

ARTICLE

THE ESTABLISHMENT CLAUSE AND PUBLIC EDUCATION IN AN ISLAMOPHOBIC ERA

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The public education system has often been considered a critically important site for inter-ethnic dialogue designed to root out the prejudice that leads to discrimination against ethnic minorities. However, the prohibition of certain religious practices in schools has placed the “celebration” of religious diversity in a more precarious position than the promotion of racial diversity in ways that have deleterious effects for Muslim Americans. This Essay argues that Supreme Court jurisprudence on religious establishment in public schools has contributed to public education’s inefficacy as a tool to dismantle fear and prejudice against Muslims. We explore judicial, political, and practical approaches to bringing constitutionally permissible religious education and interfaith dialogue into public schools.

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INTRODUCTION

The spread of Islamophobia, an irrational fear or prejudice directed toward Islam or Muslims, threatens to undermine the tradition of religious tolerance that has defined the United States since its founding. Even though Muslims have been living in the United States for many generations, they are now often

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perceived as foreigners. Islamophobia is a growing problem with substantial ethical, legal, and social ramifications.¹

Research conducted by the Council on American Islamic Relations (CAIR) reported a 29.6% increase in incidents of discrimination, violence and harassment against Muslims from 2004 to 2005.² A 2011 Pew Research Center poll shows that four out of ten Americans link Islam to violence;³ in a 2006 Gallup poll, 39% of respondents believed Muslims should carry special identification cards.⁴ Nearly one-third of Americans say their opinion of Islam is “not favorable at all,”⁵ and nearly half believe Muslims are more likely than members of other faiths to encourage violence against non-believers.⁶ Controversy regarding the building of the Islamic Center near Ground Zero reveals that feelings ignited by events on 9/11 continue, a decade later, to produce an environment that fosters civil discord and, potentially, violence.

Although over six million Muslims live in the United States today, public figures such as New York congressman Peter King, former house speaker Newt Gingrich, and former Alaska governor Sarah Palin have expressed suspicion and reservations about the role of American Muslims in American society.⁷ Former evangelical Christian pastor Terry Jones burned the Quran, the Muslim holy book, in March 2011. Jones attempted to stage a rally in Dearborn,

1. Numerous books and articles on this phenomenon have appeared in both the academic and popular press, especially in recent years. See, e.g., PETER GOTTSCHALK & GABRIEL GREENBERG, *ISLAMOPHOBIA: MAKING MUSLIMS THE ENEMY* (2008); Shafiqah Ahmadi, *The Erosion of Civil Rights: Exploring the Effects of the Patriot Act on Muslims in American Higher Education*, 12 RUTGERS RACE & L. REV. 1, 39-44 (2011) (describing the rise of strong anti-Muslim sentiment in America and the “racialization” of Muslims); Dean Obeidallah, *Bin Laden: Father of American Islamophobia*, CNN, available at http://articles.cnn.com/2011-05-03/opinion/obeidallah.muslims.binladen_1_arab-americans-arab-heritage-arabs-and-muslims?_s=PM:OPINION. But see Karima Bennouna, *Remembering the Other's Others: Theorizing the Approach of International Law to Muslim Fundamentalism*, 41 COLUM. HUM. RTS. L. REV. 635, 671-77 (2010) (warning about the dangers of overuse of the “Islamophobia” term when used to prevent inquiry about human rights violations).

2. Council on American Islamic Relations, *Islamophobia*, <http://www.cair.com/Issues/Islamophobia/Islamophobia.aspx> (last visited May 13, 2012).

3. PEW RESEARCH CENTER, *CONTINUING DIVIDE IN VIEWS OF ISLAM AND VIOLENCE I* (Mar. 2011), <http://www.people-press.org/files/2011/03/714.pdf> (last visited May 13, 2012).

4. Lydia Saad, *Anti-Muslim Sentiments Fairly Commonplace*, GALLUP NEWS, Aug. 10, 2006, available at <http://www.gallup.com/poll/24073/antimuslim-sentiments-fairly-commonplace.aspx>

5. Gallup Center for Muslim Studies, *In U.S., Religious Prejudice Stronger Against Muslims*, GALLUP NEWS (Jan. 21, 2010), <http://www.gallup.com/poll/125312/religious-prejudice-stronger-against-muslims.aspx>.

6. Bobby Ghosh, *Mosque Controversy: Does America Have a Muslim Problem?*, TIME, (Sept. 2, 2010), <http://www.time.com/time/nation/article/0,8599,2011798,00.html> (citing 2010 Gallup survey) (last visited July 5, 2011).

7. John Esposito, *Getting It Right About Islam and American Muslims*, HUFFINGTON POST (May 25, 2011), <http://www.islamophobiatoday.com/2011/05/25/john-l-esposito-getting-it-right-about-islam-and-american-muslims/>.

Michigan, targeted toward Muslims attending the Arab International Festival.⁸ Former GOP presidential candidate Herman Cain gained media attention by stating that, if elected, he would require any members of the Muslim faith appointed to his Cabinet to sign a special, Muslim-only “loyalty oath” to United States law.⁹ The Tennessee Legislature was recently criticized for a bill that targeted Muslim groups and followers of Islamic Law that would have made it a “crime punishable by 15 years in prison for Muslims to worship together in groups of two or more.”¹⁰ During this debate, some Tea Party activists and organizations accused the Islamic Center of Nashville of promoting radical Islam.¹¹ In November 2010, Oklahoma became the first state to pass a ban (via ballot initiative) on the use of Sharia law¹² in U.S. courts, with 70% of Oklahoma voters supporting the ban.¹³ The Tenth Circuit Court of Appeals recently upheld a district court’s preliminary injunction against enactment of the measure on First Amendment grounds,¹⁴ but several Oklahoma lawmakers are attempting to revive it.¹⁵ Mosques, homes, and other property belonging to or representing Muslims have been burned and vandalized. In addition to the above-stated litany of indignities, riots and

8. Niraj Warikoo, *Pastor Terry Jones Thwarted in Dearborn*, DETROIT FREE PRESS (June 18, 2011), <http://www.freep.com/article/20110618/NEWS05/106180355/Pastor-Terry-Jones-thwarted-Dearborn>.

9. See, e.g., Ashley Killough, *Herman Cain: Muslims Must Show Loyalty to Work for Me*, CNN (June 10, 2011), <http://politicalticker.blogs.cnn.com/2011/06/herman-cain-muslims-must-show-loyalty-to-work-for-me/>.

10. Kari Ansari, *Open Letter to President Obama from a Muslim Family*, HUFFINGTON POST (May 20, 2011), available at <http://www.islamophobiatoday.com/2011/05/20/kari-ansari-open-letter-to-president-obama-from-a-muslim-family/>.

11. Bob Smietana, *Tenn. Bill Criticized for Targeting Muslims Splits Tea Party*, USA TODAY (May 22, 2011), available at http://www.usatoday.com/news/nation/2011-05-22-tennessee-bill-tea-party_n.htm (last visited May 13, 2012).

12. Sharia is often referred to as “Islamic law,” but can more accurately be described as “God’s Law” as viewed through the Muslim faith. For a more detailed, law-focused explanation of the role of Sharia in Islam, see Asifa Quraishi, *Who Says Shari’a Demands the Stoning of Women? A Description of Islamic Law and Constitutionalism*, 1 BERKELEY J. MID. EASTERN & ISLAMIC L. 163, 164-66 (2008).

13. See, e.g., Justin Elliott, *Anti-Sharia Measure Under Attack in the Courts*, SLATE (May 10, 2011), available at http://www.salon.com/2011/05/10/oklahoma_sharia_court_fight/. See also Oklahoma State Election Board, 2010 General Election Results, State Question No. 755, Legislative Referendum No. 355, <http://www.ok.gov/elections/support/10gen.html>

14. *Awad v. Ziriax*, No. 10-6273 (10th Cir. Jan. 10, 2012), available at <http://www.ca10.uscourts.gov/opinions/10/10-6273.pdf>.

15. See Okla. HB 1552, 1st Sess. 53rd Legislature (Jan. 20, 2011), available at <http://webserver1.lsb.state.ok.us/cf/2011-12%20INT/hB/HB1552%20INT.DOC>. After outcry from CAIR and negative media coverage, this bill died in the last session—but not before receiving a 10-3 recommendation for passage from the Oklahoma House Judiciary Committee. OK House Committee on the Judiciary. HB 1552 (Report), Mar. 1, 2011, available at <http://webserver1.lsb.state.ok.us/cf/2011-12%20COMMITTEE%20REPORTS/HOUSE/HB1552%20HCR.DOC>.

protests against Muslims and the faith of Islam have spread throughout the country.

The treatment of Muslims in America today is reminiscent of, albeit not identical to, the treatment of other feared minority groups throughout U.S. history. Ethnic minorities, such as Irish immigrants during the nineteenth century, the Japanese during World War II, Latino immigrants today, and certainly African Americans during most of the nation's history, have been subjected to severe discrimination in part because they were viewed as a threat to the social survival of the majority. Today's Islamophobia is borne of what social psychologists call the "ultimate attribution error," in which the actions of the few (here, terrorists on 9/11 who happened to ascribe to the Muslim faith) are mistakenly attributed to the majority (mainstream, non-radical Muslims).¹⁶

The suspicion surrounding Islam has spread to school board committees in Texas that wish to remove "pro-Islamic" sentiment from textbooks;¹⁷ similar controversies have erupted in Scottsdale, Arizona; Middletown, Ohio; and again in Oklahoma.¹⁸ At Carver Elementary School in San Diego, where the school schedules a special recess break for Muslims to observe daily prayer, a substitute teacher expressed concerns that the school was "indoctrinating" students in Islamic practices.¹⁹ A San Francisco columnist called post-9/11 cultural diversity programs that include information about Islamic practices a form of "soft jihad."²⁰

The public education system has often been considered a critically important site for inter-ethnic dialogue that helps to root out the prejudice that leads to discrimination against ethnic minorities. This perception is bolstered

16. For more information on this psychological concept's role in creating and exacerbating prejudice, see, e.g., Sheri Lynn Johnson, *Race and Capital Punishment*, in BEYOND REPAIR? AMERICA'S DEATH PENALTY 11, 135-39 (Stephen P. Garvey ed., 2003); Thomas Pettigrew, *The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice*, in INTERGROUP RELATIONS: ESSENTIAL READINGS 162-73 (Michael Hogg & Dominic Abrams eds., 2001); LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY (1991).

17. David Waters, *Texas School Board Fights Islamic Bias with Christian Bias*, WASH. POST: ON FAITH (Sept. 24, 2010), http://newsweek.washingtonpost.com/onfaith/undergod/2010/09/texas_school_board_fights_islamic_bias_with_christian_bias.html.

18. Gregory Starrett, *Islam and the Politics of Enchantment*, 15 J. ROYAL ANTHROPOLOGICAL INST. S222-S240, S225 (2009), available at <http://clas-pages.uncc.edu/gregory-starrett/files/2011/10/Islam-and-the-Politics-of-Enchantment-final.pdf> (last visited May 13, 2009); see also Liz Jackson, *Islam and Muslims in U.S. Public Schools Since September 11, 2001*, 106 RELIGIOUS EDUC. 162, 167 (2011).

19. Helen Gao, *Muslim Prayers in School Debated: S.D. Elementary at Center of Dispute*, SAN DIEGO UNION-TRIB., July 2, 2007, available at http://www.signonsandiego.com/uniontrib/20070702/news_1n2prayer.html (last visited May 13, 2012).

20. Cinnamon Stillwell, *Islam in America's Public Schools: Education or Indoctrination?*, S.F. CHRON., June 11, 2008, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/g/a/2008/06/11/cstillwell.DTL&ao=all> (last visited May 18, 2012).

by social psychological theory, in particular Gordon W. Allport's contact hypothesis,²¹ which suggests that if children from different racial/ethnic/religious backgrounds identify themselves and work with students through mutual interdependence over a period of time, the results could include a significant decrease in prejudice or phobia. However, the prohibition of certain religious practices in schools has placed the "celebration" of religious diversity in a more precarious position than the promotion of racial diversity. One of many insidious features of Islamophobia is that the core distinguishing factor between the majority and the minority—religion—does not enjoy the same emphasis within the public school system as ethnic diversity. This essay argues that Supreme Court jurisprudence on religious establishment in public schools has contributed to public education's inefficacy as a tool to dismantle fear and prejudice against Muslims.

Part I outlines the ways public perception of the Establishment Clause has shut religion, and accordingly democracy-enhancing interfaith dialogue, out of schools. Part II contrasts the treatment of religious diversity in schools with the jurisprudence on racial diversity in schools to demonstrate obstacles to tolerance of religious diversity. Part III introduces potential ways to more effectively bring religious education and interfaith dialogue into public schools by exploring judicial, political, and practical approaches.

I. RELIGION IN PUBLIC SCHOOLS IN THE COURTS

Supreme Court jurisprudence on religion in public schools is often understood by the public as effectively barring the type of interfaith dialogue and interreligious understanding that could root out Islamophobia. Most of the cases in question, such as *Engel v. Vitale*,²² *Abington v. Schempp*,²³ and *Lee v. Weisman*,²⁴ focus on school prayer, which the Court has usually understood to be an unconstitutional establishment of religion. However, the public interpretation of these cases—that religious discussion, exploration, and practice is essentially prohibited in schools—has perpetuated the idea that Islam (or even religion generally) should be removed as much as possible from the school setting. The resultant discouragement of interfaith discussion, in contrast with the encouragement of inter-ethnic exchange,²⁵ means that public schools have less potential influence as a means of combating Islamophobia than they have for decreasing racial and ethnic prejudice.²⁶

21. See generally GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1954).

22. 370 U.S. 421 (1962) (holding, for the first time, that imposition of an official school prayer in public schools violates the Establishment Clause).

23. 374 U.S. 203 (1963) (extending *Engel*).

24. 505 U.S. 577 (1992) (extending *Engel* and *Abington*).

25. See *infra* Part II.

26. The idea that racism will ultimately be remedied through interracial exposure via the public education system was popularized in sociologist Gunnar Myrdal's seminal 1944

The Supreme Court has never prohibited interfaith dialogue in schools, yet interfaith dialogue thrives in only a few school systems. The Harvard University Pluralism Project has identified teachers who use methods that promote discussion of religious pluralism and has created proposed syllabi targeted at the secondary school level.²⁷ However, use of these teaching methods is not widespread, and even those who use these methods may fear overstepping the thin boundary between interfaith education and establishment of religion. A survey on American schoolteachers found that 69% surveyed are “not at all familiar” with guidelines on religious expression in schools.²⁸

In *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*,²⁹ which borrows from the early work of Jeremy Bentham, Meir-Dan Cohen introduced a potential way of understanding gaps between court decisions and the public’s understanding of these decisions in the criminal law context. Cohen describes two categories of legal rules: (1) conduct rules, which are addressed to the general public and are designed to guide its behavior (or in other words, what people think the law is); and (2) decision rules, which are directed towards the officials who apply conduct rules (what the law actually is). In criminal law, sometimes the public’s interpretation of what the law permits is filtered through the lens of what Cohen labels “selective transmission” of criminal rules because there is not full “acoustic separation” between the public and “officialdom.”³⁰ In other words, the law regulates the public’s behavior by controlling the messages the public receives about the law and the messages the actual law sends to decision-making officials. The division between conduct rules and decision rules, and the phenomenon of selective transmission, has been recognized in other contexts as a reason the public might have a different understanding of what the law requires than judges and other decision-makers do; for example, the belief that affirmative action permits the use of “quotas” endures thirty-five years after the Supreme Court ruled them unconstitutional.³¹

book on American race relations, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY*. For one of many modern applications of Myrdal’s theory, see Society for Research in Child Development, *Improving Prejudice-Reduction Programs in Schools: Lessons Learned Since Brown v. Board of Education*, 21 SOC. POL’Y REP. BRIEF 1 (2007).

27. Diana Eck, *The Pluralism Project at Harvard University*, Pluralism.org (last visited June 26, 2011).

28. Robert Kunzman, *Imaginative Engagement with Religious Diversity in Public School Classrooms*, 101 RELIGIOUS EDUC. 516 (2006), available at http://findarticles.com/p/articles/mi_qa3783/is_200610/ai_n17194908/pg_2/?tag=mantle_skin;content.

29. Meir-Dan Cohen, *Decision Rules vs. Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

30. *Id.* at 634-66.

31. See, e.g., Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CALIF. L. REV. 1251, 1253-54. The Supreme Court barred the use of strict racial quotas in the education context in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 319-20 (1978).

This confusion comes in part from the way the Supreme Court has discussed what constitutes “establishment” of religion. For example, in Justice Blackmun’s concurring opinion in *Lee*, he stated, “The Establishment Clause proscribes public schools from conveying, or attempting to convey, a message that religion or a particular religious belief is *favored* or *preferred*, even if the schools do not actually impose pressure upon a student to participate in a religious activity.”³² This type of language, though constitutionally sound, discourages any mention of religion in schools whatsoever because the risk of unconstitutional establishment of religion is so great and the barriers so unpredictable.

One case that illustrates how the public perceives the First Amendment’s relationship with education about religion in the school setting is *Eklund v. Byron Union School District*.³³ The plaintiffs and their two daughters objected to a California school district’s use of role playing to teach seventh-grade world history students about Islam, arguing that this form of education violated the Establishment Clause of the First Amendment. In the history class at issue, the teacher used various teaching methods including distribution of handouts, classroom discussion, and textbook readings. To teach students the first two pillars of the Islamic faith, *shahada* (the creed) and *salat* (daily prayers), the teacher read aloud portions of the Quran and required students to recite a line from the text. The teacher permitted students to dress in Arabic-styled clothing for their group presentations about Islam. The students also used “fact” cards to test each other’s knowledge of Islam; however, the teacher emphasized that the “facts” on the cards were not necessarily historical truths but instead were religious beliefs held by practicing Muslims.

The plaintiffs’ rejection of the role-playing exercises described above suggests their broader concern that their children and others were being proselytized towards the Islamic faith. However, as the court noted, the educational context of the activities contradicts the notion that the teacher was attempting to convert the students: “Role-playing activities which are not in actuality the practice of a religion do not violate the Establishment Clause.”³⁴ Also, the court observed that teachers in this district used similar role-playing exercises in other contexts. For example, the seventh-grade biology class participated in a mock medical school, the eighth-grade U.S. history class participated in a mock senate and, most relevant, the seventh-grade world history class used similar role-playing activities in their unit on medieval Europe, where one student dressed as a priest.³⁵ The plaintiffs misconstrued the teaching of Islam’s historical perspective as proselytizing; they were not

32. 505 U.S. at 604-05 (Blackmun, J., concurring) (internal citations and quotations omitted).

33. No. C 02-3004 PJH, 2003 U.S. Dist. LEXIS 27152 (N.D. Cal. Dec. 5, 2003), *aff’d* 154 Fed. App’x 648 (9th Cir. 2005), *cert. denied*, 549 U.S. 942 (2006).

34. *Id.* at *24, *27.

35. *Id.* at *10-12.

concerned about the use of role-playing as a method to educate students. *Eklund* demonstrates that the public sometimes misconstrues the school-based Establishment Clause cases to suggest that teaching about religion generally or a particular faith (or perhaps just Islam) is unconstitutional. The *Eklund* court, applying the tests for government endorsement of religion in public schools set forth in the Supreme Court cases *Lemon v. Kurtzman*³⁶ and *Lynch v. Donnelly*³⁷ and the “coercion test” introduced in *Lee*,³⁸ rejected the plaintiffs’ claim. Nonetheless, *Eklund* illustrates the gap between courts’ rulings on the Establishment Clause in public schools and the public’s and school officials’ interpretation of those rulings.

Jurisprudence on free exercise of religion in classrooms provides further evidence of the confusion that has arisen from Establishment Clause cases. For example, in *DeNooyer v. Merinelli*,³⁹ a teacher started a program to raise the confidence and self-esteem of students in her class. Each week she chose a student “VIP” who gave a presentation on a subject of his or her choice. One student chose to present a video of her singing a Christian song that “describe[d] the benefits of a child’s early relationship with Jesus Christ and the importance of turning over one’s ‘childish heart of sin’ in order to be saved.”⁴⁰ The teacher objected to screening the video for several reasons, one of which was that “[s]he feared her students would assume that she and the school endorsed the message of the song and that the song’s message and her presumed endorsement of it might embarrass or offend other students in the classroom who were not Christians.”⁴¹ The Sixth Circuit sided with the teacher because the judges believed she had valid pedagogical concerns about showing a video; the court did not discuss the merits of the teacher’s concerns about endorsement of religion.

Similarly, in *Duran v. Nitsche*,⁴² a fifth grader claimed that her right to free speech was infringed when her principal and teacher did not allow her to distribute a survey to students about their belief in God for a class project and only permitted her to give an oral presentation on this subject in the library, not in a classroom. The plaintiff’s teacher was concerned about the survey because she “did not want to promote or denigrate any type of religion in [her]

36. 403 U.S. 602, 612-13 (1971). The *Lemon* test and its progeny have been explained and critiqued extensively by other writers. See, e.g., Ian Bartrum, *Salazar v. Buono: Sacred Symbolism and the Secular State*, 105 NW. U. L. REV. COLLOQUY 31, 34-39 (2010). See generally Mark Strasser, *Religion in the Schools: On Prayer, Neutrality, and Sectarian Perspectives*, 42 AKRON L. REV. 185 (2009) (tracing the evolution of jurisprudence on religion in the schools).

37. 465 U.S. 668, 679 (1984).

38. 505 U.S. 577, 578 (1992).

39. No. 92-2080, 1993 U.S. App. LEXIS 30084 (6th Cir. 1993 Nov. 18, 1993).

40. *Id.* at *3.

41. *Id.* at *5.

42. 780 F. Supp. 1048 (E.D. Pa. 1991), *vacated without opinion*, 972 F.2d 1331 (3d Cir. 1992).

classroom.”⁴³ The principal shared the teacher’s concern that “a fifth-grade-aged student . . . would assume that was the teacher’s response or that . . . the child must complete the test and return it to the teacher.”⁴⁴ The trial court, like the Sixth Circuit in *DeNooyer*, withheld comment on the merits of the school officials’ concerns about the appearance of endorsing religion. The court explained that it “need not engage in an analysis of whether the defendants’ assessments of their students’ propensities were ‘right,’ i.e. whether, in fact, fifth-grade students are too young to be able to appreciate the difference between private speech and school-sponsored speech. The court need only determine, as it does, that the defendants’ concern was reasonable.”⁴⁵ The court concluded that the officials’ concerns met the standard of reasonableness. The appellate court later vacated the decision, but did not explain its reasoning. Thus, it remains unclear whether the distribution of a student-written survey that asks about students’ religious beliefs would be protected or prohibited by the First Amendment, and whether school officials are justified in a concern that even rudimentary participation in distribution of a survey could be considered unconstitutional endorsement of religion.

This lack of clarity, and the confusion also illustrated in *DeNooyer* and *Eklund*, may inhibit the ability of students to share their religious beliefs with each other. School officials generally do not want to be perceived as using their position of authority over students to proselytize. Relatedly, officials reasonably fear potential law suits and the costs, financial and otherwise, to defending against such litigation. The inability to share and express religious views hinders the process of what Allport calls “Acquaintance Potential,” or getting to know students as friends—for who they are—and not just as classmates.⁴⁶ Educators, and society at large, are thereby missing a critical opportunity for relieving religious bias or bigotry such as Islamophobia.

In the public school context, there are historically strong reasons that society would benefit if the conduct rule emanating from the school-based Establishment Clause cases erred on the side of removing religion from schools wholesale. Historically, schools and religion were closely intertwined in a way that excluded groups that did not adhere to Judeo-Christian beliefs, and usually to Protestant Christianity.⁴⁷ In *Eklund*, the plaintiffs, as members of the public, were conflating the conduct rule—that religion has no place in schools—with the more nuanced decision rule—that education on religion is permissible when the primary purpose of such teaching is educational. The officials on the school board committees that are seeking to remove the mention of Islam from school texts are arguably making the same error, though they are likely also motivated

43. *Duran*, 780 F. Supp. at 1055.

44. *Id.*

45. *Id.* at 1056.

46. See ALLPORT, *supra* note 21, at 264-68.

47. John M. Kang, *Deliberating the Divine: On Extending the Justification from Truth to Religious Expression*, 73 BROOK. L. REV. 1 (2007).

by Islamophobia.⁴⁸

II. RELIGION VERSUS RACE IN PUBLIC SCHOOLS

The Supreme Court has consistently recognized racial diversity among students and within classrooms as playing a pivotal role in teaching students to interact and cooperate with individuals of different ethnic backgrounds, which will help them to prosper in the increasingly diverse landscape of American society. The idea is that a “critical mass” of racial minorities is necessary to spark inter-ethnic conversation in classrooms. In the Court’s first consideration of affirmative action in the education context, *Regents of the University of California v. Bakke*, Justice Powell explained in his majority opinion that the “nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.”⁴⁹ In 2003’s *Grutter v. Bollinger*, one of the leading modern cases on race and public education, the Court held that racial diversity is a compelling state interest because it “promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’”⁵⁰ Because this interest was considered “compelling,” and because the individual burden white students had to endure was not considered “undue,” Justice O’Connor wrote for the majority that the Fourteenth Amendment “does not prohibit the [Michigan] Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”⁵¹

The rationale offered in *Grutter* dealt with law school education, but similar rationales have been offered on the K-12 level. In the 2007 case *Parents Involved in Community Schools v. Seattle School District No.1* (which, unlike *Grutter*, focused on K-12 public education), a majority of the Court recognized that racial diversity may serve some educative role protected by the Constitution.⁵² Although Justice Kennedy voted with conservative Justices to strike down the racial assignment measures used by the school districts in *Parents Involved*, he nonetheless joined liberal Justices in affirming that “[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.”⁵³ Although the Court ultimately ruled that the specific methodologies used by the school districts violated the Fourteenth Amendment, Justice Kennedy carefully noted that schools may use

48. The risk of conflating conduct rules and decision rules in the school board context is understandable considering that school boards occupy a mixed role as not only decision-makers about schools but also as representatives of public views and public opinion.

49. 438 U.S. 265, 313 (internal quotations omitted).

50. 539 U.S. 306, 330 (2003).

51. *Id.* at 343.

52. 551 U.S. 701 (2007).

53. *Id.* at 783.

some as-of-yet undefined race-conscious measures to achieve school diversity.⁵⁴ Accordingly, the central question with regard to race in schools is not *whether* it may be taken into account to achieve diversity, but rather *how* it may be counted. This has not been the case with respect to religion, despite a view in some corners that religious diversity should be considered in a similar, if not identical, way as race.⁵⁵

The influence of courts, specifically pertaining to racial and ethnic diversity, on the decisions of educational institutions on all levels is apparent. For example, the standards established for American law schools by the American Bar Association Council of the Section of Legal Education and Admissions of the Bar states in American Association of Law Schools Standard 211, which focuses on “non-discrimination and equality of opportunity,” include:

(a) A law school shall foster and maintain equality of opportunity in legal education, including employment of faculty and staff, without discrimination or segregation on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability.

(b) A law school shall not use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability.⁵⁶

This portion of the Standards explicitly recognizes that any discriminatory action taken against a person because of his or her religious belief is impermissible. In contrast, Standard 212, which focuses on “equal opportunity and diversity,” does not mention religion:

(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.⁵⁷

Neglecting religion and singularly emphasizing racial, ethnic, and gender

54. *Id.* at 787-89 (Kennedy, J., concurring).

55. See Peter H. Schuck, *The Perceived Values of Diversity, Then and Now*, 22 CARDOZO L. REV. 1915, 1959 (2001) (“Our public and private institutions adopt Affirmative Action programs designed to increase certain kinds of diversity (e.g., skin color and language group) while ignoring or even discouraging other diversities that are (or ought to be) more closely related to the goals of those institutions. Law school faculties, for example, evidently have little enthusiasm for viewpoint diversity and even for its closer proxies (e.g., religious tradition), yet their core intellectual mission should be to encourage the clash of viewpoints.”). *But see* Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2071-76 (1996) (comparing the use of race in admissions to religion, but arguing that neither attribute should be used to promote diversity in school admissions).

56. AM. BAR ASS'N, Standard 211 (2011), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_standards_and_rules_for_web.authcheckdam.pdf.

57. *Id.*, Standard 212.

diversity for their educational value is problematic. Law schools have little external incentive to create an environment that fosters religious diversity. Among other difficulties, this may inhibit an educational environment that is conducive to inter-religious dialogue in law schools. Although this example focuses on law schools that are both public and private, and not public education more generally, it nonetheless suggests that educational institutions consider racial diversity as a more important type of diversity to protect and promote than religious diversity.

III. CONCLUSION AND POTENTIAL SOLUTIONS

As explained in Part I, there is often a disconnect between the public's perception of the role of the First Amendment's Establishment Clause in schools and the courts' application of it. This misunderstanding may perpetuate religious conflict, especially in this post-9/11 highly Islamophobic age, in the educational context extending, but not limited to, school boards, teachers, and the general public. As explained in Part II, in post-Civil Rights Era America, schools and the education system have (at their best) been a space in which children are exposed to the breadth of racial and ethnic diversity that characterize this nation. However, religion is often overlooked in this process. This gap leaves room for the public to misconstrue the legal principles that support and protect those values—such as freedom, equality, and tolerance—that are essential to a strong democracy. In a political climate where a religion (Islam) is feared, parents, teachers, principals, other school administrators, and even students look to the law as a shield to deal with their fear.

To the extent that remedying this abuse of Establishment Clause jurisprudence is possible, it will require a multifaceted approach. Perhaps the most obvious component of this remedy is judicial. Judges should be more circumspect when applying the Establishment Clause in schools, avoiding the harshest tones and language and being careful to include descriptions of the types of religious education that are constitutional in the school setting, or at least including disclaimers that by barring “establishment” of religion, the court is not prohibiting educational exercises or policies designed to enhance religious diversity or interreligious understanding. Careful language could potentially help the public become more aware of the use and application of the First Amendment right. To address our additional broader concern about the *protected legal status* of religious diversity, it may even be necessary for the Court to positively affirm the importance of religious diversity in public education.⁵⁸ However, we are currently less interested in encouraging the use of

58. See Volokh, *supra* note 56, at 2059 (arguing that, if diversity in higher education is truly about “diversity of experiences, outlooks, and ideas,” higher-education admissions committees might use affirmative action to guarantee religious diversity but ultimately concluding that neither race- nor religion-based affirmative action is constitutional). Unfortunately, the most recent higher-education case that came before the Court claiming to

affirmative action to foster religious diversity at the college level than we are in ensuring that the Establishment Clause is not misused to eliminate critically important education about religion from the K-12 classroom.

On a political and policy level, those who would like to clarify the distinction between permissible and impermissible uses of religion in the public school setting could first clarify in the public eye as much as possible that Islamophobes may be deploying the Establishment Clause as a sword to demonize a religious faith instead of operating from a sincere concern that education about Islam violates the Constitution. Advocates might also consider lobbying for legislatures to affirm the importance of education about religious pluralism in schools and for school boards to issue clarifications about the distinction between religious “establishment” and constitutionally permissible, democracy-enhancing education about religion.

On the most practical level, training for teachers, similar to the methods used by Harvard’s Pluralism Project, which includes guidelines for methods and a framework for curricula, should be promoted on a broader scale. This would help educators understand the ways they can teach religion in an educational setting, such as by using the “jigsaw classroom technique,” a cooperative teaching method designed in the 1970s that aims to reduce racial conflict among schoolchildren.⁵⁹ Encouraging students to speak openly about their religious backgrounds, without expression from authority figures displaying preference for one religion over others or for religiosity over non-religiosity, allows for an environment conducive to dialogue. This environment offers at least some promise for the improvement, or even eradication, of Islamophobia and other forms of religious prejudice.

This Essay has described how Establishment Clause jurisprudence may have the unintended consequence of perpetuating Islamophobia by encouraging—or giving Islamophobic officials an excuse for—omission of education about the Muslim faith and religious pluralism generally. The gap between the public’s understanding of what the Establishment Clause permits and the more complex legal rule (or, as Cohen would say, the gap between the Establishment Clause’s conduct rule and the decision rule) means that the potentially democracy-enhancing effect of religious education and interreligious dialogue in the public school setting is, too often, lost. By identifying this issue and offering potential solutions, this Essay aspires to start

raise questions about religious or viewpoint diversity was actually about a religious student group’s right to exclude BGLT students and still gain official recognition on campus, which is not the type of “diversity” we would protect because it requires the exclusion of one group for the inclusion of another. See *Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 2986 n.13, 2999-3000 (2010).

59. The jigsaw technique borrows from Allport’s contact hypothesis, the social psychological theory mentioned in the Introduction. The technique combines role play with team work and cooperation. For more information about the structure, history, and philosophy of this technique, see the Jigsaw Classroom Technique website, <http://www.jigsaw.org/>.

a conversation about ways public schools can become a space that is more conducive to advancing the shared American value of religious diversity without overstepping the critically important limits imposed by the First Amendment.