Testimony of

Mr. Vincent Phillip Munoz

Professor
North Carolina State University
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MR. CHAIRMAN and members of the subcommittee: Thank you for inviting me to share my views. I am the Civitas Fellow of Religion and Public Life at the American Enterprise Institute and an Assistant Professor of Political Science at North Carolina State University.

If I can communicate only one point in my testimony today it is this: The United States Supreme Court remains primarily responsible for the continued legal hostility toward religious expression in the public square. Stated simply, the Supreme Court has interpreted the Establishment Clause in a manner that encourages and sometimes demands hostility toward religion.

Two Establishment Clause doctrines, in particular, lead to hostility toward religion: The "endorsement" test and the "coercion" test.

The "endorsement" test, which was invented by Justice Sandra Day O'Connor in the 1984 case Lynch v. Donnelly, prohibits state actors from endorsing religion. It purportedly keeps government religiously neutral. In practice, however, "no endorsement" quickly becomes outright hostility, especially in the context of public schools. Under this rule, activities that a child might perceive to favor religion must be prohibited to avoid the appearance of governmental endorsement.

The quintessential example of how the "endorsement" test purges religion from public schools occurred in the 1985 case Wallace v. Jaffree. The Supreme Court used the test to strike down an Alabama law that directed the public school day to begin with a moment of silence for voluntary prayer or meditation. Justice O'Connor claimed that to set aside one minute for children to pray silently endorses religion, and thus, under her interpretation, violates the Constitution.

In 1989 the Supreme Court used the "endorsement" test to require the removal of a privately funded nativity scene in front of a courthouse in Allegheny County, Pennsylvania. Perhaps most notoriously, the 9th Circuit Court of Appeals employed the "endorsement" test to prohibit teacher-led recitations of the Pledge of Allegiance in public schools. The words "under God," the 9th Circuit explained, endorse a particular religious concept, namely monotheism.

The 9th Circuit's decision has come under heavy criticism, including criticism from the Senate. But the 9th Circuit only followed the example set by the Supreme Court. "Under God" endorses the civic faith Americans have adopted since the signing of the Declaration of Independence. But this expression, if we use Justice O'Connor's standard, violates the Constitution.

The second leading test used by the Supreme Court for Establishment Clause jurisprudence is the "coercion" test. Invented by Justice Kennedy in the 1992 case Lee v. Weisman, the "coercion"

test sounds reasonable--no one believes that the state legitimately may coerce religious practice--but, as applied by the Court, it too drives religion out of the public square.

In Lee v. Weisman, the Court eliminated non-denominational invocations and benedictions at public school graduations. According to Justice Kennedy, to ask public school children to stand respectfully while others pray "psychologically coerces" religious practice. In 2000, the Court prohibited the Texas tradition of non-denominational prayer before high school football games, because, it said, some fans might feel like "outsiders." Thus interpreted, the "coercion" test secures "the right not to feel uncomfortable" because of others publicly expressing their religious beliefs.

It's common sense to say that the government may not force a student to pledge allegiance to the flag or to recite a prayer. It's something altogether different to say that because some feel like outsiders, others may not pray. Tolerance should be a two-way street.

Like the "endorsement" test, the logic of the "coercion" test calls for the curtailment of public expressions of religious sentiment. It's no coincidence that the 9th Circuit also cited Justice Kennedy's psychological coercion reasoning when it struck down the Pledge of Allegiance.

While the cases I have mentioned are significant in and of themselves, their impact extends far beyond the specific parties involved. What constitutes an impermissible "endorsement" or "psychological coercion" is inherently indistinct. The law's vagueness makes state acknowledgement of religious sentiment suspect. It enables special interest litigators, who are professionally hostile toward religion, to file lawsuits to challenge almost any state action that accommodates religion. The chilling effect of such litigation and the mere threat it is considerable.

Imagine yourself as a city council member or a high school principal: it's easier to remove the Ten Commandments from the public park or to silence the school valedictorian who wishes to speak about religious faith, than it is to undertake a costly legal battle against ACLU. Fearful local officials and public school administrators have the incentive to eliminate the public acknowledgement of religious sentiment in order to avoid costly litigation. In this way, the Supreme Court has armed anti-religious activists to impose their vision of the secular state through legal threats and litigious intimidation. The result is not only "the naked public square," but the trampling of religious individuals' constitutional rights to religious free exercise and freedom of expression.

The Constitution's text prohibits laws respecting an establishment of religion or prohibiting the free exercise thereof. It says nothing about government "endorsement of religion." Justice O'Connor effectively has replaced the text and original meaning of the First Amendment with her own words and ideas. Justice Kennedy's "psychological coercion" test is also far off the mark. The Founders understood religious "coercion" to mean being fined or imprisoned on account of one's religion; not feeling uncomfortable when other people mention God.

The modern Court has lost sight of the fact that framers of the First Amendment meant to protect religious freedom, not to banish religion from the public square. The free exercise of religious is the primary end of the First Amendment; no-establishment is a means toward achieving that end.

By prohibiting religious establishment, the Founders sought to end practices like state officials appointing bishops, limiting public office to members of the established church, and the licensing and regulation of dissenting religious ministers. They did not mean to forbid the public acknowledgement of God or even non-sectarian endorsement of religion. They certainly did not intend to constitutionalize doctrines like the "endorsement" test and the "coercion" test. Until these doctrines are overturned, legal hostility to religion in the public square will continue.