ARTICLE

REGULATING RELIGIOUS COERCION

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This Article examines the nature and regulation of religious coercion. Direct religious coercion denotes situations where the government expressly applies sanctions to ensure conformity with religious goals. Indirect religious coercion describes situations where, although the state may not have intended to pressure citizens to comply with or participate in some religious activity, it nonetheless takes advantage of social, psychological or peer pressure that has the same conformity-inducing effect. Indirect religious coercion is a real problem for those who dissent from majoritarian religious practices. But an open-ended inquiry into it can, as critics point out, be a highly unpredictable and subjective exercise. On balance, the Article concludes that the concept does deserve recognition by the courts. The Article develops a modified indirect coercion test to guide judges in First Amendment cases. A two-step test is expounded to streamline the inquiry, identify the key criteria, and render the test more workable.

INTRODUCTION .................................................. 216

I. TWO CONCEPTIONS OF RELIGIOUS COERCION ................. 218
   A. Direct Religious Coercion .................................. 219
   B. Indirect Religious Coercion ............................... 222

II. THE CASE AGAINST INDIRECT RELIGIOUS COERCION .......... 224
   A. Administratively Unworkable ............................. 224
   B. Over-Inclusive Coverage and Secularizing Effect ...... 225
   C. The De Minimis Principle and the Standard for Judging Coercion ........................................ 227

III. THE REJOINER .............................................. 228
   A. More “Realistic” ........................................ 228
   B. Under-Inclusive Coverage ................................ 231

IV. AN ASSESSMENT .............................................. 232

V. A MODIFIED INDIRECT RELIGIOUS COERCION TEST ......... 235
   A. Stage One: The Preconditions ............................ 236
      1. Government Action .................................... 236
      2. Indirect Coercion .................................... 237

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215
3. Religious Activity .......................................................... 238
B. Stage Two: The Rebuttable Presumption .................................. 239
CONCLUSION ............................................................................. 241

“No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”

“Let there be no coercion in religion.”

INTRODUCTION

To ask, “What is religious coercion?” is a demanding question, akin to asking, “What is religious freedom?” This is because religious coercion is the antithesis of religious freedom. Defining precisely what is “coercion” is an exercise that continues to tax philosophers. To take but one definition, “[c]oercion occurs when one person threatens to visit some evil or unwanted consequence on another unless that other does or refrains from doing some act in accordance with the coerctor’s demands.” Rather than laboriously work through the subject again from scratch, it will suffice for present purposes to posit an initial working definition of religious coercion as: the application of, or threat of, force by the coerctor to ensure someone, the coerced person (or

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2. Qur’an 2:256.
3. “The right to religious freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that in matters religious no one is to be forced to act in a manner contrary to his own beliefs.” Vatican II Council, Declaration on Religious Freedom (1965), reprinted in THE DOCUMENTS OF VATICAN II (1967, 1979) (Walter M. Abbott ed., 1966) [hereinafter Vatican].
6. Fortunately this has been done. For a most rigorous and lucid analysis of the core elements of coercion, see Peter Westen, ‘Freedom’ and ‘Coercion’—Virtue Words and Vice Words, 1985 DUKE L.J. 541, 559-69 (defining coercion as “a constraint or promise of a constraint, Y, that X, knowingly brings to bear on X in order that X choose to do something, Z, that X would not otherwise do and that X does not wish to be constrained to do—where X knows that X is bringing or promising to bring Y to bear on him for that purpose, where Y renders X’s doing more eligible to X than Z would otherwise be, and where Y leaves X worse off either than he otherwise expects to be or than he ought to be for refusing to do X’s bidding.”).
coercee), engages in (or refrains from engaging in) a particular religious\(^7\) practice, observance, ceremony or ritual.

Notice in this definition, the identification of the coercer is left open. Definitions of religious coercion typically talk about compulsion, force or power exercised by the state or by others.\(^8\) There is no doubt that religious coercion may be exerted by non-state actors—employers, unions, churches, clubs, neighbors, parents, relatives, friends—upon other citizens or groups of citizens. If one believes that authentic faith must be free and voluntary,\(^9\) then it may seem myopic to focus upon government coercion in religious matters and not coercion by non-government actors. This is a fair criticism. However, constitutional bills of rights typically have a “vertical” focus and are aimed curbing excesses of government power exercised towards citizens.\(^1\) Thus, some form of state action is required before the conduct at issue can be scrutinized as a constitutional violation. Secondly, the extent to which the state ought to intervene to protect one group of vulnerable citizens from religious pressure exercised by another such group is simply beyond the scope of this Article—save in one situation that I shall come to shortly. Conceivably, the state’s duty to protect the religious freedom of its citizens could require it in some circumstances to intervene.\(^2\) The obvious example is a law to prevent disturbance or interruption at places of worship.\(^3\) The focus of this essay, however, is religious coercion exercised or authorized by the state.

In Part I, I outline the two conceptions of religious coercion, direct and indirect. In Parts II and III respectively, I examine the case against and for legal recognition of indirect religious coercion. Part IV contains an assessment of the pros and cons of adopting the indirect coercion approach and concludes in favor of the law recognizing the concept. Part V sets out a modified indirect coercion test. My goal here is to ensure the benefits of scrutinizing the practical

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\(^7\) On what constitutes a “religious” versus a philosophical, patriotic or moral practice, see infra notes 159-173 and accompanying text.

\(^8\) See Vatican, supra note 3 (“[C]oercion on the part of individuals or of social groups and of any human power . . . .”).


\(^10\) See, e.g., Vatican, supra note 3, at 689-70 (“It is one of the major tenets of Catholic doctrine that man’s response to God in faith must be free. Therefore no one is to be forced to embrace the Christian faith against his own will . . . . The act of faith is of its very nature a free act. Man . . . cannot give his adherence to God revealing Himself unless the Father draw him to offer to God the reasonable and free submission of faith.”).

\(^11\) See, e.g., Paul Rishworth, Liberty, Equality and the New Establishment, in LITIGATING RIGHTS: PERSPECTIVES FROM DOMESTIC AND INTERNATIONAL LAW 91, 97 (Grant Huscroft & Paul Rishworth eds., 2002) (“The orthodoxy, of course, is that bills of rights are designed to limit the power of government for the benefit of private persons and institutions.”).

\(^12\) See Rex Ahdar & Ian Leigh, RELIGIOUS FREEDOM IN THE LIBERAL STATE 176-84 (2005).

\(^13\) See id. at 363.
social pressure that majoritarian religionists exert upon adherents of religious minorities are not dissipated by an unpredictable, open-ended inquiry. Accordingly, I propound a test that narrows the inquiry sufficiently to give it a greater degree of administrability and predictability. I conclude that indirect religious coercion is worth proscribing, provided a focused inquiry is followed.

I. TWO CONCEPTIONS OF RELIGIOUS COERCION

From the case law we can identify two distinct conceptions of religious coercion, one narrow and one broad.14

First, there is direct or legal religious coercion. This denotes overt, express, explicit, or blatant pressure exercised by the state upon individuals to engage in (or not engage in) matters religious. It is “legal” in nature as there is the express threat of a legal penalty, sanction, fine or the threat of withdrawal of a state benefit for non-compliance. It is “direct” because the government is intentionally and openly confronting the person with a choice of conforming to the religious activity in question or facing the adverse consequences imposed by the state. There are just two parties involved: the coercer and the coerced.

The second type is “indirect” religious coercion where the state uses an intermediary or third party to achieve its objective. Indirect religious coercion comprises less overt and more “subtle” kinds of social, peer or psychological pressure by private persons upon other private individuals to engage in (or not engage in) matters religious. There is, with this second form of religious coercion, no legal sanction imposed by the state for non-compliance. Furthermore, the choice to conform or not with the religious conduct is in a strict, formal sense, voluntary.

This situation appears at first glance to be an instance of purely private religious coercion and it is difficult to see how the state has coerced citizens to support or participate in religion. Nonetheless, the argument goes, the state may still be implicated where one can discern a causal link between the state and the ostensibly private exercise of coercion.15 While the state may not have directly applied pressure, it may have “orchestrate[d]”16 or relied upon social pressure to ensure conformity to some religious matter. This is wrong, as “the government may no more use social pressure to enforce orthodoxy than it may use more direct means.”17 Here there are three parties involved: the coercer, the intermediary and the coerced person.

My prime focus is not the situation where the government intentionally and actively co-opts private intermediaries as its agent to bring pressure to bear.

17. Lee, 505 U.S. at 594.
This is non-contentious for it is just another species of direct coercion, but it is not the phenomenon at issue. Rather, I am concerned with situations where this was not the original or principal objective but, nevertheless, the state becomes aware of the “collateral damage” its policy is now causing. It belatedly becomes aware that it has “structured an environment” were social pressure is having a coercive effect upon some citizens and having done so “the State cannot disclaim its responsibility for those resulting pressures.”

Indirect religious coercion theory says the government cannot use an intermediary to bring about its goal or—and this is the crux—blithely allow the same result to occur having creating a situation where the prospect of a person being coerced to participate by (non-state) actors is a real and foreseeable one. Having so structured the situation it would be wrong to simply “let peer pressure take its natural and predictable course.” Plainly, the government cannot expressly say: engage in this religious activity or suffer the penalty. Neither, according to the indirect religious coercion theory, should the state create or mandate a situation where the person being coerced is confronted with a technical choice to not engage in a religious activity, but this choice is illusory due to the presence of social or peer pressure exerted by intermediaries.

In the Establishment Clause case law the distinction is firmly recognized, although there has been a debate among the Supreme Court justices on the wisdom of extending the notion of religious coercion beyond direct legal coercion to include indirect forms of religious coercion.

To reiterate, this essay seeks to clarify these two kinds of religious coercion and, in particular, to explore whether indirect religious coercion is a workable and helpful notion for legal purposes.

A. Direct Religious Coercion

A straightforward understanding of religious coercion is legal coercion—religious practice or observance enforced by the threat of legal sanction by the state. The Human Rights Committee in its authoritative General Comment No. 22 upon Article 18.2 of the International Covenant on Civil and Political Rights 1966 (“No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice”) take this approach to the meaning of coercion:

Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or

21. See Lee, 505 U.S. at 577. But see id. at 632 (Scalia, J., dissenting).
penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant, are similarly inconsistent with article 18.2.22

Justice Antonin Scalia, dissenting in Lee v. Weisman, has been a consistent advocate of the direct legal coercion approach: “The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty.”23 Lee is one of the many cases where the conduct at issue was public prayer.24 The Supreme Court held that it was unconstitutional for a rabbi to offer non-sectarian, generically theistic, invocation and benediction prayers at Rhode Island, middle school and high school graduation ceremonies.25 The prayers were not rendered lawful by the fact that attendance at the graduation was voluntary in a legal sense.26

Justice Clarence Thomas in the Pledge of Allegiance case, Elk Grove, strongly endorsed Justice Scalia’s strict definition.27 He argued that the broader notion of indirect, subtle coercion (to be discussed shortly) adopted in cases such as Lee “cannot be defended”28 and “has no basis in law or reason.”29 Justice O’Connor in Elk Grove pinpointed “compulsion. . . of the direct sort”30 and instances where the government “overtly coerce[s] a person,”31 as the proper focus.

What are examples of direct coercion? Taxation to support a state church, compelling attendance at a state church and requiring a religious oath to obtain government office are historic instances.32 The Human Rights Committee mentions the deprivation of state educational or medical benefits for non-

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23. 505 U.S. at 640.
24. Id. at 581.
25. Id. at 599.
26. Id. at 586, 595.
28. Id. at 45.
29. Id. at 49.
30. Id. at 44. (O’Connor, J., concurring).
31. Id.
compliance as further examples.\textsuperscript{33}

A good contemporary example are the cases concerning religiously-oriented substance abuse treatment programs run for prisoners.\textsuperscript{34} For instance, in\textit{ Kerr v. Farrey},\textsuperscript{35} James Kerr, an inmate at a Wisconsin state minimum-security facility, was subject to significant penalties if he refused to attend religion-based narcotics rehabilitation meetings. Specifically, he would be classified to a higher security risk category and adverse notations on his prison record would be entered that could affect his eligibility for parole.\textsuperscript{36} The Seventh Circuit Court of Appeals held that the state had impermissibly coerced him to participate in a religious program.\textsuperscript{37} Similarly, in\textit{ Inouye v. Kenma}, the plaintiff “had long objected to compelled participation in religion-based drug treatment programs.”\textsuperscript{38} Ricky Inouye had sued prison officials in the past regarding his placement in Narcotics Anonymous and Alcoholics Anonymous while in prison and taken steps to avoid such religion-based programs while on parole. Prior to his release on parole, he sent a letter to the Hawaiian state parole authority objecting to being placed in such programs as a condition of his parole, stating that he was Buddhist and enclosing a copy of the Seventh Circuit’s decision in\textit{ Kerr}. The court concluded that his rights had been violated by being forced to choose between returning to prison or attending a religious-based drug treatment program. The court commented: “While we in no way denigrate the fine work of AA/NA, attendance in their programs may not be coerced by the state. The Hobson’s choice Nanamori [the parole officer] offered Inouye—to be imprisoned or to renounce his own religious beliefs—offends the core of Establishment Clause jurisprudence.”\textsuperscript{39}

Another illustration is\textit{ Milwaukee Deputy Sheriffs Association v. Clarke}.\textsuperscript{40} The Milwaukee County Sheriff had invited a local Evangelical church’

\textsuperscript{33} General Comment, \textit{supra} note 22.

\textsuperscript{34} For cases concerning religious-based substance abuse programs for prisoners where the courts ruled there was \textit{no} religious coercion, usually on the basis that the plaintiff raised no objection before or during his participation in the program, see, e.g., Burnight v. Sisto, No. CIV S-08-1894, 2011 WL 533979, at *1 (E.D. Cal. Nov. 16, 2010) (finding an allegation of denial of parole due to failure to attend an Alcoholics Anonymous program unfounded); Sanders v. Swarthout, 09-cv-3303, 2011 U.S. Dist. LEXIS 17646, at *1 (E.D. Cal. Feb. 23, 2011) (finding no evidence prisoner was coerced to participate in Alcoholics Anonymous program); Goodwin v. Hamilton, 10-cv-11909, 2011 U.S. Dist. LEXIS 25790, at *1 (E.D. Mich. March 14, 2011) (finding no evidence prisoner was coerced to participate in Narcotics and Alcoholics Anonymous program).

\textsuperscript{35} 95 F.3d 472 (7th Cir. 1996).

\textsuperscript{36} \textit{Id.} at 474.

\textsuperscript{37} \textit{Id.}

\textsuperscript{38} 504 F.3d 705, 709 (9th Cir. 2007). A violation of the plaintiff’s religious freedom was similarly found in Hanas v. Inner City Christian Outreach, Inc., 542 F. Supp. 2d 683 (2008), where a Catholic offender faced incarceration unless he attended Bible studies and followed the worship directives of the Pentecostal rehabilitation program.

\textsuperscript{39} \textit{Inouye}, 504 F.3d at 714.

\textsuperscript{40} 513 F. Supp. 2d 1014 (E.D. Wis. 2007).
organization, the Fellowship of Christian Centurions, to make presentations at the Department's occasional leadership conferences, as well as at the Department's daily "roll call" meetings at the start of each work shift. The plaintiffs, two deputies who were Muslim and Catholic, objected to what was an indisputably religious message presented on these occasions, as well as to the religious literature distributed. The District Court held that the Department had engaged in "religious proselytizing." Attendance at the conferences and roll calls was mandatory and the Department did not advise them of, nor provide any opportunity for, the deputies to excuse themselves. Before the leadership conference the Department had rather pointedly discussed promotion criteria. The deputies had been coerced to participate, or at least remain present, at these religious presentations for fear of losing their jobs or being stymied in their career.

B. Indirect Religious Coercion

A more subtle and broader understanding of coercion takes into account the psychological, social, or peer pressure a person may experience if he or she does not comply. Whilst not under any legal penalty, the person may feel they have little real choice not to engage in the conduct expected.

In a long line of Establishment Clause cases, judges have criticized state-approved practices that involve "subtle coercive pressures" to engage in some religious practice. In Engel v. Vitale, a nondenominational voluntary prayer said by the class at the start of each school day at a New York public school was struck down as a violation of the Establishment Clause. The majority of the Supreme Court stated:

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. . . . 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.

In Lee v. Weisman, the majority of the Supreme Court insisted that "public pressure, as well as peer pressure, . . . though subtle and indirect, can be as real

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41. Id. at 1016-17.
42. Id. at 1019.
43. Id. at 1021.
45. Lee, 505 U.S. at 588.
47. Id. (emphasis added).
as any overt compulsion.”

The Court accompanied the expanded notion of coercion with an expanded (and similarly contested) meaning of “support” or “participation” in a religious activity. Conceivably, the objector to the prayer could sit or stand in silence during the invocation, thereby signifying mere respect for the prayer, rather than participation or assent. But the Court saw it otherwise: “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.” The dissenter is coerced into appearing to subscribe to a religious activity he or she does not agree with.

Justice Scalia dissented forcefully on this point:

The Court’s notion that a student who simply sits in “respectful silence” during the invocation and benediction (when all others are standing) has somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous. We indeed live in a vulgar age. But surely “our social conventions” . . . have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence.

Even a student who was standing would not have been justified in believing that this action signified her own participation or approval. For Justice Scalia, standing “[would] not remotely establish a ‘participation’ (or an ‘appearance of participation’) in a religious exercise.” Rather, he contended, it would be equally consistent with respect for the religious observances of others.

The Supreme Court in *Santa Fe Independent School District v. Doe* found similar indirect coercion at work in a Texas high school’s student-led prayer delivered before a home football game. While attendance at a football game was technically voluntary, and not as compelling an event as a one-off graduation ceremony, the Court held that in a practical, cultural sense it was involuntary. For some pupils, such as the direct participants—the football players, cheerleaders and band members—attendance was required. But even for the greater student body, it would be unrealistic to say that students did “not feel immense social pressure . . . to be involved in the extracurricular event that is American high school football.” Thus, the prayer had “the improper effect of coercing those present to participate in an act of religious worship.”

48. 505 U.S. at 593.
49. Id.
50. Id. at 637 (Scalia, J., dissenting).
51. Id. at 638.
53. Id. at 311-12.
54. Id. at 311.
55. Id.
56. Id. at 312.
In Elk Grove, the majority of the Ninth Circuit Court of Appeals drew upon Lee and Santa Fe in ruling that the elementary public school policy requiring teacher-led daily recitation of the Pledge of Allegiance was coercive. Given that the Pledge uses the words “under God,” students were effectively coerced to participate in an exercise with religious content: choosing to refrain would risk disapproval from their teachers and backlash by their peers. Although the Supreme Court was not required to rule on the merits of the Establishment Clause violation, Justice Thomas agreed that if the Court’s broad understanding of coercion in Lee was the ruling precedent, then the Pledge was unconstitutional. The Ninth Circuit recently affirmed this finding of coercive effect.

II. THE CASE AGAINST INDIRECT RELIGIOUS COERCION

There appear to be no dissenters to the proposition that direct religious coercion is impermissible. But is indirect religious coercion the kind of coercion that courts should be concerned with? There are at least three distinct objections to the concept.

A. Administratively Unworkable

Some are adamant that, in light of the confusing case law on indirect coercion to date, the courts are ill-equipped to delve into slippery questions of psychological coercion. The concept is yet another species of “constitutional Rorschach test,” another “weasel word.” Justice Scalia in Lee v. Weisman

57. Newdow v. U.S. Congress, 328 F.3d 466, 486-87 (9th Cir. 2003).
58. Id. at 488.
59. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 46 (2004) (Thomas, J., concurring). As we have seen, however, he believed that Lee was wrongly decided and the broader notion of indirect coercion was unsustainable.
60. Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1038 (9th Cir. 2010) (“We agree that the students in elementary schools are being coerced to listen to the other students recite the Pledge. They may even feel induced to recite the Pledge themselves. Although the School District’s Policy does not compel them to recite the Pledge, or even to listen to others reciting the Pledge, we recognize that elementary school children are unlikely to walk out of the classroom in protest.”).
62. Gey, supra note 61, at 467, is applying this pejorative description to the much-maligned three-part Lemon test for Establishment Clause violations (Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)) not the coercion test.
was at his caustic best in his denunciation of the notion.\(^{64}\) He accused the majority of wielding “the bulldozer of its social engineering” by “invent[ing] a boundless, and boundlessly manipulable, test of psychological coercion.”\(^{65}\) Reflecting upon the public nativity display cases which had come, to quote the words of another judge, to “requir[e] scrutiny more commonly associated with interior decorators than with the judiciary,”\(^{66}\) Justice Scalia continued, “But interior decorating is a rock-hard science compared to psychology practiced by amateurs.”\(^{67}\) There was, in Justice Scalia’s view, no room for a kind of judicial “psycho-journey,”\(^{68}\) adding:

I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty—a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of Freud.\(^{69}\)

The majority had seen itself as engaging in a “delicate and fact-sensitive”\(^{70}\) approach in its utilization of the concept of psychological coercion. But Justice Scalia doubted whether the Court fully grasped the complexities and subtleties of this phenomenon.\(^{71}\) A few sporadic citations of articles from the psychological literature could not, in his view, “disguise the fact that the Court ha[d] gone beyond the realm where judges know what they are doing. The Court’s argument that state officials ha[d] ‘coerced’ students to take part in the invocation and benediction at graduation ceremonies [was], not to put too fine a point on it, incoherent.”\(^{72}\)

B. Over-Inclusive Coverage and Secularizing Effect

The adoption of the concept of indirect religious coercion in anti-establishment cases has had adverse consequences for religious expression in the public square.\(^{73}\) An increasing number of traditional, historic public religious displays and ceremonies have been successfully challenged due to the courts’ acceptance of the argument that there is a subtle coercive effect upon

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65. Id. at 632. See also, Smith, supra note 63, at 26 (“the notion of coercion is simply the term that judges and other citizens use to describe what happens whenever the state adopts religious and moral values with which they disagree. Constraints that are disliked are ‘coercive.’”)
67. Lee, 505 U.S. at 636 (Scalia, J., dissenting).
68. Id. at 643.
69. Id. at 642.
70. Id. at 597 (majority opinion).
71. Id. at 636 (Scalia, J., dissenting).
72. Id.
73. At least that is the view of some leading commentators. See, e.g., Stephen Carter, The Culture of Disbelief 122-23 (1993).
those citizens who do not share that faith.\textsuperscript{74} In most Western nations, the predominant religious observances and rituals tend to be Christian—a result of the historic predominance of Christianity in the West.

Public displays that are not directly and legally coercive are, nonetheless, constitutionally suspect under an indirect religious coercion approach because they are said to send an alienating and exclusionary signal to citizens who do not share that religion.\textsuperscript{75} These signals may encourage some dissenters to conform to majoritarian religious practices. But the real objection is surely not that some citizens are coerced to conform; more often than not the dissenter stands his ground.\textsuperscript{76} It is in the nature of things that some will be more courageous than others. Furthermore, coercion is not always successful, but that does not mean that the coerces has not exercised coercion.\textsuperscript{77} “To coerce a person is to subject him to coercive constraint, regardless of whether the constraint achieves its purpose.”\textsuperscript{78} At the very least one can charge the coerces with an attempt to coerce.\textsuperscript{79}

Arguably, the real concern behind the alienating-signal objection is not so much that some may be coerced but that the state is not acting neutrally or even-handedly in singling out certain religious communities for special

\textsuperscript{74} See, e.g., McCrory Cnty. v. ACLU, 545 U.S. 844 (2005) (upholding an injunction against a Kentucky courthouse display of Ten Commandments, challenged as violating the Establishment Clause); Am. Atheists, Inc. v. Duncan, 616 F.3d 1145 (10th Cir. 2010) (holding roadside crosses marking slain police officers to be unconstitutional); Trunk v. San Diego, 629 F.3d 1099 (9th Cir. 2011) (holding the display of a large cross on Mt. Soledad unconstitutional). Admittedly, the tide is not one-way and some religious displays and landmarks have survived Establishment Clause challenges: see, e.g., Van Orden v. Perry, 545 U.S. 677 (2005) (finding a Ten Commandments monument on Texas State Capitol lawn upheld to be constitutional); Pleasant Grove City v. Summum, 555 U.S. 460 (2009) (finding a Ten Commandments monument in Utah City Park to be constitutional); Salazar v. Buono, 130 S. Ct. 1803 (2010) (failing to find a Latin cross in Mojave National Park unconstitutional). See also, Douglas Laycock, Government-Sponsored Displays: Transparent Rationalizations and Expedient Post-Modernism, 61 CASE W. RES. L. REV. 1211 (2011).


\textsuperscript{76} Indeed it may be patronizing to assume that most meekly succumb. One commentator, criticizing the courts treatment of indirect coercion, charges that the courts’ implicit assessment of the complainants rests upon the “patronizing[... ]... assumption that whatever... oppositional views that [they] may hold... are so fragile and weakly supported that the prayer is sufficient to overwhelm their volition and to induce in them a response contrary to their own belief.” L. Scott Smith, Religion Interfacing with Law and Politics: Three Tired Ideas in the Jurisprudence of Religion, 10 LOGOS 14, 25 (2007).

\textsuperscript{77} See Bayles, A Concept of Coercion, in NOMOS XIV: COERCION (J. Roland Pennock & John W. Chapman eds., 1972); McCloskey, supra note 9, at 344.

\textsuperscript{78} Peter Westen, ‘Freedom’ and ‘Coercion’—Virtue Words and Vice Words, 1985 DUKE L.J. 541, 562.

\textsuperscript{79} McCloskey, supra note 9, at 344.
treatment. Christopher Eisgruber and Lawrence Sager contend that the real objection to public school prayer rituals and the like is their social meaning. Implicit is a blunt message: “[t]he real members of this community (the school community, and by extension the larger community serviced by the school or school district) are practicing Christians of a certain sort; others dwell among us but lack the status of full membership.” These practices “create a class of outsiders and thereby disparage those relegated to that status.” A constitutional wrong is committed even if students can avoid the ritual and are not directly coerced to participate.

C. The De Minimis Principle and the Standard for Judging Coercion

Critics of the indirect coercion approach argue that allegations of exclusion, embarrassment, stigma or alienation are properly caught by the de minimis non curat lex principle (the law does not concern itself with trifles).

Some critics would say that the outer limit of coercion was reached, if not breached, when the majority of the Ninth Circuit Court of Appeals in early rounds of the Elk Grove litigation held the Pledge of Allegiance to be coercive. Even though the school pupil was not obliged to recite the pledge, she was compelled to watch and listen to the ritual: “the mere presence in the classroom every day as peers recite[d] the statement ‘one nation under God’ ha[d] a coercive effect.” The policy “impermissibly coerce[d] a religious act.” Judge Fernandez, dissenting, believed it was “obvious” that the tendency of the Pledge’s “under God” phrase to establish religion in the United States, or to interfere with the free exercise (or non-exercise) of religion, was de minimis. There was, he believed, no coercion of anyone’s religious liberty “except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity.” Subsequently, the Ninth Circuit has held that the Pledge of Allegiance is constitutional, but importantly for this present discussion, the finding of coercion was affirmed.

Admittedly it is no response to say glibly that an aggrieved citizen should simply be less sensitive, have a thicker skin, or be made of sterner stuff. In

81. Id. at 163.
83. Newdow v. U.S. Congress, 328 F.3d 466, 488 (9th Cir. 2003).
84. Id.
85. Id. at 487.
86. Id. at 493 (Fernandez, J., dissenting).
87. Id. at 492.
88. See Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1038 (9th Cir. 2010). For the majority, however, this was coercion of a patriotic activity, not coercion of a religious activity. Id.
Lee, the majority rejected the argument that the embarrassment and intrusion suffered by the pupils was of a de minimis character. 89 This issue highlights a recurrent question in discussions of coercion in the law in general: what is the standard by which the response of the coerced person is to be judged? Is it the actual coerced person’s susceptibility to the religious pressure or is it the average or reasonable person in his or her position? 90 It is, as Wertheimer comments on standards for assessing coercion in law generally, “not clear which approach is preferable” 91—a subjective or individualized test versus an objective or standardized one. In the religious context, there might be a case for leaning in favor of a subjective approach based on the individual’s actual response. Those subjected to religious pressure are almost invariably dissenters from, or at least non-members of, the majoritarian religion. If the reasonable average person in that situation—neither especially courageous nor timid—would not succumb to pressure and conform, that might simply reflect the fact that this person is a member of that faith already or has been socialized by the dominant religion to acquiesce to or feel indifference toward such things.

Of course, subjective protestations of coercion that do not square with the objective likelihood of such may not be given much credence. This perhaps explains Chaudhuri v. Tennessee. 92 The Court of Appeals for the Sixth Circuit refused to find there had been indirect coercion where Dr. Philip Chaudhuri, a professor of mechanical engineering and a Hindu, challenged the practice of prayers at Tennessee State University functions, including graduations. 93 “By no stretch of the imagination” was the professor coerced to attend the functions, given that attendance by faculty was not mandatory, attendance was not monitored, and no faculty member had been penalized for non-attendance. 94 Compared to Lee, continued the Court, “[w]e may safely assume that doctors of philosophy are less susceptible to religious indoctrination than children are.” 95

III. THE REJOINER

A. More “Realistic”

Defenders of indirect religious coercion argue that it addresses the practical reality of situation.

It might be that philosophers are unanimous that the coerced person does

92. 130 F.3d 232 (6th Cir. 1997).
93. Id. at 233.
94. Id. at 239.
95. Id.
have a choice and the response is voluntary. "To say a person has been ‘coerced’ into doing something presupposes an act of will on his part." A person being coerced has a choice between acquiescence or resistance to the coancer’s demands, even though the unpleasant consequences of failure to acquiesce might be highly probable or even a dead certainty.

There are situations where philosophers agree that it is correct to say a person is forced to do something against his will and that the action is involuntary, namely, where the force is an overwhelming external physical force upon which one has no control (a hurricane) or an overpowering natural person (a deranged madman who clasps the hand of the person holding a gun, forcing her to pull the trigger). These instances of true involuntary action or acts against one’s will—it might be better to dub these “compulsion”—are rare and not the kind of situation we are addressing here. The sorts of coercion we are concerned with are those where the person acts and is not acted upon, where they reluctantly choose to do something they would prefer not to:

[T]he coerced person acts. He does what he does as a result of coercion. He may well not like doing what he does and may much prefer to act in other ways; and he may do what he does only because he is coerced. Nonetheless, he, the coerced person does what he does; he chooses to do it.

Even if, according to the refined strictures of philosophy, the person does exercise choice and the conduct is technically voluntary and not against her will, this does not dispose of the matter so far as the law is concerned. There may be effective compulsion of citizens even if there is no overwhelming or irresistible pressure to contend with. The “real alternative[s]” open to the complainant must, it is contended, be addressed. In Lee v. Weisman, the middle school graduation prayer case, the majority commented:

Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term “voluntary” . . . . The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real

97. Westen, supra note 6, at 565.
98. Leiser, supra note 5, at 33.
99. See Bayles, supra note 77, at 18; McCloskey, supra note 9, at 336.
100. Leiser, supra note 5, at 33. Bayles calls this type “occurrent” coercion to distinguish it from “dispositional” coercion, the latter denoting the choice between unpalatable alternatives. Bayles, supra note 77, at 18.
101. McCloskey, supra note 9, at 336.
alternative to avoid.\footnote{103}

Recognition of the reality of subtle or indirect coercion in religious matters is said to avoid the “formalism” of the direct religious coercion approach.\footnote{104} “[\text{T]o say],” said the Court in \textit{Lee}, “a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme.”\footnote{105} Steven Gey describes the invidious choice confronting school pupils such as “Jane” Newdow and Deborah Weisman\footnote{106} this way:

He or she may silently accept the government-sanctioned religious exercise, thereby suppressing deep disagreement with the exercise and misleading the rest of society about the dissenter’s true views. Alternatively, the dissenter may make an overt gesture of dissent, which will be perceived by virtually everyone as inappropriate, rude, inflammatory, and probably sacrilegious, thereby increasing the dissenter’s feelings of ostracism and the psychological pressure to conform.\footnote{107}

Similarly, Judge Reinhardt, dissenting in \textit{Newdow v. Rio Linda School District}, described it this way:

[R]ather than label himself an oddball, a troublemaker, and an outcast, rather than subject himself to humiliating name calling, harassment and derision, he may simply prefer to conform, formally pledging his adherence to a religious belief that is antithetical to his true philosophical views. For these children who conform unwillingly, coercion has had its effect: They have chosen to forego their constitutional rights rather than to face the consequences of not doing so.\footnote{108}

Some philosophers are reluctant to say that social pressure or public opinion may coerce.\footnote{109} Coercion is “an interpersonal phenomenon”\footnote{110} that

\begin{footnotes}
\footnotetext[103]{103. \textit{id.} at 595, 598 (emphasis added).}
\footnotetext[105]{105. \textit{Lee}, 505 U.S. at 595. And perhaps it is formalistic to say even adult citizens, such as licensed Texas lawyer Thomas Van Orden, who regularly pass by the six-foot-high red granite Ten Commandments monument erected on the lawn of the state capitol, Van Orden \textit{v.} Perry, 545 U.S. 677 (2005), are immune from coercive pressures too.}
\footnotetext[106]{106. Or, at least their fathers. Daniel Weisman, “[a]cting for himself and his daughter,” objected to any prayers at fourteen-year-old Deborah’s middle school graduation. \textit{Lee}, 505 U.S. at 581. The Rev. Dr. Michael Newdow, an atheist and ordained minister of the Universal Life Church, objected to his five-year-old daughter’s exposure at kindergarten to the Pledge of Allegiance. Greg Lucas, \textit{ Atheist Dad Ready for Date at Top Court}, S.F. \textit{Chron.}, Mar. 22, 2004, at A1. The (unnamed) daughter herself, was, according to her mother, a Christian who did not object to saying the Pledge. Elk Grove Unified Sch. Dist. \textit{v.} Newdow, 542 U.S. 1, 9 (2004). The Supreme Court held that as he was the non-custodial parent, he lacked standing to sue on her behalf. \textit{id.}}
\footnotetext[107]{107. Gey, \textit{supra} note 61, at 503-04.}
\footnotetext[108]{108. Newdow \textit{v. Rio Linda Union Sch. Dist.}, 597 F.3d 1007, 1096-97 (9th Cir. 2010) (Reinhardt, J., dissenting).}
\footnotetext[109]{109. \textit{See, e.g.,}McCloskey, \textit{supra} note 9, at 339.}
\footnotetext[110]{110. Rhodes, \textit{supra} note 96, at 372; \textit{see also} Bayles, \textit{supra} note 77, at 19; Westen, \textit{supra} note 6, at 560; \textit{Leiser}, \textit{supra} note 5, at 33.}
\end{footnotes}
requires both coercer and coercee to be “persons”—either natural or juridical (such as corporations, churches or the government). Natural forces such as impending storms or lightning might compel people to act in a certain way but, as noted above, they cannot sensibly be said to engage in coercion.\textsuperscript{111} The amorphous thing called “social pressure” seems equally suspect as the coercive agent. One reply would be to say that the intermediary is that collectively of natural persons we call society: it is real humans exercising the pressure to comply. Another would be that we are not talking about indiscriminate and diffuse social pressure in general, but a particular, localized, and discrete instance of it (such as a school or council meeting). Even if, however, there is a clear distinction between coercion (personal) and social pressure (impersonal, diffuse, indeterminate, and lacking design or conscious direction to achieve certain intended ends) there is, as the drawers of the distinction concede, the exceptional situation where social pressure “may be exploited . . . to achieve certain intended ends of conformity.”\textsuperscript{112} This is the very situation presented by the indirect religious coercion cases. The state is taking advantage of social or peer pressure to attain its goal.\textsuperscript{113}

B. Under-Inclusive Coverage

Critics of the exclusive use of a direct religious coercion test only contend that this approach is too narrow and disturbingly under-inclusive in its coverage.\textsuperscript{114} Gey argues:

\begin{quote}
[T]he narrow definition of coercion imposes almost no limit whatsoever on government-sponsored religious activity. Adopting this version of the coercion standard would rob the Establishment Clause of almost all its power. . . . Justice Scalia’s “legal coercion” standard is unpalatable even to many advocates of coercion theory, for the obvious reason that the “legal coercion” standard in effect would convert the government into a subsidiary of the majority’s religious faith, which would seriously inhibit the religious liberty of everyone else in society.\textsuperscript{115}
\end{quote}

Gey rightly points to a case like \textit{Doe v. Duncanville Independent School District}\textsuperscript{116} as a troubling example of what social pressure can do.

Duncanville, Texas, is described in its official city government website as “A Warm Community of Friends” and “A Wonderful Place to Raise a Family.”\textsuperscript{117} The following events suggest that this self-description may not

\begin{itemize}
\item \textsuperscript{111} See, e.g., Rhodes, supra note 96, at 372.
\item \textsuperscript{112} McCloskey, supra note 9, at 339.
\item \textsuperscript{113} Or, social pressure being used in “an instrumentalized fashion” by the state.
\item \textsuperscript{114} ROSENBAUM, supra note 4, at 38.
\item \textsuperscript{115} See, e.g., Peterson, supra note 90.
\item \textsuperscript{116} Gey, supra note 61, at 493, 533.
\item \textsuperscript{117} 994 F.2d 160 (5th Cir. 1993).
\end{itemize}
have always been so. Jane Doe was a twelve-year-old girl who made the girls basketball team at Reed Junior High, Duncanville.\textsuperscript{118} The coach of the team regularly began or ended a game with a team recitation of the Lord’s Prayer.\textsuperscript{119} Even though Doe was “uncomfortable with these prayers,” she joined in “out of a desire not to create dissension.”\textsuperscript{120} Doe’s father, upon learning his daughter did not like participating in these prayers, took the matter up with the school authorities—but to no avail.\textsuperscript{121} Thereafter, Doe was regularly required to stand apart from the team during subsequent prayers.\textsuperscript{122}

The record shows that her fellow students asked, “Aren’t you a Christian?” and one spectator stood up after a game and yelled, “Well, why isn’t she praying? Isn’t she a Christian?” Additionally, Doe’s history teacher called her “a little atheist” during one class lecture.\textsuperscript{123}

The Fifth Circuit Court of Appeals held that the basketball prayers were unconstitutional, largely based on the fact that the coach, a school official, chose and led the prayer.\textsuperscript{124} Had, as Gey hypothesized, the school required the coach to not participate in the prayers and permitted the students to decide whether to pray voluntarily, it is likely that the student body would have voted to continue the practice.\textsuperscript{125} Would the outcome have been any different?

In fact an event similar to the hypothetical Gey postulated did occur subsequently. As we have seen, in \textit{Santa Fe} the Supreme Court held that a student-led, student-initiated, Christian invocation said over the public address system by a student prior to football games at Santa Fe High School, a public school in southern Texas, was in violation of the Establishment Clause.\textsuperscript{126} The interposition of a two-step student election process—whereby students voted first on whether to have an invocation and, secondly, who should deliver it—as a “circuit-breaker” mechanism did not eradicate the coercive element of the final message and thus did not immunize the practice from constitutional challenge.\textsuperscript{127} In addition, it was still government and not private speech.\textsuperscript{128}

\section*{IV. AN ASSESSMENT}

There is considerable merit in the indirect religious coercion approach, in that it does take account of the social and psychological pressures that may

\begin{itemize}
\item \textsuperscript{118} 994 F.2d 160, 161 (5th Cir. 1993).
\item \textsuperscript{119} \textit{Id.}
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{121} \textit{Id.} at 162.
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} \textit{Id.} at 162-63.
\item \textsuperscript{124} Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160, 164 (5th Cir. 1993).
\item \textsuperscript{125} Gey, \textit{supra} note 61, at 525-56.
\item \textsuperscript{126} Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 313-17 (2000).
\item \textsuperscript{127} \textit{Id.} at 310.
\item \textsuperscript{128} \textit{Id.} at 302, 309.
\end{itemize}
practically force a person to comply with some religious activity. As the Court in *Lee v. Weisman* noted, and subsequent studies continue to affirm, research in psychology does support the everyday intuition that peer and social influence has a demonstrable conformity-inducing effect upon adolescents. The notion, however, is not without difficulties, both conceptual and practical. Broadly speaking, do the “costs” of adopting an indirect religious coercion approach outweigh the “benefits”?

First, in terms of the “costs”, the indirect religious coercion approach calls for subjective and imprecise evaluations of intangible phenomena—peer and social pressure, alienation, stigmatization, and ostracism. Clearly, however, some judges believe they are capable of undertaking such evaluations. Many areas of the law have long called for the courts to engage in subjective and imprecise assessments. For instance, determining the quantum of compensatory damages for loss of reputation is difficult. The determination of whether a merger will result in a substantial lessening of competition in a market is likewise a challenging exercise. Granted, religious coercion is a “manipulable” label, as Justice Scalia dubbed it. It is certainly not, however, the only one to be found in the law. Unconscionable conduct in contract law and exclusionary, monopolizing conduct in antitrust law are just two examples.

Secondly, a finding of indirect religious coercion is somewhat unpredictable. There is the oft-heard accusation that it is simply a matter of “I know it when I see it.” But is *ex ante* certainty as important a virtue here as it is in commercial law? Is religious freedom law perhaps more like family law where, arguably, *ex ante* certainty is less important? Flexibility and individualized justice are paramount in family and child law and thus amorphous standards such as the “best interests” test are acceptable.

A third “cost” is that indirect religious coercion has the potential to expunge religious symbolism from the public square. I have placed this third

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cost in quotation marks, since the merits of the extirpation of religious displays in the public sphere, and the removal of voluntary religious prayers in state institutions such as schools, is a highly contentious matter.\footnote{See Ahdar \& Leigh, supra note 12, chap. 5; Laycock, supra note 74. The debate over the placement of the ground zero seventeen-foot steel beam “cross” in a public museum devoted to the 9/11 attack is just one of the more prominent socio-religious issues that regularly evoke controversy. See Elissa Gootman, Atheists Sue to Block Display of Cross-Shaped Trade Center Beam in 9/11 Museum, N. Y. TIMES, July 28, 2011, at A20.} It depends on one’s political and religious outlook.

Fourthly, is not some indirect religious coercion—subtle social or peer pressures to conform, grudging compliance to avert embarrassment or stigma—simply a fact of life in modern pluralistic democracies? Is some offense to at least some persons not an inevitable by-product of contemporary social life, where an increasing range of diverse cultures and religions live cheek-by-jowl in cramped urban confines? Justice O’Connor in Elk Grove observed:

Any coercion that persuades an onlooker to participate in an act of ceremonial deism is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character. . . . That is not to say, however, that government could overtly coerce a person to participate in an act of ceremonial deism. . . . The compulsion of which Justice Jackson [in West Virginia Bd. Of Ed. v. Barrette, 319 U.S. 624 (1943)] was concerned, however, was of the direct sort—the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles if it did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory.\footnote{Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 44 (2004) (O’Connor, J., concurring). See also Doe v. Elmbrook Sch. Dist., 658 F.3d 710, 727 (7th Cir. 2011) (“[T]he Establishment Clause does not shield citizens from encountering the beliefs or symbols of any faith to which they do not subscribe.”).}

Fifthly, and paradoxically, does history not show that religious pressure and testing may produce beneficial effects for adherents of minority faiths by reinforcing their religious convictions? Although it may seem unpleasant,\footnote{Elk Grove, 542 U.S. at 49 (Thomas, J., concurring) (“Peer pressure, unpleasant as it may be, is not coercion.”).} the testing of one’s religious commitments through peer or social pressure may bolster that faith.

Finally, why should there be a sort of “religious dissenter’s veto” akin to the so-called “heckler’s veto”? The majority in Lee v. Weisman was not unaware of these points:

We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity. But . . . the conformity required of the student in this case was too high an
exaction to withstand the test of the Establishment Clause.\textsuperscript{138}

Clearly, reasonable people can disagree on what constitutes “too high an exaction.” Chief Justice Rehnquist in *Elk Grove* decried the notion that the court should affirm a sort of religious version of the heckler’s veto.\textsuperscript{139} Mr. Newdow might sincerely disagree with the “under God” part of the Pledge, but that did not give him “a veto power” over the “democratic choices made by public bodies” that willing participants should participate in a daily patriotic recitation.\textsuperscript{140} This case perhaps points to an unarticulated factor at work here.\textsuperscript{141} Religious activities that seem to lack little claim to governmental support might be invalidated even if a small amount of indirect coercion is present. By contrast, if there seems to be a good reason for the government practice (for example, engendering community solidarity and patriotism by saying a pledge) a greater amount of pressure is allowed and the “exaction” is not “too high.”

On balance I believe that a case can be made for adoption of the indirect religious coercion approach. As with so many issues, it is not an all-or-nothing choice. There is more to consider than the stark alternatives of rejecting the concept entirely or accepting an open-ended version of it.

V. A MODIFIED INDIRECT RELIGIOUS COERCION TEST

Instead of an open-ended test of indirect religious coercion, I propose a modified or truncated two-stage test of indirect religious coercion.\textsuperscript{142} The object is to capture the benefits of taking into account the practical social pressure that majoritarian religionists exert upon adherents of religious minorities and other dissenters, whilst streamlining the inquiry to give it a greater measure of administrability and predictability.

The first step is to restrict the availability of the test. Because coercion is open-textured, greater certainty can only be achieved by more fully specifying its variable terms.\textsuperscript{143} One could limit the pool of potential claims by focusing on the type and nature of the complainant (the coerced person), the perpetrator (the coercer), the factual setting, the coercion and so on. The plaintiff should have the burden of showing he or she is in the protected class, and that the preconditions to a viable claim have been met.

Having refined the situations where a claimant can plead indirect religious coercion, the second stage comprises a mixture of burdens of proof and presumptions, whereby the defendant has the opportunity to show that the


\textsuperscript{139} *Elk Grove*, 542 U.S. at 32 (Rehnquist, C.J., concurring).

\textsuperscript{140} Id.

\textsuperscript{141} I am most grateful to Steve Smith for this insight.

\textsuperscript{142} For other tests, see, e.g., Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Sch., 373 F.3d 589, 598 (4th Cir. 2004) (specifying a test that considers, first, the context and, second, the character of the allegedly coercive activity).

\textsuperscript{143} See Westen, *supra* note 6, at 589-90.
practice is legitimate in the circumstances.

A. Stage One: The Preconditions

There are three preconditions to a successful claim that the complainant must satisfy: there must be government conduct not private action, there must be indirect coercion, and the coercion must be religious in nature.\(^{144}\)

I have limited these prerequisites to three. One could extend the requirements further to stipulate the nature of the context or factual situation in which the coercion must occur or the nature of the victim of the indirect coercive pressure. I have rejected these additional conditions. Regarding the factual context, there seems no valid reason why we should restrict the availability of a claim to, for example, closely regulated environments such as schools, the military or prisons. Indirect coercion pressure may occur outside these environments at places such as town meetings. Secondly, there is no convincing reason why the coerced person should be limited to those especially vulnerable to peer pressure such as children. Adults could avail themselves of constitutional protection also, although the assessment of the susceptibility to pressure will take into account the age and maturity of the complainant.\(^{145}\) I turn now to the three prerequisites.

1. Government Action

First, the complainant must show that the state has acted.\(^{146}\) This in turn raises the question of a causal nexus. As Cynthia Ward rightly comments, “The problem of setting limits to indirect coercion is really one of connecting the state’s behavior to the feared harm in a way that justifies barring the state from a challenged religious activity.”\(^{147}\) Usually this causation exercise will be straightforward but sometimes it is not so clear-cut.

In Lee v. Weisman the Court divided on whether there was state action. Justice Scalia, for the minority, remarked he found it “difficult to fathom” how the state was involved and how the rabbi who delivered the graduation prayers could be said to be “a mouthpiece of the school officials”\(^{148}\) when the school

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144. I draw here from the three-step inquiry in Kerr v. Farrey, 95 F.3d 472, 479 (7th Cir. 1996).
146. Kerr, 95 F.3d at 479.
did not draft or screen the prayers. The majority, however, was clear that this was a “state-sponsored” and “state-directed” religious activity. A state official, the pubic school principal, determined that a prayer should be said and “this [was] a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur.” The principal chose the rabbi and issued guidelines on an inclusive prayer suitable for this occasion and this sufficed to connect the state to the impugned conduct.

Attempts to insulate the government from challenge and sever or “short-circuit” the link between it and the impugned conduct are possible. But, if the Santa Fe case is anything to go by, these efforts will be scrutinized stringently. As noted earlier, the attempted “circuit-breaker mechanism” failed in that case. The school held a two-fold election where students voted whether to have a pre-game prayer and, if so, who the speaker would be. The Texas school district argued this case was distinguishable from Lee: that there was no impermissible government coercion since the pre-game messages were the product of student choice; they were private not public speech. The majority disagreed: “Although it is true that the ultimate choice of student speaker is ‘attributable to the students’ . . . the District’s decision to hold the constitutionally problematic election is clearly ‘a choice attributable to the State.’” The majority held that to empower the student body majority (via an election) “with the authority to subject students of minority [religious] views to constitutionally improper messages” (namely, prayers) was impermissible. “The award of that power alone, regardless of the students’ ultimate use of it, is not acceptable.”

2. Indirect Coercion

The coerced person must establish that indirect religious coercion was exercised. The claimant must show he or she was confronted with a state-created choice between a religious activity and a non-religious one and that the presence of peer or social pressure by private citizens operated to ensure the religious option was the only realistic or practical choice open to him or her. To

149. Id. at 586-87 (majority opinion).
150. Id. at 587.
151. Id. at 587-88.
153. Id.
154. Id. at 302.
155. Id. at 311.
156. Id. at 316.
157. Id. However the dissent disagreed strongly on this issue, see id. at 321-24 (Rehnquist, C.J., dissenting).
fulfill the causation requirement, the negative social sanction must either be intended by the state or be a “reasonably foreseeable consequence” of requiring the persons coerced to make the choice set before them.

3. Religious Activity

The object of the government coercion must be “religious” and not secular.\(^{159}\) Again this may or may not be straightforward.\(^ {160}\) Defining “religion” or “religious” activity is difficult.\(^ {161}\) A full discussion is beyond the scope of this article but in brief I favor the approach taken by Judge Arlins Adams of the Third Circuit.\(^ {162}\) His definition-by-analogy approach utilizes three indicia. A religion “addresses fundamental and ultimate questions,” is “comprehensive in nature” and is characterized by “the presence of certain formal and external signs.”\(^ {163}\)

The recitation of the Pledge of Allegiance by children in public schools might, due to the presence of the words “under God,” be characterized as a religious exercise, akin to the saying of a prayer. The majority of the Supreme Court in Elk Grove rejected this argument: “Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church.”\(^ {164}\) Similarly, the Fourth Circuit Court of Appeals, while conceding that it would be demeaning to religious people to say that the phrase “under

\(^{158}\) I adopt the approach of Ward, supra note 15, at 1653-54, 1660.

\(^{159}\) Kerr v. Farrey, 95 F.3d 472, 479 (7th Cir. 1996). See also Ward, supra note 15, at 1655-59.

\(^{160}\) Is a public elementary school that directs its pupils to take home—along with a host of pamphlets, circulars and newsletters—a flyer inviting parents to give permission to their child to attend a school Christian club coercing its students’ participation in a religious activity? The answer of the majority of the Fourth Circuit Court of Appeals was “no.” Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Sch., 373 F.3d 589 (4th Cir. 2004). See also Rebecca Hardberger, Coercion, Misperception and Excessive Entanglement with Religion: A Reexamination of Child Evangelism Fellowship of Maryland, Inc. v Montgomery County Public Schools (2006) 39 U.C. DAVIS L. REV. 1941.

\(^{161}\) For the complexities involved, see, e.g., Stanley Ingber, Religion or Ideology: A Needed Clarification of the Religion Clauses, 41 STAN. L. REV. 233 (1989); KENT GREENAWALT, RELIGION & THE CONSTITUTION 124-56 (Vol. 1, 2006); AH DAR & LEIGH, supra note 12, at 110-125.


\(^{163}\) Africa, 662 F.2d at 1032.

\(^{164}\) Elk Grove Unified Sch. Dist., v Newdow, 542 U.S. 1, 31 (2004) (Rehnquist, C.J., concurring). See also id. at 44 (O’Connor, J., concurring) (“Any coercion that persuades an onlooker to participate in an act of ceremonial deism [such as the Pledge] is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character.”). But see id. at 48 (Thomas, J., concurring) (arguing that even if the Pledge was not a prayer, it still entailed “an affirmation that God exists” and presented a “constitutional problem[]” since “the government cannot require a person to “declare his belief in God.””).
God” lacked religious significance, nonetheless held that the words did not alter the nature of the Pledge as a patriotic exercise.165 Most recently, the Ninth Circuit majority affirmed this view in the latest round of the Elk Grove litigation.166

By contrast, in Kerr v. Farrey, an example of direct religious coercion discussed above, one of the issues was whether the substance-abuse rehabilitation program the inmate was coerced to attend, Narcotics Anonymous, was a religious one.167 The Seventh Circuit Court of Appeals concluded that AA-style, twelve-step program was religious.168 The steps—“We made a decision to turn our will and our lives over to the care of God as we understood Him”; “[w]e admitted to God, to ourselves, and to another human being the exact nature of our wrongs” and so on169—were clearly “based on the monotheistic idea of a single God or Supreme Being.”170 The District Court was incorrect in holding that the concept of God could include the non-religious idea of individual will power and hence the program was not inevitably a religious one.171 The meetings the inmate Kerr attended were “permeated with explicit religious content”172 such as prayers invoking the Lord. This was not a case like Pledge of Allegiance where the only religious note struck was a couple of words “or other incidental references.”173

B. Stage Two: The Rebuttable Presumption

Once the claimant has satisfied the court that he or she is within the protected class and that the three preconditions are met—there is state action that coerced the complainant into a religious activity—a prima facie case is established. I propose that upon fulfillment of the prerequisites, a rebuttable presumption174 arise that indirect religious coercion was exercised in violation

166. Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1038 (9th Cir. 2010).
167. 95 F.3d 472, 479-80 (7th Cir. 1996).
168. Id. at 480.
169. The twelve steps are quoted in full in Kerr, 95 F.3d at 474.
170. Id. at 480.
171. Id.
172. Id.
173. Id.; accord, Inouye v. Kemna, 504 F.3d 705, 713 (9th Cir. 2007).
174. The presumption against religious coercion derives from the presumption against coercion generally. “[A]lthough coercion is not always wrong (quite obviously: one coerces the small child not to run across the highway, or the murderer to drop his weapon), there is a presumption against it... What can be concluded at the moral level is that we have a prima facie obligation not to employ coercion.” Virginia Held, Coercion and Coercive Offers, in NOMOS XIV: COERCION, supra note 4, at 61-62. See also Robert Paul Wolff, Is Coercion 'Ethically Neutral'?, in NOMOS XIV: COERCION, supra note 4, at 145-46 (“But why seek to eliminate, or at least to minimize coercion if it is not intrinsically evil?... Presumably because coercion is not morally neutral (as persuasion perhaps is) but morally evil, and hence requires justification.... The real reason [coercion is intrinsically evil] is quite simply
of the religious freedom of the complainant.

The defendant coercer has the opportunity to escape constitutional infringement. The onus is upon the coercer to show either: (a) that the effect upon the claimant is *de minimis*, or, failing that, (b) that the defendant has taken all feasible steps to avert the subtle coercive pressure upon the claimant. If the defendant can do neither then the practice is prima facie in violation of the relevant provision safeguarding the right of religious freedom.

The *de minimis* defense is not an easy one for defendants to satisfy for the reasons discussed above. It is all too easy to dismiss the response of members of minority religions, atheists, and other dissenters from the majoritarian faith. The test, as I devise it, is individualized and subjective. It is not how a reasonable person would feel and whether that person would succumb to the pressure of the situation and choose religious conformity. It is how the actual complainant, typically a member of a religious minority, would respond. There is an objective gloss here though. Where the actual complainant’s reaction is idiosyncratic and is one that no reasonable person clothed with the coerced person’s attributes of age, religion and so on, would take, the claim ought to be given little or no weight. If an adult atheist or Buddhist at a university graduation ceremony felt alienated and stigmatized by a theistic prayer and felt compelled to join in, his or her claim may not be accorded much weight where the evidence showed there was ample opportunity to exit the venue without embarrassment. Take *Tanford v. Brand*.

The Seventh Circuit Court of Appeals found there was no constitutional violation. The complainants, a law school professor, two law students, and an undergraduate student, were firstly, free to stay and listen to the invocation and benediction at the Indiana University graduation ceremony (an impersonal gathering of some 30,000 people) or, secondly, as many staff and students chose to do, to not attend the morning ceremony (which included the prayer) but the afternoon one (which did not have a prayer) or, thirdly, to seamlessly exit the morning ceremony to avoid listening to the prayers. The advancement of religion or entanglement of government concluded the Court—and I would equally add, the prospect of any real coercive effect—was “*de minimis at best*.”

If the *de minimis* defense fails, the defendant may still point to the fact it has taken all feasible steps to avert coercive pressure. Obviously an excusal or exemption mechanism is required. But, as the cases make abundantly clear, that may not be sufficient. The opt-out mechanism must be designed so that the embarrassment or stigma is negligible, if not non-existent. The fact that careful consultation with the affected persons has taken place regarding measures to

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that coercion is degrading. To coerce a man rather than persuade him is to treat him as a thing governed by causes rather than as a person guided by reasons.”).

175. 104 F.3d 982 (7th CIR. 1997).
176. Id. at 985.
177. Id. at 986.
minimize embarrassment would assist the defendant in this respect. Of course, there may be no compromise possible and, from the coerced person’s viewpoint, nothing short of cessation of the activity may suffice. But the duty to eliminate coercion is not absolute and, under my formulation, the steps taken to offset any coercive pressure must be all those which are “feasible.”

An example of the appropriate exculpatory measures is Kaplan v. City of Chicago. A police officer complained she had been coerced by having to attend community policing meetings (“beat meetings”) at which the function opened and closed with a Christian prayer. Her direct superior expressly told her she was free to excuse herself from the meetings during the prayer, that it would not be held against her and that if anyone challenged her for absenting herself she would tell that person that attendance at prayer by police officers was not required. He also offered to change her roster so she would no longer be in the pool of officers possibly assigned to beat meetings. The court found there was no coercion on these facts, and the fact that she might incur some embarrassment or feel conspicuous in excusing herself did not give rise to a constitutional violation.

CONCLUSION

Coercion is a “vice word[]” and an open-textured concept. While most judge coercion to be bad, coercion can be a purely descriptive and morally neutral term that describes the situation where the pressure exercised by the coercher has in fact left the coercee in a worse position than she otherwise desired to be. It can also be a normative or prescriptive term denoting the situation where the pressure by the coercher has left the coerced person in a worse position than she ought to be. It is too easy, as Westen points out, to conflate the descriptive and normative. In religious freedom law this tends to happen: religious coercion has occurred, therefore a constitutional violation has

179. Id. at *2.
180. Id. The plaintiff also failed to establish there had been “state action,” because the prayers at beat meetings were not at the direction of the Chicago Police Department, they were not led by CPD officers, and the prayers were not listed the meeting’s agenda. Id. at *3.
181. Id.
182. Westen, supra note 6, at 543, 547.
183. Not everyone agrees, see, e.g., Westen, supra note 6, at 548; McCloskey, supra note 9, at 349 (arguing “[i]n fact, it is unprofitable to speak in the abstract about the evilness or otherwise of coercion. Society cannot exist, let alone function well, without the use of coercion at many levels, institutional and personal. It is an essential tool for social life.”); Samuel Dubois Cook, Coercion and Social Change, in NOMOS XIV: COERCION, supra note 4, 107 at 126 (maintaining that “[c]oercion of the human will is intrinsically neither good nor evil.”).
184. Westen, supra note 6, at 590.
185. Id. at 544-48, 590-93.
transpired. Yet, "[w]hether an institution exercises coercive force is a matter empirically ascertainable and logically distinct from whether its exercise of coercive force is morally defensible."\textsuperscript{186} The danger of conflating the descriptive and prescriptive is that, having conducted the factual exercise of identifying the exercise of religious coercion, we neglect the further and distinct task of determining whether this particular instance is justifiable in these circumstances.\textsuperscript{187} My proposal starts with the presumption that religious coercion is bad, but does not rest there, for it allows the coercer to make a case that this instance is nonetheless justified.

To recap, there are two broad concepts of religious coercion, one narrow and the other broad. Direct religious coercion, the express and direct imposition by the state of penalties for failure to comply with some religious exercise is wrong. It clearly violates religious freedom. It is the second, broader concept that is controversial. Indirect religious coercion denotes situations where the state makes use of subtle social or peer pressures from private persons to achieve conformity to some religious objective. The state creates or orchestrates a situation where the person has a theoretical choice to decline to engage in a particular religious activity, but the social and psychological constraints make compliance well nigh certain.

I have argued that the indirect religious coercion theory is a useful addition to the religious freedom jurisprudence. It addresses some of the very real and complex dynamics of religious and group behavior. Nonetheless, it is, like many things in life and human society, a subtle and complex phenomenon that does not easily translate into a workable legal doctrine. Rather than jettison the concept entirely, as some are wont to do, I have put forward a modified indirect coercion test in an attempt to focus the analysis, identify the key criteria and make the test more manageable and transparent.

In stage one, the complainant must satisfy three conditions before his or her claim of violation of religious freedom may proceed. First, there must be government and not private action. Second, there must, obviously enough, be indirect coercion exercised. The claimant must be confronted with a state-mandated choice to conform or not to conform to a particular religious activity, and the prevailing social or peer pressures must render the religious option the only practical or real one. Third, the activity must be a religious and not a secular one.

If these preconditions are met, a rebuttable presumption arises that indirect coercion was exercised in breach of the claimant’s religious liberty. The second stage enables the coercer to rebut the presumption. First, the coercer may endeavor to show that the infringement was a de minimis breach: the coercive effect is so attenuated and mild that no religious dissenter or person with the same attributes to the claimant’s would succumb to the pressure and join in the

\textsuperscript{186} Reidy & Riker, supra note 4, at 6-7.
\textsuperscript{187} Westen, supra note 6, at 593.
religious practice. If that fails, the defendant may show that it has taken all feasible steps to avert coercive pressure and ensure that the claimant’s choice was really voluntary.

“The multitude,” said de Tocqueville, “require no laws to coerce those who do not think like themselves: public disapproval is enough.” Social and peer pressure to effect religious conformity is real and is deleterious. We can ignore it but the challenge is to construct a workable law to sensibly regulate its most egregious and conscience-impeding forms.

188. ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 261 (Knopf 1994) (1835).