

Religion: Church and State Relations: Balanced Treatment of Theories of Origins—*Edwards v. Aguillard*

In 1981, Louisiana adopted the Balanced Treatment for Creation-Science and Evolution-Science Act.¹ The express purpose of the Act was to protect academic freedom.² The Act directed public secondary and elementary schools to give a balanced, overall treatment of the two models when dealing with the subject of the origin of man, life, the earth, or the universe.³ It did not require any instruction in the subject of origins, but did require that if either scientific model was taught, the other must be taught⁴ as theory rather than fact.⁵ Discrimination was prohibited against students who accepted or rejected either model,⁶ and against teachers who taught creation-science.⁷ The Act provided means by which it could be carried out in practice.⁸

In 1985 a group of parents, teachers, and religious leaders challenged the constitutionality of the Act under the establishment clause.⁹ *Edwards v. Aguillard*¹⁰ evaluated the Balanced Treatment Act under the *Lemon v. Kurtzman* establishment clause test.¹¹ The Supreme Court invalidated the statute because it found “no clear secular purpose for the Louisiana Act,”¹² despite

1. LA. REV. STAT. ANN. §§ 17:286.1-286.7 (West 1982).

2. *Id.* § 286.2.

3. *Id.* § 286.4(A).

4. *Id.* § 286.5.

5. *Id.* § 286.4(A).

6. *Id.* § 286.4(B).

7. *Id.* § 286.5(C).

8. *Id.* §§ 286.6, 286.7.

9. *Aguillard v. Treen*, 634 F. Supp. 426 (E.D. La. 1985). An injunction and a declaration that the Act violated the establishment clause were sought and obtained upon summary judgment. The court of appeals (765 F.2d 1251 (5th Cir. 1985)) and the Supreme Court (107 S. Ct. 2573 (1987)) affirmed the decision below.

10. 107 S. Ct. 2573 (1987).

11. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

12. *Edwards v. Aguillard*, 107 S. Ct. 2573, 2578 (1987). A dissimilar statute with an identical title (ARK. STAT. ANN. §§ 80-1663 to 80-1670 (Supp. 1981)) was struck down in *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982).

the expression of purpose on the face of the statute. Two dissenting Justices abandoned *Lemon's* purpose test because it was "difficult to apply and yield[ed] unprincipled results."¹³ Nevertheless, by reading the plain meaning of the statute's words and reviewing the legislative history in context, the dissent found that the secular purpose requirement was satisfied.¹⁴

This note explores the question of whether a state legislature can effectively require balanced treatment of creation-science and evolution-science in public schools consistent with the religion clauses of the first amendment. A brief history of the teaching of evolution in secondary schools and the status of evolution in public opinion supplies a foundation for further discussion. Analysis of both models of origins under the definitions of "science" and "religion" reveals their common character. Assessment of the Act under the establishment clause of the first amendment demonstrates the value of allowing balanced treatment in public schools.

Evolution in Public Schools

Although high school life-science textbooks of the 1860s and 1870s totally omitted evolutionary concepts,¹⁵ in the 1880s and through the turn of the century they were invariably evolutionary.¹⁶ By the 1910s, biology textbooks presented human evolution as fact.¹⁷ One 1914 article advocated instruction of evolution over religion. Teachers were advised of their "duty" to correct Sunday school or home training over the objections of parents ignorant about the anthropoidal descent of man.¹⁸

Expansion of public secondary education in the 1920s coincided with the antievolution crusade in state legislatures¹⁹ because evolution was carried to an increasing number of America's youth.²⁰ Antievolution legislation, though never enforced,²¹ brought a form of "neutrality through silence on the subject of biological origins."²² Presumably, if teaching biblical creationism in public schools would be prohibited, excluding evolutionary teaching in public schools would yield the requisite educational neutrality.²³ From the 1920s to

13. 107 S. Ct. at 2605 (Scalia, J., dissenting).

14. *Id.*

15. E. LARSON, TRIAL AND ERROR: THE AMERICAN CONTROVERSY OVER CREATION AND EVOLUTION 12, 14 (1985) [hereinafter E. LARSON].

16. *Id.* at 15, 18, 22.

17. *Id.* at 19.

18. *Id.* at 24.

19. In the 1920s, forty-five antievolution bills surfaced in twenty different states. *Id.* at 48, 75. Three states adopted antievolution laws, the last of which was struck down in 1970 in Mississippi. *Id.* at 122.

20. *Id.* at 27.

21. "No indictments were filed during the hiatus [thirty-year truce, 1920s to 1950s] under the three existing anti-evolution laws." *Id.* at 81-82.

22. *Id.* at 95.

23. "Bryan [antievolution advocate], always sensitive to the rights of religious minorities, appreciated that the disestablishment of religion precluded teaching the Genesis account in public schools." *Id.* at 47-48.

the 1950s, commercial publishers of high school textbooks deemphasized evolution, often avoiding the use of the word "evolution" by substituting "development."²⁴ They presented natural selection as an unproven hypothesis, as theory rather than dogma, as scientific suggestion rather than fact.²⁵

In 1959 the National Science Foundation (a federal agency) began funding the Biological Science Curriculum Study (BSCS, a nonprofit organization), largely as a result of the Soviet Union's success in launching the first satellite (Sputnik) in 1957.²⁶ The BSCS biologists who rewrote high school textbooks boldly embraced evolution as a major theme.²⁷ One BSCS author observed that unlike an individual author, the federally funded BSCS organization possessed enough "clout" to demand incorporation of evolution in its texts regardless of the effect on sales.²⁸

This massive reintroduction of the teaching of evolution in public secondary schools caused creationists to redouble their efforts. The 1920s efforts to abolish evolutionary teaching in schools were temporarily effective, not because the laws were enforced but because the laws reflected popular opinion that was heeded by textbook publishers. The courts upheld²⁹ and then struck down³⁰ state antievolution statutes. Court action coupled with federal support of evolution textbooks brought an alternative strategy to return neutrality to the classroom—balanced treatment of evolution-science and creation-science.

Evolution in Public Opinion

Remarkably, the debate continues more than a century after Darwin's thesis was published. Americans became absorbed in the evolution controversy after the Civil War.³¹ Over a ten-year period (1860-70), popular magazines progressed "from hostility to skepticism to gingerly approval, and finally to full-blown praise."³² Today, one might expect public opinion to duplicate the atti-

24. *Id.* at 84-85.

25. *Id.*

26. *Id.* at 91. See D. FUTUYMA, *SCIENCE ON TRIAL: THE CASE FOR EVOLUTION* 6 (1983) [hereinafter D. FUTUYMA]; *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255, 1259 (E.D. Ark. 1982).

27. See sources cited *supra* note 26.

28. E. LARSON, *supra* note 15, at 95-96.

29. *Scopes v. State*, 289 S.W. 363 (Tenn. 1927).

30. *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Smith v. State*, 242 So. 2d 692 (Miss. 1970).

31. One participant in the Civil War used Darwinism to interpret his experience: He felt, like nine men in ten, an instinctive belief in Evolution . . . [I]t was the very best substitute for religion; a safe, conservative, practical, thoroughly Common-Law deity. Such a working system for the universe suited a young man who had just helped to waste five or ten thousand million dollars and a million lives, more or less, to enforce unity and uniformity on people who objected to it.

R. HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 15-16 (rev. ed. 1955) [hereinafter R. HOFSTADTER] (citing *THE EDUCATION OF HENRY ADAMS* 225-26 (1931)).

32. *Id.* at 22.

tude of the scientific community.³³ Yet, recently George Gallup concluded after researching the subject:

Debate over the origins of man is as alive today as it was at the time of the famous Scopes trial in 1925, with the public now about evenly divided between those who believe in the biblical account of creation and those who believe either in a strict interpretation of evolution or in an evolutionary process involving God.³⁴

Not only the general public but also "America's finest thinkers" are evenly divided concerning creation-evolution issues.³⁵ At Harvard Law School in 1981, forty distinguished conferees voted on twenty propositions.³⁶ The final proposition was: "Efforts to impose on the public school system the teaching of creationism should be resisted."³⁷ This was the only proposition on which the participants were equally divided: nineteen affirmative, nineteen negative, two abstaining. The proposition failed by virtue of the tie vote.³⁸

Through the years the controversy has embraced "theistic evolution versus biblical literalism and educational neutrality through silence on the subject of origins versus the legitimacy of evolutionary teaching."³⁹ In 1928, Arkansas held a democratic initiative vote and nearly two-thirds voted opposition to evolutionary teaching.⁴⁰ A 1981 nationwide poll showed that "over 86% of the people favored having creationism taught in the schools."⁴¹ By the end of that same year, twenty-three bills similar to Louisiana's Balanced Treatment Act had been introduced in fifteen states.⁴² The initial discourse of the

33. D. FUTUYMA, *supra* note 26, at xi ("Evolution has, by now, the status of fact."); O. MAYO, *NATURAL SELECTION AND ITS CONSTRAINTS* 10 (1983) ("Evolution has occurred. . . . This is a truism."); K. EDWARDS, *EVOLUTION IN MODERN BIOLOGY* 1 (1977) ("[T]he fact of evolution [was] accepted fairly rapidly by most biologists (although rather more slowly by the general public."); M. RIDLEY, *THE PROBLEMS OF EVOLUTION* 15 (1985) ("With the fact of evolution established, the next problem is to explain why it takes place."); S. GOULD, *HEN'S TEETH AND HORSE'S TOES* 254 (1983) ("Well, evolution is a theory. It is also a fact. . . . [H]uman beings evolved from apelike ancestors whether they did so by Darwin's proposed mechanism or by some other, yet to be discovered.") and *id.* at 256 ("[N]o biologist has been led to doubt the fact that evolution occurred; we are debating *how* it happened.").

34. E. LARSON, *supra* note 15, at 130-31. A 1979 survey by the Gallup polling organization found that "half of the adults in the U.S. believe God created Adam and Eve to start the human race." Similar results were obtained three years later. *Id.*

35. A. HOWARD, J. BAKER & T. DERR, *CHURCH, STATE, AND POLITICS* 3 (Chief Justice Earl Warren Conference on Advocacy in the United States, J. Hensel ed. 1981) (foreword by J. Burgess) [hereinafter Conference].

36. *Id.* at 119-36.

37. *Id.* at 133.

38. *Id.*

39. E. LARSON, *supra* note 15, at 78.

40. *Id.* at 81.

41. *Id.* at 131. "Nevertheless, creationists only request *fair* treatment, not favored treatment, in the schools." *Id.*

42. Lines, *Scientific Creationism in the Classroom: A Constitutional Dilemma*, 28 *LOY. L. REV.* 35, 38 n.8 (1982).

1920s antievolution movement mirrors that of the 1980s balanced treatment movement: a plea for "academic freedom and protecting the faith of children."⁴³

Comparison of the Theory of Evolution and the Theory of Creation

In 1859, Charles Darwin published *The Origin of Species*. Natural selection became known as the theory of evolution,

defined as "the belief that simple forms of life on the earth slowly and gradually gave rise to those more complex and that thus ultimately the most complex form came into existence." The fossil record spanning "millions of years" was given as evidence of this evolution. Man is presented as a product of this evolution, with the Caucasian race being "finally, the highest type of all."⁴⁴

The "general" theory of evolution holds "that all the living forms in the world have arisen from a single source which itself came from an inorganic form."⁴⁵ The scientific community reacted in a variety of ways to the theory.⁴⁶ Some scientists adopted evolution in its entirety;⁴⁷ others added evolutionary concepts by adjusting the role given to God;⁴⁸ still others rejected the theory.⁴⁹ The very same physical evidence was construed differently by scientists, either to explain evolution or to explain the unity of one author of nature.⁵⁰

An alternative explanation of origins is creationism. The creation model proposes a beginning where "all the basic laws and categories of nature, including the major kinds of plants and animals, as well as man, were brought into existence by special creative and integrative processes which are no longer in operation."⁵¹ Processes of conservation then replaced the processes of creation to sustain and maintain the basic systems.⁵² Where evolution is naturalistic, self-contained, nonpurposive, directional, irreversible, universal, and contin-

43. E. LARSON, *supra* note 15, at 78.

44. *Id.* at 21, citing G. HUNTER, A CIVIC BIOLOGY: PRESENTED IN PROBLEMS 183, 194-96, 405 (1914).

45. Bird, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515, 515 n.2 (1978) [hereinafter Bird]. The "special" or "limited" theory holds that genetic variation and limited mutation cause observable changes in many living animals over a period of time. *Id.*

46. See R. HOFSTADTER, *supra* note 31, at 16-24.

47. John Fiske, Edward L. Youmans, William James, Joseph LeConte. *Id.* at 14, 16, 17.

48. Asa Gray, Edward Hitchcock, Yale President N. Porter. *Id.* at 18; E. LARSON, *supra* note 15, at 9-12.

49. Louis Agassiz, James Dwight Dana. E. LARSON, *supra* note 15, at 11, 13; R. HOFSTADTER, *supra* note 31, at 17. *But see id.* at 18.

50. Darwin interpreted this as evidence for evolution. Dana saw in the fossil record a unity of plan and purpose in all nature pointing to one author. Agassiz opposed both the Bible ("series of Divine acts occurring at intervals over a very long earth history") and evolution ("there is nothing like parental descent connecting [the faunas of different ages]"), but attributed apparent animal relationships to their "common origin in the mind of their Creator." E. LARSON, *supra* note 15, at 11-12.

51. H. MORRIS, SCIENTIFIC CREATIONISM 12 (1974) [hereinafter H. MORRIS].

52. *Id.*

uing, creationism is supernaturalistic, externally directed, purposive, completed, and irreversibly directional toward lower rather than higher levels of complexity.⁵³

That evolution is scientific and creationism is religious is frequently maintained without challenge.⁵⁴ Evolution and creationism both are explanations of the origin of life and both should be evaluated as "science" and as "religion."

Study of Origins as "Science"

"Science" is defined as "knowledge based on observed facts and tested truths arranged in an orderly system."⁵⁵ The traditional Baconian definition of science is classified knowledge and explanation of facts.⁵⁶ The essence of science is repeatable observation.⁵⁷ A hypothesis is a merely tentative explanation of the data, advanced or adopted as a guide to further observation or experiment.⁵⁸

One prominent Yale geologist in 1863 asserted that Darwin's development-hypothesis was not even true science "because it was refuted by the central evidence that species do not shade into one another, higher species sometimes appear earlier than lower species, and the earth has suffered total extinctions of whole families that subsequently reappeared."⁵⁹ The point is that scientific observation and experiment provide data that lead some to conclude, for example, that various species originated from a common ancestor, but that conclusion does not necessarily follow from the facts.⁶⁰

The problem is obvious: origins can neither be observed nor repeated.⁶¹ Creation is not presently observed, nor has a scientific experiment been devised to describe or prove any past creation process. Likewise, evolution is not presently observed and, if occurring, operates too slowly to be measurable. Small but discernible variations and mutations in organisms are consistent with both models but prove neither.⁶² "Even if modern scientists should ever actually achieve the artificial creation of life from non-life, or of higher kinds from lower kinds, in the laboratory, this would not *prove* in any way that

53. *Id.* at 11-12. The creation model postulates that "[t]he completed original creation was perfect and has since been 'running down.'" See *infra* note 73.

54. See H. MORRIS, *supra* note 51, at 6.

55. 2 WORLD BOOK DICTIONARY 1963 (1986).

56. E. LARSON, *supra* note 15, at 45. Francis Bacon, renowned seventeenth-century English philosopher, believed in "the testing of ideas by controlled and scientific methods," among other progressive ideas he espoused. WEBSTER'S 3D NEW INT'L DICTIONARY (1976).

57. See H. MORRIS, *supra* note 51, at 4.

58. 1 WORLD BOOK DICTIONARY 1042 (1986).

59. E. LARSON, *supra* note 15, at 13 (citing J. DANA, A TEXT-BOOK OF GEOLOGY DESIGNED FOR SCHOOLS AND ACADEMIES 258-59 (1863)). In a chapter aimed at establishing "the fact of evolution" (see M. RIDLEY, *supra* note 33, at 15), a 1985 author admits that "[t]he fossil record of evolutionary change within single evolutionary lineages is very poor." *Id.* at 11.

60. See *supra* note 50.

61. H. MORRIS, *supra* note 51, at 4.

62. See *id.* at 5.

such changes did, or even could, take place in the past by random natural processes."⁶³ Actually, it would support the argument of purposive creation—a demonstration of cause and effect. A leading British evolutionary biologist recognized that “[b]elief in evolution is thus exactly parallel to belief in special creation—both are concepts which believers know to be true but neither, up to the present, has been capable of proof.”⁶⁴

That which can neither be proved or disproved is beyond the realm of true science. Two modern biologists admit that their theory of evolution “cannot be refuted by any possible observations. It is thus ‘outside of empirical science,’ but not necessarily false. No one can think of ways in which to test it.”⁶⁵ One botanist admitted that his “attempt to demonstrate evolution by an experiment carried on for more than 40 years has completely failed. . . . The idea of an evolution rests on pure belief.”⁶⁶

Evolutionary theory is no more scientific than creationism when it relies solely on opinion. Both approaches depend on evidence which is observed and proven.⁶⁷ But to the extent they “fill in the gaps” of information with conjecture, they exceed the bounds of science and become philosophy or religion.⁶⁸ Because no one was present at the beginning to observe and record, and because beginnings cannot be repeated or tested, science cannot explain origins without relying on speculation and “pure belief.”

Study of Origins as “Religion”

“Religion” is not easily defined in so many words, yet the Supreme Court must attempt to define it in order to interpret the first amendment. The dictionary defines “religion” as belief in or worship of God or gods, or anything followed with reverence or devotion.⁶⁹ The first part of the definition describes theistic religions, while the second part is broad enough to include nontheistic religions. Indeed, the trend is for courts to recognize nontheistic beliefs as having religious status.⁷⁰ In 1890 the Supreme Court posited a theistic definition: “The term ‘religion’ has reference to one’s views of his relations to his

63. *Id.* at 6.

64. *Id.* (citing Matthews, Foreword to Darwin’s *ORIGIN OF SPECIES* [London: J.M. Dent & Sons, Ltd., 1971] at x.).

65. *Id.* at 6-7 (citing Ehrlick & Birch, 214 *NATURE* 352 (1967), also stating that evolutionary dogma is accepted by most biologists/scientists as part of their training).

66. *Id.* at 9 n.1 (citing Dr. N. Heribert-Nilsson, Director of the Botanical Institute at Lund University, Sweden [*Synthetisch Artbildung*, 1953]).

67. “Some of the scientific data (e.g., the regular absence of transitional forms) may be best explained by a creation theory, while other data (e.g., transmutation of species) substantiates a process of evolution.” This 1969 Science Framework for California Public Schools gave California creationists authority for demanding that natural (not supernatural) evidence for creation be included in science teaching. E. LARSON, *supra* note 15, at 123.

68. The *World Book Dictionary* defines “philosophy” as “study of the most general causes and principles of the universe,” and as “a system for guiding life, such as a body of principles of conduct, religious beliefs, or traditions.” 2 *WORLD BOOK DICTIONARY*, *supra* note 55, at 1565.

69. *Id.* at 1766.

70. See *infra* text accompanying notes 76-78. See also Conference, *supra* note 35, at 57-61.

Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."⁷¹

At first blush creationism seems to fit into this definition. Indeed, a program that teaches directly from a religious text and coerces an affirmative religious response would be within this definition. Yet creation-science as taught in a high school science class could present "scientific data supporting the theory that life abruptly appeared on earth,"⁷² without further teaching that the students have an obligation toward a Creator. No attributes of the First Cause need be described, only that there are facts which logically support belief in a First Cause. Those claiming extensive knowledge of creation-science declare that "it is essentially a collection of scientific data supporting the theory that the physical universe and life within it appeared suddenly and have not changed substantially since appearing."⁷³ Scientific evidence of a theory of origins is separate from religious indoctrination and can be presented without religious reference.⁷⁴

Creation science, its proponents insist, no more must explain *whence* life came than evolution must explain whence came the inanimate materials from which it says life evolved. But even if that were not so, to posit a past creator is not to posit the eternal and personal God who is the object of religious veneration. Indeed, it is not even to posit the "*unmoved mover*" hypothesized by Aristotle and other notably nonfundamentalist philosophers.⁷⁵

Nontheistic philosophical and ethical systems do not share with theistic religions a belief in a Supreme Being, yet they may be considered as religions. "[T]he Supreme Court, when it is called on to do so, will hold that nontheistic beliefs constitute religions within First Amendment usage."⁷⁶ In a conscientious objection case, the Court held a nontheistic ethical belief to meet

71. *Davis v. Beason*, 133 U.S. 333, 342 (1890).

72. *Edwards v. Aguillard*, 107 S. Ct. 2573, 2602 (1987) (Scalia, J., dissenting).

73. *Id.* at 2592 (Scalia, J., dissenting). For example, the nonreligious creationist curriculum could include that the basic laws of nature are constant and invariable (law of gravity, two laws of thermodynamics, laws of motion, law of cause and effect) and that the basic nature of matter and energy is a constant (laws of mass conservation and energy conservation). The First Law of Thermodynamics states that nothing is now being either created or destroyed. The Second Law of Thermodynamics states that every system left to its own devices always tends to move from order to disorder. Both laws support the conclusion that the universe is moving toward lower, not higher, levels of complexity. To a certain degree, general science confirms the creation model while posing a serious problem to the evolution model. H. MORRIS, *supra* note 51, at 18-19, 37-46. Also, the abrupt appearance in the fossil record of complex life and the extreme rarity of transitional life forms in that record are evidence for creation-science. *Edwards v. Aguillard*, 107 S.Ct. at 2599 (Scalia, J., dissenting).

74. *Edwards v. Aguillard*, 107 S.Ct. at 2592 (Scalia, J., dissenting).

75. *Id.* at 2602 (Scalia, J., dissenting).

76. Conference, *supra* note 35, at 57. Dicta that support this view are found in *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Washington Ethical Soc'y v. District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957); *Fellowship of Humanity v. County of Alameda*, 315 P.2d 394 (Cal. Dist. Ct. App. 1957).

the test of "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."⁷⁷ Ethical societies and humanist fellowships have been held to be religions entitled to tax-exempt status as churches.⁷⁸

Evolution has been followed with religious devotion. To scientists and non-scientists alike, "*The Origin of Species* became an oracle, consulted with the reverence usually reserved for Scripture."⁷⁹ George Gaylord Simpson, a well-known Harvard University paleontologist, displayed a missionary zeal toward his evolutionary philosophy of life.⁸⁰ "Hailing such teaching as 'supremely important,' Simpson argued, 'It is evolution that can provide answers, so far as answers can be reached rationally and from objective evidence, to some of those big and universal questions' about how to live and to act."⁸¹ University of Chicago theologian Langdon Gilkey testified that some religious humanists "have taken evolution from its original scientific state and adopted it as a part of their belief system."⁸²

From the beginning, Darwin's theory of origins implicated religion. By contradicting the argument from design, Darwinism seemed inevitably to lead to atheism. Traditional conceptions of sin, moral sanctions of the past, authority of Scripture, and human dignity itself were threatened.⁸³ Early on, scientists wrote articles to defend evolution against charges of atheism.⁸⁴ The theory provoked religious responses from scientists, sociologists, laymen, and clergy. As in the scientific community, religious leaders varied in their acceptance of the theory. Some clergymen accepted evolution;⁸⁵ some incorporated it into their world views;⁸⁶ others rejected it altogether.⁸⁷

That the theory of evolution has challenged believers in the Genesis account is obvious. Christian fundamentalists might be offended by evolution-science,⁸⁸ and secular humanists might be offended by creation-science.⁸⁹ But an

77. *United States v. Seeger*, 380 U.S. 163, 176 (1965).

78. See *supra* note 76.

79. R. HOFSTADTER, *supra* note 31, at 16.

80. E. LARSON, *supra* note 15, at 127.

81. *Id.* at 128, citing G. SIMPSON, *THIS VIEW OF LIFE: THE WORLD OF AN EVOLUTIONIST* 37-38 (1964).

82. *Id.* at 128 (citing L. GILKEY, in *MCLEAN TRANSCRIPT* 227).

83. R. HOFSTADTER, *supra* note 31, at 25.

84. *Id.* at 13.

85. St. George Mivart, Henry Ward Beacher. *Id.* at 26, 29.

86. James McCosh, President of Princeton University. *Id.* at 27.

87. Dwight L. Moody, Charles Hodge, Orestes A. Brownson. *Id.* at 25, 26. The Genesis version of creation "must be maintained until the contrary is fully demonstrated; the burden of proof therefore lies with Darwin." *Id.* at 26.

88. Fundamentalists generally hold that the Scriptures are inerrant, and probably most take them as literally true. *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255, 1259 n.4 (E.D. Ark. 1982).

89. Secular humanists believe "that man is just as much a natural phenomenon as an animal or plant: that his body, mind and soul were not supernaturally created but are products of evolution, and that he is not under the control or guidance of any supernatural being or beings, but has to rely on himself and his own powers." Kennedy, *What's Happened to American Education?*, in *THE REBIRTH OF AMERICA* 121, 122 (1986) (citing Sir Julian Huxley).

independent issue is whether evolution-science or creation-science is inherently religious. A scientific method is neutral as to religion when it does not depend upon "leaps of faith" but rather upon concrete evidence.⁹⁰ One creation scientist makes the following observations: "While evolutionists deny the miraculous in the origin of living things, the evolutionary process, given enough time, supposedly produces miracles."⁹¹ He illustrates the point by supposing that a frog turning instantaneously into a prince equals a nursery tale, but that a frog turning into a prince over 300 million years equals science.⁹² Evolutionists have "faith" that given enough time, one species can give birth to a new species,⁹³ despite a lack of physical evidence proving this has occurred.⁹⁴

Creationism is religious when it relies solely on faith in the biblical account in Genesis to "prove" that all life was created separately and the species are immutable. Evolutionary theory is as religious as creationism to the extent it depends on speculation without sufficient physical evidence to prove its tenets. Evolutionists are no more scientific than creationists when they reach beyond "knowledge based on observed facts and tested truths,"⁹⁵ and hold fast to their belief system "with reverence or devotion."⁹⁶

Constitutionality of Balanced Treatment

Comparison of the two leading models of origins roughly demonstrates how creationism can be as scientific as evolutionary theory, and evolutionary theory can be as religious as creationism.⁹⁷ Because both theories share common characteristics, equal treatment in public schools is warranted. This is not to say that they are equally true or equally persuasive, but that the same first amendment standard must be applied to each in determining their treatment in the classroom.

90. See *supra* text accompanying notes 65-66.

91. D. GISH, *EVOLUTION: THE FOSSILS SAY NO!* 4 (1973).

92. *Id.* at 5.

93. But the chief cause of our natural unwillingness to admit that one species has given birth to clear and distinct species, is that we are always slow in admitting great changes of which we do not see the steps. . . . The mind cannot possibly grasp the full meaning of the term of even a million years; it cannot add up and perceive the full effects of many slight variations, accumulated during an almost infinite number of generations.

C. DARWIN, *THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION* 240 (Encyclopedia Britannica, Inc., vol. 49, Great Books of the Western World, 1952).

94. Various weaknesses in the evolutionary theory are: "conflicts among evolutionary scientists, the missing links in the fossil record, the contrivance of Java Man from slight evidence, and the Piltdown Man hoax." E. LARSON, *supra* note 15, at 102.

95. See the definition of "science," *supra* note 55.

96. See the definition of "religion," *supra* note 69. An outstanding British biologist observed that the theory of evolution is "universally accepted not because it can be proved by logically coherent evidence to be true, but because the only alternative, special creation, is clearly incredible." Watson, *Adaptation*, 123 *NATURE* 233 (1929). Evolutionists are protected in their belief under the free exercise clause ("Men may believe what they cannot prove." *United States v. Ballard*, 322 U.S. 78, 86 (1944)), but should not use government to promote their beliefs in public schools.

97. See E. LARSON, *supra* note 15, at 149.

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁹⁸ The religion clauses of the first amendment were included in the Constitution primarily for the purpose of restraining the federal government from interfering with then-existing state establishments of religion.⁹⁹ Yet the Supreme Court later held that the fourteenth amendment applied the establishment clause¹⁰⁰ and the free exercise clause¹⁰¹ to the states.

“[W]hen the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of representatives of the actual people of the here and now.”¹⁰² In this way, judicial review is a counter-majoritarian, undemocratic force.¹⁰³ “Society consents to be ruled undemocratically” within the enduring principles of the Constitution.¹⁰⁴ Tyranny of the minority occurs when legitimate majority power is usurped by the Court imposing its own value choices rather than a valid constitutional theory.¹⁰⁵ “Striking down a law approved by the democratically elected representatives of the people is no minor matter.”¹⁰⁶

The Supreme Court has created standards to analyze whether a given law violates the establishment clause¹⁰⁷ or the free exercise clause.¹⁰⁸ The Louisiana Balanced Treatment Act does not inhibit the free exercise of religion but arguably is an attempt to remedy such inhibition.¹⁰⁹

98. U.S. CONST. amend. I.

99. *Abington School Dist. v. Schempp*, 374 U.S. 203, 309-10 (1963) (Stewart, J., dissenting). “[A]s late as the time of the Revolutionary War, there were established churches in at least eight of the thirteen former colonies and established religions in at least four of the other five.” *Engel v. Vitale*, 370 U.S. 421, 427-28 (1962).

100. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

101. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

102. W. LOCKHART, Y. KAMISAR, J. CHOPER & S. SHIFFRIN, *CONSTITUTIONAL LAW* 18 (1986) [hereinafter W. LOCKHART] (citing A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962)).

103. *Id.*

104. W. LOCKHART, *supra* note 102, at 29, citing Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 2-3 (1971).

105. *Id.* “Quixotry . . . is not an express constitutional basis for voiding a statute.” E. LARSON, *supra* note 15, at 113 (discussing *Epperson v. Arkansas*, 393 U.S. 97 (1968)).

106. *Edwards v. Aguillard*, 107 S. Ct. 2573, 2600 (1987) (Scalia, J., dissenting). The Court evades the force of the express purpose of the Act “by stubbornly misinterpreting it, and then finding that the provisions of the Act do not advance that misinterpreted purpose, thereby showing it to be a sham.” *Id.*

107. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

108. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

109. Exclusive instruction in the general theory of evolution has been challenged in court. *See Bird, supra* note 45, at 515 n.3.

Segraves, a southern California suburban housewife and mother, claimed the right to protect her son’s freedom to believe in Creationism from being violated by evolutionary teaching.

“Do Christian children have equal rights with atheist and unbelieving children under the law in tax supported schools?” Segraves asked. Concluding that they do and that evolutionary teaching promotes atheism, Segraves argued that “a neutral position can be achieved in the school by the objective presentation of both points of view regarding origins.” She added, “To restrict the teaching concerning origins

The controversy over science instruction in public schools raises difficult constitutional issues under the First Amendment: whether exclusive presentation of the general theory of evolution in public school classes burdens free exercise of creationist religions, whether the peculiar characteristics of public schools make this burden substantial, whether the governmental interest in presentation of the general theory justifies the restraint on religious freedom, and whether available methods of relief would violate the First Amendment prohibition against establishment of religion.¹¹⁰

Where a state law fosters free exercise of religion, it might go as far as to establish religion in violation of the first amendment. This is the inevitable tension between free exercise and establishment.¹¹¹ Whether the Balanced Treatment Act established religion was the issue in *Edwards v. Aguillard*.¹¹²

Establishment of Religion

Edwards held that the Balanced Treatment Act violated the establishment clause of the first amendment for failure to have a valid secular purpose. The three establishment tests articulated in *Lemon v. Kurtzman*¹¹³ are not precise limits to the constitutional inquiry but serve only as guidelines with which to measure impairment of establishment clause objectives.¹¹⁴ The majority, interpreting the Act under the purpose prong, discredited the express

to a single theory, that of organic evolution, violates the Constitutional prohibition against the teaching of sectarian religious views just as clearly as if the teaching concerning origins were restricted to the Book of Genesis.”

E. LARSON, *supra* note 15, at 96.

Wright alleged that evolutionary teaching unconstitutionally inhibited the free exercise of her creationist religion while establishing a “religion of secularism.” *Id.* at 124. She challenged the constitutionality of teaching the theory of evolution as a fact in public schools “without critical analysis and without reference to other theories which purport to explain the origin of the human species.” According to her complaint, such teaching represented a direct attack “on creationist religious beliefs” in violation of the Free Exercise Clause and lent “official support to a ‘religion of secularism’ ” in violation of the Establishment Clause.

Id. at 132. The judge dismissed Wright’s complaint for failing to state a claim upon which relief could be granted. Dismissal on these grounds is severe and rare. *Id.*

110. Bird, *supra* note 45, at 518. The comprehensive note argues that “exclusive public school instruction in the general theory of evolution, at the secondary and elementary levels, abridges free exercise of religion.” *Id.*

111. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973). Chief Justice Burger suggested that “where the state law is genuinely directed at enhancing a recognized freedom of individuals . . . the Establishment Clause no longer has a prohibitive effect.” *Id.* at 802 (Burger, C.J., dissenting in part).

112. 107 S. Ct. 2573 (1987).

113. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

114. *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 383 (1985) (citing *Meek v. Pittenger*, 421 U.S. 349, 359 (1975)). See also *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (settled principle but no more than helpful signpost).

legislative purpose stated in the Act.¹¹⁵ With no analysis of either the effect or entanglement prongs, the Court stated that the Act advances a religious doctrine and seeks to employ support of government to achieve a religious purpose.¹¹⁶ In contrast, this note discusses the reasons for finding a valid secular purpose, a valid primary effect, and limited entanglement of government with religion.

“First, the statute must have a secular legislative purpose.”¹¹⁷ This prong does not require that a statute have “exclusively secular” objectives.¹¹⁸ That a law happens to harmonize with the purposes of a religious group will not render void an otherwise valid legislative purpose.¹¹⁹ The Court has found a secular purpose was lacking only when “there was *no question* that the statute . . . was motivated *wholly* by religious considerations.”¹²⁰ The Court has had a general “reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State’s program may be discerned from the face of the statute.”¹²¹

Only one secular purpose is required under *Lemon*,¹²² and the statute passed by the Louisiana legislators spelled it out: “This subpart is enacted for the purposes of protecting academic freedom.”¹²³ The Court’s views about the evolution and creation models should be beside the point; its task is to ascertain what the legislators believed when they voted the bill into law, including this declaration of purpose.¹²⁴ While “academic freedom” was not defined in the statute, the legislature presumably would not have approved the Act

115. *Edwards v. Aguillard*, 107 S. Ct. at 2578-83.

116. *Id.* at 2584.

117. *Lemon v. Kurtzman*, 403 U.S. at 612.

118. *Wallace v. Jaffree*, 472 U.S. 38, 64 (1985) (Powell, J., concurring) (citing *Lynch v. Donnelly*, 465 U.S. 668, 681 n.6 (1984)).

119. *Edwards v. Aguillard*, 107 S. Ct. at 2594 (Scalia, J., dissenting); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

As virtually all the churches believe that the right to speak publically [sic] on moral issues is an essential, integral part of the practice of faith, forbidding them from lobbying would be a plain denial of the right to free exercise of religion. . . . It is well to remember that this is a principle which stands even if we disagree with the content of the particular program a group is advocating. Liberal churchmen who lobbied so brilliantly for civil rights legislation in the 1960s can hardly tell the Moral Majority and its ilk that they have no right to lobby for their own conservative program. The place to oppose them is on the substance of the issues, not on their right to push their causes.

Conference, *supra* note 35, at 88.

120. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (emphasis added). Even where the benefits to religion were substantial . . . [citations omitted], we saw a secular purpose and no conflict with the Establishment Clause.” *Id.*

121. *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). Interestingly, the *Lemon* Court gave appropriate deference to the clear statement of purpose in the statutes themselves: to enhance the quality of secular education in all schools covered by the compulsory attendance laws. *Lemon v. Kurtzman*, 403 U.S. at 613.

122. *Edwards v. Aguillard*, 107 S. Ct. at 2593-94, 2605 (Scalia, J., dissenting).

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

124. *Edwards v. Aguillard*, 107 S. Ct. at 2597-98 (Scalia, J., dissenting).

had it thought the purpose would be misinterpreted as violating the Constitution.¹²⁵ Legislators, as well as Justices, are bound by oath to support the Constitution.

Taken as a whole, the Act suggests several secular purposes that would promote academic freedom. The very existence of the Act indicates a perceived problem of sufficient magnitude to enlist legislative action. What evil was the law intended to cure? Its direction toward balanced treatment indicates a remedy for imbalance. The Court in *Edwards* refers to the Act time and again as the "Creationism Act,"¹²⁶ despite its precise provision for balance in the teaching of origins. This label indicates the Court noticed that evolution teaching currently predominates in public schools.

The *Edwards* Court said that the "goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science."¹²⁷ The implication is that the Balanced Treatment Act does not mean what it says, but instead is an antievolution, procreation law. A fairer reading is that the Act promotes "truth in advertising," "equal access," and "free marketplace of ideas."

To "advertise" in a high school biology class that one explanation of origins is believed by all scientists is dishonest.¹²⁸ The theory of evolution is one of several explanations of origins, and balanced treatment serves the secular purpose of acknowledging the truth that more than one theory exists and can be supported rationally.¹²⁹ How can the Act "provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety,"¹³⁰ when it merely provides a forum for interpretation of data when contrary views are presented? If creation-science does not persuade based on the evidence alone (no religious indoctrination) then evolutionists are not threatened. The value of the free marketplace of ideas is that concepts remain that are persuasive in themselves. Therefore, counterbalancing evolution teaching with creation-science teaching will "discredit" evolution only if it can do so on the merits of the evidence.¹³¹

125. See *supra* note 106. See also *Edwards v. Aguillard*, 107 S. Ct. at 2591 (Scalia, J., dissenting).

126. *Edwards v. Aguillard*, 107 S. Ct. at 2575-76, 2582-84.

127. *Id.* at 2579.

128. See *supra* note 59. See generally O. MAYO, *NATURAL SELECTION AND ITS CONSTRAINTS* (1983) and M. RIDLEY, *supra* note 33.

129. See *supra* note 67. A 1973 Tennessee bill called for equal space for alternative theories in textbooks where theory of human origins is presented. E. LARSON, *supra* note 15, at 134-35. A 1970 proclamation of the Texas Board of Education stated: "Textbooks that treat the theory of evolution should identify it as only one of several explanations of the origins of humankind and avoid limiting young people in their search for meanings of their human existence." *Id.* at 139. Kentucky gives teachers the option of presenting biblical creationism along with evolution. *Id.* at 143-44. The Indiana Textbook Commission approved a creationist text along with six other texts; in 1976, one school adopted only the creationist text, which was later disallowed. *Id.* at 145-46.

130. *Edwards v. Aguillard*, 107 S. Ct. at 2582.

131. *Id.* at 2580.

Pluralism, diversity of association, viewpoint, and enterprise,¹³² educational excellence, educational alternatives, and wholesome competition,¹³³ and freedom of thought¹³⁴ are among valid secular purposes recognized by the Court in the past. If indeed science teachers are exclusively teaching evolution as true, state action to broaden science instruction on origins is valid. The Court said that Louisiana schoolteachers could already teach any theory about the origin of life, and therefore the Act provided them no new authority.¹³⁵ Although no law prohibited teaching any theory of origins, there was some indication that creation-science "is now being censored from or misrepresented in the public schools."¹³⁶ Senator Keith, who introduced the bill, stressed that "to . . . teach religion and disguise it as creationism . . . is not my intent. My intent is to see to it that our textbooks are not censored."¹³⁷ It would seem a valid endeavor to balance federal support for evolutionist textbooks (BSCS) with some state funds for creationist texts.¹³⁸

The statute at issue in *Epperson v. Arkansas* eliminated evolutionary teaching from the science curriculum and was declared unconstitutional.¹³⁹ The Court said "the state has no legitimate interest in protecting any or all religions from views distasteful to them."¹⁴⁰ The statute at issue in *Edwards* did not prohibit teaching evolution nor any view of origins, but did insist on balance when origin theories were taught. Because evolution teaching already occurs, the overall effect of the Act is to bring creation-science into the classroom. Where is the state's "legitimate interest in protecting" secular humanists or other evolution proponents "from views distasteful to them?"

Despite the statute's multiple provisions that treat both camps neutrally,¹⁴¹ the Court found a "discriminatory preference for the teaching of creation science."¹⁴² Legislatures generally are in the business of correcting perceived or real problems. "If it ain't broke, don't fix it" is a familiar axiom. Given the unavailability of creation-science textbooks and the ample supply of evolution-science textbooks, and given that discrimination against teachers of evolution is not currently a problem and that *Epperson* might be understood to protect them already, it is likely the legislature provided a remedy for existing but not potential discrimination. The Act could easily be amended to equalize treatment where it is unequal without changing the purpose or effect of the law.¹⁴³

132. *Walz v. Tax Comm'n*, 397 U.S. 664, 689 (1970) (Brennan, J., concurring).

133. *Mueller v. Allen*, 463 U.S. 388, 395 (1983).

134. *United States v. Ballard*, 322 U.S. 78, 86 (1944).

135. *Edwards v. Aguillard*, 107 S. Ct. at 2579.

136. *Id.* at 2599.

137. *Id.*

138. See *supra* text accompanying notes 26-28.

139. 393 U.S. 97 (1968).

140. *Id.* at 107 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952)).

141. See LA. REV. STAT. ANN. § 17:286.1-286.6 (West 1982).

142. *Edwards v. Aguillard*, 107 S. Ct. at 2579. See LA. REV. STAT. ANN. § 17:286.7 (West 1982).

143. *Edwards v. Aguillard*, 107 S. Ct. at 2602-03 (Scalia, J., dissenting).

“[S]econd, its principal or primary effect must be one that neither advances nor inhibits religion.”¹⁴⁴ With no analysis of the effects test, the Court declared that the Act sought “to employ the symbolic and financial support of government to achieve a religious purpose.”¹⁴⁵ The Court has consistently rejected the argument that “any program which in some manner aids an institution with a religious affiliation” violates the establishment clause.¹⁴⁶ But if the aid is direct and substantial in effect,¹⁴⁷ then the Act fails under *Lemon’s* second test. Here the “aid” is indirect and incidental.¹⁴⁸

The effect of the Balanced Treatment Act is not primarily religious but academic. Its scope is limited to scientific evidence and subsequent inferences. It does not approve advancing religious doctrine. Any benefit to religion will come from the persuasiveness of the evidence for sudden appearance of life or for gradual appearance of life. The principal advantage of balanced treatment is the promotion of academic freedom of students by protecting them from indoctrination. Where only one theory of origins is taught, and evolution is the one, children most likely are inhibited from freely exercising their contrary religious beliefs.¹⁴⁹ In this situation, evolution taught as fact has the indirect effect of inhibiting creationist belief, arguably in violation of the free exercise clause. With balanced treatment, religious beliefs regarding origins taught at home will not be inhibited but rather accommodated by one of the two theories presented.¹⁵⁰ This effect on religion is indirect and neither advances nor inhibits students’ faith.

Neither does balanced treatment employ symbolic government support for any religion. Under statutes mandating Bible reading and prayer in school,¹⁵¹ “a student who did not share the religious beliefs expressed in the course of the exercise was left with the choice of participating, thereby compromising the nonadherent’s beliefs, or withdrawing, thereby calling attention to his

144. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (citing *Board of Educ. v. Allen*, 392 U.S. 236 (1968)).

145. *Edwards v. Aguillard*, 107 S. Ct. at 2584.

146. *Mueller v. Allen*, 463 U.S. 388, 393 (1983) (quoting *Hunt v. McNair*, 413 U.S. 734, 742 (1973)).

147. *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 394 (1985).

148. *Id.*

149. See Lines, *supra* note 42, at 52-53 (illustrating that a child who answers a test question consistent with the creationist view but inconsistent with the evolutionist view might receive a reduced grade in school). Cf. the words of Justice Black: “The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can . . . force [a person] to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs.” *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947).

150. See *Walz v. Tax Comm’n*, 397 U.S. 664, 673 (1970) (“The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.”).

151. See *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (Bible reading); *Engel v. Vitale*, 370 U.S. 421 (1962) (prayer).

or her nonconformity.”¹⁵² Prior to balanced treatment, a child whose religious sensibilities were offended by the teaching of evolution as fact was subjected to the same dilemma. Children of tender years were necessarily influenced by the government support of evolutionist teaching.¹⁵³ With balanced treatment, all children have a chance to participate free of government sponsorship of one theory of origin.

Equal access does not implicate government endorsement of a religious belief. “[B]y creating a forum the [State] does not thereby endorse or promote any of the particular ideas aired there.”¹⁵⁴ The Balanced Treatment Act in essence creates a forum for the discussion of origins. “[T]he ‘primary effect’ of such a policy would not be to advance religion, but rather to further the neutral purpose of developing students’ ‘social and cultural’ awareness as well as [their] intellectual curiosity’.”¹⁵⁵ “[A]n open forum in a public [school] does not confer any imprimature of state approval on religious sects or practices.”¹⁵⁶

“[F]inally, the statute must not foster ‘an excessive government entanglement with religion’.”¹⁵⁷ The goal in producing teaching materials to implement the Balanced Treatment Act is to separate the religious indoctrination from the scientific evidence. State officials are called on to determine whether creationist materials are free of religious tenets, but the more difficult task is determining whether evolutionist materials are likewise wholly secular.¹⁵⁸ While recognizing the difficulty, the Court has approved state officials determining whether particular books were or were not secular.¹⁵⁹

A book can be inspected once; its contents are ascertainable; its acceptability

152. *Wallace v. Jaffree*, 472 U.S. 38, 72 (1985) (O'Connor, J., concurring).

153. *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 390 (1985). The majority in *Edwards* reiterated the need for vigilance in monitoring elementary and secondary schools to ensure compliance with the establishment clause.

Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. [Citations omitted.] The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.

Edwards v. Aguillard, 107 S. Ct. 2573, 2577 (1987). The very same considerations call for ending the exclusive teaching of evolution as fact. Consider the following: “In public schools, both evolution and creation should be taught as equally as possible, since there are children of taxpayers representing both viewpoints in the classes. If people wish *only* evolution to be taught, they should establish private schools with that purpose.” H. MORRIS, *supra* note 51, at 14.

154. *Widmar v. Vincent*, 454 U.S. 263, 272 n.10 (1981).

155. *Id.* at 267.

156. *Id.* at 274.

157. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

158. See *supra* text accompanying notes 69-96.

159. *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (upholding loan of secular textbooks to parents or children attending nonpublic schools).

can be determined.¹⁶⁰ Once evolution-science and creation-science curricula are developed, selected, and implemented, there need be only limited contact between government and religion. With religion-neutral resources, no “comprehensive, discriminating, and continuing state surveillance” will be required to ensure that the first amendment will be respected.¹⁶¹

The Louisiana Balanced Treatment Act does not establish religion under the first amendment. The Act has several valid secular purposes, one of which is promoting academic freedom of students from indoctrination in origins. Its primary effect neither advances nor inhibits religion; it affects religious belief only indirectly, if at all. Finally, the statute does not foster excessive government entanglement with religion.

Conclusion

Curiosity is a marvelous thing. The origin of life is worthy of attention. The truth is that the study of origins is a mixture of science and speculation, philosophy and religion. This unique study has a place in the public school. Given that there are basically two theories of origins, the following approaches are possible: (1) teach creationist theories and exclude evolutionist theories; (2) teach evolutionist theories and exclude creationist theories; (3) exclude both theories from the public school science class; (4) include both theories in the public school science class; (5) bifurcate the study of origins and teach only the data in science class and save the interpretation of data for a comparative religion class.

Teaching one theory to the exclusion of the other is unacceptable. The result of that approach is imbalance, misinformation, limited access, and censorship. Excluding both theories is the simplest solution. That approach would avoid controversy but at the cost of stifling curiosity about beginnings. Bifurcating the study of origins is the hardest; it recognizes the true nature of the component parts of the theories, but it would lack continuity where the science teacher does not also teach comparative religions. Including both theories, and variations of those theories, is the fairest and most beneficial approach; it encourages students to think for themselves critically about scientific theories, rather than accept one point of view without question.

Justice Scalia and Chief Justice Rehnquist agree that “[t]he Act’s reference to ‘creation’ is not convincing evidence of religious purpose.”¹⁶² Yet admittedly the very word “creation” brings to mind a “creator,” with or without a capital “C.” The label “evolution” does not carry the religious connotation, though it too speculates about life from nonlife. Perhaps changing the name of “creation-science” would eliminate the fear of it being more religious than scientific. Certainly, this method called creation-science must stand firmly

160. See *Lemon v. Kurtzman*, 403 U.S. at 617, 619.

161. *Id.* at 619.

162. *Edwards v. Aguillard*, 107 S. Ct. at 2602 (Scalia, J., dissenting).

on objective rational principles rather than any religious text or tenet. Likewise, evolution-science must be objective and rational.

The Balanced Treatment Act was an attempt to handle the study of origins in the fairest and least restrictive manner. We do our students a disservice when we permit teachers to teach only one theory of beginnings, without critiques of that theory. “[T]eaching 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.”¹⁶³ This the Balanced Treatment Act proposed to do, but it was struck down before having been implemented.¹⁶⁴

“The tensions between church and state are not by nature resolvable. We aim for a tolerable compromise.”¹⁶⁵ The balanced treatment approach is the coveted compromise for persons who value the free marketplace of ideas, who value truth, who value the secular idea of accommodating various religious views rather than government sponsorship of one view, who value students’ freedom to inquire free of government censorship. As the Louisiana Governor said when he signed the bill into law: “Academic freedom can scarcely be harmed by inclusion. It can be harmed by exclusion.”¹⁶⁶ Those who have made up their minds and those who are undecided are beneficiaries under the Act.

By not legislating the issue, some states leave curriculum decisions to local school boards or even to individual teachers. Some states see no problem in teaching evolutionary theories to the exclusion of creationist theories. But where a state legislature perceives a problem and enacts a law that provides for the teaching of both theories of origins when either is taught, it exercises its legitimate majority power. The United States Supreme Court exceeds its role when it substitutes its judgment for that of the state legislature absent a valid constitutional theory. Louisiana’s Balanced Treatment Act does not establish religion in violation of the first amendment; therefore, the will of the majority should be upheld.

V. Kay Curtis

163. *Id.* at 2583.

164. *Id.* at 2576 n.1. See *supra* note 9. “The Louisiana Supreme Court has never been given the opportunity to interpret the Balanced Treatment Act, state officials have never attempted to implement it, and it has never been the subject of a full evidentiary hearing.” *Id.* at 2592 (Scalia, J., dissenting).

165. Conference, *supra* note 35, at 83.

166. E. LARSON, *supra* note 15, at 155.