SHH! STATE LEGISLATORS BITE YOUR TONGUES: SEMANTICS DICTATES THE CONSTITUTIONALITY OF PUBLIC SCHOOL "MOMENT OF SILENCE" STATUTES

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INTRODUCTION

While walking down the hallway of your local public school, the only sound you hear is the click-clack of your wooden heels striking the shiny, hard floor. You realize that the building is eerily quiet. The normal sounds of chalk on the blackboard and instructions for children to begin their lessons are noticeably absent. Passing by several classrooms, you notice that all of the children are in their seats remaining perfectly still and silent. You wonder, "What are they doing? Did something terrible just happen and everyone is in shock? Are they just an unusually obedient class? Are they all day dreaming?" When one envisions a silent classroom, it is unlikely that one associates this image with prayer.

For decades, prayer in public schools has been the subject of countless litigation[1] and legal scholarship.[2] In the past, courts

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[1] The Religion Clauses of the 1st Amendment have been dealt with in countless aspects. *See* Lee v. Wiesman, 505 U.S. 577, 598–99 (1992) (holding that clerical members who offered prayer at a graduation ceremony unconstitutionally established religion); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 5 (1989) (holding that there was no sales tax exemption for religious publications); Widmar v. Vincent, 454 U.S. 263, 277 (1981) (holding that the Establishment Clause did not bar a university from granting access to student religiously affiliated groups); Abington Township v. Schempp, 374 U.S. 203, 205 (1963) (holding that a Pennsylvania statute requiring reading prayer from the bible violated the Establishment Clause).

[2] Some of the more poignant articles on this topic are William F. Cox, Jr., Article, *The Original Meaning of the Establishment Clause and Its Application to Education*, 13 REGENT U. L. REV. 111 (2001); Mary Ellen Quinn Johnson, Comment, *School Prayer and the Constitution: Silence is Golden*, 48 MD. L. REV.

have been presented with more blatant and traditional challenges to prayer in public schools, such as a teacher reading bible passages aloud to her students.[3] One of the more recent challenges is the promulgation of silence as a means to return voluntary prayer to public schools. In *Brown v. Gilmore*,[4] a group of parents believed that offering a moment-of-silence in Virginia public schools unconstitutionally established religion and forced their children to pray,[5] which robbed them of their First Amendment Rights.[6] Virginia, however, is not the only state to enact "minute of silence" or "moment of silence" statutes; twenty-five other states have, or once had, similar laws on their books.[7]

1018 (1989); David Lubecky, Note, *Silent Moments in Public Schools:* Wallace v. Jaffree, 54 U. CIN. L. REV. 1405 (1985); Michael A. Umayam, Note, Santa Fe Independent School District v. Doe: *Can "Moment of Silence" Statutes Survive?*, 50 CATH. U. L. REV. 869 (2001); Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools,* 96 HARV. L. REV. 1874 (1983).

[3] *See Abington Township*, 374 U.S. at 205.

[4] 258 F.3d 265 (4th Cir. 2001), *cert. denied*, 121 S.Ct. 465 (2001).

[5] *See id.* at 270. The parents filed suit for a declaratory judgement that the statute was unconstitutional, and for an injunction prohibiting its enforcement. The suit was filed after the statute was passed on June 13, 2000, but before its effective date on July 1, 2000. *Id.* at 273.

[6] *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."). The parents specifically allege that the minute of silence statute violates the Establishment Clause, claiming that its main purpose was to advance prayer in public schools. *Brown*, 258 F.3d at 270.

[7] *See* ALA. CODE § 16-1-20 (Michie 2001); ARIZ. REV. STAT. ANN. § 15-342(21) (2000); ARK. CODE. ANN. § 6-16-119 (2001); CONN. GEN. STAT. § 10-16a (1999); DEL. CODE ANN. tit. 14, § 4101A (2000); GA. CODE ANN. § 20-2-1050 (2000); GA. CODE ANN. § 20-2-1051 (2000); ILL. COMP. STAT. ANN. § 105-20/1 (Smith-Hurd 2001); IND. CODE ANN. § 20-10.1-7-11 (Michie 2000); KAN. STAT. ANN. § 72.5308a (2000); LA. REV. STAT. ANN. § 17:2115a (2001); ME. REV. STAT. ANN. tit. 20-A, § 4805 (2000); MD. EDUC. CODE ANN. § 7-104a (2001); MASS. GEN. LAWS ANN. ch. 71, § 1a (West 2000); MICH. COMP. LAWS ANN. § 380.1565 (West 2001); N.C. GEN. STAT. § 115C-47(29) (2000); N.J. P.L. Ch. 205 (1982); N.M. STAT. ANN. § 22-5-4.1 (2001); N.Y. EDUC. LAW § 3029-a (McKinney 2001); N.D. CENT. CODE § 15-47-30.1 (1981); OHIO REV. CODE ANN. § 3313.601 (Anderson 2001); PA. STAT. ANN. tit. 24, § 15-1516.1 (West. 1988); R.I. GEN. LAWS § 16-12-3.1 (2001); TENN. CODE ANN. § 49-6-1004 (2001); VA. CODE ANN. §22.1-203 (Michie 2001); W. VA. CONST. art. III, § 15-a; *see also* David Z. Seide, Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis,* 58 N.Y.U. L. REV. 364, 407–08 (1983) (demonstrating a chart comparing 18 of these statutes; however note that some of the statutes have been amended or repealed making the chart slightly inaccurate, although not completely moot).

Prior to the *Brown* suit, only seven of these state statutes had been constitutionally challenged.[8] In *Wallace v. Jaffree*, the only case granted certiorari, the Court held the moment-of-silence statute, enacted "for meditation or voluntary prayer," violated the Establishment Clause.[9] There was disagreement in the other six cases as to whether their statutes were constitutional or not.[10] Oddly, five were decided at the district court level and one at the circuit court level, but none were appealed.[11] The reason for such disagreement lies in the intense semantic scrutiny given to these moment-of-silence statutes.[12]

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[8] *See* Wallace v. Jaffree, 472 U.S. 38, 40, 61 (1985) (holding the Alabama Statute authorizing a period of silence "for meditation or voluntary prayer" unconstitutional relying on the legislative history that was saturated with evidence the statute was enacted for the purpose of returning voluntary prayer to public schools); Bown v. Gwinnett County Sch. Dist., 112 F. 3d 1464, 1466 (11th Cir. 1997) (upholding Georgia's Moment of Quiet Reflection in Schools Act); May v. Cooperman, 780 F. 2d 240, 253 (3d. Cir. 1985) (striking down pure statute as lacking a secular purpose, and for promoting a religious purpose); Walter v. W. Va. Bd. of Ed., 610 F. Supp. 1169, 1170 (S.D.W. Va. 1985) (invalidating the state statute for failing to meet all three prongs of the Lemon Test); Duffy v. Las Cruces Pub. Sch., 557 F. Supp. 1013, 1015, 1018–19 (D.N.M. 1983) (striking down statute for "contemplation, meditation or prayer"); Beck v. McElrath, 548 F. Supp. 1161, 1166 (M.D. Tenn. 1982) (invalidating prayer statute); Gaines v. Anderson, 421 F. Supp. 337, 340 (D. Mass. 1976) (upholding state statute for "meditation or prayer").

[9] *See Wallace*, 472 U.S. at 40, 61.

[10] *See supra* note 8. Of the six cases that did not get appealed to the Supreme Court, two courts upheld the state statute (Bown v. Gwinnett County Sch. Dist. and Gaines v. Anderson) and four courts invalidated them (Duffy v. Las Cruces Public Schools; Beck v. McElrath; May v. Cooperman; and Walter v. W. Va. Bd. of Educ.). To further break down the analysis, District Court's held one statute valid and four invalid, while the Circuit Court held one statute valid, affirming the decision of the District Court.

[11] *See supra* note 8.

[12] *See Wallace*, 472 U.S. at 43 (noting that for determination of whether a statute is unconstitutional, close attention should be given to the actual wording of the statute). Intense scrutiny was also given to the legislative history of the statute. *Id.* at 45. The Bill's prime sponsor articulated in committee hearing's 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." *Id.* at 43 (citations omitted); *see also Walter*, 610 F. Supp. at 1175, n.4 (invalidating the provision in the State Constitution because it mandated that the activity "*shall* provide", as opposed to merely permitting it, i.e. "may" provide); *Bown*, 112 F. 3d at 1469 (upholding the statute because it expressly articulated a clear secular purpose and also expressly disclaimed a religious purpose); *Gaines*, 421 F. Supp at 343 (recognizing the that statute was framed in the disjunctive, and it permitted meditation or prayer without mandating one over the other). The court also noted that the legislative history showed the debate over whether to

This scrutiny has been invoked in order to follow the precedent-setting three prong test implemented when an Establishment Clause challenge arises—the *Lemon* Test.[13] The first prong of this test mandates that that statute must have a secular purpose.[14] While some scholarship has hypothesized that only pure moment-of-silent statues can survive constitutional muster,[15] this piece suggests that statutes so enacted do not necessarily have to fail for the mere inclusion of the word "prayer." If the courts start to hold a minute of silence statute unconstitutional solely because of the word "prayer," then it, as well as the legislature, will be promoting the absence of religion over its free exercise, which itself is unconstitutional.[16] Most fundamentally, the *Lemon* Test has yielded varying results when applied to Establishment Clause cases across the board[17] and is beginning to fall into disfavor with the Courts.[18] Due to the heavy reliance placed on the first prong of the Test, it proves especially impractical when it has been applied to moment-of-silence statutes and, therefore, hardly any legislative history will pass. Therefore, an abandonment of the *Lemon* Test may be appropriate in these cases and a substitution of an analysis

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use "and" or "or" in the final construction, evincing the legislature's intent not to promote one over the other. *Id.*

[13] *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (articulating the infamous inquiry when resolving whether a statute unconstitutionally establishes religion: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster 'an excessive government entanglement with religion' " (citation omitted)).

[14] *See id*.

[15] *See* Johnson, *supra* note 2, at 1037–43. Asserting that only pure moment of silence statues can survive, the author urges that silence is not prayer, but can accommodate prayer. *Id*. By taking the word prayer out of the statute, it in no way will come close to infringing on the Establishment Clause of the 1st Amendment. *See id.*; Umayam, *supra* note 2, at 900–04 (hypothesizing that the Court's decision in *Santa Fe* would lead to the invalidation of the Virginia moment of silence statute); Note *supra* note 2, at 1893 (concluding that "moments of silence" create coercive classroom settings that allow the state to advance and entangle with religion); Margaret Richardson, Comment, *The Constitutionality of North Carolina's Moment of Silence Statute*, 22 N.C. CENT. L.J. 200 (1996) (analyzing the constitutionality of North Carolina's moment of silence law and concluding that it would be declared unconstitutional).

[16] See U.S. CONST. amend. I.

[17] *See* text accompanying *infra* note 80.

[18] *See* text accompanying *infra* notes 74–78.

consistent with the original meaning of the Establishment Clause is necessary.

This Note is divided into four parts. Part I will examine the history of the Establishment Clause. Before going forward, it is imperative to examine the environment in which the First Amendment was enacted in order to understand its true goal of preventing the establishment of religion. Part II will then examine the 4th Circuit's reliance on the *Lemon* Test in *Brown v. Gilmore*. Part III will explore the holdings of the six other moment-of-silence statute cases in an attempt to show that blind adherence to the *Lemon* Test has produced illogical results in the various courts. Finally, Part IV will survey further the practical ramifications of a moment of silence statute with the word prayer mentioned in it.

I. THE ESTABLISHMENT CLAUSE

The First Amendment of the United States Constitution states, "Congress shall make no law respecting an establishment of religion . . . ."[19] This Clause has been interpreted in numerous Supreme Court decisions ranging from those more obviously having religious consequences, such as displaying a Nativity scene in a shopping district,[20] to those more subtlety related, such as granting tax exemptions.[21] Somewhere in between, however, the true purpose of the Establishment Clause has been misconstrued and contorted into various catch phrases and tests which have been followed as if they were the very letter and spirit of the law, when in actuality they are nothing more than historical inaccuracies.[22]

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[19] U.S. CONST. amend. I.

[20] *See* Lynch v. Donnelly, 465 U.S. 668, 671–72 (1984) (finding that the City by including the scene in its holiday display is trying to endorse religious beliefs).

[21] *See* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 666–67 (1970) (granting religious organizations tax exempt status was found not to violate the Establishment Clause).

[22] *See* Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting) (noting that the modern court has strayed far from the Framer's original intent of the Establishment Clause by recounting the history of its enactment and its early interpretations); Cox, Jr., *supra* note 2, at 111–14 (suggesting that the Establishment Clause has been misinterpreted and therefore misapplied when challenged).

A. History of the Establishment Clause

James Madison, a leader of the First Congress, proposed the amendment to protect individual citizens from the evils of a national church.[23] Madison thought this was a pressing issue because some state conventions thought the Congress would rely on the Necessary and Proper Clause "to infringe the rights of conscience or to establish a national religion."[24] Its wording was toyed with, as certain members of Congress wanted to be sure that the ultimate result would not be the abolition of religion altogether.[25] Thus, the clause underwent a metamorphosis, going from "[n]o religion shall be established by law"[26] to its present day form, "Congress shall make no law respecting an establishment of religion."[27]

The history of the Clause does not indicate that the members of Congress expected the government to be absolutely neutral between "religion and irreligion."[28] In actuality, contemporaries of the amendment were very much against this notion. However, the "same House of Representatives overwhelmingly passed a resolution in favor of a day of nationwide prayer and thanksgiving to God."[29] Further, Madison was on a committee that instituted the use of federal funds to promote religion in the United States Chaplain program.[30]

Joseph Story, a Supreme Court Justice from 1811 to 1845, who published the most contemporaneous treatise on the Constitution,[31] noted that the Establishment Clause was:

> An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation. . . . The real object of the [First] [A]mendment was, not to countenance, much less to

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[23] *See Wallace*, 472 U.S. at 99 (Rehnquist, J., dissenting).

[24] *Id.* at 96 (Rehnquist, J., dissenting).

[25] *See id*. at 95 (noting New York Representative Peter Sylvester's concern that the new revisions of the amendment would cause religion to be abolished).

[26] *Id.*

[27] U.S. CONST. amend. I.

[28] *See Wallace*, 472 U.S. at 98 (Rehnquist, J., dissenting).

[29] *See* Cox, Jr., *supra* note 2, at 124; *see also* Marsh v. Chambers, 463 U.S. 783, 788 (1983) (claiming that Madison voted for this bill).

[30] *See* Cox, Jr., *supra* note 2, at 123. Madison, as President, "authorized federal funds for missionaries to the American Indians" and, in addition, "aid[ed] a Bible society [in] printing and distributing the Holy Bible. *Id.* at 124.

[31] *See Wallace*, 472 U.S. at 104 (Rehnquist, J., dissenting). Story also was a professor at Harvard Law School during this time. *Id.*

> advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; *but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment* . . . .[32]

Legal Scholar Thomas Cooley stated, "[u]ndoubtedly the spirit of the Constitution will require, in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination or sect . . . ."[33] Those in tune with the spirit in which the Establishment Clause was adopted clearly viewed it as a way to restrict the federal and state government[34] from establishing a national religion or preferring one denomination over another.[35] Their actions make clear[36] that they were not abandoning all religious activities, but were acting within what they believed were the limits of the Establishment Clause.

One problem that arises in relying on the Framer's intent in dealing with prayer or moments of silence in public schools is that free public education did not exist in the late 18th century.[37] Therefore, since government-run schools were extremely rare, it is a stretch to claim that the drafters and ratifying legislators anticipated the specific problems that have arisen today.[38] The Framer's inability to foresee this specific application of the Establishment Clause does not render their intent in other areas

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[32] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §§ 1868, 1871 (1833) (emphasis added).

[33] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION 975 (8th ed. 1927).

[34] *See* U.S. CONST. amend. XIV, § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.
See Cox, Jr., *supra* note 2, at 141–42 (explaining the Incorporation Doctrine as applied to the Bill of Rights).

[35] *See Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting).

[36] *See supra* text accompanying notes 28–30.

[37] *See* Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 238 (1963) (Brennan, J., concurring).

[38] *See* Theodore Sky, *The Establishment Clause, the Congress, and the Schools: An Historical Perspective*, 52 VA. L. REV. 1395, 1403–04 (1966).

irrelevant, but rather it reinforces the need to examine its legislative history in full.

B. Misused Metaphor

The reason why analyses of Establishment Clause issues have strayed so far from the Framer's original intent lies in the immortal words spoken by Thomas Jefferson: "[The Establishment Clause] buil[t] a wall of separation between Church and state."[39] This metaphor was later incorporated into the 1879 Supreme Court opinion in *Reynolds v. United States*[40] but was truly emblazoned in *Everson v. Board of Education*.[41] Jefferson's phrase was continuously looked to as binding precedent for the proposition that government and religion must be entirely separate.[42] The more it was misused, the more its value seemed to increase, and the more the true meaning of the Establishment Clause was overshadowed. However, as Justice Rehnquist points out, "*stare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history."[43]

A closer analysis of this redacted statement will reveal that Jefferson did not intend for it to take on a life of its own. Thomas Jefferson was in France at the time the constitutional amendments were proposed, debated, passed by Congress, and ratified by the states.[44] He did not have any firsthand knowledge of the events surrounding the acceptance of the Establishment Clause. Furthermore, this "wall of separation" quote is found *only* in a "short note of courtesy"[45] written to the Danbury Baptists 14 years after the amendments had been passed.[46] The Baptists had written to Jefferson to congratulate him on his election to the presidency.[47] Also, in their letter they mentioned

[39] Letter from Thomas Jefferson to Nehemiah Dodge et al. (Jan. 1, 1802), *in* THOMAS JEFFERSON: WRITINGS 510 (Merrill D. Peterson ed., 1984) (hereinafter *Letter from Jefferson*).

[40] 98 U.S. 145, 164 (1879).

[41] 330 U.S. 1, 16 (1947).

[42] *See* Larkin v. Grendel's Den Inc., 459 U.S. 116, 122–23 (1982); Stone v. Graham, 449 U.S. 39, 42 (1980); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 214–25 (1963); *id.* at 232–34, 243–53 (Brennan, J., concurring); Engel v. Vitale, 370 U.S. 421, 431 (1962); McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948);.

[43] Wallace v. Jaffree, 472 U.S. 38, 99 (1985) (Rehnquist, J., dissenting).

[44] *See id*. at 92 (Rehnquist, J., dissenting).

[45] *See id*. at 91–92.

[46] *See id*. at 92.

[47] *See* Cox, Jr., *supra* note 2, at 135.

their excitement that both the President and the Baptists were in agreement that "[r]eligion is at all times and places a Matter between God and Individuals."[48] The Baptist Association, an alliance of twenty-six churches in existence since 1790, was disgruntled because Congregationalism was the official established church of Connecticut, until the state constitution was revised in 1818.[49] This left members of the Baptist congregation in a state of second class citizenship, both literally and figuratively, since full citizenship privileges were given only to members of the official state church.[50] Their letter to Jefferson recognized that the President, "[was] not the national Legislator,"[51] and that "the national government [could not] destroy the laws of each State;"[52] however, it did express the hope that Jefferson's own sentiments would "like the radiant beams of the Sun . . .shine [and] prevail through all . . . States and all the world till Hierarchy and Tyranny be destroyed from the Earth."[53] This somewhat dramatic note is what sparked Jefferson's infamous response:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus *building a wall of separation between church and State*. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.[54]

[48] *Id.* at 135. Dodge continued, "no man ought to suffer in Name, person or effects on account of his religious Opinions." *Id.*

[49] *See id*. at 134–35 (citing Daniel L. Dreisbach, *Sowing Useful Truths and Principles: The Danbury Baptists, Thomas Jefferson and the Wall of Separation*, 39 J. CHURCH & ST. 455, 501 (1997)).

[50] *See id.* at 135 (citing M. LOUISE GREENE, THE DEVELOPMENT OF RELIGIOUS LIBERTY IN CONNECTICUT 1–3 (photo. reprint 1970) (1905)).

[51] *Id.*

[52] *Id.* at 135–36.

[53] *Id.* at 136.

[54] Letter from Jefferson, *supra* note 39, at 510 (emphasis added).

The wall he spoke of was one that restrained the federal government from intervening in areas of religion. Although Jefferson would have liked to help free the Baptists from their state imposed religious discriminations, in his mind the Establishment Clause forbade interference.[55] To further complicate the true meaning of this phrase, this letter has been commonly assumed to be a response to a request for a national day of fasting.[56] This would have furthered confused the populous and made the wall of separation seem higher and more impenetrable that it was actually meant to be.

If Jefferson's metaphor of the Establishment Clause as a true wall of separation between church and state was valid, would not the Pledge of Allegiance violate the First Amendment for loyalty to "One Nation, under God"?[57] The phrase "In God We Trust" is engraved into our currency[58] and can be found as a reassurance on the walls of our courtrooms. Chapels are found on military bases and "religious institutions enjoy various government services such as fire protection, police protection, and water and sewer maintenance, while being exempted from supportive taxation."[59] "George Washington himself . . . proclaimed a day of 'public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and

[55] *See* Cox, Jr., *supra* note 2, at 137–38 (explaining that, during this time, the federal government could not constrain state government policies that would otherwise violate the Establishment Clause.) The Establishment Clause was not applied to state action until after 1868 when the Fourteenth Amendment was ratified. *Id.* at 140–41. Eventually, the amendment incorporated most of the Bill of Rights making actions by state governments as unconstitutional as if the federal government had done them. *Id.* at 141.

[56] *See id.* at 138–39 (citing DANIEL L. DREISBACH, REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT 125 (1987); DAVID BARTON, ORIGINAL INTENT 221 (1996)).

[57] *See* Wallace v. Jaffree 472 U.S. 38, 88 (1985) (Burger, J., dissenting) (noting that the majority's rationale would lead to finding the Pledge of Allegiance unconstitutional because of the words "under God"). While this Note was in the editorial process, a three judge panel in the Ninth Circuit held that the Pledge of Allegiance was unconstitutional. *See* Newdow v. United States Cong., 292 F. 3d 597, 612 (9th Cir. 2002). The decision was later amended stating that the words of the pledge were not *per se* unconstitutional, and rehearing en banc was denied at the Ninth Circuit. *See* Newdow v. United States Cong., 328 F. 3d 466, 468 (9th Cir. 2003), *cert. denied*, 124 S.Ct. 386 (2003).

[58] *See* Cox, Jr., *supra* note 2, at 115.

[59] *Id.*

signal favors of Almighty God.' "[60] He did this in response to a request from the very same Congress that ratified the Bill of Rights.[61] It is doubtful that Congress would request anything that would violate the Amendment they themselves proposed, debated, and adopted. Furthermore, federal judges and even the Presidents of the United States have sworn on Bibles that they will uphold the law of the land, and respond to their oath by articulating those famous words "so help me God."[62] Therefore, as Justice Rehnquist noted in his dissenting opinion in *Wallace v. Jaffree*, "[h]istory must judge whether it was the Father of his Country in 1789, or a majority of the Court today [in 1985], which has strayed from the meaning of the Establishment Clause."[63] For the Supreme Court itself begins each day with the marshal saying, "God save the United States and this honorable court."[64]

C. Misguided Test

The original meaning of the Establishment Clause seems to have been abandoned rather readily by a presumably neat and easy three prong test. The test was first enunciated in *Lemon v. Kurtzman*[65] and provides a checklist for determining if a statute violates the Establishment Clause. To withstand an Establishment Clause challenge: (1) a statute must have a secular legislative purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) it must not foster "an excessive government entanglement with religion."[66] The reason this test has been characterized as misguided is most notably because it has its roots in Thomas Jefferson's "wall of

[60] *Wallace*, 472 U.S. at 113 (Rehnquist, J., dissenting).

[61] *See id*.

[62] *See Bibles and Scripture Passages Used by Presidents in Taking the Oath of Office*, *available at* http://memory.loc.gov/ammem/pihtml/pibible.html (last visited Mar. 25, 2004) (noting that Presidents swear on open or closed Bibles). George Washington in 1789 swore on a Masonic Bible opened to Genesis 49:13, while George W. Bush swore on a closed family Bible in 2001. *See id.*

[63] *Wallace*, 472 U.S. at 113 (Rehnquist, J. dissenting).

[64] *The Court and Its Procedures*, *available at* http://www.supremecourtus.gov/about/procedures.pdf (last visited Mar. 24, 2004).

[65] 403 U.S. 602, 606–07 (1971) (holding that the religion clauses of the First Amendment were violated by state statutes providing state aid to Church related elementary schools, with regard to secular materials).

[66] *See id.* at 612–13 (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674 (1970)).

separation" metaphor, which has already been pointed out as being inaccurate and misquoted. The *Lemon* court derived both the first and second prongs of the test from *Board of Education v. Allen*,[67] which actually inherited its purpose and effect elements from *School District of Abington Township v. Schempp*[68] and *Everson v. Board of Education*,[69] both of which misconstrued Jefferson's remarks.[70] The inaccuracy was adopted and in what can be defined as a downward spiral continues to this day to be applied to Establishment Clause challenges. The third prong, forbidding entanglement, was derived from *Walz v. Tax Commission of New York*.[71] Of these cases, only one addressed the topic of school prayer,[72] while the others dealt more with financial matters.[73]

The *Lemon* test was first championed as providing a "cumulative criteria"[74] and was soon characterized as a "guideline."[75] The test, which further deteriorated into "no more than [a] helpful [signpost],"[76] was later seen as not binding on the courts[77] and in several instances completely disappeared.[78]

[67] 392 U.S. 236, 238 (1968) (holding a New York statute issuing free textbooks to all public and parochial school children constitutional because its primary purpose was to encourage school development, not to advance a religious agenda).

[68] 374 U.S. 203, 205 (1963) (striking down a statute requiring the reading of Bible verses and recitation of the Lord's Prayer as unconstitutional).

[69] 330 U.S. 1, 18 (1947) (upholding a state statute that reimbursed parents of parochial school children for bus transportation).

[70] *See* Wallace v. Jaffree, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting) (noting that the purpose and effect prongs have the same historical deficiencies as the wall metaphor in that they are based on neither the language nor the intent of the drafters).

[71] 397 U.S. 664, 666–67 (1970) (holding that granting tax exemptions to religious organizations did not violate the religion clauses of the First Amendment).

[72] *See Schempp*, 374 U.S. at 205.

[73] *See Walz,* 397 U.S. at 666; Bd. of Ed. v. Allen, 392 U.S. 236, 238 (1968); *Everson*, 330 U.S. at 3.

[74] *See, e.g.*, Tilton v. Richardson, 403 U.S. 672, 677–78 (1971).

[75] *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 n.31 (1973); *Tilton*, 403 U.S. at 678.

[76] Mueller v. Allen, 463 U.S. 388, 394 (1983) (alteration in original) (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)); *see* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123 (1982).

[77] *See* Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (reiterating that the *Lemon* test has never been binding on the Supreme Court).

[78] *See, e.g.*, Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 9–10 (1989) (foregoing application of the *Lemon* test when deciding whether an entirely religious

Nevertheless, most courts still return to the test,[79] which has been characterized as "sacrifice[ing] clarity and predictability for flexibility."[80] When confronted with an Establishment Clause issue, Supreme Court Justices have been know to write separate concurring opinions to specifically endorse the test as binding authority.[81] Even when the Court has followed the test, odd disparities appear in its application, most notably in school services cases. For example, "[a] State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class."[82] The results are illogical and perhaps if the Court looked back to the original intent of the Framers, as opposed to *Lemon*, which has become so ingrained in the Court's opinions, the results would be more unassailable, resting on the legislative history of the First Amendment rather than a test that has its roots planted in erroneous soil. Nevertheless, courts continue to look to *Lemon* both for guidance and as binding authority.

II. THE FOURTH CIRCUIT'S RELIANCE ON *LEMON*

Virginia's minute-of-silence statute states the following:

> In order that the right of every pupil to the *free exercise* of religion be guaranteed within the schools . . . the school board

magazine should be exempt from sales tax and implementing a single prong test). "It is not our responsibility to specify which permissible secular objectives, if any, the State should pursue to justify a tax exemption for religious periodicals . . . . Our task, and that of the Texas courts, is rather to ensure that any scheme of exemptions adopted by the legislature does not have the *purpose or effect of sponsoring certain religious tenets or religious beliefs in general.*" *Id.* at 16–17 (emphasis added); *see also* Bd. of Educ. v. Grumet, 512 U.S. 687, 721 (1994) (O'Connor, J., concurring) (welcoming the change, urging the Court to be "freed from the *Lemon* test's rigid influence."); Marsh v. Chambers, 463 U.S. 783, 786 (1983); Larson v. Valente, 456 U.S. 228, 251–52 (1982).

[79] *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000) (using the *Lemon* test to invalidate a school statute providing for oral student led prayer prior to a football game).

[80] Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980).

[81] *See e.g.,* Wallace v. Jaffree, 472 U.S. 38, 63 (1985) (Powell, J., concurring) (stating that the *Lemon* Test is "the only coherent test a majority of the Court has ever adopted," and that continued criticism could lead to courts applying *ad hoc* rules to Establishment Clause cases).

[82] *Id.* at 110 (Rehnquist, J., dissenting) (citing Bd. of Educ. v. Allen, 392 U.S. 236 (1968) and Meek v. Pittenger, 421 U.S. 349, 362–66 (1975)).

> of each school division *shall establish* the daily observance of one minute of silence in each classroom of the division. . . . [E]ach pupil may, in the exercise of his or her individual choice, *meditate, pray, or engage in any other silent activity*. . . .[83]

The Fourth Circuit in *Brown* noted reliance on the three-pronged *Lemon* Test[84] and so followed suit.[85] Since the court followed the test strictly, exploring its rationale in depth is helpful in understanding the workings of the test.

A. Secular Purpose

A statute's purpose need not be "exclusively secular"[86] for a court to find a secular purpose. Therefore, this first prong is a relatively "low hurdle" to clear.[87] Virginia's statute[88] allows students to use the minute of silence for any non-distracting purpose, religious or non-religious, including prayer and meditation.[89] The court viewed the statute as "undirected and unthreatening . . . designed to compromise no student's belief or non-belief; and . . . to exert no coercion except that of maintaining silence."[90] Therefore, the court came to the conclusion that the statute, on its face, had dual legitimate purposes, one of which

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[83] VA. CODE ANN. § 22.1-203 (Michie 2002) (emphasis added). The 1976 statute, which was replaced by the statute cited in this footnote in 2000, stated, "[T]he school board of each school division is authorized to establish the daily observance of one minute of silence." Brown v. Gilmore, 258 F. 3d 265, 271 n.1 (4th Cir. 2001). Therefore, the pertinent change was from "authorized to" to "shall," which removed the school district's option of whether or not to implement the minute of silence. *Id.*

[84] *See Brown*, 258 F.3d at 275–78 (noting that while the courts have criticized the *Lemon* Test throughout the years, it still remains binding precedent).

[85] *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000); *Wallace*, 472 U.S. at 43; Karen B. v. Treen, 653 F.2d 897, 900 (5th Cir. 1981), *aff'd* 455 U.S. 913 (1982); Stone v. Graham, 449 U.S. 39, 40–41 (1980); Comm. for Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973); Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674 (1970); Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 222 (1963); Engel v. Vitale, 370 U.S. 421, 430–31 (1962).

[86] *Brown*, 258 F. 3d at 276 (quoting Lynch v. Donnelly, 465 U.S. 668, 681 n.6 (1984)); *see Wallace,* 472 U.S. at 56.

[87] *See* Koenick v. Felton, 190 F.3d 259, 266 (4th Cir. 1999) (quoting Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337, 1345 (4th Cir. 1995) (stating that a statute fails on this account when "there is no evidence of a legitimate secular purpose")).

[88] See *infra* note 138 for the full text of the Virginia statute.

[89] *See* VA. CODE. ANN. § 22.1-203 (Michie 2002).

[90] *Brown*, 258 F.3d at 276.

was secular, and the other of which accommodates religion.[91] As long as one purpose is secular, a statute will not fail the first prong of the *Lemon* test.[92] The court also looked beyond the plain meaning of the statute and found that the State Senate debates reinforced the secular purpose of the statute.[93] Most of the debates focused on whether or not the word "prayer" should be included in the statute.[94] Senators in favor of including the word "prayer" pointed out that the words omission would effectively lead to discrimination against the activity.[95] The Senators further noted that without direction children would simply be silent and without purpose.[96] The court disposed quickly of the remaining two prongs since the suit was a facial challenge, mounted without evidence of its application in fact.[97] This

[91] *See id*.

[92] *See id*. at 277.

[93] *See id.* The Superintendent of Virginia's schools explained that a moment of silence, in her experience, has proven to be a "'good classroom management tool' because 'it works as a good transition, enabling students to pause, settle down, compose themselves and focus on the day ahead' making for 'a better school day.' " *Id.* Senators Barry and Newman explained that their purpose in enacting the statute was to provide children with the opportunity to "reflect if more than anything else." *Id.* They indicated that the word "prayer" was included in the statute, in order to prevent prayer from being discriminated against. *Id.* Even Senator Houck, who wanted the word "pray" removed from the statute, agreed that there was a legitimate secular purpose to the statute. *Id.* Although the minute of silence mandate was enacted for the accommodation of those students who wished to pray during this silent time, the statute nevertheless satisfies the first prong of the *Lemon* test because this was not its sole purpose. *Id.*

[94] *See id.* at 271–72 (recording the debate between removing or maintaining the word "prayer").

[95] *See id*. at 272. Senator Barry, the bill's sponsor, stated:

> This was simply an opportunity, hopefully, that kids in school would reflect if more than anything else. I'm saying, we're not putting prayer on a higher pedestal or a lower pedestal than meditate and reflect. But if students would just spend one minute to reflect on who they are, what they're doing and where they're going. *The word prayer in there was put in there so prayer would not be discriminated against.*

Id. (emphasis added).

[96] *See id.* at 271–72. "Senator Stephen Newman of Lynchburg criticized this position because such an altered bill would lack any 'indication . . . [of] what those students are [going to] be doing at all [during the minute of silence]. They simply will be quiet with no purpose.' " *Id.* (alteration in original).

[97] *See id*. at 273, 277 (noting that the lawsuit was filed in June, before the July first date on which the statute was to take effect).

further enforces the severe semantic scrutiny statutes of this kind are under.

B. Primary Effect Neither to Advance Nor to Inhibit

Since the court had already held that there were dual purposes to the statute and given its facial neutrality, the Virginia statute satisfied the second prong of the *Lemon* test without a problem.[98] While recognizing that school children, especially of a young age, were impressionable, the court reasoned that it could not strike down the statute on mere speculation of a religious impression.[99] "[S]peculative fears as to the potential effects of this statute cannot be used to strike down a statute that on its face is neutral between religious and non religious activity."[100]

C. No Excessive Entanglement

Regarding this prong of the test, the teacher must inform the student of his statutory options before the minute of silence begins, therefore negating excessive entanglement between the state and religion.[101] The state's involvement with religion was minor, merely seen as one of the permissible options to exercise during the minute.[102] Without reading the school children their options, they would be left to wonder what they were supposed to be doing during the silence. If this were the case and a teacher upon questioning answered the student directly that prayer was an option, then this would lean more toward entanglement.[103] However, the court held that there was no entanglement present in the statute as written.[104]

[98] *See id*. at 277.

[99] *See id.* at 277–78. The Court recognized the precedent discussing the impressionability of young children in *Lee v. Weisman*, 505 U.S. 577, 592–93 (1992) and *School District of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985), but ultimately concluded that the impressionability of children should not enter the analysis of an Establishment Clause challenge until it has been proven that the state was actually advancing religion. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 116 (2001).

[100] *Brown*, 258 F. 3d at 278.

[101] *See id*.; VA. CODE ANN. § 22.1-203 (Michie 2002).

[102] *See Brown*, 258 F. 3d at 278.

[103] *See id*.; Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (White, J., dissenting).

[104] *See Brown,* 258 F.3d at 278.

D. A World of "What If": The Wording of Constitutional Moment of Silent Statutes Suggested in Dicta

Despite what prior holdings have posited, a moment of silence statute can be constitutional, even if the word "prayer" is mentioned.[105] In *Wallace v. Jaffree*,[106] Justice O'Connor, in her concurring opinion, stated that "[e]ven if a statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives."[107] Justice Powell agreed that some moment of silence statutes may be constitutional.[108] The statute under attack in that case was held unconstitutional, but was distinguished from Virginia's statute.[109] And even though the statute was ultimately invalidated, the majority did admit it

[105] *See Wallace*, 472 U.S. at 73 (O'Connor, J., concurring).

[106] 472 U.S. 38. This case involved three separate statutes in the state of Alabama: "(1) § 16-1-20, enacted in 1978, which authorized a 1-minute period of silence in all public schools 'for meditation.' *Id.* at 40. (2) § 16-1-20.1, enacted in 1981, which authorized a period of silence "for meditation or voluntary prayer" and (3) § 16-1-20.2, enacted in 1982, which authorized teachers to lead 'willing students' in a prescribed prayer to 'Almighty God . . . the Creator and Supreme Judge of the World.' " *Id.* (alteration in original). The Court found nothing wrong with the first statute, but concluded that the other two were unconstitutional. *Id.* at 41. The main reason why § 16-1-20.1 was held invalid was due to the sworn testimony of the bill's sponsor. Senator Donald G. Holmes testified that he was the prime sponsor of the bill and explained it was an "'effort to return voluntary prayer to our public schools . . . it is a beginning and a step in the right direction.'" *Id.* at 43 (alteration in original). The statute could not further any secular purpose because meditation was already provided for in the earlier statute which was already in effect. Therefore, the Court held that it failed the first prong of the *Lemon* Test. *Id.* at 59. The only alternatives with which the Court was left with were the statute was "(1) . . . to convey a message of state endorsement and promotion of prayer; or (2) . . . for no purpose." *Id.* The Court opted to treat the legislature as if it did not act out of futility, but rather it sought to enact an unlawful statute to promote prayer. *Id.* at 60–61.

[107] *Id.* at 73 (O'Connor, J., concurring).

[108] *See id.* at 62 (Powell, J., concurring) (stating that he agrees with Justice O'Connor).

[109] *See* Brown v. Gilmore, 258 F.3d 265, 280–81 (4th Cir. 2001). There was no evidence that Virginia "acted in open defiance" of constitutional law. *Id.* Contrarily, the debates reveal the significant consideration given to Supreme Court precedent and concerns about constitutionality. *Id.* Furthermore, the Virginia legislators acknowledged both the religious and secular purposes, noting the benefits for those who would not use the time to pray. *Id*. The teachers in Virginia would have acted under strict educational guidance and under a memo sent to them had the statute gone into effect, whereas the Alabama teachers acted before the statute was passed, and in clear violation of it by leading their students in prayer and chanting. *Id.* at 281.

would have held it constitutional if it also had a clearly secular purpose,[110] such as with the Virginia statute.[111] O'Connor furthered the point in stating that "[i]t is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren."[112] There is no inherent religious quality to silence, nor does a pupil compromise her beliefs by participating in it.[113] Under the Virginia statute, there is no evidence that the state has conveyed the message that students should use the minute of silence for prayer.[114] The only message the statute gives is to be silent and to refrain from distracting others.[115]

E. Running Afoul of the Lemon Test?

The dissent in *Brown v. Gilmore* argued that the statute did not pass the *Lemon* Test,[116] primarily because there was no secular purpose. The dissent was under the impression that the proper test to employ would be the "objective observer"[117] test, which considered the text of the statute, the legislative history, and the implementation of the statute to see if there was any state endorsement of prayer in public schools.[118] The dissent said this answer was "a resounding 'Yes!'",[119] however, the legislative history of the statute showed that while the senators recognized there was a choice to pray, that this was also coupled with the

[110] *See Wallace,* 472 U.S. at 66. The majority relied on *Mueller v. Allen*, 463 U.S. 388, 394–95 (1983) (reflecting the Court's reluctance "to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute.").

[111] *See supra* text accompanying notes 86–98 (discussing the secular purpose of the Virginia statute under the *Lemon* Test).

[112] *Wallace,* 472 U.S. at 73 (O'Connor, J., concurring).

[113] *See id*. at 72 (O'Connor, J., concurring).

[114] *See id.* at 74 (O'Connor, J., concurring) (noting that the question of whether a state has attempted to convey to children that prayer is the appropriate thing to do during silence cannot be answered in the abstract). It requires the close examination of the history, the language, and administration of a particular statute. *Id.*

[115] *See* VA. CODE ANN. § 22.1-203 (Michie 2002).

[116] *See* Brown v. Gilmore, 258 F.3d 265, 283 (4th Cir. 2001) (King, J., dissenting) (arguing that the majority defies the precedent established in *Wallace* and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)).

[117] *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308.

[118] *See id*.

[119] *Brown*, 258 F. 3d at 283 (King, J., dissenting).

option not to pray,[120] and when it came down to it, even the opponents of the statute conceded there was a secular purpose.[121] "Establishing a short period of mandatory silence does not *ipso facto* amount to the establishment of anything but *silence*."[122] The dissent is poignant because it strikes at the heart of the debate, namely whether the legislative history essentially becomes dispositive.

F. "Johnny's Calling Me Names For . . . For . . . For Being Quiet!?"

The dissent disagreed strongly with the majority on the grounds that school children are too impressionable and through this silence they will be subtly coerced to pray.[123] The majority, however, refused to premise its decision on this ground because in their opinion it was too speculative.[124] The dissent was worried that the moment-of-silence would lead to pressure from one peer on another to make them pray.[125] However, no peer-on-peer harassment was found to exist under the 1976 version of the Virginia statute.[126] It must be conceded that a statute promulgating a mandatory moment of silence in a public school is

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[120] *See supra* notes 94–97 and accompanying text.

[121] *See supra* note 94 (describing the remarks of Senator Houck who was an opponent of the statute containing the word "prayer").

[122] *Brown*, 258 F. 3d at 281 (emphasis added).

[123] *See id.* at 291–92 (King, J., dissenting) (noting that children in such institutions "are impressionable and their attendance is involuntary"). "The state exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Id.* at 292.

[124] *See id.* at 277–78 (recalling that the statute was challenged facially and that an injunction was sought before the true effects of the new statute were seen in the schools).

[125] *See Brown*, 258 F. 3d at 291–92 (King, J., dissenting) (reiterating the impressionability of young children and their desire to fit in). Furthermore, "[f]amilies entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Id.* at 291 (quoting Justice Brennan in Edwards v. Aguillard, 482 U.S. 578, 584 (1987)).

[126] *See id.* at 271 (reporting that "at least 14, and perhaps 20 school divisions in Virginia chose to establish a minute of silence in their classrooms"). In a survey conducted by the Virginia Superintendent of Schools, no religious harassment of peers by peers was found in any of the participating schools. *Id.*

a far cry from the statutes of the past mandating vocal prayer.[127] Here, the legislators were solely encouraging children to pause and be silent. Logic does not dictate that a child would be harassed during this moment of silence since another student would have no way of knowing for what she has used her minute of silence.[128]

III. THE LEGISLATIVE SHAM

The main problem with the *Lemon* Test when used to analyze a moment of silence statute is that the first prong is extremely difficult to assess. To reiterate, the first prong requires the statute to have a secular purpose.[129] The statute's sole aim does not have to be secular in nature, but at least one secular purpose must arguably be present.[130] The difficulty, however, arises with what is used to determine this: text, context, and legislative history.[131] These are areas that blow the doors of interpretation wide open and, as will be illustrated, have led to hair-splitting decisions over word choice which cannot be comfortably reconciled. To frustrate the test further, if the statute fails the first prong, the analysis is over and the statute

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[127] *See* Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 223–24 (1963) (declaring Pennsylvania and Maryland statutes invalid because they authorized morning Bible readings in public schools). The Court reviewed the purpose and effect of the statutes, concluded that they required religious exercises, and therefore found them to violate the Establishment Clause. *Id.*; Engle v. Vitale, 370 U.S. 421, 425 (1962) (invalidating a New York Statute requiring teachers to lead their classes in vocal prayer). The Court concluded, "it is no part of the business of government to compose official prayers for any group for the American people to recite as part of a religious program carried on by the government." *Id.*

[128] *See* Wallace v. Jaffree, 472 U.S. 38, 72 (1985) (O'Connor, J., concurring) (noting that a child who objects to prayer is left to his or her own thoughts and not compelled to listen to the prayers or thoughts of others, and that no child would know what the other is thinking or doing unless it is revealed).

[129] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[130] *See Brown*, 258 F. 3d at 276 (citing Lynch v. Donnelly, 465 U.S. 668, 681 n.6 (1984); *Wallace*, 472 U.S. at 55–56).

[131] *See, e.g.*, *Brown*, 258 F. 3d at 275–76 (noting that on a facial challenge, that statute is scrutinized by its text, context, and legislative history); Santa Fe Indep. Sch. Dist. v. Schempp, 530 U.S. 290, 314–17 (2000).

must be found unconstitutional.[132] Therefore, the test essentially becomes only one prong of this already misguided test.

When vocal prayer statutes were challenged and the *Lemon* Test employed, all of those involving schools were invalidated.[133] They were found unconstitutional because they failed the second prong which requires that their principal effect neither advance nor inhibit religion.[134] The effect was easy to see — a room full of schoolchildren following their teacher's example and joining in group prayer.[135] The Court analyzed this secular purpose, but in the end it did not really matter because of the blatant failure of the second prong. Even if Court has conceded that the secular purpose was met, the statute still would have failed because of the second prong.[136]

Moment-of-silence statutes do not enjoy similar treatment. The effect is only to establish a room of silent schoolchildren.[137] Therefore, the argument will be won or lost by the words of both the statutes and the legislators. The seven moment-of-silence statutes that have been litigated are all fairly similar in their wording.[138] There is no uniform agreement when only the

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[132] *See, e.g.*, *Wallace*, 472 U.S. at 56 (stating that "no consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose").

[133] *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (striking down student led prayer prior to school football games); Lee v. Weisman, 505 U.S. 577 (1992) (invalidating the school's decision to allow a rabbi to recite non-sectarian prayers at graduation); Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (holding that reading of Bible passages and the Lord's Prayer violated the Establishment Clause (this case was decided pre-*Lemon*, but its rationale was later codified in the *Lemon* Test)); Jager v. Douglas County Sch. Dist, 862 F.2d 824 (11th Cir. 1989) (striking down a school practice calling for invocations prior to football games); Graham v. Cent. Cmty. Sch. Dist., 608 F. Supp. 531, 536 (S.D. Iowa 1985) (noting that "invocation and benediction . . . have as their primary effect the advancement of the Christian religion").

[134] *See* text accompanying *supra* note 124. The effect of vocal prayers is the observation of a child or children praying. It is an unavoidable conclusion that their behavior in carrying out the state statute or school policy is advancing religion in its effect.

[135] *See Sch. Dist. of Abington Township*, 374 U.S. at 205–07.

[136] *See Jager*, 862 F.2d at 829–30 (moving quickly past the first prong onto analysis of the second prong).

[137] *See Wallace*, 472 U.S. at 73 (O'Connor, J., concurring) (observing that, "It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren").

[138] Listed below are the relevant statutes:

> At the commencement of the first class each day in the first through 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.

See ALA. CODE § 16-1-20 (Michie 2002).

> (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 quite 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 (2001).

> No teacher, principal, school board, or any other person may require or prescribe any particular method or manner in which a child shall participate in any period of silent prayer or meditation, but each child shall be absolutely free to participate therein or not, in such manner or way as such child shall personally desire, consistent with his or her beliefs.

GA. CODE ANN. § 20-2-1051 (2001).

> The following announcement shall be made each school day morning in each school at the commencement of the first class (it being understood that in the high schools the home room period of the day) by the teacher in charge of the room. The announcement shall be made during the period of time when school attendance is taken. "A one minute period of silence for the purpose of meditation or prayer shall now be observed. During this period of silence shall be maintained and no activities engaged in." At the end of the one minute period, the following shall be announced by the teacher. "Thank you."

MASS. GEN. LAWS ANN. ch. 71, § 1a (West 2000).

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 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

1982 N.J. Sess. Law. Serv. 205 (West).

N.M. STAT. ANN. § 22-5-4.1 (1978) ("Each local school board may authorize a period of silence not to exceed one minute at the beginning of the school day. This period may be used for contemplation, meditation or prayer, provided that silence is maintained and no activities undertaken.") (repealed).

> (a) In order for all students and teachers to prepare themselves for the activities of the day, a period of silence of approximately one (1) minute in duration shall be maintained in each grade in public schools at the beginning of each school day. At the opening of the first class each day, it is the responsibility of each teacher in charge of each class to call the students to order and announce that a moment of silence is to be observed. The teacher shall not indicate or

wording of the statute is examined. Courts have struck down some statutes that mention prayer,[139] while they have upheld

> suggest to the students any action be to be taken by them during this time, but shall maintain silence for the full time. At the end of this time, the teacher shall indicate resumption of the class in an appropriate fashion, and may at that time make school announcements or conduct any other class business before commencing instruction. (b) It is lawful for any teacher in any of the schools of the state which are supported, in whole or in part, but the public funds of the state, to permit the voluntary participation by students or others in prayer. Nothing contained in this section shall authorize any teacher or other school authority to prescribe the form or content of any prayer. (c) Notwithstanding the provisions of subsections (a) and (b), nonsectarian and nonproselytizing voluntary benedictions, invocations or prayers, which are initiated and given by a student volunteer or student volunteers may be permitted on public school property during school-related noncompulsory student assemblies, school-related student sporting events and school-related commencement ceremonies. Such permission shall not be construed to indicate any support, approval or sanction by the state or any governmental personnel or official of the contents of any such benedictions, invocations of prayers or to be the promotion or establishment of any religion, religious benefit, or sect.

TENN. CODE ANN. § 49-6-1004 (2001).

> 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 observance 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.

VA. CODE ANN. §22.1-203 (Michie 2002).

> Public schools shall provide a designated brief time at the beginning of each school day for any student desiring to exercise their right to personal and private contemplation, meditation or prayer. No student of a public school may be denied the right to personal and private contemplation, meditation or prayer nor shall any student be required or encouraged to engage in any given contemplation, meditation or prayer as a part of the school curriculum.

W. VA. CONST. art. III, § 15-a .

[139] *See, e.g.*, Duffy v. Las Cruces Public Schools, 557 F. Supp. 1013 (D.N.M. 1983) (invalidating a New Mexico school board ruling to implement a moment of silence for lack of a secular purpose).

others.[140] Therefore, although the courts claim they rely on the wording of the statutes it is inevitable that the legislative history becomes the crucial part of the analysis.

It has been noted that this legislative inquiry is to be deferential and limited[141] and the Court should recognize any plausible, stated secular purpose.[142] The Supreme Court has noted that it has no right "to psychoanalyze the legislators."[143] Psychoanalysis, however, is exactly what has occurred in the resolution of these cases.

The majority in *Brown v. Gilmore* held that the Virginia statute had a secular purpose based on its extensive legislative history. The bill's sponsor noted that "[i]t's not [the bill's purpose] to try and re-inject prayer into the public schools system."[144] Taken in context with the other statements made in committee, the majority felt the legislators displayed a true secular purpose. However, the dissent in the same legislative history remarks expressed the opinion that the statute was "a moment of prayer."[145]

Sometimes, what the court claims as legislative history is not actually the *history* of the statute. The *Wallace* Court seized upon statements made by the bill's sponsor during the district court's evidentiary hearing one year *after* the Alabama legislature had passed the statute.[146] There was no evidence to show the legislature as a whole was either aware of his sentiments or that it shared them.[147] Nevertheless, the Court placed its full reliance on the sponsor's statement that the bill was an "effort to return voluntary prayer to our public schools,"[148] while ignoring a statement in the same testimony stating that the bill's purpose "was to clear up a widespread misunderstanding that a school child is legally *prohibited* from engaging in silent, individual prayer."[149] The *Wallace* Court,

[140] *See, e.g.*, Bown v. Gwinnett County Sch. Dist., 112 F.3d 1464, 1471, 1474 (11th Cir. 1997) (upholding a Georgia school's act because the secular purpose was met through Senator Scott's desire to address violence through silence).

[141] *Wallace*, 472 U.S. at 74 (O'Connor, J., concurring).

[142] *Id.* at 74–75.

[143] *Id.* at 74.

[144] Brown v. Gilmore, 258 F.3d 265 (4th Cir. 2001).

[145] *See id.* at 284 (King, J., dissenting).

[146] *Wallace*, 472 U.S. at 86 (1985) (Burger, C.J., dissenting).

[147] *Id.* at 86–87.

[148] *Id.* at 43.

[149] *Id.* at 87 (Burger, C.J., dissenting) (alteration in original).

however, was not relying on the legislative history, in the true meaning of the phrase. Justice Burger in his dissent chastised the majority, saying, "[n]o case in the 195-year history of the court supports the disconcerting idea that postenactment statements by individual legislators are relevant in determining the constitutionality of legislation."[150] If the Court desires to examine legislative history to determine a secular purpose, the Court must examine the full record. Without the senator's one remark at trial, the statute may have been upheld.

The reverse problem arose in New Mexico. The Court relied on a memorandum from one representative to the General Counsel to the State Department of Education stating, "[the] bill . . . would authorize some form of prayer in our public schools."[151] The Court refused to acknowledge the post-enactment statement that the statute's purpose was to enhance discipline[152] as they saw the statement as irrelevant because it was the product of afterthought.[153] But, were not the statements relied on in *Wallace* also the product of afterthought? That being the case, it should be noted that they were also looked upon as a deciding factor.

Several courts have made rulings based on sparse or non-existent legislative records. For instance, the Georgia statute was upheld because it was introduced as part of a program to curb juvenile violence.[154] There was no official record of the proceedings of the Georgia General Assembly, but a transcript of the House proceeding revealed that some House members believed this statute instituted school prayer while others did not.[155] The New Jersey legislature does not preserve an official record of its hearings.[156] In striking down its moment of silence statute, it relied on statements of witnesses who were present

[150] *Id.* (Burger, C.J., dissenting).

[151] Duffy v. Las Cruces Pub. Schs., 557 F. Supp. 1013, 1015 (D.N.M. 1983).

[152] *See id.* at 1016 (noting board members enacted the statute to instill in students "intellectual composure").

[153] *Id.*

[154] *See* Bown v. Gwinnett Sch. Dist., 112 F. 3d 1464, 1467 (11th Cir. 1997) (explaining how Senator David Scott, a member of the State Violence Task Force Committee, introduced the bill after noticing students often came together in a moment of silence on campuses where students had been killed).

[155] *See id.* at 1467.

[156] *See* May v. Cooperman, 572 F. Supp. 1561, 1564 (D.N.J. 1983).

due to their interest in the bill.[157] Leaving the credibility of the witnesses aside, it appeared that the court was placing a large stake in the ability of those witnesses to recall accurately crucial words and phrases. Despite the statute's ability to "cut down crime and disruption,"[158] the court was not convinced that this was enough.[159] The court, however, did not point to any compelling language indicating that the statute was an attempt to return to voluntary prayer.[160] The Massachusetts statute was similarly upheld despite a sparse record.[161] There, the court went so far as to assume the legislators recognized a state's potential secular purpose, such as helping them achieve their "educative goals."[162] These three states relied on inadequate information and seemed to take pick and choose which side to listen to. These inconsistencies in different parts of the country lead one to conclude this is not an efficient way to decide constitutional issues.

There was only one case where the court examined the full, recorded legislative history.[163] There the Tennessee statute at issue was also struck down because of its legislative history. The court noted the remarks of a senator that "'[t]he kids can pray, which we hope that most of them will, but they don't have to.'"[164] Here the court examined the full record and found that the overwhelming intent of the sponsors was to establish prayer in the schoolrooms.[165] The court, however, did not quote any other senators, instead making rather conclusory statements,[166] leaving one to wonder exactly what was said.

[157] *See id.* at 1564–65 (listing witnesses as Marianne Rhodes, Associate Director of Government Relations to the New Jersey School Board Association and Reverend Dudley E. Sarfaty, Associate General Secretary of the New Jersey Council of Churches).

[158] *Id.* at 1564.

[159] *See id.* at 1565 (calling this purpose a "guise").

[160] *See id.* at 1564–65 (noting that testifying witnesses to the debates said the only secular purpose they heard was in reference to crime reduction, but that they did not point to affirmative religious language by any representative).

[161] *See* Gaines v. Anderson, 421 F. Supp. 337, 341–42 (D. Mass. 1976).

[162] *See id.* at 342.

[163] Beck v. McElrath, 548 F. Supp. 1161 (M.D. Tenn. 1982).

[164] *Id.* at 1164.

[165] *See id.* at 1163.

[166] *See id.* at 1164 (using voting patterns on an amendment to the statute to manifest the intent of the legislators).

Justice O'Connor has been quick to note that it is the duty of the courts to "distinguish a sham secular purpose from a sincere one."[167] This task may become increasing difficult in the wake of the *Brown v. Gilmore* decision since the majority and the dissent split hairs over whether it was analogous to *Wallace v. Jaffree* or not. The inquiry there placed undue emphasis on the statements of the legislators. The answer at the end of the day seemed to be a warning to legislators to bite their tongues. Fear begs the question: Have not courts just given legislators an implicit hint to mention prayer as little as possible and to exaggerate a secular purpose when enacting moment of silent statues in the future? Will the constitutionality of a statute continue to depend on which legislature had the most eloquent orators or who created the most perfect sham?

While it is not suggested that the Court "turn[s] a blind eye to the context in which [the state] policy arose,"[168] it is offered that the Court remember the context in which the Establishment Clause itself arose. Enacted for the purpose of preventing government from establishing a national religion or preferring one sect over another,[169] the legislative history of the Establishment Clause, rather than the rigid first prong of the *Lemon* Test, should guide the Court's decisions. If a moment of silence is established, it should not imply prayer. This would undoubtedly comport with the views of the Founding Fathers. Courts are bogged down in a search through both obscure and nonexistent legislative history. The *Lemon* Test cannot work effectively without data to examine. Even when there was a legislative purpose, the courts did not always give the legislature due deference[170] as promised. Perhaps the disparate results and increasing criticism of the *Lemon* Test should lead the courts to abandon the test for moment of silence statutes.

IV. SILENT CHILDREN: THE LEAST OF OUR PROBLEMS

One of the sponsors of the Virginia bill told a newspaper reporter that he supported the amendment of the statute disallowing forceful school prayer; however, he commented that

[167] Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring).
[168] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315 (2000).
[169] *See* Cox, Jr., *supra* note 2, at 470–71.
[170] *Wallace*, 472 U.S. at 112 (Rehnquist, J., dissenting).

"[t]his country was based on belief in God, and maybe we need to look at that again."[171] This echoes the sentiments of the Founding Fathers. In a world where it is common for the nightly news to run multiple stories about children bringing guns to school and opening fire on their fellow classmates and teachers,[172] perhaps it is time to bring some reflection into the

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[171] Brown v. Gilmore, 258 F.3d 265, 271 (4th Cir. 2001). Because this statement was made to the press it was excluded from the record because of the hearsay rule. The court noted, however, that its inclusion neither materially adds nor detracts from the views in the legislative record. *Id.*; *see also* http://www.va.gov/pubaff/celebAm/pledge.htm (reciting the words of The Pledge of Allegiance: "I pledge allegiance to the flag of the United States of America; and to the Republic for which it stands, one Nation *under God*, indivisible, with liberty and justice for all") (emphasis added).

[172] *See Brown*, 258 F.3d at 272. Senator Barry noted that "[t]he primary thing was out of the frustrations that many of us have felt based on the violence in some of our schools, such as Columbine and the Kinkley situation in Oregon." *Id.*; *see also* http://www.angelfire.com/wa/godexists/shooting.html (detailing the 15 incidents throughout 1996 to 1999 where students went on shooting sprees at their schools). On May 20, 1999, a student opened fire at Heritage High School near Conyers, Georgia, and six schoolmates were injured. *Id.* On April 20, 1999, 17 year old Dylan Klebold and 18 year old Eric Harris gunned down 20 students at Columbine High School in Littleton, Colorado. *Id.* Fifteen students were killed, including the two gunmen who took their own lives. *Id*. On June 15, 1998, in Richmond, Virginia, a male teacher and female guidance counselor were shot by a student, but survive with minor injuries. *Id*. On May 21, 1998, a fifteen-year-old in Springfield, Oregon opened fire in the cafeteria killing two. The suspect had been expelled the day before the shooting for having a gun in school. Later that day, the shooter's parents were found shot dead in their home. On May 21, 1998, in St. Charles, Missouri, police reported that three sixth-grade boys had a "hit list" of fellow classmates. *Id.* On May 21, 1998, in Onalaska, Washington, a fifteen-year-old boy boarded a school bus with a gun and ordered his girlfriend to come home with him where he then shot himself. *Id.* On May 21, 1998, a fifteen-year-old girl was accidentally shot when a gun in the backpack of a fellow seventeen year old student went off in biology class. *Id.* On May 19, 1998, two boys were suspended from school in Johnston, R.I. for handing out threatening letters to classmates saying, "All your friends are dead." *Id.* On May 19, 1998, an eighteen year old in Fayetteville, Tennessee, killed a classmate who was dating his ex-girlfriend three days before graduation. *Id.* On April 28, 1998, a fourteen-year-old boy is charged for shooting three teenage boys playing basketball, two of whom died. *Id.* On April 24, 1998, in Edinboro, Pennsylvania, a fourteen-year-old student shot a forty-eight-year-old science teacher in front of students at graduation. *Id.* On March 24, 1998, at Westside Middle School in Jonesboro, Arkansas, during a false fire alarm, an eleven year old and a thirteen-year-old opened fire from the woods killing four girls and a teacher and wounding ten others. *Id*. On December 1, 1997, a fourteen-year-old killed three students and wounded five others, leaving one paralyzed, when he shot students participating in a prayer circle at Heath High School in West Paducah, Kentucky. *Id.* On October 1, 1997, in Pearl, Mississippi, a sixteen year old outcast killed his mother, then went to Pearl

school day. If that includes the opportunity to pray silently, without mandating it, is that particularly offensive? There are greater offenses to be concerned with. In the wake of the terrorists attacks on September 11, 2001 on the World Trade Center and the Pentagon,[173] President George W. Bush called for a national moment of silence, not just in schools, but everywhere.[174] Did people object, claiming that their constitutional rights had been violated? No. They bowed their heads in silence and most probably prayed to whomever they pray, with little or no objection.

CONCLUSION

The Establishment Clause was enacted centuries ago to prevent the government from creating one Church of the United States. Since then, Jefferson's "wall of separation" has eclipsed this original intention, seeped into case law, and has been continuously revered as untouchable precedent. The *Lemon* Test has strayed far from the Framers' intent and placed undue, intense emphasis on legislative history. The Courts should return to the true meaning of the Establishment Clause when deciding moment of silence issues. A moment of silence in which a student chooses to pray has not unconstitutionally established prayer in schools. Rather, a student has freely exercised his

High School and shot nine students, killing two of them. *Id*. On February 19, 1997, at Bethel, Alaska High School, a sixteen-year-old student opened fire with a shotgun in a common area, killing the principal and a student, and wounding two others. The shooter, Evan Ramsey, was sentenced to two 99-year terms. *Id*. On February 2, 1996, at a junior high school in Moses Lake, Washington, a fourteen year old boy wearing a trench coat walked into algebra class with a hunting rifle and opened fire, killing the teacher and two students. *Id*.

[173] *See* Mitchell Zuckoff & Matthew Brelis, *Attack on America, Thousands Feared Dead After Planes Hit Towers, Pentagon,* BOSTON GLOBE, Sept. 12, 2001, at A1.

[174] *See* http://www.usnews.com/usnewsbriefings.html. The remarks made by President Bush on September 11, 2001 concluded, "And now, if you'd join me in a moment of silence. . . . May God bless the victims, their families and America."; *see also* http://www.cnn.com/world.html (noting that 800 million residents in 43 countries across Europe observed a moment of silence at 11 a.m. for three minutes in honor of all the men and women who perished at the hands of terrorists on September 11, 2001). *Contra Wallace*, 472 U.S. at 81 (O'Connor, J., concurring) (noting that Presidential proclamations are distinguishable from school prayer statutes in that they are received in a non-coercive setting and are primarily directed towards adults).

constitutional right to pray, or not to pray. This would not be adverse to the Framers' intent. Silence, in its most fundamental sense, is nothing more than the absence of noise. It is arguably the perfect time for a little more silence in this increasingly cacophonous world.