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# The Moment of Silence in Public Schools: Valid Educational Activity or Attempt to Breach the Church-State Wall?

by James A. Helfman

Proponents of school prayer realize that a constitutional amendment is needed to get specific prayer into the nation's public schools,<sup>1</sup> and such an amendment is strongly supported by national leaders.<sup>2</sup> What is not clear, however, is the status of the "moment of silence" in public schools. On April 2, 1984, the Supreme Court heard oral argument in the case of *Wallace v. Jaffree*,<sup>3</sup> dealing with the constitutionality of an Alabama statute calling for moment of silence in Alabama public schools.<sup>4</sup> Hopefully, the Court will issue a definitive ruling on the applicability of the three-prong Establishment Clause test<sup>5</sup> as it applies to the burgeoning moment of silence movement.<sup>6</sup>

It is the purpose of this article to investigate the historical foundations of the Establishment Clause as it has evolved

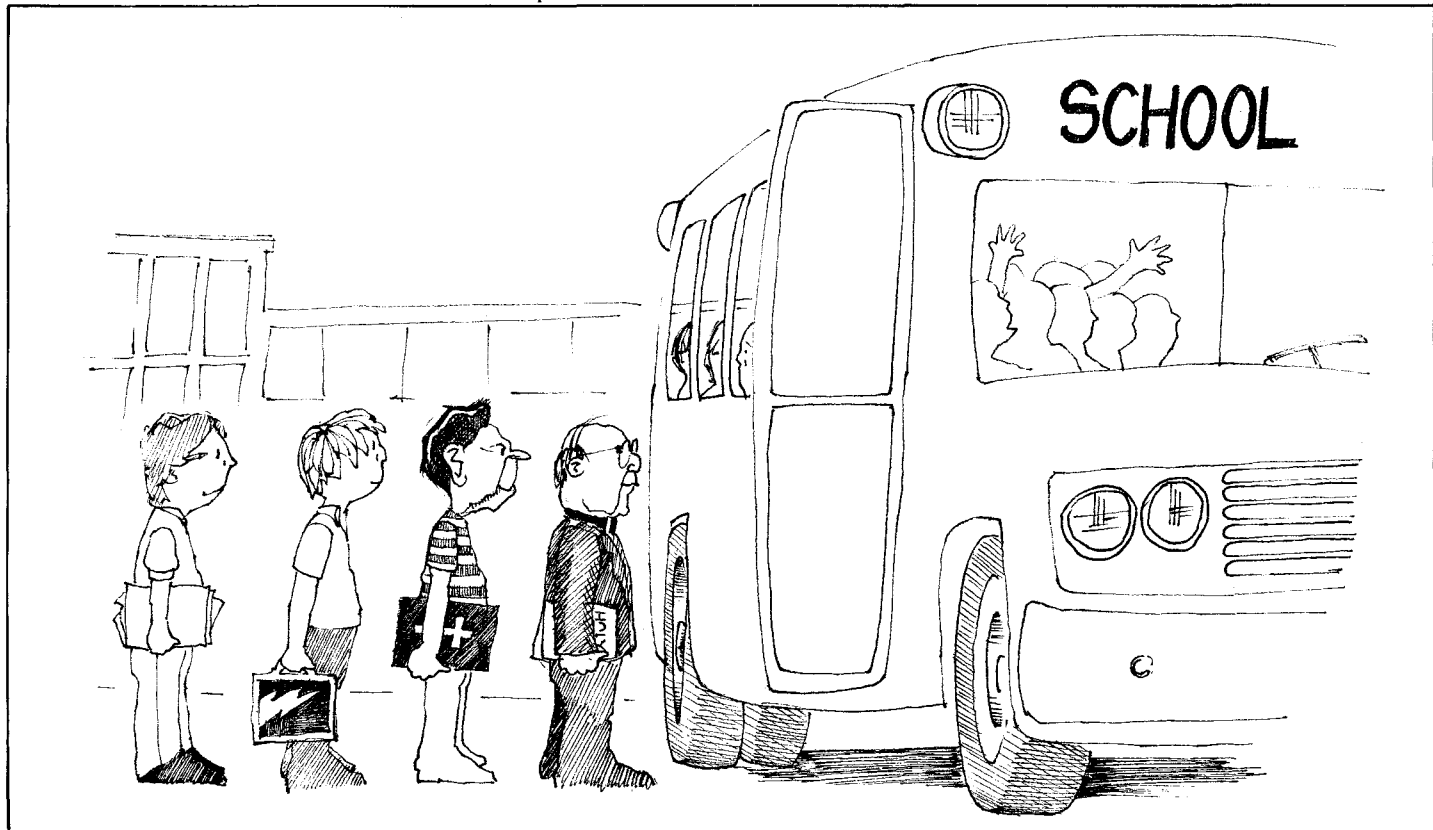
from constitutional formulation to the present day, and to analyze the evolution of case law with specific regard to the growing controversy surrounding the moment of silence in public schools. This subject and the issues surrounding it are of great concern to this writer, not just because of my years as a public school teacher but because of my firm belief that prayers are the province of religious institutions and family, not the business of school boards.<sup>7</sup>

A full understanding of the Establishment Clause requires an examination of the historical development of American religious philosophy during the formative years of our republic.<sup>8</sup> There were many evils that forced our ancestors to flee their European homeland,<sup>9</sup> and freedom of religion was a major factor in the rapid settlement of the New World.<sup>10</sup>

The right to worship as one pleased attracted displaced settlers from all nations who were determined to exercise this right upon arrival in the New World.<sup>11</sup>

Unfortunately, however, some of the groups which fled to this country to escape the religious persecution of Europe tried to force their particular religious beliefs upon other colonists.<sup>12</sup> Laws authorizing the collection of tax monies to support the government-favored churches were allowed, and religious bigotry and intolerance were widespread, particularly towards non-Christian religions.<sup>13</sup>

It is remarkable that the term "religion" is not defined anywhere in the Constitution. Indeed, the only reference to a Supreme Being is in the date of the Constitution itself, i.e., "in the year of our Lord."<sup>14</sup> This lack of Constitutional de-



definition has been a concern to courts and commentators throughout the years, since the Establishment Clause lends itself to any number of viable interpretations.<sup>15</sup> The resulting confusion is succinctly expressed by columnist George Will:

The authors of the "establishment" clause wanted to guarantee that government action would be impartial among religions. They did not intend to require that it be neutral between religion and secularism. Still less did they intend what the Supreme Court has mandated—that any law must have a "secular legislative purpose and a primary effect that neither advances nor inhibits religion."<sup>16</sup>

For the time being, however, the Establishment Clause controversy seems centered on viability of a moment of silence in public schools.

Whenever religious activities become involved with public education, the extent of governmental involvement is measured by the three-pronged Establishment Clause test.<sup>17</sup> The formulation of this test began with the 1947 decision of *Everson v. Board of Education*.<sup>18</sup> Despite upholding the validity of using public funds to transport children to parochial schools, the *Everson* Court stated clearly the constitutional parameters of the First Amendment:

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. Neither can force nor influence a person to go or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activity or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a "wall of separation between

Church and State."<sup>19</sup>

This definitional statement was repeated the following year in *McCullum v. Board of Education*.<sup>20</sup> By declaring release school time for religious education unconstitutional, the *McCullum* Court showed it had adopted a broad interpretation of *Everson* and placed an obligation of neutrality on government with respect to religion.<sup>21</sup>

The "high and impregnable wall" mentioned by the *McCullum* Court developed cracks four years later. In *Zorach v. Clauson*<sup>22</sup> the Court retreated from the broad scope of the *Everson-McCollum* principle.<sup>23</sup> The *Zorach* Court stated that the First Amendment "does not say that in every and all respects there shall be separation of Church and State... [it requires only that] there shall be no concert or union or dependency one on the other."<sup>24</sup>

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**Prayers are the  
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The refusal to extend the *McCullum* decision to the similar facts of *Zorach* was based on a subtle distinction between the two cases. The *Zorach* Court found that the difference between the school system in *McCullum* and the school system in *Zorach* was that the public school authorities in *McCullum* were deeply involved in the religious-education programs while the *Zorach* authorities were not.<sup>25</sup> The *Zorach* decision was of even greater importance, however, because the Court elaborated two religiously oriented reasons for its holding as well. The *Zorach* Court said that (1) accommodation to the spiritual needs of its citizens is an established American tradition; and (2) not making such a concession would result in preference of atheists over believers.<sup>26</sup> While this pro-religious logic did not repudiate the *Everson-McCollum* principle, greater tolerance for religious activities was clearly implied. This new tolerance produced a rash of seemingly conflicting decisions<sup>28</sup> that served to distort the once definitive *Everson* pronouncement. By 1962, the Court realized a new definition for Establishment Clause analysis was needed.

*Engel v. Vitale*<sup>29</sup> provided the Supreme Court with the opportunity to make a

definitive ruling regarding prayers in public schools, and by ruling against a state prayer the Court repaired, at least temporarily, the cracked wall of the church-state separation. In *Engel*, the New York State Board of Regents had composed a nondenominational prayer that was recited by students prior to the start of classes each day.<sup>30</sup> In holding that the use of this prayer violated the Establishment Clause, the Court revived the *Everson* standard and stated flatly that "each separate government in this country should stay out of the business of writing or sanctioning official prayers."<sup>31</sup>

The next year, a similar problem regarding prayer in the public schools faced the Court in *Abington School District v. Schempp*.<sup>32</sup> *Schempp* involved the reading of the Bible and a recitation of the Lord's prayer as a part of a school's opening exercises; it did not involve an official prayer composed by the state or a state agency. The Court, nevertheless, held that this activity violated the Establishment Clause, affirming both its earlier ruling in *Engel*<sup>33</sup> as well as the *Everson* standard. The *Schempp* Court stated two requirements which had to be met for a statute to withstand Establishment Clause scrutiny. The statute in question must have: (1) a secular legislative purpose; and (2) a primary effect that neither advances nor inhibits religion.<sup>34</sup> As the Court stated, "In the relationship between man and religion, the State is firmly committed to a position of neutrality."<sup>35</sup>

Eight years later, the Supreme Court formally announced the test for Establishment Clause analysis. In *Lemon v. Kurtzman*<sup>36</sup> the Court articulated the three-prong standard for Establishment Clause analysis: (1) the statute in question must have a secular legislative purpose; (2) the statute's principal or primary effect must be one that neither advances nor inhibits religion and (3) the statute must not foster an excessive government entanglement with religion.<sup>37</sup> Subsequent cases have reinforced the validity of this test, however inconsistent the results may be.<sup>38</sup>

While the specifics of the three-pronged test are firmly established, the exact scope of its application is far from clear and is subject to varying interpretations by judicial districts. As stated by Chief Justice

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Burger in *Kurtzman*, "The line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."<sup>39</sup> Perhaps the most succinct comment was made by Mr. Justice White when he stated that "Establishment Clause cases are not easy; they stir deep feelings, and [the Court is] divided among ourselves, perhaps reflecting the different views on this subject of the people of this country."<sup>40</sup>

The differing views of the people in this country on the subject of the Establishment Clause are clearly demonstrated in the moment of silence movement.<sup>41</sup> In determining the applicability of the first prong of the test to moment of silence laws, i.e., that the statute in question have a secular purpose, courts have looked to the legislative history of the statute as well as the face of the statute itself. In *Duffy v. Las Cruces Public Schools*<sup>42</sup> the plain language of the statute supported the Court's decision that the purpose of the statute was to establish prayer in public schools.<sup>43</sup> In determining the defendant's contention that the inclusion of the words "contemplation" and "meditation" indicated the "neutral" intent of the legislature, the Court said it was clear that words were inserted "solely for the purpose of attempting to disguise the religious nature of the bill."<sup>44</sup> In *Beck v. McElrath*, the Court determined the nonsecular purpose of the Tennessee statute by first determining the practical effect the language of the statute would have.<sup>45</sup> The Court said:

In the abstract it is true that "meditation" and "reflection" upon personal beliefs can be viewed as carrying meanings that do not touch upon religion. Individual terms within a statute are not to be construed in a purely abstract sense or in a vacuum, however. As all terms in the statute are viewed together and accorded reasonable meaning, it is difficult to escape the conclusion that the legislative purpose was advancement of religious exercises in the classroom. Ordinary principles of statutory construction do not comprehend the straining defendants would urge upon the court.<sup>46</sup>

This nonsecular conclusion was supported by the Court's review of the legislative history of the bill, which revealed that the intent in passing the bill was "to establish prayer as a daily fixture in the public schools of Tennessee."<sup>47</sup>

The second prong of the Establishment Clause test, that the statute have a pri-

mary effect that neither advances nor inhibits religion, has generally been viewed in practical terms based on the actual effect a moment of silence would have. The *Beck* Court pointed out the prevailing legal sentiment:

Unavoidably, students will understand that they are being encouraged not only to be silent, but also to engage in religious exercises. It cannot be seriously argued, and certainly cannot be assured, that nice distinctions concerning the potential meaning of "meditation" and "personal beliefs" will naturally arise in the minds of public school students.<sup>48</sup>

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**"Unavoidably, students will understand that they are being encouraged not only to be silent, but also to engage in religious activities."**

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One columnist was more direct in his belief that school children would, in practice, equate silence with prayer.

When you're eight years old and all the kids around you bow their heads, you bow your head. When everyone is mumbling words, you mumble words. When they pause for a moment of silence, you do the same. And you do it not because you want to, but because you do not want to make a spectacle of yourself. What eight-year-old is going to raise his or her hand and say to the teacher, "I have a constitutional right to be excused and I would like at this moment to do so?"<sup>49</sup>


The third prong of the test, that the statute will result in excessive government entanglement with religion, has again been viewed by courts in the light of practical application. A moment of silence in school implies that teachers will be responsible for supervising this activity, a contingency the Supreme Court has, in fact, already recognized.<sup>50</sup>

The *Beck* Court noted that as teachers and school officials perform their supervisory tasks, "public funds," though small in amount, are being used to promote a religious exercise.<sup>51</sup> Other courts have been more direct, stating flatly that "if the state must engage in continuing administrative supervision of nonsecular activity, church and state are excessively intertwined."<sup>52</sup> This entanglement would result even if the activity takes place before the opening of the school day.<sup>53</sup>

At present, the weight of authority in state and federal courts clearly holds that a state mandated "moment of silence" in public schools is unconstitutional. However, it is inescapable that a moment of silence is not per se unconstitutional,<sup>54</sup> and a properly worded and enacted bill may not violate the First Amendment. In fact, many people feel that a properly drafted moment of silence bill would be an ideal solution to the current debate between those who want a school prayer amendment and those who do not. Their logic goes as follows: If the moment of silence statute is not upheld, it is likely that the matter will be settled by the adoption of a constitutional amendment and this would invite the kind of religious involvement that must be avoided. As one periodical noted:

Those resisting the [moment of silence] are bound to appear not as defenders of freedom of conscience but as doctrinaire secularists who do not want the public school day to be opened upon the transcendent even for a fleeting moment.<sup>55</sup>

Such opinion would be regrettable and uncalled for, but it serves to demonstrate the confusion and discord that exists in the area of prayer in the public school.

This writer looks forward to the Supreme Court's ruling on *Wallace v. Jaffree*.<sup>56</sup> While I feel strongly that a moment of silence in school, no matter how carefully and neutrally created by legislature, is nothing more than an excuse to break down the wall of church-state separation and institute prayer in school, it cannot be denied that it is possible under the current Supreme Court guidelines to have a constitutionally permissible moment of silence in public schools. As the Court stated in *Schempp*, "the breach of neutrality that is today a trickling stream may all too soon become a raging torrent."<sup>57</sup> The moment of silence in public schools is such a breach. Because the current three-prong test can be circumvented by a moment of silence, a new standard must be formulated and implemented by the Court; *Wallace v. Jaffree* provides the perfect vehicle. 

## Notes

- <sup>1</sup> A proposed amendment to the Constitution was narrowly defeated in this session of Congress. The proposed amendment provides: "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public school or other public institutions. No person shall be required by the United States or by any state to participate in prayer."
- <sup>2</sup> President Reagan was quoted as saying: "The amendment we'll propose will restore the right to pray.... Changing the Constitution is a mammoth task. It should never be easy. But in this case I believe we can restore a freedom that our Constitution was always meant to protect." N.Y. Times, May 7, 1982, at B 10, col. 1.
- <sup>3</sup> 705 F.2d 1526 (11th Cir. 1983), argued, 52 U.S.L.W. 3719 (U.S. April 2, 1984)(No. 83-812). A preliminary ruling on a peripheral issue was reported but the full opinion of the Court on the merits has not been published as of the date this article was submitted.
- <sup>4</sup> ALA. CODE §16-1-20.1 (1982). The law reads as follows:

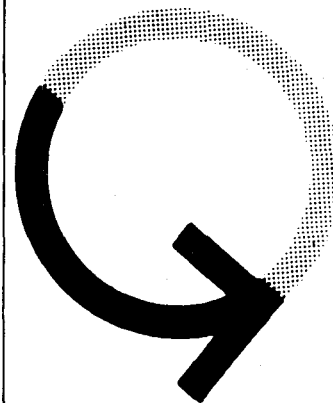
At the commencement of the first class of each day in all grades in public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.
- <sup>5</sup> See *infra* note 36.
- <sup>6</sup> Many states have passed similar laws. See, e.g., Md. S.2 (1982), proposed amendment to Md. [EDUC.] CODE ANN. §7-104 (1978 and Supp. 1983); TENN. CODE ANN. §49-6-1004 (1983); N.J. STAT. ANN. §18A: 36-4 (West 1982).
- <sup>7</sup> Thanks to James J. Kilpatrick for his expression of this religious precept. *The Sun* (Baltimore), March 23, 1983, at A 9, col. 1.
- <sup>8</sup> Such a study is beyond the scope of this article. For an in depth treatment of this area, see Sky, *The Establishment Clause, The Congress, and the School: A Historical Perspective*, 52 VA. L. REV. 1395 (1966).
- <sup>9</sup> For an excellent perspective on conditions in Europe that encouraged immigration to the New World, see *Everson v. Board of Education*, 330 U.S. 1, 8-9 (1947).
- <sup>10</sup> Comment, *Accommodating Religion in the Public Schools*, 59 NEB. L. REV. 425, 428 (1982).
- <sup>11</sup> "The privilege of setting up one's own kind of religion in the new country, and of maintaining it there, made a strong appeal to devoted groups." LOUIS B. WRIGHT, *THE CULTURAL LIFE OF THE AMERICAN COLONIES*, at 72 (1957).
- <sup>12</sup> "Let no one imagine, as school children have sometimes been taught to believe, that our ancestors came in search of 'religious toleration.' Toleration was a concept that few of them recognized or approved. What they wanted was freedom from interference by opposing religious sects or unfriendly official authorities. Once firmly in the saddle themselves, the sects that had been persecuted in England became equally zealous to root out heretics from their own order." *Id.* at 72-73.
- <sup>13</sup> Even the enlightened colonial minds of the day acknowledged this distinction. William Penn, in his *Frame of Government* (1682) welcomed to full rights all citizens of Pennsylvania "who profess to believe in Jesus Christ"; the Maryland colonial as-

sembly, in "An Act concerning Religion: (1649)(generally referred to as the Toleration Act) provided toleration to those 'professing to believe in Jesus Christ' who did not deny his divinity or the doctrine of Trinity." A. Stokes & L. Pfeiffer, *Church and State in the United States*, at 12, 18 (1964).

- <sup>14</sup> My thanks to Kenneth Lasson, Associate Professor of Law at the University of Baltimore, for providing this interesting historical note.
- <sup>15</sup> See *infra* note 38.
- <sup>16</sup> *The Sun* (Baltimore), January 20, 1983, at A 15, col. 1.
- <sup>17</sup> See *infra* note 36.
- <sup>18</sup> 330 U.S. 1 (1947).
- <sup>19</sup> *Id.* at 15-16.
- <sup>20</sup> 333 U.S. 203 (1948).
- <sup>21</sup> "To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guarantee of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the *Everson* case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable." *Id.* at 211-212.
- <sup>22</sup> 343 U.S. 306 (1952)(holding the New York City system of release time for religious education constitutional).
- <sup>23</sup> In a quote he later came to regret, Justice Douglas stated that "We are a religious people whose institutions presuppose a Supreme Being." *Id.* at 313.
- <sup>24</sup> *Id.* at 312.
- <sup>25</sup> This distinction was further explained by Justice Brennan in his concurring opinion in *Abington School District v. Schempp*, 374 U.S. 203 (1963), when he stated that the "difference was that the *McCollum* program placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects, while the *Zorach* program did not."
- <sup>26</sup> *Zorach*, 343 U.S. at 313-14.
- <sup>27</sup> Despite the pro-religion language, the Court specifically stated "We follow the *McCollum* case." *Id.* at 315.
- <sup>28</sup> See, e.g., *McGowan v. Maryland*, 366 U.S. 420 (1961)(upholding Sunday closing laws). The state's purpose in enacting Sunday Blue Laws, i.e., to provide a uniform day of rest for its citizens, was valid despite the fact the purpose "happens to coincide or harmonize with the tenets of some or all religions." *Id.* at 442.
- <sup>29</sup> 370 U.S. 421 (1962).
- <sup>30</sup> The prayer read "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country." *Id.* at 422.
- <sup>31</sup> *Id.* at 435.
- <sup>32</sup> 374 U.S. 203 (1963).
- <sup>33</sup> *Id.* at 225.
- <sup>34</sup> *Id.* at 222.
- <sup>35</sup> *Id.* at 225-26.
- <sup>36</sup> 403 U.S. 602 (1971).
- <sup>37</sup> *Id.* at 612-14.

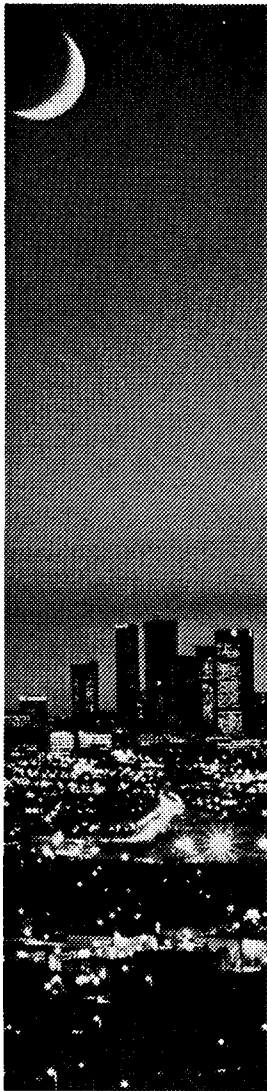
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### Moment of Silence

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- <sup>38</sup> E.g., *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 772-73 (1973)(holding a New York statute providing building maintenance and repair funds to nonpublic schools and affording parents of nonpublic school students tuition reimbursements and state income tax deductions as violative of the Establishment Clause); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 739, 748 (1976)(holding a Maryland statute authorizing payment of state funds to any private college, including religiously affiliated ones, so long as the funds were not used for "sectarian purposes" as not violative of the Establishment Clause); *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 653 (1980) (holding a New York statute directing payment to nonpublic schools of the costs incurred by them in complying with state-mandated requirements of testing, reporting, and record-keeping as not violative of the Establishment Clause).
- <sup>39</sup> 403 U.S. 602, 614 (1971).
- <sup>40</sup> 444 U.S. 646, 662 (1980). He was joined in this opinion by Chief Justice Burger and Justices Stewart, Powell, and Rehnquist.
- <sup>41</sup> See *supra* note 6.
- <sup>42</sup> 557 F. Supp. 1013, 1015 (D. N.M. 1983).
- <sup>43</sup> The bill in question reads as follows: "Each local school board may authorize a period of silence not to exceed one minute at the beginning of the school day. This period may be used for contemplation, meditation or prayer, provided that silence is maintained and no activities are undertaken." *Id.* at 1015.
- <sup>44</sup> *Id.*
- <sup>45</sup> 548 F. Supp. 1161, (M.D. Tenn. 1982).
- <sup>46</sup> *Id.* at 1163.
- <sup>47</sup> The bill in question reads as follows: "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

such class is held shall announce that a period of silence not to exceed one minute in duration shall be observed for meditation or prayer or personal beliefs and during any such period, silence shall be maintained."

- <sup>48</sup> 548 F. Supp. 1161, 1165, (M.D. Tenn. 1982).
- <sup>49</sup> Richard Cohen, *No One is Laughing*, LEARNING, February 1982.
- <sup>50</sup> "[T]he very restrictions and surveillance necessary to ensure that teachers play a strict non-ideological role give rise to entanglement between church and state." 403 U.S. 602, 620-21 (1971).
- <sup>51</sup> 548 F. Supp. 1161, 1165 (1982)(quoting *Abington School District v. Schempp*, 374 U.S. at 220, [Douglas, J. concurring]).
- <sup>52</sup> *Brandon v. Board of Education*, 635 F.2d 971, 979 (2d Cir. 1980).
- <sup>53</sup> All that is required for church-state entanglement is that the supervised activity takes place at a time "closely associated with the school day... (it is the State's compulsory education that draws the students to school whether or not the school day has officially begun." *Lubbock v. Lubbock*, 669 F.2d 1038, 1046 (5th Cir. 1982).
- <sup>54</sup> Justice Brennan, in *Abington School District v. Schempp*, states that "it has not been shown that readings from the speeches and messages of great Americans, for example, or from the documents of our heritage of liberty, daily recitation of the Pledge of Allegiance, or even the observance of a moment of reverent silence at the opening of class, may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any member of the community or the proper degree of separation." 374 U.S. 203, 281 (1963)(emphasis added).
- <sup>55</sup> *A Moment of Silence*, AMERICA, November 13, 1982, p. 283.
- <sup>56</sup> See *supra* note 3.
- <sup>57</sup> 374 U.S. 203, 225 (1963).

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