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Missing The Mark: An Overlooked Statute Redefines The Debate Over Statutory Interpretation

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INTRODUCTION

Scholars have long debated the merits of various theories for interpreting statutes. On one side, textualists argue for close adherence to text.[1] On the other side are those who interpret statutes by reference to legislative intent.

At the center of this debate[2] is the seminal 1891 Supreme Court case, *Church of the Holy Trinity v. United States.*[3] That case considered whether the Alien Contract Labor Act, which prohibited the importation of "labor or service of any kind," barred a church from hiring an English

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1. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623–24 (1990).

2. *See* Carol Chomsky, *Unlocking the Mysteries of* Holy Trinity: *Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 907 (2000) ("[T]he 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."); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1836 (1998) ("Much of the judicial and academic commentary on legislative history and interpretive theory in recent years . . . takes *Holy Trinity* as the starting point for discussion.").

3. 143 U.S. 457 (1892).

minister.[4] Writing for the Court, Justice Brewer consciously departed from statutory language and exempted the hiring.[5] Textualist and intentionalist interpreters alike regard *Holy Trinity* as a crucial test case for assessing theories of interpretation.[6]

Months before the Supreme Court decision in *Holy Trinity*, Congress specifically excluded ministers from the Act. Remarkably, the debate gives scant attention to this exclusion. The failure to consider such a highly relevant statute is no isolated mistake. Rather, it reflects a larger blind spot in our thinking about statutory interpretation. Continuing in three parts, this Essay explores the impact of the exclusion on that thinking.

Part One describes *Holy Trinity* and its role in the legal literature. Textualists such as Justice Scalia, and Professors Vermeule and Manning attack the Supreme Court decision. Intentionalist interpreters like Professors Eskridge, Tribe, and Sunstein defend the result of the case, but not Justice Brewer's opinion, which has glaring weaknesses.

Part Two argues that the subsequently enacted exception reveals Congress's intent to exclude ministers from the original Alien Labor Contract Act. Overlooked by current scholars, this argument remedies the weaknesses in Justice Brewer's opinion and was eventually adopted by the Supreme Court. Contrary to scholarly opinion, the effective date of the subsequent statute permits this argument. Congress did not bar using that statute as evidence of prior law.

Part Three considers the wider implications of the overlooked argument. Scholars ignore the subsequent statute because they are preoccupied with the choice between text and intent. The subsequent statute reminds us, however, that statutory interpretation often centers on another logically prior choice, one between competing texts. That choice

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4. *Id.* at 458 (describing the Alien Contract Labor Act of 1885, ch. 164, § 1, 23 Stat. 332, 332 (repealed 1952)).

5. *Id.* at 459.

6. *See, e.g.*, ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 18 (Amy Gutmann ed., 1997) (describing *Holy Trinity* as the "prototypical case involving the triumph of supposed 'legislative intent' . . . over the text of the law"); William N. Eskridge, Jr., *"Fetch Some Soupmeat,"* 16 CARDOZO L. REV. 2209, 2217 n.38 (1995) ("*Church of the Holy Trinity* has . . . been the focal point of the debate between the Supreme Court's 'new textualists' and more purpose-based interpreters."); Frederick Schauer, *Constitutional Invocations*, 65 FORDHAM L. REV. 1295, 1307 (1997) ("*Church of the Holy Trinity v. United States* is not only a case, but is the marker for an entire legal tradition, . . . [one which emphasizes that] there is far more to law than the plain meaning of authoritative legal texts. . . .") (footnote omitted). *See also* John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1685 (2004) (observing that the *Holy Trinity* decision has "become an important and often controversial focal point of the modern statutory interpretation debate").

requires a description of the legislative process richer than any offered in the current debate.

The Essay concludes by presenting one such description—one that acknowledges that legislation involves three distinct communities—public, political, and policy—each with its own dynamics and role in the process. The overlooked argument in *Holy Trinity* illustrates how this description aides in choosing among statutes. The ministers exception deserves retroactive application because it reflects the unwavering opinion of the most influential community—the public at large.

In the end, then, *Holy Trinity* acquires a very different meaning from that assigned to it by current scholars. Once the subsequent statute is considered, the case no longer illustrates the choice between text and intention. At the same time, however, that statute makes *Holy Trinity* a powerful example for a more fundamental and critical task—identifying the governing text.

I. *HOLY TRINITY* AND CURRENT SCHOLARSHIP

A. *The Supreme Court Opinion*

In 1887, the Church of the Holy Trinity, located in New York City, contracted with E. Wolpole Warren, an alien residing in England, to serve as its rector and pastor. The next year, the United States district attorney brought an action under the Alien Contract Labor Act of 1885, which prohibited the importation of aliens to "perform labor or service of any kind."[7] The Court of Appeals held that the Church had violated the Act, which covered "[e]very kind of industry, and every employment, manual or intellectual."[8]

In 1892, the Supreme Court reversed. Writing a unanimous opinion, Justice Brewer conceded that the hiring fell within the statutory language,[9] but held that it nonetheless fell outside congressional intent because Congress could not have wanted to exclude ministers.[10] He held that "however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."[11]

Justice Brewer offered two grounds for this holding. His first was

7. Alien Contract Labor Act of 1885, ch. 164, § 1, 23 Stat. 332, 332 (repealed 1952).

8. United States v. Rector of the Church of the Holy Trinity, 36 F. 303, 305, 306 (C.C. S.D.N.Y 1888), *rev'd sub nom.* Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

9. *See Holy Trinity*, 143 U.S. at 458 ("It must be conceded that the act of the corporation is within the letter of [the Act], for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other.").

10. *See id.* at 459 ("[W]e cannot think Congress intended to denounce . . . a transaction like that in the present case.").

11. *Id.* at 472.

based on specific legislative intent: that Congress only intended to regulate manual labor, not professional services.[12] This intent was evidenced by the title of the Act, which contained only the word "labor,"[13] suggesting a concern with only manual laborers, not professional or intellectual workers.[14] Justice Brewer also found evidence of intent in "the evil [the statute was] designed to remedy"—the immigration of "great numbers of an ignorant and servile class of foreign laborers."[15] Committee hearings focused on "cheap unskilled labor"[16] and the House report mentioned workers "from the lowest social stratum."[17] A final "singular circumstance, throwing light upon the intent of Congress," was the report of the Senate Committee on Education and Labor.[18] That committee recognized that a court might apply the statutory language to professional services,[19] but decided not to report an amendment excluding such services or any amendments at all, "believing that the bill in its present form will be construed as including only those whose labor or service is manual in character, and being very desirous that the bill become law before the adjournment."[20]

Justice Brewer's second ground was based on religion's special place in America.[21] Surveying a vast array of sources—including the commission granted Christopher Columbus,[22] colonial charters,[23] the Declaration of Independence[24], federal and state constitutions,[25] and

12. *Id.* at 463; *See also id.* at 465 ("We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committees of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor.").

13. Alien Contract Labor Act of 1885, ch. 164, § 1, 23 Stat. 332, 332 (repealed 1952) ("An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia").

14. *See Holy Trinity*, 143 U.S. at 463 ("Obviously the thought expressed in this reaches only to the work of the manual laborer, as distinguished from that of the professional man. No one reading such a title would suppose that Congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain.").

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

16. *Holy Trinity*. 143 U.S. at 464.

17. *Id.* at 465.

18. *Id.* at 464.

19. *See id.*

20. *Id.* at 464–65 (quoting 15 CONG. REC. 6059 (1884)).

21. *Id.* at 465 ("But beyond all these matters no purpose of action against religion can be imputed to any legislation . . . because this is a religious people.").

22. *Id.* at 465–66.

23. *Id.* at 466–67 (mentioning the colonial grant awarded to Sir Walter Raleigh, the compact among the Pilgrims on the Mayflower, the fundamental orders of Connecticut, and the charter of Pennsylvania).

24. *Id.* at 467–68 (describing the Declaration of Independence).

25. *Id.* at 470 (describing the United States Constitution); *id.* at 468–70 (describing the constitutions of Illinois, Indiana, Maryland, Massachusetts, Mississippi, and Delaware).

widespread social practices,[26]Justice Brewer concluded "that this is a Christian nation."[27] He could not believe that the legislature of such a nation would ever criminalize the hiring of a minister.[28]

B. *The Role of* Holy Trinity *In Current Scholarship*

Long after it was decided, *Holy Trinity* was regarded as an important case, both for its willingness to depart from the text[29] and for its reliance on legislative history.[30] In the last decade, however, *Holy Trinity* has assumed even greater importance in the midst of a raging debate over theories of interpretation.

1. TEXTUALIST CRITICISM

Holy Trinity's prominence makes it an inviting target to textualists, who reject reliance on intent and legislative history. The most prominent critic, Justice Scalia, directly challenges Justice Brewer's familiar rule. In his essay, *Common-Law Courts in a Civil-Law System*, Justice Scalia presents *Holy Trinity* as "the prototypical case involving the triumph of supposed 'legislative intent' (a handy cover for judicial intent) over the text of the law."[31] He rejects the decision as "nothing but an invitation to

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26. *Id.* at 471 (describing the administration of oaths, the observation of the Sabbath, the existence of charitable organizations under Christian auspices, and the efforts missionary associations).

27. *Id.*

28. *Id.* at 472 ("[C]an it be believed that [such an act] would have received a minute of approving thought or a single vote?").

29. *See* Nat'l Woodmark Mfrs. Ass'n v. NLRB, 386 U.S. 612, 619 (1967); NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760, 377 U.S. 58, 72 (1964).

30. "The earliest Supreme Court case commonly cited for the use of legislative history to construe a statute is Church of the Holy Trinity v. United States." Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 434 n.132 (1994) (citation omitted). *See also* Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 97–98 (1998) (noting that *Holy Trinity* "presaged a gradual change" in Supreme Court reliance on legislative history); Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1091 n.644 (1991) (commenting that *Holy Trinity* "mark[ed] the definitive rejection of [the no-recourse] rule" that had earlier prevented courts from turning to legislative history as a means of engaging in statutory interpretation).

The leading treatise on statutory interpretation reversed its position on the use of legislative history after *Holy Trinity* was decided. The 1891 edition of Sutherland's STATUTES AND STATUTORY CONSTRUCTION disparaged the use of legislative history, and made no specific reference to use of committee reports. *See* J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 383–84 (1st. ed. 1891). The 1904 edition, however, specifically stated that committee reports were "proper sources of information in ascertaining the intent or meaning of an act," citing *Holy Trinity*. 2 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION sec. 470, at 879–81 (John Lewis 2d ed. 1904) [hereinafter SUTHERLAND Second].

31. SCALIA, *supra* note 6, at 18. *See* Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 471 (1989) (Kennedy, J., joined by Rehnquist, C.J. and O'Connor, J., concurring) (criticizing *Holy Trinity*).

judicial lawmaking"[32] concluding "[i]t is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is."[33]

Following Justice Scalia's lead, other textualist scholars attack *Holy Trinity*. Recognizing the case's pioneering use of legislative history,[34] Professor Vermeule claims that the Court misread the record,[35] and that courts are systematically ill equipped to evaluate such history.[36] Professor Manning singles out *Holy Trinity* as a leading example of the absurdity rule,[37]which allows a court to reject a literal reading that yields absurd results. A relentless critic of this rule, Professor Manning finds the Supreme Court decision to be a rare result that cannot be justified on other grounds.[38]

2. INTENTIONALIST DEFENSES

Defenders of intentionalist interpretation rally around the *Holy Trinity* result.[39] Agreeing with Justice Scalia that "*Holy Trinity Church* stands for the proposition that plain text can be trumped by contrary legislative history, statutory purpose, and public values,"[40] Professor Eskridge explicitly draws upon normative considerations, such as the rule of lenity, the statutory purpose, and the longstanding openness toward the immigration of professionals.[41] In a similar vein, Professor Tribe argues that because the statute infringes upon the free exercise of religion, it should be read narrowly in accordance with the canon requiring that courts avoid constitutional issues.[42]

Professor Sunstein also supports *Holy Trinity*. He offers three possible principles for departing from statutory language[43] and then argues

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32. *See* SCALIA, *supra* note 6, at 21.

33. *Id.* at 22.

34. *See* Vermeule, *Legislative History*, *supra* note 2, at 1835 ("*Holy Trinity* elevated legislative history to new prominence by overturning the traditional rule that barred judicial recourse to internal legislative history.").

35. *See id.* at 1837.

36. *See id.* at 1860–63.

37. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2403 (2003) (describing *Holy Trinity* as "perhaps [the Supreme Court's] most influential absurdity decision").

38. *See id.* at 2463.

39. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 360–62 (1990) (praising *Holy Trinity* as a classic example of practical reasoning).

40. *See* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1532 (1998).

41. *See id.* at 1552–53.

42. *See* Laurence H. Tribe, *Comment*, *in* SCALIA, *supra* note 6, at 65, 92–93.

43. *See* Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 542–43 (1997) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION; FEDERAL COURTS

that Justice Scalia's rebuttal of those principles is unconvincing.[44] Professor Sunstein then defends a "modern" *Holy Trinity*, under which agencies would be allowed to go beyond text in interpreting statutes within their jurisdiction.[45]

C. *The Weaknesses of Justice Scalia's Opinion*

The intentionalist defense of the *Holy Trinity* result does not extend to Justice Brewer's two arguments. Intentionalists shy away from his claim that the legislative history showed that Congress intended to limit the statute to manual labor. Professor Eskridge believes that *Holy Trinity* "is a case where legislative history does little work."[46] Even though Professor Chomsky finds that ministers were not part of the contract labor system that troubled Congress,[47] she nonetheless disagrees with Justice Brewer's reading of the legislative history.[48] Intentionalists show even less interest in the Christian nation argument.[49]

This failure to defend the Supreme Court's opinion reflects weaknesses in Justice Brewer's arguments. His claim that Congress intended to limit the Act to manual labor is unpersuasive. The governing language (as opposed to the mere title of the Act)[50] suggests broad application. The Act contained limited exceptions for intellectual occupations,[51] strongly suggesting that its general rule applied broadly.[52] Later congressional action also indicates a wide reach. In 1891, Congress added to the limited exceptions,[53] and, in 1903, it modified the statute to cover

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AND THE LAW (1997) (general statutory language shall not be used to reach a result that is absurd, not intended by the legislature, or which departs from longstanding social practices)).

44. *See id.* at 549.

45. *See id.* at 552–53.

46. *See* Eskridge, *Unknown Ideal*, *supra* note 40, at 1540.

47. *See* Chomsky, *supra* note 2, at 927.

48. *See id.* at 939.

49. *See* WILLIAM N. ESKRIDGE, JR., & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 522–23 (2d ed., West Group 1995) (observing that current readers might be taken aback by Justice Brewer's "Christian nation" argument and questioning whether the argument was critical to his opinion).

50. *See* SUTHERLAND Second, *supra* note 30, at 879–81.

51. Alien Contract Labor Act of 1885, ch. 164, § 5, 23 Stat. 332, 333 (repealed 1952) ("[N]or shall the provisions of this act apply to professional actors, artists, lecturers, or singers, nor to persons employed strictly as personal or domestic servants.").

52. *See* United States v. Rector of the Church of the Holy Trinity, 36 F. 303, 305 (C.C. S.D.N.Y. 1888), *rev'd sub nom.* Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) (concluding that "the proviso is equivalent to a declaration that contracts to perform professional services except those of actors, artists, lecturers, or signers, are within the prohibition" of the Act). *See also* Brown v. Maryland, 25 U.S. 419, 438 (1827) ("[T]he exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause, had the exception not been made.").

53. *See In re* Ellis, 124 F. 637, 643 (C.C.S.D.N.Y 1903) ("It would seem that as if a much simpler amendment would have restricted the act to conform to the original intention of its

contracts to "perform labor or service of any kind, skilled or unskilled,"[54] definitively repudiating any claim that the statute was limited to manual labor.[55]

This textual evidence for a broad reading finds support in the history of the Act. The lobbying behind the Act disproves Justice Brewer's claim that the Act was limited to manual labor. In fact, it was skilled laborers who initially pushed the legislation.[56] Unskilled laborers, represented by the Knights of Labor, joined the effort later.[57] In addition, a member of the House Labor Committee said that the statute applied to a clerk,[58] an intellectual laborer.

Finally, the Senate committee's assertion that Congress intended to limit the Act to manual labor seems to be pure posturing. The committee's claim that a clarifying amendment would have delayed enactment—is, on its face, implausible. A truly noncontroversial amendment does not delay legislation. It can be adopted by a quick voice vote. Furthermore, as Professor Vermeule has shown, subsequent legislative history belie the committee's statement. After its report to the full Senate, the bill moved slowly.[59] Hoping to get a vote before adjournment, the floor manager offered several amendments, including an exception for intellectual services.[60] His offer was unsuccessful, however, and the Senate adjourned without acting.[61] The bill was reintroduced the next session, this time with amendments, but not one exempting intellectual services.[62] The failure to offer an exemption, even with ample time, reveals that none was intended. Indeed, in floor debate, the manager apparently conceded that the statute reached beyond manual labor.[63]

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framers, and it might be argued that this additional enumeration might be taken as an intimation that the words 'labor and service of any kind' were used with a broad meaning.").

54. Act of Mar. 3, 1903, ch. 1012, § 4, 32 Stat. 1213, 1214.

55. *See Ellis*, 124 F. at 643 ("Whatever may have been the intention of Congress in 1885 and 1891 as to skilled labor imported from abroad—whether it sought only to keep out 'the lowest social stratum who live in hovels on the coarsest food,' or sought also to give to skilled labor which uses brains as well as hands somewhat of the protection which it had secured to manufacturing capital—there can be no doubt as to its meaning in 1903.").

56. Glassworkers and other skilled craft unions were the first to lobby for the bill, and the bill's sponsor was past president of the Coopers International Union, closely associated with craft unions. *See* CHARLOTTE ERICKSON, AMERICAN INDUSTRY AND THE EUROPEAN IMMIGRANT 1860–1885, at 155 (1957).

57. *See id.*; Chomsky, *supra* note 2, at 938 n.185.

58. *See* 15 CONG. REC. 5358 (1884) (statements of Rep. Adams and Rep. O'Neill).

59. *See* Vermeule, *Legislative History*, *supra* note 2, at 1848.

60. *See id.* at 1848–49.

61. *See id.* at 1848.

62. *See id.* at 1849.

63. The manager responded to the claim that the bill covered skilled laborers by saying: "If that class of people are liable to become the subject-matter of [importation under contracts to labor], then the bill applies to them." 16 CONG. REC. 1633 (1885) (statement of Sen. Blair). For

Justice Brewer's second argument—that a Christian nation would not have prohibited hiring a minister—lacks any evidence connecting religious values to the Alien Contract Labor Act. In the absence of such evidence, one cannot be sure how members of the 1885 Congress would have reacted to the issue. Perhaps, they would have resisted a ministers exception for fear of opening the doors to other exemptions.[64] In the end, Justice Brewer's litany of sources for his conclusion are so far afield from the statute at issue that he seems to be substituting his views for those of Congress.[65]

II. THE OVERLOOKED ARGUMENT: A SUBSEQUENT STATUTE SPECIFICALLY EXCLUDED MINISTERS

Given the importance of *Holy Trinity*, it is remarkable how little attention is given to a subsequent statute, enacted in 1891, prior to argument before the Supreme Court. That statute specifically exempted from the Act "ministers of any religious denomination."[66] Justices Brewer and Scalia never mention the statute. Others mention it only in passing.[67]

A. *A Powerful Rationale for the Court's Decision*

On its face, the statute provides a persuasive argument for the Court's result. The exemption was directly inspired by the Circuit Court opinion below,[68] which was discussed in committee hearings,[69] and

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further discussion of this statement, see Chomsky, *supra* note 2, at 931; Vermeule, *Legislative History*, *supra* note 2, at 1849–50; Eskridge, *Unknown Ideal*, *supra* note 40, at 1537–38.

64. *See* Manning, *Absurdity Doctrine*, *supra* note 37, at 2428 ("It is at least possible that if the Senate proponents had supported significant new exceptions, such action might have led others to insist on even more exceptions, thereby reducing the bill's likelihood of enactment.").

65. *See* Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 473 (1989) (Kennedy, J., joined by Rehnquist, C.J. and O'Connor, J., concurring in judgment) (criticizing *Holy Trinity* 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" and concluding that "[t]he problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice"); Manning, *Absurdity Doctrine*, *supra* note 37, at 2404 ("Based on its view of society's commonly held attitudes toward religion, the Court simply assumed that [the statute reached unintended cases])" (footnote omitted). *See also id.* at 2421 (observing that the absurdity doctrine "relies on judicially identified social values that have no demonstrable connection to the intentions of crucial legislative gatekeepers"); Chomsky, *supra* note 2, at 949 (The Christian nation argument may lead one to believe "that Brewer and the Court were not truly convinced of the correctness of his articulated legislative intent, but instead stretched the facts and the law to reach a desired outcome.").

66. Act of Mar. 3, 1891, ch. 551, § 5, 26 Stat. 1084, 1085.

67. Professor Eskridge gives the statute limited consideration. *See* Eskridge, *Unknown Ideal*, *supra* note 40, at 1534, 1538, 1548.

68. *See* United States v. Laws, 163 U.S. 258, 265 (1896) (observing that the exemption was probably enacted as a result of the Circuit Court opinion).

69. *See* sources cited *infra* note 146 (describing Gompers testimony).

mentioned on the house floor.[70] Congress disagreed with the decision below, and considerable authority supports applying such statutes retroactively.[71]

In fact, this argument is more powerful than either offered by the Court. It eliminates the need for a broad intellectual-services exception by narrowing the holding to ministers, a result closer to probable congressional intent. Furthermore, reliance on the ministers exception grounds Justice Brewer's claim that Congress could not have intended to penalize the hiring of clergy. One need not invoke distant sources or abstract principles to support this claim. The 1891 statute provided direct evidence of popular beliefs regarding the importation of ministers.

Not only does the overlooked argument improve upon Justice Brewer's opinion in the case, it also finds support in subsequent judicial authority. Four years after its decision in *Holy Trinity*, in *United States v. Laws*, the Supreme Court[72] used the exceptions enacted in 1891 as evidence of original statutory meaning.[73] In considering whether the 1885 statute prohibited the importation of a chemist,[74] the Court did not confine itself to the language enacted in 1885 but also applied[75] without discussion a later-enacted exception for "persons belonging to any recognized profession."[76]

B. *The Effective Date*

Some scholars deny that the 1891 Act governed behavior occurring prior to its enactment.[77] In particular, they point to section 12 of that Act, which contained a "savings clause" explicitly preserving prior law for pending cases.[78] Professor Vermeule argues that this "unusually

70. In explaining an exemption for a "minister of the gospel" in an earlier version of the bill, Representative Buchanan, the floor manager of the bill observed that under the 1885 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." 21 CONG. REC. 9439 (1889).

71. *See* SUTHERLAND Second, *supra* note 30, at 600, 629 (recognizing that an amendment affecting substantive rights may apply retroactively if "the circumstances surrounding its enactment" reveal that the legislature intended such application); *id.* sec. 41.04 at 351 ("Where a statute . . . is remedial in nature, it will be construed retroactively if the legislative intent clearly indicates that retroactive operation is intended.") (footnote omitted).

72. 163 U.S. 258 (1896).

73. *Id.* at 265 ("This amendment to the statute of 1885, although passed subsequently to the decision in the Circuit Court and prior to the decision of the same case in this court, was not mentioned in the opinion in this court, because the review was had upon the record based on the act as originally passed in 1885.").

74. *See id.* at 266.

75. *See id.* at 266–68.

76. Act of Mar. 3, 1891, ch. 551, § 5, 26 Stat. 1084, 1085.

77. *See* Eskridge, *Unknown Ideal*, *supra* note 40, at 1548 n.141 ("The amendment was by its terms not retroactive.").

78. § 12, 26 Stat. at 1086 (providing "[t]hat nothing contained in this act shall be construed to

pointed nonretroactivity provision" forecloses drawing any inference from the ministers exception,[79] a proposition with which Professors Eskridge and Chomsky agree.[80]

These scholars correctly recognize that the subsequent statute did not control in *Holy Trinity*. Section 13 made that statute effective after March, 1891.[81] Under common law, the effect of a statute on private actions occurring prior to the date of enactment depended upon whether the statute amended or repealed prior law. Amendments applied prospectively,[82] but repeals, at least of criminal statutes, applied retroactively.[83] In 1871, however, Congress revised the common-law rule and enacted a general savings clause, which preserved any "penalty, forfeiture or liability" arising under prior law.[84] Thus, by the time of the *Holy Trinity* decision, it was clear that the subsequent statute formally governed only contracts entered into after 1891.

Even if not controlling, however, the 1891 statute can still be used as evidence of the meaning of the original Act.[85] Section 12 does not preclude such use. In fact, it is absurd to apply section 12 to the ministers exception. Such application distinguishes between defendants who were indicted prior to the enactment of the 1891 Act and those who were indicted after—Churches hiring ministers between 1885 and 1891 would be subject to different substantive law depending upon the date of indict-

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affect any prosecution or other proceeding, criminal or civil, begun under any existing act or any acts hereby amended, but such prosecutions or other proceedings, criminal or civil, shall proceed as if this act had not been passed").

79. Professor Vermeule argues that this "unusually pointed nonretroactivity provision" forecloses drawing any inference from the ministers exception because such inference "would *itself* have violated the 1891 statute." *See* Vermeule, *Legislative History*, *supra* note 2, at 1842 n.38.

80. Professors Eskridge and Chomsky both cite section 12 for the proposition that the ministers exception was prospective only, not affecting pending prosecutions. *See* Chomsky, *supra* note 2, at 938 n.183 (observing that section 12 barred the 1891 amendments from applying to pending prosecutions); Eskridge, *Unknown Ideal*, *supra* note 40, at 1534 n.90, 1538 n.105 (same).

81. §13, 26 Stat. at 1086 ("[T]his act shall go into effect on the first day of April, eighteen hundred and ninety-one.").

82. *See* 1A J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 412 (Norman J. Singer ed., 6th ed., 2002) ("[I]t is presumed that provisions added by [an] amendment affecting substantive rights are intended to operate prospectively.") [hereinafter SUTHERLAND Sixth].

83. *See* Elmer M. Million, *Expiration or Repeal of a Federal or Oregon Statute or Regulation as a Bar to Prosecution for Violations Thereunder*, 24 OR. L. REV. 25, 27–31 (1944) (describing the common-law rule).

84. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431, 432 ("[T]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.").

85. *See* Wetmore v. Markoe, 196 U.S. 68, 77 (1904) (finding a later enacted exception "declaratory of the true meaning and sense of the statute").

ment. It is irrational to deny relief to churches engaged in identical behavior during the same time period simply because they had been indicted.

This absurdity is avoided once one appreciates the larger statutory structure. As noted above, by 1891, Congress had already enacted a "general savings clause"[86] that preserved substantive rights. The only remaining purpose for section 12, then, was to serve as a special savings clause, preserving procedural rights. This savings clause supplemented and complemented the general savings clause enacted in 1871.

The legislative history supports this reading of section 12. Early versions of the Act contained a ministers exception but no savings clause.[87] The savings clause was added only later, along with procedural changes[88] that became the main focus of the final Act.[89] In 1882, Congress had created a system of dual authority for immigration[90]—the Secretary of the Treasury wrote the rules and contracted with states, who enforced them.[91] The 1891 Act repealed this system and entrusted enforcement to the superintendent of immigration, who appointed federal inspectors[92] with authority over the immigration laws.[93]

Procedural changes were unaffected by the general savings clause

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86. *See* SUTHERLAND Sixth, *supra* note 82, at 412.

87. *See* H.R. REP. No. 51-3808, at 1–2 (1891) (accompanying H.R. 58, 51st Cong. (1891)); H.R. REP. No. 2997, at 1, 2 (1890) (accompanying H.R. 9632, 51st Cong. (1889)), 21 CONG. REC. 9437–38 (1889); H.R. 12209, 51st Cong. § 1 (1890).

88. *See* H.R. REP. No. 51-3807, at 2–6 (1891) (accompanying H.R. 13586, 51st Cong. (1891)); H.R. REP. No. 51-3472, at 94–96 (1891) (accompanying H.R. 13175, 51st Cong. (1891)); S. 5035, 51st Cong. §§ 5, 7 (1891); H.R. REP. No. 51-280 (1890) (accompanying H.R. 578, 51st Cong. (1890)); H.R. 12298, 51st Cong. § 19 (1890).

89. *See* Chomsky, *supra* note 2, at 935 n.169 (noting that the 1891 act "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"); *see also* H.R. REP. No. 50-3792, at 2 (1889) (accompanying H.R. 12291, 50th Cong. (1889)).

90. *See* H.R. REP. No. 51-3807, at 2–4 (1891) (criticizing dual authority and recommending creation of a superintendent of immigration); H.R. REP. No. 51-3808, at 2–4 (1891) (accompanying H.R. 58, 51st Cong. (1891)); H.R. REP. No. 50-3792, at 4 (1889) ("The committee believe [sic] that the enforcement of all acts designed to regulate immigration should be intrusted to the Federal Government and not to the States.").

91. *See* Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214, 214 ("[T]he Secretary of the Treasury is hereby charged with the duty of executing the provisions of this act and with supervision over the business of immigration to the United States, and for that purpose he shall have power to enter into contracts with such State commission, board, or officers as may be designated for that purpose.").

92. *See* Act of Mar. 3, 1891, ch. 551, § 7, 26 Stat. 1084, 1085 (establishing the office of superintendent of immigration).

93. *See* § 8, 26 Stat. at 1086 ("All duties imposed and powers conferred by the second section of the act of August third, eighteen hundred and eighty-two, upon State commissioners, boards, or officers acting under contract with the Secretary of the Treasury shall be performed and exercised, as occasion may arise, by inspection officers of the United States.").

and, under common law, applied to pending cases.[94] To the extent, however, that the procedural changes made in 1891 simply strengthened enforcement, such application was unnecessary and impinged upon state autonomy. More stringent enforcement could be limited to new cases, while allowing those already in the judicial pipeline to proceed without disruption.[95] Thus, it makes sense that Congress would repeal dual authority only for future cases.[96]

Subsequent case law confirms this reading. Courts construing similar clauses have consistently refused to apply them to changes in substantive law. Such was the conclusion of a divided court of appeals that considered whether a savings clause contained in the next immigration statute, enacted in 1903,[97] repealed the general savings clause. This conclusion became firmly established in cases[98] construing similar language in the Hepburn Act.[99] In those cases, the defendant claimed that a special savings clause retroactively repealed the substantive statute for persons not yet indicted. The courts noted the absurdity of treating indicted persons more harshly than the unindicted[100] and applied the clause only

94. *See* SUTHERLAND Sixth, *supra* note 82, at 418 ("[P]rovisions added by [an] amendment that affect procedural rights—legal remedies—are construed to apply to all cases pending at the time of its enactment.").

95. *See* Chomsky, *supra* note 2, at 936 n.172 (suggesting that the nonretroactivity clause may have been included "simply to avoid disrupting the already criticized efforts at enforcing the statute").

96. Section 12 was added to the bill along with the repeal of dual authority. *Compare* H.R. 12209, 51st Cong. § 2 (1890) *with* H.R. 12298, 51st Cong. §§ 8, 19 (1890) (creating superintendent office and adding savings clause). *Also compare* H.R. REP. No. 51-3808, at 2 (1891) (accompanying H.R. 58, 51st Cong.(1891)) *with* H.R. 13586, §§ 7, 8, 12, 22 Cong. Rec. 3183–85 (1891) (creating superintendent office and adding savings clause).

97. Lang v. United States, 133 F. 201, 204 (7th Cir. 1904); *see also* State v. Showers, 8 P. 474, 477 (Kan. 1885).

98. *See* Great N. Ry. Co. v. United States, 208 U.S. 452, 464–69 (1908); United States v. Standard Oil Co., 148 F. 719, 722–26 (N.D. Ill. 1907); United States v. Chicago, St. P., M. & O. Ry. Co., 151 F. 84, 86–97 (D. Minn. 1907); United States v. Del., L. & W. R. Co., 152 F. 269, 274–76 (S.D.N.Y. 1907); United States v. New York Cent. & H.R.R. Co., 153 F. 630, 634–35 (W.D.N.Y 1907).

99. *See* Act of June 29, 1906, ch. 3591, § 10, 34 Stat. 584, 595 (providing "[t]hat all laws and parts of laws in conflict with the provisions of this Act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law").

100. *See* Great N. Ry. Co., 208 U.S. at 469 (noting that inclusion of the special savings clause was not "the result of a purpose on the part of Congress not to distinguish without reason between pending causes by saving one class and destroying the other"); Standard Oil Co., 148 F. at 726 ("[I]t is inconceivable that the Congress of the United States . . . could possibly have gotten into such a frame of mind that they would divide all prior offenders into two classes, and say that those who had been indicted should be punished, and those who, up to that time, had avoided the grand jury, should be pardoned. For Congress to do such a thing would be both absurd and unjust."); Chicago, St. P., M. & O. Ry. Co., 151 F. at 97 ("I can conceive of no reason why Congress should wish or intend that those whose violations had been discovered and against whom prosecutions had already been commenced, even though they might be few in number, should be prosecuted to

to procedural provisions contained in the Hepburn Act.[101]

III. THE WIDER IMPLICATIONS OF THE OVERLOOKED ARGUMENT

A. *Preoccupation with the Choice Between Text and Intent*

Early scholars who missed the subsequent statute were likely misled by the Supreme Court's opinion. Surprisingly, Justice Brewer did not even cite the 1891 statute in his opinion.[102] The simplest explanation for this omission is ignorance—he did not know about the ministers exception.[103] The briefs did not mention the statute and were not otherwise reluctant to rely on subsequent legislation—in fact, they drew inferences from congressional inaction in 1888.[104] Ignorance is also consistent with the explanation later offered in *Laws*, in which the Court stated that its review in *Holy Trinity* "was had upon the record based upon the act as originally passed."[105] Apparently, the 1891 Act would have been relevant had it been in the record.[106]

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a conclusion and should suffer the penalties incurred, and that that much larger class of offenders, whose violations of the law had not been discovered and against whom prosecutions had not been begun, should be allowed to go free."); Del., L. & W. R. Co., 152 F. at 275 ("I cannot believe that it was the intention of Congress that parties who had committed offenses under the Elkins act should be discharged from all liability because indictments had not been filed at the time the Hepburn act was passed; while others, no more morally guilty, should be continued to be prosecuted under indictments found before that act was passed."); New York Cent. & H.R.R. Co., 153 F. at 635.

101. *See* Great N. Ry. Co., 208 U.S. at 467 ("[T]he legislative mind was concerned with the confusion and uncertainty which might be begotten from applying the new remedies to causes then pending in the courts . . . this subject, and this subject alone, was the matter with which the provision in question was intended to deal."); *id.* at 467–68 ("[T]he provision as to pending causes was solely addressed to the remedies to be applied in the future carrying on of such cases."); *id.* at 469 (observing that the inclusion of the special savings clause "was solely based on the desire of Congress not to interfere with proceedings then pending in the courts, but to leave such proceedings to be carried to a finality, in accordance with the remedies existing at the time of their initiation").

102. *See* Chomsky, *supra* note 2, at 938 ("[I]t is curious that an enactment bearing so precisely on the issue of congressional purpose was completely ignored by both court and litigants.").

103. *See id.* ("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.").

104. *See* Brief for the United States at 7–8, Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) (No. 143) [hereinafter Brief for United States] (claiming that it was "remarkable that Congress did not make the meaning of the law clearer" in statutory amendments enacted in 1888 if the Circuit court decision "did such violence to the intention of Congress").

105. *See* 163 U.S. 258, 265 (1896) ("This amendment to the statute of 1885, although passed subsequently to the decision in the Circuit Court and prior to the decision of the same case in this court, was not mentioned in the opinion in this court, because the review was had upon the record based upon the act as originally passed in 1885.").

106. This does not mean that parties were required to cite the statute. Presumably, the Court could have taken judicial notice of the 1891 statute. Literally read, section 12 precludes even citation of the 1891 statute in cases brought prior to the date of enactment. Act of Mar. 3, 1891,

But ignorance does not explain why later scholars slight the subsequent statute. Here, the most likely explanation is that the subsequent statute does not serve their purpose. *Holy Trinity* is no longer "the prototypical case involving the triumph of supposed 'legislative intent,'"[107] if there is a statute squarely on point. Thus, scholars' preoccupation with the choice between text and intent skews their presentation of *Holy Trinity*.

At the same time, this fixation affects their view of legislation. Statutory interpretation necessarily entails a view of the legislative process,[108] and each side of the debate has its preferred perspective.[109] Textualists tend to view the legislature as simply a device for aggregating private interests. Such a device often malfunctions.[110] Some interests, particularly those which are large and diffuse, are underrepresented.[111] Intentionalists, by contrast, attribute greater rationality to the legislature. The leading advocates of purposive interpretation, Hart and Sacks, posit that the legislature is "made up of reasonable persons pursuing reasonable purposes reasonably."[112] Drawing upon civic republicanism, Professor Sunstein treats legislation as a delibera-

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ch. 551, § 12, 26 Stat. 1085, 1086. No court has adopted this reading, and many have cited subsequent statutes containing similar language. *See* Great N. Ry. Co., 208 U.S. at 464–69.

107. SCALIA, *supra* note 6, at 18.

108. *See* Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 152 (1989) ("Faced with vague or ambiguous statutes the judiciary must use *some* set of background presuppositions about legislatures and legislative behavior in order to give meaning to statutes in a polity that is dedicated to legislative supremacy. Moreover, those background presuppositions cannot safely be adopted without some positive theory of politics or the legislative process."); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1642 (1991) ("The judicial task ultimately is to make some sense of the legislative product. . . . [A] view of the legislature is an essential part of giving meaning to statutes.").

109. *See* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 275–77 (1988) (associating deference to legislative intention with a view of government as "reasonable people acting reasonably" and arguing that the public-choice vision of the legislative process undermines an intentionalist approach to statutory interpretation).

110. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 302 n.37 (2006) ("[B]ackground intentions and purposes are always subject to being narrowed or broadened by the compromises, concessions, and deals brokered in the legislative process."); Manning, *Absurdity Doctrine*, *supra* note 37, at 2424–25; *see also* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 165–67 (1965).

111. For example, in *Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 U.S. 616 (1987), Justice Scalia defended a textualist interpretation by pointing to the organizational difficulties that white men faced. *See id.* at 677 (Scalia, J., dissenting) (noting that extension of the civil rights act would accommodate the demands of organized groups at the expense of "unknown, unaffluent, unorganized" individuals). *See* OLSON, *supra* note 110, at 165 ("[L]arge or latent groups have no tendency voluntarily to act to further their common interests.").

112. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994).

tive process.[113]

When presented in a polarized debate, these perspectives appear mutually exclusive.[114] Statutes either advance private interests or the common good, but not both.[115] The result is an impoverished account of the legislative process and the statutes it produces.

B. *The Choice Between Competing Texts*

The 1891 statute serves as a reminder that statutory interpretation involves more than a choice between text and intent. Courts often face another choice, one between competing texts. *Holy Trinity* involved two such choices. Most obvious is the choice between the original Alien Contract Labor Act that likely covered ministers and the 1891 amendment that plainly excluded them. Less obvious is the choice between the general effective date contained in section 13 of the 1891 Act and the special savings clause contained in section 12 of that Act. Applying the general effective date permits the Court to draw a positive inference from the ministers exception, while applying the special savings clause blocks that inference.

The question of which text applies is, in a sense, more fundamental than the choice between text and intent. The latter choice cannot arise until one has identified the governing texts. Textualists and intentionalists alike must first determine which statutes are relevant.

This determination requires a richer account of the legislative process than those offered in the current debate. One cannot readily assign weight to competing provisions if one regards the legislature in black-and-white terms—as solely a malfunctioning machine or solely a rational actor. What is needed is an account that sorts out the mix of private interests and public goods advanced by statutes.

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113. *See* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1584 (1988) (arguing that republicanism supports interpreting statutes in a way "that could plausibly be understood as the outcome of deliberative processes").

114. *See generally* Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1 (1991) (comparing public choice and comprehensive rationality as descriptions of the legislative behavior and as basis for interpretive theory); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1 (1990) (comparing public-interest and public-choice theories of legislation).

115. *See* Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 16 (1984) (distinguishing general-interest laws, which deserve a broad reading, from private-interest laws, which deserve a narrow reading). Judge Posner offered more refined categories. *See* Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 269–72 (1982) (dividing statutes between "public interest defined economically," "public interest in other senses," "public sentiment," and "narrow interest group legislation").

C. *A Richer Description of the Legislative Process*

One such description[116] regards the legislature as a diverse institution responding to various interpretive communities,[117] which comprise both author of, and audience for, statutes. We can distinguish three distinct communities, each with its own decision-making process and role in the legislative process.[118]

The first community, the public community,[119] consists of society at large, persons lacking a special role in government. The public community is the largest and most heterogeneous community. It does not engage in extended analysis but instead reacts passively to images and symbols.[120] Its members know little about the legislative details.[121]

The second community is the political community. This community consists of the elected politicians and their consultants. Members of this community comprise the most visible actors in government: the President and administration, political appointees, members of Congress, and political parties.[122] The political community reaches consensus through bargaining and voting rather than persuasion.[123] Responding to electoral, partisan, or pressure group factors, politicians reach out to voters, debate opposing politicians, and court interest groups. Members of the political community trade provisions, build coalitions, and compromise.[124]

The third community, the policy community, consists of professionals with specialized substantive knowledge.[125] The hidden actors in

116. *See* William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 641–49 (2001). This analysis draws from John Kingdon's work, which identified three separate streams—policy, political and problem—feeding into governmental decisions. *See* JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 16 (2d ed. 2003). Kingdon's problem stream consists of value judgments drawn from the larger culture. *See id.* at 90. *See also* K N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 19 (1934) (analyzing the working constitution by reference to specialists in governing, interested groups, and the general public).

117. *See* STANLEY FISH, *Change*, *in* DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 141 (1989) (describing an interpretive community as "not so much a group of individuals who shared a point of view, but a point of view or way of organizing experience").

118. *See* Llewellyn, *supra* note 116, at 19–20. These communities reflect familiar views but do not exist in pure form. *See id.* at 21 n.32 ("[T]he marking off of '*an* interest,' '*a* group,' '*an* institution' is an artificial abstraction from a complexly concrete mass of phenomena . . . [and] the boundaries drawn will always be indefensible, save as they become useful and significant *for the purpose in hand.*").

119. Kingdon's "problem stream" is formed largely by judgments from society at large. *See* KINGDON, *supra* note 116, at 90–91.

120. *Id.* at 94–95.

121. *Id.* at 65–66.

122. *Id.* at 21–30, 34–42.

123. *Id.* at 159.

124. *See id.* at 150–62.

125. *Id.* at 117.

government, members of the policy community form separate subcommunities around different subjects.[126] The legal profession itself is one policy subcommunity, in which lawyers and judges[127] cultivate specialized knowledge.[128] Sharing specialized training, the policy community strives for consensus though reasoned argument.[129]

Each community plays a distinctive role in legislation.[130] The public community exerts the greatest influence over the agenda, the list of subjects which command governmental attention.[131] Exercising its influence through polls and elections, the public community forms the backdrop against which Congress operates,[132] defining the problem that requires a response.[133] The political community exerts some influence on both the agenda and the proposed solutions to the problem. That community sharpens and resolves differences of opinion within the society at large. The policy community has the greatest influence over the details of legislative proposals. This community drafts legislation[134] and

126. *Id.* at 68.

127. *See* Owen M. Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177, 177–78 (1985) (acknowledging that "the judge is a thoroughly socialized member of a profession").

128. *See* Richard H. Fallon, Jr., *Non-Legal Theory in Judicial Decisionmaking*, 17 HARV. J.L. & PUB. POL'Y 87, 88 (1994) ("American law cannot be *reduced* to any other discipline, nor can legal analysis be reduced to any other methodology."); Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 38 (1981) ("[W]hat judges are expert at, is, not surprisingly, the law. . . . [T]he law is a distinct subject, a branch neither of economics nor of moral philosophy, and that it is in that subject that judges and lawyers are expert; it is that subject which law professors should expound and law students study.").

129. KINGDON, *supra* note 116, at 141.

130. Passage of legislation involves all three communities. *See* KINGDON, *supra* note 116, at 178 ("[T]he probability of an item rising on a *decision* agenda is dramatically increased if all three streams—problems, policies, and politics—are joined."). *See also* Llewellyn, *supra* note 116, at 18 (describing the working constitution as embracing "the interlocking ways and attitudes of different groups and classes in the community—*different* ways and attitudes of *different* groups and classes, but all cogging together into a fairly well organized whole").

131. *See* KINGDON, *supra* note 116, at 3–4 (distinguishing agenda setting from alternative specification).

132. *See* Llewellyn, *supra* note 116, at 19 (noting that public plays a role like that of an "audience in a theatre").

133. A condition becomes a problem only if there is a shared cultural judgment that something must be done. A focusing event—a disaster, crisis, or powerful symbol—provides the occasion for this judgment. *See* KINGDON *supra* note 116, at 95–121; *see also* ROGER W. COBB & CHARLES D. ELDER, PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA BUILDING 172–73 (2d. ed. 1983) ("Policy problems are socially constructed. They arise not so much from events and circumstances as from the meanings that people attribute to those events and circumstances.").

134. *See* Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1313 (1990) ("Virtually no members of Congress draft their own legislation. Rather, that task is left to committee staff, the Office of Legislative Counsel, or lobbyists."). The Office of Legislative Counsel drafts a huge number of bills. *See* KENNETH KOFMEHL, PROFESSIONAL STAFFS OF CONGRESS 194 (3d ed. 1977) (Combined total drafting assignments performed by house and senate legislative counsel offices numbered over 6,000 in 1952.).

administers statutes. Thus, the communities form a chain of authority, in which the people delegate authority to politicians, who in turn delegate the details to policy professionals.[135]

The views of the communities display varying degrees of stability. Except in rare constitutional moments, public beliefs change slowly.[136] The policy community's views evolve predictably according to agreed-upon methods of reasoning. By contrast, the views of the political community are far less stable. The voting process through which it expresses its opinions are highly sensitive to historical conditions.[137]

D. *Using the Description to Choose Among Statutes*

The interpretive community account of the legislative process has two implications for choosing among statutes. First, it indicates that an interpreter trying to replicate the legislative, or indeed any governmental process, should give greater weight to the community with the greatest impact on the agenda. Thus, an interpreter should look first to the public perspective. If the public has no opinion on the issue, presented, the interpreter should look to the political community, and, if that community also lack an opinion, to the policy community.[138]

Second, this account indicates that retroactive application depends upon the stability of the community's views. Retroactivity is plausible for statutes emanating from the public and policy communities because the views of those communities change slowly if at all. Retroactivity is far less plausible for a decision of the political community, which is highly dependent upon the circumstances surrounding enactment. The sensitivity of a political compromise to historical conditions makes it uncertain whether a later statute reflects a prior political deal.

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135. *See* Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, The 1991 Justice Lester W. Roth Lecture (Oct. 31, 1991), *in* 65 S. CAL. L. REV. 845, 859 (1992) (The legislative "process requires each legislator to rely upon staff, in the first instance, to separate the matters that are significant from those that are not; it requires each legislator to make decisions about, and to resolve with other legislators, each significant matter; and it requires each legislator further to rely upon drafters and negotiators to carry out the legislator's decisions."). *Cf.* STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 210 (1985) ("The people must delegate responsibility for operating and monitoring the legitimacy of the legal system in its details to a smaller community of persons.").

136. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 10 (1991).

137. For example, in a system in which voters are presented with pairs of three mutually exclusive alternatives voted the ultimate result will depend upon the order in which the choices are presented. *See* ESKRIDGE & FRICKEY, *supra* note 49, at 52 for an illustration. This is a consequence of Arrow's theorem. *See generally* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed., Yale Univ. Press 1963).

138. Blatt, *supra* note 116, at 665. In practice, judges spend most of their time considering the views of the policy community, simply because most issues arising in litigation receive neither public nor political attention. *Id.* at 666–67.

The overlooked argument illustrates how the richer description can be used to choose among statutes. The ministers exception arose from the public community. In America, religion is an important public value, protected by the Constitution. Thus the public quality of the issue is evident in the briefs, which argued that application of the statute to ministers was unconstitutional.[139] It is also evident in Justice Brewer's citation of canonical texts[140] and the wide newspaper coverage given the case.[141]

By contrast, the question of whether the 1885 Act extended beyond manual labor was highly political. Immigration statutes pit interest groups against one another. Workers seeking job protection battle employers seeking cheap labor. Within this larger battle are skirmishes that favor some industries at the expense of others. In 1885, opponents of the Act offered exemptions that would dilute its impact, and Congress engaged in horse trading among various industries—discussing various exceptions[142] before finally settling on the five ultimately enacted.

The ministers exception reflects a widespread agreement that transcended this political battle.[143]The instigator of the action against the church, John Stewart Kennedy, did not want to bar the hiring of foreign ministers. In fact, he agreed to reimburse the Church for the fine ultimately imposed.[144] Kennedy's hope was that public outcry over barring the hiring of ministers would make the entire 1885 Act an object of

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139. *See* Brief for United States, *supra* note 104, at 7–8.

140. In another work, I argue that Justice Brewer's opinion is a seminal case in the tradition of reading statutes in accordance with public opinion. *See* William S. Blatt, A Neglected Tradition: Holy Trinity Church and Popular Statutory Interpretation (unpublished manuscript, on file with author).

141. *See Importing a Rector*, N.Y. TIMES, Sept. 25, 1887, at 2; *Holy Trinity to Be Sued*, N.Y. DAILY TRIB., Oct 14, 1887, at 8; *The Right to Import Rectors*, N.Y. DAILY TRIB., Mar. 1, 1892, at 2; *A "Coolie" Clergyman*, N.Y. TIMES, Sept. 25, 1887, at 4; *The Imported Minister*, N.Y. TIMES, Oct. 14, 1887, at 1; *Suing Holy Trinity Church*, N.Y. TIMES, Oct . 22, 1887, at 3; *Parsons Need Protection*, N.Y. TIMES, Apr. 24, 1888, at 9; *He Is a Contract Laborer*, N.Y. TIMES, May 24, 1888, at 8; *Looks Bad for Trinity*, N.Y. TIMES, Jan. 8, 1892, at 5.

142. Senator Morgan suggested extending the exceptions to "painters, sculptors, engravers, or other artists, farmers, farm laborers, gardeners, orchardists, herders, farriers, druggists and druggists' clerks, shopkeepers, clerks, book-keepers, or any person having special skill in any business, art, trade or profession." 16 CONG. REC. 1633 (1885). Also, Senator Coke proposed an exception for "agriculture and stock-raising" laborers. *Id.* at 1788.

143. Even the Circuit Court below doubted that Congress intended to apply the statute to ministers. *See* United States v. Rector of the Church of the Holy Trinity, 36 F. 303, 304 (C.C.S.D.N.Y. 1888), *rev'd sub nom.* Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) ("[I]t 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.").

144. *See The Right to Import Rectors*, *supra* note 141, at 2 ("The suit was an entirely friendly one . . . [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.") (quoting E. Wolpole Warren); *e.g.*, Vermeule, *Legislative History*, *supra* note 2, at 1840.

ridicule and cause its repeal.[145]

The same dynamic existed in Congress. The ministers exception was not backed by opponents of the 1885 Act but by proponents of that Act.[146] This amendment was viewed as strengthening the Act, not weakening it. The exception passed easily; the only question was whether to limit it to ministers of the gospel or extend it to those of other denominations.[147]

Thus, the ministers exception did not result from horse trading. The suit was not initiated by someone threatened by an American minister threatened by foreign competition, nor was the statute pushed by churches seeking cheap labor. Rather, the exception reflected overriding social consensus. The ministry is not simply one more guild. Even today, most Americans agree that we are a "Christian nation."[148]

None of these conclusions are altered by the savings clause. The public and political communities pay little attention to the effect of legislation on pending cases.[149] That issue falls into the domain of lawyers, who routinely inserted similar language into a wide array of statutes.[150]

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145. *See Importing a Rector*, *supra* note 141, at 2 ("[M]y only object . . . is . . . 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.")(quoting John Stewart Kennedy); Chomsky, *supra* note 2, at 910–11.

146. *See* H.R. REP. No. 51-3472, at 91 (1891) (hearing by the Select Committee to Inquire Into Alleged Violations of the Laws Prohibiting the Importation of Contract Laborers, Paupers, Convicts, and Other Classes) (statement of Samuel Gompers, President of the American Federation of Labor, describing the prosecution of Holy Trinity Church as "an attempt to bring the law into odium and ridicule, and cause a revulsion of feeling among the citizens and secure its repeal"); *see also* H.R. MISC. DOC. No. 50-572, at 402 (1889) (statement of Gompers that in *Holy Trinity*, a man was "arrested for an affair never intended to be covered, but it was only done for the purpose of bringing that law into notoriety").

147. *See* 21 CONG. REC. 10, 466–67 (1890); 22 CONG. REC. 2955 (1891).

148. *See* PRINCETON SURVEY RESEARCH ASSOCS., NEWSWEEK POLL: A POST-CHRISTIAN NATION? 8 (2009), http://www.psrai.com/_uploads/0904%20ftop%20w%20methodology.pdf (poll finding that 62% of Americans consider the United States to be a "Christian nation"); THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, AMERICANS STRUGGLE WITH RELIGION'S ROLE AT HOME AND ABROAD 3 (2002) (survey showing that 67% of Americans consider the United States to be a "Christian nation").

149. For example, prior to the enactment of the general savings clause, defendants often escaped punishment, "because the legislature, in the hurry and confusion of amending and enacting statutes, had forgotten to insert a clause to save offenses and liabilities already committed or incurred from the effect of express or implied repeals." *United States v. Barr*, 24 F. Cas. 1016, 1018 (D. Or. 1877) (No. 14,527).

150. As the Supreme Court later stated, "These provisions, though differing in their terms, manifested an intention on the part of Congress to save rights which had accrued under prior laws." *United States v. Menasche*, 348 U.S. 528, 532 (1955). *See* Millard H. Ruud, *The Savings Clause—Some Problems in Construction and Drafting*, 33 TEX. L. REV. 285, 286 (1955); 1A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION §§ 23:38 (6th ed., West Group 2002); 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES & STATUTORY CONSTRUCTION §§ 47:12-47:13 (7th ed., Thompson/West 2007).

Thus, section 12 simply does not bear upon the substantive decision reached by the public community.

CONCLUSION

The preoccupation with the choice between textualist and intentionalist theories of interpretation creates blind spots in the scholarship on statutory interpretation. At the level of case analysis, it causes scholars to slight the subsequent statute in *Holy Trinity*. At a broader level, this preoccupation causes them to neglect the more fundamental choice between competing texts. Resolving this choice requires a description of the legislature that is richer than that found in the debate over textualism and intentionalism. One such account recognizes that the legislature consists of three separate interpretive communities, each displaying a different level of stability and playing a distinct role in the legislative process. *Holy Trinity* itself nicely illustrates how this description helps choose among texts.