
TALKING “RELIGIOUS, SUPERSTITIOUS
NONSENSE” IN THE CLASSROOM:
WHEN DO TEACHERS’ DISPARAGING
COMMENTS ABOUT RELIGION RUN
AFOUL OF THE ESTABLISHMENT
CLAUSE?

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I. INTRODUCTION

A sizable contingent of Christians in America are profoundly anxious, not only because of a fear that Christianity is losing its grip on the culture, but also because of a perception that religious faith has become an acceptable target for scorn and ridicule.¹ This anxiety, though ever present, inevitably intensifies whenever the religious right is dealt a political setback. Predictably, then, the rhetoric of religious victimhood began to escalate after Barack Obama won the presidency.² America, it would seem,

1. See, e.g., David Brody, *Are Evangelicals Now More Scorned Than Homosexuals?*, CBN NEWS: THE BRODY FILE (Mar. 27, 2013, 12:18 PM), <http://blogs.cbn.com/thebrodyfile/archive/2013/03/27/are-evangelicals-now-more-scorned-than-homosexuals.aspx> (suggesting that because evangelicals like Rick Santorum, Kirk Cameron, Tim Tebow, and Chick-fil-A founder Dan Cathy have been “endlessly ridiculed,” conservative Christians now face more adversity than gays and lesbians); *ESPN Should Have Made Fun of Jeremy Lin’s Christianity*, THE RUSH LIMBAUGH SHOW (Feb. 20, 2012), available at http://www.rushlimbaugh.com/daily/2012/02/20/espn_should_have_made_fun_of_jeremy_lin_s_christianity (claiming that the ESPN writer who was censured for making a racially insensitive remark about NBA basketball player Jeremy Lin “might have been promoted” if he had instead “mocked [Lin’s] Christianity”).

2. See, e.g., *The O’Reilly Factor* (Fox News broadcast Feb. 27, 2012), available at <http://www.foxnews.com/on-air/oreilly/2012/02/28/bill-oreilly-jfk-ronald-reagan-and-rick-santorum> (“[R]eligious Americans are under siege . . . There is no question that the Obama administration wants to impose secularism on everybody. . . . Secularism is on the march in America. We are not a faith-based country anymore.”).

is now embattled in a full-fledged “war on Christianity.”³ These feelings stem in part from the rapidly changing religious landscape. The ranks of the religiously unaffiliated have been steadily swelling in recent years. In 2012 Pew found that one-fifth of Americans—and one-third of those under thirty—claim no religious affiliation, a marked increase from just five years earlier.⁴

But the alarmist rhetoric nevertheless strikes many as unjustified and even a little silly. For one thing, President Obama has, of course, spoken about his personal Christian faith on more than one occasion.⁵ A man who publicly testifies that Jesus Christ has died for his sins makes for a curious leader in a crusade against Christianity. In addition, almost 75 percent of Americans still identify as Christians and the ranks of atheists and agnostics, though increasing, are still rather negligible.⁶ Unsurprisingly, then, many find it difficult to get behind the notion that religion in general or Christianity in particular is under legitimate attack. When voiced against a backdrop of two centuries of uninterrupted representation at the highest levels of government, the grievances of the supposedly victimized Christian majority are hard to take seriously.⁷ As a result, the gripes from religious conservatives often spur a self-fulfilling and even self-

3. Todd Starnes, *Rick Perry, Barack Obama and the War on Christianity*, FOXNEWS.COM (Dec. 8, 2011), <http://www.foxnews.com/opinion/2011/12/08/rick-perry-president-obama-and-war-on-christianity/>. See also Stephanie Condon, *Republican Candidates Decry “War on Religion,”* CBSNEWS.COM (Jan. 7, 2012, 11:49 PM), http://www.cbsnews.com/8301-503544_162-57354594-503544/republican-candidates-decry-war-on-religion/ (reporting on 2012 Republican candidates’ shared belief that “there’s a lot more anti-Christian bigotry today”).

4. PEW FORUM ON RELIGION & PUBLIC LIFE, “NONES” ON THE RISE: ONE-IN-FIVE ADULTS HAVE NO RELIGIOUS AFFILIATION 9 (2012) [hereinafter PEW FORUM], available at http://www.pewforum.org/uploadedFiles/Topics/Religious_Affiliation/Unaffiliated/NonesOnTheRise-full.pdf.

5. See, e.g., Christi Parsons & Peter Nicholas, *Obama Says He Became a Christian by Choice*, L.A. TIMES, Sept. 29, 2010, <http://articles.latimes.com/2010/sep/29/nation/la-na-obama-religion-20100929>.

6. PEW FORUM, *supra* note 4, at 9, 13 (showing that 73 percent of Americans still identify as Christians, while a comparatively slim 5.7 percent self-identify as atheists or agnostics, and more than two-thirds of the 13.9 percent who identify as “nothing in particular” still profess a belief in God). However, the voices of the atheist minority have undeniably been amplified in recent years thanks to the work of such arch-atheists as Richard Dawkins, Christopher Hitchens, Sam Harris, and Bill Maher. See, e.g., Sean McManus, *If God Is Dead, Who Gets His House?*, N.Y. MAG., Apr. 28, 2008, at 36.

7. A few years ago, for example, in response to a Republican Congressman’s rhetoric about the “long war on Christianity,” Jon Stewart sarcastically opined, “I pray that one day we may live in an America where Christians can worship freely in broad daylight openly wearing the symbols of their religion, perhaps around their necks, and maybe—dare I dream it—maybe one day there could even be an openly Christian president—or perhaps forty-three of them consecutively.” *The Daily Show with Jon Stewart* (Comedy Central broadcast June 22, 2005), available at <http://www.thedailyshow.com/watch/wed-june-22-2005/the-long-war-on-christianity>.

exacerbating cycle, as the complaints themselves become sources of ridicule and the feelings of victimization redouble.⁸ But while the popular discourse is dominated by a back and forth between hyperbolic bombast on one side and bewildered scoffing on the other, religious persecution is, of course, no laughing matter. Moreover, what “may seem [like] silly or wrong-headed” sensitivity to some is a deeply felt, “sincerely held . . . belief”⁹ to others.

When Orange County sophomore Chad Farnan filed a lawsuit claiming that his teacher, Dr. James Corbett, was making antireligious comments during class,¹⁰ it attracted national attention precisely because the suit was situated as part of this larger war-on-Christianity narrative—it struck a raw cultural nerve. Not only was Farnan’s cause eagerly taken on by Advocates for Faith and Freedom, a conservative interest group founded to restore America’s “Judeo-Christian . . . foundation” in “a society increasingly devoid of the message and influence of God,”¹¹ but Farnan also earned the accolades of Fox News pundits¹² and conservative bloggers for standing up to his “bigot teacher.”¹³ He was even trotted out as a fundraising tool at Republican campaign events.¹⁴ Like Farnan, Corbett also benefitted from high-profile support, most notably representation by

8. Rick Perry’s “Strong” campaign ad that ran prior to the 2012 Republican Iowa Caucus is a paradigmatic case. In the ad, Perry “folksily” declared that he was not “ashamed to admit that [he was] a Christian” and insisted that “there’s something wrong with this country when gays can serve openly in the military, but our kids can’t openly celebrate Christmas or pray in schools.” His statements struck many as absurd—on several levels, and as a result he was met with a torrent of ridicule. The ad “spawned a virtual cottage industry of parodies” on the Internet. See James Oliphant, *Rick Perry’s ‘Strong’ Ad Spawns a Flood of Video Parodies*, L.A. TIMES, Dec. 12, 2011, <http://articles.latimes.com/2011/dec/12/news/la-pn-rick-perry-strong-ad-spawns-parodies-20111212>.

9. *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1074 (6th Cir. 1987) (Boggs, J., concurring).

10. David Haldane, *Suit Targets History Teacher’s Comments*, L.A. TIMES, Dec. 13, 2007, <http://articles.latimes.com/2007/dec/13/local/me-student13>.

11. *About*, ADVOCATES FOR FAITH & FREEDOM, <http://www.faith-freedom.com/about> (last visited Nov. 5, 2013). *Accord Farnan v. Capistrano School District*, ADVOCATES FOR FAITH & FREEDOM, <http://www.faith-freedom.com/cases/farnan-v-capistrano-valley-school-district/> (last visited Nov. 5, 2013).

12. Farnan and his attorney appeared, for example, on *The O’Reilly Factor*. O’Reilly praised Farnan and told him that if he had known him earlier, Farnan “would have been on this cover of [his] book.” *The O’Reilly Factor* (Fox News broadcast Dec. 19, 2007), available at <http://www.foxnews.com/story/2007/12/19/bad-teaching-stops-here/>. O’Reilly characterized Corbett’s statements as “bully[ing]” and “indoctrination,” and stated that this was happening “all over America.” *Id.*

13. E.g., *Christian Student Silences Bigot Teacher*, DEFENDCHRISTIANS.ORG (Sept. 9, 2009), <http://defendchristians.org/commentary/christian-student-silences-bigot-teacher/>.

14. Scott Martindale, *‘Fight Back,’ Implores Student Who Sued Teacher*, ORANGE COUNTY REG., Oct. 16, 2009, <http://www.ocregister.com/news/farnan-215191-corbett-teacher.html>.

preeminent constitutional law scholar Erwin Chemerinsky.¹⁵ Chemerinsky was undoubtedly drawn to the case in part because of its novelty—never before had a student sued his teacher for making incendiary statements about religion during class.

In his complaint, Farnan objected to Corbett’s intentionally “provocative” discussions of current events in his Advanced Placement European History class,¹⁶ discussions that Farnan claimed were “not related to Advanced Placement European History” and were “derogatory, disparaging, and belittling” toward religion in general “and Christianity in particular.”¹⁷ Farnan provided more than twenty tape-recorded comments to support his allegation that Corbett violated the First Amendment’s Establishment Clause by “demonstrat[ing] hostility towards religion” and “favor[ing] irreligion over religion.”¹⁸

A good number of the comments that Farnan found objectionable, including observations Corbett made about the Boy Scouts,¹⁹ balance being a “buzz word,”²⁰ sex education policies,²¹ the enforcement of drug laws,²²

15. Scott Martindale, *UCI Law Dean to Represent Teacher Sued by Student*, ORANGE COUNTY REG., Oct. 26, 2009, <http://www.oregister.com/articles/corbett-216491-school-court.html>.

16. Corbett described these discussions as follows in a letter that he sent home to his Advanced Placement European History students prior to the first day of class:

Most days we will spend a few minutes (sometimes more) at the beginning of class discussing current events from either The Orange County Register or the L.A. Times. I may also use material from a variety of news Web sites. Discussion will be quite provocative, and focus on the “lessons” of history. My goal is to have you go home with something that will provoke discussion with your parents. Students may offer any perspective without concern that anything they say will impact either my attitude toward them or their grades. I encourage a full range of views.

James Corbett, *Teachers Must Challenge Myths*, OPEN SALON (May 9, 2009, 5:31 PM), http://open.salon.com/blog/corribean/2009/05/09/dr_james_jesus_glasses_corbett (internal quotation marks omitted).

17. First Amended Complaint for Declaratory and Injunctive Relief and Damages at 4, C.F. v. Capistrano Unified Sch. Dist. (*Capistrano I*), 615 F. Supp. 2d 1137 (C.D. Cal. 2009) (No. SACV07-1434 JVS (ANX)) [hereinafter Farnan Complaint].

18. *Id.* at 10.

19. Corbett brought up the Boy Scouts in a discussion about the separation of church and state: Now, the Boy Scouts have said, unless you’re willing to love God, and unless you’re willing to—unless you’re not gay, um—they are saying, being gay excludes you. Not believing God or not professing a belief in God also excludes you . . . But you see, until they started these rules, Boy Scouts used to—or Boy Scout troops usually met at schools, and places like that, parks, government buildings. They can’t do that anymore. They can’t do that anymore because now they are, in their own mind, a homophobic and a racist organization. It’s that simple . . . It’s call[ed] separation of church and state. The Boy Scouts can’t have it both ways. If they want to be an exclusive, Christian organization or an exclusive, God-fearing organization, then they can’t receive any more support from the state, and shouldn’t.

Appellants—Cross-Appellees Opening Brief at 9–10, C.F. *ex rel.* Farnan v. Capistrano Unified Sch. Dist. (*Capistrano III*), 654 F.3d 975 (9th Cir. 2011) (Nos. 09-56689, 09-56690) [hereinafter Farnan Brief] (ellipses and alteration in original) (internal quotation marks omitted).

20. In reference to a past parent’s complaint about the content of his class, he said:

and Viagra,²³ only vaguely touched upon religion (if at all). Other comments, however, explicitly invoked religion. For example, when discussing John Peloza, a former biology teacher at the high school who had sued the school district for requiring him to teach evolution,²⁴ Corbett defended his own role in the affair²⁵ by saying that he did not want to “leave John Peloza alone to propagandize kids with . . . religious,

[B]alance is just one of those buzz words for the right-wingers to try and get nonsense included along with the truth. That’s what I’m interested in. I’m interested in the facts. I’m interested in that which can be reasonably believed to be true because it is based in fact and in reason . . . [T]his parent . . . said, “Do you give both sides.” When there are two sides, sure. But most of the time the two sides are not equal. . . . [S]o, no, I am not trying to achieve balance. And, again, as I said, it’s a code word for the right-wing demanding that nonsense be presented equally with that which is proven by evidence to be, you know, a possibility [sic] true.

Id. at 14 (internal quotation marks omitted).

21. Corbett criticized abstinence-only sex education programs by saying:

After an outbreak of pregnancies among middle school girls, education officials in the city [of Brooklyn, Maine] had decided to make birth control pills available at the middle school centers [O]ther people say, you know, we shouldn’t be teaching our kids how to have sex safely. We should be teaching our kids abstinence. Well, we know abstinence doesn’t work. And we know one other thing; and that is, once people become sexually active, they often don’t stop for, like, 40 or 50 years. I mean, generally, when you start you don’t, like, have a conversion and try to become re-virginized, you know. It’s not going to happen.

Farnan Complaint, *supra* note 17, at 5–6 (ellipses and alterations in original) (internal quotation marks omitted).

22. He remarked:

If you’re poor, and you live in the inner city, um, chances are actually greater that one parent will be at home, and that you will be living in an apartment. You guys, most of you, have parents, two parents, who work. And if you want to smoke a joint, you can walk out into the backyard, sit down by the swimming pool, and smoke it. You do not have to worry about some cop driving by and busting you. In the inner city, you can’t smoke with your mom in the apartment, so you go down to the street corner. There is no place to hide. They get busted all the time there. Here, you know, the dealers—I’m sure there are people in here who know people who will sell pot. That’s one of the ironies of teaching here and one of the ironies of our own judicial system

Id. at 8.

23. His Viagra joke, though probably irrelevant to the study of European history, did not comment on religion or religious beliefs:

U.S. regulators say they added new warnings about the potential risks of sudden hearing loss for men who are using Viagra, Cialis, or Levitra. So what they have been telling you all these years, that you’ll go blind, isn’t true; but you will go deaf. And now what I think—some Canadian has to get this, but I have a suspicion, if you went down the list of side effects, of possible side effects, of this drug, you could—you could really—I mean, somebody who had all the side effects would be pretty fun. I mean, there is, after all, the four-hour thing. So, you know, you know, if you run into somebody who is, you know, deaf and whose pants felt stiff, he’s probably using the drug They’re happy, but they’re deaf.

Id. at 5 (ellipses in original).

24. *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 519 (9th Cir. 1994) (per curiam).

25. Corbett was a named party in Peloza’s suit because Corbett advised the student newspaper that ran an article critical of Peloza’s teaching choices. He failed to allow Peloza to present an opposing view in the paper. *C.F. v. Capistrano Unified Sch. Dist. (Capistrano I)*, 615 F. Supp. 2d 1137, 1146 (C.D. Cal. 2009), *vacated sub nom. C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist. (Capistrano III)*, 654 F.3d 975 (9th Cir. 2011), *cert. denied sub nom. C.F. v. Corbett (Corbett)*, 132 S. Ct. 1566 (2012).

superstitious nonsense.”²⁶ And this was not an isolated criticism of creationism. On various other occasions he said:

[There] are . . . two possibilities: it [the universe] was created out of nothing or it’s always been here. Your call as to which one of those notions is scientific and which one is magic. [Inaudible] the spaghetti monster behind the moon. I mean, all I’m saying is that, you know, the people who want to make the argument that God did it, there is as much evidence that God did it as there is that there is a gigantic spaghetti monster living behind the moon who did it.²⁷

[N]o creation, unless you invoke magic. Science doesn’t invoke magic. If we can’t explain something, we do not uphold that position. It’s not, ooh, then magic. That’s not the way we work. If we can’t find a rational explanation, we go looking for other rational explanations. We do not invoke a supernatural every time we get stymied What was it that Mark Twain said? “Religion was invented when the first con man met the first fool.”²⁸

The first time a scientist finds something that can’t be explained, you know, in evolution, it may not be thrown out, but it is undermined. And, actually, when they do the research, they’re not looking to prove evolution. They’re looking to disprove it. That’s what the moral hypothesis is. You try and disprove it. And the more you try and disprove it and the more you fail, the more you believe it.

Contrast that with creationists. They never try to disprove creationism. They’re all running around trying to prove it. That’s deduction. It’s not science. Scientifically, it’s nonsense.²⁹

Religion was also directly implicated in a pair of Corbett’s comments about crime and punishment:

People—in the industrialized world [who are] least likely to go to church are the Swedes. The people in the industrialized world most likely to go to church are the Americans. America has the highest crime rate of all industrialized nations, and Sweden has the lowest. The next time somebody tells you religion is connected with morality, you might want to ask them about that.³⁰

26. *Capistrano I*, 615 F. Supp. 2d at 1146 (internal quotation marks omitted).

27. Farnan Brief, *supra* note 19, at 16–17 (second and third alterations in original).

28. *Id.* at 17.

29. *Capistrano III*, 654 F.3d at 981.

30. Farnan Brief, *supra* note 19, at 10.

So we know what rehabilitation works [sic] and that punishment doesn't, and yet we go on punishing. It really has a lot to do with these same culture wars we're talking about. This whole Biblical notion: Sinners need to be punished. And so you get massively more Draconian punishment in the South where religion is much more central to society than you do anyplace else. And, of course, the Southerners get really upset, a[t] what they see as lenient behavior in the North. You know, we're going to solve this problem. Except, guess what? What part of the country has the highest murder rate? The South. What part of the country has the highest rape rate? The South. What part of the country has the highest . . . church attendance? The South. Oh, wait a minute. You mean there is not a correlation between these things? No, there isn't. Um, in fact, there is an inverse correlation. In those places where people go to church the least, the crime was the most. And that's not just Sweden and the United States. That's Pennsylvania and Georgia.³¹

In another instance, Corbett suggested that religion negatively impacts women:

[C]onservatives don't want women to avoid pregnancies. That's interfering with God's work. You got to stay pregnant, barefoot, and in the kitchen and have babies until your body collapses. All over the world, doesn't matter where you go, the conservatives want control over women's reproductive capacity. Everywhere in the world. From conservative Christians in this country to, um, Muslim fundamentalists in Afghanistan. It's the same. It's stunning how vitally interested they are in controlling women.³²

Finally, during a lecture about the peasants' religiously motivated resistance to Joseph II's reforms that would have benefited them politically and economically, Corbett said that "when you put on your Jesus glasses, you can't see the truth."³³

The district court held that none of the statements were impermissibly hostile to religion except for one—the one about John Peloza that referred to creationism as "religious, superstitious nonsense."³⁴ Further, although only one of Corbett's statements had crossed the line, a single instance of religious hostility was enough to violate the Establishment Clause in the

31. *Id.* at 12–13.

32. *Id.* at 10–11.

33. *C.F. v. Capistrano Unified Sch. Dist. (Capistrano I)*, 615 F. Supp. 2d 1137, 1147 (C.D. Cal. 2009) (internal quotation marks omitted), *vacated sub nom. C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist. (Capistrano III)*, 654 F.3d 975 (9th Cir. 2011), *cert. denied sub nom. C.F. v. Corbett (Corbett)*, 132 S. Ct. 1566 (2012).

34. *Id.* at 1146, 1153 (internal quotation marks omitted).

court's view.³⁵ The district court subsequently held, however, that Corbett was entitled to qualified immunity³⁶ because “the constitutional right at issue was not clearly established when Corbett made the [‘superstitious nonsense’] statement.”³⁷ Both parties appealed. The Ninth Circuit agreed with the district court that Corbett was shielded from liability because they could not “expect Corbett to have divined the law without the guidance of any prior case on point.”³⁸ The court used Corbett’s qualified immunity protection as an excuse to “decline to pass upon the constitutionality of . . . the challenged statements,”³⁹ but at the same time the court observed that “[a]t some point a teacher’s comments on religion might cross the line and rise to the level of unconstitutional hostility.”⁴⁰ Seeking answers to the fundamental constitutional question that the Ninth Circuit evaded, Farnan’s attorneys filed a cert petition with the Supreme Court.⁴¹ The Court, however, declined to weigh in,⁴² leaving the core constitutional questions raised by the case largely unanswered. But given the ever-growing feelings of religious victimization among the religious right, the tension between religious students and secular schools is likely to produce similar litigation in coming years—the core constitutional questions, therefore, need answering.

By sidestepping the substantive contours of the Establishment Clause issue while ominously warning that a teacher could cross a “dimly perceive[d]”⁴³ constitutional line during classroom discussions about religion, the Ninth Circuit ultimately failed to satisfy either of the opposing interests in the case. This Note argues that a precise, tailored Establishment Clause standard should be adopted for the context of extemporaneous classroom discussion so that educators can freely engage in the robust exchange of ideas without fear of crossing into unconstitutional territory,

35. *Id.* at 1156.

36. On qualified immunity, the Supreme Court has stated:

[A] plaintiff may seek money damages from government officials who have violated her constitutional . . . rights. But to ensure that fear of liability will not “unduly inhibit officials in the discharge of their duties,” the officials may claim qualified immunity; so long as they have not violated a “clearly established” right, they are shielded from personal liability.

Camreta v. Greene, 131 S. Ct. 2020, 2030–31 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)) (citation omitted).

37. *C.F. v. Capistrano Unified Sch. Dist. (Capistrano II)*, 656 F. Supp. 2d 1190, 1204 (C.D. Cal. 2009), *aff’d sub nom. C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist. (Capistrano III)*, 654 F.3d 975 (9th Cir. 2011), *cert. denied sub nom. C.F. v. Corbett (Corbett)*, 132 S. Ct. 1566 (2012).

38. *Capistrano III*, 654 F.3d at 988 (citation omitted).

39. *Id.* at 978.

40. *Id.* at 988.

41. Petition for Writ of Certiorari, *Capistrano III*, 654 F.3d 975 (9th Cir. 2011) (No. 11-759).

42. *Corbett*, 132 S. Ct. at 1566.

43. *Capistrano III*, 654 F.3d at 988 (quoting *Mueller v. Allen*, 463 U.S. 388, 393 (1983)).

while religious students can simultaneously have judicial recourse when bona fide religious hostility is established in the classroom. Part II provides a brief overview of the Supreme Court's Establishment Clause jurisprudence, while Part III focuses on school-related Establishment Clause claims brought under a hostility-to-religion theory. In Part IV, this Note shifts to a detailed summary of the courts' Establishment Clause analysis in *C.F. v. Capistrano Unified School District*. Part V continues the discussion of *Capistrano* by exploring how the approaches adopted by the district court and Ninth Circuit threaten to (A) have a chilling effect on classroom discourse and (B) leave students vulnerable to impermissibly hostile comments about religion. Then, Part VI proposes a new hostile-classroom-environment standard for Establishment Clause claims that challenge teachers' in-class comments about religion. Part VII concludes.

II. THE SUPREME COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE

The First Amendment provides that "Congress shall make no law respecting an establishment of religion."⁴⁴ The Supreme Court has long struggled with the conceptual difficulty of crafting a precise articulation as to what exactly constitutes an impermissible "establishment of religion," and the establishment inquiry continues to stubbornly resist easy analysis for the Court. In its first modern Establishment Clause case, the Court declared government neutrality toward religion to be the overriding command of the Clause.⁴⁵ While the principle of neutrality has remained the "touchstone" for the Court,⁴⁶ competing and overlapping theories of neutrality have been proffered⁴⁷ as best serving the Establishment Clause's

44. U.S. CONST. amend. I. The Court subsequently used the incorporation doctrine to impose the Establishment Clause's limits on state governments as well. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

45. *Everson*, 330 U.S. at 16 ("[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers State power is no more to be used so as to handicap religions, than it is to favor them.").

46. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005). *See also, e.g.*, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995) ("A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.").

47. Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 314 (1987) ("Th[e] pervasive commitment to neutrality has not yet generated any clear and convincing account of what neutrality actually entails. It has become increasingly clear, rather, that neutrality is a 'coat of many colors.' Thus far, the concept's protean character has not noticeably undermined its appeal, and may even have enhanced it; virtually anyone can find a nostrum to his liking in the cabinet of neutrality." (footnote omitted) (quoting *Bd. of Educ. v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring))).

various underlying values—equality, individual liberty, nondisvisiveness, and structural independence for both religious and civil institutions.⁴⁸ Neutrality has been alternately theorized by the Justices, for example, as (A) requiring strict separation between church and state, (B) preventing the government from favoring religion in general or any particular religion over another, and (C) disallowing the state from coercing religious belief or participation.⁴⁹

A. NEUTRALITY AS SEPARATION

The Court's earliest glosses on the Establishment Clause adopted Thomas Jefferson's well-known language that the First Amendment was intended to build "a wall of separation between church and State."⁵⁰ Because of Jefferson's role in the crafting of the Constitution, the Court accepted his separation concept as an "almost . . . authoritative declaration of the scope and effect of the amendment."⁵¹ This Jeffersonian approach envisions a "complete and permanent separation of the spheres of religious activity and civil authority."⁵²

Drawing on the ideas of John Locke,⁵³ the separate spheres theory is animated by an antifusion principle that posits that both government and religion are degraded when they intermingle.⁵⁴ While the Enlightenment-minded Jefferson seems to have been primarily concerned with the way in

48. See Jorge O. Elorza, *Secularism and the Constitution: Can Government Be Too Secular?*, 72 U. PITT. L. REV. 53, 100–05 (2010).

49. While these broad categories represent three of the Court's most prominent conceptions of neutrality, given the Justices' infamous wishy-washiness in this area, it is a far from exhaustive list. See Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 728 (arguing that "[f]rom a theoretical standpoint, the Court has failed to achieve even a rudimentary level of consistency in its First Amendment pronouncements regarding church and state" and noting that in the past several years "one or more of the nine Justices have signed opinions proposing ten different standards for enforcing the Establishment Clause").

50. *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (quoting Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1802)) (internal quotation marks omitted). See also *Everson*, 330 U.S. at 18 ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.").

51. *Reynolds*, 98 U.S. at 164.

52. *Everson*, 330 U.S. at 31–32.

53. See JOHN LOCKE, A LETTER CONCERNING TOLERATION 17 (Patrick Romanell ed., William Popple trans., Bobbs-Merrill Co. 2d ed. 1955) ("I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other. If this be not done, there can be no end put to the controversies that will be always arising between those that have, or at least pretend to have, on the one side, a concernment for the interest of men's souls, and, on the other side, a care of the commonwealth.").

54. *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (noting that the "first and most immediate purpose" of the Establishment Clause "rested on the belief that a union of government and religion tends to destroy government and to degrade religion").

which religious intrusion into civil affairs would infringe on individual liberty, breed divisiveness, and result in public contempt for the government, Protestant pastor Roger Williams first conceived of the metaphorical wall because he was fearful of the pernicious effect that “worldly corruptions” would have on the church.⁵⁵ As Justice Brennan has explained, a separationist approach to the Establishment Clause simultaneously serves both interests; it preserves the purity of both spheres by “guarantee[ing] the individual right to conscience,” “keep[ing] the state from interfering in the essential autonomy of religious life,” “prevent[ing] the trivialization and degradation of religion by too close an attachment to the organs of government,” and “assur[ing] that essentially religious issues, precisely because of their importance and sensitivity, [do] not become the occasion for battle in the political arena.”⁵⁶

But while strict separation is a seemingly straightforward, easy-to-apply concept, the Court soon discovered that erecting a wholly impenetrable wall is impractical simply because “[s]ome relationship between government and religious organizations is inevitable.”⁵⁷ In recent years, therefore, as the size of the government has grown, the “wall [of separation]” has largely been reconceptualized as a “useful figurative illustration” rather than an absolute mandate.⁵⁸ When the Jeffersonian approach is applied today, the once “high and impregnable” wall⁵⁹ more closely resembles a “blurred, indistinct, and variable barrier.”⁶⁰

B. NEUTRALITY AS NONDISCRIMINATION: NONENDORSEMENT AND EQUAL TREATMENT

Alternatively, several Justices have broadly conceptualized neutrality as a bar against any state-sanctioned support or disapproval of religion. A nuanced symbolic endorsement standard has been proposed by Justice O’Connor as the best way of capturing not only “overt efforts at government proselytization,” but also the “numerous more subtle ways that government can show favoritism to particular beliefs or convey a message

55. MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 6 (1965).

56. *Marsh v. Chambers*, 463 U.S. 783, 803–05 (1983) (Brennan, J., dissenting) (citations omitted).

57. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

58. *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 122–23 (1982) (“Some limited and incidental entanglement between church and state authority is inevitable in a complex modern society . . .”). See also Ira C. Lupu, *The Lingering Death of Separationism*, 62 *GEO. WASH. L. REV.* 230 (1994) (exploring the decline of separationism as the prevailing theory of the Establishment Clause).

59. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

60. *Lemon*, 403 U.S. at 614.

of disapproval to others.”⁶¹ She has described this nonendorsement approach as promoting the twin principles of nondiscrimination and antisubordination, reasoning that the “government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.”⁶² Under this approach, neutrality is compromised and the Establishment Clause is violated whenever “a reasonable observer” would detect a message of religious endorsement or disapproval in a government action.⁶³

A far narrower conception of neutrality that nevertheless has similar theoretical underpinnings interprets the Establishment Clause to merely require equal treatment of religious and nonreligious groups.⁶⁴ Whereas the endorsement standard is chiefly concerned with the discriminatory effects felt by nonadherents when the government lends support to religion, the equal treatment conception of neutrality instead detects discrimination when the government explicitly excludes religious groups from receiving government support.⁶⁵ The equal treatment approach, grounded in a reverence for traditional values and a desire to give religion a space in the public square,⁶⁶ welcomes a not-insubstantial degree of church-state overlap. Under this theory of neutrality, it is constitutionally permissible for the state to provide funding and open its doors to religious institutions so long as such government support is dispensed with an even, “neutral” hand.⁶⁷ In other words, equal treatment proponents would sanction potentially lopsided outcomes in which certain religious groups were given government support, so long as the government program dispensing the aid relied on neutral criteria and was not intentionally designed to promote religion.⁶⁸

61. *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 627–28 (1989) (O’Connor, J., concurring).

62. *Id.* at 627.

63. *Id.* at 630.

64. See Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 341, 365 (1999) (arguing that “equal treatment is constitutionally compelled” and that the “government may not discriminate against people or institutions because of their religiosity”).

65. See *id.* at 365–73.

66. See Toni M. Massaro, *Religious Freedom and “Accommodationist Neutrality”: A Non-Neutral Critique*, 84 OR. L. REV. 935, 945–49 (2005) (discussing the Court’s equal treatment approach in freedom of religious speech cases).

67. See generally *id.* (exploring how the Court has grown increasingly solicitous to religion in the public sphere based on the theory of equal treatment or “accommodationist neutrality”).

68. See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995) (“[T]he guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints,

Justice Rehnquist took the equal treatment line of reasoning one step further, arguing that the Establishment Clause has the even more modest aim of simply prohibiting the government from favoring any particular religious denomination or sect.⁶⁹ According to Justice Rehnquist, therefore, the Establishment Clause permits overt state preferences for religion over irreligion.⁷⁰ While the equal treatment philosophy has found a fair number of proponents on the Court and has even carried the day in some cases,⁷¹ Justice Rehnquist's more extreme version of this approach has not been widely embraced.⁷²

C. NEUTRALITY AS NONCOERCION

Justice Kennedy has described the Establishment Clause's neutrality directive as a guarantee "that government may not coerce anyone to support or participate in religion or its exercise."⁷³ While he has conceptualized coercion broadly enough to detect coercion in the indirect pressure of a prayer at a public school graduation,⁷⁴ Justice Scalia has framed the same concept extremely narrowly. Based on Justice Scalia's historical reading of the text, only directly coercive government action is forbidden by the Establishment Clause. He believes that the government operates within the bounds of the Establishment Clause absent "readily discernible" coercion that is "backed by threat of penalty."⁷⁵ In Justice Scalia's view, therefore, "[s]peech is not coercive; the listener may do as he likes."⁷⁶

including religious ones, are broad and diverse.").

69. *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting).

70. *Id.*

71. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 120 (2001) (holding that a school's refusal to allow a Christian children's club to meet at school based on its religious nature was unconstitutional viewpoint discrimination); *Rosenberger*, 515 U.S. at 839-40 (discussing the Court's respect for programs that are "neutral toward religion"); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395-97 (1993) (holding that permitting a church access to school premises would not violate the Establishment Clause under the equal treatment approach).

72. *See McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 885 (2005) (Scalia, J., dissenting) (arguing that the "Court's oft repeated assertion that the government cannot favor religious practice is false"); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 145-46 (1992) (citing evidence refuting Justice Rehnquist's approach and predicting that it would not feature prominently in future decisions).

73. *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

74. *See id.* at 593 (arguing that "subtle and indirect" pressure "can be as real as any overt compulsion").

75. *Id.* at 642 (Scalia, J., dissenting).

76. *Id.* (quoting *Am. Jewish Cong. v. Chicago*, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting)).

D. THE *LEMON* TEST

These various theories of neutrality have somewhat coalesced in the Court's governing Establishment Clause precedent: the tripartite test laid out in *Lemon v. Kurtzman*.⁷⁷ Under *Lemon*, in order to pass Establishment Clause scrutiny, a government action must meet three requirements: (1) it must have a "secular . . . purpose"; (2) "its principal or primary effect must be one that neither advances nor inhibits religion"; and (3) it must "not foster an 'excessive government entanglement with religion.'" ⁷⁸ The first and second *Lemon* prongs, therefore, attempt to address the primary concerns of the nonendorsement and noncoercion theories of neutrality. At the same time, the third prong intends to promote the antifusion principle. A permissive approach to state support of religion, on the other hand, does not have much room to maneuver within the parameters of *Lemon*, and accordingly, proponents of a lax interpretation of the Establishment Clause have been especially vocal in advocating that *Lemon* be overruled.⁷⁹

Dissatisfaction with *Lemon*, however, has been far from one sided. Instead, *Lemon* has been sharply criticized by commentators of all ideological stripes⁸⁰ as well as by both liberal and conservative members of the Court.⁸¹ Though the Justices have differed in the particulars of their complaints, they have largely united in branding the test as inconsistent,

77. The Court has invoked the *Lemon* test in all but two of its subsequent Establishment Clause cases. See *Marsh v. Chambers*, 463 U.S. 783, 791–92 (1983) (applying a history-and-tradition standard that permitted religious gestures by government that had been ratified by historical practice and were "part of the fabric of our society"); *Larson v. Valente*, 456 U.S. 228, 252 (1982) (applying a strict scrutiny standard because the challenged law made a discriminatory classification based on religion).

78. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (citation omitted) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

79. See, e.g., *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–400 (1993) (Scalia, J., concurring).

80. See, e.g., Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 693 (2002) (bemoaning the "relatively thin connection between the three-pronged test and an expressly articulated theory of the purposes of the Establishment Clause"); Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795, 800–01 (1993) (finding a "major analytic flaw or ambiguity" in each prong of the test).

81. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 694 (2005) (Thomas, J., concurring) (lamenting that the Court's Establishment Clause "jurisprudence leaves courts, governments, and believers and nonbelievers alike confused"); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring) (suggesting that the *Lemon* test is often "so vague as to be useless"); *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part) (emphasizing that while he was "content for present purposes to remain within the *Lemon* framework," he did "not wish to be seen as advocating, let alone adopting, that test as [the Court's] primary guide in this difficult area"); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (describing any attempt to apply *Lemon* as a "sisyphian task").

ambiguous, and doctrinally incoherent. Despite this less-than-full embrace of *Lemon*, its three-part test has not been categorically overruled or replaced with any definitive alternative approach. As a result of the Court's ambivalence, *Lemon* is still accepted as binding law at the district and appellate level and though "repeatedly killed and buried," it still "stalks [the Court's] Establishment Clause jurisprudence."⁸²

III. ALLEGATIONS OF RELIGIOUS HOSTILITY IN SCHOOLS

The Establishment Clause is often thought of as solely preventing the state from promoting or facilitating religion, but the case law has consistently clarified that the clause "is . . . violated as much by government disapproval of religion as it is by government approval of religion."⁸³ Although in some respects Chad Farnan's claim was novel—it was the first time the Establishment Clause had been used to object to a teacher's off-the-cuff comments⁸⁴—the classroom has long been fertile ground for Establishment Clause claims based on a hostility-to-religion theory. Schools have been a central battleground for good reason. Because public schools are "sites for the creation of American identity," the "[l]oss of control over what [is] taught in the schools would be evidence of lost control over the public meaning of American life."⁸⁵ Despite the impassioned insistence by many that schools have grown increasingly hostile to religion,⁸⁶ charges of religious hostility have not fared well in the courts.⁸⁷

Most of these claims have come in the form of complaints about the

82. *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring).

83. *Vernon v. City of L.A.*, 27 F.3d 1385, 1396 (9th Cir. 1994).

84. However, a mirror-image set of facts emerged in 2006 when an 11th grader recorded his history teacher telling his class "that evolution and the Big Bang were not scientific, that dinosaurs were aboard Noah's ark, and that only Christians had a place in heaven," but the student was satisfied with sharing his recordings with school officials and the press. He did not file a complaint in court. Tina Kelley, *Talk in Class Turns to God, Setting off Public Debate on Rights*, N.Y. TIMES, Dec. 18, 2006, <http://www.nytimes.com/2006/12/18/nyregion/18kearny.html>.

85. NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 70 (2005).

86. See, e.g., Barbara Pinto, *Is Public School System Anti-Christian?*, ABC NEWS (June 15, 2004), <http://abcnews.go.com/WNT/story?id=131713&page=1#T0s-GfUmySo>.

87. See, e.g., *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1223–31 (10th Cir. 2005) (holding that a sculpture displayed at Washburn University that allegedly mocked God and Catholicism was not an unconstitutional establishment of religious hostility); *Ass'n of Christian Sch. Int'l v. Stearns*, 679 F. Supp. 2d 1083, 1109–10 (C.D. Cal. 2008) (upholding university admission guidelines that did not accept some coursework from religious schools because "a secular purpose [was] plainly evident," "a reasonable person would not find the primary effect of the UC course review process to be inhibition of religion," and the guidelines evaluated coursework based on whether they prepared students for college, not whether they contained religious content).

content of public school curricula, assertions that the curricula either established religious hostility or the “religion” of secular humanism. Ultimately, however, religious parents and students have not had much success in their attempts to use the Establishment Clause (or the Free Exercise Clause)⁸⁸ to force public schools to fashion curricula they consider ideologically or theologically palatable. Courts have been skeptical of these claims in part for a practical reason: devising a curriculum that would satisfy the demands of all faiths in a religiously pluralistic society would surely be an impossible task. And even more fundamentally, the case law has made clear that the First Amendment does not tolerate, much less mandate, curricula that “cast a pall of orthodoxy over the classroom.”⁸⁹ The plaintiffs in these cases have therefore been unsuccessful because they have sought an unconstitutional remedy. It would violate the Establishment Clause “to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.”⁹⁰ The cases have ended poorly for the plaintiffs no matter what secular element of the curriculum has been targeted, whether secular humanism in general, sex education, evolution, or gay tolerance.

A. THE FUNDAMENTALIST ATTACK ON SECULAR HUMANISM

The modern Christian fundamentalist movement was born out of doctrinal disputes in the early twentieth century between orthodox Christians who clung to a belief in the inerrancy of Scripture and liberal Protestant theologians who “sought to understand God through the lens of contemporary developments in science and biblical studies.”⁹¹ Convinced that this theological chasm threatened true Christianity, a minority of evangelicals intensified their focus on what they deemed the “fundamentals” of their faith.⁹² After an embarrassing moment in the sun during the *Scopes* monkey trial, which was depicted in the press “as a battle of enlightenment against ignorance,” these fundamentalists largely

88. Although curricular challenges have been made on Free Exercise grounds, a Sixth Circuit judge observed that “the Court has almost never interfered with the prerogative of school boards to set curricula, based on free exercise claims” and therefore concluded that school boards are “bounded only by the Establishment Clause” in this area. *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1079, 1080 (6th Cir. 1987) (Boggs, J., concurring).

89. *Epperson v. Arkansas*, 393 U.S. 97, 105 (1968) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)) (internal quotation marks omitted).

90. *Id.* at 106.

91. FELDMAN, *supra* note 85, at 136. See also Nomi Maya Stolzenberg, “*He Drew a Circle That Shut Me Out*”: Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 HARV. L. REV. 581, 615–17 (1993).

92. Stolzenberg, *supra* note 91, at 617–18.

retreated from the public arena to create spiritually pure safe havens secluded from what they regarded as the evils of secular society and modern perversions of their faith.⁹³ They began to re-emerge in the late 1970s, however, to take the political stage and take on what they called secular humanism.⁹⁴ And although sprung from a minority movement, their complaints about secular humanism soon began to make their way into mainstream, popular discourse.⁹⁵

Few self-identify as secular humanists, however, and “most of the targets of the attack on secular humanism would not recognize themselves as . . . followers of any particular mindset.”⁹⁶ Nevertheless, fundamentalists have conceptualized the wide-ranging worldview that grew out of “moral and cultural relativism” and “an indifference to biblical absolutes” as a discrete ideology.⁹⁷ And though fundamentalists purport that this dangerous ideology has been advanced in everything from Enlightenment philosophy to surrealist art, “the most powerful vehicle of secular humanism today is the public school.”⁹⁸

As one arm of their movement, then, fundamentalists looked to rescue the public schools from the influence of secular humanism, and taking their complaints to the courtroom, they hoped the Establishment Clause could serve as a weapon in the fight. The Supreme Court invited claims of this nature in a pair of opinions in the 1960s.⁹⁹ The first, *Torcaso v. Watkins*, a free exercise case, featured a footnote that included secular humanism among a list of American religions.¹⁰⁰ The following year, in *School District v. Schempp*, the Court cast devotional Bible reading out of the public schools, but softened the blow by noting that schools also could “not establish a ‘religion of secularism’ in the sense of affirmatively opposing or showing hostility to religion.”¹⁰¹ Although the language in *Torcaso* and *Schempp* gave religious plaintiffs enough doctrinal footing to pursue claims

93. *Id.* at 618–20.

94. Although fundamentalists had previously thought that worldly separation was a spiritual mandate, many, like Jerry Falwell, had a change of heart and decided that their absence from the political process was creating a “bad” government. *Id.* at 623–25.

95. See FELDMAN, *supra* note 85, at 190 (discussing the rise of fundamentalism in mainstream discourse).

96. *Id.* at 614.

97. *Id.* at 621–22.

98. *Id.* at 622.

99. Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. REV. 603, 608 (1987).

100. *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (“Among religions in this country . . . are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.”).

101. *Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963).

that schools had impermissibly established secular humanism or religious hostility, in the cases that followed, the courts were thoroughly unconvinced that any "religion of secularism" was actually established in the schools.¹⁰²

In 1987, for example, a group of plaintiffs brought a broad-based objection to the curriculum in the Mobile County School System to the Eleventh Circuit. They asserted that forty-four of the county's home economics, history, and social studies textbooks unconstitutionally established the religion of secular humanism and evinced hostility to Christianity.¹⁰³ The plaintiffs objected to the home economics text for setting forth tenets of humanistic psychology, like "you are the most important person in your life."¹⁰⁴ Assuming *arguendo* that secular humanism is a religion for Establishment Clause purposes,¹⁰⁵ the Eleventh Circuit found no impermissible advancement of secular humanism in the textbooks because "mere consistency with religious tenets is insufficient to constitute unconstitutional advancement of religion."¹⁰⁶ Per *Lemon*, a curriculum's correspondence with religious tenets only violates the Establishment Clause if it is accompanied by an impermissible purpose, an impermissible effect, or excessive entanglement with religion.¹⁰⁷ In this case, the home economics book did not convey a message of religious endorsement, the Court concluded, but rather a message of fundamental civic values, such as "independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decisionmaking."¹⁰⁸ Similarly, a curriculum's mere inconsistency with religious beliefs is not enough to make it an unconstitutional establishment of religious hostility. As the court explained, quoting Justice Jackson, "If we are to eliminate everything that is objectionable to any [religion] or inconsistent with any [religious] doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system [could] result."¹⁰⁹

102. Mitchell, *supra* note 99, at 609–12.

103. Smith v. Bd. of Sch. Comm'rs, 827 F.2d 684, 688 (11th Cir. 1987).

104. *Id.* at 690–91 (internal quotation marks omitted).

105. *Id.* at 689. The court acknowledged that the Supreme Court has yet to definitively answer the "delicate question" of what constitutes a religion for Establishment Clause purposes. *Id.* (internal quotation marks omitted).

106. *Id.* at 692.

107. Mitchell, *supra* note 99, at 672.

108. Smith, 827 F.2d at 692.

109. *Id.* at 693 n.10 (quoting *McCullum v. Bd. of Educ.*, 333 U.S. 203, 235 (1948) (Jackson, J., concurring)).

The history and social studies textbooks were faulty in the plaintiffs' view not because of what they said, but rather what they left out. The books, they claimed, improperly minimized the role of religion in history and culture.¹¹⁰ The court, however, did not see an endorsement of secular humanism or a disapproval of religion in the texts' failure to include certain religion-related content and characterized any benefit to secular humanism from such oversight as "merely incidental"; "the message that reasonably would be conveyed to students and others [was] that the education officials . . . chose to use these particular textbooks because they deemed them more relevant to the curriculum, or better written, or for some other nonreligious reason found them to be best suited to their needs."¹¹¹ Echoing the reasoning of the cases involving the "balanced treatment" of creationism and evolution,¹¹² the Court concluded that the neutrality required by the Establishment Clause is not equivalent to "an affirmative obligation to speak about religion" in public schools.¹¹³

The supposedly insidious influence of secular humanism has also been found in literature classes. A parent, for example, claimed that the assignment of Gordon Parks's *The Learning Tree* in her daughter's sophomore English class violated the Establishment Clause,¹¹⁴ even though the novel, a semi-autobiographical account of a young African American in rural Kansas during the early twentieth century, is principally concerned with race and has little to do with religion.¹¹⁵ Nonetheless, the plaintiff insisted that the novel advocated secular humanism and was anti-Christian.¹¹⁶ The Ninth Circuit's majority opinion breezed through its analysis to reach its conclusion that the novel did "not constitute establishment of religion or antireligion,"¹¹⁷ but Judge Canby dismantled the plaintiff's argument more fully in his concurrence.

The claim was fundamentally flawed, he explained, because it conflated the secular with the antireligious.¹¹⁸ If secularism is by its very nature antireligious, an unworkable binary emerges where everything is

110. *Id.* at 693.

111. *Id.* at 693–94.

112. *See infra* Part III.C.

113. *Smith*, 827 F.2d at 695.

114. *Grove v. Mead Sch. Dist.* No. 354, 753 F.2d 1528, 1531 (9th Cir. 1985). *See also* *Fleischfresser v. Dir. of Sch. Dist.* 200, 15 F.3d 680, 688–89 (7th Cir. 1994) (holding that assigning fantasy and make-believe stories did not constitute an establishment of paganism).

115. *See generally* GORDON PARKS, *THE LEARNING TREE* (Fawcett 1987) (telling the story of "[h]ow it feels to be black in the white man's world," according to the publisher's front-cover blurb).

116. *Grove*, 753 F.2d at 1539.

117. *Id.* at 1534.

118. *Id.* at 1535–36 (Canby, J., concurring).

either religious or antireligious.¹¹⁹ And if these were the only two options, it would follow that Establishment Clause violations would be literally impossible to avoid.¹²⁰ Furthermore, even supposing that secular humanism could be treated as a religion for Establishment Clause purposes and that *The Learning Tree* promoted the religion of secular humanism, because a religious text can be taught in the classroom for literary purposes,¹²¹ Canby concluded, then surely a secular humanist text can be also, so long as it is presented objectively so as to not communicate governmental endorsement.¹²²

B. SEX EDUCATION

A handful of suits have specifically targeted sex education programs, but to no avail. The first of these claims that sex education would impermissibly “establish religious concepts”¹²³ was summarily dismissed by the Maryland District Court, which saw sex education as well outside the scope of the Establishment Clause because its primary purpose and effect is protecting public health, not instilling religious beliefs.¹²⁴ Five years later, in 1974, when parents challenged a health course they claimed promoted a humanist philosophy,¹²⁵ the New Hampshire District Court reached the same conclusion: “The state has a paramount and recognized duty to provide for the health, welfare, and safety of its citizens. The health course, which is secular in nature and purpose, is a proper means by which the state can discharge this duty.”¹²⁶ Similarly, the argument that a sex education program failed the second prong of the *Lemon* test by having the primary effect of inhibiting religion was shot down by the New Jersey Supreme Court in 1982.¹²⁷ Sex is not by its very nature an irreligious subject, the court explained.¹²⁸ A sex education program, then, would only be impermissible if it promoted a decidedly irreligious moral view of the

119. *Id.* at 1536.

120. *See id.*

121. *Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (“It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said . . . indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.”).

122. *Grove*, 753 F.2d at 1540–41 (Canby, J., concurring).

123. *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340, 342 (D. Md. 1969), *aff’d per curiam*, 428 F.2d 471 (4th Cir. 1970).

124. *Id.* at 344.

125. *Davis v. Page*, 385 F. Supp. 395 (D.N.H. 1974). The parents in this case objected to the health course on Free Exercise grounds and did not make an Establishment Clause argument.

126. *Id.* at 404.

127. *Smith v. Ricci*, 446 A.2d 501, 506–07 (N.J. 1982).

128. *Id.* at 507.

subject matter to the exclusion of all religious moral views.¹²⁹

C. EVOLUTION

The charge has also been levied that teaching evolution raises Establishment Clause problems. However, entirely banishing the topic from the classroom has not been a possibility ever since the Supreme Court declared that an outright ban on evolution is unconstitutional.¹³⁰ And John Peloza's recent attempt to redefine evolution in religious terms, "as a concept that embraces the belief that the universe came into existence without a Creator," was soundly rejected by the Ninth Circuit a few years ago in the last headline-grabbing litigation involving the Capistrano Unified School District.¹³¹ As a result, arguing that evolution is itself a religion remains a dead end. Plaintiffs have argued in the alternative, therefore, that creationism must be granted equal time in order for the state to avoid showing a nonneutral preference for a secular theory. But because "virtually every religion known to man holds its own peculiar view of human origins," a Texas district court explained, this remedy is ultimately "impractical, unworkable and ineffective."¹³² An equal treatment approach to neutrality simply does not work in the classroom context, where time is too scarce to make room for every religion's creation narrative in the biology curriculum.

Building on this reasoning, an Arkansas district court struck down the state's "Balanced Treatment for Creation-Science and Evolution-Science Act" and held that giving equal time to creationism and evolution creates, rather than remedies, an Establishment Clause problem.¹³³ "Creation science," the court concluded, "has no scientific merit or educational value as science," and therefore has the primary effect of advancing religion and fails *Lemon's* second prong.¹³⁴ The Supreme Court subsequently endorsed this conclusion in 1987, holding that Louisiana's balanced treatment statute was unconstitutional because its primary purpose was to promote a religious belief.¹³⁵

129. *Id.*

130. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

131. *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994) (per curiam).

132. *Wright v. Hous. Indep. Sch. Dist.*, 366 F. Supp. 1208, 1211 (S.D. Tex. 1972).

133. *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982), *aff'd per curiam*, 723 F.2d 45 (8th Cir. 1983).

134. *Id.* at 1272.

135. *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987).

D. LGBT TOLERANCE

The focus has recently turned to the so-called “gay agenda” in schools.¹³⁶ Before the controversial, news-making legislative action on opposite sides of the issue in California and Tennessee,¹³⁷ as well as the gay tolerance programs that began springing up across the country¹³⁸ in response to the spate of teen suicides that sparked a national conversation in 2010 and 2011,¹³⁹ a handful of lawsuits had challenged LGBT-related content in the schools. Unlike the challenges to other allegedly hostile curricula, plaintiffs have had some success in this area, but only because the challenged curriculum explicitly invoked religion. This successful challenge came in 2005, when two religious organizations objected to the debunking of “myths regarding sexual orientation” as part of a school district’s health program.¹⁴⁰ The Maryland District Court was “extremely troubled” by the school board’s decision “to venture—or perhaps more correctly bound—into the crossroads of controversy where religion, morality, and homosexuality converge.”¹⁴¹ The biggest problem with the program’s approach was not that it discussed sexual orientation, but rather that it did so by commenting on religious beliefs and proffering interpretations of religious texts.¹⁴² The court even suggested that, based on the Supreme Court’s decision in *Larson v. Valente*,¹⁴³ the program should

136. John Wright, *Focus on the Family/CitizenLink Sees “Sneaky” Gay Agenda in the Public Schools*, DALLAS VOICE (Aug. 22, 2010, 4:44 PM), <http://www.dallasvoice.com/focus-on-the-family/citizenlink-sees-sneaky-gay-agenda-in-the-public-schools-1040605.html>.

137. California governor Jerry Brown signed recent legislation mandating the inclusion of LGBT history in the curriculum, whereas the Tennessee Senate passed a bill flatly prohibiting any mention of homosexuality in grades K–8. Patrick McGreevy, *New State Law Requires Textbooks to Include Gays’ Achievements*, L.A. TIMES, July 15, 2011, <http://articles.latimes.com/2011/jul/15/local/la-me-legislature-20110715>; *Tennessee ‘Don’t Say Gay’ Bill Advances in State Senate*, HUFFINGTON POST (Apr. 22, 2011, 2:40 PM), http://www.huffingtonpost.com/2011/04/22/tennessee-dont-say-gay-bill-advances_n_852616.html.

138. See, e.g., Michael Alison Chandler, *In D.C. Schools, Early Lessons in Gay Tolerance*, WASH. POST, Feb. 4, 2012, http://articles.washingtonpost.com/2012-02-04/local/35443328_1_gay-tolerance-gay-issues-gay-pride-parade.

139. Jesse McKinley, *Suicides Put Light on Pressures of Gay Teenagers*, N.Y. TIMES, Oct. 3 2010, <http://www.nytimes.com/2010/10/04/us/04suicide.html>.

140. *Citizens for a Responsible Curriculum v. Montgomery Cnty. Pub. Sch.*, No. AW-05-1194, 2005 U.S. Dist. LEXIS 8130, at *5–13 (D. Md. May 5, 2005).

141. *Id.* at *32.

142. The program commented on religion in the facts it provided to counter the myths (for example, “Homophobia rather than homosexuality should be cured”; “Jesus said absolutely nothing at all about homosexuality”; “Religion has often been misused to justify hatred and oppression”; “Hatred of gay men and lesbians is the work of humans, not God.”). *Id.* at *7–13.

143. *Larson v. Valente*, 456 U.S. 228, 246 (1982) (“[W]hen we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.”).

be subject to strict scrutiny because of the way it “juxtapose[d] [a] portrait of an intolerant and Biblically misguided Baptist Church against other, preferred Churches, which are more friendly toward the homosexual lifestyle.”¹⁴⁴

A few years later, however, the First Circuit was less receptive to a similar challenge in *Parker v. Hurley*. The plaintiffs objected to a school’s use of children’s books that depicted same-sex couples, but they “disclaim[ed] any intent to seek control of the school’s curriculum or to impose their will on others.”¹⁴⁵ All they wanted was a notice requirement and permission for parents to exempt their children from exposure to the books.¹⁴⁶ But the court dismissed this modest request, stating, “Public schools are not obliged to shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them.”¹⁴⁷ According to the court, the proper venue for the parents’ grievances would have been the local political process because a personal objection to school content does not rise to the level of being a colorable constitutional claim.¹⁴⁸

E. PASSIVE HOSTILITY

Allegations of religious hostility in school have not been limited to challenges to secular curricula. Another maneuver has been to assert that schools evince hostility and therefore violate the Establishment Clause when they disallow teachers from expressing their religious beliefs in the classroom. Like most of the attacks on secular curricula, however, these challenges have not gained any traction in the courts.¹⁴⁹ Since religious expression by teachers in the classroom has been held to violate the Establishment Clause on multiple occasions,¹⁵⁰ it is unsurprising that a

144. *Citizens for a Responsible Curriculum*, 2005 U.S. Dist. LEXIS 8130, at *28–31.

145. *Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008).

146. *Id.*

147. *Id.* at 106.

148. *Id.* at 107.

149. *See, e.g.*, *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) (holding that a memo ordering a university professor to refrain from discussing his religious beliefs in class was constitutionally permissible); *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990) (holding that a school did not violate the Establishment Clause by directing a teacher to keep his Bible off his desk during class).

150. *See, e.g.*, *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1285 (11th Cir. 2004) (holding that a teacher gave her “implicit imprimatur” to religiosity and therefore violated the Establishment Clause by collecting prayer requests and leading a moment of silence); *Breen v. Runkel*, 614 F. Supp. 355 (W.D. Mich. 1985) (holding that teachers violated the Establishment Clause by praying and reading from the Bible in their classrooms).

claim seeking such unconstitutional behavior as its remedy is doomed to failure. If corrective steps to ensure constitutional compliance were themselves deemed to be unconstitutional, a clearly unworkable paradox would emerge.

The consistent rulings in favor of school boards and educators in hostility-to-religion cases might be simply explained by the deference that courts feel compelled to show state and local authorities in the education sphere. Justice Fortas, for example, cautioned in 1968 that “[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.”¹⁵¹ Courts should only intervene, he continued, when problems arise that “*directly and sharply* implicate basic constitutional values.”¹⁵² In that same case, however, writing for a majority of the Court, Fortas did not mind using the Establishment Clause to strike down an Arkansas statute that prohibited the teaching of evolution in public schools.¹⁵³ Many fundamentalists, therefore, feel as though courts are more likely to see a direct or sharp conflict with the First Amendment when states or localities use their educational authority in a way that benefits religion than when those same local authorities favor ideas or values that are inconsistent with religion.¹⁵⁴

This application of the Establishment Clause has unsurprisingly made fundamentalists and other religious sympathizers feel as though the deck is stacked against them, despite the neutrality that the Establishment Clause purportedly guarantees. They complain that Establishment Clause jurisprudence is functionally one-sided. Even though the First Amendment is not supposed to countenance religious animus in public schools any more than it does religious endorsement, they argue that in practice it operates solely in one (hostile, antireligious) direction. Justice Kennedy has acknowledged that “students may consider it an odd measure of justice to be subjected during the course of their educations to ideas deemed offensive and irreligious, but to be denied a brief, formal prayer ceremony that the school offers in return.”¹⁵⁵ But, he insisted, such asymmetry is in

151. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

152. *See id.* (emphasis added).

153. *Id.* at 107–09.

154. *See* Nadine Strossen, ‘*Secular Humanism*’ and ‘*Scientific Creationism*’: Proposed Standards for Reviewing Curricular Decisions Affecting Students’ Religious Freedom, 47 OHIO ST. L.J. 333, 334 (1986) (“Although the Supreme Court has generally been reluctant to permit judicial intervention in public school curricula, it has sanctioned such intervention for the specific purpose of eradicating religious influences from the public schools.”).

155. *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

fact what the Establishment Clause's neutrality mandate requires.¹⁵⁶ Others, however, have looked at this same asymmetry and characterized it as the kind of unconstitutional passive religious hostility against which Justice Goldberg warned in 1963¹⁵⁷:

[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.¹⁵⁸

Although this perspective has its proponents both on and off the Court, it has not carried the day.¹⁵⁹ The Court has not embraced the notion that casting religious expression out of public schools in the name of neutrality could itself create Establishment Clause problems. Instead, religious students have been left frustrated with their "odd measure of justice."¹⁶⁰

IV. THE COURTS' ESTABLISHMENT CLAUSE ANALYSES IN *CAPISTRANO*

Chad Farnan's claim against his teacher James Corbett therefore emerged against a backdrop in which plaintiffs have historically been unable to demonstrate unconstitutional religious hostility in the schools, while at the same time, the Establishment Clause has been used to effectively scrub all traces of religion from the classroom. But Farnan had something that previous plaintiffs lacked: an arsenal of incendiary comments that directly criticized religion. His claim would seemingly have a much stronger chance of success than garden-variety complaints about secular curricula. He too, however, was likely left feeling he had been dealt an "odd measure of justice," but the opposing interests were far from vindicated either. Instead, the courts doled out partial, muddied victories to both sides.

156. *Id.*

157. *See, e.g.,* Richard M. Esenberg, *Must God Be Dead or Irrelevant: Drawing a Circle That Lets Me In*, 18 WM. & MARY BILL RTS. J. 1 (2009) (arguing that this asymmetry in the current Establishment Clause doctrine's treatment of religious and antireligious expression is not substantively neutral).

158. *Sch. Dist. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

159. *See, e.g., Lee*, 505 U.S. at 598–99 (acknowledging Justice Goldberg's approach but holding that a prayer at a graduation ceremony violated the Establishment Clause and did not constitute unconstitutional passive hostility).

160. *Id.* at 591.

A. THE DISTRICT COURT'S ANALYSIS

The district court began its opinion by announcing that it was bound to apply the *Lemon* test to evaluate the constitutionality of Corbett's statements.¹⁶¹ Before getting into the *Lemon* analysis, however, the Court had to engage in the preliminary task of "[s]eparating the [g]rain from the [c]haff."¹⁶² In other words, the court had to distinguish (and discard) the comments that did not implicate the Establishment Clause at all and therefore could not be challenged under the First Amendment. Invoking the Eleventh Circuit's reasoning in *Smith* that content's mere inconsistency with religious tenets does not render it unconstitutional,¹⁶³ the court categorically stated that "Corbett's in-class opinions on various social or political issues not touching upon religion [did] not violate the Establishment Clause, regardless of whether those of a particular religious faith might disagree with or find his statements offensive."¹⁶⁴ Farnan's attempt to conflate a liberal worldview with religious hostility was therefore a nonstarter. Too much case law had accumulated establishing that there is no constitutional problem when school content incidentally conflicts (or corresponds) with religious values or beliefs.¹⁶⁵ A large number of the comments, such as Corbett's statements about abstinence-only sex education,¹⁶⁶ then, were thrown out at the outset because they did not explicitly mention religion.¹⁶⁷ In the court's view, some additional comments qualified as "chaff" that could be quickly disregarded, even though they touched upon religion, because they were "clearly not in violation of the Establishment Clause" and did not "shed light on the nature of other statements."¹⁶⁸ One such "clearly" permissible comment concerned the Bible Institute of Los Angeles. The school, Corbett said, "has no academic integrity whatsoever. And it is a fundamentalist Christian school. I think, a college that has basically one book."¹⁶⁹ In the same conversation, however, Corbett praised the academic fitness of another Christian theology seminary, so the court found that "[i]n context," it was clear that Corbett "does not hold Biola in high regard because of his view

161. *C.F. v. Capistrano Unified Sch. Dist. (Capistrano I)*, 615 F. Supp. 2d 1137, 1141 (C.D. Cal. 2009), *vacated sub nom. C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist. (Capistrano III)*, 654 F.3d 975 (9th Cir. 2011), *cert. denied sub nom. C.F. v. Corbett (Corbett)*, 132 S. Ct. 1566 (2012).

162. *Id.*

163. *See supra* text accompanying notes 103–13.

164. *Capistrano I*, 615 F. Supp. 2d at 1143.

165. *See supra* Part III.

166. *See supra* note 21 and accompanying text.

167. *Capistrano I*, 615 F. Supp. 2d at 1142–43.

168. *Id.* at 1143.

169. *Id.*

of its academics, and not because it is a Christian fundamentalist school.”¹⁷⁰ The court also dismissed Corbett’s comments about the Boy Scouts, which involved religion in that they touched upon the separation of church and state and referred to the organization as being God-centered, racist, and homophobic.¹⁷¹ Corbett’s disapproval of a perceived violation of the separation of church and state, the court said, in no way equated to a disapproval of religion: “Corbett cannot be found to violate the Establishment Clause for endorsing a principle set forth by the Supreme Court or for voicing his opinion that the Boy Scouts have violated this principle.”¹⁷² And as for Corbett branding the Boy Scouts as homophobic and racist, the court relied on a prior Ninth Circuit case that had held that “government officials may attempt to promote tolerance and equality by criticizing perceived intolerance and discrimination without violating the Establishment Clause.”¹⁷³ Corbett’s statements regarding the Boy Scouts, then, had a doubly permissible purpose—“espousing tolerance and non-discrimination, as well as separation of church and state”—and could easily be set aside as well within constitutional bounds.¹⁷⁴

The court thought the remaining statements that commented on religion presented closer questions that warranted in-depth consideration. Such consideration, the court concluded, should take the form of separately subjecting each individual comment to the *Lemon* test.¹⁷⁵ Any comment that cleared the *Lemon* hurdles could subsequently be discarded along with the other “chaff,” while any single comment that failed any of the three prongs would constitute an impermissible “establishment” of religious hostility.

The court began its analysis with the first *Lemon* prong, which requires a legitimate secular purpose in order for a challenged action to pass constitutional muster.¹⁷⁶ Corbett characterized all of the challenged statements as having the shared purpose of teaching European history and deductive reasoning.¹⁷⁷ Farnan, on the other hand, alleged that the statements’ “only purpose . . . [was] to make sure that the students who [sat] before him as a captive audience underst[ood] that religion is

170. *Id.* at 1144.

171. *See supra* note 19 and accompanying text.

172. *Capistrano I*, 615 F. Supp. 2d at 1144.

173. *Id.* at 1144–45 (citing *Am. Family Ass’n, Inc. v. City & Cnty. of S.F.*, 277 F.3d 1114, 1118 (9th Cir. 2002)).

174. *Id.* at 1145.

175. *Id.*

176. *Id.*

177. *Id.* at 1146.

irrational.”¹⁷⁸ The court attempted to unpack the purpose of each of Corbett’s comments in turn, guided by a series of *Lemon* interpretive canons: the first prong is not satisfied only if the government actor was “motivated *wholly* by an impermissible purpose,”¹⁷⁹ the court should be “reluctant to attribute unconstitutional motives to the [government],”¹⁸⁰ and “the government’s assertion of a legitimate secular purpose is entitled to deference.”¹⁸¹

Given the substantial governmental deference that is built-in to the first prong of the *Lemon* test, it is unsurprising that the court agreed with Corbett that most of the statements had the purpose of preparing the students for the Advanced Placement European History exam.¹⁸² His quotation of Mark Twain’s cutting remark that “religion was invented when the first con man met the first fool,” for example, merely made a historical observation about man’s “turn to the non-rational when [he] cannot, or is unable, to develop a rational solution.”¹⁸³ And because Corbett clearly identified Twain as the coiner of the pithy turn of phrase, the court could not hold him responsible for any implicit disparagement in the statement.¹⁸⁴ Similarly, Corbett’s “Jesus glasses” comment¹⁸⁵ was also intended to make a relevant point about history—“that people sometimes make choices that are against their best interests for religious reasons and that religion has and can be used as a manipulative tool.”¹⁸⁶

The court was unable to give Corbett the same benefit of the doubt, however, with regard to his statement about John Peloza propagandizing his students with “religious, superstitious nonsense.”¹⁸⁷ In the court’s view, with this remark Corbett “state[d] an unequivocal belief that creationism is ‘superstitious nonsense.’”¹⁸⁸ And such a statement of “unequivocal belief,” the court concluded, was devoid of any legitimate secular purpose and

178. *Id.* (internal quotation marks omitted)

179. *Id.* at 1145 (emphasis added) (quoting *Am. Family Ass’n, Inc. v. City & Cnty. of S.F.*, 277 F.3d 1114, 1121 (9th Cir. 2002)) (internal quotation marks omitted).

180. *Id.* (alteration in original) (quoting *Vasquez v. L.A. Cnty.*, 487 F.3d 1246, 1255 (2007)) (internal quotation marks omitted).

181. *Id.* (quoting *Chaudhuri v. Tennessee*, 130 F.3d 232, 236 (6th Cir. 1997)) (internal quotation marks omitted).

182. *Id.* at 1147.

183. *Id.* at 1146 (internal quotation marks omitted).

184. *Id.* at 1146–47.

185. *See supra* text accompanying note 33.

186. *Capistrano I*, 615 F. Supp. 2d at 1147.

187. *See supra* text accompanying notes 24–26.

188. *Capistrano I*, 615 F. Supp. 2d at 1146.

therefore violated the Establishment Clause.¹⁸⁹

The court then turned to *Lemon*'s second prong, which looks to whether the challenged action has the primary effect of either advancing or inhibiting religion, and clarified that the analysis should be conducted from the perspective of a reasonable, informed observer.¹⁹⁰ In the end, this step of the analysis yielded results that resembled those reached for the first prong: only the "superstitious nonsense" comment primarily communicated a message of disapproval of religion.¹⁹¹ In the court's view, all of the other comments would have been alternatively construed by a reasonable observer.¹⁹²

The "Jesus glasses" comment, for example, would not have been interpreted as primarily disapproving of religion given that it was but one "phrase in the middle of a larger discussion about how religion may affect political [and economic] choices," a topic that is appropriate for an Advanced Placement European History class.¹⁹³ Similarly, Corbett's remarks about the correlation between church attendance and crime rates¹⁹⁴ "only suggest[ed] disapproval of religion by way of speculation or inference" because he "explicitly state[d] that he [was] not drawing a causal connection."¹⁹⁵ Additionally, even though Corbett's criticism of conservative Christians' stance on reproductive issues¹⁹⁶ was an unambiguous expression of disapproval of that particular religious position, the court concluded that "the statements from which disapproval can be inferred [were] only incidental and ancillary to Corbett's primary political point regarding reproduction."¹⁹⁷ And while it is arguably imprudent for high school teachers to share their political preferences during class, it is not a matter of constitutional significance—the Establishment Clause requires neutrality toward *religion*, not politics.

Finally, although Corbett's other comments about creationism¹⁹⁸ had the same general tenor as the Pelozo statement that the court found objectionable, they were able to pass the second *Lemon* prong.¹⁹⁹ Like the

189. *Id.*

190. *Id.* at 1147–48.

191. *Id.* at 1149.

192. *Id.* at 1149–53.

193. *Id.* at 1149.

194. *See supra* text accompanying notes 30–31.

195. *Capistrano I*, 615 F. Supp. 2d at 1150.

196. *See supra* text accompanying note 32.

197. *Capistrano I*, 615 F. Supp. 2d at 1150.

198. *See supra* text accompanying notes 27–29.

199. *Capistrano I*, 615 F. Supp. 2d at 1151–52.

Peloza statement, Corbett's other comments regarding creationism also "affirmatively suggested that the literal interpretation of the Bible was not true."²⁰⁰ These other comments did not evince an "unequivocal belief,"²⁰¹ however, and instead had a permissible primary effect because they were presented in the context of a discussion of "the secularization in thinking over time due to increasing belief in scientific principles."²⁰² Even though the court conceded "that common sense dictates that people of a certain religious faith may be offended by a comparison of their religion to 'magic' and that this could be construed as being derogatory," it concluded that the primary effect of the lecture was an appropriately educational lesson about the tension between scientific reasoning and religious faith.²⁰³

In considering the third *Lemon* prong, which is aimed at excessive government entanglement with religion, the court was faced with a fundamentally different question. While the third prong is usually most relevant in cases involving funding for parochial schools, Farnan argued that there was excessive entanglement in this case because Corbett's offensive statements were "continual and incessant."²⁰⁴ Therefore, although the court had engaged in a comment-by-comment analysis for the primary purpose and effect prongs, here the court had to take a broader view. This analytical shift did not help Farnan, however. Because the court's previous analysis had established that only one of Corbett's statements was unconstitutionally hostile to religion, in assessing whether there was a constitutionally problematic pattern of religious hostility, the court could easily say that one hostile statement does not amount to an ongoing pattern.²⁰⁵ Farnan had also introduced testimony from one of Corbett's former Advanced Placement Art History students, who provided other examples of allegedly hostile statements.²⁰⁶ The court could disregard this evidence on standing grounds (Farnan was not personally impacted by these statements because he was not in the art history class), but it also said that even if these additional comments were considered along with the Peloza statement, together they would not be enough "to demonstrate ongoing, excessive entanglement."²⁰⁷ The court did not explain, however,

200. *Id.* at 1152.

201. *Id.* at 1149.

202. *Id.* at 1152.

203. *Id.* at 1152–53.

204. *Id.* at 1153.

205. *Id.* at 1153–54.

206. *Id.* at 1153. The student testified, for example, that in a discussion about Christian evangelism, Corbett said "all you Christians can go to hell."

207. *Id.* at 1154.

how it reached this conclusion. As a result, it remains unclear how many hostile comments would have been necessary for the entanglement to have risen to the level of “excessive,” and it is equally ambiguous what kind of duration and frequency would have made the entanglement “ongoing.”

In the end, therefore, the court delivered a split decision: Corbett’s “superstitious nonsense” statement violated the Establishment Clause, but all of his other statements were constitutionally permissible.²⁰⁸ Recognizing that finding Corbett liable for a single hostile statement might strike some as odd—it is, after all, counterintuitive to regard one comment as an “establishment” of anything—the court addressed this concern in its afterword. When a fundamental right has been implicated, the court explained, *de minimis* exceptions simply cannot be entertained.²⁰⁹ Invoking Madison’s oft-quoted directive that “it is proper to take alarm at the first experiment on our liberties,”²¹⁰ the court felt that anything less than strict enforcement would “undermine[] the basic right in issue: to be free of a government that directly expresses disapproval of religion.”²¹¹ Further, because “relatively minor encroachments” involving government endorsement of religion have not been allowed, the court concluded that the same absolute rule must apply to government expressions of disapproval of religion.²¹²

B. THE NINTH CIRCUIT’S ANALYSIS

Before the case made its way to the Ninth Circuit, the district court issued a second opinion in which it granted Corbett qualified immunity.²¹³ The preliminary question before the appellate court, therefore, was whether qualified immunity was rightfully awarded.²¹⁴ Because “there ha[d] never been any prior reported case holding that a teacher violated the Constitution under comparable circumstances,” and because government officials are entitled to qualified immunity whenever they violate a constitutional right that is not “clearly established,” the Ninth Circuit felt as though it was “readily apparent” that qualified immunity was appropriate for Corbett.²¹⁵

208. *Id.* at 1155.

209. *Id.* at 1156.

210. *Id.* (quoting *Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963)) (internal quotation marks omitted).

211. *Id.*

212. *Id.* (quoting *Schempp*, 374 U.S. 203, 225 (1963)) (internal quotation marks omitted).

213. *C.F. v. Capistrano Unified Sch. Dist. (Capistrano II)*, 656 F. Supp. 2d 1190, 1205–06 (C.D. Cal. 2009), *aff’d sub nom. C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist. (Capistrano III)*, 654 F.3d 975 (9th Cir. 2011), *cert. denied sub nom. C.F. v. Corbett (Corbett)*, 132 S. Ct. 1566 (2012).

214. *Capistrano III*, 654 F.3d at 984.

215. *Id.* at 978.

As a result of its reliance on qualified immunity grounds to resolve the case, the court did not have to decide the underlying constitutional question at all.²¹⁶

The Ninth Circuit, therefore, did not engage in the same level of in-depth Establishment Clause analysis as the district court, but it also did not entirely ignore the constitutional dimensions of the case. By praising the district court's opinion as "thoughtful,"²¹⁷ for example, the Ninth Circuit seemed to implicitly endorse the lower court's Establishment Clause analysis. Later, the court wrapped up its opinion by emphasizing the importance of intellectual freedom in the classroom, noting that the judiciary should be careful not to "impos[e] dogmatic restrictions that chill teachers from adopting the pedagogical methods they believe are most effective."²¹⁸ In the next sentence, however, the court warned, without elaboration, that "[a]t some point a teacher's comments on religion might cross the line and rise to the level of unconstitutional hostility."²¹⁹

V. THE FAILINGS OF THE *CAPISTRANO* RESULT

Following the decisions of the district court and the Ninth Circuit, then, the central constitutional question was resolved thusly: a teacher *can* violate the Establishment Clause by making inappropriate statements about religion, and teachers' only guidance as to *when* such a constitutional violation might occur is the district court's analysis of Corbett's comments. Although the qualified immunity defense provided a convenient way for the Ninth Circuit to punt the issue, it left both teachers and students in the lurch. Despite both courts explicitly recognizing the delicate constitutional balance that must be maintained between students' religious freedom, on the one hand, and "protecting the 'robust exchange of ideas' in education," on the other,²²⁰ both of these constitutional interests were ultimately somewhat compromised following *Capistrano*. Because the decisions failed to enunciate any standard beyond the muddled mess that is *Lemon*, teachers have no roadmap going forward as to how to stay within

216. *Id.* See also *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (holding that in cases involving suits against state officers, lower courts have the discretion to resolve the qualified immunity question first and completely bypass the constitutional issues).

217. *Capistrano III*, 654 F.3d at 979.

218. *Id.* at 988.

219. *Id.*

220. See *id.* at 988 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). Accord *C.F. v. Capistrano Unified Sch. Dist. (Capistrano I)*, 615 F. Supp. 2d 1137, 1155 (C.D. Cal. 2009), *vacated sub nom. C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist. (Capistrano III)*, 654 F.3d 975 (9th Cir. 2011), *cert. denied sub nom. C.F. v. Corbett (Corbett)*, 132 S. Ct. 1566 (2012).

constitutional bounds, and this uncertainty will doubtlessly encourage timidity in the classroom. At the same time, however, as long as the law in this area remains unclear, students will likely be unable to hold teachers accountable for religious hostility, as qualified immunity could remain a perpetual escape hatch.

A. THE CHILLING EFFECT ON CLASSROOM DISCOURSE

While Corbett was not “on notice that his actions might be unconstitutional,”²²¹ future teachers conceivably *are* now on notice because of the district court’s full analysis of the issue and the Ninth Circuit’s cryptic warning that a teacher could cross a constitutional line “at some point.”²²² The *Capistrano* nonstandard, however, leaves teachers largely in the dark as to what is constitutionally permissible and impermissible to say during class discussions involving religion. But because they know that a single statement could get them into trouble, teachers are bound to be overly cautious.

The district court’s *Lemon* analysis did provide some guidance as to how the constitutionality of in-class comments about religion would be adjudged. And because the vast majority of the disputed comments were deemed permissible, that analysis could provide some comfort to teachers like Corbett who encourage free-wheeling class discussions and favor a Socratic pedagogical approach. On balance, however, it is difficult to rely confidently on any analysis grounded in a case-by-case exegesis of individual comments. Even though the district court’s unpacking of the individual comments was logical and well reasoned, the overall approach was still problematic because that kind of hair-splitting inevitably leads to inconsistent, unreliable results.

The Pelozo statement, for example, when considered in its full context,²²³ could have been generously interpreted, like the Boy Scouts

221. *Capistrano III*, 654 F.3d at 988.

222. *Id.*

223. The “superstitious nonsense” comment was part of a larger discussion about the Pelozo controversy that was prompted by a student question. Corbett’s comments, in full, were as follows:

I was the adviser to the student newspaper. In his classes, [Pelozo] was not telling the kids the scientific truth about evolution. He was hinting to kids in his class that there’s another explanation, and he invited kids to his home so they could hear the truth, the Biblical truth about all this. And he came in at lunch and had meetings at lunch with kids who wanted to believe in creationism. And, anyway, my editor wrote an editorial in which she inferred[sic] that [Pelozo] was not teaching science in his biology classroom. Instead, he was teaching religion.

He sued me as the advisor to the paper for five million, as a matter of fact. He also, on another issue, sued several other members of the faculty here because he claimed that he had the right under rules of academic freedom, because he was a fully qualified biology teacher,

remarks, as permissible commentary on the separation of church state. His remarks about Pelozo, after all, were seemingly just endorsing the Supreme Court's conclusion in *Edwards v. Aguillard* that creationism has no place in the public school curriculum.²²⁴ Or, on the other hand, some of Corbett's other creationism critiques or even his comment about "balance being a buzzword"²²⁵ could have just as easily been parsed as representing "an unequivocal belief" that religion is nonsense. These unpredictable results, therefore, leave teachers with little confidence as to what they can or cannot say about religion in the classroom.

In the face of such uncertainty, the most likely result will be that teachers will choose to not touch upon religion in the classroom at all. Skittishness in this area has already resulted in religion playing a negligible role in public school education:

Most public schools do not offer classes about religion. Teachers have not been trained to teach about religion. . . . [T]extbooks in all core subjects, including history, for the most part have treated religious topics in a perfunctory or superficial manner or have ignored them altogether. As a result, students have often graduated from high school without learning anything more about the breadth of the American religious experience than what they have learned about their own religion in their own home or place of worship.²²⁶

But there is consensus on both ends of the political spectrum that a public school education devoid of any substantive discussion of religion is problematic. Even both sides of the *Capistrano* litigation were in agreement that "AP Euro could not be taught without discussing religion," and the Ninth Circuit emphatically agreed that "the freedom to have a frank discussion about the role of religion in history is an integral part of any

to teach biology any way he saw fit as a qualified teacher . . .

[T]he school district hired an attorney to defend us. And at the first meeting, the school district's attorney, my attorney, said, "First thing we need you all to do, we do not need to make any more public statements about this until the lawsuit is over." At that point, I stood up and said, "I'll tell you what. I will sign a statement giving you—you do not have to defend me, but I will not leave John [Pelozo] alone to propagandize kids with this religious, superstitious nonsense John wanted to talk about creation as a science and all that stuff, but you get involved in that argument, you just lose because it's just nonsense

Id. at 981–82 (alterations and ellipses in original).

224. See *supra* text accompanying note 135.

225. In his comments about balance being a buzzword, Corbett said that right-wingers' efforts to achieve balance was misguided because they were trying to "get nonsense included along with the truth." Even though Corbett did not explicitly say that the "nonsense" he found objectionable was religious in nature, it is possible that a reasonable observer would interpret the comment in that way. See *supra* note 20 and accompanying text.

226. Jay D. Wexler, *Preparing for the Clothed Public Square: Teaching About Religion, Civic Education, and the Constitution*, 43 WM. & MARY L. REV. 1159, 1164–65 (2002) (footnotes omitted).

advanced history course.”²²⁷ An appreciation for the role of religion in history and contemporary society, as well as the ability to thoughtfully and respectfully converse about religion, are crucial for full civic participation as adults. Religious education has a host of virtues²²⁸: among its many salutary effects, it lessens ignorant fears of minority religions,²²⁹ instills a basic appreciation for inherent human dignity,²³⁰ improves critical thinking skills,²³¹ and imparts a more comprehensive understanding of the lessons of history. *Capistrano*, however, has likely made teachers unwilling to try to achieve these salutary results because they will not want to risk wading into potentially unconstitutional waters. As a result, students’ ability to have a full, rich educational experience has been compromised.

The potential chilling effect of *Capistrano* has dual free speech implications: it not only muzzles teachers, but it also infringes on students’ right to hear and converse about a broad range of ideas. While neither teachers nor students have wholly unfettered First Amendment freedoms in the classroom, they also do not fully “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”²³² The Supreme Court’s plurality opinion in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, for example, identified a First Amendment right for students to be exposed to a diverse array of ideas, explaining that “such access [to ideas] prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.”²³³ Various characterized as a “right to know”²³⁴ or a “right to read and be exposed to controversial thoughts and language,”²³⁵ this right has never been explicitly recognized by the Court, but some lower federal courts have detected such a right in the Supreme Court’s precedent.²³⁶ Students also have an even more firmly established

227. *Capistrano III*, 654 F.3d at 988.

228. See generally Caroline Elizabeth Branch, Comment, *Unexcused Absence: Why Public Schools in Religiously Plural Society Must Save a Seat for Religion in the Curriculum*, 56 EMORY L.J. 1431 (2007) (exploring the various ways learning about religion instills values, skills, and knowledge that help students emerge as better citizens).

229. Marc O. DeGirolami, *The Problem of Religious Learning*, 49 B.C. L. REV. 1213, 1233–35 (2008).

230. *Id.* at 1236–42.

231. See Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 90–92 (2002).

232. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

233. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 868 (1982) (plurality opinion).

234. *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 583 (6th Cir. 1976).

235. *Right to Read Def. Comm. of Chelsea v. Sch. Comm.*, 454 F. Supp. 703, 714 (1978).

236. Mitchell, *supra* note 99, at 717–18.

right to speak in school.²³⁷ While this right has some clear limits—a school can prohibit vulgar or disruptive speech—student speech cannot be restricted simply because it may create controversy.²³⁸ *Capistrano* runs up against both of these student rights to free expression. Significantly, the sole Corbett comment that the district court found to be unconstitutional arose in response to a student’s question.²³⁹ In a post-*Capistrano* classroom, a teacher would likely feel compelled to deflect any such student questions that broach controversial issues and might even discourage similar questions in the future, thereby curtailing students’ ability to speak freely and receive information.

B. STUDENTS LEFT INADEQUATELY PROTECTED AGAINST RELIGIOUS HOSTILITY

The chief problem with the *Capistrano* result for religious students is that it likely leaves them with no ability to enforce their constitutional right to be free from hostile religious comments in the classroom. Because the Ninth Circuit failed to enunciate a clear standard, teachers could potentially remain protected by qualified immunity again and again in subsequent suits, even if their comments step far over the line. A purely theoretical constitutional right that can be violated with impunity does little to protect students’ interests.

Even if the standard used by the district court is deemed sufficiently clear to make qualified immunity unavailable for teachers in the future, the district court’s stratified *Lemon* analysis leaves religious students with little comfort that their right to be free from religious hostility will be protected. Just as the unpredictability of a comment-by-comment approach compromises teachers’ ability to confidently lead class discussions, such an approach is also unsatisfactory for students because a daily barrage of disparaging remarks could easily be deemed not to run afoul of the Establishment Clause when each comment is parsed individually. The district court gestured at the possibility of using the third *Lemon* prong to take a broader perspective and consider whether there was an ongoing pattern of hostile comments,²⁴⁰ but because all of the comments that were deemed not hostile during the prior analysis were excluded from the calculus (even the close calls), it did little to counteract the overall problems with using *Lemon* to detect Establishment Clause violations in

237. *Id.* at 710.

238. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681–86 (1986).

239. *See supra* note 223 and accompanying text.

240. *See supra* text accompanying notes 204–07.

teachers' comments about religion. The rigid binary that underlies the district court's *Lemon* analysis (every comment is either hostile or not) ignores the possible message of disapproval communicated when semihostile comments are considered together. Corbett's string of comments that insinuated that creationism is "nonsense,"²⁴¹ for example, were mostly deemed permissible when evaluated individually. But if examined together, each successive instance of implicit disparagement makes it more likely that the overall classroom environment has become hostile to religion.

Capistrano, therefore, leaves religious students vulnerable to hostile comments in the classroom, despite students' keen interest in having their constitutional interests in this area protected. Because the teacher stands in a position of authority before a captive and impressionable audience, the threat of indoctrination makes Establishment Clause violations especially pernicious in the classroom.²⁴² As Justice Jackson famously declared in *West Virginia State Board of Education v. Barnette*, indoctrination is fundamentally counter to our constitutional values: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."²⁴³ But in the wake of *Capistrano* teachers can still hold considerable sway: their comments about religion risk creating a classroom environment in which religious students feel coercive pressure to forsake their faith. Meanwhile, with the continued possibility of qualified immunity for teachers, and with *Lemon* providing scant guidance as to how to resolve these kinds of cases, students cannot mount much of a constitutional challenge to such an environment.

VI. A NEW STANDARD FOR EVALUATING TEACHERS' COMMENTS ABOUT RELIGION: HOSTILE CLASSROOM ENVIRONMENT

A. WHAT CONSTITUTES HOSTILITY TO RELIGION?

The first task in formulating a standard for assessing teachers' comments is to determine what kind of comments about religion in the

241. See *supra* text accompanying notes 26–29.

242. *Smith v. Bd. of Sch. Comm'rs*, 827 F.2d 684, 689–90 (11th Cir. 1987) ("[T]he pervasive influence exercised by the public schools over the children who attend them . . . makes scrupulous compliance with the establishment clause in the public schools particularly vital.").

243. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

classroom should be properly classified as hostile. The *Capistrano* litigation failed to deliver a straightforward definition, and the prior case law only offers vague and inconsistent guidance. As a result, “hostility” by and large remains a conclusory label devoid of any specific content. As long as this definitional issue remains up in the air, both teachers and students will be short-changed.

1. Offense-Based Definition

One possibility is to define religious hostility subjectively. This conception of hostility would be grounded in an offense-based theory. Under this wholly subjective standard, any teacher statements that caused offense would be impermissibly hostile. An offense-based definition has a certain intuitive appeal: if a victim has been truly harmed, the Establishment Clause’s antidiscrimination and antipersecution aims would seemingly be compromised. Countervailing interests, however, caution against adopting a subjective standard. First of all, the evidentiary challenges would be considerable, as there would be no surefire way of divining whether a person’s allegations of psychic injury were sincere. And in the context of the classroom, a standard that accepts all such allegations at face value would have troubling consequences. If a student could banish any content by simply claiming offense, the entire educational enterprise would essentially be turned on its head, as it would put the ultimate authority in the hands of the student. The Ninth Circuit has used this very reasoning to reject a subjective standard for Establishment Clause claims: “If an Establishment Clause violation arose each time a student believed that a school practice either advanced or disapproved of a religion, school curricula would be reduced to the lowest common denominator, permitting each student to become a ‘curriculum review committee’ unto himself or herself.”²⁴⁴ In addition, the weight of the precedent on challenges to school curricula²⁴⁵ has rather definitively established that school content cannot (and should not) be deemed unconstitutional merely because it incidentally conflicts with religious doctrine and causes hurt feelings.

2. Intent-Based Definition

Alternatively, then, hostility might be defined from the perspective of the speaker and detected via an intent-based inquiry. Only those comments that are actually motivated by religious animus or a conscious desire to discourage religious belief would be captured by this definition of hostility

244. *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1379 (9th Cir. 1994).

245. *See supra* Part III.

so that neither a teacher's innocent slip of the tongue nor a respectful dialogue about controversial ideas would get the teacher into trouble. This definition would best promote robust classroom discourse, as teachers would be able to speak freely without fear of inadvertently crossing into unconstitutional territory.

Properly conceptualizing intent in this context would be difficult, however, especially given that a teacher like Corbett might often be acting "out of intentional but unconscious bias based on a lack of self-awareness or reflection."²⁴⁶ The relatively narrow range of comments that could straightforwardly be considered intentional—only outright slurs and consciously derogatory speech—would therefore leave religious students vulnerable to a large swath of statements that, while not purposefully hostile toward religion, could still exert considerable coercive force or instill feelings of inferiority. In other words, even if teachers lack the specific intent to discourage religious belief or disparage religious students, their comments might still have that effect. A fault-based definition of hostility that does not capture comments that have objectively hostile consequences would therefore compromise the religiously neutral educational experience guaranteed by the Establishment Clause.

3. Objective-Subjective Definition

A hybrid objective-subjective standard best balances the competing interests at issue while simultaneously serving the goals of the Establishment Clause. This standard would consider whether an informed, reasonable student in the victim's circumstances would interpret the teacher's comments as discouraging religious belief. In other words, a totality-of-the-circumstances approach is warranted, much like the approach to assessing hostility that the Supreme Court has adopted in Title VII harassment suits.²⁴⁷ Both the Ninth Circuit and the Supreme Court have emphasized in Title VII harassment cases that the reasonable victim standard is "not static"²⁴⁸ and should be responsive to "the social context in which particular behavior occurs and is experienced by its target."²⁴⁹

When dealing with allegations of religious hostility in the classroom, this context-sensitive inquiry would have to take into account the student's age and religion as well as the circumstances under which the allegedly

246. David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1718 (2002).

247. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

248. *Ellison v. Brady*, 924 F.2d 872, 879 n.12 (9th Cir. 1991).

249. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

hostile comment was made. The more vulnerable the student, the more likely the teacher's negative comments about religion would be impermissible. A comment disparaging the faith of a Muslim student in elementary school, therefore, would today likely more easily rise to the level of impermissible hostility than a comment of the same general tenor about Christianity in a college classroom. Similarly, a comment directed to a specific student in private would more likely be hostile than one made during a lecture delivered to the entire class.

Using the student's reasonableness as an objective baseline from which to assess the statements would mean not only that the student has typical sensitivities, but also that the student understands that a statement's incidental conflict with religious beliefs does not make it hostile to religion. Because this standard is informed by the secular curricula precedent,²⁵⁰ it assumes that it is inherently unreasonable to detect religious hostility in statements about secular subject matter, like statements encouraging gay tolerance or statements expressing opposing political views. In practice, then, a comment could only objectively be classified as hostile to religion if, in light of the student's age, religion, and other attendant circumstances, the comment "unreasonably interfere[d]"²⁵¹ with a student's educational experience, and nonreligious comments about secular topics could never cause this kind of unreasonable interference.

B. WHEN IS UNCONSTITUTIONAL RELIGIOUS HOSTILITY ESTABLISHED?

Settling on a perspective from which to define hostility, however, is only the first step in setting up an Establishment Clause framework. As the district court in *Capistrano* itself acknowledged, "[T]he Establishment Clause is not a blanket prohibition on making any disapproving or hostile statements."²⁵² After identifying hostility, therefore, the necessary follow-up question is whether the hostile conduct has in fact "overwhelm[ed] the . . . secular dimensions" of the educational experience and given rise to an unconstitutional establishment.²⁵³

The district court in *Capistrano*, however, effectively ended the inquiry after uncovering an isolated instance of religious hostility,

250. See *supra* Part III.

251. *Harris*, 510 U.S. at 23.

252. *C.F. v. Capistrano Unified Sch. Dist. (Capistrano II)*, 656 F. Supp. 2d 1190, 1204 (C.D. Cal. 2009), *aff'd sub nom. C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist. (Capistrano III)*, 654 F.3d 975 (9th Cir. 2011), *cert. denied sub nom. C.F. v. Corbett (Corbett)*, 132 S. Ct. 1566 (2012).

253. *Id.* (internal quotation marks omitted) (quoting *Catholic League for Religious & Civil Rights v. City & Cnty. of S.F.*, 567 F.3d 595, 605 (9th Cir. 2009)) (internal quotation marks omitted).

reasoning that “it is proper to take alarm at the first experiment on our liberties.”²⁵⁴ But isolated comments made by individual teachers call for different treatment. Unlike district-wide, institutionalized curricula, teacher comments lack a direct message of government endorsement. While public school teachers do stand as government speakers, their speech is also imbued with a significant amount of self-expression. Accordingly, classifying a single off-hand statement made by an individual teacher as a government “establishment” of religious hostility seems incongruous. Instead, teachers might be fairly said to have established religious hostility if they have cultivated an overall hostile classroom environment. Borrowing from Title VII guidelines for detecting workplace harassment,²⁵⁵ this standard would find an Establishment Clause violation if the teachers’ hostile comments are (1) directly coercive, (2) severe, or (3) ongoing and pervasive.

1. Quid Pro Quo Hostility

Actionable quid pro quo sexual harassment arises when a harasser makes a sexual advance with the threat that the victim will be fired, demoted, or denied a promotion if she does not submit.²⁵⁶ Religious harassment in the workplace can also give rise to a quid pro quo Title VII claim if, for example, an employer conditions an employee’s continued employment on the employee attending church services.²⁵⁷ Transporting the concept of quid pro quo harassment to the classroom provides one form of religious hostility that would violate the Establishment Clause under a hostile classroom environment standard.

If a teacher in any way ties students’ standing in the class to their willingness to forsake their religious beliefs, a hostile classroom environment will have been established. In specific terms, if Corbett had been a quid pro quo harasser, he might have required his students to subscribe to his belief that creationism is “superstitious nonsense” in a graded essay or on an exam. Similarly, quid pro quo hostility would have

254. *C.F. v. Capistrano Unified Sch. Dist. (Capistrano I)*, 615 F. Supp. 2d 1137, 1156 (C.D. Cal. 2009) (internal quotation marks omitted) (quoting *Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963)), *vacated sub nom. C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist. (Capistrano III)*, 654 F.3d 975 (9th Cir. 2011), *cert. denied sub nom. C.F. v. Corbett (Corbett)*, 132 S. Ct. 1566 (2012).

255. *See Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 67 (1986).

256. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998).

257. *See Theresa M. Beiner & John M. A. DiPippa, Hostile Environments and the Religious Employee*, 19 U. ARK. LITTLE ROCK L.J. 577, 583 (1997) (stating that a quid pro quo religious harassment claim would arise if an employer failed to promote an employee if she refused to join the employer’s religion).

also been established if, for example, he threatened to give detention to students who challenged his irreligious beliefs during class discussions. Unlike an isolated statement disapproving of creationism, which seems to “establish” very little, this form of direct coercive pressure has clear Establishment Clause implications. If students’ performance in the class hinges on whether or not they adopt a particular religious view, their religious liberty has been sharply infringed and hostility toward religion permeates their entire educational experience in the classroom.

2. Severely Hostile Comments

Workplace harassment is also actionable if, in light of the totality of the circumstances, the harassment is sufficiently severe or pervasive to create an abusive working environment.²⁵⁸ A religiously hostile comment of sufficient severity in the classroom could similarly give rise to a claim under the Establishment Clause. Just as whether the comments can be classified as hostile is based on an objective-subjective standard, the severity of the comments would also be evaluated from the perspective of a reasonable student in the plaintiff’s circumstances. Under this theory, a hostile classroom environment might be created on the basis of a single hostile comment, but only if that comment was egregiously hostile—if, for example, it communicated a pure message of religious animus, it had a drastic, tangible effect on the student, or it had a long-lasting, reverberating effect in the classroom. A single disparaging comment about religion, therefore, would likely only trigger the Establishment Clause if it was acutely persecutory or humiliating.

3. Ongoing, Pervasive Hostility

The severity of the hostile classroom comments would be considered together with their pervasiveness in assessing whether a hostile classroom environment has been established. If a teacher makes comments that are only subtly disparaging, therefore, they might still establish a hostile classroom environment if they are delivered on an hourly basis. If, on the other hand, the hostile comments are sporadic, they would have to be of a greater severity in order to create the effect of an overall hostile classroom environment. Once again, the perspective of the reasonable student who has all of the victim’s sociological trappings would be adopted to determine whether the comments cross a constitutional line. A hostile classroom environment would doubtlessly be established for a vulnerable religious minority, then, on the basis of just a few comments that communicated a

258. *Id.* at 584–85.

message of disapproval, while it is unlikely that a college-aged Christian's overall classroom experience would be compromised in the absence of a long and consistent pattern of disparaging remarks.

VII. CONCLUSION

As its awkward application in *Capistrano* made evident, *Lemon* is an imperfect fit for evaluating comments made by teachers. A hostile classroom environment standard that evaluates the totality of the circumstances is a better barometer that is more responsive to the distinct challenges that arise in this distinct context. Not only does it impose a sufficiently high bar to give teachers enough leeway to conduct class without being overly cautious, but it also simultaneously protects students from having to endure a pervasively hostile classroom experience. And although the standard is fact sensitive and undeniably somewhat challenging to apply,²⁵⁹ the concept of a hostile classroom environment sets the parameters with enough clarity to give both teachers and students a good idea of what is constitutionally required.

Further, an analogous standard based on the totality of the circumstances could be adopted to evaluate comments that profess religious belief or are supportive of religion. As it stands now, relatively trivial expressions of religious faith have gotten teachers into hot water,²⁶⁰ whereas Corbett's expressions of religious disapproval were immune from judicial sanction,²⁶¹ thus compounding a much complained-about perceived double standard.²⁶² If an overall classroom environment standard were

259. Justice Scalia's complaints about the squishiness of the hostile work environment standard concededly could apply to the hostile classroom environment standard as well. In his *Harris v. Forklift Systems, Inc.* concurrence he lamented, "[H]ostile' . . . does not seem to me a very clear standard—and I do not think clarity is at all increased by adding the adverb 'objectively' or by appealing to a 'reasonable person[s]’ notion of what the vague word means." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 24 (1993) (Scalia, J., concurring) (second alteration in original). But because the universe of conduct that could *reasonably* be classified as hostile under the Establishment Clause here is narrowly constrained by the secular curricula precedent, this standard does not threaten to open up "expansive vistas of litigation" in the classroom context. *Contra id.*

260. See, e.g., *Borden v. Sch. Dist.*, 523 F.3d 153, 178 (3d Cir. 2008) (holding that high school football coach's practice of silently bowing his head and taking a knee during the team's prayer violated the Establishment Clause); *Bishop v. Aronov*, 926 F.2d 1066, 1077 (11th Cir. 1991) (suggesting that a university professor might have violated the Establishment Clause by offering an optional class that covered Christian perspectives on academic topics); *Roberts v. Madigan*, 921 F.2d 1047, 1057–58 (10th Cir. 1990) (holding that a teacher violated the Establishment Clause by silently reading from the Bible during class).

261. Corbett did not face any major professional setbacks either. He remains in his teaching job at Capistrano Valley High School, where he continues to serve as the faculty advisor to the Freethinking Atheist and Agnostic Kinship club.

262. See *supra* Part III.E.

adopted, on the other hand, isolated and benign expressions of both religious approval and disapproval would be tolerated. Not only would parity in this area go a long way to lessening the perception that the Establishment Clause is functionally one-sided in the schools, but a more permissive standard would also protect against excessive judicial intrusion into the classroom.

