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Recent Developments: Edward v. Aquillard: Establishment Clause Violated by Statute Requiring School's Balanced Treatment of Evolution and Creation Science

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Edward v. Aquillard: ESTABLISHMENT CLAUSE VIOLATED BY STATUTE REQUIRING SCHOOL'S BALANCED TREATMENT OF EVOLUTION AND CREATION SCIENCE

In *Edwards v. Aquillard*, ____U.S.____, 107 S. Ct. 2573 (1987), the Supreme Court of the United States held the Louisiana Balanced Treatment Act facially invalid because it violated the Establishment Clause of the first amendment. The Court found that the Act, as it applied to elementary and secondary public schools, sought to employ the symbolic and financial support of government to achieve a religious purpose.

The Plaintiffs, Louisiana teachers and parents of public school students, challenged the constitutionality of the Act in federal district court. The district court granted the Plaintiffs' motion for summary judgment, holding that no secular purpose for the Act was present. The court of appeals affirmed.

The Balanced Treatment Act did not require the teaching of either evolution or creation-science. However, it did forbid the teaching of either without balanced treatment of the other. The theories of evolution and creation-science were statutorily defined as "the scientific evidences for [creation or evolution] and inferences for those scientific evidences." La. Rev. Stat. Ann. § 17:286.1-7 (West 1982).

The Court has applied the three prong *Lemon* test in the past to determine the constitutionality of Establishment Clause cases. First, the law must have a secular legislative purpose. Second, the statute's primary effect must neither advance nor inhibit religion and third, the statute must not result in an excessive entanglement of government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

In the instant case, because the Court found that the Act had no secular purpose, "no consideration of the second or third criteria is necessary." *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). The purpose prong of the *Lemon* test considers whether the government's actual purpose is to endorse or disapprove of religion. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984).

As to the determinative issue of secular purpose, the main point of disagreement between the majority and the dissent was whether the Act's stated purpose of "protecting academic freedom" was sufficiently secular (dissent) or a cover-up of a religious preference (majority). To support their decisions, both the majority and dissent appealed to the statutory terms, judicial and legislative history, and the general history and understanding of the two theories.

In its analysis, the Court first found that academic freedom was not advanced by Louisiana's Balanced Treatment Act. Conversely, the purpose was to "discredit evolution by counter-balancing its teaching at every turn with the teaching of creation-science." *Edward v. Aquillard*, 107 S. Ct. 2573, 2580. The Act provided schoolteachers with no more authority or flexibility than what they already possessed. The Court also saw the Act as having a discriminatory preference for the teaching of creation-science because curriculum guides, research services, and protection against discrimination were supplied for it but not for evolution-science.

Opining for the dissent, Justice Scalia joined by Chief Justice Rehnquist, took issue with the Court's evaluation of "academic freedom" because it was contrary to the terms of the statute. In their view, the legislative history clearly showed that the "academic freedom" was intended for the students to be free from indoctrination, not the teacher's freedom to teach what they want.

The dissent approached the majority's argument of discrimination in favor of creation-science by focusing on the present status of the science curriculum in public schools. Creation-science asserted the dissent, is being discriminated, misrepresented, and censored in public schools in favor of evolution. *Id.* at 2602. The Act's purpose was to reasonably redress this discrimination by compensating for the unavailability of texts on creation-science for class use and allowing creation-scientists to write them. Simply, the dissent argued, protection for evolutionists from discrimination is not needed.

Next, the Court found that the legislative and historical interpretation of creation-science advanced a particular religious doctrine. In *Epperson v. Arkansas*, 393 U.S. 97 (1968), the Court noted contemporaneous and historical antagonisms and connections between the teachings of certain religious denominations and the teaching of evolution. Witnesses at the legislative hearings in the instant case testified that a creator was responsible for the universe and everything in it. The sponsoring senator stated that "evolution advances religions contrary to my own." *Edwards*, 107 S. Ct. at *2582.*

From this evidence, the majority concluded that the Act's primary purpose was to provide an advantage to a particular religious doctrine that rejects evolution and holds to the creation of humankind by a divine creator. To violate the Establishment Clause the statute must either promote a particular religious doctrine, here, the Judeo-Christian belief in creation, or prohibit a theory deemed antagonistic to a particular doctrine, here, evolution. *See Epperson*, 393 U.S. at 106-7.

The dissent asserted that the majority disregarded the stated purpose of the statute and determined what they believed to have motivated the legislature. Creation-science is a term of art. Louisiana law, continued the dissent, requires it to be interpreted according to the art or profession to which it refers. La. Civ. Code Ann. art. 15 (West 1952). The majority had interpreted "creation-science" according to its historical affiliations. The dissent believed that "creation-science" should be defined according to the statutory definition and legislative history, and therefore, could easily be taught without reference to religion.

Additionally, the dissent asserted that legislators could vote based on their religious convictions and stay within the confines of the first amendment. To support this proposition, the dissent relied on *Harris v. McRae*, 448 U.S. 297 (1980), where Sunday blue laws were upheld even though they happened to harmonize with the tenets of some religions.

An inconsistency in the Court's opinion was shown by the dissent because without the Balanced Treatment Act the Court was violating the Establishment Clause by allowing evolution-science to be taught freely. The Court has referred to secular humanism as a religion with evolution as a central tenant. *Torcaso v. Watkins*, 367 U.S. 488 (1961). Therefore, the dissent concluded, creation-science is being discriminated against and religion with evolution is being promoted. The Balanced Treatment Act was designed to redress that for the benefit of the students.

Justice Powell joined by Justice O'Conner (concurring) concluded that there were historical associations of creation-science with the religious belief in the creation of the universe by a divine God as described in the Bible. These associations, according to Justice Powell, were enough to override the fact that the statute did not explicitly refer to a religious purpose.

The Court did leave the door open for religious oriented information and creation-science to be used in public schools; but the purpose must not advance a particular religious belief.

Edwards v. Aquillard follows closely the trend of Supreme Court decisions dealing with state statutes addressing religion in public schools. The Establishment Clause is being relied upon in the Court's involvement in state educational law, an area in which the state and local governments have a large interest. In recent years the Court has invalidated a school district's use of public school teachers in religious schools. *Grand Rapids School District v. Ball,* 473 U.S. 373 (1985), and the hanging of a copy of the Ten Commandments on a public school wall. *Stone v. Gragam,* 449 U.S. 39 (1980). In these two cases the Court found no secular purpose. *Edwards* also illustrates that in determining the presence of secular purpose the Court will go beyond the definitions in the statute to find the motives of the legislature. This is one reason why Justice Scalia has called for a re-evaluation of the *Lemon* secular purpose test.

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Lee v. Wheeler: RECOVERY FOR NEGLIGENCE OF PHANTOM DRIVER UNDER UNINSURED MOTORIST PROVISIONS

On a question certified by the United States Court of Appeals for the District of Columbia, the Court of Appeals of Maryland held in *Lee v. Wheeler,* 310 Md. 233, 528 A.2d 912 (1987) that under an automobile insurance policy covering Maryland insureds, an uninsured motorist provision limiting coverage to situations in which there is physical contact between the insureds' vehicle and the phantom vehicle is unenforceable as against public policy under Maryland law. This case expanded a similar ruling in *State Farm Mut. Auto. Ins. Co. v. Maryland Auto. Ins. Fund,* 227 Md. 602, 356 A.2d 560 (1976) by making such provisions unenforceable for accidents happening outside, as well as inside, the State of Maryland.

Ark and Olivia Lee were residents of Maryland whose automobile was titled and registered in Maryland. The original insurance policy and all renewals were addressed and mailed to the Lees' Maryland residence and all premiums were paid from the same residence. While the Lees were operating their vehicle in the District of Columbia, a vehicle operated by Marlene Wheeler swerved to avoid an unidentified (phantom) vehicle that suddenly entered her lane of traffic. In the process, Wheeler struck the Lees' vehicle head-on.

The Lees brought an action against Wheeler in the United States District Court for the District of Columbia invoking diversity jurisdiction under 28 U.S.C. § 1332 (1982). The Lees also joined their insurer, Pennsylvania General Insurance Company (Pennsylvania General), seeking coverage under the policy's uninsured motorist provisions for the damages sustained as a result of the phantom's negligence.

The Lees' claim against Pennsylvania General was dismissed because the district judge found that the Lees' insurance policy expressly required physical contact with the phantom vehicle in order for the uninsured motorist coverage provisions to apply and that provision was enforceable under District of Columbia law. The Lees appealed from the order granting the motion to dismiss.

The United States Court of Appeals for the District of Columbia Circuit found that Maryland law applied but found no pertinent Maryland cases to serve as a guide in making a decision. Under Md. Cts. & Jud. Proc. Code Ann. § 12-601 (1984), they certified the following ques-