March 11, 2009

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

William S. Blatt, University of Miami

Available at: https://works.bepress.com/william_blatt/4/
Missing the Mark: An Overlooked Statute Redefines the Debate Over Statutory Interpretation

By William S. Blatt*

©William S. Blatt
University of Miami School of Law
1311 Miller Drive, Room 282
Coral Gables, Florida 33124-8087
305-284-3644
e-mail: wblatt@law.miami.edu

Please do not quote or circulate without permission of the author.
Comments are greatly appreciated.

Draft (March 9, 2009)

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

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>03</td>
</tr>
<tr>
<td>I. Holy Trinity and Current Scholarship</td>
<td>05</td>
</tr>
<tr>
<td>A. The Supreme Court Opinion</td>
<td>05</td>
</tr>
<tr>
<td>B. The Role of Holy Trinity in Current Scholarship</td>
<td>09</td>
</tr>
<tr>
<td>1. Textualist Criticism</td>
<td>09</td>
</tr>
<tr>
<td>2. Intentionalist Defenses</td>
<td>11</td>
</tr>
<tr>
<td>C. The Weaknesses of Justice Brewer's Opinion</td>
<td>12</td>
</tr>
<tr>
<td>II. The Overlooked Argument</td>
<td>15</td>
</tr>
<tr>
<td>A. A Powerful Rational for the Court's Decision</td>
<td>15</td>
</tr>
<tr>
<td>B. The Effective Date</td>
<td>17</td>
</tr>
<tr>
<td>III. The Wider Implications of the Overlooked Argument</td>
<td>22</td>
</tr>
<tr>
<td>A. Scholarly Preoccupation with Text and Intent</td>
<td>22</td>
</tr>
<tr>
<td>B. The Choice Between Competing Texts</td>
<td>24</td>
</tr>
<tr>
<td>C. A Richer Description of the Legislative Process</td>
<td>25</td>
</tr>
<tr>
<td>D. Using the Description to Choose Among Statutes</td>
<td>30</td>
</tr>
<tr>
<td>Conclusion</td>
<td>34</td>
</tr>
</tbody>
</table>
Missing the Mark: An Overlooked Statute Redefines the Debate Over Statutory Interpretation

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 would interpret statute by reference to legislative intent.

At the center of this debate\(^2\) is the seminal 1891 Supreme Court case, *Holy Trinity Church 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 minister. Writing for the Court, Justice Brewer deliberately departed from statutory language and exempted the hiring. Textualists and intentionalist interpreters alike regard *Holy Trinity* as a crucial test case for assessing theories of interpretation.\(^4\)

---


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

\(^4\) 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 *A Matter of Interpretation: Federal Courts and the Law*, 3, 23 (Amy Gutman ed., 1997) [Hereinafter INTERPRETATION] ("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 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."). *See also* John F.
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.

This essay falls into three parts. Part one describes *Holy Trinity* and the role that case plays in current scholarship. Textualists such as Justice Scalia, and Professors Vermuele and Manning attack the Supreme Court decision. Intentionalist interpreters like Professors Eskridge, Tribe and Sunstein defend the result in the case. This defense has not extended to Justice Brewer's opinion, which has glaring weaknesses.

Part two of the article argues that the ministers exception, even though it was enacted afterwards, 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 finds support in a later Supreme Court case. 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 of the article 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 choice, one between competing texts. That choice is logically prior to the choice between text and intent. It also requires a richer description of the legislative process than that presented in the current debate.

---

Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Text*, 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.")
The article concludes by presenting one such 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 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 accorded 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 issue -- how to identify the governing text.

I. *Holy Trinity* and Current Scholarship.

A. The Supreme Court Opinion.

In 1887, the Church of the Holy Trinity, a church located in New York City, entered into a contract with E. Wolpole Warren, an alien residing in England, to serve as its rector and pastor. The next year, the 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."³ 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."\(^6\)

Nearly four years later, the Supreme Court reversed. Writing a unanimous opinion, Justice Brewer conceded that the hiring fell within the statutory language,\(^7\) but held that it nonetheless fell outside congressional intent. Congress could not have wanted to exclude ministers.\(^8\) He concluded, "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."\(^9\)

Justice Brewer offered two grounds for his conclusion. The first was based on specific legislative intent: that Congress only intended to regulate manual labor, not professional services. He found evidence of this intent in several sources.\(^10\) One was the title of the Act, which contained only the word "labor,"\(^11\) suggesting a concern with only manual laborers, not professional or intellectual workers.\(^12\) Another source was the evil the statute was intended to

---


\(^7\) See 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.").

\(^8\) Se id. at 459 ("[W]e cannot think Congress intended to denounce . . . a transaction like that in the present case.").

\(^9\) Id. at 472.

\(^10\) See 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.").


\(^12\) See 143 U.S. at 463 ("Obviously the thought expressed in this reaches only to the work of the manual laborer, as distinguished from the that of the professional man. No one reading such a title would suppose that
remedy -- the immigration of "great numbers of an ignorant and servile class of foreign laborers."\textsuperscript{13} Committee hearings referred to "cheap unskilled labor"\textsuperscript{14} and the House report mentioned workers "from the lowest social stratum."\textsuperscript{15} A final, "singular circumstance throwing light on the intent of Congress"\textsuperscript{16} was the report of the Senate Labor committee. That committee recognized that a court might apply the statutory language to professional services,\textsuperscript{17} 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."\textsuperscript{18}

\begin{flushright}
\footnotesize
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.
\end{flushright}

\textsuperscript{13} Id. at 463 (quoting United States v. Craig, 28 F. 795, 798 (1886)).
\textsuperscript{14} Id. at 464.
\textsuperscript{15} Id. at 465.
\textsuperscript{16} Id. at 464.
\textsuperscript{17} See id. at 464.
\textsuperscript{18} Id. at 464 (quoting 15 CONG. REC. 6059 (1884)).
Justice Brewer's second ground was based on religion's special place in America.\textsuperscript{19} Surveying a vast array of sources -- the commission granted Christopher Columbus,\textsuperscript{20} the colonial grant awarded to Sir Walter Raleigh,\textsuperscript{21} the compact among the Pilgrims on the Mayflower,\textsuperscript{22} the fundamental orders of Connecticut,\textsuperscript{23} the charter of Pennsylvania,\textsuperscript{24} the Declaration of Independence,\textsuperscript{25} the constitutions of Illinois, Indiana, Maryland, Massachusetts, Mississippi, and Delaware,\textsuperscript{26} the United States Constitution,\textsuperscript{27} judicial opinions,\textsuperscript{28} and social practices such as oaths and the observation of the Sabbath\textsuperscript{29} -- Justice Brewer concluded "that this is a Christian nation."\textsuperscript{30} He could not believe that the legislature of such a nation would ever criminalize the hiring of a minister.\textsuperscript{31}

\textsuperscript{19} 143 U.S. 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.").

\textsuperscript{20} Id. at 465-66.

\textsuperscript{21} Id. at 466.

\textsuperscript{22} Id.

\textsuperscript{23} Id. at 466-67.

\textsuperscript{24} Id. at 467.

\textsuperscript{25} Id. at 467-68.

\textsuperscript{26} Id. at 468-470.

\textsuperscript{27} Id. at 470.

\textsuperscript{28} Id. at 470-71.

\textsuperscript{29} Id. at 471.

\textsuperscript{30} Id. at 472 ("[C]an it be believed that [such an act] would have received a minute of approving thought or a single vote?").

8
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 "familiar rule" and for its reliance on legislative history. 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." He rejects the


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 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," citing *Holy Trinity*. 2 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION sec. 470, at 879-80, 882 (2d ed. 1904).

decision as "nothing but an invitation to judicial lawmaking" 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." Following Justice Scalia's lead, other textualist scholars attack *Holy Trinity*. Recognizing the case's pioneering use of legislative history, Professor Vermeule argues that the Court misread that history and that that misreading reveals that features of the adjudicative process that systematically limit judicial competence to evaluate legislative history. Singling out *Holy Trinity* as leading example of the absurdity rule, Professor Manning argues for wholesale rejection of that principle. *Holy Trinity* is one of the few cases he cannot defend on alternative grounds.

2. Intentionalist Defenses.

36 See Scalia, *supra* note at 22.
37 See Vermeule, *supra* note, at 1835 ("*Holy Trinity* elevated legislative history to new prominence by overturning the traditional rule that barred judicial recourse to internal legislative history.").
38 See Vermeule, *supra* note, at 1837.
41 See Manning, *supra* note at 2463.
Intentionalist interpreters rally around the *Holy Trinity* result.\(^{42}\) Professor Eskridge agrees with Justice Scalia that "*Holy Trinity* stands for the proposition that plain text can be trumped by contrary legislative history, statutory purpose and public values.\(^{43}\) Disagreeing with Justice Scalia, Professor Eskridge explicitly draws upon normative considerations, like the rule of lenity, the narrow statutory purpose and the practice of allowing professionals into the country.\(^{44}\) In a similar vein, Professor Tribe argues that because the statute infringes upon the free exercise of religion, it should be read narrowly under the canon requiring that courts avoid constitutional issues.\(^{45}\)

Professor Sunstein also disagrees with Justice Scalia. He finds in *Holy Trinity* three possible principles for departing from general language\(^{46}\) and then argues that Justice Scalia's rebuttal of those principles reasons is unconvincing.\(^{47}\) Professor Sunstein defends a "modern" *Holy Trinity*, under which agencies would be allowed to go beyond text.\(^{48}\)

C. The Weaknesses of Justice Brewer's Opinion.

---


\(^{43}\) See Eskridge, *Ideal*, supra note at 1532.

\(^{44}\) See Eskridge, *Ideal*, supra note at 1552-53.

\(^{45}\) See Tribe, *supra* note at 92-93.

\(^{46}\) See Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 542-43 (1997) (general language shall not be used to reach a result that is absurd, not intended by the legislature, or which departs from longstanding social practices).

\(^{47}\) See Sunstein, *supra* note at 549.

\(^{48}\) See Sunstein, *supra* note at 552-53.
The intentionalist defense of the *Holy Trinity* result does not extend to Justice Brewer's 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." Professor Chomsky but does not concur in Justice Brewer' reading of the legislative history, even though she finds that ministers were not part of the contract labor system that troubled Congress. Intentionalists shown even less interest in Justice Brewer's Christian Nation argument.

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

49 See Eskridge, *Ideal*, supra note at 1540.

50 See Chomsky *supra* note at 927, 939.

51 See William N. Eskridge, Philip P. Frickey & Elizabeth Garrett, *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).

52 See Sutherland, *supra* note.

53 Alien Contract Labor Act of 1885, sec. 5, 23 Stat. at 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.").

54 See *Holy Trinity*, 36 F. at 305 (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. (12 Wheat.) 419, 438 (1827) ("[T]he exception of a particular thing from a 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.").

55 See In re Ellis, 124 F. 637, 643 (Cir. Ct. 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 framers, and it might be argued
cover contracts to "perform labor or service of any kind, skilled or unskilled," definitively repudiating any claim that the statute was limited to manual labor.\footnote{56}

This textual evidence for a broad reach finds support in the history of the Act. The lobbying behind the Act disproves Brewer's claim that the Act was limited to manual labor. In fact, it was skilled laborers who initially pushed the legislation.\footnote{58} Unskilled laborers, represented by the Knights of Columbus, came later.\footnote{59} In addition, a member of the House Labor Committee said that the statute applied to a clerk,\footnote{60} an intellectual laborer.

Finally, the Senate committee's assertion that Congress intended that the Act be limited 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 slow legislation. It can be adopted by a quick voice vote. Furthermore, as Professor Vermeule has shown, subsequent events belie 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.\footnote{61} His offer was unsuccessful, however, and the Senate adjourned without acting. The bill was 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.

\footnote{56}{Act of March 3, 1903, c. 1012, 32 Stat. 1213, sec. 4.}

\footnote{57}{See \textit{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 hand somewhat of the protection which it had secured to manufacturing capital -- there can be no doubt as to its meaning in 1903.").}

\footnote{58}{The glass workers 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. \textit{See Charlotte Erickson}, \textit{American Industry and the European Immigrant 1860-1885} 139-166 (1957).}

\footnote{59}{See id., Chomsky \textit{supra} note at 938 n. 185.}


\footnote{61}{See Vermeule, \textit{supra} note at 1848-49.}
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 conceded that the statute covered intellectual services.\(^2\)

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 minister's exception for fear of opening the doors to other exemptions.\(^3\) 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 own views for those of Congress.\(^4\)

II. The Overlooked Argument.

Given the extraordinary attention paid to *Holy Trinity*, it is remarkable how little attention is given to a subsequent statute, enacted in 1891, prior to argument before the Supreme Court.

---

\(^2\) 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], the bill applies to them." 16 CONG. REC. 1633 (statement of Senator Blair). For further discussion of this statement, see Chomsky, *supra* note at 931; Vermeule, *supra* note at 1848-50; Eskridge, *supra* note at 1537-38.

\(^3\) See Manning *supra* note 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.").

\(^4\) See Public Citizen v. United States Dept of Justice, 491 U.S. 440, 473 (1989) (Kennedy, J., joined by Rehnquist, C.J. and O'Connor, J., concurring in the judgment) (criticizing *Holy Trinity* as "rumag[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 "the problem with spirits is that tend to reflect less the views of the world whence they came then the views of those who seek their advice"); Manning, *supra*, note at 2404 ("Based on its view of society's commonly held attitudes toward religion, the Court simply assumed that [the statute reached unintended cases). 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 at 949 (The Christian nation argument may lead one to believe "that Brewer and the Court were not truly convinced of the correctness of this articulated legislative intent, but instead stretched the facts and the law to reach a desired outcome.").
That statute specifically exempted from the Act "ministers of any religious denomination." Justices Brewer and Scalia never mention the statute. Others mention it only in passing.

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

On its face, the statute is powerful evidence for the Court's result. The exemption was directly inspired by the Circuit Court opinion below, which was discussed in committee hearings, and mentioned on the house floor. Congress disagreed with the decision below and considerable authority supports applying such statutes retroactively.

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

---


66 William Eskridge gives the statute limited consideration. See Eskridge, Ideal, supra note at 1534, 1538, 1548.

67 See United States v. Laws, 163 U.S. 259, 265 (1895) (observing that the exemption was probably enacted as a result of the Circuit Court opinion).

68 See H.R. Rep. No. 513472, at 91 (1890) (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") (Statement of Samuel Gompers, President of the American Federal of Labor); 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 Gompers that the prosecution was "an attempt to bring the law into ridicule . . . [I]t was only done for the purpose of bringing that law into notoriety.").

69 In explaining an exemption for "ministers 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 (1890).

70 See SUTHERLAND, supra note at sec. 22.36 at 305 (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).
closer to likely 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 in this context.

Not only is the overlooked argument an improvement over Brewer's opinion in the case, it also is supported by judicial authority. Four years after its decision in Holy Trinity, the Supreme Court, in United States v. Laws,71 used the exceptions enacted in 1891 as evidence of original statutory meaning. That case considered whether the 1885 statute prohibited the importation of a chemist. In analyzing that question, the Court did not confine itself to the language enacted in 1885 but also applied,72 without discussion, a later enacted exception for "persons belonging to any recognized profession."73

B. The Effective Date.

Some scholars challenge the assumption that the subsequent statute governs behavior occurring prior to its enactment.74 In particular, they point to section 12 of that statute, which

---

71 See United States v. Laws, 163 U.S. 259, 265 (1895) ("This amendment to the statute of 1885, although passed subsequently to the decision in the Circuit Court and prior to the decision in the same case in this court, was not mentioned in the opinion of this court because the review was had upon the record based on the act as originally passed in 1885").

72 See id. at 266-68.


74 See Eskridge, Ideal, supra note at 1548 n. 141 ("The amendment was by its terms not retroactive.").
contained a "savings clause" explicitly preserving prior law for pending cases.\textsuperscript{75} Professor Vermeule argues that this "unusually pointed nonretroactivity provision" forecloses drawing any inference from the ministers exception,\textsuperscript{76} a proposition with which Professors Eskridge and Chomsky agree.\textsuperscript{77}

This challenge is correct in recognizing that the subsequent statute did not control in \textit{Holy Trinity}. Section 13 made that statute effective after March, 1891.\textsuperscript{78} 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,\textsuperscript{79} but repeals, at least of criminal statutes, applied retroactively.\textsuperscript{80} 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.\textsuperscript{81} Thus, by the time of the \textit{Holy Trinity} decision, it was clear that the subsequent statute formally governed only contracts entered into after 1891.

\textsuperscript{75} Act of Mar. 3, 1891, sec. 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.").

\textsuperscript{76} Professor Vermeule claims that the "unusually pointed nonretroactivity provision" precludes drawing any inference from the ministers exception because such inference "would itself have violated the 1891 statute." \textit{See} Vermeule, \textit{supra} note at 1842 n.38.

\textsuperscript{77} Professors Eskridge and Chomsky both cite section 12 for the proposition that the ministers exception was prospective only, not affecting pending prosecutions. \textit{See} Chomsky, \textit{supra} note at 938 & n.183 (observing that section 12 barred the 1891 amendments from applying to pending prosecutions); Eskridge, \textit{Ideal, supra} note at 1534 & n.90, 1538 & n.105 (same).

\textsuperscript{78} Act of Mar. 3, 1891, sec. 13, 26 Stat. at 1086 ("[T]his act shall go into effect on the first day of April, eighteen hundred and ninety-one.").

\textsuperscript{79} \textit{See} SUTHERLAND, \textit{supra} note at sec. 22.36 at 304 ("[I]t is presumed that provisions added by [an] amendment affecting substantive rights are intended to operate prospectively.").

\textsuperscript{80} \textit{See} Elmer M. Million, \textit{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 (describing the common law rule).

\textsuperscript{81} Act, Feb. 25, 1871, c. 71, sec. 2, 16 Stat. 432, 1. U.S.C. sec. 29, Rev. Stat. sec. 13. ("The 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
The challenge is incorrect, however, insofar as it is a claim that the subsequent statute is irrelevant to the case at hand. Even if not controlling, the 1891 statute can still be used as evidence of the meaning of the original Act.\textsuperscript{82} Section 12 does not preclude such use. In fact, it is absurd to apply section 12 to the minister's exception. Such application distinguishes between defendants who were indicted prior to the enactment of the 1891 statute and those who were indicted after. Churches hiring ministers between 1885 and 1891 would be subject to different substantive law depending upon when they were indicated. 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, which 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.\textsuperscript{83}

The legislative history supports this reading of section 12. Early versions of the 1891 Act contained a ministers exception, but no savings clause.\textsuperscript{84} That clause was only added later, along with procedural changes,\textsuperscript{85} which became the main focus of the final Act.\textsuperscript{86} In 1882, Congress

\begin{footnotesize}
\textsuperscript{82} 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").

\textsuperscript{83} See SUTHERLAND, supra note.

\textsuperscript{84} See H.R. 58 sec. 1 (Dec. 18 1889); H.R. 9632 (introduce April 23, 1890), reprinted in 21 Cong. Rec. 9437-38 (August 30, 1890). See also H.R. 12209 (Dec. 1 1890) (sec.1).

\textsuperscript{85} See H.R. 12298 (December 3, 1890), sec. 19; H.R. 13175, sec. 12, (Jan. 15, 1891) reported in H.R. Rep. No. 3472 (51st Cong., 2d Sess); S. 5035 (Feb. 9, 1891); H.R. 13586; H.R. 578.
\end{footnotesize}
had created a system of dual authority for immigration—\textsuperscript{87} the Secretary of the Treasury wrote the rules and contracted with states, who enforced them.\textsuperscript{88} The 1891 Act repealed this system and entrusted enforcement to the superintendent of immigration, who appointed federal inspectors\textsuperscript{89} with authority over the immigration laws.\textsuperscript{90}

Procedural changes were unaffected by the general savings clause and, under common law, applied to pending cases.\textsuperscript{91} To the extent, however, that the procedural changes made in 1891 simply beefed-up enforcement, such application was unnecessary and impinging upon state autonomy. More stringent enforcement could be limited to new cases, while allowing those

\textsuperscript{86} See Chomsky, \textit{supra} note 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."). \textit{See also} H.R. Rep. No. 50-3792, at 2 (1889) (accompanying H.R. 12, 291 (50th Cong. (1889)).

\textsuperscript{87} See H.R. Rep. No. 3807 at 2-4 (1891), 50th Cong., 2d Sess. (criticizing dual authority and recommending creation of a superintendent of immigration); H.R. Rep. No. 3808 at 2-4 50th Cong., 2d Sess. (1891) (same); H.R. Rep. No. 3792 at 4 50th Cong., 2d Sess. (1891) ("The committee believe [sic] that the enforcement of all acts designed to regulate immigration should be entrusted to the Federal Government and not to the States.").

\textsuperscript{88} See Act of Aug. 3, 1882, sec. 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.").

\textsuperscript{89} See Act of Mar. 3, 1891, sec. 7, 26 Stat. at 1085 (establishing the office of superintendent of immigration).

\textsuperscript{90} See \textit{id.}, sec. 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, board, 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.").

\textsuperscript{91} See SUTHERLAND, \textit{supra} note at sec. 22.36 at 305 ("provisions added by [an] amendment that affects procedural rights -- legal remedies -- are construed to apply to all cases pending at the time of its enactment"); \textit{id.} at sec. 41.04 at 351 ("[W]here a new statute deals only with procedure, prima facie it applies to all actions -- to those which have been accrued or are pending, and to future actions. It has been held that there is a presumption that procedural statutes apply retroactively.") (footnote omitted); \textit{id.} at sec. 41.09 at 399 ("[W]here a statute is determined to be procedural, it is often applied retroactively on the basis of its procedural nature."); \textit{id.} at sec. 41.09 at 401 ("Retroactive law affecting only matters of procedure are regularly sustained. Unless a contrary legislative intent appears, changes in statute law which pertain only to procedure are generally held to apply to pending cases.") (footnote omitted).
already in the judicial pipeline to proceed without disruption. Therefore, it makes sense that Congress would repeal dual authority only for future cases.

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 in *Lang v. United States*, which considered whether a savings clause contained in the next immigration statute, enacted in 1903, repealed the general savings clause. The *Lang* rule became firmly established in later 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 unindicted and applied the clause only to procedural provisions contained in the Hepburn Act.

---

92 *See Chomsky, supra* note 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”).

93 Section 12 was added to the bill along with the repeal of dual authority *Compare* H.R. 12209 (December 1, 1890) *with* H.R. 12298, secs. 8, 19 (December 3, 1890) (creating superintendent office and adding savings clause). *Also compare* H.R. 58 *with* H.R. 13856, secs. 7,8,12 (creating superintendent office and adding savings clause) 22 Cong. Rec. 3183-85 (Feb. 23, 1891).

94 *See Lang* v. United States, 133 F. 201, 66 C.C.A. 255 (1904). *See also* State v. Stowers, 34 Kan 269, 8 Pac. 474.


96 An Act to Amend an Act Entitled "An Act to Regulate commerce," Approved February Fourth, Eighteen Hundred and Eighty-seven, and All Acts Amendatory Thereof, and to Enlarge the Powers of the Interstate Commerce Commission," L. 584, ch. 3591, 34 Stat. Act 595, sec. 10 (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.").

97 *See Great Northern Railway*, 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*, 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
III. The Wider Implications of the Overlooked Argument.

A. Scholarly Preoccupation with Text and Intent.

Early scholars who missed the subsequent statute were likely mislead by the Supreme Court opinion. Surprisingly, Justice Brewer did not even cite the 1891 statute. The simplest

---

98 See Great Northern Ry. Co., 208 U.S. at 468 ("[T]he legislative mind was concerned with the confusion and uncertainty which might be gotten 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 468-69 ("[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 470 (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.").

99 See Chomsky, supra note 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.").
explanation for this omission is ignorance: He did not know about the ministers exception.\textsuperscript{100} The briefs do not mention the statute, and were not otherwise reluctant to rely on subsequent legislation -- in fact, they drew inferences from congressional inaction.\textsuperscript{101} Ignorance is also consistent with the explanation later offered in \textit{Laws}. Acknowledging that the 1891 statute also predated its \textit{Holy Trinity} decision, the Court in \textit{Laws} said that its review in \textit{Holy Trinity} "was had upon the record based upon the act as originally passed."\textsuperscript{102} Apparently, the 1891 Act would have been relevant had it been in the record.\textsuperscript{103}

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. \textit{Holy Trinity} is no longer "the prototypical case involving the triumph of supposed `legislative intent',\textsuperscript{104} if there is a statute squarely on point. Thus, the scholarly preoccupation with the choice between text and intent skews the presentation of \textit{Holy Trinity}.

\textsuperscript{100} See \textit{id. at 938} ("Although the exemption for ministers was enacted almost a full year before the \textit{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 the deliberated.").

\textsuperscript{101} See Brief for the United States at 7-8, \textit{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.").

\textsuperscript{102} See \textit{Laws}, 163 U.S. at 265 ("This amendment to the statute of 1885, although passed subsequently to the decision in the Circuit Court and prior to the decision in the same case in this court, was not mentioned in the opinion of this court because the review was had upon the record based on the act as originally passed in 1885").

\textsuperscript{103} 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 in cases brought prior to date of enactment. See note \textit{supra}. No court has adopted this reading and many have cited subsequent statutes containing similar language. See note \textit{supra} (citing \textit{Great Northern Railway}).

\textsuperscript{104} See Scalia, \textit{supra} note, at 18.
At the same time, this fixation affects their view of legislation. Statutory interpretation necessarily entails a view of the legislative process and each side of the debate has its preferred description. Textualists tend to view the legislature as simply a device for aggregating private interests. Such a device often malfunctions. Some interests, particularly those which are large and diffuse, are underrepresented. By contrast, intentionalists 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." Drawing upon civic republicanism, Professor Sunstein regards statutes as the result of a deliberative process.

---

105 See Nicholas S. Zeppos, Justice Scalia's Textualism: The 'New' Legal Process, 12 CARDOZO L. REV. 1597, 1642 (1991) ("The judicial task ultimately is to make sense of the legislative product. . . . [A] view of the legislature is an essential part of giving meaning to statutes."); Jerry L. Mashaw, The Economics of Politics and the Understanding of Public Law, 65 CHICAGO-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.").


107 See ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 302 n.37 (2006) ("background intentions and purposes are always subject to being narrowed or broadened by the compromises, concessions,and deals brokered in the legislative process); Manning supra note at 2424-25. See generally MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 165 (1965).

108 For example, in Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987), Justice Scalia defended a textualist interpretation by pointing to the organizational difficulties faced by white men. See 480 U.S. at 677 (Scalia, J., dissenting) (noting that extension of civil rights act would accommodate the demands of organized groups at the expense of unknown, unaffluent, unorganized individuals). See generally MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 165 (1965) ("[L]arge or latent groups have no tendency voluntarily to act to further their common interests.").


110 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 a deliberate process).
When presented in a polarized debate, these descriptions appear mutually exclusive.\textsuperscript{111} Statutes either advance private interests or the common good, not both.\textsuperscript{112} The result is an impoverished account of the legislative process and the statutes it produces.

B. The Choice Between Competing Texts.

The subsequent 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. \textit{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 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 minister’s exception. 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 text. Textualists and intentionalists alike must first determine which statutes are relevant.


This determination requires a richer account of the legislative process than found in the current debate. One cannot readily assign weight to competing provisions if one regards the legislature in black and white terms -- as exclusively a malfunctioning machine or 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 description\(^\text{113}\) regards the legislature is a diverse institution responding to various interpretive communities,\(^\text{114}\) which comprise both author of, and audience for, statutes. One can\(^\text{115}\) distinguish three distinct communities, each with its own decision making process and role in the legislative process.

---


\(^{114}\) See 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").

\(^{115}\) These communities constitute ideal types, intellectual constructs that reflect familiar views but do not exist in pure form. See Llewellyn, supra note at 20 n.32 ("the 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."). The policy, political and public communities are not the "only" or "true" communities involved in statutory interpretation. The only claim here is that this grouping generates useful insights.
The first community, the public community,\textsuperscript{116} consists of society at large, persons lacking a special role in government. The public community is the largest and most heterogeneous community. It usually reacts passively, out of prior images and symbols.\textsuperscript{117} Its members know little about the legislative details.

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. 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.\textsuperscript{118}

\footnotesize
\begin{itemize}
    \item Kingdon's third "stream" is the "problem stream." This stream, however, is formed largely by judgments from society at large. \textit{See} Kingdon, \textit{supra} note, at 115.
    \item \textit{See, e.g.}, Murray Edelman, \textit{The Symbolic Uses of Politics} 5 (1974) ("For most men, most of the time, politics is a series of pictures in the mind, placed there by television news, newspapers, magazines, and discussions. The pictures create a moving panorama taking place in a world the mass public never quite touches, yet one its members come to fear or cheer, often with passion and sometimes with action.").
    \item \textit{See} Kingdon, \textit{supra} note at 152-172.
\end{itemize}
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. Lawyers and judges\(^{119}\) claim specialized knowledge.\(^{120}\) Sharing specialized training, the policy community strives for consensus though reasoned argument.\(^{121}\)

Each community plays a distinctive role in legislation.\(^{122}\) The public community exerts greatest influence over the agenda, the list of subjects which command governmental attention.\(^{123}\) Exercising its influence through polls and elections, the public community forms the backdrop against which Congress operates,\(^{124}\) defining the problem that requires a response.\(^{125}\) The political community exerts some influence on both the

---

\(^{119}\) See Owen M. Fiss, *Comments on Conventionalism*, 58 S. CAL. L. REV. 177, 177-78 (1985) (acknowledging that a "the judge is a thoroughly socialized member of a profession").

\(^{120}\) See Richard H. Fallon, Jr., *Non-Legal Theory in Judicial Decision making*, 17 HARV. J. L. PUB. POL. 87, 88 (19 ) (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, 36 (1981) ("What 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.").

\(^{121}\) See id. at 122-151.

\(^{122}\) Passage of legislation involves all three communities. See KINGDON, *supra* note at 211 ("The probability of an item rising on a decision agenda is dramatically increased if all three elements — problem, policy proposal, and political receptivity — are linked in single package."). See also Llewellyn, *supra* note 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 clogging together into a fairly well organized whole.").

\(^{123}\) See KINGDON, *supra* note at 3 (distinguishing agenda setting from alternative specification).

\(^{124}\) See Llewellyn, *supra* note at 19 (noting that public plays a role like that of an audience in a theater).

\(^{125}\) See KINGDON *supra* note 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 and Charles D. Elder,
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\(^\text{126}\) 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.\(^\text{127}\)

The views of the communities display varying degrees of stability. Except in rare constitutional moments,\(^\text{128}\) public beliefs change slowly. The policy community's views evolve 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.\(^\text{129}\)

D. Using the Description to Choose Among Statutes.

\(\text{PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA BUILDING 172-173 (1983)}\) ("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.").

\(^{126}\) \textit{See} Nicholas S. Zeppos, \textit{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. \textit{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).

\(^{127}\) \textit{See} Stephen Breyer, \textit{On the Uses of Legislative History in Interpreting Statutes}, 65 S. Cal. L. Rev. 845, 859 (1992) (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."). \textit{Cf.} STEVEN J. BURTON, AN INTRODUCTION TO LEGAL REASONING 210 (1985) ("The people must delegate responsibility for operating and monitoring the legitimacy of the legal system to a smaller community of persons.").


\(^{129}\) 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. \textit{See} ESKRIDGE & FRICKEY \textit{supra} note at 52 for an illustration. This is a consequence of Arrow's theorem. \textit{See generally} KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963).
This account has two implications for choosing among statutes. First, it indicates that an interpreter trying to replicate the legislative, or indeed any governmental, process should look first to the public perspective on the issue. Bills are not enacted without perception of a public problem. The interpreter should then look to political community, which exerts some influence on the agenda. The views of the policy community should be consulted last. Thus, public understandings play a role in rare, but prominent cases.

Second, this account indicates that retroactive application depends upon the stability of the community's views. The stability of the public and policy communities make it likely that a subsequent statute reflects a prior understanding. 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.

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. This constitutional dimension is evident in the briefs, which argued that application of the

---

130 In practice, however, 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. See Blatt supra note at 666.
statute to ministers was unconstitutional, and in Justice Brewer's list of canonical texts. It is no wonder, then, that the case received wide newspaper coverage.

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 before finally settling on the five ultimately enacted.

The ministers exception reflects a widespread agreement that transcended this political battle. 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. Kennedy's hope was that public outcry over barring the hiring of ministers would make the act an object of ridicule and lead to its repeal.

131 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).


133 Senator Morgan suggested extending the exceptions to "painters, sculptors, engravers, or other artists, shopkeepers, clerks, book-keepers, or any person having special skill in any business, trade or profession." 16 CONG. REC. 1633. Also, Senator Coke proposed an exception for "agricultural" and stock-raising laborers." Id. at 1788.

134 Even the Circuit Court below doubted that Congress intended to apply statute to ministers. See 36 F. at 304 ("it 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").

135 See The Right to Import Rectors, N.Y. DAILY TRIB., Mar. 1, 1892, 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
The same dynamic existed in Congress. The ministers exception was not backed by opponents of the 1885 Act but by defenders of that act, who wanted save it from ridicule. Its enactment 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.

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."

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. That issue falls into the domain of lawyers, who routinely inserted similar language into a

---

136 See Importing a Rector, supra note at 2 ("[M]y only object . . . is . . . 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 generally Chomsky, supra note at 910-11.

137 See supra note (describing Samuel Gompers' testimony).

138 See 21 CONG. REC. 10,466-67 (1890); 22 id. 2955 (1891).

139 See The Pew Research Center For The People & The Press, Americans Struggle With Religion's Role At Home and Abroad 3 (March 20, 2002) (survey showing that 67% of Americans consider the United States to be a "Christian nation").

140 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 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. (U.S.) 254, 255 (1877).
wide array of statutes.\textsuperscript{141} Thus, section 12 simply does not bear upon the substantive decision reached by the public community.

Conclusion

\textsuperscript{141} 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). See Millard H. Ruud, The Savings Clause -- Some Problems in Construction and Drafting, 33 TEX. L. REV. 285 (1955); SUTHERLAND, STATUTORY INTERPRETATION sec. 23.37, 23.39, 47.12, 47.13.
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.