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SERIES I: Subject File

THE WHITE HOUSE

WASHINGTON

May 6, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: S. 47, "Voluntary School Prayer Act of 1985"

OMB has asked for our views no later than May 29 on S. 47, the "Voluntary School Prayer Act of 1985." This bill would divest the Supreme Court of jurisdiction to hear any case involving voluntary school prayer, and correspondingly divest the Federal district courts of jurisdiction over the same class of cases.

You may recall discussing this type of legislation with me in the past. After an exhaustive review at the Department of Justice I determined that such bills were within the constitutional power of Congress to fix the appellate jurisdiction of the Supreme Court, "with such Exceptions, and under such Regulations as the Congress shall make," Art. III, § 2, cl. 2. I also concluded that such bills were bad policy and should be opposed on policy grounds.

My views did not carry the day, however, and the Department issued an opinion (in the form of a letter to the Senate and House Judiciary Committees) concluding that the above-quoted "Exceptions Clause" did not mean what it said and that Congress could not restrict the appellate jurisdiction of the Supreme Court in constitutional cases. The bills were, accordingly, opposed on constitutional grounds.

I do not know if the new regime at Justice will adhere to the old opinion or revisit the issue. There is much to be said for the virtues of stare decisis in this area, and I think I would recommend that we adhere to the old misguided opinion and let sleeping dogs (an apt reference, given my view of the opinion) lie. On the other hand, I know this issue has been close to the hearts of some who are now over at Justice, so there could be a push for reconsideration. If you agree, I would like to tell OMB we will wait to see the Justice report before opining on the bill.

LG

ID # 313292 CU

RM020

WHITE HOUSE
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Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: James Munn

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Subject: S. 47, the "Voluntary School Prayer Act of 1985"

ROUTE TO: **ACTION** **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUHOLL	ORIGINATOR	85 / 05 / 01			/ /
	Referral Note:				
CUAT 18	D	85 / 05 / 02		S	85 / 05 / 12
	Referral Note:				
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	Referral Note:				
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ACTION CODES:
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- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
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- S - For Signature
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313292 CR

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 1, 1985

LEGISLATIVE REFERRAL MEMORANDUM

TO: Department of Justice
Department of Education

SUBJECT: S. 47, the "Voluntary School Prayer Act of 1985"

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than May 29, 1985. (Note: This bill was ordered placed on the Senate calendar 1/21/85.)

Direct your questions to Branden Blum (395-3454), the legislative attorney in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: J. Cooney
K. Wilson
B. White
F. Fielding

1985 APR 31 2:56

Calendar No. 2

99TH CONGRESS
1ST SESSION

S. 47

To restore the right of voluntary prayer in public schools and to promote the separation of powers.

IN THE SENATE OF THE UNITED STATES

JANUARY 3, 1985

Mr. HELMS (for himself, Mr. DENTON, and Mr. EAST) introduced the following bill; which was read the first time

JANUARY 21, 1985

Read the second time and placed on the calendar

A BILL

To restore the right of voluntary prayer in public schools and to promote the separation of powers.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Voluntary School Prayer
4 Act of 1985".
5 SEC. 2. (a) Chapter 81 of title 28, United States Code,
6 is amended by adding at the end thereof the following new
7 section:

★(Star Print)

1 **"§ 1260. Appellate jurisdiction; limitations**

2 "(a) Notwithstanding the provisions of sections 1253,
3 1254, and 1257 of this chapter, the Supreme Court shall not
4 have jurisdiction to review, by appeal, writ of certiorari, or
5 otherwise, any case arising out of any State statute, ordi-
6 nance, rule, regulation, practice, or any part thereof, or aris-
7 ing out of any act interpreting, applying, enforcing, or effect-
8 ing any State statute, ordinance, rule, regulation, or practice,
9 which relates to voluntary prayer, Bible reading, or religious
10 meetings in public schools or public buildings.

11 "(b) As used herein, 'voluntary' means an activity in
12 which a student is not required to participate by school au-
13 thorities.".

14 (b) The section analysis of chapter 81 of title 28 is
15 amended by adding at the end thereof the following new
16 item:

"1260. Appellate jurisdiction; limitations.".

17 Sec. 3. (a) Chapter 85 of title 28, United States Code,
18 is amended by adding at the end thereof the following new
19 section:

20 **"§ 1365. Limitations on jurisdiction**

21 "Notwithstanding any other provision of law, the dis-
22 trict courts shall not have jurisdiction of any case or question
23 which the Supreme Court does not have jurisdiction to
24 review under section 1260 of this title.".

1 (b) The section analysis at the beginning of chapter 85
2 of title 28 is amended by adding at the end thereof the fol-
3 lowing new item:

"1365. Limitations on jurisdiction.".

4 SEC. 4. The amendments made by this Act shall take
5 effect on the date of enactment, except that such amend-
6 ments shall not apply to any case which, on such date of
7 enactment, was pending in any court of the United States.

Calendar No. 2

99TH CONGRESS
1ST SESSION

S. 47

A BILL

To restore the right of voluntary prayer in public schools and to promote the separation of powers.

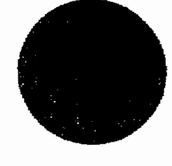
JANUARY 21, 1985

Read the second time and placed on the calendar

THE WHITE HOUSE

WASHINGTON

June 4, 1985



MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Wallace v. Jaffree

A sharply divided Supreme Court ruled today in Wallace v. Jaffree that an Alabama statute mandating a one-minute period of silence for "meditation or voluntary prayer" violated the Establishment Clause of the First Amendment. Justice Stevens wrote the opinion for the Court, which was joined unconditionally by only three other Justices -- Brennan, Marshall, and Blackmun. Justice Powell concurred in the opinion (giving Stevens a court); Justice O'Connor concurred in the judgment only; and the Chief Justice and Justices White and Rehnquist each wrote separate dissents. Although the Court struck down the Alabama statute, careful analysis shows at least a majority of the Justices would vote to uphold a simple moment-of-silence statute.

Justice Stevens's opinion for the majority reiterated the three-pronged Establishment Clause test announced in Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971): to survive constitutional challenge, a law must (1) have a secular purpose, (2) not have a primary effect of advancing or inhibiting religion, and (3) not foster excessive entanglement of the State in religion. The Alabama law failed the first part of the test, since its sponsors stated clearly in the legislative history that their purpose was to return voluntary prayer to schools, and that they had no other purpose. Slip op., at 17-18. The statute was thus struck down because of the peculiarities of the particular legislative history, not because of any inherent constitutional flaw in moment-of-silence statutes.

This conclusion is fortified by the other opinions. Justice Powell concurred because the statute must be assessed against the background of "Alabama's persistence in attempting to institute state-sponsored prayer in public schools," but he noted that "some moment-of-silence statutes may be constitutional." Slip op., at 1. Justice O'Connor wrote a 19-page opinion concurring in the judgment, "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." Slip op., at 2. The Chief Justice in dissent thought it simply ridiculous

to maintain that a moment of silence violated the Establishment Clause, and Justice White in dissent concluded that "a majority of the Court would approve statutes that provided for a moment of silence but did not mention prayer." Slip op., at 1. Finally, Justice Rehnquist in dissent called for abandoning the Lemon test, arguing from historical analysis that the Establishment Clause prohibited only establishing a state religion or preferring one denomination or sect at the expense of others. Thus, at least five Justices -- the three dissenters and Justices Powell and O'Connor -- would approve some moment-of-silence statutes.

The United States filed an amicus curiae brief defending the law as a neutral accommodation of the exercise of the students' religious freedoms. Again, this position lost as regards this particular statute, but can be seen to have prevailed more generally. The attached press guidance for Russell Mack emphasizes this positive spin. The President's revised Birmingham remarks state that the decision shows we still have an uphill battle to return prayer to schools, and that is accurate -- there is nothing positive in the opinion for prayer, only for a moment of silence.

(For what it's worth, a reading of the opinions strongly suggests that the outcome of this case shifted in the writing. As I see it, Rehnquist was writing for the Court -- he would not write 24 pages of dissent (longer even than Stevens's majority), and the structure and tone of the dissent is that of a majority opinion. He had five votes to uphold the statute, and tried to use the occasion to go after the bigger game of the Lemon test itself. O'Connor probably was in Rehnquist's original majority but was not convinced that the broad opinion applied to the facts, penning a dissent to the would-be majority -- her 19-page concurrence is directed solely to that opinion, critiquing it step-by-step and analyzing none of the others. It is very unusual for a concurrence to take on a dissent in such a fashion, and at such length. O'Connor's dissent apparently persuaded Powell to drop by the wayside as well, with a lame concurring opinion focusing on stare decisis, as if to explain why he was changing a vote. Thus, as I see it, Rehnquist took a tenuous five-person majority and tried to revolutionize Establishment Clause jurisprudence, and ended up losing the majority. Which is not to say the effort was misguided. In the larger scheme of things what is important is not whether this law is upheld or struck down, but what test is applied.)

THE WHITE HOUSE

WASHINGTON

June 4, 1985

MEMORANDUM FOR RUSSELL MACK
DIRECTOR, PUBLIC AFFAIRS

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Wallace v. Jaffree

A sharply-divided Supreme Court ruled today, in Wallace v. Jaffree, that an Alabama statute providing for a one-minute period of silence "for meditation or voluntary prayer" violated the Establishment Clause of the First Amendment. Justice Stevens, joined by Justices Brennan, Marshall, Blackmun, and Powell, focused on the articulated purpose of the sponsors of the law. Those legislators stated that their purpose was to bring voluntary prayer back to the public schools, and that they had no other purpose. The law accordingly failed the Establishment Clause test announced in the 1971 decision of Lemon v. Kurtzman, since it had no secular purpose.

It is important to note, however, that at least five members of the Court -- a majority -- wrote that they would uphold some moment-of-silence statutes. Justice Powell indicated that he would in a separate concurring opinion, as did Justice O'Connor in an opinion concurring in the judgment. The Chief Justice and Justices White and Rehnquist, each of whom wrote a separate dissent, obviously consider such statutes constitutional. The Alabama law failed not because moment-of-silence statutes are necessarily unconstitutional, but because of the peculiarities of this particular statute, and its legislative history. As Justice White concluded, "a majority of the Court would approve statutes that provided for a moment of silence but did not mention prayer."

The opinions in Wallace v. Jaffree demonstrate the need to continue to push for a school prayer amendment. They also demonstrate, however, that some moment-of-silence laws may be constitutional even in the absence of such an amendment.

FFF:JGR:aea 6/4/85
cc: FFFielding
JGRoberts
Subj
Chron

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WALLACE, GOVERNOR OF ALABAMA, ET AL. *v.* JAFFREE ET AL.

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

No. 83-812. Argued December 4, 1984—Decided June 4, 1985*

In proceedings instituted in Federal District Court, appellees challenged the constitutionality of, *inter alia*, a 1981 Alabama Statute (§ 16-1-20.1) authorizing a 1-minute period of silence in all public schools "for meditation or voluntary prayer." Although finding that § 16-1-20.1 was an effort to encourage a religious activity, the District Court ultimately held that the Establishment Clause of the First Amendment does not prohibit a State from establishing a religion. The Court of Appeals reversed.

Held: Section 16-1-20.1 is a law respecting the establishment of religion and thus violates the First Amendment. Pp. 9-23.

(a) The proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does Congress is firmly embedded in constitutional jurisprudence. The First Amendment was adopted to curtail Congress' power to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience, and the Fourteenth Amendment imposed the same substantive limitations on the States' power to legislate. The individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. Moreover, the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. Pp. 9-16.

(b) One of the well-established criteria for determining the constitutionality of a statute under the Establishment Clause is that the statute must have a secular legislative purpose. *Lemon* v. *Kurtzman*, 403

*Together with No. 83-929, *Smith et al.* v. *Jaffree et al.*, also on appeal from the same court.

U. S. 602, 612–613. The First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion. Pp. 16–18.

(c) The record here not only establishes that § 16–1-20.1's purpose was to endorse religion, it also reveals that the enactment of the statute was not motivated by any clearly secular purpose. In particular, the statements of § 16–1-20.1's sponsor in the legislative record and in his testimony before the District Court indicate that the legislation was solely an "effort to return voluntary prayer" to the public schools. Moreover, such unrebutted evidence of legislative intent is confirmed by a consideration of the relationship between § 16–1-20.1 and two other Alabama statutes—one of which, enacted in 1982 as a sequel to § 16–1-20.1, authorized teachers to lead "willing students" in a prescribed prayer, and the other of which, enacted in 1978 as § 16–1-20.1's predecessor, authorized a period of silence "for meditation" only. The State's endorsement, by enactment of § 16–1-20.1, of prayer activities at the beginning of each school day is not consistent with the established principle that the Government must pursue a course of complete neutrality toward religion. Pp. 16–23.

705 F. 2d 1526 and 713 F. 2d 614, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion. O'CONNOR, J., filed an opinion concurring in the judgment. BURGER, C. J., and WHITE and REHNQUIST, JJ., filed dissenting opinions.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

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 STEVENS delivered the opinion of the Court.

At an early stage of this litigation, the constitutionality of three Alabama statutes was questioned: (1) § 16-1-20, enacted in 1978, which authorized a one-minute period of silence in all public schools "for meditation";[1] (2) § 16-1-20.1, enacted in 1981, which authorized a period of silence "for meditation or voluntary prayer";[2] and (3) § 16-1-20.2, enacted in

[1] Alabama Code § 16-1-20 (Supp. 1984) reads as follows:

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

Appellees have abandoned any claim that § 16-1-20 is unconstitutional. See Brief for Appellees 2.

[2] Alabama Code § 16-1-20.1 (Supp. 1984) provides:

"At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration

1982, which authorized teachers to lead "willing students" in a prescribed prayer to "Almighty God . . . the Creator and Supreme Judge of the world."[3]

At the preliminary-injunction stage of this case, the District Court distinguished § 16-1-20 from the other two statutes. It then held that there was "nothing wrong" with § 16-1-20,[4] but that § 16-1-20.1 and 16-1-20.2 were both invalid because the sole purpose of both was "an effort on the part of the State of Alabama to encourage a religious activity."[5] After the trial on the merits, the District Court did not change its interpretation of these two statutes, but held that they were constitutional because, in its opinion, Alabama has the power to establish a state religion if it chooses to do so.[6]

The Court of Appeals agreed with the District Court's initial interpretation of the purpose of both §§ 16-1-20.1 and 16-1-20.2, and held them both unconstitutional.[7] We have

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shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in."

[3] Alabama Code § 16-1-20.2 (Supp. 1984) provides:

"From henceforth, any teacher or professor in any public educational institution within the state of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead the willing students in the following prayer to God:

"Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen."

[4] The court stated that it did not find any potential infirmity in § 16-1-20 because "it is a statute which prescribes nothing more than a child in school shall have the right to meditate in silence and there is nothing wrong with a little meditation and quietness." *Jaffree* v. *James*, 544 F. Supp. 727, 732 (SD Ala. 1982).

[5] *Ibid.*

[6] *Jaffree* v. *Board of School Commissioners of Mobile County*, 554 F. Supp. 1104, 1128 (SD Ala. 1983).

[7] *Jaffree* v. *Wallace*, 705 F. 2d 1526, 1535-1536 (CA11 1983).

already affirmed the Court of Appeals' holding with respect to § 16-1-20.2.[8] Moreover, appellees have not questioned the holding that § 16-1-20 is valid.[9] Thus, the narrow question for decision is whether § 16-1-20.1, which authorizes a period of silence for "meditation or voluntary prayer," is a law respecting the establishment of religion within the meaning of the First Amendment.[10]

I

Appellee Ishmael Jaffree is a resident of Mobile County, Alabama. On May 28, 1982, he filed a complaint on behalf of three of his minor children; two of them were second-grade students and the third was then in kindergarten. The complaint named members of the Mobile County School Board, various school officials, and the minor plaintiffs' three teachers as defendants.[11] The complaint alleged that the appellees brought the action "seeking principally a declaratory judgment and an injunction restraining the Defendants and each of them from maintaining or allowing the maintenance of regular religious prayer services or other forms of religious observances in the Mobile County Public Schools in violation of the First Amendment as made applicable to states by the Fourteenth Amendment to the United States Constitution."[12] The complaint further alleged that two of the children had been subjected to various acts of religious indoctrination "from the beginning of the school year in September, 1981";[13] that the defendant teachers had "on a daily basis" led their classes in saying certain prayers in unison;[14] that the

[8] *Wallace* v. *Jaffree*, 466 U. S. —— (1984).

[9] See n. 1, *supra*.

[10] The Establishment Clause of the First Amendment, of course, has long been held applicable to the States. *Everson* v. *Board of Education*, 330 U. S. 1, 15-16 (1947).

[11] App. 4-7.

[12] *Id.*, at 4.

[13] *Id.*, at 7.

[14] *Ibid.*

minor children were exposed to ostracism from their peer group class members if they did not participate;[15] and that Ishmael Jaffree had repeatedly but unsuccessfully requested that the devotional services be stopped. The original complaint made no reference to any Alabama statute.

On June 4, 1982, appellees filed an amended complaint seeking class certification,[16] and on June 30, 1982, they filed a second amended complaint naming the Governor of Alabama and various State officials as additional defendants. In that amendment the appellees challenged the constitutionality of three Alabama statutes: §§ 16-1-20, 16-1-20.1, and 16-1-20.2.[17]

On August 2, 1982, the District Court held an evidentiary hearing on appellees' motion for a preliminary injunction. At that hearing, State Senator Donald G. Holmes testified that he was the "prime sponsor" of the bill that was enacted in 1981 as § 16-1-20.1.[18] He explained that the bill was an "effort to return voluntary prayer to our public schools . . . it is a beginning and a step in the right direction."[19] Apart from the purpose to return voluntary prayer to public school, Senator Holmes unequivocally testified that he had "no other purpose in mind."[20] A week after the hearing, the District Court entered a preliminary injunction.[21] The court held that appellees were likely to prevail on the merits because the enactment of §§ 16-1-20.1 and 16-1-20.2 did not reflect a clearly secular purpose.[22]

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[15] *Id.*, at 8-9.

[16] *Id.*, at 17.

[17] *Id.*, at 21. See nn. 1, 2, and 3, *supra*.

[18] *Id.*, at 47-49.

[19] *Id.*, at 50.

[20] *Id.*, at 52.

[21] *Jaffree* v. *James*, 544 F. Supp. 727 (SD Ala. 1982).

[22] See *Lemon* v. *Kurtzman*, 403 U. S. 602, 612-613 (1971). Insofar as relevant to the issue now before us, the District Court explained:

"The injury to plaintiffs from the possible establishment of a religion by the State of Alabama contrary to the proscription of the establishment

In November 1982, the District Court held a four-day trial on the merits. The evidence related primarily to the 1981–1982 academic year—the year after the enactment of § 16–1–20.1 and prior to the enactment of § 16–1–20.2. The District Court found that during that academic year each of the minor plaintiffs' teachers had led classes in prayer activities, even after being informed of appellees' objections to these activities.[23]

In its lengthy conclusions of law, the District Court reviewed a number of opinions of this Court interpreting the

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clause outweighs any indirect harm which may occur to defendants as a result of an injunction. Granting an injunction will merely maintain the status quo existing prior to the enactment of the statutes.

. . . . .

"The purpose of Senate Bill 8 [§ 16–1–20.2] as evidenced by its preamble, is to provide for a prayer that may be given in public schools. Senator Holmes testified that his purpose in sponsoring § 16–1–20.1 was to return voluntary prayer to the public schools. He intended to provide children the opportunity of sharing in their spiritual heritage of Alabama and of this country. *See* Alabama Senate Journal 921 (1981). The Fifth Circuit has explained that 'prayer is a primary religious activity in itself. . . .' *Karen B.* v. *Treen*, 653 F. 2d 897, 901 (5th Cir. 1981). The state may not employ a religious means in its public schools. *Abington School District* v. *Schempp*, [374 U. S. 203, 224] (1963). Since these statutes do not reflect a clearly secular purpose, no consideration of the remaining two-parts of the *Lemon* test is necessary.

"The enactment of Senate Bill 8 [§ 16–1–20.2] and § 16–1–20.1 is an effort on the part of the State of Alabama to encourage a religious activity. Even though these statutes are permissive in form, it is nevertheless state involvement respecting an establishment of religion. *Engle* v. *Vitale*, [370 U. S. 421, 430] (1962). Thus, binding precedent which this Court is under a duty to follow indicates the substantial likelihood plaintiffs will prevail on the merits." 544 F. Supp., at 730–732.

[23] The District Court wrote:

"Defendant Boyd, as early as September 16, 1981, led her class at E. R. Dickson in singing the following phrase:

"'God is great, God is good,'

"'Let us thank him for our food,

"'bow our heads we all are fed,

"'Give us Lord our daily bread.

Establishment Clause of the First Amendment, and then embarked on a fresh examination of the question whether the First Amendment imposes any barrier to the establishment of an official religion by the State of Alabama. After reviewing at length what it perceived to be newly discovered historical evidence, the District Court concluded that "the establishment clause of the first amendment to the United States Constitution does not prohibit the state from establishing a religion."[24] In a separate opinion, the District Court dismissed appellees' challenge to the three Alabama statutes because of a failure to state any claim for which relief could be granted. The court's dismissal of this challenge was

"'Amen!'

"The recitation of this phrase continued on a daily basis throughout the 1981–82 school year.

. . . . .

"Defendant Pixie Alexander has led her class at Craighead in reciting the following phrase:

"'God is great, God is good,

"'Let us thank him for our food.'

"Further, defendant Pixie Alexander had her class recite the following, which is known as the Lord's Prayer:

"'Our Father, which are in heaven, hallowed be Thy name. Thy kingdom come. Thy will be done on earth as it is in heaven. Give us this day our daily bread and forgive us our debts as we forgive our debtors. And lead us not into temptation but deliver us from evil for thine is the kingdom and the power and the glory forever. Amen.'

"The recitation of these phrases continued on a daily basis throughout the 1981–82 school year.

. . . . .

"Ms. Green admitted that she frequently leads her class in singing the following song:

"'For health and strength and daily food, we praise Thy name, Oh Lord.'

"This activity continued throughout the school year, despite the fact that Ms. Green had knowledge that plaintiff did not want his child exposed to the above-mentioned song." *Jaffree* v. *Board of School Commissioners of Mobile County*, 554 F. Supp., at 1107–1108.

[24] *Id.*, at 1128.

also based on its conclusion that the Establishment Clause did not bar the States from establishing a religion.[25]

The Court of Appeals consolidated the two cases; not surprisingly, it reversed. The Court of Appeals noted that this

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[25] *Jaffree* v. *James*, 554 F. Supp. 1130, 1132 (SD Ala. 1983). The District Court's opinion was announced on January 14, 1983. On February 11, 1983, JUSTICE POWELL, in his capacity as Circuit Justice for the Eleventh Circuit, entered a stay which in effect prevented the District Court from dissolving the preliminary injunction that had been entered in August 1982. JUSTICE POWELL accurately summarized the prior proceedings:

"The situation, quite briefly, is as follows: Beginning in the fall of 1981, teachers in the minor applicants' schools conducted prayers in their regular classes, including group recitations of the Lord's Prayer. At the time, an Alabama statute provided for a one-minute period of silence 'for meditation or voluntary prayer' at the commencement of each day's classes in the public elementary schools. Ala. Code § 16-1-20.1 (Supp. 1982). In 1982, Alabama enacted a statute permitting public school teachers to lead their classes in prayer. 1982 Ala. Acts 735.

"Applicants, objecting to prayer in the public schools, filed suit to enjoin the activities. They later amended their complaint to challenge the applicable state statutes. After a hearing, the District Court granted a preliminary injunction. *Jaffree* v. *James*, 544 F. Supp. 727 (1982). It recognized that it was bound by the decisions of this Court, *id.*, at 731, and that under those decisions it was 'obligated to enjoin the enforcement' of the statutes, *id.*, at 733.

"In its subsequent decision on the merits, however, the District Court reached a different conclusion. *Jaffree* v. *Board of School Commissioners of Mobile County*, 554 F. Supp. 1104 (1983). It again recognized that the prayers at issue, given in public school classes and led by teachers, were violative of the Establishment Clause of the First Amendment as that Clause had been construed by this Court. The District Court nevertheless ruled 'that the United States Supreme Court has erred.' *Id.*, at 1128. It therefore dismissed the complaint and dissolved the injunction.

"There can be little doubt that the District Court was correct in finding that conducting prayers as part of a school program is unconstitutional under this Court's decisions. In *Engle* v. *Vitale*, 370 U. S. 421 (1962), the Court held that the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment, prohibits a State from authorizing prayer in the public schools. The following Term, in *Murray* v. *Curlett*, decided with *Abington School District* v. *Schempp*, 374

Court had considered and had rejected the historical arguments that the District Court found persuasive, and that the District Court had misapplied the doctrine of *stare decisis*.[26] The Court of Appeals then held that the teachers' religious activities violated the Establishment Clause of the First Amendment.[27] With respect to § 16–1–20.1 and § 16–1–20.2, the Court of Appeals stated that "both statutes advance and encourage religious activities."[28] The Court of Appeals then quoted with approval the District Court's finding that § 16–1–20.1, and § 16–1–20.2, were efforts "'to encourage a religious activity. Even though these statutes are permissive in

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U. S. 203 (1963), the Court explicitly invalidated a school district's rule providing for the reading of the Lord's Prayer as part of a school's opening exercises, despite the fact that participation in those exercises was voluntary.

"Unless and until this Court reconsiders the foregoing decisions, they appear to control this case. In my view, the District Court was obligated to follow them." *Jaffree* v. *Board of School Commissioners of Mobile County*, 459 U. S. 1314, 1314–1316 (1983).

[26] The Court of Appeals wrote:

"The stare decisis doctrine and its exceptions do not apply where a lower court is compelled to apply the precedent of a higher court. *See* 20 Am. Jur. 2d *Courts* § 183 (1965).

"Federal district courts and circuit courts are bound to adhere to the controlling decisions of the Supreme Court. *Hutto* v. *Davis*, [454 U. S. 370, 375] (1982) . . . . Justice Rehnquist emphasized the importance of precedent when he observed that 'unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.' *Davis*, [454 U. S. at 375]. *See Also, Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, [460 U. S. 533, 535] (1983) (the Supreme Court, in a per curiam decision, recently stated: 'Needless to say, only this Court may overrule one of its precedents')." *Jaffree* v. *Wallace*, 705 F. 2d, at 1532.

[27] *Id.*, at 1533–1534. This Court has denied a petition for a writ of certiorari that presented the question whether the Establishment Clause prohibited the teachers' religious prayer activities. *Board of School Commissioners of Mobile County, Alabama* v. *Jaffree*, 466 U. S. —— (1984).

[28] 705 F. 2d, at 1535.

form, it is nevertheless state involvement respecting an establishment of religion.'"[29] Thus, the Court of Appeals concluded that both statutes were "specifically the type which the Supreme Court addressed in *Engle* [v. *Vitale*, 370 U. S. 421 (1962)]."[30]

A suggestion for rehearing en banc was denied over the dissent of four judges who expressed the opinion that the full court should reconsider the panel decision insofar as it held § 16-1-20.1 unconstitutional.[31] When this Court noted probable jurisdiction, it limited argument to the question that those four judges thought worthy of reconsideration. The judgment of the Court of Appeals with respect to the other issues presented by the appeals was affirmed. *Wallace* v. *Jaffree*, 466 U. S. —— (1984).

II

Our unanimous affirmance of the Court of Appeals' judg-

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[29] *Ibid.*

[30] *Ibid.* After noting that the invalidity of § 16-1-20.2 was aggravated by "the existence of a government composed prayer," and that the proponents of the legislation admitted that that section "amounts to the establishment of a state religion," the court added this comment on § 16-1-20.1:

"The objective of the meditation or prayer statute (Ala. Code § 16-1-20.1) was also the advancement of religion. This fact was recognized by the district court at the hearing for preliminary relief where it was established that the intent of the statute was to return prayer to the public schools. *James*, 544 F. Supp. at 731. The existence of this fact and the inclusion of prayer obviously involves the state in religious activities. *Beck* v. *McElrath*, 548 F. Supp. 1161 (MD Tenn. 1982). This demonstrates a lack of secular legislative purpose on the part of the Alabama Legislature. Additionally, the statute has the primary effect of advancing religion. We do not imply that simple meditation or silence is barred from the public schools; we hold that the state cannot participate in the advancement of religious activities through any guise, including teacher-led meditation. It is not the activity itself that concerns us; it is the purpose of the activity that we shall scrutinize. Thus, the existence of these elements require that we also hold section 16-1-20.1 in violation of the establishment clause." *Id.*, at 1535-1536.

[31] *Jaffree* v. *Wallace*, 713 F. 2d 614 (CA11 1983) *(per curiam).*

ment concerning § 16-1-20.2 makes it unnecessary to comment at length on the District Court's remarkable conclusion that the Federal Constitution imposes no obstacle to Alabama's establishment of a state religion. Before analyzing the precise issue that is presented to us, it is nevertheless appropriate to recall how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States.

As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience.[22] Until the Fourteenth Amendment was added to the Constitution, the First Amendment's restraints on the exercise of federal power simply did not apply to the States.[23] But when the Constitution was amended to prohibit any State from depriving any person of liberty without due process of law, that Amendment imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power. This Court has confirmed and endorsed this elementary proposition of law time and time again.[24]

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[22] The First Amendment provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[23] See *Permoli* v. *Municipality No. 1 of the City of New Orleans*, 3 How. 589, 609 (1845).

[24] See, *e. g.*, *Wooley* v. *Maynard*, 430 U. S. 705, 714 (1977) (right to refuse endorsement of an offensive state motto); *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949) (right to free speech); *Board of Education* v. *Barnette*, 319 U. S. 624, 637-638 (1943) (right to refuse to participate in a ceremony that offends one's conscience); *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940) (right to proselytize one's religious faith); *Hague* v.

Writing for a unanimous Court in *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940), Justice Roberts explained:

> ". . . We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion."

Cantwell, of course, is but one case in which the Court has identified the individual's freedom of conscience as the central liberty that unifies the various clauses in the First

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CIO, 307 U. S. 496, 519 (1939) (opinion of Stone, J.) (right to assemble peaceably); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 707 (1931) (right to publish an unpopular newspaper); *Whitney* v. *California*, 274 U. S. 357, 373 (Brandeis, J., concurring) (right to advocate the cause of communism); *Gitlow* v. *New York*, 268 U. S. 652, 672 (1925) (Holmes, J., dissenting) (right to express an unpopular opinion); cf. *Abington School District* v. *Schempp*, 374 U. S. 203, 215, n. 7 (1963), where the Court approvingly quoted *Board of Education* v. *Minor*, 23 Ohio St. 211, 253 (1872), which stated:

"The great bulk of human affairs and human interests is left by any free government to individual enterprise and individual action. Religion is eminently one of these interests, lying outside the true and legitimate province of government."

Amendment.[35] Enlarging on this theme, THE CHIEF JUSTICE recently wrote:

> "We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. See *Board of Education* v. *Barnette*, 319 U. S. 624, 633–634 (1943); *id.*, at 645 (Murphy, J., concurring). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.' *Id.*, at 637.
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> "The Court in *Barnette*, *supra*, was faced with a state statute which required public school students to participate in daily public ceremonies by honoring the flag both with words and traditional salute gestures. In overruling its prior decision in *Minersville District* v. *Gobitis*, 310 U. S. 586 (1940), the Court held that 'a ceremony so touching matters of opinion and political attitude may [not] be imposed upon the individual by official authority

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[35] For example, in *Prince* v. *Massachusetts*, 321 U. S. 158, 164 (1944), the Court wrote:

"If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functionings."

See also *Widmar* v. *Vincent*, 454 U. S. 263, 269 (1981) (stating that religious worship and discussion "are forms of speech and association protected by the First Amendment").

under powers committed to any political organization under our Constitution.' 319 U. S., at 636. Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree. Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.' *Id.*, at 642." *Wooley* v. *Maynard*, 430 U. S. 705, 714–715 (1977).

Just as the right to speak and the right to refrain from speaking are complimentary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Mohammedism or Judaism.[*] But when the underlying princi-

[*] Thus Joseph Story wrote:

"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." 2 J. Story, Commentaries on the Constitution of the United States § 1874, p. 593 (1851) (footnote omitted).

In the same volume, Story continued:

ple has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.[37] This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the

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"The real object of the amendment 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 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. . . ." *Id.*, § 1877, at 594 (emphasis supplied).

[37] Thus, in *Everson* v. *Board of Education*, 330 U. S., at 15, the Court stated:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."

Id., at 18 (the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers"); *Abington School District* v. *Schempp*, 374 U. S., at 216 ("this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another"); *id.*, at 226 ("The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of the government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality"); *Torcaso* v. *Watkins*, 367 U. S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs").

product of free and voluntary choice by the faithful,[38] and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among "religions"—to encompass intolerance of the disbeliever and the uncertain.[39] As

[38] In his "Memorial and Remonstrance Against Religious Assessments, 1785," James Madison wrote, in part:

"1. Because we hold it for a fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the [Manner of discharging it, can be directed only by reason and] conviction, not by force or violence.' The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. . . . We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.

. . . . .

"3. Because, it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?" The Complete Madison 299–301 (S. Padover ed. 1953).

See also *Engel* v. *Vitale*, 370 U. S. 421, 435 (1962) ("It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look for religious guidance").

[39] As the *Barnette* opinion explained, it is the teaching of history, rather than any appraisal of the quality of a State's motive, that supports this duty to respect basic freedoms:

Justice Jackson eloquently stated in *Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943):

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

The State of Alabama, no less than the Congress of the United States, must respect that basic truth.

III

When the Court has been called upon to construe the breadth of the Establishment Clause, it has examined the criteria developed over a period of many years. Thus, in *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971), we wrote:

"Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." 319 U. S., at 640–641.

See also *Engel* v. *Vitale*, 370 U. S., at 431 ("a union of government and religion tends to destroy government and to degrade religion").

> "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz* [v. *Tax Commission*, 397 U. S. 664, 674 (1970)]."

It is the first of these three criteria that is most plainly implicated by this case. As the District Court correctly recognized, no consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose.[40] For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion, see, *e. g.*, *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 296–303 (1963) (BRENNAN, J., concurring), the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.[41]

In applying the purpose test, it is appropriate to ask "whether government's actual purpose is to endorse or disapprove of religion."[42] In this case, the answer to that

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[40] See *supra*, n. 22.

[41] See *Lynch* v. *Donnelly*, 465 U. S. —, — (1984); *id.*, at — (O'CONNOR, J., concurring); *id.*, at — (BRENNAN, J., joined by MARSHALL, BLACKMUN and STEVENS, JJ., dissenting); *Mueller* v. *Allen*, 463 U. S. 388, ——— (1983); *Widmar* v. *Vincent*, 454 U. S., at 271; *Stone* v. *Graham*, 449 U. S. 39, 40–41 (1980) *(per curiam)*; *Wolman* v. *Walter*, 433 U. S. 229, 236 (1977).

[42] *Lynch* v. *Donnelly*, 465 U. S., at — (O'CONNOR, J., concurring) ("The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid").

question is dispositive. For the record not only provides us with an unambiguous affirmative answer, but it also reveals that the enactment of § 16-1-20.1 was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose.

IV

The sponsor of the bill that became § 16-1-20.1, Senator Donald Holmes, inserted into the legislative record—apparently without dissent—a statement indicating that the legislation was an "effort to return voluntary prayer" to the public schools.[43] Later Senator Holmes confirmed this purpose before the District Court. In response to the question whether he had any purpose for the legislation other than returning voluntary prayer to public schools, he stated, "No, I did not have no other purpose in mind."[44] The State did not present

[43] The statement indicated, in pertinent part:

"Gentlemen, by passage of this bill by the Alabama Legislature our children in this state will have the opportunity of sharing in the spiritual heritage of this state and this country. The United States as well as the State of Alabama was founded by people who believe in God. *I believe this effort to return voluntary prayer* to our public schools for its return to us to the original position of the writers of the Constitution, this local philosophies and beliefs hundreds of Alabamians have urged my continuous support for permitting school prayer. Since coming to the Alabama Senate I have worked hard *on this legislation to accomplish the return of voluntary prayer in our public schools and return to the basic moral fiber.*" App. 50 (emphasis added).

[44] *Id.*, at 52. The District Court and the Court of Appeals agreed that the purpose of § 16-1-20.1 was "an effort on the part of the State of Alabama to encourage a religious activity." *Jaffree* v. *James*, 544 F. Supp., at 732; *Jaffree* v. *Wallace*, 705 F. 2d, at 1535. The evidence presented to the District Court elaborated on the express admission of the Governor of Alabama (then Fob James) that the enactment of § 16-1-20.1 was intended to "clarify [the State's] intent to have prayer as part of the daily classroom activity," compare Second Amended Complaint ¶ 32(d) (App. 24-25) with Governor's Answer to § 32(d) (App. 40); and that the "expressed legislative purpose in enacting Section 16-1-20.1 (1981) was to 'return voluntary prayer to public schools,'" compare Second Amended Complaint ¶¶ 32(b) and (c) (App. 24) with Governor's Answer to ¶¶ 32(b) and (c) (App. 40).

evidence of *any* secular purpose.[45]

The unrebutted evidence of legislative intent contained in the legislative record and in the testimony of the sponsor of § 16-1-20.1 is confirmed by a consideration of the relationship between this statute and the two other measures that were considered in this case. The District Court found that the 1981 statute and its 1982 sequel had a common, nonsecular purpose. The wholly religious character of the later enactment is plainly evident from its text. When the differences

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[45] Appellant Governor George C. Wallace now argues that § 16-1-20.1 "is best understood as a permissible accommodation of religion" and that viewed even in terms of the *Lemon* test, the "statute conforms to acceptable constitutional criteria." Brief for Appellant Wallace 5; see also Brief for Appellants Smith et al. 39 (§ 16-1-20.1 "accommodates the free exercise of the religious beliefs and free exercise of speech and belief of those affected"), *id.*, at 47. These arguments seem to be based on the theory that the free exercise of religion of some of the State's citizens was burdened before the statute was enacted. The United States, appearing as *amicus curiae* in support of the appellants, candidly acknowledges that "it is unlikely that in most contexts a strong Free Exercise claim could be made that time for personal prayer must be set aside during the school day." Brief for United States as *Amicus Curiae* 10. There is no basis for the suggestion that § 16-1-20.1 "is a means for accommodating the religious and meditative needs of students without in any way diminishing the school's own neutrality or secular atmosphere." *Id.*, at 11. In this case, it is undisputed that at the time of the enactment of § 16-1-20.1 there was no governmental practice impeding students from silently praying for one minute at the beginning of each school day; thus, there was no need to "accommodate" or to exempt individuals from any general governmental requirement because of the dictates of our cases interpreting the Free Exercise Clause. See, *e. g.*, *Thomas* v. *Review Board, Indiana Employment Security Div.*, 450 U. S. 707 (1981); *Sherbert* v. *Verner*, 374 U. S. 398 (1963); see also *Abington School District* v. *Schempp*, 374 U. S., at 226 ("While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs"). What was missing in the appellants' eyes at time of the enactment of § 16-1-20.1—and therefore what is precisely the aspect that makes the statute unconstitutional—was the State's endorsement and promotion of religion and a particular religious practice.

between § 16-1-20.1 and its 1978 predecessor, § 16-1-20, are examined, it is equally clear that the 1981 statute has the same wholly religious character.

There are only three textual differences between § 16-1-20.1 and § 16-1-20: (1) the earlier statute applies only to grades one through six, whereas § 16-1-20.1 applies to all grades; (2) the earlier statute uses the word "shall" whereas § 16-1-20.1 uses the word "may"; (3) the earlier statute refers only to "meditation" whereas § 16-1-20.1 refers to "meditation or voluntary prayer." The first difference is of no relevance in this litigation because the minor appellees were in kindergarten or second grade during the 1981-1982 academic year. The second difference would also have no impact on this litigation because the mandatory language of § 16-1-20 continued to apply to grades one through six.[46] Thus, the only significant textual difference is the addition of the words "or voluntary prayer."

The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day. The 1978 statute already protected that right, containing nothing that prevented any student from engaging in voluntary prayer during a silent minute of meditation.[47] Appellants have not identified any secular purpose that was not fully served by § 16-1-20 before the enactment of § 16-1-20.1. Thus, only two conclusions are consistent with the text of § 16-1-20.1: (1) the statute was enacted to convey a message of State endorsement and promotion of prayer; or (2) the statute was enacted for no purpose. No one suggests that the statute was nothing but a meaningless or irrational act.[48]

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[46] See n. 1, *supra*.

[47] Indeed, for some persons meditation itself may be a form of prayer. B. Larson, Larson's Book of Cults 62-65 (1982); C. Whittier, Silent Prayer and Meditation in World Religions 1-7 (Cong. Research Service 1982).

[48] If the conclusion that the statute had no purpose were tenable, it would remain true that *no purpose* is not a *secular purpose*. But such a

We must, therefore, conclude that the Alabama Legislature intended to change existing law[49] and that it was motivated by the same purpose that the Governor's Answer to the Second Amended Complaint expressly admitted; that the statement inserted in the legislative history revealed; and that Senator Holmes' testimony frankly described. The Legislature enacted § 16-1-20.1 despite the existence of § 16-1-20 for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day. The addition of "or voluntary prayer" indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the Government must pursue a course of complete neutrality toward religion.[50]

The importance of that principle does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political major-

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conclusion is inconsistent with the common-sense presumption that statutes are usually enacted to change existing law. Appellants do not even suggest that the State had no purpose in enacting § 16-1-20.1.

[49] *United States* v. *Champlin Refining Co.*, 341 U. S. 290, 297 (1951) (a "statute cannot be divorced from the circumstances existing at the time it was passed"); *id.*, at 298 (refusing to attribute pointless purpose to Congress in the absence of facts to the contrary); *United States* v. *National City Lines, Inc.*, 337 U. S. 78, 80-81 (1949) (rejecting Government's argument that Congress had no desire to change law when enacting legislation).

[50] See, *e. g.*, *Stone* v. *Graham*, 449 U. S., at 42 *(per curiam)*; *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 792-793 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion"); *Epperson* v. *Arkansas*, 393 U. S. 97, 109 (1968); *Abington School District* v. *Schempp*, 374 U. S., at 215-222; *Engel* v. *Vitale*, 370 U. S., at 430 ("Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause"); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S 203, 211-212 (1948); *Everson* v. *Board of Education*, 330 U. S., at 18.

ity.[51] For whenever the State itself speaks on a religious subject, one of the questions that we must ask is "whether the Government intends to convey a message of endorsement or disapproval of religion."[52] The well-supported concurrent findings of the District Court and the Court of Appeals—that § 16-1-20.1 was intended to convey a message of State-approval of prayer activities in the public schools—make it unnecessary, and indeed inappropriate, to evaluate the practi-

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[51] As this Court stated in *Engel* v. *Vitale*, 370 U. S., at 430:

"The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."

Moroever, this Court has noted that "[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." *Id.*, at 431. This comment has special force in the public-school context where attendance is mandatory. Justice Frankfurter acknowledged this reality in *McCollum* v. *Board of Education*, 333 U. S. 203, 227 (1948) (concurring opinion):

"That a child is offered an alternative may reduce the constraint, it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children."

See also *Abington School District* v. *Schempp*, 374 U. S., at 290 (BRENNAN, J., concurring); cf. *Marsh* v. *Chambers*, 463 U. S. 783, 792 (1983) (distinguishing between adults not susceptible to "religious indoctrination" and children subject to "peer pressure"). Further, this Court has observed:

"That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Board of Education* v. *Barnette*, 319 U. S., at 637.

[52] *Lynch* v. *Donnelly*, 465 U. S., at —— (O'CONNOR, J., concurring) ("The purpose prong of the *Lemon* test requires that a government activity have a secular purpose. . . . The proper inquiry under the purpose prong of *Lemon* . . . is whether the government intends to convey a message of endorsement or disapproval of religion").

cal significance of the addition of the words "or voluntary prayer" to the statute. Keeping in mind, as we must, "both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded,"[53] we conclude that § 16-1-20.1 violates the First Amendment.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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[53] *Id.*, at ——.

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 WHITE, dissenting.

For the most part agreeing with the opinion of the Chief Justice, I dissent from the Court's judgment invalidating Alabama Code § 16–1–20.1. Because I do, it is apparent that in my view the First Amendment does not proscribe either (1) statutes authorizing or requiring in so many words a moment of silence before classes begin or (2) a statute that provides, when it is initially passed, for a moment of silence for meditation or prayer. As I read the filed opinions, a majority of the Court would approve statutes that provided for a moment of silence but did not mention prayer. But if a student asked whether he could pray during that moment, it is difficult to believe that the teacher could not answer in the affirmative. If that is the case, I would not invalidate a statute that at the outset provided the legislative answer to the question "May I pray?" This is so even if the Alabama statute is infirm, which I do not believe it is, because of its peculiar legislative history.

I appreciate JUSTICE REHNQUIST's explication of the history of the religion clauses of the First Amendment. Against that history, it would be quite understandable if we undertook to reassess our cases dealing with these clauses, particularly those dealing with the Establishment Clause. Of course, I have been out of step with many of the Court's decisions dealing with this subject matter, and it is thus not surprising that I would support a basic reconsideration of our precedents.

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

[June 4, 1985]

JUSTICE POWELL, concurring.

I concur in the Court's opinion and judgment that Ala. Code § 16–1—20.1 violates the Establishment Clause of the First Amendment. My concurrence is prompted by Alabama's persistence in attempting to institute state-sponsored prayer in the public schools by enacting three successive statutes.[1] I agree fully with JUSTICE O'CONNOR's assertion that some moment-of-silence statutes may be constitutional,[2] a

[1] The three statutes are Ala. Code § 16–1–20 (Supp. 1984) (moment of silent meditation); Ala. Code § 16–1–20.1 (Supp. 1984) (moment of silence for meditation or prayer); and Ala. Code § 16–1–20.2 (Supp. 1984) (teachers authorized to lead students in vocal prayer). These statutes were enacted over a span of four years. There is some question whether § 16–1–20 was repealed by implication. The Court already has summarily affirmed the Court of Appeals' holding that § 16–1–20.2 is invalid. *Wallace* v. *Jaffree*, —— U. S. —— (1984). Thus, our opinions today address only the validity of § 16–1–20.1. See *ante*, at 3.

[2] JUSTICE O'CONNOR is correct in stating that moment-of-silence statutes cannot be treated in the same manner as those providing for vocal prayer:

suggestion set forth in the Court's opinion as well. *Ante*, at 20.

I write separately to express additional views and to respond to criticism of the three-pronged *Lemon* test.[3] *Lemon* v. *Kurtzman*, 403 U. S. 602 (1972), identifies stand-

"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*, 374 U. S., at 281 (BRENNAN, J., concurring) ("The 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 government"); L. Tribe, American Constitutional Law, § 14-6, at 829 (1978); P. Freund, "The Legal Issue," in Religion in the Public Schools 23 (1965); Choper, *supra*, 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."

Post, at 6–7 (O'CONNOR, J., concurring in the judgment).

[3] JUSTICE O'CONNOR asserts 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." *Post*, at 2–3 (O'CONNOR, J., concurring). JUSTICE REHNQUIST would discard the *Lemon* test entirely. *Post*, at 23 (REHNQUIST, J., dissenting).

As I state in the text, the *Lemon* test has been applied consistently in Establishment Clause cases since it was adopted in 1972. In a word, it has been the law. Respect for *stare decisis* should require us to follow *Lemon*. See *Garcia* v. *San Antonio Metro. Transit Auth.*, —— U. S. ——, —— (1985) (POWELL, J., dissenting) ("The stability of judicial decision, and with it respect for the authority of this Court, are not served by the precipitous overruling of multiple precedents . . . .").

ards that have proven useful in analyzing case after case both in our decisions and in those of other courts. It is the only coherent test a majority of the Court has ever adopted. Only once since our decision in *Lemon*, *supra*, have we addressed an Establishment Clause issue without resort to its three-pronged test. See *Marsh* v. *Chambers*, 463 U. S. 783 (1983).[4] *Lemon*, *supra*, has not been overruled or its test modified. Yet, continued criticism of it could encourage other courts to feel free to decide Establishment Clause cases on an *ad hoc* basis.[5]

The first inquiry under *Lemon* is whether the challenged statute has a "secular legislative purpose." *Lemon* v. *Kurtzman*, *supra*, at 612 (1971). As JUSTICE O'CONNOR recognizes, this secular purpose must be "sincere"; a law will not pass constitutional muster if the secular purpose articulated by the legislature is merely a "sham." *Post*, at 10 (O'CONNOR, J., concurring in the judgment). In *Stone* v. *Graham*, 449 U. S. 39 (1980) *(per curiam)*, for example, we held that a statute requiring the posting of the Ten Commandments in

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[4] In *Marsh* v. *Chambers*, 463 U. S. 783 (1983), we held that the Nebraska Legislature's practice of opening each day's session with a prayer by a chaplain paid by the State did not violate the Establishment Clause of the First Amendment. Our holding was based upon the historical acceptance of the practice, that had become "part of the fabric of our society." *Id.*, at ——.

[5] *Lemon* v. *Kurtzman*, 403 U. S. 602 (1972), was a carefully considered opinion of the Chief Justice, in which he was joined by six other Justices. *Lemon*'s three-pronged test has been repeatedly followed. In *Comm. of Public Education* v. *Nyquist*, 413 U. S. 756 (1974), for example, the Court applied the "now well defined three part test" of *Lemon*. *Id.*, at ——.

In *Lynch* v. *Donnelley*, —— U. S. —— (1984), we said that the Court is not "confined to any single test or criterion in this sensitive area." *Id.*, at ——. The decision in *Lynch*, like that in *Marsh* v. *Chambers*, 463 U. S. 783 (1983), was based primarily on the long historical practice of including religious symbols in the celebration of Christmas. Nevertheless, the Court, without any criticism of *Lemon*, applied its three-pronged test to the facts of that case. It focused on the "question whether there is a secular purpose for [the] display of the crèche." *Id.*, at ——.

public schools violated the Establishment Clause, even though the Kentucky legislature asserted that its goal was educational. We have not interpreted the first prong of *Lemon*, *supra*, however, as requiring that a statute have "exclusively secular" objectives.[6] *Lynch* v. *Donnelley*, —— U. S. ——, —— n. 6. If such a requirement existed, much conduct and legislation approved by this Court in the past would have been invalidated. See, *e. g.*, *Walz* v. *Tax Comm'n*, 397 U. S. 664 (1970) (New York's property tax exemption for religious organizations upheld); *Everson* v. *Bd. of Education*, 330 U. S. 1 (1947) (holding that a township may reimburse parents for the cost of transporting their children to parochial schools).

The record before us, however, makes clear that Alabama's purpose was solely religious in character. Senator Donald Holmes, the sponsor of the bill that became Alabama Code § 16–1—20.1, freely acknowledged that the purpose of this statute was "to return voluntary prayer" to the public schools. See *ante*, at 18, n. 43. I agree with JUSTICE O'CONNOR that a single legislator's statement, particularly if made following enactment, is not necessarily sufficient to establish purpose. See *post*, at 11 (O'CONNOR, J., concurring in the judgment). But, as noted in the Court's opinion, the religious purpose of § 16–1—20.1 is manifested in other evidence, including the sequence and history of the three Alabama statutes. See *ante*, at 19.

I also consider it of critical importance that neither the District Court nor the Court of Appeals found a secular purpose, while both agreed that the purpose was to advance religion. In its first opinion (enjoining the enforcement of § 16–1—20.1 pending a hearing on the merits), the District Court said that the statute did "not reflect a clearly secular purpose."

[6] The Court's opinion recognizes that "a statute motivated in part by a religious purpose may satisfy the first criterion." *Ante*, at 17. The Court simply holds that "a statute must be invalidated if it is *entirely motivated* by a purpose to advance religion." *Ibid.* (emphasis added).

Jaffree v. *James*, 544 F. Supp. 727, 732 (SD Ala. 1982). Instead, the District Court found that the enactment of the statute was an "effort on the part of the State of Alabama to encourage a religious activity."[7] *Ibid.* The Court of Appeals likewise applied the *Lemon* test and found "a lack of secular purpose on the part of the Alabama legislature." *Jaffree* v. *Wallace*, 705 F. 2d 1526, 1535 (CA11 1983). It held that the objective of § 16-1—20.1 was the "advancement of religion." *Ibid.* When both courts below are unable to discern an arguably valid secular purpose, this Court normally should hesitate to find one.

I would vote to uphold the Alabama statute if it also had a clear secular purpose. See *Mueller* v. *Allen*, —— U. S. ——, —— (1983) (the Court is "reluctan[t] to attribute unconstitutional motives to the state, particularly when a plausible secular purpose may be discerned from the face of the statute"). Nothing in the record before us, however, identifies a clear secular purpose, and the State also has failed to identify any non-religious reason for the statute's enactment.[8] Under these circumstances, the Court is required by our precedents to hold that the statute fails the first prong of the *Lemon* test and therefore violates the Establishment Clause.

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[7] In its subsequent decision on the merits, the District Court held that prayer in the public schools—even if led by the teacher—did not violate the Establishment Clause of the First Amendment. The District Court recognized that its decision was inconsistent with *Engle* v. *Vitale*, 370 U. S. 421 (1962), and other decisions of this Court. The District Court nevertheless ruled that its decision was justified because "the United States Supreme Court has erred . . . ." *Jaffree* v. *Bd. of School Comm'rs*, 554 F. Supp. 1104 (S. D. Ala. 1983).

In my capacity as Circuit Justice, I stayed the judgment of the District Court pending appeal to the Court of Appeals for the Eleventh Circuit. *Jaffree* v. *Bd. of School Comm'rs*, —— U. S. —— (1983) (POWELL, J., in chambers).

[8] Instead, the State criticizes the *Lemon* test and asserts that "the principal problem [with the test] stems from the *purpose* prong." See Brief of Appellant George C. Wallace, p. 9 *et seq.*

Although we do not reach the other two prongs of the *Lemon* test, I note that the "effect" of a straightforward moment-of-silence statute is unlikely to "advanc[e] or inhibi[t] religion."[9] See *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968). Nor would such a statute "foster 'an excessive government entanglement with religion.'" *Lemon* v. *Kurtzman*, *supra*, at 612–613, quoting *Walz* v. *Tax Commissioner*, 397 U. S. 664, 674 (1970).

I join the opinion and judgment of the Court.

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[9] If it were necessary to reach the "effects" prong of *Lemon*, we would be concerned primarily with the effect on the minds and feelings of immature pupils. As JUSTICE O'CONNOR notes, during "a moment of silence a student who objects to prayer [even where prayer may be the purpose] is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others." *Post*, at 7 (O'CONNOR, J., concurring in the judgment). Given the types of subjects youthful minds are primarily concerned with, it is unlikely that many children would use a simple "moment of silence" as a time for religious prayer. There are too many other subjects on the mind of the typical child. Yet there also is the likelihood that some children, raised in strongly religious families, properly would use the moment to reflect on the religion of his or her choice.