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# SHIFTING TOWARD BALANCE, NOT CONSERVATISM: THE COURT'S INTERPRETATION OF THE *LEMON* TEST'S LEGISLATIVE INTENT PRONG AND REACTION FROM THE ELECTORATE

KEDRICK N. WHITMORE\*

## I. INTRODUCTION

Political and sociological analysts appear determined to paint the opening of the twenty-first century as a Renaissance for Christian conservative groups in the United States.<sup>1</sup> These groups' recent history seemingly supports this conclusion. Throughout the 1980s, movements like the Moral Majority gained nation-wide power, culminating with Pat Robertson's failed presidential candidacy in 1988.<sup>2</sup> But the Christian conservative movement seemed dormant throughout the Clinton years, and this lack of political activity paralleled a drop in religious worship.<sup>3</sup> Religious groups appeared to re-awaken during the 2000 presidential election, as George W. Bush's personal expressions of faith saw religious voters reassert themselves as a formidable voting bloc.<sup>4</sup> The notion of the United States as an increasingly religious nation only intensified after the September 11, 2001 terrorist attacks when President Bush invoked religious imagery and themes in speeches to rally the nation after the devastating event.<sup>5</sup> The crowning jewel of Christian conservative achievement was the 2004 Presidential election; many analysts credited religious groups for President George

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1. See, e.g., The Center for Religion, Ethics, and Social Policy at Cornell University, *Theocracy Watch: The Rise of the Religious Right in the Republican Party*, <http://www.theocracywatch.org/introduction2.htm#Estimate> (last visited Oct. 12, 2007) [hereinafter *Theocracy Watch*] (discussing the growing power of Christian conservatives in the United States).

2. A. JAMES REICHLEY, *FAITH IN POLITICS* 329–30 (2002).

3. PETER SCHOTTEN & DENNIS STEVENS, *RELIGION, POLITICS & THE LAW: COMMENTARIES AND CONTROVERSIES* 54–57 (1996) (citing a trend of decreasing church attendance through 1996).

4. See REICHLEY, *supra* note 2, at 333–34 (noting that Bush's courtship of religious groups was a major factor in staving off John McCain's challenge for the Republican presidential nomination).

5. *Id.* at 335 (stating that President Bush's use of religious rhetoric after September 11, 2001 convinced many evangelical Christians that his beliefs were sincere); *id.* at 346–48 (stating that after September 11, 2001 many people turned to religion for comfort and felt that President Bush's faith renewed their confidence in the country's moral compass).

W. Bush's reelection,<sup>6</sup> despite the deteriorating economy and situation in Iraq. These events of the past decade led many to believe that the United States experienced a religious revival in the early twenty-first century.<sup>7</sup>

Indeed, many of the beliefs held by Americans regarding religion's role in the nation during this time would seem to support this hypothesis. In a 2002 Pew Research Center (Pew) survey, 85% of the Americans who thought that religion's influence in the nation was increasing believed this increase was a positive trend; conversely, 84% of the Americans who believed that religion's influence in the nation was waning viewed the decrease as negative.<sup>8</sup> Additionally, in a 2006 Pew survey, 69% of respondents expressed dissatisfaction that "liberals have gone too far in keeping religion out of . . . government," while only 49% expressed the same problem with "Christian conservatives . . . impos[ing] their . . . values."<sup>9</sup> Based on these attitudes and on the simultaneous rise in power of Christian conservatives in the national government, some analysts believe that a shift to the right occurred as large groups of Americans embraced an activist and conservative brand of Christianity.<sup>10</sup>

Despite these trends, a sweeping movement of Christian fundamentalism did not occur. In the same 2006 Pew survey, only 32% of respondents believed that the Bible should govern the nation, while 63% responded that the will of the people should.<sup>11</sup> In addition, only 44% of Evangelical Protestants, often the most prominent players in the Christian conservative movement, believed the Bible should be the ultimate source of legal authority.<sup>12</sup> Furthermore, few people identified themselves as part of the much ballyhooed "religious right"—only 11% of respondents in this same survey, including only

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6. See Alan Cooperman and Thomas B. Edsall, *Evangelicals Say They Led Charge For the GOP*, THE WASH. POST, Nov. 8, 2004, at A1.

7. See Theocracy Watch, *supra* note 1.

8. News Release, The Pew Forum on Religion & Public Life, *Americans Struggle with Religion's Role at Home and Abroad 6* (Mar. 20, 2002), available at <http://pewforum.org/publications/surveys/religion.pdf> [hereinafter *Americans Struggle*].

9. News Release, The Pew Research Center for the People and The Press, *Many Americans Uneasy with Mix of Religion and Politics 2* (Aug. 24, 2006), available at <http://people-press.org/reports/pdf/287.pdf> [hereinafter *Many Americans Uneasy*].

10. See, e.g., Michelle Goldberg, *Kingdom Coming: The Rise of Christian Nationalism* (2006), available at [http://www.worldproutassembly.org/archives/2006/05/tyranny\\_of\\_the.html](http://www.worldproutassembly.org/archives/2006/05/tyranny_of_the.html) (discussing the growing power and intolerance of Christian political groups).

11. See REICHLEY, *supra* note 2, at 5.

12. *Id.* at 6.

one quarter of white, evangelical Christians identified themselves as members of the Christian right.<sup>13</sup>

These numbers demonstrate that the United States did not experience a period of religious fervor, as a majority of people held relatively moderate views on the role of religion in government. It is clear, however, that most Americans were dissatisfied with the increasing secularization of the country, evidenced both by public opinion polls and voting trends.<sup>14</sup> Analysts who insist that this demand for religion in public life sprang from stronger religious devotion have ignored an important factor: the Supreme Court has made a strong shift toward secularization in the latter half of the twentieth century.<sup>15</sup> In particular, the use of the first prong of the *Lemon* test by the Court has eliminated many symbols and practices that are rooted in religion from the public sphere in ways that often appear unfair and prejudicial.<sup>16</sup> In particular, the Court has consistently ignored secular purposes of statutes that deal with religion in some way<sup>17</sup> and has displayed a strong bias against religion in reaching such conclusions.<sup>18</sup> The resulting level of secularization proved distasteful to many Americans.<sup>19</sup> This led some moderate Americans to believe that religion requires some protection and restoration in the public sphere.<sup>20</sup> Christian conservatives favor the maintenance of religious symbols and practices in the government<sup>21</sup> and as such were an established and practical vehicle for “defending” religion and balancing a Court seemingly bent on total secularization. The American public did not shift to the right so much as respond to the Court’s shift to the left.

## II. SETTING THE STAGE: LEGAL RULE OF THE *LEMON* DECISION

Much of this secularization has come about due to *Lemon v. Kurtzman*,<sup>22</sup> which created a new test for examining cases under the

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13. *Id.* at 2.

14. *See generally id.*; *see also* Cooperman and Edsall, *supra* note 6.

15. *See generally infra* Part III.

16. *Id.*

17. *Id.*

18. *Id.*

19. *See* Americans Struggle, *supra* note 8; *see also* Many Americans Uneasy, *supra* note 9.

20. *See* Many Americans Uneasy, *supra* note 9.

21. *See* Wikipedia, Christian Right, [http://en.wikipedia.org/wiki/Christian\\_conservative#Issues](http://en.wikipedia.org/wiki/Christian_conservative#Issues) (last visited Feb. 6, 2009) (describing Christian conservatives’ desire to increase the role of religion in public life).

22. 403 U.S. 602 (1971).

Establishment Clause.<sup>23</sup> In *Lemon*, the constitutionality of Rhode Island and Pennsylvania statutes were challenged as repugnant to the Establishment Clause because they provided state aid to religious elementary and secondary schools.<sup>24</sup> To decide this issue, the Court articulated a three part test to determine if a state statute challenged under the Establishment Clause was constitutional: (1) the statute must have a clear secular purpose; (2) its primary effect must not advance nor inhibit religion; and (3) the statute must not create “an excessive government entanglement with religion.”<sup>25</sup>

In *Lemon*, the Court found that the purpose of the statutes was to enhance secular education and neither advanced nor inhibited religion.<sup>26</sup> Nevertheless, the Court held that the statutes fostered an “excessive entanglement between government and religion” and were therefore unconstitutional.<sup>27</sup> This decision was based on the fact that the infusion of government money involved in each statute would invariably involve government oversight to ensure that this money was spent for the purpose for which it was earmarked.<sup>28</sup> The Court noted that a relationship between church and state is not permissible under the Establishment Clause.<sup>29</sup> At the same time, the Court recognized that some connection between religion and government is inevitable.<sup>30</sup> This makes the *Lemon* test a rather difficult and ambiguous standard of review because it seeks to disentangle government and religion, while recognizing the inevitability of their interrelationship. The *Lemon* test’s ambiguity, particularly its first prong, is a flaw that continually hampers its usefulness and causes popular opposition to its application.<sup>31</sup>

The *Lemon* decision has altered the landscape of legal thought regarding the role of religion in the public forum. The first prong of the test, requiring that the government’s action have a clear secular purpose, has rarely been used,<sup>32</sup> but when invoked it has produced some of the most controversial decisions limiting religion’s role in government.<sup>33</sup> This piece argues that the subjective nature and

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23. *Id.* at 612–13.

24. *Id.* at 606, 607–11 (describing the Pennsylvania and Rhode Island state statutes).

25. *Id.* at 612–13 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970)).

26. *Id.* at 613.

27. *Id.* at 614.

28. *Id.* at 620–22.

29. *Id.*

30. *Id.* at 614.

31. *See infra* Parts III.B & E.

32. *See McCreary County v. A.C.L.U. of Ky.*, 545 U.S. 844, 859 (2005).

33. *See generally infra* Part III.

inconsistent enforcement of what constitutes a legitimate secular purpose has led to the perception that the Court is unfairly biased against religion. In addition, the cases that apply the *Lemon* test's first prong to strike down statutes have often refused to recognize stated secular purposes for statutes dealing with religion.<sup>34</sup> Furthermore, this note argues that many Americans perceived this treatment of religion as unfair and subsequently supported Christian conservatives during the first part of the twenty-first century in order to "balance out" the Court's actions and to restore some measure of religion into government.

### III. SHIFTS TO THE LEFT: CASES DEMONSTRATING THE COURT'S INCREASINGLY SECULAR VIEW USING *LEMON*'S FIRST PRONG

#### *A. The Ten Commandments in Public Schools: Stone v. Graham*

The Court waited nine years before upholding a challenge using the first prong of the *Lemon* test. In *Stone v. Graham*,<sup>35</sup> the Court held that a Kentucky statute that required copies of the Ten Commandments to be displayed in all public school classrooms in the state was unconstitutional.<sup>36</sup> Below each sign was a disclaimer stating that the Commandments are recognized as the foundation of the legal code of western civilization, and each sign was purchased with private funds.<sup>37</sup>

The Court found the statute unconstitutional under the first prong of the *Lemon* test because it had no secular purpose.<sup>38</sup> Despite the disclaimer and the argument that many modern laws are predicated upon the mandates of the Commandments, the Court found that because the Commandments contained references to God and worship, the statute lacked a secular purpose and thus violated the Establishment Clause.<sup>39</sup>

Justice Rehnquist's dissent noted the two central problems with the Court's application of *Lemon* test's first prong. First, the Court ignored the stated legislative intent of the postings: to recognize the Ten Commandments' role in fashioning the legal code of the United

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34. See *supra* Part I.

35. 449 U.S. 39 (1980) (per curiam).

36. *Id.* at 41.

37. *Id.* at n.1 (stating the text of the Kentucky statute).

38. *Id.*

39. *Id.* at 41–42.

States, along with much of the rest of the world.<sup>40</sup> Justice Rehnquist disagreed with this rejection of the stated intent and identified several previous instances where it was upheld under *Lemon*.<sup>41</sup> In addition, Justice Rehnquist stated that the Decalogue “had a significant impact on the development of secular legal codes of the Western World.”<sup>42</sup> To Justice Rehnquist, this provided a secular, educational purpose that was constitutional, despite the fact that it “may overlap with what some may see as a religious objective . . . .”<sup>43</sup> This, he argued, created the secular purpose required by *Lemon*.<sup>44</sup> Yet in rejecting Justice Rehnquist’s argument, the majority ignored the significance of the Decalogue in the nation’s history because of its religious roots.<sup>45</sup> The Court’s refusal to find a secular purpose for statutes containing any religious significance is repeated and expanded upon later in Establishment Clause jurisprudence.<sup>46</sup>

In addition, the Court decided this case in a summary fashion, “without benefit of oral argument or briefs on the merits . . . .”<sup>47</sup> The Court treated a serious and complicated case dismissively. Although there is no indication in the text of the opinion, one may infer that such a summary reversal occurred, at least in part, because of the religious context of the case. This is the beginning of a pattern of bias in the application of the *Lemon* test’s first prong that continues and is recognized later by members of the Court.<sup>48</sup>

*Stone* is the first decision where the Court struck down a statute based on the first prong of the *Lemon* test. The flaws in the *Stone* decision are repeated and exploited by the dissent in successive cases<sup>49</sup> where the Court ignored the stated legislative intent of such statutes and religion’s significance in the history of the United States as a legitimate secular purpose. Through these types of decisions, the Court began to drive the secularization of the nation beyond the level desired by most citizens.<sup>50</sup> This led these citizens, in turn, to support Christian

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40. *Id.* at 43 (Rehnquist, J., dissenting).

41. *Id.* at 43–44.

42. *Id.* at 45.

43. *Id.* at 44.

44. *Id.* at 44–46.

45. *Id.*

46. *See infra* Parts III.B–E.

47. *Stone*, 449 U.S. at 47.

48. *See infra* Parts III.B–E.

49. *Id.*

50. *See supra* Part I.

conservatives who similarly wish to reverse the trend of secularization.<sup>51</sup>

*B. Has the Court Outlawed Prayer in School?: Wallace v. Jaffree*

At issue in *Wallace v. Jaffree*<sup>52</sup> was an Alabama statute that authorized a one minute period of silence in all public schools for meditation or voluntary prayer.<sup>53</sup> The Court found this statute impermissible under the *Lemon* test's secular purpose prong.<sup>54</sup> It was revealed that the legislative purpose of this statute was designed to bring voluntary prayer back into school.<sup>55</sup> The main architect of the statute, Alabama State Senator Donald G. Holmes, put into the legislative record that this bill was intended to provide "our children in this state . . . the opportunity of sharing in the spiritual heritage of this state and this country"<sup>56</sup> and confirmed this purpose in testimony to the district court.<sup>57</sup> Therefore, the Court determined that no secular purpose existed, and thus the statute violated the Establishment Clause under *Lemon*.<sup>58</sup>

In analyzing the legislative intent of this statute, the Court took the converse of its action in *Stone v. Graham*.<sup>59</sup> In *Stone*, the Court ignored a stated, secular legislative intent and found that the statute existed for a religious purpose.<sup>60</sup> Yet in the *Wallace*, the Court found that the stated legislative intent was dispositive in determining that the statute has no secular legislative intent.<sup>61</sup>

As recognized by Justice O'Connor in her concurrence, it is the Court's duty to "distinguish[h] a sham secular purpose from a sincere one."<sup>62</sup> Many contexts have required the Court to look beyond the stated legislative intent of a statute in order to combat attempts by unscrupulous legislatures to pass discriminatory statutes in the guise of

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51. *See id.*

52. 472 U.S. 38 (1985).

53. *Id.* at 40.

54. *Id.* at 56.

55. *Id.* at 56–57.

56. *Id.* at 57 n.43.

57. *Id.* at 57.

58. *Id.* at 60–61.

59. 449 U.S. 39 (1980).

60. *Id.* at 42–43.

61. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

62. *Id.* at 75 (O'Connor, J., concurring).



permissible statutes.<sup>63</sup> As such, there are many circumstances where the Court must disregard the stated legislative intent of a statute. In this context, however, the refusal to use stated legislative intent to determine whether a statute has a secular purpose leads to a perception that the Court treats statutes dealing with religion unfairly.

Chief Justice Burger dissented in *Wallace*, stating that the Court capitalized on statements of religious purpose unfairly and that “there is not a shred of evidence that the legislature as a whole shared the sponsor’s motive or that a majority in either house was even aware of the sponsor’s view of the bill when it was passed.”<sup>64</sup> Indeed, the statements relied on were all made after the enactment of the statute, casting doubt on whether these intentions were those held by the members of the legislature when passing the bill into law.<sup>65</sup> These facts undermine the majority’s position that no secular purpose existed.

In addition, Chief Justice Burger found a clear secular purpose for the statute. He first noted the hypocrisy inherent in the decision because members of Congress participate in prayers at the opening of each session and the Supreme Court begins its days with an invocation.<sup>66</sup> The idea that prayer may be used to solemnize an event or occasion, and that such use is a truly secular one, is repeated in later decisions.<sup>67</sup> The fact that some traditions with religious undertones exist at the highest levels of government lends further credence to the idea that it is possible for a secular purpose to exist in recognizing rituals based on religion. Thus, the majority in *Wallace* ignored any potential secular purpose merely because a single religious purpose was found.

Not only did Chief Justice Burger find an uneven application of legislative intent, he also found an open bias against religion. As proof of this bias, he pointed to the Court’s holding where it found that the mere use of the word “prayer” made this speech unconstitutional.<sup>68</sup> This posture of categorically striking public speech based on any mention of religion, or even potential mention of religion, is repeated

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63. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 539–42 (1993) (holding that a city council’s true legislative intent in restricting the slaughter of animals was to impede the practice of the Santeria religion, despite its stated intent to prevent cruelty to animals).

64. *Wallace*, 472 U.S. at 86–87 (Burger, C.J., dissenting).

65. *Id.*

66. *Id.* 84–85.

67. *Santa Fe v. Doe*, 530 U.S. 290, 307 (2000).

68. *Wallace*, 472 U.S. at 85 (Burger, C.J., dissenting).

throughout this line of cases.<sup>69</sup> In addition, Chief Justice Burger argued that *Wallace* would lead to the Court treating religion with “callous indifference,” rather than “benevolent neutrality” in the future.<sup>70</sup> This phrase is prophetic, as the Court has continued to take an increasingly negative posture toward religion, particularly in its application of the first prong of the *Lemon* test.<sup>71</sup>

Justice Rehnquist also recognized problems with bias in decisions based on the *Lemon* test’s first prong. As he noted, the Court never clearly defined the types of statutes the test is meant to exclude.<sup>72</sup> Justice Rehnquist stated that if the test is to be read literally to strike only those statutes with the purpose to aid religion, then the test has no teeth because crafty legislators could simply articulate only a secular purpose and circumvent the spirit of the test;<sup>73</sup> if, on the other hand, the test is meant to hold unconstitutional any statute giving aid to religious institutions, whether this intent is stated or not, a slew of statutes would be eliminated, including many previously upheld ones.<sup>74</sup> Somewhere in the middle are those cases that declare statutes unconstitutional based on the application of the *Lemon* test’s first prong: the Court has sometimes looked to the intent of the statute, as in *Wallace*, and at other times looked merely at the perceived effects of the statute, disregarding the intent, as it did in *Stone v. Graham*.<sup>75</sup> The subjective and fluid nature of the *Lemon* test leaves it ripe for abuse. When this method leads to religiously-infused statutes being struck down, it is easy to see how the opinion could arise that the Court has a bias against religion.

The Court has played into the hands of Christian conservatives by refusing to recognize a statute’s secular intent and by showing a general bias against religion in public life. Justice Rehnquist recognized the popular discontent that would arise from the *Wallace* decision, stating that it will surprise “a large number of thoughtful Americans . . . to learn that the Constitution, as construed by the majority, prohibits the Alabama Legislature from ‘endorsing’ prayer.”<sup>76</sup>

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69. See *Scopes v. State*, 278 S.W. 57 (Tenn 1925); *Santa Fe*, 530 U.S. at 290.

70. *Wallace*, 472 U.S. at 90 (Burger, C.J., dissenting).

71. See *supra* Part I.

72. *Wallace*, 472 U.S. at 108.

73. *Id.*

74. *Id.* at 108–09.

75. *Stone v. Graham*, 449 U.S. 39, 41–42 (1980) (per curiam).

76. *Wallace*, 472 U.S. at 113 (Rehnquist, J., dissenting).

Justice Rehnquist's characterization may or may not have been true at the time of the decision, but it has proved valid today. Seventy-six percent of respondents in an August 2005 Gallup Poll favored a constitutional amendment to allow voluntary prayer in public schools.<sup>77</sup> While *Wallace* only restricted a school's endorsement of voluntary prayer and did nothing to restrict voluntary prayer in school,<sup>78</sup> it led a large majority of Americans to believe that drastic measures are necessary to protect voluntary prayer in public school.<sup>79</sup> Furthermore, this belief that religious expression in the public forum is in danger from a secularist Court led many citizens to support Christian conservatives, even when they normally would not.<sup>80</sup>

### *C. The Specter of Scopes: Edwards v. Aguillard*

Popular myth holds that the legitimacy of teaching evolution in public schools was definitively addressed in the famed "Scopes Monkey Trial."<sup>81</sup> However, the criminal charge against Scopes was dismissed on a technicality.<sup>82</sup> Instead, the validity of laws preventing the teaching of evolution in schools was decided in *Epperson v. Arkansas*.<sup>83</sup> Patterned on the Tennessee law at issue in *Scopes*, the law at issue in *Epperson* imposed a criminal penalty on an instructor at any public school or university who taught the theory that man descended from a lower order of animals.<sup>84</sup> Petitioner Epperson sought an injunction against Arkansas to prevent the enforcement of this law.<sup>85</sup> The Court struck this law down on the basis that, under the First Amendment, the government must take a neutral stance regarding religion.<sup>86</sup> The Court held that the statute was unconstitutional because it restricted instruction in a doctrine contrary to a literal interpretation of the Bible, thereby impermissibly aiding Judeo-Christian religions.<sup>87</sup>

Despite the fact that evolution could not be constitutionally excluded from the classroom, Louisiana employed a different tactic to

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77. Gallup Poll, Religion, Aug. 8-11, 2005, available at <http://www.pollingreport.com/religion.htm>.

78. *Wallace*, 472 U.S. at 40.

79. See *supra* Part I.

80. *Id.*

81. *Scopes v. State*, 278 S.W. 57 (Tenn. 1925).

82. *Id.* at 58.

83. 393 U.S. 97 (1968).

84. *Id.* at 98-99.

85. *Id.* at 100.

86. *Id.* at 103-04.

87. *Id.* at 103.

maintain religion's presence in public schools. In *Edwards v. Aguillard*,<sup>88</sup> a Louisiana statute mandated that if evolution was taught in public schools, equal time in the curriculum must be given to "creation science," a form of the creation theory of Judeo-Christian theology.<sup>89</sup> The statute's legislative purpose was to promote academic freedom: students would be able to hear two competing theories on the origin of man and make their own decision as to which theory to accept.<sup>90</sup>

Despite this facially neutral explanation of the statute, facts revealed that the statute existed so that the state could discredit evolutionary theory in a way that did not violate *Epperson*.<sup>91</sup> The record showed that many funding and administrative advantages were given to the instruction of creation sciences.<sup>92</sup> In fact, the state senator who introduced the bill stated on many occasions that he found the theory of evolution personally distasteful.<sup>93</sup> Thus, the Court found that the purpose of the statute was to discredit evolution by mandating a better funded and administered creation science program to counterbalance it, in an attempt to prevent students from accepting evolution over creationism.<sup>94</sup> These two facts prevented the statute from having a secular legislative purpose, and thus the statute was invalidated on the basis of the *Lemon* test's first prong.<sup>95</sup>

The Court permitted the state to continue teaching religious principles and theories, but only through objective studies of religion as part of history and civilization.<sup>96</sup> This holding appeared to validate the idea that recognition of religion's significance in the founding of the nation may itself be considered a legitimate secular purpose. In a later decision, however, the Court rejected such reasoning in attempts to justify religious symbols in public life.<sup>97</sup>

Once again, the Court ignored a secular legislative intent and displayed bias against statutes with religious undertones. Justice Scalia noted that the majority refused to accept a seemingly valid legislative purposes for this statute.<sup>98</sup> The legislature in this case clearly laid out

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88. 482 U.S. 578 (1987).

89. *Id.* at 581.

90. *Id.* at 582.

91. *Id.* at 588, 592.

92. *Id.* at 588.

93. *Id.* at 592.

94. *Id.* at 589.

95. *Id.*

96. *Id.* at 594.

97. *Santa Fe v. Doe*, 530 U.S. 290, 309–10 (2000).

98. *Edwards*, 482 U.S. at 626–27 (Scalia, J. dissenting).

its purpose of enhancing educational freedom within the text of the statute, only to be ignored by the Court as a sham.<sup>99</sup> While concentrating on the sponsor's *personal* issues with evolutionary theory,<sup>100</sup> the Court all but ignored the *legislative* history of this bill.<sup>101</sup> The record contained repeated instances of the bill's presentment in a secular, scientific, and educational manner, specifically avoiding religious purpose or discussion.<sup>102</sup> Just as the idea that evolution must be taught in school for a complete education is a valid legislative purpose, the requirement that creationism be taught can be viewed as similarly having a valid purpose. A secular purpose for the bill is indicated by the nature of the bill's presentation in the legislature, as well as by its stated intent. *Edwards* again demonstrated an unwillingness by the Court to find a secular legislative purpose for a statute relating to religion.

In his dissent, Justice Scalia also recognized that the legislative intent in the context of *Lemon* is an ambiguous concept.<sup>103</sup> He stated that the fluid nature of the *Lemon* test's first prong allows the Court to make a subjective determination as to the validity of stated secular purposes and allows any existing bias to creep into the decision making process.<sup>104</sup> Justice Scalia believed that such bias exists, stating that the Court has "an *instinctive reaction* that any governmentally imposed requirements bearing upon the teaching of evolution must be a manifestation of Christian fundamentalist repression."<sup>105</sup> He continued to argue that this instinctive reaction is a result of the Court's bias against religion and causes the Court to go to great lengths to discredit many statutes dealing with religion.<sup>106</sup> In this way, Justice Scalia argued that the Court has taken on the role of oppressor, previously held by the opponents of evolution. Justice Scalia noted that *Scopes* had the opportunity to present facts in his classroom that supported the theory of evolution, and so it seemed illogical that the state of Louisiana may not respond in kind, presenting evidence that

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99. *Id.*

100. *Id.* at 592.

101. *Id.* at 628–34 (Scalia, J., dissenting).

102. *Id.* The bill required that creationism be taught merely as a theory, not as doctrinal fact, and that it be counterbalanced "at every turn" by evolutionary theory. The sponsor of the bill also emphasized that creationism be taught truly as a science, devoid of any religious elements. *Id.*

103. *Id.* at 613.

104. *See supra* Part I.

105. *Edwards*, 482 U.S. at 634 (emphasis added).

106. *Id.*

refutes the theory of evolution.<sup>107</sup> The perception of this bias and unfair treatment of religion enhanced support for Christian conservatives during the beginning of the twenty-first century, as average Americans felt that the treatment of religion needed to be “balanced out.”<sup>108</sup>

Many Americans disagree with the Court’s decision in *Edwards*. According to a Pew July 2005 survey, 64% of Americans stated that they would support the teaching of creationism in schools alongside evolution.<sup>109</sup> A majority of Americans believe that some legitimate purpose exists for teaching creationism alongside evolution.<sup>110</sup> The fact that many people who do not strongly adhere to Judeo-Christian faiths support teaching creationism shows that there may be some secular purpose behind teaching this theory. The divergence of popular views with the rulings of the Court caused many holding such beliefs to support Christian conservatives at the outset of the twenty-first century as a potential bulwark against the tide of liberal judicial activism.<sup>111</sup>

#### *D. Religious Speech by Students: Santa Fe v. Doe*

While *Wallace v. Jaffree*<sup>112</sup> prevented a school from requiring a period of silence that could be used for prayer, the idea of preventing religious expression in public school was taken a step further in *Santa Fe v. Doe*.<sup>113</sup> In *Santa Fe*, a public school policy allowing a student to lead a prayer before high school football games was challenged as an unconstitutional endorsement of religion.<sup>114</sup> The school’s policy allowed a student vote to determine whether a pre-game speech should occur and, if so, by which student.<sup>115</sup>

The Court determined that no secular legislative purpose existed for this practice.<sup>116</sup> First, the Court noted, the school district mandated a special election for the particular purpose of giving a

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107. *Id.*

108. *See supra* Part I.

109. The Pew Research Center for the People and The Press, Reading the Polls on Evolution and Creationism, Sept. 28, 2005, available at <http://people-press.org/commentary/display.php3?AnalysisID=118>.

110. *Id.*

111. *See supra* Part I.

112. 472 U.S. 38, 56 (1985).

113. 530 U.S. 290 (2000).

114. *Id.* at 294.

115. *Id.* at 297–98.

116. *Id.* at 316.

certain speech at these particular events.<sup>117</sup> Second, the type of message to be delivered was prescribed by the school district, which required that the speech “solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.”<sup>118</sup> The Court recognized that these strictures, while not explicitly requiring a prayer, could only be fulfilled by religious speech.<sup>119</sup> The Court found that the requirements of the school board not only pointed toward a prayer, but they had been understood in this way by students, as the student speaker always chose to deliver a prayer in these circumstances.<sup>120</sup> Therefore, the statute was found unconstitutional under the *Lemon* test because it involved an encouragement of religious speech at a school sponsored event and had no secular legislative purpose.<sup>121</sup>

The school district argued that the speech was private because it was made by students rather than the school, and as such the Establishment Clause did not apply.<sup>122</sup> The Court disagreed, finding that such religious speech at a publicly sponsored event, using public resources such as speakers and microphones, was not private.<sup>123</sup> The school also argued that it created a public forum where all students could express religious beliefs equally.<sup>124</sup> The Court recognized that indeed, nothing officially prohibited students of minority religions from presenting their views; but, the decision about whether or not an invocation would be delivered and which student would deliver it was determined by popular vote.<sup>125</sup> The Court held that this meant that only students who were members of the majority religion in the school would have their religious views represented at the ceremony, and that those holding minority beliefs would have no opportunity to speak.<sup>126</sup>

The Court also rejected the idea that those who were offended by or did not agree with the content of the invocation could simply choose not to attend the game.<sup>127</sup> The Court noted that many students and parents were required to attend the games as members of the football or cheerleading squads, coaching staff, marching band, or

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117. *Id.* at 304 n.15.

118. *Id.* at 306.

119. *Id.* at 306–07.

120. *Id.* at 307.

121. *Id.* at 317.

122. *Id.* at 308–09.

123. *Id.*

124. *Id.* at 303.

125. *Id.* at 305, 310–11.

126. *Id.* at 304.

127. *Id.* at 310–13.

other organization.<sup>128</sup> Beyond this, the Court pointed out that weekly football games were important cultural events in high school, and that students should not be forced to choose between their faith and full participation in any school activity.<sup>129</sup>

Again, the majority ignored a secular legislative purpose and displayed bias in reaching its final conclusion. In his dissent, Chief Justice Rehnquist found an obvious secular purpose: the speech is used ceremonially to lend gravity to the event, an objective stated by the school district.<sup>130</sup> Such arguments echoed the ideas of Chief Justice Burger's dissent in *Wallace*.<sup>131</sup> The Court once again rejected the idea that a religiously-inspired practice may have some secular purpose that prevents its violation of the Establishment Clause.

Chief Justice Rehnquist also pointed out flaws and potential bias in the Court's logic. He asserted that this was not a case of government action because the students, not the school, determined whether a prayer would be given and by whom.<sup>132</sup> If the school allowed this practice to continue, students might choose a speaker on a completely secular basis, such as speaking ability, or they might choose not to have a pre-game speech at all.<sup>133</sup> Reaching the conclusion that this statute was unconstitutional in the face of these points serves to reinforce the perception that the Court holds some bias against religion. The Court takes great pains to come to a conclusion against the religious practice. Restricting speech chosen and delivered by private students, which may or may not be a prayer, may lead people to believe that the Court is biased against religion.

Once again, the Court used the first prong of the *Lemon* test to interpret the Constitution in a way that would surprise and upset many ordinary Americans, ignoring a specifically stated secular intent and showing a bias against religion in its decision making process. Decisions with these characteristics only make the position of Christian conservatives more attractive to moderates who do not agree with the Court's increasing secularization of American government. Most Americans, in fact, do not agree with a complete secularization of public schools. In the same 2005 Gallup poll previously mentioned, 60% of respondents said that religion had too little presence in public schools, compared to only 27% who said that about the right amount

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128. *Id.* at 311–12.

129. *Id.*

130. *Id.* at 322 (Rehnquist, C.J., dissenting).

131. *Wallace v. Jaffree*, 472 U.S. 38, 86–87 (Burger, C.J., dissenting).

132. *Santa Fe*, 530 U.S. at 324–25 (Rehnquist, C.J., dissenting).

133. *Id.* at 321.



of religion existed in public schools and 11% who said too much religion existed.<sup>134</sup> By making an unpopular decision that ignored secular intent and contained biased reasoning, the Court encouraged support for Christian conservatives, as these groups seek to halt and reverse the secularization imposed by the Court.

*E. The Ten Commandments Revisited: McCreary County v. ACLU of Kentucky*

In *McCreary County v. ACLU of Kentucky*,<sup>135</sup> the Court held that a display of the Ten Commandments in county courthouses was impermissible under the Establishment Clause.<sup>136</sup> The Commandments were displayed in such a way as to emphasize their role in establishing the legal code of the state,<sup>137</sup> but the Court found that this display focused only on religious elements.<sup>138</sup> The displays were held unconstitutional because the Court found that they had no secular purpose.<sup>139</sup> This determination was based in part on the motivations behind and creation of two earlier displays.<sup>140</sup> The Court also rejected the petitioner's argument that the motives for the statute should not be examined in determining its constitutionality.<sup>141</sup>

The Court recognized the growing opinion that an unfair bias existed against religion, assuring that the determination of religious purpose was not "rigged in practice to finding a religious purpose dominant every time a case is filed."<sup>142</sup> Despite this disclaimer, many Americans have held the belief that the Court holds an unfair bias against religion and will generally make decisions to remove religion from public discourse in all situations.<sup>143</sup> Dissatisfaction with these decisions drove many to side with Christian conservatives.<sup>144</sup>

The facts of this most recent case also illustrate the growing discontent with the Court's rulings on cases involving the Establishment Clause. The County Executive of Pulaski County

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134. Gallup Poll, Religion, Aug. 8-11, 2005, available at <http://www.pollingreport.com/religion.htm>.

135. 545 U.S. 844 (2005).

136. *Id.* at 881.

137. *Id.* at 853.

138. *Id.* at 869.

139. *Id.* at 881.

140. *Id.* at 869-70.

141. *Id.* at 861-63.

142. *Id.* at 863.

143. *See supra* Part I.

144. *Id.*

responded to criticism over these monuments by having them hung in a ceremony at the courthouse, which both he and his pastor attended.<sup>145</sup> After the ACLU sought to enjoin the displays, the county expanded them, adding copies of many significant documents in the nation's history that directly referenced or dealt with religion.<sup>146</sup> This action can be seen as a symbolic, defiant statement against the trend of increasing secularization in government because it was done in direct response to criticism of the monument's religious overtones.<sup>147</sup> Only after the Court enjoined this second display did the county back away from its religious expression by erecting a third monument containing the Decalogue as part of a larger, more secular display, which emphasized the influence of the Ten Commandments on the founding of the nation.<sup>148</sup> This display was enjoined as well.<sup>149</sup> The beliefs of the Pulaski County officials embodied in these actions were microcosms of broader dissatisfaction with the Court's decisions on religious speech in government.

As in earlier cases, the Court again chose to ignore the stated secular legislative purpose of the display. Justice Scalia stated that the third iteration of the display has a clear statement of secular legislative purpose physically placed next to it.<sup>150</sup> In addition, the secular nature of the Commandments' display was further enhanced by the non-religious, political documents near it.<sup>151</sup> Justice Scalia argued that these factors showed a clear secular legislative purpose. Again, however, the Court ignored these factors and struck down the statute, arguing that common sense dictated that because a clearly religious purpose was behind the original statute, that purpose must still exist in the background of the second and third iterations of this statute.<sup>152</sup> The Court rejected the idea that the role of the Ten Commandments in shaping America's legal code is a sufficient secular purpose.<sup>153</sup> The Court reached its conclusion even after the *Edwards* Court held that a secular purpose existed for teaching evolution in the context of its effect on the history of the nation.<sup>154</sup> In *Stone*, the Court similarly

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145. *McCreary County*, 545 U.S. at 851.

146. *Id.* at 852–53. For example, the Declaration of Independence mentions rights given by a “Creator” and the text of a Congressional record declares 1983 as the Year of the Bible.

147. *Id.*

148. *Id.* at 854–55.

149. *Id.* at 856–57.

150. *Id.* at 903–04 (Scalia, J., dissenting).

151. *Id.* at 905.

152. *Id.* at 869 (majority opinion).

153. *Id.*

154. *Edwards v. Aguillard*, 482 U.S. 578, 593–94 (1987).

alluded to the idea that the Ten Commandments may be used in school for the secular purpose of enhancing education in history or other courses.<sup>155</sup> It seems contradictory to hold that evolution and the Ten Commandments may be used in public schools in a way that demonstrates their role in the formation of the United States, but that they may not be displayed in a county courthouse for a similar purpose. The Court in *Edwards* and *Stone* laid out an acceptable method for use of religious symbols and ideas in the public forum.<sup>156</sup> When used in this way, however, the majority here doubled back and ignored the secular intent that was previously sanctioned. The Court's apparent contradiction in this regard is strong evidence that it has ignored and will continue to ignore stated secular legislative intents in applying the first prong of the *Lemon* test.

The dissent here also recognized bias in the majority's opinion similar to that of other cases in this line. As Rehnquist did in *Santa Fe*<sup>157</sup> and Burger before him in *Wallace*,<sup>158</sup> Justice Scalia drew attention to the hypocrisy in allowing some religious symbols and practices to be used by the government while finding others unconstitutional by referencing icons of Moses and the Ten Commandments in the Supreme Court and other public buildings.<sup>159</sup>

In addition, Justice Scalia repeated his criticism of the *Lemon* test's secular intent prong as being poorly defined and discussed how it has led to biased application of the test.<sup>160</sup> In this case, Justice Scalia cited the uneven application of the test over time.<sup>161</sup> Indeed, the majority acknowledged these inconsistencies, discussing the different methods used for finding a lack of secular legislative purpose in different cases.<sup>162</sup> Justice Scalia argued that the inconsistency in applying the *Lemon* test's first prong can lead many to believe that the decisions in this line have been made arbitrarily by the Court, "as their personal preferences dictate."<sup>163</sup>

Not only had the Court applied the *Lemon* test inconsistently, but Justice Scalia also recognized that this case shifted the Court's

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155. *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam).

156. *Edwards*, 482 U.S. at 594; *Stone*, 499 U.S. at 42.

157. 530 U.S. at 321–25 (Rehnquist, C.J., dissenting).

158. 472 U.S. 38, 86–87 (Burger, C.J., dissenting).

159. *McCreary County v. A.C.L.U. of Ky.*, 545 U.S. 844, 906–07 (2005) (Scalia, J., dissenting).

160. *Id.* at 890.

161. *Id.*

162. *Id.* at 862–63 (majority opinion).

163. *Id.* at 891 (Scalia, J., dissenting).

view in two ways that showed a greater bias against religion.<sup>164</sup> First, the Court specified that it will no longer look specifically at legislative intent as dispositive on its face, but rather use it to determine what a reasonable observer would think of the intent;<sup>165</sup> if a reasonable observer would believe that no secular intent existed, the Court would find that the statute violated *Lemon's* first prong, regardless of the actual intent.<sup>166</sup> Thus, the Court has added an extra step of subjectivity to its analysis of legislative intent, and this only adds to the likelihood that any bias against religion will be used to strike down statutes.

Second, the Court increased its level of scrutiny on a statute's intent. Rather than require that merely some secular purpose exist, the Court here determined that the secular purpose must dominate.<sup>167</sup> Although the effect of such an ambiguous alteration to an already fuzzy concept is difficult to determine, the Court has most certainly created a higher threshold of secular intent that must be met by legislatures. This heightened level of scrutiny will only serve to increase the popular belief that the Court is biased against religion in the public sphere.

Popular opinion certainly disagreed with the Court's ruling in *McCreary County*. In a June 2005 Gallup Poll, three-quarters of those surveyed stated that the Court should allow these monuments to be displayed.<sup>168</sup> By striking the Commandments from courtrooms as well as from classrooms,<sup>169</sup> the Court has eliminated public religion and enforced secularism. The Court did so while ignoring secular intent and displaying bias toward religion in a way that dissatisfies many Americans.<sup>170</sup> This decision, as well as the earlier ones using the first prong of the *Lemon* test, pushed many otherwise moderate citizens to support Christian conservatives.<sup>171</sup>

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164. *Id.* at 900.

165. *Id.* at 900–01.

166. *Id.* at 901.

167. *Id.*

168. Gallup Poll, Religion, June 24–26, 2005, available at <http://www.pollingreport.com/religion.htm>.

169. See *supra* Part I.

170. *Id.*

171. *Id.*

#### IV. LESSONS OF *LEMON*: EFFECTS OF THE DECISION ON MODERN POLITICS

The secular purpose prong of the *Lemon* test has been used sparingly by the Court, but its use has had a large impact on the secularization of public life. Many references to religious doctrines or ideas that would have been commonplace a half-century ago have been stricken from government.<sup>172</sup> Nevertheless, Christian conservatives have learned from reverses in this area. The Court's treatment of religion in the cases examined above strengthened popular support for Christian conservatives in the early part of the twenty-first century,<sup>173</sup> as many citizens believed that the Court went gone too far in attempting to secularize American government.<sup>174</sup> This support stemmed from both the Court's choice to ignore secular legislative intent and its perceived logical bias against religion.<sup>175</sup> Decisions on secularization that contain these flaws created greater support for Christian conservatives, and consequently these groups have attempted to use this fact to their advantage.

In response, these groups have chosen to secularize their own nomenclature while still attempting to advance programs that have a religious bent. The increasingly secular nature of these programs may be such that they pass the first prong of the *Lemon* test and are upheld by the Court. Even if the policies are reversed, the Court will be forced to go to ever-greater lengths in order to invalidate these seemingly secular ideas. Such decisions will inevitably require an ignorance of a strong secular intent as well as circuitous logic in order to reach this result. Just as the cases above have led to successes for Christian conservatives in the early twenty-first century, these future decisions may create another groundswell of popular support for Christian conservatives, as the judiciary will be seen as treating religion unfairly. Despite Democratic successes in the 2006 mid-term election, the recent trend of electing conservatives to legislative and executive positions<sup>176</sup> as a way to "balance out" the activist secular judiciary will likely re-occur based on such decisions. Charles Haynes, a religious liberty expert at the First Amendment Center, recognized these problems, stating that in such cases "[e]ven the winning side loses

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172. *See supra* Part III.

173. *See supra* Part I.

174. *Id.*

175. *Id.*

176. *Id.*

because of the deep divisions that will result.”<sup>177</sup> Although these comments referred specifically to *McCreary*, Haynes could be speaking about any of the above mentioned cases striking down statutes using the first prong of the *Lemon* test. In stoking the idea that the Court is anti-religion by supporting strong secular purposes, Christian conservatives can put themselves in a “win-win” position when attempting to pass statutes that place religion in the public sphere.

The strategic move toward secularization mentioned above was mirrored in a tactical decision by Christian conservatives in recent debates over same-sex marriage. There is little doubt that the most virulent objections to same-sex marriage are based on religious beliefs. In a 2006 Pew Center study, more non-progressive Christians were opposed to same-sex marriage than progressive Christians.<sup>178</sup> Despite the obviously religious objection to the practice, the cases above have shown that a statute outlawing the practice based on Biblical or religious grounds will not withstand the first prong of the *Lemon* test. For these reasons, in recent years Christian conservatives have shifted their goals from banning gay marriage to defining marriage specifically as involving exclusively a man and a woman. This provides a secular legislative intent, as marriage has been a positive social institution for hundreds, if not thousands, of years. Although religiously rooted, marriage has become an effective tool for generating wealth and rearing children. Therefore, enacting legislation meant to “protect” marriage has a strong secular purpose in and of itself, even though such laws are truly meant to achieve the religious end of preventing unions between homosexuals.

## V. CONCLUSION

Despite the ideas of some analysts, electoral successes by Christian conservatives in the early twenty-first century were not indicative of a massive shift in the American electorate. It is the Court that has shifted to the left and toward a stronger policy of secularization.<sup>179</sup> Regardless of whether such a posture is wise or foolish, the practical effects are undeniable: this strong secularization caused a popular backlash, leading to increased support for groups

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177. Bill Mears, Ten Commandments Before High Court: Explosive church-state issues from Kentucky, Texas, CNN.com, Mar. 2, 2005, available at <http://www.cnn.com/2005/LAW/03/01/scotus.ten.commandments/index.html>.

178. See SCHOTTEN & STEVENS, *supra* note 3, at 11.

179. See *supra* Part III.

seeking to return religion to the public sphere.<sup>180</sup> The cases invalidating statutes on the basis of the *Lemon* test's first prong are a perfect example of both the Court's shift and its effect on the electorate.<sup>181</sup> By ignoring secular legislative purposes and displaying a bias against religion, the popular perception that the Court treats religion unfairly has grown. As stated, such a situation gives a significant advantage to those seeking to reverse the trend of secularization, as either their policies will succeed in the judicial realm, or their setbacks will create popular support that will translate to success in legislative or executive positions. Only time will tell when this cycle will end, either through a permanent shift to the left by the American public and a popular embrace of secularism, or through the Court's decision to abandon the current posture of secularization and alter its interpretation of the Establishment Clause under *Lemon*.

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180. *See supra* Part I.

181. *See supra* Part III.