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**EVERSON AND MOMENTS OF SILENCE IN PUBLIC SCHOOLS:  
CONSTITUTIONAL AND ETHICAL CONSIDERATIONS**

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Those who choose to reflect thoughtfully upon the fiftieth anniversary of *Everson v. Board of Education*<sup>1</sup> are likely to divide into two different camps. On the one hand, separationists will celebrate the decision for enshrining Thomas Jefferson's "wall of separation" as that metaphor which best describes the relationship that should exist between church and state in America. Accommodationists, on the other hand, being those who seek a larger role for religion in public life, are more likely to bemoan the decision for the very reason that separationists celebrate it—the "wall" language and the separationist framework it created for addressing church-state issues. But in fact the *Everson* decision was neither a total victory for separationists nor a total loss for accommodationists. While the decision was replete with separationist rhetoric and definitely laid the groundwork for a host of separationist decisions to come, its result—allowing Ewing Township of New Jersey to reimburse parents for costs incurred to transport their children to and from parochial schools on city buses—was decidedly accommodationist. The Court, in other words, seemed to honor Jefferson by constructing a "high and impregnable wall," but then immediately set out to create at least one wide gate of safe passage.

The current law regarding moments of silence in the nation's public schools is in many ways a microcosm of the kind of separationist "wall"/accommodationist "gate" approach seen in the *Everson* decision. In 1985, in *Wallace v. Jaffree*,<sup>2</sup> the Court struck down Alabama's moment-of-silence legislation, but then uncharacteristically assumed the role of counselor by telling legislatures everywhere how to craft a moment-of-silence statute that would pass constitutional muster. Many states subsequently took the message to heart and passed new (in

some cases revising old) moment-of-silence statutes. The Court has not seen fit to revisit the issue to put its official stamp of approval on any of these statutes, but it is now widely assumed that moment-of-silence observances are constitutional, provided the Court's unofficial suggestions are followed. So, as in *Everson*, the *Jaffree* Court appeared quite serious about preserving Jefferson's separationist "wall," but simultaneously was willing to cut yet another door of safe passage. While some have argued that the *Jaffree* case was simply another in a long line of church-state cases in which the Court seemed capable only of doublespeak, the Court saw itself as acting with sensitivity to the competing demands of the Establishment and Free Exercise Clauses, or, in its own words, of pursuing "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."<sup>3</sup>

This essay will not quibble with the constitutionality of moments of silence. It is conceded that if drafted carefully, such enactments are probably constitutional. And, of course, moments of silence might in many cases have salutary effects upon participating students. It will be suggested, however, that on balance, for a number of ethical reasons, moments of silence are a bad idea and should not be part of the daily routine in America's public schools. To state it more matter-of-factly, what is legal is not always what is best when it comes to educating America's children.

### **I. Moments of Silence and the *Jaffree* Case**

When the Supreme Court decided in 1985 to review the *Jaffree* case, twenty-five states already had moment-of-silence statutes.<sup>4</sup> Such statutes generally were responses to public sentiment that some form of prayer should be permitted, even encouraged, in the nation's public schools. More overt forms of prayer had already been held to be unconstitutional in *Engel v. Vitale*<sup>5</sup> and *Abington Township School District vs. Schempp*.<sup>6</sup>

In *Engel*, the Court struck down a twenty-two word, nondenominational prayer written by the New York Board of Regents for official use in the public schools of New York.<sup>7</sup> Pupils

could remain silent or be excused from the room while the prayer was being recited, but the Court was not persuaded that this made the prayer acceptable. Justice Hugo Black, writing for the majority, wrote that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."<sup>8</sup> He added that "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."<sup>9</sup> The Court's decision, needless to say, was one of the most controversial in its history.

Undaunted by the public vilification it received following the *Engel* decision, the Court agreed the next year (1963) to hear two more cases dealing with religion in the public schools. One involved a Pennsylvania statute providing that at least ten Bible verses should be read daily in each classroom in the state; the other challenged a Maryland statute that provided for the daily reading of a chapter from the Bible and/or reciting the Lord's Prayer. Deciding the cases together in *Abington Township School District v. Schempp*, the Court disallowed both practices as violations of the Establishment Clause.

Neither *Engel* nor *Schempp* dealt specifically with moments of silence. In *Schempp*, however, Justice William Brennan, in making the point that states could not use religious means to achieve secular ends when nonreligious means would suffice, noted by way of example that a state could not be prohibited from permitting "daily recitation of the Pledge of Allegiance, or even the observance of a moment of reverent silence."<sup>10</sup> This seemed to be the opening in the "wall" rationale of *Everson* that many state legislators were looking for. While it was not possible to compose prayers to be recited in classrooms, it did appear that periods of meditation, even periods of silence specifically for prayer, might be constitutional. Thus, not surprisingly, half of the states in the ensuing twenty-year period passed moment-of-silence statutes. The typical statute called for a moment of silence in the classroom for either meditation or voluntary prayer, although some called for meditation only. Lower courts were divided on the constitutionality of these statutes,<sup>11</sup> and it therefore came as no surprise that the Supreme Court

would feel compelled to address the constitutionality of moments of silence. The Court decided to tackle the moment-of-silence issue by reviewing *Wallace v. Jaffree*, a case involving Alabama's attempt to provide a framework for daily silent prayer in its public schools.

*Jaffree* involved a challenge to three separate Alabama statutes. One provided that teachers could lead "willing students" in a recital of a specified prayer that was set out in the statute. The Supreme Court upheld the lower courts' invalidation of this statute, in essence reaffirming *Engel v. Vitale*. A second statute authorized a one-minute period of silence for "meditation." The district court upheld this statute, and it was not challenged on appeal. It was the opinion of all concerned parties that a period calling for "meditation" alone did not invoke Establishment Clause concerns. One might question what possible motivation the Alabama legislature might have had for passing a "meditation" statute if it were not to provide specifically for a time for prayer, but the statute, all agreed, was facially acceptable. Whether or not such statutes should so readily be deemed constitutionally permissible is discussed below. The third statute provided for "meditation or voluntary prayer." It was this statute that was the focus of the case and which the Supreme Court, in a 6-3 vote, found to violate the Establishment Clause.

Justice Stevens, who authored the majority opinion, emphasized that the State of Alabama failed to "present evidence of *any* secular purpose"<sup>12</sup> for the statute, as required under the first or "secular purpose" prong of the three-prong test articulated in *Lemon v. Kurtzman*.<sup>13</sup> The Court looked primarily to the testimony of the statute's sponsor in the State Senate, Donald Holmes, who unabashedly testified that the bill was an "effort to return voluntary prayer to our public schools" and that he had "no other purpose in mind."<sup>14</sup> Stevens noted that "even though a statute that is motivated in part by a religious purpose may satisfy the first [prong of the *Lemon* test], the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion."<sup>15</sup> Thus, since the statute endorsed prayer as a favored practice, it violated the Establishment Clause.

It was not Justice Stevens, however, but Justices Lewis Powell, Jr. and Sandra Day O'Connor, who in separate concurring opinions strongly intimated that a moment of silence, untainted by the religious purpose which so obviously characterized the statute in the *Jaffree* case, would be permissible. Justice Powell, after concluding that the Alabama statute failed the "secular purpose" prong of the *Lemon* test, commented that a better-worded statute would not necessarily violate the second and third prongs. "I note," he stated, "that the 'effect' of a straightforward moment-of-silence statute is unlikely to 'advance or inhibit religion.' Nor would such a statute 'foster an excessive entanglement with religion'."16 According to O'Connor, "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. A moment of silence law that is clearly drafted and implemented so as to permit prayer, meditation, and reflection with the prescribed period, without endorsing one alternative over the others, should pass this test."17 These statements adequately outlined how a constitutional statute might be written. Justice O'Connor even noted that existing laws in many states would likely pass Establishment Clause scrutiny since they did not "favor the child who chooses to pray during a moment of silence over the child who chooses to meditate or reflect."18

Following the *Jaffree* decision, fifteen of the twenty-five states that had moment-of-silence statutes, apparently confident that their statutes were in keeping with *Jaffree*, left them intact; seven states revised their statutes to comply with *Jaffree*, although one of these (Arkansas) was later repealed; and three states invalidated their prior laws altogether. This left twenty-one states with moment-of-silence statutes, but two states subsequently enacted new statutes, so that presently twenty-three states have moment-of-silence statutes that would appear to meet the Stevens-Powell-O'Connor guidelines.19 The typical statute, which leaves the decision for implementation with local school districts, is much like that of the State of Texas: "A school district may provide for a period of silence at the beginning of the first class of each school day during which a student may reflect or meditate."20 Some, like New Mexico's, require that

moments of silent mediation must be implemented only at the request of the students.<sup>21</sup> All of the statutes presuppose that moments of silence are propitious, an assumption which can and should be challenged.

## II. Ethical Arguments Against Moments of Silence in View of the *Lemon* Test

Any number of ethical arguments might be advanced either for or against the observance of moments of silence. The latter half of this essay consists of a presentation of five ethical arguments against moments of silence, some of which have a theological orientation. Most ethical arguments of a theological nature, of course, are not a significant part of the political debate associated with moments of silence. This is due to the Supreme Court's requirement, pursuant to the *Lemon* test, that legislation reflect a *secular* purpose, that it not have the primary effect of *advancing* or *inhibiting* religion, or that it not create an excessive entanglement between religion and government. Since many might object, on the grounds of *Lemon*, to the presentation of theological arguments against moments of silence, it is appropriate to briefly explain why this author does not consider these arguments to violate either the letter or spirit of the *Lemon* test.

In terms of political theory, the *Lemon* three-prong test reflects the Court's understanding that the nation is essentially a liberal state rather than a religious state. However, according to most modern accounts of the liberal state, this designation carries requirements that are in addition to the mandates of the *Lemon* test. Most significantly, according to most theorists, participants' dialogue in public discourse within a liberal democracy must be intelligible to other participants. Since religious language is unintelligible to many citizens, it should be translated into nonreligious language accessible to everyone. Religious motivation might lay beneath the veneer of certain legislation, but the arguments for or against the legislation must be essentially nonreligious or secular. By most accounts, this requirement is a logical antecedent to the *Lemon* test, which requires that the final product of public discourse—legislation—carry a secular orientation.

The work of John Rawls, of course, is pivotal for the entire tradition of liberal political thought. In *A Theory of Justice*, he makes these basic points in support of a secular basis for the liberal state.<sup>22</sup> Rawls's work has been highly influential in the United States, and has widespread

support among political theorists, albeit in varying degrees.<sup>23</sup> In recent years, liberal political theory has been challenged by a host of communitarian thinkers, all complaining basically that Rawlsian liberal theory unnecessarily undermines the viable contributions to the public good that specifically religious viewpoints can make. Among these critics have been Stephen Carter, who argues in *The Culture of Disbelief* that religious arguments and even religion-based legislation should be countenanced in a liberal democratic framework.

It is my own view, contrary to Rawls and affirming Carter, that religious *arguments* in public discourse generally should be permitted. Common sense may dictate that on many occasions the one advancing a religious argument should translate that argument into secular language in order that it become more intelligible and convincing to others, but that should be the decision of the one advancing the argument. Nevertheless, it is suggested here, contrary to Carter and affirming Rawls, that when the public debate on a particular issue is completed and legislation is to be enacted—when the relative "free-for-all" that is American liberal democracy in which every conceivable viewpoint (religious and nonreligious alike) has been entertained—the legislation enacted, consistent with the *Lemon* test, should reflect essentially *secular* aims and effects. The greater weight of evidence is that the Founding Fathers, most demonstrably by omitting the name of God in the Constitution, intended to create what is generally referred to today as a liberal state. The decision to break with traditional political theory which placed human government under divine authority was the result of their belief that the power to frame a new government derived not immediately from heaven, but from the American people. The Founders created a government which was to be "of the people, by the people, and for the people." This in no way was a denial of their personal religious (mostly Christian) convictions, but the new federal government was to be one in which the people were the responsible parties, not God. The product of public discourse was to be man's law, not holy law. This has always been and remains the essence of a liberal state.

In the modern lawmaking process, politicians, like the Founding Fathers, may personally hold themselves accountable to God. But whether or not they do, they are in fact accountable to the people. Since the people are of diverse faiths, the product of public debate—legislation—should be religiously neutral (secular) so as to reflect the common good, not merely the good of those who prevailed in the debate. This kind of commitment is what is embodied in the *Lemon* three-prong test.

In keeping with these principles, then, various ethical arguments will now be advanced in opposition to moment-of-silence legislation. While many of the arguments presented are distinctly theological in nature, it is submitted that, consistent with the discussion above concerning the legitimacy of religious arguments, they should be considered in the public debate alongside other meritorious religious and nonreligious arguments. Any resulting legislation, however, either allowing or prohibiting moments of silence, should be couched in secular language, reflecting the requirements of both *Lemon* and *Jaffree*.

### **III. Ethical Arguments Against Moments of Silence**

The presentation to follow makes five ethical arguments against moments of silence. The presentation is not intended to be exhaustive; certainly other arguments could be advanced against moments of silence. Nor is the presentation intended to be balanced in the sense of weighing the arguments against various arguments which favor moment-of-silence observances in public schools. The presentation, in other words, is decidedly biased against moments of silence. The task of presenting opposing arguments favorable to the moment-of-silence practice will be left to others.

To be absolutely clear, it should be noted at the outset should that the arguments presented here are not arguments against the *constitutionality* of moments of silence; rather they are *ethical* arguments that a legislative body might consider in deciding whether or not to enact a moment-of-silence statute. Hopefully, it has already been demonstrated why consideration of these and

related kinds of ethical arguments are not forbidden by our liberal democratic form of government and the *Lemon* test. The constitutionality of a properly worded statute is conceded. Such a statute is constitutional because it constitutes a Court-approved (*Jaffree*) gate in the wall of separation between church and state. Both the “wall” and “gate” were constructs of the *Everson* Court, and *Jaffree* is simply one case in which the Court deemed it appropriate to carve out a gate in the wall. If pressed, this author would probably assert that a gate in the wall should not have been created for moments of silence because realistically they have the primary effect of advancing religion in violation of the second prong of the *Lemon* test. The Court, of course, did not make such a finding, holding that moments of silence might be promulgated for nonreligious as well as religious reasons. But in all candor, it seems to this author that in virtually every case, moments of silence are enacted and observed for fundamentally *religious* reasons. Nevertheless, for purposes of this essay, it is conceded that they are constitutional, and various ethical arguments will be made against their passage by any particular legislative body.

First, moments of silence tend to trivialize prayer. They are constitutional because they are supposedly prayer neutral; that is, students may choose to pray during the prescribed time of meditation, or they can use the time in other ways, such as to prepare mentally for the day or just enjoy the solitude. Yet no one really disputes that moments of silence are primarily efforts to encourage prayer. As Walter Dellinger has said, "Since a normal school day ordinarily includes any number of occasions during which an individual student acting on her own initiative can engage in a moment of silent prayer or reflection, the formal creation . . . of an organized teacher-supervised moment of silence is an event that has no readily apparent purpose--unless the government is attempting to convey a message."<sup>24</sup> For the same reason, Dean Norman Redlich of the NYU Law School suggests that "all prescribed moments of silence are highly suspect."<sup>25</sup> Thus, in schools where the moment of silence is observed, school administrators, each day at the appointed time, are actually saying to students, "This might be a good time to pray." And students, being generally smarter than adults give them credit for, are fully aware

that the preferred activity during the moment of silence is prayer. Many students, of course, will choose to engage in prayer during the period of silence and be grateful for the opportunity. Nevertheless, it is a sacrilege to expect certain students to pray without necessarily knowing what prayer is, the identity and character of the God to whom they are to pray, what kind of relationship might be possible with the receiver of the prayer, and what the consequences of the prayer might be.

For those within the Christian tradition, this point can be underscored on the strength of what Jesus Christ clearly taught in the New Testament. Luke 11:2-4 (the Lord's Prayer) and Luke 18:9-14 (comparing the prayers of a Pharisee and a tax gatherer) are clear examples of Jesus teaching his disciples *to pray*, but also how *not to pray*. Thus, the faithful Christian would not simply mandate prayer (especially for a child) without instruction as to content and method, i.e., without teaching the child how *to pray*. To do so would be to encourage a child to undertake a spiritual task without the proper tools, which the New Testament suggests is not only unwise, but dangerous to the practitioner's spiritual life. Instruction on theological specifics is an important matter which public schools are prohibited by law from providing. Why not leave prayer where it belongs—outside the school, where there are ample opportunities for full discussion, explanation, training, encouragement, and participation in the religious life?

Some will surely say, in response to this line of thinking, "Well, then, why not explain to the children what prayer is all about." But who will do the explaining? What will they teach? Do we allow every different religious tradition to give their version, only to confuse the children? Avoiding problems like these is what is behind the American commitment to the separation of church and state.

To expect or hope that some children might pray meaningfully without the advantages of instruction and mentoring is to deny them the benefits of what the spiritual life is all about. Moreover, by observing a moment of silence, are school administrators suggesting to students that prayer takes place only one minute per day? One would not generally think so, but young,

impressionable children unfamiliar with the spiritual life may indeed receive such an impression. In short, moments of silence trivialize prayer. They may not trivialize prayer for those students whose homes, churches, synagogues, temples, or mosques have trained them to pray, but such students hardly need a moment of silence set aside by their school to pray; they will pray volitionally perhaps many times during the course of a day. As James David Knight notes, "Prayer which is genuine cannot be prevented by the absence of a daily ritual; on the other hand, a daily ritual can thwart the meaningful purpose of prayer."<sup>26</sup>

Second, many advocates of religion in the public schools feel that moments of silence, given the Supreme Court's disallowance of more traditional religious exercises, might be the last remaining hope for arresting the trend toward secularism that pervades American public education. They believe that secular humanism is threatening to gain control of the minds of the nation's children, which would virtually assure the eventual demise of America as a godly nation. The absence of any form of prayer in the classroom, they argue, is a capitulation to the forces of secular humanism and a sure sign that God has been removed from the schools. The Reverend Jerry Falwell, for example, accuses public education of being "materialistic, humanistic, atheistic, and socialistic," and claims that many students are now morally bankrupt because "education has moved from centering on God to centering on man."<sup>27</sup>

This kind of reasoning is rejected by those who see the need for the government to remain neutral with regard to religion. John Swomley, for instance, contends that public education in America operates without any humanistic bias against religion. He says that many religious fundamentalists assume that secular humanism rejects a belief in God. They observe that the schools make no effort to teach students to believe in God, so they wrongly conclude that the schools are teaching secular humanism. Swomley then draws an interesting analogy. He points out that Buddhism does not include a belief in a personal god either, but one would not therefore conclude that the schools are teaching Buddhism simply because they are not instructing the students in the Judeo-Christian view of God.<sup>28</sup>

As James David Knight points out, the accusation that secular humanism pervades the public schools is somewhat inconsistent with the claim made by the religious right that 94 percent of Americans believe in God. If such a vast number believe in God, then why are the schools condemned as dens of godless secular humanism?<sup>29</sup> As James Dunn has so appropriately asked, are all public school teachers being selected from the 6 percent who supposedly do not believe in God? If not, then why should there be such a phobia that the teachers are somehow the purveyors of atheistic humanism?<sup>30</sup>

Finally, related to the view that secular humanism has taken over the public schools is the belief that God has been removed from the schools and that He therefore must be returned to the schools. Donald Shriver considers it irrational for proponents of school prayer to speak of "putting God back into the public schools." He considers such thinking to reflect a feeble understanding of the biblical God. "God," he says, "cannot be brought to earth by our rituals. God does not 'need' our prayers to be in charge of any part of the universe."<sup>31</sup> To speak of putting God back in the schools assumes that someone had the power to remove Him in the first place. As Dunn has observed, "It's as if we had the power to dump the Heavenly Father in a wheelbarrow and cart him around."<sup>32</sup> But even if it is granted that God has been "removed" from the public schools and must therefore be readmitted, the real question becomes, Whose version of God will be readmitted? Most schools, in an effort to respect the religious diversity among their students, would inevitably introduce a generic, lowest common denominator version of God. This result, again, would further trivialize religion.

Third, many advocates of moments of silence claim that some form of religious activity in public schools is needed to stem the tide of rising immorality in America. They frequently point the finger at the Supreme Court for "removing" God from the schools and ushering in a period of moral decline. Christian-nation advocate David Barton, for example, claims that the *Engel* and *Schempp* decisions of the early 1960s have destroyed American society: "Following the judicial rejection of natural law and the embracing of relativism, the United States has become number

one in the world in violent crime, divorce, illegal drug use; number one in the western world in teenage pregnancies; and number one in the world in illiteracy. . . . By removing divine law, the Court removed the source of our previous stability."<sup>33</sup>

It should be noted that neither natural law nor divine law (which Barton seems to use interchangeably) have ever been officially enshrined as the bases for American law, nor have they ever been rejected; they exist alongside other modes of thought, philosophies, and worldviews that have always served the formulation of law and public policy in the United States. What Barton means, of course, is that the removal of the traditional practices of teacher-led prayer and Bible reading, observed in a nation for many years on the strength of a cultural Christian hegemony, are indications that the nation no longer chooses to be governed by Christian ideals. What he fails to realize is that the federal courts never had the power to favor Christian practices over non-Christian ones, due to Establishment Clause constraints. And he also fails to recognize that by the time of the *Engel* and *Schempp* decisions, a dozen states had already banned teacher-led prayer and Bible readings, either by statute or judicial decision. The Supreme Court was merely adopting the view which was already becoming prevalent among the states, a view necessitated not only by the Establishment Clause, but by the need to protect the growing number of non-Christian public school students against coercive religious discrimination.

That is not the main point to be made here, however. The point is that it is somewhat naive to blame the current moral decline on the Supreme Court decisions of the 1960s.

Fourth, it is rare to find Jews, Buddhists, Hindus, Muslims, and members of other minority communities of faith who favor moments of silence. Why is this? First, members of minority religions fear that the decidedly Christian majority that characterizes most schools across America will use the moment-of-silence observance as a steppingstone to more specifically Christian prayer and religious activities. In many sectors of the country, Christians are hostile toward public education and do not mince words about their intention to "reclaim" the nation's

schools. While Jerry Falwell could not be said to speak for all Christians, his sentiments are shared by many: "I hope I live to see the day when, as in the early days of our country, we won't have any public schools. The churches will have taken them over again and Christians will be running them. What a happy day that will be."<sup>34</sup> Given such an attitude, it is little wonder that members of non-Christian religions generally support the elimination of school-sponsored religious exercises in the schools. The outlooks of religious minorities, as well as nonbelievers, should be respected. The public schools belong to them too.

The nation's public schools, from the time of their formation in the first half of the nineteenth century, have been looked upon as a means to unite citizens in educational concerns that are common to all the people, not as a means to divide the people based on their religious differences. The commitment to the separation of church and state, as articulated most forcefully in *Everson*, has for all of the nation's history been good, not bad, for America because it has protected the sanctity of religion in the private sphere without allowing it to become a divisive force in the public sphere. In the long term, legislation that sanctions government-initiated religious activities such as moments of silence will tend only to divide the American people.

Members of religious minorities also tend to oppose moments of silence for a second important reason. Moments of silence, as opportunities for spiritual reflection or meditation, often carry little meaning for some religious traditions. In the Islamic tradition, for example, there are several forms of prescribed prayer. The "Salat" ritual calls for prayer five times each day, performed while facing Mecca, preferably while kneeling. Each of the five prayers should generally be of at least five to ten minutes in length, and typically involve reciting verbally verses from the Quran and invoking one of God's holy names. Obviously, this form of prayer could hardly be executed within the typical moment-of-silence framework.<sup>35</sup> Many school administrators permit Muslim students to be excused to a safe, private area at appropriate times during the day for the offering of such mandatory prayers.<sup>36</sup> Some Muslims also engage in the "Dhikr" form of prayer, which is the glorifying of Allah with certain fixed phrases, repeated in a

ritual order, either aloud or in the mind, with special breathings and physical movements. While "Dhikr" might be observed in a moment of silence, it would not be without some difficulty.<sup>37</sup> "Wird" prayer is also a regular form of Islamic prayer, involving private prayer to Allah at a definite time of day or night. While this form of prayer might be possible during a moment of silence, it would still break with traditional "Wird" prayers which involve verbal recitations lasting far longer than one minute in duration.<sup>38</sup>

There are today approximately six million Muslims living in the United States. While many Muslim children attend special Islamic schools, many attend public schools. The worship practices of these children, as well as those of other religious traditions,<sup>39</sup> are often overlooked by school officials who are familiar only with worship, meditation, and prayer practices within the more familiar Judeo-Christian tradition. If legislatures and school officials intend for moments of silence to be an outlet for spiritual reflection by children representing the ever-broadening range of religious practices in the United States, it seems they will have to plan such observances with more information than typically is gathered.

Fifth, proponents of moments of silence frequently make the argument that a time for silent prayer is needed because the students presently have no opportunities to exercise their faith. If this were true, it would be far more difficult to be opposed to moments of silence. It is not true, however, because students have many opportunities to exercise their faith in the public school setting. The Equal Access Act of 1984 allows for Bible and other kinds of religious clubs to meet before or after the school day in secondary schools. Further, it has appropriately been upheld by the Supreme Court,<sup>40</sup> the justices maintaining that since the Act requires religious activity to be student-initiated and student-run, without school officials' oversight and direction, activities consistent with the requirements of the Act are protected by the Free Speech and Free Exercise Clauses and do not violate the Establishment Clause.

Moreover, students are free to pray privately any time they choose: before, during, or after school. They are free to read their Bibles, share their faith, pray with other students, distribute

religious tracts, or sing religious songs provided these activities do not disrupt other school activities. All of these activities are protected by the Free Exercise Clause and the Religious Freedom Restoration Act (1993). As President Bill Clinton noted in a speech delivered on July 12, 1995, the public schools are in no way a "religion free zone."<sup>41</sup>

Unfortunately, what often fuels the movement for more religious activity in the public schools is the widespread myth that all religion is banned inside school walls. Admittedly, many teachers and administrators are confused about what schools may and may not do regarding religion, and tend, therefore, to err on the side of excluding religion from the classroom. While it is indeed unfortunate that a few teachers are sometimes hostile toward religion and go too far in excluding lawful religious acts of students, the great majority of teachers are respectful toward students of all faith traditions, and wish to accommodate those students' religious needs insofar as the law will allow. There are encouraging signs these days that many school districts are taking seriously the need to understand the nuances in the law regarding student religious activity and to familiarize their teachers with what the law allows and disallows. Fortunately, this development comes at a time when the blurred lines between student-initiated religious exercises that are protected by the Free Exercise Clause and government-promulgated religious activities that are prohibited by the Establishment Clause are coming into sharp focus. Some gray areas, such as prayer at commencement exercises, still exist, but the courts are increasingly providing much-needed clarification on what kinds of religious activities are constitutional.

It is imperative that students learn that religion is an important part of the fabric of life for most people, inseparable from the other dimensions of life. The public schools should never foster the belief that religion is taboo or in some way to be discouraged or suppressed. Public schools have the responsibility to avoid giving students a distorted view of the (highly religious) culture around them, and thus it is important that schools locate the balance between respecting private religious expression without becoming official sponsors of religious activity.

#### IV. Conclusion

Twenty-three states now permit moments of silence in their public schools. These states assume, probably correctly, that the practice is constitutional pursuant to the guidelines of the *Jaffree* case. In the best tradition of *Everson*, these states take advantage of a wide "gate" in Jefferson's "wall" that permits the moment-of-silence practice. But *Everson* and its progeny do not mandate that every gate be utilized. It must be remembered that twenty-seven states, in what they deem the best interest of their youth, have chosen to keep the *Jaffree* gate locked. For them, a legal practice is not necessarily a good practice.

Five decades have elapsed since *Everson* was decided. Separationists rejoice that its "wall of separation" framework remains intact, although most would never suggest that erecting an absolutely impenetrable wall serves the interest of religious liberty. This author joins those who believe that *Everson* sanctioned the opening of gates in the wall from time to time, but contends that the Court should not have carved a new gate in the wall for moments of silence. No matter how they are advertised, moment-of-silence observances make the public school the purveyor of religion, the agent of encouraging students, every day, to be religious, something the Supreme Court, in *Everson* and many times since, has said the Constitution does not permit. The inescapable conclusion, nevertheless, is that *Everson* created a flexible framework for protecting religious liberty, and *Jaffree* is proof of that. This makes a remembrance, even a celebration, of *Everson's* fiftieth anniversary an altogether fitting exercise.

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<sup>1</sup>330 U.S. 1 (1947).

<sup>2</sup>472 U.S. 38 (1985).

<sup>3</sup>*Walz v. Tax Commission*, 397 U.S. 664 (1970) at 669.

<sup>4</sup>See Ala. Code § 16-1-20 (1985); 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); Fla. Stat. § 233.062 (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.

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Educ. Code Ann. § 7-104 (1985); Mass. Gen. Laws Ann., ch. 71 § 1A (1982); Mich. Comp. Laws Ann. § 380.1565 (West 1984-1985); N.J. Stat. Ann. § 18A: 36-4 (West Supp. 1984-1985); N.M. Stat. Ann. § 22-5-4.1 (1981); N.Y. Educ. Law § 3029-a (McKinney 1981); N.D. Cent. Code § 15-47-30.1 (1981); Ohio Rev. Code Ann. § 3313.60.1 (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 § 22.1-203 (1980); W. Va. Const., Art. III, § 15-a. For a useful chart comparing the various statutes, see Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 *N.Y.U. L. Rev.* (1983): 364, 407-08. See also Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 *Harv. L. Rev.* (1983): 1874; and Rodney K. Smith, "Now Is the Time for Reflection: *Wallace v. Jaffree* and Its Legislative Aftermath," 37 *Alabama Law Review* (1986): 345.

<sup>5</sup>370 U.S. 421 (1962).

<sup>6</sup>374 U.S. 203 (1963).

<sup>7</sup>The prayer read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers, and our country."

<sup>8</sup>*Engel* at 425.

<sup>9</sup>*Ibid.* at 432.

<sup>10</sup>*Schempp* at 280-81 (Brennan, J., concurring).

<sup>11</sup>Compare *Gaines v. Anders*, 421 F.Supp. 337 (D. Mass. 1976) (upholding statute) with *May v. Cooperman*, 572 F.Supp. 1561 (N.D. N.J. 1983) (striking down statute); and *Duffy v. Las Cruces Pub. Schools*, 557 F.Supp. 1013 (D.N.M. 1983) (striking down statute).

<sup>12</sup>*Jaffree* at 57.

<sup>13</sup>403 U.S. 602 (1971). The second prong of the text requires that a statute not have the primary effect of either advancing or prohibiting religion, and the third prong requires that a statute cause no excessive entanglement between religion and government.

<sup>14</sup>*Jaffree* at 43.

<sup>15</sup>*Ibid.* at 56.

<sup>16</sup>*Ibid.* at 66.

<sup>17</sup>*Ibid.* at 76.

<sup>18</sup>*Ibid.*

<sup>19</sup>The fifteen states that retained their statutes were Connecticut, Florida, Illinois, Indiana, Kansas, Maine, Maryland, Michigan, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Tennessee, and Virginia. Those revising their statutes were Alabama, Arkansas (but repealed in 1993), Delaware, Georgia, Louisiana, Massachusetts, and New Mexico. Those that had their statute invalidated were Arizona (repealed, *Ariz. Rev. Stat. Ann.*, Ch. 268, § 26, 1995), New Jersey (declared unconstitutional in *May v. Cooperman*, 780 F.2d 240 (1985)), and West Virginia (declared unconstitutional in *Walter v. W.V. Bd of Education*, 610 F.Supp. 1169 (SD. W.Va. 1985)). Those passing

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new statutes were South Carolina (So. Car. Stat. § 59-1-443 (West, 1995) and Texas (Tex. Ann. Stat. § 25.082 (West, 1995)).

<sup>20</sup>Tex. Ann. Stat. § 25.082 (1995).

<sup>21</sup>N.M. Stat. Ann. 22-27-3 (1995). "Students in the public schools may voluntarily engage in student-initiated moments of silent meditation."

<sup>22</sup>John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971).

<sup>23</sup>See, for example, Bruel Ackerman, *Social Justice in the Liberal State* (New Haven, Conn.: Yale University Press, 1980); Thomas Nagel, "Moral Conflict and Political Legitimacy," *Philosophy and Public Affairs* 16 (Summer 1987): 232; and Kent Greenawalt, *Religious Convictions and Political Choice* (New York: Oxford University Press, 1988).

<sup>24</sup>Walter Dellinger, "The Sound of Silence: An Epistle on Prayer and the Constitution," *Yale Law Journal* 95 (1986): 1637.

<sup>25</sup>Norman Redlich, "Separation of Church and State: The Burger Court's Tortuous Journey," *Notre Dame Law Review* 60 (1985): 1136.

<sup>26</sup>James David Knight, "Christian Ethics and Responsible Citizenship in Church-State Affairs: The Debate Over Prayer in the Public Schools," Ph.D. Diss., Duke University, 1986, 111.

<sup>27</sup>Jerry Falwell, *Listen, America!* (Garden City, N.Y.: Doubleday, 1980): 211, 218.

<sup>28</sup>John Swomley, Jr., "Secular Humanism—Neutral Ground for Teaching Values," *Report from the Capital* 38 (July-August 1983): 10.

<sup>29</sup>Knight, "Christian Ethics and Responsible Citizenship in Church-State Affairs," 98.

<sup>30</sup>James M. Dunn, "Reflections," *Report from the Capital* 37 (November-December 1982): 15.

<sup>31</sup>Donald W. Shriver, Jr., "Against School Prayer," *New York Times*, 7 October 1982, A27; quoted in Knight, "Christian Ethics," 98.

<sup>32</sup>Quoted in Knight, "Christian Ethics," 99.

<sup>33</sup>David Barton, *The Myth of Separation*, 3rd ed. (Aledo, Texas: Wallbuilders Press, 1992), 217. For a similar argument that the removal of God from the classroom has caused moral decay, see D.J. Mattheis, "Religion and Education: A Response," *Educational Leadership* 39 (1981): 209.

<sup>34</sup><sup>35</sup>Quoted in Rob Boston, "Public Schools Under Siege," *Church and State* 47 (April 1994): 4.

<sup>35</sup>Akbar S. Ahmed, *Living Islam: From Samarkand to Stormoway* (New York: Facts on File, Inc., 1994), 40.

<sup>36</sup>For a good discussion of Muslim religious observance in public schools, see "The Needs of Muslim Children in Public Schools," *Religion and Education* 22 (Fall 1995): 90.

<sup>37</sup>"Dhikr," in *The Encyclopaedia of Islam* (Leiden: E.J. Brill, 1979), II: 75.

<sup>38</sup>"Wirt," in *ibid.*, 634.

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<sup>39</sup>For a statement on moments of silence as generally compatible with Buddhism, see José Ignacio Cabezón, "The Case for Silence: A Buddhist Perspective on Prayer in Public Schools," *Religion and Education* 22 (Fall 1995): 72.

<sup>40</sup>*Westside v. Mergens*, 496 U.S. 226 (1990).

<sup>41</sup>President Clinton's speech is reprinted in *Liberty* 90 (November/December 1995): 20-22.