CONSTITUTIONAL LAW—ESTABLISHMENT CLAUSE—STATUTE REQUIRING THE TEACHING OF CREATION-SCIENCE IN CONJUNCTION WITH EVOLUTION VIOLATES THE FIRST AMENDMENT—*Edwards v. Aguillard*, 107 S. Ct. 2573 (1987).

Man is inherently a political and religious being.[1] Our Founding Fathers recognized this principle and sought to construct a system of government based upon the fundamental notion that religious expression must be separate from a government's exercise of power.[2] The first amendment to the Constitution of the United States was drafted to ensure that the federal government would not exert influence over the religious sovereignty of its people.[3] The amendment guarantees that

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[1] *See* ARISTOTLE, THE POLITICS (T. Sinclair trans. 1962).

> It follows that the state belongs to a class of objects which exist in nature, and that man is by nature a political animal; it is his nature to live in a state. He who by his nature and not simply by ill-luck has no city, no state, is either too bad or too good, either sub-human or superhuman—sub-human like the war-mad man condemned in Homer's words "having no family, no morals, no home"; for such a person is by his nature mad on war, he is a non-cooperator like an isolated piece in a game of draughts. But it is not simply a matter of cooperation, for obviously man is a political animal in a sense in which a bee is not, or any gregarious animal.

*Id.* at 28. *See also* Zorach v. Clauson, 343 U.S. 306 (1952). In *Zorach* Justice Douglas stated: "We are a religious people whose institutions presuppose a Supreme Being." *Id.* at 313. E. BURKE, SELECTED WORKS (W. Bate ed. 1960) "We know, and it is our pride to know, that man is by his constitution a religious animal; that atheism is against, not only our reason, but our instincts; and that it cannot prevail long." *Id.* at 401.

[2] *See, e.g.*, McCollum v. Board of Educ., 333 U.S. 203, 244-48 (1948) (Reed, J., dissenting); Everson v. Board of Educ., 330 U.S. 1, 38-43 (1947) (Rutledge, J., dissenting).

[3] *See* Davis v. Beason, 133 U.S. 333 (1890). In *Davis*, the majority stated:

> The first amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. The oppressive measures adopted, and the cruelties and punishments inflicted by the governments of Europe for many ages, to compel parties to conform, in their religious beliefs and modes of worship, to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons, and enforce an outward conformity to a prescribed standard, led to the adoption of the amendment in question.

*Id.* at 342.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[4]

Interpreting the first amendment, the Supreme Court has considered historical evidence in an attempt to apply the framers' original intent.[5] The Court's decisions, however, have served only to further intensify the conflict between the forces of religion and government.[6] A manifestation of this continued struggle is *Edwards v. Aguillard*,[7] wherein the Supreme Court considered the constitutionality of a Louisiana statute which required equal treatment of creationism and evolution in public schools.[8]

In 1981, the Louisiana state legislature enacted the Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act (Creationism Act).[9] This statute prohibited the teaching of evolutionary theory in the public elementary and secondary schools of Louisiana, unless accompanied by equal instruction in "creation-science."[10] No school was com-

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4 U.S. CONST. amend. I, cl. 1. The amendment states in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

5 *See* Engel v. Vitale, 370 U.S. 421, 425-30 (1962); *McCollum*, 333 U.S. at 213-21 (Frankfurter, J., concurring); *Everson*, 330 U.S. at 8-16.

6 *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (invalidating Alabama statute authorizing public schools to begin each school day with a one minute period of silence); Stone v. Graham, 449 U.S. 39 (1980) (invalidating Kentucky statute requiring posting the Ten Commandments in public classrooms); McCollum v. Board of Educ., 333 U.S. 203 (1948) (invalidating Illinois practice of allowing religion teachers to hold thirty minute weekly sectarian classes in public school facilities). *Compare* Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding Rhode Island practice of erecting Christmas display which included a nativity scene); Marsh v. Chambers, 463 U.S. 783 (1983) (upholding Nebraska legislature's practice of beginning each session with a prayer offered by chaplain); Everson v. Board of Educ., 330 U.S. 1 (1947) (upholding New Jersey reimbursement scheme to refund transportation costs incurred by parents of children attending private schools). For an extended discussion of these cases, see *infra* notes 27-97 and accompanying text.

7 107 S. Ct. 2573 (1987).

8 *Id.*

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

10 *Edwards*, 107 S. Ct. at 2575-76. The Creationism Act provides in pertinent part:

> Commencing with the 1982-1983 school year, public schools within this state shall give balanced treatment to creation-science and to evolution-science. Balanced treatment of these two models shall be given in classroom lectures taken as a whole for each course, in textbook materials taken as a whole for each course, in library materials taken as a whole for the sciences and taken as a whole for the humanities, and in other educational programs in public schools, to the extent that such lectures,

pelled by the Creationism Act to provide instruction in evolution or creation-science.[11] Neither theory, however, could be taught to the exclusion of the other.[12]

A group of educators, religious leaders, and parents of Louisiana school children instituted an action in the United States District Court for the Eastern District of Louisiana against Louisiana officials responsible for the implementation of the Creationism Act.[13] The plaintiffs moved for summary judgment, contending that the Act was invalid on its face, because it violated the establishment clause of the first amendment.[14] Conversely, the government officials defended the constitutionality of the Act, claiming that its purpose was to protect the secular interest of academic freedom.[15]

The district court granted the plaintiffs' motion and asserted that a statute prohibiting the teaching of evolution, or requiring that it be accompanied by instruction in creation-science, serves no secular interest.[16] The court reasoned that "the teaching of 'creation-science' and 'creationism,' as contemplated by the statute, involves teaching 'tailored to the principles' of a particular religious sect or groups of sects."[17] Accordingly, the court held

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> 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.

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

11 *Edwards*, 107 S. Ct. at 2576.

12 *Id.*

13 *Id.* The Louisiana officials responsible for implementing the Act included the Governor of Louisiana, the State Attorney General, the State Department of Education, the State Superintendent, and the St. Tammany Parish School Board. *See id.* at 2576 n.1. They agreed not to implement the Act until the conclusion of this litigation. *Id.*

14 *Id.* at 2576. The district court initially stayed the action pending the outcome of a separate lawsuit instituted by the sponsor of the legislation. *Id.* at 2576 n.2. Upon dismissal of the separate action, the district court lifted its stay and held that the Act violated the Louisiana Constitution. Aguillard v. Treen, No. 82-3778 (E.D. La. Nov. 24, 1982). The Court of Appeals for the Fifth Circuit certified the state constitutional question to the Louisiana Supreme Court. Aguillard v. Treen, No. 82-3778 (5th Cir. March 14, 1983). The Louisiana Supreme Court held that the Act did not violate the Louisiana State Constitution. Aguillard v. Treen, 440 So.2d 704 (La. 1983). The court of appeals then remanded the case to the district court to consider whether the Act violated the United States Constitution. Aguillard v. Treen, 720 F.2d 676 (5th Cir. 1983).

15 *Edwards*, 107 S. Ct. at 2576.

16 *See* Aguillard v. Treen, 634 F. Supp. 426, 427-28 (E.D. La. 1985), *aff'd sub nom.* Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985), *aff'd*, 107 S. Ct. 2573 (1987).

17 *Aguillard*, 634 F. Supp. at 427 (quoting Epperson v. Arkansas, 393 U.S. 97, 106 (1968)).

that the Creationism Act violated the establishment clause, because the Act's purpose was to advance a select religious doctrine.[18] The United States Court of Appeals for the Fifth Circuit affirmed on the same grounds[19] and the United States Supreme Court noted probable jurisdiction.[20]

Affirming the lower court's decision, the Supreme Court held that the Creationism Act violated the establishment clause.[21] Justice Brennan, writing for the majority, stated that the Act clearly advanced a theistic interest by requiring that either creation-science be taught concomitant with evolution or that evolutionary theory be banished from the curriculum of Louisiana public schools.[22] Additionally, the Justice noted that the Act sought to utilize government funds to accomplish this religious purpose.[23]

In 1940, the Supreme Court in *Cantwell v. Connecticut*[24] held the establishment and free exercise clauses of the first amendment applicable to the states through the fourteenth amendment.[25] Since that time, the Court has struggled to formulate the appropriate standards by which to adjudicate establishment clause questions.[26]

Subsequent to *Cantwell*, the Court ruled on an establishment clause challenge in the case of *Everson v. Board of Education*.[27] In *Everson*, the Court upheld a New Jersey reimbursement scheme in which the transportation costs incurred by parents of children attending private schools would be refunded by the state.[28] The

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18 *Id.* at 429. Specifically, the court noted that the Act "promot[ed] the beliefs of some theistic sects to the detriment of others." *Id.*

19 Aguillard v. Edwards, 765 F.2d 1251, 1253 (5th Cir. 1985), *aff'd*, 107 S. Ct. 2573 (1987). The court determined that the legislative intent behind the Creationism Act was "to discredit evolution by counterbalancing its teaching at every turn with the teaching of creationism, a religious belief." *Id.* at 1257.

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

21 *Edwards*, 107 S. Ct. at 2584.

22 *Id.*

23 *Id.*

24 310 U.S. 296 (1940).

25 *Id.* at 303. In *Cantwell*, the Court considered the constitutionality of a state statute which prohibited solicitation for religious purposes without a duly procured certificate. *Id.* at 303. The Court determined that such statute was an unconstitutional restraint on free exercise of religion and a deprivation of due process in violation of the fourteenth amendment. *Id.*

26 *See infra* notes 27-97 and accompanying text.

27 330 U.S. 1 (1947).

28 *Id.* at 3. Specifically, the state statute authorized local school districts to enter contracts and promulgate rules for the transportation of children to and from private schools. *Id.* Pursuant to this statute, a local school board of education author-

Court's inquiry focused upon whether the contested law was neutral with regard to religion.[29] The majority reasoned that the disputed legislation was indeed neutral, because parents of all private school children were reimbursed irrespective of their religious affiliation.[30] Notwithstanding this conclusion, the Court noted that the wall of separation between church and state "must be kept high and impregnable."[31]

A fractured Court in *Everson* realigned in *McCollum v. Board of Education*[32] to examine rights granted under the first amendment.[33] In *McCollum*, the Court considered the constitutionality of an Illinois practice of permitting sectarian teachers to hold weekly classes in religious instruction in lieu of compulsory secular education at public school facilities.[34] Writing for the majority, Justice Black first noted that pupils are required by law to attend school for a secular education.[35] The Justice then reasoned that Illinois' scheme was, without question, a use of public funds employed to aid sectarian groups in propagating their beliefs.[36] Thus, Justice Black concluded that the practice was unconstitutional.[37]

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ized the reimbursement for bus transportation costs to parents of parochial school children. *Id.* A district taxpayer challenged the reimbursement scheme as violative of the New Jersey and United States Constitutions. *Id.* at 3-4.

29 *Id.* at 18.

30 *See id.*

31 *Id.*

32 333 U.S. 203 (1948).

33 In *Everson*, Justices Rutledge, Frankfurter, Jackson and Burton dissented. Everson v. Board of Educ., 330 U.S. 1 (1947). A year later in *McCollum*, the Justices who had dissented in *Everson* concurred in the result reached by the majority. McCollum v. Board of Educ., 333 U.S. 203 (1948).

34 *McCollum*, 333 U.S. at 207-09. Under this plan, representatives from the Catholic, Jewish, and Protestant faiths gave religious instruction in public school buildings once a week. *Id.* at 208-09. The Champaign Council on Religious Education, an independent body composed of concerned members of the Jewish, Protestant and Roman Catholic faiths, hired the religious teachers. *Id.* at 207. The Council obtained the school board's permission to offer these religion classes once a week to grades four through nine. *Id.* If a child's parent requested that the child be excused from secular classes, the pupil was required to attend the religion classes. *Id.* at 207-09. Students not wishing to attend the religious classes, however, were required to attend the regularly scheduled secular classes. *Id.* at 209.

35 *Id.* at 209-10.

36 *Id.* at 210.

37 *Id.* In so holding, the Court explained that:

> 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 or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. . . . No tax in any amount, large or

In a concurring opinion, Justice Frankfurter stressed the importance of public schools by stating that as "the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects."[38] Thus, the *McCollum* case, decided two years after *Everson*, illustrated a marked change in the Court's interpretation of the establishment clause.[39]

In 1961, in *Engel v. Vitale*,[40] the Court held unconstitutional the New York practice of beginning each day of public school class with the recitation of a state composed nondenominational prayer.[41] Summarizing the Court's position, Justice Black stated that New York's practice of beginning each school day with an invocation of God's blessing undoubtedly constituted a religious activity.[42] Conspicuously absent from the majority's opinion, however, were any references to the yardstick employed by the Court to arrive at its conclusion.[43]

Justice Douglas' concurring opinion once again brought the concept of neutrality to the forefront.[44] The Justice posited that religious interests are better served when a government assumes a neutral posture with regard to religion.[45] Significantly, Justice

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> 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 a Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. (emphasis in original).

*Id.* at 210-11 (footnotes omitted) (quoting Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947)).

38 *Id.* at 216-17 (Frankfurter, J., concurring). Justice Reed filed a dissent calling for a less rigid interpretation of the establishment clause and pointed to the "history of past practices" in concluding that the Illinois practice should be upheld. *Id.* at 256 (Reed, J., dissenting).

39 *Compare McCollum*, 333 U.S. at 209-12 *with Everson*, 330 U.S. at 8-18.

40 370 U.S. 421 (1962).

41 *Id.* at 422-24. The prayer recited in unison by the students at the beginning of each school day read as follows:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.

*Id.* at 422. The prayer was composed by the State Board of Regents, a governmental agency created in accordance with New York's Constitution. *Id.* at 422-23. The Board maintained supervisory power over the New York public school system. *Id.*

42 *Id.* at 424.

43 *See id.* at 424-36.

44 *Id.* at 443 (Douglas, J., concurring).

45 *Id.* Justice Douglas reasoned:

> The First Amendment leaves the Government in a position not of hostility to religion but of neutrality. The philosophy is that the atheist or agnostic—the nonbeliever—is entitled to go his own way. The philosophy is that if government interferes in matters spiritual, it will be a divi-

Douglas also noted that the *Everson* case, decided sixteen years earlier, was "out of line with the First Amendment."[46]

Building upon Justice Douglas' concept of neutrality, the Court in *Abington School District v. Schempp*,[47] formulated a new standard for evaluating state legislation under the establishment clause.[48] In *Schempp*, the Court assessed the validity of a Pennsylvania statute requiring the reading of a selected passage from the Bible each school morning.[49] The law, however, allowed a child to be excused from participation upon formal written request by a parent or legal guardian.[50] In considering the constitutionality of this state-sponsored practice, the Court embellished upon the *Everson* "neutrality" standard by formulating a new two-prong test.[51] The *Schempp* Court stated that an enactment must have both "a secular legislative purpose and a primary effect that neither advances nor inhibits religion" in order to pass constitutional muster under the establishment clause.[52] Utilizing this two-prong standard, the *Schempp* Court invalidated the Pennsylvania statute as violative of the first amendment.[53] Clearly, this stringent two-prong standard evidenced a shift in the Court to a more scrutinizing view towards legislation seeking to weaken "the wall of separation between church and state."[54]

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> sive force. The First Amendment teaches that a government neutral in the field of religion better serves all religious interests.

*Id.*

46 *Id.* Justice Douglas noted that "[the result of the *Everson* case] is appealing, as it allows aid to be given to needy children. Yet by the same token, public funds could be used to satisfy other needs of children in parochial schools—lunches, books, and tuition being obvious examples." *Id.*

47 374 U.S. 203 (1963).

48 *Id.*

49 *Id.* at 205.

50 *Id.*

51 *Id.* at 222.

52 *Id.* (citing McGowan v. Maryland, 366 U.S. 420 (1961); Everson v. Board of Educ., 330 U.S. 1 (1947)).

53 *Id.* at 226-27.

54 *See* Letter from Thomas Jefferson to Danbury Connecticut Baptist Association (Jan. 1, 1802), *reprinted in* S. PADOVER, THE COMPLETE JEFFERSON (1943). Thomas Jefferson was the first to use the phrase "wall of separation between church and state." The letter states in pertinent part:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the

The Court employed the two-prong standard formulated in *Schempp* five years later in *Epperson v. Arkansas*.[55] In *Epperson*, the Court struck down an Arkansas statute which made it unlawful for a teacher in a public school or university to teach the evolutionary theory of man.[56] Writing for the majority, Justice Fortas determined that the first amendment does not allow the state to mandate that teaching and learning be tailored to the tenets or principles of any religious sect.[57] Applying the test articulated in *Schempp*, the Court reasoned that the sole purpose of the Arkansas law was to further the religious account of the origin of man as explained in the Book of Genesis.[58] Accordingly, the *Epperson* Court concluded that the Act clearly failed to meet the first amendment requirements of government neutrality.[59]

Three years later, in the seminal case of *Lemon v. Kurtzman*,[60] the Supreme Court formulated a tripartite test to resolve establishment clause issues.[61] In *Lemon*, the Court assessed the constitutionality of a Pennsylvania and a Rhode Island statute which both provided state aid to parochial elementary and secondary schools.[62] Chief Justice Burger, writing for the majority, articulated a new standard which expanded upon the existing approach for scrutinizing establishment clause questions.[63] In addition to requiring that a statute have a secular purpose and possess the

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> free exercise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction that progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.
>
> I reciprocate your kind prayers for the protection and blessing of the common Father and Creator of man, and tender you for yourselves and your religious association, assurances of my high respect and esteem.

*Id.* at 518-19.

55 393 U.S. 97 (1968).

56 *Id.* at 109.

57 *Id.* at 106.

58 *Id.* at 107-09 (citing Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963)).

59 *Id.* at 109.

60 403 U.S. 602 (1971).

61 *See Lemon*, 403 U.S. at 612-13.

62 *Id.* at 606. Pennsylvania's program provided financial support to nonpublic schools by reimbursing their costs for teachers' salaries, textbooks and other materials used in secular courses. *Id.* at 606-07. Under the Rhode Island statutory scheme, the state supplemented 15% of nonpublic school teacher salaries. *Id.* at 607.

63 *Id.* at 612-13.

principal effect of neutrality, the *Lemon* Court also held that the statute must not constitute "an excessive government entanglement with religion."[64] Applying this test to both state statutes, the Court concluded that "the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion," and therefore, failed to meet the newly formulated third criterion.[65] Following *Lemon*, the tripartite test has become the benchmark against which many establishment clause cases have been analyzed.[66]

Nearly a decade later, in *Stone v. Graham*,[67] the Court decided the constitutionality of a Kentucky statute requiring the posting of a copy of the Ten Commandments in all public classrooms in the state.[68] Employing the *Lemon* criteria, the Court rejected the Kentucky legislature's articulation of a secular purpose and held the statute unconstitutional.[69] Further, the Court determined

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64 *Id.* (citing Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

65 *Id.* at 614.

66 *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 680-85 (1984) (application of tripartite test to uphold city sponsored creche display); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (application of tripartite test to ban church power to regulate liquor licensing); Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (application of tripartite test to uphold funding to private schools). *But see* Mueller v. Allen, 463 U.S. 388, 394 (1983) (suggesting *Lemon* test is only an aid in analysis); Marsh v. Chambers 463 U.S. 783, 795 (1983) (utilizing historical analysis to uphold legislature prayer). At least one commentator has criticized the Court's inconsistent application of the *Lemon* test. *See* Choper, *The Religious Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680 (1980).

67 449 U.S. 39 (1980) (per curiam).

68 The Kentucky statute provided:

> (1) It shall be the duty of the superintendent of public instruction, provided sufficient funds are available as provided in subsection (3) of this Section, to ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary and secondary school classroom in the Commonwealth. The copy shall be sixteen (16) inches wide by twenty (20) inches high.
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> (2) In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."
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> (3) The copies required by this Act shall be purchased with funds made available through voluntary contributions made to the state treasurer for the purposes of this Act.

KY. REV. STAT. ANN. § 158.178 (Bobbs-Merrill 1980) (declared unconstitutional in Stone v. Graham, 449 U.S. 39, 42-43 (1980)).

69 *Stone*, 449 U.S. at 40-41. In its analysis of the constitutionality of the statute, the Court noted that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments

that the only possible effect of the texts would "be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments."[70] The Court also noted, however, that it might be constitutionally permissible to incorporate the Ten Commandments into secular subjects such as history, civilization, or comparative religion.[71]

Justice Rehnquist filed a scathing dissent in which he criticized the Court's failure to accept the Kentucky legislature's articulation of a secular purpose.[72] According to the Justice, the majority's outright rejection of the stated purpose did not afford the legislative pronouncements the deference they deserved.[73] By stating that "[t]he Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin,"[74] Justice Rehnquist expressed a viewpoint which foreshadowed the outcome of subsequent establishment clause decisions.

Thus, in the 1983 case of *Marsh v. Chambers*,[75] the Court adopted, to a limited extent, the position expressed by Justice Rehnquist in *Stone*.[76] In *Marsh*, the Court upheld the validity of a Nebraska practice of beginning each legislative session with a prayer recited by a chaplain.[77] In so doing, the Court did not apply the *Lemon* tripartite test, but instead relied upon historical precedent with regard to this matter.[78] The Court reasoned that the authors of the first amendment did not view paid chaplains reciting opening prayers as unconstitutional because the practice had continued without interruption since the initial congres-

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are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Id.* at 41 (footnote omitted).

70 *Id.* at 42.

71 *Id.* (citing Abington School Dist. v. Schempp, 374 U.S. 203, 225 (1963)).

72 *See id.* at 43 (Rehnquist, J., dissenting). Historically, the Court has accepted the secular purpose of a statute as stated by the legislature. *See, e.g.*, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 773 (1973) (accepting New York Legislature's stated secular purpose behind statute granting financial aid to nonpublic schools); Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (deferring to stated secular purpose of statute supplementing salaries of private school teachers); Board of Educ. v. Allen, 392 U.S. 236, 243 (1968) (accepting New York Legislature's stated secular purpose behind statute authorizing loan of textbooks to private schools).

73 *See Stone*, 449 U.S. at 43-44 (Rehnquist, J., dissenting).

74 *Id.* at 45-46.

75 463 U.S. 783 (1983).

76 *See id.* at 784.

77 *Id.* The chaplain was chosen by the Executive Board of the Legislative Council and his salary was subsidized through public funds. *Id.* at 784-85.

78 *Id.* at 788.

sional session.[79] Furthermore, the *Marsh* Court noted that the two hundred year tradition of commencing legislative sessions with prayer "has become part of the fabric of our society."[80]

In dissent, Justice Brennan abandoned his previous position in *Schempp*, where he noted that invocational prayers at legislative sessions were not prohibited by the establishment clause.[81] Reasoning that Nebraska's practice clearly failed all three criteria set forth in *Lemon*, Justice Brennan stated that "[f]or my purposes, however, I must begin by demonstrating what should be obvious: that, if the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause."[82]

Similarly, the case of *Lynch v. Donnelly*[83] illustrates the Court's willingness to relax its application of the *Lemon* tripartite test when certain traditional practices are involved.[84] In *Lynch*, the residents of Pawtucket, Rhode Island challenged the city's practice of erecting a Christmas display, which included a nativity scene in a park owned by a nonprofit organization.[85] Writing for the majority, Chief Justice Burger applied the *Lemon* test and concluded that the city's display of the creche did not violate the establishment clause.[86] Evaluating the purpose behind the city's action, the *Lynch* Court reasoned that the celebration of the holiday season by Pawtucket was secular in nature.[87] Further, the

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79 *Id.*

80 *Id.* at 792.

81 *See* Abington School Dist. v. Schempp, 374 U.S. 203, 299-300 (1963) (Brennan, J., concurring). In his concurrence in *Schempp*, Justice Brennan stated:

> [T]he saying of invocational prayers in legislative chambers, state or federal, and the appointment of legislative Chaplains, might well represent no involvement of the kind prohibited by the Establishment Clause. Legislators, federal and state, are mature adults who may presumably absent themselves from such public and ceremonial exercises without incurring any penalty, direct or indirect.

*Id.* at 299-300 (Brennan, J., concurring). In his dissent in *Marsh*, Justice Brennan stated that: "After much reflection, I have come to the conclusion that I was wrong then and that the Court is wrong today. I now believe that the practice of official invocational prayer, as it exists in Nebraska and most other state legislatures is unconstitutional." *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting).

82 *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting).

83 465 U.S. 668 (1984).

84 *See id.* at 672-87.

85 *Id.* at 671. The Christmas display included a Santa Claus house, candy-cane poles, reindeer pulling Santa's sleigh, a Christmas tree, cut-out figures representing clowns, carolers, elephants, teddy bears, hundreds of colored lights, a "SEASONS GREETINGS" banner, as well as the creche at issue. *Id.*

86 *Id.* at 679-87.

87 *Id.* at 680-81. The Court reasoned that:

Court concluded that the creche, when viewed in the context of the overall Christmas display, did not impermissibly benefit religion, and therefore, it satisfied the second prong of the *Lemon* test.[88] Noting that the city of Pawtucket did not consult with church authorities as to the design or content of the creche, the Court concluded that the activity did not create an excessive entanglement between church and state.[89]

Justice Brennan, in a stinging dissent, criticized the Court's "less-than-vigorous application of the *Lemon* test . . . ."[90] Questioning the majority's commitment to the principles espoused by the test, Justice Brennan stated further that the holding in *Lynch* was irreconcilable with prior decisions.[91] He reasoned that the city's practice was "a coercive . . . step toward establishing the sectarian preferences of the majority at the expense of the minority" by utilizing public funds to support theological tidings conveyed by the creche.[92]

Decided in 1985, the case of *Wallace v. Jaffree*[93] represents a return by the Court to the standard of scrutiny employed in cases prior to *Marsh* and *Lynch*. In *Wallace*, the Court considered the constitutionality of an Alabama statute authorizing public schools to initiate each day of classes with a one minute moment of silence "for meditation or voluntary prayer."[94] Authoring the majority opinion, Justice Stevens found that the statute was wholly motivated by a religious purpose, and therefore, it failed the first prong of the *Lemon* test.[95] Accordingly, the Court held the stat-

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> When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the creche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message. In a pluralistic society a variety of motives and purposes are implicated. The city, like the Congresses and Presidents, however, has principally taken note of a significant historical religious event long celebrated in the Western World. The creche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.

*Id.* at 680 (citations omitted).

88 *Id.* at 681-83.

89 *Id.* at 683-84.

90 *Id.* at 696 (Brennan, J., dissenting).

91 *See id.* at 697 (Brennan, J., dissenting).

92 *Id.* at 725-26 (Brennan, J., dissenting). Justice O'Connor filed a concurring opinion in which she suggested abandoning the first criterion of the *Lemon* test. *Id.* at 687-94 (O'Connor, J., concurring).

93 472 U.S. 38 (1985).

94 *Id.* at 43 (quoting ALA. CODE § 16-1-20.1 (Supp. 1984)).

95 *Id.* at 56.

ute to be unconstitutional.[96] The Court, however, did not determine that all statutes falling under the rubric of "moment of silence" would be per se unconstitutional under the establishment clause.[97]

The evolution of establishment clause litigation underscores the prominent role assumed by *Edwards*. Recent cases display the Court's uncertainty in determining how strictly the establishment clause must be construed.[98] The *Edwards* Court, however, evinced a general willingness by the majority to apply strict scrutiny to a contested statute within the parameters of the *Lemon* test.[99]

Assessing the validity of the Creationism Act, Justice Brennan, writing for the majority, first noted the considerable discretion afforded to state and local school boards in operating public schools.[100] Recognizing that the Court has been "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," Justice Brennan emphasized that in employing the tripartite test enunciated in *Lemon*, the Court must be especially cognizant of the specific concerns existing in the context of public educational institutions.[101] Ap-

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96 *Id.* Justice Stevens, in reaching this conclusion referred to the stated purpose of the bill as expressed by its sponsor, Senator Holmes. In answer to the question regarding whether there was any purpose for the act other than the introduction of prayer into public schools, Senator Holmes commented that he did not have a different purpose in mind. *Id.* at 57 (footnote omitted).

97 *See id.* at 58-59. In his concurrence, Justice Powell stated: "I agree fully with Justice O'Connor's assertion that some moment-of-silence statutes may be constitutional, a suggestion set forth in the Court's opinion as well." *Id.* at 62 (Powell, J., concurring) (footnote omitted). In a separate concurring opinion, Justice O'Connor stated:

> A state-sponsored moment of silence in the public schools is different from state-sponsored vocal prayer or Bible reading. First, a moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise. Second, a pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others. For these simple reasons, a moment of silence statute does not stand or fall under the Establishment Clause according to how the Court regards vocal prayer or Bible reading.

*Id.* at 72 (O'Connor, J., concurring).

98 *See supra* notes 27-97 and accompanying text.

99 *See* Edwards v. Aguillard, 107 S. Ct. 2573, 2577-78 (1987).

100 *Edwards*, 107 S. Ct. at 2577 (citing Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159 (1986)).

101 *Id.* at 2577-78. In assuming this position, the Court observed that parents entrust the public school system with the education of their children and do so under the belief that the classroom will not intentionally advance religious views

plying the first prong of the *Lemon* test, the Court concluded that the purpose of the legislation was to advance the viewpoint that a supernatural being created mankind.[102] Finding no merit in the Act's stated purpose of protecting academic freedom, the Court reasoned that the "goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science."[103]

Conceding that the Court is normally deferential to a legislature's proffered secular purpose, the Court noted that such deference is only accorded when the statement of such purpose is "sincere and not a sham."[104] After examining the legislative history of the Creationism Act, the Court concluded that the ban on teaching did not further, but rather undermined the promotion of a comprehensive scientific education.[105] Thus, since the purpose of the Act in question was "to restructure the science curriculum to conform with a particular religious viewpoint," the Court held that the Act violated the first prong of the *Lemon* test.[106] In so holding, however, Justice Brennan recognized the value in teaching certain religious beliefs and emphasized that it may be validly done if the program evinces the secular purpose of improving the efficacy of science instruction.[107] Louisiana's Act, according to Justice Brennan, did not achieve this constitutionally permissible objective.[108]

In a concurring opinion, Justice Powell stated that the language of the Creationism Act must first be examined to deter-

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that may conflict with the religious beliefs of the child and his or her family. *Id.* at 2577. Furthermore, the Court recognized that students are impressionable and susceptible to peer pressure. *Id.* Accordingly, the Court posited that "[i]n no activity of the State is it more vital to keep out divisive forces than in its schools . . . ." *Id.* at 2578 (quoting McCollum v. Board of Educ., 333 U.S. 203, 231 (1948)).

102 *Id.* at 2578-81.

103 *Id.* at 2578-79.

104 *Id.* at 2579 (citing Wallace v. Jaffree, 472 U.S. 38, 64 (1985) (Powell, J., concurring)).

105 *Id.* at 2579. Arriving at this conclusion, the Court reasoned:

> If the Louisiana legislature's purpose was solely to maximize the comprehensiveness and effectiveness of science instruction, it would have encouraged the teaching of all scientific theories about the origins of humankind. But under the Act's requirements, teachers who were once free to teach any and all facets of this subject are now unable to do so.

*Id.* at 2580 (footnote omitted).

106 *Id.* at 2584.

107 *Id.* at 2582-83.

108 *Id.*

mine whether a secular purpose exists.[109] Noting that the purpose of "academic freedom" offered by the legislature was ambiguous, the Justice proceeded to examine the legislative history of the statute.[110] Justice Powell concluded that the Louisiana legislature intended to promote a particular religious belief system and determined, therefore, that the Act was unconstitutional.[111]

In conclusion, Justice Powell recognized the authority of state and local school boards to formulate the education policies of public schools.[112] According to Justice Powell, interference with a school board's authority is warranted only when the purpose for its decision is "clearly religious."[113] The Justice posited that school children "can and should properly be informed of all aspects of [our] Nation's religious heritage," as long as such instruction is not intended to promote a particular religious belief.[114]

Justice White filed a concurring opinion in which he advocated the Court's practice of deferring to a lower court's interpretation of a state statute.[115] The Justice postulated that district courts and courts of appeals are proper forums for interpreting legislation originating in their own states.[116] Accordingly, he asserted that where a court of appeals arrives at a rational construc-

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109 *Id.* at 2585 (Powell, J., concurring) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring)).

110 *Id.* at 2586 (Powell, J., concurring).

111 *Id.* at 2586-88 (Powell, J., concurring). Justice Powell noted that the Louisiana legislature relied on presentations by the Institute for Creation Research and on the Creation Research Society, *inter alia*, in formulating the legislation. *Id.* at 2587-88 (Powell, J., concurring). Justice Powell also noted that both groups sought to revive the belief "in special creation as the true explanation of the origin of the world," and that both groups believed that the biblical accounts of creation were scientifically and historically correct. *Id.* at 2587 (Powell, J., concurring). The Justice concluded that there was "no persuasive evidence in the legislative history" to warrant a finding that the legislature had a secular purpose in enacting the legislation. *Id.* at 2588 (Powell, J., concurring).

112 *Id.* (quoting Board of Educ. v. Pico, 457 U.S. 853, 893 (1982)).

113 *Id.* at 2589 (Powell, J., concurring).

114 *Id.* at 2589-90 (Powell, J., concurring). Justice Powell noted:

> I would see no constitutional problem if school children were taught the nature of the Founding Father's religious beliefs and how these beliefs affected the attitudes of the times and the structure of our government. Courses in comparative religion of course are customary and constitutionally appropriate.

*Id.* (footnotes omitted).

115 *See id.* at 2590-91 (White, J., concurring).

116 *Id.* at 2591 (citing Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 500 (1985)).

tion of a statute, the Supreme Court should accept that lower court's determination.[117] In Justice White's opinion, both the district court and court of appeals properly determined that the Act's purpose was to advance religion.[118] Therefore, the Supreme Court should have accepted the lower court's interpretation of the Act without conducting further inquiry.[119]

Justice Scalia, in a spirited dissent, expressed his disapproval of the Court's examination of the Louisiana legislature's purpose for enacting the Creationism Act.[120] The Justice contended that by rejecting the legislature's stated secular purpose for enacting the Act, the majority essentially held that the Louisiana legislators had violated their oaths to uphold the federal constitution "and then lied about it."[121] Justice Scalia stated further that invalidation under the purpose prong of *Lemon* is only appropriate when the statute is undoubtedly motivated solely by religious considerations.[122] Therefore, the Justice reasoned that the majority should only have invalidated the Creationism Act if the Louisiana legislature had undeniably no secular purpose in enacting the statute.[123]

Justice Scalia stressed that the purpose prohibited by the *Lemon* test is that of advancing religion.[124] The Justice contended further that the establishment clause does not preclude legislators from acting upon their religious beliefs, but allows religious men and women to participate in the political process.[125] Embracing the dynamics of religion, he noted that "[t]oday's religious activism may give us the [Creationism] Act, but yesterday's resulted in the abolition of slavery, and tomorrow's may bring relief for famine victims."[126]

Demonstrating a strong conviction that states should have autonomy in their own affairs, Justice Scalia noted that invalidation of a statute approved by the duly elected representatives of the people is a serious matter.[127] The Justice stressed that the cardinal principle guiding the Court in reviewing state legislation

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117 *Id.* (citing Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 499-500 (1985)).
118 *Id.*
119 *See id.*
120 *See id.* (Scalia, J., dissenting).
121 *Id.* at 2591-92 (Scalia, J., dissenting).
122 *Id.* at 2593 (Scalia, J., dissenting).
123 *Id.* at 2594 (Scalia, J., dissenting).
124 *Id.* (citations omitted).
125 *Id.*
126 *Id.*
127 *Id.* at 2600 (Scalia, J., dissenting).

"is to save and not to destroy."[128] When confronted with two possible interpretations of an act, Justice Scalia believed that it is the Court's duty to choose the alternative which would result in upholding the legislation.[129] Coupling the Louisiana legislature's explicitly stated secular purpose of "protecting academic freedom" in the text of the Act, with its legislative history, Justice Scalia reasoned that the statute should survive *Lemon*'s purpose test.[130] The Justice attributed the majority's willingness to invalidate the Louisiana Act to "an intellectual predisposition created by the facts and legend of *Scopes v. State* . . .—an instinctive reaction that any governmentally imposed requirements bearing upon the teaching of evolution must be a manifestation of Christian fundamentalist repression."[131] Justice Scalia described the majority's position as an "illiberal judgment" in that it was based upon "*Scopes*-in-reverse" biases.[132]

Perhaps the most important point raised by Justice Scalia is the fallibility of the purpose prong of the *Lemon* test.[133] Citing numerous possible motivational factors, the Justice recognized that discerning a legislator's subjective ratiocination for enacting a statute is a Sisyphean task.[134] Therefore, Justice Scalia stated that to search for the unitary purpose behind a legislature's action is "to look for something that does not exist."[135] Noting the inherent deficiency in *Lemon*'s purpose prong, Justice Scalia suggested that it should be replaced by a standard which would be

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128 *Id.* (quoting National Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937)).

129 *Id.*

130 *Id.* at 2601 (Scalia, J., dissenting). Senator Keith, the sponsor of the legislation explained academic freedom as a student's freedom from indoctrination. *See id.*

131 *Id.* at 2604 (Scalia, J., dissenting) (citing Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927)).

132 *Id.*

133 *See id.* at 2605 (Scalia, J., dissenting). Justice Scalia credited the purpose prong of *Lemon* with creating a "maze of the Establishment Clause . . . ." *Id.* He further stated that the Court has held:

> Government may not act with the purpose of advancing religion, except when forced to do so by the Free Exercise Clause (which is now and then); or when eliminating existing governmental hostility to religion (which exists sometimes); or even when merely accommodating governmentally uninhibited religious practices, except that at some point (it is unclear where) intentional accommodation results in the fostering of religion, which is of course unconstitutional.

*Id.*

134 *Id.*

135 *Id.* at 2606 (Scalia, J., dissenting).

pellucid and would produce predictable results.[136]

The *Lemon* test has served the Court well in adjudicating establishment clause litigation for over seventeen years.[137] It has proven to be a valuable yardstick in measuring the validity of any contested act which potentially weakens the "wall of separation between church and state."[138] Questioning the efficacy of the first prong of *Lemon*, Justice Scalia echoed the disenchantment voiced by Justices O'Connor and Rehnquist in previous opinions.[139] Isolating the sole purpose of a law-making body in enacting a statute has proven to be an elusive goal. Yet, to abandon this, or any other prong of *Lemon*, would be a radical departure from precedent. Thus, the *Lemon* standard should evolve in a manner that will enable it to meet the current demands being placed upon this test. This evolution is consistent with the well-recognized axiom that the Constitution is amenable to ever-changing interpretations.

If the *Lemon* test becomes unworkable, an alternative approach would be to institute a balancing test which would retain the three existing prongs of *Lemon*. Balancing tests are traditionally employed in the adjudication of constitutional issues. Courts have developed various balancing tests to scrutinize diverse types of contested legislation.[140] Applying this analysis to establish-

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136 *See id.* at 2605 (Scalia, J., dissenting).

137 *See supra* note 66 and accompanying text. The Court has relied upon the *Lemon* test, to some extent, in all establishment clause contests from 1971 to the present, with the exception of Marsh v. Chambers, 463 U.S. 783 (1983). *Id.*

138 *See supra* note 54.

139 *See* Wallace v. Jaffree, 472 U.S. 38, 68-69 (1985) (O'Connor, J., concurring); *Wallace*, 472 U.S. at 91-114 (Rehnquist, J., dissenting); Lynch v. Donnelly, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

140 *See* Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) (utilizing balancing test to evaluate constitutionality of state statute regulating length of trains). In *Southern Pacific*, Justice Stone observed:

> [T]he matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference.

*Id.* at 770-71. *See also* Dean Milk Co. v. Madison, 340 U.S. 349 (1951) (utilizing balancing test to evaluate constitutionality of ordinance regulating sale of pasteurized milk); Hood & Sons v. DuMond, 336 U.S. 525 (1949) (utilizing balancing test to evaluate constitutionality of statute regulating the importation of milk); Baldwin v. Seelig, 294 U.S. 511 (1935) (utilizing balancing test to evaluate constitutionality of state statute prohibiting importation of milk).

ment clause litigation would permit a prudent and scholarly examination of all competing concerns.

In its application of the *Lemon* test, the *Edwards* Court recognized that the stated purpose of an act, albeit important, is not wholly indicative of true legislative intention.[141] The stated purpose should be the starting point of any establishment clause analysis. Yet, the *Edwards* Court went beyond the letter of the statute and made an independent determination as to the validity of its stated purpose. Such review must entail, among other things, scrutinizing the legislative history and examining the language of the statute. Employing this process, the *Edwards* Court protected the first amendment interests threatened by the Creationism Act.

Constitutional compliance, however, can only be established by ascertaining the ultimate impact of the legislation. Regardless of whether an act appears to be facially valid, if the ultimate impact of the statute advances or inhibits religion, it must be struck down. For as James Madison wrote over two hundred years ago in his famous Memorial and Remonstrance against Religious Assessments, "[w]ho does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish, with the same ease, any particular sect of Christians, in exclusion of all other sects?"[142]

*Charles Joseph Sgro*

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141 *See Wallace*, 472 U.S. at 64 (Powell, J., concurring).

142 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 163-64 (1865).