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Recent Developments

Wallace v. Jaffree: MOMENT OF SILENCE IN PUBLIC SCHOOLS

The appellee, Ishmael Jaffree, filed a complaint in the Federal District Court for the Southern District of Alabama on behalf of three of his children seeking declaratory and injunctive relief. *See Jaffree v. James*, 544 F. Supp. 727 (S.D. Ala. 1982). The complaint alleged that the local school board, through its teachers, was engaged in the "maintenance of regular religious prayer services . . . in violation of the First Amendment as made applicable to states by the Fourteenth Amendment to the United States Constitution." *See Wallace v. Jaffree*, 105 S.Ct. 2479, 2482-83 (1985) (citation omitted). The original complaint was subsequently amended to join the Governor of the State of Alabama and various state officials as party defendants in the action, obtain class certification, and to challenge the constitutionality of three Alabama statutes.

The district court initially determined that two of the three statutes were unconstitutional because their sole purpose was to "encourage a religious activity." *Wallace v. Jaffree*, 105 S.Ct. 2479 (1985) (citation omitted). Accordingly, the court entered a preliminary injunction. Later, however, the court conducted a trial on the merits and determined that the statutes did not violate the first amendment to the constitution because "the first amendment . . . does not prohibit the state from establishing a religion." *Id.* at 2484. The court purported to base its conclusion on what it viewed as "newly discovered historical evidence" that the framers of the constitution did not intend to proscribe *state* establishment of religion, only *national* establishment of a dominant religion. The Supreme Court per Stevens, J. found that this "remarkable conclusion" was without merit and affirmed the court of appeals reversal of the district court. *Wallace v. Jaffree*, 105 S.Ct. 2479 (1985). The sole issue on appeal was whether the statute which authorized a moment of silence "or voluntary prayer" was constitutional under the establishment clause of the first amendment.

The Supreme Court found it unnecessary to go beyond the "secular purpose" prong of the *Lemon* test. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Writing for the majority, Justice Stevens declared that "the record . . . reveals that the enactment of . . . [the statute] was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose." *Wallace v. Jaffree*, 105 S.Ct. at 2490 (emphasis original). The Court referred to the trial record

and recalled the testimony of one of the sponsors of the legislation. This individual had testified that, apart from a desire to return prayer to the public schools, he "did not have no other purpose in mind" [sic] when he pressed for enactment of the proposed statute in the state legislature. *Id.* at 2490.

The Court observed that since an earlier statute already afforded school children the opportunity to engage in voluntary *silent* prayer, the legislative intent to return *vocal* prayer to the public schools was evident. Indeed, the Court noted that the state itself had not expressed any secular motivation for the statute in its brief to the Court. *Id.* at 2491. Thus, the Court found that the addition of the words "or voluntary prayer" to the previous statute indicated "that the State intended to characterize prayer as the favored practice." *Id.* at 2492. The Court concluded:

> The importance of [the principle of complete neutrality toward religion] does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority. . . . Keeping in mind . . . 'both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded,' we conclude that . . . [the statute] violates the First Amendment.

Id. at 2492-93 (citations omitted).

There were two concurring opinions in *Jaffree*. Justice Powell expressed concern that continued criticism of the *Lemon* test would tend to "encourage other courts to feel free to decide Establishment Clause cases on an *ad hoc* basis." *Id.* at 2494. He pointed out that the *Lemon* inquiry provided the courts with "identifie[d] standards that have proven useful in analyzing case after case. . . ." *Id.* at 2493-94. Finally, Justice Powell expressly indicated that he would have little difficulty upholding any statute which authorized "a straightforward moment-of-silence." *Id.* at 2495.

In her opinion concurring in the judgment, Justice O'Connor also expressly endorsed the "moment-of-silence" concept and affirmed her basic confidence in the *Lemon* standards. However, on this latter point she urged changes in the manner in which the Court applies the *Lemon* test.

Justice O'Connor indicated that the obvious problem in examining statutes under the establishment and free exercise clauses is the conflict which is created when the two clauses are "expanded to a logical extreme." *Id.* at 2504. (citation omitted). That is to say, that when government acts in a manner which is of benefit to religion (as in providing free bus transportation to and from school for all pupils in a county, whether they attend public or sectarian schools), it is arguable that government is thereby "promoting" or "establishing" religion. If, on the other

hand, government acts in a manner which has an adverse effect on sectarian interests (such as withholding free bus transportation from pupils at sectarian schools) it is equally arguable that government is acting to "inhibit" the free exercise of religion.

Justice O'Connor expressed the view that the Court has, in the past, "exacerbated the conflict by calling for government 'neutrality' toward religion." She declared: "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." *Id.* at 2496. To this end, Justice O'Connor would add an "endorsement test" by which the "effect" and "purpose" prongs of the *Lemon* test would be judged. This proposal was originally advocated by Justice O'Connor in her concurrence in *Lynch v. Donnelly*, 104 S.Ct. 1355 (1984) (holding that expenditures by the state for the purpose of erecting a nativity creche did not violate the establishment clause). The "endorsement test" advocated by Justice O'Connor would ostensibly enhance the *Lemon* purpose and effect tests by focussing on "whether [the] government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement." *Jaffree*, 105 S.Ct. at 2497.

While the "endorsement" concept articulated by Justice O'Connor may appear intriguing, it is hardly a novel concept; it is merely a restatement of the *Lemon* "effect" test which calls for a determination of whether a statute "advances" religion. Indeed, it seemingly would substitute "endorsement" for "advancement" and thereby weaken the *Lemon* inquiry. Justice O'Connor went on to illustrate the application of the "endorsement" test in circumstances analogous to those before the Court in the instant case.

Presumably, Justice O'Connor's endorsement test would allow states to enact "moment of silence" statutes which expressly informed the student that he or she is free to use that moment to silently pray. However, as was clearly expressed by the majority opinion, the addition of the words "or to pray" permit the student nothing beyond that which he or she already had, and can be interpreted in no other way but as an "endorsement" of religion. Conversely, failure to include such words in a statute do nothing to inhibit a student's freedom of silent expression or exercise of religion. Accordingly, the conflicting values inherent in the establishment and free exercise clauses of the first amendment, "if expanded to their logical extremes", need never "clash". While Justice O'Connor correctly pointed out that "the courts are capable of distinguishing a sham secular purpose from a sincere one", Id. at 2500, implementation of a so-called "endorsement" test would do little to clarify the inquiry.

Maryland's "moment-of-silence" statute, Md. Educ. Code Ann. § 7-104 (1985), would seem to run afoul of the constitutional standards set out in *Lemon* and its progeny. The statute provides:

> (a) *Silent meditation.* Principal and teachers in each public elementary and secondary school in this State may require all students to be present and participate in opening exercises on each morning of a school day and to meditate silently for approximately 1 minute.
> (b) *Praying or reading holy scripture permitted.* During this period, a student or teacher may read the holy scripture or pray.

The provision which appears to vest in each individual principal and teacher discretionary power to compel attendance at moment of silence exercises in the public schools appears to go well beyond even the statute struck down in *Jaffree*. By its very terms, the statute is neither voluntary nor does it enhance privacy of thought or deed. Further, the provisions which allow such compelled attendance at an exercise in which the participants (including teachers) are encouraged to produce "holy scripture(s)" are clearly violative of the *Lemon* test. Finally, the statute contains the "or [to] pray" language held offensive in *Jaffree*.

It seems clear that the Maryland statute would not withstand judicial scrutiny. Accordingly, the statute should be redrafted to reflect the "moment-of-silence" sanctioned by the Supreme Court in *Jaffree*.

– Christopher N. Luhn