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## Silence of the Lambs: Are States Attempting to Establish Religion in Public Schools?

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# NOTES

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*Congress shall make no law respecting an establishment of religion . . .*<sup>1</sup>

## I. INTRODUCTION

The proper role of religion in public schools has been a topic of bitter debate for many years.<sup>2</sup> While one group of individuals believes that there should be a complete separation of church and state, another group believes that religion should have an integral place in public education. Although both groups have looked to the circumstances surrounding the enactment of the First Amendment to support their respective positions, each has been unable to find clear, definitive support regarding the appropriate relationship between religion and public schools, as there was no public education system at that time.<sup>3</sup> One major issue that has arisen in the context of this controversy involves state statutes requiring public school students to observe a "moment of silence" at the beginning of each school day.<sup>4</sup>

Both opponents and supporters of religion in public schools have openly criticized these laws. Opponents of religion in public schools argue that the moment of silence statutes are a surreptitious attempt to reintroduce prayer into public schools and that these laws therefore violate the Establishment Clause.<sup>5</sup> Meanwhile, those who

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1. U.S. CONST. amend. I.

2. "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." *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

3. 2 DAVID M. O'BRIEN, *CONSTITUTIONAL LAW AND POLITICS* 645 (2d ed. 1995) ("[T]here was no controversy over school prayer (during the founding period) because there was no system of public education.").

4. See *Wallace v. Jaffree*, 472 U.S. 38, 59-61 (1985) (striking down an Alabama statute that provided for a moment of silence for "meditation or voluntary prayer" because the statute had no secular purpose and it was clear from the statute's legislative history that its sole purpose was to reintroduce prayer to the public schools); *Brown v. Gilmore*, 258 F.3d 265, 277 (4th Cir. 2001), *cert. denied*, 534 U.S. 996 (2001) (upholding Virginia's statute that mandated a "minute of silence" during which time a child could engage in any activity, including meditation or prayer, so long as it was silent, because there was clearly a secular purpose and because the presence of another arguably secular purpose that addressed religion did not invalidate the statute); *Bown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464, 1474 (11th Cir. 1997) (upholding Georgia's statute that provided for a "moment of quiet reflection" because it satisfied the three-prong *Lemon* test); *May v. Cooperman*, 780 F.2d 240, 245, 253 (3d Cir. 1985) (striking down a New Jersey law that permitted public schools to implement a minute of silence to be observed by students as they chose as long as they remained silent); *Duffy v. Las Cruces Pub. Schs.*, 557 F. Supp. 1013, 1015, 1020 (D.N.M. 1983) (striking down a statute authorizing local school boards to institute a moment of silence because the statute had no clear secular purpose); *Gaines v. Anderson*, 421 F. Supp. 337, 339, 346 (D. Mass. 1976) (upholding Massachusetts statute that called for a moment of silence because the law was noncompulsory and had a secular purpose).

5. U.S. CONST. amend. I.

support religious activity in public schools believe that the statutes do not adequately satisfy a child's desire to openly engage in religious expression. Defenders of the statutes have long argued that the laws neither promote nor inhibit religion and that they are primarily designed to provide students with a calming environment to counteract the hectic circumstances in their lives.<sup>6</sup> This Note posits that a moment of silence statute, when written and administered in a neutral manner, does not violate the Establishment Clause; rather, these laws represent a fair compromise between the views of opponents and supporters of religion in public schools.

Part II of this Note briefly examines the history of the Establishment Clause, which opponents of moment of silence statutes have used to challenge these laws.<sup>7</sup> Part III of this Note outlines the three levels of scrutiny that the Supreme Court has employed in deciding Establishment Clause cases. Part IV of this Note traces the downfall of state-sponsored school prayers and the subsequent development of the moment of silence statutes. Finally, Part V asserts that the moment of silence statutes are constitutional and presents a compromise between the views of those who advocate a complete separation of church and state and those who support a substantial presence for religion in the public school system.

## II. THE ESTABLISHMENT CLAUSE

### A. *The Text and Legislative History*

The First Amendment states that "Congress shall make no law respecting an establishment of religion . . . ."<sup>8</sup> It does not specify what "establishment" means, nor does it specify who should be responsible for defining the term.<sup>9</sup> To discover the true meaning of the Establishment Clause, it is therefore necessary to look to the history of the First Amendment in addition to the text.

The Founding Fathers' ancestors fled from England to escape religious intolerance and persecution.<sup>10</sup> Despite this history, most of

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6. See, e.g., *Bown*, 112 F.3d at 1467 (pointing out that the primary sponsor of Georgia's statute maintained that he had introduced the law as a means for students to utilize the period as a calming mechanism to combat violence).

7. See *Wallace*, 472 U.S. at 42-43. A moment of silence statute is not a free speech problem because speech is not being implicated through silent prayer. Similarly, the Free Exercise Clause is also not a concern, because there is no challenge to the right of students to pray silently.

8. U.S. CONST. amend. 1.

9. O'BRIEN, *supra* note 3, at 644-45.

10. See *id.* at 645 (noting that colonial settlements were "populated by many escaping religious persecution in England or on the European continent").

the colonial settlements were dominated by a particular religion, and the governments of those colonies discriminated against other faiths.<sup>11</sup> However, the Founding Fathers did not forget the persecution of their ancestors and penned the First Amendment to the United States Constitution to prevent the establishment of an official religion in the new nation.<sup>12</sup> During the Constitutional Convention, the Framers considered inserting a provision guaranteeing freedom of religion. On June 8, 1789, James Madison proposed the following amendments to the House of Representatives:

The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed. No State shall violate the equal rights of conscience, or freedom of the press, or the trial by jury in criminal cases.<sup>13</sup>

After being debated by the House, the proposals were revised to read:

Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.<sup>14</sup>

Once the amendment reached the Senate, the Senate voted that the amendment state:

Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.<sup>15</sup>

This alteration by the Senate only prevented Congress from endorsing a single denomination or a national religion.<sup>16</sup> Congress could, however, provide aid to religion as long as it did so in a nondiscriminatory manner.<sup>17</sup> In exchange for the House's acceptance of the Senate's versions of other amendments, however, the Senate approved the House's final version of the religion clauses:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.<sup>18</sup>

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11. *Id.* The Congregational Church was established in Massachusetts, while the Church of England (Anglican) was established in Virginia and four other Southern colonies. *Id.* Only four colonies never established a state religion: Rhode Island, Pennsylvania, Delaware, and New Jersey. *Id.*

12. *Id.* at 646-48 (discussing the Founding Fathers' desire to guarantee "religious freedom" in the Constitution).

13. *Id.* at 647-48.

14. *Id.* at 648.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

*B. The Intent of the Framers: Jefferson vs. Madison*

Because the text and legislative history of the Establishment Clause fail to elucidate the Framers' intentions, scholars seeking to settle the debate have proposed two possible interpretations of the Establishment Clause.<sup>19</sup> One group of scholars has directed attention toward Thomas Jefferson's famous "wall of separation" that supposedly exists between church and state to support the position that the First Amendment was intended to prohibit any introduction, however minute, of religion into the public realm.<sup>20</sup> However, Jefferson did not write about this "wall" until fourteen years after the First Amendment was passed by Congress and ratified by the states.<sup>21</sup> In fact, Jefferson was not even in the country when the Bill of Rights was proposed and enacted.<sup>22</sup> Therefore, Jefferson's "wall of separation" metaphor concerning the appropriate interplay between church and state should only be given the attention that is due the observations of a detached observer.<sup>23</sup>

Other scholars have instead looked to James Madison's writings to support the position that the First Amendment was designed only to prohibit the creation of a *national* religion.<sup>24</sup> Unlike Jefferson, Madison played a substantial role in drafting the Bill of

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19. Nancy E. Drane, Comment, *The Supreme Court's Missed Opportunity: The Constitutionality of Student-Led Graduation Prayer in Light of the Crumbling Wall Between Church and State*, 31 LOY. U. CHI. L.J. 497, 502-03 (2000) ("There was evidence that the Framers, especially Thomas Jefferson, aimed to build an impenetrable wall separating church and state. Equally strong historical data suggested that the Clauses simply meant to prohibit the development of a national religion.").

20. O'BRIEN, *supra* note 3, at 647. Jefferson wrote the following to the Danbury Baptist Association in 1802:

Believing with you that religion is a matter which lies solely between man and his god; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only and not opinions, 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 or prohibiting the free exercise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.

*Reynolds v. United States*, 98 U.S. 145, 164 (1878) (quoting Thomas Jefferson).

21. *Reynolds*, 98 U.S. at 164.

22. *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) (relating that Thomas Jefferson was in France during the time of the drafting of the Constitution).

23. *Id.*

24. *See id.* at 98 ("It seems indisputable . . . that [Madison] saw the Amendment as designed to prohibit the establishment of a national religion . . .").

Rights.<sup>25</sup> In contrast to Jefferson's advocacy of a wall of separation between church and state, Madison's original proposal for the First Amendment only prohibited the establishment of a *national* religion: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."<sup>26</sup> Despite several attempts, Madison ultimately was unable to persuade Congress that the states, and not just the federal government, should be prohibited from establishing official religions.<sup>27</sup> Following the adoption of the Bill of Rights, states continued to retain vestiges of established religion. Massachusetts, for example, denied Jews the right to hold public office until 1828 and did not eliminate all vestiges of an established religion until 1833.<sup>28</sup> The Fourteenth Amendment, enacted in 1868, finally applied the First Amendment to the states.

This brief inquiry into the history of the Establishment Clause does not definitively clarify the role that the Framers intended for religion to play in the public realm. Consequently, scholars have looked beyond the text and history of the Establishment Clause and have examined the jurisprudence surrounding the clause to gain a better understanding of the appropriate relationship between church and state.

### III. EVOLUTION OF ESTABLISHMENT CLAUSE JURISPRUDENCE

#### A. *Building a High Wall of Separation*

Although the Establishment Clause was ratified as part of the First Amendment in 1789, the Supreme Court did not directly consider its application until 1947 when the Court decided *Everson v. Board of Education*.<sup>29</sup> In *Everson*, the Court reviewed a New Jersey policy allowing the state to reimburse parents for their children's bus transportation to private, religious, and public schools.<sup>30</sup> The Court declared its intent to maintain a "wall" between church and state and expressed concern about the prospect of allowing the state to provide

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25. *Id.* at 92 ("James Madison . . . play[ed] as large a part as anyone in the drafting of the Bill of Rights. . . . [H]e was present in the United States, and he was a leading Member of the First Congress.").

26. O'BRIEN, *supra* note 3, at 648.

27. *Id.* at 647.

28. *Id.* at 648.

29. 330 U.S. 1 (1947).

30. *Id.* at 3.

financial assistance to families of children attending religious schools.<sup>31</sup> Notwithstanding this view, the Court permitted the state to allocate these subsidies to parents of children who attended religious schools.<sup>32</sup> In response to the contention that the state was establishing religion by upholding New Jersey's law, the Court stated that the First Amendment required that the state be *neutral* in its relationship with both religious and nonreligious groups; it did not allow the state to be hostile toward religion.<sup>33</sup> The Court compared the situation to one in which state-paid policemen are required to protect children from traffic dangers when they travel to and from church schools.<sup>34</sup> Thus, although the Court maintained that the wall of separation between church and state needed to remain in place, it also asserted that religion must be treated in a neutral manner.<sup>35</sup>

The *Everson* case seemed to indicate that the Court did not interpret the Establishment Clause to require a strict separation between church and state, but the Court moved toward this interpretation in *Illinois ex rel. McCollum v. Board of Education*.<sup>36</sup> In *McCollum*, the Court held that an Illinois law allowing religious classes to be taught in public school buildings violated the Establishment Clause.<sup>37</sup> Under the Illinois statute, public school officials were permitted to excuse students from their secular classes provided that they attended religious classes that were offered at the school.<sup>38</sup> Justice Frankfurter, writing for the majority, stated that "[t]he great American principle of eternal separation' . . . is one of the vital reliances of our Constitutional system . . . . It is the Court's duty to enforce this principle in its full integrity."<sup>39</sup> Thus, the Court determined that allowing religious classes to be held in publicly financed buildings and permitting students to attend the religious classes was a violation of the Establishment Clause.<sup>40</sup>

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31. *Id.* at 15, 18.

32. *Id.* at 16-17.

33. *Id.* at 18.

34. *Id.* at 17.

35. *Id.* at 18.

36. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 215-16 (1948) ("Zealous watchfulness against fusion of secular and religious activities by Government itself, through any of its instruments but especially through its educational agencies, was the democratic response of the American community to the particular needs of a young and growing nation, unique in the composition of its people.").

37. *Id.* at 209-11.

38. *Id.* at 209-10.

39. *Id.* at 231.

40. *Id.* at 212.

*B. Dismantling the Wall of Separation*

The Court did not long adhere to the strict separationist view set forth in *McCullum*, however, and soon embraced a new stance in favor of accommodation of religion in public schools. In *Zorach v. Clauson*, the Court upheld a New York policy allowing students to be released from public schools to attend religious classes that were held off campus.<sup>41</sup> The Court distinguished *Zorach* from *McCullum* by pointing out that the religious classes did not take place in a public school building and that there was no public administrative involvement in the religious teachings.<sup>42</sup> The *Zorach* Court further explained that the policy had only an incidental, and not primary, effect of aiding religion.<sup>43</sup> Advocating a policy of accommodation of religion in public schools, the Court repeated the notion set forth in *Everson* that the First Amendment did not require the state to be hostile to religion.<sup>44</sup> Furthermore, Justice Douglas cautioned that without the accommodation of religious needs, the Court would not only “show a callous indifference to religious groups,” but also to the historical principles upon which the nation was founded.<sup>45</sup>

Thus, from the beginning, the Court appeared to fluctuate between two applications of the Establishment Clause: one requiring a rigid partition separating church and state and the other proposing an accommodation of religion in the public realm.<sup>46</sup> Because the Court refrained from taking a definitive position, early Establishment Clause cases did not resolve the question of which view should ultimately prevail.<sup>47</sup> During the next two decades, the Court would strive to balance the desire to maintain the separation between church and state with the need to accommodate religious freedoms in accordance with the First Amendment.<sup>48</sup>

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41. 343 U.S. 306 (1952).

42. *Id.* at 315.

43. *Id.* at 312-14; *see also* *Meek v. Pittenger*, 421 U.S. 349, 359 (1975).

44. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (“[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.”).

45. *Id.*

46. DANIEL A. FARBER, *THE FIRST AMENDMENT* 268 (1998) (discussing the two lines of theories that were espoused by the Court in its decisions regarding Establishment Clause cases).

47. *Id.* (“In the two decades after *Everson*, the Court seemed to oscillate between these two attitudes.”).

48. *See, e.g., Zorach*, 343 U.S. at 313 (advocating a position of accommodation toward religion in public schools).

*C. The Emergence of the Lemon Test*

In *Lemon v. Kurtzman*, the Court announced a new test<sup>49</sup> to analyze situations in which the state potentially “endorsed” religion.<sup>50</sup> In *Lemon*, the Court struck down two state statutes providing tax dollars to religious schools.<sup>51</sup> The Court reasoned that this practice resulted in the inappropriate appearance and effect of government “sponsorship, financial support, and active involvement” in religious activity.<sup>52</sup> In determining whether a state law involving religion was constitutional, the Court announced that three criteria had to be met.

First, the state needed to have a “secular legislative purpose” in enacting the policy.<sup>53</sup> Here, the Court sought to root out state policies that, while appearing facially neutral, were actually created to purposefully promote and sustain religious activity in the public realm.<sup>54</sup> In ascertaining legislative intent, the Court relied on a thorough examination of both the text and legislative history of the statute.<sup>55</sup> If a court finds that a law was not enacted for a secular purpose, then the inquiry ends, and the state has unconstitutionally endorsed religion. In the alternative, if the court finds that the law does have a secular purpose, it must proceed to the next step of the test.

The second question is whether the primary effect of the law either advances or inhibits religion.<sup>56</sup> This inquiry involves a study of both the practical results of the law as well as public perception of the policy.<sup>57</sup>

Finally, the third inquiry is whether the state, in administering the policy, creates “an excessive government entanglement with

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49. FARBER, *supra* note 46, at 268 (arguing that the *Lemon* decision “made sense” of previous Establishment Clause cases and was a “synthesis” of such precedent); see also Ann E. Stockman, Comment & Note, *ACLU v. Black Horse Pike Regional Board of Education: The Black Sheep of Graduation Prayer Cases*, 83 MINN. L. REV. 1805, 1812-14 (1999) (declaring that the *Lemon* test was the “first comprehensive test” for the Establishment Clause).

50. 403 U.S. 602 (1971).

51. *Id.* at 606-07. In Pennsylvania, the state reimbursed nonpublic elementary and secondary schools for the cost of teachers’ salaries, instructional materials and textbooks in certain secular subjects. *Id.* Rhode Island supplemented nonpublic elementary school teachers fifteen percent of their annual salaries. *Id.*

52. *Id.* at 612-13 (citing *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 668 (1970) (upholding a New York property tax exemption for church and other charitable property because removal of this traditional exemption would lead to excessive entanglement)).

53. *Id.*

54. *Id.*

55. *Id.* at 613.

56. *Id.*

57. *Id.*

religion.”<sup>58</sup> The Court articulated three aspects that needed to be analyzed to determine whether there was excessive government entanglement: 1) the character and purposes of the institutions that the law benefits; 2) the type of aid that is provided by the state; and 3) the relationship that results between the government and religion from this interaction.<sup>59</sup>

Subsequent cases have clarified the *Lemon* test. In her concurring opinion in *Lynch v. Donnelly*, Justice O'Connor sought to refine the first (purpose) and second (effect) prongs of the *Lemon* test.<sup>60</sup> Justice O'Connor proposed that the first prong was a subjective one: whether or not the government intends to convey a message of endorsement or disapproval of religion.<sup>61</sup> As to the second prong, Justice O'Connor believed that the appropriate inquiry was an objective one: whether the law actually has the effect of endorsing or disapproving of religion.<sup>62</sup> In creating the *Lemon* test, therefore, the Court sought to provide a clear guide by which to measure laws against the Establishment Clause.

#### *D. Other Standards Used for Establishment Clause Cases*

In subsequent cases, the Court has demonstrated that if it does not view the problem as one of endorsement, it will not use the *Lemon* test to determine the validity of the laws challenged. Rather, the Court has applied a variety of other tests to situations in which it does not consider endorsement to be the main issue.

##### 1. The Coercion Test

In *Lee v. Weisman*, the Court found that a public school policy allowing members of the clergy to give invocations and benedictions at middle school and high school graduations violated the Establishment

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58. *Id.* at 613 (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

59. *Id.* at 615; *see also* *Walz*, 397 U.S. at 670, 674 (serving as the origin of the third prong of the *Lemon* test).

60. 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). The Court held that a city's holiday display which included traditional secular figures like Santa Clause, reindeer, clowns, and elephants, along with a crèche was constitutional. *Id.* at 671-72.

61. *Id.* at 691-92. The *Wallace* Court would later adopt this reasoning when it struck down Alabama's moment of silence statute. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (citing *Lynch*, 465 U.S. at 690) ("In applying the purpose test, it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'").

62. *Lynch*, 465 U.S. at 691-92 (O'Connor, J., concurring) (stating that instead of looking to whether or not the government practice has in fact advanced or inhibited religion, the Court should focus on whether the activity has "the effect of communicating a message of government endorsement or disapproval of religion").

Clause.<sup>63</sup> Although the Court declined to overrule the *Lemon* test, it did not use the test in this case.<sup>64</sup> Instead, the Court employed a “subtle coercion” test to analyze whether the school’s policy violated the Establishment Clause.<sup>65</sup> This analysis required the Court to examine whether the state intended to encourage religion by forcing individuals to observe a particular religious practice.<sup>66</sup> Recognizing that graduation ceremonies are in a sense mandatory, the Court determined that the prayers forced everyone in attendance to participate in the religious activity merely by virtue of their presence.<sup>67</sup>

## 2. Historical Practices Test

In *Marsh v. Chambers*,<sup>68</sup> the Court also refused to apply the *Lemon* test in deciding to uphold the Nebraska legislature’s practice of opening each session with prayers delivered by a state-employed chaplain.<sup>69</sup> Instead, the Court examined “historical practice” to find the Nebraska legislature’s activity constitutional.<sup>70</sup> The Court stressed that prayers had opened legislative sessions since the time of the Founding Fathers, who found the invocations to be acceptable despite their conflicting views on religion.<sup>71</sup> By citing the “unique history” of the role of prayer in legislative sessions, the Court held that the prayers did not pose a threat to the Establishment Clause because any perceived endorsement was de minimis.<sup>72</sup>

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63. 505 U.S. 577, 581 (1992).

64. *Id.* at 587.

65. *See id.* at 588, 593-94.

66. *Id.* at 587 (holding that a state action is suspect if it has the effect of pressuring people to attend religious events or prayer services); *see also* Harlan A. Loeb, *Suffering in Silence: Camouflaging the Redefinition of the Establishment Clause*, 77 OR. L. REV. 1305, 1305 (1998) (arguing that the Establishment Clause has been wrongly eroded and that the different tests that have been applied by the Court in place of the *Lemon* test, instead of being used separately, should be incorporated into the *Lemon* analysis).

67. *Lee*, 505 U.S. at 593.

68. 463 U.S. 783 (1983).

69. *Id.*

70. *Id.* at 786-95. “It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . is not something to be lightly cast aside.” *Id.* at 790 (citing *Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970)).

71. *Id.* at 792. The Court interpreted the delegates’ actions to imply that they “did not consider opening prayers as a proselytizing activity or as symbolically placing the government’s ‘official seal of approval on one religious view.’” *Id.*

72. *Id.* at 791. “In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society.” *Id.* at 792.

The different tests that the Supreme Court has applied to Establishment Clause challenges have led to considerable confusion for lower courts attempting to extract a clear standard to apply. One particular area involves school prayers and moments of silence. Courts have generally agreed that the proper standard for analyzing prayer in schools and moment of silence statutes is the *Lemon* test.

#### IV. THE SCHOOL PRAYER CASES

Many Establishment Clause cases have been brought concerning the appropriate role of religion in the public schools. Critics of religion in public schools have long argued for the need to maintain a strict separation between church and state in that context based on the unique role of public education in American society.<sup>73</sup> Indeed, the Court declared public schools to be the "symbol of our democracy" where divisive forces, like religion, have no place.<sup>74</sup> In addition, the need to separate church and state is all the more pressing in public schools because children are impressionable. It was not until 1962, however, that the Court considered one of the most prominent displays of religious activity in public schools—school prayer.<sup>75</sup>

In *Engel v. Vitale*, the Court struck down a state law<sup>76</sup> requiring a daily prayer to be conducted in public schools, firmly disposing of the possibility of state-mandated prayer activities in public schools.<sup>77</sup> The Court did not use the *Lemon* test in *Engel*, because *Lemon v. Kurtzman* had not yet been decided. Instead, the Court relied on a historical analysis of the Establishment Clause to support its decision.<sup>78</sup> Reasoning that many colonists left England

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73. Mary Ellen Quinn Johnson, *School Prayer and the Constitution: Silence is Golden*, 48 MD. L. REV. 1018, 1027-28 (1989).

74. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948).

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

76. The New York State Board of Regents composed the following prayer to be read aloud at the beginning of each day: "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.

77. *Id.*; see also *id.* at 425 (stating that "the constitutional prohibition against laws respecting an establishment of religion 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 part of a religious program carried on by government"). The Court also stated that "[i]t is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." *Id.* at 435.

78. *Id.* at 425.

because of the “very practice of establishing governmentally composed prayers for religious services,” the Court stated:

[T]he constitutional prohibition against laws respecting an establishment of religion 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 part of a religious program carried on by government.<sup>79</sup>

In *School District of Abington Township v. Schempp*,<sup>80</sup> another pre-*Lemon* case, the Court reviewed the constitutionality of Pennsylvania<sup>81</sup> and Maryland statutes<sup>82</sup> requiring school officials to conduct daily Bible readings but making participation by students completely voluntary. Justice Clark, writing for the majority, articulated the following test to determine whether the government had violated the Establishment Clause: “[W]hat are the purpose and the primary effect of the enactment?”<sup>83</sup> If the answer to either part of the question is that government “advances” or “inhibits” religion, Justice Clark stated, then the activity violates the First Amendment.<sup>84</sup> After finding that both laws promoted religion because the activity constituted a “religious ceremony” and because the state intended this result, the Court then reiterated its adherence to a position of neutrality in Establishment Clause cases.<sup>85</sup> In an important concurrence, Justice Brennan observed that a statute mandating a

79. *Id.*

80. 374 U.S. 203 (1963).

81. The text of Pennsylvania’s statute reads as follows:

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, or attending such Bible reading, upon the written request of his parent or guardian.

PA. STAT. ANN. tit. 24, § 15-1516 (Purdon 1992). Additionally, the school district added the requirement that a recitation of the Lord’s Prayer follow the readings from the Bible. *Schempp*, 374 U.S. at 208.

82. The rule adopted by the Board of School Commissioners of Baltimore, Maryland read as follows:

Opening Exercises. Each school, either collectively or in classes, shall be opened by the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord’s Prayer. The Douay version may be used by those pupils who prefer it. Appropriate patriotic exercises should be held as a part of the general opening exercise of the school or class. Any child shall be excused from participating in the opening exercises or from attending the opening exercises upon the written request of his parent or guardian.

*Id.* at 211-12.

83. *Id.* at 222.

84. *Id.* This two-part test was incorporated into the three-part *Lemon* test that later became the standard applied in Establishment Clause cases. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

85. *Schempp*, 374 U.S. at 222-24 (speaking of “wholesome neutrality”); see also *id.* at 225 (discussing the fear of a rising “breach in neutrality”).

moment of silence might survive a constitutional challenge. Therefore, with the end of the debate over the proper role of prayer in schools, the controversy shifted toward moment of silence statutes.

## V. MOMENT OF SILENCE STATUTES

Almost immediately after the Court struck down school prayer statutes, many state legislatures enacted moment of silence statutes. Several of these statutes were "pure" moment of silence laws, stating only that the period of silence was to be used for the purpose of meditation.<sup>86</sup> A majority of the statutes, however, provided that the time could be used for either meditation or prayer.<sup>87</sup> Although lower courts were strongly divided over the constitutionality of the two versions of moment of silence laws, they have been consistent in striking down statutes that appear to have the purpose of encouraging prayer in public schools.<sup>88</sup>

### A. *Wallace v. Jaffree (1985)*

The only instance in which the Court has considered the constitutionality of a moment of silence statute occurred in 1985 in *Wallace v. Jaffree*.<sup>89</sup> In *Wallace*, three separate Alabama statutes were at issue.<sup>90</sup> The first required a period of silence to be "observed for meditation."<sup>91</sup> The district court upheld the validity of this statute,

86. See, e.g., ALA. CODE § 16-1-20 (Michie Supp. 1984).

87. § 16-1-201.

88. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 71 (1985). The district court in *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976), upheld the following statute:

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 shall announce that a period of silence not to exceed one minute in duration shall be observed for meditation or prayer, and during any such period silence shall be maintained and no activities engaged in.

MASS. GEN. LAWS ANN. ch. 71, § 1A (West 1996). However, the district court in *Duffy v. Las Cruces Pub. Schs.*, 557 F. Supp. 1013 (D.N.M. 1983), struck down New Mexico's statute: "Each local school board may authorize a period of silence not to exceed one minute at the beginning of the school day. This period may be used for contemplation, meditation or prayer, provided that silence is maintained and no activities are undertaken." N.M. STAT. ANN. § 22-5-4.1 (Michie 1978).

89. 472 U.S. at 38.

90. *Id.* at 38, 40.

91. The text of the 1978 statute read as follows:

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.

and before reaching the Supreme Court, the plaintiffs abandoned the claim that this “pure” moment of silence statute was unconstitutional.<sup>92</sup> Under the second statute, teachers were *allowed* to “lead willing students” in an open prayer in the classroom.<sup>93</sup> In a separate decision, the Court held that the statute was clearly invalid.<sup>94</sup> Finally, the third statute permitted a period of silence to be “observed for meditation or voluntary prayer.”<sup>95</sup> Using the *Lemon* test, the *Wallace* Court struck down this third statute on the grounds that there was substantial evidence demonstrating that Alabama’s legislature had not enacted the statute for a clearly secular purpose.<sup>96</sup> However, the Court also strongly indicated that a statute providing for a “pure” moment of silence would not be a violation of the Establishment Clause, because it would protect a student’s right to engage in voluntary prayer during a moment of silence without establishing religion.<sup>97</sup>

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ALA. CODE § 16-1-20 (Michie Supp. 1984).

92. *Wallace*, 472 U.S. at 40.

93. The text of the statute reads as follows:

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.”

§ 16-1-20.2.

94. *Wallace*, 466 U.S. 924 (1984) (Stevens, J., concurring) (“As I understand it, the order this Court enters today is a holding that Ala. Code § 16-1-20.2 is invalid as repugnant to the Establishment Clause of the First Amendment, applicable to the States under the Fourteenth Amendment.”).

95. The text of the statute reads as follows:

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 class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

§ 16-1-20.1 (repealed 1998).

96. *Wallace*, 472 U.S. at 56. At an evidentiary hearing held by the district court, Alabama State Senator Donald G. Holmes, who identified himself as the “‘prime sponsor’” of the bill that would become section 16-1-20.1, stated unequivocally that the bill was indeed an “‘effort to return voluntary prayer to our public schools . . . [I]t is a beginning and a step in the right direction.’” *Id.* at 43. Moreover, Senator Holmes further testified that he had “‘no other purpose in mind.’” *Id.* (citation omitted).

97. *See id.* at 58-59 (comparing sections 16-1-20 and 16-1-20.1 and noting that the only significant textual difference was the addition of the words “or voluntary prayer,” leading to the conclusion that the purpose of enacting section 16-1-20.1 was to bring prayer back into public schools); *see also id.* at 59 (“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.”).

The concurring opinions in *Wallace* further support the idea that a “pure” moment of silence statute (and perhaps even one not as “pure”) would be found constitutional. In her concurrence, Justice O’Connor stated that although the Alabama statute at issue was unconstitutional, other moment of silence statutes might be valid.<sup>98</sup> The Alabama law was struck down only because the legislative history accompanying the statute showed that it clearly lacked a secular purpose.<sup>99</sup> Maintaining that a moment of silence statute is not inherently religious, Justice O’Connor further declared that even a statute specifying prayer as a permissible activity would not be unconstitutional solely based on that specification.<sup>100</sup> In a concurrence, Justice Powell also stated that some moment of silence statutes could be constitutional and that he would have upheld the Alabama statute mentioning prayer if Alabama’s legislature had articulated a clearly secular purpose for its enactment.<sup>101</sup>

### B. Post-Wallace

Following the *Wallace* decision, lower courts have also applied the *Lemon* test to more recent moment of silence statute cases.<sup>102</sup> Because the *Wallace* Court did not proceed to examine the second and third prongs of the *Lemon* test after determining that Alabama’s statute failed to meet the first prong, however, lower courts have emphasized this first element. Once a statute has been deemed either to satisfy or fail the requirement that the law was enacted for a clearly secular purpose, the second and third prongs receive rather cursory treatment, as though the first prong were dispositive.

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98. *Id.* at 84 (O’Connor, J., concurring) (“The Court does not hold that the Establishment Clause is so hostile to religion that it precludes the States from affording schoolchildren an opportunity for voluntary silent prayer, [and] . . . the moment of silence statutes of many States should satisfy the Establishment Clause standard.”).

99. *Id.* at 78 (“Given this evidence in the record, candor requires us to admit that this Alabama statute was intended to convey a message of state encouragement and endorsement of religion.”).

100. *Id.* at 73 (“Even if a statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives.”); *id.* at 76 (“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.”).

101. *Id.* at 62, 66 (Powell, J., concurring); see also *id.* at 66 (noting that a pure moment of silence statute was unlikely to either advance or inhibit religion).

102. See *Brown v. Gilmore*, 258 F.3d 265, 277 (4th Cir. 2001), cert. denied, 534 U.S. 996 (2001); *Bown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997).

1. *May v. Cooperman* (1985)

Six months after the Court's ruling in *Wallace*, the U.S. Court of Appeals for the Third Circuit struck down New Jersey's moment of silence statute allowing for "contemplation" or "introspection" in *May v. Cooperman*.<sup>103</sup> Focusing on the text of the statute, the court determined that the statute provided only that teachers should *permit*, but not require, the students to observe a moment of silence.<sup>104</sup> After noting that the most difficult part of the case was determining whether the law passed the first prong of the *Lemon* test, the court proceeded to conduct a detailed application of this first element.<sup>105</sup> Although the court acknowledged that the statutory text was facially neutral because it did not specify prayer as a possible activity, it accepted the district court's finding that the statute had been enacted for a religious, not a secular, purpose.<sup>106</sup> Although the district court was unable to examine the statute's legislative history in making this determination—because none had been recorded—the Court nevertheless noted the legislature's past efforts to bring religion back into the public schools as an indication that this moment of silence statute was an attempt to do the same.<sup>107</sup> Thus, despite the fact that the statute was facially neutral and that there was an absence of legislative history to show that the law was not enacted for a secular purpose, the court of appeals affirmed the district court's holding that the New Jersey statute failed the first prong of the *Lemon* test.<sup>108</sup>

Although the court was not required to examine the other prongs of the *Lemon* test—because it had already decided that the statute failed the first prong, it nevertheless did so. The court determined that the application of the statute did not have the effect of advancing or inhibiting religion.<sup>109</sup> Furthermore, the Third Circuit

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103. 780 F.2d 240 (3d Cir. 1985).

104. *Id.* at 246.

105. *Id.* at 250.

106. *Id.* at 251 (pointing to the fact that "the district court relied heavily upon evidence suggesting that the silent minute has no legitimate pedagogical value").

107. *Id.* at 251-52.

108. *Id.* at 253.

109. *Id.* at 250. The school principal had sent out the following memorandum to facilitate the implementation of the statute:

We will observe one minute of seated silence in each homeroom at the very beginning of the opening exercises. You will note that the Bill says students shall be permitted to observe a minute of silence. That will be interpreted to mean that there will be a minute of silence in the classroom so that each student may use that time as the individual interprets his or her desire to do so. This means that there will be no talking and no movement about the room. Each student will remain seated in his or her seat during the one minute period. At the conclusion of the one minute, students

held that there was no excessive entanglement because the students were only *allowed* a moment of silence but were not *required* to observe the moment of silence in a religious manner.<sup>110</sup> However, despite the fact that New Jersey's statute did not advance or inhibit religion and did not involve an excessive entanglement of the state with religion, the law was declared invalid because it had failed the first prong requiring a secular legislative purpose.<sup>111</sup>

## 2. *Bown v. Gwinnett County School District* (1997)

In *Bown v. Gwinnett County School District*,<sup>112</sup> the Court of Appeals for the Eleventh Circuit held that Georgia's Moment of Quiet Reflection in Schools Act<sup>113</sup> was constitutional. The statute provides for a period of "quiet reflection" to be observed at the beginning of each school day.<sup>114</sup> Additionally, the statutory text specifically states that the time period is not intended to be used to conduct a religious service.<sup>115</sup> Thus, it is a "pure" moment of silence statute because it does not even mention prayer as a possible activity.

In analyzing the statute, the court carefully reviewed both the plain text and the legislative history of the statute as required by the first prong of the *Lemon* test and determined that the statute had a clearly secular purpose.<sup>116</sup> The court noted that the preamble of the statute itself stated that the secular purpose was to provide students

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will be asked to rise and participate in the Pledge, and the remainder of the homeroom procedure will continue as in the past.

*Id.* at 248 (alteration in original).

110. *Id.* at 247.

111. *Id.* at 253.

112. 112 F.3d 1464 (11th Cir. 1997).

113. The text of the statute reads as follows:

Brief period of quiet reflection authorized; nature of period.

(a) In each public school classroom, the teacher in charge shall, at the opening of school upon every school day, conduct a brief period of quiet reflection for not more than 60 seconds with the participation of all the pupils therein assembled.

(b) The moment of quiet reflection authorized by subsection (a) of this Code section is not intended to be and shall not be conducted as a religious service or exercise but shall be considered as an opportunity for a moment of silent reflection on the anticipated activities of the day.

(c) The provisions of subsections (a) and (b) of this Code section shall not prevent student initiated voluntary school prayers at schools or school related events which are nonsectarian and nonproselytizing in nature.

GA. CODE ANN. § 20-2-1050 (1996).

114. *Id.*

115. *Id.*

116. *Bown*, 112 F.3d at 1471 ("The Act's legislative history, although somewhat conflicting, is not inconsistent with the express statutory language articulating a clear secular purpose and disclaiming a religious purpose.").

with an opportunity to engage in quiet reflection that Georgia's legislature believed would benefit them in "today's hectic society."<sup>117</sup> Additionally, the court specifically noted that the statute did not mention prayer as a possible activity.<sup>118</sup> Rather, it provided only for a "brief period of quiet reflection."<sup>119</sup>

After examining the statutory text, the court then turned to the statute's legislative history.<sup>120</sup> Senator David Scott maintained that he had introduced the Act as part of an effort to curb juvenile violence.<sup>121</sup> Senator Scott stated that he believed that providing an opportunity for quiet reflection at the start of each school day "would help to combat violence among Georgia's students."<sup>122</sup> While Senator Scott introduced evidence showing that several members of the legislature had indicated their desire to reinstate school prayer with this bill, other legislators believed that the bill had nothing to do with prayer or religion.<sup>123</sup> Faced with this conflicting legislative history, the court determined that the facially neutral language tipped the balance toward a finding that the statute did have a clearly secular purpose.<sup>124</sup>

In considering the second prong of the *Lemon* test, the court analyzed the implementation and application of the statute and concluded that the law neither advanced nor inhibited religion.<sup>125</sup> The court noted that the announcement of each day's moment of silence by the school's principal called only for a reflection upon the day's activities and did not promote using the period of silence for any

117. *Id.* at 1469; *see also* Moment of Quiet Reflection in Schools Act, Act No. 770, § 1, 1994 Ga. Laws 256, 256 (1994). The Act's uncodified preamble states:

The General Assembly finds that in "today's hectic society," all too few of our citizens are able to experience even a moment of quiet reflection before plunging headlong into the day's activities. Our young citizens are particularly affected by this absence of an opportunity for a moment of quiet reflection. The General Assembly finds that our young, and society as a whole, would be well served if students were afforded a moment of quiet reflection at the beginning of each day in the public schools.

118. *Bown*, 112 F.3d at 1469 & n.3.

119. *Id.* (citing GA. CODE ANN. § 20-2-1050(a) (1996)).

120. *Id.* at 1471.

121. *Id.* at 1467.

122. *Id.*

123. *Id.* at 1471.

124. *Id.* at 1472.

[E]ven if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law.

*Id.* at 1471-72 (citing *Bd. of Educ. v. Mergens*, 496 U.S. 226, 249 (1990) (plurality opinion)).

125. *Id.* at 1473 (upholding the statute "so long as the quiet reflection exercise is conducted in the manner prescribed").

particular activity.<sup>126</sup> Furthermore, the court reasoned that there was no government pressure to engage in any religious activity because students were not required to pray during the period—they were only required to be silent.<sup>127</sup> The Eleventh Circuit briefly mentioned the coercion test when it admitted that it was not sure how to apply the coercion test in conjunction with the *Lemon* test.<sup>128</sup> Nevertheless, the court briefly stated that some of its members believed that a showing of coercion was sufficient but not necessary to constitute a violation of the Establishment Clause.<sup>129</sup>

With regard to the third prong of the *Lemon* test, the court easily disposed of the third prong of the *Lemon* test by determining that there was no excessive entanglement between government and religion.<sup>130</sup> The teachers were not required to participate in, or to lead, prayers.<sup>131</sup> In addition, the teachers were not placed in a situation that required them to review the content of any prayers made silently by the students during the moment of quiet reflection. In fact, it would be impossible for teachers to tell whether the children were actually praying during the silence.<sup>132</sup> Following the Eleventh Circuit's decision to uphold Georgia's moment of silence statute, the plaintiffs did not apply for a writ of certiorari to the Supreme Court.

### 3. *Brown v. Gilmore* (2001)

In *Brown v. Gilmore*, the U.S. Court of Appeals for the Fourth Circuit upheld Virginia's moment of silence statute.<sup>133</sup> In contrast to

126. *Id.* at 1472.

127. *Id.* at 1473 (stating that the facts of the case “do not indicate that the state has created a situation in which students are faced with public pressure or peer pressure to participate in religious activity”).

128. *Id.* at 1473 n.11.

129. *Id.* at 1473.

130. *Id.* at 1474.

131. *Id.*

132. *Id.* (considering *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (5th Cir. 1996), in which the court found that excessive entanglement occurred because school administrators had participated in and reviewed the content of prayers).

133. 258 F.3d 265 (4th Cir. 2001). The amended statute reads as follows:

In order that the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the Commonwealth either to engage in, or to refrain from, religious observation on school grounds, the school board of each school division shall establish the daily observance of one minute of silence in each classroom of the division.

During such one-minute period of silence, the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display to the end that each pupil may, in the exercise of his or her

Georgia's moment of silence statute, Virginia's statute specifically mentioned prayer as an optional activity that students may engage in during the silent period.<sup>134</sup>

In examining the first prong of the *Lemon* test, the Fourth Circuit determined that the statute had two purposes: one, meditation, was clearly secular; the other, prayer, could be considered secular, even though it involved religion.<sup>135</sup> The court determined that a statute with dual legitimate goals did not violate the Constitution simply because one of the statute's purposes involved religion.<sup>136</sup> After examining the text's plain meaning, the court stated that the law provided a neutral environment in which students could engage in either religious or nonreligious activity.<sup>137</sup>

Turning its attention to the legislative history of the statute, the court reasoned that the evidence was insufficient to alter the conclusion from the plain text that the statute had a clearly secular purpose.<sup>138</sup> The sponsor of the bill, Virginia Senator Warren Barry, explained that he had introduced the bill in response to the school shootings that had occurred throughout the United States, Senator Stephen Newman stated that he hoped the periods of silence would decrease the students' desire to resort to violence.<sup>139</sup> In explaining the motivation behind specifying "meditation, prayer and reflection" as possible activities in which the students could engage during the minute of silence, Newman stated that these options were examples of

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individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.

The Office of the Attorney General shall intervene and shall provide legal defense of this law.

VA. CODE ANN. § 22.1-203 (Michie 2000).

134. Compare GA. CODE ANN. § 20-2-1050 (1996), with VA. CODE ANN. § 22.1-203 (Michie 2000).

135. *Brown*, 258 F.3d at 276 ("To the extent that the minute of silence is designed to permit nonreligious meditation, it clearly has a nonreligious purpose. And to the extent it is designed to permit students to pray, it accommodates religion."). The court further noted that accommodating religion "is itself a secular purpose in that it fosters the liberties secured by the Constitution." *Id.*

136. *Id.* at 277. "We need not find that the purpose be 'exclusively secular.'" *Id.* at 276 (citing *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984)).

137. *Id.* at 276 (reading the statute to mean that the "minute of silence is explicitly offered to the students for any nondistracting purpose—religious or nonreligious—including prayer or meditation").

138. *Id.* at 277 ("The superintendent of Virginia's schools noted that in her experience, a moment of silence has proved to be 'a good classroom management tool' because it 'works as a good transition, enabling students to pause, settle down, compose themselves and focus on the day ahead' making for 'a better school day.'").

139. *Id.* at 271.

what students could do during the period.<sup>140</sup> Senator Newman maintained that, without providing any examples, the moment of silence would potentially have no purpose at all.<sup>141</sup> Prayer was included not because the state was trying to endorse it, but rather because the state was trying to avoid discriminating against it.<sup>142</sup>

After determining that the statute had a clearly secular purpose, the court stated that "the final two prongs of the *Lemon* test need not detain us long."<sup>143</sup> The court held that the second prong of the *Lemon* test—that the statute neither advance nor hinder religion—was satisfied because the statute allowed both religious and nonreligious practices of reflection and silence.<sup>144</sup> The fact that the statute had the potential effect of conveying to some students that the state was promoting prayer was insufficient by itself to render the facially neutral statute unconstitutional.<sup>145</sup>

Finally, the court held that the state had not become excessively entangled with religion by enacting this statute.<sup>146</sup> The court determined that by specifying that prayer was a permissible activity, along with meditation and reflection, the state actually was disentangling itself from religion.<sup>147</sup> Instead of requiring students to openly ask a teacher if they could pray silently and requiring the teacher to answer affirmatively, the students would know that praying was allowed.<sup>148</sup> Thus, the court held that, in fact, the only thing that the statute established was a neutral moment of silence.<sup>149</sup>

After determining that the statute withstood the scrutiny of the *Lemon* test, the court further declared that the statute was not coercive in nature, because only the student knows whether she is praying during the moment of silence.<sup>150</sup> Therefore, the state cannot

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140. *Id.*

141. *Id.* at 271-72.

142. *Id.* at 272.

143. *Id.* at 277.

144. *Id.* The statute was implemented by the teacher of each classroom, who, in accordance with a memorandum from the school board, would say: "As we begin another day, let us pause for a moment of silence." *Id.* at 272.

145. *Id.* at 278 (establishing that "speculative fears as to the potential effects of this statute cannot be used to strike down a statute that on its face is neutral between religious and nonreligious activity").

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 281 (noting that just as the "short period of quiet serves the religious interests of those students who wish to pray silently, it serves the secular interests of those who do not wish to do so").

150. *Id.* at 278, 281.

be accused of forcing students to engage in religious activity.<sup>151</sup> The state is merely requiring students to be quiet, which is clearly within the prerogative of public school officials.<sup>152</sup>

In his opinion denying an injunction during a pending petition for a writ of certiorari, Justice Rehnquist indicated that, if considered by the Supreme Court, the Virginia statute would be deemed constitutional.<sup>153</sup> Justice Rehnquist wrote that the Virginia statute was presumptively valid.<sup>154</sup> Relying on the Fourth Circuit's determination that the Virginia statute had a clearly secular purpose, Justice Rehnquist stated that this fact alone might be sufficient to distinguish the case from the Court's earlier results in *Wallace*.<sup>155</sup> Justice Rehnquist also reminded the Court of Justice O'Connor's and Justice Powell's concurring opinions in *Wallace* indicating their willingness to uphold moment of silence statutes that contained the word "prayer" as a possible option.<sup>156</sup>

### C. Analysis

As the three cases that have reached the federal courts of appeals since the Supreme Court's decision in *Wallace* demonstrate, lower courts have dutifully followed the *Wallace* Court's lead in using the *Lemon* test to determine the constitutionality of moment of silence statutes.<sup>157</sup> Although the *Lemon* standard is the appropriate test to apply, this Note posits that courts should balance their analyses of the three prongs of the *Lemon* test more evenly.

It is apparent from the principal moment of silence cases that the primary hurdle for the state in Establishment Clause challenges is the secular purpose requirement.<sup>158</sup> The *Wallace* and *May* Courts struck down two moment of silence statutes because the relevant laws lacked a clear secular purpose.<sup>159</sup> The *Wallace* Court found it unnecessary to continue with the *Lemon* test because the statute

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151. *Id.*

152. *Id.*

153. *Brown v. Gilmore*, 533 U.S. 1301, 1302 (2001).

154. *Id.* at 1303 (noting that it would only allow injunctive relief under the All Writs Act, 28 U.S.C. § 1651(a) (2000), to be used "sparingly and only in the most critical and exigent circumstances").

155. *Id.*

156. *Id.*

157. See *Brown v. Gilmore*, 258 F.3d 265, 277 (4th Cir. 2001), *cert. denied*, 534 U.S. 996 (2001); *Bown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997); *May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985).

158. *Id.*

159. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); *May*, 780 F.2d at 251.

failed to satisfy the first prong.<sup>160</sup> The *May* Court briefly examined the second and third prongs of the *Lemon* test and found that the statute would have satisfied those criteria.<sup>161</sup> On the other hand, the courts in *Bown* and *Brown*, upheld two moment of silence laws because the courts determined that the statutes did have a secular purpose.<sup>162</sup> Neither court analyzed the second or third prong of the *Lemon* test as extensively as it did the first prong, but further analysis of the second and third prongs of the *Lemon* test found that both requirements were easily satisfied.<sup>163</sup> Both courts also briefly discussed the coercion element, although neither seemed to know exactly how to incorporate it into the *Lemon* test.<sup>164</sup> Only *Brown v. Gilmore* has been appealed to the Supreme Court.<sup>165</sup> By refusing to grant a writ of certiorari in *Brown*, the Supreme Court left standing a statute that allowed public schools to implement a moment of silence and specifying prayer as a permissible activity in which students may engage during the period.<sup>166</sup>

Courts have placed too much emphasis on the first prong of the *Lemon* test and have overlooked the second and third prongs of the analysis. The first prong of the *Lemon* test demands that a statute be enacted for a clearly secular purpose.<sup>167</sup> To analyze this prong, courts look to the statutory text and to its legislative history.<sup>168</sup> The inherent difficulty with this prong of the test, however, is that it is subject to legislative manipulation. It is relatively easy to draft a facially neutral statute so that the true purpose in passing the law is clouded in secular rhetoric.

In addition, an examination of the statute's legislative history often provides a blurred view of the true motivation behind the enactment of the law. Legislators, knowing they must refrain from openly asserting that a statute is being passed to bring religion into public schools, may surreptitiously cite a secular purpose as the reason for the creation of a law. Furthermore, a legislature is composed of many unique individuals, and it may be difficult to

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160. *Wallace*, 472 U.S. at 56 (noting that there was no need to analyze the second or third prongs of the *Lemon* test where the statute had failed the first prong).

161. *May*, 780 F.2d at 247, 250.

162. *Brown*, 258 F.3d at 277; *Bown*, 112 F.3d at 1471-72.

163. See *Brown*, 258 F.3d at 277-78; *Bown*, 112 F.3d at 1472-74.

164. *Bown*, 112 F.3d at 1473 n.11 (admitting that it is unclear how the coercion test comports with the *Lemon* test but deciding to include it in the second (effects) prong analysis); *Brown*, 258 F.3d at 281 (declaring that the moment of silence statute was not coercive).

165. *Brown v. Gilmore*, No. 01-384, 2001 U.S. LEXIS 10022 (Oct. 29, 2001).

166. *Id.*

167. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

168. *Id.*

establish a single, unitary legislative intent. Sometimes it may be unclear why some individuals vote in favor of a law while others do not. The motivation may involve religious convictions, entirely secular reasons, or some combination of the two.

Therefore, the first prong of the *Lemon* test should not be the sole focus of Establishment Clause jurisprudence, because as long as the statute's text is facially neutral and the legislative history provides an indication of a secular purpose, a statute will pass the first prong.

Courts should instead focus on the second (effects) and third (excessive entanglement) prongs of the *Lemon* analysis. These prongs are logically linked, and as such, should be combined into a single test. The second prong prohibits a statute from having the primary effect of either advancing or inhibiting religion,<sup>169</sup> while the third prong demands that the government not become excessively entangled with religious activity.<sup>170</sup> These concepts are inextricably linked: advancing or inhibiting religion invariably entangles a state with religion.

The dominant inquiry should be whether the effect of the statute is to advance or inhibit religion in such a way as to result in students feeling compelled to engage in, or observe, religious activity. Those who choose to participate in religious activity should be allowed to do so. By the same token, those who do not wish to engage in religious exercises should be protected as well. The element of coercion would fit well into this model, as a showing that a statute promoted an environment which forced students to participate in religious activity would clearly invalidate the law as advancing religion.

Using this type of analysis, state moment of silence statutes (both those that specifically mention prayer and those that do not), do not appear to violate the Establishment Clause. Rather, these statutes offer a compromise for those who advocate a strict separation of church and state and those who desire a prominent place for religion in public schools. The application of the first part of the revised *Lemon* test likely would result in a determination that moment of silence statutes have a clearly secular purpose. Both types of moment of silence statutes are facially neutral. A moment of silence law that does not mention prayer is clearly neutral on its face. Even a moment of silent statute that provides an opportunity for prayer and other activities such as meditation or reflection as examples of activities in which students may engage during the quiet time, is facially neutral. A statute should not be invalidated simply because it specifies prayer

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169. *Id.* at 612.

170. *Id.* at 613.

as a potential activity. Instead, this acknowledgement of prayer should be considered in light of the context in which it is offered, as an illustration of an acceptable activity. If a statute offered *only* prayer as an option, perhaps the statute would cease to be facially neutral.

A combination of the second and third prongs of the *Lemon* test should be the primary focus of the analysis. Does the statute have the actual effect of forcing students to participate in prayer or the apparent effect of government promoting prayer in public schools? The two parts of the question are one and the same. If government is perceived as endorsing prayer, it can really only do so if students feel as though they are compelled to pray while the moment of silence is being observed. Similarly, if students feel as though they must pray during the moment of silence, then the government must be perceived as endorsing prayer.

A moment of silence statute does neither of the above, because it only requires that a student remain quiet during the silent period; it does not force a student to engage in religious activity. Obviously, it is well within a school's right to require students to be quiet for a time during classes. Whether the student chooses to pray during that moment of silence is irrelevant, because the student's thoughts are private and are not observable by others. Moment of silence statutes represent a compromise, in that they allow religion to occupy a role in public schools that does not violate a student's right to be free from religious coercion. The moment of silence statutes neither advance nor inhibit religion and therefore do not excessively involve government in the area of religion.

This new approach should satisfy those who oppose the moment of silence statutes as well as those who currently support them. Instead of being viewed as yet another battleground in the continuing war to keep religion out of public schools, the statutes should be viewed as a viable compromise for both sides. A policy of accommodation, an early mark in Establishment Clause cases, is an adequate tool to be used in these cases.

Those who support the notion of a strict separation of church and state should have no objections to a statute that is facially neutral in both its text and in its application. Moment of silence statutes, although once enacted to circumvent the constitutional prohibition on prayer, can now be enacted to give children a time to think in peace. Encouraging youth to reflect upon matters, or merely allowing them a moment of quiet, is a legitimate, secular purpose, and one that should not be disregarded simply because earlier statutes had the express legislative purpose of introducing religious activities in the public school arena. That the statute nevertheless might have the incidental

effect of providing a moment during school hours in which children may engage in religious activity should not lead to invalidation. A child who prays during the moment of silence is not forcing another child to join in this prayer.

Individuals who wish public schools to welcome religious activities openly should also be satisfied with a moment of silence statute. While the state does not provide guidance in this religious activity, it is nevertheless allowing a time during which the child may engage in the activity if he so chooses. Indeed, it is not the state's responsibility to teach students religion, as that option properly rests with the child's family. Thus, in striking a balance between these two competing groups, moment of silence statutes offer a compromise that affords the recognition of the need to accommodate religion in public schools.

#### V. CONCLUSION

The proper role of religion in public schools continues to be a topic of debate. While some contend that a complete separation between church and state is required by the Constitution, others argue that the Constitution allows religion to play a role in public education. After school prayer statutes were overwhelmingly struck down by the courts, state legislatures responded by enacting moment of silence statutes. Although the early moment of silence statutes were enacted with the goal of reintroducing prayer to the classroom, state legislatures' more recent enactments do not reflect this same purpose. Moment of silence statutes, when written and applied in a neutral fashion, provide a compromise between those who desire a complete separation of government and religion and those who do not.

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