"A PICTURE HELD US CAPTIVE":
CONCEPTUAL CONFUSION AND THE LEMON TEST

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The very way in which a concept is defined and the nuance in which it is employed already embody to a certain degree a prejudgment concerning the outcome of the chain of the ideas built upon it.

Karl Mannheim¹

A picture held us captive. And we could not get outside it, for it lay in our language and language seemed to repeat it to us inexorably.

Ludwig Wittgenstein²

According to Raoul Berger, "[r]igorous constitutional analysis [often] halts at the door of particular predilections."³ This tendency is perhaps best illustrated by those cases involving the religion clauses of the first amendment.⁴ Since 1971, the Supreme Court has analyzed the establishment clause through the application of a three-part test it first articulated in *Lemon v. Kurtzman*:⁵ "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'"⁶

This Comment argues that the first part of the *Lemon* test, the purpose criterion, should be eliminated. Attempts to determine purpose—both in the historical sense of the "Framers' intent" and with respect to contemporary legislation—are meaningless and lead the Court to assume a causal relationship between purpose and effects that

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¹ K. MANNHEIM, *IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE* 177 (L. Wirth & E. Shils trans. 1952).

² L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 115 (G. Anscombe trans. 1958).

³ R. BERGER, *GOVERNMENT BY JUDICIARY* 411 (1977).

⁴ The first amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

⁵ 403 U.S. 602 (1971).

⁶ *Id.* at 612-13 (citations omitted).

does not necessarily exist. The resulting confusion distorts the Court's understanding of effects. This Comment proposes that the Court examine effects contextually, free from the chains of a potentially spurious causation between purpose and effects.

I. OVERVIEW

Early establishment clause cases reflected the Supreme Court's view that religion and theism (of the Judeo-Christian variety) were one and the same; the Court showed little tolerance for other forms of religious expression.⁷ More recent cases in this area have avoided this earlier parochialism.⁸ *Fowler v. Rhode Island*⁹ foreshadowed the contemporary Court's approach to the religion clauses when Justice Douglas stated that "it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."¹⁰ As Laurence Tribe has noted, however, "[w]hile the Court has . . . abandoned the narrow and conventional view of religion reflected in an earlier period, it has not wholly escaped the necessity of drawing some boundary around religion."¹¹

Some Americans are displeased with the boundaries that the Court has drawn around religion. They contend that the Court's tolerance towards all forms of belief (and disbelief) represents a covert hostility towards traditional American values.¹² Because attitudes towards reli-

⁷ See, e.g., *The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 49 (1890) (stating that the Mormon Church's practice of polygamy was "a blot on our civilization. . . . [and] a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world").

⁸ See, e.g., *Welsh v. United States*, 398 U.S. 333, 340, 343-44 (1970) (granting conscientious objector status to a petitioner even though he did not believe in a "Supreme Being").

⁹ 345 U.S. 67 (1953).

¹⁰ *Id.* at 70.

¹¹ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 830 (1978).

¹² Critics of the Court's approach in this area often invoke Justice Douglas' statement that Americans "are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Richard John Neuhaus has offered a sophisticated criticism of the Court's approach to religion since *Zorach*. He argues:

[a]s time went on [after *Zorach*] . . . the Court's references to religion had less and less to do with what is usually meant by religion. That is, religion no longer referred to those communal traditions of ultimate beliefs and practices ordinarily called religion. Religion, in the court's meaning, became radically individualized and privatized. Religion became a synonym for conscience. . . . Thus [for the Court] religion is no longer a matter of . . . communal values but of individual conviction. In short, it is no longer a public reality and therefore cannot interfere with public business.

Such a religious evacuation of the public square cannot be sustained,

gion generate deep emotions, decisions in this area will always be controversial, and the thin line between the free exercise and establishment clauses of the first amendment guarantees that the Court will never be able to adopt an approach that yields obvious and predictable results.¹³

The *Lemon* test appears to compartmentalize the factors that are dispositive in establishment clause cases and hints at precision in both analysis and outcome. Yet Chief Justice Burger, the author of *Lemon*, was not sanguine about the test's ability to clarify establishment clause interpretation: "Candor compels acknowledgment . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive

either in concept or in practice. When religion in any traditional or recognizable form is excluded from the public square, it does not mean that the public square is in fact naked. . . . When recognizable religion is excluded, the vacuum will be filled by *ersatz* religion, by religion bootlegged into public space under other names.

R. NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* 80 (1984).

Neuhaus' assertion that the "public square" can never be naked has much to support it. As Vilfredo Pareto's analysis suggests, while elites rise and fall, a society cannot exist without an operating ideology. Changes in elites are brought about by a loss of faith in the operating ideology. See V. PARETO, *THE RISE AND FALL OF THE ELITES* 36-41 (1986). Neuhaus' conclusion, if accepted, reduces the phrase "government neutrality" to an oxymoron.

Less insightful critics have oversimplified the Court's position in attempts to make it appear unreasonable and unfair. Pat Robertson, the fundamentalist preacher-turned-presidential candidate, has distorted the Court's position in an attempt to rally voters. For example, he stated that Virginia school children could not bring Christmas cookies to school because their teachers were afraid that this activity was unconstitutional. When reporters were unable to verify this story, Robertson dismissed them as "too literal." See *On the Grapevine*, TIME, Feb. 1, 1988, at 19.

¹³ Phillip E. Johnson has pointed out that:

[t]he Supreme Court seems at times to treat any government assistance to religious activities as a forbidden establishment, yet at other times, it requires governments to take extraordinary measures to accommodate unusual religious practices. Despite the most determined efforts of the Justices and the scholars, no single logical framework seems capable of explaining the law (citations omitted).

Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 818-19 (1984).

Although the *Lemon* test has become the interpretative approach to establishment clause cases, there have been a few exceptions. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 786-92 (1983) (employing an historical analysis rather than the *Lemon* test in deciding that the Nebraska legislature's chaplaincy practice did not violate the establishment clause); *Larson v. Valente*, 456 U.S. 228, 252 (1982) (declining to apply the *Lemon* test in declaring that the Minnesota legislature's Charitable Solicitations Act violated the establishment clause because *Lemon* was "intended to apply to laws affording a uniform benefit to all religions, and not to provisions . . . that discriminate among religions" (citations omitted)). According to one commentator, "[t]he *Lemon* test is not novel, but rather a deliberate synthesis of the teaching of earlier precedent." Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 129 (1986).

area of constitutional law.”¹⁴ Other members of the Court have also lacked confidence in the test: Justice O'Connor has argued that the test should be modified,¹⁵ and Chief Justice Rehnquist has written bluntly that “[t]he three-part [*Lemon*] test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize.”¹⁶ Many scholars are no kinder to the *Lemon* test.¹⁷

While criticism of the *Lemon* test will continue, it appears that it will not be readily abandoned by a majority of the Court. As Justice Brennan has stated, the test is the Court's “settled method of analyzing Establishment Clause cases.”¹⁸ This “settled method,” however, has had an unsettling impact on the outcome of establishment clause cases. Jesse Choper argues that the “application of the Court's three-prong test has generated ad hoc judgments which are incapable of being reconciled on any principled basis.”¹⁹ Choper attributes this “conceptual chaos” to the *Lemon* test's third criterion, which addresses the question of “entanglement.”²⁰ Yet a careful examination of the assumptions underlying the *Lemon* analysis reveals that to a greater extent its attempt to determine *purpose* is what has led to conceptual chaos.

II. THE PROBLEMS WITH PURPOSE

Wittgenstein was correct when he wrote that “[a] main source of our failure to understand is that we do not *command a clear view* of the use of our words.”²¹ Under the *Lemon* test, the Court attempts to determine purpose, seemingly unaware of the quagmire it has entered. The Court's hunts for purpose fall into two groups, historical and contemporary, and appeals are made to both. For example, in *Wallace v.*

¹⁴ *Lemon*, 403 U.S. at 612. Time did not improve the Chief Justice's confidence in the test; indeed, in 1983, he declined to apply it in *Marsh*, 463 U.S. at 786-92.

¹⁵ See *Lynch v. Donnelly*, 465 U.S. 668, 687-89 (1984) (O'Connor, J., concurring).

¹⁶ *Wallace v. Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) (Chief Justice Rehnquist was an Associate Justice at the time).

¹⁷ See, e.g., Kurland, *The Irrelevance of the Constitution: The Religious Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 17-23 (1978) (arguing that the three-prong test hardly elucidates the Court's judgments); see also *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1645 (1987) (“[A]pplying the *Lemon* formulation to public sphere accommodations is problematic, because it yields fundamentally ambiguous results.”).

¹⁸ *Lynch*, 465 U.S. at 695-96 (Brennan, J., dissenting).

¹⁹ Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680 (1980).

²⁰ See *id.* at 681.

²¹ L. WITTGENSTEIN, *supra* note 2, at § 122.

Jaffree,²² a recent school prayer case, Chief Justice Rehnquist examined the original intent of the Framers in order to determine purpose,²³ while Justice Stevens, writing for the majority, focused on the legislative history of the statute.²⁴ Not surprisingly, the two approaches to purpose yield different outcomes. But does either really determine purpose?

A. Purpose and Original Intent

Establishment clause cases seem to demand original intent arguments. Many of the Framers and other Founding Fathers wrote on the subject.²⁵ The famous "wall" metaphor, first used in *Everson v. Board of Education*,²⁶ was taken from Jefferson's letter to the Danbury Baptist Association.²⁷ Arguments in favor of eroding, if not destroying, this wall have also appealed to the original intent of the Framers.²⁸ Chief Justice Burger and Chief Justice Rehnquist have relied heavily on original intent arguments when discussing establishment clause cases.²⁹ Justice Brennan has also appealed to the original intent of the Framers, but with far different results than those of the two Chief Justices.³⁰ Taken together, these widely varying approaches illustrate why appeals to original intent are methodologically unsound.

For Chief Justice Burger, both original intent and tradition determine the outcome of most establishment clause cases. Tradition bridges the gap in time between the Framers' era and the present. In *Lynch v. Donnelly*,³¹ for example, the Chief Justice argued that "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least

²² 472 U.S. 38 (1985).

²³ See *id.* at 91-106 (Rehnquist, J., dissenting).

²⁴ See *id.* at 56-61.

²⁵ Chief Justice Rehnquist's dissent in *Wallace* faithfully documents the pertinent primary writings from this period. See *id.* at 91-106 (Rehnquist, J., dissenting).

²⁶ 330 U.S. 1, 16 (1947) ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878))).

²⁷ See *Reynolds*, 98 U.S. at 164.

²⁸ See, e.g., *Wallace*, 472 U.S. at 107 (Rehnquist, J., dissenting) ("[T]he greatest injury of the 'wall' notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights.").

²⁹ See *infra* notes 31-37 and accompanying text.

³⁰ See, e.g., *Abington School Dist. v. Schempp*, 374 U.S. 203, 232-42 (1963) (Brennan, J., concurring) (using the Framers' intent for guidance to deal with the problems of the twentieth century without becoming "too literal" in interpreting that intent); see also *infra* text accompanying notes 38-41 (discussing Justice Brennan's position).

³¹ 465 U.S. 668 (1984).

1789.”³² If these “historical patterns”³³ have become “part of the fabric of our society,”³⁴ then they are constitutional. Accordingly, even an overtly religious activity, if supported by original intent and tradition, does not violate the establishment clause; instead, it is “simply a tolerable acknowledgment of beliefs widely held among the people of this country.”³⁵

Chief Justice Rehnquist’s unadulterated appeal to original intent is most clearly visible in his dissent in *Wallace*,³⁶ which reads like an essay on history. According to Chief Justice Rehnquist, establishment clause confusion has not been caused by any ambiguity in the Constitution itself, but by the Court’s failure to heed the original intent of the Framers. “As drafters of our Bill of Rights, the Framers inscribed the principles that control today. Any deviation from their intentions frustrates the permanence of that Charter and will only lead to the type of unprincipled decision-making that has plagued our Establishment Clause cases since *Everson*.”³⁷ For Chief Justice Rehnquist then, original intent alone, unmediated by tradition, is the standard for establishment clause interpretation.

Justice Brennan, who has far less faith in original intent than Chief Justices Burger and Rehnquist, nevertheless believes that original intent offers some interpretative help in this area. While he states that “an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems,”³⁸ he believes that by focusing on the *consequences* of what the “Framers deeply feared,”³⁹ the Framers can give the Court guidance. Of course, to staunch supporters of original intent, Justice Brennan’s approach only uses the Framers as a springboard into an interpretative approach free from intent. Justice Brennan admits that “[a] too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected.”⁴⁰ He argues that the original intent of the Framers was not to ossify particulars for all time, but instead to discourage “interdependence between religion and state.”⁴¹

How much help is original intent in this area? How much does it

³² *Id.* at 674.

³³ *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

³⁴ *Id.* at 792.

³⁵ *Id.*

³⁶ See 472 U.S. at 91 (Rehnquist, J., dissenting).

³⁷ *Id.* at 113 (Rehnquist, J., dissenting).

³⁸ *Abington School Dist. v. Schempp*, 374 U.S. 203, 234 (1963) (Brennan, J., concurring).

³⁹ *Id.* at 236 (Brennan, J., concurring).

⁴⁰ *Id.* at 237 (Brennan, J., concurring).

⁴¹ *Id.* at 236 (Brennan, J., concurring).

tell us about purpose? The most obvious problem with original intent is that history seemingly can be shaped to fit the demands of a particular argument.⁴² As Justice Brennan states, often "the historical record is at best ambiguous, and statements can readily be found to support either side of [a] proposition."⁴³ History easily becomes the servant of a particular end since it is not a science that produces objective results.⁴⁴ Justice Brennan's and Chief Justice Rehnquist's sharply different understandings of the Framers' intent vividly illustrate this problem.

Even if history could produce objective results, however, original intent jurisprudence would not be without its problems. Proponents of original intent are faced with a more subtle but far more serious issue. For even if history could tell us the Framers' positions, it does not tell us the meaning of the text they wrote. Proponents of original intent are guilty of "the intentional fallacy": they mistakenly believe that the author's intention reveals the meaning of a text.⁴⁵

The Framers' opinions and beliefs are relevant only to the extent that they reveal the meaning of the Constitution; however, their thoughts tell us little, if anything, about methods of constitutional interpretation. Supporters of original intent incorrectly read the Constitution flatly, ignoring both the roles of time and the reader in the interpretative process. This hermeneutical stance has become untenable. According to the literary critic Jonathan Culler,

[a]t its most basic the lesson of contemporary European criticism is this: the . . . dream of a self-contained encounter between innocent reader and autonomous text is a bizarre fiction. To read is always to read in relation to other texts, in relation to the codes that are the products of these texts and

⁴² See, e.g., L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 299 (1988) ("The Justices tend to reason backward . . . They reach results first and then find reasons, precedents, and historical support."). Levy goes on to observe that "[t]wo centuries of Court history should bring us to understand what really is a notorious fact: the Court has flunked history." *Id.* at 300.

⁴³ *Schempp*, 374 U.S. at 237 (Brennan, J., concurring).

⁴⁴ See, e.g., G. IGGERS, NEW DIRECTIONS IN EUROPEAN HISTORIOGRAPHY 3 (1975) ("Since before Nietzsche's essay on 'The Use and Abuse of History' doubts have increasingly been expressed not only regarding the utility of history to life but regarding the possibility of a science of history . . ."); S. KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT 25 (D. Swenson & W. Lowrie trans. 1974) ("[F]or nothing is more readily evident than that the greatest attainable certainty with respect to anything historical is merely an *approximation*.").

⁴⁵ See W. WIMSATT & M. BEARDSLEY, THE VERBAL ICON: STUDIES IN THE MEANING OF POETRY 3-18 (1954) (The "design or intention of the author is neither available nor desirable as the standard for judging the success of a work of literary art . . ."); see also Wimsatt & Beardsley, *Intention*, in DICTIONARY OF WORLD LITERATURE 327 (J. Shipley ed. 1953) (same).

go to make up a culture.⁴⁶

Textual interpretation can never be a mere historical reconstruction. A text's meaning does not spring directly from the text, nor does it spring solely from the reader's mind. Meaning comes from the meeting between text and reader. The reader brings her preconditions, her "prejudices," in Gadamer's special use of the word,⁴⁷ to all texts. This "intertextuality" between reader and text signifies that texts are always media of interpretation.⁴⁸ Even if the thoughts of the Framers and the meaning of the Constitution were identical (which they are not), a flat, "literal" reading of the document would not produce the intent of the Framers.

A text such as the Constitution, which reflects the rules and values of a community, is a "lens[] through which human beings see and respond to their changing worlds"⁴⁹ The pristine world of the Framers can never be recreated, and even if it could, it would fail to disclose meaningful answers. As Gadamer correctly writes, "a hermeneutics that regarded understanding as the reconstruction of the original would be no more than the recovery of a dead meaning."⁵⁰

B. *Purpose and Legislative Intent*

1. Whose Intent Matters?

The second type of purpose hunt involves legislative history. Some members of the Court look first to the intent of the authors and supporters of legislation to determine whether or not legislation is constitutional. An excellent example of this approach to purpose can be found

⁴⁶ J. CULLER, *THE PURSUIT OF SIGNS: SEMIOTICS, LITERATURE, DECONSTRUCTION* 11-12 (1981).

⁴⁷ See H. GADAMER, *TRUTH AND METHOD* 239-45 (1986) ("[P]rejudice means a judgment that is given before all the elements that determine a situation have been finally examined. . . . Thus 'prejudice' certainly does not mean a false judgment, but it is part of the idea that it can have a positive and a negative value.").

⁴⁸ The concept of intertextuality and the notion that texts are always media of interpretation are to a certain extent the insights of deconstruction. For an introduction to this diverse literary approach, see generally, C. NORRIS, *DECONSTRUCTION: THEORY AND PRACTICE* (1982). "A . . . reversal of priorities occurs in the deconstructive reading of 'literary' texts. There is no longer a sense of a primal authority attaching to the literary work and requiring that criticism keeps its respectful distance." *Id.* at 24. While I find this terminology useful, I reject many of deconstruction's more radical conclusions, including the suggestion that this intertextuality reduces interpretation to a completely subjective process.

⁴⁹ G. LINDBECK, *THE NATURE OF DOCTRINE: RELIGION AND THEOLOGY IN A POSTLIBERAL AGE* 83 (1984).

⁵⁰ H. GADAMER, *supra* note 47, at 149.

in *Wallace*,⁵¹ where the Court was faced with an unusual situation described in Justice Stevens' majority opinion: "After reviewing at length what it perceived to be newly discovered historical evidence, the District Court concluded that 'the establishment clause of the first amendment to the United States Constitution does not prohibit the state from establishing a religion.'"⁵²

To decide *Wallace*, Justice Stevens turned to the statute itself, applied the *Lemon* test,⁵³ and then ascertained the statute's purpose by examining its legislative history. He concluded that "[t]he State did not present evidence of *any* secular purpose."⁵⁴

The legislative history behind the Alabama statute was seemingly clear: the statute's sponsor stated for the record that the legislation's purpose was an attempt to return "voluntary prayer" to the public schools.⁵⁵ Since there was no evidence that the statute had any secular purpose, Justice Stevens found the statute unconstitutional without examining the remaining two criteria of the *Lemon* test.⁵⁶

While Justices Powell and O'Connor agreed with Justice Stevens that the Alabama statute had a solely religious purpose, both had reservations about his reliance on the statement of the statute's sponsor. Justice O'Connor pointed out that the sponsor's testimony was given during a preliminary injunction hearing and, in light of this, she "would give little, if any, weight to this sort of evidence of legislative intent."⁵⁷ Justice Powell agreed with Justice O'Connor, stating that "a single legislator's statement, particularly if made following enactment, is not necessarily sufficient to establish purpose."⁵⁸

2. Can Legislative History be Trusted?

The concurrences of Justices Powell and O'Connor in *Wallace* only hint at the problems that come from equating purpose with legislative history. As with original intent, the question of *whose* intent counts becomes an important and disputed question. In *Edwards v. Aguillard*,⁵⁹ a recent case involving a statute that was invalidated on the basis of *Lemon's* purpose analysis, Justice Scalia strongly attacked

⁵¹ See 472 U.S. at 45. In *Wallace*, Chief Justice Rehnquist's dissent strongly appealed to original intent. See *supra* notes 36-37 and accompanying text.

⁵² *Wallace*, 472 U.S. at 45.

⁵³ See *id.* at 55-56.

⁵⁴ *Id.* at 57.

⁵⁵ See *id.*

⁵⁶ See *id.* at 56.

⁵⁷ *Id.* at 77 (O'Connor, J., concurring).

⁵⁸ *Id.* at 65 (Powell, J., concurring).

⁵⁹ 482 U.S. 578 (1987).

the relationship between legislative history and the purpose criterion.⁶⁰ *Aguillard* involved Louisiana's "Creationism Act,"⁶¹ which prohibited the teaching of evolution unless "creation science" was also taught.⁶²

On its face, the stated purpose of the Louisiana statute was secular: to "protect academic freedom."⁶³ Justice Brennan, writing for the majority, admitted that the words "protect academic freedom" might, "in common parlance, be understood as referring to enhancing the freedom of teachers to teach what they will."⁶⁴ Yet he concluded that this stated purpose was a "sham" and that "[i]t is . . . clear that requiring schools to teach creation science with evolution does not advance academic freedom."⁶⁵ The statute was therefore held to be unconstitutional on the grounds that it violated the purpose criterion of the *Lemon* test: the stated purpose of the statute hid an unconstitutional religious purpose.⁶⁶

How did Justice Brennan reach this conclusion? He examined the public statements of the statute's sponsors. The state senator who introduced the statute admitted that he wished that neither creation science nor evolution was taught in public schools.⁶⁷ Other legislators stated that they supported the statute for religious reasons.⁶⁸ In light of these statements, Justice Brennan concluded that the stated purpose of the statute was not its genuine purpose.⁶⁹

Justice Brennan in *Aguillard* approached legislative purpose in much the same way as did Justice Stevens in *Wallace*.⁷⁰ Both Justices were confident that they could determine legislative intent from a stat-

⁶⁰ See *id.* at 610 (Scalia, J., dissenting).

⁶¹ See Balanced Treatment for Creation-Science and Evolution-Science Act, LA. REV. STAT. ANN. § 17:286.1-.7 (West 1982). Part of the Statute's nondiscrimination requirement states:

public schools within this state shall give balanced treatment to creation-science and to evolution-science. Balanced treatment to these two models shall be given in classroom lectures taken as a whole for each course, in textbook materials taken as a whole for each course, in library materials taken as a whole for the sciences and taken as a whole for the humanities, and in other educational programs in public schools, to the extent that such lectures, textbooks, library materials, or educational programs deal in any way with the subject of the origin of man, life, the earth, or the universe.

Id. at § 17:286.4A.

⁶² See *Aguillard*, 482 U.S. at 580-82.

⁶³ *Id.* at 586.

⁶⁴ *Id.*

⁶⁵ *Id.* at 587.

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ See *id.* at 590-93.

⁶⁹ See *id.*

⁷⁰ See *supra* notes 53-56 and accompanying text.

ute's legislative history and both looked beyond the officially stated legislative purpose to statements⁷¹ of the statute's sponsors.⁷² Chief Justice Burger, dissenting in *Wallace*, argued that the majority was wrong to impugn the motives of the Alabama legislature.⁷³ The sponsor's testimony, on which the majority greatly relied, was "made *after* the legislature had passed the statute; indeed, the testimony that the Court finds critical was given well over a year after the statute was enacted."⁷⁴ He asserted that there was "not a shred of evidence that the legislature as a whole shared the sponsor's motive or that a majority in either house was even aware of the sponsor's view of the bill when it passed."⁷⁵

Chief Justice Burger's dissent raises a disconcerting issue: when the Court attempts to determine legislative intent, which statements are relevant, and how much weight should each be given? In both *Wallace* and *Aguillard*, some of the Justices were uneasy with the way the majority ascertained legislative purpose.⁷⁶ Justice Scalia, in his dissent in *Aguillard*,⁷⁷ strongly objected to the majority's decision to allow the case to be dismissed on summary judgment grounds: "[T]he question of . . . [the Act's] constitutionality cannot rightly be disposed of on the gallop, by impugning the motives of its supporters."⁷⁸

Justice Brennan, in a footnote to his majority opinion, criticized Justice Scalia's use of legislative history: "[I]t is astonishing that the dissent, to prove its assertion, relies on a section of the legislation, which was eventually deleted by the legislature."⁷⁹ Justice Brennan, sanguine that the Court could determine the statute's proper and correct purpose, confidently asserted that "[t]he plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history, can control the determination of legislative purpose."⁸⁰ But the fact that the Justices themselves disagreed over the legitimate

⁷¹ See *Aguillard*, 482 U.S. at 593; *Wallace*, 472 U.S. at 59-60.

⁷² See *Aguillard*, 482 U.S. at 593 ("The legislation . . . sought to alter the science curriculum to reflect endorsement of a religious view that is antagonistic to the theory of evolution."); *Wallace*, 472 U.S. at 59-60 ("We must, therefore, conclude that the Alabama Legislature intended to change existing law and that it was motivated by the same purpose that the Governor's answer to the second amended complaint expressly admitted; that the statement inserted in the legislative history revealed; and that Senator Holmes' [the statute's sponsor] testimony frankly described. The legislature enacted . . . [the statute] for the sole purpose of expressing the State's endorsement of prayer activities" (citation omitted)).

⁷³ See *Wallace*, 472 U.S. at 86 (Burger, C.J., dissenting).

⁷⁴ *Id.* (Burger, C.J., dissenting).

⁷⁵ *Id.* at 86-87 (Burger, C.J., dissenting).

⁷⁶ See *supra* notes 57-58 & 73-75 and accompanying text.

⁷⁷ See 482 U.S. at 610 (Scalia, J., dissenting).

⁷⁸ *Id.* at 611 (Scalia, J., dissenting).

⁷⁹ *Id.* at 588 n.8 (citation omitted).

⁸⁰ *Id.* at 594 (citation omitted).

parameters of legislative history should serve as a clear warning of that history's unreliability.

The dispute over the proper role of legislative history, vividly illustrated in *Aguillard* and *Wallace*,⁸¹ can never be resolved because the borders of legislative history cannot be clearly marked. As with original intent, the most important factor in assessing legislative purpose is the predisposition of the person determining the statute's legislative history. As Justice Scalia has correctly noted, "[a]ll of these sources . . . [of legislative history] are eminently manipulable."⁸² Thus, the majority in *Aguillard*, according to Justice Scalia, has forgotten an obvious point:

We cannot of course assume that every member present (if, as is unlikely, we know who or even how many they were) agreed with the motivation expressed in a particular legislator's pre-enactment floor or committee statement. Quite obviously, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it."⁸³

Even if the Court were able to agree on the proper sources of legislative history, the problems with using this history for determining purpose would remain. In addition to the problems of assessing which statements properly express a statute's legislative purpose, and resisting the temptation to equate these statements uncritically with the written statute,⁸⁴ the Court must ascertain the veracity of a stated legislative purpose. Should the Court assume that a state legislature acts in good faith when it reports the "official" purpose of a statute?

In large part, the disagreement between Justices Brennan and Scalia in *Aguillard* stems from different attitudes towards the Louisiana legislature. Justice Scalia was willing to accept that the legislature acted in good faith when it stated the official purpose of the creation-science statute; Justice Brennan was not. The legislature was very deliberate in preparing its official purpose for the Creationism Act.⁸⁵ Justice Brennan concluded that the stated purpose of "academic freedom" was a pretense, carefully designed to avoid the limits of the establish-

⁸¹ See *supra* notes 53-58 & 67-80 and accompanying text.

⁸² *Aguillard*, 482 U.S. at 638 (Scalia, J., dissenting).

⁸³ *Id.* at 637 (Scalia, J., dissenting) (quoting *United States v. O'Brien*, 391 U.S. 367, 384 (1968)).

⁸⁴ To equate author intent with the meaning of a written statute is as problematic in the area of legislative intent as it is in the area of original intent. See *supra* notes 45-50 and accompanying text.

⁸⁵ See *Aguillard*, 482 U.S. at 626-35 (Scalia, J., dissenting).

ment clause.⁸⁶ Justice Scalia concluded that the assiduous attention given the Act's official purpose revealed a sincere respect for the constitutional boundaries.⁸⁷

Pinpointing the intent of legislatures is as difficult as assessing the intent of the Framers. The question of *whose* intent should be dispositive is not easily answered and the process can be extremely subjective.⁸⁸ Furthermore, by focusing on motive, the approach encourages legislative hypocrisy. Zealous legislators may calibrate the proper "purpose" for statutes in the hope that they can avoid the constitutional limits set by the Court.⁸⁹

3. Narrative Truth and Historical Truth

The confusion surrounding legislative intent does not spring only from the cynicism of some legislators. On the contrary, even the most earnest and conscientious legislators cannot always be certain of their intentions. All historical recountings are to some extent interpretative in nature. And these interpretations, according to the psychiatrist Donald P. Spence, involve a "search for continuity and connection"⁹⁰ that incorporate two kinds of truths: narrative and historical.⁹¹ Spence defines narrative truth as "the criterion we use to decide when a certain experience has been captured to our satisfaction; it depends on continuity and closure and the extent to which the fit of the pieces takes on an aesthetic finality."⁹²

Since motivations are often ambivalent and manifold, Spence argues that in interpreting a past event, "it is more appropriate to think of construction rather than reconstruction . . ."⁹³ Given this, well-intended legislators will be predisposed to discount the conflicting motivations behind their legislative actions. They will confuse historical

⁸⁶ See *id.* at 586-87; *supra* note 66 and accompanying text.

⁸⁷ See *id.* at 610 (Scalia, J., dissenting).

⁸⁸ Cf. Comment, *Politics and Purpose: Hide and Seek in the Gerrymandering Thicket after Davis v. Bademer*, 136 U. PA. L. REV. 183, 225-27 (1987) (demonstrating that tests to determine legislative intent of New Jersey moment of silence statute were subjective).

⁸⁹ See *Aguillard*, 482 U.S. at 637-38 (Scalia, J., dissenting); see also *May v. Cooperman*, 572 F. Supp. 1561, 1563-65 (D.N.J. 1983) (tracing the attempts of the New Jersey legislature to introduce school prayer through what appeared to be increasingly "secular" legislation).

⁹⁰ D. SPENCE, *NARRATIVE TRUTH AND HISTORICAL TRUTH: MEANING AND INTERPRETATION IN PSYCHOANALYSIS* 280 (1982).

⁹¹ See *id.* at 292-97.

⁹² *Id.* at 31. Historical truth, in contrast, is "the way things were." *Id.* at 27. Spence argues that the need to tell a coherent, understandable account tends to shift people's stories "away from what 'really' happened." *Id.* at 28.

⁹³ *Id.* at 288.

truth with narrative truth, and the "coherence" of their account may mislead them into thinking that they have made "contact with an actual happening."⁹⁴ Justice Scalia recognized this dynamic in his dissent in *Aguillard*:

[D]iscerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite. In the present case . . . a particular legislator need not have voted for the Act either because he wanted to foster religion or because he wanted to improve education. He may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the Majority Leader, or he may have hoped the Governor would appreciate his vote and make a fundraising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity⁹⁵

Because of these difficulties, Justice Scalia accepted the legislators' stated legislative purpose of "academic freedom,"⁹⁶ and concluded that "those legislators who supported the . . . Act *in fact* acted with a 'sincere' secular purpose."⁹⁷ His conclusion admits the limits of attempts to determine purpose, but stops short of calling for a complete rejection of the concept.

The Court can no more rely on legislative intent than it can on the Framers' original intent. The parameters of legislative intent are nebulous, the Court's focus on intent encourages hypocrisy and evasion, and even a well-intentioned legislator may confuse narrative truth with historical truth in the hopes of creating a coherent explanation for her actions. Legislative intent does not yield a statute's purpose, but instead offers only a melange of explanations—all pliable, all obvious, and all extraneous.

⁹⁴ *Id.* at 27.

⁹⁵ *Aguillard*, 482 U.S. at 636-37 (Scalia, J., dissenting).

⁹⁶ *See id.* at 628-29 (Scalia, J., dissenting).

⁹⁷ *Id.* at 614 (Scalia, J., dissenting); *see also id.* at 626-27 (Scalia, J., dissenting) (stating that the Court should defer to an expression of secular purpose explicitly set forth in the statute).

III. THE CONFUSION OF PURPOSE, EFFECTS, AND CAUSATION

Attempts to determine purpose not only are fruitless, but they can lull members of the Court into two different, but equally insidious, assumptions: first, that purpose, by itself, can reveal the meaning of a statute and; second, that a law enacted with a religious purpose will necessarily have a religious effect. In turn, the results of these assumptions are confusing. The Court's sojourns into the realm of "purpose" are in reality sojourns into the realm of "effects." This section examines how these erroneous assumptions influence the Court's reasoning in establishment clause cases.

A. *A Religious Purpose Does not Necessarily Lead to a Religious Effect*

In *The Concept of Mind*,⁹⁸ Gilbert Ryle introduces the concept of a "category-mistake" which "represents the facts of mental life as if they belonged to one logical type or category (or range of types or categories), when they actually belong to another."⁹⁹ Category-mistakes are common, and they often involve seemingly harmless semantic issues.¹⁰⁰ Yet according to Ryle, "[t]he theoretically interesting category-mistakes are those made by people who are perfectly competent to apply concepts, at least in the situations with which they are familiar, but are still liable in their abstract thinking to allocate those concepts to logical

⁹⁸ G. RYLE, *THE CONCEPT OF MIND* (1949).

⁹⁹ *Id.* at 16. Ryle illustrates the concept as follows:

A foreigner visiting Oxford or Cambridge for the first time is shown a number of colleges, libraries, playing fields, museums, scientific departments and administrative offices. He then asks "But where is the University? I have seen where the members of the Colleges live, where the Registrar works, where the scientists experiment and the rest. But I have not yet seen . . . your University." It has then to be explained to him that the University is not another collateral institution, some ulterior counterpart to the colleges, laboratories and offices which he has seen. The University is just the way in which all that he has already seen is organized. When they are seen and when their co-ordination is understood, the University has been seen. His mistake lay in his innocent assumption that . . . "the University" stood for an extra member of the class of which these other units are members. He was mistakenly allocating the University to the same category as that to which the other institutions belong.

Id.

¹⁰⁰ Even a small degree of imprecision in language can easily lead to significant misunderstandings. See L. WITTGENSTEIN, *ON CERTAINTY* (G. Anscombe & G. von Wright eds., D. Paul & G. Anscombe trans. 1969) §§ 6-21 (pointing out that the meaning of the expression "I know" varies from "I am certain" to "I feel," and discussing the implications of this imprecision); see also T. MORAWETZ, *WITTGENSTEIN & KNOWLEDGE* 60-61 (1978) (noting that propositions have meaning by virtue of a standard context, not meaning in themselves).

types to which they do not belong."¹⁰¹

Ryle's category-mistake describes the Court's use of purpose to support conceptual relationships that the term cannot properly support. In particular, the Court often incorrectly assumes a causal relationship between the first two parts of the *Lemon* test, and concludes that a religious purpose necessarily leads to a religious effect. Because of this conceptual confusion, the Court often uses the term purpose when it means effects. While this incorrect wording seems unimportant, it clouds the Court's understanding of effects, which in turn greatly obscures the Court's analysis of the establishment clause.

The fundamental mistake in the *Lemon* analysis is its assumption that a religious purpose, *by itself*, renders a statute unconstitutional. If the Court were concerned with religious purpose alone, however, it would be forced to declare many statutes unconstitutional solely because they coincide with religious beliefs. Choper is correct when he writes that:

a set of values or beliefs does not become "religious" for purposes of the Establishment Clause simply because some people adopt[] them as their "religion." . . . If this were not true, then laws against murder and theft would be unconstitutional because these legal prohibitions coincide with the tenets of virtually every major religion in the world. . . . The values that underlie the government action are not "religious" for the purpose of sterilizing the government from acting in accordance with its own set of secularly oriented beliefs.¹⁰²

Choper's argument seems almost self-evident. Yet under current doctrine, if a legislator's religious motivation coincides with the secular effect of a statute, that statute is automatically rendered unconstitutional under the *Lemon* test. The Court assumes that a religious purpose can never lead to a secular effect. This is incorrect. Legislation often involves "religious" convictions on some level. Religious beliefs can direct a legislator's attention to a problem, such as the lack of shelter for the homeless, or reconcile conflicting values when "shared premises and common forms of reasoning"¹⁰³ will not suffice. Religion is frequently present in the amalgam of factors that compel legislators to

¹⁰¹ G. RYLE, *supra* note 98, at 17.

¹⁰² Choper, *Church, State and the Supreme Court: Current Controversy*, 29 ARIZ. L. REV. 551, 557-58 (1987).

¹⁰³ K. GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 250 (1988).

act and this presence does not render the legislation unconstitutional.

The Court has struck down statutes with religious purposes because it sees purposes and effects as necessarily interwoven. But a religious purpose is not a necessary cause of religious effects.¹⁰⁴ If it were, then a religious purpose would result in an unconstitutional statute. If this were true, then, as Choper points out,¹⁰⁵ many unquestionably constitutional statutes would be unconstitutional.¹⁰⁶

While one of the common hallmarks of a cause and effect relationship is that a cause precedes an effect in time, not all temporal relationships are causal relationships.¹⁰⁷ The Court sometimes confuses a temporal relationship with a causal relationship, however, and assumes cause and effect because the religious purpose precedes the statute's effects. But a religious purpose can yield a secular effect, and a secular purpose can yield a religious effect. Accordingly, there is no necessary causal relationship between the first two criteria of the *Lemon* test.

For example, suppose a legislator believed that Shakespeare's plays inculcated Christianity because she thought they depicted a world ordered by a Christian cosmology. If for this reason she introduced legislation that required the plays of Shakespeare to be taught in every high school, would this religious cause yield a religious effect? Absolutely not. The legislator's purpose is totally unrelated to its effect,

¹⁰⁴ For purposes of this Comment, "cause" is defined as the condition or conditions necessary to produce a certain change; this change is the cause of the effects. That is, if A exists, then B must also exist. If it rains, then the ground will be wet. This definition of cause is a tremendous oversimplification. Hume's questions concerning "necessary" causation can be found in D. HUME, *AN ENQUIRY CONCERNING HUMAN UNDERSTANDING* 39-53 (E. Steinberg ed. 1977). See generally H. HART & A. HONORE, *CAUSATION IN THE LAW* 26-30 (1959) (providing a general discussion of cause and effect).

¹⁰⁵ See *supra* note 102 and accompanying text.

¹⁰⁶ The truth of this statement is illustrated by Thanksgiving, which is a national holiday. See 5 U.S.C. § 6103 (a) (1982). The pilgrims clearly had a religious intent when they conceived of Thanksgiving. See W. BRADFORD, *OF PLYMOUTH PLANTATION, 1620-1647*, at 131-32 (S. Morison ed. 1952) ("[T]he Lord sent them such seasonable showers . . . as, through His blessing, caused a fruitful and liberal harvest . . . [f]or which mercy, in time convenient, they also set apart a day of thanksgiving."). Thanksgiving, as it is observed by the majority of Americans, is no longer a primarily religious happening. See, e.g., L. PFEFFER, *CHURCH, STATE, AND FREEDOM* 226 (1953) ("[T]he nationalist element [of Thanksgiving is] so dominant that it is closer to Washington's Birthday or Independence Day than it is to a religious holiday."). Hence, its proclamation is not unconstitutional.

¹⁰⁷ Hart and Honore illustrate this point with the following example:

[I]f a man shoots at his wife intending to kill her, and she takes refuge in her parents' house where she is injured by a falling tile, though we may believe, on the strength of various general propositions, that if the man had not shot at his wife she would not have been injured . . . this would not justify the assertion that the man had caused his wife's injury . . .

H. HART & A. HONORE, *supra* note 104, at 11-12.

which by consensus is secular. Because there is no necessary causation between the first two criteria of the *Lemon* test, a violation of the first criterion does not necessarily lead to a violation of the second.

What if some teachers in the state, aware of the statute's Christian purpose, used the plays as a springboard to proselytize? This use, of course, would be a violation of the establishment clause. Although the statute's purpose has not changed, its effects has. The Shakespeare statute's constitutionality is determined by its effect and not by its purpose. This category mistake—confusing purpose with effects—exists because the Court mistakenly sees a causal relationship between purpose and effect.

B. *Examples of Purpose-Effect Confusion*

Because a religious purpose does not automatically produce a religious effect, statutes with no religious effect should be constitutional. Thus, the Court should be focusing on effects and ignoring purpose because purpose only obscures analysis.¹⁰⁸

According to Richard Taylor, "[a]ny adequate analysis of the causal relation should enable one to distinguish analytically between causes and effects. It should not obliterate the difference between them."¹⁰⁹ When applying the *Lemon* test, the Court believes that it has separated cause and effect when in fact it obliterates the differences between them. While claiming to examine a statute's purpose, members of the Court are often exploring its effects. For example, in his concurrence in *Edwards v. Aguillard*,¹¹⁰ Justice Powell wrote: "The Establishment Clause is properly understood to prohibit the use of the Bible and other religious documents in public school education only when the purpose of the use is to advance a particular religious belief."¹¹¹ But is Justice Powell really concerned with purpose in this situation? His statement would be more accurate if the word "effect" replaced the word "purpose." Justice Powell has committed a "category mistake." He says purpose when he means effects.

The purpose of the statute is only relevant to the extent that it can reveal its effects. But since no necessary cause and effect relationship exists between purpose and effect,¹¹² why not examine effects directly?

¹⁰⁸ As the philosophers W. V. Quine and J. S. Ullian have written, "[w]e should be wary of explanations that appeal to motives and character traits." W. QUINE & J. ULLIAN, *THE WEB OF BELIEF* 80 (1970).

¹⁰⁹ Taylor, *Causation*, in 2 *ENCYCLOPEDIA OF PHILOSOPHY* 56, 64 (1967).

¹¹⁰ 482 U.S. 578 (1987).

¹¹¹ *Id.* at 608 (Powell, J., concurring).

¹¹² See *supra* notes 102-07 and accompanying text.

While Justice Powell emphasizes the role of purpose, he is actually concerned with effects; "purpose of the use" is really just another way to talk about effects.

Justice O'Connor also uses the word "purpose" when she means "effects." In her concurrence in *Wallace v. Jaffree*,¹¹³ for example, she wrote that "[w]hile the secular purpose requirement alone may rarely be determinative in striking down a statute it nevertheless serves an important function. It reminds government that when it acts it should do so without endorsing a particular religious belief"¹¹⁴ Like Justice Powell, she stresses "acts"—which falls under the effects criterion, not the purpose criterion. Government "acts" are the effects of an antecedent cause. Whether or not this cause was religious is irrelevant; what is important is that the act itself not endorse a particular religious belief.

For the reasons discussed above,¹¹⁵ if the Court insists on continuing to use the first criterion of *Lemon*, perhaps Justice Frankfurter's understanding of purpose, in an opinion written ten years before *Lemon*, works best: "To ask what interest, what objective, legislation serves, of course, is not to psychoanalyze its legislators, but to examine the necessary effects of what they have enacted."¹¹⁶ For Justice Frankfurter, a statute's objective, or purpose, is determined by its effects. While he too is guilty of assuming a causal relationship between purpose and effects, Justice Frankfurter at least focuses his discussion on effects, and not purpose.

C. *The Purpose Criterion Taints the Court's Analysis of Effects*

Attempts to determine religious purpose offer little chance of success. Indeed, when applying the *Lemon* test, the Court usually examines purpose cursorily; since the Court first adopted the *Lemon* test, it has only twice invalidated a statute on the basis of the purpose criterion.¹¹⁷ According to Justice Scalia, "[a]lmost invariably, we [the Court] have effortlessly discovered a secular purpose for measures challenged under the Establishment Clause, typically devoting no more than a sentence or two to the matter."¹¹⁸ At best, the first criterion of the *Lemon* test is superfluous, although it also has a more nefarious

¹¹³ 472 U.S. 38 (1985).

¹¹⁴ *Id.* at 75-76 (O'Connor, J., concurring).

¹¹⁵ See *supra* notes 108-14 and accompanying text.

¹¹⁶ *McGowan v. Maryland*, 366 U.S. 420, 466 (1961) (Frankfurter, J., concurring).

¹¹⁷ See *Wallace*, 472 U.S. at 56; *Stone v. Graham*, 449 U.S. 39, 41 (1980).

¹¹⁸ *Aguillard*, 482 U.S. at 613-14 (Scalia, J., dissenting).

influence: its false causation taints the Court's analysis of a statute's effects.

By allowing purpose to dictate effects, the *Lemon* test narrows the Court's understanding of effects. The Court tends to examine effects through the lens of purpose. Thus, in *Aguillard*, a majority of the Court gave the statute's sponsor the power to dictate its effects. This approach ossifies effects, and does not properly appreciate the contextual nature of religious meaning.

Meaning is determined by use¹¹⁹ as Wittgenstein's study of language illustrates.¹²⁰ He warns about misunderstanding meaning by assuming that it exists in an objective state, free from the influence of community decisions, thoughts, and beliefs.¹²¹

For the events and symbols examined by establishment clause cases, Wittgenstein's understanding of meaning points out an obvious problem with the *Lemon* test: the relationship between the first two criteria leads the Court to assume that the meaning of a religious event or symbol is predetermined and fixed. Purpose claims to grasp a statute's effects, its meaning in the community, *before* the group has been exposed to the statute. But as Wittgenstein argues, meaning does not develop in this way; rather, meaning is determined by group experience, by a form of life.¹²²

¹¹⁹ Cf. L. WITTGENSTEIN, *supra* note 2, at § 138 (“[W]e understand the meaning of a word when we hear or say it.”).

¹²⁰ See L. WITTGENSTEIN, *supra* note 100, at § 61 (“A meaning of a word is a kind of employment of it”). Wittgenstein states that:

There is always the danger of wanting to find an expression's meaning by contemplating the expression itself, and the frame of mind in which one uses it, instead of always thinking of the practice. That is why one repeats the expression to oneself so often, because it is as if one must see what one is looking for in the expression and in the feeling it gives one.

Id. at § 601.

¹²¹ Wittgenstein's insights into language also apply to general epistemological issues, and his understanding of language as symbols of meaning can be applied to a statute's effects. We arrive at knowledge from experience; an object's meaning is determined by group consensus, what Wittgenstein calls a “form of life.” See L. WITTGENSTEIN, *supra* note 2, at § 241 (“‘So you are saying that human agreement decides what is true and what is false?’—It is what human beings *say* that is true and false; and they agree in the *language* they use. That is not agreement in opinions but in form of life.”).

¹²² Events and symbols that involve religion are especially sensitive to forms of life. Wittgenstein was aware of this problem. In a forward for a book that was not published in his lifetime, he wrote the following:

I would like to say “This book is written to the glory of God”, but nowadays that would be chicanery, that is, it would not be rightly understood. It means the book is written in good will, and in so far as it is not so written, but out of vanity, etc., the author would wish to see it condemned. He cannot free it of these impurities further than he himself is free of them.

The power of a religious symbol depends on this form of life. Activities and objects can either lose or gain their religious symbolism. The Christmas tree is an excellent example of this change in a religious object's symbolic power. Unlike the public display of a creche, which leads to complaints and lawsuits, many view the Christmas tree as an innocuous, non-religious symbol. Yet the Christmas tree was once a powerful symbol of Christianity¹²³ that has since lost its religious content.¹²⁴ According to the theologian Paul Tillich,

[a] religious symbol is true if it adequately expresses the correlation of some person with final revelation. A religious symbol can die . . . if the correlation of which it is an adequate expression dies. This occurs whenever the revelatory situation changes and former symbols become obsolete. The history of religion, right up to our own time, is full of dead symbols.¹²⁵

Does a Christmas tree differ from a creche? Given public awareness and sensitivity to the presence of a creche in a public place, probably so. But this assessment cannot be made *before* the creche meets the community¹²⁶ or by examining purposes; it can only be determined through an exploration of a form of life. Justice Brennan correctly stated in *Abington School District v. Schempp*¹²⁷ that a religious symbol, such as "In God We Trust" on currency, has been interwoven "so

L. WITTGENSTEIN, PHILOSOPHICAL REMARKS, Foreword (R. Hargreaves & R. White trans. 1975).

Wittgenstein's *Foreword* illustrates the problems of a religious symbol in transition. The phrase, "glory to God," which once conveyed a religious affirmation, has lost this original meaning. But it has not yet been completely secularized, and so cannot clearly convey Wittgenstein's intended meaning—good will. As much as Wittgenstein wished otherwise, a form of life still determined the phrase's meaning, and this form of life had not completely secularized the phrase.

¹²³ See, e.g., W. WALSH, CURIOSITIES OF POPULAR CUSTOMS AND OF RITES, CEREMONIES, OBSERVANCES, AND MISCELLANEOUS ANTIQUITIES 241-42 (1907) (one legend identifies Martin Luther as its originator, while another credits St. Winfrid with starting the custom as a symbol of peace, everlasting life, and the Christ-child).

¹²⁴ Meaning for the Christmas tree has come and gone before. Theories regarding its ultimate origin point to Norse mythology, practices of the Roman Saturnalia, ancient Egyptian winter solstice observances, and Chanukah. See *id.* at 242-43.

¹²⁵ P. TILICH, 1 SYSTEMATIC THEOLOGY 240 (1951).

¹²⁶ This is not to say that courts may never determine whether a statute violates the establishment clause until after the statute has taken effect. Courts routinely judge the impact of events before they have occurred in cases involving injunctive relief. Federal courts may grant a temporary restraining order on a showing "that immediate and irreparable injury, loss or damage *will* result to the applicant . . ." FED. R. CIV. P. 65(b) (emphasis added). In granting injunctions in establishment clause cases, as at other times, the court should predict the effect of the future occurrence on the applicant, and not analyze the state of mind of the adverse party.

¹²⁷ 374 U.S. 203 (1963).

deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits."¹²⁸ Justice Brennan's statement shows a great sensitivity to the nature of religious objects and actions, since it does not attempt to pre-ordain their meaning. Nor does it make any causal assumptions between purpose and effects, or confuse the two. Not surprisingly, his statement preceded *Lemon*.

Perhaps more than any other aspect of Constitutional law, establishment clause jurisprudence depends on an understanding of forms of life in order to generate clear analysis. As Robert Cover has argued, "[t]he religion clauses of the Constitution seem to me unique in the clarity with which they presuppose a collective, norm-generating community"¹²⁹ By applying the first criterion of the *Lemon* test, the Court has not shown the same appreciation of the importance of the "collective, norm-generating community."

IV. CONCLUSION

The *Lemon* test sets a purpose threshold in front of all establishment clause examinations. But purpose cannot be discovered; neither original intent nor legislative intent are available to the Court. Even if they were, they would not help the Court to decide establishment clause cases, since the purpose of the Framers or of state legislators does not reveal the meaning of the Constitution or of statutes.

Purpose also has a nefarious influence on all attempts to determine effects. The Court confuses cause with effect and assumes a necessary causal relationship that does not exist. Because it cannot explore effects free from purpose, the Court assumes further that the meaning of a religious object or action pre-exists, and has an objective status that does not change. This supposition clouds the Court's understanding of context and its relationship to effects. Consequently, the Court does not recognize the way the meaning of a religious symbol or event should be assessed. Only through a study of a form of life can meaning be determined; and only through a study of effects, unfettered by purpose, can a form of life be understood.

The *Lemon* test does not function properly because it stands on a faulty philosophical foundation. Its simple three-step process hides confusion about interpretation, causation, and even epistemology. Undoubtedly, some want to retain *Lemon* and skirt the abstract issues that

¹²⁸ *Id.* at 303 (Brennan, J. concurring).

¹²⁹ Cover, *The Supreme Court 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 32 n.94 (1983).

lie behind its facade. But in an increasingly complex, pluralistic society, the Court cannot ignore these abstract, seemingly remote, problems. For as Justice Holmes once wrote: "[a]lthough practical men generally prefer to leave their major premises inarticulate, yet even for practical purposes theory generally turns out the most important thing in the end."¹³⁰

¹³⁰ Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 420 (1898-99).