

1993

Comment: A Comment on the Death of *Lemon*

Richard S. Myers

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

Recommended Citation

Richard S. Myers, *Comment: A Comment on the Death of Lemon*, 43 Case W. Rsrv. L. Rev. 903 (1993)
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol43/iss3/11>

This Symposium is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

A COMMENT ON THE DEATH OF *LEMON*

*Richard S. Myers**

I believe Professor Michael S. Paulsen's paper makes an important contribution to the necessary rethinking of the constitutional law dealing with religion that has been underway for at least the last decade.¹ The other two commentators² have expressed fundamental reservations about Professor Paulsen's basic approach. I, too, have some important disagreements with his paper, but these observations come from one who is basically in agreement with much of what Professor Paulsen has voiced.³ Most of my remarks reflect matters of emphasis that begin from what are, by and large, shared premises.

This comment will make three basic points. The first point is relatively narrow; the second and third are more sweeping, and I have intentionally tried to express them in a way that will provoke the sort of dialogue this symposium is attempting to advance. First,

* Associate Professor of Law, University of Detroit Mercy School of Law. This paper is a slightly revised version of the author's comments delivered on November 13, 1992 at Case Western Reserve University School of Law's Symposium on Religion and the Public Schools After *Lee v. Weisman*. The author would like to thank Mollie Murphy and Stephen Safranek for their comments on an earlier version of this paper and John Hnat for research assistance.

1. Michael S. Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795 (1993).

2. Daniel O. Conkle, *Lemon Lives*, 43 CASE W. RES. L. REV. 865 (1993); Ira C. Lupu, *Which Old Witch?: A Comment on Professor Paulsen's Lemon is Dead*, 43 CASE W. RES. L. REV. 883 (1993).

3. See, e.g., Richard S. Myers, *Curriculum in the Public Schools: The Need for an Emphasis on Parental Control*, 24 VAL. U. L. REV. 431 (1990) [hereinafter Myers, *Curriculum*] (arguing that *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988), was wrongly decided); Richard S. Myers, *The Establishment Clause and Nativity Scenes: A Reassessment of Lynch v. Donnelly*, 77 KY. L.J. 61 (1988-89) [hereinafter Myers, *Nativity Scenes*] (Establishment Clause analysis ought to focus on coercion); Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19 (1991) [hereinafter Myers, *Privatization*] (the Supreme Court's approach to the funding of religious education is in need of revision).

although I agree with Professor Paulsen's focus on coercion in his approach to the Establishment Clause,⁴ I disagree with him about how such a test should work on the facts of *Lee v. Weisman*.⁵ In short, I think *Weisman* was wrongly decided, although, admittedly, it is a very close question. Second, Professor Paulsen fails to come to grips with a concern that those critical of *Weisman* have about the outcome: that the Court is contributing to what has been called the privatization of religion.⁶ That is, the effect of *Weisman* is to contribute to a process that is all too familiar — banishing religion from public life. I do not suggest that either Justice Kennedy or Professor Paulsen has this goal in mind,⁷ but I fear that Justice Kennedy's (and Professor Paulsen's) endorsement of a weak form of the coercion test might further the privatization of religion. Such a result is not to be applauded.⁸ Third, Professor Paulsen neglects to address *directly* the key question in debates about the government and education — namely, whether the state or the family should have the primary control over the education of our children.⁹ There is much in his paper that is supportive of parental rights, but he never *directly* focuses on the fundamental issue that should orient our thinking about education issues.

I would like to address each issue in more detail. First, although his emphasis on coercion is correct, Professor Paulsen does not explain adequately why the facts of *Weisman* violate his coer-

4. See Myers, *Nativity Scenes*, *supra* note 3, at 97-106 (setting forth an approach to the Establishment Clause that focuses on whether there exists an institutional relationship between a particular religious denomination and the government from which coercion is likely to flow).

5. 112 S. Ct. 2649 (1992).

6. See generally Myers, *Privatization*, *supra* note 3. See also Gerard V. Bradley, *Dogmatomachy — A "Privatization" Theory of the Religion Clause Cases*, 30 ST. LOUIS U. L.J. 275, 277 (1986) (arguing that the Supreme Court's decisions "attempt[] to move religion into the realm of subjective preference by eliminating religious consciousness"); Gerard V. Bradley, *Tribe's "Jurisprudence of the Religion Clauses,"* 4 BENCHMARK 137 (1990) (arguing against removing religion from public life).

7. Justice Kennedy's majority opinion in *Lee v. Weisman* expressly cautioned that "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Weisman*, 112 S. Ct. at 2661. Professor Paulsen's discussion of the propriety of the public display of religious symbols confirms that he does not intend to banish religion from public life. Paulsen, *supra* note 1, at 831 n.126.

8. I have argued this issue in detail elsewhere. See generally Myers, *Privatization*, *supra* note 3.

9. See Myers, *Curriculum*, *supra* note 3, at 438-40 (parents should have the right to determine what their children are taught).

cion test.¹⁰ Justice Kennedy's opinion in *Weisman* turns on the fact that students were required to attend *and* participate in a graduation ceremony that included prayers.¹¹ Most of Justice Kennedy's opinion focused on the issue of participation and it was on this point that the dissent struck some telling blows about the majority's psycho-coercion test.¹² Professor Paulsen correctly rejects the participation portion of Justice Kennedy's opinion, but tries to defend the result in *Weisman* by focusing on what he characterizes as compelled attendance at "a religious worship service."¹³

Professor Paulsen's entire argument on coercion rests on this characterization. If the characterization that Deborah Weisman was compelled to attend a religious worship service is accepted, then Professor Paulsen's argument is unassailable. Everyone agrees that church attendance requirements violate the Establishment Clause.¹⁴ The core example Professor Paulsen mentions — a requirement to attend a Catholic mass¹⁵ — would violate the Establishment Clause, but, thankfully, there are *no* cases on point. Establishment Clause cases arise in situations such as those in *Weisman*, where there is usually little reason to accept the "religious worship service" characterization.

Professor Paulsen's characterization fits a Baccalaureate Mass, but does not fairly cover the graduation ceremony. Here, he makes an error that is all too common in Establishment Clause case law — he isolates the religious portion of the program, rather than evaluating the government's overall conduct.¹⁶ The brevity of the prayers and the overall setting should affect how one characterizes the event in question. The following factors, which argue against Professor Paulsen's assessment, would seem relevant to the characterization issue: the students were not in a church or other place of worship, and there was no identifiable congregation in the sense of

10. I do agree that some form of coercion test is most desirable, even though there will be hard questions at the margin, as our disagreement indicates.

11. *Weisman*, 112 S. Ct. at 2655, 2661.

12. *Id.* at 2681-82 (Scalia, J., dissenting).

13. See, e.g., Paulsen, *supra* note 1, at 830-31.

14. See, e.g., *Weisman*, 112 S. Ct. at 2683 (Scalia, J., dissenting). See also Myers, *Nativity Scenes*, *supra* note 3, at 107 n.220.

15. Paulsen, *supra* note 1, at 829.

16. See Myers, *Privatization*, *supra* note 3, at 40. Professor Paulsen does not make this error when dealing with funding of religious education. Paulsen, *supra* note 1, at 858-59.

a worship community (there was, for example, no necessary relationship between Rabbi Gutterman and the graduation audience); the purpose of the event was to celebrate the graduation, not to worship; and no institutional relationship existed between the school and any religious denomination.

The error can perhaps be better seen by focusing on a point raised by Justice Scalia. If including Rabbi Gutterman's prayers violates the Establishment Clause, why doesn't including the Pledge of Allegiance (which includes the phrase "One Nation, under God") also violate the Establishment Clause?¹⁷ Or, put differently, is a graduation ceremony that includes the Pledge a religious worship service? Another example raises the same problem: does every session of the Supreme Court constitute a religious worship service because the Marshal calls everyone to order with a short statement that includes the words, "God save the United States and this Honorable Court"?¹⁸

It is unclear how Professor Paulsen would answer the "religious worship service" question in these situations, but his approach seems to be that the briefest inclusion of a religious element in a public ceremony transforms the event into a religious worship service. I simply do not agree with that basic characterization. We need to be realistic about the differing impact of classic church attendance requirements and the graduation ceremony in *Weisman*, where there seems to be no contention that the government's institutional weight is being thrown behind a particular religious denomination. Under Professor Paulsen's approach we would be spending a lot of time trying to figure out if a public event should be identified as a religious worship service.¹⁹ This is not a profitable inquiry. We would be better off focusing on the actual effect the event has on religious liberty rather than making everything turn on the definitional question.²⁰

17. *Weisman*, 112 S. Ct. at 2682 (Scalia, J., dissenting). Professor Paulsen does not address this point.

18. See *County of Allegheny v. ACLU*, 492 U.S. 573, 672 (1989) (Kennedy, J., concurring in part, dissenting in part) (noting this practice).

19. This would be similar to the courts' focus on whether a symbol being displayed by the government is religious or secular. See, e.g., *Myers, Privatization*, *supra* note 3, at 45 (discussing the definitional question in the context of the public display of religious symbols); *Myers, Nativity Scenes*, *supra* note 3, at 109-10 (same).

20. A good place to start would be Justice Scalia's dissent on coercion. See *Weisman*, 112 S. Ct. at 2683-85 (Scalia, J., dissenting) (urging the Court to avoid extending the concept of coercion beyond acts backed by a threat of penalty). See also *Myers, Nativity*

This ties into my second point about the hazards of a weak form of the coercion test. If a graduation ceremony that includes the Pledge and every session of the Supreme Court violate the Establishment Clause, then there is a real risk that this coercion test could be used to further privatize religion. The consequence of this form of the test might be to exclude any religious symbolism from public life.²¹

In a recent article, I examined the extent to which the privatization thesis — the idea that religion is a private affair that should not play a role in public life — has influenced constitutional doctrine involving the interaction between religion and the legal order.²² I discussed both the Establishment and Free Exercise Clauses and also substantive due process doctrine, which is not considered frequently in discussions of the privatization thesis.²³ I con-

Scenes, supra note 3, at 110 (arguing that avoiding a definitional inquiry “shifts the focus from the character of the symbol to more substantive concerns, such as the institutional relationships involved.”).

21. I do not mean to suggest that Professor Paulsen supports this consequence. See *supra* note 7. His test might lead to this result, however, depending on how one defined “required to attend.” Some have suggested that any government endorsement of religion is coercive. See *Weisman*, 112 S. Ct. at 2664 n.6 (Blackmun, J., concurring) (“As a practical matter, of course, anytime the government endorses a religious belief there will always be some pressure to conform.”); Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 8 (1986) (arguing that the names of cities such as Corpus Christi and Los Angeles and that the National Motto (“In God We Trust”) are unconstitutional).

22. Myers, *Privatization, supra* note 3. See also Frederick M. Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 682-93 (1992) (tracing the hostility to the distinction between public and private life).

23. In the article:

[I] examine[d] the privatization thesis through a discussion of the Establishment Clause and of substantive due process. In both contexts, religion is typically involved in an explicitly public role. For example, many Establishment Clause issues involve aid to religious institutions. The constitutional debate in these cases often turns on whether it is permissible for the religious institution to play an active role in performing a “public” task, such as education or child care. The privatization thesis requires that institutions retaining their religious character be denied direct government support. Similarly, in the context of substantive due process it is important to determine the appropriate role of religiously influenced moral principles in public decisionmaking on such issues as abortion and homosexual conduct. Here, the privatization thesis works in two ways. First, religiously influenced moral judgments are not taken into account in support of the constitutionality of legislation because such judgments do not constitute “secular” interests that the government may advance. Second, religiously influenced moral judgments are viewed as dispositive of the case against the constitutionality of legislation because it violates the Establishment Clause for “religious” views to be embodied in secular legislation.

Myers, *Privatization, supra* note 3, at 22-23 (footnotes omitted).

cluded that the privatization thesis had indeed influenced some of the Justices, but that the theory was virtually dead in both Religion Clause and substantive due process cases. I also warned that because our culture has moved in the direction of privatized religion, the privatization thesis would likely resurface in the next generation.²⁴ To my great surprise, the next generation may well have arrived when the Court decided *Lee v. Weisman*²⁵ and *Planned Parenthood v. Casey*²⁶ in late June, 1992. These cases may well indicate the reemergence of the privatization thesis.²⁷ I believe that Professor Paulsen should have addressed that aspect of *Weisman*.

It is not clear that Justice Kennedy's view in *Weisman* accepts the complete exclusion of religious symbolism from public life.²⁸ It may be that his opinion is limited to the public school context, where the Court has, for good reason, long been the most separationist.²⁹ Weak forms of the coercion test do, however, run the risk of completely excluding religious symbolism from public life,³⁰ and Professor Paulsen needs to be attentive to this phenomenon.

A more detailed explanation of why the exclusion of religious symbols from public life is a bad idea will help to clarify this point. Many view religious symbolism in public life as inherently coercive.³¹ Justice Scalia defended public prayer in *Weisman* by focusing on such prayer's value in guarding against religious bigotry and prejudice.³² Religious symbolism in public life serves an-

24. *Id.* at 80.

25. 112 S. Ct. 2649 (1992).

26. 112 S. Ct. 2791 (1992) (upholding the right to an abortion, but placing a number of limitations on the exercise of that right).

27. See generally Richard S. Myers, *The Supreme Court and the Religion Clauses*, in No. 25 ESSAYS ON OUR TIMES SERIES (Free Congress Foundation, forthcoming 1993).

28. See *supra* note 7.

29. *Weisman*, 112 S. Ct. at 2658 (emphasizing that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.") See also Myers, *Nativity Scenes*, *supra* note 3, at 108 n.225; Myers, *Privatization*, *supra* note 3, at 51 n.174. Cf., Laycock, *supra* note 21, at 8.

30. See *supra* note 21 and accompanying text.

31. See, e.g., Marvin E. Frankel, *Religion in Public Life — Reasons for Minimal Access*, 60 GEO. WASH. L. REV. 633, 641-43 (1992); Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 843-44 (1992).

32. *Weisman*, 112 S. Ct. at 2685-86 (Scalia, J., dissenting). Justice Scalia's dissent also rejects the privatization theory. *Id.* at 2685 (Scalia, J., dissenting). See also Myers, *Privatization*, *supra* note 3, at 47-58 (discussing another example of Justice Scalia's rejection of the privatization theory).

other benefit: rather than view religious symbols in public life as an exercise in religious domination, we ought to view most such displays as acts of humility. Through such displays, the government recognizes that there is an authority beyond the state. This recognition provides important support for the idea of limited government and the preservation of individual freedom. Will Herberg captured this point eloquently nearly 30 years ago:

[W]e should understand from our theological and political traditions, [that] a society, and the state through which it is organized politically, remain "legitimate," "righteous" and "lawful" *only insofar as they recognize a higher majesty beyond themselves*, limiting and judging their pretensions. Once the state forgets or denies this, once it sets itself up as its own highest majesty, beyond which there is nothing, it becomes *totalitarian*: in effect, it divinizes itself, and thereby ceases to be a "legitimate" state in the theological understanding of the term. Therefore, the "established order" — the state, above all — ought to include within itself signs, symbols, and ceremonials constantly reminding itself and the people that it *is* subject to a majesty beyond all earthly majesties. That is the indispensable function of religious symbols and ceremonials in public life, one that no responsible theologian, however resentful he may be of trivialization and superficiality in religion, can afford to forget.³³

Public displays of religious symbols, including Rabbi Gutterman's prayers, thus express the view that our nation is — as the Pledge of Allegiance states — "under God" and subject to a transcendent order. This view has roots deep in our American traditions, as the Declaration of Independence and the Gettysburg Address attest. Public displays of religious symbols underscore the idea that the health of a political community depends on its acknowledgement that there are "at least a minimum of objectively established rights not granted by way of social conventions, but antecedent to any political system of law."³⁴

This view is really essential to the preservation of true freedom.³⁵ The relentless exclusion of religious symbols from public

33. Will Herberg, *Religion and Public Life*, NAT'L REV., July 30, 1963, at 61.

34. Cardinal Joseph Ratzinger, *Doctrinal Document on Threats to Life Proposed*, 20 ORIGINS 755, 757 (1991).

35. *See id.* *See also* Pope John Paul II, *Centesimus Annus*, 21 ORIGINS 1, 17 (1991)

life thus may contribute to turning our democracy into an "open or thinly disguised totalitarianism."³⁶ This may seem extreme, but one way to measure this is to examine the extent to which our society has respect for human life. There is, I believe, a connection between the privatization tendencies of *Weisman* and the moral bankruptcy of *Planned Parenthood v. Casey*, which explicitly rests on the view that there are no moral norms external to the individual.³⁷ It ought to have been less surprising, therefore, that the justices who joined in *Weisman* made up the majority in *Casey*, advancing the view that the state cannot prohibit abortions at any time during pregnancy.³⁸ According to one of the twentieth century's most influential theologians: "The ultimate root of all attacks on human life, is the loss of [a belief in] God [and in a transcendent order]. Where [this belief] disappears, the absolute dignity of human life disappears as well."³⁹

The privatization thesis, therefore, has real risks. Although there

("It must be added that totalitarianism arises out of a denial of truth in the objective sense. If there is no transcendent truth, in obedience to which man achieves his full identity, then there is no sure principle for guaranteeing just relations between people."). See generally JOHN C. MURRAY, *WE HOLD THESE TRUTHS* viii-ix (1960) (stressing the importance of the idea of objective truth in promoting human dignity and freedom).

36. Pope John Paul II, *supra* note 35, at 18.

37. *Casey*, 112 S. Ct. at 2807. For additional discussion of this aspect of *Casey*, see Russell Hittinger, *What Really Happened in the Casey Decision: Et Tu, Justice Kennedy?*, *CRISIS*, September 1992, at 16; Myers, *supra* note 27. Cf. Myers, *Privatization*, *supra* note 3, at 71 (discussing this feature of certain substantive due process opinions).

38. Robert H. Bork has addressed this issue:

Both *Casey* and *Weisman* bespeak a willingness to ignore the actual principles of the Constitution in order to enact a liberal cultural agenda. Both rest on extreme principles of individual autonomy. Both display strong elements of sentimentality as an engine of Constitution-rewriting. Both, contrary to the historical Constitution, reject the concerns of the community for a simplistic and unreflective individualism so characteristic of elite opinion in this age.

Robert H. Bork, *Beside the Law*, *NAT'L REV.*, October 19, 1992, at 38, 41.

39. Ratzinger, *supra* note 34, at 758. Cardinal Ratzinger further discussed human life:

[A] state which arrogates to itself the prerogative of defining which human beings are or are not the subject of rights and which consequently grants to some the power to violate others' fundamental right to life, contradicts the democratic ideal to which it continues to appeal and undermines the very foundations on which it is built. By allowing the rights of the weakest to be violated, the state also allows the law of force to prevail over the force of law. One sees, then, that the idea of an absolute tolerance of freedom of choice for some destroys the very foundation of a just life for men together. The separation of politics from any natural content of right, which is the inalienable patrimony of everyone's moral conscience, deprives social life of its ethical substance and leaves it defenseless before the will of the strongest.

Id. at 757. See also MURRAY, *supra* note 35, at 28.

are obviously limits to the measures the state may take to emphasize the notion that the nation is under God, I do not believe those limits were transgressed in *Weisman*.⁴⁰

The third point of this comment is that Professor Paulsen neglects to address *directly* the key question in debates about the government and education, namely, whether the state or the family should have the primary control over the education of our children.⁴¹ Commendably, he does focus on some questions that touch on this issue (in particular his discussion of funding of religious schools⁴²), but we need to get the key question directly on the table. Discussions of how much religion we can include or must exclude from the public schools can create the illusion that we can solve the problems posed by public education and can also risk obscuring the broader issue of whether the state or the family should have the ultimate responsibility over the education of our children.

Our history demonstrates that we cannot solve the problem of public education without some radical rethinking of the issues. We have had problems since the government began to assume responsibility for education in the first half of the nineteenth century. The school wars of the 1840s in New York illustrate that problems of the sort discussed in this symposium have been with us for quite some time. In the 1840s, the Catholic Bishop in New York City complained (correctly I might add) that the state-funded schools were biased against Catholics and began a lengthy, but ultimately unsuccessful, fight for a share of the common school funds to support the Catholic schools. The striking similarity between this fight 150 years ago and the current discussion of voucher schemes, which is driven in part by a rejection of the educational philosophy of the public schools, suggests that there is no easy solution to the dilemma.⁴³

We have had a more or less stable set of affairs for most of the history of public schools. The public schools have been basic-

40. I would agree with Justice Scalia's conclusion that "[to] deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law." *Weisman*, 112 S. Ct. at 2686 (Scalia, J., dissenting).

41. See Myers, *Curriculum*, *supra* note 3, at 438-40 (discussing the fact that "textbook battles" are not unique to the present era).

42. Paulsen, *supra* note 1, at 858.

43. Myers, *Curriculum*, *supra* note 3 at 432.

ly Protestant schools for most of their history.⁴⁴ Those parents who were unhappy with this and who had the means could avoid public schools altogether. The Constitution did not play much of a role in these debates until the Court incorporated the Religion Clauses in the middle of this century.⁴⁵ The school prayer cases of thirty years ago⁴⁶ accelerated the move to a secular — as opposed to Protestant — government school system.

Most of the current Establishment Clause battles in the public school context are attempts to ensure that all traces of religion are banished from the schools.⁴⁷ These *are* important issues, because there is a very real risk of coercion in the public school setting. Professor Paulsen demonstrates that, if anything, the courts have gone too far in trying to keep religion out of the public schools — even in situations where a proper view of the constitutional rights of teachers or students would have led to a different result.⁴⁸

Discussing these issues, however, is basically a sideshow. Discussing them leads to the illusion that we can indeed solve the problems posed by our current system of public education. I do not think we can. Excluding all traces of religion from the public schools does not resolve the issue — although it may eliminate Establishment Clause problems as long as we do not view secular humanism as a religion.⁴⁹ But eliminating Establishment Clause

44. Nomi M. Stolzenberg, "He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of Liberal Education, 106 HARV. L. REV. 581, 638 n.322 (1993) (noting that parochial schools grew as a result of the domination of public schools by Protestant teachers); John E. Coons, *School Choice as Simple Justice*, FIRST THINGS, April 1992, at 15-16 ("Until yesterday it was also the practice of our schools to force dissenting and nonbelieving children of the poor to behave like Protestants.").

45. See *Everson v. Board of Education*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

46. See *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963) (holding that the state cannot require that passages from the Bible be read in public schools even if individual students could be excused upon parental request); *Engel v. Vitale*, 370 U.S. 421 (1962) (holding that state officials could not compose an official state prayer and require that it be recited daily in public schools).

47. See, e.g., *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, 112 S. Ct. 3025 (1992) (upholding a school principal's directive to a teacher to remove two religiously-oriented books and to discontinue reading the Bible while school was in session). The effort to banish religion from schools has largely succeeded. For example, there seems to be general agreement that public school textbooks ignore the role of religion in American society. See, e.g., George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 870 (1988); Myers, *Curriculum*, *supra* note 3, at 431.

48. See, e.g., Paulsen, *supra* note 1, at 850-56.

49. See, e.g., *Smith v. Board of Sch. Comm'rs*, 655 F. Supp. 939 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987) (rejecting the contention that textbooks advanced secular

issues does not in any way eliminate the impact of public schools on religious liberty.

Neutrality in the public schools is not possible.⁵⁰ Excluding religion from public education can interfere with religious liberty in two significant ways. It sends the message that religion is unimportant or that it is possible to draw a sharp distinction between the spiritual and the temporal orders.⁵¹ It ignores reality to think that this message does not have an effect. The principal virtue of Justice Kennedy's opinion in *Weisman* is that it acknowledges the coercive aspects of public schools.⁵² If Rabbi Gutterman's prayers are coercive, then the entire curriculum of our public schools must be coercive. There is no way to eliminate that problem within the existing framework.

Most of the debates we have about how much religion we can include or must exclude from the public schools risk obscuring the real issue of whether the state or the family should have the ultimate responsibility for the education of our children. The real problem is that there are not enough candid discussions of the central issues at stake. As one commentator has noted in defending the current concept of public education:

[T]he entire concept of compulsory education is based on the assumption that there are times when the state rather than the parent may decide what perspectives the child confronts. Although society normally assumes that parents are best able to determine and do what is best for their child, compulsory education traditionally has been justified as a mechanism to expose children to ideas that will enable them to advance beyond the home and transcend the prejudices of the past. To compel education, especially education under state control or supervision, is to assert that the state — rather than parents — ultimately should decide what is

humanism, even assuming that secular humanism is a religion).

50. See Myers, *Curriculum*, *supra* note 3, at 432 & n.6.

51. Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 162 (1986) ("Studious silence on a subject that parents may say touches all of life is an eloquent refutation."); see also John C. Murray, *A Common Enemy, A Common Cause*, FIRST THINGS, October 1992, at 29, 36 ("[T]he sheer omission of religion from public schools creates a pressure on the child against religion, and puts a constraint on him to believe that what is not important to be taught in school is not important at all.").

52. *Lee v. Weisman*, 112 S. Ct. 2649, 2658 (1992) ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.").

best for children.⁵³

This is the issue we need to debate.

I think we typically decide this key question in advance by assuming that state education is the norm — and that any concessions to parental rights ought to be reserved for fringe groups, such as the Amish.⁵⁴ We assume that state control of education is the baseline and that exceptions ought to be narrow because they threaten the public schools, which the Supreme Court has characterized as the very symbol of our democracy.⁵⁵

We should reverse the presumption. The venerable notion of subsidiarity has much to contribute to this debate. According to the principle of subsidiarity,

[a] community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good.⁵⁶

Under this view, we begin with the presumption that intermediate communities, such as the family or religious groups, have the primary responsibility for tasks such as education. State action should be supportive of parental decisions regarding education, and state intervention in ways inconsistent with parental choices should only be justified in narrow cases when the intermediate community has demonstrated a serious inability to discharge its responsibility.

53. Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 298 (1989) (footnotes omitted); see also Stanley Ingber, *Religious Children and the Inevitable Compulsion of Public Schools*, 43 CASE W. RES. L. REV. 773, 786 (1993). For a discussion of this issue, see Myers, *Curriculum*, *supra* note 3, at 433-38.

54. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988), the Sixth Circuit gave a very narrow reading to *Yoder* on the grounds that "*Yoder* rested on such a singular set of facts that we do not believe it can be held to announce a general rule . . ." *Id.* at 1067.

55. See Myers, *Privatization*, *supra* note 3, at 29 & n.44. See also Murray, *Common Enemy*, *supra* note 51, at 36-37 (criticizing the idea that public schools are symbol of democracy, as well as its counterpart, the idea that the national religion of the United States is the religion of democracy).

56. Pope John Paul II, *supra* note 35, at 19. See generally RICHARD J. NEUHAUS, *DOING WELL AND DOING GOOD: THE CHALLENGE TO THE CHRISTIAN CAPITALIST* 243-45, 249-54, 255, 259 (1992) (discussing the principle of subsidiarity).

The most desirable solution would be some sort of voucher system, so that the option to avoid the public schools would be available to all, not just the wealthy. Of course, parents sometimes make mistakes. But the risk of error should not always weigh in on the side of state power.⁵⁷

The whole system of public education (with the grudging concession given to private education⁵⁸) needs to be challenged as a violation of parental rights. Professor Paulsen makes some strong arguments that are supportive of the necessary rethinking,⁵⁹ but he would do well to go even further and focus directly on the fundamental question.

57. See Myers, *Curriculum*, *supra* note 3, at 436-39 (arguing that parents should have greater latitude in educating their children); Murray, *supra* note 51, at 36-37 (challenging the Court to recognize greater school choice for parents).

58. See Myers, *Privatization*, *supra* note 3, at 26-43; Myers, *supra* note 27.

59. See Paulsen, *supra* note 1, at 855-59 (discussing public funding of religious education and criticizing *Mozert*).

