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Comments on 'Strategic Manoeuvring with the Intention of the Legislator in the Justification of Judicial Decisions'

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The Supreme Court's 1892 decision in *Holy Trinity Church versus United States* that Eveline Feteris had chosen for her study demonstrating the importance of pragma-dialectical theory is a most prominent case in law theories. The case that goes back to 1892 is considered as being a classical case (in the US) of the debate whether judges should interpret statutes and the Constitution in a literal way or not. More technically speaking, the debate is about whether judges interpreting statutes should consult legislative history as a reliable and necessary interpretative source. The feature that had made *Holy Trinity* so prominent was that it is the first majority opinion of the Supreme Court to give legislative history sufficient weight to trump contrary statutory text. Among the manifold argument against the legislative-history position, there are two which are particularly important: First, according to the textualist position, statutes themselves are the law, reliance on legislative history encourages the assumption that legislative intent is the law and that statutes are merely evidence of that intent. Secondly, legislative intention is a meaningless concept because collective bodies do not have necessarily a coherent intention; consequently, consulting legislative history produces bad statutory interpretation. Against these assertions, defenders of the legislative history position usually argue that the constitutional provisions are prescriptive in their nature, however, these provisions do not forbid judges to use any particular method of statutory interpretation. And, hence, an interpretation as judge Brewer in the *Holy Trinity* case had offered it is most legitimate.

For obvious reasons, Feteris' demonstration is set out on the ground of the legislative-history position. A textualist position could hardly accept that argumentation theory would ever contribute to the solution of the *Holy Trinity* case. In the first part of her paper, Feteris describes the role of "the judge in the application of legal rules and his burden of justification when he wants to make an exception to

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a rule on the basis of unacceptable consequences.” She argues that in this case the judge has to deal with a tension between the requirement of legal certainty and the requirement of reasonableness and fairness. According to Feteris, one possible solution of this tension would be if the judge can demonstrate that his making an exception would be coherent with the intention of the legislator. The position that Feteris takes is obviously the one of legislative-history. Textualist judges and commentators would argue against this saying that the judicial practice of consulting legislative intention as an interpretative source is unconstitutional. Now, what we particularly can learn from Feteris' paper is how the legislative-history position could be most faithful reconstructed in its inner rationality from the point of view of pragma-dialectic approach. Roughly speaking, she shows how first the judge has to demonstrate that only a specific result is desirable, and this because it is compatible with a precise purpose that is intended by the legislator respectively is a rational goal underlying the legal system. This is exactly what happened in *Holy Trinity*. After that, the opinion of the Supreme Court had initially conceded that “the [church's act] is within the letter of this section,” it proceeds on the premise that the legislator intention trumps text: “While there is great force to this reasoning, we cannot think congress intended to denounce with penalties a transaction like that in the present case. 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.”

In the following part, the Court gives two alternative reasons for concluding that the case falls outside the intent of the statute's makers. Feteris discusses these two grounds later on in her analysis of the opinion under *The justification of the choice of the argumentation scheme*. The first ground is that the critical phrase, which prohibited immigration under contract to perform “labor or service of any kind,” was intended to cover only manual labour rather than professional or intellectual work. The second ground is that Congress could not have intended to prohibit the immigration under contract of a Christian minister. In order to support the first ground, the Court relies on several sources. He argues that the statute should be limited to the scope of the evil that the statute was designed to remedy. It was “common knowledge” that the act's “motive” was to prevent an influx of “cheap, unskilled labor” in the form of “an ignorant and servile class of foreign labourers.”

Another source that the Court mentions for determining the intention of the legislator is the internal legislative history. This is particularly remarkable, given that in this respect the opinion breaks from traditional doctrine without any further explanation for doing so. Two documents of legislative history are considered. The first is a report from the Committee on labor of the House of Representatives, in which the bill had originated. This report stated that the act wanted to prohibit the immigration or importation of “[labourers] from the lowest social stratum, [who] live upon the coarsest food… and are certainly not a desirable acquisition to the body politic.” The second document, which provided strong support for the Court's limitation of the act to manual “labor or service of any kind,” was a report of the Senate Committee on Education and Labor. Feteris mentions shortly both items where she analyses the justification from the perspective of strategic manoeuvring. Among the different rhetorical techniques the Court uses to present its own

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interpretation as obvious, she refers to the excessive amount of citations from precedents. These, says Feteris, "can be considered as an acceptable way of justifying a legal decision."

At first glance this seems convincing and the only conclusion that Feteris draws is that the reliance on precedent documents is "rhetorically strong in a legal context". But still one question remains open: does this suffice to demonstrate that the Court correctly read the legislative history to restrict the statute's coverage to manual labour? The problem with the Court's reliance on the legislative history is that, even if it might be considered as strong from a rhetorical point of view, there is enough evidence to assume that the Court apparently mishandled the legislative history at issue in *Holy Trinity*, overlooking or ignoring events. As Vermeule (2006) had recently shown, the legislative history at issue in *Holy Trinity* did not support the Court's holding, but rather supported the rule apparent on the face of the statutory text itself. Vermeule argues that even if there was some minor tinkering in the debate, and an exception for artists was inserted, the Senate had essentially settled the question of the bill's scope in favour of coverage of both brain toilers and manual labourers. And although members of both houses acknowledged that the initial impetus for the bill was the contractual importation of "degraded" manual labour, they also understood the bill's legal scope to extend more broadly. Consequently, the Court's reliance on the House committee reports to support its own view of the case simply overlooked that the legislative product became broader than the particular evil that provided the initial impetus for legislative action (Vermeule, Chap. 4). So, the question remains open to discussion: in what sense could the reliance on precedent documents considered to be strong if justice Brewer apparently misread them? And, moreover: Can this error of interpretation be adequately addressed in pragma-dialectical terms?

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Reference

Vermeule, A. 2006. *Judging under uncertainty: An institutional theory of legal interpretation*. Cambridge, MA: Harvard University Press.