Forced Faith: Coercion and Civil Religion in Post-*Kennedy* Establishment Clause Doctrine

ABSTRACT

In Kennedy v. Bremerton School District, the Supreme Court threw out the long-standing Lemon test for navigating the Establishment Clause. In place of the Lemon test, the Court held that "the Establishment Clause must be interpreted by 'reference to historical practices and understanding.'" But the Court provided no defined set of legal principles to do so and instead conducted a fact-specific analysis. Coercion jurisprudence has not often been litigated in the Supreme Court and as a result, recently was misapplied in the context of judicial prayer by the Fifth Circuit in Freedom from Religion Foundation v. Mack. This paper suggests Courts could find much needed guidance from theories of religious coercion, which, are still permissible post-Kennedy. Coercion provides a more approachable and principled form of Establishment Clause jurisprudence. This paper will also offer courts a tool to evaluate America's history and traditions of religion by discussing the academic concept of civil religion, which is consistent with American religious tradition and implicitly recognized by Supreme Court jurisprudence. Finally, this paper will apply the coercion test to the facts of Freedom from Religion v. Mack and argue that it was wrongly decided.

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INTRODUCTION

In 2021, the Supreme Court overturned fifty years of First Amendment precedent in the name of history and tradition. The Court in *Kennedy v. Bremerton School District* confronted a fundamental Establishment Clause question: can school employees engage in public prayer at school events?[1] Overturning the longstanding *Lemon* test, which had previously been used to address Establishment Clause issues,[2] the 6-3 majority instead required that religious displays need only be consistent with "historical practices and understandings" of America.[3] But as Justice Sotomayor explained in her dissent, "[t]he Court reserves any meaningful explanation of its history-and-tradition test for another day."[4] Merely stating that history and tradition must be evaluated to determine whether a First Amendment violation exists creates substantial difficulties in interpretation for both private parties and lower courts. Because there is no longer a clear doctrine, "the Court . . . offers essentially no guidance for [private citizens]" and puts

[1] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2416 (2022).
[2] Under the Lemon test, a law was unconstitutional if it (1) did not have a "secular legislative purpose," (2) had a primary effect of advancing or inhibiting religion, or (3) it fostered "an excessive government entanglement with religion." Lemon v. Kurtzman, 403 U.S. 602, 612–613 (1971), *abrogated by* Kennedy, 142 S. Ct. 2407.
[3] *See id.* at 2427–28; *id.* at 2434 (Sotomayor, J., dissenting) ("The Court overrules Lemon v. Kurtzman . . . and calls into question decades of subsequent precedents . . . .").
[4] *Id.* at 2450 (Sotomayor, J., dissenting).

lower court judges in the difficult position of being adjudicators of history—which judges "regularly disagree (and err)" in assessing.[5]

Justice Sotomayor's concerns manifested a year later in *Freedom from Religion Foundation v. Mack*, where the Fifth Circuit applied *Kennedy*'s history and tradition test to a Texas justice of the peace named Judge Mack opening his courtroom with daily prayer led by a rotating cast of chaplains.[6] The plaintiffs alleged the prayers were "'five-to eight-minute Christian sermon[s]' . . . 'addressed to the Christian God,' made in Jesus' name, and styled as the supplication of the whole audience."[7] The plaintiffs further alleged that this practice was coercive to the point that one attorney had permanently stopped practicing in the county where Judge Mack presides.[8] Even so, the Fifth Circuit reversed the district court and entered summary judgment for Judge Mack.[9] The court found that beginning court with prayer was consistent with a longstanding history and tradition of judicial and legislative prayer in America and thus, under *Kennedy*, constitutional.[10]

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[5] *Id.*
[6] Freedom from Religion Found., Inc. v. Mack, 49 F.4th 941, 951 (5th Cir. 2022).
[7] *Id.* at 957.
[8] *Id.* at 947.
[9] *Id.* at 961.
[10] *Id.* at 957.

These outcomes indicate the start of a worrying line of precedent. Each of these two cases stands for the notion that government officials in positions of power and influence will be allowed to engage in public religious displays within the ceremonial heart of their power. This is true whether that be the center of the football field under the Friday night lights or from the bench shortly before hearings begin. These displays are also unlikely to be anything but Christian in nature; Christianity has long had a position of privilege in America while other religions are repeatedly marginalized when attempting to enter the public sphere.[11] Today, forty-five percent of American adults believe America should be a "Christian nation" and nineteen percent of all American adults believe that religious diversity weakens American society.[12] Public religious displays by non-Christian groups are often met with hostility while Christian displays are cheered on and vigorously defended.[13]

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[11] *E.g.*, Kenneth C. Davis, *America's True History of Religious Tolerance*, SMITHSONIAN MAGAZINE (Oct. 2010), https://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/. ("The problem is that this tidy narrative [of American religious tolerance] is an American myth. . . . From the earliest arrival of Europeans on America's shores, [Protestantism] has often been a cudgel, used to discriminate, suppress and even kill the foreign, the 'heretic' and the 'unbeliever'—including the 'heathen' natives already here.")

[12] Gregory Smith, Michael Rotolo & Patricia Tevington, *45% of Americans Say U.S. Should Be a 'Christian Nation'*, PEW RESEARCH CTR. (Oct. 27, 2022), https://www.pewresearch.org/religion/2022/10/27/45-of-americans-say-u-s-should-be-a-christian-nation/.

[13] *See, e.g.*, John Leland, *Tension in a Michigan City Over Muslims' Call to Prayer*, N.Y. TIMES (May 5, 2004), https://www.nytimes.com/2004/05/05/us/tension-in-a-michigan-city-over-

Any test, mandated as binding precedent by the Supreme Court, that focuses on a judge's interpretation of America's "history and traditions" will naturally reinforce Christian hegemony in the modern day. It is thus essential that courts work within that framework in a way that allows a pluralistic society to thrive, and minority religions not to be marginalized. A nuanced view of religion and how it functions within society, as understood by scholars of religion, supports this claim. "Civil religion" is a religious studies concept that understands some forms of religious expression as methods of binding the nation around a common set of non-sectarian morals and narratives; "theistic religion" evangelizes and promotes a sectarian identity separate from the nation.[14] Because of this, civil religion is less likely than theistic religion to cause discomfort or coercion when present in a public sector context.[15]

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muslims-call-to-prayer.html (citizens of Hamtrack, Michigan, objecting to hearing the Muslim call to prayer in their neighborhood because "[i]t's against my constitutional rights to have to listen to another religion evangelize in my ear."); *Religious Freedom: Satguru Delivers Opening Prayer For US House of Representatives*, HINDUISM TODAY (Oct. 1, 2013), https://www.hinduismtoday.com/magazine/october-november-december-2013/2013-10-religious-freedom-satguru-delivers-opening-prayer-for-us-house-of-representatives/ (evangelicals protest a Hindu chaplain delivering the opening prayers in the House of Representatives because "[the Founders] would have found utterly incredible the idea that all religions, including paganism, be treated with equal deference.").

[14] *See, e.g.*, *God Bless America: Reflections on Civil Religion After September 11*, PEW RESEARCH CTR. (Feb. 6, 2002), https://www.pewresearch.org/religion/2002/02/06/god-bless-america-reflections-on-civil-religion-after-september-11/.

[15] *See* Lynch v. Donnelly, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting) (citing Arthur E. Sutherland, Book Review, 40 Ind. L.J. 83, 86 (1964) (reviewing Wilber G. Katz, Religion and American Constitutions (1963)).

This paper will first outline the reasoning in *Kennedy v. Bremerton School District* and *Freedom from Religion Foundation v. Mack*. Next, this paper will analyze the criticisms of the *Lemon* test and recommend that Justice Kennedy's coercion test, as discussed in cases such as *County of Allegheny v. ACLU* and *Lee v. Weisman*, be adopted as the primary doctrine in its place. This paper will also compare "civil religion" with the Supreme Court's concept of "ceremonial deism." Understanding these concepts leads to a more accurate understanding of religion's historical place in the public sphere, which a principled application of the originalist history-and-tradition test should strive towards, and helps delineate what religious activity creates a greater or lesser risk of coercion. Finally, this paper will apply the coercion test to the facts of *Freedom from Religion Foundation v. Mack* and argue that it was wrongly decided.

DISCUSSION

I. *KENNEDY* LEAVES THE COURTS WITHOUT A CLEAR WAY TO EVALUATE RELIGIOUS ISSUES UNDER ITS "HISTORY-AND-TRADITION" TEST BUT PERMITS THEORIES OF COERCION TO BE LITIGATED.

Joseph Kennedy began coaching high school football in the peninsular town of Bremerton, Washington, in 2007.[16] Soon after starting, he began a practice of praying on the fifty-yard line

[16] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2416 (2022).

of the field after each game to express his gratitude to the Christian god for "'what the players had accomplished and for the opportunity to be part of their lives through the game of football.'"[17] Over time, some players from his team began to join in the prayers.[18] Over the next seven years, members of the team progressively joined the prayers until most of the team participated in the post-game prayers.[19] The school district remained unaware of these post-game prayers until 2015 when an employee from another school commented to the Bremerton School District about the prayers.[20]

The District quickly sent a letter to Kennedy, requiring him to avoid engaging in religious expression around students to avoid giving the impression that the District was endorsing a particular religion.[21] Kennedy at first agreed to cease his post-game prayers but reversed course a month later.[22] In a letter to the District, Kennedy explained that he "felt 'compelled' to offer a 'post-game personal prayer' of thanks at midfield" and intended to resume his practice.[23] The District responded that he was not allowed to engage in any overtly religious behavior while on duty as an employee of the school, as doing so would

[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at 2416–17.
[22] *Id.* at 2417.
[23] *Id.*

violate the Establishment Clause.[24] Despite this warning, Kennedy continued his practice of prayer on the fifty-yard line during the next three games of the season and also engaged in several media appearances in local and state news declaring that he would be doing so.[25] This led the District to place him on paid administrative leave and Kennedy to not reapply to coach after his contract expired at the end of the season.[26]

Throughout the events leading up to the Supreme Court's review of the case, Kennedy maintained that he never directly "coerced, required, or asked any student to pray" and never "told any student that it was important that they participate in any religious activity."[27] However, the District Court in Washington found that "[s]ome students and parents expressed thanks for the District's directive that Kennedy cease praying after games, with some noting that their children had participated in the prayers to avoid being separated from the rest of the team or ensure playing time."[28] Faced with these facts, the District Court concluded that Kennedy's actions were both coercive and could be reasonably perceived as government

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[24] *Id.* at 2417–18.
[25] Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1230 (W.D. Wash. 2020).
[26] Kennedy, 142 S. Ct. at 2418–19; Andrew Koppelman, *Elena Kagan and the Supreme Not-A-Court*, THE HILL (Sept. 25, 2022, 8:00 AM), https://thehill.com/opinion/judiciary/3659769-elena-kagan-and-the-supreme-not-a-court/.
[27] *Id.* at 2429. (internal quotation marks omitted).
[28] Kennedy, 443 F. Supp. 3d at 1229.

endorsement of religion.[29] The court accordingly entered summary judgment for the District and the Ninth Circuit affirmed.[30] Kennedy appealed and the Supreme Court granted certiorari.[31]

A. Kennedy's *discussion of the history-and-tradition test.*

The Supreme Court began its Establishment Clause and Free Exercise Clause analysis with a discussion of the Court's longstanding *Lemon* test upon which both the District Court and the Ninth Circuit relied in coming to their conclusions.[32] The *Lemon* test focused mainly on avoiding government entanglement with religion and ensuring there was a secular purpose to the conduct at issue.[33] The Court further elaborated that the Court had "long ago abandoned *Lemon* and its endorsement test offshoot" in favor of interpreting the Establishment Clause "by 'reference to historical practices and understandings.'"[34] This analysis must focus on "original meaning and history" and "accord with history and faithfully reflect the understanding of the Founding Fathers."[35] The Court did not, however, apply this "history and

[29] *Id.* at 1238–40.
[30] Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1022–23 (9th Cir. 2021).
[31] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 857, 857 (2022).
[32] Kennedy, 142 S. Ct. at 2427.
[33] *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)) (abrogated by Kennedy, 142 S. Ct. 2407).
[34] Kennedy, 142 S. Ct. at 2427-28 (citing Town of Greece, 572 U.S. at 576; Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019) (plurality opinion)).
[35] *Id.* at 2428 (citing Town of Greece, 572 U.S. at 576–77).

tradition" test to the facts at hand, simply stating that the lower courts erred by failing to apply it.[36]

The Court instead analyzed whether Kennedy's prayers coerced students to pray themselves.[37] It began by stating that a coercion test was "consistent with a historically sensitive understanding of the Establishment Clause" and that there was no doubt coercion "was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment."[38] The Court recognized that there were multiple interpretations of the coercion test within its jurisprudence but declined to decide that one interpretation was binding, instead finding that in no case could Kennedy's conduct be considered impermissibly coercive.[39]

The Court noted that the District never raised concerns of coercion in its letters to Kennedy, and found no evidence of Kennedy ever directly coercing anyone to join his prayers.[40] Kennedy never "direct[ed] any prayers to students or require[d] anyone else to participate" and attempted to do his prayers while his players were otherwise occupied.[41] The Court concluded that although some parents had expressed that some players had

[36] *Id.*
[37] *Id.*
[38] *Id.* at 2429, 2429 n.5.
[39] *Id.* at 2429.
[40] *Id.*
[41] *Id.* at 2429–30.

participated in the prayers "only because they did not wish to separate themselves from the team," there was no proof to connect those players to the prayers at the three games following the District's reprimand letter.[42] The Court also noted that no formal program facilitated the prayers, the prayers were not "broadcast or recited to a captive audience" as had been problematic in past cases like *Zorach v. Clauson* or *Santa Fe Independent School District v. Doe*, and players were not "required or expected to participate."[43]

Justice Sotomayor, joined by Justices Kagan and Breyer, dissented from the opinion. They noted that the position of a coach creates inherent coercive pressure[44] and that concerns of coercion were more than speculative.[45] due to some parents expressing that their children had only joined the prayers due to feeling "social pressure to follow their coach and teammates," and that the progressive increase in the number of students participating in the prayers over time was "an evolution showing coercive pressure at work."[46] These students had watched their own team members join for years, members of the opposing team join the prayers, and both members of the public and state representatives join Kennedy on the fifty-yard

[42] *Id.* at 2430.
[43] *Id.* at 2431–32.
[44] *Id.* at 2443 (Sotomayor, J., dissenting).
[45] *Id.*
[46] *Id.*

line.[47] Kennedy also appeared to know that his actions would invite students to join his prayers; he requested "that the District agree that it would not 'interfere' with students joining him in the future."[48] And despite Kennedy never formally asking students to join, the dissenters noted that even implicit coercion is unconstitutional.[49]

The dissenting justices then addressed the majority's history-and-traditions test. They concluded that the majority's test was no less a "grand unified theory" than the *Lemon* test and presented judges with the difficult task of accurately interpreting history—a task that judges are poorly suited to carry out.[50] The test also presents government employees with the same difficult task of interpreting history, as now they must assess how closely a particular practice accords with the United States' 246 years of religious history rather than if a reasonable person would believe the government was endorsing religion.[51] The dissent also criticized the majority for failing to elaborate further upon the history-and-traditions test or

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[47] *Id.* at 2444.
[48] *Id.*
[49] *Id.* ("But existing precedents do not require coercion to be explicit . . . . To the contrary, this Court's Establishment Clause jurisprudence establishes that 'the government may no more use social pressure to enforce orthodoxy than it may use more direct means.'") (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000)).
[50] *Id.* at 2450.
[51] *See id.* ("If even judges and Justices, with full adversarial briefing and argument tailored to precise legal issues, regularly disagree (and err) in their amateur efforts at history, how are school administrators, faculty, and staff supposed to adapt?").

offer guiding doctrine to lower courts and government employees in assessing future Establishment Clause issues.[52]

B. Kennedy *abandoned the* Lemon *test for being ahistorical and unworkable*

The *Lemon* test sought to distill the "cumulative criteria developed by the Court" throughout its many years of First Amendment decisions into a three-part test.[53] First, it required there to be a secular purpose to the purportedly religious activity; second, that the "principle or primary effect must be one that neither advances nor inhibits religion"; and third, that the activity must not excessively entangle the government with religion.[54] These factors aimed to prevent the "three main evils" that animate the First Amendment: "sponsorship, financial support, and active involvement of the sovereign in religious activity."[55] Abandoning the *Lemon* test, the *Kennedy* majority summarized it as an "ambitious, abstract, and ahistorical approach to the Establishment Clause" that "invited chaos" in the lower courts and "created a 'minefield' for legislators."[56]

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[52] *Id.*
[53] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (abrogated by Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022)).
[54] *Id.* at 612–13 (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).
[55] *Id.* at 612 (citing Walz, 397 U.S. at 674).
[56] Kennedy, 142 S. Ct. at 2427 (citing Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2079-81 (2019) (plurality opinion); Town of Greece v. Galloway, 572 U.S. 565, 575–77 (2014); Capitol Square Rev. and Advisory Bd. v. Pinette, 515 U.S. 753, 7678–69 (1995)).

Kennedy was far from the first time that *Lemon* had been criticized.[57] In *Wallace v. Jaffree*, Justice Rehnquist levied criticism against the need for a secular purpose, contending that it was ahistorical.[58] He contended that the historical record actually reveals that the First Amendment merely forbids a national religion or governmental preference between denominations—not that the government had to show neutrality between religion and secularism or to abstain from "solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires."[59]

Two years later, Justice Scalia further questioned the legitimacy and utility of the *Lemon* test in *Edwards v. Aguillard*. Evaluating the past sixteen years of caselaw, he concluded that inconsistent application of the purpose factor had "made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what

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[57] The criticisms of the *Lemon* test are too numerous for each individual criticism to be addressed. *See*, *e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080–81 (2019) ("The [*Lemon*] test has been harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars."). Instead, this Note will sample some of the more prevalent criticisms for each prong.

[58] Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) ("[T]he *Lemon* test has no more grounding in the history of the First Amendment than does the . . . theory upon which it rests.").

[59] *See id.* at 105–06. (quoting THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 470–71 (1868)).

motives will be held unconstitutional."[60] Discerning legislative purposes forces courts to wade through a morass of conflicting statements by individual legislators, attempting to determine how widespread a various purpose is, and then evaluating what number of legislators holding an impermissible purpose is required to create unconstitutionality.[61]

Justice Kennedy attacked the second prong of the *Lemon* test in *Allegheny*, regarding the "primary or principle effect" of the religious activity, as "an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents . . . ."[62] Like other Justices, Kennedy found that this prong ignored that "[g]overnment policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage."[63] While emphasizing the need for the government to remain neutral and avoid compelling any form of worship, he argued that the government must nonetheless accommodate religion in the public sector.[64]

The Court neatly summarized the critiques of *Lemon* in its *American Legion* opinion: first, identifying the original purpose of symbols or practices that were "first established long ago .

[60] Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).
[61] *See id.* at 636–39.
[62] Allegheny, 426 U.S. at 655 (Kennedy, J., concurring and dissenting in part).
[63] *Id.* at 657.
[64] *Id.* at 659–60.

. . may be especially difficult."[65] Second, the purpose for maintaining various symbols and practices changes over time; for example, what was once a temple may be maintained for archeological purposes.[66] Third, the meaning conveyed by symbols and practices may change. What was once religious may become more a secular recognition of cultural history.[67] Fourth, the removal of symbols or halting of practices that have existed for a longer period creates a very different reaction in the community than doing so near the issue's inception.[68] Removing a long-standing religious artifact could well be perceived as anti-religious rather than promoting plurality, whereas preventing the artifact from being erected at the outset is likely to be less divisive.[69]

Rightly or wrongly, the *Lemon* test is now, in all meaningful ways, fully overruled in favor of a history and tradition test.[70] But even post-*Kennedy*, a mere historical analysis is not the end-all-be-all of First Amendment analysis.[71]

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[65] *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2082 (2019) (plurality opinion).
[66] *See id.* at 2082–83.
[67] *See id.* at 2084 ("Notre Dame in Paris provides a striking example. Although the French Republic rigorously enforces a secular public square, the cathedral remains a symbol of national importance to the religious and nonreligious alike. Notre Dame is fundamentally a place of worship . . . but its meaning has broadened.").
[68] *See id.* at 2084–85 ("A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion.").
[69] *See id.*
[70] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2434 (2022) (Sotomayor, J., dissenting).
[71] *See id.* at 2429.

The majority opinion recognized that a coercion test is consistent with America's history and traditions but failed to articulate what the standards of that coercion test might be. And past decisions show some disagreement in what exactly constitutes coercion.[72] In light of this, a coercion test should (1) attempt to alleviate, but not necessarily completely avoid,[73] the complaints levied against the *Lemon* test and (2) be consistent with already-existing Supreme Court precedent. The coercion test first discussed by Justice Kennedy in *County of Allegheny v. ACLU* and elaborated upon in *Lee v. Weisman* and *Town of Greece v. Galloway*, satisfies both of these requirements.

II. *Freedom from Religion Foundation v. Mack* provides an example of coercion theories in the post-*Kennedy* context

Judge Wayne Mack is a justice of the peace in Montgomery County, Texas. His court is "high-volume" and has jurisdiction over both criminal cases punishable by fines and civil cases in which up to twenty thousand dollars are at issue.[74] Before

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[72] Compare Lee v. Weisman, 505 U.S. 577, 592–93 (1992) with *id.* at 640–641 (Scalia, J., dissenting).

[73] One of the great criticisms of *Lemon* is that "entanglement" is a somewhat ambiguous standard. *See*, *e.g.*, Roemer v. Bd. of Pub. Works, 426 U.S. 736, 769 (1976) (White, J., concurring in the judgment). It may also be argued that coercion is a somewhat ambiguous standard. Yet the Establishment Clause is well recognized as containing "sparse language" that is "at best opaque, particularly compared with other portions of the Amendment." *See id.*; Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (abrogated by Kennedy, 142 S. Ct. 2407). Thus, some ambiguity and fact-dependent analysis will be inherent to any First Amendment doctrine. *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 636 (1989) (O'Connor, J., concurring in part) ("Establishment Clause analysis . . . depends on sensitivity to the context and circumstances presented by each case.").

[74] Freedom From Religion Found., Inc. v. Mack, 49 F. 4th 941, 944 (5th Cir. 2022). The procedural posture of the case is cross-motions for summary

joining the judiciary, Judge Mack was a Pentecostal minister for ten years.[75] His ministry was incorporated into his judicial election campaign, promising voters that he would "open his courts with prayer" and create a chaplains program.[76] Upon his election, he implemented both policies.[77] Judge Mack described his program "in overtly religious terms. For example, he once said a volunteer chaplain's role was to 'be a representative of God bearing witness to His hope, forgiving and redeeming power.'"[78] Judge Mack has also said the program is "a program that God wanted in place, for His larger purpose."[79] While Judge Mack invited members of all faiths to participate, the daily-prayer invitation list consisted of predominantly Christian chaplains, with only ten-percent of the chaplains being of a non-Christian faith.[80]

The daily prayers occurred during the court's opening ceremony.[81] A bailiff informed everyone in the courtroom that an "invocation by one of our volunteer chaplains" will take place and said that no one is required to be in the courtroom for the

judgment. The trial court granted summary judgment for the plaintiffs on a theory of coercion. *Id.*

[75] *Id.*
[76] *Id.*
[77] *Id.* at 944–45.
[78] *Id.* at 945.
[79] Freedom from Religion Found., Inc. v. Mack, 540 F. Supp. 3d 707, 710 (S.D. Tex. 2021).
[80] *Id.* at 709.
[81] Freedom from Religion Found., Inc. 49 F. 4th at 945.

prayer.[82] The bailiff further stated that participation (or lack thereof) would have no impact on the outcome of the court's decisions.[83] Judge Mack then entered the courtroom and began the prayer ceremony.[84] The prayers themselves varied significantly:

> Some prayers are short and ecumenical—for instance, "May the Lord bless you." But some observers claim to have witnessed prayers they characterize as "five-to eight-minute [Christian] sermon[s]." Observers also describe at least some prayers as "highly religious," "addressed to the Christian God," and as made in Jesus' name. They say some prayers are worded to include the audience in supplication. For example, prayers may include the phrase, "*we* come to you today to ask that you help *us*."[85]

Participation in these prayers was required for all that remained in the room in the form of standing and bowing their head.[86] Whether Judge Mack was able to tell who is in the room and who is participating was highly disputed: Judge Mack said he turns around during the prayers and cannot see the gallery; the plaintiffs provided four "firsthand accounts" that Judge Mack remained facing forward and "ke[pt] his eyes open and scan[ned] the audience as if probing attendees' piety."[87] At times, the courtroom doors were closed and locked during the prayers, providing another opportunity for Judge Mack to notice a non-participant when they re-entered the room.[88]

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[82] *Id.*
[83] *Id.* at 946.
[84] *Id.*
[85] *Id.* (emphasis in original).
[86] *Id.*
[87] *Id.*
[88] *Id.*

The plaintiffs alleged coercion based on the experiences of three individuals.[89] Two of these individuals were lawyers in Montgomery County and one was a criminal defendant.[90] The first lawyer ("Roe") "felt compelled to remain in the courtroom during the prayers" because he perceived the ceremony as "very important" to Judge Mack and that he might upset Judge Mack if he left; his clients want him to avoid "mak[ing] a scene or being an activist" and so it would be "crazy to leave."[91] On the one occasion, Roe was not in the gallery when the ceremony began.[92] The court's clerk came to him and said Roe "'needed' to participate in the ceremony."[93] After this incident, Roe refused to practice in Judge Mack's court until the prayers ended.[94]

The second lawyer ("Doe") went to Judge Mack's courtroom once where he stayed in the gallery for the prayer but did not bow his head.[95] He claimed that Judge Mack observed this and acted "unprofessional and hostile" during Doe's case and that Judge Mack awarded him less relief than his case merited because of Doe's decision to not bow his head.[96] The third individual ("Jane") was a criminal defendant in Judge Mack's court. Jane acted "apath[etic]" during the prayer ceremony and subsequently

[89] *Id.* at 947.
[90] *Id.* at 947–48.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 947–48.

reports Judge Mack attempted to increase the fine agreed upon by her lawyer in a plea deal with the prosecutor.[97] Judge Mack later agreed to the original terms of the plea deal.[98]

The court began its legal analysis by evaluating the historical evidence of "public, government-sponsored prayer" and identified four distinct categories: "*first*, the behavior of early federal judges and Justices in court-related proceedings; *second*, the in-court behavior of those judges and Justices; *third*, the in-court behavior of non-federal judges; and *fourth*, indirect evidence of the prevalence of courtroom prayer."[99] In doing so, the court noted that the focus of this analysis was on "original public meaning," particularly as elucidated by "widespread" historical practices, at the time of the Founding and at the time of incorporation.[100]

The Fifth Circuit provided a single example of historical evidence in the first category. Supreme Court Justices from 1789 to 1800 "often" presided over openings of new court terms and grand jury terms where a chaplain led the court in prayer.[101] Sometimes, the Justices would include "religious supplications" when charging the grand jurors.[102] The court noted, however, that

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[97] *Id.* at 948.
[98] *Id.*
[99] *Id.* at 951 (emphasis in original).
[100] *Id.* (citing McDonald v. City of Chicago, 561 U.S. 742, 769–70 (2010); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022)).
[101] *Id.* at 951, 951 n.8.
[102] *Id.* at 951–52, 952 n.11. An example of these supplications includes: "May God in his mercy preserve us from [the loss of order and justice], and on the

these prayers and supplications occurred in "far from all" circuits.[103] In response, the plaintiffs argued that prayers before the opening of a new term are quite different than prayers before daily court openings, as "opening court days had special ceremonial importance."[104] The Fifth Circuit rejected this distinction, saying that "we must not reflexively allow any factual difference to dissuade us from treating two situations alike" and that while not all court attendees appear in court by choice, they need not attend an opening ceremony.[105]

The evidence in the second category consisted of justices opening courts with phrases such as "God save this honorable court!", "So help you God," and three instances of God being referenced in early Supreme Court opinions.[106] Here, the plaintiffs distinguished Judge Mack's prayers by arguing that these mere invocations of God's name were forms of "ceremonial deism" rather than a prayer.[107] This distinction was found unpersuasive, as the court concluded that these invocations

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contrary enable this country ... to present the spectacle of a people, who knowing what freedom is ... at all hazards will defend it against all attacks ...." *Id.* at 952 n.11 (alterations in original).

[103] *Id.* at 951, 951 n.9. The court identified such events in three states (Massachusetts, New Hampshire, and Rhode Island) on fourteen separate occasions. *Id.* at 951 n.9.

[104] *Id.* at 954.

[105] *Id.* at 955.

[106] *Id.* at 952–53, 953 n.14.

[107] *Id.* at 955. The plaintiffs defined ceremonial deism as "a short phrase, ubiquitously utilized, that has minimal religious content, does not amount to worship or prayer, and does not reflect or refer to any particular religion." *Id.* Ceremonial deism will be explored in greater depth in Part IV of this Paper.

were, in fact, prayer because they involved supplication to a divine being.[108] While the court did recognize that "an average person likely would perceive a chaplain-led prayer as more religious than the numerous examples of short, ecumenical, in-court prayers throughout our history," it determined that the differences were "of degree, not kind."[109]

The third category was supported by the tradition of saying "[m]ay the almighty have mercy on our souls" before executions in England, as well as federal district courts in Iowa and Massachusetts.[110] The court also passingly referenced "scattered evidence" of courtroom prayers that occurred with "uncertain regularity" around the time of incorporation.[111] The plaintiffs successfully argued that this evidence was "too thinly spread to conclude that those prayers occurred regularly" and that they were insufficiently tied to the time of incorporation.[112]

Finally, the court addressed the fourth category, noting that Supreme Court Justice John Jay believed opening court terms with prayer was a well-established tradition and that there was a book titled "Prayer for Courts of Justice" published in 1835.[113] The author of the prayer book noted, however, that

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[108] *Id.* at 956.
[109] *Id.*
[110] *Id.* at 953, 953 n.16.
[111] *See id.* at 953.
[112] *Id.* at 956–57.
[113] *Id.* at 953–54.

"[h]ow extensively the prayers which I have published are used in my Diocese I do not exactly know."[114] The court found that this demonstrated that courtroom prayers were "at least conceivable to some Americans."[115] Considering all four categories together, the Fifth Circuit determined that opening a courtroom with daily prayer both "fits within" and is "consistent with" America's history and traditions of government-sponsored prayer.[116]

Having concluded that the practice was consistent with history, the court addressed the plaintiff's coercion theory. The court began by taking note of a hypothetical appearing in the *Town of Greece* dissent written by Justice Kagan, along with three other Justices, in which a judge calls the court to order and instructs the gallery to rise for a "sectarian, Christian" prayer delivered by a minister.[117] The four dissenters stated they had "every confidence" such a practice was unconstitutional; Justices Scalia and Alito, responding to the proposed hypothetical, implied agreement with the dissenters that such a practice would be unconstitutional.[118]

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[114] *Id.* at 954 n.19.
[115] *Id.* at 957.
[116] *Id.* (citing Town of Greece v. Galloway, 572 U.S. 565 (2014)).
[117] *See id.* (citing Town of Greece, 572 U.S. at 617 (Kagan, J., dissenting)).
[118] *See id.* (citing Town of Greece, 572 U.S. at 618, 603 (Kagan, J., dissenting) (Alito, J., concurring)).

The Fifth Circuit concluded that Judge Mack's actions were not coercive for three reasons.[119] First, the hypothetical that concerned the dissent and concurrence is not binding law.[120] Second, the court distinguished the hypothetical from the present facts because the prayer occurred after the court was called to order (rather than before) and because the bailiff—not the judge—instructs the gallery to rise.[121] Third, the court found the plaintiff's evidence of coercion to be "speculative."[122] That attendees were "free to leave" and regularly invited to do so, that none of the complainants had ever attempted to leave the room, and that none of the complainants could point to an actual unfavorable outcome in their legal proceedings, all weighed against there being a "real and substantial likelihood" of coercion.[123] Accordingly, the Fifth Circuit reversed the grant of summary judgment to the plaintiffs and entered summary judgment for Judge Mack.[124]

III. Justice Kennedy's interpretation of the coercion test properly balances pluralism with America's religious history and traditions

Coercion is well recognized as implicating the religion clauses of the First Amendment,[125] just as it is also recognized

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[119] *Id.* at 960.
[120] *Id.*
[121] *See id.*
[122] *See id.*
[123] *Id.* at 960–61.
[124] *Id.* at 961.
[125] *E.g.*, Lee v. Weisman, 505 U.S. 577, 587 (1992) ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . .").

that religion has a place in the public sector.[126] Justice Kennedy's Establishment Clause jurisprudence aptly navigates this tension.[127] This is a difficult thing to manage, as "[t]he ability of the organized community to recognize and accommodate religion in a society with a pervasive public sector requires diligent observance of the border between accommodation and establishment."[128] This border is particularly found when the accommodation of religion turns into coercion.[129] Speech alone can constitute coercion, particularly if it involves "participation or attendance at a religious activity."[130]

Within the context of *Allegheny*, which dealt with the display of a Christmas crèche and a menorah, Justice Kennedy determined that the display was purely passive.[131] It required no active participation and did not mandate observation.[132] Thus, "[t]here [was] no realistic risk that the crèche and the menorah represent[ed] an effort to proselytize" or coerce.[133] While advocating for and applying the coercion analysis, Kennedy

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[126] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022) ("Nor does the Clause 'compel the government to purge from the public sphere' anything an objective observer could reasonably infer endorses or 'partakes of the religious.'") (quoting Van Orden v. Perry, 545 U.S. 677, 699 (2005) (Breyer, J., concurring)).
[127] *See* Paul Earl Pongrace III, *Justice Kennedy and the Establishment Clause: The Supreme Court Tries the Coercion Test*, 6 U. FLA. J.L. & PUB. POL'Y 217, 219 (1994).
[128] Allegheny, 492 U.S. at 659 (Kennedy, J., concurring in part).
[129] *Id.* at 660.
[130] *Id.* at 660–61 (citing Engel v. Vitale, 370 U.S. 421 (1962); McGowan v. Maryland, 366 U.S. 420 (1961)).
[131] *Id.* at 664.
[132] *Id.*
[133] *Id.*

simultaneously recognized the criticism as "persuasive"[134] and expressed concern that an approach insensitive to America's religious history "would border on a latent hostility to religion in society."[135]

In *Lee v. Weisman*, Justice Kennedy once again wrote about coercion in the Establishment Clause context, but this time for the majority. The opinion focused entirely upon the coercion analysis; the *Lemon* test went unused and largely unmentioned, despite a request from the petitioners to reconsider the constitutional framework.[136] The facts were stipulated to and simple in nature; at issue was a rabbi delivering a brief and nonsectarian prayer during a public high school's graduation ceremony.[137] Despite a private individual conducting the prayer, the Court concluded that the prayer was government sponsored because the principal decided, of his own initiative, to include a prayer at the graduation.[138] In coming to this conclusion, the Court cautioned against having the government directly involved in organizing religious displays, as "in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce."[139]

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[134] *Id.* at 655
[135] *See id.* at 672.
[136] *See* Lee v. Weisman, 505 U.S. 577, 587–88 (1992).
[137] *Id.* at 582–84.
[138] *Id.* at 587.
[139] *Id.* at 592.

The nature of a school presented heightened concerns over coercion: "[t]he undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction."[140] Despite this being a "subtle and indirect" pressure, it still infringed the student's First Amendment rights.[141] "[T]he state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit."[142]

Although standing could be understood as simply showing respect, in the context of standing during a prayer, "[t]here can be no doubt . . . that the act of standing or remaining silent was an expression of participation in the rabbi's prayer" for many students because "that was the very point of the religious exercise."[143] The short nature of the standing in silence did not reduce the significance of the coercion.[144] Moreover, the decision to attend the benediction was not truly voluntary; although students could choose to not be present

[140] *Id.* at 593.
[141] *Id.*
[142] *Id.* at 597.
[143] *Id.* at 593.
[144] *Id.* at 594.

during the beginning and end of the ceremony, at which time the prayer occurred, this distinction was "formalistic in the extreme" because leaving would require relinquishing some amount of intangible benefits.[145]

Importantly, the Court recognized that school graduations are not the only place that can present these risks.[146] Public school graduations present risk of coercion due to the importance of the event, the relative difficulty in leaving a graduation unnoticed, and the high level of control that government employees exercise over the ceremony.[147] This was all distinguished from the legislative prayers contemplated in *Marsh v. Chambers*, which were relatively unimportant, easy to leave, and not dictated in content by the legislators.[148]

Justice Kennedy, once again writing for the majority, used a coercion analysis in place of the *Lemon* test in *Town of Greece v. Galloway*.[149] This case dealt with prayer at town council meetings which were open to the public.[150] Emphasizing the importance of the "historical backdrop of historical practice," the Court concluded that "[i]t is presumed that the reasonable observer is acquainted with this tradition [of legislative

[145] *Id.* at 595.
[146] *Id.* at 592.
[147] *Id.* at 597.
[148] *See id.*
[149] *See* Town of Greece v. Galloway, 572 U.S. 565, 586–87 (2014).
[150] *Id.* at 571–72.

prayer] and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many citizens" rather than evangelize to the captive audience.[151] Notably, legislative prayer does not have a captive public audience—such prayer is directed solely towards members of the legislature.[152] "The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity."[153]

Although some members of the public were asked to stand during the prayer, the requests were not made by the legislators; they were made by the ministers "who presumably are accustomed to directing their congregations in this way and might have done so thinking the action was inclusive, not coercive."[154] None of the legislators ever provided any indication that they judged members of the public based on participation. And unlike in *Lee*, an adult standing during the prayers would not "be interpreted as an agreement with the words or ideas expressed. Neither choice represents an unconstitutional imposition as to mature adults, who

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[151] *Id.* at 587.
[152] *Id.* at 587–88 (citing Chambers v. Marsh, 504 F. Supp. 585, 588 (D. Neb. 1980)).
[153] *Id.* at 588.
[154] *Id.*

'presumably' are 'not readily susceptible to religious indoctrination or peer pressure.'"[155]

Crucially, Justice Kennedy recognizes that coercion may be indirect as well as direct.[156] No formal threat needs to be made or policy needs to exist for coercion to be unconstitutionally present.[157] This is the majority position within Establishment Clause jurisprudence[158] and is crucial for a robust coercion test. This standard does not allow for a purely subjective perception of coercion, however. Coercion must be judged by an objective, reasonable person standard.[159] Establishment Clause doctrine must zealously guard the right of every individual person to exercise, or to abstain from, religious expression in the manner they chose. Requiring a formalized threat pushes bad actors to conceal their coercive efforts as unofficial policies and force an affected party to test the concealed policy before relief may be gained. Yet the perceived threat of punishment by the state, even if informal, may intimidate believers to the point of being unwilling to act on their conscious.

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[155] *Id.* at 590 (citing Marsh v. Chambers, 463 U.S. 783, 792 (1983)).
[156] Lee v. Weisman, 505 U.S. 577, 592–93 (1992).
[157] Compare *id.* with *id.* at 640–641 (Scalia, J., dissenting).
[158] *E.g.*, Engel v. Vitale, 370 U.S. 421, 431 (1962); Lee, 505 U.S. at 592–93; Cnty. of Allegheny v. ACLU, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in part); Kennedy v. Bremerton Sch. Dist. 142 S. Ct. 2407, 2451 (2022) (Sotomayor, J., dissenting).
[159] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022) (quoting Good News Club v. Medford Cent. Sch., 533 U.S. 98, 119, 121 (2001)) ("[T]he Establishment Clause does not include anything like a 'modified heckler's veto, in which ... religious activity can be proscribed' based on 'perceptions' or 'discomfort.'").

Requiring formalized coercion thus transforms the requirement of showing *coercion* to showing *retaliation* and puts the burden of potential punishment on the believer. Ultimately, "[t]he Establishment Clause . . . stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate";[160] a permissive standard for relief should be allowed.

Synthesized, the coercion test asks whether a reasonable person could feel coerced to engage in religious activity—either directly or indirectly—based on four factors: (1) where and when the activity occurs,[161] (2) the nature of the activity,[162] (3) the audience subjected to the activity,[163] (4) and the degree to which an authority figure participates in the activity.[164] This test is properly sensitive to America's religious history and traditions, as required by *Kennedy*. At the same time, it is consistent with existing doctrine, provides doctrinal guidance to lower courts and private parties, and curtails the coercive pressure that government-involved religious activity presents.

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[160] Engel, 370 U.S. at 431.
[161] *See* Lee v. Weisman, 505 U.S. 577, 597 (1992); Town of Greece v. Galloway, 572 U.S. 565, 582–83 (2014).
[162] *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring in part); Lee, 505 U.S. at 593; Town of Greece, 572 U.S. at 582–83.
[163] *See* Lee, 505 U.S. at 593–94; Town of Greece, 572 U.S. at 589–90.
[164] *See* Allegheny, 592 U.S. at 664; Lee, 505 U.S. at 588, 597; Town of Greece, 572 U.S. at 588.

IV. CONSIDERING CEREMONIAL DEISM AND CIVIL RELIGION COMPORTS WITH AMERICA'S HISTORY AND TRADITIONS WHILE HELPING AVOID COERCION IN OUR MODERN, PLURALISTIC SOCIETY

The Court has consistently recognized that the purpose of the First Amendment is not to categorically exclude religion from the public square.[165] Indeed, the government is constitutionally permitted to recognize the "important role that religion plays in the lives of many Americans."[166] Rather, the First Amendment is intended to avoid "religiously based divisiveness,"[167] a preference for one denomination or faith,[168] and to prevent the government from "coerc[ing] anyone to support or participate in religion or its exercise."[169] Consistent with this understanding, practices that solemnize certain official proceedings and encourage dutiful civic service are often held constitutional.[170] Sectarian or evangelistic practices, in contrast, are often unconstitutional.[171] Combining these

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[165] *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2090 (2019).
[166] *See id.* at 2089.
[167] Van Orden v. Perry, 545 U.S. 677, 704 (2005) (Breyer, J., concurring).
[168] Cnty. of Allegheny v. ACLU, 492 U.S. 573, 605 (1989).
[169] Lee v. Weisman, 505 U.S. 577, 587 (1992).
[170] *See* Am. Legion, 139 S. Ct. at 2088 ("[Early legislative prayers were] designed to solemnize congressional meetings, unifying those in attendance as they pursued a common goal of good governance."); Town of Greece v. Galloway. 572 U.S. 565, 582–83 (2014) ("Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. . . .").
[171] Town of Greece v. Galloway, 572 U.S. 565, 583 (2014) ("[I]nvocations [that] denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion . . . [may] fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort."); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("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

principles with the coercion test discussed by Justice Kennedy allows for courts to remain faithful to America's history and traditions while still preserving the neutrality of the public sphere in our pluralistic society.

A. *Ceremonial deism is a judicial doctrine recognizing that some forms of religious expression solemnize proceedings and encourage civic participation*

A form of religious expression called "ceremonial deism" by the Court neatly fits this concept of solemnizing proceedings and encouraging civic participation. This phrase was first coined by Yale Law School Dean Eugene Rostow and describes a form of religious invocation that has lost its theistic, First-Amendment-implicating aspects through "rote repetition."[172] The descriptor was adopted by the Court in *Lynch v. Donnelly.*[173] There, Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, cited "In God We Trust" and the mention of God in the Pledge of Allegiance, as examples of ceremonial deism.[174] Each reference is "uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government

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matters of opinion or force citizens to confess by word or act their faith therein.").

[172] *See* Lynch v. Donnelly, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting) (citing Arthur E. Sutherland, Book Review, 40 Ind. L.J. 83, 86 (1964) (reviewing Wilber G. Katz, Religion and American Constitutions (1963)).

[173] *Id.*

[174] *Id.*

were limited to purely non-religious phrases."[175] Their "long history" and association with secular functions renders them unproblematic in the First Amendment context.[176] Justice O'Connor' concluded similarly in *Lynch*, recognizing the value and unproblematic nature of ceremonial deism[177]

Ceremonial deism was once again briefly recognized by Justices O'Connor, Brennan, and Stevens in their *County of Allegheny* concurrence.[178] The Justices specifically recognized "[p]ractices such as legislative prayers or opening Court sessions with 'God save the United States and this honorable Court'" as acceptable forms of ceremonial deism because of the secular purposes enumerated in *Lynch*.[179] Crucially, the justices noted that "historical longevity" of certain practices was not sufficient to immunize such practices; following the values of the First Amendment was also necessary.[180]

Ceremonial deism has most recently been discussed by the Court in *Elk Grove United School District v. Newdow*. There, the plaintiff argued that forcing school children to listen to the

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[175] *Id.* at 716–17.
[176] *Id.* at 717.
[177] *Id.* at 693 (O'Connor, J., concurring); *see also* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 595 n.46 (1989) (recognizing the *Lynch* concurrence as describing ceremonial deism).
[178] Cnty. of Allegheny, 492 U.S. at 630 (O'Connor, J., concurring in part).
[179] *Id.*
[180] *Id.*; *see also* Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970) ("It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.").

words "Under God" during the pledge of allegiance violated the Establishment Clause, even if the children were not forced to participate.[181] In concurrence, Justice O'Connor explained that practices constituting ceremonial deism are not simply *de minimis* violations of the Constitution that cause so little harm as escape the First Amendment's ambit.[182] Rather, "their history, character, and context prevent them from being constitutional violations at all.[183] It is the long-lasting existence of a particular religious practice or expression in America that gives rise to a "shared understanding of its legitimate nonreligious purposes"; "novel or uncommon references to religion," in contrast, are more likely to be a violation of the First Amendment.[184]

Within this framework, O'Connor specifically addressed prayer, concluding that "only in the most extraordinary circumstances could actual worship or prayer be defended as ceremonial deism."[185] While opening a legislative session with prayer may be acceptable, a prayer that "plac[es] the speaker or listener in a penitent state of mind, or that is intended to

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[181] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 4 (2004). The Court rejected the plaintiff's claim for lack of standing and did not reach the constitutional question, *id.*, but Justice O'Connor addressed the establishment clause argument in a concurring opinion, concluding that the school district would prevail on the merits regardless of standing. *Id.* at 33 (O'Connor, J., concurring).
[182] *Id.* at 37 (O'Connor, J., concurring).
[183] *Id.*
[184] *Id.*
[185] *Id.* at 40.

create a spiritual communion or invoke divine aid" would unconstitutionally fail to merely solemnize an event or recognize a "shared religious history."[186] Similarly, any form of sectarian invocation would not be ceremonial deism; merely recognizing "God," however, would not be unconstitutionally sectarian due to "God" referencing a general "Supreme Being" and the descriptive limits of the English language.[187]

B. *Civil religion is an academic concept also recognizing that some forms of religious expression are not overtly theistic and instead solemnize proceedings and encourage civic participation*

The American sociologist Robert Bellah is often considered the first to study civil religion in the American context.[188] Within Bellah's framework, American civil religion is an attempt to understand "the American experience in light of ultimate or universal reality."[189] More broadly understood, "[c]ivil religion is the expression of the cohesion of the nation" and "represent[s] the nation—the people—as a higher and more

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[186] *Id.; see also* Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290, 309 (2000) ("[T]he use of an invocation to foster . . . solemnity is impermissible when, in actuality, it constitutes [state-sponsored] prayer").
[187] *See id.* at 42; *see also* Lee v. Weisman, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) (recognizing that "where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)," the endorsement would likely be unconstitutionally coercive).
[188] *See, e.g., God Bless America: Reflections on Civil Religion After September 11*, PEW RESEARCH CTR. (Feb. 6, 2002), https://www.pewresearch.org/religion/2002/02/06/god-bless-america-reflections-on-civil-religion-after-september-11/.
[189] *Id.*

valuable reality than mere (i.e., human) social contract and convention."[190] It is transcendent and grants sacredness to the national cohesion.[191] Early American history is riddled with examples of references to a creator and transcendent, God-given rights.[192] The usage of these expressions, however, is often not evangelistic or specific to a particular faith; rather, they are "supportive of the nation and generic . . . to religion."[193] Its purpose is to "bind[] together an identity and a purpose and a direction" within the nation.[194]

Society needs "commanding truths in public" in order to maintain cohesion and, the reality is, religion has successfully provided that for century upon century.[195] Democracy in particular is dependent upon local cultural traditions and informal institutions to instill the values that promote a strong citizen ethic of tolerance and unity despite diversity; the strength of a democracy hinges on the quality of its citizens.[196] That religion has been so enduring as a form of societal coherence makes it almost "inevitable that when the society feels the greatest need for coherence and moral purpose that the articulation of the people's concern and of their

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[190] MEREDITH B. MCGUIRE, RELIGION: THE SOCIAL CONTEXT 191 (4th ed. 1997).
[191] *See id.*
[192] *See God Bless America: Reflections on Civil Religion After September 11*, *supra* note 157.
[193] *See id.*
[194] *Id.*
[195] *See id.*
[196] *See* ROBERT HEFNER, CIVIL ISLAM: MUSLIMS AND DEMOCRATIZATION IN INDONESIA 5 (2011).

allegiance will take the form of the available religious symbols, myths, stories . . .”[197]

Although civil religion in America may often be expressed in Christian terms, other religions also express the same principles. Islamic reformist movements pursue democracy and pluralism through the Quran and Quranic jurisprudence, “denying the wisdom of a monolithic ‘Islamic’ state and instead affirming democracy, volunteerism and a balance of countervailing powers in a state and society”[198] Recognizing democracy’s need for a “noncoercive culture” that promotes discussions of how society should be constructed, these Islamic democrats create spaces where the values of civil society, shared both the religious and secular, can be discussed within the value system of Islam.[199]

In America, this takes place in various ways. American Muslims create organizations like the United Muslims of America (UMA), which promotes understanding “America as one nation, endeavoring to create one family through interfaith understanding,” and “promot[ing] racial and religious harmony through religious institutions, projecting an image of America as a world leader who stands up for the human rights for all

[197] *God Bless America: Reflections on Civil Religion After September 11*, *supra* note 157.
[198] HEFNER, *supra* note 164 at 12–13.
[199] *Id.* at 13.

communities."[200] They hold days of civil activism such as the "Purple Hijab Day" which seeks to promote awareness of domestic violence.[201] Schools like the Zaytuna College "follow[] an integrated curriculum of Islamic studies, Arabic language, and liberal arts including U.S. history and literature."[202] And Islamic spiritual leaders provide prayers to state legislatures asking that "Allah may guide this House in making good decisions" and to bless the state "so it may continue to prosper and become a symbol of peace and tranquility for people of all ethnic and religious backgrounds."[203]

Jewish Americans have similarly interpreted and reinforced American national ideals through religion. Mordecai Kaplan, a prominent 20th century American rabbi, viewed Judaism as being complimentary to the American national identity and its inclusion within that identity as vital to the health of American democracy.[204] Rather than imposing Judaism upon the nation, he believed that America's democracy and values of

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[200] Yvonne Yazbeck Haddad & Nazir Nadar Harb, *Post 9/11: Making Islam and American Religion*, 5 RELIGIONS 477, 489 (2014).
[201] *Id.* at 490.
[202] *Id.* at 491. The college's motto is "Where America meets Islam." *Id.*
[203] Angela Galloway, *2 lawmakers spurn Muslim's prayer*, SEATTLE POST-INTELLIGENCER (Mar. 13, 2011, 10:31 a.m.), https://www.seattlepi.com/news/article/2-lawmakers-spurn-Muslim-s-prayer-1108773.php. Two Republican legislators left during the prayer, with one commenting "[t]he Islamic religion is so . . . part and parcel with the attack on America." *Id.*
[204] MORDECAI KAPLAN, JUDAISM AS A CIVILIZATION: TOWARD THE RECONSTRUCTION OF AMERICAN-JEWISH LIFE 242 (1934). "Any concept of nationalism which demands that Jews break with their past, and commit spiritual suicide by repudiating a three-thousand-year-old tradition and ancestry, undoubtedly harbors dangers for people other than Jews." *Id.*

equality, pluralism, prosperity for all, and conservation (among others) could be cultivated through Jewish religious expression in the public sphere.[205] Through this, Jewish people and other minority groups would help assert their place within American democracy and help guard against potential dangers of ethnoreligious nationalism.[206]

These ideas are expressed in the modern day through various Jewish organizations. For example, the Religious Action Center of Reform Judaism quotes Deuteronomy 16:20—"Tzedek, tzedek tirdof," which translates to "Justice, justice you shall seek!" [207]—as one of the religious bases for its advocacy work in Washington D.C. and social justice outreach work with high schoolers from across the county.[208] Even beyond Reform Judaism, three-in-ten American Jews engage in political activism as an expression of their Jewishness[209] and fifty-nine percent say that working for justice and equality in society is essential to their Jewish identity.[210] An example of this religiously-based activism is the Occupy Wallstreet offshoot, Occupy Judaism,

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[205] *See* Beth S. Wagner, *Making American Civilization Jewish: Mordecai Kaplan's Civil Religion*, 12 JEWISH SOC. STUDIES 56, 58–60 (2006).
[206] Id. at 62.
[207] Marla J. Feldman, *Advocacy & Activism: Why Advocacy is Central to Reform Judaism*, RELIGIOUS ACTION CTR. OF REFORM JUDAISM, https://rac.org/advocacy-activism-why-advocacy-central-reform-judaism.
[208] *Id.*; *What is L'Taken?*, RELIGIOUS ACTION CTR. OF REFORM JUDAISM, https://rac.org/leadership-development/empowering-young-leaders/ltaken-social-justice-seminars/what-ltaken.
[209] *Jewish Americans in 2020*, PEW RESEARCH CTR. 76 (May 11, 2021).
[210] *Id.* at 64.

which engaged in a traditional Hebrew liturgy in Zuccotti Park to protest the unjust economic system.[211]

These examples are far from exhaustive within each mentioned religion and there are other religions where civil religion manifests. And certainly not all of these examples are government sponsored, although many have the potential to receive government funding and thus may implicate the First Amendment.[212] But each of these examples shows that not all combinations of political and religious displays are theistic. Instead, religious rhetoric and activity can reinforce national values without crossing a line into proselytizing or coercion. Such religious activities have an important place in our society. It is appropriate for the government to have some involvement in these activities and displays. They unify us as we work towards a common national goal[213] and act as powerful markers of societal meaning.[214]

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[211] Ayala Fader & Owen Gottlieb, *Occupy Judaism: Religion, Digital Media, and the Public Sphere*, 88 ANTHROPOLOGICAL QUARTERLY 759, 772–74 (2015).
[212] *C.f.* Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987 (2022) (holding that providing tuition assistance for religious schools does not violate the Establishment Clause); Trinity Lutheran v. Comer, 137 S. Ct. 2012 (2017) (holding that denial of church's application for grant to purchase rubber playground surfaces was denial of church's free exercise rights).
[213] *E.g.*, Town of Greece v. Galloway, 572 U.S. 565, 583 (2014) ("Prayer that is solemn and respectful in tone . . . invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing . . . .").
[214] *E.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2089 (2019) ("It is natural and appropriate for those seeking to honor the deceased to invoke the [cross to] signify what death meant for those who are memorialized.").

Civil religious expression comports Supreme Court precedent on ceremonial deism, is consistent with America's history and traditions, and is consistent with a pluralistic modern society. As Samuel Adams said during a Founding-era debate over legislative prayer, "I am no bigot. I can hear a prayer from a man of piety and virtue, who is at the same time a friend of his country."[215] Certainly, the government may not mandate that all religious expression that the government touches contain the hallmarks of civil religion.[216] But when religious displays become coercive, the government must have no part in it.[217]

V. PROPERLY APPLYING THE COERCION TEST TO *FREEDOM FROM RELIGION FOUNDATION*, THE FIFTH CIRCUIT SHOULD HAVE DENIED SUMMARY JUDGMENT TO JUDGE MACK

Writing separately from the majority, Judge Jolly agreed that the lower court's grant of summary judgment for the plaintiff should be reversed.[218] There were simply too many contested material facts to say that no reasonable jury could find for the defendant.[219] But the reverse applied as well. "[A]lthough the majority's opinion states that the '[w]ant of

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[215] DEREK DAVIS, RELIGION AND THE CONTINENTAL CONGRESS 74 (2000).
[216] *C.f.* Lee v. Weisman, 505 U.S. 577, 590 (1992) (recognizing that civil religion is less problematic for the First Amendment than theistic prayer, but concluding that a government actor shaping a prayer to avoid theistic religion impermissibly interfered with religious rights).
[217] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 44 (2004) (O'Connor, J., concurring) ("Our cardinal freedom is one of belief; leaders in this Nation cannot force us to proclaim our allegiance to *any* creed, whether it be religious, philosophic, or political.").
[218] Freedom from Religion Found., Inc. v. Mack, 49 F.4th 941, 961 (5th Cir. 2022) (Jolly, J., concurring and dissenting in part).
[219] *Id.*

evidence showing coercion dooms [this] case,' . . . it is actually the want of acknowledging evidence of coercion that dooms the majority opinion."[220]

In this case, three separate individuals subjectively felt a coercive pressure to stand for the chaplains' prayers during the court's opening ceremony.[221] Of course, this does not end the discussion. Their perception of coercion must be objectively reasonable.[222] There is also little question that the coercion theory is one of indirect coercion. No allegations appear that there was a formalized policy of discrimination against nonparticipants or that Judge Mack ever made an express threat against one of the aggrieved individuals. Rather, the perception was that Judge Mack would notice nonparticipation and would then act against their courtroom interests to some unknown degree.[223]

Consider first the location and timing of the activity. The prayers occurred within the courtroom where low-level criminal charges and civil controversies worth up to $20,000 are adjudicated.[224] A courtroom, much like a school graduation, "carr[ies] a particular risk of indirect coercion."[225] It is a place of formalized government authority. The issues adjudicated

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[220] *Id.*
[221] *Id.* at 947–48.
[222] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022) (quoting Good News Club v. Medford Cent. Sch., 533 U.S. 98, 119, 121 (2001)).
[223] *See* Freedom from Religion Found., 49 F.4th at 947–48.
[224] *Id.* at 944.
[225] *See* Lee v. Weisman, 505 U.S. 577, 592–93 (1992).

within have a meaningful impact on the lives of those who attend, with judgments enforced by the power of the state. And for many, it is a place that causes some apprehension—society is rapidly losing faith in the court system, largely due to perceptions of unfair partiality.[226] Those who abstain from participating in the prayer risk upsetting Judge Mack right before he evaluates their case, as the prayers occur shortly before the actual day-to-day activities of the court.[227]

Second, the nature of at least some of the activity appears overtly sectarian. The plaintiffs describe five-to-eight minute long sectarian sermons directly addressing the Christian God styled as if the whole audience is requesting God's aid.[228] Before the prayer begins, an employee of the court "directs the audience members to stand and bow their heads during the prayer."[229] This is dramatically different from the prayers in *Town of Greece*. Unlike the citizen chaplain who asks for participation out of habit, "thinking the action [is] inclusive, not coercive,"[230] here it is the government itself, from a seat of ceremonial power, requesting the participation. And there is a factual dispute over the contents of the sermons themselves,[231]

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[226] *See 2022 State of the State Courts – National Survey Analysis*, NAT'L CTR. FOR STATE COURTS 2–3 (Nov. 21, 2022).
[227] *See* Freedom from Religion Found., 49 F.4th at 961. (Jolly, J., concurring and dissenting in part).
[228] *See id.* at 947.
[229] *Id.* at 946.
[230] Town of Greece v. Galloway, 572 U.S. 565, 589 (2014).
[231] Freedom from Religion Found., 49 F.4th at 957.

meaning they cannot reasonably be treated as noncoercive by a judge during a Rule 56 motion.[232]

Although the goals of the chaplaincy program, as stated during the lawsuit's proceedings, are consistent with civil religion—"solemniz[ing] the proceedings in [the] courtroom," "set[ing] the tone ... for everybody that's in the courtroom," and "helpi[ng] people center themselves emotionally in what can be an emotionally charged atmosphere"[233]—this contradicts other statements Judge Mack has made. In 2015, he stated that "the (Chaplaincy) program that I wanted in place was a program that God wanted in place, for His larger purpose."[234] Similarly, in response to a judicial complaint filed against him, Judge Mack emailed his supporters the following: "Atheists brought a complaint to the Judicial Conduct Commission, while it proved to be without merit, sympathetic bureaucrats without authority directed that the programs be ended. [We were able to prevail with the Commission], but the liberal bias of a few has made it necessary to press on."[235] While we cannot independently assess the contents of the prayers themselves, Judge Macks' statements suggest a sectarian purpose behind the prayer program.

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[232] *See* Fed. R. Civ. P. 56(a).
[233] Freedom from Religion Found., Inc. v. Mack, 540 F. Supp. 3d 707, 710 (S.D. Tex. 2021), *rev'd*, 49 F.4th 941 (5th Cir. 2022).
[234] *Id.*
[235] Freedom from Religion Found., 49 F.4th at 962 n.1. (Jolly, J., concurring and dissenting in part).

Third, the audience subjected to the activity is vulnerable to coercion. Civil petitioners are not, in any meaningful sense, free to leave the courtroom. They are in the courtroom because they have been wronged in some capacity and deserve a remedy. Civil, and especially criminal, defendants are even less free to leave. Their presence is compelled by the judicial process and penalties exist for failure to comply.[236] Similarly, the attorneys in the room are not free to leave because of their obligation to their clients.[237]

This is not like the legislative prayer in *Town of Greece*, where the prayer was directed as an "internal act" towards the government legislators themselves.[238] The prayer in Judge Mack's courtroom is specifically directed towards a public captive audience, much more like the students at graduation in *Lee*.[239] And while these are adults, which weighed against coercion in *Town of Greece*, there is a sole adjudicator in a courtroom, rather than a panel of legislators, and the penalties are

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[236] Freedom from Religion Found., 540 F. Supp. 3d at 715.
[237] *See id.* ("The client wants me to follow the rules, to be nice, be courteous, and win his case. . . . And so, just by dint of having the prayer be the centerpiece of the proceedings, means that I would never choose to not participate. . . .")
[238] Town of Greece v. Galloway, 572 U.S. 565, 587 (2014). "The analysis would be different if town board members directed the public to participate in the prayers . . . ." *Id.* at 588.
[239] *C.f.* Lee v. Weisman, 505 U.S. 577, 630 (1992) (Souter, J., concurring) ("[R]eligious invocations in Thanksgiving Day addresses and the like, rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular, inhabit a pallid zone worlds apart from official prayers delivered to a captive audience of public school students and their families.").

different in a courtroom than when asking local legislators to consider a bill. As Judge Jolly astutely noted "That the prayer ceremony is directed at the audience Judge Mack holds power over further demonstrates the likelihood of coercion."[240]

Fourth, according to the plaintiffs, Judge Mack is highly present during these prayers. Four separate eyewitness accounts say that "Mack not only faces the audience but also keeps his eyes open and scans the audience as if probing attendees' piety" and notes who attends and who does not.[241] The one lawyer who chose not to participate reported facing hostility as a result.[242] The majority dismissed this as speculative while the dissent believed it to evidence coercion.[243] Such a disagreement suggests that a reasonable jury could conclude this contested fact in either way and should thus be decided by the jury instead of a judge.[244] It is objectively reasonable to fear that a judge, a former minister who has previously made negative public statements about people complaining about the courtroom prayers, would be prejudiced against a party who did not participate in the prayer ceremony started by the judge.[245]

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[240] Freedom From Religion Found., Inc. v. Mack, 49 F.4th 941, 962 (5th Cir. 2022) (Jolly, J., concurring and dissenting in part).
[241] *Id.* at 946.
[242] *Id.* at 947.
[243] *See id.* at 960, 962.
[244] *See* Fed. R. Civ. P. 56(a).
[245] *See* Freedom from Religion Found., 49 F.4th at 962 (Jolly, J., concurring and dissenting in part).

In short, each of the four factors identified by Justice Kennedy weigh in favor of finding coercion. This case should have proceeded to trial for a jury to evaluate, once the veracity of the facts was determined, whether a reasonable person would have felt coerced under these circumstances. "However the facts may be resolved, we do know this: an appellate panel is not where it occurs."[246] But that did not happen. Indeed, "[f]or the majority to find that there is no evidence of coercion, suggests, in my opinion, willful blindness and indisputable error."[247] "[T]he majority's determination to reach its outcome brushes past" and "inaccurately presents" Supreme Court precedent[248] and the academic study of religion. Should future courts want to faithfully apply a "history and tradition" originalist approach, they must more closely examine the Supreme Court's coercion and ceremonial deism jurisprudence and consider the academic literature on civil religion. "[R]eligion is too personal, too sacred, too holy, to permit its 'unhallowed perversion'"[249] through governmental coercion.

[246] *Id.* at 963.
[247] *Id.*
[248] *See id.* at 964.
[249] Engel v. Vitale, 370 U.S. 421, 431 (1962).