

2006

Coercion and Choice Under the Establishment Clause

Cynthia V. Ward

William & Mary Law School, cvward@wm.edu

Repository Citation

Ward, Cynthia V., "Coercion and Choice Under the Establishment Clause" (2006). *Faculty Publications*. 101.
<https://scholarship.law.wm.edu/facpubs/101>

Copyright c 2006 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/facpubs>

Coercion and Choice Under the Establishment Clause

Cynthia V. Ward^{*}

In recent Establishment Clause cases the Supreme Court has found nondenominational, state-sponsored prayers unconstitutionally “coercive” — although attendance at the events featuring the prayer was not required by the state; religious dissenters were free to choose not to say the challenged prayers; and dissenters who so chose, or who chose not to attend the events, suffered no state-enforced sanction. Part I of this Article lays out the historical background that gave rise to the coercion test, traces the development of that test in the Court’s case law, and isolates the core elements in the vision of coercion that animates the test. Part II proposes a new reading of coercion under the Establishment Clause that keeps faith with the conceptual boundaries of coercion while also responding to the particular constitutional concerns that gave rise to the coercion test and to the particular holdings in the Supreme Court cases that have deployed it. Finally, Part III suggests that the coercion test, as reconstructed, could be the basis for restoring internal coherence and external predictability to constitutional analysis under the Establishment Clause.

TABLE OF CONTENTS

INTRODUCTION.....	1623
I. COERCION IN ESTABLISHMENT CLAUSE JURISPRUDENCE.....	1627
A. <i>The Lemon and Endorsement Tests</i>	1627
B. <i>The Arrival of the Coercion Test</i>	1630
1. <i>Allegheny, Lee, and Santa Fe</i>	1630
2. <i>Coercion and the Pledge of Allegiance</i>	1635
C. <i>The Supreme Court’s Conception of Coercion: Four Burning Questions</i>	1637

^{*} Professor of Law, College of William and Mary. Many thanks to the William and Mary Law School for research support. Peter Alces, Neal Devins, and William Van Alstyne offered useful comments to an earlier draft. All errors are of course my own.

II. THE CONCEPT OF COERCION	1639
A. <i>The Elements of Coercion</i>	1639
1. A Forced Choice	1639
2. Threat of Sanction	1641
3. Coercive Intent	1642
B. <i>Reconsidering the Core Elements</i>	1646
1. The Elements of Indirect Coercion	1646
2. The Role of Causation	1649
3. Is State Coercion Different?	1652
4. When Is Coercion Religious?	1655
III. RECONSTRUCTING THE ESTABLISHMENT CLAUSE	1659
A. <i>The Role of the Coercion Test</i>	1659
B. <i>The Role of the Endorsement Test</i>	1662
C. <i>The Tests in Action</i>	1665
CONCLUSION	1668

INTRODUCTION

Few areas of U.S. Supreme Court interpretation have attracted such strong and universal criticism as the Court's Establishment Clause jurisprudence.¹ Over the half century that the Court has been deciding cases under the Clause,² its muddled and inconsistent decisions have confounded scholars, lower courts, and at times, even members of the Court itself.³ So far, this tangled body of doctrine has resisted every attempt to bring clarity, predictability, and coherence to the constitutional standard for evaluating state action under the Clause. The Court's first formal methodology for analyzing Establishment Clause issues, the so-called *Lemon* test,⁴ proved so ad hoc and unpredictable in application that it has receded into the background as an analytical tool.⁵ In the mid 1980s, Justice Sandra Day O'Connor proposed a "refinement" of the *Lemon* test, centered on the intuition that the government violates

¹ The Establishment Clause of the First Amendment states: "Congress shall make no law respecting an establishment of religion" U.S. CONST. amend. I.

² The first Supreme Court case decided on Establishment Clause grounds was *Everson v. Board of Education*, 330 U.S. 1 (1947).

³ See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow* (*Newdow II*), 542 U.S. 1, 45 (2004) (Thomas, J., concurring) ("Our jurisprudential confusion [in Establishment Clause cases] has led to results that can only be described as silly."); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring) ("[O]ur Establishment Clause jurisprudence is in hopeless disarray."); *Lee v. Weisman*, 505 U.S. 577, 636 (1992) (Scalia, J., dissenting) ("I find it a sufficient embarrassment that our Establishment Clause jurisprudence regarding holiday displays has come to 'require scrutiny more commonly associated with interior decorators than with the judiciary.'" (citations omitted)); *County of Allegheny v. ACLU*, 492 U.S. 573, 674-76 (1989) (Kennedy, J., concurring in part and dissenting in part) (accusing Court of embracing "jurisprudence of minutiae Deciding cases on the basis of such an unguided examination of marginalia is irreconcilable with the imperative of applying neutral principles in constitutional adjudication. 'It would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with experts testifying about whether one display is really like another, and witnesses testifying they were offended — but would have been less so were the crèche five feet closer to the jumbo candy cane.'" (citation omitted)).

⁴ The test is named for the case in which it first appeared, *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁵ It has not, however, been ejected from the toolbox altogether. See, e.g., *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Free Union School District. . . . Over the years . . . no fewer than five of the currently sitting Justices have . . . personally driven pencils through the creature's heart . . . and a sixth has joined an opinion doing so The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will."); *infra* note 114 and accompanying text (noting use of test in 2005 case).

the Establishment Clause when the purpose, or the reasonable effect, of its action is to "endorse" or disfavor religious activity.⁶ But O'Connor's "endorsement test" also drew heavy fire from both inside⁷ and outside⁸ the Court, and it has thus far failed to win the consistent allegiance of any Justice other than its author.⁹

In the late 1980s, Justice Anthony Kennedy put forward the concept of coercion as the gauge for an Establishment Clause violation, and Justice Kennedy's "coercion test" has recently caught on.¹⁰ In two Establishment Clause cases since the early 1990s, the Court has tied the question of constitutionality to the question of whether the challenged state action coerced citizens into supporting or participating in religious activities. If coercion exists, then the state action, be it aid to private religious schools or references to God in public schools, is unconstitutional.¹¹ Thus, in the 1992 case of *Lee v. Weisman*,¹² the Court held that a nondenominational prayer at a public school graduation ceremony "coerced" religious dissenters into participating and that such coercion violates the Establishment Clause.¹³ Likewise, in the 2000 case of *Santa Fe Independent School District v. Doe*,¹⁴ the Court held that a student-delivered prayer at a high school football game fell afoul of the Clause because, inter alia, the prayer coerced potentially dissenting students into participating.¹⁵ And although the Supreme Court never reached the merits of plaintiff

⁶ Justice O'Connor announced the endorsement test in the case of *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

⁷ See, e.g., *Allegheny*, 492 U.S. at 668 (Kennedy, J., concurring in part and dissenting in part) (calling endorsement test "a recent, and in my view most unwelcome, addition to our tangled Establishment Clause jurisprudence," and describing the test as "flawed in its fundamentals and unworkable in practice").

⁸ See also *infra* text accompanying note 43. See generally Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795, 801 (1993).

⁹ Justice O'Connor has continued vigorously to defend the endorsement test. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow* (*Newdow II*), 542 U.S. 1, 33-45 (2004) (O'Connor, J., concurring).

¹⁰ See *Allegheny*, 492 U.S. at 659-79 (Kennedy, J., concurring in part and dissenting in part); *infra* text accompanying notes 44-67.

¹¹ The reverse is not necessarily true. That is, a finding that the challenged state behavior was not coercive does not, by itself, prove there has been no violation of the Clause. See, e.g., *Allegheny*, 492 U.S. at 597 n.47 ("[T]his Court repeatedly has stated that 'proof of coercion' is 'not a necessary element of any claim under the Establishment Clause.'" (citations omitted)); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (dictum) (rejecting proposition that plaintiffs must show coercion in order to prove Establishment Clause violation).

¹² 505 U.S. 577 (1992).

¹³ *Id.* at 587-88.

¹⁴ 530 U.S. 290 (2000).

¹⁵ *Id.* at 311-12.

Michael Newdow's Establishment Clause claim in the 2004 case of *Elk Grove Unified School District v. Newdow* (*Newdow II*),¹⁶ the Ninth Circuit Court of Appeals, in *Newdow v. U.S. Congress* (*Newdow I*),¹⁷ did. Drawing heavily on *Lee* and *Santa Fe*, the Ninth Circuit ruled that school-sponsored recitation of the Pledge of Allegiance was coercive and therefore unconstitutional because the Pledge contains the words "under God."¹⁸

A circuit split has continued the debate over the constitutional status of the Pledge of Allegiance under the coercion test. In *Myers v. Loudon County Public Schools*,¹⁹ the plaintiff challenged a Virginia law that required daily recitation of the Pledge in public schools.²⁰ The Fourth Circuit held that the Pledge did not violate the Establishment Clause because, unlike the school-sponsored prayers that the Supreme Court found unconstitutionally coercive in *Lee*, the Pledge of Allegiance is primarily a patriotic, not a religious, exercise.²¹ A month later, and across the country in California, plaintiff Newdow won another victory at the district court level in the Ninth Circuit, where he had filed a new complaint alleging the same Establishment Clause violation as in his prior case, but free from the procedural defect that caused the Supreme Court to remand that case.²² The United States District Court for the Eastern District of California denied the defendants' motion to dismiss Newdow's complaint, ruling that under Ninth Circuit precedent (from *Newdow I*), the words "under God" in the Pledge violate the rights of school children to be "free from a coercive requirement to affirm God."²³ At some point the issue appears likely to move up the ladder once again, giving the Supreme Court a second chance to decide the merits of Newdow's Establishment Clause claim.

Next time, the Court should embrace the chance to do so. Although the basic intuition underlying the coercion test has strong roots in our constitutional history, the test, as deployed in *Lee* and *Santa Fe*, has

¹⁶ 542 U.S. 1 (2004).

¹⁷ 328 F.3d 466 (9th Cir. 2003) (en banc), *rev'd*, 542 U.S. 1 (2004).

¹⁸ *Id.* at 487 ("Because we conclude that the school district policy impermissibly coerces a religious act and accordingly hold the policy unconstitutional, we need not consider whether the policy fails the endorsement test or the *Lemon* test as well.").

¹⁹ 418 F.3d 395 (4th Cir. 2005).

²⁰ See VA. CODE ANN. § 22.1-202(C) (2005).

²¹ *Myers*, 418 F.3d at 407.

²² In the new case, Newdow has enlisted two other sets of parents and their children, all of whom concededly have standing to bring suit, in his new claim. *Newdow v. Cong. of the U.S.* (*Newdow III*), 383 F. Supp. 2d 1229 (E.D. Cal. 2005).

²³ *Id.* at 1240.

produced more confusion than clarity in an area of constitutional doctrine already mired in doctrinal disarray. In those cases the Court found that a state-sponsored, nondenominational prayer was "coercive" even though attendance at the event featuring the prayer was not mandatory, religious dissenters at each event were free to choose not to say the prayer and dissenters who so chose, or who chose not to attend, suffered no state-enforced sanction. In what sense, critics have wondered, has the state unconstitutionally *coerced* citizens into supporting or participating in religion when the state has required them to do neither?²⁴ The Court attempted to answer this question in *Lee*, by introducing the concept of *indirect* coercion as a basis for an Establishment Clause violation.²⁵ The Court conceded in *Lee* that attendance at graduation was "voluntary" in the sense that students were not required to go and their academic status was unaffected by nonattendance.²⁶ The Court also acknowledged that individual dissenters who chose to attend the ceremony were not required to say the prayer and that no state-authored sanction would follow their choice not to say it.²⁷ In short, no *direct* coercion was involved. Nonetheless, the Court held that, as a practical matter, graduation is mandatory for many students because their parents and families value their attendance.²⁸ The Court concluded that although students who chose not to say the prayer would face no sanction inflicted by the school, they might well face social pressure from their peers as a result of their nonparticipation.²⁹ Thus, *indirect* coercion became a valid basis for challenging state action under the Establishment Clause.

The casual observer may well be taken aback by this proposition. Since when does social pressure from one's peers constitute coercion *by*

²⁴ See, e.g., *Lee v. Weisman*, 505 U.S. 577, 636-38 (1992) (Scalia, J., dissenting) ("The Court's notion that a student who simply *sits* in 'respectful silence' during the invocation and benediction (when all others are standing) has somehow joined — or would somehow be perceived as having joined — in the prayers is nothing short of ludicrous. . . . But let us assume the very worst, that the nonparticipating graduate is 'subtly coerced' . . . to stand! Even that half of the disjunctive does not remotely establish a 'participation' (or an 'appearance of participation') in a religious exercise.").

²⁵ See *infra* text accompanying notes 48-58.

²⁶ *Lee*, 505 U.S. at 583 ("The parties stipulate that attendance at graduation ceremonies is voluntary" in the sense described above.).

²⁷ *Id.* at 593 (stating that school-sponsored prayer at issue "places public pressure, as well as peer pressure, on attending students to stand, . . . or, at least, maintain respectful silence during the invocation and benediction."); *id.* ("Finding no violation under these circumstances would place objectors in the dilemma of participating . . . or protesting.").

²⁸ See *id.* at 594-95.

²⁹ *Id.* at 593.

the state? On what theory of coercion can such holdings be justified? What are its conceptual underpinnings, and what room, if any, does it leave for the state to “accommodate” religion without running afoul of the Establishment Clause?³⁰ This Essay proposes answers to those questions.

Part I lays out the historical background that gave rise to the coercion test, traces the development of the test in the Court’s case law, and isolates the core elements in the vision of coercion that animates the test. Part II addresses the idea of coercion directly, exploring its contours and comparing it to the conception of coercion that was enforced in *Lee* and *Santa Fe*. I propose a new reading of coercion under the Establishment Clause that keeps faith with the conceptual boundaries of coercion while also responding to the particular constitutional concerns that gave rise both to the coercion test and to the holdings in *Lee* and *Santa Fe*. In Part III, I suggest that the coercion test, as reconstructed, could be the basis for restoring internal coherence and external predictability to constitutional analysis under the Establishment Clause.

I. COERCION IN ESTABLISHMENT CLAUSE JURISPRUDENCE

As an independent measure of government compliance with the Establishment Clause, the coercion test is a recent development. It is not, however, the only test the courts use to decide claims under the Clause. Indeed, federal courts found challenged school policies in both *Santa Fe Independent School District v. Doe*³¹ and *Elk Grove Unified School District v. Newdow (Newdow II)*³² unconstitutional not only under the coercion test, but also under the so-called *Lemon* and endorsement tests. These two tests foreshadowed the emergence of coercion as a central element in Establishment Clause jurisprudence.

A. The Lemon and Endorsement Tests

In the 1971 case of *Lemon v. Kurtzman*,³³ taxpayers challenged state statutes in Pennsylvania and Rhode Island that provided aid to private elementary and secondary schools, including religious schools. The

³⁰ See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989) (stating that Establishment Clause should be interpreted in light of “[g]overnment policies of accommodation, acknowledgment, and support for a religion [that] are an accepted part of our political and cultural heritage”).

³¹ 530 U.S. 290 (2000).

³² 542 U.S. 1 (2004).

³³ 403 U.S. 602 (1971).

Supreme Court held that the statutes violated the Establishment Clause because (in significant part) they fostered excessive government entanglement with religion.³⁴ Drawing on prior Establishment Clause decisions over several decades, the *Lemon* Court developed a three-part analysis for state actions that are challenged under the Clause. To survive constitutional inspection, a challenged state action must: (1) have a secular purpose, (2) have a principal or primary effect that neither advances nor inhibits religion, and (3) not foster "excessive entanglement" between government and religion.³⁵

To state the test is to raise the vagaries with which the Court has wrestled ever since *Lemon*. First, what is a "secular purpose"? This prong of the *Lemon* test must allow the state to make laws that are motivated by a desire not to squelch but to *accommodate* religious practice. Indeed, the state may well be obligated to pass such laws under the command of the Free Exercise Clause.³⁶ But if such pro-religion laws are allowable or even necessary, what does the phrase "secular purpose" mean?

Second, how does one measure the "principal or primary effect" of a law or state action and reliably distinguish it from secondary effects that may nevertheless have important impacts on religious practice? Even more puzzling, what does it mean to "advance" or "inhibit" religion? Again, doesn't the government in some sense "advance" religion when it passes laws attempting to accommodate religious practice?

Finally, the *Lemon* test fails to tell the state, *ex ante*, how to avoid "excessive entanglement" between government and religion. The Court has said over and over again, in *Lemon* and other cases, that the Constitution does not forbid all connection between government and religion and that some relationship between the two is not only constitutional but also necessary.³⁷ But the test articulated in *Lemon*

³⁴ *Id.* at 615.

³⁵ *Id.* at 612-13.

³⁶ It is basic hornbook doctrine that the Free Exercise Clause requires the government to affirmatively accommodate good-faith religious practice. *See, e.g.*, NOWAK & ROTUNDA, CONSTITUTIONAL LAW 1307 (6th ed. 2000) (noting "natural antagonism" between Establishment and Free Exercise Clauses, and commenting that "[t]his tension . . . often leaves the Court with having to choose between competing values in religion cases").

³⁷ *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984) ("In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible."); *Lemon*, 403 U.S. at 614 ("[T]otal separation [of government and religion] is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.").

draws no principled distinction between allowable and “excessive” entanglement.

Unsurprisingly, the *Lemon* test produced a confused set of court opinions and has been widely criticized by both courts and constitutional scholars.³⁸ In the 1984 case of *Lynch v. Donnelly*,³⁹ Justice Sandra Day O'Connor suggested a “refinement” of *Lemon* that has since become known as the endorsement test. In Justice O'Connor's view:

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions. . . . The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the community.⁴⁰

In her concurrence in *Newdow II*, Justice O'Connor summarized the endorsement test as it has been applied in the Establishment Clause context:

In order to decide whether [unconstitutional government] endorsement has occurred, a reviewing court must keep in mind two crucial and related principles. First, because the endorsement test seeks “to identify those situations in which government makes adherence to a religion relevant . . . to a person's standing in the political community,” it assumes the viewpoint of a reasonable observer. . . . Second, because the “reasonable observer” must embody a community ideal of social judgment, as well as rational judgment, the test does not evaluate a practice in isolation from its origins and context. Instead, the reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation's cultural landscape.⁴¹

³⁸ See, e.g., Paulsen, *supra* note 8, at 801 (“[T]he ambiguity of the test left the Court leeway to interpret each prong in varying ways, producing a bewildering patchwork of decisions as the justices engaged in a tug-of-war over the interpretation of the test. Not all of the decisions were wrong . . . but they certainly lacked doctrinal coherence.”).

³⁹ *Lynch*, 465 U.S. 668.

⁴⁰ *Id.* at 687-88 (O'Connor, J., concurring).

⁴¹ *Elk Grove Unified Sch. Dist. v. Newdow (Newdow II)*, 542 U.S. 1, 34-35 (2004) (O'Connor, J., concurring).

However, the endorsement test raised at least as many questions as it answered. Once again, the ambiguities in the test have attracted strong criticism. The Court has conceded that not all government action that in some way "advances" religion constitutes an endorsement of it.⁴² Yet, the test as formulated fails to offer a clear and predictable method of determining which advancements are unconstitutional and which are not. As summarized by Professor Michael Paulsen:

The basic problem with the endorsement test is that it is no test at all, but merely a label for the judge's largely subjective impressions. . . . Justice O'Connor has awkwardly attempted to remedy this obvious problem by postulating a neutral "objective observer." Moreover, this observer must be one "familiar with this Court's precedents." . . . The "objective observer" canard is merely a cloaking device, obscuring intuitive judgments made from the individual judge's own personal perspective. . . . The endorsement test does not resemble anything that could be called "law."⁴³

The perceived defects of both the *Lemon* and the endorsement tests pointed to the need for a new and more coherent standard by which to measure Establishment Clause violations. In the late 1980s, Justice Kennedy advanced the idea of coercion as the basis for such a standard.

B. *The Arrival of the Coercion Test*

1. *Allegheny, Lee, and Santa Fe*

Justice Kennedy first articulated the coercion test for Establishment Clause violations in an opinion, concurring in part and dissenting in part, in *County of Allegheny v. ACLU*.⁴⁴ He wrote of the need for "diligent observance of the border between accommodation [of religion] and

⁴² According to the *Lemon* test, a government action is unconstitutional under the Establishment Clause only if it has a *principal* or *primary* effect that advances or inhibits religion. See *supra* text accompanying note 35.

⁴³ Paulsen, *supra* note 8, at 815-16 (citations omitted). But see *County of Allegheny v. ACLU*, 492 U.S. 573, 595 (stating that Justice O'Connor's concurrence in *Lynch*, outlining parameters of endorsement test, "provides a sound analytical framework for evaluating governmental use of religious symbols").

⁴⁴ *Allegheny*, 492 U.S. at 601-02, 620-21 (holding that Christian crèche displayed at Christmas season promoted religious message and violated Establishment Clause, while Chanukah menorah was symbol for holiday with secular meaning and did not violate Establishment Clause)

establishment” and identified coercion as the means of discerning that border:

Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact “establishes a [state] religion or religious faith, or tends to do so.” These two principles, while distinct, are not unrelated, for it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing. . . . The freedom to worship as one pleases without government interference or oppression is the great object of both the Establishment and the Free Exercise Clauses. Barring all attempts to aid religion through government coercion goes far toward attainment of this object.⁴⁵

Justice Kennedy concluded in *Allegheny* that “[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal.”⁴⁶

Justice Kennedy’s opinion in *Allegheny* also introduced a distinction between *direct* and *indirect* coercion that would become important in the Court’s future discussions of the concept. Justice Kennedy argued that unconstitutional coercion may be either direct — involving an explicit, state-imposed sanction for nonpreferred religious behavior or belief — or indirect — involving less overt but nonetheless genuinely coercive state actions that impinge on religious liberty.⁴⁷ Kennedy gave no firm

⁴⁵ *Id.* at 659-60 (Kennedy, J., concurring in part and dissenting in part) (citation omitted).

⁴⁶ *Id.* at 662.

⁴⁷ Justice Kennedy acknowledged that “some of our recent cases reject the view that coercion is the sole touchstone of an Establishment Clause violation”; these cases have held that proof of government coercion is not required to demonstrate an Establishment Clause violation. *Id.* at 660. But Kennedy argued that this is true only if “coercion” means “direct coercion in the classic sense of an establishment of religion that the Framers knew.” *Id.* at 660-61. That is, proof of direct coercion is not a necessary component of a successful Establishment Clause claim. Unconstitutional coercion, however, may also be indirect, and Kennedy seems to argue here that once the idea of indirect coercion is incorporated, coercion does become the “touchstone” of an Establishment Clause violation. Thus, Kennedy comments in his *Allegheny* opinion: “[O]ur cases have held only that *direct* coercion need not always be shown to establish an Establishment Clause violation.” *Id.* at 662 n.1. By contrast, “the prayer invalidated in *Engel* was unquestionably coercive in an

shape to the concept of indirect coercion in *Allegheny*. Three years after that decision, however, the Court put the idea to use. In *Lee v. Weisman*,⁴⁸ Justice Kennedy wrote the majority opinion, finding that the state had unconstitutionally "coerc[ed]" dissenting students by inviting a clergy member to say a nonsectarian, but monotheistic, prayer at a public high school graduation ceremony.⁴⁹

The coercion test was the sole basis for the decision in *Lee*. The Court held that it need not consult the other tests for Establishment Clause violations because "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise"⁵⁰ and the school policy in question failed this threshold requirement.⁵¹ Once again treating liberty of conscience as a central concern not only of the Free Exercise Clause but also of the Establishment Clause, Justice Kennedy spoke of the special need to protect that liberty "from subtle coercive pressure in the elementary and secondary public schools."⁵² In particular, "our decisions . . . recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there."⁵³ In the case of the school-sponsored prayer in *Lee*, the Court cited the

undeniable fact . . . that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.⁵⁴

The unconstitutional compulsion in *Lee* consisted not in the school forcing students to pray, which would be an instance of direct coercion and would clearly be unconstitutional, but in the school-created

indirect manner" *Id.* Although the vagueness of the language makes this less than certain, Justice Kennedy appears to argue that a showing of either direct or indirect state coercion should be both necessary and sufficient to prove an Establishment Clause violation. See, e.g., Paulsen, *supra* note 8, at 823 ("It is probable . . . that Justice Kennedy continues to believe that his *Allegheny* formulation is the correct one — not only a doctrinal minimum but a maximum as well — and will adhere to it in future cases.").

⁴⁸ 505 U.S. 577 (1992).

⁴⁹ *Id.* at 592-93.

⁵⁰ *Id.* at 587.

⁵¹ *Id.* at 599.

⁵² *Id.* at 592.

⁵³ *Id.* (emphasis added).

⁵⁴ *Id.* at 593.

possibility that dissenting students might be subjected to social pressure from their peers:

Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention. To recognize that the choice imposed by the State [between participation in the prayer and protest against it] constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means.⁵⁵

Thus, the Court invalidated the school-sponsored prayer in *Lee* on the ground that potential social pressure from a dissenting student's peers constitutes coercion of that student by the state.

In emphatic dissent, Justice Antonin Scalia attacked the Court's "psycho-coercion" test, declaring: "The Court's argument that state officials have 'coerced' students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point on it, incoherent."⁵⁶ In Justice Scalia's view, the concept of coercion is indeed relevant to the evaluation of state action under the Establishment Clause, but the Court's interpretation of that concept was fatally flawed. Invoking history as a benchmark for the proper meaning of coercion within the Clause, Justice Scalia wrote:

The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*. Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities. . . . The Establishment Clause was adopted to prohibit such an establishment of religion at the federal level. . . . [T]here is simply no support for the proposition that the officially sponsored nondenominational invocation and benediction read by Rabbi Gutterman — with no one legally coerced to recite them — violated the Constitution of the United States. To the contrary, they are so characteristically American they could have come from the pen of George Washington or Abraham Lincoln himself.⁵⁷

⁵⁵ *Id.* at 593-94.

⁵⁶ *Id.* at 636 (Scalia, J., dissenting).

⁵⁷ *Id.* at 640-41 (Scalia, J., dissenting). Justice Scalia anticipated at least one pertinent

Thus, Justice Scalia agreed that acts of direct coercion — threats backed by legal sanctions — are barred by the Establishment Clause, but he opposed the Court's view that indirect coercion is also prohibited by the Clause.⁵⁸

Justice Scalia failed to convince his colleagues that they had pushed the meaning of coercion too far. Eight years after *Lee*, the Court put its shoulder to the concept once again, invalidating a school policy that permitted, but did not require, students to elect a student speaker to deliver "a brief invocation and/or message" at school-sponsored football games.⁵⁹ Drawing heavily on Justice Kennedy's opinion for the Court in *Lee*, the majority in *Santa Fe* held that the school's policy violated the Establishment Clause, even though the policy (1) did not require students to attend football games; (2) did not require that any message, religious or otherwise, be given at the games, but left that option to the results of a student-run election; and (3) did not require, in the event that students chose to elect one of their number to speak at the games, that the message delivered be religious.⁶⁰ Recalling its analysis in *Lee*, the Court once again equated possible social pressure from student peers with coercion by the state:

To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is "formalistic in the extreme." We stressed in *Lee* the obvious

connection between the Court's holding in *Lee* and its future Establishment Clause jurisprudence. In his *Lee* dissent, Scalia noted that:

[S]ince the Pledge of Allegiance has been revised since *Barnette* to include the phrase "under God," recital of the Pledge would appear to raise the same Establishment Clause issue as the invocation and benediction. If students were psychologically coerced to remain standing during the invocation, they must also have been psychologically coerced, moments before, to stand for (and thereby, in the Court's view, take part in or appear to take part in) the Pledge. Must the Pledge therefore be barred from the public schools (both from graduation ceremonies and from the classroom)? . . . Logically, that ought to be the next project for the Court's bulldozer.

Id. at 639.

⁵⁸ *Id.* at 642 (Scalia, J., dissenting) ("[W]hile I have no quarrel with the Court's general proposition that the Establishment Clause 'guarantees that government may not coerce anyone to support or participate in religion or its exercise,' . . . I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty — a brand of coercion that, happily, is readily discernible to those of who have made a career reading the disciples of Blackstone rather than of Freud.").

⁵⁹ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 298 n.6 (2000).

⁶⁰ See *id. passim*.

observation that “adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.” High school home football games are traditional gatherings of a school community. . . . Undoubtedly, the games are not important to some students, and they voluntarily choose not to attend. For many others, however, the choice between whether to attend these games or to risk facing a personally offensive religious ritual is in no practical sense an easy one. The Constitution, moreover, demands that the school may not force this difficult choice upon students. . . .⁶¹

Indeed, the majority opinion continued,

[e]ven if we regard every high school student’s decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of *coercing* those present to participate in an act of religious worship. For “the government may no more use social pressure to enforce orthodoxy than it may use more direct means.”⁶²

2. Coercion and the Pledge of Allegiance

It was thus a very well-established vision of coercion that animated the Ninth Circuit opinions in the first Pledge of Allegiance case.⁶³ Reciting the Supreme Court’s declaration in *Lee* that “at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise,” the en banc Ninth Circuit panel in *Newdow v. United States Congress (Newdow I)* placed the challenged public school policy, requiring daily teacher-led recitations of the Pledge of Allegiance in public schools, on the same constitutional page as the challenged policies in *Lee* and *Santa Fe*.⁶⁴ The Ninth Circuit imported the Supreme Court’s view of coercion as articulated in those two prior cases and came to the unsurprising conclusion that the policy requiring daily classroom recitation of the Pledge also violated the Establishment Clause:

The school district’s policy here, like the school’s action in *Lee*, places students in the untenable position of choosing between

⁶¹ *Id.* at 311-12.

⁶² *Id.* at 312 (emphasis added) (quoting *Lee*, 505 U.S. at 594).

⁶³ See *Newdow v. U.S. Cong. (Newdow I)*, 292 F.3d 597 (9th Cir. 2002), *amended by* 328 F.3d 466 (9th Cir. 2003) (en banc), *rev’d*, 542 U.S. 1 (2004).

⁶⁴ *Newdow I*, 328 F.3d at 486-88.

participating in an exercise with religious content or protesting. . . . As the Court observed with respect to the graduation prayer in *Lee*: “What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.” . . .

. . . [E]ven without a recitation requirement for each child, the mere presence in the classroom every day as peers recite the statement “one nation under God” has a coercive effect.⁶⁵

Thus, the Ninth Circuit concluded that the public school policy at issue in *Newdow I* violated the Establishment Clause because, among other things, it coerces students by exposing them to references to God and forcing them to choose between “participating” in such references (by hearing them) and provoking possible social backlash by protesting.⁶⁶

In his concurrence in *Newdow II*, Justice Clarence Thomas agreed that the Ninth Circuit’s holding in *Newdow I* follows directly from the Court’s analysis of coercion in *Lee*:

Adherence to *Lee* would require us to strike down the Pledge policy, which, in most respects, poses more serious difficulties than the prayer at issue in *Lee*. A prayer at graduation is a one-time event, the graduating students are almost (if not already) adults, and their parents are usually present. By contrast, very young students, removed from the protection of their parents, are exposed to the Pledge each and every day. . . . I conclude that, as a matter of our precedent, the Pledge policy is unconstitutional.⁶⁷

At the same time, Justice Thomas’s opinion in *Newdow II* raises the core question of whether the concept of coercion reaches as far as the Court stretched it in *Lee*. If not, what really explains the precedents that appear

⁶⁵ *Id.* at 488. The Court’s support for that declaration is somewhat confusing. Its opinion goes on to say that “the coercive effect of the Pledge is also made even more apparent when we consider the legislative history of the Act that introduced the phrase ‘under God.’ These words were designed to be recited daily in school classrooms.” *Id.* at 488. The Court thus infers the effect of the Act from its purpose, or “design.” See also *infra* text accompanying notes 117-18.

⁶⁶ *Newdow I*, 328 F.3d at 488.

⁶⁷ *Elk Grove Unified Sch. Dist. v. Newdow (Newdow II)*, 542 U.S. 1, 46-49 (2004) (Thomas, J., concurring). Immediately following the excerpt above, Justice Thomas goes on to say: “I believe, however, that *Lee* was wrongly decided. *Lee* depended on a notion of ‘coercion’ that . . . has no basis in law or reason.” *Id.* at 49. The majority in *Newdow II* based its decision on the procedural issue of respondent’s standing and never reached the merits of Newdow’s Establishment Clause claim.

to give the Ninth Circuit's holding in *Newdow I* such a strong constitutional pedigree?

C. *The Supreme Court's Conception of Coercion: Four Burning Questions*

The coercion test, as deployed in *Lee*, *Santa Fe*, and *Newdow II*, raises at least four sets of questions. First, from the Court's discussions in those key cases it would seem that the state has been "coercive" under the Establishment Clause not only when it expressly penalizes citizens for refusing to engage in state-sponsored religious activity, but also when it presents citizens with a choice between religious and nonreligious activity and the choice is one that the citizen would not be required to make in the absence of the challenged state-sponsored activity. But what is the relationship between coercion and choice? Is there an important connection between these two concepts? If so, how should that connection play out in a constitutional analysis?

Second, what is the role of intentionality in a finding of direct or indirect coercion under the Establishment Clause test? Both *Lee* and *Santa Fe* invite us to examine the state's *intention* to abridge the constitutional rights of religious dissenters. The Court forbids the state from "us[ing]" social pressure — pressure from other students — to enforce religious orthodoxy.⁶⁸ The verb "use" suggests that the Court seeks to bar the state from intentionally exploiting peer pressure in the pursuit of religious conformity. But the Court did not rely on evidence that the schools in either *Lee* or *Santa Fe* knowingly engaged in the creation or application of such peer pressure.⁶⁹ Its finding of state coercion in these cases was not, therefore, predicated on a finding of intentionality. But if intention is not a requisite element of state coercion, what is required to view the state as the source of coercion that violates the Establishment Clause?

Third, what is the analytical distinction between "direct" and "indirect" coercion, and what is the proper place of indirect coercion in constitutional analysis? The Court's holdings in *Lee* and *Santa Fe* rely explicitly on the idea that the Establishment Clause prohibits the state not only from directly coercing religious orthodoxy — for example, by expressly requiring students to say a school-sponsored prayer — but also from *indirectly* doing so — for example, by "using" social peer pressure

⁶⁸ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000); *Lee v. Weisman*, 505 U.S. 577, 594 (1992).

⁶⁹ See *Santa Fe*, 530 U.S. at 324-25; *Lee*, 505 U.S. at 636-37.

to change the religious preferences or behavior of dissenting students. Yet, the Court has declined to give definite shape to its vision of indirect coercion, to discuss the relationship between direct and indirect coercion, or to examine the very troubling issue of boundaries and limits that the introduction of indirect coercion inevitably introduces into the mix. A prohibition on direct coercion contains easily discernable limits that tell the state, *ex ante*, which behavior is unconstitutionally coercive and which is not.⁷⁰ Unless carefully limited and defined, a constitutional ban on *indirect* coercion could easily mire the Court even deeper in the very kind of intuitional, *ad hoc* jurisprudence that has led to strong and widespread condemnation of the *Lemon* and endorsement tests.

Finally, the Pledge of Allegiance cases in particular raise a fourth issue, one that arises from the fact that, unlike a school-sponsored prayer, the Pledge is not primarily a religious exercise. The Pledge first came into being containing no religious language at all; the words "under God" were added in 1954 as a congressional afterthought. Not only *can* the Pledge exist independently of those two words, but it *did* so exist, as a purely patriotic exercise to which religious language was subsequently added during the Cold War for the political purpose of distinguishing American political culture from "atheistic Communism."⁷¹ This makes it necessary to answer a question that never arose in the school prayer cases because those cases involved exercises whose chief purpose was to recognize and celebrate a deity. Even if we agree that the government may not constitutionally coerce citizens into preferred religious behavior and we also agree on a workable definition of "coercion" for Establishment Clause purposes, the question that the Pledge cases highlight is: "Coercion of *what*?" Coercion of religious exercise violates the Establishment Clause, but coercion of *patriotic* exercise does not.⁷² Does the mere presence of the words "under God" turn the Pledge into a "religious exercise"? If so, why? If not, then how can we discern the

⁷⁰ See, e.g., *supra* text accompanying note 57 (quoting from Scalia dissent in *Lee*).

⁷¹ See, e.g., *Newdow I*, 292 F.3d at 597, amended by 328 F.3d 466.

⁷² The Fourth Circuit makes this point in *Myers v. Loudon County Public Schools*. 418 F.3d 395, 406-08 (2005) ("[A]ll of the cases holding that indirect coercion of religious activity violates the Establishment Clause presuppose that the challenged activity is a *religious exercise*. . . . [A]lthough religious exercises in public schools, even if voluntary, may violate the Constitution because they can indirectly coerce students into participating, nothing in any of the school prayer cases suggests the same analysis applies when the challenged activity is not a religious exercise. And distinguishing this case . . . is the simple fact that the Pledge, unlike prayer, is not a religious exercise or activity, but a patriotic one. . . . Even assuming that the recitation of the Pledge contains a risk of indirect coercion, the indirect coercion is not threatening to establish religion, but patriotism.").

boundary line between nonreligious exercises that in some way “acknowledge” religion — exercises that the state may mandate without violating the Establishment Clause⁷³ — and those genuinely “religious” exercises that do invoke the proscriptions of the Clause? In short, what exactly is it that makes a state-sponsored exercise “religious” in nature?

II. THE CONCEPT OF COERCION

Consider a paradigmatic case of coercion. A robber advances on you in a dark alley, points a gun in your face, and declares: “Your money or your life.”⁷⁴ What exactly makes his action “coercive”?

A. *The Elements of Coercion*

The robbery scenario is coercive for at least three reasons. First, it presents the victim with a choice that exists only because of the coercive behavior of the robber. Second, it involves the threat of a sanction for failure to choose in accordance with the will of the robber. Third, the threat from the robber is *intentional*, in the senses described below.⁷⁵

1. A Forced Choice

The robbery victim would presumably like to hang on to both her money and her life; the fact that she must now choose between them is the direct result of the coercer’s behavior. It follows that a coercer’s victim makes the choice against her will: without the presence of the coercer’s credible threat of harm, she would behave otherwise. If I hold a gun on you and command, “Walk into that cave or I will shoot you,” and (unknown to me) you are an avid spelunker and were already on your way to explore that very cave, then I have not coerced you into walking in. In a coercive situation, the coercee’s world, and will, are altered because of the coercer’s threats.

Although the choice between one’s money and one’s life will probably be an easy one for most people, it is nevertheless a real choice: a choice in which the coercee deliberates between alternatives and can be expected to select that which, from his or her perspective, causes the

⁷³ However, under the Free Exercise and Free Speech Clauses, the calculation may be different. See *West Virginia v. Barnette*, 319 U.S. 624, 641-42 (1943).

⁷⁴ See, e.g., Michael Gorr, *Toward a Theory of Coercion*, 16 CAN. J. PHIL. 383, 385 (“The paradigm example of coercion is provided by a conditional threat, e.g., ‘Your money or your life.’”).

⁷⁵ See *infra* text accompanying notes 83-87.

least harm.⁷⁶ In illustration, remember the old joke that plays off the robber-victim scenario. Gun-toting robber approaches male victim, points his gun and demands: "Your money or your wife." Victim hesitates. Robber finally asks: "Well?" Victim responds: "I'm thinking, I'm thinking!"

The point of the joke is a serious one, for we can easily imagine a victim totting up the pros and cons and rationally choosing to risk his life rather than hand over his money. Consider, in illustration, the case of Jessica Santillan, a teenager who died in 2003 following a botched organ transplant at Duke University Medical Center in North Carolina.⁷⁷ Several years before the fatal transplant, Jessica's parents paid a smuggler to transport the family from its native Mexico to the United States in order for Jessica to receive medical treatment for her heart condition.⁷⁸

Suppose for a moment that you are Jessica's mother. You have converted all your assets into cash and placed the cash in a bank account. Now you are on your way to meet the smuggler who has promised, in return for that money, to transport you and Jessica to the United States where she will receive life-saving treatment. Just as you reach your bank, a robber walks up, points a gun at your head, and demands:

⁷⁶ See, e.g., H.J. McCloskey, *Coercion: Its Nature and Significance*, 18 S. J. PHIL. 335, 336 (1980) ("Coercion and force need to be distinguished, . . . because when one is coerced, one still acts. When subjected to force, one does not act at all; rather one is acted upon; things are done to one or *via* one. . . . By contrast, the coerced person acts. He does what he does as a result of coercion. He may well not like doing what he does and may much prefer to act in other ways; and he may do what he does only because he is coerced. Nonetheless, he, the coerced person does what he does; he chooses to do it."); Michael J. Murray & David F. Dudrick, *Are Coerced Acts Free?*, 32 AM. PHIL. Q. 109, 110 (1995) (citing McCloskey, *supra*, for proposition that "[i]n cases of coercion proper, . . . there is . . . a choice, which arises out of deliberation about alternatives, i.e., an act," and basing the authors' own distinction between force and coercion upon his); Michael Rhodes, *The Nature of Coercion*, 34 J. VALUE INQUIRY 369, 370 (2000) ("The notion that coercion does not involve a choice being made by the coerced agent is nonsensical, but pervasive. With genuine instances of coercion, expressions such as 'so and so was forced to surrender his wallet' are entirely misleading if 'forced' is understood to imply an absence of free will or choice. A gunman relies upon the victim's capacity for choice when attempting coercion, and assumes that the victim will choose his life over his wallet. Even though the choice might be easy if the person values his life much more highly than his wallet, it remains the case that a choice must be made. Thus it is inaccurate and untrue to say, 'I had no choice, since I had a gun placed to my head.' What should be said in such cases is that 'I had only one reasonable alternative and as such the choice was effortless. . . . Coercion necessarily involves a choice being made in light of certain conditions being proposed by another agent.'").

⁷⁷ See, e.g., Rob Stein, *Teenage Girl in Botched Organ Transplant Dies*, WASH. POST, Feb. 23, 2003, at A11.

⁷⁸ See, e.g., Shankar Vedantam, *U.S. Citizens Get More Organs Than They Give*, WASH. POST, Mar. 3, 2003, at A3 (noting fact that Jessica and her family were illegally smuggled into United States).

"Your PIN number or your life." What will you do? Surely the "correct" choice is not at all obvious. Or rather, it might be absolutely clear to you that you will risk anything, including your life, rather than give away that PIN number. The point is simple but important: as long as we can imagine realistic cases in which the choice might be made either way, the coercive choice remains a real choice. A rich conception of coercion, therefore, will not distinguish coercion from choice per se; instead it will focus on the question of which choices are coercive and which ones are not.⁷⁹

2. Threat of Sanction

How, then, ought we to distinguish coercive choices from noncoercive ones? We can hypothesize that a coercive choice is one in which the coercer has weighted the choice by threatening to do something *wrong*, something that deprives the victim of one or more moral rights. Now, it should be clear that not all deprivations of choice involve moral wrong. Only some restrictions on choice — the coercive ones — involve such a wrong.

A slightly modified example offered by Robert Nozick reveals the conceptual roots of this element.⁸⁰ Imagine a world populated by fifty-one people, comprised of twenty-six men and twenty-five women. Following Nozick's parameters, suppose further that all members of each sex agree on the same ranking of all members of the other sex in terms of desirability as marriage partners and that all members of the society want to get married. Thus, for purposes of marital desirability, we might name the men A to Z and the women A• to Y•, in decreasing preferential order. Presumably A and A• will choose to marry each other. B would like to marry A•, and B• would like to marry A. Those choices have been precluded, however, by the prior voluntary choices of A and A• to marry each other. B and B•, then, if they want to be married at all, will marry each other, and so on down the line: each succeeding person would, if given the choice, marry those ranked above himself or herself in the preferential ordering, but instead marries the best possible mate he or she can get. Now we've reached Y, who is considering his available options. Y would prefer, if given the choice, to marry one of A• through X•, but they have chosen to marry above him.

⁷⁹ See, e.g., Bernard Gert, *Coercion and Freedom*, in COERCION 30, 32 (J. Roland Pennock & John W. Chapman eds., 1972) (arguing that coercive choices are internally different from noncoercive ones).

⁸⁰ ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 263 (1974).

His choices are dramatically constrained as compared to all the men before him; he may marry Y• or not marry at all. Poor Z is quite out of luck; by the time we reach him, all the available women are married, and he has no choice to marry at all!

Z's choices have been dramatically constrained — down to none, in fact. But has Z been *coerced* into staying single? Surely not. Z's predicament is the result not of coercive force but of the legitimate choices of other freely acting individuals. No threat or intentional constraint has been used upon Z to force him into remaining single, nor has Z been *unfairly* placed in a situation in which he is unable to marry.⁸¹ The mere fact that Z does not, as a matter of fact, have the choice to marry is not enough to demonstrate coercion. A compelled action is not necessarily a coerced one. Only when a choice has been wrongly weighted by the threat of a sanction does that choice involve coercion.⁸² Thus, the second reason that we call the robbery hypothetical "coercive" is that it does feature such a threat: give me your money and I will let you go; refuse me your money and I will kill you.

3. Coercive Intent

The threat from our hypothetical robber is *intentional* in two senses: the robber has intentionally subjected his or her victim to a choice — between her money and her life — that she would not otherwise have to make, and the robber has intentionally weighted that choice in favor of the robber's wishes. In illustration, consider a scenario drawn from Peter Westen's provocative article, "*Freedom*" and "*Coercion*" — *Virtue Words*

⁸¹ See, e.g., *id.* at 262 ("Other people's actions place limits on one's available opportunities. Whether this makes one's resulting action non-voluntary depends upon whether these others had the right to act as they did."); Jeffrie G. Murphy, *Consent, Coercion, and Hard Choices*, 67 VA. L. REV. 79, 84 (1981) ("[T]rue duress or coercion results when one's rights are violated by others . . .").

⁸² Coercion, because it does involve the threat of a sanction, has been distinguished from the related concepts of pressure, manipulation, exploitation, persuasion, temptation, and seduction. The robber who holds a gun to your head and demands your money has coerced you; the man who offers you a mink coat to sleep with him has not. See, e.g., McCloskey, *supra* note 76, at 335 ("To exercise coercion is to exercise power. But not all exercises of power are exercises of coercion. Power may be exercised *via* the use of force, by manipulation, conditioning, pressure, as in social pressure, individual pressure, group pressure Whilst various of these forms of power are loosely characterized as forms of coercion, there are good reasons for distinguishing coercion proper from all these forms of power. . . . Because coercion figures prominently — and rightly so — in moral, legal, and political issues, it is important that it be distinguished from these other forms of power and influence.").

and Vice Words.⁸³ Westen develops an example using Frederick Douglass, who spent half his life as a slave. In this context Westen poses two connected hypotheticals that are exactly on point. First, Westen establishes that

a constraint that X[1] brings to bear on X is not “coercion” unless X[1] *knows* he is bringing the constraint to bear on X. If Frederick Douglass’s master goes pheasant shooting in the fields without knowing that Douglass is working there and by unwittingly shooting in Douglass’s direction causes Douglass to take shelter, we might say that the master has “caused” Douglass to take shelter, or has “forced” Douglass to take shelter, but we would not say that he has “coerced” Douglass into taking shelter because the master did not know he was bringing the constraint to bear on Douglass. This suggests . . . [that] coercion is a constraint, Y, that X[1] brings to bear on X to do Z(1), where X[1] knows he is bringing Y to bear on X.⁸⁴

As Westen immediately goes on to explain, however, this formulation does not go far enough in describing X[1]’s requisite level of intentionality:

Assume that Frederick Douglass’s master wishes to shoot pheasant in the fields where he knows Douglass is working, but he does not wish Douglass to quit working; he takes care, therefore, to shoot over Douglass’s head with the wish and expectation that Douglass will continue working; Douglass, becoming afraid that he will be shot, quits working. We might say in that event that by knowingly shooting over Douglass’s head, the master has “caused” Douglass to quit working, but we would not say that Douglass’s master has coerced him into quitting work. To constitute coercion, [the coercer] must not only knowingly bring a constraint to bear on [the coercee], but he must bring it to bear for the purpose or with the expectation of causing [the coercee] to do [what the coercer wants him to do]. “Coercion occurs when one man’s actions are made to serve another man’s will, not for his own but for the other’s purpose.”⁸⁵

⁸³ Peter Westen, “Freedom” and “Coercion” — *Virtue Words and Vice Words*, 1985 DUKE L.J. 541.

⁸⁴ *Id.* at 560-61.

⁸⁵ *Id.* at 561 (quoting F. A. HAYEK, *THE CONSTITUTION OF LIBERTY* 133 (1960), and citing LAWRENCE CROCKER, *POSITIVE LIBERTY* 17 (1980) (“[T]here is a strict use of ‘coercion’ which requires the intent to influence behavior”)); see NEIL MACCORMICK, *LEGAL RIGHT AND SOCIAL DEMOCRACY* 235 (1982) (“To be one who coerces is to act purposively.”); Michael D. Bayles, *A Concept of Coercion*, in *COERCION*, *supra* note 79, at 16, 21 (“Dispositional coercion is thus distinguished from mere threats by an agent’s intent that a victim act in a specific

To the extent that intentionality is a central component of coercion, it would seem that coercive threats are necessarily human in origin. Some scholarly accounts have suggested as much.⁸⁶ The presence of intentionality has also suggested to some that coercion is fundamentally a *moral*, as opposed to purely descriptive, concept.⁸⁷ Thus, suppose Professor X requires that her law students pass a final exam in order to get credit for her required first-year property class. Students who do not pass the exam will fail the course. Professor X's students are "forced" to take her exam if they want to pass the course, but we would not say that the professor has *coerced* them into taking it. Compare this to the case in which Professor X tells a student: "Sleep with me or you will fail my course." Here, we have no problem finding a coercive use of power. The difference is not the amount or kind of force — in both cases, the threatened penalty for noncompliance is failing the course — but its moral legitimacy.

It is also true that some definitions of "coercion" focus on its descriptive properties, claiming that whether or not coercion is wrongful is a different question from whether or not it exists.⁸⁸ According to this second, non-normative conception, coercion simply describes a situation in which one party compels another, by means of a threat backed by force, to make a choice between alternatives, one of which is favored by the coercing party.⁸⁹ According to this view, the use of coercion against someone may or may not be wrongful, depending on other

manner.").

⁸⁶ See, e.g., ISAIAH BERLIN, *FOUR ESSAYS IN LIBERTY* 122 (1969) ("[C]oercion implies the deliberate interference of other human beings within the area in which I could otherwise act.").

⁸⁷ See, e.g., Murphy, *supra* note 81, at 87 ("True duress [or coercion] . . . requires not merely an unhappy choice but a *villain* who is responsible for creating the necessity of making that choice.").

⁸⁸ See, e.g., ALAN S. ROSENBAUM, *COERCION AND AUTONOMY: PHILOSOPHICAL FOUNDATIONS, ISSUES, AND PRACTICES* 25 (1986) ("[I]n law and legal theory both normative and nonnormative conceptions of coercion can be found," and "in moral theory and ethics coercion is understood with regard to some presumed notion of prior individual freedom, autonomy, or rational agency but with normative and nonnormative variations, depending on the writer's final purpose . . ."); Rhodes, *supra* note 76, at 369 (defending descriptive account of coercion on grounds that "[p]roviding a non-evaluative, descriptive account allows the separation of the normative judgment from the identification of the phenomenon thereby described. Asserting that something is an instance of coercion does not commit us to any particular normative assessment of it. Whether or not, being an instance of coercion, it is also wrongful or unfair remains an open question.").

⁸⁹ See, e.g., J. Roland Pennock, *Coercion: An Overview*, in *COERCION*, *supra* note 79, at 1, 1 ("Coercion signifies, in general, the imposition of external regulation and control upon persons, by threat or use of force and power." (citation omitted)).

circumstances or background conditions. These include the harm to the coercee if he or she accedes to the coercer's will, the equality or lack thereof (as defined by the individual theorist) between coercer and coercee, and whether the use or threatened use of force violates the coercee's pre-existing rights.⁹⁰

Our intuitions about the normative content of coercion depend, in part, on whether the coercer is a person or the state. The term "coercive," as applied to relations between individuals, is usually normative, signifying the coercing party as a villain and the coerced person as a victim. In the interpersonal context, the philosopher Jeffrie Murphy is right that "[t]rue duress [or coercion] . . . requires not merely an unhappy choice but a *villain* who is responsible for creating the necessity of making that choice."⁹¹ In contrast, when we speak of coercion by the state we often adopt a descriptive definition, in which state "coercion" is both synonymous and coextensive with the state's power to enforce the law. Thus, legal and political philosophers frequently examine the conditions under which state coercion is justified, implying that such coercion is sometimes justified and sometimes not.⁹²

Perhaps the most distinctive feature of the Supreme Court's use of the coercion test under the Establishment Clause is that it applies the

⁹⁰ See, e.g., Rhodes, *supra* note 76, at 369-74.

⁹¹ See Gorr, *supra* note 74, at 383 (citing, but not agreeing with, view that "coercion is an essentially normative concept whose 'conditions of application contain an ineliminable reference to moral rightness or wrongness'" (citation omitted)); Murphy, *supra* note 81, at 87.

⁹² See, e.g., Russell Hardin, *Rationally Justifying Political Coercion*, 15 J. PHIL. RES. 79, 79 (1989-90) ("Without coercion government would fail. Hence, the central problem of political philosophy is how to justify coercion by government."); McCloskey, *supra* note 76, at 350 ("A serious political approach to coercion raises two types of issues. The more basic, general issue relates to determining criteria for legitimate, permissible coercion. What kinds, degrees of coercion ought the state to engage in itself, what ought it to permit, and what ought it to ban? Are general criteria or rules possible, or must each case be determined on its merits? If the latter, what constitute the relevant merits?"). The legal positivists extended this debate into the realm of law. See, e.g., John Austin, *A Positivist Conception of Law*, in PHILOSOPHY OF LAW 24, 25-26 (Joel Feinberg & Jules Coleman eds., 7th ed. 2004) ("Every law . . . is a command. . . . [A] command is distinguished from other significations of desire by this peculiarity: that the party to whom it is directed is liable to evil from the other, in case he comply not with the desire."); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 596 ("The existence of law is one thing; its merit or demerit is another." (quoting JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 184 (Library of Ideas 1954) (1832))); *id.* at 53 ("What both Bentham and Austin were anxious to assert were the following two simple things: first, in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law.").

normative vision of coercion to the behavior of the state. In the Establishment Clause context, the Supreme Court appears to assume that state coercion is *never* justified and that it is always an unconstitutional violation of a citizen's rights. In evaluating a claim under the coercion test, the Court does not ask: "Is this a case in which state coercion is justified or not?" Instead, it assumes that religious-based coercion by the state is *per se* unconstitutional. If the state forces citizens to make a choice between religion and nonreligion and weights that choice by imposing a sanction for choosing one way or another, then the state has always, by definition, violated the Clause.⁹³

B. *Reconsidering the Core Elements*

To summarize the argument thus far: the robber-victim scenario is coercive because (1) it presents the victim with a choice (between her money and her life) that she would not otherwise have to make, (2) that choice has been wrongly weighted by the robber with a sanction for the refusal to choose in accordance with the robber's wishes, and (3) both the choice and the sanction have been intentionally inflicted on the victim by the robber. In the Establishment Clause context, the Supreme Court applies this normative conception of coercion to its evaluation of the state's behavior under the coercion test.

1. The Elements of Indirect Coercion

Must all three of the above elements be present in order for a particular choice to be coercive? This is a key question for the purposes of the Establishment Clause coercion test, because one could argue that the conception of state coercion applied to cases of *indirect* coercion, such as *Lee v. Weisman*⁹⁴ and *Santa Fe Independent School District v. Doe*,⁹⁵ contains only one of the three elements. Under the test enforced in those cases, the state unconstitutionally "coerces" a citizen when it presents her with a choice between religious and nonreligious behavior and that state-authored choice is a choice she would not have faced in the absence

⁹³ See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) ("Undoubtedly, the [football] games are not important to some students, and they voluntarily choose not to attend. For many others, however, the choice between whether to attend these games or to risk facing a personally offensive religious ritual is in no practical sense an easy one. The Constitution, moreover, demands that the school may not force this difficult choice on students . . .").

⁹⁴ 505 U.S. 577 (1992).

⁹⁵ *Santa Fe*, 530 U.S. 290.

of state intervention. Thus, the first element, a forced choice, is required under the test. But that element apparently also defines the entirety of the test. In both *Lee* and *Santa Fe*, the Court made clear that the negative sanctions at issue were not penalties created or enforced by the state. Rather, the sanction was the potential for social pressure or ostracism by a religious dissenter's peers in the event that a dissenter chose not to say the challenged prayer or not to attend the event in order to avoid saying it.⁹⁶ Thus, at least initially, it does not appear that the Court requires the state actor to weight the choice with a sanction in order for there to be unconstitutional coercion.

The Court's coercion test also does not appear to require the state to have *intentionally* organized, or set in motion, this peer pressure in order for its actions to be found unconstitutionally coercive. The Court does state in *Lee* that "the government may no more *use* social pressure to enforce orthodoxy than it may use more direct means."⁹⁷ But in neither *Lee* nor *Santa Fe* does the Court's holding rely upon evidence that the schools in those cases intentionally brought, or attempted to bring, peer pressure to bear on dissenting students, either to attend the voluntary events at issue or to say the challenged prayer at those events.⁹⁸ It would seem, then, that by the word "use" the Court did not necessarily mean "deploy with conscious purpose." But is it really "coercive," for Establishment Clause purposes, for the state to present dissenters with a choice they would not otherwise have whenever *some* sanction, whether or not imposed by the state, might conceivably follow? Such a broad vision of coercion could severely restrict the state's ability to accommodate religion and "take it into account."⁹⁹ For every time the

⁹⁶ See *supra* text accompanying notes 50-62.

⁹⁷ *Lee*, 505 U.S. at 594 (emphasis added).

⁹⁸ On the contrary, see for example *id.* at 588 ("Petitioners argue, and we find nothing in the case to refute it, that the directions for the content of the prayers were a good-faith attempt by the school to ensure that the sectarianism which is so often a flashpoint for religious animosity be removed from the graduation ceremony."). In *Santa Fe*, the Court did note plaintiffs' claim that dissenting students were rebuked for their beliefs. 530 U.S. at 295 ("In their complaint the Does alleged that the District had engaged in several proselytizing practices, such as . . . chastising children who held minority religious beliefs . . ."). But the Court cited no evidence that the state intentionally "used" social pressure to enforce the challenged prayer policy. Nor did the Court suggest that such evidence exists or rely upon the assumption that it exists in deciding the case.

⁹⁹ See, e.g., *supra* note 36; *infra* note 101 and accompanying text; see also *Van Orden v. Perry*, 351 F.3d 173, 175, 178 (2003) (affirming these principles). In upholding the constitutionality of a Ten Commandments display located on the grounds of the state legislature of Texas, the *Perry* Court said that although the government must be "neutral" toward religion,

state overtly tried to do so and some negative consequence resulted which the state had neither intended nor inflicted, the state's accommodation attempt would have to be struck down under the Establishment Clause. This cannot be the right result. State action frequently presents citizens with choices, including choices that have religious dimensions. Alongside the Court's worries about state-induced coercion of religious behavior, the Court has also clearly said that the state may not be affirmatively hostile toward religion,¹⁰⁰ that a total eradication of religion from the public sphere would be neither possible nor desirable,¹⁰¹ and that the state may even "accommodate religion and take religion into account" in making policy.¹⁰² Any standard under

neutrality is not self-defining. It does not demand that the state be blind to the pervasive presence of strongly held views about religion with myriad faiths and doctrines. Nor could it do so. Religion and government cannot be ruthlessly separated without encountering other First Amendment constraints, including its guaranty of the free exercise of religion. Such hostility toward religion is not only not required; it is proscribed. It is not the case that the Establishment Clause is so inelastic as to not permit government some latitude in recognizing and accommodating the central role religion plays in our society. . . . "Neither government nor the United States Supreme Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion."

Id. at 178 (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)).

¹⁰⁰ See, e.g., *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general.").

¹⁰¹ See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 692-93 (1984) (O'Connor, J., concurring) (stating that government display of crèche in circumstances of case is "no more an endorsement of religion than such governmental 'acknowledgements' of religion as legislative prayers of the type approved in *Marsh v. Chambers*, government declaration of Thanksgiving as a public holiday, printing of 'In God We Trust' on coins, and opening court sessions with 'God save the United States and this honorable court.' Those government acknowledgements of religion serve, in the only ways reasonably possible in our culture, . . . legitimate secular purposes . . ." (citation omitted)); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.' It is well-established, too, that '[t]he limits of permissible state accommodation to religion are by no means co-extensive with the non-interference mandated by the Free Exercise Clause.' There is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'" (citations omitted)).

¹⁰² See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 601 n.51 ("Government efforts

which the state is forbidden ever to create a choice that involves religion would not only be impractical, it could also affirmatively contradict the accommodation theme in the Supreme Court's Establishment Clause jurisprudence. Thus, we should not read the Establishment Clause to say simply: "Indirect coercion exists whenever the state requires citizens to make a choice that has religious implications."

2. The Role of Causation

What then *is* the best interpretation? Beyond the actual results in its cases, the Supreme Court has offered few clues as to the theory of indirect coercion that lay behind the holdings in *Lee* and *Santa Fe*. It may be possible, however, to discern a theory that logically produces those results. One would prefer to work from a rule that would dictate the various conceptions of indirect coercion available and thereby ensure that one has covered the entire field of viable interpretations.¹⁰³ Absent such a rule, it is difficult, albeit not impossible, to identify and examine all the viable theories of indirect coercion. The problem of setting limits to indirect coercion is really one of connecting the state's behavior to the feared harm in a way that justifies barring the state from a challenged religious activity. Thus, in *Lee* and *Santa Fe* the Supreme Court expressed its fear that public school students' right to dissent from the majority's religious views could be limited by peer pressure on dissenters to say, or otherwise support, school-sponsored monotheistic prayer.¹⁰⁴ The Court connects such peer pressure to the state via the concept of *indirect* coercion. But what does this mean? What must the

to accommodate religion are permissible when they remove burdens on the free exercise of religion."); *id.* at 631 ("Clearly, the government can *acknowledge* the role of religion in our society in numerous ways that do not amount to an endorsement. Moreover, the government can accommodate religion by lifting government-imposed burdens on religion."); *id.* at 663 ("[W]e have never held that government's power to accommodate and recognize religion extends no further than the requirements of the Free Exercise Clause. To the contrary, '[t]he limits of permissible state accommodation to religion are by no means coextensive with the non-interference mandated by the Free Exercise Clause.'" (citation omitted)).

¹⁰³ One wishes, in other words, for an investigative process as compelled and comprehensive as that in an Agatha Christie novel. A brilliant detective is called in to solve a baffling murder that was committed on a moving train. Ten others were on board when the crime was done. The detective's investigation is beautifully boundaried both as to scope — the ten survivors are the only possible suspects — and as to process — he proceeds by interviewing each of the ten and assessing his or her potential liability. The train scenario is of course based on the famous novel, AGATHA CHRISTIE, MURDER ON THE ORIENT EXPRESS (1934).

¹⁰⁴ See *supra* text accompanying notes 50-62.

kind and degree of connection between the state's behavior and the feared harm to religious rights be in order for the Establishment Clause to prohibit the state from engaging in a challenged activity? When we know the answer to that, we will know the boundaries of the Court's vision of indirect coercion.

In law we employ two means of connecting a harmful event to the actions of an individual defendant. The question "Was this defendant responsible for this legally addressable harm?" really presents two issues for the law: (1) did the defendant *cause* the harm, and (2) did the defendant possess the requisite level of mens rea or intent to be held legally responsible for the harm? Thus, we might ask the question: "Do intent or causation place any discernable boundaries around the concept of indirect coercion?" If so, what are those boundaries?

Consider again the paradigm case: the robber, the alley, and the choice between "your money or your life." Now suppose you know that R, the "robber," is an eight-year-old child and holds no weapon. Suppose further that no other basis exists on which R might enforce a sanction against you. Finally, R makes no threat of a sanction; he simply walks up to you and says: "Give me your money, or not." If you decide to comply with this request, have you been coerced into doing so? Surely not. You have been presented with an unweighted choice between parting with your wallet or not doing so; if you decide to give R your money, your choice is freely, and completely, your own.

Now suppose it turns out that R is a local homeless child who is harmless and beloved in the town. Under the longstanding custom of the town, everyone gives R money on demand. Suppose that if you refuse to give R money and the town finds out about your refusal, some (perhaps even most) townspeople may think less of you and may even refuse to associate with you on the grounds that you are a Scrooge. Rather than face the wrath of the town, you decide to give R some money. Has R coerced you into this action? How would one go about deciding the answer to that question?

Assume, for the moment, that social pressure can be "coercive" in whatever sense we define "coercion"¹⁰⁵ and that in this situation you can

¹⁰⁵ Philosophers have argued that social sanctions can be at least as harmful as state-imposed ones. In his famous essay *On Liberty*, for example, the great libertarian philosopher John Stuart Mill made the following case:

Like other tyrannies, the tyranny of the majority was at first, and is still vulgarly, held in dread, chiefly as operating through the acts of the public authorities. But reflecting persons perceived that when society is itself the tyrant — society collectively, over the separate individuals who compose it — its means of

therefore make the credible claim, "I was coerced." But were you coerced *by R*? Our theory of coercion suggests that in order to assign responsibility to R, there must be some link between R's action (asking you for money) and the potential effect of that action (your social ostracism). That link, in the general theory, is supplied by the requirement of intent. So if R asks you for money, explaining that if you refuse he will punish you by calling down the wrath of the town, then R has weighted the choice by a sanction ("S"), although the sanction would not actually be imposed by R. This seems true whether or not R is the actual means by which the town finds out about your refusal. It matters not whether R goes to the mayor's office to report your stinginess or whether R purposely confronts you when you and R are standing two feet away from the Town Gossip, knowing that he or she will immediately relate your refusal to the appropriate authorities. In either case, where R knows what the potential consequences of refusal are and R knows that you know as well, R has weighted his request with coercive force.

Suppose, however, that R has not acted with a conscious purpose as above and that S is not a reasonably foreseeable result of R's request. Instead, it is merely possible that your refusal to comply with R's request will lead to your social detriment. For example, suppose that R has

tyrannizing are not restricted to the acts which it may do by the hands of its political functionaries. Society can and does execute its own mandates: and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practices a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself. Protection, therefore, against the tyranny of the magistrate is not enough; there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent the formation, of any individuality not in harmony with its ways, and compel all characters to fashion themselves upon the model of its own. There is a limit to the legitimate interference of collective opinion with individual independence; and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism.

John Stuart Mill, *On Liberty*, in THE BASIC WRITINGS OF JOHN STUART MILL: ON LIBERTY, THE SUBJECTION OF WOMEN, AND UTILITARIANISM 6-7 (2002).

The philosopher H.J. McCloskey brings the concept of social tyranny within our definition of "coercion" by noting that although social tyranny is not "intentional" in the sense that society as a whole has no conscious purpose of oppressing the individual, such pressure can be coercively and intentionally exploited by agents who do have the capacity for conscious purpose. See generally McCloskey, *supra* note 76.

accosted you in a deserted street and you know that R normally does not report those who refuse to give him money to the authorities. If you decide to give R money rather than face the mere possibility of social ostracism for not doing so, has R coerced you into giving him the money? Probably not. Thus, it would seem that the more remote the possibility of the sanction that you fear, the more the analysis shifts away from assigning responsibility to the choice-creator and toward re-assigning responsibility for your choice to you. But at what point does that responsibility shift? Must there be at least a 50% likelihood that S would result from your refusal to give R money? Greater than 50%? What if the likelihood is less than 50% but still substantial, say 30%? Furthermore, how would one go about assessing such statistical probabilities?

Consider a final possibility. Suppose that R did not intend to tell anyone about your refusal and that he did not actually know for certain that anyone would find out. Nevertheless, it was reasonably foreseeable that the town would find out and would, on that basis, subject you to ostracism. Knowing this, and to avoid that negative consequence, you decide to give R money. With respect to the sanction of social pressure on you, R in this case is both a but-for cause (a cause without which the sanction would not happen) and a proximate cause (in that the social pressure is a reasonably foreseeable result of R's request). R has intentionally created a situation in which you choose in a certain way because you fear a sanction and that sanction is a reasonably foreseeable consequence of the choice. Has R coerced you into giving him money? Peter Westen would insist that R has coerced you only when R has the conscious purpose of bending you to his will.¹⁰⁶ Under Westen's analysis, therefore, R would not be guilty of coercion in this scenario. But what about when the question is not one of interpersonal coercion but of coercion by the state? Is there a good reason to weaken the causal link between coercer and act when the state, and not an individual, is accused of being coercive?

3. Is State Coercion Different?

Here, it seems, we must move from the analytical realm into the realm of policy. The question then is not: "What state behavior is inherently coercive, and what is not?" Rather, the question becomes: "Is state coercion that is premised, not on intentionally inflicted sanctions against

¹⁰⁶ See *supra* text accompanying notes 83-85.

religious dissent, but on reasonably foreseeable sanctions, properly deemed 'coercive' from the standpoint of the Establishment Clause?"

At least three reasons support an answer of "yes." First, the proximate cause vision of indirect coercion fits well with the factual situations in *Lee* and *Santa Fe*. In both cases the Court rested its holding — that the state had indirectly coerced religious dissenters — not on any express state-imposed sanctions for religious dissent, but on the possibility that such dissent would be met by the negative sanction of social pressure from dissenting students' peers. In both cases the Court, in assigning the label "coercion" to the state's behavior, declared: "To recognize that the choice imposed by the State [between participation in the prayer and protest against it] constitutes an unacceptable constraint only acknowledges that *the government may no more use social pressure to enforce orthodoxy than it may use more direct means.*"¹⁰⁷ In neither case does the Court cite evidence that the state intentionally — with conscious purpose — deployed social pressure to enforce religious orthodoxy. Indeed, had the public schools in *Lee* and *Santa Fe* consciously encouraged students who favored the challenged prayers to ostracize those who opposed prayers, then these state actors would clearly be guilty of religious coercion. But such intentional coercion did not appear to motivate the Court's opinions in these cases or its statement that the state may not "use" social pressure. The best reading of that statement relies not on conscious purpose but on foreseeability. That is, where it is reasonably foreseeable by the state that significant negative social sanctions may follow a state-created choice between religion and nonreligion, the choice is "coercive" for the purposes of the Establishment Clause, even when the state has not expressly weighted it with state-enforced sanctions. Thus, although the public schools in *Lee* and *Santa Fe* may not have intentionally deployed social sanctions against dissenters who refused to say the challenged prayers, it was reasonably foreseeable by the schools that such sanctions would result from religious dissent and that such sanctions might have a particularly negative impact on impressionable adolescents in a school setting.¹⁰⁸ Reasonable

¹⁰⁷ *Lee v. Weisman*, 505 U.S. 577, 594 (1992) (emphasis added); see *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) ("For 'the government may no more use social pressure to enforce orthodoxy than it may use more direct means.'" (quoting *Lee*, 505 U.S. at 594)).

¹⁰⁸ See, e.g., *Lee*, 505 U.S. at 592 ("[O]ur decisions . . . recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there."); *id.* at 593-94 ("Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is

foreseeability constitutes a sufficient link between the state-authored choice and the feared sanction to merit the label "coercion."

A second reason that a forced choice premised on reasonably foreseeable sanctions is properly deemed "coercive" is that this reading makes sense from a policy standpoint, particularly in the context of state coercion. In other First Amendment contexts, perhaps most notably the protection of speech, the Court has made clear that it will take constitutional notice not only when the government has expressly banned a particular form of speech, but also when government action, although not clearly intended to suppress speech, has a "chilling" effect on the rights protected by the Free Speech Clause.¹⁰⁹ The conception of indirect coercion developed in *Lee* and *Santa Fe* erects a functionally equivalent buffer zone around the right of religious minorities not to be coerced by their government into majoritarian religious belief or behavior. Thus, in the context of the state's relationship to the citizenry under the Bill of Rights, the proximate cause-based vision of indirect coercion not only fits well with the Court's holdings but serves understandable, and justifiable, constitutional purposes.

Finally, the proximate cause conception renders the idea of indirect coercion more transparent to state actors making judgments about when they may and may not constitutionally present citizens with choices between religion and nonreligion. Just as the state may not "chill" speech by legislating in ways that suppress that important individual right, the state may not chill religious dissent by requiring citizens to make choices between religion and nonreligion when such choices will foreseeably be weighted by significant sanctions in favor of one side or the other. This interpretation of the Court's vision of indirect coercion should help state actors make better judgments about the potential chilling effect of their actions upon religious dissent. It could also give states a powerful incentive to study the problem and take affirmative steps to avoid the imposition of social sanctions on religious dissenters in schools. In the educational setting, for example, schools could train students in the value of religious tolerance, or punish students who violate the standard of tolerance, or both. Under the coercion test as

strongest in matters of social convention. To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means."); *see also Santa Fe*, 530 U.S. at 311-12 (citing *Lee* for same proposition).

¹⁰⁹ In that case, the Free Speech doctrines of vagueness and overbreadth apply. *See, e.g.*, DANIEL FARBER, *THE FIRST AMENDMENT* 49-53 (2d ed. 2002) (discussing Supreme Court's use of vagueness and overbreadth doctrines to address "chilling" effects).

developed here, such actions by a school could prevent students from putting social pressure on religious dissenters and thus forestall constitutional liability for state actions designed to recognize and accommodate religion.¹¹⁰

4. When Is Coercion Religious?

Under the coercion test thus developed, plaintiffs Michael Newdow¹¹¹ and Edward Myers¹¹² appear to have a strong argument that when the state mandates the recitation of the Pledge of Allegiance in public schools, it has indirectly coerced dissenting students, even if such students have the right not to say the Pledge and the state expressly acknowledges that it is not allowed to punish them for refusing. Under the test for indirect coercion, the question becomes: "Is it reasonably foreseeable by the school district that requiring children to say the Pledge in public school will have a coercive effect, consisting of social sanctions inflicted on dissenting students by their majoritarian peers as a result of their refusal?" If so, then the Pledge is indirectly coercive within the meaning of the test.

But coercive of *what*? As noted above,¹¹³ one important issue that arises with particular force in the Pledge cases is the question of when the state has coerced *religious* exercise — an action that is unconstitutional under the Establishment Clause — and when it has not. Assume we can agree, as *Lee* and *Santa Fe* suggest, that in the public school setting, social sanctions that are reasonably foreseeable results of state action are in some important sense "coercive." Nevertheless, such coercion violates the Establishment Clause only if it "establishes religion" — if it forces citizens to engage in religious behavior or to make choices on religious grounds that they would not otherwise be required

¹¹⁰ Cf. *Lee*, 505 U.S. at 644-45 (Scalia, J., dissenting) (averring that majority decision in case "is only a jurisprudential disaster and not a practical one. Given the odd basis for the Court's decision, invocations and benedictions will be able to be given at public school graduations next June, as they have for the past century and a half, so long as school authorities make clear that anyone who abstains from screaming in protest does not necessarily participate in the prayers. All that is seemingly needed is an announcement, or perhaps a written insertion at the beginning of the graduation program, to the effect that, while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so. That obvious fact recited, the graduates and their parents may proceed to thank God, as Americans have always done, for the blessings He has generously bestowed on them and on their county.").

¹¹¹ *Newdow v. Cong. of the U.S. (Newdow III)*, 383 F. Supp. 2d 1229 (E.D. Cal. 2005).

¹¹² *Myers v. Loudon County Pub. Sch.*, 418 F.3d 395 (4th Cir. 2005).

¹¹³ See *supra* text accompanying notes 71-73.

to make. In the case of prayers such as those involved in *Lee* and *Santa Fe*, this issue does not arise because all parties acknowledge that the challenged state-sponsored event is religious in nature. In the case of the Pledge, however, how should we determine whether something that all seem to admit is primarily a patriotic exercise nonetheless contains enough of a religious component to go beyond mere "acknowledgement" of religious and into "establishment" of it?

In the end, this may well be the issue that drives any Supreme Court decision on the merits of an Establishment Clause challenge to the Pledge. Yet, the answer is not at all clear, and Court precedent presents few attractive options. Perhaps the easiest option would be to once again exhume the much-dishonored *Lemon* test and, in particular, its first prong, commanding that a challenged state action must have a secular purpose in order to survive Establishment Clause scrutiny. Under that test, which the Court most recently invoked in the 2005 case of *McCreary County v. ACLU*,¹¹⁴ the Pledge, unarguably enacted with a patriotic purpose and for more than a decade containing no religious language at all, may well survive Establishment Clause scrutiny. But the vagueness and manipulability of this prong, not to mention of the *Lemon* test as a whole, has attracted justified condemnation both from within and from outside the Court.¹¹⁵ The Court would only add fuel to the fire by converting the real question in the Pledge cases — when a state action or declaration becomes "religious" under the Clause — into the quite different question of what the government's intent was when it enacted the challenged measure.

There is a core problem with the logic in the *Lemon* approach, one that Justice O'Connor attempted to solve by reframing the first two prongs of *Lemon* into the endorsement test.¹¹⁶ In answering the question of whether a challenged state action has a "secular purpose" under *Lemon*, the Court has repeatedly conflated two quite separate questions: that of the legislature's *intent* in approving the challenged measure and that of the probable *effect* of the challenged measure on, in the words of the endorsement test, the "reasonable observer."¹¹⁷ That this has caused confusion is evident from one of the Ninth Circuit opinions in *Newdow v.*

¹¹⁴ 125 S. Ct. 2722, 2732-37 (2005) (stating that under *Lemon*, state's manifest objective may be dispositive of constitutional inquiry).

¹¹⁵ See *supra* text accompanying notes 35-37.

¹¹⁶ See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 690-94 (1984).

¹¹⁷ See, e.g., *McCreary County*, 125 S. Ct. at 2746-47 (O'Connor, J., concurring); *id.* at 2734-36 (conflating purpose prong of *Lemon* with probable effect on endorsement test's reasonable observer).

U.S. Congress (Newdow I),¹¹⁸ in which the court declared: "The coercive effect of the Act [challenged by plaintiff Newdow] is apparent from its context and legislative history, which indicate that the Act was designed to result in the daily recitation of the words 'under God' in school classrooms."¹¹⁹ The court thus inferred the *effect* of the challenged statute from its *purpose*, its "design." Importantly, however, the question of the legislature's purpose is distinct from the question of whether the reasonable observer is likely to see the state-enacted measure as religious, or nonreligious, in nature.

The ad hoc nature of the inquiry into purpose has appeared in other ways as well. In one of the 2005 "Ten Commandments" cases, *McCreary County*, the Court affirmed a lower court judgment that a display of the Commandments in two Kentucky county courthouses had no valid secular purpose.¹²⁰ The Court found this to be the case despite the simultaneous display of "the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice."¹²¹ By contrast, in another case, *Van Orden v. Perry*,¹²² the Court affirmed rulings by the lower federal courts that a monument displaying the Ten Commandments and placed on the grounds of the Texas state capitol did, in fact, evince a valid secular purpose.¹²³ The Court found this valid secular purpose in the fact that the monument was one of seventeen monuments and twenty-one historical markers "commemorating the 'people, ideals, and events that compose Texan identity.'"¹²⁴ Of particular relevance to the Court's finding of invalidity in *McCreary County* was the Court's rejection of the counties' position that their purpose in erecting the Ten Commandments display should be assessed not by looking at the entire history of the display, which went through three iterations during the litigation, but by viewing the latest version of the display as surrounded by other, more secular documents attesting to the "Foundations of American Law and Government."¹²⁵ On the

¹¹⁸ 292 F.3d 597 (9th Cir. 2002), *amended by* 328 F.3d 466 (9th Cir. 2003) (en banc), *rev'd*, 542 U.S. 1 (2004).

¹¹⁹ *Id.* at 609.

¹²⁰ *McCreary County*, 125 S. Ct. at 2745.

¹²¹ *Id.* at 2731.

¹²² 125 S. Ct. 2854 (2005).

¹²³ *Id.* at 2864.

¹²⁴ *Id.* at 2858.

¹²⁵ *McCreary County*, 125 S. Ct. at 2736-37.

contrary, declared the Supreme Court: "The Counties' position just bucks common sense: reasonable observers have reasonable memories, and our precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.'"¹²⁶ This reasoning suggests that the Court will not look favorably on any attempt by plaintiffs to depict the Pledge itself as primarily religious in nature, on the ground that Congress's action in adding the words "under God" to the Pledge in 1954 must, on its face, have been motivated by a primarily religious purpose. Instead, the reasoning in *McCreary County* suggests that the Court would consider the addition of those words, and the purpose behind them, as only one fact in the history of the Pledge as a whole. Indeed, no one argues that the enactment of the Pledge was not motivated at all by a valid secular purpose. The Court may thus have signaled in *McCreary County* that, to the extent it relies on the secular purpose prong of *Lemon*, and of the endorsement test, neither the Pledge of Allegiance nor state policies mandating its recitation in public school violate the Establishment Clause.

A second, and related, option for the Supreme Court would be to deploy the fig leaf of "ceremonial deism," which the Court has invoked in the past in order to defend its insistence that *some* state-backed mentions of religion — those that have presumably been bled of primary religious significance by time and repeated usage — are allowed under the Clause.¹²⁷ As other scholars have pointed out, however, the government may no more require citizens to attend a ten-second, or even two-second, religious exercise than it may require them to attend services at a certain church every Sunday.¹²⁸ The particularly religious significance of the words "under God" is apparent not only in the fact that Congress specifically added those words to the Pledge twelve years after first enacting it without religious references, but also on the face of the Pledge, which declares the speaker's affirmative belief that the "United States of America" is "one nation, under God."¹²⁹ The question

¹²⁶ *Id.* at 2737.

¹²⁷ See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow (Newdow II)*, 542 U.S. 1, 36-37 (2004) (O'Connor, J., concurring) ("This case requires us to determine whether the appearance of the phrase 'under God' in the Pledge of Allegiance constitutes an instance of such ceremonial deism. Although it is a close question, I conclude that it does . . ."); *Marsh v. Chambers*, 463 U.S. 783 (1983) (stating that Nebraska's practice of hiring chaplain to open sessions of state legislature does not violate Establishment Clause).

¹²⁸ See, e.g., Paulsen, *supra* note 8, at 829 ("The brevity of the religious element does not distinguish it. Surely, the state could not compel attendance at a ten-minute Mass or a five-minute sermon.").

¹²⁹ In its ruling in *Myers v. Loudon County Public Schools*, the Fourth Circuit, which

presented is not whether the legislature intended the Pledge to have religious significance or whether the Pledge has been around long enough that its apparent religious significance is no longer remembered or taken seriously. The question for the Court is whether state-mandated use of the words “under God” compels a declaration of fidelity to religion and thus violates the command of the Establishment Clause that the government remain neutral among the different religions and between religion and nonreligion.

In *Myers v. Loudon County Public Schools*,¹³⁰ in which the Fourth Circuit upheld the Pledge against an Establishment Clause challenge, the majority directly addressed this issue, declaring that “[t]he inclusion of these two words [‘under God’] . . . does not alter the *nature* of the Pledge as a patriotic activity. The Pledge is a statement of loyalty to the flag of the United States and the Republic for which it stands.”¹³¹ By contrast, “[t]he prayers ruled unconstitutional in *Lee*, *Schempp*, and *Engel*, . . . were viewed by the Court as distinctly religious exercises,” and “[t]he indirect coercion analysis discussed in [those prior cases] simply is not relevant in cases, like this one, challenging non-religious activities.”¹³² Thus, the Fourth Circuit concluded, “[e]ven assuming that the recitation of the Pledge contains a risk of indirect coercion, the indirect coercion is not threatening to establish religion, but patriotism.”¹³³ The Supreme Court, should it choose to address the merits of an Establishment Clause challenge to the Pledge, should accept the chance to address this core issue.

III. RECONSTRUCTING THE ESTABLISHMENT CLAUSE

A. *The Role of the Coercion Test*

To summarize, this Essay has sought to explore the potential of the coercion test to bring a measure of clarity to the Court’s fog-afflicted Establishment Clause jurisprudence. According to the Court’s vision of coercion under the Clause, the state has *directly* coerced a citizen when it

ultimately upheld the Pledge against Establishment Clause challenge, nonetheless acknowledged, “[u]ndoubtedly, the Pledge contains a religious phrase, and it is demeaning to persons of any faith to assert that the words ‘under God’ contain no religious significance.” *Myers v. Loudon County Pub. Sch.*, 418 F.3d 395, 407 (4th Cir. 2005).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 408.

(1) intentionally (2) forces him or her to make a choice between religion and nonreligion (or between one religion and another) and (3) weights that choice with an express negative sanction (such as a legally imposed fine or other punishment) for choosing in a way that the state does not approve. Such coercion "by force of law and threat of penalty"¹³⁴ is involved when, for example: the state requires citizens to attend a state-approved church; the law mandates that only state-endorsed clergy may perform religious sacraments; or religious dissenters face any state-authored penalty that is expressly designed to promote either a particular religious sect or to promote religion as a whole.¹³⁵ Under the Court's conception of *indirect* coercion, a state-mandated choice between religion and nonreligion may be unconstitutionally coercive even though the state has expressed no preference as to how the choice should be made, it has not intentionally weighted the choice with a legal penalty, and the source of any negative sanction is not the state but the behavior of private citizens who may seek to pressure or ostracize a religious dissenter into complying with the majority religious view. In such cases, however, according to the best reading of the Court's coercion test as applied in *Lee v. Weisman*¹³⁶ and *Santa Fe Independent School District v. Doe*,¹³⁷ the state has behaved coercively only when the negative social sanction is a reasonably foreseeable consequence of requiring religious dissenters to make the choice in question. In *Lee* and *Santa Fe*, the potential for social ostracism of dissenters was both foreseeable and substantial, since both cases occurred in school settings and involved the potentially great influence of social pressure on vulnerable teenaged students.¹³⁸

Read in this fashion, the coercion test may point the way toward a restructuring of the Court's Establishment Clause jurisprudence as a whole. The function of the coercion test, as interpreted in this Essay, is to deal with cases in which a state-mandated choice could either directly result in state-authored penalties directed at religious minorities, or foreseeably result in penalties inflicted on such minorities by nonstate

¹³⁴ *Elk Grove Unified Sch. Dist. v. Newdow* (*Newdow II*), 542 U.S. 1, 49 (2004) (Thomas, J., concurring) (quoting *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting)); *Lee*, 505 U.S. at 640 (Scalia, J., dissenting).

¹³⁵ See cases cited *supra* note 134. This is, of course, the vision of coercion articulated by Justice Scalia in *Lee*, 505 U.S. at 640-41.

¹³⁶ *Lee*, 505 U.S. 577.

¹³⁷ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

¹³⁸ See *Lee*, 505 U.S. at 592 ("[O]ur decisions . . . recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there.").

sources. But is the coercion test an all-inclusive method of evaluating the constitutionality of state action under the Clause? Introducing the test in his opinion in *County of Allegheny v. ACLU*,¹³⁹ Justice Anthony Kennedy suggested that coercion might serve as the sole method of evaluating state action under the Establishment Clause, particularly when the concept of *indirect* coercion is folded in.¹⁴⁰ Justice Kennedy acknowledged that “some of our recent cases reject the view that coercion is the sole touchstone of an Establishment Clause violation.”¹⁴¹ These cases have held that proof of government coercion is not required to demonstrate an Establishment Clause violation.¹⁴² But Justice Kennedy argued that this is true only if “coercion” means “*direct* coercion in the classic sense of an establishment of religion that the Framers knew.”¹⁴³ That is, proof of direct coercion is not a necessary component of a successful Establishment Clause claim. Unconstitutional coercion, however, may also be indirect, and Justice Kennedy seemed to argue here that once the idea of indirect coercion is incorporated, coercion does become the “touchstone” of an Establishment Clause violation.¹⁴⁴ “Absent coercion,” he concluded, “the risk of infringement of religious liberty by passive or symbolic accommodation is minimal.”¹⁴⁵ Justice Kennedy appeared to argue that a showing of either direct or indirect state coercion should be both necessary and sufficient to prove an Establishment Clause violation.¹⁴⁶

However, the coercion test fails to deal with another category of state actions — those captured under the rubric of state “endorsement,” where no coercion of any kind is involved. Under Justice O’Connor’s endorsement test, even where the state has concededly not coerced religious behavior, either directly or indirectly, state action may nevertheless violate the Clause if it creates the impression, in the mind of the reasonable observer, that the state has endorsed religion over nonreligion, or vice versa.

¹³⁹ 492 U.S. 573 (1989).

¹⁴⁰ *Id.* at 660-62.

¹⁴¹ *Id.* at 660.

¹⁴² *See id.* at 597 n.47.

¹⁴³ *Id.* at 660-61.

¹⁴⁴ *See id.* at 660.

¹⁴⁵ *Id.* at 662.

¹⁴⁶ *See, e.g.,* Paulsen, *supra* note 8, at 823 (“It is probable . . . that Justice Kennedy continues to believe that his *Allegheny* formulation is the correct one — not only a doctrinal minimum but a maximum as well — and will adhere to it in future cases.”).

B. *The Role of the Endorsement Test*

The intuition that government endorsement, even where not coercive in any defensible sense, can violate the Establishment Clause is one that deserves separate recognition by the Court. Two examples demonstrate this. First, consider the Court's method of analysis in another Establishment Clause context — that of religious displays on public property. In the most recent iterations of this situation, plaintiffs challenged privately donated displays of the Ten Commandments at two county courthouses, in *McCreary County v. ACLU*,¹⁴⁷ and on the grounds of the Texas state legislature, in *Van Orden v. Perry*,¹⁴⁸ claiming that the displays violated the Establishment Clause. The Supreme Court reached contrary constitutional holdings in the cases, but assumed that the correct tests to apply were the *Lemon*, or the endorsement tests, or both. Neither holding relied upon the coercion test, which makes perfect sense because the state's behavior in these public display cases was clearly not coercive, either directly or indirectly.

One could, perhaps, interpret the state in *McCreary County* and *Perry* as having presented citizens with a forced choice. The argument might be that the presence of the Ten Commandments in a county courthouse forces a choice between going there and being exposed to the Ten Commandments and not going in order to avoid such exposure. However, the key difference between the state actions in *McCreary County* and *Perry* and the state's behavior in *Lee* and *Santa Fe* is that in the school prayer cases the Court feared a potentially powerful negative sanction — social pressure from the peers of religious dissenters — resulting from either the failure to attend or, having chosen to attend, the failure to say the challenged prayer. In the Ten Commandments context, no such sanction looms. In choosing whether or not to visit the courthouse, a reasonable person would not fear that her choice not to go, or to avoid reading the Ten Commandments display if she did choose to go, would bring social condemnation or ostracism.¹⁴⁹ At the very least,

¹⁴⁷ 125 S. Ct. 2722, 2727 (2005).

¹⁴⁸ 125 S. Ct. 2854, 2858 (2005).

¹⁴⁹ Of course, some people are compelled to visit the courthouse or the legislative grounds, and as to them, the issue of coercion may be a closer question. Still, would it really be credible to argue that being required to *walk past* a display of the Ten Commandments on the grounds of your state legislature or your local courthouse constitutes government coercion under the Establishment Clause? Or is this situation more analogous to that of *Cohen v. California*, 403 U.S. 15 (1971), where, in the context of the Free Speech Clause, the Court responded to the argument that the defendant, by wearing the message "Fuck the Draft" on his jacket into a public courthouse, had forced that message upon other listeners. *Id.* at 16. The Court's response was that "[t]hose in the Los Angeles

the possibility of such ostracism was much more distant in the Ten Commandments cases than it was in *Lee* and *Santa Fe*. To the extent that there is an Establishment Clause problem with the Ten Commandments cases, it lies not in the presence of state coercion but, as the lower courts in *McCreary County* and *Perry* recognized, in the possibility that the displays demonstrated state favoritism — endorsement — of religion over nonreligion.

As a second example of why endorsement without coercion deserves scrutiny, consider a variation on the facts of *Lee* and *Santa Fe*. Suppose that those cases had not involved negative sanctions (i.e., the threat of social ostracism) on students who refused to say the prayer at football games or the graduation ceremony. Suppose, instead, that the schools had offered the best seats at the game and the graduation to students who agreed beforehand to say the challenged prayer. Undoubtedly the Court would have no problem finding that such offers violate the Establishment Clause. But would it do so on grounds that such a policy is *coercive*? Surely not. Under the conception of coercion developed here, the state action in that case would not be unconstitutionally coercive, either in a direct or an indirect sense. Instead, one suspects, the Court would strike down the policy on endorsement grounds, on the basis that, while not coercive, the challenged state action would signal to a reasonable observer that the state was partial toward religion over nonreligion. An interpretation of coercion as encompassing state-backed threats of harm and not state-backed offers of benefits fits well with Supreme Court precedent. According to that precedent, negative sanctions against religious dissenters have been analyzed under the coercion test, while the state's affirmative promotion of particular religious beliefs or behavior has been scrutinized under the endorsement test, with its underlying mistrust of state action that causes some citizens to feel excluded from the political community on religious grounds.¹⁵⁰

courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Id.* at 21. Religious dissenters can of course do the same thing, with impunity, when passing by the Ten Commandments. Any claim of government coercion must be greatly weakened by that fact.

¹⁵⁰ See, e.g., *Allegheny*, 492 U.S. at 593; *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."). In *Allegheny*, the court stated:

[T]he word "endorsement" . . . derives its meaning from other words that this Court has found useful over the years in interpreting the Establishment Clause. Thus, it has been noted that the prohibition against government endorsement of

Thus, an offer of a benefit for performing a religious activity seems to be a prime candidate for consideration under the Endorsement test. This teaches us something very important about the Court's solution to the old problem of creating a distinction between threats and offers that is strong enough to support a clear and well-contained definition of "coercion."¹⁵¹ Under the Court's actual practice, those cases which involve the deliberate infliction of unwanted sanctions on religious dissenters have been scrutinized under the coercion test, while offers of benefits to those who engage in state-preferred religious activity have been analyzed under the endorsement test. There is nothing necessary

religion "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *avored* or *preferred*." [Wallace v. Jaffree, 472 U.S. 38, 70 (1985)] (O'Connor, [J.,] concurring) (emphasis added). Accord, [Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 27-28 (1989)] (separate opinion concurring in judgment) (reaffirming that "government may not favor religious belief over disbelief" or adopt a "preference for the dissemination of religious ideas"); [Edwards v. Aguillard, 482 U.S. 578, 593 (1987)] ("preference" for particular religious beliefs constitutes an endorsement of religion); [Abington Sch. Dist. v. Schempp, 374 U.S. 203, 305 (1963)] (Goldberg, J., concurring) ("The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects or between religion and nonreligion"). Moreover, the term "endorsement" is closely linked to the term "promotion," [Lynch, 465 U.S. at 691] (O'Connor, J., concurring), and this Court long since has held that government "may not . . . promote one religion or religious theory against another or even against the militant opposite," [Epperson v. Arkansas, 393 U.S. 97, 104 (1968)]. See also [Wallace, 472 U.S. at 59-60] (using the concepts of endorsement, promotion, and favoritism interchangeably.)

Allegheny, 492 U.S. at 593 (citations modified from original).

¹⁵¹ A good deal of scholarly ink has been spilled on the question of whether a coercive restraint must involve a threat or a burden, or whether offers can also be coercive. See, e.g., Westen, *supra* note 83, at 570 ("Everyone agrees that not all constraints or promises of constraint are coercive. They disagree, however, about what distinguishes coercive constraints from noncoercive constraints. Some distinguish between 'threats,' 'penalties,' and 'burdens,' on the one hand, and 'offers,' 'rewards,' and 'benefits,' on the other; the former are coercive, they say, while the latter are not. Others reject the distinction, arguing that offers, rewards, and benefits can indeed be coercive."). The problem, some have argued, is the weakness of the analytical distinction between threats and offers; threats can easily be recast as offers and vice versa. Take our classic "your money or your life" case. Intuition tells us that the robber's demand is a coercive threat, and so it is. But it could easily be recast as a genuine offer: "I will let you live if you agree to give me your money." Similarly, an "offer" by B to pay A \$1000 if A agrees to speak to B's garden club can be reframed as a "threat" to deprive A of the money if A does *not* speak to the club. But see *id.* at 569-87 (arguing that debate over whether offers and benefits can be coercive is "semantic," and proposing different set of baselines against which to measure choices as coercive or noncoercive); *id.* at 589 ("Coercion can thus be defined as a constraint [fulfilling certain other conditions], . . . and where Y leaves X worse off either than he otherwise expects to be or than he ought to be for refusing to do X[1]'s bidding.").

about this division; one could, perhaps, shoehorn some cases involving offers into a valid conception of coercion for purposes of the Establishment Clause. However, confining the meaning of “coercion” to those cases involving the threat of a sanction matches well with our common intuitions about what “coercion” means, and thus forms the basis for an intelligible standard that has predictive value.

The endorsement test, of course, has met with a good deal of criticism both on and off the Court¹⁵² and has never consistently won the allegiance of any justice other than its author, Justice O’Connor. But the core intuition of the test — that the state may not make religion relevant to a citizen’s standing in the political community, even by measures that fall short of being affirmatively punitive — seems both distinct from the penalty-based prohibitions of the coercion test and also quite compatible with that test in the sense that the tests deal with two distinguishable types of state action both of which are, and ought to be, unconstitutional under the Establishment Clause.

C. *The Tests in Action*

This suggests a two-step structure to the analysis of state action under the Establishment Clause.¹⁵³ In a first, threshold inquiry, the Court asks whether the challenged state action is either directly or indirectly coercive under the coercion test as conceptualized above. If the answer to that initial inquiry is “yes,” then the state’s action is unconstitutional and no further inquiry is necessary.¹⁵⁴ If the answer to the coercion question is “no,” then the Court proceeds to a second level of inquiry, under which it asks whether the challenged state action, although concededly not coercive, violates the endorsement test by creating political hierarchies based on religion. Again, the endorsement inquiry is substantively distinct from the coercion one because the court does not ask whether forced choices exist or whether foreseeable penalties have weighted those choices. Instead, the Court asks how a reasonable

¹⁵² See, e.g., *supra* text accompanying notes 42–43.

¹⁵³ Compare *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (stating that coercion test constitutes threshold inquiry into Establishment Clause violation), with *Newdow v. U.S. Cong. (Newdow I)*, 328 F.3d 466, 487 (9th Cir. 2003) (en banc), *rev’d*, 542 U.S. 1 (2004) (“We are free to apply any or all of the three tests [for an Establishment Clause violation], and to invalidate any measure that fails any one of them. Because we conclude that the school district policy impermissibly coerces a religious act and accordingly hold the policy unconstitutional, we need not consider whether the policy fails the endorsement test or the *Lemon* test as well.”).

¹⁵⁴ See, e.g., *Lee*, 505 U.S. at 587 (“[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.”).

observer would view this concededly noncoercive state action. Would a reasonable observer conclude that the state, by engaging in the challenged action, has demonstrated partiality either toward or against religion, or toward or against a particular religion? If so, the action is unconstitutional; if not, it is not.

Do the coercion and endorsement tests, working together, articulate a complete theory of the Establishment Clause? That is, are there cases in which the Establishment Clause ought to prohibit state action although it is not coercive and does not create, in the mind of the reasonable observer, a perception that the state has created a political hierarchy based on religion? In thinking about this question one must consider a third line of cases — those involving funding for religious schools — that the Court has decided under the Clause.¹⁵⁵ The most recent example of such a case is *Zelman v. Simmons-Harris*.¹⁵⁶ In that case the Supreme Court upheld a school voucher program in Cleveland against the challenge that the program violated the Establishment Clause because 96% of participating students used their vouchers to attend religious schools. En route to this holding, the Court instructed that “[t]he Establishment Clause question is whether Ohio is *coercing* parents into sending their children to religious schools. . . .”¹⁵⁷ The Court decided that Cleveland’s voucher program did not involve such coercion, that it was instead an instance where “true private choice” had produced the challenged result, and that it therefore did not violate the Establishment Clause.¹⁵⁸ No one claimed that the state of Ohio had expressly required parents to send their children to religious schools; such an express requirement would clearly violate the Establishment Clause.¹⁵⁹ But the background reality of Ohio’s compulsory school attendance law¹⁶⁰ raised

¹⁵⁵ See, e.g., John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 281 (2001) (“These two propositions — that public aid should not go to religious schools, and that public schools should not be religious — make up the separationist position of the modern Establishment Clause.”).

¹⁵⁶ 536 U.S. 639 (2002).

¹⁵⁷ *Id.* at 655-56 (emphasis added).

¹⁵⁸ *Id.* at 653 (“We believe that the program challenged here is a program of true private choice . . . and thus constitutional.”).

¹⁵⁹ Such a requirement would be an example of direct coercion, which no one doubts is unconstitutional. See, e.g., *Lee*, 505 U.S. at 640 (Scalia, J., dissenting) (“The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.”).

¹⁶⁰ OHIO REV. CODE ANN. § 3321.04 (West 2002) (“Every parent of any child of compulsory school age . . . must send such child to a school or a special education program that conforms to the minimum standards prescribed by the state board of education, for the full time the school or program attended is in session . . .”).

the problem of coercion in another guise. If, as a practical matter, parents could comply with the compulsory attendance law only by sending their children to religious schools, then direct coercion was clearly involved because the choice not to educate one's children in religious schools would automatically subject parents to the legally enforced penalties for failure to comply with the compulsory attendance law. In deciding the question of whether coercion existed, both the majority opinion and Justice O'Connor's concurrence focused on the availability of nonreligious school choices. The Court held that the presence of such choices made the state's voucher program noncoercive because it allowed parents to choose secular schooling for their children while also complying with the state's compulsory attendance law.¹⁶¹

Zelman, in other words, involved a claim of direct coercion, and the Court put the issue of coercion at the center of its decision in the case.¹⁶² The mere fact, in *Zelman*, that taxpayer money, including the money of taxpayers who are not religious, went to support religious schools was not enough to violate the Establishment Clause. Only if the parents who were given control of that money via the voucher program were coerced into choosing a religious over a secular education would the program be liable for a constitutional violation. The operation of the coercion test

¹⁶¹ *Zelman*, 536 U.S. at 655-56 ("There . . . is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children. Cleveland schoolchildren enjoy a range of educational choices The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school."); *id.* at 672 (O'Connor, J., concurring) ("I find the Court's answer to the question whether parents of students eligible for vouchers have a genuine choice between religious and nonreligious schools persuasive. In looking at the voucher program, all the choices available to potential beneficiaries of the government program should be considered.").

¹⁶² In his concurrence in *Elk Grove Unified School District v. Newdow* (*Newdow II*), Justice Clarence Thomas wrote that, under the "coercion test" as articulated in *Lee*, the state's behavior in *Newdow II* would be coercive. 542 U.S. 1, 45-46 (2004). According to Thomas, "[a]dherence to *Lee* would require us to strike down the Pledge policy, which, in most respects, poses more serious difficulties than the prayer at issue in *Lee* [A]lthough students may feel 'peer pressure' to attend their graduations, the pressure here is far less subtle: Students are actually compelled . . . to attend school." *Id.* at 46-47 (citation omitted). Of course, under *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), students are free not to be present, or not to participate in saying, the Pledge of Allegiance. *Id.* at 642. But under the conception of coercion articulated here, it may well be reasonably foreseeable that such refusal or nonattendance could result in social pressure on dissenting students. If so, then the type of policy involved in *Newdow II* could be coercive, unless the school took affirmative action to discourage and prevent any social ostracism of religious dissenters.

was the core issue in *Zelman* and accounted for the Court's decision in that case.

CONCLUSION

It would seem that the conjunctive application of the coercion and endorsement tests could offer a basis for analyzing Establishment Clause issues that is both coherent and intelligible to the state actors whose behavior the Clause constrains. The Court's vision of coercion has wide and defensible application to a broad, but appropriately bounded, range of situations in which the state requires citizens to choose between religious and nonreligious behavior. Charitably interpreted, the coercion test offers a valid basis on which the Court can deal with both the methodological discordance and the specific doctrinal confusions that continue to haunt its jurisprudence under the Establishment Clause.