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SYMPOSIUM: RELIGION AND THE PUBLIC SCHOOLS AFTER *LEE V. WEISMAN*

INTRODUCTION

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Controversy about public education has long been a staple of American political discourse.[1] Disputes about religion have also been intense.[2] Not surprisingly, therefore, arguments about the proper relationship between religion and the schools have had a prominent place on the nation's agenda. Perhaps the most contentious aspect of this relationship has been the propriety of prayer in public schools. Although officially mandated school prayers were held to violate the Establishment Clause a generation ago,[3] debate on the subject has persisted.[4] Resolution of that debate has po-

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1. For a brief overview, see LAWRENCE A. CREMIN, POPULAR EDUCATION AND ITS DISCONTENTS (1990).

2. For a recent historical account, see A. JAMES REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE (1985).

3. School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

4. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting).

tentially significant ramifications, because the legal standard for assessing the validity of school prayer may well affect the constitutionality of other programs that would incorporate religion into public education, provide governmental assistance to religious schools, or create voucher systems for elementary and secondary school pupils.

For this reason, the Supreme Court's ruling in *Lee v. Weisman*[5] was eagerly anticipated. Many observers predicted that a strongly conservative Court would take the opportunity to reformulate Establishment Clause doctrine along lines significantly more sympathetic to a closer connection between religion and the schools than recent decisions had allowed. The case involved the constitutionality of the invocation and benediction offered at a public school graduation in Providence, Rhode Island, in apparent disregard of the earlier Court decisions proscribing officially mandated school prayers. The school authorities retained Charles J. Cooper, a long-time critic of the school prayer decisions who had served as assistant attorney general under President Reagan, to represent them. Fueling expectations of impending doctrinal change, the Bush administration as amicus curiae joined Cooper in urging the Court not only to uphold the prayer but also to overrule *Lemon v. Kurtzman*,[6] the leading case in modern Establishment Clause jurisprudence.

The Court's actual decision, which struck down the prayer and declined to overrule *Lemon*, might therefore be viewed as anticlimactic. As the participants in this symposium make clear, however, that interpretation would be mistaken. The decision is simply the latest chapter in the long-running debate described above. What the Court said in *Weisman* has important implications for the future of public education.

To explore those implications, the *Case Western Reserve Law Review* convened a two-day symposium on November 13-14, 1992. Nearly a dozen prestigious legal scholars were joined by the lawyer who represented the Weismans throughout their challenge to the graduation prayer and by a prominent political scientist for a thorough review and assessment of the Supreme Court's decision. Participants held a broad range of views on the Religion Clauses of the First Amendment, from strict separationist to staunch

5. 112 S. Ct. 2649 (1992).
6. 403 U.S. 602 (1971).

accommodationist. Attitudes toward public schools ran a similar gamut. Hence, almost everyone will find many things in this symposium with which to agree and many others with which to disagree.

In the first principal paper, Professor George W. Dent, Jr. explores *Weisman*'s implications for educational claims arising under the Free Exercise Clause. Various aspects of public school curricula have sparked religiously based objections.[7] Professor Dent contends that the Court's expansive conception of compulsion in analyzing Deborah Weisman's Establishment Clause challenge to the graduation prayer necessarily implies that much, if not all, that takes place in public schools is inherently coercive. Accordingly, pupils who find aspects of their curricula offensive to their religious beliefs should be able to invoke the reasoning of *Weisman* in support of their efforts to obtain accommodation of their views within the school setting. Dent explores the range of possible accommodations and urges that the Free Exercise Clause be interpreted generously in these situations.

Professor Dent's argument evokes divergent responses from three commentators. Professor John Garvey finds merit in the argument and explores in greater detail four different kinds of harm that might be thought to arise from exposing pupils to religiously offensive ideas. Professor Garvey identifies two fundamental concerns, the possibility that children first might come to believe and then to act in conformity with such ideas. He concludes by explaining why, for some parents, mere exposure to unwelcome ideas is religiously objectionable even though children are not forced to disavow their beliefs. Professors Joanne Brant and Stanley Ingber, on the other hand, reject Professor Dent's analysis. For them, the argument founders on the shoals of *Employment Division v. Smith*,[8] which severely circumscribed the scope of the Free Exercise Clause in challenges to generally applicable laws. Professor Ingber further seeks to clarify the place of values in public education, concluding that some measure of compulsion is inherent in schools but that accommodation of religious objectors to particular aspects of the curriculum should only rarely be granted. Both these

7. *See, e.g.*, Smith v. Board of School Comm'rs, 659 F. Supp. 939 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987); Mozert v. Hawkins County Pub. Sch., 647 F. Supp. 1194 (E.D. Tenn. 1986), *rev'd*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

8. 494 U.S. 872 (1990).

commentators also raise questions about the feasibility of maintaining effective public schools if religious objectors are too easily accommodated with alternatives to regular instructional materials.

In the next principal paper, Professor Michael Stokes Paulsen argues that, contrary to conventional wisdom, *Weisman* did in fact repudiate the *Lemon* test and replaced it with a new test based upon the principle of coercion. Professor Paulsen, a staunch critic of *Lemon*, reaches his counterintuitive conclusion through a close reading of the various opinions in *Weisman*. He argues that a properly understood coercion standard, unlike the *Lemon* test, provides a clear rule of decision for Establishment Clause disputes. Paulsen then contrasts his version of the coercion test with others that have been proposed and applies his test to a variety of fact patterns, noting that his approach would alter the result of a number of leading cases and provide a more satisfactory basis for decision in others whose outcome would remain unchanged, including *Weisman*.

Professor Paulsen's thesis also elicits a range of responses. Professor Daniel Conkle rejects Paulsen's entire approach, offering a spirited defense of *Lemon*'s underlying concern for respecting both religious and irreligious minorities. Professor Conkle further challenges the purported clarity of the coercion test, arguing that it does not offer the principled, "bright line" method for resolving Establishment Clause claims that Paulsen and other advocates suggest. Professor Ira Lupu agrees with much of Conkle's critique, but he emphasizes some implications of Paulsen's theory that would make some establishment claims easier to sustain than supporters of the coercion standard might expect. On the other hand, Professor Richard Myers generally supports Paulsen's analysis, though he believes *Weisman* to have been wrongly decided. He suggests that Professor Paulsen should more explicitly specify that parents rather than public officials have ultimate authority to direct children's education. Myers emphasizes the importance of mediating structures such as families and invokes the principle of subsidiarity in support of his position.

In the final principal paper, Dean Rodney K. Smith explores the extent to which *Weisman* lends credence to arguments for a broader right of conscience under the Establishment Clause. Drawing upon the various opinions in that case and several other recent decisions as well as the writings of modern jurisprudential and political theorists, he describes two contrasting approaches to the

right of conscience: one based upon choice, the other upon obligation. He then criticizes the Court's analysis in *Weisman.*

Our final two commentators respond to both Dean Smith and Professor Paulsen. Like Smith, Professor Edward Foley relies heavily upon philosophical insights. Professor Foley applies John Rawls's notion of "overlapping consensus" to the Establishment Clause. Foley contends that establishment jurisprudence cannot be neutral among denominations and that illiberal religions should not enjoy constitutional protection. He also criticizes some implications of Paulsen's coercion test, implications he finds sufficient to reject that test out of hand.

Professor Ronald Kahn, a distinguished political scientist who has written extensively on constitutional theory in general and the Religion Clauses in particular, concludes this symposium issue by urging a broader analytical framework. Professor Kahn maintains that the Supreme Court considers both polity and rights values in constitutional adjudication. Polity principles relate to structural and institutional matters: whether decisions should be made at the local, state, or national level; and whether those decisions should be made by courts or by more electorally accountable officials. Rights principles are perhaps more familiar to modern lawyers and involve notions about the scope of individual liberty. Kahn argues that polity and rights values play important complementary roles in constitutional interpretation. He supports this position through a close reading not only of *Weisman* but also of *Planned Parenthood v. Casey*,[9] the landmark abortion decision handed down only five days later.[10] Accordingly, he criticizes both Dean Smith and Professor Paulsen for focusing too narrowly upon rights-based approaches to the Religion Clauses at the expense of vital polity considerations.

As noted above, several of the principal papers and many of the commentaries raised broader questions about the role of public schools in American society. Those issues were considered more directly in a free-wheeling, two-hour discussion involving all of the symposium participants after each of the papers had been presented and analyzed. Although that discussion cannot be reproduced here, some of its main themes might assist the reader in sorting out the arguments presented in this issue.

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9. 112 S. Ct. 2791 (1992).

10. *Weisman* and *Casey* were five-to-four decisions. The same five justices comprised the majority in both cases, a fact that Professor Kahn uses to buttress his analysis.

This plenary session began with an extended assessment of voucher systems. Several speakers contended that some kind of voucher scheme is constitutionally mandated in order to permit parents to exercise meaningful control over the education of their children. Placing primary responsibility with families serves, in this view, as a check on the undue accumulation of governmental power over the lives of citizens. Although no one argued that the Constitution precludes adoption of any form of educational voucher system, other speakers strongly challenged the argument that vouchers must be provided. They also raised questions about how such a scheme would work. For example, would a voucher cover the full cost of a child's schooling each year? How could schools be prevented from raising tuition to excessive levels to take advantage of the potential economic windfall that a voucher system might provide?

These questions quickly led to other issues. The argument for vouchers rests upon the desire to safeguard parental rights, but a number of participants asked about possible conflicts between parent and child.[11] In some circumstances, a child might be coerced rather than nurtured by the family. One example that generated extensive discussion concerned a family in which parents refused to allow their daughter to attend school because they sincerely believed, for religious reasons, that women should spend their lives in the home and therefore do not need to be formally educated. Some speakers suggested that no one, including parents, should have exclusive control over children's lives.[12] Others doubted that government could make sound decisions in this area and suggested that the nation would be better off by trusting private actors despite their fallibility. From this perspective, mistaken decisions about child welfare would be minimized and the societal value of mediating institutions would be enhanced.

This discussion led in turn to exchanges about the proper scope of regulation of private schools. For example, some speakers expressed concern about including racist schools in any voucher

11. *Cf.* Wisconsin v. Yoder, 406 U.S. 205, 243-46 (1972) (Douglas, J., dissenting) (emphasizing that a child might wish to attend school over parents' religiously based objections). Several participants mentioned this case during the discussion.

12. Some participants referred to recent decisions permitting girls to obtain abortions with the approval of only one parent or, in some circumstances, without parental consent but with a court order. Hodgson v. Minnesota, 497 U.S. 502 (1990); Ohio v. Akron Center for Reproductive Health, 497 U.S. 417 (1990).

system because those schools might further divide American society. These speakers pointed to the resistance to desegregation after *Brown v. Board of Education*[13] and to more recent controversies over racially discriminatory private schools.[14] There were two responses to these concerns. One minimized the extent of the problem, suggesting that few such institutions exist in the contemporary United States and that a voucher system would not provide incentives for additional ones to be established. The other acknowledged that some racist schools would receive support under a voucher system but that, to the extent that such schools taught religiously based values, this was a necessary price to pay for taking the Free Exercise Clause seriously.

The preceding example prompted more general consideration of permissible governmental oversight of private schools. Topics covered included teacher qualifications, curriculum content, and national or state achievement standards. Spirited argument ensued as participants debated the proper standard for regulation. Some suggested a "compelling interest" test, which led to further differences over defining what constitutes a compelling governmental interest. One alternative focused upon the likelihood that a person would become a public charge, while others emphasized such factors as commitment to democratic values. This debate in turn prompted consideration of questions about child autonomy, the justifications for compulsory school attendance, and the future of public schools.

The final session reached no conclusions. Rather, the range of conversation illustrated the intractability of the relationship between religion and education. *Lee v. Weisman* did not resolve the controversy. This symposium demonstrates why the issues raised by that case retain their vitality and helps us to understand those issues more clearly. Despite their disagreements, the participants in the program will take satisfaction if their efforts contribute to greater public understanding of these vital national questions.

13. 347 U.S. 483 (1954).

14. *E.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983).