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Abner S. Greene
Fordham University School of Law

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Cover Page Footnote

Associate Professor, Fordham University School of Law. B.A. Yale University, 1982; J.D. University of Michigan, 1986.

I am grateful for helpful comments from Martin Flaherty, Jim Fleming, Tracy Higgins, Bill Treanor, and Ben Zipursky. For comments on a prior draft, I thank participants in a workshop at the University of Chicago Law School.

ARTICLES

THE PLEDGE OF ALLEGIANCE PROBLEM

*Abner S. Greene**

INTRODUCTION

IT is probably unconstitutional for teachers to lead the pledge of allegiance to the United States flag in public school classrooms, even if students have the option not to participate. This somewhat startling claim does not follow from any grand theory of liberalism, has nothing to do with the words "one nation under God," and does not stem from an elaborate or controversial reading of Supreme Court precedent. Rather, the assertion that the pledge of allegiance may not be led by teachers in public schools follows neatly from the Court's own writings. Yet, no court has ever held that teachers may not lead the pledge of allegiance in public schools, and the only court to address the issue held otherwise. This Article sets forth the argument that the pledge of allegiance is unconstitutional when led by teachers in public schools,[1] even with an opt-out provision, and then suggests some ways to revise constitutional doctrine to avoid this result.

Here are the basic steps to the conclusion that teachers may not lead the pledge of allegiance in public schools: In *Lee v. Weisman*,[2] the Court invalidated government-sponsored prayer at a public secondary school graduation ceremony. The majority opinion, authored by Justice Kennedy, turned on a finding of psychological coercion. Although no student was legally compelled to participate in the prayer, Justice Kennedy wrote that the psychological pressure on 14-year-olds was the constitutional equivalent of legal coercion.[3] In *West Virginia State Board of Education v. Barnette*,[4] the Court held that public schools may not compel students to participate in the pledge of allegiance. *Barnette* was the first in a series of cases addressing the right not to speak, which prohibits the government from compelling expression in which the speaker does not wish to engage. *Barnette*

* Associate Professor, Fordham University School of Law. B.A. Yale University, 1982; J.D. University of Michigan, 1986. I am grateful for helpful comments from Martin Flaherty, Jim Fleming, Tracy Higgins, Bill Treanor, and Ben Zipursky. For comments on a prior draft, I thank participants in a workshop at the University of Chicago Law School.

1. I refer throughout to teacher-led prayer to distinguish student prayer not involving governmental personnel, which is presumptively protected under the Free Speech Clause. *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (holding that denying religious groups access to school premises violated the Free Speech Clause).

2. 505 U.S. 577 (1992).

3. *Id.* at 593-94.

4. 319 U.S. 624 (1943).

involved legal coercion; West Virginia schools had the authority to expel students for failing to participate in the pledge of allegiance. But *Weisman* holds that when the government sponsors prayer in public schools, psychological pressure counts as coercion. There's no reason to believe the psychological pressure to recite the pledge of allegiance is any weaker than the psychological pressure to join in prayer. Thus, combining *Weisman* and *Barnette*, we reach the conclusion that the psychological pressure on students to join in a governmentally sponsored pledge of allegiance violates the right not to speak of students who would prefer not to recite the pledge.

Dissenting in *Weisman*, Justice Scalia made this precise point. He wrote:

> [T]he Court itself has not given careful consideration to its test of psychological coercion. For if it had, how could it observe, with no hint of concern or disapproval, that students stood for the Pledge of Allegiance, which immediately preceded Rabbi Gutterman's invocation? The government can, of course, no more coerce political orthodoxy than religious orthodoxy (citing *Barnette*). . . . 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 . . . ? In *Barnette* we held that a public-school student could not be compelled to *recite* the Pledge; we did not even hint that she could not be compelled to observe respectful silence—indeed, even to *stand* in respectful silence—when those who wished to recite it did so.[5]

The Court had no response to this point, and has not since addressed it. Only one lower court has addressed the issue. In *Sherman v. Community Consolidated School District*,[6] Judge Easterbrook wrote for a Seventh Circuit panel that even after *Weisman*, teachers may constitutionally lead the pledge of allegiance in public schools. Judge Easterbrook agreed that the "analogy" to *Weisman* in the pledge of allegiance setting is "sound," but explained that "[a]s an understanding of the first amendment it is defective."[7] He continued:

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5. 505 U.S. at 638-39 (citations omitted). I have deleted the following sentence (which appears after the citation to *Barnette*): "Moreover, since 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." *Id.* at 639. I do not take Justice Scalia to be arguing merely that the words "under God" in the Pledge render a teacher-led Pledge in the public schools a violation of the Establishment Clause. I understand the paragraph quoted in the text to make the additional point that adding together Justice Kennedy's psychological coercion analysis and the holding in *Barnette*, public school teachers would be disabled from leading the Pledge in class. That is why Justice Scalia states that government may "no more coerce political orthodoxy than religious orthodoxy." *Id.*

6. 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2439 (1993).

7. *Id.* at 444.

> The religion clauses of the first amendment do not establish general rules about speech or schools; they call for religion to be treated differently.... Patriotism is an effort by the state to promote its own survival, and along the way to teach those virtues that *justify* its survival. Public schools help to transmit those virtues and values. Separation of church from state does not imply separation of state from state. Schools are entitled to hold their causes and values out as worthy subjects of approval and adoption, to persuade even though they cannot compel, and even though those who resist persuasion may feel at odds with those who embrace the values they are taught.[8]

He then added that "[a]n extension of the school-prayer cases could not stop with the Pledge of Allegiance. It would extend to the books, essays, tests, and discussions in every classroom."[9] Thus, concluded Judge Easterbrook, "All that remains is *Barnette* itself, and so long as the school does not compel pupils to espouse the content of the Pledge as their own belief, it may carry on with patriotic exercises."[10]

Judge Easterbrook's reasoning is flawed. His argument divides into two parts. He first claims that the Establishment Clause makes the prayer case different from the pledge of allegiance case. It is true that the Establishment Clause bars governmental involvement in promoting religion and that neither the Establishment Clause nor any other part of the Constitution bars governmental involvement in promoting patriotism (putting aside for the moment the question of means). For example, government may officially endorse nonreligious ends, such as patriotism, by flying the flag, or the hazards of smoking, by posting warning signs, but may not officially endorse a particular religion through placing that religion's symbols on government property.[11] Furthermore, government may enact legislation with a predominantly secular justification, but may not enact legislation with a predominantly religious justification.[12] Additionally, government may fund the teaching of secular doctrine, but may not fund the teaching of religious doctrine.[13] As I discuss below in part III.A, had the *Weisman* Court relied solely or even primarily on the structural argument that the Establishment Clause bars governmental promotion of religion,

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8. *Id.*
9. *Id.*
10. 980 F.2d at 445.
11. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 612-13 (1989) (holding that display of a crèche on government property endorsed a patently religious message and thus violated the Establishment Clause).
12. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 597 (1987) (holding that a law prohibiting the teaching of evolution solely justified on religious grounds violates the First Amendment); Epperson v. Arkansas, 393 U.S. 97, 107-09 (1968) (holding that a statute forbidding the teaching of evolution unaccompanied by instruction in creation science violates the Establishment Clause because it lacks a clear secular purpose).
13. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 619 (1971) (discussing the concern that public funds for secular education in religious schools will in fact be used to "inculcate religion").

then Judge Easterbrook would be correct in asserting that teacher-led prayer in public schools is unconstitutional whereas a teacher-led pledge of allegiance in public schools is not. But the majority opinion in *Weisman* does not rely primarily on the structural Establishment Clause argument. It rests instead on equating psychological coercion with legal coercion in the public school setting.[14] Judge Easterbrook does not argue that psychological coercion disappears when we move from prayer to pledge, and he offers no argument for the proposition that we should treat psychological coercion as relevant to Establishment Clause analysis but irrelevant to right not to speak analysis. In fact, he neither confronts nor cites the passage of Justice Scalia's *Weisman* dissent quoted above. Thus, although the Establishment Clause often renders governmental involvement in religion unconstitutional while allowing parallel governmental involvement in secular activities, coercion is a concern of both the Establishment Clause (if we adopt Justice Kennedy's *Weisman* argument) and the Free Speech Clause (under *Barnette*). In part III.B.7, I ultimately agree with Judge Easterbrook that we should treat psychological coercion as sufficient to invalidate teacher-led public school prayer but as insufficient to invalidate a teacher-led public school pledge of allegiance. But I reach that conclusion only by reconsidering the Court's right not to speak doctrine. Under the doctrine as articulated by the Court, there is little reason to believe that psychological coercion should be treated any differently for the pledge than for prayer.

Judge Easterbrook's second claim is that extending *Weisman* to the pledge of allegiance setting would open the floodgates and imperil all of public education.[15] Students must often engage educational materials that offend their values; if the peer pressure to say the pledge of allegiance is sufficient to scuttle the saying of the pledge, then the peer pressure to engage in many other classroom activities should be sufficient to render them unconstitutional, as well.[16] This argument, however, overlooks the right not to speak basis of the constitutional claim. The right not to speak does not prevent government from exposing students to materials they find offensive, nor from requiring student participation in classroom exercises, tests, etc., involving those materials. Rather, the right not to speak prevents government from compelling students—and here we're assuming this means legally or psychologically—to utter words they prefer not to utter. Extending *Weisman* to the pledge of allegiance setting would, admittedly, require the invalidation of certain types of classroom recitation, but it would leave alone most educational methods, since they do not involve compelled utterances.

14. Lee v. Weisman, 505 U.S. 577, 593-94 (1992).

15. Sherman v. Community Consol. Sch. Dist., 980 F.2d 437, 444 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2439 (1993).

16. *Id.*

In sum, Judge Easterbrook's opinion in *Sherman* does not successfully deal with Justice Scalia's suggestion that the combination of *Weisman* and *Barnette* renders a teacher-led pledge of allegiance in public school unconstitutional. We are left with the analogy that if psychological coercion counts as coercion, and if peer pressure in public schools counts as psychological coercion, then all governmentally led group utterances in public schools are unconstitutional, whether or not those utterances are religious in nature. The remainder of this Article describes how this situation came about and offers some ways out of it. Part I reviews the school prayer cases, revealing that Justice Kennedy's opinion in *Weisman* marked a significant turn from the structural view of the Establishment Clause to a coercion-based view. Part II explores the right not to speak cases, showing a complex set of concerns grouped under one heading. Part III relies on observations from parts I and II to offer two escape hatches from the conclusion that teachers may not constitutionally lead the pledge of allegiance in public schools. The first escape hatch involves returning to the structural view of the Establishment Clause, eliminating psychological coercion as a factor. If psychological coercion no longer counts for constitutional analysis, then governmentally led prayer in public schools would still be unconstitutional (the Establishment Clause forbids it as a structural matter), but a governmentally led pledge of allegiance in public schools would be constitutional, absent direct legal coercion (because there is no constitutional provision that bars the government from advancing its view of the good, in public schools or elsewhere).[17] The second escape hatch requires unpacking the right not to speak, reshaping it not as a free speech right but as an autonomy right, which we might think of as violated by direct legal coercion but not by psychological coercion.

I. The School Prayer Cases

The Court could have taken a clean, schematic approach from the beginning. It could have held that coercion is relevant to Free Exercise Clause claims (the government may not attempt to coerce religious belief, worship, prayer, etc.) and to cognate Free Speech Clause claims (the government may not attempt to coerce any belief, thought, expression, etc.). The Establishment Clause, on this view, would cover noncoercive governmental participation in religious activities. Although not all such involvement would be invalidated (lines would have to be drawn), governmentally prescribed and led prayer in the public schools would constitute a clear infringement of the structural

17. This argument brackets the question whether selective funding of public schools but not of private schools violates the rights of parents to educate their children as the parents see fit. The more extreme claim—that government may not constitutionally seek to advance its view of the good in public schools (even if evenhanded funding of private schools were offered)—seems to me groundless.

separation of powers between civil government and religious institutions. In this way, governmentally sponsored prayer in the public schools would be invalidated under the Establishment Clause, regardless of whether such prayer was coercive. Governmentally sponsored nonreligious utterances—such as the pledge of allegiance—would be presumptively valid. But although presumptively valid, such nonreligious utterances would still be subject to a noncoercion rule under the Free Speech Clause. Whether psychological pressure on children to engage in utterances counts as coercion would be a separate question. If the Court concluded that psychological pressure does not count as coercion for constitutional analysis, it would still invalidate teacher-led prayer in public school on the structural argument.

In the early school prayer cases, the Court took the structural approach, expressly stating that coercion is not necessary to prove an Establishment Clause violation. In the later school prayer case, *Lee v. Weisman*,[18] the Court brought coercion into the Establishment Clause test. In this part, I discuss the Court's school prayer opinions. Part III.A suggests that returning to a structural view of the Establishment Clause, combined with a narrower view of coercion, would enable teachers in public schools to lead the pledge of allegiance and other nonreligious group recitations, so long as students were not compelled to participate through threat of legal sanction.

A. *The Structural Approach:* Engel *and* Schempp

When the Supreme Court first held teacher-led prayer in public schools unconstitutional, it stressed a set of structural Establishment Clause arguments, and expressly refused to make coercion the touchstone of the analysis. Three possible questions regarding coercion are relevant here: (a) Is proof of coercion sufficient for an Establishment Clause claim? (b) If so, is proof of coercion necessary for an Establishment Clause claim? (c) Is psychological pressure to participate in government-sponsored prayer the constitutional equivalent of legal coercion? In both *Engel v. Vitale*[19] and *Abington Township School District v. Schempp*,[20] the Court avoided questions (a) and (c) by answering question (b) with a clear "No"—proof of coercion is not necessary for an Establishment Clause claim.

The Court reasoned that the Establishment Clause deprives government of the power to prescribe and lead prayer, at least in the public schools. The basic point is a structural one: prescribing and leading prayer is for private citizens and religious institutions, and is not part of the job of persons acting in their public, governmental capacity. *Engel* declares that the Establishment Clause

18. 505 U.S. 577 (1992).
19. 370 U.S. 421 (1962).
20. 374 U.S. 203 (1963).

> must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government. . . .
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> . . . .
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> . . . [E]ach separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.[21]

In an important passage in *Engel*, the Court explained its reasons for relying on this structural view, and rejected the argument that coercion is a necessary element of an Establishment Clause cause of action:

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.[22]

In *Schempp*, the Court again stressed that "a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended."[23] Thus, by relying on the structural argument, the Court in both of the early school prayer cases rejected coercion as a necessary element of an Establishment Clause violation, at least in the school prayer setting.

Moreover, because the structural argument is itself sufficient to make out an Establishment Clause claim—"a union of government and religion tends to destroy government and to degrade religion"[24]—the Court did not have to (and did not) resolve questions (a) and (c), namely, whether proof of coercion is sufficient for an Establishment Clause claim and whether psychological pressure counts as coercion for constitutional analysis. To be sure, *Engel* recognizes that governmental support for the majority religion places "indirect coercive pressure" on minority religions. But recognizing psychological pressure as coercive is not the same thing as considering that type of coercion

21. 370 U.S. at 425, 435.
22. *Id.* at 430-31.
23. 374 U.S. at 223.
24. 370 U.S. at 431.

sufficient to make out a constitutional claim. *Engel* does the former, but does not address the latter.

Thus, after *Engel* and *Schempp*, teacher-led prayer in public schools was unconstitutional, not because of coercion (psychological or otherwise), but because of the structural claim that government may not prescribe and lead prayer. The Court did not have to determine whether psychological pressure constituted coercion for constitutional analysis. Justice Brennan, concurring in *Schempp*, clearly stated that the psychological pressure on students who wanted to opt out of praying violates the Free Exercise Clause,[25] but the other Justices in the majority did not address this contention. I return to Justice Brennan's argument in part III.A, when I discuss the possibility of disconnecting psychological pressure from constitutionally relevant coercion.

B. *Coercion Becomes Relevant:* Lee v. Weisman

Lee v. Weisman[26] could have been a simple extension of the early school prayer cases. The Court could have said that a governmentally sponsored prayer at a public secondary school graduation ceremony violates the Establishment Clause because government may not involve itself in prayer services. Instead, Justice Kennedy wrote a majority opinion that brings coercion into the Establishment Clause analysis and that relies heavily on deeming psychological pressure coercive for constitutional analysis.

Justice Kennedy's opinion is somewhat difficult to parse. At times, it stresses the structural concerns from *Engel* and *Schempp*. For example:

> The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. . . .
>
> . . . .
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> . . . The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions.[27]

At other points, however, Justice Kennedy stresses the coercive aspect of the psychological pressure faced by the graduating 14-year-olds. For example, consider the opening of Justice Kennedy's legal analysis:

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25. 374 U.S. at 288-90.
26. 505 U.S. 577 (1992).
27. *Id.* at 589-91.

> These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.[28]

And consider the end of the opinion:

> The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.[29]

I will set forth in a moment the passages in which Justice Kennedy holds that psychological pressure constitutes coercion for constitutional analysis. The above-quoted passages reveal that coercion is a *sufficient* factor in determining whether the Establishment Clause has been violated, which is a step beyond *Engel* and *Schempp*. Justice Kennedy never quite makes clear whether coercion (legal or psychological) is a *necessary* factor in the analysis, but considering his prior views on the subject, it seems that for him (and for him alone among the five Justices in the majority),[30] a plaintiff must show coercion to prove an Establishment Clause violation, at least in the school-prayer setting. Three years before *Weisman*, Justice Kennedy authored a separate opinion in *County of Allegheny v. ACLU*,[31] a case involving religious symbols on government property. Justice Kennedy (joined by Chief Justice Rehnquist and Justices White and Scalia) wrote that the Establishment Clause may be violated in only two ways:

> [G]overnment 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."[32]

In *Weisman*, Justice Kennedy never suggests that governmentally sponsored graduation prayer "establishes a state religion or religious faith, or tends to do so." He does suggest, often, that such prayer in the public school setting constitutes coercion. Thus, it appears that, at

28. *Id.* at 586.
29. *Id.* at 599.
30. *See infra* text accompanying notes 33-35.
31. 492 U.S. 573 (1989).
32. *Id.* at 659 (citation omitted).

least for Justice Kennedy, absent an established state religion, coercion is a necessary predicate for an Establishment Clause claim.

I say that Justice Kennedy is alone among the five-Justice majority in deeming coercion a necessary predicate for an Establishment Clause claim (absent an established state religion), because the Justices joining Justice Kennedy's majority opinion—Justices Blackmun, Stevens, O'Connor, and Souter—wrote and joined separate opinions to stress that for them, coercion was not necessary to an Establishment Clause claim. Thus, Justice Blackmun wrote, in an opinion joined by Justices Stevens and O'Connor, "our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation."[33] Justice Blackmun did, however, add that coercion is "sufficient" to prove an Establishment Clause violation, and he equated "[g]overnment pressure to participate in a religious activity" with coercion.[34] Justice Souter did not join Justice Blackmun's concurrence, but agreed in his own concurrence (also joined by Justices Stevens and O'Connor) that coercion is not a necessary element of an Establishment Clause violation.[35] Justice Souter did not offer an opinion on whether coercion is sufficient to prove an Establishment Clause violation.

Assuming, therefore, that there is no majority for the combined proposition that (d) psychological pressure constitutes coercion for constitutional analysis and (e) absent an established state religion, proof of coercion is necessary to make out an Establishment Clause violation—Justice Kennedy appears to be the only Justice in *Weisman* to think both parts of this proposition true—there is, still, a clear five-Justice majority for the combined proposition that (d) psychological pressure constitutes coercion for constitutional analysis and (f) proof of coercion is sufficient for an Establishment Clause claim.[36] So long as this proposition holds, it is but a short step to the conclusion that teachers may not lead the pledge of allegiance in public schools, because the same psychological pressure is present to participate in the pledge as it is to participate in prayer, and because the right not to speak is violated by coerced speech just as the Establishment Clause is violated by coerced prayer. As I suggest in part III.A, one way around this conclusion, while still maintaining a ban on governmentally sponsored prayer in public schools, is to jettison the equation of psychological pressure with coercion for constitutional analysis, while returning to the purely structural view of the Establishment Clause.

33. 505 U.S. at 604.

34. *Id.*

35. *Id.* at 619.

36. Even though Justice Souter did not, in his concurrence, state clearly that coercion is sufficient to prove an Establishment Clause claim, he did join Justice Kennedy's majority opinion.

The *Weisman* Court equated psychological pressure with coercion in a somewhat unusual way. First, the Court refused to accept the parties' stipulation that attendance at the graduation ceremony is voluntary. "[T]o say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme."[37] This seems sensible. Second, Justice Kennedy wrote:

> [T]he 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. Of course, in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the Rabbi's prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.
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> Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. . . .
>
> The injury caused by the government's action, and the reason why [plaintiffs] object to it, is that the State, in a school setting, in effect required participation in a religious exercise.[38]

Although Justice Kennedy ends this discussion by asserting that the State "in effect required participation in a religious exercise,"[39] most of the discussion focuses not on the compulsion to participate in prayer, but on compulsion to engage in activity that a reasonable observer would construe as participation in prayer. The obvious way out of this dilemma, for the dissenting student, is to display a protest to the prayer, but Justice Kennedy clearly states that the government

37. 505 U.S. at 595.

38. *Id.* at 593-94.

39. *Id.* at 594.

may not constitutionally "place primary and secondary school children in this position."[40]

Now it is one thing to hold that psychological pressure *to pray* is unconstitutional. It is a further step (though probably a correct one) to hold unconstitutional psychological pressure to engage in activity that a reasonable observer would construe as praying. Underneath this second step, however, is the empirical prediction that a reasonable observer would construe the absence of protest as participation in prayer. Justice Scalia criticized the Court sharply on precisely this point, arguing that a reasonable observer would have no reason to conclude that a student sitting or standing in silence is participating in prayer.[41] I agree with Justice Scalia that it is wrong to posit that a reasonable observer necessarily would think a nonprotesting student is thereby participating in prayer. Even if one agreed with this critique of Justice Kennedy's opinion, of course, there would still be the questions whether students in cases such as *Weisman* are psychologically pressured *to pray* (an empirical question that Justice Kennedy does not address) in a way that constitutes coercion for constitutional analysis (a legal question). A related question is whether courts should evaluate this matter case by case, requiring proof that particular plaintiffs were in fact psychologically pressured to pray, or whether courts should instead reach a conclusion on this question wholesale, as it were, either ruling that peer pressure is sufficiently great that we should assume that constitutionally relevant coercion is present, or holding that legal coercion only (e.g., expulsion for failing to pray) counts for constitutional analysis.

In any event, *Weisman* holds that when government sponsors a group prayer at a public secondary school graduation ceremony, psychological pressure on students is sufficiently great to constitute coercion for constitutional analysis and to render the prayer invalid. If we accept this analysis, then we should apply it to governmentally sponsored nonreligious utterances in the public school setting, for the psychological pressure to participate, or at least not to protest (and thereby, according to Justice Kennedy, to signal participation), is just as great. (If not greater. There is an argument that it is easier to show

40. *Id.* at 593. If we accept for the moment (but see discussion in the text immediately below) the argument that absent a protest, others will perceive a student as participating in prayer, then Justice Kennedy's argument here makes sense, for the government would be forcing children to choose between remaining silent (and thus evidencing participation in prayer) and outwardly protesting. This deprives the children of a third option: remaining silent with no attendant ramifications.

41. *Id.* at 637. As I discuss in part III.B, the right not to speak cases should require case-by-case evaluation of whether reasonable observers would associate compelled utterances with the speaker or with the government. As I will argue, if a reasonable observer would know that the utterance is compelled, and is not freely chosen by the speaker, then the Free Speech Clause is probably the wrong hook on which to hang a constitutional claim. The compulsion is still problematic, but the violation is of autonomy or personhood.

dissent from organized prayer than from an organized pledge of allegiance, for most people know and respect religious pluralism, but few people tolerate dissenters from flag worship.)

II. The Right Not to Speak Cases

There are two categories of cases here, first, cases in which the government compels speakers to utter or foster the government's own message, and second, cases in which the government compels speakers to foster a private party's message.

A. *Compelling the Government's Message*

In *Minersville School District v. Gobitis*,[42] the Court held that government may constitutionally require students in public schools to participate in a teacher-led pledge of allegiance to the United States flag. Three years later, in *West Virginia State Board of Education v. Barnette*,[43] the Court overruled *Gobitis*, holding that the Constitution forbids such compelled expression. The Court did not invalidate the pledge in public schools; rather, it held that States may not require students to participate.[44] Furthermore, although plaintiffs were members of the Jehovah's Witnesses faith raising religious objections to saying the pledge, the Court did not limit its holding to those with religious objections. The Court was not entirely clear about which constitutional provision was at stake. Although the Court referred generally to a "right of self-determination,"[45] most of the majority opinion refers more specifically to the First Amendment: After mentioning "the free speech guaranties of the Constitution,"[46] the opinion states that "[o]bjection to this form of communication when coerced is an old one;"[47] it asks "[w]hether the First Amendment of the Constitution will permit officials to order observance of ritual of this nature;"[48] it distinguishes the "vagueness of the due process clause,"[49] observing that "freedoms of speech and of press, of assembly, and of worship may not be infringed" if the government has only a "rational basis" for so doing;[50] finally, it holds that "the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[51] These passages do not

42. 310 U.S. 586 (1940).
43. 319 U.S. 624 (1943).
44. *Id.* at 641-42.
45. *Id.* at 631.
46. *Id.* at 633.
47. *Id.*
48. 319 U.S. at 634.
49. *Id.* at 639.
50. *Id.*
51. *Id.* at 642.

indicate clearly whether the Court viewed the right against governmentally compelled expression to be a product of the various clauses of the First Amendment, or, instead, to be more specifically a Free Speech Clause right.

Since *Barnette*, the Court has decided seven cases involving governmentally compelled expression. Some of these right not to speak cases have rested squarely on the Free Speech Clause of the First Amendment, while others, like *Barnette*, have referred more generally to the First Amendment, without specifying the Free Speech Clause. None of the right not to speak cases after *Barnette* has involved compelled oral speech, and only one has involved the government seeking to advance its own message, as opposed to helping private citizens advance their messages. That case was *Wooley v. Maynard*,[52] in which New Hampshire had required all passenger license plates to bear the State's motto, "Live Free or Die." Again in response to a suit by a member of the Jehovah's Witnesses faith, the Court held that the State may not constitutionally require citizens to carry an objectionable message on their vehicle license plates. The Court stated:

> [T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."[53]

The Court later referred to plaintiffs' "interests as implicating First Amendment protections,"[54] and to "an individual's First Amendment right to avoid becoming the courier for [the State's] message."[55] Thus, as in *Barnette*, the Court relied on the First Amendment without specifying the Free Speech Clause.

B. *Compelling a Private Party's Message*

The Court has decided six cases involving state action compelling one party to carry or foster the speech of another.[56] In the two cases in which the compulsion was upheld as constitutional, the Court relied on specific facts about the forums involved. The first such case was *Red Lion Broadcasting Co. v. FCC*,[57] upholding FCC actions requiring broadcasters to give free reply time to a party claiming to have

52. 430 U.S. 705 (1977).
53. *Id.* at 714 (citations omitted).
54. *Id.* at 715.
55. *Id.* at 717.
56. Six is the correct number if we count *Red Lion* and its progeny as one case, and if we count *Abood* and its progeny as one case. *See infra* notes 59 and 80.
57. 395 U.S. 367 (1969).

been personally attacked by another over a radio or television station. Rejecting a free speech and free press challenge, the Court held that because broadcasting involves spectrum scarcity, not every person can respond easily to an attack over the airwaves. "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[58] Because the government must allocate the scarce broadcasting spectrums, it may insist on a type of sharing, which involves a right to reply to personal attacks. In other words, broadcasting as a forum is neither typically public (streets and parks), in which the government may not require one citizen to carry the message of another, nor is it typically private (one's home), in which, again, the government may not require one citizen to carry the message of another. Broadcasting spectrums, at least in the world addressed by the *Red Lion* Court,[59] are somewhat akin to government speech, where the government may control its own message. Granted, the broadcasting stations are not owned by the government, but because of spectrum scarcity and governmental licensing of spectrum access, speech through the airwaves is not purely that of the speaker, but rather that of the speaker as mediated through the government.

The other case upholding a type of "must-carry" rule is *PruneYard Shopping Center v. Robins*.[60] The California Supreme Court interpreted the California Constitution as requiring private shopping center owners to permit others to engage in "speech and petitioning, reasonably exercised,"[61] even against the will of the shopping center owner. The shopping center owners argued that "a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others."[62] The United States Supreme Court rejected this challenge, distinguishing *Barnette*, *Wooley*, and *Miami Herald Publishing Co. v. Tornillo*,[63] which had held unconstitutional a state law granting a right of reply to newspaper attacks. *Wooley*, said the Court, involved a license plate on plaintiffs' personal car; the shopping center, to the contrary, is a "business establishment that is open to the public to come and go as they please.

58. *Id.* at 388.

59. The FCC has since abandoned the so-called "fairness doctrine," which included the regulations at issue in *Red Lion*. *See* Syracuse Peace Council v. FCC, 867 F.2d 654, 665 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). Recently, the Court stated that an intermediate level of scrutiny should be applied to federal regulations requiring cable television systems to carry certain programming, and remanded the case for further record development. *See* Turner Broadcasting Sys. v. FCC, 114 S. Ct. 2445 (1994).

60. 447 U.S. 74 (1980).

61. *Id.* at 78 (citation omitted).

62. *Id.* at 85. The owners also advanced a takings claim, which the Court rejected. *Id.* at 82-85.

63. 418 U.S. 241 (1974).

The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner."[64] Furthermore, because "no specific message is dictated by the State,"[65] there is "no danger of governmental discrimination for or against a particular message."[66] In addition, the shopping center owner may "expressly disavow any connection with the message."[67] *Barnette*, said the *PruneYard* Court, "is inapposite because it involved the compelled recitation of a message containing an affirmation of belief."[68] Finally, the Court explained that *Tornillo* "rests on the principle that the State cannot tell a newspaper what it must print,"[69] and that the right of reply statute might deter "editors from publishing controversial political statements."[70] Whether these distinctions make sense is a matter I address in part III.B, "Rethinking the Right Not to Speak."

The Court has ruled against the government in the other four cases involving state action compelling one party to carry or foster the speech of another. *Tornillo*, which I have already mentioned, invalidated under the Free Press Clause of the First Amendment a state statute "granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper."[71] The Court held that the "Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. . . . The Florida statute exacts a penalty on the basis of the content of a newspaper."[72] To avoid triggering the right of reply statute, editors might avoid controversy.[73] The Court rejected the argument (similar to the one made in *Red Lion*) that it is too difficult for attacked citizens to reply through the print medium.[74]

Next, in *Abood v. Detroit Board of Education*,[75] the Court ruled on two constitutional challenges to "agency shop" agreements entered into between a public employee union and a local government employer. The agreement required even nonunion employees to contribute a service fee in lieu of union dues, and the question was whether compelling such a fee from nonunion members violated their constitutional rights.[76] The Court held that nothing in the Constitution prevented the union from using the compelled fee for collective

64. 447 U.S. at 87.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 88.
69. *Id.*
70. *Id.*
71. 418 U.S. 241, 243 (1974).
72. *Id.* at 256.
73. *Id.* at 257.
74. *Id.* at 247-54.
75. 431 U.S. 209 (1977).
76. *Id.* at 211.

bargaining, but also ruled that the Constitution prevents the union from "spending a part of [the] required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative."[77] "[A]t the heart of the First Amendment," said the Court, "is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."[78] The Court did not rely specifically on the Free Speech Clause; it did, though, state that "the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments."[79] The Court cited only one of the prior right not to speak cases (*Barnette*), but *Abood* arguably fits with them,[80] for it is about government compelling citizens to help foster ideas with which they disagree.[81]

Two cases remain. In *Pacific Gas & Electric Co. v. Public Utilities Commission*,[82] the Court held that a State may not "require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees."[83] The Court relied primarily on the Free Speech Clause, but also referred to cognate Free Press Clause principles. It held that the right of reply statute at issue (the State had required the company to carry the message of a public interest group called "Toward Utility Rate Normalization") "is antithetical to the free discussion that the First Amendment seeks to foster. For corporations as for individuals, the choice to speak includes within it the choice of what not to say."[84] The Court explained that in *PruneYard*, there was no "concern that access to [the area open to the public at large] might affect the shopping center owner's exercise of his own right to speak,"[85] whereas here the Commission had ordered the utility company to carry the public interest group's message four times a year, thus depriving the company of that extra space in the billing envelope.[86] The Court also stated that "the relevant forum in

77. *Id.* at 234.
78. *Id.* at 234-35.
79. *Id.* at 233.
80. As do cases following *Abood*. *See* Keller v. State Bar, 496 U.S. 1 (1990); *cf.* Communication Workers of Am. v. Beck, 487 U.S. 735 (1988) (construing National Labor Relations Act narrowly to avoid requiring nonunion members to pay fee that could be used for noncollective bargaining purposes).
81. Granted, fostering objectionable ideas through compelled fees is different from doing so through driving a car with a license plate motto with which one disagrees, but so too is that action, *see* Wooley v. Maynard, 430 U.S. 705 (1977), different from being forced to utter words with which one disagrees, *see* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). See infra part III.B, "Rethinking the Right Not to Speak," in which I address these differences.
82. 475 U.S. 1 (1986).
83. *Id.* at 4.
84. *Id.* at 16 (citations omitted).
85. *Id.* at 12.
86. *Id.* at 5-6.

PruneYard was the open area of the shopping center into which the general public was invited. This area was, almost by definition, peculiarly public in nature."[87]

The most recent right not to speak case is *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.[88] The state court had ruled that the organizers of Boston's St. Patrick's Day Parade, a private group, may not, under state anti-discrimination law, exclude a gay and lesbian Irish-American group from the parade.[89] The Supreme Court reversed, holding that the parade organizers have a First Amendment right to exclude any message with which they disagree.[90] The use of state power to force the inclusion of the gay and lesbian marchers (with whatever banners they would carry and message that would send) "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[91] The Court distinguished *PruneYard*, explaining that the "principle of speaker's autonomy was simply not threatened," because the shopping center was generally open to the public, because the audience would not likely associate the messages at issue with the shopping center's owners, and because the owners could easily disavow any connection with the messages.[92]

Thus, treating *Red Lion* as a category unto itself (governmentally controlled forum), the right not to speak cases line up coherently, except for *PruneYard*, which the other cases are constantly at pains to distinguish. The relevant issues in distinguishing *PruneYard* are the public nature of the forum (albeit a privately-owned shopping center), the lack of association between the messages in question and the forum's owners, and the opportunity for those owners to disavow any connection between them and the messages. As I discuss in part III.B, although these factors should be relevant in assessing the constitutionality of compelled expression, the Court has not always applied them in a logical fashion. Moreover, the Court's failure to locate the precise constitutional obstacle to compelled speech—it refers at various times to a right of self-determination, to the freedom of association, to the freedom of speech, and to the freedom of the press—opens the way for a fresh examination of the problem. In the end, I will suggest a narrower scope for the right not to speak.

87. *Id.* at 12 n.8.

88. 115 S. Ct. 2338 (1995).

89. *Id.* at 2342.

90. *Id.* at 2350-51. I assume for purposes of argument that the *Hurley* Court correctly assumed (a) that the parade constituted private speech, and (b) that access to the streets of Boston for a St. Patrick's Day Parade is in fact open to all comers pursuant to neutral rules.

91. *Id.* at 2347.

92. *Id.* at 2350-51.

III. Solving the Pledge of Allegiance Problem

Regardless of the nuances of the school prayer and right not to speak cases, we are left, after *Barnette* and its progeny and after *Weisman*, with a simple equation: When the government sponsors a group utterance in public schools, psychological pressure is placed on students either to participate in the utterance or to behave in such a way that a reasonable observer would view them as participating. This psychological pressure counts as coercion for constitutional analysis. The government may not, under the Establishment Clause, coerce people to pray, and it may not, under the Free Speech Clause (and perhaps other constitutional provisions), coerce people to speak or otherwise foster messages. Giving students the option not to participate in group utterances is insufficient, for the very existence of a government-led group utterance in public school is sufficiently coercive to violate either the Establishment Clause or the Free Speech Clause.

Maybe this is a good result. Perhaps public schools should not be in the business of leading group utterances of any kind, even with an opt-out for dissenting students. Public schools engage in plenty of character formation as it is, and many people find even that troublesome, preferring a system in which all education is privatized or at least one in which vouchers are available to opt out of the public school system.[93] The remainder of this Article, however, will assume without demonstrating that there are good reasons to try to preserve the constitutionality of a teacher-led pledge of allegiance in the public schools.

A. *Rejecting Psychological Coercion*

A teacher-led pledge of allegiance in the public schools is, under current Supreme Court doctrine, unconstitutional because of the confluence of two strands of doctrine. Revising either one would save the pledge. Here, I discuss discarding psychological coercion as relevant to proving a constitutional violation. In the next section, I discuss revising the right not to speak doctrine.

If we refuse to recognize psychological coercion as relevant to making out a constitutional claim, we could still invalidate governmentally sponsored prayer in public schools on a structural theory. As I explained above,[94] the early school prayer cases (*Engel* and *Schempp*)

93. *See, e.g.*, Stephen Arons, *The Separation of Church and State:* Pierce *Reconsidered*, 46 Harv. Educ. Rev. 76 (1976) (discussing parents' right to choose schools where inculcation of values or beliefs is involved); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto* (June 19, 1995 draft, on file with the author) (promoting a strong parental rights view); Michael McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 U. Chi. Legal Forum 123, 126 (proposing a voucher system "in which parents would be free to choose among available accredited schools").

94. *See supra* text accompanying notes 19-23.

relied on the argument that our Constitution adopts a prophylactic device regarding governmental fostering of religion. We assume that such sponsorship will lead to sectarian contests for public power, and may also lead to the profanation of the religious. As constitutional doctrine, invalidation of governmental sponsorship of religion is properly considered prophylactic, because plaintiff's claim does not depend upon proving that the state action in question has already led to sectarian contests for public power or to the profanation of religion. Rather, the risk that such results will obtain is assumed, and the danger is headed off at the outset.

Although the Establishment Clause, thus, could be read as a structural right (similar to the separation of powers or federalism[95]), one could still argue that coercion is constitutionally sufficient to prove a Free Exercise or Free Speech Clause claim, and that psychological coercion counts as coercion for constitutional purposes. The former claim is certainly true: Government may not coerce prayer or speech through the threat of legal sanction. But should psychological coercion count as coercion for constitutional purposes? Justice Brennan, concurring in *Schempp*, answered Yes:

> [T]he excusal procedure itself necessarily operates in such a way as to infringe the rights of free exercise of those children who wish to be excused. We have held in *Barnette* . . . that a State may [not] require . . . public school students . . . to profess beliefs offensive to religious principles. By the same token the State could not constitutionally require a student to profess publicly his disbelief as the prerequisite to the exercise of his constitutional right of abstention. . . . [B]y requiring what is tantamount in the eyes of teachers and schoolmates to a profession of disbelief, or at least of nonconformity, the procedure may well deter those children who do not wish to participate for any reason based upon the dictates of conscience from exercising an indisputably constitutional right to be excused. Thus the excusal provision in its operation subjects them to a cruel dilemma. In consequence, even devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists simply on the basis of their request.[96]

There are two arguments here. The first is about pressure to profess either belief or disbelief. The first step of this argument follows from the right not to speak, regardless of its precise constitutional basis. The government may not force a citizen to choose between uttering certain words and stating her disagreement with the message of those words. For this choice deprives the citizen of a third option:

95. *See* Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. Chi. L. Rev. 123 (1994).

96. 374 U.S. at 288-90 (footnote omitted).

remaining silent on the matter. The second step of the argument is far from clear, however: Is nonparticipation in a group utterance "tantamount in the eyes of teachers and schoolmates to a profession of disbelief, or at least of nonconformity?" Assuming students don't have to give reasons for opting out, it seems wrong to equate a silent action of nonparticipation with a compelled expression of disagreement with the content of the group utterance.[97]

The second argument, though, is a strong one. Even if the action of nonparticipation cannot be equated with a declaration of disbelief, students undoubtedly feel strong pressure not to opt out, if only for fear of being branded as weirdos or losers or otherwise ostracized. Justice Brennan captures this when he writes that "even devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists simply on the basis of their request."[98] One way of challenging this conclusion would be to require social science evidence of such peer pressure, or to provide social science evidence concluding that school children do not feel such peer pressure. But I will accept as well-founded the empirical basis for the claim that children will feel extraordinary pressure to participate in any group activity, including group utterances. More interesting is the question whether the existence of such pressure should matter for constitutional analysis.

One argument against considering psychological coercion constitutionally relevant is that line-drawing is difficult. Surely many college students and adults feel pressure to conform; should the government be constitutionally prohibited from leading the pledge of allegiance or the national anthem during public university graduations or football games, or during town meetings? Another argument is that we should not assume that all school children will feel psychologically coerced; instead, we should wait for as-applied challenges. But the strongest argument against making psychological coercion relevant for constitutional analysis involves detaching the government from the psychological coercion: The government is banned from coercing prayer or speech through legal sanction, but so long as the government grants an option out of such an utterance, it is off the hook. The psychological coercion that students undoubtedly feel to participate in group utterances is not properly attributable to the government, even though it was the government's decision to have its agents (the teachers) lead the group utterance. Rather, the psychological coercion is attributable to the student's peers, and they are not "the State." The Constitution should not be extended past clear instances of state action.

97. *See supra* text accompanying note 41 (discussing Justice Scalia's dissent in *Weisman*).

98. 374 U.S. at 290.

This argument against deeming psychological coercion constitutionally relevant fits with the Court's general reluctance to attribute private conduct to the State. The Court consistently has rejected claims that the Constitution requires the government to fund citizens in the exercise of their constitutional rights.[99] Even though the refusal to fund is state action, the lack of money is seen as proximately caused not by the government, but by private forces. So it is with peer pressure. (That is, assuming the government's agents—the teachers—don't penalize the nonconforming students.) In addition, the Court has demanded that federal courts cease jurisdiction over desegregation cases once the causal nexus between segregation and governmental action is no longer clear.[100] But however powerful the doctrinal argument against the constitutional relevance of psychological coercion, Justice Brennan's argument in *Schempp*[101] and Justice Kennedy's argument in *Weisman*[102] are, still, hard to rebut. When the government places students in the position of participating in a group utterance or opting out, the pressure to participate is overwhelming. To say that the only proximate cause of the coercion is one's peers and not also the government is correct only on a narrow view of proximate cause.[103] Thus, although the Court could, with fairly strong doctrinal consistency, eliminate psychological coercion as constitutionally relevant (thus saving the pledge of allegiance in public schools), this does not seem the best course. But if we continue to accept psychological coercion as constitutionally relevant, then how can we avoid stripping the public schools of the power to lead the pledge? For under the Court's doctrine, governmental coercion invalidates both prayer and pledge, and there's nothing in the Court's doctrine to indicate that psychological coercion should invalidate the former but not the latter. The answer, provided in the next section, requires reevaluating the right not to speak and understanding it as a right of autonomy or personhood that is violated only by the threat of legal sanction.

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99. *See, e.g.*, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (upholding a statute prohibiting the use of public facilities for abortions); Harris v. McRae, 448 U.S. 297 (1980) (holding that states need not fund medically necessary abortions); Maher v. Roe, 432 U.S. 464 (1977) (upholding a state regulation limiting Medicaid benefits to medically necessary first trimester abortions).

100. *See, e.g.*, Missouri v. Jenkins, 115 S. Ct. 2038 (1995) (permitting a federal court to order state remedies for segregation only to the extent of state responsibility); Freeman v. Pitts, 503 U.S. 467 (1992) (stating that it is "beyond the authority" of the federal courts to counteract segregation arising from changes in demographics); Board of Educ. v. Dowell, 498 U.S. 237 (1991) (judicial determination of a school district's compliance with the Equal Protection Clause would be sufficient to lift or modify a desegregation decree). *See also* Abner S. Greene, Kiryas Joel *and Two Mistakes About Equality*, 96 Colum. L. Rev. (forthcoming 1996).

101. *See supra* notes 96-98 and accompanying text.

102. *See supra* part I.B.

103. *See* DeShaney v. Winnebago Dep't of Social Servs., 489 U.S. 189 (1989) (Rehnquist, C.J. and Brennan, J., debating proximate cause and governmental responsibilities under the Due Process Clause).

B. *Rethinking the Right Not to Speak*

1. The Nonexpressiveness of Compelled Speech

The First Amendment's Free Speech Clause covers more than merely "speech," literally understood. The guarantee covers, more broadly, acts of expression; as Thomas Scanlon put it, it applies to acts "intended by [their] agent to communicate to one or more persons some proposition or attitude."[104] The Supreme Court has agreed that the Free Speech Clause covers nonlinguistic, symbolic expressive acts.[105] But does the clause cover less than "speech," literally understood? That is, if the clause is construed functionally, to cover all expressive acts, should this functional definition be applied in reverse, to exclude from the clause's coverage nonexpressive acts, even if linguistic?[106]

The proposition I will defend here is this: For an act to be considered expressive, and thus worthy of prima facie protection under the Free Speech Clause, that act must involve (or appear to a reasonable observer to involve) the communication of the speaker's internal mental state, such as her beliefs, attitudes, or convictions. Thus, the right to speak is the right to express beliefs, to reveal one's mind publicly. As a corollary to this right, the right not to speak is the right not to reveal one's mind publicly.

A law that compels a person to speak certain words does not require that she reveal her mind publicly. To be sure, such a law requires the use of the mind, insofar as the speaker must choose whether to respond to the legal command and engage in whatever cognitive process is necessary to form and say the required words. But this use of the mind in responding to legal obligation is no different from the use of the mind in responding to legal obligation not involving words. The mind is used in deciding whether to signal a left turn, and then in signaling the turn. Neither a law compelling the utterance of the pledge of allegiance nor a law compelling a left turn signal requires the agent to reveal the contents of her mind, to share with others what is "on her mind." As Meir Dan-Cohen has pointed out in a different context, "Detached speech is an essentially *impersonal* production: It is externally motivated, and being exempt from

104. Thomas Scanlon, *A Theory of Freedom of Expression*, 1 Phil. & Pub. Aff. 204, 206 (1972).

105. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (invalidating law prohibiting the burning of the United States flag, as applied to a political protest).

106. When I talk about the "coverage" of the Free Speech Clause, I refer to state action properly considered to implicate concerns of the Clause. When I talk about the "protection" of the Clause, I refer to a determination in a given case that speech is protected under the Clause. Thus, to say that speech is "prima facie protected" under the Clause means that it is "covered" by the Clause, and that we must still explore whether the government's reasons for regulating the speech in question are sufficiently strong to overcome the citizen's prima facie case.

the requirement of sincerity, it is avowedly cut off from the speaker's own identity and psychological state."[107]

For compelled speech to be nonexpressive, and thus not covered by the Free Speech Clause, a reasonable observer must know that the speech act was compelled. If a reasonable observer views the act in such a fashion, then she knows that the uttered words are not necessarily reflective of the speaker's thoughts. If a reasonable observer would understand the speech as reflective of the speaker's beliefs (that is, if she would not view the speech as compelled), then even though the speech was in fact compelled by law, it should be deemed expressive and covered by the Free Speech Clause. But so long as the speech act is compelled and is known by a reasonable observer to be compelled,[108] it would be unreasonable for such an observer to view the message contained in the communication as necessarily a revelation of the speaker's beliefs. Rather, a reasonable observer who knows the speech was compelled should believe that the speaker was merely following the law, which happened to involve a speech act. Whether the speaker also believes the content of the utterance is merely coincidental, and does not affect the characterization of the speech act as "following the law" rather than "expressing one's beliefs." Furthermore, it would be wrong for the reasonable observer to conclude that because the speaker could have disobeyed the law and suffered the penalty, her utterance is thereby expressive. It is more reasonable to believe that she did not want to suffer the penalty. Obeying the law to avoid suffering a penalty is no more an expressive act if the obedience takes the form of an utterance than if it takes the form of a nonverbal action.

Whether a reasonable observer would understand that the words of a speech act were compelled by law, and would thus dissociate the content of the speech from the individual speaker, is a factual, case-by-case matter.[109] Additionally, if in a particular case a reasonable observer would not understand the speech as compelled, and would, instead, associate its content with the speaker, the government may not avoid bringing the Free Speech Clause into play by arguing that all the speaker need do is explain that she is being compelled to speak. That speech act does reveal something about the speaker's beliefs, and the government may not, under the Free Speech Clause, require such a disclosure. If the speech were reasonably understood (although, by hypothesis, incorrectly) as noncompelled, and therefore

107. Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 Cal. L. Rev. 1229, 1241 (1991).

108. I leave aside the complex situation in which a speech act not in fact compelled is nevertheless viewed by the reasonable observer as compelled.

109. *But see* David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. Rev. 995, 1005 (1982) (assuming that others will perceive compelled speech as sincere).

as revealing something about the speaker's beliefs, then the compelled speech is presumptively invalid under the Free Speech Clause.

Finally, the Court and commentators have been wrong to suggest that compelled speech constitutes an "affirmation," or a "declaration," or the "expression of a view."[110] Those terms all apply, to be sure, to compelled speech that is reasonably understood as revealing the speaker's beliefs. But if a reasonable observer would understand the speech as dissociated from the speaker, then the speech affirms nothing, declares nothing, and expresses nothing. It merely follows the law, which involves the saying of words. Again, there might be, in some cases, something terribly constitutionally wrong with the government compelling such empty speech. But the Free Speech Clause is the wrong hook on which to hang a constitutional claim here. Sometimes the Court and commentators appreciate this, if only dimly. For example, in *Wooley v. Maynard*[111] (the "Live Free or Die" license plate motto case), the Court talked of a "right to decline to foster" certain concepts.[112] But once we understand that the problem involves the "fostering" of messages rather than the "affirmation" or "expression" of views, then it will be easier to move from the Free Speech Clause to a different set of principles, involving autonomy and personhood. I discuss those below, in part III.B.5.

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110. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 882 (1990) (referring to *Barnette* and *Wooley* as involving "compelled expression"); Pacific Gas & Elec. Co. v. Public Utils. Comm'n., 475 U.S. 1, 16 (1986) ("[Were the government] freely able to compel [corporate] speakers to propound political messages with which they disagree, . . . the government could require speakers to affirm in one breath that which they deny in the next."), *quoted in* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338, 2348 (1995); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943) ("compulsion of students to declare a belief"); *id.* at 633 ("requires affirmation of a belief and an attitude of mind"); *id.* at 642 ("force citizens to confess by word or act their faith therein"); Sanford Levinson, Constitutional Faith 101 (1988) (required pledge of allegiance is "a peculiarly American form of the loyalty oath"); *id.* at 102 ("*Barnette*'s 'fixed star' is almost invariably cited whenever the state tries to require its employees to take loyalty oaths indicating their commitment to certain beliefs); David A.J. Richards, Toleration and the Constitution 130, 166 n.3 (1986) (*Barnette* and *Wooley* involved "compulsory expression"); Laurence H. Tribe, American Constitutional Law 804 (2d ed. 1988) (*Barnette*'s lesson is that "forcing someone to express a view is as offensive as forbidding someone to express it"); *id.* at 1303 (*Barnette* and *Wooley* involve "the choice of symbols one publicly endorses"); *id.* at 1315 (law in *Barnette* compels one "to express beliefs and convictions"); Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 Ga. L. Rev. 795, 833 n.45 (1981) (government may not "compel affirmation of a belief"); David B. Gaebler, *supra* note 109, at 1005 (individual likely to view his own compelled speech as an "outright affirmation of . . . the views involuntarily expressed"); *id.* at 1010 (in *Barnette* government has "clearly compelled expression"); Ira C. Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 Conn. L. Rev. 739, 772 (1986) (law in *Barnette* compelled belief); Steven Shiffrin, *Government Speech*, 27 UCLA L. Rev. 565, 590 n.131 (1980) (law in *Barnette* required people "to affirm in public ceremonies beliefs that [they do] not hold").

111. 430 U.S. 705 (1977).

112. *Id.* at 714.

2. The Issue of Dissent

Even if the speech act is reasonably understood as compelled, the government might still presumptively violate the Free Speech Clause by closing off dissent. Thus, critical to compelled speech remaining outside the coverage of the Free Speech Clause is that the government leave open channels for dissent to the very message it is compelling. Closing off dissent violates the core of the Free Speech Clause by shutting down the public communication of one's beliefs,[113] as seen in cases such as *Tinker v. Des Moines Independent Community School District*,[114] *Texas v. Johnson*,[115] and *Cohen v. California*.[116]

Now it is true that a law compelling the recitation of the pledge of allegiance has the effect of curtailing a certain type of expressive act: A student would be prohibited from remaining silent to express her disapproval of the pledge; she would have to choose another means to express such disapproval. But this is merely a byproduct of the law; the law's purpose is not to stifle dissent. That a law covers some expressive conduct is not sufficient to invalidate it if it is not directed at such conduct. The Supreme Court has upheld such laws of so-called "general applicability."[117]

The stifling of dissent is precisely what distinguishes the religious test and loyalty oath cases—and other analogous scenarios[118]—from a compelled pledge of allegiance. For example, consider *Torcaso v. Watkins*.[119] The Court invalidated Maryland's religious test that "was

113. *Cf.* Steven M. Shiffrin, The First Amendment, Democracy, and Romance (1990) (discussing the image of the dissenter as an organizing symbol for the free speech doctrine).

114. 393 U.S. 503 (1969) (invalidating regulation prohibiting wearing black armbands to school).

115. 491 U.S. 397 (1989) (invalidating law prohibiting desecration of the United States flag).

116. 403 U.S. 15 (1971) (government may not prohibit citizen from wearing jacket with words "Fuck the Draft" in the public corridors of a courthouse).

117. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968) (upholding law prohibiting destruction of draft cards because its purpose was not the suppression of free speech); *see also* Scanlon, *supra* note 104, at 209 (stating that the focus must be on government's justifications for its restrictions, not on the restrictions themselves).

118. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 n.13 (1943) (citations omitted):

> Early Christians were frequently persecuted for their refusal to participate in ceremonies before the statue of the emperor or other symbol of imperial authority. The story of William Tell's sentence to shoot an apple off his son's head for refusal to salute a bailiff's hat is an ancient one. . . . The Quakers, William Penn included, suffered punishment rather than uncover their heads in deference to any civil authority.

One could add other references: The Spanish Inquisition during which the Jews were forced to convert, flee, or die; the Hamen and Esther story from the Bible in which Esther refused to bow down to Hamen. What makes all these stories similar, and in the loyalty oath category, is that required speech is accompanied by forbidden dissent.

119. 367 U.S. 488 (1961).

designed to . . . bar every person who refuses to declare a belief in God from holding a public 'office of profit or trust' in Maryland."[120] An atheist who desired such an office had the following choices: (1) Lie, take the oath, get the job, and say nothing further about her theistic beliefs. (2) Not take the oath, and forfeit the job. The atheist did not have the following option: (3) Take the oath, get the job, and then state, "I don't really believe in God." Such a statement would forfeit the job. In such cases, the government is not interested merely in compelling speech regardless of whether it matches the true beliefs of the speaker (as was the case in *Barnette* and *Wooley*). Rather, the government is interested in ferreting out the speaker's true beliefs, and denying certain benefits if those beliefs are the wrong ones. Thus, laws requiring statements of belief as a prerequisite to receiving a government benefit are quite different from laws such as a compelled pledge of allegiance. The former do not permit dissent; the latter do.

Whether one would feel comfortable dissenting from compelled speech immediately, or only in a different setting, should not alter the analysis. For example, school children might well feel pressure not to dissent immediately after the saying of the pledge; similarly, most adults would be unlikely to display a protest to the United States at a town meeting immediately after the singing of the national anthem. A few points are important here. First, I am assuming now that a reasonable observer would understand the speech act as compelled, and thus not expressive. So the speech act is, on my argument above, not covered by the Free Speech Clause. Second, turning to the stifling of dissent claim (another way to bring the Free Speech Clause back into the picture), psychological pressure not to dissent in a particular setting should not be sufficient to make out a Free Speech Clause claim, so long as other avenues for dissent are open. Indeed, the Court has permitted direct regulation of certain types of communication, so long as alternative channels of expression remain open.[121]

What of the fact that by compelling a speech act the government forces the speaker to take an action to dissent? Doesn't this take away an important option, namely, the option to say nothing? This argument confuses compelled speech that is reasonably understood as that of the speaker (and thus as expressive) with compelled speech that is reasonably understood as compelled (and thus as nonexpressive). Assuming the latter obtains (for if the former does, the Free Speech Clause is thereby brought into play), the speaker need not dissent to dispel any notion that the utterance was representative of her

120. *Id.* at 489-90. Although I use the example of a religious test case, my point here is not limited to the context of religious belief.

121. *See, e.g.*, City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding prohibition on posting of signs on public utility poles); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (upholding governmental restrictions on speech found on off-site commercial billboards).

beliefs. For if a reasonable observer understands the utterance as compelled, then the observer also understands that the utterance is not necessarily representative of the speaker's beliefs. Whether the speaker wants to take the further action of registering dissent to the message of the compelled utterance is, thus, identical to whether any citizen wants to dissent to any law.

3. The Self-Incrimination Analogy

It might be helpful to draw on an analogy to another area of constitutional law responsive to governmental attempts to coerce speech. To gain the protection of the Fifth Amendment privilege against self-incrimination, one must show that a statement is (a) compelled by the government, (b) incriminating, and (c) testimonial.[122] For a statement to be testimonial, it must "relate a factual assertion or disclose information."[123] Thus, requiring someone to say words that do not reveal the contents of the mind does not implicate the privilege. To take an easy case, a voice exemplar used to identify a voice is not testimonial because the government is not interested in what the speaker chooses to say.[124]

A more difficult case, which is helpful in considering the pledge of allegiance problem, is *Doe v. United States*.[125] The United States desired access to Doe's bank records from the Cayman Islands, but Doe refused to answer questions about certain records and, pursuant to Cayman Islands law, the banks refused to disclose any records without Doe's consent. So the United States compelled Doe to sign the following form:

> I . . . do hereby direct any bank . . . at which I may have a bank account . . . to disclose all information and deliver copies of all documents . . . in your possession or control which relate to said bank account . . . and this shall be irrevocable authority for so doing. This direction has been executed pursuant to that certain order of the United States District Court . . . . This direction . . . shall be construed as consent with respect [to Cayman Islands law].[126]

In holding the statement to be nontestimonial in nature,[127] the Court held, "Because the directive explicitly indicates that it was signed pursuant to a court order, Doe's compelled execution of the form sheds

122. *See, e.g.*, Doe v. United States, 487 U.S. 201, 207 (1988).

123. *Id.* at 210. *See also* Louis Michael Seidman, *Rubashov's Question: Self-Incrimination and the Problem of Coerced Preferences*, 2 Yale J.L. & Hum. 149, 154 (1990) ("[T]he statement must require her to employ her cognitive faculties to relate some factual assertion or disclose information.").

124. *See* United States v. Dionisio, 410 U.S. 1, 5-7 (1973).

125. 487 U.S. 201 (1988).

126. *Id.* at 204 n.2.

127. There are obvious difficulties in the government's attempting to pass off a coerced statement as consent, and, indeed, the Cayman Islands government maintained that "a compelled consent . . . is not sufficient to authorize the release of confidential

no light on his actual intent or state of mind."[128] The same analysis should apply to Free Speech Clause challenges to governmentally compelled utterances: If it is clear that the utterance is made pursuant to governmental directive, then a person's execution of that directive also "sheds no light on his actual intent or state of mind."

The Fifth Amendment privilege cases can be analogized as well to the loyalty oath cases. The privilege prevents the government from building a criminal case through the mind of the accused, by helping to avoid the "cruel trilemma of self-accusation, perjury, or contempt."[129] A person faced with stating publicly a loyalty oath that she does not believe, as a condition to receiving a government job, is faced with a similar "cruel trilemma." She can admit that she is not loyal, and lose the job (similar to "self-accusation"); she can take the oath and refuse to disavow it publicly, thus stifling her dissent and projecting a false image (similar to "perjury"); or she can refuse to respond to the request for an oath, leading as well to the loss of the job (similar to "contempt"). When a person is forced to make a potentially incriminating testimonial statement, she has to share her thoughts and beliefs with the government (and some of those thoughts and beliefs might lead to criminal conviction); loyalty oaths similarly require the sharing of a person's real thoughts and beliefs. Both types of compulsion are different from compelling a linguistic act that does not reveal anything about the speaker's mind, that is properly considered nonexpressive, and that is therefore not covered by the Free Speech Clause.

4. Compelled Speech Triggered by Expression

Compelled speech might violate the Free Speech Clause for a reason unconnected to anything I have discussed so far. If the government conditions compelled speech on the speaker's expression, the law might be sufficiently nonneutral to violate the Free Speech Clause. For example, consider two laws, one that requires all participants at a town meeting to sing the national anthem, the other that requires only those adults who are wearing protest buttons to sing the national anthem. Assuming that a reasonable observer would understand the singing as compelled in each instance (and thus as nonexpressive), and assuming avenues of dissent to the town's actions are open to all, the Free Speech Clause would not be violated under either of the principles I have discussed above. But, obviously, the second hypothetical law is constitutionally infirm under the Free Speech Clause. Importantly, it is infirm not because of what it requires, but because of the triggering condition for that requirement. The law would be just as invalid if it required only those adults who

financial records," *id.* at 218 n.16, making one wonder why the United States persisted in its efforts.

128. *Id.* at 216.

129. *Id.* at 212 (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)).

are wearing protest buttons to pay extra, leave the meeting, or eat ice cream. Unless the government has a compelling interest, it may not disproportionately burden those who are engaging in a certain form of expression.

Some of the right not to speak cases involve compelled speech triggered in a nonneutral way. What is troublesome about the state action in those cases is not, however, that the government has violated the right not to speak. Rather, what renders the state action in those cases invalid under the Free Speech Clause is that the government has burdened a selected group of speakers without adequate justification. This point will become clearer when I go through the cases again in part III.B.6.

5. The Autonomy/Personhood Argument

We should assume now a category of laws with the following characteristics: (a) The government has compelled speech. (b) A reasonable observer would know that the speech was compelled, and thus that the words spoken do not necessarily reflect the speaker's beliefs. (c) Channels of dissent are open. (d) The government has not placed the compelled speech burden in an unjustified, nonneutral fashion on a selected group of persons. The sum of my arguments above suggests that whatever else we might say about laws that satisfy these four criteria, they should not be thought to raise Free Speech Clause problems. An example might be the one I gave in the previous section: a town meeting that requires all in attendance to sing the national anthem. Here, (a) the speech is governmentally compelled, (b) assume that all reasonable observers would understand that the song is compelled, and thus that the words sung do not necessarily reflect the singers' beliefs, (c) nothing in the hypothetical indicates any restriction on dissent, and (d) the burden has been placed on all in attendance, rather than on an unjustifiable subgroup. But even if I am correct in arguing that the Free Speech Clause is the wrong constitutional avenue for a challenge here, one might still maintain that the government may not constitutionally require the singing of the national anthem. What is the appropriate constitutional source for this claim?

In many cases, not always linked, the Court has read the Constitution to deprive government of the power to place great intrusions on autonomy, or personhood. These terms are necessarily vague, for the line between legitimate governmental regulation and unconstitutional governmental regulation is hard to draw. The cases I refer to include: *Roe v. Wade*[130] and *Planned Parenthood v. Casey*[131] (right to abortion

130. 410 U.S. 113 (1973).
131. 112 S. Ct. 2791 (1992).

before fetal viability); *Griswold v. Connecticut*[132] and *Eisenstadt v. Baird*[133] (right to purchase and use birth control); *Cruzan v. Director, Missouri Department of Health*[134] (right to refuse lifesaving hydration and nutrition; dicta); *Meyer v. Nebraska*[135] (right to teach children a foreign language); *Rochin v. California*[136] (right against unconsented stomach pumping); *Turner v. Safley*[137] (right of prisoners to marry); *Moore v. City of East Cleveland*[138] (right of nonnuclear family members to live in one house). The cases may be and have been theorized in many ways, but what they have in common is a strong personal claim of liberty counterposed against a weak justification for governmental regulation. My proposal here is that compelled speech cases, absent the Free Speech Clause hooks I have described above, should be seen as autonomy or personhood cases, like the ones just listed.[139] Just as it would be hard to justify a governmental requirement that everyone wear blue on Fridays, or that everyone eat ice cream once a week, so is it hard to justify a governmental requirement that everyone say the pledge of allegiance. The concern in the pledge of allegiance situation, thus, is centered not on the speech involved, but rather on the intrusion on and insult to the person[140] and the weakness of the regulatory need. The category is not "right not to speak" but rather "right against intrusive, insulting, thinly justified governmental action," which can be violated by compelled speech as well as by compelled actions (or compelled inaction) that have nothing to do with speech. Obviously there will be enormously difficult line-drawing problems, and there are important arguments as to why the Court should never have developed this "substantive due process" line of cases to begin with. But the cases exist, and although I will not attempt here an extended theoretical justification for them, others have

132. 381 U.S. 479 (1965).
133. 405 U.S. 438 (1972).
134. 497 U.S. 261 (1990).
135. 262 U.S. 390 (1923).
136. 342 U.S. 165 (1952).
137. 482 U.S. 78 (1987).
138. 431 U.S. 494 (1977).
139. *See* Tribe, *supra* note 110, at 1303-04, 1314-18; Gaebler, supra note 109, at 1004 (describing infringement, in the right not to speak setting, of "the individual's interest in selfhood").
140. The intrusion on and insult to the person, in the pledge setting, might be linked to the association many of us have between compelled utterances and freedom of speech. That would seem to indicate that the Free Speech Clause is the appropriate constitutional provision for challenging compelled utterances. If a reasonable observer would understand that the speech act was compelled, however, and assuming that dissent is open and that the law applies to citizens neutrally, then the nature of the harm to the person seems less like the harm resulting from forbidden expression or compelled expression, and more like the harm from other, nonspeech intrusions on the self.

presented strong arguments for their place in our constitutional fabric.[141]

This autonomy right should be limited in a few important respects. One is that it should be considered a right of the person, and not of corporate entities. Another is that the nature of the regulatory intrusion must be direct on the person, intrusive or insulting or demeaning in what we would agree is a personal, almost bodily way.[142] These limitations will help explain, in the next section, why compelling corporate speech is not invalid, and why compelling speech in a detached way, such as using tax money for governmental propaganda, is also not invalid as unconstitutional compelled expression or as an unconstitutional infringement of an autonomy/personhood right. Finally, as part of the limitation of the right to direct harm to the person, laws that enable psychological pressure from fellow citizens but that do not legally coerce the person should not be included in the right of autonomy/personhood. I say more about this, by way of bringing the discussion full circle, in part III.B.7.

6. Application to the Cases

Barnette. Would a reasonable observer understand the teacher-led pledge of allegiance, with no opt-out provision, as compelled and thus as not reflective of the beliefs of the students? The reasonable observer must be someone who is present at the scene, not some hypothetical average person. So the question must be whether a reasonable student, participating in the saying of the pledge of allegiance, would understand that the content of the pledge does not necessarily reflect the beliefs of any student? This includes a student's understanding of her own beliefs as well as of others' beliefs. Even young students understand the difference between a show and tell project (for example), which reflects the individuality and choice of a fellow student, and a teacher-led pledge of allegiance in which all students participate and say the same words. It would be unreasonable for even a young student to think that the message of the pledge of allegiance necessarily reflects the beliefs of her fellow students. She might, of course, think that most or all of the students share the patriotic values of the pledge, but that is not the test. The test is whether a reasonable observer would understand that a speech act was compelled by the government (here, represented in the teacher).

Whether dissent is available is a difficult question. Certainly most young children would not feel comfortable dissenting to the pledge's

141. *See* Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should be Overruled*, 59 U. Chi. L. Rev. 381 (1992); James E. Fleming, *Securing Deliberative Autonomy*, 48 Stan. L. Rev. 1 (forthcoming 1995); James E. Fleming, *Constructing the Substantive Constitution*, 72 Tex. L. Rev. 211 (1993).

142. In some of the cases—affecting, for example, abortion rights and the right to die—we can drop the "almost" from the preceding sentence.

message in the classroom setting. But we should not underestimate the ability of children to speak their minds on controversial issues if the children are old enough to have dissenting opinions on such issues. And even if dissent is not likely to occur in the classroom setting, the child would be free of the classroom pressure to dissent outside the classroom setting.[143] As discussed earlier,[144] that is sufficient to overcome the Free Speech Clause challenge.

The required pledge in *Barnette* is not triggered by the expression of a particular group, so we are left without a Free Speech Clause argument. But *Barnette* is the best case in the so-called "right not to speak" area for the autonomy/personhood argument. Compelling people through threat of legal sanction to say words that they don't want to say is as much an affront to dignity as many other laws the Court has invalidated. The long-term harm might be less here than from outlawing abortion or birth control, but the insult is clear and the governmental interest in accomplishing its result (inculcating patriotism) through this particular means (compulsory pledge) is low.

Wooley. Of the cases in this group holding against the government, this one is most clearly wrong. A reasonable observer would understand that the license plate motto is the State's message, not the Maynards' message. Furthermore, the Maynards are completely free to dissent to the "Live Free or Die" message in any number of ways. Also, the requirement is for all license plates, not a subgroup of car-owners who are already engaging in a form of expression. So the Free Speech Clause has no place here.[145]

Although the Maynards are individuals, and not a corporation, the autonomy/personhood argument seems weak. The Maynards are not forced to speak certain words, or wear certain buttons or badges. The insult or affront from driving a car with a disagreeable license-plate motto is small; the message that is fostered is detached from the persons fostering it. So I conclude not only that the Free Speech Clause claim fails, but that the autonomy/personhood claim fails as well.

People such as the Maynards might still bring a Free Exercise Clause claim, arguing that even though the law in question is a religion-neutral one of general applicability, it conflicts with religious tenets. Under current Supreme Court doctrine, this claim would lose,[146] but there are many critics of this doctrine,[147] and the federal Religious Freedom Restoration Act ("RFRA") might well give people such as

143. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 663-64 (1943) (Frankfurter, J., dissenting).

144. *See supra* text accompanying note 121.

145. *See* Wooley v. Maynard, 430 U.S. 705, 719-22 (1977) (Rehnquist, J., dissenting).

146. *See* Employment Div. v. Smith, 494 U.S. 872 (1990).

147. *See, e.g.*, Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 Yale L.J. 1611 (1993); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109 (1990).

the Maynards relief in a case such as this.[148] Note that on either argument—Free Exercise Clause or RFRA—individuals with religious objections will prevail while individuals with nonreligious objections will lose.

Red Lion. This remains a special case; if we accept the empirical predicate of spectrum scarcity and governmental control of the broadcast spectrums,[149] then it makes sense to permit the government to attach certain conditions to licenses to prevent certain speakers from gaining a type of monopoly.

PruneYard. The case seems correctly decided. A reasonable observer would not associate the message of various speakers in the shopping center with the owners of the shopping center, and those owners have many avenues to dissent from disliked messages. Furthermore, the access requirement is not triggered by any expression of the owners. So there is no Free Speech Clause claim.

The autonomy/personhood claim fails as well, because the owners are suing in a corporate capacity, and because the speech that benefits from the law is only loosely attached to the owners. Whether the Court was correct to reject the takings claim is a matter I do not address.

Tornillo. The compelled speech here—reply by those personally attacked in the newspaper—is clearly dissociated from the newspaper; any article that would run pursuant to the statute would undoubtedly bear some sort of disclaimer from the newspaper. Without the disclaimer, a reasonable observer might connect the reply with the newspaper, but the nature of a reply to a personal attack is such that it should usually be fairly clear that the one writing the reply is not the one who made the original personal attack. The newspaper has plenty of opportunity, of course, to express dissenting views. Any autonomy/personhood argument should fail; the newspaper is a corporate entity, and there is no insult or affront to particular persons as persons when the newspaper is forced to carry a reply.

But *Tornillo* is an excellent example of a Free Speech Clause claim based on the triggering mechanism for the compelled speech. The right of reply statute is triggered by certain speech only—criticism and attacks on the record of a political candidate.[150] Thus, regardless of what penalty a newspaper must face for printing such criticism and attacks, the Free Speech (and Free Press) Clause would be implicated. For example, suppose the State had enacted a law requiring newspapers to pay $1000 to all candidates it criticized or attacked. That would be unconstitutional even though the State did not require the newspaper to carry any speech. It would be unconstitutional because

148. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as 42 U.S.C. § 2000bb (1994)).

149. *See supra* note 59.

150. *See* Miami Herald Publishing v. Tornillo, 418 U.S. 241, 244 (1974).

the newspaper is being sanctioned for engaging in a particular kind of otherwise protected speech. (Here, speech of the highest order—political speech.) The fact that Florida chose to sanction the newspaper by requiring it to carry a reply from the candidate is not what makes the state action unconstitutional; the law is unconstitutional not for what it requires, specifically, but because the requirement is triggered by protected speech.

Abood. This is a difficult case. On the one hand, a reasonable observer would not associate the union's political speech with nonunion members who are compelled to pay service fees in lieu of union dues. Furthermore, those members have complete freedom to dissent from any disagreeable union speech. In addition, the speech fostered against the plaintiffs' wishes is not connected to the plaintiffs in a way that gives rise to an autonomy/personhood objection. In many ways, the law in *Abood* operates as many tax and spend programs do. For example, the United States collects taxes from all who earn income, and spends some of that money on speech, such as the National Endowment for Democracy ("NED") and the National Endowment for the Arts ("NEA"). Regardless of what one thinks about these programs as a matter of policy, there is nothing clearly unconstitutional about the government spending money in this way. But if it is constitutional to spend tax money on messages that certain taxpayers reject, then why is it unconstitutional to spend union service fees on messages certain fee payers reject?

Still, there is something troubling about requiring people who would rather not be union members at all to pay not only for collective bargaining (which is in their long-term economic interest), but also for union political speech. Recall that the service fees were used in part to "contribute to political candidates and to express political views unrelated to [the Union's] duties as exclusive bargaining representative."[151] The compelled speech, therefore, is often politically partisan in nature. Does that fact, however, distinguish expenditures for the NED and the NEA? Surely those projects often advance messages that are politically partisan; the first, advancing democracy over, say, socialism; the second, supporting in individual cases art with blatantly political messages. Perhaps the problem is that the plaintiffs in *Abood* are being singled out for fees; they are a smaller, more discrete class than all American taxpayers who must support the NED and the NEA. Or, perhaps, I have gotten the argument backwards, and *Abood* should be considered a clear instance of a constitutional problem that exists as well with regard to the NED and the NEA. I leave further discussion of this tax and spend category for another day.

151. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 (1977).

Pacific Gas. A reasonable observer would understand that the public interest group's message contained in the utility company's bill is not that of the utility company. Further, the company has many avenues of dissent open. And, because the company is a corporate entity, arguments from autonomy/personhood do not obtain.

But, as with *Tornillo*, the company can argue that the compelled speech requirement was triggered in a way that was not itself neutral toward expression. This argument is trickier here than in *Tornillo*, which involved a state statute granting a right of reply to all attacked political candidates. Here, the public interest group's speech was compelled by the state utility commission, which issued an order requiring the utility company to carry the public interest group's speech four times a year (billing is monthly). One could argue that the commission's order has nothing to do with the utility company's speech, but resulted from a more general conclusion that the public would benefit from the public interest group's views. But that is not how the case came about. It arose because the utility company included various messages in the billing envelope every month, and because the public interest group objected to these messages. Rather than prohibit the messages outright, the commission devised its sharing plan, permitting the utility company to use the extra envelope space eight times a year, and granting the public interest group access the remaining four months. As litigated, therefore, *Pacific Gas* involves compelled speech triggered by speech itself, and this violates the Free Speech Clause. (At least presumptively. The case raises some difficult questions about the utility company's monopoly access to utility consumers, and therefore looks a bit like *Red Lion*. I express no view on whether that is the appropriate analogy.)

Hurley. This might be the only case properly decided as a right not to speak case. The Court stated that the gay and lesbian marchers'

> participation would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well . . . . Although each parade unit generally identifies itself, each is understood to contribute something to a common theme, and accordingly there is no customary practice whereby private sponsors disavow "any identity of viewpoint" between themselves and the selected participants. Practice follows practicability here, for such disclaimers would be quite curious in a moving parade . . . . Without deciding on the precise significance of the likelihood of misattribution, it nonetheless becomes clear that in the context of an expressive parade, as with a protest march, the parade's overall message is distilled from the individual presenta-

> tions along the way, and each unit's expression is perceived by spectators as part of the whole.[152]

On this logic, which seems correct,[153] a reasonable observer would connect the parade organizers to all messages included in the parade. (This assumes lack of knowledge of the litigation underlying the parade, which involved a court order admitting the gay and lesbian marchers.)

7. The Pledge of Allegiance, with an Opt-Out Provision

We can now return to the case of a teacher-led pledge of allegiance in public school, with an opt-out provision for students who don't wish to participate. Assuming that the message of the pledge is not reasonably associated with the minds of participating students, and assuming a fair opportunity for dissent, even though such dissent might not occur in the classroom, the Free Speech Clause does not come into play. Also, there is no compelled speech triggered in a nonneutral way by expression itself.[154] So far, the analysis tracks my analysis of *Barnette*. *Barnette*, of course, involved a pledge of allegiance compelled through threat of legal sanction, and I have argued that this violates the autonomy/personhood rights of students who would prefer not to participate. Can we say the same if students are given the option not to participate, and the pressure they feel is psychological rather than from the threat of legal coercion?

The autonomy/personhood argument should be reserved for direct threats of legal coercion, and not extended to cases of psychological pressure, even if we attribute such pressure ultimately to the government. The autonomy/personhood right involves an intrusion on or insult to the person, a dignitary harm. When the government makes abortion or birth control illegal, for example, such a harm has been worked. But when the government permits such behavior while exerting extralegal pressure against the individual not to engage in it, the same sort of harm to the person does not exist. This is reflected in the abortion decisions. Although the Court has read the Constitution to forbid the government from banning abortion before fetal viability, the Court has permitted government to place other forms of pressure on women to choose childbirth over abortion. Thus, the Court has upheld laws that require waiting periods before abortions and that require abortion providers to give to women seeking abortions information about the hazards of abortion.[155] These laws exert pressure against abortion, but they ultimately leave the choice to the woman involved. In the pledge of allegiance setting, we should also distin-

152. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 115 S. Ct. 2338, 2348-49 (1995).

153. *See supra* note 90.

154. *See supra* part III.B.4.

155. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

guish between coercion based on the threat of legal sanction and coercion that uses psychological methods to try to influence choice.

This argument requires me to say more about the relevance of psychological coercion in the setting of teacher-led public school prayer. Earlier, in part III.A, I set forth the arguments for and against deeming psychological coercion constitutionally relevant, and provisionally accepted Justice Kennedy's *Weisman* argument in favor of psychological coercion's constitutional relevance. I did not, at that point, distinguish between the prayer and the pledge setting, because I was still accepting the Court's doctrine regarding both school prayer and the right not to speak, which rendered coercion relevant in both settings and which did not seem to provide any grounding for treating psychological coercion differently in the two settings. Then I argued for rethinking the right not to speak, and for evaluating certain instances of governmentally compelled speech as implicating autonomy/personhood rights rather than free speech rights. The final argument, in the preceding paragraph, was that psychological coercion should not be sufficient for an autonomy/personhood claim. Why, then, should it be sufficient for an Establishment Clause claim?

First, there might be good reasons for allowing broader scope for the textually based Establishment Clause claim than for the unenumerated, extratextual autonomy/personhood claim. Precisely because of the superior constitutional pedigree of the Establishment Clause claim, we can more confidently extend its scope to include psychological coercion. We should be more wary of extending the scope of the autonomy/personhood claim, which has a weaker constitutional pedigree. Although I think this argument significant, one might, however, reject it as improperly ranking constitutional rights. There is, then, a second, and more substantive reason for considering psychological coercion sufficient for an Establishment Clause claim but not for an autonomy/personhood claim. As I argued above,[156] an autonomy/personhood claim involves an insult to the person, a dignitary harm, which is not violated by psychological coercion alone. One should not take umbrage at psychological coercion in settings involved in the autonomy/personhood cases as one takes umbrage at legal coercion. When prayer is coerced, however, the injury cuts to the heart of what the religion clauses are meant to protect; involuntary prayer is, often, an immediate harm to the subject's religious conscience, even if a reasonable observer knows the prayer is compelled, and regardless of whether the involuntariness is the result of legal or psychological coercion. In part this is because, for many, prayer implicates concerns beyond the world, concerns such as the preservation of one's spiritual life after one's physical death. The act of saying an involuntary pledge does not carry the same consequences.

156. *See supra* part III.B.5.

I have now reached the same conclusion as Judge Easterbrook—that psychological coercion should invalidate, in the public schools, teacher-led prayer but not a teacher-led pledge of allegiance.[157] Judge Easterbrook's primary argument for this conclusion, however, was that the Establishment Clause prohibits governmental advancement of religion through teacher-led public school prayer but says nothing about governmental advancement of patriotism through a teacher-led public school pledge of allegiance. Under the structural view of the Establishment Clause, this would be true, for under that view the advancement of patriotism is a legitimate governmental end but the advancement of religion is not. If we accept, however, Justice Kennedy's argument in *Weisman* that psychological coercion is relevant to the constitutional analysis,[158] and add to that *Barnette*'s holding that the government may not coerce citizens to speak,[159] then we may no longer rely on the special way in which the Establishment Clause disables the government from promoting religion. Adding together *Weisman* and *Barnette*, government coercion of citizen speech is unconstitutional regardless of the content of the speech, and there is no reason to believe that psychological pressure will force students to pray but will not force them to say the pledge. My agreement with Judge Easterbrook's conclusion, thus, has required moving away from the structural view of the Establishment Clause, and, instead, reconceptualizing the harm done through a psychologically coerced pledge of allegiance.

CONCLUSION

The pledge of allegiance problem stems from the intersection of two lines of Supreme Court doctrine, the school prayer cases and the right not to speak cases. The most recent school prayer case, *Lee v. Weisman*,[160] recognizes psychological pressure on students in public school as constitutionally relevant to assessing governmentally sponsored group prayer.[161] The government may not coerce people to pray, or to appear to others to be participating in prayer, and the Court said that psychological pressure counts as coercion.[162] The right not to speak cases, in turn, bar the government from requiring people to foster messages they do not wish to foster. If psychological pressure to pray is recognized as constitutionally relevant, then the same pressure to join in a group pledge of allegiance might also be recognized as constitutionally relevant. If the government may not coerce people to pray, and psychological pressure counts as coercion, and if the govern-

157. *See supra* text accompanying notes 6-10.
158. *See supra* part I.B.
159. *See* 319 U.S. 624, 642 (1943).
160. 505 U.S. 577 (1992).
161. *Id.* at 592-93.
162. *Id.*

ment may not coerce people to speak, and psychological pressure still counts as coercion, then the pledge of allegiance may not be led by teachers in public-school classrooms. Or so the argument would go.

In this Article, I have suggested two ways around this conclusion, both involving revision of constitutional doctrine. The first is to understand the school prayer cases as involving a structural concern with governmental involvement in religious activities. The Establishment Clause, on this view, prohibits governmentally sponsored prayer in public schools regardless of coercion analysis. Furthermore, we could recognize psychological coercion not only as not necessary for an Establishment Clause claim in the setting of public-school prayer, but as irrelevant to constitutional analysis more generally. On this argument, psychological coercion is proximately worked by fellow students, not by the government.

The second way around the conclusion that the pledge of allegiance may not be led by teachers in public schools, even with an opt-out provision, is to rethink the right not to speak cases. My main argument here is that compelled speech often should be considered nonexpressive, and thus not covered by the Free Speech Clause. If a reasonable observer would understand another's speech as compelled by the government, and as not necessarily reflective of the speaker's own beliefs, then the Free Speech guarantee is not in play. There are other ways that the government might violate the Free Speech Clause in the compelled speech setting, however, and we should be attuned to them as well. So, the government may not prohibit the dissent of those it is compelling to speak, and the government may not trigger a speech requirement by the speaker's antecedent expression, in a selective and unjustifiable way. But if none of these predicates obtains, then the Free Speech Clause is the wrong constitutional hook for arguments against governmentally compelled speech. In some cases, however, compelling speech violates an autonomy or personhood right of the individual, intruding on the person and insulting the person's dignity through requiring the person to speak words she would rather not speak. The right here is similar to that in the "substantive due process" cases. The right does not apply to corporations, however, nor does it apply to individuals when the speech they are forced to foster is detached from them personally.

If we understand the compelled speech (or right not to speak) cases in this way, then we can bar the pledge of allegiance when compelled through threat of legal sanction, while permitting it if students have the legal option not to participate. For even if we recognize psychological pressure as constitutionally relevant in the prayer setting, we should consider it insufficient as the predicate for an autonomy/personhood claim, for such pressure does not harm the dignitary interests of the person as does the threat of legal sanctions.