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Griffin S. Rubin
Southern Methodist University, Dedman School of Law

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CONSTRUCTING A TOWER OF BABBLE: AN EXAMINATION OF PURPOSE IN ESTABLISHMENT CLAUSE JURISPRUDENCE

Griffin S. Rubin [*]

ABSTRACT

"Purpose" is a key component of modern Establishment Clause jurisprudence. While the Supreme Court has expanded the role purpose plays in various areas of constitutional analysis over the last half-century, the Court seemingly continues to muddy the waters as to purpose's proper place in Establishment Clause cases. This Comment focuses on the function and operation of purpose in Establishment Clause cases in order to probe the complications and obstacles inherent to this area of constitutional law. By constructing and applying an analytical framework that examines modern Establishment Clause cases through the lenses of "conceptions of purpose," "evidence of purpose," and "indicia of impermissible purpose," this Comment provides critical takeaways about the development and current state of the Establishment Clause–as well as potential future outcomes in these cases. Ultimately, the dispositive consideration in Establishment Clause cases is the utilization and weight given by individual Justices in any given case to the factors discussed in this Comment's analytical framework. This conclusion demonstrates the judge-dependent nature of these cases and the value certain Justices place on the institutional legitimacy of the Supreme Court and the judicial branch as a whole.

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* J.D. Candidate, SMU Dedman School of Law, May 2020; B.A., University of Pennsylvania, May 2017. Thank you to Professor Dale Carpenter for his guidance in the development of this Comment. Thanks also to all the teachers and professors, from the Academy to SMU Law School, for pushing me to always want more. And thanks as always to my family and friends for their unwavering support.

INTRODUCTION

> "The purposes of a person's heart are deep waters, but one who has insight draws them out."[1]

Towering four stories above one of the busiest intersections in Prince George's County, Maryland,[2] the Bladensburg Cross casts its long shadow upon any and all who pass.[3] While the monument commemorates forty-nine individuals from the area who perished in World War I, certain residents of the county filed a lawsuit, arguing that the forty-foot tall Latin cross is an unconstitutional "government display" of religion.[4] This controversy was the latest clash in the courts regarding the Establishment Clause, an area of jurisprudential turmoil that "leaves constitutional law scholars reminiscing wistfully about the elegance and

1. *Proverbs* 20:5 (New Int'l).

2. As of 2019, the estimated population of Prince George's County is 909,327. *QuickFacts, Prince George's County, Maryland*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/princegeorgescountymaryland/PST040217 [https://perma.cc/V7RQ-YGQ3].

3. Am. Humanist Ass'n v. Md.-Nat'l Cap. Park & Plan. Comm'n, 874 F.3d 195, 201 (4th Cir. 2017), *rev'd sub nom.* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019). The cross is also referred to as the "Peace Cross," "Memorial Cross," or "Bladensburg Memorial." Am. Humanist Ass'n v. Md.-Nat'l Cap. Park & Plan. Comm'n, 147 F. Supp. 3d 373, 376 (D. Md. 2015).

4. *Am. Humanist Ass'n*, 874 F.3d at 200, 202. The Court ultimately ruled 7–2 to allow the Bladensburg Cross to stand. *Am. Legion*, 139 S. Ct. at 2089. For overarching analysis of the decision, see Michael W. McConnell, *No More (Old) Symbol Cases*, 2019 CATO SUP. CT. REV. 91, 92–102; Leading Cases, *First Amendment–Establishment Clause–Government Display of Religious Symbols*—Am. Legion v. Am. Humanist Ass'n, 133 HARV. L. REV. 262 (2019); Richard Schragger & Micah Schwartzman, *Establishment Clause Inversion in the Bladensburg Cross Case* 21 (Univ. Va. Sch. L. Pub. L. & Legal Theory, Working Paper No. 2019-54), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3463840 [https://perma.cc/8AJS-WA3N].

simplicity of the Uniform Commercial Code or the Rule Against Perpetuities."[5]

A key component of modern Establishment Clause analysis is "purpose." Within these cases, purpose examination has generally contained itself within the boundaries of the *Lemon* test;[6] even the Court has dramatically expanded the role purpose plays in other constitutional analyses over the last half-century.[7] To date, legal scholarship is practically devoid of an overarching, acontextual analysis of the role purpose plays in Establishment Clause cases.[8] This Comment attempts to fill that void and demonstrate the sporadic and often-overlooked role purpose plays in this jurisprudential context. Moreover, while the examination of Establishment Clause case law that follows provides greater insight into the factors the Court considers in its deliberative process, the analysis ultimately demonstrates that the utilization of these factors and the weight given to each is entirely judge-dependent and is typically based upon consideration of the Judiciary's institutional legitimacy.

At the outset, it should be clear what this Comment does *not* do. First, this Comment does not enter the debate over the original purpose of the Establishment Clause,[9] nor does it critique the myriad analytical approaches to the Establishment Clause propounded by judges and scholars.[10] As well, this Comment does not undertake a normative analysis of the current state of affairs in this area[11] or propose substantive solutions to the problems involved in Establishment Clause cases.[12] Not only have these questions been addressed time and time again, but a thorough examination of each would imprudently broaden this Comment's scope.

This Comment focuses wholeheartedly but unconventionally on purpose analysis in Establishment Clause cases in order to probe the complications and obstacles fundamental to this area of law. Part I briefly summarizes the relevant

5. Richard H. Fallon, Jr., *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 59, 60 (2017) (quoting PAUL HORWITZ, THE AGNOSTIC AGE 223 (2011)); *see also* Richard Albert, *The Separation of Higher Powers*, 65 SMU L. REV. 3, 23–24 (2012); William P. Marshall, *"We Know It When We See It": The Supreme Court Establishment*, 59 S. CAL. L. REV. 495, 495–97 (1986).

6. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); *see also, e.g.*, Josh Blackman, *This* Lemon *Comes as a Lemon: The* Lemon *Test and the Pursuit of a Statute's Secular Purpose*, 20 GEO. MASON U. C.R.L.J. 351, 359–62 (2010). *But see, e.g.*, VALERIE C. BRANNON, CONG. RSCH. SERV., LSB10315, NO MORE *LEMON* LAW? SUPREME COURT RETHINKS RELIGIOUS ESTABLISHMENT ANALYSIS 2 (2019); Blackman, *supra*, at 389–90; Hal Culbertson, Note, *Religion in the Political Process: A Critique of* Lemon*'s Purpose Test*, 1990 U. ILL. L. REV. 915, 933–39; Michael Stokes Paulsen, Lemon *Is Dead*, 43 CASE W. RES. L. REV. 795, 800–10 (1993).

7. *See* Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 850 tbl.2 (2017); *see also, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443–56 (1996) (free speech).

8. *See* Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 532 (2016).

9. *See generally* Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1133 (1988).

10. *See generally* Joe Dryden, *The Religious Viewpoint Antidiscrimination Act: Using Students as Surrogates to Subjugate the Establishment Clause*, 82 MISS. L.J. 127, 136–45 (2013).

11. *See generally* Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1403–26 (2012).

12. *See generally* John M. Bickers, *Of Non-Horses, Quantum Mechanics, and the Establishment Clause*, 57 U. KAN. L. REV. 371, 393–406 (2009).

history of Establishment Clause jurisprudence to set the stage for the analysis that follows. Part II addresses the theoretical aspects of the Comment's analysis, specifically examining how the Supreme Court conducts purpose analysis and why purpose analysis is relevant in the first place. Part III details the methodology with which this Comment analyzes the relevant case law, while Part IV applies Part III's methodological framework to the modern Establishment Clause canon. Finally, Part V reflects on these findings and forecasts a continuing state of confusion and disarray in Establishment Clause jurisprudence.

I. BRIEF BACKGROUND OF THE ESTABLISHMENT CLAUSE

The Establishment Clause traces its roots to sixteenth-century Europe as political and religious philosophers such as John Calvin and Martin Luther began wrangling with notions of religious tolerance and secular authority.[13] In crafting the Constitution and the Bill of Rights, the Framers frequently turned to the philosophical observations of Thomas Hobbes and John Locke for guidance in resolving issues of church and state.[14] Although many understand the text of the First Amendment to mandate the separation of religion and the Republic,[15] historically speaking, the Establishment Clause most likely reflected the Framers' desire for a deferential federal attitude toward the states in settling the establishment issue.[16] As such, few cases and controversies involving the establishment of religion made their way to the Supreme Court prior to the Clause's incorporation against the states.[17]

When a taxpayer in New Jersey named Arch Everson challenged the decision by his school district's board of education to reimburse parents of parochial school students for bus transportation, Justice Black led the Court in formally

13. *See* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 17 (2000).

14. For excerpts and analysis tracking the development of colonial thinking toward religion, see MICHAEL W. MCCONNELL, THOMAS C. BERG & CHRISTOPHER C. LUND, RELIGION AND THE CONSTITUTION 14–65 (4th ed. 2016) (tracking the development of colonial thinking toward religion); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-3, at 1158–66 (2d ed. 1988) (discussing the ideas and proposals of relevant Framers).

15. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

16. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 34 (1998). *But see* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 878 (1986). Using history and original intent to understand the Establishment Clause is a particularly contentious method of interpretation. *See, e.g.*, JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 5 (1995); FRANK S. RAVITCH, MASTERS OF ILLUSION: THE SUPREME COURT AND THE RELIGION CLAUSES 3–5 (2007); *see also* Stephanie H. Barclay, Brady Earley & Annika Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 ARIZ. L. REV. 505, 508–11 (2019) (discussing the application of corpus linguistics to understand the Establishment Clause's meaning).

17. *See* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 282, 284 n.15 (2001) (identifying Bradfield v. Roberts, 175 U.S. 291 (1899), and Quick Bear v. Leupp, 210 U.S. 50 (1908), as the only pre-incorporation Establishment Clause cases). For recent historical dives into the Establishment Clause, see Nathan S. Chapman, *Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause*, 96 NOTRE DAME L. REV. 677 (2020); and Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. PA. L. REV. 111 (2020).

incorporating the Establishment Clause.[18] While the Clause's incorporation in *Everson* continues to generate debate among scholars,[19] the decision marked the beginning of the modern Establishment Clause canon.[20] At first, Establishment Clause cases immediately following *Everson* made singular, passing references to "purpose."[21] The first instance in which the Court overtly introduced purpose to the calculus of Establishment Clause analysis was in *McGowan v. Maryland*. Purpose dominated the language of the decision,[22] and within a few years, scholars recognized that the Court had forever transformed Establishment Clause jurisprudence.[23]

Examining purpose in this line of cases may seem natural to law students considering six decades have passed since *McGowan*, yet it is still valuable to question why purpose plays a role in Establishment Clause cases in the first place. The text of the First Amendment nowhere declares that Congress shall make no law "with the purpose" of respecting an establishment of religion.[24] What truly is the purpose of "purpose" in Establishment Clause analysis?[25] To address this pivotal question, a clearer conceptual understanding of purpose is necessary.

II. WHAT PURPOSE IS AND ITS IMPORTANCE

A. WHAT ACTUALLY IS PURPOSE?

While the word "purpose" is a basic notion in common parlance, it is anything but simple in the constitutional law context.[26] To complicate matters further, the legal concepts of purpose, intent, and motive tend to be grouped together, and

18. *See* Everson v. Bd. of Educ., 330 U.S. 1, 8, 15 (1947). *Everson* confirmed the Court's previous holding that all clauses of the First Amendment were applicable to the states. *See* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940); *see also* NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1565 (20th ed. 2019).

19. *Compare* Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1087–88 (1995) (pro-incorporation), *with* Conkle, *supra* note 9, at 1134–37 (anti-incorporation).

20. *See, e.g.*, Donald L. Drakeman, Reynolds v. United States: *The Historical Construction of Constitutional Reality*, 21 CONST. COMMENT. 697, 697–98 n.2 (2004).

21. Zorach v. Clauson, 343 U.S. 306, 318 (1952); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 240 (1948) (Reed, J., dissenting).

22. *See* McGowan v. Maryland, 366 U.S. 420, 445 (1961).

23. *See, e.g.*, Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513, 532–33 (1968) ("The *legislative purpose* and primary effect test . . . seems likely to have more than passing influence.") (emphasis added) (internal quotation marks omitted).

24. *See* JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT app. at 296–97 (4th ed. 2016).

25. For further consideration of constitutional purpose analysis, see Lawrence A. Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 925–26 (1978) (introducing a symposium dedicated to the topic).

26. The Supreme Court examines purpose, intent, or motive in a number of other constitutional settings. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (plurality opinion) (Due Process Clause of the Fourteenth Amendment); Emp. Div. v. Smith, 494 U.S. 872, 878 (1990) (Free Exercise Clause); Pers. Adm'r v. Feeney, 442 U.S. 256, 272 (1979) (Equal Protection Clause); City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (Dormant Commerce Clause).

attempting to differentiate them is not straightforward.[27] While some scholars insist clear distinctions exist among these terms,[28] others dismiss these differences as minute and conceptually irrelevant.[29] Moreover, disagreement endures as to whether analysis of purpose, intent, or motive even constitutes a coherent and reliable method of constitutional interpretation.[30]

This Comment proceeds under two assumptions. First, the terms "purpose," "intent," and "motive" are synonymous.[31] Second, purpose analysis is a viable form of constitutional analysis.[32] While these assumptions may be reductive, developing the discussion here to consider these issues fully would expand this Comment beyond all reasonable limits. With this working definition of purpose, confronting the underlying question as to why purpose is even examined becomes more addressable.

B. WHY DOES PURPOSE MATTER?

Scholars have theorized as to why purpose matters in various legal contexts,[33] but what makes this concept resonate so profoundly here?[34] Recognizing the rights of individuals at stake,[35] Professor John Hart Ely theorized that purpose analysis conducted by judges serves to affirm an elected official's "duty to accord the entirety of his or her constituency equal concern and respect."[36] Other scholars

27. *See* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 436 n.48 (1997) ("This issue raises difficult questions . . . .").

28. *See, e.g.*, Fallon, *supra* note 8, at 534–36; Gordon G. Young, *Justifying Motive Analysis in Judicial Review*, 17 WM. & MARY BILL RTS. J. 191, 207 (2008).

29. *See, e.g.*, J. Morris Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953, 956–63 (1978); Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 37, 106 n.321 (1977).

30. *See* Frederick Schauer, *Free Speech, the Search for Truth, and the Problem of Collective Knowledge*, 70 SMU L. REV. 231, 239 n.54 (2017) (noting relevant scholarship); *see also, e.g.*, FELDMAN & SULLIVAN, *supra* note 18, at 1181–82; Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 248–54 (1992). *But see, e.g.*, ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 132–39 (2d ed. 2005).

31. To avoid confusion, this Comment uses the word "purpose," and its operational definition is an "objective, goal, or end." *Purpose*, BLACK'S LAW DICTIONARY (11th ed. 2019). Even the Supreme Court has used these terms interchangeably. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383 (1968); *see also* Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 5–9 (1992) (discussing the distinctions between purpose, intent, and motive generally).

32. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 139 (1980) ("[T]here are real-world cases where an unconstitutional motivation . . . can quite confidently be inferred . . . .").

33. *See, e.g.*, Michael Coenen, *Campaign Communications and the Problem of Government Motive*, 21 U. PA. J. CONST. L. 333, 341–56 (2018) (campaign communications); Deborah W. Denno, *Concocting Criminal Intent*, 105 GEO. L.J. 323, 331–37 (2017) (criminal law); Leslie Kendrick, *Free Speech and Guilty Minds*, 114 COLUM. L. REV. 1255, 1278–86 (2014) (free speech).

34. Even though the Supreme Court has insisted over time that purpose is irrelevant "in constitutional adjudication[,] . . . in reality, [purpose] matter[s]." Lynn E. Blais, *The Problem with Pretext*, 38 FORDHAM URB. L.J. 963, 975 (2011).

35. *See* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1211 (1970).

36. ELY, *supra* note 32, at 243 n.10. Professor Ely asserts that "select[ing] people for unusual deprivation on the basis of race, religion, or politics, or even simply because the official doing the choosing doesn't like them" defies constitutional norms. *Id.* at 137. And "[w]hen such a principle of selection [is] employed, the system has malfunctioned: indeed we can accurately label such a selection

maintain that purpose analysis is an innate aspect of judicial review because "even a dog distinguishes between being stumbled over and being kicked."[37] Professor Richard Fallon understands this analogy to mean:

> [W]e often cannot even characterize an act without understanding what motivated it. Within deeply entrenched ethical structures, what people (like dogs) are often owed is concern, care, or respect, and not necessarily a particular outcome. When constitutional doctrine is viewed against this background, there is nothing mysterious about the idea that the quality of governmental acts, and hence their constitutionality, should sometimes depend on their purposes.[38]

Distilled to their cores, these explanations for purpose analysis stem from concerns for legitimacy.[39]

The Supreme Court has long concerned itself with its institutional legitimacy,[40] both explicitly[41] and implicitly.[42] While abstract and theoretical examinations of legitimacy are pervasive,[43] scholars examining purpose analysis tend to identify differing components of judicial legitimacy.[44] For instance, Professor Scott

a denial of due process." *Id.*

37. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (Little, Brown & Co. 1923) (1881); *see* Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 590 (1975); Clark, *supra* note 29, at 963.

38. RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 93 (2001). Relatedly, Professor Fallon asserts, "When political officials act for constitutionally illegitimate reasons, they forfeit any reasonable claim to judicial deference." *Id.* at 94.

39. *See, e.g.*, CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 53–54 (1996); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 323–25 (1997); Joseph Landau, *Process Scrutiny: Motivational Inquiry and Constitutional Rights*, 119 COLUM. L. REV. 2147, 2152 (2019); Michael D. Gilbert & Mauricio A. Guim, *Active Virtues*, 98 WASH. U. L. REV. (forthcoming 2021) (manuscript at 3–7), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3366512 [https://perma.cc/J3HG-5JAJ]; Micah Schwartzman, *Official Intentions and Political Legitimacy: The Case of the Travel Ban* 6–11 (Univ. Va. Sch. L. Pub. L. & Legal Theory, Working Paper No. 22, 2018), https://ssrn.com/abstract=3159393 [https://perma.cc/RU9J-GPBV].

40. *See, e.g.*, Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 VA. L. REV. 865, 898 (2019) ("In its most introspective moments, the Supreme Court has openly pondered how best to preserve the foundations of its own legitimacy.").

41. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865–66 (1992) (plurality opinion) ("The Court's power lies . . . in its *legitimacy*, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.") (emphasis added); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985) (considering legitimacy explicitly).

42. *See* Samuel R. Olken, *The Ironies of* Marbury v. Madison *and John Marshall's Judicial Statesmanship*, 37 J. MARSHALL L. REV. 391, 436–38 (2004). For further discussion of the Court and its legitimacy, see generally Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703 (1994).

43. *E.g.*, Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 115–32 (2003); Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 190–95, 196–97 (2013); Leslie Green, *Law, Legitimacy, and Consent*, 62 S. CAL. L. REV. 795, 803–25 (1989); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1813–39 (2005); David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 778–85 (2009).

44. Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240 (2019) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018))

Idleman identifies participatory equality of citizens and moral resonance of law as the elements of legitimacy safeguarded by purpose analysis,[45] while Professor Brandon Garrett emphasizes that failure by the courts to root out improper purpose in laws leads to "a system-wide delegitimizing effect."[46] Professor Andrew Koppelman posits that, specifically in Establishment Clause cases, purpose analysis serves to prevent government from "declar[ing] . . . religious truth."[47]

Taking these theoretical conceptions together with the relevant history illuminates a plausible explanation for purpose analysis in Establishment Clause jurisprudence. While the United States has always been "an asylum to the persecuted and oppressed of every nation and religion,"[48] the intersection of church and state in America has never been simple.[49] This issue is fundamental to the fabric of American society, interwoven with the deeply held and sometimes conflicting convictions of "a religious people whose institutions presuppose a Supreme Being."[50] When the Supreme Court observed a near-instantaneous jump in Establishment Clause cases following *Everson*, the Court likely envisaged the storm of sectarian turmoil and accompanying legitimacy concerns brewing on the horizon. As a result, the Justices ostensibly integrated purpose into the Court's analysis of Establishment Clause issues to preserve the legitimacy of the Supreme Court and the government as a whole in the eyes of the citizenry.[51]

III. FINDING PURPOSE: A METHODOLOGY

Discussing purpose in the abstract is sufficiently complicated; selecting a concrete path for analysis is even more so. While the analysis that follows is far from comprehensive, the results shed light on the methods used and conclusions drawn by the Supreme Court pertaining to purpose in Establishment Clause cases.[52] The Court has handed down sixty Establishment Clause decisions in the

("Legitimacy is a complex and puzzling concept.").

45. *See* Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J.L. & PUB. POL'Y 1, 71 (2002).

46. *See* Brandon L. Garrett, *Unconstitutionally Illegitimate Discrimination*, 104 VA. L. REV. 1471, 1476 (2018).

47. Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 88 (2002).

48. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* MCCONNELL ET AL., *supra* note 14, at 46.

49. *See* Mark W. Cordes, *Politics, Religion, and the First Amendment*, 50 DEPAUL L. REV. 111, 113–14 (2000); *see also* Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397, 1403–11 (2003) (outlining the general mentalities of Americans toward religion).

50. Zorach v. Clauson, 343 U.S. 306, 313 (1952). *But see* Mark L. Movsesian, Masterpiece Cakeshop *and the Future of Religious Freedom*, 42 HARV. J.L. & PUB. POL'Y 711, 722–30 (2019) (describing the increase in Americans identifying as "nones"—people who do not affiliate with an organized religion).

51. For in-depth discussion of the Supreme Court's legitimacy, see FALLON, *supra* note 44, at 20–46.

52. *See* TRIBE, *supra* note 14, § 14-14, at 1280 (discussing the difficulties in developing a coherent analytical framework to examine purpose in Establishment Clause cases). Involving purpose analysis in its Establishment Clause cases went against the Court's traditional observation of the "wise and ancient doctrine . . . not [to] inquire into the motives of a legislative body or assume them to be wrongful." John Donovan, *Unconstitutional Motivation Analysis and the First Amendment: The Further Demise of a Wise and Ancient Doctrine*, 33 CASE W. RES. L. REV. 271, 272–74 (1983) (quoting United States v. Constantine, 296 U.S. 287, 299 (1935) (Cardozo, J., dissenting)).

modern era that remain precedential.[53] Part IV begins by collecting and sorting modern Establishment Clause cases by the types of statutory purpose. First, each case is examined for a per se violation of the Establishment Clause.[54] If the government action at issue in a case is facially neutral, each is subsequently grouped by the purpose designation given by the Supreme Court.[55] This categorization breaks out into five groups:[56] (1) secular purpose; (2) primary secular purpose; (3) religious purpose; (4) primary religious purpose; and (5) miscellaneous examination or no purpose examination.[57] The analysis then turns to three other important questions when decisions examine purpose:[58] (1) how did the Justices identify the purpose; (2) what evidence did the Justices use to identify such purpose; and (3) which "indicia of impermissible purpose," if any, were involved in their decision.

A. CONCEPTIONS OF PURPOSE

Of the questions frequently posed about purpose analysis, the "ascertainability" concern is almost always raised.[59] On numerous occasions, Justices have pointed to the "extreme[] difficult[y]" in "ascertain[ing] the motivation, or collection of different motivations, that lie behind [governmental action]."[60] While academics have inspected and dissected various notions of purpose in the constitutional setting,[61] Professor Fallon has posited a simple and effective method to examine

53. Because certain Establishment Clause cases more directly concern standing, this Comment does not consider these cases to avoid distorting the analysis. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 85 (1968). *See generally* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 128–30 (7th ed. 2015).

54. *Cf.* Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (violating the Equal Protection Clause on its face). Professor Fallon refers to this type of constitutional test as a "forbidden-content" test. *See* FALLON, *supra* note 38, at 78.

55. *See* FALLON, *supra* note 38, at 79 (defining purpose tests).

56. *See, e.g.*, Stone v. Graham, 449 U.S. 39, 41–42 (1980) (per curiam); Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 14–17 (1989).

57. Great effort is made to avoid discussing the complexities and nuances inherent in a government act that has multiple purposes. For general analysis of mixed-motives examination, see Andrew Verstein, *The Failure of Mixed-Motives Jurisprudence*, 86 U. CHI. L. REV. 725, 732–41 (2019), and Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1114–21 (2018). *See also* Daniel O. Conkle, *Religious Purpose, Inerrancy, and the Establishment Clause*, 67 IND. L.J. 1, 3–4 (1991) (discussing mixed-motives analysis in the Establishment Clause context). This Comment also does not engage with a major issue Justice Scalia saw in applying purpose analysis in Establishment Clause cases—whether government action violates the Establishment Clause for furthering a religious purpose when religious and secular views happen to align. *See* RICHARD L. HASEN, THE JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION 112 (2018).

58. *See infra* Parts IV.B.–D.

59. *See* United States v. O'Brien, 391 U.S. 367, 383–84 (1968); Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 119.

60. Palmer v. Thompson, 403 U.S. 217, 224 (1971) (citing *O'Brien*, 391 U.S. at 383–84); *see* Calvin Massey, *The Role of Governmental Purpose in Constitutional Judicial Review*, 59 S.C. L. REV. 1, 10–12 (2007) (discussing the difficulty the Court faces in "agree[ing] on the method of locating purpose, even when agreement is reached that purpose is relevant").

61. *See, e.g.*, Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1, 66–73 (2016); Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1861–71 (2008); Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669, 694–

how judges identify or construct governmental purpose.[62] His model serves as this Comment's framework to analyze Establishment Clause cases.[63]

Although Professor Fallon believes purpose is a "protean concept capable of assuming different forms," there are three applicable and distinct ways in which the Court can find or derive the purpose of a law or government action.[64] First, judges may subjectively identify the purpose with which government actors take action and subsequently determine the extent that such purpose motivated others.[65] Second, judges may impute a collective intent to make sense of specific language or action.[66] Governmental conduct may have an objective purpose[67] indicated by the "performance of actions [that] . . . because of what they involve, are typically motivated by a certain rationale and are reasonably interpreted as being so motivated."[68] Finally, judges may find legislative purpose from the "expressive meaning" of a statute.[69] This method begins with a judge attributing an expressive meaning to some statute or official action and concludes with the imputation of an objective purpose to communicate such meaning.[70]

Applying this conceptual framework of purpose to modern Establishment Clause cases makes clearer whether a pattern (or lack thereof) exists as to the manner in which the Supreme Court identifies purpose in these cases.

B. EVIDENCE OF PURPOSE

The perception of a law or governmental action's purpose represents the macro-

95 (2019).

62. *See* Fallon, *supra* note 8, at 534–54. Fallon uses the terms "intent" or "intention" in the same manner this Comment uses the term "purpose." *See id.* at 535–36.

63. For purposes of this Comment, legislative purpose includes the purpose with which a government actor takes a particular action.

64. Fallon, *supra* note 8, at 553. While Professor Fallon explores more than these three methods, he ultimately concludes that the three subjective conceptions of purpose are effectively the same in that they involve "identifying the forbidden intentions of individual legislators and then determining how many other legislators likely had similar motivations." *Id.* at 541. Further, Professor Fallon's "Categorically Ascribed Objective Intent" method references per se violations of the Establishment Clause. *See id.* at 544–45. As such, for purposes of this Comment, this conception of purpose is synonymous with per se violations of the Establishment Clause.

65. *See* Fallon, *supra* note 8, at 544–45. For the different ways this subjective conception of purpose forms, see *id.* at 538–40.

66. *Id.* at 541–43. "[A] statute's meaning is the meaning that an informed observer would understand it as having in its semantic context." *Id.* at 542; *see* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 91–92 (2006). *But see* SANFORD LEVINSON, CONSTITUTIONAL FAITH 124–25 (1988).

67. While Fallon refers to a number of these conceptions of purpose as objective, at points even he implicitly questions the nature of these "objective" purpose conceptions. *See* Fallon, *supra* note 8, at 549 (emphasizing the term "objective" with quotation marks).

68. *Id.* at 543 n.83. Fallon acknowledges that this method "often overlap[s] . . . with a conception of . . . [purpose] based on the imagined subjective intentions of a majority of the actual legislature." *Id.* at 544.

69. *Id.* at 549. Expressive theories "tell actors—whether individuals, associations, or the State—to act in ways that express appropriate attitudes toward various substantive values." Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504, 1527 (2000). For instance, when American antiwar protestors publicly burned the American flag in the mid-1960s, such action manifested one's state of mind and belief that the United States's involvement in the Vietnam War was wrong. *See id.* at 1506.

70. *See* Fallon, *supra* note 8, at 549.

level of the Court's purpose analysis, but how exactly do the Justices arrive at such conclusions? The micro-level examination making up the whole of an identified purpose is the evidence considered by the Court, each piece coming together to construct an overarching purpose.[71] While the types of evidence examined vary greatly across different areas of constitutional law,[72] the framework used here derives from the works of several commentators writing about the Equal Protection Clause.[73]

In general, the Justices consider five broad types of evidence to determine purpose: textual, procedural, contextual, pretextual, and effectual.[74] First, on the most basic level, the text of the statute can be examined.[75] Second, the Court considers contextual evidence, such as "historical background demonstrating past discriminatory acts[] and . . . departure[s] from the usual substantive considerations governing the decision."[76] Third, the Justices look to procedural evidence, which is the sequence of events leading to "passage, the . . . procedure, and the . . . history accompanying"[77] passage or authorization of the statute or action in question, respectively. Procedural evidence is particularly noteworthy for its array of information that indicates purpose to judges, yet the Court focuses on official statements[78] and other actions by relevant government actors.[79] Fourth, the Justices may find pretextual evidence when there is an "utter failure of alternative explanations to offer legitimate ends along with means that really advance those ends."[80] Finally, the Court may examine effectual evidence and observe the real-world impact of a statute or action to identify purpose.[81] While

71. *See* Richard H. Fallon, Jr., A *Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2276 (2017) ("In imputing beliefs or emotional attitudes to people in nonlegal contexts, we rely on a mix of evidentiary factors to reach judgments in which we frequently have justified confidence.").

72. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977).

73. *See infra* notes 74–83 and accompanying text. Both Equal Protection Clause and animus cases serve as great templates for examining evidence in Establishment Clause purpose analyses due to the similarity of the clauses' underlying concerns. *See, e.g.*, Daniel A. Crane, *Faith, Reason, and Bare Animosity*, 21 CAMPBELL L. REV. 125, 137 (1999); Eisenberg, *supra* note 29, at 133; Timothy L. Hall, *Religion, Equality, and Difference*, 65 TEMP. L. REV. 1, 50 (1992); Elizabeth D. Katz, *"Racial and Religious Democracy": Identity and Equality in Midcentury Courts*, 72 STAN. L. REV. 1467, 1479–81 (2020). *But see* Caroline Mala Corbin, *Intentional Discrimination in Establishment Clause Jurisprudence*, 67 ALA. L. REV. 299, 307 n.57 (2015) ("The doctrine for the [Equal Protection and Establishment Clauses] is obviously not completely parallel.").

74. *See* Dale Carpenter, Windsor *Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 245–46.

75. *See id.* at 245; Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1268–69 (2018). While the majority of scholarly work analyzing purpose focuses on the statutory context, this Comment expands the analysis to other settings from which purpose can be derived, such as the governmental displays of symbols.

76. Carpenter, *supra* note 74, at 245–46; *see also* Ely, *supra* note 35, at 1220.

77. Carpenter, *supra* note 74, at 246; *see also* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 516 (2003).

78. *See, e.g.*, Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 138–43 (2018).

79. *See, e.g.*, Carpenter, *supra* note 74, at 248, 257–79.

80. *See id.* at 246.

81. *See id.*; *see also* Huq, *supra* note 75, at 1274–77. It is important to note that analyzing the effects of a statute here involves two steps: (1) observing the real-world impact of a statute; and (2) determining whether this impact was intended by the enactors. *See, e.g.*, Carpenter, *supra* note 74, at

the Justices have looked to effectual evidence in many contexts, examining its impact to discern purpose is particularly controversial.[82] Nevertheless, the impact of a statute or governmental action may carry evidentiary value for the Court when conducting purpose analysis.[83]

Analyzing modern Establishment Clause cases through the lens of these five evidentiary methods helps answer the following questions: First, what types of evidence do the Justices look to in Establishment Clause cases? Second, are there particular types of evidence the Court favors or disfavors when conducting purpose analysis in these cases? Finally, how do these pieces of evidence come together to produce the Court's conception of purpose in Establishment Clause cases?

C. INDICIA OF IMPERMISSIBLE PURPOSE

When analyzing purpose in Establishment Clause cases, the Justices look for specific content in the evidence evincing an illicit end or objective.[84] But what are these "indicia of impermissible purpose"?[85] Similarly to evidence of purpose, case law and scholarly work involving the Equal Protection Clause provide examples of how the Court views specific subject matters as manifestations of constitutionally proscribed purpose.[86]

Building upon previous models designed to detect improper purpose, four general indicia make up the analytical framework utilized herein.[87] First, religious

279–81. Examining statutory effects in this way differs from the analysis under the *Lemon* test's effects prong, which only involves the first of these two analytical steps. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) ("[The statute's] principal or primary effect must be one that neither advances nor inhibits religion . . . .").

82. *Compare* Frederick Mark Gedicks, *Motivation, Rationality, and Secular Purpose in Establishment Clause Review*, 1985 ARIZ. ST. L.J. 677, 690–91, *with* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 129 (1992). Professor Carpenter contemplates possible justifications for examining effects in the context of purpose analysis. *See* Carpenter, *supra* note 74, at 246 n.229.

83. *Cf.* Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 12–23 (2013) (analyzing the interaction of purpose and impact in Equal Protection Clause jurisprudence). More likely than not, the Justices "use the balance of consequences as evidence of [purpose], but not as conclusive evidence, not as the equivalent of [purpose]." *See* Charles Fried, *Types*, 14 CONST. COMMENT. 55, 63 (1997). Professor Fallon argues that "effects-based tests can reasonably be viewed as [a] surrogate[] for purpose tests." FALLON, *supra* note 38, at 91.

84. This Comment identifies when the Court has found constitutionally impermissible purpose under the Establishment Clause but does not evaluate those findings here. For further discussion, see Brest, *supra* note 59, at 116–19; Conkle, *supra* note 57, at 5–8; and Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1796–98 (2012).

85. It is imperative to distinguish impermissible purpose from discriminatory purpose. While debate persists as to what actions specifically involve impermissible purpose in Religion Clauses cases, discriminatory purpose represents a clear standard of mental awareness in acting with a specific desire to affect a particular group. *Compare* Conkle, *supra* note 57, at 8–12, *with* Goodwin Liu, *Racial Justice in the Age of Diversity*, 106 CALIF. L. REV. 1977, 1978 (2018).

86. *See infra* notes 90–102 and accompanying text; *see also* Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 138–40 (1997). Especially in the context of race and the Equal Protection Clause, the Supreme Court looks for articulated indicators of forbidden purpose. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 551 (1896) ("[T]he enforced separation of the two races stamps the colored race with a *badge of inferiority*." (emphasis added)), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

87. *See infra* Part IV.D. While these indicia are closely related and their boundaries are

animus can demonstrate impermissible purpose. While no concrete legal definition for animus exists,[88] in this context, the term refers to taste-based discrimination,[89] and its presence can cause serious harm to those affected.[90] When evidence makes reference to a group's traits,[91] stereotypes,[92] or stigmas,[93] impermissible purpose typically abounds.[94] Second, classification can signal improper purpose. While the distinction between classification and animus is imprecise,[95] classification refers to state action intended to press a religious class "into service for purposes of persecution, rather than for other, benign purposes."[96] Classification may result in the "[e]ncouragement of prejudice,"[97] which would reveal an even more decidedly impermissible purpose.[98] Third, subordination may suggest the presence of impermissible purpose. Even though the notions of classification and subordination arise from the same conceptual basis of group dynamics, subordination takes classification a step further by seeking "to produce and reinforce status hierarchies between different social groups."[99] Like classification, subordination can also give way to encouragement of prejudice but in a distinctly more intentional manner.[100] Finally, a lack of government impartiality may signal forbidden purpose. When a "sense of breach

amorphous, analyzing the Establishment Clause cases through these lenses provides useful insight into the inner workings of this area of constitutional jurisprudence.

88. *See generally* WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW (2017).

89. *See* Huq, *supra* note 75, at 1243–44; Clark, *supra* note 29, at 954; *see also* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (describing animus as "a bare congressional desire to harm a politically unpopular group"); Daniel O. Conkle, *Animus and Its Alternatives: Constitutional Principle and Judicial Prudence*, 48 STETSON L. REV. 195, 198 (2019) ("[T]he Constitution demands that every law serve a public-regarding interest or objective or, at a minimum, that it at least be intended to do so.").

90. William E. Adams, Jr., *Is it Animus or a Difference of Opinion? The Problems Caused by the Invidious Intent of Anti-Gay Ballot Measures*, 34 WILLAMETTE L. REV. 449, 467–77 (1998) (detailing the effects of anti-gay animus on gay communities).

91. *See* Huq, *supra* note 75, at 1243.

92. *See* Hall, *supra* note 73, at 57–60.

93. David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 942–43 (1989). Interestingly, Professor Robert Tsai posits that the concept of stigma can affect the person or group engaging in stigmatization, which involves "branding the wrongdoer" as discriminatory and having acted in an unconstitutional manner. First Mondays, *OT2018 #18: "Rorschach Test"*, SCOTUSBLOG (Feb. 11, 2019), https://www.scotusblog.com/2019/02/ot2018-18-rorschach-test/ [https://perma.cc/3FAY-WWLG].

94. *See* Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 MINN. L. REV. 1341, 1399 (2020) ("[A]nimus doctrine holds that the government cannot engage in acts driven by animus toward a particular religion or religious group.").

95. *See* Huq, *supra* note 75, at 1256.

96. Hall, *supra* note 73, at 56–57; *see* Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1839–41 (2009) (detailing Justice O'Connor's similar line of thought).

97. Strauss, *supra* note 93, at 944.

98. For more on classifications and divisions in Establishment Clause cases, see Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1681–1708 (2006).

99. *See* Huq, *supra* note 75, at 1257–58; *see also* Plessy v. Ferguson, 163 U.S. 537, 559–60 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

100. *See* Koppelman, *supra* note 96, at 1841; *see also* Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600, 1606–08 (2020) (discussing subordination in the context of race).

of faith between the governor and the governed" occurs,[101] the existence of impermissible purpose is more likely.[102] This amorphous indicator overlaps with the other indicia while simultaneously representing a catch-all for any state action lending itself to the delegitimization of the political system.[103]

Analyzing modern Establishment Clause jurisprudence in this manner will answer three key questions: First, is the presence of at least one impermissible purpose indicia a necessary condition for finding a violation of the Establishment Clause? Second, is there a trend as to how many indicia must be identified to serve as a sufficient condition for finding a violation of the Establishment Clause? Finally, are these indicia, and thereby purpose analysis generally, even correlated with the outcomes in Establishment Clause cases?

IV. FROM *MCGOWAN* TO THE BLADENSBURG CROSS: A COMMON LAW ANALYSIS

When the Court conducts purpose analysis in Establishment Clause cases, the Justices overwhelmingly tend to find a secular purpose. But this conclusion, without further unpacking, fails to comprehensively encapsulate relevant case law. The analysis that follows seeks to provide context for this finding.

A. ESTABLISHMENT CLAUSE CASES BY TYPES OF PURPOSE

1. Per Se Violations

First, there are the cases that facially violate the Establishment Clause.[104] These cases are fairly short, simple, and self-explanatory. For example, when the Governor of Maryland appointed Roy Torcaso to the office of the Notary Public, Torcaso was refused his commission because he would not declare his belief in God as required by Article 37 of the Declaration of Rights of the Maryland Constitution.[105] Torcaso brought suit alleging a violation of the Establishment Clause and had his commission delivered pursuant to a unanimous ruling from the Supreme Court.[106] Writing for the Court, Justice Black identified the forbidden content inherent in the state action: the creation of a religious test for

101. Clark, *supra* note 29, at 964. Lack of impartiality as an indicator of impermissible purpose in Establishment Clause cases relates to the contentious idea of state neutrality toward religion. Neutrality, however, stems from the debate over the Founders' original intent in drafting the First Amendment and plays a much more decisive role in Establishment Clause cases.

102. *Cf.* Strauss, *supra* note 93, at 940–41.

103. *See, e.g.*, Richard Schragger, *Unconstitutional Government Speech* 11 (Univ. Va. Sch. L. Pub. L. & Legal Theory, Working Paper No. 2019-56), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3468469 [https://perma.cc/MKH3-6EAQ] (describing an instance of overlap among the government impartiality, classification, and subordination indicia).

104. *E.g.*, Engel v. Vitale, 370 U.S. 421, 424–25 (1962); Torcaso v. Watkins, 367 U.S. 488, 495–96 (1961). Facial violations of the Establishment Clause are those violations that are "plainly intentional." *See* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 885 (2004).

105. *Torcaso*, 367 U.S. at 489.

106. *Id.* at 496.

those serving in the state government of Maryland.[107] While Justice Black further laid out why this provision of the Maryland Constitution violated the Establishment Clause,[108] this explanation is dictum because the opinion had already declared the religious test to be a per se violation of the Establishment Clause.[109]

2. Secular Purpose

Next, the Supreme Court has decided cases in which the challenged action had a secular purpose. Juxtaposing the cases of *McGowan v. Maryland*[110] and *Mueller v. Allen*[111] demonstrates the manner in which Establishment Clause cases involving secular purpose have evolved over time. At the time of *McGowan*, the Maryland legislature had passed a statute commonly known as a "Sunday Closing Law," which was a criminal statute that "generally proscribe[d] all labor, business and other commercial activities on Sunday."[112] Petitioners in the case were seven employees of a large discount department store indicted by the state of Maryland for selling "a three-ring loose-leaf binder, a can of floor wax, a stapler and staples, and a toy submarine" on a Sunday.[113] Of the legal theories advanced by the petitioners, the most critical was Maryland's the asserted violation of the Establishment Clause for enacting and enforcing its Sunday Closing Law.[114]

In the majority opinion, Chief Justice Warren admitted that Sunday Closing Laws undoubtedly originated with religious purpose and detailed such evidence all the way back to thirteenth-century British common law.[115] However, Chief Justice Warren interestingly framed the issue as "whether present Sunday legislation, having undergone extensive changes from the earliest forms, still retains its religious character."[116] The Court ultimately held that, based on their language and operative effects, the Sunday Closing Laws had become "part and parcel of this great governmental concern wholly apart from their original purposes or connotations" and had the secular purpose of "provid[ing] a uniform day of rest for all citizens."[117]

The *McGowan* decision laid the framework for courts to consider purpose in

107. *Id.* at 489–91. Justice Black spelled out that the Court's decision was made under the Establishment Clause and not the No Religious Test Clause of Article VI, Clause 3. *See id.* at 489 n.1.

108. *Id.* at 490. The Court pointed to indicia of impermissible purpose in the religious test, as the test both (1) classifies the population into theists and non-theists, and (2) causes the government to be partial. *See id.*

109. *See id.* at 490–91.

110. 366 U.S. 420, 444–45, 452–53 (1961). *McGowan* was one of the "Sunday Closing Cases," along with *Braunfeld v. Brown*, 366 U.S. 599 (1961), *Gallagher v. Crown Kosher Super Mkt.*, 366 U.S. 617 (1961), and *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961).

111. 463 U.S. 388, 402–03 (1983).

112. *McGowan*, 366 U.S. at 422.

113. *Id.*

114. *See id.* at 431.

115. *See id.* at 431–35, 446–48.

116. *Id.* at 431.

117. *Id.* at 445, 447–48. Chief Justice Warren added, "[T]he fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals." *Id.*

Establishment Clause cases until *Lemon*. The *McGowan* framework proved quite favorable for those defending against claims of establishment of religion, as the Court found a secular purpose in nearly every case it heard up until the introduction of the "endorsement test" in *Lynch v. Donnelly*.[118] By the time *Lemon* controlled Establishment Clause analysis, a more representative case in which the Supreme Court identified a secular purpose in state action was *Mueller v. Allen*.[119]

The *Mueller* petitioners were a group of Minnesota taxpayers suing the state regarding a law permitting taxpayers to deduct certain expenses from their gross incomes related to educating their children.[120] The challengers took issue with the statute allowing taxpayers to send their children to private sectarian schools while also deducting education-related expenses.[121] As such, the petitioners brought suit against the state of Minnesota for allegedly violating the Establishment Clause.[122]

Writing for the Court, then-Justice Rehnquist determined the statute in question satisfied all three prongs of the *Lemon* test and, therefore, did not violate the Establishment Clause.[123] In scrutinizing the statute's purpose, Justice Rehnquist remarked that "little time need[ed] be spent" conducting such examination because the purpose of similar government assistance programs had been previously upheld.[124] Justice Rehnquist then quickly enunciated four possible secular purposes attributable to the statute and, having satisfied the purpose prong of the *Lemon* test, proceeded with the rest of the analysis.[125]

Mueller indicated a key change from *McGowan*: the Court began dedicating significantly less time analyzing a law's purpose, instead preferring to defer to governmental bodies as to the purpose of an action.[126] This hesitancy to scrutinize for purpose likely reflects the Court's "reluctance to attribute unconstitutional motives . . . particularly when a plausible secular purpose . . . may be discerned from the face of the statute."[127] Even though this shift indicates that purpose is much less likely to be dispositive in Establishment Clause cases, it "nevertheless serves an important function."[128]

118. 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (combining the purpose and effect prongs of the *Lemon* test).

119. *See* 463 U.S. 388, 394 (1983).

120. *Id.* at 391–92.

121. *Id.* at 392.

122. *Id.*

123. *See id.* at 394–404.

124. *See id.* at 394.

125. *See id.* at 395. Justice Rehnquist noted that the statute did not expressly state a legislative purpose and its legislative history offered "few unambiguous indications of actual intent." *Id.* at 395 n.4.

126. *See id.* at 394–95.

127. *Id.* In fact, the Supreme Court has only directly questioned a statute's stated purpose three times since *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963). *See* McCreary County v. ACLU of Ky., 545 U.S. 844, 868–75 (2005); Edwards v. Aguillard, 482 U.S. 578, 585–94 (1987); Stone v. Graham, 449 U.S. 39, 41–43 (1980) (per curiam).

128. Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring). The 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." *Id.* at 75–76.

3. Primary or Preeminent Secular Purpose

The third purpose category includes those cases in which the challenged statute or governmental action is characterized by a primary or preeminent secular purpose.[129] When the Justices conducted purpose analysis in the first three decades of modern Establishment Clause jurisprudence, they would determine whether a governmental action possessed either a secular or religious purpose.[130] Once the Court's approach began to morph in the mid-1980s, the rigidity of the binary classification slackened and the Court began to designate state action as having *primarily* secular purposes and *primarily* religious purposes.

Emblematic of the cases in which the Justices identified a primary secular purpose is *Lynch v. Donnelly*.[131] In *Lynch*, a group of residents from Pawtucket, Rhode Island, brought suit against the downtown retail merchants' association for a Christmas display erected to celebrate the holiday season.[132] The residents took issue mainly with the perpetual inclusion of a crèche in the holiday display, claiming the crèche ran afoul of the Establishment Clause.[133] The crèche was one part of the display, together with, among other things, "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, [and] a large banner that read[] 'SEASONS GREETINGS.'"[134]

Writing for a divided court, Chief Justice Burger found no violation of the Establishment Clause.[135] The Chief Justice focused the inquiry narrowly, determining the crèche must be examined in relation to the "context of the Christmas season."[136] While not denying that religious purpose could be attributed to the display, the Court held the district court's finding—that the crèche had no possible secular purpose—was "clearly erroneous."[137] The primary purposes of the crèche—"to celebrate the Holiday and to depict the origins of that Holiday"—were valid, secular purposes.[138]

The result in *Lynch* has been subjected to significant criticism,[139] some of which

129. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2085 (2019); Van Orden v. Perry, 545 U.S. 677, 691–92 (2005); Bowen v. Kendrick, 487 U.S. 589, 607, 622 (1988); Lynch v. Donnelly, 465 U.S. 668, 707 (1984).

130. *See, e.g.*, Hunt v. McNair, 413 U.S. 734, 741 (1973) (secular purpose); Epperson v. Arkansas, 393 U.S. 97, 107–08 (1968) (religious purpose).

131. *Lynch*, 465 U.S. at 687.

132. *Id.* at 671. The display was located at "the heart of the [town's] shopping district." *Id.*

133. *See id.* at 671–72. A crèche is "a nativity scene, often displayed at Christmas, consisting of a representation of the infant Jesus in the manger, with attending figures." *Crèche*, OXFORD ENGLISH DICTIONARY (3d ed. 2014). Along with secular symbols, the crèche "consist[ed] of the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals." *Lynch*, 465 U.S. at 671.

134. *Lynch*, 465 U.S. at 671.

135. *Id.* at 687.

136. *Id.* at 679.

137. *See id.* at 681 & n.6.

138. *See id.* at 681.

139. *See, e.g.*, Marshall, *supra* note 5, at 514–23, 532–41; Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 269–76 (1987).

refers to the holding as the "'Saint Nicholas too' test" or the "two plastic reindeer rule."[140] Though this outcome might seem curious or even unprincipled,[141] there are certainly viable justifications for the decision in light of precedent and history.[142] Nevertheless, this finding of primary secular purpose stands today and served as the model in two other Supreme Court cases.[143]

4. Religious Purpose

The fourth category of purpose within Establishment Clause jurisprudence includes cases involving government action with a religious purpose[144] analogous to those involving government action with secular purposes. *Wallace v. Jaffree* is emblematic of these cases.[145] In *Wallace*, Ishmael Jaffree sued the state of Alabama on behalf of his children who "had been subjected to various acts of religious indoctrination" at school—specifically, their teacher had led the class in daily prayers and the "children were exposed to ostracism from their peer group class members" by not participating.[146] The litigation eventually made it to the Supreme Court.[147]

Writing for the majority, Justice Stevens held the Alabama law was unconstitutional under the Establishment Clause.[148] In conducting the Court's purpose analysis, Justice Stevens found only a religious—and thereby impermissible—purpose.[149] The majority found this religious purpose through several pieces of evidence. First, the semantic makeup of the statute plainly indicated religious purpose.[150] Next, the historical context and the evolving statutory language across multiple drafts signaled a purposeful promotion of religion by the state legislature.[151] Moreover, and most notably, Justice Stevens

140. *See* Daniel Parish, Comment, *Private Religious Displays in Public Fora*, 61 U. CHI. L. REV. 253, 260 n.52 (1994).

141. *See* William Van Alstyne, Comment, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall–A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770, 784–85.

142. For instance, given Justice Rehnquist's statement one year prior in *Mueller* regarding purpose and deference to legislatures, the *Lynch* Court could have exhibited greater deference as to the holiday display in Pawtucket. *See supra* note 127 and accompanying text.

143. *See* Van Orden v. Perry, 545 U.S. 677, 686–87 (2005); Bowen v. Kendrick, 487 U.S. 589, 602–03 (1988).

144. *See, e.g.*, Bd. of Educ. v. Grumet, 512 U.S. 687, 690 (1994); Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 5 (1989); Wallace v. Jaffree, 472 U.S. 38, 40–42 (1985).

145. *See Wallace*, 472 U.S. at 59–61.

146. *Id.* at 42. This "ostracism," more generally classified as subordination, was one of three indicia of impermissible purpose present in the case, along with classification and lack of impartiality. *See id.* at 59–60.

147. The statute at issue read, in relevant part:

> At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

ALA. CODE § 16-1-20.1 (1982) (repealed in 1998).

148. *Wallace*, 472 U.S. at 61.

149. *See id.* at 59–60.

150. *Id.* at 58–59.

151. *See id.*

looked to the legislative record and official statements of the bill's sponsor, who, when asked if there were any other purpose for the legislation other than returning voluntary prayer to public schools, answered, "No, I did not have no [sic] other purpose in mind."[152] Further, evidence of pretext played a key role in finding religious purpose in the enactment because "[n]o one suggest[ed] that the statute was [any]thing but a meaningless or irrational act."[153] Taking this evidence together with the statute's effects,[154] the Justices found little difficulty identifying the statute's purpose as religious—and thereby unconstitutional under the Establishment Clause.[155]

5. Primary or Preeminent Religious Purpose

The fifth type of purpose category in these cases involves government actions with a primary or preeminent religious purpose.[156] The *Santa Fe Independent School District v. Doe* case exemplifies the regular approach the Court takes in these limited instances.[157] The plaintiffs—a Mormon student, a Catholic student, and their mothers—filed suit following a vote by the students of Santa Fe High School to allow prayer at home football games.[158] The question before the Supreme Court was "[w]hether [Santa Fe Independent School District]'s policy permitting student-led, student-initiated prayer at football games violate[d] the Establishment Clause."[159]

Writing for the Court, Justice Stevens concluded that the policy was incompatible with the Establishment Clause because of the predominance of the practice's innate religious purpose.[160] The majority turned to different pieces of evidence in locating this purpose: first, the policy's text reinforced the perception that the school was encouraging the prayer in question.[161] Second, Justice Stevens looked to the procedural evidence of the policy, noting significantly that the stated purpose was "to solemnize the event,"[162] and that the changes to the policy appeared to demonstrate the school's desire "to preserve the practice of prayer before football games."[163] The Court determined that these pieces of evidence, together with the effectual evidence,[164] indicated the policy's purpose to be primarily religious and, therefore, unconstitutional under the Establishment

152. *Id.* at 57; *see* Huq, *supra* note 75, at 1270 (citing *Wallace*, 472 U.S. at 57–58).

153. *See Wallace*, 472 U.S. at 59.

154. *Id.* at 42.

155. *See id.* at 59–61. This case set the model for how the Court would proceed in cases in which the Justices identified a religious purpose in a statute. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987).

156. *See* McCreary County v. ACLU of Ky., 545 U.S. 844, 881 (2005); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000); *Edwards*, 482 U.S. at 595–97 (1987). Development of the primary-religious-purpose designation evolved similarly to that of the primary secular purpose.

157. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 317.

158. *Id.* at 294, 297.

159. *Id.* at 301.

160. *See id.* at 309–10 (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984)).

161. *Id.* at 308; *see* Huq, *supra* note 75, at 1274 n.259.

162. *Santa Fe Ind. Sch. Dist.*, 530 U.S. at 306.

163. *Id.* at 309.

164. Three indicia of impermissible purpose were present in the case: classification, subordination, and lack of impartiality. *See id.* at 305.

Clause.[165]

6. Remaining Assortment

The sixth and final purpose category of cases consists of those decisions that do not fall neatly into any of the purpose categories. Because these cases are relatively inapposite to the analysis in this Comment, little attention is paid to them. Nevertheless, identifying these cases is important for comprehensiveness. One type of case in this catch-all category is that in which the challenged governmental action is not analyzed for purpose at all.[166] Such was the case in *Estate of Thornton v. Caldor, Inc.*, in which the Court invalidated the statute in question for violating the effects prong of the *Lemon* test[167] and never analyzed the statute's purpose.[168] Other cases in this group involve engaging purpose analysis but not coming to a definitive conclusion as to the purpose of an action.[169] There are also cases involving some substantive analysis of the Establishment Clause but were decided on different grounds.[170] Another type of case not fitting uniformly into the five main purpose types is that involving the intersection of the Establishment and Free Exercise Clauses.[171] For instance, the outcome in *Trinity Lutheran Church v. Comer* depends upon a hybridized judicial theory that incorporates both Religion Clauses.[172]

Finally, some Establishment Clause cases set aside conventional purpose analysis when certain exceptions apply.[173] This result does not occur frequently.[174]

165. *See id.* at 309. Between religious purpose and primary or preeminent religious purpose, the Court has struck down government actions and enactments on six occasions. *See* ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 85–86 (2013).

166. *See, e.g.*, Est. of Thornton v. Caldor, Inc., 472 U.S. 703, 710–11 (1985).

167. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.") (internal citations and quotation marks omitted) (first citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968); and then quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)). These three elements, or "prongs," of the *Lemon* test are referred to as the "purpose," "effects," and "excessive entanglement" prongs, respectively. *E.g.*, Amy J. Alexander, *When Life Gives You the* Lemon *Test: An Overview of the* Lemon *Test and Its Application*, 3 PHX. L. REV. 641, 643 (2010).

168. *See Est. of Thornton*, 472 U.S. at 708–10.

169. *See, e.g.*, Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472, 482 (1973).

170. *See, e.g.*, Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 761–70 (1995) (free speech grounds).

171. *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024–25 (2017); Cutter v. Wilkinson, 544 U.S. 709, 719–20 (2005). These types of cases are characterized by the ability to "play in the joints" of the Religion Clauses. *See Walz*, 397 U.S. at 669; *see also* Kent Greenawalt, *Speech and Exercise by Private Individuals and Organizations*, 72 SMU L. REV. 397, 398 (2019) ("[P]rotecting free exercise ties to the Establishment Clause's premise that government should not favor one particular religion over others . . . ."). For greater discussion of the intersection between Establishment and Free Exercise Clauses, see generally KENT GREENAWALT, WHEN FREE EXERCISE AND NONESTABLISHMENT CONFLICT (2017).

172. *See Trinity Lutheran Church of Columbia, Inc.*, 137 S. Ct. at 2019–21; *see also* Richard W. Garnett & Jackson C. Blais, *Religious Freedom and Recycled Tires: The Meaning and Implications of* Trinity Lutheran, 2017 CATO SUP. CT. REV. 105, 120–30 (analyzing what the *Trinity Lutheran* decision portends for "playing in the joints" of the Religion Clauses).

173. *See, e.g.*, Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1129–34, 1145–48 (2020).

174. *See* Town of Greece v. Galloway, 572 U.S. 565 (2014); Hosanna-Tabor Evangelical Lutheran

For instance, in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Court officially recognized the ministerial exception to the Establishment Clause, which exempts religious institutions from antidiscrimination laws when hiring employees.[175] Then there are the historical exception cases, in which the Justices set aside purpose analysis in favor of historical tradition as dispositive guidance.[176] In sum, while these cases do not deal directly with the concept of purpose analysis, they each play a particular role in fully understanding the Court's approach to purpose examination in Establishment Clause jurisprudence.

While these purpose categories begin to make some sense of the entropic jurisprudential array that is the modern Establishment Clause canon, what can be taken away from these groupings? Drawing conclusions from this varied and broad body of case law would likely be helpful—up to a point. Breaking down these cases by the three criteria outlined above[177] sheds greater light on this byzantine area of law.

B. ESTABLISHMENT CLAUSE CASES BY CONCEPTIONS OF PURPOSE

To start, the subjective approach is the least frequently invoked notion of how judges discern purpose in Establishment Clause cases. In fact, the Court has drawn its conclusion as to purpose "subjectively" in only one case: *Board of Education of Kiryas Joel Village School District v. Grumet*.[178] The case involved an "unusual Act"[179] which "empowered [the] locally elected board of education to take such action as opening schools and closing them, hiring teachers, prescribing textbooks, establishing disciplinary rules, and raising property taxes to fund operations."[180] The statute's peculiar nature came from the fact that the residents of the school district were members of the Satmar Hasidic religious sect.[181]

In the opinion for the Court, Justice Souter examined the evidence to reconstruct what he subjectively believed to be the purpose with which the New York State Assembly and Governor had acted.[182] While the enactors did not explicitly state a religious purpose, the majority found the textual and contextual evidence relevant to the statute's delegation of civil authority to be based on religious affiliation, just not in express terms.[183] Justice Souter considered three

Church & Sch. v. EEOC, 565 U.S. 171 (2012); Marsh v. Chambers, 463 U.S. 783 (1983).

175. *See Hosanna-Tabor*, 565 U.S. at 188–89; *see also* Brian M. Murray, *A Tale of Two Inquiries: The Ministerial Exception After* Hosanna-Tabor, 68 SMU L. REV. 1123, 1126–47 (2015) (analyzing *Hosanna-Tabor* and its application in the lower courts).

176. *See, e.g.*, McCreary County v. ACLU of Ky., 545 U.S. 844, 859 n.10 (2005) ("In special instances we have found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious."); *see also* Krista M. Pikus, *Hopeful Clarity or Hopeless Disarray?: An Examination of* Town of Greece v. Galloway *and the Establishment Clause*, 65 CATH. U. L. REV. 387, 402–08 (2015) (analyzing the case's implications).

177. *See supra* Parts III.A.–C.

178. 512 U.S. 687, 709–10 (1994).

179. *Id.* at 690.

180. *Id.* at 693.

181. *Id.* The Court describes the Satmar Hasidic sect in depth in the first section of its opinion. *See id.* at 690–91.

182. *See id.* at 698–705.

183. *See id.* at 699.

other facts significant: (1) the State Assembly knew the incorporated village remained exclusively Satmar; (2) carving the school district in this manner ran counter to customary practice; and (3) the act originated as a special act of the State Assembly.[184] From these facts and other textual and contextual evidence, the Court identified a subjective legislative purpose to the New York State Assembly's action: the legislators intended to define "a political subdivision and hence the qualification for its franchise by a religious test, resulting in a purposeful and forbidden fusion of governmental and religious functions."[185]

The limited nature of the subjective conception of purpose in modern Establishment Clause cases makes two things clear. First, the Supreme Court reluctantly engages in subjective guesswork as to the purpose with which government actors operate in this context. Second, even when the Justices subjectively identify governmental purpose, they ground the assessment in concrete evidence.[186]

The second conceptual understanding of purpose—objectively imputing the collective purpose of governmental actors based primarily on the face of the action in question—plays the most significant role in the context of the Establishment Clause. In the vast majority of these cases, the Justices derive purpose from the semantic context and stated purpose of such action.[187] For instance, the Court upheld the Higher Education Facilities Act in *Tilton v. Richardson*, finding the statute in question applied to "all colleges and universities regardless of any affiliation with or sponsorship by a religious body."[188] In examining the law's purpose, Chief Justice Burger looked to the text of the statute and the legislature's stated statutory purpose.[189] Finding the statutory text and procedural evidence to support Congress's asserted purpose of ensuring the "fullest development of the[] intellectual capacities" of "this and future generations of American youth,"[190] the Court deemed this purpose secular and thereby valid.[191]

Tilton demonstrates three general trends in Establishment Clause cases in which purpose is objectively imputed by judges on the face of the challenged governmental action. First, when the Court utilizes this conception of purpose, the Justices tend not to engage in extensive purpose examination if the stated purpose of the statute is facially neutral.[192] Relatedly, the Court will likely defer to the governmental actor or body's stated purpose out of judicial concern regarding "the legitimate objectives of any [governmental actions being] subverted

184. *See id.* at 699–701.

185. *See id.* at 702 (internal quotation marks omitted). For further discussion of *Kiryas Joel* and its unique substantive issues, see Abner S. Greene, Kiryas Joel *and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 27–57 (1996).

186. *See, e.g.*, *infra* notes 189–190 and accompanying text.

187. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 661–62 (2002); Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987); Tilton v. Richardson, 403 U.S. 672, 684–89 (1971).

188. *Tilton*, 403 U.S. at 676.

189. *Id.* at 675.

190. *Id.* at 678 (quoting 20 U.S.C. § 701 (1964)).

191. *Id.* at 679.

192. *See, e.g.*, *id.* at 678–80.

by conscious design or lax enforcement"[193]—standing alone, these concerns do not "warrant striking down a statute as unconstitutional."[194] Finally, when the Supreme Court conceives of purpose by objective determination on the face of an action, the Court will rarely declare the action in question unconstitutional under the Establishment Clause.[195]

Lastly, there is the expressive-meaning conception of purpose in Establishment Clause cases, which arises more often than subjective conceptions of purpose but less often than objectively imputed conceptions of purpose.[196] Nevertheless, scholars turn to some Establishment Clause cases as the clearest examples of how the Supreme Court examines the overlap of expressive theory and purpose analysis.[197] For instance, in *Santa Fe Independent School District v. Doe*, Justice Stevens focused on the school district's message that seemingly endorsed prayer at Santa Fe High School.[198] Because an objective observer would have reasonably perceived the pregame message as a public expression of state-sanctioned prayer in public schools, the Court imputed such expressive purpose to the school district and found the purpose in question violative of the Establishment Clause.[199]

Santa Fe demonstrates two key takeaways regarding expressive purpose in Establishment Clause cases. First, while the application of this notion of purpose is relatively new and novel, the theory is and remains a viable manner in which the Court identifies purpose in this type of case.[200] Additionally, in all but one modern Establishment Clause case since *Lemon*,[201] the Supreme Court has found violations of the Establishment Clause when expressive theories guided the Justices in identifying the purpose of an action or enactment.

C. ESTABLISHMENT CLAUSE CASES BY EVIDENCE OF PURPOSE

The extent to which the type of evidence plays a role in identifying purpose in Establishment Clause cases is jumbled but nevertheless meaningful. While no significant pattern or formula wholly explains the Court's decision-making process, important conclusions can still be drawn.

First, no necessary condition exists as to what kind (or how much) purpose evidence is needed to locate purpose in an Establishment Clause case. For instance, the Court accounted for all five types of evidence to find a religious

193. *Id.* at 679.

194. *Id.*

195. *See, e.g.*, *id.* at 679. *But see, e.g.*, Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam). The Supreme Court has made clear that a statement of legislative purpose warrants scrutiny to ensure its sincerity and that the stated purpose is not a "sham." See Edwards v. Aguillard, 482 U.S. 578, 586–87 (1987); *see also* Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring).

196. *See, e.g.*, McCreary County v. ACLU of Ky., 545 U.S. 844, 881 (2005); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000); McGowan v. Maryland, 366 U.S. 420, 453 (1961).

197. *See, e.g.*, Note, *The Establishment Clause and the Chilling Effect*, 133 HARV. L. REV. 1338, 1343–46 (2020); Anderson & Pildes, *supra* note 69, at 1545–51; Fallon, *supra* note 8, at 549–50.

198. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 309–10.

199. *See id.* at 308–10; Fallon, *supra* note 8, at 549–50.

200. *See, e.g.*, *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308–10.

201. *See* Lynch v. Donnelly, 465 U.S. 668, 686–87 (1984).

purpose in *Wallace v. Jaffree*,[202] but the Justices examined only textual evidence in *Larson v. Valente* to reach the same outcome.[203] It is clear the Court may examine textual, contextual, procedural, pretextual, and effectual evidence when identifying purpose in an Establishment Clause case, but the Justices will not always consider *all* evidence presented by the parties indicative of purpose.[204]

When the Court does identify purpose, however, the analysis almost always involves textual evidence.[205] The critical role semantic evidence plays in Establishment Clause cases likely occurs for three reasons. First, text is the most clear and concrete type of purpose evidence—it is almost always the only "objective" basis of evidence.[206] Second, using textual evidence to justify the outcome of a case resonates with Justices who are less likely to invoke other types of purpose evidence.[207] Finally, some on the Court certainly take solace in the "values of democratic legitimacy, interpretive fidelity, and judicial restraint" textual evidence provides.[208]

While practically all Justices on the Supreme Court rely on text in their Establishment Clause decisions, they diverge as to their reliance on contextual and procedural evidence. This methodological difference may seem logical given the Justices' distinctive methods of interpretation, but the degree to which contextual and procedural evidence forms the basis of a decision can have significant consequences. *Trump v. Hawaii* recently demonstrated these potential and very real effects.[209]

In *Trump v. Hawaii*, the Court found President Trump's "travel ban" to be a legitimate exercise of executive authority and to comport with the strictures of the Establishment Clause.[210] The evidence used to examine purpose in Chief Justice Roberts's majority opinion and Justice Sotomayor's dissenting opinion illuminates the distinct analytical processes utilized to decide the case. In his

202. 472 U.S. 38, 55–61 (1985).

203. *See* Larson v. Valente, 456 U.S. 228, 246–47, 253–54 (1982).

204. *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565, 577–91 (2014) (forgoing contextual and effectual purpose evidence).

205. *See, e.g.*, Huq, *supra* note 75, at 1267 nn.229–30 (collecting cases).

206. *See id.* at 1269.

207. *See, e.g.*, John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 430–31 (2005) (explaining the importance of text as a means of interpretation). For example, in *McGowan*, the Court voted 8–1 to uphold a Sunday Closing law. McGowan v. Maryland, 366 U.S. 420, 453 (1961). Justice Felix Frankfurter, one of the more zealous advocates of textualism to sit on the Court, concurred in the decision, averring the consideration of other evidence in favor of the statutory text. *See id.* at 520–21 (Frankfurter, J., concurring). Even in spite of the effect the law would have on the Jewish petitioners with whom he shared a religious faith, Justice Frankfurter relied upon the statutory text to ground his decision, opining, "However preferable, personally, one might deem such an exception, I cannot find that the Constitution compels it." *Id.* at 520.

208. Jeffrey Rosen, *Introduction*, 66 GEO. WASH. L. REV. 1081, 1081 (1998). *But see* Andrew Tutt, *Fifty Shades of Textualism*, 29 J.L. & POL. 309, 317 (2014) ("To accept [textualism] as the standard for measuring the legitimacy of an interpretation transforms the whole enterprise into an elaborate incantation of the words 'trust me.'").

209. *See* Trump v. Hawaii, 138 S. Ct. 2392 (2018); *see also* Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475, 1500–06 (2018) (detailing the effects of President Trump's executive orders outside of the courtroom).

210. *See Trump*, 138 S. Ct. at 2400–02, 2423. *See generally* Neal Kumar Katyal, Trump v. Hawaii: *How the Supreme Court Simultaneously Overturned and Revived* Korematsu, 128 YALE L.J. F. 641 (2019).

opinion, Chief Justice Roberts identified legitimate secular purposes for the travel ban and therefore upheld the executive order under the Establishment Clause.[211] The Chief Justice explicitly acknowledged the contention made by the travel ban's challengers that "a series of statements by the President and his advisers casting doubt on the official objective of the [travel ban]" might evidence an illegitimate religious purpose under the Establishment Clause;[212] ultimately, Chief Justice Roberts was unpersuaded by this procedural evidence of purpose because the text was "facially neutral toward religion" and the travel ban was "a matter within the core of executive responsibility."[213]

By contrast, Justice Sotomayor forcefully maintained that President Trump's travel ban violated the Establishment Clause.[214] Justice Sotomayor asserted that Supreme Court precedent mandated consideration of textual, contextual, procedural, and effectual evidence when reviewing an alleged violation of the Establishment Clause.[215] After a comprehensive recitation of the procedural-purpose evidence from the Trump campaign and the early days of the Trump Presidency,[216] Justice Sotomayor concluded that the primary purpose of the travel ban was "to disfavor Islam and its adherents by excluding them from the country" and, therefore, the travel ban ran afoul of the Establishment Clause.[217] The contrasting approaches taken by Chief Justice Roberts and Justice Sotomayor demonstrate how the types of purpose evidence considered and the weight given to each can significantly impact the outcome of Establishment Clause cases.[218]

A final notable observation relates to the inclusion of pretextual and effectual evidence in an Establishment Clause opinion. Aside from the Sunday Closing Law cases and *Agostini v. Felton*,[219] every case that considered effectual evidence ultimately struck down the governmental action in question.[220] Similarly, every case that considered pretextual evidence ultimately invalidated the action under review.[221] And not surprisingly, cases examining effectual evidence tend to consider pretextual evidence, and vice versa.[222]

Examining evidence of purpose in Establishment Clause cases clearly

211. *Trump*, 138 S. Ct. at 2420–23.

212. *Id.* at 2417; *see* Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. 1337, 1392–95 (2019).

213. *See Trump*, 138 S. Ct. at 2418.

214. *Id.* at 2433 (Sotomayor, J., dissenting).

215. *See id.* at 2434–35. Arguably the most critical difference between Roberts's and Sotomayor's opinions concerned the role contextual evidence—President Trump's campaign statements—should play in the travel ban litigation. *See* Coenen, *supra* note 33, at 335–36.

216. *See Trump*, 138 S. Ct. at 2435–38 (Sotomayor, J. dissenting).

217. *Id.* at 2438–40 (citing McCreary County v. ACLU of Ky., 545 U.S. 844, 862–63 (2005)).

218. For empirical analysis of the interpretative canons and devices used by the Court, see Krishnakumar, *supra* note 7, at 847–55.

219. 521 U.S. 203, 239–40 (1997).

220. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 599 (1992); Engel v. Vitale, 370 U.S. 421, 436 (1962).

221. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 107 (1968) ("No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens.").

222. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 60–61 (1985); Torcaso v. Watkins, 367 U.S. 488, 489–91, 495–96 (1961).

demonstrates significant aspects of the Supreme Court's approach to this extensive strand of case law. The most critical conclusion, however, is that the approach taken towards identifying purpose in Establishment Clause cases may be the root of the jurisprudential cacophony. Specifically, the way in which the Justices utilize contextual, procedural, and effectual evidence to evince purpose may be the very cause of the convoluted nature in this area of law. Establishment Clause cases are extraordinarily fact-dependent; as such, when one claims that decisions in these cases rely upon the Justices on the Court or the framework implemented by the majority, it is more accurate to conclude that the types of purpose evidence the Justices are willing to consider explain the Establishment Clause's labyrinthine nature.

D. ESTABLISHMENT CLAUSE CASES BY INDICIA OF IMPERMISSIBLE PURPOSE

For the most part, looking to indicia of impermissible purpose in Establishment Clause cases contributes little to better understanding the Court's approach in this area. However, two useful conclusions are apparent. First, when a decision in an Establishment Clause case mentions or discusses just one of the indicia, the Court is much more likely to find a challenged action constitutionally impermissible.[223] Whether inclusion of one or more of these indicia of impermissible purpose in an opinion is a cause or a result of the Court's decision regarding the law under examination remains to be seen but is noteworthy nevertheless. Second, when the Justices discuss indicia at all in Establishment Clause decisions, the two indicia most frequently invoked are lack of impartiality[224] and classification,[225] respectively.

A natural question in light of the limited role these indicia play in Establishment Clause analysis is, why so? The answer is likely two-fold. First, these indicia skew more closely to policy considerations than interpretive canons, and the Justices take precautions to avoid the appearance of "legislating from the bench,"[226] especially when handling sensitive cases like those involving the Establishment Clause. As well, keeping discussion of these indicia to a minimum helps prevent "branding the wrongdoer,"[227] a potential phenomenon only further intensified by the talismanic effect Supreme Court rulings have on public affairs and jurisprudential development.[228]

Taking these observations together reaffirms the previous discussion: the core justification for purpose analysis in the Establishment Clause canon (and

223. *See, e.g.*, McCreary County v. ACLU of Ky., 545 U.S. 844, 881 (2005).

224. *See, e.g.*, *Lee*, 505 U.S. at 596.

225. *See, e.g.*, Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 14–17 (1989).

226. *See* Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185, 194–96 (2007) (defining the term "legislating from the bench" and its role in public discourse of the judiciary).

227. *See* First Mondays, *supra* note 93. A Supreme Court decision even slightly insinuating that a person or group acted in a theophobic or xenophobic manner could be delegitimizing to the judiciary. *See id.*

228. While the Court has a solid record overall in appropriately deciding cases, the Justices have previously erred in critical cases. *See, e.g.*, Scott v. Sanford, 60 U.S. (19 How.) 393, 454 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

constitutional law as a whole) originates in the concern for the legitimacy of the Court and the judicial branch. By invoking these indicia of impermissible purpose when striking down a statute under the Establishment Clause, the Court communicates to litigants and the American people that it will weigh in on the church-and-state debate only when entirely necessary—to legitimate the very nature of American governmental institutions and to ensure "equal concern and respect" for all those subject to the laws of the United States.[229]

V. CONCLUSION

Modern Establishment Clause jurisprudence and constitutional purpose analysis are intricate and involved and attempting to synthesize and study them creates an entirely new analytical Leviathan. But the foregoing analysis demonstrates some overarching conclusions and forges new questions to be explored.

First, purpose has not been the dispositive analytical component in the vast majority of Establishment Clause cases the Supreme Court has decided.[230] Albeit an element in the general framework used by the Justices, purpose is the deciding factor only on occasion.[231] Second, when conceptualizing the purpose of governmental action in the Establishment Clause context, the Court tends to do so by imputing a collective purpose of the enacting body to make sense of the particular action.[232] When the Justices identify purpose through this "objective" imputation, purpose is rarely the dispositive factor.[233] However, when the Court finds purpose through the expressive conception,[234] purpose tends to be dispositive and usually leads to the invalidation of the action in question.[235]

As well, the Court has engaged all five types of purpose evidence—textual, contextual, procedural, pretextual, and effectual—in its Establishment Clause analyses. When the Justices mention or discuss pretextual or effectual evidence in deriving purpose, the decision will most likely strike down the governmental action in question.[236] Additionally, even though procedural and contextual purpose evidence are most likely to swing the outcome of a case,[237] these types of evidence, while important to consider, are not always dispositive in Establishment Clause purpose analyses.[238] Finally, while indicia of impermissible purpose do not play a significantly active role in most modern Establishment Clause cases, the

229. *See* Ely, *supra* note 35, at 1211.

230. *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024-25 (2017); Est. of Thornton v. Caldor, Inc., 472 U.S. 703, 710–11 (1985); *see also* KOPPELMAN, *supra* note 165, at 86.

231. *See* Note, *Government Display of Religious Symbols–Ten Commandments*, 119 HARV. L. REV. 258, 266 (2005).

232. *See supra* notes 67–69 and accompanying text.

233. *See, e.g.*, Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 396–97 (1990).

234. *See supra* notes 69–70 and accompanying text.

235. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 316–17 (2000).

236. *See, e.g.*, Stone v. Graham, 449 U.S. 39, 42–43 (1980) (per curiam) (pretextual); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 224–27 (1963) (effectual).

237. *See supra* notes 215–22 and accompanying text.

238. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 691–92 (2005).

mention or discussion of religious animus, classification, subordination, or lack of government impartiality in Establishment Clause decisions frequently foretells the finding of impermissible purpose, which normally leads to the invalidation of the action in question.[239]

The insight gained from this analysis is beneficial for better comprehension of this area of constitutional law, but several crucial questions spring from these findings. For instance, how does the type of evidence and the emphasis on particular forms of evidence affect the conception of purpose the Court utilizes in identifying purpose? A more definite answer to this question would be instructive for litigants defending or bringing challenges against actions pursuant to the Establishment Clause. As well, how much of modern Establishment Clause jurisprudence is fact-dependent and, therefore, simply conditional upon the members of the Supreme Court at the time of a decision? And finally, even if the Court overrules *Lemon*, will purpose still play a role in Establishment Clause analysis, and, if so, how significant will that role be?[240]

These questions simply begin an inquiry into Establishment Clause jurisprudence from a different angle. Yet even after analyzing this area of law from numerous perspectives, it is difficult to observe any strong correlation between these analyses and the outcomes in these cases. Even more challenging would be to ignore the possibility that these distinct analytical approaches and the importance given to each remains entirely at the *discretion of judges*, likely based upon concern for the institutional legitimacy of the Judiciary.

Academics and legal commentators continue to warn of enduring threats to the Establishment Clause,[241] and there is anticipation that similar challenges will persist in reaching the Supreme Court.[242] The Bladensburg Cross case elicited seven separate opinions and demonstrated diverging views on the Establishment Clause,[243] further stressing that "the meaning of the Establishment Clause is in play."[244] Regardless of how vigorously the Court attempts to clarify Establishment Clause jurisprudence, legal scholars, practitioners, and the American populace as a whole will not be of "one language and a common speech"[245] on this issue for some time to come.

239. *See, e.g.*, McCreary County v. ACLU of Ky., 545 U.S. 844, 875, 881 (2005).

240. *But see* KOPPELMAN, *supra* note 165, at 84 ("The [secular purpose] doctrine cannot be discarded, however, without effectively reading the Establishment Clause out of the Constitution altogether.").

241. *See, e.g.*, JAMES HITCHCOCK, THE SUPREME COURT AND RELIGION IN AMERICAN LIFE, VOLUME II: FROM "HIGHER LAW" TO "SECTARIAN SCRUPLES" 162–63 (2004).

242. *See* J. Clifford Wallace, *The United States' Approach to Curtailing the Government's Establishment of Religion*, 62 ADVOC. 49, 52 (2019); *see also, e.g.*, Kondratyev v. City of Pensacola, 949 F.3d 1319, 1333–34 (11th Cir. 2020).

243. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2073 (2019).

244. Leslie C. Griffin, *What Can We Expect of Law and Religion in 2020?*, 73 SMU L. REV. F. 73, 77 (2020).

245. *Genesis* 11:1 (New Int'l).