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Comment: Not a Prayer for Curricular Reform after *Lee v. Weisman*

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NOT A PRAYER FOR CURRICULAR REFORM AFTER *LEE V. WEISMAN*

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Our task, as participants in this Symposium, is to consider the implications of *Lee v. Weisman*[1] for future free exercise challenges to public school curricula. Professor Dent suggests that *Weisman* may offer some good news for free exercise challenges to curricula, because the Supreme Court has demonstrated its sensitivity to compulsion in the public school arena. He argues that if the Court is willing to recognize the coercive impact of a brief, nondenominational prayer at a middle school graduation ceremony that students are not required to attend, then they must surely recognize the coercive impact of a mandatory curriculum that degrades or otherwise offends a student's religious beliefs.

His argument is logically persuasive. Unfortunately, the force of logic plays a limited role in the jurisprudence of the Religion Clauses.

Professor Dent's argument is ultimately not persuasive, quite simply, because *Employment Division v. Smith*[2] leaves him no room. In *Smith*, the Court rejected a free exercise challenge to Oregon's narcotics laws, which had the effect of criminalizing the consumption of peyote as part of a religious communion ceremony.[3] The coercive effect of the Oregon statute upon the religious freedom of the plaintiffs was pellucidly clear. It is difficult to argue that a criminal sanction on a religious communion ceremony is less coercive than the forced exposure of students in classrooms

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1. 112 S. Ct. 2649 (1992).

2. 494 U.S. 872 (1990) (holding that workers who were fired for using peyote in religious ceremony were not entitled to unemployment compensation).

3. *Id.* at 890.

to books and ideas that conflict with their religious beliefs. Yet that is the argument Professor Dent must make in order to contend that plaintiffs who wish to challenge curricular decisions are likely to succeed where the *Smith* plaintiffs failed.

Even more importantly, the facts of *Smith* present a formidable challenge to Professor Dent's use of the belief/conduct dichotomy.[4] *Smith* tells us that the act of taking communion, perhaps the supreme physical expression of belief, can be prohibited by any neutral law of general application.[5] Given this for a starting point it is an uphill struggle to find, as Professor Dent does, that public school instruction is more akin to protected belief than it is to conduct, because instruction in doctrine interferes with the "preservation and transmission" of religious belief.[6] *Smith* preserves the rhetoric of a belief/conduct dichotomy, but leaves so little on the "belief" side of the line that it is unlikely the distinction will prove valuable to free exercise claimants. The belief/conduct issue is too peripheral in *Weisman* for any incidental comments in that case to presage a genuine expansion of what the Court is prepared to recognize as protected belief.[7]

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4. It is often asserted that the Free Exercise Clause affords absolute protection to religious beliefs, but only qualified protection to conduct based upon religious beliefs. *See, e.g., id.* at 876-81 (differentiating between the complete protection afforded to religious beliefs and protections given the *exercise* of religion); Bowen v. Roy, 476 U.S. 693, 699 (1986) (affording less protection to the exercise than the belief); Sherbert v. Verner, 374 U.S. 398, 402-03 (1963) (distinguishing between freedom of individual conduct and freedom of individual belief); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (also distinguishing conduct and beliefs).

5. Justice Scalia refused to consider the importance of peyote ingestion to members of the Native American Church, stating that judicial determinations of the "importance" or "centrality" of the conduct that the state sought to regulate were inappropriate. *Smith*, 494 U.S. at 886-89.

6. George W. Dent, Jr., *Of God and Caesar: The Free Exercise Rights of Public School Students*, 43 CASE W. RES. L. REV. 706, 717 (1993) (quoting Lee v. Weisman, 112 S.Ct. 2649, 2656-57 (1992)).

7. Professor Dent relies upon a statement by the Supreme Court in *Weisman*: "[P]reservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere." Lee v. Weisman, 112 S. Ct. 2649, 2656-57 (1992). Dent claims that this language indicates the Court is prepared to recognize a broader definition for "belief" than had previously been afforded. *See* Dent, *supra* note 6, at 716.

The problem with this argument is, once again, the *Smith* decision, which made clear that even if worship is "committed to the public sphere," worshippers are not immunized from regulation under neutral laws of general application. *Smith*, 494 U.S. at 878-79. I find it unlikely that instruction in doctrine, even wrapped in the protective armor of "preservation and transmission of beliefs" is likely to obtain more protective treatment from the Court than did the religious worship ceremony of the Native American Church.

Professor Dent goes on to suggest that, after *Weisman*, the Court will be more concerned about coercion that occurs in public school settings than about coercive pressure applied by the state to adults.[8] Dent illustrates the significance of a public school setting through a comparison of *Weisman* and *Marsh v. Chambers*,[9] in which the Court rejected an Establishment Clause challenge to the use of a chaplain who opened legislative sessions with a nondenominational prayer. Professor Dent suggests that the difference in results between *Chambers* and *Weisman* indicates the Court's heightened sensitivity to coercion in the public school context.[10]

As Dent points out, Justice Kennedy's opinion in *Weisman* distinguished *Chambers* on the ground that adults were not coerced by the prayer; they were free to enter and leave the legislative session at any time.[11] Kennedy also noted that there was no pressure upon legislators to participate, either by their conduct or through silence and a respectful posture.[12] Unfortunately, this argument again fails to take account of *Smith*, which the lower federal courts have not hesitated to apply in public school settings.

In *Vandiver v. Hardin County Board of Education*,[13] the Sixth Circuit applied *Smith* to the free exercise claim of a high school student who had completed one year of a religious home study program and was required to complete equivalency tests in order to obtain school credit for his home study program. The court found that the school's policies on testing and academic standing were valid, neutral laws of general application within the meaning of *Smith*.[14] As a result, the plaintiff's free exercise claim was doomed to fail. It could have been resurrected only if the plaintiff had been able to establish the violation of another constitutional right in addition to his free exercise claim, and thus present a "hybrid" claim as recognized by *Smith*.[15] Since the student in *Vandiver* was unable to establish that the school's policy burdened other constitutionally protected rights, his free exercise claim

8. *See* Dent, *supra* note 6, at 718 (noting the impact of strong pressures placed on children in the public school setting).

9. 463 U.S. 783 (1983).

10. *See* Dent, *supra* note 6, at 716-17 (describing how the *Chambers* case highlights the weaker pressures on adults to participate in prayers in the legislature).

11. *Weisman*, 112 S. Ct. at 2658.

12. *Id.*

13. 925 F.2d 927 (6th Cir. 1991).

14. *Id.* at 932.

15. Employment Div. v. Smith, 494 U.S. 872, 881-82 (1990).

was denied.[16]

Vandiver runs counter to many of the inferences Professor Dent would have us draw from *Weisman.* Yet the case presents a rather straightforward application of the principles set forth in *Smith.* Dent raises the possibility that free exercise challenges to curricula could be presented as "hybrid" claims based on a parent's right to direct the education of their children[17] — a right the Supreme Court did reaffirm in the *Smith* decision.[18] However, as Dent has acknowledged, this cryptic reference may be no more than shorthand for the rights established by *Pierce v. Society of Sisters*[19] and *Wisconsin v. Yoder.*[20] As such, it may not be an "independent" constitutional right at all, but only an indication of the Court's continued willingness to afford religious children the right to withdraw completely from the public school system.[21] The right to withdraw completely does not necessarily encompass the right to be exempted from particular curricular offerings, as the latter practice is more difficult for public schools to accommodate.

The Supreme Court is currently considering a case that may clarify the scope of *Smith* and provide more guidance than *Weisman* to the future of free exercise curricula challenges. On November 4, 1992, the Court heard oral arguments involving a free exercise challenge to four ordinances adopted by the City of Hialeah, Florida.[22] The ordinances, taken together, prohibit the religious sacrifice of animals.[23] The plaintiffs are practitioners of the Santeria religion, which originated in Africa over four thousand years ago and was carried to the Caribbean by slaves, and to the United States by Cuban refugees.[24]

At first glance, it is not readily apparent how an animal sacrifice case is likely to affect the rights of religious parents who seek

16. *Vandiver*, 925 F.2d at 933.

17. *See* Dent, *supra* note 6, at 715.

18. *Smith*, 494 U.S. at 881 (asserting it is "the Free Exercise Clause in conjunction with other constitutional protections" which provides the foundation for a valid challenge to a neutral law).

19. 268 U.S. 510 (1925) (striking down state law requiring parents to send children to public schools).

20. 406 U.S. 205 (1972) (striking down compulsory attendance laws as applied to Amish students over 16).

21. *See* Dent, *supra* note 6, at 714.

22. Petitioner's Brief at 6, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467 (S.D. Fla. 1989) (No. 91-948).

23. HIALEAH, FLA., ORDINANCES §§ 87-40, -52, -71, -72 (1987).

24. Petitioner's Brief at 2, *Lukumi Babalu* (No. 91-948).

exemptions or accommodations from offensive elements of a public school curriculum. Yet the case, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[25] presents at least two issues whose resolution is critical to curricular decisions.

The first issue is what counts as a neutral, generally applicable law under *Smith*. In his brief for the plaintiffs, Douglas Laycock argues that this is now the single most important issue in Free Exercise Clause analysis.[26] His argument is that a law is not neutral if it: (1) singles out religion for special regulation, or is enacted for anti-religious motives; (2) has the dominant effect of suppressing religious exercise, or (3) if it penalizes religiously motivated but not secularly driven conduct.[27]

The City of Hialeah, on the other hand, contends that their ordinances are neutral laws of general application because those laws have a secular purpose that the State is free to regulate (i.e., prohibiting cruelty to animals and promoting public health) and because the laws apply neutrally to all members of society.[28] The City contends that if a law meets these requirements, it may affect religious exercise without triggering stricter scrutiny of the law's purpose and fit.[29]

The Supreme Court's resolution of this question is critical to curricular decisions, for it will determine the scope of *Smith*. Is a school board's decision to require all students to read a particular book a neutral, generally applicable rule? What if the school board adopts its rule in order to revoke a prior policy of accommodating parents by permitting their children to read alternative, non-offensive texts? The *Lukumi Babalu* case may help us answer these questions.

The second issue that *Lukumi Babalu* may resolve, or at least shed some light upon, is the nature of a compelling state interest that is sufficient to defeat a free exercise right. Both the district court and the court of appeals decided that the City's ordinances did not violate free exercise because the City's interests in zoning, public health and preventing cruelty to animals were sufficient to

25. 723 F. Supp. 1467 (S.D. Fla. 1989). The opinion of the Court of Appeals is unreported. *See* Petitioner's Brief at 6, *Lukumi Babalu* (No. 91-948).

26. Petitioner's Brief at 11.

27. *Id.*

28. Respondent's Brief at 45-46, *Lukumi Babalu* (No. 91-948).

29. *Id.*

satisfy that standard.[30] Laycock has argued that more must be shown than simply that a regulation falls within a state's police power.[31] Resolution of this issue will directly affect cases involving curricular decisions.

For example, what interests would a school board need to demonstrate in a curricular case to prevail under the compelling state interest standard? May the state invoke its general interest in education, or must it show a compelling interest in the specific part of the curriculum that is the subject of the free exercise challenge? What level of specificity is needed, and what sort of interests is the Court prepared to recognize as compelling?[32] By determining whether the City of Hialeah's interest in promoting public health and preventing cruelty to animals amounts to a compelling interest sufficient to support the ordinances, the Court may help us answer these questions.

Professor Dent has argued that the government has a compelling interest in education only insofar as education is needed to avoid indigent citizens.[33] This proposition is difficult to accept. The compulsory education laws of most states recognize that public schools perform a more important function than merely reducing the incidence of indigency and illiteracy.[34] And therein lies the heart of most free exercise challenges to public school curricula.

The public schools are a pivotal source of instruction in fundamental values. What those values are, or more importantly, what they should be, remains a source of great division. But most of the courts and legislatures that have considered the question agree that these values include, at a minimum, teaching the importance of civic rights and liberties, and promoting tolerance for diverse backgrounds, viewpoints and religious traditions.[35] These values are

30. Petitioner's Brief at 8, *Lukumi Babalu* (No. 91-948).

31. *Id.* at 8, 22-24.

32. Levels of generality in constitutional interpretation have received some recent scholarly attention. *See generally*, Bruce Ackerman, *Liberating Abstraction*, 59 U. Chi. L. Rev. 317 (1992); Frank Easterbrook, *Abstraction and Authority*, 59 U. Chi. L. Rev. 349 (1992).

33. Dent, *supra* note 6, at 730.

34. *See, e.g.*, CAL. EDUC. CODE § 1915 (1993) (including "citizenship training" in the public school curriculum); NEB. REV. STAT. § 79-214 (1991) (requiring teachers to emphasize "honesty, morality, courtesy, obedience to law, respect for the national flag, the Constitution of the United States, and the Constitution of the State of Nebraska, respect for parents and the home, the dignity and necessity of honest labor, and other lessons of a steadying influence which tend to promote and develop an upright and desirable citizenry"); TENN. CODE ANN. § 49-6-1007 (1986 Supp.) (including a "positive values" education requirement).

35. *See, e.g.*, cases discussing the importance of tolerance of divergent political views:

widely deemed essential to harmony in a pluralistic society. Free exercise challenges that oppose these fundamental values are particularly difficult for the courts.

One such case, decided by the Sixth Circuit in 1987, was *Mozert v. Hawkins County Board of Education*.[36] The plaintiffs in that case challenged the schools' use of a basal reader published by Holt, Rhinehart and Winston.[37] Two particular stories from the readers that were offensive to the plaintiffs may be illustrative.

In one story, entitled "A Visit to Mars", thought transfer and telepathy are portrayed.[38] The parents in *Mozert* found this story offensive because they felt it depicted "futuristic supernaturalism" and sent a message to children that telepathy can be viewed as a scientific concept.[39] Another passage that the plaintiffs found objectionable as futuristic supernaturalism described Leonardo de Vinci as a creative individual whose art "came closest to the divine touch."[40]

In *The Diary of Anne Frank*, Anne explained her idea of what religion means to her friend Peter Van Doan, saying "I don't mean you have to be Orthodox . . . or believe in heaven and hell and purgatory and things . . . I just mean some religion . . . it doesn't matter what. Just to believe in something"[41] Read as a whole, plaintiffs objected to the fact that this passage encourages tolerance for religious diversity.[42]

I offer these examples not in a spirit of ridicule or criticism, for I have no doubt that these texts were deeply offensive to the plaintiffs, and that their religious beliefs were sincerely held. I offer these examples to illustrate the difficulty for school boards and textbook editors in identifying texts that are likely to give offense, and to show the breadth of the possible exemptions that could be required. The court in *Mozert* found that the plaintiffs had failed to

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Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986); Ambach v. Norwick, 441 U.S. 68, 77 (1979); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29-30 (1973); Brown v. Board of Educ. 347 U.S. 483, 493 (1954); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 669-70 (1943) (Frankfurter, J., dissenting); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1068 (6th Cir. 1987), *cert. denied.*, 484 U.S. 1066 (1988).

36. 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

37. *Id.* at 1059-60.

38. *Id.* at 1062.

39. *Id.*

40. *Id.*

41. JOAN DELFATTORE, WHAT JOHNNY SHOULDN'T READ 33 (Yale 1992).

42. Mozert v. Hawkins County Public Schools, 582 F. Supp. 201, 202 (1984).

show that exposure to these and other stories burdened the free exercise of their religion, and therefore found that the school board had no constitutional obligation to accommodate the plaintiffs.[43]

Weisman is likely to be criticized by those who consider the current Court to be "unduly protective" of the Establishment Clause at the expense of free exercise.[44] Numerous examples of Establishment Clause jurisprudence[45] could be offered to lend support to the claim that the judiciary has been zealous in its efforts to keep religion out of public schools. I suggest that if the Court were to recognize, as I do not believe it will, free exercise challenges to curricula like those presented in *Mozert*, the resulting burden on public education would make the current burdens imposed by a strict reading of the Establishment Clause pale in comparison.

43. *Id.* at 1070.

44. *See, e.g.*, George W. Dent, *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 864, (1988); Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19 (1991); Richard S. Myers, *Curriculum in the Public Schools: The Need for an Emphasis on Parental Control*, 24 VAL. U. L. REV. 431 (1990).

45. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987); Wallace v. Jaffree, 472 U.S. 38 (1985); Stone v. Graham, 449 U.S. 39 (1980) (per curiam); Wolman v. Walter, 433 U.S. 229 (1977); Epperson v. Arkansas, 393 U.S. 97 (1968); School Dist. of Abington v. Schempp, 374 U.S. 203 (1963); McCollum v. Board of Educ., 333 U.S. 203 (1948).