Constitutional Law - Freedom of Religion - Establishment Clause - Secular Purpose

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CONSTITUTIONAL LAW—FREEDOM OF RELIGION—ESTABLISHMENT CLAUSE—SECULAR PURPOSE—The United States Supreme Court has held that the articulated purpose in a state statute allowing for the teaching of creation science in public schools was a “sham” and therefore violated the judicially created secular purpose requirement of the establishment clause.


During 1981, Louisiana enacted a measure sponsored by State Senator Bill Keith entitled the “Balanced Treatment for Creation-Science and Evolution-Science Act” (Act). The Act provided, *inter alia*, that elementary and secondary schools were to provide “balanced treatment” to creation-science if evolution-science was taught. Subsequent to the signing of the Act into law, the plain-

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1. Edwards v. Aguillard, 107 S. Ct. 2573, 2581-82; id. at 2586-87 (Powell, J., concurring); *see generally*, McLean v. Arkansas, 529 F. Supp. 1255 (E.D. Ark. 1982) (providing background on the model for the Balanced Treatment for Creation-Science and Evolution-Science Act). The “Act” was based on a model act that had been circulated among various individuals around the country. Sometime around 1977, Paul Ellwanger, a respiratory therapist with no apparent legal education, began preparing the model act for introduction in various legislatures to support the teaching of creationism in public schools. Mr. Ellwanger corresponded with Louisiana State Senator Bill Keith for the purpose of discussing a lobbying strategy. In his correspondence, Mr. Ellwanger wrote to Senator Keith: “I view this whole battle as one between God and anti-God forces, though I know there are a large number of evolutionists who believe in God.” *Id.*

2. 107 S. Ct at 2576; LA. REV. STAT. ANN. § 17:286.1-6. “Balanced treatment” is a defined term in the Act. The pertinent text of the Act is as follows:

**SUBPART D-2. BALANCED TREATMENT FOR CREATION-SCIENCE AND EVOLUTION-SCIENCE IN PUBLIC SCHOOL INSTRUCTION**

§286.1 **SHORT TITLE**

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

§286.2 **PURPOSE**

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

§286.3 **DEFINITIONS**

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

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

2. “Creation-science” means the scientific evidences for creation and inferences from those scientific evidences.

3. “Evolution-science” means the scientific evidences for evolution and inferences from those scientific evidences.

4. “Public schools” means public secondary and elementary schools.
tiffs instituted an action in the Federal District Court for the Eastern District of Louisiana against the State Board of Elementary and Secondary Education (BESE) to enjoin the Act from going into effect and to declare it violative of the United States Constitution's establishment clause. Shortly after the commencement of the suit, the state's BESE left the defense and realigned itself to become a plaintiff in the action and moved for summary judgment.

BESE contended that the Act removed its authority over educational policy by allowing the legislature to set subject matter curriculum. Thus, it was argued that the Act violated provisions of the

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

Id.

4. Other defendants in the suit included: the Governor of Louisiana, David C. Treen; Louisiana Attorney General William J. Guste, Jr.; State Superintendent of Education, J. Kelly Nix; the Louisiana Department of Education; the St. Tammany Parish School Board; the Orleans Parish School Board, which later became realigned as a party plaintiff. See Aguillard v. Treen, 440 So.2d 704 (La. 1983).

Senator Keith and other interested parties brought a separate action to declare the Act constitutional. They also sought to have the Act enforced by injunctive means. The district court dismissed that action due to a lack of jurisdiction. Keith v. Louisiana Dept. of Educ., 553 F. Supp. 295 (M.D. La. 1982). See also Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985) (briefly discussing the related suit while reviewing the history of the action).
Louisiana constitution vesting that authority in the BESE. The district court, in an unpublished opinion, held that the power over educational policy conferred on the BESE by the constitution was exclusive and that the Act constituted school policy making by the legislature. The court of appeals for the fifth circuit certified the question to the Louisiana Supreme Court, which held that the Act did not violate the Louisiana state constitution.

Following the answer to the certified question, the court of appeals reversed the decision of the district court and remanded the case with instructions to consider the federal constitutional issue. The district court found that the purpose of the Act, as expressed in its plain meaning, was the promotion of a religion, and granted the plaintiffs' motion for summary judgment. The court of appeals affirmed the decision, calling the case a "simple one" because the Act's stated purpose—to provide for the teaching of creation science—was furthering a particular religious belief.

The Louisiana Supreme Court rejected, inter alia, the argument that §3(a) of the Louisiana constitution vests exclusive authority over educational policy in the BESE, by examining the plain meaning of the language of the state constitution. The court also rejected BESE's argument that §13(a), which provides for the Legislature to appropriate funds to the BESE for the purchase of books, allows it to set what policies will be implemented. The court held that those policies were subject to the supervision of the Legislature under laws it might pass.

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7. La. Const. art. VIII, § 3(A) provides that the BESE "shall supervise and control the public elementary and secondary schools, vocational-technical training and special schools under its jurisdiction and shall have budgetary responsibility for all funds appropriated or allocated by the state for those schools, all as provided by law." Id.
10. The Louisiana Supreme Court rejected, inter alia, the argument that §3(a) of the Louisiana constitution, see supra note 7, vests exclusive authority over educational policy in the BESE, by examining the plain meaning of the language of the state constitution. Aguillard v. Treen, 440 So.2d 704, 709 (La. 1983). The court also rejected BESE's argument that § 13(a), which provides for the Legislature to appropriate funds to the BESE for the purchase of books, allows it to set what policies will be implemented. The court held that those policies were subject to the supervision of the Legislature under laws it might pass. Id. at 710.
11. Aguillard v. Treen, 720 F.2d 676 (5th Cir. 1983).
12. The court held that: "Because it promotes the beliefs of some theistic sects to the detriment of others, the statute violates the fundamental First Amendment principle that a state must be neutral in its treatment of religions." Aguillard v. Treen, 634 F. Supp. 426, 429 (E.D. La. 1985).
15. 778 F.2d 225 (5th Cir. 1985). Gee, J., joined by five other judges and the Chief Judge, dissented to the denial of rehearing en banc arguing that under a summary judgment motion the affidavits supporting the view that creationism is a valid scientific theory must be accepted as true because there are at least two views on the subject, and that created a genuine issue of material fact. Id. at 226. The dissent then continued to argue that the authorities relied upon by the majority, including Lemon v. Kurtzman, see infra note 16, and Stone v. Graham, 449 U.S. 39 (1980), were ones in which a "direct and clear religious
Supreme Court noted probable jurisdiction.\textsuperscript{16} The Supreme Court's opinion began by reaffirming the three part test compiled in \textit{Lemon v. Kurtzman}\textsuperscript{17} for determining whether legislation violates the establishment clause. The Court found that the first part of the test, requiring the legislature to have a secular purpose in the legislation it advances, conflicted with the Act's actual purpose of promoting a religious viewpoint.\textsuperscript{18} The Court drew the conclusion that the plain meaning of the Act lacked a secular purpose, in spite of its explicit proclamation to the contrary.\textsuperscript{19}

The Court next considered the legislative history of the Act, focusing on the purpose and motives of its sponsor, Senator Keith.\textsuperscript{20} The Court's analysis relied substantially on the expressions of the Act's supporters in the Legislature, including those other than Senator Keith, and its evolution in the legislative process.\textsuperscript{21} The Court concluded that the Act had a religious purpose and that its asserted goal of "promoting academic freedom" would not be met by including creation science in a public school curriculum.\textsuperscript{22} Further...
nally, the Court concluded that the granting of summary judgment by the district court was entirely proper.\textsuperscript{23}

Justice Powell, joined by Justice O'Connor, concurred in the opinion,\textsuperscript{24} but emphasized, apparently over concern with subjects that might parallel religious teachings, that there remained "broad discretion" in state and local school boards to select the subjects and courses of study.\textsuperscript{25} Justice White wrote that he would affirm the court of appeals and the district court based on the principle of deferring to reasonable constructions of state statutes by lower courts.\textsuperscript{26} Justice Scalia, joined by Chief Justice Rehnquist, dissented.\textsuperscript{27}

The dissenters began by criticizing the Court's reliance on the plain meaning of the statute.\textsuperscript{28} In the dissent's view, the term "creation science" is a term of art which, under Louisiana law, is given its "meaning and acceptance with the learned in the art, trade or profession . . . ."\textsuperscript{29} The dissent stressed that, in its view, the benefit of the doubt must be given to the appellants on the meaning of the term "creation science".\textsuperscript{30}

Justice Scalia's opinion next turned to a criticism and analysis of the secular purpose prong of the three-part \textit{Lemon} test.\textsuperscript{31} Noting that the purpose prong is seldom used by the Court to invalidate a statute under the establishment clause, the dissent found that the

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\item Alabama statute allowing for a period of silence for "meditation or voluntary prayer. . . ." Ala. Code § 16-1-20.1 (Supp. 1984). There remained unchallenged in \textit{Wallace} another statute that provided for meditation, but not prayer, at the start of the school day. Ala. Code § 16-1-20.1 (Supp. 1984). The Court found that the challenged statute did nothing to add to what was already provided for by the statute in place. 472 U.S. 38, 58-59.

\item The defendants had contended that the summary judgment motion should be reversed because the affidavits of their witnesses raised genuine issues of material fact on the question as to whether creation science is a religion. This point was used by the dissent to the denial of rehearing en banc before the Fifth Circuit Court of Appeals. See supra note 14. The Court rejected this argument, relying on the district court's rationale that none of the experts filing the affidavits had participated in the legislative proceedings, and they were, therefore, not qualified to explain the "contemporaneous purpose" of the statute when it was passed. 107 S. Ct. at 2584.

\item Id. at 2584. Justice Powell concurred in all of the Court's opinion and Justice O'Connor joined the opinion in all but Part II. Id. Justice White concurred in the judgment. Id. at 2590.

\item Id. at 2584.
\item Id. at 2590-91.
\item Id. at 2591.
\item Id. at 2592.
\item Id. at 2592, citing La. Civ. Code Ann. art. 15 (West 1952).
\item 107 S. Ct. at 2592. This reasoning paralleled the reasoning of the court of appeal's dissent in the denial for a petition for rehearing en banc. See supra note 14.
\item 107 S. Ct. at 2593.
\end{itemize}
requirement that must be shown under the purpose prong is one of "'actual' [religious] motives of those responsible for the challenged action." Justice Scalia failed to find that the legislature had no secular purpose in enacting the Act.

Finally, the dissent focused on a specific criticism of the purpose prong of the Lemon test. Justice Scalia expressed his support for an earlier critique of Lemon written by Justice Rehnquist in Wallace v. Jaffree. The dissent also found the subjective intent of legislatures to be a dangerous area for the Court to venture into, and one that is justified only if it was required by the establishment clause. Justice Scalia concluded that the establishment clause did not require that sort of evaluation.

The dissent's reliance on a case criticizing the historical basis for the Lemon test, its harsh criticism of Lemon's secular purpose component, and its general criticism of a purpose analysis altogether, raises legitimate questions concerning the purpose prong's foundation in case law, its future use, and the use of a legislative purpose analysis in areas outside of the establishment clause. Moreover, although the dissent attempted to distinguish the secular purpose inquiry under Lemon from other legislative purpose or motive inquiries, it also recognized that the problems are often

32. Id. at 2593.
33. Id. at 2594, 2596-2605.
34. Id. at 2605. See supra note 17.
35. 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (state statute providing for a one minute period of meditation was not based on a secular purpose). Justice Rehnquist presented an extensive evaluation of the historical background surrounding the establishment clause and the free exercise clause of the first amendment. Id. See also Note, Wallace v. Jaffree and the Need to Reform Establishment Clause Analysis, 35 Cath. U.L. Rev. 573 (1986) ("[I]n exceptional cases the Court has opted to return to the historical approach of earlier decisions.") Id. at 581-82.
36. 107 S. Ct. at 2607.
37. Id.
38. See Wallace supra note 35 (Rehnquist, J., dissenting).
39. For a criticism of the Lemon test's continued use, see, e.g., Note, Developments in the Law—Religion and the State, 100 Harv. L. Rev. 1606, 1646 (1986) ("Application of the Lemon test thus depends entirely on the characterization of the government's actions; when characterized in accordance with the 'secular' ends encompassed by the accommodation rationale, government actions may pass muster under Lemon's purpose-effect test."); see also Choper infra note 71.
40. See infra note 75 and accompanying text.
41. 107 S. Ct. at 2593 (Scalia, J., dissenting). "[R]egardless of what 'legislative purpose' may mean in other contexts, for the purpose of the Lemon test it means the 'actual' motives of those responsible for the challenged action." Id.
42. "By and large the term 'purpose' has served as nothing more useful than a signal that the Court is willing to look at motivation, 'motive' as a signal that it is not." Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205, 1217
the same. The motive analysis that have taken place in the establishment of religion context have often exhibited the general uneasiness of the Court in developing and relying on legislative purpose for evaluating constitutional compliance.

Everson v. Board of Education is often credited by the Court as having been the case that formed the basis for the secular purpose test. Writing for the Court in Everson, Justice Black identified the test's standard rather ambiguously as legislation being drawn with a private purpose as opposed to a public one. He then characterized the statute in Everson as "public welfare" legislation because it aided all those who needed help, comparing it to police and fire protection. The statute in Everson was upheld because it served this general "public purpose."

Perhaps even more than a purpose analysis, however, the Everson Court was also using an effects analysis of the state's action. Over time, this would lead to problems in using the purpose analysis because, while Justice Black relied on the effects of the statute in conjunction with its "public purpose," the result was the lack of a well-developed evaluative procedure for determining when a legislative purpose would run afoul of the establishment clause. In subsequent decisions, the Court would rely on Everson as the purpose analysis' foundation, without ever seriously questioning or developing it as a meaningful tool for evaluating legislative purpose.

(1970). See also Eisenberg, infra note 75; Note, Legislative Purpose and Constitutional Adjudication, 83 Harv. L. Rev. 1887, 1887-88, n.1 (1970). "[I]t probably is . . . fruitless to attempt a principled articulation of the distinction between motive and purpose." Id. (quoted in, Ely at 1221).

43. 107 S. Ct. at 2605 (Scalia, J., dissenting). "[D]iscerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task." Id.

44. See generally note 75, infra, and the authorities cited therein.

45. 330 U.S. 1 (1947). Everson concerned the reimbursement by a local school board of money expended by parents for bus transportation in sending their children to parochial schools. Id.


47. 330 U.S. at 16-17.

48. Id. at 17.

49. Id. at 17.

50. Id. at 18. The Court considered the statute "as applied" in concluding that it had a general purpose. Id.

51. Id. at 17-18.

52. See supra note 41. The Court often combined the secular purpose and effects analysis as one test for a violation of the establishment clause. See, e.g., Board of Educ. v. Allen, 392 U.S. 236 (1968). "Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose." Id. at 243; Abington School Dist. v. Schempp, 374 U.S. 203 (1963).
Another aspect of the secular purpose requirement that has been present since its inception in *Everson*, and which has also been combined with an effects analysis thus confusing the secular purpose test, is the willingness of the Court to infer a non-secular purpose. 53 In *Abington School Dist. v. Schempp*, 54 the Court was presented with arguments by counsel for the state asserting that the reading of the Bible or Lord’s Prayer in public school served to promote general moral values. 55 The Court was therefore faced with an assertion of a secular purpose that could seemingly withstand purpose analysis scrutiny. The Court concluded, however, that the “religious character of the exercise was admitted by the State” and that “even if the purpose is not strictly religious, it is sought to be accomplished through readings . . . from the Bible.” 56 The Court established that, under certain conditions, it would infer a religious purpose through the use or effect of incorporating articles associated with religious dogma into a public school setting.

The Court finally enshrined the loosely developed purpose prong as a separate but equal component of a three part test in *Lemon*, where it credited the purpose prong as having been part of the “cumulative criteria developed by the Court over many years.” 57 In fact, however, the Court had only once before used the secular purpose test to strike down a state statute 58 and, as was the case in *Edwards*, the statute centered on the teaching of evolution. 59 The Court did not expand on the secular purpose requirement, 60 other

53. See infra note 60 and accompanying text.


55. 374 U.S. at 223-24.

56. Id. at 224.

57. 403 U.S. 602, 612 (1971). For a summary of *Lemon* and its three part test, see supra note 17.

58. Epperson v. Arkansas, 393 U.S. 97 (1968). Justice Scalia uses this in his dissent in *Edwards* to point out how little the secular purpose part of the *Lemon* test has been developed. 107 S. Ct. at 2593 (Scalia, J., dissenting). Although the secular purpose prong of the *Lemon* test has not been well-developed by itself, it has been more often used and applied in conjunction with the effects analysis. See infra notes 61, 62 and 70.

59. “The Arkansas law was an adaptation of the famous ‘Tennessee ‘monkey law’ . . . .” 393 U.S. at 98. The statute on which the Arkansas law was based was the subject of the Scopes trial of 1927 and prohibited the teaching of the theory of evolution. See *Epperson*, 393 U.S. at 98; *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927).

60. Instead of clarifying the secular purpose analysis, the Court relied on the views expressed in *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963). “[W]hat are the pur-
than to continue the pattern that would surface again in later cases, including *Edwards*, of inferring a purpose of promoting religion. Justice Black, who had written the opinion in *Everson* and thereby gained credit as the author of the secular purpose requirement, questioned in a concurring opinion in *Everson* the use of a motive inquiry at all.

Following *Lemon*, the Court insists that it has applied the three part test, including the purpose prong analysis as a separate component, in all but one or two cases. Regardless of the number of times the three part test has been applied, the Court had used the purpose analysis under it to strike down legislation in only two cases prior to *Edwards*. In *Wallace v. Jaffree*, the Court used a motive analysis to hold unconstitutional an amended statute that provided for a one minute period of silent meditation or prayer.

Pose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." 374 U.S. at 222, quoted in *Epperson*, 393 U.S. at 107.

As there were two statutes under review in *Schempp*, and only one of the district courts had made a finding that there was no secular purpose, the Court did not find one to have been enacted without a secular purpose, and instead it relied on an effects analysis to strike down both. *Schempp*, 374 U.S. at 223-24.

61. 393 U.S. at 107. "In the present case, there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man." *Id.*

62. *Id.* at 109 (Black, J., concurring). "[T]his Court has consistently held that it is not for us to invalidate a statute because of our views that the 'motives' behind its passage were improper; it is simply too difficult to determine what those motives were. See, e.g., United States v. O'Brien, 391 U.S. 367, 382-383 (1968)." *Id.* at 113.

63. See *Edwards*, 107 S. Ct. at 2577.

64. The exact number of times that the Court has refused to apply the *Lemon* test is the subject of some contradiction among the various opinions. See, e.g., *Edwards*, 107 S. Ct. at 2577, n.4, where the Court acknowledges that it has not applied the *Lemon* test in *Marsh* v. Chambers, 463 U.S. 783 (1983), but states that that case is the only time it has deviated from it. *Marsh* concerned the opening prayer delivered in a state legislature before the start of a legislative session. The prayer was challenged on establishment clause grounds and the Court upheld the practice based on its "historical acceptance..." *Id.* In *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Rehnquist, J., dissenting), the dissent cites *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), as a case along with *Marsh* in which the Court has refused to apply the *Lemon* test. In *Lynch*, the Court actually did use the *Lemon* purpose prong as a guide in determining that a nativity scene in a Christmas display was not violative of the establishment clause. *Lynch*, 465 U.S. at 680-81. To confuse matters even further, the Court in *Lynch* contends that it has not applied the *Lemon* test in *Marsh* and *Larson v. Valente*, 456 U.S. 228 (1982). *Lynch*, 465 U.S. at 679. In *Larson*, as in *Lynch*, the Court at least paid lip service to the *Lemon* test even if it did not rely on it exclusively.


when there already existed another statute that provided only for meditation. Once again the Court inferred a non-secular legislative motive, this time by the enactment of an additional statute that only added the phrase "or voluntary prayer."67 Similarly, in *Stone v. Graham*,68 the Court was left to infer a non-secular purpose in the posting of the Ten Commandments on schoolroom walls despite an avowed secular educational purpose.69

If neither *Wallace* nor *Stone* developed the secular purpose analysis, much more than reaffirm that a non-secular purpose could be inferred from the legislation itself or the history surrounding its enactment, the cases following *Lemon* that were not directly decided on the purpose component developed the analysis even less. In *Lynch v. Donnelly*,70 the Court did add the requirement that the secular purpose must be such that the statute in question "was motivated wholly by religious considerations,"71 but

67. 472 U.S. at 58-59. "[The] legislature enacted [the statute containing silent meditation or voluntary prayer] despite the existence of [the statute allowing silent meditation only] for the sole purpose of expressing the State's endorsement of prayer activities." *Id.* at 60.

Justice O'Connor expressed what turned out to be a particularly prophetic remark:

It is of course possible that a legislature will enunciate a sham secular purpose for a statute. I have little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one, . . . inquiry into the effect of an enactment would help decide those close cases where the validity of an expressed secular purpose is in doubt. *Id.* at 75. (O'Connor, J., concurring in the judgment). Justice O'Connor suggested that a "deferential" position should be taken towards a legislature's articulation of purpose. *Id.* at 74.

One commentator has suggested that her views constitute a "reformulation" of the *Lemon* test, relying in part on her analysis of the relationship between the establishment clause and the free exercise clause's accommodationist rationale. *Id.* at 79-84. See Note, supra note 39, at 1647.


69. "The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." 449 U.S. at 41.

The statute provided that there was to be a small "notation concerning the purpose of the display, as follows: 'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'" *Ky. Rev. Stat. Ann.* §158.178 (Baldwin 1980).


71. *Id.* at 680. Justice Scalia points this out in his dissent in *Edwards*: "In 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 motive was to promote religion." 107 S. Ct. at 2594 (Scalia, J., dissenting).

This view has received some support from outside the Court as well. See Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673,
then upheld the erection of a creche by the City of Pawtucket, dismissing an apparent non-secular purpose due to "insufficient evidence."\footnote{72} In \textit{Larson v. Valente},\footnote{78} the Court expanded on the purpose analysis but ultimately decided on the basis of an entanglement theory and applied a "strict scrutiny" test.\footnote{74}

Finally, in \textit{Edwards}, the Court has reinvigorated the purpose test as a supposedly distinct component. However, the history of the Court's use of a purpose analysis indicates that it has been closely interwoven with the effects analysis. The combination of the two has allowed the Court to infer a non-secular purpose, but at the same time caused the purpose analysis to not be fully developed as an independent procedure for determining if the legislature has complied with the establishment clause's restrictions. This lack of development in a purpose analysis under religious challenges is paralleled by a lack of definition to the Court's evaluation of motive inquiries in other areas of constitutional jurisprudence.\footnote{76}

As a result of this confusion, the Court may have been able to add clarity to its establishment clause analysis by abandoning, at least

\footnote{675 (1980). ("Establishment clause should forbid only government action whose purpose is solely religious . . .") (emphasis in original). Id.}

\footnote{72. 465 U.S. at 680. "[I]t 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." Id.}

\footnote{73. 456 U.S. 228 (1982).}

\footnote{74. The Court has identified the "strict scrutiny" test as the appropriate standard of review in a free exercise case involving racial discrimination. Bob Jones Univ. v. United States, 461 U.S. 574 (1983). The Court has also applied a "stricter scrutiny" when the third prong of the \textit{Lemon} test, excessive entanglement between government and religion, is involved. "A finding of excessive entanglement, typically of the political sort, can serve as a 'warning signal,' triggering stricter judicial review than would otherwise have been appropriate." L. TRIBE, \textit{AMERICAN CONSTITUTIONAL LAW} 866 (1978), citing, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973). However, \textit{Larsen} was the first establishment clause case to expressly use the phrase "strict scrutiny."}

\footnote{75. See Ely, \textit{supra} note 42, in which he discusses United States v. O'Brien, 391 U.S. 367 (1968). In \textit{O'Brien}, the Court said: "It is a familiar principal of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." 391 U.S. at 383. But see, Washington v. Davis, 426 U.S. 229, 253 (1976) ("The requirement of purposeful [racial] discrimination is a common thread running through the cases. . .") (Stevens, J., concurring).

\textit{See generally} Eisenberg, \textit{Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication}, 52 N.Y.U. L. Rev. 36 (1977). Eisenberg discusses the use of motive inquiries in general and concludes that: "When the government seeks to disadvantage individuals because of their race, religion, national origin, or political beliefs, judicial resort to motive may be the only way to vindicate fundamental constitutional rights." \textit{Id.} at 149. Eisenberg also discusses alternatives to resorting to the motive inquiry in the first instance.

The areas in which the Court will use or will not use motive as a device to evaluate the constitutionality of a state's action is beyond the scope of this note.
in *Edwards*, the purpose analysis, and instead, rely exclusively on an effects evaluation.\(^7\)

The use of an effects analysis in *Edwards* would certainly have been justified given the close association of creationism with religious dogma.\(^7\) Under an effects analysis, the Court could easily find that the Act, if implemented, had as its *sine qua non* the teaching of a dogma that is closely associated with a religious belief that is not shared by others with differing religious beliefs.\(^8\) This type of effects analysis would have spared the Court from having to call the Louisiana Legislature a liar when it said the Act’s purpose was the promotion of “academic freedom.”\(^7\)

The use of a pure effects analysis would also have prevented the Court from further confusing the use of motive inquiries in other areas of constitutional law.\(^8\) The Court has now explicitly expanded purpose and motive inquiries to the point where it will feel free to dispute a statute’s articulation of purpose. Given the reality that legislatures are likely to resort to “sham” statements of purpose more often in the future when enacting legislation of questionable constitutionality, it may have been necessary for the Court to have taken this step at some point. However, given the lack of development of motive inquiries in general, and especially with motive inquiries in the area of establishment clause analyses, this was probably the wrong time to extend this broad tool to an undefined area when the Court could clearly have avoided having to do so by either equating creationism with religion\(^8\) or falling...
back on the "inference" method on which it has relied in the past. 82

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82. See supra notes 51-70 and accompanying text.