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Tammy Gales
Hofstra University, tammy.a.gales@hofstra.edu

Lawrence M. Solan
Brooklyn Law School, larry.solan@brooklaw.edu

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REVISITING A CLASSIC PROBLEM IN STATUTORY INTERPRETATION: IS A MINISTER A LABORER?

Tammy Gales* & Lawrence M. Solan**

ABSTRACT

This study presents a new analysis of an iconic United States Supreme Court case, *Holy Trinity Church v. United States* (1892). The question in *Holy Trinity Church* concerned whether a law making it illegal to pay the transportation of a person entering the U.S. under contract to perform “labor or service of any kind” applied to a wealthy Manhattan church that had paid to bring its new rector from England to New York. The Supreme Court unanimously ruled that the law did not apply to the church’s contract, relying first on the ordinary meaning of “labor” and second on the legislative history of the single construction “labor or service.”

Highlighting the use of corpus linguistic methods, this study tests the arguments presented by the Court and reveals new insights through an analysis of historic and contemporary reference corpora and a specialized corpus of U.S. statutes. The results demonstrate that the disjunctive phrase “labor or service” appeared to be a legal term of art with narrow interpretation that would exclude clergy, but around the time of *Holy Trinity Church*, slight variations on the phrase (e.g., pluralization, conjunction, and modification) applied to contexts with

* Associate Professor of Linguistics, Hofstra University

** Don Forchelli Professor of Law, Brooklyn Law School

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broader meaning. When examining “labor” as an independent term, those who labored were generally not clergy and the description of the activities of clergy was typically not described as labor, although examination evidenced instances of both. The findings demonstrate the importance of consulting corpora in the evaluation of statutory and ordinary meaning and considering the sociohistorical contexts in which it occurs.

INTRODUCTION

Our goal in this article is to demonstrate how the use of linguistic corpora in historical cases—when used with proper caution—can add significantly to conventional tools of statutory interpretation, especially in cases in which meaning may have changed over time. In doing so, we use the methods described by Lee and Mouritsen¹ as a springboard to make new contributions to the study of *Holy Trinity Church v. United States*²—perhaps the most studied United States case engaging methods of statutory interpretation.

Holy Trinity Church concerned whether a law making it illegal to pay the transportation of a person entering the U.S. under a contract “to perform labor or service of any kind” applied to a wealthy Manhattan church that paid to bring its new rector from London to New York.³ In 1892, the Supreme Court decided the answer to the issue was no.⁴ Justice Brewer’s opinion for a unanimous Court relied, as its first argument, on the Justices’ sense of the typical use of the relevant language.⁵

Because of its two later arguments, relying on legislative history to respond to the fact that the list of exceptions did not include members of the clergy⁶ and recognizing that Congress—knowing that the U.S.

1. Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 788 (2018).

2. *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

3. *Id.* at 457–58.

4. *Id.* at 459.

5. *Id.* at 463.

6. *Id.* at 464–65.

was founded as a Christian nation—would be unlikely to have intended to impede religion so aggressively,⁷ the case has received great attention and continues to provoke debate as it rumbles through its second century.⁸ The fact that the first main argument is about ordinary meaning, a conventional argument at that, is sometimes lost in the literature.

The facts are as follows. In 1885, Congress passed the Alien Contract Labor Law.⁹ Section 1 contained the main provision:

[I]t shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia.¹⁰

Section 5 listed exceptions:

[N]or shall this act be so construed as to prevent any person, or persons, partnership, or corporation from engaging, under contract or agreement, skilled workman in foreign countries to perform labor in the United States in or upon any new industry not at present established in the United States: *Provided*, That skilled labor for that purpose cannot be otherwise obtained; nor shall the provisions of this act apply to professional actors, artists, lecturers, or singers, nor to

7. *Id.* at 465–72.

8. Compare Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 911–16 (2000), with Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1835–37 (1998), and ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 18–23 (1998).

9. Alien Contract Labor Law of 1885, ch. 164, § 1, 23 Stat. 332, 332 (amended 1887, 1888).

10. *Id.*

persons employed strictly as personal or domestic servants: *Provided*, That nothing in this act shall be construed as prohibiting any individual from assisting any member of his family or any relative or personal friend, to migrate from any foreign country to the United States, for the purpose of settlement here.¹¹

In 1891, Congress added “ministers of any religious denomination, . . . persons belonging to any recognized profession,” and “professors for colleges and seminaries” to the list of exceptions.¹² But that was too late for Manhattan’s Church of the Holy Trinity and the minister it hired from London under contract, the Reverend Doctor Edward Walpole Warren.¹³ The district court had already prosecuted and fined the church for violating the law in 1888.¹⁴

The church appealed to the Supreme Court, which ruled unanimously that the law did not apply to the church’s contract with its new clergyman. The Court first articulated this often-quoted statement about the interpretation of statutes:

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 has been often asserted, and the Reports are full of cases illustrating its application. 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 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

11. *Id.* § 5, 23 Stat. at 333.

12. *See* Immigration Act of 1891, ch. 551, § 5, 26 Stat. 1084, 1085.

13. *See* United States v. Church of the Holy Trinity, 36 F. 303, 303–04 (S.D.N.Y. 1888), *rev’d*, 143 U.S. 457 (1892).

14. *Id.* There is contemporaneous evidence supporting a claim that the church brought the case collusively in an effort to have the law declared unconstitutional. *See* Chomsky, *supra* note 8, at 910–16.

believe that the legislator intended to include the particular act.¹⁵

Though Brewer's reference to the "spirit" of the law may strike a discordant note to the modern ear,¹⁶ recognizing that laws might be drafted in language broader than that needed to serve their purpose stems back to Aristotle,¹⁷ and dealing with that reality remains a matter of considerable disagreement among judges and scholars today.¹⁸

The Court moved on to employ the ordinary meaning canon as its first interpretive argument:

The common understanding of the terms "labor" and "laborers" does not include preaching and preachers, and it is to be assumed that words and phrases are used in their ordinary meaning. So whatever of light is thrown upon the statute by the language of the title indicates an exclusion from its penal provisions of all contracts for the employment of ministers, rectors, and pastors.¹⁹

Yet, the Court recognized that the language of the statute was susceptible to an interpretation that extended beyond the evil that the statute was enacted to address, as had the enacting Congress.²⁰ Not only was the term "labor or service of any kind" open to a broad interpretation (although such an interpretation would not have been preferred), but the list of exceptions then in effect also did not include members of the clergy.²¹ The canon *expressio unius est exclusio alterius* dictates that the passage of what appears to be a complete list of

15. *Holy Trinity Church*, 143 U.S. at 459.

16. SCALIA, *supra* note 8, at 18–22.

17. ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, at 174–76 (F. H. Peters trans., Kegan Paul, Trench, Trübner & Co. 5th ed. 1893) (c. 384 B.C.E.).

18. *See, e.g.*, *Yates v. United States*, 574 U.S. 528 (2015).

19. *Holy Trinity Church*, 143 U.S. at 463.

20. 15 CONG. REC. 6057 (1884).

21. *But see infra* note 77 and accompanying text for arguments that "lecturers" included members of the clergy, which is within the list of named exceptions.

exceptions implies that items not listed are not exceptions.²² Unable to modify the bill without jeopardizing passage in the current session, the Senate Report predicted—as Justice Brewer noted—that the courts would not construe the statute more broadly than required to combat the evil that Congress enacted the law to address.²³ The Court thus reversed the conviction unanimously.

I. Corpus Linguistic Analysis in Legal Interpretation

Fast forward 125 years. A number of legal scholars and judges have been collaborating with linguists to employ methods of corpus linguistics in the service of statutory and constitutional interpretation. The principal goal is to use big data that is representative of a particular variety of language as a source of information about ordinary meaning in the realm of statutes and original public meaning in constitutional argument. Among other things, this partnership has produced a symposium in the *BYU Law Review*,²⁴ a number of amicus briefs filed in U.S. Supreme Court cases, and a 2018 article in the *Yale Law Journal* by Thomas C. Lee and Stephen R. Mouritsen, *Judging Ordinary Meaning*.²⁵ Lee is Associate Chief Justice of the Utah Supreme Court and a former full-time member of the Brigham Young University law faculty.²⁶ Mouritsen is Lee's former student and law clerk and is trained in the methods of corpus linguistics.²⁷

The principal argument has been one of drawing inferences of ordinary meaning based upon the relative frequency of one usage over another with respect to a disputed term. For example, in *Costello v. United States*,²⁸ Judge Posner, using Google News, determined that the

22. See WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 408 (2016) (discussing this canon from different interpretative perspectives); see also ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107–11 (2012).

23. *Holy Trinity Church*, 143 U.S. at 464–65.

24. Symposium, 2017 BYU L. REV. 1297 (2018).

25. Lee & Mouritsen, *supra* note 1, at 789.

26. See generally *id.*

27. *Id.*

28. See generally *United States v. Costello*, 666 F.3d 1040 (7th Cir. 2012).

verb “to harbor,” when used with a human object, generally implies an effort to hide an individual, such as harboring Jews from the Nazis.²⁹ He thus held that a woman living with her undocumented boyfriend did not “harbor” him in violation of a federal statute, absent evidence that she attempted to help hide him from the authorities.³⁰ And Justice Lee has used corpus analysis in a number of cases, most notably *State v. Rasabout*,³¹ in which, in a concurring opinion, he used Brigham Young’s *Corpus of Contemporary American English (COCA)*³² to determine that a gang member who fired twelve shots in a drive-by shooting actually “discharged” his gun twelve times, based on the corpus’s showing that “discharge” in the context of weapons is almost exclusively used to describe individual shots, rather than emptying one’s weapon of its ammunition entirely.³³ Other courts have followed suit, employing one or another version of corpus linguistic analysis, although at times with considerable controversy within the courts.³⁴

It should not be surprising that the legal community is turning to big data to determine ordinary linguistic usage. Accustomed to using databases such as Lexis and Westlaw, legal analysts conduct a kind of corpus analysis in their own right when they comb big data to determine how language is used in particular contexts. To take one well-studied case as an example, in *West Virginia University Hospitals v. Casey*,³⁵ the issue was whether a law awarding “a reasonable attorney’s fee” to victorious civil rights litigants included the recovery of expert witness costs that the lawyers incurred.³⁶ The expression is ambiguous. A reasonable attorney’s fee can mean a reasonable fee for the time spent by the attorney, excluding disbursements that the attorney makes for other litigation services, or it can refer to the

29. *Id.* at 1044.

30. *Id.* at 1050.

31. *State v. Rasabout*, 356 P.3d 1258, 1264 (Utah 2015).

32. *Id.* at 1277 (referencing *COCA*, which is available at <https://www.english-corpora.org/coca/>).

33. *Id.*

34. *See, e.g.,* *Wilson v. Safelite Grp., Inc.*, 930 F.3d 429, 440 (6th Cir. 2019) (detailing disagreement among judges about appropriateness of corpus linguistic methods); *People v. Harris*, 855 N.W.2d 832, 838–39 (Mich. 2016) (exhibiting disagreement among justices about the appropriate search to conduct).

35. *See generally* *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991).

36. *Id.* at 84.

amount that the attorney bills the client, including such costs as disbursements for expert witnesses and other things.³⁷ In holding that the statute does not cover the recovery of expert witness fees, Justice Scalia, writing for a majority of six, turned to the language used in federal statutes that call for the recovery of attorney's fees.³⁸ The Court found:

The record of statutory usage demonstrates convincingly that attorney's fees and expert fees are regarded as separate elements of litigation cost. While some fee-shifting provisions, like § 1988, refer only to "attorney's fees," see, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), many others explicitly shift expert witness fees *as well as* attorney's fees.³⁹

Thus, by searching the United States Code, and demonstrating that Congress often specifies the inclusion of expert fees when it wants to make sure that they are recoverable, the Court supported its argument that the absence of such specification reasonably implies a lack of commitment to the recovery of expert fees.⁴⁰

In earlier work, we looked at corpus linguistic analysis of statutory cases with a critical eye while attempting to describe the conditions under which it is likely to be efficacious.⁴¹ We observed that corpus analysis is most useful when (a) the task is to discover the ordinary meaning of a statutory term; (b) the understanding of "ordinary meaning" is resolved; (c) there is agreement about the appropriate search to conduct and in which corpora to conduct it; and (d) inferences drawn from the absence of particular meanings from a corpus are not excessive.

37. *Id.* at 106–07.

38. *Id.* at 86–90.

39. *Id.* at 88.

40. *Id.* at 92.

41. Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 BYU L. REV. 1311, 1313–16 (2018).

As an initial matter, whether the ordinary meaning of a term in dispute should carry the day is a legal question. Courts indeed frequently default to the ordinary understanding of statutory terms.⁴² In many cases, however, the Supreme Court has determined from the context of the law's enactment that the legislature intended a meaning either narrower or broader than the statutory term's ordinary usage would dictate.⁴³ Moreover, many statutory terms have particular legal meanings even if they also have ordinary, nontechnical meanings. Sometimes, these senses overlap, creating difficult interpretive problems and difficult decisions for the corpus linguist as to which corpus, if any, to use in the analysis.⁴⁴

Second, as Lee and Mouritsen document,⁴⁵ the Supreme Court does not have a uniform concept of ordinary meaning.⁴⁶ In *Holy Trinity Church v. United States*, the principal subject of this article, frequency of usage appears to carry the day, whereas in *McBoyle v. United States*,⁴⁷ in which the Supreme Court unanimously held that a stolen airplane does not come within the meaning of "vehicle" for purposes of construing the National Motor Vehicle Theft Act, Justice Holmes relied on the image that first comes to mind upon hearing the term.⁴⁸ Recent work by Kevin Tobia argues persuasively that corpus linguistic analysis is especially adept at identifying prototypical usage of a term.⁴⁹ Psychologists argue that we base our sense of what is prototypical more on what has the essential features of the concept at

42. See ESKRIDGE, JR., *supra* note 22, at 42; see also LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES* 53 (2010). See generally BRIAN G. SLOCUM, *ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION* (2015).

43. *Yates v. United States*, 135 S. Ct. 1074, 1077 (2015) (finding a narrower than ordinary meaning applied); *Bond v. United States*, 572 U.S. 844, 858 (2014) (finding a narrower than ordinary meaning applied); *Chisom v. Roemer*, 501 U.S. 380, 400 (1991) (finding a broader than ordinary meaning applied). See generally Solan & Gales, *supra* note 41 (discussing these and similar cases).

44. Evan C. Zoldan, *Corpus Linguistics and the Dream of Objectivity*, 50 SETON HALL L. REV. (forthcoming 2020).

45. Lee & Mouritsen, *supra* note 1, at 798.

46. SLOCUM, *supra* note 42, at 81; see Lee & Mouritsen, *supra* note 1, at 798.

47. See generally *McBoyle v. United States*, 283 U.S. 25 (1931).

48. *Id.* at 26.

49. Kevin P. Tobia, *Testing Ordinary Meaning: An Experimental Assessment of What Dictionary Definitions and Linguistic Usage Data Tell Legal Interpreters*, 133 HARV. L. REV. (forthcoming 2020).

hand than on central tendency.⁵⁰ The giraffe is the prototypical tall animal because it is exaggeratedly tall, not because we see more giraffes than, say, camels.⁵¹

Third, a similar issue arises from time to time over what search is appropriate once one decides that a corpus may be helpful in principle. In one Supreme Court case, *Muscarello v. United States*,⁵² Justice Breyer wrote for the majority that a particular meaning of the word “carry” was ordinary in part because one-third of usages in a corpus of news articles conveyed the same meaning.⁵³ The issue was whether the defendant’s having a gun in his car as he drove to a drug crime constituted “carrying . . . a firearm” under the relevant statute.⁵⁴ Breyer searched news articles that contained the words “carry,” “weapon,” and “vehicle” (and synonyms of them).⁵⁵ As Mouritsen points out, however, by including the word “vehicle” in the search, Breyer preordained the result.⁵⁶ Instead, he should have searched “weapon” and “carry” (and their synonyms) occurring in close proximity, and then determined the extent to which “carry” in that context meant carrying the weapon in a vehicle.⁵⁷ Mouritsen did so using *COCA* and found that carrying a weapon in a vehicle defined the context only one-sixth as often as did carrying a weapon on one’s person.⁵⁸

Fourth, as noted above, it is not enough to observe that one meaning in a corpus predominates over another. We call this the “blue pitta” problem. The blue pitta is a bird of Asia, not mentioned at all in *COCA*.⁵⁹ Is it any less a bird for that reason? Of course not. A law prohibiting the killing of birds in a nature reserve would certainly not

50. Elizabeth B. Lynch et al., *Tall Is Typical: Central Tendency, Ideal Dimensions & Graded Category Structure Among Tree Experts & Novices*, 28 *MEMORY & COGNITION* 41, 41 (2000).

51. *Id.*

52. *Muscarello v. United States*, 524 U.S. 125 (1998).

53. *Id.* at 131.

54. *Id.* at 127.

55. *Id.* at 131.

56. Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 *BYU L. REV.* 1915, 1946–48.

57. *Id.*

58. *Id.* at 1960–61.

59. Solan & Gales, *supra* note 41, at 1315.

exempt the killing of bird species that are not spoken of often. On the contrary, if anything, rare birds would be more highly valued. Americans do not talk much about blue pittas, but that has nothing to do with their membership in the category *bird*.

Consider *Smith v. United States*,⁶⁰ a predecessor to *Muscarello*, in which a divided Supreme Court held that the defendant had used a firearm in a drug trafficking crime when he attempted to trade his unloaded machine gun for cocaine.⁶¹ Justice Scalia wrote a strong dissent, arguing that when one thinks of using a gun, one thinks of using it as a weapon, not as a thing of value.⁶² A corpus search shows that he was right: when people speak of using a gun, they speak of using it as a weapon. To make his argument stronger, however, we suggest Scalia might have also shown that people indeed speak of exchanging a weapon for something of value, but when they do so they use words other than “use,” such as “exchange” or “trade.” Our own search of *COCA* shows that this is indeed the case.⁶³ We have made similar suggestions with respect to other cases that have been subjected to corpus analysis.⁶⁴

Historical cases, such as the one discussed in this article, require us to focus on a fifth issue: the importance of deciding which corpora to consult. In many cases, especially historical ones, that decision often requires consulting more than one corpus. We will see that even corpora that are structured to balance data from various genres are selective in the examples they include. The fact that these corpora are intended to be understood in their ordinary sense becomes nonobvious when the terms in the disputed law can be understood alternatively as either (1) ordinary language or (2) as language that has a history of interpretation within legal discourse.⁶⁵

60. See generally *Smith v. United States*, 508 U.S. 223 (1993).

61. *Id.* at 241.

62. *Id.* at 245.

63. See *Corpus of Contemporary American English*, ENGLISH-CORPORA.ORG, <https://www.english-corpora.org/coca/> [<https://perma.cc/8Q4P-XNYX>] (last visited Nov. 7, 2019) [hereinafter *COCA*]. On February 6, 2019, the authors searched “weapon” co-occurring with synonyms of “exchange.” Leading collocates were “trade” and “switch”; “use” did not occur.

64. Solan & Gales, *supra* note 41, at 1354–56 (discussing *State v. Rasabout*).

65. Frederick Schauer, *On the Relationship Between Legal and Ordinary Language*, in *SPEAKING OF*

II. *Our Method*

Below, we provide findings from corpus linguistic analyses that investigate the language of the Alien Contract Labor Law at issue in *Holy Trinity Church*. In conducting the analyses, we employ a number of different corpora and corpus tools that allow us to trace the meaning of “labor or service” in statutory and ordinary meaning over time. In particular, we consulted and used:

- **United States Statutes at Large (USSL)**
This specialized statutory corpus⁶⁶ contains 835,743 words from 131 statutes from the years 1789–2008 that use (or refer to) the words “labor”⁶⁷ and “service.” We used *AntConc*, a software program designed for corpus analysis, for the analysis.⁶⁸
- ***The Corpus of Historical American English (COHA)***
This corpus contains more than 400 million words of written texts (fiction, magazines, newspaper articles, and nonfiction books) equally divided by decade from 1810–2010.⁶⁹
- ***The Corpus of Contemporary American English (COCA)***

LANGUAGE AND LAW: CONVERSATIONS ON THE WORK OF PETER TIERSMA 35,35–36 (Lawrence M. Solan et al. eds., 2015). See generally Zoldan, *supra* note 44.

66. Corpus linguists distinguish between general (or reference) corpora and specialized corpora in terms of representativeness, balance, and design. The U.S. Statutes at Large (USSL) is a specialized corpus we compiled within this rubric. Tammy Gales & Lawrence M. Solan, U.S. Statutes at Large (unpublished corpus) (on file with authors) [hereinafter USSL].

67. Searches included the spelling variant “labour”.

68. *U.S. Statutes at Large*, HEINONLINE, <https://home.heinonline.org/content/u-s-statutes-at-large/> [https://perma.cc/2YV6-ZCW8] (last visited Nov. 7, 2019). Statutes were collected from the HeinOnline database with the much-appreciated help of our research assistants. Files were converted into “.txt” files and the analysis was performed with *AntConc*. *AntConc*, LAURENCE ANTHONY’S WEBSITE, <http://www.laurenceanthony.net/software/antconc/> [https://perma.cc/2D66-NTPC] (last visited Nov. 7, 2019).

69. See CORPUS HIST. AM. ENG., <https://www.english-corpora.org/coha/> (last visited Nov. 7, 2019) [hereinafter *COHA*].

This corpus is comprised of 560 million words from 1990–2017 and is balanced, i.e., equally divided, across five registers: spoken, fiction, magazines, newspapers, and academic texts.⁷⁰

- Google Books Ngram Viewer
The Ngram viewer function of Google Books allows users to search for words or phrases within millions of books in the Google collection (both copyrighted and out-of-copyright publications of books, reports, and documents).⁷¹ The results are displayed in a graph showing usage over time, and examples from each time period can be viewed individually within those time periods.⁷²

As with all corpus analyses, there are limitations. First, the results can only reflect the data represented in the corpora analyzed. Some of the following analyses investigated large, publicly available reference corpora (*COCA* and *COHA*), which contain language from a range of mostly written registers—newspapers, academic texts, magazines, and fiction books. As we discuss below, examinations of more specialized texts, such as statutes in USSL and nonfiction books in Google’s Ngram Viewer, provided additional insights into the uses of each term or phrase in question.⁷³ This point is especially important when conducting legal analysis since Brigham Young University’s large reference corpora do not include legal documents as an independent category and tend to contain very few legal documents in general.⁷⁴

Second, the search features used here are not meant to be indicative of the full range of ways to search corpora; creating additional

70. *COCA*, *supra* note 63.

71. *Ngram Viewer*, GOOGLE BOOKS, <https://books.google.com/ngrams> [<https://perma.cc/9Q9T-RR8V>] (last visited Nov. 7, 2019).

72. *Id.* Because Google preselects the time periods, those in the analysis below may not match the exact time periods selected for investigation in the BYU corpora. *Id.* The closest overlap of decades was chosen for use in the analysis. *Id.*

73. *See infra* Part III.

74. *See generally Overview*, BYU CORPORA, <https://corpus.byu.edu/overview.asp> [<https://perma.cc/S47V-XNT9>] (last visited Nov. 7, 2019).

specialized corpora, using other corpus software tools,⁷⁵ and performing searches using regular expressions or different statistical measures may allow for a wider range of results.⁷⁶

That said, our findings support the Court's conclusion, at least to the extent that it was based on how the language contained in the statute was actually used in the nineteenth century both in ordinary usage and in statutes. Specifically, when people spoke of what the clergy did, they rarely used the word "labor," and when they used the word "labor," they generally did so to describe manual labor, not something typically performed by clergy. Thus, "labor" and "clergy" were doubly dissociated. Furthermore, in both the Constitution and in earlier statutes, the compound phrase "labor or service" was used as an expression to mean the work of slaves—not the tasks of the clergy. As for the list of exceptions, to which we will return, one exception was for "lecturers." In the nineteenth century, one meaning of that word was a junior member of the clergy in the Church of England.⁷⁷ Thus, it should not be too surprising that the Congress that enacted this law recognized that it might be construed more broadly than the problem it was intending to address, but at the same time had confidence that the courts would exercise sufficient wisdom to construe the law consistent with its goals.⁷⁸

75. See, e.g., *WordSmith Tools*, LEXICAL ANALYSIS SOFTWARE LTD., <https://www.lexically.net/wordsmith/> [<https://perma.cc/6E6M-WYR9>] (last visited Nov. 7, 2019).

76. See generally Symposium, James C. Phillips & Jesse Egbert, *A Concise How-to-Guide for Law and Corpus Linguistics: Importing Principles and Practices from Survey and Content-Analysis Methodologies to Improve Corpus Design and Analysis*, 2017 BYU L. REV. 1589 (2018) (providing a more thorough discussion of the compilation and selection of corpora and the use of corpus tools in legal analyses).

77. *Lecturer*, THE OXFORD CONCISE DICTIONARY OF THE CHRISTIAN CHURCH (Elizabeth A. Livingstone ed., 3d ed. 2014) (1977). The Oxford Concise Dictionary of the Christian Church contains the following definition of "lecturers": "Stipendiary ministers (often deacons), appointed in the century after 1559 by town corporations, parishes, and occasionally by individual laymen, to provide regular frequent preaching." *Id.*; see also *Lecturer (clergy)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Lecturer_\(clergy\)](https://en.wikipedia.org/wiki/Lecturer_(clergy)) [<https://perma.cc/KYR4-W9G8>] (last edited Sept. 30, 2019). Our gratitude to William Eskridge for bringing this fact to our attention.

78. *Holy Trinity Church v. United States*, 143 U.S. 457, 465 (1892).

III. Does the Alien Contract Labor Law Reflect Ordinary Language or Is It a Legal Term of Art?

A. “Labor or Service” in Statutory Language

This case presents a problem not addressed by the Court. The term “labor or service” may not be a matter of ordinary meaning at all but may rather be a legal term of art used to describe the work of slaves. Article IV of the Constitution contains the following language:

No Person held to **Service or Labour** in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such **Service or Labour**, but shall be delivered up on Claim of the Party to whom such **Service or Labour** may be due.⁷⁹

Similarly, both the Fugitive Slave Act of 1793 and the Fugitive Slave Act of 1850 contain precisely this expression.⁸⁰ The 1793 Act required:

And be it also enacted, That when a person held to **labour** in any of the United States, or in either of the Territories on the Northwest or South of the river Ohio, under the laws thereof, shall escape into any other part of the said States or Territory, the person to whom such **labour or service** may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from **labour**, and to take him or her before any Judge of the Circuit or District Courts of the United States⁸¹

79. U.S. CONST. art. IV, § 2 (emphasis added).

80. Fugitive Slave Act of 1793, ch. 7, § 3, 1 Stat. 302, 302–03 (repealed 1864); Fugitive Slave Act of 1850, ch. 60, § 6, 9 Stat. 462, 463 (repealed 1864).

81. § 3, 1 Stat. at 302–03 (emphasis added).

It is worth noting that this statute sometimes uses the expression “service or labor” and at other times refers only to “labor.”⁸² We see the same linguistic decision made by the Supreme Court in *Holy Trinity Church*, which focuses on the bald word “labor,” and emphasizes that the title of the statute contains the word “labor” but not the word “service” as justification for this analytical move.⁸³

Similarly, the 1850 Fugitive Slave Act contained the following language:

And be it further enacted, That when a person held to **service or labor** in any State or Territory of the United States, has heretofore or shall hereafter escape into another State or Territory of the United States, the person or persons to whom such **service or labor** may be due . . . may pursue and reclaim such fugitive person, either by procuring a warrant from some of the courts, judges or commissioners aforesaid, . . . for the apprehension of such fugitive from **service or labor**, or by seizing and arresting such fugitive, where the same can be done without process, and by taking or causing such person to be taken, forthwith before such court, judge or commissioner . . . ; and upon satisfactory proof being made, . . . to use such reasonable force and restraint as may be necessary, under the circumstances of the case, to take and remove such fugitive person back to the State or Territory whence he or she may have escaped as aforesaid. In no trial or hearing under this act shall the testimony of such alleged fugitive be admitted in evidence⁸⁴

This language continues in usage today, although “service” has been replaced by “services” in statutory language. For example, the federal statute currently barring forced labor says:

82. *Id.*

83. *Holy Trinity Church*, 143 U.S. at 458–59.

84. § 6, 9 Stat. at 463 (emphasis added).

Whoever knowingly provides or obtains the **labor or services** of a person by any one of, or by any combination of, the following means—

- (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
- (2) by means of serious harm or threats of serious harm to that person or another person;
- (3) by means of the abuse or threatened abuse of law or legal process; or
- (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such **labor or services**, that person or another person would suffer serious harm or physical restraint, shall be punished as provided under subsection (d).⁸⁵

The expression likely was recognized as a euphemism because the Thirteenth Amendment, which abolished slavery, speaks of “slavery” or “involuntary servitude” directly.⁸⁶

With these historically salient examples in mind, we determined to search the entire body of USSL to determine whether the words “labor or service” (in either order) were routinely used to refer to the type of manual labor that slaves engaged in, or whether the words, when used disjunctively as in the statutes, typically suggested a broader connotation.

In USSL, “labor”⁸⁷ occurred a total of 783 times and “service” a total of 1,903 times.⁸⁸ The phrase “labor or service” occurred fifty-one times in nineteen statutes from 1789 to 1986.

85. 18 U.S.C. § 1589 (2018) (emphasis added).

86. U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

87. *See generally* USSL, *supra* note 66 (including “labour”). Search: “labo*r”.

88. *See generally id.* Due to the age of some of the statutes, variations on spellings, line breaks, and character fonts caused some inconsistencies in the file conversion process. *Id.* Given the low frequencies

When examining the statutory language in context, fairly clear patterns of use over time can be traced:

1. **1789–1863:** Slaves, indentured servants, or those who perform forced manual labor.
 - 1 Stat. 53 (1789): Provided always, that any person escaping into the same, from whom **labour or service** is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her **labour or service** as aforesaid.⁸⁹
2. **1881–1907:** Aliens, foreigners, and contract day laborers who perform manual (forced or temporary low-paid) labor.
 - 34 Stat. 898 (1902): That for every violation of any of the provisions of section four of this Act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract **laborer** into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised **labor or service** of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States;
3. **1925–present:** Workers or employees who perform voluntary manual, paid labor.

of these occurrences, hand-correcting was not performed for these searches. For example, the following variations due to odd line breaks were not included: “labo” = 4, “labora” = 9, “labore” = 1 and “servi” = 1, “servic” = 3. *Id.* However, for more concise results, hand-correcting for conversion errors is recommended. *Id.*

89. Minor corrections were made to the corpus examples (e.g., removing hyphens from original line breaks and page numbers that were inserted into the text due to OCR conversion); however, the remainder of the text examples are presented verbatim from the original source. Bolding has been added for emphasis.

- 54 Stat. 348 (1936): Any officer or agent of the United States whose duty it shall be to employ, direct, or control any person employed in connection with the operation or maintenance of such railroad who shall intentionally require or permit such person to be employed for hours of **labor or service** in violation of this Act shall be deemed guilty of a misdemeanor

While the kinds of labor referred to in each of the statutory periods outlined above relate primarily to some kind of manual labor, the status of the participants performing such duties changed over time. Statutes in the earlier time period referred to the work performed by slaves or those who were indentured to others to perform such work. During the second period, there was a shift to manual laborers who performed usually low-paid contracted work. Finally, with the Railway Labor Act of 1926, statutes began to refer to “employees” and specialized technical positions such as “mechanics,” as well as workers who were able to “quit” if they desired. Examining the phrase in its reverse order—“service or labor”—resulted in similar frequencies (i.e., fifty-four total instances in thirty-two statutes from 1789–2008) and changes in meaning over time.⁹⁰

With respect to the first two of these periods, which cover the nineteenth century period relevant here, these facts raise an important linguistic question: whether the meaning of “labor or service” should be taken as a single construction or whether the terms are compositional, and should be examined separately according to their individual contribution to the meaning of the whole phrase. Linguist Adele Goldberg has focused on the extent to which language contains constructions that must be learned individually by children learning their native tongue.⁹¹ Linguist Ray Jackendoff has argued that there is

90. *See generally* USSL, *supra* note 66.

91. *See generally* ADELE E. GOLDBERG, CONSTRUCTIONS: A CONSTRUCTION GRAMMAR APPROACH TO ARGUMENT STRUCTURE (1995).

a continuum between the two in natural language.⁹² Examples of expressions as constructions include such idiomatic expressions as “hand over fist,” “head over heels,” “hand in glove,” “tongue in cheek,” and “hand to mouth.”⁹³ The meanings of these expressions are not the sum of their parts.⁹⁴ In contrast, language is most often compositional.⁹⁵ A red truck is a truck that is red. When a menu says “soup or salad” it means soup or salad as a disjunctive phrase. The language at issue in *Holy Trinity Church* lands somewhere in the middle of this continuum. It can be understood as either a construction or as compositional. Samuel L. Bray has argued that certain clauses found in the Constitution, including “necessary and proper” and “cruel and unusual,” are actually constructions and should not be analyzed as compositional expressions.⁹⁶

It is not likely to be an accident that the statute at issue uses the language that traditionally describes the work of slaves in legal documents. Yet the historical facts suggest that Congress did not intend to limit the scope of the statute so aggressively. First, the statute speaks of “labor or service *of any kind*.”⁹⁷ This modification suggests a broad interpretation. However, if “labor or service” is understood as a single construction meaning “slave-like work,” then the entire phrase means nothing more than slave-like work of any kind. The legislative history does not discuss the expression in these terms,⁹⁸ but the historical use of this verbiage should nonetheless be taken seriously.

92. Ray Jackendoff, ‘Construction After Construction’ and Its Theoretical Challenges, 84 LANGUAGE 8, 8 (2008). Constructions are typically inflexible when it comes to order (“hook, line and sinker,” not “sinker, line and hook”). *Id.* Thus, the language under discussion is not a prototypical construction. *Id.*

93. *Id.* at 8–9.

94. *Id.*

95. See generally JERRY A. FODOR & ERNEST LEPORE, THE COMPOSITIONALITY PAPERS (2002); PAULINE JACOBSON, COMPOSITIONAL SEMANTICS: AN INTRODUCTION TO THE SYNTACTIC/SEMANTIC INTERFACE (2014).

96. Samuel L. Bray, ‘Necessary AND Proper’ and ‘Cruel AND Unusual’: Hendiadys in the Constitution, 102 VA. L. REV. 687, 693 n.33 (2016).

97. Alien Contract Labor Law of 1885, ch. 164, § 1, 23 Stat. 332, 332 (amended 1887, 1888).

98. See Chomsky, *supra* note 8; Vermeule, *supra* note 8. We are grateful to Timothy Lytton and Julian Davis Mortenson for bringing to our attention the uncertainty of the psychological state of Congress with respect to this issue.

Second, as Adrian Vermeule emphasizes, the exceptions in the statute go beyond slave-like manual labor.⁹⁹ If Congress so limited the statute in the first place, there would be no need to have listed these exceptions.

The Court was well aware of these arguments and acknowledged them early in the opinion:

It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words “labor” and “service” both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added “of any kind;” and, further, as noticed by the circuit judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section.¹⁰⁰

Yet the Court determined that the purpose of the statute, the fact that the title of the statute mentioned only “labor,” and the ordinary meaning of “labor” outmatched the arguments to the contrary.¹⁰¹

Of note are variants on the phrase “labor or service” (in either order) and on the application of the term “labor” that begin to appear in USSL around 1910 and increase steadily from 1926 onward—around the time of the Railway Labor Act. For example, the phrase is pluralized (e.g., “labor or services”), conjoined (“labor and service(s)”), and increasingly modified over time to refer to a broader range of workers (e.g., “labor” that is: “alien,” “contract,” “convict,” “railway,” “agricultural,” “day,” “farm,” “mechanical,” “skilled,” “unskilled,” and “temporary”). Statutes using such language generally referred to

99. See Vermeule, *supra* note 8, at 1851–57.

100. *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

101. *Id.* at 513–14.

construction workers, janitors, maintenance crews, railway workers, and farmers, among other skilled and unskilled laborers.¹⁰²

Following the idea of double dissociation utilized in our earlier work,¹⁰³ we examined instances of “work”¹⁰⁴ as a variation of “labor” to see whether statutory language indeed covered a broader concept of employment-related activity using a term other than “labor.”¹⁰⁵ Interestingly, the use of “work” in USSL follows a pattern similar to that found with the variants of “labor or service” noted above.¹⁰⁶ “Work” begins to appear in these statutes around 1910 and increases dramatically in the 1930s to 1950s. In such cases, it is almost exclusively modified and used to refer to construction or government work (e.g., work that is “electrical,” “mechanical,” “road,” “sanitation,” “repair,” “construction,” and “street-cleaning”). For example:

- 52 Stat. 156 (1938): All apportionments of appropriations for the use of the municipal architect in payment of personal services employed on **construction work** provided for by said appropriations shall be based on an amount not exceeding 3 per centum of a total of not more than \$2,000,000 of appropriations made for such construction projects
- 56 Stat. 424 (1942): That the services of draftsmen, assistant engineers, levelers, transitmen, rodmen, chainmen, computers, copyists, overseers, and inspectors temporarily required in connection with **sewer, water, street, street-cleaning, or road work**, or construction and repair of buildings and bridges, or any general or special **engineering or**

102. See Vermeule, *supra* note 8, at 1855 n.94.

103. Solan & Gales, *supra* note 41, at 1351–54.

104. See *infra* Part IV. Instances not related to the “labor” meaning (e.g., “a work of art” or “copyright works”) were excluded.

105. See *infra* Part IV.

106. See *supra* Part III.

construction work authorized by appropriations may be employed exclusively to carry into effect said appropriations when specifically and in writing ordered by the Commissioners

These shifts in form and application are likely not arbitrary. Linguistic research has shown that some expressions, based on their social, cultural, or historical contexts, take on what is called semantic prosody, that is positive or negative connotations that are not typically included in dictionary definitions.¹⁰⁷ In the case of “labor or service,” the origin and use of the phrase in statutory language were associated with slavery—a concept with extremely negative meaning.¹⁰⁸ As society shifted views and practices, what appears to have been a term of art that was associated with negative practices came to be altered, perhaps lessening the negative prosody. As society entered the era of the Civil Conservation Corps and similar projects, focus was on work and more positive forms of labor. Statutes passed during these decades, such as the Railway Labor Act, reflect this shift to a more positive attitude toward labor and work, whether manual or not.

IV. “*Labor or Service*” in Ordinary Speech

A. *Changes in Meaning over Time*

It is also possible to investigate the extent to which “labor or service” was used as a single construction by examining corpora of ordinary usage during the relevant periods and drawing inferences from the context in which the expression is used. In this case, we searched for the phrase in *COHA*, which covers the time period from 1810–2010, and *COCA*, which covers the period from 1990–2017.¹⁰⁹

107. Michael Stubbs, *Quantitative Data on Multi-Word Sequences in English: The Case of the Word World*, in *TEXT, DISCOURSE AND CORPORA: THEORY AND ANALYSIS* 163, 178 (Michael Hoey et al. eds., 2007).

108. See Vermeule, *supra* note 8, at 1852.

109. *COCA*, *supra* note 63; *COHA*, *supra* note 69 (search “labo*r or service”).

In *COHA*, there were fourteen instances of the exact phrase “labor or service”.¹¹⁰ Ten referred to slaves or the work performed by slaves, one referred to the statute in question in this analysis, and three (two of which are quoted below) referred to paid industrial labor (1873 and 1877) and domestic labor (1954):

- 1873 (MAG):¹¹¹ To keep the value of money uniform, the rate of interest must be kept uniform. Then it will distribute products equitably, according to the **labor or service** performed in their production; and without violating any principle of equity, restore to the industrial classes their natural rights of which they are now deprived by the present iniquitous system.
- 1954 (NEWS): Its administrative paragraph set forth that any local law adopted by the city might contain provisions for exempting all work by domestic employes and? “for the exemption of any other wages for work, **labor or service** paid // at a rate not in excess e \$1,200 per annum.”¹¹²

In *COCA*, there were only two instances of “labor or service,” both of which referred to workers who held low-paying jobs. Specifically:

- 2000 (ACAD): many young adults with histories of ED/BD tend to work only sporadically and hold low-paying **labor or service** jobs with few if any fringe benefits

110. *COHA*, *supra* note 69. This search does not include punctuation within or after the phrase. Other search queries may yield additional results. For example, see the lemma search below where commas are included in the results. Because they did not greatly alter the frequencies or content in any category, they were not included in the basic searches.

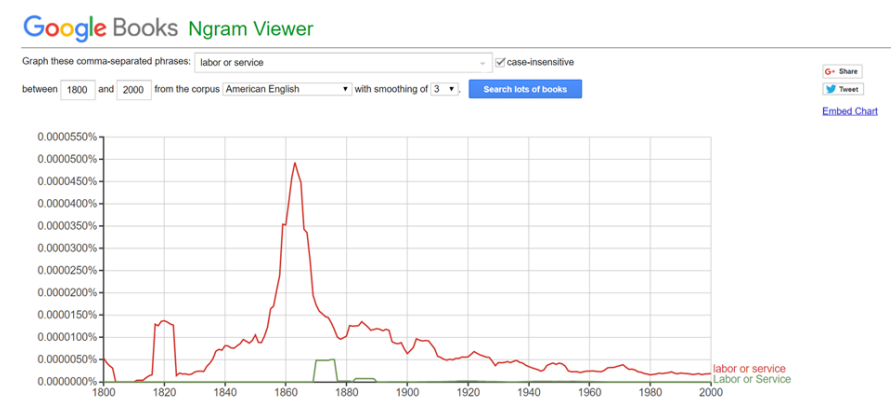
111. *Id.* Abbreviations for registers used in *COHA* refer to Fiction (FIC), Magazine (MAG), Newspaper (NEWS), and Non-Fiction Books (NF); abbreviations in *COCA* refer to Fiction (FIC), Magazine (MAG), Newspaper (NEWS), Academic (ACAD), and Spoken (SPOK). See ENGLISH-CORPORA.ORG, <https://www.english-corpora.org/>, for a more detailed description of the texts in each register.

112. *COHA*, *supra* note 69. Non-standard spellings and errors are included from the original. Bolding added for emphasis.

- 2014 (ACAD): 75% of Mexican immigrant mothers had less than a high school education, 79% worked in **labor or service** jobs, and 70% were below the poverty line.

These findings are further amplified by a search on the phrase in Google’s Ngram viewer, which provides general usage of words or terms over time based on searches of books, documents, and reports.

Figure 1: Google Books Ngrams for “labor or service”



A closer look at the materials that reference “labor or service” during the height of use (approximately 1840–1900) provided results that were either official government documents or records, or historical works referring to such documents or records. For example:

- Labor Laws of the United States (1896)
- Special Report of the Commissioner of Labor (1896)
- The Story of Manual Labor in All Lands and Ages (1886)

When looking at the few texts in the more contemporary period (1960–2000), books and documents that used the phrase were similarly

nonfiction texts about historical laws, government labor bulletins, and legal documents. For example:

- The Black Laws in the Old Northwest (1993)
- Bulletin of the United States Bureau of Labor Statistics (1967)
- Labor-management relations in the public service (1970)

Given the infrequent use of “labor or service” in *COHA*, *COCA*, and Google Books to refer to much other than the original statutes or historical government publications, we then examined lemmas,¹¹³ or word forms, of the noun “labor” collocating with the noun “service” in the two time periods to investigate other ways the two terms were being used in proximity to each other. Our goal was to see whether ordinary language also reflected the shift in usage over time in statutory language. Looking only at the statutory term, “labor or service,” is not sufficient to answer this question.

In *COHA*, there were 257 results, and in *COCA*, there were 129.¹¹⁴ A random sample of 100 was taken from each corpus for further analysis.¹¹⁵ In *COHA*, there were approximately twelve instances that referred to the original statute and used the exact phrase “labor or service”; however, the majority of results used variations of the original phrase and moved away from references to slaves or slave-like labor. Interestingly, these variations precede similar variations found in USSL, which did not appear until later, around the time of the Railway Labor Act in 1926.¹¹⁶ Specifically, in *COHA* in the 1880s, “labor or service” is more frequently pluralized (e.g., “labor or services”), conjoined (e.g., “labor and service(s)”), and modified (e.g., “contract labor and civil service” or “camp labor and military

113. See, e.g., *COCA*, *supra* note 63; *COHA*, *supra* note 69. Lemma searches include all variants of a word—e.g., labor, labors, labour, etc. Lemma searches are represented in the text by CAPS.

114. *COCA*, *supra* note 63; *COHA*, *supra* note 69 (search “LABOR_nn* and SERVICE_nn* +/-3”; collocates).

115. *COCA*, *supra* note 63; *COHA*, *supra* note 69. Instances in each search that referred to names of labor organizations, government services, or other related agencies were excluded from the analysis.

116. *COCA*, *supra* note 63; *COHA*, *supra* note 69.

service”). And while some instances still refer to indentured-style labor, references also start to include more voluntary, contract-based manual employment. For example:

- 1888 (MAG): Besides this assault upon Mr. Cleveland and the Democracy, there is little else in General Harrison’s letter, except some assurances that, while he was in the Senate, he gave votes that approved the declarations in the Republican platform on the subject of **contract labor and civil service** reform.
- 1897 (MAG): There are others where such a period is prescribed, in the absence of contract, as to general industrial or mechanical labor; that is, to labor by the day, and not to **farm labor or domestic service**.

In *COCA*, there are a few instances referring to the “fugitive slave clause”; however, as compared to *COHA*, *COCA* provides even more instances of conjoined or modified versions of “labor or service” and refers to a much broader range of employment—from physical to mental. For example:

- 2011 (MAG): Many in **labor and service** who do belong to a union still benefit from the efforts of the union to increase wages and benefits, as well as to improve working conditions and social conditions.
- 2016 (ACAD): The estimated cost of the entire project was about \$1 million, though the vast majority of **labor, services, and materials** was donated.
- 2017 (ACAD): “the Supreme Court . . . interpreted the FLSA to mean that unpaid intern volunteers at nonprofits are legal because such volunteers without promise or expectation of compensation, but solely

for their own pleasure, **labor in the service** of a cause that they believe in.”

COCA shows that apart from references to the original statute, when contemporary writers use the terms “labor” and “service” to refer to slave-like duties, *those* instances are now modified. For instance:

- 1998 (MAG): The sagging fortunes of the Canadian dollar may also help explain the sudden appeal of Cuba as a holiday destination; with **virtual slave labor to provide services**, package tours to Castro’s island are significantly cheaper than similar excursions to Florida or other Caribbean venues.
- 2003 (ACAD): The UN protocol specifically addresses the trade in human beings for purposes of prostitution and other forms of sexual exploitation, **forced labor or services**, slavery or practices similar to slavery, servitude, and the removal of organs.

Thus, the evidence points to the fact that “labor or service” has been used as a term of art to describe manual, often nonvoluntary, work-related activities both in the past and in the present.¹¹⁷ Modifications of the term—beginning in the early time period and more commonly used today—expand the usage to refer to paid employment that is frequently physical, but may also possess a mental aspect, as described in the timeline below.

“Labor or Service” Timeline

- **USSL 1780s–1860s:** Fixed phrase used to refer to slaves, indentured servants, or others who perform forced manual labor.

Compare COHA/COCA 1800s–2010s: Overall, the majority of instances of the fixed phrase “labor or

117. Also highlighted in the timeline is the fact that use of the terms in the language of ordinary citizens allowed for a broader range of meanings earlier than in statutory language across all time periods.

service” referred to the statutes under discussion. In COHA 1870s: The fixed phrase “labor or service” first used to refer to manual labor as a chosen profession.

- **USSL 1880s–1900s:** Fixed phrase used to refer to aliens, foreigners, and contract day laborers who perform manual (mostly forced or low-paid temporary) labor.

Compare COHA 1880s: Variations of “labor or service” begin to occur with increased applications for voluntary and/or permanent employment.

- **USSL 1910s–1920s:** Variations of “labor or service” begin to occur with mixed applications to apply to forced and voluntary “labor”. “Work” also begins to appear to refer to paid manual labor of government workers and contractors.

Compare COHA/COCA 1800s–2010s: “Work” appears throughout the time periods to refer to all meanings of “labor” (slave-like, forced, temporary, voluntary, permanent, etc.).

- **USSL 1920s–2000s:** Variations of “labor or service” refer to workers or employees who perform mostly manual, voluntary paid labor.

Compare COCA 1900s–present: Voluntary, paid labor (whether manual or mental) is the default use of “labor” and “service.” And in COCA 1990s–present: References to the original slave-like “labor” and “service” are now the modified (i.e., marked) variations.

Note again that the statute at issue in this case contained the term modified by “of any kind,” but it appears that “labor or service” has only more recently been modified to take on the broader sense.

B. What People Mean When They Use “Labor”

Since the Court focused on “labor” individually, we investigated that term further in relation to what “labor” means, who “labors,” and if those findings could apply to the activities that “clergy” perform.

This portion of the analysis investigates two time periods and corpora: *COHA* (1880–1899), which covers the historic period in which the statute was enacted and challenged, and *COCA* (2010–2017), which provides a contemporary comparison of the terms, presented in Table 1.

Table 1: Time Periods and Corpora Investigated

Statute: 1885	COHA: 1880–1889
Decision: 1892	COHA: 1890–1899
Contemporary: 2018	COCA: 2010–2017

1. What Does “Labor” Mean?

Merriam Webster provides a definition of the noun “labor”¹¹⁸ as consisting of activities requiring *physical* or *mental* effort.¹¹⁹ Definitions include, for example:

- expenditure of physical or mental effort especially when difficult or compulsory (e.g., was sentenced to six months at hard *labor*)¹²⁰

118. *Labor*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/labor> [<https://perma.cc/P9GT-ZJHG>] (last visited Nov. 7, 2019).

119. *Id.*

120. *Id.*

- human activity that provides the goods or services in an economy¹²¹
- an economic group comprising those who do manual labor or work for wages¹²²
- workers available for employment (e.g., Immigrants provided a source of cheap *labor*).¹²³

Yet, the examples and synonyms presented highlight the physical aspects of the term (e.g., “grind, slavery, sweat, toil”) over the mental aspects.¹²⁴

An examination of adjectives collocating with “LABOR” in *COHA* and *COCA* also highlight the physical or manual aspects of “labor” with “manual” and “hard” occurring in the first two positions in both corpora, as shown in Table 2 below.

Table 2: Top Ten Adjectives¹²⁵ Collocating with “labor”¹²⁶

<i>COHA</i> : 1880–1899	Raw Freq.	<i>COCA</i> : 2010–2017	Raw Freq.
Manual	104	Manual	134
Hard	92	Hard	128
Organized	33	Cheap	118
Skilled	32	Organized	101
Productive	31	Forced	96
Unskilled	25	Fair ¹²⁷	59

121. *Id.*

122. *Id.*

123. *Id.*

124. *Labor*, *supra* note 118.

125. *COCA*, *supra* note 63; *COHA*, *supra* note 69. “Central” was excluded from *COHA* since it referred only to the name of a particular union, and “immaterial” and “national” were excluded from *COCA* since the examples were only from a single publication and the name of a single organization, respectively. These examples further demonstrate the need to examine context when performing such analyses.

126. *COCA*, *supra* note 63; *COHA*, *supra* note 69 (search “LABOR and _j* +3”; collocates, MI = 3 or higher).

127. *COCA*, *supra* note 63; *COHA*, *supra* note 69. Instances of “fair” were almost exclusively used in reference to “fair labor associations” or “fair labor standards,” which further emphasize manual or physical labor, but also refer to hourly workers, more generally, with the “Fair Labor Standards Act.”

Cheap	24	Physical	46
Arduous	22	Skilled	44
Honest	21	Agricultural	23
Patient	18	Environmental	22

Other collocates such as “arduous,” “forced,” and “physical” further emphasize the physical aspect of the term and a keyword in context (KWIC) examination of “organized,” “unskilled,” “cheap,” “honest,” and “agricultural” provide additional instances of physical or manual labor, as in the following examples:

- 1884 (MAG): It is one of the delusions that still abide in too many minds that the great industrial need of the South is cheap and **unskilled labor**, the toil of an ignorant peasantry.
- 1882 (MAG): The cultivation of tobacco on a great scale required immense plantations and an abundance of **cheap labor**; and as among the white immigrants **cheap labor** was not forth-coming in sufficient quantity, recourse was at once had to the slave-trade.
- 1882 (MAG): He is quick to perceive that, while “**honest labor**” dignifies the laborer because it is honest, it is not more dignified or honest because unintelligent, or such as can be performed as well by a steam-engine or a horse. It can not be questioned that it is precisely this aspect of farming—its supposed necessary association with hard, unintelligent, merely mechanical labor, unrelieved by any considerable use of the intellect - that has in the past caused it to be looked down upon as a pursuit unworthy of educated and intellectual men

In *COHA*, one of the adjectival collocates—“skilled”—was used in reference to both physical and mental aspects of “labor,” as in the following examples:

- 1890 (MAG): With our productive machinery, with the inventive genius of our people constantly in advance of the world, with our cheap and **skilled labor**, we can produce, cheaper and better, more than half the products which the manufacturing people of Europe are distributing through the world, if we could obtain the materials at the same cost.
- 1881 (MAG): Artistic labor, **skilled labor**, that which is done with the least waste of mental and bodily vigor, and accompanied with the highest wages, is that which best develops the individual for the advantage of society.

The collocate “patient” in *COHA* was the only term that more often referenced the mental aspect of “labor,” typically in an educational setting, as in the following example:

- 1892 (MAG): All science indeed has come to exist through the **patient labors** of students who have slowly done the work of unravelling the tangled web of interlaced actions, some part of which in turn each faithful inquirer must with the teacher’s aid repeat.

The results from *COHA* and *COCA* demonstrate that while “labor” can be a mental activity, it is most often applied to contexts wherein physical or manual labor is occurring.

All of this suggests that by the end of the nineteenth century, when the law was enacted and the case arose, the scope of “labor” had grown to include more than slave-like labor, and, at the margins, more than work that required physical exertion.

2. *Who “Labors”?*

When examining who performs “labor” in *COHA* and *COCA*, the majority of results can be grouped into two main semantic categories: (1) collocates that refer to working-class, forced, or slave-like workers (e.g., “slave,” “pauper,” “convict,” “agitators,” “child,” and “migrant”), and (2) collective noun collocates that refer to laborers as impersonal mass units (e.g., “class,” “ranks,” “market,” “supply,” and “pool”). As seen in Table 3, many terms possess both semantic qualities.

Table 3: Top Ten Collocate Nouns¹²⁸ Describing Those Who Perform “labor”¹²⁹

<i>COHA</i> : 1880–1899	Raw Freq.	<i>COCA</i> : 2010–2017	Raw Freq.
Classes	84	Market	585
Slave	23	Force	525
Market	30	Child	154
Prison	19	Slave	90
Pauper	18	Markets	81
Ranks	13	Farm	45
Poverty	13	Supply	41
Convict	11	Pool	34
Agitators	10	Migrant	31
Missionary	10	Migration	29

128. *COCA*, *supra* note 63; *COHA*, *supra* note 69. There were other nouns collocating with “LABOR” such as “capital”, “hours”, and “problem”; collective nouns referring to entities that organize or manage laborers such as “union”, “federation”, and “bureau”; and proper titles and names of such organizations such as “secretary”, “division”, and “Knights”, but only those related to people who perform labor were included in this table. *Id.* Additionally, “day” was excluded from *COCA* since the context revealed its use almost exclusively referred to the holiday “Labor Day” and not “day laborers”, providing further support for a close contextual examination of the data. *Id.*

129. *COCA*, *supra* note 63; *COHA*, *supra* note 69 (search “LABOR and _nn* +/-3”; collocates, MI = 3 or higher).

Examples from category 1—working-class, forced, or slave-like workers—include:

- 1892 (NEWS): A bill designed to prevent the employment on public works of **prison or convict labor** or the products of such labor was reported to the House to-day from the Labor Committee by Representative Davis . . .
- 1892 (NF): Large numbers of the alien laborers who are coming now, are little better than “slaves of contractors, steamship lines, and the professional European jobbers in **pauper labor** . . .

Examples from category 2—collective nouns referring to laborers as impersonal mass units—include:

- 1883 (MAG): It is not for the protection of the rich, but of the middle and less favored or **manual labor classes**, that public expenditure should be carefully guarded.
- 2014 (NEWS): But in all seriousness, in Washington right now, the **labor pool** hasn’t caught up with the boom. It’s a real problem for hiring in restaurants, let alone in the government.

Other nouns on the collocation list with “labor” related to *qualities* of those who “labor.” In most instances, the terms provided a negative prosody with respect to “laborers.” Negative terms included “problem,” “expense,” “troubles,” “disputes,” and “imprisonment.” The collocates that provided neutral or positive semantic prosody (e.g., “cost,” “products,” and “fruits”) did not reference the “laborers,” but the benefits received by the employers of the laborers.

The one term that appeared to reference a positive quality of “laborers” was “dignity.” However, upon further examination, the structure of each sentence carried negative connotations given the

context of use. For example (*italics added for emphasis of the negativity*):

- 1880 (MAG): The words spoken about the **dignity of labor** *are not apt to be very sincere*.
- 1887 (FIC): to talk of **dignity attaching to labor** of any sort under the system then prevailing *was absurd*.

Thus, despite the fact that dictionary definitions of “labor” do not mark the term with a positive or negative meaning, as speakers of a language, we tend to utilize words in a way that is shared by our community.¹³⁰ In this case, the underlying tendency to frame “labor” in a negative manner may have additionally played a role in the Court’s decision to treat the activities of “clergy” as outside of the definition of “labor.”¹³¹ The way in which clergy were described as “brain toilers” suggests a conceptual distinction between laborers and the clergy¹³² as is further exemplified by this example that juxtaposes “clergymen,” who are of “professional classes,” with the “laboring classes”:¹³³

- 1880 (MAG): the professional classes have less bodily strength than the **laboring classes**, and that clergymen, in particular, are weak in the arm of flesh.

Finally, we found an earlier exception from one magazine. A search for synonyms of “clergy” with collocates of “LABOR” resulted in three instances of “laboring clergy”¹³⁴ from the 1830s and described

130. Joanna Channell, *Corpus-Based Analysis of Evaluative Lexis*, in EVALUATION IN TEXT: AUTHORIAL STANCE AND THE CONSTRUCTION OF DISCOURSE 38, 38–55 (Susan Hunston & Geoff Thompson eds., 2000).

131. *Id.*

132. *See* Holy Trinity Church v. United States, 143 U.S. 457, 464 (1892) (“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.”).

133. *COHA*, *supra* note 69.

134. *Id.* (search “=clergy and LABOR +/-3”; collocates, MI = 3 or higher). The remaining results primarily referred to the UK Labor Ministry or Ministry of Labor, which were excluded.

“clergy” who were “the teachers of religion” as opposed to the “bishops and archbishops” who led the religious institutions.

- 1832 (MAG): But whether it will be thought just, by the reformed Parliament, giving effect to the popular sense, to assess on the owner of the land the whole cost of supporting the teachers of religion,—which is the effect of the present system,—we do not pretend to say. That something will be done, and that speedily, with the Church, seems to be understood. It appears to be admitted, even on the present system, that its revenues require a new apportionment between the dignitaries and the **laboring clergy**.
- 1835 (MAG): The average salaries paid to the bishops and archbishops exceed twenty-five thousand dollars a year, and some of them receive as much as a hundred thousand dollars; while a numerous class of the **clergy**, the **laboring clergy** too, are obliged to content themselves with a scanty subsistence.

Because these were the only examples we found and they were from the same magazine (*North American Review: Reform in England*), we regard them as outliers.

Thus, while there are instances in *COCA* of mental labor, as noted above, “labor” in both *COHA* and *COCA* appear to primarily relate to physical labor—oftentimes seen as an impersonal, yet organized, mass—and are referenced in a negative manner. The few instances that reference clergy juxtapose their work from that of “laborers” in both class and mental effort.

3. *What Do Clergy Do?*

In order to examine more closely what actions “clergy” perform, we investigated verbs that collocate with “clergy,” as seen in Table 4.

Table 4: Top Ten Verbs¹³⁵ Collocating with “clergy”¹³⁶

<i>COHA</i> : 1880–1899	Raw Freq.	<i>COCA</i> : 2010–2017	Raw Freq.
Opposed	4	Founded	8
Bore	4	Estimates	8
Accepted	4	Declared	6
Attended	3	Ordained	5
Announced	3	Marry	5
Represented	3	Denied	5
Arrogated	2	Refused	5
Denouncing	2	Exercised	4
Strained	2	Banned	4
Deprived	2	Blamed	4

The verbs on these lists—both in *COHA* and *COCA*—primarily reflect activities that are cognitive or communicative in nature and use. For example:

- 1887 (NF): [A]s a whole, the **priesthood accepted**, without any effective protest, the fires of the Council of Constance which consumed Huss, and the abominations of the Borgias at Rome.
- 1898 (NF): The Federalist **clergy joined in denouncing** Jefferson on the ground that he was an atheist.

135. *COCA*, *supra* note 63; *COHA*, *supra* note 69. Instances of “changed,” “formed,” and “resigned” were excluded from the *COHA* list since they almost exclusively referred to UK government officials (“the ministry”) as opposed to religious leaders. In *COCA*, “issued,” “announced,” “estimates,” and “oversees” were excluded for similar reasons (i.e., foreign government ministries). It should be noted that in some of the other instances in both *COHA* and *COCA*, government ministries are referenced as well, but the verbs also frequently relate to activities performed by religious leaders, so they were included here for illustrative purposes.

136. *COCA*, *supra* note 63; *COHA*, *supra* note 69 (search “=clergy and _v* -3”; collocates, MI = 3 or higher).

- 2010 (NEWS): Experts who study Christian ministries said that whatever the reason for it, Dr. Dobson’s decision was extraordinary. # “I can’t think of another example where the leader of a major **ministry organization founded** it, built it up, then moved on and did something so visibly competitive,” said Stewart M. Hoover, director of the Center for Media, Religion and Culture at the University of Colorado, Boulder.
- 2013 (MAG): One **ministry declared** simply: “Adoption is the new pregnant.” # All of this enthusiasm has created an army of advocates rallying to revive an international adoption business that has been on the wane since 2004, and has reoriented the industry in a more overtly religious direction.

These results demonstrate that the primary functions of “clergy” are not manual, indentured-like labor, but activities that require more cognitive duties such as “denouncing,” “declaring,” and “opposing.”

Finally, since few collocations between “clergy” and “LABOR” were found in the previous section describing who labors, we examined “work” as a common synonym of “labor” from the statutory corpus in connection to activities performed by “clergy.” In both corpora, examples were similar to the other activities performed by “clergy”—i.e., those that are more representative of “work” that is spiritual or mental in nature. For example:

- 1886 (MAG): **the priesthood** could **work** miracles
- 2014 (MAG): As he explained his **work with a prison ministry** in Texas, I found myself surprised and asked why he was involved. He said, “More than a decade ago, I realized that when Jesus tells us to feed the hungry, cloth the naked, and visit the prisoner, he actually means it.”

- 2013 (MAG): Most important, he believes **ministry leaders must work** from a place of love.

Interestingly, in light of how the statute was interpreted, “service” was mostly left out of consideration in the opinion. The same dictionary previously cited defines the noun “service” as including features related to employment as well as the act of doing something positive for another person.¹³⁷ For example:

- the occupation or function of serving (e.g., in active *service*)
- employment as a servant (e.g., entered his *service*)
- contribution to the welfare of others (e.g., glad to be of *service*)
- a meeting for worship—often used in plural (e.g., held evening *services*)
- the act of serving, such as a helpful act (e.g., did him a *service*)
- useful labor that does not produce a tangible commodity—usually used in plural (e.g., charge for professional *services*)

The senses of “service” are mixed between activities related to being in servitude and providing something of helpful service, which, given the corpus findings above, could clearly relate to the activities of the “clergy.”

An investigation in the two relevant time periods of the collocates “clergy” (and its synonyms) and “SERVICE” produced a few hits: five in *COHA* and twenty-five in *COCA*.¹³⁸ For example:

137. *Service*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/service> [<https://perma.cc/2J3M-V6A9>] (last visited Nov. 7, 2019).

138. *COCA*, *supra* note 63; *COHA*, *supra* note 69 (search “=clergy and SERVICE +/-4”; collocates). This number increases to twenty-four in *COHA* and sixty-nine in *COCA* with the search: “=clergy and =service +/-4”; collocates. This includes collocates such as “assistance,” “benefit,” and “help” in both corpora, which further describe the spiritual, nonmanual work the “clergy” provide.

- 1882 (MAG): FOR a while after his reception, Mr. Newman proposed to devote himself to some secular calling, but Cardinal Wiseman, in whose hands he had placed himself decided otherwise; and, indeed, it must have been obvious to all the leading members of the church which now had gained him that so great gifts of preaching, such deep theological // learning, so keen a power of analyzing the workings of the human heart, should be available for the **service of the priesthood**.
- 1892 (MAG): Arthur Brooks, now rector of the Church of the Incarnation in New York City, and the Rev. John Cotton Brooks, now rector of Christ Church, Springfield, and also of his other brother, the late Frederick Brooks, who died while rector of St. Paul's Church, Cleveland, and who gave abundant promise of a brilliant and successful **service in the Episcopal ministry**.
- 2011 (MAG): I encourage you to pursue your important **ministry in the service** of the church, sustained by the vigilant attention of your bishop and the unending prayers of the Christian community.
- 2016 (MAG): The **ministry offers an uncommon service**, given that white-collar criminals and their families have little social support other than online forums.

Given the instances provided above, the outcome of *Holy Trinity Church* may have been decided differently if the Court had investigated the meaning and use of “service” when collocated with the “work” “clergy” perform. Yet, as we tried to demonstrate above, the phrase “labor or service” had its own meaning in statutory

language, and a negative connotation that went beyond the meanings of the individual terms.¹³⁹

SUMMARY

Analysis of data from USSL, *COHA*, *COCA*, and Google Books suggests the following facts:

- “Labor or Service” in either order was used through most of the nineteenth century to refer to manual, slave-like labor.
- In legal contexts, the expression was used to specifically characterize slaves themselves. Article IV of the Constitution contains a fugitive slave provision that uses exactly that language, and the Fugitive Slave Acts of 1793 and 1850 do so as well, as do other statutes from that era.

It is therefore not clear whether to consider “labor or service” as a single construction meaning the type of work that slaves perform or as an ordinary compound disjunctive noun phrase. That is, one can ask either about the expression “labor or service” or about “labor” and “service” separately. The Court seemed to choose the latter course, although we argue here that the former course may have been more faithful to the meaning of the term as understood at the time based on the following:

- When the activities of clergy were represented in the corpora, “labor” was rarely used other than in “labor of the Lord” and similar expressions. Yet, while rare, the corpus demonstrated occasional use of “labor” in connection with the tasks that members of the clergy performed.

139. *COCA*, *supra* note 63; *COHA*, *supra* note 69.

- When the corpora demonstrated that clergy perform a “service,” it was either in the sense of being “in the service of the lord” or providing a positive “service” to the community. However, the decision placed more focus on the former term—“labor”—than on the latter—“service.”

It appears to us that the Court got the ordinary meaning argument correct based on corpus analysis: The statute could be construed to apply to a member of the clergy hired under contract by a church, but it would be an outlying use of the language, notwithstanding the fact that the statute includes “labor or service of any kind.” As for concern about the clergy not being listed among the exceptions, the argument may not be as strong as it initially seemed, but we certainly do not claim it to be irrelevant. Thus, we take no stand on the Supreme Court’s actual holding, but the history of usage in both statutory and ordinary language do support the Court’s decision.

Returning to the discussion at the start of this article, we have attempted to strengthen the use of corpus linguistic analysis by relying on doubly dissociated terms, such as “labor” and “clergy,” highlighting the value of creating or consulting specialized corpora to investigate whether the statutory language reflects ordinary usage or carries a specialized legal meaning, and exploring inferences that can be drawn from collocational information in addition to the frequency of word usage. Our goal has been to demonstrate how corpus analysis can be of help in exploring historical cases, for which introspection about meaning is unavailable.