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EDWARDS v. AGUILLARD:* THE LEMON TEST YIELDS BITTER FRUIT FOR TRADITIONAL RELIGIOUS VALUES

The United States Supreme Court has generally interpreted the first amendment religion clauses¹ to protect the right of individuals to choose whether or not to practice religion, and to make that choice without governmental interference.² The Establishment Clause specifically prohibits government from endorsing or advancing religion.³ In *Edwards v. Aguillard*,⁴ the United States Supreme

* 107 S. Ct. 2573 (1987).

1. The first amendment to the United States Constitution provides in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" U.S. CONST. amend. I.

2. *Abington School Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring). Justice Goldberg summarized the first amendment as requiring that "government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work no deterrence of religious belief." *Id.*

3. The Establishment Clause was enacted to avoid state sponsored religion and the persecution connected with such a state-church union. *Everson v. Board of Educ.*, 330 U.S. 1, 12 (1947) (quoting MADISON 2 WRITINGS OF JAMES MADISON 183 (1785)). Thomas Jefferson wanted to erect a "wall of separation" between church and state, and saw a "clear and present danger" coming from a church-state alignment. *Id.* at 32 n.9. (quoting RANDALL, 1 THE LIFE OF THOMAS JEFFERSON 220 (1858)). While modern Establishment Clause doctrine makes Jefferson's "wall" seem permeable, the *Everson* Court explained what kind of government acts violate the clause:

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. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.

Id. at 15-16.

Later Establishment Clause cases made the prohibition against aid for religion unclear. *See Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (tax exemptions for church-owned property upheld); *Zorach v. Clausen*, 343 U.S. 306 (1952) (law allowing public school students to be released from school during school day in order to go to religion classes upheld). Notably, if all "aid" to religion is prohibited, few government programs would stand. General public aid has always been provided to religious institutions, such as police and fire protection, or the closing of public schools on the weekend to allow children to attend religious services. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 334 (1963).

More recent decisions also made the prohibition against government participation in religious affairs unclear. *See Witters v. Washington Dep't of Serv. for the*

Court addressed the issue of whether a Louisiana statute⁵ requiring both creation and evolution to be taught together in the public schools violated the Establishment Clause.⁶ The Court held that because the law had an exclusively religious purpose,⁷ it violated the Establishment Clause. In doing so, the Court ignored the presence of an arguably secular purpose in the statute's wording and legislative history,⁸ thus infringing the rights of Americans who practice traditional⁹ religions.¹⁰

Blind, 106 S. Ct. 1485 (1986) (allowing students who attend religious schools to use state-funded scholarships); *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736 (1976) (allowing state subsidies to religious colleges).

4. 107 S. Ct. 2573 (1987).

5. LA. REV. STAT. ANN. §§ 17:286.1-7 (West 1982).

6. *Edwards*, 107 S. Ct. at 2584; see also Caudill, *A Spectator's Guide to Aguillard v. Edwards*, Part I, *Will the Clock Strike Thirteen?*, 17 CUMB. L. REV. 87 (1986) (analysis of *Edwards* case following appellate court's decision, in which Professor Caudill predicted Court would ultimately invalidate the Act for violating the Establishment Clause); Strossen, "Secular Humanism" and "Scientific Creationism": *Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom*, 47 OHIO ST. L.J. 332 (1986) (survey of recent trends in school-religion issues, offering a possible solution to current problems; in particular the creation/evolution controversy); Wood, *Religion and Education in American Church-State Relations*, 26 J. CHURCH & ST. 31 (1984) (general information and history of religion issues as related to the public schools); Note, *Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction: Aguillard v. Edwards*, 13 S.U.L. REV. 153 (1987) (predicting Balanced Treatment Act will fail all three prongs of *Lemon*).

7. The Court also refers to laws that have an exclusively religious purpose as lacking any secular purpose. For an explanation of the Court's ruling on the Balanced Treatment Act's purpose, see *infra* notes 24-48 and accompanying text.

8. For an explanation of how the Court should have interpreted the evidence of the Act's secular purpose, see *infra* notes 76-123 and accompanying text.

9. Traditional religions, when referred to in this note, are those which espouse theistic beliefs. A theist believes in God as the creator and ruler of the universe who is known to man by revelation. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1891 (2d ed. 1979). Non-traditional religions, when referred to in this note, are those which espouse non-theistic beliefs, such as Secular Humanism. For an explanation of the religious beliefs of Secular Humanism, see *infra* note 121.

10. For an explanation of how the *Edwards* ruling reflects unfavorably on Americans who practice theistic religion, see *infra* note 123. An implied problem that grows out of the *Edwards* ruling is the Court's upholding of an unfair dual definition of religion, which results in an unconstitutional establishment of secular religion in the public schools. This must be changed. See generally Arons & Lawrence, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L.L. REV. 309 (1980) (criticizing government's use of public schools to indoctrinate children); Becker, *Creationism: New Dimensions of the Religion-Democracy Relation*, 27 J. CHURCH & ST. 315 (1985) (creationism and evolution are both characteristically unscientific, and both should be recognized for the religious qualities they possess); Bird, *Freedom from Establishment And Unneutrality in Public School Instruction and Religious School Regulation*, 2 HARV. J.L. & PUB. POL'Y 125 (1979) (advocating a neutral stance towards religion in public schools, which defers to both religious and secular interests, rather than policy of total separation allowing secular in and keeping all influence of religion out); Emerson & Haber, *The Scopes Case in Modern Dress*, 27 U. CHI. L. REV. 522 (1960) (advocating balanced treatment in all areas of the public school curriculum to insure freedom of expression); Moskowitz, *The Making of the Moral Child: Legal Implications of Values Education*, 6 PEP-

In July 1981, the state of Louisiana enacted the Balanced Treatment Act ("Act"),¹¹ which required public schools to give equal treatment to the theories of evolution and creation when teaching the subject of universal or human origin.¹² The Act did not require schools to teach creation or evolution.¹³ If a school taught one the-

PERDINE L. REV. 105 (1978) (explaining how modern values education curriculums allow religious beliefs, particularly those associated with Secular Humanism, to be disseminated in public schools); Strossen, "Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom, 47 OHIO ST. L.J. 332 (1986) (offering standard for curricular decisions by which Establishment Clause violations by both traditional and secular religions can be avoided); Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications*, 10 TEX. TECH L. REV. 1 (1978) (secularism and Secular Humanism are religions, and, as taught in the public schools, violate the Establishment Clause); Note, *The Establishment Clause, Secondary Religious Effects, and Humanistic Education*, 91 YALE L.J. 1196 (1982) (offering solution to limit the scope of humanistic and secular education to conflict less with other religious groups). But see Larson, *Textbooks, Judges, and Science*, 17 CUMB. L. REV. 116 (1986) (recognizing religiousness of secularism, but questioning whether Louisiana Balanced Treatment Act would be upheld as means to correct it); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978) (supporting continuation of dual definition of religion as beneficial to religious freedom and social order, and outlining ways to clarify definition).

11. LA. REV. STAT. ANN. §§ 17:286.1-7 (West 1982).

12. *Id.* §§ 17:286.3-4, provides in part:

§ 286.3. Definitions

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

- (1) "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.

§ 286.4 Authorization for balanced treatment; requirement for non-discrimination

- A. Commencing with 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 the public schools, to the extent that such textbooks, library materials, or educational programs deal in any way with the subject of the origin of man, life, the earth, or the universe.

13. *Id.* § 286.5, provides in pertinent part:

§ 286.5. Clarifications

This Sub-part 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 Sub-part 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 Sub-part does not require each individual classroom lecture 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.

ory, however, the Act required it to also present the other.¹⁴ The Act further required schools teaching both theories to present scientific evidence to support them,¹⁵ without presenting either theory as scientific fact.¹⁶ The Act prohibited schools from discriminating against those who chose to teach or believe in creation science.¹⁷ It also required the establishment of a special curriculum panel of experts in the creation-science field to guide school districts in the establishment of a creation curriculum.¹⁸

The American Civil Liberties Union ("ACLU"), a group of parents, teachers, and religious leaders, filed suit in federal district court to enjoin implementation of the Act.¹⁹ The district court

14. *Id.* § 286.4.

15. *Id.* § 286.3, provides in pertinent part:

§ 286.3. Definitions

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

(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

16. "When creation or evolution is taught, each shall be taught as a theory, rather than as proven scientific fact." *Id.* § 286.4(A).

17. *Id.* § 286.4, which states in pertinent part:

§ 286.4 Authorization for balanced treatment; requirement for nondiscrimination

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.

The term "creation science" was used as a term of art by the state in the statute's text and in its arguments before the courts to legitimize the theory of creation for use in public school science curriculums. This note will use the term "creationism" to mean the same thing. Likewise, the term "evolution" will replace the state's use of "evolution-science."

18. *Id.* § 286.7, which states in pertinent part:

§ 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.

19. *Aguillard v. Treen*, 634 F. Supp. 426, 427 (E.D. La 1985). At the same time, the Act's sponsor filed a second suit to have the act declared constitutional. *Keith v. Louisiana Dep't of Educ.*, 553 F. Supp. 295 (M.D. La. 1982). This suit was dismissed

granted summary judgment for the ACLU, holding that the Act violated the Establishment Clause of the first amendment in mandating that teachers present the religious doctrine of creation science whenever they present the theory of evolution.²⁰ The Court of Appeals for the Fifth Circuit affirmed,²¹ agreeing that the legislature designed the Act to further particular religious beliefs and therefore violated the Establishment Clause.²²

The United States Supreme Court granted certiorari²³ to consider whether the purpose of the Act violated the Establishment Clause. The Court concluded that because the legislature was motivated solely by religious considerations in passing the Act,²⁴ and because the Act itself advanced the beliefs of a particular religious group,²⁵ the Act's purpose violated the Establishment Clause.²⁶ Therefore, the Court struck down the Act as facially invalid and unconstitutional.²⁷

The Court began its analysis by citing the three-pronged test it had set forth in *Lemon v. Kurzman*²⁸ for determining Establishment

for lack of jurisdiction. *Id.*

The district court originally held that the Act violated the Louisiana Constitution's provision creating the State Board of Education, and delegating to it the power over the public schools. See LA. CONST. art. VIII, § 3(A). On appeal, the Fifth Circuit certified the issue to the Louisiana Supreme Court. *Aguillard v. Treen*, 430 So. 2d 660 (La. 1983). The state court held the act was constitutional under the state constitution. *Aguillard v. Treen*, 440 So. 2d 704 (La. 1983). Section 3(A) of the state constitution grants authority to the Board "as provided by law." *Id.* at 708. Under Louisiana law, "provided by law" means provided by legislation. *Id.* "Law is the solemn expression of legislative will." *Board of Elementary and Secondary Educ. v. Nix*, 347 So. 2d 147, 151 (La. 1977). The state court then sent the case back to federal district court.

20. *Treen*, 634 F. Supp. at 428. The district court, using the *Lemon* test, see *infra* notes 28-33 and accompanying text for a discussion of *Lemon*, could find no secular purpose for the Act. It relied on *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968), holding that the teaching of creationism involved the presenting of views tailored to the tenets of a particular religious group. *Treen*, 634 F. Supp. at 427.

21. *Aguillard v. Edwards*, 765 F.2d 1251 (5th Cir. 1985).

22. *Id.* The Fifth Circuit, in affirming summary judgment, found that the Act's purpose of academic freedom was inconsistent with a requirement to teach creation whenever evolution is taught. *Id.* at 1257. The court found the actual purpose of the Act was to discredit evolution and to exalt the ideals of creationism, a religious belief, in the classroom. *Id.*

The Fifth Circuit affirmed its own decision in an *en banc* rehearing. *Aguillard v. Edwards*, 778 F.2d 225 (5th Cir. 1985) (the vote was 8-7). The dissenters harshly criticized the affirmance of summary judgment, pointing to the factual controversy over affidavit evidence showing creation science to be scientifically based and not religious, making summary judgment on religious purpose inappropriate. *Id.* at 226 (Gee, J., dissenting). Because the Act was, in their estimate, an affirmation of scientific truth, it passed constitutional muster. *Id.*

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

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

25. *Id.* at 2583.

26. *Id.* at 2584.

27. *Id.* at 2578, 2584.

28. 403 U.S. 602 (1971). The attempts to keep up the "wall of separation" while trying to recognize or accommodate the importance of religion in society culminated

Clause violations.²⁹ Under *Lemon*, a government action violates the Establishment Clause if it has a primarily religious purpose,³⁰ a primary effect that advances or inhibits religion,³¹ or if the action re-

in *Lemon*. *Lemon* struck down two state statutes which allowed the states to supplement the salaries of parochial school teachers who taught nonreligious subjects. *Id.* at 607. In its holding, the Court admitted that total separation of church and state is impossible. *Id.* at 625. Inevitably, there will be some relation between government and religious institutions. *Id.* at 614. The "wall" was now a blur, and defining the line would now depend on all the circumstances surrounding particular situations. *Id.* at 602, 614.

29. *Edwards*, 107 S. Ct. 2573, 2577 (citing *Lemon*, 403 U.S. at 613-14). In early Establishment Clause decisions involving schools, the court tried to maintain the "wall of separation" between church and state. See *supra* note 3 for a discussion of these decisions. In *Everson v. Board of Educ.*, 330 U.S. 1 (1947), a statute allowing parents who send their children to parochial schools to be reimbursed for transportation costs was upheld, because all citizens benefitted from the law, regardless of what religion they practiced. The cases that followed made the division between church and state increasingly more difficult to define.

In *McCollum v. Board of Educ.*, 333 U.S. 203 (1948), the Court struck down a law that allowed students, with parental consent, to receive religious instruction in the public schools. *Id.* However, in *Zorach v. Clausen*, 343 U.S. 306 (1951), the Court stated that students may receive religious instruction during the school day as long as it is done off school property. *Id.* The *Zorach* Court held that there need not be strict separation of church and state in every instance, because religion is an integral part of our history and culture. *Id.* at 308-09, 313-14. The Court subsequently upheld a law that allowed tax exemptions for property owned by religious organizations. *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). In *Walz*, the Court looked back to the original intent of the drafters of the first amendment. *Id.* at 669. To the "founding fathers," establishment of religion meant direct state sponsorship, direct financial support, and active government involvement in religious activity. *Id.* In this light, any government endorsement of religion that was short of direct intervention or financial support was allowable.

Following the *Everson* decision, the Court addressed the issue of prayer in the public schools. See *Engle v. Vitale*, 370 U.S. 421 (1962). In *Engle*, a state statute required public school teachers to read a state-composed non-denominational prayer. *Id.* at 422 (generically referring to "God" without preferring any single sect's doctrine). The Court held that even though no child was required to recite the prayer and the prayer was non-denominational, the law violated the Establishment Clause, because the government was endorsing religion and preferring religion over non-religion. *Id.* at 430. *Engle* used a two-prong test, striking down the use of prayer for religious purpose and effect. *Id.* at 430-31.

But see generally Boles, *Religion and the Public Schools in Judicial Review*, 26 J. CHURCH & ST. 55 (1984) (overview of recent Court decisions involving schools and religion, conceding that the *Lemon* test is firmly settled as law, but noting that conservative bloc on Court is pushing for alternate test); Comment, *The Secular Meaning Behind the Lemon Test: Lynch v. Donnelly*, 2 TOURO L. REV. 247 (1986) (overview of Establishment Clause history and use of *Lemon* test, suggesting that *Lynch* case announces new standard for the Establishment Clause); Note, *Wallace v. Jaffree: A New Twist on the Old Lemon?*, 13 W. ST. U.L. REV. 659 (1986) (concluding that the *Lemon* test will soon be replaced or refined).

30. *Lemon*, 403 U.S. at 613-14. For an explanation of the Court's application of the purpose prong, see *infra* notes 55-74 and accompanying text.

31. See *Thornton v. Caldor*, 472 U.S. 703 (1985). *Thornton* involved a state law that required employers to give all employees one day off per week on that employee's Sabbath day. *Id.* at 706. The statute was struck down because it was absolute in effect, allowing an employee's religious belief to control the circumstances of his day off. *Id.* at 708-09. Had the law allowed employers to consider other factors, such as seniority, the fact that an employer must take his employee's religious beliefs into

sults in government and religion becoming overly entangled.³² A government action must pass all three prongs of the test to satisfy constitutional scrutiny under the Establishment Clause.³³ The Court explained that examining a statute's language, legislative history, and historical context reveals its actual purpose.³⁴ After analyzing these factors, the Court found that the Act had only a religious purpose.³⁵ Therefore, the Act failed the first prong of the *Lemon* test,³⁶ making further analysis unnecessary.

In reviewing the statute's actual wording, the Court observed that the Act's stated purpose was academic freedom and fairness.³⁷ The Court noted that while it was usually deferential to a state's statement of secular purpose, it would not tolerate a sham.³⁸ The Court found that the Act's favoritism towards creationists belied the stated purpose of fairness, and revealed the actual purpose of ad-

consideration when assigning days off would be lawful. *Id.* at 710 n.9. The Court also found a violation of the effects prong in *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973). The *Nyquist* statute allowed grants, tax credits, and tax deductions to parents of children in non-public schools. *Id.* at 761-68. Despite its secular purpose, the law failed for only benefitting religious school students. *Id.* at 774-80. *But see* *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding law allowing general tax credits to all families for educational expenses such as tuition, textbooks, and transportation, because all families could technically partake of benefits regardless of religious affiliation).

32. See *Aguilar v. Felton*, 473 U.S. 402 (1985) (invalidating law allowing federal funds to be used for remedial programs in religious schools); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985) (invalidating law allowing public school teachers to teach in private schools at state expense). The laws in *Aguilar* and *Grand Rapids* were invalidated because the surveillance and administrative systems needed to guarantee compliance with the first amendment entangled government and religion too closely. *Aguilar*, 473 U.S. at 408-14; *Grand Rapids*, 473 U.S. at 381-98. They also ran the risk of violating government neutrality as proscribed in *Everson*, 330 U.S. at 15-16 and the religious freedom of the parochial school officials.

See also *Lemon*, 403 U.S. at 616 (control and surveillance required to insure non-religious effect was too great an entanglement of state government with parochial schools). The *Lemon* Court also stated that the entanglement prong required that the results of a statute's enactment must not lead to any excessive degrees of political division. *Id.* at 613. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court dismissed this as frivolous, declaring that statutes which arouse feelings of political divisiveness on the part of individual citizens due to perceived religious effect will not violate the establishment clause. *Id.* at 684. Constitutional scholars have generally interpreted the political division factor merely as a refined aspect of the entanglement prong. See J. NOWAK, R. ROTUNDA, & J. YOUNG, *CONSTITUTIONAL LAW* 851 (West 1978).

33. *Edwards*, 107 S. Ct. at 2578; *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

34. *Edwards*, 107 S. Ct. at 2578-83.

35. *Id.* at 2584.

36. *Id.* at 2576-77.

37. *Id.* at 2578-79. See LA. REV. STAT. ANN. § 17:286.2 (West 1982), which states in pertinent part: "§ 286.2. Purpose—This Sub-part is enacted for the purposes of academic freedom."

The state argued that the legislature had not used academic freedom in a correct sense. *Edwards*, 107 S. Ct. at 2579. Instead, the legislature really intended it to mean a concept of fairness, allowing both sides of the issue to be presented to the school children, so students could make an informed choice. *Id.*

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

vancing creationism over evolution.³⁹ It also found the statute's description of academic freedom fallacious because in narrowly restricting the curriculum, the Act actually deprived teachers of the academic freedom they had previously enjoyed to choose what theories of origins to teach.⁴⁰

Additionally, the Court discovered a lack of secular purpose in reviewing the historic context of the Act.⁴¹ Noting the ongoing battle between religious fundamentalists and evolutionists concerning theories of human origin,⁴² the Court found parallels between the circumstances surrounding similar invalid government actions and the local religious fervor that surrounded the Act's passage.⁴³ Therefore, the Court concluded that the historic context of the Act's origin confirmed its primarily religious purpose.⁴⁴

The Court next examined the legislative history of the Act and found that it plainly supported a religious purpose.⁴⁵ The Court noted that the Louisiana Legislature emphasized the religious notions of creationism, rather than scientific evidence.⁴⁶ Moreover, the Act's chief sponsor repeatedly stated his aversion to evolution.⁴⁷ The Court concluded that the legislative history showed that the Act's chief purpose was to narrow the public school's science curriculum in favor of a particular religious doctrine.⁴⁸

39. Under the Act, only creationists could serve on the curriculum panel, receive research aids, or be protected from discrimination. *Edwards*, 107 S. Ct. at 2579-80. Evolutionists received no additional benefits. *Id.* See LA. REV. STAT. ANN. §§ 17:286.4-7 (West, 1982).

40. *Edwards*, 107 S. Ct. 2579.

41. *Id.* at 2581.

42. The Court compared the surrounding social history of the Act to the history of the fundamentalist/evolution conflict, which culminated in cases like *Epperson v. Arkansas*, 393 U.S. 97 (1968); *McClean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982); and *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927). Each of these antievolution statutes seemed to be inspired by fundamentalist furor, and there was evidence of the same in the present case. *Edwards*, 107 S. Ct. at 2581.

43. *Edwards*, 107 S. Ct. at 2581.

44. *Id.*

45. The leading expert witness for the state testified that an intelligent mind created life on earth, and repeatedly defined creation science with references to the existence of a supernatural creator. Brief of Appellants App. E at 421-22, *Edwards v. Aguillard*, 107 S. Ct. 2573 (1987) (No. 85-1513). The Act's sponsor made repeated references to his own dislike of the theory of evolution, and of the theory's conflict with his personal beliefs. *Edwards*, 107 S. Ct. at 2580-83. The original draft of the Act contained references to God, creation from nothing, and a universal flood. *Id.* at 2583-87. The Court determined that the overriding purpose of the Act was to further these religious views. *Id.*

46. *Edwards*, 107 S. Ct. at 2579-80.

47. *Id.* For an explanation of how the Court viewed the Act's sponsor's religious leanings, see *infra* notes 97-98 and accompanying text.

48. *Edwards*, 107 S. Ct. at 2583. The Court concluded its opinion by disposing of the state's argument that the lower courts had committed procedural error. *Id.* The State submitted factual evidence, much of it supported by expert witnesses' affidavits, to both the district and appellate courts. *Id.* See Brief of Appellants at 6-12,

Although the Court was justified in concluding that the Act violated the Establishment Clause,⁴⁹ the Court used inconsistent rea-

Edwards v. Aguillard, 107 S. Ct. 2573 (1987) (No. 85-1513). The State attempted to prove that creation science consists of scientific findings, not religious concepts, and that evolution is no more scientific or non-religious than creationism. *Id.* at 13. The ACLU did not present any evidence to controvert the State's evidence. *Edwards*, 107 S. Ct. at 2583; Brief of Appellants at 6-12, *Edwards v. Aguillard*, 107 S. Ct. 2573 (1987) (No. 85-1513). The State contended that both the district and appellate courts sustained summary judgment in direct conflict with procedural rules. *See Brunswick Corp. v. Vineburg*, 370 F. 2d. 605, 612 (5th Cir. 1967) (warning against abuse of summary judgment); *see also* 6 MOORE'S FEDERAL PRACTICE ¶ 56.02-14, 56.23 (2d ed. 1982), which generally states that the purpose of summary judgment is to avoid a useless trial where there is no issue of material fact to be tried, and that a party puts his interests in peril if the motion is not supported or opposed by evidentiary materials or an affidavit filed under Fed. R. Civ. P. 56. The State cited cases holding that uncontroverted affidavits must be accepted as truth and admitted, for summary judgment purposes, as conclusive as to factual issues. *See McPherson v. Rankin*, 736 F.2d 175, 178 (5th Cir. 1984) (reviewing court required to consider evidence in light most favorable to non-moving party, thus factual statements made in opponent's uncontroverted affidavits must be regarded as true on appeal); *Jones v. Wike*, 654 F.2d 1129, 1130 (5th Cir. 1981)(uncontroverted affidavit containing expert opinion establishes experts opinions as true); *Jones v. Halekulani Hotel, Inc.*, 557 F.2d 1308, 1310 (9th Cir. 1977) (on appeal, uncontroverted affidavits upheld as true); *Wang v. Lake Max-inhall Estates, Inc.*, 531 F.2d 832, 835 n.10 (7th Cir. 1976) (failing to controvert affidavits leads court to accept facts set forth in affidavits as true); *Morrison v. Walker*, 404 F.2d 1046, 1048-49 (9th Cir. 1969) (facts stated by moving party in affidavits for summary judgment which are not contradicted by opposing affidavits in opposing motion are admitted).

The State further contended that the lower courts were in error because the courts cited no authority to refute the State's claims. Brief of Appellants at 9, *Edwards v. Aguillard*, 107 S. Ct. 2573 (1987) (No. 85-1513). In fact, the lower courts disregarded all the evidence the state presented. *See Aguillard v. Edwards*, 765 F.2d 1251, 1256-57 (5th Cir. 1985). Also, the courts failed to view the factual assertions in the light most favorable to the opposing party, or to place the burden of proof for showing the absence of a genuine issue of material fact on the ACLU. *See Adickes v. S.H. Kuess & Co.*, 398 U.S. 144, 157 (1970) (moving party in summary judgment motion has burden of proof, and facts presented must be viewed in light most favorable to opposing party). *Accord* WRIGHT, MILLER, & KANE, 10A FED. PRACTICE AND PROCEDURE § 2723, at 68 (1973); 6 MOORE'S FEDERAL PRACTICE ¶ 56.15[3] (2d ed. 1966).

The Court chose to downplay the importance of the procedural issue, and held that uncontroverted affidavits do not always preclude summary judgment. *Edwards*, 107 S. Ct. at 2584 (citing *Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986)), which states there is no requirement in Rule 56 that the moving party must support its motion with affidavits in order to negate the opposing side's claim. The Court noted that the state obtained the affidavits after the passage of the Act. *Id.* The Court reasoned that post-enactment testimony has little to do with pre-enactment purpose, and held that the evidence raised no issues of material fact. *Id.*

Professor David Caudill speculated on the reason for all three courts ignoring or dismissing as irrelevant the Rule 56 issue. Caudill, *A Spectator's Guide to Aguillard v. Edwards: Part I, Will the Clock Strike Thirteen?*, 17 CUMB. L. REV. 87, 98 (1986). He saw the procedural issue as an inherently weak argument. *Id.* The State's position on the religious purpose issue was so obvious to the courts that to allow the case to be remanded on procedural issues alone is akin to letting a captured criminal go free on a technicality. *Id.*

49. For a discussion of the Court's possible use of the other two *Lemon* test prongs to invalidate the Act, see *infra* note 118. *See also* Caudill, *A Spectator's Guide to Edwards v. Aguillard: Part I, Will the Clock Strike Thirteen?*, 17 CUMB. L. REV. 87 (1986) (examination of whether Act would pass each of *Lemon* test's prongs).

soning when it based this decision on the purpose prong of the *Lemon* test. First, the Court has historically invalidated legislation on the purpose prong of the *Lemon* test only if that legislation had absolutely *no* secular purpose.⁵⁰ There is some evidence, however, that the Balanced Treatment Act had *some* secular purpose.⁵¹ Second, the Court refused to recognize that the Act's provisions contained terms of art, and misinterpreted the Louisiana Legislature's intent and instead applied its own conception of the Act's key phrases,⁵² most notably, "academic freedom."⁵³ Finally, the Court misinterpreted the legislative history of the Act, particularly the Act's implied secular purpose of assuring that public schools will not religiously indoctrinate children.⁵⁴

The first prong of the *Lemon* test requires that the act in question must not have a primarily religious purpose.⁵⁵ In applying this prong, the Court invalidates a law only when it finds an exclusively religious purpose, which the Court also labels as no secular purpose.⁵⁶ The Court, however, is usually brief when it deals with the

50. For an explanation of the Court's use of the *Lemon* test's purpose prong to invalidate legislation, see *infra* notes 55-74 and accompanying text.

51. For an explanation of how the Court should have handled the evidence as related to the procedural issues raised by the state, see *supra* note 48. For an explanation of how the Court should have responded to the evidence of the Act's secular purpose, see *infra* notes 76-123 and accompanying text.

52. For an explanation of the Act's language as containing terms of art and how the Court should have interpreted those terms in relation to Louisiana law, see *infra* notes 88-96 and accompanying text.

53. For an explanation of how the Court should have interpreted academic freedom, see *infra* notes 83-87 and accompanying text.

54. For a discussion of how the legislature intended the Act to prevent religious indoctrination, see *infra* notes 113-117 and accompanying text.

55. *Lemon v. Kurtzman*, 403 U.S. 602, 613-14 (1971).

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

It is important to note that the first prong of the *Lemon* test prohibits the advancement of religion. *Lemon*, 403 U.S. at 613. This does not prevent legislators from acting upon their religious convictions. *Edwards*, 107 S. Ct. at 2594 (Scalia, J., dissenting) (Establishment Clause does not forbid religiously motivated laws providing humanitarian aid).

Also, a law's purpose is not religious simply because it coincides with the beliefs of some or all religions. *Harris v. McRae*, 448 U.S. 297, 319 (1980) (federal statute prohibiting funding of abortions is constitutional despite advocating position supported by tenets of major religions); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961) (Sunday closing laws constitutional despite coincidence of religious sabbatarian practices). Often the general welfare of society dictates such results. *Id.* at 444-45; see also *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding general tax credits for all families with school aged children—arguably motivated by desire to lessen financial burdens on all families as well as help families sending students to religious schools); *Walz v. Tax Comm'n*, 397 U.S. 306 (1970) (upholding tax exemptions for property owned by religious organizations—arguably motivated by both religious and secular motives).

Justice Scalia also noted that the Court, in striking down the Balanced Treatment Act for the reasons expressed by the majority, contradicted the notion that Title VII of the Civil Rights Act of 1964, which both forbids religious discrimination by private sector employers and requires them to reasonably accommodate their employee's religious practices, is constitutional. *Edwards*, 107 S. Ct. at 2596 (Scalia, J.,

purpose prong of the *Lemon* test.⁵⁷ Typically, the Court finds some secular purpose in government acts challenged under the Establishment Clause.⁵⁸ In fact, the Court has invalidated laws for lack of

dissenting) (citing 42 U.S.C. §§ 2000 e-2(a)(1)- e(j) (1981)). Justice Scalia posited that Title VII was motivated by religious purpose *and* secular purpose, just like the Balanced Treatment Act, yet no one would interpret Title VII as violating the Establishment Clause. *Id.*

Notably, the Court upheld section 702 of Title VII as constitutional in a case decided after *Edwards*. See *Corporation of Presiding Bishop v. Amos*, 107 S. Ct. 2862 (1987) (employee working in a secular capacity for the Mormon Church dismissed for not adhering to moral practices of the church). Section 702 of Title VII exempts non-profit religious organizations from the restrictions that Title VII places on other employers. 42 U.S.C. § 2000 e-1 (1981). The Court upheld section 702 as constitutional, declaring that the "government may (and sometimes must) accommodate religious practices and it may do so without violating the Establishment Clause." *Id.* at 2867 (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 107 S. Ct. 1048 (1987)). If the purpose behind section 702 is constitutional, then the Balanced Treatment Act's purpose is arguably also permissible.

There are also instances where the free exercise clause will require the intentional advancement of religion. See *Edwards*, 107 S. Ct. at 2595-96 (Scalia, J., dissenting) (citing *Hobbie v. Unemployment Appeals Comm'n of Florida*, 107 S. Ct. 1048 (1987)). In *Hobbie*, an employee, a Seventh-Day Adventist, was discharged for refusing to work on Saturdays, her Sabbath day. The Court held that the state must pay the fired employee's unemployment compensation, allowing her to benefit from religion. See *Thomas v. Review Bd. Ind. Employment Sec. Div.*, 450 U.S. 707 (1981). *Thomas* involved a Jehovah Witness who resigned from his job rather than work on material used for weapons. The Court ordered the state to pay the worker's unemployment benefits because he did not resign willfully, but his religious beliefs compelled him to resign. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972), where the Court held Amish school children need not comply with mandatory attendance laws for high school. The Court ordered the exemption for the Amish unless the state could show an interest of the highest order, and ruled the state's interest in two more years of compulsory education was not as strong as the Amish's personal religious interests. *Id.* On the other hand, had the state offered a less religiously burdensome alternative, as was suggested in *Thornton v. Caldor*, see *supra* note 31 for *Thornton's* summary, the Court may have upheld the state's claim. See also *Sherbert v. Verner*, 374 U.S. 398 (1963) (Seventh-day Adventist denied unemployment benefits for refusing to work on Saturday). In all these cases, the Court required the Government to grant an exemption for an otherwise perfectly valid law due to a particular group's religious views—in effect, advancing religion.

57. *Edwards v. Aguillard*, 107 S. Ct. 2573, 2593 (1987) (Scalia, J., dissenting).

58. *Id.* (citing *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 485-86 (1986) (allowing blind students to use funds earmarked for handicapped-vocational rehabilitation to attend parochial colleges is secular in purpose); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 383 (1985) (purpose of law allowing non-public students to be instructed in state mandated curriculum at public expense is "manifestly secular"); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123-24 (1982) (ban on liquor sales near churches has secular purpose of keeping order in a dignified society); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981) (state university prohibiting student religious groups from using facilities has secular purpose of avoiding first amendment violation); *Comm. for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 229, 236 (1980) (reimbursing parochial schools for costs of state required testing has secular purpose); *Levitt v. Comm. for Pub. Educ. and Religious Liberty*, 413 U.S. 472, 479-80 n.7 (1973) (using government funds for parochial school repairs has secular purpose but religious effect); *Tilton v. Richardson*, 403 U.S. 672, 678-79 (1971) (law allowing grants to religious colleges upheld as having secular purpose because grants were indiscriminantly given to all colleges); *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (law allowing government stipends to parochial school teachers who teach secular

secular purpose on only three occasions.⁵⁹

In the first of these cases, *Epperson v. Arkansas*,⁶⁰ the Court declared that a state law prohibiting the teaching of evolution in the public schools had an exclusively religious purpose. The Court found that the only purpose for passing the law was to ban teaching at odds with "fundamentalist sectarian convictions."⁶¹ There was no evidence presented by the state or in the express intent of the legislature to support the conclusion that the antievolution law's purpose was anything but religiously motivated.⁶² Even though the *Epperson* case predates *Lemon*, it is often cited as an example of failing *Lemon*'s first prong.⁶³

In the second case, *Stone v. Graham*,⁶⁴ the posting of the ten commandments in public school classrooms had the primary purpose of advancing religion, despite a declared secular purpose of displaying the ten commandments as "the fundamental legal code of Western Civilization and the Common Law of the United States."⁶⁵ Because the decalogue is undeniably religious in nature, the Court

subjects has secular purpose of improving quality of all students' secular education).

59. See Larson, *Textbooks, Judges, and Science*, 17 CUMB. L. REV. 116, 129 (1986) (noting Court's infrequent use of purpose prong in invalidating legislation).

60. 393 U.S. 97 (1968).

61. *Id.* at 108.

62. *Id.* at 107-08. The Arkansas legislature enacted the law in 1928 by popular initiative in wake of the infamous *Scopes* "Monkey" trial in Tennessee. *Id.* at 109 n.17. Evidence showed that the Arkansas law passed on a wave of fundamentalist zeal, *id.* at 108 n.16, and there is nothing in the language of the law, see *id.* at 99 n.3, or in the legislative history, *id.* at 98 (Arkansas law is an adaptation of the Tennessee law made infamous in *Scopes* trial), to refute the religious purpose.

It is interesting to note that Justice Black, in concurrence, objected to the majority's use of improper purpose as the reason to strike down the law. Instead, he objected to the statute's vagueness. *Id.* at 112 (Black, J., concurring). Justice Black stated that "this Court has consistently held that it is not for us to invalidate a statute because of our views that the 'motives' behind its passage were improper; it is simply too difficult to determine what those motives were." *Id.* at 113 (Black, J., concurring) (citing *United States v. O'Brien*, 391 U.S. 367, 382-83 (1968)).

63. See *Edwards v. Aguillard*, 107 S. Ct 2573, 2582 (1987). A similar, but more recent case, is *McClellan v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982), which held a law requiring both creation and evolution to be taught equally in the public schools was also a product of pandering to fundamentalist christian zeal. *Id.* at 1259-63. In fact, the author of this Balanced Treatment Act in Arkansas had a tremendous influence on the drafting of the Louisiana Balanced Treatment Act. For an explanation of this influence, see *infra* notes 103-07 and accompanying text. The state claimed that the law as written was not conclusively religious. *McClellan*, 529 F. Supp. at 1265. The Court, however, in examining the legislative history and historic context of the act, as well as statements by the legislative sponsors, *id.* at 1263-64, concluded that the only purpose for enacting the statute was to further a particular religious belief. *Id.* at 1264. The state failed to present any evidence that, at any time during the legislative process, any one in the Arkansas legislature articulated a legitimate educational purpose for the act. *Id.* With no evidence to the contrary, the court ruled that the Arkansas statute failed the purpose prong of the *Lemon* test. *Id.*

64. 449 U.S. 39 (1981).

65. *Id.* at 41 (quoting KY. REV. STAT. § 158.178 (1980)).

concluded that no legislative recitation of secular purpose could justify the law's purpose.⁶⁶ Therefore, despite express legislative secular intent, it failed the purpose prong.⁶⁷

In the third case, *Wallace v. Jaffree*,⁶⁸ the Court struck down a law proscribing a moment of silence at the beginning of the school day for meditation and prayer. The Court held that the statute in *Wallace* also violated the purpose prong because the state offered no evidence of secular purpose in enacting the law,⁶⁹ and both the express intent of the legislature and the legislative history pointed to an exclusively religious purpose.⁷⁰ *Wallace*, however, also acknowledged that a law could have a religious purpose and still be valid.⁷¹ A statute is invalidated under the purpose prong only if it is "en-

66. *Id.* The Court noted that the ten commandments do indeed contain references to secular matters, such as honoring parents, and general bans against antisocial conduct such as murder, adultery, stealing, false witness, and covetousness. *Id.* at 41-42. The first few commandments, however, concern religious functions, such as worship, avoidance of idolatry, and sabbath duties. *Id.* at 42. Also, the commandments were displayed on the wall. *Id.* Therefore, they took on the aspects of veneration and devotion, as opposed to an integrated part of the school curriculum; where the commandments become part of a history, ethics, or comparative religion class. *Id.*

67. *Id.* at 43 (Rehnquist, J., dissenting). Justice Rehnquist, in dissent, criticized the majority for declaring that the statute in *Stone* had no secular purpose without any evidence other than its own opinion. *Id.* After citing several examples of the Supreme Court's usual deference to legislative intent in establishment clause cases, *id.* at 44, he noted that a religious motivation and a secular purpose may overlap without violating the constitution. *Id.* (quoting *McGowan v. Maryland*, 366 U.S. 420, 445 (1961)). He also criticized the majority for its reliance on *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (prohibiting devotional use of Bibles in public schools). In *Schempp*, the government actions in question were either openly intended to be religious by the state, *id.* at 223, or admitted to be religious by the state after the fact. *Id.* at 224. In *Stone*, however, while the ten commandments are obviously sacred writings, they also had a "significant impact on the development of secular legal codes of the Western World." *Stone*, 449 U.S. at 45 (Rehnquist, J., dissenting). Justice Rehnquist also noted that the Establishment Clause does not require that the public be insulated from anything of religious significance or origin. *Id.* at 45-46. He also cited several examples of cases where a state could display religious documents due to their significant secular impact. *Id.* at 45 (citing *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 33, *cert. denied*, 414 U.S. 878 (1973) (10th Cir. 1973), where a statue on public land was allowed to display the ten commandments because of their "substantial secular attributes," and *Opinion of the Justices*, 108 N.H. 97, 228 A.2d 161 (1967), allowing plaques that displayed the motto "In God We Trust" in public schools).

68. 472 U.S. 38 (1985).

69. *Id.* at 57. The statute had originally been passed as a "moment of silence" law with no mention of prayer in the wording of the Act. *Id.* at 59. The only purpose proffered by the Alabama legislature was to return voluntary prayer to the public schools. *Id.* at 57 n.43. At oral argument before the Supreme Court, the appellants in *Wallace* attempted to frame the purpose of the statute as an accommodation of all religious beliefs. *Id.* at 57 n.45. They also sought to present the statute as protecting the free exercise beliefs of those children who wanted to use the time to pray. *Id.* The Court dismissed these arguments, saying that to make these claims, the state must prove that some free exercise violations existed before the statute's enactment. *Id.*

70. *Id.* at 57-58.

71. *Id.* at 56 (citing *Abington School Dist. v. Schempp*, 374 U.S. 203, 296-303 (1963) (Brennan, J., concurring)).

tirely motivated by a purpose to advance religion."⁷² If the statute in *Wallace* had not mentioned prayer, and the legislative history and context of the law's passage had not revealed a desire to place voluntary prayer back in the public schools, the Court would have held that the law was valid.⁷³

In all three of these cases, the Court examined the legislative history and the express legislative intent in the record and held that there was absolutely *no* secular motive for passing the law.⁷⁴ To be consistent with this precedent,⁷⁵ therefore, the *Edwards* Court

72. *Id.* (citing *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984)).

73. *Id.* at 59.

74. *Edwards v. Aguillard*, 107 S. Ct. 2573, 2593 (1987) (Scalia, J., dissenting). It should also be noted that in recent years, the Court has articulated alternatives to the *Lemon* test. See *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, a state-paid chaplain opened state legislative sessions with prayer. *Id.* at 784-85. The Court upheld this practice as constitutional. *Id.* at 792-95. The Court relied on historical factors and ignored the *Lemon* test altogether. *Id.* at 786-92. The Court stated that the continued use of prayer in public functions, especially the legislature, for over 200 years "has become part of the fabric of our society." *Id.* at 792. The Court further stated that this practice did not establish religion, but recognized a belief widely held among the nation's people. *Id.* It appears that a religious practice which is so much a part of our national heritage as to be indistinguishable from secular aspects of history will not violate the Establishment Clause. See Note, *The Secular Meaning Behind the Lemon Test: Lynch v. Donnelly*, 2 *Touro L. Rev.* 247, 253 n.41 (1986) [hereinafter *Secular Meaning*] (one example might be the phrase "In God We Trust" placed on coins).

75. One possible interpretation of *Edwards* is that the Court is announcing a new interpretation of the purpose prong of the *Lemon* test. The Court may be announcing that it will find a lack of secular purpose even when a statute arguably contains some secular purpose. This would move away from the patterns established in *Wallace*, *Stone*, and *Epperson*. The language of the *Edwards* decision, however, points to an upholding of past use of the *Lemon* test, which states a law will only be struck down on the purpose prong if it has absolutely no secular purpose. *Edwards*, 107 S. Ct. at 2579-83. The Court concluded that any statement in the Act's wording or in its legislative history which might indicate secular motivation was actually an attempt to mask the actual religious purpose behind the Act. *Id.*

But see *Lynch v. Donnelly*, 465 U.S. 668 (1984). *Lynch* further refined the *Lemon* test to the point of supplanting it. The court upheld a city's display of a Christmas nativity scene with other symbols traditionally associated with Christmas, for example, Santa Claus, reindeer, christmas trees, and a banner reading "Season's Greetings." *Id.* at 671. The court held that in the context of Christmas as celebrated in the U.S., the display passed all three *Lemon* test prongs. *Id.* at 681-84.

The *Lynch* majority implied that a statute need not pass all three *Lemon* test prongs to be valid. *Lynch*, 465 U.S. at 686-87. *Lynch* appears to announce a new test. While *Lemon* requires secular purpose, *Lynch* appears to require secular meaning. See *Secular Meaning*, *supra* note 74, at 257. Under *Lemon*, a law is invalidated when a court finds no express or implicit primary secular purpose, and will validate the law only if it was obviously motivated by non-religious factors. *Id.* The act must still pass the other two prongs to survive. With *Lynch*, the determination of a secular meaning will end the inquiry. *Id.* Secular meaning is determined objectively, while purpose is subjective. Secular meaning, however, must be determined in the light of several outside factors: 1) historical significance or tradition, see *Johnson v. Board of County Comm'rs of Bernalillo County*, 528 F. Supp. 919 (D.N.M. 1981) (upholding use of cross as symbol on county seal in New Mexico as valid due to strong tradition of Spanish and Catholic influences in state history), *rev'd sub nom. Friedman v. Board of County Comm'rs of Bernalillo County*, 781 F.2d 777 (10th Cir. 1985), *cert. denied*,

should not have struck down the Act for lack of secular purpose unless the record showed that the *sole* motivation for the legislation was religious.⁷⁶ The record in *Edwards* did not display this singular purpose. The legislature articulated a secular purpose for the Act,⁷⁷ revealed in the statute's wording and in the legislative history.⁷⁸ Therefore, the Court should have followed its usual course of deferring to the express intent of the legislature.⁷⁹ The fact that the state presented evidence that raised genuine issues of material fact as to the Act's purpose emphasizes this deviation from past practice.⁸⁰ The Court's affirmation of summary judgment,⁸¹ in light of this evidence, is highly questionable.⁸²

The Court also engaged in a strained interpretation of the Act's

106 S. Ct. 2890 (1986) (due to the cross being the prominent feature in the emblem, not even history or tradition enough to pass constitutional muster). Perhaps if combined with the other factors of this analysis, history and tradition might have more significance. 2) proximity, see *Secular Meaning*, *supra* note 74, at 260 (the closer sacred objects are to secular ones, the more secular meaning is possible). 3) a connection with a federal holiday as opposed to a non federal one, see *Fox v. City of Los Angeles*, 22 Cal.3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978) (symbols associated with Christmas, but not with Easter, pass muster). 4) duration, see *Secular Meaning*, *supra* note 74, at 264 (longer an act stays in effect, more likely it will be unconstitutional).

Due to the special nature of the public school situation, however, such as mandatory attendance and the possible effect of indoctrination on young minds, the Court should still strictly apply the safeguards contained in the *Lemon* test. *Id.* at 266.

Lynch seemed to put the future of the three pronged test in doubt. Justice O'Connor's concurrence seemed to suggest the *Lemon* approach would only be used as a way of evaluating the broader question of a subjective secular meaning. *Lynch* 465 U.S. at 687-94 (O'Connor, J., concurring). In fact, noted constitutional scholar Gerald Gunther did not even bother to include *Lemon* in the latest edition of his casebook, but uses *Lynch* as a focal point of study. G. GUNTHER, CONSTITUTIONAL LAW 1463-1531 (11th ed. 1985).

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

77. *Edwards*, 107 S. Ct. at 2599 (Scalia, J., dissenting).

78. *Id.* at 2596-605 (Scalia, J., dissenting).

79. *Id.* at 2600 (Scalia, J., dissenting) (citing Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 654 (1980)).

80. See *id.* at 2583.

81. For an explanation of the summary judgment issue, see *supra* note 48.

82. In a related issue, Justice O'Connor suggested in concurrence in *Wallace v. Jaffree*, 472 U.S. 38 (1985), that a majority of the Court might uphold a law if the state showed a desire to accommodate the religious practices of those the statute will benefit. *Id.* at 73-76 (O'Connor, J., concurring). She warned, however, that the legislature cannot convey or attempt to convey the message that the statute's provisions could be used by those who wish to use the law's religious benefits to advance their religious beliefs. *Id.* For example, in the fact pattern in *Wallace*, the state could pass a law requiring a moment of silence before class begins in order to accommodate a child's desire to pray in school, as long as the statute does not convey to school children and parents that the moment of silence was meant for prayer. Comparing this situation to *Edwards*, the Louisiana legislature could enact balanced treatment as a means to accommodate the religious views of those who favor creationism, as long as the Act does not convey to creationists that their view is now the favored one, or has the endorsement of the government.

actual provisions by using its own definitions of the key terms in the Act's provisions. The Court substituted its own interpretation of "academic freedom," ignoring the legislative intent. It also ignored the meaning of the Act's terms contained in the Act's special definition section.

First, the Court misconstrued the stated purpose of the Act: "academic freedom." The Court held that the Act was the antithesis of academic freedom because it deprived teachers of the freedom to teach any theory of origin they wished,⁸³ and concluded that if the legislature had truly wanted to expand educational comprehensiveness they would have encouraged teaching of all scientific theories of origin, and not just creationism and evolution.⁸⁴ The legislative history, however, defined academic freedom in terms of the students.⁸⁵ The legislature perceived that public schools censored creationism while presenting evolution as the exclusive theory of origins.⁸⁶ The Act assured that teachers would present both theories to students, thus providing them with a more comprehensive education.⁸⁷ By creating its own definition of academic freedom, the Court refused to recognize this secular purpose.

The Court further misapplied the first prong of the *Lemon* test by using its own definitions of the terms defined in the Act's special definition section. The Act explicitly defined creation and evolution science, and explained that the legislature wanted these terms interpreted in light of those definitions.⁸⁸ Also, the legislature based these definitions on the testimony of scientific and educational experts.⁸⁹ The Court, however, refused to accept these definitions.⁹⁰ Instead, it based its interpretation of the Act's terms on dictionary definitions.⁹¹ Whether the legislature's view of the Act's terms was

83. *Edwards*, 107 S. Ct. at 2578-79.

84. *Id.* at 2580.

85. *Id.* at 2601 (Scalia, J., dissenting).

86. *Id.* at 2599 (Scalia, J., dissenting).

87. *Id.* at 2601 (Scalia, J., dissenting).

88. LA. REV. STAT. ANN. § 17:286.3 (West 1982) (creation and evolution defined by scientific evidence supporting each theory, and inferences drawn from such evidence).

89. *Edwards*, 107 S. Ct. at 2598 (Scalia, J., dissenting).

90. *Id.* at 2584.

91. *Id.* at 2585 (Powell, J., concurring). Justice Powell stated that the Act *did not define* creation or evolution, blatantly ignoring the wording of the statute. *Id.* Instead, Justice Powell used dictionary definitions to define the two theories. *Id.* at 2585. Writing for the Court, Justice Brennan pointed out that even if these terms were clearly defined as terms of art in the Act, they were not perceived by school officials to mean what the Act said they meant. *Id.* at 2584 n.18. The state school board survey revealed that superintendents across the state thought creation science had religious meaning. *Id.*

The Court's refusal to recognize the definitions contained in the Act also contradicts Louisiana's requirement that those who interpret statutory language, in an area of expertise, do so according to the language's received meaning, and in a manner

objectively correct is irrelevant.⁹² Under the purpose prong of the *Lemon* test, the Court should only consider the sincerity of the legislative purpose underlying a statute, and not the legislature's wisdom in believing the statute would advance that purpose.⁹³ Unlike other areas of constitutional adjudication dealing with fundamental rights,⁹⁴ questions of Establishment Clause violation turn on the sincerity of the legislature.⁹⁵ Because the Act's language revealed a

consistent with how experts view this particular area of the law. LA. CIV. CODE ANN. art. 15 (West 1952). Under state law, any interpretation of identified terms of art contrary to what the legislature meant the terms to mean, or what experts in that field determine them to mean, is irrelevant. *Id.* Also, there was more than enough evidence in the language of the act; amplified by the legislative history, and the affidavit testimony of the state's experts. *Edwards*, 107 S. Ct. at 2596-605 (Scalia, J., dissenting). The experts included two scientists, two theologians, and a school administrator. *Id.* at 2583. These experts insisted that creation science was a science, and could be presented to public school children in a non-religious fashion. *Id.* at 2592 (Scalia, J., dissenting). The Act on its face, the legislative history, and the expert testimony all combine under Louisiana's method of interpreting statutory language of this sort to point to a secular purpose.

Also, the Louisiana law on statutory interpretation, when it refers to experts, refers to experts trained in the particular field the legislation regulates. LA. CIV. CODE ANN. art. 15 (West 1952). Reading between the lines, it appears the Louisiana state legislature wanted to assure that no Court would misconstrue the meaning of a statute. The legislature tacitly excludes judges from being "experts" in any field requiring special training:

Moreover, The ACLU offered no expert evidence to controvert the legislature's interpretation of the Act's terms. *Edwards*, 107 S. Ct. at 2583. In fact, all of the State's evidence was uncontroverted. *Id.* Therefore, the Court should not have gone beyond the evidence presented to the trial court, or the evidence of legislative intent when defining the Act's terms. For a further explanation of the procedural aspects of the case, see *supra* note 48 and accompanying text.

92. *Edwards*, 107 S. Ct. at 2598 (Scalia, J., dissenting).

93. *Id.*

94. Fundamental rights are those which originate in the express terms of the Constitution, or which are implied from those terms. BLACK'S LAW DICTIONARY 607 (5th ed. 1979). See G. GUNTHER, CONSTITUTIONAL LAW 442-48, 501-35, 787-848 (11th ed. 1985) (in-depth explanation of Court's use of fundamental rights under the due process and equal protection clauses). While the Court has never expressly identified religious rights as fundamental rights, the Court has often used the same judicial standards of review in religion cases as in due process and equal protection cases. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-10, at 846 (1978).

95. Legislative purpose has no bearing on due process decisions. Courts often consider intent when deciding equal protection cases, but the dispositive proof of an equal protection violation is usually the effect of the law. See *Rogers v. Lodge*, 458 U.S. 613 (1982) (facially valid voting law held to violate equal protection, even without intent to discriminate, because law was discriminatorily administered for 70 years); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (facially neutral law administered discriminatorily). The Court has required proof of discriminatory intent to uphold a racial discrimination claim. *Washington v. Davis*, 426 U.S. 229 (1976). But see G. GUNTHER, CONSTITUTIONAL LAW 712-36 (11th ed. 1985) (the Court will not strike down facially neutral laws which produce school segregation, even if the legislature intended to discriminate).

An ironic twist to *Lemon*'s purpose prong is the fact that a facially neutral law with no religious effects, such as a humanitarian measure motivated solely by a religious convictions to help the poor, will fail the *Lemon* test. *Edwards*, 107 S. Ct. at 2594, 2607 (Scalia, J., dissenting). Justice Scalia also noted that determining legislative intent is inherently unreliable. *Id.* at 2606-07.

secular purpose, the Court should have conformed with its own past precedent,⁹⁶ and deferred to this purpose.

The Court also misinterpreted the secular purpose of the Act as found in the legislative history. The Court chose to scrutinize the sponsor of the Act's religious background, the questionable history of a model statute upon which the Act was based, and the scientific credibility of the Act. In so doing, the Court ignored the Act's other objectively secular purposes.

The *Edwards* majority noted that the religious prejudices of the chief sponsor of the Act were foundational to the Act's purpose.⁹⁷ The Court cited the sponsor's repeated references to his personal aversion to evolution, and how evolution conflicted with his own religious beliefs.⁹⁸ There is evidence, however, that the Act's sponsors presented the Act to the legislature as having a secular foundation.⁹⁹ The Act's chief sponsor repeatedly and vehemently denied that his purpose was to advance religion.¹⁰⁰ There was no evidence that conclusively proved that the legislature did not accept the sponsor's statements as reflecting his motives.¹⁰¹ Even if a majority of the legislature enacted the Act for the purpose of fostering religious belief, the purpose prong of the *Lemon* test will not invalidate the law if a

96. Traditionally, if a statute could have two interpretations, one constitutional and the other invalid, the Court normally has adopted the valid interpretation. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) (upholding the constitutionality of the National Labor Relations Act). The *Jones* Court stated:

[T]he cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same.

Id. Therefore, it is logical to infer that if a law's purpose is in question, and there are two possible interpretations of that purpose—one religious and the other secular—the Court should uphold the law as having a valid purpose.

97. *Edwards*, 107 S. Ct. at 2581-82 nn. 13-14.

98. *Id.* at 2582 n.14.

99. *Id.* at 2597-605. (Scalia, J., dissenting).

100. *Id.* at 2599.

101. *Id.* at 2600 (Scalia, J., dissenting). The Act was presented to the legislature in the following manner: 1) The only two viable explanations for the origin of life are evolution and creation-science. 2) The body of scientific evidence which supports creation science is as dependable as the evidence which supports evolution. In fact, the evidence for creation may be stronger. 3) Creation science is a valuable asset to the curriculum, and could be presented to children void of any religious content. 4) Despite the scientific evidence for creation, and its value to scientific study, it is being censored or misrepresented in the public schools. 5) The censorship of creation has two harmful effects: A) Students are deprived of knowledge of one of the theories of the origin of life, and are taught to believe that evolution is an absolute truth (therefore education suffers). B) It violates the Establishment Clause. The United States Supreme Court has held that Secular Humanism is a religion, and belief in evolution is one of the core values and beliefs of Secular Humanism. Therefore, by censoring creation and presenting evolution as absolute fact, the government, through the public schools, is advancing religion in violation of the Establishment Clause. *Id.* at 2598-99 (Scalia, J., dissenting) (citing the legislative history of the Act).

valid secular purpose also exists.¹⁰² Because such evidence existed, it was improper for the Court to affirm the summary judgment.

The Court also noted that the Act was based on a model bill, which an Arkansas federal district court declared unconstitutional.¹⁰³ The Court found that the legislature edited several religious terms out of an early draft of the Act after the Arkansas law failed constitutional scrutiny,¹⁰⁴ and that the author of the model bill designed it with a religious purpose.¹⁰⁵ Again, there was no conclusory evidence that the legislature adopted these views. If restoring the deleted portions of the Act's original draft restored words of religious purpose,¹⁰⁶ then the majority should have also considered other deleted sections to determine legislative purpose. The Court chose to ignore the the section of the Act which defined "academic freedom," as originally introduced, and which clearly defined the Act's purpose as protecting the students' right to a comprehensive education.¹⁰⁷

Finally, the Court refused to recognize the scientific credibility of the Act, especially as supported by the affidavits of the state's expert witnesses.¹⁰⁸ The *Edwards* majority, noting that the state's witnesses were different from those who testified before the legislature, refused to recognize the validity of expert testimony which did not directly influence the purpose of the Act at the time of enactment.¹⁰⁹ There was no evidence, however, to show that the legislature had any reason to doubt the credibility of the witnesses that testified before it.¹¹⁰ Because the Act passed by a wide margin,¹¹¹ the Court should have assumed that the legislature adopted the Act's stated purpose.¹¹²

By selectively isolating certain aspects of the legislative history, the Court refused to recognize an obvious and express secular purpose for the Act—the need for students to be free from religious indoctrination.¹¹³ This purpose was based on the chief sponsor of

102. *Id.* at 2604 (Scalia, J. dissenting).

103. *Id.* at 2586 (Powell, J., concurring). See *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982). The Act and the legislation in *McLean* were both based upon the same model Balanced Treatment Act. *Edwards*, 107 S. Ct. at 2586-87 (Powell, J., concurring).

104. *Edwards*, 107 S. Ct. at 2586-87 (Powell, J., concurring).

105. *Id.* at 2582 n.14.

106. *Id.* at 2586 n.2 (Powell, J., concurring).

107. *Id.* at 2601 (Scalia, J., dissenting).

108. *Id.* at 2584-85. For an explanation of the witnesses' background, see *supra* note 91.

109. *Id.* at 2584.

110. *Id.* at 2598-600 (Scalia, J., dissenting).

111. *Id.* at 2597 (Scalia, J., dissenting).

112. *Id.* at 2600 (Scalia, J., dissenting).

113. *Id.* at 2598-604 (Scalia, J., dissenting).

the Act's perception that the public schools were censoring creationism. This censorship was an attempt to illegally establish the religion of Secular Humanism, of which evolution is a major tenet,¹¹⁴ in the public schools.¹¹⁵ Again, because there was no evidence to prove the sponsor's insincerity, whether his perceptions about religion and evolution were correct is irrelevant. Also, preventing the indoctrination of secular or non-traditional religion in schools is no less valid a legislative goal than eliminating prayer and devotional bible recitation as a means of preventing the inculcation of Christian religious truths.¹¹⁶ Because the legislative history reveals this to be part of the Act's purpose, the Court should have upheld the purpose as secular.¹¹⁷

114. The Act's chief sponsor, Senator Bill Keith, stated in a committee meeting: We have a problem not only in this state, but in other states relative to the constitutionality of teaching only one of the concepts [referring to evolution being taught exclusively]. In 1961 . . . the Supreme Court ruled that Secular Humanism is a bona fide religion If you have ever read the Humanist Manifesto, you would have discovered that the hallmark of Secular Humanism is evolution. Therefore, we have a constitutional problem.

Jt. Ex. at E-A(2), E 2-4 *Edwards v. Aguillard*, 107 S. Ct. 2573 (1987) (No. 85-1513). Senator Keith went on to outline balanced treatment as an acceptable way to begin to counteract the establishment of Secular Humanism in the public schools.

In another committee meeting, Senator Keith said:

I would just reiterate that since the United States Supreme Court in 1963 [sic] (date is incorrect) . . . determined that Secular Humanism is a bona fide religion. I say to you that we are teaching religion in our schools and that it is unconstitutional. Either we need to take the teaching of the religion of Secular Humanism out of our public schools and teach neither, or we need teach both.

Id. E-37-38.

115. *Edwards*, 107 S. Ct. at 2599 (Scalia, J., dissenting).

116. While not specifically articulated as a standard for review, practically every case in which a court has invalidated a statute under the Establishment Clause has been for the advancement of traditional, theistic religion, particularly Christianity. See *Thorton v. Caldor*, 472 U.S. 703 (1985) (law requiring employees to receive off-day on their religious Sabbath struck down); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (moment of silence, for the purpose of prayer, in public schools invalidated); *Stone v. Graham*, 449 U.S. 39 (1981) (posting of ten commandments in public schools unconstitutional); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (antievolution law for public school curriculum invalid because it advanced Christianity); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (devotional bible reading in public schools unconstitutional); *Engel v. Vitale*, 370 U.S. 421 (1962) (reading of prayers in public schools unconstitutional). One of the only exceptions to this undeclared rule is *Malnak v. Yogi*, 392 F.2d 197 (3d Cir. 1979). *Malnak* held that a public school violates the Establishment Clause if it offers a class in Transcendental Meditation, a non-theistic religion. *Id.* If courts were applying the Establishment Clause correctly, objectively non-theistic religions like Secular Humanism would be sanctioned along with Christianity. For an explanation of Secular Humanism as a religion, see *infra* note 121.

117. *Edwards*, 107 S. Ct. at 2599, 2605 n.6 (Scalia, J., dissenting). Justice Scalia noted that even the majority recognized that the Act's sponsor sincerely believed that Secular Humanism was a religion, and that evolution was a major part of that religion. *Id.* at 2605 n.6 (Scalia, J., dissenting). Justice Scalia also noted that the Act's sponsor, in speaking before the legislature, made references to the Court "holding" that Secular Humanism was a religion. *Id.* Of course, the sponsor had mistaken the Court's dicta for an actual holding. Justice Scalia noted, however, how easy that mistake was to make, because the Court did in fact refer to Secular Humanism as reli-

While the Court arguably could have struck down the Act on other grounds,¹¹⁸ invalidating the Act¹¹⁹ on purpose alone is ques-

tion. *Id.* (emphasis added). See *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961). The Court used the sponsor's references to Secular Humanism as proof of his personal aversion to evolution. *Edwards*, 107 S. Ct. at 2581-82. However, evidence did point to the fact that the sponsor wanted to use the Act to prevent the illegal establishment of Secular Humanism in the schools. *Id.* at 2605 n.6. (Scalia, J., dissenting). The sponsor viewed the bill as a remedy to ensure that schools would be neutral in religious matters. *Id.* Justice Scalia concluded that, while the sponsor's argument is certainly questionable, there is nothing in any of the evidence or in the Act which revealed the legislature's insincerity in passing the Act. *Id.* The purpose of balancing these opposing religious views should be permitted under *Lemon*. *Id.*

118. The Court, after finding a valid purpose, should have moved on to the second two prongs of the *Lemon* test, and determined whether the Act had an effect of advancing or prohibiting religion, or caused government and religion to become overly entangled. *Lemon v. Kurtzman*, 403 U.S. 602, 613-14 (1971). Because the Court never reached these issues, any consideration of the Act by these standards is mere conjecture. However, there are convincing arguments presented in the briefs of both parties that give an indication as to how the Court would have decided this case had it found secular purpose. Actually, had the Supreme Court found secular purpose, it would have reversed the summary judgment and remanded the case back to district court for trial on the other issues. See *supra* note 48 for an explanation of the procedural issue.

The ACLU charged that the Act would have the perceived effect of endorsing a particular religious belief. Appellee's Brief at 37, *Edwards v. Aguillard*, 107 S. Ct. 2573 (1987) (No. 85-1513). School children would see creationism as setting up a new rivalry of ideas between God and anti-God concepts in science class. *Id.* at 38. They also would perceive a "blackout on the facts," implying the study of origins is too sacred to be dealt with in the classroom. *Id.* Students will consider a scientific theory's validity on the basis of religious faith. *Id.* at 37. In the long run, both religion and science would lose credibility as one theory or the other is exalted or debased, and children will be forced to take sides. *Id.* The result is state-sponsored coercion to accept the religious doctrine of creationism as true, while "tainting these beliefs with a corrosive secularism." *Id.* (quoting *Grand Rapids School Dist. v. Ball*, 474 U.S. 373 (1985)). The State simply viewed creationism as a scientific fact the students should be allowed to hear in order to broaden their educational opportunities. Appellant's Brief at 118, *Edwards v. Aguillard*, 107 S. Ct. 2573 (1987) (No. 85-1513). The state argued that even though creation science will lead to an advancement of religion, this advancement would only be incidental. *Id.* See *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984) ("incidental" advancement of religion is proper).

The Balanced Treatment Act meets its biggest *Lemon* test problem on the entanglement prong. The State claimed Louisiana already requires religious curriculum monitoring to avoid the teaching of theistic evolution, so any government administration of balanced treatment would only be an extension of controls already in place. Appellant's Brief at 48-49, *Edwards v. Aguillard*, 107 S. Ct. 2573 (1987) (No. 85-1513). But the ACLU foresaw church groups taking over the curriculum process. Appellee's Brief at 40-41, *Edwards v. Aguillard*, 107 S. Ct. 2573 (1987) (No. 85-1513). The fear that church groups and scientists with church leanings will be appointed to the curriculum board is a real one. Pressure from these groups on the Board to "balance" creation with evolution may lead to evolution being "balanced" right out of the schools. *Id.* at 40. Also, the state would find it extremely difficult to monitor implementation in each classroom, and to mete out sanctions if a teacher refuses to comply.

Despite these possible violations, the State argued the Act could be carefully implemented without excessive church influence. Appellant's Brief at 37-40, *Edwards v. Aguillard*, 107 S. Ct. 2573 (1987) (No. 85-1513). There is some evidence this would have happened. Because the Court gives deference to local authorities in the operation of public schools, perhaps the Court should have given the state the benefit of

tionable. By failing to find any secular purpose underlying the Act, the *Edwards* Court contradicted its own past decisions which upheld laws motivated by both religious and secular purposes.¹²⁰ By refusing to recognize the legislature's secular purposes, both in the Act's provisions and in the legislative history, the Court unfairly characterized these purposes as unimportant or irrelevant. This is unfortunate. In cases such as *Epperson*, *Stone*, and *Wallace*, the Court prevented Christian religious groups from using public school classrooms to indoctrinate students. The *Edwards* decision refused to follow this precedent, and failed to recognize that preventing indoctrination in other religions¹²¹—perceived as a problem in school

the doubt. *Edwards*, 107 S. Ct at 2579. But the actual threat of overt control of curriculum by religious groups makes the possibility of entanglement too great. Appellee's Brief at 41, *Edwards v. Aguillard*, 107 S.Ct 2573 (1987) (No. 85-1513).

119. The state, of course, posited that the Court should uphold the Act as constitutional. The state, at every court level, argued that the Act passed both the *Lemon* test, see *supra* notes 28-33 and accompanying text, and the *Marsh* test, see *supra* note 74. They claimed the secular purpose of academic freedom was clearly and expressly stated, heavily documented in evidence, and affirmed in the legislative history. Brief for Appellants at 1-13, *Edwards v. Aguillard*, 107 S. Ct. 2573 (1987) (No. 85-1513). The effects prong would not be affected, because creation science could be taught with no reference to religion, and was only an affirmation of clear, scientific truth, and was at least as scientific as evolution. *Id.* at 26-27. Relying heavily on the Fifth Circuit's *en banc* dissent, the State held the Act out as a way to fairly educate the public school children in an unbiased, nonreligious way. *Id.* There could be no entanglement problems because the Act was completely monitored by the schools, and would need no more surveillance than what was already in use to insure theistic evolutionary theory was not taught. *Id.* Under *Marsh*'s historic test, the State countered the ACLU's claim that creationism is unconstitutional because of its reference to a creator. The state noted examples of traditional government references to a creator, *i.e.*, Declaration of Independence, George Washington's presidential speeches, Thanksgiving Day resolution by the first Congress, and others. *Id.* at 31. The ACLU countered that the *Marsh* test cannot apply to public schools, because public schools, evolutionary theory, and "creation science" did not exist at the time the Bill of Rights was adopted. Appellee's Brief at 41, *Edwards v. Aguillard*, 107 S. Ct. 2573 (1987) (No. 85-1513). The state presented evidence of public schools existing as early as 1804. Appellant's Brief at 31, *Edwards v. Aguillard*, 107 S. Ct. 2573 (1987) (No. 85-1513) (with Thomas Jefferson as the first public school superintendent and creation being taught as part of the curriculum). But the historic test should not be applied to public school situations. The *Marsh* comparison is weak, because public schools only existed in the District of Columbia in 1804, *id.* at 31, and public schools as they exist today did not begin to develop until the 1830's, and did not take root until the 1870's. Wood, *Religion and Education in American Church State Relations*, 26 J. CHURCH & ST. 31,32-36 (1985). The means of teaching science has radically changed in the last 20 years, let alone the last 200 years. See Larson, *Textbooks, Judges, and Science*, 17 CUMB. L. REV. 116, 122-24 (1986).

120. For an explanation of Court decisions upholding laws that have both religious and secular purpose, see *supra* note 56.

121. Although the Court has never held that Secular Humanism is a religion for first amendment purposes, except in dicta, *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961), there is evidence that indicates Secular Humanism has all the characteristics of traditional religion, and is akin to religious philosophies that the Court has held are protected under the Free Exercise clause. See *infra* note 123 for an explanation of the Court's definitions of religion.

"Secular," by definition, means "the temporal rather than spiritual." AMERICAN

HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 1173 (1973). "Secularism" is a doctrine in which morality is based only on the temporal well being of man without any consideration for God or a future eternity. Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications*, 10 TEX. TECH L. REV. 1, 30 n.161 (citing 2 SHORTER OXFORD DICTIONARY ON HISTORICAL PRINCIPLES 1828 (1934)). "Humanism" concerns itself with a theology centered on men rather than abstract beings or the supernatural. *Id.* at 30 n.162. While Secular Humanism is usually viewed as an abstract philosophy with no organization or set beliefs, *Malnak v. Yogi*, 592 F.2d 197, 212 (3d Cir. 1979), actually, vast numbers of humanists believe in a specific creed, stated in the Humanist Manifestos, I and II. See Strossen, "Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom, 47 OHIO ST. L.J. 333, 338 (1986). Secular Humanists are involved in well planned, church-like organizations. *E.g.*, Fellowship of Religious Humanists, Fellowship of Humanity, American Humanist Association, Ethical Culture Fellowship, Free Religious Association, World Union of Free Thinkers, American Rationalist Association, Bertrand Russell Society, Society of Evangelical Agnostics, United Secularists of America, and the Unitarian-Universalist Church, which is an accepted religious denomination in America. *Id.* at 337-38 nn. 25-26. They are internationally organized, and a yearly Congress of International Humanist and Ethical Union is held. *Id.* The *Humanist*, published by the American Humanist Association and American Ethical Union, is Humanism's "official" voice and magazine. Whitehead & Conlan, *supra*, at 33 n.176. Signatories of the Humanist Manifestos, signed in 1933 and 1973, respectively, include some of the most influential thinkers of our time: behaviorist B.F. Skinner; Ed Doerr of Americans United for Separation of Church and State; educator John Dewey; DNA pioneer Francis Crick; chairman of the Fellowship of Religious Humanists and brother of the former vice president, Lester Mondale, author Issac Asimov, former UNESCO head Sir Julian Huxley, and author Gonnar Myrdal. *Id.* n.177.

The preludes to both Humanist Manifestos identify the spreading of humanism as a religion as the ultimate goal, and that state establishment of humanism is a "major necessity". *Id.* at 34. Both documents clearly state an open hostility towards beliefs which conflict with humanism, but most notably theistic ones. A call to eradicate all theistic values from the world is prominently noted. *Id.* at 34-37. Manifesto II tries to dissuade people from holding humanism as a religion, stating its contents should not be interpreted as a "binding credo." *Id.* at 36. Despite the fact that many humanists may express their beliefs in a variety of ways, there remain several universal core values that apply to all humanists. This is similar to the way various Christian denominations may be different, but share the same absolute beliefs. *Id.* at 37.

The basic tenets of Secular Humanism as stated in both Manifestos are: 1) God or supernatural agencies have no relevance. A Secular Humanist practices his "prayer and worship" in his "heightened sense of personal life and in cooperative effort to promote social well-being." *Id.* 2) "Human reason" is supreme over all other doctrine, principle, or law. "Human reason" is defined as a belief that man can work out all the great questions which confront him by his intellect, within him alone. *Id.* at 38. One author called this Humanism's "leap of faith." *Id.* at 38-39 (citing GUINNESS, THE DUST OF DEATH 14 (1973)). Modern man has proven to be very irrational beneath his reasoning level, and very unaware of the depth of this second nature. Many Humanists have become impatient with man's inability to rise above this base side of his nature, or else pretend this nature does not exist. Whitehead & Conlan, *supra*, at 39 (citing GUINNESS, *supra*, at 14). 3) Humanists believe in the inevitability of progress. Whitehead & Conlan, *supra*, at 39. Helped along by the strong emphasis they place on evolutionary theory, both biological and social, Humanists believe man will eventually reach perfection by the power of human reason. As noted in tenet 2, many Humanists are disappointed at the lack of human progress. Therefore, they are more and more relying on the state to push Humanist views and help speed up the process. *Id.* at 40. 4) Science is the guide to human progress, and the source of alternatives to religion and morality. *Id.* at 42. Many Humanists view science as a religion itself. *Id.* at 42-43; Becker, *Creationism, New Dimensions of the Religion-Democracy Relation*,

curricula by the legislature—was a valid purpose.¹²² Because the

27 J. CHURCH & ST. 315, 319-21 (1985). 5) Man is totally self sufficient; any teaching of a need for God, salvation, or redemption is disregarded. Whitehead & Conlan, *supra*, at 45. Man has no "fallen" or sinful nature—man is innately good. Man controls his own destiny, and creates his own absolute values of good and evil, outside any reference to God. The authors of the Whitehead article point out that if this is true, Humanists cannot criticize the atrocities of Hitler or Stalin, because, as autonomous men, they set up their own absolute values. *Id.* While bordering on the ridiculous, this point does give credence to the danger of the "everything is relative" philosophy in modern American morality. 6) Evolution is an absolute truth. All life evolved from an inorganic source by chance. Several experts who are Humanists and noted evolutionary scientists insist that every humanist must believe this premise as true. *Id.* at 47 (citing several authorities on evolution, such as Julian Huxley, Jacques Monod, and G. Kerkut). In Monod's view, there are no innate absolute values, and mankind will live in chaos unless it develops its own absolutes to preserve our society. *Id.* at 48. There is convincing evidence that evolutionary theory did not originate with Darwin, but was part of the basis of many ancient cult religions. Whitehead & Conlan, *supra*, at 48 (citing JACOBSON, *Enuma Elish-The Babylonian Genesis*, THEORIES OF THE UNIVERSE (Munitz ed. 1957) and MORRIS, *THE TWILIGHT OF EVOLUTION* (1963)).

Humanists also express religious faith in evolution: "We believe as an article of faith that life evolved from dead matter on this planet." Whitehead & Conlan, *supra*, at 49 (quoting Harold C. Urey, a Nobel laureate); "The [evolutionary] theory is an act of faith" *Id.* (quoting Robert Jastrow, physicist); "Evolution is still a matter of faith rather than demonstrably scientific fact" *Id.* (quoting Carl Sagen); "Spontaneous generation of a living organism is impossible. Yet we are here—as a result, I believe." *Id.* (quoting Harvard biologist George Wald). This belief in chance generation of life allows for subjective relativism, leading to a belief that there is no need for morality. *Id.* at 51-61.

The Court has held that non-theistic religions deserve free exercise protection. For a summary of these holdings, see *infra* note 123. However, the government may not establish a religion of secularism, or establish hostility towards religion. *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947). Secular Humanism, as defined above, is both a religion of secularism and hostile to traditional religion. Secular Humanism is therefore a religion, and will violate the Establishment Clause if the government endorses it.

122. Regarding education, Humanist Manifesto II says that "Moral Education for children and adults is an important way of developing awareness and sexual maturity The conditions of work, education, devotion, and play should be humanized." Whitehead & Conlan, *supra* note 121, at 40 n.208.

The concept of separation of church (that is, theistic church) and state is vitally important to the Humanist's conception of education. The goal of Manifesto II is "secular society on a planetary scale." *Id.* By sanitizing the schools of all belief systems contrary to Humanism, this goal is given a foundation in the nation's children. The separation of all traditional theism from the state was also a goal of John Dewey, a signer of Manifesto I, and one of the most influential educators and pedagogues of this century. No one man in the history of the United States, with the possible exception of Horace Mann, has had so much influence on curriculum, teaching philosophy, and teacher training. *Id.* (citing MORRIS, *EDUCATION FOR THE REAL WORLD* 23 (1977)). Dewey totally rejected traditional theism and Christianity, saying it was incompatible with the vital moral and spiritual ideals he wanted to see infused into American education. *Id.* (citing DEWEY, *A COMMON FAITH* 51 (1934)). Dewey was an evolutionary humanist, and thought that man had reached the place in his development as a species to control his future evolutionary development. Therefore, he systematically applied evolutionary concepts to curriculum planning and classroom teaching. *Id.* Dewey believed that education was the basic tool of social progress, and that it must be used to "[usher] in . . . the true kingdom of God." *Id.* (citing DEWEY, "My Pedagogic Creed," JOHN DEWEY ON EDUCATION: SELECTED WRITINGS 438-39 (1964))(referring to humanity as the collective Humanist deity). Dewey's influence can be seen in

purpose prong of the *Lemon* test involves subjective purpose, the objective correctness of the legislature's views were unimportant. The *Edwards* Court, however, misinterpreted the purpose prong and drew an arbitrary distinction between different types of religions that was inconsistent with prior precedent.¹²³

the teacher training programs in most colleges and graduate education programs, which, for the most part, are definitely slanted towards producing teachers who espouse Humanism. See Strossen, *supra* note 121, at 338 n.29. Many of America's current leading educators favor Humanistic education. See Note, *The Establishment Clause, Secondary Religious Effects, and Humanistic Education*, 91 YALE L.J. 1196, 1205 (1982) [hereinafter Note, *Education*].

It should be noted that Secular Humanism is not a problem in every area of the curriculum. Only when Secular Humanism is presented as a religious doctrine is there a possibility of an establishment clause violation. See Strossen, *supra* note 121, at 364-84 (presentation of curricular material that happens to correspond to religious beliefs will not necessarily violate the Establishment Clause). A growing area of concern for those who object to the establishment of Secular Humanism in the public schools is the use of "Values Clarification" in the curriculum. See Strossen, *supra* note 121, at 336 n.17. The goals of these classes is to confront students with hypothetical questions, experiences, or moral dilemmas, and ask them to sort out their feelings and opinions and arrive at a value judgment. Note, *Education*, *supra*, at 1206. The teacher will then lead a programmed discussion to insure students will understand the nature of their decisions. *Id.* at 1207. Invariably, these classes are slanted towards the encouraging of Humanistic values, while discouraging traditional religious values. See Strossen, *supra* note 121, at 336 n.17.

Espousers of traditional religion have criticized these classes for the following reasons. First, Values Clarification classes tend to discourage the teaching of absolute moral values, even non-religious ones, and encouraging the idea that moral standards are relative and fungible. See Moskowitz, *The Making of the Moral Child: Legal Implications of Values Education*, 6 PEPPERDINE L. REV. 105, 122 (1978); Whitehead & Conlan, *supra* note 121, at 55; Note, *Education*, *supra*, at 1208 n.62. Second, Values Clarification classes tend to confuse moral issues with non-essential decision making. See Note, *Education*, *supra*, at 1206 n.51 (a particular Values Clarification questionnaire equated the following decisions as being more or less equal in nature; whether to: 1. encourage an unwed mother to consider abortion; 2. read Playboy magazine; 3. be upset if there were no more organized churches; 4. go on a diet; 5. encourage parents to allow their children to masturbate; 6. watch the Super Bowl); see also Moskowitz, *supra*, at 123 (moral and religious values equated with choosing one's hair style or deciding on dessert). Third, Values Clarification classes tend to encourage values that openly conflict with traditional religious beliefs. See Note, *Education*, *supra*, at 1206 nn.49, 53 (encouragement of expressing sexual fantasies in junior high sex education classes, and any concept of values originating outside of the individual, or are religiously inspired, should be completely rejected); see also Moskowitz, *supra*, at 122 (Values Clarification teaches values from an agnostic premise).

Even if Secular Humanism is so diverse as to defy definition as a religion, the Secular Humanism of the public schools is arguably the same as that which is portrayed in the Humanist Manifestos. This religious philosophy pervades many aspects of public school education in America today. Secular Humanism, as it exists in the public schools, is a religion and is therefore a violation of the Establishment Clause. See Note, *Education*, *supra*, at 1197.

123. The Court has been unclear in defining the meaning of "religion" for first amendment purposes, and in applying that definition to the Constitution's religion clauses. The framers of the Constitution appear to have had a theistic concept of religion for the first amendment. See Whitehead & Conlan, *supra* note 121, at 3 n.13, 4 n.15, 24-29. For a definition of theism, see *supra* note 9. For an explanation of the framers' purposes in enacting the religion clauses, see *supra* note 3. See also 2 STORV, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1873 (5th ed. 1833)

The Court has declared that its past decisions involving the Estab-

(positing that the amendment was meant to prevent rivalry among the various Christian denominations); Corwin, *The Supreme Court As National School Board*, 14 LAW & CONTEMP. PROBS., 3, 20 (1949).

The earliest Court decisions involving the religion clauses upheld the theistic definition of religion. See *Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1, 50 (1890) (incorporation of the Mormon Church invalidated because federal law prohibits the practice of polygamy; Mormon Church not a religion, because polygamy was not in accord with the "enlightened sentiments" of man, and in conflict with the "civilization which Christianity produced in our Western World"); *Davis v. Beason*, 133 U.S. 333, 341-43 (1890) (law requiring oath renouncing practice of polygamy and membership in sects that espouse polygamy valid, despite Mormon free exercise claim; holding standard for determining what religion is the "general consent of the Christian world in modern times," and defining religion as "one's views of his relation to his Creator, and to the obligations they impose of the reverence of his being and character, and of obedience to his will"); *Reynolds v. United States*, 98 U.S. 145 (1878) (the practice of polygamy is contrary to the morals of the country, therefore Mormons have no free exercise right to practice polygamy). See also *United States v. Macintosh*, 283 U.S. 605 (1931), *rev'd*, *Girouard v. United States*, 328 U.S. 61, 69 (1946) (refusing alien's naturalization because he would not swear to defend the United States for religious reasons, stating United States citizens are committed to the "supremacy of God's will"). These cases emphasized a first amendment concept of theism, stressing a need for developed theology, sacraments, mysticism, and worship of God before a religion is held to exist. Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1060 (1978) [hereinafter Note, *Definition*]; see also *Malnak v. Yogi*, 392 F.2d 197 (3d Cir. 1979). These cases stood for the proposition that the free exercise clause protects a person's right to subjectively believe anything he chooses, but not a person's right to practice that belief if it violated societal norms. Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L.J. 1115, 1122 (1973). These cases, however, also created a belief-action dichotomy under the free exercise clause that would later cause the Court to reconsider its definition of religion. Whitehead & Conlan *supra* note 121, at 7.

The Court began to see a need to protect an individual's personal beliefs, and began to allow belief systems that had not been traditionally classified as religions to receive constitutional protection. See *United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943) (conscientious draft objector not allowed religious exemption, despite belief in non-theistic religion). *Kauten* began the trend away from the emphasis on objective aspects of religion, like dogma, doctrine, or organization, to focus on subjective considerations, such as conscience, *id.* at 708, and on the "psychological function of the belief in the life of the individual." Note, *Definition, supra*, at 1061; see also *United States v. Ballard*, 322 U.S. 78 (1944) (religious views cannot be presented to jury to determine truthfulness of beliefs or to relate beliefs to the offense). In *Ballard*, the Court focused on the sincerity of the individual believer, and not on the objective doctrine of the religion the believer espoused. *Id.* at 87-88. Whether a belief was religion or not was now a subjective test, and could only be determined in the mind of the believer. Note, *Definition, supra*, at 1063.

The change in religion's definition was further clarified in *Torcaso v. Watkins*, 367 U.S. 488 (1961) (law requiring notary publics to declare a belief in God before they could be certified to work struck down, thus allowing avowed Secular Humanist to work without taking oath). The Court held that the Establishment Clause does not allow the government to force individuals to profess belief or disbelief in religion, to aid religion over non-religion, or to aid theism over non-theism. *Id.* at 495. The Court specifically extended free exercise protection to the plaintiff in *Torcaso*, and, in dicta, outlined the kinds of non-theistic religions that should receive free exercise protection. *Id.* These religions included Buddhism, Taoism, Ethical Culture, and Secular Humanism. *Id.* at 495 n.11.

The Court finally openly announced the subjective belief standard as the definition of religion for free exercise purposes in a series of cases involving conscientious objectors during the Vietnam War. See *Welsh v. United States*, 398 U.S. 333 (1970)

(holding if an individual sincerely holds mere ethical or moral beliefs, and those beliefs impose on him a duty not to participate in any war at any time, he receives conscientious objector status); *United States v. Seeger*, 380 U.S. 163 (1965) (conscientious objector status granted if non-traditional or non-theistic belief is sincere and occupies parallel place in believer's life as theistic beliefs do in life of a traditional religious believer). To qualify for a religious exemption, an objector's aversion to war had to be directly related to his belief in a "Supreme Being," and this belief must have been based on the claimant's "religious training and belief." Military Selective Service Act, 50 U.S.C. § 456(j) (1981) (after the *Seeger* decision, in 1967, § 456(j) was amended so that the statute contained no reference to a "Supreme Being"). The original version of this statute, passed in 1917, read "God" instead of "Supreme Being." The *Seeger* Court saw this as indicating a broader definition of religion, at least for conscientious objectors. *Seeger*, 380 U.S. at 174-78. But the Court emphasized that philosophical, social, or political beliefs could not rise to the level of religious belief. *Id.* at 179.

In formulating a definition for religion, the Court drew on the writings of several noted theologians, especially Paul Tillich, *id.* at 180, and concluded a belief is a religion if it deals with the "ultimate concerns" of life. Note, *Definition, supra*, at 1067. In Tillich's theories, "ultimate concern," and not any concept of "God," defines religion. *Id.* An outline of this theory is "the concerns of any individual can be ranked, and that if we probe deeply enough, we will discover the underlying concern which gives meaning and orientation to a person's whole life. It is of this kind of experience, Tillich tells us, that religions are made." *Id.* (citing TILlich, *THE SHAKING OF THE FOUNDATIONS* 63-64 (1972)). The problem with Tillich's analysis is its breadth. Under it, all people have a religion of some sort.

Applying the "ultimate concerns" view, the *Seeger* Court expressly extended constitutional protection to non-theistic religion. *Seeger*, 380 U.S. at 166. In *Welsh*, the Court allowed any moral or ethical view a person deeply believes in, even if only based on a general public policy, to be a religion. *Welsh*, 398 U.S. at 339-41. Under these cases, almost any belief receives free exercise protection.

The Court uses this expanded definition of religion for the free exercise clause, and has not extended it to the Establishment Clause. See *supra* note 116 for examples. Thus, the Court, while prohibiting the establishment of secular religion, *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963), allows secularism to enjoy free exercise protection. This distinction has no constitutional basis. Because "religion" is only used once in the first amendment, it should have a single definition. *Everson v. Board of Educ.*, 330 U.S. at 32 (Rutledge, J., dissenting) ("the word [religion] governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for securing 'the free exercise thereof'"). See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-2 at 814 (1978) (the framers, by using the word once, arguably meant it to have a single definition); Note, *Definition, supra*, at 1083 (same proposition). Therefore, any belief or act protected by the free exercise clause should be illegal under the Establishment Clause if state sponsored. Whitehead & Conlan, *supra* note 121, at 17. *Accord* *Malnak v. Yogi*, 592 F.2d 197, 210-13 (3d. Cir. 1979) (dual definition of religion gives non-theistic religion unfair advantage over theistic faiths and non-religious and political philosophies—if secularism receives free exercise protection, it should be sanctioned by the Establishment Clause as well). See also Rice, *The Meaning of "Religion" in the School Prayer Cases*, 50 A.B.A.J. 1057, 1059 (1964) (warning against the possible problems expansion of definition of religion may bring). The *Edwards* decision tacitly upholds this unfair distinction.

But see TRIBE, *supra*, § 14, at 822-38; Note, *Definition, supra*, at 1072-89. Professor Tribe and the student author of *Definition* encourage the Court to adhere to this distinction. Anything arguably religious is defined as religion for free exercise purposes, while anything arguably non-religious is not held to be religion for Establishment Clause purposes. See TRIBE, *supra*, at 822-38 (Professor Tribe is concerned a single definition of religion will result in the restriction of free exercise rights and the possibility that much useful social legislation will be overturned for having religious purpose). The *Definition* author calls for beliefs which deal with ultimate concerns to

lishment Clause sacrifice clarity and predictability for flexibility.¹²⁴ The Court, however, must be clearer and more predictable, or the flexibility of the Establishment Clause may deprive Americans who adhere to traditional religious beliefs of their constitutional rights.

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be considered religious for free exercise claims, and to only classify a belief as religion for Establishment Clause claims if it has certain criteria, such as "doctrinal systemization and organizational stability and coherence." *Definition, supra*, at 1072-89. Both theories would allow theism to always be classified as religion, while Secular Humanism would never violate the Establishment Clause.

124. *Edwards*, 107 S. Ct. at 2607 (Scalia, J., dissenting) (citing Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980)). This statement is also a "euphemism . . . for . . . the absence of any principled rationale" regarding the interpretation of the religion clauses. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680-81 (1980).