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Liquor and Lemon: The Establishment Clause and State Regulation of Alcohol Sales

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NOTES

Liquor and *Lemon*: The Establishment Clause and State Regulation of Alcohol Sales

I. INTRODUCTION

> County regulations require that you visit your preacher before you visit your bartender. No alcohol purchases before noon on Sundays.[1]

Approximately half of the fifty states[2] and numerous municipalities[3] maintain and enforce legislation that prohibits the sale of

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1. Sign at a concession stand in the Nashville International Airport. See Code of Metropolitan Government of Nashville and Davidson County, Tennessee § 7.08.170(C) (1995) (making the sale of beer between 3:00 a.m. and noon on Sunday illegal).

2. See, for example, Alaska Stat. § 04.11.410 (Micbie, 1995) (barring issuance of liquor licenses to establishments located within 200 feet of a church building in Alaska); Ark. Code Ann. § 3-4-206 (Michie, 1995) (prohibiting liquor sales within 200 yards of a school or church in Arkansas); Ga. Code Ann. § 3-3-21(A) (Michie, 1995) (barring the sale of distilled spirits within 100 yards of a church building and within 200 yards of a school in Georgia); 235 Ill. Comp. Stat. 5/6-11 (West, 1996) (prohibiting the issuance of licenses for the sale of alcoholic liquor for premises locatod within 100 feet of a church or school in Illinois); Ky. Rev. Stat. Ann. § 243.220 (Banks-Baldwin, 1995) (barring the issuance of liquor licenses for establishments located within 200 feet of any building used as a church in Kentucky); Me. Rev. Stat. Ann. tit. 28-A, § 351 (West, 1995) (prohibiting the location of liquor steres within 300 feet of schools or churches in Maine); Md. Ann. Code art. 2B, § 9-204.3 (1995) (barring the issuance of new liquor licenses for premises located within 300 feet of a church or school in Baltimore, Maryland); Mich. Stat. Ann. § 18.988(1) (Law. Co-op., 1994) (mandating the denial of a liquor license application in the event the contomplated location is within 500 feet of a church or school building in Michigan); Miss. Code Ann. § 67-1-51(h)(3) (1995) (prohibiting the issuance of liquor licenses to establishments locatod within 400 feet of any church, school, kindergarten, or funeral home in Mississippi, except in commercial areas, where the minimum distance drops to 100 feet); Mont. Code Ann. § 16-3-306 (1995) (barring the issuance of retail liquor licenses for premises located within 600 feet of buildings used exclusively as churches or schools in Montana); Neb. Rev. Stat. § 53-177 (1995) (prohibiting liquor license issuance to establishments located within 150 feet of churches, schools, hospitals, and other institutions in Nebraska); N.J. Stat. Ann. § 33:1-76 (West, 1994) (barring the issuance of licenses for the sale of alcohol within 200 feet of any church or public school in New Jersey); N.M. Stat. Ann. § 60-6B-10 (Michie, 1995) (proscribing the grant of licenses for the sale of alcoholic beverages within 300 feet of any church or school in New Mexico); N.Y. Alco. Bev. Cont. Law § 105 (1995) (prohibiting the issuance of a license to sell alcohol for off-premises consumption for a facility on the same street as, and within 200 feet of, a building occupied exclusively as a school, church, synagogue, or other place of worship in New York); 37 Okla. Stat. Ann. § 163.23 (West, 1995) (making it unlawful for any place licensed to sell low-point beer for on-premises consumption to be located within 300 feet of a public school or church property in Oklahoma); R.I. Gen. Laws § 3-7-19 (1994) (barring the issuance of liquor licenses to establishments situated within 200 feet of any school or place of public worship in Rhode Island); S.C. Code Ann. § 61-3-440 (Law. Co-op., 1993) (barring the issuance of new liquor licenses to establishments located within 300 feet of a church, school, or playground located within a municipality, or 500 feet of such an institution situated outside a municipality in South Carolina); Utah Code Ann. § 32A-3-101(3)(b) (1995) (requiring tbat no package store be located within 200 feet of a church in Utah).

3. Tennessee, Oregon, and several other states make the restriction of liquor sales a matter of local option. See, for example, Tenn. Code Ann. §§ 57-5-105, 57-5-106 (1995); Or. Rev.

alcohol close to churches. A number of other states allow their liquor-licensing authorities to consider proposed vendors' proximity to churches.[4] Likewise, states and municipalities in all regions of the country have laws that restrict the sale of alcohol on Sunday.[5]

Notwithstanding the secular justifications offered by the proponents of such legislation, analysis reveals that it is religiously motivated. Although the Bible contains no clear mandate against the sale, purchase, or consumption of alcohol,[6] history illustrates that prohibitions on the sale of alcohol on Sunday evolved from British and colonial laws that codified the Fourth Commandment's requirement

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Stat. § 471.506 (1994). Many municipalities in these states have passed ordinances prohibiting the sale of alcoholic beverages in the vicinity of churches. See, for example, Code of the Metropolitan Government of Nashville and Davidson County, Tennessee § 7.08.090(A)(1) (1995) ("No beer permit shall be issued to an applicant whose location is less than one hundred feet from a church . . . .") and § 7.16.110(A) (1992) (prohibiting the sale of intoxicating liquors other than beer "within one hundred yards of any church").

4. See, for example, Cal. Bus. & Prof. Code § 23789(a) (West, 1995) (authorizing the California licensing body to refuse to issue licenses for establishments locatsd in the vicinity of churcbes and hospitals); Conn. Gen. Stat. § 30-36 (1994) (giving Connecticut licensing authorities the discretion to refuse to issue licenses if the location of the premises will detrimentally affect on church or school); 4 Del. Code Ann. § 543(c) (1995) (giving the Delaware licensing commission discretion to refuse to grant liquor licenses to any establishment located near a school or church); Ind. Code Ann. § 7.1-3-21-10 (West 1995) (requiring applicants in Indiana to disclose the proximity of their institutions to schools or churches and making this a factor for the board to consider); Ohio Rev. Code Ann. § 4303.292(B)(1) (Baldwin 1994) (granting the Ohio licensing authority discretion to refuse to issue licenses to premises whose operation will adversely affect normal activities at a school or a church); Wash. Rev. Code § 66.24.010 (1995) (requiring the Washington licensing board to consider the proximity of an applicant's business to churches, schools, and other public institutions); W. Va. Code § 11-16-18 (1995) (authorizing the West Virginia licensing commissioner to refuse to issue licenses for premises within 300 feet of any school or church).

5. See, for example, Ala. Code § 28-3A-25(a)(1) (1995) (making it unlawful to sell, trade, or barter in alcoholic beverages between 9:00 p.m. Saturday and 2:00 a.m. the following Monday); Ariz. Rev. Stat. Ann. § 4-244 (West, 1995) (making the sale of liquor between 1:00 a.m. and 10:00 a.m. Sunday unlawful); Ark. Code Ann. § 3-3-210 (1995) (making it a misdemeanor to sell alcoholic beverages on Sunday); Conn. Gen. Stat. § 30-91 (1994) (making the sale, consumption, or dispensing of alcoholic beverages on Sunday between 2:00 a.m. and 11:00 a.m. a misdemeanor); Ordinances of Metropolitan Nashville-Davidson County, Tenn. § 7.08.170(C) (1995) (making the sale of beer between 3:00 a.m. and noon on Sunday unlawful).

6. In general, the Bible condemns drunkenness but does not forbid drinking alcohol. See Ephesians 5:18 ("And do not get drunk with wine, for that is debauchery; but be filled with the Spirit."); I Timothy 3:2-3 ("A bishop then must be abeve reproach, . . . no drunkard . . . ."). Indeed, Jesus's first miracle was turning water into wine to provide approximately 120 gallons of wine for a wedding reception. See John 2:1-11. See also I Timothy 5:23 (urging Timothy not te "drink only water, but use a little wine for the sake of your stomach and your frequent ailments"). Scripture does, however, urge caution. See, for example, Proverbs 20:1 ("Wine is a mocker, strong drink a brawler; and whoever is led astray by it is not wise."); Remans 13:13 ("Let us conduct ourselves becomingly as in the day, not in revelling and drunkenness . . . ."); Proverbs 23:31-33 (warning that wine "goes down smoothly" but "bites like a serpent").

that the Sabbath be respected.[7] Both these laws and those that ban the sale of alcohol near churches are rooted in a perceived incompatibility between religious worship and alcohol.[8] Indeed, such enactments are intended to protect or insulate religion from the disruption and moral corruption associated with alcohol. Moreover, as the sign quoted above demonstrates, these enactments objectively appear to be religiously motivated. For these reasons, such laws implicate the Establishment Clause.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion . . . ."[9] Together with the Free Exercise Clause, this provision restricts the government from interfering with religious liberty.[10] The vague language of this seemingly simple pronouncement[11] obfuscates its meaning and scope.[12] At the very least, the Establishment Clause prohibits the

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7. For example, the predecessor to one of the Maryland statutes challenged in *McGowan v. Maryland*, 366 U.S. 420, 470-75 (1961), made it criminal to "profane the Sabbath or Lord's day called Sunday by . . . drunkenness . . . ." Id. at 445 (quoting An Act Concerning Religion, 1 Archives of Maryland 244-47 (1649)). Indeed, the series of statutes at issue in *McGowan*—including a number of provisions restricting the sale of alcoholic beverages on Sunday—was entitled "Sabbath breaking," even at the time the case was decided. *McGowan*, 366 U.S. at 445, 453-60 (Appendix of the Opinion of the Court). In his dissent, Justice Douglas described Sunday Blue Laws as "enunciation[s] of the Fourth Commandment." Id. at 470-75 (Douglas, J., dissenting).

8. The publications of one religious group are illustrative. See, for example, Christian Life Commission, *Issues & Answers: Alcohol* 5 (Baptist General Convention of Texas, no date) ("From the first temperance movements in this country over a hundred years ago until the present time, churches have been in the forefront of the efforts to control the sale of alcoholic beverages."); Christian Life Commission, *The Bible Speaks on Alcohol* ("[B]oth general Bible principles and specific Bible teachings help Christians today to abstain from the dangerous drug [alcohol].").

9. U.S. Const., Amend. I.

10. By its own language, the First Amendment restricts only the federal government. However, by incorporating the First Amendment into the Due Process Clause of the Fourteenth Amendment, the Supreme Court has applied the First Amendment to state governments as well. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

11. *Espresso, Inc. v. District of Columbia*, 884 F. Supp. 7, 9 (D.D.C. 1995).

12. See Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 Vand. L. Rev. 1335, 1335-36 (1995) (noting that although the Supreme Court has consistently articulated the same test in establishment clause cases over the years, it has failed to articulate a meaningful distinction between those governmental actions that violate the clause and those that do not).

adoption of an official state religion.[13] Read more liberally, it bars any aid to or endorsement of religion by the government.[14]

The Supreme Court has consistently interpreted the Establishment Clause to prohibit the legislative majority from imposing religious beliefs on or requiring religious practices of citizens.[15] The Court has long tolerated, however, numerous religious pronouncements by the government, characterized by one scholar as "de minimis" and historical exceptions to the prohibition.[16] Examples of these exceptions are the motto "In God We Trust" that appears on our currency, the "one nation under God" language in the Pledge of Allegiance, and invocations by ministers or rabbis at the openings of sessions of Congress and various state legislatures.[17] Although these practices undeniably constitute governmental endorsements of the beliefs of theists over those of atheists, the Court apparently views them as harmless and has upheld them in the face of attack.[18]

Even if we accept such religious pronouncements as harmless, *pro forma* "establishments" of religion, laws that prohibit activities because of their incompatibility with majority religious values cannot be so characterized. Legislative enactments that restrict the sale of alcohol on Sunday or in the vicinity of churches go far beyond mere verbalistic ritual. These laws target behavior precisely because it is

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13. At least two Supreme Court justices interpret the Establishment Clause te go no further. See *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) (asserting that the Establishment Clause merely prohibits the adoption of an official state religion); *Edwards v. Aguillard*, 482 U.S. 578, 610 (1987) (Scalia, J., dissenting) (same).

14. The Supreme Court has asserted that the First Amendment mandates governmental neutrality toward religion:

> 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.

Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968).

15. See *School District of Abington Township v. Schempp*, 374 U.S. 203, 220 (1963) ("We repeat again that neither a State nor the Federal Government can constitutionally force a person to profess a belief or disbelief in any religion.") (quoting *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961)). See also McCoy, 48 Vand. L. Rev. at 1337 (cited in note 12).

16. McCoy, 48 Vand. L. Rev. at 1338-39 (cited in note 12).

17. See *Lynch v. Donnelly*, 465 U.S. 668, 716-17 (1984) (Brennan, J., dissenting) (suggesting that such exceptions are examples of "ceremonial deism" which have lost through rote repetition any significant religious content) (citation omitted). See also McCoy, 48 Vand. L. Rev. at 1338 (citod in note 12).

18. McCoy, 48 Vand. L. Rev. at 1338-39 (cited in note 12). See, for example, *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding a state legislature's practice of opening sessions with a prayer).

believed to be inimical to religious worship. For this reason, such laws raise core establishment clause concerns.

This Note analyzes such enactments under the Establishment Clause. Part II briefly examines the Supreme Court's methodology for deciding establishment clause cases. Part III traces the judicial treatment of state and local regulatory schemes thought to raise first amendment concerns. Parts IV and V demonstrate that legislative enactments banning the sale of alcohol on Sunday or near churches represent efforts by the legislative majority to prevent citizens from engaging in activity considered to be incompatible with the practices and beliefs of the dominant denominations. Such laws should be struck down as per se infringements of the Establishment Clause. Finally, Parts IV and V also establish that even if such enactments are not per se invalid, they impermissibly endorse religion and cause political divisiveness along religious lines.

II. EVALUATION OF LEGISLATION UNDER THE ESTABLISHMENT CLAUSE: THE *LEMON* TEST

Courts almost always consider establishment clause challenges to legislative enactments using the test articulated by the Supreme Court in *Lemon v. Kurtzman*.[19] In order to survive scrutiny under the *Lemon* test, an enactment must: (1) reflect a clear secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive governmental entanglement with religion.[20] Unless a legislative enactment[21] meets all three of these criteria, it is invalid under the Establishment Clause.[22]

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19. 403 U.S. 602 (1971). *Lemon* invalidated two state statutes. The Rhode Island Salary Supplement Act provided for a salary supplement te be paid to teachers in nonpublic schools, including parochial schools, at which the average per-pupil expenditure on secular education was below the average in state public schools. Id. at 607-08. Pennsylvania's Nonpublic Elementary and Secondary Education Act authorized the state to reimburse private schools, including parochial schools, for textbooks, instructional materials, and teachers' salaries. Id. at 609-10.

20. Id. at 612-13. This three-part methodology represents an amalgamation of the various tests used by the Court in the years preceding the decision. Id.

21. The *Lemon* Court articulated and applied its methodology in evaluating the validity of the statutes. The Court has since employed the test in evaluating not only legislative enactments but also other forms of governmental action alleged to violate the Establishment Clause. For example, in *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573 (1989) and *Lynch*, 465 U.S. at 668, the Court employed tbe *Lemon* methodology in deciding whether local governments' Christmas displays were unconstitutional.

22. *Stone v. Graham*, 449 U.S. 39, 40-41 (1980).

In application, the *Lemon* methodology merely provides the basic framework within which courts decide whether a governmental action constitutes an invalid establishment of religion.[23] It offers little guidance to courts about how to approach each of the three relevant inquiries.[24] Commentators have criticized the *Lemon* methodology for forcing courts to make ad hoc value judgments.[25] Several Supreme Court justices have attacked the *Lemon* methodology for its incoherence, and some have even called for its repudiation.[26] Moreover, the contradictory results the test has produced during its twenty-five year history evidence its shortcomings as a guideline for objective decisionmaking.[27] Nevertheless, the *Lemon* test has survived as the framework for evaluating legislative enactments under the Establishment Clause.[28]

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23. See *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (stating that the *Lemon* test "provides 'no more than [a] helpful [signpost]' in dealing with Establishment Clause challenges") (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)). See also Scott Titshaw, Note, *Sharpening the Prongs of the Establishment Clause: Applying Stricter Scrutiny to Majority Religions*, 23 Ga. L. Rev. 1085, 1098 (1989) (describing *Lemon* as "providing a skeleton on which future courts could build").

24. McCoy, 48 Vand. L. Rev. at 1352 (cited in note 12).

25. See, for example, Titshaw, 23 Ga. L. Rev. at 1099 (cited in note 23) (noting the Court's propensity to use the *Lemon* test as a justification for ad hoc decisionmaking). See also McCoy, 48 Vand. L. Rev. at 1354-55 (cited in note 12) (asserting that use of the *Lemon* test has resulted in ad hoc decisionmaking).

26. See *Wallace*, 472 U.S. at 110-11 (Rehnquist, C.J., dissenting) (calling for the repudiation of the *Lemon* approach because of confusion in its application); *Committee for Public Education v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (advocating the abandonment of the "blurred, indistinct, and invariable" barrier between church and state created by *Lemon*, and for a return to Jefferson's "high and impregnable" wall); *Edwards*, 482 U.S. at 636 (Scalia, J., dissenting) (calling for the abandonment of the *Lemon* "maze"); *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141, 2149-50, 124 L. Ed. 2d 352, 365 (1993) (Scalia, J., concurring) (describing the *Lemon* methodology as a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried"); id. at 2149 (Kennedy, J., concurring) (criticizing the Court's citation of *Lemon* as "unsettling and unnecessary").

27. For example, compare *Board of Education v. Allen*, 392 U.S. 236 (1968) (holding that the government may lend books to students in church-sponsored schools) with *Wolman v. Walter*, 433 U.S. 229 (1977) (holding that the government may not lend magazines, maps, and other materials te students in church-sponsored schools). Also compare *Mueller*, 463 U.S. at 383 (upholding a scheme allowing tax deductions and tuition reimbursement for the parents of parochial school students) with *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) (invalidating a similar scheme).

28. In only a bandful of establishment clause cases since *Lemon* has the Court failed to rely explicitly on the *Lemon* methodology. In *Marsh*, 463 U.S. at 792, for example, the Court relied upon historical patterns to uphold the Nebraska legislature's practice of opening its legislative sessions with a prayer. In *Larson v. Valente*, 456 U.S. 228, 252 (1982), the Court stated that the *Lemon* methodology is intended to apply to laws affording a uniform benefit te all religions and not to enactments that discriminate among religions. The *Larson* Court reasoned, however, that the concerns embodied in the *Lemon* methodology warranted the application of strict scrutiny to the Minnesota law at issue. Id.

A. *The Purpose Prong: Governmental Action Must Have a Valid Secular Purpose*

The first component of the *Lemon* test[29] poses the threshold question of whether a governmental action deliberately aids or endorses religion.[30] If so, the action is per se unconstitutional.[31]

Lemon does not tell courts how to determine whether a legislative enactment is intended to aid or promote religion. The statutes at issue in *Lemon* contained clear statements of secular purpose.[32] The Court accepted these declarations because of the lack of any indication that the legislature's actual intent differed from its stated intent.[33] By inquiring about actual intent, however, the *Lemon* Court implied that analysis under the first prong of the test requires more than mere examination of the statute for a statement of secular purpose.[34] Thus, the existence of such a declaration does not resolve the question of whether a statute passes muster under the first prong.[35]

Similarly, the *Lemon* test does not tell courts how to evaluate enactments that are silent as to purpose. As a result, courts have adopted a variety of approaches in analyzing such laws. In one

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In a more recent case, *Board of Education of Kiryas Joel v. Grumet*, 114 S. Ct. 2481, 2487-90, 2491-94, 129 L. Ed. 2d 546 (1994) (plurality opinion), Justice Souter did not directly rely upon the *Lemon* test te invalidate a New York law that created an autenomous public school district for a religious community. He employed the language of the test, however, and referred to the case through two "see also" citations. Id. at 2488. See also Derrick R. Freijomil, Comment, *Has the Court Soured on Lemon?: A Look into the Future of Establishment Clause Jurisprudence*, 5 Seton Hall Const. L. J. 141, 193 n.200 (1994) (analyzing *Grumet*). In a concurring opinion, Justice Blackmun stressed that the Court's decision did not "signal[ ] a departure" from *Lemon*'s principles. *Grumet*, 114 S. Ct. at 2494 (Blackmun, J., concurring).

29. The first prong of the *Lemon* test is often referred to as the "purpose prong."

30. See *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring) (stating that the proper inquiry under the first prong of *Lemon* is whether the government intends its action to convey a message of endorsement of religion); McCoy, 48 Vand. L. Rev. at 1352 (cited in note 12).

31. McCoy, 48 Vand. L. Rev. at 1352 (cited in note 12). See also *McGowan v. Maryland*, 366 U.S. 420, 575 (1961) (Douglas, J., dissenting) ("There is in this realm no room for halancing.") (cited in note 12). The examples of "ceremonial deisın" discussed above constitute exceptions te this rule. See notes 16-18 and accompanying text.

32. *Lemon*, 403 U.S. at 613.

33. Id. The Court did not explain how much deference to the legislature was "appropriate" in the face of a statement of secular purpose.

34. See *Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring) (stating that the requirement is not satisfied by the mere existence of a secular purpose). But see id. at 681 & n.6 (Burger, C.J.) (asserting that the "narrow question" under the first prong is simply "whether there is a secular purpose" and stating that the statute's purpose need not be "exclusively secular").

35. In *Stone*, 449 U.S. at 41-42, the Court invalidated a state statute mandating the posting of a copy of the Ten Commandments on the walls of all public school classrooms. The Court found that the statute had an impermissible religious motive, rejecting a legislative statement of secular purpose. Id. See also Cynthia A. Krebs, Recent Development, *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), 59 Wash. L. Rev. 87, 91 n.30 (1983) (analyzing *Stone*).

instance, the Supreme Court assumed that a statute silent as to intent embraced a valid secular purpose, performing all analysis under the second and third prongs of the test.[36] Other courts have inferred secular motivation from the statutory text and from surrounding circumstances.[37] Still others have drawn the opposite inference, finding an impermissible religious motive in the absence of an explicit statement of purpose.[38]

B. The Effect Prong: Governmental Action Must Not Have the Primary Effect of Advancing Religion

Once a court concludes that a legislative enactment is not intended to aid religion, it must determine whether the enactment nonetheless raises establishment clause concerns. The second prong[39] of the *Lemon* test requires a court to ask whether the governmental action results in too much inadvertent aid to or endorsement of religion.[40] If the action has this effect, regardless of the legislature's purpose, it is invalid under the Establishment Clause.[41] Like the first portion of the test, however, the "effect prong" offers courts insufficient guidance: how much inadvertent aid or endorsement renders governmental action invalid?[42]

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36. See *Larkin v. Grendel's Den Inc.*, 459 U.S. 116, 123-24 & n.6 (1982), in which the Supreme Court assumed that a state law silent on legislative motive served a valid secular purpose but noted the existence of less restrictive means of serving that purpose. It is unclear from the case whether, for that reason, the statute would have failed under the first prong of the *Lemon* test. *Espresso*, 884 F. Supp. at 10 n.7 (citing *Grendel's Den*, 459 U.S. at 123-24 & n.6). The Court evaluated the law "[i]ndependent[ly] of the first of [the *Lemon*] criteria," *Grendel's Den*, 459 U.S. at 123, and explicitly held that the statute violated the second and third prongs of the test. Id. at 126. A court could not adopt this approach in finding an enactment valid under the Establishment Clause because, in order to survive, such an enactment must satisfy all three components of the *Lemon* methodology. It was only because the legislation in *Grendel's Den* failed the other prongs that the Court did not need to examine it under the first prong.

37. See, for example, *Silver Rose Entertainment, Inc. v. Clay County*, 646 So.2d 246, 252 (Fla. Ct. App. 1994) ("Because the challenged ordinance has no explicit statement of purpose, we are left to infer its purposes . . . and we are unwilling to presume any unconstitutional motive.").

38. See, for example, *Griswold Inn, Inc. v. State*, 441 A.2d 16 (Conn. 1981) (stating that a statute's lack of an explicit statement of purpose revealed that the legislative motive in passing it could not have been secular).

39. The second portion of the *Lemon* test is often called the "effect prong."

40. McCoy, 48 Vand. L. Rev. at 1352 (cited in note 12).

41. Id.

42. See id. at 1353 (discussing the ambiguities of the second prong of the *Lemon* test). The *Lemon* Court did not apply the second prong of its test to the statutes in question. *Lemon*, 403 U.S. at 613-14. Its holding that the enactments were unconstitutional was based solely on analysis under the third component. Id. at 614.

The Court attempted to refine the effect prong in several cases decided in the years following *Lemon*. In *Committee for Public Education v. Nyquist*,[43] the Court interpreted the effect prong to require the invalidation of any law having a "direct and substantial" effect—as opposed to a "remote and incidental" effect—of advancing religion.[44] The *Nyquist* Court did not elaborate on the meaning of these terms. Although the Court has frequently cited the *Nyquist* reading of the effect prong,[45] this interpretation offers little clarification. It merely defines one vague term with several others.[46]

The Court more effectively explained the effect component of the test in *Allegheny County v. American Civil Liberties Union*.[47] The *Allegheny* Court stated that whether governmental conduct has the effect of endorsing religion depends on the message that the action communicates.[48] According to the Court, the relevant question is whether the challenged governmental action is likely to be regarded by adherents of the denominations that purportedly benefit from it as an endorsement, and by nonadherents as a disapproval, of their individual religious choices.[49] If a governmental action results in such apparent endorsement of religion, it is unconstitutional.[50]

Thus, the relevant precedent illustrates that the effect prong embodies two separate, but related, considerations. First, it directs a court to consider the actual effect of a governmental act. If such an act has the effect of providing too much inadvertent aid to religion, it is unconstitutional. Second, the effect prong directs a court to decide whether a governmental act gives the objective appearance of provid-

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43. 413 U.S. 756 (1973).

44. Id. at 784-85 n.39.

45. Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 Cornell L. Rev. 905, 918 & n.58 (1987) (citing *Grand Rapids School District v. Ball*, 473 U.S. 373, 394 (1985); *Meek v. Pittenger*, 421 U.S. 349, 366 (1975)).

46. Simson, 72 Cornell L. Rev. at 918 (cited in note 45). Simson argues that because *Nyquist* used two pairs of words in refining the effect prong, it is unclear whether the Court was attempting te label the opposite ends of one or two different spectrums. Id. He also points out that the Court further confused the issue by using these same terms in its analysis under the other two steps of the *Lemon* methodology. Id.

47. 492 U.S. 573 (1989).

48. Id. at 595. The Court relied heavily upon the rationale of Justice O'Connor's concurrence in *Lynch*.

49. Id. at 597. The Court stressed that a governmental act need not coerce participation in or abstention from a particular religious practice to be found unconstitutional. Id. at 597 n.7.

50. A number of commentators have treated the "apparent endorsement" consideration as an alternative methodology to the *Lemon* test. See, for example, Freijomil, 5 Seten Hall Const. L. J. at 202-03 (cited in note 28) (discussing Justice O'Connor's endorsement test as an alternative to *Lemon*). However, a majority of the Court first adopted the "appearance of endorsement" consideration in the context of the effect prong. See *Allegheny*, 492 U.S. at 595 ("The effect of the display depends upon the message that the government's practice communicates . . . .").

ing too much aid to religion.[51] If so, the act is invalid under the Establishment Clause, even if its actual effect does not rise to an impermissible level.

C. The Entanglement Prong: Excessive Entanglement Between Government and Religion and Political Divisiveness Along Religious Lines

The third inquiry of the *Lemon* methodology[52] applies to governmental action that is not intended to aid or endorse religion and that does not inadvertently provide too much aid or endorsement. Such action is nonetheless unconstitutional if it results in excessive entanglement between government and religion[53] or if it causes political divisiveness along religious lines.[54]

Application of the entanglement component in *Lemon* itself and in a number of other cases indicates that it prohibits the government from associating too closely and conspicuously with religion, even though the "primary effect" of the unintentional aid is not significant enough to violate the second component of the test.[55] In administering this component of the test, the *Lemon* Court considered the character and purpose of the institutions benefited by the governmental action at issue, the nature of the state aid, and the resulting relationship between the government and religious authorities.[56] The Court stated that governmental aid to institutions with substantial religious character could give rise to entangled church-state relations of the sort the First Amendment proscribes.[57] Applying this rationale, the *Lemon* Court found parochial schools to involve substantial religious activity and purpose.[58] The Court then reasoned that providing such institutions with the type of aid at issue would require continuing and comprehensive governmental surveillance of religious activity or institutions in order to ensure compliance

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51. See *Allegheny*, 492 U.S. at 595.
52. The third prong of the *Lemon* methodology is often called the "entanglement prong."
53. *Lemon*, 403 U.S. at 612-13.
54. Id. at 622-23.
55. McCoy, 48 Vand. L. Rev. at 1353 (cited in note 12). See also *Nyquist*, 413 U.S. at 780 (stating that the third prong of *Lemon* prohibits "teo intrusive and continuing a relationship between Church and State").
56. *Lemon*, 403 U.S at 615.
57. Id. at 616.
58. Id.

with related restrictions.[59] The Court concluded that the Establishment Clause prohibits such an intimate and continuing relationship between government and religion.[60]

The *Lemon* Court also considered potential political divisiveness along religious lines to be an important factor under the entanglement prong.[61] The Court reasoned that state assistance to church-related schools would engender considerable political activity, both by supporters of such institutions and by opponents of state aid.[62] Political candidates would be forced to choose sides, and citizens would vote according to their religious convictions.[63] The Court concluded that this kind of "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[64]

The *Lemon* Court seems to have considered political fragmentation along religious lines sufficient to render state schemes invalid under the entanglement prong.[65] More recently, however, several courts have commented that the Court has never used political divisiveness as an independent ground for invalidating a governmental practice.[66] Even if this is true, the Court has not ruled

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59. The Court reasoned that the aid schemes would require the states to monitor the schools in order to ensure that they did not use the money for religious purposes. Id. at 619. This surveillance, the Court reasoned, would amount to excessive entanglement hetween government and religion. Id.

60. Id. at 620.

61. See id. at 622-24 (describing the "divisive political potential" of the state programs at issue as "[a] broader base of entanglement of yet a different character"). Subsequent cases have also considered governmental actions' potential political divisiveness to be a relevant factor under the entanglement prong. See, for example, *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring) (citing *Nyquist*, 413 U.S. at 796; *Lemon*, 403 U.S. at 623).

This concern is closely related to the apparent endorsement inquiry that the *Allegheny* Court included under the second prong of the test. Both examinations reason that conspicuous governmental entanglement in matters of religion, upon which adherents of particular faiths take strong positions in public, is likely to cause people to align their votes with their faith. *Lemon*, 403 U.S. at 622-23. This kind of division threatens the normal political process by obscuring important secular issues. Id.

In at least one case the Court has voiced this concern under both the second and third prongs. See *Grendel's Den*, 459 U.S. at 125-27 (considering the "symbolic benefit" and inherent "potential for conflict" under the second prong and the "danger of political fragmentation . . . on religious lines" under the third prong).

62. *Lemon*, 403 U.S. at 622.

63. Id.

64. Id. (quoting Paul A. Freund, Comment, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1680, 1692 (1969)).

65. See *Lemon*, 403 U.S. at 623-24. See also John Morton Cummings, Comment, *The State, The Stork, and the Wall: The Establishment Clause and Statutory Abortion Regulation*, 39 Cath. U. L. Rev. 1191, 1209 (1990) (stating that the *Lemon* Court "ruled that the statutes also violated the entanglement test because of political divisiveness . . .").

66. See, for example, *Lynch*, 465 U.S. at 684 ("[T]his Court has never held that political divisiveness alone was sufficient to invalidate government conduct.").

that political fragmentation could *never* alone provide the basis for invalidating of governmental action. And, at the very least, this type of divisiveness serves as a "warning signal" that the Establishment Clause has been violated.[67]

Thus, the entanglement prong, like the effect prong, embodies two separate considerations. First, a court must determine whether governmental action that inadvertently aids religion will require too close and continuing a relationship between the government and religious institutions. Second, a court must decide whether the governmental action is likely to result in political divisiveness along religious lines. If the government fails the first inquiry, the action is invalid under the Establishment Clause. If it fails the second, the practice is at least rendered highly suspect under *Lemon*.

D. Continuing Vitality of the Lemon *Methodology*

Notwithstanding its shortcomings, the *Lemon* test remains the framework for analyzing establishment clause challenges to governmental action. The Supreme Court has employed the test in all but a handful of establishment clause cases in the years since its articulation[68] and has repeatedly declined the opportunity to repudiate it.[69] The *Lemon* methodology's repeated application in the face of frequent criticism[70] illustrates the continuing vitality of its mandate of government neutrality toward religion.[71]

Several courts have also stated that the divisiveness inquiry is applied mainly in cases involving financial subsidies to parochial schools. See, for example, id. (declining to inquire into political divisiveness because the issue of state subsidies to church-sponsored schools was not involved); *Mueller*, 463 U.S. at 403-04 n.11 (noting that the divisiveness inquiry should be regarded as limited to direct subsidy cases); *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1401 (9th Cir. 1994) (same). However, the Supreme Court and a number of other courts have employed the divisiveness inquiry in other contexts. *Brown v. Woodland Joint Unified School District*, 27 F.3d 1373, 1383 (9th Cir. 1994) (discussing *Lee v. Weisman*, 112 S. Ct. 2649, 2655-56, 120 L. Ed. 2d 467, 481 (1992), and other cases in which courts have inquired into political fragmentation in non-school-aid cases).

67. Simson, 72 Cornell L. Rev. at 933 n.116 (cited in note 45) (quoting *Lynch*, 465 U.S. at 684).

68. See note 28.

69. See *Lamb's Chapel*, 113 S. Ct. at 2149-50. (Scalia, J., concurring) (lamenting the repeated reinvigoration of the *Lemon* methodology).

70. See notes 23-27 and accompanying text.

71. See *Grumet*, 114 S. Ct. at 2487 (plurality opinion) (not relying directly upon the *Lemon* test, hut stating that the Establishment Clause requires that the government neither favor one religion over others nor favor religious adherents collectively over nonadherents (citing *Epperson*, 393 U.S. at 104).

The *Lemon* test absolutely prohibits the government from deliberately providing competitive aid[72] or endorsement to religion. The test also bars the government from inadvertently furnishing too much aid or endorsement to religion. Moreover, it prohibits the excessive entanglement of government with religion. Finally, *Lemon* forbids the government from taking action that creates the risk of political divisiveness along religious lines.

III. APPLICATION OF THE *LEMON* TEST IN SIMILAR CASES

A. Challenges to Restrictions on Alcohol Sales Near Churches

The Supreme Court has never directly confronted the question of whether a state law or local ordinance absolutely prohibiting the sale of alcohol in the vicinity of churches violates the Establishment Clause. The Court has, however, indicated in at least one case that it would uphold such a law.

In *Larkin v. Grendel's Den*,[73] the Supreme Court applied the *Lemon* methodology in striking down a Massachusetts law that restricted the acquisition of liquor licenses by enterprises located near churches and schools.[74] The statute vested in the governing bodies of schools and churches the power to block the granting of liquor licenses to premises located within five hundred feet of the objecting institution.[75] The Court rejected the state's argument that the statute was merely a legislative exercise of zoning power and concluded instead that the law implicated the Establishment Clause by delegating legislative "veto power" to religious institutions.[76] Assuming that the law effectuated its stated secular objective of protecting spiritual, cultural, and educational institutions from the "hurly-burly" associated with liquor-serving establishments,[77] the Court decided the case on the basis of second and third prongs of the *Lemon* test.[78]

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72. For a discussion of the concept of competitive aid, see notes 151-54 and accompanying text.

73. 459 U.S. 116 (1982).

74. Id. at 120-27.

75. Id. at 117.

76. Id. at 122. The Court relied upon the construction of the statute hy the Supreme Judicial Court of Massachusetts, which in an earlier case had interpreted the law as delegating "veto power" to religious institutions. Id. (citing *Arno v. Alcoholic Beverages Control Comm'n*, 384 N.E.2d 1223, 1227 (Mass. 1979)).

77. Id. at 123 n.6. The Court noted that the church in question was already surrounded by twenty-six liquor outlets and conceded that this fact cast doubt upon its assumption that the

The Court first scrutinized the statute under the effect prong. The Court noted that the veto power vested in churches by the law was standardless, requiring no supporting reasons or findings.[79] Nothing in the statute prevented a church from utilizing this unbounded power for explicitly religious purposes.[80] Even if churches could be trusted not to use the power to advance religion, the Court reasoned, the law created the appearance of a joint exercise of legislative authority by church and state, providing a significant symbolic benefit to religion.[81] As such, the law had the primary effect of advancing religion.[82]

Although the determination that the statute failed under the effect prong was sufficient to support a holding that the law violated the Establishment Clause, the Court nevertheless examined the statute under the entanglement prong as well. The Court concluded that the statute vested a core governmental power in religious institutions.[83] Noting that a primary concern underlying the Establishment Clause is preventing the fusion of governmental and religious functions,[84] the Court held that the law unconstitutionally entangled the church in the processes of government and created the danger of political fragmentation along religious lines.[85]

The *Grendel's Den* Court did not decide whether the statute would have survived scrutiny under the first prong of the *Lemon* test.[86] The Court stated in dicta that the statute embraced the valid, secular purpose of insulating schools and churches from the commotion associated with liquor stores.[87] The Court declared, however, that this purpose could be readily served without granting exclusive

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law met its purpose of shielding the church from disruption. Id. The Court appears to have assumed this was a *secular* purpose because the liquor license applicant failed to argue in the proceedings below that the law lacked a valid secular purpose. See id. at 119.

78. The Court made its decision "[i]ndependent[ly] of the first of [the *Lemon*] criteria." Id. at 123.

79. Id. at 125.

80. Id.

81. Id. at 125-26.

82. Id. at 126.

83. Id. at 127.

84. Id. at 126.

85. Id. at 127.

86. *Espresso*, 884 F. Supp. at 10 n.7. Whether or not the statute in *Grendel's Den* would have failed the first prong of *Lemon* depends largely upon what it means for a governmental action to "refiect" a secular purpose. See *Lemon*, 492 U.S. at 612. The language employed by the Court in *Lemon* itself indicates that a statute's stated legislative intent should be accorded "appropriate deference," as long as it is not undermined by other facters. Id. at 613. See also notes 33-35 and accompanying text.

87. *Grendel's Den*, 459 U.S. at 123-24.

and unilateral legislative power to a church.[88] The Court noted that a complete legislative ban on the issuance of liquor licenses within reasonable, prescribed distances of churches, schools, and other like institutions would be a possible alternative.[89] By doing so, the Court strongly implied that without the veto provision, the statute would have survived scrutiny under *Lemon*.[90]

Since the Supreme Court decided *Grendel's Den*, a number of other courts have invalidated similar regulatory provisions.[91] For example, in *Espresso, Inc. v. District of Columbia*,[92] the United States District Court for the District of Columbia enjoined enforcement of a District of Columbia municipal regulation. The challenged provision prohibited the Alcoholic Beverage Control Board from issuing a liquor license to any establishment within four hundred feet of a church with more than one hundred members, absent written consent by the church.[93] The court rejected the defendant's argument that the distinction between the written consent provision in the District of Columbia regulation and the written objection provision struck down in *Grendel's Den* was constitutionally significant, and held that the regulation failed under the second and third prongs of *Lemon*.[94]

The *Espresso* court gave a liberal reading to the *Grendel's Den* dictum that an absolute legislative ban on liquor sales close to a church might be an acceptable alternative to a law vesting veto power in a religious institution. Seizing on this language, the court stated that an absolute ban on all liquor licenses within four hundred feet of any church would "unquestionably pass constitutional muster."[95]

Thus, although no federal court has upheld an absolute legislative prohibition on the sale of alcohol in the vicinity of religious insti-

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88. Id.

89. Id.

90. Indeed, the Court pointed out that at the time the case was decided, twenty-seven states had laws prohibiting liquor outlets within a prescribed distance of various types of protected institutions, including churches. Id. at 124 n.7.

91. See, for example, *Espresso, Inc.*, 884 F. Supp. at 12 (enjoining enforcement of a similar statute); *First Baptist Church of Brisbee v. Arizona State Liquor Board*, 716 P.2d 81, 83 (Ariz. 1986) (invalidating veto provision and allowing remainder of statute to stand); *Farris v. Mini Mart Foods, Inc.*, 684 S.W.2d 845, 849 (Ky. 1984) (invalidating entire statuto with veto provision).

92. 884 F. Supp. 7 (D.D.C. 1995).

93. Id. at 8. A District of Columbia municipal regulation prohibited the issuance of a liquor license "for any establishment within four hundred feet of any . . . church . . . ." 27 D.C.M.R. § 302.1. A more detailed subsection allowed the Board, in its discretion, to issue a license to a business within four hundred feet of a church if either (a) the church had a membership of less than 100 persons, or (b) the church had one hundred or more members and its governing body provided written consent. 27 D.C.M.R. § 302.5.

94. 884 F. Supp. at 11.

95. Id. at 12.

tutions, the Supreme Court and several other courts have at least suggested that such legislation would survive under *Lemon.*

B. Challenges to Restrictions on Sunday and Holiday Activities

No federal court has heard an establishment clause challenge to a legislative enactment barring the sale of alcoholic beverages on Sunday. The Supreme Court has, however, decided several cases dealing with other "Blue Laws."[96]

In *McGowan v. Maryland*,[97] for example, the Court rejected a constitutional challenge to a state law banning various forms of retail sales activity on Sunday. Employees of a large department store were convicted and fined under the statute for selling on Sunday a loose-leaf binder, a can of floor wax, a stapler, staples, and a toy.[98] After rejecting the employees' equal protection claim,[99] the Court held that the employees had no standing to claim a free exercise violation.[100] In its establishment clause analysis, the Court concluded that despite the undeniable religious origins of the Blue Laws,[101] Sunday closing laws in the modern setting serve the valid secular purpose of providing a uniform day of rest for all citizens.[102]

In a compelling dissent, Justice William O. Douglas interpreted the religious guarantees of the First Amendment in stricter terms than did the majority.[103] According to Justice Douglas, the Free Exercise and Establishment Clauses command the government to be completely neutral on matters of religion.[104] He reasoned that just as the First Amendment bars the government from financing a selected church, it protects citizens against laws that penalize them in any

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96. Blue Laws are enactments that regulate entertainment activities, work, and commerce on Sundays. Black's Law Dictionary 173 (West, 6th ed. 1990).

97. 366 U.S. 420 (1961). *McGowan* was decided along with four companion cases in which the Court rejected claims that Sunday closing laws violated the religion clauses.

98. Id. at 422.

99. Noting that there was no indication that the distinctions drawn by the statute were irrational or unreasonable, the Court rejected the claim. Id. at 425-28.

100. The employees alleged only economic injury and not infringement of their own religious freedom. Id. at 429-30.

101. Writing for the Court, Chief Justice Warren stated that "[t]here is no dispute that the original laws which dealt with Sunday Labor were motivated by religious forces." Id. at 431.

102. Id. at 444-45. *McGowan* was decided before the Court announced the *Lemon* methodology.

103. Justice Douglas criticized the majority, stating, "The Court balances the need of the people for rest, recreation, late sleeping, family visiting, and the like against the command of the First Amendment that no one need bow to the religious beliefs of another. There is in this realm no room for balancing." Id. at 575 (Douglas, J., dissenting).

104. Id. at 564.

way for not observing a given religious custom, practice, or belief.[105] The law at issue did just that by compelling all citizens, regardless of their own beliefs, to observe the Christian Sabbath. By penalizing those who chose not to observe Sunday as the Sabbath, he concluded, the statute was as offensive to the Establishment Clause as a law punishing those who would refuse to fast from sunrise to sunset during the Moslem month of Ramadan.[106]

To Justice Douglas, the secular justification offered by the Court was unconvincing. Although legislatures and courts might now characterize Sunday closing laws as serving the secular purpose of providing a uniform day of rest, these enactments are undeniably traceable to the Fourth Commandment.[107] Justice Douglas reasoned that Sunday, the Sabbath of the dominant denominations in our nation, is no less the Sabbath because it has become expedient for nonreligious purposes.[108] The First Amendment, he urged, forbids the legislative majority from imposing its religious beliefs or customs upon the people.[109]

In a more recent case, *Griswold Inn, Inc. v. State*,[110] the Connecticut Supreme Court employed the *Lemon* methodology to invalidate a state law that banned the sale of alcohol on Good Friday.[111] The court rejected the state's argument that the law served the secular purpose of prohibiting the sale of alcohol on a holiday that enjoys statewide celebration,[112] pointing out that the statute made Good Friday the only day of the year on which liquor could not be purchased.[113] Had the legislature truly been concerned with the secular celebration of a holiday, the court reasoned, it would have prohibited the sale of alcohol on other holidays as well.[114] Given the traditional and continued Christian exhortation to fast and mourn on Good Friday for the death of Christ, and the lack of public acceptance of the day as a secular holiday, the court concluded that singling out

105. Id.
106. Id. at 564-65.
107. Id. at 572-73. See also note 7 and accompanying text.
108. Id. at 573 n.6.
109. See id. at 575 ("A legislature of Christians can no more make minorities conform to their weekly regime than a legislature of Moslems, or a legislature of Hindus.").
110. 441 A.2d 16 (Conn. 1981).
111. Id. at 22.
112. The law appears to have contained no statement of purpose. The Court noted that "[a] reading of [the statute] shows that [the secular purpose contended by the defendants] could not be the legislative intent." Id. at 20.
113. Id.
114. Id.

that day alone revealed that the legislature could not have had a valid secular purpose for passing the law.[115]

Although the Connecticut statute's failure to satisfy the first component of the *Lemon* test was sufficient to support a holding that the law was unconstitutional,[116] the court nevertheless undertook analysis under the second and third prongs as well. The court concluded that the enactment failed the second part of the *Lemon* test because the law had the primary effect of advancing religion.[117] The very existence of a legal prohibition on a major Christian holiday gave the rites and practices observed on that day governmental endorsement, illustrating an unallowable bias in favor of the dominant Christian sects and against those with different beliefs.[118] Moreover, the court reasoned, the law went beyond mere approval by actually imposing the observance of a purely religious holiday on all citizens.[119]

The *Griswold Inn* court also determined that by requiring the state to monitor observance of a religious holiday in order to enforce the law, the statute violated the entanglement prong of *Lemon* as well.[120] Moreover, the court concluded that the legislative and popular debate over the prohibition encouraged political divisions and debate along religious lines, pitting Christians against non-Christians.[121] In the court's view, this sort of fragmentation on matters of religion was one of the principal evils against which the Establishment Clause was intended to protect.[122]

In a similar case, *Silver Rose Entertainment, Inc. v. Clay County*,[123] the Florida Court of Appeals upheld an ordinance banning the sale of alcohol on Christmas day. The court concluded that the enactment satisfied all three elements of the *Lemon* test.[124] Noting that the challenged enactment contained no explicit statement of purpose, the court refused to infer that it was motivated by an unconstitutional purpose, despite the significance of Christmas as a reli-

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115. Id. at 20-21.
116. See id. at 22-23 (Healey, J., concurring).
117. Id. at 21-22.
118. Id.
119. Id. The court rejected the contention that the primary effect of the statute was to promote traffic safety. The stato had argued that Good Friday presents special highway safety prohlems because it represents for many people the first opportunity to engage in outdoor recreational activity following "a dreary cold winter." The court stated that any problem of alcohol abuse on this day was speculative and incidental to the prohibition's religious impact. Id. at 22.
120. Id. at 22.
121. Id.
122. Id. (citing *Meek*, 421 U.S. at 372).
123. 646 So.2d 246 (Fla. Ct. App. 1994).
124. Id. at 252-53.

gious holiday.[125] The court concluded instead that the law served two valid secular purposes: encouraging purveyors of alcohol to relax with their families on Christmas day and discouraging the consumption of alcohol on that day.[126] With almost no analysis, the court then held that the prohibition did not have a primary effect of advancing religion, that it did not entangle government with religion in an impermissible way, and that it did not endorse the religious practices or beliefs of some citizens.[127] The court distinguished *Griswold Inn*, asserting that unlike Good Friday, Christmas enjoys a special constitutional status because of the secular traditions associated with it.[128]

IV. EVALUATION OF ABSOLUTE LEGISLATIVE PROHIBITIONS ON THE SALE OF ALCOHOL NEAR CHURCHES

When the Supreme Court decided *Grendel's Den*, at least twenty-seven states had laws prohibiting the sale of intoxicating liquors close to churches.[129] Eleven other states directed the authorities charged with issuing liquor licenses to consider the proximity of the proposed establishment to protected institutions such as churches.[130] Today, at least twenty states[131] and numerous municipalities in other states[132] maintain such restrictions.

No court has seriously questioned the constitutional validity of an absolute legislative ban on the sale of alcoholic beverages close to religious institutions. Indeed, the *Grendel's Den* and *Espresso* courts,[133] as well as several others, have suggested that they would uphold such legislation as a valid exercise of state zoning power.[134]

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125. Id. at 252.

126. Id.

127. Id. at 252-53.

128. Id. at 253. The court analogized Christmas to Sunday, citing *McGowan* for the proposition that people of all religions and with no religion regard Christmas, like Sunday, as a day for family activity and the like. Id. at 252 (citing *McGowan*, 366 U.S. at 452).

129. 459 U.S. at 124 n.7. The Court explicitly refrained from passing on the validity of any such statute other than the Massachusetts law at issue in the case. Id. As noted above, however, the Court implied that absolute legislative bans on liquor sales within reasonable prescribed distances of churches would be valid. Id. at 123-24. See notes 87-90 and accompanying text.

130. *Grendel's Den*, 439 U.S. at 124 n.7.

131. See notes 2 and 4 and accompanying text.

132. See notes 3-4 and accompanying text.

133. 459 U.S. at 123-24; 884 F. Supp. at 12.

134. See, for example, *First Baptist Church of Brisbee*, 716 P.2d at 83-84 (stating that without a church veto provision the legislature might constitutionally provide that no liquor license may be issued within a reasonable distance of a church); *Farris*, 684 S.W.2d at 849 (stating that the statute at issue might have been valid without a provision delegating veto

These courts have not characterized bans on the sale of alcoholic beverages near churches as "de minimis" or "historical" exceptions to the Establishment Clause, but rather as serving a secular purpose.[135]

A. No Valid Secular Purpose

Few, if any, legislative prohibitions of the sale of alcoholic beverages in the vicinity of churches contain explicit statements of purpose. For this reason, a court faced with an establishment clause challenge to such an enactment would likely be left to infer legislative intent in order to evaluate it under *Lemon*'s first prong.

A court could not realistically find legislation banning the sale of alcoholic beverages near churches[136] to be intended to serve a secular purpose. Such enactments affect only two classes of citizens—those who practice their religious beliefs at churches and the patrons and owners of enterprises that wish to sell alcoholic beverages.[137] Since such legislation restricts the legitimate economic activity of potential purveyors and consumers of alcoholic beverages, it cannot possibly be intended to benefit this group.[138] Rather, laws prohibiting alcohol sales near churches can only be intended to aid churches and those who worship in churches.[139]

Indeed, in cases involving similar statutes, courts have found the regulation of alcohol sales near churches to be intended to insulate churches from the disruption associated with activities at liquor outlets.[140] These courts have concluded, however, that this legislative aim constitutes a valid *secular* purpose under the first prong of the

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power to a church); *Wiles v. Michigan Liquor Control Commission*, 229 N.W.2d 434, 437 (Mich. 1975) (holding a five hundred foot ban to be constitutional).

135. See, for example, *Grendel's Den*, 459 U.S. at 123-24 ("There can be little doubt that [protecting a church from the commotion associated with liquor sales] embraces [a] valid secular . . . purpose[]."); *Wiles*, 229 N.W.2d at 437 (concluding that a legislative ban served a valid secular purpose).

136. Most legislative prohibitions on the sale of alcohol in the vicinity of churches define "church" broadly enough to include any facility used for regular religious worship. See, for example, Code of the Metropolitan Government of Nashville and Davidson County, Tennessee § 7.08.010 (1995) (defining "church" as "a building or property where a congregation regularly meets at least one day per week for religious worship"). Such enactments therefore do not embody the prohibited governmental preference of one religious sect over another. As demonstrated below, however, these regulations do embrace the equally impermissible state preference for religion over nonreligion. See *Epperson*, 393 U.S. at 103-04 (stating that the Establishment Clause mandates governmental neutrality between religion and nonreligion).

137. Krebs, 59 Wash. L. Rev. at 95 (cited in noto 35).

138. Id.

139. Id.

140. See cases discussed in Part III.A.

Lemon test.[141] Of course, a state may have a valid secular interest in attempting to shield schools, playgrounds, and other such institutions from disruption.[142] The extension of such protection to institutions that have a primarily religious purpose, however, embraces a *religious* purpose and violates the Establishment Clause.[143]

Legislative prohibitions on the sale of alcoholic beverages in the vicinity of churches are intended to provide church-goers with a peaceful environment in which to practice their religion.[144] In order to create such an atmosphere, these regulations require nearby business owners to refrain from selling certain products. Such regulations are thus aimed directly at promoting religious activity over other activities. Such a purpose can hardly be characterized as "secular."

Indeed, many of the states that ban alcohol sales near churches allow numerous other "disruptive" activities in the vicinity of such institutions. Restaurants, shopping malls, and movie theaters, for example, may operate freely close to churches. In addition, stores that may not sell beer or wine because they are located close to religious institutions may sell a host of other products. Such activities create no less commotion or disruption than the sale of alcohol. A legislature truly concerned with preventing general disruption would restrict these activities as well. Alcohol sales are restricted only because of a perceived religion-based incompatibility between alcohol and religion.[145] Legislation that embraces such a religious purpose must fail under the first prong of *Lemon*.

B. Primary Effect of Advancing Religion

Even if legislative prohibitions on the sale of alcohol near churches do somehow embrace a valid secular purpose, they have the primary effect of advancing religion over non-religion, and therefore must fail under the second *Lemon* consideration. While state legislatures might not intend such enactments to promote the practice of religion at the expense of neighboring businesses, these laws unquestionably have such an effect. Businesses located near religious institutions must forego the additional clientele and revenue that would

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141. See id.

142. Krebs, 59 Wash. L. Rev. at 95 (cited in note 35).

143. See id. at 95 ("[W]hen a state seeks te protect churches from such disturbances through a statute aimed directly toward that end, it risks establishment clause violation.").

144. See *Grendel's Den*, 459 U.S. at 123 (describing a Massachusetts law restricting the sale of alcohol near churches as being aimed at protecting spiritual centers from the disruption associated with liquor sales).

145. See note 8 and accompanying text.

result from alcohol sales.[146] Such legislative prohibitions thus have the effect of forcing some citizens—the owners and clientele of stores located in the vicinity of religious institutions—to refrain from engaging in legitimate economic activity so that church-goers may practice their religions free from the disruption associated with alcohol. The promotion of religion over other activities is impermissible under the second prong of the *Lemon* test.

In addition, these regulations cannot survive scrutiny under the "apparent endorsement" arm of the effect prong. Such laws are likely to be viewed by members of religious institutions as endorsements, and by non-members as disapprovals, of their individual religious choices.[147] Through these enactments, legislatures send an unmistakable message that religious activity is worthy of governmental protection and that church members are favored members of the political community.[148] Likewise, legislative bans on alcohol sales near churches send an accompanying message to those who are not members of these religious institutions that they are outsiders—second-class citizens.[149] The message is particularly harsh for the owners of businesses located near churches, who must give up the additional revenue that alcohol sales might generate. The Establishment Clause forbids the passage and enforcement of legislation that communicates such a message.[150]

The Supreme Court has in certain contexts allowed state and local government to provide various forms of aid to religious institutions. For example, the Court has stated on a number of occasions that the Establishment Clause does not prohibit municipalities from providing fire protection to such institutions.[151] If local governments did not offer this service, religious organizations would have to secure fire protection on their own.[152] Providing this type of service thus supports these institutions by relieving them of a material operating expense.[153]

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146. Krebs, 59 Wash. L. Rev. at 99 (cited in note 35).

147. See *Allegheny*, 492 U.S. at 597 (citing *Grand Rapids*, 473 U.S. at 390) (discussing the endorsement inquiry).

148. See id. (citing *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)).

149. See id. (stating that the apparent endorsement inquiry turns on the message communicated by the governmental action in question).

150. See id. (discussing the endorsement test).

151. See Simson, 72 Cornell L. Rev. at 921 (cited in note 45) (citing *Nyquist*, 413 U.S. at 781-82; *Everson*, 330 U.S. at 17-18). Municipalities may also provide religious institutions a variety of other similar forms of aid, including police protection, sewage disposal, and sidewalks. See *Nyquist*, 413 U.S. at 781; *Everson*, 330 U.S. at 17-18.

152. Simson, 72 Cornell L. Rev. at 921 (cited in note 45).

153. Id.

The support offered to religious institutions in the form of fire protection, however, differs in at least two important respects from the aid provided by legislative bans on alcohol sales near such institutions. First, the government provides fire service to all citizens without regard to their religious beliefs or practices.[154] Legislative prohibitions on the sale of alcoholic beverages near religious institutions, on the other hand, do not benefit all citizens. Such bans benefit only those who practice their religions at these institutions. Moreover, these enactments directly burden the owners of businesses in the vicinity of religious institutions by prohibiting them from engaging in legitimate business activity.

Second, because fire protection is provided to all citizens regardless of their religious convictions, nonreligious citizens are not likely to view the provision of this service as an endorsement of religion. Enactments banning the sale of alcohol near religious institutions, on the other hand, benefit only those who worship at these institutions. Such laws thus send out a strong message to local store owners that the political establishment views their economic well-being as less important than the religious practices of other citizens. Because these bans result in such an apparent endorsement of religion over nonreligion, they cannot pass muster under the second prong of the *Lemon* test.

C. Political Divisiveness Along Religious Lines

Enactments banning the sale of alcohol in the vicinity of churches do not result in the kind of close and continuing relationship between government and religion that the Court held to be unconstitutional in *Lemon* and *Grendel's Den*.[155] These laws do, however, impermissibly cause political divisiveness along religious lines.[156] By benefiting the practice of religion at the expense of local business, such enactments pit religion against business. Attempting to open new restaurants serving alcoholic beverages involves considerable extra expense to plan around such enactments. Often developers must lobby city and state governments for exemptions to legislation that would otherwise preclude them from selling alcohol at their new

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154. Fire protection, "provided in common to all citizens, [is] 'so separate and so indisputably marked off from the religious function' that [it] may fairly be viewed as reflect[ing] a neutral posture toward religious institutions." Simson, 72 Cornell L. Rev. at 921 (cited in note 45) (quoting *Nyquist*, 413 U.S. at 781-82; *Everson*, 330 U.S. at 18).

155. See notes 55-60 and 83-85 and accompanying text.

156. See *Lemon*, 403 U.S. at 622 ("[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect.").

businesses.[157] Their efforts typically produce political response from members of the religious community who wish to maintain the status quo.[158]

The controversy surrounding the construction of the Nashville Arena in Tennessee provides a recent example of the political divisiveness that legislative bans on the sale of alcoholic beverages near churches can cause. The developers of the arena planned to apply for a license to sell beer at arena events. During construction, it was discovered that the arena site is located eighty-five feet from a Baptist church.[159] Opponents of alcohol sales at arena events, including the minister and various members of the church, launched a campaign to force the metropolitan government to refuse to grant the arena's operators a license to sell beer.[160] They rallied around the county's ordinance barring the sale of beer within one hundred feet of a church.[161] In response, the developers lobbied county authorities for an exemption to the ordinance.[162] The entire community found itself embroiled in a heated debate that continued even after the city council voted to exempt the new arena from the ban on beer sales.[163]

The debate over beer sales at the arena constituted precisely the type of divisiveness along religious lines that the *Lemon* Court found to be unacceptable under the Establishment Clause.[164] To the *Lemon* Court, the mere *potential* for this type of political division was enough to render two state regulatory schemes constitutionally inva-

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157. See, for example, Richard Locker, *Churches, New Arena Vie over No-Booze Rule*, The Commercial Appeal 1A (June 7, 1995) (discussing frequent exemptions granted to new restaurants in downtown Nashville).

158. See, for example, Thomas J. Fitzgerald and Elizabeth Murray, *Last Roadblock to Devils Move is Gone; In Showdown Vote, Nashville Allows Beer Sales in Arena*, The Record A12 (June 7, 1995) (discussing the mobilization of religious conservatives to enforce a ban on beer sales in the new Nashville Arena).

159. Locker, The Commercial Appeal at 1A (citod in note 157).

160. *Rcligion News*, The Plain Dealer 7E (Feb. 4, 1995).

161. Id.

162. Stephen G. Hirsch and Thomas J. Fitzgerald, *Vote Set Tonight on Devils Issue; Beer Legal at Nashville Arena?*, The Record A5 (June 6, 1995). See also Fitzgerald and Murray, The Record at A12 (cited in note 158) ("The ordinance [exempting the arena from the beer ban] got enough votes only after intense lobbying.").

163. The issue of beer sales at the new arena almost prompted one of Nashville's best-known pastors to run against the city's incumbent mayor, who supported the arena exemption. Locker, *The Commercial Appeal* at 1A (cited in note 157). See also Fitzgerald and Murray, The Record at A12 (cited in noto 158) (noting that preachers urged their parishioners to flood the city council with letters and telephone calls to express their discontent with the arena exemption).

164. But see notos 65-67 and accompanying toxt.

lid.[165] The controversy over the Nashville arena illustrates that legislative bans on alcohol sales in the vicinity of churches *actually cause* political divisiveness along religious lines. For this reason such enactments cannot survive scrutiny under the political divisiveness component of the *Lemon* test's third prong.

Thus, legislative bans on the sale of alcohol in the vicinity of religious institutions clearly violate the first two elements of the *Lemon* test. Such enactments are intended to serve the impermissible religious purpose of providing members of religious institutions with a zone of protection in which to practice their faiths. Moreover, regulations of this sort promote the practice of religion at the expense of local business. Such laws send out a clear message that the members of religious institutions enjoy favored, "insider" status and that the business interests of other citizens are less important to the government. The enforcement of these bans also creates political divisiveness along religious lines. They are therefore highly suspect under *Lemon*'s third prong. For these reasons, such enactments cannot stand under the Establishment Clause.

V. EVALUATION OF RESTRICTIONS ON SUNDAY ALCOHOL SALES

A number of states and many municipalities in other states maintain and enforce legislation restricting the sale of alcohol on Sunday.[166] While the Supreme Court has upheld a number of Sunday Blue Laws under the Establishment Clause,[167] no court has directly addressed the constitutionality of a legislative prohibition on the sale of alcoholic beverages on Sunday. Like enactments proscribing the sale of alcohol in the vicinity of religious institutions, Sunday prohibitions cannot survive under the *Lemon* test.

A. No Valid Secular Purpose

Very few, if any, enactments barring the sale of alcohol on Sunday contain explicit statements of legislative purpose. For this reason, courts faced with establishment clause challenges to such

165. See *Lemon*, 403 U.S. at 622-24 (stating that the potential for political divisiveness along religious lines threatens the political process by obscuring issues of great urgency—issues on which our legislature should focus).

166. See note 5 and accompanying text.

167. See Part III.B.

regulations must infer purpose in order to perform analysis under the first prong of the *Lemon* test.

History reveals that legislative restrictions of alcohol sales on Sunday, like other Blue Laws, are rooted in the biblical command to observe the Sabbath.[168] Courts' applications of the older versions of many Sunday laws demonstrate their religious origins.[169] Such laws were intended to prohibit worldly activity on a day set aside for worship.[170]

Enactments restricting the sale of alcohol on Sundays are simply modern versions of these older laws. The religious basis of these laws has not disappeared;[171] legislative prohibitions on Sunday alcohol sales are still based upon a perceived incompatibility between religion and alcohol. Like other Blue Laws, these enactments prohibit activity historically believed to be incongruous with observance of the Sabbath.

In *McGowan v. Maryland*,[172] the Supreme Court held that notwithstanding the original religious purposes of Sunday laws, such enactments now serve the valid secular purpose of providing a uniform day of rest for all citizens regardless of religion.[173] Perhaps the most plausible secular justification offered by proponents of laws banning the sale of alcohol on Sunday is that such enactments are aimed at promoting safety on this secular day of rest. Supporters argue that the prohibition on alcohol sales on Sunday reduces the risk of accidents on a day when many people travel to visit family or engage in other recreational activities. The need for safety is no greater, however, on this day of rest than it is on days of work. Indeed, alcohol-impaired work is a greater risk to society than alcohol-impaired rest. Moreover, at least as many people drive their cars on work days as on Sundays. For these reasons, the secular

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168. See note 7 and accompanying text.

169. See, for example, *McGowan*, 366 U.S. at 570 (Douglas, J., dissenting) (quoting *Commonwealth v. McCarthy*, 138 N.E. 835, 836 (Mass. 1923) (stating that the aim of a Massachusetts Sunday law was " 'to secure respect and reverence for the Lord's Day.' "); *Sparhawk v. Union Passenger Railway Co.*, 54 Pa. 401, 423 (1867) ("Rest and quiet, on the Sabbath day, with the right and privilege of public and private worship, undisturbed by any mere worldly employment, are exactly what the statute was passed to protect.")).

170. See id. at 569 (Douglas, J., dissenting) (quoting *Davis v. City of Somerville*, 128 Mass. 594, 596 (1880)) (stating that "[o]ur Puritan ancesters saw fit to enforce with penal legislation the observance of Sunday as a day devoted to worship undisturbed hy secular cares or amusements").

171. See id. at 573 n.6 (Douglas, J., dissenting) (stating that the historical basis of Blue Laws cannot be swept aside merely because Sunday has taken on secular significance).

172. 366 U.S. 420 (1961).

173. Id. at 444-45.

justification offered by proponents of Sunday bans on alcohol sales is far from compelling. The religious basis for such laws cannot be so easily swept aside.

Even if we assume that prohibiting the sale of alcohol all day on Sunday is actually intended by legislatures to make the common day of rest safer for recreational activities, this justification does not work for Sunday-morning bans. Sunday morning presents no safety risk that is not present during the rest of the day. The argument that Sunday morning creates alcohol-related problems that are not present during the rest of the day on Sunday, or on other mornings, is speculative at best. Indeed, the religious meaning of Sunday morning constitutes the only attribute of that part of the day that sets it apart from the rest of Sunday and from other mornings. Sunday morning is the time that adherents of the dominant religions congregate to worship.[174] The singling out of this time of the week reveals that no clear secular purpose justifies the prohibition of alcohol sales during this part of the day.[175] Thus, these bans must instead be intended to require that the behavior of all citizens conform to the religious values of the legislative majority. Such prohibitions fail under the first prong of the *Lemon* test.

B. Primary Effect of Advancing Religion

Even if legislative restrictions on the sale of alcohol on Sunday do embrace a valid secular purpose, such enactments have the primary effect of advancing religion. For this reason they cannot survive the second prong of the *Lemon* test.

By proscribing behavior thought to be incompatible with observance of the Sabbath on Sunday, these laws advance religion, in general, over nonreligion, and they promote faiths that observe a Sunday Sabbath over other faiths.[176] Moslems, Jews, Seventh Day Adventists, and atheists must forego legitimate nonreligious conduct so that the values of dominant denominations are not offended and so

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174. The Supreme Court has acknowledged the religious significance of Sunday morning in the context of Blue Laws, stating that "most Christian church services are held on Sunday morning . . . ." *McGowan*, 366 U.S. at 445.

175. See *Griswold Inn*, 441 A.2d at 20 (stating that the singling out of Good Friday, a religious holiday for Christians, reveals that legislation harring alcohol sales on that day alone has no clear secular purpose).

176. See *McGowan*, 366 U.S. at 576 (Douglas, J., dissenting) (stating that Sunday closing laws "force [religious] minorities to obey the majority's religious feelings of what is due and proper for a Christian community"); *Griswold Inn*, 441 A.2d at 21 (stating that a legislative ban on liquor sales on Good Friday had the effect of imposing the observance of Christian practices on Christians and non-Christians alike).

that adherents of these faiths may worship in peace.[177] Denominations that observe a Sunday Sabbath, on the other hand, are free to engage in a full range of worldly pursuits on Friday, the traditional day of worship for Moslems, and on Saturday, the Sabbath for Jews and Seventh Day Adventists. Indeed, citizens who worship on days other than Sunday must observe two Sabbaths, one of their own choice and another imposed on them by law.[178] Legislative enactments that result in such a direct preference for some religions over others cannot stand under the Establishment Clause.

Legislative bans on Sunday alcohol sales also require some citizens to refrain from engaging in legitimate economic activity so that the practice of observing the Sabbath on that day is not disturbed. These enactments have the effect of forcing store owners to give up the additional revenue that the sale of alcohol on Sunday mornings might produce.[179] Such laws thus promote the religion over other activities. This effect is impermissible under the second prong of the *Lemon* test.

In addition, legislative restrictions on Sunday alcohol sales have the effect of putting the force of law behind the religious values of the legislative majority, thereby placing coercive pressure on all citizens to conform with officially sanctioned practices.[180] Those who choose not to conform with these practices face fines or even jail.[181] Enactments that impose criminal sanctions for noncompliance with the religious tenets of the dominant faith can hardly be characterized as "neutral" toward religion.[182] Such laws have the impermissible effect of advancing religion.

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177. See *McGowan*, 366 U.S. at 578 n.10 (Douglas, J., dissenting) (stating that Sunday closing laws assist Christianity by making idleness compulsory on the Christian Sabbath) (citation omitted).

178. See id. at 577 (stating that a Sunday closing law forced non-Christians to observe a second Sabbath).

179. See Krebs, 59 Wash. L. Rev. at 99 (cited in note 35) (arguing that the ban of alcohol sales near churches has the impermissible effect of forcing store owners to give up the additional clientele and revenues that alcohol sales would create). This argument is equally compelling with respect to Sunday-morning prohibitions on alcohol sales.

180. See *Griswold Inn*, 441 A.2d at 21 ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.") (quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962)).

181. See, for example, Ark. Code Ann. § 3-3-210 (1995) (making the sale of alcohol on Sunday a misdemeanor punishable by imprisonment for ten days to six months).

182. See *Epperson*, 393 U.S. at 103-04 ("The First Amendment mandates government neutrality between religion and religion, and religion and nonreligion."). See also *McGowan*, 366 U.S. at 576 (Douglas, J., dissenting) ("There is an 'establishment' of religion in the constitutional sense if any practice of any religious group has the sanction of law behind it.").

Legislative prohibitions on the sale of alcohol on Sunday also send a message to members of the denominations that observe a Sunday Sabbath that they are favored members of the political community.[183] Likewise, these regulations send a message to nonadherents of these faiths that they are political outsiders.[184] These people are likely to view such enactments as affirmations of their minority status in Christian communities.[185] Because legislative prohibitions on Sunday-morning alcohol sales communicate a clear message of governmental endorsement of the values of certain denominations, these enactments cannot pass muster under the "apparent endorsement" element of the *Lemon* test's second prong.[186]

C. Political Divisiveness Along Religious Lines

Enactments barring the sale of alcoholic beverages on Sunday mornings are also highly suspect under the third *Lemon* inquiry. Although these laws do not result in an impermissibly close relationship between religion and government, they do engender political divisiveness along religious lines. Legislative and popular debates over the propriety of such regulations pit religion against religion, and religion against nonreligion. Religious institutions and individuals who observe a Sunday Sabbath are likely to embrace such enactments, while citizens with different beliefs are likely to object to these regulations. Our nation's growing non-Christian population is likely to augment the opposition to such laws.[187] Those who oppose religion-based laws may promote political action in order to achieve their goals.[188] Those who embrace this legislation will inevitably respond, employing the same political techniques.[189] The potential for

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183. See *Allegheny*, 492 U.S. at 595 (stating that the apparent endorsement inquiry turns on the message that the government's practice communicates).

184. See id.

185. See Marc A. Stadtmauer, *Remember the Sabbath? The New York Blue Laws and the Future of the Establishment Clause*, 12 Cardozo Arts & Ent. L. J. 213, 213 (1994) (stating that Sunday Blue Laws give substance to the contention that America is a Christian nation).

186. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Allegheny*, 492 U.S. at 605 (quoting *Larson*, 456 U.S. at 244).

187. *McGowan*, 366 U.S. at 566 n.1 (Douglas, J., dissenting) (citing Arthur Hartzberg, *The Protestant 'Establishment,' Catholic Dogma, and the Presidency*, Commentary 285 (Oct. 1960) (discussing the political impact of the influx of non-Protestant immigrants after World War II)).

188. See *Lemon*, 403 U.S. at 622 (describing the potential for political division along religious lines created by two state regulatory schemes designed to provide aid to parochial schools).

189. Some religious groups actively advocate anti-alcohol legislation. See, for example, Christian Life Commission, *Issues & Answers: Alcohol* (cited in note 8).

conflict created by legislative prohibitions on Sunday alcohol sales is precisely the kind of fragmentation that the *Lemon* Court held to be a violation of the First Amendment.[190] Thus, such enactments are, at the very least, highly suspect under the entanglement prong.

D. The Possibility of an Historical Justification

Those who embrace legislative bans on the sale of alcohol on Sunday might argue that because religiously-motivated Sunday laws were accepted at the time of the adoption of the Bill of Rights, laws banning the sale of alcohol on Sunday morning cannot possibly violate the Establishment Clause. Indeed, the Supreme Court used similar reasoning in *Marsh v. Chambers*[191] to uphold the Nebraska state legislature's practice of opening its legislative sessions with a proselytizing prayer. For at least two reasons, however, history cannot legitimate state bans on Sunday-morning alcohol sales under the Establishment Clause.

First, the First Amendment was not applicable to the states at the time of its adoption.[192] Because only the states, and not the federal government, had Sunday laws at the time of the adoption of the Bill of Rights, the acceptance of such laws at that time can have no bearing on their validity today.[193] Only after the Fourteenth Amendment was adopted did the restrictions of the First Amendment become applicable to the states.[194] While the Supreme Court has upheld a variety of Sunday laws since the First Amendment's incorporation into the Fourteenth, it has also invalidated a number of other state practices that were characterized by historical acceptance.[195] Indeed, the Court has repeatedly confirmed that history alone cannot

190. See *Lemon*, 403 U.S. at 622 (stating that the Framers intended the First Amendment to protect against political division based on religious differences).

191. 463 U.S. 789 (1983). *Marsh* is one of a handful of decisions in which the Supreme Court has not employed the *Lemon* methodology in facing establishment clause attacks on governmental action. See note 28 and accompanying text.

192. *McGowan*, 366 U.S. at 579 n.11 (Douglas, J., dissenting).

193. Id.

194. Id.

195. The *Marsh* Court itself recognized that "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees." *Marsh*, 463 U.S. at 790. Indeed, the Court has held unconstitutional racial segregation in public schools, *Brown v. Board of Education*, 347 U.S. 483 (1954), and school prayer, *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203 (1963); *Engel*, 370 U.S. at 421, both of which were widely accepted practices during a large portion of our nation's history.

legitimate practices that demonstrate the government's allegiance to a particular sect or creed.[196]

In addition, although a nonsectarian, proselytizing prayer can be viewed as a harmless historical exception to the Establishment Clause, legislative prohibitions on Sunday alcohol sales cannot be so characterized. Such laws go far beyond mere *pro forma* establishment by criminalizing behavior because it is considered to be incompatible with the religious values of the legislative majority. History alone cannot justify such a clear violation of the Establishment Clause.

VI. CONCLUSION

This Note endeavors to take a fresh look at the regulation of alcohol sales in light of the principles embraced in the Supreme Court's establishment clause jurisprudence. It attempts to establish that legislation restricting the sale of alcohol on Sunday or near churches is impermissibly driven by a religion-based perception of incompatibility between religion and the consumption of alcohol. Although it may be impossible to demonstrate conclusively that such laws are purposeful "establishments" of religion, this Note also—more convincingly, perhaps—tries to show that this legislation implicates the Establishment Clause through its effects.

The day-to-day impact of legislation restricting the sale of alcohol on Sundays or near churches is, for most of us, insignificant. After all, if one cannot purchase wine on Sunday, one need only plan ahead and buy it on Saturday instead. Likewise, if one cannot obtain beer at a store near a religious institution, one need only travel a short distance to purchase it at another establishment.

Nevertheless, such laws have an additional, more profound impact. These enactments tell us much about the relationship between religion and government in our nation. They send a strong message that those who hold certain religious beliefs enjoy preferred status in the eyes of the legislative majority. Sunday restrictions, for example, tell non-Christians that they are outsiders who must not offend the mores of the favored majority by purchasing alcohol during a time reserved for religious worship.

In an increasingly diverse nation, the potential for this type of legislation to cause division among us grows. Though the Framers

196. See *Allegheny*, 492 U.S. at 603-05 (noting that the history of our nation contains numerous examples of official acts endorsing Christianity, but stating that this heritage of discrimination against non-Christians has no place in establishment clause jurisprudence).

could not have envisioned the vast changes that have taken place over the last two centuries, they left us the tools necessary to preserve and protect the values upon which they created our nation. One of these core values is that, to the extent possible, religion and government must exist—and appear to exist—in separate spheres. This separation was intended by the Framers in part to protect against persecution and divisiveness based on religion. The Establishment Clause is one of the tools the Framers left us to protect against these evils. We must continue to interpret it to do so.

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