The Final Rule: A Call for Congressional Action to Return the FLSA and the Middle Class to Its Former Glory

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The Final Rule: A Call for Congressional Action to Return the FLSA and the Middle Class to Its Former Glory

By Ashley Singrossi*

2017 was full of change in America. But not for the middle class. The middle class remained stagnant, if not shrinking—as it has been for decades. Many scholars and economists theorize why the class that is the backbone of America—that once flourished as the beacon of hope for hard-working people around the world—has steadily declined over the past few decades. The answer lies in labor regulation. Federal labor regulations helped build America’s robust middle class. But those regulations are outdated and ineffective. If we want to see the middle class restored to its prosperity, and stop it from slowly slipping into poverty, we must start with restoring the effectiveness of those labor regulations.

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PROLOGUE

A. Bob Thompson, The Shrinking Middle Class, And Why We Should Care About Either

In the 1960’s, Bob Thompson began his rise to the middle class. At the time, there was nothing extraordinary about this: the economy was flourishing and the American people flourished with it. When Thompson, a high school graduate and a one–tour veteran, returned to his hometown of Downey, California, something big was happening—the Rockwell plant had won the Apollo contract. This was the beginning of an era of prosperity, for Rockwell, for Downey, and for many working class people like Thompson.

1. Jim Tankersley, Why America’s Middle Class is Lost, WASH. POST (Dec. 12, 2014), http://www.washingtonpost.com/sf/business/2014/12/12/why-americas-middle-class-is-lost/?tid=a_inl (discussing the stagnant growth of the American middle class for the past 25 years, despite an 83 percent increase in the economy).
3. Tankersley, supra note 1.
The Rockwell plant hired Thompson in August of 1965, at $2.59 an hour (almost double the minimum wage in California at that time). Thompson started small, running blueprints across the factory, but he eventually gained a management position in shipping. Rockwell took Thompson with it on its ride to economic successes, even providing Thompson with stable work when times were not so good. Thompson’s rise to middle class reflected Rockwell’s rise to prosperity, as it secured contract after contract in the booming aerospace industry during the Cold War. Rockwell employees of all levels—from the grunt workers to the accountants and engineers—bought split-level homes in Downey, and when Thompson bought his first color television set in 1965 the clerk waived the credit paperwork after discovering Thompson was a Rockwell employee, knowing full well he was good for the money. In Downey, people said, “the easiest way to tell a Rockwell assembly worker’s house from a Rockwell top manager’s was to watch how often the Cadillac in the driveway gave way to a new one.”

But then, the Cold War ended, the aerospace industry dried up, and in 1999 Rockwell closed, shrinking Downey’s job economy by 25,000 jobs. City officials swore that only a company that paid its employees well enough to purchase homes in Downey, like Rockwell did, would ever replace it. That promise went unfulfilled for decades, until city officials eventually settled for the construction of a second shopping mall. Although the mall would bring about one thousand new jobs, those jobs would be minimum wage restaurant–like positions, not at all like Thompson’s starting job at Rockwell many years prior (recall that Rockwell hired Thompson at almost twice the minimum wage).

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4 Id.; History of California Minimum Wage, STATE OF CAL. DEP’T OF INDUS. REL., http://www.dir.ca.gov/iwc/minimumwagehistory.htm (listing the minimum wage in California by year; in 1965, California’s minimum wage was $1.30).
5 Id.
6 Id.
7 Id.
8 Id.; Barbara Ballinger, Split–Level Homes: Outdated or Underrated?, RELATOR MAG. (September 2008), http://realtormag.realtor.org/home-and-design/architecture-coach/article/2008/09/split-level-homes-outdated-or-underrated (this style appealed to many buyers then because it was grander than the popular bungalow, yet could be affably built).
9 Id.
10 Id.
11 Id.
12 Id. (though many plans fell through, most crushing was the 2010 plan for a Tesla factory, with whispers of $16 an hour starting wages).
13 Id.
B. The Shrinking Middle Class

Thompson, and many others like him, were the last generation of the robust and growing middle class. Of course the economy has grown since then, but now many employees are not seeing the fruits of that growth the way Thomson did—hence the shrinking middle class. This begs the question: why? America is no stranger to economic ups and downs. In fact, there were ten recessions between 1948 and 2011. The ebb and flow of America’s recessions and recoveries is normal. However, the abnormality today is in the slow but steady decline of the middle class, throughout the economy’s ups and downs. Empirically, the middle class shrunk ten percent between 1970 and 2013. And when “jobless recover[ies]” followed both 2000’s recessions, medium-income continued to fall, even after the Great Recession ended.

Today’s American workers produce twice as much product and provide twice as much service as workers in 1979, yet they take home less of the profit. And as inflation of the dollar continues to climb but salaries do not, people are falling out of the middle class and into the working class, dangerously close to the poverty line. This is the “shrinking” of the middle class. This widespread issue seems at odds with the fact that our

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14 Rakesh Kochhar & Richard Fry, America’s ‘Middle’ Holds its Ground After the Great Recession, PEW RES. CTR. (Feb. 4, 2016), http://www.pewresearch.org/fact-tank/2015/02/04/americas-middle-holds-its-ground-after-the-great-recession/ ("[A]dults who live in middle-income households has eroded over time, from 61% in 1970 to 51% in 2013. . . . [T]he erosion over the last four decades has been sure and steady, through economic ups and downs.").
16 Id.
17 Id.
19 See Kochhar, supra note 14 (the middle-income range for a three-person household was $131,072 in 2000 and fell to $122,000 by 2013).
20 See id.
22 Id.
23 From 2000 to 2014 the portion of adults living in middle-income households dropped in 88% of metropolitan areas. America’s Shrinking Middle Class: A Close Look at Changes
economy, despite its ups and downs, has grown steadily over the past 25 years.\textsuperscript{24} Where is the disconnect? And most importantly, why doesn’t the typical American worker see that growth in his or her earnings?\textsuperscript{25}

Once upon a time, the working class, like Thompson, literally took America to the moon, and they benefited from the prosperity accordingly—rising to the middle class.\textsuperscript{26} But since then, something has run awry.

C. Why We Should Care

The era in which Thompson rose to the middle class as the economy grew is long gone—a mere bedtime-story of the golden opportunity America once offered. Today, despite the steady two percent yearly increase in the economy over the past twenty-five years, the income of a typical family remains relatively stagnant.\textsuperscript{27} The whispers of inequality have become audible: what happened to the days where growth in the economy meant more change in the average family’s pocket?\textsuperscript{28}

The middle class is shrinking, and despite efforts in the shape of tax cuts, stimulus spending, and low interest rates, it is not bouncing back.\textsuperscript{29} The “why,” I propose to you, begins with the current ineffectiveness of the Fair Labor Standards Act ("FLSA"). Due to outdated calculations underlining the regulations the great protections that once ensured income equality, when the private market failed to do so, are now wholly ineffective in serving their once–righteous goals. America’s economy is thriving, and there is no reason why its backbone—the middle class—should not thrive with it.

This note argues that the Final Rule, a well–needed update to the FLSA regulations that boots the effectiveness of the FLSA’s overtime–pay protection, is a step in the right direction towards correcting income

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Tankersley, supra note 1.
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Jones, supra note 24, at 6; see also Priester, supra note 21 ("[b]etween 1979 and 2007, paycheck income of the top 1 percent of U.S. earners exploded by over 256 percent. Meanwhile, the bottom 90 percent of earners have seen little change in their average income. . . . ").
\end{quote}

\begin{quote}
PEW RES. CTR., supra note 25 (in a January 2014 survey, 65% of adults said the gap between the rich and everyone else had increased in the past 10 years).
\end{quote}

\begin{quote}
See PEW RES. CTR., supra note 23.
\end{quote}
inequality and restoring prosperity to the middle class. This note further proposes that Congressional action is necessary to enact the Final Rule, putting to bed once and for all the constitutionality arguments about the Department of Labor’s power to do so. Part I discusses the historical roots of labor regulation in light of the timeless power struggle between the government and the private sector. Part II discusses what exactly the Final Rule is and the conflict surrounding it. Part III proposes a solution, urging Congress to enact the Final Rule by confirming the DOL’s authority to breathe life back into the once glorious FLSA, through bringing its regulations up to par with current market values. And Part IV presents the big picture analysis explaining why Congress enacting the Final Rule is a step towards returning the effectiveness of the FLSA—and solving the problem of the shrinking middle class.

I. BACKGROUND: FROM THE FIRST LABOR REGULATIONS TO THE FINAL RULE

In understanding why the Final Rule, as an amendment to the FLSA regulations, is important to the viability of a robust middle class, one must first understand the white-collar exemption that the Final Rule applies to—and to understand the white-collar exemption, one must understand the FLSA. In order to do so, it is essential to start all the way back at the beginning of labor regulation in the United States.

A. The History of Labor Regulation

Long before the FLSA even existed, the United States government exercised its power to regulate the American workforce. It did so in two ways: first, through attempts to regulate public workers, and second, through attempts to regulate private workers. The very first labor regulation came in 1936 when Congress passed the Walsh–Healy Public


31 LES A. SCHNEIDER & J. LARRY STINE, WAGE AND HOUR LAW: COMPLIANCE AND PRACTICE, FAIR LABOR STANDARDS ACT OF 1938 (FLSA)—HISTORY OF WAGE AND HOUR LAWS PRIOR TO PASSAGE OF FLSA § 1:2, (NOV. 2017 UPDATE), Westlaw.
Contracts Act.\textsuperscript{32} The Supreme Court confirmed Congress’ power to regulate public labor through this Act, based on the federal government’s imminent right to control the terms and conditions of the contracts it enters into.\textsuperscript{33}

While Congress’ attempts to regulate private labor were more heavily debated, the Supreme Court eventually confirmed Congress’ power to also regulate private labor.\textsuperscript{34} Shortly after the Supreme Court’s landmark decision in \textit{N.L.R.B. v. Jones & Laughlin Steel Corp}, deeming wage and hour regulation to be a valid exercise of congressional power to regulate interstate commerce, President Franklin D. Roosevelt addressed Congress regarding the public policy issue of labor regulation.\textsuperscript{35} Many of President Roosevelt’s statements in support of the labor relation then, apply today in support of the Final Rule. He said:

\begin{quote}
Our nation so richly endowed with natural resources and with a capable and industrious population should be able to devise ways and means of insuring to all our able-bodied working men and women a fair day’s pay for a fair day’s work. A self–supporting and self–respecting democracy can plead no justification... [and] \textit{no economic reason for chiseling workers’ wages or stretching workers’ hours}. . . . All but the hopelessly reactionary will agree that to conserve our primary resources of manpower, Government must have some control over maximum hours, minimum wages . . . and the exploitation of unorganized labor.\textsuperscript{36}
\end{quote}

\textbf{B. The FLSA Is Born}

The next big movement in labor regulation history was the enactment of the FLSA itself. While some contend that the FLSA is a labor regulation that doesn’t go far enough to protect the workforce, others argue that it is

\begin{flushright}
\textsuperscript{33} Perkins v. Lukens Steel Co., 310 U.S. 113, 131–32 (1940) (holding that “[t]he interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and [the Court is] quite satisfied, that such a power was never intended to be given to them.”).
\textsuperscript{34} See N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (holding that the wage and hour regulation in the National Labor Relations Act fell under Congressional authority).
\textsuperscript{36} Message from President Franklin D. Roosevelt, supra note 35 (emphasis added).
\end{flushright}
a classic example of congressional overreach into private or state matters. No matter the opinion, the history of the Act remains the same. On June 25, 1938, President Roosevelt’s signature created the Fair Labor Standards Act of 1938, a “landmark law in the Nation’s social and economic development.” Although this version of the FLSA covered less of the workforce than today’s FLSA, applying only to large industries, it was the first federal law of its kind to ban child labor, implement a minimum wage, and mandate the maximum number of hours for a normal workweek.

Private companies were quick to challenge the FLSA’s constitutionality and not long after its enactment, Fred W. Darby, of Darby Lumbar Company, was indicted for FLSA violations. Darby challenged the indictment, and the Supreme Court again faced the decision of whether Congress had the constitutional power to regulate labor. The Supreme Court ultimately held that regardless of a state’s laws, Congress did possess such regulatory power, through its authority to regulate interstate commerce. From then on, the FLSA has protected American workers from unfair wages and uncompensated over–time work.

C. The White–Collar Exemption Emerges

The FLSA’s protections, from its inception till now, have never covered all employees. As originally enacted, the Act was riddled with exceptions—and these exceptions have only multiplied over time. When Congress initially approved the FLSA, the Act mandated a minimum wage

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38 Id. (the original FLSA applied only to industries “whose combined employment represented only about one–fifth of the labor force.”).

39 U.S. v. Darby, 312 U.S. 100 (1941) (specifically sections 15(a)(1), (2), and (5)).

40 Id. (Darby unsuccessfully argued that “Congress did not have the authority under the guise of regulation of interstate commerce to regulate wages and hours within the state contrary to the policy of the state not to regulate wages and hours.”); LES A. SCHNEIDER, J.D. & J. LARRY STINE, J.D., WAGE AND HOUR LAW: COMPLIANCE AND PRACTICE, *FAIR LABOR STANDARDS ACT OF 1938* (FLSA)—HISTORY OF WAGE AND HOUR LAWS PRIOR TO PASSAGE OF FLSA § 1:4, (NOV. 2017 UPDATE), Westlaw.

41 Darby, 312 U.S. at 114. (“Congress . . . is free to exclude from commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.”).


43 Id.
and overtime pay protection; meaning that employers must pay their employees time-and-a-half overtime wages (a rate of 1.5 times their hourly wage), for any additional hours worked beyond the 40-hour workweek.\textsuperscript{44} However, exempt from the overtime pay protection was any employee working in a bona fide executive, administrative, or professional capacity.\textsuperscript{45} This exemption, eventually coined “the white-collar exemption,” allowed employers to avoid paying overtime wages to any employee they deemed to be “executive, administrative, and professional.”\textsuperscript{46}

On October 20, 1938, Elmer F. Andrews, the first DOL Wage and Hour Administrator, released the contours of the white-collar exemption in a two-column regulation printed in the Federal Register.\textsuperscript{47} He defined both executive and administrative as employees charged with the “primary duty” of “management of the establishment,” who did not perform a “substantial amount of work of the same nature as” the rest of the employees.\textsuperscript{48} A professional would have a special education and his or her work would be “predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work” and involve “discretion and judgment both as to the manner and time of performance, as opposed to work subject to active direction and supervision.”\textsuperscript{49}

\textbf{D. The Salary Threshold is Created}

The first notable adjustment to the white-collar exemption was in 1940 when the salary-based requirement first appeared. Philip B. Fleming, the second Wage and Hour Administrator, redefined the terms executive, administrative, and professional.

\textsuperscript{44} For example, if a worker made $6.00 an hour, he or she would be paid $9.00 ($6.00 x 1.5) for every hour over 40 hours that he or she worked in one week. Thus, if he or she worked 45 hours in one week, he or she would be paid $240.00 ($6.00 x 40 hours) plus $45.00 ($9.00 x 5 hours) for that week. \textit{Id.; see} Fair Labor Standards Act of 1938, Pub. L. No. 75–781, 52 Stat. 1060 §§ 4, 6, 7, and 13.

\textsuperscript{45} \textit{W HITTAKER, supra note 42; 29 U.S.C. § 213 (a)(1) (West); 29 U.S.C. § 202. Although these workers were also exempt from the minimum wage mandate, this note focuses only on the overtime pay mandate.}


\textsuperscript{47} \textit{W HITTAKER, supra, note 42 (the Act also created the Wage and Hour Division of the DOL, which was to be headed by an Administrator “appointed by the President with the advice and consent of the Senate.”).}

\textsuperscript{48} Regulations Defining and Delimiting the Terms “Any Employee Employed in a Bona Fide Executive Administrative, Professional, or Local Retailing Capacity, or in the Capacity of Outside Salesman”, 3 Fed. Reg. 2518, 2518 (Oct. 20, 1995) (to be codified at 29 C.F.R. § 541.1(a) (1940 supp.)).

\textsuperscript{49} \textit{Id.}
administrative, and professional—adding to each a minimum salary threshold to determine if the employee’s position in fact warranted an exemption from overtime pay, based on his or her white-collar position.\textsuperscript{50} This time, executive and administrative were given separate definitions.\textsuperscript{51} An executive was someone whose primary duty consists of management,\textsuperscript{52} who directed other workers, had the authority to hire or fire other employees, exercised discretionary powers, and spent no more than 20\% of his or her work hours completing tasks similar to the tasks of the employee’s he or she managed.\textsuperscript{53} An executive was only exempt\textsuperscript{54} from the overtime protection if he or she was paid at least $30 per week.\textsuperscript{55} An administrative employee was only exempt if he or she was paid at least $200 per month.\textsuperscript{56}

Furthermore, a professional was only an exempt employee if he or she was paid at least $200 per month.\textsuperscript{57} Thus, \textit{the salary basis test}—the concept of basing which employees should be exempt from receiving overtime wages on the employees’ salaries, was born.\textsuperscript{58} This test dictated the definition of the white-collar exemption for the next sixty years.\textsuperscript{59}

\section*{E. Raising The Salary Threshold}

The next notable overhaul of the white collar exemption was in 2004, under the Bush Administration.\textsuperscript{60} On March 31, 2003, Wage and Hour Administrator Tammy McCutchen posted a “proposed rule with request

\begin{Verbatim}
\textsuperscript{50} \textsc{Whittaker}, supra note 42, at 6–7 (the adjustment was published in the Federal Register).
\textsuperscript{51} Id. at 7.
\textsuperscript{52} Regulations Defining and Delimiting the Terms “Any Employee Employed in a Bona Fide Executive, Administrative, Professional, or Local Retailing Capacity, or in the Capacity of Outside Salesman,” 5 Fed. Reg. 4077–4078 (Oct. 15, 1940) (to be codified at 29 C.F.R. 541.1 (1940 supp.)).
\textsuperscript{53} Id. (The 20\% restriction “shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment.”).
\textsuperscript{54} Id. (an “exempt” employee is someone who was not guaranteed to be paid overtime wages by the FLSA, because he or she falls in to the white–collar exemption category).
\textsuperscript{55} Id.\textsuperscript{56} \textsc{Whittaker}, supra, note 42, at 8 (quoting regulations defining and delimiting the terms “Any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman,” 5 Fed. Reg. 4077–4078 (Oct. 15, 1940) (to be codified at 29 C.F.R. 541.1 (1940 supp.))).
\textsuperscript{57} \textsc{Whittaker}, supra note 42, at 8.
\textsuperscript{58} Id. at 10.
\textsuperscript{59} Id. at 8.
\textsuperscript{60} 29 C.F.R. § 541 (2004).
\end{Verbatim}
for comments” in the Federal Register.\footnote{Defining and delimiting the exemptions for executive, administrative, professional, outside sales and computer employees, 68 Fed. Reg. 15560–97 (Mar. 31, 2003) (to be codified at 29 C.F.R. pt. 541 (2004)).} The proposed rule raised the salary threshold for all exempt white–collar workers to $22,100 per year\footnote{WHITTAKER, supra note 42, at 26 (anyone earning less than the new threshold would automatically be eligible for overtime pay on the basis of low earnings).} and required those who met the threshold to also meet a duties test.\footnote{See id. at 29 (the white–collar exemption was updated in three ways: 1) raising the salary threshold for all exempt white collar workers to $22,100 per year and requiring those who meet the threshold to also meet a duties test; 2) creating a new highly compensated threshold, in which anyone earning more than $65,000 a year and performing any task associated with white collar status could be exempt; and 3) defining parts of the duties test to include what the employee actually does, his or her relationship to the employer or the firm, the relative importance of the executive, administrative, or professional duties, an employee’s freedom of judgment and initiative, and the education required of a professional).}

By the time the comment period closed a few months later, over 75,000 comments were posted in response to the proposed rule and a public policy debate ensued over the raised salary threshold.\footnote{Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122–01, (April 23, 2004) (to be codified at 29 C.F.R. pt. 541) (“During a 90–day comment period, the Department received 75,280 comments from a wide variety of [people]. . . . [The] proposal prompted vigorous public policy debate. . . . The public commentary revealed significant misunderstandings regarding the scope of the ‘white collar’ exemptions, but also provided many helpful suggestions for improving the proposed regulations.”).} Many companies were not in favor of the proposed rule because raising the salary threshold for the white–collar exemption meant companies would have to either pay their employees a higher salary, or have to pay them over–time wages for any time they worked over forty hours a week. However, despite mixed feedback, on April 23, 2004, the DOL announced enactment of this rule on overtime pay.\footnote{Id.} Those in opposition to the DOL’s regulation, attempted, but were overall unsuccessful, in nullifying its enactment.\footnote{A Bill (S. 2810), requiring reinstatement of the pre–2004 overtime regulations, an end–of–session omnibus spending bill funding the DOL and several other agencies during FY2005 (H.R. 4810) that initially contained language rescinding the new overtime regulations, failed; WHITTAKER, supra note 42, at 84. (2005) (quoting a senior Senate GOP aide, who said that the overtime pay provision “will be stripped from an omnibus appropriations bill . . . [because it’s] controversial, . . . time consuming, and the president won’t sign [it].”).}
II. CONFLICT: THE PUSHBACK AGAINST THE DOL’S ATTEMPTS TO UPDATE THE FLSA

The theme of challenging the DOL’s authority to enact regulations continues today, with the heavy opposition to the DOL’s newest proposed regulation—the Final Rule. Meanwhile, the FLSA, rendered useless and ineffective in achieving its goals by its outdated regulations, lays in wait for someone to revive it.

A. The First Wave

Amidst the first wave of pushback, in response to the 2004 regulation, the DOL defended its authority to raise the salary threshold. The DOL asserted that it had the congressionally-granted authority to define which employees were white-collar workers, exempt from overtime protections—and it had been doing so for centuries. The DOL explained that the white-collar exemption existed in the first place, “premised on the belief that the [white-collar] workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers [who were] entitled to overtime pay.”

Further, the DOL explained that the “type of work [exempt white-collar workers] performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA’s time-and-a-half overtime premium.” The DOL relied on Congress’ explicit authorization to enact such defining regulations, found in section 13(a)(1) of the FLSA, stating that “because the FLSA delegates to the Secretary of Labor the power to define and delimit the specific terms of these exemptions through notice-and-comment rulemaking, the regulations so issued have the binding effect of law.”

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68 Id.
69 Id. (internal quotations omitted).
70 Id. (internal quotations omitted).
71 29 U.S.C. § 213 (a)(1) (2016) (West) (“any employee employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary”) (emphasis added).
McCutchen’s new regulation brought the purpose of the white–collar exemption back into focus. The white–collar exemption, as designed, sought to exclude those members of the work force, who were already highly compensated, from the FLSA’s overtime pay protection. This overtime pay protection ordinarily ensured that an employer was not taking advantage of its employees by forcing employers to compensate its employees appropriately (time–and–a–half wage) for any hours he or she had worked beyond the federally mandated 40–hour workweek. This protection was simply not necessary for the high–powered executive who worked 60 hours a week as a company’s CFO or operations manager, because he or she presumably had a high salary and the privilege of fringe benefits—thus the exemption. But when companies began to classify their employees as “white–collar” administrative or managerial, in order to reap the benefits of not having to pay them overtime wages, the overtime pay protections lost their luster.

McCutchen’s regulation attempted to return some of the FLSA’s overtime pay protections because the revamped salary threshold and duties test made it more difficult for employers to avoid paying their employees overtime wages, by appropriately narrowing the category of workers that fell into the exemption. However, considering that a salary of $22,100 (the new threshold salary) was still below the current official poverty income, of $24,257 for a family of four, and only marginally above the $18,871 poverty threshold for a family of three, McCutchen’s regulation does not go far enough to ensure that the right category of employees is exempt from overtime pay protection.73 That is, the white–collar exemption still allows an employer to legally avoid paying its poverty–level employees federally mandated time–and–a–half wages for overtime work, by classifying those employees as “white–collar.” This classification is in spite of the fact that those employees, not otherwise compensated for their overtime through fringe benefits or high salary, are exactly the class of people the overtime pay protections were designed to help.

B. The Next Regulation Update: The Final Rule

The DOL’s next attempt to update the FLSA came in the form of the Obama Administration’s Final Rule. President Obama had addressed the issue of the shrinking middle class and income inequality many times

during his terms. And like many before him, he vowed to return the American middle class to prosperity. Effective December 1, 2016, the Final Rule provided the necessary salary threshold raise that would extend overtime pay protections to over 4 million workers who needed it within the first year of implementation. The Final Rule advanced President Obama’s commitment to income equality, that is the “goal of ensuring workers are paid a fair day’s pay for a hard day’s work,” by ensuring low salaried workers were not precluded from receiving overtime pay because of a false classification as a white–collared worker—who presumably was already compensated through a high salary and fringe benefits. The Rule expands overtime pay protections to workers with low salaries and long hours who were previously exempt from overtime pay simply because their tasks included some managerial duties.

The DOL again articulated its reasoning for the update, stating that “[t]he exemption is premised on the belief that these kinds of [white–collared] workers typically earn salaries well above the minimum wage and enjoy other privileges, including above–average fringe benefits, greater job security, and better opportunities for advancement, setting

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78 Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 29 CFR § 541 (2016).
79 Supra note 77, at 6.
them apart from workers entitled to overtime pay." The DOL further explained that since 1940 the salary level test was the “best single test” to define exempt white-collar workers. The Final Rule updates the threshold for the salary test to $47,476 annually, almost double the previous $23,660 threshold. The DOL calculated the Final Rule’s salary threshold at the “40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South)." In addition, the DOL provided for automatic updates of the salary threshold every three years to ensure the exemption actually maintained its intended purpose over time. Put simply, under the Final Rule, a full time employee who makes less than $47,476 a year is protected by the FLSA’s overtime pay safeguards—such an employee must be paid overtime wages for any time worked beyond a 40–hour workweek.

C. The Second Wave

The DOL faced strong pushback from employers who viewed the Final Rule’s salary threshold increase as “drastic." Employers vehemently oppose the increase because there are over 4 million workers who are currently exempt from the FLSA overtime protections, but who would become eligible for federally mandated overtime pay under the new rule. The Final Rule gives employers 3 options, all of which hold heavy

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81 According to the DOL, the FLSA “delegates to the Secretary of Labor the authority to define and delimit the terms of the exemption.” Supra note 77, at 6.
82 Id. at 7.
83 DEP’T OF LABOR, supra note 76.
84 Supra note 80, at 7. (“The Department believes that a standard salary level set at the 40th percentile of full-time salaried employees in the lowest-wage Census Region will accomplish the goal of setting a salary threshold that adequately distinguishes between employees who may meet the duties requirements of the [white collar] exemption and those who likely do not.
85 Supra note 80, at 8–9; see also, Questions and Answers, WAGE AND HOUR DIV., THE U.S. DEP’T OF LABOR (2016), https://www.dol.gov/whd/overtime/final2016/faq.htm#8 (the Department believes that regularly updating the salary and compensation levels is the best method to ensure that these tests continue to provide an effective means of distinguishing between overtime-eligible white collar employees and those who may be bona fide EAP employees).
88 Id. (Employers will have to either raise salaries or start paying overtime wages to the 4.2 million employees who will be covered under the “Final Rule.”).
financial ramifications for employers. Employers can either: 1) pay these workers time–and–a-half for all hours worked in excess of 40 hours each week, 2) limit these workers’ hours to only 40 hours per week without changing their salary, or 3) raise these workers’ salary to $47,476 so they can continue to work beyond 40 hours per week without overtime pay.89

Employers, motivated by these ramifications, successfully blocked the Final Rule in court.90 Less than two months before the Final Rule’s effective date, over fifty business organizations moved for expedited summary judgment on the constitutionality of the Final Rule, asking the Eastern District of Texas for a preliminary injunction.91 And just 9 days before the Final Rule’s effective date, the court granted the Plaintiff’s Emergency Motion for Preliminary Injunction and enjoined the DOL from implementing or enforcing the Final Rule.92 Though the DOL initially filed a notice of appeal to the U.S. Circuit Court of Appeals for the Fifth Circuit, under new leadership of the Trump administration, it has since dismissed its appeal.93 Meaning that, for now, the decision of the Texas court stands, and the Final Rule has yet to be effectuated.

D. The Rebuttal

These waves of opposition ignore the fact that an increase in salary threshold is necessary to effectuate the purpose of the white–collar exemption—as the previous salary threshold was below the poverty line.94 Congress intended the white–collar exemption to exempt only those employees in a position with salaries and fringe benefits “well above” that of the workers they supervise—not employees living at or below the poverty line.95 Employers’ position that changing the status quo is unfair because costs it them big money, is senseless. For years, employers have

89 Id.
94 Id.
been able to skirt the FLSA’s overtime pay mandates through exploiting the white–collar exemption. Arguing that employers should be able to continue the exploitation just because they have gotten away with it for so many years is inapposite to the very rule of law the FLSA stands for: a fair day’s pay for a fair day’s work.

III. Resolution: Congress Enacting the Final Rule is the Answer to the DOL’S Opposition and to the Problem of the Shrinking Middle Class

The companies shirking millions of dollars in the costs of complying with the Final Rule have successfully blocked implementation of the Rule, leaving only Congress with the power and the responsibility to enforce the Final Rule itself. While the Texas court incorrectly concluded that “29 U.S.C. § 213(a)(1) does not grant the Department the authority to utilize a salary–level test or an automatic updating mechanism under the Final Rule,” Congress can reaffirm that it vested that requisite power in the DOL through the FLSA.

A. Why The Court Got It Wrong

Contrary to the court’s conclusion, enacting the Final Rule was well within the DOL’s scope of authority, as granted by Congress through the FLSA. And lengthy Supreme Court precedent supports Congressional authority to regulate wages and hours. The Supreme Court has already previously turned down challenges to the constitutionality of federal regulations on wage and hours. Specifically, in Garcia, the Court

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96 Booker, supra note 90 (“[P]laintiffs [the State of Nevada, Et Al] . . . said the new overtime rules would have caused an uptick in government costs in their states and [would make] it mandatory for businesses to pay millions in additional salaries.”).
98 Nevada, 218 F. Supp. 3d at 528 (the court concluded that Section 213 (a)(1) was not clear and therefore a look into congressional intent determined that the DOL did not have the authority to implement the Final Rule, in part because there was no intent to impose an automatically updating salary minimum for the white–collar exemption).
101 See Garcia, 469 U.S. at 554; see also Darby, 312 U.S. at 113 (holding that Congress may regulate, anything under the commerce clause, they conceive to be “injurious to the
established that Congress possessed the authority under the Commerce Clause to impose the FLSA’s minimum wage and overtime requirements on state and local employees, regardless of the argument that such regulation should be left up to the states.\(^1\)

The DOL is authorized to dictate the boundaries of the white collar exemption because Congress delegated to it the power to define and delimit the terms “bona fide executive,” “administrative,” and “professional” in section 213 (a) (1) of the FLSA.\(^2\) The DOL possesses authority to implement the “Final Rule” directly from the language of the FLSA itself.\(^3\) Congress explicitly delegated to the Secretary of Labor, the head of the DOL, the authority to define and construct boundaries on the terms “executive,” “administrative,” or “professional,” as they apply to potentially exemptible employees.\(^4\) Section 213(a)(1) of the FLSA explicitly states that the minimum wage and overtime protections of the FLSA do not apply to “any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary. . . .).”\(^5\)

For over 70 years the DOL has exercised this authority by issuing regulations defining and delimiting terms “executive,” “administrative,” or “professional,” in light of the white-collar exemption.\(^6\) When the authority of the DOL’s regulations has been challenged in court, courts have held that “the validity and binding effect of the [DOL’s FLSA] regulations is well established.”\(^7\) Scholars in the wage and labor field

\(^1\) Garcia, 469 U.S. at 554.

\(^2\) Id.

\(^3\) Id.


\(^5\) Id.

\(^6\) Id.

\(^7\) William G. Whittaker, The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13(a)(1), CONGR. RES. SERV., RL32088, 9 (2005) (discussing the second set regulations the DOL issued in regards to the FLSA, enacted 2 years prior) (quoting Regulations Defining and Delimiting the Terms “Any Employee Employed in a Bona Fide Executive, Administrative, Professional, or Local Retailing Capacity, or in the Capacity of Outside Salesman”, Pursuant to section 13 (a) (1) of the Fair Labor Standards Act, 5 FR 4077–4078 (Oct. 15, 1940)).

\(^8\) Mitchell v. Budd, 350 U.S. 473, (1956) (holding that the regulation defining the term “area of production” in the FLSA, for purposes of exemption accorded those engaged in agricultural enterprises in the “area of production,” was valid).
agree that because Congress delegated the authority to the DOL, so long as the DOL’s FLSA regulations “are reasonable, the courts must follow the regulations as if Congress enacted them.”

Courts typically apply a two-step process “when reviewing an agency’s construction of a statute.”110 A court first determines “whether Congress has directly spoken to the precise question at issue.”111 If Congressional intent is clear, the court must interpret the agency’s construction of a statute in line with the congressional intent.112 Here, Congress could not have spoken more directly to the precise question at issue. The question of whether the DOL can implement a minimum salary threshold of its choosing to define the terms “executive,” “administrative,” or “professional” is directly answered by Congress’s articulation that “such terms are defined and delimited from time to time by regulations of the Secretary [of Labor].”113

If Congress has not spoken directly to the issue, then courts must continue on to the second step, in which courts defer to the agency’s interpretation unless it is “arbitrary, capricious, or manifestly contrary to the statute.”114 But, because Congress so unambiguously expressed its intent in section 213 (a) (1) of the FLSA to delegate the contours of the white collar exemption to the Secretary of Labor, there is no need to explore Congressional intent beyond the plain language of the FLSA. And even if courts were to move on to step two, a salary threshold is not arbitrary, capricious, or manifestly contrary to section 213 (a) (1) of the FLSA.

The court in the Eastern District of Texas incorrectly held that “Congress defined the [white collar] exemption with regard to duties, which does not include a minimum salary level.”115 The court reasoned that the plain meaning of “bona fide” and its placement in the statute indicated Congress intent that the white collar exemption to apply based

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112 Id. at 842–43 (“If the intent of Congress is clear, . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).
113 29 U.S.C. § 213 (West 2018); Walling v. Yeakley, 140 F.2d 830, 831 (10th Cir. 1944) (The plain meaning of “define” is to “state explicitly; to limit; to determine the essential qualities of; to determine the precise signification of; to set forth the meaning or meanings of,” and the plain meaning of “delimit” is “to fix or mark the limits of; to demarcate; bound.”).
115 Id.
upon the tasks an employee actually performs.\textsuperscript{116} However, this logic falls short because after decades of DOL regulations implementing a salary minimum to the white collar exemption, Congress never amended the FLSA to prohibit such “non intended” classifications of administrative, executive, or professional.\textsuperscript{117} While it was up to the Fifth Circuit to correct the Eastern District of Texas’s misinterpretation of the FLSA, the new administration’s decision to forfeit the appeal leaves Congress as the only possible reprieve.\textsuperscript{118}

B. A Call for Congressional Action

The Eastern District Court of Texas hit the nail on the head when it articulated that “[i]f Congress intended the salary requirement to supplant the duties test, then Congress, and not the Department, should make that change.”\textsuperscript{119} Congressional action would still be the most constitutionally sound avenue of enacting the “Final Rule,” and delegating to the DOL the once and for all undeniable authority to enact any salary threshold’s going forward.

An amendment to section 213(a)(1) of the FLSA could dispel any future disagreement or confusion on what branch holds the power to define the white-collar exemption. Adding the phrase “in whatever way the Secretary sees fit” to the end of the delegating sentence in section 213(a)(1) would instill a broader authority for the DOL to define the white-collar exemption. Furthermore, adding the specific phrase “including a salary threshold” would specifically address the issue without granting the DOL any more authority than necessary. A version of Section 213(a)(1) that reads “any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary, in whatever

\textsuperscript{116} Id.

\textsuperscript{117} Id. (The State of Nevada stated that there has been no congressional action because the minimum salary threshold was set so low before the DOL’s Final Rule).

\textsuperscript{118} Kate Tornone, DOL abandons overtime rule, asks court to OK salary threshold concept, HR DRIVE (June 30, 2017), https://www.hrdrive.com/news/dol-abandons-overtime-rule-asks-court-to-ok-salary-threshold-concept/446257/; Sean Higgins, Trump court filing could be the end of Obama overtime rule, WASH. EXAMINER, (Jan. 25, 2017, at 3:53 PM) http://www.washingtonexaminer.com/trump-court-filing-could-be-end-of-obama-overtime-rule/article/2612960 (explaining how the executive branch, on behalf of the DOL, requested a continuance until March 2, affording the new administration more time to submit its brief in support of the constitutionality of the DOL’s “Final Rule”—interesting because of the fact that president elect Donald Trump previously sided with the State of Nevada and larger corporations, voicing his opposition to the “Final Rule.”).

\textsuperscript{119} See Nevada, 218 F. Supp. 3d at 531.
way the Secretary sees fit, including a salary threshold. . . )" would solidify the DOL’s authority to define the white collar exemption.\textsuperscript{120}

Time and time again, courts have answered the question of which branch of government holds the power to make laws. The simple answer is the legislative branch of course. The longer answer is, the legislative branch—unless it gives away that power in statute to another branch. Here, the decades long struggle over the power to define the white–collar exemption, between the executive branch (the DOL), the judicial branch, and the legislative branch could be resolved once and for all with congressional action reaffirming the power of the DOL to define the white–collar exemption with a salary threshold. Although Congress has unsuccessfully attempted to pass legislation on the DOL’s Final Rule, the issue is ripe again to ensure the Final Rule and its salary threshold is effectuated.\textsuperscript{121}

IV. CONCLUSION: THE CORRELATION BETWEEN EFFECTIVE FLSA PROTECTIONS AND A STRONG MIDDLE CLASS

Let’s go back to why all of this matters. Recall Thompson and how his rise to the middle class exemplified a previous generation’s experience in the workforce. Thompson was lucky enough to be a part of the workforce when the FLSA’s protections were at their heights. But, considering how the FLSA’s once–shiny–new protections have dulled over time, begs the question: how does the average worker fare today? It’s now time to meet the current example of today’s average workforce member, who unlike Thompson, is not protected by the FLSA.

A. Meet Elizabeth

Elizabeth, like many others, is over worked and underpaid, and slowly losing faith in the American Dream.\textsuperscript{122} She is the mother of a three–year–old boy and works as an assistant manager at a sandwich shop.\textsuperscript{123} She earns about $24,000 yearly, routinely working 50 hours a week, sometimes even more, but “because of the outdated overtime regulations, she doesn’t have to be paid a dime of overtime.”\textsuperscript{124} Elizabeth is bordering the poverty–line,

\textsuperscript{120} 29 U.S.C. § 213 (West 2018).
\textsuperscript{121} See Protecting Workplace Advancement and Opportunity Act (PWAOA) (H.R. 4773, S.B. 2707), (if passed, would require the Secretary of Labor to void the Final Rule).
\textsuperscript{123} Id.
\textsuperscript{124} Id.
while oddly enough qualifying as a privileged white-collar worker, exempt from the FLSA’s overtime pay protections, because she presumably doesn’t need them. Elizabeth is the kind of worker that the FLSA sought to protect with its overtime pay protections. But right now, the FLSA fails to protect her and others like her because the outdated salary threshold no longer exempts only those employees who are compensated and rewarded past the need for FLSA overtime protection. While stories like Thomson’s were once a dime-a-dozen, stories like Elizabeth’s unfortunately are the dime-a-dozen today.

B. Recall Thompson

The enactment of the FLSA and its overtime protections encouraged Thompson’s upwards advancement in Downey in the 1960’s, just as it encouraged the growth of the middle class. In the 1960’s, the “white-collar exemption” exempted only employees who did not need overtime protection because their salaries compensated them enough already.\(^{125}\) Back then, the DOL’s salary threshold under the white-collar exemption was $150.00 per week.\(^{126}\) Therefore, Thompson, at $2.95 an hour, made $103.60 in forty hour work week and was afforded the FLSA’s overtime protections.\(^{127}\) As such, Thompson was appropriately paid overtime wages (1.5 times his hourly pay) for any hour he worked beyond the average 40-hour work week, helping him climb from the working class to the middle class.\(^{128}\) In other words, in the 1960’s, the FLSA properly protected middle and working class workers from working over forty hours a week without being compensated—and appropriately exempted only those workers who were living above the poverty line from that protection. This is the strong middle class we should aspire to return to, the one that took America to the moon.\(^{129}\)

\(^{125}\) Annual Statistical Supplement, 2014 – Poverty (Table 3.E8), SOCIAL SECURITY ADMINISTRATION, https://www.ssa.gov/policy/docs/statcomps/supplement/2014/3e.html#table3.e8 (showing that the poverty line for a family of four in 1965 was $3,223.00 per year).

\(^{126}\) Meaning that, according to the FLSA, anyone making less than $150.00 per week must be compensated for working over forty hours a week. Whereas anyone making over $150.00 per week did not need to be compensated for working over forty hours a week. 28 Fed. Reg. 9505, 9506 (Aug. 30, 1963); see also 28 Fed. Reg. 9782 (Sept. 6, 1963).

\(^{127}\) Tankersley, supra note 1; History of California Minimum Wage, CAL. DEP’T OF INDUS. REL., http://www.dir.ca.gov/iwc/minimumwagehistory.htm (listing the minimum wage in California by year; in 1965, California’s minimum wage was $1.30).

\(^{128}\) See Tankersley, supra note 1.

\(^{129}\) Id.
C. The Difference

The ineffectiveness of the FLSA’s initial protections today is the missing link. President Obama used Elizabeth’s story to illustrate the struggle of the countless middle class Americans who work overtime without being compensated for doing so—because of the FLSA outdated regulations.130 He articulated that “the 40–hour workweek and overtime are two of the most basic pillars of a middle class life . . . [and yet despite our ever–changing economy], our overtime rules have only been updated once since the 1970s.”131 Forty years ago “more than 60 percent of workers were eligible for overtime based on their salaries” but today “that number is down to seven percent.”132 Whereas the FLSA protected workers from exploitation and encouraged income equality for most of the workforce (60 percent) during Thompson’s career, it barely touches the workforce today (7 percent). Elizabeth’s story is what that difference looks like: teetering on the edge of poverty and working class, yet ineligible for overtime pay protection because of her obviously inaccurate classification as a white–collar worker.

Contrast Thompson’s story with Elizabeth’s. She earns about $24,000 yearly, working 50 hours a week.133 If the new salary threshold of the Final Rule were implemented, she would be protected by the FLSA’s overtime wage protections—just as Thompson was. She would be protected because her current salary is well below the $47,476 threshold the Final Rule proposes. As such, she would receive time–and–a–half pay for those 10 extra hours a week she works. Based off a normal 40–hour week, Elizabeth earns about $11.50 an hour, so her overtime wages, at 1.5 times her normal wages, would be $17.25. Thus, Elizabeth would bring home an extra $8,970 yearly at her current pace of working 50 hours a week. This would put Elizabeth at $32,970 yearly, pulling her away from the edge of poverty—and closer towards the middle class.

D. Concluding Remarks

Today, the salary threshold of the white–collar exemption is so low that a worker living in poverty is exempted from receiving overtime time

130 See THE WHITE HOUSE, supra note 122.
131 Id.
132 Id. (emphasis added).
133 Id.
wages. Because the salary threshold has not been updated since 2004. Undoubtedly, the so called “white-collar” exemption fails to protect the appropriate category of today’s American workers from unpaid overtime work. Congressional action to ensure that the salary threshold is properly raised, and continues to be raised over the years, will improve the FLSA’s effectiveness in protecting—not hurting—the middle class.

The Final Rule, as one of Obama last actions, sought to take “a step to help more workers get the overtime pay they’ve earned.” “[I]t was one of [his] most far-reaching efforts to boost pay for workers at the lower end of the income ladder,” but with its effective date still unknown, the legislative branch is the last authority left standing to implement the change the middle class needs in the battle for income equality. President Obama remarked, “this is the single biggest step I can take through executive action to raise wages for the American people.” And with the Final Rule currently blocked in the courts, the next step is Congress’ to take. Under the Final Rule, workers like Elizabeth will no

134 Questions and Answers, Wage and Hour Division, U.S. Dep’t of Labor, https://www.dol.gov/whd/overtime/final2016/faq.htm#8 (2016) (The DOL explains that the “the annualized equivalent of the standard salary level is below the 2015 poverty threshold for a family of four, making it inconsistent with Congress’ intent to exempt only “bona fide” [white collar] workers, who typically earn salaries well above those of workers they supervise and presumably enjoy other privileges of employment such as above average fringe benefits, greater job security, and better opportunities for advancement.”).


136 Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 29 C.F.R. § 541.100 (2016), https://www.federalregister.gov/documents/2016/05/23/2016-11754/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales (“The [DOL] believes that a standard salary level set at the 40th percentile of full–time salaried employees in the lowest–wage Census Region will accomplish the goal of setting a salary threshold that adequately distinguishes between employees who may meet the duties requirements of the [white collar] exemption and those who likely do not. . . .”).

137 Id. (“The [DOL] believes that regularly updating the salary and compensation levels is the best method to ensure that these tests continue to provide an effective means of distinguishing between overtime–eligible white collar employees and those who [are not]”).

138 See The White House, supra note 122.


140 Id. In 2014, President Obama signed a Presidential Memorandum instructing the DOL to update the FLSA regulations defining which white–collar workers the FLSA’s minimum wage and overtime pay standards protect. (“[T]he memorandum instructed the Department to look for ways to modernize and simplify the regulations while ensuring that the FLSA’s intended overtime protections are fully implemented.”); see also Updating and Modernizing Overtime Regulations, 79 Fed. Reg. 18737 (Apr. 3, 2014).
longer be forced to work over 40 hours a week without being properly compensated—strengthening the middle class rather than shrinking it. With a robust middle class again, the possibilities for America are endless. Who knows, maybe this time the middle class will take America to Mars.