I write separately to note certain aspects of the legislative history, and to emphasize the broad discretion accorded state and local school officials in the selection of the public school curriculum.
March 10, 1987

No. 85-1513, Edwards v. Aguillard

FIRST DRAFT

JUSTICE POWELL, concurring.

I join in the thorough and well-reasoned opinion for the Court. I write separately to emphasize why, in light of the broad discretion accorded state and local official in the selection of the public school curriculum, the statute at issue in this case violates the Constitution.

This Court has consistently applied the three-pronged test of Lemon v. Kurtzman, 403 U.S. 602 (1972) to determine whether a particular state action violates the
Establishment Clause of the Constitution.\(^1\) See, e.g., Grand Rapids School District v. Ball, 105 S. Ct. 3216, 3222 (1985) ("We have particularly relied on Lemon in every case involving the sensitive relationship between government and religion in the education of our children"). The first requirement of the Lemon test is that the challenged statute have a "secular legislative purpose." Lemon v. Kurtzman, supra, at 612. If no valid secular purpose for the statute can be identified, the "purpose" prong of the test is determinative.

\(^1\)As the Court recognizes, ante, n. 4., the one exception to this consistent application of Lemon is Marsh v. Chambers, 463 U.S. 787 (1983).

"[P]ublic schools within [the] state shall give balanced treatment to creation-science and to evolution-science. Balanced treatment of these two models shall be given in classroom lectures taken as a whole for each course, in textbook materials taken as a whole for each course, in library materials taken as a whole for the sciences and taken a a whole for the humanities, and in other educational programs in public schools, to the extent that such lectures, textbooks, library materials, or educational programs deal in any way with the subject of the origin of man, life , the earth, or the universe. When creation or evolution is taught, each shall be taught as a theory, rather than as proven scientific fact." §17:286.4.
"Balanced treatment" means "providing whatever information and instruction in both creation and evolution models the classroom teacher determines is necessary and appropriate to provide insight into both theories in view for the textbooks and other instructional materials available for use in his classroom." §286.3(1). "Creation-science" means "the scientific evidences for creation and inferences from those scientific evidences." §286.3(2). Evolution-science" means "the scientific evidences for evolution and inferences from those scientific evidences." §286.3(3).

Although the Act mandates the teaching of the scientific evidences of both creation and evolution whenever either is taught, it does not define either term. "A fundamental canon of statutory construction is that,
unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."

_Perrin v. United States_, 444 U.S. 37, 42 (1979). In the Dictionary, the creation theory is defined as "Theology. ... The doctrine ascribing the origin of all matter and living forms as they now exist to distinct acts of creation by God." The American Heritage Dictionary of the English Language 311 (New College Edition 1976).

"Evolution" is defined as "Biology. ... The theory that groups of organisms, as species, may change with passage of time so that descendants differ morphologically and physiologically from their ancestors." Id., at 455.

Thus, the Balanced Treatment Act mandates that public schools present the scientific evidences that support a theological theory of divine creation whenever they...
present the scientific evidences that support the biological theory of evolution. From the face of the statute, a purpose to advance a particular religious belief is apparent.


When, as here, "both courts below are unable to discern an
arguably valid secular purpose, this Court normally should hesitate to find one. 


**B**

In June 1980, Senator Bill Keith introduced Senate Bill 956 to the Louisiana legislature. The purpose of the bill was to "assure academic freedom" by "requiring the teaching of the theory of creation ex nihilo in all public schools where the theory of evolution is taught." 1 App. E-1. The bill defined the "theory of creation ex nihilo" as "the belief that the origin of the elements, the galaxy, the solar system, of life, of all the species of
8.

plants and animals, the origin of man, and the origin of all things and their processes and relationships were created ex nihilo and fixed by God." 1 App. E-1a – E-1b. This theory was "referr[ed] to" by Senator Keith "as scientific creationism." 1 App. E-2.

While a Senate committee was studying scientific creationism, Senator Keith introduced a second draft of the bill, requiring balanced treatment of "evolution-science" and "creation-science." 1 App. E-108. This bill was based upon a "model act" supplied to Senator Keith by Paul Ellwanger. The model act was also the basis for a similar statute in Arkansas. See McLean v. Arkansas Board of Education, 529 F. Supp. 1255 (E.D. Ark. 1982).

Although the bill prohibited "instruction in any religious
doctrine or materials," 1 App. E-302, it defined "creation-science" to include:

"the scientific evidences and related inferences that indicate (1) Sudden creation of the universe, energy, and life from nothing; (2) The insufficiency of mutation and natural selection in bringing about development of all living kinds from a single organism; (3) Changes only within fixed limits or originally created kinds of plants and animals; (4) Separate ancestry for man and apes; (5) Explanation of the earth's geology by catastrophism including the occurrence of a worldwide flood; and (6) A relatively recent inception of the earth and living kinds." 1 App. E-298.

The District Court in McLean carefully examined this model act and concluded that "[b]oth [its] concepts and wording ... convey an inescapable religiosity." 529 F. Supp., at 1265. The court found "[t]he ideas of [this section] not merely similar to the literal interpretation of Genesis; [but] identical and parallel to no other story of creation." Ibid.
The complaint in McLean was filed on May 27, 1981.

On May 28, the Louisiana Senate committee deleted, by amendment, the illustrative list of scientific evidences. The amendment was "intended to try to produce some good for the bill and not intended to try to gut it in any way, or defeat the purpose which Senator Keith introduced this bill." 1 App. E-432. More specifically, a committee member urged the deletion because he "had no knowledge as to whether this should be all inclusive list. Maybe there are some things that are not included on here that some person smarter than us would have thought of that should have been included, maybe there are some things in here that ought not have been included. I don't know. Whoever drafted the bill evidently had this list and put these in,
my amendments would strike those out. I don't think it does any violence to the bill." 1 App. E-438.

Because the amended version of the bill did not contain a definition of the scientific evidences supporting creation-science, it is necessary to look to the legislative history to determine its meaning. The primary speaker in support of the bill was Dr. Edward Boudreaux, a creation scientist. He explained the source of the creation-science theory: "[t]here are a number of people today in America alone numbering something like a thousand who are members of the Creation Research Society who hold doctorate and masters degrees in all areas of science and equally affiliates with the Institute of Creation Research." 2 App. E-503-504. Information on
both of these organization is part of the legislative history.

The Institute for Creation Research is an affiliate of the Christian Heritage College in San Diego, California. The Institute was established to address the "urgent need for our nation to return to belief in a personal, omnipotent Creator, who has a purpose for His creation and to whom all people must eventually give account." 1 App. E-197. A goal of the Institute is "a revival of belief in special creation as the true explanation of the origin of the world." Therefore, the Institute concentrates on the "development of new methods for teaching scientific creationism in public schools." 1 App. E-197-199. The Creation Research Society is located in Ann Arbor, Michigan. A member must subscribe to the
following statement of belief: "The Bible is the written work of God, and because it is inspired throughout, all of its assertions are historically and scientifically true." 2 App. E-583. To study "creation-science" at the Society, a member must accept "that the account of origins in Genesis is a factual presentation of simple historical truth." 2 App. E-583.

C

In this case even assuming that the Act on its face is ambiguous, I see no evidence in the legislative history that indicates an intent other than to promote religious belief. The legislative history of the Arkansas statute prohibiting the teaching of evolution examined in Epperson v. Arkansas, supra, at 97, was remarkably similar to the
"It is clear that fundamentalist sectarian conviction was and 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 story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower class of animals.' Perhaps the sensational publicity attendant upon the Scopes trial induced Arkansas to adopt less explicit language. It eliminated Tennessee's reference to 'the story of the Divine creation of man' as taught in the Bible, but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man." Id., at 109.

Here, it is clear that religious belief is the Balanced Treatment's Act's "reason for existence."

Although the Act does not contain explicit reference to its religious purpose, there is no indication in the legislative history that the deletion of "creation ex nihilo" and the four primary tenets of the theory were
intended to alter the purpose for teaching creation-science. Instead, the Act appears to have exactly the same religious purpose found to have been behind the Arkansas Balanced Treatment Act invalidated in McLean -- to promote the Genesis story of creation. This Court has recognized that "the place of the Bible as an instrument of religion cannot be gainsaid," Abington School District v. Schempp, 374 U.S. 203, 224 (1963), and "no legislative recitation of a supposed secular purpose can blind us to that fact." Stone v. Graham, 449 U.S. 39, 41 (1980).

Although the Louisiana legislature purported to add information to the school curriculum rather than detract from it as in Epperson, both legislatures acted with the unconstitutional purpose of structuring the public school
curriculum to make it compatible with a particular religious belief: the "divine creation of man."

That the statute is limited to the scientific evidences supporting the theory does not render the purpose of the statute secular. In reaching its conclusion that the Act is unconstitutional, the Court of Appeals did not "deny that the underpinnings of creationism may be supported by scientific evidence." 765 F. 2d 1251, 1256 (1985). And there is no need to do so. Whatever the academic merit of particular subjects or theories, the Establishment Clause limits the discretion of state officials to pick and choose among them for the purpose of promoting a particular religious belief. The language of the statute and its legislative history
convince me that the Louisiana legislature exercised its discretion for this purpose in this case.

II

Despite the fact that I find Louisiana's Balanced Treatment Act unconstitutional, I adhere to the view "that the States and locally elected school boards should have the responsibility for determining the educational policy of the public schools." Board of Education v. Pico, 457 U.S. 853, 893 (1982) (POWELL, J., dissenting). In the context of a challenge under the Establishment Clause, interference with the decisions of these authorities is warranted only when no valid secular purpose for their judgment is evident.

A statute does not violate the Establishment Clause "because it 'happens to coincide or harmonize with the
tenets of some or all religions." *Harris v. McRae*, 448 U.S. 297, 319 (1980) (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)). Thus, a public school can teach subjects or particular theories that are consistent with religious beliefs. Similarly, a state legislature could require by statute that such subjects or even theories be taught, so long as some valid secular purpose for the enactment exists.

It is important to emphasize that the Establishment Clause does not prohibit general moral discourse in the public schools. Certainly there are values that we share as a Nation that are necessary and important for children to learn at a young age in order to be productive members of society and personally fulfilled individuals. As this Court has noted, "[t]hat the Judeo-Christian religions
I oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny." Harris v. McRae, supra, at 319. I see no reason why school children should not be taught the genesis of such laws: that our society views stealing as immoral and a violation of the rights of other members of society.

I also believe that school children can and should be properly informed of the religious heritage of our Nation.

"The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." Abington School District v. Schempp, supra, at 213. Our history affects and informs our present. In my
view, it would be tragic if school children were deprived of knowledge of this history due to the supposed constraints of the Establishment Clause. As this Court has recognized, the Bible, although an "instrument of religion," id., at 224, "may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Stone v. Graham*, supra, at 42 (citing id., at 225). The Establishment Clause prohibits the use of the Bible and other religious

2State-sponsored universities in Louisiana already offer courses integrating religious studies into the curriculum. Approximately half of the state-sponsored universities offer one or more courses involving religion. As an example, Louisiana State University at Baton Rouge offers seven courses: Introduction to Religion, Old Testament, New Testament, Faith and Doubt, Jesus in History and Tradition, Eastern Religions, and Philosophy of Religion. Many general teaching guides indicate that education as to the nature of various religious beliefs could be integrated into a secondary school curriculum in a manner consistent with the Constitution. See, e.g., C. Kniker, Teaching about Religion in the Public Schools (1985); The Religion in Elementary Social Studies Project, Final Report (Fla. State Univ. 1976); L. Karp, Teaching the Bible as Literature in the Public Schools (1973).
documents only when the purpose of the use is clearly to advance religious belief.

III

In sum, I find the language and the legislative history of the Balanced Treatment Act to indicate that its purpose is to advance religious belief. Although the discretion of state and local authorities over public school curriculum 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." Epperson v. Arkansas, supra, at 106. Accordingly, I concur in the opinion and judgment of
the Court that the Balanced Treatment Act violates the Establishment Clause of the Constitution.
No. 85-1513, Edwards v. Aguillard

FIRST DRAFT

JUSTICE POWELL, concurring.

I write separately to note certain aspects of the legislative history, and to emphasize the broad discretion accorded state and local school officials in the selection of the public school curriculum.

I

This Court has consistently applied the three-pronged test of Lemon v. Kurtzman, 403 U.S. 602 (1971), to determine whether a particular state action violates the Establishment Clause of the Constitution. ¹ See, e.g.,

¹As the Court recognizes, ante, n. 4., the one exception to this consistent application of Lemon is Marsh v. Chambers, 463 U.S. 783 (1983).

0 "to emphasize that nothing in the Court's opinion diminishes the broad discretion...."

traditional
Grand Rapids School District v. Ball, 405 S. Ct. 3216, 3222 (1985) ("We have particularly relied on Lemon in every case involving the sensitive relationship between government and religion in the education of our children"). The first requirement of the Lemon test is that the challenged statute have a "secular legislative purpose." Lemon v. Kurtzman, supra, at 612. See Committee for Public Education v. Nyquist, 413 U.S. 756, 773 (1973). If no valid secular purpose for the statute can be identified, the "purpose" prong of the test is determinative.

"[P]ublic schools within [the] state shall give balanced treatment to creation-science and to evolution-science. Balanced treatment of these two models shall be given in classroom lectures taken as a whole for each course, in textbook materials taken as a whole for each course, in library materials taken as a whole for the sciences and taken as a whole for the humanities, and in other educational programs in public schools, to the extent that such lectures, textbooks, library materials, or educational programs deal in any way with the subject of the origin of man, life, the earth, or the universe. When creation or evolution is taught, each shall be taught as a theory, rather than as proven scientific fact." §17:286.4.
"Balanced treatment" means "providing whatever information and instruction in both creation and evolution models the classroom teacher determines is necessary and appropriate to provide insight into both theories in view for the textbooks and other instructional materials available for use in his classroom." §286.3(1). "Creation-science" means "the scientific evidences for creation and inferences from those scientific evidences." §286.3(2). "Evolution-science" means "the scientific evidences for evolution and inferences from those scientific evidences." §286.3(3).

Although the Act mandates the teaching of the scientific evidences of both creation and evolution whenever either is taught, it does not define either term.

"A fundamental canon of statutory construction is that,
unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."

Perrin v. United States, 444 U.S. 37, 42 (1979). The creation theory is defined as "Theology... The doctrine ascribing the origin of all matter and living forms as they now exist to distinct acts of creation by God." The American Heritage Dictionary of the English Language 311 (New College Edition 1976). "Evolution" is defined as "Biology... The theory that groups of organisms, as species, may change with passage of time so that descendants differ morphologically and physiologically from their ancestors." Id., at 455.² Thus, the Balanced Treatment Act mandates that public schools present the

²Other dictionary definitions will be added.
scientific evidence that support a theological theory of
divine creation whenever they present the scientific
evidence that is thought to support the biological theory
of evolution. From the face of the statute, a purpose to
advance a particular religious belief is apparent.

A religious purpose alone is not enough to invalidate
an act of a state legislature. The religious purpose must
predominate. See Wallace v. Jaffree, 105 S. Ct. 2479,
2486 (1985); Lynch v. Donnelly, 465 U.S. 668, 681, n. 6
"protec[t] academic freedom." §286.2. This statement is
puzzling, because "academic freedom" does not encompass
the right of a legislature to structure the public school
curriculum in order to advance a particular religious
When, as here, "both courts below are unable to discern an arguably valid secular purpose, this Court normally should hesitate to find one." Wallace v. Jaffree, 105 S. Ct. 2479, 2495 (1985) (POWELL, J., concurring). Nevertheless, I read this statement as rendering the purpose of the statute at least ambiguous. Accordingly, I proceed to review the legislative history of the Act.

B

In June 1980, Senator Bill Keith introduced Senate Bill 956 to the Louisiana legislature. The purpose of the bill was to "assure academic freedom by requiring the teaching of the theory of creation ex nihilo in all public schools where the theory of evolution is taught." 1 App.
E-1. The bill defined the "theory of creation ex nihilo" as "the belief that the origin of the elements, the galaxy, the solar system, of life, of all the species of plants and animals, the origin of man, and the origin of all things and their processes and relationships were created ex nihilo and fixed by God." App. E-1a - E-1b.

This theory was referred to by Senator Keith as "scientific creationism." App. E-2.

3Creation "ex nihilo" means creation "from nothing" and has been found to be an "inherently religious concept." McLean v. Arkansas Board of Education, 529 F. Supp. 1255, 1266 (E.D. Ark. 1982). The District Court in McLean found:

"The argument that creation from nothing in [section] 4(a)(1) [of the substantially identical Arkansas Balanced Treatment Act] does not involve a supernatural deity has no evidentiary or rational support. To the contrary, 'creation out of nothing' is a concept unique to Western religions. In traditional Western religious thought, the conception of a creator of the world is a conception of God. Indeed, creation of the world 'out of nothing' is the ultimate religious statement because God is the only actor." Id., at 1265.
While a Senate committee was studying scientific creationism, Senator Keith introduced a second draft of the bill, requiring balanced treatment of "evolution-science" and "creation-science." 1 App. E-108. This bill was based upon a "model act" supplied to Senator Keith by Paul Ellwanger. The model act was also the basis for a similar statute in Arkansas. See McLean v. Arkansas Board of Education, 529 F. Supp. 1255 (E.D. Ark. 1982).

Although the Keith bill prohibited "instruction in any religious doctrine or materials," 1 App. E-302, it defined "creation-science" to include:

"the scientific evidences and related inferences that indicate (a) sudden creation of the universe, energy, and life from nothing; (b) The insufficiency of mutation and natural
selection in bringing about development of all living kinds from a single organism; (4) changes only within fixed limits or originally created kinds of plants and animals; (5) separate ancestry for man and apes; (6) explanation of the earth's geology by catastrophism including the occurrence of a worldwide flood; and (7) a relatively recent inception of the earth and living kinds." 1 App. E-298.

Significantly, the model act on which the Keith bill relied was also the basis for a similar statute in Arkansas, McLean v. Arkansas Bd of Education, 529 F. Supp. 1255 (E.D. Ark. 1982). The district court in McLean carefully examined this model act and concluded that "[b]oth [its] concepts and wording ... convey an inescapable religiosity." 529 F. Supp. at 1265. The court found that the ideas of this section not merely similar to the literal interpretation of Genesis; they are identical and parallel to no other story of creation." Ibid.

The complaint in McLean was filed on May 27, 1981. On May 28, the Louisiana Senate committee amended the Keith bill to delete amendment of the illustrative list of scientific evidences.
The legislator who proposed the amendment indicated no intent to alter the purpose of creation-science, but that it would no longer permit defendants to deny the Genesis story of creation. The legislator was "trying to produce some good in the bill."

For the bill and not intended to try to gut it in any way, or defeat the purpose which Senator Keith introduced this bill." 1 App. E-432. Because the amended version of the bill did not contain a definition of the scientific evidences supporting creation-science, it is necessary to look further to the legislative history to determine the meaning. A principal supporter of the bill was Dr. Edward

Creations Scientist

He had no knowledge as to whether this should be an all-inclusive list. Maybe there are some things that are not included on here that some person smarter than us would have thought of that should have been included, maybe there are some things in here that ought not have been included. I don't know. Whoever drafted the bill evidently had this list and put these in, my amendments would strike those out. I don't think it does any violence to the bill." 1 App. E-438.
who hold doctorate and masters degrees in all areas of science and equally affiliate with the Institute of Creation Research. 2 App. E-503-504. Information on both of these organization is part of the legislative history.

The Institute for Creation Research is an affiliate of the Christian Heritage College in San Diego, California. The Institute was established to address the "urgent need for our nation to return to belief in a personal, omnipotent Creator, who has a purpose for His creation and to whom all people must eventually give
A goal of the Institute is "a revival of belief in special creation as the true explanation of the origin of the world." Therefore, the Institute concentrates on the development of new methods for teaching scientific creationism in public schools." 1 App. E-197-199. The Creation Research Society is located in Ann Arbor, Michigan. A member must subscribe to the following statement of belief: "The Bible is the written Word of God, and because it is inspired throughout, all of its assertions are historically and scientifically true." 2 App. E-583. To study creation-science at the Society, a member must accept "that the account of origins in Genesis is a factual presentation of simple historical truth." 2 App. E-583.
In this case even assuming that the Act on its face is ambiguous, I see no evidence in the legislative history of the Balanced Treatment Act that indicates an intent other than to promote religious belief. The legislative history of the Arkansas statute prohibiting the teaching of evolution examined in *Epperson v. Arkansas*, supra at 97, was remarkably similar to the legislative history of the Balanced Treatment Act. There, the Court found:

"It is clear that fundamentalist sectarian conviction was and 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 story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower class of animals.' Perhaps the sensational publicity attendant upon the Scopes trial induced Arkansas to adopt less explicit language. It eliminated Tennessee's reference to 'the story of the Divine creation of man' as taught in the Bible, but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man." *Id.*, at 109.
Here, it is clear that religious belief is the Balanced Treatment's Act's "reason for existence." Although the Act does not contain explicit reference to its religious purpose, there is no indication in the legislative history that the deletion of "creation ex nihilo" and the four primary tenets of the theory were intended to alter the purpose for teaching creation-science. Instead, the Act appears to have exactly the same religious purpose found to have been behind the Arkansas Balanced Treatment Act invalidated in McLean to assure the teaching in the public schools of the Genesis story of creation. This Court has recognized that "the place of the Bible as an instrument of religion cannot be gainsaid," Abington School District v. Schempp, 374 U.S. 203, 224 (1963), and "no legislative recitation is religious belief. No one can say that the legislative history of the Act is religiously neutral and that the religious purpose was any different."
of a supposed secular purpose can blind us to that fact."

Stone v. Graham, 449 U.S. 39, 41 (1980). Although the Louisiana legislature purported to add information to the school curriculum rather than detract from it as in Epperson, both legislatures acted with the unconstitutional purpose of structuring the public school curriculum to make it compatible with a particular religious belief: the "divine creation of man."

That the statute is limited to the scientific evidences supporting the theory does not render the purpose of the statute secular. In reaching its conclusion that the Act is unconstitutional, the Court of Appeals did not deny that the underpinnings of creationism may be supported by scientific evidence." 765 F. 2d 1251, 1256 (1985). And there is no need to do so.
Whatever the academic merit of particular subjects or theories, the Establishment Clause limits the discretion of state officials to pick and choose among them for the purpose of promoting a particular religious belief. The language of the statute and its legislative history convince me that the Louisiana legislature exercised its discretion for this purpose in this case.

II

Despite the fact that I find Louisiana's Balanced Treatment Act unconstitutional, I adhere to the view "that the States and locally elected school boards should have the responsibility for determining the educational policy of the public schools." Board of Education v. Pico, 457 U.S. 853, 893 (1982) (POWELL, J., dissenting). In the context of a challenge under the Establishment Clause,
The amendment was "intended to try to produce some good for the bill and not intended to try to gut it in any way, or defeat the purpose which Senator Keith introduced this bill." 1 App. E-432.

The legislator who proposed the amendment indicated no intent to alter the nature of creation-science to make it no larger, broader definition than the Genesis story of creation. Senator Keith, the legislator's concern was "whether my amendments should be an all-inclusive list." 1 App. E-438.

The amendment was "intended to try to produce some good for the bill and not intended to try to gut it in any way, or defeat the purpose which Senator Keith introduced this bill." 1 App. E-432.

More specifically, a committee member urged the deletion because he had no knowledge as to whether this should be an inclusive list. Maybe there are some things that are not included on here that some person smarter than us would have thought of that should have been included, maybe there are some things in here that ought not have been included. I don't know. Whoever drafted the bill evidently had this list and put these in, my amendments would strike those out. I don't think it does any violence to the bill." 1 App. E-438.

The principal supporter of the bill was Dr. Edward Creation Scientist in support of the bill. He was not viewed as working "any violence to the bill." 1 App. E-436.

And there are indications that the bill did not contain a definition of the scientific evidence supporting creation-science, it is necessary to look further to the legislative history to determine the amendment changes reflected a change in legislative purpose.
Boudreaux, a creation scientist. He explained the source of the creation science theory: "If there are a number of people today in America—indeed, something like a thousand who are members of the Creation Research Society who hold doctorate and masters degrees in all areas of science and equally affiliates with the Institute of Creation Research, 2 App. E-503 - 504. Information on both of these organization is part of the legislative history.

The Institute for Creation Research is an affiliate of the Christian Heritage College in San Diego, California. The Institute was established to address the "urgent need for our nation to return to belief in a personal, omnipotent Creator, who has a purpose for His creation and to whom all people must eventually give
interference with the decisions of these authorities is warranted only when no valid secular purpose for their judgment is evident. A statute does not violate the Establishment Clause "because it 'happens to coincide or harmonize with the tenets of some or all religions.'"

*Harris v. McRae*, 448 U.S. 297, 319 (1980) (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)). Thus, a public school can teach subjects or particular theories that are consistent with religious beliefs. Similarly, a state legislature could require by statute that such subjects or even theories be taught, so long as some valid secular purpose for the enactment exists.

As a matter of history, school children, of course, can and should be properly informed of the religious heritage of our Nation. "The fact that the Founding
Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." Abington School District v. Schempp, supra, at 213. Our history affects and informs our present. In my view, it would be tragic if school children were deprived of knowledge of this history due to the supposed constraints of the Establishment Clause. As this Court has recognized, the Bible, although an "instrument of religion," id., at 224, "may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." Stone v. Graham, supra, at 42 (citing id., at
The Establishment Clause prohibits the use of the Bible and other religious documents only when the purpose of the use is clearly to advance religious belief.

III

In sum, I find that the language and the legislative history of the Balanced Treatment Act indicate beyond question that its purpose is to advance a particular religious belief. Although the discretion of state and state-sponsored universities in Louisiana already offer courses integrating religious studies into the curriculum. Approximately half of the state-sponsored universities offer one or more courses involving religion. As an example, Louisiana State University at Baton Rouge offers seven courses: Introduction to Religion, Old Testament, New Testament, Faith and Doubt, Jesus in History and Tradition, Eastern Religions, and Philosophy of Religion. Many general teaching guides indicate that education as to the nature of various religious beliefs could be integrated into a secondary school curriculum in a manner consistent with the Constitution. See, e.g., C. Kniker, Teaching about Religion in the Public Schools (1985); The Religion in Elementary Social Studies Project, Final Report (Fla. State Univ. 1976); L. Karp, Teaching the Bible as Literature in the Public Schools (1973).
local authorities over public school curriculum 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." Epperson v. Arkansas, supra, at 106. Accordingly, I concur in the opinion and judgment of the Court that the Balanced Treatment Act violates the Establishment Clause of the Constitution.
of evolution. "[C]oncepts concerning ... a supreme being of some sort are manifestly religious. ... These concepts do not shed that religiosity merely because they are presented as philosophy or as a science." Malnak v. Yogi, 440 F. Supp. 1284, 1322 (D.N.J. 1977), aff'd per curiam, 592 F. 2d 197 (CA3 1979). Thus, 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. See Wallace v. Jaffree, 472 U.S. 38, 56 (1985); Lynch v. Donnelly, 465 U.S. 668, 681, n. 6 (1984). The Act contains a statement of purpose: to "protect academic freedom." §286.2. This statement is puzzling, because the "academic freedom" of teachers to
present information and students to receive it in public schools is circumscribed by the Establishment Clause. Thus, "academic freedom" does not encompass the right of a legislature to structure the public school curriculum in order to advance a particular religious belief. *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968). Nevertheless, I read this statement as rendering the purpose of the statute at least ambiguous. Accordingly, I proceed to review the legislative history of the Act.

B

In June 1980, Senator Bill Keith introduced Senate Bill 956 to the Louisiana legislature. The purpose of the bill was to "assure academic freedom by requiring the teaching of the theory of creation ex nihilo in all public schools where the theory of evolution is taught." I App.
The bill defined the "theory of creation ex nihilo" as "the belief that the origin of the elements, the galaxy, the solar system, of life, of all the species of plants and animals, the origin of man, and the origin of all things and their processes and relationships were created ex nihilo and fixed by God." 1 App. E-1a - 1b.

This theory was referred to by Senator Keith as "scientific creationism." 1 App. E-2.

2Creation "ex nihilo" means creation "from nothing" and has been found to be an "inherently religious concept." McLean v. Arkansas Board of Education, 529 F. Supp. 1255, 1256 (E.D. Ark. 1982). The District Court in McLean found:

"The argument that creation from nothing in [section] 4(a)(1) [of the substantially similar Arkansas Balanced Treatment Act] does not involve a supernatural deity has no evidentiary or rational support. To the contrary, 'creation out of nothing' is a concept unique to Western religions. In traditional Western religious thought, the conception of a creator of the world is a conception of God. Indeed, creation of the world 'out of nothing' is the ultimate religious statement because God is the only actor." Id., at 1255.
While a Senate committee was studying scientific creationism, Senator Keith introduced a second draft of the bill, requiring balanced treatment of "evolution-science" and "creation-science." 1 App. E-108. Although the Keith bill prohibited "instruction in any religious doctrine or materials," 1 App. E-302, it defined "creation-science" to include:

"the scientific evidences and related inferences that indicate (a) sudden creation of the universe, energy, and life from nothing; (b) the insufficiency of mutation and natural selection in bringing about development of all living kinds from a single organism; (c) changes only within fixed limits or originally created kinds of plants and animals; (d) separate ancestry for man and apes; (e) explanation of the earth's geology by catastrophism, including the occurrence of a worldwide flood; and (6) a relatively recent inception of the earth and living kinds." 1 App. E-298 - 299.
Significantly, the model act on which the Keith bill relied was also the basis for a similar statute in Arkansas. See *McLean v. Arkansas Board of Education*, 529 F. Supp. 1255 (E.D. Ark. 1982). The District Court in *McLean* carefully examined this model act, particularly the section defining creation-science, and concluded that "[b]oth [its] concepts and wording ... convey an inescapable religiosity." *Id.*, at 1265. The court found that "[t]he ideas of [this section] are not merely similar to the literal interpretation of Genesis; they are identical and parallel to no other story of creation." *Ibid.*

The complaint in *McLean* was filed on May 27, 1981. On May 28, the Louisiana Senate committee amended the Keith bill to delete the illustrative list of scientific
evidences. The amendment was "not intended to try to gut [the bill] in any way, or defeat the purpose [for] which Senator Keith introduced [it]," 1 App. E-437, and was not viewed as working "any violence to the bill." 1 App. E-438. Instead, the concern of the legislator who proposed the amendment was "whether this should be an all inclusive list." 1 App. E-438.

The legislature then held hearings on the amended bill which became the Balanced Treatment Act under review. The principal creation-scientist to testify in support of the Act was Dr. Edward Boudreaux. He did not elaborate on the nature of creation-science except to indicate that the "scientific evidences" of the theory are "the objective information of science [that] point[s] to conditions of a creator." 2 App. E-501 - 502. He further testified,
however, that the recognized creation-scientists in the United States, who "numbe[r] something like a thousand [and] who hold doctorate and masters degrees in all areas of science" are affiliated with either or both the Institute of Creation Research and the Creation Research Society. 2 App. E-503 - 504. Information on both of these organization is part of the legislative history.

The Institute for Creation Research is an affiliate of the Christian Heritage College in San Diego, California. The Institute was established to address the "urgent need for our nation to return to belief in a personal, omnipotent Creator, who has a purpose for His creation and to whom all people must eventually give account." 1 App. E-197. A goal of the Institute is "a revival of belief in special creation as the true
explanation of the origin of the world." Therefore, the Institute currently is working on the "development of new methods for teaching scientific creationism in public schools." 1 App. E-197 - 199. The Creation Research Society (CRS) is located in Ann Arbor, Michigan. A member must subscribe to the following statement of belief: "The Bible is the written word of God, and because it is inspired throughout, all of its assertions are historically and scientifically true." 2 App. E-583. To study creation-science at the CRS, a member must accept "that the account of origins in Genesis is a factual presentation of simple historical truth." 2 App. E-583.3

3 The District Court in McLean noted three other elements of the CRS statement of belief to which members must subscribe:

(2) All basic types of living things, including man, were made by direct creative acts of God (Footnote continued)
When, as here, "both courts below are unable to discern an arguably valid secular purpose, this Court normally should hesitate to find one." Wallace v. Jaffree, supra, at 66 (POWELL, J., concurring). 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 religious belief.

(Footnote 3 continued from previous page)
during Creation Week as described in Genesis. Whatever biological changes have occurred since Creation have accomplished only changes within the original created kinds. (3) The great Flood described in Genesis, commonly referred to as the Noachian Deluge, was an historical event, world-wide in its extent and effect. (4) Finally, we are an organization of Christian men of science, who accept Jesus Christ as our Lord and Savior. The account of the special creation of Adam and Eve as one man and one woman, and their subsequent Fall into sin, is the basis for our belief in the necessity of a Savior for all mankind. Therefore, salvation can come only thru [sic] accepting Jesus Christ as our Savior." 529 F. Supp., at 1260, n. 7.
The legislative history of the Arkansas statute prohibiting the teaching of evolution examined in *Epperson v. Arkansas*, 393 U.S., at 97, was remarkably similar to the legislative history of the Balanced Treatment Act. In *Epperson*, the Court found:

"It is clear that fundamentalist sectarian conviction was and 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 story of 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 sensational publicity attendant upon the Scopes trial induced Arkansas to adopt less explicit language. It eliminated Tennessee's reference to 'the story of the Divine creation of man' as taught in the Bible, but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man." *Id.*, at 107-109 (footnotes omitted).
Here, it is clear that religious belief is the Balanced Treatment's Act's "reason for existence." The tenets of creation-science parallel the Genesis story of creation. As with the Ten Commandments, the Genesis story of creation is a religious belief, and "no legislative recitation of a supposed secular purpose can

4After hearing testimony from numerous experts, the District Court in McLean concluded:

The parallels between [the definition section of the model act] and Genesis are quite specific: (1) "sudden creation from nothing" is taken from Genesis, 1:1-10; (2) destruction of the world by a flood of divine origin is a notion peculiar to Judeo-Christian tradition and is based on Chapters 7 and 8 of Genesis; (3) the term "kinds" has no fixed scientific meaning, but appears repeatedly in Genesis; (4) "relatively recent inception" means an age of the earth from 6,000 to 10,000 years and is based on the genealogy of the Old Testament using the rather astronomical ages assigned to the patriarchs; (5) separate ancestry of man and ape focuses on the portion of the theory of evolution which Fundamentalists find most offensive, Epperson v. Arkansas, 393 U.S. 97 (1968)." 529 F. Supp., at 1285, n. 19.
blind us to that fact." Stone v. Graham, 449 U.S. 39, 41 (1980). Although the Act as finally enacted does not contain explicit reference to its religious purpose, there is no indication in the legislative history that the deletion of "creation ex nihilo" and the four primary tenets of the theory were intended to alter the purpose for teaching creation-science. Instead, the statements of purpose of the sources of creation-science in the United States make clear that their purpose is to promote a religious belief. I see no evidence in the legislative history that the legislature's purpose was any different. The fact that the Louisiana legislature purported to add information to the school curriculum rather than detract from it as in Epperson does not affect my analysis. Both legislatures acted with the unconstitutional purpose of
structuring the public school curriculum to make it compatible with a particular religious belief: the "divine creation of man."

That the statute is limited to the scientific evidences supporting the theory does not render its purpose secular. In reaching its conclusion that the Act is unconstitutional, the Court of Appeals "did not deny that the underpinnings of creationism may be supported by scientific evidence." 765 F. 2d 1231, 1256 (1985). And there is no need to do so. Whatever the academic merit of particular subjects or theories, the Establishment Clause limits the discretion of state officials to pick and choose among them for the purpose of promoting a
particular religious belief. The language of the statute and its legislative history convince me that the Louisiana legislature exercised its discretion for this purpose in this case.

II

Even though I find Louisiana's Balanced Treatment Act unconstitutional, I adhere to the view "that the States and locally elected school boards should have the

5For this reason, I dispose in short order of the argument that the affidavits submitted in this case rendered the grant of summary judgment by the District Court erroneous. To preclude summary judgment, affidavits must raise a genuine issue of material fact. Fed. R. Civ. P. 56(c). As I read the affidavits, they primarily purport to prove that a scientific basis for creation-science exists. But this proof is not material to the legal issue of whether the legislature intended to promote religious belief in requiring that these scientific evidences be taught. To the extent that the affidavits express the opinion that creation-science is not religious, they do not put into issue the legislature's understanding of the nature of the theory. This intent is properly determined by examination of the language of the Act and the legislative history contemporaneous with its enactment.
responsibility for determining the educational policy of the public schools." Board of Education v. Pico, 457 U.S. 853, 893 (1982) (POWELL, J., dissenting). A decision respecting the subject matter to be taught in public schools does not violate the Establishment Clause simply because the material to be taught "'happens to coincide or harmonize with the tenets of some or all religions.'" Harris v. McRae, 448 U.S. 297, 319 (1980) (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)). In the context of a challenge under the Establishment Clause, interference with the decisions of these authorities is warranted only when no valid secular purpose for their judgment is evident.

The history of the religion clauses of the First Amendment has been chronicled by this Court before in
See, e.g., Everson v. Board of Education, 330 U.S. 1, 8-14 (1947); McGowan v. Maryland, supra, at _; Engel v. Vitale, 370 U.S. 421, ___ (1962). Therefore, only a brief review at this point is necessary. The early settlers of this country came to escape religious persecution in Europe in the form of forced support of state-established churches. The new Americans thus reacted strongly when they perceived the same type of religious intolerance emerging in this country. The reaction in Virginia, the home of many of the Founding Fathers, is instructive. George Mason's draft of the Virginia Declaration of Rights, adopted in 1776, contained a guarantee of free exercise of religion. Eight years later, a provision prohibiting the establishment of religion became a part of Virginia law when James
Madison's Memorial and Remonstrance against Religious Assessments, written in response to a proposal by Patrick Henry that all Virginia citizens be taxed to support the teaching of the Christian religion, spurred the legislature to consider and adopt Thomas Jefferson's Bill for Establishing Religious Freedom. See Committee for Public Education v. Nyquist, supra, at 770, n. 28. Both the guarantees of free exercise and against the establishment of religion were then incorporated into the federal Bill of Rights by James Madison, its drafter.

While the "meaning and scope of the First Amendment" must be read "in light of its history and the evils that it was designed forever to suppress," Everson v. Board of Education, 330 U.S., at 14-15, this Court has also recognized that "[t]his Nation's history has not been one
of entirely sanitized separation between Church and State." Committee for Public Education v. Nyquist, supra, at 760. "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." Abington School District v. Schempp, supra, at 213.6 The Court has noted "an unbroken history of official acknowledgement ... of the role of religion in American life." Lynch v. Donnelly, 46 U.S., at 674, and implied that these references to "our

6John Adams wrote in a letter to Thomas Jefferson, "The Bible is the best book in the world. It contains more of my little philosophy than all the libraries I have seen; and such parts of it as I cannot reconcile to my little philosophy, I postpone for future investigation." Correspondence II 412 (Dec. 25, 1813).
religious heritage" are constitutionally acceptable. Id., at 677.

As a matter of history, school children, of course, can and should properly be informed of all aspects of this Nation's religious heritage. I would see no constitutional problem if school children were taught the nature of the Founding Father's religious beliefs and how these beliefs affected the attitudes of the times and the structure of our government. In a course in comparative religion, it would also be constitutionally appropriate. In fact, since religion permeates our history, a familiarity with the nature of religious beliefs is necessary to understand many historical as well as contemporary events.

7 The Encyclopedia of American Religions (2d ed. 1987) describes 1,347 churches.
To take examples on a worldwide scale, the political controversies in Northern Ireland, the Middle East and India, to name a few, cannot be understood properly without reference to the underlying religious beliefs and conflicts. In my view, it would be tragic if school children were deprived of a full and complete understanding of the history of this country and the world due to the supposed constraints of the Establishment Clause.

It is also important to emphasize that the Establishment Clause does not prohibit absolutely the use of religious documents in public school education.

Although this Court has recognized that the Bible is "an instrument of religion," Abington School District v. Schempp, supra, at 224, it has noted that the Bible "may
constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." Stone v. Graham, supra, at 42 (citing id., at 225). The book is, in fact, "the world's all-time best seller" with undoubted literary and historic value apart from its religious content. The Establishment Clause is properly understood to prohibit the use of the Bible and

8State-sponsored universities in Louisiana already offer courses integrating religious studies into the curriculum. Approximately half of the state-sponsored universities offer one or more courses involving religion. As an example, Louisiana State University at Baton Rouge offers seven courses: Introduction to Religion, Old Testament, New Testament, Faith and Doubt, Jesus in History and Tradition, Eastern Religions, and Philosophy of Religion. Many general teaching guides indicate that education as to the nature of various religious beliefs could be integrated into a secondary school curriculum in a manner consistent with the Constitution. See, e.g., C. Kniker, Teaching about Religion in the Public Schools (1985); The Religion in Elementary Social Studies Project, Final Report (Fla. State Univ. 1976); L. Karp, Teaching the Bible as Literature in the Public Schools (1973).

9See N.Y. Times, §2, p. 24, col. 3 (May 10, 1981); McWhirter, 1986 Guinness World Records 144 (the Bible is the world's most widely distributed book).
other religious documents in public school education only when the purpose of the use is clearly to advance religious belief.

III

In sum, I find that the language and the legislative history of the Balanced Treatment Act indicate beyond question that its purpose is to advance a particular religious belief. Although the discretion of state and local authorities over public school curriculum 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." Epperson v. Arkansas, supra, at 106. Accordingly, I concur in the opinion and judgment of the
Court that the Balanced Treatment Act violates the Establishment Clause of the Constitution.