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LAWWA 602: Law & Religion
Reading Materials

LAW & RELIGION

CHAPTER III: RELIGION IN THE PUBLIC SCHOOLS

Introduction

The Establishment Clause is vigorously enforced in the public school setting because schoolchildren are particularly impressionable, teachers serve as authority figures, and compulsory education laws make students a captive audience for school activities. Therefore, the introduction of religion into public school curricular and extracurricular activities is carefully monitored by the courts to make sure no "establishment" of religion occurs. This is already clear from *Illinois ex rel. McCollum v. Board of Education* and *Zorach v. Clauson* in Chapter I. This theme will be further developed in the next chapter which includes public school prayer cases.

1. EPPERSON v. ARKANSAS
393 U.S. 97 (1968)

MR. JUSTICE FORTAS delivered the opinion of the Court.

This appeal challenges the constitutionality of the "anti-evolution" statute which the State of Arkansas adopted in 1928 to prohibit the teaching in its public schools and universities of the theory that man evolved from other species of life. The statute was a product of the upsurge of "fundamentalist" religious fervor of the twenties. The Arkansas statute was an adaptation of the famous Tennessee "monkey law" which that State adopted in 1925. The constitutionality of the Tennessee law was upheld by the Tennessee Supreme Court in the *Scopes* case in 1927.

The Arkansas law makes it unlawful for a teacher in any state-supported school or university "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals," or "to adopt or use in any such institution a textbook that teaches" this theory. Violation is a misdemeanor and subjects the violator to dismissal from his position.

The present case concerns the teaching of biology in a high school in Little Rock. According to the testimony, until the events here in litigation, the official textbook furnished for the high school biology course did not have a section on the Darwinian Theory. Then, for the academic year 1965-1966, the school administration, on recommendation of the teachers of biology in the school system, adopted and prescribed a textbook which contained a chapter setting forth "the theory about the origin . . . of man from a lower form of animal."

Susan Epperson was employed by the Little Rock school system in the fall of 1964 to teach 10th grade biology at Central High School. At the start of the next academic year, 1965, she was confronted by the new textbook (which one surmises from the record was not unwelcome to her). She faced at least a literal dilemma because she was supposed to use the new textbook for

classroom instruction and presumably to teach the statutorily condemned chapter; but to do so would be a criminal offense and subject her to dismissal.

She instituted the present action in the Chancery Court of the State, seeking a declaration that the Arkansas statute is void and enjoining the State and the defendant officials of the Little Rock school system from dismissing her for violation of the statute's provisions.

Only Arkansas and Mississippi have such "anti-evolution" or "monkey" laws on their books. There is no record of any prosecutions in Arkansas under its statute. Nevertheless, the appeal as of right is properly here, and it is our duty to decide the issues presented.

The law must be stricken because of its conflict with the constitutional prohibition of state laws respecting an establishment of religion. The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not intervene in conflicts which arise in the daily operation of school systems and which do not directly implicate basic constitutional values. On the other hand, "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom."

There can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles of any religious sect or dogma. While study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition, the State may not adopt programs or practices in its public schools or colleges which "aid or oppose" any religion. This prohibition is absolute. It forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma. The test was stated in *Abington School District* v. *Schempp*: "What are the purpose and the 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."

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. No suggestion has been made that Arkansas' law may be justified by considerations other than religious views. It is clear that fundamentalist sectarian conviction is the law's reason for existence. Its antecedent, Tennessee's "monkey law," candidly stated its purpose: to make it unlawful "to teach any theory that denies

the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals." Perhaps the publicity attendant upon the *Scopes* trial induced Arkansas to adopt less explicit language, but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which "denied" the divine creation of man.

Arkansas' law cannot be defended as an act of religious neutrality. The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account. Plainly, the law is contrary to the mandate of the First Amendment."

2. STONE v. GRAHAM
449 U.S. 39 (1980)

PER CURIAM

A Kentucky statute requires the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public classroom in the State.[1] Petitioners, claiming that this statute violates the Establishment and Free Exercise Clauses of the First Amendment, sought an injunction against its enforcement. The state trial court upheld the statute, finding that its "avowed purpose" was "secular and not religious," and that the statute would "neither advance nor inhibit any religion or religious group" nor involve the State excessively in religious matters. The Supreme Court of Kentucky affirmed by an equally divided court. We reverse.

This Court has announced a three-part test for determining whether a challenged state statute is permissible under the Establishment Clause of the United States Constitution: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster 'an excessive government entanglement with religion.'" *Lemon* v. *Kurtzman*.

If a statute violates any of these three principles, it must be struck down. We conclude that Kentucky's statute requiring the posting of the Ten Commandments in public school rooms has no secular legislative purpose, and is therefore unconstitutional.

The Commonwealth insists that the statute serves a secular legislative purpose, observing that the legislature required the following notation at the bottom of each display: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal

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

code of Western Civilization and the Common Law of the United States."

The trial court found the "avowed" purpose of the statute to be secular. Under this Court's rulings, however, such an "avowed" secular purpose is not sufficient to avoid conflict with the First Amendment. In *Abington School District* v. *Schempp*, 374 U.S. 203 (1963), this Court held unconstitutional the daily reading of Bible verses and the Lord's Prayer in the public schools, despite the school district's assertion of such secular purposes as "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature."

The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.

This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. Posting of religious texts on the wall serves no such educational function. If the posted copies are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However this is not a permissible state objective under the Establishment Clause.

It does not matter that the posted copies of the Ten Commandments are financed by private contributions, for the mere posting of the copies under the auspices of the legislature provides the "official support of the State Government" that the Establishment Clause prohibits. Nor is it significant that the Bible verses are merely posted on the wall, rather than read aloud as in *Schempp* and *Engel*, for "it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment." We conclude that Ky. Rev. Stat. § 158.178 (1980) violates the first part of the *Lemon* test, and thus the Establishment Clause.

JUSTICE REHNQUIST, dissenting.

The Court concludes that the Kentucky statute "has *no* secular legislative purpose," and that "[the] pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." This even though, as the trial court found, "[the] General Assembly thought the statute had a secular legislative purpose and specifically said so." The Court's summary rejection of a secular purpose articulated by the legislature and confirmed by the state court is without precedent in Establishment Clause jurisprudence. This Court regularly looks to legislative articulations of a statute's purpose in Establishment Clause cases and accords such pronouncements deference.

The Court rejects the secular purpose articulated by the State because the Decalogue is "undeniably a sacred text." It is equally undeniable, however, that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World.

Certainly the State was permitted to conclude that a document with such secular significance should be placed before its students, with an appropriate statement of the document's secular import.[1]

The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin. This Court has recognized that "religion has been closely identified with our history and government," and that "[the] history of man is inseparable from the history of religion," *Engel* v. *Vitale*, 370 U.S. 421, 434 (1962). Kentucky has decided to make students aware of this fact by demonstrating the secular impact of the Ten Commandments. The words of Justice Jackson, concurring in *McCollum* v. *Board of Education*, 333 U.S. 203, 235-236 (1948), merit quotation at length:

"Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach appreciation of the arts if we are to forbid exposure to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. . . . I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity -- both Catholic and Protestant -- and other faiths accepted by a large part of the world's peoples. One can hardly respect the system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared."

I dissent from what I cannot refrain from describing as a cavalier summary reversal, without benefit of oral argument or briefs on the merits, of the highest court of Kentucky.

4. EDWARDS v. AGUILLARD
482 U.S. 578 (1987)

JUSTICE BRENNAN delivered the opinion of the Court. JUSTICE O'CONNOR joins all but Part II of this opinion.

The question for decision is whether Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction" Act (Creationism Act) is facially invalid as violative of the Establishment Clause.

I.

The Creationism Act forbids the teaching of the theory of evolution in public schools unless accompanied by instruction in "creation science." No school is required to teach evolution or

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[1] The Court's emphasis on the religious nature of the first part of the Ten Commandments is beside the point. The document as a whole has had significant secular impact, and the Constitution does not require that Kentucky students see only an expurgated or redacted version containing only the elements with directly traceable secular effects.

creation science. If either is taught, however, the other must also be taught. The theories of evolution and creation science are statutorily defined as "the scientific evidences for [creation or evolution] and inferences from those scientific evidences."

II.

The Court has been vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Students in such institutions are impressionable and their attendance is involuntary. 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. Therefore, in employing the *Lemon* test, we must do so mindful of the concerns that arise in the context of public elementary and secondary schools. We now turn to the evaluation of the Act under the *Lemon* test.

III.

Lemon's first prong focuses on the purpose that animated adoption of the Act. "The prong asks whether government's actual purpose is to endorse or disapprove of religion." If the law was enacted for the purpose of endorsing religion, "no consideration of the second or third criteria [of *Lemon*] is necessary." In this case, appellants have identified no clear secular purpose for the Act.

True, the Act's stated purpose is to protect academic freedom. The Court of Appeals, however, correctly concluded that the Act was not designed to further that goal.[1] Even if "academic freedom" is read to mean "teaching all of the evidence" with respect to the origin of human beings, the Act does not further this purpose. 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.

While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham. That requirement is precisely tailored to the Establishment Clause's purpose of assuring that Government not intentionally endorse religion or a religious practice."

It is clear from the legislative history that the purpose of the legislative sponsor, Senator Bill Keith, was to narrow the science curriculum. During the legislative hearings, Senator Keith stated: "My preference would be that neither [creationism nor evolution] be taught." Such a ban on teaching undermines the provision of a comprehensive scientific education.

It is equally clear that requiring schools to teach creation science with evolution does not advance academic freedom. The Act does not grant teachers a flexibility that they did not already

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[1] As the Court of Appeals explained, the Act "requires the teaching of creation-science whenever evolution is taught. Although states may prescribe public school curriculum concerning science instruction under ordinary circumstances, the compulsion inherent in the Balanced Treatment Act is, on its face, inconsistent with the idea of academic freedom as it is universally understood." The Act actually serves to diminish academic freedom by removing the flexibility to teach evolution without also teaching creation science, even if teachers determine that such curriculum results in less effective and comprehensive science instruction.

possess to supplant the present science curriculum with the presentation of theories, besides evolution, about the origin of life. Indeed, the Court of Appeals found that no law prohibited Louisiana public school teachers from teaching any scientific theory. The Act provides schoolteachers with no new authority. Thus the stated purpose is not furthered by it.

Furthermore, the goal of basic "fairness" is hardly furthered by the Act's discriminatory preference for the teaching of creation science and against the teaching of evolution.[2] While requiring that curriculum guides be developed for creation science, the Act says nothing of comparable guides for evolution. Similarly, resource services are supplied for creation science but not for evolution. Only "creation scientists" can serve on the panel that supplies the resource services. The Act forbids school boards to discriminate against anyone who "chooses to be a creation-scientist" or to teach "creationism," but fails to protect those who choose to teach evolution or any other noncreation science theory, or who refuse to teach creation science.

If the Louisiana Legislature's purpose was solely to maximize the comprehensiveness and effectiveness of science instruction, it would have encouraged the teaching of all scientific theories about the origins of humankind. But under the Act's requirements, teachers who were once free to teach any and all facets of this subject are now unable to do so. Moreover, the Act fails even to ensure that creation science will be taught, but instead requires the teaching of this theory only when the theory of evolution is taught. Thus the Act does not serve to protect academic freedom, but has the distinctly different purpose of discrediting "evolution by counterbalancing its teaching at every turn with the teaching of creationism."

There is a historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution. It was this link that concerned the Court in *Epperson* v. *Arkansas*, 393 U.S. 97 (1968). The Court found that there can be no legitimate state interest in protecting particular religions from scientific views "distasteful to them," and concluded "that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."

These same historic and contemporaneous antagonisms between the teachings of certain religious denominations and the teaching of evolution are present in this case. The preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind. The term "creation science" was defined as embracing this particular religious doctrine by those responsible for the passage of the Creationism Act.

The legislative history documents that the Act's primary purpose was to change the science curriculum in order to provide advantage to a religious doctrine that rejects the factual basis of evolution. Out of many possible science subjects taught in the public schools, the legislature chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects. The Creationism Act is designed *either* to promote the theory of creation

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[2] The Creationism Act's provisions appear among other provisions prescribing the courses of study in Louisiana's public schools. These other provisions prescribe courses of study in such topics as driver training, civics, the Constitution, and free enterprise. None of these other provisions mandates "equal time" for opposing opinions within a specific area of learning.

science by requiring that creation science be taught whenever evolution is taught *or* to prohibit the teaching of a scientific theory disfavored by certain religious sects by forbidding the teaching of evolution when creation science is not also taught. The Establishment Clause, however, "forbids *alike* the preference of a religious doctrine *or* the prohibition of theory which is deemed antagonistic to a particular dogma." Because the primary purpose of the Act is to advance a particular religious belief, the Act endorses religion in violation of the First Amendment.

We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught. Indeed, the Court acknowledged in *Stone* v. *Graham* that its decision did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization. In a similar way, teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction. But because the primary purpose of the Creationism Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause.

The Louisiana Creationism Act violates the Establishment Clause because it seeks to employ the symbolic and financial support of government to achieve a religious purpose.

JUSTICE POWELL, with whom JUSTICE O'CONNOR joins, concurring.

The Act mandates that public schools present scientific evidence to support a theory of divine creation whenever they present scientific evidence to support the theory of evolution. From the face of the statute, a purpose to advance a religious belief is apparent.

A religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must predominate. The Act contains a statement of purpose: to "protec[t] academic freedom." This statement is puzzling. "Academic freedom" does not encompass the right of a legislature to structure the public school curriculum in order to advance a particular religious belief. Nevertheless, I read this statement in the Act as rendering the purpose of the statute at least ambiguous. Accordingly, I proceed to review the legislative history of the Act.

My examination of the language and the legislative history of the Balanced Treatment Act confirms that the intent of the Louisiana Legislature was to promote a particular religious belief. I find no persuasive evidence in the legislative history that the legislature's purpose was any different.

Although the discretion of state and local authorities over public school curricula is broad, "the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."

JUSTICE WHITE, concurring in the judgment.

As it comes to us, this is not a difficult case. We usually defer to courts of appeals on the meaning of a state statute, especially when a district court has the same view. Here, the District Judge, relying on the terms of the Act, discerned its purpose to be the furtherance of a religious belief, and the Court of Appeals agreed. Of those four judges, two are Louisianians. I would

accept this view of the statute. Even if as an original matter I might have arrived at a different conclusion, I cannot say that the courts below are so plainly wrong that they should be reversed.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins, dissenting.

Even if I agreed with the questionable premise that legislation can be invalidated under the Establishment Clause on the basis of its motivation alone, without regard to its effects, I would still find no justification for today's decision. The legislators who passed the Balanced Treatment Act were well aware of the potential Establishment Clause problems and considered that aspect of the legislation with care. After seven hearings and several months of study, they approved the Act overwhelmingly and specifically articulated the secular purpose they meant it to serve. Although the record contains abundant evidence of the sincerity of that purpose, the Court today holds that the members of the Louisiana Legislature knowingly lied about it. I dissent.

After examining the statute, its legislative history, and its historical and social context, the Court holds that the Louisiana Legislature acted without "a secular legislative purpose." As I explain below, I doubt whether that "purpose" requirement of *Lemon* is a proper interpretation of the Constitution; but even if it were, I could not agree with the Court's assessment.

This Court has said little about the first component of the *Lemon* test. Almost invariably, we have effortlessly discovered a secular purpose. Nevertheless, a few principles have emerged from our cases, principles which to an unfortunately large extent do not guide the Court's application of *Lemon* today. First of all, "legislative purpose" means the "actual" motives of those responsible for the challenged action. Thus, if those legislators who supported the Balanced Treatment Act *in fact* acted with a "sincere" secular purpose, the Act survives the first component of the *Lemon* test, regardless of whether that purpose is likely to be achieved by the provisions they enacted.

Our cases have also confirmed that when the *Lemon* Court referred to "a secular purpose," it meant "*a* secular purpose." Invalidation under the purpose prong is appropriate when "there [is] *no question* that the statute or activity was motivated *wholly* by religious considerations." Thus, the majority's invalidation of the Balanced Treatment Act is defensible only if the record indicates that the Louisiana Legislature had *no* secular purpose.

It is important to stress that the purpose forbidden by *Lemon* is the purpose to "advance religion." Our cases in no way imply that the Establishment Clause forbids legislators merely to act upon their religious convictions. We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved.

Similarly, we will not presume that a law's purpose is to advance religion merely because it "'happens to coincide or harmonize with the tenets of some or all religions,'" or because it benefits religion, even substantially. Thus, the fact that creation science coincides with the beliefs of certain religions does not itself justify invalidation of the Act.

One final observation: In the past we have repeatedly affirmed "our reluctance to attribute unconstitutional motives to the States." We "presume that legislatures act in a constitutional

manner." This is particularly true where the legislature has specifically considered the question of a law's constitutionality.

II.

We have relatively little information upon which to judge the motives of those who supported the Act. About the only direct evidence is the statute itself and transcripts of the seven committee hearings at which it was considered. Nevertheless, there is ample evidence that the majority is wrong in holding that the Balanced Treatment Act is without secular purpose.

The Louisiana Legislature explicitly set forth its secular purpose ("protecting academic freedom") in the text of the Act. We have repeatedly deferred to such expressions. Senator Keith unquestionably understood "academic freedom" to mean "freedom from indoctrination." If one adopts the obviously intended meaning of the statutory term "academic freedom," there is no basis whatever for concluding that the purpose is a "sham."

The legislative history gives ample evidence of the sincerity of the Balanced Treatment Act's articulated purpose. Witness after witness urged the legislators to support the Act so that students would not be "indoctrinated" but would instead be free to decide for themselves, based upon a fair presentation of the scientific evidence, about the origin of life.

In sum, we have no adequate basis for disbelieving the secular purpose set forth in the Act itself, or for concluding that it is a sham. I am astonished by the Court's unprecedented readiness to reach such a conclusion, which I can only attribute to an intellectual predisposition created by the facts and the legend of *Scopes* v. *State*, 154 Tenn. 105, 289 S. W. 363 (1927) -- an instinctive reaction that any governmentally imposed requirements bearing upon the teaching of evolution must be a manifestation of Christian fundamentalist repression.

Because I believe that the Balanced Treatment Act had a secular purpose, I would reverse the judgment of the Court of Appeals and remand for further consideration.

III

I have to this point assumed the validity of the *Lemon* "purpose" test. In fact, however, I think the pessimistic evaluation that THE CHIEF JUSTICE made of the totality of *Lemon* is particularly applicable to the "purpose" prong: it is "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results . . . ." *Wallace* v. *Jaffree*, 472 U.S., at 112 (REHNQUIST, J., dissenting).

Our cases applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional. But the difficulty of knowing what vitiating purpose one is looking for is as nothing compared with the difficulty of knowing how to find it. Discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task.

In the past we have attempted to justify our embarrassing Establishment Clause jurisprudence on the ground that it "sacrifices clarity and predictability for flexibility." I think it time that we sacrifice some "flexibility" for "clarity and predictability." Abandoning *Lemon*'s purpose test -- a test which exacerbates the tension between the Free Exercise and Establishment Clauses, has no basis in the language or history of the Amendment would be a good place to start.