

THE PARADOX OF INCLUSION BY EXCLUSION: THE ACCOMMODATION OF RELIGION IN THE PUBLIC SCHOOLS

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Government service provides unique opportunities, especially given the high rate of constituent contact such positions require.

I received a telephone call from a concerned citizen who was greatly troubled by what she perceived to be the efforts of her local public school district to undermine American ideals and usher in a “One World Government.” At the core of her suspicions was the teaching of the metric system of weights and measures. The metric system, she asserted, is un-American. She knew that a meter was longer than a yard, but she did not understand the relationship of grams to pounds, liters to gallons, or centimeters to inches.

I attempted to reassure her that the metric system was not being foisted upon the young and unsuspecting minds of our children as a part of some international conspiracy. In fact, I advised, Congress authorized the use of the metric system in the United States in the nineteenth Century.¹

Undeterred, she coolly responded, with the clarity of vision that only profound paranoia can provide: “If we convert to the metric system, have you thought about what that will do the length of the calendar year?” There is a certain degree of perverse logic in her *non sequitur*. Such curious illogic, however, is not reserved to political or social arenas: It is prevalent in the pitched battles waged over religion in the public schools. Although there are many facets to the disputes over the extent to which religion must or should be accommodated within a public school context, this article addresses only one observable phenomenon—Inclusion by Exclusion.

While the U.S. Constitution does not sanction government hostility towards religion,² there is a belief by some that public schools are increasingly hostile to one faith tradition—Christianity.³ The government’s position should be one of

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1. The Metric Act of 1866 was enacted on July 28, 1866. It legally recognized the metric system of measurement. The law is currently codified at 15 U.S.C. §§ 204, 205 (2000). The Metric Conversion Act of 1975 (P.L. 94-168) designated the metric system as the preferred system of weights and measures for trade and commerce. Congress directed federal agencies, to the extent possible, to convert to the metric system. See 15 U.S.C. § 205a (2000).

2. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

3. See, e.g., *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006) (upholding public school’s actions in preventing a student from wearing a T-shirt with religious messages condemning homosexuality); *Skoros v. New York City*, 437 F.3d 1 (2d Cir. 2006) (affirming, in a 2-1 decision, judgment in favor of public school district holiday display policy that permitted the Jewish Menorah and the Islamic Star and Crescent but prohibited the Christian crèche); *O.T. v. Frenchtown Elementary Sch. Dist. Bd. of Educ.*, 465 F. Supp. 2d 369 (D.N.J. 2006) (holding public

strict neutrality, neither aiding nor opposing religion. Those who believe public schools are hostile to Christianity also typically assert that the public schools actively promote either minority faith traditions or a “religion of secularism” that favors irreligion over religion.⁴

This perception of hostility has resulted in a type of hyper-vigilance whereby those who believe they are being excluded seek to ensure that all other “religions,” secular or otherwise, are also excluded. Only through this exercise of dogmatic “cleansing” can the excluded class be once again included on an equal footing.

This paradoxical thinking does not appear to be organized or covert. It appears to be more reactionary. Nonetheless, the phenomenon is real. The following are examples of this phenomenon.

I. HALLOWEEN

In *Guyer v. School Board of Alachua County*,⁵ the plaintiff removed his children from their elementary school on Halloween because he objected to the depiction of witches, cauldrons, brooms, and other traditional Halloween symbols.⁶ The plaintiff asserted these symbols and other Halloween observations violated the Establishment Clause of the First Amendment⁷ by promoting a religion known as “Wicca,” which involves witchcraft.⁸ The court noted that the school employed Halloween symbols in a secular, non-sectarian manner and there was no attempt to teach or promote Wicca, Satanism, witchcraft or any form of religion.⁹ “[C]ostumes and decorations simply serve to make Halloween a fun day for the students and serve an educational purpose by enriching the educational background and cultural awareness of the students.”¹⁰ There was also a witch in the school cafeteria holding a wand with the caption, “What’s cooking?”¹¹ The court found that Halloween “enhances a sense of community”

school district was not justified in preventing second-grade student from singing “Awesome God” at a school-sponsored talent show opened to the public). Dissenting opinions in both *Skoros* and *Harper* raise interesting questions. The Supreme Court granted certiorari in the *Harper* case. *Harper v. Poway Unified Sch. Dist.*, 127 S. Ct. 1484 (2007). However, the Court declined to hear the *Skoros* case. *Skoros v. City of New York*, 127 S. Ct. 1245 (2007).

4. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963) (“We agree of course that the State may not establish a religion of secularism in the sense of affirmatively opposing or showing hostility to religion, thus preferring those who believe in no religion over those who do believe.” (citation and internal punctuation omitted)).

5. 634 So. 2d 806 (Fla. Dist. Ct. App. 1994).

6. *Id.* at 806-07.

7. “Congress shall make no law respecting an establishment of religion” U.S. CONST. amend. I.

8. *Guyer*, 634 So. 2d at 806-07.

9. *Id.* at 807.

10. *Id.* at 807-08 (noting that witches appear in many mainstream literary contexts).

11. *Id.* at 807 n.1.

and is basically “fun.”¹² There are no violations of the Establishment Clause merely because some adherents to a particular religion have adopted some of the same symbols associated with Halloween.¹³ “Witches, cauldrons, and brooms in the context of a school Halloween celebration appear to be nothing more than a mere ‘shadow,’ if that, in the realm of establishment clause jurisprudence.”¹⁴

II. MASCOTS

Native American mascots in professional and collegiate sports have not been the only source of controversy.¹⁵ In *Kunselman v. Western Reserve Local School District*,¹⁶ the circuit court upheld a federal district court’s grant of summary judgment to the school district regarding a challenge by the plaintiffs to the school’s use of a “Blue Devil” as a mascot.¹⁷ The court found unreasonable the plaintiffs’ assertion that the use of such a mascot promotes Satanism in violation of the Establishment Clause.¹⁸ The “Blue Devil” mascot came from Duke University, which, in turn, borrowed the name from an elite corps of French alpine soldiers who fought in World War II wearing blue berets and going by the *nom du guerre* “Blue Devils.”¹⁹ The Circuit Court of Appeals, quoting the district court’s decision, found the mascot’s use was entirely secular and did not have the primary or principal effect of promoting Satanism.²⁰ Being personally offended does not create a constitutional violation.²¹

Additionally, in *West Virginia v. Berrill*,²² the court upheld the defendant’s convictions for disrupting a public meeting and wearing a mask.²³ Berrill, believing the school board did not take seriously his earlier concerns about the school district’s use of a “red devil” as a mascot, disrupted a school board meeting by dressing in a devil costume and prancing around the room, frightening some children present.²⁴

12. *Id.* at 808.

13. *Id.* at 809.

14. *Id.*

15. *See, e.g., Pro-Football, Inc. v. Harjo*, 415 F.3d 44 (D.C. Cir. 2005) (involving a long-running dispute over the use of the term “redskin” by a professional football franchise); *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004) (involving one of several controversies involving “Chief Illiniwek” at the University of Illinois).

16. 70 F.3d 931 (6th Cir. 1995).

17. *Id.* at 933.

18. *Id.* at 932.

19. *Id.*

20. *Id.* at 933.

21. *Id.* at 932-33.

22. 474 S.E.2d 508 (W. Va. 1996).

23. *Id.* at 510.

24. *Id.*

III. T-SHIRTS

In *Harper v. Poway Unified School District*,²⁵ the school district permitted the Gay-Straight Alliance to hold a “Day of Silence” at the school to heighten awareness of intolerance shown towards those of different sexual orientation.²⁶ The school had experienced conflict in the past over this issue and the use of the “Day of Silence.”²⁷ On the “Day of Silence” scheduled for 2004, Harper—a sophomore at the time—wore a T-shirt expressing his religious objections to homosexuality and his general objection that the school had seemingly endorsed a practice that God had condemned.²⁸ His T-shirt contained Biblical references.²⁹ He was advised that his T-shirt created “a negative and hostile working environment for others,” which violated the school’s dress code.³⁰ Harper would not remove his T-shirt.³¹ He remained in the administration office for the day.³² He was not suspended or disciplined.³³ He later sued, asserting in part that the school’s action violated the Free Exercise, Free Speech, and Establishment Clauses of the First Amendment,³⁴ as well as Equal Protection and Due Process Clauses of the Fourteenth Amendment.³⁵

The district court dismissed the Fourteenth Amendment claims and denied injunctive relief.³⁶ The Ninth Circuit affirmed the denial of the injunctive relief because it did not believe the student demonstrated a likelihood of success on his First Amendment claims.³⁷ The case demonstrates how divided the Ninth Circuit is on religious issues. One judge on the court sought rehearing en banc, which was denied.³⁸ But the resulting opinions concurring or dissenting were unusually pointed. The dissent believed the majority engaged in “viewpoint

25. 445 F.3d 1166 (9th Cir. 2006), *vacated, remanded*, 127 S. Ct. 1484 (2007), *appeal dismissed as moot*, 2007 U.S. App. LEXIS 9234 (9th Cir. Apr. 23, 2007).

26. *Id.* at 1171.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 1172.

33. *Id.*

34. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press” U.S. CONST. amend. I.

35. *Harper*, 445 F.3d at 1273. “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV.

36. *Harper*, 445 F.3d at 1173.

37. *Id.* at 1192.

38. *Harper v. Poway Unified Sch. Dist.*, 455 F.3d 1052 (9th Cir. 2006).

discrimination.”³⁹

IV. EVOLUTION

In *Peloza v. Capistrano Unified School District*,⁴⁰ Peloza was a biology teacher who filed suit against his school district claiming his civil rights were violated by the school’s actions requiring him to teach evolution and prohibiting him from discussing religious matters with students on school grounds.⁴¹ He asserts that “evolutionism” is a “religious belief” and “not a valid scientific theory.”⁴² He refused to include the theory of evolution in his instruction because it is not “fact” and because it “occurred in the non-observable and non-recreatable past and hence . . . not subject to scientific observation.”⁴³ The court found that adding “ism” to “evolution” doesn’t “metamorphose ‘evolution’ into a religion.”⁴⁴ Disagreeing with the teacher, the court did not find that he was required to teach the theory of evolution as fact nor did the court find that the theory of evolution denies the existence of a divine creator.⁴⁵ “To say red is green or black is white does not make it so.”⁴⁶ Thus, the teaching of the theory of evolution is not the promotion of a religion.⁴⁷

The court also found that the teacher’s rights of free speech were not impermissibly violated by the school district’s reprimands and restrictions regarding his proselytizing of students on school grounds.⁴⁸ The court acknowledged there was a restriction on his free speech rights, but such restrictions on public school teachers are justified where there is a compelling governmental interest in avoiding a constitutional violation.⁴⁹ “The school district’s interest in avoiding an Establishment Clause violation trumps Peloza’s right to free speech.”⁵⁰ The court supported this finding by noting that Peloza, “whether . . . in the classroom or outside of it during contract time, . . . is not just any ordinary citizen. He is a teacher.”⁵¹ Because of his respected position, there is an increased likelihood that high school students will equate his views with those of the school.⁵² Discussing his religious beliefs with students during school time on school grounds “would flunk all three parts of the test articulated in

39. *Harper*, 445 F.3d at 1197 (Kozinski, J., dissenting).

40. 37 F.3d 517 (9th Cir. 1994).

41. *Id.* at 519.

42. *Id.*

43. *Id.* at 520.

44. *Id.* at 521.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 522.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

*Lemon v. Kurtzman.*⁵³

V. CURRICULUM

In *Fleischfresser v. Directors of School District 200*,⁵⁴ the plaintiffs sought to prevent the elementary school from using the *Impressions* reading series as the main supplemental reading program in grades K-5, contending the series violated the First Amendment's Establishment Clause by promoting "wizards, sorcerers, giants and unspecified creatures with supernatural powers," thus indoctrinating children in anti-Christian values.⁵⁵ The Seventh Circuit upheld the district court's dismissal of the action through summary judgment for the school district. The Seventh Circuit reiterated that schools have broad discretion in selecting curriculum, and courts should only interfere where constitutional values are "directly and sharply implicate[d]."⁵⁶ In this case, the plaintiffs failed to demonstrate that any coherent "religion" was being promoted even accepting the argument that the reading series contained concepts found in "paganism and branches of witchcraft and satanism."⁵⁷ A K-5 reading series should serve to stimulate a child's imagination, intellect, and emotions. Expanding children's minds and developing their sense of creativity is not an "impermissible establishment of pagan religion."⁵⁸ Works cited by the court included C.S. Lewis, A.A. Milne, Dr. Suess, Ray Bradbury, L. Frank Baum, and Maurice Sendak.⁵⁹ The court also rejected the plaintiffs' assertions that stories with witches, goblins and Halloween violated the Establishment Clause, holding instead that Halloween is an "American tradition" and is a purely secular affair.⁶⁰ The court also noted that the reading series contains stories based upon Christian beliefs, but any "religious references are secondary, if not trivial" when the overall purpose of the reading series is considered.⁶¹

Similar to *Fleischfresser*, in *Brown v. Woodland Joint Unified School District*,⁶² the plaintiffs attacked the *Impressions* reading series as violating the First Amendment's Establishment Clause by promoting "religion" while violating plaintiffs' right to free exercise of their own beliefs.⁶³ The plaintiffs challenged thirty-two of the selections, contending these selections promoted the religion of

53. *Id.* (citation omitted); see *infra* Part VIII for a discussion of the *Lemon* test.

54. 15 F.3d 680 (7th Cir. 1994).

55. *Id.* at 683. *Impressions* is a series of fifty-nine books with approximately 10,000 literary selections reflecting a broad range of North American cultures and traditions.

56. *Id.* at 686.

57. *Id.* at 687.

58. *Id.* at 688.

59. *Id.*

60. *Id.* at 688 n.8.

61. *Id.* at 689.

62. 27 F.3d 1373 (9th Cir. 1994).

63. *Id.* at 1376.

“Wicca” (witchcraft).⁶⁴ The selections do refer to witches and some related classroom activities include pretending one is a witch or sorcerer and creating a poetic chant.⁶⁵ In affirming the district court’s summary judgment in favor of the school district, the Ninth Circuit Court of Appeals viewed favorably the school district’s review committee, which was established following complaints from parents.⁶⁶ The review committee included a Christian minister.⁶⁷ The review committee found no connection between the reading series and the occult.⁶⁸ Citing the Seventh Circuit, the court noted the *Impressions* reading series was developed to serve a secular purpose related to the education of elementary school children and was not designed to promote any religion, although certain selections involving faith traditions and folklore in America are a part of the series, including selections involving the Christian faith.⁶⁹ Coincidental resemblance to certain religious practices does not amount to a constitutional violation.⁷⁰ The court also rejected the plaintiffs’ assertion that the challenged selections are designed “through the use of neuro-linguistic programming” to “foster and promote” a “magical world view that renders children susceptible to future control by occult groups” and make them “more likely to become involved in occult practices later in their lives.”⁷¹

VI. HARRY POTTER

Fleischfresser and *Brown* were decided before the British boy-wizard Harry Potter appeared. *Counts v. Cedarville School District*⁷² involved the boy-wizard Harry Potter, whose exploits at Hogwarts School of Witchcraft and Wizardry are central to the six published novels by J.K. Rowling and four feature films.

The *Harry Potter* series has been something of a publishing phenomenon, with hundreds of millions of copies published worldwide in sixty-three languages.⁷³ Not surprising, a number of public school libraries contain the books. Also not surprising, there are those who wish to ban or restrict access to the books because of a belief that the books promote unwholesome activities (magic spells, disrespect for authority, deceit) as well as pagan religions and Satanism.

Counts began when a parent expressed objections to her pastor regarding the presence of *Harry Potter* books in the school library.⁷⁴ Her pastor was also one

64. *Id.*

65. *Id.*

66. *Id.* at 1384.

67. *Id.* at 1377.

68. *Id.*

69. *Id.* at 1381.

70. *Id.*

71. *Id.* at 1382.

72. 295 F. Supp. 2d 996 (W.D. Ark. 2003).

73. http://en.wikipedia.org/wiki/Harry_Potter (last visited June 8, 2007).

74. *Counts*, 295 F. Supp. at 1000-01.

of the five school board members.⁷⁵ She was notably concerned with *Harry Potter and the Sorcerer's Stone*.⁷⁶ A fifteen-member Library Committee was formed to review her request to have this book withdrawn from all students.⁷⁷ The Library Committee voted unanimously in favor of keeping the book in circulation without restriction.⁷⁸ The school board, however, voted 3-2 to restrict access to the *Harry Potter* books to those students who had a signed permission statement from their parents or guardians.⁷⁹ Of the three school board members who voted to restrict access, two had never read a *Harry Potter* book and the third had read only one (the aforementioned *Sorcerer's Stone*).⁸⁰ They did not believe the books contained any profanity, sexuality, obscenity, or perversion, nor did they express any concern the books had actually led to disruption in the school district.⁸¹ They did believe the books “might promote disobedience and disrespect for authority,” and they were concerned the books dealt with “witchcraft” and “the occult.”⁸² The pastor-member, who had read one of the books, testified that he believed the books would “create . . . anarchy” at the schools and that restriction was a “preventative measure” necessary “to prevent any signs that will come up like Columbine and Jonesboro.”⁸³ The court stated the issue to be decided: “Does a school board’s decision—to restrict access to library books only to those with parental permission—infringe upon the First Amendment rights of a student who has such permission?”⁸⁴

The court noted that the restrictions placed on access to the *Harry Potter* books had a “stigmatizing effect” that constituted “a restriction on access.”⁸⁵ Unless the school board could justify such restrictions, “they amount to impermissible infringements of First Amendment rights.”⁸⁶

The court cited to (and quoted extensively from) *Tinker v. Des Moines Independent Community School District*.⁸⁷

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over

75. *Id.* at 1001.

76. Ironically, the original title of this book (as released in the United Kingdom) was *Harry Potter and the Philosopher's Stone*. http://en.wikipedia.org/wiki/Harry_Potter_and_the_Philosophers_Stone (last visited June 8, 2007). Although this is a more direct reference to alchemy, the school patron was upset with the references to “witchcraft.” *Counts*, 295 F. Supp. 2d at 1004.

77. This type of *ad hoc* committee approach was viewed with favor in *Brown*.

78. *Counts*, 295 F. Supp. 2d at 1001.

79. *Id.*

80. *Id.*

81. *Id.* at 1000-01.

82. *Id.* at 1002.

83. *Id.* at 1003.

84. *Id.* at 1001-02.

85. *Id.* at 1002.

86. *Id.*

87. 393 U.S. 503, 511 (1969).

their students. Students in school as well as out of school are “persons” under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reason to regulate their speech, students are entitled to freedom of expression of their views.⁸⁸

The restrictions, to be justified, must be necessary to avoid material and substantial interference with schoolwork or discipline.⁸⁹ The three board members, however, were not aware of

any actual disobedience or disrespect that had flowed from a reading of the *Harry Potter* books. Their concerns are, therefore, speculative. Such speculative apprehensions of possible disturbance are not sufficient to justify the extreme sanction of restricting the free exercise of First Amendment rights in a public school library.⁹⁰

The court was likewise not persuaded that the *Harry Potter* series promoted a “religion.” All three members testified that they believed the series promoted “witchcraft religion,” but one testified that if the books “promoted Christianity,” he would not object to them.⁹¹ Notwithstanding their personal distaste for “witchcraft religion,” the court wrote, “it is not properly within their power and authority as members of defendant’s school board to prevent the students at Cedarville from reading about it.”⁹² Accordingly, plaintiffs’ Motion for Summary Judgment was granted. The school district was enjoined and directed to return the books to the library shelves without any restrictions.⁹³

VII. GOOD FRIDAY AND CHRISTMAS

In *Cammack v. Waihee*,⁹⁴ a case involving Hawai’i’s observance of Good Friday, the Ninth Circuit discussed the problem of “political divisiveness” where minority faith traditions or non-religious persons or entities militate for official

88. *Counts*, 295 F. Supp. 2d at 1002-03.

89. *Id.* at 1003.

90. *Id.* at 1004.

91. *Id.*

92. *Id.* (citing *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (1982) (involving a school board sought to remove library books it considered, in part, to be anti-Christian and the court stated “In brief, we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.’”)).

93. *Id.* at 1005.

94. 932 F.2d 765 (9th Cir. 1991).

recognition of days or periods of time important to them.⁹⁵ Public schools find themselves between those who would sanitize the public schools of any religious studies or references and those who wish to use the public schools as a means to promote denominational and theological preference. While the latter circumstance has been well litigated, the “sanitization” cases have not. But it seems evident from U.S. Supreme Court decisions that any “relentless and all pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution” as evincing hostility towards religion, which is as much proscribed as endorsement.⁹⁶ The following two cases illustrate positive approaches to balancing the religious and cultural diversity of the American population while satisfying constitutional requirements.

In *Florey v. Sioux Falls District 49-5*,⁹⁷ in response to complaints that Christmastime assemblies were religious exercises, the school board established a broad-based committee of citizens to review the school district’s practices in light of constitutional requirements.⁹⁸ The committee’s eventual report to the school board delineated permissible school activity but also recommended a policy to promote understanding and tolerance of various faith traditions while remaining neutral toward religion and non-religion.⁹⁹ The school board adopted the policy, recognizing that one of the school district’s goals “is to advance the students’ knowledge and appreciation of the role that our religious heritage has played in the social, cultural and historical development of civilization.”¹⁰⁰ To implement this policy, the school board arranged the school calendar so as not to conflict with religious observances and to incorporate “the teaching *about* and not *of* religion . . . in a factual, objective and respectful manner.”¹⁰¹ Religious themes in the arts, literature, history, music, and drama were permitted if “presented in a prudent and objective manner.”¹⁰² Religious symbols, such as a cross, a crescent, and a Star of David were “permitted as a teaching aid or resource provided such symbols are displayed as an example of the cultural and religious heritage of the holiday and are temporary in nature.”¹⁰³

The district court refused to enjoin the implementation of the policy, and the Eighth Circuit Court of Appeals affirmed. The appellate court noted “[t]he close

95. “Political divisiveness” has been raised in Establishment Clause cases as an argument that to permit the challenged activity to continue would provoke political battles and divide the community. The U.S. Supreme Court has not determined a constitutional infringement based upon “political divisiveness” alone but has required a showing of “a direct subsidy to religious schools or colleges” in order to warrant inquiry into “political divisiveness.” *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984).

96. *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

97. 619 F.2d 1311 (8th Cir. 1980).

98. *Id.* at 1313.

99. *Id.*

100. *Id.* at 1319.

101. *Id.* at 1320.

102. *Id.* at 1319.

103. *Id.* at 1319-20.

relationship between religion and American history and culture,” and that “total separation [between church and state] is not possible in an absolute sense.”¹⁰⁴ The court found the policy to be neutral and “not promulgated with the intent to serve a religious purpose.”¹⁰⁵ Religious symbols were used only as teaching aids and resources and were displayed only temporarily.

We view the thrust of these rules to be the advancement of the students’ knowledge of society’s cultural and religious heritage, as well as the provision of an opportunity for students to perform a full range of music, poetry and drama that is likely to be of interest to the students and their audience.¹⁰⁶

The Court likewise did not find that the primary effect was to advance or inhibit religion. “The First Amendment does not forbid all mention of religion in public schools; it is the *advancement* or *inhibition* of religion that is prohibited.”¹⁰⁷ The study of religion, when objectively presented as part of a secular program of education, is not forbidden.¹⁰⁸ The court expanded upon the concept of “study” to mean not only classroom instruction but public performances as well (but not religious ceremonies).¹⁰⁹ The fact that some people may be affected by religious references in a secular course of study does not invalidate the inclusion of such references. “It would be literally impossible to develop a public school curriculum that did not in some way affect the religious or nonreligious sensibilities of some of the students or their parents.”¹¹⁰ In addition, “[t]he public schools are not required to delete from the curriculum all materials that may offend any religious sensibility.”¹¹¹

*Clever v. Cherry Hill Township Board of Education*¹¹² is a case that involved school officials removing a Nativity display from a bulletin board in one of its elementary schools in December 1991.¹¹³ This resulted in a significant brouhaha. The school board formed a “Seasonal Observance Committee,” which, as in *Florey*, reported back to the school board with several recommendations for including cultural, ethnic, or religious themes in the school’s educational programs.¹¹⁴ The school board adopted the recommendations as policy and developed procedures to “foster mutual understanding and respect for the rights of all individuals regarding their beliefs, values, and customs.”¹¹⁵ The school

104. *Id.* at 1313-14 (citation omitted).

105. *Id.* at 1314.

106. *Id.*

107. *Id.* at 1315 (emphasis added).

108. *Id.*

109. *Id.* at 1316.

110. *Id.* at 1317.

111. *Id.* at 1318.

112. 838 F. Supp. 929 (D.N.J. 1993).

113. *Id.* at 934.

114. *Id.*

115. *Id.* at 932.

board added: "Programs which teach about religion and its role in the social and historical development of civilization and in the social and political context of world events do not violate the religious neutrality of public schools. Schools may teach about but not promote religion."¹¹⁶ Although the school board relied heavily upon *Florey*, it did not restrict its curricular objectives to holidays that had both religious and secular relevancy.¹¹⁷ The school board broadened the use of religious symbols by including these in school calendars along with secular holidays.¹¹⁸ Appropriate seasonal displays were also permitted, but were restricted to no more than ten days.¹¹⁹

Cherry Hill's policy also mandates that the calendars be used in conjunction with a list of books and other resource materials available in the school library relating to holidays identified in the calendar. Teachers are provided with descriptions of each holiday to "be utilized by staff members as an educational resource throughout the school year."¹²⁰

The school board's primary purpose was "to promote the educational goal of advancing student knowledge about our cultural, ethnic, and religious heritage and diversity."¹²¹

The federal district court, in granting summary judgment to the school board, found: (1) the context within which the religious and secular symbols are employed does not endorse any religion; (2) the displays are curriculum-related and are not permanent; (3) there is no "overt religious exercise" associated with the policy, and thus no religious coercion; (4) there is no denominational preference; (5) there is no denominational hostility; (6) the policy "has a genuine and demonstrable secular purpose"; (7) the "primary effect" of the policy does not endorse any particular religion nor favor religion over non-religion; and (8) the policy and its procedures do not "unduly entangle the government in state-church relationships."¹²²

The court also observed:

Religion is a pervasive and enduring human phenomenon which is an appropriate, if not desirable, subject of secular study. It is hard to imagine how such study can be undertaken without exposing students to the religious doctrines and symbols of others.

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116. *Id.*

117. *Id.* at 934.

118. *Id.*

119. *Id.*

120. *Id.* at 933.

121. *Id.* at 934.

122. *Id.* at 939-40, 942.

. . . We learn this lesson [mutual understanding, respect, and tolerance] not by being offended or threatened by the religious symbols of others, but by understanding the meaning of those symbols and why they have the capacity to inspire intense emotions. If our public schools cannot teach this mutual understanding and respect, it is hard to envision another societal institution that could do the job effectively.¹²³

The court's decision is not only well written but included seven exhibits detailing the school board's policies, its procedures, its guidelines, a compilation of religious symbols, two calendar months from the school calendar, and explanatory text to guide teachers in explaining the symbols.¹²⁴

VIII. THE STUDY OF ISLAM

The U.S. Supreme Court has not banned instruction concerning religion in public schools. In *School District of Abington Township v. Schempp*,¹²⁵ the Court noted that "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."¹²⁶

This is often stated in more simplified terms: Public schools can teach *about* religion rather than *teach* religion. Crossing the line can result in litigation claiming the challenged practice violates the First Amendment's religion clauses. However the concept may be phrased, the social sensitivities of the times may result in litigation to prevent or challenge the teaching about certain faith traditions. The tragic events of September 11, 2001 and subsequent hostilities have made the teaching about Islam a sensitive matter. Not surprisingly, there has been litigation.

In *Eklund v. Byron Union School District*,¹²⁷ the plaintiffs challenged the middle school curriculum that involved the use of a role-playing game to teach seventh grade students about Islam.¹²⁸ Plaintiffs claimed the school's methods violated the Establishment Clause of the First Amendment.

The California State Board of Education required seventh grade world history classes to include a unit on Islamic history, culture, and religion.¹²⁹ There was an approved textbook—*Across the Centuries*—which the school district employed, but the teachers were encouraged to use other instructional methods they believed would enhance their students' understanding of the unit.¹³⁰ Some teachers used an interactive module called "Islam: A Simulation of Islamic History and Culture," which uses a variety of role-playing activities to engage students in

123. *Id.* at 939.

124. *Id.* at 942-50.

125. 374 U.S. 203, 225 (1963).

126. *Id.*

127. No. C02-3004 PJH, 2003 U.S. Dist. LEXIS 27152 (N.D. Cal. 2003).

128. *Id.* at *2.

129. *Id.* at *3.

130. *Id.* at *3-4.

situations approximating the Five Pillars of Islam, the elements of faith in the Muslim religion.¹³¹

Students were encouraged but not required to choose a Muslim name to facilitate the role-playing.¹³² For the first two Pillars of Islam, the teacher read Muslim prayers and portions of the Qur'an aloud in class.¹³³ Student groups recited a line from a Muslim prayer, such as "In the name of God, Most Gracious, Most Merciful" as they left class.¹³⁴ Students also made group posters.¹³⁵ Some banners had quotations from the Qur'an, both in Arabic and English, although this was not required.¹³⁶

For the third and fourth Pillars, students were encouraged to give up things for a day, such as watching television or eating candy, to demonstrate the fasting associated with *Ramadan*.¹³⁷ Students were also encouraged to perform volunteer community service, mostly around the school, as a means of demonstrating the charity aspect of *Zakaat*.¹³⁸ In all, these four activities took about a week in the eight-week unit.¹³⁹

For the fifth Pillar—*Hajj*, the pilgrimage to Mecca—the teacher had the students participate in a board game called "Race to Makkah."¹⁴⁰ Students used their knowledge of Islam to advance on the board, with the goal of the game to reach "Mecca."¹⁴¹ Cards were used that expressed certain elements of the Muslim faith, with three categories to choose from ("trivia," "truth," or "fact").¹⁴² The teacher indicated the statements were expressions of what Muslims believed and were not actual historical fact.¹⁴³ The teacher also permitted students to dress in Arabic garb for class presentations.¹⁴⁴

As a part of the final, the teacher required the students to write an essay critiquing elements of Islamic culture, albeit with the following caveat: "BE CAREFUL HERE—if you do not have something positive to say, don't say anything!!!"¹⁴⁵ The final followed the events of September 11, 2001, and the

131. *Id.* at *1-4. The Five Pillars of Islam are *Shahada* (profession of faith in God); *Salaat* (prayer five times a day); *Ramadan* (ritual fasting from dawn to dusk during the month of Ramadan); *Zakaat* (charity); and *Hajj* (pilgrimage to Mecca).

132. *Id.* at *6.

133. *Id.* at *7.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at *7-8.

138. *Id.* at *8.

139. *Id.* During the time of the events at issue, the tragic events of September 11, 2001 occurred. The class spent a week discussing the attacks in the context of world history. *Id.* at *5.

140. *Id.* at *8.

141. *Id.* at *8-9.

142. *Id.* at *9.

143. *Id.*

144. *Id.*

145. *Id.* at *10.

teacher was concerned the students might “express racist remarks” rather than attend to the objectives of the unit on Islam.¹⁴⁶

Other world history units also used role-playing. Some units also addressed religious themes, such as the rise of Christianity after the fall of the Roman Empire and the role of Buddhism in Chinese culture.¹⁴⁷

Although the plaintiffs’ son had participated in the Islam module when he was in seventh grade, his sister was allowed to “opt out” of the unit at the parents’ request.¹⁴⁸ The plaintiffs’ daughter was provided an alternate assignment (the French Revolution) while the rest of the class participated in the Islam unit.¹⁴⁹

The school moved for summary judgment. The federal district court judge noted that the Supreme Court has fashioned three separate but interrelated tests for analyzing Establishment Clause disputes:¹⁵⁰ the *Lemon* test,¹⁵¹ the *Lynch* endorsement test,¹⁵² and the *Lee* test.¹⁵³ The court also noted that “[a]s an initial matter, the Supreme Court has held that the public schools bear the responsibility of educating their students about the history and cultures of other countries, which often must include a discussion of religion as well.”¹⁵⁴ “The history of man is inseparable from the history of religion.”¹⁵⁵ The plaintiffs argued the role-playing games constituted the practice of Islam and the school district’s use of the Islam simulation module constituted an impermissible endorsement of the Islam faith.¹⁵⁶

Under the *Lee* test or “Coercion Test,” the Establishment Clause is violated where a school coerces students into participating in religious activities. “Coercion” can include “subtle and indirect pressure, such as social pressure from

146. *Id.*

147. *Id.* at *10-12.

148. *Id.* at *12.

149. *Id.* at *12-13.

150. *Id.* at *14-16.

151. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The government action at issue must (1) have a secular purpose; (2) not have the principal or primary effect of advancing or inhibiting religion; and (3) not foster excessive government entanglement with religion. *Id.* at 612.

152. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring). The *Lynch* endorsement is somewhat a clarification or refinement of the “excessive entanglement” prong of *Lemon*. Under the endorsement test, the question is whether the challenged practice “sends a message to 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.” *Id.*

153. *Lee v. Weisman*, 505 U.S. 577 (1992). This test is also known as the “coercion test.” “[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’” *Id.* at 587.

154. *Eklund v. Byron Union Sch. Dist.*, No. C02-3004 PJH, 2003 U.S. Dist. LEXIS 27152, at *19 (N.D. Cal. 2003).

155. *Id.* at *19-20 (quoting *Engel v. Vitale*, 370 U.S. 421, 434 (1962)).

156. *Id.* at *21.

peers to conform to school-set norms, . . . even if students are otherwise free to opt out of the unit.”¹⁵⁷ The school district argued that, as a threshold matter, the Establishment Clause could not be violated because the role-playing activities at issue were not “religious” activities.¹⁵⁸

The court found that an objective review of the circumstances led to the conclusion the students at the middle school “[c]annot be considered to have performed any actual religious activities in their seventh grade world history class.”¹⁵⁹ The students did not perform the actual Five Pillars of Faith. They did not proclaim faith in one God or belief in Muhammad as His prophet, did not pray five times a day, did not fast for a month, did not make charitable donations, and did not travel to Mecca.¹⁶⁰ “Instead, the students participated in activities which, while analogous to those pillars of faith, were not actually the Islamic religious rites.”¹⁶¹ Role-playing activities do not constitute the actual practice of a religion and do not violate the Establishment Clause.¹⁶² “In addition, there is no evidence that the students performed these classroom activities with any devotional or religious intent.”¹⁶³ The subjective lack of spiritual intent demonstrates the activities in question could not objectively be considered “religious activity” for the purposes of *Lee*.¹⁶⁴

The plaintiffs countered that should the court find the role-playing activities did not constitute a “religious activity,” the module nonetheless had the effect of advancing or endorsing the Islam religion, failing both the *Lemon* and the *Lynch* tests.¹⁶⁵ The court agreed that the Islam module would be unconstitutional under both *Lemon* and *Lynch* should the role-playing activities have the primary effect of either endorsing or disapproving of any religion.¹⁶⁶

Upon an objective review of the situation at hand, the students would not reasonably have understood the module to have endorsed Islam over other religions merely because of the role-playing activities at issue. As a matter of law, “a practice’s mere consistency with or coincidental resemblance to a religious practice does not have the primary effect of endorsing religion.” Thus, the mere fact that the Islam role-playing module involved approximations of Islamic religious acts is not sufficient to create an endorsement of the Islamic faith.¹⁶⁷

157. *Id.* (citing *Lee*, 505 U.S. at 592-94).

158. *Id.*

159. *Id.* at *22.

160. *Id.* at *23.

161. *Id.*

162. *Id.* at *24.

163. *Id.* at *25.

164. *Id.* at *26.

165. *Id.* at *27.

166. *Id.*

167. *Id.* at *29 (citation omitted) (quoting *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1381 (9th Cir. 1994) (holding role-playing witchcraft rituals not an endorsement of

A reasonable student could not have believed the activities constituted an endorsement of religion. Students at the middle school participated in a number of role-playing activities for purely educational reasons and were exposed to a number of different religions.¹⁶⁸ “Given these facts, an objective review of the activities in question does not result in a finding of an endorsement of Islam.”¹⁶⁹ In addition, the use of the Islam module was motivated by a purely secular purpose: to instruct the students in world history regarding the history, culture, and religion of Islam.¹⁷⁰ “[E]ven quasi-religious role-play is permissible if it does not objectively endorse one religion over another.”¹⁷¹

The judge was not swayed by the plaintiffs’ claim that the banners violated the Establishment Clause, drawing an analogy to the display of the Ten Commandments. The court added that the display of the banners was not for the primary purpose of endorsing a religion,¹⁷² as the display of the Ten Commandments was in *Stone v. Graham*.¹⁷³ The court was likewise not persuaded by the plaintiffs’ objections to the “Race to Makkah” trivia game and its cards that quizzed students on information they had learned during the Islam module. Given the context in which the cards were used, an objective observer could not conclude the cards endorsed Islam.¹⁷⁴ In addition, the teacher’s cautionary note prior to the final examination could not reasonably be construed as endorsement of Islam.¹⁷⁵ The school district was granted summary judgment.¹⁷⁶

Plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit. In a terse opinion, the Ninth Circuit summarily affirmed the decision of the federal district court judge.¹⁷⁷ On May 31, 2006, the Plaintiffs filed for a writ of certiorari with the U.S. Supreme Court. The Supreme Court denied the writ on October 2, 2006.¹⁷⁸

Wiccan religion)).

168. *Id.* at *30.

169. *Id.*

170. *Id.*

171. *Id.* at *31.

172. *Id.*

173. 449 U.S. 39, 41 (1980).

174. *Eklund*, 2003 U.S. Dist. LEXIS 27152 at *33-36.

175. *Id.* at *36-37.

176. *Id.* at *42.

177. *See Eklund v. Byron Union Sch. Dist.*, 154 Fed. Appx. 648 (9th Cir. 2005).

178. *Eklund v. Byron Union Sch. Dist.*, 127 S. Ct. 86 (2006). For a similar post-secondary dispute, see *Yacovelli v. Moeser*, 324 F. Supp. 2d 760 (M.D.N.C. 2004) (granting the University of North Carolina at Chapel Hill’s Motion to Dismiss the plaintiffs’ complaint that the university’s orientation program—which required incoming freshmen to read and discuss a book on Islam, with alternatives for those who objected to the exercise—violated the First Amendment’s Free Exercise Clause).

IX. RECOMMENDATIONS

Describing a phenomenon is only a first step. It would be a mistake to dismiss the perception of anti-Christianity within the public schools as the opinions of fringe elements. As is evident in a number of the reported cases above—notably the dissenting opinions in the Ninth Circuit’s *Harper* decision (T-shirt with religious messages describing homosexuality as sinful)—there are a number of judges who believe the balance has shifted such that public school policies militate against religious expression of students, especially Christian expression, in favor of a “religion of secularism,” a type of hostility that should run afoul of Supreme Court guidance.

The approaches by the school districts in *Brown v. Woodland Joint Unified School District*¹⁷⁹ (challenge to the *Impressions* reading series), *Counts v. Cedarville School District*¹⁸⁰ (Harry Potter), *Florey v. Sioux Falls District 49-5*¹⁸¹ (incorporation of religious symbols in instruction as means of increasing student knowledge, appreciation, and respect for the role of religion and faith traditions), and *Clever v. Cherry Hill Township Board of Education*¹⁸² (similar to *Florey*, with the development of a calendar and related library references that provided additional information on important religious and secular observances throughout the year)¹⁸³ involved representatives of the respective school communities who received and acted upon concerns and complaints from other community members. The committees were composed of a cross-section of the community and were thus representative.¹⁸⁴ The courts have looked favorably upon this approach because it creates a forum for those who believe themselves to be marginalized or disenfranchised with the opportunity to be heard.

A greater concern is with the evolution of Establishment Clause defense strategies, especially in attempts to justify restrictions on religious speech of students, including student symbolic speech. In addition to the “political divisiveness” argument addressed above, there is also an emerging defense strategy that would permit restriction on student speech so as to avoid potential Establishment Clause violations. Under this latter strategy, viewpoint discrimination by a governmental entity (i.e., a public school district) may be justified where necessary to avoid an Establishment Clause violation. The U.S. Supreme Court has not explicitly accepted this defense, although it did acknowledge its existence—without ruling on it—in *Good News Club v. Milford Central School*,¹⁸⁵ where the Court stated: “[I]t is not clear whether a State’s interest in avoiding an Establishment Clause violation would justify viewpoint

179. 27 F.3d 1373 (9th Cir. 1994).

180. 295 F. Supp. 2d 996 (W.D. Ark. 2003).

181. 619 F.2d 1311 (8th Cir. 1980).

182. 838 F. Supp. 929 (D.N.J. 1993).

183. *Id.* at 933-34.

184. *Id.* at 932.

185. 533 U.S. 98, 112-13 (2001).

discrimination.”¹⁸⁶

Permitting a governmental entity to avoid addressing the accommodation of religion through viewpoint discrimination based on an alleged Establishment Clause violation would be a disservice to all public school constituents. Such a defense strategy, if successful, would do nothing to allay the concerns of those who perceive the public schools to be hostile to their faith tradition. It would, in fact, tend to reinforce this perception. The resolution of this phenomenon depends upon direct engagement, no matter how unpleasant this might be. To do otherwise would be to abandon the essential teaching function of our public schools.

186. *Id.* at 113.

