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The Establishment Clause and Liquor Sales: The Supreme Court Rushes in Where Angels Fear to Tread—Larkin v. Grendel's Den, 103 S. Ct. 505 (1982)

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THE ESTABLISHMENT CLAUSE AND LIQUOR SALES: THE SUPREME COURT RUSHES IN WHERE ANGELS FEAR TO TREAD—*Larkin v. Grendel's Den*, 103 S. Ct. 505 (1982).

In 1977 Grendel's Den, a restaurant located in the Harvard Square area of Cambridge, Massachusetts, applied for a liquor license. A Massachusetts statute provided that any church or school located within a 500-foot radius of a license applicant could prevent issuance of a liquor license to that applicant by objecting to the license application.[1] Despite the presence of twenty-five establishments with liquor licenses within 500 feet of its premises,[2] the Holy Cross Armenian Catholic Parish[3] filed an objection to Grendel's Den's application. As a result, the local license commission denied the application.[4]

Grendel's Den sued the state liquor licensing authorities in federal district court, claiming that the Massachusetts law violated the establishment clause of the first amendment.[5] On cross-motions for summary judgment, the court held that the law was facially unconstitutional under the establishment clause.[6] The First Circuit Court of Appeals affirmed in an en banc decision.[7] In *Larkin v. Grendel's Den*,[8] the United States Supreme Court affirmed the judgment of both lower courts.

This Note examines the Supreme Court opinion, focusing on two statements made by the Court. First, the Court maintained that the purported secular objectives[9] of the Massachusetts statute could be constitutionally

1. MASS. ANN. LAWS ch. 138, § 16C (Michie/Law. Co-op. 1981), which was declared unconstitutional in *Larkin*, provides 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 . . . .

2. Larkin v. Grendel's Den, 103 S. Ct. 505, 507 n.2 (1982).

3. The Holy Cross church was located 10 feet from Grendel's Den. *Id.* at 507.

4. The Cambridge License Commission voted to deny the application; on appeal, this decision was upheld by the Massachusetts Alcoholic Beverages Control Commission. Grendel's Den v. Goodwin, 662 F.2d 102, 103 (1st Cir. 1981), *aff'd sub nom.* Larkin v. Grendel's Den, 103 S. Ct. 505 (1982).

5. Grendel's Den also claimed that the Massachusetts statute violated the equal protection and due process clauses of the fourteenth amendment and the Sherman Act. *Larkin*, 103 S. Ct. at 508. While the lower courts addressed these claims, the Supreme Court did not reach them.

6. Grendel's Den v. Goodwin, 495 F. Supp. 761 (D. Mass. 1980), *aff'd*, 662 F.2d 102 (1st Cir. 1981), *aff'd sub nom.* Larkin v. Grendel's Den, 103 S. Ct. 505 (1982).

7. Grendel's Den v. Goodwin, 662 F.2d 102 (1st Cir. 1981), *aff'd sub nom.* Larkin v. Grendel's Den, 103 S. Ct. 505 (1982).

8. 103 S. Ct. 505 (1982).

9. The district court had found that the purpose of the Massachusetts statute was to "protect[] spiritual, cultural, and educational centers from the 'hurly-burly' associated with liquor outlets." 495

achieved by less drastic means.[10] Second, the Court implied that, had the Massachusetts law provided adequate assurance that the veto power delegated to churches would be used in a "religiously neutral way," the statute might have been sustained.[11] This Note maintains that the constitutionality of an outright ban on liquor outlets in the proximity of churches is doubtful because such a statute would be secular in neither purpose nor effect. Further, a delegation of state power to churches under a "religiously neutral" standard, enabling them to veto a liquor license application, would only increase the potential for an unconstitutional entangling relationship between church and state.

I. LEGAL BACKGROUND

The Massachusetts law is one of several methods used by states attempting to insulate religious institutions from the presence of liquor outlets. Yet despite the abundance of these statutes, the Massachusetts law was the first of this type to be examined by the Supreme Court under establishment clause criteria.

A. Statutory Approaches Taken by the States

Most states have enacted statutes regulating the proximity of liquor outlets to certain specified "protected institutions."[12] A majority of the states imposes an absolute ban on liquor outlets within designated distances of churches, schools, hospitals, libraries, and other named institutions.[13] Other states, including Massachusetts, require the consent of

F. Supp. at 766. The Supreme Court remarked, "There can be little doubt that this embraces valid secular legislative purposes." *Larkin*, 103 S. Ct. at 510.

10. The Court suggested, for example, imposing an absolute ban on liquor licenses within set distances of churches and schools, or providing a hearing where objecting institutions might voice their concerns. *Larkin*, 103 S. Ct. at 510–11.

11. *Id.* at 511.

12. *Id.* at 510–11 nn.7–8.

13. ALASKA STAT. § 04.11.410 (1982); ARK. STAT ANN. § 48-345 (1977); GA. CODE ANN § 5A-508 (Supp. 1982); IDAHO CODE §§ 23-303, 23-913 (1977) (local governing body can consent to issuance of liquor licenses in proscribed areas); ILL. ANN STAT ch. 43, § 127 (Smith-Hurd Supp. 1983); IND CODE ANN § 7.1-3-21-11 (Burns 1978); KAN. STAT ANN. § 41-710 (1981); LA REV STAT ANN § 26:280 (West 1975); MD ANN CODE art. 2B, §§ 46, 46B, 47, 49, 50, 52A, 52A-1, 52B, 52C, 53 (1981 & Supp. 1983); MICH COMP LAWS § 436.17a (MICH STAT ANN. § 18.988(1) (Callaghan Supp. 1983)); MISS. CODE ANN § 67-1-51(3) (Supp. 1982); MONT. CODE ANN. § 16-3-306 (1981); NEB REV STAT § 53-177 (1978); N.H. REV. STAT ANN. § 177:1 (1977); N.J. STAT ANN § 33:1-76 (West 1940); N.M. STAT. ANN § 60-6B-10 (1981); N.Y. ALCO. BEV CONT LAW § 105(3) (McKinney 1970); OKLA STAT. ANN tit. 37, § 534 (West Supp. 1982); R.I. GEN LAWS § 3-7-19 (1982); S.C. CODE ANN § 61-3-440 (Law. Co-op. 1977); UTAH CODE ANN § 32-1-36.15 (Supp. 1981); WIS STAT ANN § 125.68(3) (West Supp. 1983).

Six states, however, do not include churches in the category of institutions to be insulated from

churches and schools within a prescribed radius before the licensing authority may issue a liquor license.[14] Still other states allow the licensing authorities to consider the proximity of churches and schools in the licensing decision.[15] Only six states have no statutes regulating the location of liquor outlets in relationship to churches, schools, and like institutions.[16] Although the Court in *Larkin* limited its decision to the Massachusetts law,[17] the decision clearly calls into question the validity of these similar state laws.

B. The Three-Part Establishment Clause Test

In *Larkin,* the Court applied to the Massachusetts law the three-part establishment clause test which the Court has developed in establishment clause decisions over more than three decades. Although the terminology used by the Court in its effort to formulate a consistent theory has varied, the concept of neutrality between church and state pervades the development of the three-part test.

The first amendment to the United States Constitution forbids any law respecting the establishment of religion or prohibiting the free exercise of religious beliefs.[18] The two clauses require government to remain neutral with respect to religion.[19] The Court has recognized, however, that some interaction between religion and government is unavoidable.[20] The three-

liquor outlets. ALA. CODE § 28-3-17 (1977); CAL. PENAL CODE § 172 (West Supp. 1983); COLO. REV. STAT. § 12-47-138 (1978); IOWA CODE ANN. § 123.20(2) (West Supp. 1983); MINN. STAT. ANN. § 340.14(3) (West Supp. 1983); S.D. CODIFIED LAWS ANN. § 35-2-6.1 (Supp. 1983).

14. ARIZ. REV. STAT. ANN. § 4-207 (1974 & Supp. 1982); KY. REV. STAT. ANN. § 243.220(3) (Baldwin 1980); ME. REV. STAT. ANN. tit. 28, § 301 (1974); MO. ANN. STAT. § 311.080 (Vernon 1963); WASH. REV. CODE § 66.24.010(9) (Supp. 1982); W. VA. CODE § 11-16-12(e) (1974).

15. CONN. GEN. STAT. ANN. § 30-46 (West Supp. 1983); DEL. CODE ANN. tit. 4, § 543(c) (1975); HAWAII REV. STAT. § 281-56 (1976); N.C. GEN. STAT. § 18B-901 (Supp. 1981); PA. STAT. ANN. tit. 47, §§ 4-404, 4-432(d) (Purdon 1969 & Supp. 1983); VA. CODE § 4-31(2)(c) (1983).

Tennessee and Texas have passed enabling laws allowing county and city legislative authorities to impose absolute ban regulations within their jurisdictions. TENN. CODE ANN. § 57-5-105 (Supp. 1983); TEX. ALCO. BEV. CODE ANN. § 109.33 (Vernon 1978). The Ohio statute provides that notice and opportunity to be heard must be given to neighboring churches and schools when a liquor license application is made. OHIO REV. CODE ANN. § 4303.26 (Page 1982).

16. Florida formerly had a statute imposing an absolute ban on liquor outlets within set distances of churches, schools, and like institutions. FLA. STAT. § 561.44 (1962). This statute was repealed in 1972, and apparently no substitute provision has been enacted. FLA. STAT. ANN. § 561.44 (West Supp. 1983). In addition, Nevada, North Dakota, Oregon, Vermont, and Wyoming have no statutes regulating location of liquor outlets.

17. *Larkin,* 103 S. Ct. at 511 n.7.

18. U.S. CONST. amend. I.

19. *See infra* note 28 and accompanying text.

20. *See, e.g.,* Roemer v. Board of Pub. Works, 426 U.S. 736, 745–47 (1976). One of the more acute examples of this is the Court's decision in Walz v. Tax Comm'n, 397 U.S. 664 (1970). In *Walz,* the Court recognized that, in the case of property tax exemptions for churches, some interac-

part test embodies the Court's conclusion that the first amendment does not forbid this interaction on an indirect, secondary level.[21] The test is therefore directed at the "primary" purpose and effect[22] of the law, and whether the law leads to "excessive" entanglement of church and state.[23] The use of these modifying terms allows courts a measure of flexibility in determining a law's validity under the establishment clause. Thus, while direct aid to religion is proscribed, some inevitable, indirect benefit to religion will not render the law unconstitutional.[24]

An inherent tension exists between the two religion clauses.[25] The establishment clause prohibits government promotion of religion, requiring that government be neutral and that it neither aid nor promote religion.[26] But the free exercise clause prohibits government interference with religious beliefs, requiring that government permit and accommodate reasonable religious behavior.[27] This intrinsic tension requires courts to balance the competing interests protected by the two clauses in an effort to preserve an overall attitude of governmental neutrality in matters relating to religion.[28]

The United States Supreme Court has developed a three-part test to determine whether, under the law in question, a sufficiently neutral relationship exists between church and state.[29] First, the law must have a

tion between church and state was unavoidable. Government would be involved either in taxing the church, or in auditing its records to ensure that it qualified for exemption. The Court determined that the latter alternative would lead to less entanglement. *Id.* at 674–75. *See also* R. MILLER & R. FLOWERS, TOWARD BENEVOLENT NEUTRALITY. CHURCH, STATE, AND THE SUPREME COURT 298–99 (1977).

21. R. CORD, SEPARATION OF CHURCH AND STATE 169–70 (1982).

22. *See* Gianella, Lemon *and* Tilton: *The Bitter and the Sweet of Church-State Entanglement*, in CHURCH AND STATE THE SUPREME COURT AND THE FIRST AMENDMENT 143–44 (P. Kurland ed. 1975).

23. *See infra* notes 32–33 and accompanying text. *See also Larkin*, 103 S. Ct. at 510 ("[s]ome limited and incidental entanglement between church and state authority is inevitable in a complex modern society").

24. *See* R. MILLER & R. FLOWERS, *supra* note 20, at 301. *See also* Roemer v. Maryland Bd. of Pub. Works, 426 U.S. 736, 747 (1976) ("*Everson* and *Allen* put to rest any argument that the State may never act in such a way that has the incidental effect of facilitating religious activity").

25. Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970); P. FREUND, ON LAW AND JUSTICE 30 (1968); P. KAUPER, RELIGION AND THE CONSTITUTION 45 (1964).

26. Roemer v. Maryland Bd. of Pub. Works, 426 U.S. 736, 747 (1976); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970).

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

28. *Nyquist*, 413 U.S. 756, 758 (1973); Zorach v. Clauson, 343 U.S. 306, 314 (1952); Everson v. Board of Educ., 330 U.S. 1, 18 (1947). In Epperson v. Arkansas, 393 U.S. 97, 103–04 (1968), the Court stated:

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

29. The development of establishment clause theory in the United States Supreme Court began

secular legislative purpose.[30] Second, the law must have a primary effect

with the case of Everson v. Board of Educ., 330 U.S. 1 (1947). *See* R. MILLER & R. FLOWERS, *supra* note 20, at 298–99; P. KAUPER, *supra* note 25, at 53. In a famous opinion by Justice Black, the majority of the Court espoused a viewpoint of strict separation of church and state, yet upheld a statute which authorized reimbursement of school bus fares to the parents of both public and private, including parochial, schoolchildren. *Everson*, 330 U.S. at 3–4. The Court held that the secular purpose of the law was to provide safe transportation of schoolchildren, and the incidental benefit to parochial schools was irrelevant. *Id.* at 17–18.

With Justice Black again writing the majority opinion, the Court in Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948), adhered to the separationist view, finding a plan to offer released-time religious education on public school premises during the school day unconstitutional. A few years later in Zorach v. Clauson, 343 U.S. 306 (1952), however, the Court upheld a different released-time scheme because the religious instruction was given away from school premises, and because the state's compulsory education machinery was not used to provide pupils for the religion classes. Justice Douglas, writing for the majority in *Zorach*, concluded that state accommodation of religion was consistent with the constitution, since it "follows the best of our traditions." *Id.* at 313–14.

The *Zorach* case, however, proved to be the only instance in which the Court employed the accommodation theory. In Engel v. Vitale, 370 U.S. 421 (1962), the Court returned to a more absolutist view of the establishment clause. In *Engel*, the Court found a state program involving public schoolroom recitation of a prayer composed by the state board of regents to be a religious activity in violation of the establishment clause. *Id.* at 425.

Against this uncertain background, the Court formulated the three-part test of purpose, effect, and entanglement potential. *See infra* notes 30–33. This approach constitutes a middle ground between the absolute separation theory of *Everson* and *Engel* and the unstructured accommodation theory of *Zorach*. The Court's emphasis in modern establishment clause decisions is on government neutrality in matters relating to religion. *See supra* note 28 and accompanying text.

30. In School Dist. v. Schempp, 374 U.S. 203 (1963), the Court held unconstitutional state statutes requiring Bible reading and prayer recitation in public schools. Although the state contended the exercises had a secular purpose in promoting "moral values," in contradicting "the materialistic trends of our times," and in "the teaching of literature," the Court found the Bible reading and prayer recitation exercises to serve only a religious purpose. *Id.* at 223–24. Thus, the statute could not pass the "secular purpose" test.

Similarly, in Stone v. Graham, 449 U.S. 39 (1980), the Court found unconstitutional a state statute mandating the posting of a copy of the Ten Commandments on the walls of all public classrooms. Despite the state's insistence that the statute served a secular purpose, the Court found no educational motive in the requirement. The Ten Commandments are clearly a sacred text, the Court concluded, and inducing children to read and obey the commandments was not a permissible state objective under the establishment clause. *Id.* at 42.

In the Court's most recent establishment clause decision, Marsh v. Chambers, 103 S. Ct. 3330 (1983), the Court upheld a state's practice of opening each legislative day with a prayer by a chaplain paid by the state. The majority did not emphasize the three-part test, but instead based its decision largely on the historical support it found for the practice, noting that neither the purpose nor the effect of the legislative prayer was to "proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 3337.

The Court in Lemon v. Kurtzman, 403 U.S. 602, 613 (1971), evidenced a willingness to accept at face value the declaration of the legislature that the purpose of a law providing state aid to nonpublic schools was exclusively secular. However, in Stone v. Graham, 449 U.S. at 41–42, the Court in reviewing a statute requiring the display of the Ten Commandments in public classrooms refused to accept the avowed secular purpose stated by the legislature. Instead, the Court looked to what it deemed the "pre-eminent" religious purpose of the statute.

which neither advances nor inhibits religion.[31] Third, the law must not foster an excessive government entanglement with religion[32] or an excessive political entanglement along religious lines.[33] The three parts of the

31. For example, in Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), the Court declared unconstitutional a state program providing maintenance and repair grants to nonpublic schools, and providing tuition reimbursements and income tax relief to parents of children attending nonpublic schools. The Court found all these statutory provisions to have a primary effect advancing religion, chiefly because none of them contained safeguards which would assure that the aid would be used for secular purposes. *Id.* at 774, 780, 794. *See also* L. PFEFFER, GOD, CAESAR AND THE CONSTITUTION 287 (1975) (*Nyquist* was based on the premise that law can have more than one primary effect, "and if one of the primary effects is to advance religion the statute is unconstitutional"); Note, *The Establishment Clause, Secondary Religious Effects, and Humanistic Education*, 91 YALE L.J. 1196, 1211–22 (1982) (distinguishing various types of secondary religious effects, and proposing a balancing of secular purpose and secondary effect on religion to determine constitutionality).

Commentators have proposed two factors for the court to consider in determining whether a law has a primary effect which advances religion. First, how pervasively religious is the institution receiving the aid? The more religion-permeated the aid recipient, the more likely the law is unconstitutional. Second, how independent of its religious function is the secular function of the institution receiving aid? If the religious and secular functions of the institution are sufficiently distinct so that state aid flows only to the secular function, the law will probably be found constitutional. R. MILLER & R. FLOWERS, *supra* note 20, at 302; Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175 (1974).

32. The third part of the Court's test was first articulated in Walz v. Tax Comm'n, 397 U.S. 664 (1970). In that case, the Court upheld tax exemptions on property owned by religious organizations if the property was used exclusively for religious purposes. *Id.* at 666–67. The Court found that tax exemption was not sponsorship of religion, because the government did not transfer revenue to churches but simply abstained from demanding that the church support the state. *Id.* at 675. Further, the Court declared, tax exemption involves even less entanglement than nonexemption because it does not require government to examine the affairs of churches and audit churches' records. *Id.* at 674.

In Lemon v. Kurtzman, 403 U.S. 602, 615 (1971), the Court identified three subparts to the entanglement test: evaluation of "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." The Court considered the nature of the benefited institution in Meek v. Pittenger, 421 U.S. 349 (1975). There, certain forms of aid to nonpublic schools were held invalid, since parochial schools were so pervasively religious that religious and nonreligious aspects of the schools were inseparable, resulting in excessive entanglement. *Id.* at 366. The Court relied on the religious nature of the aid in Wolman v. Walter, 433 U.S. 229 (1977). In that case, certain forms of aid to nonpublic schools were found invalid because the nature of the aid was such that it benefited the parochial schools and religion directly, rather than the student or parent. *Id.* at 250–51. The Court applied the third subpart of the entanglement test in *Lemon*, 403 U.S. at 619, where aid to parochial schools was invalidated because the resulting church-state relationship was likely to be continuing and intimate, thus entangling government and religion.

33. The Court first noted this aspect of the entanglement problem in Lemon v. Kurtzman, 403 U.S. 602, 622 (1971). Justice Brennan in his dissenting opinion in Meek v. Pittenger, 421 U.S. 349 (1975), stated that consideration of the divisive political potential of the state statute should be added as a fourth factor to the Court's three-part test. *Id.* at 374 (Brennan, J., dissenting); *see also* R. CORD, *supra* note 21, at 203, 235–39; Gianella, *supra* note 22, at 133–34. However, the Court has not yet relied on the potential for political divisiveness as the sole basis for invalidating a statute under the establishment clause. R. MILLER & R. FLOWERS, *supra* note 20, at 301; Note, *The Forbidden Fruit of Church-State Contacts: The Role of Entanglement Theory in its Ripening*, 16 SUFFOLK U.L. REV 725, 741 (1982).

test are independent of one another: a law need fail only one part of the test to be declared unconstitutional.[34]

II. THE COURT'S REASONING IN *LARKIN v. GRENDEL'S DEN*

In *Larkin v. Grendel's Den*[35] the state licensing authorities contended that the Massachusetts statute was a valid exercise of the zoning power which shielded institutions such as churches and schools from the close proximity of liquor outlets. The Court found, however, that the law was not a mere exercise of the zoning power, but instead a delegation of that power to private, nongovernmental bodies, allowing them to veto certain liquor license applications.[36] Because this veto power was vested in churches and schools, rather than in government agencies, the Court held that the judicial deference normally given a legislative exercise of the zoning power was not warranted.[37]

The concern over the political divisiveness aspect of entanglement arose in the context of the Court's review of the historical basis of the first amendment. Usually political debate and partisanship are healthy byproducts of a democratic form of government; however, political division along religious lines was one of the chief evils the first amendment was designed to prevent. Lemon v. Kurtzman, 403 U.S. at 622. When communities divide over religious issues, the urgency of other, more significant issues is obscured and overlooked. The energies of the political process thus are diverted from the areas in which they may be most effective. L. PFEFFER, *supra* note 31, at 62–63; Curry, *James Madison and the Burger Court: Converging Views of Church-State Separation*, 56 IND. L.J. 615, 629–35 (1981).

34. R. MILLER & R. FLOWERS, *supra* note 20, at 302.

Cases dealing with state aid to nonpublic schools illustrate the Court's application of the three-part establishment clause test. In cases where the Court found no establishment clause violation, the Court found sufficient safeguards in the form of the aid to ensure (1) that public funds would be used exclusively for nonsectarian purposes, Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 656 (1980); Wolman v. Walter, 433 U.S. 229, 238, 240 (1977); Meek v. Pittenger, 421 U.S. 349, 361–62 (1975); (2) that the effect of the statutes was to provide a benefit to all schoolchildren, not to benefit the parochial schools, Mueller v. Allen, 103 S. Ct. 3062, 3069–70 (1983); *Regan*, 444 U.S. at 653; *Wolman*, 433 U.S. at 237–38; *Meek*, 421 U.S. at 360–61; and (3) that no entangling supervision of the state over receipt of the aid was necessary, *Mueller*, 103 S. Ct. at 3071; *Wolman*, 433 U.S. at 240–41.

Conversely, in cases where state aid was held violative of the establishment clause, most often the aid provisions were found to have a primary effect advancing religion. In those cases, neither the form of the aid nor the process by which it was administered assured that public funds would be used strictly for neutral, secular purposes. *Wolman*, 433 U.S. at 250–51, 253–54; *Meek*, 421 U.S. at 365–66; Sloan v. Lemon, 413 U.S. 825, 831–32 (1973); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 774, 780, 783, 794 (1973); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 480–81 (1973).

35. 103 S. Ct. 505 (1982).

36. *Id.* at 509. While the *Grendel's Den* case was pending in federal district court, the Supreme Judicial Court of Massachusetts had interpreted the Massachusetts statute as a delegation of a "veto power" to churches and schools. Arno v. Alcoholic Bev. Control Comm'n, 377 Mass. 83, 384 N.E.2d 1223 (1979).

37. 103 S. Ct. at 510.

The Court then applied the three-part establishment clause test of purpose, effect, and entanglement potential to the Massachusetts statute.[38] First, although the parties did not contest the purpose of the statute, the Court assumed the statute had a secular purpose in protecting schools and churches from the disruption associated with liquor outlets. This asserted secular purpose, the Court held, could be accomplished by means other than granting a veto power to affected institutions.[39] Second, the Court found that the statute primarily and principally advanced religion. A church's power under the statute was standardless, and the statute provided no means of ensuring that the delegated power would be used in a religiously neutral way.[40] Third, the Court noted the statute's entangling tendencies: the statute enmeshed churches in governmental affairs. That entanglement in turn created a danger of political fragmentation and divisiveness along religious lines—results which the establishment clause was intended to prevent.[41] The Supreme Court thus concluded that the law was facially unconstitutional under the establishment clause.[42]

III. ANALYSIS

The *Larkin* Court reached a sound result when it determined that the Massachusetts statute violated the establishment clause. But the Court's additional statements concerning the constitutionality of other methods of regulating the juxtaposition of churches and liquor outlets raise serious questions.

First, the Court suggested that an outright ban on liquor outlets within a specified radius of churches might not violate the establishment clause.[43] Second, the Court's opinion implied that a statute which provided standards limiting the authority delegated to churches would also be constitutional.[44] However, neither alternative avoids establishment clause problems. An outright ban on liquor sales surrounding a church would have

38. *Id.* at 510–12.

39. *Id.* at 510. The Court suggested two alternative ways to effect the statute's asserted secular purpose: by imposing a flat ban on liquor outlets within a prescribed distance of churches and schools, or by affording a hearing at which the views of churches and schools could be aired regarding licenses in the vicinity.

40. *Id.* at 511.

41. *Id.* at 512.

42. Justice Rehnquist alone dissented, taking the position that the Massachusetts statute did not subsidize any particular religious group or encourage participation in religious activities. He pointed out that the majority had conceded that the legislature could enact a flat ban on the sale of liquor within 500 feet of a church. Such a ban, he declared, would be more protective of churches and more restrictive of liquor sales than the Massachusetts law. Because he found no establishment clause violation, Justice Rehnquist voted to uphold the statute. *Id.* at 512–14 (Rehnquist, J., dissenting).

43. *Id.* at 510 (opinion of the Court).

44. *See id.* at 511.

both a religious purpose and the principal effect of advancing religion. Further, any statutory standards aimed at ensuring a religiously neutral decision by churches would encourage entanglement. A statute incorporating either of these features would violate the establishment clause.

A. The Outright Ban Proposition

The Court stated that the Massachusetts statute encompassed a valid secular objective of dissociating churches from the disruption of nearby liquor outlets. The Court suggested that this objective might be accomplished by "an absolute legislative ban on liquor outlets within reasonable prescribed distances from churches, schools, hospitals and like institutions."[45] A state may have a valid secular purpose in seeking to protect its "schools, hospitals and like institutions" from disturbances.[46] But when a state seeks to protect churches from such disturbances through a statute aimed directly toward that end,[47] it risks establishment clause violation.[48]

An absolute ban statute affects only two groups of citizens: patrons of protected institutions and patrons and owners of liquor outlets. A statute banning liquor sales in the vicinity of churches thus has only two possible beneficiaries: the liquor outlet and the church. Such a statute obviously does not benefit liquor outlets and their patrons; rather, it imposes limitations on liquor sales. The absolute ban statute is therefore intended solely to benefit churches.

The "purpose" and "effect" tests often are indistinguishable in the Court's analysis,[49] since the purpose of a statute is merely its intended effect. Thus, because the only possible intended effect of an absolute ban statute is to aid churches, the statute's purpose is to aid religion. The law therefore has an unconstitutional nonsecular purpose.

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45. *Id.* at 510. As a second alternative, the Chief Justice suggested affording an opportunity for churches and schools to present their views on a liquor license application at a hearing during the licensing proceedings. *Id.* at 510–11. Presumably a church or school would have the same right as any party to voice its opinion at community zoning hearings.

46. *See infra* notes 62–63 and accompanying text.

47. Given that an absolute ban statute has no secular purpose, *see infra* note 49 and accompanying text, such a statute does not even satisfy the classic test of constitutionality formulated by Chief Justice Marshall in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819): "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

48. As the First Circuit held, the fact that the law may also protect schools and other institutions "does not dilute its forbidden religious classification." Grendel's Den v. Goodwin, 662 F.2d 102, 106 (1st Cir. 1981), *aff'd sub nom.* Larkin v. Grendel's Den, 103 S. Ct. 505 (1982).

49. *See* Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175, 1180–81 (1974).

However, the *Larkin* Court uncritically characterized an absolute ban statute as secular in purpose.[50] The purpose of insulating churches from nearby businesses selling liquor is, as the Court itself stated, to protect "spiritual, cultural, and educational centers from the 'hurly-burly' associated with liquor outlets."[51] A state's interest in providing a tranquil atmosphere for religious activities is questionable, however, when such a goal entails governmental preference of religion at the expense of neighboring businesses. A law designed with the express aim of protecting churches is decidedly lacking in secular purpose.[52] The only conceivable secular purpose a state could assert for such a law is that it promotes the free exercise of religion. Yet a state's duty under the first amendment is only to refrain from passing a law which would "prohibit[] the free exercise" of religion.[53] A state has no duty to pass laws promoting such free exercise.

The *Larkin* Court found that churches and schools have "a valid interest in being insulated from certain kinds of commercial establishments, including those dispensing liquor."[54] The Court asserted that a state could use its zoning power[55] to protect these interests, citing two cases regarding first amendment free speech provisions.[56] However, a state's interests underlying its duty to safeguard free speech and its duty not to promote the establishment of religion are different. Although a state may protect its schools, the free speech cases to which the Court refers cannot be analogized to the *Larkin* case in order to approve the protection of religion.

In the free speech cases, the state asserted a compelling interest to justify restrictions on speech. But in the case of an absolute ban statute, the state cannot assert a compelling interest in its citizens' practice of religious beliefs sufficient to justify a restriction on businesses surrounding churches. As the Court has stated, the purpose of such a restriction is to

50. *Larkin*, 103 S. Ct. at 510.

51. *Id.* Were this only an incidental effect of a statute the primary purpose of which was secular, the law would not be unconstitutional for that reason. *See supra* text accompanying notes 20-24. Where the primary purpose of a statute is secular (for example, to provide for improvement of citizens' health, safety, and welfare) the Court has upheld the statute, even though its effect coincided with the beliefs of some or all religions. McGowan v. Maryland, 366 U.S. 420 (1961).

52. *See supra* notes 47–49 and accompanying text.

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

54. *Larkin*, 103 S. Ct. at 509.

55. For a discussion of churches and the zoning power, see generally L. PFEFFER CHURCH STATE AND FREEDOM 563–65 (1953).

56. *Larkin*, 103 S. Ct. at 509. The Court cited Young v. American Mini Theatres, 427 U.S. 50 (1976), and Grayned v. City of Rockford, 408 U.S. 104 (1972). *See infra* notes 58–61 and accompanying text.

protect religion. Because protection of religion is not a secular purpose, the state would find itself in violation of the establishment clause.[57]

In support of its contention that a state may use its zoning power to protect churches, the Court first cited its decision in *Young v. American Mini Theatres*.[58] In that case, the Court upheld a city zoning ordinance regulating the location of adult movie theatres. The Court found that such regulation did not conflict with the first amendment free speech rights of the theatre owners, and that the zoning ordinance was valid as a regulation of the time, place, and manner in which such expression might occur. In *Young*, the city's purpose and motivation were purely secular. The city had a valid interest in planning and regulating its commercial property and preserving the character of its neighborhoods.[59] The Court held this sufficient to justify the restriction on the first amendment rights of the theatre owners to locate their theatres wherever they chose.

The *Larkin* Court also cited *Grayned v. City of Rockford*.[60] In *Grayned*, the Court recognized that a state has a sufficiently compelling interest in the education of children to justify a city ordinance prohibiting noises which might disrupt a school session. Again, the state's purpose and motivation were purely secular. The *Grayned* Court confirmed a state's power to impose reasonable time, place, and manner restrictions on first amendment free speech rights in furtherance of its secular purpose.[61]

These cases, however, are inapposite to an establishment clause case. In appropriate circumstances, a state or local governing body can assert a sufficiently compelling interest in preserving its commercial business neighborhoods or in educating its children to justify constraint on free speech rights.[62] Similarly, a state's interest in providing an atmosphere conducive to education might justify an absolute ban on liquor outlets within certain distances of schools.[63] But no compelling secular interest of the state supports an absolute ban on the sale of liquor in proximity to religious institutions.[64] A state is prohibited by the first amendment from

57. *See supra* notes 47–53 and accompanying text.

58. 427 U.S. 50 (1976).

59. *Id.* at 62–63.

60. 408 U.S. 104 (1972).

61. *Id.* at 115.

62. The Court stated in Cantwell v. Connecticut, 310 U.S. 296, 304 (1940):

> It is . . . clear that a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.

63. *See Grayned*, 408 U.S. at 119 (city had "compelling interest in having an undisrupted school session conducive to the students' learning").

64. *See supra* notes 47–49 and accompanying text.

asserting an interest in furthering its people's religious beliefs; rather, it must abstain from establishing religion and strive to remain neutral.[65] A state is not required to demonstrate hostility toward religion in order to preserve its neutral stance,[66] but neither may it "pass laws which aid one religion, aid all religions, or prefer one religion over another."[67]

The analogy is not apt for another reason. The first amendment guarantees free speech in only one clause. But the guarantee of freedom of religion is contained in two clauses. A state enacting a law concerning religion must take care not to impinge upon the freedom guaranteed by one clause in its zeal to protect the freedom embodied in the other.[68] In the case of an outright ban statute, the analogy to the free speech cases is oversimplified. Such a comparison does not achieve a constitutional balance between the right of the churchgoers to hold services in tranquility, and the right of neighboring businesses to be free of governmental benefits to religion at their expense.

Thus, time, place, and manner restrictions on free speech rights are permissible only where a state has a compelling interest to support such restrictions.[69] The *Larkin* Court's reliance on these cases is misplaced. When a state seeks to ensure that its citizens are provided a tranquil atmosphere for religious worship by enacting a statute intended to aid religion, the state runs afoul of the establishment clause.

An absolute ban statute not only has a nonsecular purpose, but its primary effect is to aid religion.[70] The benefit received by churches under such a statute is not a secondary, inevitable result of benefit to the other named institutions.[71] Instead, churches are the intended primary beneficiaries of absolute ban statutes.[72] The primary effect of such statutes is to

65. Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

66. Roemer v. Maryland Bd. of Pub. Works, 426 U.S. 736, 747 (1976) (plurality opinion); Engel v. Vitale, 370 U.S. 421, 443 (1962) (Douglas, J., concurring); Zorach v. Clauson, 343 U.S. 306, 314 (1952).

67. Everson v. Board of Educ., 330 U.S. 1, 15 (1947); *see also* Bob Jones Univ. v. United States, 103 S. Ct. 2017, 2035 n.30 (1983).

68. *See supra* note 25 and accompanying text.

69. Any exercise of the zoning power must be based on the state's interest in attending to the health, safety, and welfare of its citizens. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928).

70. Even if the statute were found to have some secular effect, "[o]ur 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." Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 n.39 (1973).

71. Protection of churches is not necessary to protection of other institutions. Indeed, some states do not seek to protect religious institutions through these statutes, confining the protected group to schools and/or hospitals, and like institutions. *See supra* note 13.

72. *See supra* notes 47–49 and accompanying text.

elevate a quiet atmosphere for religious worship over the secular, commercial needs of neighboring businesses, which must forgo the benefit of liquor licenses.

Although the Court has sustained secular state statutes which may incidentally benefit religion, it has never done so when the benefit is solely to religion, and occurs at great cost to a secular party.[73] In such cases,[74] the aid given religion was merely a byproduct of a program with decidedly secular aims. No other party was forced to suffer a substantial loss because of an indirect benefit to religion.[75] Indeed, the very essence of the primary effect test precludes such a result: a law which penalizes others in order to achieve its primary aim—aiding religion—by its nature has the primary effect of advancing religion.[76]

This is precisely the constitutional predicament of a statute imposing an absolute ban on liquor outlets in the vicinity of a church. Unavoidably, the purpose and intended effect of such a ban would be to benefit religion. Just as unavoidably, those businesses located within the defined limits would be penalized, because they would be forced to forgo the additional clientele and resulting revenue which the sale of liquor might provide. Thus, the Court's suggested alternative to the invalidated Massachusetts law is in fact no improvement. Its only purpose is to protect religion, and its primary effect is to do so at the expense of other parties—no less a violation of the establishment clause.

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73. *See infra* note 75 and accompanying text. For example, the Court has upheld textbook loans and bus transportation for children in parochial schools, despite indirect benefit to the parochial schools through the programs. Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Board of Educ. v. Allen, 392 U.S. 236 (1968); Everson v. Board of Educ., 330 U.S. 1 (1947). Similarly, the Court has upheld programs through which public schoolchildren were released from their classes to attend religious classes away from school premises, despite the benefit religious institutions thereby received from the state's compulsory education machinery. Zorach v. Clauson, 343 U.S. 306 (1952).

74. *E.g.*, Roemer v. Maryland Bd. of Pub. Works, 426 U.S. 736 (1976) (upholding annual noncategorical grants to state-accredited private colleges, where school required to use funds for nonsectarian purposes); Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (upholding public reimbursement to private schools for costs of administering standardized tests).

75. In theory, every taxpayer suffers a detriment when funds that could be used for public education are instead used to benefit children attending parochial schools. The Court has addressed this point by consistently holding that such payments are not an unconstitutional taking of private property for a private purpose. Providing a benefit to schoolchildren is a public purpose. Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370, 374–75 (1930); Everson v. Board of Educ., 330 U.S. 1, 7 (1947); *see also* Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 14–17 (1961).

76. *See supra* notes 47–49 and accompanying text.

B. The Delegation of Standards Proposition

The *Larkin* Court's opinion also yields the inference that a statute similar to the Massachusetts law would be constitutional if it contained an adequate means of ensuring that the veto power delegated to churches would not be used for religious purposes.[77] But a state may not confer standardless discretionary power if the exercise of that power may interfere with first amendment rights.[78] In this case, the statute could include certain standards limiting the power and requiring that it be used "exclusively for secular, neutral and nonideological purposes."[79] This attempt to satisfy the primary effect prong of the establishment clause test results, however, in a violation of the third prong of the test.

Any attempt to insert procedures or standards to guarantee religiously neutral decisions by the church inevitably leads to impermissible entanglement between church and state.[80] The delegation of standards to a nongovernmental entity necessarily carries with it a concomitant legislative or judicial power to review decisions made by the churches. The continuous surveillance required to guarantee that churches abide by the prescribed standards would give rise to an entanglement problem.

The possibility of entanglement also exists in a broader sense. The Court has frequently articulated its concern with the divisive political potential of church-state relations.[81] In *Larkin*, it found that the invalidated Massachusetts law "enmeshe[d] churches in the processes of government" on "issues with significant economic and political implications," creating political division along religious lines.[82] A delegation of power under strict standards to churches would not lessen the potential for political division in the community. Religion and the political process would become even more entangled as the state reviewed church decisions to ensure that they were made on a neutral basis. Such an entanglement would frustrate the purpose of the first amendment to prevent state authorities from interfering with the church and the church from becoming in-

77. Larkin v. Grendel's Den, 103 S. Ct. 505, 511 (1982).

78. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Saia v. New York, 334 U.S. 558 (1948). The Court has often condemned broadly worded licensing ordinances which grant standardless discretion to public officials. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–51 (1969); Staub v. City of Baxley, 355 U.S. 313, 323–25 (1958); Schneider v. New Jersey, 308 U.S. 147, 163–64 (1939).

79. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973).

80. The *Larkin* Court conceded that review of the churches' decisionmaking by the Massachusetts Alcoholic Beverage Control Board "would present serious entanglement problems." 103 S. Ct. at 511 n.9.

81. *E.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973); Tilton v. Richardson, 403 U.S. 672, 688 (1971); Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

82. *Larkin*, 103 S. Ct. at 512.

volved in the affairs of government.[83] The first amendment unquestionably forbids an entanglement of this nature.

IV. CONCLUSION

The Court in *Larkin v. Grendel's Den,* applying the three-part establishment clause test to the Massachusetts law, reached a sound result when it held the statute unconstitutional. However, the Court's suggested alternative constitutional models for statutes regulating liquor outlets would likewise fail the Court's test. Any attempt by a state to ensure a zone of tranquility around churches will result in an establishment clause violation, since religion is thereby promoted. A state would be well advised to steer clear of statutory schemes to protect religious institutions. A state seeking to insulate churches and other religious institutions from disruptive influences such as liquor outlets must do so in a religiously neutral manner—a difficult if not impossible task.

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83. P. KAUPER. *supra* note 25, at 47–50.