“Time and a Half’s the American Way”

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

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The analogy is not proper.... A butler is a laborer or workman. These are not laborers; these are actors and actresses. They develop entertainment for the American public and improve employment.¹

Our greatest primary task is to put people to work.²

We are making two rather definite efforts. The first is to spread employment over a very large number of people, as, for instance, in certain factories and certain industries where the work can be spread out over a larger number of people. The second principle is to prevent any one individual man, woman or child, from working too many hours at a time in any twenty-four hours.³


²Franklin D. Roosevelt, First Inaugural Address, in Franklin D. Roosevelt, Selected Speeches, Messages, Press Conferences, and Letters 90-95 at 92 (Basil Rauch ed. 1957 [Mar. 4, 1933]).

³Franklin D. Roosevelt, Press Conference #11 (Apr. 12, 1933), in Roosevelt, Selected Speeches at 103-106 at 104.
Prolog: "Brain Toilers" under the Alien Contract Labor Immigration Laws from the 1880s to the 1930s

Presidents of...corporations do not generally act as workmen, clerks, or servants, but exercise authority over these classes, occasionally arbitrary and oppressive, but always in a way to let them know the president is not one of them. There is no evidence...that Mr. Slocumb...did any work; no evidence he kept the books, or even the minutes of the corporation, as clerk, or acted in the capacity of servant. He was not a servant, for he had no master over him, but was presumably supreme in the body. Men who have attained position, and in their own minds regard themselves as rulers, often in a bombastic way proclaim themselves the servants of the people.... Possibly, in this way, a president of a commercial corporation may regard himself as the servant of the corporate body, but this is not what is contemplated in the [bankruptcy] statute. The classes to whom it was evidently the intention of congress to give priority is that class who labor and serve....

Even late-nineteenth- and early-twentieth-century legislatures, courts, and administrative agencies in the United States had constructed a relatively consistent image of protection-worthy blue-collar workers and white-collar employees not in need of such protection. To be sure, that conception was not monolithic, and the latter were not always and everywhere deemed individually capable of looking after their own interests. That the two groups were not always regarded as rigidly dichotomous, even in the nineteenth century, is especially significant since the socio-economic gulf between them was considerable. The legal regimes under review here may have been substantively far removed from overtime regulation, but their stratum-specific differential conferral or denial of

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1In re Carolina Cooperage Co., 96 F. 950, 952-53 (E.D. NC 1899).

2Even earlier the British Parliament had entrenched the distinction in truck acts prohibiting the payment of wages otherwise than in money. For example, the Truck Act of 1831 covered "Artificers, Workmen, Labourers" and deemed "all Workmen, Labourers, and other Persons in any Manner engaged in the Performance of any Work, Employment, or Operation" as "Artificers," whereas "all Masters, Bailiffs, Foremen, Managers, Clerks, and other Persons engaged in the Hiring, Employment, or Superintendence of the Labour of any such Artificers, shall be and be deemed to be 'Employers'...." 1 & 2 Will. 4, ch. 37, §§ 19, 25 (1831). See also Marc Linder, The Employment Relationship in Anglo-American Law: A Historical Perspective 103-10 (1989).
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protection nevertheless sufficed to force government agents to reflect on the differences between blue- and white-collar workers and their relevance to the statutory purposes. The immigration-restriction statutes first enacted in the 1880s, which form the focus of this chapter, constitute a little-known but rich example of early governmental forging of blue-collar/white-collar discourse. Two appendixes devoted to the Dependent Pension Act of 1890 and lien, bankruptcy, corporate insolvency, and wage payment laws shed further light on the prehistory of what became dichotomous treatment.

A Brief Humanitarian Interlude

The structure of our civilization was growing more complicated. The worker was becoming less exclusively a producer. The “white-collar class” was increasing relatively as well as actually in numbers, though despite its high laundry bills it was still, in general and measured by economic terms, a section of “labor.”

One integrative judicial ruling was especially poignant. In the wake of the Triangle Waist Company fire in 1911 that killed 147 workers, the New York State legislature enacted a series of laws, including one in 1912 that amended the Labor Law to require building owners to install automatic sprinkler systems in factory buildings over seven stories or 90 feet in height in which wooden flooring or trim was used and more than 200 people were “regularly employed” above the seventh floor or more than 90 feet above ground level. Although 354 people were regularly employed above the seventh floor, the owner of the 16-story tenant factory and office building challenged the fire commissioner’s order to install the sprinklers on the grounds that only 140 of them were “employees” within the meaning of the Labor Law—namely, mechanics, workingmen, or laborers working for another for hire—whereas the other 214 comprised 52 office employees in

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3R[obert]. Duffus, “We Begin Our Greatest Labor Experiment,” NYT, Aug. 6, 1933 (sect. 9, 1:1).

41912 NY Laws ch. 332, at 661 (Apr. 15).

5The family was one of the large property owners in downtown district of Manhattan. “John Street History,” NYT, Dec. 17, 1917 (sect. 3, 45:4-5).

61909 NY Laws, ch. 36, § 2, in Labor Law, Consolidated Laws, ch. 31, at 2038 (1909). An earlier hours law applying to public works also covered mechanics, workingmen, and laborers. 1870 NY laws ch. 385, § 2 at 919.
factories, 62 employees in non-factory offices, and 100 employers of labor. Arguing that the term "employed" in the sprinkler provision had to be understood within the meaning of the Labor Law's definition of "employee," the owner claimed that all the employers and "non-factory employees, such as accountants, clerks, stenographers and the like should be excluded in making the count...."

That the owner and her lawyers, even in the immediate aftermath of the historic Triangle Waist fire, were not embarrassed to indulge in such pettifoggery was hardly surprising given the real estate industry's protests against the legislature's fire safety measures to begin with.

The state intermediate appeals court agreed with the owner that if the sprinkler provision had used the statutory term "employees," judicial precedent would have required exclusion of office employees and "persons employed in non-factory quarters." However, the court pointed out, the sprinkler provision in fact did not use that term: "the Legislature has with evident intention omitted to make the number of 'employees' the measure of the requirement...." Although the numbers in this particular case made it unnecessary to decide whether to include employers, the court was even willing to concede that, given the law's broad purpose of safeguarding human life and the omission of the "technical term 'employees,'" the government's contention might well be correct that "the expression 'people * * * employed' was used in the sense of 'persons engaged,' or occupants, and this notwithstanding the fact that in various sections of the Labor Law the term 'occupants' is more than once used in a technical sense as distinguished from 'employers.'" Leaving that question undecided, the judges turned to the broader definitional issue and found it "reasonably clear that all persons who work for hire are properly included in the phrase 'people * * * employed.' Where the statute in so many sections carefully uses the word 'employees' when it is obviously intended to refer only to workingmen, mechanics and laborers and fails to in this case, I see no reason for departing from the natural and customary

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8People ex rel. Cockcroft v. Miller, 187 A.D. at 712.

9One of the owner's lawyers, Harold R. Medina, 30 years later gained national notoriety as the federal judge presiding over the Smith Act convictions of 11 Communist Party officials.


meaning of the words and limiting it so as not to take into account all who are hired and regularly work for hire, simply because all persons who are hired are in a general sense employees and the term ‘employees’ as defined for specific purposes in certain sections refers only to workingmen, mechanics and laborers.”12

That the judges were swayed by humanitarian considerations to throw white-collar workers onto the scales when lives were palpably at stake, even though they had to give a somewhat careless legislature an interpretive helping hand, emerged from an aside that made it clear that even the presence of the “technical term ‘employees’” would not deter the court from an expansive construction if the public health interests were significant enough:

[T]here is one section of the law in which the word “employees” is specifically used where the plain intent of the law is to include all persons engaged in work. Take section 85, referring to size of rooms. It reads: “No more employees shall be required or permitted to work in a room in a factory *** than will allow to each of such employees, not less than two hundred and fifty cubic feet of air space.” There the meaning of the word “employees” as first used obviously means “persons,” for the purpose of the provision is to provide a certain amount of cubic feet of air space for the workingmen, laborers and mechanics. Persons other than employees would use up the air space just as effectively as workingmen and it would be impossible to obtain the requisite air space for employees, technically referred to, if a large number of clerks, stenographers and accountants were permitted to crowd into the room. What we are required to do is to interpret this provision liberally and so as to carry out the plain intent of the statute. While it may be generally true that the act was passed in the interest of workingmen and many of the provisions specifically refer to them, the intent of this “sprinkler section” was to protect human life from fire perils. The number of persons working on a given floor of a building or working above the seventh floor obviously has a direct relation to such a fire peril as panic. It, therefore, seems reasonable to conclude that the Legislature meant to make the measure of this particular requirement for sprinklers the presence of more than 200 people who are regularly employed above the seventh floor, giving the usual and ordinary interpretation to the words “people *** employed.”13

12People ex rel. Cockcroft v. Miller, 187 A.D. at 712-13. One dissenting judge would have ruled that “people...regularly employed” should have been construed broadly to include employers because the “panic risk increases with the number of people exposed, and is not limited by the question of whether they pay salaries and wages or are paid.” Id. at 715-16.

13People ex rel. Cockcroft v. Miller, 187 A.D. at 713-14. In 1921, the legislature amended the provision, substituting “persons...employed” for “employees.” 1921 NY Laws ch. 50, § 300, at 132, 201. At the same time, it vastly expanded the scope of “employed” by defining it as including “permitted or suffered to work.” Id. § 2.5 at 133.
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Where getting enough air to breathe or protecting "human life from fire perils" were obvious statutory purposes that, regardless of inept drafting, made it manifest that white-collar workers were human beings who could no more protect themselves than low-paid mechanics, workingmen, or laborers, judges—with the horrible deaths of the Triangle Waist workers presumably acutely present to mind—were quick to intervene on their behalf. In contrast, later in the twentieth century, without any articulated legislative purpose as a guide or any perception that years of overwork could be as lethal as a fire, judges never scrutinized the exclusion of white-collar workers from the FLSA with a view to affording protection to overworked executive, administrative, and professional employees.14

Alien Contract Labor Immigration Laws

This bill was not framed by children and babes, but by the men whose interests it undertakes to guard and conserve. By their leaders and most intellectual representatives they came before the committee of the House of Representatives, as they did before our committee, asking for this bill...which embodies the ideas and propositions which they thought necessary to remedy the public evils of which they complain.15

In examining the immigration restriction statutes, it is crucial to keep in view how their protective and exclusionary structures differed from those of maximum-hours or overtime laws. In the latter, exclusion of white-collar workers constitutes a material deprivation because it withholds from them the right to a standard shorter workweek and/or premium wages for nonstandard longer weeks. The immigration laws operated differently. They were touted as designed to protect

14As the Occupational Safety and Health Administration observed with regard to the legislative history of the Occupational Safety and Health Act (which does not exclude white-collar workers): "The reason for excluding no employee, either by exemption or limitation on coverage, lies in the most fundamental of social purposes of this legislation, which is to protect the lives and health of human beings in the context of their employment." 29 CFR § 1975.3(a)(2003). Thus, for example, white-collar workers are entitled to use the toilet at work when they need to do so. Marc Linder, Void Where Prohibited Revisited: The Trickle-Down Effect of OSHA's At-Will Bathroom-Break Regulation (2003). On the other hand, not all state laws that require employers to provide rest and/or meal breaks include executive, administrative, or professional employees. E.g., Minn. Stat. §§ 177.23.7(6), 177.253-254 (2003).

U.S.-citizen or at least resident blue-collar workers from low-wage competitors recruited primarily in Europe or Asia by employers seeking to reduce wages or break strikes. In contrast, the excluded manual workers suffered a detriment; in the racist-tinged words of the author and chief sponsor of the principal alien contract labor law: "A few hundred dollars is to an Italian laborer a fortune upon which he can live in squalid magnificence in sunny Italy the balance of his days. They generally return after having accumulated what to them seems a large and princely fortune." By the same token, Congress conferred a benefit on the white-collar workers in Europe or Asia who were exempt from the ban on the importation of contract labor. Despite Congress’s purported efforts to calibrate on a differentiated occupational basis the competitive impact of the admission of contracted-for white-collar workers on their counterparts already employed in the United States in order to avoid harming the latter’s labor market position, some white-collar groups eventually complained bitterly about such wage-cutting competition. In this respect, the exemptions in hours laws and the immigration law operated similarly: although the white-collar workers excluded from the former suffer a detriment, while those exempt from the latter presumably benefited, the immediate beneficiaries of the exemptions under both statutes are/were their employers, who in both cases benefit from the absence of government regulation of working conditions and an international labor market.

An 1882 act in aid of a treaty with China declared that the coming of Chinese “laborers” to the United States endangered “the good order of certain localities.” The statute did not define “laborers” other than to specify that the term included Chinese employed in skilled and unskilled labor as well as in mining. When a case (In re Ho King) arose as to whether the term encompassed a Chinese actor, the federal district judge, initially relying on dictionaries, concluded that it referred

15 CR 15:5351 (June 19, 1884) (Rep. Martin Foran). He added that even if they remained in the United States, “when we consider their intellectual status, it is questionable indeed whether they would make desirable citizens.” Id. For a brief race-based view of the alien contract labor law, see Gwendolyn Mink, Old Labor and New Immigrants in American Political Development: Union, Party, and State, 1875-1920, at 108-110 (1986).

16 Senator Blair, the chairman of the Senate Education and Labor Committee and floor manager of the bill, conceptualized the kind of competition Congress meant to preclude: “If they [Europeans] come here by virtue of a contract...by which their compensation is to be restricted to a lower rate of wages than the natural rate of wages which they would obtain in fair competition with our own laboring people, the effect upon American labor is precisely that which we undertook to...prohibit by the anti-Chinese act.” CR 16:1630 (Feb. 13, 1885).

18 Act of May 6, 1882, ch. 126, 22 Stat. 58.

19 Act of May 6, 1882, 22 Stat. at 61.
to a person performing physical labor, and therefore did not "include an actor any more than...a merchant or teacher." This understanding also comported well with the commonly understood problems that the act was meant to solve: "Neither the treaty nor the act have in mind the protection of what are called the professional or mercantile classes, or those engaged in mere mental labor, from competition with the Chinese. No grievance of this kind was ever complained of...." Since the purpose of the treaty was to allow the United States to limit or suspend Chinese laborers' existing right to compete with U.S. citizens' labor "for the local means of livelihood," "[a] Chinese actor engaged in dramatic representations upon the stage of a Chinese theater seems as far removed from such competition as it is possible for a person to be."20

A similar but somewhat more complex construction of the blue-collar/white-collar line was generated by adjudication under an 1885 congressional act restricting the importation of contract labor, which made it unlawful to prepay the transportation of or assist or encourage importation or migration of an alien or foreigner under a contract or agreement made prior to the immigration "to perform labor or service of any kind in the United States."21 Congress prohibited construing the act so as to prevent contracting with skilled workmen in foreign countries to perform labor in the United States in a new industry not established in the United States, provided that skilled labor could not otherwise be obtained. Finally and most pertinently, the legislature provided that "the provisions of this act [shall not] apply to professional actors, artists, lecturers, or singers, nor to persons employed strictly as personal or domestic servants."22

The enactment originated with agitation by the Knights of Labor, especially by 1884, when employers began to hire such contract labor to defeat strikes. This tactic was used primarily in coal mining, railway construction, coke making, and glass blowing.23 And more generally, as Judge Henry Brown (who later became

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20 In re Ho King, 14 F. 724, 725-26 (D. Or. 1883) (quoting from the same judge's decision in an earlier case).
23 According to Terence V. Powderly, the Grand Master Workman of the Knights of Labor: "We had a law drawn up, a lawyer was consulted, and the law was framed, and our general assembly...which met in Cincinnati that year, approved of the law, and ordered the general officers to present it to Congress.... We did it, and on the 26th of February, the bill was signed by President Arthur." Report of the Select Committee on Immigration and Naturalization, and Testimony Taken by the Committee on Immigration of the Senate and Select Committee on Immigration and Naturalization of the House of Representatives Under Concurrent Resolution of March 12, 1890, at 238 (H. Rep. No. 3472, 51st Cong., 2d Sess., 1891). In fact, the document approved by that general assembly merely

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a Supreme Court justice) took judicial notice in a case the year after the law was enacted: “The motives and history of the act are matters of common knowledge. It had become the practice for large capitalists in this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts, by which the employer agreed, upon the one hand, to prepay their passage, while, upon the other hand, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market, and to reduce other laborers engaged in like occupations to the level of the assisted immigrant.”

The legislative history was replete with express explanations of the statute’s purposes. Ohio Democratic Representative Martin Foran, a former president of the Coopers International Union, who had introduced the bill and was the House Labor Committee’s floor manager for the bill, the report on which he had written, stated that the bill’s “object is to prevent and prohibit men whose love of self is above their love of country and humanity from importing into this country large requested that pauper migration be restricted and that Congress protect the American laborer from unjust and degrading competition. Knights of Labor, Record of the Proceedings of the Seventh Regular Session of the General Assembly, Held at Cincinnati, Ohio, Sept. 4-11, 1883, at 432, 500. Whereas John Commons et al., History of Labour in the United States 2:372-73 (1918), attributed enactment “almost entirely to the efforts of the Knights of Labor,” Gerald Grob, Workers and Utopia: A Study of Ideological Conflict in the American Labor Movement 1865-1900, at 84-85 (1969 [1961]), concluded that other labor organizations, protectionists, merchants, manufacturers, and state charity boards did as well. Charlotte Erickson, American Industry and the European Immigrant 1860-1885, at 139-47, 149-50, 154 (1967 [1957]), argued that skilled craft unions were crucially involved. On the leading role of the glass workers, see Norman Ware, The Labor Movement in the United States, 1860-1895: A Study in Democracy 191-200 (1929).


Commons et al., History of Labour in the United States 2:75.


bodies of foreign laborers to take the places of and crowd out American laborers.” And although the committee amendment adding professional actors, lecturers, and singers had just been read to the House, Foran ignored it in his tour d’horizon, mentioning in addition to laborers only the ban on importing skilled workmen or artisans. He also observed that during the previous five or six years “American capitalists and corporations have imported and shipped into this country, as so many cattle, large numbers of degraded, ignorant, brutal Italian and Hungarian laborers. American citizens have been replaced by these foreign serfs. This is the class of persons, this the species of immigration with which this bill seeks to deal.” To be sure, “American capitalists” had also sent for skilled workmen “by the shipload,” thus causing “American workmen” to be “thrown out of employment and compelled to seek other avocations or starve.”

29 But Foran’s focus was on the Italian and Hungarian laborers, who were “by the greed and rapacity of capitalists being forced into the amalgam of American society.”

29 CR 15:5349 (June 19, 1884).

30 CR 15:5350. Erickson argued that the charge made by Foran and other members of Congress that “industrial capitalists were importing large numbers of Hungarian and Italian peasants,” though “apparently widely believed,” was “not substantiated by either an investigation of the contemporary records in European countries or a careful analysis of the evidence submitted to Congressmen. ... These accounts made more lurid reading and carried a broader appeal to racial prejudice than did the complaints of craftsmen against the importation of at most a few hundred skilled workmen.” Erickson, American Industry and the European Immigrant at 68, 157-58. Her book’s central “thesis” was that “contract labor was rare in America during the years after the Civil War, and never reached the proportions claimed by the advocates of a law against its importation. When, on rare occasions, American industrialists did resort to importations, they were designed to bring in highly skilled workers for particular jobs. No mass importations of unskilled workers were made by mine operators or railroad contractors. The bulk of the immigration from Italy and Hungary in the eighties was as voluntary as the exodus from Sweden in the sixties and Ireland and Germany in the early fifties had been.” Id. at vii. In her view, the 1885 statute was “originally the program of a highly specialized a-typical [sic] group of craft workers whose skills could be duplicated and whose strikes could be broken only by the importation on contract of skilled workers from England and Belgium. This group, the window glass workers, realizing that their case was a rather special one, sought support by playing on the prejudices against ‘new immigrants’ which other Knights felt, and thus broadened their appeal.” This “racialist appeal” resonated with other occupational groups within the Knights because their strikes had in fact been repeatedly broken by the use of immigrant strikebreakers: “But these strikebreakers were not contract laborers. They were immigrants and others supplied to manufacturers by private labor agencies in large cities.” Id. at viii. See also Calavita, “The Anti-Alien Contract Labor Law of 1885 and ‘Employer Sanctions’ in the 1980s” at 53-55; Calavita, U.S. Immigration Law and the Control of
Republican Senator John Sherman of Ohio, who had opposed the 1882 Chinese labor bill because it departed from the policy of "open[ing] our doors to laboring men for all lands," had not given the new bill much thought, but it was clear to him that its underlying principle was similar—to "discriminate against a class...of people who do not own themselves, who are brought here by corporations or by wealthy persons to compete in mines, manufactures, and establishments of various kinds with the free labor of free men, against hardy miners, mechanics, manufacturers, and even farmers...." The system that the bill was intended to suppress involved "the shysters...sent off by corporations to gather up a gang of a hundred or a thousand men to come here and drive out an equal number of hardy, industrious miners and laborers...."31 It seems improbable that in the 1880s such gangs would have encompassed white-collardom.

The only light that the House debates in 1884 shed on the question of whether Congress actually intended to subject to contract-labor restrictions all the white-collar workers except those employed in the four expressly enumerated occupations (professional actors, lecturers, and singers, and artists) was a brief colloquy between John Adams, a Democrat from New York City, and John O'Neill, a Missouri Democrat, who was the second ranking majority member of the Labor Committee (and its chairman during the following two Congresses) and a strong supporter of the bill. O’Neill had declared that importation of contract labor occurred when labor was struggling against capital for its just rights, when manhood says: "We have submitted all we can to the exactions of unjust capitalists." ...

Whenever labor, driven to the last edge, is compelled to stand up for its rights, then your capitalists send abroad and bring over this pauper labor to work at...75 or 80 cents a day...for a temporary emergency, to be used in crushing our workmen in their effort to improve their condition and that of their loved ones. And then, after that is accomplished,

Labor at 44-49; Robert Parment, Labor and Immigration in Industrial America 49-58 (1981). Isaac Hourwich, Immigration and Labor: The Economic Aspects of European Immigration to the United States 99-101, 394-95 (1912), concluded that the prevalence of contract labor had been greatly exaggerated. Even if Erickson’s view is correct that the driving force behind the enactment was protection of skilled craftsmen, it would not affect the argument here, which hinges on the dichotomy between manual labor and white-collar workers, which remained a chasm regardless of whether the manual workers were low-paid Italian miners or highly skilled and paid glass blowers.

31CR 16:1634 (Feb. 13, 1885). To be sure, as New Jersey Democrat John McPherson pointed out to Sherman (without receiving an answer), since the bill’s phraseology was very liberal, it applied “even to individual cases” and did “not apply to organized labor alone....” Id. at 1635.
these poor, misguided, wronged, deceived, and robbed forced emigrants are turned out upon the wayside to starve. [T]he most deadly blow ever struck at the roots of protection was done by the importation of this alien labor to take the place of our artisans when contending against what they deemed the unjust demands of capital. It has done more to open the eyes of workmen than all the sophistries of free-traders.32

Almost immediately following this harangue, Adams, who stated that he too favored a bill similar to the one under debate, modestly asked O’Neill for a clarification of “the exact effect” of the bill if enacted. Specifically, Adams—an emigrant from Canada who had himself been a dry-goods clerk in New York City until 187433—wanted to know whether the law would “prohibit Arnold, Constable & Co., or Lord & Taylor, or any of the large retail dealers in the city of New York who may be abroad purchasing goods and who finds there an efficient clerk they would like to transfer to this country, and to whom they would pay a salary, whether this section would not prohibit them from employing any such clerk under penalty of a thousand dollars.”34

O’Neill’s response, even if not intentionally evasive, was nevertheless ambiguous: “All I have to say is that if Arnold, Constable & Co. or any other dry-goods house in the city of New York...go to Europe and import this labor for the purpose of breaking down men in their own employ, I hope the law will reach them. That is the intention of the law.”35 The use of the hypothetical “if” suggests that O’Neill harbored a dichotomous conception of coverage: because overwhelming evidence had persuaded the House Labor Committee that the manufacturing, mining, and construction capitalists’ only purpose in recruiting alien contract labor was to weaken workers’ labor market position, employers of manual workers were per se guilty of violating the law by virtue of prepaying the transportation of aliens with whom they contracted for the performance of labor or service; in contrast, since the committee had apparently been presented with no testimony concerning similar abuses among employers of white-collar workers, O’Neill was in principle open to holding them liable if (and only if) it could be shown empirically that they, too, had engaged in the practice in order to force down wages. Why this outcome was merely O’Neill’s “hope” and not a legal certainty is unclear. In any event, the open-textured character of the inquiry suggests that O’Neill was leaving it to enforcement agents and ultimately the courts to find the facts and interpret the

32 CR 15:5357-58 (June 19, 1884).
34 CR 15:5358.
35 CR 15:5358.
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statute against the background of this crucial element of congressional intent.36

When Adams again asked whether “that is the intent of this bill,” O’Neill explained that the bill was “for the purpose of preventing pauper laborers from being brought here from abroad for the purpose of breaking down the efforts of the workingmen of this country to secure their just rights.” Apparently hoping to resolve the dispute by drawing a distinction between daily wages and weekly or monthly salaries, Adams asked why O’Neill did not instead insert “‘day laborers.’” After informing Adams that the workers in question were not day laborers, but might work by the week or month, O’Neill finally lost his patience with the interrogation about the coverage of white-collar workers: “Never mind about these hair-splitting technicalities....”37

The Senate committee report and floor debates were more illuminating. A few days after the House had passed the bill,38 the Committee on Education and Labor reported it back favorably without amendment, “in the hope that the bill may not fail of passage during the present session,” although there were “certain features...which might well be changed or modified....”39 The report went on to declare:

Especially would the committee have otherwise recommended amendments, substituting for the expression “labor and service”...the words “manual labor” or “manual service” as sufficiently broad to accomplish the purposes of the bill, and that such amendments would remove objections which a sharp and perhaps unfriendly criticism may urge to the proposed legislation. The committee, however, believing that the bill in its present form

36That such inquiries were within Congress’s contemplation was demonstrated by Senate debate over a proviso permitting employers to contract with skilled workers abroad to work in a new industry if “skilled labor for that purpose cannot be otherwise obtained.” When Senator Morrill asked: “How is that to be determined?” Senator Blair replied: “That is a question of fact that arises in the administration of all laws,” and Senator Dawes added that the employer “would have to show...that there was nobody else in the United States to do this work.” CR 15:6059 (July 5, 1884).

37CR 15:5358. Nevertheless, immediately thereafter, when Adams pointed out a gross drafting error in the bill that would have prohibited “the [foreign] workingmen who may be here now from being employed by American capitalists,” O’Neill thanked him for the “practical suggestion” to correct what was “evidently an oversight not intended by the committee” and which he was certain would be amended. Id; on its amendment, see id. at 5370. Why, in contrast, O’Neill was so resistant to correcting the overly broad definition of excludible labor that Adams had pointed out is unclear.

38“Notes from Washington,” NYT, June 20, 1884 (3:7); “The Contract Labor Bill,” NYT, June 20, 1884 (3:2).

39CR 15:6059 (July 5, 1884).
will be construed as including only those whose labor is manual in character, and being very desirous that the bill become a law before the adjournment, have reported the bill without change.\(^{40}\)

When a senator pressed him on those changes, Henry Blair, the New Hampshire Republican who chaired the committee, replied that the report had not been intended to give the impression that the possible modifications had been "deemed of very great importance, because" the committee believed that "the bill will be construed the same" with or without the suggested changes. Moreover, Blair announced that he intended to make a motion for the modifications "so that the bill would then be restricted to the evil that exists, and it would be available for the protection of that class of our people who are suffering most from the evil." He also revealed that the bill's friends had assured him that the House would agree to the change immediately so that it would be passed before adjournment. Finally, Blair expressed his belief that once the modification had been made, there could be "no objection on the part of any one in either branch of Congress. It would apply only to those engaged in manual labor or service."\(^{41}\) In the event, however, further consideration of the bill was postponed until the second session of the Forty-Eighth Congress.\(^{42}\)

The Senate report and Blair's remarks confirmed the existence of widespread and potentially lethal congressional unease about the possibility—which Adams had expressed in the House and O'Neill had been unable or unwilling to dispel—that administrative enforcers and courts might hold contracting for the

\(^{40}\)CR 15:6059. Congress in fact adjourned two days later.

\(^{41}\)CR 15:6059. Adrian Vermeule, "Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church," SLR 50(6):1833-96 at 1848 (July 1998), argued that Blair's statement about the effect of the amendment contradicted the committee report, which expressed the belief that the exclusion would be construed as limited to manual labor. In fact, Blair was not trapped in a contradiction: the committee was merely speculating, not stating a certainty, and Blair was seeking to achieve that certainty.

\(^{42}\)CR 15:6065 (July 5, 1884). Two weeks after the postponement, the Times reported from Reading, Pennsylvania, that Congress's neglect to "pass the bill against foreign contract or pauper contract labor is creating a great deal of discontent among American-born workingmen, whose wages are being seriously interfered with" by the employment of Poles, Hungarians, and Italians crowding them out on railroad and canal work, ore and coal mining, and other "arduous labor." Although the newspaper observed that "[w]hole gangs of them are brought to America under contract, it also emphasized that "[t]he contract labor...is the exception. The majority of these foreigners pay their own way to America." "Crowding Out Americans," NYT, July 23, 1884 (3:7).
importation of white-collar workers to be illegal. Blair’s plan to allay these apprehensions by writing the limitation to manual labor directly into the statute reinforces the notion that, despite O’Neill’s hypothetical contention that capitalists might seek to mobilize the international labor market against white-collar workers as well, employers, members of Congress, and perhaps even much of the labor movement recognized a categorical divide that made such real-world assimilation of the two groups improbable and identical legal treatment therefore unnecessary.

Although Congress failed to write all of white-collardom out of the statute, the Senate debate that resumed in February 1885 disclosed relatively uniform views on the need for exempting non-manual workers. Largely responsible for fleshing out this legislative purpose was John Tyler Morgan from Alabama, a former general in the Confederate Army who was in the middle of his second of six consecutive senatorial terms. In addition to his unsurprising penchant for intensifying the racist component of the debate over immigration, Morgan purported to be driven by his hostility to “class legislation”; and like the bill’s other vocal supporters and opponents, he, too, knew that “[t]he classes legislated for and protected by the bill...are almost wholly and exclusively the miners, the men who delve about the iron-works, and the men who do the ruder sorts of work about the manufacturing establishments of this land.” In contrast, however, he was the first to point out that the bill “discriminates in favor of professional actors, lecturers, or singers. It makes an express exception and provision for professional actors, lecturers, and singers, leaving out all the other classes of professional men.” Dismissing Blair’s lame and irrelevant denial—“Not at all; personal or domestic servants are also excepted”—Morgan noted that if “a gentleman...happens to be a lawyer, an artist, a painter, an engraver, a sculptor, a great author, or what not, and he comes under employment to write for a newspaper, or to write books, or to paint pictures, as we are informed that a recent Secretary of State sent abroad for an artist to paint his picture, he comes under the general provisions of the bill.” After failing to elicit any shocked confession of ignorance from Morgan by observing that these prohibitions applied only to contract labor, Blair made two

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44After asking Blair whether he did not think that the Irish, Germans, and Italians were not “better people than the Chinese,” Morgan added that restraining the importation of coolies was designed to bar the admission of “a large number of very inferior and very degraded people, people that belonged to a different class from those that possess the Anglo-Saxon blood” and prevent “the infusion of lower blood into the social element in this country.” CR 16:1630, 1631 (Feb. 13, 1885).

45CR 16:1632. Earlier that day Blair himself had offered the amendment exempting personal and domestic servants, which the Senate agreed to. Id. at 1621.
crucial admissions: "If that class of people are liable to become the subject-matter of such importation, then the bill applies to them. Perhaps the bill ought to be further amended." Thus forced to concede that all the white-collar occupations, with the exception of the expressly enumerated groups, were subject to the contract labor provisions, Blair for the first time thought aloud about the possibility of conforming the scope of occupational coverage to the scope of the evil and remedy.

Ignoring the offer of accommodation that he had succeeded in extracting from Blair, Morgan, who seemed to prize obstructionism above practical legislative achievements, blithely continued in the same sarcastic vein, cataloging the white-collar (and other) occupations against which the bill discriminated:

People who can instruct us in morals and religion and in every species of elevation by lectures and by acting plays in the theaters and by singing are not prohibited. ... Chinese singers and Japanese players can come over here...provided they fall within these honorable and distinguished and exempt provisions.

Now, I shall propose when we get to it to put an amendment in there. I want to associate with the lecturers and singers and actors, painters, sculptors, engravers, or other artists, farmers, farm laborers, gardeners, orchardists, herdsmen, farriers, druggists and druggists' clerks, shopkeepers, clerks, book-keepers, or any person having special skill in any business, art, trade, or profession.

These extensive congressional debates may constitute grounds for skepticism about legal theoreticians' (non-empirical) claim that "[t]he drafter probably did not mean to include preachers in the general prohibition, but created a problem" by failing to include them within the group of enumerated exemptions: "By trying to be comprehensive, the drafter produced a statute that could yield unjust results and might not prove flexible enough to deal fairly with new occupational groups that might later want to migrate to the United States." The proviso exempting three categories of professional or artistic employees (professional actors, lecturers, and singers) from the ban on importation of contract labor would be unconstitutional.
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laborers, which had not appeared in the original bill, was included as a proposed amendment in the House Labor Committee report without explanation. The exemption of artists was added during the Senate floor debate. The amendment was offered by Kansas Republican Preston Plumb, who advocated further exemptions for musicians in 1890. In February 1885, the Senate rejected a proposed amendment by Republican Elbridge Lapham of New York to delete “singers” from the exemptions because he believed that “the worst form of tyranny is found in the case of the Italian children who are brought over here and who go about our streets singing, and who are whipped every night when they go home if they do not bring in a certain sum of money. I do not want...the bill so framed that its prohibition will not apply to that class of cases.” Although it is unclear why he did not frame the exemption more narrowly, it is noteworthy that the Senate was apparently willing to countenance the importation of such child laborers. By a vote of 50 to 9 the Senate passed the bill in its entirety. Without debate the House then concurred in all the Senate amendments including the exemption of artists.

Seven years later, the defendant in the most prominent Supreme Court white-collar case ever decided under the statute argued in its brief that it was “a well-known fact that, in these days, contracts are constantly entered into between” these four groups and American managers for performances; it then added the speculation that “no doubt, managers...who have many hundreds of thousands of dollars at stake in some of their contracts...wished to be perfectly sure that the Act would not sometime be surprisingly and absurdly applied to them, and their ‘star’ not allowed to land on the eve of an undertaking, they called the attention of the committee to it, and as the proposed legislation was never designed by the petitioners therefor to apply to any but ‘laborers, mechanics and artisans,’ the proviso was immediately accepted and inserted....” Although this account seems

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50 H. Rep. No. 444 at 1. The House agreed to the amendment shortly before passing the bill. CR 15:5371 (June 19, 1884). Vermeule, “Legislative History and the Limits of Judicial Competence at 1851, evaded the issue by asserting that congressional members’ “motives for approving a statute of such breadth are neither wholly clear nor particularly important.”

51 CR 16:1837 (Feb. 18, 1885).

52 See below.

53 CR 16:1837.

54 CR 16:1839 (Feb. 18, 1885); “Stopping Foreign Contract Labor,” N-YT, Feb. 19, 1885 (2:2).

55 CR 16:2032 (Feb. 23, 1885).

56 Brief for the Plaintiff in Error at 15-16, Holy Trinity Church v. United States, 143 US 547 (1892).
plausible, its credibility would have been enhanced if such managers had furnished testimony to the House Labor Committee. Although the committee did take testimony at the beginning of February 1884, there is no record of a published or unpublished hearing; all that is extant is the summary that the committee provided of the testimony of about twenty members of the Knights of Labor and labor unions, whose complaints about the importation of foreign laborers in the coke, glass making, coal mining, and railway construction industries had furnished the impetus for the legislation.

In point of fact, the brief may have stood contemporary reality on its head since organizations of musicians and actors appeared at House hearings in December 1888 to persuade Congress to repeal the proviso exemptions. According to the account in *The New York Times*:

The American actor has taken alarm at the invasion of the theatres of the United States by the ever-increasing army of English and European foot-light artists. He says that the profession is overcrowded and that he is being pushed to the wall by actors from abroad who come here, and, after securing a large share of the wealth of the country, flit back to their native shores to revel in their newly-acquired wealth. He tells the same story that miners, mechanics, and others have told of being supplanted by cheap labor brought to this country under contract. Like the artisans, he wants protection. Louis Aldrich, Harley Merry, and Lewis M. Sanger, a committee representing the Actors' Order of Friendship, appeared to-day before the Ford immigration investigating committee and asked that the contract labor law be amended so as to include professional actors and musicians among the classes prohibited from entering the United States under a labor contract. ... Under this exemption the committee said that large numbers of foreign actors were annually brought to this country for the sole reason that they would work cheaper than American actors.

By January 1889, the *Times* was reporting that the actors' agitation had "practically died for want of fuel. The Ford investigating committee took so little notice of the petition of Mr. Aldrich and his friends that it concluded its labors without calling any witnesses on the subject of the actors' plaint, and the originators of the movement admit now that nothing will be done in their interest

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at this session of Congress at least."\footnote{Booth and Barrett,}\textit{ NYT,} Jan. 6, 1889 (5:2). When Ford’s committee issued its report in January 1889, it not only did not mention the question of musicians and actors, but continued the tradition of characterizing the objects of the ban as those workers with "vicious" habits and "disgusting" customs. \textit{To Regulate Immigration} 5 (H. Rep. No. 3792, 50th Cong., 2d Sess., Jan. 19, 1889). Representative Melbourne Ford was a Michigan Democrat.

\footnote{Views of the Managers,}\textit{ NYT,} Dec. 20, 1888 (8:1).

\footnote{Protection for Actors,}\textit{ NYT,} Dec. 17, 1888 (4:5) (editorial). Oddly, in attacking the enactment of the original statute, the \textit{Times} had asserted that engagements with workmen were "in no sense different in principle" than those for actors, singers, artists, and lecturers. \textit{Imported Contract Labor,} \textit{ NYT,} Feb. 19, 1885 (4:3-4).

\footnote{Trouble Ahead for Strauss,}\textit{ NYT,} Feb. 12, 1890 (1:2); "What Is an Artist?" \textit{ NYT,} Feb. 13, 1890 (8:3). Eduard Strauss, though less well known than his father and brother (both named Johann), conducted and managed the family orchestra for decades and was himself a prolific composer. \url{http://www.johann-strauss.org.uk/composers/index.php3?content=eduard1}. As early as 1889 it had been judicially decided that, based on common usage, milliners, dressmakers, tailors, cooks, and barbers were not "artists." United States v. Thompson, 41 F. 28, 29 (CC SDNY 1889).

\footnote{See below chs. 7 and 12.}
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organization that is willing to put in the degrading plea that its members are not "artists," in order to induce the Treasury Department to decide that the members of a foreign orchestra must be excluded under the provisions of the alien contract labor law has reached a pretty low level. The theory of this action is...that the public demands and will pay only for a certain fixed amount of musical entertainment, and that if, in part, its demand is satisfied by and its money paid to foreign performers by that much "local musical organizations" are robbed of their just opportunity and emolument. This puts music upon the same level with street paving, car driving, and bricklaying, and it is the practitioners of the art who put it there. Musicians possessed of greater professional pride and sounder reasoning powers might be expected to welcome the Vienna orchestra on the theory that its concerts would be likely to foster the popular taste for musical entertainment and increase the demand for it. But the laborers of the "local musical organizations" who have appealed to the Collector for protection against the Vienna performers are naturally incapable of that kind of reasoning.65

In the event, the musicians’ alleged penchant for positing the existence of one general labor market must have been contagious: a year later the Times itself, when confronted with a complaint that 1,500 musicians were struggling for a livelihood in New York City, knew nothing better to reply than that it was a “pity. Many, very many, of these musicians would be doing better service to the cause of art by laying bricks. They might help to rear fine buildings. They do not help to play fine music.”66

While the Collector of the Port of New York was amused by a reporter’s question as to whether he was personally going to “examine the musicians to discover whether they were artists or merely contract laborers,” the alarmed American representatives of the management of the Strauss orchestra declared that its members were “such mighty musicians that they...would refuse to come to America rather than submit to such an indignity, which they would regard as an insult to their reputation....”67

The controversy was intensified by the testimony of Hugh Coyle, a music manager or head of an organization of musicians, at the joint congressional hearings on the operation of the statute held at Castle Garden in April 1890. Coyle had already denounced the Strauss orchestra to the U.S. Attorney for the Southern District of New York, charging that if these “cheap musicians...incapable of playing in the operatic or regular theatrical orchestras of Vienna” were admitted “to inaugurate the great new Madison Square Garden amphitheater” in violation of the law, “the next year will see herds of cheap charlatan musical organizations from

65NYT, Feb. 12, 1890 (4:6) (untitled editorial).
Europe playing at our watering places, mountain resorts, etc., posing as artists, and the American citizen will be left out in the cold, without employment, creating distress among some of our most worthy citizens.68 At the hearing, Coyle, who disclosed that he had been organizing a band that had lost a contract to Strauss’s orchestra, asserted that in order to qualify as an “artist,” a musician had to be a composer or a soloist. A musician did not have to be a Mozart to achieve the requisite standard, but “the constructors of the law, to protect musicians, had...in view...that the ordinary musician was a laborer, and there are thousands of those who would flood this country and do the American citizen out of employment.” Although he himself played three or four instruments, he emphatically denied “being an artist, as a musician”—other than in the indiscriminate sense (which he attributed to the Collector of the Port of New York) “that every other fellow that plays a Jewsharp is.”69

The testimony failed to satisfy the Times, which judged that Coyle and the committee had been “utterly unable to fix a test by which an artist’s standing was to be determined.”70 Testifying the next day, David Blakely, the manager of the Strauss orchestra, called Coyle’s definition “such sublime nonsense that it is not necessary to answer it.”71 Instead, he preferred a dictionary definition of an “artist” as a “person skilled in the manipulation of his art.”72 In spite of the sharp dispute over an operative definition, Blakely and the committee chairman, Indiana Republican Representative William Owen (who, after failing to be reelected, was appointed Superintendent of Immigration the following year), unintentionally gave powerful corroboration to labor’s viewpoint. Although Blakely initially responded negatively to Owen’s question as to whether salary was an index of acceptance as an artist, his admission that “a very skillful player would be more apt to receive a larger salary than one who is not a fine player” prompted this pithy exchange: “Q. It is a commodity in the market, you know?—A. Exactly.”73

68Report of the Select Committee on Immigration and Naturalization, and Testimony Taken by the Committee on Immigration of the Senate and Select Committee on Immigration and Naturalization of the House of Representatives Under Concurrent Resolution of March 12, 1890, at 387-88.

69Report of the Select Committee on Immigration and Naturalization, and Testimony Taken at 466-68.

70“Not Desirable Citizens,” NYT, Apr. 25, 1890 (8:3).

71Report of the Select Committee on Immigration and Naturalization, and Testimony Taken at 499.

72Report of the Select Committee on Immigration and Naturalization, and Testimony Taken at 498.

73Report of the Select Committee on Immigration and Naturalization, and Testimony
Despite his aforementioned disclaimer, the Collector of the Port of New York did purportedly examine the musicians. When he informed the Treasury Department that the orchestra was expected in New York and asked whether the members should be permitted to land as "artists," the department replied that "as the accepted definition of the word ‘artist’ includes musicians who combine science and taste in the manual execution of their art, such members of the Strauss Orchestra may be admitted as artists under the proviso to...section 5 as by their skill, taste, and accomplishments as musicians evidently come within the definition. Whether each member of the Strauss Orchestra comes up to the standard is a question of fact to be decided upon the best evidence obtainable." From the fact that the members were allowed to land on their arrival, "nearly three months later, after a thorough examination by the collector of the port of New York," the Treasury Department inferred that the collector must have determined that the evidence had sufficed to establish their claims to be artists.74

AFL President Gompers saw the law's over- and underenforcement as leading to its eventual repeal. It was construed, at one extreme, to apply to ministers and star actors, but when it came to the laborer or worker, it was held inapplicable. Unlike the *Times*, however, Gompers regarded the musicians' proletarian political economy as thoroughly rational: efforts were made, he told a congressional immigration investigatory committee, to introduce bands like Strauss's "only...because they work cheaper, and to offset and throw out of employment the musicians of our own country who are equally efficient, only that they insist on having some beefsteak, and fair clothes, and a fair home, instead of having sauerkraut and wooden shoes."75

The struggle over the extent to which musicians could be contracted for internationally resumed in late September 1890 when the Senate began debating H.R. 9632, which the House had already passed.76 After the Senate had agreed to one amendment adding "musical or other artists" to the groups of exempt

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74Decision No. 10429 (Dec. 10, 1890), in *Synopsis of the Decisions of the Treasury Department on the Construction of the Tariff, Navigation, and Other Laws for the Year Ended December 31, 1890*, at 570 (1891). This decision, which was written by Assistant Secretary O. L. Spaulding, was sent to Joseph Rugraff, who in the course of complaining about the engagement of Mexican musicians in St. Louis, asserted that the U.S. district attorney had stated that the case was covered by the decision in the Strauss case. Spaulding quoted from the Strauss case in his reply.

75*Report of the Select Committee on Immigration and Naturalization, and Testimony Taken* at 92.

occupations,77 the same Senator, Preston Plumb of Kansas, who had offered it, moved to add "musicians" as well. He sought to justify it on the grounds that music, like acting, rather than being a commodity, was a civilizational pleasure "not bounded by the boundary lines of nations...." Moreover, in keeping with the proviso as a whole, which was "designed to exclude persons who are not engaged in manual labor," the amendment did "not touch upon the domain of manual labor. It is not competitive in the ordinary sense of the term. Our musicians go all over the world, and similarly we want other musicians to come here."78 Senator Blair, the floor manager of the bill, agreed with Plumb that "[t]he idea of these exceptions is to allow those into the country whose skilled labor in art as well as in other occupations may be a source of instruction to our own people," but argued that Plumb's first amendment had already achieved that end. Unlike Plumb, however, Blair focused on the socio-economic fact that:

There is a large class of people in our country who get their living by their practice of music, pursuing it as an avocation. There are at least 20,000 who are in an organized musical union, a union of the common average laborers in music, you may say. They are called musicians; they call themselves musicians; and the term which the Senator would now insert in the bill would bring the common, average, every-day musician of Europe with his low prices and low rates of compensation directly in competition with the general American musician. It is the object of the bill to exclude those as well as others who come in competition with those who practice the art as an avocation of common life.

[T]he contracting to bring them here in masses to break down the common business of the American musician I object to; at least the bill objects to it; and if those who are engaged in the common work of life are to be protected against that sort of competition, if the miner is to be protected against it, with probably a hundred thousand people in this country who obtain their livelihood in this way, why ought they not to be protected against the contract musical labor of the Old World?79

While purporting to sympathize with Blair's view of excluding competitors of manual laborers, Plumb made the incoherent claim that musical competition was "of a different kind entirely. The pay for it comes from persons who are able to indulge in the luxury of it, whether poor or rich...." When the Senate agreed to Plumb's second amendment too, Blair trusted the Senate-House conferees to dispose of it.80

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77 CR 21:10466 (Sept. 26, 1890).
79 CR 21:10468.
80 CR 21:10468. See below on its ultimate elimination in 1891.
law is interrupted at this point in order to attend to legal proceedings under the act that were initiated in 1887 and the resolution of which ultimately decisively shaped further congressional action and judicial and administrative understanding of the white-collar exemptions from the statute. The question of whether the act was intended to encompass persons who were not manual laborers was decided by the U.S. Supreme Court in 1892 in a case involving the "high-salaried" Protestant Episcopal Church of the Holy Trinity at Madison Avenue and Forty-Second Street in Manhattan, which had contracted with the Reverend Edward Walpole Warren, a British subject resident in England, to move to New York City to enter its service as rector/pastor. 81 As The New York Times noted in June 1887 before suit had been filed, Warren, who was "of remarkable executive ability," having accepted "the call to the rectorate," would "enter upon his labors" and "his salary will be whatever he may desire it to be." On his arrival in New York three months later, the Times interviewed Warren, who emphasized that he desired to "feel his way before attempting anything in the line of work"; and the paper itself admitted that it "required but a glance to see that he was a master of his work." 82

Almost as soon as Warren began working, the legal process testing the applicability of the law to him was initiated. 83 The matter had been brought to the U.S. district attorney's attention by someone "actuated by the most disinterested motives" with regard to Warren and the church, "his only object having been to test the law, and to show its absurdity in applying it to professional men." 84

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81 "E. Walpole Warren an Alien," NYT, Apr. 12, 1892 (6:1).
82 Church of the Holy Trinity v. United States, 143 US 457, 458 (Feb. 29, 1892).
83 "The Call Accepted," NYT, June 9, 1887 (8:5).
85 Already on October 10, 1887, U.S. District Attorney Walker received a letter from Warren's lawyers requesting that they be allowed to explain the circumstances of the offer and acceptance of the rectorship "before he takes action on the question of the importation from London of Mr. Warren as a contractor laborer." The district attorney granted the request. "Given Time to Explain," NYT, Oct. 11, 1887 (8:3). In contrast, a few months later Walker "smiled broadly" when asked whether W. K. Vanderbilt's "'gastronomical director'"—who was about to arrive and represented "in his profession a position as far above the old-time chef as the modern 'funeral director' does above the old-time undertaker"—came under the law. Although it was "a clear case," neither he nor the Collector of the Port of New York intended to intervene without a complaint "'through the regular channels.'" "Vanderbilt's Imported Cook," NYT, Mar. 20, 1888 (5:3).
86 "He Is a Contract Laborer," NYT, May 24, 1888 (8:5). The person in question, John S. Kennedy, purportedly sought to test the law because federal authorities had sent back
At argument on the church’s demurrer to the government’s complaint, the defendant’s lawyer, relying on *In re Ho King* decided under the Chinese labor exclusion act, stressed that the term “laborer” did not mean “the kind of mental and spiritual service which a clergyman renders his congregation.” In contrast, the U.S. district attorney argued that there was no need “for the court to grope for what is called the spirit of the act or the intention of Congress” because its meaning was “clear”: the law constituted a sharp break with the “American policy,” which had prevailed throughout “[t]he whole history of our country,” of inducement to immigration. In a remarkable harangue by the government prosecutor against the statute, its underlying policy, and the labor organizations that lobbied for its enactment, District Attorney Walker asserted:

A law against the immigration of the perfectly equipped and willing laborer to our country is as much adverse to the general spirit of our legislation as would be an act to check the natural increase of our resident population, and much more against self-interest, as the immigrant adds at once his matured energies to the working force of the community while the new-born infant is a burden on the body politic. The reversal or checking of this American policy is due partly to the fear of the voting power of labor organizations as operating on, not to say terrorizing, our legislative assemblies. So in the last few years we have had a deluge of short-hour laws, of holiday laws, all having their origin in pure deference to the voting power and independent of any just political principle. Any measure having the endorsement of a labor organization must be carried through Congress as gingerly as eggs in a basket.

Having excoriated the law, its policy basis, and its chief supporters, Walker
to Scotland several of his countrymen to whom he believed the law had been unjustly applied. Kennedy also placed at the church’s disposal the $1,000 fine under the law as indemnification in case the government prevailed. *Id.* Immediately after the Supreme Court announced its decision, Warren told the *Tribune* that Kennedy’s object had been “to make odious the attempt to apply the law to clergymen and other men of the same class.” ‘The Right to Import Rectors,” *N-YT*, Mar. 1, 1892 (2:1-2). In 1890 a church in Pennsylvania obtained an authoritative opinion from the acting Treasury Secretary that in “calling” a clergyman from Canada, it had undertaken to violate the law. “Ministers and Glassworkers,” *NYT*, Mar. 2, 1890 (4:4) (editorial). As of early 1890, Holy Trinity Church was the only church that the government had taken to court; the industries revealed by the defendants’ names included railways, mills, ice, zinc, canning, brick, smelting, and electric light and power. *Number of Suits Under Contract Labor Law: Letter from the Attorney-General* (H. Ex. Doc. No. 206, 51st Cong., 1st Sess., Feb. 4, 1890). See also *Report of the Select Committee on Immigration and Naturalization* at 388, 398-99.

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87“Parsons Need Protection,” *NYT*, Apr. 24, 1888 (9:1).
88“Parsons Need Protection.”
then explained the measure as an effort by workmen to achieve the benefits of the protective tariff that they felt had been withheld from them. Using the exclusion of “competitive labor” as the fundamental principle of the law, the district attorney was able to demonstrate empirically that the labor market for parsons was in as much need of protection:

Suppose that its plain interpretation excludes a clergyman from the list of immigrants. It also excludes a blacksmith and a market gardener. The services of each would be useful, but the home supply is abundant. In no department of service has competition been more active than in clerical work. Our choicest and most desirable metropolitan pulpits are invaded by the foreign product. Eight of the best-paying and best-attended churches in New-York are at the present time served by imported...clergymen. Meanwhile our theological seminaries, which are infant industries just as much as carding machines or iron mills, are turning out annually enough of this form of labor product to supply the home demand and meet the exigencies of missionary service also. There are more Congregational ministers in the United States not engaged in the work of their profession in proportion to their numbers than there are carpenters or masons out of employment. Of the 4,090 Congregational ministers in the United States in 1887, only 2,852 were engaged in pastoral work. These suggestions might not be without force in maintaining a prohibitory duty on clergymen if it were the duty of counsel to justify a specific rate of duty, prohibitory or otherwise, on a specific commodity.

That Walker’s attempt to assimilate professional or brain workers to the model of the manual laborer may have been done tongue in cheek draws some support from his protestation after prevailing that he “had not presented the case in a spirit of levity....” Nevertheless, he declared that “[i]f the decision forced an amendment of the law no one would be more pleased than himself.”

Making ample use of the district attorney’s argument, the trial court explained that the labor unions had introduced and advocated the measure, which was designed to shield the interests they represented “from the effects of the competition in the labor market of foreigners brought here under contract....” The court then added, not without irony, that: “Except from the language of the statute, there is no reason to suppose a contract like the present to be within the evils which the law was designed to suppress, and indeed it would not be indulging a violent supposition to assume that no legislative body in this country would have advisedly enacted a law framed so as to cover a case like the present.” Be that as it may, however, where the statutory terms were “plain, unambiguous, and explicit,” a judge was “not at liberty to go outside of the language to search for a meaning.

89“Parsons Need Protection.”
90“He Is a Contract Laborer.”
which it does not reasonably bear in the effort to ascertain and give effect to what may be imagined to have been or not to have been the intention of Congress.” In particular, the court was barred from resorting to “speculations of policy [or] even to the views of members of Congress in debate to find reasons to control or modify the statute.”91

To clinch the hopelessness of the defendant’s argument, the court made explicit the logic of the professional proviso: “If without this exemption the act would apply to this class of persons because such persons come here under contracts for labor or service, then clearly it must apply to ministers, lawyers, surgeons, architects, and all others who labor in any professional calling. Unless Congress supposed the act to apply to the excepted classes, there was no necessity for the proviso.”92

The only other point the court made was to dismiss as inconsequential a potential self-contradiction in the statute, acknowledgment of which might have opened the way to recognizing the presence of the kind of deep-seated statutory ambiguity that would have made consideration of the legislative history proper. (Curiously, the Supreme Court did not even allude to this issue in support of its interpretation.) From the very first version of the bill to the final enactment, § 4 made it a misdemeanor for “the master of any vessel who shall knowingly bring within the United States and land, or permit to be landed, from any foreign port or place, any alien laborer, mechanic, or artisan who, previous to embarkation on such vessel, had entered into contract or agreement...to perform labor or service in the United States”and imposed a fine of at least $500 for “every such alien laborer, mechanic, or artisan....”93 Since laborers, mechanics, and artisans were then and are now, in common parlance, all manual workers and neither then nor now could plausibly include a religious minister or professional or clerical employee, the fact that ship masters could not be prosecuted for bringing such white-collar employees into the United States demonstrated either that the latter were not part of the evil that Congress had targeted—or that the bill had been sloppily drafted and that none of the numerous members of Congress who caught and criticized many other flaws detected this one. If it was a flaw, presumably it became one only after the House Labor Committee and Foran reported the bill with the amendment implying that all but four categories of professionals were covered, but neglected to alter the language in § 4 accordingly.94

91United States v. Church of the Holy Trinity, 36 F. 303, 304 (SDNY 1888).
92United States v. Church of the Holy Trinity, 36 F. at 305.
94Congress was, at any rate by 1890, aware of the discrepancy: “How can a master
The court attended to § 4 as an afterthought, dismissing it on the merely speculative grounds that the provision was “wholly independent of the others, and the difference in the persons described may reasonably be referred to an intention to mitigate the severity of the act in its application to masters of vessels.”

As the defendant pointed out in its brief before the Supreme Court, the lower court’s observation did “not meet the intendment” of § 4. First the church noted that provision was a “clear and specific declaration as to whom the law makers intended to exclude from our shores. ... These words must mean something or they would not be so explicitly used and repeated.” Second, the defendant argued: “The framers of this Act felt that the Captains of vessels could clearly know the class of persons they desired to keep from the country, as it was openly charged that many of the captains and the ship owner’s agents in foreign countries were financially interested in increasing the importation of the very persons whom it was the desire of the petitioners for the law (the labor organizations) to keep from this shore, namely, ‘laborers, mechanics and artisans’ under contract before they start.” Thus it was precisely at “stop[ping] the masters of vessels from encouraging and knowingly participating in that kind of immigration” that § 4 was directed and not, as the lower court had speculated, “to mitigate any severity of the Act in its application to the masters of vessels.”

The court’s decision holding “ministers of the gospel as contract laborers” was, as far as AFL President Gompers was concerned, an example of what he viewed as “an attempt to bring the law into odium and ridicule, and cause a revulsion of feeling among the citizens and secure its repeal....” Nevertheless, the questions posed by the justices at oral argument before the Supreme Court on January 7, 1892, gave, in the opinion of The New York Times, “good ground for the presumption” that they would decide against the church. Indeed, the questions had

know whether a person is a mechanic, an artisan, or a laborer? And if the proscription is limited to those classes, immigrants who wish to evade it will always report themselves as being of some other pursuit.” CR 21:10557 (Sept. 27, 1890) (Sen. Evarts).

95United States v. Church of the Holy Trinity, 36 F. at 305-306.

96Brief for the Plaintiff in Error at 13-14, Church of the Holy Trinity v. United States, 143 US 547 (1892).

97Report of the Select Committee on Immigration and Naturalization at 91.

98One reason for the passage of almost four years after the lower court’s ruling was the issuance by the attorney general, after the case had been appealed to the Supreme Court, of an opinion to the Treasury Secretary doubting the latter’s authority to compromise cases arising under the alien labor contract law after the district attorney and Treasury Secretary had recommended accepting the church’s offer to settle the $1,000 fine for $100. OOAG 19:345-50 (1891 [June 27, 1889]); “The Rev. E. Walpole Warren’s Case,” NYT, July 2, 1889 (2:4).
persuaded even the assistant attorney general that his participation in oral argument was unnecessary. After all, despite the defendant’s contention that it was not Congress’s intention to exclude ministers, but only laborers, mechanics, and ordinary workmen, the justices’ questions revealed that “although Congress may have intended simply to exclude workingmen, yet the language of the act itself was on its face so plain as not to leave any room for the court to inquire into Congressional intention.” Justice Field was typical of his colleagues—whose questions made it clear that they thought that only the expressly exempted occupations were excluded—in quoting the language of the statute and asking rhetorically: “Don’t we [meaning the Justices] perform service here?” In response to the church’s argument that such an interpretation would be an “absurdity” that the Court should avoid by giving the act a construction that would articulate “the most sensible view that could be taken of the intention of Congress,” Justice Brewer (who wrote the unanimous opinion) replied: “Is it not just as much of an absurdity to prevent the incoming of an honest laborer as of an Episcopal minister?”

The trial judge may have internalized the traditional canons of statutory construction as insuperable constraints, the Supreme Court did not. Although the Court could hardly avoid conceded the great force in reasoning that the text of the law did outlaw this transaction, the justices “cannot think Congress intended” to penalize it: “It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. ... This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words

99“Looks Bad for Trinity,” NYT, Jan. 8, 1892 (5:3).

100Bizarrely, barely a month after the decision was handed down, the Times erroneously reported that the Supreme Court had “saved” Warren “on appeal by letting him stay on as a ‘teacher.’” “E. Walpole Warren an Alien.” Ironically, at the same time Warren “put himself on record as a perpetual alien” because New York City was “so wicked and corrupt that I would not wish to be identified with it even as a voter.” Id. This declaration impelled the Times to interpret the statute as justly excluding professionals who migrated to the United States solely for opportunistic economic reasons: “A man who comes here avowedly and merely to make a living, and remains an alien, does not occupy a particularly admirable attitude.” Although the effort to enforce the contract labor law against him had failed, “if the purpose of the law had been to exclude clergymen who came to this country merely to make their livings by the practice of their profession, while remaining aliens and refusing to identify themselves with the country, we are not prepared to say that the purpose would have been blameworthy. If Mr. Warren had been excluded, upon the ground that he himself has now furnished, we are quite sure that the Republic would have taken no detriment by his exclusion.” “The Alien Preacher,” NYT, Apr. 12, 1892 (4:1) (editorial).
broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.”

The Court sought to use this spirit and intention to trump the letter in several ways. First, the justices pointed out that the title of the act mentioned only “perform labor,” omitting the term “service,” which could more plausibly serve as basis for including those not engaged in manual labor. “Obviously the thought expressed...reaches only to the work of the manual laborer, as distinguished from that of the professional man. No one reading such a title would suppose that Congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain. The common understanding of the terms labor and laborers does not include preaching and preachers....”

A second guide to the meaning of a statute was to be found in the evil that it was designed to remedy; here a court might properly examine “contemporaneous events, the situation as it...was pressed upon the attention of the legislative body.” In this regard the Court, in addition to quoting Judge Brown’s aforementioned opinion, observed that from the petitions presented to Congress and the committee hearing testimony, it appeared that “it was this cheap unskilled labor which was making the trouble, and the influx of which Congress sought to prevent. It was never suggested that we had in this country a surplus of brain toilers, and, least of all, that the market for the services of Christian ministers was depressed by foreign competition. Those were matters to which the attention of Congress, or of the people, was not directed.”

The Court located the final guide in the more narrowly defined and conventional legislative history, which it characterized as “[a] singular circumstance, throwing light upon the intent of Congress.” Specifically the Court was referring

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102 Some legal scholars regard Church of the Holy Trinity as the first case in which the U.S. Supreme Court used conventional legislative history to interpret a statute or, alternatively, to trump a contrary statutory text. William Eskridge, Dynamic Statutory Interpretation 208-10 (1994); Vermeule, “Legislative History and the Limits of Judicial Competence” at 1836.
103 Church of the Holy Trinity v. United States, 143 US at 463.
to this aforementioned statement in the report of the Senate Education and Labor Committee: "Especially would the committee have otherwise recommended amendments, substituting for the expression ‘labor and service,’ whenever it occurs in the body of the bill, the words ‘manual labor’ or ‘manual service,’ as sufficiently broad to accomplish the purposes of the bill, and that such amendments would remove objections which a sharp and perhaps unfriendly criticism may urge to the proposed legislation. The committee, however, believing that the bill in its present form will be construed as including only those whose labor or service is manual in character, and being very desirous that the bill become a law before the adjournment, have reported the bill without change."  

Although there was apparently nothing "singular" about the House report, which was much more substantive, the Court nevertheless quoted it at length to show that the workers whom Congress intended to exclude were "from the lowest social stratum" and lived on "the coarsest food and in hovels of a character before unknown to American workmen. ... The inevitable tendency of their presence among us is to degrade American labor and to reduce it to the level of the imported pauper labor." Finding that all these guides "concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor," the Court's "duty" was to state that "however broad the language of the statute may be," contracting with the minister, "although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."

Interestingly, the Supreme Court refrained from advancing one argument in support of its implicit boast that it was better able to express Congress's intent than the legislature itself—namely, that in 1891 Congress had amended the law ("probably" in reaction to the trial court decision in Church of the Holy Trinity) to exempt "ministers of any religious denomination,...persons belonging to any recognized profession, [and] professors for colleges and seminaries...." Apparently, Congress may well have agreed with the Times that sustaining "professional free trade" was more important than "protecting" a few disgruntled actors, most of
whom could get employment if they would take it...”111

During the multi-year interim between enactment of the original statute and its amendment, a large number of bills were introduced to add other exempt occupations in order to preclude repetitions of the lower-court decision in Church of the Holy Trinity, which rested on the canon of statutory construction that the inclusion of certain occupations in an exemption implies the exclusion of all others from it (“expressio unius est exclusio alterius”). Other bills, however, would have limited the existing exemptions in response to partisan demands. For example, in early 1888, bills were introduced in both chambers of the Fiftieth Congress by Philadelphia Republicans that would have declared that “the term ‘artists’ shall not be construed as referring to organized bands of music or orchestras.”112 Later that year, New York Democrat Representative Samuel Cox, who was closely linked to various working-class groups, and Senator Blair introduced amendatory bills that would have substituted for the original exemptions a statement that the act did not apply to “actors, or to foreign musicians, performing under a temporary engagement on a tour of the United States....”113 A bill in late 1889 that had exempted professors in universities and “ministers of the Gospel,” was reported out by committee as excepting school teachers and professional actors as well.114 In contrast, in March 1890, as the controversy over musicians was building, New York Republican Senator William Evarts, a former attorney general and secretary of state, introduced a bill that expressly confined the applicability of the 1885 statute to “alien laborers, mechanics, or artisans.”115

A month later, as the hearings were taking place in Castle Garden, the aforementioned H.R. 9632 was introduced in the House, which was passed in August, exempting “professional actors, artists, lecturers, regularly ordained ministers of the gospel, learned professors of colleges or seminaries, or professional sing-

113H.R. 10897, § 5 (50th Cong., 1st Sess., July 19, 1888); S. 3395, § 5 (50th Cong., 1st Sess., July 30, 1888); H.R. 11685, § 5 (50th Cong., 2d Sess., Dec. 10, 1888); S. 3395, § 5 (50th Cong., 1st Sess., Aug. 10, 1888) (as reported out by the Education and Labor Committee, of which Blair was chairman from 1881 to 1890); S. 3406, § 5 (51st Cong., 1st Sess., Apr. 5, 1890).
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ers...." The congressional focus on professors was highlighted by the effort by Republican Representative George Hoar of Massachusetts to add "or teachers" to the "professors for colleges and seminaries" on behalf of Harvard University (of which he was a trustee), which had engaged Felix Klein, "the most famous living mathematician in the world," for three years as a teacher; "when the engagement was made it turned out that that the contract-labor bill, as interpreted by the Treasury Department..., prevented that eminent scholar from coming to this country." After the bill died in the Senate, Representative Owen introduced a new bill in early 1891 that added to the exempt groups of the 1885 statute "regularly ordained ministers of the Gospel,...persons belonging to any recognized profession, [and] professors for colleges and seminaries." His Select Committee reported the bill out with the same language, which the House then passed after amending the clerical exemption to include "ministers of any religious denomination." That the amended statute with its expanded list of exempt occupations had not put an end to the struggle over the labor market was made obvious by the fact that the very day it became law, The New York Times published a report that if any enterprise undertook to bring over musicians, the Musical Mutual Protective Union would "again make a test of the alien contract labor law in the courts and see whether a musician of New-York cannot be regarded in the light of a laboring man who works for wages." And even if the legal battle were lost, the union announced that it would "rigidly enforce its own rules," and none of its members would play with any other musicians who were not members.

Though relatively few in number, court decisions interpreting the 1885 statute offer important insights into both legal and more popular understandings of the distinctions between white- and blue-collar workers. An appellate court in 1899


117 CR 21:10555-56 (Sept. 27, 1890).


120 CR 22:2295 (Feb. 19, 1891). The House also rejected a proposed amendment to insert "learned" before "professions." Id. See below on the enactment of this qualification in 1903.

had to grapple with whether a draper-cum-window dresser/dry-goods clerk was within or outside the ban on contract labor. Relying on *Church of the Holy Trinity*, the Seventh Circuit Court of Appeals, liberated from strict construction, declared that “when we once break away from the letter of the law, and seek for its true meaning and intent, which was to stay the influx of cheap, unskilled manual labor, then the liberal construction adopted by the supreme court furnishes the only safe resting place.”¹²² The straightforward answer for the court lay in the fact that the mischief at which Congress had aimed was great corporations’ contracting abroad for cheap unintelligent labor for mines and mills, not a single person’s coming to the United States as a clerk.¹²³ Although that consideration alone should have sufficed to dispose of the case, the appellate judges then sought to explain how to identify a manual laborer in the real world:

A silk draper or linen draper is not a common laborer. He may do work with his hands, as does a minister, a lawyer, or surgeon, but to designate him as a common manual laborer would be a misuse of the English language. The habit of working with the hands is not by any means the criterion. All men work with their hands. But in some occupations, like that of working with a spade or shovel and wheelbarrow, or as a common hand in a sawmill or in the lumber woods with a peavey or crosscut saw, the value of the labor consists principally in the physical results accomplished. The surgeon also works with his hands, but the beneficial results in his case come more from the skilled labor of the mind, guided by large study and experience, in connection with that of the hand. A stenographer or typewriter works constantly with the hands, and yet the value of his work does not consist mainly in the manual labor done, and it would be a misuse of terms to call him a laborer. He is not such in the ordinary acceptation of the term, no more than is a draper or window dresser. The need of window dressers in large commercial centers like New York to dress out window fronts for an artistic display of silks and woolens is very well known. It has become a favorite way of advertising, and the tradesman who can present the most attractive window is apt to get the best trade. The occupation does not necessarily require any manual labor at all, as that may all be done under the direction and superintendence of the one skilled in that trade or business. But it evidently requires experience, with good taste and judgment. If such a person is not an artist, he should at least have intelligence with an artistic taste and judgment. He must know the value of perspective, and must be able to arrange and combine light and shade and colors to the best advantage,—something as an artist does in a painting. To do this with proper effect requires something more than mere muscle and a spinal cord. It calls for intelligent skill. So with a skillful salesman of silks and woolens, a mercer or draper, though he employs the labor of his hands to a certain extent, the principal value of his services comes from a different and more occult source. He must know his wares thoroughly, and the best

¹²²United States v. Gay, 95 F. 226, 229-30 (7th Cir. 1899).
manner of exhibiting them, and have some knowledge and experience in the treatment and management of customers.124

In another case from 1903 involving the question of whether accountants fit within the professional exemption, the judge, Emile Henry Lacombe—who was sometimes disposed to find...too regularly on the side of property125—manifestly felt that the ruling in Church of the Holy Trinity had made it possible for the judiciary to range freely; in his (possibly ironic) statement of the Supreme Court’s holding: “in construing these statutes we are to get at the spirit of the statute and the intention of its makers, however inconsistent that may be with the words used.”126 Lacombe proceeded in this vein to argue that, pursuant to the Supreme Court’s construction that Congress had intended “simply to stay the influx of cheap unskilled manual labor...the exceptions are superfluous. An ‘expert accountant’ is certainly not an unskilled manual laborer.” And whatever the situation under the 1885 and 1891 enactments, it was reasonable to assume that Congress had a restrictive purpose127 in 1903 in qualifying “profession” by adding “learned.”128 Relying solely on “the ordinary use of language,” Lacombe was certain that accountants did not belong to the learned professions, and the attempt by the aliens’ lawyers to circumvent this

125“Ex-Judge Lacombe, Federal Jurist, Dies,” NYT, Nov. 29, 1924 (13:5).
126Ir re Ellis, 124 F. 637, 641 (CC SDNY 1903), appeal dismissed per stipulation sub nom. Ellis v. Williams, 200 US 623 (1906).
127Ir re Ellis, 124 F. at 643.
128Act of Mar. 3, 1903, ch. 1012, Pub. L. No. 162, § 2, 32 Stat. 1213, 1214. Inexplicably, in the bill from which this act derived the word “learned” was not printed in italics designating a change in existing law. H.R. 12199, § 2 (57th Cong., 1st Sess., Mar. 6, 1902). Nor was there any discussion of the word in the committee reports or floor debates. H. Rep. No. 982: Immigration of Aliens (57th Cong., 1st Sess., 1902); S. Rep. No. 2119: Foreign Immigration (57th Cong., 1st Sess., 1902); CR 35:5764, 5819 (May 21-22, 1902). The Senate report even stated programmatically that: “The absence of comment...indicates that such portion is, either in terms or in substance, existing law.” S. Rep. No. 2119: Foreign Immigration at 1. Quoting this passage, the attorney general opined that insertion of “learned” was “clearly insufficient to justify the assumption that Congress intended the proviso to have any different effect from that given it by the Supreme Court” in Church of the Holy Trinity. OOAG 27:383, 399 (1909 [June 2, 1909]). In the 1902 summary volume of its report, the Industrial Commission published a proposed law draft which it had asked a number of immigration commissioners in various ports to draw up; it included the word “learned.” Final Report of the Industrial Commission 19:1015 (57th Cong., 1st Sess., H. Doc. No. 380, 1902).
obstacle by asserting that all professions were by definition learned failed to explain why Congress would have gone to the trouble of adding a meaningless word.129

Until the end, the courts faithfully adhered to Church of the Holy Trinity. Noting the Supreme Court's holding that Congress had not had in its mind any purpose of staying the coming into this country of "any class whose toil is that of the brain," a federal judge in 1921 found that because the planning work of marine engineering originated in the engineer's mind, it was a recognized learned profession.130 Similarly, three years later, another court, quoting the Supreme Court's remark that it had never been suggested that "we had in this country a surplus of brain toilers" and taking judicial notice of the "common knowledge" that "the work ordinarily and regularly performed by telegraph operators is not manual nor physical in any proper sense, but is mental," dismissed from custody under a deportation warrant a Canadian female telegraph operator.131 And as late as 1929, the Third Circuit Court of Appeals dismissed a deportation action against a German who worked as a plant superintendent on the grounds that he did not belong to the "ignorant and servile class of foreign laborers."132

The Attorney General, in providing advisory opinions on the scope of the contract labor statute to other department heads, also had occasion to flesh out the distinction between manual and mental labor. In 1901, for example, the Treasury Secretary, in asking whether lace makers should be refused a landing, framed the inquiry in terms of whether Church of the Holy Trinity had narrowed the application of the law to aliens performing manual labor or had simply held that it did not apply to a clergyman.133 Remaining faithful to this framework, President McKinley's Attorney General, John Griggs—who, according to the Times, was "believed to be friendly to organized labor"134—pointed out that "[t]he proper distinction" as worked out by the Court was "that between manual labor and the professions," which the amendments of 1891 had incorporated.135 He then pointed out that, although no craft required more skill than was possessed by the members

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129 In re Ellis, 124 F. at 643.
130 Ex parte Aird, 276 F. 954, 957 (E.D. Pa. 1921).
132 McCandless v. United States ex rel. Rocker, 30 F.2d 652, 653 (3d Cir. 1929).
133 OOAG 23:381, 382 (1902 [Jan. 28, 1901]).
135 OOAG 23:386.
of the American Window Glass Workers’ Association, which had provided the original impetus for the contract labor law, they were nevertheless not “brain toilers, as that phrase is usually intended. Such artisans are workers of brain and hand; they use their brains, and mental capacity informs and directs the skill of the handicraftsman; but the distinction is broad and obvious.”\textsuperscript{136} Adding dictum on dictum, the attorney general—evincing a remarkable degree of reflectiveness, subtlety, epistemological humility, and self-doubt that neither Congress nor the DOL would ever display in limning the borders of white-collardom—conceded that “there may be an anomalous region between the line of manual labor and that of the professions, in which are to be found occupations of certain superior clerkly functions or involving taste and skill little short of art, the status of which may be difficult to settle.” Finally, he alluded to “the same doubtful situation...in the Chinese-exclusion laws, in which the question remains for conclusive decision whether an upper clerk or ‘buyer and seller’ or ‘assistant accountant,’ who is not strictly a laborer nor yet a merchant, should be embraced in the exclusion expressly directed at the one class, or admitted under the permission expressly (and perhaps exclusively) granted to the other class and its cognate classes.”\textsuperscript{137}

Eight years later, President Taft’s attorney general from Wall Street, George Wickersham, advised the Secretary of Commerce and Labor that a British-Canadian induced to come to the United States by the promise of employment as superintendent of a lumber mill did not come within the scope of the contract labor statute because his position did not require the performance of manual labor.\textsuperscript{138} More important than this unremarkable conclusion was his insistence that if, in light of the Supreme Court’s interpretations, Congress had intended to extend the statute’s prohibitory scope beyond manual labor, it would have been duty bound to make that intent “plain and ambiguous”; yet nothing in any of the congressional enactments since 1885 or their legislative history disclosed an intent to make “such a radical change in the policy of the Government....”\textsuperscript{139}

The longevity of the struggle over the labor market and the Musical Mutual Protective Union’s tenacity in prosecuting it is impressively documented by the fact that 17 years after it had brought the first suit under the alien contract labor law in May 1885 against a German steamship line for importing a 40-member band,\textsuperscript{140} the union appealed to President Theodore Roosevelt to help musicians secure “a fair and just interpretation of the alien contract labor law to protect the

\textsuperscript{136}OAAG 23:387.
\textsuperscript{137}OAAG 23:388.
\textsuperscript{138}OAAG 27:383, 384, 406.
\textsuperscript{139}OAAG 27:405-406, 399.
\textsuperscript{140}“Under a New Law,” NYT, May 10, 1885 (7:2).
interest of our profession.”141 On the occasion of yet another decision permitting the entry of an orchestra,142 the union’s president, Alexander Bremer, complained of the continuing impact of the “arbitrary” ruling by the Treasury Secretary in 1890 that all musicians were artists. In contrast, it persisted in its view that: “The ordinary professional musician...has no steady employment,” and “[w]herever engagement is offered him he makes a bare living at best, and lives from hand to mouth from day to day not knowing when the next engagement may come to him. He is certainly a wage earner, and as such he is entitled to protection and the benefit of the law the same as any other wage earner. He may be classed as an artisan, but not an ‘artist.’”143 With equal doggedness, the Times remained puzzled by Bremer’s insistence—so contrary to the “natural tendency of mankind...to magnify their respective offices”—on “elaborately belittling and disparaging the craft...of orchestral musicians.”144

Not until the nadir of the Great Depression, when more than 50,000 of the 158,000 members of the American Federation of Musicians were unemployed,145 did Congress feel obliged to accommodate musicians’ exclusionary demands. The legislature had been impelled to act because, in the (not entirely accurate) words of the Senate Immigration Committee report:

Up to the present no distinction has ever been drawn at the ports of entry...between those who are artists in the field of fine music and the great mass of those who can play, however indifferently, some musical instrument.

A man who played a little on a clarinet could be admitted as an artist although in fact he might be following the trade of a shoemaker.

Under the disguise of artists, thousands evade the contract-labor law in entering the United States, and although they are inferior to American musicians, they are often employed here for a long period of time because of the low wage they will accept, and in this way they deprive talented American musicians of contracts....146

141“Musicians Make Appeal,” NYT, Nov. 28, 1902 (5:3).
143“Musicians Make Appeal.”
144“‘Artists’ and Musicians,” NYT, Nov. 30, 1902 (6:4) (editorial).
146S. Rep. No. 419: For the Protection of Musicians (n.p. [at 1]). In fact, eight years earlier, an Egyptian machinist and clarinet player who made the mistake of admitting, in response to a leading question at an immigration hearing, that because he was not good enough to play as a soloist he was not an “artist,” was therefore ordered deported, see United States ex rel. Deliannis v. Commissioners of Immigration at Port of New York, 298
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The House Immigration and Naturalization Committee, while conceding that no instrumental musician who "by any fair interpretation of the word can be called an artist" should be barred and that "[o]ur people are entitled to the cultural pleasures and advancement which visiting artists make possible," insisted that there was "no justification for admitting great numbers of cheap, ordinary alien musicians who are not distinguished at home or elsewhere...." This restrictiveness was rooted not only in the Depression, but also in the previous two decades' "radical changes in the music employment field," as a result of which "the demands of motion pictures, night clubs, cafes, and like places of entertainment, brought about a great increase in the number of instrumental musicians depending upon their employment as such for a livelihood." In addition to the decline of the legitimate theater, technological changes had created "adverse conditions" for musicians: "motion pictures are generally adopting sound and dispensing with orchestras, so that where some 23,000 musicians were employed in motion pictures a year or so ago only half of that number are employed now; also the radio, which of itself decreases musical employment opportunities, is resorting to records and recorded programs."147

As to the need for changes in the legal text itself, the House Committee impliedly assigned the blame for the admission of undistinguished musicians to the Supreme Court's interpretation in Church of the Holy Trinity and its progeny, which dichotomized the scope of the law, in effect reading all non-manual contract laborers out of the prohibition. As a result, the 1885 contract labor law got off to a bad start in the courts, and notwithstanding subsequent amendments designed to perfect the statute and to lead to a change of judicial construction, the first decisions still...prevail as precedents. The result is that the contract labor law is not construed as a general prohibition from which certain specified classes, including professional artists, are exempted; instead, the prohibition itself is virtually limited and made applicable to manual laborers only. Under such construction, the exceptions...have little or no effect. Consequently, the test, in substance, is not whether one seeking admission is a "professional artist" but whether he is a manual laborer; if he represents himself as able to play, in some way or other, however indifferently, some musical instrument, he is admitted. The player not being a manual laborer in the judicial sense must be an artist. An alien who played a little on a clarinet was an artist, even if he made the most of his living as a farrier. It has been said, probably with truth, that organ-grinders have been thus admitted.148

F. 449, 450 (2d Cir. 1924).


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Thus, in 1932 Congress amended the statute to provide that: "No alien instrumental musician shall, as such, be considered an ‘artist’ or a ‘professional actor’...unless—(1) he is of distinguished merit and ability as an instrumental musician, or is a member of a musical organization of distinguished merit and is applying for admission as such; and (2) his professional engagements...are of a character requiring superior talent." Amusingly, just eight years later, the U.S. Department of Labor, in issuing revised regulations identifying the “professional” employees who would be deprived of an entitlement to wage and hour protection under the just enacted FLSA, took precisely the opposite approach. Although the initial regulations promulgated in 1938 had made no mention of artists, Harold Stein, the DOL’s hearing officer who drafted the revised regulations, asserted, with no supporting evidence, that “the general qualifications and methods of work of the bona fide artist make it reasonable to include such workers within the definition of ‘professional.’” He then created as a subdefinition that “the work must be ‘predominantly original and creative in character, as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training.’” Finally, in words that would have been anathema to the opponents of Strauss’s orchestra a half-century earlier, he certified that: “Musicians, composers, conductors, soloists, all are engaged in original and creative work within the sense of this definition.”

The white-collar exemptions, reenacted, both narrowed and expanded, remained embedded in the alien contract labor law through the first half of the twentieth century, until the entire statute itself was finally repealed by the landmark Immigration and Nationality Act of 1952.

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Appendix I:

"[T]he higher or more intellectual occupations" and Manual Labor under the Dependent Pension Act of 1890

All valuable labor involves the exertion of both physical and mental powers.153

Almost exactly at the same time that Congress was debating and courts and an executive branch agency were adjudicating whether white-collar workers performed “labor” for the purposes of the Alien Contract Labor Law, a very similar controversy was roiling Congress concerning disabled Civil War veterans. After four years of debate and President Grover Cleveland’s veto of one bill, in 1890 Congress passed and President Benjamin Harrison approved a law that conferred a monthly pension (ranging from six to twelve dollars, “proportioned to the degree of inability to earn a support”), on Civil War veterans who were “suffering from a mental or physical disability of a permanent character, not the result of their own vicious habits, which incapacitates them from the performance of manual labor in such a degree as to render them unable to earn a support....”154

These disability pensions were not related to military service in any way: a veteran who developed such a disability after and unrelated to the war was eligible.

Nor was the 1890 law the first (or last) time that Congress had found it necessary to deal with the subject.155 As early as 1866, Congress had made eligibility for receipt of a service-related pension depend on whether the veteran was incapacitated for performing any manual labor or suffered from an invalidity to perform manual labor.156 During the years from 1886 to 1890, while the various

154Act of June 27, 1890, ch. 634, § 2, 26 Stat. 182, 182). The statute also conditioned the entitlement of the dependent parents of a dead soldier to a pension on his, her, or their being “without present means of support other than their own manual labor....” Id. § 1, 26 Stat. at 182.
155Act of May 11, 1912, ch. 123, Pub. L. No. 155, § 1, 37 Stat. 112, 113 (providing a pension for anyone who was wounded in the military during the Civil War and was “unfit for manual labor by reason thereof” or who from other causes incurred in the line of duty resulting in his disability was “unable to perform manual labor”).
156Act of June 6, 1866, ch. 106, § 1, 14 Stat. 56. See also Act of Mar. 3, 1873, ch. 234, § 1, 17 Stat. 566, 567, which was framed in terms of a veteran’s disability for procuring his subsistence by manual labor.
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bills were under consideration in Congress, the word "manual," which appeared and disappeared numerous times, was subject to extended, repeated, and vigorous debate. Two key congressional colloquies took place in the Senate in 1886 and in the House in 1890.

In the Senate, after inconclusive discussion on the difference that adding "manual" might make, several senators requested more precise information on the issue. New Hampshire Republican Henry Blair played a crucial role in the first session of the Forty-Ninth Congress, just as he had with regard to the debate over white-collar exemptions from the alien contract labor bill. At a point when the Senate bill (S. 1886) required an applicant to be incapacitated from performing labor and "dependent upon his own labor for support," but used total incapacity to perform any manual labor as a measure of the highest pension amount, Blair explained that "labor" in this context meant that a man had to be "dependent upon his labor, not upon his income from other sources, not upon his bonds or money at interest, but upon his labor for support." This view prompted Kentucky Democrat James Beck to intervene. (Beck, who ultimately voted against the bill—all 14 opponents were Democrats—argued that the pensions should be paid for not by protective tariffs, which oppressed labor and industry, but by an income tax on all with an income above $5,000, but especially on millionaires.) Beck instanced the stenographer at the hearing who lived only on what he earned by his work or labor; if he was discharged from the army a healthy man, but later lost his left arm as a result of being kicked by a horse, would this disability entitle him to a pension despite the fact that he could still earn $3,000 a year? Blair had no difficulty replying that, so long as he was dependent on his labor for support rather than on "outside property," he was eligible; in this respect the proposed bill differed from the general pension, which awarded a disability pension to any soldier who had

157 On the legislative history, see William Glasson, Federal Military Pensions in the United States 204-33 (1918).

158 For example, S. 389, which became law, as introduced by Minnesota Republican Cushman Davis—chairman of the Senate Committee on Pensions and himself a Civil War veteran—included "manual," but it was deleted in committee, and reinserted later. S. 389, § 2 (51st Cong., 1st Sess., Dec. 4, 1889); S. Rep. No. 90 (51st Cong., 1st Sess., Jan. 15, 1890). The House conferees "strenuously" insisted that it be reinstated, but Davis did not think it was of "material significance one way or the other." CR 21:5968 (June 12, 1890).

159 CR 17:4465 (May 13, 1886).

160 CR 17:4465.

161 CR 17:4681.

162 CR 17:4671.
been disabled in battle even if he lived on income from bonds and rents.\footnote{CR 17:4630.}

Shifting the example from a stenographer to a lawyer, Kansas Republican John Ingalls, who was a lawyer but not a Civil War veteran, elicited from Blair, who was both, the response that the lawyer too would be eligible. When Ingalls maintained that that outcome was “not right,” Blair backtracked: “I do not say that it is right, but I think that it is well enough. At the same time I stated early in the discussion that it might be well to insert before that word ‘labor’ the word ‘manual,’ and say ‘manual labor.’” Apparently heartened by Blair’s concession, Ingalls explained that what he had really meant to say was that, whereas he did not want to pension a lawyer whose postwar disability did “not disqualify him from continuing to earn his livelihood by his labor,” he did want to limit a pensionable disability to one that “would prevent a man from obtaining his livelihood in his own calling in life to which he has devoted himself”—in order to “keep him out of the poor-house.”\footnote{CR 17:4630. In other words, Ingalls proposed an occupation-specific disability test that would have disadvantaged white-collar workers, many of whom, as Beck contended, could continue to “make a handsome living,”\footnote{CR 17:4629.} precisely because their work entailed relatively little manual labor.

Instead of expressly engaging Ingalls’ transformative proposal, which would have programmatically segregated blue- and white-collar workers, Blair implicitly rejected identification of the occupation-specific impact of disabilities without, however, articulating a work-related basis for what in essence was an undifferentiated award for pain and suffering within the working—as opposed to the coupon-cutting—class:

I think the word “manual” is omitted in the eleventh line with design, but the man who is actually disabled and who is dependent upon his work, whatever it may be, for his

\footnote{CR 17:4630. This view was echoed by Nebraska Republican Charles Van Wyck, who started with “the theory of benefiting those who actually need it on account of their necessity, because they are unable to procure their daily bread by daily labor.” Consequently, the bill’s only purpose was “to prevent the spectacle, revolting to the American people, that there should be a portion of their soldiers, from a disability incurred after the service, dying in the poor-house or begging on the street-corners.” \textit{Id.} at 4670-71 (May 19, 1886). Van Wyck, who himself had offered an amendment to add “manual” and then withdrew it, had been a brigadier general in the Civil War and was in 1892 an unsuccessful Populist gubernatorial candidate in Nebraska. S. 1886 (49th Cong., 1st Sess., Apr. 28, 1886) (amendments by Van Wyck); CR 17:4464-46 (May 13, 1886); John Hicks, \textit{The Populist Revolt: A History of the Farmers’ Alliance and the People’s Party} 259 (1961 [1931]).}
livelihood, shall be entitled to a pension. ... If the physical disability from which a man suffers, disregarding his employment entirely, it being a physical disability, is so great that he can not perform any manual labor—whether that manual labor was the means of getting his living or not is unimportant—then he is entitled for such a degree of physical disability to $24 a month.\textsuperscript{166}

To be sure, Blair muddied the waters again by adding that the variable monthly pensions amounts were a function of "the degree of physical disability from which the man suffers, and that must be got from the idea of the nature of the work on which the man depends."\textsuperscript{167} Since Blair had just declared that it was irrelevant whether the claimant actually performed manual labor, it is puzzling why he suddenly focused on the actual work that the claimant performed. This confusion may also have prompted Ingalls to ask Blair: "Now, will the Senator advise me why or upon what principle of justice the lawyer disabled by a railroad accident and losing three fingers of his left hand and still able to carry on the business of his profession should receive any pension at all? That is what I want to know."\textsuperscript{168} Blair's response was largely evasive, hiding behind the small numbers of affected white-collar pensioners, rather than confronting the central issue of whether disability for the applicant's actual nonmanual occupation was relevant. Alternatively, he speculated that a lawyer might become proletarianized:

He is disabled physically, and he is in that regard. There are very few instances of that kind, of course. But when you pass from the lawyer, who may be one in a hundred thousand or one in fifty thousand throughout the country, and you come to the case of the clerk, how is it? You may assume that there is not any great necessity that the lawyer shall receive under this general bill; but on the other hand you have to consider that there are but very few such, and that in the vicissitudes of life he may come to be dependent upon physical labor. Although then he may have to depend upon his profession, the time may come when he may have to abandon it. It is a comparatively trifling matter.

You come very soon to other classes, the clerks and the teachers of the country who have been in the service.... They are not a very large number, and they suffer from physical disability, and they are all to be dependent upon their labor. There does not seem to be any great objection, they having performed honorable service, to giving them a pension in proportion to the actual degree of physical disability from which they suffer. It is very true that oftentimes this disability in these classes of what you may call the higher or more intellectual occupations would not largely disable them from acquiring a livelihood in their chosen vocation; but after all there are a great many cases where it would; and if you say "manual labor" you exclude a very large class of those who ought

\textsuperscript{166}CR 17:4630 (May 18, 1886).
\textsuperscript{167}CR 17:4630.
\textsuperscript{168}CR 17:4630-31.
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to take under the provisions of such an act. It was on the whole thought best to omit that word “manual” as the bill came to the Senate because of the hardship that would result in such a very large class of cases if these persons in intellectual employments, if you may so call them, were omitted.169

That Blair was not in the mood for compromise emerged from a follow-up question by Massachusetts Republican George Hoar, who wanted to know whether “manual labor” meant “working with his hands or something equivalent to that” because: “When you give a lien to a laborer you do not give it to a lawyer or teacher....” This reminder of lien law terminology then prompted Senator Ingalls to chime in that in religion, too, “the laborer is worthy of his hire’...does not mean the lawyer is worthy of his hire; it means the laboring man.” But Blair, having tired of semantic instruction, informed Ingalls: “Then the bill is right as it is, and the Senator’s criticism is of no consequence.”170

The following day Blair elaborated by observing that, although he had earlier intended to insert “manual,” since the debate had indicated and his own understanding now being, “that the language as it stands would be held to include persons disabled and dependent upon their labor, whether it was that of a teacher or a physician or a clergymen dependent upon the exercise of his usual pursuit in life,” he would withhold the amendment. In a role switch, Ingalls now intervened on behalf of the white-collardom at whose entitlement he had cast such a jaundiced look the previous day; suddenly it was very clear to his mind that the only people who would be entitled to benefits were the disabled “dependent upon their own manual labor for support. I know of no reason why that rule should be applied. A man who has been a soldier and who is a physician or a clergymen or a lawyer or an editor or a merchant or a teacher, being disabled and dependent and unable to pursue his avocation, ought to receive the benefits of this bill exactly the same as a man who follows the plow or makes shoes or manufactures iron in the forge.”171 In an effort to use “a great deal more comprehensive” term that would extend the bill’s benefits to all the disabled regardless of “their pursuit in life,” Ingalls proposed substituting “exertion” for “labor.” Blair and a majority of the Senate agreed to the amendment,172 but the House did not pass the bill that

170 CR 21:4631.
171 CR 21:4677 (May 19, 1886).
172 CR 21:4678, 4681. Nevertheless, S. 1886 as passed by the Senate included another reference to “manual labor,” which was not used in the 1890 law: “The highest rate of pension granted under this section, which shall be for total incapacity to perform manual labor....” S. 1886, § 1, (49th Cong., 1st Sess., May 25, 1886) (as passed in Senate). When
session;173 and when a House bill supplanted it in 1887 during the second session of the Forty-Ninth Congress, the bill that passed both Houses and was vetoed by President Cleveland replaced the broader “exertion” with “labor” bereft of the modifying “manual.”174

The aforementioned key discussion in the House in 1890 occurred after the conference committee had reinserted “manual,”175 thus requiring the pensioners to be “incapacitated from the performance of manual labor.” New York Republican Representative John Farquhar, who had been president of the National Typographical Union from 1860 to 1862, was awarded the Congressional Medal of Honor during the Civil War, and became a prominent lawyer,176 asked: “Why was the word ‘manual’ inserted before the word ‘labor’? “Is that definite enough to cover all kinds of disabilities which ought to be provided for?”177 The chairman of the House Committee on Invalid Pensions, Kansas Republican Edmund Morrill, who was also a Civil War veteran and later a bank president, explained that he had investigated the matter very thoroughly. My first impression was in favor of the bill as the Senate had it, but I found that it would entirely revolutionize the rulings of the Pension Office. The only standard recognized by the Pension Office has been and is manual labor. They say there that it is the only possible standard, that they can not measure a man’s mental condition or ability for mental labor, and that manual labor is the only standard that has ever existed in the office and the only standard that they can possibly work by.178

Ingalls asked how any modification could have been achieved by deleting the other “manual” since this one was embedded in the controlling clause, Blair replied, without much force, that the term was there “simply to indicate a measure for the varying degrees of physical disability from which the applicant may have come to suffer, from total incapacity to perform manual labor down.” CR 17:4631. Again Blair failed to explain why that standard was relevant to gauging the disability of, for example, a lawyer who could continue to engage in his profession even though he was incapacitated to perform manual labor.

173As reported out by the House Committee on Invalid Pensions, “labor” had once again replaced “exertion.” S. 1886, § 1 (49th Cong., 1st Sess., June 15, 1886).
175CR 21:5945 (June 11, 1890).
176David Montgomery, Beyond Equality: Labor and the Radical Republicans, 1862-1872, at 94, 213 (1972 [1967]).
177CR 21:5946 (June 11, 1890).
Morrill’s explanation suggested that the use of “manual” may have been a formality or makeshift designed to accommodate the limits of examiners’ ability to measure; consequently, the eligibility of veterans performing nonmanual labor would be determined by their hypothetical ability to perform manual labor, even though their actual profession required virtually no such labor. As explained by the leading early-twentieth-century chronicler of the history of military pensions:

But a man might be in receipt of a comfortable or handsome income from his services as a skilled worker, salesman, clerk, lawyer, physician, public official, business man or banker without thereby being ineligible for a pension. The law inquired only as to the ability of the applicant to perform crude manual labor, and rated in an arbitrary manner those physical and mental ills which, when of a permanent character, would hamper a man in performing such labor. ... Pensions were provided for the highly paid but rheumatic lawyer, for the prosperous business man hurt in a street accident.\(^\text{179}\)

Although the Republican Party, which was the chief political engine of Civil War pensions, advocated extending them to still more people in an effort to spend the budget surpluses built up by rising tariff revenues and to gain more votes from those who did not believe that they directly benefited from high tariffs,\(^\text{180}\) it is not clear that the number of potential white-collar beneficiaries of the new nonwar-related disability pensions among Civil War veterans was either large enough or strategically located in terms of northern and western election geography to have played any part in congressional deliberations.

In spite of its use in pension statutes going back more than a quarter-century, as late as 1895 an appeal from a rejection of a claim by a county surveyor on the grounds that he was not wholly disabled for manual labor stated that: “No accurate definition of ‘manual labor’ as contemplated by the pension laws has ever been given....” The claimant had cleverly argued that surveying was not “manual labor” within the meaning of the law, but chiefly mental; since the only physical exertion required by surveying was walking, and since he was able to adduce a dictionary’s definition as “physical employment with the hands as distinguished from mental


or professional labor,” he challenged the Interior Department’s conclusion that manual labor also included labor of the legs and feet. John Reynolds, the assistant secretary of the interior, rejected this strict etymological sense of the term on the odd grounds that it led to the reductio ad absurdum that a man totally paralyzed in both legs but with unimpaired use of both hands was not incapacitated for the performance of manual labor. But more importantly, the adjudicator held that “all valuable labor” involved the exertion of both physical and mental powers. Instead of focusing on white-collar professions, however, Reynolds illustrated his view by reference to the blue-collar work of shoemaking, upholstering, painting, and “similar occupations,” the muscular force employed in which was “slight. The chief value-giving element is the knowledge which directs that force. Yet these are all forms of manual labor.” While conceding that surveying required “the exercise of special knowledge and some mental labor,” Reynolds pointed out that it also required considerable physical exertion; the very fact that a man was able to do the necessary walking to overcome the various obstacles usually found in the field, demonstrated that he possessed sufficient physical powers for the “performance of some manual labor....” This refutation of the claimant’s position was, however, merely a preliminary skirmish because “[t]he essential question” was not whether he “actually performs manual labor but whether he is able to perform it.”181 In other words, construing the statutory term did not require an examination of whether a claimant’s actual job involved manual labor, but whether hypothetically he could perform manual labor “to earn a support....”182


182The DOL has classified surveyors as engaged in a professional or other related occupation in the same subgroup with architects, lawyers, librarians, models, psychologists, social workers, and urban planners. US BLS, Occupational Outlook Handbook: 1970-71 Edition xii (Bull. No. 1650).
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Appendix II:
Lien Laws and Bankruptcy and State Corporate Insolvency and Wage Payment Statutes

It would hardly do to hold that the general manager of the business of a corporation...becomes entitled to priority, for the reason he incidentally sweeps the floor, dusts the counters, and assists in selling goods. Adopt this rule and general managers of a business would be sure to do enough menial work to bring themselves within the section of the bankruptcy act giving priority to workmen, clerks, salesmen, and servants.183

A supervising "chief designer" is not in the same economic class as the workers who follow his designs and do the actual manufacture. The [bankruptcy] statute was intended to favor those who could not be expected to know anything of the credit of the employer, but must accept a job as it comes.... The claimant would have been the first to resent the notion that he was a workman or a servant.184

The concept of social or economic rank has been so far employed against the wage and salary claimant....185

Much less obscure than alien contract labor or Civil War pension laws are nineteenth-century lien laws as well as U.S. federal (and British) bankruptcy and state corporate insolvency laws that created a priority for wages, several of which extended protection to clerks. In addition, all states enacted wage payments statutes prescribing when or how often wages had to be paid and/or in what form (and banning payment in scrip or compulsory company stores).186 Because these regimes have been explored elsewhere,187 they are treated cursorily here.

Because lien laws often protected workers and ‘contractors’ as well, their dual-class origins and purposes prompted judges to engage in more expansive line-drawing than was common under many other statutes. In particular, lien laws

183 In re Greenberger, 203 F. 583, 584 (N.D.N.Y. 1913).
186 For an overview and a comprehensive collection of the statutory texts, see Lindley Clark and Stanley Tracy, Laws Relating to Payment of Wages (BLS Bull. No. 408, 1926).
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represented a noteworthy area of the law in which courts early on treated one white-collar occupation—architects—on an equality with blue-collar workers. After all, if, as one court put it, lien laws covered "the material man, who does no work," there was no reason not to cover architects, who did expend labor. Eventually, many states amended their lien laws to cover architects expressly.

Interpreting an 1862 New York law that created a lien in favor of "any person who shall perform any labor, or furnish any materials in building, altering, or repairing any house, etc., by virtue of any contact with the owner," the state's highest court held in 1878:

The architect who superintends the construction of a building performs labor as truly as the carpenter who frames it, or the mason who lays the walls, and labor of a most important character. It is not any the less labor within the general meaning of the word, that it is done by a person who is fitted by special training and skill for its performance. The language quoted makes no distinction between mere manual labor and the labor of one who supervises, directs, and applies the labor of others. ... Looking at the whole act it is plain that it was not passed simply for the protection of laborers, using that word in a restricted sense as designating those who work with their hands, and are dependent upon their daily toil for their subsistence. Mechanics' lien acts were originally enacted for the especial protection of this class of persons, but their scope has been greatly extended. Under the act in question a lien may be created not only in favor of workmen employed by a contractor, but in favor of the contractor also. The lumber dealer, the hardware merchant, in short any person who supplies materials for the use of the building, may acquire a lien thereon for their value. The right to acquire a lien is not confined to persons who may be supposed to need the especial protection of the State.

Nor were architects the only non-manual laborers to benefit from lien-law adjudications. In 1881, the U.S. Supreme Court, in a case that arose under a Utah Territory lien law, admitted that it was "somewhat difficult to draw the line between the kind of work and labor which is entitled to a lien, and that which is mere professional or supervisory employment, not fairly to be included in those terms," but, construing a lien law liberally, nevertheless found that "the overseer and foreman of the body of miners who performed manual labor upon the mine" was entitled to a lien:

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191 Mining Company v. Cullins, 104 US 176, 179, 177 (1881).
He planned and personally superintended and directed the work, with a view to develop the mine and make it a successful venture. His duties were similar to those of the foreman of a gang of track hands upon a railroad, or of a force of mechanics engaged in building a house. Such duties are very different from those which belong to the general superintendent of a railroad, or the contractor for erecting a house. Their performance may well be called work and labor; they require the personal attention and supervision of the foreman, and occasionally in an emergency, or for an example, it becomes necessary for him to assist with his own hands. They cannot be performed without much physical exertion, which, while not so severe as that demanded of the workmen under his control, is nevertheless as really work and labor. Bodily toil, as well as some skill and knowledge in directing the work, is required for their successful performance. We think that the discharge of them may well be called work and labor.192

The federal bankruptcy law of 1841 included a priority only for an “operative.”193 Following its swift repeal, the next federal bankruptcy statute of 1867 included clerks together with workmen and servants within the protected class.194 Unfortunately, its legislative history sheds no light on the reason for the inclusion of clerks.195 But the fact that the priority was limited to $50 earned during the previous six months strongly suggests that it was probably not intended to protect workers earning more than minimal incomes. In any event, this act was in effect only for a decade before it, too, was repealed.196 Another 20 years passed before Congress enacted another bankruptcy law, which even at the turn of the century protected the wages of the same categories of workers only up to $300 earned during the previous three months.197 Under it a music teacher charging 50 cents an hour was held not to be a wage-earner, but, rather, like a lawyer or doctor:

192 Mining Company v. Culllins, 104 US at 177-78. See also Banker’s Surety Co. of Cleveland, Ohio v. Maxwell, 222 F. 797 (4th Cir. 1915) (working foreman entitled to lien).
195 H.R. 7, § 27 (39th Cong., 1st Sess., Dec. 11, 1865), and H.R. 598, § 27 (39th Cong., 1st Sess., May 27, 1866), both contained the priority for clerks at the time they were introduced, and the congressional debates of the very sections embodying them did not discuss the issue. Nevertheless, inclusion of clerks was apparently not a foregone conclusion since some bills in the early 1860s did not mention them. See, e.g., H.R. 253, § 22 (37th Cong., 2d Sess., Jan. 28, 1862) (bill files by Roscoe Conkling protecting only operatives and physicians). But see H.R. 424, § 30 (38th Cong., 2d Sess., Dec. 13, 1864) (bill introduced by Lafayette Foster protecting operatives, clerks, and house servants).
197 Act of July 1, 1898, ch. 541, § 64 b, 30 Stat. 544, 563; 11 Code of the Laws of the United States of America, § 104(b) (1934 ed.).
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"His work is mental, not physical. He labors with his head, not his hands." In 1916, Judge Learned Hand, interpreting the bankruptcy statute, added: "Everyone who understands words knows that it is absurd to call an actress who can command $5,000 for a four weeks engagement a workman or a servant."

In New York State, where an 1859 act incorporating a steamship company made the stockholders individually liable for all debts owing to all their "laborers and operatives for services" provided to the corporation, a court held as early as 1862 that a consulting engineer did not fall under those headings, which applied to "an entirely different class of men...who obtain their living by coarse manual labor, as distinguished from professional men; men who work with their hands, rather than their heads." More importantly, the court also ruled that the engineer also did not come within "the policy or reason of the law," because "[t]he purpose of the legislature was to protect a class of men not well qualified to protect themselves. Men who usually labor for small compensation, and who are regarded, to a certain extent, as in the power of their employers—men who usually take no security for their services, who would generally be dismissed for the requiring it, and therefore never make the attempt." Even though the engineer in question had failed to take such security, the court still held that "he obviously does not belong to the class referred to" because the legislature did not consider "professional men," who "[a]s a general thing...take care to protect themselves," "as requiring the aid of such laws."

200 Erricson v. Brown, 38 Barbour 390, 391-92 (NY Sup. Ct. 1862). The state's highest court was even more dismissive of the claims of a lawyer who contracted with a corporation to perform its legal work for a fixed salary of $50 a week and then sued it for the salary due him: "When, in section 54 of the Stock Corporation Law, the general word 'employees' was added after the words 'laborers' and 'servants,' it could not have been intended, from the collocation of words and for the want of reason in the thing, to include persons performing services to the corporation of a higher dignity, such as its legal adviser. Indeed, the appellant would be utterly without any reason in claiming the protection of the statute, if he could not pretend that his agreement with the company made him its employee. ... The lawyer does not lessen the dignity and independence of his position towards his client, or in the community, by making such an agreement. He does not, thereby, descend into that inferior and subordinate class of persons who, being continuously employed in the corporate business for a compensation paid in wages, or in salaries, and being under the orders of the managers of the corporation, are usually regarded as its servants or employees." Bristor v. Smith, 157 NY 158, 160 (1899). But see Conant v. Van Schaick, 24 Barbour 87, 99 (1857), which interpreted a New York railroad corporation statute which made stockholders individually liable for debts due to any of
A few years later the highest court in New York, interpreting an 1848 statute authorizing the formation of manufacturing corporations and making stockholders individually liable for debts owing to their "laborers, servants, and apprentices," held that the corporate secretary, an officer whose duties involved "a minimum amount of either head or hand work," was not a servant. The law’s purpose "was to protect the classes most appropriately described...as those engaged in manual labor, as distinguished from the officers of the corporation or professional men engaged in its service; in short, to furnish additional relief to a class who usually labor for small compensation, to whom the moderate pittance of their wages is an object of interest and necessity, and who are poorly qualified to take care of their own concerns, or look sharply after their employers."

At the turn of the century the same court, in a case involving the claims of a $100-a-month clerk/bookkeeper, a $125-a-month superintendent, a $125-a-month draftsman, and two foremen with salaries of $125 and $225 a month, interpreted an 1885 law that required the wages of a corporation’s employees, operatives, and laborers to be paid preferentially when the corporation went into receivership. The court found that it was not the law’s purpose "to secure a preference for claims due to the clerical force engaged in transacting the business, nor to the superintendent, foremen or officers of the corporation who are compensated by a fixed yearly salary." Interestingly, the court remarked that it was "significant...that insurance its “laborers or servants” for services performed for the corporation as applicable to a civil engineer: “I see no middle ground, between restricting it to day laborers, and applying it to all persons employed in the service of the company who have not a different proper and distinctive appellation; such as officers and agents of the company. The engineer...is as fully entitled to its benefits as is the man who shovels gravel.”

201 1848 NY Laws ch. 40, § 18, at 54, 58.

202 Coffin v. Reynolds, 37 NY 640, 642, 644 (1868). Similarly, fourteen years later the Court of Appeals found in Wakefield v. Fargo, 90 NY 213, 218-19 (1882): “A general manager is not ejusdem generis with an apprentice or laborer; and although in one sense he may render most valuable services to the corporation, he would not in popular language be deemed a servant. The word used is no doubt broad enough, and might without exaggeration, represent all persons connected with the administration or furtherance of the affairs of a corporation; in this instance, from the one who dips or bottles the water, to the president, but this would manifestly be too general. ‘Laborer or apprentice’ are words of limited meaning, and refer to a particular class of persons employed for a defined and low grade of service performed...without responsibility for the acts of others, themselves directed to the accomplishment of an appointed task under the supervision of another. They necessarily exclude persons of higher dignity, and require that one who seeks his pay as servant, should be of no higher grade than those enumerated as laborers or of lesser quality.”
and moneyed corporations are excepted from the operation of the statute. There was no reason for excepting these corporations but for the fact...that they do not employ labor, in the ordinary sense of the word. The conduct of the business of these corporations requires a large clerical force, graded and organized according to the extent and necessities of the business. If it was intended to protect the claims of this class of employees, there was no reason why all corporations should not be included within the scope of the statute. But it evidently was not. It was supposed that that class of employees could protect themselves, whereas the common laborer, operative or mechanic would be left by the failure of the business in a much more helpless condition.\(^{203}\)

The scope of wage payment laws, which generally began to be enacted later in the nineteenth century and, inter alia, prescribed weekly or semimonthly payment, proscribed company stores or payment in scrip, varied widely among the states: some covered “all employees” (New Mexico), “every employee” (Kentucky), and “employees of every description” (California), while others applied to “[a]ll wage earners” (Kentucky), “laborers, servants, or employees” (Illinois), “mechanics, laborers, or other servants” (Kansas), “wageworkers engaged in manual or clerical work” (Maryland), an employee defined as “a mechanic, workingman, or laborer” (Vermont), and “wage workers...engaged in manual, mechanical, or clerical labor including all employees, except officials, superintendents or other heads or subheads of departments, who may be employed by the month or year at stipulated salaries” (Georgia).\(^{204}\)

The courts of New York were, once again, active in restrictively interpreting the statutory coverage terms that that state’s various wage payment laws used. In 1890 the legislature enacted “An act to provide weekly payment of wages by corporations,” which applied to “each and every employe engaged” in the covered (including municipal) corporations’ business.\(^{205}\) In a test case brought that same year by the factory inspector on behalf of a clerk in the mayor’s office, a secretary and treasurer of the park commissioners, a member of the fire department, a school teacher, and a patrolman on the police force of the City of Buffalo, the state sought recovery of the $10 penalty for the city’s failure to pay them weekly. The controlling principle that the judges chose to construe the law was the legislature’s intention as determined by the statutory language and “the cause or necessity of making the statute.” The law’s “spirit and purpose” were so crucial that the statute “should be so construed as to carry out the legislative intent, even though such

\(^{203}\)Re Stryker, 158 NY 526, 529 (1899).

\(^{204}\)Clark and Tracy, Laws Relating to Wage Payment at 105, 72, 51, 71, 64, 70, 78, 135, 61.

\(^{205}\)1890 NY Laws ch. 388, at 741.
construction be contrary to the literal meaning of some of the words used therein.”

Viewing also “the evil sought by the act to be remedied,” the judges concluded that the “statute belongs to a large class of legislation designed for the promotion of the welfare of laborers and workmen, and may be classed with...the acts of our own legislature for the limitation upon the employment of children of tender age, the limitation of the hours of labor, the protection of laborers under the acts for the inspection of factories....” Consequently, although “the word ‘employe,’ as used in the body of this statute, standing by itself, without words of limitation, is sufficient to include, not only persons engaged in manual labor, such as servants and laborers, but also such as may be employed otherwise,” the court was able to identify “no special reason observable” why the statute should intervene to override their contractual terms of employment: “Not one of those persons represents a class asking for legislation in its behalf. It would, therefore, be extending the statute beyond what appears to us to be the obvious meaning of the legislature in passing it, to apply it so as to cover the cases of those persons.” Without disclosing how it knew that none of these government workers had sought or might benefit from the wage payment law, the court tried to buttress its value judgment by referring to cases “having a bearing upon the subject-matter involved,” decided under the aforementioned law of 1848, and holding that courts could not interpret “laborers, servants, and apprentices” as encompassing “clerks and contractors and other persons...although the word ‘servant’ or ‘laborer,’ detached from the connection in which it is used in the statute, and used metaphorically, is broad enough to include any person who engages his services to another for compensation.” Thus, unlike late-twentieth-century courts interpreting the exclusion of white-collar workers from the overtime provision of the FLSA, the New York judges in 1890 did focus on legislative intent and the evil sought to be remedied—a hallmark of progressive jurisprudence striving to expand the bounds of statutory coverage—but their analysis was so unencumbered by the empirical realities of work-

206People v. City of Buffalo, 11 NYS 314, 315 (Sup. Ct., General Term, 5th Dept., Oct. 23, 1890).
207People v. City of Buffalo, 11 NYS at 317.
208People v. City of Buffalo, 11 NYS 316.
209People v. City of Buffalo, 11 NYS 317-18. At exactly the same time another court reached the same conclusion concerning the $3,000-a-year property clerk and assistant paymaster of the Parks Department of the City of New York. People v. Myers, 11 NYS 217 (Sup. Ct., Spec. Term. NY County, Oct. 1890).
210The principle was nevertheless venerable: “The office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to
ing conditions and so freighted with preconceptions that it failed to do justice to that interpretive guideline.

A quarter-century later New York judges, construing a somewhat differently worded wage payment provision in the state's Labor Law, did not even find it necessary to offer reasoned arguments in support of their exclusion of a series of white-collar workers. The New York State Industrial Commission had sought to impose penalties on the Interborough Rapid Transit Company for its failure to pay wages weekly to the following employees paid the following monthly salaries: stenographer ($80); accountant ($125); typist ($45); chainman who assisted civil engineers ($50); levelman who assisted civil engineers ($85); two civil engineers ($250 and $225); bookkeeper ($100); draftsman ($150); structural designer ($160); and clerk ($90).211 The wage payment provision applied to "each employee" of covered corporations, while the Labor Law defined "employee" as "a mechanic, workingman or laborer who works for another for hire."212 As to all these workers the judges merely asserted that: "It scarcely needs argument to show " that they were "not within the defined classes." The court conceded the "border[-]line" character of two other employees: a $65-a-month rodman who assisted civil engineers by carrying and holding graduated surveyors' rods; and a $40-a-month blueprinter, who prepared blueprints of plans and drawings. They resolved their doubts about the former in favor of exclusion because, while his work was largely manual, "we may infer that he belongs to the engineering staff, although in a humble capacity, rather than among the workingmen or laborers." Without any explanation whatsoever, the court, using a "liberal construction," deemed the blueprinter a workingman, thus classifying him together with a $25-a-month office boy, a $50-a-month switchboard operator, a $35-a-month matron (who helped the operators care for their rooms)—all of whom also required the same construction to achieve inclusion. Only the $85-a-month chauffeur (who drove the field engineers) could be classed as a mechanic or workingman without a liberal interpretive boost.213


212 1909 NY Laws ch. 36, Consolidated Laws, ch. 31, § 2. This definition went back to the first Labor Law: 1897 NY Laws, ch. 415, § 2, at 461, 462 (May 13), which repealed (id. at 499) an early eight-hour law, which had covered "all mechanics, workingmen and laborers." 1870 NY Laws ch. 385, § 1, at 919 (Apr. 26).

213 People v. Interborough Rapid Transit Co., 154 NYS at 630.

suppress subtle inventions and evasions for continuance of the mischief...according to the true intent of the maker of the Act, pro bono publico." Heydon's Case, 3 Co. Rep. 7a, 76 Eng. Rep. 637, 638 (1584).
The dissenting judge was somewhat more forthcoming in rooting his value judgments in the legislature’s purposes:

Having in mind the beneficent purpose which the Legislature had in view in the passage of the statute in question, of protecting employees from unscrupulous employers who by deferring the payment of the wages due them might ultimately defraud them of the fruits of weeks of labor, amounting in the aggregate to large sums, such a construction should be given to the provisions of the law as will extend its protection to as wide a field of labor as possible, consistent with the language used therein. ... So viewed, the definition of an employee in...the Labor Law...as “a mechanic, workingman or laborer who works for another for hire,” taken in conjunction with the term “wages”...appears to me to clearly indicate the employees whom the statute was intended to protect as those engaged in manual or mechanical labor, as distinguished from those occupying professional or executive positions, and who were paid on the smaller scale of wages rather than on the higher one of salary. It was these subordinates embraced in the first class, whose dependence on their toil made the loss of any of its recompense a serious matter to them, and whose comparative helplessness to assert their right to the prompt reward of their labor, whom the State was solicitous of protecting, rather than the better paid and more independent members of the second class.214

Based on this dichotomy between “manual or mechanical labor” and “professional or executive positions,” the dissenting judge concluded, also without explanation, that only the two engineers, structural designer, and draftsman were excluded from the protection of the statute.215 Perhaps the judge considered them as occupying professional positions (though the draftsman was unlikely to have done so); in any event, they happened to be the four highest paid employees. Apart from the dissenter’s failure to offer reasons, his dichotomous scheme appeared to be deficient since it did not comprehensively span the universe of occupations; most glaringly, even in the case context, its implicit categorization of the accountant as engaged in “manual or mechanical labor” was either idiosyncratic or presciently Marxist.216

214 People v. Interborough Rapid Transit Co., 154 NYS at 631 (Dowling, J., dissenting).


216 Curiously, the New York State Attorney General, Thomas Carmody, wrote an opinion in 1912 under the same statute stating that “[a]ll ‘employees’ receiving ‘wages’ should come within the scope and protection of the law”; in particular, he opined that salesmen, clerks, stenographers, and draftsmen were “all clearly ‘employees’” and that
Two decades later, by the time of the Great Depression and mass industrial unionism, New York State judges became bolder in their purpose-driven guerrilla warfare against narrow interpretations of the term "employee." In a suit against a stock brokerage brought by an assistant cashier, after he had been terminated, to recover wages that had been withheld under the employer’s regime requiring the employees to give up their compensation one week out of six, a highly respected New York City municipal court judge denied the employer’s motion for summary judgment on the grounds that:

Fine words are in law like fine feathers in life. They do not make an executive out of a

their compensation could fairly be called "wages." Although he argued that cases decided under the corporate insolvency statutes should not be controlling with respect to the wage payment laws because the former, inasmuch as they gave a preference to one class of creditors to the exclusion and at the expense of others, had to be construed strictly, he failed even to mention that the wage payment law defined an “employee” as a “mechanic, workingman, or laborer,” let alone to explain how any of those terms applied to any of these white-collar workers fit that description. Annual Report of the Attorney General of the State of New York For the Year Ending December 31, 1912, at 538-40 at 539 (1913 [Dec. 12, 1912]). The point here is not that it would have been preposterous to classify, for example, a clerk as a workingman, but that it was incumbent on the attorney general to offer some evidence to overcome dictionary definitions focusing on manual work. Interestingly, the OED, while defining a “workingman” as “a man employed to work for a wage, esp. in a manual or industrial occupation: a term inclusive of ‘artisan’, ‘mechanic’, and ‘labourer’,” nevertheless presented this citation from the Westminster Gazette from 1896: “The word ‘workingman’ was held here to include a clerk or small shopkeeper, or anyone whose total income did not exceed £150 a year.” Oxford English Dictionary 12:299:1 (1961 [1933]).

To be sure, in 1933, the New York State Attorney General was still citing People v. Interborough Rapid Transit Co. as an impediment to coverage of various white-collar workers in an opinion addressed to the Milk Research Council, which had asked whether the wage payment law applied to “executives, professional writers, translators, and office stenographic help.” New York State Department of Labor, Annual Report of the Industrial Commissioner For the Twelve Months Ended on December 31, 1933, at 89-90 (1934 [Mar. 7, 1933]).

Two years after Justice David C. Lewis had issued this decision, the Tammany Hall Democratic Party machine refused to renominate him because he had refused to take orders from district party leaders concerning his cases. He then ran for reelection with the support of the leftist American Labor Party and National Lawyers Guild, but was defeated. “Progressives Back Lewis,” NYT, Aug. 15, 1937 (2:7); “Judge and Boss,” NYT, Sept. 16, 1937 (24:2-3) (editorial); “Judge Lewis Is Loser,” NYT, Sept. 17, 1937 (18:4); “Prime Test of Fitness,” NYT, Sept. 29, 1937 (22:1-2) (editorial).
clerk. ... Do the well-paid workers in an organized trade cease to be workingmen or mechanics? Yet one fears that these elements may have been unduly stressed in the distinction that the courts may have written into the statute

How can this statute serve its real purpose if we put it in the strait-jacket of a too strict or restricted construction. Today clerical work can claim no majesty; and manual labor suffers no menialism.219

219Strom v. Prince, 279 NYS 589, 592 (Municipal Ct. NY, Borough of Manhattan, Mar. 29, 1935). To summarize the subsequent development of the law: In 1956, the legislature added § 196-a, which, inter alia, excluded from coverage salesmen whose principal activity was supervisory, managerial, executive, or administrative. 1956 NY Laws ch. 512, at 1234-35 (Apr. 10). The next day it added § 196-c, which required "[e]very employer" to "pay to each individual in his employ the wages and salary earned in accordance with the agreed terms of employment," but excluded from coverage executive, administrative, and professional employees earning more than $100 a week. 1956 NY Laws ch. 539, § 1, at 1263, 1264 (Apr. 11). See also People v. Fernandez, 233 NYS2d 86 (City Ct of NY, Port Jervis, Orange Cty., July 5, 1962). Then in 1966, the legislature repealed the old wage payment law and enacted a new one, which, for purposes of frequency of payments, created four categories of workers: manual worker; railroad worker; commission salesman, which did "not include an employee whose principal activity is of a supervisory, managerial, executive or administrative capacity"; and clerical and other worker, which included all employees not included in the other three categories, "except any person employed in a bona fide executive, administrative or professional capacity whose earnings are in excess" of $200 a week—an amount that by 1992 was increased to $600. 1966 NY Laws ch. 548, § 2 at 1293-98 (June 14); NY Labor Law §§ 190-93, 198-c (McKinney 2002). Extensive litigation has ensued over whether these three white-collar groups are categorically excluded from the statute altogether or whether they are, for example, still protected by the prohibition on certain deductions from wages in § 193, which does not expressly exclude these groups. For a detailed discussion of the judicial interpretive controversy, see Miteva v. Third Point Management Co., 2004 US Dist. Lexis 12439 (SDNY, July 2, 2004). Remarkably, this federal court decision denying the investment management firm-employer’s motion for summary judgment concluded, solely on the basis of logically parsing the statute without any analysis of its socioeconomic purposes, that the plaintiff, an analyst whose promised annual salary and bonus amounted to many hundreds of thousands of dollars, was not totally unprotected by the statute. Wage payment laws in several states (including Arkansas, California, Connecticut, Illinois, Missouri, New Mexico, Oklahoma, Texas, and Virginia, as well as the District of Columbia) either categorically excluded the executive, administrative, and professional employees excluded from the FLSA or permitted employers to pay them less frequently than other employees. CCH, State Compensation Laws: Minimum Wage/Overtime, Prevailing Wage, Wage Payment 124, 319-20, 448, 508, 666, 1173, 1469, 1763, 2197, 2287 (n.d. [2000]).

212
By the end of the 1930s, even the state’s highest court expressed a willingness to let purpose trump literalness. After the state legislature had enacted a little Wagner Act in 1937, which was incorporated into the state Labor Law, which still defined an employee as “a mechanic, workingman or laborer,” the leftist (and arguably Communist) United Office and Professional Workers of America organized the industrial insurance agents of the Metropolitan Life Insurance Company in the New York metropolitan area. However, in what the chairman of the New York State Labor Relations Board later called “a determined effort to deprive white collar workers of the protection of the act,” the world’s largest insurance company refused to bargain collectively with its insurance agents on the grounds that they were not “employees” within the meaning of the statute. The employer’s syllogistic argument was so strong that the trial court observed that the State Labor Relations Board “cannot meet petitioner’s argument and its attempts to do so have either resulted in additional grounds for the petitioner’s viewpoint or in contentions so patently refutable that a recitation of them would serve no purpose. Counsel for the Board finally reaches the conclusion that the omission of the words ‘any employee’ included in the National act, is a typographical error or an inadvertency.” Instead, the trial court decided to cut the Gordian knot purposively:

While the power of the court to supply omissions of the Legislature, no matter how obvious, is highly restricted..., where, as here, the question is the determination of the intent, it is permissible to consider the purpose of the statute as set out in it. Section 700 states the reasons for the act. [T]he Legislature is seeking to supply actual liberty of contract between employer and employee in place of the theoretical liberty long recognized to be virtually non-existent. The language used indicates an application to all industry, not restricted to manual workers. It would be very strange if the Legislature intended to restrict what it believes will accomplish a beneficent purpose to what in this State would be a fraction of the working population. To so hold would be to determine that if this were done advisedly the Legislature was engaged in the practice of a deceit. The only natural conclusion is that the intention was to use the dictionary meaning of the word employee.

In upholding the lower courts in a 4 to 3 decision, the state’s highest court

220 See below chs. 9-13. In the ensuing litigation the union was represented by the internationally famous Marxist, Louis Boudin.
221 “Lauded by Father Boland,” NYT, Apr. 12, 1939 (19:2).
222 “Ecker Asserts Size Is Insurance Asset,” NYT, Feb. 8, 1939 (7:1).
rejected the employer’s claim that in omitting the coverage phrase “any employee” of the National Labor Relations Act, the state legislature intended “not to go along with the Congress of the United States in extending the protection of this legislation to so-called white collar workers. We think it unnecessary to set forth our analysis of the many critical refinements which this idea implies. Over and above all such argumentation stands the engendering principle of the New York act as declared by the words already quoted from section 700. The purpose and policy there avowed...dispel all doubt that these agents of Metropolitan are employees in the sense of section 701.” Had the dissenters’ lack of purposive imagination prevailed, “hundreds of thousands of white collar workers in the State who work in department and retail stores, hotels, restaurants, offices and banks” would, as the chairman of the State Labor Relations Board observed, have been “excluded from the protection of the act....”

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225 The three dissenters argued that the law applied only to industrial workers. Metropolitan Life Insurance Company v. New York State Labor Relations Board, 280 NY at 209.

226 “Lauded by Father Boland.”