

## School Prayer and the Constitution: Silence is Golden

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# Comments

## SCHOOL PRAYER AND THE CONSTITUTION: SILENCE IS GOLDEN

### I. INTRODUCTION

The United States Supreme Court has demonstrated little tolerance for mandated prayer in the public schools.<sup>1</sup> During the past twenty-five years, the Court not only has held that a state cannot require prayers to be recited in the public schools;<sup>2</sup> it also has declared unconstitutional a state law providing that each public school day begin with a moment of silence for "meditation or voluntary prayer."<sup>3</sup>

Despite the Court's apparent desire to keep sectarian influence outside public school walls, there have been numerous attempts to return organized religious activity to the public school classroom. Proponents of school prayer have proposed in Congress hundreds of constitutional amendments to permit voluntary prayer in the public schools.<sup>4</sup> They also have introduced in Congress bills to curtail

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1. The first amendment commands in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I. The religion clauses are referred to respectively as the establishment clause and the free exercise clause. Silent moment laws raise questions only under the establishment clause. See, e.g., *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

2. See *Abington School Dist. v. Schempp*, 374 U.S. 203, 205 (1963) (declaring daily Bible readings violative of establishment clause); *Engel*, 370 U.S. at 424 (holding oral recitation of prayer composed by school board unconstitutional).

3. See *Wallace v. Jaffree*, 472 U.S. 38, 56-61 (1985) (striking down moment-of-silence statute because of express legislative intent to return prayer to public schools) (emphasis added).

4. CONGRESSIONAL RESEARCH SERV., *RELIGIOUS ACTIVITIES IN THE PUBLIC SCHOOLS AND THE FIRST AMENDMENT: JUDICIAL DECISIONS AND THE CONGRESSIONAL RESPONSE*, Rep. No. 81-34A, at 75 (1981). President Reagan unsuccessfully proposed an amendment which read: "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or any State to participate in prayer." President's Message to the Congress Transmitting a Proposed Constitutional Amendment on Prayer in School, 1 PUB. PAPERS 647, 648 (May 17, 1982).

The President's amendment would have permitted government-sponsored, teacher-led recitation of prayer by public school children. *Contra Engel*, 370 U.S. at 425 (establishment clause at very least means that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government"); see *Schempp*, 374 U.S. at 221 (quoting *Engel*, 370 U.S. at 425).

the federal court's jurisdiction to hear school prayer cases.<sup>5</sup> The state and local governments, however, have led the most visible and controversial effort to return prayer to the public school classroom. Many state legislatures and local school boards defend daily moments of silence as a means of accommodating religion in the public schools while remaining within constitutional bounds.

Twenty-one states, including Maryland, permit or require students in public school classrooms to observe a moment of silence.<sup>6</sup> A few states require students to spend time in silent meditation.<sup>7</sup> But the typical statute mandates silence at the beginning of each school day for meditation, reflection or prayer.<sup>8</sup>

Those who support a silent moment assert that it does not violate the principle of separation of church and state. A silent moment gives public school children the opportunity to pray, but neither forces them to pray nor interferes with those who wish to contemplate secular matters.<sup>9</sup> The Supreme Court struck down one moment-of-silence statute, enacted "for meditation or voluntary prayer,"<sup>10</sup> but has not ruled on the validity of other types of silence

5. See, e.g., *Prayer in Public Schools and Buildings—Federal Court Jurisdiction: Hearings on S. 450 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. (1980) [hereinafter Helms Hearings].

6. See ALA. CODE § 16-1-20 (1987); ARIZ. REV. STAT. ANN. § 15-522 (1984); ARK. STAT. ANN. § 6-16-119 (1987); CONN. GEN. STAT. § 10-16a (1986); DEL. CODE ANN. tit. 14, § 4101 (1981 & Supp. 1988); FLA. STAT. § 233.062 (1989); GA. CODE ANN. § 20-2-1050 (1987); ILL. ANN. STAT., ch. 122, para. 771 (Smith-Hurd 1961 & Supp. 1988); IND. CODE ANN. § 20-10.1-7-11 (Burns 1985); KAN. STAT. ANN. § 72.5308a (1985); ME. REV. STAT. ANN. tit. 20-A, § 4805 (1983); MD. EDUC. CODE ANN. § 7-104 (1989); MASS. GEN. LAWS ANN. ch. 71, § 1a (West 1982 & Supp. 1989); MICH. COMP. LAWS ANN. § 380.1565 (West 1988); N.Y. EDUC. LAW § 3029-a (McKinney 1981); N.D. CENT. CODE § 15-47-30.1 (1981); OHIO REV. CODE ANN. § 3313.60.1 (Anderson 1985); PA. STAT. ANN. tit. 24, § 15-1516.1 (Purdon Supp. 1988); R.I. GEN. LAWS § 16-12-3.1 (1988); VA. CODE ANN. § 22.1-203 (1985); W. VA. CONST. art. III, § 15-a; see also Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U. L. REV. 364, 407-08 (1983) (chart comparing 18 of these statutes).

7. See, e.g., ARIZ. REV. STAT. ANN. § 15-522 (1984); CONN. GEN. STAT. § 10-16a (1986); R.I. GEN. LAWS § 16-12-3.1 (1988).

8. See, e.g., ARK. STAT. ANN. § 6-16-119 (1987); GA. CODE ANN. § 20-2-1050 (1987); ILL. ANN. STAT. ch. 122, para. 771 (Smith-Hurd 1961 & Supp. 1988); IND. CODE ANN. § 20-10.1-7-11 (Burns 1985); KAN. STAT. ANN. § 72-5308a (1985); PA. STAT. ANN. tit. 24, § 15-1516.1 (Purdon Supp. 1988).

9. See, e.g., Helms Hearings, *supra* note 6, at 509-10 (statement of Rep. Collins); *id.* at 517-19 (testimony of Rep. Holt).

10. In *Wallace v. Jaffree*, 472 U.S. 38, 61 (1985), the Court declared unconstitutional an Alabama statute authorizing a period of silence "for meditation or voluntary prayer." The Court found that the legislative history underlying the statute's enactment demonstrated a blatant intent to return prayer to the public school classroom. *Id.* at 60. Because most silence statutes are not as rich in legislative history—some states do not even record it—many commentators have criticized *Jaffree* as providing little guidance for future

statutes, such as those creating a pure moment of silence.<sup>11</sup> Lower federal courts are divided on the constitutionality of pure silence statutes, although most courts have invalidated them.<sup>12</sup>

This comment addresses whether pure moment-of-silence statutes conform with the establishment clause. Part I reviews the history behind the enactment of the establishment clause and examines the Supreme Court's approach to establishment clause cases. Part II discusses Supreme Court cases involving prayer in the public schools, and Part III analyzes the constitutionality of silent moment laws, particularly the State of Maryland's silent moment statute. Although the Supreme Court has ruled that some silent moment statutes are unconstitutional, this comment concludes that the Court would uphold *pure* silence statutes.

## II. THE ESTABLISHMENT CLAUSE

### A. *The History Behind its Enactment*

Many colonists departed England for religious freedom in America because of the promulgation of governmentally composed

school prayer cases. See, e.g., Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U.L. REV. 1, 58 (1986) (stating that *Wallace* was decided on the "narrowest possible ground"); Comment, *Constitutional Law—First Amendment—Moment of Silence in Public Schools*, 17 RUTGERS L.J. 737, 738 (1986) (concluding that much remains to be clarified in moment of silence cases); Note, *Wallace v. Jaffree: Which Statutes Authorizing "Moments of Silence" in Public Schools are Constitutional?*, 30 ST. LOUIS U.L.J. 1243, 1244 (1986) (failing to set out criteria for future moment-of-silence cases). But see *infra* notes 67-84 and accompanying text (reasoning that the *Jaffree* holding was based on alternative, more concrete grounds).

11. Pure moment-of-silence statutes establish a silent moment without specifying in any way that the moment is for prayer. An example of a pure silence statute is Rhode Island's, which states in pertinent part:

At the opening of every school day in all grades in all public schools the teacher in charge of the room in which each class is held shall announce that a period of silence not to exceed one minute in duration shall be observed for meditation, and during this period silence shall be maintained and no activities engaged in.

R.I. GEN. LAWS § 16-12-3.1 (1988). Even a silence statute that is pure on its face could be found unconstitutional because of its application or its legislative history. See *infra* note 105. The Court strongly indicated in dicta that it would uphold pure silent moment statutes. See *infra* notes 67-84 and accompanying text.

12. Compare *Gaines v. Anderson*, 421 F. Supp. 337, 340 (D. Mass. 1976) (upholding statute "for meditation or prayer") with *May v. Cooperman*, 780 F.2d 240, 253 (3d Cir. 1985) (striking down pure statute as lacking secular purpose); *Karen B. v. Treen*, 653 F.2d 897, 900 (5th Cir. 1981) (invalidating statute that permitted voluntary oral prayer), *aff'd mem.*, 455 U.S. 913 (1982); *Duffy v. Las Cruces Pub. Schools*, 557 F. Supp. 1013, 1018-19 (D.N.M. 1983) (declaring statute for "contemplation, meditation or prayer" unconstitutional); and *Beck v. McElrath*, 548 F. Supp. 1161, 1166 (M.D. Tenn. 1982) (invalidating prayer statute).

prayers.<sup>13</sup> In England the *Book of Common Prayer* (the *Book*) detailed the accepted form and content of prayer and of other religious practices in the established Church of England.<sup>14</sup> The *Book* was the source of constant controversy because its contents frequently changed with the views of each new ruler.<sup>15</sup> While powerful groups in the mainstream of the Church of England sought to influence the *Book's* contents, groups without political influence left the religious melee in England for religious freedom in America.

Ironically, several groups opposing religious oppression in England gained control of colonial governments in America and passed laws designating their own religion as the official sect of their respective colonies.<sup>16</sup> During the Revolutionary War period, colonists established churches in the majority of the thirteen colonies and favored religions in most other colonies.<sup>17</sup> But opposition to the governmental establishment of religion followed the Revolution. For example, James Madison and Thomas Jefferson led those opposed to the established Episcopal Church in Virginia to enact the Virginia Bill for Religious Liberty.<sup>18</sup> The Bill required the gov-

13. See, e.g., *Engel v. Vitale*, 370 U.S. 421, 425-26, 429 (1947) (centuries immediately before and contemporaneous with colonization of America were filled with "anguish, hardship and bitter strife," generated by struggle between religious sects determined to obtain exclusive governmental approval).

14. The *BOOK OF COMMON PRAYER* (the *Book*) was approved by Acts of Parliament and created under the direction of the government in 1548, 2 & 3 Edw. 4, c. 1, entitled "An Act for Uniformity of Service and Administration of the Sacraments throughout the Realm," and in 1549, 3 & 4 Edw. 4, c. 10, entitled "An Act for the abolishing and putting away of divers books and images." For a complete description of the *Book's* provisions and history, see L. PULLAN, *THE HISTORY OF THE BOOK OF COMMON PRAYER* (1900).

15. See L. PULLAN, *supra* note 14, at vii-xvi.

16. For a description of the types of religious laws enacted by early New England settlers, see V. PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT* (1930).

17. The Church of England was the established church in Virginia, Carolina, Maryland, New Jersey, and Georgia. S. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* 75, 116, 386, 405-06, 420-21 (1902). The Congregationalist Church officially was established in Connecticut, Massachusetts, and New Hampshire. In New York and New Jersey the Church of England received substantial support. *Id.* at 340, 405. In Delaware and Pennsylvania all Christian sects received fairly equal treatment, but Catholics were discriminated against in some respects. *Id.* at 47-48.

18. Act of Oct. 17, 1785, ch. 35, 1785 Va. Acts 84 (entitled "An act for establishing religious freedom"). The preamble to the Act stated in part:

Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . .

*Id.* The statute itself stated "[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of

ernment to treat all religions equally. Other states passed similar legislation thereafter.<sup>19</sup>

By the time the Bill of Rights was adopted, many Americans knew that "one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services."<sup>20</sup> Therefore, the founding fathers intended the religion clauses of the first amendment to curtail the government's power to interfere with a person's freedom to believe and to worship according to the dictates of his or her conscience.<sup>21</sup> The first amendment's proscription of governmental interference with religion became applicable to the states when the Supreme Court determined that the fourteenth amendment prohibited a state from depriving any person of liberty without due process of law.<sup>22</sup>

The first amendment prohibits both state and federal governments from establishing an official church or religion. But the amendment forbids more than just an established Church of America or Church of Maryland; it forbids all laws "respecting an establishment of religion."<sup>23</sup> The Supreme Court has interpreted the clause to mean: "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."<sup>24</sup> Therefore, the

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his religious opinions or belief . . ." *Id.* at 86. For an account of the background of this law, see S. COBB, *supra* note 17, at 74-115, 482-99.

19. See S. COBB, *supra* note 17, at 482-509.

20. *Engel v. Vitale*, 370 U.S. 421, 429 (1962).

21. *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985). One constitutional scholar wrote: "The manifest object of the men who framed the institutions of the country, was to have a *State without religion*, and a *Church without politics* . . . . As the Church takes no note of men's political differences, so the State looks with equal eye on all modes of religious faith." J. BLACK, *Religious Liberty*, in *ESSAYS AND SPEECHES OF JEREMIAH S. BLACK* 53 (C. Black ed. 1886) (emphasis in original).

22. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court stated:

The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.

*Id.* at 303.

23. U.S. CONST. amend. I (emphasis added).

24. *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947). See also *Abington School Dist. v. Schempp*, 374 U.S. 203, 216 (1963) (rejecting "unequivocally" contentions that establishment clause forbids only government preference for one religion over another); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (stating that neither state nor federal

government may not *favor* a specific religious practice or denomination; indeed, government is forbidden to favor *all* religions.

### B. Establishment Clause Analysis of Governmental Action

1. *A Wall of Separation Between Church and State.*—The Supreme Court considered its first case under the establishment clause in 1947. In *Everson v. Board of Education*<sup>25</sup> the Court recognized that “in the light of its history and the evils it was designed forever to suppress,”<sup>26</sup> the establishment clause means “at least” that neither a state nor the federal government “can pass laws which aid one religion, aid all religions, or prefer one religion over another.”<sup>27</sup> The Court stated that there must be a “‘wall of separation between church and State’”<sup>28</sup> and that government must pursue a course of

government can pass laws “or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs”) (footnotes omitted); *McGowan v. Maryland*, 366 U.S. 420, 441-42 (1961) (noting that the first amendment “did not simply bar a congressional enactment *establishing a church*; it forbade all laws *respecting an establishment of religion*. Thus, this Court has given the Amendment a ‘broad interpretation . . . in the light of its history and the evils it was designed forever to suppress . . .’)” (quoting *Everson*, 330 U.S. at 14-15) (emphasis added by *McGowan* Court).

25. 330 U.S. 1 (1947). The Court assessed the constitutionality of a statute authorizing monetary reimbursement to parents transporting their children to and from school on buses operated by the public transportation system. *Id.* at 3. A portion of the reimbursement covered children transported to Catholic parochial schools. *Id.*

26. *Id.* at 14-15. *See id.* at 8-16 (history of establishment clause); *supra* notes 13-24 and accompanying text.

27. 330 U.S. at 15. *See supra* note 24 and accompanying text. The Court found the reimbursement program not an establishment of religion because the program was implemented pursuant to the state’s power to legislate for the public welfare. The statute was enacted to enable children, irrespective of their religious convictions, to travel to and from school safely. *Everson*, 330 U.S. at 18. Recognizing an incidental benefit to children attending parochial schools, the Court nonetheless refused to find the benefit a violation of the establishment clause, comparing it to the benefit the children enjoy from state-salaried policemen who patrol the streets during school hours to protect *all* children from traffic. *Id.* at 17.

28. *Id.* at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (Mormon challenge under free exercise clause to federal polygamy law)). The wall of separation language originally appeared in a letter from Thomas Jefferson to the Danbury Baptist Association. *See* 8 THE WRITINGS OF THOMAS JEFFERSON 113 (H. Washington ed. 1879).

While it is likely that the wall of separation theory was an interpretation of the establishment clause intended to guide courts in future cases, Justices even have dissented over this interpretation. *See, e.g.,* *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) (wall of separation theory “based on bad history” and “should be frankly and explicitly abandoned”); *see also id.* at 91-106 (examination of history indicating absence of historical basis for theory of rigid separation between church and state). *But see* Loewy, *Rethinking Government Neutrality towards Religion under the Establishment Clause: The Untapped Potential of Justice O’Connor’s Insight*, 64 N.C.L. REV. 1049, 1053 n.35 (1986) (finding Justice Rehnquist’s historical analysis unpersuasive).

neutrality toward religion.<sup>29</sup>

2. *Historical Analysis.*—After *Everson* the Court tried to clarify which state sponsored activities are religious in nature and thereby violative of the establishment clause. The Court's analysis focused on the history and purpose of the establishment clause.<sup>30</sup> In *Engel v. Vitale*,<sup>31</sup> for example, the Court invalidated a prayer that the State of New York composed for recitation in the public schools.<sup>32</sup> To assess the constitutionality of the state's prayer under the establishment clause, the Court examined the history of the clause,<sup>33</sup> noting that the governmental practice of composing prayers and compelling citizens to recite them was one of the reasons colonists left England for America.<sup>34</sup> A year later, however, in *Abington School District v. Schempp*,<sup>35</sup> the Court began to displace the tenuous historical analysis with a more concrete test.<sup>36</sup>

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29. *Everson*, 330 U.S. at 18 (first amendment "requires the state to be a neutral in its relation with groups of religious believers and non-believers"). The doctrine of neutrality has been reiterated and refined by the Court in a number of cases. See, e.g., *Jaffree*, 472 U.S. at 60 (course of "complete neutrality" toward religion); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973) (establishment clause compels government to "pursue a course of 'neutrality' toward religion"); *Abington School Dist. v. Schempp*, 374 U.S. 203, 226 (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment."); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) ("first and most immediate purpose [of the establishment clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion"); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (no government "can constitutionally force a person 'to profess a belief or disbelief in any religion'"); *Zorach v. Clauson*, 343 U.S. 306, 312 (1952) (separation between church and state must be "complete and unequivocal"); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring) ("[s]eparation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally").

The Supreme Court's interpretation of the establishment clause was influenced in part by James Madison's argument that even minor state promotions of religion parallel the state sponsored religious persecutions acknowledged and feared by many colonists. In *Schempp* the Court noted: "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'" 374 U.S. at 225 (citation omitted).

30. The Court applied this strictly historical analysis in *Engel*, 370 U.S. at 425-36, and *Zorach*, 343 U.S. at 312-14.

31. 370 U.S. 421 (1962).

32. *Id.* at 424. New York's prayer is set forth *infra* note 58.

33. See *Engel*, 370 U.S. at 425-35.

34. *Id.* at 426-27. See *supra* note 13 and accompanying text.

35. 374 U.S. 203 (1963).

36. Justice Brennan, concurring in *Schempp*, advanced persuasive arguments for abandoning the historical approach to deciding establishment clause cases. Brennan doubted that insight into the history of and intent behind the enactment of the first



3. *The Lemon Test*.—Recognizing this historical command, the *Schempp* Court devised a test to protect the neutrality between church and state. To withstand establishment clause strictures, a governmental activity must have a secular legislative purpose and a primary effect that neither advances nor inhibits religion.<sup>37</sup> In *Lemon v. Kurtzman*<sup>38</sup> the Court reformulated the *Schempp* test into a three-prong test;<sup>39</sup> a governmental activity must satisfy all three prongs to be found constitutional.<sup>40</sup> First, the activity must have a secular legislative purpose;<sup>41</sup> second, it must have a principal or primary effect that neither advances nor inhibits religion;<sup>42</sup> and third, the activity must not foster an excessive government entanglement with religion.<sup>43</sup> Although the seemingly straightforward *Lemon* test has been criticized heavily as an unworkable fiction,<sup>44</sup> the Supreme

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amendment could resolve every concrete problem arising under the establishment clause. *Id.* at 234 (Brennan, J., concurring). First, he argued that recorded history is ambiguous and statements to support conflicting interpretations of the establishment clause are abundant. *Id.* at 237-38. Second, with respect to religion in the public schools, Brennan recognized that the structure of American education has changed significantly since the first amendment was adopted. *Id.* at 238. Because education originally was in private sectarian hands, the fact that devotional exercises in the classroom did not meet with criticism is inapposite to evaluating the same exercises in today's public schools. *Id.* at 238-39. Brennan also emphasized that modern America is more religiously diverse than was the America of our forefathers. *Id.* at 240. Thus, practices acceptable then may be objectionable now. *Id.* at 240-41. Finally, Justice Brennan stressed that the American experiment in public education has been guided in a large part by our increasing religious diversity: "public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions." *Id.* at 241-42 (emphasis in original).

37. *Id.* at 222. The *Schempp* test was an exclusive test—if a court found either no secular legislative purpose or a primary effect advancing or inhibiting religion, then the government practice under scrutiny would be found unconstitutional. *Id.*

Critics say that this test was an inaccurate reformulation of the earlier principle that if the primary effect or purpose behind the enactment of a statute is the advancement or inhibition of religion, it violates the establishment clause. See *infra* notes 100-101 and accompanying text.

38. 403 U.S. 602 (1971).

39. *Id.* at 612-13.

40. *Id.*

41. *Id.* at 612. This prong has caused controversy among Justices and commentators alike. See *infra* note 44.

42. *Lemon*, 403 U.S. at 612.

43. *Id.* at 613. See also *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (origin of third prong of *Lemon* test).

44. Justice O'Connor proposed to refine the purpose and effect prongs of the *Lemon* test in *Lynch v. Donnelly*, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring). Justice O'Connor's endorsement test is based on the premise that one principle behind the establishment clause is that government may not act to endorse or disapprove of religion. *Id.* at 687-88. Believing that the *Lemon* test does not account for institutional en-

Court continues to apply its three prongs when analyzing possible establishment clause violations.<sup>45</sup>

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dorsement or disapproval of religion, Justice O'Connor submitted that the proper inquiry under the purpose prong is whether government "intends to convey a message of endorsement or disapproval of religion." *Id.* at 691. She also stated that the effect prong should not focus on whether a government practice *in fact* advances or inhibits religion, but rather should focus on whether the government practice has "the effect of communicating a message of government endorsement or disapproval of religion." *Id.* at 691-92. Thus under the endorsement test, a court must examine whether government's purpose is to endorse religion (subjective test) and whether its actions actually convey a message of endorsement (objective test). *Id.* at 690.

In *Wallace v. Jaffree*, 472 U.S. 38 (1985), Justice O'Connor again proposed the endorsement test, noting that it "does not preclude government from . . . taking religion into account in making law and policy. [But] [i]t does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Id.* at 70 (O'Connor, J., concurring).

Justice O'Connor's insight into the purpose prong of the *Lemon* test was approved and the majority of the Court expressly adopted it in *Jaffree*: "In applying the purpose test, it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'" *Id.* at 56 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)). In a footnote the Court, however, quoted Justice O'Connor's complete test which refined the purpose prong and the effect prong of the *Lemon* test. *See id.* at 56 n.42. The Court has not adopted the endorsement inquiry under the effect prong, but it is logical to expect that it will do so.

Then Chief Justice Burger also criticized the *Lemon* test. He believed that the *Lemon* test evidenced the Court's "naive preoccupation with an easy, bright-line approach for addressing constitutional issues." *Id.* at 89 (Burger, C.J., dissenting). Justice Rehnquist believed the *Lemon* test, like the wall of separation theory, was without historical foundation and inadequate for deciding establishment clause cases. *Id.* at 110 (Rehnquist, J., dissenting); *see supra* note 28.

Various commentators have criticized the *Lemon* test, in many instances proposing new tests purportedly easier to apply. *See, e.g.,* Dellinger, *The Sound of Silence: An Epistle on Prayer and the Constitution*, 95 YALE L.J. 1631, 1638 (1986) (secular purpose prong is an inaccurate reformulation of principle that if purpose of enactment is advancement or disapproval of religion, it violates establishment clause); Loewy, *supra* note 28, at 1051 (endorsement test clarifies establishment clause analysis); Note, *Wallace v. Jaffree and the Need to Reform Establishment Clause Analysis*, 35 CATH. U.L. REV. 573, 591 (1986) [hereinafter Note, *Need to Reform*] (proposing that the test be "whether the government's action has the direct or indirect effect of influencing or coercing an individual's religious beliefs"); Note, *supra* note 6, at 386 (proposing the following test: "If an activity would be or generally is regarded as religious, then it should be considered an unconstitutional establishment of religion") (emphasis omitted); Note, *supra* note 10, at 1254 (proposing the following test: "All moment-of-silence statutes are constitutional unless they clearly establish governmental preference of one religious practice over another") (emphasis omitted). This comment does not profess to guide the Supreme Court in establishment clause cases but instead recognizes the gradual improvement of the *Lemon* test because of refinements such as Justice O'Connor's endorsement inquiry.

45. The Court sometimes returns to an historical analysis. In *Marsh v. Chambers*, 463 U.S. 783 (1983), for example, the Court declared constitutional the daily invocation in the Nebraska state legislature. *Id.* at 795. The Court recognized the traditional nature of this practice in the federal and state legislatures since the Constitution was adopted and the framers of the first amendment clearly did not intend to prohibit this.

## III. THE SCHOOL PRAYER CASES

Despite the numerous cases before the Supreme Court implicating the establishment clause, those involving public schools have been relatively rare. The Court has reviewed public school activity under the establishment clause seven times,<sup>46</sup> and it has invalidated the activity under scrutiny in all but one of these cases.<sup>47</sup>

These decisions demonstrate that the Court has constructed an impermeable wall of separation between church and state when the government's religious activity under challenge involves public education.<sup>48</sup> The Court has applied stricter standards of separation to

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*Id.* at 786-91. See also *Lynch*, 465 U.S. at 672-85 (applying both historical analysis and *Lemon* test).

46. The seven cases are: *Wallace v. Jaffree*, 472 U.S. 38 (1985) (moment-of-silence statute "for meditation or voluntary prayer"); *Stone v. Graham*, 449 U.S. 39 (1980) (posting of the ten commandments in public school classrooms); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (statute prohibiting teaching of Darwinian theory of evolution); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (statutes requiring recitation of Bible verses and Lord's Prayer); *Engel v. Vitale*, 370 U.S. 421 (1962) (state-composed prayer for recitation in public school classrooms); *Zorach v. Clauson*, 343 U.S. 306 (1952) (released time program for off-campus religious education); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (released time program for on-campus religious instruction). In *Karcher v. May*, 108 S. Ct. 388 (1987), the Court refused to decide the constitutionality of a pure moment-of-silence statute because of a lack of jurisdiction. *Id.* at 395.

47. In *Zorach* the Court upheld a released time program providing for the dismissal of public school students who received religious instruction at religious centers located off public school property. 343 U.S. at 315. The Court stated that mere accommodation, as opposed to active promotion, of religious activities is acceptable in light of the history of the establishment clause. *Id.* It determined that it "would have to press the concept of separation of Church and State to [the extreme] to condemn the [released time program] on constitutional grounds." *Id.* at 313.

In *McCollum* the Court invalidated a different released time program in which the children received religious education on school property. 333 U.S. at 231. Although the religious instructors were privately employed—so that no public funds were expended—the Court found that the program presented "powerful elements of inherent pressure by the school system in the interest of religious sects," and so violated the establishment clause. *Id.* at 227. See also *Engel*, 370 U.S. at 431 ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.").

48. See *Schempp*, 374 U.S. at 230 (Brennan, J., concurring) ("The Court's historic duty to expound the meaning of the Constitution has encountered few issues more intricate or more demanding than that of the relationship between religion and the public schools.").

Activities with a religious aspect have not been excluded entirely from the public school classroom. The Court has approved the objective study of the Bible or religion as part of a secular program of education. *Id.* at 225. The Court also would allow the recitation of the Declaration of Independence, which contains references to God, and the Pledge of Allegiance, which contains a profession of faith in a Supreme Being. *Engel*, 370 U.S. at 435 n.21. The Court views these activities as educational, patriotic or cere-

the public schools because of the unique role of public education in American society. First, the Court considers public schools the "symbol of our democracy"<sup>49</sup>—where children can be trained in an atmosphere free from religious influence—in which the state must not manifest a preference for a particular sect or religious practice.<sup>50</sup> Second, the state must not even *appear* to show religious preferences because school-age children are vulnerable to such policies. These children are vulnerable because they are susceptible to the influence of teachers and peers<sup>51</sup> and because they are subject to compulsory attendance requirements.<sup>52</sup> Third, religious beliefs

monial which bear no resemblance to obviously religious exercises such as recited prayer. *Id.*

49. *McCullum*, 333 U.S. at 231. See Note, *supra* note 6, at 379 (public schools are the "breeding ground of democracy").

50. Note, *supra* note 6, at 379. See *McCullum*, 333 U.S. at 216-17 (public schools must "keep scrupulously free from entanglement in the strife of [religious] sects"); *Schempp*, 374 U.S. at 241-42 (Brennan, J., concurring) ("It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions.") (emphasis in original).

51. Note, *supra* note 6, at 379. In *Brandon v. Board of Educ. of Guilderland Cent. School Dist.*, 635 F.2d 971, 973 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), for example, the Second Circuit held that a student prayer group could not hold communal prayer meetings on school property before school commenced. The court noted:

Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit.

*Id.* at 978. In *Collins v. Chandler Unified School Dist.*, 644 F.2d 759 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981), the Ninth Circuit relied on *Brandon* to hold unconstitutional a student council's religious exercises held prior to school assemblies. *Id.* at 762-63. The voluntary nature of the participation did not sway the court. It found that students were forced to choose between listening to prayer or not attending an important school function, believing it "difficult to conceive how this choice would not coerce a student wishing to be part of the social mainstream and, thus, advance one group's religious beliefs." *Id.* at 762. See also *Duffy v. Las Cruces Pub. Schools*, 557 F. Supp. 1013, 1016 (D.N.M. 1983) (expert testimony that "children are extremely impressionable and easily influenced . . . [;] [t]hey exhibit a tendency to conform with each other in dress and behavior, and it is psychologically disturbing for a child to be different from his peers"); *cf. Widmar v. Vincent*, 454 U.S. 263, 274 n.14, 277 (1981) (Court invalidated university regulation prohibiting use of university facilities for religious purposes, noting that university students are young adults, not as impressionable as younger children).

52. Compulsory attendance brings the students within the state's coercive powers. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 72 (1985) (O'Connor, J., concurring); *Abington School Dist. v. Schempp*, 374 U.S. 203, 223 (1963); *Engel v. Vitale*, 370 U.S. 421, 431 (1962); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 212 (1948); *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038, 1046 (5th Cir. 1982).

often are the heart of a person's identity;<sup>53</sup> it is the parent's role to guide a child's religious maturation<sup>54</sup> free from interference by the state.<sup>55</sup> Finally, conducting religious activities in the public schools may cause the kind of conflict among the sects that the establishment clause was intended to preclude.<sup>56</sup>

#### A. *Engel v. Vitale*

In *Engel v. Vitale*<sup>57</sup> the Supreme Court declared unconstitutional a school board requirement that each public school class begin every school day with the recitation of a prayer composed by the New York State Board of Regents.<sup>58</sup> Justice Black, writing for the Court, stated that the establishment clause "must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."<sup>59</sup>

#### B. *Abington School District v. Schempp*

In *Abington School District v. Schempp*<sup>60</sup> the Court considered the constitutionality of religious exercises chosen by state government officials. In particular, the challenge involved the Pennsylvania and

53. Note, *supra* note 6, at 379.

54. See, e.g., *Schempp*, 374 U.S. at 226 ("The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind."); *id.* at 273-74 (Brennan, J., concurring) ("Religious teaching in our homes, Sunday schools, churches, by the good mothers, fathers, and ministers . . . is far preferable to compulsory teaching of religion by the state. The spirit of . . . [the Constitution] from the beginning . . . [has] been to leave religious instruction to the discretion of parents.") (quoting D. BOLES, *THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS* 238 (1961)).

55. See *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972).

56. Note, *supra* note 6, at 379. For an account of the historical controversy over religion in the American public school system, see *Schempp*, 374 U.S. at 267-78 (Brennan, J., concurring).

57. 370 U.S. 421 (1962).

58. The prayer read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422. Justice Brennan thought the Regent's prayer not only unconstitutional but also "rather bland." *Abington School Dist. v. Schempp*, 374 U.S. 203, 267 (1963) (Brennan, J., concurring).

The Board of Regents recommended the prayer as part of their "Statement on Moral and Spiritual Training in the Schools," saying: "We believe that this Statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program." *Engel*, 370 U.S. at 423.

59. *Engel*, 370 U.S. at 425. The fact that the Regent's prayer was nondenominational and voluntary—a reluctant child could remain silent or leave the room—did not free it from establishment clause violations. *Id.* at 430.

60. 374 U.S. 203 (1963).

Maryland legislatures' requirement that every school conduct daily Bible readings.<sup>61</sup>

After reviewing the Court's prior decisions under the establishment clause<sup>62</sup> and reaffirming its adherence to the doctrine of government neutrality toward religion,<sup>63</sup> Justice Clark set forth a two-part test for determining whether a governmental activity violates the establishment clause: "If either [the purpose or the primary effect of the enactment] is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. . . . [T]here must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."<sup>64</sup> The Court found that the programs in both states were unconstitutional because of their religious character.<sup>65</sup>

### C. *Wallace v. Jaffree*

After *Engel* and *Schempp*, many legal commentators opined that school officials could reserve, without constitutional infirmity, a designated moment of silence in which students may choose to pray silently.<sup>66</sup> In *Wallace v. Jaffree*<sup>67</sup> the Court considered for the first

61. The Pennsylvania statute provided: "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, . . . upon the written request of his parent or guardian." PA. STAT. ANN. tit. 24, § 15-1516 (Purdon 1962). The defendant school district added the requirement that the readings be followed by the recitation of the Lord's Prayer. *Schempp*, 374 U.S. at 208.

In Maryland the Board of School Commissioners of Baltimore City adopted a rule providing for opening exercises in the city's public schools consisting primarily of the "reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer." *Id.* at 211. By the time the Supreme Court heard the case the rule had been amended to permit children to be excused from participating in or attending the opening exercises upon the written request of a parent or guardian. *Id.* at 211-12 n.4.

62. *See id.* at 217-22.

63. *Id.* at 222 ("wholesome" neutrality).

64. *Id.* The *Schempp* test became the first two prongs of the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *see supra* text accompanying notes 40-42.

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

66. *See, e.g.,* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-5, at 1169 n.4 (1988); Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 371 (1963); Dellinger, *supra* note 44, at 1632; Fordham, *The Implications of the Supreme Court Decisions Dealing with Religious Practices in the Public Schools*, 6 J. CHURCH & STATE 44, 55-56 (1964); Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031, 1041 (1963); Laycock, *supra* note 10, at 3; Stone, *In Opposition to the School Prayer Amendment*, 50 U. CHI. L. REV. 823, 844 (1983); *cf.* Loewy, *supra* note 28, at 1066 (mention of "voluntary prayer" does not necessarily render statute unconstitutional); Comment, *Constitutional Law—Religious Exercises and the Public Schools*, 20 ARK. L. REV. 320, 352-53 (1967) [hereinafter Comment, *Religious Exercises and the Public Schools*] (all silent moment legislation may be constitutionally permissible); Note, *Need to Reform*, *supra* note

time the constitutionality of a moment-of-silence statute. Although the Court invalidated a statute authorizing a period of silence "for meditation or voluntary prayer," the majority implied that a pure silent moment statute would not violate the establishment clause.<sup>68</sup>

Originally, three separate Alabama statutes were challenged in *Jaffree*. The first statute provided that a minute of silence would be observed "for meditation."<sup>69</sup> The district court upheld this statute,<sup>70</sup> and the plaintiffs did not challenge it on appeal. The second statute authorized teachers to lead all "willing students" in a statutorily prescribed prayer.<sup>71</sup> In an earlier decision, the Supreme Court upheld the lower court's decision to invalidate this statute,<sup>72</sup> thereby reaffirming its decisions in *Engel* and *Schempp*. A third statute permitted a period of silence "for meditation or voluntary prayer."<sup>73</sup> It was this latter statute that the *Jaffree* Court considered

44, at 592 (school prayer statutes not unconstitutional unless coercive); Comment, *supra* note 10, at 759 (constitutionality of school prayer statutes must be decided on case-by-case basis); Note, *supra* note 10, at 1256 (mention of "voluntary prayer" constitutional). But see Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 HARV. L. REV. 1874, 1893 (1983) [hereinafter Note, *Unconstitutionality of State Statutes*] (all silent moment legislation unconstitutional); Note, *supra* note 6, at 394 (same).

67. 472 U.S. 38 (1985).

68. *Id.* at 59.

69. The 1978 meditation statute read:

At the commencement of the first class each day in the first through the sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in.

ALA. CODE § 16-1-20 (1987).

70. *Jaffree v. James*, 544 F. Supp. 727, 732 (S.D. Ala. 1982) ("it is a statute which prescribes nothing more than a child in school shall have the right to meditate in silence and there is nothing wrong with a little meditation and quietness").

71. The voluntary prayer statute provided:

From henceforth, any teacher or professor in any public educational institution within the State of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead the willing students in the following prayer to God:

Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen.

ALA. CODE § 16-1-20.2 (1987).

72. *Wallace v. Jaffree*, 466 U.S. 924 (1984).

73. The 1981 "meditation or voluntary prayer" statute provided:

At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be

and invalidated.

Justice Stevens, writing for the majority, compared the three statutes and noted that the first statute was a pure silence statute and fully protected a student's right to choose to pray.<sup>74</sup> He said that a statute enacted "for meditation or *voluntary prayer*," however, did not serve the secular purpose of accommodating a student's religion or religious practice.<sup>75</sup> The silent prayer law only served to promote "the State's endorsement . . . of religion and a particular religious practice,"<sup>76</sup> which is "not consistent with the established principle that the government must pursue a course of complete neutrality toward religion."<sup>77</sup>

The majority opinion strongly suggested that it is a permissible purpose to protect a public school student's right to engage in voluntary prayer during a moment of silence: "The legislative intent to return prayer to the public school is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school-day."<sup>78</sup> Therefore, the Court appeared to find the silent prayer statute unconstitutional because the state endorsed religion by designating "prayer" as an officially approved use of a moment of silence. The Court's position suggests that a pure silent moment statute is constitutional.

Notably, both the concurring and dissenting opinions in *Jaffree* further support a pure moment-of-silence statute. The dissent in *Jaffree* would have upheld even the statute that expressly specified

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observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

ALA. CODE § 16-1-20.1 (1987).

74. *Jaffree*, 472 U.S. at 57-58 n.45 (at the time the statute "for meditation or voluntary prayer" was enacted "there was no governmental practice impeding students from silently praying for one minute at the beginning of each schoolday").

75. While the legislative history of the silent prayer law clearly showed that the statute was enacted for the sole purpose of returning "voluntary prayer" to the public schools, *see id.* at 56-57, 57 n.43, the governor argued in his brief that the statute was "best understood as a permissible accommodation of religion." *Id.* at 57 n.45. The Court responded that there was no basis for the argument that the silent prayer statute was "a means for accommodating the religious and meditative needs of students without in any way diminishing the school's own neutrality or secular atmosphere." *Id.* at 58 n.45 (quoting Brief for United States as *Amicus Curiae* at 11, *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Nos. 83-812, 83-929)). The previously enacted pure silence statute fully accommodated a student's choice to pray. *See supra* note 74 and accompanying text.

76. *Jaffree*, 472 U.S. at 58 n.45 ("precisely the aspect that makes the statute unconstitutional").

77. *Id.* at 60. *See supra* note 29 and accompanying text.

78. *Jaffree*, 472 U.S. at 59. Justice Stevens' opinion was joined by Justices Brennan, Marshall, Blackmun, and Powell.



prayer.<sup>79</sup> In her concurrence, Justice O'Connor stated that silent moment laws that do not expressly promote prayer would be constitutional. She noted that it is "difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren."<sup>80</sup> Justice O'Connor would uphold even those silence statutes that designate "prayer,"<sup>81</sup> as would have Justice Powell.<sup>82</sup> Thus, at the time that *Jaffree* was decided, six members of the court—Stevens, O'Connor, Powell, Brennan, Marshall, and Blackmun—indicated that moment-of-silence statutes are not constitutionally infirm if they do not promote or endorse religion by emphasizing prayer as an officially preferred activity. All other members of the Court—Burger, Rehnquist, and White—would uphold such a statute as well. The Court, narrowly deciding *Jaffree* on the Alabama statute's legislative history, has been criticized for not setting forth the criteria for determining the constitutionality of other moment-of-silence statutes.<sup>83</sup> Nevertheless, the Court's opinion does suggest that if provided the opportunity, it would uphold statutes that create a pure moment of silence, but would invalidate those in which the government promotes or endorses school prayer.<sup>84</sup>

79. *Id.* at 89-90 (Burger, C.J., dissenting) (the silent prayer statute "'endorses' only the view that the religious observances of others should be tolerated and, where possible, accommodated"); *id.* at 90 (White, J., dissenting) (silence statute for meditation "or prayer" constitutional); *id.* at 113 (Rehnquist, J., dissenting) ("endorsing" prayer does not violate first amendment).

80. *Id.* at 73 (O'Connor, J., concurring). See *Abington School Dist. v. Schempp*, 374 U.S. 203, 281 (1963) (Brennan, J., concurring) ("the observance of a moment of reverent silence at the opening of class" may serve "the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government").

81. *Jaffree*, 472 U.S. at 76 (O'Connor, J., concurring) ("A moment of silence law that is clearly drafted and implemented so as to permit *prayer*, meditation, and reflection within the prescribed period, without endorsing one alternative over the others, should pass . . . [the endorsement] test.") (emphasis added). Justice O'Connor believed the Alabama statute's legislative history promoted prayer. *Id.* at 78.

82. *Id.* at 66 (Powell, J., concurring) ("I would vote to uphold the Alabama statute [mentioning prayer] if it also had a clear secular purpose.").

83. See, e.g., Note, *supra* note 10, at 1251 (Court able to decide *Jaffree* because of "'peculiar legislative history'" of the Alabama statute, but offered no new guidelines for applying *Lemon* to other silent moment laws (quoting *Jaffree*, 472 U.S. at 91 (White, J., dissenting))).

84. This implied holding of the Court was also recognized by Justice White in his dissent. *Jaffree*, 472 U.S. at 90-91 (White, J., dissenting).

## IV. MOMENT-OF-SILENCE STATUTES

## A. Arguments that All or Most Silent Moment Legislation is Constitutional

The *Jaffree* Court's decision to invalidate the silent moment law because of the Alabama legislature's inclusion of the word "prayer" has been criticized as "unduly fastidious"<sup>85</sup> by those who would have sustained it. In his dissent, Justice White stated that the addition of the word "prayer" was not an endorsement of a religious activity, but rather a message that prayer is merely a permitted activity.<sup>86</sup> Chief Justice Burger, also dissenting, asserted that the statute requiring silence for "meditation or voluntary prayer" merely accommodates the religious choices of those students who wish to pray silently while also creating a time for secular reflection for those who chose not to pray.<sup>87</sup> The statute "endorses," Burger suggested, only the view that the "religious observances of others should be tolerated and, where possible, accommodated."<sup>88</sup> Concurring in *Jaffree*, Justice O'Connor also would find no endorsement of religion in a silence statute merely because it designates voluntary prayer as an approved activity. She noted that religion is endorsed only when the state has "conveyed or attempted to convey the message that children should use the moment of silence for

85. Dellinger, *supra* note 44, at 1636.

86. *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985) (White, J., dissenting). Justice White argued that inserting the word "prayer" was no more unconstitutional than would be a teacher answering in the affirmative if a student were to ask if prayer was permitted during the moment of silence. *Id.* White's comparison, however, is flawed. The teacher's proper response to a student's question, "may I pray," is not, "yes, you may." Rather, "I think it would be better if you talked with your parents about prayer," is a reply unequivocally neutral toward religion. A teacher's permission to pray easily could be misconstrued by a young and impressionable child as encouragement, such encouragement being best left to the parents. See *supra* notes 51-55 and accompanying text; *infra* text accompanying notes 92-94.

87. *Jaffree*, 472 U.S. at 89 (Burger, C.J., dissenting).

88. *Id.* at 89-90. Burger continued:

If the government may not accommodate religious needs when it does so in a wholly neutral and noncoercive manner, the "benevolent neutrality" that we have long considered the correct constitutional standard will quickly translate into the "callous indifference" that the Court has consistently held the Establishment Clause does not require.

*Id.* at 90. The Chief Justice added that to interpret a silence statute that mentions "prayer" as an unconstitutional endorsement of religion, and to maintain that a statute providing for a simple moment of silence does not, "manifests not neutrality but hostility toward religion." *Id.* at 85. But see *Engel v. Vitale*, 370 U.S. 421, 435 (1962) ("It is neither sacrilegious nor antireligious to say that each separate government in this country should . . . leave [the] . . . purely religious function[s] to the people themselves and to those the people choose to look to for religious guidance.").

prayer."<sup>89</sup>

To assert that a state statute which explicitly refers to "prayer" does not amount to state encouragement or endorsement of a religious practice ignores the very reason such a statute *does* endorse religion. The addition of the word "prayer" is "utterly unnecessary to the goal of creating a formal opportunity for reflection in which students can, if they wish, choose to pray."<sup>90</sup> That goal is wholly accomplished by a statute that designates a moment of silence for "meditation" or "meditation or reflection."<sup>91</sup> Furthermore, designating "prayer" is unnecessary as an informational device, as Justice White suggests.<sup>92</sup> If a pure silence statute were enacted, parents, priests, rabbis, and ministers could counsel their children or parishioners or congregants that the silent moment be used for prayer, thereby alleviating Justice White's concerns. The state should not take the role of informing children as to when or whether they may or should pray.<sup>93</sup> When a state specifies in a statute that "prayer" is permitted, it "takes the state itself across a thin line and into the improper business of official endorsement of a religious exercise."<sup>94</sup>

89. *Jaffree*, 472 U.S. at 73 (O'Connor, J., concurring). Endorsement of religion would occur, Justice O'Connor suggested, if a teacher encouraged children to use the moment to pray or if the statute on its face or in its legislative history promoted prayer over the other designated alternatives. *Id.* See also Dellinger, *supra* note 44, at 1639 n.37 (government officials could promote particular religious practice in any number of ways so that it would be impossible to specify those that violate the Constitution).

90. Dellinger, *supra* note 44, at 1636. See *supra* text accompanying note 78.

91. Because a formal opportunity for prayer is created by a pure silence statute, there is no need to insert the word "prayer" as an ostensible accommodation of religion. Thus Chief Justice Burger misinterpreted exactly what a *pure* moment of silence statute "accommodates." *Jaffree*, 472 U.S. at 38, 39 (1985) (Burger, C.J., dissenting).

92. See *supra* note 86 and accompanying text.

93. See *Board of Educ. v. Minor*, 23 Ohio St. 211, 253 (1872) ("The great bulk of human affairs and human interests is left by any free government to individual enterprise and individual action. Religion is eminently one of these interests, lying outside the true and legitimate province of government."), quoted with approval in *Abington School Dist. v. Schempp*, 374 U.S. 203, 214-15 n.7 (1963).

94. Dellinger, *supra* note 44, at 1636. Justice White and others convinced that the mere mention of "prayer" is not an endorsement should consider Professor Dellinger's analysis. Dellinger has advanced an interesting and very accurate comparison of a statute that designates "prayer" to one that designates an activity not quite as pure:

Imagine a state statute providing that a moment of silence be conducted at the beginning of each school day for "meditation or erotic fantasy." Could one plausibly say in that case that the state is being wholly "neutral" with regard to "erotic fantasy," that the statute merely reflects the fact that students can (and some no doubt will) use any period of silence for that purpose?

*Id.* It requires no stretch of the imagination to recognize the public outrage such a statute would evoke, parents and legislators alike chastising the statute's advocates for sug-

*B. Arguments that All Silent Moment Legislation is Unconstitutional*

Those who would invalidate pure moment-of-silence statutes<sup>95</sup> generally assert that the statutes lack a secular purpose, the first prong of the *Lemon* test.<sup>96</sup> In *May v. Cooperman*,<sup>97</sup> for example, the United States District Court for the District of New Jersey examined a pure silent moment statute and found that the secular purpose proffered by the statute's advocates—to provide a calming transition from play to school work—was "pretextual," advanced only after the commencement of litigation.<sup>98</sup> The court found the statute invalid because it recognized no legitimate secular purpose.<sup>99</sup>

The problem with the *Cooperman* analysis, as Professor Dellinger has noted, is the erroneous assumption that a literal secular purpose is required.<sup>100</sup> The first prong of the *Lemon* test requiring a secular legislative purpose is an unfortunate shorthand reformulation of the principle that the statute violates the establishment clause if its purpose is either the advancement or inhibition of religion.<sup>101</sup> A statute having no specifically articulated secular purpose, however, does not necessarily promote or inhibit religion as its purpose. A statute such as the one at issue in *Cooperman* provides those students who so desire an opportunity to pray. The statute does not in that respect have a purely secular purpose. The Supreme Court, however, has acknowledged that even a silence statute "motivated in part by a religious purpose may satisfy the first criterion" of the *Lemon* test.<sup>102</sup>

gesting to their children (*encouraging* them) that the silence be spent conjuring licentious images.

95. Comment, *Religious Exercises and the Public Schools*, *supra* note 66, at 352-53; Note, *Unconstitutionality of State Statutes*, *supra* note 66, at 1893; Note, *supra* note 6, at 394.

96. See *supra* note 41 and accompanying text.

97. 572 F. Supp. 1561 (D.N.J. 1983), *aff'd*, 780 F.2d 240 (3d Cir. 1985), *appeal dismissed*, 484 U.S. 72 (1987) (lack of jurisdiction).

98. *Id.* at 1572. The court recognized that a silent moment "can serve as a useful boundary between nonschool activities and school work." *Id.* The court stated, however, that "only the utterly naive would conclude that the Bill's advocates were fighting passionately for such a boundary." *Id.* at 1573. The real purpose behind the enactment of the legislation was religious, the court said—to accommodate prayer in the public schools. *Id.* at 1574.

99. *Id.* at 1573. A panel of the United States Court of Appeals for the Third Circuit affirmed the lower court's invalidation of the neutral statute, *May v. Cooperman*, 780 F.2d 240, 253 (3d Cir. 1985), despite the Supreme Court's intervening decision in *Jaffree*, and the absence of any legislative intent to encourage prayer over the other designated alternatives. *Id.* at 252.

100. Dellinger, *supra* note 44, at 1638.

101. *Id.* See *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963), in which Justice Clark equated the "advancement or inhibition of religion" with a lack of "secular legislative purpose."

102. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). Even if a pure silence statute were to

In fact, the first amendment mandates that "a statute must be invalidated if it is *entirely* motivated by a purpose to advance religion."<sup>103</sup> A legislature that enacts a silent moment statute to create the opportunity for prayer does not necessarily have the *sole* purpose of advancing religion.<sup>104</sup> Advancing or endorsing religion requires more overt governmental action than merely creating an open and undesignated time for personal reflection.<sup>105</sup> A statute expressly creating a moment of silence "for prayer" represents a deliberate action evidencing a purpose to endorse religion. Because the creation of a pure moment of silence does not inhibit prayer,<sup>106</sup> a statute designating that the time may be used "for prayer" unnecessarily emphasizes religious practice<sup>107</sup> and ultimately endorses it.

### C. Silence is Not Prayer

Pure moment-of-silence statutes comply with the limits of the establishment clause for several reasons. First, the statutes are non-

contain in its legislative history statements by a sponsor who "hopes" that children use the time for prayer, the statute still would be valid. While the legislator did not have a "secular purpose," the legislator's subjective desire that children pray does not taint an objectively pure statute. See Dellinger, *supra* note 44, at 1639.

103. *Jaffree*, 472 U.S. at 56 (footnote omitted) (emphasis added).

104. *Id.* Neither does the pure silence statute necessarily constitute a legislative "endorsement" of religion in violation of Justice O'Connor's interpretation of the purpose prong. See *supra* note 44.

105. See *supra* note 89. Whether a moment-of-silence statute, neutral on its face, unconstitutionally advances or endorses religion *in its application* requires case-by-case adjudication. For example, it is theoretically possible that two states, even neighboring states, enact facially pure silent moment legislation identical in every respect except legislative history. Imagine that the first state enacts a statute providing for "one minute of quiet contemplation" for the secular purpose of a transition between the rigmarole of daily adolescent existence and the contemplative atmosphere strived for in public elementary schools. The second state follows suit, also enacting a statute permitting the observation of "one minute of quiet contemplation," but its legislative record is filled with observations that the sole purpose of the act is "to promote spiritual adoration of Our Almighty Creator through a daily moment of reflection on His glories." Both states have silence statutes, pure on their face, but one statute is marred by legislative history evidencing a solely religious intent. Under the analysis set forth in this comment, and under the *Lemon* test, see *supra* text accompanying notes 41-43 and note 44, the first statute would be found constitutional, the second an unequivocal violation of the establishment clause. Imagine that still another state enacted a silence statute that provided for "one minute of quiet contemplation *or prayer*," and that the legislative history indicated that the legislators wanted to provide the traditional moment of calm as well as protect a child's right to pray. Such a statute would survive attack under the *Lemon* test, see *supra* text accompanying notes 41-43 and note 44; however, because the statute denotes "prayer" as a permitted activity, it would not pass muster under this comment's analysis.

106. See *supra* text accompanying notes 90-91.

107. See *supra* note 94 and accompanying text.

religious in that they allow a student to think about whatever he or she wants during the silent time: they create a brief "open forum" during which prayer constitutionally may occur on public school grounds.<sup>108</sup> Second, silence is not inherently religious because silence is not automatically associated with a religious exercise.<sup>109</sup> Professor Tribe has noted that "[p]rayer" holds religious significance for most people, and thus cannot be officially endorsed; "meditation" holds religious significance for relatively few people, and thus may be officially endorsed."<sup>110</sup> Third, no child participating in a moment of silence could be coerced to compromise his or her beliefs.<sup>111</sup> Fourth, a pure "moment of reverent silence"<sup>112</sup> serves the same secular objective—to "'still the tumult of the playground and start a day of study'"<sup>113</sup>—as a moment of silence for prayer without jeopardizing individual religious liberties or the principle of church-

108. *Cf. Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (equal access to university facilities required for student organized religious groups). Because establishment clause analysis is more stringent when young and impressionable grade school students are involved, the "open forum" the younger students enjoy is similar but not as expansively interpreted as that granted university students.

109. *Wallace v. Jaffree*, 472 U.S. 38, 73 (1985) (O'Connor, J., concurring). On the other hand, while silence in itself is not inherently religious, it can be a "powerful message." Professor Dellinger noted:

Since a normal school day ordinarily includes any number of occasions during which an individual student acting on her own initiative can engage in a moment of silent prayer or reflection, the formal creation in public-school classrooms of an organized, teacher-supervised moment of silence is an event that has no readily apparent purpose—unless the government is attempting to convey a message. Even where no textual mention is made of prayer, a community of observers may well perceive the "meaning" of a school-organized moment of silence is that the government is endorsing something, and that something might be seen as religion.

Dellinger, *supra* note 44, at 1637 (footnotes omitted). Professor Dellinger, however, recognized that the Supreme Court nevertheless will sustain pure silence laws. *Id.* at 1636-37. See also Redlich, *Separation of Church and State: The Burger Court's Tortuous Journey*, 60 NOTRE DAME L. REV. 1094, 1135-36 (1985) (even though all "prescribed moments of silence are highly suspect," a pure moment-of-silence law is probably valid "unless the legislative history dilutes the purity").

110. L. TRIBE, *supra* note 66, § 14-6, at 1187.

111. *Jaffree*, 472 U.S. at 72 (O'Connor, J., concurring) ("a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others"). See also Choper, *supra* note 66, at 371 ("since no student would really know the subject of his classmates' reflections, no one could in any way be compelled to alter his thoughts").

112. *Abington School Dist. v. Schempp*, 374 U.S. 203, 281 & n.57 (1963) (Brennan, J., concurring).

113. Choper, *supra* note 66, at 371 & n.247 (quoting Editorial, Wash. Post, June 28, 1962, at A22, col. 2), *quoted with approval in Schempp*, 374 U.S. at 281 n.57 (Brennan, J., concurring).

state separation.<sup>114</sup> Finally, there is no "serious threat to religious liberty from a room of silent, thoughtful schoolchildren."<sup>115</sup>

#### D. *Maryland's Silent Moment Legislation*

On February 11, 1964, Delegate Thomas H. Lowe introduced House Bill 80 in the Maryland House of Delegates to provide for "a daily period of silent meditation for the students of every public elementary and secondary school in the State and relating also to prayers, the reading of scripture, and the free exercise of religion in the public schools."<sup>116</sup> As introduced, the bill mandated that principals and teachers require students "to meditate silently . . . ; provided that no student or teacher . . . be prohibited from reading the holy scripture, praying, or any other expression of the free exercise of his religion."<sup>117</sup> When enacted, Maryland's first silent moment statute read:

§ 98A. Daily period of silent meditation.

Principals and teachers in every public elementary and secondary school in this State may require all students at these schools to be present and participate in opening exercises on each morning of a school day and to meditate silently for approximately one moment; provided that no student or teacher shall be prohibited from reading the holy scripture, or praying.<sup>118</sup>

In 1978 laws pertaining to education were recodified into the Education Article,<sup>119</sup> and the silent moment statute was revised:

§ 7-104. Daily period of silent meditation.

(a) *Silent meditation*.—Principals and teachers in each public elementary and secondary school in this State may require all students to be present and participate in open-

114. *Schempp*, 374 U.S. at 281 (Brennan, J., concurring).

115. *Jaffree*, 472 U.S. at 73 (O'Connor, J., concurring).

116. Act of Apr. 7, 1964, ch. 189, 1964 Md. Laws 452. The last clause, "and the free exercise of religion in the public schools," was stricken by amendment before the bill was enacted. *Id.* Delegate Lowe introduced the silent moment bill approximately one year after the Supreme Court declared unconstitutional daily Bible readings in public schools in *Schempp*, 374 U.S. at 205, and approximately two years after the Court held unconstitutional the oral recitation of prayer in the public school classroom in *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

117. Act of Apr. 7, 1964, ch. 189, 1964 Md. Laws 452.

118. MD. ANN. CODE art. 77, § 98A (1965). In 1969 article 77 was repealed and its sections reenacted as part of either article 77, "Public Education," or article 77A, "Higher Education." Former § 98A was recodified at MD. ANN. CODE art. 77, § 78 (Supp. 1969).

119. Act of Apr. 3, 1978, ch. 22, 1978 Md. Laws 219.

ing exercises on each morning of a school day and to meditate silently for approximately 1 minute.

(b) *Praying or reading holy scripture.*—During this period a student or teacher may read the holy scripture or pray. . . .<sup>120</sup>

Subsection (a) is a pure silence provision and, standing alone, is

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120. MD. EDUC. CODE ANN. § 7-104 (1989). Section 7-104 has not been amended since it was enacted. In recent history several amendments, however, have been proposed. For instance, Maryland's silent moment law gives principals and teachers discretion whether to conduct a silent moment. Most proposed amendments have sought to make the moment of silence mandatory. In the House of Delegates, an amendment that would make silent moments mandatory on every morning of every school day in Maryland's public schools has been introduced several times. In 1976 27 delegates introduced H.B. 1401, which read in part: "Principals and teachers in every public elementary and secondary school in this State [may] SHALL require all students at these schools to be present and participate in opening exercises on each morning of a school day . . . ." H.B. 1401, 1976 Sess. (brackets indicate proposed deletions from existing law; capitals indicate proposed additions). After the first reading, the bill was referred to the House Judiciary Committee. See 1976 JOURNAL OF PROCEEDINGS OF THE HOUSE OF DELEGATES 1050.

The principal delegate introducing H.B. 1401, Delegate Decatur W. Trotter, was not deterred by the bill's demise; he introduced the same amendment in the two succeeding years. See H.B. 4, 1977 Sess.; H.B. 394, 1978 Sess.

In 1981 eleven delegates introduced the same amendment. See H.B. 990, 1981 Sess. No further amendments to Maryland's silent moment law have originated in the House of Delegates.

In the Senate the same amendment to make a silent moment mandatory has been introduced several times. In 1977 Senator Joseph S. Bonvegna introduced S.B. 1 on the same day Delegate Trotter introduced H.B. 4 in the House of Delegates. See S.B. 1, 1977 Sess. S.B. 1 was not as short-lived as its counterpart in the House. It received a favorable vote in the Senate and was referred to the House of Delegates. 1977 JOURNAL OF PROCEEDINGS OF THE SENATE 3359. S.B. 1 was read in the House and referred to the House Judiciary Committee. 1977 JOURNAL OF PROCEEDINGS OF THE HOUSE OF DELEGATES 3156.

In 1978 Senator Bonvegna again proposed the same amendment to Maryland's silent-moment law. See S.B. 261, 1978 Sess. See S.B. 261 was defeated in the Senate before it received a second reading.

In 1982 Senator Bonvegna introduced a different amendment to the silence law for the purpose of "requiring public school students to participate in either prayer, meditation, or the reading of the holy scripture during a certain school period." S.B. 2, 1982 Sess. One publicized discussion of the bill indicated that its purpose was to put back into the public school system prayer and the Bible. See *The Evening Sun* (Baltimore), Feb. 10, 1982, at F3, col. 5. There was no stated or apparent secular purpose for the proposed changes. As introduced, S.B. 2 read in part:

(a) Principals and teachers in each public elementary and secondary school in this State may require all students to be present and participate in opening exercises on each morning of a school day [and to meditate silently for approximately 1 minute].

(b) During this period, [a student or teacher may read the holy scripture or



constitutional.<sup>121</sup> Because it does not state that prayer or any other religious activity is permitted during the silent moment, the Supreme Court should find that it comports with the strictures of the first amendment. Moreover, subsection (a) does not compromise Maryland's neutrality toward the religious convictions of its residents. It does not propel the state across the "thin line"<sup>122</sup> separating constitutional legislation that protects the freedom to worship according to one's conscience from official endorsement of religion or a religious exercise. Section 7-104(a) provides the op-

pray.] EACH OF THE STUDENTS PRESENT SHALL PARTICIPATE IN ONE OF THE FOLLOWING:

- (1) PRAYER;
- (2) READING OF THE HOLY SCRIPTURE; OR
- (3) MEDITATION.

*Id.* (brackets indicate proposed deletions from existing law; capitals indicate proposed additions). S.B. 2 removed the discretion afforded teachers and principals under Md. EDUC. CODE ANN. § 7-104 (1989) as it now is enacted. The proposed amendments also replaced the emphasis of § 7-104(a) upon silent meditation with a blatant emphasis upon religion by highlighting conspicuously three permitted activities, the first two of which were "Prayer" and "Reading of the Holy Scripture." S.B. 2 was referred to the Senate Finance Committee, which amended the bill so that it was identical to the previous unsuccessful amendments to make a silent moment mandatory, substituting "shall" for "may" in subsection (a) of the bill and striking all other amendments proposed by Senator Bonvegna. 1982 JOURNAL OF PROCEEDINGS OF THE SENATE 2676-77. The Finance Committee returned a favorable report, *id.* at 2720, and S.B. 2 as amended passed easily in the Senate and was referred to the House of Delegates. *Id.* at 2895. In the House, S.B. 2 was referred to the Committee on Constitutional and Administrative Law. 1982 JOURNAL OF PROCEEDINGS OF THE HOUSE OF DELEGATES 2621.

The most recently proposed amendment to Maryland's silence statute, S.B. 820, 1984 Sess., was introduced by Senator Bonvegna and six other senators in 1984. 1984 JOURNAL OF PROCEEDINGS OF THE SENATE 690-91. S.B. 820 was identical to S.B. 2 as Senator Bonvegna had introduced the latter bill two years before. The Committee on Constitutional and Public Law did not amend S.B. 820 to the extent that the Committee on Finance amended the 1982 bill, choosing only to remove the language mandating a child's participation in the organized silent moment. *Id.* at 1711, 1779-80. The Committee did not delete the conspicuous enumeration of the permitted activities. *Id.* S.B. 820 as amended failed to receive a constitutional majority of the vote during its third reading in the Senate and thereby was defeated. 1984 JOURNAL OF PROCEEDINGS OF THE SENATE 2716-17.

121. See 67 Op. Att'y Gen. 37, 41-42 (1982) ("current case law suggests no constitutional problem posed by a period of silent meditation, as now permitted under § 7-104"). In *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963), Justice Brennan noted in his concurrence:

It has not been shown that . . . the observation of a moment of reverent silence at the opening of class, may not adequately serve the solely secular purposes of the devotional activities [prayer, reading of Holy Scripture] without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government.

*Id.* at 281 (Brennan, J., concurring). *But cf. supra* note 109 (silent moment legislation is highly suspect despite its constitutionality).

122. Dellinger, *supra* note 44, at 1636.

portunity for prayer without promoting a sectarian practice. As Justice Brennan observed in *Schempp*, it has not been shown that

the observance of a moment of reverent silence at the opening of class, may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government.<sup>123</sup>

The quiet moment under subsection (a) has a constitutional and secular purpose because it attempts to put students in a frame of mind conducive to learning before the school day begins.

Section 7-104(b), however, renders Maryland's silent moment statute unconstitutional. By specifying that the silent moment may be spent praying or reading Holy Scripture, the Maryland legislature oversteps constitutional boundaries by endorsing religion and religious activities.<sup>124</sup> In *Jaffree*<sup>125</sup> Justice Stevens compared Alabama's pure silence statute with its statute permitting "meditation or voluntary prayer,"<sup>126</sup> and noted that the statute mentioning prayer promoted religion in violation of the government's mandated course of absolute neutrality toward religion.<sup>127</sup> Unlike the statute struck down in *Jaffree*, the Maryland silence statute is not marred by a legislative record indicating that the return of prayer and the Holy Scripture to the public school classroom was the sole purpose behind its enactment.<sup>128</sup> Nevertheless, the Supreme Court's indication in *Jaffree* that it would uphold pure silence stat-

123. 374 U.S. at 281 (Brennan, J., concurring). Some of the secular purposes advanced by the proponents of the statute at issue in *Schempp* were "fostering harmony and tolerance among the pupils, enhancing the authority of the teacher, and inspiring better discipline." *Id.* at 280.

124. Maryland's Attorney General Stephen H. Sachs opined, however, that the mention of prayer in § 7-104 is constitutionally permissible:

Nor is a statute that, like present § 7-104, permits a required meditation period during which a student or teacher may silently pray or read the Holy Scripture necessarily invalid. As previously observed, § 7-104(b) "reflects nothing more than a concern that no student or teacher, by virtue of this statute, be denied the free exercise of his or her religion."

67 Op. Att'y Gen. 37, 42 (1982) (quoting Letter of Advice (S.B. 1) from George A. Nilson, Deputy Attorney General, to James Clark, Jr., President of the Senate (Feb. 7, 1977)). The Attorney General wrote the opinion three years before the Supreme Court's decision in *Wallace v. Jaffree*, 472 U.S. 38 (1985).

125. 472 U.S. 38 (1985).

126. *See supra* notes 69-73 and accompanying text.

127. 472 U.S. at 60. *See supra* text accompanying notes 74-77.

128. *See Jaffree*, 472 U.S. at 56-57 (sponsor of bill that became Alabama's silent-moment statute testified at trial that he had no other purpose for the legislation).

utes and invalidate those mentioning prayer<sup>129</sup> suggests that the Court would declare unconstitutional section 7-104 because of the reference to prayer in subsection (b).

Those who argue that subsection (b) merely ensures that students and teachers have the opportunity to pray and read Holy Scripture during the silence are unpersuasive. Subsection (b) is entirely unnecessary to accomplish this goal.<sup>130</sup> Under section 7-104(a), a student may contemplate or read anything—be it religious, nonreligious or irreligious—during the silent moment. For those students who wish to begin their school day with prayer, subsection (a) grants them the formal opportunity. Likewise, students wishing to read the Holy Scripture may do so as well. Subsection (b), on the other hand, encourages religious contemplation. Subsection (b) emphasizes and endorses religion and religious activities in direct violation of the establishment clause. As Justice Brennan has noted, “the State acts unconstitutionally if it either sets about to attain even indirectly religious ends by religious means, or if it uses religious means to serve secular ends where secular means would suffice.”<sup>131</sup> By including subsection (b) in section 7-104 the Maryland legislature has used religious means where secular ones would suffice. If the legislature desires to create a constitutional moment of silence in the public schools, it should amend section 7-104, expunging all specific references to religion or religious activity.<sup>132</sup>

## V. CONCLUSION

Twenty-five years ago the Supreme Court declared that mandated prayer in the public schools violates the first amendment. The Court has extended this holding to invalidate a silent moment statute that even mentions prayer in the classroom. The Court, however, has implied that pure moment-of-silence statutes would comply with the commands and intent of the first amendment.

Those who wonder aloud why a moment-of-silence statute that merely *mentions* “prayer” is dangerous may be trying to push more religion through the doors of the American public schools than the Constitution permits to enter. They fail to realize that silence permits prayer in the public schools. *Silence permits every conceivable secular*

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129. See *supra* text accompanying note 84.

130. See *supra* text accompanying notes 90-94.

131. *Abington School Dist. v. Schempp*, 374 U.S. 203, 281 (1963) (Brennan, J., concurring).

132. Repealing subsection (b) would leave subsection (a) to accomplish constitutionally the legislature's goal.

*or sectarian thought.* Those who insist that even a pure silent moment statute is an endorsement of religion may be correct. But the establishment clause was not intended to invalidate all governmental activity that could be construed as incidentally religious. Rather, the establishment clause was intended to neither advance nor inhibit religion. Silence may permit prayer, but it is not subterfuge to promote it.

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