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## Recommended Citation

Diane Webber, *Education as a Counterterrorism Tool and the Curious Case of the Texas School Book Resolution*, 11 U. Md. L.J. Race Relig. Gender & Class 271 (2011).

Available at: <http://digitalcommons.law.umaryland.edu/rrgc/vol11/iss2/4>

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# EDUCATION AS A COUNTERTERRORISM TOOL AND THE CURIOUS CASE OF THE TEXAS SCHOOL BOOK RESOLUTION

DIANE WEBBER\*

*“Educate and inform the whole mass of the people. . . They are the only sure reliance for the preservation of our liberty.”<sup>1</sup>*

## I. INTRODUCTION

From an early age, children should be taught to respect, understand and tolerate people of different religions, and those of no religion. As a case study, this paper reviews a resolution<sup>2</sup> passed by the Texas State Board of Education on September 24, 2010. The resolution prevents schools from teaching certain social studies texts that contain “pro-Islamic/anti-Christian distortions.”<sup>3</sup> Unsurprisingly, the resolution elicited diverse reactions.<sup>4</sup> It has been described as “a stunning victory for our nation’s schools”<sup>5</sup> by some, and “a thinly veiled attempt to generate fear and promote religious intolerance” by others.<sup>6</sup>

This paper argues that the benefits of religious tolerance education extend well beyond the obvious advantage of improving students’ understanding of each other: religious tolerance education can also be an extremely valuable and essential counterterrorism tool.

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1. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 6 THE WRITINGS OF THOMAS JEFFERSON 385 at 392 (Lipscomb & Bergh, eds., Memorial Ed. 1903).

2. Tex. State Bd. Of Educ. Res. (2010), [herein after Tex. Res.] *available at* [http://msnbcmedia.msn.com/i/msnbc/sections/news/SBOE\\_resolution\\_9.2010.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/SBOE_resolution_9.2010.pdf).

3. Press Release, Tex. Educ. Agency, State Board of Education provides \$2.6 billion for State budget; passes resolution (Sep. 24, 2010), *available at* [http://www.tea.state.tx.us/news\\_release.aspx?id=2147487010](http://www.tea.state.tx.us/news_release.aspx?id=2147487010).

4. *See infra* notes 5–6.

5. Carole Hornsby Haynes, *SBOE’s Victory for American Education*, TEXAS INSIDER, (Oct. 8, 2010, 4:32 PM), <http://www.texasinsider.org/?p=35194>.

6. *Attacking Religious Freedom: the Anti-Islam Resolution*, TEXAS FREEDOM NETWORK, [http://www.tfn.org/site/PageServer?pagename=issues\\_sboe\\_islam\\_resolution](http://www.tfn.org/site/PageServer?pagename=issues_sboe_islam_resolution) (last visited Oct. 19, 2011).

The threat of terror attacks by extremists in the United States is still very serious. With the recent thwarting of terror plots relating to the New York subway,<sup>7</sup> the Times Square car bomb,<sup>8</sup> the Washington, D.C. metro,<sup>9</sup> a Christmas tree lighting ceremony in Portland, Oregon,<sup>10</sup> and a plot to bomb a military recruiting center in Baltimore,<sup>11</sup> there is much discussion about the extent of the threat of homegrown terrorism,<sup>12</sup> and of how “radicalization” contributes to that threat.<sup>13</sup>

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7. See, e.g., Jason Ryan, Aaron Katersky & Mark Schone, *Zazi pleads Guilty to Terrorism Charges*, ABC NEWS, (Feb. 22, 2010), <http://www.abcnews.go.com/Blotter/najibullah-zazi-pleads-guilty-terrorism-charges/story?id=9911713>.

8. Basil Katz, *Defiant Times Square Bomber Gets Life in Prison*, REUTERS, (Oct. 5, 2010, 6:14 PM), <http://www.reuters.com/article/idUSTRE69437A20101005>.

9. Spencer S. Hsu, *Suspect in Metro Plot Aspired to Kill Troops Abroad, FBI Says*, WASH. POST, Oct. 29, 2010, at A1.

10. *Oregon Muslim Leaders Fear Retribution after Christmas Tree Lighting Bomb Plot*, FOX NEWS, (Nov. 29, 2010), <http://www.foxnews.com/us/2010/11/28/reported-islamic-center-oregon>.

11. Armen Keteyian, *Baltimore Plot Shows More Terror Home Grown*, CBS EVENING NEWS, (Dec. 8, 2010), <http://www.cbsnews.com/stories/2010/12/08/eveningnews/main7131761.shtml>.

12. See, e.g., *Nine Years after 9/11: Confronting the Terrorist Threat to the Homeland: Statement for the Record Senate Homeland Security and Governmental Affairs Committee*, 111th Cong. 2 (2010) (statement of Michael Leiter); DAVID SCHANZEN, CHARLES KURZMAN & EBRAHIM MOOSA, *ANTI-TERROR LESSONS OF MUSLIM AMERICAN COMMUNITIES* 8 (Jan. 6, 2010), available at [http://www.sanford.duke.edu/news/Schanzer\\_Kurzman\\_Moosa\\_Anti-Terror\\_Lessons.pdf](http://www.sanford.duke.edu/news/Schanzer_Kurzman_Moosa_Anti-Terror_Lessons.pdf); CENTER ON LAW AND SECURITY, N.Y.U. SCH. OF LAW, *TERRORIST TRIAL REPORT CARD, SEPTEMBER 11, 2001–SEPTEMBER 11, 2009*, at 20 (Jan. 2010); Ariane Chebel d’Appollonia & Simon Reich, *Quandaries of Integration in America and Europe*, in *MANAGING ETHNIC DIVERSITY AFTER 9/11*, 3 (Ariane Chebel d’Appollonia & Simon Reich, eds., Rutgers Univ. Press 2010); Ariane Chebel D’Appollonia, *How to Make Enemies*, in *MANAGING ETHNIC DIVERSITY AFTER 9/11*, 116 (Ariane Chebel d’Appollonia & Simon Reich, eds., Rutgers Univ. Press 2010); Bobby Ghosh, *Threat of Home Grown Islamic Terrorism May Be Exaggerated*, TIME (Jan. 6, 2010), available at <http://www.time.com/time/nation/article/0,8599,1952009,00.htm>; Ken Dilanian, *Homegrown Radicals Changing Terrorism Threat in U.S., Officials Say*, LOS ANGELES TIMES, (Sep. 21, 2010), at A14; Pete Yost, *Homegrown Terrorists Troubling, Officials Say*, WASH. TIMES, (Sep. 22, 2010, 2:56 PM), <http://www.washingtontimes.com/news/2010/sep/22/homegrown-terrorists-troubling-officials-say>; William Wan, *Sting underscores Muslims’ complex relationship with FBI*, WASH. POST, Oct. 29, 2010 at A6 (“Since last year, more than 60 U.S. citizens have been charged or convicted in terrorism cases, federal officials say”); Sherri Ly, *Napolitano Reacts to Baltimore Co. Terror Plot*, MYFOXDC.COM (Dec. 8, 2010), <http://www.myfoxdc.com/dpp/news/local/napolitano-reacts-to-baltimore-bomb-plot-120810>, (“We are also seeing . . . more and more individuals residing in the United States, who themselves have become radicalized to the point of violence”).

13. See, e.g., BRIAN MICHAEL JENKINS, RAND CORP., *WOULD BE WARRIORS: INCIDENTS OF JIHADIST TERRORIST RADICALIZATION IN THE UNITED STATES SINCE SEPTEMBER 11*, at 1, 2001 (2010), available at [http://www.rand.org/pubs/occasional\\_papers/2010/RAND\\_OP292.pdf](http://www.rand.org/pubs/occasional_papers/2010/RAND_OP292.pdf); SAMUEL MUSA & SAMUEL BENDETT, *ISLAMIC RADICALIZATION IN THE UNITED STATES: NEW TRENDS AND A*

Many of the actions taken by the Government post-9/11 in the name of protecting the nation have singled out innocent American Muslims for adverse treatment.<sup>14</sup>

For example, some of the measures that disparately impact Muslims, even though they are not specifically mentioned, include immigration roundups of individuals,<sup>15</sup> placing people on no-fly and terrorist watch lists<sup>16</sup> and Office of Foreign Assets Control (OFAC) lists,<sup>17</sup> intrusive surveillance of records on the grounds of religion or race,<sup>18</sup> and discrimination and profiling in immigration procedures.<sup>19</sup> This, and other adverse treatment, has in itself contributed to a sense of alienation felt by some Muslims.<sup>20</sup>

Many analysts agree that alienation is one of the many causes of “radicalization.”<sup>21</sup> There is seemingly no clear definition of “radicalization,”<sup>22</sup> and a detailed analysis of its meaning is beyond the

PROPOSED METHODOLOGY FOR DISRUPTION 4 (Sept. 2010), *available at* <http://www.ndu.edu/inss/docUploaded/Isamic%20Radicalization%20in%20US.pdf>; Lolita Baldor, *US must deal with domestic radical problem*, ASSOCIATED PRESS, Sep. 10, 2010, *available at* [http://www.huffingtonpost.com/2010/09/10/us-does-not-have-system-i\\_n\\_711916.html](http://www.huffingtonpost.com/2010/09/10/us-does-not-have-system-i_n_711916.html).

14. *See, e.g.*, Sahar F. Aziz, *Sticks and Stones, the Words that Hurt: Entrenched Stereotypes Eight Years after 9/11*, 13 N.Y. CITY L. REV. 33, 37–43 (2009); Ariane Chebel d’Appollonia & Simon Reich, *Quandaries of Integration in America and Europe*, in *MANAGING ETHNIC DIVERSITY AFTER 9/11*, 116 (Ariane Chebel d’Appollonia & Simon Reich, eds., 2010); John Tirman, *Security and Antiterror Policies*, in *MANAGING ETHNIC DIVERSITY 9/11*, 60–61 (Ariane Chebel d’Appollonia & Simon Reich, eds., 2010).

15. *See, e.g.*, DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR*, 107–09 (2007).

16. *See, e.g.*, GOV’T ACCOUNTABILITY OFFICE, *TERRORIST WATCH LIST SCREENING: OPPORTUNITIES EXIST TO ENHANCE MANAGEMENT OVERSIGHT, REDUCE VULNERABILITIES IN AGENCY SCREENING PROCESSES AND EXPAND USE OF THE LIST* (2007), *available at* <http://www.gao.gov/new.iems/d08110.pdf>.

17. *See, e.g.*, SHIRIN SINNAR, LAWYERS’ COMMITTEE FOR CIVIL RIGHTS, *THE OFAC LIST: HOW A TREASURY DEPARTMENT WATCHLIST ENSNARES EVERYDAY CONSUMERS 3* (2007).

18. *See, e.g.*, MICHAEL GERMAN & MICHELLE RICHARDSON, AMERICAN CIVIL LIBERTIES UNION, *RECLAIMING PATRIOTISM: A CALL TO RECONSIDER THE PATRIOT ACT 5* (2009), *available at* [http://www.aclu.org/pdfs/safefree/patriot\\_report\\_20090310.pdf](http://www.aclu.org/pdfs/safefree/patriot_report_20090310.pdf).

19. *See, e.g.*, JENNIFER KIM ET AL., CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE AT N.Y. UNIV., *AMERICANS ON HOLD: PROFILING, CITIZENSHIP, AND THE “WAR ON TERROR,”* 10 (2007), *available at* <http://www.chrgj.org/docs/AOH/AmericansonHoldReport.pdf>; ASIAN LAW CAUCUS, *RETURNING HOME: HOW U.S. GOVERNMENT PRACTICES UNDERMINE CIVIL RIGHTS AT OUR NATION’S DOORSTEP 4* (2009), *available at* <http://www.asianlawcaucus.org/wp-content/uploads/2009/04/Returning%20Home.pdf>.

20. *See, e.g.*, AMERICAN CIVIL LIBERTIES UNION, *BLOCKING FAITH, FREEZING CHARITY 117-120* (2009), *available at* <http://www.aclu.org/pdfs/humanrights/blockingfaith.pdf>.

21. *See, e.g.*, Tirman, *supra* note 14, at 70; Chebel d’Appollonia, *How to Make Enemies*, *supra* note 12, at 129; Ariane Chebel d’Appollonia & Simon Reich, *supra* note 14, at 276.

22. Peter R. Neumann, *Introduction*, in *PERSPECTIVES ON RADICALISATION AND POLITICAL VIOLENCE: PAPERS FROM THE FIRST INTERNATIONAL CONFERENCE ON*

scope of this paper. Nonetheless, “radicalization” is perhaps a conflation of two terms: “radical” in the context of extreme beliefs or behavior adopted by individuals or groups;<sup>23</sup> and “root causes” of terrorism, because the word radical derives from the Latin word “radix.”<sup>24</sup> Some analysts attempt to predict future behavior from an analysis of core elements of “radicalization,”<sup>25</sup> even though there are many views as to what the core elements are and how much emphasis should be placed on one core element over another. Much of the current literature on “radicalization” defines it solely by reference to Islamic extremism.<sup>26</sup> Other scholars, such as Mark Sageman, define it more expansively. For Sageman, “radicalization” is “the process of transformation of ordinary people into extremists using violence for political means.”<sup>27</sup> For the purpose of the analysis that follows, this paper uses Sageman’s broad definition.

This paper suggests that the adverse treatment of Muslims in general derives from a conflation of fear of terrorist action by an extremist Islamist minority<sup>28</sup> with widespread general fear and ignorance of the religion of Islam. Hayri Abaza and Soner Cagaptay note that even Western thinkers – people who are expected to have some knowledge of Islam because they write about it – appear confused about the politics of Islam: “[t]he left is wrongly defending Islamism [as] an extremist and at times violent ideology which it confuses with the common person’s Islam, while the right is often wrongly attacking the Muslim faith, which it confuses with Islamism. Western thinkers must begin to recognize the difference between

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RADICALIZATION AND POLITICAL VIOLENCE 3 (2008), available at <http://icsr.info/publications/papers/12345169381CSRPerspectivesonRadicalisation.pdf>.

23. HOMELAND SECURITY INSTITUTE, RADICALIZATION: AN OVERVIEW AND ANNOTATED BIOGRAPHY OF OPEN-SOURCE LITERATURE 1 (2006), available at [http://www.homelandsecurity.org/hsireports/Radicalization\\_Final\\_Report\\_15Dec06.pdf](http://www.homelandsecurity.org/hsireports/Radicalization_Final_Report_15Dec06.pdf).

24. See Neumann, *supra* note 22, at 3–4.

25. Aziz Huq, *Modeling Terrorist Radicalization*, 2 DUKE FORUM FOR L. & SOC. CHANGE 39, 40 (2010).

26. See, e.g., MITCHELL D. SILBER & ARVIN BHATT, N.Y.C. POLICE DEP’T, RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT 6 (2007), available at [http://www.nypdshield.org/public/SiteFiles/documents/NYPD\\_Report-Radicalization\\_in\\_the\\_West.pdf](http://www.nypdshield.org/public/SiteFiles/documents/NYPD_Report-Radicalization_in_the_West.pdf).

27. Mark Sageman, *A Strategy for Fighting International Islamist Terrorists*, 618 ANNALS AM. ACAD. POL. & SOC. SCI. 223, 225 (2008).

28. M. Cherif Bassiouni, *Evolving Approaches to Jihad: From Self-Defense to Revolutionary and Regime Change Political Violence*, in JIHAD AND ITS CHALLENGES IN INTERNATIONAL AND DOMESTIC LAW 11, 11–12 (M. Cherif Bassiouni & A. Guellali, eds., 2010) (explaining how jihad has evolved from “a call to put everything a person had to the service of Islam” (i.e. with a basis in spirituality) to a “revolutionary doctrine that sought its justification in theology.”).

Islamism and Islam, or we are headed toward an ideologically defined battle with one quarter of humanity.”<sup>29</sup>

If intellectuals and writers are confused, there is seemingly little hope for the vast majority of the public. Research shows that many Americans do not appear to have knowledge or understanding of many minority religions,<sup>30</sup> particularly Islam.<sup>31</sup> For example, in 2005, the Council on American-Islam Relations found that 60% of Americans said they “are not very knowledgeable” or “not at all knowledgeable” about Islam.<sup>32</sup> This has hardly improved in the last five years. A 2010 survey by the Pew Research Center showed that of Americans surveyed, “55% say they do not know very much (30%) or know nothing at all (25%) about the Muslim religion and its practices; 35% say they know some about the religion while just 9% say they know a great deal.”<sup>33</sup>

Teaching tolerance and respect for different religions would help reduce the alienation experienced by minorities discussed above, and could have a positive impact on counterterrorism activities. Yet education is given little, if any, attention in U.S. counterterrorism strategy.<sup>34</sup> The 9/11 Commission Report mentions it: “[e]ducation that teaches tolerance, the dignity and value of each individual, and respect for different beliefs is a key element in any global strategy to eliminate

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29. Hayri Abaza & Soner Cagaptay, *Is it Islamic or Islamist? The West's Confusion Spells Trouble*, NEWSWEEK, Oct. 22, 2010, at 18.

30. THE PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 5 (2008), available at <http://religions.pewforum.org/reports> (finding that demographics of the U.S. population are 78% Christian, 1.7% Jewish, 0.7% Buddhist, 0.6% Muslim, 0.4% Hindu, Other religions 1.5%, Unaffiliated 16.1%).

31. THE PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS KNOWLEDGE SURVEY (2010), <http://pewforum.org/Other-Beliefs-and-Practices/U-S-Religious-Knowledge-Survey.aspx>.

32. COUNCIL ON AMERICAN-ISLAMIC RELATIONS, AMERICAN PUBLIC OPINION ABOUT MUSLIMS AND ISLAM 2 (2006), available at [http://www.cair.com/Portals/0/pdf/american\\_public\\_opinion\\_on\\_muslims\\_islam\\_2006.pdf](http://www.cair.com/Portals/0/pdf/american_public_opinion_on_muslims_islam_2006.pdf).

33. THE PEW FORUM ON RELIGION & PUBLIC LIFE, PUBLIC REMAINS CONFLICTED OVER ISLAM 4 (2010), available at <http://people-press.org/files/legacy-pdf/647.pdf>.

34. See, e.g., THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 25 (2010), available at [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf) (“We must educate our children to compete in an age where knowledge is capital . . .”); J. Scott Carpenter, Michael Jacobson & Matthew Levitt, *Confronting the Ideology of Radical Extremism*, 3 J. NAT'L SECURITY L. & POL'Y 301, 322 (2009) (“U.S. policy should be to recognize that religious diversity and education can be a bulwark against extremism.”); Lorenzo Vidino, *Toward a Radical Solution*, FOREIGN POLICY, Jan. 5, 2010, [http://www.foreignpolicy.com/articles/2010/01/05/toward\\_a\\_radical\\_solution?page=0,0](http://www.foreignpolicy.com/articles/2010/01/05/toward_a_radical_solution?page=0,0) (“A network of competent law enforcement officials, social workers, teachers, and community leaders is considered the best front-line defense against radicalization.”) (emphasis added).

Islamist terrorism.”<sup>35</sup> This recommendation, however, only focuses on building and operating schools in Muslim countries,<sup>36</sup> and while this is undoubtedly a good idea, work needs to be done at home too.

This paper argues that public education about different religions in general, and Islam in particular, is not only lawful, but is also an essential counterterrorism tool. Fear and ignorance contribute to stereotyping, profiling, targeting and blanket adverse treatment of innocent Muslims. This in turn contributes to a feeling of alienation, which leads directly to radicalization.

To avoid this cycle, we must take a grass roots approach by teaching children from an early age about different religions and cultures in school to promote tolerance and understanding. One scholar, Caroline Branch, argues that “public schools should be preparing students to engage productively [in] issues with religious dimensions in public policy debate.”<sup>37</sup>

Part II of this paper summarizes statutory and constitutional law relating to teaching religion in public schools. Part III discusses how religion may be taught in U.S. public schools and focuses on two current initiatives: the Modesto project<sup>38</sup> and the Tony Blair Faith Foundation’s Face to Faith program.<sup>39</sup> Part IV analyzes the Texas school book resolution of September 24, 2010, which bans certain social studies texts from use in schools that contain supposed pro-Islamic/anti-Christian distortions.<sup>40</sup> In Part V, the resolution, although not part of the Texas Education Code, is treated as if it were law, and this paper analyzes whether it violates the Constitution. Part VI discusses education as a counter-terrorism tool. Finally, the paper assesses the rationale behind the Texas school book resolution and concludes that the resolution is doing the exact same damage as the harm it complains about. Through its anti-Islamic sentiments, the resolution contributes to ignorance and fear of religious minorities. The paper concludes with an emphasis on the importance of religious

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35. NAT’L COMM. ON TERRORIST ATTACKS UPON THE UNITED STATES, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 378 (2004).

36. *Id.*

37. Caroline Elizabeth Branch, *Unexcused Absence: Why Public Schools in Religiously Plural Society Must Save a Seat for Religion in the Curriculum*, 56 EMORY L.J. 1431, 1432 (2007).

38. See generally EMILE LESTER & PATRICK S. ROBERTS, FIRST AMENDMENT CENTER, LEARNING ABOUT WORLD RELIGIONS IN PUBLIC SCHOOLS (2006).

39. *Education Projects*, TONY BLAIR FAITH FOUNDATION, <http://www.tonyblairfaithfoundation.org/pages/education> (last visited Oct. 1, 2011).

40. Tex. Res., *supra* note 2, at 2.

tolerance education as a counterterrorism tool to reduce the alienation of minorities.

## II. THE LAW ON TEACHING RELIGION IN PUBLIC SCHOOLS

The First Amendment states that “Congress shall make no law respecting an establishment of religion, or preventing the free exercise thereof.”<sup>41</sup> Thus there are two components relating to religion: the first prohibits the state from establishing religion, and the other establishes the right to free exercise of religion. Although religious freedom is one of the core principles of the U.S. Constitution, many religious minorities have suffered discrimination and harassment long before the current wave of Islamophobia.<sup>42</sup>

Religious discrimination even occurs in schools, and this can cause students to feel alienation at an early age. Title VI of the Civil Rights Act of 1964<sup>43</sup> does not prohibit discrimination on grounds of religion in federally funded schools.<sup>44</sup> To remedy this deficiency in the law, Senator Arlen Specter and Congressman Brad Sherman introduced a bill on September 23, 2010 to protect students from religious discrimination.<sup>45</sup> In addition to reducing a sense of alienation, countering discrimination in schools is another reason to teach children from an early age about different religions and the importance of tolerance and respect for diversity.

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41. U.S. CONST. amend. I.

42. See, e.g., Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. COLO. L. REV. 1021, 1024 (2005); Eddie Glaude Jr., *Islamophobia and Religious Pluralism: America’s Real History*, HUFFINGTON POST (Aug. 26, 2010), [http://www.huffingtonpost.com/eddie-glaude-jr-phd/is-it-time-we-got-rid-of-\\_b\\_694539.html](http://www.huffingtonpost.com/eddie-glaude-jr-phd/is-it-time-we-got-rid-of-_b_694539.html); THE PLURALISM PROJECT AT HARVARD UNIV., POST 9/11 HATE CRIME TRENDS: MUSLIMS, SIKHS, HINDUS AND JEWS IN THE U.S (2005), available at <http://pluralism.org/reports/view/104>; JEWISH VIRTUAL LIBRARY, ANTI-SEMITISM AND THE UNITED STATES (2010), <http://www.jewishvirtuallibrary.org/jsource/anti-semitism/usanttoc.html>.

43. 42 U.S.C. § 2000d (2006) (“no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”).

44. Kenneth L. Marcus, *The Most Important Right We Think We Have But Don’t: Freedom from Religious Discrimination in Education*, 7 NEV. L.J. 171, 172 (2006) (“[R]eligious discrimination in federally assisted activities, such as universities and public schools, was never statutorily barred . . .”); Kenneth L. Marcus, *Privileging and Protecting Schoolhouse Religion*, 37 J.L. & EDUC. 505, 506 (Oct. 2008), (noting that Congress and the federal courts have failed to “prohibit religious discrimination in education statutorily with appropriate enforcement mechanisms”).

45. H.R. 6216, 111th Cong. (2010), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h111-6216>.



Religion can be taught in public schools only if it is not deemed to be an establishment of religion.<sup>46</sup> In *Everson*, Justice Black, rejected a challenge to the statutory right of a New Jersey school board to reimburse parents for the costs of transporting their children to and from Catholic parochial schools, and explained what the Establishment Clause means: “[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.” No public money can be used to “teach or practice religion.”<sup>47</sup> In practical terms, this requires the state to be “neutral in its relations with groups of religious believers and non-believers.”<sup>48</sup> Applying this to the public schools, Justice Jackson, in dissent, said: “[o]ur public school[s] . . . [are] organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion.”<sup>49</sup>

A year later in *McCullum*, the appellant sought an order to prohibit the teaching of religious education in public schools.<sup>50</sup> Although the Court acceded to the appellant’s petition, it noted that it was not the Court’s role to decree uniform unchanging standards as to how religion is dealt with – this is a matter for individual school boards.<sup>51</sup> Justice Jackson commented: “[n]eighborhoods differ in racial, religious and cultural compositions. It must be expected that they will adopt different customs which will give emphasis to different values and will induce different experiments.”<sup>52</sup>

Justice Jackson also opined as to the desirability of:

isolat[ing] and cast[ing] out of secular education all that some people may reasonably regard as religious instruction. . . . But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences . . . . Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. And I should

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46. U.S. CONST. amend. I.

47. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947).

48. *Id.* at 18.

49. *Id.* at 24 (Jackson, J., dissenting).

50. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

51. *Id.* at 237–38.

52. *Id.* at 237.

suppose it is a proper, if not indispensable, part of proper preparation for a worldly life to know the roles that religion and religions have played in the tragic history of mankind . . . One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.<sup>53</sup>

In 1963 in *Schempp*, concerning a challenge to a Pennsylvania statute providing for Bible reading at the start of each school day, Justice Clark went further:

[I]t 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.<sup>54</sup>

The *Schempp* dicta are the basis and roadmap for many schools' civics education programs.<sup>55</sup> Following this language, the key is teaching "about religion, as distinguished from teaching of religion."<sup>56</sup> The civics programs teach tolerance by reference to different ethnic and religious groups, provided there is strict neutrality in the treatment of faiths. A recent study of civics teachers found that 49% of those surveyed considered it extremely important to "internaliz[e] core values such as tolerance and equality" and 41% thought it important "to get students to celebrate the unique identities

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53. *Id.* at 235–36.

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

55. CENTER FOR RELIGION AND PUBLIC AFFAIRS, WAKE FOREST UNIVERSITY SCHOOL OF DIVINITY, RELIGIOUS EXPRESSION IN AMERICAN PUBLIC LIFE: A JOINT STATEMENT OF CURRENT LAW 23 (2010), available at <http://divinity.wfu.edu/uploads/2011/09/divinity-law-statement.pdf>; see also FIRST AMENDMENT CENTER, A TEACHER'S GUIDE TO RELIGION IN THE PUBLIC SCHOOLS 2 (2008), available at <http://www.freedomforum.org/publications/first/teachersguide/teachersguide.pdf>.

56. *Schempp*, 374 U.S. at 306.

and experiences of the different ethnic, religious, and immigrant groups that have contributed to the making of America.”<sup>57</sup>

### III. CURRENT EXAMPLES OF CIVICS EDUCATION ABOUT RELIGION IN PUBLIC SCHOOLS

There have been two recent experiments in civics education relating to religion. The first was a project in Modesto, California, a religiously diverse town.<sup>58</sup> All ninth grade students were required to take a course on world religions as part of social studies.<sup>59</sup> There were no complaints that this course violated the First Amendment because the “approach was descriptive rather than comparative to ensure neutrality,” and it focused on the historical development and major contemporary beliefs and practices of each religion.<sup>60</sup> The school board approved the course on the grounds that it would be used to teach respect for and tolerance of religious diversity, and provide safer and more inclusive schools and communities.<sup>61</sup> After a nine-month course, the students were surveyed and their responses indicated that the course bolstered their respect for religious liberty.<sup>62</sup>

According to Charles Haynes, senior scholar at the First Amendment Center and director of the Religious Freedom Education Project at the Newseum, Washington, D.C., the course is still offered in Modesto, and “a good number of public schools have elective courses on world religions, (11 in Fairfax County, VA, for example),” but there are no similar required courses elsewhere in the U.S.<sup>63</sup>

The second initiative is part of the Face to Faith program sponsored by the Tony Blair Faith Foundation. Using video-conferencing and online communications, American students engage directly with students in Pakistan, India and elsewhere “who actually practice the faith traditions covered in the U.S. curriculum” to enable

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57. GARY J. SCHMITT ET AL., AMERICAN ENTERPRISE INSTITUTE, HIGH SCHOOLS, CIVICS AND CITIZENSHIP: WHAT SOCIAL STUDIES TEACHERS THINK AND DO 16 (2010), *available at* <http://www.aei.org/paper/100145>.

58. CHARLES C. HAYNES, FIRST AMENDMENT CENTER, A TEACHER’S GUIDE TO RELIGION IN THE PUBLIC SCHOOLS 5 (2008), *available at* <http://www.freedomforum.org/publications/first/teachersguide/teachersguide.pdf>.

59. *Id.*

60. *Id.* at 22.

61. *Id.* at 21.

62. *Id.* at 6.

63. E-mail from Charles C. Haynes, Dir., Religious Freedom Education Project at the Newseum, to author (Oct. 19, 2010, 18:13 EST) (on file with author).

“each to learn directly with, from, and about the other.”<sup>64</sup> Currently, twenty-five schools in the U.S., in California, Georgia, New York, Utah and Washington, participate in this program.<sup>65</sup> Face to Faith is “an educational program designed to increase young people’s cultural and religious literacy and to encourage respect for the rights of others among students of all faiths and beliefs.”<sup>66</sup> The program plans to expand to at least 120 American schools over the next two years, placing special emphasis on linking young people in America with their peers in Muslim-majority countries including Jordan, Pakistan, Lebanon, the Palestinian Territories and Indonesia.<sup>67</sup> The program receives guidance from the Religious Freedom Education Project to ensure that it does not violate the First Amendment.<sup>68</sup>

In addition to these recent initiatives, the Anti-Defamation League has been working for many years to teach educators about bias and discrimination.<sup>69</sup> Their programs promote respect for diversity and aim to inspire action against prejudice. They also help schools to prevent and intervene against racial and religious harassment and bullying.<sup>70</sup> Their “A World of Difference” program has reached 375,000 teachers at elementary and secondary schools across the U.S.<sup>71</sup> Despite this work that encourages tolerance, there is some public opposition in Texas to the world religions’ content of the social studies curriculum in Texas public schools.

#### IV. THE CURIOUS CASE OF THE TEXAS SCHOOL BOOK RESOLUTION

The Texas School Board resolution, passed on September 24, 2010, resolves that there are “gross pro-Islamic/anti-Christian distortions in social studies texts” and that “chronic partiality to one of the world’s great religions and animus to another flout democratic values” in violation of the Texas Education and Administrative Codes.

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64. Charles C. Haynes, *Facing Faith in American Public Schools*, ON FAITH, (Sep. 27, 2010, 12:36 PM), [http://onfaith.washingtonpost.com/onfaith/panelists/charles\\_c\\_haynes/2010/09/facing\\_faith\\_in\\_american\\_public\\_schools.html](http://onfaith.washingtonpost.com/onfaith/panelists/charles_c_haynes/2010/09/facing_faith_in_american_public_schools.html).

65. *Id.*

66. See e.g., *A World of Difference Institute*, ANTI-DEFAMATION LEAGUE, [http://www.adl.org/education/edu\\_awod/awod\\_classroom.asp](http://www.adl.org/education/edu_awod/awod_classroom.asp) (last visited on Oct. 3, 2011).

67. *Id.*

68. *Id.*

69. See, *Education*, ANTI-DEFAMATION LEAGUE, [http://www.adl.org/main\\_Education/default.htm](http://www.adl.org/main_Education/default.htm) (last visited on Dec. 12, 2011).

70. *Id.*

71. See *supra* note 65.

Therefore, the School Board will reject future “prejudicial” social studies submissions where there are “significant inequalities” of coverage space-wise of the world’s major religious groups and/or by demonizing or lionizing one or more of them over the others.”<sup>72</sup>

At first blush this resolution appears to comport with *Everson* by not “prefer[ing] one religion over another,”<sup>73</sup> and *Schempp*, as “institutions . . . may not officially involve religion in such a way as to prefer, discriminate against, or oppress, a particular sect or religion.”<sup>74</sup> However, as discussed below, the resolution makes inaccurate statements about alleged pro-Islamic distortions in textbooks. Those inaccuracies create animus against the Islam religion.

School boards have every right to ensure that their text books contain materials that are compliant with the law and U.S. Constitution, but their review should be both fair and accurate. It is not unusual for school boards to review their books for inaccuracies, such as possible historical inaccuracies,<sup>75</sup> or for religious groups to complain about inaccuracies in text books.<sup>76</sup> In California, Jews succeeded in securing changes to books in 2005,<sup>77</sup> but Hindus had very limited success in 2006.<sup>78</sup> Texas, like California, is no stranger to text book controversy. In early 2010, the Texas School Board was embroiled in a controversy about changes to certain books that were alleged to be historically inaccurate. The curriculum allegedly downplayed “the role of Thomas Jefferson among the founding fathers, questions the separation of church and state, and claims that the U.S. government was infiltrated by Communists during the Cold War.”<sup>79</sup>

72. Tex. Res., *supra* note 2, at 2.

73. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

74. *Sch. Dist. v. Schempp*, 374 U.S. 203, 231 (1963) (Brennan, J., concurring).

75. Rosalind S. Helderman & Kevin Sieff, *Va. to Reevaluate Adoption Process for Schoolbooks*, WASH. POST, Oct. 27, 2010, at B6 (discussing inaccuracies in fourth grade history books in Virginia).

76. Daniel Golden, *Defending the Faith: New Battleground in Textbook Wars: Religion in History--Hindu, Islamic, Jewish Groups Fault Portrayals of Events and Often Win Changes--the Untouchables Weigh in*, WALL ST. J., Jan. 25, 2006, at A1.

77. Sue Fishkoff, *State Textbooks Get Accuracy Upgrade*, THE JEWISH J. (Nov. 17, 2005), [http://www.jewishjournal.com/world/article/state\\_textbooks\\_get\\_accuracy\\_upgrade\\_20051118/](http://www.jewishjournal.com/world/article/state_textbooks_get_accuracy_upgrade_20051118/) (discussing the nearly 1,000 edits required in textbooks that erroneously stated the Jews crucified Jesus).

78. Charles Burrell, *Hindu Groups Lose Fight to Textbooks; but Decision by State Board of Education is Supported by Some Hindu Americans*, S.F. CHRON., Mar. 10, 2006, at B1.

79. Michael Birnbaum, *Historians Criticize Textbook Changes as ‘Partisan’ Texas has Broad Reach Jefferson, Hip-hop Would be Played Down*, WASH. POST., Mar. 18, 2010, at A3.

The current resolution is important because “the Texas textbook market is so large, books assigned to the state’s 4.7 million students often rocket to the top of the market, decreasing costs for other school districts and leading them to buy the same materials.”<sup>80</sup> However, as one scholar notes, courts require that school leaders exercise their discretion as to school operations “in a manner that comports with the transcendent imperatives of the First Amendment.”<sup>81</sup> To support her position, the scholar points to the words of Justice Frankfurter in *McCullum*, that schools must keep “scrupulously free from entanglement in the strife of sects.”<sup>82</sup> Thus, a school board that bans social studies books discussing different religions needs to take care not to violate the First Amendment, especially where the board’s decision may be built on some false premises, and where that decision can impact beyond state borders.

The current Texas resolution is curious for three reasons. First, in the preamble to the resolution, the School Board bases the entire premise of the resolution on past social studies text books. In fact, as highlighted by Texas Freedom Network, a non-partisan organization of 45,000 religious and community leaders in Texas,<sup>83</sup> those books are not currently in Texas classrooms. Some of those books were published in 1999. Publishers updated the books and Texas adopted them in 2002.<sup>84</sup> Strangely, a board member explained that the resolution discussed past books “because board rules prohibit a resolution on the current textbooks.”<sup>85</sup>

Second, Texas Freedom Network reviewed a more current version of books dated 2003 against the claims made in the resolution, and found the claims of the School Board to be “superficial and grossly misleading.”<sup>86</sup> In other words, it appears that the resolution is based on inaccurate claims. It was a close fight, as the Board passed

80. *Id.*; see also Donna Garner, *Stop Pro-Islam, Anti-Christian Bias in Students' Textbooks*, TEXAS INSIDER (Aug. 4, 2010, 11:20 AM), <http://www.texasinsider.org/?p=31381>.

81. Branch, *supra* note 37, at 1437 (quoting *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1982)).

82. *Id.* at 1438 (quoting *McCullum v. Bd. of Educ.*, 333 U.S. 203, 216-17 (1948) (Frankfurter, J., concurring)).

83. *Mission*, TEXAS FREEDOM NETWORK, [http://www.tfn.org/site/PageServer?pagename=about\\_mission](http://www.tfn.org/site/PageServer?pagename=about_mission) (last visited Sept. 30, 2011) (explaining the mission of the Texas Freedom Network).

84. *What are the Facts About the State Board of Education's Anti-Islam Resolution?*, TEXAS FREEDOM NETWORK (Sept. 2010), [http://www.tfn.org/site/DocServer/Islam\\_Resolution\\_Brief\\_LH.pdf?docID=2042](http://www.tfn.org/site/DocServer/Islam_Resolution_Brief_LH.pdf?docID=2042).

85. Erik Robelen, *Texas Textbooks: 'Pro-Islamic' Bias?*, EDUC. WK., Sept. 29, 2010, at 16.

86. *Id.*

the resolution by 7:6, and two members were absent. Notably, a member of the school board said she could not vote for a resolution “that had not been properly reviewed and checked for accuracy.”<sup>87</sup>

Third, the resolution is described as “non-binding.” This means, as a member of the school board explained, that the resolution had “no authority over future State Boards of Education.”<sup>88</sup> Several school board members are up for re-election, so the 2011 board may have a completely different dynamic. Some commentators, however, maintain that despite being described as non-binding, the resolution will have a far-reaching impact on the curriculum in many states, “because the enormous number of schools in states like Texas and California means publishers often find it financially advantageous to follow these states’ guidelines.”<sup>89</sup>

Whether the resolution is binding or non-binding, if its content is not accurate, an incorrect and unfavorable impression of Islam is being disseminated to those who read about the resolution and to the children in schools where the curriculum is impacted by the resolution. The resolution effectively promotes religious intolerance and alienation of Muslims.

#### V. DOES THE TEXAS RESOLUTION VIOLATE THE CONSTITUTION?

It is beyond the scope of this paper to analyze whether this particular resolution is binding or whether resolutions have sufficient legal status to be tested for conformity with the Constitution. As a case study, this paper assumes that Texas had included the words of this resolution in its Education Code,<sup>90</sup> thereby giving it the status of a law subject to legal challenge.

Charles Haynes of the First Amendment Center, pointing to remarks made by the Texas Freedom Network, suggests that Board members, by “calling for teaching the ‘biblical foundations’ of a ‘Christian America,’” are “pushing a religious agenda in public schools that would violate the Establishment Clause of the First

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87. Geraldine Miller, *SBOE Update: Children’s Textbooks, Dyslexic Students Get Help*, TEXAS INSIDER (Oct. 21, 2010, 12:21 PM), <http://www.texasinsider.org/?p=36035>.

88. *Id.*

89. See Alexander Stille, *Textbook Publishers Learn: Avoid Messing with Texas*, N.Y. TIMES, June 29, 2002, at A1 (noting that publishers are often at the mercy of states like Texas and California due to the large number of schools in both states).

90. Tex. Educ. Code Ann. § 28.002 (West 2006).

Amendment.”<sup>91</sup> This section will discuss whether the Texas resolution violates (a) the Establishment Clause, and (b) the Equal Protection Clause.

### *A. Establishment Clause*

Succeeding in an Establishment Clause challenge to this resolution would be fraught with difficulty. Putting aside the issue of whether the facts referred to in the Texas resolution are accurate or not, if a law appears to grant a “denominational preference,” it must be treated as “suspect” and should be strictly scrutinized to assess its constitutionality.<sup>92</sup> This is because “one religious denomination cannot be officially preferred over another.”<sup>93</sup>

The Supreme Court formulated a three-pronged test in *Lemon v. Kurtzman*<sup>94</sup> that a statute must pass to avoid violating the Establishment Clause.<sup>95</sup> First, the statute must have a secular legislative purpose.<sup>96</sup> Second, its principal or primary effect must neither advance nor prohibit religion.<sup>97</sup> Third, the statute cannot foster an excessive governmental entanglement with religion.<sup>98</sup>

A later case, *Larson v. Valente*,<sup>99</sup> clarified that “the *Lemon* ‘tests’ are intended to apply to laws affording a uniform benefit to all religions, and not to provisions . . . that discriminate *among* religions.”<sup>100</sup> From one point of view, the Texas resolution could be interpreted as discriminating among religions by preferring a Christian view of history over an Islamic viewpoint. But that would be problematic because *Larson* suggests that the *Lemon* test would not apply in this situation.<sup>101</sup> In *Larson*, the Court ruled that “when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply

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91. Charles C. Haynes, *Revising History: What Happens in Texas Won't Stay in Texas*, FIRST AMENDMENT CENTER (Aug. 16, 2009), <http://www.firstamendmentcenter.org/revising-history-what-happens-in-texas-won%e2%80%99t-stay-in-texas>.

92. *Larson v. Valente*, 456 U.S. 228, 246 (1982).

93. *Id.* at 244.

94. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 613.

99. *Larson v. Valente*, 456 U.S. 228 (1982).

100. *Id.* at 252.

101. *Larson*, 456 U.S. at 252.



strict scrutiny in adjudging its constitutionality.”<sup>102</sup> Perhaps this resolution would fail to survive strict scrutiny, i.e. a court would hold that the resolution does not serve compelling government interests and it is not essential to those interests.

There may also be an argument that *Lemon* does not apply because a preference between two religions is not the same thing as a preference between two denominations of one religion. Also, the state might succeed in a legal challenge by establishing that the materials merely teach *about* religion, rather than endorsing one, or preferring one over another.

However, it is not totally clear whether *Lemon* would be inapplicable. In a later case, *Wallace v. Jaffree*,<sup>103</sup> the Court held that in analyzing the secular purpose prong of *Lemon*, one of the questions that must be asked is “whether the government intends to convey a message of endorsement or disapproval of religion.”<sup>104</sup> For the purposes of the analysis of the resolution, Justice O’Connor appears to take this further in saying: “[t]he endorsement test . . . does preclude government from conveying or attempting to convey that religion *or a particular religious belief* is favored or preferred.”<sup>105</sup>

If *Lemon* applies, its test has been modified by subsequent holdings. In *Zelman v. Simmons-Harris*,<sup>106</sup> the Court held that “the Establishment Clause prevents a state from enacting laws that have the ‘purpose’ or ‘effect’ of advancing or inhibiting religion.”<sup>107</sup> One scholar argues that the effects prong has been “disemboweled” and that as long as the government “does not appear to purposefully or intentionally favor specific religions or religion in general, the governmental action will be upheld.”<sup>108</sup> In 2005, in *McCreary Cnty. v. ACLU of Ky.*,<sup>109</sup> Justice Souter emphasized that the secular purpose must be “real and not secondary to a religious purpose.”<sup>110</sup> Although this resolution could fail the purpose test, the counter argument is that the purpose of the law is to set a curriculum that teaches about religions rather than endorse a religion or one religion over another.

102. *Id.* at 246.

103. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

104. *Id.* at 61.

105. *Id.* at 70 (emphasis added).

106. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

107. *Id.* at 648–49.

108. Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine and the Future*, 6 U. PA. J. CONST. L. 222, 264 (2003).

109. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005).

110. *Id.* at 864.

In another case relating to problems in text books, the California Parents for the Equalization of Educational Materials (CAPEEM) had enormous difficulty in trying to remove alleged inaccuracies relating to Hinduism from California public school text books.<sup>111</sup> Their Establishment Clause challenge to the adoption process for California's history and social science textbook process failed on the basis that that they lacked standing to make a complaint.<sup>112</sup> The court ruled that "CAPEEM's motion focuses on 26 claims of Christian and Jewish indoctrination."<sup>113</sup> Such claims are not germane to [CAPEEM's] stated purpose of promoting an accurate portrayal of Hinduism in textbooks used in California public schools."<sup>114</sup> The court did not reach the substantive Establishment Clause point.

### *B. Equal Protection*

CAPEEM also claimed that the process violated the Equal Protection Clause. The court ruled that their claim as to the contents of the textbooks was not viable as a matter of law in the Ninth Circuit "because the State has the discretion to determine the content of its curriculum, and the Equal Protection Clause does not provide a basis to challenge such curriculum decisions."<sup>115</sup> However, the court decided that the claim was viable with regard to the actual process of adoption.<sup>116</sup> Ultimately the case settled in 2009 and CAPEEM received \$175,000 in compensation.<sup>117</sup>

CAPEEM is a rare example where the Equal Protection Clause has been invoked in a religion case.<sup>118</sup> Some scholars disagree on the

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111. *Ca. Parents for the Equalization of Educ. Materials v. Noonan*, 600 F. Supp. 2d 1088, 1102–03 (E.D.Cal. 2009) [hereinafter *CAPEEM v. Noonan*] (describing the various challenges of CAPEEM in trying to get changes made to the textbooks' description of Hindus).

112. *Id.* at 1108.

113. *Id.* at 1107.

114. *Id.*

115. *Id.* at 1111 (citing *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1032 (9th Cir. 1998) and *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000)).

116. *Noonan*, 600 F. Supp. 2d. at 1111–14 (concluding that the defendant's motion for summary judgment should be denied after thorough analysis of the plaintiff's equal protection claim with regards to the textbook adoption process).

117. Stipulation for Dismissal at 1, *CAPEEM v. Noonan*, 600 F. Supp. 2d 1088 (E.D.Cal. 2009) (1088 2:06-CV-00532-FCD-KJM), available at <http://www.people.fas.harvard.edu/~witzel/CAPEEM-detailed-dismissal-30768180.pdf>.

118. Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665,

extent to which the Clause has been or should be used. Patrick Garry contends that current First Amendment doctrines already incorporate an equal protection approach.<sup>119</sup> Susan Gellman and Susan Looper-Friedman argue that Equal Protection should be used additionally and “as a backup” to Establishment Clause claims.<sup>120</sup>

Gellman and Looper-Friedman reason that in religious expression cases, where it is more difficult to succeed on a challenge to the Establishment Clause, the right approach is a separate analysis of the governmental action under the Fourteenth Amendment Equal Protection Clause, and this is a tactic that is rarely used.<sup>121</sup> They focus on language in religious expression cases that could be read as recognizing an equality interest in the *Lemon*<sup>122</sup> line of Establishment Clause cases. For example, in *Allegheny Cnty. v. ACLU*,<sup>123</sup> Justice O’Connor said “[t]he Court has come to understand the Establishment Clause to mean that government may not . . . discriminate among persons on the basis of their religious beliefs and practices.”<sup>124</sup> In *Bd. of Educ. v. Grumet*,<sup>125</sup> Justice O’Connor wrote, “[w]e have time and time again held that the government may not treat people differently based on the G-d or gods they worship, or do not worship.”<sup>126</sup>

The resolution under consideration in this paper does not fall within the category of religious expression cases, but it may be subject to *Lemon* scrutiny. Therefore, it would not be inappropriate to analyze the resolution using equal protection principles. Instead of deciding if a law is religious or secular, the focus is on equal protection of minorities.<sup>127</sup> Under equal protection analysis, strict scrutiny would be applied to government action that either intentionally discriminated against a “suspect class” or interferes with a “fundamental right.”<sup>128</sup> Of

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666 (2008) (noting that challenges to religion are rarely pursued under the equal protection clause).

119. Patrick M. Garry, *An Equal Protection View of the First Amendment*, 28 QUINNIPIAC L. REV. 787, 845 (2010) (noting that the Court has always used an equal protection approach in First Amendment decisions).

120. Gellman & Looper-Friedman, *supra* note 118, at 742.

121. *Id.* at 668.

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

123. *Allegheny Cnty. v. ACLU of Pittsburgh*, 492 U.S. 573 (1989).

124. Gellman & Looper-Friedman, *supra* note 118, at 683 (quoting *Allegheny Cnty.*, 492 U.S. at 590).

125. *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994).

126. Gellman & Looper-Friedman, *supra* note 118, at 683 (quoting *Grumet*, 512 U.S. at 714–15).

127. Gellman & Looper-Friedman, *supra* note 118, at 710.

128. Gellman & Looper-Friedman, *supra* note 118, at 707.

course, it might be very difficult to prove intentional discrimination<sup>129</sup> and there may be issues about standing and whether the plaintiff has suffered actual injury.<sup>130</sup>

There are also questions as to whether religion is a “suspect class” warranting strict scrutiny. Gellman and Looper-Friedman think it is a suspect class, even though there is no case that firmly establishes the principle.<sup>131</sup> Instead they point to *dicta* where religion is mentioned together with other “suspect classes.”<sup>132</sup> Having said that, even though the idea of making an equal protection claim in the current resolution issues may be appealing, it is clear from the example of the CAPEEM case discussed above that a challenge to a school board decision is fraught with difficulty. Thus, there is no clear answer as to whether this resolution would pass Constitutional muster.

## VI. EDUCATION AS A COUNTERTERRORISM TOOL?

Irrespective of whether or not the Texas resolution is constitutional, as a matter of public policy, it harms community relations and impedes law enforcement officials when trying to work with the Muslim community to combat terrorism. Enlisting the support of local populations is seen as a key counterterrorism strategy.<sup>133</sup> Measures such as the Texas resolution, however, add to distrust and alienation in the Muslim community.<sup>134</sup> This is likely to adversely

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129. See generally, Gellman & Looper-Friedman, *supra* note 118, at 713–22 (discussing cases where intentional discrimination was hard to prove).

130. See Gellman & Looper-Friedman, *supra* note 118, at 722–30 (discussing cases where there were issues of standing due to questions of cognizable injury.)

131. Gellman & Looper-Friedman, *supra* note 118, at 707.

132. Gellman & Looper-Friedman, *supra* note 118, at 707 (citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)).

133. See generally Samuel J. Rascoff, *The Law of Homegrown (Counter) Terrorism*, 88 TEX. L. REV. 1715, 1725–30 (2010) (explaining that terrorism starts from a local level and local police forces are better able to gather intelligence because they have access to local citizens who can aid in gathering information); Jerry Markon, *Holder Defends Legality of FBI Stings Against Muslims*, WASH. POST, Dec. 11, 2010, at A1 (noting that the Justice Department works closely with Muslims in investigating violence against them); U.S. Dept. of Justice, *Attorney General Eric Holder Speaks at the Muslim Advocates' Annual Dinner*, (Dec. 10, 2010), <http://www.justice.gov/iso/opa/ag/speeches/2010/ag-speech-1012101.html> (“the cooperation of Muslim and Arab-American communities has been absolutely essential in identifying, and preventing, terrorist threats . . . if we are going to realize our nation’s promise—and if we want to heal persistent wounds and overcome new threats—then we must work together . . . . In this nation, our many faiths, origins, and appearances must bind us together – not break us apart.”)

134. *Muslim Americans: No Signs of Growth in Alienation or Support for Extremism*, PEW RESEARCH CENTER, (Aug. 30, 2011), <http://people-press.org/2011/08/30/muslim-americans-no-signs-of-growth-in-alienation-or-support-for-extremism/> (noting data showing

impact cooperation, viewed as vital by the government, between law enforcement officials and local communities. If people feel alienated they will not want to cooperate, or see the point in cooperation.

In counterterrorism academic literature, there is some recognition of the importance of education in U.S. counterterrorism strategy. For example, J. Scott Carpenter, Matthew Levitt and Michael Jacobson argue that “U.S. policy should be to recognize that religious diversity and education can be a bulwark against extremism.”<sup>135</sup> The Muslim Public Affairs Council also mentions education: “Muslim communities’ main task is counter-radicalization efforts through better religious education, social programs and long-term constructive political engagement.”<sup>136</sup> Scholar Divya Sharma contends that not only is it critical for teachers in the U.S. to educate the young generation, but the media need to be educated too, so that the “media can help [their] audience in developing informed opinions.”<sup>137</sup>

If local communities feel alienated because of profiling and surveillance measures, and because Muslims are being placed on terrorists watch lists just because they are Muslims, communities will be less inclined to cooperate with police and report suspicious activity.<sup>138</sup> Therefore, religious tolerance education is a valuable counterterrorism tool that benefits everyone. Knowledge about world religions teaches tolerance and respect, and should help to ensure that policy makers have the tools to devise non-discriminatory policies. Tolerance and respect contributes to reducing alienation and mistrust currently experienced by many Muslims, and also enhances law enforcement’s counterterrorism strategy of engaging with communities.

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that in spite of increased controversies and pressures involving the Muslim community in America, Muslims do not have an increased feeling of alienation or anger).

135. Carpenter et al., *supra* note 34, at 322.

136. ALEJANDRO J. BEUTEL, MUSLIM PUB. AFFAIRS COUNCIL, BUILDING BRIDGES TO STRENGTHEN AMERICA: FORGING AN EFFECTIVE COUNTERTERRORISM ENTERPRISE BETWEEN MUSLIM AMERICANS & LAW ENFORCEMENT 37 (2009), available at [http://www.mpac.org/assets/docs/publications/building-bridges/MPAC-Building-Bridges--Complete\\_Unabridged\\_Paper.pdf](http://www.mpac.org/assets/docs/publications/building-bridges/MPAC-Building-Bridges--Complete_Unabridged_Paper.pdf).

137. Divya Sharma, *Why Do They Hate U.S.? Exploring the Role of Media in Cultural Communication*, in TERRORISM & JUSTICE—THE BALANCE FOR CIVIL LIBERTIES 246, 260 (Central Missouri State Univ. Inst. Just. & Int’l. Stud. Ed. 2008).

138. Tom R. Tyler, Stephen Schulhofer & Aziz Z. Huq, *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC’Y REV. 365, 381 (2010).

## VII. CONCLUSION

Whether or not the Texas resolution violates the Constitution, it is a measure that is extremely damaging to community relations and is very likely to cause Muslims to feel alienation. It is difficult not to view the Texas resolution as a measure of no merit and as merely a battle involving religious politics. All seven board members who voted in favor of it were conservatives, and they were not interested in approving an amendment that would have removed the offensive “anti-Christian, pro-Muslim” words.<sup>139</sup> Kathy Miller, for the Texas Freedom Network said: “[i]t’s hard not to conclude that the misleading claims in this resolution are either based on ignorance of what is in the textbooks or, on the other hand, are an example of fear-mongering and playing politics.”<sup>140</sup>

In fact, the resolution is itself doing what it purports to counteract – it shows “chronic partiality to one of the world’s great religions and animus against another.”<sup>141</sup> It is itself flouting the democratic values referred to in the Texas Education Code.<sup>142</sup> In complete contrast to the Modesto Project,<sup>143</sup> the Face to Faith initiative,<sup>144</sup> and the work done by the Anti-Defamation League,<sup>145</sup> the Texas resolution, by showing animus towards Islam based on apparent inaccuracies in out-dated textbooks, is an example of treatment calculated to increase the alienation felt by many Muslims.

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139. *Texas School Board to Ditch Pro-Islam Textbooks*, AGENCE FR. PRESSE ENGLISH WIRE, Sept. 24, 2010, at 1, available at <http://www.google.com/hostednews/afp/article/ALeqM5j53MPQMyS254qS6NZtsnuUYpJC1A>.

140. *Texas: Mentions of Islam Unwelcome in Textbooks*, N.Y. TIMES, Sept. 25, 2010, at A12.

141. Tex. Res., *supra* note 2 (“chronic partiality to one of the world’s great religions . . . flout democratic values and the letter and spirit of this rule . . .”).

142. Tex. Educ. Code Ann. §28.002(h) (West 2006) (“A primary purpose of the public school curriculum is to prepare thoughtful, active citizens who understand the importance of patriotism and can function productively in a free enterprise society with appreciation for the basic democratic values of our state and national heritage.”).

143. See generally EMILE LESTER & PATRICK S. ROBERTS, FIRST AMENDMENT CTR., LEARNING ABOUT WORLD RELIGIONS IN PUBLIC SCHOOLS (2010) (findings from a project in Modesto schools requiring a world religions course).

144. Candace Hetchler, *Face to Faith: An Opportunity for Dialogue and Expression*, ASHARQ ALAWSAT, May 17, 2011, available at <http://www.asharq-e.com/news.asp?section=2&id=25182> (describing Face to Faith program which encourages students of different religions to learn from each other directly in order to build understanding).

145. See Anti-Defamation League *supra*, note 69.

Supporters of the Texas resolution and proponents of measures taken in the name of national security that target minorities as a group are blinkered.<sup>146</sup> At a time when “reciprocal negative perceptions between the Western and Muslim worlds continue to escalate,”<sup>147</sup> it is essential to acknowledge the important role of education to promote tolerance and reduce alienation of minorities, and recognize that education can help to combat terrorism.

Religious tolerance education in the civics or social studies curriculum does not violate the Constitution. Educating both children and adults about religion is lawful and essential. Education will arm students both young and old with sufficient knowledge to understand and respect diversity, and to recognize and eschew actions or policies that could cause upset and offense to minority communities. The knowledge gained from religious tolerance education can then be used to help reduce feelings of alienation within minority communities, and to counter “radicalization.” Thus education becomes an effective and essential counterterrorism tool.

*“Education that teaches tolerance, the dignity and value of each individual, and respect for different beliefs is a key element in any global strategy to eliminate Islamist terrorism.”*<sup>148</sup>

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146. Aziz Huq, *How the NYPD Slipped Blanket Surveillance of American Muslims Past the Courts—and the People*, THE NATION (Sept. 26, 2011), <http://www.thenation.com/print/article/163633/national-security-federalism-leads-civil-rights-violations-nypd> (explaining that the NYPD’s targeted surveillance and profiling of Muslims is both unnecessary and counterproductive because all American Muslims are not a threat and the ones that would be obviously wouldn’t target New York thanks to the policing regime).

147. Bassiouni, *supra* note 28, at 35.

148. NAT’L COMM. ON TERRORIST ATTACKS UPON THE UNITED STATES, *supra* note 35, at 378.