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Louisiana's Balanced-Treatment Act and the Establishment Clause: Edwards v. Aguillard

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NOTES AND COMMENTS

LOUISIANA'S "BALANCED-TREATMENT" ACT AND THE ESTABLISHMENT CLAUSE: *EDWARDS v. AGUILLARD*

I. INTRODUCTION

Thomas Jefferson wrote, "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State."[1] The Supreme Court later adopted Jefferson's interpretation[2] of the religion clauses of the first amendment;[3] however, attempts to erect Jefferson's "wall of separation" have resulted in decisions which imprecisely define what constitutes "establishment" of religion. Thus, Chief Justice Burger conceded in *Lemon v. Kurtzman*[4]

1. Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting 8 JEFF. WORKS 113).

2. *See* Epperson v. Arkansas, 393 U.S. 97, 106 (1968); Everson v. Board of Educ., 330 U.S. 1, 16 (1947); *Reynolds*, 98 U.S. at 164.

3. U.S. CONST. amend. I states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The religion clauses of the first amendment are applicable to the states through the fourteenth amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson*, 330 U.S. at 15. *Contra*, Jaffree v. Board of School Comm'rs, 554 F. Supp. 1104, 1128 (S.D. Ala.), *stay granted*, 459 U.S. 1314, *modified sub nom.* Wallace v. Jaffree, 705 F.2d 1526 (11th Cir. 1983), *prob. juris. noted*, 466 U.S. 924 (1984), *aff'd*, 472 U.S. 38 (1985), where Chief Judge W. Brevard Hand held that the first amendment did not apply to the states, and that Alabama therefore had the power to establish a state religion if it so chose. When the case reached the Supreme Court, Justice Stevens responded:

> Before analyzing the precise issue that is presented to us, it is nevertheless appropriate to recall how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States.
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> . . . [W]hen the Constitution was amended to prohibit any State from depriving any person of liberty without due process of law, that Amendment imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power. This Court has confirmed and endorsed this elementary proposition of law time and time again.

Wallace, 472 U.S. at 48-49 (1985) (footnote omitted).

4. 403 U.S. 602 (1971).

that the line between Church and State was a blurry one at best.[5] In *Lemon*, the Supreme Court announced a test for use in Establishment Clause cases, now known as the *Lemon* test.[6] Nevertheless, the Justices disagree on how the test should be applied[7] and the goal the test is meant to achieve.[8]

The *Lemon* test is a three-pronged examination used by the Supreme Court to determine whether a statute violates the Establishment Clause of the first amendment. A constitutional statute (1) must have a secular legislative purpose, (2) must have a principal or primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive governmental entanglement with religion.[9] If the Supreme Court finds that a statute violates any of the three prongs, the Court will invalidate the statute.[10]

Edwards v. Aguillard[11] focused on the first prong of the *Lemon* test. In *Edwards*, the United States Supreme Court held that the Louisiana "Balanced Treatment for Creation Science and Evolution Science Act"[12] (the Balanced Treatment Act) lacked a secular purpose and was therefore unconstitutional. The Balanced Treatment Act mandated teaching

5. *Id.* at 612.

6. The *Lemon* test requires that "[f]irst, 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.' " *Id.* at 612-13 (footnote omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

7. "The secular purpose prong has proven mercurial in application because it has never been fully defined, and we have never fully stated how the test is to operate." *Wallace*, 472 U.S. at 108 (Rehnquist, J., dissenting).

8. Supreme Court Justices have traditionally believed that government neutrality is the ultimate goal. "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970). *See also* Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (government required to take a neutral position between religion and nonreligion); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 226 (1963) (reaffirming the State's neutral position). *But see Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting) (arguing that the Establishment Clause does not require government neutrality, and that there is no historical basis for such interpretation).

9. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

10. *See, e.g.*, Stone v. Graham, 449 U.S. 39, 40-41 (1980) (per curiam), where the Court stated that "[i]f a statute violates any of these three principles, it must be struck down under the Establishment Clause." *See also Wallace*, 472 U.S. at 56 (second and third prongs of the *Lemon* test are inapplicable if the statute does not have a clearly secular purpose).

11. 107 S. Ct. 2573 (1987).

12. LA. REV. STAT. ANN. §§ 17:286.1-286.7 (West 1982). The entire text of the statute reads as follows:

Section 286.1. Short Title

This Subpart shall be known as the "Balanced Treatment for Creation-Science and Evolution-Science Act."

Section 286.2. Purpose

This Subpart is enacted for the purposes of protecting academic freedom.

"creation-science" whenever theories of evolution were taught in public

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Section 286.3. Definitions

As used in this Subpart, unless otherwise clearly indicated, these terms have the following meanings:

(l) "Balanced treatment" means providing whatever information and instruction in both creation and evolution models the classroom teacher determines is necessary and appropriate to provide insight into both theories in view of the textbooks and other instructional materials available for use in his classroom.

(2) "Creation-science" means the scientific evidences for creation and inferences from those scientific evidences.

(3) "Evolution-science" means the scientific evidences for evolution and inferences from those scientific evidences.

(4) "Public schools" mean public secondary and elementary schools.

Section 286.4. Authorization for balanced treatment; requirement for nondiscrimation.

A. Commencing with the 1982-1983 school year, public schools within this state shall give balanced treatment to creation-science and to evolution-science. Balanced treatment of these two models shall be given in classroom lectures taken as a whole for each course, in textbook materials taken as a whole for each course, in library materials taken as a whole for the sciences and taken as a whole for the humanities, and in other educational programs in public schools, to the extent that such lectures, textbooks, library materials, or educational programs deal in any way with the subject of the origin of man, life, the earth, or the universe. When creation or evolution is taught, each shall be taught as a theory, rather than as proven scientific fact.

B. Public schools within this state and their personnel shall not discriminate by reducing a grade of a student or by singling out and publicly criticizing any student who demonstrates a satisfactory understanding of both evolution-science or creation-science and who accepts or rejects either model in whole or part.

C. No teacher in public elementary or secondary school or instructor in any state-supported university in Louisiana, who chooses to be a creation-scientist or to teach scientific data which points to creationism shall, for that reason, be discriminated against in any way by any school board, college board, or administrator.

Section 286.5. Clarifications

This Subpart does not require any instruction in the subject of origins but simply permits instruction in both scientific models (of evolution-science and creation-science) if public schools choose to teach either. This Subpart does not require each individual textbook or library book to give balanced treatment to the models of evolution-science and creation-science; it does not require any school books to be discarded. This Subpart does not require each individual classroom lectures in a course to give such balanced treatment but simply permits the lectures as a whole to give balanced treatment; it permits some lectures to present evolution-science and other lectures to present creation-science.

Section 286.6. Funding of inservice training and materials acquisition

Any public school that elects to present any model of origins shall use existing teacher inservice training funds to prepare teachers of public school courses presenting any model of origins to give balanced treatment to the creation-science and the evolution-science model. Existing library acquisition funds shall be used to purchase nonreligious library books as are necessary to give balanced treatment to the creation-science model and the evolution-science model.

Section 286.7. Curriculum development

A. Each city and parish school board shall develop and provide to each public school classroom teacher in the system a curriculum guide on presentation of creation-science.

B. The governor shall designate seven creation-scientists who shall provide resource services in the development of curriculum guides to any city or parish school board upon request. Each such creation-scientist shall be designated from among the full-time faculty members teaching in any college and university in Louisiana. These creation-scientists shall serve at the pleasure of the governor and without compensation.

schools.[13] The problem, however, was that the Louisiana legislature included in the Balanced Treatment Act a specific statement that the Act's passage was for a secular purpose.[14] Nevertheless, the Court disregarded this stated purpose and inferred a preeminent religious purpose to strike down the Act.[15]

In *Edwards*, the Court clarified the degree of religious purpose that a statute, arguably violative of the Establishment Clause, is allowed to have and still pass the purpose prong of the *Lemon* test. The decision marked only the third time that the Court has struck down a statute under the *Lemon* test's purpose prong.[16] The two previous statutes failed the purpose prong for having completely religious purposes.[17] The *Edwards* Court, however, struck down the Balanced Treatment Act merely for having a "primary purpose" of advancing religion.[18] Thus, in *Edwards* the Supreme Court clarified its standard for determining a violation of *Lemon's* purpose prong, thereby defeating the Louisiana legislature's attempt to classify creationism as a science.

II. STATEMENT OF THE CASE

A. *Facts*

In June, 1980, Louisiana State Senator Bill Keith[19] introduced legislation entitled "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction."[20] The Louisiana State Legislature passed the bill, and Governor David Treen signed the statute into law

13. *Id.* at § 17:286.4A.

14. *Id.* at § 17:286.2 (section 286.2 provides that "[t]his Subpart is enacted for the purposes of protecting academic freedom").

15. Edwards v. Aguillard, 107 S. Ct. 2573, 2584 (1987).

16. *Id.* at 2593 (Scalia, J., dissenting). The other two statutes were struck down in Wallace v. Jaffree, 472 U.S. 38 (1985) (statute allowing for a daily moment of silent prayer in public schools), and Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (statute ordering the posting of the Ten Commandments in public classrooms). One statute was also struck down due to lack of secular purpose prior to the *Lemon* decision. *See* Epperson v. Arkansas, 393 U.S. 97 (1968) ("anti-evolution" statute which forbade any teaching of the theory of evolution).

17. *See, e.g., Wallace*, 472 U.S. at 56 (statute is unconstitutional if it is entirely motivated by a nonsecular purpose); *Stone*, 449 U.S. 41 (statute with no secular legislative purpose held unconstitutional).

18. *Edwards*, 107 S. Ct. at 2582. The Court held that "[b]ecause the primary purpose of the Creationism Act is to advance a particular religious belief, the Act endorses religion in violation of the First Amendment." *Id.*

19. Senator Keith reportedly began working on the Balanced Treatment Act after learning that his son's science teacher had refused to accept as satisfactory the boy's explanation of the origin of man. The younger Keith's response had been, "God created the world, and God created Man." Reidinger, *Creationism in the Classroom*, 72 A.B.A. J. 66, 67 (1986).

20. LA. REV. STAT. ANN. §§ 17.286.1-286.7 (West 1982).

on July 20, 1981.[21] The Balanced Treatment Act did not require that any instruction be given as to the origin of man,[22] but it did mandate that "creation-science" must be taught whenever "evolution-science" is taught.[23]

Uncertainty over the Act's constitutionality eventually led to litigation. When the Louisiana Department of Education failed to implement the Balanced Treatment Act,[24] Senator Keith filed suit seeking to have the Act declared constitutional and to force its implementation.[25] Parents challenging the Balanced Treatment Act in a separate suit sought declaratory relief in the United States District Court for the Eastern District of Louisiana[26] to have the Balanced Treatment Act declared unconstitutional under the first and fourteenth amendments of the United States Constitution, and to enjoin the Act's implementation.[27] That suit was stayed pending the outcome of Senator Keith's suit.[28]

The parents' suit focused on the intent of the legislature in passing the Balanced Treatment Act.[29] The plaintiffs, who included Louisiana teachers and religious leaders,[30] claimed that the Act's purpose was to attack the theory of evolution, and to incorporate the Biblical theory of creationism into public education.[31] The defendants, Louisiana state officials who were charged with implementing the Balanced Treatment Act,[32] argued that the statute was passed with the intent of promoting

21. *Edwards*, 107 S. Ct. at 2597 (Scalia, J., dissenting).

22. "This Subpart does not require any instruction in the subject of origins but simply permits instruction in both scientific models (of evolution-science and creation-science) if public schools choose to teach either." LA. REV. STAT. ANN. § 17:286.5 (West 1982).

23. *Id.* at § 17:286.4A.

24. J. Kelly Nix, Superintendent of the Louisiana Department of Education, believed the Balanced Treatment Act to be unconstitutional, and decided to forego implementing it until its constitutionality was judicially decided. Comment, *The Louisiana Balanced Treatment Act: A Fundamentalist Facade?*, 9 S.U.L. REV. 99, 99-100 (1982).

25. That suit was eventually dismissed on jurisdictional grounds. Keith v. Louisiana Dep't of Educ., 553 F. Supp. 295 (M.D. La. 1982).

26. Edwards v. Aguillard, 107 S. Ct. 2573, 2576 & nn.1-2 (1987).

27. Aguillard v. Treen, 440 So. 2d 704, 706 (La. 1983), *aff'd sub nom.* Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985), *prob. juris. noted*, 106 S. Ct. 1946 (1986), *aff'd*, 107 S. Ct. 2573 (1987).

28. *Edwards*, 107 S. Ct. at 2576 n.2.

29. *Id.* at 2576.

30. *Id.*

31. *Edwards*, 765 F.2d at 1254.

32. *Edwards*, 107 S. Ct. at 2576 n.1. The defendants included the Governor, Attorney General, and State Superintendent of Education of Louisiana, the State Department of Education, and the St. Tammany Parish School Board. The Louisiana Board of Elementary and Secondary Education and the Orleans Parish School Board were originally named as defendants in the suit, but both were later realigned as plaintiffs. *Id.*

academic freedom, and therefore was constitutional.[33]

The United States district court invalidated the Balanced Treatment Act as violative of the United States Constitution.[34] The court granted the plaintiff's motion for summary judgment[35] and enjoined the implementation of the Balanced Treatment Act,[36] stating that teaching the doctrine of creation-science necessarily entails the teaching of a religious tenet, the existence of a Divine Creator.[37]

The Fifth Circuit Court of Appeals affirmed the district court decision,[38] agreeing that the statute was intended to promote a religious belief.[39] The defendant petitioned the United States Supreme Court, which noted probable jurisdiction over the case on May 5, 1986.[40]

B. *Issue*

Edwards addressed the issue of whether the Balanced Treatment Act violated the Establishment Clause, and more specifically whether a secular legislative purpose prompted passage of the Act.[41] The Supreme Court found no valid secular purpose and struck down the Balanced Treatment Act on June 19, 1987.[42]

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33. *Id.* at 2576.

34. Aguillard v. Treen, 634 F. Supp. 426, 429 (E.D. La.), *aff'd sub nom.* Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985), *prob. juris. noted*, 106 S. Ct. 1946 (1986), *aff'd*, 107 S. Ct. 2573 (1987). After dismissing Senator Keith's suit on jurisdictional grounds, Keith v. Louisiana Dep't of Educ., 553 F. Supp. 295 (M.D. La. 1982), the district court lifted its stay on Aguillard v. Treen, and (in an unpublished opinion) United States District Judge Adrian Duplantier held the Balanced Treatment Act to be in violation of the Louisiana Constitution. The defendants appealed that decision to the United States Court of Appeals for the Fifth Circuit, which certified the state constitutional question to the Louisiana Supreme Court. The Fifth Circuit Court of Appeals certified the question of whether the Louisiana legislature had the authority under the state constitution to prescribe courses of public school study—a duty assigned by the state constitution to the Board of Elementary and Secondary Education (BESE). The State Supreme Court held that BESE's power was not exclusive, and that the ability to pass laws setting public school curriculums remained in the state legislature's plenary powers. Aguillard v. Treen, 440 So. 2d 704, 710 (La. 1983). When the high court of Louisiana found no violation of the state constitution, the Fifth Circuit Court of Appeals remanded the case to the District Court with instructions to address the federal constitutional questions. Aguillard v. Treen, 720 F.2d 676 (5th Cir. 1983).

35. *Treen*, 634 F. Supp. at 427.

36. *Id.*

37. *Id.* at 428.

38. Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985), *prob. juris. noted*, 106 S. Ct. 1946 (1986), *aff'd*, 107 S. Ct. 2573 (1987). In May of 1984, Edwin W. Edwards replaced David Treen as Governor of Louisiana, and thus, as a defendant in this case.

39. *Id.* at 1253.

40. Edwards v. Aguillard, 106 S. Ct. 1946 (1986).

41. Edwards v. Aguillard, 107 S. Ct. 2573, 2577-78 (1987).

42. *Id.*

III. LAW PRIOR TO THE CASE

A. *The Development of a Test*

In the 1920's, John Thomas Scopes attempted to teach the theory of evolution to his Tennessee biology class in spite of the state's "monkey law," which prohibited the teaching of theories which were contrary to the Biblicial story of Creation.[43] Scopes was convicted of violating the statute and fined one hundred dollars.[44] The Supreme Court of Tennessee refused to sustain Scope's Establishment Clause challenge to the statute,[45] but the court did reverse Scope's conviction on technical grounds.[46]

To decide the statute's constitutionality, the Tennessee court focused on the effect of the statute, rather than on its purpose. Scopes challenged the validity of the statute on the grounds that the motive of the Tennessee legislature in passing the anti-evolution statute was improper.[47] The court responded that "the validity of a statute must be determined by its natural and legal effect, rather than proclaimed motives."[48] The Tennessee court's holding that the purpose of the statute was not relevant to its validity was eventually superceded by the United States Supreme Court's formal Establishment Clause test.[49]

The Supreme Court announced its first Establishment Clause test in *School District of Abington Township v. Schempp*.[50] Two previous decisions[51] served as the source of the test the Court used to strike down a

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43. 1925 Tenn. Pub. Acts 50, known as the Tennessee Anti-Evolution Act provides in pertinent part:

> Section 1. *Be it enacted by the General Assembly of the State of Tennessee*, That it shall be unlawful for any teacher in any of the Universitis[sic], Normals and all other public schools of the State which are supported in whole or in part by the public school funds of the State, to teach any theory that denies the story of the Devine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.

44. Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927).

45. *Id.* at __, 289 S.W. at 366-67. The Tennessee Supreme Court stated:

> We are not able to see how the prohibition of teaching the theory that man has descended from a lower order of animals gives preference to any religious establishment or mode of worship. . . . Belief or unbelief in the theory of evolution is no more a characteristic of any religious establishment or mode of worship than is belief or unbelief in the wisdom of the prohibition laws.

Id. at __, 289 S.W. at 367.

46. *Id.* Tennessee law required any fine over fifty dollars to be imposed by a jury. Scope's fine was imposed by the trial judge. *Id.*

47. *Id.*

48. *Id.* (citations omitted).

49. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

50. 374 U.S. 203 (1963).

51. *Id.* at 222. *See* Everson v. Board of Educ., 330 U.S. 1 (1947) (focusing on the requirement

statute that required Bible reading in public schools.[52] According to the Court, the test for violation of the Establishment Clause considered both the purpose and the primary effect of the enactment.[53] Justice Clark explained the application of the rule, stating that "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[54] Thus, the Court derived a two-part test.

The Court rejected the school board's contention that the decision established a "religion of secularism."[55] Justice Clark pointed out the value of studying religious materials for their literary and historic value, and noted that the first amendment does not prohibit any teaching of the Bible or religion when it is presented objectively.[56] Justice Clark stated that the teaching of Biblical theory in public schools is not unconstitutional;[57] however, the study of the Bible is limited to its "literary and historic qualities."[58]

While *Abington* addressed a state's attempt to promote religion by requiring the use of religious materials in the schools, *Epperson v. Arkansas*[59] represented a state's attempt to promote religion by keeping theories contrary to religion out of the schools. *Epperson* involved a 1928 "anti-evolution" statute, which prohibited teaching the theory of evolution[60] in any state supported school. A unanimous Supreme Court reversed the Arkansas Supreme Court and struck down the statute.[61] Justice Fortas equated the Arkansas statute with Tennessee's "monkey

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of government neutrality to uphold a program that reimbursed school children—including students of parochial schools—for their public transportation bus fare when traveling to and from school); McGowan v. Maryland, 366 U.S. 420, 449 (1961) (holding that the purpose and effect of a Sunday Closing Law was "not to aid religion, but to set aside a day of rest and recreation").

52. "The Commonwealth of Pennsylvania by law . . . requires that '[a]t least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.' " *Abington*, 374 U.S. at 205 (quoting PA. STAT. ANN. tit. 24 § 15-1516 (Purdon 1962)).

53. *Id.* at 222.

54. *Id.*

55. *Id.* at 225.

56. *Id.*

57. The Court stated that "[n]othing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment." *Id.*

58. *Id.*

59. 393 U.S. 97 (1968).

60. "[I]t shall be unlawful for any teacher or other instructor in any University, College, Normal, Public School, or other institution of the State . . . to teach the theory or Doctrine that mankind ascended or descended from a lower order of animals. . . ." ARK. STAT. ANN. § 80.1627 (1947).

61. *Epperson*, 393 U.S. at 109.

law," writing that "there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man."[62] Justice Fortas cited *Abington's* purpose and effect test as one of several precedents used to strike the statute.[63]

The Court also noted in *Epperson* that the state had the right to prescribe a curriculum for its public schools,[64] and that not all religious study in public schools is unconstitutional.[65] According to the Court, the historic and literary study of religion and the Bible is allowed when it is presented objectively as part of a secular program of education.[66] Justice Fortas warned, though, that the state cannot develop its curriculum around religious principles.[67] When combined, *Abington* and *Epperson* prohibit anti-evolutionists from promoting their religious beliefs by forcing the teaching of creationism or by excluding contrary theory.

In *Walz v. Tax Commission*,[68] the Court introduced a third criterion to determine a violation of the Establishment Clause: whether the challenged act caused an excessive entanglement between the government and religion.[69] In *Walz*, the Court upheld New York's property tax exemption of any property held by religious organizations and used solely for worship.[70] After finding that the law's purpose was secular,[71] Chief Justice Burger, writing for the majority, went on to say that "[w]e must also be sure that the end result—the effect—is not an excessive government entanglement with religion."[72] Although Chief Justice Burger appeared to be applying the effect prong of the Court's previously

62. *Id.* *See also id.* at 108 n.16, which avers that "[t]he following advertisement is typical of the public appeal which was used in the campaign to secure adoption of the statute:

> THE BIBLE OR ATHEISM, WHICH?
>
> All atheists favor evolution. If you agree with atheism vote against Act No. 1. If you agree with the Bible vote for Act No. 1. . . . Shall conscientious church members be forced to pay taxes to support teachers to teach evolution which will undermine the faith of their children? The Gazette said Russian Bolshevists laughed at Tennessee. True, and that sort will laugh at Arkansas. Who cares? Vote FOR ACT NO. 1."

Id. (quoting from the Arkansas Gazette, Nov. 4, 1928, at 12, cols. 4-5).

63. *Id.* at 107.

64. *Id.*

65. *Id.* at 106.

66. *Id.*

67. "There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." *Id.*

68. 397 U.S. 664 (1970).

69. *Id.* at 674.

70. *Id.* at 666.

71. *Id.* at 674.

72. *Id.*

announced purpose and effect test, his discussion of "excessive entanglement" was evidently so popular among the other Justices that it was later incorporated as a third prong of Establishment Clause scrutiny.

The Court eventually arrived at the current Establishment Clause test by combining the purpose and effect analysis it used in *Abington* and *Epperson* with the entanglement factor from *Walz*. The modern test, commonly known as the *Lemon* test, is a three-pronged examination named for the case in which it was enunciated, *Lemon v. Kurtzman*.[73] Chief Justice Burger stated: "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.' "[74] The Supreme Court has used the *Lemon* "purpose-effect-entanglement" examination in nearly every Establishment Clause case it has decided since the test's inception.[75]

B. *Application of the* Lemon *Test*

Kentucky legislators must have had the *Lemon* test in mind when they passed the statute[76] later challenged in *Stone v. Graham*,[77] because they took special steps to display a secular intent. The Kentucky law required that the Ten Commandments be posted on the wall of each public school classroom in the state and mandated that each display contain a statement of the display's secular purposes.[78] The Supreme Court

73. 403 U.S. 602 (1971).

74. *Id.* at 612-13 (citations omitted). The first two prongs of the *Lemon* test, although attributed by Chief Justice Burger to Board of Educ. v. Allen, 392 U.S. 236 (1968), restate the purpose and effect concepts of School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963). These two prongs of the test were stated in *Abington* as "what are the purpose and the primary effect of the enactment?" *Id.* at 222. Walz v. Tax Comm'n, 397 U.S. 664 (1970), served as the source of the third prong.

75. The single exception to the Court's consistent use of the *Lemon* test in Establishment Clause cases is Marsh v. Chambers, 463 U.S. 783 (1983). In *Marsh*, the Court upheld the constitutionality of the Nebraska legislature's practice of having a state-paid chaplain open each session with a prayer, basing its decision on the historical acceptance of the practice, which dated back to colonial times. Chief Justice Burger wrote that "[t]o invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 792.

76. KY. REV. STAT. ANN. § 158.178 (Michie/Bobbs-Merrill 1980).

77. 449 U.S. 39 (1980) (per curiam).

78. "In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: 'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal Code of Western Civilization and The Common Law of the United States.' " KY. REV. STAT. ANN. § 158.178(2) (Michie/Bobbs-Merrill 1980).

ignored the stated secular purpose, observing instead that the Commandments are undeniably religious.[79]

Stone was the first occasion in the history of the *Lemon* test that the Court disregarded a stated a secular purpose and imputed a religious one. Significantly, in the past the Court had commonly deferred to legislative statements of purpose or to findings of secular purpose made by state courts.[80] Both were present here, and both were ignored.[81]

After the Court determined that legislative statements of purpose would not always be decisive, it then determined which factors to use to find the *actual* purpose for the passage of a statute. In *Wallace v. Jaffree*,[82] the Court stated that one factor to consider was how an act changed existing law. The Alabama statute challenged in *Wallace* allowed public schools to observe a daily minute of silence "for meditation or voluntary prayer."[83] Because Alabama already had a similar law on the books which allowed a minute of silence for meditation,[84] and this new statute only added the words "or voluntary prayer," the Supreme Court concluded that the act must have been passed for the impermissible purpose of endorsing or promoting prayer in the public school systems of Alabama.[85] Thus the law was struck down. The *Wallace* Court also held that a statute may pass the *Lemon* test, and therefore be constitutional, even if it is motivated in part by a religious purpose. However, the Court warned that any statute motivated entirely by a religious purpose must be invalidated.[86] Until the *Edwards* decision, *Wallace* and

79. *Stone*, 449 U.S. at 41. The *Stone* Court refused to defer to the Kentucky legislature's avowed secular purpose in passing the law and, instead, found a purely religious intent. The Court's per curiam opinion found a total lack of secular purpose and stated that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Id.* (footnote omitted).

80. "The Court's summary rejection of a secular purpose articulated by the legislature and confirmed by the state court is without precedent in Establishment Clause jurisprudence. This Court regularly looks to legislative articulations of a statute's purpose in Establishment Clause cases and accords such pronouncements the deference they are due." *Id.* at 43-44 (Rehnquist, J., dissenting).

81. *Id.*

82. 472 U.S. 38 (1985).

83. ALA. CODE § 16-1-20.1 (Supp. 1986).

84. ALA. CODE § 16-1-20 (Supp. 1986).

85. *Wallace*, 472 U.S. at 59. In his dissent, Justice Rehnquist criticized the Court's understanding of the Establishment Clause in general and its use of the *Lemon* test in particular. Justice Rehnquist asserted that the "wall of separation between church and state" metaphor—taken from a "short note of courtesy" written by Thomas Jefferson while in France 14 years after the passage of the Bill of Rights (see *supra* note 1 and accompanying text)—has misled the courts as to the actual intent of the first amendment's drafters, and has caused the neither principled nor unified Establishment Clause decisions made by the Court. *Id.* at 112 (Rehnquist, J., dissenting).

86. *Id.* at 56.

Stone were the only examples of statutes failing the purpose prong of the *Lemon* test.[87]

IV. THE *EDWARDS* DECISION

In *Edwards v. Aguillard*, the Supreme Court affirmed the Fifth Circuit's holding that the Louisiana Balanced Treatment Act violated the Establishment Clause.[88] Justice Brennan, writing for the 7-2 majority,[89] again turned to the *Lemon* test for resolution of the case,[90] but had only to apply the purpose prong to find the statute unconstitutional.[91]

The Court used a two-step approach to hold that the Balanced Treatment Act failed the purpose prong of the *Lemon* test. First, the Court found the stated legislative purpose of "protecting academic freedom"[92] to be a fictive motive. Justice Brennan, using a term from a previous concurring opinion by Justice O'Connor,[93] wrote that "[w]hile the

87. The "anti-evolution" statute involved in Epperson v. Arkansas, 393 U.S. 97 (1968), was also found to have no secular purpose, but that case was decided before the adoption of the *Lemon* test.

88. Edwards v. Aguillard, 107 S. Ct. 2573, 2584 (1987).

89. Justice Brennan was joined by Justices Marshall, Blackmun, Powell, and Stevens—and by Justice O'Connor in all but Part II. Justice Powell filed a concurring opinion, in which Justice O'Connor joined. Justice White wrote his own opinion concurring in the judgment. Justice Scalia, joined by Chief Justice Rehnquist, dissented.

Part II of the majority decision implied that the "special context of the public elementary and secondary school system" warranted extraordinary consideration of the Balanced Treatment Act. Justice Brennan wrote that "in employing the three-pronged *Lemon* test, we must do so mindful of the particular concerns that arise in the context of public elementary and secondary schools." *Id.* at 2577-78. Noting that school-age children are impressionable, their attendance in public schools is not voluntary, and that the Court has frequently been called upon to decide Establishment Clause cases in public school contexts, Justice Brennan stated that "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Id.* at 2577. The opinion never stated, though, what difference this "special context" made to the holding of the case.

90. *Id.* Justice Brennan noted that the *Lemon* test had been used in every Establishment Clause case since its inception in 1971, with the exception of Marsh v. Chambers, 463 U.S. 783 (1983). *See supra* note 75. The *Marsh* form of analysis, looking to whether the practice was common and allowed at the time of the writing of the first amendment, was inapplicable in *Edwards*, according to Justice Brennan, "since free public education was virtually nonexistent at the time the Constitution was adopted." *Edwards*, 107 S. Ct. at 2577 n.4.

91. *Id.* at 2578. As the Court had previously held, once a statute has failed one prong of the test, no further examination is necessary. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 56 (1985). In *Edwards*, Justice Brennan wrote, "*Lemon's* first prong focuses on the purpose that animated adoption of the Act. 'The purpose prong . . . asks whether government's actual purpose is to endorse or disapprove of religion.' . . . This intention may be evidenced by promotion of religion in general, or by advancement of a particular religious belief." *Edwards*, 107 S. Ct. at 2578 (citation omitted) (quoting from Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).

92. LA. REV. STAT. ANN. § 17:286.2 (West 1982).

93. *See Wallace*, 472 U.S. at 75 (O'Connor, J., concurring).

Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham."[94] The "sham" label came from the Court's conclusion that the Balanced Treatment Act did nothing to promote academic freedom.[95] Before passage of the Balanced Treatment Act, Louisiana teachers were already allowed to supplement their teachings on evolution with any other scientific theory.[96] Therefore, Justice Brennan declared the case to be analogous to *Wallace v. Jaffree*,[97] where a statute was held to be unconstitutional because there was no secular purpose for the addition of the phrase "or voluntary prayer" to a statute allowing for a daily moment of silence in public schools.[98]

Second, the Court found that the legislature's purpose for passing the statute was preeminently religious.[99] After reviewing the legislative history of the Balanced Treatment Act, Justice Brennan concluded that it was passed with the intent of restructuring the curriculum of Louisiana schools to counter the teaching of a theory which contradicted religious tenets.[100] This marked the first time the Court determined a law to be unconstitutional due to the law's primary purpose of advancing a religious belief.[101]

The majority concluded that the district court had not erred in granting summary judgment.[102] Again, legislative purpose was determinative. After implying that a finding of improper legislative purpose left no genuine issue of material fact,[103] Justice Brennan listed the factors

94. *Edwards*, 107 S. Ct. at 2579.

95. *Id.* at 2579-80.

96. *Id.* at 2580.

97. 472 U.S. 38 (1984).

98. *Id.* at 59.

99. *Edwards*, 107 S. Ct. at 2580. Throughout the *Edwards* decision, Justice Brennan apparently uses the adjectives "preeminent" and "primary" interchangeably to describe the Court's conclusion of the purpose of the Balanced Treatment Act. *See id.* (Court cannot ignore the legislature's "preeminent religious purpose"); *id.* at 2581 (Court refers to the preeminent purpose of the Louisiana legislature to advance a religious viewpoint); *id.* at 2582 (Court concludes that the Act's primary purpose to provide persuasive advantage to religious tenets); *id.* (the Balanced Treatment Act unconstitutionally endorses religion because its primary purpose is to advance religious belief); *id.* at 2583 (primary purpose of the Balanced Treatment Act is to advance religious doctrine; thus, the Act is unconstitutional).

100. *Id.* at 2581-83.

101. "Because the primary purpose of the Creationism Act is to advance a particular religious belief, the Act endorses religion in violation of the First Amendment." *Id.* at 2582.

102. *Id.* at 2584.

103. Justice Brennan explained:

> The District Court, in its discretion, properly concluded that a Monday-morning 'battle of the experts' over possible technical meanings of terms in the statute would not illuminate the contemporaneous purpose of the Louisiana legislature when it made the law. We

which the Court can use to determine legislative purpose: the statute's plain meaning and context, legislative history, and the specific sequence of events leading to the statute's passage.[104]

Justice Scalia, joined by Chief Justice Rehnquist, dissented. Beginning with the assumption that the purpose prong of the *Lemon* test is valid,[105] Justice Scalia first focused on the Balanced Treatment Act's legislative history.[106] In his view, the history showed a secular legislative intent.[107] He then expressed his displeasure with the *Lemon* test's purpose prong,[108] and contended that the Court had made a "maze of the Establishment Clause."[109]

Justice Scalia's dissenting opinion concluded with a recommendation that use of *Lemon's* purpose prong be discontinued.[110] He called any interpretation of the first amendment which prohibits nonsecular purpose without regard to effect "unnatural,"[111] and concluded that the purpose prong was unnecessary in any Establishment Clause examination.[112] Justice Scalia wrote that the Court's previous Establishment Clause decisions had focused on flexible standards at the expense of clarity and predictability. He contended that clarity and predictability should be the objectives, and that abandoning the purpose prong of the *Lemon* test would be a good start toward achieving those goals.[113]

V. ANALYSIS

A. *Classifying Creationism as a Science*

With the exception of the use of the term "creation-science," the Louisiana Balanced Treatment Act clearly avoided expressions with even remotely sectarian connotation. The words "God," "Supreme Being," or even "Creator" never appeared in the Act.[114] The statute was written in the context of mandating equal treatment of two "sciences": "Evolution-

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therefore conclude that the District Court did not err in finding that appellants failed to raise a genuine issue of material fact, and in granting summary judgment.

Id. (footnotes omitted).

104. *Id.* at 2583.
105. *Id.* at 2591 (Scalia, J., dissenting).
106. *Id.*
107. *Id.* at 2592 (Scalia, J., dissenting).
108. *Id.* at 2605 (Scalia, J., dissenting).
109. *Id.*
110. *Id.* at 2607 (Scalia, J., dissenting).
111. *Id.*
112. *Id.*
113. *Id.*
114. LA. REV. STAT. ANN. §§ 17:286.1-286.7 (West 1982).

science," which was defined as "the scientific evidences for evolution and inferences from those scientific evidences,"[115] and "Creation-science," which was defined almost identically as "the scientific evidences for creation and inferences from those scientific evidences."[116] Regardless of whether the intent of the Balanced Treatment Act was secular or religious, the lawmakers undoubtedly proposed to avoid invalidation of the Act under the *Lemon* test by professing a secular purpose and using neutral language.[117]

Justice Brennan expressed the majority's disbelief that creation-science is a secular concept by pointing to the legislative hearings prior to the Act's passage.[118] At the hearings, Edward Boudreaux, described as Senator Keith's leading expert on creation-science, testified that creation-scientists believe in "the existence of a supernatural creator."[119] Justice Brennan concluded that the legislative history revealed that the term "creation science," as contemplated by the legislature, embodied the religious belief that a supernatural being created humankind.[120] He also contended that several legislators revealed their religious motives for supporting the bill, including Representative Jenkins, who observed that the existence of God is a scientific fact.[121] Thus, from the statements of a creation-scientist and several of the state legislators, Justice Brennan inferred the nonsecular purpose of the entire legislature.[122]

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115. *Id.* at § 17:286.3(3).

116. *Id.* at § 17:286.3(2).

117. This definition is very different from that in Senator Keith's original bill. His original bill was based on a model act, which Arkansas adopted and a district court subsequently declared unconstitutional. McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982). Keith's original proposal defined "creation-science" as including:

> The scientific evidences and related inferences that indicate
> (a) sudden creation of the universe, energy, and life from nothing;
> (b) the insufficiency of mutation and natural selection in bringing about development of all living kinds from a single organism;
> (c) changes only within fixed limits or originally created kinds of plants and animals;
> (d) separate ancestry for man and apes;
> (e) explanation of the earth's geology by catastrophism, including the occurrence of a worldwide flood; and
> (f) a relatively recent inception of the earth and living kinds.

Edwards, 107 S. Ct. at 2586 (1987) (Powell, J., concurring). The day following the filing of the original complaint in *McLean*, the Louisiana legislature began amendment proceedings to change the definition of "creation-science" in the Keith bill. *Id.*

118. *Id.* at 2581-82.

119. *Id.* at 2581.

120. *Id.* at 2582.

121. *Id.* at 2581 n.13.

122. Justice Powell reached a sectarian definition of "creation-science" another way, by invoking the canon of statutory construction that words not otherwise defined are given their "ordinary, contemporary, common meaning." *Id.* at 2585 (Powell, J., concurring). Justice Powell determined that "creation" is commonly defined as "holding that matter, the various forms of life, and the world

While Justice Brennan stopped his analysis of the Balanced Treatment Act with the Act's failure to meet the purpose prong of the *Lemon* test, he hinted that such an act might be constitutional if it were passed with a valid secular purpose.[123] In previous cases, the Court flatly stated that religious doctrines may constitutionally be taught in public schools so long as they are presented in an objective fashion[124] as part of the State mandated curriculum.[125] Justice Brennan included a similar disclaimer in *Edwards*, stating that the majority opinion does not imply that a legislature cannot require the teaching of scientific critiques of prevailing theories.[126] Because the Court determined that the Balanced Treatment Act was not passed with a secular purpose, though, Justice Brennan did not state whether this Act would have been constitutional if not for the legislature's improper purpose in passing it.

The majority opinion did slightly expand upon the implication made in *Stone* that religious materials could be used in public schools for an "educational function."[127] According to *Abington*, the educational function requirement could be satisfied by an objective presentation of religious materials in a secular setting.[128] In *Edwards*, Justice Brennan elaborated further, stating that simply presenting a variety of scientific theories of human origin would satisfy the purpose prong.[129] Apparently then, the idea of an objective presentation "as part of a secular program of education" means the teaching of a variety of theories with a clear secular intent.

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were created by a transcendent God out of nothing," and reached the conclusion that "[f]rom the face of the statute, a purpose to advance a religious belief is apparent." *Id.* (Powell, J., concurring).

In dissent, Justice Scalia labeled "creation-science" a "term of art" which is " 'to be interpreted according to [its] received meaning and acceptation with the learned in the art, trade or profession to which [it] refer[s].' " *Id.* at 2592 (Scalia, J., dissenting) (footnote omitted) (quoting from LA. CIV. CODE ANN. Art. 15 (West 1952)). The dissent argued that the legislative history supported the contention that creationism could be taught in public schools without reference to any particular religious dogma. *Id.* at 2585 (Scalia, J., dissenting). In the final analysis, though, Justice Scalia felt the true definition of "creation-science" was a moot point: "[o]ur task," he wrote, "is not to judge the debate about teaching the origins of life, but to ascertain what the members of the Louisiana Legislature believed." *Id.* at 2598 (Scalia, J., dissenting). Justice Scalia felt that the definition critical to the decision was the one to which the legislature subscribed.

123. "We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught." *Id.* at 2582.

124. Stone v. Graham, 449 U.S. 39, 42 (1980) (per curiam).

125. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963).

126. *Edwards*, 107 S. Ct. at 2582.

127. *Stone*, 449 U.S. at 42.

128. *Abington*, 374 U.S. at 225. The *Stone* Court expanded this allowable field of education to an "appropriate study of history, civilization, ethics, comparative religion, or the like." *Stone*, 449 U.S. at 42.

129. *Edwards*, 107 S. Ct. at 2583.

The implication of these cases seems to be that the Court will uphold the teaching of religious doctrine in public schools so long as the purpose of allowing such teaching is secular, and the material is presented both objectively and as part of a variety of theories offered regarding a subject. Although the *Edwards* Court never discussed the issue, the Louisiana Balanced Treatment Act appeared to meet the objectivity requirement. The Balanced Treatment Act stated that "[w]hen creation or evolution is taught, each shall be taught *as a theory, rather than as proven scientific fact.*"[130] The Court also did not rule on whether the presentation of two theories constituted a "variety" and offered no clue as to whether it might. The purpose of the Balanced Treatment Act was the decisive factor in determining its constitutionality.

B. *Application of the Purpose Prong*

The Supreme Court had anticipated that a legislature might feign a secular purpose for an act passed with truly religious intent.[131] Justice Rehnquist contended in his dissent in *Wallace* that the purpose prong was of little use if all a legislature had to do to pass an act was to include a statement of secular purpose and omit all sectarian references.[132] Four years earlier, the Louisiana legislature possibly did just that; with the stated purpose of protecting academic freedom,[133] it passed the Balanced Treatment Act. In 1987, the United States Supreme Court held that this stated purpose was not genuine and that the Act's actual purpose was invalid;[134] but in reaching its decision the Court clarified its purpose prong standard by holding that a primary purpose of advancing religion is sufficient to strike down a statute.[135]

Courts traditionally have dealt with the purpose prong of the *Lemon* test in a cursory manner when the challenged statute contained an express statement of purpose.[136] The *Lemon* case itself gave "appropriate

130. LA. REV. STAT. ANN. § 17:286.4(A) (West 1982) (emphasis added).

131. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring) (acknowledging the possibility that a legislature's avowed secular purpose could be a sham).

132. *Id.* at 108 (Rehnquist, J., dissenting).

133. LA. REV. STAT. ANN. § 17:286.2 (West 1982).

134. Edwards v. Aguillard, 107 S. Ct. 2573, 2578-79 (1987).

135. *Id.* at 2582.

136. *See, e.g.*, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 773 (1973), where the Court summarily agreed with the legislative statement of secular purpose by writing "we need touch only briefly on the requirement of a 'secular legislative purpose.' As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests." *See also* Board of Educ. v. Allen, 392 U.S. 236, 243 (1968) (citing the *Abington* purpose and effect test and disposing of the purpose prong by simply reciting the state legislature's stated purpose).

deference" to a stated legislative intent.[137] The statute challenged in *Stone* failed the first prong of the *Lemon* test when the Court found that the statute had "no secular legislative purpose."[138] Similar words were used to invalidate the *Wallace* statute.[139] In *Wallace*, Justice Stevens explained the Court's application of the purpose prong when he stated that a statute may satisfy the first prong of the *Lemon* test despite the existence of a partially religious motivation.[140] Justice Stevens wrote that "even though a statute that is motivated in part by a religious purpose may satisfy the first criterion . . . the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion."[141] The *Edwards* Court went beyond this explanation of the purpose prong.

In *Edwards*, the Court further clarified the application of the purpose prong when it held that the Balanced Treatment Act was unconstitutional for having a primary purpose of advancing a religious belief.[142] Although the Court never explicitly stated the degree of permissible religious motivation in the passage of legislation,[143] the Court repeatedly referred to the Balanced Treatment Act's "preeminent religious purpose"[144] and "primary purpose" to advance religion.[145] Thus, the Court

137. In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Court observed that "the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the . . . [challenged] laws. There is no reason to believe the legislatures meant anything else." *Id.* at 613.

138. "We conclude that Kentucky's statute requiring the posting of the Ten Commandments in public school rooms has no secular legislative purpose, and is therefore unconstitutional." Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam). The Court went on to confuse the standard it used, though, by stating that "[t]he preeminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." *Id.*

139. Wallace v. Jaffree, 472 U.S. 38, 56 (1985).

140. *Id.*

141. *Id.* (citation and footnote omitted).

142. Edwards v. Aguillard, 107 S. Ct. 2573, 2582 (1987).

143. The Court appeared to cite as its standard a quote from Justice O'Connor's concurrence in *Wallace*, 472 U.S. at 38. " 'It is not a trivial matter . . . to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws. That requirement is precisely tailored to the Establishment Clause's purpose of assuring that government not intentionally endorse religion or a religious practice.' " *Edwards*, 107 S. Ct. at 2582 (quoting *Wallace*, 742 U.S. at 75 (O'Connor, J., concurring)).

Even though Justice Brennan appeared to quote this statement for use as a benchmark, he made no further reference to omitting all sectarian endorsements. Subsequent references to the purpose prong spoke in terms of "preeminent" or "primary" religious purpose. *See infra* note 145.

144. *Id.* at 2580, 2581.

145. *Id.* at 2582 (primary purpose to advance religion demonstrated by legislative history). The Court also noted that "[b]ecause the primary purpose of the Creationism Act is to advance a particular religious belief, the Act endorses religion in violation of the First Amendment." *Id.* "[B]ecause the primary purpose of the Creationism Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause" *Id.* at 2583.

implicitly explained the purpose prong more precisely than it had before. The *Stone* Court struck down a statute with *no* secular legislative purpose.[146] The *Wallace* Court stated that a *partially religious purpose* may be valid.[147] The *Edwards* Court clarified that standard by holding that the *preeminent* or *primary* purpose of a statute must not be religious in order to pass the purpose prong of the *Lemon* test.[148]

The Court applied the new standard after determining that the Act's stated purpose was not valid. The Court's examination focused on one of the vital areas stated in *Wallace v. Jaffree*: Did the statute serve any secular purpose which was not already served by the existing law?[149] The answer in *Edwards*, as in *Wallace*, was "no." Justice Brennan cited the testimony of the president of the Louisiana Science Teachers Association, who said that no new legislation was necessary to allow the teaching of any scientific concept based on established fact.[150] Justice Brennan wrote that because the Act did not provide Louisiana school teachers with any new authority, it failed to further its stated purpose.[151] Because the Balanced Treatment Act served no new secular purpose, the Court concluded that the law's stated purpose was a sham.[152]

After indicating that the legislature's stated purpose for passing the Balanced Treatment Act was not genuine, the Court next had to determine the statute's true purpose. The Act would still pass the first prong of the *Lemon* test, regardless of its failure to further the stated purpose, so long as the actual purpose was secular.[153] Justice Brennan felt that the legislature's preeminent religious purpose in passing the Balanced Treatment Act was obvious.[154] The majority of the Court agreed and held the Act unconstitutional, even though this was the first time that a primary purpose to advance religion was held to constitute an Establishment Clause violation under the *Lemon* test.[155]

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146. Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam).

147. Wallace v. Jaffree, 472 U.S. 38, 56 (1985).

148. *Edwards*, 107 S. Ct. at 2583.

149. *Wallace*, 472 U.S. at 59.

150. *Edwards*, 107 S. Ct. at 2579.

151. *Id.*

152. *Id.* at 2580.

153. The Court in *Edwards* noted that although the Balanced Treatment Act had a stated secular purpose, it in fact did not support that goal. Furthermore, the Court found that the Balanced Treatment Act had no clear secular purpose. *Id.* at 2578.

154. *Id.* at 2582.

155. In Wallace v. Jaffree, 472 U.S. 38 (1985), the Court, applying the *Lemon* test, stated that only statutes motivated *in part* by a religious purpose may still satisfy the purpose prong. *Id.* at 56. In finding a religious purpose, the Court analogized *Edwards* with Epperson v. Arkansas, 393 U.S. 97 (1968), which dealt with a 1928 "anti-evolution" statute. Justice Brennan felt that both cases

C. *The Utility of the Purpose Prong*

The purpose prong of the *Lemon* test contains two flaws. First, despite the majority of the Supreme Court's contention, ascertaining the true purpose behind legislation is very difficult.[156] Second, the Court's current method of applying the purpose prong confuses purpose and effect. Because of these defects, the purpose prong of the *Lemon* test should be discarded.

Determination of the collective motive behind the actions of legislators is difficult because of the many different purposes that may be involved. While a majority of the state's House and Senate approved the Balanced Treatment Act,[157] the *Edwards* Court focused on the actions and statements of the bill's sponsor, Senator Keith.[158] In reaching the conclusion that the purpose of the *entire* legislature in passing the Act must have been nonsecular,[159] the Court took a rather large step in deductive reasoning. While Senator Keith may be the definitive source for determining what prompted the *introduction* of the legislation, his statements can hardly be said to reflect the feelings of the entire Louisiana legislature. Justice Brennan cited statements by two other legislators which may lead to an inference of their religious motives,[160] but the Court could not possibly have known the true intent of the majority of the lawmakers who voted in favor of the Act.[161]

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involved attempts by the state legislature to support a theory of Divine Creation. *Edwards*, 107 S. Ct. at 2581. In support of his conclusion, Justice Brennan looked to the legislative hearings and the remarks of Senator Keith, the bill's sponsor. *Id.* at 2581. Senator Keith advocated the teaching of religious views in public schools to counterbalance the teaching of the theory of evolution, which conflicted with his own beliefs. *Id.* The majority was certain that the Louisiana legislature's purpose in passing the Balanced Treatment Act was to promote religion. *Id.* Therefore, the Court declared the Act unconstitutional. *Id.* at 2582.

156. "I have little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one. . . ." *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring).

157. *Edwards*, 107 S. Ct. at 2597 (Scalia, J., dissenting).

158. "It is clear from the legislative history that the purpose of the legislative sponsor, Senator Bill Keith, was to narrow the science curriculum." *Id.* at 2579. *See also id.* at 2581 n.13 (Court refers to sponsor's belief as embodying the purpose of the Act); *id.* at 2582 (Court infers religious purpose by reference to the sponsor's own statements).

159. *Id.* The Court noted that Senator Keith had argued in the legislature that scientific evidence supporting his religious beliefs should be taught in public schools. Having then passed the Balanced Treatment Act, the legislature intended to change the existing curriculum and endorse a religious view.

160. *Id.* at 2581 n.13.

161. Justice Scalia attacked this Act of imputing the motive of all legislators through the statements of a few. He demonstrated the futility of attempting to find a single legislative purpose for the passage of an act by listing some of the considerations a legislator makes:

> The number of possible motivations, to begin with, is not binary, or indeed even finite. In the present case, for example, a particular legislator need not have voted for the Act either because he wanted to foster religion or because he wanted to improve education. He may

The second problem with the application of *Lemon's* purpose prong is its confusion between purpose and effect. In *Edwards*, the majority claimed that by looking at the language of the statute and its legislative history they could discern what must have been the intent of the legislature.[162] Justice Brennan's majority opinion stated that a religious purpose "may be evidenced by promotion of religion in general . . . or by advancement of a particular religious belief . . . ."[163] Such promotion or advancement, though, is not really a purpose; it is an effect. The majority sought to determine whether the stated purpose of the Balanced Treatment Act was a "sham" by looking at whether the Act served a purpose that was not already fully served by existing state law.[164] Here, again, the inquiry focused not on purpose, but on effect.

If the examination of a statute under the *Lemon* test were to extend past the first prong, this method of analysis would lead to a duplication of efforts. In *Edwards*, the Court said that it must look to the purpose of the challenged act to apply the first prong of the *Lemon* test.[165] If the act has a stated purpose, the Court then needs to look at the act's effect to determine whether the stated purpose is a sham.[166] If the act has no

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have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the Majority Leader, or he may have hoped the Governor would appreciate his vote and make a fundraising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctanct to hurt the feelings of a loyal staff member who worked on the bill, or he may have been settling an old score with a legislator who opposed the bill, or he may have been mad at his wife who opposed the bill, or he may have been intoxicated and utterly *un*motivated when the vote was called, or he may have accidentally voted "yes" instead of "no," or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations. To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist.

Id. at 2605-06 (Scalia, J., dissenting) (emphasis in original). Justice Scalia now joins Chief Justice Rehnquist as an open opponent of the purpose prong of *Lemon*. Justice Rehnquist had already criticized the entire *Lemon* test in Wallace v. Jaffree, 472 U.S. 38, 112 (1985), and called for the discontinuation of its use. Justice Scalia's dissenting opinion concluded with a call for the purpose prong's abandonment. *Edwards*, 107 S. Ct. at 2607 (Scalia, J., dissenting).

162. "The preeminent purpose of the Louisiana legislature was clearly to advance the religious viewpoint that a supernatural being created humankind." *Id.* at 2581 (footnote omitted).

163. *Id.* at 2578 (citations omitted).

164. "The goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science." *Id.* at 2579. The Court also stated that "[t]he Act provides Louisiana schoolteachers with no new authority. Thus the stated purpose is not furthered by it." *Id.*

165. *Id.* at 2578 ("*Lemon's* first prong focuses on the purpose that animated adoption of the Act").

166. *Id.* at 2578-79. The Court determined that the stated purpose of the Act was a sham after examining whether the Act furthered its stated purpose. This examination actually focuses on the Act's *effect*, rather than on its *purpose*.

stated purpose, the Court finds a religious purpose if the statute promotes religion in general or advances a particular religious belief.[167] If the stated purpose is not a sham and the actual purpose of the act is indeed secular, then the Court must move on to the second prong of the test to examine the effect of the act, which it has already done.[168] Such duplicity suggests that the purpose prong of the *Lemon* test can be eliminated with no ill effect.

Discarding *Lemon's* purpose prong would greatly simplify and clarify the Court's examination of Establishment Clause cases. The necessity of trying to determine actual motives for the passage of legislation would end, and the unpleasant connotation of purposes being labeled as "shams" would be eliminated. The results of Establishment Clause examination, though, would not change. Well written statutes with genuine, primarily religious purposes would have primarily religious effects and, therefore, would be struck down under a two pronged "effect and entanglement" test. Statutes with religious purposes that were so poorly written that they had no religious effects would not be repugnant to the Establishment Clause. The most favorable outcome would lie in the trickiest of the statutes: those passed with partially secular and partially religious intent. Effect and entanglement would be the decisive factors in determining the constitutionality of such acts. While the test would still be less than mathematically precise, determining degrees of effect and entanglement will be more just and less complicated than attempting to determine degree of improper intent.

VI. CONCLUSION

The *Edwards* decision demonstrates that the major problem with the purpose prong of the *Lemon* test is the determination of actual purpose, if one primary purpose can be determined at all. The Court has struck down laws with no stated purpose, with a stated sectarian purpose, and with a stated secular purpose which the Court has determined to be a "sham." In using the *Lemon* test, examinations have ranged from cursory facial readings with great deference given to stated legislative intent,

167. *Id.* at 2578.

168. *Id.* at 2577. The second prong of the *Lemon* test asks whether the statute's principal or primary effect advances religion. However, a statute which advances religion is usually viewed as being passed with a secular purpose. Thus, the purpose and effect prongs have been combined into one inquiry.

to in-depth scrutiny of legislative hearings to find the legislature's "hidden intent." What level of inquiry the Court will use in any given case is as unpredictable as the conclusion it will reach.

Such unpredictability leads to the question of whether the purpose prong of the *Lemon* test is actually necessary. It probably is not. A two-pronged "effect and entanglement" test for violation of the Establishment Clause would be just as effective and less confusing than the current three pronged test.

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