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Comment: A Comment on the Death of *Lemon*

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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. The other two commentators 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. 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,

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although I agree with Professor Paulsen's focus on coercion in his approach to the Establishment Clause, I disagree with him about how such a test should work on the facts of *Lee v. Weisman*. 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. 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, 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. 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. 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).


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).
tion test. 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. 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. 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."

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. The core example Professor Paulsen mentions — a requirement to attend a Catholic mass 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. 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.
12. *Id.* at 2681-82 (Scalia, J., dissenting).
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? 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”??

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. 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.

17. Weisman, 112 S. Ct. at 2682 (Scalia, J., dissenting). Professor Paulsen does not address this point.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{23} I con-
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. To my great surprise, the next generation may well have arrived when the Court decided *Lee v. Weisman* and *Planned Parenthood v. Casey* in late June, 1992. These cases may well indicate the reemergence of the privatization thesis. 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. 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. Weak forms of the coercion test do, however, run the risk of completely excluding religious symbolism from public life, 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. Justice Scalia defended public prayer in *Weisman* by focusing on such prayer’s value in guarding against religious bigotry and prejudice. Religious symbolism in public life serves an-

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24. *Id.* at 80.
26. 112 S. Ct. 2791 (1992) (upholding the right to an abortion, but placing a number of limitations on the exercise of that right).
28. See supra note 7.
30. See supra note 21 and accompanying text.
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

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." 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).


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 empha-
size the notion that the nation is under God, I do not believe those
limits were transgressed in Weisman.\footnote{I would agree with Justice Scalia's conclusion that "[t]o 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).}

The third point of this comment is that Professor Paulsen ne-
glects 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 chil-
dren.\footnote{See Myers, Curriculum, supra note 3, at 438-40 (discussing the fact that "textbook
battles" are not unique to the present era).} Commendably, he does focus on some questions that touch
on this issue (in particular his discussion of funding of religious
schools\footnote{Paulsen, supra note 1, at 858.}), 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 respon-
sibility 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.\footnote{Myers, Curriculum, supra note 3 at 432.}

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

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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).}
ly Protestant schools for most of their history. 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. The school prayer cases of thirty years ago 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. 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.

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. 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.").


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. 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. 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. 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).


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.").

best for children.\textsuperscript{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.\textsuperscript{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.\textsuperscript{55}

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

\begin{quote}
[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.\textsuperscript{56}
\end{quote}

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.


\textsuperscript{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.

\textsuperscript{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).

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.\footnote{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).}

The whole system of public education (with the grudging concession given to private education\footnote{58. See Myers, Privatization, supra note 3, at 26-43; Myers, supra note 27.}) needs to be challenged as a violation of parental rights. Professor Paulsen makes some strong arguments that are supportive of the necessary rethinking,\footnote{59. See Paulsen, supra note 1, at 855-59 (discussing public funding of religious education and criticizing \textit{Mozert}).} but he would do well to go even further and focus directly on the fundamental question.