

RECONSIDERING RELIGION:  
TOWARDS A BROADER UNDERSTANDING OF MULTICULTURAL EDUCATION IN  
U.S. PUBLIC SCHOOLS

By

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## ABSTRACT OF THE DISSERTATION

Title RECONSIDERING RELIGION:  
TOWARDS A BROADER UNDERSTANDING OF MULTICULTURAL EDUCATION  
IN U.S. PUBLIC SCHOOLS

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This dissertation analyzed the legal and policy issues involved with teaching *about* religion in U.S. public schools as part of a multicultural curriculum. U.S. public schools are government entities, and thus, the people who work within the public education system are bound by U.S. laws, policies, regulations and court rulings relating to schools. This dissertation used federal and lower court rulings dealing with Constitutional demands for the separation of church and state and the resulting public school policies and practices to highlight the difficulties many school teachers and administrators have attempting to sift through dense and often vague or contradictory legal dicta contained therein.

Additionally, this dissertation combined legal, religious and socio-political theories to create a new theoretical framework, Critical Religious Legal Theory, which was then used to analyze the structures that shape educational law and policy in the realm of teaching *about* religion in public schools. The analysis focused on critically analyzing the laws and policies dealing with religion and public schools as social phenomena and as tools of control, and the education law and policy makers in the context of the social and political atmosphere at the time that the laws/policies were created. This dissertation also critically analyzed the generally accepted Christian norms in public education and America's reliance upon ceremonial deism, as it relates to public schools. And this research explained how religion has been used as a tool of

control and how and why religion can and should be demystified through the use of multicultural curricula that are inclusive of religion to (amongst other things) promote secular “moral truths” in character education like goodness, justice, love, truth while dispelling the religious stereotypes and prejudices that have been promulgated. The research generated by this dissertation, along with the pre-existing body of research on the intersection of religion and public schools, can be used by researchers, administrators and educators to expand the curricula in public schools to include courses where religion is discussed, in a constitutionally permissible manner, to inoculate against the ignorance behind many religiously motivated hate crimes.

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## CHAPTER ONE

### Introduction

#### *Background*

This dissertation analyzed the legal and policy issues involved with teaching *about* religion in U.S. public schools as part of a multicultural curriculum. U.S. public schools are government entities, and thus, the people who work within the public education system are bound by U.S. laws, policies, regulations and court rulings relating to schools. This dissertation used federal and lower court rulings dealing with Constitutional demands for the separation of church and state and the resulting public school policies and practices to highlight the difficulties many school teachers and administrators have attempting to sift through dense and often vague or contradictory legal dicta contained therein. Additionally, this dissertation used legal, religious and socio-political theories to analyze the structures that shape educational policy in the realm of teaching *about* religion in public schools.

Since America is, for the first time, no longer be a Protestant majority country (Pew, 2012), teaching *about* religion in public schools is necessary to increase students' comprehension of the world's major religions and to reduce incidents of religiously motivated hate crimes in school and in society at large. The U.S. Department of Justice (2012) reported in the congressionally mandated FBI hate crimes statistics, that there were a reported 1,318 incidents of hate crimes motivated by religious bias (down from 1,409 in 2010 but, up from 1,303 in 2009), and an additional 1,508 hate crimes motivated by an anti-queer bias<sup>1</sup> (up from 1,202 in 2009 and 1,470 in 2010). Religion is a defining characteristic for many people and for some it is as

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<sup>1</sup> I have included the number of hate crimes based on a person's sexuality (or perceived sexuality) because it is often the case that the perpetrators of the anti-gay incidents are motivated by a religious ideology (Herek, 2004).

defining as race or gender (Carter, 1993; Moore, 2007). There is an extensive body of knowledge on the necessity for schools to teach a multicultural curriculum that is inclusive of racial minorities and women (Anyon, 2005; Banks, 1995; Banks & Banks, 2007; DeCuir & Dixson, 2004; Maestri, 2005). Yet, unlike issues of race and gender, the topic of religion is often avoided by public school curricula (Moore, 2007; Lugg & Tabbaa-Rida, 2009). And when religion is included in the curriculum, it is frequently incorporated in an unconstitutional way (*Edwards v. Aguillard*, 1987; *Epperson v. Arkansas*, 1968; *Kitzmiller, et al. v. Dover Area School District et al.*, 2005).

The United States is known for its cultural diversity. However, the U.S. is also one of the most religiously diverse nations in the world (Eck, 2001; Moore, 2007). According to a 2012 report by the Pew Forum on Religion and Public Life, the current religious make-up of the US, from highest to lowest, is approximately: 48% Protestant, 22% Catholic, 14% Nothing in particular, 6% Other Faith, 4% Agnostic, 3% Atheist, 2% Mormon, 1% Orthodox. Despite this diversity many Americans lack any real understanding of the basic tenets of the world's major religions (Moore, 2007). Ignorance of difference can lead to fear and hostility. Currently school violence is an issue for many U.S. public schools (Moore, 2007). The results of a 2009 questionnaire found that 1.7% of students ages 12-18 reported that they were the targets of religiously motivated hate speech and an additional .6% of students aged 12-18 reported that they were the targets of hate speech in regard to their perceived or actual sexual orientation (Robers, Zhang & Truman, 2012). And 29.2% of students in grades 9-12 reported seeing hate related graffiti in their school environment, while 8.7% reported that they were the targets of hate related words (Robers, Zhang & Truman, 2012). Furthermore, the U.S. is involved in multiple wars due at least in part to religious tensions (Moore, 2007). A selectively homogenous

curriculum is a breeding ground for stereotypes, fear and hate (Smith-Maddox & Solorzano, 2002). When students are not given enough information about people who differ from them, they are forced to label the difference with whatever the dominant culture has created: Muslims are terrorists, Jews are greedy, Buddhists are peaceful, etc. (Moore, 2007). An educational curriculum that is silent with regard to religion serves to silence intelligent inquiry into this area of difference.

### *Multicultural Education*

Multicultural education is a philosophical idea, an educational reform movement, and a process whose foremost goal is to alter the structure of educational institutions so that all students (male and female, exceptional and remedial, and those who are members of diverse racial, ethnic, linguistic, religious and cultural groups) will have an equal chance to achieve academically in school (Banks & Banks, 2007). A multicultural curriculum is one which attempts to present a more complete picture through the inclusion of historically marginalized people (Maestri, 2006). This curriculum is useful for not only engaging all students, and particularly minority<sup>2</sup> students, in the curriculum by giving them a voice, it can also be used to empower the students by showing that people like them have made vast contributions to the world that we all live in.

Gollinck and Chinn (1998) describe multicultural education reform as “a means for positively using cultural diversity in the total learning process. In the process, classrooms should become models of democracy and equity (p. 330). Because multicultural education has equality as an end goal its objective, technically, it will never be fully achieved (Banks & Banks, 2007). Like the concept of neutrality, which will be discussed in Chapters 2 and 3, equality is an ideal

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<sup>2</sup> The term minority, unless specifically stated, refers to all historically marginalized groups.

that people should work towards but will never fully attain (Banks & Banks, 2007). And the ideal of equality exists alongside the institutionalized discriminatory treatment of many ethnic, religious and cultural groups in U.S. society (Banks & Banks, 2007). But the existence of this discrimination is the reason multicultural education is necessary to increase educational equality for all students. “Multicultural education must be viewed as an ongoing process, not as something we “do” and thereby solve the problems that are the targets of multicultural educational reform” (Banks & Banks, 2007, p. 4). Multicultural education is an attempt to instill a dash of equity into an otherwise inequitable system.

The literature on multiculturalism tells us, among other things, that much of the pressure on public schools to have a more inclusive curriculum (usually in relation to race) comes more from the hopes of altering student achievement rather than the desire to correct the culture of the school (Loutzenheiser & MacIntosh, 2004). But multicultural education can affect several dimensions of public schools such as content integration, the knowledge construction process, prejudice reduction, equity pedagogy, and empowering the school’s culture and social structure (Banks & Banks, 2007). Therefore, to successfully implement multicultural education into schools it is first necessary to understand that a school is a social system (Banks & Banks, 2007). To that end each major variable in the school, such as its culture, its power relationships, the curriculum, resources, and the attitudes, norms, values and beliefs of the staff, administration, students and parents must be changed in ways that will allow the school to promote educational equity for students from diverse groups (Banks & Banks, 2007; Beykont, 2000).

Educators need to gain a form of multicultural competence that shifts their perceptions from ethnocentrism to an awareness that will allow them to see and treat others as equals (Apple, 1996; Banks & Banks, 2007; Ladson-Billings, 1994). This entails not only the development of

respect and appreciation of difference, but also a strong sense of self to move along the continuum of cultural awareness from sensitivity to having the competency to teach fairly and appropriately about differences in a way that can encourage social change and justice (Apple, 1996; Banks & Banks, 2007; Giroux, 1991; Ladson Billings, 1994; McCarthy, 1993; Nieto, 1999; Perry & Fraser, 1993; Sleeter & Grant; 1993; Trueba, 1994). However, this would involve several changes within the educational system. Specifically, public schools involved in a multicultural curricula shift would need to include activities for faculty, staff and students (and possibly parents at some point in the change process) which would aid them in exploring their own racial, religious, ethnic and cultural identities such as including self-awareness activities and discussions (Banks & Banks, 2007; Moore, 2007). These schools would also need to establish cross curricular program norms that include respect for multiculturalism while building a community of learners who acknowledge and celebrate diversity (Banks & Banks, 2007; Jewett, 2006). They would also need to find ways to analyze diversity issues by comparing and defining with ethnographic descriptive tools rather than the usual rigid tools (Banks, 1995; Ladson-Billings, 1994).

With these changes a core multicultural curriculum and mode of instruction would enable students not only to learn the history of the diverse groups who make up the United States, but also to learn to respect the culture and contributions of these diverse groups (Loewen, 2007; Noddings, 1995). Students will be able to develop knowledge, appreciation and understanding of their group characteristics and how these characteristics can impart privilege or marginalize other individuals or groups (Ladson-Billings, 1994; Loewen, 2007). And students can learn the steps necessary to bring about social and structural equality and can become dedicated to work toward that goal (Anyon, 2005; Ladson-Billings, 1994).

A multicultural public education can help all students avoid being subjected to the warped or selective reality that a regular curriculum presents (Banks & Banks, 2007; Loewen, 2007). In general, textbooks and other curricular materials present an unrealistic “whitewashed,” portrayal of history, one which hits briefly on prejudice but focuses mainly on hero worship (Banks & Banks, 2007; Loewen, 2007). This restricts students’ knowledge and real life preparation (Banks & Banks, 2007). Textbooks in particular have perpetuated this cultural bias by mainly offering a white Protestant heterosexual male interpretation of social life and history, claiming that interpretation as the norm (Banks & Banks, 2007; Loewen, 2007). Hegemony and power are reinforced by material resources such as text choice that only offer mainstream values (Apple, 1992; Banks & Banks, 2007). Without a multicultural curriculum, many minorities cannot gain access points into the mainstream of American life. Consequently, with little to no curriculum access minority students have limited political presence, limited legitimate civic identity and limited discernible voice (Anyon, 2005). Clearly then a student’s identity as a citizen is severely compromised by this lack of access.

Anyon (2005) believes that a multicultural education would urge minority students towards a position of entitlement with regard to the responsibility of governments to provide equal opportunities. Further, she hopes that this would encourage minority students to hold the system accountable for their failure to date. Anyon (2005) feels that a politically energizing education for minority students must explicitly teach students that they and their families are not free, and that social change is necessary and possible. Though Anyon’s (2005) argument focuses on racial minorities, the same argument can hold true of all minorities, including religious minorities. Students are taught that this is a land of opportunity, but the “for some” is intentionally left out. They are taught that we live in a democracy of the people, for the people,

by the people; once again the, of “some,” for “some,” and by “some” is left out (see Loewen, 2007).

Researchers have found that minority students often feel “invisible,” or feel as if they have no voice in schools (DeCuir & Dixson, 2004). Sometimes this is from blatant prejudices on the part of other students, teachers or administrators within the school (DeCuir & Dixson, 2004). But much of this feeling of invisibility has to do with them feeling as if they have no claim to the information that is being presented to them by their instructors (Ladson-Billings, 1994). A school curriculum that has significant omissions on diversity issues tends to imply that these minority groups are of less value and significance in our society (Banks & Banks, 2007). On the other hand students can be made to feel entirely too visible if they are seen as having traits outside of the school’s norm (Lee, 1996). Some traits are easy to notice, such as skin color, accents, religious attire, and some disabilities. These students may feel that their minority traits make them stand out and apart from the rest of the school, especially when the school’s curriculum omits them. Without a multicultural curriculum, students are denied a comprehensive understanding of themselves and other people and they are more likely to resort to stereotypes or, even worse, fall into the prescribed role of the stereotype (Moore, 2007).

### *Religion and Public Schools*

Many public school district personnel and school board members feel pressured to balance the religious desires of the community with the legal requirement to separate church and state, and in their attempts to find this balance, often, costly court battles ensue (*Epperson v. Arkansas*, 1968; *Edwards v. Aguillard*, 1987; *Kitzmiller, et al. v. Dover Area School District, et al.*, 2005). A multicultural curriculum that includes religion would allow students and teachers to have a constitutionally permissible dialog about the world’s religions and the current and past

events surrounding them. This multicultural curriculum, which should include courses and lesson plans that teach *about* religion, is a way for schools to balance the desires of the community with the demands of the law without ending up in court.

The issues surrounding religion and public schools are the subject of a great deal of legal, political and religious debate in the United States (*Abington Township School District v. Schempp*, 1963; *Agostini v. Felton*, 1997; *Ahlquist v. City of Cranston*, 2012; *Board of Education of Kiryas Joel Village School District v. Grumet*, 1994; *Edwards v. Aguillard*, 1987; *Engle v. Vitale*, 1962; *Epperson v. Arkansas*, 1968; *Everson v. Board of Education*, 1947; *Freiler v. Tangipahoa Parish Bd. of Education*, 1999; *Good News Club, et al. v. Milford Central School*, 2001; *Kitzmiller, et al. v. Dover Area School District, et al.*, 2005; *Lee v. Weisman*, 1992; *Lemon v. Kurtzman*, 1971; *McCullum v. Board of Education*, 1948; *McLean, et al. v. Arkansas Board of Education*, 1982; *Newdow v. Rio Linda Union School District*, 2010; *Pelozo v. Capistrano Unified School District*, 1993; *Santa Fe Independent School District v. Doe*, 2000; *Scopes v. State of Tennessee*, 1927; *Selman v. Cobb County School District*, 2005; *Smith v. Board of School Commissioners of Mobile County*, 1987; *Wallace v. Jaffree*, 1985; *Westside School District v. Mergens*, 1990; *Wisconsin v. Yoder*, 1972; *Zelman v. Simmons-Harris*, 2002).

Whether religion is taught and how it is taught in a given public school varies, not only from state-to-state, but is also likely to vary from district-to-district within a given state (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005). This area of constitutional law is delicate, because it involves both the prohibition of government-sponsored religious expression and the protection of individual religious expression.

The relationship between religion and public schools in the United States is governed in large part by the First Amendment to the U.S. Constitution. The U.S. Constitution is the supreme

law of the land, and no law, policy, act or legal ruling is valid if it conflicts with the U.S. Constitution (*Marbury v. Madison*, 1803). The First Amendment states in part: “Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof...” (*U.S. Constitution*, Amendment I). It was added to the Constitution to assure that “neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say - that the people's religious [beliefs] must not be subjected to the pressures of government for change each time a new political administration is elected to office” (*Engle v. Vitale*, 1962, at 429-430). There are two prohibitions that are contained within the aforementioned segment of the First Amendment, and they apply to both the federal and state governments.<sup>3</sup> The first is that the government is prohibited from *establishing* religion, meaning that it may not act in a way that shows favoritism to any particular religion. And the second is that the government cannot restrict citizens’ rights to *freely exercise* their religion. The Free Exercise Clause protects citizens’ choice to believe in, and to practice, the religion they choose. Though the Establishment and Free Exercise Clauses sound straight forward, problems arise when they are interpreted and applied to specific situations.

The question of how the First Amendment Religion Clauses relate to the public school setting is a legitimate one (McCarthy, 2000). At the time that the First Amendment was adopted there was no plan for a public school system (McCarthy, 2000), and until the Civil War the constitutional separation of church and state only applied to the federal government (Fraser, 1999). Four years before the First Amendment was enacted, the Northwest Ordinance was adopted which states in part, “Religion, morality, and knowledge, being necessary to good

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<sup>3</sup> The First Amendment is made applicable to the states by the Fourteenth Amendment to the U.S. Constitution.

government and the happiness of mankind, schools and the means of education shall forever be encouraged” (Northwest Ordinance, 1787, Article III). It can, and has, been argued that this clause demands that religion and schools are linked (Fraser, 1999). And many state constitutions included similar quotes linking religion and education, since at that time states were free to make laws respecting an establishment of religion (Fraser, 1999). In the early 1800’s Horace Mann, who was a key figure the early public school<sup>4</sup> movement, believed that schools should provide students with a democratic religious education (Fraser, 1999). And most of those who were active in the creation of public schools in the 19<sup>th</sup> century felt that schools and Protestant churches were necessary “allies in the quest to create the Kingdom of God in America” (Tyack, 1966, p. 448). Unsurprisingly, the religious text that the early public schools used to ensure a moral populace was the King James version of the Bible (Fraser, 1999). After the Civil War most public schools where newly freed slaves were educated were run by churches, taught in churches and/or taught using the Bible (Fraser, 1999). Public schools continued teaching the Bible as “truth” well into the 1960’s (Fraser, 1999). However, as legal scholars have been noting for decades, the U.S. Constitution, like the Declaration of Independence, is a ‘living document’ that shifts in meaning and/or the application of principle as society evolves (Balkin, 2007; Goldford, 2005; Obama, 2006; Winkler, 2001). If this was not the case it would be impossible to read statements like the Declaration’s decree that “all men are created equal,” with the current interpretation of “all people are created equal.”<sup>5</sup> Clearly, at the time of the drafting of the

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<sup>4</sup> Early public schools used to be called common schools.

<sup>5</sup> The current translation that “all people are created equal” seems to have more to do with being politically coded, rather than arising from a true belief in equality. There are probably few people who would say that those of a low socioeconomic status are equal with those in the upper class or even those in the middle class.

Declaration of Independence, the only people who were considered to be equal with the drafters were other White, land-owning, Protestant-men. It would also be impossible to understand how the Supreme Court could interpret the Constitution to permit the “separate but equal” ruling of *Plessy v. Ferguson* (1896) and then later find the same ruling to be a Constitutional violation almost 60 years later (*Brown v. Board of Education*, 1954). In both of these instances there was a guarantee of “equality.” While the “shifted meaning” remains true to the guarantee of equality in both documents, the “shift” expands the intended recipients of the guaranteed equality. Thus, despite the fact that the Framers<sup>6</sup> may not have originally envisioned that the First Amendment would govern systems of public schools, much like they may have never envisioned a time when a Black man would be the President of the United States, the living nature of documents like the Constitution permits the First Amendment to apply to the public school setting.<sup>7</sup>

At the minimum, it appears that the Establishment Clause was intended to prohibit the federal government from establishing and financially supporting a national religion, which was the norm in many other countries, particularly England, at the time this nation was founded (*Engel v. Vitale*, 1962; *Everson v. Board of Education of Ewing*, 1947; Fraser, 1999). It is less

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<sup>6</sup> The Constitution is silent on the matter of constitutional interpretation (*Marbury v. Madison*, 1805). Yet the original framers, most of whom were trained lawyers and legal theorists, must have been aware of the debates about interpreting legal texts and they also should have known the confusion that not providing a clear interpretive method would cause (Brown, 1976). Thus, had the Framers meant for future generations to interpret the Constitution in a specific manner, they could have indicated the correct interpretive method within the Constitution. The lack of guidance seems to mean that future generations should be free to re-examine for themselves how to properly interpret the Constitution within the bounds of the law (*Marbury v. Madison*, 1805).

<sup>7</sup> Some Constitutional scholars, like Supreme Court Justices Scalia and Rehnquist, assert that the Constitution is a “dead document”. This argument is usually based on the premise that asserting a “living constitution” disregards Constitutional language and will likely lead to judicial activism and lawlessness. (Jacob, 2008; Rehnquist, 1976/2006; Ward, 2008)

apparent whether the Establishment Clause was also intended to prevent the federal government from supporting Christianity in general. Those who support a narrow interpretation of the Establishment Clause point out that the same First Congress who proposed the Bill of Rights, which includes the First Amendment, hired institutional chaplains and opened its legislative day with prayer (*Marsh v. Chambers*, 1983). They would also likely observe that since the early Presidents often included religious messages in their inaugural and Thanksgiving Day addresses, the Framers could not have meant for the Establishment Clause to forbid the 'non-coercive' state endorsement of religion (*Lee v. Weisman*, 1992). Those supporting a broad interpretation of the clause could cite writings by Thomas Jefferson and James Madison, two of the Founding Fathers, which suggest the need to establish "a wall of separation" between church and state (*Engle v. Vitale*, 1962, at 428, 437; *Lee v. Weisman*, 1992, at 591, 600-601; Gaustad, 1987, pp. 185-186).

From this brief discussion we can see that the religion clauses of the First Amendment are malleable. This is a convoluted area of constitutional law because while claiming religious neutrality the federal government actively supports numerous references to God in many different formats. For example, the Pledge of Allegiance, U.S. currency, the invocation to the deity prior to judicial and legislative proceedings, the mention God in most political speeches, the addition of a National Day of Prayer established by Congress in 1952 and the fact that only Christian holy days are considered national holidays (Epstein, 1996; Fraser, 1999). This practice is known as ceremonial deism (Epstein, 1996). Ceremonial deism in its most basic definition means that there are some things that are so ingrained in American tradition that they have lost their religious roots and have become secular (Epstein, 1996). Essentially, the U.S. Courts have decided that over time America has adopted Christian norms and has merged Christianity with

Americanism until only Americanism remains (*Aronow v. United States*, 1970; *County of Allegheny v. ACLU*, 1989; *Lynch v. Donnelly*, 1984). However, this translates into ‘do as I say, not as I do’ rulings from the Supreme Court which tend to confuse more than they provide bright-line guidelines.

Political authority and power are ultimately held by those with the ability to enforce legal decisions (Ward, 2004). The pragmatic philosopher William James believed that ‘truths’ are simply opinions that have been legitimated by those with power (James, 2002; Ward, 2004). These power holders preserve and enforce American ‘truths,’ which helps to explain why the ceremonial deism that exists in America does not run afoul of the principal of the separation of church and state. Those with power and influence at the top levels of government have determined that the many strictly Christian references to God that are interwoven into American culture are simply ‘American’ rather than ‘Christian’ (see Epstein, 1996).

If it is true that the word ‘God’ in statements like: ‘One nation under God,’ ‘In God we trust,’ ‘God save this honorable court,’ are in fact religiously neutral, meaning that the word ‘God’ is not secular, that it neither advances nor inhibits religion and that there is not excessive government entanglement with religion (*Lemon v. Kurtzman*, 1971), then we should be able to substitute ‘God’ with another religious deity without violating the First Amendment, since the word ‘God’ is simply acting as a symbol rather than “conveying government approval of particular beliefs” (*Lynch v. Donnelly*, 1984, at 693). Yet, it seems unlikely that ‘One nation under Allah,’ ‘In Buddah we trust,’ or ‘Goddess save this honorable court’ would survive a First Amendment challenge. To be truly religiously neutral it would seem better to say, “One nation

under President Obama”<sup>8</sup> since, if we ignore the separation of power, the President seems to be the figurehead of America. Or, because it would be tedious to have to re-do money every time a new president is elected, we could simply print ‘In the President of the United States We Trust’ or ‘In the Government of the United States we Trust’ on money.

Public schools also fall prey to ceremonial deism beyond the Pledge of Allegiance noted above. For example, the school calendar is set around Christian holidays like Christmas and Easter, even if they have been renamed the winter and spring breaks (Moore, 2007). Additionally, extracurricular activities such as sports rarely, if ever, meet on a Sunday morning, the usual time for Christian worship (Moore, 2007). And even the majority of the public school curriculum is focused on Western literature and history which cannot be neatly divorced from Christianity (Moore, 2007).

Despite these issues, courts throughout the U.S. have repeatedly forbidden governmental sponsorship of religious practices in public schools and enforced the separation of church and state (*Edwards v. Aguillard*, 1987; *Epperson v. Arkansas*, 1968; *Kitzmiller, et al. v. Dover Area School District, et al.*, 2005). That said, some public school boards, administrators, and teachers remain confused on this point, and court cases still arise to address these issues. Stated simply, teachers in public schools do not appear to have a working knowledge of the law in this area (Gropp, 2004; Moore, 2004). And advocacy groups like the Protestant Right who want religion to be taught in school are constantly devising new ‘schemes’ to attempt to get it in through the back door (*Edwards v. Aguillard*, 1987; *Epperson v. Arkansas*, 1968; *Freiler v. Tangipahoa Parish Board of Education*, 1999; *Kitzmiller et al. v. Dover Area School District, et al.*, 2005;

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<sup>8</sup> Though this may pass muster on religious grounds it is extremely close to supporting a monarchy, which is clearly not what America’s Founders had in mind.

*McLean et al. v. Arkansas Board of Education*, 1982; *Scopes v. State of Tennessee*, 1927; *Selman v. Cobb County School District*, 2005).

Since the U.S. courts are responsible for interpreting the First Amendment's protection as it relates to the public schooling, it is important to look at the ways the courts have approached the issue. Court decisions have varying degrees of weight, with federal courts and in particular the U.S. Supreme Court decisions carrying the most weight. In fact, the U.S. Supreme Court is the ultimate interpreter of the U.S. Constitution (*Cooper v. Aaron*, 1958, McCarthy, 2000). In the U.S. legal system, only questions of law (rather than fact) can be appealed to a higher court. A losing party cannot appeal a judgment if s/he is simply unhappy that s/he lost, s/he will need to show that the judge or jury erred in the interpretation of the law. Furthermore, very few cases that are appealed to the U.S. Supreme Court are accepted for review. But once accepted, the Court's decision is "final," there is no way to appeal a Supreme Court decision<sup>9</sup>.

In 1890, with regard to the Free Exercise Clause, the Supreme Court wrote that it "was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in the form of worship as he may think proper, not injurious to the equal rights of others..." (*Davis v. Beason*, 1890, at 342, overruled, *Thomas v. Review Board*, 1981). The court has also addressed religious entanglements in schools stating, "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out

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<sup>9</sup> The Supreme Court can overturn its prior rulings such as what happened when the Court in *Brown v. Board of Education* (1954) found that its ruling in *Plessy v. Ferguson* (1896) was constitutionally impermissible.

divisive forces than in its schools..." (*Illinois ex rel. McCollum v. Board of Education*, 1948, at 231).

The Supreme Court has specified a difference between religious conduct and religious beliefs. This distinction means that the free exercise clause "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society" (*Cantwell v. Connecticut*, 1940, at 303-304). To illustrate, despite the fact that we are in the middle of a 'war on terror,' a public school cannot refuse to admit a student on the grounds that he or she believes in Muslim teachings.<sup>10</sup> However, the school might regulate conduct that it saw as relating the Muslim faith in some instances, such as if the behavior intruded into the orderly operation of the school (*Bethel School District No. 403 v. Fraser*, 1986; Lugg & Tabbaa-Rida, 2009, *Tinker v. Des Moines Independent Community School District*, 1969). This power of the government to regulate conduct is not absolute. "Where the state conditions the receipt of an important benefit upon conduct proscribed by religious faith, or where it denies such a benefit because of conduct mandated by the religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden on religion exists...[t]he state may justify [such] an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest" (*Thomas v. Review Board*, 1981, at 717-718).

This quote introduces the concept of judicial review. There are three standards of judicial review that are used by the courts to review federal law: rational basis, intermediate scrutiny and strict scrutiny. This hierarchy of standards is used to weigh an asserted government interest

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<sup>10</sup> I am in no way attempting to support the stereotype that links Muslims with terrorism; however research shows that this stereotype does lead to Muslim students being the targets of harassment in schools (see O'Melveny & Myers LLP, 2009; Rusling, 2008).

against a constitutional right or policy that conflicts with the manner in which the interest is being pursued. In rational basis review, the government need only show that the challenged classification is rationally related to serving a legitimate state interest (Gunther & Sullivan, 1997). Intermediate scrutiny is the middle level of review, which involves important government interests furthered by substantially related means (Gunther & Sullivan, 1997). Courts will use strict scrutiny when a fundamental constitutional right has been infringed, such as those found in the Bill of Rights, the first ten Amendments to the Constitution, or when a government action involves the use of a suspect classification such as race or religion since that may violate the Equal Protection Clause (Gunther & Sullivan, 1997).

Since this dissertation is centered on religion, which is a suspect classification and is a fundamental right guaranteed by the First Amendment, the courts will use strict scrutiny in arriving at their decisions. To pass strict scrutiny, the law or policy must satisfy a three pronged test. First, it must be justified by a compelling governmental interest (Gunther & Sullivan, 1997). The concept of a “compelling government interest” generally refers to something necessary or crucial, such as not violating an explicit constitutional protection, as opposed to something that is merely preferred. Second, the law or policy needs to be narrowly tailored to achieve the specific end (Gunther & Sullivan, 1997). If the government action is over-inclusive, addressing more than the particular goal or under-inclusive, failing to address central aspects of the compelling interest, then it is not considered to be narrowly tailored. The third prong demands that the law or policy be the least restrictive means for achieving that interest (Gunther & Sullivan, 1997). This last prong will not be violated if there is another method of achieving the interest that it equally as restrictive, it specifically means that there cannot be a less restrictive way to effectively achieve the compelling government interest.

It should be noted that education is not a fundamental right at the federal level, despite the fact that children are required by state law to be educated, and state constitutions provide for a public system of education. This means that without the addition of a federal fundamental right or one of the suspect classifications such as race or religion an educational question of law would only receive rational basis review by the federal courts. The result of this is that cases brought under rational review are usually decided in the State's favor, whereas cases that arise under strict scrutiny are much more likely to be decided in the complainant's favor (Gunther & Sullivan, 1997).

The Constitution permits some religious activity in public schools. Unfortunately this area of Constitutional law is not as well-known and consequently, some school districts incur enormous legal bills to defend against issues that have already been decided (*Kitzmiller et al. v. Dover Area School District et al.*, 2005). The law may appear murky in many of these situations, but with a little research it is usually possible to determine what is legally permissible.

#### *The Research Question*

Because the legal history dealing with religion and public schools is vast I have limited this dissertation research to the focus on the answer to the following question:

*How can U.S. public schools incorporate religion as part of multicultural education that meets constitutional obligations?*

#### *Methodology*

This dissertation will employ a legal analysis to examine the legal and policy rulings that have led to the current trend of religious curricular silence in U.S. public schools (Moore, 2007). Legal analysis looks at the key events, people, and legal decisions that shape the law. Postmodern theoretical perspectives like critical legal theory, acknowledge that subjectivities are

embedded into all types of legal, historical and political analyses (Marshall & Gerstl-Pepin, 2005). “There are no facts, merely interpretations of other interpretations” (Ward, 2004, p. 140). Politics is the interplay of varying interpretations set against the power of the interpreter (Sheridan, 1980; Ward, 2004). This raises questions about how power operates in areas such as cultural understanding, organizational and social structures and influencing the laws and policies that affect schools (Marshall & Gerstl-Pepin, 2005). This is important because legal and policy rulings and discussions about teaching religion in public schools are generally centered around the fallacy of neutrality (McCarthy, 2001). Public education, like the law, is not neutral (McCarthy, 2001; Moore, 2007). For example, the mere inclusion of religion to the academic curriculum gives credibility to religion as a valid field of inquiry (Moore, 2007). And it also challenges those who hold a particular religious view to understand the religious perspectives of others (Moore, 2007). But public schools are not secular to be neutral; they are secular in an attempt to promote non-repression and nondiscrimination (Moore, 2007). A public school’s status as a secular institution does not mean that it is anti-religious. In fact, public schools are very often filled with students and teachers with who hold a diverse array of religious beliefs. Additionally, it would be hard, if not impossible, to teach courses in history and English literature, for example, without referencing religious influences.

Perhaps the most vexing and interesting facet of legal analysis is the subjective nature of laws (Ward, 2004). After all, if legal analysis was simply the application of rules to fact, lawyers would be out of a job, and comedians would have to purge lawyer jokes from their acts. But this is not the case, because legal facts are not necessarily absolute: Facts and circumstances differ from one case to the next, leading to different and sometimes conflicting rulings by judges. When looking at legal decisions rendered by judges we must take into account the totality of the

circumstances. Most importantly, despite the vivid imagery of Lady Justice blindfolded and holding a perfectly balanced scale, there is no true neutrality in the law. Judges are not automatons, they come chock full of feelings, emotions, prejudices and preconceived notions. That justice is blind is a fallacy. This means that in rendering legal judgments, legal facts and evidence, along with personal prejudices shape the law (Ward, 2004).

Furthermore, law does not occur in a bubble, therefore, to understand the ‘who-what-when-where-why-how’ of a law or policy we must look at it in its historical context. We are all here because of, and in some cases, despite, history, and thus our knowledge, collective or independent, is historically and socially situated (Hunt & Wickham, 1994; Ward, 2004). As Foucault (1980) asserts, knowledge and power are complementary and reinforcing. In an analysis of the history of laws and policies it becomes important to note who holds the power at a given time because laws are shaped by powerful people and tend to mimic the beliefs of the power holders of that era. Laws and policies that are touted as neutral are likely to be skewed towards the beliefs or values of society’s power holders. This dissertation will go beyond claims of neutrality to look at the way power has shaped law and how this affects public schools.

#### *Sources*

Primary and secondary sources were used to substantiate this research. Primary sources will include newspaper articles, books and first person materials from prior decades, case law and policy briefs. Secondary sources such as scholarly books and journal articles were also used to support and when necessary supplement the primary sources. The majority of the research was found online using programs such as Lexis/Nexis and Westlaw for court cases, and ProQuest, Wilson Web and JSTOR for journal articles. I used contemporaneous corroboration of primary and secondary sources to provide greater trustworthiness. Contemporaneous corroboration of

sources makes past events more likely to have occurred because the same evidence is given by multiple sources. The reliability of the research is increased when sources are corroborated (Cresswell, 1998; Marshall & Rossman, 2006).

### *Theoretical Framework*

This dissertation analyzed legal and policy matters dealing with teaching about religion in public schools and as such the analysis crossed several disciplines: law, religion and social science theory. Because of this, I developed and then employed a new theoretical framework Critical Religious Legal Theory<sup>11</sup>. Critical Religious Legal Theory is based on the well-established traditions of Critical Legal Studies (CLS), a theory that challenges and overturns accepted norms and standards in legal theory and practice (Altman, 1990; Kelman, 1987; Unger, 1983 ), second generation<sup>12</sup> Critical Race Theory (CRT), which borrows heavily from postmodernism, post structuralism and critical theory to look at the intersections between difference and dominance (Morphin, Perez, Parker, Lynn & Arrona, 2006), and critical theory of

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<sup>11</sup> I believe Critical Religious Legal Theory to be a normative theory rather than an explanatory theory. Instead of attempting to explain a phenomenon through other established theories, Critical Religious Legal Theory attempts to provide a guide for critically interpreting and addressing deficiencies and illegalities in educational policies and laws that relate to religion in U.S. public schools, while broadening the generally accepted understanding of multicultural education to include religion. Critical Religious Legal Theory is situated normatively within the realms of pragmatism (see James, 1902), virtue ethics (see Gilligan, 1989) and deontology (see Kant, 1998).

<sup>12</sup> Recently, CRT has expanded its discourse to concentrate on more than racism. Specifically CRT has been split into two strands of scholarship, first-generation and second-generation (Carbado & Gulati, 2003). First-generation scholars focused primarily on the material manifestations of racism as a way to argue for social justice. These scholars demand the inclusion of the subjugated voices of racially marginalized people into discussions of legal issues, race, racism and society in general (Bell, 1980; Crenshaw, 1998; Crenshaw, Gotanda, Peller & Thomas, 1995; Harris, 1994). For the purposes of this dissertation I feel that the scholarship of the second-generation is more on point. The second-generation scholars have taken the work of the aforementioned authors and expanded their research to include such issues as culture, ethnicity, gender, language and sexuality (Valdes, Culp & Harris, 2002).

religion, which looks at religion as both an oppressive and freeing phenomenon (Kim, 1996). CLS, CRT and critical theory of religion draw from a broad literature base including, history, law, philosophy, theology and sociology to better understand the various ways that power, or those who wield power, controls the law (Kelman, 1987; Unger, 1983; Ward, 2004).

Critical Legal Studies (CLS) seeks to show that law is a social phenomenon that is often characterized by inequality and oppression through its tendency to promote the status quo, which again is usually socially constructed (Kelman, 1987; Unger, 1983). The law is thought of as a normative social practice that attempts to guide human behavior along with other normative domains like religion, morality, etiquette, etc. But CLS teaches us that law is not omnipotent; it was created by people for people. This leads to the need to scrutinize those who are at the top of the legal ladder, the people who decide what is normative, along with the laws and policies that they create. One drawback to CLS is its over-reliance on class as the main analytic variable (Valdes, 1995; Ward, 2004). Extending CLS's precepts, Critical Religious Legal Theory analyzes religious issues in educational law, policy and politics as social phenomena. And it requires that the educational law and policy makers be scrutinized along with the social and political atmosphere at the time the law and policies are enacted. This scrutiny extends to the over reliance or misuse of concepts like neutrality and ceremonial deism as they relate to laws and policies involving religion and public schools.

Critical Religious Legal Theory also borrows from the tenets of second generation Critical Race Theory (CRT) to challenge the generally accepted normative citizenship standard of the White, Protestant, heterosexual, male. As this dissertation will show, the history of teaching religion and teaching *about* religion in public schools has been surrounded by issues of dominance and power (Justice, 2005). In the realm of education, CRT provides insights,

perspectives, methodologies and pedagogies that attempt to identify, analyze and transform the structural and cultural aspects of education that maintain subordinate and dominant positions inside and outside of the classroom (Matsuda, Lawrence, Delgado & Crenshaw, 1993; Smith-Maddox & Solorzano, 2002; Tierney, 1993). With regard to education, CRT has at least five elements that form its basic model: (a) the centrality of race and racism and their intersectionality with other forms of subordination, (b) the challenge to dominant ideology, (c) the commitment to social justice, (d) the centrality of experiential knowledge and (e) a trans-disciplinary perspective (Smith-Maddox & Solorzano, 2002; Solorzano, 1997; Solorzano, 1998; Solorzano & Bernal, 2001; Solorzano & Yosso, 2002). Critical Religious Legal Theory broadens this focus on race and racism to include the subordination of religion and belief that differs from the majority as a central feature.

And finally Critical Religious Legal Theory borrows from the tenets of critical theory of religion which views religion as a human product that is framed and embodied within historical social structures, and as such it is both illusory and, in some ways antithetical to an advanced society (Kim, 1996; McKown, 1975; McLellan, 1987; O'Toole, 1984). The core of critical theory of religion promotes the idea of emancipation, which emphasizes the importance of autonomous reason and freedom from the dogmas of traditional religion (Kim, 1996). Since religion is seen as an ideal, non-critical theorists in religion tended to avoid studying the role of religion as a barrier to emancipation (Kim, 1996). But many critical religion theorists argue that human emancipation:

...requires the complete removal of the illusory character of religion and preservation of its moral truths... [they also reject]... the consolatory aspect of religion, which hides the misery of capitalist society, but [welcome] the

revolutionary aspect of religion which they linked with the desire for, and impulse toward, justice and freedom. (Kim, 1996, p. 273)

Critical religion theorists generally believe that as long as religion remains unknown or unknowable and largely controlled by an elite few, people will remain oppressed (Kim, 1996; Marcuse, 1964). Due to this, critical religion theorists predict an “end” to conventional religion, but they assert that the content of religion, such as absolute goodness, truth, love and justice will remain in a dialectic form (Horkheimer, 1972; Kim, 1996). While this may sound anti-religious, it is not since many critical religious theorists believe that religion holds, and will continue to hold, an important place in society. That said, the majority of critical religion theorists believe that society will evolve into a progressive humanistic religion (Kim, 1996). This new form of religion will promote emancipation by removing power and control over religion from the hands of an elite few while empowering society through reason, logic and ethics (Kim, 1996). However, in order for these changes to occur critical religion theorists believe that religion has to be demystified to further individual self-knowledge and self-reflection and to eliminate unnecessary forms of social domination by critically examining the interrelationship between religion and dominant social institutions (Kim, 1996).

Because the topic of religion is often ignored or only touched upon briefly in the broader critical theory literature (Banks & Banks, 2007; Kim, 1996; Salili & Hoosain, 2006), I feel that a new theory needed to be developed that purposefully and critically addresses the intersections of religion, law and social sciences. Borrowing from the well-developed tenets second-generation Critical Race Theory, Critical Legal Studies and Critical Theory of Religion, I developed Critical Religious Legal Theory, a theory that looks not only at religion through a legal lens, but also

through a socio-political lens that is cognizant of difference, dominance and power and that seeks emancipation and understanding as its end goals.

Critical Religious Legal Theory combines aspects of legal theory with social science theory, which are complementary but differ in some respects. All theories attempt to explain and/or predict behavior, outcomes or other phenomena in certain situations. Legal theories are usually more absolute, or have a very narrow/focused starting point; they look at laws and policies that concretely exist and then analyze them in the context of ideals like equality, justice and fairness (Putman, 2004). Social science theories are frameworks where empirical evidence is used to study and interpret social phenomena (Cresswell, 1998). These theories generally have a broader evidentiary base since they need to be generalizable and replicable. Because this dissertation looks at the sociopolitical effects of laws and policies dealing with religion in the realm of public education, I designed Critical Religious Legal Theory to integrate aspects of both legal and social science theories.

To guide my analysis using Critical Religious Legal Theory I: 1) Looked at the laws and policies dealing with religion and public schools as social phenomena; 2) Critically analyzed the education law and policy makers in the context of the social and political atmosphere at the time that the law/policy was created; 3) Critically analyzed the generally accepted Christian norms in public education and America's reliance upon ceremonial deism; 4) Critically analyzed religion as a tool of control and explained how religion could be demystified through the use of multicultural curricula that are inclusive of religion to (amongst other things) promote secular "moral truths" in character education like goodness, justice, love, truth and equality. Each step in the analysis focused on how issues of dominance and power with regard to religion affect law and policy creation which then affects public schools in social and academic ways.

### *Chapter Breakdown*

The following chapters further illuminate the history of U.S. courts' interpretations of the religion clauses of the First Amendment with regard to a number of issues surrounding religion in public schools.

Chapter One consists of the Introduction and analytical framework discussed above.

Chapter Two begins the legal analysis of religion and public schools including a discussion of state sponsored prayer in schools. This analysis include private student and/or teacher prayer (*Engle v. Vitale*, 1962), school sponsored prayer (*Engel v. Vitale*, 1962; *School District of Abington v. Schempp*, 1963; *Wallace v. Jaffree*, 1985; *Lee v. Weisman*, 1992; *Santa Fe Independent School District v. Doe*, 2000), and the official participation or encouragement of religious activity (*Ahlquist v. City of Cranston*, 2012; *Stone v. Graham*, 1980). Chapter Two also analyzes the legality of religious meetings in public schools (*Equal Access Act of 1984*; *Westside School District v. Mergens*, 1990; *Widmar v. Vincent*, 1981). Methodologically this chapter looks at the laws and policies dealing with religion and public schools as social phenomena and critically analyzes the education law and policy makers in the context of the social and political atmosphere at the time that the laws and policies were created.

Chapter Three analyzes the differences between teaching religion in public schools versus teaching *about* religion in public schools: (*Daniel v. Waters*, 1975; *Edwards v. Aguillard*, 1987; *Epperson v. Arkansas*, 1968; *Kitzmiller, et al. v. Dover Area School District, et al.*, 2005; *Malnak v. Yogi*, 1977; *McLean, et al. v. Arkansas Board of Education*, 1982; *Peloza v. Capistrano Unified School District*, 1993; *Scopes v. State of Tennessee*, 1927; *Selman v. Cobb County School District*, 2005; *Webster v. New Lennox School District*, 1990). Methodologically this chapter looks at the laws and policies dealing with teaching religion versus teaching *about*

religion in public schools as social phenomena and critically analyzes the education law and policy makers in the context of the social and political atmosphere at the time that the laws and policies were created. It also critically analyzes the generally accepted Christian norms in public education.

Chapter Four discusses multicultural education in U.S. public schools, including what it is, how it's defined and why religion is usually left out. It discusses the necessity of a multicultural curriculum that includes religion to stem the tide of ignorance and violence that persists when students are not thoroughly educated about difference. This chapter also provides guidance for how public school educators can teach about religion in a way that does not violate Constitutional mandates and that addresses the needs of a multicultural global society.

Methodologically this chapter critically analyzes the generally accepted Christian norms in public education and America's reliance upon ceremonial deism. It also critically analyzes religion as a tool of control and explains how religion could be demystified through the use of multicultural curricula that are inclusive of religion to (amongst other things) promote secular "moral truths" in character education like goodness, justice, love, truth and equality.

Chapter Five briefly revisits the major themes from Chapters 1-4, and then explains how Critical Religious Legal Theory can be used by law and policy makers as well as educators and administrators to help them to determine what laws, policies and other curricular changes dealing with religion and public schools will survive, or better yet avoid, any Constitutional challenges. It then brings this entire discussion of religion and U.S. public schools to a close.

#### *Research Limitations*

This is not a quantitative study, thus the goal is not to have a large enough sample size to be able to predict or generalize about results in relation to large populations. In legal research,

the goal is to look at cases or policies that are similar to establish precedence, by way of a pattern or divergence, and to then apply the law to the case or legal question at hand (Putman, 2004). Additionally, legal decisions, policies, and laws are ultimately decided by ‘majority rules’ voting. This becomes relevant since, at times, a single case will exist as precedence and that single case may have been decided by a split 5-4 Supreme Court vote which is generally divided along ideological grounds (see *Agostini v. Felton*, 1997). And, as opposed to educational research which usually takes years to be put into practice and even longer before any results are seen, legal research and the policies, laws and court decisions that result from it are expected to have immediate results, with some notable exceptions (Putman, 2004; for expected delayed results see *Brown v. Board of Education*, 1954; No Child Left Behind Act, 2003). This means that using legal research for educational purposes demands that the usual immediacy of the legal research be relaxed to apply to a more hypothetical and general educational approach.

Another limitation of this study is the lack of access to unpublished court opinions which would have given a clearer and more complete picture of this area of law (Dorf, 2003). In addition, it is typical for school districts and parents to resolve disputes by circumventing the legal system. Since court cases are a drain on the already limited funds that public schools have, schools may find that it is more cost effective to settle a dispute out of court (see *Selman v. Cobb County School District*, 2006). There could be many more instances of religious entanglements in school that are undocumented in the legal realm. As a result, the findings here cannot be construed to mean that the cases analyzed represent all controversies in the United States related to religion and public schools. Instead, the collection of cases analyzed has been limited to those cases made available to the public via Lexis-Nexis and Westlaw, the two dominant electronic legal research databases.

A final limitation to this study is that because the focus is law and policy it will not function as a curriculum guide for educators. The research generated from this dissertation will give guidance as to what schools can and cannot legally teach in public schools but it will not give educators specific lesson plans to follow should they wish to incorporate a multicultural curriculum that is inclusive of religion.

### *Concluding Remarks*

Though this research focuses on the evolution of teaching about religion in U.S. public schools, it also discusses the implications of religious ignorance and the possible repercussions of generations of U.S. students who have little knowledge of religion (beyond their own) in an increasingly global world. The research also identified and critically analyzed many of the federal and state court cases dealing with religion and public schools, focusing on the trend for 5/4 decisions chock full of unclear language by the Supreme Court, which has made this area of law difficult for the general public, especially teachers with no legal background, to understand (*Agostini v. Felton*, 1997; *Everson v. Board of Education*, 1947; *Hein v. Freedom From Religion Foundation*, 2007; *Lee v. Weisman*, 1992; *Lynch v Donnelly*, 1984; *McCreary County v. ACLU of Kentucky*, 2005; *Stone v. Graham*, 1980; *United States v. Ballard*, 1944; *Van Orden v. Perry*, 2005; *Zelman v. Simmons-Harris*, 2002). Particular care was taken to ensure that the analysis contained in this research is written in such a way that teachers without a legal background can understand it and then follow it, saving school districts the time and expense of avoidable court battles.

I believe that Critical Religious Legal Theory analysis, which draws from the well-established traditions of Critical Legal Studies, second generation Critical Race Theory and the Critical Theory of Religion, will provide a nuanced theoretical perspective that will expand the

ways that critical theorists view the issues surrounding religion and public schools. It is my hope that the research generated by this dissertation, along with the pre-existing body of research on the intersection of religion and public schools, will be used by researchers, administrators and educators to expand the curricula in public schools to include courses where religion is discussed, in a constitutionally permissible manner, to inoculate against the ignorance behind many religiously motivated hate crimes.

## CHAPTER TWO

### Religion and Public Schools

#### *Background*

Religious conservatives have generally argued that America was once a place of informed and vibrant discourse on religion and that this religious discourse has been driven into hiding by the public secularism that plagues America today (Gedicks, 1995). What this argument fails to note is that when this informed and vibrant discourse supposedly took place, *who* could actually participate in this discourse was tightly constrained. It is doubtful that the vibrant discourse referred to was between the original inhabitants of America and the early American immigrants as they slaughtered those ‘Godless’ Native Americans (Loewen, 2007). Those who were murdered on charges of witchcraft in the 17<sup>th</sup> Century would probably take issue with the claim that there was informed and vibrant discourse about religion in the United States during their lifetimes (Karlsen, 1987). And it is unlikely that this argument acknowledges the rampant anti-Catholicism of the 18<sup>th</sup> and 19<sup>th</sup> Centuries, the anti-Semitism of the 20<sup>th</sup> Century, nor the fear and hate expressed towards Muslims in the 21<sup>st</sup> Century (Greenawalt, 2005). Yet it does seem likely that the intolerance that many Americans felt and expressed towards people who were not Protestant is at least part of the reason that public secularism grew in the United States over time (see Ahlstrom, 1972).

The competing interests of people who hold a multitude of religious views or none at all make the inclusion of intellectual discussions *about* religion in public schools a point of contention. But it is exactly this contention that makes the inclusion of lessons *about* religion necessary for an educated and compassionate populace. Without an understanding of different people’s belief systems one tends to demonize the beliefs of those one does not agree with. This

is particularly true since one's theoretical and theological preconceptions of the world alter one's intuitive experience of it (Gedicks, 1995). For example, while many people believe in things like secular morality, or morality separate from a belief in or fear of God, many religious conservatives believe religion to be the main source of certain values and practices that underlie a civilized society (Gedicks, 1995). These religious conservatives generally rally behind issues such as the support of the traditional nuclear family, which often translates into an aversion to things like abortion, sex education in schools (beyond abstinence-only education), and feminist and/or queer civil rights movements (de Vise, 2007; Gedicks, 1995; Haberman, 2005; Wiley, 2002). They also tend to support, if not demand, a public acknowledgement of the preeminence of the Biblical God, which includes the push for public prayer particularly within public schools (Fraser, 1999). Many religious conservatives also tend to rely heavily on 'historical tradition' and/or God's authority to dictate right and wrong. I placed the phrase 'historical tradition' in quotes because many religious conservatives seem to rely on a narrow definition of it that assumes history began whenever it best suits their argument. For example, when the phrase "One Nation, under God" came under 'attack' (discussed below) many religious conservatives were outraged, and insisted that God has 'always' been in the Pledge of Allegiance and that taking 'God' out of the Pledge is therefore un-American. For example, in response to a 2006 candidate questionnaire for Alaska's gubernatorial race which asked, "Are you offended by the phrase "Under God" in the Pledge of Allegiance? Why or why not?" conservative Republican candidate Sarah Palin responded, "Not on your life. If it was good enough for the founding fathers, its(sic) good enough for me and I'll fight in defense of our Pledge of Allegiance" (Eagle, 2006, Question 11, paragraph 12). This argument is historically flawed because the Pledge did not exist during the time of the Founding Fathers and it did not originally contain the words 'under God' (*Elk*

*Grove Unified School District v. Newdow*, 2004). The phrase ‘under God’ was added in the 1950’s, over 60 years after the original draft of the Pledge, and it has been argued that it was added as a specific attempt to assert the superiority of the Protestant God over that of any of the growing influx of immigrants’ chosen deity(s) (Fraser, 1999).

Using Critical Religious Legal Theory to analyze religious and secular morality draws a focus to the social aspects of moral “laws” or “codes.” Looking at this critically, both secular morality and morality based upon a belief in, and, in some cases, fear of, God leads citizens to act in certain ways, both privately and publically. Generally morality, regardless of where it originates (i.e. from a fear of God or from secular ethics), places limits on freedom much like laws do. And often the line between religious morality and secular morality is very blurry. For example it is difficult to discern whether a moment of silence in public schools is religious, civic or neutral unless we know the intent of the people who instituted the moment of silence. And in the case of a specific public school district instituting a moment of silence there may be little reason to argue against it, regardless of the original intent, since there can be secular and religious motivations for it. However there may be times when secular and religious motives contradict each other. To give a potent example, a white supremacist parent’s religious belief system may advocate depriving minorities of their political rights and this parent may see a secular curriculum that teaches acceptance or even tolerance to violate his family’s religion (Greenawalt, 2005). The white supremacist parent may demand that the public school system refrain from violating his child’s religious belief system. But it is likely that this infringement upon his religious beliefs will be seen as acceptable because the state did not intend to infringe upon this parent’s religious beliefs in instituting a curriculum of acceptance, rather the state has a civic duty to promote acceptance of difference within its schools to have a functioning society

when the students grow up and enter the work force. This means that courts will often focus on the social and societal repercussions of a religious infringement in an attempt to balance the private vs. public issues before them.

The following U.S. federal court cases discuss the types of religious entanglement that tend to arise in public schools and how courts across the U.S. deal with the cases that come before them. The cases have been analyzed using the Critical Religious Legal Theory framework outlined in Chapter One. Specifically this analysis focused on the social aspects of the law and policies at issue and scrutinized the law and policy makers/sponsors in the context of the social and political atmosphere at the time that the law/policy was created.

#### *Official Endorsement or Encouragement of Religion*

When acting in their official capacities, public school teachers and school administrators are considered representatives of the state, and as such they are prohibited from encouraging or soliciting any student religious activity. This means that when acting in their official capacities public school teachers and school administrators may not engage in religious activities with their students (*Engle v. Vitale*, 1962; *School District of Abington v. Schempp*, 1963; *Wallace v. Jaffree*, 1985). However, this does not mean that they cannot legally worship together outside of school. For example, public school teachers, administrators and students may legally belong to and worship at the same synagogue, but a teacher may not solicit her students to join her synagogue and worship with her, regardless of whether the solicitation takes place inside or outside of the school grounds. For a teacher to request that her students join her in worship would be seen as a state endorsement of religion.

Prohibited religious encouragement or endorsement has been found in several situations, such as in *Stone v. Graham* (1980), where a Kentucky statute was adopted which required a copy

of the Ten Commandments, purchased with private contributions, to be posted on the wall in every public classroom in the state. The following notation was to be placed, in small print, at the bottom of each display of the Ten Commandments: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States" (*Stone v. Graham*, 1980, at 41).

Complainants were parents of students in the public school system who claimed that the statute violated the Establishment and Free Exercise Clauses of the First Amendment. The Supreme Court used the three pronged *Lemon Test* to determine whether the statute is permissible under the Establishment Clause:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' No consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose. (*Lemon v. Kurtzman*, 1971, at 612-613)

The Court concluded in a 5-4 decision that the statute requiring the posting of the Ten Commandments in public school rooms had no secular legislative purpose, and was therefore unconstitutional. Specifically, the Court stated:

The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. ... The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and

observing the Sabbath Day. ...If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause. (*Stone v. Graham*, 1980, at 41-42)

The Court found that the mere written assurance that something is secular is not sufficient to guarantee that it really is secular. And the justices held that the fact that the Ten Commandment were displayed rather than read aloud does not avoid conflict with the First Amendment violation. The Court additionally held that the use of private funds, rather than taxpayer funds, to purchase the displays did not prevent these displays from being a violation of the First Amendment. The majority opinion also established a generally worded guideline for where the Bible or Biblical references could legally be integrated into the public school curriculum without violating the First Amendment. "...the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like" (*Stone v. Graham*, 1980, at 42).

This decision is significant because a Majority of the Court found that there was *no* secular purpose to the law even though the legislature claimed otherwise. To hold that there is absolutely no secular purpose to the posting of the Ten Commandments seems to say that due to their historic and religious nature, the Commandments are irrefutably religious. This would mean that displaying them in a public school setting is a priori state endorsement of religion; yet the split decision shows that there was significant discomfort amongst the Justices in this matter. Looking at this case through the lens of Critical Religious Legal Theory exposes the posting of the Ten Commandments in public schools as a tool of control and as a possible attempt at an

expansion of ceremonial deism. The legislature was using Biblical scripture to place restrictions on student behavior. Though the control exerted on the children was nominal, the children were free to ignore the postings if they chose to, the fact that they were young impressionable children made it more likely that the children would, over time see Christian morality as the norm, further stratifying secular and non-Christian morality.

In *Joki v. Board of Education of the Schuylerville Central School District* (1990), parents of two students in the school district objected to a 10 foot by 12 foot religious painting that was permanently on display on the wall of the high school's auditorium and requested that it be removed. One of the parents was Jewish and the parents were raising their child within the Jewish faith. The painting was described as follows:

The central figure in the painting portrays a man nailed to a wooden cross. This figure is bleeding from the left side of his chest. Across his forehead are two intertwined white lines containing red highlighting which appears to be a crown of thorns. Further, a shell burst of yellow light surrounds the cross upon which the central figure is hanging. Other figures in the painting include two other men nailed to crosses, a man tossing a net into the water, a woman mourning, two men fighting and a man carrying two engraved stone tablets. The man carrying the tablets has a long gray beard and is situated directly to the left of the central cross. The tablets have the Roman numerals I through X inscribed on them. (*Joki v. Board of Education of the Schuylerville Central School District*, 1990, at 824-825)

The school refused to remove the painting stating that it was student created as part of a program to support the arts which started in the 1960's and lasted for seven years. There was

only one other painting on display in the auditorium that was created by a student and it was much smaller than the debated painting. The painting in question had been on display for roughly 25 years and the school administration felt that they were not endorsing the message of the painting by displaying the student's work. The school also claimed that the painting was not religious in nature and simply depicted "Man's inhumanity to man" (*Joki v. Board of Education of the Schuylerville Central School District*, 1990, p. 825). The Joki family felt that the painting depicted the crucifixion of Jesus Christ.

The New York federal district court judge used the "effect test" from *County of Allegheny v. ACLU* (1989): with regard to religious displays on government property the Establishment Clause does not allow displays that have the effect of endorsing religion. The judge stated: "when evaluating the effect of defendants display in this instance, the court must determine whether, taking into account the content and context of the painting, a reasonable observer would likely perceive the government action as an endorsement of Christianity" (*Joki v. Board of Education of the Schuylerville Central School District*, 1990, at 827). The judge found that this was clearly a painting of the Crucifixion of Jesus Christ. However, unlike the Supreme Court in *Stone v. Graham*, 1980 *supra*, here the judge gave merit to the school's argument that there were secular aspects in the painting that may neutralize the religious nature of the painting (see *County of Allegheny v. ACLU*, 1989). Despite this, the court held that because the painting was displayed where impressionable children would see it repeatedly it has the primary effect of endorsing Christianity in violation of the second prong of the Lemon Test (*Lemon v. Kurtzman*, *supra*).

In 1994 the Sixth District U.S. Court of Appeals heard a similar case, *Washegesic v. Bloomington Public Schools*, which was brought by a Michigan public high school senior to

remove a portrait of Jesus Christ that was on display in the school's hallway. The painting was hung on the wall outside the principal's office. The court used the Lemon Test, *supra* and held that: "The display here fails all three prongs of *Lemon*. The portrait is moving for many of us brought up in the Christian faith, but that is the problem. The school has not come up with a secular purpose. The portrait advances religion. Its display entangles the government with religion" (*Washegesic v. Bloomington Public Schools*, 1994, at 683). As a result the court found that the painting violated the First Amendment and ordered it to be removed from the school because, "[t]he school's ownership and display of the portrait endorses the Christian religion and promotes it exclusively" (*Washegesic v. Bloomington Public Schools*, 1994, at 684).

Recently a district court in Rhode Island decided the case of *Ahlquist v. City of Cranston* (2012). In this case an atheist public high school student brought suit, with the help of her father, against her high school to remove or alter a Christian prayer that was on an 8ft by 4ft mural, with highly visible 3inch by 2inch lettering, on the wall of the auditorium. The mural titled "SCHOOL PRAYER" read in all capital letters as follows:

Our Heavenly Father, grant us each day the desire to do our best, to grow mentally and morally as well as physically, to be kind and helpful to our classmates and teachers, to be honest with ourselves as well as with others, help us to be good sports and smile when we lose as well as when we win, teach us the value of true friendship, help us always to conduct ourselves so as to bring credit to Cranston High School West. Amen. (*Ahlquist v. City of Cranston*, 2012, at 447-449, capitalization omitted)

The school refused to remove or alter the prayer claiming that because the prayer had been on the wall since the 1960's it was "an historical memento of the school's founding days, with a predominantly secular purpose" (*Ahlquist v. City of Cranston*, 2012, at 444-445).

Ahlquist testified that since first questioned the mural she has "experienced feelings of exclusion and ostracism" and that when she spoke to her peers about her feelings about the mural "some did not hesitate to demonstrate their disrespect for her feelings" (*Ahlquist v. City of Cranston*, 2012, at 450). Additionally Ahlquist spoke at some of the School Committee's public forums where the school invited a discussion about whether to keep the mural, remove the mural, or reword it. Ahlquist was repeatedly verbally attacked for being an atheist at these meetings, with some people stating that she should be charged with a hate crime, and she was given a police escort out of one of the meetings out of concern for her safety. One of the comments made by an adult and directed towards Ahlquist, a minor, was "If people want to be Atheist, it's their choice and they can go to hell if they want" (*Ahlquist v. City of Cranston*, 2012, at 452).

The School Committee voted 4-3 to retain the mural because of its religious and historical importance to the school. After this decision Ahlquist testified "that she experienced bullying and threats at school, on her way home from school and on-line" (*Ahlquist v. City of Cranston*, 2012, at 452). After Ahlquist filed this lawsuit the high school held an assembly in the auditorium where the mural hung, which she, as a student at the high school, was required to attend, and the mayor of the town publicly announced that he wanted the mural to remain on the wall of the auditorium. Ahlquist testified that this made her feel "horrible, very uncomfortable, alone and isolated" (*Ahlquist v. City of Cranston*, 2012, at 460).

The district court used the *Lemon Test* to determine whether or not the school violated the Establishment Clause by posting the school prayer in the auditorium. With regard to the first,

secular purpose prong, the court found that the original intent behind creation and installation of the School Prayer mural were “clearly religious in nature” (*Ahlquist v. City of Cranston*, 2012, at 471). The school prayer was drafted in 1959 and was recited in the school until the Supreme Court banned public school prayer in *Engle v. Vitale* (1962)(discussed below), which is when the School Prayer was hung on the auditorium wall. The district court held that:

No amount of debate can make the School Prayer anything other than a prayer, and a Christian one at that. Its opening, calling upon the “Heavenly Father,” is an exclusively Christian formulation of a monotheistic deity, leaving out, *inter alia*, Jews, Muslims, Hindus, Buddhists, and atheists alike. The Prayer concludes with the indisputably religious closing: “Amen;” a Hebrew word used by Jews, Christians and Muslims to conclude prayers. In between, the Prayer espouses values of honesty, kindness, friendship and sportsmanship. While these goals are commendable, the reliance on God’s intervention as the way to achieve those goals is not consistent with a secular purpose. (*Ahlquist v. City of Cranston*, 2012, at 472)

But the court did not stop its analysis with the original purpose of the mural. It also looked at the current purpose as evidenced by the School Committee voting to retain the mural. Here the court found that the Committee members reasoning varied from clearly religious motives to what the court called a “murky and dangerous bog” of deference to tradition and history to the importance of encouraging morality in the high school population of students (*Ahlquist v. City of Cranston*, 2012, at 472). The court found the Committee’s reasoning to be patently religious but still moved to the second prong of the *Lemon Test* to determine whether the primary effect of the mural was to advance religion. The district court found that “[t]o the extent the... Prayer Mural has an

effect, its impact is to advance religion. The Prayer Mural espouses important moral values, yet it does so in the context of religious supplication” (*Ahlquist v. City of Cranston*, 2012, at 473).

Despite finding a violation of both the first and second prongs of the *Lemon Test* the court moved to the third prong which requires that government actions avoid excessive religious entanglements. Here the court found overtly excessive religious entanglements stating that at the public School Committee meetings:

...a significantly lopsided majority of the speakers spoke passionately, and in religious terms, in favor of retaining the Prayer Mural. Various speakers read from the bible, spoke about their personal religious convictions, threatened Plaintiff with damnation on Judgment Day and suggested that she will go to hell. The atmosphere was such that the Superintendent of Schools felt compelled to discuss his own religious beliefs at length when he made his recommendation to the Committee that they vote to retain the Prayer Mural. Similarly, five of the seven School Committee members expressed avowals of their own religious beliefs at the meeting, including two of those who voted against retaining the Mural. (*Ahlquist v. City of Cranston*, 2012, at 474)

The court then moved on to the *endorsement test* to determine whether the School Committee’s vote to retain the mural had the “purpose or effect of endorsing, favoring, or promoting religion” (*Freedom From Religion Foundation v. Hanover School District*, 2010, at 10). The court found that throughout the mural’s history there was constant endorsement, favor and promotion of religion by using a Christian prayer to attempt to instill values into school children.

The final test the court used was the *coercion test* to determine whether or not the mural exerted pressure on students to conform to a particular religious view or activity (see *Freedom From Religion Foundation v. Hanover School District*, 2010; *Lee v Weisman*, 1992). The district court decided that if there was any coercion it was subtle, but that because this was a case dealing with school children the court had a duty to ensure that even subtle coercion was avoided.

The district court found that the mural failed the Lemon Test, the endorsement test and the coercion test and issued a mandatory permanent injunction for the school to remove the mural from the wall of the auditorium and ordered the school to pay for Ahlquist's attorney and court fees.

Using Critical Religious Legal Theory to analyze the sociopolitical aspects of these rulings shows that in all four of these cases the courts found that the religious displays within the public schools made it seem that the schools, as arms of the state, endorsed Christianity over other religions or none at all. The courts all found that this was particularly dangerous since these Christian displays were seen daily by impressionable students. Further, the posting of the Ten Commandments in *Stone v. Graham* (1980) and the school prayer banner in *Ahlquist v. City of Cranston* (2012) were attempts to use Christian morality to restrict or guide children's behavior. The courts were forced to balance the interests of the law and policy makers and the communities' interests with the possible and actual consequences of the laws and policies as they relate to children. To do this the courts focused in large part on the social effects that laws and policies intertwined with Christianity will have on those who are not Christian. The court's findings in *Ahlquist v. City of Cranston*, 2012, for example, clearly show the possible effects of an irate Christian majority imposing its views on religious minority children in a public school

setting. This is not to say that the School Prayer Banner in *Ahlquist v. City of Cranston*, 2012 was created or displayed with the intent to quash religious or nonreligious views, but the effect of the Banner and the community outrage over the lawsuit did just that. It was then the court's duty to step in as a seemingly neutral party to protect society's interests. It is probable though that displays containing the religious aspects mentioned in these four cases would be permitted within the public schools if the displays were inclusive of multiple beliefs and were part of multicultural displays that are meant to educate rather than to proselytize (see *County of Allegheny v. ACLU*, 1989). The social effects of these multicultural displays would be inclusive rather than exclusive, and particularly in public high school settings, could encourage critical discussions about the differences and similarities within and between the various belief systems that were displayed.

#### *Private Student Prayer*

In the case of student prayer, it is important to specify what type of prayer is occurring in a given public school. If it is individual student prayer, such as when a teacher places a test on a student's desk and the child silently prays, there is no way (or reason) for the school to regulate it, as long as it does not interfere with the orderly progression of the school day (*Wallace v. Jaffree*, 1985). The Establishment Clause does not apply to purely private religious speech. Thus, within the public school setting students have the right to do things like pray individually, discuss religion during their free time with other students who want to be part of the discussion, bring religious texts to school and read them, etc., so long as their religious activity is not disruptive. However, students do not have the right to preach their religious views to unwilling listeners, nor may they force other students to join them in prayer (*Engle v. Vitale*, 1962; *Lee v.*

*Weisman*, 1992; *Santa Fe v. Doe*, 2000; *School District of Abington v. Schempp*, 1963; *Wallace v. Jaffree*, 1985).

### *School Sponsored Prayer*

Public school administrators, teachers, students, parents, etc., may not mandate or organize prayer at any time during school activities and events (*Engle v. Vitale*, 1962; *Lee v. Weisman*, 1992; *Santa Fe v. Doe*, 2000; *School District of Abington v. Schempp*, 1963; *Wallace v. Jaffree*, 1985). Using Critical Religious Legal Theory to analyze the socio-political individual versus group rights in the cases below brings a focus to the “captive audience” clause (*Cohen v. California*, 1971). When citizens are required, or have the right to be in a particular place, in this case at a public school or at a public school-related event, they are considered to be a captive audience. As such, the state cannot subject citizens to a particular religious speech, because it is impractical for them to leave and thus the religious speech infringes upon their First Amendment rights (*Kunz v. New York*, 1951). Students, in particular, fall into the captive audience category because there are truancy laws in every state which dictate that students must be educated. Thus, assuming that the students cannot be homeschooled, even if they do not want to be in school, the truancy laws say that they must (Jackson, 1990). Because of students’ status as a captive audience, and despite the fact that there may not a universally accepted interpretation of the First Amendment’s religion clauses, courts, including the Supreme Court, have repeatedly ruled against agents of the state, such as public school administrators and teachers, leading, reciting or otherwise endorsing prayer within the normal operation of the school day (*Engle v. Vitale*, 1962; *School District of Abington v. Schempp*, 1963; *Wallace v. Jaffree*, 1985).

In 1962, the Supreme Court considered for the first time the constitutionality of state-sponsored prayer in a public school in *Engle v. Vitale* (1962). In this case, the following prayer

was to be said aloud by each class in a New York public school in the presence of a teacher at the beginning of each school day: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country” (*Engle v. Vitale*, 1962, at 422). The parents of ten students brought suit stating that the recitation of the official prayer in the public schools was contrary to their families’ beliefs, religions, and/or religious practices. Specifically, they challenged the constitutionality of both the state law authorizing the school district to conduct prayer in public schools and the school district's regulation ordering the recitation of the aforementioned prayer on the ground that these actions of official governmental agencies violate the Establishment Clause.

The Supreme Court decided in a 6 - 1<sup>13</sup> vote that the state sponsored prayer breaches the constitutional demands for the separation of Church and State.

Because of the prohibition of the First Amendment against the enactment of any law "respecting an establishment of religion," which is made applicable to the States by the Fourteenth Amendment, state officials may not compose an official state prayer and require that it be recited in the public schools of the State at the beginning of each school day - even if the prayer is denominationally neutral and pupils who wish to do so may remain silent or be excused from the room while the prayer is being recited. (*Engle v. Vitale*, 1962, at. 421)

Though the majority opinion, written by Justice Black, did not address the captive audience argument, Justice Douglas’ concurring opinion and Justice Stewart’s dissenting opinions did.

Justice Douglas wrote that there is “no compulsion or coercion” in the morning prayer because

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<sup>13</sup> This case was decided in an unusual vote of 6-1, because Justice Felix Frankfurter suffered a cerebral stroke during the review of the case that forced him to retire, and Justice Byron White took no part in the case.

students are not forced to take part in it (*Engle v. Vitale*, 1962, at. 438). And both of the Justices noted that the law stated that students must not be harassed for their decision to refrain from the morning prayer. But the fact that the students had the option to leave the room while the prayer was recited did not necessarily remove the captive audience status. Many factors could prevent a student who does not want to participate in a morning prayer from leaving the room or simply remaining silent, despite the law's protection, such as peer pressure or not wanting to incur the actual or perceived wrath of teacher who supports the morning prayer. It is unrealistic to believe that a rule, law or court order will stop students from teasing each other. And while it may be acceptable to hold teachers to a higher standard, it is again unrealistic to assume that students will want to run the risk of annoying teachers who hold the power of doling out grades. Though a student may not be coerced in any physical sense as (s)he was technically permitted to leave, there could still be mental and/or emotional coercion. The result of this type of coercion would mean that some students might indeed be a captive audience.

One year later, the Supreme Court again invalidated government-sponsored prayer in public schools in *School District of Abington v. Schempp* (1963). In this 8 - 1 case, the school day for Baltimore, Maryland, and Abington Township, Pennsylvania, began with a reading from the Bible, or a recitation of the Lord's Prayer, or both. Participation in the prayer was 'voluntary.' However, students were "asked to stand and join in repeating the prayer in unison" each morning before the prayers began (*School District of Abington v. Schempp*, 1963, at 207). Several parents and their children objected to the practice. One parent testified that he had considered having his children "excused from attendance at the exercises but decided against it for several reasons, including his belief that the children's relationships with their teachers and classmates would be adversely affected" (*School District of Abington v. Schempp*, 1963, at 208). He further explained

that even if his children removed themselves from the classroom to stand in the hall during the morning prayers, the children would be stigmatized for doing something bad. They would be seen as abnormal since they would be going against the “normal” progression of the morning. This essentially makes those with a different religion or no religion at all seem less important or even “bad” in comparison to those students who give deference to the King James Version (KJV) of Christianity espoused by their public schools. Because these students felt compelled to take part in the prayer recitations, they again fall within the realm of a captive audience. The test the Court used to guide their opinion was: “[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution” (*School District of Abington v. Schempp*, 1963, at 222).

After a thorough review of the Court's prior Establishment Clause cases, the Court concluded that the morning prayers were:

...prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools. ... [The prayer is] a religious ceremony and was intended by the State to be so. ... Given that finding, the exercises and the law requiring them are in violation of the Establishment Clause. (*School District of Abington v. Schempp*, 1963, at 223)

The Court stressed that this ruling was not made in an attempt to be hostile to religion. In fact the Court held:

...it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the

advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here 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. (*School District of Abington v. Schempp*, 1963, at 225)

In the concurring opinion the Justice Douglas stated:

[T]he Establishment Clause is not limited to precluding the State itself from conducting religious exercises. It also forbids the State to employ its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone. Thus, the present regimes must fall under that clause for the additional reason that public funds, though small in amount, are being used to promote a religious exercise. Through the mechanism of the State, all of the people are being required to finance a religious exercise that only some of the people want and that violates the sensibilities of others. (*School District of Abington v. Schempp*, 1963, at 229)

With regard to the captive audience, this case brings up a very interesting point in stating that those who refused to participate in the prayers would likely be deemed atheists, regardless of whether that was the case or whether they simply followed a religion other than Protestant Christianity. In the 1960's, when this case took place, and even now, there is a stigma attached to atheists that many who believe in a deity or deities would likely not appreciate (see *Ahlquist v. City of Cranston*, 2012; *Newdow v. Rio Linda Union School District*, 2010).

Since the Supreme Court had already held that state sponsored prayer, denominational or non-denominational, was not permitted in public schools, religious conservatives tried something

slightly different. In *Wallace v. Jaffree* (1985), a statute in Alabama that authorized a one minute period of silence in all public schools "for meditation or voluntary prayer" was challenged by a parent on behalf of his three children (*Wallace v. Jaffree*, 1985, at 42). Part of his complaint stated that his children's teachers had led their classes in daily prayers and students were supposed to repeat these prayers in unison. He further claimed that his "children were exposed to ostracism from their peer group class members if they did not participate" (*Wallace v. Jaffree*, 1985, at 42). This ostracism, whether real or perceived, brought these children into the realm of the captive audience.

The prime sponsor of the Statute, State Senator Donald G. Holmes, stated that the law was an "effort to return voluntary prayer to our public schools . . . it is a beginning and a step in the right direction" (*Wallace v. Jaffree*, 1985, at 43). And he said that with regard to the Statute, besides trying to return voluntary prayer to public school, he had "no other purpose in mind" (*Wallace v. Jaffree*, 1985, at 43). The Supreme Court used the *Lemon Test*, *supra*, to determine whether the Statute violated the Establishment Clause. The Court found that the enactment of the Statute was not motivated by any clearly secular purpose and that it did not have secular purpose. The Court stated, "[t]he legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday (sic)" (*Wallace v. Jaffree*, 1985, at 59). Thus, the Court concluded in a 6 - 3 decision that, "[t]he legislature enacted [the law], . . . for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each schoolday (sic). . . . Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion" (*Wallace v. Jaffree*, 1985, at 60).

In its decision, the Court also noted the fact that the in the initial ruling in this case the District Court of Alabama concluded that “the establishment clause of the first amendment to the United States Constitution does not prohibit the state from establishing a religion” (*Wallace v. Jaffree*, 1985, at 44). Granted, the First Amendment does specifically state that “Congress shall make no law respecting an establishment of religion” (emphasis added), but apparently, the District Court of Alabama forgot that the 14<sup>th</sup> Amendment’s Due Process Clause makes this amendment applicable to the States. The Supreme Court did not forget, and stated that, “not surprisingly”, the Appellate Court rightly reversed the District Court’s holding (*Wallace v. Jaffree*, 1985, at 47). The Court further held:

... the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects - or even intolerance among "religions" - to encompass intolerance of the disbeliever and the uncertain. (*Wallace v. Jaffree*, 1985, at 44-45)

Taking all of this into consideration, the Supreme Court struck down the Statute not because it coerced students to participate in prayer, but because the manner of its enactment “convey[ed] a message of state approval of prayer activities in the public schools” (*Wallace v. Jaffree*, 1985, at 61). Many schools have set aside time, usually in the morning before classes begin, for students and teachers to engage in a moment of silence (see *Brown et al. v. Gilmore*, 2001). These

moments will likely be deemed legal if the schools' purpose is to set aside time for students to reflect silently on their day, to think about loved ones, to pray or simply to relax before the day begins, and so forth (Schimmel, Fischer & Stellman, 2008). If however, the courts find that the purpose of the moment of silence is to return prayer to the school it will likely be struck down as a violation of the establishment clause (*Wallace v. Jaffree*, 1985).

During the 1990's the Supreme Court heard the case of *Lee v. Weisman* (1992), which dealt with prayers at graduation ceremonies. In Providence, Rhode Island principals were allowed to invite clergy members to give invocations and benedictions at their schools' commencement ceremonies. In this particular case a middle school principal invited a rabbi to lead a nonsectarian prayer at their graduation ceremony that year. The prayer was:

#### INVOCATION

God of the Free, Hope of the Brave: For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it. For the liberty of America, we thank You. May these new graduates grow up to guard it. For the political process of America in which all its citizens may participate, for its court system where all may seek justice, we thank You. May those we honor this morning always turn to it in trust. For the destiny of America, we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it. May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled. AMEN

#### BENEDICTION

O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement. Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them. The graduates now need strength and guidance for the future; help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: to do justly, to love mercy, to walk humbly. We give thanks to You, Lord, for keeping us alive, sustaining us, and allowing us to reach this special, happy occasion AMEN. (*Lee v. Weisman*, 1992, at 581-582)

While the school district deemed this to be a nonsectarian prayer it is only nonsectarian for religions who believe in a single deity called God. As was noted in *School District of Abington v. Schempp* (1963), there is a tendency to for nonsectarian prayer to refer specifically to nonsectarian Christian prayer. However, for those who are not Christian these prayers would likely seem to be sectarian.

A lawsuit was initiated by parents to prohibit school officials from including the prayers in this and future ceremonies. The case made it all the way to the U.S. Supreme Court, which ruled in a split 5 - 4 decision that the inclusion of clergy who offer prayers as part of an official public school graduation ceremony is forbidden by the Establishment Clause. The Court stated:

These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are, in a fair and real sense, obligatory, though the school district

does not require attendance as a condition for receipt of the diploma. (*Lee v. Weisman*, 1992, at 586)

The Court also said, “What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy” (*Lee v. Weisman*, 1992, at 593).

The dissent, written by Justice Scalia, relied heavily on the history of government prayer: In holding that the Establishment Clause prohibits invocations and benedictions at public school graduation ceremonies, the Court - with nary a mention that it is doing so - lays waste a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally. (*Lee v. Weisman*, 1992, at 631-632)

The dissent saw no government coercion because students who objected to the ceremonial prayers could remain in their seats silently or could stand and refuse to bow their heads in prayer. They stated: “...the Court's notion that a student who simply sits in "respectful silence" during the invocation and benediction (when all others are standing) has somehow joined - or would somehow be perceived as having joined - in the prayers is nothing short of ludicrous” (*Lee v. Weisman*, 1992, at 637). This argument misses the point of the government coercion. It is not necessarily that the students have to fear being mistaken for adherents to the worship of God. The coercion is that the State is supporting the worship of God and is subjecting all of those in attendance to the government's established religious practices, which violates the First Amendment.

This ruling holds, by a narrow margin, that even when prayer is not necessarily specific to particular religion it still infringes on the rights of those who do not believe in God. Once again this boils down to the captive audience argument. Although no one is “forced” to attend a graduation ceremony, it is an honor and a rite of passage that students and their families have worked toward for many years to achieve. Students and their families have a right to be in attendance at the ceremony to commemorate achievement the school’s use of the aforementioned prayer creates second class citizens. The prayer praises those with a belief in God and ignores those who do not. This detracts from the achievements of those who do not believe in God by making it seem like their school is leaving them out of part of the ceremony. One way that public schools have tried to avoid these issues is to designate the graduation ceremony as a forum for student expression so that students could, if they choose, include religious messages in their speeches (see *Doe v. Madison School District No. 321*, 1998).

At the turn of the century the Supreme Court ruled on a case dealing with student prayer, *Santa Fe Independent School District v. Doe* (2000). Prior to 1995, at Santa Fe High School, a student was elected as student council chaplain who then had the job of delivering a prayer over the public address system before each home varsity football game. Mormon and Catholic students, alumni and parents, filed a lawsuit challenging this practice under the Establishment Clause. While that suit was pending, the school district changed its policy and authorized two student elections: the first to determine whether any prayers should be delivered at games, and the second to choose the student to deliver them. After the students held elections to authorize the prayers and to select a student chaplain, the District Court entered an order to modify the policy to permit only nonsectarian prayer, rather than prayer that was directly linked to a particular religion.

In a 6-3 decision the Supreme Court ruled that the district's policy permitting student-led, student-initiated prayer, even if it was nonsectarian, at football games violated the Establishment Clause. As for the school district's intent, the Court emphasized that "in light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular 'state-sponsored religious practice'" (*Santa Fe Independent School District v. Doe*, 2000, at 309, citing *Lee v. Weisman*, 1992, at 596). The Court concluded that the football game prayers were public speech authorized by a government policy and taking place on government property at government sponsored school related events. The Court held that the school district's policy involved both a perceived and actual government endorsement of the delivery of prayer at school events. The Court stated: "Through its election scheme, the District has established a governmental mechanism that turns the school into a forum for religious debate and empowers the student body majority to subject students of minority views to constitutionally improper messages" (*Santa Fe Independent School District v. Doe*, 2000, at 292).

The Court used the objective observer test that Justice O'Connor mentioned in her concurring opinion in *Wallace v. Jaffree* (1985): "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools" (p. 76). With regard to this test the Court held: "Regardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval" (*Santa Fe Independent School District v. Doe*, 2000, at 308).

Once again this case deals with a captive audience. The Court found that "[f]or some students, such as cheerleaders, members of the band, and the team members themselves,

attendance at football games is mandated, sometimes for class credit. ...The Constitution demands that schools not force on students the difficult choice between attending these games and avoiding personally offensive religious rituals” (*Santa Fe Independent School District v. Doe*, 2000, at 292). The Court’s holding accepts that school sports are an integral part of the high school experience thus while attendance may be seen as voluntary to someone looking in, to the students themselves and possibly the parents of the student participants attendance is expected and highly anticipated. The Court concluded that: "School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community’” (*Santa Fe Independent School District v. Doe*, 2000, at 309-310, citing *Lynch v. Donnelly*, 1984, at 688).

Critical Religious Legal Theory’s focus on the sociopolitical context of the laws and policies at issue in the cases above clearly shows that the two most important issues that these cases bring up are the captive audience status of public school students and their families and the intent of the law/policy sponsors/creators. If public school students/parents have a right to be somewhere or are required by law to be somewhere and prayer is included the public will likely be seen a captive audience, and the prayer will most likely be deemed illegal. Additionally, if the sponsors of the law or policy had the sole intention or even the main intention of returning prayer to schools it will likely be seen as a First Amendment violation.

#### *The Pledge of Allegiance*

At this point of the discussion it should be pretty clear that as far as the Supreme Court is concerned, government-sponsored coercive prayer is not allowed in public schools because it

creates a captive audience. In *Engle v. Vitale* (1962) a prayer was defined as "...a solemn avowal of divine faith and supplication for the blessings of the Almighty" (p. 424). And yet we have the sticky situation of the Pledge of Allegiance, where a promise to be true to (the Christian) God, and the nation he rules, is apparently not a prayer. Critical Religious Legal Theory requires that the historical context for the creation of, the amendments to, the government adoption of, and the caselaw concerning the Pledge of Allegiance be taken into account when analyzing its purpose and religiosity.

The Pledge of Allegiance was written in 1892 for a children's magazine, and was marketed as a way to celebrate the 400th anniversary of Columbus arriving in the Americas (*Elk Grove Unified School District v. Newdow*, 2004). The original Pledge read: "*I pledge allegiance to my Flag and the Republic for which it stands, one Nation indivisible, with Liberty and Justice for all*" (*Elk Grove Unified School District v. Newdow*, 2004, at 6). In the 1920's the Pledge was altered to state: "*I pledge allegiance to the Flag of the United States of America and the Republic for which it stands, one Nation indivisible, with Liberty and Justice for all*" (*Elk Grove Unified School District v. Newdow*, 2004, at 6). This was done in part to ensure that the myriad of immigrants were not secretly failing to pledge allegiance to the U.S. flag and instead were continuing to pledge allegiance to their original country's flag (see *Newdow et al. v. Rio Linda Union School District*, 2010, dissenting opinion).

In 1951, the Knights of Columbus, a Roman Catholic fraternal organization adopted a resolution requiring that when the Pledge of Allegiance was said at organizational meetings the phrase 'under God' would be included. In 1952 Representative Louis Rabaut, a Catholic congressman from Michigan, under the guidance of the Supreme Council of the Knights of Columbus, sponsored a bill for the U.S. Congress to adopt Knights of Columbus version of the

Pledge (see *Newdow et al. v. Rio Linda Union School District*, 2010, dissenting opinion). The proposed bill failed twice. Then in 1954 the ‘under God’ phrase received mainstream Protestant backing. This time the major push came from a Presbyterian Reverend, George M. Docherty, who argued in an impassioned speech before President Eisenhower and several members of the Congress that adding ‘under God’ to the Pledge was “necessary to distinguish America from militantly atheistic communism, and, more specifically, to distinguish the Judaio(sic)-Christian beliefs governing this nation from the secularized Godless philosophy that motivated our opponents in the theological war in which we were engaged” (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1050, internal citations and quotation marks omitted). Of the possible First Amendment entanglement issues Reverend Docherty asserted that the addition of the phrase ‘Under God’ “would not create a state church in this land such as exists in England nor would it discriminate between the great Jewish Community, and the people of the Moslem faith, and the myriad denominations of Christians in the land” (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1051, dissenting opinion, internal quotation marks omitted). But he did not ignore the fact that not everyone in the U.S. believes in a God. Of those citizens he said:

[A]n atheistic American is a contradiction in terms.... [T]hey really are spiritual parasites.... [They] are living upon the accumulated spiritual capital of a Judaio(sic)-Christian civilization, and at the same time, deny the God who revealed the divine principles upon which the ethics of this Country grow....[I]f he denies the Christian ethic, [the atheist] falls short of the American ideal of life.

(*Newdow et al. v. Rio Linda Union School District*, 2010, at 1051-1052, dissenting opinion)

The day following Reverend Docherty's speech a new bill was drafted to amend the Pledge and it was immediately submitted to both the House of Representatives and the Senate. Within the week following the Reverend's speech, Representative Rabaut announced to the House of Representatives that Reverend Docherty's "sermon was so powerful that in its wake no fewer than seventeen bills were introduced to incorporate God into the Pledge of Allegiance" (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1051-1052, dissenting opinion, citing Epstein, 1996, at 2119). The arguments in support of the change strongly and unabashedly supported the need to include America's belief in and reverence for God in the Pledge and the arguments were equally as strong asserting that those who did not believe in God were un-American (see *Newdow et al. v. Rio Linda Union School District*, 2010, dissenting opinion). The bill passed both the Republican controlled House and the Senate unanimously.

On Flag Day, June 14, 1954, Republican President Eisenhower signed the joint resolution to change the text of the Pledge again to add the phrase "Under God," creating the wording that is still in use today: "*I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with Liberty and Justice for all*" (*Elk Grove Unified School District v. Newdow*, 2004, at 7). In the speech the President gave at the signing of the bill he stated:

From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural school house, the dedication of our Nation and our people to the Almighty. To anyone who truly loves America, nothing could be more inspiring than to contemplate this rededication of our youth, on each school morning, to our country's true meaning. (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1057)

Using Critical Religious Legal Theory to analyze the motives of the major players (the Knights of Columbus, Reverend Docherty, Congress and President Eisenhower) in the adoption of the “under God” addition to the Pledge leads to the sole conclusion that the adoption was unquestionably religious in nature. No one involved in the adoption offered a secular reason to include the phrase “under God.” And the singular effect of the “under God” addition was to change an arguably secular patriotic exercise into one that is entangled with religion. Additionally, *Engle v. Vitale* (1962), the Supreme Court case that declared state sponsored religious prayer to be illegal in public schools, had not yet been decided, so there was little reason for Congress to try to hide the religious nature of the “under God” amendment. However, despite this historical religious entanglement the 1954 “under God” addition has survived every challenge that has been brought against it, even after *Engle v. Vitale* (1962) was decided.

The law in this area tells us that students and teachers in public schools may not be forced to recite or stand for the Pledge of Allegiance (*Freedom From Religion Foundation v. Hanover School District*, 2010; *West Virginia State Board of Education v. Barnette*, 1943). They may be required to remain seated and quiet if they choose not to stand to salute the flag (*Freedom From Religion Foundation v. Hanover School District*, 2010; *West Virginia State Board of Education v. Barnette*, 1943). The issue of whether the phrase “under God” violates the First Amendment has not yet been decided by the Supreme Court. The controlling cases for these issues are discussed below.

In *West Virginia State Board of Education v. Barnette* (1943), before the inclusion of the phrase “Under God” in the Pledge, the West Virginia Board of Education adopted a resolution to encourage civic education within the school district. This resolution ordered, amongst other things, that the flag salute become “a regular part of the program of activities in the public

schools,” and that all teachers and students “shall be required to participate in the salute honoring the Nation represented by the Flag....” (*West Virginia State Board of Education v. Barnette*, 1943, at 626). Failure to conform to the mandates of the resolution was considered to be insubordination and was to be “dealt with by expulsion” (*West Virginia State Board of Education v. Barnette*, 1943, at 629). Readmission would only be allowed once the student agreed to salute the flag. However, since the expelled child was to be considered “unlawfully absent” (s)he could still “be proceeded against as a delinquent,” which meant that the child’s parents or guardians could be prosecuted, and, if convicted, would be subject to a fine of up to \$50 and to a jail term of up to thirty days (*West Virginia State Board of Education v. Barnette*, 1943, at 629).

The challengers were Jehovah's Witnesses who alleged that the law and regulations were unconstitutional because the law denied religious freedom and of freedom of speech under the First Amendment and that the law was invalid under the 'due process' and 'equal protection' clauses of the Fourteenth Amendment. The Supreme Court explained that:

The [Jehovah’s] Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior (sic) to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: 'Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them.' They consider that the flag is an 'image' within this command. For this reason they refuse to salute it. Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined

juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency. (*West Virginia State Board of Education v. Barnette*, 1943, at 630-631)

The Supreme Court held 6-3 that the state law compelling students to salute the flag was a violation of the First Amendment. The Court felt it was important to point out that the main issue in the case was the clash between State authority and individual rights, since the State was “condition[ing] access to public education on making a prescribed sign and profession and at the same time [coercing] attendance by punishing both parent and child” (*West Virginia State Board of Education v. Barnette*, 1943, at 631). The Barnette children’s personal refusals to salute the flag were “peaceable and orderly” and did not attempt to infringe upon the rights of other students to continue to participate in the Pledge (*West Virginia State Board of Education v. Barnette*, 1943, at 631). The Majority found that the flag salute was a form of utterance, and that its compulsory nature required affirmation of a belief and an attitude of mind. The Court reasoned:

[i]t is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. . . . But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to

compel him to utter what is not in his mind. (*West Virginia State Board of Education v. Barnette*, 1943, at 633-634)

The Majority further explained that:

[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. (*West Virginia State Board of Education v. Barnette*, 1943, at 638)

This case had more to do with civics and power than it did with religion, particularly since the “Under God” phrase was not yet a part of the Pledge. In rendering its decision the Supreme Court stated:

To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. ... We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control. (*West Virginia State Board of Education v. Barnette*, 1943, at 641-642)

The Court did not concern itself with whether or not the Jehovah's Witnesses held a sincere religious belief that prevented them from participating in the flag salute. The Court instead

focused on the fact that civic mindedness and love of Country should not be forced, but rather should occur because of the freedoms and rights guaranteed to citizens by the Constitution (*West Virginia State Board of Education v. Barnette*, 1943). Though this case was not intricately involved with religious reasoning the remaining cases dealing with the Pledge of Allegiance have the primary focus of determining whether the addition of the phrase “under God” transforms a civic exercise into a religious one.

In *Elk Grove Unified School District v. Newdow* (2004), a public school student’s father who is atheist, objected to the morning recitation of the Pledge of Allegiance because he felt that the phrase “Under God” is religious indoctrination in violation of the First Amendment. The Supreme Court found 5-3<sup>14</sup> that Mr. Newdow did not have standing to sue on behalf of his daughter because the child’s mother was granted the right to have the final say in the matter of the child’s religious and educational upbringing. Because of this, the Court did not decide on the First Amendment issue.

Since the Supreme Court did not decide the issue of whether the phrase “Under God” violates the First Amendment, we can only look at the history of the case and to the concurring opinions of the Supreme Court Justices who did address the issue. The history is: the Magistrate Judge concluded that the Pledge did not violate the First Amendment, and the District Court agreed with the Magistrate Judge and dismissed the complaint. The Ninth Circuit Court reversed, and held that the school district's policy to have children say the Pledge violated the Establishment Clause.

In the Concurring Opinion of the Supreme Court case Justice Rehnquist joined by Justice O’Connor noted that the Congressional sponsor for the 1954 “under God” amendment “said its

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<sup>14</sup> Justice Scalia took no part in the case.

purpose was to contrast this country's belief in God with the Soviet Union's embrace of atheism” (*Elk Grove Unified School District v. Newdow*, 2004, at 25). While the religious intent of a particular law or policy caused many of the aforementioned cases to fail in the Supreme Court, here Justice Rehnquist simply noted, “We do not know what other Members of Congress thought about the purpose of the amendment” (*Elk Grove Unified School District v. Newdow*, 2004, at 25). The crux of Rehnquist’s argument seemed to be that America has a religious history and the addition of “under God” is simply a ‘nod’ to that religious history. And that the addition was not meant to establish a belief in or worship of God, but to acknowledge the idea that the Founders of the U.S. and others throughout history were guided by a belief in God. Justice Rehnquist also observed that the Court’s ruling in *West Virginia State Board of Education v. Barnette* (1943) permits that, “[s]tudents who object on religious (or other) grounds may abstain from the recitation” (*Elk Grove Unified School District v. Newdow*, 2004, at 30). Because of this Rehnquist found no First Amendment entanglement: “Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church” (*Elk Grove Unified School District v. Newdow*, 2004, at 31).

Justice O’Connor’s separate concurrence delved into the issue of ceremonial deism (discussed in Chapter One) and she concluded that, “[w]hatever the sectarian ends its authors may have had in mind, our continued repetition of the reference to “one Nation under God” in an exclusively patriotic context has shaped the cultural significance of that phrase to conform to that context. Any religious freight the words may have been meant to carry originally has long since been lost (*Elk Grove Unified School District v. Newdow*, 2004, at 41).

Justice Thomas also wrote a separate concurring opinion where he stated that “as a matter of our precedent, the Pledge policy is unconstitutional” based on students being coerced to either recite the Pledge or at the very least to attend school where recitation of the Pledge is required (*Elk Grove Unified School District v. Newdow*, 2004, at 49). However he also stated that duress through “[p]eer pressure, as unpleasant as it may be, is not coercion” (*Elk Grove Unified School District v. Newdow*, 2004, at 49). He agreed with Justice Scalia’s dissenting opinion in *Lee v. Weisman* (1992) that the only coercion that would rise to First Amendment violations would be “by force of law and threat of penalty” (*Elk Grove Unified School District v. Newdow*, 2004, at 49). He concluded:

Through the Pledge policy, the State has not created or maintained any religious establishment, and neither has it granted government authority to an existing religion. The Pledge policy does not expose anyone to the legal coercion associated with an established religion. Further, no other free-exercise rights are at issue. It follows that religious liberty rights are not in question and that the Pledge policy fully comports with the Constitution. (*Elk Grove Unified School District v. Newdow*, 2004, at 54)

Because the Court did not make an ultimate ruling on the legality of the phrase “under God” there is no definitive answer for whether the phrase violates the First Amendment. However, the three Justices who did address this issue all found that there was no violation, though they all arrived at this conclusion for slightly different reasons.

In line with this assessment the Ninth Circuit Court of Appeals recently heard *Newdow et al. v. Rio Linda Union School District* (2010). Although this case once again focused on the 1954 “under God” addition, this time Newdow and his co-plaintiffs also questioned the legality

of whether the teacher-led recitation of the current version of the Pledge of Allegiance by students in public schools constitutes an establishment of religion in violation of First Amendment.

The court held (2-1), in a logically questionable ruling, that the Pledge is indeed constitutional stating that:

The Pledge of Allegiance serves to unite our vast nation through the proud recitation of some of the ideals upon which our Republic was founded and for which we continue to strive: *one Nation under God*-the Founding Fathers' belief that the people of this nation are endowed by their Creator with certain inalienable rights; *indivisible*-although we have individual states, they are united in one Republic; *with liberty*-the government cannot take away the people's inalienable rights; *and justice for all*-everyone in America is entitled to “equal justice under the law.” (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1012)

Despite the lawsuit, this court majority believed that the Pledge unites the nation. Thus, the court summarily dismissed everyone in America who does not salute the flag including many atheists, secular humanists and Jehovah's Witnesses, for example, as irrelevant to the unity of the nation. The court then wrote off the “under God” portion of the pledge as giving deference to the Founding Father's religious beliefs<sup>15</sup>, while the rest of the reasoning in the quote deals with the

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<sup>15</sup> The issue of giving deference to the Founding Fathers religious views is complex and goes beyond the scope of this dissertation. However, it can briefly be noted that there have been several groups of ‘Founding Fathers’ and, the deference that would be paid to their religious beliefs would probably vary depending upon which group one was referring to. The generally accepted group of Founding Fathers includes George Washington, Benjamin Franklin, James Madison, John Adams, Alexander Hamilton, Thomas Jefferson, and Thomas Paine, all of whom were Deists of differing degrees (Holmes, 2006; Lambert, 2003; Morris, 1973). Additionally, John Jay may have been Orthodox Christian (Holmes, 2006) or he may have been Deist (Lambert, 2003). Deism was a religious philosophy that emphasized reason and

present day. Thus, the most recent addition to the Pledge requires us to go back the furthest in history in order to attempt to reconcile its legality under the First Amendment. The dissent, written by Justice Reinhardt noted that with regard to public school students in California who, at that time, totaled over 6 million:

At least 190,000 of those students are Buddhist, Hindu or followers of a Native American religion and thus do not believe in traditional monotheism—that is, the existence of a single, non-metaphorical, supervisory God. Over half a million California students come from “secular” families... [most of whom] moved away

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nature over revelation and Scripture (Lambert, 2003). “...Deism offered a religious choice to those who could no longer follow the “corruptions” and “superstitions” of Christianity, especially the Calvinist brand that prevailed in America” (Lambert, 2003, p. 160). Lambert (2003), quotes Jonathan Edwards, a foremost theologian of the late 1700’s, who described Deists as people who had “Wholly cast off the Christian religion, and are professed infidels. ...they deny the whole Christian religion. ...They deny any revealed religion, or any word of God at all; and say that God has given mankind no other light to walk by but their own reason” (p. 160).

Sometimes the Founding Fathers are thought of as a much bigger group, with the well-known historical figures, but also the other early American settlers (Bernstein, 2009). While it is probably true that the majority of white people in the early U.S. settlements were of varying Christian sects, there were also Native Americans and African Slaves who did not practice any form of Christianity. Paying deference to this group of diverse peoples religious views would be somewhat complex and could not be done with a simple reference to God.

The Planting Fathers, on the other hand, were the men who founded the original colonies and who drafted the constitutions for those settlements (Lambert, 2003). The Puritan Planting Fathers, for example, had fled from religious persecution in England and came to America for what they called religious freedom, but what was actually freedom to organize a Christian State governed by God’s word (Holmes, 2006; Lambert 2003). For the Puritan Planting Fathers “their government rested on divine authority and pursued godly purpose” (Lambert, 2003, p. 1). Additionally, “citizenship in the state was directly tied to one’s religious faith” (Lambert, 2003, p. 2). However, it is doubtful that people would be referring to this group of individuals as the Founding Fathers who require deference since they lived about 150 years before the swearing in of the first U.S. president, who instead of pledging to follow God’s word, swore to “preserve, protect and defend the Constitution of the United States” a document that made no explicit reference to God (Lambert, 2003, p. 2).

from religious observance because they no longer believe in God or religious teachings. ... In California's public schools, over one million students are not sure whether they believe in God, and fully 439,000 students are avowed atheists. (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1065, dissenting opinion, internal citations and quotation marks omitted)

But the majority chose not to look at the religious composition of California's public schools and instead looked back hundreds of years in history to give deference to the speculation surrounding America's forefather's beliefs rather than America's future leaders. And, with regard to deferring to the Founding Fathers presumed religious beliefs it seems important to point out that nowhere in the U.S. Constitution does the word 'God' appear, despite the fact that during the drafting and ratification of the U.S. Constitution there were several requests to insert phrases proclaiming obedience, reverence, or acknowledgement the divine (Lambert, 2003). Lambert (2003) quotes Thomas Jefferson's description of what happened when someone moved to add to the Preamble an acknowledgement that Jesus Christ was the holy author of the religion of the people of the United States: "the insertion was rejected by a great majority, in proof that they meant to comprehend within the mantle of its protection the Jew and the Gentile, the Christian and Mahometan, the Hindoo and infidel of every denomination" (p. 238). I mention this, not because there were never mentions of God made by the Founding Fathers, but rather to point out that the Founders themselves lived in a time of religious intolerance, and many fled to America to be free from Theocratic rule. This, coupled with the fact that the Founding Fathers had a multitude of religious beliefs not all of which were Christian (see endnote 3), makes the majority's insistence that the addition of "under God" is a simply nod to the religious beliefs of the Founders even more questionable. Additionally, the 1797 Treaty of Tripoli which was submitted to the Senate

by President John Adams, and which was unanimously approved by the U.S. Senate “assured the world that the United States was a secular state and that its negotiations would adhere to the rule of law, not the dictates of the Christian faith” (Lambert, 2003, p. 11). The Treaty stated:

As the Government of the United States of America is not, in any sense, founded on the Christian religion,—as it has in itself no character of enmity against the laws, religion, or tranquility, of Mussulmen,—and as the said States never entered into any war or act of hostility against any Mahometan nation, it is declared by the parties that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries. (Lambert, 2003, p. 239)

I use the Treaty not to prove the truth of the statements contained therein, it was a political peace treaty and could have been written simply to placate the Muslims living in Tripoli. Instead, and in line with Critical Religious Legal Theory, I use the words of the treaty and the issues raised during the ratification of the U.S. Constitution to show that it is difficult, if not impossible, to determine exactly what the Founding Fathers would have wanted America to pay deference to with regard to their religious beliefs or with regard to claims that the United States is a Christian country.

The majority goes on to pose the question: “In other words, does Roe have the right to prevent teachers from leading other students from reciting the Pledge of Allegiance—something we all agree is a patriotic exercise—because the mention of God in the Pledge offends her as an atheist?” (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1013). Notice the assertion that “we all agree” that the Pledge “is” a patriotic exercise. It raises the question of exactly who this royal “we” is. It could be the court, the justice system, the government or segments of the

American populace. But the way it is worded sounds like the court is claiming that it is undisputed, despite the fact that there is a lawsuit before them challenging, in part, whether the Pledge is now a religious indoctrination because of the most recent addition of “under God” rather than a patriotic exercise. This is a classic propaganda strategy that is used to delegitimize dissent by claiming unity where there is, according to the lawsuit, discord (Jowett & O’Donnell, 2011).

The court claimed that “under Supreme Court law we are instructed to examine the history and context in which the phrase ‘one Nation under God’ is used so that we may discern Congress’ ‘ostensible and predominant’ purpose when it enacted the Pledge” (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1014). The court went on to say:

Congress had two primary purposes in including the phrase “one nation under God” in the Pledge: (1) to underscore the political philosophy of the Founding Fathers that God granted certain inalienable rights to the people which the government cannot take away; and (2) to add the note of importance which a Pledge to our Nation ought to have and which ceremonial references to God invoke. (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1014)

The court concluded from this repeated acknowledgment and deference to the clearly Christian God, that “Congress’ ostensible and predominant purpose when it enacted and amended the Pledge over time was patriotic, not religious” (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1014). This highlights an important point about interpretation. For some people, for example those who do not believe in a God, the inclusion of the phrase “under God” in the Pledge when it was not there originally, and a historical record detailing that the purpose of including the phrase was to give a nod to those who may have believed in the Christian God, is

patently religious. And perhaps more troubling to citizens who do not believe in a God, would be the idea that adding the phrase “under God” somehow solemnizes a patriotic exercise. It seems to tell the “nonbeliever” that (s)he is not an important part of America because her/his personal beliefs make at least part of the Pledge offensive or at least irrelevant. At the very least it seems to repeatedly (since the Pledge is said every school day morning for 13 years of a child’s life) tell the “non-Christian” that (s)he is wrong, that there is a God and that God is the ultimate power in the United States. Taking a step back it is not hard to see why a “nonbeliever” would feel that a daily declaration that American’s are united under what (s)he feels is an imaginary force could be seen by that person as the government endorsing religious belief over non-belief. “[I]t is self-evident that one cannot profess to believe that our nation is “under God” without professing to believe that God exists” (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1047, dissenting opinion). The dissent further wrote:

If the plain meaning of the words “under God” were not enough to demonstrate beyond any doubt that the majority's contention borders on the irrational, and that the term is predominantly, if not entirely, religious in both meaning and purpose, the overwhelmingly religious intent of the legislators who added the phrase to the Pledge, as shown by the unanimous statements to that effect in the Congressional Record, would remove any possible doubt from the mind of any objective person. (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1046)

However, for other people, like the majority of the *Newdow* (2010) court,

[t]he purpose of public prayer is always active-to invite divine intercession, to express personal gratitude, to ask forgiveness, etc. On the other hand, the recitation of “one Nation under God” is a description of the Republic rather than

an expression of the speaker's particular theological beliefs, a recognition of the historical principles of governance, affected by religious belief, embedded in the Pledge. (at 1021)

Those who do believe in God(s), may not see the “under God” addition as overtly religious because it is neither asking for something nor thanking God for something. To them it is natural to think of God as the Creator, the ultimate power/force behind everything, so to note that America is “One Nation under God” is simply a fact.

At one point in the ruling the majority attempted to show that “oftentimes what one person considers secular, another considers religious” (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1036). Unfortunately, the court attempted to show this by referencing *West Virginia State Board of Education v. Barnette* (1943), a case that was not about whether the Pledge was religious or not, but rather whether forcing children to participate in something that violates the tenants of their religion was legal. And from this contextually irrelevant comparison the court decided that because the recitation of the Pledge was voluntary it did not violate the First Amendment. It would have been more relevant for the court to reference *Stone v. Graham* (1980) or *Joki v. Board of Education of the Schuylerville Central School District* (1990), both of which dealt with cases where the courts had to determine whether something was secular or religious by looking at the intent, history and effect of the thing in question. However, in both of these cases the courts found that the things in question, copies of the Ten Commandments and a painting depicting the Crucifixion of Jesus Christ, were not secular, despite testimony and legislative history claiming that there were secular purposes to display them in public schools.

The Majority included a brief discussion of ceremonial deism (discussed in Chapter One) stating in part that “[n]ot every mention of God or religion by our government or at the

government's direction is a violation of the Establishment Clause” (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1013). Then, to determine the constitutionality of the recitation of the Pledge, the court used The Lemon Test, The Endorsement Test and The Coercion Test *supra*. The court stated that it was uncontested that the purpose of the California statute requiring the school day in public schools to include patriotic exercises which could be satisfied by having students recite the Pledge of Allegiance was in fact a facially neutral patriotic purpose, thus the California statute passed the Lemon Test. The question before the court was whether the Pledge of Allegiance violated the first prong of the Lemon Test, since the challenged governmental action must have a secular purpose (*Lemon v. Kurtzman*, 1971, at 612-13). The court refused to look solely at the two word 1954 addition of “under God” to the Pledge to determine the secular purpose. Instead they looked at whether the Pledge of Allegiance as a whole had a religious purpose. Not surprisingly, they held that the purpose of the Pledge as a whole is secular.<sup>16</sup> The

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<sup>16</sup> The court compared looking solely at the “Under God” addition to looking at only one part of the religious display that was deemed constitutional as a whole in *Lynch v. Donnelly* (1984). In that case a Rhode Island shopping center had a public display that featured, amongst other things, a Santa Clause house, a Christmas tree, reindeer pulling Santa’s sleigh, a ‘Seasons Greetings’ banner, carolers and a nativity scene. It is unclear from the wording of the case whether the entire display began around 1944 or whether the Court meant that the nativity scene was added to the display in 1944, either way this was right around the time the “Under God” phrase was added to the Pledge.

The Supreme Court held in a split 5-4 decision that there was a secular purpose for including the nativity scene in the Christmas display and that its inclusion neither impermissibly advanced religion nor did it create an excessive entanglement between religion and government. The majority claimed that the display, as a whole had the secular purpose of being “sponsored by the city to celebrate the Holiday recognized by Congress and national tradition and to depict the origins of that Holiday...” and that, “[w]hatever benefit to one faith or religion or to all religions inclusion of the [nativity] in the display effects, is indirect, remote, and incidental, and is no more an advancement or endorsement of religion than the congressional and executive recognition of the origins of Christmas... (*Lynch v. Donnelly*, 1984, p. 669). The Court further noted,

dissenting opinion in this case felt that the majority erred in its reasoning, and should have relied on Supreme Court precedence from *Wallace v. Jaffree* (1985) (discussed supra) and stated that

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...that the display advances religion in a sense; but our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action. The Court has made it abundantly clear, however, that "not every law that confers an `indirect,' `remote,' or `incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid (*Lynch v. Donnelly*, 1984, p. 683, citing *Committee for Public Education v. Nyquist*, 1973, p. 771).

The dissent in this split decision case felt that the "inclusion of a life-sized display depicting the biblical description of the birth of Christ as part of its annual Christmas celebration is [an] unconstitutional... impermissible governmental endorsement of a particular faith" (*Lynch v. Donnelly*, 1984, p. 695). Writing for the dissent Justice Brennan reasoned that:

And it is plainly contrary to the purposes and values of the Establishment Clause to pretend, as the Court does, that the otherwise secular setting of Pawtucket's nativity scene dilutes in some fashion the [nativity's] singular religiosity, or that the city's annual display reflects nothing more than an "acknowledgment" of our shared national heritage. Neither the character of the Christmas holiday itself, nor our heritage of religious expression supports this result. Indeed, our remarkable and precious religious diversity as a Nation, which the Establishment Clause seeks to protect, runs directly counter to today's decision (*Lynch v. Donnelly*, 1984, p. 697).

The dissent also noted that, "the nativity scene, unlike every other element of the... display, reflects a sectarian exclusivity that the avowed purposes of celebrating the holiday season and promoting retail commerce simply do not encompass" (*Lynch v. Donnelly*, 1984, p. 700). By way of the government showing a preference for the religion the dissent stated "[t]hose who believe in the message of the nativity receive the unique and exclusive benefit of public recognition and approval of their views" (*Lynch v. Donnelly*, 1984, p. 700). The dissent gave credence to the belief that the inclusion of the nativity as the only overtly religious aspect of the holiday display gave the appearance that the government supported Christianity while shunning, or at least ignoring or alienating, all other religions that also celebrate holidays around the same time, or those who simply celebrate the secular aspects of the holiday season.

Though the *Newdow* (2010) court did not cite the dissent in *Lynch v. Donnelly* (1984), it should be noted that Justice Brennan wrote, "that while a particular governmental practice may have derived from religious motivations and retain certain religious connotations, it is nonetheless permissible for the government to pursue the practice when it is continued today solely for secular reasons" (*Lynch v. Donnelly*, 1984, p. 715). This, nod to ceremonial deism seems to be the basis for why the "Under God" addition the Pledge is still permitted in public schools.

[w]ell-established controlling Supreme Court law... makes it clear... it is the amendment and its language, not the Pledge in its entirety, that courts must examine when, as here, it is the amendment, not the Pledge as a whole, that is the subject of the claim of unconstitutionality. The majority's error in this respect causes it to analyze the legal issues improperly throughout its opinion. Examining the wrong issue inevitably leads the majority to reach the wrong result. (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1046)

The *Newdow* (2010) majority also gave no credence to the questions arising under the Coercion Test stating:

The dissent states that the mere recitation of “under God” in the Pledge is an affirmation that God exists: it requires affirmation of a belief and an attitude of mind’ to which [a] young [student] does not subscribe: a belief that God exists and is watching over our nation. If in fact the students were required to say the Pledge, the dissent would have a valid point. But the California legislature has already taken this consideration into account by allowing anyone not to say the Pledge, or hear the Pledge said, for any personal reason. What is at issue is not saying the Pledge or affirming a belief in God. What is at issue is whether [a] child can prevent other students, who have no such objection, from saying the Pledge. (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1021, internal citations and quotation marks omitted)

Consequently, this court did not believe that students, though required to be in school because of truancy and compulsory education laws, are a captive audience because they may either refuse to participate in the Pledge and/or may remove themselves from the room while the Pledge is being

recited. The court did not believe that peer pressure, nor the fear of annoying a teacher who hands out grades, would be sufficient coercion to force a student who finds the Pledge offensive or even irrelevant to refrain from participation out of fear of retaliation. The court dismissively stated:

We agree that the students in elementary schools are being coerced to listen to the other students recite the Pledge. They may even feel induced to recite the Pledge themselves. . . . we recognize that elementary school children are unlikely to walk out of the classroom in protest. But the main distinction is this: Here, the students are being coerced to participate in a patriotic exercise, not a religious exercise.

*(Newdow et al. v. Rio Linda Union School District, 2010, p. 1038)*

The dissent found this reasoning to be flawed stating, “A religious component included in a secular exercise, whether or not a patriotic one, is subject to the same coercion rules as is any other religious practice to which public school students are subjected (*Newdow et al. v. Rio Linda Union School District, 2010, at 1047*). Additionally, it is unlikely that the Majority would still feel that this was not a religious exercise if the students recited the Pledge daily with the phrase “One Nation, under Satan” (see Lugg, 2004). But the Majority repeatedly insisted that the Pledge is first and foremost a patriotic exercise and gave little attention to the fact that the Pledge existed for 62 years without the phrase “Under God” added to it. Yet it is doubtful that they believed that during those 62 years the Pledge failed to “solemniz[e] public occasions, or inspir[e] commitment to meet some national challenge” (*Newdow et al. v. Rio Linda Union School District, 2010, at 1020, citing Lynch v. Donnelly, 1984, at 716-717*). As the dissent observed, “Surely, our original Pledge, without the McCarthy-era effort to indoctrinate our nation's children with a state-held religious belief, was no less patriotic” (*Newdow et al. v. Rio*

*Linda Union School District*, 2010, at 1043). And if the majority did feel that the Pledge was patriotically incomplete before the phrase “Under God” was added it seems to beg the question of why that particular two word phrase was so powerful especially if we are to assume that it does not bring an overtly religious element to the Pledge.

The Majority also noted that “Without knowing the history behind these words, one might well think the phrase “one Nation under God” could not be anything but religious” (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1028). But as the Dissent points out, “[h]istory leaves no doubt that Congress inserted the words “under God” in the Pledge of Allegiance in order to inculcate in America's youth a belief in religion, and specifically a belief in God” (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1044). Interestingly there was nothing in the record to show that students were required to learn the history of the Pledge of Allegiance. The students were simply directed to stand and recite the Pledge each morning. If the court is correct and a knowledge of history is necessary to understand that the phrase “Under God” is not in fact religious, and if it is also a fact that no such historical lesson is given to students it seems to point to a coercive government endorsement of religion by the omission such history. However, once again, the court relies on erroneous precedence stating:

...a child's understanding cannot be the basis for our constitutional analysis. The Supreme Court has expressly rejected this approach: “We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive.” (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1037-1038 citing *Good News Club v. Milford Central School*, 2001 at 119.

But these two cases, though both dealing with religious entanglements in public school, have little to do with each other beyond that. In *Good News Club et al. v. Milford Central School* (2001) a public school refused to let religious groups use its building after school hours though the school did permit non-religious groups to use the building after school hours. The Milford Central School feared that the public, including the students in the school, would assume that the religious groups were being endorsed by the school officials. In that case it was doubtful that adults would see this as government endorsement of religion but it was possible that the younger students might not. In the case of the Pledge of Allegiance the vast majority of people who would be subjected to it daily are young students. Further, it was the intent of those adding the phrase ‘under God’ that it would inculcate America’s youth with a patriotic love of God and country. The dissent quotes several of the major proponents of the 1954 Amendment to show that young children were meant to be the focus of the amended Pledge such as, Senator Wiley, who stated, “What better training for our youngsters could there be than to have them, each time they pledge allegiance to Old Glory, reassert their belief, like that of their fathers and their fathers before them, in the all-present, all-knowing, all-seeing, all-powerful Creator” and Senator Ferguson who said “we should remind the Boy Scouts, the Girl Scouts, and the other young people of America, who take [the] pledge of allegiance to the flag more often than do adults, that it is not only a pledge of words but also of belief” (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1057-1058, dissenting opinion). And, as previously noted, even President Eisenhower pointed out the centrality of the Pledge to children in the speech he gave when he signed the 1954 bill. He declared, “[f]rom this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural school house, the dedication of our Nation and our people to the Almighty” (*Newdow et al. v. Rio Linda Union School District*,

2010, at 1058, dissenting opinion). It seems illogical not to base the analysis on what the majority of people who were intended to be and who actually are subjected to the Pledge know or feel about it. However, with regard to the Endorsement Test, the majority found no violation ruling that “[t]he phrase ‘under God’ is a recognition of our Founder's political philosophy that a power greater than the government gives the people their inalienable rights. Thus, the Pledge is an endorsement of our form of government, not of religion or any particular sect” (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1037).

The Dissent was adamant in its disagreement with the majority.

To put it bluntly, no judge familiar with the history of the Pledge could in good conscience believe, as today's majority purports to do, that the words “under God” were inserted into the Pledge for any purpose other than an explicitly and predominantly religious one: to recognize the power and the universality of God in our pledge of allegiance; to acknowledge the dependence of our people, and our Government upon the moral direction and the restraints of religion, and to indoctrinate schoolchildren in the belief that God exists. Nor could any judge familiar with controlling Supreme Court precedent seriously deny that carrying out such an indoctrination in a public school classroom unconstitutionally forces many young children either to profess a religious belief antithetical to their personal views or to declare themselves through their silence or nonparticipation to be protesting nonbelievers, thereby subjecting themselves to hostility and ridicule. (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1043, internal citations and quotation marks omitted)

Regardless, of the dissenting opinion the majority held that “California's statute requiring school districts to begin the school day with an ‘appropriate patriotic exercise’ does not violate the Establishment Clause even though it permits teachers to lead students in recitation of the Pledge”, because they deemed the Pledge to be unquestionably secular (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1014).

This case is important because the diametrically opposed views of the majority and the dissent perfectly highlight the tension that this issue raises for America’s public schools. Even within the majority opinion the court repeatedly flip flopped between claiming that “the phrase ‘one Nation under God’ constitutes a powerful admission by the government of its own limitations” (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1036), to reducing an all-powerful Christian deity to a mere idea stating, “Here, a patriotic exercise is involved which only mentions the concept of ‘God’” (*Newdow et al. v. Rio Linda Union School District*, 2010, at 1036). The flip-flopping in the decision, though likely confusing and frustrating to the citizens who are governed by it, perfectly exemplifies the complexity of the issue of religious entanglements in public school settings and the difficulty courts have in attempting to interpret and rule on issues that require a balance between opposing individual and group beliefs.

While the *Newdow* case was occurring another federal court case dealing with the “Under God” portion of the pledge was decided in New Hampshire. In *Freedom From Religion Foundation v. Hanover School District* (2010) an atheist and an agnostic parent of 3 elementary students in the Hanover school district, and who were members of the Freedom From Religion Foundation, alleged that the New Hampshire School Patriot Act (2002) (hereinafter The Act), violated the Establishment Clause, the Free Exercise Clause, the Due Process Clause and the Equal Protection Clause of the federal constitution. The Act required the state's public schools to

provide time during the school day for students to voluntarily participate in the recitation of the Pledge of Allegiance and required those who wished to refrain from participating in the Pledge to remain silent in order to respect the rights of those who wished to participate. The Freedom From Religion Foundation maintained that the 1954 “under God” addition to the Pledge made recitation of the Pledge a religious exercise that was being sponsored and required under the Act.

The Appellate Court first addressed whether the “under God” portion of the Pledge was religious in nature. To do this the court looked at the notion of ceremonial deism stating:

In our view, mere repetition of the phrase in secular ceremonies does not by itself deplete the phrase of all religious content. A belief in God is a religious belief.

That the phrase has some religious content is demonstrated by the fact that those who are religious, as well as those who are not, could reasonably be offended by the claim that it does not. (*Freedom From Religion Foundation v. Hanover School District*, 2010, at 7)

Though the court found the “under God” addition to have some religious significance it still found that the Pledge did not amount to a prayer nor a recitation from a religious text.

The Appellate Court continued its analysis using the *Lemon Test* and determined that it was uncontested that the Act passed the first prong of the *Lemon Test* because it had the secular primary purpose of promoting patriotism. However, the Freedom From Religion Foundation was not trying to fault the Act in particular for having a religious purpose. Instead the argument was that the addition of “under God” was done for a religious purpose and when the Act used the Pledge as a patriotic exercise it paired its secular purpose with this religious purpose. Without addressing this argument the Appellate Court moved to the second prong of the *Lemon Test* to determine whether the primary effect of the law was to advance religion. Here the Appellate

Court noted two views about the religiosity of the Pledge. First the court cited Laycock (2004) who said of the “One nation, under God” phrase: “To affirm this description necessarily affirms the propositions included in that description: that there is a God, and only one, of such a nature that a nation can be under that God.” (p. 228). Then the court cited Supreme Court Justice Rehnquist who stated: “[T]he Pledge itself is a patriotic observance focused primarily on the flag and the Nation, and only secondarily on the description of the Nation.” (*Elk Grove Unified School District v. Newdow*, 2004, at 26). The court was using these quotes to show that while the “One nation, under God” phrase is likely a religious affirmation, it does not primarily advance religion because it only relates to the secondary purpose of the Pledge as a whole. Yet, a few sentences later, the court reverted back to a focus on the description of the Nation stating that the school district’s purpose for having the students recite the pledge was help “to [teach] our country’s history” to the students (*Freedom From Religion Foundation v. Hanover School District*, 2010, at 10). The Court also cited the Supreme Court’s statement that “the Pledge of Allegiance evolved as a common public acknowledgment of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles. (*Freedom From Religion Foundation v. Hanover School District*, 2010, at 10, citing *Elk Grove Unified School District v. Newdow*, 2004, at 6). Both of these quotes lend more support to the fact that the recitation of the Pledge with the 1954 “under God” addition does in fact encourage school children to foster a reverence for God along with the other principles that the Pledge stands for. The Appellate Court, however, saw no advancement of religion and found that the Act passed the second prong of the *Lemon Test*.

The court then addressed whether or not the Act endorsed religion. The court noted that the Freedom From Religion Foundation’s main argument was that the students who chose to

refrain from standing to recite the Pledge because they did not believe in God were “quite visibly differentiated from other students who stand and participate” which makes them “outsiders to their peer group on the grounds of their religion” (*Freedom From Religion Foundation v. Hanover School District*, 2010, at 10). The court found this argument to be without weight because it found that there would be no way to distinguish why students were not standing to recite to say the Pledge.

There are a wide variety of reasons why students may choose not to recite the Pledge, including many reasons that do not rest on either religious or anti-religious belief. These include political disagreement with reciting the Pledge, a desire to be different, a view of our country's history or the significance of the flag that differs from that contained in the Pledge, and no reason at all. Even students who agree with the Pledge may choose not to *recite* the Pledge.

(*Freedom From Religion Foundation v. Hanover School District*, 2010, at 11)

From here the court, like the court in *Newdow et al. v. Rio Linda Union School District* (2010), attempted to draw an analogy between the Pledge of Allegiance and a holiday display that included both secular and religious artifacts. The court found that like a holiday display with both secular and religious artifacts, the Pledge's religious message of “under God” along with the other secular principles did not amount to government endorsement of the religious aspects (see *Lynch v. Donnelly*, 2004). Assuming, for the sake of argument that these two things are analogous there is no reason to think that the government is not endorsing the religious messages in a holiday display. Holidays in the U.S. are generally centered around religious holy days. And unlike the display in *Lynch v Donnelly* (2004) many government sponsored holiday displays contain multiple religions in the displays along with secular aspects. These displays may in fact

be endorsing religion; they may be endorsing the multi-religious/multi-cultural aspect of the holiday season along with the secular aspects of the holiday season, which would not be illegal. The Appellate Court found that the secular words surrounding the religious “Under God” phrase modified its religious significance to that of a secular one, and because of that the court found no government endorsement of religion.

The court then moved to the *coercion test* to see if the Act unduly coerces students to recite the Pledge despite it going against their religious views. The Freedom From Religion Foundation argued that: 1. The students in this case are young (elementary and middle school students) and are impressionable, 2. The Pledge is led by teachers who are respected authority figures, 3. The Pledge is an oral activity so students are encouraged to participate by speaking rather than just listening, 4. The Pledge occurs every school day, 5. Refusing to participate in the daily recitation of the Pledge is obvious, 6. Students may be alone in their refusal to participate and may feel unsupported in their decision. The Appellate Court avoided analysis of these issues by finding that because the Pledge is a patriotic exercise and not a religious one the Freedom From Religion Foundation’s arguments were moot and thus there was no religious coercion.

Finding no violations of the Establishment Clause, the court then moved to the Free Exercise Clause noting that the government cannot legally:

(1) compel affirmation of religious beliefs; (2) punish the expression of religious doctrines it believes to be false; (3) impose special disabilities on the basis of religious views or religious status; or (4) lend its power to one side or the other in controversies over religious authorities or dogma. (*Freedom From Religion Foundation v. Hanover School District*, 2010, at 11, citing *Parker v. Hurley*, 2008, at 103)

The Freedom From Religion Foundation claimed that the daily recitation of the Pledge violated their children's ability to practice atheism and/or agnosticism and that it interfered with their parental rights to instill these religious views in their children. The court found no violation of the Free Exercise Clause citing its previous ruling in *Parker v. Hurley* (2008): "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" (*Freedom From Religion Foundation v. Hanover School District*, 2010, at. 14, citing *Parker v. Hurley*, 2008, at 106).

The court also found no violation of the Equal Protection Clause because it held that the Act did not require the school to treat people differently, nor did it give people preferential treatment because of their religious beliefs. The court gave no weight to the Freedom From Religion Foundation's argument that the school district failed in its duty to respect nontheistic religious views because it "[led] students in affirming that God exists, and that [the school district] created a social environment that perpetuates prejudice against atheists and agnostics" (*Freedom From Religion Foundation v. Hanover School District*, 2010, at. 14). Additionally, the court found that there was no violation of the Freedom From Religion Foundation's fundamental constitutional right of parenthood under the Due Process Clause because the clause does not give parents the level of protection that would allow them to control their child's public school education to the degree sought in this case.

Finding no Constitutional violation the Appellate Court ruled in favor of the school district. This case is important because it exemplifies the trend of modern courts using multiple analysis tests (The *Lemon Test*, the *coercion test* and the *endorsement test*) to look for First

Amendment violations. This is done to help to ensure that the decision will withstand appeal if the Supreme Court eventually does away with one or more of the tests.

As previously stated, using Critical Religious Legal Theory to analyze the case law dealing with the Pledge of Allegiance requires us to look at its history, the motivations of its major players and its current use. The Pledge is currently used in schools throughout the United States in part to fulfill civics requirements in state curriculum standards and to promote patriotism in young citizens (*Freedom From Religion Foundation v. Hanover School District*, 2010; *West Virginia State Board of Education v. Barnette*, 1943). Though courts repeatedly point out the patriotic nature of the Pledge of Allegiance as a whole, this argument fails to address the true religious question surrounding the Pledge (see *Freedom From Religion Foundation v. Hanover School District*, 2010; *Newdow et al. v. Rio Linda Union School District*, 2010). Those who bring suit to challenge the Pledge of Allegiance are generally not claiming that the entire Pledge should be removed from the school curriculum (see *Elk Grove Unified School District v. Newdow*, 2004; *Freedom From Religion Foundation v. Hanover School District*, 2010; *Newdow et al. v. Rio Linda Union School District*, 2010). Instead they are claiming that the most recent amendment to the Pledge of Allegiance creates unconstitutional religious government entanglement. The following three charts track the major changes that the two amendments to the Pledge created.

Figure 2.1 1892 Original Pledge of Allegiance

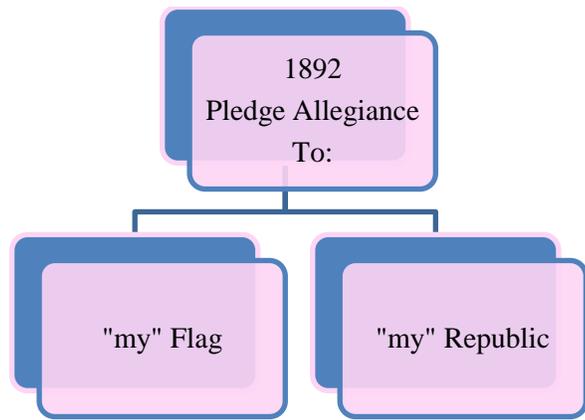


Figure 2.1 1892 Original Pledge of Allegiance

Note. From *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004).

Figure 2.2 1920's Amendment to the Pledge of Allegiance

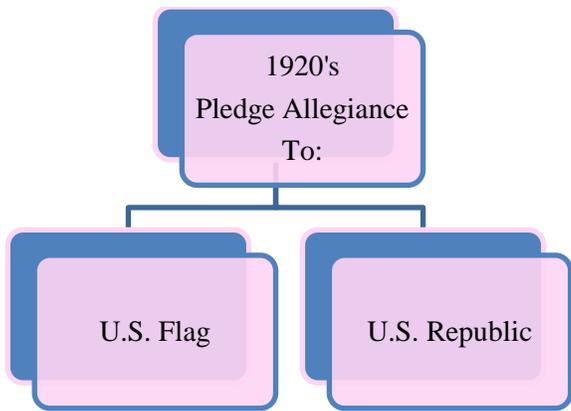


Figure 2.2 1920's Amendment to the Pledge of Allegiance

Note. From *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004).

Figure 2.3 1954 Amendment to the Pledge of Allegiance

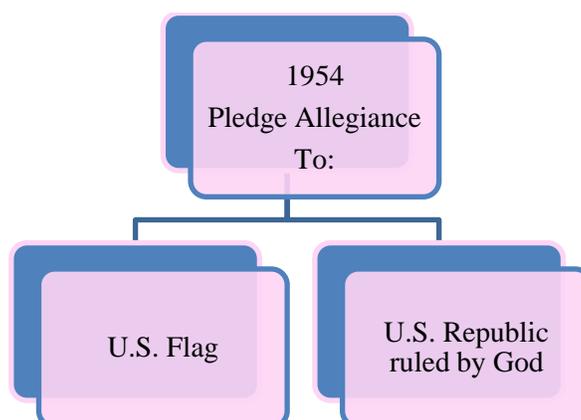


Figure 2.3 1954 Amendment to the Pledge of Allegiance

Note. From *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004).

As can be seen in these charts, the Pledge has always encompassed at least two aspects: students are pledging allegiance to a flag and a republic. The charts also show that the Pledge existed as a patriotic exercise in public schools for 62 years before the addition of a religious deity. But courts tend to analyze the patriotic purpose of the Pledge as a whole and refuse to give weight to the argument that that it could or should be looked at in two parts, the patriotic Pledge and the 1954 “under God” amendment to the patriotic Pledge.

As explained in the analysis of the cases in this area the only purposes put forth by the supporters of the 1954 “under God” addition were religious. The courts analyzing the history of the Pledge and the meaning/purpose of the 1954 addition flip flopped between claiming that knowledge of the history of the Pledge is essential to understanding why the ‘under God’ addition was not religious (see *Newdow et al. v. Rio Linda Union School District*, 2010), to claiming that anyone who knows the history of the Pledge could not see the addition as anything other than religious (see *Newdow et al. v. Rio Linda Union School District*, 2010), to claiming that the Pledge helps to teach students the country’s history (see *Freedom From Religion*

*Foundation v. Hanover School District*, 2010). Courts also diverge as to whether ceremonial deism has stripped the “under God” addition of all religious meaning through its repetition (see *Elk Grove Unified School District v. Newdow*, 2004), whether the phrase retained its some of its religiosity but fails to transform the Pledge as a whole into a prayer or religious recitation (see *Freedom From Religion Foundation v. Hanover School District*, 2010; *Newdow et al. v. Rio Linda Union School District*, 2010) or whether the phrase was blatantly religious and did in fact alter the Pledge’s meaning to endorse religion (see *Newdow et al. v. Rio Linda Union School District*, 2010, dissenting opinion).

If schools really want to focus to be on patriotism, unity and love of country the removal of 2 words would go a long way to doing this. The ‘under God’ phrase seems to add nothing but confusion, selectivity, and religiosity to clearly patriotic exercise. At the very least, if schools truly want to create civics curricula that teach students about America’s history they should include lessons about the Pledge of Allegiance, its creation, adoption and amendments. Then students would be able to make an informed decision about whether they want to participate in the recitation of the Pledge and those who did choose to recite the Pledge would be more likely to be doing it because they believe in and appreciate its history and meaning rather than the thoughtless mechanical recitation that is passed off as a patriotic exercise.

#### *Religious Meetings in Public Schools*

Despite all of the case law that tells us that public prayer in public schools is generally not permitted, there is one law in particular that protects students who wish to study religion and/or worship together on public school property. The Equal Access Act of 1984 (EAA), was developed to protect religious students by giving them the right to meet and pray on public school grounds without running afoul of the Constitution (Broberg, 1999). The EAA protects,

among other things, students' First Amendment Free Exercise rights while also making it clear that the state is not hostile to religion.

The major precursor to the adoption of the EAA was the 1981 Supreme Court case of *Widmar v. Vincent*. In that case a registered student religious group at the University of Missouri was denied permission to use University facilities to conduct their meetings because the school had a rule that prohibited the use of University property for religious worship or teaching. The Supreme Court held 8-1 that this prohibition was a violation of the First Amendment. The Court stated that if a state university creates a limited open forum by making its facilities available for the activities of registered student groups it cannot then close its facilities to a registered student group that wants to use the facilities for religious worship and religious discussion. To do so would be to regulate speech based on its religious content which is a First Amendment violation. The Court specifically stated that it is not the case "that an "equal access" policy would be incompatible with this Court's Establishment Clause cases" (*Widmar v. Vincent*, 1981, p. 271).

In line with *Widmar v. Vincent* (1981), the EAA specifies that if a school receives federal funding it must offer a fair opportunity to students who wish to conduct a meeting, regardless of its religious, political, philosophical or other message, within its limited open forum *if* the school already allows non-curricular groups to meet (like the football team). These meetings must: be voluntary and student-initiated; not sponsored by the school, the government, its agents or its employees; not materially and substantially interfere with the orderly performance of education activities within the school; and not directed, controlled, conducted, or regularly attended by people outside the public school's community (20 U.S.C.S. §§ 4071(c)(1), (2), (4), & (5)). An interesting result of the EAA is that in many cases groups that may not have been permitted to

meet on public school grounds, like Gay –Straight Alliance Clubs, are now legally guaranteed that right.

In 1990, the case of *Westside School District v. Mergens*, clarified the protections guaranteed by the EAA while deeming it constitutionally sound. Specifically the *Mergens* (1990) Court defined non-curricular groups as those that are not directly related to the subject matter of the body courses offered by the school. A Spanish club or physics club, for example, would likely be a curricular club if the school offered courses in Spanish or physics. However a chess club, a stamp collecting club, any varsity sport, or a gay/straight alliance (GSA) would be considered non-curricular since these do not directly relate to any particular subject taught in the school.

The EAA allows students in U.S. public high schools to create or join a group or club, like a Bible club, and meet before, during, or after school as long as the school already allows non-curriculum clubs to meet during those times. Students' speech cannot be restricted in this manner if other types of non-curricular speech are permitted. This permits them to meet with other like-minded students on school grounds in a constitutionally permissible manner. Additionally, while faculty members may be present when these student groups meet, they need not, and often times legally cannot, participate in the group. For example, a teacher cannot lead the students in prayer at a Bible Club meeting on school grounds, but a teacher may pray silently along with the students if (s)he chooses to. Additionally, people outside the school, like a local pastor, may not control or regularly attend the group's meetings. The limitations outlined in the EAA are there to ensure that the public school is not seen as violating the Establishment Clause by endorsing whatever religious meetings were taking place on public school grounds.

### Summary

What we can gather from the case law on the issues of official participation or encouragement of religious activity, private prayer, school sponsored prayer, the Pledge of Allegiance, and religious meetings in public schools is that the Establishment Clause is designed to prohibit public schools--as representatives of the government--from favoring any particular religion or from favoring religious beliefs over nonreligious beliefs. Yet, the courts are likely to allow the public schools to acknowledge the historical significance of religion through things like the inclusion of the phrase "under God" in the Pledge of Allegiance. At least part of this allowance comes from "ceremonial deism", the belief that through repetition, religious (Christian) phrases lose their religiosity and become American (see *Elk Grove Unified School District v. Newdow*, 2004). Critical Religious Legal Theory serves to challenge this reliance on Christian norms to remind the powerful majority who make this claim that while it may seem simply American to someone who believes in the Christian God to mention his existence as fact, to those who do not believe added phrases such as "under God" to a patriotic exercise serve to exclude. If the nation is indeed united and indivisible as the Pledge claims there is no need to place an unnecessary partition in an exercise repeated daily for the majority of around 13 years of young citizens' lives. Additionally, the claim that the phrase pays deference to the Founding Fathers is not enough of a reason for it to remain. The Founding Fathers were also slave owners, but tweaking the Pledge to give deference to the Founders belief that people can be property would (hopefully) not be seen as acceptable, for example: 'I pledge allegiance to the flag of the United States of America, and to the Republic, forged by slaves, one Nation under God, indivisible, with liberty and justice for all.' And to make the claim that God is positive while slavery is not still only works for those who believe in God. To those who do not, the former

may be seen as imaginary while the latter may be seen as evil, but neither would belong in an exercise used to promote patriotism. It is difficult to understand how a Constitutional Amendment forbidding the establishment of a national religion is not violated by claims that blatantly Christian references of a Nation ruled by God in government sponsored activities like daily recitation of the Pledge of Allegiance in U.S. public schools are simply American.

Looking at ceremonial deism critically through the lens of Critical Religious Legal Theory exposes it as a tool for the majority to use to silence the minority. Ceremonial deism essentially translates into “I hear what you are saying, but I think it is ridiculous and not worth my time.” The minority is succinctly labeled both heathens and un-American in one concise phrase, and any attempts to argue against these labels just make them seem even more accurate. The minority is made to look like instigators and dissidents, going against America’s history. The majority is seen as the voice of reason offering a middle ground: those who believe in God can see a phrase like “under God” in the Pledge as religious if they choose to, and those who do not can just see it as a nod to America’s forefathers’ assumed beliefs. Ceremonial deism clouds the meaning of the Establishment Clause making it hard for legal scholars to interpret and for public schools to properly adhere to.

The Free Exercise Clause receives the most protection in public schools through the rights guaranteed by the Equal Access Act. Reconciling the demand for government “neutrality” with the religious beliefs of a large portion of the populace is a difficult balancing act for the courts. Because of this tension courts have in the past, and will probably continue in the future, to focus on the specific facts and circumstances in each case in an attempt to balance the competing interests of U.S. citizens.

## CHAPTER THREE

### Evolution, Creation & Intelligent Design

#### *Introduction*

While Chapter Two laid out some of the interactions of religion and schools, such as where and when prayer is permissible during the school day, Chapter Three uses Critical Religious Legal Theory to map the curricular issues that arise with the topics of evolution, creationism and Intelligent Design and the reasoning the courts use to arrive at their decisions on these issues.

#### *The Debate about Teaching Evolution, Creationism & Intelligent Design in Public Schools*

Using Critical Religious Legal Theory to analyze the issues surrounding evolution, creationism and Intelligent Design (ID) in public schools as a social phenomenon requires the major voices and the social and political atmosphere throughout the ongoing controversy to be addressed. The legal status of teaching about Intelligent Design, creationism and evolution in public schools is the subject of a great deal of legal, political and religious debate in the United States. The debate is generally between two diametrically opposed factions. One side, largely made up of Protestant Fundamentalists, argues that it is sacrilegious to teach the scientific theory of the evolution of humans in science classes in public schools because they believe that God created humans in our final and complete form without any sort of evolution (see *McLean, et al. v. Arkansas Board of Education*, 1982; Thomas, 2007). They will often “compromise” and agree to have evolution taught along with Creation or ID (see *Daniel v. Waters*, 1975; *Edwards v. Aguillard*, 1987; *McLean, et al. v. Arkansas Board of Education*, 1982; Thomas, 2007). But this compromise ensures their religious beliefs are presented as science. The other side believes that religion has no place in a science classroom, and that, therefore only the scientific theory of

evolution and any other scientifically valid competing theory should be taught within a public school's science classroom (see *Edwards v. Aguillard*, 1987; *Kitzmiller, et al. v. Dover Area School District, et al.*, 2005; Thomas, 2007).

Whether evolution is taught in public schools and how, not only varies from state-to-state but is also likely to vary from district-to-district within a state (see *Kitzmiller, et al. v. Dover Area School District, et al.*, 2005). In some schools evolution may be mentioned in general, but educators may not delve in to human evolution to appease those community members who oppose evolutionary theory on religious grounds (see *McLean, et al. v. Arkansas Board of Education*, 1982). And there is a long history of public schools attempting to teach creationism and intelligent design in lieu of, or in addition to, evolution as part of a science curriculum (*Daniels v. Waters*, 1975; *Edwards v. Aguillard*, 1987; *Epperson v. Arkansas*, 1968; *Kitzmiller, et al. v. Dover Area School District, et al.*, 2005; *McLean, et al. v. Arkansas Board of Education*, 1982;). This history was fueled by Protestant fundamentalists making claims like: "Evolution is thus not only anti-Biblical and anti-Christian, but it is utterly unscientific and impossible as well. But it has served effectively as the pseudo-scientific basis of atheism, agnosticism, socialism, fascism, and numerous other false and dangerous philosophies over the past century" (Morris & Clark, 1976, p. 79).

Despite fundamentalist rhetoric, courts throughout the U.S. have repeatedly supported the teaching of evolutionary theory in science class and have consistently rejected the teaching of creationism and Intelligent Design in public school science classes--since both are religion, not science (*Daniel v. Waters*, 1975; *Edwards v. Aguillard*, 1987; *Epperson v. Arkansas*, 1968; Moore, 2004; *Kitzmiller, et al. v. Dover Area School District, et al.*, 2005). Yet teachers and administrators in public schools do not appear to have a working knowledge of the law regarding

the constitutional impermissibility of teaching creationism and Intelligent Design in public school science classes (Moore, 2004). Consequently, those who want creationism and/or Intelligent Design taught in school are constantly devising new schemes to attempt to get it in through the back door (*Daniel v. Waters*, 1975; *Edwards v. Aguillard*, 1987; *Epperson v. Arkansas*, 1968; *Freiler v. Tangipahoa Parish Board of Education*, 1999; *Kitzmiller, et al. v. Dover Area School District, et al.*, 2005; *McLean v. Arkansas*, 1982; *Scopes v. State of Tennessee*, 1927; *Selman v. Cobb County School District*, 2005).

Before the legal analysis of this area can begin it is necessary, under Critical Religious Legal Theory analysis, to briefly discuss the origins of the evolution/creationism/Intelligent Design debate. The man who is usually blamed or credited with developing the theory of evolution is Charles Darwin.<sup>17</sup> Interestingly, Darwin had little formal training in biological science, and after failing in the study of medicine, he studied religion at Cambridge University with the intent to join the Anglican clergy (Mills, 2004). In 1859 Darwin wrote ‘The Origin of Species,’ a book which set forth, in detail, his hypothesis about natural selection. Natural selection posits that all species of life have descended over time from a common ancestry, through a process of altering to suit their environment, and where the best adapted are the most likely to reproduce and pass on their adapted traits (Mills, 2004). Natural selection describes a process for success or failure in the competition for ecological resources (Rennie, 2008).

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<sup>17</sup> Though I am going to focus on Darwin’s contributions to the theory of evolution I acknowledge that Darwin did not create the theory of evolution out of thin air. As early as 1749 scientists like Goerges Louis Leclerc, comte de Buffon started to pave the way for evolutionary theory through his animal, and later species, classification system. Charles Darwin’s grandfather Erasmus Darwin wrote a book called *Zoonomia* which described the origins of life in non-Creation terms, and which touched on evolution (see Mills, 2004). Additionally, Charles Darwin and man named Alfred Russel Wallace technically ‘discovered’ the concept of natural selection at the same time and both were aware of the others research (see Mills, 2004; Ress, 2007).

Although Darwin is often linked with the terms ‘evolution’ and ‘survival of the fittest’ it was not until the sixth and final edition of ‘The Origin of the Species’ published in 1879 that he used the word ‘evolution’ (Ress, 2007). And Herbert Spencer, an English philosopher, biologist and sociologist, was the first to use the phrase ‘survival of the fittest’ in his book ‘Principles of Biology’ in 1864; Darwin later, grudgingly, used this term in the fifth edition of ‘The Origin of the Species’ which was published in 1869 (Mills, 2004, Ress, 2007). None of the six versions discussed human evolution, though the books mentioned in passing that the principles of natural selection and evolution might work with humans as well (Mills, 2004). It was not that Darwin doubted that humans evolved, rather he was sure that the people of his time were not ready to hear about human evolution in opposition to religious doctrine, and he did not want religious dogma to cloud the public’s perception of his work (Mills, 2004). He later published “The Descent of Man, and Selection in Relation to Sex” in 1871 which addressed human evolution.

Darwin’s original theory along with its current evolved form, was not and is not, *completely* accepted by all scientists. As Mills (2004) points out there are scientists who argue about “whether species change suddenly or gradually...whether selection is the sole driving force...” (p. 4). One of the claims that supporters of creationism or ID often put forth is that evolution is not good science because parts of the theory have been challenged by scientists (see *Kitzmiller, et al. v. Dover Area School District, et al.*, 2005). However, in order for a scientific theory to meet the demands of a science it needs to be challenged, tested and reworked by the scientific field (see Mills, 2004). Because of this “the theory of evolution, like all theories, is larger than its originator” (Mills, 2004, p. 4). Currently evolutionary theory is used in fields such as molecular biology, ecology, embryology, technology and oncology (Mukherjee, 2010; Rennie, 2008).

One of the shortcomings of Darwin's original theory of natural selection was that he was working in a time before scientists knew about DNA and because of this Darwin was unable to explain why different characteristics could be passed on to offspring (Mills, 2004). In 'The Origins of the Species' he simply showed that characteristics were in fact passed on, for example as could be seen by breeding specific animals to pass on certain traits, but he did not address how this occurred (Mills, 2004). After Darwin's death the field of genetics began to take shape and with it came scientific proof that natural selection and evolution was possible (Mills, 2004). Additionally, as the fields and tools of paleontology and archeology progressed there were more and more species added to the fossil record to show evolutionary changes in support of Darwin's theories (Mills, 2004).

A dangerous offshoot of Darwin's theory comes from the phrase 'survival of the fittest,' which, as mentioned above, was not coined nor enthusiastically embraced by Darwin, but rather was created and used by Herbert Spencer. Spencer used the phrase to pursue what was eventually called social Darwinism, which was then used as scientific proof for eugenics (Mills, 2004). Eugenics was a term coined by Darwin's cousin, Francis Galton, and simply means 'good birth' (Mills, 2004). Galton was interested in the inheritance of intelligence and talent, and he suggested that 'good families' should be encouraged to have more children (Mills, 2004). Eugenics was embraced by a German scientist named Ernst Haeckel who used it to create what he termed biogenetic law. This law claimed that there was a hierarchy of genetic development with man, and in particular White Northern European man, at the top of the hierarchy (Mills, 2004). Perhaps the most obvious result of this research was that Adolf Hitler's adoption of Haeckel's biogenetic law led to horrific genocidal results during the Holocaust. However, even in the U.S., immigrants were screened to determine the worth of their genetic contributions to

America (Mills, 2004). Additionally, the United States practiced selective involuntary sterilization throughout most of the twentieth century in an attempt to ‘protect’ America’s gene pool (Mills, 2004). While the evil results of eugenics may have evolved from Darwin’s theories, they should be looked at as distinct entities. But this is a distinction that Fundamentalist Christians in the U.S. are often unwilling to make (see Mills, 2004).

The following cases detail the progression of the debate about teaching evolution, creationism and Intelligent Design in public schools.

#### *Legislative Efforts to Ban Evolution*

In the early 1900’s, some Fundamentalists began the task of removing or banning the teaching, or even the mention, of evolutionary theory in public schools. This was brought to a head in 1926 when the Supreme Court of Tennessee heard the infamous Scopes Monkey Trial (*Scopes v. State of Tennessee*, 1927). In this (3-1)<sup>18</sup> case John Scopes a public school teacher from Tennessee appealed from his earlier conviction of violating the state’s Anti-Evolution Act, which prohibited

the teaching of the evolution theory in all the Universities, normals and all other public schools in Tennessee, which are supported in whole or in part by the public school funds of the state... it shall be unlawful for any teacher in any of the Universities, normals and all other public schools of the state which are supported in whole or in part by the public school funds of the state, to teach any theory that denies the story of the divine creation of man as taught in the Bible and to teach instead that man has descended from a lower order of animals. (*Scopes v. State of Tennessee*, 1927, at 363)

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<sup>18</sup> Judge Swiggart did not participate in the decision.

Scopes' appeal to the Supreme Court of Tennessee claimed that the Anti-Evolution Act was vague and that its enforcement violated the Fourteenth Amendment to the U.S. Constitution, as well as the Education Clause and the Religion Clause of the Tennessee State Constitution.

Scopes argued that the Act was vague because it both banned the teaching of the theory of evolution in general and yet its application seemed to ban only the teaching of human evolution. For example, the Act initially forbade the teaching of evolutionary theory, which would mean that that a teacher would not be able to teach any type of evolutionary theory, even of the type contained in 'The Origin of the Species,' which does not delve into human evolution at all. But the Act then specifies that it is tailored to the ban of teaching human evolution in particular. So the unconstitutional vagueness that Scopes' claim put forth is that the Act did not make it clear as to whether he would be in violation of the law if he taught evolutionary theory of plants and animals other than humans. The Supreme Court of Tennessee seemed to acknowledge the vagueness stating that "[e]volution, like prohibition, is a broad term" (*Scopes v. State of Tennessee*, 1927, at 364). Yet, the court held that the Act was not vague because the only type of evolutionary theory that had led to "recent bickering" was the one that "holds that man has developed from some pre-existing lower type" (*Scopes v. State of Tennessee*, 1927, at 364). According to this reasoning, despite the wording of the Act, the court's holding made it legal for non-human evolutionary theory to be taught in public schools in Tennessee without violating of the law.

The court also held that the Act was not a violation of the Fourteenth Amendment's privileges and immunities clause, which would have made it illegal for the government to infringe upon Scopes' rights and privileges to work, and his freedom to teach. The court reasoned that since Scopes was under contract with the public school he was bound by the terms

that the state put forth under that contract. Thus, the state had the right to determine the curriculum that was to be taught in its public school and Scopes did not have the right to challenge that state ordered curriculum. The court reasoned that Scopes' ability or right to teach or promote the theory of evolution outside of school grounds was in no way affected by the restriction in the public school curriculum and because of that there was no Fourteenth Amendment violation.

The court then looked at Scopes' claim that the Act violated the Education Clause of the Tennessee Constitution which stated in relevant part, "It shall be the duty of the General Assembly in all future periods of this government, to cherish literature and science" (*Scopes v. State of Tennessee*, 1927, at 366). Scopes claimed that human evolution "is now established by the preponderance of scientific thought and that the prohibition of the teaching of such theory is a violation of the legislative duty to cherish science" (*Scopes v. State of Tennessee*, 1927, at 366). But the court found that the Education Clause was "too vague to be enforced by any court" and gave deference to the Legislature stating:

If the Legislature thinks that, by reason of popular prejudice, the cause of education and the study of science generally will be promoted by forbidding the teaching of evolution in the schools of the state, we can conceive of no ground to justify the court's interference. The courts cannot sit in judgment on such acts of the Legislature or its agents and determine whether or not the omission or addition of a particular course of study tends to cherish science. (*Scopes v. State of Tennessee*, 1927, at 366, internal quotations omitted)

Finally, the court addressed Scopes' claim that the Act violated the Religion Clause of the Tennessee Constitution which stated in relevant part "that no preference shall ever be given,

by law, to any religious establishment or mode of worship” (*Scopes v. State of Tennessee*, 1927, at 366). Once again the court found no violation. Using Critical Religious Legal Theory to understand the court’s reasoning on this point it is important to keep this case in the context of the times. When this case was decided in 1927, prayer was still legal in public schools because the Supreme Court had not yet heard *Engle v. Vitale* (1962) (discussed in Chapter 2). Because of this the court held that since the scientific theory of evolution was not a major tenant of any particular religion, suppressing it was not a violation of Tennessee’s Religion Clause. This was premised on the fact that no religious theory of human origins was required to be taught in the public school system. Specifically the court reasoned that even if the Biblical story of Creation was included in the Bible readings that were required to be read at the beginning of every school day in Tennessee public schools at that time, it would not be part of the academic curriculum, and because of that it would not count as instruction about the origins of humans. It is possible that if Creationism was being taught in the Tennessee public schools regularly, rather than in passing as part of the daily Bible readings, the court may have held that suppressing the theory of evolution was a violation of the Religion Clause because it would have preferred Christian version of the origins of humans. Or the court may have decided the same way since it would still be the case that the scientific theory of evolution was not linked to a particular religion and keeping it out of the curriculum would not have hindered a religion.

The court felt it necessary to stress that the Act “deals with nothing but the evolution of man from a lower order of animals” (*Scopes v. State of Tennessee*, 1927, at 367). And though the court never went into detail about what it meant by that statement it seems to say that the theory of evolution was not completely banned from the Tennessee public school curriculum, only

human evolution was banned from the curriculum. Thus, as stated above, plant evolution or non-human animal evolution could legally be taught in public schools in Tennessee.

Though the court ruled against all of Scopes' claims it ultimately held that "We see nothing to be gained by prolonging the life of this bizarre case. On the contrary, we think the peace and dignity of the state, which all criminal prosecutions are brought to redress, will be the better conserved by the entry of a nolle prosequi herein" (*Scopes v. State of Tennessee*, 1927, at 367). A holding of nolle prosequi means that the case was to be dropped, and directly translates from Latin as, "we shall no longer prosecute."

This case is important in part because of its notoriety; it was intended, from the beginning, to be a media event (see Mills, 2004). The ACLU specifically sought out a public school science teacher who would agree to challenge the law in an attempt to push back against the Fundamentalist pressure to restrict the teaching of evolution in public schools. Unlike many cases that remain out of the public eye, this one was known about throughout the world. And the decision against Scopes also meant that teaching human evolution remained illegal in Tennessee and the case provided precedence to support Fundamentalists' desire to keep human evolution out of the curriculum. But Tennessee's holding in this area was only the beginning of the almost century long battle between the proponents of the scientific theory of evolution and the proponents of the religious theories of creation and Intelligent Design. In fact, laws restricting instruction remained in states like Tennessee, Arkansas and Mississippi until the late 1960's, as states adjusted to the Supreme Court's decision in *Engle v. Vitale* (1962) to ban school sponsored prayer (see Mills, 2004).

The state of Arkansas, like a number of states with citizens who have historically had relatively homogeneous religious beliefs, has a long history of official opposition to evolution

which is motivated by adherence to Fundamentalist beliefs in the inerrancy of the Book of Genesis (see *Epperson v. Arkansas*, 1968; *McLean, et al. v. Arkansas Board of Education*, 1982). In the (9-0) decision in *Epperson v. Arkansas* (1968) the Supreme Court invalidated a state law that barred the teaching of 'Darwin's theory of evolution' because, although the statute obviously did not coerce anyone to support religion or participate in any religious practice, it was enacted for a singularly religious purpose. In this case an Arkansas statute made it illegal for public school teachers, including public university professors, "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals,' or 'to adopt or use in any such institution a textbook that teaches' this theory" (*Epperson v. Arkansas*, 1968, at 98-99). Violation of the statute was a misdemeanor and subjected the teacher to dismissal from his/her position. A biology teacher at a public high school challenged the law because her school district required her to use a textbook which included evolutionary theory, and yet doing so could subject her to criminal charges. A parent with children in the district joined her.

The Court felt that the statute sought to prevent teachers from discussing the theory of evolution because it was contrary to the belief of many of Arkansas citizens that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. The Court stated, "[i]t is clear that fundamentalist sectarian conviction was and is the law's reason for existence" (*Epperson v. Arkansas*, 1968, at 108). Despite the fact that there was support for the statute amongst a large segment of the population who felt that teaching evolution was offensive to their religious views, the Court still felt that it was a violation of the Establishment Clause because it favored the religious beliefs of the majority over a scientific theory. The Court focused on neutrality reasoning that:

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. (*Epperson v. Arkansas*, 1968, at 103-104)

The Court also invoked neutrality precedence from *McCullum v. Board of Education* (1948) and stated:

While study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition, the State may not adopt programs or practices in its public schools or colleges which aid or oppose any religion. This prohibition is absolute. It forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma.

(*Epperson v. Arkansas*, 1968, at 106-107, *internal citations and quotes omitted*)

The Court ruled that though the State certainly has the right to decide the curriculum for its public school this right does not allow it to attach criminal charges to the prohibition of teaching a scientific theory when the prohibition is found to be unconstitutional. The Court stated:

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

contrary to the mandate of the First, and in violation of the Fourteenth, Amendment to the Constitution. (*Epperson v. Arkansas*, 1968, at 109)

It should be noted that in his concurring opinion Justice Black stated that he did not see the motives of the proponents of the Arkansas Law to be as clear cut as the Majority felt it to be.

Justice Black reasoned that:

It may be instead that the people's motive was merely that it would be best to remove this controversial subject from its schools; there is no reason I can imagine why a State is without power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools. (*Epperson v. Arkansas*, 1968, at 112-113)

However, despite Justice Black's misgivings about the certainty of the intentions behind the Arkansas Statute, both he and Justice Stewart, in a separate concurring opinion, felt that the law should be struck down for vagueness. The Justices felt that under the wording of the Statute a teacher would not be able to figure out whether it was only illegal to teach evolution as a truth or if it was also illegal to mention that the theory of evolution exists without contending that it is true. This uncertainty would deny a public school teacher due process since he or she may not be able to figure out how to educate without breaking the law.

This case is important because the Supreme Court 'unanimously'<sup>19</sup> held that it is not a crime to teach the scientific theory of evolution in any public school in the U.S. and that teachers

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<sup>19</sup> I place the word 'unanimously' in quotes because although all 9 of the Justices concurred with the holding, Justices Black, Harlan and Stewart wrote separate concurring opinions which showed that they arrived at the holding for somewhat different reasons than were detailed in the Majority opinion.

do not have to modify their instruction with regard to the theory of evolution despite the fact that it may be incompatible with a student's or a community's religious beliefs.

Using Critical Religious Legal Theory to analyze the legal shift in the outcomes of these two cases draws attention to the social and political atmosphere surrounding the religion clause rulings as they related to public schools during that time. As previously mentioned, when *Scopes* (1925) was decided state-sponsored prayer was still legally permitted in public schools. Between the *Scopes* decision, which ruled against instruction in human evolution in public school science classrooms, and the *Epperson* (1968) ruling, which held that instruction in evolutionary theory in public school science classrooms is not crime, the religious legal landscape had shifted. This shift was due in large part to the Supreme Court's ruling in *Engle v. Vitale* (1962), which held that state sponsored prayer is unconstitutional in public schools. This political shift affected the social climate with regard to religion and public schools as many Protestant religious conservatives felt attacked and felt as if they were losing fundamental rights, and public schools were left trying to balance the demands of the law with public sentiment (see Fraser, 1999).

#### *Balanced Treatment*

Since the Supreme Court had unanimously ruled in *Epperson v. Arkansas* (1968) that banning instruction in evolutionary theory in science class was a First Amendment violation the religious conservative effort shifted to demand equal time for instruction in evolution and creationism.

In 1975, the U.S. Court of Appeals heard *Daniel v. Waters*, which arose from yet another legislative effort in Tennessee (home of the *Scopes* monkey trial) to suppress the study of the theory of evolution in public schools. In 1974, Tennessee amended its statutory code to add the following:

Any biology textbook used for teaching in the public schools, which expresses an opinion of, or relates a theory about origins or creation of man and his world shall be prohibited from being used as a textbook in such system unless it specifically states that it is a theory as to the origin and creation of man and his world and is not represented to be scientific fact. Any textbook so used in the public education system which expresses an opinion or relates to a theory or theories shall give in the same text-book and under the same subject commensurate attention to, and an equal amount of emphasis on, the origins and creation of man and his world as the same is recorded in other theories, including, but not limited to, the Genesis account in the Bible. ...The teaching of all occult or satanical beliefs of human origin is expressly excluded from this Act. ...the Holy Bible shall not be defined as a textbook, but is hereby declared to be a reference work and shall not be required to carry the disclaimer above provided for textbooks. (*Daniel v. Waters*, 1975, at 487)

The Court of Appeals called this law “a 1974 version of the legislative effort to suppress the theory of evolution which produced the famous Scopes “monkey trial” of 1925” (*Daniel v. Waters*, 1975, at 486-487). Parents, biology teachers and the National Association of Biology Teachers sued members of the Tennessee School Board who were responsible for textbook selection.

Though the statute did not forbid the teaching of evolution the Court of Appeals still held 2-1 that the statute was unconstitutional. The court stated that while courts generally have no authority to intervene in the day to day activities of public schools, “(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools...”

and "...the First Amendment does not tolerate laws that cast a pall of orthodoxy over the classroom" (*Daniel v. Waters*, 1975, at 490, internal citations omitted). The court used the Lemon Test to determine whether the statute violated the Establishment Clause. The court first addressed the statute's demand that if evolution was taught it would need to have the disclaimer mentioned above, as would any other lesson on origins except for the Biblical account of creation set out in Genesis. The court held that it was clear that the legislation showed a preference for the Biblical version of creation as opposed to a scientific version. For the state to enforce this preference was a violation of the First Amendment's Establishment Clause. The court found that the disclaimer and waiver violated the first (purpose) and second (effect) prongs of the Lemon Test. Additionally, the court found that the statute violated the third (excessive government entanglement) prong because of the statute's ban on the "teaching of all occult or satanical beliefs of human origin":

would inextricably involve the State Textbook Commission in the most difficult and hotly disputed of theological arguments... Throughout human history the God of some men has frequently been regarded as the Devil incarnate by men of other religious persuasions. It would be utterly impossible for the Tennessee Textbook Commission to determine which religious theories were "occult" or "satanical" without seeking to resolve the theological arguments which have embroiled and frustrated theologians through the ages. (*Daniel v. Waters*, 1975, at 491)

The Court of Appeals held that the statute failed all three prongs of the Lemon Test and violated the Establishment Clause. The court then sent its decision back to the district court for an order to the textbook commission to immediately stop following the demands of the statute. The district court agreed with the holding of the Court of Appeals and added:

the court feels compelled to comment that the provisions of the statute that equal attention and emphasis be given to all other theories of the origin and creation of life and the universe are patently unreasonable. A casual reference to the literature of cosmogony shows that there is a myriad of recorded theories of creation. Every religious sect, from the worshipers of Apollo to the followers of Zoroaster, has its belief or theory. It is beyond the comprehension of this court how the legislature, if indeed it did, expected that all such theories could be included in any textbook of reasonable size, or even that the authors of such textbook could know that all theories had in fact been included. (*Daniels v. Waters*, 1975, 511-512)

This is the only case where a judge went into detail about the existence of multiple religious beliefs about creation. Other decisions briefly noted that there was the false dichotomy in the claim that the only alternative to evolution was creation/Intelligent Design, but failed to address the specifics of the dichotomy from a religious point of view (see *Edwards v. Aguillard*, 1987; *Kitzmiller, et al. v. Dover Area School District, et al.*, 2005; *McLean, et al. v. Arkansas Board of Education*, 1982).

Using Critical Religious Legal Theory to analyze the social and political atmosphere at the time the case was decided draws attention to the fact that because this case was decided in a time when this area of controversy was making its way to center stage the Court of Appeals very clearly laid out its First Amendment neutrality analysis stating:

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

Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. As early as 1872, this Court said: ‘The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.’ (*Daniel v. Waters*, 1975, at 490)

This reasoning means that even if the scientific theory of evolution was seen by some as an attack on a particular religious belief, the government could not aid the ‘attacked’ religious belief by requiring equal curricular time for a religious response to the “attack.” The court then gave a nod to multicultural religious education, reasoning that:

[w]hile study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition, the State may not adopt programs or practices in its public schools or colleges which aid or oppose any religion. This prohibition is absolute. It forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma. . . . the state has no legitimate interest in protecting any or all religions from views distasteful to them . . . (*Daniel v. Waters*, 1975, at 490-491, internal citations and quotations omitted)

This case was important because it showed that almost 50 years after *Scopes v. State of Tennessee* (1927) was decided, the issue of teaching evolution was still as hotly contested in Tennessee as it was in many parts of the United States. And in those years the Tennessee courts shifted their First Amendment analysis from one where Christian prayer was permitted in schools to one where school sponsored prayer violated the demands for neutrality under the law.

However, because this was not a Supreme Court case the ruling was not binding on the entire United States, and so the debate raged on.

In *McLean, et al. v. Arkansas Board of Education* (1982), a high school biology teacher, several parents of children attending Arkansas schools, bishops, clergy and other principal officials of several religious organizations in Arkansas, as well as representatives from a number of national Jewish and educational organizations on behalf of their members who lived in Arkansas, challenged the constitutionality of what was called the, "Balanced Treatment for Creation-Science and Evolution-Science Act" or the "Model Act," which was passed in 1981. The complaint was threefold: first, it claimed that the Act violated the Establishment Clause of the First Amendment. Second, the complaint claimed the Act violated the First Amendment's Free Speech Clause because it limited students' and teachers' rights to academic freedom. And finally the complaint alleged that the Act violated the Fourteenth Amendment Due Process Clause because it was impermissibly vague.

The "Model Act" which became Act 590 was drafted by Paul Ellwanger, a respiratory therapist, who, the court was sure to point out, was "trained in neither law nor science" (*McLean, et al. v. Arkansas Board of Education*, 1982, at 1261). In line with Critical Religious Legal Theory, the court stressed that because he drafted the "Model Act" his intent and understanding of creation science is important. The court then noted that "Mr. Ellwanger's correspondence on the subject shows an awareness that Act 590 is a religious crusade, coupled with a desire to conceal this fact" (*McLean, et al. v. Arkansas Board of Education*, 1982, at 1261). And the court stated that his ultimate purpose was to end the creationism vs. evolution debate by "killing evolution" (*McLean, et al. v. Arkansas Board of Education*, 1982, at 1262). Specifically, the court found that his drafting and his campaign for the "Model Act's" adoption "was motivated

by his opposition to the theory of evolution and his desire to see the Biblical version of creation taught in the public schools” (*McLean, et al. v. Arkansas Board of Education*, 1982, at 1263). Additionally the court found that Mr. Ellwanger revised the “Model Act” at some point to substitute the word “creationism” with "creation science" because he felt that people would see creationism as “too religious a term” (*McLean, et al. v. Arkansas Board of Education*, 1982, at 1262).

The court also found no evidence that the most vocal and influential supporters of the “Model Act”, including its Congressional sponsor Senator Holstead, were motivated by anything other than their religious convictions when proposing its adoption and during their intense lobbying efforts in its behalf. The court felt that there could be no doubt that Senator Holsted knew that he was sponsoring the teaching of a religious doctrine in public schools and that he attempted to skirt the issue of First Amendment entanglement by claiming that it did not favor one religious denomination over another.

The court then went into a detailed discussion of the contents of the “Model Act” and found that the Act’s definition of “creation science” was inherently religious, even though it did not name God as the creator, since it referenced the first 11 chapters of the Book of Genesis. The court found that the argument that the absence of a supernatural deity in the ‘creation from nothing’ reference in the “Model Act” did not make it religiously neutral. The court stated:

... "creation out of nothing" is a concept unique to Western religions. In traditional Western religious thought, the conception of a creator of the world is a conception of God. Indeed, creation of the world "out of nothing" is the ultimate religious statement because God is the only actor. ... [T]he Act refers to one who has the power to bring all the universe into existence from nothing. The only "one" who

has this power is God. (*McLean, et al. v. Arkansas Board of Education*, 1982, at 1265)

The court held that, “(C)oncepts concerning ... a supreme being of some sort are manifestly religious ... These concepts do not shed that religiosity merely because they are presented as philosophy or as a science...” (*McLean, et al. v. Arkansas Board of Education*, 1982, at 1265, citing *Malnak v. Yogi*, 1977, at 1322). Additionally, the court found the argument that it is not a First Amendment violation to teach students about the ‘truth’ of the existence of God unless the lesson asks for students to commit to a particular religion to be unconvincing.

The court also held that ‘creation science’ lacks educational scientific value and that its inclusion in the science curriculum would have serious adverse consequences for students, especially those who planned to attend college. The court held that “creation science” is a misnomer and is not science because it depends upon a supernatural intervention which is not guided by natural law, is not explainable by natural law, is not testable and is not falsifiable. The court went even further to state that “creation science” fails to fit the general descriptions of “what scientists think” and “what scientists do” (*McLean, et al. v. Arkansas Board of Education*, 1982, at 1268). The court pointed out that scientists come from varied fields and that their research, findings, hypotheses and theories are published and peer reviewed. The court stated that, “[t]here is, however, not one recognized scientific journal which has published an article espousing the creation science theory described in [the Act]” (*McLean, et al. v. Arkansas Board of Education*, 1982, at 1268). The court also held that a scientific theory needs to be falsifiable and must always be subject to revision or abandonment in light of new facts. The so called ‘creation science theory’ which is “dogmatic, absolutist and never subject to revision...regardless of the

evidence developed during the course of the investigation” cannot be a scientific theory (*McLean, et al. v. Arkansas Board of Education*, 1982, at 1269).

Further, the court held that the State failed to produce any evidence that would prove anyone had researched or even considered the legitimate educational value of the “Model Act”. “It was simply and purely an effort to introduce the Biblical version of creation into the public school curricula. The only inference which can be drawn from these circumstances is that the Act was passed with the specific purpose by the General Assembly of advancing religion” (*McLean, et al. v. Arkansas Board of Education*, 1982, at 1264). Therefore, the court ruled that the “Model Act” failed the first prong of the three-pronged test articulated in *Lemon v. Kurtzman* (1971), since it was not enacted with a secular purpose.

Critical Religious Legal Theory requires that the social and political atmosphere at the time of the case be taken into account when critically analyzing the court’s ruling. In this case the court acknowledged that the vast majority of Americans either believe in the idea of a Creator, or at least are not opposed to it, and because of this the majority may see nothing wrong with a religious theory being taught in public schools. But the court’s ruling reminds us that the “[t]he application and content of First Amendment principles are not determined by public opinion polls or by a majority vote. ...No group, no matter how large or small, may use the organs of government, of which the public schools are the most conspicuous and influential, to foist its religious beliefs on others” (*McLean, et al. v. Arkansas Board of Education*, 1982, at 1274).

Even though this was not a Supreme Court decision, the holding is important because the federal district court, in no uncertain terms declared that creationism, even when called ‘creation science,’ is not science. The court also found that the theory of evolution is science. The court

then synthesized these two findings to hold that because evolution is science and creationism is not, science teachers must not teach creationism in science classes in public schools even if the majority of the population wishes for it to be taught. However, the court opened the door to further challenges by holding that other *scientific* theories may be taught alongside evolution to refute it or expand upon it.

A few years later the Supreme Court heard the case of *Edwards v. Aguillard* (1987) and in a (7-2) decision the Court confirmed the holding of the federal district court in *McLean, et al. v. Arkansas Board of Education* (1982). In this case Louisiana had a 'Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction' Act which forbade the teaching of evolution in public elementary and secondary schools unless it was accompanied by instruction of "creation science." Parents, teachers, and religious leaders challenged the Act's constitutionality under the First Amendment's Establishment Clause. The Louisiana officials who were charged with enforcing the Act claimed that its primary purpose was to protect academic freedom, which is secular. Writing for the Majority, Justice Brennan noted the importance of the school children's status as a captive, and impressionable, audience stating:

The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families 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 and his or her family. Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of

teachers as role models and the children's susceptibility to peer pressure.

(*Edwards v. Aguillard*, 1987, at 583-584, internal citations omitted)

The Supreme Court used the three-pronged *Lemon Test* (1971) to determine whether the Act complied with the Establishment Clause, and found that it failed the first (secular primary purpose) prong of the test. The Court held that governmental intent to promote religion can be found when the State enacts a law to serve a religious purpose, and that this intent can be inferred by the promotion of religion in general, or by advancing a particular religious belief (see *Epperson v. Arkansas*, 1968; *Stone v. Graham*, 1980; *Wallace v. Jaffree*, 1985). In this case the Court rejected the argument that the primary purpose of the Act was to encourage academic freedom and found “no clear secular purpose for the Louisiana Act” (*Edwards v. Aguillard*, 1987, at 585). The Court reasoned that:

[Academic freedom] might, in common parlance, be understood as referring to enhancing the freedom of teachers to teach what they will. ...the Act was not designed to further that goal. ...Even if academic freedom is read to mean teaching all of the evidence with respect to the origin of human beings, the Act does not further this purpose. The goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science. (*Edwards v. Aguillard*, 1987, at 586, internal quotations omitted)

The Court found that it was also clear that academic freedom was not enhanced by requiring schools to teach creation science with evolution since teachers already had the freedom to teach multiple scientific theories about the origins of life. The Act, rather than granting teachers new authority, was actually restricting their academic freedom by forcing them to teach a religious theory in a science class. Further, in line with Critical Religious Legal Theory, the

Court analyzed the motives of the proponents of the Act and found that it was “clear from the legislative history that the purpose of the legislative sponsor, Senator Bill Keith, was to narrow the science curriculum” (*Edwards v. Aguillard*, 1987, at 587). The Dissent, written by Justice Scalia and joined by Chief Justice Rehnquist, felt that the Majority erred in looking at whether academic freedom would be achieved by the Act, “what is crucial is not their *wisdom* in believing that purpose would be achieved by the bill, but their *sincerity* in believing it would be” (*Edwards v. Aguillard*, 1987, at 621). The Supreme Court also found that there was nothing fair about the Act's discriminatory preference for the teaching of creation science over the teaching of evolution. The Court stated that it was not balanced treatment to require that curriculum guides be developed, and resource services be supplied for creation science, while leaving out the same requirement for evolution. The Court found that the Act also forbade school boards from discriminating against anyone who "chooses to be a creation-scientist" or who chooses to teach "creationism," but failed to demand the same protections “for those who choose to teach evolution, or any other non-creation scientific theory, or for those who refuse to teach ‘creation science’” (*Edwards v. Aguillard*, 1987, at 588).

With regard to the legislative history the Court looked again at the testimony of the sponsor of the Act, Senator Keith, who had testified that “his disdain for the theory of evolution resulted from the support that evolution supplied to views contrary to his own religious beliefs” (*Edwards v. Aguillard*, 1987, at 592). Senator Keith also stated that he believed the theory of evolution to be in line with the "cardinal principle[s] of religious humanism, secular humanism, theological liberalism, atheism [*sic*]" (*Edwards v. Aguillard*, 1987, at 592). And Senator Keith felt that because the theory of evolution complemented these religious views “scientific evidence supporting his religious views should be included in the public school curriculum”

(*Edwards v. Aguillard*, 1987, at 592). But the Court did not give credence to the religiosity of the scientific theory of evolution simply because it coincided with some of the tenants of humanism, atheism, etc.<sup>20</sup> The Court held that:

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<sup>20</sup> Seven years earlier the US Court of Appeals decided *Crowley v. Smithsonian Institute* (1980) where two creationist organizations, the National Foundation for Fairness in Education and National Bible Knowledge, Inc, brought suit against the Smithsonian Institution and two Smithsonian employees for using federal funds for two exhibits containing references to evolution at the Smithsonian's Museum of Natural History. One of the exhibits was entitled "The Emergence of Man," the other one showcased "the diversity of life on Earth, the adaptation of plant and animal life to their environments, and the way in which organisms change over time in response to environmental and other influences" (*Crowley v. Smithsonian Institute*, 1980, at 740). The complainants felt that the use of federal funds for this exhibit "violated the first amendment's prohibition against the establishment of religion and inhibited [their] free exercise of their religion" by "unconstitutionally support[ing] the religion of Secular Humanism" (*Crowley v. Smithsonian Institute*, 1980, at 740). They demanded that the court either prohibit the use of federal funding for the exhibits or, that the court require that the museum commit equal funds to a creationism exhibit in line with the Biblical account in Genesis. The U.S. Court of Appeals held that:

Application of the Supreme Court's caution to this case necessarily requires a balance between appellants' freedom to practice and propagate their religious beliefs in creation without suffering government competition or interferences and appellees' right to disseminate, and the public's right to receive, knowledge from government, through schools and other institutions such as the Smithsonian. This balance was long ago struck in favor of diffusion of knowledge based on responsible scientific foundations, and against special constitutional protection of religious believers from the competition generated by such knowledge diffusion. (*Crowley v. Smithsonian Institute*, 1980, at 744)

The court concluded that the exhibits in question were not impermissible simply because "their message may coincide or harmonize with a tenet of Secular Humanism or may be repugnant to creationism" (*Crowley v. Smithsonian Institute*, 1980, at 742-743). The court thus held that identifying one religious group that espoused evolution as one of its tenets is did not constitute a violation of the Establishment Clause because the theory of evolution had a "widely disseminated, responsible, secular endorsement" (*Crowley v. Smithsonian Institute*, 1980, at 743). In ruling against the creationist organizations, and finding that the financing and the display of the exhibits was within the museum's statutory authority, the court stated:

The solid secular purpose of the exhibits is apparent from their context and their elements. They did not materially advance the religious theory of Secular Humanism, or sufficiently impinge upon [the complainants'] practice of theirs to justify interdiction. Except insofar as appellants have themselves entangled

The Louisiana Creationism Act advances a religious doctrine by requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety. The Act violates the Establishment Clause of the First Amendment because it seeks to employ the symbolic and financial support of government to achieve a religious purpose. (*Edwards v. Aguillard*, 1987, at 596-597)

The financial support that the court referred to in this quote is the use of taxes to fund religious instruction in public schools. The Dissent did not believe that creation science would be religious instruction because the State presented experts who “swear that [creation science] is essentially a collection of scientific data supporting the theory that the physical universe and life within it appeared suddenly, and have not changed substantially since appearing,” (*Edwards v. Aguillard*, 1987, at 612). The Dissent then cites these experts making falsely dichotomous arguments such as: “Since there are only two possible explanations of the origin of life, any evidence that tends to disprove the theory of evolution necessarily tends to prove the theory of creation science, and vice versa” (*Edwards v. Aguillard*, 1987, at 622). As previously stated, it is not factual to state that there are only two possible explanations for the origins of life. In fact many religions have their own origins explanations (see *Daniel v. Waters*, 1975; Thomas, 2007).

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religion in the exhibits, there is no religious involvement... (*Crowley v. Smithsonian Institute*, 1980, at 744)

The court limited its ruling stating that the:

approval of financial support of the exhibits here at issue would not foreclose a conclusion in some other case that government financial support of a theory of the origin of life advocated by religious groups, but with less substantial support from secular research and scholarship, would be impermissible establishment of religion. (*Crowley v. Smithsonian Institute*, 1980, at 743)

To claim that the Fundamentalist Christian version of origins is the only one that exists is to prefer Fundamentalist Christian “truths” over other religious “truths.” The majority of the Court held that, as in *Epperson* (1968), the legislature passed the Act to give preference to Fundamentalist religious groups that believe in “the creation of humankind by a divine creator” (*Edwards v. Aguillard*, 1987, at 593).

This case is important because it held that creationism/creation science, because it is a religious doctrine—not science, may not be taught alongside evolution in public school science classrooms. However, the Supreme Court echoed the reasoning of the court in *Epperson* (1968), *supra*, stating that:

teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction. But because the primary purpose of the Creationism Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause. (*Edwards v. Aguillard*, 1987, at 594)

Science classrooms in public schools are not the only places where conflicts arise surrounding teaching creationism/creation science. In *Webster v. New Lenox School District* (1990), Mr. Webster, a (public) junior high school social studies teacher, brought a claim stating that the New Lenox School District violated his First and Fourteenth Amendment Free Speech rights by prohibiting him from teaching creationism in his classroom. Mr. Webster’s argument was that he taught creationism to rebut the textbook’s claim that the world is over four billion years old. He felt that his lessons were designed to help his students to develop open questioning minds. However, despite Mr. Webster’s additional assertion that he was teaching multiple

alternative viewpoints it was shown that he only taught one Christian fundamentalist theory of creation. Mr. Webster was told by the school's superintendent that he could not advocate a Christian viewpoint in his history class by teaching creationism, but that he could, when appropriate to the curriculum, objectively discuss the historical relationship between church and state.

The Appellate Court held that it was clear from this statement that Mr. Webster's Free Speech rights were not being inhibited because the superintendent specifically explained that it was his religious advocacy that was banned, not his objective, historical lessons on church/state relations. The court found that the First Amendment is "not a teacher license for uncontrolled expression at variance with established curricular content" (*Webster v. New Lennox School District*, 1990, at 1007, citing *Palmer v. Board of Education*, 1979, at 1273). The court invoked Supreme Court precedence from *Edwards v. Aguillard* (1987), *supra*, stating that:

Clearly, the school board had the authority and the responsibility to ensure that Mr. Webster did not stray from the established curriculum by injecting religious advocacy into the classroom. Families 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 and his or her family. (*Webster v. New Lennox School District*, 1990, at 1007, internal quotations omitted)

Additionally, the court noted the captive audience status of the students and the fact that:

[a] junior high school student's immature stage of intellectual development imposes a heightened responsibility upon the school board to control the curriculum... secondary school teachers occupy a unique position for influencing

secondary school students, thus creating a concomitant power in school authorities to choose the teachers and regulate their pedagogical methods.

(*Webster v. New Lennox School District*, 1990, at 1007, internal citations omitted)

The Appellate Court ruled (3-0) against Mr. Webster holding that, “[g]iven the school board's important pedagogical interest in establishing the curriculum and legitimate concern with possible establishment clause violations, the school board's prohibition on the teaching of creation science to junior high students was appropriate” (*Webster v. New Lennox School District*, 1990, at 1008). Though this was not a Supreme Court case it is important because it extended the prohibition, on teaching creation science or creationism as truth, beyond the science classroom. This case also held that the right to free speech is not extended to the right to advocate creationism/creation science in public schools.

Using Critical Religious Legal Theory to analyze these “equal time” cases draws attention to the fact that the cases all revolve around the generally accepted Christian norm that according to Genesis, God created the earth and its inhabitants suddenly and their completed forms. And because of this religious ‘truth’ all four of the cases analyzed focused on the false dichotomous argument that there are only two theories of origins, the religious theory of Creation and the scientific theory of evolution. A false dichotomous argument mistakenly assumes that there are only 2 possible choices and thus, if one is wrong the other must be right. For many of those who subscribe to the religious theory of origins Biblical truths are absolute and cannot be questioned or disproved. Because of this, the scientific theory of evolution is seen as a challenge to these religious truths and is something to be discredited. By contrast, the scientific theory of evolution does not seek truth, it seeks to explain natural phenomena. In line with science is falsifiable, and is subject to amendment when new scientific discoveries are

made. The non-absolute character of science is what many proponents of Creation cling to in their arguments for why evolution is “just a guess” and should not be taught or should be balanced with a religious ‘truth’. But this character is simply one of a multitude of differences between science and religion and is part of the reason why religious theories have been judicially banned from public school science classrooms.

*Evolution(ism)*

In *Peloza v. Capistrano Unified School District* (1993), Mr. Peloza, a public high school biology teacher, sued the Capistrano Unified School District and various individuals connected with the school district under 42 U.S.C. § 1983 (a civil action based on a due process claim of the deprivation of rights) alleging that the school district required him to teach "evolutionism," which he claimed was a religious belief system, in violation of his rights under the U.S. Constitution's First Amendment Free Speech and Establishment Clauses, the Due Process Clause of the Fourteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment (he abandoned his equal protection argument on appeal). Peloza also claimed that the school district conspired to deprive him of his civil rights and privileges, in violation of 42 U.S.C. § 1985(3), because it “attempted by harassment and intimidation to force him to teach evolutionism. ... because they have a class-based animus against practicing Christians, a class of which he is a member” (*Peloza v. Capistrano Unified School District*, 1993, at 519). His final claims were that the school district violated California's Tom Bane Civil Rights Act, which protects individuals from interference with their rights secured by the United States or California Constitution or by federal or state law, and for the intentional infliction of emotional distress.

The Appellate Court dismissed (3-0)<sup>21</sup> all of Pelozo's claims. The court provided a summary of Pelozo's complaint which stated that he feels:

He is being forced by the defendants (the school district, its trustees and individual teachers and others) to proselytize his students to a belief in evolutionism under the guise of [it being] a valid scientific theory. Evolutionism is an historical, philosophical and religious belief system, but not a valid scientific theory. Evolutionism is one of two world views on the subject of the origins of life and of the universe. The other is creationism which also is a religious belief system. The belief system of evolutionism is based on the assumption that life and the universe evolved randomly and by chance and with no Creator involved in the process. The world view and belief system of creationism is based on the assumption that a Creator created all life and the entire universe. Pelozo does not wish to promote either philosophy or belief system in teaching his biology class. The general acceptance of ... evolutionism in academic circles does not qualify it or validate it as a scientific theory. ... His first amendment rights have been abridged by interference with his right to teach his students to differentiate between a philosophical, religious belief system on the one hand and a true scientific theory on the other. (*Pelozo v. Capistrano Unified School District*, 1993, at 519)

Pelozo claimed that the Establishment Clause was violated because the school district required that he teach 'evolutionism' which he believed to be a religious belief system, as a valid scientific theory. Pelozo claimed that evolutionism is not a valid scientific theory because it is

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<sup>21</sup> Judge Poole voted to affirm in part and reverse in part.

based on events which "occurred in the non-observable and non-recreatable past and hence are not subject to scientific observation" (*Peloza v. Capistrano Unified School District*, 1993, at 520). The Appellate Court directly addressed Peloza's use of the term "evolutionism" to denote its religious entanglement stating:

[a]dding "ism" does not change the meaning nor magically metamorphose "evolution" into a religion. "Evolution" and "evolutionism" define a biological concept: higher life forms evolve from lower ones. The concept has nothing to do with *how* the universe was created; it has nothing to do with whether or not there is a divine Creator (who did or did not create the universe or did or did not plan evolution as part of a divine scheme). (*Peloza v. Capistrano Unified School District*, 1993, at 521)

Using the *Lemon Test* the Appellate Court rejected Peloza's claim that "the school district's actions establish a state-supported religion of evolutionism, or more generally of 'secular humanism,'" holding that "neither the Supreme Court, nor this circuit, has ever held that evolutionism or secular humanism are "religions" for Establishment Clause purposes" (*Peloza v. Capistrano Unified School District*, 1993, at 521). The Appellate Court may have erred in stating that the Supreme Court has never declared secular humanism to be a religion (see *Torcaso v. Watkins*, 1961), but it was correct in stating that the Supreme Court has never declared evolution to be a religion (see *Edwards v. Aguillard*, 1987). The court reasoned that the only way for Peloza's claim to have merit would be for the accepted scientific definition and common understanding of evolution to be changed to Peloza's religious definition. The court refused to accept Peloza's definition stating, "[t]o say red is green or black is white does not make it so" (*Peloza v. Capistrano Unified School District*, 1993, at 521). Looking at the holding in *Edwards*

*v. Aguillard* (1987), the court stated that “[t]he Supreme Court has held unequivocally that while the belief in a divine creator of the universe is a religious belief, the scientific theory that higher forms of life evolved from lower forms is not” (*Peloza v. Capistrano Unified School District*, 1993, at 521). The Appellate Court affirmed the district court’s holding that because evolution is not a religion it is not a violation of the Establishment Clause for a public school to require a teacher to include evolution in the science curriculum. The court stated that:

Evolution is a scientific theory based on the gathering and studying of data, and modification of new data. It is an established scientific theory which is used as the basis for many areas of science. As scientific methods advance and become more accurate, the scientific community will revise the accepted theory to a more accurate explanation of life's origins. Plaintiff's assertions that the teaching of evolution would be a violation of the Establishment Clause is (sic) unfounded (*Peloza v. Capistrano Unified School District*, 1993, at 521-522).

The court then moved on to *Peloza*’s claim that his free speech rights were violated by a letter from his school district directing him to refrain from attempting to convert students to Christianity and/or from initiating conversations with students about his religious beliefs during class time, immediately before or after school. Finding no First Amendment Free Speech violation the Appellate Court reasoned that while the school district was restricting his right to free speech it was doing so solely to avoid an Establishment Clause violation. The Appellate Court also dismissed *Peloza*’s §1983, §1985(3) and state law violation claims. With regard to *Peloza*’s §1983 claim, which required proof of a violation of due process through the “deprivation of a life, liberty or property interest within the meaning of the Fourteenth Amendment's Due Process Clause,” the court found *Peloza*’s claims of an injury to his

reputation, a liberty interest, to be insufficient (*Pelozza v. Capistrano Unified School District*, 1993, at 523). The court cited Supreme Court precedence from *Siegert v. Gilley* (1991), stating “the Court laid to rest the notion that reputation alone is a sufficient interest to give rise to due process rights” (*Pelozza v. Capistrano Unified School District*, 1993, at 523). Additionally, Pelozza’s §1985(3) claims rested on a claim of a conspiracy of individuals within the school district to deprive him of the rights in the claims that the Appellate Court had already dismissed. Since it was found that none of his rights were violated the court found no conspiracy to violate his rights. Finally, Pelozza’s state law claims were all dependent upon a showing of federal law violations which were all dismissed, so his state law claims were dismissed too.

Though this was not a Supreme Court case this holding is important because it dismissed the claim that the scientific theory of evolution becomes a religious theory simply by referring to it as ‘evolutionism’ and calling it a religious doctrine. This case also held that public schools can require science teachers to teach the theory of evolution even if conflicts with the teachers’ religious views.

#### *Disclaimers*

The final set of cases in this area of law deal with the legality of requiring disclaimers to be read or displayed in science classes stating that the discussion of evolution is not meant to dissuade students from accepting the biblical version of creation or intelligent design (*Freiler v. Tangipahoa Parish Board of Education*, 1999; *Kitzmiller, et al. v. Dover*, 2005; *Selman v. Cobb County Board of Education*, 2005).

In yet another case arising in Louisiana, *Freiler v. Tangipahoa Parish Board of Education* (1999), parents of students in Tangipahoa Parish public schools sought to enjoin the

school board from mandating that a disclaimer had to be read immediately before any lessons on evolution in all elementary and secondary classes. The disclaimer was as follows:

It is hereby recognized by the Tangipahoa Board of Education, that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept. It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her own opinion and maintain beliefs taught by parents on this very important matter of the origin of life and matter. Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion. (*Freiler v. Tangipahoa Parish Board of Education*, 1999, at 341)

The U.S. Court of Appeals ruled (3-0) that the disclaimer was a violation of the Establishment Clause. The court looked at the history of the Tangipahoa school system and noted that teaching evolution had hotly contested for many years, and that after a failed attempt to add creationism to the science curriculum, the Tangipahoa Parish Board of Education adopted the disclaimer that was at issue in this case. In line with Critical Religious Legal Theory the Appellate Court analyzed the social and political atmosphere at the time the disclaimer was created through a discussion of the debate that surrounded the wording of the disclaimer and found that it:

centered on the inclusion of the phrase “Biblical version of Creation.” A School Board member... voiced concerns that the reference to the Bible excluded non-Christian viewpoints ...the board member who proposed the disclaimer, justified including the phrase, arguing that because “there are two basic concepts out

there” (presumably creation science and evolution), and because he believed that “perhaps 95 percent” of the community “fall into the category of believing [in] divine creation,” the Board should not “shy away, or hide away from saying that this is not to dissuade from the Biblical version.” (*Freiler v. Tangipahoa Parish Board of Education*, 1999, at 341-342)

The Appellate Court evaluated the disclaimer under two of the tests established by the Supreme Court, the *Lemon Test* and the *endorsement test*. With regard to the *Lemon Test* the court stated that “for state activity to pass muster under *Lemon* 's first criterion a sincere secular purpose for the contested state action must exist; even if that secular purpose is but one in a sea of religious purposes” (*Freiler v. Tangipahoa Parish Board of Education*, 1999, at 344). The court then listed the school board’s asserted purposes for the disclaimer which were “(1) to encourage informed freedom of belief, (2) to disclaim any orthodoxy of belief that could be inferred from the exclusive placement of evolution in the curriculum, and (3) to reduce offense to the sensibilities and sensitivities of any student or parent caused by the teaching of evolution” (*Freiler v. Tangipahoa Parish Board of Education*, 1999, at 344). The court dismissed the first purpose stating, that despite the disclaimer encouraging students “to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion,” the disclaimer instead serves to protect and maintain Fundamentalist Christian beliefs (*Freiler v. Tangipahoa Parish Board of Education*, 1999, at 344). Further, the court reasoned that reading a disclaimer that informs students “that evolution as taught in the classroom need not affect what they already know... is contrary to an intent to encourage critical thinking, which requires that students approach new concepts with an open mind and a willingness to alter and shift existing viewpoints” (*Freiler v. Tangipahoa Parish Board of Education*, 1999, at 345).

The court did find the school board's second and third purposes to be furthered by the disclaimer so it sought to determine whether those purposes could be considered secular. The court reasoned that a purpose can still be secular even if it had religious elements. Thus, the Appellate Court held:

that, under the instant facts, the dual objectives of disclaiming orthodoxy of belief and reducing student/parent offense are permissible secular objectives that the School Board could rightly address. . . . In so doing, we acknowledge that local school boards need not turn a blind eye to the concerns of students and parents troubled by the teaching of evolution in public classrooms. (*Freiler v. Tangipahoa Parish Board of Education*, 1999, at 345-346)

Since the court found a secular purpose it moved on to the second prong of the *Lemon Test* and the *endorsement test*, which in this case would similarly ask whether the disclaimer's primary effect "conveys a message of endorsement or disapproval" (*Freiler v. Tangipahoa Parish Board of Education*, 1999, at 346, citing *Doe v. Santa Fe Independent School District*, 1999, at 817).

The court used Supreme Court precedence to guide its analysis stating:

the Supreme Court has cautioned that a government practice may not aid one religion, aid all religions, or favor one religion over another. Nonetheless, where the benefit to religion or to a church is no more than indirect, remote, or incidental, the Supreme Court has advised that [there is] no realistic danger that the community would think that the [contested government practice] was endorsing religion or any particular creed. (*Freiler v. Tangipahoa Parish Board of Education*, 1999, at 346)

The school board claimed that “the disclaimer advances freedom of thought, as well as sensitivity to, and tolerance for, diverse beliefs in a pluralistic society” (*Freiler v. Tangipahoa Parish Board of Education*, 1999, at 346). But the Appellate Court did not agree that this was the primary effect of the disclaimer, and instead concluded that the disclaimer’s primary effect was to protect and maintain belief in the Biblical version of Creation. To reach this determination, the court relied on three factors:

(1) the juxtaposition of the disavowal of endorsement of evolution with an urging that students contemplate alternative theories of the origin of life; (2) the reminder that students have the right to maintain beliefs taught by their parents regarding the origin of life; and (3) the “Biblical version of Creation” as the only alternative theory explicitly referenced in the disclaimer. (*Freiler v. Tangipahoa Parish Board of Education*, 1999, at 346)

Further, the court held that “[t]he disclaimer, taken as a whole, encourages students to read and meditate upon religion in general and the “Biblical version of Creation” in particular (*Freiler v. Tangipahoa Parish Board of Education*, 1999, at 346). Giving a nod to multicultural religious education, the Appellate Court reasoned that:

[a]lthough it is not per se unconstitutional to introduce religion or religious concepts during school hours, there is a fundamental difference between introducing religion and religious concepts in “an appropriate study of history, civilization, ethics, comparative religion, or the like” and the reading of the School Board-mandated disclaimer now before us. (*Freiler v. Tangipahoa Parish Board of Education*, 1999, at 347, citing *Stone v. Graham*, 1980, at 42)

Finding against the school board the Appellate Court held that having a public school teacher read the disclaimer harms students' perception of the merit of the science lesson and implies the school's approval of religious principles. The Appellate Court held that the disclaimer violated the endorsement test as well as the second prong of the Lemon Test because it impermissibly advanced religion by conveying a benefit to religion was "more than indirect, remote, or incidental" (*Freiler v. Tangipahoa Parish Board of Education*, 1999, at 348). The Appellate Court then limited its decision by stating that it was not holding that all evolution disclaimers would be per se unconstitutional, rather its decision was limited to the "precise language of the disclaimer and the context in which it was adopted" (*Freiler v. Tangipahoa Parish Board of Education*, 1999, at 342).

This case is important because it was appealed to the Supreme Court but failed to gather the four votes required for the Supreme Court to review the case (see *Tangipahoa Parish Board of Education v. Freiler*, 2000). This left the Supreme Court case labeled as 'Certiorari Denied,' but unlike most cases that are denied without comment, this time Justice Scalia wrote a dissent to the denial of certiorari which Chief Justice Rehnquist and Justice Thomas joined. The dissent focused in part on the Justices' disapproval of the *Lemon Test*. Justice Scalia's dissent stated, "I would grant certiorari in this case if only to take the opportunity to inter the *Lemon* test once for all" (*Tangipahoa Parish Board of Education v. Freiler*, 2000, at 2708). Additionally, the dissent chastised the Court of Appeals' application of the *Lemon Test*. While the Court of Appeals held that the disclaimer failed the 'primary effect' prong of the *Lemon Test*, the Supreme Court dissent felt that advancing freedom of thought was the secular primary effect. The dissent reasoned that:

The only allusion to religion in the entire disclaimer is a reference to the “Biblical version of Creation,” mentioned as an illustrative *example*—surely the most obvious example—of a “concept” that the teaching of evolution was “not intended to influence or dissuade.” The disclaimer does not refer again to the “Biblical version of Creation,” much less provide any elaboration as to what that theory entails; instead, it merely reaffirms that “it is the basic right and privilege of each student to form his/her own opinion or maintain beliefs taught by parents on this very important matter of the origin of life and matter,” and neutrally encourages students to “closely examine *each* alternative” before forming an opinion.

*(Tangipahoa Parish Board of Education v. Freiler, 2000, at 2708)*

Though the Appellate Court’s decision is still good law, had this case been granted certiorari it is likely that at least three of the nine Supreme Court Justices would have held that “the disclaimer constitutes nothing more than simply a tolerable acknowledgment of beliefs widely held among the people of this country” (*Tangipahoa Parish Board of Education v. Freiler, 2000, at 2708, internal quotations omitted*). Once again this shows that it is difficult for some jurists to come to a consensus about what constitutes religious entanglements in schools.

In *Selman v. Cobb County School District* (2005), parents of students in the district sued Georgia’s Cobb County school district and Board of Education challenging the legality of a sticker commenting on evolution that was placed in some science textbooks in 2002. The sticker stated: “This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully and critically considered” (*Selman v. Cobb County School District, 2005, at 1292*). In line with Critical Religious Legal Theory the district court critically analyzed the social and

political atmosphere at the time the disclaimer was created and began its Opinion with its own disclaimer stating:

Due to the various challenges that arise in this area, the Court believes it prudent to state from the outset what the instant case is not about. First, the Court is not resolving in this case whether science and religion are mutually exclusive, and the Court takes no position on the origin of the human species. Second, the issue before the Court is not whether it is constitutionally permissible for public school teachers to teach intelligent design, the theory that only an intelligent or supernatural cause could be responsible for life, living things, and the complexity of the universe. Third, this case does not resolve the ongoing debate regarding whether evolution is a fact or theory or whether evolution should be taught as fact or theory. To be clear, this opinion resolves only a legal dispute. Specifically, the narrow issue raised by this facial challenge is whether the sticker placed in certain Cobb County School District science textbooks violates the Establishment Clause of the First Amendment of the United States Constitution and/or Article I, Section II, Paragraph VII of the Constitution of the State of Georgia. (*Selman v. Cobb County School District*, 2005, at 1288)

With that point of clarity, the district court then detailed the facts that led up to the case. In 2001 the school district decided to introduce new science textbooks to bring Cobb County into compliance with statewide curriculum requirements. Prior to this point, it was not uncommon for textbook pages with information about evolution to be ripped out of students' science textbooks before they were given to the students. Additionally teachers were instructed not to discuss

human evolution in classes that were required for graduation but they were allowed to teach human evolution in elective science classes.

Several parents challenged the new books because they included material on scientific theory of evolution and did not include any alternative religious theories like creationism or intelligent design. One parent, who identified herself as a six-day biblical creationist, opposed the presentation of evolution in the science textbooks as a fact rather than as a theory. She also gathered 2,300 signatures on a petition that “requested, among other things, that the Board ensure the presentation of all theories regarding the origin of life and place a statement prominently at the beginning of the text that warned students that the material on evolution was not factual but rather was a theory” (*Selman v. Cobb County School District*, 2005, at 1291-1292). In part because of a concern with parental discontent with the theory of evolution, the school board unanimously voted to place the aforementioned sticker in the science textbooks that included lessons on evolution. The school board then issued a public statement at the beginning of the 2002/2003 school year “that the Sticker ‘was not intended to interject religion into science instruction but simply to make students aware that a scientific dispute exists’” (*Selman v. Cobb County School District*, 2005, at 1293). The district court noted that the opponents of the sticker claimed that:

[e]volution is the only theory mentioned in the Sticker, and there is no sticker placed in textbooks related to any other theory, topic, or subject covered in the Cobb County School District's curriculum. However, there are other scientific topics taught that have religious implications, such as the theories of gravity, relativity, and Galilean heliocentrism. (*Selman v. Cobb County School District*, 2005, at 1291-1292)

Additionally, the court found that at some point before the sticker was placed in the books a high school science teacher who opposed the stickers suggested that if there had to be a disclaimer that it should state: “This textbook contains material on evolution, a scientific theory, or explanation, for the nature and diversity of living things. Evolution is accepted by the majority of scientists, but questioned by some. All scientific theories should be approached with an open mind, studied carefully and critically considered” (*Selman v. Cobb County School District*, 2005, at 1295). Though the school district administration favored this version of the disclaimer the district court found that the school board did not give his suggestion much consideration.

Despite the district court’s attempts to avoid the issues of whether science and religion are mutually exclusive and about the true origin of humans, the court found that “[e]volution is the dominant scientific theory regarding the origin of the diversity of life and is accepted by the majority of the scientific community” (*Selman v. Cobb County School District*, 2005, at 1289). The court further stated that much of the scientific community maintains “that evolution is not a theory of the origin of life but is a theory concerning the origin of the diversity of life” (*Selman v. Cobb County School District*, 2005, at 1289). And the court admitted that “[t]he significance of this distinction is not entirely clear to the Court, particularly as it relates to the origin of the human species, which is one of the more sensitive issues in the ongoing debate between proponents and opponents of evolution” (*Selman v. Cobb County School District*, 2005, at 1289).

The district court applied the three-pronged *Lemon Test*, and stated that the sticker would violate the Establishment Clause if its predominant purpose was to advance religion. In line with Critical Religious Legal Theory the court tried to look at the history behind the sticker to decipher its purpose but found that there was no statement regarding its purpose, nor were there any sort of detailed school board meeting notes that could help the court determine the why the

school board voted for the sticker. The school board claimed that its purpose in adopting the sticker was consistent with its reasons for adopting the district's revised policy, to strengthen the science curriculum and to include instruction in evolution. The district court found that the stated purpose for the adoption of the revised curriculum was "to foster critical thinking among students, to allow academic freedom consistent with legal requirements, to promote tolerance and acceptance of diversity of opinion, and to ensure a posture of neutrality toward religion" (*Selman v. Cobb County School District*, 2005, at 1296). The district court found that fostering critical thinking was a secular purpose of the sticker since, as stated before, many students were not receiving instruction in evolutionary theory before the adoption of the new textbooks and the addition of the sticker because those pages were often removed from the science textbooks. Since the school board knew that many of the families in the district held beliefs that would be seen to conflict with the study of evolution, the court held that, "[a]gainst this backdrop, the Sticker appears to have the purpose of furthering critical thinking because it tells students to approach the material on evolution with an open mind, to study it carefully, and to give it critical consideration" (*Selman v. Cobb County School District*, 2005, at 1302). But the court was not convinced that the promotion of critical thinking was the sticker's main purpose, instead it felt that "the chief purpose of the sticker was to accommodate or reduce offense to those persons who hold beliefs that might be deemed inconsistent with the scientific theory of evolution" (*Selman v. Cobb County School District*, 2005, at 1303). This led the court to believe that the primary purpose of the sticker was in fact "intertwined with religion" (*Selman v. Cobb County School District*, 2005, at 1303). Yet, the district court still found no violation of the first prong of the *Lemon Test* since, it felt that the school board's primary purpose was not to endorse or

advance religion but rather that it was to acknowledge the personal/religious beliefs of many of the citizens while maintaining a neutral stance with regard to religion.

The district court then moved on to the second (effect) prong of the *Lemon Test* and ruled that:

...an informed, reasonable observer would interpret the Sticker to convey a message of endorsement of religion. That is, the Sticker sends a message to those who oppose evolution for religious reasons that they are favored members of the political community, while the Sticker sends a message to those who believe in evolution that they are political outsiders. This is particularly so in a case such as this one involving impressionable public school students who are likely to view the message on the Sticker as a union of church and state. (*Selman v. Cobb County School District*, 2005, at 1306)

With regard to what constitutes a reasonable observer the district court stated:

...the informed, reasonable observer would know that a significant number of Cobb County citizens had voiced opposition to the teaching of evolution for religious reasons. ...that despite this opposition, the Cobb County School District was in the process of revising its policy and regulation regarding theories of origin to reflect that evolution would be taught in Cobb County schools. ...that citizens and parents largely motivated by religion put pressure on the School Board to implement certain measures that would nevertheless dilute the teaching of evolution, including placing a disclaimer in the front of certain textbooks that distinguished evolution as a theory, not a fact. ... [and] that the language of the

Sticker essentially mirrors the viewpoint of these religiously-motivated citizens.

(*Selman v. Cobb County School District*, 2005, at 1307)

The court further stated that, the crux of its conclusion that the sticker failed the effect clause and violated the Establishment Clause was the inclusion of:

the statement that ‘evolution is a theory, not a fact, concerning the origin of living things.’ ...the first problem with this language is that there has been a lengthy debate between advocates of evolution and proponents of religious theories of origin specifically concerning whether evolution should be taught as a fact or as a theory, and the School Board appears to have sided with the proponents of religious theories of origin in violation of the Establishment Clause. ...the Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief, and this is exactly what the School Board appears to have done. (*Selman v. Cobb County School District*, 2005, at 1307, internal citations and quotations omitted)

The district court acknowledged that the fact/theory argument was a strategy often used by religiously motivated anti-evolutionists to dilute the impact of instruction in evolutionary theory. To counter the use of such a dilution the court found that “evolution is more than *a theory* of origin in the context of science. ...evolution is the dominant *scientific* theory of origin accepted by the majority of scientists” (*Selman v. Cobb County School District*, 2005, at 1309). Further, the court found that the use of the term ‘theory’ on the sticker plays on the popular, non-scientific meaning of the word “and suggests to the informed, reasonable observer that evolution is only a highly questionable ‘opinion’ or a ‘hunch’” (*Selman v. Cobb County School District*, 2005, at 1310). Scientists use the term ‘hypothesis,’ not ‘theory,’ for the initial, questioning

stages of research. Though the court found that the sticker did not result in the topic of religion arising during the discussion of evolution any more than it did before the sticker, the court did find that the sticker had an impact on science instruction on evolution.

Some students have pointed to the language on the Sticker to support arguments that evolution does not exist. In addition, [a science teacher] testified that the Board's misuse of the word "theory" in the Sticker causes "confusion" in his science class and consequently requires him to spend significantly more time trying to distinguish "fact" and "theory" for his students. ...some of his students translate the Sticker to state that evolution is "just" a theory, which he believes has the effect of diminishing the status of evolution among all other theories” (*Selman v. Cobb County School District*, 2005, at 1297).

The district court held that referring to evolution in the sticker as a ‘theory, not a fact’ and stating that it should be ‘approached with an open mind,’ “misleads students regarding the significance and value of evolution in the scientific community for the benefit of the religious alternatives” (*Selman v. Cobb County School District*, 2005, at 1309). Based upon their findings, the district court held that the sticker violated the second prong of the *Lemon Test* and the endorsement test, and ordered that the stickers be removed from the textbooks.

However the case did not end there, and in 2006 the Court of Appeals vacated the district court’s 2005 decision and remanded the case back to the district court for further evidentiary findings, since the Court of Appeals found that some of the documents and evidence that the district court relied upon in making its decision were missing from the record (see *Selman v. Cobb County School District*, 2006). But the district court did not have a chance to clear up the evidentiary record on remand, instead the parties settled out of court. In the settlement, since the

stickers had already been removed from the textbooks from the initial district court ruling, the Cobb County School District was barred from "restoring to the science textbooks of students in the Cobb County schools any stickers, labels, stamps, inscriptions, or other warnings or disclaimers bearing language substantially similar to that used on the sticker that is the subject of this action" (National Center for Science Education, 2008, p. 3). The school district was further barred:

from taking the following actions that would prevent or hinder the teaching of evolution in the School District: a. making any disclaimers regarding evolution orally, in writing, or by any other means; b. placing on students' science textbooks any stickers, labels, stamps, inscriptions, or other warnings or disclaimers referring or relating to evolution or Charles Darwin; c. placing on students' science textbooks any stickers, labels, stamps, inscriptions, or other statements relating to creationism, creation science, intelligent design, or any other religious view concerning the origins of life or the origins of human beings; d. excising or redacting materials on evolution in students' science textbooks..."

(National Center for Science Education, 2008, pp. 3-4)

The school district also agreed to pay partial attorney fees to the plaintiff parents in the amount of \$166, 659.12. The plaintiff parents agreed to take no further legal action with regard to this case against the school district. The Cobb County school board released a statement in 2006 praising the settlement and stating that "[a]ppealing the lower court ruling was the right decision by the school board because that ruling was incorrect... The Board maintains that the stickers were constitutional, but, at the same time, the Board clearly sees the need to put this divisive issue behind us" (National Center for Science Education, 2008, p. 1). Though it largely seems

that the school district was on the losing end of the settlement it claimed that the stickers were legal and then appear to take the high road by backing out of the continued lawsuit to get back to the task of educating students.

This case was important even though the matter was never really settled by a federal court, or even a district court. First, it showed that even in 2005-2006 courts were applying the *Lemon Test* even though the Supreme Court seems to be questioning its usefulness (see *Tangipahoa Parish Board of Education v. Freiler*, 2000). Second, it shows that huge amounts of money can go in to defending against First Amendment religious violations. Here, in addition the money the school district spent defending the case, it also spent close to \$167,000 to pay the opposing side's attorney fees. This is money that most, if not all, public school districts simply cannot afford to pay, in a time when ensuring that students are able to pass state mandated tests is one of the top priorities for all public schools.

While *Selman v. Cobb County School District* (2005) was being heard in Georgia, Pennsylvania was having its own disclaimer case. In *Kitzmiller, et al. v. Dover Area School District, et al.* (2005) several parents in Dover, Pennsylvania brought suit against the Dover Area School District challenging the constitutional validity of a resolution and press release (hereinafter, collectively, "the ID Policy"), claiming that it constitutes an establishment of religion prohibited by the First Amendment. The resolution which passed by a 6-3 school board vote in October of 2004 stated, "Students will be made aware of gaps/problems in Darwin's theory and of other theories of evolution including, but not limited to, intelligent design. Note: Origins of Life is not taught" (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 708). The Press Release from November of 2004 stated that, beginning in January of 2005 all

teachers in Dover High School who teach ninth grade biology would be required to read this statement:

The Pennsylvania Academic Standards require students to learn about Darwin's Theory of Evolution and eventually to take a standardized test of which evolution is a part. Because Darwin's Theory is a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist for which there is no evidence. A theory is defined as a well-tested explanation that unifies a broad range of observations. Intelligent Design is an explanation of the origin of life that differs from Darwin's view. The reference book, *Of Pandas and People*, is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves. With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussion of the Origins of Life to individual students and their families. As a Standards-driven district, class instruction focuses upon preparing students to achieve proficiency on Standards-based assessments. (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 708-709)

Evidence at trial showed that no other course at the school required the reading of a disclaimer and that some biology teachers refused to read the disclaimer. Because of the teachers' refusals, school administrators had to come into the science classrooms to read the disclaimer instead. The district court stated that, "the administrators made the remarkable and awkward statement, as part of the disclaimer, that "there will be no other discussion of the issue and your teachers will not answer questions on the issue" (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 727).

The district court used both the endorsement test and the *Lemon Test* to analyze the constitutionality of the ID Policy under the Establishment Clause. Unlike other courts (see *Freiler v. Tangipahoa Parish Board of Education*, 1999; *Selman v. Cobb County School District*, 2005), the district court in this case decided to view these as distinct tests and chose to first look at whether the ID policy violated the endorsement test. The court did this in part because of what it referred to as “the evolving caselaw regarding which tests to apply,” and the court’s desire to ensure that its ruling would still hold even if one of the two tests, particularly the *Lemon Test*, was later abandoned by the Supreme Court (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 714).

In line with Critical Religious Legal Theory, the court began with a brief legal history of Supreme Court cases and other legal rulings leading up to this case and then moved on to its *endorsement test* analysis to determine whether the ID Policy appears to endorse or disapprove of religion, regardless of the intent of the school district.

The [endorsement] test consists of the reviewing court determining what message a challenged governmental policy or enactment conveys to a reasonable, objective observer who knows the policy's language, origins, and legislative history, as well as the history of the community and the broader social and historical context in which the policy arose. (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 714-715)

The court felt that in this case the reasonable objective observer fell into two different categories, that of the intended audience, an objective Dover Area High School student, and that of a reasonable, objective adult observer from the Dover area. With regard to the former the court stated: “At a minimum, the pertinent inquiry is whether an “objective observer” in the

position of a student of the relevant age would perceive official school support for the religious activity in question” (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 715). As to the latter the court felt that the views of a reasonable objective adult in the Dover area were important to address because it was found that “a newsletter explaining the ID Policy in detail was mailed by the Board to every household in the District, as well as the Board members' discussion and defense of the curriculum change in public school board meetings and in the media” (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 716, internal citations and quotations omitted).

In line with Critical Religious Legal Theory, to determine what a reasonable adult or child observer in the Dover area would know, the court looked at the sociopolitical roots of the controversy and stated:

The history of the intelligent design movement (hereinafter “IDM”) and the development of the strategy to weaken education of evolution by focusing students on alleged gaps in the theory of evolution is the historical and cultural background against which the Dover School Board acted in adopting the challenged ID Policy. As a reasonable observer, whether adult or child, would be aware of this social context in which the ID Policy arose, and such context will help to reveal the meaning of Defendants' actions, it is necessary to trace the history of the IDM. (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 716)

From there the court went into a more detailed history of the legal, political and religious landscape leading up to this case, noting the cases and outcomes discussed in this dissertation. The court then moved to a discussion of the sociopolitical roots of Intelligent Design and heard

testimony from both sides that Intelligent Design has unquestionably religious origins. One of the plaintiff's expert witnesses was a theologian named John Haught who testified that ID's argument is not a new scientific argument, but is instead an old argument, for the existence of God. Dr. Haught stated that the argument was put forth in the 13<sup>th</sup> Century by Thomas Aquinas, who used the following syllogism to frame the argument, "Wherever complex design exists, there must have been a designer; nature is complex; therefore nature must have had an intelligent designer. Dr. Haught testified that Aquinas was explicit that this intelligent designer 'everyone understands to be God'" (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 718). The court pointed out that Aquinas' syllogism mirrored the argument for ID that was presented by the school district's expert witnesses Professors Behe and Minnich who use the phrase "purposeful arrangement of parts" (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 718).

Dr. Haught also testified that ID's argument for the existence of God was advanced by Reverend Paley early in the 19<sup>th</sup> Century and defense expert witnesses Behe and Minnich admitted that their "purposeful arrangement of parts" argument is the same one that Reverend Paley made for design. The only difference that the court found between Reverend Paley's argument and the argument for ID is that it does not specifically name God as the designer. But Dr. Haught testified that:

anyone familiar with Western religious thought would immediately make the association that the tactically unnamed designer is God, as the description of the designer in *Of Pandas and People* is a "master intellect," strongly suggesting a supernatural deity as opposed to any intelligent actor known to exist in the natural world. (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 718)

The school district's expert witnesses, Behe and Minnich, both testified that they believe that the intelligent designer is God. Additionally,

Professor Minnich testified that he understands many leading advocates of ID to believe the designer to be God. Although proponents of the IDM occasionally suggest that the designer could be a space alien or a time-traveling cell biologist, no serious alternative to God as the designer has been proposed by members of the IDM, including Defendants' expert witnesses. In fact, an explicit concession that the intelligent designer works outside the laws of nature and science and a direct reference to religion is *Pandas*' rhetorical statement, "what kind of intelligent agent was it [the designer]" and answer: "On its own science cannot answer this question. It must leave it to religion and philosophy." (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 718-719, internal citations omitted)

The court then looked at statements that have been made by leaders and proponents of the Intelligent Design Movement (IDM) which tend to align Intelligent Design with religious and philosophical thought and which align the 'intelligent designer' with the Christian God. The court first looked at statements from Philip Johnson who the court called "the father of the IDM" (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 719). The court found that Johnson:

has written that 'theistic realism' or 'mere creation' are defining concepts of the IDM. This means 'that God is objectively real as Creator and recorded in the biological evidence ...' ...Johnson states that the 'Darwinian theory of evolution contradicts not just the Book of Genesis, but every word in the Bible from

beginning to end. It contradicts the idea that we are here because a creator brought about our existence for a purpose.’ (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 719, internal citations omitted)

The court also looked at statements made by ID proponent William Dembski who “has written that ID is a ‘ground clearing operation’ to allow Christianity to receive serious consideration, and ‘Christ is never an addendum to a scientific theory but always a completion’” (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 719). Additionally, the school district’s lead expert claimed that “the plausibility of the argument for ID depends upon the extent to which one believes in the existence of God” (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 720). And since the court found no evidence in the record to indicate that the validity of any scientific theory rests on the belief in a God or Gods the court found that these statements constituted substantial evidence that ID is a religious proposal rather than a scientific theory.

The court also found “[d]ramatic evidence of ID’s religious nature and aspirations ... in what is referred to as the ‘Wedge Document’” a plan that was “developed by the Discovery Institute’s Center for Renewal of Science and Culture, [which] represent[ed] from an institutional standpoint, the IDM’s goals and objectives” (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 720). The court stated that:

The Wedge Document states ...that the IDM’s goal is to replace science as currently practiced with ‘theistic and Christian science.’ ...the IDM’s ‘Governing Goals’ are to ‘defeat scientific materialism and its destructive moral, cultural, and political legacies’ and ‘to replace materialistic explanations with the theistic understanding that nature and human beings are created by God.’ A careful review of the Wedge Document’s goals and language throughout the document

reveals cultural and religious goals, as opposed to scientific ones. ID aspires to change the ground rules of science to make room for religion, specifically, beliefs consonant with a particular version of Christianity. (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 720)

Using Supreme Court precedence the court stated that the requirement of a supernatural creator, or as here designer, is expressly religious and removes it from the scientific domain. Further, the school district's witnesses "confirmed that the existence of a supernatural designer is a hallmark of ID" and they testified that "for ID to be considered science, the ground rules of science have to be broadened so that supernatural forces can be considered" and "that it is ID's project to change the ground rules of science to include the supernatural" (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 720). The court also stated that there was no attempt made by the school district's experts to explain how the supernaturally intelligent design and Designer could be anything other than a religious proposal.

The court then looked at the at the sociopolitical links between creationism and Intelligent Design particularly as it related to the reference book *Of Pandas and People* and found that it went through several drafts both before and after *Edwards v. Aguillard* (1987) where the Supreme Court held that it was unconstitutional to teach creationism as science. The court stated that:

By comparing the pre and post *Edwards* drafts of *Pandas*, three astonishing points emerge: (1) the definition for creation science in early drafts is identical to the definition of ID; (2) cognates of the word creation (creationism and creationist), which appeared approximately 150 times were deliberately and systematically replaced with the phrase ID; and (3) the changes occurred shortly after the

Supreme Court held that creation science is religious and cannot be taught in public school science classes in *Edwards*. This word substitution is telling, significant, and reveals that a purposeful change of *words* was effected without any corresponding change in *content*... (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 721)

From this the court held that an objective adult or child observer, would be aware of ID's religious ties because it requires the involvement of a supernatural master intellect who, though unnamed is clearly the Christian God.

Next the court moved to a discussion about whether an objective student would view the disclaimer as an official endorsement of religion and found that it explicitly mentions and then disavows the theory evolution by informing students that they only have to learn it because the state standards require it, and the court found that there are no other disclaimers about any of the other courses in the district's curriculum. Additionally, like to court in *Selman v. Cobb County School District*, (2005) the court in this case also found that the disclaimer used the 'just a theory' language tactic to mislead students to believe that it was simply an unproven guess. The court noted that "the disclaimer undermines students' education in evolutionary theory and sets the groundwork for presenting students with the District's favored religious alternative" (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 725). And the court found that since the disclaimer only mentioned ID as the alternative to evolutionary theory the school district was trying to set up the same false dichotomy between the two explanations that had already been overruled in *McLean, et al. v. Arkansas Board of Education* (1982), "that one must either accept the literal interpretation of Genesis or else believe in the godless system of evolution" (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 725). The court also

found that the disclaimer mimics the one that the Fifth Circuit Court of Appeals struck down as unconstitutional in *Freiler v. Tangipahoa Parish Board of Education* (1999), since it encouraged students to keep an open mind with regard to theories other than evolution but the only alternative that was named was the religious theory of ID. Holding that an objective Dover area student would view the disclaimer as an official endorsement of religion or of a religious viewpoint the court stated that:

[i]n summary, the disclaimer singles out the theory of evolution for special treatment, misrepresents its status in the scientific community, causes students to doubt its validity without scientific justification, presents students with a religious alternative masquerading as a scientific theory, directs them to consult a creationist text as though it were a science resource, and instructs students to forego scientific inquiry in the public school classroom and instead to seek out religious instruction elsewhere. (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 728-729)

The court then looked at how the objective Dover adult observer would view the ID Policy. The school district sent all residents of Dover, even those without children in the public school system, a newsletter explaining the changes in the biology curriculum and questioning the scientific veracity of evolution while promoting Intelligent Design. The school district also had public board meetings where the ID policy was discussed in what the court called “expressly religious terms” and members of the Dover community were allowed to speak (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 731). The court reasoned that objective Dover adults would know that attempts to teach about and supplement the supposed gaps in the scientific theory of evolution with other theories are Creationist strategies designed to inject the

science curriculum with religion. Further, the court found that the entire Dover community became aware of the ID Policy controversy since the school board's actions were repeatedly reported in in the two local newspapers. The court looked at 225 letters to the editor and 62 editorials published in these two local newspapers from June of 2004 through September of 2005 and found that of the 225 letters to the editor 146 of them addressed the controversy in religious terms while 45 of the 62 editorials framed the controversy in religious terms. The court felt that the letters were:

probative of the fact that members of the Dover community perceived the Board as having acted to promote religion, with many citizens lined up as either for the curriculum change, on religious grounds, or against the curriculum change, on the ground that religion should not play a role in public school science class. (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 734)

The court concluded “that an informed, objective adult member of the Dover community aware of the social context in which the ID Policy arose would view [the school district’s] conduct and the challenged Policy to be a strong endorsement of a religious view” (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 734).

With regard to the *Lemon Test*, the court found a violation of the first ‘purpose’ prong stating, “the disclaimer's plain language, the legislative history, and the historical context in which the ID Policy arose, all inevitably lead to the conclusion that Defendants consciously chose to change Dover's biology curriculum to advance religion” (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 747). Though the court cited several statements from the school district to show this purpose, one of the more poignant was from a school board member who stated, “This country wasn't founded on Muslim beliefs or evolution. This country was founded

on Christianity and our students should be taught as such” (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 751). In addition, a board member who opposed the curriculum change was called “an atheist” and told “that she would go to hell” by two of the other board members, and another board member stated that she “was coerced into voting for the curriculum change by Board members accusing her of being an atheist and un-Christian” (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 762).

The court found that although the school district insisted that the ID Policy was adopted for the secular purposes of improving science education in the district and encouraging students to think critically, the Board did not take any actions that would have ensured that those goals would be met by the ID Policy. Specifically:

[t]he Board consulted no scientific materials. The Board contacted no scientists or scientific organizations. The Board failed to consider the views of the District's science teachers. The Board relied solely on legal advice from two organizations with demonstrably religious, cultural, and legal missions, the Discovery Institute and the [Thomas Moore Law Center (TMLC)]. Moreover, Defendants' asserted secular purpose of improving science education is belied by the fact that most if not all of the Board members who voted in favor of the biology curriculum change conceded that they still do not know, nor have they ever known, precisely what ID is. To assert a secular purpose against this backdrop is ludicrous.

(*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 763)

Finding that “[a]ny asserted secular purposes by the Board are a sham and are merely secondary to a religious objective,” the court did not need to move to the second “effect” prong of the *Lemon Test* but it still chose to briefly address it stating that, “[t]he effect of [the school

district's] actions in adopting the curriculum change was to impose a religious view of biological origins into the biology course, in violation of the Establishment Clause" (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 763).

Perhaps the most important thing that came from this decision was the court's determination that Intelligent Design is not a science. The court began by stating that it was addressing the issue of whether Intelligent Design is a science to explain why the disclaimer was violation of the Establishment Clause and to attempt to save other school districts time and money arguing the same issue. The court reasoned that:

ID fails on three different levels, any one of which is sufficient to preclude a determination that ID is science. They are: (1) ID violates the centuries-old ground rules of science by invoking and permitting supernatural causation; (2) the argument of irreducible complexity, central to ID, employs the same flawed and illogical contrived dualism that doomed creation science in the 1980's; and (3) ID's negative attacks on evolution have been refuted by the scientific community.

...it is additionally important to note that ID has failed to gain acceptance in the scientific community, it has not generated peer-reviewed publications, nor has it been the subject of testing and research. (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 735)

The court then described what constitutes scientific inquiry stating that science has been focused on the search for natural (rather than supernatural) causes to explain natural phenomena since the scientific revolution of the late 1500's which allowed scientists to reject the appeal to authority (God) and instead rely on empirical evidence. The court further stated that:

[s]ince that time period, science has been a discipline in which testability, rather than any ecclesiastical authority or philosophical coherence, has been the measure of a scientific idea's worth. In deliberately omitting theological or “ultimate” explanations for the existence or characteristics of the natural world, science does not consider issues of “meaning” and “purpose” in the world. While supernatural explanations may be important and have merit, they are not part of science. This self-imposed convention of science, which limits inquiry to testable, natural explanations about the natural world, is referred to by philosophers as “methodological naturalism” and is sometimes known as the scientific method. Methodological naturalism is a “ground rule” of science today which requires scientists to seek explanations in the world around us based upon what we can observe, test, replicate, and verify. (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 735, internal citations omitted)

The court noted that all of the major scientific associations that have delved into the science of ID have concluded that it cannot be considered a science. Of these major scientific associations the court relied greatly upon evidence from the National Academy of Sciences which was considered to be “the ‘most prestigious’ scientific association in this country” by experts on both sides of the case (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 735). The court quoted the National Academy of Sciences statement that:

[s]cience is a particular way of knowing about the world. In science, explanations are restricted to those that can be inferred from the confirmable data—the results obtained through observations and experiments that can be substantiated by other scientists. Anything that can be observed or measured is amenable to scientific

investigation. Explanations that cannot be based upon empirical evidence are not part of science. (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 735-736, citations omitted)

The National Academy of Sciences also made the statement that:

Creationism, intelligent design, and other claims of supernatural intervention in the origin of life or of species are not science because they are not testable by the methods of science. These claims subordinate observed data to statements based on authority, revelation, or religious belief. Documentation offered in support of these claims is typically limited to the special publications of their advocates.

These publications do not offer hypotheses subject to change in light of new data, new interpretations, or demonstration of error. This contrasts with science, where any hypothesis or theory always remains subject to the possibility of rejection or modification in the light of new knowledge. (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 737, citations omitted)

The court also noted that the school district's "experts concede that ID is not a theory as that term is defined by the [National Academy of Sciences] and admit that ID is at best 'fringe science' which has achieved no acceptance in the scientific community" (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 738).

Evidence at trial from the school district's experts showed that Intelligent Design relies on untestable supernatural causation. The school district's expert testimony also supported the conclusion that Intelligent Design argues that animals, including humans, were created through supernatural means in their completed form, and that they did not evolve naturally over time. Additionally, the court stated that "[i]t is notable that defense experts' own mission, ...is to

change the ground rules of science to allow supernatural causation of the natural world, which the Supreme Court in *Edwards* and the court in *McLean* correctly recognized as an inherently religious concept” (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 736, citations omitted). The leading school district expert testified that this proposed change to the definition of science to include Intelligent Design “would also embrace astrology” (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 736). The court also found that prominent leaders of the Intelligent Design movement agree “that the ground rules of science must be changed for ID to take hold and prosper” (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 736). And the Discovery Institute, which is a conservative think tank that promotes Intelligent Design and which developed the Wedge Document, *supra*, has stated that some of the goals of Intelligent Design are to “defeat scientific materialism and its destructive moral, cultural and political legacies and replace materialistic explanations with the theistic understanding that nature and human beings are created by God” (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 737, internal quotations omitted). The Wedge document also stated that the Intelligent Design movement’s “goal is to replace science as currently practiced with theistic and Christian science” (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 737, internal quotations omitted). The court reasoned that the Intelligent Design Movement “seeks nothing less than a complete scientific revolution in which ID will supplant evolutionary theory” (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 737).

The court then addressed the false dichotomous argument that began with creationism/creation science versus evolution, and moved to Intelligent Design versus evolution: “that to the extent evolutionary theory is discredited, ID is confirmed” (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 738). Rather than discussing the fact that there are multiple

religious views of creation and that claiming that the Fundamentalist Christian view of creation is the only one is showing a preference for a particular religious view in violation of the First Amendment, the court instead looked at whether arguments against evolution necessarily prove the truth of Intelligent Design. Specifically, the court looked at the argument that “irreducibly complex systems cannot be produced through Darwinian, or any natural, mechanisms”

(*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 738, internal quotations omitted).

The term ‘irreducibly complex’ was defined as by the school district’s experts as:

a single system which is composed of several well-matched, interacting parts that contribute to the basic function, wherein the removal of any one of the parts causes the system to effectively cease functioning. An irreducibly complex system cannot be produced directly by slight, successive modifications of a precursor system, because any precursor to an irreducibly complex system that is missing a part is by definition nonfunctional ... Since natural selection can only choose systems that are already working, then if a biological system cannot be produced gradually it would have to arise as an integrated unit, in one fell swoop, for natural selection to have anything to act on. (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 739)

However, the court found that this definition had an acknowledged, but unaddressed, defect since it focuses on removing parts from a complex functioning system whereas in evolutionary theory, natural selection focuses on bringing together parts to create new systems. Additionally the court noted that the claim that the removal of part of a complex system would render it nonfunctional is misleading since it seems to lead to the conclusion that it would stop working. The court pointed out that rather than not working at all it could simply function in a different way, as it

evolved from one thing to the next. This means that the changed part would technically be nonfunctional for its old purpose but the part could be functional in a different capacity, or remain dormant until it fully evolved into a new function. And the court cited expert testimony to show that the concept of irreducible complexity failed to poke holes in the theory of evolution because:

the theory of evolution proffers exaptation as a well-recognized, well-documented explanation for how systems with multiple parts could have evolved through natural means. Exaptation means that some precursor of the subject system had a different, selectable function before experiencing the change or addition that resulted in the subject system with its present function (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 739)

To support this testimony the court once again looked at a statement from the National Academy of Sciences which reasoned that:

structures and processes that are claimed to be “irreducibly” complex typically are not on closer inspection. For example, it is incorrect to assume that a complex structure or biochemical process can function only if all its components are present and functioning as we see them today. Complex biochemical systems can be built up from simpler systems through natural selection. ...Natural selection can bring together parts of a system for one function at one time and then, at a later time, recombine those parts with other systems of components to produce a system that has a different function. (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 740)

The court held that “irreducible complexity has been refuted in peer-reviewed research papers and has been rejected by the scientific community at large. Additionally, even if irreducible

complexity had not been rejected, it still does not support ID as it is merely a test for evolution, not design” (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 740, internal citations omitted). This means that even if the “irreducibly complex” argument was found to disprove evolution it still lends no support to the truth of ID.

The court then looked at Intelligent Design’s argument about the “purposeful arrangement of parts” which was explained by the school district’s expert to mean that:

[w]e infer design when we see parts that appear to be arranged for a purpose. The strength of the inference is quantitative; the more parts that are arranged, the more intricately they interact, the stronger is our confidence in design. The appearance of design in aspects of biology is overwhelming. Since nothing other than an intelligent cause has been demonstrated to be able to yield such a strong appearance of design, Darwinian claims notwithstanding, the conclusion that the design seen in life is real design is rationally justified. (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 741)

The court noted that some people call this intelligent designer God, and others, like the school district’s experts, refuse to name the designer. The court also pointed out that although this definition claims that there is a quantitative aspect to the argument, the school district’s experts admitted that no quantitative criteria exist to determine what degree of complexity or what number of parts would remove the “purposeful arrangement” from the possibility of being a natural process.

The basis of the argument for the “purposeful arrangement of parts” was that biological design has recognizable aspects, just like things that are crafted by humans. This explanation was offered to prove that, “[b]ecause we are able to recognize design of [human made] artifacts and

objects, ... that same reasoning can be employed to determine biological design” (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 742). But one of the school’s district’s experts testified that this analogy required human made artifacts and biologically designed systems to have a high degree of similarity, so the court systematically pointed out the lack of similarity between the two designs.

Unlike biological systems, human artifacts do not live and reproduce over time.

They are non-replicable, they do not undergo genetic recombination, and they are not driven by natural selection. For human artifacts, we know the designer's identity, human, and the mechanism of design, as we have experience based upon empirical evidence that humans can make such things, as well as many other attributes including the designer's abilities, needs, and desires. With ID, proponents assert that they refuse to propose hypotheses on the designer's identity, do not propose a mechanism, and the designer, he/she/it/they, has never been seen. (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 742)

The school district’s expert testimony supported the court’s summary of the reasons biological systems should not be compared with human created artifacts, and the “only response to these seemingly insurmountable points of disanalogy was that the inference still works in science fiction movies” (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 742). The court held that “purposeful arrangement of parts” argument did “not satisfy the ground rules of science which require testable hypotheses based upon natural explanations. ID is reliant upon forces acting outside of the natural world, forces that we cannot see, replicate, control or test, which have produced changes in this world” (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 742-743).

The court cited expert testimony that scientists' lack of an absolute explanation for how biological systems evolved right now does not mean that they will never be able to explain it someday. Scientific progress and understanding is a never ending process. Additionally, expert testimony:

...provided multiple examples where *Pandas* asserted that no natural explanations exist, and in some cases that none could exist, and yet natural explanations have been identified in the intervening years. ...just because scientists cannot explain every evolutionary detail does not undermine its validity as a scientific theory as no theory in science is fully understood. (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 738, internal citations omitted)

Because the court found that Intelligent Design is not a science, and that the Intelligent Design Policy failed the endorsement test and the *Lemon Test*, the court held that the school board's Intelligent Design Policy violated the Establishment Clause. The court then limited its holding to state that:

we do not question that many of the leading advocates of ID have *bona fide* and deeply held beliefs which drive their scholarly endeavors. Nor do we controvert that ID should continue to be studied, debated, and discussed. ...our conclusion today is that it is unconstitutional to teach ID as an alternative to evolution in a public school science classroom. (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 765)

This once again shows that a court ruling firmly that the study of religion does not belong in the science classroom, still acknowledges the importance of the study of religious theory. The

question then becomes where, if not the science classroom, the study of religion could legally occur with a public school curriculum, which is what will be discussed in the next chapter.

Looking at the disclaimer cases through the lens of Critical Religious Legal Theory requires that the disclaimer policies be recognized as a sociopolitical phenomenon. In each case community pressure to counter science with religion pressured public schools to act in ways that may be perceived as religiously neutral only if one falls prey to generally accepted Christian norms. Specifically, an aspect of science, an arguably secular subject, was feared to counter a particular Fundamentalist Christian belief and steps were taken by the public schools in question to assure the Fundamentalist Christian believers that this aspect of science, *unlike all others*, could simply be ignored. The public schools claimed that these disclaimer policies were neutral because they balanced secular science instruction with an acknowledgement of conflicting Fundamentalist Christian religious beliefs. In each disclaimer case the court critically analyzed the social and political atmosphere at the time the disclaimers were created as well as the motives of the policymakers and the effects of the disclaimer policies and found that they were primarily religiously motivated and unconstitutionally entangled the public schools with religion. Due to this, in each case the court held that the State cannot force, or even allow, teachers to display or read aloud disclaimers stating that their the discussion of evolution is not meant to dissuade students from accepting the biblical version of creation or Intelligent Design (*Freiler v. Tangipahoa Parish Board of Education*, 1999; *Kitzmiller, et al. v. Dover Area School District, et al.*, 2005; *Selman v. Cobb County Board of Education*, 2005). Further, the *Kitzmiller, et al. v. Dover Area School District, et al.*, (2005) court took great pains to explain in intricate detail that Intelligent Design is the same thing as Creationism and that it is not a science and cannot be taught in science class.

### *Summary*

As this chapter has shown, recent court rulings have consistently ruled in favor of evolution while ruling against instruction in creationism/creation science, and Intelligent Design in science classes in public schools (see *Daniel v. Waters*, 1975; *Edwards v. Aguillard*, 1987; *Epperson v. Arkansas*, 1968; *McLean, et al. v. Arkansas Board of Education*, 1982; *Peloza v. Capistrano Unified School District*, 1993). Looking at these rulings through the lens of Critical Religious Legal Theory brings the focus to the major players and the social and political atmosphere at the time the issues arose. With regard to the major players, in every case brought in this area, Protestant religious conservatives created laws and policies to counter instruction about the scientific theory of evolution in public school science classes. In the cases that focused on instruction in science classes the people bringing the suits were mainly biology teachers who would have been required to teach or not teach evolution and or creationism in the classroom, and who may have been subjected to criminal charges and/or dismissal for failing to heed the laws (see *Daniel v. Waters*, 1975; *Edwards v. Aguillard*, 1987; *Epperson v. Arkansas*, 1968; *McLean, et al. v. Arkansas Board of Education*, 1982; *Peloza v. Capistrano Unified School District*, 1993; *Scopes v. State of Tennessee*, 1927; *Webster v. New Lennox School District*, 1990). In the disclaimer cases, parents of students in the district were the ones who were suing the school districts to stop them from undermining their children's education in evolutionary theory (see *Freiler v. Tangipahoa Parish Board of Education*, 1999; *Kitzmiller, et al. v. Dover Area School District, et al.*, 2005; *Selman v. Cobb County School District* 2005).

The federal district court in *McLean, et al. v. Arkansas Board of Education* (1982) summed up the social and political history of the conflict surrounding the teaching of evolution in biology classes in U.S. public schools. The court stated that between the 1920's and 1960's,

there was a pervasive “anti-evolutionary sentiment” that could be seen through the fact that many textbooks omitted the topic of evolution and Darwin completely (*McLean, et al. v. Arkansas Board of Education*, 1982 at 1259). This tendency for omission continued largely unchallenged until 1957 when the Soviet Union launched Sputnik and placed itself ahead of the United States in the space race. The disgrace of seemingly losing the space race re-emphasized the necessity for effective science education in the United States. The National Science Foundation (NSF) began to fund several programs aimed at updating the science curriculum in public schools to, amongst other things, include evolutionary theory as a major theme. “Scientific creationism” also called “creation science” began to gain ground around the same time the new science curriculum was introduced, which the court attributed to “efforts by Fundamentalists to attack the theory [of evolution]” (*McLean, et al. v. Arkansas Board of Education*, 1982, at 1259).

According to the *McLean* court, in the 1960’s and 1970’s religious Protestant Fundamentalist organizations were avidly promoting the idea that the Book of Genesis, which they believed to be sole source of knowledge about human origins, was supported by scientific data. "Creation science" and "scientific creationism" are the terms that these Fundamentalists adopted to describe their religious study of creation and the origins of man (*McLean, et al. v. Arkansas Board of Education*, 1982, at 1259). The *McLean* court also noted that creationist organizations consider the introduction of ‘creation science’ into public schools to be “part of their ministry,” and that “[c]reationists view evolution as a source of society's ills” (*McLean, et al. v. Arkansas Board of Education*, 1982, at 1260). To that end the court pointed out that creationists have adopted the Fundamentalists’ view “that there are only two positions with regard to the origins of the earth and life: belief in the inerrancy of the Genesis story of creation and of a worldwide flood as fact, or belief in what they call evolution” (*McLean, et al. v.*

*Arkansas Board of Education*, 1982, at 1260). However, the court stated that the two model approach of the creationists is just a “contrived dualism” without any “scientific factual basis or legitimate educational purpose” (*McLean, et al. v. Arkansas Board of Education*, 1982, at 1266).

The two model argument would be more persuasive if, in fact, there were only two theories or ideas about the origins of life and the world. But there are in fact a number of theories. For example there is a theory that life on earth was "seeded" by comets which delivered genetic material and perhaps organisms to the earth's surface from interstellar dust far outside the solar system. The "seeding" theory further hypothesizes that the earth remains under the continuing influence of genetic material from space which continues to affect life. (*McLean, et al. v. Arkansas Board of Education*, 1982, at 1269)

The *McLean* court did not mention that there were multiple religious views about the origins of earth, though the court in *Daniels v. Waters* (1975) did, rather it focused on different scientific views of origins. The court in *Kitzmiller, et al. v. Dover Area School District, et al.* (2005) also addressed the false dichotomy, but, as mentioned above, that court focused on the fact that disproving the theory of evolution, if that could be done, would not prove the truth of Intelligent Design, and because of this there was no academic need to balance instruction in evolutionary theory with instruction of Intelligent Design.

Courts have consistently ruled that creationism/creation science and Intelligent Design are religious, that they address the same Fundamentalist Christian concept of Creation and that they are not science (see *Daniel v. Waters*, 1975; *Edwards v. Aguillard*, 1987; *Epperson v. Arkansas*, 1968; *Freiler v. Tangipahoa Parish Board of Education*, 1999; *Kitzmiller, et al. v. Dover Area School District, et al.*, 2005; *McLean, et al. v. Arkansas Board of Education*, 1982;

*Pelozo v. Capistrano Unified School District*, 1993; *Webster v. New Lennox School District*, 1990). Courts have also consistently ruled that evolution, even when given the misnomer of evolutionism (see *Pelozo v. Capistrano Unified School District*, 1993), is not religious but is science (see *Daniel v. Waters*, 1975; *Edwards v. Aguillard*, 1987; *Epperson v. Arkansas*, 1968; *Freiler v. Tangipahoa Parish Board of Education*, 1999; *Kitzmiller, et al. v. Dover Area School District, et al.*, 2005; *McLean, et al. v. Arkansas Board of Education*, 1982; *Pelozo v. Capistrano Unified School District*, 1993; *Selman v. Cobb County School District* 2005). The *McLean* court clarified that “the essential characteristics of science are: (1) It is guided by natural law; (2) It has to be explanatory by reference to natural law; (3) It is testable against the empirical world; (4) Its conclusions are tentative, i.e., are not necessarily the final word; and (5) It is falsifiable” (*McLean, et al. v. Arkansas Board of Education*, 1982, at 1267).

Recent Fundamentalist challenges have focused on adding disclaimers to science lessons about evolution (see *Freiler v. Tangipahoa Parish Board of Education*, 1999; *Kitzmiller, et al. v. Dover Area School District, et al.*, 2005; *Selman v. Cobb County School District* 2005; *Tangipahoa Parish Board of Education v. Freiler*, 2000). These challenges have all failed, in part because of the patently religious language and intent included in the disclaimers such as the claim that instruction in evolution is “not intended to influence or dissuade the Biblical version of Creation” (*Freiler v. Tangipahoa Parish Board of Education*, 1999, at 341). Further, the disclaimers use the Fundamentalist tactic of misconstruing scientific terms like fact and theory in order to make evolution seem like bad science: “Because Darwin's Theory is a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist for which there is no evidence” (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 708) and “Evolution is a theory, not a fact, regarding the origin of living things”

(*Selman v. Cobb County School District*, 2005, at 1292). In science, facts are merely observations and are a first step to gathering data to study, hypotheses are best guesses that are posed to question the facts and observations and to guide research, laws are created to describe the collected facts, observations and hypotheses, and then theories are generated to explain the facts, observations, hypotheses, and laws (National Academy of Sciences, 1998). The *Dover* and *Selman* courts exposed the Fundamentalistic tactic to misconstrue the term theory to mean a guess or opinion, and to make it seem that facts are superior and more absolute than theories. The courts found that this was done to encourage students to question the truth of evolution, while only presenting a single Fundamentalistic Christian alternative in the disclaimer such as “Intelligent Design is an explanation of the origin of life that differs from Darwin's view” (*Kitzmiller, et al. v. Dover Area School District, et al.*, 2005, at 708).

Despite this lengthy and largely consistent legal history, or perhaps because of it, many teachers seem to lack a working knowledge in this area. In 2004, Randy Moore published the results of a study which focused on Minnesota public school biology teachers’ knowledge and understanding of the legal issues surrounding creationism and evolution. He surveyed a total of 103 teachers and found that the vast majority of the biology teachers surveyed knew the following: they do not have to give equal time to creationism if they teach evolution (98%)<sup>22</sup>; they do not have to change their curriculum to remove evolution if students or their parents claim that it is against their religious views (91%); that tax money can be used to support instruction in evolution, but cannot be used to promote creationism (92%); that the First Amendment does not provide protection to science teachers who teach creationism (95%); that evolution is not a

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<sup>22</sup> The percentages listed here are the percent of biology teachers who answered Moore’s (2004) survey questions correctly.

religion and teaching evolution does not constitute a violation of the Establishment Clause (97%) and that a public school can require a teacher to teach evolution and to stop teaching creationism (87%) (Moore, 2004).

But what is of concern is that in 2004, after close to 80 years of court cases dealing directly with these issues Moore (2004) found that biology teachers' understanding about many issues was still deficient on the following facts: That if teachers teach evolution they are not allowed to give equal time in the curriculum to creationism (73%); that it is not a crime anywhere in the U.S. to teach evolution in public schools (71%); that courts have determined that creationism/creation science have no scientific merit (41%); that science teachers cannot be required to read a disclaimer stating that instruction in evolution is not meant to dissuade students from believing in and accepting the biblical version of creation (35%); even if the school district adopts a science textbook that promotes creationism, science teachers still cannot teach creationism (72%) (Moore, 2004). Though the disclaimer issue was decided after this study was conducted, all of the other questions of law had been decided prior to the study.

If Moore (2004) is correct in stating that these results are representative of other states, it seems to lead to the conclusion that many science teachers in the United States are still not clear about the legal issues, requirements and ramifications of teaching evolution, creationism/creation science and Intelligent Design in public school science classrooms or that some of them feel so strongly about their religious beliefs that they feel that it is necessary to ignore the law to ensure that what they see as religious truth has a place in the science curriculum (see Moore, 2004). This raises serious implications in the realm of educational policy. If the issue is 'simply' a lack of legal knowledge of in this realm it may be possible for schools of

education and/or professional development to ‘fix’ these gaps in knowledge.<sup>23</sup> However, if it is a matter of teachers feeling that their religious beliefs are threatened by being forced to teach evolution without countering it with religious instruction, the issue becomes much more difficult. Governments can create and enforce as many laws and policies as they desire, but if people feel that they have a moral and/or religious obligation to do something then the demands of the law may fall upon deaf ears.

As will be discussed in the next chapter, I believe that the inclusion of lessons about religion as part of an overall multicultural curriculum could help to solve some of this misunderstanding or protest, because it may give both students and teachers in public schools a better understanding of multiple religious beliefs which could lead to deeper levels of empathy and acceptance of the existence of different views. A multicultural curriculum that is inclusive of religion would not permit religious theories of Creation to be taught in science class, but it may provide students and teachers with access to this information in other classes and contexts within a public school setting in a way that does not run afoul of the law.

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<sup>23</sup> This will be addressed further in Chapter 4.

## CHAPTER FOUR

### Multicultural Education Inclusive of Religion

#### *Background*

Building on the discussion of multicultural education from Chapter One this chapter specifically addresses why multicultural curricula that include religion are essential for twenty first century public schools. This chapter also discusses how religion is defined and it addresses best practices for schools involved in a multicultural curricular shift that is inclusive of religion. This analysis is guided by Critical Religious Legal Theory, and will focus on and critically analyze this issues surrounding curricula grounded in generally accepted Christian norms, religion as a tool of control and how and why religion can and should be demystified through the use of a multicultural curriculum that will serve to preserve ‘moral truths’ like goodness, truth, love, and justice while helping to counter, fear, distrust and hate.

Multicultural education reform is not a new phenomenon. In 1976 the Association for Supervision Curriculum Development (ASCD) released a statement that illustrates multicultural education:

Multicultural education is a humanistic concept based on the strength of diversity, human rights, social justice, and alternative life choices for all people. It is mandatory for quality education. It includes curriculum, instructional, administrative, and environment efforts to help students avail themselves of as many models, alternatives, and opportunities as possible from the full spectrum of our culture....[it] is a continuous, systematic process that will broaden and diversify as it develops. It views a culturally pluralistic society as a positive force that welcomes differences as vehicles for understanding. (Grant, 1977, p. 3)

The initial push for multicultural education emerged from the civil rights movements of the 1960's and 1970's when African Americans organized in an attempt "to eliminate discrimination in public accommodations, housing, employment, and education" and feminists organized to "articulat[e] and publiciz[e] how discrimination and institutionalized sexism limited the opportunities of women [in such things as employment, income and education] and adversely affected the nation (Banks & Banks, 2007, p. 6). The result of this was that disenfranchised groups began to demand that educational institutions reform curricula to reflect the diversity of the "experiences, histories, cultures and perspectives" of the people who shape America (Banks & Banks, 2007, p. 6). The roots of the multicultural education movement help to explain why the bulk of research on multicultural education focuses on race, class, and gender.

Multicultural education continues to be necessary, in part, because of the ever changing demographics of the United States. By the year 2020 it has been estimated that between 20-22% of all children in the U.S. will live in poverty (see Banks, 1997; Monea & Sawhill, 2011). The U.S. Census Bureau has projected that by the year 2020 around 40% of the U.S. population will be non-white and by 2050 about 53% of the U.S. population will be non-white (see Figures 4.3 & 4.4). The following 4 charts track the changing racial demographics from 2000 to 2010 and then show the U.S. Census Bureau's projected racial demographics for 2020 and 2050.

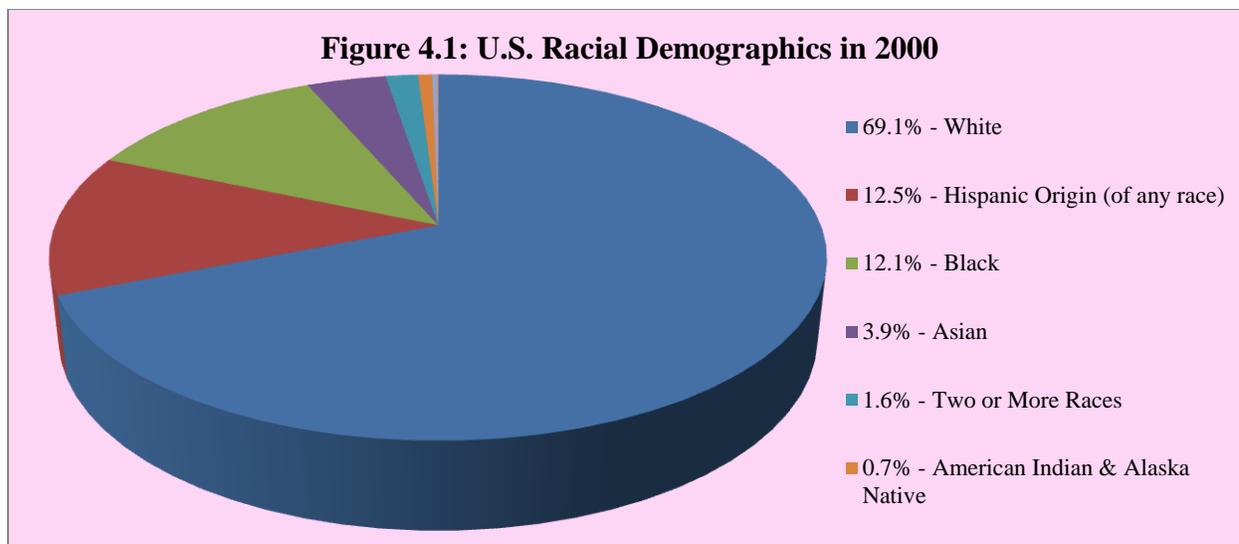


Figure 4.1. U.S. Racial Demographics in 2000

Note. From “U.S. Census Bureau, Census 2000 Redistricting Data (P.L. 94-171) Summary File for states,” (p. PHC-T-1), by U.S. Census Bureau, Population Division, Washington D.C.: U.S. Government Printing Office. Copyright 2001, by U.S. Census Bureau.

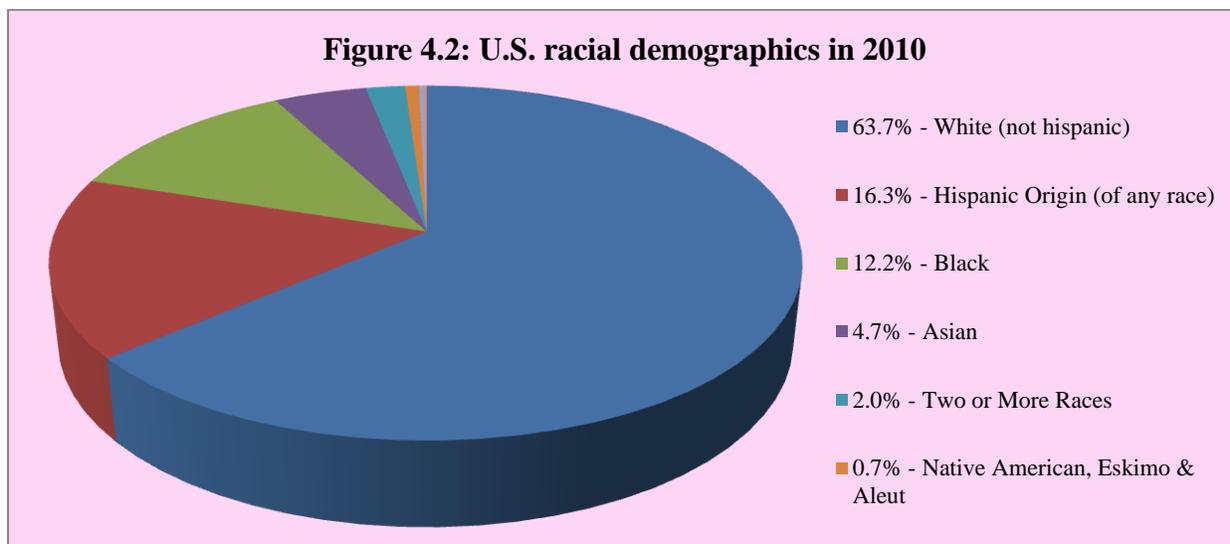


Figure 4.2. U.S. Racial Demographics in 2010

Note. From “Summary of Modified Race and Census 2010 Race Distributions for the United States (US-MR2010-01),” (p. Table 1). Washington D.C.: U.S. Government Printing Office. Copyright 2010 by the U.S. Census Bureau.

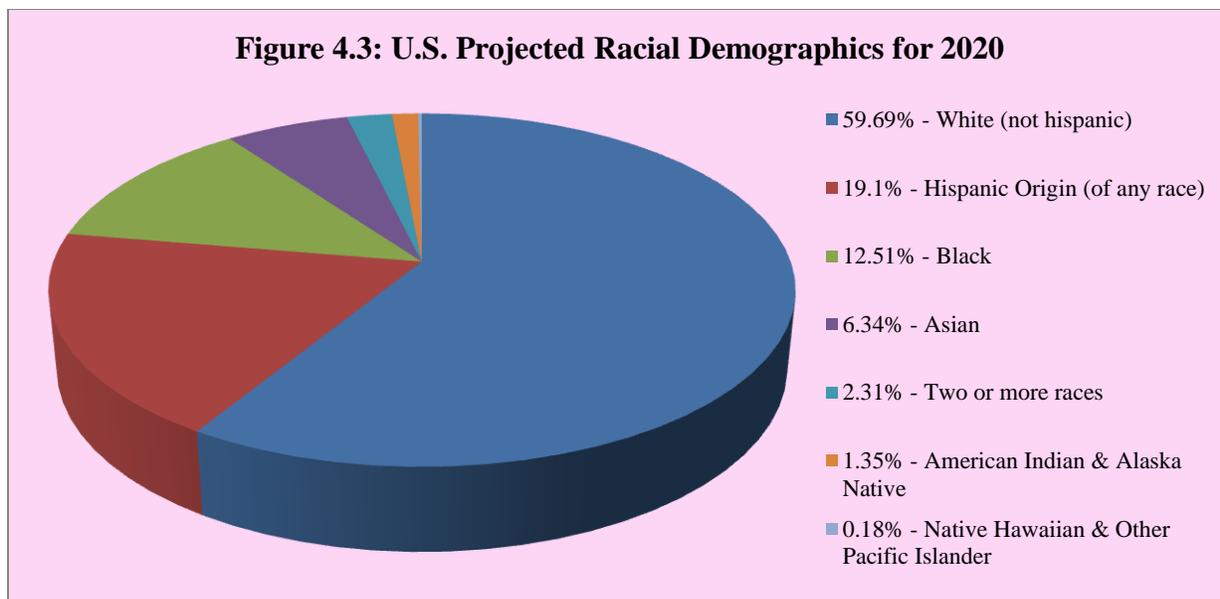


Figure 4.3. U.S. Projected Racial Demographics for 2020

Note. From “2012 National Population Projections. Percent Distribution of the Projected Population by Race and Hispanic Origin for the United States: 2015 to 2060” (p. Table 6).

Washington D.C.: U.S. Government Printing Office. Copyright 2012 by the U.S. Census Bureau.

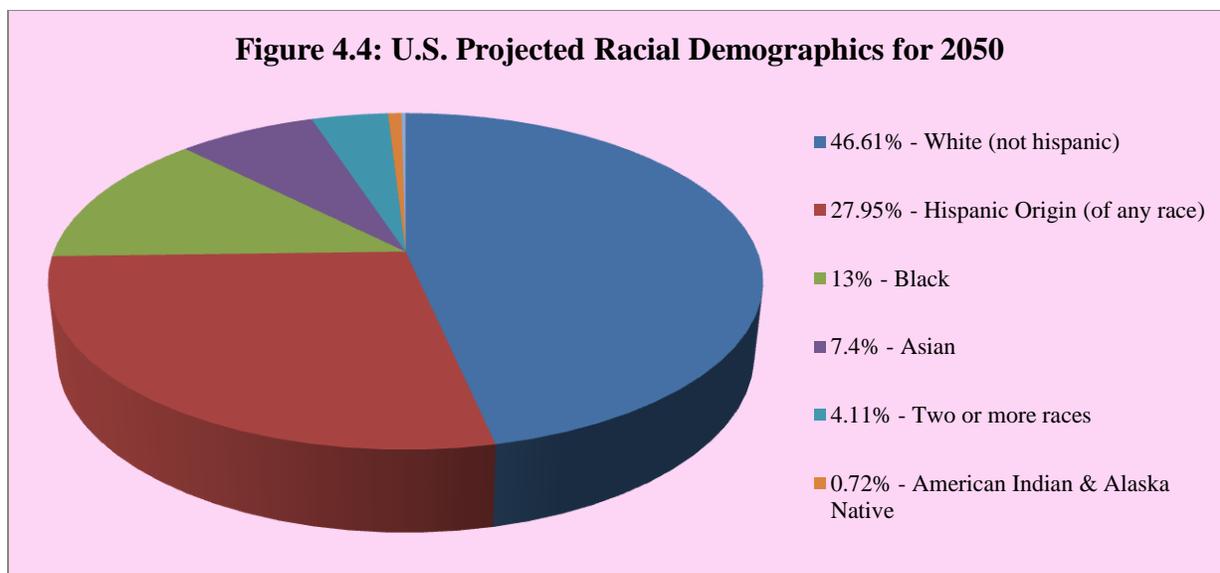


Figure 4.4. U.S. Projected Racial Demographics for 2050

Note. From “2012 National Population Projections. Percent Distribution of the Projected Population by Race and Hispanic Origin for the United States: 2015 to 2060” (p. Table 6).

Washington D.C.: U.S. Government Printing Office. Copyright 2012 by the U.S. Census Bureau.

But these are not the only changing demographics in the United States. In 2012 the Pew Forum on Religious and Public Life published a report which shows that while America is still a Christian majority country (73%), for the first time in its history America has lost its Protestant majority status (48%) (see Figure 4.5).

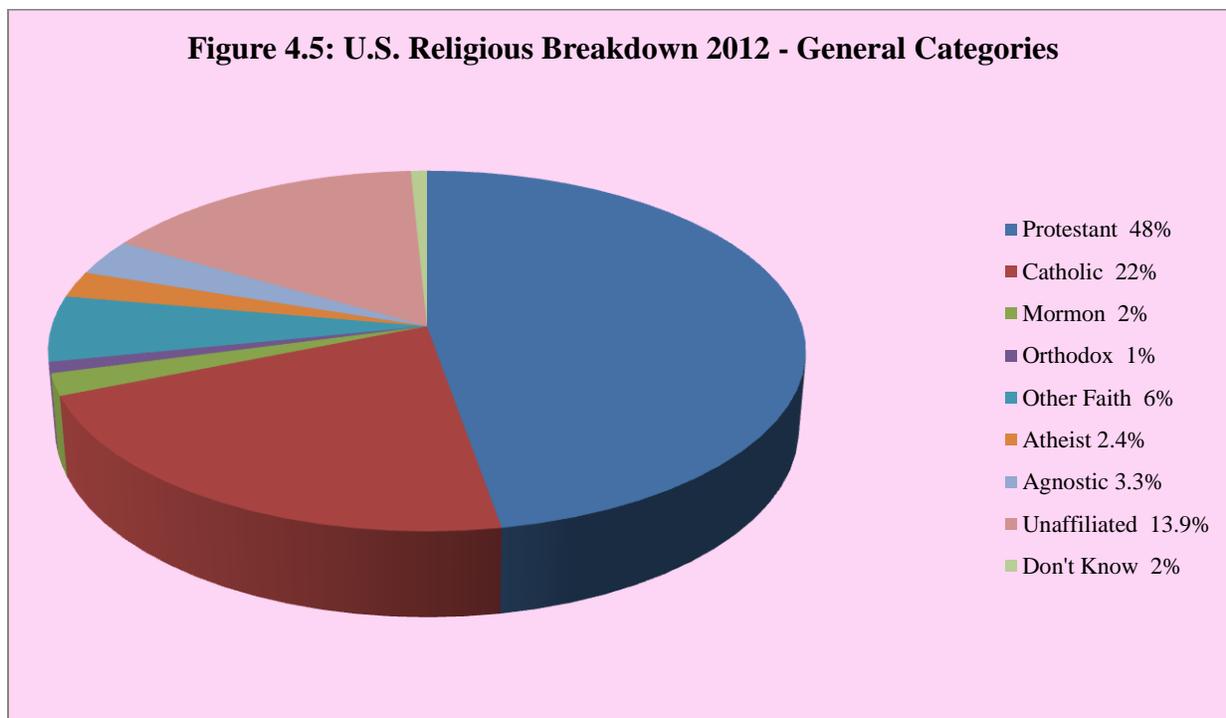


Figure 4.5. U.S. Religious Breakdown 2012 – General Categories

Note. From “‘Nones’ on the rise. One-in-five adults have no religious affiliation.” (p. 13) by Pew Forum on Religion & Public Life, Washington D.C.: Pew Research Center. Copyright 2012, by the Pew Research Center.

Public schools need to be able to address the various learning needs of such a diverse student population. An increasingly multicultural nation in the twenty-first century demands citizens who are critical thinkers and who are able to deal with the complexities of multicultural difference.

The world's greatest problems... result from people in the world—from different cultures, races, religions, and nations—being unable to get along and work together to solve the world's problems, such as global warming, the HIV/AIDS epidemic, poverty, racism, sexism, terrorism, international conflict, and war.

(Banks & Banks, 2007, p. 5)

### *Religion Defined*

Salili and Hoosain (2006), state that “religion is an increasingly dominating force in global affairs and conflict” (p. vii). Interestingly, efforts to find a single all inclusive definition of religion generally fall flat or become reductionist. In part this is because different lenses tend to define religion in a way that relates to that particular lens. For example, sociologists may look to Emile Durkheim (2001) who asserts that religion is a social phenomenon which he distinguishes from magic, something he believes is done in private. His definition focuses on this social aspect: “A religion is a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden -- beliefs and practices which unite into one single moral community called a Church, all those who adhere to them” (Durkheim, 2001, p. 46).

Philosophers may embrace definitions of religion such as one from Immanuel Kant (1998) that religion is “...the recognition of all duties as divine commands” (p. 153). Or they may look to a famous quote by philosopher Karl Marx (1970) who stated that “Religion is the sigh of the oppressed creature, the heart of a heartless world, just as it is the spirit of a spiritless situation. It is the opium of the people” (p. 131). Theologians may follow definitions such as that of Paul Tillich (1994) who stated: “Religion is the state of being grasped by an ultimate concern, a concern which qualifies all other concerns as preliminary and which itself contains the answer

to the question of a meaning of our life” (p. 4). While social anthropologists may embrace a definition such as that from Clifford Geertz (1993) who states:

*...a religion is: (1) a system of symbols which acts to (2) establish powerful, pervasive, and long-lasting moods and motivations in men by (3) formulating conceptions of a general order of existence and (4) clothing these conceptions with such an aura of factuality that (5) the moods and motivations seem uniquely realistic. (p. 90)*

Psychologists, on the other hand, may adopt definitions from people like Sigmund Freud (1965) who said of religion:

While the different religions wrangle with one another as to which of them is in possession of the truth, our view is that the truth of religion beliefs may be left altogether on one side. Religion is an attempt to master the sensory world, in which we are situated by means of the wishful world which we have developed within us as a result of biological and psychological necessities. ...Its doctrines bear the imprint of the times in which they arose, the ignorant times of the childhood of humanity. ...If we attempt to assign the place of religion in the evolution of mankind, it appears not as a permanent acquisition but as a counterpart to the neurosis which individual civilized men have to go through in their passage from childhood to maturity. (pp. 207-208)

The general public may be more likely to look online sources like Merriam-Webster (2012) which defines religion as:

1 *a*: the state of a religious *b* (1): the service and worship of God or the supernatural (2): commitment or devotion to religious faith or observance 2: a

personal set or institutionalized system of religious attitudes, beliefs, and practices  
 3 *archaic*: scrupulous conformity: conscientiousness 4: a cause, principle, or  
 system of beliefs held to with ardor and faith.

The Supreme Court has thus far avoided giving an absolute/narrow definition of religion. In *U.S. v. Ballard* (1944) the Supreme Court stated that the truth or falsity of religious beliefs and doctrines should not be at issue before U.S. courts, rather the Court felt that the sincerity of the believer(s) as to the truth of those religious beliefs and doctrines were the things that could properly be brought before a court. Additionally, beyond the mainstream religions which profess a belief in one or more Supreme Beings the Court has recognized “Buddhism, Taoism, Ethical Culture, Secular Humanism” (*Torcaso v. Watkins*, 1961, at 495), Scientology (*Hernandez v. Commissioner of Internal Revenue*, 1989) and Atheism (*Wallace v. Jaffree*, 1985) to be religions within the scope of the First Amendment.

In general, religions tend to be “based on the notion of the Transcendent” and “contain the four ‘C’s’: Creed, Code, Cult [and] Community-structure” (Salili & Hoosain, 2006, p. 17). The lack of a single universally accepted lexical definition of religion is not harmful to a multicultural religious curriculum because different teachers can simply adopt a stipulative definition (such as one of those mentioned above) that works best with their curricula.

### *The Problem*

Using Critical Religious Legal Theory to analyze the ways religion is addressed in U.S. public school curricula uncovers several deeply rooted issues. As Chapters 2 and 3 illustrated, there is a long history of confusion and/or purposeful attempts to ignore Constitutional demands governing teaching religion versus teaching about religion in public schools. This, coupled with America’s reliance upon ceremonial deism, means that public school students are often presented

with material that reinforce Christian norms and leave everything else as to be thought of as the (anti-American) beliefs of the Other (see the analysis of the Pledge of Allegiance in Chapter 2). Loewen (2007) describes how Native American<sup>24</sup> religious beliefs, which in reality are varied and sophisticated, are both simplified and bundled in U.S. history textbooks. He quotes a textbook which states: “These Native Americans [in the Southeast] believed that nature was filled with spirits. Each form of life, such as plants and animals, had a spirit. Earth and air held spirits too. People were never alone. They shared their lives with nature” (Loewen, 2007, p. 113). This description makes Native American beliefs sound shallow and somewhat silly. Yet as he points out Christianity is never oversimplified in the textbooks in such a manner, though he includes a description of how it could be done:

These Americans believed that one great male god ruled the world. Sometimes they divided him into three parts, which they called father, son and holy ghost. They ate crackers and drank wine or grape juice, believing that they were eating the son’s body and drinking his blood. If they believed strongly enough, they would live on forever after they died. (Loewen, 2007, p. 113)

Including non-Christian religions only to oversimplify them is harmful to the goals of multicultural education because it makes them seem less important, less true and less persuasive as belief systems than Christianity (Loewen, 2007). This perpetuates an underlying Christian bias in the curriculum. This bias is further reinforced by repeated the attempts of Christian religious

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<sup>24</sup> There can be many issues that arise during educational multicultural discourse involving Native Americans or other indigenous peoples. For example Richardson (2011), discusses the lack of diplomacy in educational discourse in continually referring to Indigenous/Native peoples as “conquered” which reinforces the stereotype of primitive cultures being overtaken by more advanced cultures. In a transformative multicultural educational curriculum (discussed below) this would be part of the hidden curriculum that would need to be purposefully and directly addressed.

conservatives to insert religious symbols such as prayers, religious displays, and religious theories (taught as truth) into public schools as a way to promulgate their power as the dominant culture and the correct way of seeing the world (see Chapters 2 & 3). Yet these same religious symbols, when respectfully demystified and looked at through cultural and social lenses could serve to enrich public school curricula by making them more inclusive.

A selectively homogenous curriculum is a breeding ground for stereotypes (Smith-Maddox & Solorzano, 2002). Looking at this through the lens of Critical Religious Legal Theory draws attention to the ways that generally accepted Christian norms in public schools can be used as a tool of control. When students are not given enough information about people who are different than them they are more likely to label them with whatever the dominant culture has created (Moore, 2007). Many students have internalized the negative and distorted conceptions of their own and other ethnic groups, a process that has been promulgated by society (Lee, 1996). Minority students may be convinced that their heritages have little of value to offer, while those from dominant groups may have inflated notions about their significance (Jewett, 2006). Developing a better understanding of their own and of other groups cultural experiences can help students to correct these distortions (Banks & Banks, 2007; Moore, 2007). Students come from diverse communities and it is essential to acknowledge this diversity in an integrated multicultural curriculum that is inclusive of religion. Wilson (2006) states that:

[t]he multi-religious global situation of the present time and the concern to promote moral and spiritual values in secular education gives an appropriate opportunity to incorporate teaching of religions in school and college curricula, in the spirit of promoting greater interreligious understanding where it is not done already. (p. 30)

When minorities are added to the curriculum without true integration, like a notation in the margin of the textbook, it serves to further fragment student understanding (Loewen, 2007). For example, it still communicates to students that the white, heterosexual, Christian male mainstream is correct, and even worse it seems to say that the add-ons are less important; just an afterthought (Loewen, 2007). In many communities, and the schools and educational programs within them, those labeled minorities are actually the majority (Kozol, 2005). Yet even in these schools the curriculum and culture often fails to reflect a multicultural integrated picture of America, especially as related to religion (see Moore, 2007; Salili & Hoosain, 2006). Merry (2006) states that “multicultural curricula often resort to stereotypical and reductionist depictions of non-European cultures and ways of life” which may serve to increase or solidify the inequalities that those minorities face, rather than promoting their interests (p. 42). Diversity cannot just exist on paper, it needs to be celebrated in classrooms and it should be used to teach lifelong lessons of tolerance and acceptance (Newmann, 1996).

### *Multicultural Curriculum Goals*

Banks (2004) articulated five core goals that can be used to guide multicultural education reform that is inclusive of religion. The first goal is *content integration* which is where the curriculum is infused with material from diverse groups. This curricular change may include the addition of new textbooks and/or authors, and historical lessons from multiple viewpoints. Care should be taken to make sure that textbooks present contributions from diverse groups within the main text rather than as notes in the margins (Loewen, 2007). The second goal is *knowledge construction* which is an intentional focus on the way that culture, ethnicity, religious beliefs, etc. shape the identification and interpretation of educational content. For example, a social studies lesson could address the different cultural points of view about the claim that Christopher

Columbus ‘discovered’ America, when America was already inhabited by Native Americans. Or a history lesson in high school could look at the claim that the United States was founded on religious freedom through the viewpoints of the immigrants who were escaping harsh religious rules in other countries, and slaves and Native Americans, for example, who had Christianity forced upon them. The third goal is *prejudice reduction* which is the extent to which educators work to reduce prejudice and stereotypes embraced by the school community. This goal can be met through purposeful inclusion of multicultural lessons, assemblies, etc. that address known and/or likely stereotypes and prejudices in the school and the world at large. An assembly could include a presentation by leaders from various religions who could talk about the complementary and positive aspects of their religions to show that while beliefs may diverge in places there is a common core of goodness underlying religions in general. The fourth goal is *equity pedagogy* which is the purposeful inclusion of pedagogies that are designed to increase the academic achievement of lower performing students and to create greater equity between students. Achievement of this goal would require schools to look at each lower performing student from multiple angles, race, religion, gender, sexual orientation, ability, etc. to ensure that the pedagogies would address the whole child rather than a single dimension of the child. The fifth goal is *empowering school culture* which is where a school’s structures and processes are reformed to be more empowering for all students. This goal can be achieved by schools addressing the hidden curriculum within a school such as working to eliminate traces of institutionalized prejudice in school practices.

#### *Multicultural Religious Curriculum Goals*

Wilson (2006), compares religious goals with educational goals stating that they both seek to impart “knowledge, information, beliefs, and practices to their adherents and students”

and they share the goal of seeking to “ensure the well-being of the entire humanity and the whole of creation” (p. 10). In line with Critical Religious Legal Theory, the more tailored goals of multicultural religious education should certainly include demystifying various religious beliefs and practices, understanding the tenets of the major religions and the reduction of prejudice and stereotypes, but they should not end there. This curriculum should also encourage students to develop empathy to understand religion by teaching them that all people, no matter who, what or whether they believe or worship, share a common humanity (Salili & Hoosain, 2006).

Additionally, with regard to religious stereotype and prejudice reduction, Salili and Houssain (2006) assert that is it not enough for a teacher to simply state that a stereotype is wrong, instead the teacher should use in depth critical discussions to look at the origins of stereotypes and how they have evolved over time.

Another goal of multicultural religious education should be to encourage students to critically analyze the similarities and differences of a multitude of religions. “An open minded and empathetic discussion of [religion] should include drawing a distinction between the original tenets of a religion and how some societies following a religion have evolved practices specific to their own sociopolitical history” (Salili & Hoosain, 2006, p. 2). This goal can help to reduce the types of misunderstandings between people who hold different beliefs that have led to intolerant acts of hate and violence throughout history. Wilson (2006) states that often such intolerant acts:

were primarily shaped by the narrow understanding of the teaching of one’s own faith and the misunderstanding of the other. Comparing the best of one’s tradition with the least of the other, claiming superiority on this false comparison, and

arriving at such conclusions without any genuine engagement with the *other* (p. 12).

Part of the analysis of the similarities and differences of a multitude of religions could include questions such as how and/or why believers of different versions of the ‘Golden Rule’<sup>25</sup> (treat others as you would like to be treated) could embrace intolerant feelings and actions towards others (Salili & Hoosain, 2006). Discussions such as this may be uncomfortable for both teachers and students and should be approached empathetically. Supreme Court Justice Black once stated that, “there is no reason I can imagine why a State is without power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools” (*Epperson v. Arkansas*, 1968, at 112-113). But there are many topics that students and teachers may find controversial and distasteful that would be arguably destructive to American society if future generations of students remained ignorant about them, such as slavery, activism, war, assassinations, etc. Additionally, Loewen (2007) reminds us that emotionless, noncontroversial lessons bore children and leave lessons void of humanity and because of that they are easily forgotten.

Another goal of multicultural religious education should be to make sure that religion is not discussed in a bubble. Religion is only one aspect of culture, so it should be discussed in the historical and contemporary context of how it relates to, exists in and shapes the world and its inhabitants. Moore (2007) encourages educators to ensure that students are able to “discern and analyze the fundamental intersections of religion and social/political/cultural life through multiple lenses” by teaching them “the history, central texts, beliefs, practices and contemporary

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<sup>25</sup> Versions of ‘The Golden Rule’ appear in several religions such as Hinduism, Buddhism, Confucianism, Judaism, Christianity, Islam, Zoroastrianism, Jainism, Bahai, and Sikhism (see Salili & Hoosain, 2006).

manifestations of several of the world's religious traditions as they arose out of and continue to be shaped by particular social, historical and cultural contexts" and by teaching them to "discern and explore the religious dimensions of political, social and cultural expressions across time and place" (pp. 56-57).

Special care must be taken when teaching about religion to ensure that the teacher, as an arm of the government is presenting religious material academically. Thus, another goal of multicultural religious education should be for both teachers and students to learn to discuss their own ideas and/or beliefs and ideas and/or beliefs that may differ from their own in a critical but empathetic way.

Religion in multicultural education is not meant to replace the student's personal or familial religious experience. Neither is it meant to dilute the student's feeling and commitment for his or her own religion. . . .diversity in multicultural education is used to enrich the entire learning process. The nonpartisan way in which multicultural education is conducted invites the student to ponder the complexity of religious experience, resulting in a deeper appreciation of the experience. (Salili & Hoosain, 2006, p. 4)

Haynes (2008) developed a teacher's guide to religion and public schools which included guidelines to help teachers to understand how to teach *about* religion in a way that should help teachers to avoid First Amendment issues: 1. The teacher's approach to the study of religion should be academic rather than devotional. 2. The teacher should encourage students to be aware of different religions, but should not force the students to accept the teachings of any religions as truth. 3. The school can sponsor the study of religion, but not the practice of religion. 4. Students can be exposed to a multitude of religious views

and practices, but the school should not impose any particular religious view or practice.

5. The teacher should educate students about multiple religions, but the teacher should not promote or disparage any particular religion or religion in general. 6. The teacher should inform students about various beliefs, but he or she should not try to indoctrinate students to any particular belief. Moore (2007) points out that these guidelines seem to rely on teachers presenting information neutrally and objectively, which she states is largely impossible since education is never neutral. For example, there would be no way for a teacher to cover every religion that exists in the world, so the teacher's choice of which religions to discuss in the curriculum would already be subjectively choosing which ones were 'more important' to discuss. However, as Moore (2007) states this subjectivity does not undermine the validity of the guidelines, it is just something for teachers to be aware of and sensitive to when constructing their curricula.

### *Multicultural Best Practices*

Much of the rhetoric behind multicultural education reform often relies on "color-blind discourses" that seek assimilation as their end goal (Loutzenheiser & MacIntosh, 2004; Jewett, 2006). But the assimilationist vision of an America where race, culture and ethnicity were not important identities because all citizens had blended into a single American race, culture and ethnicity, often symbolized as the melting pot, has not, and most likely will never come to be (see Banks, 1997; Salili & Hoosain, 2006). Additionally, though many public schools would probably assert that, in an attempt to close the achievement gap, they have adopted integrated curricula focused on minority student achievement, minority students do not seem to be benefiting from the 'improvement' (Banks, 1997; Loewen, 2007). One reason could be that despite schools' assertions students are still primarily taught a one sided view of the world

(Maestri, 2006). Students receive snips of integration here and there mostly through months, like Black History Month, the shortest month of the year, but this should not be considered true multicultural education. And, though there are some religious heritage months, for example Jewish American Heritage month is in May, not all religions have months assigned to them. So, even with this form of multiculturalism it is unlikely that religion will get much attention. Schools embracing a multicultural curriculum inclusive of religion would need to find ways to acknowledge and celebrate diversity and multicultural similarities and differences throughout the entire curriculum. “The religion component in multicultural literacy should include... an appreciation of the trials and tribulations as well as triumphs of different religions” (Salili & Hoosain, 2006, p. 3). If students are not really taught where we have come from, or are given only a sterilized version of the past, they cannot be expected to lead us to anything better than what we have today.

Instead of mainly focusing on multicultural education as a way to close the achievement gap, Critical Religious Legal Theory analysis would require that the focus be broadened to include the multicultural curricular goals discussed earlier in this chapter: content integration, the knowledge construction process, prejudice reduction, equity pedagogy, student achievement and empowering the school’s culture and social structure (Banks & Banks, 2007). Superficial curricula change tends to do more harm than good; true curricular change seeks to challenge the deep structures of society’s institutions and respond to the need to educate and empower the pluralistic society it serves (Moore, 2007, Banks & Banks, 2007). Banks (1995) uses the terms inclusion, infusion, and transformation to define three approaches to multicultural curriculum reform. The primary goal of multicultural curricular inclusion or improvement is to include the historically omitted and to correct stereotyped portrayals of diverse groups. This is the type of

curricular change that is most often seen in schools but is the least effective in transferring the goals of multicultural education to students (Banks, 1995). The inclusion is characterized by the “3 C’s” of culture: cuisine, costumes and crafts (Banks, 1995). This selective information is presented as a supplement to what is currently taught. For example, multicultural elements may be discussed primarily in terms of the inclusion of contributions of famous minorities, like Nelson Mandela or Martin Luther King, during black history month or touching on the surface meanings of a few religious celebrations that occur in December. The biggest problem with this method is that the multicultural content, concepts, and activities are added without changing the structure of the core curriculum which serves to blur the purpose of the inclusion (Banks, 1995). However, this type of multicultural curriculum reform may be acceptable for teachers of younger children, K-4, since it will begin to introduce students to their multicultural world, and will provide building blocks for more critical academic discussions of multiculturalism in later grades. For example, lessons about the religious and secular December holidays could be structured so that students in a 1<sup>st</sup> grade classroom could learn different religious and secular holiday songs, while students in a 4<sup>th</sup> grade classroom were taught about different religious and secular celebrations that occur in the month of December, and students in a 6<sup>th</sup> grade classroom could have critical discussions about the reasons why some people may be uncomfortable with greetings of “Merry Christmas” or “Happy Holidays” during this time.

During the process of infusion multicultural content is interwoven through multiple aspects of the curriculum on a regular and routine basis (Banks, 1995). This information is about ‘all’ people and is presented to all students regardless of their racial, ethnic, cultural, religious or educational background, and is found in all courses and activities (Banks, 1995). Multicultural content infusion should be seen in every unit, curriculum guide, textbook, audiovisual aid, and

even the physical environment of the school. An infused curriculum should focus on where we, as a global community, have come from and what we have the potential to achieve in the future, including past, present and future problems, conflicts and triumphs. The religious aspect of an infused multicultural curriculum would need to address the reality of religious diversity in both American society and in the global society (Salili & Hoosain, 2006). An infused curriculum should be multicultural, interdisciplinary, and comparative in nature (Banks, 1995). Additionally, an infused curriculum could be used to foster strong relationships with the community through a school's inclusion of service learning outreach projects in the curriculum (Newmann, 1996).

Multicultural curricular transformation goes beyond inclusion and infusion to a core value paradigm shift which leads to strong social action, equality, and transformative dimensions (Banks, 1995). In curricular transformation the core principles and values of the status quo are challenged. The structure of the curriculum should be changed to enable students to view the multicultural concepts from the perspectives of diverse ethnic and cultural groups. All classes should approach each thematic topic from a comparative cross-cultural perspective rather than as an afterthought. This transformative curriculum would also likely benefit from presentations and community involvement with various races, religions, genders, etc. to allow not only students, but also teachers and administrators to gain a thorough understanding of difference and gain empathy for others. At this level of transformation, all levels of the educational change, from the integration of the new curricula into the community, the advisory boards, faculty, staff, recruitment, curricular materials, teaching methodology, and program activities (to name a few) are impacted (Banks, 1995). This transformation is the hardest to accomplish because it demands that everyone involved in the school be on board (Banks, 1995). With multicultural curriculum transformation that is inclusive of religion (or any kind of multicultural reform that is inclusive

of religion), administrators, teachers, students, parents and the community, etc. will need to be educated about what the First Amendment actually protects and why academic lessons *about* religion should not violate these constitutional demands, since the fear of violating the law is often the reason why schools avoid the topic of religion in the curriculum (Moore, 2007).

To make any kind of change in a public school setting there are several steps that must be followed to ensure that the change will be accepted and properly instituted in the classroom. First, it is necessary to make the entire school community aware of the need for the change and it is essential, early in the change process that all necessary change agents are brought on board (Banks & Banks, 2007). Fullan and Stieglebauer (1991) name eight types of stakeholders in the local community who are necessary to bring about change in schools: teachers, principals, students, district administrators, consultants, parents /community, government, teacher-educators. They point out that the first steps in the change process are to: build coalitions within groups and between groups, establish areas of common interest, and then move forward (Fullan & Stieglebauer, 1991). It is important to note that if curricular change is going to occur successfully, it must occur within the boundaries established by things like textbooks and state/national standards. This means that educational policy makers and educational material suppliers will need to be included in the change process.

Once it appears that the necessary people are on board it is essential to define the educational goal, here a goal would be the inclusion of lessons about religion as part of the school's multicultural curriculum. Since it is likely that there will be different opinions about how to achieve the proposed goal it is important to allow everyone to be heard, especially the teachers who will be expected to institute the proposed changes within their classes. In reaching the envisioned goal of a multicultural curriculum that is inclusive of religion the eight previously

named change agents should be consulted to assure that the majority are on board and that all ideas and suggestions have been given due weight. Leaders should be identified who can bring dissenters on board to join the vision and they will need to take concrete steps along pathways that lead to student, professional and system learning (Knapp, Copland & Talbert, 2003).

A professional learning community should be created with opportunities for people, particularly teachers, within the school to speak to each other and also to people outside of the school to advance their understanding of the proposed change (Newmann, 1996). It is essential that the principal, superintendent and other administration be supportive and active within the professional learning community (Eisner, 2007). They should see their positions within the school as instructional leaders, supporting teacher collaboration and providing numerous opportunities for teachers to have input on curricular and programmatic decisions relating to the change (Newmann, 1996). Teachers will need support from the administration to achieve the competency in the proposed changes and the administration should strive to provide constructive feedback about educational and instructional strategies that are well supported by scholarly research (Eisner, 2007). But, keeping all this in mind, is it still the case that teachers, merely one of several necessary change agents, often become the be all and end all of educational change. Simply put, once the classroom doors close, their words become law and teachers may or may not implement the sought after vision into their already overburdened curricula. Making sure that the teachers are not only on board with the change, but are also fully supported in order to make the change, must be a top priority.

With multicultural curriculum transformation that is inclusive of religion, material, human and social resources will be necessary for the vision to succeed (Gamoran, Anderson, Quiroz, Secada, Williams & Ashman, 2003). The support necessary to ensure that teachers

remain committed to the educational reform comes in many forms. It should be understood that any change is going to take the teachers' time both inside and outside the classroom. Teachers need to feel competent with the change before they will add it to the curriculum. To avoid the issue of teachers not feeling competent with a proposed change, they must be provided with adequate and on-going professional development to raise their competency in the area of the proposed change and when possible this professional development should be compensated (Graziano, 2007; Moore, 2007). While it is comforting to think that teachers are noble and selfless and live only for their students, in reality it must be acknowledged that teachers have lives beyond the classroom and when additional demands are placed on their free time they should be compensated for it. Teachers already feel that they are underpaid for what they do (Graziano, 2007; Koppich, 2007), to add to their schedules without an obvious benefit to them makes the change likely to be greeted with hostility or indifference, neither of which make it likely that the change will be implemented (Graziano, 2007). Teachers will also need to be provided with the tools, like textbooks, technology, etc., necessary for a smooth transition in the classroom. Not providing teachers with the necessary tools makes it very likely that they will simply avoid integrating the proposed change into their regular curricula (Graziano, 2007).

As the teachers implement the proposed changes into their curricula they must be allowed to take a front seat in assessing the proposed changes (Moore, 2007). The assessment should include things like: ease of implementation, student interest, student achievement, benefits to the student, benefits to society, etc. (Banks & Banks, 2007; Moore, 2007). An outside viewer sees only a snapshot of the progress of the change. A teacher gets a front seat day after day and sees the reality of the process. While the teacher should not have the only word in the assessment, the teacher should have a place at the assessment table. This research can then be used by policy

makers to, for example, adjust state/national standards to better reflect the realities of multicultural education in the classroom, and revamp state/national assessments to include multicultural material to ensure that it remains a priority in the classroom.

Additionally, although most educational reform seems to be instituted in top down fashion, a bottom up plan or a plan that blends the two, may better serve the educational community (Marantz Cohen, 2007). Teachers often feel like they are commanded by those at the top to institute whatever new educational trend is on the horizon without having any say in the matter (Marantz Cohen, 2007). The problem in effecting change, as Freire (1993) noted, is that it cannot be handed down but must be constructed in the realm of social interactions. People tend to learn and accept new behaviors primarily through their interactions with others (Fullan & Kilcher, 1992). Ongoing channels of negotiation between all of the change agents are necessary to make any type of educational change successful. Giving teachers a strong and competent voice in the change process may make them more likely to follow through with the change once the classroom doors close. Teachers should be the focal point of the majority of educational change because when the bell rings and the doors close the vision of change begins or ends with them.

### *Teacher Education in Religion*

It probably goes without saying that for educators to teach a multicultural curriculum that is inclusive of religion they must first educate themselves about religious multiculturalism. A partial solution to this would be to include required classes on multicultural curriculum creation in teacher education programs. However, because there are so many aspects of multiculturalism such as race, religion, gender, sexuality, socio-economic status, ability, ethnicity, culture, etc., a semester long course would likely only touch on religion in passing.

Viewing teacher preparation through a Critical Religious Legal Theory lens would require teachers to be educated in multiple aspects of religion. For example, teachers would need to be taught about the beliefs, goals and histories of multiple religions and the socio political nature of religion in general. They would need to be taught to recognize and address any underlying Christian biases in their schools. And they would need to learn how to teach about religious topics in a secular and empathetic manner. Moore (2007) provides a structured suggestion for both in-service and pre-service teacher training that would likely meet these demands. First, Moore (2007) outlines five areas of religious knowledge/competence that all teachers should obtain. The first is that teachers need to gain an historical and contemporary understanding of the ever evolving relationship between religion and the U.S. government. The second is that teachers need to develop bias reducing, reflective tools that will allow the, to critically analyze their own assumptions about religion and the assumptions and biases of those around them. The third is that teachers need to be aware of the different methods that can be used to study religion so that they can choose a method that best suits the age group or subject that they teach. The fourth is that teachers should use a cultural studies framework to learn about at least two different religious traditions to make themselves aware of the diversity within and between those and other religious traditions. And the fifth is that teachers need to be able to incorporate their multifaceted knowledge of religion into their lessons in ways that will complement and deepen their existing curriculums, rather than simply adding errant lessons to ensure that religious topics are covered.

Moore (2007) further describes the 'Program in Religion and Secondary Education' at Harvard, which is a specialized training program for teacher education Masters students who are also pursuing a Master of Theological Studies (MTS) or a Master of Divinity (M.Div) degree. In

this program pre service teachers take 4 courses dealing with religion and secondary education and one course in education psychology, complete a teaching internship and pass the state's teacher licensing exams, in addition they also complete the requirements for the M.Div or MTS degree (see Moore, 2007). This program has been in existence since 1972, and is unique to Harvard. However, Moore (2007) suggests ways that schools of education could expand their programs to support teacher training in religion. The first is for schools of education to ensure that their multicultural course offerings include religion as a major focus. The second is for schools of education to partner with their campus religious studies department or a nearby religious studies college/department to create religious studies courses that are geared towards educators. And the third is schools of education to require pre service teachers to demonstrate competence in legally integrating the study of religion into their chosen field.

For in-service teachers, professional development workshops may allow teachers to gain competence in ways to integrate religious studies into a multicultural curriculum. But Moore (2007) suggests a more structured approach to gain teacher competence in religious literacy through a certificate program with a series of courses that would at a minimum:

- 1) introduce teachers to the historical context regarding religion, values, and public education in the United States; 2) address the content and methods required to include religion as a category of multicultural studies; and 3) introduce teachers to the study of religion through a cultural studies approach that could focus on particular traditions or religion as it is manifested in the context of particular geopolitical regions. (pp. 97-98)

Of importance to in-service teachers would be the adaptability of this type of program to address the needs of various types of teachers from elementary through high school.

It is essential for schools and colleges of education, pre service and in-service teachers who engaged in the aforementioned religious competence scaffolding to publish qualitative and quantitative research reports on the effectiveness of programs and courses in terms of such things as teacher religious competence, program acceptance and integration at schools of education, the ways teachers use the knowledge gained in their religious studies to shape their multicultural curricula and the perceived and actual worth of such programs by teachers, schools of education and elementary/secondary schools. Additionally, since federal laws such as No Child Left Behind and Race to the Top demand measurable gains in student achievement, systematic research should be conducted on things like cooperative learning, critical thinking, prejudice reduction, knowledge construction, and the influence of multicultural content integration that is inclusive of religion on student outcomes. Further, research should look at the effects of multicultural curricula reform that is inclusive of religion on student outcomes like grades, advancement in tracked school environments and graduation rates, but research should also look into things like college and trade school enrollment, performance and graduation rates.

### *Teaching About Religion*

Public school personnel who embrace a multicultural curriculum that is inclusive of religion will need to be mindful of what is and is not legally permissible in a public school. For example (putting the controversy over the Pledge of Allegiance aside) teachers cannot require that the school day or a particular class be opened with a prayer even if participation is voluntary (see *Engle v. Vitale*, 1962; *School District of Abington v. Schempp*, 1963), but teachers could require students to learn, discuss and/or analyze prayers from various religions in a social

studies, language arts or philosophy class. Religious theories about Creation cannot legally be taught in science class, but they can be taught in a philosophy class (see *Daniel v. Waters*, 1975; *Edwards v. Aguillard*, 1987; *Epperson v. Arkansas*, 1968; *McLean, et al. v. Arkansas Board of Education*, 1982; *Peloza v. Capistrano Unified School District*, 1993). Aspects of religious holidays can be celebrated in the classroom through the use of multicultural lessons and displays as long as there is a secular educational purpose (see *Ahlquist v. City of Cranston*, 2012; *Joki v. Board of Education of Schuylerville Central School District*, 1990; *Stone v. Graham*, 1980).

Public school teachers cannot teach religion as truth, but, in a curricularly appropriate class, they can teach about the religious beliefs that various populations hold as truth (see *Stone v. Graham*, 1980). Teachers should approach lessons about religion from a neutral stance, but should be aware that absolute neutrality is not required under the law (see Moore, 2007).

Historical people, places and things can be discussed in curricularly appropriate classes in public schools in light of their religious significance, such as a discussion of the Founding Father's religious beliefs and how they may or may not have shaped the creation of the U.S. government or a discussion of the similarities and differences between Christianity and Judaism during lesson about the Holocaust. When discussing the characteristics of historical or important figures, their religious beliefs should be included along with things like race, gender, country of origin, etc. (see Banks & Banks, 2005).

Using Critical Religious Legal Theory as a guide, when religion is included in lessons in public school classrooms the discussions should be inclusive, addressing multiple religious views, and comparative, showing students the commonalities between various religions. In the younger grades, lessons should focus on the beneficial aspects of various religions, like community, or shared 'moral truths' like absolute goodness, truth, love, and justice (see Kim,

1996). All public school teachers should directly, and age appropriately, address known religious prejudices and stereotypes in an empathetic, but historically factual manner that will allow them to challenge the underlying misconceptions of their students and teach them to critically analyze the roots and origins of these prejudices and stereotypes (see Salili & Hoosain, 2006). And older public school students should be scaffolded to, for example, critically analyze how and why religion has been used by people in power to control the masses, or how and why religion has unified people to overcome adversities throughout time (see Olsen, 2003).

In line with Critical Religious Legal Theory school personnel should be mindful of the Christian bias, sometimes under the guise of ceremonial deism, that permeates public schools and should address the bias in an educational and empathetic manner. This bias can be seen in things like the Pledge of Allegiance, wholly Christian religious displays, school activities that occasionally occur on a Saturday (a day of rest for Jews), but rarely, if ever, on Sundays (Christian holy days), and school vacations which are scheduled around Christian holidays (see *Elk Grove Unified School District v. Newdow*, 2004; *Freedom From Religion Foundation v. Hanover School District*, 2010; *Moore*, 2007; *Newdow et al. v Rio Linda Union School District*, 2010). To overcome this bias schools could, for example, ensure that students are educated about the history of the Pledge of Allegiance, change wholly Christian displays into multi-religious educational displays and carefully consider the scheduling of school sponsored events to ensure that all families have a chance to participate and that none are repeatedly left out because of religious scheduling conflicts.

### *Summary*

This Chapter used Critical Religious Legal Theory to critically analyze generally accepted Christian norms in public schools, the ways that religion has been used as a tool of

control and why religion should be demystified through the use of multicultural curricula that are inclusive of religion to reduce prejudice and promote secular “moral truths” such as goodness, truth, justice, and love.

Religion in public schools tends to be addressed in extremes. The Religious Right laments the removal of the Christian God from the public schools and demands that biblical lessons be returned; the Liberal Left demands what amounts to absolute silence on the subject of religion within the public school classroom (Fraser, 1999; Moore, 2007; Salili & Hoosain, 2006). Both of these extremes fail to acknowledge the fact that a multitude of religions and beliefs make up American culture, and ignoring them completely, or only recognizing a small segment of them is harmful to a democratic society (Salili & Hoosain, 2006). Multicultural education reform that includes religion is a way to bridge this extreme divide. Multicultural education is a philosophical idea, an educational reform movement, and a process which seeks to alter the structure of educational institutions so that all students (male and female, exceptional and remedial, and those who are members of diverse racial, ethnic, linguistic, religious and cultural groups) will have an equal chance to achieve academically in school (Banks & Banks, 2007).

Multicultural education reform has different levels, from the more basic highlighted inclusion of different minorities in the curriculum, to an infused curriculum where multicultural content can be found in aspects of the curriculum on a regular and routine basis, to the transformative curriculum which is a core multicultural paradigm shift that permeates the entire school (Banks, 1995). All three of these approaches will, to differing degrees, need to address the general goals of multicultural education reform which are at a minimum: content integration, knowledge construction, prejudice reduction, equity pedagogy, and empowering school culture (Banks, 2004). And since religion is often overlooked in public schools, often due to a lack of

understanding of what the First Amendment's Religion Clauses actually allow or forbid in public schools, the more tailored goals of multicultural education reform that is inclusive of religion should include: demystifying various religious beliefs and practices, understanding the tenets of the major religions, reduction of religious prejudice and stereotypes, developing empathy through reflecting upon our shared humanity despite belief or disbelief, critically analyzing the similarities and differences between religions, and learning religion in its historical and contemporary context to show its multidimensionality (see Moore, 2007; Salili & Hoosain, 2006).

It is my hope that this dissertation will encourage schools to consider the transformative tradition of multicultural curricular reform that is inclusive of religion and that the research generated from it will encourage educators to reconsider their general assumptions about the law and their classroom practices with regard to teaching about religion in public schools.

## CHAPTER FIVE

### Conclusion

#### *The Problems Continue*

The cases discussed in Chapters 2 and 3 show that several legal issues involving religion and public schools have been decided by the Supreme Court and other courts throughout the U.S. yet public schools across the country are still finding themselves in the middle of expensive legal battles on these exact issues. For example, in January of 2012 a district court in South Carolina entered an Order requiring a public school district in South Carolina to stop encouraging and requiring attendance/participation in prayer, religious assemblies and other religious activities (Anderson v. Chesterfield County School District, et al., 2012). The Complaint in this case, brought by a father for his minor son, described several accounts of the public school's entanglements with religion, one of which was that the school:

held an evangelical revival assembly to "save" students by encouraging them to accept Jesus Christ into their hearts. The school-day assembly featured a minister who delivered a sermon, a Christian rapper (known as "B-SHOC"), and church members who prayed with students. Students were urged to sign a pledge dedicating themselves to Christ. (Weaver, 2012, para 2)

The Complaint further stated that:

Though teachers announced prior to the B-SHOC assembly that students could instead report to the in-school suspension ("ISS") room, Son felt pressured to attend the assembly, especially because he believed that sending students to the ISS room was basically intended to punish them for refusing to go to the religious event. In ISS, students would be forced to sit in silence and could be ordered to do

extra work that those attending the assembly would not have to do. (Weaver, 2012, para 44)

In December of 2011, a school district in Tennessee mediated and settled a suit stating that it will no longer require student attendance at field trips to religious venues, designate school officials to be Chaplains in charge of any after school activities, allow school officials to promote their religious beliefs to students during the school day, and that school officials will not lead students in prayer during the school day (ACLU of Tennessee, et al. v. The Sumner County Board of Education, et. al., 2011).

Legal issues dealing with evolution, creationism and Intelligent Design also continue to surface regularly. In 2008 the Louisiana legislature passed S.B. 733, the Louisiana Science Education Act which allowed schools to use supplemental materials to critique scientific theories like evolution. The law was backed by the Discovery Institute and a Discovery Institute senior fellow and legal advisor, David DeWolf helped to craft the law (Louisiana, 2008). John West, a senior fellow at the Discovery Institute claimed that the Bill was necessary because:

...science teachers are being harassed, intimidated, and sometimes fired for trying to present scientific evidence critical of Darwinian theory along with the evidence that supports it. Second, many school administrators and teachers are fearful or confused about what is legally allowed when teaching about controversial scientific issues like evolution. The Louisiana Science Education Act clarifies what teachers may be allowed to do (West, 2008, para 4).

West did not cite examples of science teachers being harassed nor did he describe what type of scientific evidence these unnamed science teachers were presenting. The Louisiana Coalition for

Science (2008) stated that there is no evidence of West's claims of harassment occurring to teachers in Louisiana. In January of 2012 The Fordham Institute published an evaluation of science standards for all 50 U.S. states. With regard to Louisiana, the evaluation stated:

The Louisiana science standards are reasonably challenging and comprehensive, but they suffer from a devastating flaw: Thanks to the state's 2008 Science Education Act, which promotes creationism instead of science, the standards (especially for biology and life science) are haunted by anti-science influences that threaten biology education in the state. (Fordham Institute, 2012, p. 80)

In 2011 and 2012 Louisiana Democratic Senator Karen Carter Peterson submitted Bills to repeal the Louisiana Science Education Act. In 2011 Senate Bill 70 died in committee, Senate Bill 374 (2012) was sent to the Education Committee for consideration on March 12, 2012.

Recently, in Tennessee, home of the infamous *Scopes Monkey Trial* discussed in Chapter 3, the legislature passed and submitted House of Representatives Bill 368 (2012), as amended Senate Bill 892 (2012) written by Republican Representative Bill Dunn, to Republican Governor Bill Haslam on March 29<sup>th</sup>, 2012, for his review<sup>26</sup>. The Bill deemed evolution to be a controversial issue and allows teachers to review the strengths and weaknesses of the theory by encouraging students to express their opinions about the theory. This Bill allowed discussions of creationism and/or Intelligent Design in science classes in Tennessee if the students believe that these religious theories poke holes in the theory of evolution. On April 10<sup>th</sup>, 2012, Governor Haslam allowed House of Representatives Bill 368/Senate Bill 892 (2012) to become law

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<sup>26</sup> When a bill is submitted to a governor for review the governor has 3 options: 1. Sign the bill and it becomes law, 2. Veto the bill and it does not become law, 3. Ignore the bill by not signing and not vetoing and the bill becomes law (Eskridge, Frickey, & Garret, 2001).

without signing it. At that point, in his 15 months as governor this was the only Bill that Governor Haslam had ever allowed to become law without his signature (Wing, 2012). With regard to the Bill Governor Haslam stated:

I have reviewed the final language of HB 368/SB 893 and assessed the legislation's impact. I have also evaluated the concerns that have been raised by the bill. I do not believe that this legislation changes the scientific standards that are taught in our schools or the curriculum that is used by our teachers. However, I also don't believe that it accomplishes anything that isn't already acceptable in our schools. The bill received strong bipartisan support, passing the House and Senate<sup>27</sup> by a three-to-one margin, but good legislation should bring clarity and not confusion. My concern is that this bill has not met this objective. For that reason, I will not sign the bill but will allow it to become law without my signature. (Wing, 2012, para 6-7)

Though these bills have become law others have not been as successful as the Tennessee and Louisiana bills. In March of 2011 a similar bill, Senate Bill 1854, was filed by Florida Republican Senator Stephen Wise, who stated, "If you're going to teach evolution, then you have to teach the other side [Intelligent Design] so you can have critical thinking" (Soergel, 2009, para

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<sup>27</sup> The Tennessee Senate was composed of thirteen democrats and twenty republicans. The Tennessee House was composed of thirty four democrats and sixty four republicans. Despite Governor Haslam's claims of strong bipartisan support the votes in the Senate were twenty five in favor and eight opposed. All eight Senators voting against the bill were democrats, this means that the bill passed the Senate with five democrats voting for it and twenty republicans voting for it. In the House the vote was seventy two in favor and twenty three opposed. All twenty three Representatives voting against the bill were democrats, this means that the bill passed the House with eleven democrats voting for it and sixty four republicans voting for it (see Tennessee General Assembly, n.d.).

5). The bill died<sup>28</sup> in the Legislature in July of 2011. In Kentucky, Republican Representative Tim Moore sponsored House of Representatives Bill 169 in January of 2011 which would have allowed teachers to use supplemental materials to address any perceived controversies in the theory of evolution. This Bill died in committee in March of 2011.

In January of 2011, Oklahoma Republican Representative Sally Kern, sponsored House of Representatives Bill 1551 which would have required schools districts to help teachers find more effective ways to teach certain scientific topics deemed controversial such as biological evolution and the chemical origins of life. The Bill seemingly died in committee in February of 2011, but was revived in February of 2012 and was in still being considered as of March 21<sup>st</sup> 2012. A similar bill (Senate Bill 1742) was introduced in the Oklahoma Senate by Republican Senator Josh Brecheen in January of 2012. This Bill including wording specifically denying being an attempt to encourage the insertion of lessons on creationism and/or Intelligent Design into the science curriculum, and instead stated that it was designed to critical critiques about the theory of evolution. This Bill appears to have died in committee in February of 2012. Undaunted, on March 28, 2012 Republican Senator Steve Russell amended House of Representatives Bill 2341, a benign educational Bill seeking to extend the amount of time for schools to adopt new books, to include the anti-evolution provisions from House of Representatives Bill 1551. Prior to this amendment the Bill passed both the House and the Senate Education Committee, now it will be up for a new vote with Senator Russell's amendment. This is a small sample of the Bills that are proposed in state legislatures across America each year attempting to undermine or skirt the

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<sup>28</sup> When a bill "dies" it means that after the bill was referred to a particular legislative committee so that it can be considered in detail. The committee then chooses to reject the bill by not acting on it. If the committee approves the bill it would stay alive and continue through the legislative process. When a bill is said to have died in committee or on the calendar means that there was a failure to act to approve the bill (Eskridge, Frickey, & Garret, 2001).

Supreme Court's decision that evolution is a leading scientific theory and belongs in science class, while creationism is a religious theory and cannot be taught in science class (see *Edwards v. Aguillard*, 1987; *Epperson v. Arkansas*, 1968).

The religious culture wars currently raging in U.S. legislatures, court systems and public schools are wasting much needed educational time and funds. Trying to figure out whether the 'Religious Right' is correct in demanding that God be returned to public schools, or whether the 'Secular Left' is correct in demanding an absolute separation of church and state, is clearly not working. It should be noted that even the demand for separation of *church* and state is an inherently Christian demand. If the phrase was changed to say the separation of 'synagogue and state' or 'mosque and state' it is likely that the most politically vocal members of the Religious Right, who are usually part of the Protestant Right in particular, would then side with the Secular Left to demand a complete separation. Further, the demand for a separation of church and state seems to confuse more than it governs. Lawsuits have been plaguing the public school system concerning religion for almost 100 years and show no signs of stopping or even slowing. If the Supreme Court cannot unanimously agree where the line separating religion from public schools is, the average citizen is certainly likely to have a difficult time.

Looking at the intersections of religion with the U.S. government through the lens of Critical Religious Legal Theory raises some interesting points. The United States does not demand that race nor gender nor socio-economic status nor any other defining feature be kept out of government. And religion permeates America's government and political system as much as these other defining features. Additionally, a preference for Christianity is deeply rooted in American institutions and culture, as seen through the judicially recognized concept of ceremonial deism (see *Elk Grove Unified School District v. Newdow*, 2004; *Freedom From*

*Religion Foundation v. Hanover School District*, 2010; *Newdow et al. v. Rio Linda Union School District*, 2010). Historically, the idea of separation of church and state originated in a letter written by President Thomas Jefferson in 1802 where Jefferson declared that the truth of religion was not a matter for the government to declare or decide, rather it was a private matter between people and God (see Banks & Banks, 2007). Other scholars believe that the separation of church and state may have been an attempt to protect the church from the state (Salili & Hoosain, 2006). But regardless of what it was originally, “[w]hat might be more important in the modern context is to revise the original notion of separation of church and state to one of ensuring a level playing field, with no religious denomination or point of view being in a privileged position” (Salili & Hoosain, 2006, p. 5). This revision would require policy makers to take a closer look at the governmentally accepted aspects of ceremonial deism throughout the U.S. such as the phrase “Under God” in the Pledge of Allegiance, the phrase “In God we Trust” on U.S. currency, etc. As discussed in Chapter 4, within the realm of public schools, a multicultural curriculum that is inclusive of religion could serve as a mediating point between those demanding that God be returned to public schools and those demanding an absolute separation of church and state.

In 2010, the Pew Forum on Religion and Public Life published “The U.S. Religious Knowledge Survey” which found that:

Atheists and agnostics, Jews and Mormons are among the highest-scoring groups on a new survey of religious knowledge, outperforming evangelical Protestants, mainline Protestants and Catholics on questions about the core teachings, history and leading figures of major world religions. On average, Americans correctly answer 16 of the 32 religious knowledge questions on the survey... (Pew Forum, 2010, p. 6).

Of particular relevance to this dissertation, some of the questions specifically dealt with religion and public schools. The report found that 89% of Americans knew that public school teachers cannot lead their classes in prayer, however, only 36% knew that public schools could offer comparative religion courses, and only 23% knew that public school teachers could read from the Bible as an example of literature (Pew Forum, 2010). The report offers the interpretation that “this block of questions suggests that many Americans *think* the constitutional restrictions on religion in public schools are tighter than they really are” (Pew Forum, 2010, p. 9).

As was mentioned in Chapters 2 and 3, the Supreme Court is strongly in favor of religion being taught in public schools and though the Court has not given schools specific guidelines they have placed limitations on instruction (see *Edwards v. Aguillard*, 1987; *Engle v. Vitale*, 1962; *Epperson v. Arkansas*, 1968; *School District of Abington v. Schempp*, 1963; *Stone v. Graham*, 1980) and has made suggestions for where/how lessons in religion would be proper in public schools:

...it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. Nothing we have said here indicates that such study... of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. (*School District of Abington v. Schempp*, 1963, at 225)

Additionally, the Supreme Court has stated: “...the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like” (*Stone v. Graham*, 1980, at 42). Though this quote falls prey to ceremonial deism by focusing on the

Bible, the same would hold true for other religious texts in the multicultural study of religion in public schools.

As discussed in Chapter 4, multicultural curricula that are inclusive of religion and which are carefully tailored to present multiple religious voices in an academic and empathetic manner would begin to address some of the problems wrought by the lack of understanding of the multitude of belief systems throughout the United States and the rest of the world. These curricula should be instituted in the early elementary grades in an arguably uncontroversial manner to introduce students to the multitude of cultures and subcultures that make up their neighborhoods and the larger world (see Nord, 1995). As students gain multicultural competence these lessons can be used to engage students in critical discussions about normative standards in America and globally and what these standards mean with regard to ideals like equality and justice (Banks & Banks, 2007; Nord, 1995)

#### *Critical Religious Legal Theory*

In this dissertation I used Critical Religious Legal Theory to: 1) Critically analyze laws and policies dealing with religion and public schools as social phenomena; 2) Critically analyze the education law and policy makers in the context of the social and political atmosphere at the time that the law/policy was created; 3) Critically analyze the generally accepted Christian norms in public education and America's reliance upon ceremonial deism; 4) Critically analyze religion as a tool of control and explain how religion could be demystified through the use of multicultural curricula that are inclusive of religion to (amongst other things) promote secular "moral truths" in character education like goodness, justice, love, truth and equality. Each step in the analysis focused on how issues of dominance and power with regard to religion affect law and policy creation which then affects public schools in social and academic ways.

Reconciling the demand for government “neutrality” with the religious beliefs of a large portion of the populace is a difficult balancing act for the courts. My analysis, through the lens of Critical Religious Legal Theory, uncovered several themes in judicial decisions dealing with some aspects of religion in public schools. Courts are very aware of students’ status as a captive audience within the public schools (*Engle v. Vitale*, 1962; *School District of Abington v. Schempp*, 1963; *Wallace v. Jaffree*, 1985). Because of this courts are generally wary of religious entanglements within public schools that alienate students and they will focus on the motives and intent of law and policy makers when the laws and policies directly affect the students (*Engle v. Vitale*, 1962; *Freiler v. Tangipahoa Parish Board of Education*, 1999; *Kitzmiller, et al. v. Dover*, 2005; *Selman v. Cobb County Board of Education*, 2005; *School District of Abington v. Schempp*, 1963; *Wallace v. Jaffree*, 1985). And, despite the fact that courts occasionally accept ceremonial deism (*Freedom From Religion Foundation v. Hanover School District*, 2010; *Newdow et al. v. Rio Linda Union School District*, 2010), they are showing an increasing awareness of the social and educational effects that laws and policies intertwined with Christianity will have on those who are not Christian, particularly when those laws and policies affect children (*Ahlquist v. City of Cranston*, 2012; *Daniel v. Waters*, 1975; *Edwards v. Aguillard*, 1987; *Freiler v. Tangipahoa Parish Board of Education*, 1999; *Kitzmiller, et al. v. Dover*, 2005; *McLean, et al. v. Arkansas Board of Education*, 1982; *Selman v. Cobb County Board of Education*, 2005; *Stone v. Graham*, 1980; *Washegesic v. Bloomingdale Public Schools*, 1994; *Webster v. New Lennox School District*, 1990).

I believe that Critical Religious Legal Theory is a framework that educators and policy makers can use to constitutionally include educational aspects of religion in multicultural curricula within public schools. To do this they should analyze how and why religion is being

addressed in the proposed law, policy or curriculum change. The socio-political aspects of the proposed change should be investigated. This would include an analysis of the socio-political motivations and purposes of the people who proposed law, policy or curriculum change and an analysis of the socio-political effects that the proposed change will have on the schools and particularly on the students within the schools keeping in mind their status as a captive audience. Additionally an analysis of the normative standards of the proposed change should occur. In particular this analysis should focus on whether the proposed change rests on generally accepted Christian norms and/or ceremonial deism.

#### *Limitations & Significance*

This dissertation used a newly generated theoretical framework (Critical Religious Legal Theory) to conduct a legal and policy analysis of some of the curricular issues surrounding religion and public schools. Because this is a new framework it will need to gain acceptance in the field of educational policy analysis before it can produce any benefits to educators. But I believe that Critical Religious Legal Theory analysis, which draws from the well-established traditions of Critical Legal Studies, second generation Critical Race Theory and the Critical Theory of Religion, will provide a nuanced theoretical perspective that will expand the ways that critical theorists view the issues surrounding religion and public schools.

Another limitation is that this dissertation does not function as a curriculum guide for educators and policy makers. However, while the legal and policy analysis within this dissertation will not give educators specific lesson plans to follow should they wish to incorporate a multicultural curriculum that is inclusive of religion, it can provide guidance through the theoretical framework of Critical Religious Legal Theory as to what educators can and cannot legally teach in public schools to help them to avoid First Amendment challenges.

### *Concluding Remarks*

This dissertation developed and then employed Critical Religious Legal Theory to analyze the law and policy that relates to teaching about religion in public schools. The analysis focused on critically analyzing the laws and policies dealing with religion and public schools as social phenomena and as tools of control, and the education law and policy makers in the context of the social and political atmosphere at the time that the laws/policies were created. This dissertation also critically analyzed the generally accepted Christian norms in public education and America's reliance upon ceremonial deism, as it relates to public schools. And this research explained how religion has been used as a tool of control and how and why religion can and should be demystified through the use of multicultural curricula that are inclusive of religion to (amongst other things) promote secular "moral truths" in character education like goodness, justice, love, truth while dispelling the religious stereotypes and prejudices that have been promulgated.

Multicultural religious education in an increasingly globally connected 21<sup>st</sup> century world should be seen as a necessity to counter religious illiteracy, because as Moore (2007) states: "The consequences of this religious illiteracy are significant and include fueling the culture wars, curtailing historical and cultural understanding, and promoting religious and racial bigotry" (p. 3). And continuing to educate generations of students who lack an of understanding about the diverse ways that religion is intertwined in the political, historical, economic and cultural motivations of various countries throughout the world could stunt our ability to remain a world power in an increasingly global society. Educators who embrace a multicultural curriculum will need to have an understanding of multiple religions and will need to learn to present religious

material and guide discussions of religion in empathetic and academic ways and must avoid devotional and/or absolutist discourse (Moore, 2007).

The point of a school approach to religion in which everyone learns from everyone else is not a dilution of belief or a slow movement towards common faith. The goal is rather a common democratic culture in which a diversity of citizens, each holding their own creed with passion and wisdom, respects other citizens, each holding their own creeds, or no creed, with equal passion and –it is hoped—equal wisdom. The goal is an American democracy that is both religiously tolerant and religiously informed. (Fraser, 1999, p.7)

When considering when a law, policy or curriculum change in public schools involving the inclusion of religion, educators and policy makers can use Critical Religious Legal Theory as a guide to help them to avoid costly and time consuming Constitutional challenges. It is my hope that the research generated by this dissertation, along with the pre-existing body of research on the intersection of religion and public schools, will be used by policy makers, researchers, administrators and educators to expand the curricula in public schools to include lessons where religion is discussed, in a constitutionally permissible manner, to inoculate against the ignorance behind many religiously motivated hate crimes.

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