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WHICH OLD WITCH?: A COMMENT ON PROFESSOR PAULSEN’S LEMON IS DEAD

Ira C. Lupu*

Professor Paulsen does not remember The Wizard of Oz very well. At the conclusion of his Symposium remarks, he paraphrased one of the film’s more memorable lines — “Let the joyous word be spread, Lemon v. Kurtzman at last is dead!” In the film, the original line leads to a delightful song and dance in which the Munchkins celebrate the death of the Wicked Witch of the East. Indeed, as the coroner tells us, “She’s not only merely dead, she’s really most sincerely dead.”

The song ends on a sour note, however, as an evil-looking crone, strongly resembling the one whose demise has produced such gaiety, arrives on the scene. She explains that she is the Wicked Witch of The West, the sister of the deceased. Westie vows revenge upon Dorothy (and her little dog too) for causing Eastie’s death. It requires another ninety minutes, and a harrowing journey to the Wizard, before Westie perishes in a Dorothy-driven meltdown.

In his own analysis, Professor Paulsen seems to assume multiple roles. Like the Munchkins rejoicing at the death of the despised Wicked Witch of the East, he expresses abiding antipathy toward the principles of Lemon v. Kurtzman and explicit glee at the prospect of its demise. It comes as a surprise, therefore, when

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Paulsen turns out to be his own Wicked Witch of the West. He advocates an alternative principle which produces results that are more separationist than most of those produced by the Rehnquist Court. Paulsen accepts the outcome in *Lee v. Weisman* and proposes an attractive and expansive theory of coercion as a substitute for *Lemon*.

Whether Professor Paulsen accepts the implications of his principle is another story. Perhaps he also wants to play a third role in the picture: in a manner reminiscent of the Wizard of Oz himself, he hides Establishment Clause insensitivity behind an illusion to the contrary.

I. LEMON LEFTOVERS

Before describing the features of the West Witch Professor Paulsen creates after his interment of *Lemon*, let me join in Professor Conkle's argument that *Lemon* — Eastie herself — is far from dead. Despite all the signs that the Supreme Court is not following *Lemon* rigorously, lower courts continue to cite and rely upon it regularly.

Furthermore, this Term's anticipated decision in *Zobrest v.*

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6. See Ira C. Lupu, *The Trouble With Accommodation*, 60 GEO. WASH. L. REV. 743, 762-68 (1992) (discussing the decline of the regime of separationism associated with *Lemon*). Writing before *Lee v. Weisman*, I was previously too pessimistic about the future of separationism: Justices Kennedy and Souter have both surprised me.
Catalina Foothills School District is unlikely to overturn Lemon, explicitly or otherwise. In Zobrest, the Ninth Circuit upheld a state's refusal, grounded on the Establishment Clause, to supply a state-employed sign language interpreter to accompany and aid a parochial school child with severe hearing impairment. Had the student attended public school or a private nonreligious school, the state would have supplied the interpreter. Zobrest is likely to turn on two factual considerations: first, the interpreter is a state employee; second, the interpreter will become significantly involved in the religious portion of the student's education. Such an arrangement is tantamount to directly supplying a state-employed religion teacher for the school's use with particular students. Under long-prevailing law, the state cannot directly aid and involve itself in the religious component of parochial education. It seems highly unlikely that a majority of the Supreme Court will abandon such a fundamental and well-settled legal principle, even in a case with facts as sympathetic as these.

The only way to avoid the constitutional dilemma in Zobrest is for the state to provide aid directly to the student's family for the interpreter's services. If the program were structured in this way, with the family free to choose an accredited school and to employ the interpreter, the state's relationship with the religious outcome would be sufficiently attenuated to escape Establishment

8. 963 F.2d 1190 (9th Cir.), cert. granted, 113 S. Ct. 52 (1992).
9. Id.
10. Id. at 1192.
11. In prior decisions striking down state aid to parochial schools, either in the form of teaching personnel or funds to pay such personnel, the state took great pains to limit direct aid to secular subjects. See, e.g., Aguilar v. Felton, 473 U.S. 402, 407 (1985) (public employees teaching educationally deprived children in parochial schools instructed to avoid involvement with religious activities in the schools and to ban religious materials from their classrooms); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 378 (1985) (requiring nonpublic school classrooms in which nonpublic school students were taught at public expense to be free of any type of religious symbols and directing teachers using these classrooms to post signs reading "public school classroom"); Earley v. DiCenso, 403 U.S. 602, 607-08 (1971) (imposing restrictions, designed to minimize the likelihood of religious content of state-subsidized instruction, upon the eligibility of teachers of secular subjects in nonpublic elementary schools for a state salary supplement program); Lemon v. Kurtzman, 403 U.S. 602, 609-10 (1971) (conditioning direct state reimbursement to nonpublic schools for certain "secular educational services" upon fulfillment of specific statutory criteria). Nevertheless, all such aid programs were constitutionally inadequate because the schools could not guarantee that there would be no spill-over religious uses, or because the state's attempts to prevent such spill-over effects created entanglement problems. Zobrest is striking in its absence of such state efforts to limit aid to secular subjects.
Clause condemnation.\textsuperscript{12} Current federal and Arizona law may not permit this arrangement in any school, however, and the Establishment Clause prohibition against favoring religion over nonreligion presumably mandates that the program be structured no more favorably in religious schools than others. The Court in \textit{Zobrest} therefore cannot order Arizona to create an aid program limited to parochial schools as a way of solving the constitutional problems in the case: such an order would simply substitute one Establishment Clause violation for another.

Whatever the result in \textit{Zobrest}, \textit{Lemon}'s three component requirements will survive, even if in a different form than that which prevailed in the 1970's. \textit{Lemon}'s first requirement is that state action must have a secular purpose.\textsuperscript{13} This requirement is nothing more than a particularization of the general obligation that legislation be designed to pursue constitutionally permissible ends.\textsuperscript{14} Religious accommodations are occasionally required by the Constitution for secular reasons.\textsuperscript{15} When not required, however, such accommodations are frequently forbidden because they discriminate in favor of religious association and expression and against their analogous nonreligious counterparts.\textsuperscript{16} The death of \textit{Lemon} will not change these general nondiscrimination requirements, nor will it

\textsuperscript{12} See Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 489 (1986) (providing financial aid through a state vocational rehabilitation program to a visually impaired student at a Christian college, for training as a pastor, missionary, or youth director, does not advance religion in a manner inconsistent with the Establishment Clause); Mueller v. Allen, 463 U.S. 388, 400 (1983) (holding that a state tax deduction for educational expenses, including expenses of parochial school, does not violate the Establishment Clause).

\textsuperscript{13} Lemon, 403 U.S. at 612.

\textsuperscript{14} See Edwards v. Aguillard, 482 U.S. 578, 585 (1987) (noting that the secular purpose requirement concerns whether the actual purpose of the government is to "endorse or disapprove" of religion).

\textsuperscript{15} See, e.g., Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144-45 (1987) (acknowledging that the government may, and sometimes must, accommodate religion and that this may be done without an Establishment Clause violation).

\textsuperscript{16} See Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 17 (1989) (holding that a state sales tax exemption for religious publications violated the Establishment Clause because it denied similar benefits to nonreligious publications, lacked a secular objective to justify its preference, and had the overall effect of endorsing religion). \textit{But see} Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 337 (1987) (commenting that in order for a law to have "forbidden" effects, a fair assessment must demonstrate that the government itself has advanced religion "through its own activities and influence"). \textit{See generally} Ira C. Lupu, \textit{Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion}, 140 U. Pa. L. Rev. 555 (1991) (discussing religious accommodation and concluding that it should be permitted only when constitutionally required).
eliminate the prohibition on purposeful government advancement of a sectarian creed.

The second requirement of Lemon focuses on how the challenged government action advances or inhibits religion. This "effects" focus may be subject to larger changes, but these will be refinements rather than abandonments. In cases involving religious symbols, the doctrinal dispute revolves around an approach based on "coercion," as developed in Weisman, and one based on "endorsement." The former is concerned with state pressure to conform, while the latter focuses upon a person's sense of exclusion from the religious norms of the community. Although these approaches diverge in some cases, both examine the effects of state practices.

In cases involving financial assistance to religious institutions as part of a larger, more inclusive program of state assistance, it is not clear whether or how Zobrest may modify the Lemon effects test. Most probably, state assistance directly to religious organizations, without insulation from purely theological aspects of the enterprise, will continue to be constitutionally unacceptable. Call that "forbidden effects" or what you will, it still remains a bedrock First Amendment principle.

The third requirement of Lemon prohibits excessive interaction between government and religion. The future of this "entanglement" doctrine is difficult to predict because its constitutional basis has always been uncertain. Joint ventures of various kinds between state and religious institutions will remain constitutionally troublesome whatever doctrinal formulation surrounds them. Indeed, in finding state involvement which exceeded permissible limits under the Establishment Clause, Weisman itself emphasized the state direction and control over the choice of clergy and the content of the prayer.

17. Lemon, 403 U.S. at 612.
18. See County of Allegheny v. ACLU, 492 U.S. 573, 597 & n.47 (1989) (declining to utilize a coercion inquiry and commenting that the Court's task was to determine whether the public display of a creche and a menorah had the effect of endorsing or disapproving religious beliefs); see also Lynch v. Donnelly, 465 U.S. 668, 690-94 (1984) (O'Connor, J., concurring) (advocating and explaining the use of the endorsement approach).
19. Cf. supra note 11 and accompanying text.
Here as elsewhere, constitutional law is more likely to display new bottles than new wine. If the question Professor Paulsen is addressing is whether Lemon qua Lemon will ever again be relied upon by a majority to reach an anti-government result in the Supreme Court, then the answer is likely no. On the other hand, if the question is whether Lemon will continue to influence lower court decisions, or whether Lemon themes will retain significant vitality in Establishment Clause doctrine, then the answer is surely yes. Professor Paulsen’s beer winnings were not illgotten.23

II. THEORIES OF COERCION — THE PROFESSOR VS. THE COURT

The breadth of Professor Paulsen’s theory of coercion delighted and surprised me. His proposed principle hints at an approach broader than, and superior to, the Supreme Court’s methodology for resolving problems of governmental promotion of religion. Professor Paulsen’s theory is certainly more expansive than the Court’s opinion in Lee v. Weisman,24 authored by Justice Kennedy.

Professor Paulsen advances the following Establishment Clause principle:

Government may not, through direct legal sanction (or threat thereof) or as a condition of some other right, benefit, or privilege, require individuals to engage in acts of religious exercise, worship, expression or affirmation, nor may it require individuals to attend or give their direct and personal financial support to a church or religious body or ministry.25

He concludes that the graduation prayer in Weisman violated that principle because it conditioned the benefit or privilege of participation at graduation upon “attendance at a religious worship ceremony, even [a] . . . de minimis one, . . . [and regardless of] whether or not one is forced further to participate in particular acts of religious worship.”26

Justice Kennedy offered a far narrower formulation in Weisman

official makes a decision regarding an invocation and a benediction, it is a choice attributable to the state). For further analysis of this aspect of the Court’s opinion, see Conkle, supra note 5, at 876.

23. See Paulsen, supra note 1, at 796-97.
25. Paulsen, supra note 1, at 797 (emphasis removed).
26. Id. at 799.
as the basis for the Court’s opinion:

These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.\(^{27}\)

No one in the \textit{Weisman} majority, other than Justice Kennedy, is willing to be limited to coercion, however defined, as the exclusive Establishment Clause principle. Contrary to Professor Paulsen’s assertion,\(^ {28}\) moreover, not even those Justices who joined in Justice Scalia’s dissent are prepared to accept Scalia’s narrower version of coercion as the exclusive principle of the Establishment Clause. Rather, the dissent emphasizes the permissibility of traditional “nonsectarian” religious ceremony in the nation’s public life.\(^ {29}\) Only Justice Kennedy focuses on coercion, and even he recognizes the additional limitation that government may not “par-

\(^{27}\) \textit{Weisman}, 112 S. Ct. at 2655. Justice Kennedy also described why attendance at graduation was “voluntary” only in the weakest sense:

There was a stipulation in the District Court that attendance at graduation and promotional ceremonies is voluntary. Petitioners and the United States, as \textit{amicus}, made this a center point of the case, arguing that the option of not attending the graduation excuses any inducement or coercion in the ceremony itself. The argument lacks all persuasion. Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. True, Deborah could elect not to attend commencement without renouncing her diploma; but we shall not allow the case to turn on this point. Everyone knows that in our society and in our culture high school graduation is one of life’s most significant occasions. A school rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself form the graduation exercise in any real sense of the term “voluntary,” for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years. Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.

\textit{Id.} at 2659 (citation omitted).

\(^{28}\) Paulsen, supra note 1, at 825 (“[T]he four dissenters in \textit{Weisman} joined Kennedy in agreeing that the proper inquiry is coercion.”).

\(^{29}\) \textit{Weisman}, 112 S. Ct. at 2679-80.
participate in religion or its exercise, or otherwise act in a way which
'establishes a [state] religion or religious faith, or tends to do so.'”30

Thus, Professor Paulsen is all alone. His view of coercion
differs from that of everyone on the Court, and none of the Justices accepts his assertion that coercion is a necessary element of
an Establishment Clause violation. Along with Charles Cooper who argued Weisman for the Providence School Board, perhaps Professor Paulsen does not believe that the Establishment Clause forbids printing “In Jesus Christ We Trust” or “Allah Be Praised” on the realm’s coin,31 but no one on the Supreme Court appears to share that view.

In every respect, the differences between Professor Paulsen and the Court in Weisman are significant. The Court describes the
prayer in Weisman as “a formal religious exercise[,]”32 while Paulsen is more broadly concerned with “acts of religious exercise, worship, expression or affirmation.”33 More significantly, the Court views graduation attendance as having the character of obligation and suggests that this quasi-obligatory character is crucial to the conclusion that participation is coercive. In contrast, Professor Paulsen broadens the Establishment Clause trigger to include acts of religious exercise which the state requires as a condition of any right, benefit, or privilege.

These distinctions mark the lines between the Court’s miserly
approach to the Establishment Clause and the far more generous one suggested by Professor Paulsen.34 Consider the problem of
religious holiday symbols displayed by public officials on public
property. The Court has divided along several dimensions in such

30. Id. at 2655 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).
32. 112 S. Ct. at 2655.
33. Paulsen, supra note 1, at 797 (emphasis removed).
34. I say “suggested by” because both his essay and his remarks at the symposium indicate that Professor Paulsen resists many of the implications his view supports. For example, he was surprised by my assertion that his view undercut Lynch, 465 U.S. 668, and his essay intimates that Edwards v. Aguillard, 482 U.S. 578 (1987), McCollum v. Board of Education, 333 U.S. 203 (1948), and Stone v. Graham, 449 U.S. 39 (1988), were wrongly decided. See Paulsen, supra note 1, at 803 n.26, 852-55. Each of the latter three involves some form of religious coercion.
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cases, and it is not clear that any view currently commands a majority. In County of Allegheny v. ACLU, Justice Kennedy authored a significant opinion taking a broad view of state power to acknowledge religious holidays with symbolic displays. In particular, he concluded that a publicly sponsored display of the nativity scene in the main foyer of a county courthouse did not violate the Establishment Clause.

Does Weisman suggest that Justice Kennedy has changed his approach to such cases? Justice Scalia thinks so, but apparently Justice Kennedy does not. Justice Kennedy presumably would distinguish graduation prayer from holiday displays (even in courthouse foyers) on several grounds. First, the presence of the crèche is not coercive because extended presence in the foyer is not "in a fair and real sense obligatory." Rather, one can avert one's eyes from the crèche while passing through the foyer on the way to one's real place of business in the courthouse. Second, courthouses are for adults more than for impressionable youths. Third, the crèche is passive; unlike a member of the clergy speaking at a large official gathering, the crèche is not self-solemnifying.

Whether or not these distinctions are constitutionally sufficient, none of them is available to Professor Paulsen. In the setting of Allegheny, all those who seek the public benefit of use of the courthouse must view the crèche. Paulsen cannot rely on the adult-youth distinction because he rejects psychological theories of coercion. Nor can he make the "avert your eyes" argument per-

35. See County of Allegheny v. ACLU, 492 U.S. 573 (1989) (determining by divided opinion the constitutionality of a crèche and a menorah display); Lynch, 465 U.S. 668 (determining the constitutionality of a crèche display and producing a split opinion).
37. Id. at 655-79 (Kennedy, J., concurring in judgment in part and dissenting in part).
38. Id. at 655.
40. In Weisman, Justice Kennedy cited his opinion in Allegheny and gave no indication that he considered the two to be inconsistent. Weisman, 112 S. Ct. at 2658.
41. Id. at 2655.
42. There is no doubt that courthouses, including their foyers, built and maintained at public expense, constitute a public benefit. For civil and criminal defendants, attendance at the courthouse may be coercive, in response to subpoena or arrest. Perhaps Justice Kennedy would fall back on the availability of an alternative entrance into the courthouse. There is some symbolism for you: "Attention nonbelievers, please enter the courthouse through the basement."
43. See Paulsen, supra note 1, at 833. The main target of Professor Paulsen's criticism
suasively; Deborah Weisman could have averted her eyes and plugged her ears, but Paulsen does not find these options to be sufficient.\textsuperscript{44} If they were, then the school prayer cases would have to be overruled; the Scalia Four would reach this result, but Professor Paulsen, Justice Kennedy, and the remaining Justices would not.

The active-passive distinction is the only way Professor Paulsen can save public display of the crèche from his own condemnation. Paulsen would be forced to argue that presence of the crèche does not constitute a "worship ceremony" in the same way as spoken prayer. However, visual symbols can invite worship or devotion more powerfully than spoken prayer. For example, compare a school teacher opening class by softly speaking the words "Yea God" with the Eastertime display on the courthouse lawn of a twenty-foot high, artistically powerful sculpture of Christ suffering crucifixion.\textsuperscript{45} Would Professor Paulsen find the former to be coerced attendance at religious worship but not the latter?

Alternatively, Professor Paulsen might rely on the context in a larger sense. Graduations can be solemn occasions; audiences take them seriously and are essentially captives to the social circumstances. Courthouse foyers, by contrast, are filled with hustle and bustle; not everyone will stop and reflect upon the crèche or other holiday symbols.

Professor Paulsen’s methodology cannot succeed, however, if its central focus is on the likelihood that people will notice (and therefore "attend") the symbol. This approach cannot escape the problems of subjectivity. Some people may not notice crèches or feel compelled to attend to their message, but others are acutely aware of the presence of religious symbols in public places. The problem of subjectivity is one from which Professor Paulsen promised to spare us.\textsuperscript{46} Indeed, after his extended critique of Lemon,
he gives short shrift to the "endorsement" principle, coercion's real rival as the reigning approach to Establishment Clause problems. His critique of endorsement is not normative; he does not challenge its central premise that the Establishment Clause prohibits the government from sending messages which divide the community into insiders and outsiders. Rather, he echoes the complaints of others that the endorsement test is hopelessly subjective. If Professor Paulsen is to distinguish the crèche and cross cases from Weisman persuasively he must demonstrate how his coercion theory is any less subjective than its rivals in the field.

Whatever criticisms one might make of Professor Paulsen's approach, it is superior to that offered by Justice Kennedy. The

47. Id. at 815-16.
50. A theory which requires coercion as a necessary element of an Establishment Clause violation can never go far enough. The appropriate response to this narrow view of the Establishment Clause is that it would make the Establishment Clause duplicative of the Free Exercise Clause. See, e.g., Douglas Laycock, "Noncoercive" Support for Religion: Another False Claim About the Establishment Clause, 26 Val. U. L. Rev. 37 (1991). Professor Paulsen responds by arguing that the Free Exercise Clause protects religious believers against interference with their religious practices, while the Establishment Clause protects everyone against the coercive imposition of belief or practice by government. Paulsen, supra note 1, at 843 n.171. This response is unpersuasive; freedom of speech, for instance, protects individuals against both compelled speech and interference with their own speech. See, e.g., Wooley v. Maynard, 430 U.S. 705, 717 (1977) (prohibiting New Hampshire from requiring individuals to display the state motto, which was repugnant to their moral, religious and political beliefs, on their license plates); West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that the state cannot compel students to salute the flag and recite the pledge of allegiance). Thus, it is reasonable to believe that the Free Exercise Clause similarly protects both believers and nonbelievers against compelled religious exercise. The Establishment Clause must have a function other than protecting individuals against compelled religious exercise; otherwise, the Clause becomes superfluous.

In my opinion, the better argument for Paulsen is that both Religion Clauses outlaw only coercion but are remedially distinct; the Free Exercise Clause supports exemptions for religious individuals, while the Establishment Clause supports injunctions against religious practices by government. However, on closer inspection, the remedial argument drags the substantive proposition down with it. The clauses generate remedial differences because their underlying substantive theories differ; the Establishment Clause goes beyond coercion and extends to unions between the state and religion; such unions cannot be cured adequately by exemptions for complaining individuals.
former, if honestly applied, is likely to catch more constitutional violations than the latter. *Weisman* gives us a rule for public schools: it is another school prayer case, and little else.

### III. PUBLIC VS. PRIVATE COERCION

The most school-specific focus for Professor Paulsen's coercion theory revolves around questions concerning the identity of the coercer. Professor Paulsen argues that official school sponsorship of religious ceremonies is always constitutionally troublesome.\(^{51}\) At the other extreme, he asserts that voluntary, student-initiated religious activities at school are private actions which are not constitutionally questionable.\(^{52}\) The hard cases in between involve on-premises teacher behavior, with its attendant mix of private and public features.\(^{53}\)

I agree with Professor Paulsen's ranking of these problems, but they are not as categorically distinct as Professor Paulsen would have us believe. Furthermore, we should not tolerate religion-promoting teacher behavior to the extent Professor Paulsen suggests.

Paulsen's attempt to catalogue sources of coercion aimed at public school students raises two difficulties. The less important problem is that state compulsion places students in the path of whatever other students choose to throw at them. If student coercion of others is criminal or tortious, and school officials have reason to know about such misbehavior, the officials may be required to intervene or else be held liable. Of course, this concern is limited to extreme methods of proselytizing. Further, this concern is not religion-specific: outrageous forms of religious, political, sexual, social or other harassment by students should trigger the same responsibilities.

The more significant problem, specific to the Establishment Clause, is that of joint ventures between religious students and their allies in the faculty or administration. The image of pious students praying quietly on their own before school begins is untroubling, as would be heated nonviolent lunch-time conversation between religious zealots and others in the student cafeteria. A different image is projected, however, by high school cheerleaders prompting a prayer from the stands during half-time at the football

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51. Paulsen, *supra* note 1, at 848.
52. Id. at 849-52.
53. See id.
game. This might be purely private behavior, without official sponsorship of any kind, or it might be the result of collaboration with, and active encouragement by, the football coaches, the school administration, or others in official power. Such joint ventures are no different in principle than the invalid prayer in Weisman, but because the cooperation may be clandestine rather than open, its existence will be more difficult to prove.

Professor Paulsen and I differ with respect to teacher behavior in contexts where the teacher’s official position provides an opportunity to proselytize or otherwise coerce students. Professor Paulsen is correct at the extreme; teachers are constitutionally entitled to follow their own obligatory religious practices. Just because a teacher’s religion may be compatible with that of some students but incompatible with that of others is an insufficient reason to force teachers to neuter themselves religiously. Teachers should be free, for example, to wear religious emblems or garb as required by their faiths.

In cases where teachers go beyond the requirements of their faith in bringing religion to the classroom, however, the dangers become more serious. Here, I believe the line should be drawn with more Establishment Clause sensitivity than Professor Paulsen displays. Consider the anecdote, told to me by a professor at another law school, of a Mississippi public school teacher who inquired of her fourth grade students on the first day of classes whether each of them had yet accepted the Lord Jesus Christ as his Saviour. Does posing the question itself, without regard to the manner in which it is asked, violate the Establishment Clause? Based on Professor Paulsen’s remarks about religious privacy, there is reason to believe he would think that asking the question in such a context offends the Constitution.

The case of Roberts v. Madigan, discussed by Professor Paulsen, illustrates the difficulty arising in cases of in-class manifestations of religious convictions by teachers. As Professor Paulsen describes, principal Madigan ordered teacher Roberts to remove the

54. Cf. Jager v. Douglas County Sch. Dist., 862 F.2d 824, 832-33 (11th Cir.), cert. denied, 490 U.S. 1090 (1989) (holding that an “equal access” plan through which lay speakers were randomly selected to deliver pre-game invocations violated the Establishment Clause because it permitted religious invocations instead of requiring wholly secular inspirational speeches).

55. See Paulsen, supra note 1, at 847 (commenting that individuals have a right to religious privacy and cannot be required to identify their affiliations or beliefs in public).

Bible from his desktop and to refrain from reading the Bible during each day's fifteen minute silent reading period. If these had been all of the relevant facts, I would agree with Professor Paulsen's conclusion that Roberts was acting within his rights and that the principal overreacted to the Establishment Clause danger that Roberts was teaching religion.

Curiously, Professor Paulsen fails to mention three critical facts. First, the lawsuit alleged that principal Madigan removed the Bible from the school library, not just from the classroom. If true, this bespeaks the sort of anti-religious, bureaucratic zealotry that is separationism at its worst. The Bible is thought by many to be one of the world's great and most influential works of literature, and it deserves library space on these grounds.

The other facts omitted from Professor Paulsen's discussion, however, cut the other way. Teacher Roberts placed a poster on his classroom wall which read, "You have only to open your eyes to see the hand of God." Principal Madigan ordered the poster removed, and Roberts did not contest this decision. Roberts also maintained a classroom library of over two hundred books, including The Bible in Pictures and The Life of Jesus. The principal ordered these two books removed from the classroom, and this order remained a central point of dispute throughout the litigation.

With these facts in place, the Roberts story becomes more problematic. Mr. Roberts was not simply given to reading the

57. Id. at 1049-50.
58. There was a dispute concerning whether in fact the principal had removed the Bible from the library. Id. at 1050. In any event, school officials stipulated at trial that the Bible would be replaced and not removed again. Id.
59. Id. at 1049.
60. The Court of Appeals described these books as follows:

The Bible in Pictures is a 320-page volume with over one thousand illustrations. The illustrations are designed to provide both children and adults with a better understanding of the Bible. In the book's preface, the author states: "I pray that this book may bring a fresh vision of Christ, and God's purpose in Him, to you who now read it in the midst of the heartache and frustration of our modern world."

The Story of Jesus is a 128-page volume that depicts through illustrations and text the birth, life, and resurrection of Jesus Christ. The book concentrates on the teachings of Jesus of Nazareth with the underlying premise that he is the Son of God.

Id. at 1049 n.2. Teacher Roberts compiled the library "over his nineteen years of teaching." Id. at 1049. While the opinion does not state definitively whether Roberts owned all the books in this collection, the books in controversy were clearly Roberts's personal property. Id. at 1057.
Bible in his spare time. He was apparently a deeply religious man, who communicated that commitment to his students in a variety of ways, including reading choices, pictorial displays, and inclusions in the class library. Does this account suggest a threat to Establishment Clause policies designed to protect citizens, especially children, from the use of an official position to advance particular religious faiths?

To be sure, nothing in the record indicates coercion of any student. The class library also contained works on Indian religion and Greek mythology (but not Islam or Judaism), and the wall poster was "nonsectarian" as that term is now used euphemistically to describe America's so-called civil religion. Nevertheless, a principal who has received complaints about such a teacher might well act to forestall what seems to be an actual or imminent Establishment Clause violation. If the principal acts correctly, she is a wise administrator; if she acts rigidly or inappropriately, she is a bureaucratic tyrant.

The Roberts tale provides several larger lessons about the problem of religious expression by teachers in public schools. First, most obviously, the constitutional dividing line between a teacher's private, protected conduct and abuse of his official position is difficult to establish. An unobtrusive religious symbol worn as jewelry should always be acceptable, but spontaneous spoken prayer in the middle of class should not be. There is a wide grey area between these two extremes.

Second, more subtly, Roberts involved a school principal utilizing constitutional values in administration, rather than a lawsuit by a student or parent against the school system. In this context, the principal need not get the Establishment Clause point "exactly right." Rather, she should be free — up to the point of conflicting teacher rights, which I do not believe were strongly implicated in Roberts — to err on the side of overenforcement of the Establishment Clause.

Indeed, for several reasons, such overenforcement is bureaucratically appropriate, as well as courageous. First, if the principal allows teachers to engage in conduct approaching constitutional boundaries, some will surely cross the line. That this may give rise to litigation should be only a secondary concern; the primary focus

61. Id. at 1055; see supra note 29 and accompanying text (discussing Justice Scalia's dissent in Weisman).
should be on the question of which values the Constitution is designed to promote, and at what (and whose) expense. Among other things, such a focus would promote civic education for students and others in the community.

In addition, overenforcement by administrators is a salutary counterweight to the likelihood of unwillingness by students and their parents to enforce the Establishment Clause through litigation. Litigation is always expensive, stressful, or both; within small communities, Establishment Clause litigation is unusually divisive and difficult for families who have the courage to pursue it. Courts cannot readily cure the problem of underenforcement, but administrators can assist in a reasonable manner.⁶²

This analysis of personnel behavior on religious matters in public schools is tied to the much larger constitutional question regarding the relationship between parental and governmental authority in the rearing of children. Our constitutional strategy for protecting adults against governmental oppression involves, among other things, the deployment of enforceable rights against governmental action. However, children are not ordinarily in a position to assert their own rights; they typically depend upon others — parents, teachers, juvenile authorities, social workers, etc. — to protect them from abuse, oppression, coercion, and exploitation. In other words, our constitutional strategy for protecting children is one of separation of powers; rather than assign rights to children directly, we assign overlapping but fragmented authority over them to parties who are in competition for children’s attention, respect, emulation, and approval.⁶³

Only with respect to religious upbringing does our constitutional arrangement depart from this model of separated power over children. Our constitutional principles guarantee parents that the state will not directly compete with their choice of religious training. Parents may choose private religious schooling or public schooling; when they choose the latter, they should feel as safe as possible that no one is condemning their religion or indoctrinating

⁶². See George W. Dent, Jr., Of God and Caesar: The Free Exercise Rights of Public School Students, 43 CASE W. RES. L. REV. 707, 741 (1993) (commenting that administrative action can mitigate or eliminate the divisiveness of constitutional litigation); see also discussion infra Part IV (dealing with administrative discretion to implement Religion Clause values).

their children in some alternative faith. While it is impossible for children to attend public school in a pluralistic society without some competition from secular norms, and exposure to alternative religious ideas, it is consistent with the constitutional structure for administrators, teachers, and courts to minimize the competition between family and state on matters of religious choice.

Professor Paulsen is sensitive to these concerns about power and authority in public institutions, but he seems ambivalent about the role of the Establishment Clause in policing them. Despite his offer of a promising theory, Professor Paulsen at times seems overly committed to a conception of Religion Clause unity in which the clauses are “two sides of the same coin” of religious liberty. This conception systematically undervalues concerns about religious equality and freedom from imposition of state-sponsored religion, whether imposed through coercion or otherwise.

IV. THE RELIGION CLAUSES AND ZONES OF ADMINISTRATIVE DISCRETION

The above analysis of Roberts v. Madigan indicates that administrators or other nonjudicial personnel may have broad discretion to address Religion Clause matters. Elsewhere I have written that Free Exercise exemptions from rules which are formally religion-neutral should emerge only from the process of adjudication. My current approval of administrative power to overenforce the Establishment Clause, when compared with my previous condemnation of nonadjudicative enforcement of the Free Exercise Clause, suggests that I am as one-sided in my view of the Religion Clauses as Professor Paulsen, with the clause priority reversed.

Similarly, Professor Dent’s symposium essay argues that my preference for adjudication alone to accommodate free exercise concerns is flawed on other grounds. In particular, Dent argues that if only courts can accommodate religion, collusive free exercise suits between accommodation-seekers and receptive officials

64. Paulsen, supra note 1, at 843 n.171; see also Michael W. McConnell, Accommodation of Religion, 1983 SUP. CT. REV. 1, 3 (arguing that an interpretation of the Free Exercise Clause and the Establishment Clause must be based on religious liberty in order to distinguish between permissible accommodations and impermissible establishments); Richard J. Neuhaus, A New Order of Religious Freedom, 60 GEO. WASH. L. REV. 620, 626-27 (1992) (stating that there is only one Religion Clause and that there is neither conflict, nor need for balancing, between free exercise and establishment).
65. Lupu, supra note 16, at 600-09.
66. Dent, supra note 62, at 739-42.
will result.\textsuperscript{67}

I continue to believe that discretionary accommodations of religion are substantively unacceptable, no matter which official agency makes them.\textsuperscript{68} The criticism from Dent and others, however, has led me to reconsider the question of administrative power to accommodate religion in cases where the Constitution arguably requires it.

The danger associated with non-judicial accommodation is that of religious favoritism and inequality — accommodating the strong, popular, well-financed, or nonthreatening religions, but not others equally entitled to such accommodation under the Constitution. Legislative accommodations of particular religions or practices present a stark danger of this kind of favoritism, and I continue to oppose any doctrine that would permit legislative exemptions for specified sects or specific religious practices.

In an administrative setting, however, the danger of unconstitutional discrimination can be controlled by the same means used to check such discrimination in other First Amendment matters. The key control is procedural regularity. Administrators seeking to determine which religious accommodation claims to honor and which to reject should operate under specific, published, nondiscriminatory standards.\textsuperscript{69} Furthermore, denials of accommodation should be subject to expedited judicial review in the same fashion as denials of parade permits or other licenses to engage in expressive activity.\textsuperscript{70} Under such arrangements, administrators should be allowed to consider claims for mandatory accommodations.

\textsuperscript{67} Id.

\textsuperscript{68} See Lupu, supra note 16, at 611 ("When the Constitution requires such treatment, courts should fearlessly order it; but whatever is not required is presumptively proscribed . . . ").

\textsuperscript{69} See Cox v. Louisiana, 379 U.S. 536, 558 (1965) (reversing conviction under a state statute forbidding obstruction of public passages because the statute gave local authorities uncontrolled discretion); Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (upholding a state statute prohibiting unlicensed public parades because the licensing provisions conferred only limited authority on the licensing entity and provided for systematic and consistent treatment).

\textsuperscript{70} See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 229 (1990) (invalidating a municipal licensing scheme for sexually oriented businesses because it failed to provide adequate procedural safeguards, including prompt judicial review of denials); Carroll v. President & Comm'r's of Princess Anne, 393 U.S. 175, 180 (1968) (overturning a restraining order against public rallies because the order was obtained without notice in an ex parte proceeding incompatible with the First Amendment); Freedman v. Maryland, 380 U.S. 51, 58-59 (1965) (invalidating state censorship procedure which failed to provide adequate procedural safeguards, including prompt judicial review).
Although such a regime would not eliminate all invidious discrimination from administrative decisions, it would help to reduce the operation of such prejudice. This emphasis on procedure is consistent with the program proposed by the Religious Freedom Restoration Act, which would require all government decisionmakers to operate under general and uniform substantive standards. Preferably, the Act should be amended to include additional procedural requirements of the type described above. Due process of the Religion Clauses is always worth explicit attention, although such concerns are frequently overshadowed by substantive passions concerning the general subject of religion and state.

Having partially recanted my view of administrative power and Religion Clause decisionmaking, do I remain caught in the trap of biased Establishment Clause priority because I favor administrative overenforcement of that Clause but no more than precise enforcement of the Free Exercise Clause? I do not think so. In my opinion, discretionary religious accommodations are forbidden by constitutional requirements of equality—religious, associational, and moral. Consequently, administrators cannot accommodate beyond what the Constitution requires.

The Religion Clauses do not, however, operate similarly in the other direction. In some circumstances, administrators may overenforce the Establishment Clause without violating the Free Exercise Clause; sometimes they should do precisely that. The discretionary constitutional zone created by the Religion Clauses is not the famous zone of permissible accommodation; rather, it is that of permissible Establishment Clause concern by public officials. Within that area of concern, general standards, and sensitive processes through which those standards are applied, should minimize invidious discrimination and other constitutional errors.

When administration of those Establishment Clause concerns tramples on the Free Exercise Clause or other constitutional rights


— as it would if the school principal told the teacher that he must hide all signs of his religion even if they were unobtrusive and even if his religion commanded him to display them — discretion has exceeded its constitutional warrant. It would be salutary for courts to begin crafting principles to guide administrators between the zone of Establishment Clause discretion and the demands of individual rights under other, competing clauses. Indeed, such developments would prove far more productive of a healthy church-state regime than overstated pronouncements, judicial or otherwise, that a wicked old decision at last is dead.