Constitutional Law - Moment of Silence Statutes May Threaten the Wall of Separation between Church and State - Wallace v. Jaffree

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NOTES


INTRODUCTION

The wall separating church and state is built from the bricks and mortar of the first amendment's establishment clause, which provides that "Congress shall make no law respecting an establishment of religion . . . ."1 For twenty-three years, the United States Supreme Court has rigidly maintained the wall's impregnability insofar as it applies to prayer and the public schools. In Engel v. Vitale2 and Abington School District v. Schempp,3 the Court held oral Bible reading and mandatory prayer in public schools to be unconstitutional. In Stone v. Graham,4 printed copies of the Ten Commandments posted on public school classroom walls fell under the same edict. In Treen v. Karen B.,5 the Court struck down a statute permitting voluntary vocal prayer in public schools. Many states responded by enacting legislation permitting or requiring public school teachers to have students observe a moment of silence for meditation or prayer.6 Do these statutes threaten the wall of separation? Some may.

One such statute from Alabama came before the United States Supreme Court in Wallace v. Jaffree.7 The decision rested on testi-

1. U.S. CONST. amend. I, cl. 1. The first amendment is applicable to the states by virtue of the fourteenth amendment. See, e.g., Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). "The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact [laws respecting an establishment of religion]."
5. 455 U.S. 913 (1982), aff'g mem., 653 F.2d 897 (5th Cir. 1981).
mony of the statute’s sponsor and a statement of intent in the legislative record, both of which indicated that the legislation was an effort to return voluntary prayer to the public schools. Based upon this evidence, the plurality found that the statute’s enactment was not motivated by any clearly secular purpose; rather, its enactment was motivated by a purpose to endorse religion. As such, the statute was a law respecting the establishment of religion and violated the first amendment. In *dicta*, however, the Court suggested that not all statutes with similar wording would necessarily be unconstitutional, even if they were “motivated in part by a religious purpose.”

The three dissenting Justices each wrote separately. Chief Justice Burger disagreed with the Court’s reliance on postenactment testimony. Justice White did not interpret the establishment clause to proscribe a statute from providing for a moment of silence for meditation or prayer. Justice Rehnquist attacked the Court’s constitutional doctrine, which he considered to be built upon a mistaken understanding of Jefferson’s “misleading metaphor.”

This Note will trace the Supreme Court’s treatment of prayer in the public schools. It will then explore the parameters laid out in *Jaffree* and demonstrate that the Supreme Court has relaxed its rigid attitude towards prayer in the public schools. Finally, the Note will apply the *Jaffree* parameters to North Carolina’s new “Moment of Silence” statute.

8. *Id.* at 2490. Senator Holmes inserted the following statement into the legislative record: “Gentlemen, by passage of this bill by the Alabama Legislature our children in this state will have the opportunity of sharing in the spiritual heritage of this state and this country. The United States as well as the State of Alabama was founded by people who believe in God. I believe this effort to return voluntary prayer to our public schools for its return to us to the original position [sic] of the writers of the Constitution, this local philosophies and beliefs hundreds of Alabamians [sic] have urged my continuous support for permitting school prayer. Since coming to the Alabama Senate I have worked hard on this legislation to accomplish the return of voluntary prayer in our public schools and return to the basic moral fiber.[sic]” *Id.* n.43.

9. *Id.* at 2492.

10. *Id.* at 2493.

11. *Id.* at 2490.


13. 105 S. Ct. at 2506.

14. *Id.* at 2508.

15. *Id.* at 2509.

16. 1985 N.C. Sess. Laws 637. To be codified as N.C. GEN. STAT. § 115C-
In 1978, Alabama enacted a statute authorizing a one minute period of silence "for meditation" in all public schools. This statute was followed by a second in 1981, which authorized a period of silence "for meditation or voluntary prayer," and by a third in 1982, which authorized teachers to lead "willing students" in a prescribed prayer.

In 1978, Ishmael Jaffree, a resident of Mobile County, Alabama, had three children attending public school, two in the second grade and one in kindergarten. In that year he filed a complaint in District Court on behalf of his children, seeking a declaratory judgment and an injunction restraining the Mobile County School Board, various school officials and the children's teachers from maintaining regular prayer services or other religious observances in the Mobile County Public Schools in violation of the establishment clause of the first amendment. Mr. Jaffree alleged that two of the children had been subjected to religious indoctrination, that their teachers led the classes in saying prayers in unison each day and that his children suffered peer ostracism if

17. ALA. CODE § 16-1-20 (Supp. 1985). "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."

18. ALA. CODE § 16-1-20.1 (Supp. 1985) (emphasis supplied). "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 observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in."

19. ALA. CODE § 16-1-20.2 (Supp. 1985). "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."

20. Jaffree, 105 S. Ct. 2479, 2482. Mr. Jaffree is an attorney.

21. Id.
they did not participate. In a second amended complaint in 1982, he challenged the constitutionality of all three statutes.

At an evidentiary hearing, the prime sponsor of the statute authorizing “meditation or voluntary prayer” testified that the statute was an effort to return voluntary prayer to the public schools. He further stated that he had “no other purpose in mind.” The district court found that Jaffree was likely to prevail on the merits because the enactment of both the “meditation or voluntary prayer” statute and the prescribed “prayer” statute did not reflect a clearly secular purpose. The court entered a preliminary injunction. At the trial, the district court held the “meditation” statute to be constitutional. In addition, the court upheld the constitutionality of the “meditation or voluntary prayer” statute and the prescribed “prayer” statute even though it found that they “encourage[d] a religious activity.” In a temerarious opinion, the court explored the history surrounding the framing of the Constitution at length and concluded that the United States Supreme Court had erred in its reading of that history. The court held that the establishment clause did not prohibit the state from establishing a religion. The court dismissed the case and Jaffree appealed.

The Eleventh Circuit Court of Appeals affirmed in part and

22. Id. at 2483.
23. Id.
24. Id.
25. Id.
26. Jaffree v. Board of School Commissioners, 554 F. Supp. 1104 (S.D. Ala. 1983). The court concluded that it could find: “precious little historical support” for the view that the states were prohibited by the establishment clause of the first amendment from establishing a religion.

More than any other provision of the Constitution, the interpretation by the United States Supreme Court of the establishment clause has been steeped in history. This Court’s independent review of the relevant historical documents and its reading of the scholarly analysis convinces it that the United States Supreme Court has erred in its reading of history. Perhaps this opinion will be no more than a voice crying in the wilderness and this attempt to right that which this Court is persuaded is a misreading of history will come to nothing more than blowing in the hurricane, but ... this Court is persuaded as was Hamilton that “[e]very breach of the fundamental laws, though dictated by necessity impairs the sacred reverence which ought to be maintained in the breast of the rulers towards the constitution.” R. Berger, (quoting Federalist No. 25 at 158).

Id. at 1128.
reversed in part. The court held the “meditation” statute to be constitutional. In contrast, it held that the statute containing the prescribed prayer and the statute authorizing a period of silence for “meditation or voluntary prayer” were unconstitutional because they advanced and encouraged religious activities. Even though the statutes were permissive in form, they were nevertheless laws respecting an establishment of religion. A petition for rehearing was denied over the dissent of four judges, who expressed doubt that the “meditation or voluntary prayer” statute was unconstitutional. The State of Alabama appealed the decision on the “prayer” and the “meditation or voluntary prayer” statutes.

The United States Supreme Court reviewed the two statutes separately. The Court unanimously affirmed the court of appeals’ judgment on the prescribed “prayer” statute. In considering the “meditation or voluntary prayer” statute, the Supreme Court found that the enactment of the statute was not motivated by any clearly secular purpose. To be constitutional, every statute examined under the establishment clause must have a secular legislative purpose. The addition of the words “or voluntary prayer” indicated that the state impermissibly intended to convey a message of endorsement of prayer as a favored practice. The statute therefore violated the first amendment. Although Alabama’s statute failed the constitutional test, the Court stated that “a statute motivated in part by a religious purpose [might] satisfy the . . . criterion . . . .”

**BACKGROUND**

Constitutional questions are customarily considered in their

28. Id.
29. Id. at 1535.
30. Id. quoting opinion of the district court.
33. Id.
36. Id. at 2489-90.
37. Id. at 2493.
38. Id.
39. Id. at 2490.
narrowest form. While the wide issue of religion in public schools has been developed in many cases, the narrower issue of school prayer has been addressed in only a few. The first of these cases was *Engel v. Vitale.* In *Engel,* the New York State Board of Regents composed a prayer which they recommended and published as part of their "Statement of Moral and Spiritual Training in the Schools." The Board of Education, acting in its official capacity under the law, directed a local school district to have the prayer said aloud by each class in the presence of a teacher at the beginning of each school day. The parents of some pupils filed suit, challenging the constitutionality of both the state law and the school district's regulation implementing it. They contended that the official prayer was contrary to their religious beliefs and practices and that these actions of official government agencies violated the establishment clause. The New York Court of Appeals upheld the power of New York to use the Regent's prayer so long as the schools did not compel any pupil to join in the prayer over his or his parents' objection.

On certiorari to the United States Supreme Court, the parents contended that the prayer should be struck down as a violation of the establishment clause because it was composed by government officials as part of a governmental program to further religious beliefs. The Supreme Court agreed, holding that it was not the business of government to compose official prayer for any group of American people. By using the public school system to encourage

42. 370 U.S. 421 (1962).
43. *Id.* at 423. "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.
44. *Id.* at 422.
45. *Id.* at 423.
46. *Id.*
47. *Id.* at 425.
48. *Id.*
recitation of prayer, a religious activity, the state had adopted a practice wholly inconsistent with the establishment clause. The school district argued that the prayer did not officially establish religious beliefs because it was non-denominational, and the program did not require all pupils to recite the prayer, but permitted those who wished to do so to remain silent or be excused from the room. The Supreme Court held that neither the prayer's nature nor its voluntary observance served to free it from the limitations of the establishment clause. "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." The Supreme Court found that the state had contravened the establishment clause on three grounds: first, by composing an official prayer; second, by using the public school system and its facilities to encourage a religious activity; and third, by indirectly coercing pupils into conformity.

The following year, in Abington School District v. Schempp, the Supreme Court was again called upon to consider the scope of the establishment clause with respect to school prayer. Pennsylvania legislators had enacted a statute requiring at least ten verses to be read without comment from the Holy Bible at the opening of each public school day. Any child could be excused from attending the reading upon his parents' written request. Abington Senior High School conducted its opening exercises pursuant to the statute by broadcasting the reading into each room in the school building. Following the reading, a recitation of the Lord's Prayer was likewise broadcast, during which students were asked to stand and join in repeating the prayer in unison. Participation in the opening exercises was voluntary. The Schempp family filed suit contending that their fourteenth amendment rights had been, and would continue to be violated until the statute was declared to be

49. Id. at 424.
50. Id. at 430.
51. Id.
52. Id. at 431.
54. Id. at 205.
55. Id.
56. Id. at 206-07.
57. Id. at 207.
in contravention of the first amendment. The district court found the statute to be unconstitutional and entered an injunction restraining the school district from continuing to conduct the readings and recitations. The school district appealed.

The United States Supreme Court considered this case in tandem with another case which challenged the constitutionality of a nearly identical statute passed by Maryland legislators. The Maryland Court of Appeals, however, had held the Bible readings and use of the Lord's Prayer to be constitutional.

The Supreme Court reiterated the principles underlying the establishment clause—the deeply embedded belief in liberty of religious opinion, the neutrality of government towards religion, and the free exercise of a chosen form of religion. The Court concluded:

[the wholesome "neutrality" of which this Court's cases speak ... stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits.

The Court then stated that for a statute of the type under consideration to withstand the strictures of the establishment clause, it must have a secular legislative purpose and a primary effect that neither advanced nor inhibited religion. Neither the Pennsylvania nor the Maryland statute passed the test. The Court found that the exercises in both states were of a religious character and that Pennsylvania had intended them to be so. Furthermore, the states were using the school systems implicitly to promote the exercise of religion. Both states contended that the statutes were enacted with secular purposes, among which were promotion of moral values, contradiction to the materialistic trends of the times,

58. Id. at 205.
59. Id. at 206.
60. Id. at 211.
61. Id. at 212.
62. Id. at 215-20.
63. Id. at 222.
64. Id.
65. Id. at 223.
66. Id.
The Court stated that the place of the Bible as an instrument of religion could not be gainsaid. The states' recognition of the prevailing religious character of the opening exercises was consistent with their permitting non-attendance at those exercises. The Court concluded that in both cases the laws passed by the states required religious exercises in violation of the first amendment.

The major factual difference between Engel and Schempp was that in Schempp the texts to be used in the school opening exercises were not composed by the states. Even so, the states could not escape the strictures of the establishment clause by using religious texts such as the Holy Bible and claiming a secular purpose of literary study. The Court acknowledged that the Bible was worthy of study for its literary and historical qualities. But to be consistent with the establishment clause, the study would have to be presented objectively as part of a secular program of education. The statutes here promoted the opposite, religious effect. In addition, the other two grounds for unconstitutionality—use of the school system to promote the readings, and indirect coercion—were present.

The issue of prayer in public schools did not come before the Supreme Court again for seventeen years. During the interval, in the related public school case of Lemon v. Kurtzman, the Court took the opportunity of assembling the cumulative criteria developed over many years for testing the constitutionality of statutes under attack on establishment clause grounds. In Lemon, Rhode Island's 1969 Salary Supplement Act provided a salary supplement to be paid to teachers in parochial schools at which the average per-pupil expenditure on secular education was below the average in public schools. Pennsylvania's Non-Public Elementary and Secondary Education Act authorized the purchase of secular educational services such as salaries and textbooks for non-public schools. Both Acts were attacked under the establishment

67. Id.
68. Id. at 224.
69. Id.
70. Id. at 224.
71. Id. at 225.
73. Id. at 608.
74. Id. at 609.
In examining the constitutionality of the Acts, the Supreme Court used three tests gleaned from its prior establishment clause cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must neither advance nor inhibit religion; and third, it must not foster excessive government entanglement with religion. The Court held both Acts unconstitutional because the overall relationships arising under the statutes constituted excessive entanglement between government and religion. With one exception, the criteria laid out in Lemon have been used in all succeeding establishment clause cases.

Kentucky's attempt to present the Ten Commandments as part of a secular program of education failed in Stone v. Graham. The statute required that printed copies of the Ten Commandments, purchased with private contributions, be posted on every public school classroom wall. A notation appearing at the bottom of each poster proclaimed that "[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and Common Law of the United States." Parents of some public school students sought an injunction against the statute's enforcement, contending that it violated the establishment and free exercise clauses of the first amendment. The state trial court found the statute to be constitutional because its avowed purpose was secular and not religious. A sharply divided Kentucky Supreme Court affirmed this decision.

On certiorari to the United States Supreme Court, the State of Kentucky contended that the statute served a secular legislative purpose as evidenced by the notation. The Supreme Court dis-

75. Id. at 610.
76. Id. at 612-13.
77. Id. at 614.
78. Marsh v. Chambers, 463 U.S. 783 (1983). Here the Court upheld the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the state. The Court did not apply the Lemon test, but looked instead at the practice in the light of long historical acceptance of legislative and other official prayers.
80. Id.
81. Id at 40 n.1.
82. Id. at 40.
83. Id.
84. Stone v. Graham, 599 S.W.2d 157 (Ky. 1980).
agreed. The Court found the Ten Commandments to be a sacred
text, so that the pre-eminent purpose for posting them on school-
room walls was plainly religious in nature.\textsuperscript{86} The legislative recita-
tion of a supposed secular purpose could not save the statute from
the strictures of the establishment clause, because the only effect
of the posted copies would be to induce schoolchildren "to read,
meditate upon, perhaps to venerate and obey, the [Ten] Com-
mandments."\textsuperscript{87} Although the Bible verses were not read aloud, as
in Engel and Schempp, even a relatively minor encroachment on
the first amendment could not be tolerated.\textsuperscript{88} The decision in
Stone v. Graham demonstrated that even though the verses were
not composed by government officials, and no coercion of school-
children existed, any attempt to introduce religious texts into pub-
lic schools other than in the curriculum as literature, would fail.
The religious purpose behind such an attempt could not be cos-
metically disguised.

Finally, in Karen B. v. Treen,\textsuperscript{89} a statute authorizing a period
of silent meditation came under scrutiny. At issue was a Louisiana
statute's enabling legislation, pursuant to which a local school
board had established guidelines providing that each school day
begin with a minute of prayer followed by a minute of silent med-
tation.\textsuperscript{90} The guidelines required each teacher to ask if any student
wished to volunteer a prayer, and if none did so, the teacher could
offer a prayer of his own. If the teacher elected not to pray, then
the period of silent meditation began immediately.\textsuperscript{91} Students who
wished to participate in the prayer portion of the exercises were
required to submit their parents' express written permission and to
make a verbal request to join in the exercise.\textsuperscript{92} Non-participating
students could remain outside the classroom.\textsuperscript{93} The parents of
some of the students sought declaratory and injunctive relief, con-
tending that the statute and regulations offended the establish-
ment clause.

The district court held that the enabling legislation and the
School Board's regulations did not offend the Constitution because

\begin{itemize}
  \item \textsuperscript{86} Id.
  \item \textsuperscript{87} Id. at 42.
  \item \textsuperscript{88} Id.
  \item \textsuperscript{89} 653 F.2d 897 (5th Cir. 1981), aff'd mem., 455 U.S. 913 (1982).
  \item \textsuperscript{90} Id.
  \item \textsuperscript{91} Id.
  \item \textsuperscript{92} Id.
  \item \textsuperscript{93} Id.
\end{itemize}
they had a secular legislative purpose. The district court based its conclusion on the testimony of the legislation’s sponsors that the purpose behind the statute was “to increase religious tolerance by exposing school children to beliefs different from their own.” The court denied relief and the parents appealed. The Fifth Circuit Court of Appeals followed Stone and held that a testimonial avowal of secular legislative purpose was not sufficient to avoid conflict with the establishment clause. The observance of prayer, a primary religious activity, has a more obvious religious purpose than the mere display of a religious text. Once again, the provisions for excusing students who did not wish to participate in the prayer sessions betrayed the legislature’s recognition of the fundamentally religious character of the exercise. The State of Louisiana contended that the statute was constitutional since it was content-neutral. This argument failed under Engel and Schempp because the statute gave rise to the same grounds for infirmity—use of the public school system to favor a particular religious practice and its corollary of indirect coercion. The court of appeals reversed. The United States Supreme Court affirmed in a memorandum opinion.

The net result of Engel, Schempp, Stone and Treen was a blanket ban on any vocal Bible reading or prayer, voluntary or involuntary, in the public schools. In response to the ban and in an effort to appease the establishment clause, many states enacted legislation providing for silent voluntary prayer as an alternative to meditation during a period of silence at the beginning of the public school day. When the constitutionality of these “moment of silence” statutes came into question, the federal courts of appeal were unable to reach consistent decisions. The United States Su-

94. Id. at 900.
95. Id.
96. 653 F.2d 897.
97. Id. at 900.
98. Id. at 901.
99. Id.
100. Id.
101. Id. at 902.
102. 653 F.2d 897.
104. See supra note 6.
preme Court directly addressed the issue in Wallace v. Jaffree.

**Analysis**

In Wallace v. Jaffree the Supreme Court held that Alabama’s “meditation or voluntary prayer” statute violated the establishment clause because it had no secular purpose. Further, the record revealed that the state’s actual purpose was to endorse religion. The Court began by characterizing as “remarkable” the district court’s conclusion that the federal Constitution imposed no obstacle to Alabama’s establishment of a state religion. The Court reiterated the firmly embedded proposition that the several states have no greater power to restrain the individual freedoms protected by the first amendment than does the Congress. One of the first amendment’s underlying principles is that an individual has a right to refrain from accepting the creed established by the majority. When this principle is examined in the “crucible of litigation,” the unambiguous conclusion must be that the individual freedom of conscience protected by the first amendment “embraces the right to select any religious faith or none at all.” Concomitantly, no government may prescribe what shall be orthodox in religion. Alabama was required to respect this basic truth no less than the United States Congress.

The Court then laid out the three criteria used in testing a statute under establishment clause attack. These criteria, known collectively as the Lemon test, are: 1) the statute must have a secular legislative purpose; 2) its principal or primary effect may neither advance nor inhibit religion; and 3) the statute may not foster excessive government entanglement with religion. Since Alabama’s statute could not meet the requirements of Lemon’s first criterion, consideration of the second and third criteria was obviated. Both the sponsor’s testimony and the legislative history conclusively demonstrated that the only purpose behind en-

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106. 105 S. Ct. at 2490.
107. Id. at 2486.
108. Id.
109. Id. at 2488.
110. Id.
111. Id. at 2489.
113. Id. at 612-13.
The enactment of the “meditation or voluntary prayer” statute was to return prayer to Alabama’s public schools. 116 This evidence alone would have been sufficient to render the statute unconstitutional. In addition, however, the textual relationship between this statute and its companion measures revealed its wholly religious character. 116 The significant textual difference between the original “meditation” statute and this one was the addition of the words “or voluntary prayer.” Since the “meditation” statute already protected every student’s right to engage in voluntary prayer in an appropriate moment of silence during the school day, the additional words in the “meditation or voluntary prayer” statute could be nothing less than an endorsement and promotion of prayer as a favored practice. 117

Chief Justice Burger dissented. He stated that the Court’s holding manifested not neutrality, but rather hostility towards religion, because the Alabama legislature had no more endorsed religion than the Congress did when it provided for legislative chaplains, or than the Court did when it opened each session with an invocation to God. 118 In addition, he pointed out that the sponsor’s statements of purpose upon which the Court relied were made after the legislature had passed the statute, so that the Court’s decision to strike down the statute for lack of secular purpose was based solely on the personal subjective motives of a single legislator. 119 Justice White took the view that the first amendment does not proscribe a statute that provides, when initially passed, for a moment of silence for meditation or prayer. He could not invalidate a statute that at the outset provided the legislative answer to the question “May I pray?” 120 Justice Rehnquist’s lengthy dissent explored the historical precedent of the establishment clause. 121 The clause “has been expressly freighted with Jefferson’s misleading metaphor [of the wall of separation between church and state]
for nearly forty years." Constitutional doctrine, according to the Justice, has therefore been built upon a mistaken understanding of constitutional history. Justice Rehnquist concluded that nothing in the first amendment prohibits a generalized endorsement of prayer, such as Alabama's statute was.

Alabama's "meditation or voluntary prayer" statute failed the Lemon test because it was clearly religious in purpose and textual content. This is not to say, however, that all statutes offering a choice between meditation and voluntary silent prayer during a period of silence will fail the Lemon test. Although the purpose criterion appears to be the most difficult hurdle to clear, the Court suggested in dicta that even though "a statute [may be] motivated in part by a religious purpose, [it] may yet satisfy [that] criterion."

What, then, are the parameters set by the Supreme Court for "moment of silence" statutes? First, the statute must meet the three Lemon criteria, the first and most demanding of which, in this context, is the "purpose" test. The statute's enactment must have a clear secular purpose, that is, a purpose which is not overtly or specifically religious. Secular purposes might include use of the moment of silence as a transitional tool, to calm the students and serve as a bridge between the tumult of the playground and the serious business of a day of study. The statute might create the opportunity for a moment of appropriate solemnity. It might serve to strengthen discipline in the classroom. Under these circumstances, any religious purpose would only be secondary and therefore constitutionally permissible. The key is the overall use of the time as a secular tool, particularly since students are constitutionally permitted to use the moment of silence for prayer if they

122. Id. at 2509.
123. Id.
124. "It would come as much of a shock to those who drafted the Bill of Rights as it will to a large number of thoughtful Americans today to learn that the Constitution, as construed by the majority, prohibits the Alabama Legislature from 'endorsing' prayer." Id. at 2520.
125. Id. at 2490.
so wish. Any plausible pedagogical purpose should be sufficient to meet the first Lemon criterion. Lemon's second and third criteria—the statute may neither advance nor inhibit religion, nor result in excessive governmental entanglement—appear easier to meet. A moment of silence statute which suggests prayer as an alternative to meditation is "wholly consistent with the clearly permissible purpose of clarifying that silent, voluntary prayer is not forbidden in the public school building." Such a statute is unlikely to foster an excessive government entanglement with religion since close administrative supervision, spot checks, or large sums of taxpayers' money are unnecessary for its successful functioning.

The second parameter within which the statute must remain is the textual requirement. A moment of silence statute must offer prayer as an alternative to meditation in a textually neutral manner. Alabama's statute failed because it was an obvious textual progression towards official endorsement of prayer as a favored practice. However, an original statute which includes voluntary prayer as an alternative to meditation should be constitutionally sound. "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 this test." The crucial factor is the lack of official endorsement of any one suggestion over another. If all such suggestions are neutrally presented as equal alternatives, the statute will meet the textual requirement.

Wallace v. Jaffree demonstrates a slight lessening of the Supreme Court's rigidity towards prayer in public schools. From dicta in the opinion, the states may conclude that, provided they can produce a plausible secular purpose for enactment of a moment of silence statute, whether it be in the mind of the sponsor, in the legislative record, or in the statute itself, they can take full advantage of any secondary religious effect the statute might have. Jaffree itself and other sources show that the Engel and Schempp decisions caused confusion in the states as to whether prayer in public schools was permitted at all. Jaffree clears up the confu-

133. Id. at 2501 (O'Connor, J., concurring in the judgment).
134. Telephone interview with Representative N.J. Crawford, House Sponsor
sion. The Court stated that public school students have always had the right to pray in an appropriate moment of silence if they so wish.\(^{135}\) Now this right may be officially endorsed. Only when the government endorses the right as an officially favored alternative to meditation or reflection is the establishment clause violated.\(^{136}\)

The United States Supreme Court decided *Jaffree* on June 4, 1985.\(^{137}\) On July 5, 1985, the North Carolina Legislature enacted a moment of silence statute\(^{138}\) in response to school boards' requests for guidance "in this grey area."\(^{139}\) Analyzed in terms of *Jaffree*, the statute is constitutionally ironclad. In pertinent part the statute provides:

\[
\text{[A] period of silence not to exceed one minute in duration shall be observed and . . . during that period silence shall be maintained and no one may engage in any other activities. Such period of silence shall be totally and completely unstructured and free of guidance or influence of any kind from any source.}\(^{140}\)
\]

First, although the statute mandates a period of silence, it offers no suggestions for any mental activities during that time, and


\(^{135}\) *Jaffree*, 105 S. Ct. at 2491.
\(^{136}\) *Id.* at 2493.
\(^{137}\) *Id.* at 2479.
\(^{139}\) Telephone interview with Rep. N.J. Crawford, supra note 134.
\(^{140}\) 1985 N.C. Sess Laws 637.

An Act to Permit Local School Boards to Authorize The Observance of a Moment of Silence Each Day in School.

(28) To authorize the observance of a moment of silence. Local boards of education may adopt policies to authorize the observance of a moment of silence at the commencement of the first class of each day in all grades in the public schools. Such a policy shall provide that 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 and that during that period silence shall be maintained and no one may engage in any other activities. Such period of silence shall be totally and completely unstructured and free of guidance or influence of any kind from any sources.

This act is effective upon ratification and applies to all school years beginning with the 1985-86 school year.
therefore avoids the possibility of constitutional infirmity under Jaffree's textual requirement. Further, local school boards may adopt the policy at their option.\textsuperscript{141} Finally, the legislative purpose behind the enactment is clearly secular. The House sponsor stated that the moment of silence was to be used as a "helpful transitional interlude, much like an athlete taking a deep breath before a race."\textsuperscript{142} Courts should only find an improper purpose behind a moment of silence statute where either its text or its official legislative history suggest that its primary purpose is to endorse prayer.\textsuperscript{143}

North Carolina's statute "was crafted to meet the guidelines of the United States Supreme Court."\textsuperscript{144} The statute successfully meets those guidelines, and it is further buttressed by the fact that no official legislative history of its passage exists\textsuperscript{145} into which judicial inquiry could be made. Certainly, the argument exists that "no power on earth—including th[e Supreme] Court and Congress—can stop any teacher from opening the school day with a moment of silence for pupils to meditate, to plan their day—or to pray if they voluntarily elect to do so."\textsuperscript{146} North Carolina's statute does nothing more than provide for such a moment of silence.

The question remains—what if the Legislature were to pass another statute that offered a choice between "meditation or silent

\textsuperscript{141} Id. In at least one school district, the policy appears to be working well. "'I was wary at first,' Clinton B. Johnson, the principal, said of Wilson County's new policy requiring all public school classes to observe a moment of silence at the beginning of the day. The school board adopted the policy in September. 'I thought we'd have kids who didn't handle it well, and teachers never liked unstructured time. But I was wrong. It gives the kids a moment to calm down and discipline themselves. They can pray if they want to, but I'd say most of them don't.'" Raleigh News and Observer, October 20, 1985 at 1A, col. 1-2.

\textsuperscript{142} Telephone interview with Rep. N.J. Crawford, supra note 134. Senate Sponsor, Senator Henson Barnes, stated that he informed Senate members, on the floor, that the purpose of the statute was to "set parameters or guidelines for the local Education Associations with regard to the moment of silence." The aim was to create uniformity throughout the State for the local boards. Telephone interview with Senator Barnes (Oct. 17, 1985).

\textsuperscript{143} Jaffree, 105 S. Ct. at 2500 (O'Connor, J., concurring in the judgment).

\textsuperscript{144} Raleigh News and Observer, July 5, 1985 at 1A, col. 6.

\textsuperscript{145} Personal interview with Mrs. Vivian Halperin, Chief Librarian, N.C. Legislative Library, Raleigh (July 19, 1985); telephone interview with Representative Wright, House Second Judiciary Committee, N.C. Legislature (July 22, 1985).

\textsuperscript{146} Jaffree, 105 S. Ct. at 2505 (Burger, C.J., dissenting). "It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren." Id. at 2499 (O'Connor, J., concurring in the judgement).
voluntary prayer”? Such a statute would be an original statute in terms of text in that neither “meditation” nor “prayer” appear in the present statute. Its legitimate secular purpose might simply be to endorse officially every student’s right to pray, as permitted under Jaffree. Would it pass constitutional muster? Probably not. The present statute implicitly protects the right to pray, and textual neutrality alone is not sufficient to achieve constitutionality under Jaffree. Because North Carolina already has a moment of silence statute, another statute offering “meditation or voluntary prayer” would be open to attack on the grounds that its avowed secular purpose was a sham. As Stone and Treen demonstrate, the courts are prepared to look behind an avowed secular purpose where necessary. The North Carolina Legislature has effectively stymied any future efforts to insert “prayer” into a moment of silence statute.

CONCLUSION

In Wallace v. Jaffree, Alabama’s statute mandating a moment of silence for “meditation or voluntary prayer” was declared unconstitutional. The statute failed the Lemon test because its enactment had no clear secular legislative purpose and its text revealed an impermissible endorsement of religion. The Supreme Court indicated in dicta that other similarly worded statutes might be constitutional provided they were enacted with a secular legislative purpose.

The possibility of litigation remains because although an avowed secular purpose may be present, it might be a sham. The courts would then have to “distinguish the sham purpose from the sincere one.” For proponents of the idea that every vestige of religion, direct or indirect, should be eradicated from the public schools, the door is still open to attack moment of silence statutes on establishment clause grounds.

The wall separating church and state remains high but not

147. According to the Library of Congress, no states have done so since Jaffree was decided. Telephone interview (October 17, 1985).
149. Id. at 2490-91
150. Id. at 2490.
151. Id. at 2500 (O’Connor, J., concurring in the judgment).
completely impregnable. The Supreme Court’s decision in Wallace v. Jaffree offers a small grappling hook for the determined climber.

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