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A ROSE BY ANY OTHER NAME: SCHOOL PRAYER REDEFINED AS A MOMENT OF SILENCE IS STILL UNCONSTITUTIONAL

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I. INTRODUCTION

Views on prayer in public schools have been sharply divided ever since the Supreme Court affirmed the separation of church and state in that setting.[1] Various political interest groups have repeatedly attempted to "return God to the classroom" by introducing legislation aimed at restoring prayer to public schools.[2] Since the terrorist attacks of September 11th, 2001, there is a renewed interest in school prayer.[3] Many state governments are considering passing legislation mandating a "moment of silence" or otherwise promoting prayer in public schools.[4] The issue of

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1. Engel v. Vitale, 370 U.S. 421, 435 (1962). Justice Black, writing for the majority, held that use of a brief, non-denominational prayer each morning in the New York public schools was a clear violation of the Establishment Clause of the First Amendment. *Id.* at 424. The majority opinion reminded us that freedom from government-imposed religion was one of the reasons colonists had come to America in the first place. *Id.* at 425. The Court noted that the First Amendment was adopted as a safeguard, "to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say . . . ." *Id.* at 429.

The following year, the Court also prohibited Bible readings in public schools. Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963). The Court noted that the First Amendment was written to ensure "a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." *Id.* at 217 (citing Everson v. Bd. of Educ., 330 U.S. 1, 31-32 (1947)).

2. *See infra* Part IV (A).

3. *See, e.g.*, Jodie Morse, *Letting God Back In; Prayer, Long Banned from Schools, Is Making a Post-terror Comeback*, TIME, Oct. 22, 2001, at 71 (noting that "[s]ome teachers are broadcasting morning blessings over the p.a. system or praying with distraught students."); Howard Fineman: *One Nation, Under . . . Who?*, NEWSWEEK, July 8, 2002, at 20 (noting the resurgence of religious speech by political leaders since the attacks).

4. Examples of this legislation include (but are not limited to): the Religious Speech Amendment, H.R.J. Res. 81, 107th Cong. (2001) (introduced in December 2001 by U.S. Rep. Ernest Istook); H.R. 1142, 146th Gen. Assem., Reg. Sess. (Ga. 2002); Idaho H.J.M. 17; H.C.R. 5050, 79th Gen. Assem., Reg. Sess. (Kan. 2002); H.C.R. 19, 91st Gen. Assem., 2d Reg. Sess. (Mo. 2002); H.J.R. 635, 102d Gen. Assem. (Tenn. 2002); H.J.R. 682, 102d Gen. Assem. (Tenn. 2002) (all calling on Congress to pass a constitutional amendment allowing voluntary school prayer); H.C.R. 22, 91st Gen. Assem., 2d Reg. Sess. (Mo. 2002) (calling for federal legislation allowing voluntary school prayer); Missouri H.C.R. 30 (proposing a constitutional amendment allowing voluntary school prayer); H.B. 1446, 157th Gen. Ct., 2d Reg. Sess. (N.H. 2001) (requiring students to recite the Lord's Prayer at the beginning of each day); H.B. 676, 185th Gen. Assem., Reg. Sess. (Pa. 2001)

prayer in public schools has also re-emerged in the federal court system, in the guise of objections to the words "under God" in the Pledge of Allegiance.[5] Also, at least one candidate for state governor wants to make returning prayer to public schools a major plank in his campaign.[6] In *Wallace v. Jaffree*,[7] the Court held that laws creating a moment of silence are unconstitutional if the purpose is to promote religion; however, the Court seemed to leave open the possibility that moment of silence laws, enacted without such motivations, might be constitutional.

For a movement that has been seeking to reintroduce prayer in schools for more than 40 years, the potential loophole left open by the Court in *Jaffree* appears to be a golden opportunity when combined with increased popular support for prayer in general following the September 11th attacks.[8] How much of an opportunity actually exists depends on the exact parameters of the Court's view on moment of silence laws. Since *Jaffree*, however, the Court has declined to clarify its position by taking another case on these laws.[9] Given the Court's silence, interested parties can only attempt to infer the direction of the Court from other sources including the Court's recent related Establishment Clause jurisprudence. The recent case *Doe v. School Board of Ouachita Parish*[10] in Louisiana illustrates the connection between moment of silence laws and school prayer, and also serves as another guidepost in the murky landscape left by the Supreme Court.

This Article explores the possible direction of the Court in this area. Part II analyzes *Wallace v. Jaffree*, the seminal Supreme Court case striking down legislation requiring religiously motivated moments of silence in schools. Part III examines some of the state challenges to moment of silence laws since *Jaffree* and the rationales courts have used

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(requiring the Department of Education to request all school districts to begin each school day with prayer or a short period of meditation); H.B. 541, Biennium Adj. Sess. (Vt. 2002) (requiring schools to begin each day with a short prayer).

5. *See* Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir. 2002) (discussed more fully *infra* note 132 and accompanying text).

6. Governor Rick Perry, re-elected in 2002 to a full four-year term as Texas governor, supports a return to public school prayer, at least partially in response to the terrorist attacks. He sees "no problem with ignoring the U.S. Supreme Court ban on organized school prayer 'at this very crisis moment in our history.'" Meighan, Editorial, *Perry's Stand on Prayer Sends a Bad Message*, CORPUS CHRISTI CALLER-TIMES, Nov. 3, 2001, at A15. Senator David Scott (D-Ga.) was elected in 2002 to represent Georgia's 13th Congressional District. Scott campaigned on the issue of restoring prayer to public schools through legislation making the requirement of a moment of silence legal. *Ready to Represent Georgia*, JET, Sept. 16, 2002, at 34.

7. 472 U.S. 38 (1985).

8. *See infra* Part IV for a more detailed explanation of the road from school prayer to moment of silence statutes.

9. Most recently, the Court denied certiorari to a case challenging the Virginia moment of silence statute, Brown v. Gilmore, 258 F.3d 265, 270 (4th Cir. 2001) (affirming holding that the statute did not unconstitutionally establish religion), *cert. denied*, 534 U.S. 996 (2001).

10. 274 F.3d 289 (5th Cir. 2001) (striking down a Louisiana statute validating vocal prayer in public schools, which had formerly contained the word "silent," but was recently modified to allow vocal prayer).

for sustaining or striking down these statutes.[11] Finally, Part IV outlines why public school moment of silence statutes, as stand-ins for school prayer, must be unconstitutional as a violation of the Establishment Clause.

II. THE COURT SPEAKS: *WALLACE V. JAFFREE*[12]

The Supreme Court's first, and only, statement about moment of silence laws came in 1985. *Wallace v. Jaffree*[13] settled a challenge to a 1981 Alabama statute[14] authorizing a one-minute period of silence in public schools "for meditation or voluntary prayer."[15] The plaintiff, Ishmael Jaffree, on behalf of his school-age children, sought an injunction against the application of this statute, claiming it violated the First and Fourteenth Amendments.[16] The defendants argued that the First Amendment, and therefore the Establishment Clause, did not apply to the states but only to the federal government.[17] Further, the State argued that the Fourteenth Amendment did not and was never intended to subject the states to the restrictions of the First Amendment.[18]

After a lengthy trial, with testimony from state officials including the primary sponsor of the amendment, State Senator Donald G. Holmes,[19] the District Court reviewed the history of the First and Four-

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11. Four state "moment of silence laws" have been challenged since *Jaffree*. Two were upheld—*Bown v. Gwinnett Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997), and *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001)—and two were struck down as unconstitutional—*May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985), and *Doe v. Ouachita Sch. Bd.*, 274 F.3d 289 (5th Cir. 2001).

12. 472 U.S. 38 (1985).

13. *Jaffree*, 472 U.S. at 38.

14. ALA. CODE § 16-1-20.1 (Supp. 1984).

> 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 mediation, and during any such period of silence shall be maintained and no other activities shall be engaged in.

Id. Two other statutes—ALA. CODE §§ 16-1-20 & 20.2 (Supp. 1984) were also challenged in the original complaint. *Jaffree*, 472 U.S. at 41-42. The plaintiffs dropped their claim that section 16-1-20, which provided for a period of silence for meditation, was unconstitutional. *Id.* Section 16-1-20.2, which provided for teacher-led prayers at the start of the school day, was held to be unconstitutional by both the Court of Appeals for the Eleventh Circuit and by the Supreme Court, and was not at issue in *Jaffree*. *Jaffree*, 472 U.S. at 41-42.

15. ALA. CODE § 16-1-20.1 (Supp. 1984). The 1984 amendment actually added the words "voluntary prayer" to the statute, which had previously only called for a moment of silence for meditation.

16. *Jaffree*, 472 U.S. at 42-43 (stating that the original complaint simply asked that the school be enjoined from imposing religious services and prayers on the public school students, while a later amendment to the complaint specified the portions of the Alabama Code at issue).

17. Jaffree v. Bd. of Sch. Comm'rs, 554 F. Supp. 1104, 1113 (S.D. Ala. 1983).

18. *Id.* The defendants also argued that if religion were to be banned from public schools, so-called "secular humanism" would also need to be removed from the curriculum. *Id.* Since "[s]uch a purge" would be difficult if not impossible, the defendants argued that other religions must also be permitted to remain. *Id.*

19. *Jaffree*, 472 U.S. at 43. Senator Holmes testified that he had no secular purpose in mind when he introduced the amendment adding "voluntary prayer" to the Alabama statute in question.

teenth Amendments.[20] The District Court held that the Establishment Clause does not prevent states from establishing a religion and upheld the moment of silence law.[21] The Eleventh Circuit Court of Appeals reversed the District Court.[22] The Supreme Court affirmed, holding that the First Amendment did apply to the states as well as to the federal government and that the law was unconstitutional as a violation of the Establishment Clause.[23]

Writing for a five-Justice majority, Justice Stevens affirmed the holding below that the Establishment Clause of the First Amendment, through the Fourteenth Amendment, applied to the states, as well as to the federal government.[24] He stressed the central importance of the idea that individuals must be free not only to worship as they choose, but also to refrain from worshipping at all, if they so choose.[25] Governments, both state and federal, must respect this "basic truth"—that individuals cannot be forced by the State to either abandon or embrace religion.[26]

Justice Stevens applied the *Lemon* test, formulated to evaluate Establishment Clause challenges, to the Alabama law.[27] This test consists

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Id. His sole intention was an "effort to return voluntary prayer to our public schools . . . it is a beginning and a step in the right direction." *Id.*

20. *Jaffree*, 554 F. Supp. at 1113, 1125 (concluding that the purpose of the First Amendment was to ensure that the federal government would not interfere with the states' right to establish official religions, and that the Fourteenth Amendment was never intended to apply the First Amendment to the states).

21. *Id.* at 1128 (acknowledging that its decision was against the force of Supreme Court precedent, but felt that the previous decisions were wrongly made and felt "a stronger tug from the Constitution which it ha[d] sworn to support and to defend" than from adherence to precedent). *Id.* at 1126-28.

22. Jaffree v. Wallace, 705 F.2d 1526 (1983). The court of appeals chastised the district court for acting against Supreme Court precedent, emphasizing the doctrine that lower courts are bound by the decisions of higher courts:

> The district court attempted to justify its actions by discussing the limited exceptions to the doctrine of stare decisis. The doctrine of stare decisis pertains to the deference a court may give to its *own* prior decisions. The stare decisis doctrine and its exceptions do not apply where a lower court is compelled to apply the precedent of a higher court.

Id. at 1532 (citations omitted) (emphasis added). The court of appeals also noted that the Supreme Court had rejected the narrower interpretation of the Establishment Clause that the district court clung to. *Id.* at 1530. It also noted the Court's unanimity "regarding the history of the first amendment's applicability to the states through the fourteenth amendment." *Id.* at 1531.

23. *Jaffree*, 472 U.S. at 61.

24. *Id.* at 48-49. The Supreme Court unanimously affirmed the portion of the appellate decision that overturned the district court's holding that the First Amendment did not restrict the states. *Id.* Stevens briefly elaborated on this affirmation, citing a long string of Supreme Court cases that have held the First Amendment applicable to the states as well as to the federal government. *Id.*

25. *Id.* at 53 (stating that "[this] Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.").

26. *Id.* at 55 (quoting Justice Jackson, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

27. *Id.* at 55 (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)). The Establishment Clause test first articulated in *Lemon* has been modified slightly by later cases, including *Agostini v. Felton*, 521 U.S. 203 (1997) (modifying the criteria used to assess whether aid to religion has an impermissible effect).

of three prongs: first, that there is a secular purpose for the law; second, that the primary effect of the law must not be to advance or inhibit religion; and third, that the law not cause excessive entanglement between the government and religion.[28] Justice Stevens only examined the first prong of the three-prong test, however, as the Court found that the Alabama law had no secular purpose.[29] Both the text of the statute[30] and statements by State Senator Donald G. Holmes, the bill's sponsor,[31] indicated that the statute had a purely religious purpose—returning prayer to public schools. For the majority of the Court, the fact that the statute clearly and solely had a religious purpose eliminated the need to examine the second and third prongs of the *Lemon* test.[32] Thus, the Court struck down the Alabama statute as a violation of the First Amendment.[33]

In reaching this conclusion, the majority also noted the importance of the special setting involved—the public schools. Justice Stevens stated that the "indirect coercive pressure upon religious minorities to conform" is of special concern in the public school setting.[34] He expanded on the special significance of the public school setting by citing several previous cases where the Court acknowledged the role peer pressure plays in school settings.[35] Justice Stevens especially worried about the potential impact of peer pressure, citing Justice Frankfurter's earlier concerns, "That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children."[36]

Both Justice O'Connor and Justice Powell concurred in the majority decision, but separately maintained that some moment of silence laws might well be constitutional.[37] Justice O'Connor explained that moment

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28. *Id.* at 55-56 (citing *Lemon*, 403 U.S. at 612-13). The *Lemon* test is discussed in more detail *infra* in Part IV.

29. *Id.* at 56.

30. *Id.* at 60 (finding the text of the Alabama statute problematic because it calls for "voluntary prayer" from the students and that the addition of the word "prayer" to the statute was seen as an attempt by the legislature to promote "prayer as a favored practice").

31. *Id.* at 43 (quoting Senator Holmes' explanation "that the bill was an 'effort to return voluntary prayer to our public schools . . . it is a beginning and a step in the right direction'"). Senator Holmes also made it clear that he "had no other purpose in mind," other than restoring prayer to public schools. *Id.* at 57.

32. *Id.* at 56 (stating that this factor was dispositive).

33. *Id.* at 61.

34. *Id.* at 61 n.51 (citing *Engel*, 370 U.S. at 430).

35. *Id.* (citing Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 227) (1948) (Frankfurter, J., concurring) (noting that when governmental support is given to a specific religious belief, there is pressure put on religious minorities to conform); *Schempp*, 374 U.S. at 290 (voicing concern that students might participate in religious activities to avoid being stigmatized); Marsh v. Chambers, 463 U.S. 783, 792 (1983) (distinguishing between adults not being very susceptible to 'religious indoctrination' and children who are subject to peer pressure).

36. *Id.* at 61 (quoting *McCollum*, 333 U.S. at 227) (Frankfurter, J., concurring).

37. *Id.* at 62, 72 (Powell, J., concurring) (O'Connor, J., concurring).

of silence laws were not inherently unconstitutional: first, they are not "inherently religious;"[38] second, a moment of silence does not coerce a student into "compromis[ing] his or her beliefs."[39] The primary concern according to O'Connor was whether the state "has conveyed or attempted to convey the message that children should use the moment of silence for prayer."[40] To determine if the state has done this, Justice O'Connor would look to the circumstances surrounding the enactment of the moment of silence law, specifically, "the history, language, and administration of a particular statute."[41] Justice Powell largely agreed with Justice O'Connor, and would also find a moment of silence law constitutional if there was a clear secular purpose for the law.[42]

While the Court's decision in *Jaffree* settled the question of Alabama's statute, the more general question of moment of silence statutes was left at least partially open. Since 1985, the Court has refused to definitively answer that question, denying certiorari in moment of silence cases. Part III of this Article examines the four appellate moment of silence decisions since *Jaffree*; two circuit courts have upheld such statutes, and two have invalidated them. Part IV considers the potential unconstitutionality of all moment of silence laws, attempting to read between the lines and determine the future of the Court's Establishment Clause jurisprudence.

III. INTO THE FUTURE: STATE CHALLENGES SINCE *JAFFREE*

The overall picture of the constitutionality of moment of silence laws remains murky. Since *Jaffree* was decided in 1985, only a few states have had constitutional challenges to their own moment of silence laws. Two of these states upheld the moment of silence laws as constitutional,[43] and two struck down the law as unconstitutional.[44] Because the Supreme Court has yet to take a moment of silence case since *Jaffree*, these lower court rationales serve as the only guideposts for the constitutionality, or lack thereof, of such laws.

38. *Id.* at 72.
39. *Id.*
40. *Id.* at 73.
41. *Id.* at 74.
42. *Id.* at 66.
43. The statutes of both Georgia (1997) and Virginia (2001) were upheld by the circuit courts. Bown v. Gwinnett County Sch. Bd., 112 F.3d 1464, 1474 (11th Cir. 1997); Brown v. Gilmore, 258 F.3d 265, 282 (4th Cir. 2001), *cert. denied*, 534 U.S. 996 (2001).
44. The statutes of both New Jersey (1985) and Louisiana (2001) were struck down by the circuit courts for violating the Establishment Clause. May v. Cooperman, 780 F.2d 240, 253 (3d Cir. 1985); Doe v. Sch. Bd., 274 F.3d 289, 295 (5th Cir. 2001).

A. *Sustained—Georgia and Virginia*

Both the Fourth and Eleventh Circuit Courts of Appeals have upheld moment of silence laws.[45] In doing so, both Courts focused on the first prong of the *Lemon* test, finding secular purposes for the laws.[46] No religious purpose was given for the Georgia statute. A religious purpose was given for the Virginia statute, but it was accompanied by several secular purposes. The secular purposes in both statutes are similar: both claim to provide students with a quiet moment to start the school day, allowing them to collect their thoughts. The Virginia statute also claims the purpose of promoting the values of the Free Exercise clause of the First Amendment, which the court claims is a secular purpose.[47]

Despite the courts' holdings regarding secular purposes for these statutes, suggestions of an underlying religious purpose remain. Georgia's statute, while specifically stating that the moment of silence is not religiously motivated, also expressly ensures that no voluntary student prayer is prevented and suggests that the first two provisions must implicate student prayer.[48] The court dismissed the concerns over this provision, characterizing it simply as a preventative measure against misinter-

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45. The text of the Georgia statute reads:

> § 20-2-1050. 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).

The text of the Virginia statute reads:

> § 22.1-203. Daily observance of one minute of silence
>
> 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 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 (2000).

46. While both courts do go on to examine the second and third prongs of the *Lemon* test, neither court dwells very long on those issues. *Bown*, 112 F.3d at 1472-74; *Brown*, 258 F.3d at 277-78.

47. The court observed that "the Establishment Clause [does not] preclude a government from 'accommodating' religious scruple . . . ." *Brown*, 258 F.3d at 274. The court held that the intent to accommodate religious practices is a secular purpose, not a religious one. *Id.* at 276.

48. GA. CODE ANN. § 20-2-1050(c) (1996).

pretation of the first two provisions in the statute.[49] The legislative history surrounding the statute also provided evidence of latent religious motivations.[50] However, the court downplayed these motivations, drawing a distinction between "the legislative purpose of the statute . . . [and] the possibly religious motives of the legislators who enacted the law."[51] Drawing such a distinction seems disingenuous,[52] as the court appeared willing to look past even the type of motivations that the *Jaffree* Court held unconstitutional.[53]

Virginia, too, appears to have religious motives lurking behind its moment of silence statute. The plain language of the statute mentions prayer as a potential exercise during the minute of silence.[54] When the Fourth Circuit analyzed the statutory language, it dismissed the mention of prayer as just one of a list of potential practices.[55] Additionally, the legislative history suggested a religious motivation for the statute, which was also swept away by the court. The court focused on the aspects of the legislative history that support a secular purpose,[56] while ignoring those aspects that support a religious purpose.[57] The court even looked past the fact that the same Virginia legislature passed a joint resolution opposing the holding of *Engel v. Vitale* and calling for a constitutional amendment to restore prayer to the public classroom.[58] Although the

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49. *Bown*, 112 F.3d at 1474.

50. The original bill was to create a time for prayer in the classroom, not merely a moment of quiet reflection. Several legislators also spoke fervently about the reintroduction of prayer into the public schools, and an amendment referring specifically to school prayer was "overwhelmingly supported." *See* Larry R. Thaxton, *Silence Begets Religion:* Bown v. Gwinnett County School District *and the Unconstitutionality of Moments of Silence in Public Schools*, 57 OHIO ST. L.J. 1399, 1430-31 (1996).

51. *Bown*, 112 F.3d at 1471-72.

52. If legislative purpose is not a composite of the individual motives of those legislators who enact a statute, what is it?

53. Now that the Eleventh Circuit has upheld Georgia's statute as constitutional, state legislators seem more willing to explicitly encourage prayer during the mandated moment of silence. On January 31, 2002, Georgia legislators introduced a bill that would "clarify" the uses of the moment of silence, reminding students that their First Amendment rights entitle them to pray during that moment if they so choose. *See* H.B. 1171, 146th Gen. Assem., Reg. Sess. (Ga. 2002). *See also* S.B. 402, 146th Gen. Assem., Reg. Sess. (Ga. 2002) (providing for similar clarification). The Georgia Senate has also introduced a bill that would provide a three-minute period for students to voluntarily speak about their religious beliefs. This "educational period" would be held immediately before the mandated moment of silence. *See* S.B. 331, 146th Gen. Assem., Reg. Sess. (Ga. 2002).

54. VA. CODE ANN. § 22.1-203 (2000).

55. *Brown*, 258 F.3d at 276.

56. *Id.* at 277 (emphasizing the use of a moment of silence to settle students before starting the day).

57. The sponsor of the bill firmly stated that his intent was not to return prayer to public schools, while maintaining that "[t]his country was based on belief in God." *Brown*, 258 F.3d at 271. Other senators also voiced concerns about the religious nature and purpose of the statute. *Id.* at 271-72.

58. *Brown*, 258 F.3d at 284 (King, J., dissenting). The court also ignored the fact that the Virginia legislature provided for legal defense of the moment of silence statute as a provision of that statute. This provision suggests that the legislature was aware of the Establishment Clause issues inherent in these statutes and intended to press the issue with the courts. *Id.* Combined with the joint resolution, this provision suggests that the legislature was willing to try a number of different tactics to restore prayer to the public classroom. *Id.*

religious motives behind the statute seemed clear, the court found them irrelevant and upheld the statute.[59]

Both circuit courts espoused a high level of deference to the legislative decision-making process when evaluating the stated secular purpose of these moment of silence statutes.[60] The willingness of these circuit courts to turn a blind eye to legislative purpose[61] and to the history from which these laws were born[62] signals a frightening turn of events. While legislatures are due some level of deference as a co-equal branch of government, an overly deferential approach robs the courts of their role in upholding the constitutional rights of all citizens.[63]

B. Invalidated—New Jersey and Louisiana

In contrast, two other courts of appeals have invalidated moment of silence statutes as unconstitutional violations of the Establishment Clause.[64] In addition to representing the bookends of post-*Jaffree* moment of silence jurisprudence,[65] these cases also dealt with two very different statutes.[66] While the wording of the statutes may not seem to be

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59. *Id.* at 270-72. As in Georgia, the Virginia legislature seems willing to test the limit of school prayer jurisprudence. Once certiorari was denied for *Brown*, the Virginia legislature introduced a bill that would amend the statute to require school officials to expressly inform students of the purpose of the moment of silence. The purpose, as stated by the statute, is to guarantee "the right of every pupil to the free exercise of religion." *See* H.B. 135, 2002 Leg. (Va. 2002). Both houses of the Virginia state legislature have also passed bills that would require public schools to post signs reading "In God We Trust." *See* H.B. 108, 2002 Leg. (Va. 2002); S.B. 608, 2002 Leg. (Va. 2002). These bills have now passed both Houses and were signed into law by Virginia's governor on May 17, 2002.

60. *Bown*, 112 F.3d at 1469; *Brown*, 258 F.3d at 276 (referring specifically to the level of deference espoused by Justice O'Connor's concurring opinion in *Jaffree*).

61. The legislative history for both statutes has several examples of the religious motivations of the sponsors and other supporters. State Senator Warren Barry, sponsor of the Virginia statute, was asked about his intent for the moment of silence statute. He answered that "[t]his country was based on belief in God, and maybe we need to look at that again." *Brown*, 258 F.3d at 271. An unofficial transcript of the Georgia General Assembly reveals that a number of House members took positions, for and against the statute, based on a belief that it would institute school prayer. *Bown*, 112 F.3d at 1467.

62. *See infra* Part IV.

63. The Supreme Court has repeatedly emphasized that the courts have a duty to look into legislative decisions in Free Exercise and Establishment Clause claims, to distinguish legitimate secular purposes from ones that are merely a smokescreen for religious purposes. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000); City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (stating that "Congress' discretion is not unlimited . . . and the courts retain the power . . . to determine if Congress has exceeded its authority under the Constitution.").

64. May v. Cooperman, 780 F.2d 240 (3d Cir. 1985); Doe v. Sch. Bd., 274 F.3d 289 (5th Cir. 2001).

65. *May* was decided only months after *Jaffree* was decided, and *School Board* was just decided in December 2001.

66. The text of the New Jersey statute provided:

§ 18A:36-4. Period of silence

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a one minute period of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection.

N.J. STAT. ANN. § 18A:36-4 (West 1985).

very different, their enactment was. The New Jersey statute, as challenged, was enacted as a whole; however, the Louisiana statute was amended before passing.

Jaffree had only been law a few months when the Third Circuit found that the New Jersey statute violated the Establishment Clause under the *Lemon* test.[67] While the court examined all three prongs of the *Lemon* test, it found that the New Jersey statute only violated the first prong, because it lacked a secular purpose.[68] Unlike the courts that considered the Georgia and Virginia statutes, the Third Circuit was willing to look beyond the purported secular legislative motive. The court held that the secular purpose, "to provide a transition from nonschool life to school life," was pretextual and therefore insufficient to save the statute from an Establishment Clause challenge.[69] In prior years, the New Jersey legislature had attempted to reintroduce prayer into the public schools a number of different ways, and the court took that history into account when evaluating the stated purpose for the moment of silence statute.[70]

While the court did not find a legislative intent to encourage prayer over other activities during the mandatory moment of silence, it did conclude that the "purpose of accommodating the religious beliefs of some students is itself a religious purpose."[71] In the end, the court asked if it was permissible for "the state, . . . while not endorsing prayer in preference to other forms of silent activity, [to provide] for a minute of silence for the purpose of permitting prayer by those who want to pray."[72] The answer from the Third Circuit was a solid "no."[73]

The text of the Louisiana statute provided:

§ 2115 *[Silent prayer] Prayer* or meditation; pledge of allegiance

> A. Each parish and city school board in the state shall permit the proper school authorities of each school within its jurisdiction to allow an opportunity, at the start of each school day, for those students and teachers desiring to do so to observe a brief time in *[silent] prayer or* meditation. The allowance of a brief time for *[silent] prayer* or meditation shall not be intended nor interpreted as state support of or interference with religion, nor shall such time allowance be promoted as a religious exercise and the implementation of this Section shall remain neutral toward religion.

LA. REV. STAT. ANN. 17:2115(A) (West 1999) (emphasis added) (bracketed material deleted by amendment).

67. *May*, 780 F.2d at 253.

68. *Id.* at 241 ("[This] appeal requires that we assess the impact on the district court's ruling of the subsequent decision of the Supreme Court in *Wallace v. Jaffree*") (citation omitted).

69. *Id.* at 251. The Third Circuit accepted the district court's finding that the purpose was pretextual. *Id.*

70. *Id.* at 251-52. The court also considered testimony from educational experts and witnesses at the legislative hearings before concluding that the stated purpose was but a sham. *Id.* at 252.

71. *Id.* at 252. The court goes on to state that a finding that the New Jersey statute was intended to promote prayer was not sustainable, but that the purpose of accommodation of certain religious beliefs was sufficient to render the statute unconstitutional. *Id.*

72. *Id.* at 252.

73. *Id.* at 253.

In contrast to the New Jersey statute, the Louisiana statute originally created a moment of silence, but was amended in an effort to restore prayer to public classrooms. The statute was amended twice, first to add the words "prayer or"[74] to the possible uses for the moment and later to remove the word "silent"[75] to allow for vocal prayer.[76] In *Doe*, the Court of Appeals for the Fifth Circuit held that the statute as amended was unconstitutional.[77] Drawing a comparison to *Jaffree*, the court found that the only viable purpose for the 1999 amendment removing the word "silent" was to "authorize *verbal* prayer in schools."[78] Because the court found no secular purpose for the statute, it did not consider the other prongs of the *Lemon* test.[79]

These four cases provide some guidance as to the constitutionality of moment of silence statutes. However, the lack of clarity left after *Jaffree* remains and the tension between two ideals endures. Although courts must show appropriate deference to legislative decisions, they must also fulfill their duty to ensure that those decisions are not based on impermissible motives. The history of these statutes weighs heavily on them, and courts must work harder to ignore that history than to consider it. Part IV illustrates how, even with appropriate deference to legislatures, courts must find moment of silence statutes unconstitutional.

IV. CAN A MOMENT OF SILENCE BE CONSTITUTIONAL: WHY *JAFFREE* GOT IT RIGHT—AND HOW IT GOT IT WRONG

Jaffree seems to leave the constitutional door ajar concerning moment of silence laws. While the Court clearly stated that such laws are unconstitutional when enacted for solely religious purposes, it does not speak to laws with both religious and secular purposes.[80] The Court, in both majority and concurring opinions, seems to suggest that such laws might pass constitutional muster if they had a secular motive for their

74. *Doe*, 274 F.3d at 291 (citing the 1992 amendment).

75. *Id.* (citing the 1999 amendment).

76. The text of the Louisiana statute provided:

§ 2115 *[Silent prayer] Prayer* or meditation; pledge of allegiance

A. Each parish and city school board in the state shall permit the proper school authorities of each school within its jurisdiction to allow an opportunity, at the start of each school day, for those students and teachers desiring to do so to observe a brief time in *[silent] prayer or* meditation. The allowance of a brief time for *[silent] prayer* or meditation shall not be intended nor interpreted as state support of or interference with religion, nor shall such time allowance be promoted as a religious exercise and the implementation of this Section shall remain neutral toward religion.

LA. REV. STAT. ANN. 17:2115(A) (West 1999) (emphasis added) (bracketed material deleted by amendment). The Louisiana State Legislature has since amended and re-enacted § 17:2115(A), restoring the word "silent" to the statute. *See* Act of April 18, 2002, No. 56, § 17:2115(A), 2002 La. Sess. Law Serv. 1st Ex. Sess. (West) (amended and reenacted).

77. *Doe*, 274 F.3d at 290. Both the language of the statute and the legislative history of the amendment supported this holding.

78. *Id.* at 294.

79. *Id.* at 293. The court also did not consider any endorsement or coercion issues.

80. Wallace v. Jaffree, 472 U.S. 38, 66 (1985).

enactment.[81] The Court does not, however, address the role the history of moment of silence laws might play in the determination of whether such laws are constitutional. As the Court does not squarely address the issue, the question remains as to what fate such a law would face if a clearly stated secular purpose were given for its enactment, either alone or in tandem with a religious purpose.

While there might have been a time when moment of silence laws could have been enacted in a constitutional manner, that time is past. Regardless of any stated meaning by the legislature, the history of moment of silence laws is too uncomfortably blurred with school prayer. This Part addresses the difficulties in applying the motivational test the Court implies, as well as concerns of free exercise and the special role of children in Establishment Clause issues. As the Court has yet to select a single test for evaluating all Establishment clause challenges, this Article will examine three of the "leading contenders:" the *Lemon* test, the endorsement test, and the coercion test.

A. The Lemon *Test: Silence with a Secular Purpose?*

For more than 30 years, the Court has used a test, originally set forth in *Lemon v. Kurtzman*,[82] that examines three aspects of a statute challenged as violating the Establishment Clause.[83] The Court has continued to use this test, despite criticism from both within and outside the Court, ever since.[84] In *Jaffree*, the Court applied the *Lemon* test, but only examined the first prong of the test—whether a statute has a secular purpose for enactment.[85] The majority found that the clearly stated purpose for the Alabama moment of silence law was to return prayer to the public classroom.[86]

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81. *Jaffree*, 472 U.S. at 66.

82. 403 U.S. 602 (1971).

83. First, the statute must have a secular purpose; second, the statute cannot have the primary effect of advancing or inhibiting religion; third, the statute cannot cause excessive entanglement between religion and government. *Id.* at 612-13.

84. The *Lemon* test has indeed come under a great deal of fire from within the Court, with Chief Justice Rehnquist and Justice Scalia being two of its more outspoken critics. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398-400 (1993) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again . . . ."). *But see Jaffree*, 472 U.S. at 63 (Powell, J., concurring) ("It [the *Lemon* test] is the only coherent test a majority of the Court has ever adopted."); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000) (citing *Lemon* as justification for examining the purpose of a policy); Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 470 (1994) (arguing that the "operative terms" of *Lemon* would serve to maintain church-state separation).

85. *Jaffree*, 472 U.S. at 55-56. The second and third prongs of the *Lemon* test are not examined by courts in the same detail as the first prong when considering moment of silence laws. *See Id.* Therefore, I will only examine the first prong in this Article.

86. *Id.* at 59-60.

In applying the *Lemon* test, the Court first looks to see if the challenged statute has a secular purpose.[87] If a statute has both secular and religious purposes, the secular purpose must be the primary purpose and not merely pretextual.[88] However, the secular purpose need not be exclusive; the Court has held that the government may "[recognize] the important part that religion or religious organizations may play in resolving certain secular problems."[89] Once the legislature establishes a secular purpose for a program or policy, the government's claim is generally given deference.[90] However, the secular purpose must be "sincere and not a sham."[91] If challenged, the validity of the secular purpose may be evaluated by considering events surrounding the initial decision to enact the statute.[92]

Moment of silence laws face a real problem concerning their purpose of enactment. *Jaffree* has already established that if the statute is passed solely to satisfy a religious purpose, such as returning prayer to public schools, it cannot pass constitutional muster. But what about statutes where the legislature claims a dual purpose for the statute—both religious and secular—or even a purely secular purpose? The majority in *Jaffree* seems to say that dual secular and religious purposes *may* preserve the constitutionality of a moment of silence law.[93] And if the legislature claims solely a secular purpose for the statute, the first prong of the *Lemon* test seems to be met.

But the secular purpose must not be a pretexual purpose, a sham, or a cloth drawn over the eyes of the court. Courts have the duty to investigate the stated secular purpose to ensure that it is a true purpose for the statute. Although Congress (as well as state legislatures) must be given deference in its decision-making, that deference cannot not be complete if courts are to fulfill their duties. When examining or interpreting a piece of legislation, the courts must consider the circumstances surrounding the creation of that statute as well as the stated goals of the legislature.[94] Recently, the Court has shown its willingness to look beyond the surface motivations of school officials to examine the true intent of pro-

87. *Lemon*, 403 U.S. at 612.
88. *Id.*
89. Bowen v. Kendrick, 487 U.S. 589, 607 (1988).
90. Edwards v. Aguillard, 482 U.S. 578, 596 (1987).
91. *Id.* at 587.
92. *Id.*
93. *Jaffree*, 472 U.S. at 56. The majority does not make a clear statement about the constitutionality of such a statute. Justice Stevens mentions the possibility of a secular motivation saving the statute before moving on to definitively invalidate such statutes if motivated solely by religious reasons. *Id.*
94. *See* United States v. Champlin, 341 U.S. 290, 297 (1951) (stating that "[t]he statute cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent. The circumstances and the evil are well-known."). The circumstances of any moment of silence law must necessarily include the ongoing struggle by some political factions to restore prayer to public schools. *See supra* notes 82-86 and accompanying text.

moting prayer in public schools in other related situations.[95] The Court must surely take the same care in probing behind stated purposes for the legislative intent for moment of silence laws.

From the moment that prayer in public schools was held to be unconstitutional, certain interest groups have been fighting for reinstatement.[96] On the federal level, numerous statutes and constitutional amendments have been introduced that would restore prayer to public schools in one form or another.[97] These bills started by reintroducing "prescribed prayer in public schools, [then moved] to prayer, to nonsectarian prayer, to nondenominational prayer, to voluntary prayer, to a voluntary moment of silence."[98] A proposed House amendment from 1971 shows the evolution of these bills from a call for a restoration of prayer in schools to a moment of silence (intended for prayer).[99] Congress has also attempted to restrict the Supreme Court's jurisdiction in this area with bills that would strip the Court of the power to hear "any case arising out of any state statute . . . which relates to voluntary prayers in the public schools and public buildings."[100]

On a state and local level, governments have supplemented federal attempts to restore prayer to public classrooms. State legislatures continued to enact statutes mandating prayer in public schools, ignoring the

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95. *Santa Fe*, 530 U.S. at 305-06. School officials attempted to allow student prayer before each football game, claiming that the content of the message was up to the student. *Id.* The student who was to deliver the message was elected by his or her peers, supposedly separating the potential religious message and the school officials even further. *Id.* However, the Supreme Court refused to allow the claim that the school was merely trying to "promote good sportsmanship" and invalidated the program. *Id.*

96. The reaction to the school prayer decisions was sudden and vigorous. *See* Abington Township v. Schempp, 374 U.S. 203, 223 (1963); Engel v. Vitale, 370 U.S. 421, 436 (1962). The day *Engel* was handed down was dubbed "Black Monday" in some quarters, and one senator went so far as to say that "[t]he Supreme Court has made God unconstitutional." LYNN R. BUZZARD, SCHOOLS: THEY HAVEN'T GOT A PRAYER 44 (1982). After *Schempp* was decided, numerous school officials and state superintendents announced their decision to ignore the Supreme Court and proceed with various forms of prayer in their schools, calling those who supported the decision "atheists, free thinkers, ultraliberals, a bunch of crackpots, and inverse bigots." *Id.* at 57.

97. These statutes and amendments have called for non-denominational prayers, voluntary prayers and silent prayers, among other variations. Examples include the 1966 Dirksen Amendment ("providing for or permitting the voluntary participation of students or others in prayer"); the 1971 Wylie Amendment (supporting first nondenominational, then voluntary, prayer in public buildings); and the 1981 Voluntary School Prayer Act (withdrawing jurisdiction from the Supreme Court in claims relating to voluntary school prayers). *Id.* at 60-61, 67.

98. ROBERT S. ALLEY, SCHOOL PRAYER: THE COURT, THE CONGRESS, AND THE FIRST AMENDMENT 172 (1994). Two of the newest forms this impulse has taken are moments of silence and student-initiated, nondenominational, nonproselytizing prayers at events such as graduation. *Id.*

99. The original text of the 1971 amendment, introduced by Rep. Chalmers Wylie (Ohio), was:

> Section 1. Nothing contained in this Constitution shall abridge the right of persons lawfully assembled, in any public building which is supported in whole or in part through the expenditure of public funds, to participate in nondenominational prayer.

Id. at 169.

100. Donald E. Boles, *Religion and the Public Schools in Judicial Review*, *in* RELIGION: THE STATE AND EDUCATION 49 (James E. Wood, Jr. ed., 1984).

unconstitutionality of such statutes.[101] A number of state legislatures also called for Congress to enact a "voluntary prayer amendment."[102]

Some courts and commentators would infer that *Jaffree* stands for the proposition that a moment of silence law is constitutional so long as the legislature does not acknowledge its intent to restore prayer to public schools. Among others, Justice O'Connor has voiced her concern of courts giving too little deference toward legislative decisions.[103] While Justice O'Connor may have "little doubt"[104] that the courts will be able to winnow out the sham secular purposes from the legitimate ones, the extreme level of deference she suggests for this investigation will hobble most judges. This rationale forces a questionable situation on legislatures and courts. If the Court really means to allow moment of silence laws, on the condition that the legislature itself is silent about any religious purpose for the law, this creates an awkward and easily exploitable situation for legislatures. Given the long history of the battle over prayer in public schools, this rationale is absurd if moments of silence are but the newest battlefield in that war.[105] To uphold such statutes so long as no religious purpose is stated, or at least is accompanied by a secular purpose, encourages legislators to wink at the requirements of the Establishment Clause and bring school prayer back in disguise.

Even some commentators who argue that moment of silence laws are or can be constitutional admit that the "political origin" of these laws was the war over prayer in public schools.[106] While states may claim any number of secular purposes for moment of silence laws,[107] it is unlikely that states would pass any of these laws if the history of school prayer were different or nonexistent.[108] These admissions, along with the his-

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101. David Z. Seide, *Daily Moments of Silence in Public Schools*, 58 N.Y.U.L. REV. 364, 366-67 (1983).

102. *See id.* at 366. By 1983, six states had called for such an amendment—Illinois, Kansas, Nevada, North Carolina, Virginia, and Washington. More have called for such an amendment since then. *See supra* note 4.

103. *Jaffree*, 472 U.S. at 74 ("[T]he inquiry into the purpose of the legislature in enacting a moment of silence law should be deferential and limited.").

104. *Id.* at 75.

105. Douglas Laycock observes that "many legislatures and teachers have used these moments of silence to officially encourage prayer," arguing that the problem with the laws is in the implementation, not the enactment. Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 6 (1986).

106. Laycock, for example, freely admits the origins of the moment of silence in public schools, seeing them as direct "resistance to the Supreme Court's ban on school-sponsored prayer." *Id.* at 5-6. He argues that despite this origin such laws can still be constitutional. *Id.*

107. Examples of secular purposes given for such laws include: to provide time for quiet reflection on the day ahead, to combat the problem evidenced by the violence at Columbine, to maintain order in the classroom, or to focus students on the coming day. *See, e.g.*, Bown v. Gwinnett County Sch. Dist., 112 F.3d 1464, 1472 (11th Cir. 1997) (stating that the secular purpose of the law is "to provide students with a moment of quiet reflection to think about the upcoming day"); May v. Cooperman, 780 F.2d 240, 244 (3d Cir. 1985) (suggesting a secular purpose of "providing a calm transition from nonschool life to school work").

108. Laycock notes that these laws are clearly passed "in order to accommodate religious thought." Laycock, *supra* note 105, at 62.

tory of these laws, make it difficult to see how a legislature could legitimately claim a secular purpose. While a brief moment of silence at the beginning of the school day may serve many purposes, legislators would not attempt to mandate one if prayer had not been removed from public schools.

B. Free Exercise Concerns

Proponents of moment of silence laws argue that without such laws, public school students will be unable to pray during the school day, in violation of their Free Exercise rights guaranteed by the First Amendment.[109] However, this is a specious argument. Nothing in the Supreme Court's Establishment Clause jurisprudence prevents a public school student from silently praying during a lull in school activities. Many such moments occur during the regular school day—lunchtimes, the moments between classes or lessons, the bus ride or walk to school. A specially created moment is not required for students to have a chance to exercise their right to silently pray.[110]

The Court has also held that when the Establishment and Free Exercise clauses of the First Amendment come into conflict, the Establishment Clause must predominate.[111] Arguably, the combination of the two clauses means that religious beliefs and practices are "altogether private," making their intrusion into the public world of education improper.[112] Also, citizens claiming that their right to free exercise has been violated must show how the government, through the enactment of laws, has infringed on that right.[113] Public school students are expected to keep their minds on their studies throughout the structured part of the school day; they are allowed neither to pray nor to read the daily newspaper. The free exercise of their religious practices is not singled out for special treatment. On the other hand, students are permitted to engage in

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109. In fact, at least one Justice in the *Jaffree* decision felt that this was a real danger. Justice O'Connor voiced concerns about balancing the competing demands of the Free Exercise and Establishment Clauses. *Jaffree*, 472 U.S. at 81–84 (O'Connor, J., concurring).

110. In fact, some might argue that more prayer occurs as a test is being handed out than during any state-mandated moment. *See* Herdahl v. Pontotoc County Sch. Dist., 933 F. Supp. 582, 599 (N.D. Miss. 1996); T.C. Mattocks, *Reflections on Santa Fe v. Doe: Is Student Prayer at Graduation Still an Option?*, 150 ED. LAW REP. 333, 334 (2001).

111. "[T]he Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." Cantwell v. State of Conn., 310 U.S. 296, 303–04 (1940). The Establishment Clause embodies the first concept; the Free Exercise Clause the second.

112. Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 52 (1947) (Rutledge, J., dissenting). Justice Rutledge, joined by Justices Frankfurter, Jackson, and Burton, argues that the word "religion" in the First Amendment means just that–religious teaching, training, or practices—and is not to be confused with a church. *Id.* This definition supports the theory that the prohibition that the Founding Fathers sought to impose was broader than simply banning the establishment of an official church by the government. Thus, encouraging prayer by students in public schools is just as forbidden as establishing one church as "official." *Id.*

113. *Schempp*, 374 U.S. at 223 ("[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion.").

any non-disruptive activity that they choose during the non-structured parts of the day (i.e., the lunch period). Students who choose to pray or read religious texts are certainly free to do so at these times; no specially created "moment of silence" is needed to give students an opportunity for these activities during the school day.[114]

Claims that public students will be isolated from their religious beliefs are also difficult to credit. Supporters of moment of silence laws, or of an actual return of vocal prayer to public classrooms, claim that students are taught that their religion is false or unimportant by its lack of presence in their daily curriculum.[115] However, if parents and religious institutions are unable to impart lasting religious instruction without the presence of religion in a child's daily school life, it is unlikely that a minute of prayer each day is likely to alter that result.[116]

C. *Endorsement*

Beyond the lack of a secular purpose, another problem with moment of silence laws is the appearance of government endorsement of religion. The Court sometimes uses an endorsement test,[117] instead of or in addition to the *Lemon* test.[118] Under this test, the government cannot promote or favor religion or give the appearance of promoting or favoring religion in the eyes of a reasonable and informed observer.[119] Such endorsement is prohibited because it would tend to express the idea that non-religious

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114. One fallacy promoted by those who would restore prayer to public schools is that, as the law now stands, students are prevented from silently praying on their own time during the school day. Nothing in any of the Supreme Court's Establishment Clause decisions prevents a student from silently praying at lunch, between classes, or at other free moments during the day. *See, e.g.*, Robert M. O'Neil, *Who Says You Can't Pray?*, 3 VA. J. SOC. POL'Y & L. 347, 366 (1996) (stating "individual students may not be prevented from bowing their heads and praying during the school day"); John M. Swomley, *Myths About Voluntary School Prayer*, WASHBURN L.J. 294, 297 (1996) (stating that the Supreme Court "did not attempt to prohibit individual silent prayer, or grace before meals or audible prayer in informal settings such as a cafeteria").

115. Andrew W. Hall, *A Moment of Silence: A Permissible Accommodation Protecting the Capacity to Form Religious Belief*, 61 IND. L.J. 429, 431-32 (1986). Hall suggests that students will reject their religious beliefs if those beliefs are not reinforced by the public schools. He calls the removal of religion from the public school curriculum "a negative form of religious training" and fears that the public school children will have but an "ideological void" in their moral development. *Id.* He discards the possibility that parents, in conjunction with religious institutions, can and should be the source of more "positive" religious training, not the public schools. *Id.* Rather, he states that without the presence of religious training in the public schools, students will be at the mercy of "the beliefs of the instructor or the creation of a secular ideology" in forming their moral compass. *Id.* at 433.

116. The Court has specifically noted that the "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere." *Santa Fe*, 530 U.S. at 310 (citing Lee v. Weisman, 505 U.S. 577, 589 (1992)).

117. First articulated in Lynch v. Donnelly, 465 U.S. 668, 688-92 (1984) (O'Connor, J., concurring).

118. In fact, the endorsement test has been used as recently as 2000 by a majority of the Court to examine an Establishment Clause challenge. *See Santa Fe*, 530 U.S. at 308.

119. *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 776-77 (1995) (O'Connor, J., concurring) (stating that "when the reasonable observer would view a government practice as endorsing religion, . . . it is our *duty* to hold the practice invalid").

citizens, or citizens not of the faith being endorsed, are "outsiders, not full members of the political community."[120] Often, the Court looks to "expression by the government itself . . . or else government action alleged to discriminate in favor of private religious . . . activity"[121] to determine whether there has been an unconstitutional endorsement of religion. Justice O'Connor states the test for endorsement as "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools."[122] While Justice O'Connor feels that moment of silence laws, properly enacted,[123] could pass this test, such confidence may be misplaced.

Silence can speak louder than legislators. Despite a hypothetical legislature's silence as to any religious motive for a moment of silence law, an objective observer can easily make the connection. With a long history directly linking the emergence of these laws with the abolition of prayer from the public schools,[124] an objective observer cannot help but conclude that the legislative purpose behind these laws is to restore school prayer. As students are already free to pray silently during any momentary lull in the school day, setting aside a moment of silence specifically to accommodate prayer sends the message that religious belief, or at least some forms of it, will be accommodated.[125] That the majority of the community embraces the religious belief or practice that is favored does not remove the constitutional concern and may in fact enhance it; those in the community who do not embrace that, or any, religious belief are also entitled to protection.[126] The very history of moment of silence laws may make the appearance of government endorsement inevitable.

D. Coercion and Kids—a Special Situation

Under a third theory of evaluating Establishment Clause cases, the Court looks to see if there is any sort of government coercion of religious

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120. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

121. *Pinette*, 515 U.S. at 764.

122. *Jaffree*, 472 U.S. at 76.

123. For the statute to be properly enacted, it would have to permit prayer but not specifically endorse it. *Id.*

124. *See supra* notes 96-102 and accompanying text.

125. *See* Walter Dellinger, *The Sound of Silence: An Epistle on Prayer and the Constitution*, 95 YALE L.J. 1631, 1637 (1986). Dellinger, in this open letter to Congress, draws the connections between the history of school prayer and moment of silence statutes. He sees the connection as even clearer when the statute specifically mentions prayer as a possible activity during that moment. *Id.* at 1636.

126. *See Santa Fe*, 530 U.S. at 312. Protection of adherents of minority religions grows more important each day, given our increasingly multi-cultural society. Ironically, this very diversity of beliefs threatens some who would return prayer and other religious practices to our public schools. After all, "the real problem is that Jews and atheists are pushing Christianity out of the public schools." Marc W. Brown, *Christmas Trees, Carols and Santa Claus*, 28 J.L. & EDUC. 145, 163-64 (1999).

practices.[127] No one may be forced to "support or participate in religion or its exercise."[128] Even when individual choices appear to be involved, the government must be careful that hidden coercion does not exist.[129] *Santa Fe* recognized the powerful role that peer pressure can play in determining the presence or absence of coercion.[130] Moment of silence laws, especially when combined with the force of student peer pressure, carry the risk of such coercion.[131]

The concern about the potential coercive effect of moment of silence statutes takes on deeper nuances because of the audience involved—children. The Court has repeatedly voiced concerns about the potential for government coercion when the challenged statute involves schools and/or children,[132] and has even considered mandatory school attendance coercive government action.[133] Government action need not involve direct coercive pressure to participate in religious practices, but may instead be more subtle, indirect coercion.[134] In decisions as early as *Lemon*, the Court focused on "[the] process of inculcating religious doc-

127. Justice Kennedy has been a recent champion of a coercion test in the Court's Establishment Clause jurisprudence. He first articulated this view in *Allegheny v. ACLU*, 492 U.S. 573, 660-63 (1989) (Kennedy, J., concurring in part and dissenting in part). As part of this test, Justice Kennedy states that government may not advance religion through coercive action. *Id.* This test remains in use, as recently as 2000. *See Santa Fe*, 530 U.S. at 302.

128. *Santa Fe*, 530 U.S. at 314.

129. Coercion does not always need to be overt; the circumstances surrounding a given act might result in coercion even if none is obvious or intended. "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." Engle v. Vitale, 370 U.S. 421, 431 (1962).

130. *Santa Fe*, 530 U.S. at 317 ("[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means.").

131. Justice Kennedy has noted the special problems inherent in dealing with students, realizing that the "line between voluntary and coerced participation may be difficult to draw." Bd. of Educ. Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 261-62 (1990) (Kennedy, J., concurring in part). Other courts have also noted the difficulty in establishing that participation in religious activities is truly voluntary, when the participants are minors. *See, e.g.*, Doe v. Porter, 188 F. Supp. 2d 904, 913 (E.D. Tenn. 2002).

132. The Ninth Circuit recently noted the Supreme Court's special attention to Establishment Clause cases involving public schools and children. *See* Newdow v. U.S. Congress, 292 F.3d 597, 605 (9th Cir. 2002). The court is concerned that the recitation of the Pledge of Allegiance, including the phrase "under God," will have a coercive effect on the children forced to either recite or at least listen to the Pledge on a daily basis. The "age and impressionability of schoolchildren, and their understanding that they are required to adhere to the norms set by their school, their teacher and their fellow students" are of especial concern to the court. *Id.* at 611. The Ninth Circuit found that the inclusion of the words "under God" in the Pledge was unconstitutional under all three tests the Supreme Court has used to evaluate Establishment Clause cases, including the *Lemon* test. *Id.* at 611. The Supreme Court reversed the Ninth Circuit, holding that Newdow lacked standing to challenge the Pledge on his daughter's behalf. Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2312 (2004).

133. Lisa Ness Seidman, *Religious Music in the Public Schools: Music to Establishment Clause Ears?*, 65 GEO. WASH. L. REV. 466, 482 n.127 (1997) (citing *Aguillard*, 482 U.S. at 584; *McCollum*, 333 U.S. 212). The Court has also taken notice of the special role public schools play in our society, pointing out the need for education free of divisive elements such as religious tenets. *Id.* at n.125.

134. *Id.* at 483-84. She notes that the Court has held indirect coercion—specifically the requirement to attend school—to be enough for a governmental practice to violate the Establishment Clause. *Id.* at 484 n.150 (citing *Schempp*, 374 U.S. at 223).

trine [being] enhanced by the impressionable age of the pupils, in primary schools particularly."[135] In *Jaffree*, both the majority[136] and Justice O'Connor's concurrence[137] raise concerns about the special challenges of mixing religion, government, and children.[138]

This concern for the special coercive pressure faced by students should not be lightly dismissed. While Justice O'Connor may "discern [no] serious threat to religious liberty"[139] from the creation of a daily moment of silence, the impressionability of school children cannot be discounted when evaluating these statutes. Supporters of moment of silence statutes argue that there is no coercive effect and therefore no Establishment Clause issue with them because silence is not inherently religious in nature.[140] While pure silence may not be inherently religious, the history of these statutes lends an association between prayer and silence that dooms these statutes regardless of their exact wording.[141] As explained above, the road that legislatures have traveled to arrive at moment of silence laws has been a long one—one directly linked to restoring prayer in public schools.[142] Such laws were never even considered until the Supreme Court held that mandatory prayer in public school classrooms was unconstitutional.[143]

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135. *Lemon*, 403 U.S. at 616. The Court continues to stress the importance of taking great care when evaluating Establishment Clause issues that involve children. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 592 (1992); School Dist. v. Ball, 473 U.S. 373, 390 (1985) ("The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice."); Aguillard, 482 U.S. at 583-84.

136. *Jaffree*, 472 U.S. at 61 n.51.

137. *Id.* at 81.

138. Concern about religious coercion of public school students also arises in a number of other settings. For example, the role of religious music in public school choirs and music classes has provided a battleground for those who would restore prayer to public schools. *See, e.g.* Seidman, *supra* note 133. Seidman explores the role of religious music in public schools, especially the case of *Bauchman v. West High Sch.*, 900 F. Supp. 254 (D. Utah 1995). She draws an analogy to moment of silence laws. Siedman, *supra* note 133, at 485. The Supreme Court has yet to decide how religious music and public schools may intersect the Establishment Clause, specifically denying certiorari in the *Bauchman* case. *See also* Skarin v. Woodbine Community Sch. Dist., 204 F. Supp. 2d 1195 (S.D. Iowa 2002) (challenging the school's practice of having students sing the Lord's Prayer during graduation ceremony). Student-led prayers at the beginning of high school football games have, however, already drawn the censure of the Court. *Santa Fe*, 520 U.S. at 317.

139. *Jaffree*, 472 U.S. at 73. Commentators have also drawn on O'Connor's language to downplay any potential coercion from a moment of silence. *See, e.g.* Johnson, *School Prayer and the Constitution: Silence is Golden*, 48 MD. L. REV. 1018, 1037-39 (1989). Of course, some of the individuals striving to return prayer to public schools tend not to see any religiously motivated act as much of a threat and may be somewhat biased in their appraisal of a moment of silence. *See, e.g.*, Brown, *supra* note 126, at 160 (noting that members of a group opposed to the removal of religious celebrations from the public schools didn't see that "singing 'Silent Night' [in the public schools] puts you on the radical edge").

140. Johnson, *supra* note 139, at 1037-39.

141. *See supra* notes 96-102 and accompanying text.

142. *See supra* Part IV(A).

143. *See* BUZZARD, *supra* note 96, at 58 (noting a total of 147 amendments introduced in Congress to overturn *Engel* alone). Further, moment of silence laws in their current forms did not even become a possibility until legislatures had tried a number of mandatory and voluntary vocal prayer statutes, most of which were struck down as unconstitutional. *See, e.g.*, ALLEY, *supra* note

Finally, the implementation of moment of silence laws may inadvertently coerce students. While most statutes allow students to do whatever they wish during that moment, some students will receive the message that the time is set aside for them to pray. Whether they receive that message from their parents or their preacher, those students may look askance at a fellow student who instead chooses to spend one more minute catching up on his math homework, who pulls out her Harry Potter book to read a few more pages, or who steps into the hall to avoid feeling coerced to pray.[144] Some students may even receive the message that prayer is the favored way to spend the minute from their teachers or other school officials, lending weight to the idea that any student who visibly chooses not to pray is doing something wrong.[145] Peer pressure from these students will make those who choose not to pray uncomfortable and may force them into doing something they would rather not—pray or, at least, pretend to pray.[146] Finally, state legislatures in Virginia and Georgia have already begun to send the message that prayer is the favored activity during the mandatory moment of silence, lending more coercive weight to the implementation of these laws.[147]

The threat of student coercion resulting from a moment of silence in the morning may be small, but even small threats to the values embodied in the Constitution must be taken seriously.[148] Peer pressure among stu-

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98, at 175 (noting an attempt to change voluntary prayer to a moment of silence in a proposed amendment). This progression suggests that some legislators who seek to circumvent *Engel* and related decisions are willing to take small steps backward, until they find the maximum amount of school prayer that is permitted by the Constitution.

144. Some students are already feeling the coercive effects of moment of silence statutes. Jordan Kupersmith, a Virginia high school student, spends the beginning of each day in his principal's office rather than participate in the moment of silence. Kupersmith feels that the law is "unfair" and promotes prayer as a favored classroom activity. *See Gotta Minute? Virginia Enacts Minute of Silence in Schools*, WEEKLY READER, Jan. 26, 2001, at 3.

145. After the Supreme Court denied certiorari for *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001), the Loudoun County Virginia School Board decreed that students must be told "at least twice a year that they may pray . . . during the state-mandated daily minute of silence." *See* Rosalind S. Helderman, *Principals Must Explain Moment of Silence Rights*, WASH. POST, Nov. 15, 2001, at T01. The motion to require this emphasis on the right to pray was inspired by the September 11th terrorist attacks. *Id.* One board member said that the time was right for this emphasis, given the "calls to meditation and prayer by all of our leaders" following the attacks. *Id.*

146. Religious activities associated with the school outside the moment of silence lend weight to the peer pressure in the classroom. In Florida, after a student organized a "religious-outreach opportunity" at his school, he found that his "biggest reward" was that "[k]ids who used to crack jokes during the daily moment of silence now hold their tongues." Jodie Morse, *Letting God Back In*, TIME, Oct. 22, 2001, at 71. The implication in this new silence is that the school has sent the message that prayer is the appropriate or favored way to spend the moment of silence, and that dissenters may face consequences.

147. *See supra* notes 53 and 59.

148. The Court has expressed concern over the idea that small violations of the Constitution are somehow less important, or that they do not cause any great damage to our national values. Justice Black cited James Madison, the author of the First Amendment, who wrote:

> (I)t is proper to take alarm at the first experiment on our liberties . . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three

dents is a powerful force, and the underlying history of these moments of silence may lead to pressure—overt or covert—on students to pray during these moments. The fact that moment of silence laws do not support or denounce any particular religion does not mean that the general government support for religion should be ignored.

V. CONCLUSION

Our Constitution guarantees that individuals will not be forced to participate in religious activities against their own beliefs. It also guarantees that the government—both at the state and federal levels—will not use its power to establish an official religion, nor to favor religion over non-religion. This constitutional guarantee must be at its strongest in our public schools. Without a firm separation between church and state, impressionable students may feel coerced into religious activities and beliefs.

Moment of silence laws are but the current waypoint on the long school-prayer journey that started with *Engel*.[149] To uphold these laws, with their roots in mandatory prayer, as constitutional is a serious crack in the wall separating church and state, and for courts to look the other way, while legislators obscure their religious motivations, is to promote a farce that damages our constitutional guarantees.

> pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

Engel v. Vitale, 370 U.S. 421, 436 (1962). The Court has also expressed concern about a whittling down of our constitutional protections in other instances. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 29 (1947) (Rutledge, J., dissenting) (concerned that "with time the most solid freedom steadily gives way before continuing corrosive decision").

149. Other contemporary challenges to the Supreme Court's jurisprudence on public life and prayer include school voucher programs and displays of the Ten Commandments. In Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002), the Supreme Court upheld a Cleveland, Ohio voucher program. The Court held that the program was neutral with respect to religion, and therefore did not violate the Establishment Clause. *Id.* at 2473. While most voucher systems permit the use of the funds in both secular and sectarian schools, Justice Souter's dissenting opinion pointed out that the vast majority of voucher students, and therefore voucher money, go to sectarian schools. *Id.* at 2494–95 (Souter, J., dissenting). Another current tactic for those who would restore prayer to public life is the posting of the Ten Commandments in public buildings, such as courthouses. Numerous challenges to such postings have arisen across the country. *See, e.g.*, Glassroth v. Moore, 229 F. Supp. 2d 1290 (M.D. Ala. 2002) (challenging the installation of a monument engraved with the Ten Commandments in the Alabama State Judicial Building); ACLU v. Mercer County, 219 F. Supp. 2d 777 (E.D. Ky. 2002) (challenging the posting of a framed copy of the Ten Commandments in the county courthouse).