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COMMENT

THE CONSTITUTIONALITY OF NORTH CAROLINA'S MOMENT OF SILENCE STATUTE

I. INTRODUCTION

The purpose of this comment is to analyze the constitutionality of the new North Carolina Moment of Silence statute.¹ This comment will begin with a historical review of the adoption of the First Amendment, followed by a review of Supreme Court case law associated with the question of prayer in school. Finally, the comment will compare the North Carolina statute with other states' moment of silence laws and ultimately conclude that the statute would be declared unconstitutional under the current framework of the "Lemon Test."²

II. HISTORY OF THE FIRST AMENDMENT

A. *Historical Events*

The history of the adoption of the First Amendment has been of little assistance in interpreting the intentions behind its adoption. At the time of the proposed adoption, there were many problems facing the Articles of Confederation including their failure to ensure that the federal government worked properly.³ Therefore, the Virginia Assembly called a meeting of representatives in Annapolis, Maryland in September, 1786. The stated purpose of the meeting was to create a uniform system of commercial regulations.⁴ Subsequent to the meeting in Annapolis, Congress called for a convention in Philadelphia in May of 1787. The sole purpose for the convention was to amend the Articles of Confederation, to "rend[er] the federal constitution adequate to the exigencies of government and [to] preserve the Union."⁵

1. N.C. GEN. STAT. § 115C-47(29) (Supp. 1995); *See infra* note 128.

2. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (holding as unconstitutional, a statute that provided reimbursement of teachers' salaries, textbooks and instructional material, and payment of a supplement to teachers in church related schools).

3. JAMES H. LEAHY, *THE FIRST AMENDMENT: 1791-1991: TWO HUNDRED YEARS OF FREEDOM 1* (1991). Examples of the government's inability to function included: inexistence of a uniform system of currency; business transactions between states were almost impossible; Congress could not negotiate treaties; and, Congress had no authority to levy taxes. *Id.*

4. *Id.* at 2.

5. *Id.* The Constitutional Convention was assembled in May 1787 with all states represented except Rhode Island. *Id.* at 11.

The original Constitution was designed to form a strong central government, yet provide the states with a substantial degree of independence. At the time of its ratification in 1777, there was little, if any, discussion about civil or individual rights. Representatives of the Constitutional Convention, however, suggested a variety of amendments that focused specifically on individual rights, including freedom of religion.⁶

The push for civil or individual rights was a result of a number of historic events. The colonists from England were familiar with the Magna Carta of 1215 and the Petition of Rights of 1628. Both documents provided some rights to citizens and some limitations on the power of government.⁷ In addition, many of the colonists had fled their homelands as a result of religious and social persecution.⁸ Therefore, it was not surprising that many of the citizens and their representatives were concerned about the government's ability to regulate a person's individual choices.⁹

Thomas Jefferson was responsible for the adoption of the Statute for Religious Freedom by the Virginia Assembly.¹⁰ The statute, adopted in 1786, stated that "[n]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . . nor shall otherwise suffer on account of his religious opinions or belief"¹¹ By 1787, many states had ratified their own "Bill of Rights" including Virginia, Delaware, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire.¹²

The momentum peaked on May 4, 1789, when James Madison introduced twenty-five amendments to the Constitution. These amendments represented a compilation of over 200 amendments recommended by the States.¹³ Most of the proposed amendments advocated protecting the people from the government.¹⁴ There was little discussion about the content of the proposed amendments; rather,

6. *Id.* at 13; See also JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, VOLUME III, 713 (1970).

7. LEAHY, *supra* note 3, at 13. The Magna Carta stated "every person . . . was protected in the enjoyment of his life, liberty, and property." *Id.*

8. Robert L. Cord, *Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL'Y 129, 134 (1986).

9. The concern for individual rights was apparent in a letter from Thomas Jefferson to James Madison dated December 20, 1787. Jefferson expressed concern that no Bill of Rights had been adopted and stated "[t]he Bill of Rights is what the people are entitled to against every government on earth . . . and what no just government should refuse." LEAHY, *supra* note 3, at 4.

10. *Id.*

11. *Id.*

12. *Id.* at 13.

13. See generally FRANCIS NEWTON THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES, VOLUME II: 1788-1861, 199-214 (1901).

14. *Id.* at 216.

the discussion focused on the procedure for adopting the amendments.¹⁵ On July 23, 1789, the amendments were referred to a Select Committee of One from each state.¹⁶ The original First Amendment was numbered the fourth and read "[n]o religion shall be established by law, nor shall the equal rights of conscience be infringed."¹⁷

The Select Committee of One from each state reported back to the House on August 13, 1789. The content of the amendments had basically remained unchanged, but the number had been cut from twenty to eighteen.¹⁸ On August 13, 1789, the House began its discussion, focusing primarily on where the amendments should be added to the Constitution. Ultimately, the House agreed to incorporate them into the body of the Constitution.¹⁹

On August 14, 1789, the House began debating the content of the proposed amendments. The proposed Fourth Amendment, which eventually became the First Amendment, was disliked by many representatives.²⁰ When the House questioned Madison on what he thought the First Amendment meant, he stated "[t]hat Congress shall not establish a religion and enforce the legal observance of it by law, or compel men to worship God in any manner contrary to their conscience."²¹

Three schools of thought as to the need for the First Amendment emerged during the debate. The first school of thought was advanced by Roger Williams.²² Under his evangelical view, separation of church and state was a way to protect the church from the state.²³ A second school of thought was led by Thomas Jefferson, who felt separation of church and state was a way to protect the state from the church.²⁴ Finally, James Madison led the third school of thought which saw separation as a way to preserve public order and protect each religious sect from other religious sects.²⁵

After some discussion, the proposed amendment was changed to read "Congress shall make no laws touching religion, or infringing the rights of conscience."²⁶ This change appears to reflect the evangelical view supported by Roger Williams and the Madison view of separa-

15. *Id.* at 217-18.

16. *Id.* at 224.

17. *Id.* at 227-29.

18. *Id.* at 224.

19. *Id.* at 227-29.

20. *Id.* at 237.

21. *Id.*

22. Church leader from Massachusetts. *Id.* at 237.

23. LAURENCE C. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 816-17 (1978).

24. *Id.*

25. *Id.* at 817.

26. THORPE, *supra* note 13, at 239.

tion. The proposed amendment strictly forbade Congress from making any law that affected religion. That portion of the proposed amendment supported Roger Williams' concern for the protection of the church from the state. Forbidding Congress to infringe the rights of conscience appeared to support Madison's concern for complete separation, as evidenced by an earlier letter he wrote to George Eve on January 2, 1789.²⁷ In addition, the original proposed amendment, authored by Madison, had included a similar prohibition against the infringement of the rights of conscience.²⁸

The proposed amendments were given to a Special Committee that rearranged their order, rewrote them to reflect the proposed changes, and submitted a report to the Senate.²⁹ The Special Committee's report, consisting of seventeen proposed amendments, was heard by the Senate on August 25, 1789.³⁰

The amendments had undergone substantial change from their original form. There were now only twelve, and the proposed Fourth Amendment read "[c]ongress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof."³¹ The First Amendment was eventually ratified on December 15, 1791.³²

B. *Interpretation of the Historical Events*

There are as many commentaries on the adoption of the First Amendment as there are theories about its original meaning and the intentions of those who adopted it.³³ Two major theories, however, remain most popular. Under one theory, the original intention was to protect the established religions in various states from the federal government.³⁴ This theory has support in history, in that in the same year the First Amendment was proposed, a bill to appoint chaplains for both the House and the Senate was approved.³⁵ In addition, many

27. *Id.* at 227-28. The letter stated "[t]he amendments thought necessary by Madison were to secure the rights of conscience." *Id.*

28. FRANCIS NEWTON THORPE, *THE CONSTITUTIONAL HISTORY OF THE UNITED STATES*, VOLUME II: 1788-1861, 199-214 (1901).

29. *Id.* at 257.

30. *Id.* at 257-59. The Senate disliked a number of the amendments and sent them back to the House with modifications. Subsequently, the House refused to make the modifications and the amendments were sent to a Committee of Conference. On September 24, 1789, the House agreed to most of the revisions suggested by the Senate. *Id.* at 259.

31. U.S. CONST. amend. I.

32. THORPE, *supra* note 13, at 261.

33. See Robert L. Cord, *Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL'Y 129 (1986); LAURENCE C. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978); MICHAEL J. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* (1978).

34. Cord, *supra* note 8, at 140.

35. *Id.* at 140.

states had established churches and it was not until 1833 that the last state-established church was dissolved.³⁶ Commentators have argued that this supports a "no preference" approach to First Amendment analysis.³⁷ Under the "no preference" approach, the government would not prefer one religion over another and would not establish a national religion. However, it would allow for financial support of religions as long as no religion was rejected because of a preference for another religion.³⁸ This theory has not been accepted by the Supreme Court.

The second theory is that the original intention in adopting the First Amendment was to "build a wall between church and state."³⁹ This "wall" completely separates the two entities and would make financial support of religion unconstitutional.⁴⁰ This theory was endorsed by the Supreme Court and is reflected in the currently used "Lemon Test."⁴¹ This theory also has support from a historical context. As early as 1785, James Madison, a strong contributor to the First Amendment, authored a book entitled *Memorial and Remonstrance Against Religious Assessments*. The book advocated total separation of church and state.⁴² Also, Jefferson and Madison defeated a proposed bill in Virginia that would have allowed a tax levy for the support of the established church.⁴³ The theory of separation was also expressed by Roger Williams when he stated that there is a "wall of separation between the garden of the Church and the wilderness of the world."⁴⁴

C. Current Supreme Court Interpretation

These two themes, and the history surrounding them, were discussed in depth by the Supreme Court in *Everson v. Board of Educa-*

36. *Id.* at 158; *See School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 214 n.5 (1962).

37. Cord, *supra* note 8, at 137; *See also* Richard S. Myers, *The Establishment Clause and Nativity Scenes: A Reassessment of Lynch v. Donnelly*, 77 Ky. L. J. 61 (1989); ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT OR FICTION* (1982); MICHAEL J. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* 9 (1978); RODNEY K. SMITH, *PUBLIC PRAYER AND THE CONSTITUTION* (1987).

38. Cord, *supra* note 8, at 169.

39. *Reynolds v. United States*, 98 U.S. 145 (1878) (upholding the federal government's right to make bigamy a crime in federal territories over the objection of a Mormon who claimed that polygamy was his religious duty). *See School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 216 (1962).

40. Cord, *supra* note 8, at 169; *Everson v. Board of Educ. of the Township of Erving*, 330 U.S. 1, 31-32 (1947).

41. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See infra* notes 56-59 and accompanying text.

42. LEAHY, *supra* note 3, at 4.

43. Cord, *supra* note 8, at 133-34.

44. S. Rabinove, *Separation For Religion's Sake*, *FIRST THINGS* 7, 116 (May 1990).

tion of the Township of Erving.⁴⁵ In *Everson*, the Supreme Court determined that the two themes reflected two fundamental goals of the initial proponents of the First Amendment.⁴⁶ The first goal was voluntarism, described by Lawrence Tribe as the guarantee of "freedom of conscience by preventing any degree of compulsion in the matters of belief."⁴⁷ The goal of voluntarism is expressed in the portion of the First Amendment that reads "Congress shall make no law . . . prohibiting the free exercise [of religion]."⁴⁸ This clause became known as the Free Exercise Clause.⁴⁹

The second goal was separatism, often referred to as the neutrality principle.⁵⁰ Under this principle, church and state should function independently of one another.⁵¹ The goal of separatism does not appear to be directly expressed in the First Amendment.⁵² Rather, it is an interpretation based on the history and the apparent intentions of the individuals who adopted the First Amendment. The portion of the First Amendment which states that "Congress shall make no law respecting the establishment of a religion . . ."⁵³ is called the Establishment Clause. This clause reflects a means of assuring that government does not excessively intrude upon religious liberty.⁵⁴

The Supreme Court has maintained the two goals first mentioned in *Everson*, and has refined the current Lemon Test to reflect that the intention of the First Amendment was to build a "wall."⁵⁵ Therefore, this comment will reflect on the Supreme Court's modern view of the First Amendment, its interpretation using the Lemon Test, and the application of the test to North Carolina's "moment of silence" Statute.

45. 330 U.S. 1 (1947).

46. *Id.* at 8-16.

47. TRIBE, *supra* note 23, at 818.

48. U.S. CONST. amend. I; TRIBE, *supra* note 23, at 818.

49. TRIBE, *supra* note 23, at 818.

50. *Id.* at 819.

51. *Id.*

52. *Id.*

53. U.S. CONST. amend. I.

54. TRIBE, *supra* note 23, at 815.

55. See *Lee v. Weisman*, 505 U.S. 577 (1992) (holding that prayers offered at a graduation ceremony were forbidden by the Establishment Clause); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (holding that a Christmas display that included a creche violated the Establishment Clause); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (declaring unconstitutional a statute authorizing a one-minute moment of silence in public schools); *Stone v. Graham*, 449 U.S. 39 (1980) (declaring unconstitutional a Kentucky statute that required the posting of a copy of the Ten Commandments, purchased with private donations, on the wall of each public school classroom); *Wolman v. Walter*, 433 U.S. 229 (1977) (prohibiting the reimbursement of nonpublic schoolchildren for the purchase of school supplies); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (holding that a public school can not prevent the teaching of evolution); *Everson v. Board of Educ. of the Township of Erving* 330 U.S. 1 (1947) (striking funding to reimburse parents of private school children for bus fares).

III. THE "LEMON TEST"

A. Analytical Framework

The Lemon Test is comprised of three parts which, in the words of Chief Justice Burger, were a "cumulative criteria developed by the Court over many years."⁵⁶ The issue before the Court in *Lemon v. Kurtzman*⁵⁷ was whether it was constitutional for the State of Rhode Island to supplement non-public school teachers' salaries.⁵⁸ The Court concluded that it was unconstitutional. In reaching its decision, the Court applied a three-pronged test to determine whether the governmental action violated the Establishment Clause. The Court explained that to be valid, the action must satisfy the following conditions: (i) it must have a secular legislative purpose; (ii) the primary effect of the action must neither advance nor inhibit religion; and (iii) the action must not foster an excessive governmental entanglement.⁵⁹

1. First Prong - Secular Purpose

The requirement of a secular purpose was first pronounced in *School District of Abington Township v. Schempp*.⁶⁰ In *Schempp*, the Court was asked to decide whether state action requiring schools to begin each day with readings from the Bible was constitutional. The Court debated at length whether there was a secular purpose and concluded there was none.⁶¹ The Court had previously decided that the daily reciting of prayers in classrooms was unconstitutional and that the only purpose of such prayers was religious.⁶² Although the *Schempp* Court did not clearly determine whether a secular legislative purpose existed, it relied on the premise that the character of reciting prayers is inherently religious.⁶³ In *Board of Education of Central School District No. 1 v. Allen*,⁶⁴ the Court stated "that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose"⁶⁵ Subsequent decisions have regularly applied the requirement of a secular legislative purpose to challenged actions in-

56. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

57. 403 U.S. 602 (1971).

58. *Id.*

59. *Id.* at 612.

60. 374 U.S. 203 (1963).

61. *Id.* at 224.

62. *Engel v. Vitale*, 370 U.S. 421, 425 (1962) (holding that reading of a state composed non-denominational prayer in the classroom violated the Establishment Clause).

63. *Schempp*, 374 U.S. at 222-23.

64. 392 U.S. 236 (1968).

65. 392 U.S. 236, 243 (1968) (upholding a New York statute that allowed school books to be loaned to parochial and non-parochial school children) (quoting *School Dist. v. Schempp*, 374 U.S. 203, 222 (1963)).

volving the Establishment Clause.⁶⁶ The Court has also stated that a violation of the first prong will cause a statute to fail as unconstitutional without considering either of the subsequent prongs.⁶⁷

2. Second Prong - Primary Effect

The second prong of the Lemon Test requires that the challenged action has neither the principal nor the primary effect of advancing or inhibiting religion.⁶⁸ The concept of questioning the primary effect of the challenged action was first noted in *Schempp*.⁶⁹ In a subsequent case, the Court stated "that to withstand the strictures of the Establishment Clause there must be a . . . primary effect that neither advances nor inhibits religion."⁷⁰

The Supreme Court has articulated three possible analyses to determine whether the second prong has been satisfied. Under the first analysis, the Court considers whether the institution that will receive the benefit is pervasively sectarian.⁷¹ The Court has stated that "[e]ven though earmarked for secular purposes, 'when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the impermissible primary effect of advancing religion."⁷²

The second possible analysis articulated by the Supreme Court was first introduced in *School District of Grand Rapids v. Ball*.⁷³ In *Grand Rapids*, the Supreme Court stated that elementary and secondary school children are especially susceptible to indoctrination because of their age and inexperience.⁷⁴ The Court has considered the age of the children and the classroom setting pivotal in several other cases where it determined that a challenged action was unconstitutional.⁷⁵

66. See, e.g., *Stone v. Graham*, 449 U.S. 39 (1980); *Wallace v. Jaffree*, 472 U.S. 38 (1984).

67. *Stone*, 449 U.S. at 40-41.

68. *Lemon*, 403 U.S. at 612.

69. 374 U.S. 203 (1963). The Court noted that readings, without comment, from the Bible have the effect of advancing religion because "the Bible as an instrument of religion cannot be gainsaid." *Id.* at 224 (1963).

70. *Board of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 243 (1968) (citations omitted).

71. *Aguilar v. Felton*, 473 U.S. 402, 411 (1985) (declaring it was unconstitutional to pay salaries of parochial school personnel with federal funds).

72. *Meek v. Pittenger*, 421 U.S. 349, 365-66 (1975) (challenging Pennsylvania statutes providing for auxiliary services and loans of textbooks and materials to nonpublic elementary and secondary schools) (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)).

73. 473 U.S. 373 (1985) (determining that a shared time program using public school classrooms and teachers for nonpublic school children was unconstitutional).

74. *Id.* at 391.

75. See *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding a Louisiana statute that prohibited teaching the Theory of Evolution was unconstitutional); *Stone v. Graham*, 449 U.S. 39 (1980); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

The third analysis for the second prong was also established in *Grand Rapids*. Justice O'Connor stated that a statute is unconstitutional if it creates the appearance of a "crucial symbolic link."⁷⁶ Such a link has been found in other cases, especially those involving a classroom setting or young children.⁷⁷

3. Third Prong - Excessive Entanglement

To satisfy the third prong of the Lemon Test, the challenged action must not foster an "excessive entanglement" between the government and religion.⁷⁸ This prong appears to express the Court's recognition of other factors that can affect the constitutionality of a particular challenged action. Those factors include whether the aid takes place in a school setting,⁷⁹ the age of the children,⁸⁰ and whether the aid is for all people and incidentally benefits a religious organization, or whether it specifically helps a particular religion.⁸¹ In *Lemon*, the Supreme Court outlined three factors to consider when evaluating the question of excessive entanglement.⁸² The first factor is the character and purpose of the proposed recipient of the challenged entitlement.⁸³ The second factor is the nature of the aid provided. In general, direct entitlements to religious organizations or for a religious purpose are considered unconstitutional,⁸⁴ whereas, indirect or incidental benefits to religious organizations have been considered constitutional.⁸⁵ The third factor to consider is the resulting relationship between the gov-

76. *Grand Rapids*, 473 U.S. at 385.

77. *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990) (finding no symbolic link between an after-school religious club and the government); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (finding no symbolic link between religion and government even though the Adolescent Family Life Act grants may be given to religious institutions).

78. *Lemon*, 403 U.S. at 613. The Supreme Court announced this prong in *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (upholding property tax exemptions for places of religious worship).

79. *See Board of Educ. v. Allen*, 392 U.S. at 236.

80. *See Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (distinguishing between a secondary school environment and a university environment and finding that a Maryland statute providing state funds to religious universities was constitutional).

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

82. *Lemon*, 403 U.S. at 615.

83. *Id.*

84. *See, e.g., Grand Rapids v. Ball*, 473 U.S. 373 (1985); *New York v. Cathedral Academy*, 434 U.S. 125 (1977) (holding a direct entitlement to parochial schools for state mandated testing was unconstitutional); *Meek v. Pittenger*, 421 U.S. 349 (1975) (declaring that a Pennsylvania statute which provided equipment and books to parochial schools was unconstitutional); *Lemon v. Kurtzman*, 403 U.S. 601 (1971).

85. *See, e.g., Witters v. Washington Dep't. of Servs. for the Blind*, 474 U.S. 481 (1986) (declaring that a statute providing vocational rehabilitation services for visually handicapped persons was constitutional even though the recipient attended a religious institution); *Board of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Educ. of the Township of Erving*, 330 U.S. 1 (1947).

ernment and the religious organization,⁸⁶ and whether the relationship will require on-going monitoring.⁸⁷ An additional concern considered by the Court in some decisions is whether the challenged action will create excessive political divisiveness.⁸⁸ In *Bowen*, the Court stated that "the question of 'political divisiveness' should be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools."⁸⁹

B. *Alternative "Tests"*

The Supreme Court has continued to use the Lemon Test when faced with an Establishment Clause challenge, sometimes with great controversy.⁹⁰ In the wake of this controversy, two competing tests have been advanced by Supreme Court Justices. Justice O'Connor's Endorsement Test⁹¹ involves questioning "[t]he meaning of a statement to its audience . . . the intention of the speaker and on the 'objective' meaning of the statement in the community."⁹² Under this test, a wider range of activities would be upheld as constitutional than would be upheld under the Lemon Test.

The second alternative advanced to replace the Lemon Test was the Coercion-Based Test introduced by Justice Kennedy.⁹³ The Coercion-Based Test requires a showing of direct coercion or proselytizing before the challenged action is found unconstitutional.⁹⁴ This test is the least restrictive and would provide the greatest range of activities to be found constitutional. The prevailing test continues to be the

86. *Lemon*, 403 U.S. at 615.

87. See *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988) (upholding the constitutionality of the Adolescent Family Life Act, a program providing for grants to organizations that counsel adolescents about sex and pregnancy).

88. *Lemon*, 403 U.S. at 620. See also *Bowen*, 487 U.S. at 617.

89. *Bowen*, 487 U.S. at 617.

90. See *County of Allegheny v. ACLU*, 492 U.S. 573, 655-63 (1989) (Kennedy, J., concurring in part, dissenting in part, and proposing a new test); *Edwards v. Aguillard*, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting); *Aguilar v. Felton*, 473 U.S. 402, 426-30 (1985) (O'Connor, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 108-13 (1985) (Rehnquist, J., dissenting); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'Connor, J., concurring and proposing a new test); Robert A. Holland, Comment, *A Theory of Establishment Clause Adjudication: Individualism, Social Contract, and the Significance of Coercion in Identifying Threats to Religious Liberty*, 80 Cal. L. Rev. 1595 (1992); Patrick F. Brown, *Wallace v. Jaffree and The Need To Reform Establishment Clause Analysis*, 35 Cath. U. L. Rev. 573 (1986).

91. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (upholding the constitutionality of a Christmas display that included a Santa Clause house, a Christmas tree, and a nativity scene). The name "Endorsement Test" came from the text of Justice O'Connor's opinion which stated "[e]ndorsement sends a message to nonadherents that they are outsiders." *Id.* at 688.

92. *Id.* at 690.

93. *County of Allegheny v. ACLU*, 492 U.S. at 659-60 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

94. *Id.* at 660-63.

Lemon Test because neither of the alternatives nor any other suggested analyses have been endorsed by a majority.

IV. HISTORY OF PRAYER IN PUBLIC SCHOOLS

A. *Supreme Court Case Law*

The Lemon Test and its predecessors have often been applied when the Supreme Court was faced with a challenged action that took place in a school setting.⁹⁵ Before a detailed analysis of court decisions on the question of the validity of a "moment of silence" can occur, it is important to examine the types of cases the Supreme Court has decided which involved prayers in public school.

1. School Sponsored/Mandatory Prayer

In *Engel v. Vitale*,⁹⁶ the Court was asked to decide whether a state prepared prayer recited aloud in the presence of the teacher was constitutional. The Court seemed to rely strongly on the theory of a "wall" of separation between church and state, remarking that "[t]he history of man is inseparable from the history of religion."⁹⁷ However, as one commentator noted, "it is neither sacreligious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves or to those whom the people choose to look for religious guidance."⁹⁸

The Court's decision in *Engel* was followed quickly by the decision in *Schempp*.⁹⁹ In that case, the Supreme Court held that required Bible reading and recitation of the Lord's Prayer in a classroom setting were unconstitutional.¹⁰⁰ The Court again appeared to rely on a theory of a "wall" of separation. The Court stated that the "neither a State nor the federal government can set up a church . . . or pass laws which aid one religion, aid all religions, or prefer one religion over another."¹⁰¹ More recently in *Stone v. Graham*, the Court found that posting a copy of the Ten Commandments in public schools was unconstitutional.¹⁰² The Court applied the Lemon Test and found there

95. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980); *Engel v. Vitale*, 370 U.S. 421 (1962) (striking a statute requiring teacher-led prayer in school).

96. 370 U.S. 421 (1962).

97. *Id.* at 434.

98. Martin J. McMahon, Annotation, *Constitutionality of Regulation or Policy Governing Prayer, Meditation, or "Moment of Silence" in Public Schools*, 110 A.L.R. Fed 211, 297 (1992).

99. 374 U.S. 203 (1963).

100. *Id.*

101. *Id.* at 216.

102. 449 U.S. 39 (1980).

was no secular purpose for such action.¹⁰³ The Commonwealth of Kentucky argued that the notation printed on each display was sufficient to avoid conflict with the First Amendment.¹⁰⁴ However, the Court adopted the trial court's labeling of this statutory declaration as self-serving.¹⁰⁵

2. Prayer During Nonschool Activities

The Supreme Court has also considered whether prayers conducted before, during, or after a school graduation ceremony are constitutional. In *Lee v. Weisman*,¹⁰⁶ the Court held that prayers or invocations at public school graduation ceremonies were unconstitutional.¹⁰⁷ The Court reached its decision by applying the Lemon Test.

3. Noncompulsory Prayer

As to the constitutionality of noncompulsory prayers in public schools, the Court stated in *Engel* that "the Establishment Clause, unlike the Free Exercise Clause, does not depend on any showing of governmental compulsion"¹⁰⁸ In *Engel*, even though the students were not compelled to recite a government prepared prayer, recitation of such prayer in class was considered unconstitutional.¹⁰⁹

4. "Moment of Silence"

The Supreme Court has heard only one case involving the constitutionality of a "moment of silence." In *Wallace v. Jaffree*, the Court applied the Lemon Test to determine whether an Alabama statute authorizing a one-minute "moment of silence" was constitutional.¹¹⁰ In considering whether the challenged action had a secular purpose, the Supreme Court considered the legislative history, express purpose of the statute, and the legislative intent. As the Court had noted earlier in *Lynch v. Donnelly*, these factors can be especially important when applying the first prong of the Lemon Test.¹¹¹ The *Wallace* Court

103. *Id.* at 41.

104. *Id.* The Legislature required the following notation in small print at the bottom of each display: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." *Id.*

105. *Id.*

106. 505 U.S. 577 (1992).

107. *Id.* See also Allan Gordus, Note, *The Establishment Clause and Prayers in Public High School Graduations: Jones v. Clear Creek Independent School District*, 47 ARK. L. REV. 653 (1994).

108. *Engel*, 370 U.S. at 430.

109. *Id.* at 421.

110. 472 U.S. 38 (1984) and Alabama Code § 16-1-20.1 (Supp. 1994); See also Patrick F. Brown, *Wallace v. Jaffree and The Need To Reform Establishment Clause Analysis*, 35 CATH. U.L. REV. 573 (1986).

111. 465 U.S. 668, 690 (1984).

noted that a second statute had been subsequently adopted which authorized teachers to lead willing students in a prescribed prayer.¹¹² The Court found that a modification from private reflection to teacher-led prayer reflected the legislature's true intent, which was to return voluntary prayer to the public schools.¹¹³ As previously discussed, this concept had been established as unconstitutional.

The *Wallace* Court also considered the minutes of the legislative hearings held prior to the statute's adoption, and found they reflected an attitude of endorsing religion.¹¹⁴ Finally, the Court considered testimony of the bill's sponsor that he believed the statute was a way to bring religion back into the public schools.¹¹⁵ The Court concluded that the sole purpose of the challenged action was sectarian, and therefore, it failed the first prong of the Lemon Test.¹¹⁶ Since the Alabama statute failed the first prong of the Lemon Test, there was no need to consider the second and third prongs.¹¹⁷

B. Federal Courts Case Law

Lower federal courts have dealt with the constitutionality of "moment of silence" statutes more often than the Supreme Court, and have upheld a number of challenged statutes.¹¹⁸ The lower courts also have applied the Lemon Test, and have found that a "moment of silence" can have a secular purpose. For example, in *Gaines v. Anderson*, a "moment of silence" at the beginning of each school day was found to be constitutional because one of the stated secular purposes was to induce respect for the authority of the teacher.¹¹⁹

112. *Wallace*, 472 U.S. at 40; Alabama Code § 16-1-20.2 provided as follows: "From henceforth, any teacher or professor in any public educational 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"

113. *Wallace*, 472 U.S. at 60.

114. *Id.* at 56-57.

115. *Id.* at 57. When asked whether he had any purpose other than returning voluntary prayer to the public schools, Senator Donald Holmes answered, "no, I did not have no [sic] other purpose in mind."

116. *Wallace* at 60-61.

117. See e.g., *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984); *Mueller v. Allen*, 463 U.S. 388, 394; *Stone v. Graham*, 449 U.S. 39, 40-41 (1980).

118. See e.g., *Allen v. Consolidated City of Jacksonville*, 179 F. Supp. 1532 (M.D. Fl. 1989); *Fink v. Board of Educ.*, 442 A.2d 837 (Pa. 1982); *Gaines v. Anderson*, 421 F. Supp. 337 (D.C. Mass. 1976); *Reed v. Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965); See also Andrew W. Hall, *A Moment of Silence: A Permissible Accommodation Protecting the Capacity to Form Religious Belief*, 61 IND. L.J. 429 (1986); David Z. Seide, *Daily Moments of Silence In Public Schools: A Constitutional Analysis*, 58 N.Y.U. L. Rev. 364 (1983).

119. 421 F. Supp. 337, 342 (D. Mass. 1976).

The lower federal courts have also found some "moment of silence" statutes unconstitutional.¹²⁰ In *May v. Cooperman*, the court examined the legislative history surrounding the statute's adoption, just as the Supreme Court did in *Wallace*.¹²¹ The court in *Walter v. West Virginia Board of Education* also appeared to rely on the legislative history surrounding the adoption of the West Virginia statute.¹²² In addition, the court in *Walter* considered the bill's sponsor's statements, as had the Supreme Court in *Wallace*.¹²³ Finally, in *Beck v. McElrath*, the court again looked at the legislative history and intent behind the adoption of the "moment of silence" statute.¹²⁴

The significance of the lower court opinions is not whether the challenged statutes were found constitutional, but the analysis applied in deciding the question of constitutionality. The majority of cases in which a "moment of silence" statute was upheld were decided prior to the Supreme Court's decision in *Wallace*.¹²⁵ Subsequent to the *Wallace* decision, however, similar statutes were declared unconstitutional.¹²⁶ This is significant for two reasons. First, it indicates that following the lead of the *Wallace* Court, federal courts will apply increased scrutiny to the first prong of the Lemon Test. Second, it indicates that most lower courts will find that a "moment of silence" statute lacks a secular legislative purpose and therefore, it fails to satisfy the first prong. The analysis of the "moment of silence" statute

120. See, e.g., *May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985); *Walter v. West Virginia Bd. of Educ.*, 610 F. Supp. 1169 (S.D. W. Va. 1985); *Duffy v. Las Cruces Pub. Schs.*, 557 F. Supp. 1013 (D.C. N.M. 1983); *Beck v. McElrath*, 548 F. Supp. 1161 (M.D. Tenn. 1982); See also Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence In The Public Schools*, 96 HARV. L. REV. 1874 (1983).

121. 780 F.2d 240, 243-46, 252 (3d Cir. 1985) (holding that a New Jersey statute was unconstitutional because the legislative history revealed repeated attempts to mandate school prayer that were subsequently vetoed by the Governor of New Jersey).

122. *Walter*, 610 F. Supp. 1169 (S.D. W.Va. 1985) (holding that the W. Va. Const. Art. III, § 15-a was unconstitutional because the court found that children were teased in school for not participating in the "moment of silence" and the legislative history revealed that a House delegate quoted a constituents letter stating "I believe it is time when we should welcome God back into the classrooms and not by just meditation but by prayer and praise also.") *Id.* at 1176.

123. *Walter*, 610 F. Supp. at 1175.

124. 548 F. Supp. 1161 (1984); 1982 Tenn. Pub. Acts ch. 899, § 1 (declaring that Tenn. Code Ann § 49-1922 must be amended because the "overwhelming intent among legislators supporting the bill, including the sponsors, was to establish prayer, as a daily fixture in the public school-rooms of Tennessee.") *Id.* at 1163.

125. See, e.g., *Fink v. Board of Educ. of the Warren Cty. Sch. Dist.*, 442 A.2d 837 (Pa. 1982) (upholding a Pennsylvania statute that allowed a moment of silence but finding a violation of the statute by a teacher who led prayers and readings from the Bible); *Reed v. Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965) (upholding a "moment of silence" statute that allowed a moment of reflection before lunch).

126. See, e.g., *May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985); *Walter v. West Virginia Bd. of Educ.*, 610 F. Supp. 1169 (S.D. W. Va. 1985); *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976).

recently enacted in North Carolina hinges upon these two fundamental assumptions.

V. THE NORTH CAROLINA STATUTE

A. *History*

The North Carolina "moment of silence" bill¹²⁷ was sponsored by Representative Frances Cummings from Robeson County.¹²⁸ Ms. Cummings is a professional educator and was elected on a platform of education reform. Her purpose for proposing the "moment of silence" bill was to get students and teachers to "turn to an all powerful being" for help with problems and for guidance when necessary.¹²⁹ Her inspiration for the proposed bill was the "Holy Spirit."¹³⁰ She also relied on North Carolina Constitution Article 6, § 8 and Article 9, § 1 as the constitutional bases for the proposed bill.¹³¹ Ms. Cummings subsequently abandoned the bill because she objected to the Senate

127. H.R. Res. 202, Sess. 1995.

128. N.C. GEN. STAT. § 115C-47(29) (Supp. 1995) reads as rewritten:

To Require the Observance of a Moment of Silence in All School Units. — To afford students and teachers a moment of quiet reflection at the beginning of each day in the public schools, to create a boundary between school time and nonschool time, and to set a tone of decorum in the classroom that will be conducive to discipline and learning, every local board of education shall adopt a policy to require the observance of a moment of silence at the commencement of the first class of each day in all grades in the public schools. Such a policy may provide that 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 and that during that period silence shall be maintained and no one may engage in any other activities. Such period of silence shall be totally and completely unstructured and free of guidance or influence of any kind from any sources.

129. Interview with Rep. Frances Cummings, N.C. General Assembly, in Raleigh, N.C. (July 6, 1995).

130. *Id.*

131. N.C. CONST. art. 6, § 8 states, in part: "Disqualifications for office. The following persons shall be disqualified for office; First, any person who shall deny the being of almighty God."

N.C. CONST. art. 9, § 1 states: "Education encouraged. Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged."

version.¹³² She has since endorsed an amendment to the U.S. Constitution which would allow prayer in schools.¹³³

B. Major Types of "Moment of Silence" Statutes

There are three major types of "moment of silence" statutes. One type attempts to avoid any mention of religion or religious content of the "moment of silence."¹³⁴ Rather, these statutes refer to the "moment of silence" as meditation,¹³⁵ quiet reflection,¹³⁶ or quiet and private contemplation or introspection.¹³⁷ Although a Massachusetts statute originally contained the words "or prayer," in a suit challenging its constitutionality, the words were struck and the statute was upheld.¹³⁸ The North Carolina statute contains no mention of religion or religious content in defining the "moment of silence."¹³⁹ However,

132. Ms. Cummings withdrew her support for the proposed bill after the Senate changed the wording from "such a policy *shall* provide" to "such a policy *may* provide" (emphasis added). She explained that this revision eviscerated the proposed bill and essentially left the law as it currently existed.

Ms. Cummings voted against the Senate version, S.B. 140, Reg. Sess., 1995, N.C. Laws Ch. 497, which was adopted by the House. The Senate version became effective in August, 1995.

For local news coverage of the proposed bill, See Kari C. Barlow, *McKoy, Carrington to Support Schools' Moment of Silence Bill*, THE RALEIGH EXTRA, Mar. 26, 1995, at 18; Kari Barlow & Susan Margolis, *Prayer, The Pledge and The Law*, THE RALEIGH EXTRA, June 18, 1995, at 10; Danny Lineberry, *Republicans Write A Paradox with School Bills*, THE HERALD-SUN, Apr. 9, 1995, at A14; *Odds & Ends*, NEWS & RECORD, Mar. 18, 1995, at A6; *Religion And Schools*, THE HERALD-SUN, Mar. 30, 1995, at A14; *What's Behind 'Moment of Silence' Legislation?*, NEWS & RECORD, Apr. 18, 1995, at A6; Barry Yeoman, *House of Horrors; Scary Monsters Haunt the New Legislature*, THE INDEPENDENT WKLY., July 19, 1995, at D9.

133. H.R.J. Res. 10, 104th Cong., 1st Sess. (1995); H.R.J. Res. 16, 104th Cong., 1st Sess. (1995); H.R.J. Res. 19, 104th Cong., 1st Sess. (1995); H.R.J. Res. 67, 104th Cong., 1st Sess. (1995); S.J. Res. 6, 104th Cong., 1st Sess. (1995); S.J. Res. 7, 104th Cong., 1st Sess. (1995); See also Howard Fineman, *Clinton's Values Blowout*, NEWSWEEK, Dec. 19, 1994, at 24; William Safire, *Better Go To It, Mr. President; Clinton Should Get Off the Floor, Act Like A President*, THE DAYTON DAILY NEWS, Nov. 21, 1994, at A11.

134. See ALA. CODE § 16-1-20 (1994); ARIZ. REV. STAT. ANN. § 15-522 (1994); CONN. GEN. STAT. ANN. § 10-16A (West 1994); DEL. CODE ANN. tit. 14, § 4101 (1994); GA. CODE ANN. § 20-2-1050 (1994); MASS. ANN. LAWS ch. 71, § 1A (Law. Co-op. 1994); MICH. COMP. LAWS ANN. § 380.1565 (Law. Co-op. 1993); N.J. STAT. ANN. § 18A:36-4 (West 1995); R.I. GEN. LAWS § 16-12-3.1 (1994); TENN. CODE ANN. § 49-6-1004 (1994).

135. See ALA. CODE § 16-1-20 (1994); ARIZ. REV. STAT. ANN. § 15-522 (1994); R.I. GEN. LAWS § 16-12-3.1 (1994).

136. See GA. CODE ANN. § 20-2-1050 (1994); For local news coverage of Georgia's statute, see Mark Curriden, *Perspective*, THE ATLANTA J. & CONST., Feb. 20, 1994, at 1; *Metro and Georgia In Brief: Governor Signs Classroom Silence Bill*, THE ATLANTA J. & CONST., Mar. 26, 1994, at 2; Ben Smith III, *'94 Georgia Legislature 'Reflection' Bill Gets Through On Final Day Session With Conservative Tone Rejects Efforts For Gun Control*, THE ATLANTA J. & CONST., Mar. 17, 1994, at 1; *Ruling On School Silence Is Sound*, THE ATLANTA J. & CONST., Aug. 3, 1995, at A16; Nichell J. Taylor and Diane Loupe, *Teacher's Stance The Buzz at South Students' Views on Issue Divided*, THE ATLANTA J. & CONST., Aug. 24, 1994, at 1.

137. N.J. REV. STAT. § 18A:36-4 (1995).

138. *Gaines v. Anderson* 421 F. Supp. 337, 339 (Mass. Dist. Ct. 1976) (citing Mass. Gen. L. ch. 130 (1966)).

139. N.C. GEN. STAT. § 115C-47(29) (1995) See *supra* note 128.

the lack of the mention of religion or prayer has not saved all "moment of silence" statutes.¹⁴⁰ This outcome seems even more certain given the Supreme Court's emphasis in *Wallace* that such a statute must have a secular purpose.

Unlike the statutes that omit any reference to religion, the second type contains words conveying a religious purpose or allowing voluntary prayer during the "moment of silence."¹⁴¹ These statutes allow for a "moment of silence" for the purpose of silent prayer,¹⁴² voluntary religious observance¹⁴³ and silent prayer.¹⁴⁴ The North Dakota and Maryland statutes are probably most unusual because both allow for daily Bible reading led by the teacher.¹⁴⁵

Also unusual is a Texas statute which states that every student has "an absolute right to . . . pray"¹⁴⁶ This unique wording is probably a result of *Lubbock Civil Liberties Union v. Lubbock Independent School District*.¹⁴⁷ In *Lubbock*, a school district had been holding organized prayer but made an effort to hide it through various superficial changes to the school's policy. The court stated that the modifications did not change the overall purpose from sectarian to secular and therefore struck the school district's policy. In addition, the court noted that the First Amendment does ensure that every student has a right to pray without a specific time set aside. It appears that this case was a stepping stone, similar to *Duffy v. Las Cruces Public Schools*¹⁴⁸ striking a local school board ordinance that allowed one minute of silence at the beginning of each school day, to the Supreme Court's decision in *Wallace*.¹⁴⁹

The North Carolina statute clearly omits any reference to religion, perhaps in an effort to avoid detailed scrutiny of the events surrounding its adoption.

140. *Duffy*, 557 F. Supp. 1013 (D. N.M. 1983); N.M. STAT. ANN. § 22-5-4.1 (1978) (repealed 1995).

141. See FLA. STAT. ANN. § 233.062 (West 1994); ILL. COMPILED STAT. ANN. ch. 105, para. 20/1 (1995); IND. CODE ANN. §§ 20-10.1-7.8 to -7-11 (Burns 1995); KAN. STAT. ANN. § 72-5308a (1994); LA. REV. STAT. ANN. § 17:2115 (West 1995); MD. CODE ANN., EDUC. § 7-104 (1994); MISS. CODE ANN. § 37-13-4 (1993); N.Y. EDUC. LAW § 3029-a (Consol. 1994); N.D. CENT. CODE § 15-38-12 (1993); OHIO REV. CODE ANN. § 3313.601 (Anderson 1994); TEX. EDUC. CODE ANN. § 25.901 (West 1995); VA. CODE ANN. § 22.1-203 (Michie 1994).

142. FLA. STAT. ANN. § 233.062 (West 1994); See generally Michael Griffin, *Senators Work to Put Prayer Back in Schools*, SUN-SENTINEL, Apr. 19, 1995, at A14.

143. IND. CODE ANN. § 20-10.1-7-8 (Burns 1994).

144. See, e.g., IND. CODE ANN. § 20-10.1-7-11 (1994); LA. REV. STAT. ANN. § 17:2115 (West 1995).

145. MD. CODE ANN., EDUC. § 7-104(b) (1994) and N.D. CENT. CODE § 15-38-12 (1993).

146. TEX. EDUC. CODE ANN. § 25.901 (West 1995).

147. 669 F.2d 1038 (5th Cir. 1982), cert denied, 495 U.S. 1155 (1983).

148. 557 F. Supp. 1013 (D. N.M. 1983).

149. *Wallace*, 472 U.S. at 71 (O'Connor, J., concurring).

Finally, the third type of "moment of silence" statutes have been contested and found unconstitutional and either abandoned entirely or rewritten.¹⁵⁰ This group includes the Alabama statute that was the basis for the *Wallace v. Jaffree* decision.¹⁵¹ In addition, a New Mexico statute was found unconstitutional in *Duffy*.¹⁵² In considering whether there was a secular purpose for adoption of the statute, the *Duffy* court examined committee notes and the testimony of board members and the bill's sponsor. The court decided that the purpose of the statute was merely to find a way "which would authorize some form of prayer in . . . public schools."¹⁵³

C. Statutes Currently Being Considered in Other States

Some states are currently considering "moment of silence" statutes.¹⁵⁴ For instance, Utah rejected a "moment of silence" statute and instead adopted a resolution to encourage an amendment to the United States Constitution which would allow a "moment of silence."¹⁵⁵ Also, a Texas House Committee is considering a bill that would require the state to indemnify and assist any school district or school employee sued for following its "moment of silence" statute.¹⁵⁶

VI. THE CONSTITUTIONALITY OF THE NORTH CAROLINA STATUTE

In analyzing the constitutionality of North Carolina's statute, a court would likely apply the Lemon Test as used in *Wallace v. Jaffree*. Under the first prong, the Court would address whether the statute has a secular purpose.¹⁵⁷ As the Court stated in *Wallace*, it is necessary to look past the stated purpose in the statute itself and examine committee notes and the sponsor's stated purpose for the statute.¹⁵⁸ Ms. Cummings stated that the purpose of her bill was to "encourage

150. ALA. CODE §§ 16-1-20.1 & 16-1-20.2 (1994); ARK. CODE ANN. § 6-16-119 (Michie 1994) (repealed 1993); N.M. STAT. ANN. § 22-5-4.1 (1978).

151. 472 U.S. 38 (1984).

152. 557 F. Supp. 1013 (D. N.M. 1983) (The statute provided, in part, as follows: "Each local school board may authorize a period of silence not to exceed one minute at the beginning of the school day. This period may be used for contemplation, meditation, or prayer, provided that silence is maintained and no activities are undertaken.").

153. *Id.* at 1015.

154. See H.R. Res. 78, Sess., 1995 KY. (introduced on June 26, 1995); H.B. Res. 294, Sess., 1995 KY. (introduced on May 31, 1995); H.R. Res. 656, Sess., 1995 ME. (suggesting a change from the current law that would require observance of a "moment of silence," the bill was sent to a joint committee which vetoed the bill).

155. H. Res. 6, Sess., 1995 UTAH (passed both the House and Senate on Feb. 20, 1995).

156. H.B. Res. 784, Sess., 1995 TEX. (sent to Civil Procedures Committee on Feb. 2, 1995).

157. See *Lemon*, 403 U.S. at 612.

158. *Wallace*, 472 U.S. at 60.

people to turn to prayer.”¹⁵⁹ According to Ms. Cummings, a large portion of society's current problems, including drugs, dysfunctional families, and lower student competency, are a result of the lack of prayer in schools.¹⁶⁰ Based on her comments, it appears the purpose of the statute was to return prayer to school — the same reason the statute in *Wallace* was found unconstitutional.¹⁶¹ Therefore, it seems likely that a court would find the statute unconstitutional based on its inability to satisfy the first prong of the Lemon Test.

The second prong requires that the principal or primary effect of the action neither advance nor inhibit religion.¹⁶² As the Court stated in *Aguilar v. Felton*, there are three possible analyses under this prong.¹⁶³ The *Aguilar* Court began its analysis by looking at the type of institution that would carry out the challenged action to determine whether it was pervasively sectarian.¹⁶⁴ The North Carolina statute provides for a “moment of silence” in a public school setting. Since a public school is a secular location, there should be no concern that the challenged action takes place in a pervasively sectarian institution.

The second analysis advanced by the *Aguilar* Court was to consider the audience of the challenged action.¹⁶⁵ The audience of North Carolina's statute would be school-age children. The *Grand Rapids* Court expressed concern about the unique susceptibility to indoctrination of school-age children because of their age and inexperience.¹⁶⁶ One might argue that no indoctrination would be taking place in North Carolina schools because no one particular prayer is being used. However, this argument would not satisfy atheist or agnostic parents who do not formally pray. Their children are likely to feel a certain amount of pressure to participate, regardless of their beliefs.

Under the third analysis, a court may analyze whether the “moment of silence” creates the appearance of a “crucial symbolic link.”¹⁶⁷ A teacher directing public school children to take time out for a “moment of silence” seems likely to create some type of link between prayer and the teacher, even though the children are not instructed to actually pray. This link may seem relatively inconsequential, but

159. Interview with Rep. Francis Cummings, N.C. Gen. Assembly, in Raleigh, N.C. (July 6, 1995).

160. *Id.* During the interview, Ms. Cummings stated that the Court's decision in *Engle v. Vitale* declaring prayer in schools unconstitutional represented the beginning of our current societal problems.

161. *Wallace*, 472 U.S. at 60-61.

162. *Lemon*, 403 U.S. at 612.

163. 473 U.S. 402, 411 (1985). See *supra* text accompanying notes 61-75.

164. See *Aguilar*, 473 U.S. at 411.

165. *Id.* See also *Grand Rapids v. Ball*, 473 U.S. 373, 391 (1985).

166. *Grand Rapids*, 473 U.S. at 391.

167. *Id.* at 390.

based on the Court's previous rulings, it appears sufficient for a finding that the primary effect of the statute is to advance religion. Consequently, the statute would fail the second prong of the Lemon Test.¹⁶⁸

The third prong of the Lemon Test prohibits excessive entanglement between the government and religion.¹⁶⁹ The first factor to consider is the character and purpose of the institution.¹⁷⁰ The North Carolina public school system would be the institution in question. There is little argument that it is secular in purpose and character.

The second factor is the type of aid the State would provide.¹⁷¹ Under its statute, North Carolina would provide little, if any, direct aid. Rather, the aid would be indirect — setting aside time for prayer.

The third factor a court may consider is the resulting relationship between the government and the religious institution.¹⁷² The "moment of silence" would take place in a secular institution and there would be no on-going monitoring by the State. The issue of the statute's potential for political divisiveness would not be raised since there would be no direct financial subsidy to a sectarian institution.¹⁷³ Because North Carolina's "moment of silence" statute does not foster an excessive entanglement with religion, it would satisfy the third prong of the Lemon Test.

In summary, the "moment of silence" statute would likely be declared unconstitutional because it fails two of the three prongs of the Lemon Test established by the Supreme Court.

MARGARET RICHARDSON

168. See *Grand Rapids v. Ball*, 473 U.S. 373 (1985); *New York v. Cathedral Academy*, 434 U.S. 125 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975).

169. *Lemon*, 403 U.S. at 602.

170. See *Roemer v. Board of Pub. Works*, 426 U.S. 736, 762 (1976).

171. See *Roemer*, 426 U.S. at 763.

172. *Id.*

173. See *Bowen v. Kendrick*, 487 U.S. 589, 617 n. 14 (suggesting that political divisiveness be considered only in cases where direct financial subsidies are paid to parochial schools); *Roemer*, 426 U.S. at 765.