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EDWARDS V. AGUILLARD: THE SUPREME COURT'S DECONSTRUCTION OF LOUISIANA'S CREATIONISM STATUTE

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Since the celebrated Scopes Monkey Trial of 1927,[1] the debate over the place of creationism in science education has been relegated to religious forums, while the theory of evolution has dominated public school science education.[2] Recently, however, evolution's domination of public school science education has been challenged.[3] Many of the questions evolution promised to answer have returned to the forefront of scientific investigation still unanswered.[4] Meanwhile, several scientists maintain that evidence supporting a theory of creation has accumulated to the point of making the theory at least as plausible as evolution.[5] Consequently, some argue

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1. Scopes v. State of Tennessee, 154 Tenn. 105, 289 S.W. 363 (1927).

2. The court in McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982), stated:

> [I]n 1957, the National Science Foundation funded several programs designed to modernize the teaching of science in the nation's schools. The Biological Sciences Curriculum Study (BSCS), a nonprofit organization, was among those receiving grants for curriculum study and revision. Working with scientists and teachers, BSCS developed a series of biology texts which, although emphasizing different aspects of biology, incorporated the theory of evolution as a major theme. The success of the BSCS effort is shown by the fact that fifty percent of American school children currently use BSCS books directly and the curriculum is incorporated indirectly in virtually all biology texts.

Id. at 1259 (citation and footnote omitted).

3. *See id.* A federal district court in Arkansas struck down a statute calling for balanced treatment of evolution and creation-science after a full trial to determine whether creation-science as found in that Act is science in any secular sense.

4. *See infra* notes 33-46 and accompanying text.

5. According to Dr. Dean H. Kenyon, "[c]reationist scientists now number in the hundreds, possibly in the thousands, in the States and in other countries." Affidavit of Dr. Dean H. Kenyon in Biology and Biochemistry, Brief for Appellants at A-20, Edwards v. Aguillard, 107 S. Ct. 2573 (1987) (No. 85-1513) [hereinafter Kenyon Affidavit].

that the presentation of only evolution in public school science programs treat school children unfairly, because the programs have precluded the presentation of the creation theory.

In 1981, the Louisiana Legislature, with the stated intent to protect academic freedom,[6] enacted the Balanced Treatment for Creation-Science and Evolution-Science Act (Creationism Act or Balanced Treatment Act)[7] to combat this apparent inequity. The Act required science teachers either to give equal time to both theories or to teach neither one.[8] The Act's purpose was to expose students to more than one theory concerning the origins of life and also to avoid their indoctrination.[9]

Louisiana State Senator William Keith introduced the Act into the Louisiana State Legislature. Senator Keith confronted the one-sided presentation of evolution when a science teacher asked his twelve-year-old son to recant his belief that God created the world and man and to profess instead that life resulted from evolution.[10] The bill, introduced by Senator Keith in June 1980, was signed into law in July 1981. Before the Act took effect, parents, teachers, and religious leaders challenged its validity and moved for summary judgment on the grounds that the Act was unconstitutional.

The United States District Court for the Eastern District of Louisiana had struck down the Act as an establishment of religion on the motion for summary judgment.[11] In a panel decision, three judges of the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision.[12]

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6. "This Subpart is enacted for the purposes of protecting academic freedom." LA. REV. STAT. ANN. § 17:286.2 (West 1982).

7. *Id.* at §§ 17:286.1-17:286.7.

8. The Act read as follows:

> (1) "Balanced Treatment" means providing whatever information and instruction in both creation and evolution models the classroom teacher determines is necessary and appropriate to provide insight into both theories in view of the textbooks and other instructional materials available for use in his classroom.

Id. at § 17:286.3(1).

9. For an interesting perspective on the indoctrination of school children in education science, see Gelfand, *Of Monkeys and Men—An Atheist's Heretical View of the Constitutionality of Teaching the Disproof of a Religion in the Public Schools*, 16 J. LAW & EDUC. 271 (Summer 1987).

10. Joint Appendix at E-74, 75, Edwards v. Aguillard, 107 S. Ct. 2573 (1987) (No. 85-1513).

11. Aguillard v. Treen, 634 F. Supp. 426 (E.D. La. 1985).

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

En banc review was denied over a strong dissent.[13] In *Edwards v. Aguillard*,[14] the United States Supreme Court decided whether the Louisiana Balanced Treatment Act violated the establishment clause of the first amendment. The Supreme Court held that the Act was facially invalid, thereby upholding the summary judgment of the lower court enjoining implementation of the Act.

The Court based its decision on the test used in *Lemon v. Kurtzman*,[15] or the *Lemon* test,[16] which requires that any state action involving religion must have a clear secular purpose in order not to violate the establishment clause. Although the Act explicitly states what appears to be a legitimate secular purpose,[17] the Court held that the Act's actual purpose was to "restructure the science curriculum to conform with a particular religious viewpoint."[18]

Chief Justice Rehnquist joined with Justice Scalia in dissent. Justice Scalia first objected that the case's posture before the Court required reversal of the summary judgment. He argued that a genuine issue of material fact existed, namely, the meaning of the term *creation-science*. Therefore, without the full evidentiary hearing prevented by summary judgment or without the Louisiana Supreme Court's interpretation of the Act or without the Act's implementation, the Court could only guess its meaning.[19] He concluded that in-

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13. Aguillard v. Edwards, 778 F.2d 225 (5th Cir. 1985). Circuit Judge Gee wrote a stinging dissent. He criticized the decision to deny en banc review. In the preface to his dissent, Judge Gee made an interesting comparison to the *Scopes* case:

> The *Scopes* court upheld William Jennings Bryan's view that states could constitutionally forbid teaching the scientific evidence for the theory of evolution, rejecting that of Clarence Darrow that truth was truth and could always be taught—whether it favored religion or not. By requiring that the whole truth be taught, Louisiana aligned itself with Darrow; striking down that requirement, the panel holding aligns us with Bryan.

Id. at 226.

14. 107 S. Ct. 2573 (1987).

15. 403 U.S. 602 (1971).

16. *Edwards*, 107 S. Ct. at 2576-77. "Three such tests may be gleaned from our cases. First, the statute must have a secular 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.' " Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citations omitted).

17. *See supra* note 6 and accompanying text.

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

19. *Id.* at 2592 (Scalia, J., dissenting).

stead, the Court should have remanded for further consideration.[20]

Justice Scalia also objected to the Court's application of the secular purpose prong of the *Lemon* test in *Edwards*. "[I]f those legislators . . . acted with a 'sincere' secular purpose, . . . the Act survives the first component of the *Lemon* test, regardless of whether that purpose is likely to be achieved by [it]."[21] He continued, saying that the legislative history indicated that the legislators acted with a sincere secular purpose.[22] Therefore, he concluded, the Act "should survive *Lemon*'s purpose test."[23]

Several important legal issues and policy concerns are implicated in this decision. The legal issues range from establishment clause interpretation to the principles of statutory construction. Policy concerns include the possibility that indoctrination of school children is occurring in the name of academic freedom. This comment will focus primarily on the legal issues raised by this decision.

Part I of this note begins with a short history of *Edwards*: how it arose, its development, and its posture before the Supreme Court. Following this history is a short presentation of some of the scientific evidence offered to the Court in affidavits on behalf of creationism. Part II summarizes both the majority and dissenting opinions in *Edwards*. Part III analyzes the Court's opinion in *Edwards*: its interpretation of the establishment clause and how the Court failed to remain consistent with that interpretation by misapplying the secular purpose prong of the *Lemon* test. Part III also analyzes the Court's construction of the Balanced Treatment Act and how the Court misconstrued the statute by focusing on the motivations of particular legislators rather than by applying accepted rules of statutory construction. This note concludes with a short discussion of how *Edwards* negatively affects academic freedom.

I. BACKGROUND

A. *Lower Court Opinions*

In the original action, several plaintiffs filed suit in federal district court against the State of Louisiana,[24] the Board

20. *Id.* at 2605 (Scalia, J., dissenting).
21. *Id.* at 2593 (Scalia, J., dissenting) (citation omitted).
22. *Id.* at 2596-2600 (Scalia, J., dissenting).
23. *Id.* at 2600 (Scalia, J., dissenting).
24. For a complete list of the original plaintiffs, see Aguillard v. Treen, 440 So. 2d 704, 706 n.2 (La. 1983).

of Elementary and Secondary Education (BESE), and several individuals, including the then-Governor of Louisiana, David Treen, later replaced by Edwin Edwards.[25] The plaintiffs sought to enjoin the Act and have it declared unconstitutional as violative of the first and fourteenth amendments of the United States Constitution.

BESE later realigned as a party plaintiff and moved for summary judgment, contending that the Act violated the Louisiana State Constitution on the grounds that the legislature had no power to enact it. The United States district court granted the motion, holding that the Louisiana Constitution vested BESE with the power to initiate and form educational policies and not the Louisiana Legislature. Therefore, the court held that the Act was invalid because the legislature was powerless to enact it.

On appeal, the United States Circuit Court of Appeals for the Fifth Circuit asked that the Louisiana Supreme Court hear the question concerning the power to form educational policy. There, the court held that the power rested with the legislature and, consequently, that the Act did not violate the Louisiana Constitution. The Louisiana Supreme Court did not address the question of whether the Act violated the first amendment of the United States Constitution.

The circuit court then remanded the case to the district court with instructions to address first and fourteenth amendment issues. The district court granted the plaintiffs' motion for summary judgment because the court saw no issue of material fact.[26] The defendants in the case, however, contended that the definition of *science* was a genuine issue of material fact. Still, the court held that "[w]hatever 'science' may be, 'creation,' as the term is used in the statute, involves religion, and the teaching of 'creation-science' and 'creationism,' as

25. Edwin Edwards was elected governor in the interim between the original case and the case on appeal.

26. Rule 56 of the Federal Rules of Civil Procedure requires that there be some issue of material fact and that, if there is no such issue, a party may move for summary judgment. The rule states as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. CIV. P. 56(c).

contemplated by the statute, involves teaching 'tailored to the principles' of a particular religious sect or group of sects."[27] As a result, the district court refused to hear evidence concerning the Act. The court held that "whatever that evidence would be, it could not affect the outcome."[28] The court therefore held that the Act violated the establishment clause of the first amendment.

On appeal, the circuit court affirmed the lower court's decision.[29] Judge Jolly, writing for the court, said, "[I]rrespective of whether it is fully supported by scientific evidence, the theory of creation is a religious belief."[30] A narrowly divided circuit court denied review of the case en banc.[31] The defendants appealed to the United States Supreme Court, which decided to hear the case. After hearing arguments in December 1986, the Supreme Court affirmed the lower courts' decisions on June 19, 1987.[32] Justice William Brennan delivered the opinion of the Court.

Before turning to the opinion of the Court, however, and to better appreciate its significance, evidence from affidavits by certain experts attesting to the scientific nature of creation-science first is examined below. This discussion is not meant to be a complete exposition of the theory of creation-science. Rather, it is intended to present some of the evidence offered to the Court.

B. *Creation-Science*

The Act defines *creation-science* as "the scientific evidences for creation and inferences from those scientific evidences."[33] Although this theory implies the concept of a creator, "[t]he concept of a creator is not central to creation-science, and in any event is not inherently religious, as evidenced by ancient and modern nonsupernatural concepts of a creator . . . ."[34] Creation in this context means no more

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27. Aguillard v. Treen, 634 F. Supp. 426, 427 (1985) (citation omitted).

28. *Id.*

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

30. *Id.* at 1253.

31. Aguillard v. Edwards, 778 F.2d 225 (5th Cir. 1985). The judges split eight to seven.

32. Edwards v.Aquillard, 107 S. Ct. 2573 (1987).

33. LA. REV. STAT. ANN. § 17:286.3(2) (West 1982).

34. Affidavit of Dr. Terry L. Miethe in Philosophy and Theology, Brief for Appellants at A-43, Edwards v. Aguillard, 107 S. Ct. 2573 (1987) (No. 85-1513).

than "origin through abrupt appearance in complex form . . . ."[35]

Dr. Dean Kenyon,[36] in his affidavit for the appellants, further defined creation-science and evolution. He defined creation as "origin through abrupt appearance in complex form, and includes biological creation, biochemical creation, . . . and cosmic creation."[37] Evolution, or evolution-science, he defined as "biological evolution (or organic evolution) from simple life to all plants and animals, biochemical evolution (or chemical evolution or prebiotic evolution of the first life), and cosmic evolution (including stellar evolution) (of the universe)."[38] Dr. Kenyon distinguished *macroevolution* and *microevolution*, macroevolution being "evolutionary change above the species level,"[39] while "[m]icroevolution is change within local populations at or below the species level."[40] Creation-scientists do not dispute microevolution. Rather, the discussion focuses on macroevolution.

The bases for creation-science theory arise largely from evidence in the fields of paleontology (fossil history), morphology (structural biology), information-science, probability, and genetics.

Because "[f]ossils are the only direct evidence we have that bears on the question of whether macroevolution actually happened,"[41] expert evidence which suggests that the fossil record left very little evidence of macroevolution is significant.[42] The evidence offered by Dr. Kenyon suggested that the fossil record, perhaps the most important evidence

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35. Kenyon Affidavit, *supra* note 5, at A-19.

36. Professor of Biology at San Francisco State University; Ph.D. 1965, Stanford University. Dr. Kenyon's affidavit is relied upon in this discussion because he clearly presents the bulk of the scientific evidence in favor of creation-science.

37. Kenyon Affidavit, *supra* note 5, at A-19.

38. *Id.*

39. *Id.* at A-21.

40. *Id.*

41. *Id.*

42. Dr. Kenyon stated:

> Over 120 years of paleontological research have not provided any significant number of "missing links," and there are reasons for doubting the transition status of those few that have been found. . . . Since some paleontologists now consider the fossil record to be reasonably complete, evolutionists are faced with a disturbing dilemma. Either macroevolution did not occur, or it occurred in such a way that it left no direct evidence of having occurred.

Id. at A-22 (citation omitted).

bearing on the matter, lends more support to creation-science than it does to evolution.[43]

Other evidence pertaining to morphological (structural) considerations also support creation-science. These considerations are based on the fact that "[m]ost populations of organisms at any given time are in *stasis* or genetic equilibrium, as the fossil record indicates. . . . This rather systematic similarity of fossil forms to their modern descendants supports biological creation."[44] Put another way, species today are similar to their ancestors. Organisms do not tend towards change as macroevolution suggests.

Regarding information-science, or the science relating to the biological information in RNA and DNA, evidence was adduced which suggested that this information "must have been impressed on these polymers from the 'outside' . . . ."[45] The information on certain molecules indicates a very complex design, the existence of which depends on some sort of outside ordering principle. From this evidence, one can infer the existence of an intelligent creator, which implanted that design in those molecules.

Both probability and genetics cast doubt on the validity of macroevolution and establish a factual basis for creation-science. In this regard, "the probability of the spontaneous origin of living matter can be no greater than one chance in $10^{40,000}$, and is probably much lower."[46]

Notwithstanding the fact that the evidence offered to the district court showed that creation-science is not irrational or necessarily religious, the Supreme Court's opinion never asked whether there was an issue of material fact as to the validity of creation-science as *scientific* theory.[47] Instead, Jus-

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43. The incompatibility of Darwinian evolution and the fact of the fossil record has led some scientists to posit an evolutionary theory called *punctuated equilibrium*. This view contrasts with Darwin's theory because it posits that evolution occurs rapidly and that few or no fossils are left behind to give evidence of the change. Kenyon concludes, however, that, because this theory leaves no evidence of its occurrence, "we cannot hope to find the evidence we need to substantiate the theory!" *Id.* at A-23. For a full treatment of punctuated equilibrium, see S. GOULD, EVER SINCE DARWIN: REFLECTIONS IN NATURAL HISTORY (1977).

44. Kenyon Affidavit, *supra* note 5, at A-25.

45. *Id.*

46. *Id.* at A-33 (citation omitted). This estimate is founded on the research of Sir Fred Hoyle and Chandra Wickramasinghe in F. HOYLE & C. WICKRAMASINGHE, EVOLUTION FROM SPACE (1981).

47. The *Edwards* Court saw the main issue before it as being whether creation-science had a scientific foundation or simply embodied sectarian religious belief. *Compare* McLean v. Arkansas Bd. of Educ., 529 F. Supp.

tice Brennan simply assumed in his objections that creation-science is religious in nature, based on the opinions of Judge Jolly in the appellate court and Judge Duplantier in the district court. The Court disregarded the affidavits of the scientific experts altogether on the grounds that they were not given for the purpose of passing the Act, but rather to justify the Act after it had been challenged.[48]

II. *Edwards v. Aguillard*: Majority and Dissent

A. *The Majority*

In affirming the decisions of the lower courts, the Supreme Court applied the secular purpose prong of the *Lemon* test and found that the Act failed. In *Lemon*, the constitutionality of state aid to teachers in nonpublic schools was at issue. In deciding that case, the Supreme Court applied a three-pronged test[49] to the facts to see whether government actions by the Rhode Island and Pennsylvania Legislatures violated the establishment clause of the first amendment. The first prong of the test simply requires that a "statute must have a secular legislative purpose."[50] Put another way, the action of a state need not be devoid of any religious motivation in order to satisfy the requirement, so long as it serves some secular purpose. The Court in *Edwards* stated, however, that "petitioners have identified no clear secular purpose for the Louisiana Act."[51] Instead, the Court suggested that the Act is actually a sham, intending only to promote religion and discredit evolution. The Court based its claim on statements made by Senator Keith (the Act's sponsor) during the legislative hearings.[52]

To reach the conclusion that the Act failed the purpose prong of the *Lemon* test, the Court offered five principal objections to the Act. Three of the objections contended that the Act served no secular purpose, while two contended that the Act had a preeminent religious purpose.

1255 (E.D. Ark. 1982), where the federal district court in Arkansas heard a case arising from a similar act.

48. "The postenactment testimony of outside experts is of little use in determining the Louisiana legislature's purpose in enacting this statute." Edwards v. Aguillard, 107 S. Ct. 2573, 2583-84 (1987).

49. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

50. *Id.*

51. *Edwards*, 107 S. Ct. at 2578.

52. *Id.* at 2579.

Objections to the Act

The Court first objected that "[t]he Act does not grant teachers a flexibility that they did not already possess to supplant the present science curriculum with the presentation of theories, besides evolution, about the origin of life."[53] The Court cited testimony by the president of the Louisiana Science Teachers Association, a party plaintiff, who said, " '[A]ny scientific concept that's based on established fact can be included in our curriculum already, and no legislation allowing this is necessary.' "[54] Therefore, if the aim of the Act is to grant teachers new freedom to teach various theories, the Act is superfluous.

The second objection contended that the Act is unfair because it only calls for financial assistance to creation-science research and only prohibits discrimination against creation-scientists. As the Court wrote,

> the goal of basic "fairness" is hardly furthered by the Act's discriminatory preference for the teaching of creation science and against the teaching of evolution. While requiring that curriculum guides be developed for creation science, the Act says nothing of comparable guides for evolution. . . . Similarly, research services are supplied for creation science but not for evolution. . . . The Act forbids school boards to discriminate against anyone who "chooses to be a creation-scientist" or to teach "creationism," but fails to protect those who choose to teach evolution . . . or who refuse to teach creation science.[55]

The third objection was that the Act did not further academic freedom because teachers are not free to teach what they want. If academic freedom was the purpose of the Act, "it would have encouraged the teaching of all scientific theories about the origins of humankind."[56] The Act instead limited academic freedom, because "teachers who were once free to teach any and all facets of this subject are now unable to do so."[57] Also, the Act failed to ensure that any theory would be taught, because a teacher may neglect to teach one theory and therefore cannot teach the other. In effect, therefore, "the Act does not serve to protect academic freedom,

53. *Id.*
54. *Id.* (citation omitted).
55. *Id.* at 2579-80 (citations omitted).
56. *Id.* at 2580 (footnote omitted).
57. *Id.*

but has the distinctly different purpose of discrediting 'evolution by counterbalancing its teaching at every turn with the teaching of creation science.' "[58]

The fourth and fifth objections were based on the premise that the Act had a preeminent religious purpose. The fourth objection is that, just as in *Stone v. Graham*,[59] where the Court held that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths"[60] so in this case, creation-science advances the undeniably "religious viewpoint that a supernatural being created humankind."[61] Justice Brennan then posited "a historic and contemporaneous link between the teachings of certain denominations and the teaching of evolution."[62] He stated that in *Epperson v. Arkansas*[63] this link was the downfall of a similar Arkansas statute which had prohibited the teaching of evolution. There, the Court found that "the First Amendment does not permit the state to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."[64] Likewise in *Edwards*, the Court found that "[t]hese same historic and contemporaneous antagonisms between the teachings of certain religious denominations and the teaching of evolution are present . . . ."[65] Brennan based this argument on the premise that "the term, 'creation science,' as contemplated by the legislature that adopted this Act, embodies the religious belief that a supernatural creator was responsible for the creation of humankind."[66] The Court concluded therefore that the Louisiana Creationism Act violated the first amendment for the same reason that the Act involved in *Epperson* did.

The fifth objection was based on the Act's legislative history. Once again, Justice Brennan focused on the Act's sponsor, Senator Keith, who had stated that his disdain for evolution gave rise to the Act and that his disdain arose from his religious beliefs. "The legislation therefore sought to alter

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58. *Id.* (citation omitted).

59. 449 U.S. 39 (1980) (per curiam), *reh'g denied*, 449 U.S. 1104 (1981).

60. *Id.* at 41 (footnote omitted).

61. Edwards v. Aguillard, 107 S. Ct. 2573, 2581 (1987) (footnote omitted).

62. *Id.* at 2580-81 (footnote omitted).

63. 393 U.S. 97 (1968).

64. *Id.* at 106.

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

66. *Id.* at 2582.

the science curriculum to reflect endorsement of a religious view"[67] and therefore promote religion.

Justice Brennan concluded this part of the opinion with a general discussion of the Act's religious nature. He noted that the Act was directed at the one scientific theory certain religious sects traditionally opposed. He also pointed out that the Court does not "imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught."[68] Rather, "teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction."[69] Once again, however, he concluded that the Creationism Act failed in this regard, because its primary purpose was to advance a particular religious doctrine which violated the establishment clause.

B. *The Dissent*

Before he addressed the objections by Brennan, Justice Scalia criticized the whole notion of focussing on the *motivation* of particular legislators who supported the Act rather than on the Act's explicitly stated purpose. He rebuked the Court for refusing to accept the Louisiana Legislature's stated intent of academic freedom at face value:

> Even if I agreed with the questionable premise that legislation can be invalidated under the Establishment Clause on the basis of its motivation alone . . . I would still find no justification for today's decision. The Louisiana legislators . . . , each of whom had sworn to support the Constitution, were well aware of the potential Establishment Clause problems and considered that aspect of the legislation with great care. After seven hearings and several months of study, resulting in substantial revision of the original proposal, they approved the Act overwhelmingly and specifically articulated the secular purpose they meant it to serve.[70]

This objection stemmed from the affirmation of the summary judgments of the lower courts. As Justice Scalia pointed out, because the Act was struck down in the manner of summary judgment, the case for the Act was never argued before a trier of fact. Furthermore, the Louisiana Supreme Court

67. *Id.*
68. *Id.*
69. *Id.* at 2583.
70. *Id.* at 2591 (Scalia, J., dissenting) (footnote omitted).

never interpreted the Act, nor was the Act ever implemented to allow the Court to judge it by its effects. In Justice Scalia's eyes, even if the law violates the establishment clause, it is not clear that it does so from the stated intent of the legislature. The summary judgment, therefore, was unwarranted and should have been overturned, and the case should have been remanded for a trial on the facts. After this preface, Justice Scalia addressed the objections raised by Justice Brennan in the majority opinion.

Rebuttal to the Objections

Justice Scalia rebutted Justice Brennan's first objection, that the Act is superfluous because teachers already were allowed to teach theories other than evolution, arguing that it is based on a faulty premise, namely, that "academic freedom" means the freedom of the *teacher* to decide which theories concerning the origin of life are going to be taught. Freedom of the teacher, however, is not the type of academic freedom the Louisiana legislators had in mind. As Scalia points out,

> [h]ad the Court devoted to this central question of the meaning of the legislatively expressed purpose a small fraction of the research into legislative history that produced its quotations of religiously motivated statements by individual legislators, it would have discerned quite readily what "academic freedom" meant: *students'* freedom from *indoctrination*.[71]

Citing from the Act as originally introduced, Scalia stated, "the 'purpose' section of the Balanced Treatment Act read: 'This Chapter is enacted for the purposes of protecting academic freedom . . . of *students* . . . and assisting *students* in their search for truth.' "[72]

The second objection that the Act demonstrated a "discriminatory preference for the teaching of creation science,"[73] had little to do with the secular purpose of the Act, the dissent argued. The dissent addressed this objection, however, by pointing out that the result in *Epperson* effectively outlawed discrimination against teachers professing a

71. *Id.* at 2601 (Scalia, J., dissenting) (emphasis in original).
72. *Id.* (Scalia, J., dissenting) (citation omitted) (emphasis in original).
73. *Id.* at 2579.

belief in evolution.[74] Also, the legislators who passed the Act had reason to believe that a prevalent hostility existed against creation-scientists.[75] In addition, as Dr. Kenyon noted in his affidavit for the defendants, "creation-science . . . currently does not have the benefit of the volume of research that has been carried out under evolutionist presuppositions."[76] The dissent observed that

> [i]n light of the unavailability of works on creation science suitable for classroom use . . . and the existence of ample materials on evolution, it was entirely reasonable for the Legislature to conclude that science teachers . . . would need a curriculum guide on creation science, but not on evolution . . . .[77]

Justice Scalia responded to the objection that the Act did not promote academic freedom because teachers were no longer free to teach any and all facets of the subject by again disputing the meaning of academic freedom. As in his first objection, Justice Brennan assumed that the Act was passed for the sake of the teacher's academic freedom and should allow the teacher to teach any facet of the subject that he pleases, presumably even if he deprives the student of knowledge of important facts in a subject. Nowhere does the Act proscribe the teaching of other theories concerning the origin of life. Consequently, therefore, the Act allows teachers to teach other facets of the subject.

The fourth objection is premised on the Act having a preeminent religious purpose. According to Brennan, just as in *Stone*,[78] where the Court held that the Ten Commandments could not be posted on a classroom wall because they are a sacred text, so too creation-science could not be taught, because it is primarily a religious doctrine.[79] Justice Scalia rebuts this objection, arguing that "[i]n all three cases in which we struck down laws under the Establishment Clause for lack of a secular purpose, we found that the legislature's sole mo-

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74. Epperson v. Arkansas, 393 U.S. 97 (1968); Edwards v. Aguillard, 107 S. Ct. 2573, 2602 (1987) (Scalia, J., dissenting).

75. *Edwards*, 107 S. Ct. at 2602 (Scalia, J., dissenting).

76. Kenyon Affidavit, *supra* note 5, at A-18.

77. *Edwards*, 107 S. Ct. at 2602 (Scalia, J., dissenting) (citation omitted).

78. Stone v. Graham, 449 U.S. 39 (1980) (per curiam), *reh'g denied*, 449 U.S. 1104 (1981).

79. Edwards v. Aguillard, 107 S. Ct. 2573, 2580 (1987).

tive was to promote religion."[80] The stated purpose of Louisiana's Act is to protect academic freedom, and the Court "cannot accurately assess whether this purpose is a 'sham' . . . until we first examine the evidence presented to the legislature far more carefully than the Court has done."[81]

Justice Scalia examined the legislative history and discovered five apparently non-religious or secular effects of the Act.[82] The secular purpose test, however, requires that legislators only believed that the Act had a secular purpose.[83] Without a full evidentiary hearing, the Court "[had] no way of knowing . . . how many legislators believed the testimony of Senator Keith and his witnesses,"[84] who testified that the Act had a clear secular purpose. Still, "in the absence of evidence to the contrary, [the Court must] assume that many of them did [believe the testimony]."[85] Thus, the Court erred in holding that the legislators passed the Act wholly for religious purposes.

To the fifth objection, that the religious fervor of the legislators gave rise to the Act and that therefore it had a religious purpose, the dissent answered that if heeded such an objection would "deprive religious men and women of their right to participate in the political process."[86] The majority's objection seems directed at the Act's sponsor, Senator Keith, who was motivated, at least in part by religious concerns. The dissent argued, however, that "political activism by the religiously motivated is part of our heritage."[87] As proof for this claim, Justice Scalia referred to the abolitionists, whose religious belief and fervor helped abolish slavery.[88]

Also, Justice Scalia argued that the Court should not "presume that a law's purpose is to advance religion merely

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80. *Id.* at 2594 (Scalia, J., dissenting). The three cases to which Scalia referred are Wallace v. Jaffree, 472 U.S. 38 (1985); Stone v. Graham, 449 U.S. 39 (1980); Epperson v. Arkansas, 393 U.S. 97 (1968). *See also* Lynch v. Donnelly, 465 U.S. 668 (1984), which describes *Stone* and *Epperson* as cases in which the Court invalidated laws "motivated *wholly* by religious considerations." *Id.* at 680 (emphasis added).

81. *Edwards*, 107 S. Ct. at 2597 (Scalia, J., dissenting) (citation omitted).

82. *Id.* at 2598-99 (Scalia, J., dissenting).

83. *Id.* at 2598 (Scalia, J., dissenting).

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

85. *Id.* (Scalia, J., dissenting) (footnote omitted).

86. *Id.* at 2594 (Scalia, J., dissenting).

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

88. *Id.* (Scalia, J., dissenting).

because it 'happens to coincide or harmonize with the tenets of some or all religions,' . . . or because it benefits religion, even substantially."[89] If creation-science has a secular purpose which is in the interest of the children in public schools, then the personal motivations of the legislators passing the Act should be one of the least considerations. As examples of similar Acts, Justice Scalia cited *Harris v. McCrae*[90] and *McGowan v. Maryland*,[91] where the Court "turned back Establishment Clause challenges . . . despite the fact that 'both agre[e] with the dictates of [some] Judaeo-Christian religions . . . .' "[92]

Finally, the dissent criticized the Court's refusal to view the affidavits of several experts in behalf of the Act. The Court stated that "the postenactment testimony of outside experts is of little use in determining the Louisiana legislature's purpose in enacting the statute."[93] This, in spite of the fact that " '[c]reation science' is unquestionably a 'term of art,' . . . and thus, under Louisiana Law, is 'to be interpreted according to [its] received meaning and acceptation with the learned in the art, trade or profession to which [it] refer[s].' "[94] Because the affidavits of experts in the field attest to the purely scientific nature of creation-science, the Court should "assume that the Balanced Treatment Act does *not* require the presentation of religious doctrine."[95]

III. LEGAL ANALYSIS

This analysis will focus on two major legal issues implicated in *Edwards*: the application of the establishment clause to this Act and how the Court interpreted the Act to violate the establishment clause.[96] In regard to the establishment clause, this note will briefly survey the bases for current establishment clause interpretation and focus on the *Lemon* test

89. *Id.* (Scalia, J., dissenting) (citation omitted).
90. 448 U.S. 297 (1980) (abortion funding).
91. 366 U.S. 420 (1961) (Sunday closing laws).
92. Edwards v. Aguillard, 107 S. Ct. 2573, 2594 (1987) (Scalia, J., dissenting) (citations omitted).
93. *Id.* at 2583-84.
94. *Id.* at 2592 (citations omitted).
95. *Id.* (emphasis in original).
96. Although important, this article forgoes a full discussion of any issue regarding the Rule 56 Motion for Summary Judgment. This is partly because the posture of the case before the Court is dealt with in the section of this article dealing with interpretation of the Act and partly to limit the scope of this article.

and its application in *Edwards*. In regard to state statutory construction, this note will examine and analyze the principles of interpretation the Court applied in *Edwards*.

A. Everson *and* Lemon*: The Current Bases for Establishment Clause Interpretation*

The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the Free exercise thereof."[97] The debate over the first amendment's meaning is perennial.[98]

With respect to the establishment clause of the amendment, constitutional scholars have taken two basic positions concerning the original intent of its framers.[99] One position maintains that the establishment clause is intended to proscribe preferential treatment of one religious sect over another. The other view, the view taken by the majority of the Supreme Court since the mid-1940s, is that the clause is intended not merely to prohibit the establishment of a national religion, but is intended to proscribe even nonpreferential assistance to organized churches.[100] The Court has consistently adopted the latter view of original intent.

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97. U.S. CONST. amend. I.

98. *See, e.g., infra* note 100.

99. Original intent may be no longer important in establishment clause cases before the Supreme Court. In Wallace v. Jaffree, 472 U.S. 38 (1985), Justice Stevens implied that, regardless of the original intent behind the clauses, *stare decisis* compels a different interpretation. He wrote:

> At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or adherent of non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the *crucible of litigation*, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.

Id. at 52-53 (footnotes omitted) (emphasis added). *See also* Justice Stewart's dissent in School Dist. of Abington Township v. Schempp, 374 U.S. 203, 309-10 (1963).

For our purposes, however, in the seminal case in establishment clause interpretation, Everson v. Board of Educ., 330 U.S. 1 (1947), the Court based its holding of strict separation on what it perceived to be the original intent of the framers. Since *Everson*, the Supreme Court has decided establishment clause cases upon this interpretation.

100. Two current champions of the respective interpretations are Professor Leo Pfeffer and Professor Robert Cord. Their arguments revolve primarily around three sources: *Memorial & Remonstrance Against Religious Assessments, 1785*, or *Memorial* by James Madison; Madison's *Detached Memoranda*, apparently written by Madison after he left the presidency; and *A Bill for Establishing Religious Freedom in Virginia* authored by Thomas

In *Everson v. Board of Education*,[101] the Supreme Court first applied the establishment clause to the states and set forth the principle used by the Court in deciding every establishment clause case since. New Jersey enacted a statute that allowed the Board of Education in Ewing, New Jersey, to reimburse parents for the cost of transporting their children to parochial schools by public busses. Everson sued as a taxpayer claiming that the state violated the establishment clause by using tax money to support and maintain Catholic schools. Although the Court upheld the statute, Justice Black wrote:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever . . . .[102]

The Court here adopted the view of the establishment clause that maintains that "[i]n the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' "[103] That is, the Court adopted a view of strict separation.[104] Since *Everson*, state laws which mandated school prayer, etc. have been struck down on the basis of this decision.

Jefferson. Although the *Memorial* and *Bill for Religious Freedom* were originally aimed at the established church in Virginia, they are used as indicators of what Madison and Jefferson had in mind when framing the establishment clause. For a full treatment of both these positions, see L. PFEFFER, CHURCH, STATE AND FREEDOM (1967), and R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982).

101. 330 U.S. 1 (1947).

102. *Id.* at 15-16.

103. *Id.* at 16 (citation omitted).

104. The Court's upholding the statute, despite its strict separation language, did not go unnoticed by Justice Jackson. He said, "[T]he undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion . . . ." *Id.* at 19 (Jackson, J., dissenting).

The Court's view of strict separation was later modified, and in *School District of Abington Township v. Schempp*[105] the Court adopted a view of the establishment clause that required legislation to maintain neutrality towards religion. In other words, if the purpose or primary effect is either "the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."[106]

In *Lemon v. Kurtzman*,[107] the Court set forth the standard used to determine whether state action violates the establishment clause. In *Lemon*, the Court considered both Pennsylvania and Rhode Island statutes that reimbursed teachers of secular subjects in parochial schools. The Court set forth the three-pronged test: "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 entanglement with religion.' "[108] The Court has applied this test in virtually every establishment clause case since June of 1971.[109] Nevertheless, in only one case prior to *Lemon* and in two cases after, but before *Edwards*, has the Court struck down a state action for lack of a secular purpose.[110]

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105. 374 U.S. 203 (1963). In *Abington*, the Court struck down Pennsylvania and Maryland statutes requiring readings from the Bible at the beginning of each school day.

106. *Id.* at 222.

107. 403 U.S. 602 (1971).

108. *Id.* at 612-13 (citations omitted).

109. In Marsh v. Chambers, 463 U.S. 783 (1983), the Court upheld the practice of paying a salary to the chaplain who opened legislative sessions with a prayer. The Court did not apply the *Lemon* test, rather, it upheld the statute on the grounds that because the practice has continually existed for 200 years, it "has become part of the fabric of our society." *Id.* at 792. Also, "it is simply a tolerable acknowledgement of beliefs widely held among the people of this country." *Id.* Justice Brennan, with whom Justice Marshall joined, dissented, holding that the *Lemon* test should have been applied. *Id.* at 796-97.

In Lynch v. Donnelly, 465 U.S. 668 (1984), the Court upheld a city's practice of including a nativity scene in its Christmas display. The Court applied the *Lemon* test and found that the practice had a secular purpose. *Id.* at 680-81 ("to celebrate the Holiday and to depict the origins of that Holiday"). Neither did the Court find that the primary effect of the practice was to advance religion. Lastly, the Court found that there was no evidence of excessive entanglement. Justice Brennan dissented saying, "[T]he Court's less-than-vigorous application of the *Lemon* test suggests that its commitment to those standards may only be superficial." *Id.* at 697 (Brennan, J., dissenting) (footnote omitted).

110. Wallace v. Jaffree, 472 U.S. 38 (1985); Stone v. Graham, 449

In *Epperson v. Arkansas*,[111] the Supreme Court invalidated an act that prohibited teachers from teaching evolution or the use of textbooks that teach evolution. The Court held that the "law selects from the body of knowledge a particular segment which it proscribes for the *sole* reason that it is deemed to conflict with a particular religious doctrine . . . ."[112] Because the Court could find no other reason for the proscription of the teaching of evolution and because all the evidence indicated that the act was "a product of the upsurge of 'fundamentalist' religious fervor,"[113] the Court found that the sole purpose of the act was to "advance religion." Therefore, the Court held that the act violated the establishment clause.

In *Stone v. Graham*,[114] the Court considered legislation enacted by the state of Kentucky requiring the posting of the Ten Commandments in public school classrooms.[115] Although the act claimed that the Ten Commandments have a secular application, the Court found the statute served *no* secular purpose. The Court held that the "Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."[116] The Court based its holding on the first three commandments which require worship of God and observance of the Sabbath and prohibit the taking of His name in vain.[117]

In *Wallace v. Jaffree*,[118] the Court invalidated an Alabama statute, which authorized a daily period of silence in public schools for meditation or voluntary prayer. The Court found that the statute had no secular purpose. The Court based its holding on the legislative history and the relationship of the statute to two other measures considered in the case. The Court looked at "[t]he unrebutted evidence of legislative intent contained in the legislative record and in the testimony

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U.S. 39 (1980) (per curiam), *reh'g denied*, 449 U.S. 1104 (1981); Epperson v. Arkansas, 393 U.S. 97 (1968).

111. 393 U.S. 97 (1968).

112. *Id.* at 103 (emphasis added).

113. *Id.* at 98.

114. 449 U.S. 39 (1980) (per curiam), *reh'g denied*, 449 U.S. 1104 (1981).

115. KY. REV. STAT. ANN. § 158.178 (Baldwin 1980).

116. *Stone*, 449 U.S. at 41 (footnote omitted).

117. *Id.* at 42 (citations omitted).

118. 472 U.S. 38 (1985).

of the sponsor . . . ."[119] The sponsor of the statute stated that he had no other purpose except to return voluntary prayer to the public schools. This lack of a secular purpose was supported by the fact that the statute in question added nothing to prior state actions allowing a one minute period of silent meditation except the words "or voluntary prayer."[120]

Discovering a preeminent religious purpose is easy in the above cases. The same cannot be said of *Edwards*. First, unlike *Epperson*, the Creationism Act did not ban the teaching of evolution. Rather, the Balanced Treatment *required* the teaching of evolution if creation science was taught. This requirement meshes with the stated purpose of academic freedom if academic freedom is interpreted as the students' freedom from indoctrination. Also, unlike the statute at issue in *Epperson*, "the Balanced Treatment Act did not fly through the Louisiana Legislature on wings of fundamentalist religious fervor . . . ."[121] The Louisiana Legislature instead passed the Act after seven hearings and several months of study and revision.

The Louisiana Act differs from the statute in *Stone* in that the concept of creation, despite the Court's assumption, is not necessarily the sectarian belief of a Christian church.[122] The Commandments which condemned the Kentucky statute are distinctly Judeo-Christian and the result of revelation rather than maxims arrived at by human reason. Creation, on the other hand, is first of all not an exclusively Judeo-Christian concept.[123] Second, and more important for this case, creation as used in the statute has its basis in scientific evidence. Nowhere does the Act speculate on the nature of the creator, and the legislative history only speculates that it is supernatural and intelligent.[124]

Wallace differs from *Edwards* in almost every respect, at least in regard to the Act itself. Still, a more important difference for the purposes of this note is the Court's use of the legislative history in the respective cases. In *Wallace*, the Court could not find any evidence of a secular purpose for the Act in the legislative history. Furthermore, the state

119. *Id.* at 58.
120. *Id.* at 59.
121. Edwards v. Aguillard, 107 S. Ct. 2573, 2597 (1987) (Scalia, J., dissenting).
122. Brief for Appellants at 13-14, Edwards v. Aguillard 107 S. Ct. 2573 (1987) (No. 85-1513).
123. *Id.* at 13 and n.54.
124. *Id.* at 7-10.

made no effort to produce one.[125] In *Edwards*, however, the legislative history contains several statements attesting to the Act's secular purpose as well as the scientific validity of the subject matter. Clearly, the Court in *Edwards* has extended its application of the secular purpose prong of the *Lemon* test.

B. *Interpreting the Creationism Act*

H.L.A. Hart stated, "The hard truth of the matter is that American Courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."[126] Hart's statement is borne out by the fact that no definitive set of rules has been assembled except in a way that simply offers alternative principles of interpretation.[127] Nevertheless, one cardinal principle of interpretation exists that always applies or underlies any other, namely, "to save and not to destroy."[128] Along with this principle goes the presumption of reasonableness and constitutionality of a statute and a conforming interpretation.[129] If no reasonable and constitutional construction of the statute exists, a court cannot apply it. In *Edwards*, the Court effectively held that there is none for the Louisiana Balanced Treatment Act.

The "Purpose" section of the Louisiana Creationism Act provides that it "is enacted for the purposes of protecting academic freedom."[130] The Supreme Court in *Edwards*, how-

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125. Wallace v. Jaffree, 472 U.S. 38, 57 (1985).

126. H. HART, JR. & A. SACKS, THE LEGAL PROCESS 1201 (tentative ed. 1958) *as found in* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 1 (1975).

127. *See, e.g.*, N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION, § 45.07 (C. Sands 4th ed. 1984).

128. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

129. "It has been called a golden rule of statutory interpretation that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result." N. SINGER, *supra* note 127, § 45.12, at 54 (footnote omitted). Further, "the fact that one among alternative constructions would involve serious constitutional difficulties is reason to reject that interpretation in favor of another." *Id.* § 45.11, at 46 (footnote omitted). "It is well settled that this Court will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided." United States v. Clark, 445 U.S. 23, 27 (1980) (citations omitted). "We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." NRLB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

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

ever, held that "the petitioners have identified no clear secular purpose for the Louisiana Act."[131] Instead, the Court found that the "Act does not serve to protect academic freedom, but has the distinctly different purpose of discrediting 'evolution by counterbalancing its teaching at every turn with the teaching of creation science. . . .' "[132] The Court held further that the "primary purpose of the Creationism Act is to advance a particular religious belief . . . ."[133]

The standards of interpretation the Court applied to arrive at this conclusion are unclear. It appears that the basis of this holding is what the Court calls the "actual intent,"[134] or motivation of the legislators. To discover the "actual intent," the Court turns to the legislative history and focuses on statements made by Senator Keith, the Act's sponsor. The dissent objects to the use of "motivation" as the standard for determining the purpose of the Act, because it is not at all clear that the Act was motivated wholly by religious considerations. In the three cases before *Edwards*, where the Court struck down a state action for not having a secular purpose, the Court found that the state actions were motivated *wholly* by religious considerations. In *Edwards*, as the dissent noted, the Act's stated purpose refutes the argument that the motivation behind it was wholly religious. Implicitly, the dissent is objecting to the Court's application of the "plain meaning" rule,[135] in one instance, and the Court's willingness to turn to the legislative history and select statements that condemn the Act, in another.

1. The Plain Meaning of the Act

The "plain meaning" rule requires that a court attempt to take a statute at face value. In other words, if the statute is clear on its face, a Court should not go beyond it into legisla-

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131. Edwards v. Aguillard, 107 S. Ct. 2573, 2578 (1987).
132. *Id.* at 2580 (citation omitted).
133. *Id.* at 2582.
134. *Id.* at 2576.
135. The Supreme Court described the "plain meaning" rule as follows:

> If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it.

Lake County v. Rollins, 130 U.S. 662, 670 (1889) (citations omitted). *See also* N. SINGER, *supra* note 127, at § 46.01.

tive history or other extrinsic aids to interpretation.[136] In *Edwards*, the Court apparently attempted to read the statute at face value when it called on "common parlance" to interpret academic freedom as an instructor's freedom "to teach what [he] will."[137] Although the Court rightly concluded that the Act did not further that purpose, the dissent argued that the Court should have interpreted "academic freedom" to mean *students* "freedom from indoctrination."[138] Indeed, the dissent's interpretation of academic freedom is the only one in the particular context[139] of the Act that makes sense. If the Act requires balanced treatment of the two sciences on the part of *teachers*, then the Act clearly does not promote the freedom of *teachers* to teach what they will.

The Sutherland treatise *Statutes and Statutory Construction* states that "the customary meaning of words will be disregarded when it is obvious from the act itself that the legislature intended that it be used in a sense different from its common meaning."[140] The Supreme Court also has recognized that although "statutory language should be interpreted whenever possible according to common usage, some terms acquire a special technical meaning by a process of judicial construction."[141] In *Edwards*, the Court reasoned that because the legislature amended the purpose statement of the statute to exclude the language "academic freedom . . . *of students* . . . and assisting *students* in their search for truth,"[142] the legislators did not intend that meaning of academic freedom.[143] As the dissent notes, however, "[t]he Senate Committee on Education deleted most of the lengthy 'purpose' section of the bill (with Senator Keith's consent) because it resembled legislative 'findings of fact,' which, committee members felt, should generally not be incorporated in legislation."[144]

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136. *See supra* note 134 and accompanying text.

137. Edwards v. Aguillard, 107 S. Ct. 2573, 2578 (1987).

138. *Id.* at 2601 (Scalia, J., dissenting) (citation omitted).

139. Particular context here means the "narrower sense of internal syntactical structure." R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 108 (1975).

140. N. SINGER, *supra* note 127, § 46.01, at 74 (footnote omitted).

141. Barber v. Gonzales, 347 U.S. 637, 641 (1954).

142. Joint Appendix at E-292, Edwards v. Aguillard, 107 S. Ct. 2573 (1987) (No. 85-1513) (emphasis added).

143. *Edwards*, 107 S. Ct. at 2580 n.8.

144. *Id.* at 2601 n.5 (Scalia, J., dissenting).

As we have seen, at least two of the objections made by the Court regarding the Act's stated purpose of protecting academic freedom rely on the notion that academic freedom means the freedom of teachers to teach what they will.[145] This interpretation of academic freedom is incorrect given both the immediate context of the stated purpose in the Act itself and in the context of the legislative history.

2. Use or Abuse of Legislative History

> When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. . . . That process seems to me not interpretation of a statute but creation of a statute.[146]

Thus Justice Robert Jackson described the danger of interpreting legislation by its legislative history. Indeed, the "plain meaning" rule avoids this problem by requiring courts to interpret the statute only from its face if reasonably possible.[147] In *Edwards*, however, the Court could not find a reasonable or constitutional interpretation of the Louisiana statute from its face.[148] The Court went even further and said that there is no possible constitutional interpretation. Consequently, instead of turning to the legislative history for the statute's construction, the Court did so for its destruction.

In order to conclude that the Act had a preeminent religious purpose, the Court essentially made a finding of fact that " 'creation-science' . . . embodies the *religious* belief that a supernatural creator was responsible for the creation of humankind."[149] This finding of fact was based partly on prior Supreme Court case law dealing with evolution[150] and partly

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145. *See supra* text accompanying notes 47-49.

146. United States v. Public Util. Comm'n, 345 U.S. 295, 319 (1953) (Jackson, J., concurring), *quoted in* N. SINGER, *supra* note 127, § 48.02, at 285 (footnote omitted).

147. *See supra* note 135.

148. "The question for decision is whether . . . [the] Act . . . is *facially* invalid as violative of the Establishment Clause . . . . We therefore conclude that the District Court did not err in finding that appellants failed to raise a genuine issue of material fact, and in granting summary judgment." Edwards v. Aguillard 107 S. Ct. 2573, 2575, 2584 (1987) (emphasis added).

149. *Id.* at 2582 (emphasis added).

150. *See id.* at 2580-81; Epperson v. Arkansas, 393 U.S. 97, 107-09 (1968).

on statements made in legislative hearings by both an expert and the Act's sponsor.[151] Here, we will focus on the Court's use of the legislative history.

The Court first looked at the statements of Edward Boudreaux, an expert on creation-science, who testified at the legislative hearings.[152] Boudreaux commented that creation-science included a belief in the existence of a supernatural creator.[153] Without explaining why the concept of a creator is necessarily religious, the Court stated that the Act clearly "advance[s] the religious viewpoint that a supernatural being created humankind."[154] In its statement, the Court begged the central question in the case, namely, whether the concept of creation is necessarily religious.[155]

Instead of giving a basis for this finding of fact, the Court used certain legislators' statements, especially those of Senator Keith, to support its claim that the Act was motivated by a religious purpose. For example, the Court noted a remark by Senator Keith that "his disdain for the theory of evolution resulted from the support that evolution supplied to views contrary to his own religious beliefs."[156] The Court concluded from such statements that "the legislation therefore sought to alter the science curriculum to reflect endorsement of a religious view that is antagonistic to the theory of evolution."[157]

Two problems arise from the Court's reasoning in regard to this conclusion. First, as noted above,[158] the Court offered no support for its conclusion that creation or the concept of a creator is necessarily religious. The dissent suggests that this issue should be given a full evidentiary hearing.[159]

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151. *Edwards*, 107 S. Ct. at 2581-82.

152. *Id.* at 2581.

153. Joint Appendix at E-421-22, Edwards v. Aguillard 107 S. Ct. 2573 (1987) (No. 85-1513).

154. *Edwards*, 107 S. Ct. at 2581 (footnote omitted).

155. If the question before the Court was to decide whether the Act violated the establishment clause, the Court begs the question by *defining* creation, and thereby the Act, as inherently religious. Instead, the Court should remand the case in order to allow the lower courts to look at the evidence presented to determine whether the concept of creation is necessarily religious.

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

157. *Id.*

158. *See supra* text accompanying notes 147-57.

159. Edwards v. Aguillard 107 S. Ct. 2573, 2592 (Scalia, J., dissenting).

Also, as the dissent notes, even if the theory of creation-science coincides with the religious belief of a legislator, so what? "We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved."[160] So in this case, if creation-science turns out to be a legitimate scientific theory that, when presented to children, truly enhances and complements their knowledge about origins, the personal beliefs or motivations of legislators is of little consequence.

The second problem with the Court's decision is reflected in the statement of Justice Jackson quoted above.[161] The Court assumed from the statements of two or three individuals that the state legislature acted with a similar intent and by the same motivation. The problems with such an assumption are obvious.[162] As Professor Radin states, "the intention of the legislature is undiscoverable in any real sense . . . . The chances that of several hundred men, each will have exactly the same . . . situation . . . [is] infinitesimally small."[163]

An argument can be made that, because Senator Keith sponsored the Act, the legislators probably accepted his representations of its purpose and effect. However, circumstances present in *Edwards* refute this argument. The Court demonstrated that Senator Keith had a personal interest in the bill. One should not assume, however, that the whole legislature had the same interests in mind when passing the bill. Presumably, the majority of the Louisiana Legislature did not share Senator Keith's fundamentalist beliefs.[164] On the contrary, the legislative history indicates that at least initially some hostility to the legislation existed. As the dissent notes, "Senator Keith's statements before the various committees that considered the bill hardly reflect the confidence of a man preaching to the converted. He asked his colleagues to 'keep an open mind' and not to be 'biased' by misleading

160. *Id.* at 2594 (Scalia, J., dissenting).
161. *See supra* note 146 and accompanying text.
162. *See* N. SINGER, *supra* note 127, at § 48.15.
163. Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930).
164.

Religion

The following table shows the religion of legislators. Almost half are

characterizations of creation science."[165] Consequently Senator Keith's motivation or actual purpose in sponsoring the Act probably is not the same as the majority of the legislature.

The Court's turning to the legislative history is not objectionable, at least if the Court sincerely failed to find a legitimate plain meaning to the statute on its face. The Court, however, seemed to have chosen selectively parts of the history that might imply a religious purpose, while ignoring parts that might have aided the Court in discovering a legitimate secular purpose to the Act.

CONCLUSION

From the discussion of two of the legal issues in *Edwards*, one can draw two conclusions: 1) the Court is more willing now than in the past to strike down a statute on the basis of the secular purpose prong of the *Lemon* test and 2) the Court, in interpreting the Balanced Treatment Act, adopted the impossible standard of discerning the actual intent of the legislators. However questionable these two results are, one should note in concluding that the immediate result in *Edwards* calls into question the Court's commitment to another principle the Court has viewed as important, namely, academic freedom.

Catholic, and another 26% are Baptist. Members of the 1980 Legislature had similar religious preferences.

	Senators		Representatives		Total	
Religion	Number	Percent	Number	Percent	Number	Percent
Baptist	12	31%	26	25%	38	26%
Catholic	17	44	51	48	68	47
Episcopalian	0	0	2	2	2	1
Methodist	5	13	11	10	16	11
Presbyterian	2	5	6	6	8	6
Other/Not Reporting	3	8	9	9	12	9

PUBLIC AFFAIRS RESEARCH COUNCIL OF LOUISIANA, CITIZEN'S GUIDE TO THE 1984 LOUISIANA LEGISLATURE 38 (1984).

This table indicates that over half the Louisiana legislators, at the time the Act was passed, most likely were not fundamentalist, assuming that 3% of the other groups besides the Catholics were not fundamentalist.

165. Edwards v. Aguillard, 107 S. Ct. 2573, 2597 (1987) (Scalia, J., dissenting) (citation omitted).

In *Keyishian v. Board of Regents*,[166] Justice Brennan wrote, "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' "[167] In *Board of Education v. Pico*,[168] the Court reaffirmed this principle saying that the "transcendent imperatives of the First Amendment"[169] bind states and local school boards in their educational policies. A conflict with this principle arises in *Edwards* in regard to the teaching of creation-science on account of its perceived religious nature. From this we conclude that, in a conflict between the first amendment freedom of speech concerns and establishment clause concerns, the establishment clause controls.

Few would disagree with this conclusion, especially if the religious values taught were not their own. In *Edwards*, however, no trial took place at which creation-science was determined to be religious in nature. Both of the lower courts that held that the Act violated the establishment clause said in effect that the factual basis of creation-science is unimportant. Rather, they held that the notion of a creator is necessarily religious in nature, that the teaching of creation-science in public classrooms violates the establishment clause, and that creation-science should therefore be banned from public schools.[170] The Supreme Court agreed with these conclusions.

But what of discovering the truth through the marketplace of ideas, or is this case "*Scopes*-in-reverse" as the dissent suggests?[171] If creation-science is fully supported by scientific

166. 385 U.S. 589 (1967).

167. *Id.* at 603 (citation omitted).

168. 457 U.S. 853 (1982).

169. *Id.* at 864.

170. *See* Aguillard v. Treen, 634 F. Supp. 426, 427 (1985) ("Whatever 'science' may be, 'creation,' as the term is used in the statute, involves religion, and the teaching of 'creation-science' and 'creationism,' as contemplated by the statute, involves teaching 'tailored to the principles' of a particular religious sect or group of sects." (citation omitted)). *See also* Aguillard v. Edwards, 765 F.2d 1251, 1253 (1985) ("[I]rrespective of whether it is fully supported by scientific evidence, the theory of creation is a religious belief.").

171. Edwards v. Aguillard, 107 S. Ct. 2573, 2604 (1987) (Scalia, J., dissenting). Both sides in *Edwards* liken this case to *Scopes*. Those who argue that the Creationism Act seeks to discredit evolution with religious doctrine see *Edwards* as parallel to *Scopes*. *See* Aguillard v. Edwards, 765

evidence, but is banned from the public schools, students surely are not allowed to reach the whole truth in regard to origins. Justice Scalia correctly suggested in his dissent that that concern warrants a trial to determine whether creation-science is indeed religious rather than basing a decision on an *a priori* concept of its religious nature.[172]

F.2d 1253 (1985). Those who see the Court precluding the introduction of a legitimate science see *Edwards* as a "*Scopes*-in-reverse." *See supra* note 12.

172. *Edwards*, 107 S. Ct. at 2592 (Scalia, J., dissenting).