vexed by long hours and little mentoring, young associates are putting in their time and cashing out fast[;] [t]he consequence may be a law firm culture that is forever changed”); Louis Uchitelle, *These Days, Layoffs Compete With Loyalty*, N.Y. TIMES, Aug. 19, 2001, § 3, at 4 (appealing for an exploration into the consequences of corporate America’s current freedom to fire people at will, observing that layoffs now match loyalty in social status).

636. James Fallows, *The Invisible Poor*, N.Y. TIMES, Mar. 19, 2000, (Magazine), at 68, 112 (quoting Michael Sandel, professor of government at Harvard).

637. EMPLOYMENT POLICY FOUND., ISSUE BACKGROUNDER: DOWNSIZING, JOB INSECURITY, AND WAGES: NO CLEAR CONNECTION (May 19, 1998) (countering the findings of outplacement firm Challenger, Gray & Christmas), at <http://www.epf.org/research/newsletters/1998/b980519.asp>.

638. EMPLOYMENT POLICY FOUND., ISSUE BACKGROUNDER: ARE WORKERS FEELING ANXIOUS? MOST SAY NO (Apr. 16, 1998) (surveying reports on economic and job insecurity), at <http://www.epf.org/research/newsletters/1998/b980416.asp>.

conditions for single mothers and displaced homemakers.⁶³⁹ Specifically, 7.3 million displaced homemakers (women under sixty-five forced into the work force by divorce, death, disability, or unemployment of a spouse) earned less than \$10,000 per year.⁶⁴⁰ Forty-two percent were employed in 1997, down from 49% in 1990.⁶⁴¹ Thirty-seven percent of single mothers earned less than \$10,000 per year.⁶⁴² Part of the problem was education.⁶⁴³ Thirty-three percent of the displaced homemakers, and 25% of the single mothers, had not completed high school.⁶⁴⁴

Michael J. Handel observed in his 1999 working paper, *Computers and the Wage Structure*,⁶⁴⁵ that work-related computer skills “do not seem to have been as scarce, expensive, and important in the growth of overall wage inequality.”⁶⁴⁶ Instead the sharp rise in wage inequality coincided with

severe recession, unprecedented import competition, corporate restructuring, and an administration more hostile to unions than any since before the New Deal The fact that inequality declined modestly between 1989–1992, when the minimum wage increased about 27% for the first time since 1981, further suggests the importance of structural factors. If the computer premium dominated inequality trends, it is not obvious why inequality would have declined during this time. The timing of the growth of inequality suggests that the dismantling of institutional protections and the scrapping of traditional wage norms account for a larger portion of the rise in inequality than any acceleration in the cognitive demands of work owing to the increased use of computers.⁶⁴⁷

In his 2000 policy brief, *Is There a Skills Crisis? Trends in Job Skill Requirements, Technology, and Wage Inequality in the United*

639. Francine Knowles, *Boom Leaves Single Moms Behind*, CHI. SUN-TIMES, Dec. 6, 1998, at 74.

640. *Id.*

641. *Id.*

642. *Id.*

643. *Id.*

644. Knowles, *supra* note 639, at 74.

645. MICHAEL J. HANDEL, COMPUTERS AND THE WAGE STRUCTURE (The Jerome Levy Econ. Inst., Working Paper No. 285, Oct. 1998), available at <http://www.levy.org/docs/wrkpap/papers/285.html>.

646. *Id.*

647. *Id.*

States,⁶⁴⁸ Handel concluded the thesis he began in his 1999 working paper by suggesting:

Government can perform its greatest service to workers by . . . support[ing] wages at the lower end of the distribution with policies to reverse the decline of institutional protections that has continued since the economic crisis of the early 1980s. Such policies include maintaining the real value of the minimum wage and supporting protections for unions that preserve some balance between the bargaining power of workers and management.⁶⁴⁹

Nikolas Theodore (University of Illinois-Chicago) reported in his 2000 study, *A Fair Day's Pay? Homeless Day Laborers in Chicago*, that 75% of the adults living in Chicago homeless shelters work day labor, earning less than \$9000 per year.⁶⁵⁰ Ninety-six percent of Chicago's homeless day laborers would prefer jobs with regular work schedules.⁶⁵¹ Half of them work day labor because it is the only work they can find.⁶⁵²

Linda A. Bell and Richard B. Freeman observed in their 2000 NBER working paper, *The Incentive for Working Hard: Explaining Hours Worked Differences in the U.S. and Germany*,⁶⁵³ that "a country with a more unequal distribution of earnings like the US will have a higher return to hours worked than workers in a country with a more equal distribution of earnings like Germany, and will accordingly work more hours."⁶⁵⁴ As background, Germans and Americans worked approximately the same number of hours per year in 1970.⁶⁵⁵ Between 1970 and 1997, however, Germans reduced their average annual hours by 408 hours per person, while Americans increased their annual hours.⁶⁵⁶ The earnings inequality is considerably higher in the United

648. MICHAEL J. HANDEL, IS THERE A SKILLS CRISIS? TRENDS IN JOB SKILL REQUIREMENTS, TECHNOLOGY, AND WAGE INEQUALITY IN THE UNITED STATES 7 (The Jerome Levy Econ. Inst., Pub. Pol'y Brief No. 62, 2000), available at <http://www.levy.org/ppbsum/sum62.html>.

649. *Id.* at 35.

650. Nikolas Theodore, *A Fair Day's Pay? Homeless Day Laborers in Chicago*, UIC, CENTER FOR URBAN ECON. DEV., Feb. 22, 2000) (prepared for the Chicago Coalition for the Homeless, Chicago Interfaith Committee on Worker Issues, and Chicago Jobs with Justice).

651. *Id.*

652. *Id.*

653. LINDA A. BELL & RICHARD B. FREEMAN, THE INCENTIVE FOR WORKING HARD: EXPLAINING HOURS WORKED DIFFERENCES IN THE U.S. AND GERMANY (Nat'l Bureau of Econ. Research, Working Paper No. 8051, Dec. 2000), available at <http://www.nber.org/papers/w8051>.

654. *Id.*

655. *Id.*

656. *Id.*

States than in Germany.⁶⁵⁷ An analysis of longitudinal and cross-sectional data on hours worked and earnings within the United States and Germany demonstrates that:

1. Greater hours worked among individuals who work at least twenty hours per week raises their position in the percentile distribution of earnings, either because they get promoted more rapidly, avoid being laid off in recessions, or gain larger salary increases (with a larger impact in the United States than Germany);
2. Current hours worked depends on the expected future earnings that the hours worked will generate (e.g., labor supply decisions by workers are forward looking and incentive driven); and,
3. Greater inequality in the distribution of earnings implies larger marginal changes in earnings from similar changes in workers' position in their percentile distribution.⁶⁵⁸

Bell and Freeman concluded that the difference between United States and German work hours is not an isolated fact about cross country behavior, but instead “is part of the difference between economies with very different levels of dispersion of earnings.”⁶⁵⁹ They further noted:

If our thesis is correct, and inequality is positively associated with hours worked, it will not be possible for European Union countries to increase the dispersion of wages toward American levels without giving up their relatively low hours worked; nor for Americans to reduce their “workaholic” behavior without first narrowing the distribution of earnings.⁶⁶⁰

Finally, exploring the interrelations among economic growth, real wages and poverty, Robert B. Freeman observed in his 2001 NBER working paper, *The Rising Tide Lifts . . . ?*,⁶⁶¹ that economic growth decreases poverty when there is an increase in real wages of lower-paid and less-skilled workers.⁶⁶² Providing a historical context for his thesis, Freeman showed that the substantial drop in poverty during the 1960s paralleled a 19.3% increase in real average hourly wages for the non-supervisory private sector workforce.⁶⁶³ Poverty barely dropped during

657. *Id.*

658. BELL & FREEMAN, *supra* note 653.

659. *Id.*

660. *Id.*

661. RICHARD B. FREEMAN, THE RISING TIDE LIFTS . . . ? 1 (Nat'l Bureau of Econ. Research, Working Paper No. 8155, Mar. 2001), available at <http://www.nber.org/papers/w8155>.

662. *Id.* at 23.

663. *Id.* at 12.

the 1970s. Real average hourly wages also rose by only 2.4%.⁶⁶⁴ Poverty increased during the 1980s as the real average hourly wage fell by 6.5%.⁶⁶⁵ Poverty decreased modestly during the 1990s as real average wages rose 2.9% (real average hourly earnings fell 3.3% between 1989 and 1995, and rose 6.4% between 1995 and 1999).⁶⁶⁶

3. JOB INSECURITY

Empirical research further supports the popular perception, and the feast and famine thesis, that job insecurity increased during the 1990s, particularly among white-collar and older workers. In his 1999 *Monthly Labor Review* article, *Work Displacement in the Mid-1990s*,⁶⁶⁷ Steven Hipple examined the risk of worker displacement amid six years of economic growth in the United States economy.⁶⁶⁸ White-collar displacement (3.7% in 1991–1992, 3.3% in 1993–1994, and 2.9% in 1995–1996) was lower than job displacement for blue-collar workers (5.3%, 4.2%, and 3.5%, respectively, during the same periods).⁶⁶⁹ The gap had, however, narrowed; white-collar displacement was 2.6%, 2.1%, 2.6%, 2.1% and 2.7% during the respective two-year periods between 1981 and 1990. Blue-collar displacement was 7.3%, 5.7%, 4.7%, 3.3%, and 4.5% during the same two-year periods.⁶⁷⁰

Hipple found that 2.2 million workers (2.9% of all workers) were displaced during 1995 and 1996, down from 2.4 million workers (3.3% of all workers) during 1993 and 1994.⁶⁷¹ Eighty-three percent of displaced workers were employed in February 1998, up from 79% in 1996 and 75% in 1994. The reemployment rate for twenty-five to fifty-four year-old workers displaced in 1995–1996 was 89%, compared to 60% for those fifty-five years and older.⁶⁷² More than one-half of the 1.6

664. *Id.*

665. *Id.*

666. FREEMAN, *supra* note 661, at 12 (tracking labor market forces, real wages, and wage inequity); *see also* JAMES R. HINES JR. ET AL., ANOTHER LOOK AT WHETHER A RISING TIDE LIFTS ALL BOATS 44 (Nat'l Bureau of Econ. Research, Working Paper No. 8412, Aug. 2001) (finding that “[h]ours worked and family income, in particular, tend to rise when the business conditions improve”), at <http://www.nber.org/papers/w8412>.

667. Steven Hipple, *Worker Displacement in the Mid-1990s*, 122 MONTHLY LAB. REV. 15 (July 1999), available at <http://www.bls.gov/opub/mlr/mlrhome.htm>.

668. *Id.*

669. *Id.* at 18 tbl.2.

670. *Id.*

671. *Id.* at 15, 27-28.

672. Hipple, *supra* note 667, at 21.

million reemployed workers who lost their private sector jobs were employed in a different job or industry in 1998.⁶⁷³

Virtually all of the workers displaced during 1995–1996 lost full-time jobs. By February 1998, two-thirds of them were employed in full-time work. Nine percent of the workers displaced in 1995–1996 were employed in part-time jobs in February 1998, 6% were self-employed, and the remainder were unemployed or dropped out of the labor market.⁶⁷⁴ Earnings loss was less severe for reemployed displaced workers in 1998, with a median weekly earnings decrease of 4%, compared to 15% in both 1994 and 1996. The decrease in earnings was greatest (12%) for workers of forty-five to sixty-four years of age.⁶⁷⁵

Bureau of Labor Statistics (BLS) figures from August 2000 showed that the risk of displacement during 1997 through 1999 was close to the levels of the mid–1990s.⁶⁷⁶ The proportion of displaced workers who found new jobs in February 2000 was highest for technicians and related support (86%) and lowest for machine operators, assemblers, and inspectors (66%).⁶⁷⁷ The statistics reflect the change in the industrial composition of employment and displacement that has occurred since the early 1980s:

[I]n the February 2000 survey, managerial and professional specialty occupations accounted for 30 percent of all displacements. This proportion has doubled since the early 1980s, but is still slightly below this occupational group's share of total employment. In contrast, the proportion of displacement made up of operators, fabricators, and laborers, at 18 percent in the February 2000 survey, was about half of what it had been in the early 1980s; the proportion displaced, however, was still higher than the group's share of total employment—13 percent.⁶⁷⁸

Taking a broader view, Jay Stewart concluded in his 2000 BLS working paper, *Did Job Security Decline in the 1990s?*,⁶⁷⁹ that job

673. *Id.* at 23.

674. *Id.*

675. *Id.* at 24.

676. ECONOMIC NEWS RELEASE, BUREAU OF LABOR STATISTICS, DISPLACED WORKERS SUMMARY, WORKER DISPLACEMENT DURING THE LATE 1990S 3 (Aug. 9, 2000), available at <http://www.bls.gov/news.release/disp.nr0.htm>.

677. *Id.*

678. *Id.*; see also Ryan T. Helwig, *Worker Displacement in a Strong Labor Market*, 124 MONTHLY LAB. REV. 13, 18-24 (June 2001) (corroborating prior BLS findings on worker displacement during the 1990s), available at <http://www.bls.gov/opub/mlr/2001/06/art2exc.htm>.

679. JAY STEWART, DID JOB SECURITY DECLINE IN THE 1990S? 1 (Office of Emp. Research and Program Div., Bureau of Labor Stat., Working Paper No. 330, Aug. 2000), available at

security “declined in the early to mid 1970s and, except for cyclical fluctuations, remained constant through the mid 1990s.”⁶⁸⁰ These findings are consistent with the popular perception that jobs were less secure during the 1980s than the 1970s.⁶⁸¹ He also found, however, that job security did not continue to decline in the 1990s.⁶⁸²

Stewart argued that the 1990 recession was “more ‘white collar’ than previous recessions.”⁶⁸³ As a result, reporters wrote more about worker displacement in the 1990s because it affected a larger fraction of their peers:

Groups that are usually insulated from cyclical job loss—such as men with a college degree, men with more labor market experience, and white collar workers—were relatively harder hit by the 1990 recession [T]ransition rates for less educated men, less experienced men, and blue collar workers were much lower in the 1990 recession than in the 1982 recession.⁶⁸⁴

Stewart acknowledged that the slow recovery from the 1990 recession may have also contributed to the popular perception that job insecurity increased during the 1990s. Specifically, while the recession officially ended in March 1991, “[t]he unemployment . . . did not peak until 1992, and job growth was sluggish through 1992.”⁶⁸⁵

Summing up the social/psychological impact of male white-collar job insecurity during the 1990s, Susan Faludi observed in her 1999 book, *Stiffed: The Betrayal of the American Man*,⁶⁸⁶ that the American male “role of family breadwinner was plainly being undermined by economic forces that spat many men back into a treacherous job market during corporate ‘consolidations’ and downsizing. Even the many men who were never laid off were often gripped with the fear that they could be next.”⁶⁸⁷ Applying her thesis that men, like the women described in Betty Friedan’s *The Feminine Mystique*,⁶⁸⁸ are caught up in an “ornamental culture” that packages images of men as a manhood

<http://www.bls.gov/orecatlg.htm>.

680. *Id.* at 25.

681. *Id.*

682. *Id.*

683. *Id.*

684. STEWART, *supra* note 679, at 25.

685. *Id.*

686. FALUDI, *supra* note 182.

687. *Id.* at 595.

688. BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 208 (1963).

substitute and mass markets them, Faludi described the source of male white-collar fear:

[C]orporate America's promise to continue the World War II GI's wartime experience of belonging, of meaningful engagement in a mission, was never authentic. The massive bureaucracies of postwar "white collar" employment, especially the defense contractors fat on government largesse, were replete with make-work jobs with inflated titles. Their vast middle managements were filled with functionaries who often didn't even know what they were managing, who suspected they weren't really needed at all. What these corporations were offering was a secure job, not a vital role. And ultimately even that would prove a lie. There was to be no lifetime security at McDonnell Douglas or Lockheed or IBM or even in the military itself. . . . The postwar grunts' submission to the national-security state would, after a prosperous period of historically brief duration, be rewarded with insecurity and pink slips, with massive spasms of downsizing, restructuring, union-breaking, contracting-out and outsourcing.⁶⁸⁹

According to Faludi, and more acerbically described by Richard Sennett in his 1998 book, *The Corrosion of Character: The Personal Consequences of Work in the New Capitalism*,⁶⁹⁰ the middle-aged, gray flannel suit/organizational man was displaced (bewildered, angry, kicking and screaming) during the 1990s as an outmoded or redundant employee.⁶⁹¹ Loyalty, dedication, and duty were not rewarded, "or at least appreciated in some meaningful way."⁶⁹² Sennett noted that the new regime was accompanied by "short-term, contract, or episodic labor. Corporations have sought to remove layers of bureaucracy, to become flatter and more flexible organizations."⁶⁹³ The motto is "No long term."⁶⁹⁴

689. FALUDI, *supra* note 182, at 35, 29-30.

690. RICHARD SENNETT, *THE CORROSION OF CHARACTER: THE PERSONAL CONSEQUENCES OF WORK IN THE NEW CAPITALISM* 11 (1998) (asking questions, such as "[h]ow do we decide what is of lasting value in ourselves in a society which is impatient, which focuses on the immediate moment?; . . . [h]ow can mutual loyalties and commitments be sustained in institutions which are constantly breaking apart or continually being redesigned?").

691. *Id.* at 76-144 (describing the difficulties of being a displaced middle-aged, middle-management worker during the 1990s, using former IBM workers as a case study); *see also* FALUDI, *supra* note 182, at 74-90, 97-101 (describing displaced McDonnell-Douglas middle-management workers).

692. FALUDI, *supra* note 182, at 595.

693. SENNETT, *supra* note 690, at 23.

694. *Id.* at 22.

E. EFFECTIVENESS OF MAXIMUM HOURS LABOR STANDARDS

Economists and social scientists strenuously debate whether shorter work hours create jobs. For example, Terry J. Fitzgerald of the Federal Reserve Bank of Cleveland argues that

an implicit assumption made by advocates of work-sharing is that an hour worked is an hour worked, regardless of *who* does the work. That is, the work currently being done by those putting in long hours could be performed just as well by the unemployed. This hours substitution would require the skills of the unemployed to be similar to the skills of those who work long hours. For example, if those putting in long hours are plumbers and electricians, then reducing hours would create jobs for unemployed plumbers and electricians, but not unemployed accountants.⁶⁹⁵

In the alternative, social scientists such as Tom Walker criticize the “lump-of labor fallacy” as an unsupported assumption.⁶⁹⁶ Walker observes that the debate on working time “all too frequently becomes bogged down in quasi-religious exchanges of articles of faith between supporters and opponents of reduced working time.”⁶⁹⁷ He characterizes shorter work hours in his contribution to the book, *Working Time: International Trends, Theory and Policy Perspectives*, (edited by the economists Lonnie Golden and Deborah M. Figart) as a “labor-saving device, albeit a uniquely worker-friendly one,” that creates jobs in the short term by redressing current imbalances in the distribution of work, and provides a social benefit of making more free time directly available to workers.⁶⁹⁸

There are numerous studies by mainstream economists showing that maximum hours labor standards effectively reduce work hours and spread the work in the United States. For example, Dora L. Costa showed in her 1998 NBER working paper, *Hours of Work and the Fair Labor*

695. Terry J. Fitzgerald, *Reducing Working Hours: American Workers' Salvation?*, ECON. COMM. ENT. (Sept. 1, 1996) (criticizing 1993 legislation to reduce the standard workweek under the FLSA from forty to thirty hours), at <http://www.clev.frb.org/research.com96/090196.htm>.

696. Tom Walker, *The “Lump-of-Labor” Case Against Work-Sharing: Populist Fallacy or Marginalist Throwback?*, in *WORKING TIME: INTERNATIONAL TRENDS, THEORY AND POLICY PERSPECTIVES* 196, 197 (Lonnie Golden & Deborah M. Figart eds., 2000) (tracing the history of the fallacy and deconstructing its premise).

697. *Id.*

698. *Id.* at 209; see also MARCUS RUBIN & RAY RICHARDSON, *THE MICROECONOMICS OF THE SHORTER WORKING WEEK* 33-58, 133-47 (1997) (studying the impact of cutting work hours to create jobs through increased efficiency in the United Kingdom).

Standards Act: A Study of Retail and Wholesale Trade, 1938–1950,⁶⁹⁹ that the FLSA had a substantial impact in reducing hours worked when it was first introduced, but declined in impact during the 1970s because employers could adjust their straight time wages to meet the minimum wage rate.⁷⁰⁰ This suggests that the minimum wage standard buttresses the maximum hours standard when it provides a significant number of workers with a pay raise. The minimum wage peaked, however, in the 1960s and is currently worth 18% less than it was in 1979.⁷⁰¹ Revitalizing the FLSA is therefore necessary to restore the minimum wage to fulfill its three-part purpose of supporting a minimum living standard, redistributing wealth, and shortening the workweek.

Daniel S. Hamermesh and Stephen J. Trejo found in their 1997 NBER working paper, *The Demand for Hours of Labor: Direct Evidence from California*,⁷⁰² that the California statute requiring overtime pay after eight hours in a day reduced the amount of daily overtime California men worked, compared to men in other states, and to women in California.⁷⁰³ Their findings suggest that daily overtime pay is a significant penalty by itself, reducing employer demand for overtime hours.⁷⁰⁴ Sar A. Levitan and Frank Gallo observed in their 1990 *Monthly Labor Review* article, *Work and Family: The Impact of Legislation*,⁷⁰⁵ that state and federal laws abolishing child labor and providing “shorter workweeks, post-secondary schooling, and retirement benefits have dramatically reduced the proportion of time men spend working outside the home.”⁷⁰⁶ Recent legislation encouraging older and younger workers to enter and stay in the job market has eroded this achievement.⁷⁰⁷ In addition, Claudia Goldin

699. COSTA, *supra* note 145, at 1.

700. *Id.* at 31, 33.

701. BLUESTONE & HARRISON, *supra* note 93 and accompanying text (discussing their findings on wage stagnation).

702. DANIEL S. HAMERMESH & STEPHEN J. TREJO, *THE DEMAND FOR HOURS OF LABOR: DIRECT EVIDENCE FROM CALIFORNIA* (Nat’l Bureau of Econ. Research, Working Paper No. 5973, 1997).

703. *Id.* at 13.

704. *Id.* at 13-14 (reviewing CPS data).

705. Sar A. Levitan & Frank Gallo, *Work and Family: The Impact of Legislation*, 113 MONTHLY LAB. REV. 34 (Mar. 1990).

706. *Id.* at 34; see also Stephen Franklin, *From Cutting the Workweek to Banning Discrimination, the 20th Century Gave Birth to New Workplace Laws that Improved the Quality of Life*, CHI. TRIB., Feb. 13, 2000, § 6, at 1 (noting that the laws are on workers’ side, but asking whether there will be enough government inspectors and lawyers to enforce them after the “end of big government”).

707. Public policy currently encourages workers to “spend a longer period of their life span at work than they did in the past.” BLUESTONE & HARRISON, *supra* note 93, at 90 (describing how increased labor force participation from older workers will add to America’s new growth potential). Addressing older workers, the Age Discrimination in Employment Act of 1967 (ADEA), Pub. L.

No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (2001)), outlaws mandatory retirement for most workers in the United States. 29 U.S.C. § 623. The Older Workers Benefit Protection Act of 1990 (OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (codified at 29 U.S.C. §§ 621-634 (2001)), amended the ADEA to provide (in part) strict requirements for waivers or releases of employee age discrimination rights or claims in exchange for early retirement incentive programs during corporate layoffs. 29 U.S.C. § 626(f); *see also* Murray Gendell, *Trends in Retirement Age in Four Countries, 1965-95*, 121 MONTHLY LAB. REV. 20, 28-29 (Aug. 1998) (discussing the decline in the average retirement age in the United States, Germany, Japan, and Sweden between 1965 and 1995, the increased duration of retirement during that period, and recent changes in social insurance and labor market laws in those countries to encourage later retirement and protect pension systems); Michael Higgins, *Age of Litigiousness: Graying Boomers Expected to Bring New Wave of Bias Suits*, 85 A.B.A. J. 16 (Feb. 1999) (discussing the growing number and high cost of age discrimination claims during corporate layoffs); Judith Droz Keyes & Douglas J. Farmer, *Settlement of Age Discrimination Claims—The Meaning and Impact of the Older Workers Benefit Protection Act*, 12 LAB. LAW. 261 (1996) (discussing the OWBPA requirements for settling individual employee disputes).

In addition, the Senior Citizens' Freedom to Work Act of 2000, Pub. L. No. 106-182, 114 Stat. 198 (codified at 42 U.S.C. § 403 (2001)), lifted the \$17,000 per year "earnings cap" for Social Security beneficiaries between the ages of sixty-five and sixty-nine (the cap expires for workers over seventy), eliminating the one dollar reduction in benefits for every three dollars in income a beneficiary received over the cap. §§ 2-4, 114 Stat. at 198; *see also* 106-20 SOC. SECURITY LEGIS. BULL., THE PRESIDENT SIGNS THE "SENIOR CITIZENS' FREEDOM TO WORK ACT OF 2000" (Apr. 7, 2001) (describing the impact of the bill on beneficiaries), *at* http://www.ssa.gov/legislation/legis_bulletin_040700.html. This change will increase the hours of work for a vast pool of workers who have been holding back to avoid the impact of the earnings cap. *Hearing on Improving Social Security Work Incentives Before the Subcomm. on Soc. Security of the House Comm. on Ways and Means*, 106th Congress (2000) (statement of Leon Friedberg, Assistant Professor, University of California, San Diego, and Faculty Research Fellow, National Bureau of Economic Research) (discussing the impact of the earnings test on hours of work), *available at* <http://www.waysandmeans.gov/socsec/106cong/2-15-00/2-15frie.htm>; *see also* Shu Shin Luh, *Lifting the Income Cap for Seniors Who Qualify for Social Security Is a Lifesaver for Some Area Residents*, CHI. SUN-TIMES, Apr. 23, 2000, at 2A, 2B (quoting Rusty Ayers, spokesperson for the midwest office of the AARP).

As for younger workers, the School-to-Work Opportunities Act of 1994, Pub. L. No. 103-239, 108 Stat. 568 (codified at 20 U.S.C. §§ 6101-6251 (2001)), funds state and local education programs providing workplace skill-based training (beginning in middle school) to prepare students for careers in the "global economy." 20 U.S.C. § 6143; *see also* NATIONAL SCHOOL-TO-WORK LEARNING CENTER, *at* <http://www.stw.ed.gov> (last visited Mar. 8, 2000) (describing "school-to-work"); ILLINOIS EDUCATION-TO-CAREERS, *at* <http://www.isbe.state.il.us/etc/edfaultgold.html> (last visited Mar. 8, 2000) (Illinois' Education-to-Careers homepage). The 1996 amendments to the FLSA created an economic incentive for employers to hire workers under the age of twenty by permitting employers to pay them a \$4.25 per hour "opportunity wage," rather than the current \$5.15 per hour minimum wage, for up to ninety days. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 2104, 110 Stat. 1755; *see also* Scott D. Miller, *Opinion Letter: Harmonizing the "Wage Differential" Under the Minimum Wage Act with the "Opportunity Wage" Provided by the 1996 Amendments to the Fair Labor Standards Act*, 34 ISBA LAB. & EMP. L. 3, 4-5 (Nov. 1996) (describing the 1996 FLSA amendments).

demonstrated in her 1986 NBER working paper, *Maximum Hours Legislation and Female Employment in the 1920s: A Reassessment*,⁷⁰⁸ that state legislation restricting daily work hours for women increased the number of women participating in the workplace. Goldin suggests that this result “should not be surprising”:⁷⁰⁹ “Workers with home responsibilities choose fewer days when face[d] with higher daily hours. Thus lower daily hours, within some limits, increase days worked.”⁷¹⁰

VI. THE PROPOSAL

The historic trend towards shorter work hours in the United States stopped and reversed itself in the 1970s. The primary plan for revising the FLSA during the 1970s was to “redefine the standard workweek [at] 35 hours without a pay reduction and require double pay for time worked over this amount.”⁷¹¹ Studies also showed that workers were willing to trade money for long-range work reduction, such as longer vacations and sabbaticals.⁷¹²

Times have changed. As Parts IV and V demonstrate, Americans today work beyond their short-term (weekly) hours preferences creating occupational stress, are simultaneously overworked and underworked, and fear unemployment. Since the 1970s, vacation and other paid time off have dwindled in the United States as Americans work longer hours than their counterparts in any other industrialized nation.⁷¹³ These occurrences correspond with the failure of the minimum wage to keep pace with the cost-of-living and increased inequity in the distribution of earnings.⁷¹⁴

It is time to revitalize the FLSA. It is time to reconfirm the policies and purposes of maximum hours labor standards, protecting individual and dual-earner households from time-squeeze, and providing employers

708. CLAUDIA GOLDIN, MAXIMUM HOURS LEGISLATION AND FEMALE EMPLOYMENT IN THE 1920S: A REASSESSMENT (Nat'l Bureau of Econ. Research, Working Paper No. 1949, June 1986), available at <http://www.nber.org>.

709. *Id.* at 13 (discussing theoretical underpinnings and empirical results).

710. *Id.* at 17.

711. Best, *supra* note 489, at 106 (discussing policy implications of work time preferences).

712. *Id.* at 107-37.

713. *See supra* Parts IV., V. (reviewing the “Overworked American” thesis).

714. *See supra* Parts II.B., V.D.2. (discussing the minimum wage standard and wage stagnation).

and the judiciary with clear, comprehensive and up-to-date standards.⁷¹⁵

This article recommends:

1. Replacing the current minimum wage provision (which, through lack of Congressional action, has failed to keep pace with increasing prices, poverty thresholds and average wages) with no less than a \$7.25 per hour minimum living wage that automatically increases on an annual basis, along with the consumer price index for urban wage earners and clerical workers (CPI-W), as calculated by the Bureau of Labor Statistics (BLS). The new provision will reestablish the minimum wage as a maximum hours labor standard supporting minimum living standards, redistributing wealth, and shortening the workweek.
2. Capping work hours at eight hours per day, forty hours per week, dropping to thirty hours per week within ten years, with no loss of pay and a right to refuse work over the daily and weekly standard protected by the anti-retaliation provisions of FLSA section 15(a)(3).⁷¹⁶ This proposal provides overtime pay at time and one-half the regular rate for all hours worked over the daily and weekly standards (not to exceed forty-eight, dropping to thirty-eight, hours per week) and USDOL supervised waivers for flexible work hours (allowing compressed work schedules, such as four ten hour days, etc., not exceeding the weekly overtime ceiling) similar to USDOL supervised settlements under FLSA section 16(b).⁷¹⁷ This will make the FLSA a true maximum hours statute.
3. Replacing the three white-collar exemptions with one exemption for the top 10% of an employer's workforce, analogous to the FMLA "key employee" exemption. This provides maximum hours protection for all workers except: (a) those highly paid individuals at the top of the corporate ladder who run the business (not the mid-level managers and administrator, or the low-income supervisors exempt in *Donovan*);⁷¹⁸ and (b) the independent and/or self-employed generalists addressed in the 1954 rules defining exempt bona fide professionals (not the burgeoning class of time-starved dual-income households who work as specialists within public and

715. Robert E. Prash, *Revising the Labor Supply Curve: Implications for Work Time and Minimum Wage Legislation*, in *WORKING TIME: INTERNATIONAL TRENDS, THEORY AND POLICY PERSPECTIVES* 159-73 (Lonnie Golden & Deborah M. Figart eds., 2000) (arguing for setting a minimum wage that establishes a labor/wage equilibrium at a rate above the poverty trap, covering more workers under the FLSA wage and hour provisions, and declaring more national holidays).

716. See 29 U.S.C. § 215(a)(3) (2001).

717. See *supra* note 139 and accompanying text (discussing FLSA section 16).

718. See *supra* Part III.C.3.a. (discussing the GAO Report).

private bureaucracies). By harmonizing the FLSA with the FMLA, this proposal also provides one simple and uniform standard for employers and the judiciary to follow for the two primary federal work reduction statutes.

4. Requiring employers to provide employees with four weeks of paid vacation per calendar year. This proposal addresses two of the primary reasons for the increase in work hours: steadier year-round work since the 1960s and reductions in employer provided paid time off since the 1980s (such as vacation time, holidays, sick pay, and other paid absences).

The following discusses the proposal in greater detail.

A. MINIMUM LIVING WAGE

To help narrow the wage gap (and thus decrease the incentive for buying and selling long work hours), this article proposes amending section 6 of the FLSA by striking out the “and” after “1996” in subpart (a) and inserting before the semicolon the following: “not less than \$7.25 an hour beginning on January 1, 2003.” The proposal would further amend section 6 by inserting a subpart (g) stating:

Beginning on January 1, 2004, every employer shall pay to each of his or her employees who have reached the age of twenty years wages at a rate of not less than the amount established under subsection (a) of this section.

On September 30, 2003, and on each following September 30th, the Department of Labor shall calculate an adjusted minimum wage rate to maintain employee purchasing power by increasing the current year’s minimum wage rate by the rate of inflation. The adjusted minimum wage rate shall be calculated to the nearest cent using the consumer price index for urban wage earners and clerical workers, CPI-W, or a successor index, for the twelve months prior to each September 1st as calculated by the United State Department of Labor. Each adjusted minimum wage rate calculated under this subsection (g) takes effect on the following January 1st.⁷¹⁹

719. The proposal is modeled on the Washington State minimum wage standard, resulting from a 1998 voter initiative to annually recalculate the minimum wage based on the CPI-W. WASH. REV. CODE ANN. § 49.46.020(4)(a)-(b) (West 2001); *see also* an Act Concerning the Minimum Wage, H.B. 642, 92d Gen. Assem. (Ill. 2001) (amending the Minimum Wage Law, 820 ILL. COMP. STAT.

As background, the BLS publishes the CPI. It measures the average change in the prices all urban consumers (CPI-U) or urban wage earners and clerical workers (CPI-W) pay for a fixed market basket of goods and services. The CPI-W is used for escalation primarily in blue-collar cost-of-living adjustments (COLAs).⁷²⁰ For example, the CPI-W is used to calculate COLAs for over two million workers covered by collective bargaining agreements, 47.8 million Social Security beneficiaries, 4.1 million military and Federal Civil Service retirees and survivors, and approximately 22.4 million food stamp recipients.⁷²¹

The proposed \$7.25 per hour (plus COLA) minimum living wage is within the range that most small businesses in the United States will accept with little or no change in their employment policies.⁷²² As discussed in Part III, however, this wage rate will provide workers with only a meager paycheck-to-paycheck existence below the average income in the United States.⁷²³ Nonetheless, as discussed in Part V, government support of wages at the lower end of the distribution will address a historic purpose of the standard—rectifying market defects (such as the balance of power between workers and management) resulting in wage inequity. It will therefore advance society's quality of life by addressing the corollary between broad wage dispersions and longer work hours, provide economic growth, decrease poverty, and assist individuals moving from welfare to work.⁷²⁴

B. CEILING ON MAXIMUM WORK HOURS

The FLSA currently does not prohibit employers from working employees to death. It merely requires them to pay a premium wage rate when they do it. A ceiling on work hours will therefore protect the public's health, safety, welfare, and morals.

105/4), available at <http://www.legis.state.il.us/scripts/imstran.exe?LIBSINCWHB0642>; *Minimum Wage in Washington State Rises to \$6.72 Per Hour Jan. 1*, L&I NEWS, Dec. 21, 2000, at <http://www.wa.gov/lni/news/per122100a.htm>.

720. HOW TO USE THE CONSUMER PRICE INDEX FOR ESCALATION, at <http://www.bls.gov/cpi/fact3.htm> (last visited Sept. 6, 2001).

721. BUREAU OF LABOR STAT., OVERVIEW: CONSUMER PRICE INDEXES, at <http://www.bls.gov/cpiovrw.htm> (last visited Sept. 6, 2001); see also BUREAU OF LABOR STAT., CONSUMER PRICE INDEXES, at <http://www.bls.gov/cpihome.htm> (last visited Sept. 6, 2001) (providing CPI data, publication, and news releases).

722. See *supra* text accompanying note 155.

723. See *supra* Part III.A. (reviewing the minimum wage standard).

724. See *supra* notes 277-283 and accompanying text (reviewing the importance of maximum hours labor standards under Welfare-to-Work); Part V.D.2. (discussing wage issues).

For example, a front page Sunday *New York Times* article in 2000 discussed the rise of excessive overtime hours, state legislative initiatives to cap mandatory overtime, and proposed amendments to the FLSA.⁷²⁵ In particular, the article described a utility lineman who died on the job after working two back-to-back shifts on a Friday, followed by five hours sleep, and returning to work Saturday, “clambering up and down poles for almost [twenty-four] hours straight.”⁷²⁶ He was electrocuted on the job (after taking a break for breakfast) on Sunday.⁷²⁷

Limits on mandatory overtime have become a top priority in union contract negotiations. This is evidenced by the bitter and protracted strikes by nurses in recent years, notably in New York, California, Massachusetts, the District of Columbia, and Michigan. Nurses cite to the adverse emotional and physical effects of mandatory overtime on their members, and how such working conditions put patients at risk. Mandatory overtime was also a central issue in the two-week strike of fifty thousand workers against Verizon Communications (the nation’s largest local telephone company and wireless carrier) in 2000.⁷²⁸ On May 3, 2001, the Bureau of National Affairs reported on a petition filed by

725. Mary Williams Walsh, *As Hot Economy Pushes Up Overtime, Fatigue Becomes a Labor Issue*, N.Y. TIMES, Sept. 17, 2000, § 1, at 32.

726. *Id.*

727. *Id.*; see also Lonnie Golden, *Timing Is Everything: Potential Economic Repercussions of Proposed “Flextime” Reforms to the FLSA Overtime Hours Law*, 48 LAB. L.J. 504, 508 (Jan. 1997) (analyzing economic models and arguing that the FLSA should be amended to prohibit mandatory overtime, prohibit comp-time, and create shorter workweeks analogous to the European standards); Lee Bowman, *Sleepy on the Job? You’re Not Alone: Forty Percent of Americans Have Trouble Staying Awake at Work*, CHI. SUN-TIMES, Mar. 28, 2001, at 1 (discussing the National Sleep Foundation’s findings that “almost two-thirds of Americans fail to get eight hours of sleep a night”); LESS FUN, LESS SLEEP, MORE WORK: AN AMERICAN PORTRAIT, at http://www.sleepfoundation.org/PressArchives/lessfun_lesssleep.html (last visited Sept. 5, 2001).

728. AFSCME SEEKS LIMITS ON MANDATORY OVERTIME (Mar. 2001) (discussing the detrimental effects of mandatory overtime on nurses and patients, and contractual and legislative methods for stopping excessive work hours), at http://www.afscme.org/publications/action/una011_5.htm; see also *Reduction, Elimination of Mandatory Overtime Gains Prominence as Negotiating Issue*, 143 Daily Lab. Rep. (BNA) C-1 (July 27, 1999) (reviewing the management and labor perspective on the issue); Kalpana Srinivasan, *Verizon Reaches Tentative Contract with Unions*, AMARILLO GLOBE, Aug. 21, 2000 (reprinting an Associated Press article on the conclusion of the two-week strike by 50,000 Verizon workers represented by the Communication Workers of America and the International Brotherhood of Electrical Workers), at http://www.amarillonet.com/stories/082100/usn_unions.shtml; Susan Trossman, *Fighting the Clock: Nurses Take on Mandatory Overtime*, NURSING WORLD (May/June 1998) (discussing mandatory overtime in hospitals across the country and the adverse impact of such practices on nurses and patients), available at <http://www.nursingworld.org/tan/98mayjun/ot.htm>; *Mandatory Overtime: It’s the Law!*, CBS NEWS (Aug. 31, 2000) (discussing the impact of companies working their employees overtime instead of hiring new people), at <http://www.cbsnews.com/now/story/0,1597,229717-412,00.shtml>.

several groups, including a union representing medical residents and interns, with the Occupational Safety and Health Administration. The petitioners sought to limit the number of hours medical residents must work, arguing:

[P]hysicians-in-training can work from 60 to 130 hours a week with only one day off. Based on a number of studies, the petition asserts that because of sleep deprivation from these long hours, these medical residents are at increased risk of being in automobile accidents, suffering depression, and giving birth to premature infants, and they pose a risk to patients they are forced to treat while in an impaired condition.⁷²⁹

This section reviews the proposed ceiling for daily and weekly work hours, supervised waivers, and anti-retaliation protection. It also distinguishes flex-time from comp-time.

1. HOURS CAP AND WAIVERS

The proposal's initial forty-hour workweek ceiling (forty-eight hours with overtime) will help Americans reclaim their weekends. As shown in Part V, the eight-hour day ceiling is an effective standard for reducing employer demand for overtime hours.⁷³⁰ As Parts IV and V demonstrate, reducing the standard workweek from forty to thirty hours (thirty-eight hours with overtime), and creating an eight-hour day, will help spread the work and assist dual-earner households (a growing pool in the workforce) balance their conflicting work and home lives.⁷³¹ To

729. *Petition Filed with OSHA Seeks Limit on Hours Worked by Medical Residents*, 31 O.S.H. Rep. (BNA) 407 (May 3, 2001); see also Jim Ritter, *Docs' Hours Hazardous to Your Health?*, CHI. SUN-TIMES, July 31, 2001, at 6 (quoting Peter Lurie of Public Citizen, "God help you if your doctor is working 100 hours a week").

730. See *supra* Part V.E. (discussing the effectiveness of maximum hours labor standards).

731. See *supra* Parts IV.B.3.-4., V.B. (reviewing time-squeeze on a household level, and time-use data, respectively); see also Jerry A. Jacobs & Kathleen Gerson, *Who Are the Overworked Americans?*, in *WORKING TIME: INTERNATIONAL TRENDS, THEORY AND POLICY PERSPECTIVES* 89-105 (Lonnie Golden & Deborah M. Figart eds., 2000). The authors argue that

we need to recognize that the 40-hour work week was created for the male-breadwinner family. Since the demographics of the workforce have changed dramatically and irreversibly, the time has come to re-examine this standard. . . . As the 21st century dawns, widespread transformations in family and domestic life cry out for a shorter rather than a longer standard week for individual workers.

Id. at 101; see also Ronald Kotulak, *Parents in a Trap: Businesses Need to Recognize that Children Deserve More of Parents' Time*, CHI. TRIB., May 13, 2001, § 2, at 1 (analogizing dual-income households, working overtime, and raising children to hamsters in a cage: "You run harder and harder on a wheel but you still stay in the same place").

achieve these goals, this article proposes replacing FLSA section 7(a)(1) with the following:

Except as otherwise provided in this section, the standard hours of work of an employee shall not exceed eight hours in a day and forty hours in a week; no employer shall employ any of his employees engaged in commerce or in the production of goods for commerce, or employed in an enterprise engaged in commerce or in the production of goods for commerce, to work longer hours than eight hours in any day or forty hours in any week, unless:

(A) the employee agrees to work longer than eight, but not more than twelve, hours in a day and forty-eight hours in a week; and/or

(B) the employee agrees to work longer than forty, but no more than forty-eight, hours in a week; and

(C) the Secretary of Labor grants a permit authorizing the employment of the employee in excess of the standard hours of work; and

(D) the employee receives compensation for her/his employment in excess of the standard hours of work at a rate not less than one and one-half the regular rate at which he is employed.

This proposal requires further text to phase in the reduction of the standard workweek from forty/forty-eight to thirty/thirty-eight hours. An exception for emergencies requiring the immediate services of experienced and competent labor to prevent injury to person, damage to property, or suspension of necessary operations is warranted. In addition, the proposal will require either extensive amendments to, or deletions of, the special interest exceptions from the standard work hours contained in the remaining provisions of section 7 (such as the “8 and 80” proviso for healthcare employees) and the Puerto Rico and Virgin Islands exceptions in section 8.⁷³²

Many of the United States’ trade partners (competitors) successfully work under maximum hours ceilings similar to those

732. See 29 U.S.C. §§ 207(j), 218 (2001).

contained in this proposal.⁷³³ For example, the European Community directed its member nations in June 1989 (updating the directive in November 1993) to “take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers, . . . the average working time for each seven-day period, including overtime, does not exceed 48 hours.”⁷³⁴ France reduced its standard workweek from thirty-nine to thirty-five hours in 1997 as a result of legislation, financial incentives for employers, and collective bargaining.⁷³⁵ Germany reduced its standard workweek from forty to thirty-five hours primarily through collective bargaining.⁷³⁶ Studies show that reduced work hours in Germany resulted in saving jobs, increasing job security, and preventing higher unemployment.⁷³⁷ As in France, work-time reduction campaigns in Germany “were an important symbol of the labour movement’s resiliency, showing that it could still offer fresh solutions to the pressing issue of unemployment.”⁷³⁸ The Netherlands reduced its annual work hours from 1800 hours in 1970 to 1397 hours in 1995. In April 1999, its unemployment rate was 3.4%. The country also had “low inflation, sound public finances, competitive firms, low inequality, and preservation of social protections.”⁷³⁹

733. Gerhard Bosch, *Working Time Reductions, Employment Consequences and Lessons from Europe: Defusing a Quasi-Religious Controversy*, in *WORKING TIME: INTERNATIONAL TRENDS, THEORY AND POLICY PERSPECTIVES* 177-95 (Lonnie Golden & Deborah M. Figart eds., 2000) (comparing changes in annual hours of full-time employees in Europe and the United States during 1983–1993); see also Steffen Lehndorff, *Working Time Reduction in the European Union: A Diversity of Trends and Approaches*, in *WORKING TIME: INTERNATIONAL TRENDS, THEORY AND POLICY PERSPECTIVES* 38-56 (Lonnie Golden & Deborah M. Figart eds., 2000) (discussing the role of collective bargaining, regulations, and part-time work); EUROPEAN FOUND. FOR THE IMPROVEMENT OF LIVING & WORKING CONDITIONS, *INDUSTRIAL RELATIONS IN EUROPE IN 2000—A SUMMARY*, at <http://www.eiro.eurofound.ie/2000/review/summary.html> (last visited July 6, 2001). It was observed that the “wholesale reductions in weekly working time—by law or bargaining—often witnessed in the 1980s and 1990s have come to a halt in recent years, and 2000 was no exception The great exception to this rule is France, where 2000 featured legislation implementing a 35-hour week.” *Id.*

734. Council Directive 93/104/EC of art. 6, 1993 O.J. (L 307) 18, at http://europa.eu.int/ur-lex/en/lif/dat/1993/en_393L0104.html (last visited May 9, 2001) (setting the criteria for the maximum weekly working time).

735. HAYDEN, *supra* note 1, at 133-43 (discussing French and German work time reduction measures).

736. *Id.* at 143-49.

737. *Id.* at 146; see also THE LAW ON NEGOTIATED WORKWEEK REDUCTION IN FRANCE, at <http://www.35h.travail.gouv.fr/texteang.htm> (last visited Sept. 7, 2001) (discussing the purpose of the French thirty-five-hour workweek law—“more free time and more jobs”—and outlining the main provisions of the law).

738. HAYDEN, *supra* note 1, at 149.

739. *Id.* (describing the Netherlands as Europe’s new economic model); see also LINKS TO EXTERNAL WEBSITES, at <http://webfusion.ilo.org/public/english/links/index.cfm> (last visited Sept.

Canada has not been as successful reducing work hours as the European Community. Brian Alexander Langille suggests in his 1993 article, *The Overworked Canadian?*, that Canada has not achieved the level of social change necessary for work-time reduction.⁷⁴⁰ In Canada, the Provinces are the primary regulators of labor relations and standards. Ontario (Canada's most populous and economically important Province) limits hours to eight per day and forty-eight in a week.⁷⁴¹ It also allows employers to obtain permits for compressed work schedules, requires overtime pay, and empowers employees with the collective right to refuse hours over the standard.⁷⁴² On the federal level, the Canadian Labor Code limits work to eight hours per day, forty hours per week for business within the legislative authority of Parliament (10% of the workforce), allowing forty-eight hour workweeks under strict limitations.⁷⁴³ With such protections, however, Canadians are as overworked as Americans. For example, Anders Hayden described in his 1999 book, *Sharing the Work, Sparing the Planet: Work Time, Consumption, & Ecology*, that one-half of the Canadian workforce worked approximately nine hours of overtime per week (60% of which was unpaid), while 8% of the workforce was unemployed, during the first four months of 1997.⁷⁴⁴ Langille observed that noncompliance with the law will continue until Canada empowers workers to independently enforce the standards.⁷⁴⁵

7, 2001) (providing links to labor ministries of countries participating in the ILO and further examining global work time limitations).

740. Langille, *supra* note 360, at 192-93 (discussing the social change needed to secure Canadian law reforms); *see also* Bosch, *supra* note 733, at 179-87, 192-93 (outlining the conditions in Europe since the late 1970s that allowed employment gains through weekly work time reductions, and conclusions on the future of work time policy).

741. Langille, *supra* note 360, at 180, 189-93 (discussing the Canadian experience with overwork and its maximum hours labor standards); *see also* HAYDEN, *supra* note 1, at 116 tbl.6.2 (reviewing work hours standards in each Province).

742. EMPLOYMENT STANDARDS – FACT SHEET, at <http://www.gov.on.ca/LAB/es/hrsworke.htm> (last visited May 29, 2001).

743. Canada Labour Code, R.S.C., ch. L-2, §§ 169(1), 171(1) (2001) (Can.), available at http://info.load-otea.hrdc-drhc.gc.ca/federal_legislation/part3/legislation/clc3a.htm; *see also* HAYDEN, *supra* note 1, at 115 (discussing the federal labor code).

744. HAYDEN, *supra* note 1, at 114.

745. Langille, *supra* note 360, at 192-93 (discussing current non-compliance with Canadian labor standards).

2. ANTI-RETALIATION

To empower employees who do not agree to work overtime, this article recommends amending FLSA section 15(a)(3) as follows (emphasis indicates proposed language):

(a) . . . it shall be unlawful for any person

. . . .

(3) to discharge or, in any other manner, discriminate against any employee because such employee *has not agreed in writing to work over the standard hours of work, or* has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

Under this proposal, a FLSA section 17 suit brought by the Secretary of Labor, or a private section 16(b) suit, could result in the employer reinstating an employee discharged for refusing to work overtime. Other remedies include back pay, front pay, interest, compensatory damages, liquidated damages, and punitive damages.⁷⁴⁶

3. FLEX-TIME VERSUS COMP-TIME

As discussed in Part VI.B.2., the proposal provides for flexible work hours (such as compressed and flexible hours).⁷⁴⁷ It does not, however, provide for comp-time in the private sector. Comp-time is distinguishable from (albeit often confused with) flex-time. Comp-time is time off in lieu of overtime pay for hours worked over forty in a workweek. Flex-time provides employees with flexible work hours to meet family and personal needs. Research shows, however, that many workers do not take advantage of their employer's flexible work time

⁷⁴⁶ A.B.A. SECTION OF LABOR & EMPLOYMENT LAW, THE FAIR LABOR STANDARDS ACT 927-43 (1999) (discussing the remedies in a FLSA retaliation action).

⁷⁴⁷ Brenda G. Russell, *The Flex Perplex: Telecommuting Has Its Good Side—But Beware the Pitfalls*, CHI. TRIB., Feb. 21, 2001, § 6, at 1 (discussing telecommuting, compressed work days, job sharing, and flex-time).

programs.⁷⁴⁸ This is understandable, considering that flexible work schedules under the current regime often come “at the dear price of lost leisure time, significantly lower lifetime earnings, a checkered career progression, or stresses associated with irregular work.”⁷⁴⁹

Private sector comp-time legislation showcases the conflicting and competing interests that collide over maximum hours labor standards. For example, during the first session of the 105th Congress (1997) the National Federation of Independent Business testified in favor of then Senator John Ashcroft’s (R.-Mo.) comp-time bill (S. 4, the Family Friendly Workplace Act), stating that “small businesses ‘can’t afford to pay their employees overtime. [Comp-time] is something they can offer in exchange that gives them a benefit.”⁷⁵⁰ Senate Democrats and the Clinton administration seized upon the comment as evidence that the Senate comp-time bill “is really aimed at allowing businesses to work their employees overtime without time-and-a-half pay.”⁷⁵¹ Representative Ballenger introduced similar legislation (H.R. 1, the Working Families Flexibility Act of 1997) in the House.⁷⁵² Neither S. 4 and H.R. 1, nor Representative Ballenger’s and Senator Ashcroft’s 1999 versions of the legislation became law.⁷⁵³ On May 24, 2001, Representative Judy Biggert (R.-Ill.) introduced H.R. 1982, the Working Families Flexibility

748. DRAGO, *supra* note 519, at 60 (investigating time-squeeze among school teachers); *see also* HOCHSCHILD, *supra* note 17, at 197-203 (describing the dismantling of an employer-provided work-life program and reviewing statistics on the limited use of flexible work schedules).

749. Lonnie Golden, *Flexible Work Schedules: What Are We Trading Off to Get Them?*, 124 MONTHLY LAB. REV. 50, 65 (Mar. 2001) (observing that “[f]lexible work schedules are spreading, but workers sometimes must be willing to increase their hours markedly, work evening shifts, or switch to part-time status, self-employment, or certain occupations to get flexibility in their schedules; this may entail a sacrifice of leisure time, compensation, or a predictable workweek”), available at <http://www.bls.gov/opub/mlr/2001/03/contents.htm>.

750. *Lobbyist Remarks Fuel Dem Criticism of Comp Time Plan*, NAT’L JOURNAL’S CONGRESS DAILY, Feb. 19, 1997, at 2; *see also* Family Friendly Workplace Act of 1997, S. 4, 105th Cong. §§ 3, 4 (providing biweekly work programs and limitations on salary practices relating to exempt employees).

751. *Lobbyist Remarks Fuel Dem Criticism of Comp Time Plan*, NAT’L JOURNAL’S CONGRESS DAILY, Feb. 19, 1997, at 2; *see also* Family Friendly Workplace Act of 1997, S. 4, 105th Cong. §§ 3, 4 (providing biweekly work programs and limitations on salary practices relating to exempt employees); Richard J. Pierce, Jr., *Small Is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 ADMIN. L. REV. 537, 539 (1998) (arguing that “special regulatory treatment of small firms is both unjustified and socially destructive”).

752. Working Families Flexibility Act of 1997, H.R. 1, 105th Cong. (1997); *see also* MARK WILSON, HERITAGE FOUND., FLEX-TIME FOR FAMILIES: WHAT WORKS FOR THE GOVERNMENT CAN WORK FOR THE PRIVATE SECTOR (Feb. 26, 1997) (supporting H.R. 1 and S. 4), at <http://www.heritage.org/oibrary/categories/regulation/fyil32.html>.

753. *See* Working Families Flexibility Act of 1999, H.R. 1380, 106th Cong. (1999), available at <http://thomas.loc.gov>; Family Friendly Workplace Act of 1999, S. 1241, 106th Cong. (1999), available at <http://thomas.loc.gov>.

Act of 2001, describing the measure as “pro-family, pro-worker legislation that gives workers the flexibility to spend time with family, attend teacher conferences, extend maternity and paternity leave, or other family needs that may arise.”⁷⁵⁴

Comp-time currently applies to the public, not the private, sector. The FLSA was not originally designed to apply to the public sector. A primary purpose of overtime was to penalize private sector employers for working employees over forty hours per week, thus providing an incentive to employ more people fewer hours than fewer employees more hours.⁷⁵⁵ The purpose of public sector comp-time, however, was to ease the application of the FLSA in state and local government (e.g., soften its tax impact) following the *Garcia v. San Antonio Metropolitan Transit Authority*⁷⁵⁶ decision. Under *Christensen v. Harris County*,⁷⁵⁷ public sector employers can compel their employees to use their accrued comp-time⁷⁵⁸ (emphasizing the distinction between comp-time and flex-time).⁷⁵⁹ The USDOL currently enforces a blanket prohibition on private sector comp-time.⁷⁶⁰

Ultimately, comp-time does not advance society’s quality of life because it merely juggles increased work hours (in the form of an interest-free loan of employee time to employers) instead of reducing work time.⁷⁶¹ This article proposes the elimination of comp-time as a

754. Press Release, House Committee on Education and Workplace, Biggert Introduces ‘Comp Time’ Flexibility Bill (May 24, 2001), at <http://edworkforce.house.gov/press/press107/comptime52401.htm>; see also Working Families Flexibility Act of 2001, H.R. 1982, 107th Cong., available at <http://thomas.loc.gov>; 147 CONG. REC. H2693 (2001) (statement of Rep. Biggert).

755. See *supra* Part III.C. (discussing FLSA § 7(a)).

756. 469 U.S. 528, 557 (1985) (finding the 10th Amendment to the U.S. Constitution did not preclude FLSA coverage of municipal transit employees); see also *Christensen v. Harris County*, 529 U.S. 576, 584-85 (2000) (rejecting the argument that public employees have general authority over their use of comp time under FLSA section 7(o)(5), explaining that this reading would frustrate the purpose of comp time—to alleviate financial burdens the FLSA imposes on state and local governments); *Wilson v. Charlotte*, 964 F.2d 1391, 1393 (4th Cir. 1992) (analyzing and applying the 1985 amendment to the FLSA—section 7(o)—and its legislative history); Brudney, *supra* note 4, at 181-82, 184 (discussing the political history of FLSA section 7(o)).

757. 529 U.S. 576 (2000).

758. *Id.* at 576.

759. *Id.*

760. *Wages & Hours*, Lab. Rel. Rep. (BNA) (131 IERM) 519 (Nov. 1994) (stating federal policy).

761. Lonnie Golden, *Better Timing?: Work Schedule Flexibility Among U.S. Workers and Policy Directions*, in *WORKING TIME: INTERNATIONAL TRENDS, THEORY AND POLICY PERSPECTIVES* 212-31, 228 (Lonnie Golden & Deborah M. Figart eds., 2000) (noting that Congressional comp time measures are likely to make the workplace “more family unfriendly than

consideration for providing a work-life balance by reducing work hours and empowering employees with the right to refuse overtime. The debate over comp-time could change, however, if employee use of comp-time in the private and public sectors were equivalent to work time for purposes of calculating overtime hours, thus universally preserving the forty-hour (to become thirty-hour) week.

C. REPLACING THE WHITE-COLLAR EXEMPTIONS

To help delineate and define white-collar employees whose exemption from sections 6 and 7 of the FLSA would be consistent with the policies and purposes of the maximum hours labor standards, this proposal replaces the current white-collar exemptions contained in FLSA section 13(a)(1) with text adapted from the USDOL's regulations delineating and defining the "key employee" exemption from the FMLA.⁷⁶²

Section 13(a). The provisions of section 6 (except 6 (d) in the case of paragraph (1) of this subsection) and 7 shall not apply with respect to—

(1) any employee employed as a key employee. A key employee means an employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite.

(A) in determining which employees are among the highest paid 10 percent, year-to-date earnings are divided by weeks worked by the employee (including weeks in which paid leave was taken). Earnings include wages, premium pay, incentive pay, and non-discretionary and discretionary bonuses. Earnings do not include incentives whose value is determined at some future date, e.g., stock options, or benefits or perquisites.

friendly . . . driv[ing] up employer demand for average overtime hours per employee [due to the reduced short-run marginal cost of overtime]”).

762. See 29 C.F.R. § 825.217 (2001) (“what is a ‘key employee?’”); see also *Panza v. Grappone Cos.*, 6 Wage & Hour Cas. 2d (BNA) 843, 844-45 (D.N.H. 2000) (applying the “key employee” defense).

(B) No more than 10 percent of the employer's employees within 75 miles of the worksite may be "key employees."

This proposal consciously eliminates the salary basis test from the exemption. The intent of this measure is to shift the focus from technicalities (is a worker "subject to deductions" or paid a "minimum guarantee plus extras" etc.) to the primary issue—whether the alleged exempt employee has more in common with the owner rather than the owner's workers covered by the maximum hours labor standards.⁷⁶³ Like the standard hours proposal discussed in Part VI.B.1., this proposal will require either extensive amendments to, or deletions of, the special interest exceptions from minimum wage and maximum hours contained in the remaining provisions of section 13 (such as the motor carrier, movie theater, cotton gin, and sugar beet processing exemptions).⁷⁶⁴

The American Worker Project proposals, and recent Congressional overtures, regarding the white-collar exemptions, discussed in Part III.C.3., would not advance society's quality of life. Instead, they would further erode the standards by providing additional exemptions, thereby increasing, not decreasing, work hours for more individuals.⁷⁶⁵ In addition, while the USDOL's regulatory agenda could help simplify and clarify the standards for employers and the judiciary, it cannot address the more fundamental question—do rules defining and delineating the existing white-collar exemptions advance the public health, safety, welfare and morals? It is doubtful, particularly in this regulatory environment.

763. See *supra* Part III.C.1. (discussing the white-collar exemption rules); see also *Auer v. Robbins*, 519 U.S. 452, 455 (1999) (resolving the dispute between the U.S. Circuit Courts of Appeals over the meaning of the phrase "not subject to reduction" contained in the salary test at 29 C.F.R. § 541.118(a)); *Brock v. Claridge Hotel & Casino*, 846 F.2d 180, 184-87 (3d Cir. 1988) (finding that supervisors were not paid on a salary basis—and were therefore not bona fide executives exempt from overtime pay—when they received a \$250 per week guaranteed salary plus additional wages calculated by multiplying the number of hours they worked); Michael A. Faillace, *Automatic Exemption of Highly-Paid Employees & Other Proposed Amendments to the White-Collar Exemptions: Bringing the Fair Labor Standards Act into the 21st Century*, 15 LAB. LAW. 357, 387-90 (2000) (proposing a three-tier white-collar exemption; a test based solely on salary, another providing a new salary and duties test, and a third requiring overtime if the employee earns less than the salary threshold, regardless of duties); Lawrence Peikes, *Tightening the White-Collar Exemptions—The Courts Breathe New Life into the Fair Labor Standards Act*, 10 LAB. LAW. 121, 125 (1994) (describing the salary test as a "trap for the unwary").

764. See 29 U.S.C. § 213(b)(1), (b)(27), (i), (j)(1) (2001).

765. See *supra* Part III.C.3. (reviewing the current politics of the white-collar exemptions).

D. FOUR WEEKS PAID VACATION

This article endorses Schor's proposal (discussed in Part IV.B.1.b.) to create a FLSA vacation standard.⁷⁶⁶ Under the new standard, employers would provide workers with four weeks of paid vacation per year, regardless of service, and pay a vacation tax into a vacation bank to fund a paid vacation for their contingent workers. As discussed in Part IV.A., the United States, unlike its European Community and Canadian trade partners, does not require employers to provide paid vacation. It should therefore not be surprising that Europeans and Canadians receive between four to six weeks, compared to Americans who receive between two to four weeks, of paid vacation time per year.⁷⁶⁷ The *Chicago Tribune* reported in 2001 that an increasing number of Americans are working during vacation, and "that of the people who make less than \$10 an hour—roughly one in five workers—two-thirds either have had no paid vacation for the past five years or had some years with no time off."⁷⁶⁸

A FLSA vacation standard will advance society's quality of life, providing meaningful time off for personal, home, community, and cultural life.⁷⁶⁹ It will also be an important step in addressing the lower pay and fringes, not to mention the overemployment and underemployment issues, confronted by the growing contingent workforce discussed in Part V.C.⁷⁷⁰ In addition, the standard will establish a more generous minimum substantive right to vacation time than the rights guaranteed by the states. Currently, state laws focus primarily on enforcing existing employment vacation contracts or agreements, rather than imposing minimum terms for paid vacation time.⁷⁷¹

766. See *supra* Part IV.B.1.b. (discussing the "cycle of work-and-spend").

767. See *supra* Part IV.A.

768. John Gallagher, *For Some, Vacations Kept at Arm's Length: More Americans Choose to Work While Playing*, CHI. TRIB., July 1, 2001, § 6, at 3.

769. Pamela Mendels, *Take a Break—Please!*, BUS. WK. (May 30, 2001) (discussing vacation time as a tool for addressing overwork), at http://www.buisnnessweek.com/smallbiz/content/may2001/sb2001/sb200105530_009.htm; see also *Need a Break? These Days, Take One if You Can Get It*, CRAIN'S CHI. BUS., Apr. 23, 2001 (analyzing required four-week sabbaticals at law, accounting, and consulting firms), at http://chicagobusiness.com/cgi-bin/mag/article.pl?article_id=16290&print=1.

770. See *supra* Part V.C. (discussing the contingent workforce).

771. *Massachusetts v. Morash*, 490 U.S. 107, 109 n.2 (1989) (listing statutes from forty-seven states requiring vacation pay to separated employees). Several of the states, such as California and Illinois, require an employer to pay separated employees the monetary equivalent of their unused vacation time on a pro-rata basis. Scott D. Miller, *Opinion Letters: Limitations on Vacation*

VII. CONCLUSION

Time-squeeze adversely affects family and community life. *Business Week* observed in 2000, “[w]e watch TV, and we go to work’ ‘The front porch is empty.’”⁷⁷² Living and working under these conditions, it becomes increasingly clear that the FLSA maximum hours labor standards are as relevant today, and in the foreseeable future, as they were when enacted in 1938 as a means to advance society’s quality of life. This vision incorporates a living standard that provides meaningful time from work for a personal, home, community, and cultural life, not just enough time to passively watch television and go to sleep after work. Revitalizing the FLSA maximum hours labor standards will provide a good start for making this vision a reality in the twenty-first century.

Accrual, 33 LAB. & EMP. L. 3 (Apr. 1996); see also *supra* note 82 (providing information on state wage and hour laws and links to the homepages of federal and state departments of labor).

772. Pamela Mendels, *Should Working Parents Work Less?*, BUS. WK. (Dec. 27, 2000) (quoting Benjamin Hunnicutt), http://www.businessweek/content/dec2000/sb20001227_601.htm; see also HUNNICUTT, *supra* note 11; HUNNICUTT, *supra* note 12 (discussing workers’ abandonment of shorter work hours for the right to work).