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Constitutional Law - First Amendment - State Licensing Regulation Which Delegates Veto Power to a Church over the Approval of Liquor Licenses within a Specified Distance of Such Church Violates the Establishment Clause

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Recent Developments

CONSTITUTIONAL LAW—FIRST AMENDMENT—STATE LICENSING REGULATION WHICH DELEGATES VETO POWER TO A CHURCH OVER THE APPROVAL OF LIQUOR LICENSES WITHIN A SPECIFIED DISTANCE OF SUCH CHURCH VIOLATES THE ESTABLISHMENT CLAUSE.

Larkin v. Grendel's Den, Inc. (U.S. 1982)

Grendel’s Den, Inc. (Grendel’s Den),¹ a restaurant, applied for, and was denied, a license to sell alcoholic beverages by a local Massachusetts licensing agency.² Under section 16C of chapter 138 of the Massachusetts General Laws, the issuance of a liquor license could be prohibited if the applicant’s place of business was located within a 500-foot radius of an objecting church or school.³ The Massachusetts Alcoholic Beverages Control Commission


2. Grendel’s Den, Inc. v. Goodwin, 662 F.2d 88, 89, rev’d, 662 F.2d 102 (1st Cir. 1981) (en banc), aff’d sub nom., Larkin v. Grendel’s Den, Inc., 103 S. Ct. 505 (1982). Scorpio’s, Inc., a holder of an all-alcoholic-beverages restaurant license, applied to the Cambridge License Commission for approval to transfer its license to Grendel’s Den pursuant to a purchase agreement between the parties. Id. Notice of the proposed transfer was published in a local newspaper and mailed to all abutting property owners, and to any school, hospital, or church within a 500-foot radius of Grendel’s Den. Id. (citing MASS. GEN. LAWS. ANN. ch. 138, § 15A (West 1974)). Subsequently, the Cambridge License Commission denied the application for the transfer of the license, citing as its reason a written objection filed by the Holy Cross Armenian Catholic Church. Id.

3. MASS. GEN. LAWS. ANN. ch. 138, § 16C (West 1974). In its liquor zoning laws, the Massachusetts legislature has delegated authority to local boards to prohibit

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(Beverages Control Commission) sustained the Cambridge License Commission's denial of the proposed liquor license solely on the basis of an objection submitted by the Holy Cross Armenian Catholic Church (Holy Cross Church), located ten feet from the restaurant. Grendel's Den brought an action against the state and city licensing commissions challenging the validity of section 16C under the due process and equal protection clauses of the fourteenth amendment, the establishment clause of the first amendment, and the Sherman Act. The district court, declining to follow a decision of the distribution of liquor within certain areas of their community. Id. § 12. Section 12 provides that local authorities are authorized "to refuse to grant licenses under [chapter 138] in certain geographical areas of their respective cities or towns, where the character of the neighborhood may warrant such refusal." Id. The local licensing board itself is not prohibited from denying an application on the ground that the proposed license situs is within the proximity of a church or school. Id.

Section 16C, at its inception, imposed an absolute ban on the licensing of premises for the sale of liquor located within 500 feet of a church or school. 1954 Mass. Acts ch. 596, § 16C. The state began a progressive relaxation of the limitation by modifying the statute to permit liquor licenses within a 500-foot radius of a church or school with the assent of the governing bodies of those institutions. See Arno v. Alcoholic Beverages Control Comm'n, 377 Mass. 83, 88-89, 384 N.E.2d 1223, 1227 (1979). In 1968, the legislature amended this categorical proscription to permit licensing within the 500-foot radius "if the governing body of such church or school consents in writing." 1968 Mass. Acts ch. 435.

In 1970, the present language was substituted, relieving the applicant of the duty to gain the institution's assent and shifting the burden of formal objection to the church or school. Arno, 377 Mass. at 88, 384 N.E.2d at 1226-27. Section 16C of Chapter 138 of the Massachusetts General Laws provides in pertinent part as follows:

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, but this provision shall not apply to the transfer of a license from premises located within said distance to other premises located therein, if it is transferred to a location not less remote from the nearest church or school than its former location.

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

Section 16C defines "church" as "a church or synagogue building dedicated to divine worship and in regular use for that purpose, but not a chapel occupying a minor portion of a building primarily devoted to other uses." Id. Finally, if an establishment sells liquor after one's license is disapproved, this constitutes a crime punishable by a fine of up to $1,000 and/or up to one year's imprisonment. Id. § 2.


5. 662 F.2d at 103. Grendel's Den asserted that section 16C violated federal antitrust law by creating a licensing system which permits private parties to engage in anti-competitive practices. 495 F. Supp. at 763 (citation omitted). Specifically, Grendel's Den alleged that certain members of the Holy Cross Church were competitors of the plaintiff and that the church objected to the license in order to further the commercial interests of those persons. Brief for Appellant at 7, Grendel's Den, 103 S. Ct. at 505. The district court held that the state action exemption to the Sherman Act would not bar relief under federal antitrust law. 495 F. Supp. at 770 (citing Parker v. Brown, 317 U.S. 341 (1942)). The First Circuit agreed with the district
the Massachusetts Supreme Judicial Court, held that the statute, on its face, violated the due process and establishment clauses of the Constitution. A panel of the United States Court of Appeals for the First Circuit initially reversed the district court. On rehearing, the same court, sitting en banc, affirmed that portion of the district court's judgment holding that section 16C violated the principle of separation of church and state.

The Commonwealth of Massachusetts defended the validity of section 16C under the due process clause of the fourteenth amendment at each stage of the appellate proceedings thereby preserving this issue on appeal to the Supreme Court. See C.A. Wright, The Law of the Federal Courts § 107 at 745 (West 4th ed. 1983). See also Grendel's Den, 103 S. Ct. at 512 n.11.

6. 495 F. Supp. at 765-66. The parties voluntarily suspended the district court proceedings pending resolution of a state court challenge to the same statute by another liquor license applicant. See 662 F.2d at 90 n.3.

7. Through a stipulation of contested claims, the parties agreed to present only plaintiff's facial claims to the district court; the "as applied" constitutional claims as well as the plaintiff's Sherman Act challenge remained open for further litigation pending the outcome of the "as applied" claims. See 662 F.2d at 90 n.3.

8. 495 F. Supp. at 770. The district court first concluded that a state's right to regulate liquor sales under the umbrella of the twenty-first amendment is subject to limitation by other constitutional guarantees. Id. at 764. The district court reasoned that section 16C was an impermissible delegation of legislative power which violated the due process clause of the fourteenth amendment. Id. at 766 (citing Eubank v. City of Richmond, 226 U.S. 137 (1912)). For a discussion of Eubank, see notes 27-28 and accompanying text infra. The district court went on to hold that the statute granted churches uncontrolled and standardless veto power which could be wielded for the advancement of religion in violation of the establishment clause. 495 F. Supp. at 767-68. The district court rejected plaintiff's equal protection claim. Id. at 768-69.

9. 662 F.2d at 88. The First Circuit panel, in a split decision, held that section 16C did not violate the due process clause, since it was "a reasonable means of regulation in an area where the states have wide latitude to regulate, and [was] not dissimilar to schemes commonly used in the fields of licensing and zoning." Id. at 95 (citations omitted). The court further opined that the statute did not violate the establishment clause, since it did not have the primary effect of advancing religion. Id. at 96-99 (citations omitted).

10. 662 F.2d at 102. The case was first heard by Chief Circuit Judge Coffin, Circuit Judge Campbell, and District Judge Hoffman of the Eastern District of Virginia sitting by designation. 662 F.2d at 89. The en banc panel was formed by substituting Circuit Judge Bownes for district Judge Hoffman. Chief Judge Coffin, who dissented in the first panel decision, and Judge Campbell, who wrote the majority opinion in that same decision, remained as members of the en banc panel. 662 F.2d at 102. On rehearing, Chief Judge Coffin wrote the majority opinion and Judge Campbell dissented. 662 F.2d at 103, 107.
dated by the establishment clause.11 The United States Supreme Court affirmed, holding that, despite the state's broad authority under the twenty-first amendment, a delegation to churches and schools of the power to veto applications for liquor licenses violated the establishment clause of the first amendment. *Larkin v. Grendel's Den, Inc.*, 103 S. Ct. 505 (1982).

Prior to the adoption of the twenty-first amendment,12 the states had broad power to regulate local distribution of liquor.13 Although this regula-

11. 662 F.2d at 107. Chief Judge Coffin, speaking for the majority, concluded that section 16C had the primary or principal effect of advancing religions since, by granting to churches "absolute discretion to confer or withhold an important commercial privilege," it effectively "distribute[d] benefits on an explicitly religious basis." *Id.* at 105 (emphasis supplied by the Court). See generally *id.* at 104-06. Hence, the First Circuit reasoned that the statute was "a law respecting an establishment of religion" and, therefore, void under the Constitution. *Id.* at 104. Since the law was determined to be constitutionally invalid, the court found it unnecessary to consider the due process or antitrust arguments. *Id.* at 107 n.11.

12. U.S. Const. amend. XXI, § 2. "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." *Id.* The twenty-first amendment was proposed by Congress on February 20, 1933 and was proclaimed to be in effect on the fifth of December of that same year. E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 127 n.1, 448 (1975).

The Supreme Court and a majority of commentators consider section 2 of the twenty-first amendment to be an affirmative grant of power to the states to protect their citizens against the evils of liquor within their borders. See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 107 (1980); State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62 (1936); Comment, *The Effect of the Twenty-First Amendment on State Authority to Control Intoxicating Liquors*, 75 COLUM. L. REV. 1578, 1579 (1975) [hereinafter cited as *Authority to Control*]; Comment, *State Power to Regulate Liquor: Section Two of the Twenty-First Amendment, Reconsidered*, 24 SYRACUSE L. REV. 1131, 1133 (1973); Note, *Retail Price Maintenance for Liquor: Does the Twenty-First Amendment Preclude a Free Trade Market?*, 5 HASTINGS CONST. L.Q. 507, 510 (1978). This first theory is labeled the "absolutist" approach and comports with Congressional debates over the effect of the twenty-first amendment. See 76 CONG. REC. 64-4172 (1933). A minority opinion, however, asserts that section 2 is a provision which only allows the states to exercise their police power over alcohol while the commodity is still in interstate commerce rather than in commerce within its own boundaries. See *Norman's on the Waterfront, Inc.* v. Wheatley, 444 F.2d 1011, 1018-19 (3d Cir. 1971); Comment, *The Concept of State Power Under the Twenty-First Amendment*, 40 TENN. L. REV. 465, 471-73 (1973). This opposing interpretation of section 2 has been deemed the "federalist" position, which postulates that the twenty-first amendment was enacted simply to prevent federal regulatory interference under the commerce clause from unduly interfering with so-called "dry states" who wished to keep alcohol without their borders. *Authority to Control*, supra at 1580.

13. See *Crane v. Campbell*, 245 U.S. 304 (1917). In *Crane*, the Supreme Court stated:

It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment. *Id.* at 307 (citations omitted). See generally Note, *The Twenty-First Amendment Grants States Plenary Power over the Liquor Industry Notwithstanding the Dictates of the Equal Employment Provisions of the Civil Rights Act of 1964*, 8 HOUS. L. REV. 587 (1971). Addi-
tory power was considered incident to those powers reserved to the states by the tenth amendment, the Supreme Court in California v. LaRue concluded that the twenty-first amendment conferred greater authority upon the states than the general police power: it not only strengthened the states' ability to regulate liquor distribution, but also added a presumption of validity to their regulation.

The states have exercised these tenth and twenty-first amendment powers to create zones of protection around valued institutions so they can be insulated from liquor-serving establishments. Of these institutions, the


16. Id. at 114-15, 118. See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980) (the twenty-first amendment in conjunction with the police power encompasses "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system"). The Supreme Court has subsequently recognized that states may prohibit distribution absolutely or permit distribution only under explicit conditions. New York State Liquor Auth. v. Beleanca, 101 S. Ct. 2599, 2601 (1981) (citations omitted). See also Connolly v. Alcoholic Beverages Control Comm'n, 334 Mass. 613, 619, 138 N.E.2d 131, 135 (1956) (incident to the authority wholly to prohibit the sale of alcohol, the legislature may permit sales subject to prescribed terms and conditions).

17. Many jurisdictions either prohibit the sale of liquor within a prescribed distance from the protected institution or require the licensing authority to consider this proximity in determining whether to grant a liquor license. For a discussion of the various statutes which states have enacted to create zones of protection around valued institutions, see notes 19-23 and accompanying text infra. The primary objective of these statutes is to remove the atmosphere created by a liquor-serving establishment a reasonable distance from institutions where the milieu of such places is considered inimical to the best interests and welfare of those attending such institutions. 45 AM. JUR. 2d Intoxicating Liquors § 140, 585 (1969). For a discussion of the jurisdictions totally prohibiting liquor sales within a stated distance from protected institu-
most frequently protected are churches and schools. Religious and educational institutions, whose contribution to the public welfare is beyond dispute, are favored in zoning law and practice. The form of protection used to insulate these institutions varies widely. Many jurisdictions prohibit the issuance of a liquor license within a prescribed distance of protected institutions. Some states direct the local licensing authority to consider the proximity of the proposed liquor outlet as a factor in deciding whether to grant a

for a discussion of the jurisdictions which direct the local licensing authority to consider the proximity of the proposed liquor outlet in deciding whether to grant a liquor permit, see note 20 and accompanying text, infra. For a discussion of those jurisdictions which permit a waiver of the statutory ban on liquor sales within a prescribed distance of a protected institution, if such institution gives consent or does not file an objection to the issuance of a proposed liquor license, see notes 21-22 and accompanying text, infra.


19. See R. Anderson, 2 American Laws of Zoning §§ 12.17-18 (2d ed. 1976). Courts have repeatedly emphasized the high purpose and moral value of religious and educational institutions. Id. § 12.18, at 442 & n.14. Further, religious uses are looked upon most favorably since they are given protection under the establishment and free exercise clauses of both federal and state constitutions. Id. at 443. Recognition of the contribution to the public welfare made by both religious and educational uses is reflected in a Massachusetts statute which severely restricts the degree of local zoning control that may be exercised over religious uses and nonprofit educational uses. First enacted in 1950 in response to the perceived attempt by the town of Dover, Massachusetts to discriminate against religious schools, the statute was amended in 1975. Mass. Gen. Laws Ann. ch. 40A § 3 (West 1976). For a general history of the statute and its judicial interpretation, see Bible Speaks v. Board of Appeals, 8 Mass. App. 19, 391 N.E.2d 279, 283 n.10 (1979).

liquor license. Still other states permit a waiver of the statutory restriction on the sale of liquor within a proscribed distance of a protected institution if such institution gives consent, or does not file an objection to the issuance of the proposed license. These different statutory designs reflect diverse community objectives as well as the flexible nature of land-use control and zoning.


22. A common form of limitation in the issuance of various use permits is the consent ordinance, which affords to the residents of a prescribed area in which a troublesome use is proposed, an opportunity to prevent the issuance of a permit. See R. Anderson, supra note 19 § 19.15 at 409. These ordinances may either prohibit the use in issue unless a certain percentage of the owners within a specified distance of the proposed use consent to the use, or alternatively, deprive the legislative body of jurisdiction to issue a permit until written consents have been obtained by the applicant. See id. at 409-10. See, e.g., Ariz. Rev. Stat. Ann. § 4-207(A) (1-3) (1982 Supp.) (prohibition unless assent by governing body of institution, local governing body, and existing commercial zoning in area of proposed liquor outlet); Me. Rev. Stat. Ann. tit. 28 § 301 (1964) (unanimous approval of members of local licensing commission and written approval of majority of officers or person in charge of protected institution); Mo. Rev. Stat. § 311.080 (1972) (consent in writing of governing board of protected institution); N.J. Stat. Ann. § 33:1-76 (West 1940) (prohibition except when waived by governing body of protected institution).

On the state level, the courts are generally divided as to the validity of such legislation. See generally 101 C.J.S. Zoning §§ 255-56 (1958). Those jurisdictions which invalidate consent provisions reason that such a statute is an arbitrary delegation of legislative power. See Eubank v. City of Richmond, 226 U.S. 137 (1912). For a discussion of Eubank, see notes 27-28 and accompanying text infra. Those jurisdictions which have upheld use ordinances follow the contrary reasoning of Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917). For a discussion of Cusack, see notes 29-31 and accompanying text infra.


24. For two general statements justifying the use of the police power to impose order on the development of a community through zoning legislation, see Gorieb v. Fox, 274 U.S. 603, 608 (1927); Euclid v. Ambler Realty Co., 272 U.S. 365, 386-88 (1926). An excellent illustration of an accommodation for varying community values...
Some state courts have upheld statutes which condition the grant of a liquor license on the consent of, or the absence of an objection by, residents or property owners within a particular area in which the proposed establishment is to be operated.\textsuperscript{25} Although the Supreme Court has never addressed the issue of the propriety of delegating legislative authority under a liquor licensing statute, it has analyzed statutes which have either permitted waivers of a legislative prohibition or which have imposed other types of use restrictions where consent of affected parties has been gained.\textsuperscript{26}

In \textit{Eubank v. City of Richmond},\textsuperscript{27} the Court considered the validity of a city ordinance requiring municipal authorities to establish set-back lines for buildings to be erected on any city block upon the request of the owners of two-thirds of the abutting property. The Supreme Court invalidated the City of Richmond’s scheme as an unreasonable delegation of the police power.\textsuperscript{28} In \textit{Cusack Co. v. City of Chicago},\textsuperscript{29} the Court upheld a municipal and needs is the Maryland statutory scheme which provides for various forms of protection for churches and schools. See \textit{MD. ANN. CODE art. 2B, §§ 46-53 (1981 & 1982 Supp.)}. For instance, in Baltimore, a statute permits churches and schools to waive a 300-foot restriction. \textit{Id.} § 46B. In Anne Arundel County, no license may be issued within 1000 feet of a church or school. \textit{Id.} § 46. In Dorchester County, licenses are prohibited within 300 feet of a church or school. \textit{Id.} § 50. In Queen Anne’s County, no license can issue within 500 feet of a church, school, library, or youth center. \textit{Id.} § 52C. These diverse methods of location control in land-use planning are not dissimilar to schemes commonly used in the fields of licensing and zoning. See, e.g., \textit{O’Brien v. St. Paul}, 285 Minn. 378, 173 N.W.2d 462 (1969); \textit{Robwood Advertising Assocs. v. Nashua}, 102 N.H. 215, 153 A.2d 787 (1959). For example, states have combined use of both distance requirements and consent provisions in the context of gasoline station regulation. See Note, \textit{Location Control of Gasoline Service Stations}, 12 \textit{SYRACUSE L. REV.} 66, 69-70 (1960). Although gasoline stations are necessary and lawful enterprises, like liquor outlets, their character is such that reasonable limitation and regulation as to location and use is within the settled principles of the police power. See \textit{id.} at 69.

25. See generally 45 \textit{AM. JUR. 2d Intoxicating Liquors} § 156, 598-99 (1969); 48 \textit{C.J.S. Intoxicating Liquors} § 96, 449-54 (1981). See also \textit{Davis v. Blount County Beer Bd.}, 621 S.W.2d 149, 151-53 (Tenn. 1981) (upholding ordinance which prohibited liquor licenses within 300 feet of a residential dwelling if the owner of the residence objects); \textit{Wiles v. Michigan Liquor Control Comm’n}, 59 Mich. App. 321, 229 N.W.2d 434 (1975) (statute denying liquor license if proposed location is within 500 feet of church and church files objection thereto upheld against attack alleging unconstitutional delegation of legislative authority and violation of the establishment clause); \textit{Beacon Liquors v. Martin}, 279 Ky. 468, 131 S.W.2d 446 (1939) (upholding a statute which prohibited the issuance of a liquor license within 200 feet of a nonconsenting church, school, or hospital). One author has suggested that courts have generally upheld even those consent requirements which wholly lack standards or guidelines when the proposed use is offensive to the community. See \textit{A. RATHKOPF, THE LAW OF ZONING AND PLANNING} §§ 29.04, 29.6-29.8 (rev. 3d ed. 1966). See also \textit{L. Jaffe, Law-Making By Private Groups}, 51 \textit{HARV. L. REV.} 201, 227 (1937).


27. 226 U.S. 137 (1912).

28. \textit{Id.} at 144. The Virginia statute authorized municipalities to enact building
ordinance which absolutely prohibited the erection of any billboard in designated city blocks, but permitted modification of this prohibition with the consent of those individuals most affected by such modification. Distinguishing *Eubank*, the Court in *Cusack* stated that the billboard modification was "not a delegation of legislative power, but... a familiar provision affecting the enforcement of laws and ordinances." Subsequently, in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, the Court invalidated a city zoning scheme which conditioned the issuance of a building permit for a home for the elderly on the consent of two-thirds of the property owners within 400 feet of the proposed building. The *Roberge* Court limited *Cusack* regulations, including the establishment of building lines. *Id.* at 140-41. Pursuant to this act, the Richmond City Council passed an ordinance stating that owners of two-thirds of property abutting any street could conclusively establish set-back lines, within prescribed limits, by filing a written request. *Id.* at 141. Such action triggered the licensing committee's refusal to grant any building permit which would allow construction outside the established lines. *Id.* The Court concluded that the ordinance was an unreasonable exercise of the police power because "it [was] hard to understand how the public comfort or convenience, much less the public health, [could] be promoted by a line which may be so variously disposed." *Id.* at 144. Hence, the Court concluded that the consent provision contained in the Virginia statute was an unconstitutional delegation of legislative authority. *Id.* Further, Justice McKenna reasoned that non-assenting property owners on abutting streets are denied due process of law since the ordinance leaves discretion not in the administrative agency but in two-thirds of the abutting property owners. *Id.* at 143-44. Hence, the consent provision in the Virginia statute was an unconstitutional delegation of legislative authority.

29. 242 U.S. 526 (1917).

30. *Id.* at 527-28, 531. The Chicago ordinance provided in pertinent part as follows:

> It shall be unlawful for any person, firm or corporation to erect or construct any billboard or signboard in any block on any public street in which one-half of the buildings on both sides of the street are used exclusively for residence purposes without first obtaining the consent in writing of the owners or duly authorized agents of said owners owning a majority of the frontage of the property on both sides of the street in which such billboard or signboard is to be erected, constructed or located.

*Id.* at 527-28.

The Court first observed that the regulation and control over the construction and maintenance of billboards was a legitimate exercise of the police power. *Id.* at 529-30. It then concluded that the ordinance created an absolute ban on the erection or construction of billboards, but permitted one-half of the lot owners to remove these restrictions. *Id.* at 531. Since the legislature had made a decision to ban all billboard construction unless a percentage of the landowners consented to a waiver of this legislative mandate, Justice Clarke reasoned that the statute did not effectively delegate legislative power. *Id.*

31. *Id.* The *Cusack* Court stated that the ordinance in *Eubank* left the establishment of building requirements to the action of neighboring lot owners, making the administrative body merely the "automatic register" of this private action, but giving it the effect of law. *Id.* While the *Eubank* ordinance permitted two-thirds of the adjacent lot owners to impose restrictions upon adjoining property owners, the *Cusack* statute permitted one-half of the lot owners to remove restrictions on the property owners. *Id.*

32. 278 U.S. 116 (1928).

33. *Roberge*, 278 U.S. at 122-23. The Seattle ordinance provided that: "[a] phil-
to cases involving offensive uses or nuisances which tend to cause injury or inconvenience to the community.\textsuperscript{34} Since a philanthropic home was not such a use, the attempted delegation of uncontrolled discretion to neighborhood landowners could not be sustained.\textsuperscript{35}

The distinction drawn in this trilogy of cases is thought by commentators to be clear: if the action or inaction of property owners had the effect of creating a restriction on offensive uses or nuisances, then it has the effect of legislation and constitutes an unlawful delegation of power; on the other hand, if the prohibition is imposed by the legislative body, and the consents merely waive or modify a restriction which the legislature has created, then the law is valid.\textsuperscript{36}

Although zoning legislation pursuant to the police power has been accorded great judicial deference,\textsuperscript{37} the Supreme Court has required heightened judicial scrutiny when a statutory provision infringes upon a philanthropic home for children or for old people shall be permitted in [a certain established “First Residence District”] when the written consent shall be obtained of the owners of two-thirds of the property within (400) feet of the proposed building.” \textit{Id}. at 118.

\textsuperscript{34} \textit{Id}. at 122. In contrast to the ordinances in \textit{Eubank} and the present case, the Court explained, the prohibition in \textit{Cusack} was based on “facts found [which] were sufficient to warrant the conclusion that . . . billboards would or were liable to endanger the safety and decency of [residential] districts.” \textit{Id}. There had been no legislative findings that the proposed building would cause any injury to the public health, safety, morals, or general welfare. \textit{Id}. at 121. On the contrary, “[t]he grant of permission for such building and use . . . shows that the legislative body found that the construction and maintenance of a new home was in harmony with the public interest and with the general scope and plan of the zoning ordinance.” \textit{Id}. This distinguished the proposed use from “billboards or other uses which by reason of their nature are liable to be offensive” to the community. \textit{Id}. at 122.

\textsuperscript{35} \textit{Id}. at 121-23. Justice Butler found that there was “no provision for review under the ordinance; [two-thirds of the abutting property owners’] failure to give consent is final.” \textit{Id}. at 122. Further, the Court reasoned that the property owners were “free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice.” \textit{Id}. (citing \textit{Yick Wo v. Hopkins}, 118 U.S. 356, 366, 368 (1886) (systematic exercise of laundry-licensing authority to discriminate against persons of oriental extraction violates equal protection)).

\textsuperscript{36} A. RATHKOFF, \textit{supra} note 25 § 29.02, at 29-4. The total prohibition of a use may be validly modified with the consent of those most affected by the modification; however, an actual delegation of legislative power is invalid. \textit{See} \textit{Roberge}, 278 U.S. at 122. However, where there is a modification and not a delegation, the use to which the property is put is important. \textit{Id}. at 122. If the use involves a potential nuisance, the courts are apt to validate the consent requirement. \textit{Id}, \textit{see, e.g.}, \textit{Valkanet v. City of Chicago}, 13 Ill. 2d 268, 272, 148 N.E.2d 767, 770 (1958) (citing \textit{Cusack}, 242 U.S. at 526) (approving prohibition which might be waived by consent of adjoining landowners where statutory provision deals with uses the location of which have a “strong tendency to injure the public health or morals or affect the general welfare, and have the general characteristic of a nuisance, such as saloons”).

\textsuperscript{37} Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting). Justice Marshall stated that zoning may be the most important function performed by local government, “for it is the primary means by which we protect that sometimes difficult to define concept of quality of life.” \textit{Id}. (citing \textit{Euclid v. Ambler Realty Co.}, 272 U.S. 365 (1926)). He went on to state that the police power which provides the justification for zoning is not to be narrowly confined. Rather, the
fundamental constitutional right. Furthermore, regardless of whether a state legislates under the tenth amendment police power or the more specific power to regulate the sale and use of liquor under the twenty-first amendment, that power may not be exercised in a manner which abridges the freedoms guaranteed by the first amendment.

The first amendment commands that there shall be "no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."
The religion clauses are thought to encompass a unitary guarantee of separation and freedom; that is, separation guarantees freedom and freedom requires separation. Although the Supreme Court appears to regard these clauses as expressing a single policy consideration of separation, the dual nature of the clauses has led the Court to mandate that government chart a neutral course between avoiding involvement with religion and intervening when necessary to insure religious free exercise.

The tension between the two clauses is highlighted in the struggle the Court has faced in interpreting the establishment clause. Support for a conclusion that freedom and separation were intended to meld into a unitary concept derives from the views of Roger Williams and James Madison. See id. Roger Williams opposed government enforcement of religious uniformity for the very reason that it "confounds the Civil and Religious." Williams, The Bloody Tenent of Persecution for Cause of Conscience, Discussed, in a Conference between Truth and Peace (1644), reprinted in 3 PUBLICATIONS OF THE NARRAGANSETT CLUB 3-4 (S. Caldwell ed. 1867). Madison, in opposing a bill which would have established a provision for teachers of the Christian religion, stated that religion must be directed by individual reason and conviction, not mandated by government force or violence. J. MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785) (quoting Declaration of Rights, art. 16), reprinted in Everson v. Board of Educ., 330 U.S. 1, 63-64 (1947) (appendix to Rutledge, J., dissenting).

However, in its attempt to reconcile the demands that government neither favor nor abridge the practice of religion, the Court has subjected challenged practices to independent analysis under each clause and adopted separate tests for each clause. W. D. VALENTE, LAW IN THE SCHOOLS 109 (1980).

For a discussion of the confrontation between the free exercise clause and the establishment clause of the first amendment, see notes 41-44 and accompanying text supra.
James Madison and Thomas Jefferson against the Virginia Assessment Bill\footnote{45} engendered two theories regarding the intention and meaning of this clause.\footnote{46} According to one theory, the clause bans the preferential treatment of any particular religion or sect by the government.\footnote{47} A second theory, as absolute terms. \textit{See id.} If each clause were expanded to a logical extreme, it would tend to clash with the other. \textit{Id.} at 668-69.

Apart from the confrontation between the two religion clauses which must be overcome when interpreting the establishment clause, the Court faced the uncertainty exhibited by the framers' drafts of the first amendment. The breadth of the establishment clause is apparent when the proposed alternative versions of the first amendment which were rejected by the Senate, are compared with the final version. There were two proposed versions. One provided, "Congress shall make no law establishing one religious sect or society in preference to others, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." \textit{First Session of the United States Senate 70} (September 3, 1789). The other provided, "Congress shall make no law establishing any particular denomination or religion in preference to another; or prohibiting the free exercise thereof, nor shall the right of conscience be infringed." \textit{Id. But see J. Brady, Confusion Twice Confounded 8-9} (2d ed. 1955) (the men who drafted and adopted the first amendment understood establishment of religion to mean "the recognition of one religion by the state in preference to all others, and the according to that one [religion] of special privileges not shared by others.").

\footnote{45}{The Virginia Assessment Bill, a taxing measure for the support of religion, was designed to revive the payment of tithes, a practice which had been suspended since 1777. \textit{See Everson v. Board of Educ.}, 330 U.S. 1, 36 (1947) (Rutledge, J., dissenting).

Madison delivered his \textit{Memorial and Remonstrance} to the Virginia Assembly in 1785 proclaiming that "[t]he religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." \textit{See J. Madison, Memorial and Remonstrance Against Religious Assessments, reprinted in Everson}, 330 U.S. at 63-71. Madison's protest precipitated the demise of the Assessment Bill. \textit{See Everson}, 330 U.S. at 37-39 (Rutledge, J., dissenting). Further, it laid the foundation for the enactment of Jefferson's Bill for Establishing Religious Freedom. \textit{See id. at 28-44} (Rutledge, J., dissenting). \textit{See also 11 Jefferson's Writings 428-30} (Monticello ed. 1905).

\footnote{46}{\textit{See Everson v. Board of Educ.}, 330 U.S. at 36 (Rutledge, J., dissenting). \textit{Cf. L. Tribe, American constitutional law} 816-17 (1978). Professor Tribe suggests that there are not two, but three distinct schools of thought concerning the relations between church and state. The first, held by Roger Williams, is that separation provides a vehicle for protecting the church from excesses of the state. The second is the Jeffersonian view that church should be walled off from the state in order to protect the state from the influence of the church. Finally, Professor Tribe suggests that yet a third view is represented by Madison's assertion that both religious and secular interests would be best advanced by decentralizing power so as to assure competition among sects rather than dominance by one over another. \textit{Id.}

\footnote{47}{E. Corwin, \textit{supra} note 12, at 269. This theory was supported in the abstract by Justice Story, who, although he interpreted the clause as banning the preferential treatment of a particular religion over another, regarded Congress as still free to prefer the Christian religion over other religions. \textit{Id.} (citing J. Story, \textit{Commentaries on the Constitution}, II §§ 1870-1879 (Cambridge, Mass. 1833)). It was also supported by legal scholar Thomas M. Cooley in his treatise on the principles of constitutional law, where he states that the establishment clause prohibits "the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others." \textit{Id. (citing T. Cooley, Principles of Constitutional Law} 224-25 (Little, Brown, ed. 1874)).
voiced by Thomas Jefferson, asserts that it was the purpose of the first amendment to build "a wall of separation between church and State."48 Almost one hundred years after the adoption of the first amendment, the Supreme Court, acknowledging Jefferson as the "leader of the advocates of measure," accepted the concept of a wall of separation as an almost authoritative declaration of the scope and effect of the establishment clause.49 The Court, however, has not interpreted the establishment clause as requiring a "wall" of separation between church and state;50 rather, it has drawn a

48. E. CORWIN, supra note 12, at 270. This theory was first voiced in 1802 by Thomas Jefferson in a reply letter which he wrote to a group of Baptists in Danbury, Connecticut. Id. Jefferson occasioned to say,

Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should make no law respecting an establishment of religion . . . ; thus building a wall of separation between church and State.

Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting 8 WORKS OF THOMAS JEFFERSON 113 (Washington ed. 1861)) (emphasis added). However, just three years after the Danbury letter, Jefferson appeared to have further contemplated the purpose of the first amendment: "In matters of religion, I have considered that its free exercise is placed by the Constitution independent of the powers of the general government." Second Inaugural Address of Thomas Jefferson, reprinted in J. D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, I 379 (Washington 1900).

49. Reynolds v. United States, 98 U.S. 145, 164 (1878). In Reynolds, the Court addressed the issue of whether religious belief can be accepted as a justification for an overt act made criminal by the laws of the United States. Id. at 162. The defendant was a member of the Mormon Church. Id. at 161. The federal government challenged a member's right to practice church-sanctioned polygamy, a practice forbidden by federal law. Id. In addressing the issue of the free exercise of religion, the Court reasoned that Jefferson's letter left the government free to reach actions "in violation of social duties or subversive of good order." Id. at 164. Thus, gaining its support from the language of Jefferson, the unanimous Court sustained the right of Congress to forbid polygamy in the territories of the United States. Id. at 167. Although the Court spoke with approval of the Jefferson letter, it is submitted that the Court specifically addressed the issue of Congressional power to restrain the free exercise of religion and not the concept of a wall of separation between church and state. See id.

50. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). A complete separation of church and state "is not possible in an absolute sense." Id. Rather, the line of separation "is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." Id. See also Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 662 (1980) (the Court avoids "categorical imperatives and absolutist approaches at either end of the range of possible outcomes."). Cf. Abington School Dist. v. Shempp, 374 U.S. 203, 216 (1963) ("this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another. . . .") (emphasis added); Everson v. Board of Educ., 330 U.S. at 18 (1947) (the first amendment wall between church and state must be kept high and impregnable).

The view that absolute separation of church and state is not required by the first amendment is shared by such notable scholars as Erwin Griswold, former Dean of the Harvard Law School, Edwin S. Corwin, Paul Kauper, and Wilbur Katz. Freedom or Separation, supra note 41, at 567. The principle of church-state separation, accord-
penetrable barrier to accommodate inevitable interaction and yet to afford protection against the "sponsorship, financial support, and active involvement of the sovereign in religious activity." 51

The modern era of the doctrine of separation of church and state as a genre of constitutional law began with the Supreme Court's decision in Everson v. Board of Education. 52 Everson's implicit scrutiny of the purpose and effect of state aid to religious institutions in determining the constitutional validity of the aid eventually developed into an explicit test. 53 The Court, in Lemon v. Kurtzman, 54 established the current tripartite test for determining the constitutionality of government action under the establishment clause. 55 First,
“the statute must have a secular legislative purpose”; 56 second, “its principal or primary effect must be one that neither advances nor inhibits religion”; 57 and finally, it must not foster “an excessive government entanglement with religion.” 58 The Lemon Court held that a finding of any of these considerations would be independently sufficient to render legislative fiat unconstitutional. 59 The Lemon test has been applied by the Supreme Court to strike

56. 403 U.S. at 612. The Court was willing to accept the statement of purpose offered by both Rhode Island and Pennsylvania: “[t]o enhance the quality of the secular education in all schools covered by the compulsory attendance laws.” Id. at 613.

57. Id. at 612. The Court did not decide whether the effect of the legislative programs would violate the establishment clause, because it relied on the defect of excessive entanglement, the third prong of the test. Id. at 613-14. See J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 43, at 854. The authors view the Court’s discussion as indicating that it would have found a prohibited effect in these programs had it analyzed the case under this prong of the Lemon test. Id.

This second prong of the Lemon test demonstrates the polar forces tugging at the Court’s shirttails. Advancing religion constitutes establishment, but inhibiting religion means prohibiting its free exercise, which the Court has held, also constitutes a violation of the separation of church and state. Freedom or Separation, supra note 41, at 566 (citing Everson, 330 U.S. at 15).

58. 403 U.S. at 613. “In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.” Id. at 615. The Court believed that the program’s requirement that the government inspect the schools’ financial records to determine which expenditures were religious would constitute “an intimate and continuing relation between church and state.” Id. at 620-22. The “excessive entanglement” concept is thought to introduce into religion clause jurisprudence a “prophylactic dimension.” The Entanglement Test, supra note 42, at 1200. “Administrative relationships between religious and civil authorities are forbidden not only when they result in government support or direction of religious enterprises but also when they are ‘pregnant with dangers of excessive government direction’ of such enterprises.” Id. (quoting Lemon, 403 U.S. at 620). In attempting to reduce potential church-state strife, relationships which might cause religiously-based disputes are forbidden regardless of whether any real friction between the church and state is present. Id. at 1201. Further, a secondary role for “excessive entanglement” is to act as an early warning system for more traditional establishment clause hurdles, such as the question of primary effect. Id. at 1203 (citing Nyquist, 413 U.S. at 798).

Commentators have suggested that the entanglement inquiry may have a second aspect; that is, the Court must examine for and invalidate any aid program which causes an undue amount of political division along religious lines. J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 43, at 854-55. Whether this second inquiry under the entanglement test is to be considered a fourth element of the Lemon test is an issue for debate. Id. at 855.

59. 403 U.S. at 613. See The Supreme Court, 1970 Term, 85 HARV. L. REV. 3, 168 (1971); Note, State Aid to Nonpublic Elementary and Secondary Schools Held Violative of the Establishment Clause of the First Amendment, 17 VILL. L. REV. 574, 581 (1972). It has been suggested that the latter two prongs are both “effects” tests; the former focuses on the effects of the legislation on religion, while the latter focuses upon the effects of the legislation on the relationship existing between church and state. Id. at 581. The relationship between the second and third phases of the test appear “to be such that where the degree of advancement of religion is slight and subordinate, a greater de-
down or uphold legislation in various arenas of conflict: tax exemption, aid to parochial schools or institutions, sabbatarian exemptions, religious tests for public office, conscientious objector status, and school prayer. The degree of entanglement would be justified.\(^{60}\) In \textit{Walz}, the Court was called upon to determine the constitutionality of exempting church properties from real estate taxation. \textit{Id.} at 666-67. The plaintiff had claimed that the exemption had both the purpose and effect of aiding religion, therein violating the establishment clause. \textit{Id.} The Court upheld the law on the ground that exemption rather than taxation of church properties more effectively served the purpose of avoiding excessive church-state entanglement. \textit{Id.} at 674-75.

\(^{60}\) \textit{Walz v. Tax Comm'n}, 397 U.S. 664 (1970). In \textit{Walz}, the Court was called upon to determine the constitutionality of exempting church properties from real estate taxation. \textit{Id.} at 666-67. The plaintiff had claimed that the exemption had both the purpose and effect of aiding religion, therein violating the establishment clause. \textit{Id.} The Court upheld the law on the ground that exemption rather than taxation of church properties more effectively served the purpose of avoiding excessive church-state entanglement. \textit{Id.} at 674-75.


To summarize the status of the law respecting church-related educational institutions, there is no constitutional barrier to the supply of health, nutritional, and similar therapeutic and remedial services. \textit{See, e.g., Everson}, 330 U.S. at 15-16. It is permissible to finance school transportation. \textit{See id.} at 16-17. Further, it is permissible to loan secular textbooks only at the elementary and secondary school levels. \textit{See, e.g., Board of Education v. Allen}, 392 U.S. 236 (1968); \textit{Everson}, 330 U.S. at 15-16. However, the scope of permissible governmental financing is broader at the college or university level. \textit{See e.g.}, Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (upholding non-categorical grants to church-affiliated colleges for non-sectarian purposes); Hunt v. McNair, 413 U.S. 734 (1973) (upholding issuance of public bonds to finance construction of non-sectarian facilities by church-affiliated colleges); Tilton v. Richardson, 403 U.S. 672 (1971) (upholding public construction grants to church-affiliated colleges for non-sectarian purposes).

\(^{62}\) See, \textit{e.g.}, Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Two Guys v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961). In the so-called “Sunday Closing Laws” cases, the Supreme Court found that laws proscribing certain business activities on Sundays were not necessarily based on religion and, hence, were not laws “respecting an establishment of religion.” \textit{See, e.g., McGowan}, 366 U.S. at 445. The Court reasoned that such laws had become an inherent part of an effort to improve the health, safety and general well-being of this country’s citizens, wholly apart from its original genesis in religion. \textit{Id.} The Court stated that to strike down such laws would be to give a “constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state.” \textit{Id.} The Court also held that such a law did not violate the free exercise clause of the first amendment. \textit{Id.} at 453. The Court two years later, however, did hold that it was a violation of the free exercise clause to deny employment compensation to a Seventh-Day Adventist who would not accept an available position that would require her to work on Saturdays. \textit{See Sherbert v. Verner}, 374 U.S. 398 (1963).

\(^{63}\) \textit{McDaniel v. Paty}, 435 U.S. 618 (1978). In \textit{McDaniel}, a defeated candidate in a state election for delegates to a convention to revise the Tennessee state constitution challenged a state provision barring clergy from holding public office. \textit{Id.} at 620-21. The losing candidate challenged the qualification of the victor because he was an ordained minister. \textit{Id.} The Supreme Court held that the Tennessee law violated both the free exercise and establishment clauses. \textit{See id.} at 636 (Brennan, J., concurring).

\(^{64}\) \textit{Welsh v. United States}, 398 U.S. 333, 356-57 (1970) (Harlan, J., concurring). In \textit{Welsh}, Justice Harlan described the issue in the case as whether a statute which defers to an individual’s views emanating from adherence to theistic religious beliefs is within the power of Congress. \textit{Id.} at 356 (Harlan, J., concurring). He stated
Piercing through the veil of confusion created by the Supreme Court's case-by-case analysis of establishment clause challenges, the Court has demonstrated greater willingness to review challenges brought under the establishment clause than it has toward challenges brought under other provisions of the Bill of Rights. The Court has, in the process of requiring the government to maintain a "benevolent neutrality" to protect these individual rights, set itself in a direction of much closer relations between church and state. That in order to pass muster, such a statute, having chosen to exempt, cannot draw the line between theistic and nontheistic religious beliefs on the one hand and secular beliefs on the other hand, for such distinctions are not compatible with the neutrality mandated by the establishment clause.

65. See, e.g., Engel v. Vitale, 370 U.S. 421 (1962). In Engel, the Supreme Court invalidated a New York law allowing state officials to compose a prayer and require that it be recited each school day notwithstanding the fact that the prayer was non-denominational and pupils who did not want to participate could be excused. 370 U.S. at 425-26. Stated Justice Black,

It is neither sacrilegious nor antireligious to say that each separate government . . . should stay out of the business of writing or sanctioning official prayers and leave purely religious function to the people themselves and to those the people choose to look to for religious guidance.

Id. at 435 (footnote omitted).

One year later, the Court struck down, as violative of the establishment clause, a Pennsylvania law permitting state officials to require a reading from the Bible or a recitation of the Lord's Prayer. Abington School Dist. v. Schempp, 374 U.S. at 226-27. The Court did not, however, talk in absolutes. Should study of the Bible or religion be presented objectively as part of a secular program of education, the Court reasoned that it would comport with the principles of the first amendment.

66. E. Corwin, supra note 12, at 267. For a discussion of the Court's own view that it has eschewed a straight and logical path in the area of separation, see note 44 supra.

One rationale for the inconsistency in the establishment clause decisions is the variation among the personal biases of the Justices. See Boles, Church and State and the Burger Court: Recent Developments Affecting Parochial Schools, 18 J. Church & State 21, 29 (1976). The traditional conservative line-up of Justices Powell, Blackmun, Burger, White and Rehnquist has broken down on church-state issues particularly with regard to governmental aid to religious-affiliated schools. Id. One author has suggested that Justices White, an Episcopalian, and Rehnquist, a Lutheran, reveal a clear pattern of support for such aid, with Chief Justice Burger, a Methodist, occasionally joining their position. Id. For a detailed discussion of the breakdown of the opinions of the Justices in the 1972-73 term of the Court, see Commission on Law, Social Action and Urban Affairs of the American Jewish Congress, The Civil Rights and Civil Liberties Decisions of the United States Supreme Court for the 1972-73 Term: A Summary and Analysis 97-98 (1973).

67. Boles, supra note 66, at 27. In the two decades preceding the appointment of the Nixon Court, the Warren Court averaged 71.7 percent of its decisions in favor of an asserted civil or constitutional right. Id. at 25. The Burger Court's swing away from the Warren Court's liberal position is indicated by a 50.8 percent figure. Id. The Burger Court has halted the broadening of the bounds of such constitutional guarantees of freedom and equality which characterized the Warren Court. Id. at 26. However, under the leadership of Chief Justice Burger, the Court has devoted a high proportion of its time to resolving civil liberties issues whether decided favorably towards the individual asserting the protection or not. Id. Although the Court could turn its back on those seeking protection of basic liberties through the simple expedient of refusing to accept appeals in cases of this kind, it has not done so. Id.
and state. 68

Against this background, the *Grendel's Den* Court 69 commenced its analysis by recognizing the power of a state to protect the environment around certain institutions through the exercise of reasonable zoning laws. 70 Further, the Court noted that judicial deference to the exercise of zoning powers in the area of liquor regulation is particularly appropriate in light of the states' extensive powers under the twenty-first amendment. 71 The majority cautioned, however, that the Massachusetts statute, because it delegated to religious entities the power to veto certain liquor license applications, was not due the judicial deference warranted by a legislative zoning judgment. 72 Where the exercise of a state's power to zone pursuant to the tenth or twenty-first amendments impinges upon the guarantees of the establishment clause, the Court reasoned that the former must give way to the latter. 73

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68. E. CORWIN, supra note 12, at 267. Corwin noted that this is particularly true where the state is acting to aid a religious institution. Id. Another author, however, has criticized the *Lemon* test's failure to keep abreast of the ever-increasing interplay between church and state. See *The Entanglement Test*, supra note 42, at 1238. These contrasting views are indicative of the impossible task of predicting a conclusion to a volatile problem involving "a seamless web of law, politics, religious and educational philosophy, and economics." Boles, supra note 66, at 38.


70. 103 S. Ct. at 509. The Court noted that it had previously upheld, as reasonable zoning ordinances, the regulation of the location of "adult theatres" and the prohibition of willful noise-making while disturbing to the good order of a school. Id. (citing Young v. American Mini-Theatres, Inc., 427 U.S. 50, 62-63 (1976); Grayned v. City of Rockford, 408 U.S. 104 (1972)). For a discussion of *American Mini-Theatres*, see note 39 supra.

The Court also recognized that states have long employed zoning laws to regulate the environment of churches and schools by insulating them from commercial establishments which serve liquor. Id. at 4026-27. See notes 20-23 and accompanying text supra.

71. 103 S. Ct. at 509 (citing California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 106-10 (1980); California v. LaRue, 409 U.S. 109). For a discussion of *LaRue*, see note 15 supra. The majority affirmed its prior rulings that courts should refrain from reviewing the merits of a governmental zoning decision, unless it is shown to be arbitrary or irrational. Id. (citing Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977); Village of Belle Terre v. Boraas, 416 U.S. 1, 7-9 (1974)).

72. Id. (citing Arno v. Alcoholic Beverages Control Comm'n, 377 Mass. 83, 89, 384 N.E.2d 1223, 1227 (1979)). The Court based its conclusion that the statute delegated veto power to private institutions on the most recent construction of the statute by the highest Massachusetts court. Id. at 509-10 & n.4 (citing *Arno*, 377 Mass. at 83, 384 N.E.2d at 1223). See also *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974) (implying that highest state court's interpretation of state statute is controlling upon other court's subsequent interpretation of that statute).

The majority noted that a state, as opposed to any private entity, is the repository of twenty-first amendment power. Id. at 509-10 (quoting *California v. LaRue*, 409 U.S. at 116). However, the Court declined to decide whether, or upon what conditions, the twenty-first amendment power may ever be delegated to non-governmental entities. Id. at 510.

73. *See* 103 S. Ct. at 510 n.5. For a discussion of the heightened level of judicial
The Court, referring to Thomas Jefferson's concept of a wall of separation, then explained that the establishment clause grew out of a belief that religion and government must be insulated from each other in order to coexist. Although a limited degree of entanglement is inevitable in a modern society, the Court viewed the vesting of a discretionary governmental power in a religious body as a substantial breach of that wall.

Next, the Court turned to an analysis of this "breach" under the Lemon test. It acknowledged that section 16C had a valid secular purpose, thus satisfying the first requirement under Lemon. However, the Court characterized the effect of the section as an advancement of religion because the standardless delegation of a veto power empowered churches to promote explicitly religious goals, a result proscribed by the second prong of the Lemon test. Moreover, the Court noted that "the mere appearance of a joint exercise of Legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred."
In considering the third phase of the Lemon inquiry, the majority reasoned that section 16C resulted in the very "fusion of governmental and religious functions" which was feared by the Framers when the establishment clause was adopted. The Court found that, by substituting the unguided and unilateral power of a church for the reasoned decision-making of a legislative body, "the statute enmeshed religious organizations in the processes of government." In holding that section 16C violated the establishment clause, the Court concluded that "few entanglements could be more offensive to the spirit of the Constitution."

Justice Rehnquist, in dissent, characterized the state statute as a "quite sensible Massachusetts liquor zoning law." He praised the state's refine-
ment of the absolute prohibition under the original statute, concluding that the power of a state to ban absolutely the sale of liquor within a reasonable distance of a church, a course of action "suggested" by the majority, necessarily encompassed the power to enact the less protective objection requirement of section 16C. Justice Rehnquist suggested that the majority had been too quick to characterize section 16C as a grant of "veto power" to churches. Further, even if such a delegation of legislative authority had been affected, Justice Rehnquist argued that it was inappropriate and unnecessary to invoke the Lemon analysis in order to find it invalid. Justice Rehnquist also disagreed with the result reached by the majority under the Lemon test, particularly with the conclusion that the statute "advanced" religion.

In reviewing the Supreme Court's decision in Grendel's Den, it is submitted that the court was trapped between the Scylla of validating a Massachusetts cent of St. Bartholemew's Night" provoked Justice Rehnquist to remark that great cases, hard cases, and, now, "silly cases . . . make bad law." Id. at 512-13 (Rehnquist, J., dissenting) (citations omitted).

85. Id. at 513 (Rehnquist, J., dissenting). Justice Rehnquist opined that the evolving treatment of the grant of liquor licenses as evidenced by section 16C was the sort of legislative refinement which should be encouraged rather than forbidden. Id. For a discussion of the historical evolution of section 16C, see note 3 supra.

86. See 103 S. Ct. at 510-11. Justice Rehnquist characterized this suggestion by the majority as a concession of the constitutional validity of flat prohibitions. Id. at 513 (Rehnquist, J., dissenting). The majority, however, stated only that such a law would be entitled to "substantial weight" on review. In a footnote detailing the state statutes imposing such a flat ban, the majority clearly expressed no "opinion as to the constitutionality of any statute other than that of Massachusetts." Id. at 511 & n.7.

87. Id. at 513 (Rehnquist, J., dissenting). The dissent argued that the flat ban championed by the majority was actually more protective of churches and morerestrictive of liquor sales than the Massachusetts statute. Id. Justice Rehnquist noted that the flexibility of section 16C resulted from the state's sensible conclusion that, if a church located within the 500-foot radius did not object, there would be no reason to deny the license. Id. He continued, "Nothing in the Court's opinion persuades me why the more rigid prohibition would be constitutional, but the more flexible not."

88. See id. Justice Rehnquist disagreed with the Court's incorporation of the term "veto" from the decision of the Massachusetts Supreme Judicial Court's decision in Arno, and its reliance thereon for its decision. Id. He criticized the majority for apparently concluding that section 16C "constitutes churches as third houses of the Massachusetts Legislature" without engaging in any independent analysis to determine the scope of the delegation. Id.

89. Id. Justice Rehnquist emphatically denied that a three-part analysis was necessary to determine that a statute which delegated actual legislative power to churches was a violation of the establishment clause. Id.

90. Id. at 513-14 (Rehnquist, J., dissenting). Justice Rehnquist argued that the concededly valid purpose of protecting a religious institution from an incompatible use could not be achieved through means which were "religiously neutral," and so it did not advance the inquiry to rely on this intention. See id. "Whether the ban is unconditional or may be invoked only at the behest of a particular church, it is not 'religiously neutral' so long as it enables a church to defeat the issuance of a liquor license when a similarly situated bank could not do the same." Id. at 514 (Rehnquist, J., dissenting).
setts statute which clearly violated the mandates of the establishment clause and the Charybdis of impinging upon a state's power to zone liquor establishments pursuant to the tenth and twenty-first amendments.91 The Court was, however, able to chart a narrow course between these two evils; in striking down section 16C, the Court ruled that the statute delegated the power to zone to religious institutions which excessively entangled the affairs of church and state.92 A deferential attitude towards a state's power under the tenth and twenty-first amendments should not necessitate a submission of first amendment guarantees. These amendments reserve power to the states, not to religious institutions to whom the state legislature has delegated these powers.93

Since there is a dirth of judicial precedent on the scope of the nexus among the first, tenth and twenty-first amendments,94 the court properly succumbed to the irresistible impulse to appeal to history.95 The American colonies which harbored established churches during both the colonial and Revolutionary War periods insisted on separating the secular tools of civil

91. See id. at 509-12. For a discussion of the Court's reasoning in concluding that section 16C violated the mandates of the establishment clause, see notes 77-87 and accompanying text supra. For a discussion of the states' broad powers under the tenth and twenty-first amendments, see notes 12-16 and accompanying text supra.

92. See 103 S. Ct. at 512. Since the holding of Grendel's Den is restricted to statutes identical to section 16C, the Court has not severely limited the scope of the state's power pursuant to the tenth and twenty-first amendments. See id. at 510-11 n.7. A state may impose an absolute ban on liquor outlets within a reasonable distance from churches or allow the church to be heard at a hearing before the appropriate licensing authority. See id. at 510. For a discussion of those states which impose a total ban on liquor outlets within a prescribed distance of a church, see note 20 supra. For a discussion of jurisdictions which direct the local licensing authority to consider the proximity of the proposed liquor outlet in deciding whether to grant a liquor permit, see note 21 supra. For a discussion of the Massachusetts Legislature's amendment of section 16C in response to the decision in Grendel's Den, see note 119 infra.


95. See 103 S. Ct. at 510 (quoting Reply from Thomas Jefferson to an address by a committee of the Danbury Baptist Association (January 1, 1802), reprinted in 8 WORKS OF THOMAS JEFFERSON 113 (Washington ed. 1861)). Authors have suggested that the Supreme Court's invocation of historical analysis from the perspective of the Framers is somewhat misplaced. J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 43, at 849. These authors state that since the religion clauses were ratified as part of the Bill of Rights, the intention of the ratifying states is of equal import in determining the meaning of the clauses. Id. at 850. Further, since the first amendment was only a limitation of the actions of the federal government, this fact could be read as an affirmance of state sovereignty over the subject. Id. Since in some states there were close church-state ties at the time of the Revolution, the first amendment insured that the federal government would not interfere with state preferences for particular religions. Id. It is submitted that while there may be no clear history as to the meaning of the establishment clause, it is plain that section 16C is abhorrent to the ideals of those who fled seventeenth and eighteenth-century England. See note 81 infra.
power from the spiritual authority of the church. More significantly, the colonists fled the despotic "fusion of governmental and religious functions" exemplified by legal arrangements which vested Anglican church officials with discretionary authority to withhold licenses to serve liquor. It is suggested that section 16C evinces a practice of enmeshing church and state functions akin to the liquor-licensing practices of England from which the Framers and their forebears fled over two hundred years ago.

Although the Massachusetts licensing scheme purported to go no further than to provide surroundings accommodating to the free exercise of religion, in practice, section 16C did not achieve its avowed secular purpose of protecting "spiritual, cultural, and educational centers" from the "hurry-burly associated with liquor outlets." Rather, the statute provided churches and religiously-affiliated schools with wide discrimination to pick and choose their neighbors, effectively allowing private religious discrimination sanctioned by law. Moreover, since a 500-foot radius of the Holy Cross Church encompasses all of the enormously valuable properties located


98. For a discussion of the legal arrangements which vested Anglican church officials with authority to withhold liquor licenses, see note 81 supra.

99. See 103 S. Ct. at 511. It is noted that Grendel's Den did, in fact, allege in its complaint against the Commonwealth of Massachusetts, that the Holy Cross Church required monetary "contributions" from potential licensees as a prerequisite to not exercising its power of objection. Amended Complaint of Grendel's Den, Inc. ¶ 12, cited in Brief for Appellee at 3 n.3, Grendel's Den, 103 S. Ct. at 505. See also note 5 supra. The district court agreed with Grendel's Den's position, stating that section 16C delegated political power that may have been wielded by a church to realize economic advantage. 495 F. Supp. at 767. This issue, however, became irrelevant when the parties limited the issue for resolution to whether section 16C was violative of the constitution on its face rather than as applied. See Grendel's Den, 662 F.2d at 103. For a discussion of the parties' stipulation narrowing the issues on appeal, see note 7 supra.

100. Grendel's Den, 662 F.2d at 96.

101. Although the Court stated that while it would assume for purposes of the facial attack that section 16C actually furthered its avowed purpose, it noted that the existence of 26 liquor outlets surrounding the Holy Cross Church casts some doubt on this assumption. 103 S. Ct. at 510 n.6. Appellant's brief indicated that some of these existing liquor outlets obtained licenses prior to the enactment of 16C. Reply Brief for Appellants at 8 n.4, Grendel's Den, 103 S. Ct. at 505. Although the previous statute absolutely prohibited licenses within the prescribed area, licensing within the prescribed radius may have been achieved either by transfer of a pre-existing license to a location nearer to the church from a more distant location, or because the Holy Cross Church was not in existence at that time. Id. Nevertheless, the existence of these liquor establishments while an absolute ban was in force suggests that the effectiveness of even an absolute prohibition is questionable. See id.

102. For a historical discussion of the abuses by churches of liquor-licensing practices, see notes 96-99 and accompanying text supra. As noted by Justice Rehnquist, however, the ability of the Court to discern the potential for abuse does not render section 16C violative of the establishment clause. 103 S. Ct. at 513-14 (Rehnquist, J., dissenting). Rather, if a church were to use its authority to advance the
within the social and cultural centre known as Harvard Square, the potential for political abuse through religious power to deny a liquor license was great.\footnote{103}

Despite the statute's inherent implication of the establishment clause, it is suggested that the Court's invocation of the \emph{Lemon v. Kurtzman} analysis was not necessary to justify its conclusion.\footnote{104} The central issue which faced the Court in its establishment clause analysis was whether section 16C delegated legislative functions to private religious bodies.\footnote{105} It is submitted that, by appropriating the "veto" language of the Massachusetts Supreme Judicial Court in \emph{Arno v. Alcoholic Beverages Control Commission},\footnote{106} without independent analysis of the reasoning behind that decision, the majority eschewed careful scrutiny of this preliminary delegation question.\footnote{107} In failing to discuss whether there was, in fact, a delegation of legislative authority to churches, the Court was able to summarily avoid review of the broader issue: under what conditions and to whom may the state delegate authority to proscribe certain undesired land uses?\footnote{108}

It is suggested that the Court could have invalidated section 16C on due process grounds, following the reasoning of \emph{Eubank}, \emph{Roberge} and \emph{Cusack}.\footnote{109} While it is acknowledged that section 16C dealt with a property use which interests of itself and its own members, the statute could be tested through a challenge to the statute as applied to the injured party's parcel of land. \emph{See id.}

It is submitted that by proscribing the definition of church as used in section 16C, the Massachusetts Legislature arguably differentiated between theistic and nontheistic religions. \emph{See} 103 S. Ct. at 509 n.3. \emph{For the text of the definition of "church" as used in section 16C, see note 3 supra. Although this position was taken by Grendel's Den, the Supreme Court, however, did not reach this issue. Id.}

103. \emph{For a discussion of the importance of the location of Grendel's Den in relation to neighboring establishments, see note 2 supra.}

104. \emph{See} 103 S. Ct. at 513 (Rehnquist, J., dissenting). \emph{For a discussion of Justice Rehnquist's belief that the \emph{Lemon} test is not applicable to situations where there is a clear breach of the wall of separation between church and state, see note 89 and accompanying text, supra.}

105. \emph{See} 103 S. Ct. at 509-10; \emph{id.} at 513 (Rehnquist, J., dissenting).

106. \emph{See id.} at 509 (citing \emph{Arno}, 377 Mass. 83, 89, 384 N.E.2d 1223, 1227 (1979)).

107. \emph{See id.} Although the Court noted that the Massachusetts Supreme Judicial Court's interpretation as to the meaning of section 16C would be controlling, it in fact disregarded the content of the \emph{Arno} decision. \emph{See id.} at 513 (Rehnquist, J., dissenting). Adopting the word "veto" from the \emph{Arno} opinion, the majority did not address the fact that while the Massachusetts Court had referred to section 16C's delegation as a "veto power," it nonetheless concluded that the statute was not an unconstitutional delegation, but rather, a provision for waiver of a statutory restriction. \emph{See id.; Arno,} 377 Mass. at 88-89, 384 N.E.2d at 1227.

108. \emph{See} 103 S. Ct. at 510 n.7. Although both petitioners and respondents raised the issue of the nexus between section 16C and a lack of procedural due process on appeal, the Supreme Court decided \emph{Grendel's Den} on the establishment clause issue. \emph{See note 106 infra. In so doing, the Court gave no indication as to the constitutionality of statutes containing "waiver" or "consent" provisions. See id. For a discussion of "waiver" and "consent" provisions in zoning law, see note 22 and accompanying text supra.}

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had a tendency to injure public health or morals under the mandate of Roberge,\textsuperscript{110} the statute was nonetheless unconstitutional under Eubank since it allowed private property owners to impose restrictions upon the use of neighboring property rather than merely permitting a waiver of the protection or modification of a lawful and reasonable legislative restriction or prohibition.\textsuperscript{111}

In conclusion, the Court has opened the door to heightened judicial review of state liquor and land use regulations, and its reasoning clearly indicates that such state regulation is particularly subject to scrutiny where it is deemed to implicate a first amendment guarantee.\textsuperscript{112} Significantly, despite the Court's having facilitated the means for greater potential government relative authority to private bodies as exhibited in Eubank, Roberge, and Cusack, see notes 27-36 and accompanying text \textsuperscript{supra}.

It is submitted that the issue of the validity of section 16C on due process grounds was properly before the Supreme Court for review. See note 5 \textsuperscript{supra}. It is a matter of policy, however, that the court will decide the case before it on the most narrow constitutional ground. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936). Which of the two challenges to the constitutional validity of section 16C, either due process or establishment clause, presented the more narrow ground for deciding \textit{Grendel's Den} is debatable. Justice Rehnquist on the one hand would have apparently found the due process issue to be a more narrow ground for the court's decision. \textit{Grendel's Den}, 103 S. Ct. at 514 (Rehnquist, J., dissenting). His belief was based upon the fact that the majority had intertwined the entanglement prong of the \textit{Lemon} test with the issue of unlawful delegation of legislative power, a question more properly answered in terms of due process criteria. See \textit{id}. It is asserted on the other hand that the \textit{Grendel's Den} majority, although couching its entanglement analysis in terms of unlawful delegation, may have decided the case on the more narrow establishment clause ground. Even though the Eubank, Roberge, and Cusack holdings may appear easy to apply, these cases have never been analyzed in the context of a delegation of legislative authority to a church. See \textit{id} at 512. This factor may have provoked the majority to refrain from any analysis of the due process issue, particularly where the Court believed that there was a clear violation of establishment clause principles. See notes 98-99 and accompanying text \textit{supra}.

\textsuperscript{110} For a discussion of the limitation imposed by the \textit{Roberge} Court on the decision in Cusack and Eubank, see notes 34-36 \textit{supra}.


\textsuperscript{112} See 103 S. Ct. at 510. For a discussion of the higher level of judicial review mandated when a liquor or land use regulation infringes upon a first amendment guarantee, see notes 37-39 and accompanying text \textit{supra}.

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support for religious institutions, the Burger Court, in Grendel's Den, has drawn the line where the entanglement between church and states becomes excessive. In invoking the historical theory of excessive entanglement, the Court has demonstrated the continuing vitality of this inquiry in assessing the more traditional religious-civil relationships. The decision has, however, confirmed scholars' predictions that these traditionally-accepted areas of church-state cooperation would be exposed to judicial reassessment on the ground that such relationships would pose the threat of religiously-based strife. Nonetheless, the lack of clarity and the unpredictability of the law in this area makes any assessment of the place Grendel's Den will hold in future establishment clause analysis difficult to ascertain.

113. See E. Corwin, supra note 12, at 128. For a discussion of the Court's approval of a statute providing for state reimbursement of parents for expenses incurred in transporting their children to school, see notes 53-56 and accompanying text supra. For a discussion of the Court's approval of a statute permitting a state to loan secular textbooks to all school children within the state, see note 56 supra. Professor Corwin's prediction that the Burger Court would continue to chart a course of closer relations between church and state in the area of state aid to religious institutions has borne true. See Mueller v. Allen, 103 S. Ct. 3062 (1983). In Mueller, the court validated a Minnesota statute which allowed state taxpayers, in computing their state income tax, to deduct expenses incurred in providing "tuition, textbooks and transportation" for their children attending either elementary or secondary school. Id. at 3071. The statute did not provide direct aid to religiously-affiliated institutions, but rather, it provided indirect aid to such institutions by allowing tax deductions for parents whose children attended these schools. Id. at 3064. Hence, the Court reasoned that the "historic purposes" of the establishment clause do not extend to such indirect or "attenuated financial benefit." Id. at 3069.

114. See 103 S. Ct. at 512. For a discussion of the Court's analysis of the entanglement problems encountered by section 16C, see notes 81-83 supra.

Although the Court focused on the entanglement inquiry under the Lemon test in order to facilitate its treatment of the problems engendered by section 16C's delegation of legislative authority to religious institutions, the Court also found that the statute had the "primary effect of advancing religions." See note 78 and accompanying text supra. It is submitted, however, that the Court's conclusion that a total prohibition on the sale of alcohol within a specified distance of a church would have avoided the problems created by section 16C's unlawful delegation of legislative power serves to weaken its advancement theory. See 103 S. Ct. at 510-11; id. at 513 (Rehnquist, J., dissenting). See also California v. LaRue, 409 U.S. at 120 (Stewart, J., concurring) (where a state has legislatively mandated that no liquor license shall be granted within a specified distance of a church or school, no delegation issue would arise). It is logically inconsistent to suggest, on the one hand, an absolute ban on liquor distribution near a church does not have the effect of advancing religion, while holding, on the other hand, that a prohibition which applies only if the affected institution objects does have such an effect. See 103 S. Ct. at 513-14 (Rehnquist, J., dissenting). Although some distinction may be drawn between these two types of statutes on the issue of delegation, the legislature has in both instances mandated partiality in favor of the designated institution; indeed, its very purpose is protective. See id.

115. See 103 S. Ct. at 512. See also The Entanglement Test, supra note 42, at 1238-39.

116. See The Entanglement Test, supra note 42, at 1239. For a discussion of the Court's belief that section 16C had the potential to cause strife between religious and civil components of society, see notes 78 & 80 and accompanying text supra.

117. For a discussion of the Court's own recognition that they have sacrificed
Finally, from a more pragmatic standpoint, the Court has failed to define the constitutional parameters of permissible delegation of legislative authority in zoning matters.\textsuperscript{118} The Court did, however, establish some concrete signposts within which states may permissibly protect favored institutions through land-use regulation.\textsuperscript{119}

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\textsuperscript{118} See 103 S. Ct. at 510. For a discussion of the consequences of the Court's failure to discuss the constitutionality of the delegation of legislative authority in zoning consent provisions, see notes 109-111 \textit{supra.}

Justice Rehnquist suggested that to invalidate section 16C on establishment clause grounds would stifle the creativity exhibited by the Massachusetts Legislature in the area of land-use planning. \textit{See} 103 S. Ct. at 513 (Rehnquist, J., dissenting). This reasoning exhibits Justice Rehnquist's view that the Court has too often indulged in the "federalization" of areas of law traditionally entrusted to state care. \textit{See}, \textit{e.g.}, Santosky v. Kramer, 455 U.S. 745, 792 (1982) (Rehnquist, J., dissenting). Such a view goes on to postulate that such a trend "will only thwart state searches for better solutions in [areas] where [the] Court should encourage state experimentation." \textit{Id.} at 773 (Rehnquist, J., dissenting). It is suggested, however, that Massachusetts' experimentation in the case of section 16C is not so much attributable to creativity as it is to a desire to tailor the statute to the needs of religious institutions. \textit{See} note 101 \textit{supra}. This attempt to favor religious institutions is a violation of the establishment clause. \textit{See} notes 98-99 and accompanying text \textit{supra}. Even Justice Rehnquist would concede that a state's creativity in the area of legislation must give way when such legislation abridges a constitutional provision. \textit{See} Santosky, 455 U.S. at 773. (Rehnquist, J., dissenting).

\textsuperscript{119} See 103 S. Ct. at 510. For a discussion of viable alternatives such as absolute prohibition and legislative hearing, see note 77 \textit{supra.}

The author notes that on July 12, 1983, the Massachusetts Legislature, through emergency law, amended section 16C to conform to the mandates of the \textit{Grendel's Den} Court. \textit{See} 1983 Mass. Acts 266. The newly amended version of section 16C provides as follows:

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 school or church shall not be licensed for the sale of alcoholic beverages unless the local licensing authority determines in writing and after a hearing that the premises are not detrimental to the educational and spiritual activities of said school or church; \textit{Id.}

The amended section 16C substitutes the words "local licensing authority" for the word "church." \textit{See} note 3 \textit{supra}. Thus, by providing for a legislative decision on the detrimental effects of a liquor outlet on a neighboring church or school following a legislative hearing where such institution's views may be heard, the Massachusetts Legislature has resolved the constitutional conflict inherent in the 1970 version of section 16C.