FREE WILL PARADIGMS

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One of the iconic issues in American law and politics is the question of free will—sometimes known as agency, choice, or autonomy, or the absence of duress, coercion, and compulsion. In politics, whether one is liberal or conservative, we balk at government limitations on choice and fight those limitations with legal arguments about rights and political rhetoric about freedom. Liberals demand access to abortions, want the ability to purchase medical marijuana, and bristle at pat-down searches before boarding a plane. Conservatives dislike requirements to buy health insurance or pay taxes, rail against limits on gun ownership and school prayer, and decry government regulation of everything from food to the environment. Liberals and conservatives may disagree about the specifics of what they want to be free to choose, but both sides believe that choice is a good thing.[1]

In law, the notion of choice and free will is ubiquitous. For example, only contracts freely entered into are considered valid—if a contract is the result of duress, it is unenforceable. In tort law, some acts are torts because they infringe on the will of others—a fist to the nose is a tort if not consented to, and merely pugilism if it is. Rape is sexual intercourse without consent. Sexual harassment law prohibits sexual attention in the workplace that is unwanted and unconsented-to. Under the Fourth Amendment, courts admit evidence seized without a warrant if that evidence was found in the course of consensual searches. Under the Fifth Amendment, confessions of a criminal suspect are admissible if uncoerced. Under the First Amendment Free Speech Clause, a "fixed star in our constitutional constellation,"[2] the government cannot force one to speak. Under the Free Exercise Clause, the government cannot require religious

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1. *See* KENT GREENFIELD, THE MYTH OF CHOICE: PERSONAL RESPONSIBILITY IN A WORLD OF LIMITS 1 (2011).

2. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

activity or adherence. Under the Tenth Amendment, the federal government cannot impose coercive conditions on funding going to states. One of the most important legal issues in our country today, for instance, is whether the federal government can impose an "individual mandate" to purchase health insurance. The question destined for the Supreme Court is whether Congress acted beyond its Commerce Clause power when it took from individuals the choice of whether to buy health insurance.

In one way or another, each of these political and legal questions turns on the nature of choice and free will. But defining free will is famously difficult and the question has bedeviled philosophers and legal theorists for centuries. This article presents the view that the Supreme Court has implicitly adopted three different definitions, or paradigms, of free will and choice. By outlining these paradigms, one gains insights into the analysis the Court uses to decide cases that depend on notions of free will.

This article proceeds as follows. In Part I, I introduce the three paradigms by discussing the famous case of *West Virginia v. Barnette*,[3] in which the Supreme Court struck down a mandate that schoolchildren recite the Pledge of Allegiance. In Part II, I place the debate about free will into a larger philosophical and theoretical context. In the subsequent three parts, I walk through each of the three paradigms—the "ultra-dispositionalist," the "libertarian," and the "situationalist." Focusing on constitutional law cases, I highlight some of the prominent examples of the Court's use of each paradigm to analyze and decide cases.

I. INTRODUCING THREE PARADIGMS OF FREE WILL

At the beginning of each school day, millions of children in the United States stand to pledge their allegiance to the American flag.[4] Ought a student be free to refuse? Under current law in the United States, a state can require the Pledge to be recited daily in all public schools, provided that individual students are able to opt out.[5]

3. *Id.*

4. According to the website Patriotism for All, forty-three of the fifty states require schools to begin the day with a recitation of the Pledge. *See Pledge Laws: State-by-State (2007)*, PATRIOTISM FOR ALL, http://members.cox.net/patriotismforall/state_laws.html (last accessed Nov. 6, 2011).

5. *See, e.g.*, Mass. Office of the Att'y Gen., 1942–44 Rep. of the Att'y Gen. Which Contains Official Opinions Rendered, 64 ("[P]upils in the public schools may not be required to salute the flag nor to recite the 'Pledge of Allegiance to the Flag.' Neither can pupils refusing to

Whether one believes the current state of the law is correct depends on, among other things, what one believes about the nature of free will, consent, and choice. There are three possible ways to think about this question.

One view, implicitly championed by Justice Frankfurter in his dissent in *Barnette*, is that an individual's will is not easily vitiated. As any student of First Amendment law will remember, *Barnette* reached the Court during World War II, when a number of states began requiring children to begin their school day by saluting the flag and reciting the Pledge of Allegiance. In West Virginia, a public school suspended a student who was a Jehovah's Witness for refusing to say the Pledge because it conflicted with his religious beliefs. Only three years before, the Court had upheld a pledge requirement in *Minersville School District v. Gobitis*,[6] and Justice Frankfurter, one of the more scholarly justices of the last century, argued in *Barnette* that the Court should not reverse itself. He pointed out that no one was forcing the child to attend public school;[7] the school should be permitted, if it so chooses, to condition the privilege of coming to school on a pledge requirement.[8] Parents of children who did not want to recite the Pledge could change the law democratically[9] or move to a different jurisdiction where the Pledge was not required.[10] Implicit in Justice Frankfurter's argument is an assumption that human decision-making is not so fragile that coercion occurs merely because the government imposes costs on certain choices.[11] As Justice

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participate in such ceremonies be disciplined for their refusal or required to state the reasons for such refusal."). Even if state laws do not explicitly protect a right to opt out, *Barnette* requires it as a matter of First Amendment law.

6. 310 U.S. 586, 599–600 (1940).

7. *Barnette*, 319 U.S. at 656 (Frankfurter, J., dissenting) ("West Virginia does not compel the attendance at its public schools of the children here concerned.").

8. *See id.* (noting that the question in the case was "the right of the state to compel participation in this exercise by those who choose to attend the public schools"); *id.* at 657 ("Parents have the privilege of choosing which schools they wish their children to attend. And the question here is whether the state may make certain requirements that seem to it desirable or important for the proper education of those future citizens who go to schools maintained by the states, or whether the pupils in those schools may be relieved from those requirements if they run counter to the consciences of their parents."); *see also Gobitis*, 310 U.S. at 599 (noting that states may not require students to attend public schools).

9. *See Barnette*, 319 U.S. at 647 (Frankfurter, J., dissenting) ("For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government." (quoting United States v. Butler, 297 U.S. 1, 79 (1936) (Stone, J., dissenting))).

10. *Id.* at 657, 664 (arguing that parents have the privilege of choosing which schools they wish their children to attend).

11. *See id.* at 656 ("Compelling belief implies denial of opportunity to combat it and to

Frankfurter wrote in his dissent, even if children are expelled from school for refusing to recite the Pledge, "[c]hildren and their parents may believe what they please, avow their belief and practice it."[12]

Justice Frankfurter's opinion is an example of what I will call the "ultra-dispositionalist" paradigm because it assumes that individuals' own dispositions dictate their behavior even in the face of quite strong governmental and situational constraints or influences. This paradigm is the most sanguine about free will, and assumes that humans act freely even in the face of government mandates or encouragements that significantly burden choice. Even in analyzing areas of constitutional law where "freedom" is the touchstone, such as First Amendment law, one can assume that humans act with sufficient strength of will that a government thumb on the scale is not necessarily suspect. The focus of the ultra-dispositionalist paradigm is whether options exist—if they do, even if they are burdensome, the assumption is that an individual's will is robust enough to choose among them. The Court uses this paradigm infrequently, but it is not unknown in constitutional doctrine. It is embodied in some "unconstitutional conditions" cases and defended by some legal theorists and judges.

In *Barnette*, the Court itself adopted a different view of free will. Justice Robert Jackson's opinion striking down the compulsory pledge is among the most famous in all of free speech law: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[13] Justice Jackson was saying that choices can indeed be affected by government action and that such effects can be constitutionally suspect, especially when personal freedom is the constitutional touchstone. The government must be ready to justify its impact on the will of its citizens.

Also implicit in the Court's opinion in *Barnette* was the notion that absent government constraint, the students' behavior is freely chosen. Once the Court removes its mandate, what is left is a situation in which individuals can act freely. Because this view maps well with

assert dissident views. Such compulsion is one thing. Quite another matter is submission to conformity of action while denying its wisdom or virtue and with ample opportunity for seeking its change or abrogation.").

12. *Id.* at 664.

13. *Id.* at 642.

political libertarianism, taking as its guidepost the presence or absence of governmental influence and considering government as the principal constraint on individual free will,[14] I call this paradigm "libertarian." In this paradigm, the government is the only material source of limits on free will; constraints of situation are ignored or considered immaterial. With a government mandate, ban, or significant burden on a choice or set of choices, free will does not exist. Without such mandate, ban, or burden, free will thrives. This paradigm is seen in many different constitutional law cases, including those about economic due process, reproductive rights, and free speech.

A third view challenges the assumption that government is the principal source of constraints on choice and free will. This last paradigm is the most attuned to the constraints of situation, and is thus named "situationalist." Even without a government mandate, ban, or burden, situational pressures may be sufficiently coercive to vitiate free will. To illustrate, consider a jurisdiction that requires the Pledge to be recited in classrooms as long as individual students can opt out. Even with such a right to opt out, one could believe that students are not in fact free to refuse.[15] The effects of peer and teacher pressure, along with the fear of being socially ostracized, may be sufficiently great that individual students feel compelled, despite personal beliefs, to recite the Pledge. One could believe that such impacts constitute limits on the free will of the students affected. In other words, one could hold a "situational" view of free will—that sometimes free will is vitiated by situation, even without governmental action. While the Court apparently does not hold the situationalist view of free will in the Pledge of Allegiance context,[16]

14. *Cf. id.* at 646 (referring to the Court's decision as "libertarian").

15. David Koon, *A Boy and His Flag*, ARK. TIMES, Nov. 11, 2009, *available at* http://www.arktimes.com/arkansas/a-boy-and-his-flag/Content?oid=1013276 (discussing the case of Will Phillips, a boy who refused to recite the Pledge and was harassed by teachers and other students); Jenna Johnson, *Pledge of Allegiance Dispute Results in Md. Teacher Having to Apologize*, WASH. POST, Feb. 24, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/02/23/AR2010022303889.html (discussing a thirteen-year-old girl who was shouted at, mocked by classmates, and escorted from the classroom by school security for refusing to recite the Pledge).

16. *Cf.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 5 (2004) (rejecting a First Amendment-based challenge to a pledge requirement on standing grounds); Croft v. Perry, 624 F.3d 157, 162, 166, 170 (5th Cir. 2010) (finding that neither Texas's state Pledge of Allegiance, nor the law requiring its recitation by school children, violated the Establishment Clause because a reference to "God" does not favor a particular faith, the language "under God" has permissible secular purposes, and requiring recitation does not impermissibly coerce religious

there are other cases in which the Court implicitly adopts this perspective.[17]

Barnette is just one example of a case in which the outcome depends in part on underlying assumptions about how human beings make decisions and how they exercise their will. Because so many parts of constitutional law turn on questions of freedom (e.g., free speech doctrine) or consent (e.g., search and seizure doctrine), the Court's assumptions about free will have a material effect on its analysis and conclusions. Hundreds of constitutional cases turn on which of these three basic paradigms the Court adopts.[18]

II. THE PHILOSOPHICAL AND LEGAL NOTION OF CHOICE

For hundreds, if not thousands, of years, one of the central topics in philosophy has been the question of free will.[19] The fight between the determinists, who claim that humans cannot affect their future, and the metaphysical libertarians, who believe that individuals affect their future through the exercise of will, has dominated much of philosophical debate. This debate is far from resolution.[20]

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belief); Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1040 (9th Cir. 2010) (holding that a California statute and school district policy requiring recitation of the Pledge of Allegiance did not violate the Establishment Clause because the Pledge is one of allegiance to the Republic, not of allegiance to God or to any religion); Frazier *ex rel.* Frazier v. Winn, 535 F.3d 1279, 1282 (11th Cir. 2008) (holding that a Florida statute requiring students to stand at attention during the Pledge of Allegiance violated the First Amendment because it compelled all students, even those excused by parental permission from reciting the Pledge, to stand during the Pledge); Myers v. Loudoun Cnty. Pub. Schs., 418 F.3d 395, 407 (4th Cir. 2005) (holding that Virginia's Recitation Statute did not violate the Establishment Clause because pledging allegiance is not a religious exercise, but a patriotic one).

17. *See infra* Part V.

18. While the focus of this article is on constitutional law, it is not only constitutional cases that turn on questions of consent, choice, and will. Tort law, contract law, and criminal law—just to mention three—all turn on these questions in various ways. For a general overview, see GREENFIELD, *supra* note 1.

19. In his *Enquiry Concerning Human Understanding*, David Hume called it, "the most contentious question of metaphysics, the most contentious question of science." DAVID HUME, ENQUIRY CONCERNING HUMAN UNDERSTANDING, § VIII (Clarendon Press 1975) (1748). *See generally* TED HONDERICH, A THEORY OF DETERMINISM: THE MIND, NEUROSCIENCE AND LIFE-HOPES 13–70 (Clarendon Press 1988). In the wake of the debate between free will and determinism, a debate has raged between compatibilists, who argue that the two theories can be reconciled, and incompatibilists, who argue that they cannot. In the twentieth century, compatibilism has been defended in the work of American philosophers Harry Frankfurt, Daniel Dennet, and several others, while incompatibilism has been defended by philosopher Robert Kane and NYU Professor of Philosophy and Law Thomas Nagel. For a summary of the two positions, see KASPER LIPPERT-RASMUSSEN, DEONTOLOGY, RESPONSIBILITY, AND EQUALITY (2005).

20. The debate has ancient philosophical roots. Empidocles (c. 490–430 BCE) and Heraclitis (c. 535–475 BCE) are early pre-Socratic sources on the meaning of determinism in

Meanwhile, it is often assumed that conventional legal theory and doctrine has cast its lot with the libertarians. An underlying assumption of our legal system is that human beings make choices and act with free will. The law affects those choices beforehand by defining proper behavior and by promising the punishment of improper behavior. Any *ex post* punishment is just, it is said, because one's choices flow from one's will, and it is proper to punish wrong behavior that is intentional.[21] What this means is that the implicit model of human decision-making in law is assumed to be something like:

Will → Choices → Behavior → Effect

The notion is that effects on the outside world result from our behavior, which in turn is based on our choices, which in turn are based on will.[22] Because effects ultimately can be attributed to will, good effects are evidence of maturity, an exemplary conscience, and a sense of personal responsibility. Alternatively, bad effects are evidence of immaturity, a depraved heart and mind, and a failure of personal responsibility. In economics terms, will is the exogenous variable, taken as given.[23]

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natural law. The modern debate between free will and determinism is typically traced to eighteenth-century French philosopher Pierre Simon de Laplace's (1749–1827) assertions about determinism. For a general overview, see FREE WILL AND DETERMINISM (Bernard Berofsky ed., 1966). *See also* TED HONDERICH, ON DETERMINISM AND FREEDOM (2005). Far from finding resolution between defenders of determinism and believers in free will, the debate remains unresolved in at least one philosopher's thought. *See* THOMAS NAGEL, THE VIEW FROM NOWHERE 112 (1986) (remarking in his account of determinism and free will that the author changes his mind about the subject every time he thinks about it). For a general overview of determinism, see Ernest Nagel, *Determinism in History*, *in* DETERMINISM, FREE WILL, AND MORAL RESPONSIBILITY 49 (Gerald Dworkin ed., 1970).

21. *See* William Kneale, *The Responsibility of Criminals*, *in* THE PHILOSOPHY OF PUNISHMENT: A COLLECTION OF PAPERS 172, 184 (H.B. Acton ed., MacMillan St. Martin's Press 1969). For other attempts to define punishment, see H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 4–5 (1968); Kent Greenawalt, *Punishment*, *in* 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1282 (Joshua Dressler ed., 2d ed. 2002).

22. This schematic is a riff on others I have seen. *See* Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 26 (2004).

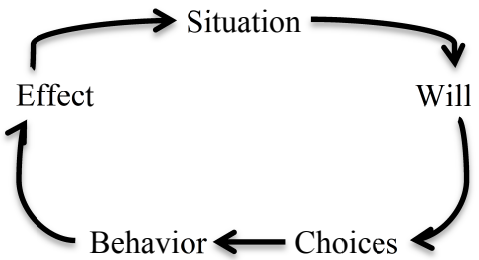
23. *See* Adam Benforado, Jon Hanson & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1802 (2004) ("[D]ispositionism [the belief that people's own choices determine their behavior] has had and continues to have an immense effect on both the framing and resolution of virtually every major social policy debate, from affirmative action to standardized testing, from gun control to school 'choice,' and from gay rights to the war on terrorism.").

Increasingly, however, legal scholars are challenging this accepted wisdom. Using insights from cognitive science, behavioral science, and economics, a number of legal scholars are raising profound questions about the nature of human decision-making and questioning the exogenous nature of will.[24] Choices may be less a product of will than of situation and circumstance, and will itself may be constructed in various ways. That is, will may be endogenous rather than exogenous, an effect rather than a cause.

In schematic form, one could represent this view in this way:

Situation → Will → Choices → Behavior → Effect[25]

Or even:



If this "situationalist" critique of conventional wisdom is true, even in part, there are a number of significant implications for legal

24. A representative sample of works questioning the exogenous nature of will might include, for example, Adam Benforado & Jon Hanson, *Attributions and Ideologies: Two Divergent Visions of Human Behavior Behind Our Laws, Policies, and Theories*, *in* IDEOLOGY, PSYCHOLOGY, AND LAW (Jon Hanson ed., forthcoming Nov. 2011); Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311 (2008); Benforado, Hanson & Yosifon, *supra* note 23; Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413 (2006); Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003); Hanson & Yosifon, *supra* note 22; Owen D. Jones et al., *Brain Imaging for Legal Thinkers: A Guide for the Perplexed*, 2009 STAN. TECH. L. REV. 5 (2009); Owen D. Jones, Erin O'Hara & Jeff Stake, *Economics, Behavioral Biology, and Law*, 19 SUPREME CT. ECON. REV. (forthcoming 2011); Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405 (2005); John A. Humbach, *Free Will Ideology: Experiments, Evolution, and Virtue Ethics* (Jan. 12, 2010) (unpublished paper). *See generally* The Project on Law and Mind Sciences at Harvard Law Sch., THE SITUATIONALIST, http://thesituationist.wordpress.com (last visited Nov. 6, 2011).

25. A more sophisticated schema can be found in Hanson & Yosifon, *supra* note 22, at 37.

theory and doctrine, which scholars are beginning to explore.[26] This article introduces the question of whether existing law ever takes into account a more nuanced view of human agency and will. Notwithstanding the conventional wisdom highlighted above, is the law more sophisticated in its assumptions about human decision-making than one might at first assume? The answer, I suggest, is that the Supreme Court utilizes three different theoretical approaches to the question of free will and choice, introduced above. They do not always take individual will as a given. In fact, the Court occasionally has used a much more situational view of human choice.

Before I move on to a more detailed analysis of each paradigm, I want to make one quick note about terminology. What I call the ultra-dispositionalist paradigm generally maps best with the philosophical notion of metaphysical libertarianism. What I call the situationalist paradigm has most in common with determinism. Finally, the libertarian paradigm is somewhere in the middle, and is not to be confused with metaphysical libertarianism.

III. THE ULTRA-DISPOSITIONALIST PARADIGM

In the ultra-dispositionalist paradigm, the focus is not on the presence of government activity, but on the existence of other choices. Even if government makes certain choices more burdensome, the assumption is that individuals' free will is robust enough that such burdens are immaterial. In the Pledge of Allegiance context, this paradigm is exemplified by the Court's view in *Gobitis* and Justice Frankfurter's dissent in *Barnette*. They argue that a requirement to recite the Pledge is not coercive because students can move to a different jurisdiction or fight for democratic change in the law. This paradigm implicitly considers human will to be quite strong because it assumes that if the student *really* objects to the Pledge, his decision to recite it or not will not be affected by the government mandate. The student's will is a given, an exogenous variable in the constitutional calculation.

The best examples of the ultra-dispositionalist paradigm are in cases surrounding consensual searches. While there are many exceptions to the general rule that law enforcement personnel need a

26. *See* references in *supra* note 24. *See also* GREENFIELD, *supra* note 1. For a cautionary note, suggesting the influence of these insights may be less than argued in the short term, see Stephen J. Morse, *Lost in Translation? An Essay on Law and Neuroscience*, *in* LAW AND NEUROSCIENCE: CURRENT LEGAL ISSUES VOL. 13, at 529 (Michael Freeman ed., 2010).

warrant to conduct searches of "persons, houses, papers, and effects,"[27] the most-used exception is probably consensual searches. By many accounts, an increasing percentage of law enforcement searches are conducted pursuant to the consent of the person searched,[28] and thus the Court frequently has faced the question of how voluntary the search must be in order to be "consensual."[29] The answer, in general, is not very, mostly because the Court applies the ultra-dispositionalist paradigm.

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27. U.S. CONST. amend. IV; Theodore P. Metzler et al., *Warrantless Searches and Seizures*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 39, *passim* (2008) (outlining exceptions to the general rule that police officers need a warrant to conduct searches); *Search Incident to Valid Arrest*, 91 GEO. L.J. 54, 88–99 (2003) (discussing the many exceptions to the probable cause and warrant requirements); CRAIG R. DUCAT, CONSTITUTIONAL INTERPRETATION: RIGHTS OF THE INDIVIDUAL 625 (2009) (expounding on the number of exceptions to the requirement that every search and seizure is supported by a warrant); *see also* Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326 (1979) (holding that contraband may be seized without a warrant under the "plain view" doctrine); Heller v. New York, 413 U.S. 483, 488 (1973) (finding no absolute First or Fourteenth Amendment right to a prior adversary hearing in all cases where allegedly obscene material is seized).

28. Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 773 (2005) ("Over 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment."); Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211 (2001) ("Although precise figures detailing the number of searches conducted pursuant to consent are not—and probably can never be—available, there is no dispute that these type [sic] of searches affect tens of thousands, if not hundreds of thousands, of people every year.").

29. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 227–28 (1973) (discussing the value of searches based on consent); Georgia v. Randolph, 547 U.S. 103, 120–21 (2006) (discussing the role of consent in a search of a house when one resident consents and the other objects). It is worth noting that the entire field of search and seizure law depends, in a sense, on choice. A search occurs only when an individual's reasonable expectation of privacy has been violated. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 33 (2001) ("[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." (citing Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring))). In many cases, this inquiry turns on whether a person has chosen to subject herself to public view or to put herself in the position where she knows she has no expectation of privacy. The cases are abundant. *See, e.g.*, Dow Chemical Co. v. United States, 476 U.S. 227, 237–39 (1986) (holding that photographing an industrial complex with a precision aerial-mapping camera is not a search); United States v. Taketa, 923 F.2d 665, 667 (9th Cir. 1991) (holding that "[v]ideotaping of suspects in public places, such as banks, does not violate the fourth amendment" because there is no expectation of privacy in these places); United States v. Gonzalez, 328 F.3d 543, 547 (9th Cir. 2003) (holding that there is no reasonable expectation of privacy in a mailroom of a public hospital); Thompson v. Johnson Cnty. Cmty. Coll., 930 F. Supp. 501, 507 (D. Kan. 1996) (security personnel locker area of a community college); United States v. Lopez, 585 F. Supp. 1400, 1401 (D. Conn. 1984) (public street); United States v. Bifield, 498 F. Supp. 497, 508 (D. Conn. 1980) (gas station); State v. Augafa, 992 P.2d 723, 734–37 (Haw. Ct. App. 1999) (public street); State v. Henry, 783 N.E.2d 609, 618–19 (Ohio Ct. App. 2002) (public restroom).

Consider *United States v. Drayton*,[30] in which police stopped a bus in the middle of the night, far from its destination.[31] Police boarded it and stood at the rear and the front.[32] Another armed officer walked up and down the aisle, approached two seated passengers and asked them to open their luggage.[33] The officer stood over them, blocking their exit, and did not say they had a right to refuse.[34] The passengers "agreed" to have the officer look in their bags and the police officer found cocaine in the ensuing search.[35]

The defendants challenged the search as not truly consensual, and of course they had a point. If Fourth Amendment "consent" means anything close to what "consent" means in other contexts, then perhaps the mere fact that the passengers knew a search would reveal drugs and result in their arrest is strong evidence that the search was a result of intimidation and pressure rather than choice. As Justice Souter pointed out, "[t]he police not only carry legitimate authority but also exercise power free from immediate check, and when the attention of several officers is brought to bear on one civilian the balance of immediate power is unmistakable."[36] He went on to say that such a "display of power" might "overbear a normal person's ability to act freely, even in the absence of explicit commands."[37]

These arguments from Justice Souter, however, were made in dissent. In an opinion by Justice Kennedy, the Court held that the search was consensual because the passengers had a choice—they could have gotten off the bus.[38] Even though this choice was not made clear to the defendants—the police officers had not informed the passengers that they could refuse the search and leave the bus—the Court concluded that "there was nothing coercive or confrontational about the encounter."[39] The Court's position was that the existence of the option to exit the bus vitiated any coercion present in the government activity.[40] The fact that the choice of getting off the bus in

30. 536 U.S. 194 (2002).
31. *Id.* at 197.
32. *Id.* at 197–98.
33. *Id.* at 198.
34. *Id.* at 198–99.
35. *Id.*
36. *Id.* at 210.
37. *Id.*
38. *Id.* at 201–02.
39. *Id.* at 207–08 (internal quotation marks and brackets omitted).
40. *Id.* at 207 (holding that the officer "did request permission to search, and the totality of the circumstances indicates that [the petitioner's] consent was voluntary, so the searches were

the middle of the night in the middle of nowhere was not particularly enticing was not significant in the Court's analysis. Just as in *Gobitis*, in which it was immaterial that the choice of moving to a different school district was burdensome, the Court focused not on the costliness of the choice but on whether a choice existed at all.[41]

The Court also adopts the ultra-dispositionalist paradigm in unconstitutional conditions cases in which the condition is upheld against a constitutional challenge.[42] The case of *Rust v. Sullivan*[43] is perhaps the best example. In that case, the Court upheld a restriction on doctors working for federally funded clinics or hospitals that prevented them from counseling patients about the need for or availability of abortions. In an opinion by Chief Justice Rehnquist, the Court held that this was not an infringement on the First Amendment rights of the clinics or the doctors, because the clinics could refuse federal money and the doctors could work elsewhere.[44] The Court emphasized that the doctors were "voluntarily employed" and that they "remain[ed] free" to "pursue abortion-related activities"

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reasonable" and stating that the arresting officer "addressed [the petitioner] in a polite manner and provided him with no indication that he was required to answer [the officer's] questions").

41. For a situationalist, the influence of peer pressure is real, and the presence of consistent behavior by everyone in a situation is evidence that the situation is influencing everyone. Justice Kennedy rejects both arguments. As to peer pressure: "Indeed, because many fellow passengers are present to witness officers' conduct, a reasonable person may feel even more secure in his or her decision not to cooperate with police on a bus than in other circumstances." *Id.* at 195. That is, in Justice Kennedy's view, the fact that one is surrounded by other passengers consenting to a search will embolden one to refuse. As to whether the fact that everyone on the bus consented to searches was evidence of coercion: "Finally, the fact that . . . only a few passengers . . . refuse[] to cooperate does not suggest that a reasonable person would not feel free to terminate the bus encounter. [B]us passengers answer officers' questions and otherwise cooperate not because of coercion. While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." *Id.* at 205.

42. The unconstitutional conditions doctrine is notoriously difficult to apply, and the Court has reached seemingly inconsistent holdings across doctrinal areas of constitutional law. For analysis of the doctrine, see Cass Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 620 (1990) (arguing that the doctrine "is too crude and too general to provide help in contested cases"); Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1416 (1989) (stating that the doctrine is "riven with inconsistencies"); R.L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321, 322 (1935) ("The Supreme Court has sustained many such exertions of power even after announcing the broad doctrine that would invalidate them."); Richard Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6 (1988) (stating that the problem is a "basic structural issue that for over a hundred years has bedeviled courts and commentators alike").

43. 500 U.S. 173 (1991).

44. *Id.* at 199.

elsewhere.[45] The limitation of their speech activities came about as "a consequence of their decision to accept employment" in the restricted project.[46] Justice Blackmun dissented, pointing out that "it has never been sufficient to justify an otherwise unconstitutional condition upon public employment that the employee may escape the condition by relinquishing his or her job."[47]

The disagreement between Justices Rehnquist and Blackmun in *Rust* can be described as a disagreement between the libertarian and ultra-dispositionalist paradigms. Justice Blackmun saw the government restriction on funding as a violation of the doctors' (and clinics') freedom of speech in part because he viewed it to be coercive to offer a choice between exercising one's free speech rights on the one hand and accepting government-funded employment on the other. Justice Rehnquist, for his part, thought the doctors' free will was not infringed by this choice—the decision to maintain employment in the federally funded clinic was "voluntary" even though it came with significant government-imposed costs.[48]

It may be easy to dismiss the ultra-dispositionalist paradigm as too sanguine about the power of individuals' free will and their ability to choose freely. But before dismissing it, it is important to note that it has a distinguished set of defenders. In a sense, the social contract theory of Jean-Jacques Rousseau, in which he asserts that "residence constitutes consent,"[49] corresponds to the ultra-dispositionalist

45. *Id.* at 198–99.

46. *Id.*

47. *Id.* at 212 (Blackmun, J., dissenting).

48. Another related example is *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), in which the Court upheld the so-called Solomon Amendment, which conditioned federal funding to universities on the institutions allowing military recruiters complete access to campus, even though the military refused to sign non-discrimination pledges as were required of other recruiters. In the oral argument at the Supreme Court, the question of whether conditioning the funds amounted to compelled speech was front and center. The attorney for Forum for Academic and Institutional Rights, Inc., argued that cutting off millions of dollars to a university amounted to a punishment for exercising its speech rights. Chief Justice Roberts shot back, saying that the statute "doesn't insist that you do anything. It says that, 'If you want our money, you have to let our recruiters on campus.'" Transcript of Oral Argument at 32, Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006) (No. 04-1152). The Supreme Court's ultimate disposition, however, sidestepped the question of whether the threat of a cutoff of funding amounted to compulsion, saying that the statute governed behavior, not speech. *Id.* at 48.

49. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT, BOOK IV ("When the State is instituted, residence constitutes consent; to dwell within its territory is to submit to the Sovereign."). For the opposite view, see RONALD DWORKIN, LAW'S EMPIRE 192–93 (1986) ("Consent cannot be binding on people . . . unless it is given more freely, and with more genuine alternate choice, than just by declining to build a life from nothing under a foreign flag.").

paradigm. According to Rousseau, anyone who chooses to live within a jurisdiction can be considered to have agreed to whatever laws that jurisdiction puts forth. That sounds quite a bit like Justice Frankfurter in *Barnette*. Another example of a defense (albeit an implicit one) of the ultra-dispositionalist paradigm is that of Professor Steven Calabresi, one of the nation's leading constitutional law scholars. He has written that various disagreements over gay rights should be handled by having LGBT people move to "secular" cities, while "Americans of faith" should "form and live in communities" where they can discriminate openly.[50] Following Rousseau, he suggests that "those who choose to live in a part of the country where their views on homosexuality are in the minority should learn to gracefully put up with a prevalence of opposing views."[51] This, too, takes residence as consent, which tracks Justice Frankfurter's view in *Barnette* (attendance at a school constitutes consent to recite the Pledge), the Court's views in *Drayton* (presence in a bus constitutes consent to search), and the Court's decision in *Rust* (employment in certain workplaces constitutes consent to fewer speech rights).

IV. THE LIBERTARIAN PARADIGM

Implicit in hundreds of Supreme Court decisions is an assumption that absent government involvement in individuals' choices, the individuals are acting freely and willfully. This is the libertarian paradigm. Government mandates are seen as coercion; government bans are infringements on liberty. Government inactivity is the default position, and government activity must be justified as a moral matter because it elbows aside volition.

Other than *Barnette*, perhaps the most famous use of the libertarian paradigm in constitutional law occurred during the Supreme Court's so-called *Lochner* era, which lasted for approximately fifty years from the latter part of the nineteenth century until the mid-1930s. During that time, the Supreme Court routinely struck down economic regulations as violations of freedom of contract. The freedom of contract—really a principle of freedom of economic choice—was seen as a value to be protected from governmental attack. Any regulation of economic life that

50. Steven G. Calabresi, Lawrence*, the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L. J. 1097, 1123 (2004).

51. *Id.*

constrained choice was constitutionally suspect. In *Lochner v. New York*[52] itself, the Court juxtaposed the right of the state to regulate with the right of the workers to choose the conditions of their job:

> [W]hen the state . . . has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood . . . it becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring . . . .[53]

Consistent with the libertarian paradigm, this notion of choice was not very robust because it ignored the constraints faced by the workers in the contracting process. Few would seriously contend that a robust choice is available when the two alternatives are to work in unsafe conditions for sixty hours per week or to go hungry because of lack of money. But the absence of real alternatives did not much bother the Court. As long as the government was not skewing the choices of the parties to a contract, the differences in bargaining power or the dearth of alternatives for either party did not vitiate the sanctity of the choices made.

A central assumption at this time was that the market was natural and given, so that anything occurring within it bore the imprimatur of consent. The market was free—whatever happened in it was chosen, and choice was a liberty to be protected by the Constitution. Free choice thus was defined as what happens in the absence of government intervention. As such, though the *Lochner* decision was about a government ban (of work weeks lasting longer than sixty hours), the *Lochner*-era Court also was worried about government mandates. Minimum-wage laws—a mandate—were just as suspect as maximum-hour laws—a ban.[54]

The libertarian paradigm later weakened in the area of economic freedoms (more on this later), but remained robust in substantive due process generally and indeed in many other areas of constitutional law. One revealing analysis concerns the abortion cases *Roe v. Wade*[55] and *Harris v. McRae*.[56] In *Roe*, of course, the Court struck down

52. 198 U.S. 45 (1905).
53. *Id.* at 54.
54. *See, e.g.*, Adkins v. Children's Hospital, 261 U.S. 525 (1923) (invalidating a minimum-wage law for women).
55. 410 U.S. 113 (1973).
56. 448 U.S. 297 (1980).

government bans on abortion services, stating that the Fourteenth Amendment's "concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[57] The Court explicitly recognized state action as a limit on free choice: "The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent."[58] Justice Stewart, concurring, also explicitly relied on assumptions about choice and will: "[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[59] In *Roe*, then, a state ban on abortions was seen as coercing a choice to remain pregnant. The Court assumed that once the government stepped out of the decision-making process, what was left was choice.

It is worth noticing, however, that the women who wanted to terminate their pregnancies in fact had options other than to get an abortion and risk prosecution. Like the students in *Barnette*, they could have traveled to a jurisdiction where their preferred choice was not illegal. Indeed, in the *Roe* oral argument, the assistant attorney general who argued in support of Texas's abortion prohibition suggested that the real choice was made at the time Roe became pregnant: "Now I think she makes her choice prior to the time she becomes pregnant. That is the time of the choice. . . . Once a child is born, a woman has no choice, and I think pregnancy then terminates that choice."[60] In direct response, Justice White added another take on choice, saying, "Maybe she makes her choice when she decides to live in Texas."[61] It is unclear whether Justice White's comment was intended to be sarcastic. It was greeted with laughter by the audience in the courtroom, but he ultimately dissented from the Court's opinion, suggesting that he could have believed that Roe should have been held accountable for her earlier choice to move to Texas, a jurisdiction that banned abortions. In any event, it is notable that Justice White's question is analogous to the argument used by Justice Frankfurter in *Barnette*.

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57. *Roe*, 410 U.S. at 153.
58. *Id.*
59. *Id.* at 169 (Stewart, J., concurring) (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974)).
60. *Roe v. Wade Oral Arguments*, 8 SETON HALL CONST. L.J. 315, 331 (1998).
61. *Id.*

This implicit use of the libertarian paradigm was made more apparent in *Harris v. McRae*, in which the Court upheld a restriction against using Medicaid and other federal monies for abortions.[62] The Court saw the use of Medicaid for the termination of pregnancies as coercive to those who did not want their tax money spent on abortions, so a ban on such use was seen as liberating to those taxpayers.[63] But the libertarian paradigm is even more obvious in light of the Court's rejection of Justice Brennan's argument in dissent that federal abortion funding was necessary to make freedom of choice genuine by relieving pregnant women from the coercive effects of financial need.[64]

Justice Brennan used the situationalist paradigm and criticized the Court for failing to recognize that the government's "denial of public funds for medically necessary abortions . . . serves to coerce indigent pregnant women to bear children that they would otherwise elect not to have."[65] Justice Brennan's point was that the economic situation of many women was such that they had no genuine ability to exercise free choice. Their ability to exercise choice was limited by their situation. Government-provided financial assistance would have liberated those women from economic coercion to bring their pregnancies to full term.

But the Court saw limits on choice as springing only from government action and not from situation. Because the economic situations of those poor women were not of the government's making, the limitations on their freedom of choice were beyond the concern of the Court.

Scores of additional cases reveal the Court's use of the libertarian paradigm. Cases striking down unconstitutional conditions often draw on libertarian assumptions about free will. For example, in *Speiser v. Randall*,[66] the Court held that the state of California could not condition a property-tax exemption for veterans on their willingness to swear a loyalty oath.[67] The condition would result in "a deterrence of speech which the Constitution makes free."[68] Implicit in this holding is the notion that it was impermissible for the government to

62. Harris v. McRae, 448 U.S. 297, 297 (1980).
63. *Id.* at 315–16.
64. *Id.* at 335–36 (Brennan, J., dissenting).
65. *Id.* at 330.
66. 357 U.S. 513 (1958).
67. *Id.*
68. *Id.* at 526.

impose costs on certain choices, and that those costs would indeed affect people's behavior. Similarly, in *Abood v. Detroit Board of Education*,[69] the Court struck down a requirement that, as a condition of employment in Detroit public schools, teachers must pay dues to the teachers' union for purposes of political speech.[70] The Court was explicit that it believed such a condition amounted to coercion: "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will . . . rather than [be] coerced by the state."[71]

These holdings correlate nicely with *Barnette*. To discover coercion, the Court need not decide that no other options exist. If that were the test, then the outcome would be different in cases like *Speiser* and *Abood*. The veteran could decline to take the tax exemption and the teacher could teach in a private school. They could both move to another jurisdiction, as the Court suggested in *Gobitis*, or they could work democratically to change the laws that burdened them, as Justice Frankfurter suggested in *Barnette*. But under the libertarian paradigm, the existence of these choices does not mean that the government restriction was not coercive. Instead, coercion can be found when the state makes a certain choice (or set of choices) significantly more costly than it would be without government intervention. The Court's focus is on the government activity.

V. THE SITUATIONALIST PARADIGM

In some cases, the Court implicitly uses a model of human agency that considers the situation relevant, even parts of the situation not directly created or influenced by government. In contrast to the ultra-dispositionalist paradigm, this model does not take the strength of human will as a given. In contrast to the libertarian paradigm, this model still considers government activity relevant but also considers other possible influences and constraints on choice.

A shift in the Court's economic substantive due process cases from the libertarian to the situationalist paradigm significantly contributed to the end of the *Lochner* era. The *Lochner*-era Courts'

69. 431 U.S. 209 (1977).

70. *Id.*

71. *Id.* at 234–35; *see also* Gardner v. Broderick, 392 U.S. 273, 279 (1968) (reversing the dismissal of a police officer who had not waived Fifth Amendment privilege while testifying before a grand jury investigating official corruption, stating that loss of employment was an "attempt, regardless of its ultimate effectiveness, to coerce a waiver of immunity").

laissez-faire assumption about human decision-making was that government regulation was the source of coercion. When the nation fell into the depths of the Great Depression, however, the principles of laissez-faire economics came under attack and the Court began to question its understanding of choice and coercion. Eventually, the Court recognized that the so-called free market could be a source of coercion that government regulation might be necessary to counteract.

This insight helped bring about a sea of change in economics, law, and politics.[72] The intellectual giants of the era saw that the "free market" was a creature of politics and law, and a creature to be tamed by the same forces.[73] The market was not an area ruled by choice, but dominated by coercion, forcing people to sell their labor in horrid conditions in order to house, feed, and clothe themselves and their families. New Deal theorists recognized that choice in the narrow, limited sense, which had been protected by the *Lochner*-era Court, was not only inconsistent with economic well-being but also inconsistent with a robust understanding of consent and coercion. Government assistance was necessary to make real choices available.

In *West Coast Hotel v. Parrish*,[74] the case marking the end of the *Lochner* era, the Court recognized the coercion of the marketplace:

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72. *See generally* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 45–62 (1993); *see also* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 201–02 (1993) (writing that "'[t]he constitutional revolution of 1937' marked the moment when the founders' conception of faction-free American Republic collapsed under the onslaught of corporate capitalism . . . . The presidency was fundamentally transformed into a 'popular' branch that was expected to be a programmatic leader of an increasingly fragmented political system; the Senate was formally democratized; the line separating the domains of national and state control over commerce, so carefully drawn by the founders and protected by the Court, was erased with the New Deal's extension of federal authority to include control over local manufacturing and production; and long-standing standards regulating Congress's ability to delegate rule-making authority to executive agencies were set aside"); STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 100–03 (1996); MORTON HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 33 (1992); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991).

73. The most influential piece from the time likely is Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POLI. SCI. Q. 470 (1923). *See also* SUNSTEIN, *supra* note 72, at 48–49 ("If coercion and law were seen there [in the market], regulation would be a justified corrective. The same principle that doomed slavery could also call for government assistance against the forms of coercion that drive people to take menial jobs at trivial pay, or that force people to work sixty hours per week if they are to work at all."). For more on the coercion of the market, see GREENFIELD, *supra* note 1, at 119.

74. 300 U.S. 379 (1937) (upholding a minimum-wage law).

> In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. . . . [T]he fact that "both parties are of full age, and competent to contract, does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself."[75]

Thus, in the eyes of the Court, the "freedom" of the parties involved was not simply a function of government regulation (as it would be in the libertarian paradigm) but of their economic situation and market power. Moreover, the existence of other choices—a different job, a different location—was immaterial (though they would be dispositive in the ultra-dispositionalist view). What mattered was whether, given the reality of the situation, people were truly free or "practically constrained." This is the embodiment of situationalism.

Another example of the use of the situationalist paradigm by the Court is the case of *Lee v. Weisman*,[76] where the Court prohibited prayers from being a part of public school graduation ceremonies. Parents of a graduating senior brought suit against their public school to enjoin it from including a prayer in its graduation ceremony, saying the prayer was a violation of the First Amendment's Establishment Clause.[77] The school defended the prayer by saying the student's attendance at the ceremony was voluntary and that she could refuse to participate in the prayer or the ceremony itself.[78]

In the eyes of the Court, however, it was not dispositive that the student could choose not to participate.[79] The Court recognized the reality of the situation of high school students put in such a position. Writing for the Court, Justice Kennedy recognized the importance of "protecting freedom of conscience from subtle coercive pressure" that arises from "public pressure, as well as peer pressure."[80] Justice Kennedy recognized that "[t]his pressure, though subtle and indirect, can be as real as any overt compulsion."[81] He set aside the question of whether "mature adults" are subject to such pressure, but asserted that "[r]esearch in psychology supports the common assumption that

75. *Id.* at 394 (quoting Holden v. Hardy, 169 U.S. 366, 397 (1898)).
76. 505 U.S. 577 (1992).
77. *Id.* at 584.
78. *Id.* at 586.
79. *Id.* at 593.
80. *Id.* at 592.
81. *Id.* at 593.

adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention."[82]

Justice Kennedy's opinion is a remarkable recognition of the power of situation in individual decision-making, at least with regard to minors. Justice Kennedy does, to be sure, sound the notes of the libertarian paradigm by recognizing that it is the state that is "plac[ing] objectors in the dilemma of participating, with all that implies, or protesting."[83] Still, *Weisman* is a more situationalist than libertarian opinion because Justice Kennedy sees the costs of the state action only by recognizing the pressures brought to bear by the situation. To illustrate, compare *Weisman* with the law surrounding the Pledge of Allegiance after *Barnette*. Under current law, the state can compel public schools to start their day with a school-wide recitation of the Pledge.[84] As long as students may opt out, it is not seen as coercing students to speak in violation of the First Amendment. In *Weisman*, however, Justice Kennedy is attuned to the coercive effects of situation. He says the school's argument that there is no coercion inherent in the ceremony "lacks all persuasion. . . . [T]o say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme."[85] He draws on conventional wisdom—"everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions"—and uses a nuanced understanding of coercion—"a student is not free to absent herself from the graduation exercise in any real sense of the term 'voluntary,' for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years."[86] The government rule is influential only because of social pressures, and "the government may no more use social pressure to enforce orthodoxy than it may use more direct means."[87]

82. *Id.*

83. *Id.; see also id.* at 587 ("A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur.").

84. *Cf.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 5 (2004) (rejecting a First Amendment-based challenge to the Pledge on standing grounds). *See supra* note 16.

85. *Weisman*, 505 U.S. at 595.

86. *Id.*

87. *Id.* at 594.

One could compare Justice Kennedy's ultra-dispositionalist opinion in *Drayton* (the bus search case) with his situationalist opinion in *Weisman*. Perhaps the difference is based on the minor status of the plaintiff in *Weisman*, or perhaps on the difference between the nature of voluntariness in the Fourth Amendment context as opposed to the Establishment Clause context. One might also think that Justice Kennedy simply is more attuned to the situation of religious minorities than to the situation of those targeted by law enforcement officers.[88]

Like the other paradigms, the situationalist paradigm claims a number of distinguished adherents. As mentioned at the beginning of this article, many legal scholars have begun to use insights from cognitive and behavioral science and economics to question the mainstream libertarian view of human decision-making. Scholars such as Cass Sunstein, Christine Jolls, Jon Hanson, Owen Jones, John Humbach, David Yosifon, Adam Benforado, and Dan Kahan, to name several, are contributing important arguments about the legal significance of situation in human decision-making.[89]

Perhaps the most provocative example of situationalist reasoning in constitutional law is in the work of some feminist theorists, most notably Professor Catharine MacKinnon. In her book *Only Words*,

88. Another revealing example of Justice Kennedy's use of the situationalist paradigm came in his opinion for the Court in *Gonzales v. Carhart*, 550 U.S. 124 (2007). In this case, the Court upheld the "Partial Birth Abortion Act" of 2003. In his opinion, Justice Kennedy suggested that late-term abortions could be banned because many women made that choice because of the constraints of their situation and that they would later regret that choice. "Whether to have an abortion requires a difficult and painful moral decision . . . . While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. . . . The State has an interest in ensuring so grave a choice is well informed." *Id.* at 128, 159. Justice Ginsberg dissented, saying: "[T]he Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from '[s]evere depression and loss of esteem.' Because of women's fragile emotional state and because of the 'bond of love the mother has for her child,' the Court worries, doctors may withhold information about the nature of the intact D & E procedure. The solution the Court approves, then, is not to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety." *Id.* at 183–84 (alteration in original) (citations omitted).

89. *See supra* note 24. *See also* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE (2008); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV., 149 (2006); Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why*, *in Acquaintance Rape Cases*, 158 U. PA. L. REV. 729 (2010).

MacKinnon argues that women are often coerced by situation:

> Empirically, all pornography is made under conditions of inequality based on sex, overwhelmingly by poor, desperate, homeless, pimped women who were sexually abused as children. The industry's profits exploit, and are an incentive to maintain these conditions. These conditions constrain choice rather than offering freedom.[90]

In other words, because the situations in which some women find themselves are so limiting, the choices of those women are best understood as products of coercion rather than choice. When that is true, one could reasonably believe that a restriction on the production of pornography would be choice-enhancing (at least for women) rather than choice-reducing.

VI. CONCLUSION

The notion of free will has long been a pivotal question in law, both implicitly and explicitly. While philosophers have largely fallen into camps that divide between those who believe free will exists and those who do not, legal thinking on the question can be placed in three general categories. The purpose of this article was to sketch out these three paradigms using constitutional cases decided by the Supreme Court. While legal thought traditionally has been characterized by an assumption of robust free will—and that assumption continues to have significant influence—constitutional analysis in fact is more nuanced and occasionally takes into account governmental and situational limits on choice and free will.[91] The Court sometimes sees human will as influenced by, or even a product of, situation or governmental pressure. That is, there are cases that map better to the philosophical determinists (who see will as an endogenous variable) than the metaphysical libertarians (who see will as an exogenous variable).

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90. CATHARINE MACKINNON, ONLY WORDS 20 (1993). Obviously, her view is not universal. *See, e.g.*, ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 191 (2003) ("I do not doubt that women sometimes agree to sexual relations that they would reject under different or more just or equal background conditions. But we do not enhance their welfare or their autonomy by denying the transformative power of their consent.").

91. It is worth noting that there are other examples of areas of law, outside of constitutional law, where courts are attuned to the power of situation. One example is contract law. *See* Kent Greenfield, *Unconscionability and Consent in Corporate Law*, 96 IOWA L. REV. BULL. 92 (2011) (discussing contract law's ability to take account of situational particularities in reaching just outcomes).

The Court's three paradigms essentially turn on how robust it believes human will to be. In the ultra-dispositionalist paradigm, the individual's will stands inviolate even in the face of firm government pressure. If options exist other than succumbing to that pressure, then the Court assumes free will exists. In the libertarian paradigm, the Court recognizes that government pressure can affect choices and vitiate consent. The presence of other options does not protect the government's action from constitutional challenge. The focus in the libertarian paradigm, however, is *only* on government influence; the coercive effects of a given situation are immaterial if they do not flow directly from the government. In the situationalist paradigm, the coercive influence of non-governmental actors is relevant in the constitutional analysis of freedom and consent. Future study could help discern if there is a pattern in the Court's use of one paradigm or another in various cases.[92]

92. It would be particularly intriguing to track Justice Kennedy's reasoning across cases, and not just because he is the most powerful jurist in the country. He has written opinions that fit on both ends of the spectrum in terms of a belief in the robustness of free will: bus passengers surrounded by police officers consented to having their bags searched even when they did not know refusal was a possibility, but high school students were coerced by social pressure to pray during a graduation ceremony. Is the only difference age? Are there other differences? And if age is the key difference, would Justice Kennedy believe that a student is free to refuse to recite the Pledge at the beginning of her school day?