

MISSING THE MARK: AN OVERLOOKED STATUTE REDEFINES THE DEBATE OVER STATUTORY INTERPRETATION

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

At the center of this debate is the seminal 1891 Supreme Court case *Church of the Holy Trinity v. United States*.² That case considered whether the Alien Contract Labor Act, which prohibited the importation of “labor or service of any kind,”³ barred a church from hiring an English minister. Writing for the Court, Justice Brewer consciously departed from statutory language and exempted the hiring. Textualist and intentionalist interpreters alike regard *Holy Trinity* as a crucial test case for assessing theories of interpretation.⁴

Months before the Supreme Court’s decision in *Holy Trinity*, however, Congress specifically excluded ministers from the Act.⁵ 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

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

² 143 U.S. 457 (1892) (link). 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.”).

³ Alien Contract Labor Act of 1885, ch. 164, § 1, 23 Stat. 332, 332, *superseded by* Act of Mar. 3, 1903, ch. 1012, § 4, 32 Stat. 1213, 1214.

⁴ 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 SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 18 (Amy Gutmann ed., 1997); 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.”).

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

Eskridge, Tribe, and Sunstein defend the result in 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 Contract Labor 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 that statutory interpretation often centers on another logically prior choice, one between competing texts. That choice requires a richer description of the legislative process than any offered in the current debate.

The Essay concludes by offering one such enriched description, one which 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 fuller description aids in choosing among statutes. The ministers exception deserved retroactive application because it reflected 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 most 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. Walpole Warren, an alien residing in England, to serve as its rector and pastor. The next year, the United States district attorney brought an action against the church under the Alien Contract Labor Act of 1885, which prohibited the importation of aliens to “perform labor or service of any kind.”⁶ The Court of Appeals held that Holy Trinity had violated the Act, which covered “[e]very kind of industry, and every employment, manual or intellectual.”⁷

In 1892, the Supreme Court reversed. Writing for a unanimous Court,

⁶ Alien Contract Labor Act § 1.

⁷ *United States v. Rector of the Church of the Holy Trinity*, 36 F. 303, 305 (C.C.S.D.N.Y. 1888).

Justice Brewer conceded that the hiring fell within the statutory language,⁸ but held that it was nonetheless legal because Congress could not have intended to outlaw the employment of a minister.⁹ He held that “however broad the language of the statute may be, the [Church’s] act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.”¹⁰

Justice Brewer offered two grounds for this holding. His first was based on specific legislative intent: Congress only intended to regulate manual labor, not professional services.¹¹ This intent was evident in the title of the Act, which contained only the word “labor,” suggesting a concern with only manual laborers, not professional or intellectual workers.¹² 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.”¹³ Committee hearings were focused on “cheap unskilled labor,”¹⁴ and the House report mentioned workers “from the lowest social stratum.”¹⁵ A final, “singular circumstance, throwing light upon the intent of Congress,” was the report of the Senate Committee on Education and Labor.¹⁶ That committee recognized that a court might apply the statutory language to professional services, 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.”¹⁷

Justice Brewer’s second ground was based on religion’s special place in America.¹⁸ Surveying a vast array of sources, including the commission granted Christopher Columbus, colonial charters, the Declaration of Independence, the federal and state constitutions, and widespread social practices,¹⁹ Justice Brewer concluded: “[T]his is a Christian nation.”²⁰ He could not believe that the legislature of such a nation would ever criminalize the

⁸ See *Church of the Holy Trinity v. United States*, 143 U.S. 457, 458 (1892).

⁹ See *id.* at 459.

¹⁰ *Id.* at 472.

¹¹ *Id.* at 463.

¹² See *id.* at 463 (“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 of the brain.”).

¹³ *Id.* (quoting *United States v. Craig*, 28 F. 795, 798 (1886)).

¹⁴ *Id.* at 464.

¹⁵ *Id.* at 465 (quoting 15 CONG. REC. 5359 (1884)).

¹⁶ *Id.* at 464.

¹⁷ *Id.* (quoting 15 CONG. REC. 6059 (1884)).

¹⁸ *Id.* at 465.

¹⁹ *Id.* at 465–71.

²⁰ *Id.*

hiring of a minister.²¹

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 text,²² and for its reliance on legislative history.²³ In the last decade, however, *Holy Trinity* has assumed even greater importance in the midst of a raging debate over theories of statutory 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."²⁴ He rejects the decision as "nothing but an invitation to judicial lawmaking"²⁵ and concludes that "[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."²⁶

Following Justice Scalia's lead, other textualist scholars attack *Holy Trinity*. Recognizing the case's pioneering use of legislative history,²⁷ Professor Vermeule claims that the Court misread the record,²⁸ and that courts are systematically ill-equipped to evaluate such history.²⁹ Professor Man-

²¹ *Id.* at 472 ("Can it be believed that [such an act] would have received a minute of approving thought or a single vote?").

²² See, e.g., *Nat'l Woodmark Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 619 (1967) (link); *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 72 (1964) (link).

²³ 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).

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 *Statutory Interpretation* disparaged the use of legislative history and made no specific reference to use of committee reports. J.G. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 300, at 383–84 (1891). The 1904 edition, however, specifically stated that committee reports were "proper sources of information in ascertaining the intent or meaning of an act." 2 J.G. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 470, at 880 (John Lewis ed., 2d ed. 1904) (citing *Holy Trinity*).

²⁴ Scalia, *supra* note 4, at 18.

²⁵ *Id.* at 21.

²⁶ *Id.* at 22.

²⁷ See Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1835 (1998) ("*Holy Trinity* elevated legislative history to new prominence by overturning the traditional rule that barred judicial recourse to internal legislative history.>").

²⁸ *Id.* at 1837.

²⁹ *Id.* at 1860.

ning singles out *Holy Trinity* as a leading example of the absurdity rule, which allows a court to reject a literal reading that yields absurd results.³⁰ 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.³¹

2. Intentionalist Defenses

Defenders of intentionalist interpretation rally around the *Holy Trinity* result.³² 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,”³³ Professor Eskridge explicitly draws upon normative considerations, such as the rule of lenity, the statutory purpose, and longstanding openness toward the immigration of professionals.³⁴ 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.³⁵

Professor Sunstein also supports *Holy Trinity*. He offers three possible principles that justify departing from statutory language,³⁶ and then argues that Justice Scalia’s rebuttal of those principles is unconvincing.³⁷ Finally, Professor Sunstein advocates a “modern *Holy Trinity*,” under which agencies would be allowed to go beyond text in interpreting statutes within their jurisdiction.³⁸

C. The Weaknesses of Justice Brewer’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, for example, believes that legisla-

³⁰ 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”).

³¹ See *id.* at 2462, 2463 n.275.

³² See, e.g., 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).

³³ See William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 Mich. L. Rev. 1509, 1532 (1998) (reviewing SCALIA, *supra* note 4).

³⁴ See *id.* at 1552–53.

³⁵ See Laurence H. Tribe, *Comment*, in SCALIA, *supra* note 4, at 65, 92–93.

³⁶ Cass R. Sunstein, *Justice Scalia’s Democratic Formalism*, 107 YALE L.J. 529, 542–43 (1997) (reviewing SCALIA, *supra* note 4) (general language shall not be used to reach a result that is absurd, “clearly not intended by the enacting legislature,” or that “depart[s] from longstanding social understandings and practices”).

³⁷ *Id.* at 549.

³⁸ *Id.* at 552–53.

tive history does “little work” in *Holy Trinity*.³⁹ Even though Professor Chomsky finds that ministers were not part of the “contract labor system” that troubled Congress, she nonetheless disagrees with Justice Brewer’s reading of the legislative history.⁴⁰ Intentionalists show even less interest in the Christian Nation argument.⁴¹

The 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)⁴² suggests broad application. The Act contained limited exceptions for intellectual occupations,⁴³ strongly suggesting that its general rule applied broadly.⁴⁴ Later congressional action also indicates a far-reaching intent. In 1891, Congress added to the limited exceptions contained in the Act,⁴⁵ and in 1903, it modified the statute to cover contracts to “perform labor or service of any kind, skilled or unskilled,”⁴⁶ definitively repudiating any claim that the statute was limited to manual labor.⁴⁷

The textual evidence for a broad reading also finds support in the history of the Act. In fact, it was skilled laborers who initially pushed the legislation.⁴⁸ Unskilled laborers, represented by the Knights of Labor, joined the effort later.⁴⁹ Moreover, a member of the House Labor Committee said that the statute applied to a clerk, an intellectual laborer.⁵⁰

³⁹ Eskridge, *supra* note 33, at 1540.

⁴⁰ Chomsky, *supra* note 2, at 927, 939.

⁴¹ See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 682 (2001) (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).

⁴² Cf. NORMAN J. SINGER & J.D. SHAMBIE SINGER, *SUTHERLAND’S STATUTES AND STATUTORY CONSTRUCTION* § 47:3, at 282 (7th ed. 2007) (noting that the use of titles to construe statutes is disfavored in Anglo-American law).

⁴³ Alien Contract Labor Act of 1885, ch. 164, § 5, 23 Stat. 332, 333 (“[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.”).

⁴⁴ See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 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”) (link).

⁴⁵ See *In re Ellis*, 124 F. 637, 643 (Cir. Ct. S.D.N.Y. 1903) (“It would seem as if a much simpler amendment would have restricted the act to conform to the original intention of its 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.”).

⁴⁶ Act of Mar. 3, 1903, ch. 1012, § 4, 32 Stat. 1213, 1214.

⁴⁷ See *Ellis*, 124 F. at 643.

⁴⁸ Glassworkers and other skilled craft unions were the first to lobby for the bill, and the bill’s sponsor was the former president of the Coopers International Union, closely associated with craft unions. See CHARLOTTE ERICKSON, *AMERICAN INDUSTRY AND THE EUROPEAN IMMIGRANT 1860-1885*, at 139–66 (1957).

⁴⁹ See *id.*

⁵⁰ See 15 CONG. REC. 5358 (1884) (statements of Rep. Adams and Rep. O’Neill).

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 implausible on its face. 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 belies the committee's statement. After its report to the full Senate, the bill moved slowly. Hoping to get a vote before adjournment, the floor manager offered several amendments, including an exception for intellectual services.⁵¹ His offer was unsuccessful, however, and the Senate adjourned without acting. The bill was reintroduced the next session, this time with amendments, but not one exempting intellectual services. The failure to offer an exemption, even with ample time, reveals that none was intended. Indeed, in floor debate, the manager apparently agreed that the statute covered intellectual services.⁵²

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.⁵³ 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.⁵⁴

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."⁵⁵ Justices Brewer and Scalia

⁵¹ See Vermeule, *supra* note 27, at 1848–49.

⁵² *Id.* 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 further discussion of this statement, see Vermeule, *supra* note 27, at 1848–50.

⁵³ See Manning *supra* note 30, at 2428 (noting 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.").

⁵⁴ *Cf.* Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring) (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") (link).

⁵⁵ Act of Mar. 3, 1891, ch. 551, § 5, 26 Stat. 1084, 1085.

never mention the statute. Others mention it only in passing.⁵⁶

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,⁵⁷ which was discussed in committee hearings⁵⁸ and mentioned on the house floor.⁵⁹ Congress disagreed with the decision below and considerable authority supports applying such statutes retroactively.⁶⁰

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 his 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*,⁶¹ the Supreme Court used the exceptions enacted in 1891 as evidence of original statutory meaning. In considering whether the 1885 statute prohibited importation of a chemist, the Court did not confine itself to the language enacted in 1885 but also applied, without discussion, a later enacted exception for "persons belonging to any recognized profession."⁶²

B. *The Effective Date*

Some scholars deny that the 1891 Act governed behavior occurring

⁵⁶ Professor Eskridge gives the statute limited consideration. See Eskridge, *supra* note 33, at 1534, 1538, 1548.

⁵⁷ See *United States v. Laws*, 163 U.S. 258, 265 (1895) (observing that the exemption was probably enacted as a result of the Circuit Court opinion) (link).

⁵⁸ See H.R. REP. NO. 51,3472, at 91 (1890) (Statement of Samuel Gompers, President of the American Federation of Labor) (describing the prosecution of Holy Trinity Church as part of an effort "to bring the law into odium and ridicule, and cause a revulsion of feeling among the citizens and secure [the Act's] repeal").

⁵⁹ In explaining an exemption for "ministers of the gospel" in an earlier version of the bill, Representative Buchanan, the bill's floor manager, 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 (1890).

⁶⁰ See NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 22.36 at 412–23 (6th ed., 2002 rev.) (recognizing that an amendment affecting substantive rights may apply retroactively "[w]here a statute . . . is remedial in nature [and] . . . the legislative intent indicates that retractive operation is intended.").

⁶¹ 163 U.S. 258.

⁶² Act of Mar. 3, 1891, ch. 551, § 5, 26 Stat. 1084, 1085. See *Laws*, 163 U.S. at 266–68.

prior to its enactment.⁶³ In particular, they point to § 12 of that Act, which contained a “savings clause” explicitly preserving prior law for pending cases.⁶⁴ Professor Vermeule argues that this “unusually pointed nonretroactivity provision” forecloses drawing any inference from the ministers exception,⁶⁵ a proposition with which Professors Eskridge and Chomsky agree.⁶⁶

These scholars correctly recognize that the subsequent statute did not control in *Holy Trinity*. Section 13 made that statute effective after March 1891.⁶⁷ 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,⁶⁸ but repeals, at least of criminal statutes, applied retroactively.⁶⁹ 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.⁷⁰ 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.⁷¹ Section 12 does not preclude such use. In fact, it is absurd to apply § 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 indictment. It is irrational to deny relief to churches engaged in identical behavior during the same time period

⁶³ See Eskridge, *supra* note 33, at 1548 n.141 (“The amendment was by its terms not retroactive.”).

⁶⁴ § 12, 26 Stat. at 1086 (providing that “nothing 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 prosecutions or other proceedings, shall proceed as if this act had not been passed”).

⁶⁵ Vermeule, *supra* note 27, at 1842 n.38. According to Professor Vermeule, such an inference “would *itself* have violated the 1891 statute.” *Id.*

⁶⁶ Professors Eskridge and Chomsky both cite § 12 for the proposition that the ministers exception was prospective only, not affecting pending prosecutions. See Chomsky, *supra* note 2, at 938 & n.183; Eskridge, *supra* note 33, at 1534, 1538.

⁶⁷ § 13, 26 Stat. at 1086.

⁶⁸ See SINGER, *supra* note 60, § 22.36, at 412 (“[I]t is presumed that provisions added by [an] amendment affecting substantive rights are intended to operate prospectively.”).

⁶⁹ See Elmer M. Million, *Expiration or Repeal of a Federal or Oregon Statute or Regulation as a Bar to Prosecution for Violations Thereunder*, 24 ORE. L. REV. 25, 27–31 (1944).

⁷⁰ 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.”).

⁷¹ 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”) (link).

simply because they had been indicted.

This absurdity is avoided once one appreciates the larger statutory structure. As noted above, by 1891, Congress had enacted “a general savings clause”⁷² that preserved substantive rights. The only purpose § 12 could therefore serve was 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. Early versions of the 1891 Act contained a ministers exception, but no savings clause.⁷³ That clause was added only later, along with other procedural changes⁷⁴ that became the main focus of the final Act.⁷⁵ In 1882, Congress had created a system of dual authority for immigration⁷⁶—the Secretary of the Treasury wrote the rules and then contracted with states, which enforced them.⁷⁷ The 1891 Act repealed this system and entrusted enforcement to the Superintendent of Immigration, who appointed federal inspectors⁷⁸ with authority over the immigration laws.⁷⁹

Procedural changes were unaffected by the general savings clause and, under common law, applied to pending cases.⁸⁰ To the extent that the procedural changes made in 1891 simply strengthened enforcement, however, such retrospective 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.⁸¹ Thus, it makes sense that Congress would repeal dual authority for

⁷² See SINGER, *supra* note 60, § 22.36, at 418–25.

⁷³ 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).

⁷⁴ 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).

⁷⁵ 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”).

⁷⁶ 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)).

⁷⁷ Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214, 214.

⁷⁸ Act of Mar. 3, 1891, ch. 551, § 7, 26 Stat. 1084, 1085 (establishing the office of superintendent of immigration).

⁷⁹ *Id.* § 8, at 1086.

⁸⁰ See SINGER, *supra* note 60, § 22.36, at 418 (stating that “provisions added by [an] amendment that affect procedural rights—legal remedies—are construed to apply to all cases pending at the time of its enactment”).

⁸¹ 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”).

future cases only.⁸²

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 a later immigration statute repealed the general savings clause.⁸³ This conclusion became firmly established in cases construing similar language in the Hepburn Act. 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 unindicted⁸⁴ and applied the clause only to procedural provisions contained in the Hepburn Act.⁸⁵

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 opinion. Surprisingly, Justice Brewer did not even cite the 1891 statute.⁸⁶ The simplest explanation for this omission is ignorance: he did not know about the ministers exception.⁸⁷ The briefs do not mention

⁸² Section 12 was added to the bill along with the repeal of dual authority. Compare H.R. 12209 (Dec. 1, 1890), with H.R. 12298, §§ 8, 19 (Dec. 3, 1890) (creating superintendent office and adding savings clause). Also compare H.R. 58, with H.R. 13586, §§ 7, 8, 12 (creating superintendent office and adding savings clause), and 22 CONG. REC. 3183–85 (Feb. 23, 1891).

⁸³ Lang v. United States, 133 F. 201, 203–05 (7th Cir. 1904).

⁸⁴ See, e.g., Great No. Ry. Co. v. United States, 208 U.S. 452, 469 (1908) (noting that the inclusion of the special savings clause was not “the result of a purpose on the part of Congress [] to distinguish without reason between pending causes by saving one class and destroying the other”) (link); United States v. Standard Oil Co., 148 F. 719, 726 (N.D. Ill. 1907) (“[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.”); United States v. Chicago, St. P., M. & O. Ry. Co., 151 F. 84, 97 (D. Minn. 1907); United States v. Delaware, L. & W. R. Co. 152 F. 269, 275 (C.C.S.D.N.Y. 1907); United States v. New York Cent. & H. R.R. Co., 153 F. 630, 630 (D.C.N.Y. 1907).

⁸⁵ See *Great No. Ry. Co.*, 208 U.S. at 467 (explaining that “the 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,” and that “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 courts, but to leave such proceedings to be carried to a finality, in accordance with the remedies existing at the time of their initiation”).

⁸⁶ 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.”).

⁸⁷ *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 atten-

the statute, and, in fact, they drew inferences from congressional inaction in 1888.⁸⁸ 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.”⁸⁹ Apparently, the 1891 Act would have been relevant had it been in the record.

But ignorance does not explain why today’s scholars slight the 1891 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,’”⁹⁰ if there is a statute squarely addressing the issue. Thus, scholars’ preoccupation with the choice between text and intent skews their presentation of *Holy Trinity*.

At the same time, the fixation on this choice affects their view of legislation. Statutory interpretation necessarily entails a view of the legislative process,⁹¹ and each side of the debate has its preferred perspective.⁹² Textualists tend to view the legislature as simply a device for aggregating private interests.⁹³ Such a device often malfunctions.⁹⁴ Some interests, particularly those which are large and diffuse, are underrepresented.⁹⁵ 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.”⁹⁶ Drawing upon civic republicanism, Professor Sunstein treats legislation as a “deliberative process[.]”⁹⁷

When presented in a polarized debate, these perspectives appear mu-

tion of the Justices when they deliberated . . .”).

⁸⁸ See Brief for the United States at 7–8, *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) (No. 13,166) (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”).

⁸⁹ *United States v. Laws*, 163 U.S. 258, 265 (1896).

⁹⁰ Scalia, *supra* note 4, at 18.

⁹¹ See Nicholas S. Zeppos, *Justice Scalia’s Textualism: The “New” New Legal Process*, 12 *CARDOZO L. REV.* 1597, 1642 (1991).

⁹² 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 persons acting reasonably and arguing that the public choice vision of the legislative process undermines an intentionalist approach to statutory interpretation).

⁹³ See, e.g., *id.* at 277.

⁹⁴ See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 302 n.37 (2006) (arguing that “background intentions and purposes are always subject to being narrowed or broadened by the compromises, concessions, and deals brokered in the legislative process”).

⁹⁵ For example, in *Johnson v. Transportation Agency, Santa Clara County*, Justice Scalia defended a textualist interpretation by pointing to the organizational difficulties faced by white men. 480 U.S. 616, 677 (1987) (Scalia, J., dissenting) (link).

⁹⁶ See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1415 (tent. ed. 1958).

⁹⁷ Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L. J.* 1539, 1584 (1988).

tually exclusive. Statutes either advance private interests or the common good, but not both.⁹⁸ 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, which likely covered ministers, and the 1891 amendment, which plainly excluded them. Less obvious is the choice between the general effective date contained in § 13 of the 1891 Act and the special savings clause contained in § 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 statutory 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.

C. *A Richer Description of the Legislative Process*

One such description⁹⁹ regards the legislature as a diverse institution responding to various interpretive communities,¹⁰⁰ which comprise both au-

⁹⁸ See Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 16 (1985) (distinguishing between general-interest laws, deserving a broad reading, from private-interest laws, which should be narrowed). Judge Posner offers more refined categories. See Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 269–272 (1982) (dividing statutes between “public interest defined economically,” “public interest in other senses,” “public sentiment,” and “narrow interest group legislation”).

⁹⁹ This analysis draws on 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* 92 (1984). Kingdon’s problem stream consists of value judgments drawn from the larger culture. See *id.* at 116. See also Karl N. Llewellyn, *The Constitution as Institution*, 34 COLUM. L. REV. 1, 19 (1934) (analyzing the “working Constitution” by reference to “specialists in governing,” “interested groups,” and the “general public”).

¹⁰⁰ See William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 641–49 (2001). See also STANLEY FISH, *Change, in DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 141, 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 that shared individuals”).

thor of, and audience for, statutes. We can distinguish three distinct communities, each with its own decisionmaking process and role in the legislative process.¹⁰¹

The first community, the public community,¹⁰² 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 to images and symbols. Its members know little about the legislative details.

The second community is the political community. This community consists of 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. The political community reaches consensus through bargaining and voting rather than persuasion. 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.¹⁰³

The third community, the policy community, consists of professionals with specialized substantive knowledge. The hidden actors in government, members of the policy community form separate subcommunities around different subjects. The legal profession itself is one policy subcommunity, in which lawyers and judges cultivate specialized knowledge.¹⁰⁴ Sharing specialized training, the policy community strives for consensus through reasoned argument.

Each community plays a distinctive role in legislation.¹⁰⁵ The public community exerts the greatest influence over the agenda, the list of subjects that command governmental attention.¹⁰⁶ Exercising its influence through polls and elections, the public community forms the backdrop against which Congress operates,¹⁰⁷ defining the problem that requires a response.¹⁰⁸ The

¹⁰¹ These communities reflect familiar views but do not exist in pure form. See Llewellyn, *supra* note 99, at 21 n.32 (1934) (“[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 for as they become useful and significant for the purpose in hand.”).

¹⁰² Kingdon’s “problem stream” is formed largely by judgments from society at large. See KINGDON, *supra* note 99, at 115.

¹⁰³ See KINGDON, *supra* note 99, at 152–172.

¹⁰⁴ Cf. Richard H. Fallon, Jr., *Non-Legal Theory in Judicial Decisionmaking*, 17 HARV. J. L. & PUB. POL’Y. 87, 88 (1994) (arguing that “American law cannot be reduced to any other discipline, nor can legal analysis be reduced to any other methodology”).

¹⁰⁵ Passage of legislation involves all three communities. See KINGDON, *supra* note 99, at 211.

¹⁰⁶ See KINGDON, *supra* note 99, at 3 (distinguishing agenda setting from alternative specification).

¹⁰⁷ See Llewellyn, *supra* note 99, at 19 (noting that the public plays a role like that of a theater audience).

¹⁰⁸ See KINGDON *supra* note 99, at 95–121. 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 expressing this judgment. See also ROGER W. COBB & CHARLES D. ELDER,

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 legislation¹⁰⁹ and 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.¹¹⁰

The views of the communities display varying degrees of stability. Except in rare constitutional moments,¹¹¹ public beliefs change slowly. 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 is highly sensitive to historical conditions.¹¹²

D. Using the Description to Choose Among Statutes

This 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 lacks an opinion, to the policy community.

Second, the interpretive community account indicates that retroactive application of a law 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 provisions reflecting a decision of the political community, which is highly dependent on the circumstances surrounding enactment. The sensitivity of a political compromise to historical conditions makes it uncertain whether a later statute reflects a prior po-

PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA BUILDING 172–173 (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 events and circumstances.”).

¹⁰⁹ Cf. 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.”).

¹¹⁰ See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 859 (1992) (stating that the legislative process “requires each legislator to rely on 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”).

¹¹¹ See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6 (1991).

¹¹² See Blatt, *supra* note 100, at 638 & n.55

litical deal.

This 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.¹¹³ It is also evident in Justice Brewer's citation of canonical texts¹¹⁴ and the wide newspaper coverage given the case.¹¹⁵

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 exceptions¹¹⁶ before finally settling on the five ultimately enacted.

The ministers exception reflects a widespread agreement that transcended this political battle.¹¹⁷ 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 any fine ultimately imposed.¹¹⁸ Kennedy's hope was that public outcry over barring the hiring of ministers would make the entire 1885 Act an object of ridicule and cause its repeal.¹¹⁹ The same dynamic existed in Congress. The ministers exception was not backed by opponents of the 1885 Act, but by its proponents.¹²⁰

¹¹³ Brief for the United States at 7–8, *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) (No. 13,166).

¹¹⁴ 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* (on file with author).

¹¹⁵ See, e.g., *Importing a Rector*, N.Y. TIMES, Sept. 25, 1887, at 2 (link); *The Imported Minister*, N.Y. TIMES, Oct. 14, 1887, at 8 (link); *The Right to Import Rectors*, N.Y. DAILY TRIB., Mar. 1, 1892, at 2.

¹¹⁶ 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 “agricultural” and “stock-raising” laborers. *Id.* at 1788.

¹¹⁷ 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) (“[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 to cover a case like the present.”).

¹¹⁸ See Chomsky, *supra* note 2, at 910 (noting that “[t]he suit was an entirely friendly one,” and that Kennedy, if he won the case, would pay the \$1,000 fine imposed (quoting *The Right to Import Rectors*, *supra* note 115, at 2)).

¹¹⁹ See *Importing a Rector*, *supra* note 115, 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)). See Chomsky, *supra* note 2, at 910–11.

¹²⁰ See *supra* note 58 (describing Samuel Gompers’ testimony).

The 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.¹²¹

Thus, the ministers exception did not result from horse trading. The suit was not initiated 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.”¹²²

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.¹²³ That issue falls into the domain of lawyers, who routinely inserted similar language into a wide array of statutes.¹²⁴ Thus, § 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.

¹²¹ See 22 CONG. REC. 2955 (1891).

¹²² See Daniel Stone, *One Nation Under God?*, NEWSWEEK.COM, Apr. 7, 2009, <http://www.newsweek.com/id/192915> (noting that 62% of Americans consider the United States to be a “Christian nation”) (link).

¹²³ 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*, 4 Sawy. 254, 255 (D. Or. 1877).

¹²⁴ As the Supreme Court later said, “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) (link). See Millard H. Ruud, *The Savings Clause—Some Problems in Construction and Drafting*, 33 TEX. L. REV. 285 (1955).