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This Lemon Comes as a Lemon. The Lemon Test and the Pursuit of a Statute’s Secular Purpose.

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“Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence …. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it, when we wish to uphold a practice it forbids, we ignore it entirely …. Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.”

INTRODUCTION

Lemon is a curious fruit. Much like the proverbial wolf who comes not in sheep’s clothing, but in wolf’s clothes, this lemon comes as a lemon. The Lemon Test, derived from Lemon v. Kurtzman, is a three-pronged test to determine whether a government action violates the Establishment Clause of the First Amendment. This article will focus on the first prong of the Lemon Test, which queries whether a statute has a “secular purpose.” While many other articles have focused on the secular aspect of this prong, few have considered what exactly purpose means.

I begin this inquiry in Part I by introducing the establishment clause, and discussing how the Supreme Court treated this issue prior to Lemon. Next, I introduce Lemon v. Kurtzman, discuss the Lemon test, including some criticisms of this ghoulish standard.

2 Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) (“Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.”) (emphasis added).
4 Lemon, at 612 (emphasis added).

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Before piercing the citric skin of the purpose prong of the *Lemon* test, in Part II, I consider intentionalism and purposivism as jurisprudential schools of thought. What is the purpose behind a law? Does a law even have a purpose? How can the purpose of a law be derived? Should the purpose of a law even matter? Can the actual intent ever be known? Does a legislature actually have a single intent? Whose intentions in the legislature matter? Is legislative intent a mere fig leaf or cover for judicial intent?

Further, this section analyzes the advantages and disadvantages of relying on legislative history to interpret a text and ascertain legislative intent. Finally, by tracing the evolving nature of the courts’ reliance on legislative history, and applying a commonly used evidentiary principle this section advances a novel theory of legislative analysis and argues that older legislative history is more reliable than modern legislative history, and applies this dynamic to originalism and interpreting founding era documents. This theory rationalizes why many originalists, including Justice Scalia, readily cite legislative histories of older vintage, but summarily reject modern legislative history.

In Part III, after introducing the *Lemon* test, and showing the difficulty of ascertaining purpose, in this section I put the two elements together, as I drive a pencil through *Lemon*’s bitter citric skin. Should purpose even matter in the *Lemon* test? I argue that the purpose prong forces Judges to rely on unreliable extrinsic sources, like legislative history.

Forging a novel research trail, this article chronicles every case in which the Supreme Court has struck down a statute for violating the purpose prong, and dissects the methodology the Court used to divine purpose. Based on this inquiry, I conclude that the Supreme Court has not taken a principled approach to interpreting these sources, and as a result, the purpose prong consistently yields inconsistent results, and allows savvy politicians to manipulate the record to
avoid Establishment Clause challenges. This is perverse, and frustrates the goal behind *Lemon*, which is to prevent excessive entanglement of church and state.

A rigorous and robust Establishment Clause jurisprudence to ensure the separation of church and state cannot tolerate such an enigmatic and unpredictable approach. For these reasons, I propose two modest proposals to the purpose prong. First, I recommend that judges follow the *Lemon* test, and actually focus on the purpose of the *statute* in question, rather than some metaphysical and largely unknowable purpose of the legislature. This comports with the text of *Lemon*. Second, I seek to replace the “objective observer” standard announced in *McCreary* with an original public meaning analysis. These two suggestions will allow courts to engage in a more robust establishment clause jurisprudence, and further the purpose of the Lemon test in rooting out excessive entanglement of religion in government, and keeping the wall between church and state high, impregnable, and resolute.

I. Establishement Clause Jurisprudence and the Lemon test

The Supreme Court first addressed the significance of establishment clause in the middle of the Twentieth Century. After shifting through several vague standards, the Court settled on the three-part test from *Lemon v. Kurtzman*.\(^5\) This section will focus on *Lemon*, and the first prong of the test, the purpose prong.

A. Establishment Clause Prior to Lemon Test

The Supreme Court’s first significant explication of the Establish Clause was pronounced in 1947 in *Everson v. Board of Education*.\(^6\) In *Everson*, the Court considered whether a New

Jersey law that permitted the Board of Education to reimburse parents for bus transportation costs if their children attended parochial school violated the First Amendment. As a threshold matter, the Court found that the First Amendment was incorporated through the Fourteenth Amendment and applied to the States. The Court upheld the program, and found that the initiative merely ensured the safe transportation of the children. The Court was careful to note that the State could not actually establish a religion, but cautioned governments not to “exclude individual[s] . . . because of their faith, or lack of it, from receiving the benefits of public welfare legislation.” Justice Black famously wrote that the First Amendment was intended to create a “wall of separation between Church and State,” and that wall should be “kept high and impregnable.” Although Justice Black proffered the “no aid” approach, the Court in *Everson* did not create any meaningful test to determine when the government violates the establishment clause.

In 1948, in *McCollum v. Board of Education*, the Supreme Court struck down a program that allowed religious instructors to teach classes in school buildings during school hours. In this case, Justice Black found that the government scaled the high separation wall, and the statute was unconstitutional. Applying the “no aid” standard, Justice Black wrote that the program was “beyond all question a utilization of the tax-established . . . public school system to aid religious groups to spread their faith.” In 1952 in *Zorach v. Clauson*, the Supreme Court, upheld a

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7 *Id.* at 18.
8 *Id.* at 15.
9 *Id.*
10 *Everson*, at 16.
11 *Id.*
12 *Id.* at 18.
14 *Id.* at 210 (“[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion”).
program that permitted students to attend religious instruction during school hours.\textsuperscript{15} The Court took a step back from the absolutist position in \textit{McCollum}, and stressed that the government must tolerate religious accommodation.\textsuperscript{16} The Court recognized that to strike down this program would have a “wide and profound” impact on our secular nation, but cautioned that the separation must remain complete where the Constitution requires it.\textsuperscript{17}

In 1962 in \textit{Engel v. Vitale}, the Court held that teachers leading students in a voluntary non-denominational prayer in school violated the Establishment clause, and applied a two-pronged secular purpose and primary effect test.\textsuperscript{18} In this case, the Court stressed that total separation of church and state would be impossible, but the government should take many efforts to keep the two apart.\textsuperscript{19} These two prongs would plant the seeds of the modern Lemon Test.

In \textit{Waltz v. Tax Commission}, the Court considered the “excessive entanglement” between state and church in a case that challenged tax exemptions given for church property.\textsuperscript{20} In this case, Chief Justice Burger upheld the law because it neither enhanced nor inhibited religion, and did not violate the Establishment clause. The “excessive entanglement” test would be adopted by the \textit{Lemon} court to create the third prong of the Lemon test.

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\textsuperscript{15} Zorach v. Clauson, 343 U.S. 306 (1952).
\textsuperscript{16} \textit{Id.} at 313-315.
\textsuperscript{17} \textit{Id.} at 313.
\textsuperscript{18} 370 U.S. 421, 433 (1962).
\textsuperscript{19} \textit{Id.} at 433-435.
\end{flushright}
B.  *Lemon v. Kurtzman*

1.  **The Facts**

   In *Lemon v. Kurtzman*, the Supreme Court considered two state statutes that provided aid to religious schools.\(^{21}\) In Pennsylvania, the law permitted payment of salaries to teachers in parochial schools, and also reimbursed funds for purchasing textbooks.\(^{22}\) In Rhode Island, the statute authorized the government to pay part of the salaries of teachers in private schools, including parochial schools.\(^{23}\) In both of these cases, the private school teachers were teaching secular, and not religious topics.\(^{24}\)

2.  **The Lemon Test**

   The Supreme Court unanimously found that providing direct aid to private religious schools violated the Establishment Clause.\(^{25}\) By aggregating factors considered in *Engel* and *Waltz*, the Court fashioned a three part test, affectionately known as the *Lemon* test, to determine whether the government has violated the Establishment Clause; “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

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\(^{21}\) *Lemon*, 403 U.S. at 606.

\(^{22}\) *Id.* at 609-611.

\(^{23}\) *Id.* at 607-609.

\(^{24}\) *Id.* at 607, 609.

\(^{25}\) *Lemon*, 403 U.S. at 625 (“The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.”).
entanglement with religion.” According to the Lemon test, if a government action fails any of the three prongs, it is unconstitutional.

The first prong, which is the focus of this article and will be discussed in great detail infra, requires that the statute have a “secular legislative purpose.” This prong ensures that the government remains neutral, and proffers a genuinely sincere purpose that is not a sham. The statutes in Lemon passed the first prong. The second prong requires that the effect of the action must be secular, and if there is a nonsecular effect, it must be incidental or remote. This prong ensures “governmental neutrality with respect to religion.”

At the minimum, the second prong is satisfied as long as the government does not prefer one religion over another. In Lemon, the statutes passed the second prong. The third prong is violated when the law requires a “comprehensive, discriminating, and continuing state surveillance” that rises to the level of an excessive entanglement. When resolving the third prong, the Court has considered “the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.” In Lemon, the two challenged statutes failed the third

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26 Id. at 612.
27 Michael W. McConnell, Stuck with a Lemon: A New Test for Establishment Clause Cases Would Help Ease Current Confusion, A.B.A. J., Feb. 1997 at 46 (“If a law or practice violates any one of [the three Lemon] criteria, it is deemed unconstitutional.”).
28 Lemon, 403 U.S. at 612.
29 Wallace v. Jaffree, 472 U.S. 38, 75-76 (1985). (The secular purpose requirement “reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share.”).
30 Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987) (“While the Court is normally deferential to a State’s articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.”).
31 Lemon, 403 U.S. at 613.
34 See Jaffree, 472 U.S. at 53 (“[T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.”).
35 Lemon, 403 U.S. at 613.
36 Lemon, at 619.
37 Lemon, at 615.
prong because they created an excessive entanglement.\textsuperscript{38} Because the statutes failed one of the prongs, the Court deemed them unconstitutional under the Establishment clause.\textsuperscript{39}

3. \textbf{Criticisms of the Lemon Test}

In recent years, many Justices have taken shots at the \textit{Lemon} test. Justices O’Connor and Kennedy have proposed alternative test that require a showing of “endorsement” or “coercion” of religion to constitute a violation of the First Amendment.\textsuperscript{40} In \textit{Lambs Chapel}, Justice Scalia proposed abandoning the \textit{Lemon} test altogether.\textsuperscript{41} Chief Justice Rehnquist wrote, “The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize. Even worse, the \textit{Lemon} test has caused this Court to fracture into unworkable plurality opinions depending upon how each of the three factors applies to a certain state action. The result from our school services cases show the difficult we have encountered in making the \textit{Lemon} test yield principled results.”\textsuperscript{42} Joined by Justice Thomas, Justice Scalia compared the \textit{Lemon} test to a “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried,”\textsuperscript{43} and argued that the \textit{Lemon} test is a mere subterfuge that enables to Court to reach a desired result.\textsuperscript{44}

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\textsuperscript{38} \textit{Lemon}, at 614.
\textsuperscript{39} \textit{Id.} at 611.
\textsuperscript{40} Ashley M. Bell, Comment, “\textit{God Save This Honorable Court}”: How Current Establishment Clause Jurisprudence Can Be Reconciled with the Secularization of Historical Religious Expressions, 50 Am. U.L. Rev. 1273, 1291 (2001).
\textsuperscript{43} \textit{Id.} at 398.
\textsuperscript{44} Lamb’s Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 399 (1993) (Scalia, J., concurring) (“The secret of the Lemon test’s survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it, when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs ‘no more than helpful signposts.’ Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.”) (citations omitted). \textit{See also}, Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (noting instances in which Court has not applied Lemon test); Aguilar v. Felton, 473 U.S. 402 (1985) (striking down state remedial education program administered
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C. Purpose Prong

Although the second and third prong are subject to much controversy, this article will focus solely on the first prong.

1. The History of the Purpose Prong

Since the inception of the Lemon test, the purpose prong “has been a common, albeit seldom dispositive element” in establishment cases.\textsuperscript{45} According to Justice Rehnquist in dissent, “the secular purpose prong has proven mercurial in application because it has never been fully defined, and we have never fully stated how the test is to operate.”\textsuperscript{46} Prior toMcCreary County v. ACLU,\textsuperscript{47} the Supreme Court has found a government action motivated by an unconstitutional purpose only four times.\textsuperscript{48} However, inMcCreary, Justice Souter reaffirmed that though “the secular purpose requirement alone may rarely be determinative . . . it nevertheless serves an important function.”\textsuperscript{49}

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\item\textsuperscript{45} Lemon, at 612.
\item\textsuperscript{47} McCreary County v. ACLU, 125 S.Ct. 2722 (2005).
\item\textsuperscript{49} McCreary, at 2732.
\end{itemize}
\end{footnotesize}
The purpose prong focuses on the rationale beneath the state action, and asks “whether [the] government's actual purpose is to endorse or disapprove of religion.”\textsuperscript{50} The action need not be solely secular; even if the action is partially motivated by a religious purpose, it survives the \textit{Lemon} test as long as a genuine secular object, and not a sham reason, is present.\textsuperscript{51} If the statute lacks a clearly secular purpose, and fails the first prong, then the second or third prongs do not need to be addressed.\textsuperscript{52} Further, the statute “must be invalidated if it is entirely motivated by a purpose to advance religion.”\textsuperscript{53}

2. \textit{McCreary County v. ACLU of Kentucky} and the Purpose Prong

In \textit{McCreary County v. ACLU of Kentucky}, the most recent pronouncement of the first prong of \textit{Lemon}, the Supreme Court per Justice Souter heavily relied on the purpose prong to declare the display of the Ten Commandments on the walls of a Kentucky courthouse unconstitutional.\textsuperscript{54} In this case, a Kentucky County mounted a display of the Decalogue in the courthouse.\textsuperscript{55} The ACLU filed suit challenging the constitutionality of these displays under the establishment clause.\textsuperscript{56} Although the County changed the nature of the display several times, the presentation the district court ultimately considered consisted of nine historical documents, “each

\textsuperscript{50} See Wallace v. Jaffree, 472 U.S. 38, 63 (1985) (Powell, J., concurring)
\textsuperscript{51} See, e.g., Sch. Dist. v. Schempp, 374 U.S. 203, 296-303 (1963) (Brennan, J., concurring) (“[T]he “Establishment” Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions.”) (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961))); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (“When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to ‘distinguish[h] a sham secular purpose from a sincere one’”) (quoting \textit{Jaffree}, 472 U.S. at 75 (O'Connor, J., concurring)); \textit{Edwards}, 482 U.S. at 586-87 (“While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.”).
\textsuperscript{53} \textit{Wallace}, at 56.
\textsuperscript{54} \textit{McCreary County v. ACLU of Ky.}, 125 S. Ct 2722, 2732-36 (2005).
\textsuperscript{55} \textit{Id.} at 2728.
\textsuperscript{56} \textit{Id.} at 2729.
either having a religious theme or excerption to highlight a religious element,” including the Decalogue. The display plaque noted that the Ten Commandments and the other documents “have profoundly influenced the formation of Western legal thought and the formation of our country.”

Applying the Lemon test, the District Court found the display “lack[ed] a secular purpose”, because the Decalogue is a “distinctly religious document,” and declared it unconstitutional. The Sixth Circuit in a divided opinion affirmed the District Court’s finding of no secular message “because of a ‘lack of a demonstrated analytical or historical connection between the Commandments and the other documents.’”

On certiorari to the Supreme Court, in a departure from earlier precedents, Justice Souter interpreted the first prong of the Lemon test to include “the heightened requirement that the secular purpose ‘predominate’ over any purpose to advance religion,” so that the proffered secular purpose not be a “sham.” With this unprecedented heightened scrutiny, he struck down the statute. To ascertain this purpose, Justice Souter relied on “the purpose apparent from government action” and the fact that “the government justified its decision with a stated desire.”

In a vociferous dissent, Justice Scalia ridiculed the Lemon test, as well as Justice Souter’s enhancement of the purpose prong. Scalia observed the purpose prong now requires that the secular purpose “not [be] merely secondary to a religious objective,” but the predominant

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57 Id. at 2729.
58 Id. at 2731.
60 Lemon, at 2731-32.
61 Id. at 2757 (emphasis added).
62 Id. at 2757.
63 Id.
64 McCreary, at 2733.
65 McCreary, at 2733
purpose. Further, Justice Scalia castigated the majority for “ratchet[ing] up the Court’s hostility to religion.” Justice Souter found that Justice Scalia’s proposal that “any secular purpose” would satisfy the Lemon test would “leave the purpose test with no real bite.” Harkening to his concurring opinion in *Lambs Chapel*, Justice Scalia criticized the use of the majority’s opinion as a “manipulation” of the *Lemon* test “to fit whatever result the Court aim[s] to achieve.” Justice Scalia also noted that this refined standard places a huge burden on the government, and greatly expands the scope of the review. While generally the Court grants deference to the government’s proffered justifications for an act, under this new test, the government is almost presumed to be incorrect absent strong rebuttal evidence to the contrary.

II. Law, Intent, and Legislative History

What is the purpose behind a law? Does a law even have a purpose? How can the purpose of a law be derived? Should the purpose of a law even matter? Before piercing the citric skin of the purpose prong of the *Lemon* test, this section considers intentionalism and

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66 *McCreary*, at 2735 (citing *Santa Fe*, 530 U.S. at 308)).
67 *Id.* at 2748, 2757-58 (Scalia, J., dissenting).
68 *Id.* at 2736, fn. 13.
69 *Id.* at 2757
70 *McCreary*, at 2757 (Scalia, J., dissenting) (“By shifting the focus of Lemon’ s purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose, the Court converts what has in the past been a fairly limited inquiry into a rigorous review of the full record.”).
71 *McCreary*, at 2757 fn. 9 (Scalia J., dissenting) (“We have repeated many times that, where a court undertakes the sensitive task of reviewing a government’s asserted purpose, it must take the government at its word absent compelling evidence to the contrary.”). See, e.g., Edwards v. Aguillard, 482 U.S. 578, 586 (1987) (stating that “the Court is ... deferential to a State's articulation of a secular purpose,” unless that purpose is insincere or a sham); Mueller v. Allen, 463 U.S. 388, 394-395, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983) (ascribing the Court’s disinclination to invalidate government practices under Lemon’ s purpose prong to its “reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State’s program may be discerned from the face of the statute”); see also Wallace v. Jaffree, 472 U.S. 38, 74, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (O’CONNOR, J., concurring in judgment) (“[T]he inquiry into the purpose of the legislature ... should be deferential and limited”).
72 ANTONIN SCALIA, MATTER OF INTERPRETATION 17 (1997) (“I think, that is simply incompatible with democratic government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated . . . . Man may intend what they will; but it is only the laws they enact which bind us.”).
purposivism as jurisprudential schools of thought. Further, this section analyzes the advantages and disadvantages of relying on legislative history to interpret a text and ascertain legislative intent. Finally, by tracing the evolving nature of the courts’ reliance on legislative history, this section advances a novel theory of originalist analysis and argues that older legislative history is more reliable than modern legislative history, and applies this dynamic to originalism and interpreting founding era documents.

A. Types of Purpose

What kind of “purpose” is the first prong of Lemon seeking? Standard statutory interpretation technique recognizes three broad umbrellas of intentionalist theories: (1) specific intent; (2) imaginative reconstruction; and (3) purposivism.  

1. Specific Intent

Specific intent asks how the legislators “actually decided a particular issue of statutory scope or application.” This seeks to get into the minds of the draftsmen to ascertain intent, working on the presumption that this thought would be a reflection of the deliberative process. A common indicia of specific intent is when a legislator calls for an amendment for a bill, but the bill is never amended. Professor Eskridge refers to this history as “smoking gun” evidence of specific legislative intent. But how specific must the specific intent be? In the context of the First Amendment, does a legislator need to specifically state on the floor, “the purpose of this display is to advance Christianity”? Or would a statement that “this display recognizes the value of religion in our country” be a close enough fit to violate the Establishment Clause? Professor

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74 See Legislation, supra note 73, at 222.
Eskridge notes the danger in deviating from the actual specific intent; “as the inquiry becomes steadily more abstracted from specific intent, however, not only does its democratic legitimacy fade, but the inquiry becomes less determinate and perhaps more driven by nonlegislator value choices, hence in tension with the rule of law.”

2. Imaginative Reconstruction

A second approach to intentionalism is termed imaginative reconstruction. In this approach, the interpreter tries to discover “what the law-maker meant by assuming his position, in the surroundings in which he acted, and endeavoring to gather from the mischief’s he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy.” In other words, imaginative reconstruction seeks to reincarnate the dead hand of the legislature that passed the bill, and ask them how they would have decided the case or controversy before the court.

The imaginative reconstruction approach suffers from aggregation and attribution problems; namely, whose intent should the court attempt to reconstruct? Can the “pivotal” voter be identified? Professor Eskridge notes that “imaginative reconstruction may be more imaginative than reconstructive” as it is hard “for intentionalists to maintain their promised link between the methodology and democratic value.” Further, as Posner and Landis have discussed, the legislative process, especially for large comprehensive bills, consists of many specific compromises. Taking a single statement in isolation from the larger overall compromise ignores the deliberative process needed to get a majority to vote for a large bill, and

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75 Id.
76 Roscoe Pound, Spurious Interpretation, 7 COLUM. L. REV. 379, 381 (1907).
77 Legislation, supra note 73, at 228.
78 Posner and Landes.
is unlikely to yield an accurate answer of what the legislature would have thought at the time. Further, to present an imaginative legislature with a problem that did not exist in the past advances the counterfactual to a new dimension, which in my mind, has no grounding to reality.

3. **Purposivism**

Purposivism asks “what was the statute’s goal” rather than “what did the drafters specifically intend?” Joel Bishop in his classic commentaries phrased it as “[T]he primary object of all rules for interpreting statutes is to ascertain the legislative intent; or exactly, the meaning which the subject is authorized to understand the legislature intended.” This approach does not seek to identify what individual drafters intended, but rather what was the ultimate aim of the statute itself, as if a statute possessed a sentient consciousness. Under this view, the statute is seen as an organic entity that possesses a purpose of its own. “Purposivism does not yield determinate answers when there is no neutral way to arbitrate among different purposes.” While the *Lemon* test never specified what type of purpose the Court is looking for, by analyzing the elements the Court has looked to in their opinions, my analysis *infra* reveals that purposivism is the Court’s primary approach.

B. **Legislative History and Legislative Intent**

One of the most common resources judges rely on to ascertain the purpose of a statute is legislative history. Legislative history consists of statements made by legislators in floor debates,

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79 *Legislation*, supra note 73, at 229.
80 JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION 57-58 (1882). See also Scalia, supra note 72, at 17 (“We look for a sort of ‘objectified’ intent – the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris.”).
81 *Legislation*, supra note 73, at 230.
in committee reports, and in committee testimony, during the process of enacting a law.\textsuperscript{82} Prevalent use of legislative history by the Supreme Court dates back to the 1940s,\textsuperscript{83} and received contemporary criticisms from leading Jurists, including Justice Jackson.\textsuperscript{84} Legislative history has many positive uses. Often, although a text may seem plain, the legislative history can show that the legislature had a specific purpose behind the bill, which is not readily observable from the statute.\textsuperscript{85} However, legislative history should not be used to change the meaning of a statute,\textsuperscript{86} and should not be used to create new law.\textsuperscript{87}

C. Deriving Intent from Legislative History. Can Intent Actually Be Known?

The use of legislative history to derive legislative intent has been subject to vast amounts of criticism in recent years, mainly from Justice Scalia,\textsuperscript{88} Circuit Judge Easterbrook,\textsuperscript{89} and other

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\textsuperscript{82} Scalia, supra note 72, at 29. \textit{See also} Jorge Carro & Andrew Brann, \textit{The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis}, 22 Jurimetrics J. 294, 304 (1982) (“During a 40-year period, researchers found that over 60% of Supreme Court’s citations to legislative history were references to committee reports.”).
\textsuperscript{83} Scalia, supra note 72, at 30.
\textsuperscript{84} United States v. Public Util. Comm’n of Cal., 345 U.S. 295, 319 (1953) (Jackson, J., concurring) (“I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird endeavor. That process seems to me not interpretation of a statute but creation of a statute.”).
\textsuperscript{85} In Re Sinclair, 870 F.2d 1340 (7th Cir. 1989) (Easterbrook, J.) (“Legislative history may show the meaning of the texts – may show, indeed, that a text ‘plain’ at first reading has a strikingly different meaning – but may not be used to show an ‘intent’ at variance with the meaning of the text.”).
\textsuperscript{86} Pierce v. Underwood, 487 U.S. 522 (1998) (“Legislative history then may help a court discover but may not change original meaning.”).
\textsuperscript{87} In Re Sinclair, 870 F.2d 1340 (1989) (Easterbrook, J.) (“Legislative history helps us learn what Congress meant by what it said, but it is not a source of legal rules competing with those found in the U.S. Code.”).
prominent new textualists. There are several problems inherent in using legislative history to develop the legislative purpose or intent. First, does a legislature actually have a singular intent? Legislative bodies consist of many minds, voicing many different opinions. That a majority of legislators votes on one bill, does not necessarily mean they possessed a singular intent.

The next logical question, is whose intentions in the legislature should matter? Assuming that a legislature has an intent, how can a judge know whose statements reflect this intent? And, what if certain statements that were instrumental in the legislative process did not make it into the legislative record, for whatever reason. The incomplete and unreliable nature of the record abounds with uncertainty. Further, because the legislative history is chock full of bits and pieces from competing factions, relying on legislative history is an invitation for judges to engage in cherry-picking to facilitate subjective statutory construction. Finally, because influencing the legislative record is easier than influencing the actual voted-on text of the statute, legislators and lobbyists alike have an incentive to insert statements into the record to support their own subjective views, regardless if others in the body hold this view.

1. **Does a Legislature Actually Have an Intent?**

Relying on legislative history to understand the legislative intent skips over a very important initial threshold question. First, does a legislature, as a collective body, actually have a singular intent when passing a statute? There is no doubt that individual legislators have an intent when they do advocate for or against a specific statutory text. However, is there some kind

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89 See e.g., Matter of Sinclair, 870 F.2d 1340, 1342, 1343 (7th Cir. 1989) (Easterbrook, J.).

90 See e.g., Covalt v. Carey Canada Inc., 860 F.2d 1434, 1438-39 (7th Cir. 1988); Electrical Workers v. NLRB, 814 F.2d 697, 712-15 (D.C. Cir. 1987), and id. at 715-20 (Buckley, J., concurring); FEC v. Rose, 806 F.2d 1081, 1089-90 (D.C. Cir. 1986); Wallace v. Christensen, 802 F.2d 1539, 1559-60 (9th Cir. 1986) (Kozinski, J., concurring).
of symbiotic collective consciousness that permeates throughout the Capitol? Of course not. As Poser and Landis have observed, passing laws is a series of compromises, where every single legislator has a different view on what the law means, and what its purpose should be. Unanimity of thought is impossible in any collective body. Chief Justice Taney recognized that a bill is the “will of the majority of both houses” and intentions of individual members cannot be relied upon to construct a statute. From a constitutional perspective, laws are passed through bicameralism and presentment to the President, not through intent.

Further, even assuming that a legislature could have a single general intent, it is highly improbable that an issue currently before the Court fits into that intent. Judge Scalia wrote “[w]ith respect to 99.99 percent of the issues of [statutory] construction reach the courts, there is no legislative intent, so that any clues provided by the legislative history are bound to be false . . . For a virtual certainty, the majority [who voted for the law] was blissfully unaware of the existence of [the specific issue now before the courts], much less had any preference as to how it

91 Max Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 870-71 (1930) (“The chances that of several hundred men each will have exactly the same determinate situation in mind as possible reductions of a given [statutory] issue, are infinitesimally small . . . In an extreme case, it might be that we could learn all that was in the mind of the draftsman, or of a committee of half a dozen men who completely approved of every word. But when this draft is submitted to the legislature and at once accepted without a dissentient voice and without debate, what have we then learned of the intentions of the four or five hundred approvers? Even if the contents of the minds of the legislature were uniform, we have no means of knowing that content except by the external utterances of behavior of these hundreds of men, and in almost every case the only external act is the extremely ambiguous one of acquiescence, which may be motivated in literally hundreds of ways, and by which itself indicates little or nothing of the pictures which the statutory descriptions imply.”)
92 Congress is a They, Not an It, 12 Int'l Rev.L. & Econ 239 (1992).
93 Posner and Landes.
94 Aldridge v. Williams, 44 U.S. 9 (1845) (Taney, C.J.) (“In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.”).
should be resolved." From a practical standpoint, this is to be expected. Congress can only consider the issues that exist at a given time. How can legislators possibly be aware of countless issues that have not yet emerged?

2. Whose Intentions Matter? Aggregation and Attribution Problems

“If motives matter, than whose motives? Do we look to the sponsor, some members of the legislative body, letters to government officials by concerned citizens, or some past misstep?” When looking at an enacted statute, whose intent should the interpreter focus on? In the federal system, and in most states, bills are passed through a bicameral legislature. What happens if statements made in the different houses conflict? Professor Eskridge refers to this dilemma as the problem of aggregation. Because it is impossible to glean the actual intent of the individual members of the legislature, interpreters often focus on specific manifestations of the intent; for example committee reports. However, far from objective recordings of the legislative process, these reports are “subject to manipulation and statements made in the course of heated, phony, or strategic debates.”

Focusing on these generalized statements of intent, drafted by specific parties, “sacrifices some of the normative appeal of internationalism’s professed goal, which is to implement the actual intent of the enacting Congress” qua Congress. This creates the second problem of

96 Scalia, supra note 72, at 32. See also, Hirschey v. FERC, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J.) (“I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill.”).
97 Legislation, supra note 73, at 229.
98 Legislation, supra note 73, at 224.
99 Legislation, supra note 73, at 224. See also William Eskridge, et al, Legislation Statues and the Creation of Public Policy 33 (2007) (“Few votes appear to be altered by floor debate; instead debate is seen mainly in terms of its strategic value . . . Members may use to it . . . pack the legislative history with remarks supporting an interpretation of the proposal they favor.”).
100 Id.
A potential remedy to this problem is to focus on the intent of the “pivotal” legislator who was key in getting a bill passed. However, determining who these pivotal legislators are, and what they genuinely believed, as opposed to what they professed as part of legislative compromises, is a daunting, if not impossible task.

3. Unreliability of Legislative History to Illustrate Intent

Assuming that a legislature can have an intent, and that a judge knows whose statements most accurately reflect the intent of the body, relying on legislative history to recreate this intent still abounds with unreliability. The use of legislative history forces a tradeoff between reliability and usefulness. On the one hand, committee reports that confirm the plain meaning of a statutory text are very reliable, but are not particularly useful, as an interpreter could come to the same conclusion in the absence of the report. Conversely, when a committee report takes a stand on an issue where the text is not clear, it is very useful to supply meaning, but is not reliable, as it can be the result of an agenda to introduce a specific meaning not agreed upon by the entire body.

Further, relying on legislative history is unreliable because it is often created early in the process and does not reflect many of the deals agreed upon to ensure passage of the bill. Legislative history may also be unreliable because it was created later in the process according to a specific agenda, and lacks much of the record devised while the bill was actually being

\[101\text{ Id.}\]
\[102\text{ See McNollgast, Positive Canons: The Role of Legislative Bargains in Statutory Interpretation, 80 GEO. L.J. 705 (1992).}\]
\[103\text{ Legislation, supra note 73, at 224-225.}\]
\[104\text{ Legislation, supra note 73, at 309.}\]
\[105\text{ See Adrian Vermeule, Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church, 50 STAN. L. REV. 1833 (1998).}\]
deliberated.\textsuperscript{106} Other legislative history is not reliable because it reflects the views of outsiders to the bill who provide the testimony to give the bill a gloss favorable to their point of view, regardless if anyone else agrees with it.\textsuperscript{107}

When a Court cites a committee report from either the House or the Senate, but not both, as opposed to a conference report, written based on the understanding of both houses, the Court is being unfaithful to the deals reached in compromise prior to presentment. Why only cite one? Why not cite both? Perhaps, the reason is because the legislative history from the House and Senate Committee Reports likely diverges, and it would be very difficult to reconcile them to establish a clear intent. Therefore, by picking one over the other, courts maintain the fig leaf that legislative history is a clear and unambiguous means to supplement the meaning of a statute.

In addition, the legislative history could be incomplete. While the committee reports come at a later stage, an important point in the process is the “mark-up” of the bill when in committee. During these stages legislators make the important compromises to get the bill advanced.\textsuperscript{108} Since the “mark-up” stage is seldom recorded, actions taken during the most important time in the legislative process are often unknowable.\textsuperscript{109} By omitting key parts of the legislative process, these records fail to paint an accurate picture of what transpired.\textsuperscript{110} Relying on legislative intent “is much more likely to produce a false or contrived legislative intent than a genuine one.”\textsuperscript{111}

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\textsuperscript{106} Legislation, supra note 73, at 308.
\textsuperscript{107} Legislation, supra note 73, at 308.
\textsuperscript{109} Patricia Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195, 202 (1983).
\textsuperscript{110} Allan Hutchinson and Derek Morgan, The Semiology of Statutes, 21 Harv. J. Legis. 583, 593-94 (1984) (“However, as the expression of legislative intent is always more or less incomplete, it is doubtful whether any impartial method of adjudication can be fashioned in a liberal society.”).
\textsuperscript{111} Scalia, supra note 72, at 32.
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4. **Legislative Intent is Cover for Judicial Intent**

One of the hallmarks of relying on legislative history is granting judges a wide swath of evidence with which to resolve an ambiguous text in numerous ways. Legislative history “is extensive [with] something for everybody. As Judge Harold Leventhal used to say, [reading legislative history is like looking] over the heads of the crowd and pick[ing] out your friends. The variety and specificity of results that legislative history can achieve is unparalleled.”\(^\text{112}\)

While relying on legislative history can be justified to fulfill the legislature’s desire, “[o]n balance, [the use of legislative history] has facilitated rather than deterred decisions that are based upon the courts’ policy preferences, rather than neutral principles of law.”\(^\text{113}\) The subjectivity is exacerbated due to the fact that there is no consistent approach to relying on legislative history.\(^\text{114}\) Judge Patricia Wald laments, “consistent and uniform rules for statutory construction and use of legislative materials are not being followed today.”\(^\text{115}\) Often, the line between the intent of the legislature and the intent of the judge blurs beyond the point of recognition.\(^\text{116}\)

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\(^{112}\) *Scalia,* supra note 72, at 36.

\(^{113}\) *Scalia,* supra note 72, at 36.

\(^{114}\) *Scalia,* supra note 72, at 36-37 (“Since there are no rules as to how much weight an element of legislative history is entitled to, it can usually be either relied upon or dismissed with equal plausibility.”).


\(^{116}\) Matter of Sinclair, 870 F.2d 1340, 1342, 1343 (7th Cir. 1989) (Easterbrook, J.) (“Often there is so much legislative history that a court can manipulate the meaning of a law by choosing which snippets to emphasize and by putting hypothetical questions-questions to be answered by inferences from speeches rather than by reference to the text, so that great discretion devolves on the (judicial) questioner. Sponsors of opinion polls know that a small change in the text of a question can lead to large differences in the answer. Legislative history offers willful judges an opportunity to pose questions and devise answers, with predictable divergence in results. These and related concerns have lead to skepticism about using legislative history to find legislative intent.”). *See also,* James N. Landis, *A Note on “Statutory Interpretation,”* 43 Harv. L. Rev. 886, 891 (1930) (“To condone . . . [judges searching for] the intent of the legislature, as if the legislature had attributed a particular meaning to certain words, when it is apparent that the intent is that of the judge, is to condone atavistic practices too reminiscent of the medicine man.”). *See e.g.*, *Legislation,* supra note 73, at 230 (“Often an attributed policy purpose is too general and malleable to yield interpretive closure in specific cases, because its application will depend heavily upon context and
Church of the Holy Trinity v. United States was a seminal case, where the Supreme Court attempted to divine the intent of Congress to construe a statute. In this case, the United States prosecuted a Church in New York City who hired an Englishman to serve as a pastor under an immigration-employment statute. In analyzing the statute, the Court held that, “While there is great force to this reasoning [relying on standard canons of statutory construction], we cannot think congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule 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.”

By selectively quoting from various atextual sources, including legislative history, and ignoring the plain meaning of the statute, the Court mangled the interpretation of the relevant statute. The court concluded, “It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.” According to Justice Scalia, “Church of the Holy Trinity is cited to [the Supreme Court] whenever counsel wants [the Court] 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.” Justice Scalia uses the case of Church of the Holy Trinity as an illustration of how the use of legislative intent is in fact promulgating judicial intent. Justice Kennedy, recognizing the difficulty of gleaning the spirit of the law, agree with Justice Scalia, “[t]he problem with spirits is that they tend to

the interpreter’s perspective. Not only are such judgments difficult, but they implicate political and policy considerations better suited to the branches that are more democratically accountable than the judiciary.”

117 143 U.S. 457 (1892).
118 Id. at 458-59 (emphasis added).
119 Scalia, supra note 72, at 19.
120 Holy Trinity, at 472.
121 Scalia, supra note 72, at 21.
122 Scalia, supra note 72, at 18.
reflect less the views of the world whence they come than the view of those who seek their advice.”123 As I will demonstrate, relying on the purpose prong in the Lemon test may often only be rationalized based on such a legal realist agenda.

D. Use of Legislative History Contributes to Self Perpetuating Cycle That Reduces Reliability of Legislative History

Professor Eskridge equates courts relying on legislative to eating potato chips. “[O]nce a little legislative history is admissible, all of it ultimately gets researched and introduced, which in turn causes more of it to get generated. It is like eating potato chips: you can’t just eat one . . . Once legislative history gets researched, how can a court not be influenced by smoking guns that the research turns up?”124 Circuit Judge Scalia noted that “it [is] time for courts to become concerned about the fact that routine deference to the detail of committee reports, and the predictable expansion in that detail which routine deference has produced, are converting a system of judicial construction into a system of committee-staff prescription.”125 “It is less that the courts refer to legislative history because it exists than that legislative history exists because the courts refer to it.”126 Judges relying on legislative history creates a self-perpetuating endless, and I would argue downward, spiral that diminishes the usefulness of this material to deeper depths of irrelevance.

124 Legislation, supra note 73, at 322.
125 Hirschey v. FERC, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J.).
126 Scalia, supra note 72, at 34.
1. **Courts Relying on Legislative History Creates Incentives for Legislators to Manipulate Record**

Because legislators know the courts will rely on legislative history, they have a strong incentive to insert their own personal views into the record in hopes that it will be picked up by the courts.\(^\text{127}\) While changing the statutory text is often quite difficult, inserting something into the legislative history is facile.\(^\text{128}\) Legislators, knowing that courts will rely on the legislative history, can mold and shape the record to reflect an understanding that never existed, and turn legislative defeats into recorded victories, and the subsequent court will be none the wiser as to what actually happened.\(^\text{129}\)

The notion of cycles of statutory interpretation by the Courts has been chronicled by Professor Vermuele.\(^\text{130}\) Professor Vermuele posits that changes in the Supreme Court’s “formulation of its rules for statutory interpretation, and to some degree changes [to] its actual interpretive practice as well” can be attributed to “endogenous shifts in the expectations of actors

\(^{127}\) Vermeule 154 (“Sophisticated intentionalists ... argue that if courts consult legislative history to ascertain legislative ‘intent,’ then legislators who anticipate judicial behavior will engage in monitoring to ensure that legislative history accurately reflects the consensus of the enacting coalition.”).

\(^{128}\) See e.g., Congressman William Moorhead, *A Congressman Looks at the Planned Colloquy and Its Effect in the Interpretation of Statutes*, 45 A.B.A. J. 1314 (1959) (“By the use of the ‘friendly colloquy’, two legislators may be able to legislate more effective than all of Congress . . . Many if not most bills are controversial to some degree, and often it may be desirable when drafting a bill to couch provisions in innocuous language in order to minimize possible objections during committee consideration. Naturally, however, the proponents of a particular viewpoint would like to insure that their interpretation be the accepted one. The friendly colloquy on the floor during debate can serve well in this situation. Acquiescence by the committee [chair] in a stated intent will very likely be relied upon by the courts in the absence of objection or other reliable evidence of an opposite intent.”).

\(^{129}\) Matter of Sinclair, 870 F.2d 1340, 1342, 1343 (7th Cir. 1989) (Easterbrook, J.) (“One may say in reply that legislative history is a poor guide to legislators' intent because it is written by the staff rather than by members of Congress, because it is often losers' history ('If you can't get your proposal into the bill, at least write the legislative history to make it look as if you'd prevailed'), because it becomes a crutch ('There's no need for us to vote on the amendment if we can write a little legislative history'), because it complicates the task of execution and obedience (neither judges nor those whose conduct is supposed to be influenced by the law can know what to do without delving into legislative recesses, a costly and uncertain process').”.

in the interpretive system.” Vermeule argues that “legislators and judges develop self-defeating expectations about the behavior of other actors” creating a “cyclical pattern of continuous mutual adjustment that never reaches a stable equilibrium.”

Courts relying on legislative history creates incentives for legislatures to generate vast volumes of legislative history. Legislators, committees, and staffers now produce a voluminous amounts of legislative history in the hopes that a judge can look through the crowd, and find a friend. This creates the problem that the legislators, by sheer constraints of time, cannot possibly be expected to be familiar, or even read this lengthy record, save perhaps the brief committee report. 131 That the legislator does not read these materials further diminishes their value, as they no longer represent anything to do with the deliberative process, and are less representative of actual intent.

Whereas legislative history is supposed to express the thoughts of the legislators, if the legislators never even look at the legislative history, then it becomes a mere work-product of staffers, bearing little relation to the actual legislative process. 132 As Justice Scalia notes, “[w]hat a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases [in the legislative history] can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.” 133

131 Scalia, supra note 72, at 32 (“In earlier days, when Congress had a smaller staff and enacted less legislation, it might have been possible to believe that a significant number of senators or representatives were present for floor debates, or read the committee reports, and actually voted on the basis of what they heard or read. Those days, if they ever existed, are long gone. The floor is rarely crowded for a debate, the members generally being occupied with committee business and reporting to the floor only when a quorum call is demanded or a vote is to be taken. And as for committee reports, it is not even certain that the members of the issuing committees have found time to read them . . .”).

132 Blanchard v. Bergeron, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring in part) (“the purpose of [the legislative history] was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction.”).

For example, Senator Danforth, a key actor in the compromise Civil Rights Act of 1991 bill, even attempted to amend the bill to forbid the courts from using the legislative history to interpret the provisions:

It is very common for Members of the Senate to try to affect the way in which a court will interpret the statute by putting things into the Congressional Record . . . [A] court would be well advised to take with a large grain of salt floor debates and statements placed into the Congressional Record which purport to create an interpretation for the legislation that is before us . . .[A]ny judge who tries to make legislative history out of the free-for-all that takes place on the floor of the Senate is on very dangerous grounds.\textsuperscript{134}

Senator Danforth, who witnessed first hand the “free-for-all” on the floor of the Senate, recognized how other senators sought to manipulate the record, and admonished the courts from relying on these unreliable indicators. Alas, as seen in numerous cases interpreting this act, Senator Danforth’s sage words were unheeded.

This dynamic is further illustrated in an exchange between Senator Dole and a witness testifying in front of a committee.\textsuperscript{135} After establishing that the Senator did not read the

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\textsuperscript{135} 128 Cong.Rec. 16918-19, 97th Cong., 2d Sess. (July 19, 1982), (quoted in Hershey v. Federal Energy Regulatory Comm’n, 777 F.2d 1, 7 n.1 (D.C. Cir. 1985) (Scalia, J., concurring)).
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Mr. ARMSTRONG. ... My question, which may take [the chairman of the Committee on Finance] by surprise, is this: Is it the intention of the chairman that the Internal Revenue Service and the Tax Court and other courts take guidance as to the intention of Congress from the committee report which accompanies this bill?
Mr. DOLE. I would certainly hope so....
Mr. ARMSTRONG. Mr. President, will the Senator tell me whether or not he wrote the committee report?
Mr. DOLE. Did I write the committee report?
Mr. ARMSTRONG. Yes.
Mr. DOLE. No; the Senator from Kansas did not write the committee report.
Mr. ARMSTRONG. Did any Senator write the committee report?
Mr. DOLE. I have to check.
Mr. ARMSTRONG. Does the Senator know of any Senator who wrote the committee report?
Mr. DOLE. I might be able to identify one, but I would have to search. I was here all during the time it was written, I might say, and worked carefully with the staff as they worked....
Mr. ARMSTRONG. Mr. President, has the Senator from Kansas, the chairman of the Finance Committee, read the committee report in its entirety?
Mr. DOLE. I am working on it. It is not a bestseller, but I am working on it.
Mr. ARMSTRONG. Mr. President, did members of the Finance Committee vote on the committee report?
Mr. DOLE. No.
committee report, the witness observed that ... “for any jurist, administrator, bureaucrat, tax practitioner, or others who might chance upon the written record of this proceeding, let me just make the point that [the committee report] is not the law, it was not voted on, it is not subject to amendment, and we should discipline ourselves to the task of expressing congressional intent in the statute.” Legislative history never considered by the legislature, regardless of what value the individual legislator attaches to it, should have no value to the courts. Yet the courts ignore this fundamental maxim. And the more records the legislature produces, the more the courts will rely on it.137

2. Attorneys and Lobbyists Can Take Advantage of Court’s Relying on Legislative History

Lobbyists have a strong incentive to influence the record to strengthen their legislative agenda. Because lobbyists know judges will rely on legislative history, they have an incentive to make sure their point of view is represented in the record,138 and will lobby legislative committees to include their opinions, regardless of whether the congress considered it.139 Justice Mr. ARMSTRONG. Mr. President, the reason I raise the issue is not perhaps apparent on the surface, and let me just state it: .... The report itself is not considered by the Committee on Finance. It was not subject to amendment by the Committee on Finance. It is not subject to amendment now by the Senate....... If there were matter within this report which was disagreed to by the Senator from Colorado or even by a majority of all Senators, there would be no way for us to change the report. I could not offer an amendment tonight to amend the committee report.... [F]or any jurist, administrator, bureaucrat, tax practitioner, or others who might chance upon the written record of this proceeding, let me just make the point that this is not the law, it was not voted on, it is not subject to amendment, and we should discipline ourselves to the task of expressing congressional intent in the statute.

136 Id.
137 Eskridge, supra note 99, at 983 (In recent years, transcripts of the mark-up phase have been released. As Professor Eskridge notes, “one might therefore expect to see more references to these sources by judges willing to consider legislative history.”). See e.g., Regan v. Wald 468 U.S. 222 (1984) (both majority and dissenting opinions relying on explanation accompanying House committee mark-up).
138 Blanchard v. Bergeron, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring in part) (“As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist.”).
139 Eskridge, supra note 99, at 983 (“Lobbyists and lawyers maneuver endlessly to persuade staff members (who write committee reports) or their legislative bosses to throw in helpful language in the reports when insertion of
Scalia notes that “One of the routine tasks of the Washington lawyer-lobbyist is to draft language that sympathetic legislators can recite in a prewritten ‘floor debate’- or even better, insert into a committee report.” From a public choice perspective, this creates vast opportunities for wasteful and prodigious rent seeking that benefits certain factions at the cost of the general welfare.

Further, litigating attorneys advancing a position not supported by the statute can ignore statutory text by citing to voluminous and wide ranging legislative history. Because attorneys know judges will rely on legislative history, they will selectively pick and choose amongst the record to create an interpretation most favorable to their client, often at the expense of ignoring the statutory text. This cycle perpetuates the use of legislative history. Because attorneys include it in their briefs, the courts are inclined to rely on them further. You can’t just have one potato chip.

E. Evolving Nature of Legislative History

The nature of legislative history is not constant, but has evolved over time as courts rely on it more. As it has become more a reflection of personal legislative agendas, and less indicative of the will of the government, it has become less reliable, and Courts are less justified in relying on it. In this section I will analyze the evolving, or perhaps a better word would be devolving,

similar language would be inappropriate or infeasible for the statute itself. ‘Smuggling in’ helpful language through legislative history is a time-tested practice.”); Legislation, supra note 73, at 308 (“Knowing that courts and agencies will . . . rely on what committees and legislators say about a bill’s meaning, interest groups will seek to plant friendly comments in the reports and induce their legislative allies to engage in planned colloquies that reflect a slanted understanding of the statute.”).

140 Scalia, supra note 72, at 34.
141 See e.g., JAMES M. BUCHANAN AND GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962).
142 See e.g., Brief for Petitioner at 21, Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989), quoted in (Green v. Bock Laundry Machine Co., 490 U.S. 504, 530 (1989) (Scalia, J., concurring) (“Unfortunately, the legislative debates are not helpful. Thus, we turn to the other guideposts in this difficult area, statutory language.”).
nature of legislative history, as a reliable indicia of legislative intent. This novel theory has broad applications to originalism, and reconciles originalist judges citing older legislative history, but simultaneously rejecting legislative history of more recent vintage.

1. **Modern Legislative History Is Less Reliable Than Older Atextual Sources**

   Over time, legislators began giving more elaborate speeches on the Floor, and committees, subcommittees, and committee reports became in vogue as laws and regulations became more complicated and cumbersome. The expansion of the media, first through newspapers, and later through radio and television further gave representatives the ability to provide more atextual contexts for a law.

   Although Congress is only constitutionally required to record a journal of its proceedings,\(^{143}\) C-SPAN and gavel-to-gavel coverage have greatly expanded the ability of congress to pontificate, and concurrently expanded the ability of politicians to provide more atextual information.\(^{144}\) This coverage also creates the opportunity to grandstand for the camera, and provide information about a bill that may have nothing in fact to do with the meaning of the language as voted upon by the Congress.

   I contend that as more legislative history is created, and Courts rely more on legislative history, legislative history becomes less reliable because legislators have a greater incentive to tweak the record to advance their personal agendas. Once the courts signal that they will look at legislative history, the floodgates are open, and all parties involved in the political machine,

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\(^{143}\) U.S. Const. art. I, § 5.

\(^{144}\) Eskridge, *supra* note 99, at 33 (“In the modern era of televised floor proceedings, members know that their constituents and lobbyists can easily monitor their activity and their positions.”).
legislators, staffers, lobbyists, attorneys, and others, are on guard to bend and shape the legislative history in anticipation of future litigation.

2. **Legislative History and Originalism**

This dynamic becomes very important in the context of originalist constitutional analyses. For example, Justice Scalia, the Prometheus of Originalism is quite willing to rely on atextual historical documents from the time of our founding and shortly thereafter, and regularly cites debates in the early Congress and contemporary publications (Federalist, Anti-Federalist papers, etc).\(^{145}\) Yet he adamantly refuses to rely on any modern legislative history, arguing that it cannot be relied upon to show the meaning of the statute as understood by a reasonable person at the time it was voted on.

In *D.C. v. Heller*, Justice Stevens in dissent calls Justice Scalia to task for relying on historical documents subsequent to the ratification of the Second Amendment, characterizing such statements as mired in “pitched political debates” and better characterized as “advocacy than good-faith attempts at constitutional interpretation.”\(^{146}\) Justice Stevens accuses Justice Scalia of being hypocritical for eschewing modern legislative history, while firmly embracing historical atextual sources, a lineal descendant of modern legislative history. Many others have leveled this critique against Scalia. But is Scalia being hypocritical? I would argue no.

Over time, has the nature of contemporary historical sources changed such that their reliability as indicia of original meaning diminished? Is it possible that contemporary historical sources from earlier times are indicative of the meaning of a statute, whereas more recent contemporary sources are less indicative of the meaning of a law? Noting that not all historical

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sources are created equal, Justice Powell in *Nixon v. Fitzgerald* discounted Justice White’s
dissent that relied on “fragmentary” historical sources, and observed that “historical evidence
must be weighed as well as cited.” Not all historical sources are created equally. Although
Scalia never mentioned it, he followed Justice Powell’s logic. Implicit in Scalia relying on some
atextual sources, but rejecting others is the presumption that not all historical sources are created
equally.

Determining original public meaning by looking to historical contemporary documents,
including legislative history, is only as effective as how constitutive the contemporary sources
are of what the statutory language in question actually meant when it was passed. In other words,
a historical source can help explain what an ambiguous law means to the extent that the source
was written without an intent to subjectively reinterpret the law to a view not actually in the
consideration of the drafters.

The key determination regarding reliability is based on how impartially the atextual
source came into existence. If a judge uses a contemporary dictionary, for example, to determine
the meaning of a word in a statute, it is fairly obvious that the dictionary was not written with an
intent to affect the substance of a law. However, if a jurist seeks to rely on a committee report
written by a staffer to shed light on a vague text, for better or worse, the report was written to
impart a specific faction’s interpretation of a bill, even if that meaning may not have been
accepted as a consensus view by those voting on it. For this reason, the contemporary dictionary
would be a more reliable indicia of meaning than a subjectively written committee report.

If in the future, judges attempt to derive original public meaning from sources such as
web-logs and user-edited sources like Wikipedia, the courts will invite an infinite number of

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biases to affect the contemporary understanding of a law. Malleable sources such as Wikipedia and blogs will create a virtual onslaught of possible meanings to the law, perhaps rendering any kind of historic analysis futile. Realizing the danger of relying on these sources, recently, the New Jersey Superior Court’s Appellate Division held that citations to Wikipedia are not subject to judicial notice. The court remarked, “it is entirely possible for a party in litigation to alter a Wikipedia article, print the article, and thereafter offer it in court in support of any given position. Such a malleable source of information is inherently unreliable, and clearly not one "whose accuracy cannot be reasonably questioned.”

Although ascertaining which historical sources are reliable and which are not is an intractable task, and cannot be simply divvied up according to chronological eras, several turning points in the development of the legislative process are useful guideposts when determining which sources can elucidate the objective meaning of a law, and which are indicative of a motivation to fabricate an ulterior meaning to a law.

*Holy Trinity* can be seen as a hypothetical point of demarcation in the history of relying on legislative history. In the British system, the courts only began considering legislative history, known as Hansard, following the landmark 1992 decision of *Pepper v. Hart*. This too can be considered a hypothetical turning point. I label *Holy Trinity* as a hypothetical point of demarcation, largely because the proclivity of the Supreme Court to cite to legislative history with any certainty cannot readily be empirically established. Empirical studies of the Supreme Court’s use of legislative history are largely inconclusive. The first empirical study of the

149 *Id.*
150 Legislation, *supra* note 73, at 308 (”Thus, legislative history produced after *Holy Trinity* might be more unreliable than that produced before the Supreme Court’s landmark decision.”)
Supreme Court’s use of legislative history found that the Court’s use increased throughout the 20th century, but Professor Vermeule criticizes this study because it did not control for the number of cases the Court decided during a given term.

According to Professor Solan, in the years following *Holy Trinity*, the Court did not immediately begin citing legislative history on a regular basis. Rather this methodology became more prevalent during the New Deal. However, Professor Solan notes that in the period following *Holy Trinity* citations to legislative history became more common, and some very important cases cited to it. Research conducted by Professor Vermeule showing the use of legislative history fluctuating throughout the twentieth century, is largely inconclusive. Professor Vermeule concedes that perhaps certain exogenous factors contribute to this random fluctuation, but the methodology does not exist to isolate the cause of these changes.

But assume that *Holy Trinity* can be viewed as a watershed moment, a quantum leap if you will, in the Supreme Court’s approach to citing legislative history. According to this model, during an earlier time, a simpler time before *Holy Trinity*, following the tradition of British Courts ignoring Hansard, the legislative record of Parliament, the Supreme Court would refuse to look at legislative history. Before *Holy Trinity*, legislators were less likely to waste time developing the legislative history, as the crucial portion the courts would consider was the text of

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153 Vermeule 185
155 Id.
156 Vermeule 186 (The research suggests “oscillating pattern of use, one that rises from 1938 until 1949, falls again until 1958, then fluctuates uncertainly until a dramatic upward spike occurs in the mid-1970s. That spike begins a slow downward trend in the mid-1980s, rises again in the mid-1990s, and falls again towards the end of the decade.”)
157 Vermeule 187
158 Hansard (Eskridge text)
159 See e.g., Marshall Field & Co. v. Clark, 143 U.S. 649 (1892).
the statute, and the committee reports were largely ignored. However, after *Holy Trinity*, legislators will take time away from legitimately debating the actual statute, and ensure that the legislative history is constructed to benefit their position. For this reason, I argue that older legislative history, where this incentive to fabricate did not exist, is more reliable than legislative history of recent vintage, where the incentive to fabricate is quite strong.\textsuperscript{160} I seek to prove this theory by application of a commonly used evidentiary principle.

3. **Reliability of Evidence and the Motivation to Fabricate the Truth**

To analyze this dynamic, Federal Rule of Evidence 801(d)(1)(B)\textsuperscript{161} is useful.\textsuperscript{162} The purpose of this rule is to determine the admissibility of statements that opposing counsel argues are untrue, due to an alleged motivation to fabricate the truth. The testimony is admissible if it is consistent with previous statements made prior to the existence of a motivation to fabricate the truth. For example X and Y are business partners. In January X testifies that Y was not involved in a specific business transaction X initiated. At this time, X has no reason to lie, as the transaction was ostensibly lawful. In February, the authorities investigate the transaction, and find there was fraud involved. This investigation caused X apprehension, and motivated him to

\textsuperscript{160} *Scalia*, *supra* note 72, at 34 (“Ironically, but quite understandably, the more courts have relied upon legislative history, the less worthy of reliance it has become. In earlier days, it was at least genuine and not contrived – a real part of the legislation’s history, in the sense that it was part of the development of the bill, part of the attempt to inform and persuade those who voted [goes to original public meaning]. Nowadays, however, when it is universally known and expected that judges will resort to floor debates and (especially) committee reports as authoritative expressions of ‘legislative intent,’ affect the courts rather than informing the Congress has become the primary purpose of the exercise.”). *See also*, Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. Chi. L. Rev. 149, 160 (2001) (“... legislators anticipating judicial use of legislative history will pollute the record with misleading snippets and colloquies designed to skew subsequent judicial decisionmaking, so that judges who treat legislative history as a valuable evidentiary source will have initiated a self-defeating causal process that makes legislative history a valueless source instead.”).

\textsuperscript{161} Fed. R. Evid. 801(d)(1)(B) (“A statement is not hearsay if--(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive ... ”).

\textsuperscript{162} This is a concept that I will further develop in future writings, but it is relevant to the *Lemon* inquiry with respect to relying on legislative history.
change his story to shift the blame to Y. When the authorities investigate X in March, X changes his tune, and claims Y was involved in the transaction. Under this evidentiary rule, because the statement made in March was proffered after the motivation to fabricate the truth (the investigation and possible criminal charges), and was inconsistent with the January statement, it would be inadmissible. Conversely, if in January, X testified that Y was involved in the transaction, and testified the same in March, it would be admissible, because the statements were consistent.

This rule can provide useful insights when relying on historical sources, where the sources are charged with being unrepresentative of the original meaning, or a form of “pitched political debates”\(^{163}\) subject to bias. This rule could allow a judge to answer the question of whether historical sources were written consistently with the original meaning of a statute, or whether they were written based on a motivation to fabricate the truth for various subjective purposes. This rule also allows judges to flesh out conflicting versions of what happened, which is a common problem when relying on historical evidentiary accounts.\(^{164}\) If there is a charge that a legislative history is a fabrication of reality, previous statements made before the motivation to fabricate existed, that confirm this later statement, renders the later statement more reliable (admissible if you will).

The following example illustrates this dynamic in the legislative process. Senator Jones, the committee chairman makes statement A, and comments that the bill in committee should be interpreted broadly. Based on that statement, the bill is drafted so that it should be interpreted broadly. After Senator Jones makes statement A, one of his constituents lobbies and explains that


\(^{164}\) Nixon v. Fitzgerald, 457 U.S. 731 n. 31 (1982). Justice Powell discounted Justice White’s dissent that relied on “fragmentary” historical sources, and observed that “historical evidence must be weighed as well as cited.”
the bill would hurt his interests, and the bill should be interpreted narrowly. This phone call can be viewed as a motivation for Senator Jones to fabricate the truth, so as to support his new views of the bill’s meaning. Senator Jones adopts this view. Prior to a floor vote, Senator Jones takes to the floor and makes statement B, explaining the bill should be interpreted narrowly. Senator Smith takes to the floor, and alleges that Senator Jones changed his tune due to the pressure of an influential lobbyist. With no further discussion on this point, the bill is passed by both houses, and signed into law.

Now, a court is confronted with determining whether the statute should be interpreted broadly, or narrowly. A Judge seeks to use the legislative history to answer this question, but is conflicted over which version of Senator Jones’s statement to rely on. Because statement B is not consistent with statement A, a subsequent court considering this dynamic, can presume that the change was due to a motivation to fabricate the record, and statement B was not indicative of what transpired in the committee during the time statement A was made. Therefore, statement B is less reliable to indicate the meaning of the bill. But, if statements A and B were consistent, statement B is reliable, and can be more readily relied upon.

But, with older laws, where generally, the only remaining record is the duly enacted statute, such opportunities to modify the meaning based on motivations to fabricate the truth were greatly reduced. In the past, if the committee drafted a bill broadly, and the committee chairman received such a message from a constituent, it would have been too late to impact the record. He could not have tried to change the meaning after the fact by slipping something into the legislative history. The bill would speak for itself.

Further, if the Senator was aware that the courts would only look at the text, and not the legislative history, he would not have the incentive to slip statements into the legislative history.
Therefore, any statements that may have been made in the legislative history are inherently more reliable in older legislative sessions than in modern sessions.

Using this evidentiary framework, I argue that over time the increasingly subjective nature of atextual sources has resulted in diminution in their reliability by judges to determine the meaning of a statute. The corollary to this diminishment in reliability has forced new textualist jurists seeking objective public meaning to eschew many modern atextual sources that are fraught with unreliability, and to rely more primarily on the text. This thus rationalizes the pseudo-contradictory behavior of judges like Justice Scalia who are willing to rely on older historical atextual sources, which are more reliable, but vehemently reject more modern sources, which are not as reliable.

III. Sticking a Pencil Through The Purpose Prong’s Citric Skin

After introducing the Lemon test, and showing the difficulty of ascertaining purpose through the use of legislative history, in this section I put the two elements together, as I drive a pencil through Lemon’s bitter citric skin. Should purpose even matter in the Lemon test? I argue that the purpose prong forces Judges to rely on unreliable extrinsic sources, like legislative history. The Supreme Court has not taken a principled approach to relying on such sources, and as a result, the purpose prong consistently yields inconsistent results, and allows savvy politicians to manipulate the record to avoid Establishment Clause challenges. This is perverse, and frustrates the goal behind Lemon, which is to prevent excessive entanglement of church and state. A rigorous and robust Establishment Clause jurisprudence to ensure the separation of

165 See Lambs Chapel v. Center Moriches School District, 508 U.S. 384, 398 (Scalia, J., dissenting) (“Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinion, personally driven pencils through the creature’s heart [Lemon] … and a sixth has joined an opinion doing so.”) (emphasis added).
church and state cannot tolerate such an enigmatic and unpredictable approach. For these reasons, I propose two modest proposals to the purpose prong. First, I recommend that judges follow the Lemon test, and actually focus on the purpose of the statute in question, rather than some metaphysical and largely unknowable purpose of the legislature. This comports with the text of Lemon. Second, I seek to replace the “objective observer” standard announced in McCreary with an original public meaning analysis.

A. Should Purpose Matter In the Lemon Test?

Returning to the first prong of Lemon, in light of the inherent unreliability and unpredictability in searching for legislative intent, I pose a vital question; should the purpose of a statute matter? In many other contexts, the Supreme Court has argued that purpose should not matter. Justice Souter argues that “purpose matters” in the First Amendment context. Yet he alludes to Justice Holmes’s famous maxim that a dog knows the difference between being kicked and being stumbled over, and finds that “it will matter to objective observers whether posting the [Ten] Commandments [in a Courthouse] follows on the heels of displays motivated by sectarianism, or whether it lacks a history demonstrating that purpose.”

166 See Board of Educ. v. Mergens, 496 U.S. 226, 249 (1990)(“motives of legislators” are irrelevant); see also Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2325 (2004)(O’Connor, J., concurring)(motives for adding “under God” in Pledge cannot, on their own, determine purpose); Wallace v. Jaffree, 472 U.S. 38, 77 (1985)(O’Connor, J., concurring) (“little, if any, weight” should be given to intent of legislators); McGowan, 366 U.S. at 466-67, 469 (Frankfurter, J., concurring)(courts cannot “psychoanalyze legislators”).
167 McCreary (“One consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage. This presents no incongruity, however, because purpose matters. Just as Holmes’s dog could tell the difference between being kicked and being stumbled over, it will matter to objective observers whether posting the Commandments follows on the heels of displays motivated by sectarianism, or whether it lacks a history demonstrating that purpose.”).
168 Id.
Justice Souter continues, remarking that posting the Decalogue results in an “ostensible indication of a purpose to promote a particular faith [that] will have the effect of causing viewers to understand the government is taking sides.” But I argue that the observer, under this theory, will see the government as taking sides regardless of the purpose. Whether they posted the King James Version of the Ten Commandments for entirely religious purposes, or for purely secular purposes, the effect will be the same; the government has picked a certain religious text to post. Umbrage is not exacerbated by behind-the-scenes congressional debates. This analysis, which is essential to Justice Souter’s opinion, is exiled to a footnote for a reason; it does not hold water. His explanation fails to answer the critical question; why does the purpose matter in the establishment clause context?

Perhaps Justice Souter would have been better-served to look at what Justice Holmes actually said, rather than what his fictitious dog felt. The Great Dissenter once opined that “Only a day or two ago – when counsel talked of the intention of the legislature, I was indiscreet enough to say I don’t care what their intentions was. I only want to know what the words mean.” Justice Holmes also remarked that “we do not inquire what the legislature meant; we

169 Id.
ask only what the statute means.”\textsuperscript{172} Or as Judge Friendly adapted Justice Holmes's theme, a court must search for “what Congress meant by what it said, rather than for what it meant simpliciter.”\textsuperscript{173} What mattered to Holmes was not what the person meant when he struck the dog, but what was the nature of striking the dog. In other words, the purpose was not relevant; it was the meaning of the act itself that was significant.

That Justice Souter must resort to a marginally related maxim about a fictitious dog to justify relying on purpose in a case implicating something as significant as the First Amendment is tribute to the flimsiness of this line of reasoning. Justice Souter attempts to reconcile this contradiction, by observing that the display with the secular purpose “will be properly understood as demonstrating a preference for one group of religious believers as against another.”\textsuperscript{174} In other words, a law passed with a secular purpose will be understood as demonstrating a secular purpose. That is circular and conclusory. How can the purpose behind a statute affect how the display impacts nonadherants? It is the act itself that matters, and not the purpose behind it.

B. \textit{Purpose Prong Forces Judges to Rely on Unreliable Extrinsic Sources Like Legislative History Without Consistent Approach}

Inquiring into purpose under the Establishment Clause, according to Justice Souter, is neither “unpredictable [n]or disingenuous.”\textsuperscript{175} Justice Souter reasoned the purpose could in fact be objectively discovered, and hints that searching for purpose is a simplistic task, and notes the

\textsuperscript{172} \textit{Oliver Wendell Holmes, \textit{Collected Legal Papers} 207 (1920), quoted in Schwegmann Bros. v. Calvert Distillers Corp, 341 U.S. 384, 397 (1951) (Jackson, J., concurring).}
\textsuperscript{173} Henry J. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in \textit{Benchmarks} 218-19 (1967).
\textsuperscript{174} McCreary County v. ACLU of Ky., 125 S. Ct 2722, 2737, fn. 14 (2005).
\textsuperscript{175} \textit{Id.} at 2734.
“straightforward nature of the test.” What exactly this test consists of, he does not say. But he does manifest the “objective observer” who considers the “external signs” that emerge from the “text, legislative history, and implementation of the statute.” How to glean and aggregate the external signs seems to be an ad hoc process. Justice Souter favorably cites Justice O’Connor’s concurring opinion from Wallace, and finds that “scrutinizing purpose does make practical sense, as in Establishment Clause analysis, where an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts.”

But, can you learn purpose from the legislative history and other extrinsic sources?

When the Supreme Court has considered the purpose behind a statute in the Establishment Clause context, they seldom use the same approach twice, and often arrive at conclusions that are not justified by the record. Building upon the analysis in Part II regarding the difficulty of assessing purpose from legislative history, the Lemon test is extremely perverse in that it forces Judges to look to these unreliable sources, to recreate an intent that may never have existed. Lemon lures judges deep into its ghoulish crypt, and does not relinquish its grasp.

The following cases illustrate the disparate techniques taken by the Court to find a purpose, somewhere, anywhere, in the legislative record. Some Justices rely on statements made by sponsors of a bill, others on statements made after a bill was enacted, others on newspaper announcements, and others on changes to a statutory text. Far from Justice Souter’s assertion that the “understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts,” the Court has adopted a hodgepodge approach to finding facts that are seldom readily discoverable. Much of the analysis does border

176 Id.
177 Id.
178 McCreary, 2734 (citing Wallace, 472 U.S., at 74 (O’CONNOR, J., concurring in judgment)).
179 Id.
of psychoanalysis, and often the objectives are not official, but pertain solely to specific members of the legislature. As Justice Marshall noted in Overton Park, “inquiry into the mental processes of administrative decisionmakers is usually to be avoided.” That the courts cannot decide on a consistent approach to determining purpose highlights the subjectivity, and in the words of Judge Leventhal, the Justices are always able to see over the crowd, and pick out their friends.

1. **Epperson v. Arkansas**

   In Epperson v. Arkansas, the Supreme Court struck down an Arkansas statute that forbade the teaching of the theory of evolution in public schools. Although this case was issued several years before Lemon, the Court still scrutinized the purpose behind the bill, so it is relevant for this inquiry. The Court used several different approaches to divine this purpose.

   a. **Court relied on newspaper advertisements to establish purpose of bill**

      First, the Court said that “it is clear that fundamentalist sectarian conviction was and is the law’s reason for existence.” To support this absolutist proposition, the Court did not cite a committee report, or a statement of a sponsor of the bill, or any statement permeating from the legislative process. Rather, they cited perhaps one of the weakest forms of extrinsic evidence imaginable; an advertisement placed in a local newspaper in support of the adoption of the

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1. See supra Part II. C.
3. Id. at 107-08.
I question what value, if any at all, a newspaper advertisement possesses to establishing the legislative purpose. Rather, this advertisement, which appealed to the citizenry, in no way affected how the statute was drafted, namely because when the advertisement was printed, the statute had already been written. The purpose was already vested in the text, and this post-drafting extrinsic evidence can have nary an effect on the legislative purpose. I conclude that this fails to “clear[ly]” show the statute’s purpose. This reliance on extrinsic evidence to divine purpose highlights the futility of this endeavor, as it enables Judges to pick and choose from an infinite supply of sources to find the “purpose” they are seeking.

b. *Monkey on their brains*

The Court then explained that this statute was modified shortly after the infamous *Scopes Monkey Trial*, and “perhaps the sensational publicity attended upon the Scopes trial induced Arkansas to adopt less explicit language” by “eliminat[ing] the reference to . . . ‘the Divine Creation.’” To support this proposition, in a footnote, the Court cited Arkansas’s brief, and noted that the “statute was passed with the holding of the Scopes case in mind.” First, what a State Attorney General reports in a Supreme Court brief, written four decades after the statute was promulgated, is hardly a reliable indication of what was “on the minds” of the legislators when the text was adopted. Furthermore, even under Justice Fortas’s convoluted and twisted reading of a clearly written appellate brief, relying on this post-enactment legislative history is perhaps the least reliable form because it can be motivated by bias and agendas that did not exist when the statute was passed.

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184 Id.
185 Id. at 107-08.
186 Id. at 109.
187 Id. at 109, fn. 18.
Second, what exactly does it mean for something to be on their mind? Does this constitute a purpose? A primary purpose? A specific purpose? Third, as Justice Black notes in a concurring opinion, the statute was enacted over forty years before this suit was brought.\(^{188}\) How could the Attorney General in 1968 possibly know what was on the minds of legislators from his grandfather’s generation? The Court does not see fit to address any of these issues.

As improper as it is to rely on this post-enactment legislative history, however, the appellate brief said no such thing. Justice Fortas’ statement that the “statute was passed with the holding of the \textit{Scopes} case in mind”\(^ {189}\) is a misreading of the record. In the Brief, the State of Arkansas wrote as the first sentence of the summary section, “The statutes involved herein do not deny due process of law because of vagueness and uncertainty because they were drafted after the opinion of \textit{Scopes v. State}, 154 Tenn. 105, 289 S.W. 363, and with the holding of that case in mind.”\(^ {190}\)

The statement had nothing to do with any purpose on their mind. The statement had nothing to do with the Establishment Clause. The brief mentioned \textit{Scopes} solely for the proposition that the statute would does not deny due process because of vagueness. However, Justice Fortas implies that what was “on their mind” was a sectarian purpose. The Arkansas Attorney General said no such thing. While Justice Fortas may think the purpose is clear, the Court merely relies on circumstantial evidence and conclusory assertions to establish a purpose. I see absolutely no evidence from the record to conclude what the purpose was. Yet, by relying on extrinsic sources, the Court goes bananas and does a creative job in fashioning one.

\(^{188}\) Epperson v. Arkansas, 393 U.S. 97, 109-10 (1968) (Black, J., concurring).
\(^{189}\) \textit{Id.} at 109, fn. 18.
\(^{190}\) Brief of Appellee of the State of Arkansas, Epperson v. Arkansas 1 (1968).
2. **Stone v. Graham**

In *Stone v. Graham*, the Supreme Court struck down a Kentucky statute that required posting copies of the Ten Commandments on the walls of each public school classroom in the state, finding that the preeminent purpose was religious in nature, and the “Avowed” secular purpose was insufficient to comport with the First Amendment.\(^{191}\)

The Court makes no effort whatsoever to scrutinize any legislative history to ascertain the purpose. Rather, doffing their judicial robes and donning clerical robes, the Justices per curiam, without any citations, proclaim from high above the marble palace at One First Street that “the pre-eminent purpose for posting the Ten Commandments on schoolroom walls is *plainly* religious in nature.”\(^{192}\) The court boldly pronounces that “no legislative recitation of a supposed secular purpose can blind [them] to the fact” that the Ten Commandments are a religious symbol.\(^{193}\)

Here, the Court doesn’t even bother considering the legislative history, as they know, without a doubt, what the ultimate purpose behind the law was. This certainty prevails despite the fact that the Trial Court considered evidence about the impact of the Decalogue on Western law, and held the evidence substantiated the State’s determination of a non-secular purpose.\(^{194}\) Such findings were of no moment, and were not mentioned, by the Supreme Court. The Court’s pronouncement also directly conflates with *Van Orden*, where the Supreme Court recognized the

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\(^{192}\) *Id.* at 41 (emphasis added).

\(^{193}\) *Id.* at 41.

secular and historical purposes of the Ten Commandments.\textsuperscript{195} These two cases cannot be easily reconciled on this ground.

In fact, the Kentucky statute at issue mandated inserting a placard below the Decalogue that read “The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.”\textsuperscript{196} This could be a secular purpose to satisfy the Lemon Test. Further, as the trial court found, the “General Assembly thought that the statute had a secular legislative purpose and specifically said so.”\textsuperscript{197} But such nonsecular purposes are of no moment for the Court, and deserve no discussion. To find a nonsecular purpose under Lemon, the Supreme Court will ignore the record, and think outside the box of what they think the purpose could have been, and strike down the statute. In this case, the Court ignores the stated purpose of the legislature, and relies on its own religious convictions to establish purpose.

Justice Rehnquist notes the hypocrisy of this opinion, and dissented that “with no support beyond its own \textit{ipse dixit}, the Court concludes that the Kentucky statute involved in this case ‘has no secular legislative purpose’ because it is ‘undeniably a sacred text.’”\textsuperscript{198} When the legislature proffers a reason, the Court summarily (and per curiam) ignores it. This further illustrates the futility of the purpose prong. When the Court wants to find a nonsecular purpose, they will, whether it is in the record, or not.

\textsuperscript{195} Van Orden v. Perry, 545 U.S. 677 (2005) (“While the Commandments are religious, they have an undeniable historical meaning.”).
\textsuperscript{196} Stone, 41.
\textsuperscript{197} App. To Pet. For Cert., Stone v. Graham, at 37.
\textsuperscript{198} Id. at 43, 45 (Rehnquist, J., dissenting).
3. **Wallace v. Jaffree**

In *Wallace v. Jaffree*, the Supreme Court struck down an Alabama statute that authorized a daily period of silence in public schools for meditation or voluntary prayer because the law lacked any clearly secular purpose. In this case, Justice Stevens finds that the secular purpose is “dispositive,” as the “record not only provides [the Court] with an unambiguous affirmative answer, but it also reveals that the enactment of [the statute] was not motivated by any clearly secular purpose—indeed, the statute had no secular purpose.” Unlike the preceding opinions which do not even attempt to analyze legislative history, Justice Stevens spends several pages going through a detailed history of the enactment of the statute. However, his selective reading of the record yields a skewed narrative of history, which unsurprisingly and conveniently leads Justice Stevens to find a secular purpose.

a. **Post-Enactment Statement Made By Sponsor of Bill**

Justice Stevens focuses on several forms of atextual extrinsic evidence to justify this “dispositive” legislative purpose. First he relies on a statement inserted by State Senator Donald Holmes, the sponsor of the bill. Holmes stated “I believe this [statute is an] effort to return voluntary prayer” to the public schools. I stress the word I, because Senator Holmes was obviously speaking of his own intent, and not necessarily that of the Alabama State Senate. Now it is curious why Justice Stevens only focused on the sponsor’s statements, and no one else’s statements. Surely no bill is passed with nary a dissent without any alternative statements on the floor. Though a sponsor of a bill can be presumed to be an instrumental actor in the process, to

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200 *Id.* at 56.
201 *Id.* at 56-62.
202 *Id.* at 56-57, fn. 43.
discount any opposition in this analysis is flawed. Also, why did Justice Stevens not include any statements made in the Alabama House? A bill needs to pass through both bodies before it can become law. It is interesting to note that the Petitioners briefed that Senator Holmes, who was not an attorney versed in First Amendment jurisprudence, did not have a single purpose behind passing the bill, but had multiple motives.\textsuperscript{203}

Justice Stevens’s key omission in this analysis, as noted by Chief Justice Burger in dissent, is that Senator Holmes’s statement was “made after the legislature had passed the statute.”\textsuperscript{204} Post-enactment statements made after a statute was passed are highly suspect, and can be motivated by biases not present during the legislative process. Relying on such statements has little or no bearing on the actual deliberative process in the Alabama State Senate.

Further, as even the plaintiffs concede, “there is 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 was passed.”\textsuperscript{205} Justice Stevens’s inexorable embrace of this single statement is misplaced, and highlights the futility of selectively using post-enactment legislative history.

Further, Chief Justice Burger chastises Justice Stevens for “ignor[ing] the statement of purpose that accompanied the moment-of-silence bill [in at least seven instances] throughout the legislative process: ‘To permit a period of silence to be observed for the purpose of meditation or voluntary prayer at the commencement of the first class of each day in all public schools.’”\textsuperscript{206} Why does Justice Stevens only focus on the statement of Senator Holmes, but ignores a

\textsuperscript{203} Petitioner Brief for Wallace 14 n. 14 (“While Senator Holmes, a non-lawyer, stated he had “no other purpose” than to restore voluntary prayer, T. 65 (J.A. 52), he also stated that he intended to clarify the right of students to pray on their own. T. 68 (J.A. 54).”).
\textsuperscript{204} Id. at 86 (Burger, C.J., dissenting).
\textsuperscript{205} Id.
statement adopted by the Senate, and repeated throughout the actual legislative history?

However, this is to be expected in light of Justice Stevens’s likely selective reading of a lengthy reading of the Alabama Senate Journal.

Justice Stevens continues by including a statement Senator Holmes made before the District Court, reaffirming that “No, I did not have no other [sic] purpose in mind.”\textsuperscript{207} Again, Senator Holmes spoke in the first person, and was speaking only for himself. That Justice Stevens focuses exclusively on the thoughts of a single legislator at the expense of the remainder of that august body clearly illustrates the problems of aggregation and attribution inherent in any legislative history analysis.\textsuperscript{208} Further, this statement was made \textit{after} the statute was enacted. This post-enactment legislative history is the least reliable, as now Senator Holmes may be motivated by certain biases that did not exist when the statute was passed. For example, his constituency was very pleased with the passage bill, and he may be motivated to advocate on their behalf.

Chief Justice Burger strongly rebukes Justice Stevens’s strong reliance on this post-enactment legislative history, and proclaims that “The sole relevance of the sponsor's statements, therefore, is that they reflect the personal, subjective motives of a single legislator. No case in the 195-year history of this Court supports the disconcerting idea that post-enactment statements by individual legislators are relevant in determining the constitutionality of legislation.”\textsuperscript{209} This mutes the import of any statements he makes about what was on his mind when the statute was passed.

\textsuperscript{207} \textit{Id.} at 57.
\textsuperscript{208} \textit{See supra} Part I. C.
\textsuperscript{209} \textit{Id.} at 87.
Justice Breyer, hardly the strict textualist, strongly condemned the use of relying on post-enactment legislative history, observing that “[t]his Court has warned against using the views of a later Congress to construe a statute enacted many years before . . .”\textsuperscript{210} In the administrative context, the courts “may not accept appellate counsel’s post hoc rationalizations for agency action.”\textsuperscript{211} Further, the agency’s proffered justifications for an action during litigation must be the same reason that the agency used when it took the questioned action.\textsuperscript{212} As well in administrative law, litigation affidavits, similar to the statements made by Senator Holmes, taken after the fact are considered merely “post hoc” rationalizations,\textsuperscript{213} and are considered a inadequate basis for review,\textsuperscript{214} and do not constitute the “‘whole record’ . . . [as] required by [the] Administrative Procedures Act.”\textsuperscript{215} Agency actions must be judged on the basis of statements proffered by the agency at the time the decision was made.\textsuperscript{216} 

In \textit{United States v. Morgan}, a series of cases dealing with the Secretary of Agriculture’s fixing maximum rates for selling livestock, the district court allowed the Secretary to be interrogated about his personal role in the decision. The Supreme Court rejected this approach

\begin{footnotesize}
\begin{enumerate}
\item \textit{FDA v. Brown & Williamson Tobacco Corp.}, 529 U.S. 120 (2000) (Breyer, J., dissenting) (“And, while the majority suggests that the subsequent history “control[s] our construction” of the FDCA . . . this Court expressly has held that such subsequent views are not “controlling.” “)). \textit{See Pension Benefit Guaranty Corporation v. LTV Corp.}, 496 U.S. 633, 650, (1990) (later history is a “ ‘hazardous basis for inferring the intent of an earlier’ Congress” (quoting \textit{United States v. Price}, 361 U.S. 304, 313, 80 S.Ct. 326, 4 L.Ed.2d 334 (1960))). \textit{See also}, \textit{Haynes v. United States}, 390 U.S. 85, 87-88, n. 4 (1968); accord, \textit{Southwestern Cable Co.}, 392 U.S., at 170, 88 S.Ct. 1994 (such views have “ ‘very little, if any, significance’ ”); see also \textit{Sullivan v. Finkelstein}, 496 U.S. 617, 632, 110 S.Ct. 2658, 110 L.Ed.2d 563 (1990) (Scalia, J., concurring) (“Arguments based on subsequent legislative history ... should not be taken seriously, not even in a footnote”).
\item \textit{SEC v. Chenery Corp.}, 332 U.S. 194, 196-97 (1947) (“It will not do for a court to be compelled to guess at the theory underlying the agency’s action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive.”); \textit{SEC v. Chenery Corp.}, 318 U.S. 80, 95 (1942) (“[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.”).
\item \textit{Burlington Truck Lines v. United States}, 371 U.S. 156, 168-69 (1962)
\item \textit{SEC v. Chenery Corp.}, 318 U.S. 80, 87 (1943)
\item \textit{See SEC v. Chenery}, 318 U.S. 80 (1943). In this case, the Supreme court refused to consider justifications offered by the SEC that different from justifications provided at the time the agency made the decision.
\end{enumerate}
\end{footnotesize}
allowing the Secretary to provide justifications after the fact, and proclaimed that “it was not the function of the court to probe the mental processes of the Secretary.” After the case was remanded, the Secretary again testified in the District Court. On appeal to the Supreme Court, the Court firmly held that “the Secretary should never have been subjected to this examination . . . Just as a judge cannot be subjected to such a scrutiny . . . so the integrity of the administrative process must be equally respected.” If the Secretary of Agriculture’s personal views are not held to be representative of the views of his agency, then surely Senator’s Holmes’s views do not represent the views of the Alabama Senate. If such post-enactment statements are not suitable for administrative proceedings, they certainly should be considered unreliable for something as fundamental as the First Amendment and the Establishment Clause.

Further, Justice Stevens, again selectively reading the extrinsic evidence, fails to mention that Senator Holmes also testified that “one of his purposes in drafting and sponsoring the moment-of-silence bill was to clear up a widespread misunderstanding that a schoolchild is legally prohibited from engaging in silent, individual prayer.” Despite the overwhelming volume of evidence to the contrary, Justice Stevens boldly proclaims that the “unrebutted evidence of legislative intent contained in the legislative record and in the testimony of the sponsor” confirms the secular purpose. In the words of Judge Leventhal, Justice Stevens picked out his good friend in the crowd, Senator Holmes, and only listened to what he liked.

217 Morgan v. United States, 304 U.S. 1, 18 (1938).
218 United States v. Morgan, 313 U.S. 409, 422 (1941).
219 Id. at 87.
220 Id. at 58.
b. **Post-Enactment Statement Made By Former and Current Governor**

Second, Justice Stevens relies on statements made by the former Alabama governor to establish a secular purpose. 221 Although the Governor is responsible for signing a bill into law, he is generally not involved in the legislative process, 222 and can in no way embody the purpose of the State Legislature. Justice Stevens further notes that the State “did not present evidence of any secular purpose.” 223 To support this proposition Justice Stevens again cites a statement “now” made by the current governor of Alabama. 224 Governor Wallace was not in office when this statute was passed, and as such had absolutely nothing to do with the enactment of the statute. His opinions should have absolutely no bearing whatsoever on the purpose of a statute. This citation illustrates the speciousness of relying on post-enactment legislative history. Justice Stevens is looking for an intent from a person who did not hold office when the statute was enacted. The statement of the current governor has no place in this *Lemon* analysis.

c. **Textual Differences**

Third, Justice Stevens relies on textual differences between the challenged statute, and a previously similar statute; the primary textual difference is the addition of the words “or voluntary prayer.” 225 This is the most compelling aspect of Justice Stevens’s purpose prong analysis because it actually focuses on the text voted upon by the entire Senate, and not individual statements made by people both before and after the statute enacted. Alas, it fails because he sets up a straw-man false dichotomy which he deftly knocks down; “only two

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221 Id. at 57, fn. 44.
222 To the extent he or his staff may have been involved in the legislative process, there is no indication in the record.
223 Id. at 57.
224 Id. at 57, fn. 45.
225 Id. at 58.
conclusions are consistent with [the change in the text]: (1) the statute was enacted to convey a message of state endorsement and promotion of prayer; or (2) the statute was enacted for no other purpose."\textsuperscript{226}

Justice Stevens explains that statutes are not to be presumed to be enacted for no purpose, which is a fair canon of construction.\textsuperscript{227} However, I object to the premise of his argument. That the state did not “identify any secular purpose not served by the previous statute,”\textsuperscript{228} does not lead to the inescapable conclusion that the statute was amended to promote prayer. To prove this negative is a very lofty burden to place on the state, and ignores the countless deals, compromises, and understandings involved when transitioning from one statute to another. That the dog didn’t bark does not necessarily mean something.\textsuperscript{229} However, Justice Stevens’s selective reading of a single sponsor’s statement fails to grasp this dynamic, and unsurprisingly yields this false dichotomy which assists the striking down of the statute.

Justice Stevens finds 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' testimony frankly described. The legislature enacted § 16-1-20.1, despite the existence of § 16-1-20 for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each schoolday.”\textsuperscript{230} This crescendo, which trails off

\begin{itemize}
\item \textsuperscript{226} Id. at 59.
\item \textsuperscript{227} Id.
\item \textsuperscript{228} Id.
\item \textsuperscript{230} Id. at 59-60.
\end{itemize}
into a whimper, summarizes the misgivings of selectively using legislative history to resolve the purpose prong.

Justice Stevens never establishes the intent of the Alabama Senate; just that of a single Senator. Yet Justice Stevens ignored the actual stated purpose of the bill, which was “‘To permit a period of silence to be observed for the purpose of meditation or voluntary prayer at the commencement of the first class of each day in all public schools.’” The Governor’s views of the Statute are irrelevant, as he was not involved in the legislative process. The statutory change does not necessarily yield this singular conclusion that it was done to endorse prayer. Not a single one of these three assertions is justified anywhere in this opinion. Yet, such trivialities are of no concern for Justice Stevens, who concludes that the statute failed the first prong of the Lemon test.

4. Santa Fe Independent School District v. Doe

In Santa Fe Independent School District v. Doe, the Supreme Court found that a student-led, student-initiated prayer before high school football games violated the First Amendment, and rejected the government’s proffered nonsecular purpose. In this opinion Justice Stevens did not explicitly cite the Lemon test, but still alluded to the first prong, and considered the “secular purpose” of the policy.
a. *Post-Enactment Legislative History from Appellate Brief*

According to the School District’s Appellate Brief, the secular purposes of the policy was to “fost[e] free expression of private persons ... as well [as to] solemniz[e] sporting events, promot[e] good sportsmanship and student safety, and establis[h] an appropriate environment for competition.” I note at the outset that it is absurd to attempt to discern the purpose of a policy based on an appellate brief written when the policy in question is being considered by the United States Supreme Court, rather than by contemporaneous statements made when the policy was instituted. This statement has little or no bearing on the actual intent of those involved in enacting the policy, and is a mere window dressing by clever appellate attorneys to fashion an ex-post justification for their clients’ actions.

The Petitioners brief does not cite to any contemporaneous statements made during the enactment of this policy (likely because no such record exists). The Petitioners have every incentive to invent a secular justification after the fact, and under this standard, are no longer tied by what was actually decided when the policy was enacted. Permitting the government to bootstrap a rationale after the fact is akin to a rational basis analysis. Such a meaningless standard of review has no place in First Amendment jurisprudence, which is essential to ensuring a separation of church and state. By relying on this brief, any meaningful relevance of the first prong of Lemon to the legislative process is eviscerated.

Yet, the absolute lack of any evidence to establish the policy’s original purpose does not stop Justice Stevens from analyzing on, and dismantling, this proffered justification. Chief Justice Rehnquist recognizes that plausible secular purposes behind the policy should be granted

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234 *Id.* citing Brief for Petitioner 14.
235 *Id.*
some degree of deference. Justice Steven writes, with no deference whatsoever, that an invocation is “not necessary to further any of these purposes” and that allowing only specific messages “does little to ‘fost[e] free expression.’” Yet, the Court “grants no deference to-and appears openly hostile toward- the policy’s stated purposes, and wastes no time in concluding that they are a sham.” That Justice Stevens divines this purpose from thin air, as there is no legislative history to rely on, is enigmatic.

b. School Changes Title of Office

Justice Steven further asserts that the school changing the title from the office of “Student Chaplain” to the office of “Prayer at Football Games,” without holding a new election pursuant to school policies, in light of the school’s history of holding prayer at student events, leads to the inference that “the specific purpose of the policy was to preserve a popular ‘state-sponsored religious practice.’” As a side note, I find it ludicrous that Justice Stevens is willing to chastise a High School for not following proper election procedures, yet a few months later in Bush v. Gore, he was willing to permit the state of Florida to selectively recount some ballots and not others. This selective moral outrage is confounding. Returning to the matter at hand, I am quite sure that Justice Stevens was not present at the school board meetings where these issues were discussed and any purposes were addressed, nor does he cite to any records from these meetings.

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236 Santa Fe, at 321 (Rehnquist, J., dissenting) (“Where a governmental body ‘expresses a plausible secular purpose’ for an enactment, ‘courts should generally defer to that stated intent.’”) citing Wallace, 472 U.S., at 74-75 (O’Connor, J., concurring in judgment); see also Mueller v. Allen, 463 U.S. 388, 394-395 (1983) (stressing this Court’s “reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State’s program may be discerned from the face of the statute”).

237 Santa Fe, at 309.

238 Santa Fe, at 321.

239 Id. at 309.

240 See Bush v. Gore, 531 U.S. 98 (Stevens, J., dissenting).
He infers where nothing was implied. Yet, in the absence of any information, he can definitively conclude the purpose behind the change.

5. **McCreary County v. ACLU of Kentucky**

Returning to the case of *McCreary County*, the County petitioned the Court to reject the purpose prong of the Lemon test, and asserted that “true ‘purpose’ is unknowable, and its search merely an excuse for courts to act selectively and unpredictably in picking out evidence of subjective intent.” Justice Souter found this argument both “seismic” and “unconvincing.”

Justice Souter responds to this charge by summarizing some of the common techniques with which the Court has derived purpose under the Lemon test. First, in *Wallace*, the Court “inferred purpose from a change of wording from an earlier statute to a later one.” However as discussed, merely observing the change of a statutory text is not nearly enough to establish intent.

Second, Justice Souter cites *Edwards* where the Court “relied on a statute’s text and the detailed public comments of its sponsor.” This is similar to the approach Justice Stevens took in *Wallace*, where he relied solely on statements of a bills sponsor and the governor. But as previously discussed, relying on the comments of single sponsor fails to grasp the range of ideas behind the legislative process, and generates an inherently incomplete record. Such an approach cannot possibly capture the actual purpose behind the passage of a bill. Third, in *Abington*, the Court does not even pretend to follow an inquiry into purpose, and merely finds

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241 McCreary County v. ACLU of Ky., 125 S. Ct 2722 (2005).
242 Id. at 2734.
243 Id. at 2734.
244 Id. at 2734, (citing Wallace v. Jaffree, 472 U.S. 38, 58-70 (1985)).
245 See supra Part III. B.3.c.
246 McCreary, at 2734 (citing Edwards v. Aguillard, 482 U.S. 578, 586-88 (1987)).
247 See supra Part III. B.3.b.
that “the government action itself bespoke the purpose.” I wasn’t aware *res ipsa loquitur* was a canon of statutory interpretation.

Justice Souter concludes that in these cases, the government action was unconstitutional because “openly available data supported a commonsense conclusion that a religious objective permeated the government’s action.” There are several flawed premises inherent with this conclusory sentence. First, just because data is openly available does not make it relevant. In the cases cited, the Court failed to consider the broad range of data, but selectively focused on a few items that fail to paint a full picture. Second, such “commonsense conclusions” are subject to reasonable debate, as evidenced by the 5-4 split’s of *McCreary* and most establishment clause cases.

The Sixth Circuit split opinion in *McCreary* “equated motives with purpose, [and] assumed a religious motivation for the prior displays, and superimposed this alleged motive on the Foundations Display.” This disjointed approach highlights the subjectivity of a court attempting to divine the purpose behind a statute, and solidifies that this result is far from “commonsense.” Third, the Court’s observations hardly reflect the government’s action, but rather is a commentary on how the Court viewed disparate factors in different cases to divine a specific type of intent.

Further, that the Court used a different approach in each case illustrates the subjective and ad-hoc nature of this jurisprudence. Why not look for the same factors in each situation? Or if the statute can merely speak for itself, why bother looking at the legislative history, if the Justices can clairvoyantly divine intent? Justice Souter rejects the assault on purposivism by the

249 *McCreary*, at 2735.
250 Petitioners Brief, McCreary at 37.
County, and writes “there is [no] indication that the enquiry is rigged in practice to finding a religious purpose dominant every time a case is filed,” noting that generally government action passes the purpose prong.\footnote{McCreary, at 2735} Justice Scalia’s contends that this process is a mere subterfuge to accommodate the Justice’s desired outcome.\footnote{Lamb’s Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 399 (1993) (Scalia, J., concurring).}

In \textit{McCreary}, Justice Souter sabotages his own argument when he critique’s Justice Scalia’s attempt to rely on founding document to establish the intent of the Framers. First, he chastises the grandfather of originalism for “fail[ing] to consider the full range of evidence showing what the Framers believed,”\footnote{McCreary, at 2743.}  as there is “more to go on.”\footnote{Id.} With this single statement, Justice Souter highlights the fallacy of attempting to derive the intent from a collective body such as a legislature. Although a majority of legislators may agree on a single wording of a bill, there is no single purpose amongst them. Rather, each individual has his own plans and ideas of how a bill should be understood.

Justice Souter acknowledges that the Founders had differing views on separation of Church and State. That Justice Souter recognizes that Madison, Jefferson, and others may have felt differently about the First Amendment, should also indicate to him that the different legislators in Kentucky also may have had differing views. Justice Souter writes “the fair inference is that there was no common understanding about the limits of the establishment prohibition . . . What the evidence does show is a group of statesmen” in Philadelphia left the meaning to be determined.\footnote{McCreary, at 2744.} The first Congress, much like the local Kentucky legislature
consisted of a group of statesmen. To try to find a single common understanding amongst them is impossible.

That Justice Souter is able to find a straightforward purpose from the Kentucky legislature, without even attempting to cite any legislative history, indicates an unprincipled approach to finding legislative intent. The petitioners were quite right to say the search is vain and meaningless. This approach underscores the futility of the first Lemon prong.

C.  **The Flawed Purpose Prong**

In light of the unprincipled manner in which the Court has relied on the purpose prong, it is flawed for two primary reasons. First, it consistently yields inconsistent results. Second, legislators cognizant of how much weight courts will place on the legislative history have an incentive to manipulate the record in anticipation of future litigation. This subverts the establishment clause, and frustrates the goals of the Lemon test; it allows crafty legislators to scale the impregnable wall and excessively entangle church and state, as long as they maintain a secular façade and keep their true sectarian purposes off the record.

1.  **Application of Purpose Prong Yields Inconsistent Results**

Allowing the purpose behind a statute to determine its constitutionality can lead to perverse and unpredictable results. Under this approach, the same display could be constitutional in one setting and unconstitutional in another, solely because of the legislative history behind it. How is it possible that the “same government action may be constitutional if taken in the first instance [with a nonsectarian purpose] and unconstitutional if it has a sectarian heritage?”

256 *McCreary*, at 866 (Scalia, J., dissenting).
Justice Scalia notes in dissent that this concept is “absurd[] in practice.”\footnote{McCreary, at 2761 (Scalia, J., dissenting).} In two cases cited in the petitioners brief in \textit{McCreary}, two towns erected similar displays to those in McCreary.\footnote{Petitioners Brief, McCreary, at 38-39. Compare ACLU v. Mercer County, 240 F. Supp. 2d 623 (E.D. Ky. 2003) with ACLU v. Rutherford County, 209 F. Supp. 2d 799 (M.D. Tenn. 2002).} In the first town, because a resolution was passed, but not acted upon to erect only the Ten Commandments and no other displays, the court found this legislative history caused the statute to fail the purpose prong.\footnote{Id.} In contrast, in the second town, the display passed the purpose prong because “there was no prior legislative activity to shed light on the purpose other than the display itself.”\footnote{Petitioners Brief 38}

The exact same display can be constitutional in one town, but unconstitutional in another, due to some isolated statements of officials, or even intentional silence.\footnote{See e.g., McCreary 2761 (Scalia, J., dissenting) ("Displays erected in silence (and under the direction of good legal advice) are permissible, while those hung after discussion and debate are deemed unconstitutional. Reduction of the Establishment Clause to such minutiae trivializes the Clause's protection against religious establishment; indeed, it may inflame religious passions by making the passing comments of every government official the subject of endless litigation.").} “If motives matter, then can good motives make a bad act constitutional? Can improper motives make a good law bad? How long do motives and past actions haunt the future? Must we wait almost 200 years for the religious motives that birthed Sunday laws to fade away?”\footnote{Petitioners Brief 38} Such questions highlight the unpredictable nature of the purpose prong, as a legislator so inclined can keep nonsecular purposes off the record to frustrate meaningful judicial review.

Justice Scalia notes how the purpose prong has transformed the Establishment Clause into a maze. In this jurisprudential labyrinth, government officials are forced to perilously evade the \textit{Lemon}-hued minotaur which can find a nonsecular purpose and strike down a statute, even if
the legislature had a different purpose in mind.\textsuperscript{263} Such judicially caused confusion is inimical to our concept of ordered liberty. Justice Scalia writes further that the purpose prong “has proven mercurial in application,” and should be “abandoned.”\textsuperscript{264} A persistent goal in Constitutional law is to yield predictable results, to increase society’s justified expectations and reliance interests. This ad-hoc approach shakes the core of the ability of government to act within their purview of authority, as legislators can no longer be sure that laws will be dutifully enforced by the courts if they touch on a hot-button issue, such as religion. “The rule of law requires a law of rules that are predictably applied to everyone.”\textsuperscript{265} The purpose prong, as it stands now, fails that test.

In the context of the equal protection clause, the Supreme Court has laid down a very elaborate framework to consider the purpose of a statute. In \textit{Arlington Heights v. Metropolitan Housing Development Corporation}, the Supreme Court identified several factors to determine whether an improper purpose exists behind a governmental action: (1) the impact of the government’s action; (2) the historical background of the decision, especially if it is part of a pattern of actions taken with an invidious purpose; (3) the sequence of events leading up to the government’s decision; (4) whether the decision departs from custom or normal procedure; (5) whether the decision represents a departure from normal substantive criteria; (6) the legislative or administrative history; (7) statements made by the decision-making body.\textsuperscript{266} “If proof of a civil right[s] violation depends on an open statement by a [single] official . . . the Fourteenth

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\footnote{Edwards v. Aguilard, 482 U.S. 578, 636 (1987)(Scalia, J., dissenting) (“Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious government official can only guess what motives will be held unconstitutional. We have said essentially the following: Government may not act with the purpose of advancing religion, except when forced to do so by the Free Exercise Clause (which is now and then); or when eliminating existing governmental hostility to religion (which exists sometimes); or even when merely accommodating governmentally uninhibited religious practices, except that at some point (it is unclear where) intentional accommodation results in the fostering of religion, which of course is unconstitutional.”).}
\footnote{Edwards, 482 U.S. at 615, 640; Wallace v. Jaffree, 472 U.S. at 108 (Rehnquist, J., dissenting).}
\footnote{Legislation, supra note 73, at 237 (discussing Justice Scalia’s “new textualism.”)}
\footnote{Vill. of Arlington Heights, 429 U.S. 252, 266 (1977).}
\end{footnotes}
Amendment offers little solace to those seeking its protection.” This directly implies that the Court will not find a violation of the Fourteenth Amendment solely based on the statement of a single legislator; yet that is exactly what the *Lemon* test yields.

The Court would be better served to identify specific factors to be considered when applying the purpose prong. This will provide the lower courts with guidance, will enable legislators to know how their actions will likely be interpreted by a court, and will ensure executive branch officials that they are properly enforcing a constitutional law. This enhances the reliance interests of all branches of government, and would improve the applicability of modern establishment clause jurisprudence.

2. **Purpose Prong Allows Savvy Politicians to Manipulate Legislative History To Influence Litigation**

Knowing that Courts are forced to rely on extrinsic evidence like legislative history to analyze the purpose prong of the *Lemon* test, politicians have a strong incentive to manipulate the legislative history so a future case can be resolved in accordance with their personal views.\(^\text{267}\) Justice Souter acknowledges that government officials, cognizant that the courts will try to divine purpose, can beat the system; “savvy officials [can] disguise[] their religious intent so cleverly that the objective observer just misse[s] it.”\(^\text{268}\) Though, Justice Souter finds little concern, as a “secret motive stirs up no strife” and cannot alienate nonadherants.\(^\text{269}\)

If the only consideration that matters is how the action will affect nonadherents, regardless of the motive, than why should the purpose prong be included at all? The crux of the purpose prong, which I would argue is flawed, is based on the presumption that because certain

\(^{267}\) *See supra* Part II. D.

\(^{268}\) *McCreary*, at 2735

\(^{269}\) *Id.*
legislators have a secular belief, the statute affects people differently. Would a law passed with a wicked heart and a law passed with a clean conscience impact the citizenry in any meaningfully different way? I contend no. Alternatively, if legislators can beat the *Lemon* test merely by hiding their beliefs, as many conversations in the legislative process undoubtedly occur off the record, then isn’t this prong mere surplusage?  

That legislators can so easily game the record highlights the futility of relying on legislative history. Smart legislators will either keep mum, or insert favorable testimony into the record, solely to help what could be a nonsecular bill seem to have a secular purpose. As the petitioners in *McCreary* noted, “[e]ither astute or mute legislators can pass the purpose prong, while others not so savvy will flunk the test, when both intend to achieve the same goal.” Surely the Supreme Court could fashion a better test than the current test which rewards duplicitous legislators, and punishes those that espouse their honest convictions.

D. **Improvements to Current Purpose Prong**

It is unlikely that the *Lemon* test will be perpetually interred in its rightful place in the graveyard of abandoned law. Therefore, I propose several slight modifications of the purpose prong that would more faithfully apply the *Lemon* test, and give support to the justifications behind the Supreme Court’s establishment clause jurisprudence. First, because the *Lemon* test requires that “the statute must have a secular legislative purpose,” I recommend that the Court actually focus on the *statute*, and not the volume of legislative history and other extrinsic

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270 *Wallace*, 472 U.S. at 108 (Rehnquist, J., dissenting) (The purpose “prong will condemn nothing so long as the legislature utters a secular purpose and says nothing about aiding religion. Thus the constitutionality of a statute may depend upon what legislators put into the legislative history and, more importantly, what they leave out. The purpose prong means little if it only requires the legislature to express any secular purpose, and omit all sectarian references, because legislators might do just that.”).

271 Petitioner’s Brief, at 37

272 *Lemon*, at 612 (emphasis added).
information behind it. Second, the “objective observer” should focus not on how the display in question would be considered, but rather on how the statute itself would be construed according to an original public meaning approach.

1. **Derive Purpose from Text of Statute**

   The purpose prong of the Lemon test, on its face, requires that “the statute must have a secular legislative purpose.”\(^{273}\) I stress the word statute, because in the decades following Lemon, the Supreme Court has blatantly ignored this condition. Rather than focusing on the purpose of the statute itself, the Court has focused on many other sources, including the purpose of the legislature, the purpose of a sponsor of a bill, and even the purpose of government officials external to the legislative process. The Supreme Court has held that there is “no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.”\(^{274}\) I would argue that many of the problems of finding “purpose” in the Lemon context could be simply and reasonably resolved by following the Lemon test; that is, look for the “statute[ʼ]s” purpose.

   By focusing solely on the statutory text, and not looking to unreliable extrinsic resources like legislative history, the Court would be able to yield a result more consistent with what the legislature meant. Further, it will decrease the incentive for savvy politicians to infect the legislative record with various statements courts that had little bearing on the actual legislative process, with the intent to influence the courts. From a policy perspective, the court should not create a perverse incentive for crafty politicians to hide illicit purposes by tinkering with the legislative history. The Supreme Court has held that “deference to the supremacy of the

\(^{273}\) *Lemon*, at 612 (emphasis added).
\(^{274}\) United States v. American Trucking Assns, Inc., 310 U.S. 534, 543 (1940)
Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that ‘the legislative purpose is expressed by the ordinary meaning of the words used.’”275 The Court would be well-served to apply this principle to the Establishment Clause jurisprudence.

In addition, focusing on the text will place the onus on the legislative branch to draft a statute that is clear. The statute should encapsulate any purposes they see fit. This would prevent the courts from needing to divine a purpose ex post.276 Clearly drafted statute help increase society’s justified reliance interest in following the law, and decreases confusion and uncertainty in the legal process. Further, if the legislatures know the Courts will only look to the text, they can be more certain that the meaning they give to a law will be faithfully be applied; whereas under the current regime, legislatures are left in the dark as to how their actions will be later judged. This creates uncertainty, confusion, and is detrimental to the democratic process.

To understand purpose by solely focusing on the statutory text would surely involve a complicated textualist analysis. Often, the mere words of a statute cannot capture the volume of thought that goes into passing a bill. However imprecise this approach would be, it would be infinitely more accurate and reliable than fishing for friends in a crowd in the legislative record, as illustrated by the Supreme Court’s disparate ad hoc approach.277

Furthermore, unlike legislative history where it is highly unlikely that many legislators would read a committee report, the enacted statute itself has the backing of a majority vote, and the force of a valid law. That the statute was duly enacted, it is inherently more reliable than

276 Vermeule 154 (“Sophisticated textualists, by contrast, argue that judicial emphasis on text will induce legislators to encode their deals in text, with beneficial consequences.”).
277 See supra Part III.B.1-5.
committee reports, which are not subject to the deliberative process. In the federal context, that a bill was passed via Article 1, Section 7,\textsuperscript{278} gives the statute the force of law, and the Court can rely on any purpose discernible from the text. Although finding purpose is an inherently unreliable form of statutory interpretation, and opens the door to subjectivity, by confining the court’s search to the text, the power of judges to import their personal beliefs is cabined.

In several cases, including in \textit{Wallace} and \textit{Santa Fe} the Court has looked to the text to derive purpose for the purpose prong. The Court has ventured down this road before. I would counsel the courts to use this approach consistently, and exclusively. Furthermore, focusing on the text, and rejecting legislative history to derive purpose would have many salutary policy effects. The use of the Supreme Court relying on legislative history has “stimulated a cottage industry of junior associates, law clerks, and lobbyists whose main job is to find or plant smoking guns in the legislative history.”\textsuperscript{279} This enables inefficient rent seeking, which seeks to aggrandize certain factions at the cost of the general populace. By ignoring the legislative history, in this slim context, this cottage industry could be scaled back. Finally, if the Court stopped relying on legislative history, this act could break the “potato chip” cycle,\textsuperscript{280} and “not only would everyone save a lot of time and money, but congressional deliberations could return to normal, unaffected by strategic plants of smoking guns that lobbyists hope to use in later interpretive battles.”\textsuperscript{281}

\textsuperscript{278} U.S. CONST. art I, § 7. \textsuperscript{279} \textit{Legislation}, supra note 73, at 237-238. \textsuperscript{280} See supra Part II. D. \textsuperscript{281} \textit{Legislation}, supra note 73, at 238.
2. **Modify the Objective Observer Standard**

I fail to see how the “objective observer” test from *McCreary* comports with the first prong of the *Lemon* test. The *Lemon* test asks for the purpose of the statute, not what someone else would think of the effects of the government action. This standard has no bearing on the first prong of *Lemon*, and blurs into the second prong of *Lemon*, the effects prong. To exacerbate this pseudo-standard, Justice Souter writes that this objective observer “takes account of the traditional external signs that show up in the ‘text, legislative history, and implementation of the statute.’”\(^{282}\) As discussed,\(^{283}\) understanding the legislative history and implementation of a statute is a subjective, imprecise, and even unknowable process. To add an unnecessary layer to an already complicated *Lemon* test, and for that layer to search for the unknowable, is a ruse.

Justice Scalia notes that *McCreary* modifies the purpose prong, and justifies searching for the purpose of a statute “not as an end itself, but as a means to ascertain the appearance of the government action to an ‘‘objective observer.’”\(^{284}\) “Under this approach, even if a government could show that its actual purpose was not to advance religion, it would presumably violate the Constitution as long as the Court's objective observer would think otherwise.”\(^{285}\)

To stay faithful with the text of the first prong of the Lemon test, the “objective observer” standard should be interred. The Court should focus solely on what the first prong of Lemon discusses; the statute, not what an objective observer would think of the government action. The objective observer standard can be reserved for the second *Lemon* prong.

As Justice Holmes wrote, “we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which

\(^{282}\) *McCreary*, at 862.
\(^{283}\) See supra Part II. C.
\(^{284}\) *McCreary*, at 2757.
\(^{285}\) *McCreary*, at 2757.
they were used . . . [T]he normal speaker of English is merely a special variety, a literary form, so to speak, of our old friend the prudent man. He is external to the particular writer, and a reference to him as not inquire what the legislature meant; we ask only what the statute means.”286 What matters not is how an objective observer would consider the purpose of the statute. What in fact matter is how the objective observer would construe the statute. Such an approach is faithful to the purpose behind Lemon, and ensures a rigorous and robust Establishment Clause jurisprudence. This textualist analysis could be supplemented by an original public meaning approach, where words are defined based on how an observer would have understood the words at the time they were used by the legislator.287

CONCLUSION

Lemon is a curious fruit, indeed. While it ostensibly attempts to smoke out religiosity in government, its purpose prong test creates a huge loophole through which scheming legislators can escape. By placing so much emphasis on the legislative history, legislatures now know exactly how to beat the system; and this defeats the purpose of a rigorous Establishment Clause analysis. My modest proposals seeks to follow the actual text of the Lemon test. This approach

287 See e.g., Matter of Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989) (Easterbrook, J.)

Statutes are law, not evidence of law. References to “intent” in judicial opinions do not imply that legislators' motives and beliefs, as opposed to their public acts, establish the norms to which all others must conform. “Original meaning” rather than “intent” frequently captures the interpretive task more precisely, reminding us that it is the work of the political branches (the “meaning”) rather than of the courts that matters, and that their work acquires its meaning when enacted (“originally”). Revisionist history may be revelatory; revisionist judging is simply unfaithful to the enterprise. Justice Holmes made the point when denouncing a claim that judges should give weight to the intent of a document's authors: [A statute] does not disclose one meaning conclusively according to the laws of language. Thereupon we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used.... But the normal speaker of English is merely a special variety, a literary form, so to speak, of our old friend the prudent man. He is external to the particular writer, and a reference to him as the criterion is simply another instance of the externality of the law.... We do not inquire what the legislature meant; we ask only what the statute means.
would cabin the discretion of judges rummaging through a volume of legislative history, and
focus on the statute. If legislatures know that Courts will construe purposes based on the text,
they will be forced to write clearer statutes, and not be able to evade a meaningful scrutiny.
Further, by eliminating the need to rely on legislative history, the Courts would do our
democratic system a huge favor, by diminishing the significance of committee reports, which
have replaced duly enacted laws in many respects, as a common approach to derive the meaning
of law. Further, by applying a consistent approach, legislatures will be able to draft statutes,
knowing how they will be interpreted. This increases society’s reliance interests, and further
advances our democratic process. Although the Supreme Court has gone astray with their
application of the *Lemon* test, by faithfully applying the first prong of *Lemon*, and only relying
on the statute itself, the Courts will ensure that the First Amendment is respected, and the wall
between church and state stands resolute.