126 Box 48 - JGR/School Prayer (2) – Roberts, John G.: Files
SERIES I: Subject File

SUPREME COURT OF THE UNITED STATES

Nos. 83–812 AND 83–929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83–812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83–929 *v.*
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 4, 1985]

JUSTICE REHNQUIST, dissenting.

Thirty-eight years ago this Court, in *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947) summarized its exegesis of Establishment Clause doctrine thus:

> "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' *Reynolds* v. *United States*, [98 U. S. 145, 164 (1879)]."

This language from *Reynolds*, a case involving the Free Exercise Clause of the First Amendment rather than the Establishment Clause, quoted from Thomas Jefferson's letter to the Danbury Baptist Association the phrase "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 be-

tween church and State." 8 Writings of Thomas Jefferson 113 (H. Washington ed. 1861).[1]

It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly forty years. Thomas Jefferson was of course in France at the time the constitutional amendments known as the Bill of Rights were passed by Congress and ratified by the states. His letter to the Danbury Baptist Association was a short note of courtesy, written fourteen years after the amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.

Jefferson's fellow Virginian James Madison, with whom he was joined in the battle for the enactment of the Virginia Statute of Religious Liberty of 1786, did play as large a part as anyone in the drafting of the Bill of Rights. He had two advantages over Jefferson in this regard: he was present in the United States, and he was a leading member of the First Congress. But when we turn to the record of the proceedings in the First Congress leading up to the adoption of the Establishment Clause of the Constitution, including Madison's significant contributions thereto, we see a far different picture of its purpose than the highly simplified "wall of separation between church and State."

During the debates in the thirteen colonies over ratification of the Constitution, one of the arguments frequently used by opponents of ratification was that without a Bill of Rights guaranteeing individual liberty the new general government carried with it a potential for tyranny. The typical response

---

[1] *Reynolds* is the only authority cited as direct precedent for the "wall of separation theory." 330 U. S., at 16. *Reynolds* is truly inapt; it dealt with a Mormon's Free Exercise Clause challenge to a federal polygamy law.

to this argument on the part of those who favored ratification was that the general government established by the Constitution had only delegated powers, and that these delegated powers were so limited that the government would have no occasion to violate individual liberties. This response satisfied some, but not others, and of the eleven colonies which ratified the Constitution by early 1789, five proposed one or another amendments guaranteeing individual liberty. Three—New Hampshire, New York, and Virginia—included in one form or another a declaration of religious freedom. See 3 J. Elliot, Debates on the Federal Constitution 659 (1891); 1 *id.*, at 328. Rhode Island and North Carolina flatly refused to ratify the Constitution in the absence of amendments in the nature of a Bill of Rights. 1 *id.*, at 334; 4 at 244. Virginia and North Carolina proposed identical guarantees of religious freedom:

> "[A]ll men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others." 3 *id.*, at 659; 4 *id.*, at 244.[2]

On June 8, 1789, James Madison rose in the House of Representatives and "reminded the House that this was the day that he had heretofore named for bringing forward amendments to the Constitution." 1 Annals of Cong. 424. Madison's subsequent remarks in urging the House to adopt his drafts of the proposed amendments were less those of a dedicated advocate of the wisdom of such measures than those of a prudent statesman seeking the enactment of measures sought by a number of his fellow citizens which could surely do no harm and might do a great deal of good. He said, *inter alia*:

---

[2] The New York and Rhode Island proposals were quite similar. They stated that no particular "religious sect or society ought to be favored or established by law in preference to others." 1 Elliot's Debates, at 328; *id.*, at 334.

> "It appears to me that this House is bound by every motive of prudence, not to let the first session pass over without proposing to the State Legislatures, some things to be incorporated into the Constitution, that will render it as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them. I wish, among other reasons why something should be done, that those who had been friendly to the adoption of this Constitution may have the opportunity of proving to those who were opposed to it that they were as sincerely devoted to liberty and a Republican Government, as those who charged them with wishing the adoption of this Constitution in order to lay the foundation of an aristocracy or despotism. It will be a desirable thing to extinguish from the bosom of every member of the community, any apprehensions that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled. And if there are amendments desired of such a nature as will not injure the Constitution, and they can be ingrafted so as to give satisfaction to the doubting part of our fellow-citizens, the friends of the Federal Government will evince that spirit of deference and concession for which they have hitherto been distinguished." *Id.*, at 431–432.

The language Madison proposed for what ultimately became the Religion Clauses of the First Amendment was this:

> "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." *Id.*, at 434.

On the same day that Madison proposed them, the amendments which formed the basis for the Bill of Rights were referred by the House to a committee of the whole, and after

several weeks' delay were then referred to a Select Committee consisting of Madison and ten others. The Committee revised Madison's proposal regarding the establishment of religion to read:

> "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.*, at 729.

The Committee's proposed revisions were debated in the House on August 15, 1789. The entire debate on the Religion Clauses is contained in two full columns of the "Annals," and does not seem particularly illuminating. See *id.*, at 729–731. Representative Peter Sylvester of New York expressed his dislike for the revised version, because it might have a tendency "to abolish religion altogether." Representative John Vining suggested that the two parts of the sentence be transposed; Representative Elbridge Gerry thought the language should be changed to read "that no religious doctrine shall be established by law." *Id.*, at 729. Roger Sherman of Connecticut had the traditional reason for opposing provisions of a Bill or Rights—that Congress had no delegated authority to "make religious establishments"—and therefore he opposed the adoption of the amendment. Representative Daniel Carroll of Maryland thought it desirable to adopt the words proposed, saying "[h]e would not contend with gentlemen about the phraseology, his object was to secure the substance in such a manner as to satisfy the wishes of the honest part of the community."

Madison then spoke, and said that "he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." *Id.*, at 730. He said that some of the state conventions had thought that Congress might rely on the "necessary and proper" clause to infringe the rights of conscience or to establish a national religion, and "to prevent these effects he presumed the amendment was intended, and

he thought it as well expressed as the nature of the language would admit." *Ibid.*

Representative Benjamin Huntington then expressed the view that the Committee's language might "be taken in such latitude as to be extremely hurtful to the cause of religion. He understood the amendment to mean what had been expressed by the gentleman from Virginia; but others might find it convenient to put another construction upon it." Huntington, from Connecticut, was concerned that in the New England states, where state established religions were the rule rather than the exception, the federal courts might not be able to entertain claims based upon an obligation under the bylaws of a religious organization to contribute to the support of a minister or the building of a place of worship. He hoped that "the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronise those who professed no religion at all." *Id.*, at 730–731.

Madison responded that the insertion of the word "national" before the word "religion" in the Committee version should satisfy the minds of those who had criticized the language. "He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought that if the word 'national' was introduced, it would point the amendment directly to the object it was intended to prevent." *Id.*, at 731. Representative Samuel Livermore expressed himself as dissatisfied with Madison's proposed amendment, and thought it would be better if the Committee language were altered to read that "Congress shall make no laws touching religion, or infringing the rights of conscience." *Ibid.*

Representative Gerry spoke in opposition to the use of the word "national" because of strong feelings expressed during the ratification debates that a federal government, not a national government, was created by the Constitution. Madi-

son thereby withdrew his proposal but insisted that his reference to a "national religion" only referred to a national establishment and did not mean that the goverment was a national one. The question was taken on Representative Livermore's motion, which passed by a vote of 31 for and 20 against. *Ibid.*

The following week, without any apparent debate, the House voted to alter the language of the Religion Clause to read "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." *Id.*, at 766. The floor debates in the Senate were secret, and therefore not reported in the Annals. The Senate on September 3, 1789 considered several different forms of the Religion Amendment, and reported this language back to the House:

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

C. Antieau, A. Downey, & E. Roberts, Freedom From Federal Establishment 130 (1964).

The House refused to accept the Senate's changes in the Bill of Rights and asked for a conference; the version which emerged from the conference was that which ultimately found its way into the Constitution as a part of the First Amendment.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The House and the Senate both accepted this language on successive days, and the amendment was proposed in this form.

On the basis of the record of these proceedings in the House of Representatives, James Madison was undoubtedly the most important architect among the members of the House of the amendments which became the Bill or Rights,

but it was James Madison speaking as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution. During the ratification debate in the Virginia Convention, Madison had actually opposed the idea of any Bill of Rights. His sponsorship of the amendments in the House was obviously not that of a zealous believer in the necessity of the Religion Clauses, but of one who felt it might do some good, could do no harm, and would satisfy those who had ratified the Constitution on the condition that Congress propose a Bill of Rights.[3] His original language "nor shall any national religion be established" obviously does not conform to the "wall of separation" between church and State idea which latter day commentators have ascribed to him. His explanation on the floor of the meaning of his language—"that Congress should not establish a religion, and enforce the legal observation of it by law" is of the same ilk. When he replied to Huntington in the debate over the proposal which came from the Select Committee of the House, he urged that the language "no religion shall be established by law" should be amended by inserting the word "national" in front of the word "religion."

It seems indisputable from these glimpses of Madison's thinking, as reflected by actions on the floor of the House in 1789, that he saw the amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion. Thus the Court's opinion in *Everson*—while correct in bracketing Madison and Jefferson together in their exertions in their home state leading to the enactment of the

---

[3] In a letter he sent to Jefferson in France, Madison stated that he did not see much importance in a Bill of Rights but he planned to support it because it was "anxiously desired by others . . . [and] it might be of use, and if properly executed could not be of disservice." 5 Writings of James Madison 271 (G. Hunt ed. 1904).

Virginia Statute of Religious Liberty—is totally incorrect in suggesting that Madison carried these views onto the floor of the United States House of Representatives when he proposed the language which would ultimately become the Bill of Rights.

The repetition of this error in the Court's opinion in *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 (1948), and, *inter alia*, *Engel* v. *Vitale*, 370 U. S. 421 (1962), does not make it any sounder historically. Finally, in *Abington School District* v. *Schempp*, 374 U. S. 203, 214 (1963) the Court made the truly remarkable statement that "the views of Madison and Jefferson, preceded by Roger Williams came to be incorporated not only in the Federal Constitution but likewise in those of most of our States" (footnote omitted). On the basis of what evidence we have, this statement is demonstrably incorrect as a matter of history.[4] And its repetition in varying forms in succeeding opinions of the Court can give it no more authority than it possesses as a matter of fact; *stare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history.

None of the other Members of Congress who spoke during the August 15th debate expressed the slightest indication that they thought the language before them from the Select Committee, or the evil to be aimed at, would require that the Government be absolutely neutral as between religion and irreligion. The evil to be aimed at, so far as those who spoke were concerned, appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another; but it was definitely not concern about whether the Government might aid all religions evenhandedly. If one were to follow the advice of JUSTICE BRENNAN,

---

[4] State establishments were prevalent throughout the late Eighteenth and early Nineteenth Centuries. See Massachusetts Constitution of 1780, Part, 1, Art. III; New Hampshire Constitution of 1784, Art. VI; Maryland Declaration of Rights of 1776, Art. XXXIII; Rhode Island Charter of 1633 (superseded 1842).

concurring in *Abington School District* v. *Schempp*, *supra* at 236, and construe the Amendment in the light of what particular "practices . . . challenged threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent," one would have to say that the First Amendment Establishment Clause should be read no more broadly than to prevent the establishment of a national religion or the governmental preference of one religious sect over another.

The actions of the First Congress, which re-enacted the Northwest Ordinance for the governance of the Northwest Territory in 1789, confirm the view that Congress did not mean that the Government should be neutral between religion and irreligion. The House of Representatives took up the Northwest Ordinance on the same day as Madison introduced his proposed amendments which became the Bill of Rights; while at that time the Federal Government was of course not bound by draft amendments to the Constitution which had not yet been proposed by Congress, say nothing of ratified by the States, it seems highly unlikely that the House of Representatives would simultaneously consider proposed amendments to the Constitution and enact an important piece of territorial legislation which conflicted with the intent of those proposals. The Northwest Ordinance, 1 Stat. 50, reenacted the Northwest Ordinance of 1787 and provided that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Id.*, at 52, n.(a). Land grants for schools in the Northwest Territory were not limited to public schools. It was not until 1845 that Congress limited land grants in the new States and Territories to nonsectarian schools. 5 Stat. 788; Antieau, Downey, & Roberts, Freedom From Federal Establishment, at 163.

On the day after the House of Representatives voted to adopt the form of the First Amendment Religion Clause

which was ultimately proposed and ratified, Representative Elias Boudinot proposed a resolution asking President George Washington to issue a Thanksgiving Day proclamation. Boudinot said he "could not think of letting the session pass over without offering an opportunity to all the citizens of the United States of joining with one voice, in returning to Almighty God their sincere thanks for the many blessings he had poured down upon them." 1 Annals of Cong. 914 (1789). Representative Aedanas Burke objected to the resolution because he did not like "this mimicking of European customs"; Representative Thomas Tucker objected that whether or not the people had reason to be satisfied with the Constitution was something that the states knew better than the Congress, and in any event "it is a religious matter, and, as such, is proscribed to us." *Id.*, at 915. Representative Sherman supported the resolution "not only as a laudable one in itself, but as warranted by a number of precedents in Holy Writ: for instance, the solemn thanksgivings and rejoicings which took place in the time of Solomon, after the building of the temple, was a case in point. This example, he thought, worthy of Christian imitation on the present occasion . . . ." *Ibid.*

Boudinot's resolution was carried in the affirmative on September 25, 1789. Boudinot and Sherman, who favored the Thanksgiving proclamation, voted in favor of the adoption of the proposed amendments to the Constitution, including the Religion Clause; Tucker, who opposed the Thanksgiving proclamation, voted against the adoption of the amendments which became the Bill of Rights.

Within two weeks of this action by the House, George Washington responded to the Joint Resolution which by now had been changed to include the language that the President "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety

and happiness." 1 J. Richardson, Messages and Papers of the Presidents, 1789–1897, p. 64 (1897). The Presidential proclamation was couched in these words:

> "Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war; for the great degree of tranquillity, union, and plenty which we have since enjoyed; for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge; and, in general, for all the great and various favors which He has been pleased to confer upon us.
>
> "And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions; to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually; to render our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed; to protect and guide all sovereigns and nations (especially such as have shown kindness to us), and to bless them with good governments, peace, and concord; to promote the knowledge and practice of true religion

and virtue, and the increase of science among them and us; and, generally, to grant until all mankind such a degree of temporal prosperity as He alone knows to be best." *Ibid.*

George Washington, John Adams, and James Madison all issued Thanksgiving proclamations; Thomas Jefferson did not, saying:

"Fasting and prayer are religious exercises; the enjoining them an act of discipline. Every religious society has a right to determine for itself the times for these exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it." 11 Writings of Thomas Jefferson 429 (A. Lipscomb ed. 1904).

As the United States moved from the 18th into the 19th century, Congress appropriated time and again public moneys in support of sectarian Indian education carried on by religious organizations. Typical of these was Jefferson's treaty with the Kaskaskia Indians, which provided annual cash support for the Tribe's Roman Catholic priest and church.[5] It was not until 1897, when aid to sectarian

[5]The Treaty stated in part:

"*And whereas*, the greater part of said Tribe have been baptized and received into the Catholic church, to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion . . . [a]nd . . . three hundred dollars, to assist the said Tribe in the erection of a church." 7 Stat. 79.

From 1789 to 1823 the U. S. Congress had provided a trust endowment of up to 12,000 acres of land "for the Society of the United Bretheren for propagating the Gospel among the Heathen." See, *e. g.*, ch. 46, 1 Stat. 490. The Act creating this endowment was renewed periodically and the renewals were signed into law by Washington, Adams, and Jefferson.

Congressional grants for the aid of religion were not limited to Indians. In 1787 Congress provided land to the Ohio Company, including acreage for the support of religion. This grant was reauthorized in 1792. See 1 Stat. 257. In 1833 Congress authorized the State of Ohio to sell the land

education for Indians had reached $500,000 annually, that Congress decided thereafter to cease appropriating money for education in sectarian schools. See Act of June 7, 1897, 30 Stat. 62, 79.; cf. *Quick Bear* v. *Leupp*, 210 U. S. 50, 77–79 (1908); J. O'Neill, Religion and Education Under the Constitution 118–119 (1949). See generally R. Cord, Separation of Church and State 61–82 (1982). This history shows the fallacy of the notion found in *Everson* that "no tax in any amount" may be levied for religious activities in any form. 330 U. S. at 15–16.

Joseph Story, a member of this Court from 1811 to 1845, and during much of that time a professor at the Harvard Law School, published by far the most comprehensive treatise on the United States Constitution that had then appeared. Volume 2 of Story's Commentaries on the Constitution of the United States 630–632 (5th ed. 1891) discussed the meaning of the Establishment Clause of the First Amendment this way:

> "Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration [First Amendment], the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience and the freedom of religious worship. 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, if not universal indignation.
>
> . . . . .
>
> "The real object of the [First] [A]mendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent

---

set aside for religion and use the proceeds "for the support of religion . . . and for no other use or purpose whatsoever. . . ." 4 Stat. 618–619.

> any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age. . . ." (Footnotes omitted.)

Thomas Cooley's eminence as a legal authority rivaled that of Story. Cooley stated in his treatise entitled Constitutional Limitations that aid to a particular religious sect was prohibited by the United States Constitution, but he went on to say:

> "But while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the Great Governor of the Universe, and of acknowledging with thanksgiving his boundless favors, or bowing in contrition when visited with the penalties of his broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of State government. Undoubtedly 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; but the power to do any of these things does not become unconstitutional simply because of its susceptibility to abuse. . . ." *Id.*, at 470–471.

Cooley added that,

"[t]his public recognition of religious worship, however, is not based entirely, perhaps not even mainly, upon a sense of what is due to the Supreme Being himself as the author of all good and of all law; but the same reasons of state policy which induce the government to aid institutions of charity and seminaries of instruction will incline it also to foster religious worship and religious institutions, as conservators of the public morals and valuable, if not indispensable, assistants to the preservation of the public order." *Id.*, at 470.

It would seem from this evidence that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations. Indeed, the first American dictionary defined the word "establishment" as "the act of establishing, founding, ratifying or ordainin(g,") such as in "[t]he episcopal form of religion, so called, in England." 1 N. Webster, American Dictionary of the English Language (1st ed. 1828). The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the federal government from providing non-discriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*.

Notwithstanding the absence of an historical basis for this theory of rigid separation, the wall idea might well have served as a useful albeit misguided analytical concept, had it led this Court to unified and principled results in Establishment Clause cases. The opposite, unfortunately, has been true; in the 38 years since *Everson* our Establishment Clause

cases have been neither principled nor unified. Our recent opinions, many of them hopelessly divided pluralities,[6] have with embarassing candor conceded that the "wall of separation" is merely a "blurred, indistinct, and variable barrier," which "is not wholly accurate" and can only be "dimly perceived." *Lemon* v. *Kurtzman*, 403 U. S. 602, 614 (1971); *Tilton* v. *Richardson*, 403 U. S. 672, 677–678, (1971); *Wolman* v. *Walter*, 433 U. S. 229, 236 (1977); *Lynch* v. *Donnelly*, 465 U. S. ——, (1984).

Whether due to its lack of historical support or its practical unworkability, the *Everson* "wall" has proven all but useless as a guide to sound constitutional adjudication. It illustrates only too well the wisdom of Benjamin Cardozo's observation that "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Berkey* v. *Third Avenue R. Co.*, 244 N. Y. 84, 94, 155 N. E. 58, 61 (1926).

But the greatest injury of the "wall" notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. The "crucible of litigation," ante at 14, is well adapted to adjudicating factual disputes on the basis of testimony presented in court, but no amount of repetition of historical errors in judicial opinions can make the errors true. The "wall of separation between church and State" is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.

The Court has more recently attempted to add some mortar to *Everson's* wall through the three-part test of *Lemon* v.

[6] *Tilton* v. *Richardson* 403 U. S. 672, 677 (1971); *Meek* v. *Pittenger*, 421 U. S. 349 (1975) (partial); *Roemer* v. *Board of Public Works of Maryland*, 426 U. S. 736 (1976); *Wolman* v. *Walter*, 433 U. S. 229 (1977).

Many of our other Establishment Clause cases have been decided by bare 5–4 majorities. *Committee for Public Education* v. *Regan*, 444 U. S. 646 (1980); *Larson* v. *Valente*, 456 U. S. 228 (1982); *Mueller* v. *Allen*, 463 U. S. 388 (1983); *Lynch* v. *Donnelly*, 465 U. S. —— (1984); *cf. Levitt* v. *Committee for Public Education*, 413 U. S. 472 (1973).

Kurtzman, *supra*, at 614–615, which served at first to offer a more useful test for purposes of the Establishment Clause than did the "wall" metaphor. Generally stated, the *Lemon* test proscribes state action that has a sectarian purpose or effect, or causes an impermissible governmental entanglement with religion. *E. g.*, *Lemon*, *supra*.

Lemon cited *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968), as the source of the "purpose" and "effect" prongs of the three-part test. The *Allen* opinion explains, however, how it inherited the purpose and effect elements from *Schempp* and *Everson*, both of which contain the historical errors described above. See *Allen*, *supra*, at 243. Thus the purpose and effect prongs have the same historical deficiencies as the wall concept itself: they are in no way based on either the language or intent of the drafters.

The secular purpose prong has proven mercurial in application because it has never been fully defined, and we have never fully stated how the test is to operate. If the purpose prong is intended to void those aids to sectarian institutions accompanied by a stated legislative purpose to aid religion, the prong will condemn nothing so long as the legislature utters a secular purpose and says nothing about aiding religion. Thus the constitutionality of a statute may depend upon what the legislators put into the legislative history and, more importantly, what they leave out. The purpose prong means little if it only requires the legislature to express any secular purpose and omit all sectarian references, because legislators might do just that. Faced with a valid legislative secular purpose, we could not properly ignore that purpose without a factual basis for doing so. *Larson* v. *Valente*, 456 U. S. 228, 262–263 (1982) (WHITE, J., dissenting).

However, if the purpose prong is aimed to void all statutes enacted with the intent to aid sectarian institutions, whether stated or not, then most statutes providing any aid, such as textbooks or bus rides for sectarian school children, will fail because one of the purposes behind every statute, whether

stated or not, is to aid the target of its largesse. In other words, if the purpose prong requires an absence of *any* intent to aid sectarian institutions, whether or not expressed, few state laws in this area could pass the test, and we would be required to void some state aids to religion which we have already upheld. *E. g., Allen, supra.*

The entanglement prong of the *Lemon* test came from *Walz* v. *Tax Commission*, 397 U. S. 664, 674 (1970). *Walz* involved a constitutional challenge to New York's time-honored practice of providing state property tax exemptions to church property used in worship. The *Walz* opinion refused to "undermine the ultimate constitutional objective [of the Establishment Clause] as illuminated by history," *id.*, at 671, and upheld the tax exemption. The Court examined the historical relationship between the state and church when church property was in issue, and determined that the challenged tax exemption did not so entangle New York with the Church as to cause an intrusion or interference with religion. Interferences with religion should arguably be dealt with under the Free Excercise Clause, but the entanglement inquiry in *Walz* was consistent with that case's broad survey of the relationship between state taxation and religious property.

We have not always followed *Walz's* reflective inquiry into entanglement, however. *E. g., Wolman*, 433 U. S., at 254. One of the difficulties with the entanglement prong is that, when divorced from the logic of *Walz*, it creates an "insoluable paradox" in school aid cases: we have required aid to parochial schools to be closely watched lest it be put to sectarian use, yet this close supervision itself will create an entanglement. *Roemer* v. *Board of Public Works of Maryland*, 426 U. S. 736, 768–769 (1976) (WHITE, J., concurring in judgment). For example, in *Wolman*, *supra*, the Court in part struck the State's nondiscriminatory provision of buses for parochial school field trips, because the state supervision of sectarian officials in charge of field trips would be too

onerous. This type of self-defeating result is certainly not required to ensure that States do not establish religions.

The entanglement test as applied in cases like *Wolman* also ignores the myriad state administrative regulations properly placed upon sectarian institutions such as curriculum, attendance, and certification requirements for sectarian schools, or fire and safety regulations for churches. Avoiding entanglement between church and State may be an important consideration in a case like *Walz*, but if the entanglement prong were applied to all state and church relations in the automatic manner in which it has been applied to school aid cases, the State could hardly require anything of church-related institutions as a condition for receipt of financial assistance.

These difficulties arise because the *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from an historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service. The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize. Even worse, the *Lemon* test has caused this Court to fracture into unworkable plurality opinions, see *supra*, n. 6, depending upon how each of the three factors applies to a certain state action. The results from our school services cases show the difficulty we have encountered in making the *Lemon* test yield principled results.

For example, a State may lend to parochial school children geography textbooks[7] that contain maps of the United States, but the State may not lend maps of the United States for use in geography class.[8] A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history

[7] *Board of Education* v. *Allen*, 392 U. S. 236 (1968).

[8] *Meek*, 421 U. S., at 362–366. A science book is permissible, a science kit is not. See *Wolman*, 433 U. S., at 249.

class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable.[9] A State may pay for bus transportation to religious schools[10] but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip.[11] A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing "services" conducted by the State inside the sectarian school are forbidden, *Meek* v. *Pittenger*, 421 U. S. 349, 367, 371 (1975), but the State may conduct speech and hearing diagnostic testing inside the sectarian school. *Wolman*, 433 U. S., at 241. Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school,[12] such as in a trailer parked down the street. *Id.*, at 245. A State may give cash to a parochial school to pay for the administration of State-written tests and state-ordered reporting services,[13] but it may not provide funds for teacher-prepared tests on secular subjects.[14] Religious instruction may not be given in public school,[15] but the public school may release students during the day for religion classes elsewhere, and may enforce attendance at those clases with its truancy laws.[16]

These results violate the historically sound principle "that the Establishment Clause does not forbid governments . . . to [provide] general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that 'aid'

---

[9] See *Meek*, *supra*, at 354–355, nn. 3, 4, 362–366.

[10] *Everson* v. *Board of Education*, 330 U. S. 1 (1947).

[11] *Wolman*, *supra*, at 252–255.

[12] *Wolman*, *supra*, at 241–248; *Meek*, *supra*, at 352, n. 2, 367–373.

[13] *Regan*, 444 U. S., at 648, 657–659.

[14] *Levitt*, 413 U. S., at 479–482.

[15] *Illinois ex rel.* v. *McCollum* v. *Board of Education*, 333 U. S. 203 (1948).

[16] *Zorach* v. *Clauson*, 343 U. S. 306 (1952).

religious instruction or worship." *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 799 (1973) (BURGER, C. J., concurring in part and dissenting in part). It is not surprising in the light of this record that our most recent opinions have expressed doubt on the usefulness of the *Lemon* test.

Although the test initially provided helpful assistance, *e. g.*, *Tilton* v. *Richardson*, 403 U. S. 672 (1971), we soon began describing the test as only a "guideline," *Committee for Public Education* v. *Nyquist*, *supra*, and lately we have described it as "no more than [a] useful signpos[t]." *Mueller* v. *Allen*, 463 U. S. 388, 394 (1983), citing *Hunt* v. *McNair*, 413 U. S. 734, 741 (1973); *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116 (1982). We have noted that the *Lemon* test is "not easily applied," *Meek*, *supra*, at 358, and as JUSTICE WHITE noted in *Committee for Public Education* v. *Regan*, 444 U. S. 646 (1980), under the *Lemon* test we have "sacrifice[d] clarity and predictability for flexibility." 444 U. S., at 662. In *Lynch* we reiterated that the *Lemon* test has never been binding on the Court, and we cited two cases where we had declined to apply it. 465 U. S., at ——, citing *Marsh* v. *Chambers*, 463 U. S. 783 (1983); *Larson* v. *Valente*, 456 U. S. 228 (1982).

If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it. The "crucible of litigation," *ante*, at 14, has produced only consistent unpredictability, and today's effort is just a continuation of "the sisyphean task of trying to patch together the 'blurred, indistinct and variable barrier' described in *Lemon* v. *Kurtzman*." *Regan*, *supra*, at 671 (STEVENS, J., dissenting). We have done much straining since 1947, but still we admit that we can only "dimly perceive" the *Everson* wall. *Tilton*, *supra*. Our perception has been clouded not by the Constitution but by the mists of an unnecessary metaphor.

The true meaning of the Establishment Clause can only be seen in its history. See *Walz*, 397 U. S., at 671–673; see also

Lynch, *supra*, at ——. As drafters of our Bill of Rights, the Framers inscribed the principles that control today. Any deviation from their intentions frustrates the permanence of that Charter and will only lead to the type of unprincipled decisionmaking that has plagued our Establishment Clause cases since *Everson*.

The Framers intended the Establishment Clause to prohibit the designation of any church as a "national" one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the "incorporation" of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson*, States are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.

The Court strikes down the Alabama statute in No. 83-812, *Wallace* v. *Jaffree*, because the State wished to "endorse prayer as a favored practice." *Ante*, at 21. It would come as much of a shock to those who drafted the Bill of Rights as it will to a large number of thoughtful Americans today to learn that the Constitution, as construed by the majority, prohibits the Alabama Legislature from "endorsing" prayer. George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God." History must judge whether it was the father of his country in 1789, or a majority of the Court today, which has strayed from the meaning of the Establishment Clause.

The State surely has a secular interest in regulating the manner in which public schools are conducted. Nothing in

the Establishment Clause of the First Amendment, properly understood, prohibits any such generalized "endorsement" of prayer. I would therefore reverse the judgment of the Court of Appeals in *Wallace* v. *Jaffree*.

SUPREME COURT OF THE UNITED STATES

Nos. 83–812 AND 83–929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83–812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83–929 *v.*
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 4, 1985]

CHIEF JUSTICE BURGER, dissenting.

Some who trouble to read the opinions in this case will find it ironic—perhaps even bizarre—that on the very day we heard arguments in this case, the Court's session opened with an invocation for Divine protection. Across the park a few hundred yards away, the House of Representatives and the Senate regularly open each session with a prayer. These legislative prayers are not just one minute in duration, but are extended, thoughtful invocations and prayers for Divine guidance. They are given, as they have been since 1789, by clergy appointed as official Chaplains and paid from the Treasury of the United States. Congress has also provided chapels in the Capitol, at public expense, where Members and others may pause for prayer, meditation—or a moment of silence.

Inevitably some wag is bound to say that the Court's holding today reflects a belief that the historic practice of the Congress and this Court is justified because members of the Judiciary and Congress are more in need of Divine guidance

than are schoolchildren. Still others will say that all this controversy is "much ado about nothing," since no power on earth—including this Court and Congress—can stop any teacher from opening the school day with a moment of silence for pupils to meditate, to plan their day—or to pray if they voluntarily elect to do so.

I make several points about today's curious holding.

(a) It makes no sense to say that Alabama has "endorsed prayer" by merely enacting a new statute "to specify expressly that voluntary prayer is *one* of the authorized activities during a moment of silence," *ante*, at 12 (O'CONNOR, J., concurring in the judgment) (emphasis added). To suggest that a moment-of-silence statute that includes the word "prayer" unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality but hostility toward religion. For decades our opinions have stated that hostility toward any religion or toward all religions is as much forbidden by the Constitution as is an official establishment of religion. The Alabama legislature has no more "endorsed" religion than a state or the Congress does when it provides for legislative chaplains, or than this Court does when it opens each session with an invocation to God. Today's decision recalls the observations of Justice Goldberg:

> "[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive dedication to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it."
>
> *School District* v. *Schempp*, 374 U. S. 203, 306 (1963) (concurring opinion).

(b) The inexplicable aspect of the foregoing opinions, however, is what they advance as support for the holding concerning the purpose of the Alabama legislature. Rather than determining legislative purpose from the face of the statute as a whole,[1] the opinions rely on three factors in concluding that the Alabama legislature had a "wholly religious" purpose for enacting the statute under review, Ala. Code § 16–1–20.1 (Supp. 1984): (i) statements of the statute's sponsor, (ii) admissions in Governor James' Answer to the Second Amended Complaint, and (iii) the difference between § 16–1–20.1 and its predecessor statute.

Curiously, the opinions do not mention that *all* of the sponsor's statements relied upon—including the statement "inserted" into the Senate Journal—were made *after* the legislature had passed the statute; indeed, the testimony that the Court finds critical was given well over a year after the statute was enacted. As even the appellees concede, see Brief for Appellees 18, there is not a shred of evidence that the legislature as a whole shared the sponsor's motive or that a majority in either house was even aware of the sponsor's view of the bill when it was passed. The sole relevance of the sponsor's statements, therefore, is that they reflect the personal, subjective motives of a single legislator. No case in the 195-year history of this Court supports the disconcerting idea that post-enactment statements by individual legislators are relevant in determining the constitutionality of legislation.

Even if an individual legislator's after-the-fact statements could rationally be considered relevant, all of the opinions fail to mention that the sponsor also testified that one of his purposes in drafting and sponsoring the moment-of-silence bill

---

[1]The foregoing opinions likewise completely ignore the statement of purpose that accompanied the moment-of-silence bill throughout the legislative process: "To permit a period of silence to be observed *for the purpose* of meditation *or* voluntary prayer at the commencement of the first class of each day in all public schools." 1981 Ala. Senate J. 14 (emphasis added). See also *id.*, at 150, 307, 410, 535, 938, 967.

was to clear up a widespread misunderstanding that a schoolchild is legally *prohibited* from engaging in silent, individual prayer once he steps inside a public school building. See App. 53–54. That testimony is at least as important as the statements the Court relies upon, and surely that testimony manifests a permissible purpose.

The Court also relies on the admissions of Governor James' Answer to the Second Amended Complaint. Strangely, however, the Court neglects to mention that there was no trial bearing on the constitutionality of the Alabama statutes; trial became unnecessary when the District Court held that the Establishment Clause does not apply to the states.[2] The absence of a trial on the issue of the constitutionality of § 16–1–20.1 is significant because the Answer filed by the State Board and Superintendent of Education did not make the same admissions that the Governor's Answer made. See 1 Record 187. The Court cannot know whether, if this case had been tried, those state officials would have offered evidence to contravene appellees' allegations concerning legislative purpose. Thus, it is completely inappropriate to accord any relevance to the admissions in the Governor's Answer.

The several preceding opinions conclude that the principal difference between § 16–1–20.1 and its predecessor statute proves that the sole purpose behind the inclusion of the phrase "or voluntary prayer" in § 16–1–20.1 was to endorse and promote prayer. This reasoning is simply a subtle way of focusing exclusively on the religious component of the statute rather than examining the statute as a whole. Such logic—if it can be called that—would lead the Court to hold, for example, that a state may enact a statute that provides reimbursement for bus transportation to the parents of all schoolchildren, but may not *add* parents of parochial school students to an existing program providing reimbursement for parents of public school students. Congress amended the

[2]The four days of trial to which the Court refers concerned only the alleged practices of vocal, group prayer in the classroom.

statutory Pledge of Allegiance 31 years ago to add the words "under God." Act of June 14, 1954, Pub. L. 396, 68 Stat. 249. Do the several opinions in support of the judgment today render the Pledge unconstitutional? That would be the consequence of their method of focusing on the difference between § 16–1–20.1 and its predecessor statute rather than examining § 16–1–20.1 as a whole.[3] Any such holding would of course make a mockery of our decisionmaking in Establishment Clause cases. And even were the Court's method correct, the inclusion of the words "or voluntary prayer" in § 16–1–20.1 is wholly consistent with the clearly permissible purpose of clarifying that silent, voluntary prayer is not *forbidden* in the public school building.[4]

(c) The Court's extended treatment of the "test" of *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), suggests a naive preoccupation with an easy, bright-line approach for addressing constitutional issues. We have repeatedly cautioned that *Lemon* did not establish a rigid caliper capable of resolving every Establishment Clause issue, but that it sought only to provide "signposts." "In each [Establishment Clause] case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed." *Lynch* v. *Donnelly*, 465 U. S. ——, —— (1984). In any event, our responsibility is not to apply tidy formulas

[3]The House Report on the legislation amending the Pledge states that the purpose of the amendment was to affirm the principle that "our people and our Government [are dependent] upon the moral directions of the Creator." H. R. Rep. No. 1693, 83d Cong., 2d Sess. 2, reprinted in 1954 U. S. Code Cong. & Admin. News 2339, 2340. If this is simply "acknowledgement," not "endorsement," of religion, see *ante*, at 12, n. 5 (O'CONNOR, J., concurring in the judgment), the distinction is far too infinitesimal for me to grasp.

[4]The several opinions suggest that other similar statutes may survive today's decision. See *ante*, at 20; *ante*, at 1–2 (POWELL, J., concurring); *ante*, at 12, n. 5 (O'CONNOR, J., concurring in the judgment). If this is true, these opinions become even less comprehensible, given that the Court holds this statute invalid when there is no legitimate evidence of "impermissible" purpose; there could hardly be less evidence of "impermissible" purpose than was shown in this case.

by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion. Given today's decision, however, perhaps it is understandable that the opinions in support of the judgment all but ignore the Establishment Clause itself and the concerns that underlie it.

(d) The notion that the Alabama statute is a step toward creating an established church borders on, if it does not trespass into, the ridiculous. The statute does not remotely threaten religious liberty; it affirmatively furthers the values of religious freedom and tolerance that the Establishment Clause was designed to protect. Without pressuring those who do not wish to pray, the statute simply creates an opportunity to think, to plan, or to pray if one wishes—as Congress does by providing chaplains and chapels. It accommodates the purely private, voluntary religious choices of the individual pupils who wish to pray while at the same time creating a time for nonreligious reflection for those who do not choose to pray. The statute also provides a meaningful opportunity for schoolchildren to appreciate the absolute constitutional right of each individual to worship and believe as the individual wishes. The statute "endorses" only the view that the religious observances of others should be tolerated and, where possible, accommodated. If the government may not accommodate religious needs when it does so in a wholly neutral and noncoercive manner, the "benevolent neutrality" that we have long considered the correct constitutional standard will quickly translate into the "callous indifference" that the Court has consistently held the Establishment Clause does not require.

The Court today has ignored the wise admonition of Justice Goldberg that "the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *School District* v. *Schempp*, 374 U. S. 203, 308 (1963) (concurring opinion). The innocuous statute that the Court strikes down does not even rise to the level of

"mere shadow." JUSTICE O'CONNOR paradoxically acknowledges, "It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren." *Ante*, at 7.[5] I would add to that, "even if they choose to pray."

The mountains have labored and brought forth a mouse.[6]

---

[5]The principal plaintiff in this action has stated: "'I probably wouldn't have brought the suit just on the silent meditation or prayer statute . . . . If that's all that existed, that wouldn't have caused me much concern, unless it was implemented in a way that suggested prayer was the preferred activity.'" Malone, Prayers for Relief, 71 A.B.A. J. 61, 62, col. 1 (Apr. 1985) (quoting Ishmael Jaffree).

[6]Horace, Epistles, bk. III (Ars Poetica), line 139.

SUPREME COURT OF THE UNITED STATES

Nos. 83–812 AND 83–929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS

83–812 *v.*

ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS

83–929 *v.*

ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 4, 1985]

JUSTICE O'CONNOR, concurring in the judgment.

Nothing in the United States Constitution as interpreted by this Court or in the laws of the State of Alabama prohibits public school students from voluntarily praying at any time before, during, or after the school day. Alabama has facilitated voluntary silent prayers of students who are so inclined by enacting Ala. Code § 16–1–20, which provides a moment of silence in appellees' schools each day. The parties to these proceedings concede the validity of this enactment. At issue in these appeals is the constitutional validity of an additional and subsequent Alabama statute, Ala. Code § 16–1–20.1, which both the District Court and the Court of Appeals concluded was enacted solely to officially encourage prayer during the moment of silence. I agree with the judgment of the Court that, in light of the findings of the Courts below and the history of its enactment, § 16–1–20.1 of the Alabama Code violates the Establishment Clause of the First Amendment. In my view, there can be little doubt that the purpose and likely effect of this subsequent enactment is to endorse and

sponsor voluntary prayer in the public schools. I write separately to identify the peculiar features of the Alabama law that render it invalid, and to explain why moment of silence laws in other States do not necessarily manifest the same infirmity. I also write to explain why neither history nor the Free Exercise Clause of the First Amendment validate the Alabama law struck down by the Court today.

I

The religion clauses of the First Amendment, coupled with the Fourteenth Amendment's guaranty of ordered liberty, preclude both the Nation and the States from making any law respecting an establishment of religion or prohibiting the free exercise thereof. *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940). Although a distinct jurisprudence has enveloped each of these clauses, their common purpose is to secure religious liberty. See *Engle* v. *Vitale*, 370 U. S. 421, 430 (1962). On these principles the Court has been and remains unanimous.

As this case once again demonstrates, however, "it is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application." *Walz* v. *Tax Comm'n*, 397 U. S. 664, 694 (1970) (opinion of Harlan, J.). It once appeared that the Court had developed a workable standard by which to identify impermissible government establishments of religion. See *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971). Under the now familiar *Lemon* test, statutes must have both a secular legislative purpose and a principal or primary effect that neither advances nor inhibits religion, and in addition they must not foster excessive government entanglement with religion. *Id.*, at 612–613. Despite its initial promise, the *Lemon* test has proven problematic. The required inquiry into "entanglement" has been modified and questioned, see *Mueller* v. *Allen*, 463 U. S. 388, 403 n. 11 (1983), and in one case we

have upheld state action against an Establishment Clause challenge without applying the *Lemon* test at all. *Marsh* v. *Chambers*, 463 U. S. 783 (1983). The author of *Lemon* himself apparently questions the test's general applicability. See *Lynch* v. *Donnelly*, 465 U. S. ——, —— (1984). JUSTICE REHNQUIST today suggests that we abandon *Lemon* entirely, and in the process limit the reach of the Establishment Clause to state discrimination between sects and government designation of a particular church as a "state" or "national" one. *Post*, at ——.

Perhaps because I am new to the struggle, I am not ready to abandon all aspects of the *Lemon* test. I do believe, however, that the standards announced in *Lemon* should be reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment. We must strive to do more than erect a constitutional "signpost," *Hunt* v. *McNair*, 413 U. S. 734, 741 (1973), to be followed or ignored in a particular case as our predilections may dictate. Instead, our goal should be "to frame a principle for constitutional adjudication that is not only grounded in the history and language of the first amendment, but one that is also capable of consistent application to the relevant problems." Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn. L. Rev. 329, 332–333 (1963) (footnotes omitted). Last Term, I proposed a refinement of the *Lemon* test with this goal in mind. *Lynch* v. *Donnelly*, 465 U. S., at —— (concurring opinion).

The *Lynch* concurrence suggested that the religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored mem-

bers of the political community." *Id.*, at ——. Under this view, *Lemon*'s inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement.

The endorsement test is useful because of the analytic content it gives to the *Lemon*-mandated inquiry into legislative purpose and effect. In this country, church and state must necessarily operate within the same community. Because of this coexistence, it is inevitable that the secular interests of Government and the religious interests of various sects and their adherents will frequently intersect, conflict, and combine. A statute that ostensibly promotes a secular interest often has an incidental or even a primary effect of helping or hindering a sectarian belief. Chaos would ensue if every such statute were invalid under the Establishment Clause. For example, the State could not criminalize murder for fear that it would thereby promote the Biblical command against killing. The task for the Court is to sort out those statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment.

The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherent, for "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engle* v. *Vitale*, 370 U. S., at 431. At issue today is whether state moment of silence statutes in general, and Alabama's moment of silence statute in particular, embody an impermissible endorsement of prayer in public schools.

A

Twenty-five states permit or require public school teachers to have students observe a moment of silence in their classrooms.[1] A few statutes provide that the moment of silence is for the purpose of meditation alone. See Ariz. Rev. Stat. Ann. § 15–522 (1984); Conn. Gen. Stat. § 10–16a (1983); R. I. Gen. Laws § 16–12–3.1 (1981). The typical statute, however, calls for a moment of silence at the beginning of the school day during which students may meditate, pray, or reflect on the activities of the day. See, *e. g.*, Ark. Stat. Ann. § 80–1607.1 (1980); Ga. Code Ann. § 20–2–1050 (1982); Ill. Rev. Stat. ch. 122, § 771 (1983); Ind. Code § 20–10.1–7–11 (1982); Kan. Stat. Ann. § 72–5308a (1980); Pa. Stat. Ann., Tit. 24, § 15–1516.1 (Purdon Supp. 1984). Federal trial courts have divided on the constitutionality of these moment of silence laws. Compare *Gaines* v. *Anderson*, 421 F. Supp. 337 (Mass. 1976) (upholding statute) with *May* v. *Cooperman*, 572 F. Supp. 1561 (NJ 1983) (striking down statute); *Duffy* v. *Las Cruces Public Schools*, 557 F. Supp. 1013 (NM 1983) (same); and *Beck* v. *McElrath*, 548 F. Supp. 1161 (MD Tenn.

[1] See Ala. Code §§ 16–1–20, 16–1–20.1 (Supp. 1984): Ariz. Rev. Stat. Ann. § 15–522 (1984); Ark. Stat. Ann. § 80–1607.1 (1980); Conn. Gen. Stat. § 10–16a (1983); Del. Code Ann., Tit. 14, § 4101 (1981) (as interpreted in Del. Op. Atty. Gen. 79–1011 (1979)); Fla. Stat. § 233.062 (1983); Ga. Code Ann. § 20–2–1050 (1982); Ill. Rev. Stat., ch. 122, ¶ 771 (1983); Ind. Code § 20–10.1–7–11 (1982); Kan. Stat. Ann. § 72.5308a (1980); La. Rev. Stat. Ann. § 17:2115(A) (West 1982); Me. Rev. Stat. Ann., Tit. 20–A, § 4805 (1983); Md. Educ. Code Ann. § 7–104 (1985); Mass. Gen. Laws Ann., ch. 71, § 1A (1982); Mich. Comp. Laws Ann. § 380.1565 (Supp. 1984–1985); N. J. Stat. Ann. § 18A:36–4 (West Supp. 1984–1985); N. M. Stat. Ann. § 22–5–4.1 (1981); N. Y. Educ. Law § 3029–a (McKinney 1981); N. D. Cent. Code § 15–47–30.1 (1981); Ohio Rev. Code Ann. § 3313.60.1 (1980); Pa. Stat. Ann., Tit. 24, § 15.1516.1 (Purdon Supp. 1984–1985); R. I. Gen. Laws § 16–12–3.1 (1981); Tenn. Code Ann. § 49–6–1004 (1983); Va. Code § 22.1–203 (1980); W. Va. Const., Art. III, § 15–a. For a useful comparison of the provisions of many of these statutes, see Note, Daily Moments of Silence in Public Schools: A Constitutional Analysis, 58 N. Y. U. L. Rev. 364, 407–408 (1983).

1982) (same). See also *Walter* v. *West Virginia Board of Education*, Civ. Action No. 84–5366 (SD W. Va., Mar. 14, 1985) (striking down state constitutional amendment). Relying on this Court's decisions disapproving vocal prayer and Bible reading in the public schools, see *Abington School District* v. *Schempp*, 374 U. S. 203 (1963), *Engle* v. *Vitale*, *supra*, the courts that have struck down the moment of silence statutes generally conclude that their purpose and effect is to encourage prayer in public schools.

The *Engle* and *Abington* decisions are not dispositive on the constitutionality of moment of silence laws. In those cases, public school teachers and students led their classes in devotional exercises. In *Engle*, a New York statute required teachers to lead their classes in a vocal prayer. The Court concluded that "it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government." 370 U. S., at 425. In *Abington*, the Court addressed Pennsylvania and Maryland statutes that 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. 374 U. S., at 223–224. Under all of these statutes, a student who did not share the religious beliefs expressed in the course of the exercise was left with the choice of participating, thereby compromising the nonadherent's beliefs, or withdrawing, thereby calling attention to his or her non-conformity. The decisions acknowledged the coercion implicit under the statutory schemes, see *Engle*, *supra*, at 431, but they expressly turned only on the fact that the government was sponsoring a manifestly religious exercise.

A state sponsored moment of silence in the public schools is different from state sponsored vocal prayer or Bible reading. First, a moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated

with a religious exercise. Second, a pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others. For these simple reasons, a moment of silence statute does not stand or fall under the Establishment Clause according to how the Court regards vocal prayer or Bible reading. Scholars and at least one member of this Court have recognized the distinction and suggested that a moment of silence in public schools would be constitutional. See *Abington*, *supra*, at 281 (BRENNAN, J., concurring) ("[T]he observance of a moment of reverent silence at the opening of class" may serve "the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and goverment"); L. Tribe, American Constitutional Law § 14–6, p. 829 (1978); P. Freund, The Legal Issue, in Religion and the Public Schools 23 (1965); Choper, 47 Minn. L. Rev., at 371; Kauper, Prayer, Public Schools, and the Supreme Court, 61 Mich. L. Rev. 1031, 1041 (1963). As a general matter, I agree. It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren.

By mandating a moment of silence, a State does not necessarily endorse any activity that might occur during the period. Cf. *Widmar* v. *Vincent*, 454 U. S. 263, 272, n. 11 (1981) ("by creating a forum the [State] does not thereby endorse or promote any of the particular ideas aired there"). Even if a statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives. Nonetheless, it is also possible that a moment of silence statute, either as drafted or as actually implemented, could effectively favor the child who prays over the child who does not. For example, the message of endorsement would seem ines-

capable if the teacher exhorts children to use the designated time to pray. Similarly, the face of the statute or its legislative history may clearly establish that it seeks to encourage or promote voluntary prayer over other alternatives, rather than merely provide a quiet moment that may be dedicated to prayer by those so inclined. The crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer.[2] This question cannot be answered in the abstract, but instead requires courts to examine the history, language, and administration of a particular statute to determine whether it operates as an endorsement of religion. *Lynch*, 465 U. S., at —— (concurring opinion) ("Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion").

Before reviewing Alabama's moment of silence law to determine whether it endorses prayer, some general observations on the proper scope of the inquiry are in order. First, the inquiry into the purpose of the legislature in enacting a moment of silence law should be deferential and limited. See *Everson* v. *Board of Education*, 330 U. S. 1, 6 (1947) (courts must exercise "the most extreme caution" in assessing whether a state statute has a proper public purpose). In

---

[2] Appellants argue that *Zorach* v. *Clauson*, 343 U. S. 306, 313–314 (1952) suggests there is no constitutional infirmity in a State's encouraging a child to pray during a moment of silence. The cited dicta from *Zorach*, however, is inapposite. There the Court stated that "When the state encourages religious instruction . . . *by adjusting the schedule of public events to sectarian needs*, it follows the best of our traditions." *Ibid.* (emphasis added). When the State provides a moment of silence during which prayer may occur at the election of the student, it can be said to be adjusting the schedule of public events to sectarian needs. But when the State also encourages the student to pray during a moment of silence, it converts an otherwise inoffensive moment of silence into an effort by the majority to use the machinery of the State to encourage the minority to participate in a religious exercise. See *Abington School District* v. *Schempp*, 374 U. S. 203, 226 (1963).

determining whether the government intends a moment of silence statute to convey a message of endorsement or disapproval of religion, a court has no license to psychoanalyze the legislators. See *McGowan* v. *Maryland*, 366 U. S. 420, 466 (1961) (opinion of Frankfurter, J.). If a legislature expresses a plausible secular purpose for a moment of silence statute in either the text or the legislative history,[3] or if the statute disclaims an intent to encourage prayer over alternatives during a moment of silence,[4] then courts should generally defer to that stated intent. See *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 773 (1973); *Tilton* v. *Richardson*, 403 U. S. 672, 678–679 (1971). It is particularly troublesome to denigrate an expressed secular purpose due to post-enactment testimony by particular legislators or by interested persons who witnessed the drafting of the statute. Even if the text and official history of a statute express no secular purpose, the statute should be held to have an improper purpose only if it is beyond purview that endorsement of religion or a religious belief "was and is the law's reason for existence." *Epperson* v. *Arkansas*, 393 U. S. 97, 108 (1968). Since there is arguably a secular pedagogical value to a moment of silence in public schools, courts should find an improper purpose behind such a statute only if the statute on its face, in its official legislative history, or in its interpretation by a responsible administrative agency suggests it has the primary purpose of endorsing prayer.

JUSTICE REHNQUIST suggests that this sort of deferential inquiry into legislative purpose "means little," because "it only requires the legislature to express any secular purpose and omit all sectarian references." *Post*, at ——. It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws. That requirement is precisely tailored to the

[3] See, *e. g.*, Tenn. Code Ann. § 49–6–1004 (1983).

[4] See, *e. g.*, W. Va. Const., Art. III, § 15–a.

Establishment Clause's purpose of assuring that Government not intentionally endorse religion or a religious practice. It is of course possible that a legislature will enunciate a sham secular purpose for a statute. I have little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one, or that the *Lemon* inquiry into the effect of an enactment would help decide those close cases where the validity of an expressed secular purpose is in doubt. While the secular purpose requirement alone may rarely be determinative in striking down a statute, it nevertheless serves an important function. It reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share. In this sense the secular purpose requirement is squarely based in the text of the Establishment Clause it helps to enforce.

Second, the *Lynch* concurrence suggested that the effect of a moment of silence law is not entirely a question of fact:

> "[W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts." 465 U. S., at —— (concurring opinion).

The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools. Cf. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. ——, —— n. 1 (REHNQUIST, J., dissenting) (noting that questions whether fighting words are "likely to provoke the *average* person to retaliation," *Street* v. *New York*, 394 U. S. 576, 592 (1969), and whether allegedly obscene material appeals to "prurient interests," *Miller* v. *California*, 413 U. S. 15, 24 (1973), are mixed questions of law and fact that are properly subject to

de novo appellate review). A moment of silence law that is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over the others, should pass this test.

B

The analysis above suggests that moment of silence laws in many States should pass Establishment Clause scrutiny because they do not favor the child who chooses to pray during a moment of silence over the child who chooses to meditate or reflect. Alabama Code § 16–1–20.1 (Supp. 1984) does not stand on the same footing. However deferentially one examines its text and legislative history, however objectively one views the message attempted to be conveyed to the public, the conclusion is unavoidable that the purpose of the statute is to endorse prayer in public schools. I accordingly agree with the Court of Appeals, 705 F. 2d 1526, 1535 (1983), that the Alabama statute has a purpose which is in violation of the Establishment Clause, and cannot be upheld.

In finding that the purpose of Alabama Code § 16–1–20.1 is to endorse voluntary prayer during a moment of silence, the Court relies on testimony elicited from State Senator Donald G. Holmes during a preliminary injunction hearing. *Ante*, at ——. Senator Holmes testified that the sole purpose of the statute was to return voluntary prayer to the public schools. For the reasons expressed above, I would give little, if any, weight to this sort of evidence of legislative intent. Nevertheless, the text of the statute in light of its official legislative history leaves little doubt that the purpose of this statute corresponds to the purpose expressed by Senator Holmes at the preliminary injunction hearing.

First, it is notable that Alabama already had a moment of silence statute before it enacted § 16–1–20.1. See Ala. Code § 16–1–20, reprinted *ante*, at ——, n. 1. Appellees do not challenge this statute—indeed, they concede its validity. See Brief for Appellees 2. The only significant addition

made by Alabama Code § 16–1–20.1 is to specify expressly that voluntary prayer is one of the authorized activities during a moment of silence. Any doubt as to the legislative purpose of that addition is removed by the official legislative history. The sole purpose reflected in the official history is "to return voluntary prayer to our public schools." App. 50. Nor does anything in the legislative history contradict an intent to encourage children to choose prayer over other alternatives during the moment of silence. Given this legislative history, it is not surprising that the State of Alabama conceded in the courts below that the purpose of the statute was to make prayer part of daily classroom activity, and that both the District Court and the Court of Appeals concluded that the law's purpose was to encourage religious activity. See *ante*, at ——, n. 44. In light of the legislative history and the findings of the courts below, I agree with the Court that the State intended Alabama Code § 16–1–20.1 to convey a message that prayer was the endorsed activity during the state-prescribed moment of silence.[8] While it is therefore unnecessary also to determine the effect of the statute, *Lynch*, 465 U. S., at —— (concurring opinion), it also seems likely that the message actually conveyed to objective observers by Alabama Code § 16–1–20.1 is approval of the child

---

[8] THE CHIEF JUSTICE suggests that one consequence of the Court's emphasis on the difference between § 16–1–20.1 and its predecessor statute might be to render the Pledge of Allegiance unconstitutional because Congress amended it in 1954 to add the words "under God." *Post*, at ——. I disagree. In my view, the words "under God" in the Pledge, as codified at 36 U. S. C. § 172, serve as a acknowledgement of religion with "the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future." *Lynch*, 465 U. S., at —— (concurring opinion).

I also disagree with THE CHIEF JUSTICE's suggestion that the Court's opinion invalidates any moment of silence statute that includes the word "prayer." *Post*, at ——. As noted *infra*, at ——, "[e]ven if a statute specifies that a student may choose to pray during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives."

who selects prayer over other alternatives during a moment of silence.

Given this evidence in the record, candor requires us to admit that this Alabama statute was intended to convey a message of state encouragement and endorsement of religion. In *Walz* v. *Tax Comm'n*, 397 U. S., at 669, the Court stated that the religion clauses of the First Amendment are flexible enough to "permit religious exercise to exist without sponsorship and without interference." Alabama Code § 16–1–20.1 does more than permit prayer to occur during a moment of silence "without interference." It endorses the decision to pray during a moment of silence, and accordingly sponsors a religious exercise. For that reason, I concur in the judgment of the Court.

II

In his dissenting opinion, *post*, at ——, JUSTICE REHNQUIST reviews the text and history of the First Amendment religion clauses. His opinion suggests that a long line of this Court's decisions are inconsistent with the intent of the drafters of the Bill of Rights. He urges the Court to correct the historical inaccuracies in its past decisions by embracing a far more restricted interpretation of the Establishment Clause, an interpretation that presumably would permit vocal group prayer in public schools. See generally R. Cord, Separation of Church and State (1982).

The United States, in an *amicus* brief, suggests a less sweeping modification of Establishment Clause principles. In the Federal Government's view, a state sponsored moment of silence is merely an "accommodation" of the desire of some public school children to practice their religion by praying silently. Such an accommodation is contemplated by the First Amendment's guaranty that the Government will not prohibit the free exercise of religion. Because the moment of silence implicates free exercise values, the United States suggests that the *Lemon*-mandated inquiry into purpose and

effect should be modified. Brief for United States as *Amicus Curiae* 22.

There is an element of truth and much helpful analysis in each of these suggestions. Particularly when we are interpreting the Constitution, "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921). Whatever the provision of the Constitution that is at issue, I continue to believe that "fidelity to the notion of *constitutional*—as opposed to purely judicial—limits on governmental action requires us to impose a heavy burden on those who claim that practices accepted when [the provision] was adopted are now constitutionally impermissible." *Tennessee* v. *Garner*, 471 U. S. ——, —— (1985) (dissenting opinion). The Court properly looked to history in upholding legislative prayer, *Marsh* v. *Chambers*, 463 U. S. 783 (1983), property tax exemptions for houses of worship, *Walz* v. *Tax Comm'n*, *supra*, and Sunday closing laws, *McGowan* v. *Maryland*, 366 U. S. 420 (1961). As Justice Holmes once observed, "[i]f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31 (1922).

JUSTICE REHNQUIST does not assert, however, that the drafters of the First Amendment expressed a preference for prayer in public schools, or that the practice of prayer in public schools enjoyed uninterrupted government endorsement from the time of enactment of the Bill of Rights to the present era. The simple truth is that free public education was virtually non-existent in the late eighteenth century. See *Abington*, 374 U. S., at 238, and n. 7 (BRENNAN, J., concurring). Since there then existed few government-run schools, it is unlikely that the persons who drafted the First Amendment, or the state legislators who ratified it, anticipated the problems of interaction of church and state in the public schools. Sky, The Establishment Clause, the Congress, and the Schools: An Historical Perspective, 52 Va. L.

Rev. 1395, 1403–1404 (1966). Even at the time of adoption of the Fourteenth Amendment, education in Southern States was still primarily in private hands, and the movement toward free public schools supported by general taxation had not taken hold. *Brown* v. *Board of Education*, 347 U. S. 483, 489–490 (1954).

This uncertainty as to the intent of the Framers of the Bill of Rights does not mean we should ignore history for guidance on the role of religion in public education. The Court has not done so. See, *e. g.*, *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, 212 (1948) (Frankfurter, J., concurring). When the intent of the Framers is unclear, I believe we must employ both history and reason in our analysis. The primary issue raised by JUSTICE REHNQUIST's dissent is whether the historical fact that our Presidents have long called for public prayers of Thanks should be dispositive on the constitutionality of prayer in public schools.[6] I think not. At the very least, Presidential proclamations are distinguishable from school prayer in that they are received in a non-coercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination. This Court's decisions have recognized a distinction when government sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs. See, *e. g.*, *Marsh* v. *Chambers*, *supra*, at ——; *Tilton* v. *Richardson*, 403 U. S., at 686. Although history provides a touchstone for constitutional problems, the Establishment Clause concern for religious liberty is dispositive here.

---

[6] Even assuming a taxpayer could establish standing to challenge such a practice, see *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464 (1982), these Presidential proclamations would probably withstand Establishment Clause scrutiny given their long history. See *Marsh* v. *Chambers*, 463 U. S. 783 (1983).

The element of truth in the United States' arguments, I believe, lies in the suggestion that Establishment Clause analysis must comport with the mandate of the Free Exercise Clause that government make no law prohibiting the free exercise of religion. Our cases have interpreted the Free Exercise Clause to compel the Government to exempt persons from some generally applicable government requirements so as to permit those persons to freely exercise their religion. See, *e. g.*, *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U. S. 707 (1981); *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972); *Sherbert* v. *Verner*, 374 U. S. 398 (1963). Even where the Free Exercise Clause does not compel the Government to grant an exemption, the Court has suggested that the Government in some circumstances may voluntarily choose to exempt religious observers without violating the Establishment Clause. See, *e. g.*, *Gillette* v. *United States*, 401 U. S. 437, 453 (1971); *Braunfeld* v. *Brown*, 366 U. S. 599 (1961). The challenge posed by the United States' argument is how to define the proper Establishment Clause limits on voluntary government efforts to facilitate the free exercise of religion. On the one hand, a rigid application of the *Lemon* test would invalidate legislation exempting religious observers from generally applicable government obligations. By definition, such legislation has a religious purpose and effect in promoting the free exercise of religion. On the other hand, judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute pertaining to religion can be viewed as an "accommodation" of free exercise rights. Indeed, the statute at issue in *Lemon*, which provided salary supplements, textbooks, and instructional materials to Pennsylvania parochial schools, can be viewed as an accommodation of the religious beliefs of parents who choose to send their children to religious schools.

It is obvious that the either of the two Religion Clauses, "if expanded to a logical extreme, would tend to clash with the other." *Walz*, 397 U. S., at 668–669. The Court has long exacerbated the conflict by calling for government "neutrality" toward religion. See, *e. g.*, *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756 (1973), *Board of Education* v. *Allen*, 392 U. S. 236 (1968). It is difficult to square any notion of "complete neutrality," *ante*, at ——, with the mandate of the Free Exercise Clause that government must sometimes exempt a religious observer from an otherwise generally applicable obligation. A government that confers a benefit on an explicitly religious basis is not neutral toward religion. See *Welsh* v. *United States*, 398 U. S. 333, 372 (1970) (WHITE, J., dissenting).

The solution to the conflict between the religion clauses lies not in "neutrality," but rather in identifying workable limits to the Government's license to promote the free exercise of religion. The text of the Free Exercise Clause speaks of laws that prohibit the free exercise of religion. On its face, the Clause is directed at government interference with free exercise. Given that concern, one can plausibly assert that government pursues free exercise clause values when it lifts a government-imposed burden on the free exercise of religion. If a statute falls within this category, then the standard Establishment Clause test should be modified accordingly. It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause. I would also go further. In assessing the effect of such a statute—that is, in determining whether the statute conveys the message of endorsement of religion or a particular religious belief—courts should assume that the "objective observer," *ante*, at ——, is acquainted with the Free Exercise Clause and the values it promotes. Thus indi-

vidual perceptions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the Free Exercise Clause strongly supported the exemption.

While this "accommodation" analysis would help reconcile our Free Exercise and Establishment Clause standards, it would not save Alabama's moment of silence law. If we assume that the religious activity that Alabama seeks to protect is silent prayer, then it is difficult to discern any state-imposed burden on that activity that is lifted by Alabama Code § 16–1–20.1. No law prevents a student who is so inclined from praying silently in public schools. Moreover, state law already provided a moment of silence to these appellees irrespective of Alabama Code § 16–1–20.1. See Ala. Code § 16–1–20. Of course, the State might argue that § 16–1–20.1 protects not silent prayer, but rather group silent prayer under State sponsorship. Phrased in these terms, the burden lifted by the statute is not one imposed by the State of Alabama, but by the Establishment Clause as interpreted in *Engle* and *Abington*. In my view, it is beyond the authority of the State of Alabama to remove burdens imposed by the Constitution itself. I conclude that the Alabama statute at issue today lifts no state-imposed burden on the free exercise of religion, and accordingly cannot properly be viewed as an accommodation statute.

III

The Court does not hold that the Establishment Clause is so hostile to religion that it precludes the States from affording schoolchildren an opportunity for voluntary silent prayer. To the contrary, the moment of silence statutes of many States should satisfy the Establishment Clause standard we have here applied. The Court holds only that Alabama has intentionally crossed the line between creating a quiet moment during which those so inclined may pray, and affirmatively endorsing the particular religious practice of prayer.

This line may be a fine one, but our precedents and the principles of religious liberty require that we draw it. In my view, the judgment of the Court of Appeals must be affirmed.