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 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 There is some question whether § 16-1-20 was repealed by implication.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-

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[3]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 825 (1978); P. Freund, "The Legal Issue," in Religion in the Public Schools 23 (1965); Choper, *supra*, 67 Minn. L. Rev., at 871; 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).

[4]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. *Donnelly*, —— 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.* *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."

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*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."[1] *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.[2] 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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[1] 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).

[2] 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."[*] 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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[*] 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.