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## Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation

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## ARTICLES

### UNLOCKING THE MYSTERIES OF *HOLY TRINITY*: SPIRIT, LETTER, AND HISTORY IN STATUTORY INTERPRETATION

Carol Chomsky\*

*In 1892, the Supreme Court construed the Alien Contract Labor Act of 1885, which barred importation of "any alien" under contract to perform "labor or service of any kind," as not prohibiting a New York church from hiring a British pastor to occupy its vacant pulpit. "[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," wrote Justice David Brewer in Holy Trinity Church v. United States. Brewer's opinion is a touchstone for those seeking to overcome plain statutory language, but is condemned by those who disapprove of using legislative history and challenge Brewer's understanding of Congress's intent. Professor Chomsky argues that a complete history of the case and statute reveals the Court was correct in its judgment and Holy Trinity demonstrates the soundness of relying on legislative history to construe statutes properly.*

#### INTRODUCTION

In 1887, the Reverend Doctor Edward Walpole Warren succeeded Wilbur L. Watkins as rector of the Church of the Holy Trinity, an Episcopal church in New York City.<sup>1</sup> Dr. Warren had spent part of the previous year at the church in a preaching mission, but was a native of and resident in England at the time he was hired. Despite the unremarkable nature of his employment contract, Dr. Warren found himself at the center of a federal prosecution charging the church with a violation of the Alien Contract Labor Act, which made it unlawful for any person, company, partnership, or corporation:

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\* Associate Professor, University of Minnesota Law School. I presented a version of this Article at a workshop at the University of Minnesota Law School and wish to thank my colleagues, especially Daniel Farber and Philip Frickey, for their helpful comments. William Eskridge also provided valuable suggestions. I have benefited from research help from John Lacey and Jessica Durbin.

1. See James Elliott Lindsley, *A History of Saint James' Church in the City of New York, 1810-1960*, at 51 (1960). A "small, but vocal, minority" at the church preferred to recall as rector Stephen H. Tyng, Jr., who had helped found the church in 1864 and stepped down as rector in 1881. *Id.* at 47-49, 51.

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 . . . under contract or agreement . . . 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 . . . .<sup>2</sup>

The Circuit Court for the Southern District of New York imposed the required \$1000 fine on the church<sup>3</sup> and, according to the church historian, Dr. Warren was ordered to return to England.<sup>4</sup>

The Church appealed to the United States Supreme Court which, in February 1892, reversed the judgment of the circuit court, concluding that the Alien Contract Labor Act did not apply to the contract between the Church and its minister.<sup>5</sup> In a statement often since cited, Justice David Brewer, speaking for a unanimous court, noted "the 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."<sup>6</sup> Referring to the title of the Act, the "evil which was intended to be remedied," the circumstances surrounding the enactment, and the committee reports, Justice Brewer concluded that Congress intended by the Act to exclude cheap, unskilled laborers, not professional men such as Dr. Warren, despite the breadth of the language used.<sup>7</sup>

Justice Brewer might have stopped there, having adequately (though not unchallengeably) supported his construction of the statute.<sup>8</sup> But Brewer went on, in ringing language and at great length,<sup>9</sup> to declare a second reason that the Act should not be construed as including the con-

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

3. See *United States v. Rector of the Church of the Holy Trinity*, 36 F. 303, 303-04 (C.C.S.D.N.Y. 1888).

4. See Lindsley, *supra* note 1, at 60. In 1887, when the original prosecution was brought against Dr. Warren, no provision of the Alien Contract Labor Act authorized deportation. As originally enacted, the statute imposed a fine on anyone importing an alien in violation of the Act, but did not penalize the alien. See Alien Contract Labor Act of 1885, § 3, 23 Stat. at 333. In 1887, the Act was amended to prevent the landing of an immigrant if the violation was discovered before entry. See Act of Feb. 23, 1887, ch. 220, § 6, 24 Stat. 414, 415. In 1888, the Act was further amended to permit the Secretary of the Treasury to arrest and deport any alien found to have entered in violation of the Act, for up to a year from entry, see Act of Oct. 19, 1888, ch. 1210, 25 Stat. 565, 566, but that provision would not have been applicable to Dr. Warren.

5. See *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

6. *Id.* at 459.

7. *Id.* at 462-465. The Act prohibited the importation of "any alien or aliens, any foreigner or foreigners . . . under contract or agreement . . . to perform labor or service of any kind . . ." Alien Contract Labor Act of 1885, § 1, 23 Stat. at 332 (emphasis added).

8. See *infra* Part II.

9. The portion described—the so-called "Christian nation" part of the opinion—equals in length the entire exposition of the legislative history and its consequences for interpretation of the Act. Compare *Holy Trinity Church*, 143 U.S. at 465-72 (Christian nation), with *id.* at 457-65 (legislative history).

tract with Dr. Warren. It could not be, he declared, that Congress would have intended to prevent this particular kind of contract, no matter how broad its language and its general effect. This was a contract to hire a minister, and “no purpose of action against religion can be imputed to any legislation, state or national, because,” declared Justice Brewer, “this is a religious people.”<sup>10</sup> With examples ranging from the charge to Christopher Columbus when he sailed westward, colonial charter documents, the Declaration of Independence, the constitutions of various states, the familiar oath of office (“so help me God”), and the opinions of no less an authority than Chancellor Kent, to the “business” and “customs” of American life, Brewer found “a volume of unofficial declarations [and a] mass of organic utterances that this is a Christian nation.”<sup>11</sup> With all this evidence, “shall it be believed that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation? . . . The construction invoked cannot be accepted as correct.”<sup>12</sup>

Brewer’s declaration that the United States is a Christian nation had little impact on the subsequent development of American law,<sup>13</sup> but the

10. *Id.* at 465.

11. *Id.* at 471.

12. *Id.* at 471–72.

13. Justice Brewer later relied upon his own statement for the Court, noting in one of his Haverford Library Lectures, somewhat disingenuously, “This republic is classified among the Christian nations of the world. It was so formally declared by the Supreme Court of the United States.” David J. Brewer, *The United States A Christian Nation* 11 (John C. Winston Co. 1905). He disclaimed any notion that it was Christian “in the sense that Christianity is the established religion or that the people are in any manner compelled to support it” or “that all its citizens are either in fact or name Christians.” *Id.* at 12. Indeed, in *Holy Trinity Church* itself, Brewer included a “Jewish synagogue” when he listed religious institutions with which Congress would never have intended interfering in their selection of clergy. 143 U.S. at 472. Nonetheless, his proof of the “Christian nature” of the country, both in *Holy Trinity Church* and in the more extended explanation in his lecture, dealt not with the religious core of American values, but with the direct references to the sectarian Christian foundations of the United States in colonial charters, state statutes, judicial opinions, and public utterances. See *id.* at 466–71; Brewer, *supra*, at 12–39.

A few judges have followed Brewer’s lead and concluded that America is at base not just religious but Christian. Only months after the decision in *Holy Trinity Church*, the Supreme Court of the Territory of New Mexico cited Brewer’s statement in affirming a conviction for selling liquor on a Sunday and declaring: “Whatever may be individual opinions as to the question of religion, and the particular form of it known as ‘Christianity,’ yet the legal fact must be recognized by every one that this nation, and every portion thereof, is nominally Christian.” *Cortesy v. Territory*, 30 P. 947, 950 (N.M. 1892). Interestingly, the court in *Cortesy* had to determine the scope of the portion of the Sunday closings law that penalized any person who “engaged in any labor” on a Sunday. The court did *not* cite *Holy Trinity Church* when it concluded that plain and unambiguous language like “any labor” requires no interpretation, nor did the dissenting judge when he concluded that the word labor meant “nothing more or less than manual, servile labor.” *Id.*

Half a century later, in *Paramount-Richards Theatres, Inc. v. City of Hattiesburg*, the Supreme Court of Mississippi upheld a statute prohibiting theaters from showing movies after 6:00 P.M. on Sundays by finding the Sunday closing laws to be of “divine origin” and

citing *Holy Trinity Church* for establishing that “[o]ur great country is denominated a Christian nation.” 49 So. 2d 574, 577 (Miss. 1950). That same year, the Superior Court of New Jersey upheld a statute mandating the reading of at least five verses from the Old Testament each day in public school and permitting recitation of the Lord’s Prayer by reference to, and substantial repetition of, Brewer’s litany of proof that the United States was founded in association with the Christian faith. See *Doremus v. Board of Educ.*, 71 A.2d 732, 734–40 (N.J. Super. Ct. Law Div. 1950).

More recently, when Justice Sandra Day O’Connor was asked by a Republican political activist from Arizona to write a letter in support of a party resolution declaring the United States a Christian nation based on the laws of the Bible, she cited *Holy Trinity Church* as authority. See 2 Experts Fault O’Connor for Letter, Wash. Post, Mar. 15, 1989, at A3. In 1998, Judge Ray Moore of Alabama, challenged by the American Civil Liberties Union because of his hand-made plaque of the Ten Commandments hanging behind his bench and his practice of inviting clergy to lead prayer at the opening of jury organizing sessions, defended himself by citing *Holy Trinity Church* and its recognition that the United States is a Christian nation. See *Alabama ex rel. James v. ACLU*, 711 So. 2d 952, 970 (Ala. 1998).

Other judges have cited *Holy Trinity Church* to support more generally the religious and moral core of American values. Typical is the handling by the Supreme Court of Louisiana. In *Herold v. Parish Board of School Directors*, the court used Brewer’s strongly worded statement of the Christian nature of American society on its way to concluding that compelled reading of the Bible would unlawfully discriminate against Jewish students. 68 So. 116 (La. 1915). “There have been differences in expressions of opinion as to whether this is a Christian land or not,” the court said, but “there is not, and there has not been, a question” that America is a “godly land” and that “we are a religious people.” *Id.* at 119. See also *United States v. Macintosh*, 283 U.S. 605, 625 (1931) (citing *Holy Trinity Church* for the proposition that “[w]e are a Christian people . . . according to one another the equal right of religious freedom . . . .”); *United States v. Patterson*, 201 F. 697, 716 (S.D. Ohio 1912) (declining to decide whether the United States is a Christian nation, as Brewer declared, but citing *Holy Trinity Church* in concluding that there is a moral basis to the antitrust laws because “dealings between man and man must be in terms of justice”); *Engel v. Vitale*, 176 N.E.2d 579, 581 (N.Y. 1961), rev’d, 370 U.S. 421 (1962) (upholding law mandating opening school prayer by quoting the statement in *Zorach v. Clayson*, 343 U.S. 306, 313 (1952) that “[w]e are a religious people whose institutions presuppose a Supreme Being,” and noting this to be a paraphrase of the Supreme Court’s similar assertion in 1892 in *Holy Trinity Church*).

In more recent cases, a few judges have criticized Brewer’s narrow vision or noted the social changes that make his declaration unseemly today. See *Lynch v. Donnelly*, 465 U.S. 668, 717–18 (1984) (Brennan, J., dissenting) (calling the Court’s approval of the public display of a creche “a long step backwards to the days when Justice Brewer could arrogantly declare for the Court that ‘this is a Christian nation’”); *United States v. Johnson*, 25 F.3d 1335, 1341 (6th Cir. 1994) (Nelson, J., dissenting) (“A century ago, when *Church of the Holy Trinity* was decided, the kind of cultural diversity that now characterizes our nation and its public servants still lay in the future. It was thus still possible to suggest . . . that ‘this is a Christian nation.’”); *ACLU of Illinois v. City of St. Charles*, 794 F.2d 265, 270 (7th Cir. 1986) (noting that “[a]s late as 1892 the Supreme Court could state in the manner of a truism, ‘this is a Christian nation,’” but finding America and the Supreme Court had changed so substantially that a city could not constitutionally display a Latin cross during the Christmas season). Similarly, Justice O’Connor was widely criticized for her letter citing *Holy Trinity Church* for calling the United States a Christian nation. See, e.g., Alan Dershowitz, A “Christian Nation”: O’Connor’s Letter Aids Religious Bigots, *Seattle Times*, Apr. 17, 1989, at A7 (arguing that country has changed dramatically since 1892 and that the Supreme Court has recognized this change, and adding “Were O’Connor a law student, she would have received a D-minus for her answer.”); Edwin M. Yoder, Jr., Justice O’Connor’s Unfortunate Letter, Wash. Post, Mar. 19, 1989, at C7 (O’Connor’s letter

case became, and remains, an often-cited statement of one of the main tenets of statutory interpretation: that the express words of a statute must be read with the legislature's purpose in mind, and circumstances literally within the statute may yet be excluded from its purview if such exclusion better fulfills the purpose. The case is, as well, a frequent target of those who challenge interpretations that venture beyond statutory text to implement legislative purpose. Justice Kennedy has referred to the "unhappy genesis" of the doctrine and its "unwelcome potential," and described the methodology of *Holy Trinity Church* as "rummag[ing] through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable."<sup>14</sup> The "problem with spirits," he said, "is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice."<sup>15</sup> Justice Scalia considers *Holy Trinity Church* to be "the prototypical case involving the triumph of supposed 'legislative intent' (a handy cover for judicial intent) over the text of the law."<sup>16</sup> *Holy Trinity Church* is cited to the Supreme Court, he says, "whenever counsel wants us to ignore the narrow, deadening text of the statute, and pay attention to the life-giving legislative intent. It is nothing but an invitation to judicial lawmaking."<sup>17</sup> To Chief Justice Rehnquist, the case "has always meant we're going to legislate a little. It means that you can't really get the meaning you want out of the statute."<sup>18</sup> Acknowledging just these attitudes, Professor Philip Frickey tells his students that "*Holy Trinity Church* is the case you always cite when the statutory text is hopelessly against you."<sup>19</sup>

Because Brewer's opinion referred to the House and Senate committee reports accompanying the Alien Contract Labor Act, *Holy Trinity Church* is also frequently credited, or blamed, for changing the rules on the use of legislative history in statutory interpretation. In a recent article in the *Stanford Law Review*, Adrian Vermeule cites the case as "elevat[ing]

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resulted in "political embarrassment"; "[v]iewed in the most favorable light, th[e] rhetorical affirmation [of *Holy Trinity* that we are a Christian people] . . . had no more historical validity because it was pronounced in the Supreme Court than if it had been shouted from a soapbox in Lafayette Park"). O'Connor expressed regret that her letter "to an acquaintance . . . was used in a political debate." *Arizona Furor Over Justice's Letter About Christianity*, *San Francisco Chronicle*, Mar. 16, 1989, at A14 (ellipsis in original).

For a thorough description of the context and aftermath of Justice Brewer's "Christian nation" dictum, see Steven K. Green, Justice David Josiah Brewer and the "Christian Nation" Maxim, 63 *Alb. L. Rev.* 427 (1999).

14. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 473 (1989).

15. *Id.*

16. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 18 (1997).

17. *Id.* at 21.

18. Transcript of Oral Argument, *United States v. Gonzales*, 520 U.S. 1 (1997) (No. 95-1605), available at 1996 WL 723377, at \*28.

19. Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 *Minn. L. Rev.* 241, 247 (1992).

legislative history to new prominence by overturning the traditional rule that barred judicial recourse to internal legislative history.<sup>20</sup> *Holy Trinity Church* became, he says, a crucial turning point in judicial use of legislative history to “endorse[ ] countertextual interpretive techniques.”<sup>21</sup> William Eskridge says the case “was a sensation” with respect to the use of legislative history.<sup>22</sup> More moderately, Lawrence Solan writes that *Holy Trinity Church* “presaged a gradual change” in Supreme Court statutory interpretation methodology, serving as a bridge between scattered early cases in which there was some Supreme Court reliance on legislative history and the increasing use of such history over the next several decades.<sup>23</sup>

Part of the notoriety of *Holy Trinity Church* lies in the general belief, held by both those who approve and those who disapprove the invocation of spirit and legislative intent, that Brewer was wrong in construing the intent of the Congress that passed the Alien Contract Labor Act, and that he indeed used legislative intent as a subterfuge for imposing his own meaning on the words of the statute. After reviewing a more extensive legislative history of the Act than Brewer apparently did,<sup>24</sup> Vermeule is convinced that Congress intended just what it said—to bar the importation of individuals under contract to perform “labor or service of any kind.” When Brewer, writing for the Court, declared that the spirit or intention of the statute should prevail over the literal words, Vermeule says, he was describing a nonexistent conflict. Scalia also doubts that the decision somehow “produced the unexpressed result actually intended by Congress.”<sup>25</sup> Ronald Dworkin, who disagrees with much else about Scalia’s statutory interpretation methodology, apparently agrees with his

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20. Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 *Stan. L. Rev.* 1833, 1835 (1998). Vermeule acknowledges that “a few prior [Supreme Court] opinions had quietly breached the traditional rule,” but still credits *Holy Trinity Church* with transforming the terrain by giving legislative history significant weight in overcoming statutory text. *Id.* at 1836 & n.14.

21. *Id.* at 1836.

22. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 209 (1994) [hereinafter Eskridge, *Statutory Interpretation*].

23. Lawrence M. Solan, *Law, Language, and Lenity*, 40 *Wm. & Mary L. Rev.* 57, 99–101 (1998).

24. Brewer quoted from a Senate committee report and referred generally to the “petitions . . . and . . . the testimony presented before the committees of Congress.” *Church of the Holy Trinity v. United States*, 143 U.S. 457, 464 (1892). Brewer may have simply relied upon the portions of the legislative history cited to him by counsel for the Church, since the brief referred both to the Senate Committee Report and to testimony before the Senate Committee on Labor. See *Brief for the Plaintiff in Error* at 18–22, *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) (No. 13,166). Vermeule cites only a few other portions of the legislative debate, see Vermeule, *supra* note 20, at 1843–44, 1846–53, though he apparently reviewed most or all of it in reaching his conclusion. See William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 *Mich. L. Rev.* 1509, 1536–40 (1998) [hereinafter Eskridge, *Unknown Ideal*] (discussing Vermeule’s “thorough legislative archeology”).

25. Scalia, *supra* note 16, at 22.

analysis of *Holy Trinity Church*, suggesting that “[t]here can be no serious doubt that Congress meant to say what the words it used would naturally be understood to say,” even if the legislators “would have voted for an exception for English priests.”<sup>26</sup> Eskridge, on the other hand, finds in the legislative history evidence for competing interpretations of the statute, concluding that *Holy Trinity Church* “is a case where legislative history does little work, beyond buttressing already-formed impressions.”<sup>27</sup>

As these recent references indicate, the meaning of the *Holy Trinity Church* case and its use of legislative history remains a significant element in the vigorous contemporary debate over statutory interpretation. Any thorough analysis of the sources, meaning, and legitimacy of the invocation of spirit, legislative intent, and legislative history must therefore be grounded in a thorough understanding of *Holy Trinity Church*, both the history of the litigation and the history of statutory interpretation methodology in which it was situated. This Article provides that historical context and discusses its implications for the current debate about statutory interpretation theory and methodology. In addition to describing in depth the legislative and political history of the Alien Contract Labor Act—so that the reader may make his or her own judgments about the meaning—the sections below explore the circumstances leading to the litigation as well as the jurisprudential context for Brewer’s analysis.

Viewed in this broader landscape, *Holy Trinity Church* establishes the importance of recourse to legislative history and affords a better foundation for non-textualist approaches to statutory interpretation than its critics have acknowledged. Like many judicial opinions, *Holy Trinity Church* is flawed in the presentation of its rationale. Brewer did not cite to the existing judicial and other authority for his interpretive approach, nor did he explore fully the legislative history available to him. But, at least by my reading of the history, he reached the correct result, one that could not have been reached by relying solely on the words that Congress wrote. Legislating is itself a very imperfect process, and the tools that Brewer used to understand its work product are vital if courts are to fully and fairly apply the law. Both Brewer’s interpretational methodology—well-grounded in prior decisions—and his conclusions—amply supported in the full statutory history—represent responsible efforts to determine the spirit and meaning of legislative language, not ill-considered divinations from the spirit world.

No doubt my arguments about the meaning and significance of *Holy Trinity Church* will neither settle the raging debate about the value or legitimacy of the use of legislative history in statutory interpretation nor convince the critics of *Holy Trinity Church* that the decision is correct. At the very least, however, this exploration of the history of the case will enrich the discussion and make it harder to dismiss the case as an unfor-

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26. Ronald Dworkin, Comment, *in* Scalia, *supra* note 16, at 118.

27. Eskridge, *Unknown Ideal*, *supra* note 24, at I540.



tunate, dangerous, or even ridiculous example of blatant judicial lawmaking. Like the statute it construes, *Holy Trinity Church* cannot be taken at face value. It must be understood in its own context. That, fundamentally, is the aim of what follows.

### I. *CHRONICLES*: THE HISTORY OF THE LAWSUIT

Holy Trinity Church, of which the Reverend Doctor Warren became rector, was established in New York City in 1864 as a low-church alternative to the older Church of the Mediator.<sup>28</sup> Its first rector was the Reverend Stephen H. Tyng, Jr., who as rector of the Church of the Mediator encouraged the secession of Holy Trinity Church from its parent parish and then joined the new facility. Under Dr. Tyng, who remained rector until 1881, Holy Trinity Church focused much of its effort on missionary outreach. It established five chapels, an orphanage, a training school for lay preachers, dispensaries and infirmaries, a lodging house in the city, and a convalescent home in the country. The church occupied a large stone-and-brick structure on the corner of Madison Avenue and 42nd Street, built in 1873 to accommodate the growing needs of the parish.<sup>29</sup>

When Dr. Tyng resigned in 1881, there may have been financial trouble at the parish due to the ambitious activities carried on by the chapels, and some parishioners were reportedly frustrated by Dr. Tyng's continual battle against "ecclesiastical power" and ceremonialism in church services.<sup>30</sup> Nonetheless, Dr. Tyng reported that the church had operated in the previous year at a surplus, had reduced its debt, had two thousand communicants, and was drawing large crowds to its services. In the next several years, however, the neighborhood around the church became increasingly commercial, and many of its parishioners were moving uptown and to other churches. "Dr. Tyng had resigned at the high noon of the parish's prominence; the two rectors who followed him were forced to face dwindling congregations and mounting costs."<sup>31</sup>

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28. Lindsley, *supra* note 1, at 47. The history of Holy Trinity Church retold here is drawn from Lindsley's book, unless otherwise indicated.

29. See *id.* at 47-49. Lindsley observes that the "style [of the building] was of the type appreciated more then than now. The designs in its brickwork caused it to be popularly known as 'the Church of the Holy Oilcloth.'" *Id.* at 49.

30. See *id.* at 49-50. The quote is from Dr. Tyng's letter of resignation, in which he laments that "our battles for principles are over" and states that "we are living in an era of ecclesiastical power." *Id.* at 49.

31. *Id.* at 50-51. The newspaper reports of Dr. Warren's hiring in 1887 give a somewhat different impression of the condition of the church several years after Dr. Tyng's resignation, however. The *New York Times* reported that the church had 1200 communicants in 1887, more than in any other Episcopal church in the city except Trinity and Grace. See *The Call Accepted*, *N.Y. Times*, June 9, 1887, at 8. By the early 1890s, however, the continued financial viability of Holy Trinity Church was uncertain. Beginning in 1893, steps were first taken towards what would become, in 1895, a merger between Holy Trinity Church and St. James' Church, a large and wealthy Episcopal parish. The merger permitted the combined church both to minister to congregants and to carry on Holy Trinity Church's significant work among the poor. Under the terms of the

In 1887, Dr. Tyng's successor resigned to lead a church in Philadelphia. To replace him, the Trustees of Holy Trinity Church turned to a man who had visited the church in December 1885 as part of a group of English missionaries whose members had preached in most of the Episcopal churches during Advent season that year.<sup>32</sup> Dr. Warren had "made a profound impression upon his congregations" during that visit.<sup>33</sup>

When he came—open-faced, hearty, and whole-souled—it required but a glance to see that he was a master of his work. He soon became in universal demand, and, with from four to seven services a day, it was a marvel how he continued to see everybody who called, prepare his sermons, and get even a fragment of necessary rest. Once the incumbent of one of the most desirable parishes in England, he voluntarily surrendered it that he might devote his time to the poor of London.<sup>34</sup>

Dr. Warren was about 50 years old, married, with a son and two daughters; he was "of medium size, of strong English physique, and a pleasant open face, which bears the impress of character and positiveness. He wears short Dundreary whiskers, but no mustache. . . . His manners are engaging."<sup>35</sup> He was reported to be "of fine presence and pleasing manners, an earnest and eloquent orator and of remarkable executive ability. He belongs to the low church party of the Church of England, or, as he himself says, 'I am a moderate churchman.' . . . [H]is salary," said the newspaper, "will be whatever he may desire it to be."<sup>36</sup>

Despite these encomiums, the selection of Dr. Warren was not entirely without controversy. A small but vocal minority apparently wanted to recall Stephen Tyng, and the former rector fully expected to be summoned. When the Trustees instead chose Dr. Warren, Dr. Tyng "steamed off for Europe, declaring to the press that upon his return he would establish an Episcopal church according to his standards."<sup>37</sup> When Warren arrived on September 23, 1887, he was asked about the plans of Dr. Tyng to found another church "with the view of drawing away a large part of your congregation."<sup>38</sup> A spokesman for Holy Trinity Church said it would make "little difference . . . . All of Dr. Tyng's closer friends have

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merger, the Holy Trinity Church building was sold, with the proceeds applied to endow a new mission church further uptown, and Dr. Warren became rector of the now larger St. James' Church parish. See Lindsley, *supra* note 1, at 52–58.

32. See *The Call Accepted*, *supra* note 31, at 8.

33. *Id.*

34. *A Preacher From London*, *N.Y. Times*, Sept. 24, 1887, at 8.

35. *Id.*

36. *The Call Accepted*, *supra* note 31, at 8.

37. Lindsley, *supra* note 1, at 51.

38. *A Preacher from London*, *supra* note 34, at 8. One day later, the *New York Times* printed a letter from Dr. Tyng announcing that he had postponed the resumption of ministerial duties in New York and the organization of a new parish "which would be very likely to draw many of its members from his former flock." *The Old and New Pastor*, *N.Y. Times*, Sept. 26, 1887, at 8. A church officer denied the impact of any return by Dr. Tyng. Most of Dr. Tyng's close friends had left the church, he said. "In fact, death recently

withdrawn from the church already. . . . We believe and trust that our troubles are now all ended, and do not wish to say anything that will recall them."<sup>39</sup> Dr. Tyng's supporters apparently tried to obtain a building for him, but their actions were discouraged by the Bishop, and "after some time the matter was closed."<sup>40</sup>

The major controversy to surround Dr. Warren, however, was not the dispute with Dr. Tyng but rather the prosecution of his employer for inviting him to be rector in alleged violation of the Alien Contract Labor Act. The challenge to the actions of the church was reported in the *New York Times* on September 25, 1887, only two days after Dr. Warren's triumphant arrival,<sup>41</sup> and the lawsuit was filed less than a month later. Professor Adrian Vermeule describes the lawsuit against Holy Trinity Church as a collusive and nonadversarial challenge brought by John S. Kennedy, "a Presbyterian gentleman connected with the Rev. Dr. John Hall's church."<sup>42</sup> Vermeule relies on an article in the *New York Daily Tribune* which reported Warren's statements about the lawsuit:

The suit was an entirely friendly one, [Warren says he was told,] and Mr. Kennedy's object was to make odious the attempt to apply the law to clergymen and other men of the same class. [Kennedy] said that if he won the case he would pay the fine of \$1,000 imposed. I think that he paid all the expenses of the defence, but I am not sure. . . . Mr. Kennedy begged us to try the case squarely on the merits to the end, and not try to have it dismissed on any side issue, as might have been done. On several grounds we might have had the case dismissed, but instead we defended it simply on the ground that the Contract Labor Law did not apply to clergymen.<sup>43</sup>

A review of contemporaneous reports on the litigation confirms that the suit was instigated by John Stewart Kennedy, a prominent banker, financier, and railroad director,<sup>44</sup> but that examination also reveals a somewhat more complicated story than reflected in the single *New York Daily Tribune* report cited by Vermeule. Kennedy set the legal wheels in motion in a letter he wrote on September 22, 1887, to Daniel Magone, Collector of United States Customs in New York, republished in the *New*

removed the last prominent member of our church who was identified with Dr. Tyng's cause." *Id.*

39. A Preacher from London, *supra* note 34, at 8.

40. Lindsley, *supra* note 1, at 51.

41. See *Importing a Rector*, *N.Y. Times*, Sept. 25, 1887, at 2.

42. Vermeule, *supra* note 20, at 1840 (quoting *The Right to Import Rectors*, *N.Y. Daily Trib.*, Mar. 1, 1892, at 2).

43. *Id.* at 1840 (quoting *The Right to Import Rectors*, *supra* note 42, at 2). William Popkin was the first to discover the newspaper references that suggested collusion. See William D. Popkin, *Materials on Legislation: Political Language and the Political Process* 230 (2d ed. 1997).

44. See *Holy Trinity To Be Sued*, *N.Y. Daily Trib.*, Oct. 14, 1887, at 8; see also George Austin Morrison, Jr., *History of St. Andrew's Society of the State of New York, 1756-1906*, at 123-30 (1906) (biographical sketch of Kennedy).

*York Times* on September 25, 1887. His reasons for challenging the hiring of Dr. Warren, at least as expressed in that letter and in subsequent reports, differ somewhat from those reported indirectly by Warren:

In calling your attention to this matter I desire distinctly to say that I have nothing whatever against Mr. Warren, and feel that the enforcement of the law against him will be a great hardship not only to him, but to the people who called him. Nevertheless, as the law stands, I do not see how any exception can be made in his favor, and as President of the St. Andrew's Society in this city I feel greatly aggrieved at the manner in which this law has been enforced against countrymen of mine who, if they had been allowed to land would have made most valuable citizens, and my only object in serving this notification upon you is in order to make this a test case, and by enforcing a most obnoxious and unreasonable law I hope thereby it will lead to its total abrogation.<sup>45</sup>

"I do not see why the Rev. Mr. Warren should be exempted" from the law used against other contract laborers, Kennedy later said.<sup>46</sup> "The law is nothing better than a sop to the Knights of Labor."<sup>47</sup>

Clearly Kennedy was a man on a mission: He indicated to Magone that he had already obtained a legal opinion on the proper interpretation of the Act before raising the matter with the authorities. James Elliott Lindsley, in his history of Saint James' Church, with which Holy Trinity Church merged in 1895, suggests a somewhat different motive for Kennedy. He reports that Kennedy disliked the law because an English gardener he had hired was ordered back to England by the courts for violating the Alien Contract Labor Act. When a short time later Kennedy read in the papers that Dr. Warren was coming to America under contract to be the rector of Holy Trinity Church, Lindsley says, Kennedy decided to test the legality of the contract labor law.<sup>48</sup>

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45. Importing a Rector, *supra* note 41, at 2. The St. Andrew's Society was a mutual benefit and charitable organization established in New York in 1756 to support natives of Scotland who emigrated to the United States. See Morrison, *supra* note 44, at 7-11. Kennedy was its president from 1879 to 1882 and 1884 to 1887. See *id.* at 123. His attitude may also have been shaped by the fact that he himself first emigrated to the United States under contract with a London trade firm to be their resident representative in America. See *id.*

46. Mr. Kennedy in Earnest, *N.Y. Times*, Sept. 27, 1887, at 4. "I see no reason . . . why a law should be enforced in the case of a poor gardener or mechanic and should not be enforced in the case of the chosen head of a rich city congregation," Kennedy wrote in his letter asking Secretary of the Treasury Fairchild to charge Holy Trinity Church with violation of the law. *Holy Trinity To Be Sued*, *supra* note 44, at 8.

47. Mr. Kennedy in Earnest, *supra* note 46, at 4. It is certainly true that organized labor was a primary supporter of the legislation. See text accompanying *infra* note 114.

48. See Lindsley, *supra* note 1, at 59-60. Although Lindsley states this version of the story with some certainty, he cites no authority for the fact. Perhaps Lindsley's gardener was actually the "Scotch agricultural laborer Cummings" sent back to Scotland by Collector Magone to whom Kennedy referred in a subsequent interview. See Mr. Kennedy in Earnest, *supra* note 46, at 4; see also *Holy Trinity To Be Sued*, *supra* note 44, at 8 (noting

Whatever Kennedy's motives may have been, the *New York Times* agreed with Kennedy's stated assessment that the law was unreasonable in all its aspects, not only as enforced against Holy Trinity Church. With tongue planted firmly in cheek, and displaying the prejudices enacted into an earlier piece of exclusionary legislation,<sup>49</sup> an editorial published the same day as Kennedy's letter called Warren a "'coolie' clergyman" and said he would "in a week or two begin his unholy work of undermining our institutions by performing the 'contract labor' for the performance of which he was imported."<sup>50</sup> If only Kennedy had written before Warren had landed, the *Times* said, the Collector of the Port might simply have notified the ship master that "he had been conveying a pernicious and unlawful immigrant, a kind of human dynamite, and to warn that astonished skipper to take back the dangerous exile whence he came."<sup>51</sup> The law was, indeed, being violated, the *Times* concluded:

Nevertheless, it seems clear that the emigration of a foreign clergyman to this country, under a call from an American parish, is a violation of the law, and we must applaud the purpose of Mr. Kennedy to enforce the law in a case where its enforcement will be a riotous travesty upon sense and justice. The law is no respecter of parsons, and what is sauce for the agricultural and manufacturing goose must be sauce also for the theological gander.<sup>52</sup>

But perhaps, the *Times* archly suggested, an "astute lawyer" might claim that the new rector was a workman in a new industry for which skilled labor was not otherwise available, one of the recognized exceptions to the ban on importation:

[I]f it can be shown that there is anything peculiar in Mr. Warren's theology, and that it is not now inculcated from the American pulpit, he might come in as the practitioner of a new industry. Congress has no objection to heresiarchs any more than to Anarchists or dynamiters, so long as they do not compete with talent native or already established.<sup>53</sup>

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that the case of "the canny Scotch gardener, M. Cummings" had attracted Kennedy's notice). Cummings, however, was not a personal gardener. He was, rather, hired by a lawyer in Kentucky to work as a farm servant or dairyman, to be in charge of a herd of 25 Jerseys. His entry was denied by the Collector, and the circuit court later upheld the Collector's decision. See *In re Cummings*, 32 F. 75 (C.C.S.D.N.Y. 1887). Cummings, and his employer, learned from the experience. When Cummings returned to the United States after being excluded, he did so without a guaranteed contract. See *Mr. Kennedy in Earnest*, supra note 46, at 4. He now "is probably watering the grounds of the Kentucky gentleman who wanted him at first," suggested the *New York Daily Tribune*. *Holy Trinity To Be Sued*, supra note 44, at 8.

49. See infra notes 115–116 and accompanying text.

50. A "Coolie" Clergyman," *N.Y. Times*, Sept. 25, 1887, at 4.

51. *Id.*

52. *Id.*

53. *Id.*

Adopting a slightly more serious tone, the editorialist finally got to the point:

Seriously, nothing could be better adapted to show the complete absurdity of the law than this proposition to use it against a man who is in all senses a welcome and valuable citizen. For the terms of the law do apparently exclude Mr. Warren, while they do not exclude the hundreds of Neapolitan paupers and criminals on board the *Alesia*, who are detained at present because they have brought cholera to the country, but are not detained when they bring only idleness and crime. If such a contract cannot induce Congress to revise the outrageous statute invoked by Mr. Kennedy the case for its revision is hopeless.<sup>54</sup>

The challenge to Dr. Warren's employment continued to be a source of comment when his clerical activities were discussed in the newspaper. In December, for instance, in an article discussing Dr. Warren's views on observance of a Sunday day of rest, the *Times* commented that Dr. Warren "has not, like some other representatives of imported contract labor, brought with him loose ideas of the use of the Sunday."<sup>55</sup>

Church services were well-attended at Holy Trinity Church the day the lawsuit was reported in the newspaper, and the *Times* noted it was a "new experience" and a "novelty" for the parishioners to be charged with trying to break the nation's laws.<sup>56</sup> William C. Browning, "an officer of the church, and one of its leading members," told the *Times* he did not think there had been a violation of the law.<sup>57</sup> Misreading the statute as establishing a violation only if the employer prepaid the immigrant's passage, he said that "of course, Mr. Warren paid his own way across the ocean and came here just as any other traveler would."<sup>58</sup> He also claimed that Warren was not under contract:

"No contract was signed, then," he was asked.

"Certainly not."

Mr. Browning explained that the minister came here with the understanding that if he decided to accept the Rectorship of Holy Trinity Parish he was to receive a stated salary. If he did not care to accept the call he had the right to decline the position offered him. The officers of the church will take care that the legal side of their case is well attended to.<sup>59</sup>

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54. *Id.*

55. Dr. Warren Qualifies His Views, *N.Y. Times*, Dec. 10, 1887, at 2.

56. The Old and New Pastor, *supra* note 38, at 8.

57. *Id.*

58. *Id.*

59. *Id.* One of the trustees (perhaps Browning) was reported as indicating that "Bishop Potter at the recent Diocesan Convention put the matter in its proper light when he said in his address to the congregation that no contract is made with an Episcopal minister until he has been at least six months a rector in a church." *Holy Trinity To Be Sued*, *supra* note 44, at 8. As Kennedy concluded, however, the described "understanding" between Dr. Warren and Holy Trinity Church—that if he chose to answer the call he would be paid, even if an official contract was not signed until sometime later—was probably

Meanwhile, Dr. Warren began his service to Holy Trinity Church, preaching his first sermon on October 2, 1887. Dr. Warren was reported to have made

a very favorable impression upon his hearers. He spoke, without manuscript, fluently and earnestly, his voice easily filling the great room. He speaks English in the English way, of course, and perhaps some of his hearers in the galleries found it difficult to understand him at times, for he is one of the most rapid speakers among the clergymen of the city.<sup>60</sup>

Ironically—perhaps intentionally so—in view of the controversy over his ministry, Dr. Warren took for his text Acts 10:29: “Therefore came I unto you without gainsaying, as soon as I was sent for; I ask, therefore, for what intent ye have sent for me?”<sup>61</sup>

Meanwhile, Mr. Kennedy continued to press his challenge to Dr. Warren and the Alien Contract Labor Act. Collector Magone indicated he did not think he had authority to act in the case,<sup>62</sup> so Kennedy took his complaint to the Secretary of the Treasury. In response, Assistant Secretary of the Treasury Maynard told Kennedy that only the district attorney could enforce the law once the alien had landed. Undeterred, Kennedy “descended upon United States District Attorney Stephen A. Walker.”<sup>63</sup> At the same time, Kennedy wrote to Adon Smith, the President of the Board of Directors of Holy Trinity Church, hoping, it appears, both to maintain friendly relations with the Church and to ensure an adequate challenge to the law:

I feel that my motives in this matter have been thoroughly appreciated by yourself and other members of your congregation,

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sufficient to constitute a “contract . . . to perform labor or service” in violation of the Act. Mr. Kennedy in Earnest, *supra* note 46, at 4. But see *United States v. Edgar*, 48 F. 91 (8th Cir. 1891) (Alien Contract Labor Act not violated because exchange of correspondence did not create a contract; laborer in England had to arrive in United States in order to form contract). The claim that no contract existed with Dr. Warren was not pressed in argument before either the circuit court or the Supreme Court.

60. *Pleased With Their Rector*, N.Y. Times, Oct. 3, 1887, at 2.

61. *Id.* The speaker in Acts 10:29 is Peter, who asks the question of Cornelius, a Gentile who sent for Peter to preach to him and his household after receiving a vision from God. Given the race and class prejudice evident in the enactment of the Alien Contract Labor Act, see *infra* notes 118–123, it is noteworthy that the theme of Acts 10 is Peter’s recognition that “God has shown me that I should not call any man common or unclean.” Acts 10:28.

62. See Mr. Kennedy in Earnest, *supra* note 46, at 4. Magone was correct about his lack of authority. Even if the importation of Dr. Warren was illegal, once an alien was admitted to the United States, the Collector of Customs had no further role in enforcement and no authority to act against either the alien or the employer. See *supra* note 4. Magone may also have been making a substantive point about the scope of the Act. On October 14, the *New York Times* reported that Magone “was nonplused. He gave the question his attention, however, but decided that theology and ministers of the gospel were products over which he had no control.” *The Imported Minister*, N.Y. Times, Oct. 14, 1887, at 1.

63. *The Imported Minister*, *supra* note 62, at 1.

and I shall rely upon you to aid the District Attorney in presenting the facts to the court without legal technicalities, so that the law can be fairly tested. If, as the result of such a trial, the penalty of \$1,000 should be collected from the church, it is my intention to contribute that amount to its treasury.<sup>64</sup>

Smith expressed doubt that the lawsuit against the Church would accomplish much towards repeal of the law. "People might scent something ridiculous [sic] in such a case," he said, and a successful prosecution of the church would likely be "the end of the whole matter."<sup>65</sup>

Only a week after Kennedy's letter to him, Walker replied that he would, indeed, prosecute the suit. In a remarkably thorough review of the central arguments that would ultimately be made, given the short time that had elapsed, Walker wrote to Kennedy:

Notwithstanding first impressions to the contrary, I have reached the conclusion that the case presented is within the statute and that it is my duty to bring suit. . . . The statute prescribes that the labor or service referred is labor or service of "any kind." This cannot mean manual labor service simply, for the terms are of the broadest character, and moreover the exceptions mentioned in the act exclude the idea that its general provisions relate to mechanical or industrial labor alone. The exceptions pertinent to be noted are, among others, "professional actors, artists, lecturers, or singers." None of these excepted cases would be regarded as belonging to the manual labor class, and the conclusion is inevitable that if not excepted they would fall within the terms of the law.

The case you present is therefore clearly within the bald and remorseless letter of the statute, and it remains to be seen whether the broader basis of interpretation, popularly known as "the spirit of the act" or "presumed legislative intent," excludes its application to the case which you present.<sup>66</sup>

Mr. Walker, it appears, also shared Kennedy's appraisal that the effort to exclude alien contract laborers was bad public policy:

Mr. Walker's opinion of the law is that it is an effort to apply the doctrine of the protective tariff to the commodity known as la-

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64. *Id.* Kennedy expressed similar sentiments in his letter to Secretary Fairchild: I need hardly add to the assurance contained in my letter to the Collector that I take this action with the kindest feelings toward the Rev. Mr. Warren and toward his congregation, which numbers several of my personal friends, and solely for the purpose of calling public attention to what I believe to be an unjust and unreasonable law.

Holy Trinity To Be Sued, *supra* note 44, at 8.

65. *The Imported Minister*, *supra* note 62, at 1.

66. *Id.* Mr. Walker concluded that, as to "this sort of legislation" (protective legislation akin to tariff imposition), "any vagaries as to the spirit of the act or the intent of the act are peculiarly inapplicable." *Holy Trinity To Be Sued*, *supra* note 44, at 8. It is noteworthy that Walker so quickly raised the "spirit" versus "letter" issue, confirming that the doctrine was well-established before the Supreme Court opinion in this case relied upon it. See *infra* notes 192-203 and accompanying text.



bor; it is protection for the sake of protection. . . . He thinks [Congress might have made an exception for preaching, as it had for lecturing, singing, and acting if] a committee of preachers asked it to do so. The statute, he states, like every other statute in the tariff system, bears the ear marks of carelessness, selfish personal interest, and all manner of invidious discrimination.<sup>67</sup>

Walker followed through quickly, filing suit on October 21, 1887, in the United States Circuit Court for the Southern District of New York.<sup>68</sup> The Church filed a demurrer, claiming the statute should be construed to exclude the hiring of Dr. Warren from its scope. The demurrer was argued on April 23, 1888, with Walker appearing for the prosecution and Seaman Miller for the defense.<sup>69</sup> Miller focused on construing the words of the statute in light of the purposes of the Act, arguing that "labor or service of any kind" was to be given its

ordinary legislative significance. The meaning of the word laborer does not include that kind of mental and spiritual service which a clergyman tenders his congregation. . . . The words 'of any kind' were to be interpreted in the light of the history of the times when the act was passed. At that time the mining and railroad laborers were threatened by a wholesale invasion of pauper manual laborers, and it was at this class the act was aimed.<sup>70</sup>

In any case, Miller argued, if the Act did include clergymen, it would be unconstitutional.<sup>71</sup>

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67. *The Imported Minister*, *supra* note 62, at 1.

68. See Complaint at 3, *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) (No. 13,166); see also *Suing Holy Trinity Church*, *N.Y. Times*, Oct. 22, 1887, at 3. The suit was filed in the circuit court because the Alien Contract Labor Act specified that fines for violation of the Act would be recoverable "as debts of like amount are now recovered in the circuit courts of the United States." Alien Contract Labor Act of 1885, ch. 164, § 3, 23 Stat. 332, 333. Cases in the circuit courts were heard either by United States Supreme Court justices acting as circuit judges in their respective circuits, or by judges specially appointed as circuit judges.

The suit against Holy Trinity Church was one of only 17 enforcement suits filed nationwide under the Alien Contract Labor Act between its enactment on February 26, 1885, and the end of 1887, and the only such suit in the Southern District of New York for that time period. Unlike a number of jurisdictions, in which prosecutors appeared to target employers with multiple violations, thus fulfilling the stated purpose of halting large scale contract labor importation (see *infra* notes 105-165 and accompanying text), all of New York's prosecutions before early 1890 were apparently for single instances of violation. See Letter from the Attorney General: Number of Suits Under Contract Labor Law, H.R. Ex. Doc. No. 51-206, at 4-5.

69. See *Parsons Need Protection*, *N.Y. Times*, Apr. 24, 1888, at 9.

70. *Id.* (paraphrasing Miller's argument).

71. See *id.*

Walker's argument, while aimed in part at responding to Miller's discussion of the language, also displayed his disdain for the Act, no matter how interpreted.<sup>72</sup>

The act was designed to be and is a drastic measure. With very slight amendments it was passed in the form presented to Congress by certain so-called labor organizations. Its emphatic and sweeping words are not the work of trained statutory draughtsmen or persons learned in the law. Attempts have been made in vain to have it remodeled by skillful hands, and it stands upon the books to-day in substantially its original form. . . . The reversal or checking of this American policy [of inducing emigration] 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 indorsement of a labor organization must be carried through Congress as gingerly as eggs in a basket.<sup>73</sup>

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72. In its contemporaneous editorial attacking "class legislation" of all kinds on behalf of laborers, the *New York Times* said that "neither counsel [in the *Holy Trinity Church* argument] concealed his contempt for the act of Congress and for the motives of the men who passed it." The *Times* shared this sentiment:

It is very undesirable that the State of New York should be made ridiculous by the acts of its Legislature. It is still more undesirable that the United States should be made ridiculous by act of Congress. Yet this was done very effectually yesterday by the argument in the case of the Rev. Walpole Warren . . . .

Class Legislation, *N.Y. Times*, Apr. 24, 1888, at 4.

73. *Parsons Need Protection*, supra note 69, at 9 (quoting Assistant District Attorney Walker). The prosecutor's attitude was not lost on the statute's labor supporters. During the pendency of the *Holy Trinity Church* litigation, the House of Representatives held hearings to investigate the level of enforcement of the immigration laws, including the Alien Contract Labor Act. Samuel Gompers, President of the American Federation of Labor, testified that the prosecution of Holy Trinity Church was part of an effort "to bring the law into odium and ridicule, and cause a revulsion of feeling among the citizens and secure [the law's] repeal." H.R. Rep. No. 51-3472, at 91 (1890); see also H.R. Misc. Doc. No. 50-572, at 402 (1889) (Testimony Taken by the Select Committee of the House of Representatives to Inquire Into the Alleged Violation of the Laws Prohibiting the Importation of Contract Laborers, Paupers, Convicts, and Other Classes) (testimony of Gompers that the prosecution of the Church was "an attempt to bring the law into ridicule . . . . [I]t was only done for the purpose of bringing that law into notoriety."). Gompers compared these prosecutions to the failure to prevent "thousands and thousands of [true] contract laborers landing every day . . . ." *Id.*

The House Committee concluded that the failure to prevent emigration of many contract laborers was not due to "unfriendly administration of the law," but rather to the near impossibility of detecting contract laborers during customs inspections, in part because the aliens would come "coached" regarding what to say during their interviews. H.R. Rep. No. 51-3472, supra, at v. Employers became adept at circumventing the law by making abundant promises but entering no contracts, or by relying on advertisements for laborers through employment agencies and in newspapers abroad. See *id.* at v-vi. Moreover, coaching by powerful intermediary padrones succeeded in both circumventing the contract labor law and establishing increased power for the padrones, who were

Walker also argued that clergymen would benefit from the same kind of protection from foreign competition that other workers wanted (no matter how ill-advised the policy of acceding to such demands):

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 2,832 were engaged in pastoral work.<sup>74</sup>

As before, the *New York Times* echoed Walker's attacks on the Act:

It is monstrous that a clergyman should be prevented from coming to this country to take charge of a parish. But it is no more monstrous than that a gardener or a coachman or a domestic servant should be prevented from coming for the express purpose of hiring his services to an employer who is willing to make an express agreement to take them, and who has advanced money on that agreement. Members of Congress who voted for the law under which it is sought to exclude Mr. Warren had no intention of doing anything more than to avoid a political boycott from the Knights of Labor among their constituents. They may see in the contempt of the counsel in the Warren case the light in which their action is regarded by sensible citizens, for whose opinion they apparently care nothing.<sup>75</sup>

Judge Wallace issued his ruling on the Church's demurrer on May 23, 1888, concluding that Holy Trinity Church had, indeed, hired Dr. Warren in violation of the Alien Contract Labor Act.<sup>76</sup> He acknowledged

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important to both the employers and the contract laborers themselves. See Gunther Peck, *Reinventing Free Labor: Immigrant Padrones and Contract Laborers in North America, 1885–1925*, 83 *Am. Hist.* 848, 853–855 (1996).

In contrast to the conclusions of the House Committee, others have argued that in fact few contract laborers were imported, due largely to labor efforts to communicate with prospective foreign workers to discourage them from emigrating or encourage them to break their largely unenforceable contracts once they arrived in the United States. See *infra* note 117.

74. *Parsons Need Protection*, *supra* note 69, at 9.

75. *Class Legislation*, *supra* note 72, at 4.

76. See *United States v. Rector of the Church of the Holy Trinity*, 36 F. 303, 305–06 (C.C.S.D.N.Y. 1888). Apparently there were no contested factual issues, despite newspaper accounts suggesting the Church might argue there was no contract, see *supra* note 59. The case proceeded solely on the legal questions whether the hiring, conceded to have occurred, was within the statutory prohibition and, if so, whether the statute was

that there was no reason to suppose Congress contemplated a case of this kind when enacting the statute. “[I]ndeed, 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.”<sup>77</sup> But the terms of the statute were “plain, unambiguous, and explicit,” and

the courts are not at liberty to go outside of the language to search for a meaning 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. Whenever the will of congress is declared in ample and unequivocal language, that will must be absolutely followed, and it is not admissible to resort to speculations of policy, nor even to the views of members of congress in debate, to find reasons to control or modify the statute.<sup>78</sup>

The next day’s newspaper reported that the decision in the case was unlikely to have any effect on Dr. Warren’s tenure as rector of the Church.<sup>79</sup> Stephen Baker, one of the vestrymen of the Church and also the representative of John S. Kennedy, confirmed Kennedy’s “disinterested motives” in urging the lawsuit, “his only object having been to test the law, and to show its absurdity in applying it to professional men.”<sup>80</sup> With Kennedy being in Europe, Baker was holding the promised check for \$1000 to be paid into the treasury of the church as indemnification for the penalty if the case were ultimately decided against it.<sup>81</sup> It was Kennedy’s intent, Baker said, to “have the matter carried to the highest court in order to thoroughly test the law.”<sup>82</sup> District Attorney Walker praised the decision and defended his own actions. He “had not presented the case in a spirit of levity, but to vindicate the law. If the decision forced an amendment of the law no one would be more pleased than himself.”<sup>83</sup> He noted that the Church corporation could settle the matter by paying the fine, though it had a right to bring the case to trial. “They could not carry it up to the Supreme Court of the United States, however, because the amount involved in the fine was too small.”<sup>84</sup>

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constitutional. The latter point was addressed in the parties’ briefs but not reached by the opinion.

77. *Id.* at 304.

78. *Id.*

79. See *He Is a Contract Laborer*, *N.Y. Times*, May 24, 1888, at 8.

80. *Id.*

81. See *id.*

82. *Id.*

83. *Id.*

84. *Id.* The Assistant District Attorney was, of course, incorrect in suggesting the case could not be brought to the Supreme Court, since the construction of a federal statute was involved, along with possible federal constitutional questions.

The Church chose not to contest the facts, and judgment issued from the circuit court on July 24, 1888.<sup>85</sup> The Church immediately filed a writ of error in the Supreme Court,<sup>86</sup> which was granted on August 17, 1888.<sup>87</sup> The Church apparently attempted to reach a settlement that would have prevented any definitive ruling, however.<sup>88</sup> On April 16, 1889, the Secretary of the Treasury requested an opinion from the Attorney General regarding his authority to compromise the suit against the Church.<sup>89</sup> Two months later, Attorney General W.H.H. Miller responded that the Secretary had no statutory authority to settle the suit against Holy Trinity Church, as he would if it were a "claim" rather than a judgment in favor of the United States.<sup>90</sup> Briefs were finally filed in December 1891, after an unexplained two year delay,<sup>91</sup> and the argument was held on January 7, 1892.

In an article headlined "Looks Bad for Trinity," the *Times* reported that questions asked by the Court at the argument strongly suggested an ultimate ruling upholding the penalty assessed against the Church.<sup>92</sup> Seaman Miller first presented his argument that construing the Alien Contract Labor Act to bar importation of ministers would be both against the intent of Congress and unconstitutional:

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85. See Judgment at 9, *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) (No. 13,166).

86. Actions originating in the circuit courts were heard on appeal at the United States Supreme Court. See Revised Statutes of the United States, Title 13, § 691 (1878).

87. See Writ of Error at 1, *Church of the Holy Trinity* (No. 13,166).

88. The existence of compromise efforts may explain why the case was not heard during the Supreme Court's 1888 Term, as originally ordered by the Court. See Record at 11, *Church of the Holy Trinity* (No. 13,166). The efforts at compromise do not explain the delay of more than two years from the failed compromise effort to the argument of the case in January 1892, however. See Vermeule, *supra* note 20, at 1840-41. But the delay may not have been unusual at the time; in April 1890, when testifying before a House of Representatives committee investigating enforcement of the immigration laws, Edward Mitchell, then the United States District Attorney for New York, said the case was pending before the Supreme Court and "there it takes three or four years, I think, to reach a case." H.R. Rep. No. 51-3472, at 392 (1890).

89. The Secretary may have been reluctant to enter any compromise: The Attorney General's opinion responded to "[your] question whether you *have to* entertain the proposition of the Church of the Holy Trinity" to compromise. 19 Op. Att'y Gen. 345, 345 (1891) (emphasis added). One would rather expect a party willing to compromise to ask whether she "may," not "has to," entertain the proposal. Why the Secretary would ask for the opinion if he wished to reject the compromise is not clear.

90. 19 Op. Att'y Gen. 345, 347-50 (1889) (inferring from Congress's choice of the word "compromise" rather than "mitigate" or "remit" that the Secretary of the Treasury's power to settle applied only to claims that had not yet resulted in judgments). Apparently other litigants were more successful in reaching settlements, presumably before judgments issued, because in 1891 Congress amended the Alien Contract Labor Act to prevent any suit from being "settled, compromised, or discontinued without the consent of the court entered of record with reasons therefor." Act of Mar. 3, 1891, ch. 551, § 2, 26 Stat. 1084, 1084.

91. See *supra* note 88.

92. Looks Bad for Trinity, *N.Y. Times*, Jan. 8, 1892, at 5.

Nearly every one of the justices on the bench then took a part in the discussion. Their questions showed 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.

"The act prohibits importations of persons under contract to perform labor or service of any kind," said Justice Field, and added, "Don't we, [meaning the Justices] perform service here?" Other questions made it evident that the court thought all except actors, lecturers, and others specially exempted were excluded by its terms. . . .

Mr. Miller, in answering these inquiries, contended that such a construction would be an absurdity. . . .

Justice Brewer: "Is it not just as much of an absurdity to prevent the incoming of an honest laborer as of an Episcopal minister?"<sup>93</sup>

The tenor of the questions so strongly indicated the Justices' agreement with the government's case that the Assistant Attorney General decided to forego oral argument and submit his case solely on his brief.<sup>94</sup>

Whether the Justices had hidden their true thoughts at the argument, had been deprived of the chance to display skepticism of the government's case by the failure of the Assistant Attorney General to present an oral argument, or had changed their minds upon deliberating, the predictions of outcome at the time of the argument proved wrong. On February 29, 1892, the Supreme Court unanimously reversed the decision of the circuit court.<sup>95</sup> "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," wrote Justice Brewer for the Court.<sup>96</sup> "The reason of the law in such cases should prevail over its letter."<sup>97</sup> The aim of Congress, gleaned from the language of the Act's title, contemporaneous events, and the legislative history, was to "stay the influx of . . . cheap unskilled labor."<sup>98</sup> Congress did not intend to exclude a minister such as Dr. Warren when it enacted the Alien Contract Labor Act, the Court concluded.

Dr. Warren pronounced himself "surprised . . . to learn that I was not a contract laborer."<sup>99</sup> The vestry had "studiously kept . . . from me" the details of the litigation "as they did not wish that I should be troubled by

93. *Id.* (bracketed material in original).

94. *See id.*

95. *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

96. *Id.* at 459.

97. *Id.* at 461 (quoting *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 487 (1868)).

98. *Id.* at 465.

99. *The Right to Import Rectors*, *supra* note 42, at 2. According to Dr. Warren's son, Warren later said he was "always irritated" by the implication that he was not a "worker," since ministers work as hard as anyone. Telephone Interview with James Elliott Lindsley (Feb. 7, 2000) (reporting conversations with Warren's son). On the other hand, he was reportedly amused that the rector of a Church would be called a contract laborer. Letter

it," but, he said, the Church had expected the Supreme Court would uphold the decision made by the lower court.<sup>100</sup>

## II. ACTS: THE HISTORY AND MEANING OF THE ALIEN CONTRACT LABOR ACT

The Court's decision that Dr. Warren was not hired in violation of the Alien Contract Labor Act was based on its understanding of the spirit and purpose of the Act as reflected in its legislative history. From his own review of that legislative history, Vermeule concludes that Brewer and the Court mishandled the analysis, that in fact the legislative history "read as a whole, provides direct and relatively reliable evidence that undermines the Court's interpretation and confirms the evident meaning of the statutory text."<sup>101</sup>

Vermeule concedes that portions of the legislative history suggest the Act was aimed at halting the importation of cheap manual laborers considered harmful to American society,<sup>102</sup> but he points to aspects of the legislative history ignored by Brewer that counter this analysis. Among them are the proviso in the original bill excepting "professional actors, singers and lecturers" from the Act's scope, which would have been unnecessary if the bill included only manual laborers; comments by both supporters and opponents of the bill that acknowledged the breadth of the bill's language, in contrast to the drafter's aims; the failure of the bill to pass the Senate in the waning days of the first session of the 48th Congress, after its sponsor explained that if there were more time an amendment would be offered to clarify the intent to include only manual labor; the passage of the bill in the next session of Congress with several amendments, none of them narrowing the scope to manual labor; and two colloquies immediately before passage that included statements by the bill's House and Senate floor managers seeming to acknowledge the breadth of the bill's final language.<sup>103</sup>

It is true, as Vermeule demonstrates, that the legislative history is significantly more complex than apparent from the Court's opinion and that there is evidence in that history to support the broad literal meaning of the Act's language. But Vermeule, too, oversimplifies. Before turning to the evidence supporting the expansive literal reading, he acknowledges briefly that the bill was "aimed to halt the importation of European and Asian manual laborers thought to be a degraded species of immigrants harmful to American labor and institutions."<sup>104</sup> Like a litigant's strategic concession of a significant fact to avoid having the jury hear per-

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from A.W. Robinson, granddaughter of Dr. Warren, to Carol Chomsky (Feb. 28, 2000) (on file with author).

100. *The Right to Import Rectors*, *supra* note 42, at 2.

101. Vermeule, *supra* note 20, at 1845.

102. See *id.* at 1846.

103. See *id.* at 1845-50.

104. *Id.* at 1846.

suasive and moving testimony, that acknowledgment misses the flavor of much of the debate supporting a narrower interpretation of the Act. Vermeule glosses over much of the early consideration of the bill, the many and repeated statements about the aims of the legislation, and the context for the acknowledgments of the breadth of the language ultimately enacted. I review those discussions at some length to try to convey a more complete sense of the legislative purposes.

The aim of the bill, as described in the House Report accompanying it, was to:

restrict and prohibit the immigration or rather the importation of . . . the immigrant who does not come by "his own initiative, but by that of the capitalist." It seeks to restrain and prohibit the immigration or importation [sic] of laborers who would have never seen our shores but for the inducements and allurements of men whose only object is to obtain labor at the lowest possible rate, regardless of the social and material well-being of our own citizens and regardless of the evil consequences which result to American laborers from such immigration.<sup>105</sup>

In contrast to immigrants who come to the United States voluntarily, for their own betterment, with a commitment to their new country and an intention to become American citizens, these paid laborers are described as ignorant about the United States and as being kept isolated from other Americans and sent back by their "sponsors" when their contracts are at an end.<sup>106</sup> The report goes on to discuss the economic rationale for the provision:

The demand for the enactment of some restrictive measure of this character comes not alone from American workingmen, but also from employers of labor in America. The employers of labor who, from inability or from patriotic motives, employ only American workingmen, are unable to compete in the markets with the corporations who employ the cheap imported labor.<sup>107</sup>

The problem, as the report describes it, is the "great numbers of immigrants . . . *who are owned by capitalists*,"<sup>108</sup> the "large gangs of laborers" who arrive, all bound for the same place.<sup>109</sup> The report quotes Mr. John Swinton of New York City writing about "firms engaged in trafficking in human flesh," with 14,000 Italians being brought to this country under contract and 6,000 of them returning home.<sup>110</sup> There is much talk, too, of the terrible conditions under which many of these contract laborers live and work.<sup>111</sup> The report makes specific reference to the glass manufacturing industry, silk manufacturing establishments, an iron company,

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105. S. Rep. No. 48-820, at 2 (1884) (reprinting H.R. Rep. No. 48-444 (1884)).

106. See *id.*

107. *Id.*

108. *Id.* at 2-3 (quoting Count Esterhazy, Austrian consul to the United States).

109. *Id.* at 3 (quoting Superintendent Jackson of Castle Garden).

110. *Id.* at 3.

111. See *id.* at 3-4, 7-12.



railroads, and coke manufacturing plants as sources of complaints about these kinds of problems.<sup>112</sup>

The effort in Congress to limit the importation of cheap labor had, in fact, begun as early as 1869, with the introduction of a bill regulating the importation of immigrants under labor contracts.<sup>113</sup> As with the law enacted in 1885, congressional action was motivated in part by pressure from American workers and the American labor movement, which from the end of the Civil War had as one of its major goals the prohibition of the importation of contract laborers.<sup>114</sup>

According to a congressional commission reporting on immigration in 1911, during the years following the introduction of the 1870 bill Congress showed "a general sentiment against the importation of contract labor, although in favor of the immigration of worthy foreigners."<sup>115</sup> The Chinese Exclusion Act of 1882, the first major exclusionary immigration legislation, was at least in part a response to the contract labor issue. Although American workers initially opposed the often racist calls to exclude Chinese "coolies" from America's shores, they ultimately supported the Chinese Exclusion Act's ban on the entry of Chinese laborers to the United States because in 1882 it appeared that no other action on the contract labor problem was politically feasible.<sup>116</sup>

The contract labor bill introduced in the 48th Congress was thus part of an already lengthy history of concern with the importation of laborers, skilled and unskilled, by employers and its tendency to undermine American labor conditions.<sup>117</sup> It was, likewise, part of an equally lengthy history of racism and discrimination in the nation's immigration laws.<sup>118</sup> These themes continued when the debate moved to the House

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112. See *id.* at 2-4.

113. See Andrew Gyory, *Closing the Gate: Race, Politics, and the Chinese Exclusion Act 37* (1998). That same year, one of the first bills offered to regulate the entry of Chinese into the United States was similarly designed to restrict the importation of Chinese workers under labor contracts that placed the laborers in virtual slavery, rather than to bar all Chinese immigration, though the legislative strategy later changed. See *id.*

114. See *id.* at 12, 39-59, 256; Michael C. LeMay, *From Open Door to Dutch Door: An Analysis of U.S. Immigration Policy Since 1820*, at 55 (1987).

115. *Immigration Legislation*, Report of the Immigration Commission, S. Doc. No. 61-758, at 22 (1911). The Commission was created in the Immigration Act of 1907 and charged with making a "full inquiry, examination, and investigation . . . into the subject of immigration." Act of Feb. 20, 1907, ch. 1134, § 39, 34 Stat. 898, 909.

116. See Gyory, *supra* note 113, at 256-57.

117. Some commentators argued that in fact there was no real problem of contract labor displacing American workers. See, e.g., Isaac A. Hourwich, *Immigration and Labor: The Economic Aspects of European Immigration to the United States 3*, 99-102 (1912) (arguing that immigration into the United States tracks demand for labor); Charlotte Erickson, *American Industry and the European Immigrant 1860-1885*, at 46-63 (1957) (demonstrating that labor organized quite effectively to prevent employers from gaining much advantage from contract labor). That many congressional representatives as well as American workers believed it was a problem is undisputed, however.

118. Senate Report 820, for example, complains that "immigration from England, Ireland, Germany, and other European countries from which the better class of

floor. The chair of the Committee on Labor and introducer of the legislation, Mr. Martin Foran, expressed the purpose of the bill as prohibiting “men whose love of self is above their love of country and humanity from importing into this country large bodies of foreign laborers to take the places of and crowd out American laborers. It also prohibits the importation of skilled workmen to take the places of American skilled artisans.”<sup>119</sup> The discussion on the House floor centered on problems caused by large scale importation of labor, often from Hungary, Italy, and other southern European countries, for the glass blowing, mining, and railroad industries.<sup>120</sup> Much concern was expressed regarding how these immigrants would fit into American society (or even whether they wanted to) and about the effect of this kind of competition on domestic labor and wages.<sup>121</sup> In the midst of the House debate, Mr. Foran submitted a report from the Committee on Labor, which summarized the problem and the “necessity of Congressional action.”<sup>122</sup>

The foreigner who voluntarily and from choice leaves his native land and settles in this country with the intention of becoming

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immigrants come, is steadily decreasing, while immigration from southern Europe [with special mention of Italians and Hungarians] is steadily increasing.” S. Rep. No. 48-820, at 6 (1884). Racial stereotyping was displayed in the descriptions of southern European immigrants employed by the bill’s supporters, just as it was employed in the rhetoric surrounding passage of the Chinese Exclusion Act. See Kitty Calavita, *The Paradoxes of Race, Class, Identity, and “Passing”: Enforcing the Chinese Exclusion Acts, 1882–1910*, 25 *L. & Soc. Inquiry* 1, 11–12 (2000).

According to several immigration historians, the Alien Contract Labor Act was part of a wave of anti-immigrant nativist legislation passed in the late 19th and early 20th centuries, but having much earlier roots in American history. While new immigrants were often needed to meet the labor needs of American employers, they were viewed as a threat not only to jobs for native-born Americans, but to the nation’s culture and institutions, especially the economic and political systems. See Joe R. Feagin, *Old Poison in New Bottles: The Deep Roots of Modern Nativism*, in *Immigrants Out!: The New Nativism and the Anti-Immigrant Impulse in the United States* 13, 14–21 (Juan F. Perea ed., 1997). Indeed, Matthew Frye Jacobson suggests that two contending forces have shaped both immigration policy and racial line-drawing in the late 19th and early 20th centuries: “capitalism (with its insatiable appetite for cheap labor) and republicanism (with its imperative of responsible citizenship).” Matthew Frye Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* 13 (1998). Similarly, Kitty Calavita has explored the contradictions between political demands to control the border and the economic benefits of a cheap immigrant workforce. See Calavita, *supra*, at 33. Questions about immigrants’ fitness for self-government as well as racial stereotypes were part of the debate surrounding the passage of the Alien Contract Labor Act, just as they were throughout immigration debates and decisions of the late 1800s and early 1900s. See Jacobson, *supra*, at 76–77.

119. 15 Cong. Rec. 5349 (1884). Despite the extensive discussion of the problems of mass importation of cheap unskilled labor throughout the legislative history, it likely was the importation of skilled artisans under contract that first motivated the labor movement to oppose contract labor and led Mr. Foran to introduce the bill. See *infra* note 185 and accompanying text.

120. See 15 Cong. Rec. 5349–71 (1884).

121. See *id.*

122. *Id.* at 5358.

an American citizen, a part of the American body-politic, has always been welcome to our shores. . . .

Such an immigrant comes here because the institutions of the country are in consonance with his social and political ideas, and because of the advantages and opportunities afforded by the extent of our domain and its material resources. He comes to better his social and financial condition, to take advantage of the facilities which he finds here; and as he comes of his own volition, by his own means, and from choice, he always exacts for his labor the highest rates which the market affords. No one is injured by his coming, and he generally makes a good citizen, the State is benefited by the acquisition. These immigrants are generally of a higher class, socially, morally, and intellectually, and have aided largely in the development of our industries and the material progress of our people. With this class of immigrants this bill has no concern. Its object is to restrict and prohibit the immigration or rather the importation of an entirely different class of persons, the immigrant who does not come by "his own initiative, but by that of the capitalist." It seeks to restrain and prohibit the immigration or importation of laborers who would have never seen our shores but for the inducements and allurements of men whose only object is to obtain labor at the lowest possible rate, regardless of the social and material well-being of our own citizens and regardless of the evil consequences which result to American laborers from such immigration.

This class of immigrants care nothing about our institutions, and in many instances never even heard of them; they are men whose passage is paid by the importers; they come here under contract to labor for a certain number of years; they are ignorant of our social conditions, and that they may remain so they are isolated and prevented from coming into contact with Americans. They are generally from the lowest social stratum, and live upon the coarsest food and in hovels of a character before unknown to American workmen. Being bound by contract they are unable, even were they so disposed, to take advantage of the facilities afforded by the country to which they have been imported. They, as a rule, do not become citizens, and are certainly not a desirable acquisition to the body-politic. When their term of contract servitude expires their place is supplied by fresh importations. The inevitable tendency of their presence among us is to degrade American labor and reduce it to the level of the imported pauper labor.<sup>123</sup>

When Representative Adams questioned the breadth of the bill, asking whether "Arnold, Constable & Co., or Lord & Taylor, or any of the large retail dealers in the city of New York" would be prohibited from hiring from abroad "an efficient clerk they would like to transfer to this country," Mr. O'Neill, a member of the sponsoring Labor Committee,

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123. *Id.* at 5358-59.

replied that if such businesses “go to Europe and import this labor for the purpose of breaking down men in their own employ” he hoped the bill would reach them.<sup>124</sup> When pressed further about the precise language of the bill, Mr. O’Neill responded:

Never mind about these hair-splitting technicalities with reference to the bill; but remedy any defects that you believe to exist in it. If we all had to run as constitutional lawyers, few of us would get elected [laughter], and remember that what the workmen ask you to do for them is simply that this Congress shall give, so far as it can, protection to them against this infamous contract system.<sup>125</sup>

It is difficult to read page after page of this House debate without concluding that the bill was meant to address the “contract labor system,” the practice by industrialists of importing large numbers of workers from abroad to take the place of American laborers at reduced wages, and that this was understood by all the legislators considering the bill. The interpretational difficulty, of course, is that the language of the bill was far broader than the articulated rationale. The language of the bill as introduced—and ultimately as passed by both House and Senate—did not outlaw only mass importation of laborers. It prohibited assisting immigration by “any foreigner or foreigners” “under contract or agreement” “to perform labor or service of any kind.” Representative Kelley called the bill “crude”<sup>126</sup> and a bill with “grave imperfections,”<sup>127</sup> and said the exceptions made to the prohibitory clauses were not

as broad as they ought to be. I do not see that it would not preclude under grave penalties the employment on the other side of the ocean of a nurse to care for a sick countryman returning to his home, or for an infant citizen of our country who, deprived of a mother by death or by the emergencies of a sea voyage, needed care while crossing the ocean.<sup>128</sup>

Nevertheless, Kelley supported the “spirit of the bill” because it addressed the need to protect the American “laboring classes” from “importation of cheap labor in the persons of the worst classes of the least enlightened states of Europe.”<sup>129</sup>

Some of the problems caused by the expansive language were addressed by floor amendments. When one House member pointed out that the bill as worded would prohibit anyone from entering a contract with an alien once that alien had arrived in the United States, the bill was changed to avoid that problem.<sup>130</sup> Exceptions were added so that individuals could help members of their own families to emigrate, and so that

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124. *Id.* at 5358.

125. *Id.*

126. *Id.* at 5355.

127. *Id.* at 5354.

128. *Id.*

129. *Id.*

130. See *id.* at 5353, 5370.

skilled workmen in foreign countries could be hired in new industries where domestic skilled labor could not be found, and the committee-endorsed amendment excepting "professional actors, lecturers, or singers" was added.<sup>131</sup> An amendment to restrict the scope of the prohibition to importation of workers "at a rate of wages less than the current rate of wages for the same class of labor in the locality in the United States where such labor is to be performed," consistent with the claimed purpose of avoiding the degradation of American labor, was defeated, without discussion.<sup>132</sup>

When the bill left the House floor, then, it retained the extremely broad language of the prohibition, despite the frequently repeated descriptions of a much narrower purpose. There were references to the difficulty posed by the bill's reference to "labor or service of any kind," but little direct attention to that difficulty, and no explanation for the failure to attempt to narrow the scope of the operative language.

In the Senate, the bill as it passed the House was presented by Mr. Blair, who described the purpose of the bill in language similar to that used in the House discussions (though, it appears, to a small group of Senators):<sup>133</sup>

Its object is to remove a great and rapidly growing public evil, an evil striking at the interests of millions of our countrymen, and those of our countrymen who can least bear the existence, much less any increase, of the evil of which they complain.

. . . [T]he practice has grown up on the part of many of the employers of the country of sending their agents abroad to England, France, Italy, Hungary, Germany, Austria, and in fact to all European countries with hardly an exception, for the purpose of contracting with bodies of working people, paying their expenses of transportation to this country, in order that their cheap labor may be brought in competition with that of our own citizens.<sup>134</sup>

The Report from the Senate Committee on Education and Labor, upon which Brewer relied in his opinion, recommended passage of the bill without amendments in order to secure passage during the final days of the session, "although there are certain features thereof which might well be changed or modified."<sup>135</sup> In particular, the Committee indicated it would have recommended substituting "manual labor" and "manual service" for "labor and service" as "sufficiently broad to accomplish the purposes of the bill . . . [and to] remove objections which a sharp and per-

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131. *Id.* at 5371.

132. *Id.*

133. Senator Blair asked for agreement to have the bill considered immediately at this first reading. "The question being put," the nays appeared to prevail. *Id.* at 6058. When Mr. Blair asked for a division, the vote was 4 yeas and 8 nays, though when the roll was then called there were 26 yeas, 14 nays, and 36 absent. See *id.*

134. *Id.* at 6057.

135. *Id.* at 6059.

haps unfriendly criticism may urge to the proposed legislation.”<sup>136</sup> But hoping to achieve final passage quickly, the Committee did not recommend amendment, noting its belief “that the bill in its present form will be construed as including only those whose labor or service is manual in character.”<sup>137</sup> Mr. Blair nonetheless indicated that he intended to move the modifications referenced in the Committee report:

so that the provision of 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. With that modification, which I am assured by the friends of the bill will be at once assented to in the House so that the bill will reach its passage at this session, there can be, as I think, 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.<sup>138</sup>

The entire House Report was then read into the record, but rather than take up the measure, the Senate proceeded to set aside the regular order of business to handle other matters needing attention.<sup>139</sup> Senator Blair attempted several times to return to consideration of the contract labor bill, but each time consent was given to attend to other business. Finally, Senator Brown moved that further consideration of the bill be postponed to the second Thursday of December, when Congress would be back in session, the bill being “a very important measure, and as it is very difficult to keep a quorum, and as we can not discuss a great question of this character at the close of the session as we would have to do and as we ought to do if we mean to consider it properly.”<sup>140</sup> The motion passed on a voice vote.<sup>141</sup>

After several false starts,<sup>142</sup> the bill was finally taken up by the Senate on February 13, 1885. Blair once again described the purpose to be

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136. *Id.*

137. *Id.*

138. *Id.*

139. There appears to have been some procedural maneuvering, though the record contains no explanation of those efforts. After having the Clerk read the House Report into the record, Senator Blair sought unanimous consent to dispense with the reading of the appendices to the report. Senator Hawley objected, however, saying “I have not heard enough of it yet.” He then immediately offered to withdraw his objection if the Senate would proceed “to the consideration of executive business.” *Id.* at 6061.

140. *Id.* at 6065.

141. See *id.* at 6067. The chair declared “that the ayes appeared to prevail.” Senator Blair then called for the yeas and nays, but to calls of “No! No!” he withdrew the call “on the suggestion that it may disable us from doing business.” The President pro tempore then declared the motion agreed to. *Id.*

142. Senator Blair attempted to get the bill heard on February 4, 1885, see 16 Cong. Rec. 1259–60 (1885), complaining that consideration of the interstate commerce bill and various other matters had impeded consideration of the alien contract labor bill. He referred to the “very great public interest” in the bill, with several state legislatures passing resolutions calling for Senate action on it. *Id.* at 1255. When he tried again late in the day, Senator Plumb said he did not believe the bill “will be able to get through as readily as

served by the bill: "to prevent substantially the cooly practices which have been initiated and carried on to a considerable extent between America and Europe."<sup>143</sup> There was much debate about the necessity and wisdom of making ship captains liable for importing contract labor and about the wisdom of the clause excepting importation of labor for new businesses where skilled labor cannot be obtained in the United States.<sup>144</sup> More significantly for understanding the scope of the prohibition, several senators warned that the bill as drafted would not accomplish its stated purposes. Senator Hawley concurred in the effort to prevent

contracts that bring a body of poor laborers over here, paying their transportation under an agreement that they shall work not alone till they have paid their fare, but shall work for months and years for wage below those of the ordinary American laborer—those contracts are shameful, they are criminal, they are wrong, they are against natural right, against American law and the spirit of our institutions. They ought not to be permitted.<sup>145</sup>

But he feared that the bill as drafted would interfere as well with "honest immigration."<sup>146</sup> In response, Senator Blair reiterated that the bill was designed to assist "the American toiler, the American workman, the American laborer . . . the man who is nearest the earth."<sup>147</sup> Senator Morgan criticized the bill as class legislation, prohibiting contracts with respect to certain kinds of labor but not as to others:

The classes legislated for and protected by the bill are not the agriculturists, they are not the house-builders and the ordinary mechanics of the country. They 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. . . . [I]t 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. . . . Personal or domestic servants are excepted; that is to say, a gen-

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[Senator Blair] thinks, although I am not aware of any opposition to it on my part. I am in favor of it with some amendments; but it is very late now, and we shall get into some wrangle about it if it is taken up." *Id.* at 1260.

143. *Id.* at 1624. Blair continued:

[I]t does undertake to prohibit the efforts of corporations and of individuals, of capitalists, which have been put forth to some extent in this country to introduce into it the cheap and servile labor of foreign lands, and, when it is not necessary to do so for the good of the American people and the promotion of American industries, the skilled labor of other countries, because that labor, as we know, can be commanded at very greatly reduced wages as compared with what we pay to the working people of our own country.

*Id.*

144. See *id.* at 1625–30.

145. *Id.* at 1625.

146. *Id.*

147. *Id.* at 1626.

tleman who has got the money can come here and bring his personal or domestic servants with him from abroad; but if he 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.<sup>148</sup>

Senator Morgan's examples of immigrants excluded by the bill include "brain toilers" not dissimilar to Dr. Warren, to whom the Act would later be applied. Senator Blair responded to these concerns, as he had in the previous session, that "[i]f that class of people are liable to become the subject-matter of such importation, then the bill applies to them."<sup>149</sup> Senator Sherman expanded on this point:

I supposed that the bill was in the line of the other legislation [the Chinese Exclusion Act], to discriminate against a class, I do not care of what race or of what color, but 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 first section of the bill, together with the exceptions in the fifth section,] describes the importation of men who come here under special contracts, mostly in large numbers, to work at largely reduced pay for the benefit of corporations and companies. If the definition is not correctly given, if the kind of people aimed at by the bill is not correctly defined, then as a matter of course the Senator from Delaware and the Senator from Alabama can suggest the correction. What I intend to vote for when I vote for the bill is to prevent this organized corporate importation, not of laboring men, but of bought men, to come here and compete with our laboring men, with our mechanics and miners.<sup>150</sup>

The critical distinction, it appears, is not between manual laborers and "brain toilers," despite the language of the Senate Report, but between those who are "bought" and "owned" by corporations importing "mostly" large numbers of workers to supplant domestic employees and those who come voluntarily and individually. Still, the language of the bill was too broad for that purpose, and Senator McPherson reiterated that point:

Mr. McPHERSON. The Senator says, if I understand him aright, that the bill is directed against the importation into this country of people who are practically bought to come here as organized labor.

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148. *Id.* at 1632–33.

149. *Id.* at 1633. Possibly in recognition of the difficulties being discussed, Blair went on to say that "[p]erhaps the bill ought to be further amended." *Id.*

150. *Id.* at 1634–35.



Mr. SHERMAN. That is what I understand it to be.

Mr. McPHERSON. The phraseology of the bill is very liberal, it seems to me, and applies even to individual cases; it makes no difference for what reason they come. It does not apply to organized labor alone, but reaches a great many laborers who would naturally come here to better themselves, and who come here under a contract previously made for that purpose.

....

Mr. SHERMAN. I will tell you what kind of a case it interferes with. Take a railroad corporation in the State of New Jersey that is not willing to pay a dollar and a quarter a day for wages, and finds that on account of the great superabundance of labor in Italy and Hungary it can hire men by the thousand, through shysters that it sends there for the purpose of talking to them, at 50 or 60 cents a day upon an agreement to work three years, with a certain stipulated quantity of rice and other food of that kind, and they make such contracts and are brought over, men who can not speak our language, who are not acquainted with our institutions, and they are put to work on a railroad in New Jersey, thus driving out of employment 3,000 Americanized laborers, good honest Americans, native-born or ordinarily naturalized citizens. That is the kind of people I want to get at. If the Senator and I can only agree on the language of the bill, I have no doubt we shall vote together.

Mr. McPHERSON. I quite agree with the Senator from Ohio, and probably will go as far as he will in any attempt to protect American labor, and I deplore as much as that Senator can the organizations that are gotten up for the purpose of depriving American labor of employment; but I want to do it by some measure of legislation that will be just and fair and proper, that will reach exactly that class of cases, and at the same time will not be so sweeping in its provisions as to deter honest and proper laborers from coming to this country seeking to better their condition.

The Senator from Ohio will go no further than I will in the direction that this bill proposes, and I submit that the only thing I wish to do is to perfect it. I do not like the bill as it is; I do not think the bill should pass in its present shape: but I do think it is possible to so amend it as to make it effective and capable of doing a great deal of good, and to that end I pledge myself, for I am very ready to aid in legislation on this question.<sup>151</sup>

At which point—the Senate adjourned for the day.<sup>152</sup> When discussion resumed, four days later, there were more long speeches about the evils of importing large numbers of laborers to depress the domestic labor market.<sup>153</sup> And there were more references to the drafting problems. Senator Vest said he thought the bill was “immature and crude, but I shall

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151. *Id.* at 1635–36.

152. *See id.* at 1636.

153. *See id.* at 1778–86.

vote for it on account of the salient principle which it announces, hoping that time and experience may perfect this legislation hereafter.”<sup>154</sup> Senator Platt noted that:

This bill has been here since last June. It has been for one reason or another, largely because of our rules, debarred from a hearing until this time; and now in the closing hours of the session [the session concluded on March 3, 1884, just two weeks later] I am pained to observe that Senators whom I believe to be in favor of the principle of this bill seem to overlook that principle and to be directing their attention to what appear to be some crudities and informalities which appear in the bill. I agree that this bill is crude, that it has not been drawn with proper care. I think it illustrates the folly of a class of men who suppose that bills can be better prepared for the consideration of Congress and passage by Congress by those who are not familiar with legal phraseology and with the legal profession.

But if I were to criticise this bill I would criticise it because I think it is not properly drawn to effectuate the object and purpose which those who desire the passage of the bill, and which I desire, have in mind. I do not believe that these sections which have been criticised, that the phraseology which has been criticised is likely to work any considerable hardship or injustice. I think the bill, if it fails in effecting a wise and salutary object, will fail because it is not properly drawn to effectuate the purposes of those who believe in the principle of the bill.<sup>155</sup>

And the purpose Senator Platt articulated was the same as had been expressed in speech after speech—to protect domestic “laborers, men who earn their bread by the sweat of their brow” and prevent “importing laborers as we import horses and cattle.”<sup>156</sup>

Several times more, Senators rose to object to the breadth of the bill and to offer limiting amendments. Senator Lapham agreed that the object of this bill, as its title imports, is to prevent the evil of importing laborers here in groups, in colonies, in shiploads. It is to prevent the practice of bringing classes of laborers here under contract to perform service, and I am in full sympathy with that; and if this bill reached no further than that, I should be in favor of it without changing a letter . . . .<sup>157</sup>

His worry, however, was not about “brain toilers,” but about individuals who labored to send money to help their friends emigrate, exacting or accepting from them an agreement to repay the funds advanced, and thus possibly violating the prohibition against prepaying the passage of someone “under contract or agreement . . . to perform labor or service of any kind in the United States.”<sup>158</sup> Although assured that such individuals

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154. *Id.* at 1780.

155. *Id.* at 1781.

156. *Id.* at 1781–82.

157. *Id.* at 1786.

158. *Id.*

would not be covered by the prohibition, the Senate agreed to an amendment to except "personal friends" from those covered.<sup>159</sup> Senator Saulsbury spoke of the "sweeping . . . character" of the bill and unsuccessfully offered an amendment to exempt agricultural workers from the prohibitions because of the scarcity of such workers.<sup>160</sup> Senator Morgan worried about the effect on state government efforts to encourage immigration, but his attempt to address this issue was rejected, perhaps based on Senator George's argument that general efforts to promote immigration were not outlawed by the bill's provisions.<sup>161</sup> In the midst of all this, Senator Morgan offered more testimony about the looseness of the language of the bill:

The honorable Senator who occupies the chair now [Mr. Platt], if I remember, when he took the floor this afternoon for the purpose of advocating this bill led off by saying that the bill was such a one as a body of lawyers would not have prepared, and the bill ought to have undergone the scrutiny, if I understood him aright, of the Judiciary Committee, or some committee of this body that could put it in shape.

I but participate in the common sentiment when I declare in my place in the Senate that I can not understand this bill as the Senator from Mississippi understands it. His vision about it is so much clearer than mine that I regret that I can not participate in the very lucid manner in which he understands this bill to his own satisfaction. To me it is cloudy and murky and muddy; to me it is ill-shaped, and it does not express any correct or clear idea.

. . . .

. . . [I]t strikes me that the honorable Senator in his zeal for this particular bill has lost sight of the real construction of its language. Why shall the Senate of the United States send out a lumbering affair like this into the world for the criticism of the bar of the United States? Sir, they would laugh at you when you have done it.<sup>162</sup>

The Senate once more adjourned, without considering any amendments to correct the identified deficiencies,<sup>163</sup> but with the promise that the bill would be called up the next day for final action.<sup>164</sup> When discussion resumed, Senator McPherson again reiterated the aims of the bill:

The bill is intended to prevent the importation of foreign labor by contract, which means cheap labor, pauper labor, and I might add vicious labor, which when brought to this country en-

159. *Id.* at 1786-87.

160. *Id.* at 1790-91.

161. *See id.* at 1792-94.

162. *Id.* at 1795.

163. The only amendment considered was one offered by Senator Morgan to exempt state agents who induce immigration and any other persons who "in good faith" assist individuals or families to emigrate for the purpose of permanent settlement. *Id.* at 1791.

164. *See id.* at 1797.

ters into competition with our laborers here; and our own laborer in the course of time from the result of that competition becomes a tramp, seeking bread from door to door.

There are only two classes in this country who indulge in this kind of practice, the railroad corporations and the manufacturing corporations.<sup>165</sup>

Several relatively insignificant amendments were then offered and adopted, with virtually no discussion.<sup>166</sup> Perhaps in response to the complaints about the “crudities” of the bill, but more likely because he opposed the substance, Senator Hawley moved to refer the bill to the Committee on the Judiciary “with instructions to report not later than the 20th instant a bill effectuating the purposes provided for in the bill as amended.”<sup>167</sup> The motion was defeated, after which the bill was finally brought to a vote, passing by a vote of fifty to nine.<sup>168</sup> The House concurred in the Senate version.

The subsequent history of the Alien Contract Labor Act offers additional information about congressional intent with respect to the emigration of Dr. Warren. In January 1889, while the *Holy Trinity Church* litigation was still pending at the Supreme Court, a bill was considered in the House that would add to the Act’s exemptions “professors in universities or ministers of the gospel.”<sup>169</sup> A committee-written substitute was presented on the House floor on August 30, 1890, still containing a new exception for “ministers of the gospel.”<sup>170</sup> Representative Buchanan, who was in charge of the bill, referred specifically to the *Holy Trinity Church* case in explaining the change:

Under the provisions of [the Act] a minister of the gospel, coming to New York, under engagement to serve a church in that city, was held to come within the prohibition; and the proposed

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165. *Id.* at 1833.

166. Two of the amendments changed the primary enforcement section to allow the United States as well as any individual to sue for recovery of the \$1000 fine imposed on persons or companies importing labor in violation of the statute, but provided that the fine would be paid solely to the United States Treasury rather than being shared with the person bringing suit. See *id.* at 1838. Other amendments added artists to the list of workers exempt from the prohibition on importation, see *id.* at 1837, and changed “service or labor” in section 2 to “labor or service,” *id.* at 1839 (“That would be altogether more poetic, while the other phrase savors rather of blank verse.”). The Senators rejected amendments to remove “singers” from the list of exempt workers (moved by a Senator who complained about the treatment of Italian child street singers) and to add “artisans” to that list. *Id.* at 1837.

167. *Id.* at 1839.

168. See *id.* at 1839–40.

169. The change was part of a bill focused primarily on strengthening the enforcement of the Alien Contract Labor Act in the face of complaints that the collectors of customs were generally unable to detect violations. The Ford Committee recommended transferring enforcement authority to the federal government in response to these difficulties. See H.R. Rep. No. 50-3792, at 4 (1889) (accompanying H.R. 12,291, 50th Cong. (1889)).

170. 21 Cong. Rec. 9438 (1890).

amendment to the original law adds to this exemption regularly ordained ministers of the gospel and learned professors of colleges or seminaries.<sup>171</sup>

No objections were made to exempting ministers in Dr. Warren's circumstances, though the floor debate does not indicate an intent to change the result in the *Holy Trinity Church* case itself.<sup>172</sup> Interestingly, however, in view of Brewer's subsequent declaration that "this is a Christian nation,"<sup>173</sup> a lengthy colloquy occurred on the Senate floor about the proper scope of the exemption for ministers. Senator Carlisle moved to amend the bill by changing "regularly ordained ministers of the gospel" to "regularly ordained or constituted ministers of religion."<sup>174</sup> At least some of his colleagues failed to understand the need for the suggested change:

Mr. CARLISLE. . . . The bill as it now stands reads "regularly ordained ministers of the gospel," and if passed in that shape would confine it alone to ministers of the christian religion and exclude Jewish rabbis and others.

Mr. COCKRELL. Why?

Mr. CARLISLE. Because they do not come in as ministers of the gospel.

. . . .

Mr. PLATT. I do not think the Senator quite explains to the Senate (at least I do not quite catch it; there has been a good deal of confusion here) the difference between a minister of the gospel and a minister of religion. I wish he would do so.

Mr. CARLISLE. As I understand it, this provision would entirely exclude Jewish rabbis, because they are not ministers of the gospel, but they are ministers of religion. Of course there is a little difficulty in selecting the exact language which would include just what we want to include, but it occurred to me that that was the very best phrase we could use. The bill as it stands now would exclude ministers of every religion whatever except the christian religion. It is confined alone to ministers of the

171. *Id.* at 9439.

172. Vermeule notes the passage of an exemption for ministers in 1891, though with slightly different language than as first introduced, but dismisses the significance of the enactment because it was accompanied by an explicit nonretroactivity provision leaving the *Holy Trinity Church* litigation unaffected by the change. See Vermeule, *supra* note 20, at 1841-42. That statement is true as far as it goes, but it suggests, inaccurately I think, that Congress was affirmatively aiming to leave the *Holy Trinity Church* ruling intact. In fact, there was no mention of the *Holy Trinity Church* case in conjunction with the nonretroactivity clause, and the inclusion of such a clause may have been simply to avoid disrupting the already criticized efforts at enforcing the statute. An identical provision was included in the next set of amendments. See Law of March 3, 1903, ch. 1012, § 28, 32 Stat. 1213, 1220.

173. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892).

174. 21 Cong. Rec. 10,466 (1890).

gospel, thus making a distinction between different religious beliefs, which I do not think we ought to make.<sup>175</sup>

It was evident from the discussion that the members of the House recognized that America was not just a Christian nation, though they were uncertain just how ecumenical they wanted to be:

Mr. COCKRELL. I should like to ask the Senator from Kentucky whether this amendment would exclude the ministers of the Chinese religion, those who conduct joss services, or the Mormons, or the ministers of anything else called religion. It seems to me that the amendment of the Senator from Kentucky is entirely too broad; that a Chinese minister conducting the services in their temple, worshipping at the shrine of their joss, could come in under this provision, and also a Brahman, or a Mormon—and a great many Mormons are coming in now—and Mussulmans, or anything of the kind. I think the amendment is entirely too broad.

Mr. BLAIR. I expect that would be the effect of the amendment; but this is a free country, free in religion as in everything else.

Mr. CARLISLE. I suppose we do not propose to make a discrimination among the various religious beliefs. This simply permits them to come here. If they should be guilty of any action in violation of our law after they come, of course they would be punished as others. The Chinese are excluded now by law, not because they are ministers of religion, but simply because of their nativity and race.

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Mr. PLATT. If I may be permitted, having asked one question, to say another word, I do not think any one would desire to exclude Jewish rabbis, but there may be some persons who would come in under what might be called religion that it would be quite well for this country not to have included.

Mr. BLAIR. This bill does not undertake to exclude or to interfere with religion or religious belief at all. It is designed to prevent the introduction of alien contract labor. It seems to me that the amendment which the Senator from Kentucky suggests can hardly be objected to.<sup>176</sup>

The amendment was added to the bill with no further discussion,<sup>177</sup> although the bill was temporarily withdrawn by its sponsor, Senator Blair, who complained of various other amendments creating a bill “which is inferior in its efficiency and usefulness.”<sup>178</sup> The bill was reintroduced in the next session, again with an exemption for “regularly ordained ministers of the Gospel,”<sup>179</sup> which was again changed, without discussion, to

175. *Id.* at 10,466–67.

176. *Id.*

177. See *id.* at 10,467.

178. *Id.* at 10,559.

179. S. Rep. No. 51-2165, at 4 (1891); H. Rep. No. 51-3808, at 2 (1891).

the more general "ministers of any religious denomination."<sup>180</sup> The bill in that form passed both the Senate and the House.<sup>181</sup> Although the exemption for ministers was enacted almost a full year before the *Holy Trinity Church* case was argued at the Supreme Court, it appears that the amendment was not brought to the attention of the Justices when they deliberated,<sup>182</sup> nor was it mentioned in the Court's opinion. The amendment was prospective in its effect on pending prosecutions<sup>183</sup> and therefore could not be applied directly to the hiring of Dr. Warren. Still, it is curious that an enactment bearing so precisely on the issue of congressional purpose was completely ignored by both court and litigants.

So just what *was* the intent of the Senate and the House when they enacted the Alien Contract Labor Act? Or, to ask a more relevant question, was it the intent of Congress to cast the net broadly, to exclude from American shores *any* person who arrived with a prearranged contract for labor or service of *any* kind? Determining the intent of a body such as Congress is problematic, of course.<sup>184</sup> But the message of an overwhelming number of comments from committee reports, sponsors, and floor supporters was that the aim of the bill—and therefore, one may infer, the aim of those who voted for it—was to stop the wholesale importation of cheap labor to undermine American workers.<sup>185</sup>

180. 22 Cong. Rec. 2955 (1891).

181. See *id.* at 3245, 3428.

182. Indeed, the attorney for the Government told the Supreme Court it was "remarkable that Congress did not make the meaning of the law clearer" when it amended the law in 1888 "if the decision of Judge Wallace in this case . . . did such violence to the intention of Congress." Brief for the United States at 7–8, *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) (No. 13,166).

183. The amending statute adopted in 1891 contained a clause specifying that pending cases should not be affected by any of the amendments. See Act of Mar. 3, 1891, ch. 551, § 12, 26 Stat. 1084, 1086 ("[N]othing contained in this act shall be construed to affect any prosecution or other proceeding, criminal or civil, begun under any existing act or any acts hereby amended, but such prosecution or other proceedings, criminal or civil, shall proceed as if this act had not been passed."). The amendment was partially retroactive as well, since it made lawful any importations that occurred before passage of the amendment, as long as the government had not yet chosen to prosecute. This raises additional equitable concerns which, of course, the Court did not address.

184. See William N. Eskridge, Jr., *The New Textualism*, 37 *UCLA L. Rev.* 621, 642–44 (1990) [hereinafter Eskridge, *New Textualism*].

185. At least one historian—and the one who explored the history of the contract labor law in the most detail—argues convincingly that the original impetus behind the legislation (and labor's support for it) was to protect skilled (not unskilled) workers. Originally promoted by the glassworkers' union, the issue gathered support from other skilled craft unions and only later received support from the Knights of Labor, the organizing body for unskilled workers. Martin Foran, who introduced the bill and was its chief sponsor, was past president of the Coopers International Union and most closely associated with the craft unions. In Congress, the more politically expedient position, however, was not to support skilled craft unions, but to claim concern for the common laborer—and to appeal to racial prejudice by railing against the immigrants from Italy, Hungary, and other southern European countries. See Erickson, *supra* note 117, at 139–66. Whatever the truth about the unexpressed motivations of Representative Foran

Did Congress choose language that would limit its remedy to that problem? Assuredly not. Why did neither the Senate nor the House amend the bill to narrow its scope, since the breadth of the proposed language was brought to the attention of Congress? The legislative history suggests that there was, at least at some stages in the consideration of the bill, insufficient time to make the necessary changes.<sup>186</sup> It also suggests, repeatedly, that neither the drafters nor the supporters thought the bill was well-drafted to accomplish its purposes. The bill was repeatedly referred to as “crude,” and at least one Senator suggested that lawyers would laugh to see what had been written. The bill was amended repeatedly to ensure exceptions for a small number of categories of immigrants—personal or domestic servants, personal friends or members of an individual’s family, artists—but the only broad amendment offered—to change “labor or service” to “manual labor or manual service”—would not in any event have matched the language of the bill to the purposes expressed. Indeed, it was clear when the breadth was discussed that supporters were satisfied with language that reached all kinds of workers—if *they were being imported in the fashion described*. Perhaps one reason for the failure to amend is the difficulty of drafting language that would do what Congress intended, that would draw a workable line between the problematic—workers brought in, often in large numbers, to damage the position of American labor—and the acceptable—voluntary immigrants coming to America, with or without promise of employment, to better their own lives and incidentally to contribute to the society they were joining.

So Brewer was right when he said Congress did not intend the Act to exclude Dr. Warren, though not simply because he was a “brain toiler” rather than a manual laborer, as Brewer wrote.<sup>187</sup> There was no problem with mass importation of foreign ministers to undermine the positions and wages of American clerics,<sup>188</sup> the problem Congress sought to ad-

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and the reasons for labor concern, the Senate and House justified its passage of the anti-contract labor provision by reference largely to the problems of unskilled labor, though their arguments—and the language of the Act—encompass both skilled and unskilled workers.

186. This argument was made both in the first session of Congress, when the Senate sought but failed to pass the measure in the very last days, and in the second session, when the bill was brought up some two weeks before final adjournment. It is true, of course, that between June 1884 and February 1885, there was quite sufficient time to draft any relevant amendments, but there is no indication why that was not done, especially in view of the Senate Report’s suggestion that an amendment would be made but for lack of time.

187. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 464 (1892).

188. There was only one reference to the labor problems of ministers in the legislative history, and it seems more strategic than based either in fact or in true concern over competition from foreign clergy. In support of his proposal to add an exemption for “any organization of musicians or orchestras” to the already proposed amendment making the Act inapplicable to ministers, Senator Plumb argued that musicians are

certainly . . . as much entitled to come in as ordained ministers of the gospel, for I have no doubt the Senator would testify of his own knowledge that the ministers of the gospel in this country are the poorest paid of all the people who labor, and



dress, and when confronted with the question whether the Act should cover circumstances like Holy Trinity Church's arrangements with Dr. Warren, Congress without any dissenting voices determined it should not. If legislative intent as reflected in legislative history should be considered in construing the statutory words—admittedly a conclusion not universally shared<sup>189</sup>—then the circumstances leading to passage of the Alien Contract Labor Act provide ample support for limiting, as Brewer did, the extremely broad language of the Act.

### III. JUDGES: THE JURISPRUDENTIAL CONTEXT AND SIGNIFICANCE OF *HOLY TRINITY CHURCH*

The *Holy Trinity Church* opinion is frequently cited, both in treatises and in case law, for its articulation of the proposition 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.”<sup>190</sup> As Vermeule notes, “[m]uch of the judicial and academic commentary on legislative history and interpretive theory in recent years thus takes *Holy Trinity* as the starting point for discussion . . . of non-textualist approaches to statutory interpretation,” providing “crucial premises” for prominent statutory interpretation cases decided by the Burger and Rehnquist Courts.<sup>191</sup>

Just why *Holy Trinity Church* has become the source of wisdom on this point is something of a mystery, however. As is clear in both contemporaneous commentary and cases, the principle itself—that literal text should be controlled by the spirit of the statute and the intention of those drafting it—was well accepted when *Holy Trinity Church* was decided in 1892. Matthew Bacon's *A New Abridgement of the Law*, for example, published in 1876, notes that “[a] thing which is within the letter of a statute is not

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if ministers of the gospel from England, Germany, France, and all the world are to come in to compete with our two or three or four hundred dollar per annum preachers, I think it is straining the matter a great deal, and it would not put any more strain on it to let in these orchestras.

21 Cong. Rec. 10,468 (1890). The competition between American clerics and those from abroad was also referenced in District Attorney Walker's argument before the circuit court on behalf of the prosecution. See *supra* text accompanying note 74. Ministers from abroad “coming in” to compete with local clergy is in any event a far cry from systematic importation by prospective employers in an effort to undermine wages.

189. See *infra* text accompanying notes 240–248.

190. *Church of the Holy Trinity*, 143 U.S. at 459. A recent search using Westlaw's KeyCite service revealed citations to *Holy Trinity Church* for this proposition in 327 cases and 160 law review articles. Search of Westlaw (May 10, 2000) (Keycite search on 143 U.S. 457). There were an additional 174 case citations and 57 law review references to *Holy Trinity Church* for the holding that a court construing a statute will consider the evil being addressed by the legislature in enacting the statute, in part by looking at contemporaneous events and the situation pressed upon the attention of the legislature. See *id.* According to KeyCite, the average number of citations to a Supreme Court case from the year in which *Holy Trinity Church* was decided is 55.6.

191. See Vermeule, *supra* note 20, at 1836.

within the statute, unless it be within the intention of the makers.”<sup>192</sup> In his 1871 treatise, Sir Fortunatus Dwaris cites this as one of the rules of statutory construction in American law.<sup>193</sup> J.G. Sutherland, in the 1891 edition of *Statutes and Statutory Construction*, cites instances in which the intention of the legislature prevailed over the precise language of the statute.<sup>194</sup> Numerous cases, in the United States Supreme Court and elsewhere, recited the same or a similar proposition well before Brewer did so in *Holy Trinity Church*.<sup>195</sup> As one court expressly acknowledged almost half a century earlier:

[T]he literal interpretation of an act is not always that which either reason or the law approves. The inartificial manner in which many of our statutes are framed, the inaptness of expressions frequently used, and the want of perspicuity and precision not unfrequently met with, often require the court to look less at the letter or words of the statute, than at the context, the subject-matter, the consequences and effects, and the reason and spirit of the law, in endeavoring to arrive at the will of the law giver.<sup>196</sup>

Moreover, when District Attorney Walker first contemplated a suit against Holy Trinity Church, he realized immediately that he would encounter arguments that the spirit of the act should overcome literal application of the statute, confirming that the doctrine was well known at the time. Brewer was quite right when he called the proposition that spirit and intention may trump express words “a familiar rule” that has “often been asserted.”<sup>197</sup>

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192. Matthew Bacon, 9 A New Abridgement of the Law 247 (Philadelphia, T. & J.W. Johnson & Co. 1876).

193. See Sir Fortunatus Dwaris, A General Treatise on Statutes: Their Rules of Construction 144 (Albany, William Gould & Sons 1871).

194. See J.G. Sutherland, *Statutes and Statutory Construction* 322 (1891).

195. See, e.g., *Viterbo v. Friedlander*, 120 U.S. 707, 724 (1887); *Kirk v. Hamilton*, 102 U.S. 68, 77 (1880); *Jones v. Guaranty & Indem. Co.*, 101 U.S. 622, 626 (1879); *Leavenworth, Lawrence, & Galveston R.R. Co. v. United States*, 92 U.S. 733, 742 (1875); *Smythe v. Fiske*, 90 U.S. 374, 380 (1874); *Thompson v. State*, 20 Ala. 54, 62 (1852); *Woodruff v. State*, 3 Ark. 285, 296 (1841); *Shillaber v. Waldo*, 1 Haw. 21, 38 (1847); *Brown v. Thompson*, 77 Ky. (14 Bush) 538, 539 (1879); *Inhabitants of Gray v. County Comm'rs*, 22 A. 376, 377–78 (Me. 1891); *New Orleans, Jackson, and Great Northern R.R. Co. v. Hemphill*, 35 Miss. 17, 21 (1858); *State ex rel. Missouri Mut. Life Ins. Co. v. King*, 44 Mo. 283, 285 (1869); *Associates of the Jersey Co. v. Davison*, 29 N.J.L. 415, 424 (N.J. 1860); *Thompson v. Egbert*, 17 N.J.L. 459, 463, 465–66 (N.J. 1840); *Leitensdorfer v. Webb*, 1 N.M. 34, 46 (1853); *Keith v. Quinney*, 1 Or. 364, 367 (1861); *Eshleman's Appeal*, 74 Pa. 42, 47 (1873); *Levinz v. Will*, 1 U.S. (1 Dall.) 430, 434–35 (Pa. 1789); *Taylor v. McGill*, 74 Tenn. 294, 300 (1880); *Chalmers and Als v. Funk & Son*, 76 Va. 717, 722 (1882); *Orange and Alexandria R.R. Co. v. City Council of Alexandria*, 58 Va. (17 Gratt.) 176 (1867); *Brown v. Gates*, 15 W. Va. 131, 165 (1879).

196. *Thompson v. State*, 20 Ala. at 62.

197. *Church of the Holy Trinity v. United States*, 132 U.S. 457, 459 (1892). Indeed, Brewer was so comfortable with this “familiar rule” that he chose to cite no authority for it. One writer disapproved of this “familiar rule” in his 1848 treatise, but even he acknowledged its widespread adoption. “The duty of the judge,” he said, “is to adhere to

Brewer himself had relied upon this concept when deciding cases as a justice on the Kansas Supreme Court between 1870 and 1884. He articulated the thought most fully in *Intoxicating Liquor Cases*,<sup>198</sup> a consolidation of eight separate prosecutions of druggists for selling various concoctions in violation of a state statute barring the sale of intoxicating liquors except under specified circumstances. The broad language of the statute, including in its sweep “all other liquors or mixtures thereof, by whatever name called, that will produce intoxication,”<sup>199</sup> literally included the sale of items such as cologne, bay rum, extract of lemon, and tincture of gentian, even if sold for medicinal or cosmetic purposes. The cardinal rule of interpretation, Brewer said, is that legislative intent governs<sup>200</sup> and “[t]he letter does not always express the intent.”<sup>201</sup> Citing a New York case and Bacon’s *Abridgement of the Laws*, Brewer noted that “‘a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers; and such construction ought to be put upon it as does not suffer it to be eluded.’”<sup>202</sup> Armed with such principles, the court ruled that certain preparations, like cologne, bay rum, essence of lemon, paregoric, and tinctures, would not be considered intoxicating liquors under the statute, despite the breadth and clarity of the statutory language.<sup>203</sup>

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the legal text, as his sole guide” even “where the case, though within the mischief, is not clearly within the meaning; or where the words fall short of the intent,—or go beyond it . . . .” E. Fitch Smith, *Commentaries on Statute and Constitutional Law* 588–89 (1848). “But,” he acknowledged, “this, unfortunately, has not been the practice.” *Id.* Instead of legislatures being forced by judges to do their duty and amend unsatisfactory statutes, “it has been left to able judges to invade its province, and to arrogate to themselves the lofty privilege of correcting abuses and introducing improvements. The rules are thus left in the breasts of the judges, instead of being put upon a right footing by legislative enactment.” *Id.* at 591.

198. 25 Kan. 524, 532–36 (1881).

199. *Id.* at 532.

200. See *id.* at 533. Several of Brewer’s earlier cases similarly noted the primacy of legislative intent. See *State v. Bancroft*, 22 Kan. 130, 147 (1879); *City of Emporia v. H.E. Norton*, 16 Kan. 236, 239 (1876).

201. *Intoxicating Liquor Cases*, 25 Kan. at 533.

202. *Id.* (citing *Holmes v. Carley*, 31 N.Y. 289 (1865)); Bacon, *supra* note 192, at 247.

203. It is worth noting, in light of Brewer’s later disquisition on the wisdom and validity of a broad statutory interpretation in *Holy Trinity Church*, that he interjected in the *Intoxicating Liquor Cases* his own personal evaluation of the merits and validity of the legislature’s seemingly broad statutory prohibition of the sale of intoxicating liquors:

And, speaking for himself alone, the writer of this opinion does not hesitate to say that such a construction, if imperatively demanded by the language used, would carry the statute beyond the power of the legislature. I do not think the legislature can prohibit the sale or use of any article whose sale or use involves no danger to the general public. The habits, the occupation, the food, the drink, the life of the individual, are matters of his own choice and determination, and can be abridged or changed by the majority speaking through the legislature only when the public safety, the public health, or the public protection requires it.

25 Kan. at 534. As in *Holy Trinity Church*, where questions of constitutionality also lurked in the background, Brewer did not reach the constitutional issue, but instead concluded that

If the principle that spirit should take precedence over literal language was well-accepted in 1892, perhaps the prominence of *Holy Trinity Church* arises from Brewer's application of the principle—how he determined the spirit of the statute. Of the three sources Brewer consulted, two are unremarkable. First, he looked at the title of the Act, not “to add to or take from the body of the statute,” but to “help to interpret its meaning.”<sup>204</sup> In doing so, he followed traditional doctrine urging consideration of other portions of the statutory text, including especially the title.<sup>205</sup> Next, he considered “the evil which [the Act] is designed to remedy; . . . contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.”<sup>206</sup> Here, again, Brewer broke no new ground.<sup>207</sup>

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“the legislature never intended such a sweeping prohibition,” and dismissed the prosecutions. *Id.*

204. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 462–63 (1892). The title was “An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States . . . .” Brewer read this as “[o]bviously” aimed at the manual laborer, “as distinguished from that of the professional man.” *Id.* at 463. While the use of “labor” in the title was somewhat different than its use in the statute itself, which barred migration of those under contract “to perform labor or service of any kind in the United States,” *id.* at 458, it is hard to see the connection to manual labor as “obvious,” as Brewer argued. Whatever may be said about *how* Brewer interpreted the title, the fact that he used the title to construe other language in the Act was well-accepted doctrine. See *infra* note 205 and accompanying text.

205. See, e.g., *Smythe v. Fiske*, 90 U.S. (23 Wall.) 374, 380 (1874); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818); *United States v. Fisher*, 6 U.S. (2 Cranch) 385, 386 (1805); *County of Perry v. County of Jefferson*, 94 Ill. 214, 220 (1879); *Reithmiller v. People*, 6 N.W. 667, 668 (Mich. 1880); *Conn. Mut. Life Ins. Co. v. Albert*, 39 Mo. 181, 183 (1866); *Halderman's Appeal*, 104 Pa. 251, 251 (1883); *Mundt v. Sheboygan & Fond du Lac R.R. Co.*, 31 Wis. 451, 451 (1872). But see *United States v. Union Pac. R.R. Co.*, 91 U.S. 72, 82 (1875) (“the title of an act, especially in congressional legislation, furnishes little aid in the construction of it, because the body of the act, in so many cases, has no reference to the matter specified in the title”; in *this* case, however, the title “truly discloses the general purpose of Congress”).

206. *Church of the Holy Trinity*, 143 U.S. at 463. Brewer quoted a trial court opinion by District Court Judge, later Supreme Court Justice, Henry Billings Brown, which cited the “motives and history of the” Alien Contract Labor Act as “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 . . . . 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.

*United States v. Craig*, 28 F. 795, 798 (E.D. Mich. 1886). As was typical in articulating the evil that legislation was meant to address, Justice Brown cited no authority, though he echoed the purposes expressed repeatedly in the congressional debates.

207. See, e.g., *Union Pac. R.R. Co.*, 91 U.S. at 79; *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 114 (1866) (noting that the “motives that must have operated with the legislature in passing [a law] are proper to be considered” when construing the statute). For another example, see *State ex rel. New Orleans Pac. Ry. Co. v. Nicholls*:

A rule of statutory construction, the soundness of which is attested by long use, and the frequent and continuing approbation of judicial tribunals, is that the intent of the law-maker is to be ascertained by inquiring what was his motive in

Finally, Brewer cited the Senate and House reports and their references both to the evils being addressed by the legislation and the desire to have "labor and service" interpreted to mean "cheap unskilled labor."<sup>208</sup> As Vermeule acknowledges, the *Holy Trinity Church* decision was not the first instance in which the Supreme Court turned to some form of legislative history to determine legislative intent in construing a statute.<sup>209</sup> In 1874, in *Blake v. National Banks*,<sup>210</sup> the Court had relied upon the journals of the House and Senate to overcome the literal meaning of a statutory text, but only by reference to the sequence of amendments to the bill, not through using substantive statements appearing in the legislative history. In 1878, in *Jennison v. Kirk*,<sup>211</sup> the Court went further, consulting the statement of a bill's author. Such history could not control the statute's interpretation, the Court said, but might be used to indicate "the probable intention of Congress."<sup>212</sup> Other courts, both state and federal, had also, on occasion, consulted a variety of sources of legislative history in construing state and federal legislation.<sup>213</sup> In his 1896 treatise, citing precedents predating *Holy Trinity Church*, Henry Campbell Black noted that opinions of individual members of Congress could not be accepted as binding authority for a particular interpretation, but could be

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legislating—what was the mischief sought to be avoided or remedied, and what the object or good to be attained. Contemporaneous history may be resorted to . . . in order to discover the meaning and scope of the law itself.

30 La. Ann. 980, 982–83 (1878). It is worth noting that in most opinions in which courts determine the evil addressed by the legislature by discussing the historical circumstances that led to passage of an enactment, the opinions rarely cite any authority for their factual recitations. In effect, they declare the history by "judicial fiat" or "authoritative revelation," techniques identified and discussed by Alfred Kelly in his influential article on the use of history by the United States Supreme Court. See Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119, 122–23.

208. *Church of the Holy Trinity*, 143 U.S. at 464–65.

209. Vermeule, *supra* note 20, at 1836 & n.14.

210. 90 U.S. 307 (1874).

211. 98 U.S. 453 (1878).

212. *Id.* at 460.

213. See, e.g., *Smith v. United States*, 19 Ct. Cl. 690, 690 (1884) (quoting committee reports and holding that such reports may be used to show the intent of both houses of Congress in passing a statute); *Ex parte Farley*, 40 F. 66, 69 (W.D. Ark. 1889) (citing speech by chair of House committee when presenting conference report: "The statements of those who had charge of the law, made to the legislative body passing it, as to its meaning and purpose, are always competent."); *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 255 (D. Cal. 1879) (No. 6546) (concluding that statements of members of board of supervisors in debate on passage of legislation may be used to ascertain the general object of legislation, though not to explain the meaning of particular terms used); *New Orleans Pac. Ry. Co.*, 30 La. Ann. at 988 (stating that a court may consult "the discussions attendant upon the progress of the legislation through its various stages, as well as the *projet* of the law" in order to determine the meaning and scope of the law); *Maynard v. Johnson*, 2 Nev. 541, 547 (1866) (consulting debates recorded in the Congressional Globe to help determine meaning of the statute); *Harrington v. Smith*, 28 Wis. 43, 70 (1871) (report of the Senate Judiciary Committee "furnishes strong evidence of the sense and meaning of the law, as understood by the legislature itself").

considered by the interpreter of the statute as one piece of evidence “tend[ing] to lead the mind to a certain conclusion” about the intent of the legislature.<sup>214</sup>

But authorities like these coexisted with others that cautioned against the use of legislative history. In *United States v. Union Pacific Railroad Co.*, for example, the Supreme Court concluded it was “not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage.”<sup>215</sup> In *Leese v. Clark*, the California Supreme Court warned that statements by certain Senators during discussion “only express the views entertained by individual members of one body of the national legislature,” and others may have disagreed.<sup>216</sup> “It is evident that the opinions expressed by individual legislators upon the object and effect of particular provisions of an act under discussion, are entitled to very little weight in the construction of the act,” the court continued.<sup>217</sup> “The intention of the legislature must be sought in the language of the act—and the object expressed or apparent on its face—and not by the uncertain light of a legislative discussion.”<sup>218</sup> In his 1891 treatise on statutory construction, Sutherland noted “occasional . . . judicial reference to declarations of members of legislative bodies,” but said that such aids are but slightly relied upon, and the general current of authority is opposed to any resort to such aids.<sup>219</sup> And in contrast to his relatively receptive attitude towards statements by individual legislators, Henry Campbell Black suggested that committee reports “cannot be accepted as pertinent evidence of the meaning which the legislature intended to attach to the statute.”<sup>220</sup>

In the context of such conflicting commentary, *Holy Trinity Church* took the rather modest step of referring with approval to two committee reports, and using them along with “the title of the act, the evil which was intended to be remedied, [and] the circumstances surrounding the appeal to Congress, . . . all [of which] concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor.”<sup>221</sup> The opinion made no effort to establish any particular authority for the

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214. Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws* 228 (St. Paul, West Publishing Co. 1896).

215. 91 U.S. 72, 79 (1875).

216. 20 Cal. 388, 425 (1862).

217. *Id.*

218. *Id.* Similarly, in *Bank of Pennsylvania v. Commonwealth*, 19 Pa. 144, 156 (1852), the Pennsylvania Supreme Court approved charging the jury to ignore a proclamation and message of the Governor, journals of the House of Representatives, and the reports of its committees in construing a tax statute. Such evidence, the Court said, “was not only of no value, but it was delusive and dangerous” and in any event showed only that a minority of House members favored a different position. *Id.*

219. J.G. Sutherland, *Statutes and Statutory Construction* 384 (Chicago, Callaghan 1891).

220. Black, *supra* note 214, at 226 (citing two English cases and *Bank of Pennsylvania*, discussed *supra* note 218).

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

statements of legislators or committees beyond the cumulative effect they had when considered with other evidence often used for statutory interpretation, and went no further than the prior opinion in *Jennison* in counting legislative history as relevant to determining legislative intent.<sup>222</sup>

Perhaps the reason *Holy Trinity Church* is so often cited as creating a revolution in statutory interpretation is not the principles upon which it drew, but the fact that the Court used them in this particular case to ignore the literal language of a statute.<sup>223</sup> It is one thing, after all, to talk of the "spirit" of a statute in order to choose among plausible understandings of ambiguous language. It is quite another to invoke the spirit to justify an interpretation in direct conflict with apparently clear language. Yet *Holy Trinity Church* was not the first decision to follow legislative intent rather than the clear letter of a statute, though the literal language was generally trumped by reference to the legislature's purpose and not by recourse to the legislative history.<sup>224</sup> Such decisions were rare before

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222. Although *Holy Trinity Church* was not a departure from prior precedent, it was *Holy Trinity Church* that was cited in the years immediately following when the Court looked at the legislative history of a bill to "place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances." *Chesapeake & Potomac Tel. Co. v. J. Forrest Manning*, 186 U.S. 238, 246 (1902) (quoting *Platt v. Union Pac. R.R. Co.*, 99 U.S. 48, 64 (1878), and citing as well *Blake v. National Banks*, 90 U.S. (23 Wall.) 307, 309 (1874)). See *United States v. St. Paul, Minn. & Manitoba Ry. Co.*, 247 U.S. 310, 318 (1918); *Woodward v. de Graffenried*, 238 U.S. 284, 295-96 (1915); *Binns v. United States*, 194 U.S. 486, 495 (1904) (noting that, although debates in Congress generally are not appropriate sources of information to determine the congressional intent, "yet it is also true that we have examined the reports of the committees of either body with a view of determining the scope of statutes passed on the strength of such reports"); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 360 (1897) (White, J., dissenting). Perhaps these citations marked the beginnings of the prominence of *Holy Trinity Church* as the seeming foundation for non-textualist interpretation for both its supporters and detractors.

223. See Vermeule, *supra* note 20, at 1836 & n.15 ("*Holy Trinity* was the first majority opinion of the Supreme Court to give legislative history sufficient weight to trump contrary statutory text.>").

224. See, e.g., *Jones v. Guaranty & Indem. Co.*, 101 U.S. 622, 626-27 (1879) (construing statute to permit company to mortgage debt before incurring it, though literal language would not allow it, because legislative purpose of statute would be served by this kind of mortgage); *Heydenfeldt v. Daney Gold & Silver Mining Co.*, 93 U.S. 634, 638 (1876) (statute grants to state specified sections of land for support of schools; although literal language would support plaintiff's claim to land he received from state grant, Court supports defendant's claim deriving from United States grant by construing statute according to the spirit and intent of the law derived from "considering the necessity for [the law], and the causes which induced its enactment"); *Thompson v. State*, 20 Ala. 54, 61-62 (1852) (statute forbids state from opening a new road "through any enclosure whilst there is a crop growing in the same"; court creates exception where individual planted small isolated patch of wheat in path of already planned road, although literal language would apply); *Maxwell v. Collins*, 8 Ind. 38, 39-40 (1856) (statute requires any lawsuit be brought in township where defendant resides; despite breadth of language, court concludes requirement applies only when suit is brought in defendant's county of

1892, to be sure, and some—though by no means all—might be characterized as more narrowly drawn efforts to construe statutes to avoid absurd results, a doctrine that even an avowed textualist like Justice Scalia endorses.<sup>225</sup> Nonetheless, *Holy Trinity Church* was not unique, either in the general doctrine it espoused or the degree to which it “ignored” the statutory text.

Why, then, has *Holy Trinity Church* become the focus of so much of the debate about the validity of non-literal interpretation?<sup>226</sup> Perhaps it was the confluence of all of these features—invocation of the spirit of an act, reference to a committee report, overcoming the literal meaning of seemingly plain text—in a single case that led subsequent courts to turn

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residence, since intent of legislature was to prevent justices in the county seat from monopolizing court business); *Commonwealth v. Reynolds*, 12 S.W. 132, 132 (Ky. 1889) (finding that though letter of the act prohibiting all sale of liquor except by a physician would bar sale by druggist under doctor’s prescription, consideration of legislative intent leads to different result); *Brown v. Thompson*, 77 Ky. (14 Bush) 538, 538–39 (1879) (statute permits recovery of money by “any person” who loses to another in gaming; though letter of statute would mandate recovery by one who sets up gambling business and loses money to customers, such compensation would violate legislative purpose and should not be considered within the statute); *Ingraham v. Speed*, 30 Miss. 410, 413 (1855) (statute broadly prohibiting banks from purchasing and holding land does not prevent bank from satisfying its lien by buying and selling property; “the policy of the statute was doubtless to restrain and prohibit reckless expansions in banking, and speculations in property,” not to prevent bank from collecting debts); *State ex rel. Missouri Mut. Life Ins. Co. v. King*, 44 Mo. 283, 284–85 (1869) (statute says life insurance company cannot do business in state unless it has specified amount invested in certain assets, including notes of bonds secured by liens on “unencumbered real estate worth at least double the amount loaned”; court adds requirement that property be in Missouri because need for superintendent to have basis for assessing value of property must have been in minds of legislature when enacting law); *Thompson v. Egbert*, 17 N.J.L. 459, 462–63 (1840) (statute requires surviving wife to elect within six months between her dower rights and property devised by husband; despite breadth of language, in order to effectuate intent of legislature to protect widow, court finds exception where, after such election, widow would be evicted from devised land due to debts on estate); *Taylor v. McGill*, 74 Tenn. 294, 300–02 (1880) (provision tolling statute of limitations while person to be sued is out of state held not to apply where suit would be brought against absent administratrix; plaintiffs could have sued heirs or property itself in her absence, so purpose of statute not served by extending time to file suit).

225. See Scalia, *supra* note 16, at 23–24. Absurdity, of course, is in the eyes of the beholder. No doubt Justice Brewer, at least, thought the application of the Alien Contract Labor Act to Dr. Warren would be absurd.

226. See, e.g., *supra* notes 14–19, 190–191 and accompanying text; Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 Marq. L. Rev. 161, 168 (1996) (“By citing *Holy Trinity Church*, a judge signals he or she is about to detour from the plain meaning of the statute.”); Daniel A. Farber, *The Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective*, 81 Cornell L. Rev. 513, 514 (1996) (reviewing *Interpreting Statutes: A Comparative Study* (D. Neil MacCormick & Robert S. Summers eds., 1991)); William Funk, *Faith in Texts—Justice Scalia’s Interpretation of Statutes and the Constitution: Apostasy for the Rest of Us?*, 49 Admin. L. Rev. 825, 842–43 (1997) (reviewing Antonin Scalia et al., *A Matter of Interpretation: Federal Courts and the Laws* (1997)); Frederick Schauer, *Constitutional Invocations*, 65 Fordham L. Rev. 1295, 1307–09 (1997).



to it, rather than other opinions, as a source of authority. Perhaps it was also the prominence of the statute being interpreted, the relative notoriety of the proceeding against the Church, and the fact that Brewer cited no precedent either when he referred to the "familiar rule . . . often asserted" that spirit may supercede letter,<sup>227</sup> or when he looked to committee reports to determine legislative intent, leaving *Holy Trinity Church* as the only apparent source of authority.

Perhaps it was all these factors that led at least one influential commentary on statutory construction to alter its articulation of interpretation methodology shortly after the Supreme Court decided *Holy Trinity Church*.<sup>228</sup> In the 1891 edition of Sutherland's treatise on statutory construction, resort to legislative materials was not encouraged, although "when occasion arises for resort to . . . extrinsic facts" because of ambiguity, "a court may obtain information from any authentic source."<sup>229</sup> No mention was made of committee reports, though Sutherland cited to use of the journals of a legislative body, typically containing procedural information about the adoption of an act but little or no substantive commentary from the legislative debates. Only "occasionally" had there been "judicial reference to declarations of members of legislative bodies, but such aids are but slightly relied upon, and the general current of authority is opposed to any resort to such aids."<sup>230</sup> In 1904, in a second edition written by John Lewis,<sup>231</sup> the rules had changed. The treatise repeated its disapproval of the use of the "declarations of members," but noted that "the proceedings of the legislature . . . may be taken into consideration in construing the act" and that reports of committees thus had been declared "proper sources of information in ascertaining the intent or meaning" of an act, citing *Holy Trinity Church*—along with several recent state cases.<sup>232</sup> It took Henry Campbell Black a bit longer to shift gears. In 1896, he still noted that "[i]t is generally agreed, by both the English and American courts, that reports or recommendations made to the legislative bodies by their respective committees in relation to a pending measure cannot be accepted as pertinent evidence of the meaning which the legislature intended to attach to the statute," though mentioning one

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

228. William Eskridge was the first to note this shift. See Eskridge, *Statutory Interpretation*, supra note 22, at 209.

229. Sutherland, supra note 219, at 383.

230. *Id.* at 384.

231. J.G. Sutherland, *Statutes and Statutory Construction* (2d ed. 1904) ("Second edition by John Lewis"). A measure of the emerging importance and activity in the field of statutory interpretation are the six thousand new cases, almost two hundred fifty new sections, and seven hundred pages added in the second edition, which appeared only thirteen years after the first. See John Lewis, *Preface to 1 Statutes and Statutory Construction*, supra, at iii.

232. 2 *id.* § 470, at 879–80, 882. It is worth noting that none of the state cases cited by Sutherland/Lewis cited to *Holy Trinity Church*, suggesting again that the Supreme Court's decision may have been in keeping with trends already appearing in other courts.

state case holding otherwise.<sup>233</sup> By 1911, he noted that “the prevalent judicial opinion is now the other way,” though without citing *Holy Trinity Church* for that proposition.<sup>234</sup> These treatises are likely themselves to have been influential in changing statutory interpretation methodology and in bringing attention to *Holy Trinity Church* in the process.<sup>235</sup>

The best explanation of the notoriety of *Holy Trinity Church* may lie, however, not in the nature of the Court’s consideration of legislative intent, but in the final portion of the opinion in which Brewer waxed eloquent about the Christian nature of the United States and the impossibility of believing that Congress would have intended “to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation.”<sup>236</sup> Both supporters and critics of non-textualist interpretation may be excused for believing that Brewer and the Court were not truly convinced of the correctness of his articulated understanding of legislative intent, but instead stretched the facts and the law to reach a desired outcome. Moreover, Brewer’s grandiloquent speech describing in great detail the many references to Christianity in a host of official and unofficial documents appears so overblown and personal,<sup>237</sup> at least to modern sensibilities, as to cast doubt on the

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233. Black, *supra* note 214, at 226. Opinions of individual members also could not serve as authority on a matter of interpretation, according to Black, though they might be considered as evidence of the history of the times and for the force of the argument made. See *id.* at 228–29.

234. Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws* 311 (2d ed. 1911). Use of legislative history was still limited to circumstances where there is “real doubt” about the meaning of the law, however. *Id.*

235. Although *Holy Trinity Church* did not mark a complete departure from prior practice, as some commentators have claimed, it was part of a gradual shift towards making more use of legislative history. William Popkin suggests the change was a “natural evolution” as judges became more distant from the legislative process and realized they needed assistance in understanding legislative purpose when before they could simply rely on their knowledge of the public history of a statute. See William D. Popkin, *Statutes in Court* 122 (1999). William Eskridge argues that reliance on legislative history allowed judges to escape charges of judicial activism even as they imposed conservative and restrictive interpretations on legislation in the *Lochner* era. See Eskridge, *Statutory Interpretation*, *supra* note 22, at 205–10.

236. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892).

237. Brewer’s personal commitment to Christianity grew naturally from his upbringing and was a constant theme throughout his adult life. Brewer’s father was a Congregational minister who spent a number of years as a missionary. See Michael J. Brodhead, David J. Brewer: *The Life of a Supreme Court Justice, 1837–1910*, at 1 (1994). Brewer was born in Smyrna, Asia Minor, during one such missionary tour. As a young lawyer recently arrived in Kansas Territory, Brewer helped to establish the First Congregational Church and served as both Bible class teacher and Sunday school superintendent. As an Associate Justice of the Kansas Supreme Court in 1883, in an address on “The Scholar in Politics” to graduates of Washburn College, Brewer spoke of “the teachings of Christ” as the “bases of modern republican institutions.” *Id.* at 48. That same year, in language he would borrow almost ten years later in *Holy Trinity Church*, he noted in one of his Kansas Supreme Court opinions that the United States was “a Christian commonwealth.” *Wyandotte County Comm’rs v. First Presbyterian Church of Wyandotte*,

entire judgment of which it is a part.<sup>238</sup> Perhaps it is that which leads one commentator to conclude that "*Holy Trinity Church* is the case you always cite when the statutory text is hopelessly against you . . . . The tactic of relying upon the case does sometimes resemble the 'hail Mary' pass in

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1 P. 109, 112 (Kan. 1883). When Brewer arrived in Washington to join the United States Supreme Court in 1890, he also "united" with the First Congregational Church of Washington and, addressing the congregation one week later on the occasion of the twenty-fifth anniversary of that Church, noted his belief that "the law and the gospel ought always to go together." Brodhead, *supra*, at 128.

In 1892, after declaring on behalf of the United States Supreme Court that the United States was a Christian nation, Brewer cited his own opinion as authority for that proposition in an address to the annual meeting of the American Home Missionary Society. "This is a Christian nation," he said. "Such is the declaration of your highest court." *Id.* at 128–29. Brewer later used similar language in his Haverford lectures. See *supra* note 13. He also occasionally used biblical references in his own opinions. For example, in *Fidelity & Deposit Co. v. L. Bucki & Son Lumber Co.*, 189 U.S. 135, 138 (1903), Brewer wrote:

We do not wonder at this observation of the Court of Appeals, as we find from the record that the plaintiff filed in that court thirty-seven assignments of error covering seventeen printed pages, and the defendant thirty-nine such assignments. It may be true, as the Scriptures have it, that "in the multitude of counsellors there is safety," but it is also true that in a multitude of assignments of error there is danger.

See also *Provident Life & Trust Co. v. Mercer County*, 170 U.S. 593, 602 (1898) (Brewer, J.) (construing a statute by comparing the language to the first sentence of Bunyan's *Pilgrim's Progress*, "[t]hat book which is said to have had a wider circulation than any except the Bible").

238. See, e.g., *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 474 (1989) (Kennedy, J., concurring) (stating that "[t]he central support for the Court's ultimate conclusion that Congress did not intend the law to cover Christian ministers is its lengthy review of the 'mass of organic utterances' establishing that 'this is a Christian nation'"). In this regard, Brewer's litany is suggestive of Justice Harry Blackmun's paean to baseball in *Flood v. Kuhn*, 407 U.S. 258, 260–64 (1972), upholding baseball's exemption from the antitrust laws, which was criticized as an incorrect decision made under the influence of a romanticized devotion to the sport. See, e.g., Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* 190 (1979) (noting that Justice Brennan was surprised by Blackmun's draft opinion; he "thought Blackmun had been in the library researching the abortion cases, not playing with baseball cards"); Paul Campos, *Silence and the Word*, 64 U. Colo. L. Rev. 1139, 1142, 1143 (1993) (calling Blackmun's list of baseball greats a "strange chant" that provides a "transrational justification" for his opinion and that is "reminiscent of nothing so much as that portion of the canon of the Catholic mass in which the priest intones the names of thirty-seven saints"); Sanford Levinson, *Why Select a Favorite Case?*, 74 Tex. L. Rev. 1195, 1198 n.10 (1996) (referring to the "(in)famous Part I" of Blackmun's opinion containing his list of greatest players); Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. Chi. L. Rev. 1421, 1434–35 (1995) (criticizing Blackmun's expression of personal views in *Flood v. Kuhn* and other cases as "embarrassing performances"); Stephen F. Ross, *Reconsidering Flood v. Kuhn*, 12 U. Miami Ent. & Sports L. Rev. 169, 173–74 (1995) (referring to the failure of Justices White and Burger to join Blackmun's ode to baseball and to off-the-record comments that "ridiculed" Blackmun for the content of Part I, and noting that such criticism has obscured the merits of the decision taken in the context of its times).

football.”<sup>239</sup> Although the Supreme Court’s reading of the Alien Contract Labor Act finds ample support in the legislative history and in the purposes Congress sought to address by the law, *Holy Trinity Church* may forever be remembered as the case in which the Court heralded its willingness to ignore statutory text in favor of a misguided effort to reach what it perceived to be a just result—and did so by communing with spirits.

#### IV. REVELATION: THE MEANING OF THE HISTORY

What should a court do when faced with the question raised in *Holy Trinity Church*? Should the operative and seemingly broad language of a statute be controlling, irrespective of the content of the legislative history? “New textualists” like Scalia and Vermeule<sup>240</sup> would hold Congress to the words it used, whatever the content of the legislative history, because of the judiciary’s institutional incompetence to determine the true intent of Congress. Even if persuaded of the “true” Congressional intent, and of the possibility of determining legislative meaning in this fashion, they might still enforce the words that Congress actually used because to do otherwise would permit Congress to legislate without completing the required process for enactment of legislation. Reading the words of the statute differently than they were written, they argue, would promote just the kind of sloppy drafting that was evident—and described by the drafters themselves—in the Alien Contract Labor Act.

But the textualist approach prevents a court from attempting to fulfill what it *can* determine of legislative intent expressed elsewhere than in the statutory language. Although it may be technically impossible to determine the specific legislative intent as to a specific issue<sup>241</sup>—whether clergy were meant to be excluded from the ban on importation of contract labor, for example—the thorough review of the legislative history of

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239. Frickey, *supra* note 19, at 247. The name of the case appears almost equally evocative. At the oral argument in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), Justice Stevens asked Solicitor General Starr if “this is a plain language case or a Holy Trinity” case. Starr replied that it was “somewhere in between. . . . [T]here certainly is a ‘spirit’ to the compromise, but my argument is going to be grounded on the structure of this statute . . . not some broad, vague, spiritual context . . . .” Transcript of Oral Argument, *Robertson*, available in 1991 WL 636570, at \*4–\*5. Observers—including “[s]easoned lawyers and reporters”—were apparently puzzled by the references:

[T]he courtroom was abuzz. . . . Surely, some said, the reference was meant as a metaphor to suggest a bright line of separation between the three branches of government. Others, just as certain, said it was some kind of inside joke akin to a “Hail Mary pass,” suggesting that the Court would need to pray for divine inspiration or luck to figure out what Congress meant in the statute.

Tony Mauro, *Courtside: Stevens’ Holy Trinity*, *Legal Times*, Dec. 9, 1991, at 10. Justice Scalia, one supposes, would agree with the latter characterization. In any event, the invocation of the “spirit” of an act together with the reference to the Holy Trinity in the title of the case seems irresistible.

240. The term is from Eskridge, *New Textualism*, *supra* note 184, at 623.

241. See *id.* at 642–44 (the “realist criticism”).

the Alien Contract Labor Act demonstrates that it is possible to understand the general purposes being served by a statute, which helps to ensure a more complete and historically accurate understanding of the law.

Ignoring legislative history also prevents the interpreter from understanding the context in which the legislator used the words written into the statutory text. In construing the words of the Alien Contract Labor Act as clearly proscribing the importation of any kind of laborer, Justice Scalia ignores not only the legislators' statements of statutory purpose and intent, but also the history of labor and immigration that, even without the legislative history of the Act, helps inform our understanding of the way in which the legislators used "labor" and "service" in the statute.<sup>242</sup> While one cannot avoid being affected by modern contexts and perceptions when attempting to understand legislative history,<sup>243</sup> the same is true when attempting to understand the bare statutory words themselves. The legislative history at least may alert the interpreter to the possible complexities of the language used in the statute. Even if the proper aim of statutory interpretation is to seek "objective meaning" rather than "subjective intent,"<sup>244</sup> knowing the legislative and other history surrounding enactment inevitably affects conclusions about what those words—even words as seemingly clear as "labor or service of any kind"—"objectively" mean.

Finally, reading statutory words as written, without recourse to legislative history, amplifies the inevitable vagaries of the legislative process. The history of the Alien Contract Labor Act demonstrates that, even in simpler times, Congress proved incapable of being clear and thorough in its statutory drafting, though it recognized and acknowledged the crudity of its language. A textualist approach will not likely result in better statutes that accurately reflect legislative intent, but instead in unintended consequences resulting from the realities of legislative work.<sup>245</sup>

Critics of the use of legislative history also contend that the sheer volume of legislative history material and the resource limitations on

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242. See Eskridge, *Unknown Ideal*, supra note 24, at 1517–18 (noting that Scalia's reading of the statute is ahistorical and pointing to contemporaneous dictionary definitions and judicial construction of similar words in the Chinese Exclusion Act as providing some historical context that Scalia ignores). It is worth noting that *Holy Trinity Church* was one of many cases in which the courts narrowly construed the Alien Contract Labor Act (and related laws) so as not to "unduly trespass upon the traditional American policy that extends a welcome to all." Samuel P. Orth, *The Alien Contract Labor Law*, 22 *Pol. Sci. Q.* 49, 60 (1907). The courts required great specificity in complaints brought under the Act, often construed the exceptions for certain classes of immigrants broadly, refused to infer the existence of a contract from suggestive facts, and declined to apply the statute to those who did not enter the country with intent to remain. See *id.* at 52–60; see also Erickson, supra note 117, at 171–76.

243. See Eskridge, *New Textualism*, supra note 184, at 644–46 (the "historicist criticism").

244. Scalia, supra note 16, at 29.

245. Cf. Eskridge, *Unknown Ideal*, supra note 24, at 1551 (noting chaotic nature of legislative process).

judges and lawyers inevitably will lead to unacceptable levels of error if judges purport to use legislative history to interpret statutes.<sup>246</sup> Nor, they say, can a judge solve these problems by simply using caution, restricting use of legislative history to arguably more authoritative sources such as committee reports and sponsor statements, or seeking only the purpose, not specific intent, in the legislative materials.<sup>247</sup> *Holy Trinity Church* is offered as a prime example of the failure of such strategies, with Brewer relying on “misleading committee reports,” “overlook[ing] policy reasons . . . that supported a legal prohibition broader” than what was initially imposed, and “misapprehend[ing] the questions at issue” because of his lack of expertise in understanding the legislative policy discussions.<sup>248</sup> The exploration of the history of the Alien Contract Labor Act demonstrates, however, that Brewer’s analysis, while not entirely correct, more accurately reflected the policy concerns of Congress than would a literal interpretation of the statutory words. As suggested by William Eskridge in his effort to analyze the costs and benefits of consulting legislative history,<sup>249</sup> the price of excluding legislative history may well be to prevent judges from viewing the statutory language as the legislators saw it, making the interpretation less, not more, democratic. Failing to consult the history behind enactment of the Alien Contract Labor Act would have left the Court interpreting the text in a vacuum, with little to connect the words to the national labor and immigration policies emerging from Congressional deliberations in the last quarter of the nineteenth century. Understanding that kind of political and social context for a statute seems vital to implementing the democratic will as expressed through legislative action, and paying attention to legislative history seems indispensable to achieving that understanding.

No doubt the debate will continue about whether legislative history ought to be used in construing statutes, and the full history of the *Holy Trinity Church* case may change few minds about either the narrow question of the meaning of labor or service in the Alien Contract Labor Act or the broader methodological question. It should at least serve to demonstrate, however, that Brewer—who construed the statute, we should remember, only seven years after its passage, within memory of the political circumstances that led to its enactment<sup>250</sup>—had a firmer foundation for

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246. See, e.g., Scalia, *supra* note 16, at 31–37; Vermeule, *supra* note 20, at 1860–77.

247. See Vermeule, *supra* note 20, at 1877–85.

248. *Id.* at 1881, 1885.

249. See William N. Eskridge, Jr., Should the Supreme Court Read *The Federalist* but Not Statutory Legislative History?, 66 *Geo. Wash. L. Rev.* 1301, 1321–23 (1998).

250. It is worth noting that in 1886, just a year before the prosecution of *Holy Trinity Church* began, the federal court in Michigan described the purpose of the Alien Contract Labor Act without any citation of authority, stating:

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

his interpretation than has often been suggested, making it more difficult to view the case as an instance of a judge blithely substituting his own judgment for the judgment of the legislature.<sup>251</sup> It should no longer be possible to say, as Justice Kennedy did in his concurrence in *Public Citizen v. United States Department of Justice*, that "the potential of this doctrine to allow judges to substitute their personal predilections for the will of Congress is so self-evident from the case which spawned it as to require no further discussion of its susceptibility to abuse."<sup>252</sup> Lawyers and judges who cite to legislative history may, like Brewer, do a less than thorough job of exploring that history, sometimes from unfamiliarity with the whole, sometimes from an excess of zeal in advocacy. This is no more reason to condemn wholesale any attempt to use legislative history, however, than to condemn efforts to use case law precedent or to explore relevant political, social, or economic history, though both are subject to the same missteps and abuses.<sup>253</sup> Striving to understand the statutory words in their broader context is the best way of applying the statute as written, for it was written at a particular time and place and as the result of a particular sequence of events and circumstances, and can only be fully comprehended with that background in mind.

#### EPILOGUE

In passing the Alien Contract Labor Act, Congress apparently sought in part to protect cultural institutions in the United States from foreign workers who had no interest in participating in American democratic so-

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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 evil finally became so flagrant that an appeal was made to congress for relief by the passage of the act in question, the design of which was to raise the standard of foreign immigrants, and to discountenance the migration of those who had not sufficient means in their own hands, or those of their friends, to pay their passage.

*United States v. Craig*, 28 F. 795, 798 (C.C.E.D. Mich. 1886).

251. See Scalia, *supra* note 16, at 22.

252. 491 U.S. 440, 474 (1989) (Kennedy, J., concurring).

253. On the uses and abuses of history (not the legislative kind) in judicial decisionmaking, see, e.g., Martin S. Flaherty, History "Lite" in Modern American Constitutionalism, 95 Colum. L. Rev. 523 (1995); Peter Charles Hoffer, "Blind to History," The Use of History in Affirmative Action Suits: Another Look at *City of Richmond v. J.A. Croson Co.*, 23 Rutgers L.J. 271 (1992); Kelly, *supra* note 207; Paul L. Murphy, Time to Reclaim: The Current Challenge of American Constitutional History, 69 Am. Hist. Rev. 64 (1963); Neil M. Richards, Clio and the Court: A Reassessment of the Supreme Court's Uses of History, 13 J.L. & Pol. 809 (1997); William F. Swindler, Legal History—Unhappy Hybrid, 55 L. Libr. J. 98 (1962); Patricia Wallace, Comment, Grave-Digging: The Misuse of History in Aboriginal Rights Litigation, 30 U. Miami Inter-Amer. L. Rev. 489 (1998); Edward C. Walterscheid, The Use and Abuse of History: The Supreme Court's Interpretation of Thomas Jefferson's Influence on the Patent Law, 39 IDEA 195 (1999); John C. Yoo, Clio at War: The Misuse of History in the War Powers Debate, 70 U. Colo. L. Rev. 1169 (1999).

ciety, who would fail to become citizens, and who, for that reason, “are certainly not a desirable acquisition to the body-politic.”<sup>254</sup> When the Supreme Court issued its decision in *Holy Trinity Church*, it no doubt assumed that the Reverend Walpole Warren would not fit such a description. Six weeks after the decision was rendered, however, Dr. Warren announced his intention to forego becoming a citizen of the United States. “I have refrained from taking out papers as a citizen of New York because the city is so wicked and corrupt that I would not wish to be identified with it, even as a voter,” Warren was reported to have said.<sup>255</sup> The *New York Times*, which had strongly supported him editorially during the prosecution of the Church for hiring him, quickly revised its opinion. Referring to his “high-salaried church,” the *Times* noted in its news coverage that the country had “proved attractive enough to him to lure him from his native land and from which he has shown no purpose to depart voluntarily.”<sup>256</sup> In an editorial column, the *Times* said his statement was a most astounding declaration” and spoke disparagingly of a clergyman

who accepts a pastorate, presumably for the purpose of doing good, and then refuses to cast in his lot with his people, and holds himself aloof from their efforts as good citizens to better the evil about them! . . . If Mr. Warren had been excluded [under the contract labor law] upon the ground he himself has now furnished, we are quite sure that the Republic would have taken no detriment by his exclusion.<sup>257</sup>

Although this reaction of the *Times* overlooked Warren’s real contributions to his adopted country,<sup>258</sup> it is a final irony that the spiritual com-

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254. 15 Cong. Rec. 5359 (1884), quoted at length at supra text accompanying notes 119–141.

255. E. Walpole Warren An Alien, N.Y. Times, Apr. 12, 1892, at 6. Warren referred specifically to political corruption in New York (“Until [New York] has rid itself of an administration that is vile from top to bottom I will remain an alien. The entire municipal machine, I believe, from Mayor Grant down, is absolutely corrupt.”), but may also have been concerned about other moral lapses. In a reported speech made several years before, Warren strongly criticized various forms of popular entertainment for their pernicious influence. See Stage and Dance Denounced, N.Y. Times, Mar. 2, 1888, at 3 (“Don’t bring up your sons and daughters to dance. Thank God, my children do not know how to dance! . . . I shall never set foot in a theatre until all indecent plays and improper dresses have been banished from the stage and the employees of the theatre are allowed some time to serve God.”).

256. E. Walpole Warren An Alien, supra note 255, at 6.

257. The Alien Preacher, N.Y. Times, Apr. 12, 1892, at 4.

258. Dr. Warren contributed substantially to the American polity as rector of Holy Trinity Church and later as the first rector of an expanded St. James’ Church when the latter merged with Holy Trinity Church in 1895. Among his other accomplishments, Warren worked successfully to extend the philanthropic ventures of the Church, which were a special mission of his original parish, and became known as a powerful preacher who drew people from all over the city to support that work. See Lindsley, supra note 1, at 48, 56, 62–67. Upon his death, the newsletter of the Church of the Holy Trinity reported the “great loss” to the Church:

All through his long and busy life his thirst for souls was keen and intense, he had peculiar ability in speaking to the consciences of men and stirring the depth of



mitments of the man whom the Supreme Court worked so hard to admit, and because of whom Congress later amended the statute that threatened to exclude him, led him to action, that—at least for a time<sup>259</sup>—raised even more questions about the spirit of the law that challenged his entry.

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their nature; and there are many who can testify that to some word or sermon of our late Rector they owe their first step toward the light and the beginning of their new life.

The Chimes (newsletter of the Church of the Holy Trinity), Oct. 1903, at 6–7.

259. Apparently Warren later changed his mind or had simply used his citizenship status to make a moral and religious point, because he was naturalized before the United States District Court for the Southern District of New York on January 31, 1899. Letter from A.W. Robinson, *supra* note 99.