CASENOTES

The Establishment Clause and Church Veto of Liquor Licenses: *Larkin v. Grendel's Den, Inc.*[1] — The first amendment to the United States Constitution prohibits Congress from enacting laws "respecting an establishment of religion."[2] This prohibition, commonly referred to as the establishment clause,[3] prohibits both the federal and state[4] governments from either establishing a church or aiding religion for predominantly sectarian purposes.[5] Under the establishment clause, the Supreme Court of the United States has struck down a state law mandating school prayer,[6] a state law requiring bible reading in public classrooms,[7] and an attempt by a state to forbid the teaching of evolution in public

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[1] 459 U.S. 116 (1982).

[2] U.S. CONST. amend. I. The full text of the first amendment provides that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

[3] At least one commentator has noted that it would be more accurate to refer to this language as the "nonestablishment principle." Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513, 513-14 (1968) [hereinafter cited as Giannella] (establishment clause represents framers' constitutional insistence on nonestablishment of religion). In this article, the more conventional phrase "establishment clause" will be used.

[4] The Supreme Court has held that the due process clause of the fourteenth amendment to the United States Constitution renders the establishment clause applicable to the states as well as the federal government. Everson v. Board of Education, 330 U.S. 1, 15-16 (1947).

[5] *See id.* In *Everson*, the Court stated:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion was intended to erect "a wall of separation between church and state."

Id. at 15-16.

The broad language quoted above is subject to certain qualifications, especially where the free exercise clause of the first amendment, which prohibits Congress and the states from making laws "prohibiting the free exercise" of religion, is involved. U.S. CONST. amend. I. For example, in Sherbert v. Verner, 374 U.S. 398 (1963), the Supreme Court held that a member of the Seventh-Day Adventist Church could not be denied unemployment compensation by the state for refusing to work on Saturdays because of her religious beliefs. *Id.* at 410. Such an exception by the government to accommodate religious beliefs could arguably violate the establishment clause as described in *Everson* above if the exception were construed as state action that advanced religion. Several commentators have discussed the potential tensions between the free exercise and establishment clauses. *See* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980) [hereinafter cited as Choper]; Fink, *The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values*, 27 CATH. U. L. REV. 207 (1978).

[6] Engel v. Vitale, 370 U.S. 421, 436 (1962) (local school board's mandate that nondenominational prayer be recited in public schools held to violate the establishment clause).

[7] Abington School District v. Schempp, 374 U.S. 203, 225 (1963) (Pennsylvania law requiring verses of the Holy Bible to be read in public school held to violate the establishment clause).

schools.[8] In the recent case of *Larkin v. Grendel's Den, Inc.*,[9] the Supreme Court addressed the question whether a Massachusetts statute allowing churches to prohibit the issuance of liquor licenses to businesses in close proximity to church property violated the establishment clause of the first amendment.[10] The *Larkin* Court held that the statute was unconstitutional because it had the primary purpose of advancing religion and led to excessive entanglement between church and state.[11]

The challenged statute, section 16C of Chapter 138 of the Massachusetts General Laws, prohibited the issuance of a liquor license to any business within 500 feet of a church if the church's governing body filed a written objection with the appropriate licensing authority.[12] In 1977, the operator of Grendel's Den, a restaurant in Cambridge, Massachusetts, applied for an alcoholic beverages license.[13] The Cambridge License Commission denied the application, citing only the objection of the Holy Cross Armenian Church located ten feet from the restaurant.[14] In its objection, the church had expressed concern over the large number of liquor licenses already granted in the area.[15]

The operator of the restaurant then appealed to the Massachusetts Alcoholic Beverages Control Commission, which upheld the Cambridge License Commission's denial of the license.[16] Subsequently, the operator sued the Cambridge License Commission and the Massachusetts Alcoholic Beverages Control Commission in the United States District Court for the District of Massachusetts,[17] claiming that the Massachusetts statute violated several provisions of the Constitution, including the establishment clause.[18] The District Court continued the plaintiff's suit to allow the Massachusetts Supreme Judicial Court to reach a decision in *Arno v. Alcoholic Beverages Control Commission*.[19] *Arno* also involved a challenge to the Massachusetts statute at issue in *Larkin*.[20]

After the Massachusetts Supreme Judicial Court upheld the statute,[21] the District

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[8] Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (Arkansas' prohibition of the teaching of evolution in public schools because of a religious group's objection held to violate the establishment clause).

[9] 459 U.S. 116 (1982).

[10] *Id.* at 117.

[11] *Id.* at 120.

[12] The statute provided in pertinent part:

> Premises, except those of an innholder and except such parts of buildings as are located ten or more floors above street level, located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages if the governing body of such church or school files written objection thereto. . . .

MASS. GEN. LAWS ANN., ch. 138, § 16C (West 1974).

[13] 459 U.S. at 117.

[14] *Id.* at 118.

[15] *Id.* In the period between the church's objection and the *Larkin* decision, one new liquor license was granted. *Id.* at 118 n.2.

[16] *Id.*

[17] Grendel's Den, Inc. v. Goodwin, 495 F. Supp. 761 (D. Mass. 1980).

[18] 459 U.S. at 118. Grendel's Den also claimed that the Massachusetts statute violated the equal protection and due process clauses of the fourteenth amendment. Additionally, the appellee claimed that section 16C violated the antitrust provisions of the Sherman Act. *Id.*

[19] 377 Mass. 83, 384 N.E.2d 1223 (1979).

[20] *Id.* at 84, 384 N.E.2d at 1224-25.

[21] *Id.* at 93, 384 N.E.2d at 1229. In *Arno*, the plaintiff contended that section 16C was an impermissible delegation of legislative authority, and that it violated the due process and establishment clauses of the United States Constitution. *Id.* at 84, 384 N.E.2d at 1224-25. The Supreme Judicial Court of Massachusetts rejected all these claims. In its rejection of the claim that the statute

Court resumed the *Larkin* case and held that section 16C was void on its face because it violated the establishment clause of the first amendment.[22] A divided panel of the First Circuit Court of Appeals reversed.[23] The operator then filed a motion for a rehearing *en banc*.[24] After the motion was granted, the First Circuit, in another divided opinion, affirmed the District Court's opinion and held that section 16C was unconstitutional because it violated the establishment clause.[25] The Supreme Court granted *certiorari*[26] and affirmed the holding of the *en banc* circuit court.[27]

In its decision, the Supreme Court applied the three prong standard that it had developed in previous cases to be used when analyzing establishment clause questions.[28]

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delegated legislative authority to churches, the court characterized section 16C as a delegation of a "veto power" to churches. *Id.* at 89, 384 N.E.2d at 1227. As such, the court concluded the statute only permitted churches to waive the protection provided by the legislature and did not delegate any legislative power to churches. *Id.* at 89-90, 384 N.E.2d at 1227-28.

The court then rejected the due process claim. According to the court, due process requires only that the opportunity for a hearing be provided before an administrative or judicial body at which aggrieved parties could raise issues such as whether the objecting institution qualified as a church within the meaning of the statute. *Id.* at 90-91, 384 N.E.2d at 1228. The court concluded that section 16C did, in fact, provide such an opportunity. *Id.*

Finally, in its rejection of the plaintiff's claim that section 16C violated the establishment clause, the court applied the three prong standard developed by the Supreme Court. *See infra* notes 33 to 110 and accompanying text. Under this standard, a statute must: first, have a secular purpose; second, have a principal effect that neither advances nor inhibits religion; and third, not lead to excessive entanglement between church and state. *Arno*, 377 Mass. at 91, 384 N.E.2d at 1228. First, according to the court, the protection of persons attending activities at churches was a valid secular purpose, and second, its principal effect did not advance nor inhibit religion. *Id.* at 91-92, 384 N.E.2d at 1228-29. Finally, the court concluded that any church-state contacts resulting from the application of section 16C did not rise to excessive entanglement. *Id.* at 92-93, 384 N.E.2d at 1229. Because the statute satisfied all three prongs, the court held that it did not contravene the establishment clause. *Id.* at 93, 384 N.E.2d at 1229.

[22] Grendel's Den, Inc. v. Goodwin, 495 F. Supp. 761, 766-68 (D. Mass. 1980). In *Goodwin*, the district court, like the *Arno* court, applied the three prong standard developed by the Supreme Court to determine the constitutionality of statutes under the establishment clause. *Id.* at 766. *See supra* note 21. Unlike the *Arno* court, however, the *Goodwin* court held that section 16C had the primary effect of advancing religion, and therefore violated the establishment clause. 495 F. Supp. at 767-68. According to the court, section 16C's delegation of a veto power could easily be abused by a church. *Id.* at 767. For example, a Protestant church could choose to exercise its veto power only when non-protestants applied for liquor licenses. *Id.* Also, a church could condition the non-exercise of the section 16C veto power upon the receipt of a donation. *Id.* This potential for abuse, the court stated, had the primary effect of advancing religion in contravention of the establishment clause. *Id.* at 767-68.

In *Goodwin*, the plaintiff also contended that section 16C violated the due process clause of the fourteenth amendment. *Id.* at 762. The district court agreed holding that section 16C delegated legislative power to churches and schools. *Id.* at 766. According to the court, the delegation of power to such nongovernmental bodies contravened the due process clause. *Id.*

[23] Grendel's Den, Inc. v. Goodwin, 662 F.2d 88, 99 (1st Cir. 1981).

[24] Grendel's Den, Inc. v. Goodwin, 662 F.2d 102 (1st Cir. 1981)(*en banc*).

[25] *Id.* at 107. The court held that section 16C violated the establishment clause because it had the direct and immediate effect of advancing religion by providing churches with a "valued benefit or power." *Id.* at 104-05. The court also held the statute unconstitutional under the establishment clause because it distributed benefits on an "explicitly religious basis" by granting the "veto power" to churches but not to similarly situated non-religious groups. *Id.* at 105.

[26] 454 U.S. 1140 (1982).

[27] 459 U.S. 116, 120 (1982).

[28] *Id.* at 122-27.

Under this standard, legislation will be in contravention of the establishment clause unless a secular purpose is present, none of the primary effects of the legislation promote religion, and the legislation does not lead to excessive entanglement between church and state.[29] If any of these prongs is not satisfied, the legislation violates the establishment clause.[30] In *Larkin*, the Supreme Court held that while section 16C had a secular purpose and was thus constitutional under the first prong of the test, the statute had a primary effect that advanced religion and led to excessive entanglement between church and state in violation of the second and third prongs.[31] Because the statute violated the second and third prongs, the Court held that section 16C was unconstitutional.[32]

The Supreme Court's decision in *Larkin* is significant for two reasons. First, *Larkin* is the first case in which the Supreme Court has struck down the delegation of legislative power to a church. Second, the Court's application of the three prong establishment clause test may be signaling new developments in this area of constitutional jurisprudence.

This casenote will begin by discussing the development of the three prong standard used for determining establishment clause questions. Next, the Supreme Court's holding in *Larkin* will be discussed. The current status of the secular purpose prong of the establishment clause test will then be examined in the wake of *Larkin*. It is submitted that because the Court chose to discuss alternatives to section 16C by which the legislature could achieve its purpose in a constitutional manner, the Court may be signaling an expansion of the secular purpose prong to require that statutes be narrowly tailored to achieve their purposes and to avoid establishment clause problems. Next, this casenote will examine the Court's holding that section 16C has a principal or primary effect that advances or inhibits religion because it could be abused by churches, and also, because it provides a significant symbolic benefit to religion. This casenote will contend that the mere potential for abuse should not render a facially neutral statute invalid. It will also be argued that any symbolic benefit provided to religion by section 16C was, at best, insignificant.

The excessive entanglement prong of the establishment clause standard as construed by the Court in *Larkin* will then be analyzed. Initially, this section of the casenote will scrutinize the first type of entanglement found by the *Larkin* Court — the potential that section 16C would lead to political division along religious lines. The ways in which section 16C could lead to political division along religious lines will be discussed. Also, the implications that the Court's holding has for future analyses under the establishment clause will be considered. This casenote contends that *Larkin* reaffirms the validity of the political divisiveness test when prior to *Larkin*, its continued applicability had become questionable. This section of the casenote will also argue that the *Larkin* decision indicates that before any statute will be held void under the political divisiveness test, the danger of a statute leading to political fragmentation along religious lines must be great. The final portion of this casenote will discuss the second type of entanglement found by the *Larkin* Court — the delegation of secular power to a church. This casenote contends that when the Court held section 16C unconstitutional because it delegated a veto power to churches over liquor licenses, the Court recognized a new type of entanglement between church and state.

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[29] *Id.* at 123.
[30] *See id.*
[31] *Id.* at 122-27.
[32] *Id.* at 127.

I. The Evolution of the Modern Establishment Clause Standard

The Supreme Court set forth the general rule that the establishment clause prevents federal or local governments from subsidizing religions in 1947, in *Everson v. Board of Education*.[33] In *Everson*, the Court upheld the constitutionality of a New Jersey statute that provided public funds for busing children to parochial schools.[34] Although the *Everson* Court, in what is known as the no-aid to religion principle,[35] stated that the establishment clause prevents states from passing laws "which aid one religion, aid all religions, or prefer one religion over another,"[36] the Court held that programs of general welfare assistance such as police protection, fire protection, sewage disposal, and the provision of public highways and sidewalks were permissible.[37] The Court explained that the establishment clause did not prohibit states from providing these general services to churches or their members,[38] but, instead only required that states be "neutral" and not prefer religious groups over secular groups.[39] According to the Court, any benefits received by churches from the busing program were not received in contravention of the establishment clause, because no special benefits were provided to religion.[40] Consequently, the state, in the *Everson* Court's view, was acting in a neutral fashion towards religion through a general welfare program.[41]

The concept of neutrality articulated in *Everson* was expanded in 1963 in *School District of Abington Township v. Schempp*.[42] In *Schempp*, the Supreme Court invalidated a Pennsylvania statute that required the reading of verses from the Bible and the recitation of the Lord's Prayer at the start of each day in public school.[43] The Court referred to the

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[33] 330 U.S. 1 (1947).

[34] *Id.* at 3-4.

[35] *See* Giannella, *supra* note 3, at 530; Schwartz, *No Imposition of Religion: The Establishment Clause Value*, 77 Yale L.J. 692, 701-03 (1968) [hereinafter cited as Schwartz].

[36] *Everson*, 330 U.S. at 15-16. For the full text of Justice Black's oft quoted passage, *see supra* note 5.

Justice Black also discussed the historical context preceding the adoption of the establishment clause. 330 U.S. at 8-13. He observed that, although many people had left Europe and sought out the New World in order to escape the persecution and practices connected with governments that supported particular religions, these same practices were resurrected in the New World. *Id.* at 8-10. Determined not to allow these practices to continue, James Madison and Thomas Jefferson led a successful attack on a Virginia bill that would have renewed a tax levy, the proceeds of which would have gone to a state-established church. *Id.* at 11-12. To prevent the future enactment of similar bills, Jefferson authored and successfully lobbied for the Virginia Bill of Liberty, which prohibited any man from being forced to support a particular religious worship, or to attend a particular religious function. *Id.* at 12-13. The Virginia Bill of Liberty preceded and was the model for the establishment clause of the first amendment. *Id.* at 13.

[37] *Id.* at 17-18.

[38] *Id.* at 18. Professor Giannella has observed that the Court's characterization of the New Jersey busing statute as a general welfare assistance program was critical because the statute straddled both the area of public health and safety and the area of education. *Giannella*, *supra* note 3, at 529. If the Court had characterized the statute as aiding religious education, the statute would have violated the Court's earlier rulings interpreting the establishment clause as prohibiting aid to religion. *See supra* note 5. By characterizing the statute as a health and safety measure, the Court could bring the statute within its notion of neutrality; that is, the evenhanded distribution of general welfare benefits.

[39] *Everson*, 330 U.S. at 18.

[40] *Id.*

[41] *Id.*

[42] 374 U.S. 203 (1963).

[43] *Id.* at 226-27.

Everson principle that government should neither aid nor oppose religion as requiring "strict neutrality."[44] In addition, the Court enunciated a two-pronged test to be applied by courts when determining whether or not the government has acted in a neutral manner.[45] For a statute to be valid under the establishment clause, the Court stated, a statute first, must have a secular legislative purpose and second, the statute's primary effect must neither advance nor inhibit religion.[46] A statute must satisfy both of these conditions to be constitutional under the establishment clause.[47] According to the *Schempp* Court, if a statute failed either of these prongs, it was unconstitutional because the government had not acted in a neutral manner.[48] After *Schempp*, therefore, if a statute lacked a secular purpose or the primary effect of the statute was to advance or inhibit religion, the statute was void. Unlike the strict no-aid to religion principle articulated in *Everson*,[49] the *Schempp* test allowed legislation to provide incidental benefits to religion, so long as the primary effect of the statute was secular.[50]

In 1970, the continued validity of the *Schempp* secular purpose and primary effect test was cast in doubt by the Supreme Court's decision in *Walz v. Tax Commission*.[51] In *Walz*, a taxpayer challenged a statute authorizing the New York City Tax Commission to grant property tax exemptions to religious organizations that used their property for religious worship on the grounds that these exemptions indirectly forced the taxpayer to support religious institutions in violation of the establishment clause.[52] In its analysis of these facts, the Court first discussed the potential conflict between the free exercise clause[53] and the establishment clause, both being found in the first amendment. Broadly defined, the free exercise clause prohibits the government from interfering with the practice of religion.[54] Thus, the Court observed that if both clauses were carried to their extremes, the government could be faced with a situation in which the establishment clause prohibits the

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[44] *Id.* at 225.

[45] *Id.*

[46] *Id.* at 222. Although *Schempp* was the first case to state explicitly the secular purpose and primary effect test, the Supreme Court, in McGowan v. Maryland, 366 U.S. 420 (1961) held that Sunday closing laws do not violate the establishment clause because the legislative purpose and primary effect of these laws is to promote the secular objective of having a uniform day of rest. *Id.* at 449.

[47] *See id.*

[48] *Schempp*, 374 U.S. at 222.

[49] *Everson*, 330 U.S. at 15-16.

[50] Schwartz, *supra* note 35, at 701-04 (Court avoided stark results of the no-aid standard by limiting the scope of its review through a balancing approach). Giannella, *supra* note 3, at 533 (Court's adherence to the secular purpose and primary effect test indicates that government can incidentally aid religious functions to a substantial degree as long as actions are primarily directed to secular ends).

Professor Schwartz has criticized the balancing approach used in Supreme Court decisions. He argues that the balancing approach fails to identify the values protected by the establishment clause. This failure results in different aids to religion being treated as qualitatively equal, and the application of the test produces inconsistent results. Schwartz, *supra* note 35, at 702-04.

[51] 397 U.S. 664 (1970).

[52] *Id.* at 666-67.

[53] This clause provides that "Congress shall make no law . . . prohibiting the free exercise . . . of religion." U.S. CONST. amend. I.

[54] *See generally* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 871-72 (1978); Kauper, *The Walz Decision: More on the Religion Clauses of the First Amendment*, 69 MICH. L. REV. 179, 184-85 (1970) [hereinafter cited as Kauper].

furtherance of primarily religious interests, while the free exercise clause requires that the government accomodate religion in order to guarantee that the practice of religion is not suppressed.[55]

In its analysis of this potential conflict, the Court stated that the religion clauses of the first amendment prohibit two extremes: governmental establishment of religion and governmental interference with religious practice.[56] The Court explained that "room for play," which it defined as "benevolent neutrality," existed between these two extremes.[57] According to the Court, the standard for determining whether benevolent neutrality was being maintained by the government was whether an "excessive entanglement" between church and state resulted from the governmental action.[58] The Commission's grant of a tax exemption to the religious properties in question was then evaluated by the Court to determine whether the grant had led to excessive entanglement between church and state.

In its discussion, the Court began by scrutinizing the degree of government involvement with religion and the contacts between church and state resulting from the tax exemption.[59] Noting that the Commission's actions had, in fact, decreased the amount of entanglement between church and state, the Court upheld the Commission's grant of the exemption.[60] According to the Court, the contacts normally connected with tax matters, such as valuation of property, foreclosure, and other direct church-state confrontations, were avoided as a consequence of the tax exemption.[61] Although the Court recognized

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[55] *Walz*, 397 U.S. 668-69.

[56] *Id.*

[57] *Id.* According to the Court, "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." *Id.*

At least one legal scholar has observed that the roots of the accommodation theory underlying benevolent neutrality can be found in several earlier Supreme Court decisions. Kauper, *supra* note 54, at 199. For example, in Zorach v. Clauson, 343 U.S. 306 (1952), the Court upheld a state released time program allowing children to leave public school in order to attend classes on religious instruction conducted outside the school premises. *Id.* at 314. According to the Court:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the public events to sectarian needs, it follows the best of our traditions...Government may not finance religious groups nor undertake religious instruction nor blend secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

Id. at 313-14. Similarly, in another case, Sherbert v. Verner, 374 U.S. 398 (1963), the Court intimated that accommodation was part of the religion clauses. In *Sherbert*, the Court held that a state was under a duty to pay unemployment compensation to a Seventh Day Adventist who had refused a job that would have required her to work on Saturdays, contrary to her religious beliefs. *Id.* at 403-06.

[58] *Walz*, 397 U.S. at 674. The rudiments of the excessive entanglement test can be found in earlier Supreme Court decisions. For example, in Engel v. Vitale, 370 U.S. 421 (1961), the Court noted that at the time the Constitution was adopted Americans were aware of the problems that resulted when religious groups struggled with one another for government approval, and therefore adopted the establishment clause to prevent church-state confrontations. *Id.* at 429. *See also*, Ripple, *The Entanglement Test of the Religion Clauses-A Ten Year Assessment*, 27 UCLA L. REV. 1195, 1197 and n.6 (1980) [hereinafter cited as Ripple].

[59] *Walz*, 397 U.S. at 674-75.

[60] *Id.* at 674-80.

[61] *Id.* at 674-75.

that the tax exemption produced an indirect economic benefit to religion, the Court concluded that the tax exemption occasioned fewer contacts between church and state, thereby preventing excessive entanglement of church and state.[62]

The Court's adoption of the benevolent neutrality test in *Walz* signaled a complete abandonment of the strict no-aid to religion principle articulated in *Everson*.[63] One of the issues the Court left unresolved, however, was what the limits on benevolent neutrality were. *Walz* also left uncertain the question whether the excessive entanglement test reformulated or superseded the secular purpose and primary effect test.[64] Moreover, the Court had failed to explain what other types of relationships and contacts between church and state constituted excessive entanglement.

One year after *Walz*, the Supreme Court, in *Lemon v. Kurtzman*,[65] attempted to answer some of these questions. In *Lemon*, the Court struck down Pennsylvania and Rhode Island statutes that provided public funds for the salaries of parochial and other non-public school teachers.[66] In so ruling, the Court formulated a three prong standard for courts to use when evaluating challenges to state action under the establishment clause: first, a statute must have a secular legislative purpose; second, an act's principal or primary effect must neither advance nor inhibit religion; and third, a statute must not foster excessive entanglement between church and state.[67] According to the *Lemon* Court, if a statute fails any of these three prongs, it violates the establishment clause.[68] The Court recognized

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[62] *Id.* The Court also noted that the granting of a tax exemption was not sponsorship of religion because the government simply abstains from requiring that the church support the state. *Walz*, 397 U.S. at 675. This characterization of a tax exemption as not sponsoring religion has been criticized by at least one group of legal scholars. SURREY, WARREN, MCDANIEL AND AULT, FEDERAL INCOME TAXATION 598 (1972) ("Regardless of what one thinks of the *Walz* result, the Court's analysis of the nature of the tax exemption will not withstand economic analysis.").

[63] *See Everson*, 330 U.S. at 15-16 discussed *supra* 33 through 41 and accompanying text. The *Walz* decision also made it clear that the Supreme Court would not apply Professor Kurland's definition of strict neutrality, which provided that government may not use religion as a basis for classification in order to advance or inhibit religion. *See* Kurland, 24 Vill. L. Rev. 3, 24 (1978); Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 5-6 (1961), reprinted as P. KURLAND, RELIGION AND THE LAW (1962).

Professor Kurland's definition was rejected not only by the Supreme Court, but also by legal scholars. *See* Giannella, *supra* note 3, at 513-37; Katz, *Radiations from Church Tax Exemption*, 1970 SUP. CT. REV. 93, 102-03 (1970). This rejection of Professor Kurland's definition by the commentators and probably the Court is derived from the harsh results the adoption of a no religious classification principle would have on the free exercise of religion, as a no religious classification principle would prohibit all state actions seeking to accommodate religion. Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 SUP. CT. REV. 147, 152-54 (1971) [hereinafter cited as Giannella].

For example, the Court's decisions in Zorach v. Clauson, 343 U.S. 306 (1952) and Sherbert v. Verner, 374 U.S. 398 (1963), discussed *supra* note 57, as well as the more recent decision in Gillette v. United States, 401 U.S. 437 (1971), where the granting of an exemption from military service to those who oppose wars because of their religious beliefs was held not to violate the establishment clause, would no longer be valid if a no religious classification standard were adopted by the Court.

[64] According to one commentator, the excessive entanglement test could merely have been a "pragmatic rephrasing" of the secular purpose and primary effect test. Ripple, *supra* note 58, at 1197. Thus, the Court may have been using excessive entanglement as an indicator of the primary effect of governmental action. *Id.* at 1197 n.15.

[65] 403 U.S. 602 (1971).

[66] *Id.* at 625.

[67] *Id.* at 612-13.

[68] *Id.* at 612-14.

that the test enunciated in *Lemon* represented a combination of the principles earlier enunciated in *Schempp* and *Walz*.[69]

Applying the first part of the three prong standard to the challenged appropriations, the Court in *Lemon* held that the statutes had the valid secular purpose of ensuring that minimum levels of secular education were provided in non-public schools.[70] The Court chose not to address, however, the primary effect prong of the standard because it held that the statutory appropriations led to excessive entanglement between church and state.[71] Finding that the programs at issue led to two distinct types of entanglement,[72] the Court observed that the first type of excessive involvement was the administrative surveillance that would necessarily accompany the state's subsidy of teachers' salaries.[73] For example, the Court noted that under the Rhode Island program, non-public schools were not eligible for state subsidies if per pupil expenditures on secular education exceeded comparable figures in public schools.[74] This ineligibility, according to the Court, was based on the notion that if the non-public school spent more on education than state schools did, no reason existed for concern over the quality of that school's secular education.[75] The Court pointed out that the statute mandated that the state inspect school records to ascertain what percentage of school expenditures were for secular, as opposed to religious, education to determine whether the total expenditures of a non-public school exceeded the amount spent on secular education in public schools.[76] This process was also necessary, the Court stated, to enable the state to ascertain how much of that subsidy was needed to bring the level of secular education in non-public schools up to the level of secular education in public schools.[77] The Court described this administrative process and the resulting relationship between church and state as "pregnant" with dangers of excessive entanglement.[78] In addition, the Court reasoned that where funds were provided to subsidize the salaries of teachers teaching secular subjects, states would have to enter schools to make sure that only secular material was taught.[79] The Court held that these "prophylactic contacts" led to excessive entanglement between church and state, in contravention of the establishment clause.[80] This form of excessive entanglement identified

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[69] *Id.* at 612. Just prior to enunciating the three prong standard, the Court stated that, "every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years." *Id.*

[70] *Id.* at 612. There has been little scholarly discussion of the secular purpose prong. *But see* Choper *supra* note 5, at 685-86. Professor Choper would replace the current establishment clause standard with one of his own. Under his test, practices in public schools would be forbidden only if a sectarian purpose was coupled with an infringement of religious liberty. *Id.* Thus, unlike the Court, Professor Choper would not invalidate a statute simply because it has a religious purpose. In regard to aid to parochial schools, he would prohibit any aid that was to be used for sectarian purposes. *Id.* at 678-79.

[71] 403 U.S. at 613-14.

[72] *Id.* at 615-24. *See generally*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-12 (1978) [hereinafter cited as L. TRIBE] (two types of entanglement: political entanglement which focuses on political division along religious lines and administrative entanglement which focuses on institutional interference between church and state). *See also*, Choper, *supra* note 5, at 681-85 (1980).

[73] *Lemon*, 403 U.S. at 619-22.

[74] *Id.* at 620.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.* at 619.

[80] *Id.*

by the *Lemon* Court — the administrative contacts the statute created between church and state — was analogous to the involvement that the Court in *Walz* held was avoided by granting tax exemptions to religious organizations. In effect, therefore, this portion of the Court's opinion merely reaffirmed the reasoning expressed in *Walz*.

The *Lemon* Court, however, then identified a second type of entanglement not mentioned in the *Walz* decision. The Rhode Island and Pennsylvania statutes challenged in *Lemon* also created excessive entanglement, the Court stated, because of their "divisive political potential."[81] Explaining this concept, the *Lemon* Court observed that in a state where there are many parochial schools, it was inevitable that a considerable amount of public debate would focus on how much government aid should be provided to such schools.[82] The Court suggested that supporters of parochial schools would attempt to campaign for increased aid,[83] but would be opposed by individuals who, for fiscal, religious or constitutional reasons, were against providing state aid to parochial schools.[84] This debate, the Court believed, would cause many people to vote based solely on their religious affiliations.[85] The Court stressed that the danger of political division and strife along religious lines was one of the principal evils the first amendment had been designed to prevent.[86] Because the parochial school subsidies in *Lemon* were likely to become part of the annual appropriations process, the Court stated that it was especially concerned that political division and conflict would occur along religious lines.[87] Accordingly, the Court held that this second type of entanglement provided an independent basis for striking down the programs as unconstitutional.[88]

The reactions of commentators to the *Lemon* Court's articulation of the political divisiveness component of the excessive entanglement test have been uniformly hostile.[89] This prong of the test has been criticized for three reasons. First, because virtually all state actions providing benefits to religion could potentially cause political divisiveness along religious lines, the commentators have noted that the test has little practical value to lawyers or judges absent more specific guidelines.[90] Second, scholars have criticized the political divisiveness test as contrary to the first amendment's protection of citizen partici-

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[81] *Id.* at 622.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* at 623-24.

[88] *Id.* at 623-25. The Court distinguished *Walz* from its holding in *Lemon* because in *Walz* all religious groups benefited from the tax exemption, whereas in *Lemon* relatively few religious groups benefited, and the annual appropriations process was likely to cause political fragmentation along religious lines. *Id.* at 623. The Court pointed to the financial crisis in Rhode Island's parochial schools and the likelihood that pressures would increase to provide greater subsidization of more parochial teachers who taught secular subjects. *Id.* at 623-24.

[89] *See* L. TRIBE, *supra* note 72, § 14-12, at 866-67; Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205 (1980) [hereinafter cited as Gaffney]; Giannella, *supra* note 63, at 166-67; Ripple, *supra* note 58, at 1228.

[90] *See* Giannella, *supra* note 63, at 167 (Political divisiveness, "taken by itself, . . . provides no practical standards for determining which are legitimate governmental programs that may nevertheless constitutionally provoke religious controversy in a healthy pluralistic society and which are illegitimate ones that provoke political fragmentation and divisiveness in violation of the Establishment clause.").

pation in political decision-making.[91] Specifically, by prohibiting statutes that cause political debate over religious-related issues, the test may frustrate the first amendment's guarantee of freedom of speech.[92] Finally, at least one legal commentator has criticized as historically unfounded the Court's conclusion that political divisiveness along religious lines was a principal evil the framers of the Constitution meant to avoid.[93]

As noted previously,[94] although the *Lemon* Court enunciated a three prong test for analyzing establishment clause questions, it chose not to discuss the second prong of that test because it held the challenged statutes unconstitutional on the grounds that the statutes led to excessive entanglement between church and state.[95] The second prong of the *Lemon* test prohibits a statute from having a primary effect that advances or inhibits religion.[96] Following *Lemon*, at least one commentator noted that the Court's failure to address this element left the primary effect prong with two possible meanings.[97] For example, by primary effect, the Court could have meant *the* single, most important effect of a statute.[98] Alternatively, the Court might have been referring to *any* significant or important effect of a statute.[99] In 1973, in *Committee for Public Education v. Nyquist*,[100] the Supreme Court made it clear that the latter interpretation was the correct one.

Nyquist involved a tuition reimbursement plan in which direct grants were provided to the parents of children who attended only non-public schools.[101] The Court held that the plan was unconstitutional under the establishment clause, stating that it had the primary effect of advancing religion.[102] Discussing the meaning of the primary effect standard, the Court stated that a statute was unconstitutional if it had the "direct and immediate" effect of advancing religion even if the statute had other primary effects which promoted legitimate secular goals.[103] The Court distinguished an earlier opinion

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[91] *See* L. TRIBE, *supra* note 72, at 866-67; Gaffney, *supra* note 89, at 232-34; Ripple, *supra* note 58, at 1228.

[92] The first amendment provides that, "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. In an excellent article analyzing and rejecting the historical, legal, political, and theological arguments propounded in support of the political divisiveness test, Professor Gaffney has stated that the test fundamentally "misconstrues the purpose of the first amendment as a mandate for consensus politics." Gaffney, *supra* note 89, at 233.

[93] *See* Gaffney, *supra* note 89, at 212-24. Professor Gaffney argues that nowhere in the Annals of Congress does it state that one of the principal evils the establishment clause is designed to prevent is political divisiveness along religious lines. Also, according to Professor Gaffney, neither the writings of Thomas Jefferson nor James Madison, the principal authors of the establishment clause indicate that the clause was designed to prevent political divisiveness. *Id.* at 223.

[94] *See Lemon*, 403 U.S. at 613-14 and *supra* note 71 and accompanying text.

[95] *Lemon*, 403 U.S. at 613-14.

[96] *Id.* at 612.

[97] Giannella, *supra* note 63, at 176-78.

[98] *Id.* at 176.

[99] *Id.* at 176-77.

[100] 413 U.S. 756 (1973).

[101] *Id.* at 780.

[102] *Id.* at 779-90.

[103] *Id.* at 783 n.39. The Court noted that the Commonwealth had argued that primary effect meant the principal effect of the statute only. The Court responded to the argument by stating that:

> We do not think that such metaphysical judgments are either possible or necessary. Our cases simply do not support the notion that a law found to have a 'primary effect' to promote some legitimate end under the state's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. In McGowan v. Maryland, 366 U.S. 420 . . . (1961), Sunday Closing Laws

upholding state laws requiring businesses to be closed on Sundays.[104] According to the Court, such statutes were constitutional because they had only a "remote and incidental" effect on the advancement of religion, and not because they had important secular effects in addition to significant religious effects.[105] The *Nyquist* Court made it clear, therefore, that a principal or primary secular purpose and effect would not render a statute constitutional if the statute also had a direct and immediate effect on the advancement of religion.[106] In summary, prior to *Larkin*, the *Lemon* three-prong test was the standard to be used in ascertaining whether statutes violated the establishment clause.[107] First, the test required that a statute have a secular purpose.[108] Second, under the test a statute could not have any principal or primary effect that either advanced or inhibited religion.[109] Third, to satisfy the test, a statute could not lead to excessive entanglement between church and state.[110] Under the test, a statute had to satisfy all three prongs of the test to pass constitutional scrutiny.

II. The Court's Opinion in *Larkin*

In an eight-to-one decision, the Supreme Court affirmed the Court of Appeals' ruling that a Massachusetts statute which allowed churches to prohibit the issuance of liquor licenses to businesses within 500 feet of church property violated the establishment clause of the first amendment.[111] The majority opinion, written by Chief Justice Burger,

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> were upheld, not because their effect was, first, to promote the legitimate interest in a universal day of rest and recreation and only secondarily to assist religious interests; instead, approval flowed from the finding, based upon a close examination of the history of such laws, that they had only a remote and incidental effect advantageous to religious institutions.

Id. at 783 n.39.

According to Professor Tribe, the Court has substituted "an almost equally metaphysical distinction between direct and immediate effects on the one hand and effects deemed indirect and incidental on the other . . . ." L. Tribe, *supra* note 72, § 14-9, at 840. He also notes that the primary effect prong has become a misnomer because, instead of requiring that a statute have a primary effect that neither advances nor inhibits religion, it mandates that all non-secular effects be remote, indirect or incidental. *Id.*

[104] McGowan v. Maryland, 366 U.S. 420 (1981).

[105] *Nyquist*, 413 U.S. at 783 n.39.

[106] *Id. See also* Kauper, *The Supreme Court and the Establishment Clause: Back to Everson?*, 24 Case W. Res. 107, 120 (1974) [hereinafter cited as Kauper].

[107] In between *Nyquist* and *Larkin*, the Court applied the *Lemon* three prong standard in several cases. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 270-75 (1981) (university's permitting religious groups to use facilities as well as non-religious groups would not violate the establishment clause); Stone v. Graham, 449 U.S. 39, 42-43 (1980) (state law requiring the posting of the Ten Commandments held to violate the establishment clause); Committee for Public Education v. Regan, 444 U.S. 646, 653-62 (1980) (state may reimburse parochial schools for the expense of administering state prepared tests); Wolman v. Walter, 433 U.S. 229, 235-55 (1977) (various forms of aid such as field trip services provided to parochial schools held to violate the establishment clause); Roemer v. Board of Public Works, 426 U.S. 736, 748, 754-67 (1976) (state's annual grants to state accredited colleges, including religiously affiliated ones, upheld where statute required that state funds only be used for secular purposes); Meek v. Pittenger, 421 U.S. 349, 366, 372 (1975) (statutory provision authorizing the loan of instructional materials and equipment and the furnishing of professional staff to provide auxiliary services to parochial schools held to violate the establishment clause).

[108] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[109] *Id.*

[110] *Id.*

[111] Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).

began its discussion of the validity of section 16C of chapter 138 of the Massachusetts General Laws by accepting the Commonwealth's argument that churches and other institutions, such as schools and hospitals, have a valid interest in being protected from the types of activity associated with certain commercial establishments.[112] Recognizing that states have the power to enact zoning regulations to protect this interest by controlling the environment around these institutions,[113] the Court noted that a state legislature's exercise of such zoning power normally should be accorded great deference by courts.[114] The Court stated, however, that section 16C could not be characterized merely as an exercise of the zoning power by the legislature.[115] Section 16C, the Court explained, delegated to churches a power to veto certain liquor license applications, a power usually vested in governmental bodies.[116] Consequently, in the Court's view, the judicial deference customarily accorded legislative zoning decisions was not appropriate in this case.[117]

Turning to an evaluation of whether section 16C violated the establishment clause, the Court observed that the first amendment's guarantees of religious freedom[118] were designed to separate church and state, while simultaneously allowing religion and government to coexist.[119] The Court recognized that Thomas Jefferson's concept of the "wall" between church and state was still useful in illustrating this notion of separateness, even though some limited and incidental contact between church and state was unavoidable in modern society.[120] Section 16C's delegation of legislative power to churches, the Court continued, "substantially breached" that wall.[121] The majority then moved directly to a discussion of the standard used to evaluate establishment clause challenges articulated in *Lemon v. Kurtzman*.[122]

Quoting from the Court's opinion in *Lemon*, the majority stated that a statute must satisfy three criteria under the establishment clause.[123] First, the Court noted that a statute must have a secular purpose.[124] Second, the Court stated that a statute must have a principal or primary effect that neither advances nor inhibits religion.[125] Finally, the Court observed, the statute may not create excessive entanglement between church and state.[126] Applying these criteria to section 16C, the Supreme Court first considered whether the statute possessed a valid secular purpose.[127] The Court recognized that protecting churches from the disruption connected with liquor outlets was undoubtedly a valid secular purpose.[128] This purpose, however, could be achieved in other ways, the

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[112] *Id.* at 121.
[113] *Id.*
[114] *Id.* at 121-22.
[115] *Id.* at 122.
[116] *Id.*
[117] *Id.*
[118] *See supra* note 2 for full text of the establishment and free exercise clauses of the first amendment.
[119] 459 U.S. at 122.
[120] *Id.* at 122-23.
[121] *Id.* at 123.
[122] *Id.*
[123] *Id.* (quoting Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*

Court stated.[129] Specifically, the Court suggested that the interests of churches and similar institutions could be protected if the legislature prohibited liquor from being sold within reasonable distances of such places, or if interested parties, such as churches, could voice their concerns at a licensing hearing.[130]

The Court then addressed the second prong of the *Lemon* test, namely, whether section 16C's principal or primary effect either advanced or inhibited religion.[131] Noting that the Massachusetts Supreme Judicial Court had previously characterized section 16C as providing churches with an absolute "veto power" over governmental licensing authority,[132] the Court stated that the statutory power granted to these institutions by section 16C was standardless.[133] Such unbridled discretion, the Court explained, created the danger that churches could exploit section 16C by promoting goals "beyond insulating the church from undesirable neighbors."[134] For example, the Court recognized that the statute would allow churches to veto only applications made by non-church members.[135] The Court explained that, although it assumed that church authorities would act in good faith, there was no guarantee that they would exercise their power under section 16C in a neutral fashion.[136] Moreover, the Court stated that because section 16C created an appearance of the church and state exercising legislative authority together, it provided a "significant symbolic benefit" to religion.[137] The Court concluded that section 16C's delegation of standardless legislative power, together with its symbolic benefit to religion, had the primary and principal effect of advancing religion in contravention of the establishment clause.[138]

Finally, the Court examined section 16C under the third prong of the *Lemon* test to determine whether the statute led to excessive entanglement between church and state.[139] The Court concluded that the implementation of section 16C led to such prohibited entanglement for two reasons. First, the Court found that by delegating a veto power to churches over liquor license applications, section 16C vested governmental powers in churches.[140] The Court held that this "fusion" of government and religion was precisely the type of entanglement between church and state the establishment clause sought to preclude.[141] The Court explained that the Constitution prevents states from delegating important, discretionary governmental powers to religious institutions.[142] Second, accord-

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[129] *Id.* at 123-24.

[130] *Id.* The implications of the Court's discussion of alternative means will be discussed *infra* notes 158-79 and accompanying text.

[131] *Id.* at 125.

[132] Arno v. Alcoholic Beverages Control Commission, 377 Mass. 83, 384 N.E.2d 1223 (1979).

[133] *Larkin*, 459 U.S. at 125.

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.* at 125-26.

[138] *Id.* at 126. The Court did not indicate whether either the standardless delegation of authority or the symbolic benefit to religion, or a combination of the two had the primary effect of advancing religion. Presumably, if any effect of a statute has the direct and immediate effect of advancing religion, the statute is unconstitutional. *See supra* notes 101 to 106 and accompanying text. The Court probably concluded that each of the effects discussed had the primary effect of advancing religion in contravention of the establishment clause.

[139] 459 U.S. at 126.

[140] *Id.* at 126-27.

[141] *Id.*

[142] *Id.* at 127.

ing to the Court, the statute's delegation of governmental power to churches created the danger of "political fragmentation and divisiveness" along religious lines.[143] Consequently, the Court affirmed the circuit court's holding that section 16C violated the establishment clause because it had the primary effect of advancing religion and led to excessive entanglement between church and state.[144]

Justice Rehnquist was the lone dissenter in *Larkin*.[145] The dissent began by agreeing with the majority's conclusion that an absolute prohibition on liquor outlets within reasonable distances of churches and like institutions would be a permissible exercise of the legislature's power.[146] Justice Rehnquist observed that because section 16C prohibited liquor outlets only when churches objected to the application for a license, the statute, in effect, was less restrictive than an absolute ban of liquor outlets.[147] According to the dissent, therefore, section 16C was simply a legislative refinement of the absolute prohibition.[148] The dissent disagreed with the majority's conclusion that although an absolute ban on liquor outlets would have been constitutional, section 16C's less restrictive alternative was not.[149]

Justice Rehnquist also objected to the majority's ruling that the statute had the primary effect of advancing religion because churches might abuse section 16C by objecting to applications in a way which was not "religiously neutral."[150] The dissent stated that the statute had the legitimate purpose of protecting persons involved in religious and educational activities from the conduct which commonly occurred at liquor outlets.[151] In the case of a church, the dissent continued, this protection from interference with the activities of the liquor outlet, whether in the form of an absolute prohibition on liquor or that present in section 16C, could never be considered "religiously neutral."[152] In either instance, according to Justice Rehnquist, the legislature is allowing a church to prevent the issuance of a liquor license.[153] The dissent explained that statutes such as section 16C do not "advance" religion, but, instead, merely allow those wishing to engage in religious activity to do so without interference.[154] According to Justice Rehnquist, the possibility that churches might object to liquor applications in a manner which favors licenses for members of that faith, by itself, did not cause the statute to be violative of the establishment clause.[155] Such abuses, in the dissent's view, should be invalidated on a case by case

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[143] *Id.* The Court did not discuss the ways section 16C could lead to political fragmentation along religious lines. *See infra* notes 224 to 229 and accompanying text for a discussion of the possible interpretations of the Court's conclusions.

[144] 459 U.S. at 127.

[145] 459 U.S. 116, 127-30 (Rehnquist, J., dissenting).

[146] *Id.* at 128.

[147] *Id.*

[148] *Id.*

[149] *Id.* at 129.

[150] *Id.*

[151] *Id.*

[152] *Id.* at 130.

[153] *Id.*

[154] *Id.*

[155] *Id.* Justice Rehnquist also disagreed with the majority's application of the *Lemon* three prong test to section 16C. In his opinion, it was unnecessary to apply the *Lemon* test to determine whether the delegation of legislative power to a church violated the establishment clause. *Id.* at 129. He agreed with the majority that such a delegation was prohibited by the establishment clause. Unlike the majority, however, Justice Rehnquist did not believe that section 16C delegated legislative power to churches. In his view, the statute merely placed the burden on churches to object to new liquor outlets instead of imposing an absolute ban on all liquor outlets. *Id.*

basis.[156] Consequently, Justice Rehnquist would have upheld the constitutional validity of section 16C.[157]

Having summarized the evolution of the three part establishment clause standard and how it was applied by the Court to section 16C in *Larkin*, this casenote will next discuss the ramifications of the decision. First, this casenote will discuss how the Court may have expanded the secular purpose prong of the establishment clause test to give it more substance than has been evident in past establishment clause cases. Next, it will be contended that a facially neutral statute such as section 16C does not have the primary effect of advancing religion, as the Court held in *Larkin*, merely because there is the potential for abuse under the statute. It will also be argued that, contrary to the Court's assertion, section 16C did not provide a "significant symbolic benefit" to religion. The final portion of this casenote will analyze the Court's application of the excessive entanglement prong of the establishment clause test in *Larkin*. Within this final section of the casenote the ways in which section 16C could have created political divisiveness along religious lines and thus led to excessive entanglement between church and state will first be discussed. The second part of this section will contend that the *Larkin* Court recognized a new type of prohibited entanglement when it held that section 16C violated the establishment clause because it "enmeshed" churches in the process of governmental decision making.

III. *LARKIN* AND THE ROLE OF THE SECULAR PURPOSE PRONG IN AN ESTABLISHMENT CLAUSE INQUIRY

Under the first prong of the *Lemon* test, a statute must have a secular legislative purpose in order to withstand scrutiny under the establishment clause.[158] In decisions subsequent to *Lemon*, the Court has rarely struck down statutes for lacking a secular purpose.[159] The scarcity of instances where the Court has failed to find a secular purpose resulted, in part, because most establishment clause cases before *Larkin* have involved challenges to statutes providing aid to parochial schools.[160] In these decisions, the Court accepted the assertions by states that the funding programs were designed to promote secular education and not sectarian education or goals.[161]

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[156] *Id.* at 130.

[157] *Id.*

[158] 403 U.S. at 612.

[159] The Court itself has indicated that statutes are usually held void because they fail one or both of the other two prongs, and not the secular purpose prong. Wolman v. Walter, 433 U.S. 229, 236 (1977) ("As is usual in our cases, the analytical difficulty has to do with the effect and entanglement criteria."). There are two notable exceptions. In Stone v. Graham, 449 U.S. 39 (1980), the Court held that a Kentucky statute requiring the posting of the Ten Commandments in public schools lacked a secular purpose, and thus violated the establishment clause. *Id.* at 42-43. In a case prior to the enunciation of the *Lemon* three part test, Epperson v. Arkansas, 393 U.S. 97 (1968), the Court held that an Arkansas statute that prohibited the teaching of Darwinian evolution in public schools violated the establishment clause because the Court found it "clear that fundamentalist sectarian conviction was and is the law's reason for existence." *Id.* at 107-08.

[160] *See, e.g.*, Committee for Public Education v. Regan, 444 U.S. 646 (1980) (reimbursement of parochial schools by state for the expense of administering state tests); Wolman v. Walter, 433 U.S. 229 (1977) (various forms of aid such as field trip services provided to parochial schools); Meek v. Pittenger, 421 U.S. 349 (1975) (state loan of instructional materials and furnishing of professional staff to parochial schools).

[161] *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 236 (1977) ("We are satisfied that the challenged statute reflects Ohio's legitimate interest in protecting the health of its youth and in providing a

Although the education of children is a valid secular purpose, in the aid to parochial schools cases, the Court only superficially analyzed whether the challenged statutes were actually enacted to advance sectarian goals and were merely cloaked under the guise of aiding secular education.[162] The single notable exception to this general pattern is *Stone v. Graham*,[163] where the Court invalidated a statute for lacking a secular purpose. *Stone* involved a Kentucky statute requiring the posting of the Ten Commandments in public schools.[164] Stating that the "pre-eminent" purpose of the posting was unquestionably religious, the Court refused to accept the Commonwealth's assertion that the Ten Commandments were being used to illustrate their secular application in Western Civilization.[165] The Court supported this conclusion by noting that the Ten Commandments are not restricted to secular matters, but also include purely religious matters such as the worship of God and the prohibition of idolatry.[166] In addition, the Court stated that the Ten Commandments were not being taught as part of the secular study of history, ethics or comparative religion which would have lent credibility to the Commonwealth's assertion of a secular purpose.[167] The Court concluded that the statute could only have been designed to serve impermissible sectarian purposes.[168] Thus, at the time the *Larkin* decision was rendered, little uncertainty remained regarding the application of the secular purpose prong of the *Lemon* test. Absent a blatant, or "pre-eminent" religious purpose, it appeared that the Court would not strike down a statute that had an arguably secular purpose.

The Court's opinion in *Larkin*, however, could arguably be signaling an expansion of the secular purpose prong. Although the Court stated that the protection of religious institutions from the conduct associated with liquor outlets was a valid secular purpose,[169] it did not end its discussion of section 16C's secular purpose at that point. Instead, the Court noted that section 16C's valid secular purpose could be achieved in ways other than through the delegation of a veto power to churches over liquor license applications.[170] As examples, the Court stated that an absolute ban by the legislature or the opportunity for churches to express their opinions at licensing hearings were permissible schemes.[171]

The *Larkin* Court's discussion of legislative alternatives under the secular purpose prong indicates that this portion of the *Lemon* test may become more important in considering establishment clause challenges. The Court's scrutiny of a statute under the secular purpose prong may now include not only a search for an arguably secular purpose, but an analysis of the challenged statute to determine whether the means with the least significant religious effects are used to achieve that purpose. For example, the

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fertile educational environment for all the school children of the state."); Meek v. Pittenger, 421 U.S. 349, 363 (1975) (The education of school children accepted as a legitimate secular purpose.).

[162] *See* cases cited *supra* at note 161.

[163] 449 U.S. 39 (1980) (*per curiam*).

[164] *Id.* at 39-40.

[165] *Id.* at 41.

[166] *Id.* at 41-42.

[167] *Id.* at 42.

[168] *Id.* at 42. Even in *Stone*, however, there were disagreements among the justices regarding whether the statute had a secular purpose. Justice Stewart dissented from the summary reversal of the courts of Kentucky. *Id.* at 43. Justice Rehnquist, in a separate opinion, dissented from the summary reversal and argued that the state's enumerated purpose was a valid secular one. *Id.* at 43-47.

[169] *Larkin*, 459 U.S. at 123.

[170] *Id.* at 123-24.

[171] *Id.*

Larkin Court suggested that the opportunity for churches to voice their objections to new liquor outlets at a governmental hearing would create less incidental religious effects than allowing churches to veto particular applications unilaterally.[172] The approach suggested by the Court would have the added advantage of eliminating any symbolic benefit to religion conferred by statutes such as section 16C. As the Court noted in its analysis of section 16C under the primary effect prong, the statute resulted in the appearance of church and state jointly exercising legislative authority.[173] If a church were only entitled to voice its opinion like all other interested parties at a legislative hearing, this effect would not be present. Under this approach, the secular licensing authority, rather than the church, would make the final determination on an application and would weigh all the competing interests.

If the Court is, in fact, expanding the meaning of the secular purpose prong to include a consideration of alternative legislative means, the concepts underlying the evolution of the establishment clause standard would be promoted.[174] Past Supreme Court decisions have focused on the notion of neutrality — a government may neither aid nor oppose religion.[175] Under this concept, the Court has required that statutes have a secular purpose, because without such a purpose the state is, by definition, aiding religion.[176] Additionally, under the second prong a statute must have a primary effect that neither advances nor opposes religion, because otherwise the government would be acting in a non-neutral manner.[177] Similarly, the requirement that government use the means with the least religious effects would ensure government neutrality. If a government did not use such appropriately tailored means, government would be providing benefits to religion that are unnecessary to achieve an admittedly secular purpose. In effect, the government would not be acting toward religion in a neutral fashion.

As discussed in the preceding paragraph, the *Larkin* Court's treatment of alternative means for achieving valid legislative goals suggests that the first prong of the *Lemon* test may no longer be satisfied by any arguably secular purpose. Precisely what effect *Larkin* will have on this prong is difficult to determine, however, because the Court in *Larkin* gave no specific reasons for discussing alternatives to section 16C's delegation of a veto power to churches. Indeed, although the Court found that section 16C had a secular purpose, it did not expressly state that section 16C satisfied the first prong of the *Lemon* test. Instead, immediately after the Court stated that section 16C had a valid secular purpose, it discussed alternative ways to achieve that purpose.[178] This language may simply have been

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[172] *Id.*

[173] *Id.* at 125-26.

[174] In earlier concurring opinions, Justice Brennan has enunciated a standard similar, but not identical, to the requirement that the means with the least religious effects be employed. According to Justice Brennan, a state is prohibited by the establishment clause from using "essentially religious means to serve governmental ends, where secular means would suffice. School District of Abington Township v. Schempp, 374 U.S. 203, 295 (1963) (Brennan, J., concurring). *See also* Walz v. Tax Commission, 397 U.S. 664, 680 (1970) (Brennan, J., concurring). Note that while Justice Brennan has emphasized that religious means not be used, the expanded secular prong suggested by *Larkin* focuses on unnecessary religious effects that are a consequence of the particular means chosen to accomplish the statute's purpose.

[175] *See, e.g.*, Everson v. Board of Education, 330 U.S. 1, 18 (1946); School District of Abington Township v. Schempp, 374 U.S. 203, 215, 218-22 (1963); Walz v. Tax Commission, 397 U.S. 664, 669-70 (1970).

[176] *See generally supra* notes 42 to 50 and accompanying text.

[177] *Id.*

[178] *Larkin*, 459 U.S. at 123-24.

dicta designed to provide helpful guidelines for states seeking to enact legislation in this area. Indeed, the *Larkin* Court recognized that the vast majority of states had enacted variations of the schemes it had suggested.[179] Under this interpretation, the dicta would only have been employed by the Court as an effective transition into a discussion of section 16C under the second prong of the *Lemon* test.

If the Court is expanding the secular purpose prong of the establishment clause test, however, such an expansion is consonant with the notion of neutrality underlying the *Lemon* test. Moreover, the requirement of narrowly tailored means should, logically, be included in any analysis of a statute's neutrality or non-neutrality. Thus, an expanded establishment clause standard would require that a statute have a secular purpose, use narrowly tailored means to achieve that purpose, and cause no significant incidental effects that are friendly or hostile to religion. A secular purpose would be required because, obviously, a sectarian purpose would be contrary to the establishment clause. Narrowly tailored means would be required, otherwise, unnecessary religious benefits would accrue to religion. Finally, significant religious effects would be prohibited, otherwise, the state would be advancing religion contrary to the requirement of neutrality. In this manner, an expanded secular purpose prong would link the purpose and effect prongs of the *Lemon* test to require a state to use a neutral means to achieve a valid secular purpose.

IV. The Primary Effect Prong of the Establishment Clause Test and the *Larkin* Decision

The *Larkin* Court held that section 16C was void under the establishment clause because it had the primary effect of advancing religion.[180] The Court found that the statute advanced religion in two ways. First, the Court stated that the potential that section 16C's veto power would be used for "explicitly religious" purposes had the primary effect of advancing religion.[181] Second, the Court found that the statute created the appearance that church and state were jointly exercising legislative power, and thus provided a "significant symbolic benefit" to religion.[182] This section of the casenote disagrees with the Court's analysis of section 16C under the second prong and submits that the statute did not have the primary effect of advancing religion.

The *Larkin* Court's first reason for holding that section 16C had the primary effect of advancing religion was the statute's failure to provide, and the Commonwealth's failure to demonstrate, any effective means of guaranteeing that churches would exercise section 16C's veto power in a religiously neutral manner.[183] The Court was concerned that the churches might, for example, approve the liquor license applications of congregation members but deny those of non-members.[184] According to the Court, "[t]he potential for conflict inheres in the situation."[185] This possibility of non-neutral application, according

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[179] *Id.* at 124 n. 7 and n. 8.
[180] *Id.* at 125-26.
[181] *Id.* at 125.
[182] *Id.* at 125-26.
[183] *Id.* at 125.
[184] *Id.*
[185] *Id.*

to the Court, created the primary effect of advancing religion and rendered the statute unconstitutional.[186]

As the dissent in *Larkin* explained, section 16C should not have been held unconstitutional merely because there was the potential for church abuse of the statute.[187] According to Justice Rehnquist, the appropriate time to analyze section 16C for abuse was when an aggrieved party challenged a particular church's exercise of its veto power on the ground that the church had exercised the veto power for unlawful reasons.[188] If a religious organization denied an application for "explicitly religious" goals, as the dissent persuasively reasoned, the church's improper denial of a liquor license could then be reversed by the courts.[189] The mere possibility of such an improper denial by a church, however, does not justify rendering the entire statute unconstitutional.[190]

There are a number of areas of constitutional adjudication where the Court has invalidated statutes that are facially neutral, but, in practice, are unconstitutionally applied.[191] One such area is equal protection.[192] For example, in *Yick Wo. v. Hopkins*,[193] the Court considered the validity of a statute that required individuals to obtain a license in order to construct wooden laundries.[194] Faced with incontrovertible data that licensors had granted licenses to seventy-nine out of eighty non-Chinese applicants and had denied licenses to all two hundred Chinese applicants, the Court held that the statute was invalid, even though neutral on its face, because of the discriminatory administrative application.[195] Consequently, as *Yick Wo* illustrates, courts can reverse individual instances in which a statute is applied in an unconstitutional manner. Furthermore, *Yick Wo* stands for the proposition that an entire statute may be held unconstitutional, even though facially neutral, if abuse of the statute is the rule and not the exception. Based on the type of reasoning employed in *Yick Wo*, the Court in *Larkin* should not have held section 16C unconstitutional because of the mere possibility that a church would abuse the veto power. The appellee in *Larkin* challenged the statute as violating the establishment clause on its face.[196] He did not argue that the Holy Armenian Church had exercised its right to

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[186] *Id.* at 126.

[187] *Id.* at 130 (Rehnquist, J., dissenting).

[188] *Id.*

[189] *Id.*

[190] *Id.* According to Justice Rehnquist,

> The Court is apparently concerned for fear that churches might object to the issuance of a license for 'explicitly religious' reasons . . . . If a church were to seek to advance the interests of its members in this way, there would be an occasion to determine whether it had violated any right of an unsuccessful applicant for a liquor license. But our ability to discern a risk of such abuse does not render section 16C violative of the Establishment Clause.

Id.

[191] *See* Hernandez v. Texas, 347 U.S. 475 (1954) (jury system selection process neutral on its face held invalid where Mexican-Americans were systematically excluded in practice); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (statute neutral on its face requiring license to construct wooden laundries held invalid because of unlawful application).

[192] The fourteenth amendment to the United States Constitution provides that, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

[193] 118 U.S. 356 (1886).

[194] *Id.* at 357-58.

[195] *Id.* at 374.

[196] *Larkin*, 459 U.S. at 118.

deny the license application for any unlawful reason, nor did he argue, as had the plaintiff in *Yick Wo*, that statistical data demonstrated that the statute was systematically abused. Absent such allegations, the Court was not justified in holding that the mere potential for church abuse of section 16C had the primary effect of advancing religion, and thereby striking down the entire statute.

Even assuming that the risk of abuse of section 16C was enough, by itself, to require an inquiry concerning whether the statute had the primary effect of advancing religion, an application of the primary effect prong of the *Lemon* test to section 16C does not support the majority's conclusion that section 16C had the primary effect of advancing religion. In earlier decisions, as discussed previously, the Court has drawn a distinction between the effects of statutes which are direct and immediate and those which are remote and incidental.[197] The former are primary effects; the latter are not.[198] In *Larkin*, the potential for church abuse of section 16C, absent evidence to the contrary, was a remote and incidental effect of the statute. Moreover, although the Court in *Larkin* stated that it did not assume bad faith on the part of churches,[199] its holding that section 16C had the primary effect of advancing religion was based on its determination that the church's absolute veto power could be used to promote religious goals. This conclusion, which indicates that the Court considered the likelihood of abuse to be a direct and immediate effect of the statute, must have assumed bad faith on the part of at least some churches. Such an assumption is unwarranted absent some evidence that section 16C had been systematically abused in the past. Individual cases of abuse can be rectified by the courts.[200] Thus, the dissent was correct in criticizing the majority's conclusion that section 16C had the primary effect of advancing religion because it created the potential for church abuse.

In addition to the potential for church abuse of the veto power, the *Larkin* Court held that section 16C had a second primary effect that advanced religion. According to the Court, section 16C provided a "significant symbolic benefit" to religion because it created

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[197] *See* Committee for Public Education v. Nyquist, 413 U.S. 756, 783 n.39 (1973) and discussion *supra* notes 100 through 106 and accompanying text.

[198] *Id.*

[199] *Larkin*, 459 U.S. at 125.

[200] The constant judicial review of exercises of the veto power of churches, however, would no doubt be fraught with excessive entanglement problems. First, such supervision by the courts would engender the types of direct confrontations explicitly held invalid by the Court in *Walz* and *Lemon*. *See supra* notes 72 to 80 and accompanying text. Judicial review by the courts would also probably violate the excessive entanglement prong of the *Lemon* test because of the potential for political divisiveness involved. *See supra* notes 81 to 88 and accompanying text. Indeed, one can scarcely imagine a situation more likely to cause political strife along religious lines than courts analyzing the integrity of a church after an application has been denied. The Court in *Larkin* implied that such excessive entanglement implications would be present if the Alcoholic Beverages Control Commission had been empowered to review church vetos for improper bases for rejection of an application, noting that "serious" entanglement problems would be present. 459 U.S. at 125 n.9. Again, however, Grendel's Den presented no evidence on the possibility of entanglement between church and state resulting from courts reviewing the denial of liquor license applications. Even assuming that such entanglement would occur, that possibility does not justify a holding that section 16C has the primary effect of advancing religion. That possibility would, however, justify a holding that section 16C led to excessive entanglement between church and state. Such a holding would have been appropriate if included in that part of the Court's opinion discussing section 16C under the third prong of the *Lemon* test.

the appearance of the joint exercise of legislative authority by church and state.[201] Although earlier decisions have discussed the financial benefits given churches by statutes,[202] symbolic, or intangible, benefits can also advance religion. Why section 16C provides a "significant" symbolic benefit, when other similar schemes do not is difficult to understand. Indeed, in *Larkin*, the Court suggested that an absolute ban on liquor outlets within specified distances of churches was constitutional.[203] Surely, an absolute ban would provide a benefit to religion at least as great in magnitude as the benefit conferred by section 16C. An absolute ban of all liquor outlets is the most extreme means a state could adopt to protect religious activities, and therefore, could be construed as showing a strong preference for religious worship. As the dissent in *Larkin* explained, whether the ban on liquor outlets is absolute or may be invoked by an objecting church, the statute is not "religiously neutral" if it allows churches to defeat license applications while other institutions, such as banks, cannot.[204] In fact, section 16C was less restrictive than an absolute ban because if churches did not object, licenses could be granted.[205] As discussed earlier in this section, any denial of a license by a church would have been reversed on appeal if the church had abused section 16C. Consequently, section 16C did not provide any additional benefits to religion that an absolute ban would not. Neither the absolute ban nor section 16C's scheme provides a "significant" symbolic benefit to religion. Both are simply ways of accomplishing what the Court has emphasized is a valid purpose — the protection of religious institutions from disruptive conduct.[206] The Court's holding that section 16C has the primary effect of advancing religion, therefore, is unwarranted because section 16C does not provide a "significant" symbolic benefit to religion.

V. *LARKIN* AND THE EXCESSIVE ENTANGLEMENT PRONG OF THE ESTABLISHMENT CLAUSE TEST

Although the preceding discussion demonstrates a fundamental disagreement with the *Larkin* Court's holding that section 16C had the primary effect of advancing religion,[207] the Court was correct in holding that section 16C was unconstitutional because the statute led to excessive entanglement between church and state. The first part of this section discusses the significance of the Court's holding that because it had the potential for creating political division along religious lines, section 16C created excessive entanglement between church and state. The second part of this section will discuss the Court's holding that the delegation of legislative authority to a church constitutes excessive entanglement between church and state. It will be contended that the Court's holding expanded the meaning of excessive entanglement in a way consistent with past establishment clause decisions.

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[201] *Larkin*, 459 U.S. at 125-26.

[202] *See* cases cited *supra* note 160.

[203] 459 U.S. at 123-24.

[204] *Id.* at 130 (Rehnquist, J., dissenting).

[205] MASS. GEN. LAWS ANN., ch. 138, § 16C (West 1974). According to Justice Rehnquist, section 16C originally provided for an absolute ban. 459 U.S. at 128 (Rehnquist, J., dissenting). Eventually the legislature realized that section 16C's goals could be achieved in a less restrictive manner and amended the statute to allow liquor outlets unless churches objected. According to Justice Rehnquist, this type of "legislative refinement" should be encouraged by the Court. *Id.* The dissenting justice also added that he could not understand how a rigid, absolute ban could be constitutional while section 16C's more flexible standards were not. *Id.*

[206] *Larkin*, 459 U.S. at 123.

[207] *See supra* notes 180 through 206 and accompanying text.

Before analyzing the Court's holding in *Larkin*, it is useful to summarize the principles concerning excessive entanglement the Court has articulated in previous decisions. As discussed earlier in this casenote, in *Walz v. Tax Commission*,[208] the Court made clear that excessive entanglement between church and state could result from direct confrontations — such as foreclosure, valuation and judicial proceedings — that generally accompany the taxation of property.[209] Similarly, in *Lemon v. Kurtzman*,[210] the Court found excessive entanglement in the administrative surveillance necessary for states to ensure that public funds given to parochial schools were used only for secular, and not religious, purposes.[211] The common thread running through *Walz*, *Lemon*, and post-*Lemon* cases,[212] is that the establishment clause prohibits direct and continuing relationships between church and state.[213]

The Court has also identified the potential for political divisiveness along religious lines as a second type of entanglement that can arise between church and state.[214] The potential for political divisiveness refers to the possibility that a statute that aids religion will cause civil strife and fragmentation.[215] Under this standard, the Court has struck down certain subsidies to parochial schools where the aid was provided on an annual basis because of the danger that future disagreements could develop along religious lines.[216]

The Court has noted that these two types of entanglements are forbidden by the establishment clause to maintain the proper separation of church and state.[217] Separating church and state, according to the Court, allows each institution to accomplish its own particular function.[218] Direct and continuing relationships between church and state, such

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[208] *See* 397 U.S. 664 (1970) and discussion *supra* notes 51 through 64 and accompanying text.

[209] *Id.* at 674.

[210] 403 U.S. 602 (1971).

[211] *Id.* at 619-22.

[212] *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 240-41 (1977) (state prepared tests eliminate the need for the supervision that gives rise to excessive entanglement); Meek v. Pittenger, 421 U.S. 349, 369-72 (1975) (provision of professional staff to parochial schools would lead to excessive entanglement between church and state because of the continuing surveillance required by the state to ensure that the personnel do not advance the religious mission of the churches they serve).

[213] *See* L. TRIBE, *supra* note 72, § 14-12, at 869-70.

[214] Lemon v. Kurtzman, 403 U.S. 602, 622 (1971). *See supra* notes 81 to 88 and accompanying text.

[215] *Id.*

[216] *Id.* at 622-24. According to the Court:

> In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their religious faith.

Id. at 622.

[217] *Id.* at 614. The Court added, however, that total separation of church and state is not possible. For example, it cited fire inspections and zoning regulations as examples of "necessary and permissible" contacts. *Id.* Still, according to the Court, "the objective is to prevent as far as possible, the intrusion of either into the precincts of the other." *Id.*

[218] Engel v. Vitale, 370 U.S. 421, 431 (1962) ("The establishment clause's first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and degrade religion.")

as administrative surveillance of the church by the state, are forbidden in order to prevent government intrusion into church affairs.[219] Correspondingly, statutes creating the potential for political divisiveness are forbidden to prevent the intrusion of religious issues into the secular realm of government.[220] Thus, prior to *Larkin*, the Court had identified two distinct types of entanglement between church and state that the establishment clause forbids.

In *Larkin*, the Court held that section 16C created excessive entanglement between church and state for two reasons.[221] First, the Court held that section 16C created the danger of political divisiveness along religious lines.[222] Second, in holding that the delegation of legislative power to a church violated the establishment clause, the Court identified a new type of prohibited entanglement. In the past, the second type of entanglement recognized by the Court as violating the establishment clause was the entanglement resulting from the direct and continuing relationships between church and state produced by statutes.[223]

Although the Court did not explain why section 16C could have caused political divisiveness along religious lines, political fragmentation could have resulted from the statute in two ways. First, the delegation of secular authority to a church, by itself, could have created political divisiveness. Those individuals who believed in the strict separation of church and state would oppose delegation of secular power to a church, whereas members of various religious faiths would presumably support section 16C as an efficient way to protect churches from the disruptive conduct associated with liquor outlets.[224] Section 16C also had the potential for creating political division along religious lines because it allowed churches to object repeatedly to new liquor outlets. In a community where a particular outlet was, or new outlets were, generally desired, a church's objection or continuing objections could have ignited dissension among the community. On the one hand, those individuals and groups in support of the new liquor outlet or outlets would claim that the church's decision was arbitrary, unfair, or contrary to the community's best interests. Members of the church's congregation, on the other hand, would probably support the church's decision.[225] In either event, the potential existed for political frag-

[219] L. TRIBE, *supra* note 72, § 14-12, at 866. (the notion of administrative entanglement reflects the fears of Roger Williams and others like him who thought that unless government were controlled it would intrude into church affairs).

[220] *See generally* L. TRIBE, *supra* note 72, § 14-12, at 866 ("the notion of political entanglement, which focuses on political division along religious lines . . . reflects a characteristically Jeffersonian fear of church intrusion into politics . . . ."). *But see* Gaffney, *supra* note 89, at 216-19. Professor Gaffney argues that Jefferson viewed religious beliefs as harmless, unlike political opinions, and would have allowed free debate on religious issues until the public order was disrupted by overt acts of disorder. *Id.* at 217-18.

[221] 459 U.S. at 126-27.

[222] *Id.* at 127.

[223] *Id.* at 126-27.

[224] Lemon v. Kurtzman, 403 U.S. 602, 622 (1971) (political divisiveness on religious grounds could occur where opposition to further religious aid was based on constitutional grounds). *See also* L. TRIBE, *supra* note 72, § 14-12, at 867 (Court decisions on political entanglement are "best understood as limiting the political role of organized religion when it seeks institutional power or economic resources for itself . . . .").

[225] Lemon v. Kurtzman, 403 U.S. 602, 622 (1971). In *Lemon*, the Court was concerned that political divisiveness along religious lines would occur where annual subsidies were provided to parochial schools. Groups supporting increased aid to parochial schools would be opposed by groups who objected to such aid for religious, constitutional or fiscal reasons. *Id.* Thus, *Lemon* stands for the proposition that the establishment clause prohibits political divisiveness along religious lines over a broad class of issues with religious, political, and economic implications.

mentation to occur.

Although the Court in *Larkin* did not explicitly address the specific instances of political divisiveness that section 16C could have created, there is language in the decision that indicates the Court was concerned about both examples of political fragmentation discussed previously.[226] The Court characterized section 16C as substituting the decision of a church for the decision of a legislative body "on issues with significant economic and political implications."[227] The Court concluded that this "enmeshment" of church and state created the danger of political fragmentation along religious lines.[228] Presumably, the Court was concerned that dissension could occur because the legislature had delegated some of its power to churches. In addition, the Court implied that it was concerned that dissension could occur as a result of churches making decisions on particular liquor license applications. These decisions, the Court noted, could have independent economic and political ramifications.[229]

The Court's holding that section 16C led to excessive entanglement because it created the danger of political fragmentation along religious lines is particularly significant because, prior to *Larkin*, the continued validity of the concept was questionable.[230] Legal commentary had been hostile to the political divisiveness test.[231] In addition, the Court's opinions after 1977 suggested that the Court had become disenchanted with the test.[232] For example, in the Court's most recent establishment clause decision prior to *Larkin*, *Widmar v. Vincent*,[233] the Court upheld a statute without discussing whether the statute might lead to political divisiveness.[234] In *Committee for Public Education v. Regan*,[235] another recent decision, the Court emphatically rejected the contention that the statute led to political divisiveness when it upheld a program providing reimbursements to parochial schools for the expenses of administering state mandated tests.[236]

In retrospect, these earlier decisions can be reconciled with *Larkin* because the potential dangers of political fragmentation present in the statutes involved in the earlier cases were significantly less than the dangers inherent in section 16C. For example, the reimbursement program involved in *Regan* is likely to cause little dissension because funds are being provided for specific expenses that are not part of a general educational program, but rather are generated only because the state requires the administration of the test. In *Larkin*, however, the Court was analyzing a statute that gave a veto power to churches over licenses with significant political and economic ramifications. The likelihood of political fragmentation along religious lines is much greater in such circumstances.

In summary, *Larkin* reaffirms the principle that one of the primary evils the estab-

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[226] 459 U.S. at 127.

[227] *Id.*

[228] *Id.*

[229] *Id.*

[230] *See* Gaffney, *supra* note 89, at 206-09.

[231] *See supra* notes 89 to 96 and accompanying text.

[232] *See* Widmar v. Vincent, 454 U.S. 263, 270-76 (1981) (Court ignored political divisiveness test); Committee for Public Education v. Regan, 444 U.S. 646, 661 n.8 (1980) (the Court stated that there was "no merit whatsoever" to the contention that the statute would lead to political divisiveness); Wolman v. Walter, 433 U.S. 229, 235-55 (1977) (Court ignored the political divisiveness test).

[233] 454 U.S. 263 (1981).

[234] *Id.* at 270-76.

[235] 444 U.S. 646 (1980).

[236] *Id.* at 661 n.8.

lishment clause is designed to prevent is political fragmentation along religious lines.[237] *Larkin* also indicates that any determination of whether or not a statute has the potential for creating political divisiveness is one of degree. The mere possibility that political divisiveness will occur is not enough to render a statute invalid. Any statute that is held to violate the establishment clause on this basis must contain significant dangers of political fragmentation.

The *Larkin* Court identified a second type of entanglement inherent in section 16C's delegation of a veto power to a church — the "enmeshment" of churches in the exercise of legislative power reserved for the government alone.[238] On that basis, the Court found excessive entanglement between church and state.[239] The Court built on the foundation it constructed in *Lemon* where it stated that the establishment clause was designed to exclude church and state from the area in which each institution operated.[240] As a result, the *Larkin* decision creates a new type of entanglement that runs afoul of the establishment clause. The establishment clause now prohibits not only excessive administrative entanglement[241] and entanglement leading to political divisiveness along religious lines, but also the entanglement between church and state that results when churches exercise power meant to be exercised only by the state.

Although this new type of entanglement was found, the extension was not without support in the reasoning of earlier decisions.[242] For example, in *Engel v. Vitale*,[243] the Court examined a statute requiring the composition of an official state prayer and its recitation in public schools at the beginning of the school day. The Court held that the statute was contrary to the establishment clause stating that "a union of government and religion tends to destroy government and to degrade religion."[244] The *Larkin* Court's conclusion is also well supported by its own historical analysis of why the framers drafted the establishment clause,[245] as well as the historical analyses of other legal scholars.[246] *Larkin* simply represents the first case in which the Court has explicitly stated that the delegation of secular power to a church is a factor to be considered under one of the prongs of the *Lemon* test.

The Court, therefore, had ample legal and historical authority for its conclusion that government may not delegate legislative authority to a church. The only remaining issue was whether or not section 16C did, in fact, delegate legislative power to churches.[247] The

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[237] Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

[238] 459 U.S. at 126.

[239] *Id.* at 127.

[240] *Id.* at 126.

[241] *See* Lemon v. Kurtzman, 403 U.S. 602, 619-21 (1971).

[242] *See* School District of Abington Township v. Schempp, 374 U.S. 203, 222 (1963) (establishment clause prohibits "a fusion of governmental and religious functions."); Everson v. Board of Education, 330 U.S. 1, 8-13 (1946) (establishment clause drafted to prevent churches dominating government).

[243] 370 U.S. 421 (1962).

[244] *Id.* at 431.

[245] *See* Everson v. Board of Education, 330 U.S. 1, 8-13 (1946) discussed *supra* note 36.

[246] *See* L. TRIBE, *supra* note 72, § 14-3, at 816-19 (three distinct schools of thought influenced the drafters of the establishment clause, all of which included the separation of church and state); Curry, *James Madison and the Burger Court: Converging Views of Church-State Separation*, 56 IND. L. J. 615, 617-22 (1981) (Madison regarded separation as a tool to control faction and foster a multiplicity of sects).

[247] The Court assumed that section 16C delegated legislative decision-making power to a church. 459 U.S. at 122. In dissent, Justice Rehnquist questioned the validity of this characterization of section 16C. *Id.* at 129 (Rehnquist, J., dissenting).

Massachusetts Supreme Judicial Court appeared to answer this question in *Arno v. Alcoholic Beverages Control Commission*.[248] Although it characterized section 16C as delegating a "veto power" to churches, the *Arno* court stated that the statute merely permitted the waiver of a restriction created by the legislature.[249] The *Arno* court concluded that section 16C did not delegate legislative power to a church, but instead, merely shifted to churches the burden of objecting to liquor licenses "while retaining the essential legislative mandate" that liquor licenses not be granted in the protected areas surrounding churches.[250]

In *Larkin*, the Supreme Court rejected this analysis. According to the Court, because churches were given a veto power over particular liquor license applications, they were, in effect, vested with the authority to make decisions normally made by governmental bodies designed to weigh competing social interests.[251] According to the Supreme Court, therefore, section 16C delegated secular power to churches. This delegation contravened the establishment clause, according to the Court, because the delegation led to excessive entanglement between church and state.[252]

The Court's characterization of section 16C as a delegation of legislative authority is correct. Conceding that section 16C only allowed churches to indicate whether they needed to be protected from the unruly conduct associated with liquor outlets, the statute vested in churches the ultimate decision on whether or not to grant a liquor license because the licensing authority could not grant a license when faced with a church's objection.[253] In contrast, under a statute where the governing body weighs the competing interests of churches, schools, parents, businesses and community leaders, for example, and denies a liquor license primarily because of the objection of a church, the government is making the ultimate decision on competing social interests and not the church. Therefore, section 16C did, in fact, vest discretionary governmental power in churches in violation of the establishment clause.

Justice Rehnquist, the sole dissenter, seems to have missed the point. According to Justice Rehnquist, section 16C was less protective of churches than an absolute ban because under section 16C a liquor license could be granted, whereas under an absolute ban, a liquor license application could never be granted.[254] Because both he and the majority agreed that an absolute ban was constitutional, the dissenting Justice could not understand why section 16C's scheme, which was less protective of churches, could be unconstitutional, while an absolute ban, which is more protective of churches, is constitutional.[255] Justice Rehnquist's argument is superficially appealing, but it fails to analyze the fundamental distinction between section 16C and an absolute ban. Section 16C allowed churches to have the ultimate control over the granting of liquor licenses. An absolute ban vests no decision-making power in churches. Thus, it is consistent to argue that an absolute ban is constitutional while section 16C is not.

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[248] 377 Mass. 83, 384 N.E.2d at 1223 (1979).

[249] *Id.* at 89-90, 384 N.E.2d at 1227.

[250] *Id.* at 90, 384 N.E.2d at 1228.

[251] 459 U.S. at 127.

[252] *Id.* According to the Court, "few entanglements could be more offensive to the spirit of the Constitution." *Id.*

[253] MASS. GEN. LAWS. ANN., ch. 138, § 16C (West 1974).

[254] 459 U.S. at 116, 128 (Rehnquist, J., dissenting).

[255] *Id.*

Conclusion

The *Larkin* decision will have a significant impact on future establishment clause cases. Prior to *Larkin*, a discussion of alternative means for achieving valid secular purposes was not part of an establishment clause analysis. The Court's discussion of alternatives means in *Larkin* may be a signal that statutes must be narrowly tailored to survive scrutiny under the establishment clause. Legislatures should be prudent and choose schemes that do not produce unnecessary benefits for religion. The *Larkin* Court's holding that section 16C had the primary effect of advancing religion is unfortunate because any effects on religion were, at best, remote, indirect and incidental. The Court's contrary conclusion may lead to confusion in future cases applying the second prong of the *Lemon* test. In contrast to the Court's application of the second prong, the Court's application of the third prong of the *Lemon* test and holding that section 16C violated the establishment clause because it delegated secular power to a church, and therefore resulted in excessive entanglement between church and state, is well founded, both in precedent and history. In the future, courts and legislatures will be on notice that the delegation of secular power to churches contravenes the establishment clause. Finally, the *Larkin* decision is important because prior to the Court's decision, the validity of the political divisiveness test was in doubt. *Larkin* reaffirmed the validity of that test when the Court held that section 16C violated the establishment clause because it created the danger of political divisiveness along religious lines. This holding puts to rest any suggestion that the Court no longer views the political divisiveness test favorably.

Kenneth Lamb