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ESTABLISHMENT AND EXCLUSION: WHY THE PROTECTION OF THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE SHOULD BE APPLIED TO ADULTS

Imagine the following scenario: After struggling to find a teaching position, a Midwesterner is fortunate enough to find employment in a public school, though it requires him to relocate over 1,000 miles to the Gulf Coast. On the morning of his first day as a teacher, he wakes with a sense of excitement and anxiety; the district convocation will be his first interaction with his colleagues. As he walks into the high school auditorium, he is amazed by the buzz of the nearly one thousand district employees in the room.

The teacher takes a seat in the section reserved for his campus and makes some brief introductions to the people around him. Two gentlemen—one of whom he later learns is the school board president—stroll to the stage. A hush settles over the room. The board president then grabs the microphone and asks the audience to rise for the prayer to be given by the minister beside him. The teacher's heart skips a beat. Though he belongs to a religious denomination, he feels strongly that it is wrong for the school to be leading a prayer. What should he do? Should he stand silently? Should he walk out or remain seated, and, if so, how will his colleagues react? Will he be labeled a troublemaker? Will he be harassed or ostracized? Could there be employment ramifications because he is a probationary employee and can be non-renewed without any explanation? Does the Constitution allow public schools to sponsor or endorse such prayers?

The situation described is not merely a fanciful law school hypothetical; it is a personal experience of this author and represents an undeveloped area in Establishment Clause jurisprudence. There have been numerous school prayer cases before the courts, but these cases have primarily focused on the rights of students, not teachers.¹ In fact, on at least one occasion, the Supreme Court expressly noted that it was not addressing whether its Establishment Clause

1. *Warnock v. Archer*, 380 F.3d 1076, 1080 (8th Cir. 2004). *See also* Alexander A. Minard, Note, *But Could They Pray at UVA? The Fourth Circuit's Application of the Supreme Court's School Prayer Jurisprudence to the Virginia Military Institute's Adult Cadets*, 13 WM. & MARY BILL RTS. J. 997, 1022 (2005) (noting that Justice Scalia argued the Court should grant certiorari and review *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003), to determine whether the principles of *Lee v. Weisman*, 505 U.S. 577 (1992), applied to adults).

jurisprudence would be the same if applied to adults.² One exception is the case of *Warnock v. Archer*. In *Warnock*, the Eighth Circuit held that the Devalls Bluff Arkansas Public School District violated the Establishment Clause by offering prayers at mandatory teacher functions.³ Strangely, despite the absence of case law in this area, *Warnock* has largely been ignored by courts and scholars. Nevertheless, *Warnock* provides an opportunity to explore how the Establishment Clause applies to adults.

One of the underlying concerns of the courts in school Establishment Clause cases is that “students at elementary and secondary schools are minors in a position of relative powerlessness and high impressionability” and are therefore susceptible to religious coercion.⁴ The implication is that adults cannot be coerced. The Eighth Circuit seems to have embraced this notion in *Warnock*, for although it held that the school district violated the Establishment Clause by endorsing religion, it brushed aside the plaintiff’s arguments that the prayers created a coercive environment.⁵ The court found it unlikely that the plaintiff could be coerced given that he was an adult and a contractual employee.⁶

The *Warnock* court was correct, under Supreme Court precedent, in finding the school district’s actions unconstitutional, even without any degree of coercion.⁷ However, the argument that adults cannot be coerced is troubling as it trivializes and overlooks the potential ramifications (e.g., ostracism, harassment and employment-related consequences) of not conforming to a mode of worship chosen by the school community.⁸ In making this argument, the *Warnock* court failed to see that government endorsement of religion is inherently coercive. That is, government endorsement of religion sends the message that religious minorities and non-believers are outsiders; it creates a divisive environment where minority groups must choose either to conform to the majority’s religious views or risk ostracism, harassment or worse.

This comment argues that the protections of the Establishment Clause are not age-dependent but should be applicable to teachers and other adults in

2. *Weisman*, 505 U.S. at 593. After discussing the unconstitutionality of forcing a student to choose between participating in a religious exercise at graduation or protesting and thereby risking alienation, the Court stated: “We do not address whether that choice is acceptable if the affected citizens are mature adults. . . .” *Id.*

3. *Warnock*, 380 F.3d at 1076.

4. Minard, *supra* note 1, at 998–99.

5. *Warnock*, 380 F.3d at 1080–81.

6. *Id.*

7. See, e.g., *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

8. Also troubling is the fact that courts have embraced the idea that adults are immune to coercion without any scientific evidence to support such an assertion. See Deanna N. Pihos, *Assuming Maturity Matters: The Limited Reach of the Establishment Clause at Public Universities*, 90 CORNELL L. REV. 1349, 1365–66 (2005).

public schools. Extending the protection to adults is consistent with the central purpose of the Establishment Clause as espoused by the Supreme Court: to prevent religious divisiveness and persecution.⁹ In our increasingly pluralistic society,¹⁰ this purpose grows ever more important. Part I offers a brief historical background on the creation of the Establishment Clause. It then traces the evolution of Establishment Clause jurisprudence and focuses on school prayer cases before the U.S. Supreme Court and the reasoning behind the Court's opinions. Part II examines the case history in *Warnock* and compares its jurisprudence with the school prayer cases from Part I. The section then contrasts *Warnock* with Establishment Clause jurisprudence in cases involving adults in other settings, which include higher education and prisons, and offers the author's critiques as to the jurisprudence in each. Part III discusses the importance of extending the protections of the Establishment Clause to adults. It illustrates the consequences that individuals must face when challenging government endorsement of religion, addresses the troubling realities facing religious minorities and non-believers today, and concludes that the *Warnock* court's decision to ignore the coercive element of school-endorsed prayer could have disastrous consequences for religious dissenters.

I. A SURVEY OF ESTABLISHMENT CLAUSE JURISPRUDENCE—THE SUPREME COURT AND SCHOOL PRAYER

A. *The Historical Foundation of the Establishment Clause*

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."¹¹ The meaning of these clauses has been hotly debated, but such was not always the case. As one scholar has noted, "[t]he great enigma of the Religion Clauses . . . is the fact that they occasioned so little discussion during their enactment."¹² The Constitution contained no reference to God or religion other than to prohibit religious tests for officeholders.¹³ It is possible that this

9. See, e.g., *Engel*, 370 U.S. at 432–33.

10. According to a 2007 estimate, the breakdown of religious affiliation in America is as follows: Protestant 51.3%, Roman Catholic 23.9%, Mormon 1.7%, Jewish 1.7%, Buddhist 0.7%, Muslim 0.6%, other or unspecified 2.5%, unaffiliated 12.1%, none 4%. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2008), available at <https://www.cia.gov/library/publications/the-world-factbook/fields/2122.html>. See also *Membership of Religious Groups in U.S.*, in THE WORLD ALMANAC AND BOOK OF FACTS 2008, at 710–11 (Readers Digest Trade Publishing 2008) (1868).

11. U.S. CONST. amend. I.

12. 2 JAMES HITCHCOCK, THE SUPREME COURT AND RELIGION IN AMERICAN LIFE 29 (2004).

13. RONALD B. FLOWERS, THAT GODLESS COURT? SUPREME COURT DECISIONS ON CHURCH-STATE RELATIONSHIPS 16 (2d ed. 2005).

silence stemmed from the fact that the Framers of the Constitution found the topic too divisive.¹⁴ Whatever the reason, the “godlessness” of the Constitution troubled some Christians.¹⁵ When it became clear that a Bill of Rights was necessary to secure ratification of the Constitution, the protection of religious freedom was one of the amendments presented to Congress by James Madison.¹⁶

Details on the creation and adoption of the First Amendment’s religion clauses are scant.¹⁷ The only record of the debate in the House of Representatives is an unofficial summary drawn from accounts found in contemporary newspapers, and the Senate debated the amendment in secret.¹⁸ However, based upon recorded votes, it is clear that the Senate rejected other potential versions of the amendment that would have allowed government to aid religion on a non-preferential basis.¹⁹

To understand the foundation of the Court’s Establishment Clause jurisprudence, it is also important to briefly discuss two key documents: James Madison’s *Memorial and Remonstrance Against Religious Assessments* (1785) and Thomas Jefferson’s 1802 letter to the Baptists of Danbury, Connecticut. In the former, Madison outlined his opposition to a bill before the Virginia legislature that would have established a tax to support Christian ministers in the state.²⁰ The bill, sponsored by Patrick Henry, would have allowed taxpayers to choose which Christian sect or denomination would receive the money.²¹

14. HITCHCOCK, *supra* note 12, at 31.

15. *Id.*

16. PETER IRONS, *GOD ON TRIAL* 13–15 (2007). The amendment was originally the third of seventeen amendments proposed by Madison. *Id.* at 14–15.

17. FLOWERS, *supra* note 13, at 17.

18. *Id.*; LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 257–58 (2d ed. rev., Univ. of N.C. Press 1994) (1986). For a full account of the House debate, see LEVY, *supra*, at 96–99. Levy notes that some of the problems with the House report were that reporters took few shorthand notes and often filled in the gaps by relying upon their memories, which sometimes produced inconsistent accounts. *Id.* at 257–58.

19. FLOWERS, *supra* note 13, at 17. One of the proposed versions stated: “Congress shall make no law establishing one religious sect or society in preference to others.” *Id.* Not everyone agrees that the First Amendment was intended to prevent Congress from aiding religious groups, provided it did so on a non-preferential basis. See *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting). For a rejection of the non-preferentialist argument, see LEVY, *supra* note 18, at 112–45, and Douglas Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1986). For those interested in the non-preferentialist argument, see generally DANIEL L. DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* (2002) and ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1988).

20. FLOWERS, *supra* note 13, at 15.

21. *Id.*

Madison attacked the bill on multiple fronts. One of his objections was that the tax would incite conflict between religious groups; that it would “destroy the moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced. . . .”²² History had shown that governmental establishment of religion caused tremendous bloodshed. This bill threatened to do the same. “Who does not see,” Madison asked, “that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?”²³ The bill was “a signal of persecution,” as it implied that those who held religious beliefs different from those in political power did not enjoy the same standing within the community.²⁴ Though Madison conceded that the establishment here was a far cry from religious persecutions throughout history, he contended that the bill represented merely a beginning, a stage of religious persecution: “Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance.”²⁵

In 1802, President Thomas Jefferson received a letter from the Danbury Baptists. In the letter, the Baptists voiced their displeasure at having to pay taxes to support the Congregational Church, the established church of Connecticut.²⁶ Jefferson’s response did not address whether it was improper for a state to establish a religion. However, Jefferson noted his agreement that religion should be a personal matter, adding: “I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion’ . . . thus building a wall of separation between church and state.”²⁷

It is debatable whether Madison and Jefferson believed in a strict separation of church and state²⁸ or whether their views on the subject even truly matter.²⁹ After all, Jefferson was not present at the Constitutional

22. James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in STEVEN G. GEY, *RELIGION AND THE STATE* 7 (2d ed. 2006).

23. *Id.* at 4–5.

24. *Id.* at 6 (“It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.”).

25. *Id.*

26. IRONS, *supra* note 16, at 23.

27. LEVY, *supra* note 18, at 246 (quoting the Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802)).

28. See, e.g., HITCHCOCK, *supra* note 12, at 23–28. Saint Louis University History Professor James Hitchcock cautions that a strict separationist view was not universally accepted even in Virginia. *Id.* at 28.

29. See, e.g., *id.* at 28. Justice William Brennan was among those who believed that the original intent of the Founders could not be known with any certainty. Moreover, Justice Brennan maintained that, even if the original intent of the Founders could be determined, it would

Convention, nor did he help draft the First Amendment.³⁰ Furthermore, Madison's actions—such as his support for congressional chaplains and his presidential proclamations of official days of thanksgiving—did not always comport with his strict separationist rhetoric, though he later lamented that these actions had been unconstitutional.³¹ Madison characterized his support for governmental endorsement of religion as a failure to live up to the ideals of the Constitution, a failure that was the product of political pressure during exigent circumstances.³² Whether Madison or Jefferson truly advocated a strict separation between church and state is beyond the scope of this comment; what is important is that the strict separationist rhetoric embodied in the aforementioned documents became central to the Supreme Court's Establishment Clause jurisprudence.³³

B. Students, School Prayer, and the Supreme Court—The Court Looks to Madison and Jefferson

Any attempt to synthesize the Supreme Court's reasoning in school prayer cases into a manageable and consistent jurisprudence is tricky at best.³⁴ Ironically, our starting point, *Everson v. Board of Education*,³⁵ is a case that did not concern school prayer. Moreover, the case's novelty is not just that it incorporated the Establishment Clause into the Fourteenth Amendment and established modern Establishment Clause jurisprudence;³⁶ it was also the first time a Supreme Court justice expressly relied upon the personal beliefs of Jefferson and Madison to interpret the Establishment Clause.³⁷

It might seem surprising to many law students today that, until the late nineteenth century, the Court rarely looked to the Founders for guidance on

not be particularly relevant or useful given the changes that have taken place in American society. *Sch. Dist. v. Schempp*, 374 U.S. 203, 234–41 (1963) (Brennan, J., concurring).

30. See *HITCHCOCK*, *supra* note 12, at 28.

31. *Id.* at 27–28. Madison confessed his regret in a private memorandum written after the end of his presidency. The memorandum was discovered over a century later. *Id.* at 27.

32. *Id.* at 27 (“[H]e saw his acquiescence . . . as lapses from principle, dictated by the particular circumstances of the time, such as the War of 1812, while he was president.”).

33. *Id.* at 6–7.

34. See *e.g.* *Warnock v. Archer*, 38 F.3d 1076, 1080 (8th Cir. 2004) (stating that the Court's use of various tests to determine Establishment Clause violations complicates making such determinations); *Minard*, *supra* note 1, at 1000 (noting the inconsistency of the Court's jurisprudence).

35. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

36. *HITCHCOCK*, *supra* note 12, at 5; *LEVY*, *supra* note 18, at 149–50. However, Peter Irons argues that the First Amendment's religious clauses were “effectively incorporated” in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), though the opinion was in fact restricted to the Free Exercise Clause. *IRONS*, *supra* note 16, at 19.

37. *HITCHCOCK*, *supra* note 12, at 6.

constitutional interpretation of the religion clauses.³⁸ It was not until the 1878 Mormon polygamy cases that the Court considered “the opinion of the Founders as normative” with respect to the First Amendment’s religious clauses.³⁹ Thereafter, until 1947, the Court largely ignored the Founders’ intent when interpreting these clauses.⁴⁰ *Everson* changed that and made the intent of the Founders an integral part of Establishment Clause jurisprudence.⁴¹

In *Everson*, the Court addressed whether a local school board violated the Constitution by authorizing reimbursement to parents for expenses they incurred sending their children to school on the public bus transportation system.⁴² The plaintiff, asserting his standing as a taxpayer, alleged the reimbursement violated the Establishment Clause because parents who used the public school buses to send their children to parochial schools were also reimbursed.⁴³ Finding no constitutional violation, the Court reasoned that the money was not used to support religious schools but was a “general program” intended to help all children get to school.⁴⁴

Writing for the Court, Justice Hugo Black noted that although colonists had come to America for religious freedom, many of these same colonists had themselves persecuted religious dissenters.⁴⁵ Justice Black contended that such persecution, combined with resentment over taxes to support established churches, caused many Americans to believe that government should not be involved in religion.⁴⁶ He reminded the Court that Madison had assailed a similar tax in *Memorial and Remonstrance*.⁴⁷ Additionally, Justice Black pointed out that the Court had previously recognized that the First Amendment was intended “to provide the same protection against governmental intrusion” that Madison and Jefferson had secured in Virginia.⁴⁸

According to Justice Black, the purpose of the Establishment Clause was to “suppress” the “evils” caused by governmental endorsement of religion—namely religious strife and persecution.⁴⁹ Justice Black laid out a broad interpretation of the Establishment Clause:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither

38. *Id.* at 3.

39. *Id.*

40. *Id.* at 4–5.

41. *Id.* at 5.

42. *Everson v. Bd. of Educ.*, 330 U.S. 1, 3–4 (1947).

43. *Id.*

44. *Id.* at 17–18.

45. *Id.* at 8–10.

46. *Id.* at 11.

47. *Everson*, 330 U.S. at 12.

48. *Id.* at 13.

49. *Id.* at 14–15. *See also* HITCHCOCK, *supra* note 12, at 5–6.

can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church . . . or force him to profess a belief or disbelief in any religion.⁵⁰

Drawing upon Thomas Jefferson's letter to the Danbury Baptists, Justice Black invoked Jefferson's statement that the First Amendment constituted "a wall of separation between Church and State."⁵¹ Justice Black maintained that this "wall must be kept high and impregnable," and not even the slightest breach could be allowed. Here, he found no breach.⁵²

Though it may seem strange given the modern debate over the meaning of the Establishment Clause, there was no disagreement on the Court regarding Justice Black's interpretation;⁵³ the disagreement was over the application of the principles Black announced.⁵⁴ The four dissenting justices concurred with the strict separationist view of the First Amendment but rejected the conclusion that there had been no breach.⁵⁵ Justice Wiley Rutledge's dissent, joined by every justice in the minority, drew expressly on the views of James Madison to explain the meaning of the Establishment Clause. Viewing the First Amendment as a "compact and exact summation" of Madison's beliefs forged during his "long struggle for religious freedom,"⁵⁶ Justice Rutledge declared that the intent behind the clause was not merely to prevent Congress from establishing a national church or religion.⁵⁷ Rather, the Founders intended the Establishment Clause to completely sever all ties between church and state and to prohibit "*every form of public aid or support for religion.*"⁵⁸

C. School Prayer and Government Endorsement

The Supreme Court first addressed the issue of school prayer in *Engel v. Vitale*.⁵⁹ The controversy arose when the New Hyde Park School Board decided that a 22-word prayer written by the New York State Board of Regents (Regents) would be recited daily in its schools.⁶⁰ The Regents recommended that all schools adopt the prayer as a way to instill moral and spiritual values in

50. *Everson*, 330 U.S. at 15.

51. *Id.* at 16 (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

52. *Id.* at 18.

53. HITCHCOCK, *supra* note 12, at 7.

54. *Id.*

55. LEVY, *supra* note 18, at 151 (quoting *Everson*, 330 U.S. at 31–32 (Rutledge, J., dissenting)).

56. *Everson*, 330 U.S. at 31 (Rutledge, J., dissenting).

57. *Id.* at 31–32.

58. *Id.* at 32 (emphasis added).

59. FLOWERS, *supra* note 13, at 103.

60. *Engel v. Vitale*, 370 U.S. 421, 422 (1962).

students.⁶¹ Due to the religious diversity in New York, the Regents intended to write a nonsectarian prayer that would encompass all religions and denominations.⁶² Though the prayer was to be recited “by each class in the presence of a teacher,”⁶³ school district policy allowed students to be excused from saying the prayer upon written request of their parents.⁶⁴

Ten students, through their parents, challenged the prayer’s constitutionality by arguing that it violated the Establishment Clause.⁶⁵ The state courts upheld the use of the prayer provided that students would not be required to participate.⁶⁶ On appeal, the Supreme Court reversed and ruled that New York had violated the Establishment Clause by encouraging religious activity in public schools.⁶⁷ Writing again for the Court, Justice Black rejected the argument that the prayer was justified based upon our country’s religious heritage.⁶⁸ Rather, Justice Black stated that it was “this very practice” of government prescribing religious orthodoxy that caused many colonists to leave England.⁶⁹ Examining the history of religion in America from colonial times through the adoption of the Bill of Rights, Justice Black concluded that, at a bare minimum, the Establishment Clause prohibits states from “compos[ing] official prayers for any group of the American people to recite as a part of a religious program carried on by government.”⁷⁰

The fact that the prayer was non-denominational and that students could either remain silent or leave the room failed to cure the constitutional defects.⁷¹ Though courts must find some element of governmental coercion to find a violation of the Free Exercise Clause, the Establishment Clause has no such requirement.⁷² Simply by endorsing religion, New York violated the Establishment Clause. Nevertheless, the Court did not dismiss the notion that governmental endorsement of religion can be coercive. It noted that history had shown that state endorsement of religion and coercion go hand-in-hand, that “[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the *indirect coercive pressure upon*

61. *Id.*

62. FLOWERS, *supra* note 13, at 103.

63. *Engel*, 370 U.S. at 422.

64. FLOWERS, *supra* note 13, at 103.

65. *Engel*, 370 U.S. at 423.

66. *Id.*

67. *Id.* at 424.

68. *Id.* at 425.

69. *Id.*

70. *Engel*, 370 U.S. at 425.

71. *Id.* at 430.

72. *Id.*

religious minorities to conform to the prevailing officially approved religion is plain."⁷³

In his concurrence, Justice William O. Douglas disagreed with the argument that the prayer was coercive.⁷⁴ Justice Douglas contended that the students were not compelled to recite the prayer and could leave the room without fear of retaliation.⁷⁵ Because students could opt out, only teachers were required to recite the prayer, and none of them was complaining.⁷⁶ Justice Douglas did not find the prayer inherently coercive either. After all, Justice Douglas reasoned, adults were compelled to witness prayers delivered at the opening of Congress and the Supreme Court, yet these prayers passed constitutional muster.⁷⁷

Perhaps responding to Justice Douglas, the majority conceded that the establishment of religion in this case (composing a brief prayer that was to be recited) paled in comparison to historical religious persecution. However, it revived Madison's argument from *Memorial and Remonstrance* that a government that could prefer Christianity to another religion could also prefer one Christian denomination to another.⁷⁸ Thus, the Court embraced a slippery slope argument; that any governmental endorsement, any crack in the wall of separation of church and state, would ultimately lead to the type of religious establishment and coercion that the First Amendment had been intended to prevent.

Only one year after *Engel*, the Court again confronted the issue of school prayer. In *School District v. Schempp*, the Court ruled that a Pennsylvania statute requiring the daily reading of Bible verses in public schools violated the Establishment Clause.⁷⁹ Each day in Abington Senior High School, a student in the school's television and radio class would choose and recite ten verses from the King James Version of the Bible to be broadcast over the school's intercom.⁸⁰ Per state law, no comments, questions or explanations regarding the verses were made.⁸¹ The recitation of the Bible verses was followed by the

73. *Id.* at 431 (emphasis added).

74. *Id.* at 438 (Douglas, J., concurring).

75. *Engel*, 370 U.S. at 438 (Douglas, J., concurring).

76. *Id.* This raises interesting questions that go to the heart of this comment: Do adults have the same rights under the Establishment Clause? Is there no constitutional violation unless one complains? Can we assume the teachers' silence meant that they were in favor of the prayer?

77. *Id.* at 439–42.

78. *Id.* at 436–37.

79. *Sch. Dist. v. Schempp*, 374 U.S. 203, 203 (1963). *Schempp* involves companion cases. In the other case, Madalyn Murray, an atheist, and her son challenged a Baltimore statute that allowed recitation of the Lord's Prayer as well as the reading of Bible verses. *Id.* at 211. My focus here is on the *Schempp* family.

80. *Id.* at 206–07.

81. *Id.*

Lord's Prayer and the Pledge of Allegiance, again broadcast over the intercom.⁸² In schools without an intercom system, the procedure was generally the same, except the teachers would choose the Bible verses to be read, which would then be read aloud in class.⁸³

Though the Pennsylvania law allowed students to be excused from the Bible reading or to leave the room upon written request of their parents,⁸⁴ Edward Schempp—who believed the practice conflicted with his family's Unitarian views and violated their religious liberty—found this remedy inadequate.⁸⁵ Schempp expressed concern that those religious dissenters who left the room would find their relationships with their peers and teachers damaged.⁸⁶ He feared his children would be labeled “odd-balls” or “atheists,” a term that carried with it the image that one was a communist or “‘un-American,’ with overtones of possible immorality.”⁸⁷

The State defended the Bible reading on the grounds that it did not favor any one specific Christian denomination,⁸⁸ and that it had secular purposes, which included the promotion of morality and the teaching of literature.⁸⁹ The Court was unimpressed. Acknowledging that historically religion held a prominent place in American society and government, the Court nonetheless proclaimed that the principle of religious freedom was equally vital given the religious pluralism of American society.⁹⁰

In the majority opinion, Justice Tom Clark “rejected unequivocally” the notion that government could aid or support religion without violating the Establishment Clause, even if it did so in a non-preferential manner.⁹¹ In the twenty years preceding *Schempp*, the Court heard at least seven Establishment Clause cases, each time reaffirming the principles announced in *Everson*.⁹² Summarizing the Court's Establishment Clause jurisprudence, Justice Clark formulated an endorsement test, which would later become part of the *Lemon*

82. *Id.*

83. *Id.*

84. *Schempp*, 374 U.S. at 206–07.

85. *See id.* at 208–09 n.3.

86. *Id.*

87. *Id.*

88. *Id.* at 210.

89. *Schempp*, 374 U.S. at 223.

90. *Id.* at 214. The Court noted that there were eighty-three religious groups in America that had over 50,000 members, as well as many smaller religious sects. *Id.*

91. *Id.* at 216.

92. *See id.* at 222. Justice Clark mentions that there were eight cases, and he starts with *Cantwell v. Connecticut*, 310 U.S. 296 (1940), instead of *Everson*. Among the cases discussed by Clark were *Everson*, *Engel*, and *Torcaso v. Watkins*, 367 U.S. 488 (1961), in which the Warren Court invalidated a state requirement that officeholders proclaim a belief in God. *Schempp*, 374 U.S. at 220.

test:⁹³ to be constitutional, the law or governmental action must have a secular purpose and could neither advance nor inhibit religion.⁹⁴

Applying Justice Clark's test to the facts in *Schempp*, the majority held the Establishment Clause had been violated.⁹⁵ By requiring public school students to read Bible verses and recite the Lord's Prayer in the classroom as part of a state-prescribed curriculum, Pennsylvania had impermissibly mandated students to partake in religious exercises.⁹⁶ Just as in *Engel*, the Court found the mere fact that students could be excused from participation did not cure the statute's unconstitutionality. Furthermore, the Court resisted the temptation to deem the practices acceptable because they were "minor encroachments" upon religious liberty.⁹⁷ After all, as Madison wrote in *Memorial and Remonstrance*, what might begin as a *de minimis* encroachment upon one's rights could easily become a larger encroachment.⁹⁸ The implication was clear: any establishment of religion is merely an invitation to religious conflict and a step toward religious persecution.

Moreover, Justice Brennan's concurrence seemed to embrace the argument that the prayers were inherently coercive. Though children could theoretically opt out of the religious exercises, Justice Brennan professed a belief that very few children would actually do so,⁹⁹ for children would be placed in the difficult position of choosing to follow their religious beliefs or conforming to peer norms.¹⁰⁰ Fearing that they would be ostracized or labeled as atheists or other unfavorable terms, most children would silently suffer the religious exercises rather than risk being stigmatized or ostracized by their peers.¹⁰¹

For Justice Brennan, whether the Founders would have approved of prayer and Bible reading in public schools was not only unable to be known with any

93. The test was formulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), a case involving state aid to religious schools. *Id.* at 603. The test was a synthesis of three tests the Court had used at that time to determine whether the Establishment Clause had been violated. The law had to have a secular purpose, could neither advance nor inhibit religion, and could not excessively entangle government with religion. *Id.* at 612–13.

94. *Schempp*, 374 U.S. at 222. Justice Sandra Day O'Connor refined the endorsement test in *County of Allegheny v. ACLU*, 492 U.S. 573, 628 (1989) (O'Connor, J., concurring). Her two-part test asked first whether government actually intended to endorse or show disapproval of a religion. If so, it violated the Establishment Clause. However, even if the government did not violate the first prong of the test, its actions could still be found unconstitutional if a reasonable person perceived its primary effect as advancing religion. Minard, *supra* note 1, at 1005.

95. *Schempp*, 374 U.S. at 222–23.

96. *Id.* at 223.

97. *Id.* at 225.

98. *Id.*

99. *Id.* at 289–92 (Brennan, J., concurring).

100. *Schempp*, 374 U.S. at 290–92 (Brennan, J., concurring).

101. *Id.* at 289–92.

certainty,¹⁰² but it was also irrelevant. America had grown more religiously diverse than the Founders likely ever imagined.¹⁰³ This religious pluralism made it virtually impossible for a state to prescribe a prayer that would not offend the religious liberties of some group.¹⁰⁴

Invoking Chief Justice John Marshall's famous phrase that "it is *a constitution* we are expounding," Justice Brennan asserted that the Court's role is to translate the protections of the First Amendment to modern society.¹⁰⁵ The Court should not focus on whether the Founders would have specifically approved of the school's practices; instead it should determine whether the practices in question were likely to produce the consequences the Founders had hoped the Establishment Clause would prevent.¹⁰⁶ And among those consequences (those "evils" as Justice Black described them in *Everson*¹⁰⁷), are religious divisiveness and persecution.

D. *The Interplay Between Endorsement and Coercion*

Though the Court in *Engel* and *Schempp* only tangentially addressed the issue of coercion,¹⁰⁸ a coercion test became integral to Establishment Clause jurisprudence in *Lee v. Weisman*.¹⁰⁹ The issue in *Weisman* was whether a school district's practice of inviting clergy to give an invocation and benediction at graduation violated the Establishment Clause.¹¹⁰ Daniel Weisman first complained of the practice when Robert E. Lee, principal at Nathan Bishop Middle School, invited a Baptist minister to give the invocation at the school's graduation in which one of Weisman's daughters was

102. *Id.* at 235–36. Justice Brennan listed several problems with interpreting the Framers' intent. For consistency, I have chosen the word "Founders," as it also includes Thomas Jefferson. Among the problems cited by Justice Brennan was a lack of clarity as to what each of the Founders thought. Moreover, Justice Brennan thought it impossible to know what the Founders would have thought about prayer in public schools because public schools had not existed in their time. *Id.* at 238–46.

103. *See id.* at 240.

104. *Id.* at 287.

105. *Schempp*, 374 U.S. at 241 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819)) (Brennan, J., concurring).

106. *Id.* at 236.

107. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 14–15 (1947).

108. The majority in *Engel* acknowledged that coercion naturally results anytime government endorses one religion or one religious sect over another. The Court in *Schempp* does not directly discuss coercion. However, the Court's slippery slope argument that *de minimis* violations of religious liberty can lead to full-scale religious persecution hints that the Court considered establishment inherently coercive. Justice Brennan's concurrence, of course, explicitly describes the coercive aspect of the prayers and Bible reading.

109. *Lee v. Weisman*, 505 U.S. 577 (1992).

110. *Id.* at 581.

participating.¹¹¹ Weisman was unsuccessful in obtaining a court injunction.¹¹² Only three years later, the issue arose once again because another Weisman daughter was graduating.¹¹³ This time Principal Lee invited a rabbi, perhaps believing this would placate the Weismans, who were Jewish.¹¹⁴ He was wrong.¹¹⁵

Justice Anthony Kennedy penned the opinion of the Court, which held that “at a minimum, the Constitution guarantees that government may not *coerce* anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith or tends to do so.’”¹¹⁶ Justice Kennedy focused on the school’s endorsement of the religious exercise and the coercive element that arose as a result.¹¹⁷ Here, the school’s involvement in the religious exercise was “pervasive.”¹¹⁸ Principal Lee had selected a religious speaker to give a religious message at a public school function supervised by public school officials.¹¹⁹ Moreover, Lee gave the rabbi guidelines for the prayer and informed him that the prayer should be nonsectarian.¹²⁰ Though Lee’s directive to have a nonsectarian prayer was a good faith effort to appeal to all religious believers, it did not alleviate the fact that the prayer bore the imprint of the State.¹²¹ Additionally, just as the *Engel* and *Schempp* Courts reasoned that the ability to be excused from participating in prayers or Bible reading did not remedy the Establishment Clause violation,¹²² Justice Kennedy rejected the argument that the prayers were acceptable because graduation was voluntary.¹²³ After all, given the years of hard work that students put in to attain graduation, as well as the importance of the occasion to the students’ families, few students would forgo the event.¹²⁴

111. MAY IT PLEASE THE COURT: COURTS, KIDS, AND THE CONSTITUTION 283 (Peter Irons ed., 2000).

112. *Id.* The Weismans attended the graduation. *Weisman*, 505 U.S. at 584.

113. MAY IT PLEASE THE COURT, *supra* note 111.

114. *Id.*

115. *Id.*

116. *Weisman*, 505 U.S. at 587 (emphasis added) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

117. *Id.* at 586–87.

118. *Id.* at 587.

119. *See id.* at 586–90.

120. *Id.* at 588.

121. *Weisman*, 505 U.S. at 588–90.

122. *See supra* Part I.C and accompanying text.

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

124. *Id.* at 586, 595. Justice Kennedy wrote that, given the circumstances, the school “ha[d] compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid.” *Id.* at 598.

Justice Kennedy then shifted to the subtle but inherently coercive elements of the prayer:

What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy. . . . The 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. . . . Of course, in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real.¹²⁵

Distinguishing the case at bar from *Marsh v. Chambers*, where the Court found that prayers offered at the opening of a state legislature did not violate the Establishment Clause,¹²⁶ Justice Kennedy emphasized that Congressmen were free to come and go at any time and that there would be many reasons for them to do so.¹²⁷ In contrast, the students in *Weisman* had little personal autonomy at the graduation ceremony; the school controlled the choice of venue, the selection and order of the speakers, the dress code and the organization of the ceremony.¹²⁸ Students were not free to leave as they pleased but were faced with a Hobson's choice: stand for the prayer or protest.¹²⁹ The brevity of the prayer in no way lessened the severity of the encroachment. To argue that a brief prayer is only a minor inconvenience or trivial encroachment upon one's religious liberty is to diminish not only the religious beliefs of the dissenter but also to diminish the importance of the prayer to those who support it.¹³⁰ Finally, Justice Kennedy again dismissed the argument that religious dissenters could avoid the prayers by staying home. Government, he noted, may not force people to surrender their constitutional rights to attend graduation.¹³¹

Interestingly, though Justice Kennedy's opinion expressly states that it is not addressing whether adults could be coerced,¹³² it does not reject such a premise either, for it acknowledges that Establishment Clause concerns "may

125. *Id.* at 592–93.

126. *Marsh v. Chambers*, 463 U.S. 783, 793 (1984).

127. *Weisman*, 505 U.S. at 597.

128. *See id.* at 596.

129. *Id.* at 593.

130. *Id.* at 594.

131. *Id.* at 596.

132. *Weisman*, 505 U.S. at 593.

not be limited to the context of schools, [though] it is most pronounced there.”¹³³ Nevertheless, Justice Kennedy was clear that coercion was sufficient but not necessary to find an Establishment Clause violation. Echoing Madison’s concern that establishment of religion is but a step toward religious persecution, Justice Kennedy wrote that history had repeatedly shown that “what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce.”¹³⁴

In *Santa Fe Independent School District v. Doe*,¹³⁵ the most recent school prayer case to reach the Court, coercion was again an integral part of the Court’s Establishment Clause analysis. Santa Fe, Texas, located approximately thirty miles southeast of Houston, is a town with a largely white, homogeneous population, a history of racial tension¹³⁶ and an alleged longstanding tradition of ignoring Establishment Clause violations.¹³⁷ The controversy stemmed from the Santa Fe Independent School District’s (the “District”) practice of allowing the Santa Fe High School student council chaplain to offer prayers over the District’s public address system before home football games.¹³⁸ After the constitutionality of this practice was challenged by two students, both of whom were members of religious minorities,¹³⁹ the District amended its “Prayer at Football Games” policy.¹⁴⁰ The new policy put the issue to a vote.¹⁴¹ Students would be allowed to vote on whether a “statement or invocation” should be delivered before each football game to solemnize the event, and, if so, students would then choose the speaker.¹⁴² The policy stipulated that the “message and/or invocation” would be left to the elected speaker’s discretion.¹⁴³

Despite the changes in the school policy, the district court, guided by the Court’s reasoning in *Lee v. Weisman*, held that the practice of delivering prayers before football games coerced students to participate in religious

133. *Id.* at 592.

134. *Id.* at 591–92.

135. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

136. IRONS, *supra* note 16, at 137. The fact that Santa Fe is white has much to do with the town’s history of racial animosity. Though neighboring towns are nearly one-third black, Santa Fe is ninety-five percent white. Its homogeneity also stretches to its religious composition, with only one Jewish family in the town. *Id.* at 137–38.

137. *See Santa Fe*, 530 U.S. at 295 (noting the District’s alleged history of promoting religion, such as encouraging students to join religious clubs or attend religious revivals, distributing Bibles on school grounds, and letting students deliver prayers during graduation ceremonies).

138. *Id.* at 294.

139. *Id.* One of the students was Mormon; the other was Catholic. *Id.*

140. *Id.* at 297–98.

141. *Id.* at 298.

142. *Santa Fe*, 530 U.S. at 298–99 n.6.

143. *Id.* at 298.

exercises and therefore violated the Establishment Clause.¹⁴⁴ The court of appeals affirmed based upon Fifth Circuit precedent that “school-encouraged prayer” at “school-related sporting events” ran afoul of the Establishment Clause.¹⁴⁵

Writing for the Court, Justice John Paul Stevens held the District’s prayer policy unconstitutional.¹⁴⁶ Much like the district court had done, Justice Stevens applied the principles of *Weisman*.¹⁴⁷ He disagreed with the District’s assertion that it had properly divorced itself from the religious messages through its claim that any religious messages would be the students’ private speech.¹⁴⁸ Rather, the signs signifying the school’s endorsement of the religious messages were plainly visible to any reasonable person: the school policy created a limited forum where only one speaker could give the message; the message was subject to the school district’s regulations; the policy’s use of the words “invocation” and “solemnize” contained religious overtones; and the message was delivered at a school event on school property over the school’s public address system that was under the control of school officials.¹⁴⁹ Based upon the totality of the circumstances, including the district’s history of supporting prayer, it was clear that the school was endorsing a particular religious practice. In doing so, the District sent the message to those in the religious minority “that they [were] outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”¹⁵⁰

The District also failed in its attempt to distinguish *Weisman* by arguing that attendance at football games was voluntary.¹⁵¹ For those students who were athletes, cheerleaders or band members, attendance at the pre-game ceremony was mandatory.¹⁵² Moreover, Justice Stevens maintained that such events were extremely important rituals to high school students, and students should not be forced to choose between isolating themselves socially and “avoiding personally offensive religious rituals.”¹⁵³ Such a choice violated “a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.”¹⁵⁴ Finally, Justice Stevens lambasted the

144. *Id.* at 299.

145. *Id.* at 299–300.

146. *Id.* at 301.

147. *Santa Fe*, 530 U.S. at 301–02.

148. *Id.* at 302.

149. *Id.* at 303–08.

150. *Id.* at 309–10 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984)).

151. *Id.* at 311.

152. *Santa Fe*, 530 U.S. at 312.

153. *Id.*

154. *Id.* (quoting *Lee v. Weisman*, 505 U.S. 577, 596 (1992)).

election process adopted by the District.¹⁵⁵ The purpose of the Bill of Rights was to forbid one from surrendering his fundamental rights to the majority.¹⁵⁶ The District's election process ensured that the only religious views that would be heard were those of the majority.¹⁵⁷ The majoritarian nature of the process also stimulated divisiveness between religious groups.¹⁵⁸ Thus, the District violated the central purpose of the Establishment Clause—to prevent religious strife.

II. EXTENDING THE PROTECTIONS OF THE ESTABLISHMENT CLAUSE TO ADULTS

A. *The Case of Warnock v. Archer—Background Facts*

In the fall of 1997, Steve Warnock joined the DeValls Bluff School District where he worked as an art teacher and part-time bus driver.¹⁵⁹ Warnock alleged that the school carried on various religious practices, which included reading the Bible over the school public address system at the beginning of each school day and offering prayers at mandatory employee meetings and trainings.¹⁶⁰ The prayers were generally delivered by Charles Archer, the school district superintendent (who had hired Warnock), though other individuals in charge of trainings sometimes offered the prayers.¹⁶¹

Warnock objected to Archer about the prayers, but his concerns fell on deaf ears. Only after Warnock requested legal assistance from the ACLU did the practice of Bible reading end.¹⁶² However, the other prayers continued despite Warnock's repeated requests to Archer that they be stopped.¹⁶³ At one point, when Archer was going to give a prayer at the faculty convocation, Warnock rose and voiced his objection again:

I said, Mr. Archer, it's against the law to pray, you know, establish a religion in school and pray. And he turns and his body was taunt [sic] with me, and this was in front of the whole faculty, and he looks at me, he goes, yes, Mr.

155. *Id.* at 304–06.

156. *Id.* at 304–05; *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

157. *Santa Fe*, 530 U.S. at 304–06.

158. *Id.* at 311.

159. Brief of Appellee at 4–5, *Warnock v. Archer*, Nos. 02-3322, 03-1422 (8th Cir. Sept. 1, 2003).

160. *Id.* at 4. One of Warnock's colleagues, Mary Craig, confirmed his belief that religion pervaded the school atmosphere. She noted colleagues repeatedly asked her whether she was a Christian, and she claimed the perception among the faculty was that a person who was not a Christian was a bad person. *Id.* at 11–12.

161. *Id.* at 4. *See also* *Warnock v. Archer*, 380 F.3d 1076, 1079 (8th Cir. 2004).

162. Brief of Appellee, *supra* note 159, at 13. The readings stopped in October 1998 before the ACLU could pursue legal action. *Id.*

163. *Id.*

Warnock, I'm aware of the recent Supreme Court ruling, but I'm going to do it anyway. . . . [A]nd during that same meeting, Mr. Eads [who delivered the prayers at bus-driver meetings] stood up and said, anybody who has a problem with us doing Christian prayer can get up and leave.¹⁶⁴

Warnock contended that the ability to leave the room during the prayers did not alleviate the situation because it singled him out:

And that makes me feel like I'm not a part of that community. I'm—I'm—I'm separated out. I'm lesser, inferior or, you know, just—I—I didn't take this public school job to watch this school endorse and practice a religion. And I found it very insulting that I had to go through all this, and damaging.¹⁶⁵

Warnock alleged that his challenge to the prayers had several negative consequences. He claimed that he was ostracized,¹⁶⁶ that his room was not maintained as well as those who were in favor of the prayer and that he was harassed by students and colleagues.¹⁶⁷ Though Warnock continued to receive positive teaching evaluations, he felt that his job was threatened¹⁶⁸ and complained that the hostile work environment caused him mental stress and anxiety.¹⁶⁹

B. *The Legal Challenge*

Warnock filed a Section 1983 suit against Archer and the Devalls Bluff School District, claiming, *inter alia*, that Archer had violated the Establishment Clause by delivering prayers at mandatory teacher meetings.¹⁷⁰ The district court ruled that the prayers violated the First Amendment, and it enjoined the district "from offering prayers at any meeting that Mr. Warnock is required to attend."¹⁷¹

The Eighth Circuit noted that, based on Court precedent, it was unclear whether the Establishment Clause forbids school-sponsored prayer where only adults are present.¹⁷² Nevertheless, applying the endorsement test, the Eighth

164. *Id.* at 14. Archer admitted that he had made such a statement. *Id.*

165. *Id.* at 16–17.

166. *Id.* at 16. Mary Craig testified that many members of the faculty were angry at Warnock for objecting to the prayer. When she first inquired as to whom Mr. Warnock was, she was told by colleagues that "she did not want to know him." *Id.* at 12.

167. Brief of Appellee, *supra* note 159, at 17–24. Warnock explained that one of the forms of harassment was that he repeatedly received Christian propaganda in his school mailbox. *Id.* at 20.

168. The record indicates that in August 1999, Archer approached Warnock and told him that he was resuming the Bible readings with the full support of the school board. Archer then asked whether Warnock would try to stop the readings. Warnock indicated that he would take legal action. *Id.* at 13.

169. *Id.* at 23.

170. *Warnock v. Archer*, 380 F.3d 1076, 1079 (8th Cir. 2004).

171. *Id.*

172. *Id.* at 1080.

Circuit declared the practice unconstitutional.¹⁷³ In making its decision, the court noted that the prayers were not isolated events, but had been consistently given at mandatory teacher meetings and offered by the school official in charge of the meeting.¹⁷⁴ Based upon these facts, a reasonable person would believe that the school had endorsed or approved of religious practice.¹⁷⁵ Thus, the school violated the First Amendment by establishing a preference for religion.

Although the Eighth Circuit affirmed the district court's ruling that the prayers violated the Establishment Clause, it found the district court's remedy to be lacking.¹⁷⁶ In effect, the district court's injunction allowed school officials to continue the prayers provided that Warnock was not required to attend the meetings.¹⁷⁷ Simply allowing Warnock to be excused did not remedy the constitutional violation in the court's view:

We think that the difficulty with this approach is that it either conceives of the constitutional violation in terms of Mr. Warnock's subjective feelings of offense, or is premised on the proposition that the primary establishment clause violation in this case lies in the fact that Mr. Warnock was being coerced or religiously indoctrinated by the state. . . . [W]e believe that it is the government's endorsement of a particular religious message that constitutes the constitutional violation here, not the effects . . . on Mr. Warnock's psyche.¹⁷⁸

Warnock's claims of ostracism and harassment were immaterial to the Establishment Clause issue. Moreover, the court found Warnock's "perceived slights and personal fears" trivial¹⁷⁹ and disputed any notion that he could be coerced or indoctrinated given the fact that he was "a strong-willed adult" who had a contractual relationship with the district.¹⁸⁰

C. Can Adults Be Coerced?—An Analysis of Establishment Clause Jurisprudence in Other Governmental Settings

In holding that the school district's practice of offering prayers at mandatory teacher functions impermissibly endorsed religion and violated the Establishment Clause, the Eighth Circuit reached the proper result. As the Supreme Court has consistently noted, coercion is a sufficient but not a

173. *Id.*

174. *Id.* at 1081.

175. *Warnock*, 380 F.3d at 1081.

176. *Id.* at 1081.

177. *Id.*

178. *Id.*

179. *Id.* at 1083.

180. *Warnock*, 380 F.3d at 1080.

necessary element of an Establishment Clause violation.¹⁸¹ The argument makes sense from a logical perspective, too. If the Framers intended the First Amendment to prevent only religious coercion, the Establishment Clause would be meaningless.¹⁸² Under such an analysis, a state could establish an official religion provided it did not force anyone to belong to or subsidize the state religion.¹⁸³ Moreover, the Eighth Circuit's ruling makes sense given the factual similarity between *Weisman*, *Santa Fe*, and *Warnock*. In *Weisman*, the school district had impermissibly endorsed religion and violated the Establishment Clause when it selected a religious leader to give a religious message (the content of which was constrained by Principal Lee's guidelines) to public school students at a public school function under the control of public school officials. Similarly, in *Santa Fe*, the Court reasoned that the school district had endorsed the pre-game prayers because it had created a limited forum where only one speaker could deliver the message; the message was controlled by school guidelines; and the prayers were delivered over the school's public address system at a school event that was controlled by school officials. Here, *Warnock*—a public school employee—had been subjected to prayers delivered at mandatory teacher functions by public school officials who controlled not only the message but also who could deliver the message. Nevertheless, the Eighth Circuit's declaration that coercion was *immaterial* in Establishment Clause cases ignores not only the jurisprudence of *Weisman* and *Santa Fe*, but it also ignores the fact that endorsement is inherently coercive.

Though the Supreme Court has not expressly stated that the Establishment Clause would apply to school-sponsored prayers if only adults were present, Justice Kennedy's opinion in *Weisman* implicitly concedes the possibility. It seems unreasonable to believe that the Establishment Clause's protections are age-dependent, that "like Trix cereal, [the clause] is [just] 'for kids.'"¹⁸⁴ Are we to believe that the prayer held unconstitutional in *Weisman* would not have been coercive had it simply been delivered a few minutes after graduation? Analysis of Establishment Clause jurisprudence in other governmental settings where adults are present provides a useful explanation.

The only Supreme Court case addressing government-sponsored prayer before adults is *Marsh v. Chambers*.¹⁸⁵ In that case, a Nebraska state legislator challenged the state's practice of opening each of its legislative sessions with a

181. See, e.g., *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

182. See *Lee v. Weisman*, 505 U.S. 577, 621 (Souter, J., concurring).

183. I am intellectually indebted to Justice O'Connor for this argument. O'Connor posed the same type of question during oral arguments in *Weisman*. For a partial transcript of the oral argument, see MAY IT PLEASE THE COURT, *supra* note 111, at 286.

184. Reply Brief of Petitioner-Appellant at 23, *Warnock v. Archer*, No. 02-3322 (8th Cir. Feb. 2, 2004).

185. *Marsh v. Chambers*, 463 U.S. 783 (1983).

prayer delivered by a chaplain chosen by the state and paid with tax dollars.¹⁸⁶ Applying the *Lemon* test, the Eighth Circuit held that the prayers violated the Establishment Clause.¹⁸⁷ The Supreme Court reversed.¹⁸⁸ In upholding the prayers, the Court emphasized the longstanding history of legislative prayer by pointing out that the First Congress had adopted a similar practice.¹⁸⁹ Similarly, the Nebraska legislature had opened its sessions with prayer for over 100 years.¹⁹⁰ The State was not conducting a religious exercise but merely acknowledging the religious views held by most Americans.¹⁹¹

Though an argument can be made that *Marsh* should be controlling in cases such as *Warnock*, the argument fails to note key differences between the situations. As Justice Kennedy noted in *Weisman*, legislators are free to come and go as they please and do so for a variety of reasons.¹⁹² Warnock's presence at the meetings was mandatory.¹⁹³ Furthermore, in *Warnock*, given the habitual delivery of the prayers, it would become readily apparent that Warnock was leaving the room to avoid the prayers.¹⁹⁴ Finally, the Court in *Marsh* placed tremendous emphasis on the fact that legislative prayers enjoyed a longstanding history.¹⁹⁵ Of course, it is questionable whether a practice should be considered constitutional simply because it has occurred for a long time. After all, Madison had contended that the prayers before Congress were unconstitutional, a failure of politicians to live up to the ideals of the Constitution.¹⁹⁶ And the fact that *Marsh* has not been the basis for any further Supreme Court rulings demonstrates that it is an outlier in Establishment Clause jurisprudence.¹⁹⁷

Unlike the Supreme Court, lower courts have confronted the issue of government-sponsored prayer at university graduations. In *Tanford v. Brand*, the Seventh Circuit ruled that prayers offered during commencement ceremonies at Indiana University did not violate the First Amendment.¹⁹⁸ Each year, the university chose different speakers to deliver a nondenominational

186. *Id.* at 784–85.

187. *Id.* at 785–86.

188. *Id.* at 786.

189. *Id.* at 787–88. The majority opinion also mentioned that the Court had a similar practice. *Id.* at 786.

190. *Marsh*, 463 U.S. at 788–89.

191. *Id.* at 792.

192. *Lee v. Weisman*, 505 U.S. 577, 597 (1992).

193. Brief of Appellee, *supra* note 159, at 4.

194. *Id.*

195. *Marsh*, 463 U.S. at 786–792.

196. Madison, *supra* note 22, at 27.

197. *See Pihos*, *supra* note 8, at 1360.

198. *Tanford v. Brand*, 104 F.3d 982, 985 (7th Cir. 1997).

invocation and benediction at the graduation services.¹⁹⁹ Three students and a law professor at the university sought to enjoin the practice by arguing that it violated the Establishment Clause.²⁰⁰ In finding for the university, the court mentioned that those who attended the graduation ceremonies were adults.²⁰¹ As such, they were not likely to be coerced or indoctrinated but could simply ignore the offensive remarks. In addition, the court reasoned that the prayers were simply an acknowledgment of religious belief and were intended to solemnize the event.²⁰²

Tanford would seem to support the argument that the Establishment Clause's protections should not apply to adults as they do to children, that *Warnock* was incorrectly decided. However, the facts in *Tanford* are clearly distinguishable: many students did not attend the commencement exercises, those in attendance generally did not rise for the prayer, and there was an alternative afternoon ceremony that did not have prayers.²⁰³ And, unlike in *Warnock*, it was customary for students and faculty to arrive and leave throughout the ceremony, with some running late, others leaving early, and still others excusing themselves to get a drink or use the restroom.²⁰⁴

Though the Seventh Circuit in *Tanford* dismissed the idea that adults could be coerced, it implicitly accepted such a possibility in *Kerr v. Farrey*.²⁰⁵ In *Kerr*, the plaintiff was a prisoner who was required by the warden to attend substance abuse meetings.²⁰⁶ The only program for the prisoners was Narcotics Anonymous, which had a 12-step program that was intertwined with religious messages.²⁰⁷ For example, one step called for participants to admit their misdeeds to God, while another "asked Him to remove [the] shortcomings."²⁰⁸ The court stated that these religious messages, coupled with other religious messages habitually offered at the meetings, amounted to a governmental endorsement of religion.²⁰⁹ In addition, the court pointed out that failure to attend the sessions could negatively impact the inmate's chances for parole as well as his inmate's security risk rating.²¹⁰ Though the warden claimed that no inmate had been penalized for failing to participate in the program, the Seventh Circuit ruled that forcing the plaintiff to choose between

199. *Id.* at 983.

200. *Id.*

201. *Id.* at 985.

202. *Id.*

203. *Tanford*, 104 F.3d at 984–85.

204. *Id.* at 983–85.

205. *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996).

206. *Id.* at 474.

207. *Id.*

208. *Id.*

209. *Id.* at 480.

210. *Kerr*, 95 F.3d at 474.

attending the program and enduring the religious messages or forgoing the program and risking his parole eligibility violated the Establishment Clause.²¹¹ While the court never used the word “coercion” in its opinion, *Kerr* demonstrates that adults can indeed be coerced, and its holding supports the notion that one may not be forced to submit his religious rights to another.²¹²

III. WHY THE ESTABLISHMENT CLAUSE’S PROTECTIONS SHOULD BE EXTENDED TO ADULTS, AND THE COST OF FAILING TO DO SO

The argument that adults cannot be coerced by government endorsement of religious practices is deficient in many respects, not the least of which is the fact that courts have generally cited no supporting evidence when making this claim; the proposition is treated as if it is self-evident.²¹³ Concededly, adults, such as *Warnock*, are not likely to be indoctrinated by such prayers offered at governmental functions. As the *Tanford* court noted, adults may simply ignore religious remarks with which they disagree.²¹⁴ The argument could also be made that *Warnock* could avoid the prayers by leaving the room or even finding a new job. Yet, the Supreme Court has held that one need not surrender his constitutional rights in exchange for public employment,²¹⁵ similar to the way that Justices Kennedy and Stevens declared that students need not forgo their constitutional rights to attend graduation or a football game.²¹⁶ Ultimately, though, the argument is deficient in that it fails to see that such endorsement is inherently coercive, fosters religious divisiveness and sends the message that religious dissenters are outsiders and not equal members of their communities. Therefore school-sponsored prayers produce the very evils that, as the Supreme Court has repeatedly noted, the Establishment Clause was intended to prevent.²¹⁷

As James Madison knew from history, government endorsement of religion often ends in violence and persecution.²¹⁸ Unfortunately, this reality has not changed since Madison’s time.²¹⁹ In the aforementioned school prayer

211. *Id.* at 479–80.

212. *See generally* *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992).

213. *See* Deanna N. Pike, *Assuming Maturity Matters: The Limited Reach of the Establishment Clause at Public Universities*, 90 CORNELL L. REV. 1349, 1365–66 (2005) (“When such important constitutional guarantees are at stake, it is surprising that the Supreme Court has perpetuated this assumption without any meaningful discussion.”).

214. *See Tanford v. Brand*, 104 F.3d 982, 983–85 (7th Cir. 1997).

215. *See Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

216. *See Santa Fe*, 530 U.S. at 290; *Weisman*, 505 U.S. at 577.

217. *See supra* Part II.

218. *See* Madison, *supra* note 22, 4–7.

219. The 1844 “Bible Riots” of Philadelphia is an example. It was common for public schools to begin the day with Bible reading and the Lord’s Prayer. When Catholics requested

cases, those individuals who dared to challenge the school-endorsed prayers met tremendous resistance, and it was not only the children who suffered. Edward Schempp received harassing phone calls and letters, and his children were taunted at school.²²⁰ The plaintiffs in *Santa Fe* had to litigate the case anonymously due to fear of reprisals.²²¹ Even so, the district court noted that the school officials tried to ferret out their identities, which prompted the district court to threaten severe criminal and civil sanctions if the activity continued.²²²

Debbie Mason, who was an outspoken critic of the prayers in *Santa Fe*, received threatening phone calls.²²³ Her daughters were physically assaulted, and she and her family were ostracized from the community.²²⁴ In particular, the Chair of the School Board, John Couch, proclaimed to those in attendance at a board meeting that Debbie's children were not Christians.²²⁵ The fact that Debbie's children attended the First Baptist Church and that Couch personally knew Debbie and her family did not stop Couch from making the claim.²²⁶ The Masons also suffered economically. With Debbie's husband no longer able to find work, Debbie had to work for three years at a fast-food restaurant to make ends meet.²²⁷

Although religious dissenters must face potential threats and harassment when challenging the establishment of religion, they also must face being marginalized and singled out in their communities. Though the ostracism and marginalization may not be as grave as threats of violence, the injury is still very real. Case after case bears this out. For instance, Edward Schempp testified before the trial court in *Schempp* that he feared his children would be singled out and viewed as atheists or communists if he requested they be excused from the Bible readings.²²⁸ The Masons, who supported the plaintiffs in *Santa Fe*, bore the brunt of smears that claimed they were not Christians or, even worse, were devil worshippers.²²⁹ Perhaps the most intriguing example of how government establishment of religion encourages divisiveness and

that the local school board allow Catholic students to read their version of the Bible, conflict erupted. In response, Protestants burned down two churches. Three days of rioting ended with thirteen deaths. IRONS, *supra* note 16, at 20–21.

220. *Id.* at 29.

221. *Santa Fe*, 530 U.S. at 294–95 n.1.

222. *Id.*

223. IRONS, *supra* note 16, at 167.

224. *Id.* at 166–69.

225. *Id.* at 163.

226. *Id.* One of Debbie's daughters was even labeled a devil worshipper by her classmates. *Id.* at 140.

227. *Id.* at 169.

228. *Sch. Dist. v. Schempp*, 374 U.S. 203, 208–09 n.3 (1963).

229. IRONS, *supra* note 16, at 140.

further marginalizes minority groups involves John Couch. In an interview with Professor Peter Irons, Couch (the School Board Chair who had claimed the Mason daughters were not Christians) recalled that the prayer controversy was simply the product of “a couple of disgruntled parents . . . [who] were always complaining about something.”²³⁰ Furthermore, Couch’s analysis of why the Fifth Circuit ruled against him invokes themes of religion and race:

So we went to the Fifth Circuit in New Orleans, and Lisa Brown argued the case there. I knew we were kind of in trouble, because I looked at the makeup of the three judges. We had a conservative that Reagan had appointed, which I thought was good. We had another guy that I think Jimmy Carter or Clinton had appointed, he was a black judge, and I figured we were going to lose there. Then we had another guy that Nixon had appointed, but he was Jewish. And the comments around what you could or couldn’t say, invoking the name of Jesus Christ, you can kind of guess how he was going to vote.²³¹

Couch gives no descriptions of the Reagan appointee, other than to mention that he is a conservative, which Couch correlates with being “good.”²³² He does not identify the judge’s race, religion or gender. Yet, when he describes the second judge—a Carter or Clinton appointee—Couch throws in the fact that the judge is an ethnic minority, that the judge was black.²³³ And for the last judge, who apparently has some redeeming value as a Nixon appointee, Couch seems to lament that the judge was a religious minority, a Jew.²³⁴ The lesson is this: when government establishes religion, those who are opposed to the establishment are transformed into outsiders.

As the cases in this comment have shown, religious dissenters, even those who are adults, are in a precarious position when government establishes a preference for religion. Courts may argue that adults cannot be coerced, but it is doubtful that most people are willing to risk physical threats, harassment and ostracism that can accompany the choice to opt out of such government-sponsored religious exercises. First, although *Weisman* focused only on the coercive effect of peer pressure on elementary and secondary students,²³⁵ the reality is that adults are also susceptible to pressure to conform to societal and cultural norms. For instance, in his article, *Why I’m Against Pre-game Prayers*, evangelical Christian Gary Christenot recounts how—while stationed with the military in a region of Hawaii where “Christians . . . were in the very distinct

230. *Id.* at 173.

231. *Id.* at 177–78.

232. *Id.*

233. *Id.* Whether Couch meant that he expected this judge to rule against him because (a) he was black or (b) he was appointed by a Democratic president is debatable given the textual construction.

234. IRONS, *supra* note 16, at 178.

235. *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

minority” and where there was “a Shinto or Buddhist shrine on every corner”—he was forced to choose between following social conventions or his religious beliefs due to a simple prayer delivered before a football game he attended:

Coming from a fairly traditional Southern upbringing, I was not at all initially surprised when a voice came over the PA and asked everyone to rise for the invocation. I had been through this same ritual at many other high school events and thought nothing of it, so to our feet my wife and I stood, bowed our heads and prepared to partake of the prayer. But to our extreme dismay, the clergyman who took the microphone and began to pray was not a Protestant minister or a Catholic priest, but a Buddhist priest who proceeded to offer up prayers and intonations to god-head figures that our tradition held to be pagan. We were frozen in shock and incredulity! What to do? To continue to stand and observe this prayer would represent a betrayal of our own faith and imply the honoring of a pagan deity that was anathema to our beliefs.

To sit would be an act of extreme rudeness and disrespect in the eyes of our . . . hosts and neighbors, who value above all other things deference and respect in their social interactions.

. . .

The point is this: I am a professional, educated and responsible man who is strong in his faith and is quite comfortable debating the social and political issues of the day. Yet when placed in a setting where the majority culture proved hostile to my faith and beliefs, I became paralyzed with indecision and could not act decisively to defend and proclaim my own beliefs. I felt instantly ostracized and viewed myself as a foreigner in my own land.²³⁶

Second, while it may seem trivial that one who opposes school-sponsored prayers or other government endorsed religious activities is labeled a communist or atheist, those labels still evoke negative feelings from the American public. According to polls, fifty-three percent of Americans would not vote for an otherwise qualified presidential candidate if that person was an atheist.²³⁷ This percentage is higher than those who would not vote for a homosexual.²³⁸ A study released by the American Sociological Association even showed that Americans had greater antipathy for atheists than they had

236. Gary B. Christenot, *Why I'm Against Pre-game Prayers*, CHURCH & STATE (Oct. 2006), available at <http://www.au.org/media/church-and-state/archives/2006/10/why-irsquom-ag.html>.

237. Jeffrey M. Jones, *Some Americans Reluctant to Vote for Mormon, 72-Year-Old Presidential Candidates*, GALLUP, Feb. 20, 2007, <http://www.gallup.com/poll/26611/Some-Americans-Reluctant-Vote-Mormon-72YearOld-Presidential-Candidates.aspx>.

238. *Id.* Only forty-three percent of Americans would not vote for someone simply because he or she was gay. *Id.*

for Muslims, homosexuals, immigrants or other ethnic minorities.²³⁹ The study concluded that atheists are seen as being concerned only with themselves as opposed to the public good, and that atheists are responsible for the rise of immorality and decline of traditional values.²⁴⁰ Thus, school-sponsored prayers serve to incite and justify discrimination against those who are deemed to be outsiders to their communities. Nevertheless, as one scholar has noted, the problem for religious dissenters is that the greatest harm they generally suffer (i.e., ostracism and harassment by the community or other non-governmental actors) is not actionable under the Constitution.²⁴¹ Nor can they recover for their injuries under tort theory (e.g., a hostile work environment lawsuit against the school district) unless they meet the difficult task of proving that the school-sponsored prayers directly caused the injury, not just fostered the conditions for it.

Third, though the Eighth Circuit listed Warnock's contractual relationship with his school district as a reason he could not be coerced,²⁴² the court failed to consider that not all states have tenure.²⁴³ Therefore, challenging school-sponsored prayers that are favored by the majority carries with it the potential for non-renewal of a teacher's contract. Although federal law makes it illegal to discriminate on the basis of one's religion,²⁴⁴ it is often difficult to prove such discrimination is the reason for non-renewal, particularly where the state allows school districts to non-renew teacher contracts without giving any reason for non-renewal.

Lastly, the *Warnock* court seems to overlook the fact that an adult who challenges school-sponsored prayers and prevails legally may still lose in practice. Judicial rulings are not self-enforcing. Even after the Supreme Court's ruling in *Santa Fe*, the unconstitutional religious practices did not cease; they continued unabated.²⁴⁵ As Debbie Mason noted when asked about the continuing constitutional violations in *Santa Fe*: "What people forget is, the courts rule, Judge Kent ruled, the Fifth Circuit court ruled, the Supreme Court

239. Penny Edgell et al., *Atheists As "Other": Moral Boundaries and Cultural Membership in American Society*, 71 AM. SOC. REV. 2, 211-34 (Apr. 2006).

240. *Id.*

241. See FRANK S. RAVITCH, SCHOOL PRAYER AND DISCRIMINATION: THE CIVIL RIGHTS OF RELIGIOUS MINORITIES AND DISSENTERS 137-38 (1999).

242. *Warrock v. Archer*, 380 F.3d 1076, 1080 (8th Cir. 2004).

243. See, e.g., Kevin Lungwitz, *A Review of Teacher Contracts*, TEX. STATE TEACHERS ASSOC., <http://www.tsta.org/legal/current/contracts.shtml> (last visited Mar. 18, 2008). The Texas State Teachers Association notes that most teachers in Texas school districts are employed under term contracts for a set number of years, although a handful of districts offer "continuing contracts," which provide some due process protections for teachers who are dismissed. *Id.*

244. See 42 U.S.C. § 2000e-2(a)(1) (2000).

245. Irons, *supra* note 16, at 169.

ruled. . . . [T]hey can rule all they want, but when [the majority] break[s] the rules they don't do anything to them."²⁴⁶

In August 2007, while perusing the website for his former community's newspaper, this author stumbled across a message directed toward him in the community blog postings. The message was short but direct: "You got rid of the prayers that 99.9% of people wanted. At Robert E. Lee High School, we're glad you are gone." A trivial injury? Certainly. A petty insult? Perhaps. But it should serve as a reminder that, as James Madison noted, when the Establishment Clause is violated, even minor encroachments are but a step toward religious persecution.

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246. *Id.*

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