

***C.F. v. CAPISTRANO UNIFIED SCHOOL DISTRICT: HOSTILITY TO RELIGION UNDER THE ESTABLISHMENT CLAUSE***

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The Religion Clauses of the First Amendment provide that government “shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>1</sup> While the Free Exercise Clause is easy to understand by comparison, the language of the Establishment Clause is famously difficult.<sup>2</sup> The clause seems by its terms to prohibit only official state support of religion, and indeed most cases interpreting it have involved some action of a legislative body that conferred a benefit on religion or on adherents to a particular religion. However, the Supreme Court has often remarked in its cases that the animating principle underlying the Establishment Clause is neutrality, and the Clause therefore prohibits government action that shows hostility to religion as well as action that advances it.<sup>3</sup>

Although government actions hostile to religion have been challenged under the Free Exercise Clause,<sup>4</sup> the Supreme Court has never decided a case involving government hostility to religion under the Establishment Clause. Lower courts have done so, but generally in the same largely legislative contexts in which cases challenging improper support to religion have come.<sup>5</sup> *C.F. v. Capistrano Unified School District*, a case currently before the Ninth Circuit, presents an Establishment Clause challenge in an entirely new context. Dr. James Corbett, a teacher at Capistrano Valley High School in Mission Viejo, California, has been accused of violating the Establishment Clause by repeatedly making statements critical of religion in his AP European History class. No court had ever decided such a case until the Central District of California concluded that, while Dr. Corbett’s statements had not generally been

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<sup>1</sup> U.S. CONST. amend. I; *see also* *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause into the Fourteenth Amendment); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (incorporating the Establishment Clause).

<sup>2</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

<sup>3</sup> *See* SUPREME COURT CASES section *infra*.

<sup>4</sup> *See, e.g.*, *Church of the Lukumi Babulu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

<sup>5</sup> *See* NINTH CIRCUIT CASES section *infra*.

hostile to religion, one of his statements by itself conveyed such a clear message of disapproval of religion as to violate the Establishment Clause.<sup>6</sup>

This paper will trace the development in the Supreme Court, and subsequently in the Ninth Circuit, of the notion that the Establishment Clause prohibits hostility to religion. It will then discuss the district court's decision regarding Dr. Corbett's statements and will argue that, while the district court was generally correct that most of the statements did not violate the Establishment Clause, it erred by finding that one of them did. To perform their jobs properly teachers must have the freedom to provoke students to think critically, and in keeping with that principle and with Establishment Clause case law courts must pay proper attention to context so that they can avoid condemning statements that analyze religion critically without disapproving of it. The *C.F.* court mostly succeeded in doing so, but it failed to appreciate that even the one statement it held to violate the Establishment Clause was made in an educational context, for an educational purpose, to an educational effect, and therefore should have passed constitutional muster.

#### SUPREME COURT CASES

In *School District of Abington Township v. Schempp*, the Supreme Court considered the constitutionality of a state law requiring that each school day begin with a reading from the Bible.<sup>7</sup> In reviewing its Religion Clause cases, the Court quoted from *Everson v. Board of Education*,<sup>8</sup> which explained that the First Amendment “requires the state to be neutral in its relations with groups of believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.”<sup>9</sup> The Court also quoted from the dissent in *Everson*, in which Justice Jackson “declared that public schools ‘are organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal

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<sup>6</sup> *C.F. v. Capistrano Unified Sch. Dist.*, 615 F.Supp.2d 1137 (C.D. Cal. 2009).

<sup>7</sup> 374 U.S. 203 (1963).

<sup>8</sup> 330 U.S. 1(1947).

<sup>9</sup> *Id.* at 14-15.

knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion.”<sup>10</sup>

The Court explained that the Establishment Clause requires neutrality to avoid the possibility that “official support would be placed behind the tenets of one or of all orthodoxies.”<sup>11</sup> The mandatory Bible readings at issue were clearly religious exercises conducted by the school, and they were therefore impermissible under the Establishment Clause.<sup>12</sup> Although the government was not permitted to establish a “religion of secularism” in the schools by “affirmatively opposing or showing hostility to religion, thus ‘preferring those who believe in no religion over those who do believe,’”<sup>13</sup> the Court denied that its decision had any such effect; the decision simply forbade the schools from conducting religious exercises. Further, the Court explained that the schools remained free to study the Bible “for its literary and historic qualities . . . when presented objectively as part of a secular program of education.”<sup>14</sup>

In *Epperson v. Arkansas*,<sup>15</sup> the Supreme Court again acknowledged that the neutrality principle prohibits hostility to religion. Arkansas had passed a statute that prohibited the teaching of evolution in its public schools. When a Little Rock school administration required all teachers to use a biology textbook that contained a chapter on evolution, a biology teacher in an affected school sued for a declaratory judgment that the statute was unconstitutional.<sup>16</sup> Justice Brennan, writing for the Court, explained the neutrality principle:

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against

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<sup>10</sup> *Abington*, 374 U.S. at 218 (quoting *Everson*, 330 U.S. at 23-24 (Jackson, J., dissenting)).

<sup>11</sup> *Abington*, 374 U.S. at 222.

<sup>12</sup> *Id.* at 223-24.

<sup>13</sup> *Id.* at 225 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)).

<sup>14</sup> *Abington*, 374 U.S. at 225.

<sup>15</sup> 393 U.S. 97 (1968)

<sup>16</sup> *Id.* at 99-100.

the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion.<sup>17</sup>

He further explained that “the state has no legitimate interest in protecting any or all religions from views distasteful to them.”<sup>18</sup> The Court found that the Arkansas statute was designed to do just that, as there was no reason to prohibit the teaching of evolution other than to stifle the dissemination of a theory distasteful to those citizens for whom any belief conflicting with the Book of Genesis was anathema.<sup>19</sup>

Finally, in *Edwards v. Aguillard*, the Supreme Court was again faced with a statute involving the teaching of evolution in schools, but this Louisiana statute allowed the teaching of evolution only if it was taught alongside creation science.<sup>20</sup> Justice Brennan, again writing for the Court, remarked that “[s]tates and local school boards are generally afforded considerable discretion in operating public schools” but that their discretion must nevertheless be exercised in a manner that comports with the First Amendment.<sup>21</sup> Courts must be particularly vigilant about compliance with the First Amendment in elementary and secondary schools because “[f]amilies entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student or his family.”<sup>22</sup> Because the primary purpose of the Louisiana statute, like that of the Arkansas statute in *Epperson*, was to advance a religious viewpoint, the statute was unconstitutional.<sup>23</sup>

#### NINTH CIRCUIT CASES

In all of the above cases, the challenged action advanced religion, rather than opposed it. Although the Supreme Court explained that the neutrality principle underlying the Establishment

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<sup>17</sup> *Id.* at 103-04.

<sup>18</sup> *Id.* at 107 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952)).

<sup>19</sup> *Epperson*, 393 U.S. at 107-08.

<sup>20</sup> 482 U.S. 578, 581 (1987).

<sup>21</sup> *Id.* at 583.

<sup>22</sup> *Id.* at 584.

<sup>23</sup> *Id.* at 591.

Clause prohibited action hostile to religion, it was never asked to decide whether a government action was actually unconstitutionally hostile to religion. A number of such cases, however, have come before the Ninth Circuit.

The first such case, *Vernon v. City of Los Angeles*, involved an Assistant Police Chief who was a devout Christian and who had been accused of various types of religious bias, toward both civilians and other officers, in the performance of his duties.<sup>24</sup> The City Council initiated an investigation, but it could not substantiate the claims of bias.<sup>25</sup> Officer Vernon filed a lawsuit nevertheless, claiming the investigation had damaged his reputation and that it violated the Establishment Clause.

The Ninth Circuit cited *Epperson* and *Abington* for the proposition that the “neutrality required under the Establishment Clause is . . . violated as much by government disapproval of religion as it is by government approval of religion.”<sup>26</sup> The court applied the three-part *Lemon* test to the city’s investigation.<sup>27</sup> Under *Lemon*, government action is permissible under the Establishment Clause if it 1) has a secular purpose; 2) neither advances nor inhibits religion, and 3) does not foster excessive government entanglement with religion.<sup>28</sup> Government action must survive all three prongs,<sup>29</sup> and in this case the court held that it did.<sup>30</sup> The primary purpose of the investigation was to verify whether Vernon had performed his job duties without violating the Establishment Clause by advancing religion, which courts had held was a valid secular purpose;<sup>31</sup> its primary effect did not send a message of disapproval of his religious beliefs because it was limited to his on-duty conduct;<sup>32</sup> and there was no ongoing relationship between government and religion that could be characterized as entanglement.<sup>33</sup>

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<sup>24</sup> 27 F.3d 1385, 1388 (9th Cir. 1994).

<sup>25</sup> *Id.* at 1390.

<sup>26</sup> *Id.* at 1396.

<sup>27</sup> *Id.*

<sup>28</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

<sup>29</sup> *Vernon*, 27 F.3d at 1397 (citing *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987)).

<sup>30</sup> *Vernon*, 27 F.3d at 1401.

<sup>31</sup> *Id.* at 1397.

<sup>32</sup> *Id.* at 1398-99.

<sup>33</sup> *Id.* at 1399-1400.

The Ninth Circuit next visited the issue in *American Family Association v. City and County of San Francisco*.<sup>34</sup> When a religious organization sponsored an ad campaign describing homosexuality as sinful and offering support to homosexuals who would give up their lifestyles, the San Francisco Board of Supervisors sent a letter to the organization critical of the ad campaign and passed two resolutions denouncing and prohibiting anti-gay rhetoric, even mentioning the organization by name.<sup>35</sup> The religious organization sued, claiming an Establishment Clause violation.<sup>36</sup> The Ninth Circuit followed its analysis in *Vernon*, explaining that the Establishment Clause prohibited “official disapproval or hostility towards religion” and then applying the *Lemon* test.<sup>37</sup> The Court concluded again that there was no Establishment Clause violation. The Board’s stated desire to protect homosexuals from violence was a plausible secular purpose, even if the Board seemed to attack the religious view that homosexuality is sinful. The primary effect of the Board’s actions was to “promot[e] equality for gays and discourag[e] violence against them,” not to oppose the plaintiff’s religion.<sup>38</sup> Finally, the fact that the Board’s action may have caused “political divisiveness along religious lines” was not enough to foster entanglement with religion.<sup>39</sup>

The Ninth Circuit considered hostility to religion most recently in *Vazquez v. Los Angeles County*,<sup>40</sup> in which the L.A. County Board of Supervisors revised the county’s official seal in part by removing a cross from it. The Board’s stated purpose for doing so was to avoid a potential Establishment Clause violation and affirm the County’s religious neutrality, but a citizen and employee of the County sued, claiming that the true purpose was disapproval of and hostility toward religion.<sup>41</sup> As in *Vernon*, the Board’s action passed the purpose prong because avoiding advancement of religion which might qualify as a violation of the Establishment Clause is a valid secular purpose not hostile to religion.<sup>42</sup> In considering the primary effect prong, the court lamented the lack of guidance, as so few cases decided

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<sup>34</sup> 277 F.3d 1114 (9th Cir. 2002).

<sup>35</sup> *Id.* at 1119-20.

<sup>36</sup> *Id.* at 1120.

<sup>37</sup> *Id.* at 1121.

<sup>38</sup> *Id.* at 1122.

<sup>39</sup> *Id.* at 1123.

<sup>40</sup> 487 F.3d 1246, 1248 (9th Cir. 2007).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1255-56.

under the Establishment Clause concerned hostility to religion,<sup>43</sup> but noted that the Ninth Circuit considers the primary effect to be advancement or disapproval of religion if it is “sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.”<sup>44</sup> The judgment of endorsement or disapproval is made from the point of view of the reasonable observer, well-informed and “familiar with the history of the government practice at issue.”<sup>45</sup> In light of cases in other circuits which had found crosses on municipal seals to violate the Establishment Clause, the Court held that the reasonable observer would not perceive the removal of the seal as a disapproval of religion but rather as an effort to restore the County’s neutrality.<sup>46</sup> As in the prior cases, there was no significant entanglement issue to detain the court.<sup>47</sup>

That the Ninth Circuit found in these cases no impermissible hostility to religion hardly means it never will. The Ninth Circuit recently reheard *en banc* a case similar to *American Family Association*, in which the San Francisco Board of Supervisors adopted a resolution criticizing the policy of the Catholic Archdiocese of San Francisco charities to place children for adoption in only heterosexual households.<sup>48</sup> The decision was inconclusive on the Establishment Clause issue. Five of the judges did not reach the merits because they found there was no standing; the six who did reach the merits were split evenly. The case was ordered dismissed because the three judges who voted to dismiss for failure on the merits plus the five who voted to dismiss for lack of standing made a majority.<sup>49</sup> It seems, then, that the issue of hostility to religion in the Ninth Circuit is thus very much a live one.

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<sup>43</sup> *Id.* at 1256 (citing *Am. Family Ass’n*, 277 F.3d at 1122, in which the Ninth Circuit had made a similar complaint).

<sup>44</sup> *Vasquez*, 487 F.3d at 1256 (quoting *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378 (9th Cir. 1994)).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1257.

<sup>47</sup> *Id.* at 1258.

<sup>48</sup> *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043, 1047 (9th Cir. 2010) (*en banc*).

<sup>49</sup> *Id.* at 1046.

C.F. v. CAPISTRANO UNIFIED SCHOOL DISTRICT

In *C.F. v. Capistrano Unified School District*,<sup>50</sup> Dr. James Corbett frequently made statements allegedly hostile to religion in his AP European History class, which a student, Chad Farnan, recorded. The court considered the constitutionality of these statements on cross-motions for summary judgment.<sup>51</sup> The court first disposed of a number of the statements summarily, finding that they clearly did not trouble the Establishment Clause.<sup>52</sup> The court then applied the *Lemon* test and analyzed three other statements under the purpose prong. In the first, Corbett told his students about a dispute he had had with a biology teacher at the school, John Peloza, who had wanted to teach creation science in his class. Corbett believed that Peloza “was not telling the kids the scientific truth about evolution” and he told his class that he “will not leave John Peloza alone to propagandize kids with this religious, superstitious nonsense.”<sup>53</sup> In a second remark, Corbett said, “What was it that Mark Twain said? ‘Religion was invented when the first con man met the first fool.’”<sup>54</sup> In the third, Corbett told his students that “when you put on your Jesus glasses, you can’t see the truth.”<sup>55</sup>

The Mark Twain comment and the Jesus Glasses comment clearly had valid secular purposes because they were made in the context of a discussion of history. Corbett had made the Mark Twain comment in the course of contrasting science’s continuing search for rational explanations with religion’s acceptance of the non-rational. The court found it was “not clear that he was espousing Twain’s view rather than merely quoting it.”<sup>56</sup> Similarly, the Jesus Glasses remark was made in the context of a discussion about how, for religious reasons, peasants did not support certain reforms made by Holy Roman Emperor Joseph II, even though the reforms would have been in the peasants’ best political and economic

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<sup>50</sup> 615 F.Supp.2d 1137 (C.D. Cal. 2009).

<sup>51</sup> *Id.* at 1140.

<sup>52</sup> *Id.* at 1141-45

<sup>53</sup> *Id.* at 1146.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1147.

<sup>56</sup> *Id.* at 1146-47.

interests.<sup>57</sup> While the court recognized that these statements, standing alone, might seem to suggest general hostility to religion, the statements had to be considered in the context in which they were made, which was a lesson about the effect of religion on historical events. Teaching students how religion affected history was a legitimate secular purpose.<sup>58</sup> The Pelozo comment, however, could not be defended on such grounds. Corbett had stated “an unequivocal belief that creationism is ‘superstitious nonsense.’” This statement was not made in the context of a lesson so much as an in-class conversation with students, and the court could discern no legitimate secular purpose for it.<sup>59</sup>

The court next considered whether the statements had the primary effect of disapproving of religion, and it relied on *Vernon*, *American Family Association* and *Vasquez* to establish the “reasonable observer” standard for this prong.<sup>60</sup> Again, the Mark Twain and Jesus Glasses comments were harmless because they were offered to make a historical point about how religion can be used to manipulate; their primary effect was not to disapprove religion but to teach history.<sup>61</sup> Under this prong the court also discussed a number of statements comparing scientific reasoning and religious reasoning. Corbett had pointed out that many events recounted in the Bible, such as the sun stopping in the sky as recounted in the book of Joshua, could not be verified by objective sources such as contemporary Chinese astronomers.<sup>62</sup> He also referred to Aristotle’s argument for the existence of a God:

He said, no movement without movers. And he argued that, you know, there sort of has to be a God. Of course that’s nonsense. I mean, that’s what you call deductive reasoning. . . . I mean, all I’m saying is that, you know, the people who want to make the argument that God [created the universe], 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. . . . Science doesn’t invoke magic. If we can’t explain something, we do not uphold that position. . . . Contrast that with creationists. They

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<sup>57</sup> *Id.* at 1147.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1146.

<sup>60</sup> *Id.* at 1148. *See supra* notes 44-45 and accompanying text.

<sup>61</sup> *Id.* at 1149.

<sup>62</sup> *Id.* at 1151.

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.<sup>63</sup>

These statements also did not primarily disapprove of religion. True, in suggesting that the literal interpretation of the Bible was not true, they went a step beyond cases like *Epperson*, which stopped at saying that a teacher could not be prohibited from teaching true scientific facts. Nevertheless, their primary effect, considered in context, was to describe the “secularization in thinking over time due to increasing belief in scientific principles” and to make the point that “generally accepted scientific principles do not logically lead to the theory of creationism.”<sup>64</sup> They therefore passed the effect prong.

The Pelozo comment was again a different story. By unequivocally stating that creationism was superstitious nonsense, Corbett had primarily sent a message of disapproval of the religious belief of creationism and thereby violated the Establishment Clause.<sup>65</sup> Again, as in the above cases, the court only cursorily analyzed entanglement, finding no entanglement issue.<sup>66</sup> The end result was that the court granted Farnan's summary judgment motion with respect to the Pelozo statement, because that statement failed the purpose and effects prong of the *Lemon* test, but granted Corbett's and the District's motions with respect to all other statements.<sup>67</sup>

## ANALYSIS

The court's analysis in *C.F. v. Capistrano Unified School District* was largely sound. The court was correct to pay careful attention to the context of Dr. Corbett's remarks. The Ninth Circuit cases that have addressed hostility to religion, which are binding on the *C.F.* court, dictate such attention. *American Family Association* is particularly relevant in this respect. In that case the Ninth Circuit recognized that it was fair to infer from some of the challenged statements that the Board of Supervisors was “hostile

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<sup>63</sup> *Id.* at 1152.

<sup>64</sup> *Id.* at 1152-53.

<sup>65</sup> *Id.* at 1149.

<sup>66</sup> *Id.* at 1153.

<sup>67</sup> *Id.* at 1155.

towards the religious view that homosexuality is sinful or immoral,” but the statements did not violate the Establishment Clause because “*read in context as a whole*, [they] are primarily geared toward promoting equality for gays and discouraging violence against them.”<sup>68</sup> More importantly, the Supreme Court’s Establishment Clause cases have consistently taken the context of the challenged action into account. In *Edwards v. Aguillard*, although the Louisiana legislature ostensibly required the teaching of creation science for the secular purpose of promoting “academic freedom” or “a basic concept of fairness” by “teaching all the evidence,” the Court found that the circumstances surrounding the government action proved the purpose was in fact to promote religion.<sup>69</sup> In religious symbol cases, which may be a better analogy to Dr. Corbett’s case than school cases such as *Edwards* because the object of scrutiny is a real-world act or display rather than a legislative act, the Supreme Court has insisted still more strongly on the importance of context.<sup>70</sup>

It was thus appropriate to take Dr. Corbett’s statements individually and assess them in context as the *C.F.* court did, but for some reason the court failed to analyze the Pelozo statement as carefully as it analyzed the others. That statement, too, had to be considered in its proper context, and in context it is clear that Corbett was not calling creationism nonsense per se. Some years before, John Pelozo had wanted to teach creation science to his biology class, and Corbett had challenged the proposed change to the curriculum.<sup>71</sup> Corbett made the Pelozo statement in answer to a question from one of his students about the past dispute with Pelozo, and Corbett went on to explain that “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.”<sup>72</sup> Corbett was not referring to creationism per se as “superstitious nonsense,” but to the idea that creationism can be scientific. The Aristotle comment quoted above sheds still more light on

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<sup>68</sup> *Am. Family Ass’n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1122 (9th Cir. 2002) (emphasis added).

<sup>69</sup> *Edwards v. Aguillard*, 482 U.S. 578, 585-86, 592 (1987).

<sup>70</sup> *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (“In this case, the focus of our inquiry must be on the creche in the context of the Christmas season”); *County of Allegheny v. ACLU*, 492 U.S. 573, 598-99 (1989) (display unconstitutional because “nothing in the context of the display detracts from the creche’s religious message.”)

<sup>71</sup> Appellee’s-Cross-Appellant’s Opening Brief, *C.F. v. Capistrano Unified Sch. Dist.*, Nos. 09-56689, 09-56690 (9th Cir. argued February 11, 2011), 2010 WL 5586481, at \*19-20

<sup>72</sup> *Id.* at \*25-26

what Corbett meant. As Corbett explained, under the scientific method one does not start from a belief and then try to prove it; “[t]hat’s deduction. It’s not science. Scientifically, it’s nonsense.” The *C.F.* court twice stated that it considered the Peloza comment unconstitutional because it expressed an “unequivocal belief that creationism is ‘superstitious nonsense.’”<sup>73</sup> The only belief Corbett expressed, however, was that creation science is not science at all because it does not proceed by the scientific method. As the court recognized in holding that the Mark Twain comment and the Jesus Glasses comment did not trouble the Establishment Clause, explaining the difference between religious reasoning and scientific reasoning is a perfectly legitimate part of an AP European History teacher’s job.<sup>74</sup> The Peloza comment therefore had neither the purpose nor the primary effect of inhibiting religion.

Although I argue that the *C.F.* case contains no Establishment Clause violation, it is nevertheless a welcome reminder that the government may not take action hostile to religion.<sup>75</sup> If Corbett had actually stood in class and argued that creationism or indeed religion in general was “superstitious nonsense,” under the reasoning in *Abington*, *Epperson* and *Edwards* he would probably violate the Establishment Clause. This case and the *Catholic League* decision may indicate that the notion of unconstitutional hostility to religion is gaining momentum. Nevertheless, it is undoubtedly important that teachers develop strong critical thinking skills in their students, and their freedom to do so by discussing provocative topics must not be abridged. Perhaps future cases will brighten the line between permissible critical analysis and impermissible disapproval, but the Supreme Court has long recognized the danger of “‘arbitrary’ restrictions upon the freedom of teachers to teach and of students to learn.”<sup>76</sup> As courts consider the limits of permissible criticism of religion, they will do well to go cautiously and maintain a healthy deference to comments made during teachers’ in-class lessons.

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<sup>73</sup> *C.F. v. Capistrano Unified Sch. Dist.*, 615 F.Supp.2d 1137, 1146, 1149 (C.D. Cal. 2009).

<sup>74</sup> See *supra* notes 58, 64 and accompanying text.

<sup>75</sup> It is fair to mention that although the district court found Dr. Corbett liable under the Establishment Clause for the Peloza statement, in a subsequent opinion it also afforded him qualified immunity because there was no prior case on point. *C.F. v. Capistrano Unified Sch. Dist.*, 656 F.Supp.2d 1190 (C.D. Cal. 2009). Oral argument of the Ninth Circuit appeal focused largely on the qualified immunity issue. Oral Argument, *C.F. v. Capistrano Unified Sch. Dist.*, Nos. 09-56689, 09-56690 (9th Cir. argued February 11, 2011), available at [http://www.ca9.uscourts.gov/media/view\\_subpage.php?pk\\_id=0000006982](http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000006982).

<sup>76</sup> *Epperson v. Arkansas*, 393 U.S. 97, 105 (1968) (quoting *Meyler v. Nebraska*, 262 U.S. 390 (1923)).