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The Hidden Legacy of Holy Trinity Church: The Unique National Institution Canon

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THE HIDDEN LEGACY OF *HOLY TRINITY CHURCH*: THE
UNIQUE NATIONAL INSTITUTION CANON

ANITA S. KRISHNAKUMAR*

ABSTRACT

This Article explores an underappreciated legacy of the Supreme Court's (in)famous decision in Church of the Holy Trinity v. United States. Although Holy Trinity has been much discussed in the academic literature and in judicial opinions, the discussion thus far has focused almost exclusively on the first half of the Court's opinion—which declares that the “spirit” of a statute should trump its “letter”—and relies on legislative history to help divine that spirit. Scholars and jurists have paid little, if any, attention to the opinion's lengthy second half. In that second half, the Court tells a detailed narrative about the country's historically Christian roots and explains that, other interpretive rules aside, the statute simply cannot be construed against the church because the United States “is a Christian nation.”

This Article maps the methodology of the Holy Trinity Court's Christian-nation argument and contends that that methodology constitutes an interpretive canon in its own right—one which perhaps aptly can be called the “unique national institution” canon. The Article goes on to demonstrate that this interpretative canon has reared its head in a number of statutory interpretation cases decided since Holy Trinity.

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INTRODUCTION

In his dissenting opinion in *Zuni Public School District No. 89 v. Department of Education*,¹ Justice Scalia lamented that the majority's statutory analysis resurrected "*Church of the Holy Trinity ... Phoenix-like, from the ashes.*"² He was referring, of course, to *Holy Trinity Church v. United States*,³ an 1892 case that has become a titan in the field of statutory interpretation. At issue in *Holy Trinity* was the Alien Contract Labor Act of 1885,⁴ which made it illegal for employers to pay the migration costs of aliens under contract to perform "labor or service of any kind" in the United States.⁵ The government sought to apply the statute against a church that had paid the migration costs for an English clergyman under contract to become the church's rector. Relying in part on House and Senate committee reports, the Supreme Court famously declared that "a thing may be within the *letter* of the statute and yet not within the statute, because not within its *spirit*, nor within the intention of its makers."⁶ The Court went on to conclude that the church's conduct was not prohibited because Congress intended for the statute to apply only to contracts to import manual laborers—not to contracts involving the importation of "brain toilers."⁷

Holy Trinity is known, in the annals of statutory interpretation, as a turning point in the judicial use of internal legislative history⁸

1. 550 U.S. 81 (2007).

2. *Id.* at 108 (Scalia, J., dissenting).

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

4. 23 Stat. 332 (codified as amended at 29 U.S.C. § 2164 (1901)), *superseded by* Act of Mar. 3, 1903, Pub. L. No. 162, 32 Stat. 1214.

5. *Id.*

6. 143 U.S. at 459 (emphasis added).

7. *Id.* at 464.

8. Internal legislative history is distinct from external legislative history in that it focuses on the intralegislative record of discussion, deliberation, and voting on the bill that eventually was enacted, whereas external legislative history focuses on a statute's evolution over the years, through amendments actually enacted by the legislature. AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 347-49 (2005). The difference between external and internal legislative history boils down to the difference between what happened at various points in time versus what legislators said about what happened. *Id.*; see also *United States v. Carlton*, 512 U.S. 26, 39-40 (1994) (Scalia, J., dissenting). British and American courts, and ardent textualists like Justice Scalia, long have been willing to rely on the external evolution

to trump a statute's clear text.⁹ As Justice Scalia's *Zuni* dissent suggests, the case is a perennial target for textualists seeking to confine statutory interpretation to the text and nothing but the text¹⁰ and, conversely, a beacon for intentionalists seeking to emphasize legislative purpose and intent as the touchstones of the interpretive process.¹¹

In accord with its contentious place in legal history, scholars and judges have spilt considerable ink analyzing *Holy Trinity*. Adrian Vermeule has argued that the *Holy Trinity* Court misread the relevant legislative history and suggested that the case should serve as a cautionary example of judicial incompetence accurately to decipher legislative history.¹² Carol Chomsky has argued that *Holy Trinity* was decided correctly when viewed in light of both the historical context within which the Alien Contract Labor Act was enacted and the jurisprudential context within which the Court rendered its decision.¹³ Justice Scalia has addressed *Holy Trinity* in countless lectures and in his book on statutory interpretation, calling it the "prototypical" example of how a statute ought not to be

of a statute as evidence of statutory meaning; it is reliance on internal legislative debates and discussions that sharply has divided intentionalists and textualists.

9. See, e.g., WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 209 (1994) (calling the case a "sensation" with respect to the use of legislative history); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1835 (1998) (commenting that *Holy Trinity* "elevated legislative history to new prominence by overturning the traditional rule that barred judicial recourse to internal legislative history").

10. 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 ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 18-23 (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"); Vermeule, *supra* note 9, at 1837-38 (arguing that the Court's incompetence at evaluating legislative history in *Holy Trinity* should serve as a warning of judicial ineptness at using legislative history to interpret statutes generally).

11. See, e.g., Ronald Dworkin, *Comment*, in INTERPRETATION, *supra* note 10, at 115, 118 (discussing Scalia's interpretation of *Holy Trinity*); Laurence H. Tribe, *Comment*, in INTERPRETATION, *supra* note 10, at 65, 92-93 (responding to Scalia's criticisms of the *Holy Trinity* holding); Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 542-50 (1997) (using *Holy Trinity* to criticize Justice Scalia's textualist approach to statutory interpretation).

12. Vermeule, *supra* note 9.

13. Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 922-24, 944-46 (2000).

interpreted and deriding it as the precedent cited “whenever counsel wants us to ignore the narrow, deadening text of the statute, and pay attention to the life-giving legislative intent. It is nothing but an invitation to judicial lawmaking.”¹⁴ Justice Kennedy similarly has criticized *Holy Trinity* as a case that empowers courts “to rummage 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.”¹⁵ Perhaps most instructively, Philip Frickey tells his students that “*Holy Trinity Church* is the case you always cite when the text is hopelessly against you.”¹⁶

The conventional wisdom, upon which critics as well as admirers of the case agree, is that *Holy Trinity*’s interpretive legacy lies in the directive that courts should privilege the *spirit*, as illuminated by legislative history, over the *letter* of the law.¹⁷ This Article suggests that *Holy Trinity* has another, underappreciated, legacy: its Christian-nation argument. The little-discussed second half of the Court’s *Holy Trinity* opinion presents an impassioned, lengthy overview of the United States’ history and status as a Christian nation and reasons that against this backdrop, Congress simply could not have intended for the Alien Contract Labor Act to prohibit contracts by churches to pay the passage of Christian ministers.¹⁸ As this Article explains, that national-history-invoking approach to interpreting statutes—which I shall call the “unique national institution” canon—has endured, even if the *Holy Trinity* Court’s characterization of the United States as a Christian nation has not.

In fact, since its inauguration¹⁹ in *Holy Trinity*, the unique national institution canon has reared its head in at least four prominent Supreme Court cases.²⁰ Like *Holy Trinity*, all four of these cases resulted in controversial statutory constructions

14. Scalia, *supra* note 10, at 18, 21.

15. *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring).

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

17. *See, e.g.*, Chomsky, *supra* note 13, at 940; Scalia, *supra* note 10, at 20-21.

18. *Holy Trinity Church v. United States*, 143 U.S. 457, 465-72 (1892).

19. To my knowledge, *Holy Trinity* is the first Supreme Court case to use this kind of “unique national institution” argument to interpret a statute.

20. *See infra* Part II.

excepting one class of “unique national” litigants from the relevant statute’s reach. And although none of the later cases directly referenced *Holy Trinity*—likely because the Christian-nation language offended twentieth-century sensibilities²¹—each case relied significantly on arguments cast in the “Christian nation” mold to justify the creation of a statutory exception.

Part I of this Article examines the overlooked second half of the *Holy Trinity* opinion. Upon inspection, the opinion’s Christian-nation passages emerge as more than just an unabashed admission of the judicial prejudices underlying the Court’s statutory interpretation. In fact, they amount to a carefully-constructed narrative about the unique national status of the Christian religion, employed as an authoritative guide to legislative intent. Part II explores the Court’s adaptation of the unique national institution exception in four leading twentieth-century statutory interpretation cases. Section A discusses parallels between *Holy Trinity*’s Christian-nation construct and the ode to baseball that opens the Court’s opinion in *Flood v. Kuhn*. Section B locates Justice Rehnquist’s homage to railroads in *Leo Sheep v. United States* within *Holy Trinity*’s unique national institution tradition. Section C illuminates the role that tobacco’s unique historical stature played in *FDA v. Brown & Williamson*. And Section D examines the Native American usurpation narrative undergirding the Court’s opinion in *Morton v. Mancari*. Part III then considers the theoretical implications of the unique national institution canon, situating it within larger interpretive debates about text versus intent and the proper scope of judicial inquiry in statutory interpretation cases.

I. HOLY TRINITY’S OTHER INTERPRETIVE PRECEDENT

To the extent that it has been discussed at all, the Christian-nation portion of the *Holy Trinity* opinion generally has been dismissed as a nineteenth-century embarrassment beyond which we

21. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) (referring to *Holy Trinity* as an “aberration” to the avoidance of “government sponsored endorsement of religion”); *Lynch v. Donnelly*, 465 U.S. 668, 717-18 (1984) (Brennan, J., dissenting) (criticizing the suggestion that the United States was a “Christian nation”); MORTON BORDEN, *JEWS, TURKS, AND INFIDELS* 125-29 (1984) (noting the hypocrisy of nineteenth-century church-state separation).

as a nation have grown,²² or as a declaration by one religious justice²³ that has had little impact on the subsequent development of American law.²⁴ In a curious but telling tic, commentators tend to refer to “Justice Brewer’s” opinion rather than “the Court’s opinion” when talking about the Christian-nation argument.²⁵ But in their rush to distance the Court and the law from the Christian-nation argument, commentators have missed the forest for the trees. That is, they have missed the methodological innovation underlying the *Holy Trinity* Court’s second, independent basis for its ruling.

Remarkably, the second half of the *Holy Trinity* opinion declared that, irrespective of all the interpretive rules discussed earlier in the opinion, including “spirits” and legislative history, the Alien Contract Labor Act could not be read to prohibit the church’s action because “no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people.”²⁶ This was, the Court explained, “historically true.”²⁷ The Court then launched into what can only be described as a history lesson, complete with documentary exhibits, marshaled to prove the Court’s point that the United States is a Christian nation.

22. See *Lynch*, 465 U.S. at 717-18 (Brennan, J., dissenting) (calling the Court’s approval of the public display of a creche “a long step backwards to the days when Justice Brewer could arrogantly declare for the Court that ‘this is a Christian nation’” (quoting *Holy Trinity*, 143 U.S. at 471)); *United States v. Johnson*, 25 F.3d 1335, 1341 (6th Cir. 1994) (Nelson, J., dissenting) (“A century ago, when *Church of the Holy Trinity* was decided, the kind of cultural diversity that now characterizes our nation and its public servants still lay in the future. It was thus still possible to suggest ... that ‘this is a Christian nation.’” (quoting *Holy Trinity*, 143 U.S. at 471)); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 270 (7th Cir. 1986) (noting that “[a]s late as 1892 the Supreme Court could state in the manner of a truism, ‘this is a Christian nation,’” but finding that America and the Supreme Court had changed so substantially since then that a city could not constitutionally display a Latin cross during the Christmas season (quoting *Holy Trinity*, 143 U.S. at 471)).

23. See, e.g., Steven K. Green, *Justice David Josiah Brewer and the “Christian Nation” Maxim*, 63 ALB. L. REV. 427, 427 (1999).

24. Chomsky, *supra* note 13, at 903.

25. See, e.g., *Lynch*, 465 U.S. at 717-18 (Brennan, J., dissenting) (quoting *Holy Trinity*, 143 U.S. at 471) (faulting Justice Brewer for “arrogantly declar[ing] for the Court that ‘this is a Christian nation’”); Chomsky, *supra* note 13, at 903 (crediting Justice Brewer with the comment that “this is a religious people,” noting that “Brewer found ‘a volume of unofficial declarations [and a] mass of organic utterances that this is a Christian nation,’” and calling it “Brewer’s declaration” that the United States is a “Christian nation”); Green, *supra* note 23, *passim*.

26. *Holy Trinity*, 143 U.S. at 465.

27. *Id.*

Exhibit 1 in the Court's history lesson was the commission given to Christopher Columbus by Ferdinand and Isabella, which invoked "*the grace of God,*" and expressed the "hope[] that by *God's assistance* some of the continents and islands in the ocean will be discovered."²⁸ Exhibit 2 was the first colonial grant, made to Sir Walter Raleigh in 1584 from "Elizabeth, *by the grace of God*" and conveying the authority to enact statutes, provided that the statutes "be not against the *true Christian faith* nowe professed in the Church of England."²⁹ The next several exhibits included: the first charter of Virginia and, by extrapolation, the charters granted to other colonies, which list "*propagating of Christian Religion*" as one of the Colonies' purposes (Exhibit 3);³⁰ the Mayflower Compact, which invokes the "*Presence of God*" and declares itself "undertaken for the *Glory of God, and Advancement of the Christian Faith*" (Exhibit 4);³¹ the fundamental orders of Connecticut, which repeatedly invoke God and "*our Lord Jesus*" (Exhibit 5);³² the charter of privileges granted by William Penn to the province of Pennsylvania (Exhibit 6);³³ the Declaration of Independence, which references the "Creator" and the "Supreme Judge of the world" (Exhibit 7);³⁴ the constitutions of the forty-four states then in existence (Exhibit 8);³⁵ the freedom of religion and Sunday exception for vetoes found in the United States Constitution (Exhibit 9);³⁶ other judicial utterances (Exhibit 10);³⁷ the appeal to the "Almighty" in most oaths of office (Exhibit 11);³⁸ the custom of opening sessions of all deliberative bodies with prayer (Exhibit 12);³⁹ the prefatory words of all wills, "*In the name of God, amen,*" (Exhibit 13);⁴⁰ and laws respecting the observance of the Sabbath (Exhibit 14).⁴¹ This

28. *Id.* at 465-66 (emphasis added).

29. *Id.* at 466 (emphasis added).

30. *Id.* (emphasis added).

31. *Id.* (emphasis added).

32. *Id.* (emphasis added).

33. *Id.* at 467.

34. *Id.*

35. *Id.* at 468.

36. *Id.* at 470.

37. *Id.* at 470-71.

38. *Id.* at 471.

39. *Id.*

40. *Id.* (emphasis added).

41. *Id.*

marshaling of historical evidence occupies a full six pages of the Court's opinion.⁴²

Once the Court finished quoting from historical documents (Exhibits 1-10), it observed that “[t]here is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation.”⁴³ The Court further pressed this point by cataloguing common American customs that invoke a Christian God (Exhibits 11-14), noting that such common practices “add a volume of unofficial declarations to the mass of organic utterances [historical documents] that *this is a Christian nation*.”⁴⁴ Having thus painted the historical landscape, the Court played its trump card, asking: “In the face of all these [utterances and practices], shall it be believed that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation?”⁴⁵ The answer to this rhetorical question was meant to be a resounding “no.” After all, the Court's antecedent history lesson had demonstrated that “the whole history and life of the country”⁴⁶ would be undermined by a law punishing the church's conduct. Against this historical backdrop, the Court insisted, the church's actions simply “could not have been intentionally legislated against.”⁴⁷

Thus employed, the Christian-nation argument emerges as an early example of what modern statutory interpretation scholars call “substantive canons” of statutory construction. Substantive canons are rules of construction that are based on background policies or presumptions.⁴⁸ They “reflect judicially-based concerns, grounded in the court's understanding of how to treat statutory text with reference to judicially perceived constitutional priorities, pre-enactment common law practices, or specific statutorily based policies.”⁴⁹ The *Holy Trinity* Court's Christian-nation argument is

42. *Id.* at 465-71.

43. *Id.* at 470.

44. *Id.* at 471 (emphasis added).

45. *Id.*

46. *Id.* at 472.

47. *Id.*

48. See, e.g., ESKRIDGE, *supra* note 9, at 276.

49. James Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for*

a classic formulation, as it articulates a particular understanding of how statutory text should be understood with reference to judicially perceived history, common practice, and quasi-constitutional priorities (for example, references to Founding-era documents, and state and federal constitutions) respecting the Christian religion.

But the *Holy Trinity* Court used the Christian-nation rationale as more than just a presumption; it cited the history as a definitive guidepost against which to measure legislative intent—concluding that given our nation’s historical commitment to Christianity, it was unthinkable that Congress could have intended for *any* statute to prohibit the church’s behavior. All substantive canons do this to some extent; their modus operandi is to tip the interpretive scales in favor of a statutory construction that preserves background societal or constitutional norms, on the theory that Congress is familiar with those norms and generally loath to contravene them. But substantive canons also typically acknowledge Congress’s power to contravene background norms if it so chooses, and courts tend to invoke substantive canons only when the statutory text is unclear.⁵⁰

The *Holy Trinity* Court’s Christian-nation argument went one step further, invoking the background norm *to trump* an otherwise clear statutory text. Such use of a substantive canon is rare, though not entirely unparalleled. There is one brand of substantive canon that ignores the invoke-only-when-the-text-is-ambiguous principle: clear statement rules. Clear statement rules mandate a strong presumption that Congress does not intend for the statutes it enacts to violate certain accepted background norms—primarily those based on the Federal Constitution—and are rebuttable only where the statute on its face clearly expresses an intent to trump a particular background norm.⁵¹ Clear statement rules change the

Neutral Reasoning, 58 VAND. L. REV. 1, 13 (2005).

50. See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229, 2271 (2008) (“The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them. We cannot ignore the text and purpose of a statute in order to save it.”) (internal citations and quotations omitted); *Richlin Sec. Serv. Co. v. Chertoff*, 128 S. Ct. 2007, 2019 (2008) (refusing to apply the substantive canon about narrow construction to waivers of sovereign immunity, noting that substantive canons are only a guide to statutory meaning and that text and other canons pointed clearly in favor of ruling against the government).

51. See, e.g., Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity*

interpretive default rule so that when certain constitutional norms are at stake (such as the nondelegation doctrine, separation of powers, federalism), it is not enough for the text of the statute unambiguously to cover the situation at hand; instead, the text must go one step further and clearly express Congress's intent to supercede the relevant background norm. This is rather like the result that the *Holy Trinity* Court achieved with its Christian-nation rationale, arguing that it did not matter how "broad the language of the statute"⁵² was or how well within its "letter"⁵³ the church's action might seem because, given the country's background Christian traditions and constitutive nature as a Christian nation, the overwhelming presumption was that Congress simply could not have intended to outlaw the church's behavior. In other words, nothing short of a declaration on the face of the statute that contracts for labor between a church and a foreign minister are covered would have convinced the Court to interpret the statute to govern the church's action.

Of course, the Court did not come out and state this, and so did not actually articulate a clear statement rule. In fact, it was not even thinking in this vein; rather, it was convinced that Congress could not possibly have intended to interfere with a church's employment practices. The Court's Christian-nation argument assumed (or sought to prove) that Christianity is so central to the American way of life that Congress could not have intended for the statute at issue to apply to Christian churches; that is, it created an exception from the general rule for a special national institution—Christian churches.

Put simply, the logical progression of the Court's Christian nation, or unique national institution, analysis is as follows:

1. The statute at issue is general and clearly prohibits the church's action if straightforwardly applied.
2. However, the United States is a Christian nation which is evidenced by Historical Exhibits 1-14.⁵⁴

Jurisprudence, 50 WM. & MARY L. REV. 517, 565 (2008) (discussing the Court's insistence on a clear statement rule in waiver of federal sovereign immunity cases).

52. *Holy Trinity*, 143 U.S. at 472.

53. *Id.* at 458.

54. See *supra* notes 28-47 and accompanying text.

3. Therefore, it is unthinkable that Congress could have meant for the statute to prohibit the employment practices of a church and we must read the statute to except this unique national institution from the general rule.

Note that the canon can take on different substantive content if the underlined word in each sentence is changed. That is, the Christian-nation argument can become a “We are a (blank) nation, and therefore Congress could not have intended for the relevant statute to cover (blank)” argument with only a little adjustment and different historical exhibits. In fact, as the next Part demonstrates, the Supreme Court subsequently has used just this kind of tweak on the “Christian nation” argument to reason its way into special statutory exemptions for four historic American entities: baseball, railroads, tobacco, and Native Americans.

II. *HOLY TRINITY’S* UNIQUE NATIONAL INSTITUTION DESCENDANTS

A word is in order here to make clear what *Holy Trinity’s* unique national institution canon (and this Article) is *not* about. The interpretive approach this Article seeks to highlight is not the Supreme Court’s mere reliance on, or even poetic recounting of, some aspect of American history to support its resolution of a given case. So, for example, this Article does not examine the historical narratives employed in constitutional cases such as *Texas v. Johnson*,⁵⁵ in which Justice Rehnquist marshaled poetry, song, and historic incidents to argue that the American flag is “the visible symbol embodying our Nation” and that a Texas statute prohibiting flag burning could not violate the First Amendment,⁵⁶ or *Boumediene v. Bush*,⁵⁷ which valorized the Great Writ en route to concluding that the Military Commissions Act⁵⁸ unconstitutionally suspends Guantanamo prisoners’ habeas corpus rights. The reason

55. 491 U.S. 397 (1989).

56. *Id.* at 422-35 (Rehnquist, J., dissenting). In the same vein is Justice Rehnquist’s dissent in *Smith v. Goguen*, 415 U.S. 566, 600-04 (1974) (Rehnquist, J., dissenting) (involving a flag-misuse statute and a petitioner who had sewn a small flag to the seat of his pants).

57. 128 S. Ct. 2229, 2244-51 (2008) (providing an extensive history lesson on the evolution of the writ of habeas corpus).

58. 28 U.S.C. § 2241(e) (2006).

for these omissions and others of their kind is twofold. First, resort to American history and tradition—not to mention the Framers’ original understanding—is a common and accepted analytic device in constitutional interpretation,⁵⁹ whereas it is an unusual and somewhat objectionable one in statutory interpretation. Indeed, there would have been nothing novel or remarkable about *Holy Trinity’s* Christian-nation argument if it had been made in the context of interpreting the Free Exercise Clause rather than a federal statute. The Constitution is designed to order our national government and to prescribe the relationship between that government and the people, as well as between the various constitutive parts of the state and national governments, for all time (unless amended, and amendment is difficult). Statutes, by contrast, are meant to govern particular policy areas and are subject to legislative amendment or repeal by a simple majority.⁶⁰ Interpretation of the Constitution thus naturally invites, and perhaps even demands, attention to our nation’s history and traditions. Interpretation of statutes, by contrast, typically involves inquiry into only the meaning of statutory text or, if the text is ambiguous, the particular circumstances that prompted a statute’s enactment. Thus, when the Court uses national history or tradition to decide what a statute

59. For this reason, cases are legion in which the Court uses a narrative about American history or tradition to determine whether a particular right claimed by a litigant is fundamental or established enough to be protected by the Constitution. *See, e.g., Boumediene*, 128 S. Ct. at 2244-51 (recounting the history of the writ of habeas corpus); *Van Orden v. Perry*, 545 U.S. 677, 688-89 (2005) (“[A]cknowledgments of the role played by the Ten Commandments in our Nation’s heritage are common throughout America a large statue of Moses holding the Ten Commandments, alongside a statue of the Apostle Paul, has overlooked the rotunda of the Library of Congress’s Jefferson Building since 1897.”); *Washington v. Glucksberg*, 521 U.S. 702, 723 (1997) (“We now inquire whether this asserted right [to commit suicide] has any place in our Nation’s traditions” and concluding that it does not); *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986) (finding no fundamental right for homosexuals to engage in consensual sexual relations); *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (“The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.”).

60. Some “super-statutes” may be different and share more in common with the Constitution. *See* William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215-17, 1272-76 (2001) (describing super-statutes and comparing them favorably to the “constitutional moments” that produced the New Deal or the Fourteenth and Fifteenth Amendments).

means in a particular case, it is playing an interpretive trump card that changes the usual rules about how statutes are to be construed—that is, through reliance on plain text, language canons, and narrow legislative history.

Second, the manner in which the Court uses historical narratives in constitutional cases differs materially from how it uses historical narratives to create a unique national institution exception in statutory interpretation cases. In constitutional cases, the Court typically references American history or traditions to demonstrate that an *individual right* claimed by a litigant—such as the right to determine the manner of one's own death,⁶¹ or the right to engage in consensual homosexual relations⁶²—contradicts longstanding public values or practices and therefore cannot be protected under the Constitution. Less often, as in *Boumediene*, the Court employs historical references to show that the claimed right is consistent with longstanding national values or traditions and therefore must be respected in the present case.⁶³ By contrast, in statutory interpretation cases (think *Holy Trinity*), the Court references American history and tradition in order to establish that a particular entity's *unique national status* entitles it to exemption from a rule dictated by the relevant statute. In other words, the historical narratives told by the Court in constitutional interpretation cases focus on the *action or practice engaged in by the litigant*, whereas the narratives told in statutory interpretation cases focus on the *iconic status* of the

61. *Glucksberg*, 521 U.S. at 723 (“[W]e are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice.”).

62. *Bowers*, 478 U.S. at 192-94 (“Proscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.” (internal citations omitted)).

63. *Boumediene*, 128 S. Ct. at 2244-51 (noting that the history of habeas corpus writ shows that defendants are entitled to greater procedural protections than are provided for in the Military Commissions Act).

entity subject to regulation.⁶⁴ Thus, the logical progression of the interpretive analysis dictated by the unique national institution canon in *Holy Trinity* and other statutory interpretation cases is decidedly different from the logical progression of the analysis generated by the Court's resort to historical tradition in constitutional cases. Compare, for example, the Christian-nation syllogism outlined above with the following syllogism for the Court's constitutional narratives:

TABLE 1

Statutory Cases (<i>Holy Trinity</i>)	Constitutional Cases (<i>Washington v. Gluckberg</i>)
1. The statute at issue is general and clearly prohibits the <i>church's</i> action if straightforwardly applied.	1. The Constitution confers on all citizens the right to <i>due process of law</i> , but is silent as to the specific contours of that right. The defendant claims that <i>due process</i> includes a fundamental right to <i>take one's own life</i> .
2. However, the United States is a <i>Christian</i> nation.	2. However, <i>taking one's own life</i> is repugnant to our nation's historical traditions.
3. Therefore, it is unthinkable that Congress could have meant for the statute to prohibit the employment practices of <i>churches</i> and we must read the statute to except this unique national institution from the general rule.	3. Therefore, the Constitution cannot protect the right of any individual, including the defendant, to <i>take his own life</i> .

64. Moreover, the litigants in constitutional interpretation cases are seeking to have their actions declared included and protected under the Constitution's deliberately vague provisions (guaranteeing, for example, "equal protection," "due process," or "free speech"), whereas the litigants (or their representatives) in statutory interpretation cases are seeking to be declared exempt from seemingly clear statutory provisions (for example, the Alien Contract Labor Act provision prohibiting "employers" from importing foreign "laborers").

In other words, when the Court uses a historical narrative in constitutional rights cases, it does so not to create a special exception from the general rule on behalf of a unique, privileged entity, but to deny that the Constitution protects the right of any individual to engage in the behavior at issue in the case. Whereas statutory interpretation cases use the “unique national institution” canon to carve out an exception to a general rule in a manner that benefits a particular litigant or related entity, constitutional interpretation cases use historical narratives to create a general rule of nonrecognition for an asserted right in a manner that strips not just the individual bringing the lawsuit, but all individuals living in the United States, of the relevant right.

Given these substantial differences in the Court’s use of national narratives in statutory versus constitutional cases, the focus of this Article is limited to the former context—that is, statutory interpretation cases in which the Court employs a national narrative about the unique, privileged status of a particular national institution as dispositive evidence of statutory meaning. As *Holy Trinity* and the cases discussed in Sections A, B, C, and D below show, the unique national institution exception to *statutory* interpretation involves two distinct components: (1) a deliberate weaving together of historical episodes, social traditions, and national identity into a story about the special role that a particular entity has played in American history or society, and (2) a reliance on that story as conclusive evidence that Congress *could not have intended* for the statute in question to disadvantage this “unique American” entity. Successful use of the unique national institution exception in the statutory context thus requires the Court first to construct, or at least invoke, a nostalgic narrative about American life and then to declare that: “Of course Congress didn’t mean to impose a burden on *that* entity—why, that would be *un-American!*” In *Holy Trinity*, the privileged entity was Christian churches; in the first case discussed below, it was baseball.

A. Flood v. Kuhn

*Flood*⁶⁵ is a fascinating 1972 case involving an antitrust action brought by major league baseball player Curtis Flood. Flood played for the St. Louis Cardinals for twelve seasons, until the ball club decided to trade him to the Philadelphia Phillies at the start of his thirteenth season.⁶⁶ The reserve clause in the standard major league baseball contract gave Flood no right to be consulted and no choice regarding the trade.⁶⁷ He complained, seeking to be made a free agent with liberty to strike his own deal with the team of his choice.⁶⁸ When his request was denied, he brought suit against the Commissioner of Baseball, the presidents of the two major leagues, and the twenty-four major league clubs then in existence, alleging that the reserve system violated federal antitrust laws, federal civil rights statutes, state statutes, the common law, and the Thirteenth Amendment.⁶⁹ By the time the case reached the Supreme Court, the focus was on Flood's antitrust claims, which alleged that the reserve clause constituted an unreasonable restraint of trade in violation of the Sherman Antitrust Act.⁷⁰

The Supreme Court's opinion in *Flood* began with a simple statement of the statutory issue before it—whether baseball's reserve system falls within the reach of the federal antitrust laws⁷¹—and then launched into a four-page poetic tribute to the sport and its history. That tribute, which garnered its own separate part titled "The Game," was far more sentimental than the *Holy Trinity* Court's Christian-nation passages, but provided an analogous chronicling of baseball's historical place in American society.⁷²

65. 407 U.S. 258 (1972).

66. *Id.* at 264-65.

67. *Id.* at 259 n.1.

68. *Id.* at 265.

69. *Id.* at 265-66.

70. 15 U.S.C. §§ 1-7 (2006).

71. The Sherman Antitrust Act prohibits, in relevant part, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, *in restraint of trade or commerce* among the several States." 15 U.S.C. § 1 (emphasis added). Flood argued that baseball's reserve clause restrained commerce by preventing players from freely negotiating and contracting with the team of their choice. *Flood*, 407 U.S. at 258.

72. See *Flood*, 407 U.S. at 260-64. Only two other Justices joined this part of the Court's opinion; Justices White and Burger refused to sign on, though they joined the rest of the opinion, including later parts relying on baseball's "status in the life of the nation" and the

The Court opened its unique national institution narrative with three sentimental recollections about professional baseball's origins. First, it recalled that "[i]t is a century and a quarter since the New York Nine defeated the Knickerbockers 23 to 1 on Hoboken's Elysian Fields June 19, 1846.... The teams were amateur, but the contest marked a significant date in baseball's beginnings."⁷³ (Exhibit 1). Second, the Court reminded readers that "[t]he Cincinnati Red Stockings came into existence in 1869 upon an outpouring of local pride [T]his professional team traveled over 11,000 miles that summer, winning 56 games and tying one."⁷⁴ (Exhibit 2). And third, the Court noted that "on St. Patrick's Day in 1871, the National Association of Professional Baseball Players was founded and the professional league was born."⁷⁵ (Exhibit 3). All three of these episodes were recounted as though they were historic events taught to all schoolchildren.

The Court then declared that "[t]he ensuing colorful days are well known"⁷⁶ and launched into a remarkable paragraph full of baseball references and trivia. Exhibits 4-20 in the Court's sentimental history of baseball reminded readers of: General Abner Doubleday (Exhibit 4);⁷⁷ the formation of the National League in 1876 (Exhibit 5);⁷⁸ Chicago's supremacy in the first year under Al Spalding and with Cap Anson at third base (Exhibit 6);⁷⁹ the formation of the American Association and the Union Association in the 1880s (Exhibit 7);⁸⁰ the introduction of Sunday baseball (Exhibit 8);⁸¹ interleague warfare through cut-rate admission prices and player raiding (Exhibit 9);⁸² *the development of the reserve clause* (Exhibit 10);⁸³ the formation of the Brotherhood of Professional Ball Players

need to "protect the integrity of the game." *Id.* at 258, 266, 272.

73. *Id.* at 260-61.

74. *Id.* at 261.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* (emphasis added).

and the Players League (Exhibit 11);⁸⁴ the appearance of the American League, or “junior circuit” (Exhibit 12);⁸⁵ the first World Series in 1903, disruption in 1904, and resumption in 1905 (Exhibit 13);⁸⁶ the short-lived Federal League on the majors’ scene during World War I (Exhibit 14);⁸⁷ the infamous 1919 World Series (Exhibit 15);⁸⁸ the home run ball (Exhibit 16);⁸⁹ the shifting of franchises (Exhibit 17);⁹⁰ the expansion of the leagues (Exhibit 18);⁹¹ the installation in 1965 of the major league draft (Exhibit 19);⁹² and the formation of the Major League Baseball Players Association in 1966 (Exhibit 20).⁹³ Notably, the Court deftly sandwiched the adoption of the reserve clause between a host of other developments in baseball history, making it appear both an inevitable and imbedded part of the sport.

But the Court’s tribute to baseball’s unique place in American society did not stop there. The Court went on to expend an entire page listing “the many names, celebrated for one reason or another, that have sparked the diamond and its environs and that have provided tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season.”⁹⁴ The list is eighty-eight names long and includes such baseball legends as Ty Cobb, Babe Ruth, Lou Gehrig, Jackie Robinson, Joe McCarthy, and Charles Comiskey (Exhibit 21).⁹⁵

84. *Id.*

85. *Id.*

86. *Id.* at 261-62.

87. *Id.* at 262.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 262-63. An oft-recited anecdote relates that Justice Blackmun’s list of all-time baseball greats originally listed only white ballplayers; Justice Marshall apparently pointed this out, prompting Blackmun, who was hoping for Marshall’s vote, to add Jackie Robinson, Satchel Paige, and Roy Campanella to the list. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 191 (1979). That anecdote recently has been challenged as false. See BRAD SNYDER, *A WELL-PAID SLAVE: CURT FLOOD’S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS* 301 (2006) (arguing that the anecdote “makes no sense” and citing letters from Justice Blackmun’s case files denying it); Ross E. Davies, *A Tall Tale of The Brethren*, 33 J. SUP. CT. HIST. 186, 195 (2008) (examining drafts of Blackmun’s opinion and

Finally, the Court made reference to Ring Lardner's "World Serious" comment (Exhibit 22) and to two famous baseball poems, "Casey at the Bat" (Exhibit 23) and "Baseball's Sad Lexicon" (Exhibit 24).⁹⁶ In conclusion, the Court explained that these popular references, combined with "all the other happenings, habits, and superstitions about and around baseball" have made it the "national pastime."⁹⁷

Although these passages read more like a sportswriter's tribute to a game he loves than a Supreme Court opinion, they, like the Christian-nation passages in *Holy Trinity*, laid a foundation for the Court to argue that baseball is "the national pastime," that America is a Baseball nation, so to speak, and that the antitrust laws should not be interpreted in a way that interferes with this venerable American sport. Interestingly, the Supreme Court did not quite have to come out and declare all of this on its own authority; instead, it was able to quote at length from the lower court's opinion denying Flood a preliminary injunction.⁹⁸ That opinion, though not containing the sentimental history of baseball provided in the Supreme Court's opinion, observed that:

Baseball has been the national pastime for over one hundred years and enjoys a unique place in our American heritage. Major league professional baseball is avidly followed by millions of fans, looked upon with fervor and pride and provides a special source of inspiration and competitive team spirit especially for the young.

Baseball's status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody's business. To put it mildly and with restraint, it would be unfortunate indeed if a fine sport and profession, which brings surcease from daily travail and an escape from the ordinary to most inhabitants of this land, were to suffer in the least because of undue concentration by any one

arguing that the first draft listed Robinson, Paige, and Campanella).

After the opinion was published, Blackmun apparently was asked why he omitted Mel Ott, the great right fielder for the New York Giants. Blackmun is said to have insisted that he had included Ott. When the clerk showed him that Ott's name was not in the printed opinion, Blackmun reportedly stated that he "would never forgive himself." WOODWARD & ARMSTRONG, *supra*, at 192.

96. *Flood*, 407 U.S. at 263-64 & nn.4-5.

97. *Id.* at 264.

98. *Id.* at 266-67.

or any group on commercial and profit considerations. *The game is on higher ground; it behooves every one to keep it there.*⁹⁹

There was no discernible need for the Supreme Court to discuss, let alone quote from, the lower court's opinion denying Curtis Flood a preliminary injunction. The Supreme Court did so because the lower court's observations advanced its unique national institution narrative and helped connect the dots in its own interpretive analysis.

Having thus employed both a sentimental history and the lower court's opinion to establish that baseball is a revered national icon, Part IV of the Supreme Court's opinion moved into a specific argument about the reserve clause and Congress's intent regarding the Sherman Act's relationship to that clause. In the course of this discussion, the Court quoted from a 1952 report issued by the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary, which affirmed "baseball's need for some sort of reserve clause" because "[b]aseball's history shows that chaotic conditions prevailed when there was no reserve clause" and because "[e]xperience points to no feasible substitute to protect the integrity of the game or to guarantee a comparatively even competitive struggle."¹⁰⁰ Unsurprisingly, the Court concluded that although other professional sports including football, boxing, and basketball were required to comply with the federal antitrust laws, baseball's reserve system was exempt from them.¹⁰¹

Caveat: I do not mean to suggest that the unique national institution canon did all of the interpretive work in *Flood v. Kuhn*. To be sure, the *Flood* opinion, like the opinion in *Holy Trinity*, relied on several traditional interpretive tools other than the baseball-as-national-icon narrative to reach its conclusion. Chief among those other tools were (1) two prior Supreme Court opinions, *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*¹⁰² and *Toolson v. New York Yankees, Inc.*,¹⁰³ which

99. *Flood v. Kuhn*, 309 F. Supp. 793, 797 (S.D.N.Y. 1970) (emphasis added).

100. *Flood*, 407 U.S. at 272-73 (quoting H.R. REP. NO. 82-2002, at 229 (1952)) (emphasis added).

101. *Id.* at 282-83.

102. 259 U.S. 200 (1922).

103. 346 U.S. 356 (1953).

interpreted the federal antitrust laws to exempt baseball's reserve clause, and (2) the fact that Congress had been well aware of the Court's interpretation in *Federal Baseball* and *Toolson* for fifty years, but had not acted to bring baseball's reserve system within the antitrust statutes.¹⁰⁴ In fact, it is these other interpretive canons—dubbed statutory *stare decisis* and legislative inaction, respectively—for which *Flood* is best known in statutory interpretation circles.¹⁰⁵ My point in this Article is not to suggest that statutory interpretation scholars have been wrong to focus on statutory *stare decisis* and legislative inaction when analyzing *Flood*; it is merely to show that the conventional reading of *Flood*, like the conventional reading of *Holy Trinity*, misses something important. That something is the recognition that whatever other canons the Court may have relied on in *Flood* and *Holy Trinity*, it also developed substantive background norms—using narratives about the unique national status of baseball and Christianity—and wielded those norms as conclusive evidence of congressional intent to exempt certain privileged national icons from the relevant statutes' reach.

Moreover, *Federal Baseball* and *Toolson* at least arguably were ripe for overruling in *Flood*, given the Court's established treatment of the antitrust laws as common law statutes subject to judicial updating¹⁰⁶ and intervening cases refusing to exempt football, boxing, and golf from the Sherman Act's reach.¹⁰⁷ If the Court had not viewed baseball as such a unique and important national institution, in danger of destruction if subjected to the antitrust laws, it might well have taken the opportunity in *Flood* to declare *Federal Baseball* and *Toolson* outdated and to bring baseball within the Sherman Act's reach.

104. *Flood*, 407 U.S. at 280-82.

105. See, e.g., WILLIAM N. ESKRIDGE, PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 640-42 (4th ed. 2007).

106. See, e.g., *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978) ("Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.").

107. See *Int'l Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242 (1959); *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957); *Deesen v. Prof'l Golfers' Ass'n of Am.*, 358 F.2d 165 (9th Cir. 1966).

Such speculations aside, one need look no further than the concluding section of the *Flood* majority opinion for proof that the baseball narrative played a significant role in the Court's determination that the Sherman Act did not apply to baseball. Points 2 and 3 in the Court's summary of its reasoning acknowledged that its ruling, together with the *Federal Baseball* and *Toolson* precedents, created "an aberration confined to baseball,"¹⁰⁸ but defended that aberration, in part, because "[i]t rests on a recognition and an acceptance of baseball's unique characteristics and needs."¹⁰⁹ Moreover, Blackmun's belief that "if the antitrust laws were applied to baseball, its unique position as the national pastime would be undermined" is well known.¹¹⁰

Finally, it bears noting that Justice Marshall's dissenting opinion made a point of stating that "Americans love baseball as they love all sports."¹¹¹ This comment hardly was critical to the dissent's reasoning, but it is interesting, if not telling, that the dissent sought subtly to challenge the majority's baseball-as-national-icon claim. In fact, the next sentence of Justice Marshall's dissent not-so-subtly chided the majority for allowing its fondness for the game to interfere with its construction of the statute, noting that "[p]erhaps we become so enamored of athletics that we assume that they are foremost in the minds of legislators as well as fans."¹¹² The dissent's reprimand elucidates the work that the unique national institution canon does in the case; the dissent chastises the Court for inappropriately allowing baseball's place in American society to serve as definitive evidence of congressional intent.

So, the Court's use of the baseball-nation narrative in *Flood* followed much the same pattern as did its use of the Christian-nation narrative in *Holy Trinity*:

1. The antitrust laws are general and clearly would cover baseball's reserve clause if straightforwardly applied.
2. However, baseball is the national pastime and enjoys a unique place in American society, as a result of which this Court twice has ruled it exempt from the antitrust laws

108. *Flood*, 407 U.S. at 282.

109. *Id.*

110. WOODWARD & ARMSTRONG, *supra* note 95, at 190.

111. *Flood*, 407 U.S. at 292 (Marshall, J., dissenting).

112. *Id.*

and Congress has abided by this interpretation for fifty years.¹¹³

3. Therefore, it is unthinkable that Congress ever intended the antitrust laws to cover baseball's reserve clause, and we must continue to read those generally-applicable laws to exempt this one special sport.

B. Leo Sheep v. United States

The Supreme Court's opinion in *Leo Sheep*¹¹⁴ similarly used sweeping historical narrative to justify an exception from statutory coverage for a unique national institution—this time, for railroads. Written by Justice Rehnquist, the opinion opened with a comment that barely concealed its author's zeal for its subject matter: "This is one of those rare cases evoking episodes in this country's history" that ought to be remembered "as adventure."¹¹⁵ As in *Flood*, the Court's opinion then succinctly set forth the statutory question at issue: whether the Government has an implied easement to build a road across land that originally was granted to the Union Pacific Railroad (and subsequently sold to Leo Sheep) under the Union Pacific Act of 1862.¹¹⁶ That question, the Court explained, "is posed against the backdrop of a fascinating chapter in our history"¹¹⁷ and "courts, in construing a statute, may with propriety recur to the history of the times when it was passed."¹¹⁸

As it did in *Holy Trinity* and *Flood*, the Court then provided a detailed history of the American West and the crucial role that railroads played in settling it. Exhibit 1 in that history lesson was the acquisition of the territory that became the American West, through the Louisiana and Gadsden Purchases in 1803 and 1853.¹¹⁹ Exhibit 2 was that that territory remained unsettled for decades, with many pre-1850 maps referring to the area west of the Missouri River as the "Great American Desert."¹²⁰ And Exhibit 3 was that as

113. See *supra* notes 73-96 and accompanying text.

114. *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979).

115. *Id.* at 669.

116. *Id.*

117. *Id.*

118. *Id.* (quoting *United States v. Union Pac. R.R. Co.*, 91 U.S. 72, 79 (1875)).

119. *Id.* at 670.

120. *Id.*

of 1860, the entire population of the State of Nebraska was less than 30,000 persons.¹²¹

Having thus established the unsettled state of the West as of 1860, the Court then described the nation's historic need for railroads to connect the eastern states to the West. The Court first explained that the building of the railroad was animated by "the desire of the Federal Government that the West be settled."¹²² That desire grew with the discovery of gold in California in 1848, as "[t]hose in the East with visions of instant wealth ... confronted the unenviable choice among an arduous 4-month overland trek, risking yellow fever on a 35-day voyage via the Isthmus of Panama, and a better than 4-month voyage around Cape Horn" (Exhibit 4),¹²³ and it intensified in the heat of the Civil War, when a logistical link with California became necessary (Exhibit 5).¹²⁴ But, the Court noted, "private investors would not move without tangible governmental inducement" (Exhibit 6).¹²⁵ Providing that governmental inducement proved difficult, because the direct governmental subsidy of a transcontinental railroad fell within a constitutional gray area, as Andrew Jackson had shown in 1830 when he vetoed a bill funding construction of a road from Maysville to Lexington, Kentucky (Exhibit 7).¹²⁶ A "checkerboard" land-grant scheme was suggested, but did not get off the ground, according to the Court, until two Civil War battles that "doubtless made some impression upon Congress of the necessity for being able to transport readily men and materials into that area for military purposes."¹²⁷ The Court's narrative described these admittedly "minor" military engagements—known as the Battle of Picacho Pass in Arizona and the Battle of Glorieta Pass in the Rocky Mountains—in some detail (Exhibits 8 and 9).¹²⁸ Finally, the Court quoted from comments made on the House floor during the debate on the Union Pacific Act:

121. *Id.*

122. *Id.* at 671.

123. *Id.* at 670.

124. *Id.* at 671.

125. *Id.*

126. *Id.* at 672. The issue was whether the funding of "internal improvements" such as railroads was within Congress's enumerated constitutional powers. *Id.*

127. *Id.* at 674.

128. *Id.* at 674-75.

If this Union is to be preserved, if we are successfully to combat the difficulties around us, if we are to crush out this rebellion against the lawful authority of the Government, and are to have an entire restoration, it becomes us, with statesmanlike prudence and sagacity, to look carefully into the future, and to guard in advance against all possible considerations which may threaten the dismemberment of the country hereafter.¹²⁹

(Exhibit 10). In short, the Court concluded that Congress enacted the statute, at least in part, because it believed transcontinental railroads were necessary to save the Union.¹³⁰

This judicial history lesson occupied a full eight pages of text and, as in *Flood*, garnered its own separate part.¹³¹ The subtext, or bottom line, of the lesson was that we needed a railroad to unify our scattered, vast nation. And we needed the Union Pacific Act and its checkerboard land-grant scheme to achieve this national imperative. As the history lesson illustrated, the checkerboard scheme allowed the government to donate alternate sections of land adjacent to the tracks to the railroads, while reserving the other half for sale.¹³² The idea was that the development of the railroad would cause the price of the reserved sections to double, so that the government would recover from the reserved sections the price of the land it had given away;¹³³ with the cost of the land grants thus neutralized, the government could be said not to have subsidized the railroads, and the constitutional gray area could be avoided.

After thus painting the development of the Union Pacific Railroad and the checkerboard land-grant scheme as the solution to a nineteenth-century national dilemma, the Court then stated that “[t]his case is the modern legacy of these early grants.”¹³⁴ Quoting from its own prior case law, the Court declared that “the intent of Congress in making the Union Pacific grants was clear: ‘It was to aid in the construction of the [rail]road by a gift of lands along its route, without reservation of rights, except such as were specifically

129. *Id.* at 675-76 (quoting CONG. GLOBE, 37th Cong., 2d Sess. 1703 (1862) (statement of Rep. Edwards)).

130. *See id.*

131. *Id.* at 670-77.

132. *Id.* at 673.

133. *Id.* (citing P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 345-46 (1968)).

134. *Id.* at 677.

mentioned.”¹³⁵ In other words, the history showed that Congress’s intent was to give private investors whatever land rights it took, within constitutional limits, to ensure that the railroads would be built. Given this intent, the Court simply could not imagine that Congress meant implicitly to reserve an easement for the government across the railroad’s lands. This was especially so, the Court explained, because Congress did make a few express reservations for homestead lands and mineral lands; where the Act is silent, the history accordingly dictated that the default should favor the railroads.¹³⁶

As in *Flood*, I do not mean to suggest that the unique national institution exception was the only interpretive tool upon which the *Leo Sheep* Court relied. The Court also quoted from two prior Supreme Court cases supporting a construction favoring the railroads and placed significant emphasis on the common law¹³⁷ doctrine of easements by necessity and its inapplicability given the government’s power of eminent domain.¹³⁸ My point in this Article is not to undermine the interpretive role played by these other tools of statutory construction, but merely to highlight the overlooked role that the unique national institution canon played in the Court’s interpretation. The Court’s history lesson in how-the-railroads-settled-the-American-West was more than just a fanciful detour taken by an overenthusiastic author of a majority opinion; it was a powerful interpretive tool used to establish Congress’s intent regarding the reservation of government rights against the railroad.

Perhaps the most telling evidence of the role that the unique national institution exception played in the Court’s decision surfaced in the course of the Court’s refusal to apply a classic, tried-and-true substantive canon in the opposite direction. As the Court explained:

The Government would have us decide this case on the basis of the familiar canon of construction that, when grants to federal

135. *Id.* at 679 (quoting *Missouri, K. & T.R. Co. v. Kan. Pac. R.R. Co.*, 97 U.S. 491, 497 (1878)).

136. *See id.* at 678-79.

137. *Id.* at 682-83 (quoting *Winona & St. Peter R.R. Co. v. Barney*, 113 U.S. 618, 625 (1885); *United States v. Denver & Rio Grande Ry. Co.*, 150 U.S. 1, 14 (1893)).

138. *Id.* at 679-80.

lands are at issue, any doubts “are resolved for the Government, not against it.” *But this Court long ago declined to apply this canon in its full vigor to grants under the railroad Acts.*¹³⁹

In other words, land grants to the railroads were unique. The Court acknowledged that public grants generally are to be “construed strictly against the grantees [that is, the railroads],” but insisted that such grants “are not to be so construed as to defeat the intent of the legislature.”¹⁴⁰ And Congress’s intent with respect to the railroad financiers, given the historical imperative to build a railroad, was solicitous. Thus, the Court noted that although “[i]t is possible that Congress gave the problem [of governmental access through railroad lands] little thought,” it was “at least as likely” that Congress considered the issue but decided that “negotiation, reciprocity considerations, and the power of eminent domain” were better avenues for securing such access than limiting the bundle of property rights conveyed to the railroads.¹⁴¹

Further, the Court, quoting a prior case involving the railroad land grants, observed that when a statute passed by Congress:

[O]ffers to individuals or to corporations [] an inducement to undertake and accomplish great and expensive enterprises or works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.¹⁴²

Translation: A special background rule applies in light of the role that railroad land grants played in the settlement of the American West. Indeed, the Court effectively created a reverse background presumption in favor of the railroads: unless a right expressly is reserved against the railroad on the face of the land-granting statute, the statute must be construed to favor the railroad. This formulation, like the Christian-nation argument in *Holy Trinity*, shares much in common with modern-day clear statement rules,

139. *Id.* at 682 (emphasis added) (citation omitted).

140. *Id.* at 682-83 (quoting *Denver & Rio Grande*, 150 U.S. at 14).

141. *Id.* at 681.

142. *Id.* at 682-83 (quoting *Denver & Rio Grande*, 150 U.S. at 14).

which require an explicit declaration in the statutory text in order to contravene certain background constitutional norms.¹⁴³ Moreover, it follows the three-step pattern set by the Christian-nation narrative in *Holy Trinity* and the baseball narrative in *Flood*:

1. The statute at issue clearly would imply an easement in favor of the government and against the railroad (and its successor) under ordinary, generally-applicable principles of statutory construction.
2. However, railroads are a unique national institution; they were the solution to a national crisis in the nineteenth century, and it took substantial government inducement to get private parties to build them.¹⁴⁴
3. Therefore, it is unthinkable that Congress could have meant quietly to limit the rights it conveyed to the railroads and we must except this unique national institution from the general rule of implied governmental reservations that would apply to other private land grantees.

Thus, the Court once again used the unique national institution canon as an interpretive tool through which to carve out a statutory exception for a particular privileged entity. Railroads, like baseball and Christian churches, were painted as national icons, upon which Congress could not have intended to impose the statutory burdens that applied to other land grantees, sports, or employers.

C. *FDA v. Brown & Williamson*

The statutory question at issue in *FDA v. Brown & Williamson Tobacco Corp.*¹⁴⁵ was whether the Federal Food, Drug, and Cosmetic Act¹⁴⁶ (FDCA) authorized the Food and Drug Administration (FDA) to regulate tobacco products. One of the main arguments presented by the tobacco companies was that if the Act did authorize the FDA to regulate tobacco, then it also would require the agency to ban tobacco products, given the FDA's findings that such products were dangerous and unsafe.¹⁴⁷ Although the statutory text clearly gave

143. See discussion *supra* note 50 and accompanying text.

144. See *supra* notes 119-30 and accompanying text.

145. 529 U.S. 120 (2000).

146. 21 U.S.C. §§ 301 et seq. (1994).

147. See, e.g., Brief of Respondents Philip Morris Inc. & Lorillard Tobacco Co. at 40-41,

the FDA authority to regulate “drugs” and “devices,”¹⁴⁸ the Court agreed with the tobacco companies’ construction and concluded that Congress could not have intended, in enacting the FDCA, to give the FDA authority to regulate, and in effect ban, tobacco products.¹⁴⁹

As in *Holy Trinity*, *Flood*, and *Leo Sheep*, the Supreme Court in *Brown & Williamson* relied significantly on tobacco’s unique place in American life and its centrality to the American economy to reach this interpretation. Unlike in those earlier cases, however, the Court in *Brown & Williamson* did not offer a detailed narrative about tobacco’s unique national status. The opinion for the Court contained no romanticization of tobacco, no lengthy homage to tobacco’s place in our nation’s history. Rather, the Court simply alluded, in a few disjointed places, to tobacco’s role in the American economy and in American society. In Part II.A, for example, the Court matter-of-factly noted that a provision of the U.S. Code declares that “the marketing of tobacco constitutes *one of the greatest basic industries of the United States* with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare.”¹⁵⁰ (Exhibit 1). Several pages later, in Part II.B, the Court quoted statements made by Department of Health, Education, and Welfare (HEW) Secretary Anthony Celebrezze during congressional hearings held in 1965, urging Congress not to amend the FDCA to cover “smoking products” because “such a ‘provision might well completely outlaw at least cigarettes,’” and “[t]his would be contrary to what, we understand, is intended or what, in the light of our experience with the 18th amendment, *would be acceptable to the American people.*”¹⁵¹ (Exhibit 2).

That was the sum total of the Court’s explicit references to tobacco’s unique status in American society. But although the

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (No. 98-1152); Brief for Respondent R.J. Reynolds Tobacco Co. at 24-26, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (No. 98-1152) [hereinafter R.J. Reynolds Brief].

148. See 21 U.S.C. §§ 321(g)-(h), 393 (1994 & Supp. III 1998).

149. *Brown & Williamson*, 529 U.S. at 142.

150. *Id.* at 137 (quoting 7 U.S.C. § 1311(a) (2000) (internal quotation marks omitted)) (emphasis added).

151. 529 U.S. at 145-46 (quoting *Cigarette Labeling and Advertising: Hearings Before the H. Comm. on Interstate and Foreign Commerce*, 88th Cong. 18 (1964) (statement of Anthony Celebrezze, Secretary, Department of Health, Education, and Welfare) (emphasis added)).

Court's opinion did not dwell on it, the tobacco-as-unique-national-institution narrative very much was lurking in the background of the case. The brief for the United States Tobacco Company, for example, reminded the Court of tobacco's vaunted pedigree upfront, noting that: "Smokeless tobacco has a long history. The Copenhagen brand of moist snuff has existed since 1822. The 'Garrett' trademark, used for moist and dry snuff products, is the oldest trademark in continuous use in the United States."¹⁵² (Background Record Exhibit 1). The brief for the R.J. Reynolds Tobacco Company similarly emphasized tobacco's central role in the American economy, explaining that: "Since early in this century, *tobacco products have been commonly used, and tobacco and tobacco products have constituted a major sector of the U.S. economy.*"¹⁵³ (Background Record Exhibit 2). The R.J. Reynolds Brief later circled back and specifically tied tobacco's economic significance to Congress's intent, arguing that

A tobacco ban would be contrary to Congress's intent in enacting the FDCA. *In view of the significant place of tobacco products in American life in 1938*, widespread concerns about their safety, and the then recent end of alcohol prohibition in 1933, *a ban on tobacco products was not reasonably within the contemplation of the enacting Congress.*¹⁵⁴

Finally, the Fourth Circuit opinion in the case highlighted legislators' sympathies towards tobacco farmers, quoting the following comment made during floor debate on amendments to the Federal Cigarette Labeling and Advertising Act:¹⁵⁵

[I]t is my feeling that not one of the tobacco farmers in my district would knowingly produce any commodity which, when consumed, would cause the dread diseases which have been claimed to be associated with tobacco. But the claims ... are not proved. Tobacco has been impeached in passion but it had not

152. R.J. Reynolds Brief, *supra* note 147, at 3.

153. *Id.* (emphasis added).

154. *Id.* at 32.

155. 15 U.S.C. § 1331 (Supp. V 1970).

been convicted in fact. Facts, cold hard facts are the basis upon which congress should legislate.¹⁵⁶

(Background Record Exhibit 3).

The Court had all of this evidence of tobacco's unique status before it while it reviewed the case and decided how to interpret the statute. And although the Court did not choose to devote several pages of text to eulogizing tobacco's role in American history, it was rather candid about the impact that this history had on its ultimate construction of the statute. Indeed, after noting the lack of textual evidence or legislative history indicating that the enacting Congress even contemplated that the FDCA might apply to tobacco products, the Court explicitly deferred to tobacco's historic status in American life, concluding that "[g]iven the economic and political significance of the tobacco industry at the time, *it is extremely unlikely that Congress could have intended to place tobacco within the ambit of the FDCA* absent any discussion of the matter."¹⁵⁷ Moreover, towards the end of its opinion, the Court again referred to tobacco's special national status to explain its construction that the FDCA does not cover tobacco products: "*Owing to its unique place in American history and society, tobacco has its own unique political history. Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products.*"¹⁵⁸

Thus, despite its lack of lyricism or detailed exegesis on tobacco's history, the Court very much relied on a background narrative about tobacco's national status to interpret the relevant statute. As in *Holy Trinity*, *Flood*, and *Leo Sheep*, it established—albeit in truncated fashion—a background presumption that tobacco is a “unique” national commodity deserving of special treatment and used that presumption as conclusive evidence of congressional intent to exempt tobacco from the reach of an otherwise clear statutory text (or, in the case of *Leo Sheep*, from the application of

156. *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 180 (4th Cir. 1998) (Hall, J., dissenting) (quoting *Cigarette Labeling and Advertising: Hearings Before the H. Comm. on Interstate and Foreign Commerce*, 91st Cong. 16 (1969) (comments of Rep. Carl Perkins, Chairman, Comm. on Education and Labor)).

157. *Brown & Williamson*, 529 U.S. at 147 (emphasis added).

158. *Id.* at 159 (emphasis added).

an otherwise controlling interpretive canon). Once again, the Court's analysis followed the familiar pattern inaugurated in *Holy Trinity*:

1. The statute at issue is generally-worded and clearly would empower the FDA to regulate tobacco products if straightforwardly applied.
2. However, tobacco is a unique national commodity with a critical role in the American economy and a long history of recreational use in American society.¹⁵⁹
3. Therefore, it is unthinkable that Congress could have meant for the statute to authorize the FDA to regulate, let alone ban, tobacco products, and we must read the statute to except this unique national commodity.

And again, as in *Holy Trinity*, *Flood*, and *Leo Sheep*, the Court's formulation approximated a clear statement rule: "[g]iven the economic and political significance of the tobacco industry at the time, it is extremely unlikely that Congress could have intended to place tobacco within the ambit of the FDCA *absent any discussion of the matter*."¹⁶⁰ In other words, *unless Congress expressly indicates otherwise, we will not interpret a statute to give a mere agency power over such an important national commodity*.

But the background presence of the tobacco narrative aside, it bears asking: why was there no lengthy homage to tobacco in this opinion? One possible answer is that the Court saw no need to pay extended tribute to tobacco because it is common knowledge that tobacco farming played a prominent role in our nation's history. Every schoolchild learns that tobacco was the cash crop of the first Virginia colonies and that many of the founding fathers were tobacco growers. It is no accident, after all, that tobacco leaves grace the tops of the pillars on nearly all federal buildings in Washington, D.C., including the Supreme Court.¹⁶¹ But the problem with this explanation is that it arguably also is true that the nation's Christian roots were common knowledge when *Holy Trinity* was decided, and that baseball's status as the national pastime was obvious when *Flood* was written, yet that did not stop the Court

159. See *supra* notes 150-53, 156 and accompanying text.

160. *Brown & Williamson*, 529 U.S. at 147 (emphasis added).

161. Ronald J. Rychlak, *Cards and Dice in Smoky Rooms: Tobacco Bans and Modern Casinos*, 57 *DRAKE L. REV.* 467, 472 n.27 (2009).

from cataloguing the country's Christian heritage or providing a sentimental history of baseball in those cases.

The real reason, I think, for the Court's reluctance to wax lyrical about tobacco in *Brown & Williamson* is that by the time the case was decided in 2000, the serious health hazards associated with tobacco use had become well known and tobacco's place in our national history had become somewhat of an embarrassment—at least to Justice O'Connor, who authored the majority opinion. Thus, the opinion for the Court stated that “for better or for worse,”¹⁶² Congress had chosen to give tobacco special treatment. The subtext: we, the Court, need not applaud tobacco's privileged status through a detailed history lesson, but merely will acknowledge it and interpret the statute in accordance with that background norm—that is, interpret the FDCA to leave tobacco regulation up to Congress and to deny the FDA authority to regulate tobacco.

As in *Flood* and *Leo Sheep*, there were, of course, other interpretive tools at work in *Brown & Williamson* besides the lurking unique national institution canon. The opinion for the Court also relied, for example, on the fact that during the first seventy-three years of the FDCA's operation, the FDA repeatedly insisted that it was not authorized to regulate tobacco products.¹⁶³ Moreover, the Court placed substantial weight on the existence of six federal statutes specifically regulating tobacco sales and advertising, reasoning that if the FDA actually possessed the authority to regulate tobacco products, then Congress would not have stepped in and regulated tobacco itself.¹⁶⁴ Along these same lines, the Court noted that, over the years, Congress had considered and rejected a number of bills that expressly would have given the FDA authority to regulate tobacco products.¹⁶⁵ As in the earlier cases, the Court's reliance on these other interpretive tools has been much discussed in the commentary on *Brown & Williamson* and forms part of the conventional understanding of the case.¹⁶⁶ By emphasizing the

162. *Brown & Williamson*, 529 U.S. at 159.

163. *Id.* at 125, 144-46, 155-58.

164. *Id.* at 143-56.

165. *Id.* at 147-48.

166. See, e.g., Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 322 (2004); Charles H. Koch, Jr., *Judicial Review of Administrative Policymaking*, 44 WM. & MARY L. REV. 375, 386 & n.58 (2002); Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J.

background influence that the tobacco narrative exerted on the Court's opinion, this Article does not mean to undermine the interpretive work performed by these other tools of construction, but only to make the conventional understanding of the case more complete.

D. Morton v. Mancari

*Morton v. Mancari*¹⁶⁷ is an intricate case involving the intersection of Title VII's antidiscrimination provision, as amended in 1972,¹⁶⁸ with a statutory preference for Indian employees at the Bureau of Indian Affairs (BIA) contained in the 1934 Indian Reorganization Act.¹⁶⁹ The case was initiated by non-Indian employees at the BIA¹⁷⁰ who argued that the Bureau's practice of giving preferences to Indian employees violated Title VII's requirement that personnel actions "be made free from any discrimination based on race, color, religion, sex, or national origin."¹⁷¹ The BIA countered that Title VII was enacted against a historical and statutory backdrop that recognized the unique status of Indian tribes and of Indian self-governance, and authorized an employment preference for Indians as a means to that end.¹⁷² It argued that Congress could not have intended, in enacting Title VII, to undo the long-standing Indian employment preference.¹⁷³ The Supreme Court agreed, holding, inter alia, that absent a clear statement in the text of Title VII indicating Congress's intent to repeal the employment

941, 1009-10 (2000).

167. 417 U.S. 535 (1974).

168. Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e et seq. (Supp. II 1973). The original, unamended version of Title VII enacted as part of the 1964 Civil Rights Act applied only to private employers and contained an express exemption for preferential employment of Indians by Indian tribes or by industries located on or near Indian reservations. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(b), 2000e-2(i) (1964). When Congress amended the statute in 1972 to extend its coverage to federal government employers, it failed to enact a similar express exemption for preferential Indian employment. 42 U.S.C. § 2000e-16 (Supp. II 1973).

169. 25 U.S.C. § 472 (1934).

170. *Mancari*, 417 U.S. at 539.

171. 42 U.S.C. § 2000e-16(a) (Supp. II 1973).

172. Brief of Appellants at 7-20, *Morton v. Mancari*, 417 U.S. 535 (1974) (No. 73-362) (citing treaties).

173. *Id.* at 27-29.

preferences for Indians, the statute must be read to contain an exception for Indian preferences.¹⁷⁴

As in the other cases discussed in this Part, the *Mancari* Court relied significantly on the unique historical status of Native Americans and tribal reservations to arrive at this interpretation of Title VII. But as with its treatment of tobacco in *Brown & Williamson*, the Court's execution of the Native-Americans-as-unique-national-entities argument was minimalist in *Mancari*. The opinion for the Court contained no detailed historical exegesis of the complicated relationship between the United States government and Native Americans, no apologetic chronicling of the manner in which Indian lands were taken by American settlers. Rather, the opinion subtly alluded to that history as the backdrop against which federal employment preferences for Indians were created and in light of which congressional intent towards the rights of Indians living on reservations should be measured. Thus, rather than recount the wars and treaties that produced the Indian reservations, the Court's opinion took that history as understood, and instead emphasized the unique treatment of Native American employees.

Part II of the opinion, for example, began by noting that the practice of according "hiring preference[s] to Indians in the Indian service dates at least as far back as 1834," when a preference was given "to persons of Indian descent" to serve as interpreters "for the benefit of the Indians" (Exhibit 1).¹⁷⁵ The opinion went on to cite additional statutes conferring preferences to Indians for employment as "clerical, mechanical, and other help on reservations and about agencies" (Exhibit 2);¹⁷⁶ as "herders, teamsters, and laborers 'and where practicable in all other employments' in the Indian service" (Exhibit 3);¹⁷⁷ as "matrons, farmers, and industrial teachers in Indian schools" (Exhibit 4);¹⁷⁸ and creating a "general preference [for] Indian labor and products of Indian industry" (Exhibit 5).¹⁷⁹

174. *Mancari*, 417 U.S. at 547-49.

175. *Id.* at 541 & n.7 (citing Act of June 30, 1834, § 9, 4 Stat. 737, 25 U.S.C. § 45).

176. *Id.* at n.8 (citing Act of May 17, 1882, § 6, 22 Stat. 88 and Act of July 4, 1884, § 6, 23 Stat. 97, 25 U.S.C. § 46).

177. *Id.* (citing Act of Aug. 15, 1894, § 10, 28 Stat. 313, 25 U.S.C. § 44).

178. *Id.* (citing Act of June 7, 1897, § 1, 30 Stat. 83, 25 U.S.C. § 274).

179. *Id.* (citing Act of June 25, 1910, § 23, 36 Stat. 861, 25 U.S.C. § 47).

The Court then alluded to the special status of Native Americans, explaining that the purpose of the Indian preferences was “to further *the Government’s trust obligation toward the Indian tribes,*” and “to give Indians a greater participation in their own self-government” (Exhibit 6).¹⁸⁰ And the Court quoted from a letter reprinted in the House Report to the 1934 Indian Reorganization Act, from President Franklin Roosevelt to Congress, calling federal encouragement of Indian self-governance “*the obligation of honor of a powerful nation* toward a people living among us and dependent upon our protection” (Exhibit 7).¹⁸¹ The Court similarly quoted from a lengthy floor statement by the House sponsor of the 1934 Act, discussing the importance of Indian self-governance and the need for Indian employment preferences to achieve it (Exhibit 8).¹⁸² Finally, the Court cited data indicating that the Indian preferences were working—that the percentage of Indians employed in the Bureau rose from 34 percent in 1934 to 57 percent in 1972 as a result of the preferences (Exhibit 9).¹⁸³

The message underlying these historical references was that the Indian tribes have a special trust relationship with the United States government and that preferential treatment for Indian employees in jobs dealing with Indian governance under the BIA was part of the government’s longstanding approach to fulfilling its duties towards the Indian tribes. Thus, after laying out its historical case, the Court made the familiar unique national institution argument that absent “some affirmative showing” of congressional intent to repeal the Indian preference, Title VII’s otherwise clear text must be read to except employment decisions that promote Indian self-governance.¹⁸⁴ In the Court’s words, “[a]ny other conclusion can be reached only by formalistic reasoning that ignores both the history and purposes of the preference and the *unique legal relationship between the Federal Government and tribal Indians.*”¹⁸⁵ Against this backdrop, the Court “simply cannot conclude”¹⁸⁶ that

180. *Id.* at 541-42 (emphasis added).

181. *Id.* at 542 n.10 (quoting H.R. REP. NO. 1804, at 8 (1934)) (emphasis added).

182. *Id.* at 543-44 (quoting 78 CONG. REC. 11729 (1934) (statement of Rep. Howard)).

183. *Id.* at 545.

184. *Id.* at 550.

185. *Id.* (emphasis added).

186. *Id.* at 551.

Congress could have intended to undo the Indian preferences when it extended Title VII's antidiscrimination provisions to federal employers in 1972—even though Congress did not expressly exempt the Indian preferences from the amendment's reach.¹⁸⁷ In fact, as in *Holy Trinity*, *Flood*, *Leo Sheep*, and *Brown & Williamson*, the *Mancari* Court created the equivalent of a reverse clear statement rule: absent clear language on the face of a statute indicating otherwise, we will assume that Congress intends to maintain all historical preferences for Indian employees.

Because *Mancari* involved a face-off between the *statutory* preference for Indian employees contained in the Indian Reorganization Act and the antidiscrimination provision in amended Title VII, the Court's opinion also relied heavily on the canon against implied repeals of existing statutes in construing the scope of Title VII.¹⁸⁸ In fact, it is this interpretive canon for which *Mancari* is best known.¹⁸⁹ Nevertheless, it seems quite likely that the Court would have construed Title VII the same way, based on the unique status of Native American tribes, even without the canon against implied repeals—that is, even if the Indian preferences had been part of longstanding federal practice but never had been codified.

Any doubts about the work performed by the unique national institution canon in *Mancari* should be resolved when one considers two things. First, the original version of Title VII enacted as part of the 1964 Civil Rights Act, which prohibited discrimination by private employers, *did contain* an explicit exemption for preferential treatment towards Indians “on or near an Indian reservation.”¹⁹⁰ Thus, the fact that Congress did not include an express exemption for Indian employment preferences when it extended Title VII to federal employers was significant and created the kind of linguistic discrepancy that courts often take as strong evidence of congressional intent *not* to exempt Indian preferences in the second situation.¹⁹¹ Accordingly, the Court must have relied on some back

187. See *supra* note 165.

188. *Mancari*, 417 U.S. at 551.

189. See, e.g., Carlos E. González, *Trumps, Inversions, Balancing, Presumptions, Institution Prompting, and Interpretive Canons: New Ways for Adjudicating Conflicts Between Legal Norms*, 45 SANTA CLARA L. REV. 233, 305 n.156 (2005) (calling *Mancari* the “most cited federal case for the presumption against implied repeals”).

190. 42 U.S.C. §§ 2000e(b), 2000e-2(i) (1964).

191. The *expressio unius* canon suggests that the express inclusion of a thing (the Indian

ground norm to tip the scales in favor of finding a congressional intent *not* to apply Title VII's antidiscrimination provision to Indian employment preferences. If that background norm were as simple as the canon against implied repeals, then why the detailed references in Part II to the history and purpose of Indian preference statutes, including several statutes besides the allegedly repealed statute at issue? Second, the unique status of Native Americans very clearly was on the Court's mind when it decided the case. Indeed, the second half of the opinion, which addressed the constitutionality of the Indian preference, directly discussed the broad history behind Native American reservations and the United States' special relationship with the tribes who live on them:

In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.¹⁹²

(Exhibit 10). Although the Court did not reference this history until the constitutional section of its opinion, the history—like the jury bell that cannot be unrung—obviously formed part of the background against which the Court conducted its statutory construction.

The Court's use of the unique national institution canon in *Morton v. Mancari* once again followed the familiar three-step pattern:

1. The statute at issue is general and clearly would invalidate Indian employment preferences if straightforwardly applied.

preference) in one part of the statute implies its deliberate exclusion under another part of the statute (the amendment) that contains no similar exclusion. See ESKRIDGE, FRICKEY & GARRETT, *supra* note 105, at 1088 (making this point regarding *Mancari*).

192. *Mancari*, 417 U.S. at 552.

2. However, Indian tribes have a unique status vis-à-vis the United States government, and the United States long has provided special preferences for Indian employees.¹⁹³
3. Therefore, it is unthinkable that Congress could have intended for the statute to invalidate Indian employment preferences, and we must read the statute to exempt this unique national entity from the general rule.

The unique national institution canon, or at least the Supreme Court's articulation of it, thus seems to have two distinct parts:

A historical narrative/other evidence/statement that X = A Unique National Institution	+	A conclusion that the statute at issue cannot govern X, because X = A Unique National Institution
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The first part involves a sort of judicial notice-taking of American history or tradition and can be lengthy, as in *Holy Trinity*, *Flood*, and *Leo Sheep* or cursory, as in *Brown & Williamson* and *Mancari*. The second part provides the interpretive work dictating how the statute should be construed; it is the distilled version of the third step of the syllogism outlined above for each of the cases. It can be stated, in canon form, as follows: general statutes and rules of law do not apply to unique national institutions unless Congress clearly has indicated otherwise.

III. THE UNIQUE NATIONAL INSTITUTION CANON IN CONTEXT

Beyond the mechanics of how the unique national institutional canon operates, the canon's existence itself raises numerous and significant theoretical questions. For example, what does it take for an interpretive technique to qualify as a "canon" or "rule" of statutory construction as opposed to a mere style of argument? Can the unique national institution exception to general rules of law legitimately be dubbed such a canon? Is the exception, in any event, a good interpretive approach? This last Part addresses such defi-

¹⁹³. See *supra* notes 175-83, 192 and accompanying text.

nitional and normative concerns about the unique national institution exception's status and value as an interpretive rule.

A. “Canons” Unpacked

The canons of statutory interpretation variously have been described as rules of thumb, maxims, presumptions, or conventions that courts use to determine the most likely meaning of statutory text.¹⁹⁴ But such definitions are unsatisfyingly self-referential. Distilled to its core, canonical status seems to derive from an interpretive technique's claim to one or more of the following: (1) frequent use by the Supreme Court; (2) longevity, in that the technique originated in English courts or long has been listed in Sutherland's definitive treatise, *Statutes and Statutory Construction*;¹⁹⁵ (3) grounding in some fundamental tenet of the American legal system (such as, the Constitution); or (4) promoting consistent judicial treatment of certain words or subject matters. The *expressio unius* maxim, for example, gains its canonical status primarily through longevity—it is a Latin maxim used often by the English courts and is prominent in Sutherland's treatise¹⁹⁶—and also has been used frequently by the Supreme Court.¹⁹⁷ The Rule of Lenity likewise derives authority from its longevity—Justice Scalia has defended the canon on the grounds that it “is almost as old as the common law itself”¹⁹⁸—and from its basis in the fundamental constitutional due process principle that criminal laws should give fair notice of the behavior that is outlawed.¹⁹⁹ Interpretive techniques with a shorter historical pedigree, such as the whole act and whole code rules, have achieved canonical status because they promote the consistent treatment of statutory words, phrases,

194. See ESKRIDGE, FRICKEY & GARRETT, *supra* note 105, at 847-48; KENT GREENAWALT, LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS 201 (1999).

195. STATUTES AND STATUTORY CONSTRUCTION (Norman Singer & J.D. Shambie Singer eds., 7th ed. 2007).

196. *Id.* at 398-438.

197. See, e.g., *Barnhart v. Sigman Coal Co.*, 534 U.S. 438, 552-53 (2002).

198. Scalia, *supra* note 10, at 29.

199. See, e.g., *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703-04 (2005); *Cleveland v. United States*, 531 U.S. 12, 25 (2000); *United States v. Granderson*, 511 U.S. 39, 54 (1994); *United States v. Kozminski*, 487 U.S. 931, 939 (1988); see also ESKRIDGE, FRICKEY & GARRETT, *supra* note 105, at 32 (categorizing the Rule of Lenity as a Due Process-based substantive canon).

sections, and subject matter. And one of the newest additions to the arsenal of statutory interpretation canons, the federalism clear statement rule, earned its stature through frequent Supreme Court use coupled with a grounding in the fundamental constitutional principle of federalism.²⁰⁰

The basic thread connecting all of these canons is established convention. Whether their authority derives from pedigree, frequent use, constitutional grounding, or precedential weight, the interpretive canons are treated as such because they are believed to reflect rules or norms with which the legal community is familiar. The “canons” are given special status, rather than treated as ordinary legal argument styles or logical inferences, because they are believed to reflect the background understandings against which legislators draft statutory language, and against which judges, lawyers, and those affected by a statute are meant to read that language.²⁰¹

So, what does all of this mean for the unique national institution exception to general rules of law? Is it a “canon” or “rule” of statutory interpretation, as this Article has argued, or merely an argumentative technique which the Supreme Court has used on a few occasions to avoid the plain meaning of a statute’s text? There is no evidence thus far that the exception was used by English courts, and it has not been listed in Sutherland’s treatise, so the longevity rationale does not seem to apply. Nor is there any indication that the exception has been used frequently by the Supreme Court; there may be instances other than those documented in this Article in which the Court excepted a revered national institution from a general rule of law, but thus far at least, there is no indication that it has done so frequently. Neither is the exception based on any fundamental constitutional tenet, although it does derive from basic public norms. The exception does, however, seem to fit the last criteria for canonical status, in that it seeks to

200. See, e.g., *Rapanos v. United States*, 547 U.S. 715, 737-40 (2006) (Scalia, J., plurality opinion); *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140-41 (2004); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994); *Gregory v. Ashcroft*, 501 U.S. 452, 461-64 (1991); see also ESKRIDGE, FRICKEY & GARRETT, *supra* note 105, at 32 app. B (categorizing federalism clear statement rules as Constitution-based substantive canons).

201. See, e.g., ESKRIDGE, FRICKEY & GARRETT, *supra* note 105, at 48; William N. Eskridge, Jr. & Philip P. Frickey, Foreword, *Law as Equilibrium*, 108 HARV. L. REV. 26, 66-69 (1994).

promote consistent legal and judicial treatment of special national entities. Like other recognized canons of statutory interpretation, the unique national institution exception derives its authority from established conventions—sometimes proved through a historical narrative and exhibits—about how particular American icons are to be treated by the government and in the law. Moreover, the Court relies on the unique national institution exception for the same reason that it relies on other canons of statutory construction—because it believes that the exception captures the background understandings and norms which Congress takes into account when drafting *all* statutes.

In this sense, the unique national institution exception is much more than just a style of argument or an argumentative technique. It is more than just a way of arguing that the statute's plain language cannot be followed because Congress did not intend or anticipate this particular result from this particular statute. Indeed, purpose-based and legislative history-based arguments could achieve that much on their own. What the unique national institution exception provides is a larger, more expansive rule dictating that broad, general statutes presumptively should not be applied in a manner that burdens certain special American icons. It is based not on Congress's intent with respect to the particular statute at hand, but on overarching legal and public norms in the shadow of which Congress is presumed to legislate. The canon thus is somewhat like the "constitutional avoidance" canon, which dictates not that the purpose of a particular statute is inconsistent with a proposed interpretation or that the statute's legislative history precludes that interpretation, but rather that an interpretation should be presumed incorrect (avoided) when it conflicts with the established constitutional principles that form the backdrop against which Congress drafts statutes.

Some may question whether an interpretive technique, even if based on established convention, can be considered a "canon" when the Court has not labeled it as such in its opinions. That is, they may resist the idea that there can be an "accidental" or "undeclared" canon of statutory construction. Such criticism, however, ignores the fact that the Court regularly employs canons of statutory construction without announcing that that is what it is doing. The Court

routinely, for example, relies on the “dog that didn’t bark” canon,²⁰² the *expressio unius* canon,²⁰³ and the whole act rule²⁰⁴ without identifying the canon on which it is relying or even necessarily indicating that the argument it is making is based on a canon. In other words, the Court often simply sets forth its reasoning as

202. The canon is named after a famous Sherlock Holmes story, *Silver Blaze*, in which the fact that a dog did not bark while a racehorse was being stolen led the detective to deduce that the thief was someone the dog knew well. ARTHUR CONAN DOYLE, *Silver Blaze*, in *THE MEMOIRS OF SHERLOCK HOLMES* 27 (Christopher Roden ed., 1993). The canon holds that where the legislative history is silent, courts should not presume that Congress intended to work drastic changes in a law, on the theory that if drastic changes were intended, some legislator would have “barked” and highlighted the change somewhere in the legislative history. The Supreme Court has employed this canon several times without naming it or even mentioning the words “dog” or “bark.” See, e.g., *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 88 (2007) (relying on the fact that when the Federal Aid Impact Program statute was amended in 1994, “no Member of Congress, no Department of Education official, no school district or State” expressed the view that the amendment required the Secretary of Education to change the Department’s long-standing system for calculating equalization of expenditures); *Scheidler v. N.O.W.*, 547 U.S. 9, 20 (2006) (refusing to presume that the 1946 revision to the Hobbs Act worked any change in the underlying substantive law absent clear expression of a legislative intent to work such change).

203. See, e.g., *Rowe v. N.H. Motor Transp. Ass’n*, 128 S. Ct. 989, 997 (2008) (rejecting the claim that there is a public health exception to the preemption provision of the Federal Aviation Administration Authorization Act on the grounds that the Act explicitly lists several other exceptions without mentioning public health); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 298 (2006) (noting that the lack of any reference to expert fees or of any comparable provisions relating to the reasonableness of expert fees “strongly suggests that recovery of expert fees is not authorized” under the Individuals with Disabilities Education Act). For an explanation of how the *expressio unius* canon works, see *supra* note 191.

204. See, e.g., *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 128 S. Ct. 1020, 1025-26 (2008) (rejecting argument that fiduciaries cannot be held liable for losses in an individual account because, inter alia, one section of ERISA exempts fiduciaries from liability when losses are caused by participants’ exercise of control over assets in their individual accounts and noting that “[t]his provision would serve no real purpose if, as respondents argue, fiduciaries never had any liability for losses in an individual account”); *Hinck v. United States*, 550 U.S. 501, 507 (2007) (“We cannot accept the Hincks’ invitation to isolate one feature of this ‘precisely drawn, detailed statute’—the portion specifying a standard of review—and use it to permit taxpayers to circumvent the other limiting features Congress placed in the same statute—restrictions such as a shorter statute of limitations than general refund suits, or a net-worth ceiling for plaintiffs eligible to bring suit.” (citations omitted)); *Rapanos v. United States*, 547 U.S. 715, 735 (2006) (stating that wetlands abutting tributaries with intermittent water flow are not “navigable waters” because, inter alia, “the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from ‘navigable waters,’ by including them in the definition of ‘point source’” and by defining “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source” and, further, that these definitions “would make little sense” if there was significant overlap between what constitutes “navigable waters” and what constitutes a “point source”).

to why a statute should be read a certain way, without locating that reasoning in the chain of jurisprudential authority to which it belongs or labeling that reasoning as an application of a particular interpretive rule. For example, in *Scheidler v. National Organization of Women*, the Court relied on congressional silence to argue that the 1946 revisions to the Hobbs Act did not work any major changes in the law, without making any mention of dogs, barking, or the Sherlock Holmes story from which the dog that did not bark canon gets its name.²⁰⁵ And that is precisely what the Court has done in the unique national institution cases—it has created exceptions for five special national entities because established conventions and practices so dictated, and it has done so without labeling its reasoning and without tying its reasoning in one case to its reasoning in prior cases. The Court's failure explicitly to identify the canon does not make the unique national institution exception any less a canon of construction than the failure to reference barking dogs or to label arguments based on legislative silence as an interpretative rule renders the dog that did not bark canon nonexistent.

Assuming, then, that the unique national institution exception is a legitimate canon of statutory construction, the question remains: what kind of canon is it? Scholars have suggested that the canons of statutory interpretation can be divided into three separate categories: textual canons, reference canons, and substantive canons.²⁰⁶ Textual canons are rules that seek to gauge the most likely meaning of statutory language based on clues and inferences found within the four corners of the statute—such as the structure, grammar, punctuation, or relationship between words and phrases in the statute's text.²⁰⁷ Reference canons involve the use of outside sources, extrinsic to the statutory text, as guides to statutory meaning, including a statute's legislative history, the common law, other statutes with similar language or structure, and agency

205. *Scheidler*, 547 U.S. at 20.

206. See, e.g., ESKRIDGE, FRICKEY & GARRETT, *supra* note 105, at 848; GREENAWALT, *supra* note 194, at 201.

207. See ESKRIDGE, FRICKEY & GARRETT, *supra* note 105, at 848; GREENAWALT, *supra* note 194, at 201-06; see also Brudney & Ditslear, *supra* note 49, at 12-13 (referring to textual canons as "language canons").

interpretations of a statute.²⁰⁸ Substantive canons are policy-based canons that create deliberate presumptions in favor of a particular statutory interpretation based on background legal or normative considerations.²⁰⁹

The unique national institution canon obviously cannot be considered a textual canon because it directs courts to ignore the text of the statute and to create an exception to the most natural reading of that text. But further categorization is difficult, as the canon shares features in common with both reference and substantive canons. On the one hand, the unique national institution exception's appeal to common practice—that is, to how government entities and the law have treated a special national entity thus far—is rather like an appeal to the prototypical extrinsic source, the common law. On the other hand, given that the exception relies on public norms and national traditions, it bears a striking resemblance to substantive canons such as the avoidance canon, clear statement rules, and the presumption against implying causes of action into federal statutes.²¹⁰ In my view, the primary difference between the reference and the substantive canons seems to be concreteness. Reference canons look to information—legislative history, the common law, other statutes, and agency interpretations—that is written down somewhere, in an authoritative extrinsic source. Substantive canons, by contrast, rely on public policies and background norms that are far more ethereal and that can seem to spring forth, Athena-like, from judges' heads²¹¹ to fill the spaces between written laws, practices, and constitutions. In this sense, the unique national institution exception, based as it is on judicial articulation of experienced but unwritten, intangible American traditions and values, has more in common with the loosey-goosey substantive canons than it does with the more tangible reference canons.

208. See ESKRIDGE, FRICKEY & GARRETT, *supra* note 105, at 848; GREENAWALT, *supra* note 194, at 171, 201, 233.

209. See ESKRIDGE, FRICKEY & GARRETT, *supra* note 105, at 848; GREENAWALT, *supra* note 194, at 206-11; Brudney & Ditslear, *supra* note 49, at 13.

210. See *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102-05 (1991); *Thompson v. Thompson*, 484 U.S. 174, 179 (1988).

211. See, e.g., EDITH HAMILTON, *MYTHOLOGY* 29 (1950) (describing Athena's birth, full-grown and in full armor, from Zeus's head).

B. Normative Considerations

The Court's opinions in *Holy Trinity*, *Flood*, *Leo Sheep*, *Brown & Williamson*, and *Mancari* have been criticized for going against the text of the relevant statute, producing bad policy, and creating an unfair exception for one entity.²¹² In employing the unique national institution exception to decide these cases, the Court neither has denied the countertextual nature of its construction nor has defended the policy consequences produced by it. Instead, the Court's justification has been that its interpretation is most consistent with Congress's specific intent towards a particular litigant or implicated entity, given that entity's iconic national status. And, irrespective of the substantive merits of the Court's constructions, it is striking that the Court does appear, in all five cases, accurately to have gauged Congress's specific intent towards the relevant regulated entities. That is, the available alternative evidence indicates that the enacting Congresses did not intend to outlaw the employment practices of Christian churches, subject baseball's reserve clause to the antitrust laws, limit the land rights conveyed to railroads, give the FDA authority to regulate tobacco products, or repeal the BIA's Indian employment preferences.

212. See, e.g., ESKRIDGE, FRICKEY & GARRETT, *supra* note 105, at 981 (arguing that a subsequent shift in statutory policy, favoring protection of the nation's natural resources rather than facilitation of private action, changed the landscape against which *Leo Sheep* should have been decided); Robert C. Berger, *After the Strikes: A Reexamination of Professional Baseball's Exemption from the Antitrust Laws*, 45 U. PITT. L. REV. 209, 210 & n.3 (1983) (criticizing the Supreme Court for "engag[ing] in overt policy-making for the benefit of a single industry.... This special 'exemption,' based on an obvious sympathy for the maturing 'national pastime,' was starkly contrary to the prevailing antitrust law. It ignored the rights and problems of the players, as well as of other potential competitors, in order to protect the interests of the then-established owners. This was not only both bad law and a poor reflection on the ideal of the 'objective judiciary,' but also arguably was bad policy in that it provided a potent precedent for specialized, situational- and industry-specific applications of otherwise general laws." (citations omitted)); Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1762 (1997) (criticizing the *Mancari* Court's failure to appreciate the racial classification consequences of upholding the Indian employment preference); C. Paul Rogers III, *Judicial Reinterpretation of Statutes: The Example of Baseball and the Antitrust Laws*, 14 HOUS. L. REV. 611, 620 (1977) (criticizing *Flood*); Scalia, *supra* note 10, at 22; Richard A. Whiting et al., *Professional Sports: Has Antitrust Killed the Goose that Laid the Golden Egg?*, 45 ANTITRUST L.J. 290, 299 (1976) (similarly criticizing *Flood*); Joseph G. White, Note, *Prestidigitation and the Chevron Doctrine: Food and Drug Administration v. Brown & Williamson Tobacco Corporation*, 120 S. Ct. 1291 (2000), 24 HAMLINE L. REV. 285, 313 (2001) (criticizing *Brown & Williamson*).

In *Holy Trinity*, for example, available contemporary evidence indicates that Congress never contemplated outlawing the employment practices of Christian churches, but sought only to curtail the widespread industrialist practice of importing large numbers of “cooly” foreign workers to take the place of American laborers on a temporary basis at reduced wages, only to be sent back to their home countries a few years later.²¹³ Indeed, once the *Holy Trinity* litigation raised the possibility that the statute might be read to outlaw a church’s engagement of a foreign minister, Congress swiftly passed an amendment exempting ministers from the statute’s reach.²¹⁴ Although this amendment did not operate retroactively to govern the outcome in *Holy Trinity*, its uncontroversial adoption a few short years after passage of the original Alien Contract Labor Act is powerful evidence that the Congress that enacted the statute did not intend for it to govern the employment practices of Christian churches.²¹⁵

Similarly, congressional studies and legislative discussions about the reserve clause during the fifty years between *Federal Baseball* and *Flood* make clear that Congress shared the *Flood* Court’s high regard for baseball and feared the damage that might be done to the “integrity of the game” and the “chaotic conditions” that might prevail if the reserve clause were eliminated.²¹⁶ Likewise, Congress’s compliant relationship with the robber barons who built the

213. See Chomsky, *supra* note 13, at 922-41. Chomsky’s thorough excavation of the contemporary and legislative history surrounding the statute’s passage convincingly demonstrates that it was designed to outlaw

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

Id. at 930 (quoting 16 CONG. REC. 1259, 1625 (1885) (statement of Sen. Hamley)). Even the chief opponent of this view, Adrian Vermeule, acknowledges that the statute was “aimed to halt the importation of European and Asian manual laborers thought to be a degraded species of immigrants harmful to American labor and institutions.” Vermeule, *supra* note 9, at 1846.

214. 22 CONG. REC. 2955, 3245, 3428 (1891); see also Chomsky, *supra* note 13, at 936-38.

215. The original statute was enacted in 1885 and the amendment in 1891. Compare Alien Contract Labor Act of 1885, 23 Stat. 332 (codified as amended at 29 U.S.C. § 2164 (1901), *superceded by* Act of Mar. 3, 1903, Pub. L. No. 57-162, 32 Stat. 1213), with 22 CONG. REC. 3245, 3428 (1891).

216. See *supra* notes 99-100 and accompanying text.

railroads at issue in *Leo Sheep* is well-documented and wholly inconsistent with the notion that Congress implicitly intended to limit the land rights conveyed under the Union Pacific Act.²¹⁷ And available contemporary evidence strongly suggests that when it enacted the FDCA in 1938, Congress neither contemplated nor intended to give the FDA authority to regulate tobacco products²¹⁸ (indeed, the dissenting opinion in *Brown & Williamson* essentially acknowledges as much).²¹⁹ Finally, Congress's enactment of two new Indian preference laws involving government training programs within months of amending Title VII is strong evidence that the Congress that amended Title VII to cover federal employers did not mean to eliminate the BIA preferences.²²⁰

But if the Court accurately gauged Congress's specific intent in these cases, then why are the cases so widely-criticized? And, perhaps more importantly, is the unique national institution exception on balance a good or a bad interpretive rule? The answer

217. See, e.g., DEE BROWN, *HEAR THAT LONESOME WHISTLE BLOW: RAILROADS IN THE WEST* 47-48, 58-59 (1977). It is well known that railroad lobbyists and industrialists enjoyed a cozy relationship with members of Congress, sometimes bought through the issuance of railroad stock certificates and land titles to representatives and senators. See, e.g., *id.* at 47, 58. As the infamous Credit Mobilier scandal revealed, the Union Pacific laid track on the longest routes possible to reap extra money and land from Congress and submitted highly inflated estimates of railroad construction costs, bilking the Treasury of huge monetary grants—all without investigation or objection from members of Congress, many of whom had been given stock in the railroad. *Id.* at 58-59.

218. At the time the FDCA was enacted, it was understood that the FDA's predecessor agency, the Bureau of Chemistry, lacked authority to regulate tobacco products under the Pure Food and Drug Act of 1906, unless they were marketed with therapeutic claims. See Bureau of Chemistry, U.S. Dep't of Agric., Service and Regulatory Announcements 21, 24 (Apr. 1914) (Feb. 1914 Announcements ¶ 13, Opinion of Chief of Bureau C.L. Alsberg). Moreover Congress, in 1929, had considered and rejected a bill seeking to extend the Pure Food and Drug Act to cover tobacco and tobacco products. S. 1468, 71st Cong. 1 (1929); see also 71 CONG. REC. 2589 (1929) (remarks of Sen. Smoot). In other words, when specifically confronted with this issue a few years earlier, Congress had declined to give the relevant agency authority to regulate tobacco products.

219. See, e.g., *Brown & Williamson*, 529 U.S. at 166 (Breyer, J., dissenting) ("In 1938, it may well have seemed unlikely that the FDA would ever bring cigarette manufacturers within the FDCA's statutory language by proving that cigarettes produce chemical changes in the body and that the makers 'intended' their product chemically to affect the body's 'structure' or 'function.' Or, back then, it may have seemed unlikely that, even assuming such proof, the FDA actually would exercise its discretion to regulate so popular a product.").

220. See Education Amendments of 1972, 86 Stat. 235, 20 U.S.C. §§ 887c(a) & (d), 1119a (Supp. II 1970) (requiring that Indians be given preference in government programs for training teachers of Indian children).

to the first question is simple: the cases are widely-criticized because the Court's constructions contradict the clear text of the relevant statutes and single out one entity for special treatment under the law. The answer to the second question is less clear. As with most reference and substantive canons, the unique national institution exception has both positive and negative dimensions.

On the positive side, as the above discussion illuminates, the exception seems accurately to capture Congress's probable intent towards the special national institutions in question. Congress probably did not want the general statutes construed in these cases to cover churches, baseball, railroads, tobacco, or Native Americans. Many consider the effectuation of legislative intent to be the most important goal of statutory interpretation;²²¹ by this measure, the unique national institution exception is an extraordinarily useful canon.

Further, the exception bears the refreshing advantage of promoting judicial honesty. Some, such as the legal realists, would argue that judges often decide cases based on vague notions about public values and policies, but tend to couch their reasoning in traditional rules and neutral principles without acknowledging the role that public values play in their decision-making. If this is true, perhaps a canon that allows judges to be open and honest with the public about the background norms motivating their decisions—as the unique national institution exception does—is to be welcomed.

In addition, the important legal concept of reliance interests supports the Court's use of the unique national institution exception: assuming that the Court accurately has gauged the background public values giving rise to the exception, a statutory construction that ignores the unique national status of the institutions in question and subjects them to the general rule would upset the settled expectations of private parties. Significantly, this is a point stressed by the Court in *Flood*, *Brown & Williamson*, and *Mancari*. In *Flood*, for example, the Court specifically expressed

221. See, e.g., *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 105 (2007) (Stevens, J., concurring) (“[A] judicial decision that departs from statutory text may represent ‘policy-driven interpretation.’ ... As long as that driving policy is faithful to the intent of Congress (or, as in this case, aims only to give effect to such intent) ... the decision is also a correct performance of the judicial function.” (internal citation omitted)).

“concern about the confusion”²²² and the “injustices of retroactivity and surprise which might follow”²²³ a judicial overturning of baseball’s longstanding antitrust exemption. Baseball owners had come to rely upon and plan under the assumption that baseball was exempt from the antitrust laws; to rule otherwise now unfairly would disadvantage them in their business dealings with baseball players. Similarly, in *Brown & Williamson*, the Court repeatedly emphasized the FDA’s prior disavowal of any authority to regulate tobacco products²²⁴ as well as the fact that “Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area.”²²⁵ The upshot of these statements is that tobacco companies rightfully had come to expect, and to rely upon the expectation that, they would be regulated by Congress rather than by the FDA. Again, changing the rules mid-game would have upset the tobacco companies’ settled expectations and disadvantaged them unfairly in the conduct of their business. Likewise, in *Mancari*, the Court repeatedly stressed the “longstanding” nature of the statutory preference for BIA employment of Native Americans.²²⁶ Although the Court did so to demonstrate that Congress could not have intended to repeal that preference, its reasoning also pointed out that a repeal would cause Native Americans to lose a benefit upon which they had come to depend.²²⁷

Finally, insofar as the unique national institution canon seeks to effectuate public values and traditions established over time, it can claim consistency with Burkean conservatism.²²⁸ Edmund Burke

222. *Flood v. Kuhn*, 407 U.S. 258, 283 (1972).

223. *Id.* at 279.

224. *Brown & Williamson*, 529 U.S. at 125, 144, 146, 152.

225. *Id.* at 159-60.

226. *Morton v. Mancari*, 417 U.S. 535, 537, 548, 550 (1974).

227. *See id.* at 542 n.10 (stating “the obligation of honor of a powerful nation toward a people living among us and dependent upon our protection” (quoting H.R. REP. NO. 73-1804, at 8 (2d Sess. 1934))).

228. Edmund Burke was a political theorist and philosopher who served for several years in the British House of Commons. *See* JIM MCCUE, EDMUND BURKE AND OUR PRESENT DISCONTENTS 16 (1997). A contemporary of the founding fathers, Burke supported the American Revolution and his ideas significantly influenced their vision of ideal government. *See, e.g.*, RUSSELL KIRK, RIGHTS AND DUTIES 119-25 (1997); RUSSELL KIRK, THE ROOTS OF

was a contemporary of the founding fathers and a passionate defender of English custom-centered common law.²²⁹ Burke urged a “custodial attitude” towards history and tradition and viewed the preservation of past customs and practices as paramount to the law and social order.²³⁰ Further, he disdained rationalism and abstract reasoning as inferior bases for establishing the rules that govern society.²³¹ The unique national institution canon, in appealing to history, tradition, and common practice to create an exception from an abstract general rule—an exception that might have no basis in rational, abstract reasoning—thus could well be seen as a respectful judicial tool for maintaining a Burkean coherence in the law.

On the other hand, there are significant negative consequences that may flow from the Court’s use of the unique national institution exception. First, there is a substantial danger that the exception will invite judicial overreaching by enabling judges to import their personal predilections into a statute under the guise of articulating prevailing societal norms. Allowing judges to decide which entities constitute “unique national institutions,” let alone selectively to recount the nation’s history and traditions, is dangerous business. Judges, for all their intelligence and education, are not trained historians. Further, unlike trained historians, they do not function in a medium that requires them to acknowledge the personal biases that may cause them to slant a historical account in a particular direction. In contrast to historical accounts, which are to be as balanced as possible, judicial opinions are meant to be authoritative and definitive. Indeed, when applying the unique

AMERICAN ORDER 382-83 (3d ed. 1991); Edmund Burke, Speech on Conciliation with America (Mar. 22, 1775), in BURKE: SPEECH ON CONCILIATION WITH AMERICA 62 (Hammond Lamont ed., 1897).

229. J. Richard Broughton, *The Jurisprudence of Tradition and Justice Scalia’s Unwritten Constitution*, 103 W. VA. L. REV. 19, 30 (2000).

230. *Id.* (quoting EDMUND BURKE, REFLECTIONS OF THE REVOLUTION IN FRANCE 33 (L.G. Mitchell ed., Oxford Univ. Press 1993) (1790)).

231. See, e.g., Neomi Rao, *A Backdoor to Policy Making: The Use of Philosophers by the Supreme Court*, 65 U. CHI. L. REV. 1371, 1399 (1998) (“The Anglo-American legal tradition has been heavily influenced by the conservatism of writers such as Burke, who focused on practical wisdom and experience, and who were deeply suspicious of the rationalist philosophers generating revolution and rebellion across the English Channel.”). Indeed, one of the grounds on which Burke criticized the men elected into the Tiers Etat in France was that “not one man was to be found” who had “any practical experience in the state” and that “[t]he best were only men of theory.” BURKE, *supra* note 230, at 40.

national institution exception in the cases discussed in this Article, the Court presented its account of American history and traditions not merely as one view of the cathedral, but as the uncontroversial, absolute truth—so universally accepted that Congress could not have intended to legislate contrary to it. There is no room within this framework for equivocal narration, and judges are rather more likely to overstate than to hedge their historical accounts.

This is not to say that there are no constraints on the manner in which judges employ the unique national institution canon. The Court's characterization of an entity as a national institution must, of course, be grounded in actual historical practice or tradition. Even when the exhibit-by-exhibit model of narration is not followed, as in *Brown & Williamson*, the Court's claims of historical privilege for a particular American entity must ring true—and cannot be conjured out of thin air by a justice on a policy mission. The Court could not credibly claim, for example, that the United States is a Muslim nation, that soccer is the American national pastime, or that poppy seeds are a long-standing and critical feature of the American economy. Indeed, the Court's reluctance to wax eloquent on America's history as a tobacco nation in *Brown & Williamson*, while still acknowledging tobacco's "unique place in American history and society"²³² and factoring that history into its interpretation of Congress's likely intent, can be taken as a sign that the unique national institution canon is grounded in more than the whims of a particular authoring justice. Tellingly, Justice O'Connor's majority opinion goes so far as to express doubt about the merits of the regulatory approach adopted by Congress, stating that "Congress, *for better or for worse*, has created a distinct regulatory scheme for tobacco products,"²³³ but nevertheless deems the Court compelled to interpret the statute *not* to give the FDA jurisdiction to regulate tobacco, given tobacco's "unique place in American history and society."²³⁴ One thus gets the distinct feeling that, in *Brown & Williamson*, tobacco's unique national status influenced the Court's interpretation in spite of, rather than because of, the authoring justice's personal views.

232. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

233. *Id.* (emphasis added).

234. *Id.*

It may be, then, that a judge's personal preferences play more of a role in determining the manner and tone in which the unique status of a particular national icon is conveyed than in determining whether the icon's unique status influences the Court's interpretation. Still, judges do have significant discretion to portray these national institutions as they wish, and they often are selective in their depictions, emphasizing only the romantic tradition-bound vision and ignoring any negative undersides. This is possible because the constraints judges face in employing the unique national institution exception are historical, rather than normative. An entity need not have worked more good than harm in order to qualify as a unique national institution; it need only be steeped in American history and tradition. Thus judges are free, in characterizing a particular entity as a national institution, to wax lyrical on its positive role in society and to leave out any negative undersides that might detract from that revered image. Consider, for example, the following table, contrasting the romantic view painted by the Court in each of the relevant cases with the nasty underside which the Court chose to ignore.

TABLE 2²³⁵

<i>Case</i>	<i>Romantic View</i>	<i>Nasty Underside</i>
<i>Church of the Holy Trinity v. United States</i>	Christian Nation	Religious Exclusion and Prejudice Ignores the Establishment Clause
<i>Flood v. Kuhn</i>	Baseball as National Pastime	Monopoly and Price-gouging by Greedy Ball Club Owners
<i>Leo Sheep v. United States</i>	Land Grants To Build the Great Transcontinental Railroad	Robber Barons Cheat and Overcharge Congress (Credit Mobilier Scandal)
<i>FDA v. Brown & Williamson</i>	Tobacco as the Great American Crop	Tobacco Causes Cancer Tobacco as Crop of Death
<i>Morton v. Mancari</i>	Integration and Protection of Native Americans	Stifling Paternalism Sanctions Racial Preferences

The unique national institution canon's susceptibility to judges' selective characterizations is, to say the least, troubling. In each of the cases discussed in this Article, an argument could be made that the romantic views presented by the Court as absolute truth were shaped by the authoring judge's personal feelings towards the national entity in question. Justice Brewer was the deeply religious

235. Many thanks to William Eskridge for suggesting this table.

son of a Christian missionary;²³⁶ Justice Blackmun was an avid lover of baseball;²³⁷ Justice Rehnquist was a railroad enthusiast²³⁸ who once referred to *Leo Sheep* as his favorite opinion;²³⁹ Justice O'Connor seems to have been sensitive to the health risks caused by tobacco products;²⁴⁰ and Justice Blackmun was a sympathetic champion of Native American rights.²⁴¹

Equally troublingly, the unique national institution canon violates the generality principle that is fundamental to our legal system. The generality principle, put simply, dictates that a nation's civil and criminal laws should be applied equally to all its citizens.²⁴² The generality principle has been described as the chief safeguard against abuse and arbitrariness in a constitutionally limited

236. See MICHAEL J. BRODHEAD, DAVID J. BREWER: THE LIFE OF A SUPREME COURT JUSTICE 1837-1910, at 128-29 (1994) (discussing the influence of Brewer's religious convictions on his political and social beliefs).

237. See, e.g., *Harry A. Blackmun Papers*, Manuscript Division, Library of Congress, Box 145, 71-32 & Box 729, 71-32, Washington, D.C. In correspondence included in these papers, Blackmun plainly states his fondness for baseball and his deep appreciation for the opportunity to write an opinion about the game he loved. See also Linda Greenhouse, *Justice Blackmun, Author of Abortion Right, Dies*, N.Y. TIMES, Mar. 5, 1999, at A1 (noting that one of Blackmun's "great loves" was baseball and that, when other Justices criticized the opening of the *Flood v. Kuhn* opinion as "beneath the dignity of the Court," Blackmun insisted that, "I would do it over again because I think baseball deserved it").

238. Notably, Justice Rehnquist devoted several pages in his book about Supreme Court history to analyzing the growth of the railroad system. See WILLIAM H. REHNQUIST, THE SUPREME COURT 83-93 (2001).

239. See Stuart Taylor, Jr., *Supreme Court; Recalling Favorite Decisions*, N.Y. TIMES, Dec. 3, 1985, at B8.

240. I am not aware of any definitive evidence of Justice O'Connor's personal feelings about tobacco products, but her votes in other tobacco cases at least circumstantially betray a lack of affinity for tobacco. See, e.g., *Helling v. McKinney*, 509 U.S. 25 (1993) (joining an opinion allowing a claim that forcing a nonsmoking prisoner to breathe secondhand smoke could, under certain circumstances, constitute cruel and unusual punishment in violation of the Eighth Amendment); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (joining an opinion allowing most product liability claims against cigarette manufacturers to proceed).

241. Blackmun was known as "one of the strongest supporters of Indian rights on the Court," *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 762 (1998) (Stevens, J., dissenting), and authored numerous opinions arguing in favor of protecting American Indian litigants. See, e.g., *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 529 (1986) (Blackmun, J., dissenting) ("[G]reat nations, like great men, should keep their word[.]"); Allison M. Dussias, *Heeding the Demands of Justice: Justice Blackmun's Indian Law Opinions*, 71 N.D. L. REV. 41 (1995) (discussing cases).

242. See, e.g., 1 F. A. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 112-15 (1973).

government,²⁴³ and political scientists have argued that it is essential to the prevention of rent-seeking by special interests.²⁴⁴ Failure to follow the principle, scholars have theorized, would result in a government of men, rather than of laws, in which citizens are ruled by the will of government officials rather than by neutral principles,²⁴⁵ and in which special interests control government officials.²⁴⁶ Viewed through this lens, the Supreme Court's use of the unique national institution exception thus far is not encouraging: as discussed above, the Court's break with the generality principle has led to judicial opinions that appear very much to reflect the individual will and personal tastes of the authoring justices.²⁴⁷ Further, it is difficult to ignore the fact that in creating special exemptions from the general rule in *Flood*, *Leo Sheep*, and *Brown & Williamson*, the Court twisted the statutory text to accommodate three exceptionally wealthy and powerful special interests: railroads, baseball club owners, and tobacco companies. Only once, in *Mancari*, did it use the exception to benefit a disadvantaged, politically powerless group—Native Americans.

So what does all of this mean? In the end, is the unique national institution canon more trouble than it is worth? I think the answer to that question must be a qualified yes. The canon does promote consistency with public values and traditions, but it also gives judges far too much license to elevate certain institutions beyond the reach of general rules of law. Moreover, the exception created by the canon is not necessary to ensure a proper construction of the statute: a direct focus on congressional intent almost certainly would get the Court to the same result without carving holes in the statute. Indeed, where Congress's likely intent was to exempt the entity in question from the statute's reach, other tools of statutory interpretation such as legislative history, contemporary statutes, or the common law should demonstrate this and can be invoked to reach the correct interpretation. Further, insofar as what we are talking about is the default rule—that is, what to do when Congress has not spoken on the law's specific applicability to a particular

243. F. A. HAYEK, *THE CONSTITUTION OF LIBERTY* 153, 169-70 (1960).

244. See JAMES M. BUCHANAN & ROGER D. CONGLETON, *POLITICS BY PRINCIPLE, NOT INTEREST* (1998).

245. HAYEK, *supra* note 243, at 153, 193-94.

246. BUCHANAN & CONGLETON, *supra* note 244.

247. See *supra* notes 236-41 and accompanying text.

entity—coherence and fairness norms argue in favor of a default position that treats all entities the same, rather than one which assumes the existence of special exceptions to the general rule.

The canon's dangers render it all the more important that lawyers and scholars be made aware of its use in statutory construction. If the canon and its dangers are understood, then perhaps opposing counsel will be more likely to present the nasty underside ignored by those advocating that a special exception be made for a particular national entity. Similarly, if the canon's logical progression becomes part of the interpretive lexicon, then perhaps judges will think twice about signing on to an opinion that contains a seemingly harmless national narrative or a statement that "X entity is special."

CONCLUSION

Most lawyers are familiar with the Christian-nation passages in the *Holy Trinity* opinion and with the ode to baseball that begins *Flood v. Kuhn*. A few also recall the railroad narrative in *Leo Sheep*. But scholars and practitioners typically have dismissed these narratives as fanciful excursions from the main text, taken by an authoring justice for his or her own amusement. One aim of this Article has been to shatter that prevailing view and to reveal the significant role that such national narratives have played in the Court's interpretation of statutes. Another aim has been to demonstrate that beyond these colorful narratives, and sometimes even without using them, the Court has created a powerful interpretive rule—the unique national institution exception from general rules of law.

This Article has argued that the unique national institution exception is as much an interpretive legacy of *Holy Trinity* as is the "spirit of the law" concept for which the case most often is cited. The "spirit of the law" concept has been criticized roundly by several jurists and scholars: Justice Kennedy has argued that excessive reliance on legislative intent and "spirits" is merely a ruse that enables judges "to discover an alternative interpretation of the statute with which the Court is more comfortable."²⁴⁸ Justice Scalia mockingly has characterized the search for legislative intent

248. See *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring).

authorized by *Holy Trinity* as “a handy cover for judicial intent.”²⁴⁹ But, the Christian-nation exception created by the Court in *Holy Trinity*—like the baseball exception created in *Flood*, the railroad exception created in *Leo Sheep*, the tobacco exception created in *Brown & Williamson*, and the Native American exception created in *Mancari*—gives judges far greater leeway to “discover an alternative interpretation of the statute” with which they are “more comfortable” and to substitute judicial intent or policy preferences for legislative intent than do arguments based on legislative history or even the “spirit” of the law. Nevertheless, Justices Kennedy and Scalia went along with the Court’s opinion in *FDA v. Brown & Williamson* and seem perfectly happy to rely on public-norms-based substantive canons as guides to statutory meaning. The irony in all of this, then, is that the danger judges perceive themselves least susceptible to may be the one that works the greatest harm. And in the end, *Holy Trinity*’s least-appreciated interpretive legacy—the unique national institution exception—may prove to be its most dangerous.

249. Scalia, *supra* note 10, at 18.

