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The Lemon Test and Subjective Intent in Establishment Clause Analysis: The Case for Abandoning the Purpose Prong

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Comment

The Lemon Test and Subjective Intent in Establishment Clause Analysis: The Case for Abandoning the Purpose Prong

INTRODUCTION

The controversy surrounding public school instruction on the origin of life has found its way into the court system of the United States once again.[1] In *Edwards v. Aguillard*,[2] the United States Supreme Court recently invalidated a Louisiana statute[3] which required "balanced treatment"[4] of "creation science"[5] and "evolution science"[6] in lectures and textbook materials used

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[1] The field remains ripe for further litigation. Between the years 1968 and 1983, "balanced treatment" statutes, *see, e.g., infra* note 6, were "introduced in at least fifteen states, including . . . Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Mississippi, South Carolina, and Texas." Wood, *Religion and the Public Schools*, 1986 B.Y.U. L. REV. 349, 357 (citing Levit, *Creationism, Evolution and the First Amendment: The Limits of Constitutionally Permissible Scientific Inquiry*, 14 J.L. & EDUC. 211, 212 (1985)).

[2] 107 S. Ct. 2573 (1987) (plurality opinion).

[3] LA. REV. STAT. ANN. §§ 17:286.1-.7 (West 1982).

[4] "Balanced treatment" under the statute required "providing whatever information and instruction in both creation and evolution models the classroom teacher determine[d] [was] necessary and appropriate to provide insight into both theories in view of the textbooks and other instructional materials available for use in his classroom." *Id.* at § 17:286.3(1). More specifically, the Louisiana law required that "balanced treatment" 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 science and taken as a whole for the humanities, and in other educational programs in public schools." *Id.* at § 17:286.4(A).

[5] The Louisiana statute defined "[c]reation science" as "the scientific evidences for creation and inferences from those scientific evidences." *Id.* at § 17:286.3(2).

[6] "Evolution science" was defined by the statute as "the scientific evidences for evolution and inferences from those scientific evidences." *Id.* at § 17:286.3(3).

in public schools. The *Edwards* decision, however, did not clarify the Court's position on whether it is proper under the establishment clause[7] for a state to introduce "creation science" into its public school system via statute. The difficulty lies in the Court's use of the "purpose" prong[8] of the *Lemon v. Kurtzman*[9] test in making this determination.[10]

Application of the "purpose" prong fails to provide a consistent standard for states to follow in adopting legislation concerning religion, particularly the teaching of creationism and evolution in public schools. This lack of clear guidance and precedent encourages state legislatures to revise their legislative histories and statutory language, and to continue to enact laws remarkably similar to those held unconstitutional by the courts.[11]

This Comment analyzes the practical effect application of the "purpose" prong has had on legislation concerning religion, particularly the teaching of creationism in public schools. Section one[12] reviews some of the difficulties associated with the application of the *Lemon* test. Problem areas include the test's historical failure to provide a standard for resolving the issue of public school instruction on creationism,[13] the inconsistent application of the test to certain factual situations,[14] and the difficulty of using subjective motivation as a judicial standard.[15]

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[7] "Congress shall make no law respecting an establishment of religion. . . ." U.S. CONST. amend. I. The Supreme Court held the establishment clause applicable to the states in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The Court has ruled that the primary goal of the establishment clause is to ensure governmental neutrality toward religion. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 802 (1983) (Brennan, J., dissenting); Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 745-47 (1976); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 770-71 n.28, 788 (1973).

[8] *See infra* notes 18-20 and accompanying text.

[9] 403 U.S. 602, 612-13 (1971); *see Roemer*, 426 U.S. at 748; *Nyquist*, 413 U.S. at 772-73.

[10] In his dissenting opinion to *Edwards v. Aguillard*, Justice Scalia wrote that the "purpose" prong "has no basis in the history of the [constitutional] amendment it seeks to interpret, is difficult to apply and yields unprincipled results." *Edwards*, 107 S. Ct. at 2605 (Scalia, J., dissenting) (quoting Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting)).

[11] *See* Comment, *Evolution and Creationism in the Public Schools*, 9 J. CONTEMP. L. 81, 89 (1983-84); *infra* note 33.

[12] *See infra* notes 18-77 and accompanying text.

[13] *See infra* notes 18-41 and accompanying text.

[14] *See infra* notes 42-70 and accompanying text.

[15] *See infra* notes 71-77 and accompanying text.

Section two[16] examines the recent Supreme Court decision in *Edwards v. Aguillard*[17] and its implications for the future of establishment clause doctrine. This Comment concludes that research and reasoning indicate a need to eliminate the "purpose" prong from the *Lemon v. Kurtzman* analysis of establishment clause cases.

I. THE TEST AND ITS APPLICATION

A. Failure to Resolve the Controversy

In 1971, the Supreme Court, via the *Lemon v. Kurtzman*[18] decision, adopted a three-prong test[19] for determining whether legislation comports with the establishment clause. The Court set forth the test as follows: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' "[20]

Statutes struck down by the first prong, or "purpose" prong, have had a tendency to reappear in slightly altered forms. In the 1968 case *Epperson v. Arkansas*,[21] the Supreme Court invalidated an Arkansas statute[22] which prohibited teaching, in public schools, the theory that Man evolved from other species of life.[23]

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[16] *See infra* notes 78-104 and accompanying text.

[17] 107 S. Ct. at 2573.

[18] Lemon v. Kurtzman, 403 U.S. 602 (1971), *reh'g denied,* 404 U.S. 876 (1971).

[19] *Id.* at 612-13.

[20] *Id.*

[21] 393 U.S. 97 (1968).

[22] ARK. STAT. ANN. §§ 80-1627 to -1628 (Supp. 1985).

[23] It shall be unlawful for any teacher or other instructor in any University, College, Normal, Public School, or other institution of the State, which is supported in whole or in part from public funds derived by State and local taxation to teach the theory or doctrine that mankind ascended or descended from a lower order of animals and also it shall be unlawful for any teacher, textbook commission, or other authority exercising the power to select textbooks for above mentioned educational institutions to adopt or use in any such institution a textbook that teaches the doctrine or theory that mankind descended or ascended from a lower order of animals.

Id. at § 80-1627.

The Court found there could be no state policy justification for such a law "other than [a desire to support] the religious views of some of its citizens."[24]

In 1973 the Tennessee General Assembly passed a statute[25] requiring, *inter alia*, that any textbook expressing an opinion[26] on the origin of man also give "commensurate attention" to "other theories, including, but not limited to, the Genesis account in the Bible."[27] Relying on both *Lemon* and *Epperson*,[28] the Sixth Circuit found that the legislative intent[29] of the Act was to attack the theory of evolution while promoting a religious doctrine in violation of the establishment clause.[30]

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[24] *Epperson*, 393 U.S. at 107. *Epperson* was decided before the 1971 *Lemon* decision. In *Epperson*, the Court applied the predecessor of the *Lemon* test found in *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963) (consisting of the first two *Lemon* prongs, "purpose" and "effect," minus the third, the "entanglement" prong).

[25] 1973 Tenn. Pub. Acts 377, *quoted in* Daniel v. Waters, 515 F.2d 485, 487 (6th Cir. 1975).

[26] The Tennessee Act did not mandate the teaching of any theory concerning the origins of man. *Id.* at § 1.

[27] Section 1 of the statute reads in full:

> Any biology textbook used for teaching in the public schools, which expresses an opinion of, or relates a theory about origins or creation of man and his world shall be prohibited from being used as a textbook in such system unless it specifically states that it is a theory as to the origin and creation of man and his world and is not represented to be scientific fact. Any textbook so used in the public education system which expresses an opinion or relates to a theory or theories shall give in the same textbook and under the same subject commensurate attention to, and an equal amount of emphasis on, the origins and creation of man and his world as the same is recorded in other theories, including, but not limited to, the Genesis account in the Bible. The provisions of this Act shall not apply to use of any textbook now legally in use, until the beginning of the school year of 1975-1976; provided, however, that the textbook requirements stated above shall in no way diminish the duty of the State Textbook Commission to prepare a list of approved standard editions of textbooks for use in the public schools of the state as provided in this section. Each local school board may use textbooks or supplementary material as approved by the State Board of Education to carry out the provisions of this section. The teaching of all occult or satanical beliefs of human origin is expressly excluded from this act.

Id.

[28] *Daniel*, 515 F.2d at 489-91.

[29] The court found that the result of the statute was to create a "clearly defined preferential position for the Biblical version of creation as opposed to any account of the development of man based on scientific research and reasoning." *Id.* at 489-90.

[30] After finding the "purpose" prong violation, the *Daniel* court also held that

In 1982 another Arkansas statute,[31] similar to the earlier Arkansas and Tennessee statutes, was invalidated in *McLean v. Arkansas Board of Education*.[32] The new statute required "balanced treatment" of "creation-science" and "evolution-science" in classroom lectures, textbooks, and library materials.[33]

This statute represented a new method for Creationists to attack the teaching of evolution, and to promote creationism, by counterbalancing[34] classroom time for evolution and a newly formulated "creation science."[35] Judge Overton, however, found

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the Act violated the "effect" and the "entanglement" prongs. *Id.* at 491. The Supreme Court, however, has not followed this procedure in applying the *Lemon* test. If an act is found to violate the "purpose" prong, the Court will invalidate the legislation without applying the second or third prongs. *See infra* note 104.

[31] ARK. STAT. ANN. §§ 80-1663 to -1670 (Supp. 1985).

[32] 529 F. Supp. 1255 (E.D. Ark. 1982).

[33] Public Schools within this State shall give balanced treatment to creation-science and to evolution-science. Balanced treatment to these two [2] 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 education programs in public schools, to the extent that such lectures, textbooks, library materials, or educational programs deal in any way with the subject of the origin of man, life, the earth, or the universe.

ARK. STAT. ANN. at § 80-1663. In an attempt to circumvent the "purpose" prong, the Arkansas legislature expressly incorporated a secular purpose into the statute:

> This Legislature enacts this Act for public schools with the purpose of protecting academic freedom for students' differing values and beliefs; ensuring neutrality toward students' diverse religious convictions; ensuring freedom of religious exercise for students and their parents; guaranteeing freedom of belief and speech for students; preventing establishment of Theologically Liberal, Humanist, Nontheist [Nonatheist], or Atheist religions; preventing discrimination against students on the basis of their personal beliefs concerning creation and evolution; and assisting students in their search for truth. This Legislature does not have the purpose of causing instruction in religious concepts or making an establishment of religion.

Id. at § 80-1668.

[34] One commentator writes that after the *Epperson* decision, "[f]undamentalists against the teaching of evolution . . ., had to find some other tactic with which to advance their cause." The result was the "dual model" approach. "The idea was simple enough. If evolution could not be eliminated, perhaps it could at least be balanced with a 'creationist' account of the origins of man and earth." Comment, *supra* note 11, at 93.

[35] The "creation science" terminology used in the "balanced treatment" statutes of the 1970s and the 1980s first developed out of the publication, *The Genesis Flood*. J. WHITCOMB & H. MORRIS, THE GENESIS FLOOD (1964); *see* Comment, *supra* note 11, at 93 n.52. The Arkansas statute made no reference to Genesis.

that the drafters of the model statute[36] (upon which the Arkansas bill was based) and the bill's sponsors were motivated by the same religious intent evident in the previously invalidated Arkansas and Tennessee statutes.[37] The judge also found that Genesis was the unmentioned reference for the statutory description of "creation science."[38]

Arkansas, after two failed attempts, apparently has not surrendered the battle for a "balanced treatment" statute. After the *McLean* decision, Arkansas' Attorney General stated that he would not appeal the ruling because he believed another bill could be drafted that met constitutional standards.[39]

The Attorney General's statement underscores the problem associated with using the "purpose" prong to invalidate legislation. Suppose the sponsors of the invalidated 1982 Arkansas statute were to introduce a new bill with exactly the same statutory language, but without reference to any model statute or without reference to any of the other religious bases upon which the court relied in *McLean*. Would the new legislation be valid under the "purpose" prong? What if the sponsor were an atheist? In such a case, would an atheist-sponsored bill pass the "purpose" prong because of its sponsor's nonreligious mind-set, but the same statute with a religiously-oriented sponsor fail? Given the above, one must question the relevancy of the inquiry in the first place. The application of the test raises more questions than it answers and reflects the difficulty or the impossibility of determining the true motivation behind the introduction of a bill.[40] Clearly, the use of the "purpose" prong in striking

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[36] Several creationist organizations have drafted bills such as the one introduced in Arkansas. For a brief description of the approach of one of these organizations, see *McLean*, 529 F. Supp. at 1261; *see infra* note 58 (for information regarding other creationist organizations).

[37] *McLean*, 529 F. Supp. at 1264.

[38] "Among the many creation epics in human history, the account of sudden creation from nothing, or *creatio ex nihilo*, and subsequent destruction of the world by flood is unique to Genesis." *Id.* at 1265.

[39] Comment, *supra* note 11, at 84 n.22.

[40] *See* Edwards v. Aguillard, 107 S. Ct. 2573, 2605 (1987) (Scalia, J., dissenting) ("discerning the subjective motivation . . . is, to be honest, almost always an impossible task"); *see also* Note, *Judicial Clairvoyance and the First Amendment: The Role of Motivation in Judicial Review of Book Banning in the Public Schools*, 1983 U. ILL. L. REV. 731, 733-34 (describing former Chief Justice Warren's reasons for rejecting a

down statutes has not settled the issue of whether "creation science" may be taught in public schools.[41]

B. Inconsistent Application and Results

The Supreme Court's inconsistent application of the "purpose" prong, and the *Lemon* test in general, have led to inconsistent results that confuse state legislatures and lower courts attempting to decipher the Supreme Court cases.[42] In 1980 the Supreme Court struck down a Kentucky statute[43] which required the posting of the Ten Commandments in public school classrooms.[44] Finding that the Ten Commandments, and the statute itself, were "plainly religious in nature,"[45] the Court applied a "pre-eminent purpose" test which some commentators consider to be a modification of the original "purpose" prong test.[46]

As a result of the Court's decisions in *Marsh v. Chambers*[47] and *Lynch v. Donnelly*,[48] the continued validity of the *Lemon*

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judicial standard based on individual and collective motive in *U.S. v. O'Brien*, 391 U.S. 367 (1967), *reh'g denied*, 393 U.S. 900 (1968)).

[41] As recently as 1987, a "balanced treatment" statute came before the Supreme Court in *Edwards*.

[42] *See id.* at 2605 (Scalia, J., dissenting) ("Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious government officials can only guess what motives will be held unconstitutional."); *see also* Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 133-34 (1986) ("standard is incoherent"); Note, Wallace v. Jaffree*: The Lemon Test Sweetened*, 22 HOUS. L. REV. 1273, 1285 n.103 (1985) ("Needless to say, a test which cannot be applied in a uniform manner is unlikely to yield uniform results."); Note, *The Lemon Test Soured: The Supreme Court's New Establishment Clause Analysis*, 37 VAND. L. REV. 1175, 1195-1201 (1984) [hereinafter *The Lemon Test Soured*].

[43] KY. REV. STAT. ANN. § 158.178 (Bobbs-Merrill 1980).

[44] The Supreme Court rejected the legislature's secular avowal that the Ten Commandments were an historical reference to a basis of the Western legal system. Stone v. Graham, 449 U.S. 39, 41 (1980), *reh'g denied*, 449 U.S. 1104 (1981). The Court *has* taken historical reference into account in other establishment clause cases, however. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984), *reh'g denied*, 466 U.S. 994 (1984); Marsh v. Chambers, 463 U.S. 783 (1983); Wisconsin v. Yoder, 406 U.S. 205 (1972).

[45] *Stone*, 449 U.S. at 41.

[46] *See* Valauri, *supra* note 42, at 133.

[47] 463 U.S. 783 (1983).

[48] 465 U.S. 668 (1984).

test was questioned.[49] In *Marsh*, the Court upheld the act of opening sessions of the Nebraska State Legislature with a prayer.[50] In doing so, the Court carved out an exception to the *Lemon* test[51] by ruling that long-standing traditions which have become "part of the fabric of our society"[52] do not violate the establishment clause.[53]

In *Lynch*, public funding of a nativity scene by the City of Pawtucket was upheld as valid under the establishment clause.[54] Liberally applying the *Lemon* test, the Court stated it would not "be confined to any single test or criterion in this sensitive area."[55] The Court found a secular purpose in that the nativity scene represented the historical origins of a national holiday.[56] The Court's decisions in *Marsh* and in *Lynch* led some commentators to believe that the *Lemon* test had been overruled.[57] Later cases, however, indicated that this was not true.

In the 1985 case of *Wallace v. Jaffree*,[58] the Court strictly applied the *Lemon* test, and the "purpose" prong in particular, in striking down an Alabama statute[59] which provided for a minute of meditation or prayer during class time in public schools.[60] The *Wallace* Court reaffirmed the validity of the *Lemon*

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[49] *See* Note, *Praying for Direction: The Establishment Clause and the Supreme Court*, 10 NOVA L.J. 217, 224 (1985); *The Lemon Test Soured, supra* note 42, at 1195 ("In *Marsh* and *Lynch* the Court moved away from a rigorous application of the *Lemon* analysis and toward a standard that the Court grounded in ambiguous historical references and a blanket recognition of religion in American society.").

[50] *Marsh*, 463 U.S. at 786.

[51] Justice Brennan, in dissent, wrote that had the *Lemon* test been applied, the facts in *Marsh* would clearly violate it. *Id.* at 796 (Brennan, J., dissenting).

[52] *Id.* at 792.

[53] *Id.*

[54] *Lynch*, 465 U.S. at 681.

[55] *Id.* at 679.

[56] *Id.* at 680.

[57] *See* Note; *supra* note 47, at 225.

[58] 472 U.S. 38 (1985).

[59] ALA. CODE § 16-1-20.1 (Supp. 1984).

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

Id.

[60] *Wallace*, 472 U.S. at 52-53 (The Court held that a governmental intent to

test without overruling the seemingly inconsistent prior decisions.[61] This decision further fueled the debate over the future application of the test.[62]

Recently, in *Edwards v. Aguillard*,[63] the Court again strictly applied the *Lemon* test in striking a Louisiana "balanced treatment" statute.[64] The Court held that the application of the test should be especially strict when public schools are involved.[65]

The Court's selective, inconsistent application of the *Lemon* test in the preceding five cases has produced the counterintuitive effect of prohibiting the posting of the Ten Commandments,[66] prohibiting meditation and prayer periods,[67] and prohibiting the teaching of "creation science"[68] in public schools, while allowing state sponsored prayers before a state legislature[69] and state sponsored displays clearly rooted in religious teachings.[70]

C. *Subjective Motivation as a Judicial Standard*

Due to its reliance on subjective intent,[71] the "purpose" prong is a difficult standard to apply as a basis for judicial

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promote religion may be evidenced by the effect the act has on the promotion of religion in general.).

[61] In *Edwards*, Justice Brennan, in a footnote, stated that the *Lemon* test "has been applied in all [establishment clause] cases since its adoption in 1971, except in *Marsh v. Chambers* . . ." which he distinguished from cases involving public schools. *Edwards*, 107 S. Ct. at 2577 n.4.

[62] *Compare* Valauri, *supra* note 42 (criticizing the "purpose" prong as too broad so as to ban all forms of religious aid and all accommodation as well, and proposing modifications) *with* Comment, *Lemon Reconstituted, Justice O'Conner's Proposed Modifications of the Lemon Test for Establishment Clause Violations*, 1986 B.Y.U. L. REV. 465 (advocating Justice O'Conner's modification of the *Lemon* test as stated in her concurring opinions in *Lynch v. Donnelly* and *Wallace v. Jaffree*).

[63] 107 S. Ct. 2573 (1987).

[64] *See supra* notes 3-6 and accompanying text.

[65] Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.

Edwards, 107 S. Ct. at 2577.

[66] *See supra* notes 44-46 and accompanying text.

[67] *See supra* notes 58-60 and accompanying text.

[68] *See supra* notes 63-65 and accompanying text.

[69] *See supra* notes 48-53 and accompanying text.

[70] *See supra* notes 49, 54-56 and accompanying text.

[71] "*Lemon*'s first prong focuses on the purpose that animated adoption of the

inquiry.[72] In other contexts the Supreme Court has, in fact, refused to use intent as a basis of decision.

In *United States v. O'Brien*,[73] O'Brien was convicted of wilfully destroying his draft card in violation of the Selective Service Act. O'Brien argued that his actions were a form of symbolic speech, protected under the first amendment,[74] and that the law was unconstitutional because Congress' purpose in passing the Act was to suppress free speech.[75] The Court, rejecting O'Brien's argument, refused to strike the statute solely on the basis of an allegedly improper motive.[76]

Chief Justice Warren cited three reasons for rejecting a judicial standard based on legislative motive.[77] First, speeches are not reliable in determining the motives of a multi-member legislature. Second, a legislature could re-enact an invalidated law at a later time for better reasons. Finally, he implied that motive-based invalidation of legislation could hamper effective lawmaking by allowing good laws with bad motives to be struck down.

In addition to Chief Justice Warren's well-taken considerations, an inherent psychological problem exists in divining an individual's motivation in formulating legislation, or in divining an individual's motivation in taking any objective action. A judicial standard based on such motivation is unreliable, and, therefore, inappropriate as a course of inquiry.

Act. 'The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion.' " *Edwards*, 107 S. Ct. at 2578 (quoting *Lynch*, 465 U.S. at 690 (O'Conner, J., concurring)).

[72] *See supra* note 40 and accompanying text.

[73] 391 U.S. 367 (1968), *reh'g denied*, 393 U.S. 900 (1968).

[74] U.S. CONST. amend. I.

[75] *O'Brien*, 391 U.S. at 382-83.

[76] *Id.* at 383; *see* NLRB v. Gissell Packing Co., 395 U.S. 575, 608 (1969), *reh'g denied*, 396 U.S. 869 (1969) (In the context of determining why an employee signed a union authorization card, the Court rejected a proposed rule which required "a probe of an employee's subjective motivation as involving an endless and unreliable inquiry."). *But see* Board of Educ. v. Pico, 457 U.S. 853 (1982) (Unable to produce a majority opinion on the appropriate first amendment standards for book banning in public schools, the Court, on a 5-4 vote, remanded the case for a determination of the motives of the individual school board members.); Diedrich v. Commissioner, 457 U.S. 191, 197 (1982) (For tax purposes, "intent is relevant in determining whether a gift has been made.").

[77] *O'Brien*, 391 U.S. at 383-84.

II. *EDWARDS V. AGUILLARD* AND THE FUTURE

In *Edwards v. Aguillard*,[78] the Supreme Court had an opportunity to reassess the *Lemon* test.[79] The challenged Louisiana statute,[80] similar to the Arkansas statute[81] overturned in *McLean*,[82] required "balanced treatment" of "creation science" and "evolution science"[83] whenever the origins of life were taught in public schools. The statute also prohibited discrimination by any school board, college board, or administrator against an instructor who chose to support "creation science."[84] The statute further provided for a publicly funded committee composed only of "creation scientists" to develop the curriculum.[85] It gave no similar protection or benefit to "evolution

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[78] 107 S. Ct. 2573 (1987).

[79] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), *reh'g denied,* 404 U.S. 876 (1971).

[80] LA. REV. STAT. ANN. §§ 17:286.1-.7 (West 1982).

[81] ARK. STAT. ANN. § 80-1663 to -1670 (Supp. 1985).

[82] McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982).

[83] LA. REV. STAT. ANN. at § 17:286.4.

[84] The statute read in pertinent part:

> A. Commencing with the 1982-1983 school year, public schools within this state shall give balanced treatment to creation-science and to evolution-science. Balanced treatment of these two models shall be given in classroom lectures taken as a whole for each course, in text-book 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 education programs in public schools, to the extent that such lectures, textbooks, library materials, or educational programs deal in any way with the subject of the origin of man, life, the earth, or the universe. When creation or evolution is taught, each shall be taught as a theory, rather than as proven scientific fact.
>
> B. Public schools within this state and their personnel shall not discriminate by reducing a grade of a student or by singling out and publicly criticizing any student who demonstrates a satisfactory understanding of both evolution-science or creation-science and who accepts or rejects either model in whole or part.
>
> C. No teacher in public elementary or secondary school or instructor in any state-supported university in Louisiana, who chooses to be a creation-scientist or to teach scientific data which points to creationism shall, for that reason, be discriminated against in any way by any school board, college board, or administrator.

Id.

[85] A. Each city and parish school board shall develop and provide to each public school classroom teacher in the system a curriculum guide on

scientists" or the evolution curriculum.[86]

The Fifth Circuit invalidated the statute.[87] In affirming the circuit court decision, the Supreme Court, by a plurality decision,[88] strictly applied the *Lemon* test. Writing for the plurality, Justice Brennan stated that "[t]he legislative history documents that the Act's primary purpose was to change the science curriculum of public schools in order to provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety."[89] He concluded that "[b]ecause the primary purpose of the Creationism Act is to advance a particular religious belief, the Act endorses religion in violation of the First Amendment."[90]

The effect of this decision, like those applying the "purpose" prong before it, most likely will be the enactment of a similar statute with slightly altered language and a sanitized record.[91] The emphasis of the "purpose" prong on individual intent appears to present a test too difficult to apply.[92] The sources which reveal such intent can be "contrived and sanitized, favorable

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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.

Id. at § 17:286.7.

[86] *Id. See supra* notes 84-85.

[87] Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985), *aff'd,* 107 S. Ct. 2573 (1987).

[88] The decision produced two concurring opinions, representing Justices Powell, O'Conner and White, and a dissent, representing Justice Scalia and Chief Justice Rehnquist. *Edwards,* 107 S. Ct. at 2584-2607.

[89] *Id.* at 2582.

[90] *Id.* The dissent argues that the majority incorrectly looks to the *primary* purpose of the legislation. Justice Scalia writes that the "Balanced Treatment" Act should be invalidated by the majority under the "purpose" prong "only if the record indicates that the Louisiana Legislature had *no* secular purpose." *Id.* at 2594 (Scalia, J., dissenting) (emphasis in original).

[91] *See supra* notes 11-41 and accompanying text.

[92] Justice Scalia argues that "discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task." *Edwards,* 107 S. Ct. 2605 (Scalia, J., dissenting).

media coverage orchestrated, and post-enactment recollections conveniently distorted."[93]

By abandoning the "purpose" prong the Court could address the substantive issues targeted by the second and the third prongs of the *Lemon* test. The second prong of the *Lemon* test requires that an act's "principle or primary effect must be one that neither advances nor inhibits religion."[94] The third prong prohibits acts fostering "an excessive government entanglement with religion."[95] While these standards maintain a level of desired flexibility,[96] they are sufficiently objective in nature and, therefore, judicially manageable. Application of the second and third prongs alone should provide for more conclusive and consistent results than has been achieved using the "purpose" prong.[97]

Abandoning the "purpose" prong of the *Lemon* test would present an opportunity for the Court to lay to rest the question of religion in public schools.[98] If the Court finds "creation science" to be a religious doctrine, all "balanced treatment" statutes might be invalidated under prong two or prong three. Legislation that advances a religion—by requiring its teaching in public schools or by requiring public school boards to oversee and to administer the new subject area—could be prohibited.[99]

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[93] *Id.* at 2606.

[94] *Lemon*, 403 U.S. at 612.

[95] *Id.* at 613.

[96] What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the states . . . produces a single, more encompassing construction of the Establishment Clause.

Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980).

[97] *See infra* note 104 and accompanying text.

[98] It is implicit in the *Edwards* dissent that the second and third prongs of the *Lemon* test provide sufficient establishment clause protection even in the absense of the "purpose" prong. Justice Scalia argues for the abandonment of the "purpose" prong without suggesting any modification of the remainder of the *Lemon* test. *Edwards*, 107 S. Ct. at 2607 (Scalia, J., dissenting).

[99] These two tests provide a sufficient standard for establishment clause protection in and of themselves. *See supra* note 98. The "secular effect" prong inquires into the substantive nature of the challenged activity while the "entanglement" prong, which deals with administrative realities, is more procedural in character.

Conversely, if the Court finds "creation science" to be presentable as a secular subject,[100] standard guidelines for states in passing sufficiently secular legislation could be established. In either case, the validity of the tenets of Creationism as a subject of public school instruction could be resolved.

In what must be considered dicta, given the scope of the decision, the Court has given some hints as to the nature of "creation science." The *Edwards* plurality,[101] and both concurrences,[102] indicate that "creation science" may historically and inevitably be linked with religious doctrine. The dissent implicitly indicates the possibility of a secular "balanced treatment" statute.[103] The recent appointment of Justice Kennedy to the Court may alter this equation. Under the present state of the law, however, if the "purpose" prong is violated, the Court need not apply the second or third prongs.[104]

CONCLUSION

Application of the "purpose" prong of the *Lemon* test[105] to invalidate state creationist legislation fails to resolve the issue of

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[100] *See* Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515, 556-57 (1978) (arguing that scientific creationism is presentable as a secular subject).

[101] Justice Brennan writes that "creation-science . . . embodies a particular religious tenet." *Edwards*, 107 S. Ct. at 2582.

[102] Justice White writes that "[b]ased on the historical setting and plain language of the act both courts [below] construed the statutory words 'creation-science' to refer to a religious belief. . . .

We usually defer to the Court of Appeals on the meaning of a state statute. . . ." *Id.* at 2590-91 (White, J., concurring).

Justice Powell argues that "concepts concerning God or a supreme being of some sort are manifestly religious. . . . These concepts do not shed that religiosity merely because they are presented as a philosophy or as a science." *Id.* at 2585 (Powell, J., concurring) (*quoting* Malnak v. Yogi, 440 F. Supp. 1284, 1322 (D.N.J. 1977), *aff'd per curiam*, 592 F.2d 197 (3d Cir. 1979) (per curiam)).

[103] In the context of a motion for summary judgment, Justice Scalia writes: "At this point, then, we must assume that the Balanced Treatment Act does *not* require the presentation of religious doctrine." *Id.* at 2592 (Scalia, J., dissenting).

[104] "If the law was enacted for the purpose of endorsing religion, 'no consideration of the second or third criteria [of *Lemon*] is necessary.' " *Id.* at 2578 (quoting Wallace v. Jaffree, 472 U.S. 38, 56 (1985)).

[105] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), *reh'g denied*, 404 U.S. 876 (1971).

"creation science" and "evolution science" instruction in public schools.[106] It also creates inconsistent results and confusing precedents.[107] The Court has adopted the "flexible" guidelines of the *Lemon* test at the expense of clarity and predictability [108] The need for flexibility, however, cannot override the need for a manageable judicial standard.

The simplest, and perhaps the most appropriate, solution is to abandon the "purpose" prong altogether [109] This alteration of the *Lemon* test would allow the Court to reach the substantive questions regarding "balanced treatment" statutes and thereby provide a more objective and consistent analysis for deciding establishment clause cases. As Justice Scalia writes: "I think it time that we sacrifice some 'flexibility' for 'clarity and predictability ' Abandoning *Lemon*'s purpose test would be a good place to start."[110]

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[106] *See supra* notes 18-41 and accompanying text.

[107] *See supra* notes 42-70 and accompanying text.

[108] *See* Committee for Pub. Educ. v. Regan, 444 U.S. 646, 662 (1980). *See generally* Note, *The Myth of Religious Neutrality by Separation in Education*, 71 VA. L. REV 127 (1985) (general discussion of the importance of maintaining flexible standard in adjudicating establishment clause claims).

[109] Justice O'Conner has proposed a modification of the "purpose" and "secular effect" prongs. *See* Lynch v. Donnelly, 465 U.S: 668, 687-94 (1984) (O'Conner, J., concurring). Under this analysis, the new prongs would ask (1) whether the government intends the statute to convey a message of endorsement of religion or disapproval of religion and (2) whether the statute actually conveys such a message. *Id.* at 691-92 (O'Conner, J., concurring). *See generally* Comment, *supra* note 62 (favorably examining O'Conner's proposed modification). This proposed modification, however, still leaves the problem of determining subjective intent. Justice O'Conner's first prong would require the same type of analysis of individual motive as the "purpose" prong presently requires. *Lynch*, 465 U.S. at 690-91 (O'Conner, J., concurring).

[110] Edwards v. Aguillard, 107 S. Ct. 2573, 2607 (1987) (Scalia, J., dissenting).