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And Now for a Moment of Silence: *Wallace v. Jaffree*

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CASENOTES

And Now for a Moment of Silence: *Wallace v. Jaffree*

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I. FACTS OF THE CASE

Ishmael Jaffree protested in vain to teachers and school officials about the daily recitation of prayers in his children's elementary schools.¹ Finding the classroom prayers "offensive," and una-

1. The facts were taken from *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985); *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983); *Jaffree v. Board of School Comm'rs*, 554 F. Supp. 1104 (S.D. Ala. 1983); *Jaffree v. James*, 544 F. Supp. 727 (S.D. Ala. 1982).

In one child's classroom, the teacher led the children in the following prayer:

God is great, God is good,
Let us thank him for our food,
Bow our heads we all are fed,
Give us Lord our daily bread.
Amen!

Jaffree v. Board of School Comm'rs, 554 F. Supp. at 1107.

In the second child's classroom, the teacher led the children in reciting the following phrase:

God is great, God is good,
Let us thank him for our food.

Id. The same teacher also had the children recite the Lord's Prayer.

In the third child's classroom, the teacher led her class in singing the following:

For health and strength and daily food,
we praise thy name, Oh Lord.

Id.

All these teachers were aware of Mr. Jaffree's protestations, as were the school administrators. The school administrators discussed the problem with the teachers, but did not ask them to discontinue the religious practices. *Id.* at 1107-08.

ble to halt the practice, Jaffree filed suit on behalf of three of his minor children.³ In the initial complaint, Jaffree sought declaratory and injunctive relief for violation of the establishment clause of the first amendment,⁴ and named as defendants the children's teachers, school officials, and the school board of Mobile County, Alabama.

In an amended complaint Jaffree alleged that three Alabama statutes were violative of the establishment clause and named as defendants the State Board of Education, the Attorney General, and the Governor of Alabama.⁴ One of the Alabama statutes, section 16-1-20, enacted in 1978, provides that teachers "shall announce" a one minute or less period of silence "for meditation."⁵ Section 16-1-20.1, enacted in 1982, provides that teachers "may announce" a one minute or less period of silence for "meditation or voluntary prayer."⁶ Section 16-1-20.2, also enacted in 1982, provides for teachers to lead "willing students" in a prayer.⁷

The United States District Court for the Southern District of Alabama applied the *Lemon* test⁸ and found sufficient merit to the constitutional challenge of sections 16-1-20.1 and 16-1-20.2 to grant a preliminary injunction.⁹ The court did not find the same "potential infirmity" with section 16-1-20.¹⁰ At the trial on the

2. Jaffree v. Board of School Comm'rs, 554 F. Supp. at 1106.

3. The first amendment provides: "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." U.S. CONST. amend. I.

4. Jaffree v. Board of School Comm'rs, 554 F. Supp. at 1108.

5. ALA. CODE § 16-1-20 (Supp. 1985). See *infra* note 104 for the full text of the statute.

6. ALA. CODE § 16-1-20.1 (Supp. 1985). See *infra* note 103 for the full text of the statute.

7. ALA. CODE § 16-1-20.2 (Supp. 1985). Section 16-1-20.2 in full provides:

From henceforth, any teacher or professor in any public educational institution within the state of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead the willing students in the following prayer to God: Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your Justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classroom of our schools in the name of the Lord. Amen.

Id.

8. See *infra* text accompanying note 56.

9. 544 F. Supp. 727. Although it thought the Supreme Court was mistaken in interpreting the establishment clause, the district court bowed to the oath of office and stare decisis when it analyzed the issue. *Id.* at 732-33.

10. 544 F. Supp. at 732. "[T]here is nothing wrong with a little meditation and quietness." *Id.* Appellees subsequently dropped the claims against § 16-1-20, and thereby re-

merits, the district court reviewed the constitutional history of the establishment clause and concluded that the establishment clause "was intended only to prohibit the federal government from establishing a national religion."¹¹ After the court's further finding that the fourteenth amendment¹² "did not incorporate the first amendment against the states,"¹³ Jaffree was left without a recognizable claim. The district court had severed the nonstatutory¹⁴ from the statutory claims¹⁵ and dismissed both cases, dissolving the previously entered injunction.¹⁶

Jaffree applied for a stay pending appeal, which was granted by Justice Powell, as Circuit Justice for the Eleventh Circuit.¹⁷ The Eleventh Circuit, on appeal, reversed the substantive holding of the district court.¹⁸ It emphasized the preeminent role of the Supreme Court as "the final arbiter of Constitutional disputes"¹⁹ and corrected the district court's misapplication of the doctrine of stare decisis.²⁰ On appeal, the Supreme Court of the United States *held*, affirmed: Section 16-1-20.1 violated the first amendment's prohibition against a governmental establishment of religion. *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985).

II. BACKGROUND

Jaffree, more than most cases, needs perspective: its significance lies as much in what it does not say as in what it does. Fa-

moved the pure moment of silence statute from Supreme Court consideration. 105 S. Ct. at 2481 n.1.

11. *Jaffree v. Board of School Comm'rs*, 554 F. Supp. at 1118.

12. U.S. CONST. amend XIV.

13. *Jaffree v. Board of School Comm'rs*, 554 F. Supp. at 1119.

14. *Jaffree v. Board of School Comm'rs*, 554 F. Supp. at 1106.

15. *Jaffree v. James*, 554 F. Supp. 1130, 1132 (S.D. Ala. 1983).

16. *Id.*

17. *Jaffree v. Board of School Comm'rs*, 459 U.S. 1314 (1983). The United States Court of Appeals for the Eleventh Circuit previously denied Jaffree's motion for a stay and injunction pending appeal. *Jaffree v. Wallace*, 705 F.2d at 1528.

18. 705 F.2d 1526. The Eleventh Circuit ordered consolidation of the severed actions. *Id.* at 1529 n.2. The circuit court used the *Lemon* test and found that both the statutes and the nonstatutory prayer activities violated the establishment clause. *Id.* at 1533-36.

19. *Id.* at 1536.

20. *Id.* at 1532. Stare decisis is an appropriate doctrine when a court is dealing with its own decisions; it does "not apply where a lower court is compelled to apply the precedent of a higher court." *Id.* (citing 20 AM. JUR. 2d *Courts* § 183 (1965)). The circuit court denied the petition for rehearing. *Jaffree v. Wallace*, 713 F.2d 614 (11th Cir. 1983). The Supreme Court denied the petition for certiorari on the nonstatutory school prayer practices. *Wallace v. Jaffree*, 104 S. Ct. 1704 (1984). The Court affirmed the circuit court, finding § 16-1-20.2 unconstitutional, and noted probable jurisdiction on the remaining issue, the constitutional-ity of section § 16-1-20.1. *Id.*

miliarity with the unspoken possibilities — what the court could have said but did not — adds dimension to the apparent simplicity of the decision. Thus the brief majority opinion takes form against a backdrop of establishment clause controversy, analysis, and case law.

A. *The Controversy*

Controversy over the proper relationship between church and state has inspired furious debate among the Justices, commentators, and the American people.²¹ Not surprisingly, Supreme Court decisions in this area have evoked derision,²² consternation,²³ and open rebellion.²⁴ One need only have a passing familiarity with history and current events to know the fervor generated by religious resolve. This fervor is particularly intense among those who perceive the role of religion as steadily diminishing in the United States. The result for some is a strong emotional commitment to safeguarding the traditional role of religion in national life, including government support and economic aid to religion.²⁵ Influenced by this view of the role of religion, and unwilling to invalidate the traditional forms of support, the Supreme Court in some cases has

21. Although there is an endless list of books and articles that could be cited in this area, the four books which follow, when read together, give an overview: CHURCH AND STATE: THE SUPREME COURT AND THE FIRST AMENDMENT (P. Kurland ed. 1975) (trenchant analysis of Supreme Court decisions on the first amendment by well-known commentators); R. MORGAN, THE SUPREME COURT AND RELIGION (1972) (description of the inherited attitudes on religion and law of early American settlers, the development of attitudes through Supreme Court cases, and the arguments of noted constitutional law scholars); F. SORAUF, THE WALL OF SEPARATION (1976) (detailed description of litigation on church-state issues from 1951-1974, including identification of the litigants, lawyers, and judges); S. WASBY, THE IMPACT OF SUPREME COURT DECISIONS (1970) (discussion of the problem and impact of noncompliance with Court decisions).

22. Justice Burger commented derisively, "[t]he mountains have labored and brought forth a mouse." 105 S. Ct. at 2508. (Burger, C.J., dissenting) (quoting *Horace, Epistles*, bk. 3 (*Ars Poetica*), line 139). See also Van Alstyne, *Friends in the Supreme Court: Mr. Jefferson's Crumbling Wall - A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 783 n.44 ("not every gross practice will be sustained") (emphasis added)).

23. Senator Robert Byrd was concerned by *Engel v. Vitale*, 370 U.S. 421 (1962): "Can it be that we, too, are ready to embrace the foul concept of atheism?" L. PFEFFER, GOD, CAESAR, AND THE CONSTITUTION 201 (1975).

24. The district court refused to defer to the preeminence of the Supreme Court in constitutional interpretation. *Jaffree v. Board of School Comm'rs*, 554 F. Supp. at 1104. See generally S. WASBY, *supra* note 21.

25. Justice Douglas cited a long list of government support and financial aid for religion, all of which he considered unconstitutional. *Engel v. Vitale*, 370 U.S. at 437 n.1 (Douglas, J., concurring); see also Kauper, *Tax Exemption for Religious Activities in THE WALL BETWEEN CHURCH AND STATE* 95 (D. Oaks, ed. 1963) (citing traditional practice as an explanation for the constitutionality of tax exemptions).

made tradition itself grounds for refusing to invalidate government support for religion.²⁶

Arrayed against those who wish to acknowledge the role of religion in American society by an "accommodation" of religion²⁷ are those who see history and current events as absolute proof of the need for a "wall of separation" between church and state.²⁸ Influenced by this view, the Supreme Court in some cases has refused to countenance even "minor encroachments" on the establishment clause, seeing any encroachment as a first step toward the dismantling of the wall.²⁹ Adherents of the latter philosophy have been referred to as "separationists,"³⁰ those who take the former view have been called "accommodationists."³¹ This fundamental disagreement on the appropriate church-state relationship is at the heart of every establishment clause dispute.

The dispute is compounded in some cases by this country's equally strong emotional commitment to education.³² The special place of religion in American life combined with the "special place of public schools in American life"³³ has made school prayer cases distinguishable from other establishment clause cases.³⁴ The Court

26. See, e.g., *Marsh v. Chambers*, 463 U.S. 783 (1983) (tradition supported the Court's finding of constitutionality of the practice of employing chaplains to start each legislative session with a prayer); *Walz v. Tax Comm'n*, 397 U.S. 664, 677-80 (1970) (tradition supported the Court's finding of constitutionality of tax exemption for religious institutions).

27. See, e.g., Chief Justice Burger's opinion for the Court in *Lynch v. Donnelly*, 104 S. Ct. 1355, 1359-61; *Marsh*, 463 U.S. 783; *Walz*, 397 U.S. at 671-74; see also Kauper, *supra* note 25.

28. In *Everson v. Board of Educ.*, the Court quoted Thomas Jefferson's famous metaphor about the first amendment "building a wall of separation between church and state." 330 U.S. 1, 16 (1947) (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878), which quoted Thomas Jefferson's letter to the Danbury Baptist Association). *Everson* was the case which incorporated the establishment clause into the fourteenth amendment. 330 U.S. at 5. The Court's adoption of Thomas Jefferson's views on church-state relations set the tone for subsequent cases. Mark DeWolfe Howe disputed the Court's assumption that the first amendment codified Jefferson's wall metaphor with its antireligious implications and posited in its place Roger Williams's "wall," which was intended to protect religion from the state. M. HOWE, *THE GARDEN AND THE WILDERNESS* 1-12 (1965).

29. See, e.g., *School Dist. v. Schempp*, 374 U.S. 203, 225 (1963); *Engel*, 370 U.S. at 436-37.

30. L. PFEFFER, *RELIGION, STATE, AND THE BURGER COURT* xi (1984).

31. *Id.*

32. Justice Frankfurter described the fierceness of denominational conflicts in early American schools. *McCullum v. Board of Educ.*, 333 U.S. 203, 214-15 (1948) (Frankfurter, J., concurring). See generally L. PFEFFER, *supra* note 23.

33. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14, at 825 (1978).

34. Notes, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U. L. REV. 364, 379 (1983) ("Strict standards of church-state separation are applied to the public schools . . ."). For a low-key, common sense discussion of school prayers, see P.

has been particularly protective of primary and secondary schools.³⁵ The Court has explained its special protectiveness by noting both the impressionability of children³⁶ and the policy of compulsory school attendance.³⁷ Professor Tribe finds it "unsurprising that no major religious activity, however 'voluntary,' has been allowed to take place in the facilities through which we inculcate values for the future."³⁸

B. *Analysis of Establishment Clause Cases*

Analytically, the hallmark of the establishment clause cases has been the lack of consistency in the Court's approach to the various problems of church-state relations.³⁹ In large measure, the inconsistency has arisen from inherent tension between the establishment clause and the free exercise clause. The tension mirrors the fundamental disagreement over the church-state relationship.⁴⁰ The potential for conflict that exists in the majority of religion cases would be realized if the Court were to give a broad reading to

FREUND, *THE LEGAL ISSUE IN RELIGION AND THE PUBLIC SCHOOLS* 13-24 (1965).

35. See Howard, *Up the Against the Wall: The Uneasy Separation of Church and State*, in *CHURCH, STATE, AND POLITICS* 16-21 (J. Hensel ed. 1981) (Final Report of the 1981 Chief Justice Earl Warren Conference on Advocacy in the United States). Commentator Howard distinguished lower schools from colleges in aid-to-education cases. Compare *McColum*, 333 U.S. 203 (finding religious instruction on public school grounds repugnant to the Constitution) with *Widmar v. Vincent*, 454 U.S. 263 (1981) (finding a university regulation prohibiting the use of its facilities for religious worship or teaching repugnant to the Constitution).

36. *Widmar*, 454 U.S. at 274.

37. *McColum*, 333 U.S. at 209-10, 212.

38. L. TRIBE, *supra* note 33, at 825; Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513, 569-70 (1968) ("On the lower levels of education the immaturity of the students presents a possibly insurmountable problem and also raises the difficult question of whether the public elementary schools should explore the things that separate the groups within the community rather than those things which they hold in common." (footnotes omitted)).

39. Richard Morgan, a political scientist, noted that the Court's difficulty in rationalizing religion clause decisions has resulted in a diminishing legitimacy for its decisions. R. MORGAN, *supra* note 21, at 2. But cf. Johnson, *Concepts and Compromise in First Establishment Religious Doctrine*, 72 CALIF. L. REV. 817, 839 (1984) ("Doctrinally, first amendment religion law is a mess," but the inconsistency may indicate a real attempt to tread "a careful path between undue preference for religion . . . and undue hostility to it," and thereby "keep the peace between strong contending factions . . ."). Compare, e.g., *McColum*, 333 U.S. at 203 (holding religious instruction in the classrooms during school hours is a violation of the establishment clause) with *Zorach v. Clauson*, 343 U.S. 306 (1952) (holding release of students during school hours to participate in religious education off-campus is a permissible "accommodation" of religion).

40. For a discussion of the two views of the church-state relationship, see also *supra* text accompanying notes 25-31.

each clause.⁴¹ If the free exercise clause were interpreted to require the government to accommodate every religious practice, and the establishment clause were interpreted to prohibit any government aid to religion, then obedience to one clause would entail violation of the other. The Court has partially avoided this conflict by restricting free exercise clause cases to those situations in which government action actually burdened a religious observance or belief.⁴²

Less successfully, the Court has attempted to reconcile the two clauses by steering a course of absolute neutrality, neither encouraging nor impeding religion.⁴³ The Court at times has interpreted neutrality as meaning that government may offer no aid to religion.⁴⁴ The Court at other times has interpreted neutrality as requiring the accommodation of an admittedly religious practice.⁴⁵ When a religious practice or observance is burdened by a government action, accommodation of the practice or observance can be explained as an exception to the establishment clause directive not to promote religion in favor of the free exercise clause directive not to interfere with the free exercise of religion.⁴⁶ But when there has

41. Both religion clauses are "cast in absolute terms" and, "if expanded to a logical extreme," would conflict. *Walz*, 397 U.S. at 669-70. Cf. *L. TRIBE*, *supra* note 33, at 833-35 (In any conflict between the clauses, the free exercise clause should dominate so that religious toleration will prevail.); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 675 (1980) (The conflict between the establishment clause and the free exercise clause can be resolved by interpreting the establishment clause to "forbid only government action whose purpose is solely religious and that is likely to impair religious freedom by coercing, compromising, or influencing religious beliefs.").

42. "[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." *Schempp*, 374 U.S. at 223. But cf. *Everson* 330 U.S. at 16 (suggesting that excluding parochial schools from the benefits of state-mandated bus fare reductions for school children might run afoul of the free exercise clause).

43. See, e.g., *Everson*, 330 U.S. at 18; *Schempp*, 374 U.S. at 215, 217-22. Many commentators have suggested that a proper reading of the religion clauses would result in the conclusion that government must be neutral with respect to religion. Foremost in this group is Philip Kurland who argued that the clauses "must be read to mean that religion may not be used as a basis for classification for purposes of governmental action." P. KURLAND, *RELIGION AND THE LAW* 17-18 (1961). Wilber Katz agreed with Kurland that government must be neutral, but posited that neutrality requires that religion be used as a basis for classification. W. KATZ, *RELIGION AND AMERICAN CONSTITUTIONS* (1964). See also Gianella, *supra* note 38, at 513, 519 (calling Kurland's neutrality "outmoded" by "increased governmental regulation" but using it as a "point of departure" for a more sophisticated analysis).

44. Johnson, *supra* note 39, at 818.

45. *Id.* at 819. The Court first mentioned accommodation in *Zorach*, 343 U.S. at 313-14. Subsequently, the Court alluded to it in *Walz*, 397 U.S. at 673, and *Lynch*, 104 S. Ct. at 1359-60. See generally Buchanan, *Accommodation of Religion in the Public Schools: A Plea for Careful Balancing of Competing Constitutional Values*, 28 UCLA L. REV. 1000 (1981).

46. See *supra* notes 41-42 and accompanying text.

been no burdensome government action, then accommodation is a constitutionally inexplicable violation of the establishment clause.⁴⁷

A second analytical problem is the lack of a "precisely drawn" guideline for applying the religion clauses. The Court noted that: "the purpose [of the Framers] was to state an objective not to write a statute."⁴⁸ Attempts to define the religion clauses have provoked discussion on both their meaning⁴⁹ and purpose.⁵⁰ In particular, constitutional authorities on and off the Court have disagreed on the content⁵¹ and appropriate role of history⁵² in constitutional

47. Commentators have developed various explanations for "nonconstitutional accommodation," but the Court has not. G. Sidney Buchanan made a may-must distinction: when free exercise is involved, the court *must* accommodate the practice, but even where free exercise is not involved, the Court *may* consider accommodation as part of its establishment clause inquiry. Buchanan, *supra* note 45, at 1011-17. Donald Giannella described neutrality as involving both a "free exercise neutrality" and a "political neutrality" which "recognizes that religious associations operate in the temporal realm and accordingly can be legitimately included among the beneficiaries of the prevailing order established and sustained by the state." Gianella, *supra* note 38, at 519 (footnote omitted). Alan Schwarz pointed out, however, that a nonconstitutionally mandated free exercise exception is not consistent with a no-aid interpretation of the establishment clause, because the value of aiding religion cannot possibly excuse the unconstitutional act of aiding religion. Schwarz, *No Imposition of Religion The Establishment Clause*, 77 YALE L.J. 692, 707 (1968).

48. *Walz*, 397 U.S. at 669.

49. Commentators have come up with some creative approaches to defining the religion clauses. Phillip Johnson concluded that there is no consistent meaning to the religion clauses. The Court's interpretation, he suggested, reflects ideological bias and attempts to avoid religious conflict through neutrality. Johnson, *supra* note 39, at 845. John Mansfield argued that the answer to the meaning of the religion clauses lies in an examination of the philosophy of the Constitution and that all the Court has done to this point is to attempt to evade that task. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847, 848 (1984). A note writer explained the religion clauses as providing "choice and plurality [which] enable the self to develop both separate and collective aspects." Note, *Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of Self*, 97 HARV. L. REV. 1468, 1475 (1984). Sidney Hook took a typical philosopher's approach when he defined the clauses by discussing what religious freedom means. S. HOOK, RELIGION IN A FREE SOCIETY 27-41 (1967). See also *supra* notes 41 & 43.

50. Compare *Lynch*, 104 S. Ct. at 1361 (Burger, C.J.) (quoting Joseph Story: "The real object of the [First] Amendment . . . was to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." 3 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 728 (1833)), with *McGowan v. Maryland*, 366 U.S. 420, 441-42 (1961) (Warren C.J.) ("But the First Amendment, in its final form, did not simply bar a congressional enactment establishing a church; it forbade all laws respecting an establishment of religion.").

51. Compare *Everson*, 330 U.S. at 13 (citing the leading role of Thomas Jefferson in the drafting of the first amendment to show the value of his opinion in interpreting it), with *Jaffree*, 105 S. Ct. at 2509 (Rehnquist, J., dissenting) (pointing out that Jefferson was in France when the first amendment was passed and ratified, and that his role, therefore, could not have been central).

52. Raoul Berger asserted that it is vital to be guided by the "original intention" in

analysis. The Court's inconsistent interpretation of the nebulous religion clauses, combined with the Court's disagreement on the role of history, recently has led the Court to question whether the standard establishment clause test is an accurate expression of doctrine⁵³ and has heightened the perception that no one test could suffice in all cases.⁵⁴

Since 1971, the Court has used the *Lemon* test as the standard establishment clause analytical tool. It was first articulated in *Lemon v. Kurtzman*:⁵⁵

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. 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."⁵⁶

Writing for the Court, Chief Justice Burger offered the test as responsive "to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"⁵⁷ Disappointing the optimism of its initial articulation, the

order to maintain "security for a consistent and stable government" R. BERGER, GOVERNMENT BY JUDICIARY 364 (1977). Robert Cord charged that "tremendous damage" to church-state relations can be wrought by "erroneous history" and decisions based on it. R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 145 (1977). Pierre Schlag took a different view; he argued that the framer's intent is unknowable, and should not be determinative: the "one legitimate role" is to "situate constitutional decision[s]." Schlag, *Framers Intent: The Illegitimate Uses of History*, 8 U. PUGET SOUND L. REV. 283, 287 (1985). John Wofford saw the inherent difficulties in determining the intent, meaning, and purpose of constitutional provisions. He suggested that an investigation of the history of the Constitution may be illuminating but cannot be binding. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 *passim* (1964).

53. See, e.g., *Lynch*, 104 S. Ct. at 1366-67 (O'Connor, J., concurring); see also Johnson, *supra* note 30, at 827-31; Mansfield, *supra* note 49, at 848 (viewing the *Lemon* test as an "incantation of verbal formulae devoid of explanatory value").

54. See *Lynch*, 104 S. Ct. 1355.

55. 403 U.S. 602 (1971).

56. *Id.* at 612-13 (citations omitted). For a more thorough examination of the *Lemon* test, see Case Comment, *A Breach in the Impregnable Wall: An Analysis of Tuition Tax Credits and the Establishment Clause*, 38 U. MIAMI L. REV. 903, 905-13 (1984); Recent Developments, *The Lemon Test Soured: The Supreme Court's New Establishment Clause Analysis*, 37 VAND. L. REV. 1175 (1984).

57. 403 U.S. at 612 (quoting *Walz*, 397 U.S. at 668). Compare Chief Justice Burger's statement about the purpose of the establishment clause in *Lemon*, with the one he gave in

Lemon test proved unequal to the task of providing real guidelines for the difficult problem of determining what government aid could be given to parochial schools without violating the establishment clause.⁵⁸ The Court made irreconcilable distinctions in these school-aid cases which provided ample opportunity for the disparagement of the *Lemon* test.⁵⁹

C. Precedents

More consistent and far more controversial than the parochial school-aid cases, are the school prayer cases,⁶⁰ *Engle v. Vitale*⁶¹ and *School District v. Schempp*.⁶² In terms of factual similarity, these two cases, decided over twenty years ago, are the immediate precedents for *Jaffree*. The challenged practice in *Engel* was the daily classroom recitation of a state-authorized nondenominational prayer,⁶³ general enough to be described by one commentator as addressed "To Whom It May Concern."⁶⁴ The Court found that the nondenominational character of the prayer and the voluntary participation of students did not save the statutory prayer from unconstitutionality.⁶⁵

In *Schempp*, the Court followed the logic of *Engel* and found that the establishment clause prohibited the reading of the Bible or the recitation of the Lord's Prayer in public classrooms.⁶⁶ In both cases, the Court maintained that it had taken a "neutral" po-

Lynch. See supra note 50.

58. Choper, *supra* note 41, at 680.

59. *Jaffree*, 105 S. Ct. at 2518-19 (Rehnquist, J., dissenting); Choper, *supra* note 41, at 680-81; Howard, *supra* note 35, at 21.

60. Sidney Hook insisted that *school-aid* is really the "momentous issue" in the church-state relationship. The Court, he believed, had over-reacted to "inconsequential religious exercises," unnecessarily "outraging the local pieties." S. HOOK, *supra* note 49, at 108-09. The result, he warned, has been a revitalization of parochial schools with a concomitant weakening of the public school system which had "helped to forge a united nation." *Id.* at 111.

61. 370 U.S. 421 (1962).

62. 374 U.S. 203 (1963).

63. 370 U.S. at 422-23.

64. S. Hook, *supra* note 49, at 80; *see also* P. FREUND, *supra* note 34, at 13 (using the same phrase).

65. 370 U.S. 430-31. "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." *Id.* at 435 (footnote omitted).

66. 374 U.S. at 223. Allowing these practices, the Court said, would mean that "a majority could use the machinery of the State to practice its beliefs." *Id.* at 226.

sition on religion,⁶⁷ a view hotly disputed by many.⁶⁸

Perhaps the furious reaction to *Engel* and *Schempp* was what influenced the Court to wait over twenty years before accepting another school prayer case; or perhaps the Court believed *Schempp* adequately represented the last word on the subject of school prayer.⁶⁹ In fact, the majority opinion in *Schempp* made a conscious effort to summarize prior establishment clause doctrine in the form of the secular purpose and primary effect analysis subsequently adopted in *Lemon*.⁷⁰ Presumably, the Court in *Schempp* was hoping to formulate establishment clause guidelines for the lower courts and legislatures that would obviate the need for the Supreme Court's further involvement in the school prayer issue.

Although *Engel* and *Schempp* provided the doctrinal background for the school prayer issue, it was the recent cases of *Marsh v. Chambers*⁷¹ and *Lynch v. Donnelly*⁷² that provided the more immediate context, indicating the Court's probable direction and the future of the *Lemon* test.⁷³ In *Marsh v. Chambers*, the Court for the first time refused to use the *Lemon* test.⁷⁴ The Court was faced with the inevitable finding that the Nebraska legislature had violated the establishment clause;⁷⁵ the practice of employing a chaplain to open each legislative session with a prayer evinced an unquestionably religious purpose and effect.⁷⁶ Instead of using the *Lemon* test, the Court relied on history to show both that the practice "ha[d] become part of the fabric of our society"⁷⁷ and that the framers who were familiar with the practice had found it to be "no real threat" to the establishment clause.⁷⁸ It was significant that

67. 374 U.S. at 226; 370 U.S. at 434.

68. Leo Pfeffer gave a colorful description of the community reaction to the school prayer cases. L. PFEFFER, *supra* note 21, at 201-02, 209-10. Phillip Johnson made the common sense observation that one's concept of neutrality depends on what "advantages or disadvantages" one thinks religion should have. Johnson, *supra* note 30, at 828-29.

69. R. MORGAN, *supra* note 21, at 134.

70. 374 U.S. at 222.

71. 463 U.S. 783 (1983).

72. 104 S. Ct. 1355.

73. For analysis and discussion of other establishment clause cases, see R. MORGAN, *supra* note 21; L. PFEFFER, *supra* note 23; F. SORAU, *supra* note 21; L. TRIBE, *supra* note 33.

74. *Marsh*, 463 U.S. 783. The Court had failed to use the *Lemon* test on one other occasion, but in that case the Court found that religious discrimination warranted strict scrutiny. *Larson v. Valente*, 456 U.S. 228, 246 (1982).

75. Johnson, *supra* note 30, at 286.

76. The circuit court applied the *Lemon* test and found the employment of the chaplain violated all three parts of the *Lemon* test. *Marsh*, 463 U.S. at 786.

77. *Id.* at 792.

78. *Id.* at 791.

six Justices chose to avoid *Lemon* rather than invalidate the manifestly religious practice. If not for *Lynch v. Donnelly*, *Marsh* could have been regarded as a simple refusal to override a venerable tradition.⁷⁹

In *Lynch*, however, the Court again referred to the tradition of government-employed chaplains, this time to justify a reading of the establishment clause which would accommodate the practice of setting up a creche on city property, as part of a Christmas display.⁸⁰ Supported by appropriate rhetoric from prior cases,⁸¹ the Court found that "accommodation of religious belief [was] intended by the Framers."⁸² *Lynch* was an extension of the rationale of *Marsh*. In *Marsh*, the practice in question was validated by its own long tradition; in *Lynch*, the practice was not validated by its own tradition but by reference to other traditions.⁸³ The *Lynch* method proves too much; it could be used to validate any religious practice.⁸⁴

After deriving support from history and case law, the *Lynch* Court reluctantly turned to the *Lemon* test.⁸⁵ Before applying the first prong of the test, which required a secular purpose, the Court noted that to "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause."⁸⁶ Thus, "in the context of the Christmas Season," the Court found the celebration of the holiday and the depic-

79. *Id.* at 795 (Brennan, J., dissenting) (calling *Marsh* a "narrow" opinion with a "limited rationale" which would "pose little threat to the overall fate of the Establishment Clause").

80. 104 S. Ct. 1355.

81. *Id.* at 1358-59.

82. 104 S. Ct. at 1359-60; Philip Kurland argued that the Burger Court has made a "steady march toward reading the first amendment as a license for cooperation between Church and state." Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U.L. REV. 1, 15 (1984).

83. Besides the chaplain tradition, the Court cited, inter alia, religious paintings in government-supported museums as evidence of the government accommodation of religion. 104 S. Ct. at 1360-61 (citations omitted).

84. Justice Brennan, in dissenting, calls this a "careless decision" because:

prior cases have all recognized that the "illumination" provided by history must always be focused on the particular practice at issue in a given case. Without that guiding principle and the intellectual discipline it imposes, the Court is at sea, free to select random elements of America's varied history solely to suit the views of five Members of this Court.

104 S. Ct. at 1386 (Brennan, J., dissenting).

85. The *Lemon* test might be "useful," the Court said, but the Court will not "be confined to any single test or criterion in this sensitive area." 104 S. Ct. at 1362.

86. *Id.*

tion of its origins were legitimate secular purposes.⁸⁷ As one commentator put it, the Court thus legitimized as secular the very acts necessary to the "appropriation of a particular religion or faith as a practice of government."⁸⁸

When it applied the second prong of the *Lemon* test, which asks whether a government practice has the primary effect of advancing or inhibiting religion, the Court in *Lynch* made comparisons with other cases and found that the city-displayed creche was no "more beneficial" and no "more an endorsement of religion" than government actions in other establishment clause cases.⁸⁹ In fact, the Court said, any benefit to religion was "indirect, remote and incidental."⁹⁰ The dissent viewed the Court's decision as a "struggle to ignore the clear religious effect of the creche."⁹¹

Finally, the Court analyzed the display of the creche in terms of the third prong of the *Lemon* test to determine whether it excessively entangled government with religion.⁹² The Court found no violation of the administrative entanglement branch of the prong: the cost of the creche was minimal, the maintenance was nonexistent, and church officials had not been consulted about the display.⁹³ With regard to the second branch, political divisiveness, the Court first denied its relevancy to the case and then found that the creche display did not promote political divisiveness.⁹⁴

The *Lynch* majority's reluctant, perfunctory use of the *Lemon* test cast doubt on the future usefulness of the test.⁹⁵ Justice O'Connor's opinion reinforced the doubt because she questioned the relationship between the *Lemon* test and the principles of the establishment clause,⁹⁶ and proffered her own replacement test.⁹⁷

87. *Id.*

88. Van Alstyne, *supra* note 22, at 786.

89. 104 S. Ct. at 1363.

90. *Id.* at 1364.

91. *Id.* at 1376 (Brennan, J., dissenting).

92. *Id.* at 1364.

93. *Id.*

94. *Id.* at 1364-65. The Court noted that this branch of the excessive entanglement prong was relevant only in cases involving "a direct subsidy to church-sponsored schools or colleges, or other religious institutions." *Id.* (citing *Mueller v. Allen*, 463 U.S. 388, 403 n.11 (1983)).

95. See *Recent Developments*, *supra* note 56, at 1188.

96. 104 S. Ct. at 1366-67.

97. Justice O'Connor's test has two parts:

[First whether] excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious

Even Justice Brennan, who wrote the dissent, noted that "no single formula can ever fully capture the analysis that may be necessary to resolve difficult Establishment Clause problems"⁹⁸ *Marsh* and *Lynch* thus set the stage for further reassessment, or possibly rejection, of the *Lemon* test.

III. THE CASE OF *Wallace v. Jaffree*

The controversial school prayer issue, the complex analysis of the establishment clause, and the recent case law explain *Jaffree*'s analytic and substantive importance. Against this complex and troubled background, the emphatic simplicity of the *Jaffree* opinion was the message. The Court's answer to the increasing controversy in establishment clause cases over both prayer in schools and mode of analysis was to unequivocally reassert "the criteria developed over a period of many years."⁹⁹ In clarifying any misconceptions left by *Marsh* and *Lynch*, the Court demonstrated its unwillingness to scrap the *Lemon* test.

A. Analysis

Before the Supreme Court applied the *Lemon* test to the Alabama statute, and after it noted that its affirmance of the court of appeals decision made "it unnecessary to comment at length on the District Court's remarkable conclusion that the Federal Constitution imposed no obstacle to Alabama's establishment of a state religion,"¹⁰⁰ the Court used half of a brief opinion to unqualifiedly reassert its commitment to the incorporation doctrine as it applied to the first amendment.¹⁰¹

The Court then turned to the *Lemon* test, never getting past the first prong: "no consideration of the second or third criteria was necessary if a statute did not have a clearly secular purpose."¹⁰² The Court discovered the purpose behind section 16-1-

lines. The second and more direct infringement is government endorsement or disapproval of religion.

104 S. Ct. at 1366 (citation omitted).

98. 104 S. Ct. at 1371 n.2. Justice Brennan also said the *Lemon* test has been the "fundamental tool of Establishment Clause analyses." *Id.*

99. 105 S. Ct. at 2489.

100. *Id.* at 2479, 2486. Justice Stevens delivered the opinion for the majority joined by Justices Brennan, Marshall, Blackmun, and Powell.

101. *Id.* at 2486. Robert Cord and Raoul Berger are two of the constitutional scholars relied upon by the district court for its finding that nothing in the Constitution impeded a state from establishing a religion. R. CORD, *supra* note 21; R. BERGER, *supra* note 52.

102. 105 S. Ct. at 2490 (footnote omitted).

20.1¹⁰³ from the words of the bill's sponsor, the failure of the state to suggest a secular purpose, and from a textual comparison of section 16-1-20.1 with its predecessor, section 16-1-20.¹⁰⁴ The sponsor of the bill had stated for the Alabama legislative record, and testified to the district court, that his purpose was "to return voluntary prayer to our public schools."¹⁰⁵ Chief Justice Burger, in dissent, justifiably criticized this part of the discussion of legislative purpose, because the statements were made only *after* passage of section 16-1-20.1, with no indication that other legislators shared the sponsor's motives.¹⁰⁶

The Court, however, did not rely primarily on the sponsor's statements or the failure of Alabama to provide a secular purpose.¹⁰⁷ From textual comparison of section 16-1-20 with section 16-1-20.1, the Court found the latter section had a "wholly religious character."¹⁰⁸ The addition of the words "or voluntary prayer" was unnecessary, the Court said; the right to voluntary prayer was already incorporated into section 16-1-20, *without* the express language.¹⁰⁹ Noting the absence of any identifiable secular purpose not fully served by section 16-1-20, the Court reasoned that the enactment of section 16-1-20.1 was either a meaningless exercise or an attempt "to convey a message of State endorsement and promotion of prayer."¹¹⁰ Because it was unlikely to have been a meaningless exercise, the Court concluded that it was a deliberate expression of state support for voluntary prayer "as a favored

103. Section 16-1-20.1 provides:

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

Id.

104. 105 S. Ct. at 2490-91; § 16-1-20 provides:

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

Id.

105. 105 S. Ct. at 2490 n.43 (quoting Brief for Appellant at 50).

106. 105 S. Ct. at 2506 (Burger, C.J., dissenting). Both Justice Powell and Justice O'Connor remarked upon the same flaw in the majority's analysis. 105 S. Ct. at 2495 (Powell, J., concurring); 105 S. Ct. at 2501 (O'Connor, J., concurring in the judgment).

107. 105 S. Ct. at 2491.

108. *Id.*

109. *Id.*

110. *Id.*

practice.”¹¹¹

Tangential to the Court's *Lemon* analysis, but crucial to the Court's purpose, footnote forty-five is worthy of special notice. Responding to arguments that the Alabama statute was “a permissible accommodation of religion,”¹¹² the Court characterized these arguments as based on the free exercise clause. Because there was “no governmental practice impeding students from silently praying for one minute at the beginning of each school day,” the Court found that the free exercise clause did not mandate accommodation.¹¹³ The Court refused to even acknowledge the possibility of accommodation when not mandated by the free exercise clause.¹¹⁴ By this refusal, the Court strengthened the *Lemon* test because it limited the accommodation policy which qualifies the test.

The Court, in conclusion, defended its one-prong analysis, supporting its own finding of an apparent intent to endorse religion with similar findings from the district court and the court of appeals.¹¹⁵ The Court acknowledged that this could be treated as “an inconsequential case involving nothing more than a few words of symbolic speech.”¹¹⁶ At the same time the Court insisted that the principle of government neutrality toward religion was too important to allow this violation to be overlooked.¹¹⁷ Chief Justice Burger disagreed, criticizing the majority opinion for failing “to distinguish between real threat and mere shadow.”¹¹⁸

Justice O'Connor defended the fine line, distinguishing school prayer cases from other establishment clause cases based on the coercion inherent in the school setting and the susceptibility of children to “unwilling religious indoctrination.”¹¹⁹ The majority opinion made the same point,¹²⁰ which left the impression that

111. *Id.* at 2492. The Court was probably influenced by the third statute, § 16-1-20.2, which authorized teachers to lead “willing students” in a state-composed prayer, but could not use a post hoc event as evidence of a religious purpose. *See supra* note 7 for the complete text of § 16-1-20.2. Justice Powell admitted that the third statute influenced his thinking: “My concurrence is prompted by Alabama's persistence in attempting to institute state-sponsored prayer in the public schools by enacting three successive statutes.” 105 S. Ct. at 2493 (Powell, J., concurring) (footnote omitted).

112. *Id.* at 2491 n.45.

113. *Id.*

114. *See supra* notes 45-47 and accompanying text.

115. 105 S. Ct. at 2493.

116. *Id.* at 2492.

117. *Id.*

118. *Id.* at 2508. (Burger, C.J., dissenting) (quoting Justice Goldberg's concurring opinion in *Schempp*, 374 U.S. at 308).

119. *Id.* at 2503 (O'Connor, J., concurring in the judgment).

120. *Id.* at 2492 nn.50 & 51.

school prayer cases call for more rigorous application of the *Lemon* test than other establishment clause cases.

B. Significance

Supreme Court watchers eagerly awaited *Wallace v. Jaffree* because the Court would be responding to an issue of major political importance after an apparent shift in the Court's direction. *Jaffree* was the answer to two questions: (1) Would the Court dispense with the *Lemon* test in favor of an analytical mode more suited to accommodation? and (2) Would the Supreme Court find a moment of silence constitutional? The answer to the first question was unequivocal, and made the answer to the second question inevitable in the particular factual circumstance.

The Court affirmed the use of the *Lemon* test as appropriate analysis for establishment clause cases, neither criticizing nor responding to criticism of the test. Subsequent cases have dispelled the impression that the rehabilitation of *Lemon* was occasioned by the school prayer issue,¹²¹ but *Jaffree's* significance is nevertheless limited by its peculiar facts and analysis. To begin with, the Court's use of the *Lemon* test gave little guidance for the application of a tripartite test already described as "problematic."¹²² The one-prong analysis offered no hint of how to apply the other two prongs to a moment of silence statute. This is particularly noteworthy in light of the Court's statement that "[a]ppellants have not identified any secular purpose that was not fully served by section 16-1-20 before the enactment of section 16-1-20.1."¹²³ The implication is that the Court finds some secular purpose in a "pure" moment of silence statute. Thus the failure to describe the *Lemon* inquiry for the other two prongs becomes a noticeable omission.¹²⁴

121. Three establishment clause cases decided after *Jaffree*, none of which involved school prayer, all used the *Lemon* test: *Aguilar v. Felton*, 105 S. Ct. 3232 (1985) (use of federal funds to send remedial, clinical, and guidance personnel into private schools violated establishment clause); *School Dist. v. Ball*, 105 S. Ct. 3216 (1985) ("shared time" and community education programs violated establishment clause); *Estate of Thornton v. Caldor, Inc.*, 105 S. Ct. 2914 (1985) (Connecticut statute providing employees with an absolute right not to work on their chosen Sabbath violated establishment clause).

122. 105 S. Ct. at 2496 (O'Connor, J., concurring in the judgment). See also *supra* notes 53-54 and accompanying text.

123. 105 S. Ct. at 2491.

124. The two concurring Justices were less reticent about expressing their opinions on whether moment of silence statutes would pass the other two prongs. Justice Powell said that a "straightforward" moment of silence statute would pass both the effect and entanglement prongs. *Id.* at 2495 (Powell, J., concurring). Justice O'Connor did not discuss the entanglement prong but found that the moment of silence statutes "of many States should

Within the one-prong analysis, the *Jaffree* decision is limited by the unusual factual circumstance of two statutes that, only when read together, evidenced a legislative intent to endorse religion.¹²⁵ Furthermore, the passage of three school prayer statutes and the failure of the state to proffer a secular purpose indicate a desire of Alabama officials to score political points rather than to have a moment of silence in public schools. Unsurprisingly, the resultant statute is perceived as a violation of the establishment clause.¹²⁶ The *Jaffree* decision responds accordingly, but offers no advice on how to deal with a more subtle set of circumstances.

It would have been particularly helpful if the Court had discussed the level of scrutiny to apply to legislative intent in these cases. It is impossible to tell from *Jaffree* whether the Court would recommend its customary "reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose . . . may be discerned from the face of the statute,"¹²⁷ or whether the Court would recommend a stricter standard. In a recent school religion case, the Court held that a "self-serving" recitation of secular purpose would "not be sufficient to avoid conflict with the First Amendment."¹²⁸ Justice Rehnquist, in his dissent, discussed the problem of how to define the secular purpose prong: "The purpose prong means little if it only requires the legislature to express any secular purpose and omit all sectarian references"¹²⁹ On the other hand, he said, if the purpose prong requires "an absence of any intent to aid sectarian institutions," then many previously approved measures would be unconstitutional.¹³⁰

While the majority in *Jaffree* uncritically used the *Lemon* test, they have at other times been critical of it. In 1977, Justice Stevens, the author of *Jaffree*, advocated abandonment of *Lemon* and

satisfy the Establishment Clause standard we have here applied." *Id.* at 2505 (O'Connor, J., concurring in the judgment).

125. See *supra* note 7 (the third statute, § 16-1-20.2, makes the total picture even more damning).

126. Professor John E. Sexton of the New York University School of Law felt that Alabama "was thumbing its nose at the court [sic]." Lauter, *Major Shift Looming In Church-State Law*, Nat'l L.J., Sept. 10, 1984, at 26, col 4.

127. *Mueller v. Allen*, 463 U.S. 388 (1983).

128. *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam). A Kentucky statute, which required a copy of the Ten Commandments to be posted in every public classroom, was unconstitutional despite fine print on the copy which referred to the secular nature of the Ten Commandments as fundamental law. *Id.*

129. 105 S. Ct. at 2517 (Rehnquist, J., dissenting).

130. *Id.* See *infra* note 145 and accompanying text.

a return to the *Everson* standard.¹³¹ More recently, Justice Powell, who wrote separately in *Jaffree* in support of *Lemon*,¹³² was part of the majority, which included Justice Blackmun, that quite willingly accepted the superficial use of the test in *Lynch* and the failure to use it at all in *Marsh*. Even more telling of the Court's commitment to *Lemon* was Justice Brennan's dissent in *Lynch*, joined by Justices Marshall, Blackmun and Stevens, in which Justice Brennan expressed dissatisfaction with the adaptability of any test to these complex issues.¹³³ Justice Brennan also proposed his own test from *Schempp* as more responsive to the difficulties of the establishment clause.¹³⁴ Having been a part of the general criticism of the *Lemon* test in *Lynch*, the *Jaffree* majority's uncritical, unqualified reliance on *Lemon* bespeaks a desire to avoid chaos by uniting behind *Lemon* until the Court can agree on an authoritative alternative.¹³⁵ The Court may be concerned, as Justice Powell observed, that "continued criticism of [the *Lemon* test] could encourage other courts to feel free to decide Establishment Clause cases on an *ad hoc* basis."¹³⁶

Because *Lemon* thus could be a stop gap measure, the question of a successor arises. The *Jaffree* decision indicates the probable success of several potential alternatives. First, *Jaffree* makes it clear that a majority of the Court will only support Chief Justice Burger's "official Chaplain" brand of historical analysis for a limited type of case.¹³⁷ Second, *Jaffree* also makes it clear that a majority of the Court is not yet willing to adopt Justice Rehnquist's suggestion to abandon the test as based on faulty history.¹³⁸ Third,

131. *Wolman v. Walter*, 433 U.S. 229, 265-66 (1977) (Stevens, J., concurring and dissenting).

132. 105 S. Ct. at 2493-94 (Powell, J., concurring).

133. 104 S. Ct. at 1371 n.2; see *supra* note 98 and accompanying text.

134. 104 S. Ct. at 1375 n.11.

135. See *Ball*, 105 S. Ct. at 3222 (1985). Justice Brennan writing for the Court in this later case reaffirmed the use of *Lemon*, but noted the limitations of the test in not affording "precise limits." *Id.* (quoting *Meek v. Pittenger*, 421 U.S. 349, 359 (1975)).

136. 105 S. Ct. at 2494 (Powell, J., concurring) (footnote omitted).

137. In *Marsh*, five Justices found Chief Justice Burger's reasoning persuasive. In *Lynch*, only four Justices joined Chief Justice Burger. In *Lynch*, Justice Powell had joined Chief Justice Burger, but Justice Powell's commitment to *Lemon* is unequivocal in *Jaffree*.

138. In *Jaffree*, Justice White agreed with Justice Rehnquist: "[I]t would be quite understandable if we undertook to reassess our cases dealing with these clauses, particularly those dealing with the Establishment Clause." 105 S. Ct. at 2508 (White, J., dissenting). Chief Justice Burger already uses history to reassess these cases. Justice O'Connor sympathized with this point, but noted the limitations of seeking the intent of the framers, and emphasized school prayer cases as distinguishable. *Id.* at 2502-03 (O'Connor, J., concurring in the judgment).

the Court, while supplementing *Lemon* with Justice O'Connor's endorsement test,¹³⁹ will not go so far as to use it as a replacement for *Lemon*.¹⁴⁰

Finally, *Jaffree* indicates the Court's current position on the policy of accommodation, which offers a possible qualification of *Lemon* rather than providing an alternative. In footnote forty-five, the Court limits accommodation to situations in which the government has burdened the free exercise of religion,¹⁴¹ and thereby halts the recent expansion of the policy.¹⁴²

It is difficult to be certain of the Court's intention on the substantive issue, and it is impossible to even guess how the Court intended to reconcile *this* substantive issue with the chosen analytical method. The majority in *Jaffree* found that "[t]he legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day."¹⁴³ The Court's evident approbation of a moment of silence is not consistent with a rigorous use of the *Lemon* test. Through moment of silence statutes, legislators were attempting to maintain some vestige of a popular religious practice without running afoul of the Court's ban on vocal school prayers.¹⁴⁴ Therefore, moment of silence statutes could only be found constitutional if the Court were willing to accept a pro forma recitation of secular purpose.¹⁴⁵ The *Jaffree* Court's suggestion that some moment of silence statutes are constitutional thus presents the conundrum of

139. See *supra* note 97 for the text of the test.

140. The Court, in *Jaffree*, used Justice O'Connor's language, but continued at the same time to look for a secular purpose to satisfy the first prong of the *Lemon* test. 105 S. Ct. at 2490-93.

141. 105 S. Ct. at 2491 n.45; see *supra* notes 44-47, 82 and accompanying text.

142. The shift to accommodation found substantial support from the Reagan administration. Lauter, *supra* note 126, at 1, col 3.

143. 105 S. Ct. at 2491. Justice O'Connor, in *Jaffree*, explicitly confirmed the acceptability of a moment of silence statute. *Id.* at 2500 (O'Connor, J., concurring in the judgment). Justice Powell explicitly agreed. *Id.* at 2495 (Powell, J., concurring). Chief Justice Burger and Justices White and Rehnquist approved of the Alabama statute as presented.

144. L. PFEFFER, *supra* note 23, at 204-05; see also *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 HARV. L. REV. 1874 (1983); Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U. L. REV. 364 (1983).

145. Justice O'Connor wrote a great deal on this issue attempting to explain the utility of the purpose prong when the inquiry into legislative motive should be "deferential and limited." 105 S. Ct. at 2500. Basically, she concluded that the benefit is that it will remind governments not to say that they are endorsing religion. *Id.* (O'Connor, J., concurring in the judgment). See *supra* text accompanying notes 127-30.

how to explain constitutionality when the rigorous use of the *Lemon* test militates for unconstitutionality.¹⁴⁶ Furthermore, if courts are to accept *some* evidence of secular purpose, how are they to decide *which* evidence is *sufficient*, or *appropriate*? The school-aid cases have already illustrated that the *Lemon* test is not a useful vehicle for subtle distinctions.

IV. CONCLUSION

Although it is clear that the Court in *Wallace v. Jaffree* is mandating the use of the *Lemon* test for the establishment clause, it is unclear how the Court means for the test to be applied to a moment of silence statute. For the twenty-five states that already have a moment of silence statute,¹⁴⁷ and for those states that may desire one, Justice O'Connor's lengthy discussion of which statutes should be found to be constitutional might prove more helpful.¹⁴⁸ The majority opinion says only what it must to legitimize its finding that Alabama's statute is unconstitutional. On the difficult issues that these statutes raise, the majority, for the moment, is silent.

SYLVIA SOHN PENNEYS*

146. Prior to *Jaffree*, four federal courts had ruled on moment of silence statutes. The Massachusetts district court, in 1976, was the only court that found a legitimate secular purpose. *Gaines v. Anderson*, 421 F. Supp. 337, 346 (D. Mass. 1976). The court hypothesized a secular purpose that would serve an educative purpose: "The legislature could reasonably believe that students tend to learn greater self-discipline and respect for the authority of the teacher from a required moment of silence." *Id.* at 342.

A district court in Tennessee, in 1982, held that the intent was religious, that "no other purpose is apparent which substantially influenced the legislature . . ." *Beck v. McElrath*, 548 F. Supp. 1161, 1164 (M.D. Tenn. 1982). In 1983, two more district courts looked for a secular purpose. The New Mexico court found that "enhanc[ing] discipline and instill[ing] in the students . . . 'intellectual composure . . . ' [were] clearly the product of afterthought . . . It is unlikely that the moment of silence carries any significant benefits to the educational process . . ." *Duffy v. Las Cruces Pub. Schools*, 557 F. Supp. 1013, 1016 (D.N.M. 1983). Finally, the New Jersey district court found that "[a]ll the evidence points to the religious intent of this enactment," which was "all the more apparent in light of the pretextual nature of the secular purpose . . ." *May v. Cooperman*, 572 F. Supp. 1561, 1572 (D.N.J. 1983).

These district court opinions are worth noting for two reasons. First, out of four decisions, three courts found no secular purpose. Second, the only court that did find a secular purpose was using a very relaxed standard of scrutiny; the court hypothesized the secular purpose. The other three courts found it very easy to look through the proffered secular purpose as mere camouflage for an obviously religious practice.

147. See 105 S. Ct. at 2498 & n.1 (O'Connor, J., concurring in the judgment).

148. 105 S. Ct. at 2498-99 (O'Connor, J., concurring in the judgment).

* For those who have taught me, and for the two special people that I have taught—Anne Catherine and James Matthew Penneys.