# GEORGE R.R. MARTIN'S FAITH MILITANT IN MODERN AMERICA[1]: THE ESTABLISHMENT CLAUSE AND A STATE'S ABILITY TO DELEGATE POLICING POWERS TO PRIVATE POLICE FORCES OPERATED BY RELIGIOUS INSTITUTIONS

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## INTRODUCTION

Since the very founding of the United States, the complex relationship between government and religion has troubled and concerned lawmakers.[2] The Establishment Clause of the First Amendment to the United States Constitution was one of the first attempts to help define and restrain the government's roles in that nexus.[3] Thomas Jefferson, in a letter praising the Establishment Clause, famously wrote that the clause "buil[t] a wall of separation between Church [and] State."[4] However, the extent of the protections that the Establishment Clause was intended to provide is unclear, and judges as well as legal scholars have struggled with interpreting the clause for years.[5] In a 2019 case discussing Establishment Clause jurisprudence, Justice Samuel Alito stated: "The Establishment Clause of the First Amendment provides that 'Congress shall make no law respecting an establishment of religion.' While the concept of a formally established church is straightforward, pinning down the meaning of a 'law respecting an establishment of religion' has proved to be a vexing problem."[6] In one

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[1] *See* GEORGE R.R. MARTIN, A FEAST FOR CROWS 601–03, 931–32 (Bantam Books 2014) (2005) (describing the reconstituted "Faith Militant"). In the fourth installment of his bestselling fantasy series, George R.R. Martin wrote about a character striking a deal with the head of a major religion that removed legal restrictions and allowed the religion to militarize its members. *Id.* The newly armed and unrestricted faithful, the Faith Militant, used the opportunity to begin enforcing law and order throughout the kingdom. *See generally id.*

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[2] *See* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 79 (2001).

[3] *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 14–15 (1998) (discussing the Establishment Clause's limitations on both state and federal governments after ratification).

[4] Letter from Thomas Jefferson to Danbury Baptist Ass'n (Jan. 1, 1802), in 8 THE WRITINGS OF THOMAS JEFFERSON, 113–14 (H.A. Washington ed., 1854).

[5] *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080–81 (2019) (indicating that the wording of the First Amendment created long-lasting interpretation issues).

[6] *Id.* at 2079–80.

of the first cases attempting to clarify the limitations of the Establishment Clause, *Everson v. Board of Education*, the United States Supreme Court asserted:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.[7]

While *Everson* helped establish a baseline notion of what the Establishment Clause meant to the courts, it did not give a clear answer for moving forward.[8] Rather, it has been necessary to develop tests and standards to help with case-by-case interpretations of the Establishment Clause as new challenges arise.[9]

When considering Establishment Clause issues, courts are often required to examine government actions or delegations of power.[10] One significant power that a government typically holds is the power to protect and police its citizens.[11] Despite the importance of police powers to both state and federal government, policing in the United States has not been immune to the growing trend of privatizing government responsibilities.[12] While the privatization of government functions in general has

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[7] Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947).

[8] *See id.* (stating the minimum of what the Court believes the Establishment Clause to mean).

[9] *See*, *e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (determining that since there was no bright-line rule, Establishment Clause interpretations should be made after weighing a series of factors developed by years of court rulings).

[10] *See, e.g.*, *Am. Legion*, 139 S. Ct. at 2079–80; *Lemon*, 403 U.S. at 612–13; *Everson*, 330 U.S. at 15–16.

[11] *See* M. Rhead Enion, Note, *Constitutional Limits on Private Policing and the State's Allocation of Force*, 59 DUKE L.J. 519, 523 (2009) (stating that one of the primary functions of collective government is to provide security in a way that individuals could not).

[12] *See* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1394–95 (2003) (discussing the major increase in interest in privatization of governmental powers and the ways in which governments can give those powers to private organizations); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1175 (1999) (detailing the major increase in private security and police forces in the United States).

raised some concerns, the specific delegation of police powers has definitely been accompanied by periods of controversy and hesitation.[13] While police force privatization continues to grow, concerns remain over how such a serious power and responsibility held by the government can be effectively and appropriately delegated to private organizations.[14]

In fact, constitutional concerns over the Establishment Clause and the delegation of police powers came to an intersection in a recent Alabama state law.[15] In a bill signed into law in June of 2019, the Alabama state legislature allowed the Briarwood Presbyterian Church, categorized as a megachurch, and its academic campus to create and maintain a police force.[16] The bill was drafted in response to the church's request,[17] which was originally presented to the Alabama state legislature several years earlier, but failed to garner the support necessary for approval twice.[18] In the original request, officials from Briarwood indicated that although they had private security in the form of off-duty police officers from neighboring police departments, the recent increase in school and church shootings led them to believe that actual church police officers were necessary for safety and security.[19] Despite the failure of the church's initial requests, its latest attempt was successful, and the Briarwood organizations, as well as a second private Christian school, now have the ability to create and maintain a private police force of trained and licensed officers.[20]

This new Alabama law creates a relationship between a religious organization and a traditionally governmental power that certainly raises the potential for Establishment

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[13] *See* Enion, *supra* note 11, at 538–41 (describing multiple periods of congressional concern stemming from private police enforcement of racist policies in the South after the Civil War, and misconduct in various labor disputes over the years).

[14] *See*, *e.g.*, Sklansky, *supra* note 12, at 1275 (highlighting the challenges that privatization of police forces might create for criminal procedure and private abuse).

[15] *See* Richard Gonzales, *New Alabama Law Permits Church to Hire Its Own Police Force*, NPR, https://www.npr.org/2019/06/20/734591147/new-alabama-law-permits-church-to-hire-its-own-police-force [https://perma.cc/4554-R5G3] (last updated June 21, 2019, 11:11 AM); Jasmine Hyman & Brian Ries, *An Alabama Megachurch Will Form Its Own Police Force After Passage of Controversial Law*, CNN, https://www.cnn.com/2019/06/21/politics/alabama-megachurch-police-force-trnd/index.html [https://perma.cc/2WTK-Z974] (last updated June 21, 2019, 5:02 PM); *Ivey Signs Law Allowing Church to Hire Police Force*, AP NEWS (June 19, 2019), https://www.apnews.com/c09feda825c441289bf14b996580dfc5 [https://perma.cc/C8YT-A9FS].

[16] *See* Gonzales, *supra* note 15; Hyman & Ries, *supra* note 15; AP NEWS, *supra* note 15.

[17] *See* Leada Gore, *Ivey Signs Law Allowing Briarwood Church, School, Madison Academy to Form Police Forces*, AL.COM, https://www.al.com/news/2019/06/ivey-signs-law-allowing-briarwood-church-school-madison-academy-to-form-police-forces.html [https://perma.cc/U7HA-ZXHP] (last updated June 21, 2019).

[18] *See* Hanno van der Bijl & Virginia Martin, *Briarwood Presbyterian Church Police Department Bill Died for Lack of Action in the Legislature*, BIRMINGHAMWATCH (May 20, 2017), https://birminghamwatch.org/briarwood-presbyterian-church-police-department-bill-died-for-lack-of-action-in-the-legislature/ [https://perma.cc/8JFT-RYSM].

[19] *See id.*

[20] *See* Hyman & Ries, *supra* note 15; Gore, *supra* note 17.

Clause questions.[21] The law generates two separate issues that concern Establishment Clause doctrine. First, would a police department established and maintained by a church violate the Establishment Clause? The second, and potentially more nuanced, question is: would a police department established and maintained by a religious academy violate the Establishment Clause? In order to answer both questions, this Note first briefly examines the history surrounding the Establishment Clause.[22] Next, it considers changing trends in who holds police powers.[23] Additionally, this Note touches on how courts have come to analyze Establishment Clause issues and the appropriate standards to apply.[24] Finally, it shows through analysis of the recently passed Alabama law that the Establishment Clause should bar Alabama from delegating police powers to the Briarwood Presbyterian Church, Briarwood Christian School, and Madison Academy.[25]

## I. THE HISTORY BEHIND THE FORMATION OF THE ESTABLISHMENT CLAUSE

When attempting to create the Bill of Rights, religious concerns weighed heavily upon the minds of the Framers.[26] Prior to that point, government and religion were frequently strongly intertwined.[27] For centuries in much of Europe, the Roman Catholic Church dominated religion and was enforced and supported by governments from the top all the way down to the local levels of government.[28] Likewise, secular rulers were often involved in the selection of the local Church hierarchy.[29] After the Protestant Reformation began, certain beliefs were no longer outright heretical, and government selection and enforcement of religion became even more involved.[30] During the reign of the Holy Roman Empire, the Peace of Augsburg left the determination of the region's religion up to the ruler of that particular area.[31] In England, Henry VIII used acts of Parliament to officially establish a new Protestant religion.[32]

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[21] *See* Gonzales, *supra* note 15; Hyman & Ries, *supra* note 15; AP NEWS, *supra* note 15.

[22] *See infra* Part I.

[23] *See infra* Part II.

[24] *See infra* Part III.

[25] *See infra* Part IV.

[26] *See* LEVY, *supra* note 2, at 79 ("Although the Framers of the Bill of Rights did not rank the rights in order of importance, some are more precious than others. A right that has no superior is the first mentioned: freedom from a law respecting an establishment of religion.").

[27] *See* KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 18 (2008) ("In Western civilization through most of the eighteenth century, governments with official religions restricted the free exercise of nonmembers.").

[28] *See id.*

[29] *See id.*

[30] *See id.*

[31] *See* Sascha O. Becker et al., *Causes and Consequences of the Protestant Reformation*, ESI WORKING PAPERS 2016, at 29–30 ("At Augsburg, the Imperial Diet famously agreed on the principle of 'whose rule, his religion' (*cuius regio, eius religio*) whereby local rulers decided the religious affiliation on behalf of their citizens.").

[32] *See id.* at 34.

In doing so, Henry VIII severed the old legitimacy of rule coming from the Church, and subjugated the new Protestant church under the control of the English Parliament.[33]

Changes in religious power structures led to various conflicts[34] and lengthy periods of government persecution, which often alternated between which group was being tormented.[35] In England specifically, the people saw various degrees of government persecution change drastically upon the ascension of three different monarchs in a row.[36] Henry VIII established changes to Catholicism and created a new church, but continued some degree of persecution against certain Protestants.[37] His son, Edward VI, was able to stop some of those persecutions, and instead Catholics in certain areas began to be jailed.[38] Finally, Edward's successor, Mary I, returned Catholicism in force, and persecution of Protestants recommenced.[39] These practices of persecution would continue and fluctuate for many years to come,[40] which certainly weighed heavily upon the minds of the Framers of the Constitution and the Bill of Rights.[41]

The fact that the new constitution remained silent on connections between religion and government was a substantial issue for many of the Framers.[42] The absence of certain guarantees, such as a guarantee against the establishment of religion, prompted certain delegates and states to require the formation of a promise, "characterized . . . as a 'Gentlemen's Agreement,'" to address the issues later, without which the Constitution likely would not have been ratified.[43] Indeed, the very discussions in Congress surrounding the passage of the Bill of Rights show the degree of importance that the legislature afforded the First Amendment and the degree of disagreement

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[33] *See id.* (discussing how Henry VIII tied the new Church to the power of his government).

[34] *See generally, e.g.*, *id.*, at 4, 7, 13 (discussing broadly some of the Reformation-based conflicts that occurred in the Holy Roman Empire).

[35] *See, e.g.*, CHRISTOPHER HAIGH, ENGLISH REFORMATIONS: RELIGION, POLITICS, AND SOCIETY UNDER THE TUDORS 187 (1993) (explaining persecutions under Henry VIII of Protestants deemed heretical, and how under Edward VI Protestant persecution declined and Catholics were jailed); GEOFFERY TREASURE, THE HUGUENOTS 3 (2013) (describing how French Protestants were persecuted, "[w]ith varying degrees of intensity and periods of remission . . . from the start").

[36] *See infra* notes 37–40 and accompanying text.

[37] *See* HAIGH, *supra* note 35, at 105.

[38] *See id.* at 187.

[39] *See id.* at 205–08.

[40] *See id.*

[41] *See* GREENAWALT, *supra* note 27, at 19 (discussing how persecution continued and remained despite the Toleration Act of 1689 and how laws prohibiting Catholicism and Judaism remained until the nineteenth century).

[42] *See* LEVY, *supra* note 2, at 80 ("The clause was added to the Constitution because the unamended text not only placed religious liberty in jeopardy; it seemed to allow for the implication that Congress might exercise powers not prohibited and might, therefore, create an establishment of religion . . . .").

[43] *See* Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73, 83–84 (2005).

that was present.[44] On June 8, 1789, James Madison originally proposed to the House of Representatives that there be an amendment reading, "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed."[45] By the end of July, the debate shifted to consider the language of: "No religion shall be established by law, nor shall the equal rights of conscience be infringed."[46] While multiple alternative versions of language were proposed over the debate period, Madison fought to ensure that the Amendment did not simply prohibit the establishment of a national religion, but rather that the government would not establish nor support a religion in any capacity.[47]

Although it took many years to reach the Supreme Court in debate, the *Everson* Court looked back to the history of these discussions, and seemingly sided with Madison, declaring that the Establishment Clause of the First Amendment prohibited governments from passing any laws that could "aid" or "prefer" any religion.[48] Despite continued disagreement in the courts about the exact meaning of the Establishment Clause's wording,[49] the lessons of history and fears of the Framers surely indicate the continued importance of the Clause's protections.[50]

## II. GOVERNMENT DELEGATION OF POLICE POWERS

One of the ways in which the courts have determined that states or the federal government can violate the Establishment Clause is through the delegation of powers that are typically held by a government actor.[51] This presents a potential problem, as there is a currently growing trend of delegating government powers to private actors.[52] When delegating government powers to private actors, some of the constitutional

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[44] *See generally* NEIL H. COGAN, THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, [AND] ORIGINS 1–13 (2d ed. 2015) (detailing the floor debates in the House of Representatives and the Senate, as well as input from various states, on the drafting of what would become the First Amendment).

[45] *Id.* at 1.

[46] *Id.* at 2.

[47] *See* LEVY, *supra* note 2, at 85.

[48] 330 U.S. 1, 15–16 (1947); *see also* COGAN, *supra* note 44, at 1.

[49] *See*, *e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2079–80 (2019) (indicating that the wording of the First Amendment created long-lasting interpretation issues).

[50] *See supra* Part I.

[51] *See*, *e.g.*, Bd. of Educ. v. Grumet, 512 U.S. 687, 699 (1994) ("Where 'fusion' is an issue, the difference lies in the distinction between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority.").

[52] Metzger, *supra* note 12, at 1369 ("Privatization is now virtually a national obsession. Hardly any domestic policy issue remains untouched by disputes over the scope of private participation in government . . . .").

restraints and protections associated with the action can be removed.[53] The potential "undermin[ing] [of] constitutional accountability"[54] by delegation is troubling in any field, but should particularly concern American citizens when it applies to the delegation of powers that are critical to their personal liberties, such as police powers.[55]

The growing trend in the privatization of government powers has certainly not skipped police powers.[56] A massive number of private actors and agencies now employ private police forces.[57] In fact, an article from over twenty years ago noted that, "[t]he private security industry already employs significantly more guards, patrol personnel, and detectives than the federal, state, and local governments combined, and the disparity is growing."[58] Unlike some of the other recent trends in privatizing government powers, the delegation of police powers to private actors is not a new practice.[59] However, the lengthy history of the private exercise of police powers can provide multiple reasons for caution and concern.[60]

Police powers are, at least to some degree, consistently historically linked to government actors.[61] Prior to the American colonial age, police powers in England were held firmly by royalty.[62] As far back as 1285, English kings created a system of sheriffs to serve as formal wielders of the sovereign's power to police.[63] During the founding of the United States, theories of the state advocated that the government should have "certain responsibilities that, by their collective nature, cannot be left solely to the individual."[64] Chief among those responsibilities would be collective security.[65] Yet, almost from the very beginning, American law enforcement included elements of "private detective agencies and watchmen services."[66] While these private police actors provided protection in areas where public police forces were slow to take root, they also frequently raised scandals and concerns.[67] In the early days of American policing, private forces drew negative attention by maintaining relationships with

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[53] *See id.* at 1369–70.

[54] *Id.* at 1377.

[55] *See id.* at 1377, 1380.

[56] *See*, *e.g.*, Elizabeth E. Joh, *The Forgotten Threat: Private Policing and the State*, 13 IND. J. GLOB. LEGAL STUD. 357, 358 (2006) ("What do Disneyland, the Abu Ghraib U.S. military prison, the Mall of America, and the Y-12 nuclear security complex in Oak Ridge, Tennessee have in common? . . . [E]ach employs private police.").

[57] *See id.*

[58] Sklansky, *supra* note 12, at 1168.

[59] *See* Enion, *supra* note 11, at 521 (discussing how "throughout history and into today, states have relied on a mix of public and private organizations to supply force").

[60] *See infra* notes 62–72 and accompanying text.

[61] *See* Enion, *supra* note 11, at 524.

[62] *See id.* at 529.

[63] *See id.* at 531–32.

[64] *Id.* at 523.

[65] *See id.*

[66] Joh, *supra* note 56, at 360–61.

[67] *See infra* notes 68–73 and accompanying text.

criminals and using "questionable methods" to gain information or silence complaints.[68] Additionally, the reputation of private police agencies suffered even more during the late nineteenth century when they were frequently used as labor enforcers.[69] Agencies like the Pinkertons were used as "strike guards, 'scabs' (substitute workers), undercover agents, and 'strike missionaries.'"[70] Criticism for private police force usage as labor enforcers reached a peak in 1892 when mistaken identities led to a shootout between workers and Pinkerton guards, leaving ten people dead.[71] After this, congressional hearings were called to address the concerning practices of private policing.[72]

Despite widespread criticism and condemnation from Congress in the late nineteenth century,[73] private policing has continued to play a major role in the United States.[74] The likely reason that private police forces survived, despite heavy criticism, was a shift to filling more cooperative, guard-like roles.[75] As public police forces shifted from "preventive patrol" to "detection and apprehension," private police forces began to take the exact opposite approach, creating a mirrored switch in roles.[76] In this process, private police forces seemingly assumed a partnership with public police forces, to fill necessary and vacated roles.[77]

However, in order for private police to serve a cooperative role with public police, they must have some form of authorization for their ability to act.[78] In some cases, typically including university police, the delegation of power occurs by statute.[79] Yet, there is often significant variance amongst these state statutes,[80] and some delegations only grant private police "the search and arrest powers of ordinary citizens."[81] This is not typically the case, however, and in many scenarios, "private

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[68] Joh, *supra* note 56, at 362–64.

[69] *Id.* at 364.

[70] *Id.*

[71] *See id.* at 365.

[72] *Id.* at 366.

[73] *Id.*

[74] *See id.* at 368 (discussing how the next few decades after the Homestead riot were actually considered "a 'golden age' of the private police").

[75] *See* Sklansky, *supra* note 12, at 1220 ("Some of what looked like retreat, however, was actually redeployment: Pinkerton and its rivals were turning from detective firms that also provided guards into security guard companies that offered detective services on the side.").

[76] *See id.*

[77] *See* Joh, *supra* note 56, at 376–77 (explaining how, after federal studies, some scholars theorized that private police forces served as partial or potentially full partners to public police).

[78] *See* Enion, *supra* note 11, at 526–27 (discussing the various roles in which private police forces may exercise policing powers, and what powers governments must grant them in order for them to do so).

[79] *See* Leigh J. Jahnig, *Under School Colors: Private University Police as State Actors Under § 1983*, 110 NW. U. L. REV. 249, 250 (2015) (explaining how university police are often granted their policing powers by state statute).

[80] *Id.*

[81] Sklansky, *supra* note 12, at 1183.

guards . . . are 'deputized' or otherwise given full or partial police powers by state or local enactment."[82]

Given the historical ties that policing powers have to sovereigns,[83] and serious examples of past abuse of private police authority,[84] governments should consider the allocation of policing powers to be a very serious delegation. While the levels of power delegated seem to vary, caution seems especially prudent in cases where higher levels of power, such as the authority to make arrests and seizures, have been delegated.[85] When considering the police force authorized by Alabama House Bill 309, it is certain that the force would be a private police force, and would be granted at least partial police powers, such as the authority to make arrests.[86] Therefore, Alabama's delegation of police powers to a private force should warrant a careful consideration of the potential impacts, including potential constitutional issues.[87]

## III. CONSTITUTIONAL ANALYSIS OF ESTABLISHMENT CLAUSE ISSUES

As the Supreme Court has pointed out, interpreting the Establishment Clause "has proved to be a vexing problem" for many decades now.[88] While the Establishment Clause was first applied to the states with the Fourteenth Amendment,[89] *Everson v. Board of Education* was the first case to attempt to examine that application in 1947.[90] In *Everson*, the Court attempted to set out the minimum boundaries of what the Establishment Clause should mean, while acknowledging a history of "broad interpretation" of the clause.[91] Several years later, the Court in *Walz v. Tax Commission* referenced the Court's earlier discussion of the history of the Establishment Clause in *Everson*, and stated that it was "sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."[92] Finally, just a year later in 1971, the Supreme Court compiled the doctrine from *Everson*, *Walz*, and other First Amendment cases[93] from the

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[82] *Id.* at 1183–84.

[83] *See supra* notes 62–65 and accompanying text.

[84] *See supra* notes 68–71 and accompanying text.

[85] *See supra* notes 78–82 and accompanying text.

[86] *See* H.B. 309, 2019 Leg., Reg. Sess. (Ala. 2019) (allowing the Briarwood Presbyterian Church, its religious academy, and the religious Madison Academy the power to employ their own police force with the power to make arrests and carry non-lethal weapons).

[87] *See* Ala. H.B. 309.

[88] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2079–80 (2019).

[89] *See id.* at 2096 n.2 (Thomas, J., concurring) (citing Town of Greece v. Galloway, 572 U.S. 565, 607, 609–10 (2014)).

[90] *See id.* at 2080.

[91] 330 U.S. 1, 14–16 (1947).

[92] 397 U.S. 664, 667–68 (1970).

[93] *See* Lemon v. Kurtzman, 403 U.S. 602, 612–14 (1971) (discussing other cases such as

intervening years in an attempt to make a single multi-factor test that could be applied to all Establishment Clause issues: the *Lemon* test.[94]

### *A. The* Lemon *Test*

The Supreme Court in *Lemon v. Kurtzman* was presented with two state statutes, one from Pennsylvania and one from Rhode Island, that "provid[ed] state aid to church-related elementary and secondary schools."[95] In determining the constitutionality of the state statutes when pitted against the Establishment Clause, the Court lamented the vagueness of the Establishment Clause's language stating, "[t]he language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment."[96] Particularly troublesome for the Court was the Amendment's use of the language: "[N]o law respecting an establishment of religion."[97] The Court discussed the difficulty of including the word "respecting," asserting:

> A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.[98]

In order to handle the ambiguity of the Establishment Clause's language, the Court created a three-pronged test that could be applied to all Establishment Clause cases in order to show infringement on the three areas of constitutional protection denoted by the *Walz* Court.[99] The first prong is intended to test whether the statute in question "ha[s] a secular legislative purpose."[100] The second prong is to determine whether that statute's "principal or primary effect . . . advances [or] inhibits religion."[101] Finally,

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Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968); Zorach v. Clauson, 343 U.S. 306, 312 (1952); and Sherbert v. Verner, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting)).

[94] *See id.* at 611–13 (discussing the three tests, compiled from previous court cases, which should be applied to test Establishment Clause issues).

[95] *Id.* at 606.

[96] *Id.* at 612.

[97] *See id.* (citing U.S. CONST. amend. I, cl. 1).

[98] *Id.*

[99] *See id.* at 612–13.

[100] *Id.* at 612.

[101] *Id.*

the third prong is meant to test whether the statute would "foster 'an excessive government entanglement with religion.'"[102] Ultimately, while acknowledging that total separation of church and state is not required or completely possible,[103] the *Lemon* Court found both Rhode Island and Pennsylvania's statutes to be unconstitutional as they failed the third prong of the test and created excessive governmental and religious entanglement.[104]

The test created in *Lemon v. Kurtzman* became the standard for future courts to apply in all Establishment Clause cases.[105] Several subsequent cases applied the test both to uphold and invalidate various state statutes.[106] In *Stone v. Graham*, the Court applied the *Lemon* test to a Kentucky statute that required a list of the Ten Commandments be posted on the wall of every public classroom in the state.[107] The Court invalidated the statute, stating that it failed the first prong of the *Lemon* test, as it did not have a secular legislative purpose.[108] In *Mueller v. Allen*, the Supreme Court was presented with a Minnesota statute that provided a tax break for expenses spent on child education.[109] The petitioners challenged the statute on the basis that it essentially provided a tax break to parents who chose to pay for their children to go to primarily religious elementary and secondary schools.[110] After applying the *Lemon* test, the Court determined that the statute passed all three prongs of the test and was constitutional.[111] As a final example, the Court used the *Lemon* test to analyze a Louisiana statute which required that if evolutionary science was taught in public schools, it could only be taught in tandem with "creation science."[112] The Court found that such a statute could not have a proper secular purpose, and that after the statute failed the first prong of the *Lemon* test, analysis of the other two prongs was unnecessary.[113]

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[102] *Id.* at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

[103] *Id.* at 614.

[104] *See id.* at 625.

[105] *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 582–83 (1987) ("The Establishment Clause forbids the enactment of any law 'respecting an establishment of religion.' The Court has applied a three-pronged test to determine whether legislation comports with the Establishment Clause.") (footnote omitted); Mueller v. Allen, 463 U.S. 388, 394 (1983) (citation omitted) ("The general nature of our inquiry in this area has been guided, since the decision in *Lemon v. Kurtzman*, by the 'three-part' test laid down in that case . . . ."); Stone v. Graham, 449 U.S. 39, 40 (1980) (per curiam) ("This Court has announced a three-part test for determining whether a challenged state statute is permissible under the Establishment Clause of the United States Constitution . . . .").

[106] *See, e.g.*, *infra* notes 107–13 and accompanying text.

[107] *Stone*, 449 U.S. at 39.

[108] *See id.* at 42–43.

[109] *Mueller*, 463 U.S. at 390.

[110] *See id.* at 391–92.

[111] *See id.* at 395–96, 403.

[112] Edwards v. Aguillard, 482 U.S. 578, 581 (1987).

[113] *See id.* at 587, 597.

*B. Shifts in the Establishment Clause Analysis*

Despite the numerous cases in which the *Lemon* test has been applied, it is certainly not without criticism.[114] Shortly after the creation of the *Lemon* test, in an opinion that was very supportive of *Lemon*, the Court specified that the tests developed in *Lemon* "must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired."[115] In *Marsh v. Chambers*, the Supreme Court was asked to consider the Nebraska legislature's practice of opening each day in session with a prayer from a chaplain who is paid with state funds.[116] The Eighth Circuit Court of Appeals applied the *Lemon* test and found that the practice violated all three prongs of the test.[117] However, the Supreme Court reversed the Eighth Circuit's opinion without mentioning a single concern raised by the *Lemon* test.[118] Instead, the Court relied entirely upon history, tradition, and original intent.[119]

Although the Court in *Marsh* simply ignored the *Lemon* test, the Court in *Zobrest v. Catalina Foothills School District* used part of the same logic employed by the test, without ever referencing it.[120] In *Zobrest*, the Court examined whether the Establishment Clause would bar a school district from providing a sign-language interpreter to a student at a private Catholic school.[121] The Ninth Circuit Court of Appeals determined that providing the interpreter in this scenario would violate the Establishment Clause based on the second prong of the *Lemon* test.[122] The Supreme Court reversed the Ninth Circuit's opinion, but never discussed the *Lemon* test in its opinion.[123] The decision in *Zobrest*, with a discussion of the *Lemon* test absent, came just a few days after Scalia's blistering criticism of the *Lemon* test in *Lamb's Chapel v. Center Moriches Union Free School District*.[124] In his concurring opinion in *Lamb's Chapel*, Scalia described the *Lemon* test as being like a "ghoul in a late-night horror

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[114] *See infra* notes 115–19 and accompanying text.

[115] *See* Meek v. Pittenger, 421 U.S. 349, 359 (1975), *overruled in part by* Mitchell v. Helms, 530 U.S. 793, 836 (2000).

[116] 463 U.S. 783, 784–85 (1983).

[117] *Id.* at 785–86.

[118] *See id.* at 792–93 (stating that the factors which the respondent suggested, and the Eighth Circuit found, would violate the Establishment Clause were not sufficient to invalidate the practice when "[w]eighed against the historical background").

[119] *See id.* at 786, 790.

[120] 509 U.S. 1, 12–13 (1993) (finding that the effect of the action in question would not provide a benefit or advance the religious school in any meaningful way, but not mentioning the second prong of the *Lemon* test in the process).

[121] *Id.* at 3.

[122] *Id.* at 3, 5.

[123] *See id.* at 12–13 (finding the action constitutional without discussing the *Lemon* test).

[124] *See* 508 U.S. 384, 399 (1993) (Scalia, J., concurring) (decided on June 7). *See generally Zobrest*, 509 U.S. 1 (decided on June 18).

movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried."[125] Additionally, Scalia criticized that "[w]hen we wish to strike down a practice [the *Lemon* test] forbids, we invoke it . . . when we wish to uphold a practice it forbids, we ignore it entirely."[126]

### *C. Current State of the Establishment Clause Analysis*

Despite being intermittently ignored and receiving criticism, the *Lemon* test has remained valid, and the Court even expressly refused to abandon the test in its 2005 decision of *McCreary County v. American Civil Liberties Union*.[127] However, after multiple new faces joined the Court, the decision of *American Legion v. American Humanist Association* seriously calls into question the status of the *Lemon* test.[128] In *American Legion*, the Court acknowledged its own usage of the *Lemon* test, but pointed out the difficulties and contradictory opinions that have arisen under the test.[129] Given the challenges that the *Lemon* test faces, the plurality of the Court determined that the *Lemon* test should no longer apply to cases "that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations."[130] Instead, the Court essentially indicated that decisions should be based on history and tradition in these scenarios.[131] In fact, the Court stated that the appropriate modern approach that the Court later took was "a more modest approach that focuses on the particular issue at hand and looks to history for guidance."[132]

Although the plurality decision criticized *Lemon*'s usage in some situations, the concurring opinions were far harsher in their discussion of the test.[133] Justice Kavanaugh would see the limitations on the *Lemon* test expanded to all Establishment Clause inquiries, effectively invalidating the test.[134] Justice Thomas indicated that he approved of the plurality's limitation of the *Lemon* test, but "would take the logical next step and overrule the *Lemon* test in all contexts."[135] Finally, Justice Gorsuch stated that he believed the *Lemon* test to now be "shelved."[136]

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[125] *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring).
[126] *Id.* at 399 (citations omitted).
[127] *See* 545 U.S. 844, 861 (2005).
[128] *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019).
[129] *Id.* ("As Establishment Clause cases involving a great array of laws and practices came to the Court, it became more and more apparent that the *Lemon* test could not resolve them.").
[130] *Id.* at 2081.
[131] *See id.* at 2081–82.
[132] *Id.* at 2087.
[133] *See id.* at 2091–2103.
[134] *See id.* at 2091–93 (Kavanaugh, J., concurring).
[135] *Id.* at 2097 (Thomas, J., concurring).
[136] *Id.* at 2102 (Gorsuch, J., concurring).

While the decision of *American Legion* calls many aspects of the *Lemon* test into question, the plurality's decision did not touch on the type of Establishment Clause issue that the delegation of police powers to a religious institution or academy would have.[137] In fact, such a relationship would likely fall under the proposed miscellaneous category of Establishment Clause interactions that the Court discussed.[138] Therefore, while it is clear that the modern Supreme Court favors history, tradition, and precedent in Establishment Clause analysis,[139] the *Lemon* test factors will still likely be helpful in analyzing the specific type of interactions that would be involved in the delegation of police powers to a religious institution or academy.[140]

## IV. ESTABLISHMENT CLAUSE CHALLENGES TO THE STATE ALLOCATION OF POLICING POWERS TO PRIVATE POLICE FORCES OPERATED BY RELIGIOUS INSTITUTIONS

In passing Alabama House Bill 309, the legislature amended section 16-22-1 of the Alabama Code to include, "Madison Academy, and Briarwood Presbyterian Church and its integrated auxiliary Briarwood Christian School" into the list of colleges and universities which were previously allowed to employ private police forces.[141] While the situation is not entirely unique,[142] the idea that any of these organizations might create their own private police force creates a novel interplay between government power and religion. Given the nature of police powers and churches, the Establishment Clause should bar Alabama from delegating police powers to the Briarwood Presbyterian Church. While the nature of religious academies may be somewhat different depending on the specific situation, the Establishment Clause should likely also bar Alabama from delegating police powers to the Briarwood Christian School and Madison Academy.

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[137] *See id.* at 2081–82 (discussing the areas where the *Lemon* test should no longer apply).

[138] *Id.* at 2081 n.16 (citations omitted) ("A final, miscellaneous category, including cases involving such issues as Sunday closing laws and church involvement in governmental decision making might be added.").

[139] *See id.* at 2087 (discussing a modern case-by-case approach to Establishment Clause issues that is rooted in history, traditions, and precedent).

[140] *See id.* at 2094 (Kagan, J., concurring) (indicating that purpose and effect, essentially the first and second prongs of the *Lemon* test, are still very important to considering government action in Establishment Clause scenarios); McCreary Cty. v. Am. Civil Liberties Union, 545 U.S. 844, 863–64 (2005) (explaining that the purpose prong of the *Lemon* test should not, and would not, be abandoned); Agostini v. Felton, 521 U.S. 203, 232 (1997) (discussing the fact that factors for the effect, or second prong, of the *Lemon* test are often the same and might be combined with factors of excessive government entanglement, or the third prong of the test).

[141] ALA. CODE § 16-22-1 (2019); H.B. 309, 2019 Leg., Reg. Sess. (Ala. 2019).

[142] *See* Enion, *supra* note 11, at 526–27.

*A. The Delegation of Police Powers to a Church or Religious Institution: Briarwood Presbyterian Church*

1. The *Lemon* Test Factors

When considering if delegating the Briarwood Presbyterian Church the power to create its own police force would violate the Establishment Clause, the *Lemon* test should be considered.[143] The first prong of the *Lemon* test asks whether the questioned statute has a secular legislative purpose.[144] Alabama House Bill 309 was proposed and enacted at the request of the Briarwood Presbyterian Church for the stated purpose of providing better safety and security.[145] When discussing their initial request to the Alabama State Legislature, officials of the church claimed that they were concerned by a perceived increase of violence in school and church settings.[146] Specifically, church administrators mentioned concerns over the Sandy Hook school shooting and "similar assaults at churches and schools."[147] Church administrators claimed that the church's large size and congregation created a need for protection that was greater than private security could provide.[148]

Given valid concerns of safety, the amendments to Alabama House Bill 309 could likely be shown to have a secular purpose. While the Court in *McCreary County* reaffirmed the validity of the first prong of the *Lemon* test, it also acknowledged that the Supreme Court had only "found government action motivated by an illegitimate purpose" four times since the *Lemon* test was created.[149] The specific nature of the statute, which intends to provide and allow for police protections, suggests a strong secular purpose, even when applied to a church.[150]

The second and third prongs of the *Lemon* test attempt to determine the effect of the statute on enhancing or inhibiting religion and the level of government entanglement that occurs as a result.[151] Examination of these elements requires analysis of the "character" and purpose of the receiving organization.[152] Additionally, the Court has asked if the effects of the statute constitute the endorsement of one religion over another.[153]

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[143] *See generally* Lemon v. Kurtzman, 403 U.S. 602 (1971).

[144] *Id.* at 612 (1971).

[145] Gore, *supra* note 17.

[146] Van der Bijl & Martin, *supra* note 18.

[147] *Id.*

[148] *See id.*

[149] McCreary Cty. v. Am. Civil Liberties Union, 545 U.S. 844, 859 (2005).

[150] *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); Van der Bijl & Martin, *supra* note 18.

[151] *See* Agostini v. Felton, 521 U.S. 203, 232–33 (1997) (discussing the relationship between the second and third prongs of the *Lemon* test and indicating that government entanglement is excessive when it serves to enhance or inhibit religion); *Lemon*, 403 U.S. at 612–13 (establishing and discussing the second and third prongs of the *Lemon* test).

[152] *See Agostini*, 521 U.S. at 232–33; *Lemon*, 403 U.S. at 615.

[153] *See* Cty. of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573, 596–97 (1989).

Although the Court has drawn conflicting conclusions from *Lemon* test factors in the past,[154] surely Alabama's delegation of police powers to the Briarwood Presbyterian Church cannot pass either of these prongs or elements of the *Lemon* test.[155] When discussing the character of the receiving organization, it is difficult to be more directly connected to religion than a church. Unlike the statutes at question in *Lemon*, which provided financial assistance to teachers at non-public elementary and secondary schools,[156] here, Briarwood Presbyterian Church would be directly receiving assistance from the government.[157] Although the church is not receiving financial assistance, the fact that Briarwood is receiving the delegation of a state power is even more concerning for an analysis of effect and excessive entanglement.[158] In *County of Allegheny v. American Civil Liberties Union*, the Court highlighted the idea that the effects of a statute could indicate what amounted to a government endorsement of one religious group to the exclusion of others.[159] In the amendments made by Alabama House Bill 309, the Briarwood Presbyterian Church is the only church or religious institution, besides the two Christian religious academies, to be granted the authority to create and maintain a police force.[160]

The exercise of police powers is a major state responsibility and a role that was historically held exclusively by the controlling sovereign power.[161] While private security forces have somewhat lessened that historical role, the delegation of actual police powers, i.e., the power to arrest and detain citizens, is still closely managed.[162] To grant that power to one specific religious entity, Briarwood Presbyterian Church, screams excessive government entanglement.[163] To any onlookers of other religions or religious groups, it is clear that the Alabama state government has granted one Christian church some of its reserved powers, and it would be difficult to say that the grant of such an important power did not indicate a government endorsement.[164]

2. History and Precedent

While the plurality and concurring justices in *American Legion v. American Humanist Association* stressed an Establishment Clause analysis based on history,

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[154] *See supra* Section III.A.
[155] *See Lemon*, 403 U.S. at 612–13, 615.
[156] *Id.* at 606.
[157] *See* H.B. 309, 2019 Leg., Reg. Sess. (Ala. 2019).
[158] *See id.*; *see also Lemon*, 403 U.S. at 612–13.
[159] 492 U.S. 573, 596–97 (1989).
[160] Ala. H.B. 309.
[161] *See* Enion, *supra* note 11, at 523.
[162] *See id.* at 523–24 (discussing the spread of private security forces and some other ways in which police powers are being privatized).
[163] *See Lemon*, 403 U.S. at 613.
[164] *See Cty. of Allegheny*, 492 U.S. at 597.

tradition, and precedent,[165] *Lemon* test factors may still be particularly relevant in the present scenario due to a general lack of both sets of factors discussed by the *American Legion* Court.[166] In fact, outside of one other possible exception at the National Cathedral in Washington, D.C., there does not appear to be any other instances of a church-run police force in the United States.[167] As such, it would likely be rather difficult to try to determine the historical perspective of the relationship. However, in terms of precedent, there are two other Establishment Clause cases in which the Supreme Court dealt with the state delegation of power to a religious organization.[168]

In a footnote to Justice Alito's opinion for *American Legion*, Alito suggested that Establishment Clause issues can be roughly categorized into six, possibly seven categories.[169] The potential seventh category, in Alito's mind, would constitute a "miscellaneous category," notably including issues centering around "church involvement in governmental decisionmaking."[170] The Supreme Court has previously dealt with "church involvement in governmental decisionmaking" Establishment Clause issues in *Board of Education of Kiryas Joel Village School District v. Grumet* and *Larkin v. Grendel's Den, Inc.*[171] Since a portion of the new Alabama law in question gives a church the power to make decisions regarding the use and manner in which police powers are applied, that issue is likely best examined as an extension of "church involvement in governmental decisionmaking."[172] Therefore, if the courts were to analyze this Establishment Clause issue without the *Lemon* test, they would most likely rely heavily upon the precedent and any traditions identified and established in *Grumet* and *Larkin*.[173]

In *Grumet*, the New York state government allowed "a religious enclave of Satmar Hasidim, practitioners of a strict form of Judaism," to form their own school district to better suit the specific needs of the religious community.[174] Prior to amendments to the New York law, the enclave fell within part of the jurisdiction of a larger school district.[175] However, children of the village almost exclusively attended private religious schools.[176] Ultimately, concerns over obtaining state funding and resources for services

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[165] *See* 139 S. Ct. 2067, 2081–83, 2087 (2019) (stating that the Court should analyze their case with history and tradition in mind, and citing precedent that successfully did so).

[166] *See generally id.*

[167] Van der Bijl & Martin, *supra* note 18.

[168] *See generally* Bd. of Educ. v. Grumet, 512 U.S. 687 (1994); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).

[169] *Am. Legion*, 139 S. Ct. at 2081 n.16.

[170] *Id.* at 2081 n.16.

[171] *Id.* at 2081 n.16 (citing *Grumet*, 512 U.S. 687; *Larkin*, 459 U.S. 116).

[172] *Id.*

[173] *See Grumet*, 512 U.S. at 687–88; *Larkin*, 459 U.S. at 116.

[174] *Grumet*, 512 U.S. at 690.

[175] *Id.*

[176] *Id.* at 693 ("By 1989, only one child from Kiryas Joel was attending Monroe-Woodbury's public schools . . . .").

aiding children with disabilities led the New York government to pass a bill carving out a unique school district matching the boundaries of the religious enclave.[177] In doing so, the state gave Kiryas Joel Village the power to create "a locally elected board of education," which would in turn be empowered to "take such action as opening schools and closing them, hiring teachers, prescribing textbooks, establishing disciplinary rules, and raising property taxes to fund operations."[178]

In determining Establishment Clause issues for *Grumet*, the lower courts relied upon the factors established in *Lemon*; however, the Supreme Court focused on elements established by *Larkin v. Grendel's Den, Inc.*[179] *Larkin* presented the Court with a scenario in which Massachusetts churches and schools were given what amounted to veto powers over applications for liquor licenses from businesses within a certain distance from the church or school.[180] The Court found this particular Establishment Clause issue to be fairly clear-cut and severe.[181] Chief Justice Burger stated in his opinion for the eight-to-one Court that, "[t]he challenged statute thus enmeshes churches in the processes of government and . . . . [o]rdinary human experience and a long line of cases teach that few entanglements could be more offensive to the spirit of the Constitution."[182] Additionally, Justice Souter later commented in *Grumet* that, "*Larkin* presented an example of united civic and religious authority, an establishment rarely found in such straightforward form in modern America."[183]

While the Court applied the *Lemon* test in its Establishment Clause analysis in *Larkin*, it also identified other considerations unique to this particular scenario.[184] Most importantly, *Larkin* flagged the difficulty of having a power delegated to a religious organization without clear limitations or standards.[185] Since the Court had not had a chance to deal with an Establishment Clause issue concerning the delegation of an important governmental power, they were especially disturbed that the state gave the power without setting clear limitations or rules.[186] The *Larkin* Court held this as informative of the second prong of the *Lemon* test, yet the Court in *Grumet* used the same logic without specific reference to the *Lemon* test.[187] In *Grumet*, the Court shared

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[177] *See id.*

[178] *Id.*

[179] *See id.* at 703–04, 707 (discussing some of the factors that the Court in *Larkin* examined, and the similarities between the fact-patterns of the cases).

[180] Larkin v. Grendel's Den, Inc., 459 U.S. 116, 117 (1982).

[181] *See id.* at 123–24.

[182] *Id.* at 127.

[183] *Grumet*, 512 U.S. at 697.

[184] *See Larkin*, 459 U.S. at 125–26 (stating the three prongs of the *Lemon* test, but also discussing considerations of delegating state powers to a religious institution and delegations of power without clear standards or rules).

[185] *See id.* at 125.

[186] *Id.* ("The churches' power under the statute is standardless, calling for no reasons, findings, or reasoned conclusions.").

[187] *See Grumet*, 512 U.S. at 703–04 (reviewing the relevant factors, and the elements

*Larkin*'s concern about a power grant that lacked standards, but was more concerned with the state's, rather than the religious group's, actions.[188] The manner in which the state of New York granted some of its governmental powers to the Kiryas Joel Village made judicial review of the action very difficult and gave no standards or guarantees "that the next similarly situated group seeking a school district of its own will receive one."[189] Therefore, despite looking at different parties, both *Grumet* and *Larkin* found that statutes granting major governmental powers to a religious group violated the Establishment Clause, in part due to a lack of clear standards or guarantees that the delegated powers would be given or used in a religiously neutral fashion.[190]

If the courts would find the proposed amendments of Alabama House Bill 309 created a delegation of important governmental power or "church involvement in governmental decisionmaking,"[191] then *Grumet* and *Larkin* both suggest that the new version of the Alabama law would be unconstitutional.[192] In *Grumet*, the Court stated that the delegation of the power to create and manage a school district "delegates a power this Court has said 'ranks at the very apex of the function of a State.'"[193] *Larkin* went even further, suggesting that "the statute, by delegating a governmental power to religious institutions, inescapably implicates the Establishment Clause."[194] The history of police powers and their inherent relationship with the governing sovereigns indicates that power delegation by Alabama in this case is certainly significant and of great importance.[195] While *Grumet* suggests that at least the legislative functions behind education constitute one of the primary state powers,[196] history indicates that police powers are just as critical a function, if not more, of the state.[197] Additionally, the Court in both *Grumet* and *Larkin* felt that insufficient steps were taken to provide standards and safeguards against uneven enforcement or application in the questioned

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considered in *Larkin*, but not listing or stating the three-pronged *Lemon* test outside of how the lower courts ruled); *Larkin*, 459 U.S. at 123–26 (performing the *Lemon* analysis).

188 *Grumet*, 512 U.S. at 703.

189 *Id.*

190 *See id.* at 710 (finding the New York statute unconstitutional, in part because the New York legislature failed to show that there were any steps or standards to protect against "religious favoritism"); *Larkin*, 459 U.S. at 125–26 (declaring the Massachusetts statute unconstitutional, in part because it has no standards or rules to guarantee that the delegation of power would be applied neutrally by the receiving religious institution).

191 *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2081 n.16 (2019) (citing generally to *Larkin*, 459 U.S. 116).

192 *See Grumet*, 512 U.S. at 709–10; *Larkin*, 459 U.S. at 127.

193 *Grumet*, 512 U.S. at 709–10 (quoting Wisconsin v. Yoder, 406 U.S. 205, 213 (1972)).

194 *Larkin*, 459 U.S. at 123.

195 *See* Enion, *supra* note 11, at 523 (detailing how policing powers arose as an exercise of the governing sovereign and have remained tied to sovereigns).

196 *See Grumet*, 512 U.S. at 709–10 (quoting *Yoder*, 406 U.S. at 213).

197 *See* Enion, *supra* note 11, at 523–25 (arguing that even if the state delegates or relinquishes some of its policing powers, the ultimate power and responsibility should remain with the state).

statutes.[198] In the Alabama law, there are arguably some standards,[199] but not the type that would alleviate the Court's fears.[200] After the amendments of Alabama House Bill 309, Alabama Code section 16-22-1 provides that the officers employed under that section will have all the powers of police officers, including the power to make arrests.[201] Additionally, those officers are to be trained in the use of non-lethal weapons, and "certified through the Alabama Peace Officers' Standards and Training Commission."[202] While the certification and training requirements may somewhat limit an included organization's ability to hire certain people, these personnel requirements have essentially no effect on how the empowered organization can choose to use the governmental delegation or how the government can decide to make the delegation in the first place.[203]

In *Larkin*, the Court was concerned that there were no standards or limitations on how churches could veto liquor license applications.[204] The churches could veto businesses' applications for solely religious purposes or to promote an adherence to one faith over another.[205] That same concern should weigh heavily upon the courts in the context of the Alabama statute. Given Briarwood's stated security concerns,[206] what is to stop a police employee of the church from handling church members or people of a certain faith differently than others in the community regarding something like criminal trespassing or vandalism? Just like the statute in *Larkin*, even assuming "that churches would act in good faith," the Alabama statute granting church authorities policing powers does not "require that churches' power be used in a religiously neutral way," and therefore, is likely unconstitutional.[207]

Lastly, similar to *Grumet*, the Alabama statute in question contains no standards or guarantees from the Alabama legislature that "foreclose religious favoritism."[208]

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[198] *See Grumet*, 512 U.S. at 709–10 (indicating that the way in which the New York legislature granted Kiryas Joel Village the state power did not include safeguards or efforts to ensure religious neutrality); *Larkin*, 459 U.S. at 125–26 (discussing how the Massachusetts statute failed to create standards to ensure religiously neutral application of the delegated power).

[199] *See* ALA. CODE § 16-22-1 (2019).

[200] *See supra* note 190 and accompanying text.

[201] ALA. CODE § 16-22-1(a) (2019); H.B. 309, 2019 Leg., Reg. Sess. (Ala. 2019) (amending language as "including the power of arrest for unlawful acts committed on the property").

[202] ALA. CODE § 16-22-1(c) (2019).

[203] *See* ALA. CODE § 16-22-1; *see also* ALA. CODE § 36-21-46 (outlining requirements for Alabama Peace Officer applicants).

[204] *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 125 (1983).

[205] *See id.*

[206] Van der Bijl & Martin, *supra* note 18.

[207] *Larkin*, 459 U.S. at 125; *see* ALA. CODE § 16-22-1 (2019) (discussing only the institutions granted the police power delegation and the powers and requirements of the officers).

[208] Bd. of Educ. v. Grumet, 512 U.S. 687, 710 (1994); *see* ALA. CODE § 16-22-1 (2019) (including only the institutions granted the power, not why and how a determination of eligibility to receive the power would occur).

The Court in *Grumet* found it constitutionally impermissible for the State of New York to grant Kiryas Joel Village the delegation of state power that they did without ensuring that the power grant was done in a neutral way.[209] Instead, when New York delegated the governmental powers, they granted it only to the village.[210] There was no indication or guarantee that any similarly situated group in the future would be able to receive the same power grant.[211] The Alabama statute is slightly distinguishable from the New York statute in *Grumet*, but still raises some of the same reasons for concern. Briarwood Presbyterian Church, Briarwood Christian School, and Madison Academy were all given the authority to create a private police force under Alabama House Bill 309; however, Briarwood Presbyterian Church and Christian School are considered together in the wording of the bill.[212] While any of the three religious organizations receiving the delegation of state police powers may be troublesome, the Briarwood Presbyterian Church is the sole house of worship that is granted police powers.[213] Alabama Code section 16-22-1 already existed as a statute granting state policing powers to colleges, universities, and the Alabama Institute for Deaf and Blind.[214] There are no standards or indications espoused for why a religious house of worship would be included with colleges and universities, and more importantly, no guarantees that a significantly similarly situated organization of a different faith or background would be granted the same delegation of powers.[215] Therefore, under the logic of *Grumet*, the Alabama statute is likely unconstitutional as written.[216]

### *B. The Delegation of Police Powers to a Religious Academy: Briarwood Christian School and Madison Academy*

#### 1. The *Lemon* Test Factors

While the delegation of police powers to a religious school may be a closer issue, it still carries many of the same constitutional concerns, and a violation of the

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[209] *See Grumet*, 512 U.S. at 703–04, 709–10 (highlighting the ways in which the New York legislature's decision to delegate state powers to Kiryas Joel Village was unusual, too narrowly tailored to one religious group, and without any protections or assurances granted to other possibly similarly situated groups).

[210] *Id.* at 703, 705.

[211] *Id.* at 703–04.

[212] *See* H.B. 309, 2019 Leg., Reg. Sess. (Ala. 2019) ("Madison Academy, and Briarwood Presbyterian Church and its integrated auxiliary Briarwood Christian School . . . .").

[213] *See* Ala. H.B. 309 (listing and discussing all of the other educational institutions, and highlighting the addition of three new religious organizations, two of which were listed as a school or academy, and one of which, Briarwood Presbyterian Church, was listed as a church or house of worship).

[214] *See* ALA. CODE § 16-22-1 (2015).

[215] *See* § 16-22-1 (2019) (discussing nothing further than the applicable organizations and the officer's duties and requirements).

[216] *See id.*; *Grumet*, 512 U.S. at 703–04, 709–10.

Establishment Clause should be tested by the *Lemon* test. For part one of the *Lemon* test, courts analyze whether the statute has a secular purpose.[217] When discussing their petitions to the Alabama State Legislature, the administrators from Briarwood did not draw a distinction between reasons that the school or church might have for requiring a private police force.[218] However, in their discussion, administrators mentioned that they were concerned over the Sandy Hook shooting, and that they had 2,000 students attending their religious school.[219] Additionally, administrators raised concerns that they were unable to develop relationships with the constantly changing off-duty officers.[220] Staff from Madison Academy have not commented on their reasons for seeking out a private police department.[221]

While previous analysis suggests that it is likely Briarwood Presbyterian Church would be able to prove that there was a secular purpose to the amended Alabama Code section 16-22-1,[222] it would likely be even easier to prove a secular purpose in regard to the religious schools. Protection of children and school environments is a very real governmental concern, and the Court even addressed that issue in *Everson v. Board of Education*.[223] There, the Court indicated that it would be an impermissible disadvantage to deprive religious schools of "such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks."[224] While providing ordinary police protection and granting the religious schools the power to hire and employ their own police protection are two wildly different scenarios,[225] the simple fact that school police protection is a government interest likely means that the Briarwood School and Madison Academy could prove that the amendments in Alabama House Bill 309 have a sufficiently secular purpose.[226]

The character and nature of the schools become much more important for determining the second and third prongs of the *Lemon* test: effect and impermissible

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

[218] *See* Van der Bijl & Martin, *supra* note 18.

[219] *Id.*

[220] *Id.*

[221] As of publication, Madison Academy has not issued a press release regarding the bill on its website, see MADISON ACAD., https://www.macademy.org [https://perma.cc/2JJJ-KBMH] (last visited Oct. 22, 2020), or to a media outlet, see Catherine Patterson, *Briarwood Presbyterian Now Able to Hire Police Officers*, WBRC, https://www.wbrc.com/2019/06/19 /briarwood-presbyterian-now-able-hire-police-officers/ [https://perma.cc/X6FC-8Q59] (last updated June 19, 2019, 5:19 AM) (quoting a press release from Briarwood Presbyterian Church but no statement from Madison Academy).

[222] *See* McCreary Cty. v. Am. Civil Liberties Union, 545 U.S. 844, 859, 862, 864 (2005).

[223] *See* 330 U.S. 1, 17 (1947).

[224] *Id.* at 17–18.

[225] *See id.* at 17 (failing to distinguish between state-provided police and school-employed police).

[226] *See McCreary Cty.*, 545 U.S. at 859, 862, 864; *Everson*, 330 U.S. at 17.

entanglement.[227] While a church, such as the Briarwood Presbyterian Church, may clearly be a religious institution, a religious school might be less clear because of the multiple roles which it could assume.[228] The Briarwood Christian School states that it teaches students "a variety of disciplines, along with . . . invit[ing] [them] to become a member of clubs, sports teams, and involved in the arts."[229] However, the school also states that it has "a highly qualified and enthusiastic faculty who are passionate and actively engaged in communicating God's truth to students through Christ-centered instruction."[230] The Madison Academy lists its educational approach as "providing academic opportunities that both challenge elite students and develop emerging students. We encourage collaboration and sharpen critical thinking skills."[231] However, the Academy also states, "[w]e provide a balanced approach to education built on a spiritual foundation. A Christian education provides a context for information. It begins with the understanding that we exist to serve others and our creator."[232] Given the schools' stated approaches, they seem very likely to have enough religious motivation to count as religious institutions.[233]

Over the course of Establishment Clause jurisprudence, the Court has indicated that schools can be touched by varying levels of religious interest.[234] In *Tilton v. Richardson*, the Court discussed potential differences between religiously affiliated universities or colleges and religious elementary and primary schools.[235] *Tilton* reasserted the opinion expressed in *Walz*, stating, "[t]he 'affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an early age.'"[236] Conversely, the *Tilton* Court suggested that there might have been some "substance to the contention that college students are less impressionable and less susceptible

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[227] *See Lemon*, 403 U.S. at 612–13 (citations omitted) ("[S]econd, [the statute's] principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'").

[228] *See* Van der Bijl & Martin, *supra* note 18 (describing "Briarworld," Briarwood's nickname referencing its size and multifaceted attributes).

[229] *About*, BRIARWOOD CHRISTIAN SCH., https://www.briarwoodchristianschool.org/about [https://perma.cc/GGY5-FUSU] (last visited Oct. 22, 2020).

[230] *Id.*

[231] Terry Davis, *Message from Terry Davis*, MADISON ACAD., https://www.macademy.org/apps/pages/index.jsp?uREC_ID=1511535&type=d&ppRE_ID=1651072 [https://perma.cc/44XS-5NST] (last visited Oct. 22, 2020).

[232] *Id.*

[233] *See* Zoë Robinson, *What is a "Religious Institution"?*, 55 B.C. L. REV. 181, 224–25 (2014) (providing four factors to determine whether an entity with religious aspects should receive Establishment Clause protection).

[234] *See, e.g.*, Tilton v. Richardson, 403 U.S. 672, 685–86 (1971).

[235] *Id.* ("There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools.").

[236] *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. 644, 671 (1970)).

to religious indoctrination."[237] Finally, the Court reasoned that "[t]he skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations. Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines."[238]

Comparing the Court's treatment of religious schools in *Tilton* and *Walz* illustrates some of the issues that affect the character and nature of the organization that is receiving power from the government.[239] While *Tilton* found that there may be fewer reasons to be concerned with government entanglement in religiously affiliated colleges and universities,[240] the *Walz* discussion of elementary and secondary schools suggests more reasons to be concerned about the effect of the statute and governmental entanglement.[241] As such, Court precedent, and the schools' own descriptions, indicate that they would likely be considered religious institutions.[242] As the schools would likely be found to be religious institutions, the delegation of significant police powers would create an impermissible entanglement between government and religious actions.[243]

2. History and Precedent

Regardless of whether the delegation of governmental police powers is given to a church or a religious school, *Grumet* and *Larkin* are still the most applicable cases for considering Supreme Court precedent and history.[244] In considering how the Court may apply standards from *Grumet* and *Larkin* to the religious school-run private police forces, many of the relevant factors are likely the same as in the previous analysis of the Alabama statute's delegation of powers to the Briarwood Church.[245] The critical factor that may differ is the Alabama legislature's actions in delegating the police powers to religious schools.[246]

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[237] *Id.* at 686.

[238] *Id.*

[239] *See infra* notes 240–41 and accompanying text.

[240] *See Tilton*, 403 U.S. at 686 (indicating it is less likely for the organizations receiving aid to be able to exert a religious influence over the students than in other scenarios).

[241] *See* Walz v. Tax Comm'n*,* 397 U.S. 644, 671–72 (1970); *see also Tilton*, 403 U.S. at 685–86 (suggesting that children in religious elementary and secondary schools do not have the same resilience to indoctrination as older college age students, and acknowledging that indoctrination is often a goal of those elementary and secondary schools).

[242] *See Tilton*, 403 U.S. at 685–86; *About*, *supra* note 229; Davis, *supra* note 231.

[243] *See Tilton*, 403 U.S. at 685–86 (implying that Establishment Clause violations would more likely be found when entangling lower education institutions with government).

[244] *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2081 n.16 (2019) (The Court explicitly cites *Larkin* and *Grumet* as leading cases for analyzing the Establishment Clause in cases of "church involvement in governmental decisionmaking.").

[245] *See supra* Section IV.A.2.

[246] *See supra* Section IV.B.1.

Alabama Code section 16-22-1, prior to the amendments of Alabama House Bill 309, codified Alabama's statute for granting policing powers to educational institutions.[247] Alabama House Bill 309 amended the existing statute to include both the Briarwood Christian School and Madison Academy,[248] which is also a Christian faith-based school.[249] As opposed to the singular act of delegating police powers to a religious house of worship that House Bill 309 accomplishes in granting policing powers to Briarwood Presbyterian Church, the grant of policing powers to Briarwood Christian School or Madison Academy could be said to simply be an extension of the grants given to other educational institutions.[250] Contrast this situation with *Grumet*.[251] Both the statute in *Grumet* and the amendments made by Alabama House Bill 309 delegated power to a religious institution without clear standards or rules as to how the power was given.[252] However, the delegation in *Grumet* was notable as it was a singular and unprecedented action.[253] In fact, the Court noted that the New York legislature had even previously viewed such an action with disfavor.[254] Conversely, the grant of governmental powers to Briarwood Christian School and Madison Academy was part of a similar scheme of extending private police forces to various educational institutions.[255] While this factor seems to draw a distinction, albeit a seemingly small one, between *Grumet* and the delegation of police powers to the two religious schools, other courts have had a chance to weigh in on this issue.[256]

3. State Decisions on Federal Constitutionality

While the issue has not yet reached federal courts, several state courts have confronted the challenge of granting state police powers to religious schools.[257] In

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[247] *See* ALA. CODE § 16-22-1 (2015).

[248] H.B. 309, 2019 Leg., Reg. Sess. (Ala. 2019).

[249] *See* Davis, *supra* note 231 (discussing the mission of Madison Academy and how it strives to integrate education and the Christian faith).

[250] *See* Ala. H.B. 309 (adding the two religious schools to the list of educational institutions which have already been granted the authority to create and maintain a private police force).

[251] *Compare id.*, *with* Bd. of Educ. v. Grumet, 512 U.S. 687, 693–94 (1994).

[252] *See* Ala. H.B. 309; *Grumet*, 512 U.S. at 693–94.

[253] *See Grumet*, 512 U.S. at 702–03 (indicating that this type of situation was an unusual act, not common legislative practice, and would not provide a good chance for judicial review).

[254] *See id.* at 703–04 ("Early on in the development of public education in New York, the State rejected highly localized school districts for New York City when they were promoted as a way to allow separate schooling for Roman Catholic children.").

[255] *See, e.g.*, H.B. 398, 1994 Leg., Reg. Sess. (Ala. 1994) (amending ALA. CODE § 16-22-1 (1975)) (providing an example of one of the first steps that occurred in the process of amending § 16-22-1 to include more educational institutions over the years).

[256] *See infra* Section IV.B.3.

[257] *See, e.g.*, Myers v. State, 714 N.E.2d 276, 279 (Ind. Ct. App. 1999); State v. Yencer, 718 S.E.2d 615, 616 (N.C. 2011); State v. Pendleton, 451 S.E.2d 274, 275–76 (N.C. 1994); State v. Jordan, 574 S.E.2d 166, 167–68 (N.C. Ct. App. 2002).

North Carolina, the state supreme court was called upon to determine whether a campus police officer for a religious institution could legitimately and constitutionally wield the police powers of the state and make an arrest.[258] The criminal defendant, Pendleton, was arrested for driving while impaired on a public highway near the university.[259] Additionally, it was uncontested that "Campbell University is closely affiliated with the Baptist State Convention of North Carolina."[260] The North Carolina Superior Court granted a motion to dismiss by Pendleton as the state statute delegating the police powers was thought to be unconstitutional.[261] While the court of appeals reversed the lower court's decision after applying the *Lemon* test, the North Carolina Supreme Court reversed the North Carolina Court of Appeals, reinstating the superior court's grant of dismissal.[262] The state supreme court rested its decision both on a finding that the North Carolina statute handling police powers delegation was unconstitutional, and that the university did not contest the facts that indicated it was a religious institution.[263] The North Carolina statute indicates that "[a]ny educational institution . . . whether State or private,"[264] can petition the Attorney General to assign and appoint police officers to the institution.[265] Furthermore, the officer would "possess all the powers of municipal and county police to make arrests for felonies and misdemeanors and to charge for infractions on property owned or controlled by their employers."[266] Finally, the officers would also have authority to exercise police powers on "the public roads passing through or immediately adjoining the property of the employer."[267]

The questioned statute reads similarly to Alabama Code section 16-22-1 in several ways. First, and most significantly, the North Carolina statute gave the officers in question the power to make arrests.[268] Alabama Code section 16-22-1 also vests officers "with all the powers of police officers, including the power of arrest."[269] Additionally, Alabama Code section 16-22-1 goes further than the unconstitutional North Carolina Code in that it allows the named organizations to "appoint and employ" officers automatically, without any request to the state attorney general to assign officers.[270] On the other hand, the North Carolina statute allowed officers to exercise their powers on roads "passing through or immediately adjoining the property

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[258] *Pendleton*, 451 S.E.2d at 275–76.
[259] *Id.* at 275.
[260] *Id.* at 276.
[261] *Id.*
[262] *Id.* at 276–77.
[263] *Id.*
[264] *Id.* at 276 (quoting N.C. GEN. STAT. § 74A-1 (1989) (repealed 1991)).
[265] *Id.*
[266] *Id.* (quoting N.C. GEN. STAT. § 74A-2(b) (1989) (repealed 1991)).
[267] *Id.* (quoting N.C. GEN. STAT. § 74A-2(e)(1) (1989) (repealed 1991)).
[268] N.C. GEN. STAT. § 74A-2(b) (1989) (repealed 1991).
[269] ALA. CODE § 16-22-1 (2019).
[270] *Compare id.*, *with* § 74A-1 (repealed 1991).

of the employer."[271] The Alabama statute only grants authority to make arrests based upon "unlawful acts committed on the property."[272] While the state court decisions of North Carolina would have no binding effect on the federal or Alabama courts, the North Carolina Supreme Court was considering the issue as a violation of federal constitutional law, and the analysis used, the *Lemon* test, should suggest a similar outcome if appropriately applied.[273] There are certainly variations between the two statutes, but the features that they share suggest that there is strong reason to believe Alabama Code section 16-22-1, as applied to a religious university, could present serious Establishment Clause issues.[274]

There are several additional factors to consider in *State v. Pendleton*.[275] First, in *State v. Jordan*, the North Carolina Court of Appeals followed the same logic used in *Pendleton* and determined that the statute there was also unconstitutional.[276] The court noted, however, that the finding should be held very narrowly to the school in question, as the decision was based upon the sufficiency of evidence to suggest that the university in question was a religious institution.[277] There, the university was "affiliated and sponsored by the Western Carolina Conference of the United Methodist Church. . . . [The] mission [was to be] a 'model church related institution preparing servant leaders for life long learning' and . . . 'encourage[d] Christian values within the context of its educational goals.'"[278] Additionally, "[t]he university's . . . governing body, must have at least six of its 44 members from the Women's Missionary Society of the Western Carolina Conference of the United Methodist Church."[279] Further conditions and controls were placed upon the university's governing body, requiring, "[t]he director of the Council of the Western Carolina Conference of the United Methodist Church . . . to be a member of the Board of Trustees [and] . . . the names of newly elected trustees [be] submitted to the . . . Conference . . . for approval."[280] Finally, the university "closes its administrative officers [sic] every Wednesday morning so that employees may attend chapel services . . . [u]ndergraduate students may obtain cultural credits toward graduation by attending those same services . . . [and] [s]tudents must take at least two courses in religion, Christian education, or philosophy."[281] The North Carolina courts considered the issue again

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[271] *Pendleton*, 451 S.E.2d at 276 (N.C. 1994) (citing N.C. GEN. STAT. § 74A-2(e)(1) (1989) (repealed 1991)).

[272] ALA. CODE § 16-22-1 (2019).

[273] *Pendleton*, 451 S.E.2d at 277 ("We base our decision in this case solely on federal constitutional grounds. We neither consider nor decide any state constitutional issues.").

[274] *Compare* U.S. CONST. amend. I, *with* § 16-22-1.

[275] *See* 451 S.E.2d at 274.

[276] 574 S.E.2d 166, 171 (N.C. App. 2002).

[277] *Id.*

[278] *Id.*

[279] *Id.*

[280] *Id.*

[281] *Id.*

in *State v. Yencer*.[282] There, the North Carolina Supreme Court acknowledged the holdings of *Pendleton* and *Jordan*, but held that the controlling statute had since been changed, placing more restrictions on the delegated police powers, and this additional step toward neutrality meant that the statute was no longer unconstitutional.[283] By adding steps such as: setting training standards, enforcing certification requirements, requiring reports, inspecting records, conducting investigations, and revoking certifications for violations,[284] North Carolina made the statute sufficiently neutral to avoid violating the Establishment Clause in this case.[285] Additionally, the court found that the university in question was not a religious institution.[286] Since the university's board and policy decisions were not directly influenced by the church organization with which the school was affiliated, and no evidence was presented to the contrary, it was assumed that the university was not a religious institution.[287]

*Yencer* suggests that the level of restrictions that a state's statutory delegation of police powers puts in place may result in a potential violation of the Establishment Clause.[288] The restraint factors present in *Yencer* in some ways exceed and in some ways fall short of the restraints put in place by Alabama Code section 16-22-1.[289] In *Yencer*, the officers were ultimately responsible to the North Carolina Attorney General for reports, training, certifications, and investigations into their conduct.[290] Under Alabama Code section 16-22-1, officers are not directly responsible to any other office besides their employer.[291] While officers are required under Alabama Code section 16-22-1 to "be certified through the Alabama Peace Officers' Standards and Training Commission," and have certain types of training,[292] there is no mention of an office that oversees these requirements, investigates the officers' actions, revokes or suspends their license if they are in violation, or inspects and reviews reports.[293] However, officers under Alabama Code section 16-22-1 are only permitted to carry non-lethal weapons, whereas the North Carolina statute does not mandate such a restriction.[294] Additionally, officers authorized to act under the Alabama Code only have authority extending to unlawful acts committed on the property, whereas the North Carolina statute authorizes a broader exercise of the

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[282] *See generally* 718 S.E.2d 615 (N.C. 2011).
[283] *Id.* at 616, 620–23.
[284] *Id.* at 620.
[285] *Id.* at 620, 622–23.
[286] *Compare id.* at 622–23, with *Jordan,* 574 S.E.2d at 171 (listing specific factors that indicated that the institution in question was a religious one).
[287] *Yencer*, 718 S.E.2d at 622.
[288] *See generally id.*
[289] *See infra* notes 291–97 and accompanying text.
[290] *Yencer*, 718 S.E.2d at 620.
[291] ALA. CODE § 16-22-1 (2019).
[292] § 16-22-1(c).
[293] *See generally* § 16-22-1.
[294] *Compare* § 16-22-1(b), *with* N.C. GEN. STAT. § 74G-6(d) (2005).

officer's authority.[295] While the factors cut both ways, the lack of oversight under Alabama Code section 16-22-1 suggests that the statute is more like the previous North Carolina statute that was found to be unconstitutional than it is the current North Carolina statute that was given more latitude by the state supreme court.[296]

Finally, the decision in *Jordan* lists multiple factors that might be considered to show that a school was a religious institution.[297] While some of the factors noted at the university in *Jordan* and conditions present in the Briarwood Christian School and Madison Academy clearly overlap, others would require a closer examination.[298] However, there is a clear distinction between the *Pendleton*, *Jordan*, and *Yencer* cases and the Briarwood and Madison schools. All three of the schools in the North Carolina state cases were universities or schools of higher education.[299] Both the Briarwood and Madison schools are primary and secondary schools, not institutions of higher education.[300] As addressed earlier, the Supreme Court specifically considered differences between those types of schools in *Tilton v. Richardson* and determined that, "[s]ince religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education."[301] Conversely, this means that there is a heightened concern for indoctrination in primary and secondary schools, meaning they are more likely to be considered religious institutions than institutions of higher education with similar factors.[302] Since there are multiple factors for the Briarwood and Madison schools that are similar to *Jordan*—religious mission, religious leadership, and mandatory Christian educational elements—the outcome in *Jordan* clearly helps to indicate, in conjunction with *Tilton*, that the two schools are religious institutions for the purpose of an Establishment Clause analysis.[303]

*Pendleton*, *Jordan*, and *Yencer* all provide elements of how state courts might decide the Federal Establishment Clause issue as applied to private police powers in school settings, using North Carolina laws and courts as a model.[304] The factors involved in the Alabama statute and the two schools in question appear to be substantially similar to cases that were invalidated as unconstitutional under federal law; thus it is highly likely that Alabama Code section 16-22-1—as it applies to the Briarwood and Madison schools—violates the Establishment Clause.[305]

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[295] *Compare* § 16-22-1(a), *with* § 74G-6(b).
[296] *Compare* § 16-22-1, *with* § 74G-6.
[297] State v. Jordan, 574 S.E.2d 166, 170–71 (N.C. App. 2002).
[298] *See id.* at 171; *About*, *supra* note 229; Davis, *supra* note 231.
[299] *See supra* notes 257, 260, 278, 287 and accompanying text.
[300] *See generally* Davis, *supra* note 231; Van der Bijl & Martin, *supra* note 18.
[301] 403 U.S. 672, 687 (1971).
[302] *See id.*
[303] *See Jordan*, 574 S.E.2d at 171; *About*, *supra* note 229; Davis, *supra* note 231.
[304] *See supra* Section IV.B.3.
[305] *See* U.S. CONST. amend. I; ALA. CODE § 16-22-1 (2019); State v. Yencer, 718 S.E.2d

## CONCLUSION

American colonial history serves as a strong reminder of the potential dangers of crossing government and religion. The Protestant Reformation threw the Western world into religious chaos, and governments scrambled to adapt for centuries.[306] Those recent memories for the Framers of the Constitution and Bill of Rights led them to explicitly state protections against a government establishment of religion.[307]

Given a lack of clarity in the wording of the First Amendment, courts have struggled with what government establishment looks like. One area that the courts have acknowledged struggling with government establishment is the delegation of significant state powers.[308] Few powers may be more significant than the state sovereigns' interest in exercising police powers. Police powers have been tied to ruling sovereigns since the ancient kings of England.[309] Early policing in America, however, saw private police forces become significant players.[310] Despite many scandals and instances of abuse, the use of private police forces prevailed and continues to grow today.[311] Modern private police forces fill a role that public police forces may sometimes lack, and often do so with delegations of state powers. While these delegations of police powers may vary, most of them grant private actors very significant powers over citizens.[312] Therefore, states should be very cautious about additional constitutional concerns, such as violating the Establishment Clause, when delegating these police powers.

When trying to determine if there has been a violation of the Establishment Clause, courts have struggled to define one consistent test.[313] In *Lemon v. Kurtzman*, the Court created a three-pronged test to determine whether there was a clear, secular purpose; whether the action advanced or inhibited religion; and whether the action

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615, 616 (N.C. 2011); State v. Pendleton, 451 S.E.2d 274, 275–76 (N.C. 1994); *Jordan*, 574 S.E.2d at 171; *About*, *supra* note 229; Davis, *supra* note 231.

[306] *See, e.g.,* HAIGH, *supra* note 35, at 205–08 (showing how, in England, religious persecution by the crown would wax and wane for centuries after the Reformation).

[307] *See* LEVY, *supra* note 2, at 79 (discussing the importance that the Framers of the Bill of Rights placed upon religious protections from the government by listing them first).

[308] *See, e.g.*, Bd. of Educ. v. Grumet, 512 U.S. 687, 699 (1994) (discussing how governments can delegate powers to religious groups, but must carefully consider several factors to avoid the "fusion" of government and religion).

[309] *See* Enion, *supra* note 11, at 529–32 (describing the strong ties between police powers and the state, dating all the way back to the English kings and sheriffs in 1285).

[310] *See* Joh, *supra* note 56, at 360–64 (explaining the historical relationship between the United States and private police forces by discussing the roles that these private forces played early on in the country).

[311] *See id.* at 368 (explaining how, despite periods of heavy criticism, private policing continued to grow and flourish).

[312] *See* Sklansky, *supra* note 12, at 1183 (noting that some private police force are given essentially the same police powers as local or state law enforcement agencies).

[313] *See supra* Part III.

created excessive entanglement.[314] While the *Lemon* test is still an accepted test, it has somewhat fallen out of favor due to the vagueness of some of the prongs.[315] As such, additional tests have been proposed, including in a recent case, which seems to suggest that factors of history and tradition should be considered.[316] Over the many years of Supreme Court cases on the Establishment Clause, at least two cases, *Grumet* and *Larkin,* have touched on the delegation of significant state powers to private organizations.[317] These cases, in addition to the *Lemon* test, should be used to help examine whether a delegation of state powers would violate the Establishment Clause.[318]

After considering the *Lemon* test, *Grumet*, *Larkin*, and the importance of police powers, Alabama House Bill 309's edit to the current statute, delegating private police powers to educational institutions, made an unconstitutional grant of police powers to the Briarwood Presbyterian Church.[319] When considering those same elements, in conjunction with decisions made in state courts concerning the delegation of police powers to religiously affiliated universities, the grant of private police powers to Briarwood Christian School and Madison Academy also violates the Establishment Clause.[320] Under the *Lemon* test, neither the church nor the schools, as religious institutions, can avoid excessive entanglement with government actions while having a private police force.[321] Under a history and tradition approach, and an examination of the relevant precedent, both delegations of power reach, or extend past, the scenarios considered in *Grumet* and *Larkin*.[322] Additionally, in the context of the schools, recent state court decisions concerning federal law suggest that a court properly applying the *Lemon* test would find that these delegations of police powers violated the Establishment Clause.[323] Considering all of the factors present, it seems certain that the police powers granted to Briarwood Presbyterian Church, its affiliated school, and Madison Academy under Alabama House Bill 309 violate the Establishment Clause of the First Amendment.

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[314] Lemon v. Kurtzman, 403 U.S. 602, 611–13 (1971).
[315] *See supra* Part III.
[316] *See* Am. Legion v. Am Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019).
[317] *See supra* Part III.
[318] *See supra* Part III.
[319] *See supra* Part IV.
[320] *See supra* Section IV.B.3.
[321] *See generally* Lemon v. Kurtzman, 403 U.S. 602, 602 (1971).
[322] *See generally* Bd. of Educ. v. Grumet, 512 U.S. 687 (1994); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1983).
[323] *See supra* Part IV.