

3-1-1988

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Recommended Citation

Richard G. Wilkins, *One Moment Please: Private Devotion in the Public Schools*, 2 BYU J. Pub. L. 1 (1988).

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One Moment Please: Private Devotion in the Public Schools

*Richard G. Wilkins**

I. INTRODUCTION

Twenty-five years ago, in the celebrated case of *Engel v. Vitale*,¹ the United States Supreme Court held that the Establishment Clause of the First Amendment precluded the Board of Education of Union Free School District No. 9, Hyde Park, New York, from causing the following prayer to be said aloud at the beginning of the school day:

Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.²

The Court, per Justice Black, concluded that the practice was unconstitutional because it was “part of a governmental program to further religious beliefs” that “breach[ed] the constitutional wall of separation between Church and State.”³ In *Karcher v. May*,⁴ the Court recently faced, but ultimately did not decide,⁵ whether the New Jersey legislature violated *Engel’s* constitutional strictures by providing a moment of silence at the start of each school day during which students could ponder, daydream, meditate, plan a date or — if they chose — pray.

The question of private devotion in the public schools has been a contentious one since the *Engel* decision. Persons opposed to any official recognition of divinity have used the decision to argue for the extirpation of all reference to deity from public life.⁶ On the other hand, the

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1. 370 U.S. 421 (1962).

2. *Id.* at 422.

3. *Id.* at 425.

4. 108 S. Ct. 388 (1987).

5. The Court disposed of *Karcher* on technical grounds, concluding that the named appellant (the former speaker of the New Jersey General Assembly) lacked standing to pursue the appeal. The Court thus did not express any opinion on the merits of the suit, although the decision left standing two lower court decisions invalidating the New Jersey moment of silence statute. *Id.* at 395.

6. Justice Douglas’ concurrence in *Engel* has been particularly useful in that regard, because it suggests that everything from tax deductions for religious charitable contributions to the National Anthem, the Pledge of Allegiance and the motto engraved on U.S. currency is unconstitu-

decision has been used as emotional fodder by radicals of another ilk to whip devotees into furious indignation over the banishment of God from the classroom.⁷ The *Engel* decision — whatever the perspective — simply resists receding quietly into the constitutional background.

The continuing debate over the validity of private devotion in the public schools has many facets. The problem can be approached on a historical basis. Those who favor a “strict” or “original intent” construction of the Constitution insist that *Engel* and other Establishment Clause decisions are flatly inconsistent with the goals originally animating the First Amendment.⁸ Alternatively, the controversy can be analyzed somewhat more pragmatically, by focusing not on what the Founding Fathers thought or intended, but rather on whether prayer and/or moments of silence in the public schools threaten principles thought to be fundamental to American democracy.⁹ This latter approach is the track taken by the Court during the past several decades.¹⁰ But, whatever the analytical approach, I believe that providing public school children with a moment of silence during which they can ponder, meditate — or even pray — does not transgress the proscriptions of the First Amendment’s Establishment Clause.

II. A MOMENT OF SILENCE IN HISTORICAL PERSPECTIVE

Recently, it has been somewhat in vogue for conservative legal scholars to attack the historical foundation for the Court’s Religion Clause cases.¹¹ The “wall of separation between Church and State,” upon which *Engel* and other Establishment Clause decisions are based,¹² has been decried by Chief Justice Rehnquist, for one, as a “metaphor based on bad history . . . which has proved useless as a guide to judging.”¹³ Indeed, the problems with the church-state wall become apparent upon even cursory examination.

tional. 370 U.S. at 437-442 and accompanying notes (Douglas, J., concurring). See McConnell, *You Can't Tell the Players in Church-State Disputes Without a Scorecard*, 10 HARV. J.L. & PUB. POL'Y 27, 28-29 (1987). See also R. NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1984).

7. See, e.g., Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U.L. REV. 1, 6 (1986) (asserting that “[i]t is generally the religious right that demands government support for religion”).

8. E.g., *Wallace v. Jaffree*, 472 U.S. 38, 91-107 (1985) (Rehnquist, J., dissenting).

9. E.g., *Engel*, 370 U.S. at 425-433.

10. E.g., *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

11. Professor Laycock labels such scholars as the “religious right.” Laycock, *supra* note 7, at 7.

12. *Engel*, 370 U.S. at 425.

13. 472 U.S. at 107 (Rehnquist, J., dissenting).

In the first place, Thomas Jefferson — the first person to use the wall construct¹⁴ — was out of the country at the time the First Amendment was debated and adopted. He is, accordingly, a “less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.”¹⁵ Moreover, the records of the debates surrounding the drafting of the First Amendment suggest that the primary concerns of the Founding Fathers were to prevent establishment of a national church and the preference of one religious sect over another.¹⁶ They did not set out to construct a wall that would preclude any government acknowledgement of or even generalized aid to religion.¹⁷ Indeed, it is quite clear that the drafters of the First Amendment did not intend to prohibit limited governmental *endorsement* of religion. One day after the House of Representative voted to adopt the form of the First Amendment that was ultimately ratified, it passed a resolution asking George Washington to issue a Thanksgiving Day proclamation.¹⁸

Thus, the men who drafted and adopted the Establishment Clause of the First Amendment almost certainly did not perceive in it a “wall” that would prohibit school children from voluntarily acknowledging their “dependence” upon God or begging his “blessings upon us, our parents, our teachers and our Country.”¹⁹ It follows *a fortiori* that they would not consider a moment of silence statute, which merely provides a moment for meditation or prayer by those who want to pray, unconstitutional. A moment of silence ceremony (or even a voluntary, non-denominational prayer, such as that involved in *Engel*), which does not seriously threaten creation of a state church or evidence hostility to any particular creed, seems fairly far removed from the core concerns that prompted enactment of the First Amendment.²⁰ From a historical or “original intent” viewpoint, therefore, the constitutionality of a moment

14. The “wall of separation” is generally credited to Jefferson, who used the phrase in a ceremonial letter to the Danbury Baptist Association. *Id.* at 91 (Rehnquist, J., dissenting).

15. *Id.* at 92 (Rehnquist, J., dissenting).

16. *Id.* at 98 (Rehnquist, J., dissenting).

17. *Id.* at 98-99.

18. Elias Boudinot, the congressman who proposed the resolution, stated on the floor of the House that he “could not think of letting the session pass over without offering an opportunity to all the citizens of the United States of joining with one voice, in returning to Almighty God their sincere thanks for the many blessings he had poured down upon them.” 472 U.S. at 101 (Rehnquist, J., dissenting) (*quoting* 1 Annals of Cong. 914 (1789)).

19. *Engel*, 370 U.S. at 422.

20. Cf. McConnell, *Neutrality Under the Religion Clauses*, 81 Nw. U.L. REV. 146, 163 (1986) (suggesting that even the non-denominational prayer in *Engel* favors “one religion or group of religions — probably the majority’s — over the others”).

of silence provision, such as that enacted by the New Jersey legislature, should be unquestionable.

It is, however, quite unlikely that the moment of silence debate will be settled by pointing out the faulty historical footing of *Engel*. Two terms ago, in *Wallace v. Jaffree*,²¹ the Supreme Court expressly rejected a strict historical approach to the Establishment Clause. There, the United States District Court for the District of Alabama had upheld the constitutionality of a statute that explicitly returned prayer to the public schools on the ground that the Supreme Court had erred in *Engel* and other cases by applying the strictures of the First Amendment to the states.²² As a pure historical matter, the district court was probably correct — the Founding Fathers did not intend the Religion Clauses to apply to the states, as evidenced by the persistence of state-established churches in Massachusetts, New Hampshire, Maryland and Rhode Island well into the Nineteenth Century.²³ But, despite the fact that the district court's opinion straightened out some sloppy scholarship in previous Supreme Court opinions, the High Court summarily affirmed the Court of Appeals' reversal of the lower court's holding.²⁴

The writers of the Establishment Clause may never have dreamed that preventing the federal government from establishing a national church would in turn hobble the states, but "original intent" is no longer controlling in this sensitive area of constitutional law.²⁵ The Supreme Court began applying various provisions of the Bill of Rights to the states late last century,²⁶ and it is simply too late in the day to abandon that course.²⁷ Indeed, most ordinary citizens would be shocked at the mere suggestion that, although the federal government *could not* establish a church, their state legislatures *could*. Thus, the current controversy over a moment of silence in the public schools likely will not be resolved by pointing out to the Supreme Court that its decision in *Engel* would receive a failing grade if submitted as a paper in a constitutional history course.²⁸

21. 472 U.S. 38 (1985).

22. *Jaffree* also involved a moment of silence statute, discussed below. Notes 58-60 and accompanying text, *infra*.

23. *Jaffree*, 472 U.S. at 99 n.4 (Rehnquist, J., dissenting).

24. *Id.* at 48-49.

25. *Id.* at 81 (O'Connor, J., concurring) (asserting that the Court "must employ both history and reason in [its] analysis").

26. *E.g.*, *Barron v. Baltimore*, 32 U.S. 243 (1883).

27. The *Jaffree* Court emphasized "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." 472 U.S. at 48-49.

28. See McConnell, *supra* note 20, at 163 (arguing why, even from the perspective of a

III. A MOMENT OF SILENCE IN THE MODERN COURT

Rather than take a strictly historical approach to Establishment Clause issues, the modern Court has analyzed several pragmatic factors to determine whether particular governmental action unduly involves the church or state in the affairs of the other. Indeed, only one case decided during the past 20 years, *Marsh v. Chambers*,²⁹ has used a strict historical analysis of an Establishment Clause issue.³⁰

Instead, beginning with its 1971 decision in *Lemon v. Kurtzman*,³¹ the Court has quite regularly applied a three-pronged test to determine the constitutionality of governmental activities ranging from providing bus transportation to parochial school students³² to erecting a Christmas Creche in a city park.³³ Under that test, governmental actions challenged under the Establishment Clause must meet the following criteria:

First, the [action] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, [it] must not foster "an excessive government entanglement with religion."³⁴

The Court's application of the *Lemon* factors has been fairly consistent. However, because state action must meet all three prongs before it passes constitutional muster, and because the proper application of the three elements to concrete facts is almost always debatable, the results obtained from the *Lemon* test can only be described as spotty and

scholar who supports government accommodation of religious practice, "there should be no government-sponsored religious exercises (vocal prayers, Bible study as scripture) in the public schools").

29. 463 U.S. 783 (1983).

30. On the basis of long acceptance and the similar practice of the first national Congress, the Court in *Marsh* upheld the constitutionality of Nebraska's practice of paying a chaplain to open each state legislative session with prayer.

31. 403 U.S. 602 (1971).

32. *Wolman v. Walter*, 433 U.S. 229, 252-55 (1977).

33. *Lynch v. Donnelly*, 465 U.S. 668 (1984).

34. 403 U.S. at 612-13.

inconsistent.³⁵ But, despite the difficulties of the *Lemon* test, no majority of the Court has shown great enthusiasm for abandoning it.³⁶

Application of the *Lemon* test to a moment of silence statute is problematic. Depending upon the predilections of individual jurists, a simple moment of silence can be viewed as violating all or none of the *Lemon* factors. The district court in *Karcher v. May*, for example, concluded that the New Jersey moment of silence statute violated all three prongs of the test.³⁷ Moreover, although the State urged before the trial court that a moment of silence had the secular purpose of providing a "transition" between non-school and school activities, and supported that assertion with significant testimony by experienced educators and other experts, the trial court rejected that proffered purpose as an "after the fact rationalization."³⁸ The district court made this finding despite its recognition that "a brief period of silence serves a transition purpose."³⁹ It further found that a moment of silence had the "effect" of advancing religion by "mandat[ing] a period at the start of each school day when all students would have an opportunity to engage in prayer."⁴⁰ Finally, the court found that the statute was unduly "entangling" because a "required minute of silence would put children and

35. Even that description may be overly charitable. Chief Justice Rehnquist has recently described the conflicting and seemingly unprincipled results of *Lemon* in the following synopsis of the Court's Establishment Clause cases:

[A] State may lend to parochial school children geography *textbooks* that contain maps of the United States, but the State may not lend *maps* of the United States for use in geography class. A State may lend *textbooks* on American colonial history, but it may not lend a *film* on George Washington, or a *film projector* to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them non-reusable. A State may pay for bus transportation *to* religious schools, but may not pay for bus transportation *from* the parochial school to the public zoo or a natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing "*services*" conducted by the State inside the sectarian school are forbidden . . . but [not] . . . *diagnostic testing*. . . . A State may give cash to a parochial school to pay for the administration of State-written tests and state-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects. Religious instruction *may not* be given in public school, but the public school *may release* students during the day for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws.

Wallace v. Jaffree, 472 U.S. at 38 at 111 (Rehnquist, J., dissenting) (emphasis added). Such results are hard to justify on anything other than an *ad hoc* basis.

36. *E.g.*, *Lynch v. Donnelly*, 465 U.S. 668 (1984).

37. 572 F. Supp. 1561, 1572 (D.N.J. 1983) (decided *sub nom* *May v. Cooperman*) (hereinafter *Karcher v. May*).

38. *Id.* at 1571.

39. *Id.* at 1570.

40. *Id.* at 1571.

parents who believed in prayer in the public schools against children and parents who do not.”⁴¹

The United States Court of Appeals for the Third Circuit, applying the same legal test, disagreed with virtually all of the district court’s reasoning.⁴² The court of appeals rejected the holding that the statute violated the “effects” test simply by “designating a time and a place when children and teachers may pray.”⁴³ “The state,” the court of appeals reasoned, “equally injects itself into religious matters when it designates a time and place when children and teachers may not pray.”⁴⁴ The court similarly rejected the notion that the statute was impermissibly “entangling” because of its potential for divisiveness. Noting the reality that any governmental action to accommodate religious belief will upset someone, the court of appeals wrote that “[i]f political divisiveness were the test for entanglement, no governmental accommodation of religion would survive Establishment [Clause] scrutiny.”⁴⁵ But, despite its well-reasoned conclusion that the moment of silence statute did not violate the “effects” and “entanglement” prongs of *Lemon*, the court of appeals affirmed the district court on the ground that the asserted secular purpose for the statute was “pretextual.”⁴⁶

The question whether the New Jersey moment of silence statute has a secular “purpose” is not readily answered. In a lengthy concurring opinion to a decision invalidating Bible reading in the public schools, handed down the year following *Engel*, Justice Brennan suggested that states could avoid violating the Establishment Clause but still accommodate the desires of those students who want to pray by providing for a brief moment of silence at the start of each school day.⁴⁷ Such a ceremony, he suggested, would serve the “solely secular ends” of “fostering harmony and tolerance among the pupils, enhancing the authority of the teacher, and inspiring better discipline.”⁴⁸

By making the apparently sensible suggestion that a state could serve a secular purpose and still accommodate the religious needs of its students by adopting a moment of silence ceremony, Justice Brennan set up a subtle “Catch 22” that was seized upon by the district court in *Karcher* to invalidate the New Jersey statute. The district court in *Karcher* acknowledged that a moment of silence may have a secular

41. *Id.* at 1575.

42. *May v. Cooperman*, 780 F.2d 240 (3d. Cir. 1985).

43. *Id.* at 249.

44. *Id.*

45. *Id.* at 247.

46. *Id.* at 251-52.

47. *Abington School Dist. v. Schempp*, 374 U.S. 203, 280 (1963) (Brennan, J., concurring).

48. *Id.*

purpose.⁴⁹ However, because it is also adopted to facilitate religious practice, to provide a “period at the start of each school day when all students would have an opportunity to engage in prayer,”⁵⁰ the secular purpose *ipso facto* converts to a sectarian purpose: the accommodation of prayer.⁵¹ The court of appeals in *Karcher*, moreover, refused to find its way out of this box. Indeed, the court explicitly noted that the New Jersey statute did not endorse or encourage prayer and that the only possible sectarian “purpose” for the moment of silence was to accommodate the desires of those who wanted to pray.⁵² Nevertheless, the court of appeals refused to release the state from the logical conundrum created by the trial court. A moment of silence may have a secular purpose, but because it also has the purpose of accommodating religious belief, it is constitutionally infirm.⁵³

The “heads you lose, tails I win” reasoning of the lower courts in *Karcher* could have been easily rectified by the Supreme Court. The Supreme Court’s prior cases applying the “purpose” prong of *Lemon* establish that a statute need not have “exclusively secular” objectives to pass constitutional muster.⁵⁴ The New Jersey legislature need only have “a secular purpose”;⁵⁵ the fact that a moment of silence accommodates religious belief *in addition to* providing a secular transition period from non-school to school life should be constitutionally irrelevant.

But, while this approach to the “purpose” prong avoids the logical traps of the lower courts’ analysis, it too is troubling. If indeed all that is needed under *Lemon*’s “purpose” test is a plausible secular purpose, and any such purpose will do, there is very little substance left to the inquiry. Human ingenuity being what it is, state or national legislatures will have little difficulty articulating some plausible secular goal for almost any undertaking — no matter how entwined with matters of religion. Although most such actions would probably run afoul of one of the other *Lemon* prongs — effect or entanglement — the fact remains that merely requiring “a” secular purpose renders the “purpose” test a virtual dead letter.⁵⁶ Yet the alternative, exemplified by the logi-

49. 572 F. Supp. at 1570 (noting that a moment of silence “serves a transition purpose”).

50. *Id.* at 1571.

51. *Id.* at 1572-73.

52. *Cooperman*, 780 F.2d at 252.

53. *Id.* at 252-53.

54. *E.g.*, *Lynch v. Donnelly*, 465 U.S. at 680-81 and n.6 (citing numerous cases).

55. *Id.* at 680 (emphasis added).

56. *Jaffree*, 472 U.S. at 108 (Rehnquist, J., dissenting) (“If the purpose prong is intended to void those aids to sectarian institutions accompanied by a stated legislative purpose to aid religion, the prong will condemn nothing so long as the legislature utters a secular purpose and says nothing about religion”).

cal juggernaut created by the lower courts in *Karcher*, where any plausible sectarian purpose is fatal, is equally unacceptable.

Faced with the above legal realities, I have concluded that the *Lemon* test does not promote thoughtful constitutional analysis of moment of silence statutes. Such statutes, as the court of appeals in *Karcher* noted, should readily pass muster under the "effect" and "entanglement" prongs.⁵⁷ But the ease with which those factors are manipulated to support the contrary result — as shown by the district court's opinion in *Karcher* — is troublesome. And, the question whether such statutes have a "secular purpose" may not be worth asking. The answer will always depend upon the point from which the questioner begins, and the selection of that starting point will always be little more than an *ipse dixit*.

IV. THE CORE CONCERNS: COERCION AND DEBILITATION OF GOVERNMENT AND RELIGION

Because of the difficulties inherent in the consistent and reasoned application of the *Lemon* test, the validity of a moment of silence statute should not depend, in the final analysis, upon a rote inquiry into purpose, effect and entanglement. Rather, the constitutional question should turn upon whether such a statute transgresses the fundamental concerns that led the Court to invalidate the recitation of a school prayer in *Engel*. There, the Court was troubled primarily by a prescribed prayer's coercion of the individual right of conscience, and its concomitant debilitation of both government and religion. Moment of silence statutes which accommodate religious sentiment, but which do not coerce individual conscience or debilitate religious expression, should pass constitutional muster.

In striking down state-prescribed prayers, the Court wrote 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."⁵⁸ The Court further noted that "a union of government and religion tends to destroy government and to degrade religion." A neutral moment of silence provision, however, does not pose any serious threat to individual conscience or the essential autonomy of church and state.⁵⁹ Perhaps more importantly, the provision of an opportunity for private contemplation or introspection facilitates the

57. *Cooperman*, 780 F.2d at 247-49.

58. *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

59. *McConnell*, *supra* note 20, at 163.

exercise of individual rights.⁶⁰ The Establishment Clause should not preclude governmental accommodation of the felt need of many persons for voluntary religious expression.

As noted earlier, the Supreme Court in *Jaffree* summarily invalidated a statute that provided for the recitation of a state-sponsored prayer. It also invalidated a moment of silence provision enacted by the State of Alabama. It did so, however, only because the legislative history of the statute, as well as its relationship to another moment of silence provision in the state, demonstrated that the provision's sole purpose was to return prayer to the public schools. The principal legislative sponsor of the Alabama statute, for example, testified that he had no other purpose for the statute other "than returning voluntary prayer to the public schools."⁶¹ Moreover, the statute invalidated in *Jaffree*, which provided a moment of silence for "meditation or voluntary prayer," was enacted despite the presence of an earlier statute that authorized a moment of silence for "meditation."⁶² In such circumstances, the Court concluded that the statute was "enacted to convey a message of State endorsement and promotion of prayer."⁶³ Because such an "endorsement" could have the effect of intimidating or coercing those who chose not to pray, the statute suffered the defect found fatal in *Engel*.

Other moment of silence statutes, so long as they neither encourage nor discourage prayer, should not suffer the same constitutional infirmities. The New Jersey statute, for example, provided:

Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before the opening exercise of each school day for quiet and private contemplation or introspection.⁶⁴

Such statutes do not create the same dangers as the recitation of a state-prescribed prayer. Unlike the established prayer in *Engel*, neutral moment of silence statutes protect "both the right to speak freely and the right to refrain from speaking at all"; they plainly are not "an instrument for fostering public adherence to an ideological point of view [an individual] finds unacceptable."⁶⁵ Such statutes, moreover, do not disrupt the essential autonomy of church and state.

First, neutral moment of silence statutes are permissive only. They

60. *Id.* at 151, 161-67.

61. *Jaffree*, 472 U.S. at 57.

62. *Id.* at 59, 61.

63. *Id.* at 59.

64. N.J. STAT. ANN. § 18A:36-4 (West 1982).

65. *Jaffree*, 372 U.S. at 51.

do not require that students do anything other than remain silent — they need not close their eyes, bow their heads, or assume any posture suggestive of religion or irreligion. Second, the language of statutes is absolutely neutral as to religion. Prayer is not even mentioned. Third, in contrast to the Alabama moment of silence statute, a truly neutral statute is not enacted exclusively to promote prayer. Several New Jersey legislators, for example, suggested that a moment of silence is provided “to help restore order in the classroom.”⁶⁶ Finally, unlike the prayer at issue in *Engel*, a moment of silence does not involve the state — or the church — in religious indoctrination of any kind. Thus, on their face, such statutes do not run afoul of the evils identified in *Engel*: they cannot coerce individual conscience because they do not require any particular thought; they do not interfere with church-state autonomy because they do not contemplate the involvement of either entity in the affairs of the other.⁶⁷

Moreover, unlike the situation in *Engel*, there is good reason to conclude that a moment of silence facilitates rather than inhibits the exercise and enjoyment of precious individual liberties such as the free exercise of religion. Some have occasionally suggested that, because compulsory attendance at public school effectively precludes many opportunities for personal prayer, a moment of silence to accommodate such activity is not only permissible but is in fact constitutionally required by the Free Exercise Clause (which, of course, prohibits government from interfering with the free exercise of religion). The Court in *Jaffree* suggested that such an argument is weak.⁶⁸ But, even though the state may be under no constitutional command to provide an opportunity for private prayer, the free exercise argument cannot be ignored. The provision of a moment of silence in the context of a public school — a structured, compulsory state institution where contemplative opportunities are limited — necessarily furthers values protected by the Free Exercise Clause.⁶⁹ As Justice Brennan has noted, “even when the

66. Robert G. Seidenstein, *The Star Ledger*, December 14, 1982 (quoting Assemblywoman Angela Perun). See also Jim Goodman, *The Trenton Times*, December 14, 1982; John Shure, *The Bergen Record*, December 14, 1982; Nancy Freiberg, *The Courier-Post*, December 14, 1982; Robert G. Seidenstein, *The Star Ledger*, December 17, 1982; Jill Pollack, *The Trenton Times*, December 3, 1982.

67. See McConnell, *supra* note 20, at 163, 154 (governmental provisions accommodating the religious practices of students should be constitutional so long as “they involve no pressure upon unwilling students to participate . . . if they are genuinely neutral among the beliefs present in the school population” and do not “interfere with the autonomy of religious life”).

68. 472 U.S. at 59, n.45.

69. Justice O'Connor, for one, has recognized that, in some circumstances, the free exercise clause requires some modification of “the standard Establishment Clause text.” *Jaffree*, 472 U.S. at 83 (O'Connor, J., concurring). Professor McConnell has forcefully argued that free exercise

government is not compelled to do so by the Free Exercise Clause, it may to some extent act to facilitate the opportunities of individuals to practice their religion."⁷⁰

State efforts to facilitate opportunities for voluntary, private devotion in the public schools should be sustained so long as they do not — as in *Engel* — infringe upon “the individual’s freedom to choose his own creed.”⁷¹ A statute which simply “permit[s]” a moment for “quiet and private contemplation or introspection” at the sole “discretion of the individual student”⁷² is neutral among religions and between religion and nonreligion. Such a statute neither favors one religion over another, nor “conveys a message of endorsement or disapproval of religion.”⁷³ As with the released-time religious study program upheld 35 years ago in *Zorach v. Clauston*,⁷⁴ a simple moment of silence leaves students to their “own desires as to . . . [their] religious devotions, if any.”⁷⁵

V. CONCLUSION

The Court in *Jaffree* noted that an attempt “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 schoolday.”⁷⁶ The Court has also noted that, “[i]n our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic.”⁷⁷ The fundamental goal of the Religion Clauses of the First Amendment should not become the removal of all traces of religion from public life.⁷⁸ On the contrary, the Constitution “affirmatively mandates accommodation, not merely tolerance, of all re-

values must be given some scope in determining the constitutionality of moment of silence provisions because, in the context of a public school, “there can be no religious element in the absence of government accommodation.” *McConnell*, *supra* note 20, at 166.

70. *Marsh v. Chambers*, 463 U.S. 783, 812 (Brennan, J., dissenting).

71. *Jaffree*, 472 U.S. at 52.

72. N.J. Stat. Ann. § 18A:36-4 (West 1982).

73. *Jaffree*, 472 U.S. at 61.

74. 343 U.S. 306 (1952).

75. *Id.* at 311.

76. 472 U.S. at 72.

77. *Lynch v. Donnelly*, 465 U.S. at 678.

78. We are, unfortunately, rather close to that goal at the present time. *McConnell*, *supra* note 20, at 162 and n.70 (“references to religion have been removed systematically from public school education”) (citing 3 RELIGION AND SOC’Y REPORT, No. 11 at 8 (Nov. 1986)); C. HAYNES, TEACHING ABOUT RELIGIOUS FREEDOM (1985); P. VITZ, RELIGION AND TRADITIONAL VALUES IN PUBLIC SCHOOL TEXTBOOKS: AN EMPIRICAL STUDY (1985).

ligions, and forbids hostility towards any.”⁷⁹ By providing school children with the opportunity for voluntary, private introspection at the start of each school day, state legislatures do not transgress constitutional limits. Rather, as the Supreme Court noted in *Zorach*, by “adjusting the schedule of public events to sectarian needs” they “follow the best of our traditions.”⁸⁰

79. *Lynch v. Donnelly*, 465 U.S. at 673.

80. 343 U.S. at 314.