NOTES

A Moment of Silence: A Permissible Accommodation Protecting the Capacity to Form Religious Belief

INTRODUCTION

The United States Supreme Court decisions prohibiting organized prayer[1] and Bible reading[2] in public schools have provoked considerable public debate and have resulted in state legislatures enacting statutes providing for students' observance of a "moment of silence" at the beginning of the school day.[3] Commentators who have considered the constitutionality of state moment of silence statutes have not reached uniform conclusions.[4] Lower courts have struck down several of these statutes under constitutional challenge as being an establishment of religion in violation of the first amendment.[5] The

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1. Engel v. Vitale, 370 U.S. 421 (1962).

2. Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

3. *See* ALA. CODE § 16-1-20.1 (Supp. 1985); ARIZ. REV. STAT. ANN. § 15-522 (Supp. 1984); ARK. STAT. ANN. § 80-1607.1 (Supp. 1985); CONN. GEN. STAT. ANN. § 10-16a (West 1985); DEL. CODE ANN. tit. 14, § 4101 (1981) (as interpreted in Op. Att'y Gen. 79-I 011 (1979)); FLA. STAT. ANN. § 233.062 (West Supp. 1985); GA. CODE ANN. § 20-2-1050 (1982); ILL. ANN. STAT. ch. 122, § 771 (Smith-Hurd 1985); IND. CODE ANN. § 20-10.1-7-11 (Burns 1985); KAN. STAT. ANN. § 72.5308a (1980); LA. REV. STAT. ANN. § 17:2115 (West 1982); ME. REV. STAT. ANN. tit. 20-A, § 4805 (1983); MD. EDUC. CODE ANN. § 7-104 (1985); MASS. ANN. LAWS ch. 71, § 1A (Michie/Law. Co-op. Supp. 1985); MICH. COMP. LAWS ANN. § 380.1565 (West Supp. 1985); N.J. REV. STAT. § 18A:36-4 (Supp. 1983); 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 (Page 1985); PA. STAT. ANN. tit. 24, § 15.1516.1 (Purdon Supp. 1985); R.I. GEN. LAWS § 16-12-3.1 (1981); TENN. CODE ANN. § 49-6-1004 (1983); VA. CODE § 22.1-203 (1985); *see also* Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis,* 58 N.Y.U. L. REV. 364, 407-08 (1983) (comparing the provisions contained in these statutes).

4. Commentators favoring a moment of silence include L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 829 (1978); Choper, *Religion in the Public Schools: A Proposed Constitutional Standard,* 47 MINN. L. REV. 329, 371 (1963); Freund, *The Legal Issue,* in RELIGION AND THE PUBLIC SCHOOLS 23 (1965); Kauper, *Prayer, Public Schools and the Supreme Court,* 61 MICH. L. REV. 1031, 1041 (1963); Comment, *Accommodating Religion in the Public Schools,* 59 NEB. L. REV. 425, 450-54 (1980); Note, *Religion and the Public Schools,* 20 VAND. L. REV. 1078, 1092-93 (1967). Commentators finding fault with a moment of silence include Drakeman, *Prayer in the Schools: Is New Jersey's Moment of Silence Law Constitutional?,* 35 RUTGERS L. REV. 341 (1983); Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools,* 96 HARV. L. REV. 1874 (1983); Note, *supra* note 3.

5. *See* May v. Cooperman, 780 F.2d 240 (3d Cir. 1985); Duffy v. Las Cruces Pub. Schools, 557 F. Supp. 1013 (D.N.M. 1983); Beck v. McElrath, 548 F. Supp. 1161 (M.D. Tenn. 1982), *appeal dismissed, vacated, remanded sub nom.* Beck v. Alexander, 718 F.2d 1098 (1983); Opinion of the Justices to the House of Representatives, 387 Mass. 1201, 440 N.E.2d 1159 (1982). *But see* Gaines v. Anderson, 421 F. Supp. 337 (D. Mass. 1976) (upholding constitutionality of moment of silence statute as an accommodation of religion).

Supreme Court addressed the constitutionality of the Alabama moment of silence statute[6] in *Wallace v. Jaffree*[7] and, in a deeply divided decision, found the statute to be unconstitutional as a "law respecting the establishment of religion within the meaning of the First Amendment."[8] The Court's decision does not, however, render other states' moment of silence statutes constitutionally infirm.[9]

This Note will explore the role that religion should play in public school curricula under a principle of permissive government accommodation of religion. This accommodation principle is a resolution of the inherent tension between the free exercise and establishment clauses of the first amendment.[10] To reflect this accommodation principle the Court's current three-part test[11] for establishment clause cases, which the majority relied upon in *Jaffree,* will be replaced with an accommodation analysis which balances competing free exercise and establishment clause interests in the public school environment.[12] Under the accommodation analysis, state statutes permitting a moment of silence constitute a constitutionally permissive accommodation of religion based upon their inherent free exercise gains in the secular public school environment.

Section I of this Note will eonsider the inherent hostility toward traditional theistic religions that results from maintaining a "wall of separation" between church and state. Analysis of the *Jaffree* deeision reveals that the majority opinion perpetuates this hostility by failing to utilize an accommodation analysis. Section II will examine the failure of other Supreme Court decisions to articulate and consistently apply an aecommodation principle. Section III will detail free exercise and establishment clause values and develop an accommodation analysis. Section IV will apply this accommodation analysis to a statute permitting or requiring a moment of silence. Because the free exercise gain derived from a moment of silence exercise exceeds any religious establishment dangers, this Note concludes that the exercise is a permissible state accommodation of religion.

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6. ALA. CODE § 16-1-20.1 (Supp. 1985).

7. 105 S. Ct. 2479 (1985).

8. *Id.* at 2482.

9. The *Jaffree* majority stated that "[t]he legislative intent 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 school day." *Id.* at 2491. Similarly, Justice O'Connor concurred, stating, "I write separately . . . to explain why moment of silence laws in other States do not necessarily manifest the same infirmity." *Id.* at 2496 (O'Connor, J., concurring).

10. U.S. CONST. amend. I.

11. In order to be held constitutional under the establishment clause a statute must, first, have a secular legislative purpose, second, have a primary effect which neither advances nor inhibits religion and, third, not foster excessive government entanglement with religious institutions. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (hereinafter referred to as the *Lemon* test).

12. *See infra* notes 142-67 and accompanying text.

I. THE DILEMMA OF RELIGION IN THE PUBLIC SCHOOLS

A. *Separation of Church and State*

The religion clauses of the first amendment require that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ."[13] All of the first amendment rights (including the religion clauses) are a reflection of the political beliefs of the Framers of the Constitution. In principle, their objective was to ensure that individuals be treated as the central unit of political and social life, free to worship, develop and express themselves as they see fit.[14]

A tension exists between the two clauses which arises from the requirements that legislation not tend to establish or impermissibly aid religion, yet not inhibit religious practice and belief.[15] The twin concerns of the religion clauses often leave the Supreme Court with discretion to choose between competing values.[16] In no area are these competing values more at odds than in the area of religious involvement in public education.[17]

Regarding the accommodation of religious practice and belief in public school curricula, the Supreme Court has held that a wall of separation is to be maintained between church and state[18] and that the use of the state's compulsory public school program to disseminate religious doctrines breaches this wall.[19] In this regard, Justice Frankfurter stated that "[the] public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny." As such, it is the "Court's duty to enforce this principle [wall of separation] in its full integrity."[20]

Exclusion of religious belief and values from public education is constitutionally problematical, despite Supreme Court decisions to the contrary. Public education, by nature of its function, occupies a large portion of a child's life and is responsible for much of the child's ethical and moral

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13. U.S. CONST. amend. I. Cantwell v. Connecticut, 310 U.S. 296 (1940) first held the free exercise clause applicable to the states. Everson v. Board of Educ., 330 U.S. 1 (1947) first held the establishment clause applicable to the states.

14. *See* Arons & Lawrence, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309, 311-12 (1980) (citations omitted).

15. *See, e.g.*, L. TRIBE, *supra* note 4, § 14-6, at 815.

16. *See infra* notes 85-93 and accompanying text. The free speech or equal protection issues that may also arise in the context of accommodating religion in the public schools reach beyond the scope of this Note.

17. Americans are concerned that our public schools be kept free of sectarianism while at the same time not be dominated by secularism. 2 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 497 (1950).

18. Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

19. McCollum v. Board of Educ., 333 U.S. 203, 212 (1948).

20. *Id.* at 231 (Frankfurter, J., concurring).

development.[21] Critical education must address questions concerning the "meaning of existence and the sources and nature of human values."[22] One commentator has suggested that public schools should be value-free or neutral, but "elements of human experience are value-free only if they are totally devoid of meaning."[23] The Court has, itself, repeatedly recognized the role of public education in conveying values to its students.[24]

The absence of all forms of theistic religion from public schools is constitutionally problematical for at least three reasons. First, the exclusion of religion from educational curricula is itself a negative form of religious training. Exclusion of religious values and beliefs implies that religion is unimportant for an intellectual and moral foundation.[25] One commentator has observed that "[if] the schools are regarded as helping to shape the child's total world, then the exclusion of religion cannot help but shape a religionless world. At the most formative period of their lives, children are in effect taught that religion is unimportant or even perhaps false."[26]

This hostility toward religion arising from its exclusion from public schools is but one particularly acute example of such hostility throughout our society. Initially, the Framers' principle prohibiting an establishment of religion coincided with and applied to a federal government of limited powers. This principle has subsequently been applied to the states through the fourteenth amendment.[27] With the expansion of state and federal government regulation and contact with individuals came an increase in the government sphere of influence at the expense of religious influence.[28] This increase in influence of government secularism is constitutionally suspect as it not only tends to disestablish religion but also burdens the free exercise thereof.[29]

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21. *See, e.g.*, Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II, The Nonestablishment Principle,* 81 HARV. L. REV. 513, 561 (1968); Katz, *Freedom of Religion and State Neutrality,* 20 U. CHI. L. REV. 426, 438 (1953).

22. Giannella, *supra* note 21, at 561.

23. R. MCMILLAN, RELIGION IN THE PUBLIC SCHOOLS 116 (1984).

24. In *Brown v. Board of Educ.* the Court stated:

> Today, education is perhaps the most important function of state and local governments. . . . [I]t is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

347 U.S. 483, 493 (1954) (citations omitted); *see also* Ambach v. Norwick, 441 U.S. 68, 76 (1979) ("preservation of the values on which our society rests"); Arons & Lawrence, *supra* note 14; Note, *The Myth of Religious Neutrality by Separation in Education,* 71 VA. L. REV. 127, 161 (1985).

25. J. BENNETT, CHRISTIANS AND THE STATE 236-37 (1958).

26. Hitchcock, *Church, State and Moral Values: The Limits of American Pluralism,* 44 LAW & CONTEMP. PROBS., Spring 1981, at 3, 13.

27. *See supra* note 13.

28. Giannella, *supra* note 21, at 513-14.

29. *See supra* notes 25-26 and accompanying text.

Second, exclusion of religion is problematical because it creates an ideological void at the time when children are developing their moral and ethical beliefs.[30] The curricula's emphasis upon objectivity and empiricism for the development of knowledge undermines the subjective approaches to knowledge.[31] In the absence of religious ideology, the beliefs of the instructor[32] or the creation of a secular ideology may be imposed to facilitate moral and philosophical growth.[33]

Third, the absence of all religious training and exposure creates an educational and cultural void in public school education. The Supreme Court has made reference in dicta to programs containing objective secular instruction of religion and has in principle approved such programs.[34]

Because the exclusion of religion may carry not only an implied message of the inferiority of religious belief and practice but may also create a void in educational curricula, public schools create a hostile environment for children to maintain and exercise their religious values. Furthermore, the exclusion of religion also creates the opportunity for the instructor or school administration to present alternative idcology which may contradict religious values or beliefs without providing for the corresponding examination of those religious values or beliefs. Religious beliefs initiated and cultivated wholly outside the public school curricula can subsequently be impaired as students' *capacities* to form religious belief are reduced. The impairment of children's capacities to form religious belief serves to burden the free exercise of religion no less than the denial of religious liberty for an adult.

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30. R. McMILLAN, *supra* note 23, at 107.

31. The secularization of public schools has resulted in a shift in emphasis from "values to knowledge and techniques." J. BOWER, MORAL AND SPIRITUAL VALUES IN EDUCATION 9 (1952).

32. R. McMILLAN, *supra* note 23, at 110-11. *See also* Note, *supra* note 24, at 164 (Any attempt to remove "value inculcation" from public schools "would effectively eliminate all the 'why' questions from the public school curriculum, as well as all investigations of normative hypotheses. It is doubtful that teachers could avoid answering such questions; if they did the classroom would become a sterile atmosphere where the development of children into mature, thinking, responsible individuals would be minimal at best.").

33. Humanistic Education is a secular response to the exclusion of religious values from public education and is an attempt to restore a proper balance between objective scientific methodology and subjective value belief. Comment, *Humanistic Values in the Public School Curriculum: Problems in Defining an Appropriate "Wall of Separation,"* 61 NW. U.L. REV. 795, 804 (1966). For a useful discussion of the goals and methods of Humanistic Education see Moskowitz, *The Making of the Moral Child: Legal Implications of Values Education,* 6 PEPPERDINE L. REV. 105 (1978); Note, *The Establishment Clause, Secondary Religious Effects, and Humanistic Education,* 91 YALE L.J. 1196 (1982).

34. Abington School Dist. v. Schempp, 374 U.S. 203, 225 (1963) (Clark, J.); McCollum v. Board of Educ., 333 U.S. 203, 235-36 (1948) (Jackson, J., concurring). The consideration of the constitutional and practical difficulties in implementing such an objective program is beyond the scope of this Note. For a useful discussion of the complexities of objective religious education see R. McMILLAN, *supra* note 23.

B. Wallace v. Jaffree: *A Court Unable to Resolve the Dilemma*

The Supreme Court's decision in *Wallace v. Jaffree*[35] is more noteworthy for the dissension within the Court as to the proper analysis to be employed in establishment clause cases than for the narrow factual determination upon which the majority decision was founded.[36] Although the majority applied the *Lemon* test,[37] its interpretation was "reexamined and refined" in concurring opinions.[38] Justices White and Rehnquist and Chief Justice Burger, in dissent, did not feel constrained to rely on the *Lemon* test in evaluating the Alabama statute.[39]

The plaintiff, Ishmael Jaffree, brought suit in federal district court on behalf of his three minor children challenging the constitutionality of three Alabama statutes.[40] The district court upheld Alabama Code § 16-1-20,[41] enacted in 1978, which provided for a moment of silence.[42] Jaffree did not appeal that determination. The district court also upheld the constitutionality of Alabama Code § 16-1-20.1,[43] enacted in 1981 and providing for "meditation or voluntary prayer," and Alabama Code § 16-1-20.2,[44] enacted in 1982 and providing for audible prayer composed by the state, notwithstanding the district court's finding that these statutes were an effort on the behalf

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35. 105 S. Ct. 2479 (1985).
36. *See infra* notes 49-51 and accompanying text.
37. 105 S. Ct. at 2489.
38. *Id.* at 2497 (O'Connor, J., concurring); *id.* at 2493 (Powell, J., concurring).
39. *Id.* at 2507 (Burger, C.J., dissenting); *id.* at 2508 (White, J., dissenting); *id.* at 2518 (Rehnquist, J., dissenting).
40. *Id.* at 2481-82.
41. ALA. CODE § 16-1-20 (Supp. 1985) provides:

> At the commencement of the first class each day in the first through the sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in.

42. Jaffree v. James, 544 F. Supp. 727, 732 (S.D. Ala. 1983).
43. ALA. CODE § 16-1-20.1 (Supp. 1985) provides:

> 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 each 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.

44. ALA. CODE § 16-1-20.2 (Supp. 1985) provides:

> From henceforth, any teacher or professor in any public cducational institution within the state of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead the willing students in the following prayer to God:
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> Almighty God, you alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen.

of Alabama to encourage religion, because the district court concluded that Alabama retained the power to establish a religion.[45] The Eleventh Circuit Court of Appeals concurred with the district court finding of religious purpose but held both statutes unconstitutional.[46] The Supreme Court affirmed the unconstitutionality of § 16-1-20.2[47] and in 1985 was presented with the sole issue of whether the Alabama statute authorizing a moment of silence for "meditation or voluntary prayer" was a "law respecting the establishment of religion within the meaning of the First Amendment."[48]

Justice Stevens, writing for the Court, characterized the case as one involving establishment clause concerns and applied the *Lemon* test requirements that a statute must have a secular legislative purpose, a primary effect which neither advances nor inhibits religion, and that it not foster excessive government entanglement with religion.[49] Upon finding that Alabama's actual purpose was to advance religion, the Court found it unnccessary to consider the effcct of, or possible entanglement caused by, the statute.[50] Justice Stevens affirmcd the court of appeals' finding of religious purpose based upon the addition of the words "or voluntary prayer" to the 1978 statute providing for silent meditation and certain statements contained in the legislative history as manifesting government endorsement and promotion of prayer.[51]

Justice Powell concurred in the Court's opinion and judgment and, in responding to criticism of the *Lemon* test, sought to further explain the purpose requirement.[52] Under the purpose requirement, a statute is not required to have "exclusively secular objectives" but the secular legislative purpose must be sincere.[53] In the present case, however, Alabama's purpose in enacting the second moment of silence statute was found to be solely religious in nature.[54] If Alabama had been able to present a secular purpose behind its statute, Justice Powell would have voted to uphold it.[55]

Justice O'Connor, concurring only in judgment, renewed her proposed refinement of the purpose and effect requirements of the *Lemon* test[56] which she first introduced in *Lynch v. Donnelly*.[57] This refinement is based upon

45. Jaffree v. Board of School Comm'rs, 554 F. Supp. 1104, 1128 (S.D. Ala. 1983).
46. Jaffree v. Wallace, 705 F.2d 1526, 1535-36 (11th Cir. 1983).
47. Wallace v. Jaffree, 104 S. Ct. 1704 (1984).
48. *Jaffree,* 105 S. Ct. at 2482.
49. *Id.* at 2489-93.
50. *Id.* at 2490.
51. *Id.* at 2490-92. Chief Justice Burger vigorously criticized the majority's use of individual state senators' statements inserted into the Senate Journal *after* passage of the legislation as indicative of legislative intent. *Id.* at 2506 (Burger, C.J.). Justice O'Connor concurred on this point. *Id.* at 2500 (O'Connor, J.).
52. *Id.* at 2493-96 (Powell, J., concurring).
53. *Id.* at 2494.
54. *Id.*
55. *Id.* at 2495.
56. *See id.* at 2496, 2497 (O'Connor, J., concurring).
57. 104 S. Ct. 1355, 1366 (1984) (O'Connor, J., concurring).

the perception that the religious liberty protected by the establishment clause is "infringed when the government makes adherence to religion relevant to a person's standing in the political community."[58] The *Lemon* inquiry into the purpose and effect of a statute requires an examination of whether the purpose is to endorse religion and whether the effect is the conveyance of a message of government endorsement.[59] This endorsement test would permit government to acknowledge and consider religion when acting so long as government endorsement is avoided.[60] Applying this standard to the Alabama statute, Justice O'Connor concluded that the law "does more than permit prayer to occur during a moment of silence 'without interference' [rather] [i]t endorses the decision to pray during a moment of silence, and accordingly sponsors a religious exercise."[61]

Chief Justice Burger and Justice White, in dissent, did not feel compelled to apply the *Lemon* test as a standard of establishment clause values.[62] Justice Rehnquist, after a detailed consideration of the historical development of the religion clauses[63] concluded that the *Lemon* test lacked a "grounding in the history of the First Amendment" and represented a "determined effort to craft a workable rule from an historically faulty doctrine."[64]

Every opinion in the *Jaffree* decision recognizes that a state statute providing for a moment of silence may, under some circumstances, be constitutional.[65] Due to the absence of a satisfactory analytical framework, however,

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58. *Jaffree,* 105 S. Ct. at 2497 (O'Connor, J.).

> Direct government action endorsing religion or a particular religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

Id. (quoting *Lynch,* 104 S. Ct. at 1366).

59. *Id.*

60. *Id.*

61. *Id.* at 2502.

62. "The Court's extended treatment of the [*Lemon* test] . . . suggests a naive preoccupation with an easy, bright-line approach for addressing constitutional issues." *Id.* at 2507 (Burger, C.J.). "[I] would support a basic reconsideration of our precedents." *Id.* at 2508 (White, J.).

63. *Id.* at 2508-20 (Rehnquist, J., dissenting).

64. *Id.* at 2518.

> The Framers intended the Establishment Clause to prohibit the designation of any church as a "national" one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the "incorporation" of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson,* States are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory seetarian means.

Id. at 2520.

65. Writing for the Court, Justice Stevens recognized that "[t]he legislative intent to return

determining which statutory language or legislative history might provide for a constitutional, state-mandated moment of silence is not easily accomplished. The accommodation principle, with its foundation in prior Court decisions,[66] can provide a framework consistent with both the free exercise and establishment clauses.

II. CONSTITUTIONAL UNDERPINNINGS OF THE ACCOMMODATION PRINCIPLE

The accommodation principle arises out of the recognition that characterizing a statute[67] as raising establishment clause concerns can ignore competing free exercise values. Failing to consider the underlying principles of both clauses can exacerbate the tension between the two. The accommodation principle aims to maximize the objectives of both clauses by subtly applying the objectives of each to the challenged legislation. Under this constitutional standard exists an area of permissible accommodation within which a legislature remains empowered to facilitate the free exercise of religion through legislation. The Court's current methodology of characterizing a case as falling primarily under one clause fails to recognize permissible accommodation in many circumstances.

In order to define the parameters of permissive government accommodation, it will be necessary to consider Supreme Court decisions over the past thirty years. First, cases characterized as "free exercise cases" are discussed. Under the free exercise clause, the Court has required government accommodation of religion based on a perceived burden upon free exercise. Second, "establishment clause cases" are considered to illustrate that the Court has permitted permissive government accommodation of religion in public schools despite the principle that a wall of separation be maintained between church and state. Third, the Court's present establishment clause test will be explored and criticized for failing to consider free exercise principles.

Analysis of these cases will show that the Court has *required* government accommodation to protect the capacity to form religious belief. Furthermore, the Court has been unable to settle upon establishment clause analysis which properly reflects accommodation principles.

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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 school day." *Id.* at 2491. *See also id.* at 2493 (Powell, J., concurring); *id.* at 2496 (O'Connor, J., concurring).

66. *See infra* notes 67-116 and accompanying text.

67. Although this Note will refer to legislation, the accommodation principle will apply to all government action.

A. *Free Exercise and the Accommodation Requirement*

The free exercise clause "prohibits the proscription of any religious belief by the government."[68] The Supreme Court has defined this clause so as to obligate government to accommodate religious beliefs and practices.

In *Wisconsin v. Yoder*,[69] Wisconsin had enacted a statute which required school attendance until the age of sixteen. Amish parents were convicted of violating this statute for removing their children from school after the eighth grade[70] and implementing an informal system of vocational training.[71] The Court found that the statute violated the Amish parents' right to free exercise as protected by the first and fourteenth amendments.[72]

In granting the Amish parents this exemption the Court relied in great part upon the evidence tending to show that compulsory education after the eighth grade would impede Amish religious and vocational development and threaten the "continued survival of Amish communities."[73] The Court dismissed the state's claim that free exercise protection extended only to religious belief and held the first amendment extended its protection to religious practice.[74]

The nature of the free exercise burden recognized in *Yoder* is important because the Court granted free exercise protection against impediments to the formation of religious belief. The Court characterized the burden on free exercise by stating that "compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today."[75] Attendance at secondary school threatened the existence of Amish communities by obstructing the formation of Amish beliefs and values in their children. The Court in *Yoder* impliedly recognized that a burden upon the formation of religious belief can require government accommodation of religion in its school system to relieve the free exercise impediment.

This extension of free exercise protection to include the formation of theistic belief is central to the accommodation principle in the public school curricula. Absence of theistic religion from the public school curricula and the possible substitution of contrary secular ideology creates an environment

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68. J. NOWAK, HANDBOOK ON CONSTITUTIONAL LAW 871 (1978).
69. 406 U.S. 205 (1972).
70. *Id.* at 207.
71. *Id.* at 212.
72. *Id.* at 234.
73. *Id.* at 209.
74. *Id.* at 219-20. But, religious conduct can be subject to regulation under state police power. *Id.*
75. *Id.* at 218. "[S]econdary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child . . . at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith . . . ." *Id.*

which is hostile toward the formation of theistic belief. Government accommodation of theistic belief under such circumstances can be seen as permissive, if not required, in order to protect free exercise goals.

In *Sherbert v. Verner*[76] a Seventh-day Adventist was discharged from her employment and was, thereafter, unable to obtain comparable employment because she was unwilling to work on Saturday, her Sabbath.[77] Her claim for unemployment compensation was denied as she was found to have failed, without good cause, to accept "suitable work when offered"[78] under the South Carolina Unemployment Compensation Act.[79] The Court held that South Carolina could not constitutionally apply its Act so as to "constrain a worker to abandon [her] religious convictions respecting the day of rest"[80] and ordered the state to grant an exemption.

Sherbert was explicitly affirmed in *Thomas v. Review Board,*[81] a case with strikingly similar circumstances. In *Thomas,* a Jehovah's Witness refused an employment transfer and quit on the grounds that his religious beliefs forbid the manufacture of weapons.[82] His claim for unemployment compensation was similarly denied for termination without good cause.[83] Justice Burger found the coercive effect of having to choose between "fidelity to religious belief or cessation of work" to be indistinguishable from *Sherbert.*[84]

In *Sherbert* and *Thomas,* as in *Yoder,* the Court recognized that the free exercise clause can compel government accommodation of religion. In *Yoder,* the free exercise claim was based upon evidence that the state's mandatory education requirement threatened the continued existence of the Amish religion.[85] The Court characterized this burden as "the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent."[86] In *Sherbert* and *Thomas,* however, the free exercise claim was much less compelling. Those states' unemployment compensation requirements did not affirmatively impede religious practice, belief, or the formation of belief, nor did their requirements threaten a religious community's continued existence.

Justice Rehnquist, dissenting in *Thomas,* argued that the state's refusal to grant unemployment compensation imposed only an indirect burden on the exercise of religion.[87] The state did not discriminate against religion, and

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76. 374 U.S. 398 (1963).
77. *Id.* at 399.
78. *Id.* at 401.
79. *Id.* at 400-01.
80. *Id.* at 410.
81. 450 U.S. 707 (1981).
82. *Id.* at 710.
83. *Id.* at 712.
84. *Id.* at 717.
85. *See supra* note 75 and accompanying text.
86. 406 U.S. at 218.
87. 450 U.S. at 722-23 (Rehnquist, J., dissenting).

all applicants who quit for personal reasons would be denied unemployment compensation.[88] In these circumstances religious practice and belief were not made unlawful, just more expensive.[89]

The Court's dispute over the characterization of *Thomas* as a free exercise case underscores the fact that characterization often determines the resolution of the case without inquiring into competing values. Under the accommodation principle, the question of whether a free exercise burden is significant enough to be characterized as a free exercise case is eliminated. Rather, the degree of free exercise gain and loss created by government action will be a relevant consideration.

To further illustrate the difficulties inherent in the Court's characterization of *Sherbert* and *Thomas* as free exercise cases, it can be noted that both cases raise establishment clause issues. Because of the free exercise characterization, the Court gave rather minimal attention to establishment clause infringement resulting from impermissible aid to religion.[90] Justice Stewart, concurring in *Sherbert,* observed that the Court's insensitive approach to establishment clause consideration was contrary to traditional doctrine forbidding government support and assistance to religion.[91] Similarly, Justice Rehnquist argued in *Thomas* that if a state were to legislate an exemption for persons who quit their employment for religious reasons, as the Court ordered, this would violate the establishment clause.[92]

In these cases which the Court has characterized as free exercise, the Court has recognized that the first amendment may require government accommodation of religious practice, belief and formation of belief—even in the case of compulsory education. The Court has mandated accommodation despite a relatively small burden on free exercise and the existence of a potentially impermissible establishment. As it is the scope of this Note to explore the parameters of permissible accommodation, the inquiry must turn toward "establishment clause cases" and the existence of permissible accommodation in that context.[93] Analysis will show that characterization of

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88. *Id.* at 723.

89. *Id.* at 722 (citing Braunfeld v. Brown, 366 U.S. 599 (1961)) (Sunday closing laws do not violate the first amendment rights of Sabbatarians). This Note does not adopt the view of Justice Rehnquist that the free exercise clause should rarely be used to require special treatment for religion. His characterization of the case as not being a free exercise case is useful for illustrating the arbitrariness of characterizing many cases as being exclusively free exercise or establishment clause. The accommodation principle recognizes this fallacy and instead proposes to balance the free exercise and establishment clause gains and losses created by government action.

90. "[T]he extension of unemployment benefits . . . does not represent that involvement of religions with secular institutions which it is the object of the Establishment Clause to forestall." *Sherbert,* 374 U.S. at 409. *See also Thomas,* 450 U.S. at 719-20.

91. 374 U.S. at 414-15 (Stewart, J., concurring).

92. 450 U.S. at 726 (Rehnquist, J., dissenting).

93. *See infra* notes 94-116 and accompanying text.

a case as establishment clause is similarly problematical as it fails to consider free exercise claims.

B. Establishment Clause and Permissive Accommodation

Since 1947, the Supreme Court's interpretation of the establishment clause has caused great controversy. In *Everson v. Board of Education,*[94] the Court upheld a New Jersey statute permitting school districts to reimburse parents for the transportation costs incurred by their children in attending parochial schools. Justice Black, writing for the majority, considered the political events leading to the adoption of the first amendment and the writings of Madison and Jefferson and concluded that "[t]he First Amendment has erected a wall [of separation] between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[95] The Court, nevertheless, approved the program to avoid hindering the free exercise right to attend parochial school. The establishment clause did not "prohibit New Jersey from extending its General State law benefits to all its citizens without regard to their religious belief."[96]

Justice Rutledge, joined in dissent by three Justices, accepted the wall of separation metaphor but construed it to require a complete and permanent separation of the spheres of religious and government activity.[97] The very fact that the Court was able to agree on the governing principle and yet divided five to four brings to question the utility of this principle[98] and the appropriateness of characterizing this case as falling under the establishment clause. Implicit in the *Everson* decision is the recognition that free exercise would have been burdened by prohibition of this government accommodation. In addition, the wall of separation between church and state contains room for *legislative* accommodation of religion.

The following year the Court confronted a legislative attempt to accommodate religious instruction in the public schools. In *McCollum v. Board of Education,*[99] the Board of Education in Champaign County, Illinois had adopted a religious instruction release-time program in the public schools. Classes were held in public school and instructed by persons selected by an interdenominational council. Those students not attending religious instruction were sent to another area of the school but not released from school.[100]

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94. 330 U.S. 1 (1947).
95. *Id.* at 18.
96. *Id.* at 16.
97. *Id.* at 31-32 (Rutledge, J., dissenting).
98. *See, e.g.,* L. TRIBE, *supra* note 4, § 14-4, at 820. *See also* Lynch v. Donnelly, 104 S. Ct. 1355, 1359 (1984) (dismissing the wall of separation as "not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state").
99. 333 U.S. 203 (1948).
100. *Id.* at 205-07.

The Court found the in-school release-time program to be an unconstitutional establishment because: (1) tax-supported public school buildings were being used for the dissemination of religious doctrine and, (2) the government was granting religious groups an impermissible aid by the use of the compulsory public school system.[101]

Four years later, the Court, in *Zorach v. Clauson,*[102] considered the constitutionality of an out-of-school release-time program for religious instruction in the public schools. By written request, a student would be released from public school for religious instruction or service, but those not attending would remain in public school.[103] Writing for the Court, Justice Douglas distinguished *McCollum* in that the program in question did not involve religious indoctrination in the public classroom nor the expenditure of public funds.[104] In the present case, he wrote, the "public schools do no more than accommodate their schedules to a program of outside religious instruction."[105]

Justice Douglas made reference to the relationship that should exist between church and state in stating that "[we] sponsor an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma."[106] He further considered the hostility toward religion inherent in a separation of church and state and concluded that callous indifference toward religious groups is not required by the Constitution.[107]

The propriety of the Court's distinction between *Zorach* and *McCollum* as based upon the out-of-school program's absence of coercive effect and nonuse of public school classrooms[108] was subject to vigorous criticism in dissent and commentary. Regarding Justice Douglas' finding of an absence of coercive effect, Justice Jackson responded that the effectiveness of release-time over voluntary instruction hinges on the coercive nature of the program: "Public school serves as a temporary jail for a pupil who will not go to Church."[109]

The distinction between in-school and out-of-school release-time programs also seems to lack constitutional significance. One commentator has suggested two bases for the insignificance of the use of public property to accommodate religion.[110] First, in *Engel v. Vitale*[111] greater use of public property was

101. *Id.* at 212.
102. 343 U.S. 306 (1952).
103. *Id.* at 308.
104. *Id.* at 308-09.
105. *Id.* at 315.
106. *Id.* at 313.
107. *Id.* at 313-14.
108. *Id.* at 311.
109. *Id.* at 324 (Jackson, J., dissenting).
110. Choper, *supra* note 4, at 351-53.
111. 370 U.S. 421 (1962) (holding unconstitutional state composed audible prayer).

made as teachers led students in audible prayer, yet *McCollum* was not cited as requiring nonuse of public schools. Second, the equal protection clause may forbid discriminatory practice in denying religious organizations access to public property.[112]

Distinguishing the two cases on the observation that *McCollum*'s prohibition of in-school release-time was necessary to ensure equality of treatment for all religions is more appealing.[113] As Justice Frankfurter observed, "not even all the practicing sects . . . are willing or able to provide religious instruction."[114] This requirement that government activity be neutral as between religious sects has been vigorously upheld in a recent decision[115] and becomes an important consideration under accommodation analysis.[116]

C. *Dissatisfaction with the* Lemon *Test*

The absence of utility in the wall of separation metaphor is due in large part to its failure to articulate guidelines under which accommodation of religious practice and belief can be accomplished. As a result of the early establishment clause analysis, the Court has developed a three-part inquiry for analysis in establishment clause cases. The *Lemon*[117] test, which the majority applied in *Wallace v. Jaffree,*[118] requires that in order to survive establishment clause challenge a statute must, first, "have a secular legislative purpose," second, have a primary effect which "neither advances nor inhibits religion" and, third, "not foster excessive government entanglement" with religious institutions.[119] Legislation which violates any of these three tests must be struck down as violative of the establishment clause.[120]

The secular purpose requirement reflects the belief that religious freedom necessitates that government action "be justifiable in secular terms."[121] To find legislative purpose a court may consider statements of legislative purpose contained in the statute,[122] purpose implied from the statute[123] or legislative

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112. *See supra* note 16.
113. Choper, *supra* note 4, at 353-54.
114. 333 U.S. at 227 (opinion of Frankfurter, J.).
115. Larson v. Valente, 456 U.S. 228 (1982); see *infra* notes 148-51 and accompanying text for brief discussion of decision.
116. *See infra* notes 148-52 and accompanying text.
117. *Lemon,* 403 U.S. 602 (1971).
118. *Jaffree,* 105 S. Ct. 2479, 2489-93 (1985).
119. *Lemon,* 403 U.S. at 612-13 (citations omitted).
120. Stone v. Graham, 449 U.S. 39, 40-41 (1980) (per curiam).
121. L. TRIBE, *supra* note 4, § 14-8, at 835. If accommodation of religion is permissible under certain circumstances, governmental purpose to accommodate becomes constitutionally permissible as well. It is inconsistent that the Constitution seeks to protect the right to freely exercise religion and yet government actions taken for the purpose of advancing free exercise rights are unconstitutional under the establishment clause. *See* Johnson, *Concepts and Compromise in First Amendment Religious Doctrine,* 72 CALIF. L. REV. 817, 827 (1984).
122. *See* Hunt v. McNair, 413 U.S. 734, 741-42 (1973).
123. *See* Wolman v. Walter, 433 U.S. 229, 236 (1977).

history.[124] Courts have invalidated legislation for lack of secular purpose but only when there "was no question" that the statute was "motivated wholly by religious considerations."[125]

The requirement that a statute not have the primary effect of advancing or inhibiting religion invalidates legislation which aids all religions or prefers one religion over another.[126] The Court has disregarded the task of distinguishing between primary and secondary effects of promoting religion.[127] Rather, the Court has required that the challenged religious effect be remote, indirect and incidental.[128]

The no excessive entanglement requirement arises out of the desire to avoid government interference with religious institutions.[129] This prong of the *Lemon* inquiry recognizes that excessive entanglement may infringe upon the freedom of religious institutions, grant these institutions inordinate political power or create political divisiveness within the population based upon religious lines.[130]

The *Lemon* test, like its predecessor the "wall of separation" metaphor, does not give explicit recognition to the notion that complete separation of church and state is not required, nor is it sensitive toward free exercise values arising in establishment clause contexts. Nonetheless, the Court has used the *Lemon* test in cases concerning aid to religious schools and has upheld statutes permitting tax deductions for tuition, [131] and providing transportation,[132] secular school books,[133] and diagnostic services.[134]

The Court has justified government aid to religious schools by characterizing the aid as public welfare legislation.[135] One commentator has argued that the secular and religious functions of religious schools cannot be separated because the objective of those schools is to create a religious atmosphere and perspective throughout the curriculum.[136] As a result, aid to religious institutions may serve as a more direct establishment of religion than accommodation of theistic belief in the wholly secular public schools.

The cases concerning government aid to religious schools are useful, not for criticizing their holdings (they may have been properly decided under

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124. *See* Meek v. Pittenger, 421 U.S. 349, 363-68 (1975).
125. *See* Lynch v. Donnelly, 104 S. Ct. 1355, 1362 (1984) (citations omitted).
126. *Everson,* 330 U.S. at 15.
127. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 783-84 n.39 (1973).
128. *Id.*
129. L. TRIBE, *supra* note 4, § 14-12, at 865.
130. Lynch v. Donnelly, 104 S. Ct. 1355, 1367 (1984) (O'Connor, J., concurring).
131. Mueller v. Allen, 103 S. Ct. 3062 (1983).
132. *Everson,* 330 U.S. 1 (used only effect prong of *Lemon* test).
133. Wolman v. Walter, 433 U.S. 229, 236-38 (1977).
134. *Id.* at 244.
135. *Everson,* 330 U.S. at 17-19.
136. *See* Giannella, *supra* note 21, at 514. "Indeed the view is sincerely avowed by many of various faiths that the basic purpose of all education is or should be religious, that the secular cannot be and should not be separated from the religious phase and emphasis." *Everson,* 330 U.S. at 46 (Rutledge, J., dissenting).

accommodation analysis) but rather for recognizing that the *Lemon* test is ill-suited to address accommodation values. Because the test fails to consider free exercise values, it provides no basis for delineating zones of permissible accommodation. This inadequacy of the *Lemon* test can be witnessed in the Court's recent decisions straining[137] and even disregarding[138] the test in order to permit government accommodation of religion.

Against this historical backdrop, the absence of a consensus in analysis in the *Jaffree* decision can be seen as the result of the majority's failure to consider free exercise values.[139] The majority recognized that moment of silence statutes may, under some circumstances, be constitutional,[140] yet under the *Lemon* test there is no clear basis for that result. Rather than concluding that, at some indeterminable level, the advancement of religion is acceptable, the Court should approve moment of silence legislation when its free exercise gains outweigh any establishment clause concerns. Justice O'Connor's refinement of the *Lemon* test to inquire into the level of state endorsement of religion[141] suffers from the same infirmity as the original *Lemon* test, as it fails to consider free exercise values in determining the level at which endorsement of religion becomes acceptable.

III. ACCOMMODATION ANALYSIS

This section will briefly sketch the free exercise and establishment clause considerations relevant to an accommodation of religion in the public school context. Although declining to provide a hard-and-fast rule in this area, accommodation analysis seeks to reduce the tension between the clauses by balancing their respective interests to maximize both. Accommodation analysis serves to avoid the characterization fiction that the Supreme Court has used in past cases.[142] Future cases can be viewed as religion clause cases in which free exercise and establishment clause values are both pertinent.

A. Free Exercise Considerations

1. Benefits to Free Exercise

The rationale for inquiring into the free exercise benefits that a statute may provide arises out of the importance of the free exercise clause under

137. *See* Mueller v. Allen, 103 S. Ct. 3062, 3064 (1983); *see also* Note, Mueller v. Allen: *A New Standard of Scrutiny Applied to Tax Deductions for Educational Expenses,* 1984 DUKE L.J. 983.

138. The Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." Lynch v. Donnelly, 104 S. Ct. 1355, 1362 (1984); *see also* Marsh v. Chambers, 103 S. Ct. 3330 (1983).

139. *See infra* notes 143-53 and accompanying text.

140. *See supra* note 65 and accompanying text.

141. *See supra* notes 57-61 and accompanying text.

142. *See supra* notes 85-93 and accompanying text.

the first amendment. As Justice Douglas wrote for the Court in *Zorach*, "[w]e are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of men deem necessary."[143]

A value judgment is made in the situation in which free exercise and establishment clause values come into conflict.[144] Commentators have argued that the free exercise clause should take preference. Free exercise, as a civil right, should be preferred over the establishment clause and its basis in eighteenth-century political theory which is no longer consistent with today's large regulatory government.[145] By permitting consideration of free exercise values in cases in which the existing burden on free exercise is not sufficient to be classified as a free exercise case, accommodation analysis requires a balancing between the clauses that must be more subtle than mere preference for free exercise. This balancing will ultimately become a value judgment, but such a delineation is necessary upon recognition that the first amendment neither requires nor permits complete separation of church and state.

In order to respect students' free exercise rights, public schools must design their curricula to protect students' capacities to form theistic belief.[146] To the degree that a secular curriculum impairs formation of theistic belief, it also burdens the free exercise of religion. The success of implementing accommodation programs, like the moment of silence, will depend in great part upon the success of educators and sociologists in further recognizing the extent of secular impairment of religious belief. Such research will serve as evidence of the necessity for accommodation programs.

The Supreme Court can be sensitive both to the existing burden upon free exercise and the nature of the free exercise gain obtained from the legislation. By considering these factors simultaneously, the Court can determine the degree of free exercise gain derived from accommodation legislation.[147]

2. Free Exercise Burdens Created by the Statute

The final free exercise consideration will be the extent to which the legislation accommodating religion also burdens its free exercise. Such a burden

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143. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

144. As they may in the case of enactment of a moment of silence statute which facilitates the free exercise of religion.

145. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part I, The Religious Liberty Guarantee,* 80 HARV. L. REV. 1381, 1389 (1967). *See also* Pfeffer, *The Supremacy of Free Exercise,* 61 GEO. L.J. 1115 (1973).

146. *See supra* notes 21-34 and accompanying text.

147. The greater the existing burden on free exercise imposed by a public school program, which excludes religious belief or promotes secular ideology, the greater the need for religious accommodation under the first amendment protection of religious free exercise.

can result from legislation which seeks to accommodate a particular religious sect while excluding or even inhibiting the development of other sects.

The Supreme Court in *Larson v. Valente*[148] recently stated that "[t]his constitutional prohibition of denominational preference is inextricably connected with the continuing vitality of the Free Exercise Clause. . . . Free Exercise can thus be guaranteed only when legislators—and voters—are required to accord their own religions the very same treatment given to small, new or unpopular denominations."[149] In *Larson* the Court applied strict scrutiny to legislation having a denominational preference[150] thereby underscoring the danger in selective accommodation.[151]

In public education, the requirement that accommodation be denominationally neutral absent compelling circumstances (circumstances as appeared in *Wisconsin v. Yoder*[152]) greatly restricts accommodation options. Because of the increased diversity of religious belief and worship in our society, accommodation aimed at particular forms of worship or requiring state instruction of religion are constitutionally problematical. Forms of accommodation which free the student in the development of his or her own theistic belief are to be preferred.

B. Degree of Establishment

Having considered the free exercise gains and losses arising from legislation which attempts to accommodate religious practice and belief, the analysis now turns its focus toward establishment clause values. Accommodation of religion in the public school context raises at least five areas of consideration relevant to establishment clause infringement.[153]

1. Historical Duration of a Particular Accommodation

The Supreme Court has, in recent cases, placed great emphasis upon the historical duration of a particular government practice accommodating re-

148. 456 U.S. 228 (1982). The Court invalidated a section of the Minnesota Charitable Solicitations Act which exempted from registration and reporting requirements those religious organizations which received over half their contributions from members or affiliates. The Court found the exemption to be a denominational preference in violation of the first amendment.

149. *Id.* at 245.

150. *Id.* at 246-47.

151. Humanistic Education Programs which do not present children with predetermined values but instead attempt to teach children "how to use its methodology to resolve the moral problems they will face in their lives," Note, *supra* note 33, at 1205, may themselves raise establishment clause concerns through value inculcation.

152. 406 U.S. 205 (1972).

153. *See* Buchanan, *Accommodation of Religion in the Public Schools: A Plea for Careful Balancing of Competing Constitutional Values*, 28 UCLA L. REV. 1000, 1032 (1981) (containing a useful development of accommodation analysis for the public school environment).

ligion.[154] Chief Justice Burger, writing for the Court in *Lynch v. Donnelly*,[155] stated that, "The real object of the [First] Amendment was. . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government."[156] Rather than taking a mechanical approach which would invalidate legislation which confers a benefit upon religion, "the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so."[157]

The utility of this inquiry in the public school context is open to dispute. There were varying degrees of accommodation and even worship in the public schools prior to *Engel v. Vitale*[158] and *Abington School District v. Schempp*[159] in the 1960's with no apparent establishment of a state religion. Many state moment of silence statutes have been enacted within the past six years, although presumably as a response to these decisions and an attempt to accommodate religious belief. The tendency that a legislative attempt to accommodate religion has to establish a religious faith is an establishment clause consideration.

2. Message of State Approval of a Particular Religious Sect

To the extent that accommodation legislation approves or assists a particular religious belief or practice to the exclusion of other beliefs or practices it becomes constitutionally problematical. As Justice O'Connor concurred in *Lynch*,[160] direct infringement of the establishment clause results from "government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[161]

Message of state approval of a particular religious sect can arise from the nature of the government accommodation practice or the manner in which the practice is implemented. Accommodation practices such as audible prayer or Bible reading can serve to alienate nontheists (if the governmcnt composed

154. Marsh v. Chambers, 103 S. Ct. 3330, 3333 (1983) (Court referred to the Continental Congress' practice of opening legislative sessions with prayer in upholding Nebraska's legislative prayer practice).

155. 104 S. Ct. 1355 (1984).

156. *Id.* at 1361 (quoting 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 728 (1833)).

157. *Id.* at 1361.

158. 370 U.S. 421 (1962).

159. 374 U.S. 203 (1963).

160. 104 S. Ct. 1355 (1984).

161. *Id.* at 1366 (O'Connor, J., concurring).

prayer presupposes a Supreme Being) or non-Christians. The religious minority's protection from legislation facilitating the majority's religious practice must remain a central concern of the first amendment.

Accommodation practices which strive to protect the capacity to form theistic belief in a secular public school are consistent with free exercise protections. Through cultivating religious diversity (but no religious compulsion) by respecting a student's right to formulate his or her own religious belief, accommodation can facilitate free exercise without state compulsion.

A practice which, on its face, does not convey a message of approval or disapproval, may still be implemented in such a manner that it does convey such a message. Legislators should be sensitive to this abuse and build in safeguards protecting the religious neutrality of an accommodation practice.[162]

3. Message of State Approval of Religion over Non-Religion

Similar to state approval of a particular religious sect, state approval of religion over non-religion can also be problematical under the first amendment. State approval of religion can be particularly troublesome as it can burden the free exercise of belief and result in an establishment clause violation.

The free exercise clause "at the very least [was] designed to guarantee freedom of conscience by preventing any degree of compulsion in matters of belief."[163] Accommodation practices which seek to do more than counteract the secular hostility toward theistic belief are to be treated with suspicion. Practices which reflect state approval and coerce religious beliefs extend beyond the first amendment protection of the capacity to form theistic belief. Furthermore, the establishment clause can be viewed, in part, as intending to assure that the advancement of a church come from its followers, not from coercive practices by the state.[164] Accommodation practices must be scrutinized to determine if they contain an excessive coercive effect in conscience or actions.

Many forms of government accommodation of religion in the public schools will not send a message of state approval of religion. Recognizing that religious belief is burdened in secular education, practices which seek

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> By mandating a moment of silence, a State does not necessarily endorse any activity that might occur during the period. . . . Nonetheless, it is also possible that a moment of silence statute, either as drafted or as actually implemented, could effectively favor the child who prays over the child who does not.

Wallace v. Jaffree, 105 S. Ct. 2479, 2499 (1985) (O'Connor, J., concurring).

163. L. TRIBE, *supra* note 4, § 14-6, at 818.

164. Giannella, *supra* note 21, at 516-18.

to respect the integrity of individual religious belief merely place theistic religion on equal footing with secular ideology.

4. Degree of Entanglement Between Religious and Government Institutions

Institutional entanglement expresses the fear that excessive interaction between church and state "may interfere with the independence of the [religious] institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines."[165] Such entanglement between the religious and governmental spheres of influence may serve only to corrupt both.[166]

This inquiry will also focus on the nature of the accommodation practice. Those practices which merely seek to accommodate religious belief (or the formation of religious belief) in a noncoercive, nondenominational manner, will by their nature result in very little, if any, entanglement between institutions. Conversely, those practices which seek to involve religious institutions in the accommodation process[167] will raise entanglement issues, as well as other establishment clause concerns.

5. Degree of Impairment of the Educational Mission of the School

Although not an explicit establishment clause issue, it is a relevant consideration to inquire into the degree that an accommodation practice might impair the educational mission of the public school.[168] The recognition that public schools have a responsibility to provide a secular education and that students are a captive audience because of compulsory education requirements illustrates the necessity in designing accommodation practices to have minimal impact on school order. This is further required because excessive impairment of classroom routine may convey state approval of religious practice and belief.

The distinction between proper and improper messages is subtle, but one that must be maintained. Under the accommodation principle, government may recognize theistic belief and permit practices which facilitate the capacity to formulate those beliefs.[169] Government may not structure those practices

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165. *Lynch,* 104 S. Ct. at 1366 (O'Connor, J., concurring).

166. *See, e.g.,* Walz v. Tax Comm'n, 397 U.S. 664, 694 (1970) (Harlan, J., concurring).

167. *See, e.g.,* McCollum v. Board of Educ., 333 U.S. 203 (1948) (in-school release-time program for religious studies requires government selection and payment of instructors).

168. *See* Buchanan, *supra* note 153, at 1032.

169. *See supra* notes 48-50 and accompanying text.

in ways that burden the secular mission of the schools or excessively approve theistic belief or practice.

IV. Moment of Silence is a Permissible Accommodation

In *Abington School District v. Schempp,*[170] the Supreme Court held unconstitutional the practices of Bible reading and reciting the Lord's Prayer in public schools. Against this prohibition of prayer in public schools has emerged strong political sentiment that a constitutional amendment permitting individual and group prayer should be adopted.[171] Some states have enacted statutes providing for a moment of silence in public schools as a means of permitting religious activity outside the constitutional prohibition,[172] thereby avoiding the difficulty in amending the Constitution.

Justice Brennan, concurring in *Schempp,* considered the proposed justification for religious exercises at the beginning of the school day (the secular goals of increased harmony and discipline in the classroom) and concluded that the establishment clause "forbid[s] the use of religious means to achieve secular ends where non-religious means will suffice."[173] He then postulated that "the observance of a moment of reverent silence at the opening of class" might achieve the legitimate secular purpose served by Bible reading or audible prayer "without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government."[174] One commentator observed that "since each student could utilize this moment of silence for any purpose he saw fit, the activity may not be fairly characterized as solely religious, and since no student would really know the subject of his classmates' reflections, no one could in any way be compelled to alter his thoughts."[175]

Under accommodation analysis, a statute requiring a moment of silence at the beginning of each class day is constitutional *as* a religious activity due to the free exercise gains to students—not a perceived minimal establishment of religion. These statutes constitute a permissible government accommodation of religion because they facilitate the free exercise protection against impairment of religious belief and the capacity to form religious belief.[176] A moment of silence results in free exercise gain in excess of

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170. 374 U.S. 203 (1963).

171. *See, e.g.,* President's message to the Congress transmitting Proposed Legislation, 18 Weekly Comp. Pres. Doc. 664-66 (May 17, 1982). Proposed Amendment reads, "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer." *Id.*

172. *See* Note, *supra* note 3, at 367.

173. *Schempp,* 374 U.S. at 280-81.

174. *Id.* at 281.

175. Choper, *supra* note 4, at 371.

176. *See supra* notes 21-34 and accompanying text.

establishment clause infringement and, consequently, the Court should recognize it as permissible accommodation of religion.

A. Free Exercise Considerations

The benefits to free exercise arising from a moment of silence at the commencement of the school day can be significant. All children deciding how to use the moment of silence could discuss with their parents, religious leaders or authority figures how to best make use of the moment of silence at the beginning of the school day. This exercise is perhaps the consummate accommodation of the free exercise of religion because of its inherent respect for the conscience of each student.[177] Occurring in the public schools, a moment of silence overcomes the "negative form of religious training"[178] by structuring the educational curricula to recognize religious belief. Rather than excluding religion during the time when children are developing their intellectual and moral foundation, a moment of silence conveys a message of state respect for the integrity of children's intellectual and spiritual thoughts by providing for such thoughts within the school curricula.[179] This message of state respect can also include respect for the subjective beliefs of children. To the extent that this is so, a moment of silence can reduce the exclusivity that secular education places on objective and empirical thought.[180]

The extent of free exercise impairment which the moment of silence statute attempts to mitigate will largely be a factual determination. Under the accommodation analysis, the right to freely practice religion in the public schools is not being protected. The accommodation principle seeks to ensure that public education does not impair the capacity to form theistic belief. As earlier observed, educators and sociologists must further explore and define the impact of secular ideology upon students of varying ages. Courts must be sensitive to this form of free exercise burden and permit accommodation legislation which addresses this burden in a minimally intrusive manner.

Legislatures enacting moment of silence statutes should consider the existing degree of burden upon free exercise. To provide greater flexibility in accommodation of religion, legislatures may prefer to draft statutes making a moment of silence exercise voluntary, to be adopted by local school boards

177. L. TRIBE, *supra* note 4, § 14-6, at 818.

178. *See supra* notes 25-26 and accompanying text.

179. *Id.*

180. *See supra* note 31 and accompanying text. Furthermore, a moment of silence can have the effect of reducing the hostility toward theistic belief contained in Secular Humanistic ideology and Humanistic Education programs. To the extent that they are present in school curricula, they are hostile toward theistic belief and seek to replace theism by prejudicing students' capacities to form theistic belief. A moment of silence, although not directly introducing theistic values and beliefs, does question the exclusivity of secular ideology by introducing in the curricula the freedom to have theistic belief.

and administrators in the event that they perceive a secular burden upon free exercise in their school district.[181]

Perhaps the greatest strength of the moment of silence statutes is the absence of any burden placed on the free exercise of school children. A moment of silence may not create government or peer pressure to pray or entertain religious beliefs. The child does not receive any state message to use the moment in a required manner because each child is left to his/her own thoughts and meditation. Furthermore, the opportunity for children to question the piety of their classmates will not arise.[182]

To assure the absence of state compulsion to worship, or to worship in a particular manner, legislation should focus on difficulties that could arise in implementing a moment of silence. Some students could find a moment of silence to compromise their religious or non-religious beliefs—perhaps by reason of instructor or classmate action. For this reason, perhaps the activity should be designated voluntary[183] so as to permit student nonparticipation with minimal attention. Legislatures should also carefully delineate the teacher's role in monitoring a moment of silence. State coercion would be present if a teacher were to suggest that the time could best be spent praying or visibly engages in prayer when leading a moment of silence. The aim of the legislation should be to provide a noncoercive forum that facilitates the independent, individual exercise of student thought outside the sphere of secular ideology.

The absence of religious coercion or compulsion is an aim which legislatures should consider in drafting and implementing a statute providing for a moment of silence, but the existence of a minor level of coercion is not a valid indictment of a moment of silence. Students may obtain large free exercise gains from a minor level of state coercion which creates minimal establishment clause concerns. The accommodation principle recognizes that the absence of religion in public school has the coercive effect of establishing non-religion. Because the aim of the first amendment is to protect the capacity to formulate theistic belief, it may be necessary for accommodation legislation to have an element of religious coercion in order to have an accommodation impact on children in the secular environment.

B. Degree of Establishment

Moment of silence statutes must be scrutinized to determine the degree of establishment clause infringement. Under accommodation analysis, the

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181. *See, e.g.*, FLA. STAT. ANN. § 233.062 (West Supp. 1985) (moment of silence exercise may be implemented by local school board).

182. Wallace v. Jaffree, 105 S. Ct. 2479, 2499 (1985) (O'Connor, J., concurring).

183. *See, e.g.*, OHIO REV. CODE ANN. § 3313.601 (Page 1985) (participation is voluntary and not required if there are religious objections).

danger of religious establishment can be relatively minor in comparison to the free exercise gains created by a moment of silence.

As the Court in *Lynch* posited, the object under the establishment clause is to prevent any "national ecclesiastical establishment."[184] Under this inquiry legislative prayer was found not to tend to do so.[185] Under the limited historical inquiry possible with moment of silence statutes the significantly lesser degree of coercive religious effect present in a moment of silence than in audible prayer would tend to show that moments of silence do not result in an establishment of religion. Although children may be much more susceptible to subtle coercion than are legislators, a silent moment does not coerce religious activity or tend to provide a religious organization with government sponsorship.

Perhaps the greatest strength of moment of silence legislation is the absence of a message of state approval of a *particular* religious sect. A silent moment avoids the conflict between competing sects arising from audible prayer or devotional exercises which may coincide with certain religions and conflict with others. A Christian majority can enact a statute permitting silent prayer but the effect of the legislation is to protect all students' capacity to form theistic belief (if they should choose to exercise the moment for that purpose).

Some people may argue that the moment is designed with sufficient duration as to permit silent recitation of the Lord's Prayer and therefore advantages Christian belief. While such a legislative motive may have existed, it is the nature of the exercise that students may pray to any God, meditate on religious ideals or not pray at all. The message the state should convey is respect for the individual thoughts and beliefs of each student without inquiry into what they might be. The duration of a moment of silence will not, by reason of its religiously neutral emphasis, convey a significant message of state approval of religion.

The Supreme Court has shown sensitivity to the difficulty in determining the proper role of religion in the public schools. The free exercise guarantee of freedom of conscience also seeks to prevent state coercion of religious belief over non-religious belief. Unfortunately, state required silence about religion in the public school can have the opposite message. In this regard, Justice Stewart stated:

> For a compulsory state education system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion. And a refusal to permit religious exercises thus is seen, not as

184. Lynch v. Donnelly, 104 S. Ct. 1355, 1361 (1984).
185. *Id.*

> the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private.[186]

A moment of silence addresses this secular hostility toward theistic religion by conveying a corresponding message that the state is not hostile toward theistic faith and respects the free exercise right that such belief be a personal choice.

The establishment clause concern that religious and government institutions each be kept free of the influence of the other is clearly met by a moment of silence. A silent moment accommodates the religious beliefs of individuals (not institutions) by respecting their quiet reflection. It is an open-ended exercise which does not provide religious institutions the opportunity to manipulate public schools or to interfere with the freedom of those religious institutions.

Some people argue that political disruption or divisiveness is a form of excessive entanglement in violation of the establishment clause. The Court has never recognized that "political divisiveness alone can serve to invalidate otherwise permissible conduct."[187] It is difficult to envisage the creation of political divisiveness by this minimally intrusive exercise other than that resulting from the litigation itself. The divisiveness inquiry is not concerned with the litigation context, but expresses the aim that government sponsorship of religion not create political strife.[188]

A moment of silence creates minimal establishment clause infringement, in large part due to its negligible impairment of the secular function of the public schools. Furthermore, the exercise can have secular gains of increased student harmony and discipline. As a quiet period at the beginning of the school day, it assimilates into the opening exercises of the classroom with minimal instrusion and permits prayer, religious meditation, thoughts on the day's activities or any nonobstructive use.

Balancing the free exercise and establishment clause concerns as developed under the accommodation analysis, moment of silence statutes are a constitutional accommodation of religious beliefs in the public schools. The free exercise gains arise from the message of respect for theistic belief that the exercise conveys to students. This gain is achieved in a setting that may otherwise impair students' capacity to form religious belief and is achieved in a manner that minimally impairs public school curricula.

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186. *Schempp*, 374 U.S. at 313 (Stewart, J., dissenting).
187. *Lynch*, 104 S. Ct. at 1364.
188. *Id.* at 1367 (O'Conner, J., concurring).

CONCLUSION

The need exists to develop an accommodation analysis which balances the competing interests of the free exercise and establishment clauses of the first amendment. As Chief Justice Burger observed:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: [t]hat we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a *benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference.[189]

The accommodation analysis developed in this Note represents an attempt to define the "play in the joints" in the context of introducing religion into the public schools.

The exclusion of religious values and belief from public schools has resulted in the creation of an environment hostile toward theistic belief. Within this environment the first amendment may permit (or even require) accommodation of religion in order to protect students' capacities to form religious belief. State statutes permitting a moment of silence at the beginning of the school day are a constitutional response to this environment under accommodation analysis by reason of their benefit to free religious exercise with minimal establishment clause infringement.

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189. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (emphasis added).