

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

vs.
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS

83-929

vs.
ISHMAEL JAFFREE ET AL.

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

(June 4, 1985)

JUSTICE O'CONNOR, concurring in the judgment.

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

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

I

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

As this case once again demonstrates, however, "it is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application." *Walt v. Tax Comm'n*, 397 U. S. 664, 694 (1970) (opinion of Harlan, J.). It once appeared that the Court had developed a workable standard by which to identify impermissible government establishments of religion. See *Lemon v. Kurtzman*, 403 U. S. 602 (1971). Under the now familiar *Lemon* test, statutes must have both a secular legislative purpose and a principal or primary effect that neither advances nor inhibits religion, and in addition they must not foster excessive government entanglement with religion. *Id.*, at 612-613. Despite its initial promise, the *Lemon* test has proven problematic. The required inquiry into "entanglement" has been modified and questioned, see *Mueller v. Allen*, 463 U. S. 386, 403 n. 11 (1983), and in one case we

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

Perhaps because I am new to the struggle, I am not ready to abandon all aspects of the *Lemon* test. I do believe, however, that the standards announced in *Lemon* should be re-examined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment. We must strive to do more than erect a constitutional "signpost," *Hunt v. McNair*, 413 U. S. 734, 741 (1973), to be followed or ignored in a particular case as our predilections may dictate. Instead, our goal should be "to frame a principle for constitutional adjudication that is not only grounded in the history and language of the first amendment, but one that is also capable of consistent application to the relevant problems." Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 *Minn. L. Rev.* 829, 832-833 (1963) (footnotes omitted). Last Term, I proposed a refinement of the *Lemon* test with this goal in mind. *Lynch v. Donnelly*, 465 U. S., at — (concurring opinion).

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

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

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

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

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Twenty-five states permit or require public school teachers to have students observe a moment of silence in their classrooms.¹ A few statutes provide that the moment of silence is for the purpose of meditation alone. See *Ariz. Rev. Stat. Ann.* § 15-522 (1984); *Conn. Gen. Stat.* § 10-16a (1983); *R. I. Gen. Laws* § 16-12-3.1 (1981). The typical statute, however, calls for a moment of silence at the beginning of the school day during which students may meditate, pray, or reflect on the activities of the day. See, e.g., *Ark. Stat. Ann.* § 80-1607.1 (1980); *Ga. Code Ann.* § 20-2-1050 (1982); *Ill. Rev. Stat.* ch. 122, § 771 (1983); *Ind. Code* § 20-10.1-7-11 (1982); *Kan. Stat. Ann.* § 72-5308a (1980); *Pa. Stat. Ann., Tit. 24, § 15-1516.1* (Purdon Supp. 1984). Federal trial courts have divided on the constitutionality of these moment of silence laws. Compare *Gaines v. Anderson*, 421 F. Supp. 837 (Mass. 1976) (upholding statute) with *May v. Cooperman*, 672 F. Supp. 1561 (NJ 1983) (striking down statute); *Duffy v. Las Cruces Public Schools*, 657 F. Supp. 1013 (NM 1983) (same); and *Beck v. McElrath*, 648 F. Supp. 1161 (MD Tenn.

¹See *Ala. Code* § 16-1-20, 16-1-20.1 (Supp. 1984); *Ariz. Rev. Stat. Ann.* § 15-522 (1984); *Ark. Stat. Ann.* § 80-1607.1 (1980); *Conn. Gen. Stat.* § 10-16a (1983); *Del. Code Ann., Tit. 14, § 4101* (1981) (as interpreted in *Del. Op. Atty. Gen.* 79-1011 (1979)); *Fla. Stat.* § 253.062 (1983); *Ga. Code Ann.* § 20-2-1050 (1982); *Ill. Rev. Stat.*, ch. 122, § 771 (1983); *Ind. Code* § 20-10.1-7-11 (1982); *Kan. Stat. Ann.* § 72-5308a (1980); *La. Rev. Stat. Ann.* § 17:2115(A) (West 1982); *Me. Rev. Stat. Ann., Tit. 20-A, § 4805* (1983); *Md. Educ. Code Ann.* § 7-104 (1985); *Mass. Gen. Laws Ann.*, ch. 71, § 1A (1982); *Mich. Comp. Laws Ann.* § 380.1566 (Supp. 1984-1985); *N. J. Stat. Ann.* § 18A:26-4 (West Supp. 1984-1985); *N. M. Stat. Ann.* § 22-5-4.1 (1981); *N. Y. Educ. Law* § 8029-a (McKinney 1981); *N. D. Cent. Code* § 15-47-30.1 (1981); *Ohio Rev. Code Ann.* § 2313.001 (1980); *Pa. Stat. Ann., Tit. 24, § 15-1516.1* (Purdon Supp. 1984-1985); *R. I. Gen. Laws* § 16-12-3.1 (1981); *Tenn. Code Ann.* § 49-6-1004 (1983); *Va. Code* § 22.1-205 (1980); *W. Va. Const.*, Art. III, § 15-a. For a useful comparison of the provisions of many of these statutes, see Note, Daily Moments of Silence in Public Schools: A Constitutional Analysis, 88 N. Y. U. L. Rev. 364, 407-408 (1983).

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

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

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

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with a religious exercise. Second, a pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others. For these simple reasons, a moment of silence statute does not stand or fall under the Establishment Clause according to how the Court regards vocal prayer or Bible reading. Scholars and at least one member of this Court have recognized the distinction and suggested that a moment of silence in public schools would be constitutional. See *Abington*, *supra*, at 261 (BRENNAN, J., concurring) ("[T]he observance of a moment of reverent silence at the opening of class" may serve "the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government"); L. Tribe, *American Constitutional Law* § 14-6, p. 829 (1978); P. Freund, *The Legal Issue, in Religion and the Public Schools* 23 (1965); Choper, 47 *Minn. L. Rev.*, at 371; Kauper, *Prayer, Public Schools, and the Supreme Court*, 61 *Mich. L. Rev.* 1031, 1041 (1963). As a general matter, I agree. It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren.

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

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capable if the teacher exhorts children to use the designated time to pray. Similarly, the face of the statute or its legislative history may clearly establish that it seeks to encourage or promote voluntary prayer over other alternatives, rather than merely provide a quiet moment that may be dedicated to prayer by those so inclined. The crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer.⁹ This question cannot be answered in the abstract, but instead requires courts to examine the history, language, and administration of a particular statute to determine whether it operates as an endorsement of religion. *Lynch*, 465 U. S., at — (concurring opinion) (“Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion”).

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

⁹Appellants argue that *Zorach v. Clauson*, 343 U. S. 306, 313–314 (1952) suggests there is no constitutional infirmity in a State’s encouraging a child to pray during a moment of silence. The cited dicta from *Zorach*, however, is inapposite. There the Court stated that “When the state encourages religious instruction . . . by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.” *Ibid.* (emphasis added). When the State provides a moment of silence during which prayer may occur at the election of the student, it can be said to be adjusting the schedule of public events to sectarian needs. But when the State also encourages the student to pray during a moment of silence, it converts an otherwise inoffensive moment of silence into an effort by the majority to use the machinery of the State to encourage the minority to participate in a religious exercise. See *Abington School District v. Schempp*, 374 U. S. 305, 326 (1963).

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determining whether the government intends a moment of silence statute to convey a message of endorsement or disapproval of religion, a court has no license to psychoanalyze the legislators. See *McGowan v. Maryland*, 366 U. S. 420, 466 (1961) (opinion of Frankfurter, J.). If a legislature expresses a plausible secular purpose for a moment of silence statute in either the text or the legislative history,⁹ or if the statute disclaims an intent to encourage prayer over alternatives during a moment of silence,¹⁰ then courts should generally defer to that stated intent. See *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U. S. 756, 773 (1973); *Tilton v. Richardson*, 403 U. S. 672, 678-679 (1971). It is particularly troublesome to denigrate an expressed secular purpose due to post-enactment testimony by particular legislators or by interested persons who witnessed the drafting of the statute. Even if the text and official history of a statute express no secular purpose, the statute should be held to have an improper purpose only if it is beyond parview that endorsement of religion or a religious belief "was and is the law's reason for existence." *Epperson v. Arkansas*, 393 U. S. 97, 106 (1968). Since there is arguably a secular pedagogical value to a moment of silence in public schools, courts should find an improper purpose behind such a statute only if the statute on its face, in its official legislative history, or in its interpretation by a responsible administrative agency suggests it has the primary purpose of endorsing prayer.

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

⁹See, e. g., Tenn. Code Ann. § 49-6-1004 (1983).

¹⁰See, e. g., W. Va. Const., Art. III, § 15-a.

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

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

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

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

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

B

The analysis above suggests that moment of silence laws in many States should pass Establishment Clause scrutiny because they do not favor the child who chooses to pray during a moment of silence over the child who chooses to meditate or reflect. Alabama Code § 16-1-20.1 (Supp. 1954) does not stand on the same footing. However deferentially one examines its text and legislative history, however objectively one views the message attempted to be conveyed to the public, the conclusion is unavoidable that the purpose of the statute is to endorse prayer in public schools. I accordingly agree with the Court of Appeals, 705 F. 2d 1526, 1535 (1983), that the Alabama statute has a purpose which is in violation of the Establishment Clause, and cannot be upheld.

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

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

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made by Alabama Code § 16-1-20.1 is to specify expressly that voluntary prayer is one of the authorized activities during a moment of silence. Any doubt as to the legislative purpose of that addition is removed by the official legislative history. The sole purpose reflected in the official history is "to return voluntary prayer to our public schools." App. 50. Nor does anything in the legislative history contradict an intent to encourage children to choose prayer over other alternatives during the moment of silence. Given this legislative history, it is not surprising that the State of Alabama conceded in the courts below that the purpose of the statute was to make prayer part of daily classroom activity, and that both the District Court and the Court of Appeals concluded that the law's purpose was to encourage religious activity. See *ante*, at —, n. 44. In light of the legislative history and the findings of the courts below, I agree with the Court that the State intended Alabama Code § 16-1-20.1 to convey a message that prayer was the endorsed activity during the state-prescribed moment of silence.⁹ While it is therefore unnecessary also to determine the effect of the statute, *Lynch*, 465 U. S., at — (concurring opinion), it also seems likely that the message actually conveyed to objective observers by Alabama Code § 16-1-20.1 is approval of the child

⁹THE CHIEF JUSTICE suggests that one consequence of the Court's emphasis on the difference between § 16-1-20.1 and its predecessor statute might be to render the Pledge of Allegiance unconstitutional because Congress amended it in 1964 to add the words "under God." *Post*, at —. I disagree. In my view, the words "under God" in the Pledge, as codified at 36 U. S. C. § 172, serve as a acknowledgement of religion with "the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future." *Lynch*, 465 U. S., at — (concurring opinion).

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

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

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

II

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

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

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

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

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

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

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

* Even assuming a taxpayer could establish standing to challenge such a practice, see *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U. S. 464 (1982), these Presidential proclamations would probably withstand Establishment Clause scrutiny given their long history. See *Marsh v. Chambers*, 463 U. S. 813 (1983).

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The element of truth in the United States' arguments, I believe, lies in the suggestion that Establishment Clause analysis must comport with the mandate of the Free Exercise Clause that government make no law prohibiting the free exercise of religion. Our cases have interpreted the Free Exercise Clause to compel the Government to exempt persons from some generally applicable government requirements so as to permit those persons to freely exercise their religion. See, e. g., *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U. S. 707 (1961); *Wisconsin v. Yoder*, 406 U. S. 205 (1972); *Sherbert v. Verner*, 374 U. S. 296 (1963). Even where the Free Exercise Clause does not compel the Government to grant an exemption, the Court has suggested that the Government in some circumstances may voluntarily choose to exempt religious observers without violating the Establishment Clause. See, e. g., *Gillette v. United States*, 401 U. S. 437, 453 (1971); *Brownfeld v. Brown*, 366 U. S. 599 (1961). The challenge posed by the United States' argument is how to define the proper Establishment Clause limits on voluntary government efforts to facilitate the free exercise of religion. On the one hand, a rigid application of the *Lemon* test would invalidate legislation exempting religious observers from generally applicable government obligations. By definition, such legislation has a religious purpose and effect in promoting the free exercise of religion. On the other hand, judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute pertaining to religion can be viewed as an "accommodation" of free exercise rights. Indeed, the statute at issue in *Lemon*, which provided salary supplements, textbooks, and instructional materials to Pennsylvania parochial schools, can be viewed as an accommodation of the religious beliefs of parents who choose to send their children to religious schools.

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It is obvious that the either of the two Religion Clauses, "if expanded to a logical extreme, would tend to clash with the other." *Wals*, 397 U. S., at 665-669. The Court has long exacerbated the conflict by calling for government "neutrality" toward religion. See, e. g., *Committee for Public Education & Religious Liberty v. Nyquist*, 418 U. S. 766 (1973), *Board of Education v. Allen*, 392 U. S. 236 (1968). It is difficult to square any notion of "complete neutrality," *ante*, at —, with the mandate of the Free Exercise Clause that government must sometimes exempt a religious observer from an otherwise generally applicable obligation. A government that confers a benefit on an explicitly religious basis is not neutral toward religion. See *Welsh v. United States*, 398 U. S. 833, 872 (1970) (WHITE, J., dissenting).

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

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

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

III

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

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