THE CONFUSION OF FUSION: INCONSISTENT APPLICATION OF THE ESTABLISHMENT CLAUSE NONDELEGATION RULE IN STATE COURTS

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It seems almost beyond dispute that if the Federal Establishment Clause prohibits anything, it prohibits religious institutions from wielding governmental power. So thought the U.S. Supreme Court in Larkin v. Grendel's Den, Inc. *when it announced that the delegation of governmental power to churches amounted to an impermissible "fusion" of government and religion. Subsequent applications of the nondelegation rule have been less clear, however. A number of state courts have wrestled with the issue of whether the nondelegation rule prohibits religiously affiliated universities from employing state-empowered campus police officers. Though the state courts are now in nominal agreement—the use of campus police by religious universities does not offend the Establishment Clause—the evolution of this line of cases illustrates that what at first appears to be a straightforward, uncontroversial rule is in fact a doctrinal conundrum. This Note argues that the nondelegation rule has introduced needless confusion into the already complicated Establishment Clause jurisprudence. The rule's mischief might be tolerable if there were some cases that the rule is uniquely suited to address. As this Note shows, however, the nondelegation rule has no such saving grace: Any analytical insights it might contain are already captured by clearer, better-credentialed Establishment Clause doctrines.*

INTRODUCTION

When the U.S. Supreme Court held in *Larkin v. Grendel's Den, Inc.* that the First Amendment's Establishment Clause prohibits "important, discretionary governmental powers" from being "delegated to or shared with religious institutions," it announced what seemed to be a clear and obvious rule.[1] The Clause, which has been incorporated against the states,[2] provides that "Congress shall make no law respecting an establishment of religion."[3] Whatever else those words might prohibit, surely they prohibit the "'fusion of governmental and religious functions.'"[4]

The experience of state courts has shown, however, that the *Larkin* nondelegation rule is much more problematic than it appears. The rule's

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1. 459 U.S. 116, 127 (1982).

2. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

3. U.S. Const. amend. I.

4. *Larkin*, 459 U.S. at 126–27 (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963)).

mischief has been particularly evident in a series of cases involving the application of state campus police authorization statutes to religiously affiliated universities. In the earliest of these cases, *State v. Pendleton*, the North Carolina Supreme Court invoked the *Larkin* nondelegation rule to invalidate the drunk driving arrest of a student at Baptist-affiliated Campbell University: The court reasoned that the campus police officer who made the arrest had no authority to do so since, as an employee of a "religious institution," he could not constitutionally be delegated state police power.[5]

Until recently, the *Pendleton* decision and its progeny[6] put North Carolina at odds with state courts in Indiana and Michigan, which rejected similar challenges to campus police authorization statutes.[7] The Indiana and Michigan courts disagreed with the North Carolina courts on a number of issues, including (1) the nondelegation rule's relationship to the *Lemon* test, (2) the rule's scope, and (3) the rule's relationship to the principle of government neutrality toward religion.[8] The state split was nominally resolved recently when, in *State v. Yencer*, the North Carolina Supreme Court found that a revised campus police authorization statute passed Establishment Clause muster.[9] *Yencer*'s resolution of the split failed to truly resolve the doctrinal confusion, however. Though the *Yencer* court arrived at the same ultimate result as the Indiana and Michigan courts, it did so based on a very different understanding of the nondelegation rule.[10]

This Note argues that the courts should no longer rely on the nondelegation rule as a distinct Establishment Clause doctrine. As the campus police authorization cases demonstrate, the application of the rule is not straightforward and involves the resolution of issues about which the Supreme Court has sent conflicting messages. Furthermore, the appealing intuition that government ought not delegate power to religion is captured by other Establishment Clause doctrines. In other words, the nondelegation rule muddies the water while offering no analytical benefit. In an area of law that contains many confusing and overlapping doc-

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5. 451 S.E.2d 274, 275–77 (N.C. 1994). The student also challenged the arrest on state constitutional grounds, but the court found it unnecessary to address the state constitutional issue in light of its holding on the Federal Establishment Clause issue. Id. at 277.

6. State v. Yencer, 696 S.E.2d 875 (N.C. Ct. App. 2010), rev'd, 718 S.E.2d 615 (N.C. 2011); State v. Jordan, 574 S.E.2d 166 (N.C. Ct. App. 2002).

7. Myers v. State, 714 N.E.2d 276, 283 (Ind. Ct. App. 1999) (finding campus police authorization statute, as applied to campus police of Lutheran-affiliated university, did not violate Establishment Clause); People v. Van Tubbergen, 642 N.W.2d 368, 375 (Mich. Ct. App. 2002) (finding sheriff deputization statute, as applied to campus police of university associated with Reformed Church of America, did not violate Establishment Clause).

8. See infra Part II (discussing state court disagreement on appropriate application of nondelegation rule to campus police statutes).

9. 718 S.E.2d at 622–23.

10. See infra Part II.B.2 (discussing *Yencer* and its reasoning).

trines,[11] a doctrine that only duplicates insights offered by others should be discarded.

Part I describes the genesis and development of the nondelegation doctrine through three U.S. Supreme Court cases: *Lemon v. Kurtzman*,[12] *Larkin v. Grendel's Den, Inc.*,[13] and *Board of Education of Kiryas Joel Village School District v. Grumet*.[14] It explains how the nondelegation doctrine arose out of the three-pronged *Lemon* test and points to three doctrinal questions left open by *Larkin* that are addressed, but not settled, in *Kiryas Joel*—specifically, (1) the nondelegation rule's relationship to the *Lemon* test, (2) the rule's scope, and (3) the rule's relationship to the principle of government neutrality toward religion.

Part II shows how the nondelegation rule has caused confusion in the state courts, particularly in cases involving the constitutionality of campus police authorization statutes. In these cases, courts have disagreed on each of the three issues left open by the Supreme Court. The courts' struggles in resolving these issues show that the nondelegation rule is significantly more difficult to apply than it appears.

Part III argues that courts should no longer rely on the nondelegation rule as a doctrinal basis for finding Establishment Clause violations. Not only has the rule caused much headache, it also adds little analytical value. Governmental delegation of power generally falls into one of three different categories—neutral delegation, accommodative delegation, or de facto delegation—and the question of whether an "important, discretionary governmental power" has been "delegated to" a religious institution does not meaningfully illuminate the relevant constitutional concerns in any of those categories.

I. THE ORIGINS AND DEVELOPMENT OF THE RULE: *LEMON*, *LARKIN*, AND *KIRYAS JOEL*

The nondelegation rule grew out of three Supreme Court cases: *Lemon v. Kurtzman*, *Larkin v. Grendel's Den, Inc.*, and *Board of Education of Kiryas Joel Village School District v. Grumet*. Part I.A discusses *Lemon* and explains the historical and doctrinal significance of its three-pronged test. Part I.B discusses *Larkin* and examines three questions about the nondelegation rule that the case left unresolved—namely, (1) the rule's relationship to *Lemon*, (2) its scope, and (3) its applicability to neutral delegations, that is, delegations that are made to both religious and nonreli-

11. See, e.g., Mitchell v. Helms, 530 U.S. 793, 870 (2000) (Souter, J., dissenting) ("[T]he inexhaustibly various circumstances of [the Religious Clauses'] applicability have defied any simple test and have instead produced a combination of general rules often in tension at their edges.").

12. 403 U.S. 602 (1971).

13. 459 U.S. 116 (1982).

14. 512 U.S. 687 (1994).

gious institutions alike. Part I.C discusses *Kiryas Joel* and argues that it failed to answer the three questions left open by *Larkin*.

A. *Doctrinal Background: The* Lemon *Test*

Though *Lemon v. Kurtzman*[15] predated the Court's announcement of the nondelegation rule by more than a decade, it is essential to understanding the rule for two important reasons. First, as discussed in Part I.B below, the *Lemon* test formed the doctrinal material out of which the nondelegation rule was created in *Larkin*. Second, as discussed in Parts II and III, the desirability of the nondelegation rule depends, in large part, upon whether it contributes any analytical insights not already captured by *Lemon* and other Establishment Clause doctrines.

Though arguably no longer as important as it once was,[16] the *Lemon* test was a central component of the Court's Establishment Clause jurisprudence for many years.[17] *Lemon* concerned the constitutionality of two state statutes that provided financial assistance to nonpublic schools.[18] Plaintiffs argued that the statutes violated the Establishment Clause because the schools that took advantage of the programs were overwhelmingly religiously affiliated.[19] In finding the statutes unconstitutional, the Court relied on three requirements gleaned from its precedent: "First, the statute must have a *secular legislative purpose*; second, its *principal or primary effect* must be one that neither advances nor inhibits religion[;]

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15. 403 U.S. 602.

16. See, e.g., Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring) (comparing *Lemon* to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried"); Geoffrey R. Stone et al., Constitutional Law 1460 (6th ed. 2009) (noting *Lemon* "has not been relied on by a majority to invalidate any practice since 1985"); Kent Greenawalt, Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance, 71 S. Cal. L. Rev. 781, 784 (1998) [hereinafter Greenawalt, Religious Law] ("Although *Lemon* as a threefold test for all occasions may be effectively dead, most Supreme Court Justices and other judges seem to believe that results reached under that test remain a substantial guide to how cases should be resolved."); Michael Stokes Paulsen, *Lemon* Is Dead, 43 Case W. Res. L. Rev. 795, 822 (1993) ("[I]t is plain that *Lemon* no longer commands majority support."). But see McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 859 (2005) (citing *Lemon* with approval as "summariz[ing] the three familiar considerations for evaluating Establishment Clause claims").

17. See, e.g., 2 Kent Greenawalt, Religion and the Constitution 160 (2008) [hereinafter Greenawalt, Religion and the Constitution] ("[F]or decades, the Court employed the *Lemon* formulation in almost every establishment case . . . ."); Ira C. Lupu, The Lingering Death of Separationism, 62 Geo. Wash. L. Rev. 230, 236 (1994) (arguing *Lemon* provided "general doctrinal framework" for Establishment Clause analysis for rest of 1970s).

18. 403 U.S. at 607–11 (describing Rhode Island and Pennsylvania aid programs at issue).

19. Id. at 608, 610 (noting 95% of students that took advantage of Rhode Island program attended Roman Catholic schools and 96% of pupils that took advantage of Pennsylvania program attended religiously affiliated schools).

. . . finally, the statute must not foster an *excessive government entanglement* with religion."[20]

In the years following *Lemon*, this three-pronged test often formed the starting point of the Court's Establishment Clause analysis.[21] Though most often applied in cases involving government aid to schools,[22] the *Lemon* test also found its way into cases involving tax benefits,[23] religious displays on government property,[24] and Sunday-closing laws.[25]

Given the *Lemon* test's importance in Establishment Clause case law, the Court has had many occasions to clarify the content of each of its prongs. Though the Court's formulations have differed slightly from case to case, overall the prongs may be described as follows.

To meet the purpose prong, a law must not have the "ostensible and predominant purpose of advancing religion."[26] The purpose prong is probably the least discussed of the three *Lemon* prongs since religious intent is rarely apparent on the face of a statute.[27] To meet the effects prong, a law must not have the "primary effect" of promoting or hindering religion. To meet the entanglement prong, the law must not involve "excessive" governmental involvement in religion.[28] As the Court has noted, the effects and entanglement prongs are often closely intertwined. Often, a law—for example, a governmental grant program for private

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20. Id. at 612–13 (emphases added) (citations omitted) (internal quotation marks omitted).

21. See, e.g., Wolman v. Walter, 433 U.S. 229, 235–36 (1977) ("The mode of analysis for Establishment Clause questions is defined by the three-part test that has emerged from the Court's decisions. In order to pass muster, a statute must [meet the *Lemon* prongs] . . . ."), overruled on other grounds, Mitchell v. Helms, 530 U.S. 793 (2000); see also supra note 17 (discussing historical significance of *Lemon*).

22. See, e.g., Aguilar v. Felton, 473 U.S. 402, 410, 412–14 (1985) (applying *Lemon* to assess constitutionality of program providing publicly funded remedial teachers to nonpublic schools), overruled on other grounds by Agostini v. Felton, 521 U.S. 203 (1997); Mueller v. Allen, 463 U.S. 388, 394 (1983) (applying *Lemon* to determine constitutionality of tax deduction for parents of children attending nonpublic schools).

23. See, e.g., Hernandez v. Comm'r, 490 U.S. 680, 696–97 (1989) (applying *Lemon* to analyze constitutionality of exclusion of required donations to Church of Scientology from tax benefit provision).

24. See, e.g., McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 859–61, 867–74 (2005) (declining to abandon purpose prong of *Lemon* and applying it to analyze constitutionality of Ten Commandments display in courthouses).

25. Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708–10 (1985) (applying *Lemon* to analyze constitutionality of Sunday-closing law).

26. *McCreary Cnty.*, 545 U.S. at 860.

27. Id. at 859 (noting purpose prong is "common, albeit seldom dispositive, element" and Court has found prong violated "only four times since *Lemon*").

28. The Court has explained that the qualifier "excessive" signifies that governmental entanglement must reach a certain threshold before the Establishment Clause is offended. Normal governmental oversight, without more, does not violate the prong. Agostini v. Felton, 521 U.S. 203, 233 (1997) ("Not all entanglements . . . have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two." (citation omitted)).

schools—runs the risk of promoting religion unless the government closely supervises how that law is administered.[29] That close supervision itself, however, might be thought to constitute excessive entanglement. This relationship between the two prongs has often been criticized as creating a "Catch-22,"[30] and, in recent cases, the Court has avoided the dilemma by finding that extensive government supervision is not required for the administration of neutral laws that treat religious institutions the same as similarly situated nonreligious institutions.[31]

The Court has also suggested that the entanglement prong should not be understood as a separate analysis but as an aspect of the effects inquiry.[32] As the Court explained, though the effects and entanglement prongs are analytically separate, in practice, they involve the same considerations, since both examine "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority."[33]

The *Lemon* test requires that a law meet all three prongs to be constitutional,[34] and courts have struck down laws based on failure to meet just one of the prongs.[35] As discussed below, *Larkin v. Grendel's Den, Inc.*, where the Court formally announced the nondelegation rule,[36] concerned primarily the effects and entanglement prongs.

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29. This problem formed the basis of almost all of the Court's school aid cases in the 1970s and 1980s. See, e.g., Aguilar v. Felton, 473 U.S. 402, 412–14 (1985), overruled by *Agostini*, 521 U.S. 203; Meek v. Pittinger, 421 U.S. 349, 369–72 (1975), overruled by Mitchell v. Helms. 530 U.S. 793 (2000); Lemon v. Kurtzman, 403 U.S. 602, 613–14 (1971).

30. See, e.g., *Aguilar*, 473 U.S. at 420–21 (Rehnquist, J., dissenting) (criticizing Court for creating "'Catch-22' paradox" by requiring that "aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement"); Wallace v. Jaffree, 472 U.S. 38, 109–10 (1985) (Rehnquist, J., dissenting) (making same point).

31. See *Agostini*, 521 U.S. at 233–35.

32. Id. at 232–33.

33. Id. at 232 (quoting *Lemon*, 403 U.S. at 615).

34. Edwards v. Aguillard, 482 U.S. 578, 583 (1987) ("State action violates the Establishment Clause if it fails to satisfy any of [the *Lemon*] prongs.").

35. See, e.g., *Aguilar*, 473 U.S. at 412–14 (relying primarily on entanglement prong); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708 (1985) (relying primarily on purpose prong).

36. Though *Larkin* was the Supreme Court's first articulation of the nondelegation rule, the issue of nondelegation had been presented and decided some years earlier by the New Jersey Supreme Court in State v. Celmer, 404 A.2d 1 (N.J. 1979). In *Celmer*, the New Jersey legislature granted some municipal powers to a small Methodist community governed by a board of trustees that had to include Methodists. The New Jersey Supreme Court found that this violated the federal and state constitutions, remarking that "[s]uch a fusion of secular and ecclesiastical power not only violates both the letter and spirit of the First Amendment, it also [violates the state constitution]." Id. at 6. This language is remarkably similar to the language the U.S. Supreme Court used in *Larkin*. See infra notes 47–48 and accompanying text.

B. *The Birth of Nondelegation:* Larkin v. Grendel's Den, Inc.

Larkin concerned the constitutionality of a state statute that made issuance of alcohol licenses contingent upon the nonobjection of nearby schools and churches.[37] Massachusetts, which previously had a statute automatically banning the issuance of alcohol licenses to institutions located within 500 feet of schools or churches, modified the ban so as to operate only when the schools or churches objected to the issuance of the license.[38] A restaurant denied an alcohol license under the statute sued, challenging the statute on the basis of, among other grounds, the Federal Establishment Clause.[39]

In an 8-1 decision, the Supreme Court found that the statute violated the Establishment Clause. Applying *Lemon*, the Court concluded that the statute ran afoul of both the effects and entanglement prongs.[40]

With respect to the effects prong, the Court characterized the statute as "conferring upon churches a veto power over governmental licensing authority" and explained that this had the primary effect of promoting religion in two ways.[41] First, since the veto power exercised by the churches was "standardless, calling for no reasons, findings, or reasoned conclusions," churches could use the power to advance their religious agendas, perhaps by selectively granting licenses to members of the favored sect.[42] Such use of the veto power would not even be in bad faith, the Court pointed out, since the statute "does not by its terms require that churches' power be used in a religiously neutral way."[43] Second, the veto power promoted religion by conferring a "significant symbolic benefit" to churches.[44] A "joint exercise of legislative authority by Church and State" sent the message that churches sat at the decisionmakers' table, right next to the state.[45] Because the law conferred these two benefits on the religious activities of churches, the Court concluded, it violated *Lemon*'s effects prong.

The Court also found that the delegation of veto power violated the entanglement prong. Echoing *Lemon*'s lesson that "[t]he objective [of the Establishment Clause] is to prevent, as far as possible, the intrusion

37. 459 U.S. 116, 117–19 (1982) (describing facts and procedural background of case).

38. Id. at 117 n.1. Specifically, the statute at issue read, "'Premises . . . located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages if the governing body of such church or school files written objection thereto.'" Id. (quoting Mass. Gen. Laws ch. 138, § 16C (1970)).

39. Id. at 118. Only the Establishment Clause claim came up for review by the Supreme Court.

40. Id. at 123–27.

41. Id. at 125–26.

42. Id. at 125.

43. Id.

44. Id. at 125–26.

45. Id.

of either [Church or State] into the precincts of the other," the *Larkin* Court found that the statute "enmesh[ed] churches in the exercise of substantial governmental powers."[46] Regardless of whether the government may share its authority with private groups generally,[47] such "'fusion of governmental and religious functions,'" the Court held, is never permissible.[48]

The Court summed up its analysis by noting that "[t]he Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions."[49]

Then-Justice Rehnquist, the lone dissenter, accused the Court of overreacting to an innocuous statute.[50] Taking it as given that the previous iteration of the law, which did not give schools and churches the ability to override the prohibition, was constitutional, Justice Rehnquist questioned how the less burdensome ban could be objectionable, but the more burdensome ban permissible.[51] After all, the veto power did not give churches more protection than they had enjoyed under the flat ban: It merely allowed them to opt out of that protection. Justice Rehnquist also argued that it made little sense to require that the churches exercise the veto power in a "religiously neutral way," since the reason they had the power in the first place—because there was a perceived conflict between church activities and the sale of alcohol—was a religious one.[52] Furthermore, the Court's concern about discriminatory exercise of the power could be addressed through case-by-case adjudication.[53]

Though ostensibly an easy case, *Larkin* left three important issues unresolved.

1. *The Nondelegation Rule's Relationship with* Lemon. — First, as a doctrinal matter, the Court did not make clear whether *Larkin* should be understood as applying the *Lemon* test or as standing for an independent doctrine of nondelegation. Nominally, the case was decided under the effects and entanglement prongs of *Lemon*, yet much of *Larkin*'s language suggested that delegation of governmental power to religious institutions

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46. Id. at 126.

47. The Court reserved judgment on this question. Id. at 122.

48. Id. at 126–27 (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963)).

49. Id. at 127.

50. Id. at 128, 130 (Rehnquist, J., dissenting) (mocking Court for firing "heavy First Amendment artillery" at such a "silly case").

51. Id. at 129.

52. Id. at 129–30. Justice Rehnquist was in effect arguing that the law was an accommodation of religion and that it therefore made little sense to require religious neutrality. The very purpose of a religious accommodation is to address some need that is uniquely burdensome to religion; here, the incompatibility between worship and the sale of alcohol was a uniquely religious problem.

53. Id.

is per se an Establishment Clause violation.[54] This was especially evident in the Court's discussion of the entanglement prong, since rather than applying existing entanglement analysis to the issue of delegation, the Court suggested that delegation is a per se form of impermissible entanglement.[55]

Based on the Court's language suggesting an equivalence between delegation and entanglement, some scholars have argued that the nondelegation rule is an aspect of the *Lemon* entanglement analysis,[56] and many courts have followed suit.[57] This understanding of the Court's opinion is overly neat, however. As discussed above, the Court relied on nondelegation in both its effects and entanglement discussions. Furthermore, much of the Court's opinion referred to delegation's unacceptability as such, rather than to its implications as measured through religious effects or excessive entanglement.

2. *The Nondelegation Rule's Scope.* — Second, assuming that *Larkin* announced a new doctrine of nondelegation, it failed to define two of the central elements of that doctrine, namely, "governmental power" and "religious institution." With respect to "governmental power," the Court's language was inconsistent: The Court referred to the power delegated variously as "a power ordinarily vested in agencies of government,"[58] "discretionary government power[],"[59] "legislative authority,"[60] and "unilateral and absolute power."[61] These variations are significant. Depending on which version controls, executive (as opposed to legislative) authority may or may not be covered, nondiscretionary powers may or may not be covered, powers exercised bi- or multilaterally[62] may or may not be covered, and so forth. The ambiguity in what constitutes a "religious institu-

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54. See, for example, id. at 127 (majority opinion), where the Court says that "[t]he Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions." If delegation per se violates the Establishment Clause, then the *Lemon* test does no real work.

55. Indeed, the whole of the Court's purported entanglement analysis consisted of language from precedent condemning the sharing of government power with religious institutions. See, e.g., id. at 126–27 ("[T]he core rationale underlying the Establishment Clause is preventing 'a fusion of governmental and religious functions . . . .'" (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963))).

56. See, e.g., Greenawalt, Religion and the Constitution, supra note 17, at 221 (characterizing nondelegation rule as "one form of entanglement").

57. See infra Part II.B (discussing how courts in *Pendleton* and *Van Tubbergen* regarded nondelegation rule as kind of entanglement analysis).

58. 459 U.S. at 122.

59. Id. at 123.

60. Id. at 125.

61. Id. at 127.

62. For purposes of this Note, powers are exercised bi- or multilaterally when they are shared by two or more groups. *Larkin* does not explain whether its prohibition against delegation extends to such cases of shared power. For instance, it is unclear whether *Larkin* would forbid an arrangement whereby a religious institution would share the delegated governmental power with some governmental agency or other entity.

tion" is similarly significant: Does the doctrine cover only houses of worship or does it also cover other religiously affiliated institutions?[63] Does it cover groups of people organized according to a shared religion?[64] As the discussion below details, these distinctions have figured centrally in the nondelegation cases that followed *Larkin*.

3. *The Nondelegation Rule's Applicability to Neutral Delegations.* — Finally, *Larkin* left open the question of whether neutrality of the delegation matters, that is, whether a delegation of governmental power to a number of nongovernmental institutions, of which religious institutions constitute only a subgroup, might be constitutional.[65] The lower court's opinion contained language suggesting that where the power was delegated to "all who are otherwise similarly situated to churches in all respects except dedication to 'divine worship,'" the breadth of the delegation could serve as a safe harbor.[66] Though the *Larkin* Court made a passing reference to the narrowness of the delegation,[67] it did not otherwise address the question.

The Court's failure to address the neutrality question head-on marked a departure from the Court's practice in other Establishment Clause cases. A substantial portion of the Court's jurisprudence in this area has been devoted to wrestling with the question of whether neutrality (however defined) should be a shield against Establishment Clause challenges.[68] Though the Justices have not always agreed about what neu-

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63. State courts have repeatedly confronted this question in applying *Larkin* to the campus police authorization statute cases, discussed infra Part II.

64. This was a central dispute between the four-Justice plurality and Justice Scalia in Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 667 (1994). Compare id. at 698 (plurality opinion) ("It is . . . not dispositive that the recipients of state power in these cases are a group of religious individuals united by common doctrine, not the group's leaders or officers."), with id. at 735 (Scalia, J., dissenting) ("[The plurality's] steamrolling of the difference between civil authority held by a church and civil authority held by members of a church is breathtaking."). This dispute, along with *Kiryas Joel* more generally, is discussed in detail infra Part I.C.

65. See, e.g., Greenawalt, Religion and the Constitution, supra note 17, at 222 (identifying this question and arguing such delegations would still be unconstitutional under *Larkin*).

66. Grendel's Den, Inc. v. Goodwin, 662 F.2d 102, 106–07 (1st Cir. 1981), aff'd sub nom. Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).

67. 459 U.S. at 122 ("[H]ere, of *two* classes of institutions to which the legislature has delegated this important decisionmaking power, *one* is secular, but *one* is religious." (emphases added)).

68. See, e.g., Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) ("[W]here a government aid program is neutral with respect to religion, . . . the program is not readily subject to challenge under the Establishment Clause."); Mueller v. Allen, 463 U.S. 388, 398–99 (1983) ("[A] program, like [the tax benefit at issue], that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause."); Widmar v. Vincent, 454 U.S. 263, 273–74 (1981) ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect.").

trality means[69] or whether neutrality provides a total defense to Establishment Clause challenges,[70] the neutrality debate has nonetheless often played a central, if not dispositive, role in the Court's analysis of government aid. The best explanation for the Court's silence on neutrality in *Larkin* is that the Court did not view the law as neutral. The law benefited only two classes of entities, schools and churches, and churches benefited by virtue of their status *as churches*, rather than as members of some more generally defined group.[71]

C. *Nondelegation Elaborated:* Kiryas Joel v. Grumet

The Court addressed each of the three unanswered questions in its next and most recent case discussing the nondelegation rule, *Board of Education of Kiryas Joel Village School District v. Grumet*. As discussed below, though *Kiryas Joel* produced a number of proposed answers to the ques-

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69. In his dissent in Mitchell v. Helms, 530 U.S. 793, 878–81 (2000), Justice Souter traces three distinct ways in which the Court has used the concept of "neutrality" throughout its jurisprudence. First, the Court has used "neutral," that is, neither encouraging nor discouraging, to refer to the posture government must take toward religion. See, e.g., Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) ("[The Establishment Clause] requires the state to be a neutral in its relations with groups of religious believers and non-believers . . . ."). Second, the Court has used "neutral" as a synonym for "nonreligious," to refer to the class of aid government may legitimately provide to religion. See, e.g., Tilton v. Richardson, 403 U.S. 672, 687 (1971) ("Our cases . . . have permitted church-related schools to receive government aid in the form of secular, neutral, or non-ideological services, facilities, or materials that are supplied to all students regardless of the affiliation of the school that they attend."). Finally, the Court has used "neutral" to describe the structure of governmental programs that extend benefits to a wide category of recipients: The fact that some such neutral programs have benefited religious institutions has been found not to violate the Establishment Clause. See, e.g., *Mueller*, 463 U.S. at 398–99 ("[A] program, like [the tax benefit at issue], that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause."). Scholars have also devoted substantial attention to the proper understanding of neutrality. See, e.g., Philip B. Kurland, Of Church and State and the Supreme Court, 29 U. Chi. L. Rev. 1, 96 (1961) (defining neutrality to mean nonclassification "in terms of religion"); Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993, 1001–02 (1990) (distinguishing Kurland's "formal neutrality," which addresses whether a law makes reference to religion, from "substantive neutrality," which addresses whether a law encourages or discourages religion).

70. In *Mitchell v. Helms*, for example, only four Justices considered the neutrality of the law dispositive in rejecting the Establishment Clause claim. 530 U.S. at 809–10 (plurality opinion). The remaining Justices explicitly rejected that contention. Id. at 839 (O'Connor, J., concurring in the judgment) ("Nevertheless, we have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid."); id. at 869 (Souter, J., dissenting) (criticizing plurality for adopting "new conception of neutrality as a practically sufficient test of constitutionality").

71. 459 U.S. at 122 ("[H]ere, of *two* classes of institutions to which the legislature has delegated this important decisionmaking power, *one* is secular, but *one* is religious." (emphases added)).

tions raised above, the Court failed to provide definitive guidance on any of them.

Kiryas Joel concerned the constitutionality of a special legislatively created school district for the village of Kiryas Joel.[72] Kiryas Joel was inhabited exclusively by a group of Satmar Hasidic Jews, who formed the village under a New York incorporation law when they broke off from a larger municipality.[73] As part of their religion, the Satmars followed a highly distinctive way of life and, to keep their children within the community's traditions, they sent their children to private religious schools rather than to public schools.[74] Though this worked well in the ordinary case, it presented a problem for Satmar children with disabilities, who required special services and were entitled to financial assistance to pay for those services under both federal and state law.[75]

The Satmars tried to solve the problem in two ways. Initially, the children received the services in a separate facility attached to one of the private religious schools.[76] Though this arrangement worked well, it was discontinued as a result of the Supreme Court's decisions in *Aguilar v. Felton*[77] and *School District of Grand Rapids v. Ball*,[78] which held that publicly funded employees could not provide remedial instruction on the grounds of a religious school.[79] Subsequently, the Satmars tried sending their children to public schools to receive services, but the children's poor integration into the schools led most to withdraw from the program.[80]

To solve this problem, the New York state legislature passed a special act giving the Satmars their own public school district. Having its own school district allowed the village to provide publicly funded special education services to the children in an environment where they were among other Satmar children.[81] The New York State School Boards Association and two of its officers sued the state and various state offi-

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72. 512 U.S. 687 (1994).

73. Id. at 690–91.

74. Id. at 691.

75. Id. at 692 (citing relevant federal and state statutes).

76. Id.

77. 473 U.S. 402 (1985), overruled by Agostini v. Felton, 521 U.S. 203 (1997).

78. 473 U.S. 373 (1985), overruled in part by *Agostini*, 521 U.S. 203.

79. *Kiryas Joel*, 512 U.S. at 692. *Aguilar* and the relevant part of *Ball* were later overturned by *Agostini*, 521 U.S. at 235.

80. 512 U.S. at 692–93.

81. Id. at 693–94. The school district did not provide any religious instruction, as this would be a clear violation of the Establishment Clause. It also did not provide any general public education. As discussed earlier, most Satmars sent their children to private religious schools; in the rare case where a Satmar child without special needs desired to attend a public school, the school district would pay for his or her tuition at an out-of-district public school. Id. at 694.

cials.[82] The plaintiffs contended that the special act violated both the State and Federal Establishment Clauses.[83]

The Court held that, in specially creating the school district, the state violated the Federal Establishment Clause by "neither presuppos[ing] nor requir[ing] governmental impartiality toward religion."[84] Specifically, the Court was troubled by the fact that the school district was created by a special legislative act, rather than through the application of some more general process.[85] In the Court's mind, this raised concerns that the Satmars received special treatment that might be denied to similarly situated groups seeking legislative help in the future.[86]

Though the *Larkin* nondelegation rule did not form the basis of the majority's holding, it played a significant role in a number of the other opinions in the case.[87] In a plurality opinion by Justice Souter, four Justices (the majority minus Justice O'Connor) argued that, in addition to running afoul of the Establishment Clause for the reason discussed above, the creation of the school district violated *Larkin*, which the plurality read for the proposition that "a State may not delegate its civic authority to a group *chosen according to a religious criterion*."[88] The *Kiryas Joel* plurality argued that an important governmental power (the power granted to school districts) was given to a group of people (the Satmars) who were chosen according to their religion.[89] While it acknowledged that *Larkin* concerned a religious institution rather than a group of individuals belonging to the same religion, the plurality argued that this distinction did not matter, since the boundaries of the village were initially drawn according to religious criteria and the New York legislature was "well aware" of this when it created the new school district.[90] In one respect, however, the plurality read *Larkin* narrowly: In

82. Id. By the time the case reached the U.S. Supreme Court, the only remaining plaintiffs were the two officers. Id. at 694 n.2.

83. Id. at 694.

84. Id. at 690.

85. Id. at 702.

86. Id. at 703.

87. Only Justice Kennedy's opinion concurring in the judgment failed to mention the delegation issue at all. Justice Kennedy's position in the case was unique. He expressly rejected the Court's reasoning that the ad hoc nature of the legislative act created the possibility of discriminatory application and failed to join the plurality's opinion relying on *Larkin*, but nevertheless found the law violated the Establishment Clause because it drew political lines based on religious identity. Id. at 722 (Kennedy, J., concurring in the judgment). No other Justice signed on to this "religious gerrymandering" argument. The issue of religious line-drawing is considered in greater detail infra Part III.B.3. Justice Stevens, joined by Justices Blackmun and Ginsburg, each of whom joined Justice Souter's plurality, also wrote a concurrence raising concerns about religious indoctrination. Id. at 711–12 (Stevens, J., concurring).

88. Id. at 698 (plurality opinion) (emphasis added).

89. Id. at 697–99.

90. Id. at 699.

its view, a distinction existed between "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."[91] In the plurality's view, *Larkin* barred the former but not the latter.

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas in dissent, disagreed with the plurality's interpretation of the scope of the nondelegation rule. Citing language in *Larkin* that referred to "churches," the "governing body of churches," "religious institutions," and "religious bodies," the dissenters argued that *Larkin* stood for the narrower proposition that "a State may not delegate its civil authority *to a church*."[92] Furthermore, the dissenters argued, even if the plurality's reading of *Larkin* were correct, there was no evidence that the New York legislature in *Kiryas Joel* was motivated by the Satmars' religion.[93] On the point of neutral delegations, however, the dissenters were silent.

In her separate concurrence, Justice O'Connor shed little light on why she chose not to join the plurality in invoking *Larkin* as an independent basis for finding the special act unconstitutional. Justice O'Connor did, however, remark that she regarded *Larkin* to be a test distinct from *Lemon*.[94] She also interpreted *Larkin* to mean that "government impartiality towards religion may not be enough in such situations"; in her view, "[a] law that bars all alcohol sales within some distance of a church, school, or hospital may be valid, but an equally even-handed law that gives each institution discretionary power over the sales may not be."[95]

Justice Blackmun, who did join the plurality opinion, also wrote a brief concurrence in which he indicated that he understood *Larkin* to be a mere application of *Lemon*.[96]

In sum, though the Justices in *Kiryas Joel* recognized and attempted to answer the three questions remaining after *Larkin*, the Court failed to speak with one voice on any of them.

1. *The Nondelegation Rule's Relationship with* Lemon. — The question of whether the nondelegation rule should be understood as doctrinally distinct from the *Lemon* test was addressed only by Justices O'Connor and Blackmun, and they offered conflicting answers. Justice O'Connor argued against the idea that *Lemon* is a "unitary" approach to Establishment Clause analysis and insisted instead that Establishment Clause cases fall into a number of different categories, each of which requires a different

91. Id. (emphases added).
92. Id. at 734–35 (Scalia, J., dissenting).
93. Id. at 737–43.
94. Id. at 720–21 (O'Connor, J., concurring in part).
95. Id.
96. Id. at 710 (Blackmun, J., concurring).

test.[97] On this view, the nondelegation rule applies to a category of cases that the *Lemon* test does not usefully analyze.[98] Justice Blackmun took exactly the opposite view, noting his "disagreement with any suggestion that today's decision signals a departure from the principles described in *Lemon*," and arguing that the *Larkin* rule should be understood as a mere application of *Lemon*'s effects and entanglement prongs.[99]

2. *The Nondelegation Rule's Scope.* — The question of the nondelegation rule's scope sparked the most robust disagreement among the Justices. As discussed above, Justice Souter, writing for himself and Justices Blackmun, Stevens, and Ginsburg, argued that the rule extends to all groups "chosen according to a religious criterion," regardless of whether such groups constitute churches in the traditional sense.[100] By contrast, Justice Scalia, writing for himself, Chief Justice Rehnquist, and Justice Thomas, argued that the rule extends only to churches.[101] Justices O'Connor and Kennedy were silent on this issue.

3. *The Nondelegation Rule's Applicability to Neutral Delegations.* — Of the three questions left open by *Larkin*, the neutrality issue is the one that the Court came closest to answering definitively. As earlier discussed, only five Justices addressed the issue head-on (the four-Justice plurality plus Justice O'Connor), and only four Justices agreed that neutral delegation falls outside the scope of *Larkin*.[102] However, parts of then-Justice Rehnquist's opinion in *Larkin* suggest that he likely agreed with the plurality on the neutrality issue.[103] Furthermore, Justice Scalia's and Justice Thomas's positions on neutrality in other cases suggest that they too likely understood the nondelegation rule to contain a neutrality exception.[104] Thus, it might be argued that enough votes existed on the Court to support a neutrality exception to the nondelegation rule.

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97. Id. at 718–21 (O'Connor, J., concurring in part).

98. Id.

99. Id. at 710 (Blackmun, J., concurring).

100. Id. at 698 (plurality opinion).

101. Id. at 734–36 (Scalia, J., dissenting).

102. Ironically, it was these four Justices who relied on *Larkin* to find the law unconstitutional. Conversely, the one Justice who found *Larkin* inapplicable, Justice O'Connor, explicitly rejected a neutrality defense. Id. at 721 (O'Connor, J., concurring in part).

103. See Larkin v. Grendel's Den, Inc., 459 U.S. 116, 130 (1982) (Rehnquist, J., dissenting) (finding no Establishment Clause violation where government extends to religious institutions "who wish to engage in religious activities" same power as that afforded to educational institutions "who wish to engage in educational activities," that is, "to be unmolested by activities at a neighboring bar or tavern").

104. For example, Justice Thomas wrote and Justice Scalia joined the plurality opinion in *Mitchell v. Helms*, arguing that

> if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.

Though it is tempting to take such a vote-counting approach, doing so is not sound. First, even if a majority of Justices were sympathetic to the idea of a neutrality exception, no majority in fact coalesced to announce such an exception—the part of *Kiryas Joel* voicing support for such an exception garnered the support of only four Justices.[105] Second, while then-Justice Rehnquist's dissent in *Larkin* suggests he likely would have supported a neutrality exception, that dissent did not actually announce such support. Rather, the dissent focused on the different (though related) question of whether *non-neutral* delegations may ever be constitutional.[106] Third, the views of Justices Scalia and Thomas on neutrality in government aid cases do not automatically apply to the issue of neutral delegations, which may raise more serious constitutional concerns. For example, Justice O'Connor, who has in other cases joined majorities upholding neutral government aid programs,[107] nevertheless explicitly rejected neutrality as an exception to the nondelegation rule. For these reasons, the better view is that *Kiryas Joel* left the issue of neutral delegations unresolved, notwithstanding the possibility that a majority of the Justices would have voted in favor of a neutrality exception.

As discussed more fully in Part II below, the indeterminacy of these three aspects of the nondelegation rule led directly to the confused state court jurisprudence on the constitutionality of campus police authorization statutes as applied to religiously affiliated universities.

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530 U.S. 793, 810 (2000) (plurality opinion) (citation omitted).

105. Such a vote-counting approach was expressly rejected by the Court in United States v. Morrison, 529 U.S. 598, 622–24 (2000). Prior to *Morrison*, in *United States v. Guest*, a majority of the Justices—but not the Court—took the position that Section 5 of the Fourteenth Amendment "empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy." 383 U.S. 745, 782 (1966) (Brennan, J., concurring in part and dissenting in part, joined by Warren, C.J. & Douglas, J.); see also id. at 762 (Clark, J., concurring, joined by Black & Fortas, JJ.). The petitioner in *Morrison* relied on the vote-counting approach to argue that *Guest* stood for the proposition that state action is not required for Congress's exercise of its Section 5 power. The Court coolly rejected this argument as "not the way that reasoned constitutional adjudication proceeds." 529 U.S. at 624.

106. *Larkin*, 459 U.S. at 129–30 (Rehnquist, J., dissenting) (conceding law was not "religiously neutral" but arguing churches could be specially treated since they were particularly burdened).

107. See, e.g., Mueller v. Allen, 463 U.S. 388, 389, 397 (1983) (joining opinion explicitly invoking neutrality of government aid program as basis for upholding program); Widmar v. Vincent, 454 U.S. 263, 264, 274 (1981) (joining decision relying on "provision of benefits to so broad a spectrum of groups" as basis for finding "secular effect"). But see *Mitchell*, 530 U.S. at 838–39 (O'Connor, J., concurring in the judgment) (arguing that though "neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges," it is not true that "a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid").

II. THE RULE APPLIED: CAMPUS POLICE AUTHORIZATION STATUTES

Following *Larkin* and *Kiryas Joel*, lower courts quickly began relying on the nondelegation rule in a variety of contexts. Many of these cases, like *Larkin*, involved the constitutionality of various land use provisions (like liquor laws) designed to protect houses of worship.[108] Apart from these land use cases (which were largely decided based on their factual similarity or dissimilarity to *Larkin*),[109] the nondelegation rule was most extensively deployed to determine the constitutionality of campus police authorization statutes and kosher laws. Part II.A discusses the basic structure of campus police statutes and kosher law cases, and argues that the former offer a better lens through which to analyze the usefulness of the nondelegation rule. Part II.B describes the various state cases involving the constitutionality of campus police authorization statutes. Part II.C then shows how inconsistency in the state courts' approaches to these cases stemmed directly from the three issues left unresolved by the Supreme Court in *Larkin* and *Kiryas Joel*. Though the North Carolina Supreme Court's recent decision in *State v. Yencer* appeared to address some of these problems, its reasoning led to the development of two new areas of disagreement.

A. *Two Laboratories: The Delegation Implications of Campus Police Statutes and Kosher Laws*

To understand the delegation issues posed by campus police authorization statutes and kosher laws and why the former offer a better lens through which to evaluate the usefulness of the nondelegation rule, it is first necessary to understand what these two kinds of laws entail.

Campus police authorization statutes, broadly speaking, are laws that confer state police power to employees of colleges and universities. Though the precise structures of such laws differ, they generally take one of two forms. First, there are statutes that explicitly allow university employees to be designated as "campus police" or "public safety officers" and thus to acquire police power within the jurisdiction of the univer-

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108. See, e.g., VFW John O'Connor Post # 4833 v. Santa Rosa Cnty., 506 F. Supp. 2d 1079, 1089–90 (N.D. Fla. 2007) (upholding statute requiring liquor license applicants to pay fee to ascertain church consent); Espresso, Inc. v. District of Columbia, 884 F. Supp. 7, 11 (D.D.C. 1995) (finding statute making issuance of liquor license dependent on consent of churches indistinguishable from *Larkin* and thus unconstitutional).

109. E.g., *VFW John O'Connor Post # 4833*, 506 F. Supp. 2d at 1089–90; *Espresso, Inc.*, 844 F. Supp. at 11; cf., e.g., Jacob J. Waldman, Note, That's What I Like About Utah: *Larkin v. Grendel's Den* and the Alcoholic Beverage Control Act, 37 Colum. J.L. & Soc. Probs. 239 (2003) (arguing Utah liquor statute is unconstitutional based on similarity to statute in *Larkin*). Because these cases were decided based on direct analogy to *Larkin* itself, rather than based on any freestanding interpretation of the nondelegation rule, they are not particularly helpful for evaluating the legal wisdom of that rule. Accordingly, this Note will not extensively discuss these cases.

sity.[110] Second, there are general deputization statutes, which allow law enforcement agencies to designate various individuals, including employees of universities, as deputy law enforcement officers.[111] Deputization statutes are the primary avenue through which private universities empower their campus police in states where the official campus police statute is limited to public universities.[112] Some public universities also choose to have their campus police officers deputized, since the jurisdiction of deputized officers generally exceeds that of officers authorized under campus police statutes.[113] Despite their varying geographical reach, campus police statutes and deputization statutes confer similar authority on officers. Officers empowered under either type of statute generally have the same powers of arrest as ordinary police officers.[114] In some jurisdictions, campus and municipal police officers may have concurrent jurisdiction over the campus and surrounding areas.[115]

Kosher laws are statutes that punish the improper labeling of products as kosher.[116] The term "kosher" means "ritually fit" and is primarily significant in the Jewish law of "kashrut," which governs acceptable methods of food preparation.[117] Since whether or not certain foods are kosher is of great significance to a variety of consumers—including Jews who wish to observe kosher requirements, members of other religions

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110. E.g., Mich. Comp. Laws Ann. § 390.1511 (West 2010); N.C. Gen. Stat. § 74G (2011); 71 Pa. Stat. Ann. § 646.1 (West 2012). Some states' statutes allow both public and private universities to create campus police, while others bestow this privilege on public universities only. Compare N.C. Gen. Stat. § 74G-2 (allowing both public and private universities to be designated as "campus police agencies"), with Mich. Comp. Laws Ann. § 390.1511 (limiting scope of campus police authorization to public universities), and 71 Pa. Stat. Ann. § 646.1(d) (defining "[c]ampus police" as "law enforcement personnel employed by a State-aided or State-related college or university").

111. See, e.g., Mich. Comp. Laws Ann. § 51.70 (West 2006) (allowing sheriffs to designate deputy sheriffs).

112. Jeffrey S. Jacobson, Note, The Model Campus Police Jurisdiction Act: Toward Broader Jurisdiction for University Police, 29 Colum. J.L. & Soc. Probs. 39, 65 (1995).

113. Id. at 65–66.

114. See, e.g., N.C. Gen. Stat. § 74G-2(b) (defining "principal State power conferred" as "power of arrest" and providing that "[i]n exercising the power of arrest, these officers apply standards established by State and federal law only"); 71 Pa. Stat. Ann. § 646.1(a)(5) (providing officers may "exercise the same powers as are now or may hereafter be exercised under authority of law or ordinance by the police of the municipalities wherein the college or university is located"). A now-repealed Indiana statute also appeared to give campus police officers the ability to enforce school rules, though it is unclear whether the statute's grant of state police power could be employed for that purpose. Ind. Code § 20-12-3.5-2 (2005) (repealed 2007) ("In addition to any other powers or duties, such police officers have the duty to enforce . . . the rules and regulations of the institution . . . .").

115. E.g., 71 Pa. Stat. Ann. § 646.1(b); Jacobson, supra note 112, at 67–69 (describing versions of such statutes in Maryland and Illinois).

116. Greenawalt, Religious Law, supra note 16, at 781.

117. Mark Popovsky, Note, The Constitutional Complexity of Kosher Food Laws, 44 Colum. J.L. & Soc. Probs. 75, 76–77 (2010).

who observe similar dietary restrictions, and consumers who desire kosher foods for health reasons[118]—many states have passed statutes making it a type of consumer fraud to improperly label foods as kosher.[119] Given the disagreement about the actual requirements of kashrut, some of these statutes have specified that the views of a particular subdivision of Judaism, usually Orthodox Judaism, should govern, while other statutes omit reference to any particular denomination.[120]

Both campus police authorization statutes[121] and kosher laws raise obvious delegation concerns. Campus police authorization statutes are problematic because, as applied to religiously affiliated universities, they effectively grant police powers to employees of religious institutions.[122] Kosher laws are problematic because they are often enforced with the help of rabbis who offer advice as to the precise contours of kashrut requirements.[123]

At first glance, campus police statutes and kosher statutes appear to offer equally acceptable lenses through which to evaluate the nondelegation rule. Unlike the land use laws at issue in other nondelegation cases, both types of statutes are different enough from the liquor law in *Larkin* to implicate the nondelegation rule as a freestanding legal doctrine, separated from its factual origins. Furthermore, both types of statutes have been analyzed by multiple courts in multiple cases.

On closer scrutiny, however, the campus police statute cases are more instructive. The kosher law cases are less helpful for a number of reasons. First, in the kosher law cases, nondelegation generally comprises only a small part of the analysis since the cases may more obviously be disposed of on the basis of other Establishment Clause doctrines, such as the doctrines concerning denominational preference and the impermissibility of governmental stances on religious questions.[124] Consequently,

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118. Greenawalt, Religious Law, supra note 16, at 787.

119. Popovsky, supra note 117, at 83–84.

120. Id. at 92–93.

121. Despite the distinction between campus police statutes proper and deputization statutes, this Note will refer to both as campus police authorization statutes, since the distinction is immaterial to the Establishment Clause issue.

122. The question of whether religiously affiliated universities are "religious institutions" for purposes of the nondelegation rule is controversial and discussed in greater detail infra Part II.B.

123. E.g., Commack Self-Service Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 428–29 (2d Cir. 2002); Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337, 1342–43 (4th Cir. 1995); Ran-Dav's Cnty. Kosher v. State, 608 A.2d 1353, 1361–62 (N.J. 1992).

124. To varying degrees, the courts in all the kosher law cases have reasoned that the laws impermissibly favored the views of one denomination of Judaism over another, thereby violating the Establishment Clause prohibition against denominational preference. *Commack*, 294 F.3d at 426–27; *Barghout*, 66 F.3d at 1346 (Luttig, J., concurring); id. at 1349 (Wilkins, J., concurring); *Ran-Dav's*, 608 A.2d at 1359 (suggesting court disagreed with lower court's finding of no denominational preference, but refrained from basing

the kosher law cases devote relatively little attention to the intricacies of the delegation analysis itself. By contrast, the nondelegation rule has been the central issue in all of the campus police authorization cases.[125] Second, many of the trickier issues surrounding the scope of the nondelegation rule do not arise in the kosher law cases, since it is uncontroversial that the recipients of governmental power in those cases (rabbis) are members of religious institutions and that the power delegated to the rabbis is quasi-legislative.[126] Finally, the kosher law cases do not present the difficulties regarding the status of neutral delegations, since kosher laws are not "neutral" programs of general applicability. In sum, kosher laws do not present the ideal laboratory to test the workability of the nondelegation rule, since the kosher law cases do not implicate the aspects of the rule that are most potentially problematic.[127]

In contrast to the kosher law cases, the campus police cases fully bring out all the difficulties surrounding the nondelegation rule. Specifically, each of the three unresolved aspects of the nondelegation rule discussed in Part I—the rule's relationship to *Lemon*, its scope, and its applicability to neutral delegations—has been presented in the campus police cases.

B. *Conflict and Inconsistency: The Nondelegation Rule in Campus Police Cases*

Cases raising Establishment Clause challenges to campus police authorization statutes have arisen in three states: North Carolina, Indiana, and Michigan. Of these, North Carolina has dealt with the issue most frequently, generating three cases on the issue: *State v. Pendleton*, *State v. Jordan*, and *State v. Yencer*. Part II.B.1 and Part II.B.2 discuss these North Carolina cases; Part II.B.3 and Part II.B.4 discuss the Indiana case, *Myers v. State*, and the Michigan case, *People v. Van Tubbergen*, respectively.[128]

1. Pendleton *and Its Progeny.* — In *Pendleton*, an undergraduate at the Baptist-affiliated Campbell University was arrested by the University's

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opinion on this ground, since law was also unconstitutional under *Lemon*). The kosher law cases have also all relied heavily on the rule that the government should not take a position on religious issues. *Commack*, 294 F.3d at 427; *Barghout*, 66 F.3d at 1344; *Ran-Dav's*, 608 A.2d at 1362.

125. See infra Part II.B for more detailed discussion.

126. *Commack*, 294 F.3d at 428–29.

127. That is not to say that the constitutionality of kosher laws is an easy issue—it is not. Whether kosher laws violate the Establishment Clause or other constitutional provisions has been the subject of much scholarly literature. See, e.g., Greenawalt, Religious Law, supra note 16; Popovsky, supra note 117.

128. The question of whether campus police statutes violate the Establishment Clause has also been raised in the Court of Appeals for the Tenth Circuit. See Raiser v. Church of Jesus Christ of Latter-Day Saints, 211 F. App'x 804, 809–10 (10th Cir. 2007). However, the Tenth Circuit declined to rule on the question since it found that the plaintiff lacked standing. Id.

campus police for drunk driving.[129] The defendant challenged the authority of the officer to make the arrest, arguing that the campus police statute then in force could not constitutionally be applied to a religiously affiliated university like Campbell.[130]

The North Carolina Supreme Court agreed. The court interpreted *Larkin* as establishing a "clear rule" that "[a] state may not delegate an important discretionary governmental power to a religious institution or share such power with a religious institution."[131] Accordingly, the court understood the case before it as raising only two issues: (1) whether the police power delegated was an "important discretionary governmental power" and (2) whether Campbell University was a "religious institution."[132] Citing U.S. Supreme Court language that police powers are "plenary discretionary powers," the court had little trouble finding the power delegated[133] to be an "important discretionary" power under *Larkin*.[134] The court then referred to a number of facts about Campbell University—among them, that the University's Code of Ethics required students to develop "Christian character" and that the University described itself as a "Baptist university"—to find that the University was a "religious institution" for *Larkin* purposes.[135] Based on these two conclusions, the court held that the campus police statute was unconstitutional as applied to Campbell University.[136]

The court's decision was criticized on multiple grounds by a dissenting opinion joined by three justices.[137] The dissent disagreed with both the majority's framing of the analysis and its application of that analysis. With regard to the analytical framework, the dissent argued that the court erred by interpreting *Larkin*'s discussion of nondelegation as a "test."[138] The dissenters quoted U.S. Supreme Court language that there are "always risks in treating criteria discussed by the [Supreme] Court from time to time as 'tests' in any limiting sense of that term," and argued that, rather than treating nondelegation as a bright line rule, the court should have understood it to be one consideration in a broader

129. State v. Pendleton, 451 S.E.2d 274, 275–76 (N.C. 1994).

130. Id. The defendant challenged the law on both state and federal constitutional grounds, but the court reached only the federal constitutional question. Id. at 277.

131. Id. at 278.

132. Id.

133. The statute allowed campus police officers to "possess all the powers of municipal and county police officers to make arrests for both felonies and misdemeanors and to charge for infractions." N.C. Gen. Stat. § 74A-1 (repealed 1992).

134. 451 S.E.2d at 278–79 (quoting Foley v. Connelie, 435 U.S. 291, 297–98 (1978)).

135. Id. at 279–81.

136. Id. at 281.

137. Id. at 281 (Whichard, J., dissenting). For an argument that the dissent's objections were basically correct, see generally Stephen See, Note, *State v. Pendleton*: Impermissible Delegations to Religious Institutions: Is Campbell University an Armed Church?, 18 Campbell L. Rev. 409 (1996).

138. 451 S.E.2d at 284 (Whichard, J., dissenting).

analysis.[139] The dissent additionally argued that the court erred by ignoring the fact that, insofar as it constituted a delegation of governmental power, the campus police statute was a neutral delegation. Citing the plurality in *Kiryas Joel*, the dissenters argued that the fact that "Campbell is affiliated with the North Carolina Baptist Convention is wholly incidental to the state's commissioning of the University's police officers to enforce secular statutes of general applicability"; accordingly, even if the statute delegated governmental power to a religious institution, it did not violate the Establishment Clause since it was a neutral delegation.[140]

Finally, the dissent disagreed with the court's application of its two-part inquiry to the facts of the case. In the dissent's view, the police power at issue was not the sort of power contemplated by *Larkin*, and Campbell University was not a "religious institution."[141] According to the dissent, *Larkin* barred only delegations of standardless power.[142] Since the power delegated here was subject to limitations in that campus police could enforce only state and federal laws, *Larkin* did not apply.[143] Moreover, the dissent argued, Campbell University was not a religious institution for purposes of the *Larkin* rule. Citing *Tilton v. Richardson*[144] and *Hunt v. McNair*[145]—two cases in which the U.S. Supreme Court held that government aid to religious universities for secular purposes did not violate the Establishment Clause—the dissent argued that Campbell University was, like the schools at issue in those cases, primarily an educational, not a religious, institution.[146] In the dissent's view, the nondelegation rule (to the extent that *Larkin* announced such a rule) only barred delegation to churches or "religious governing bod[ies]."[147]

Pendleton illustrates the confusion caused by the nondelegation rule. All three unresolved issues identified in Part I—the rule's relationship with the *Lemon* test, scope, and applicability to neutral delegations—arose in *Pendleton* and formed the basis of disagreement between the ma-

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139. Id. (quoting Tilton v. Richardson, 403 U.S. 672, 678 (1971)).

140. Id. at 282, 284 (citing Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 698 (1994) (plurality opinion)).

141. Id. at 282.

142. Id. at 283–84 (arguing rule governs only situations like *Larkin* itself, where "the church . . . effectively usurped the role of the state").

143. Id.

144. 403 U.S. 672.

145. 413 U.S. 734 (1973).

146. 451 S.E.2d at 283 (Whichard, J., dissenting). The *Tilton* and *Hunt* cases were part of a series of Supreme Court decisions that distinguished religious institutions that were "pervasively sectarian," such that any government aid would invariably go to religious purposes, from institutions that could separate their sectarian and secular activities. Recently, in *Mitchell v. Helms*, a plurality of Justices hinted that this distinction has been abandoned. 530 U.S. 793, 826 (2000) (plurality opinion) (suggesting "period when this factor mattered" is "one that the Court should regret, and it is thankfully long past").

147. 451 S.E.2d at 282 (Whichard, J., dissenting). This, of course, was the view of the *Kiryas Joel* dissent. See supra notes 92–93 and accompanying text.

jority and the dissent. On the first issue, the majority understood nondelegation to be an independent basis for striking down the law,[148] while the dissent viewed nondelegation as one consideration in a holistic analysis. On the second issue, the majority interpreted the rule's scope broadly, while the dissent interpreted it narrowly. On the third issue, the majority completely ignored the ramifications of neutrality,[149] while the dissent found the statute's neutral nature significant.

Pendleton was not the last campus police case in North Carolina. The issue arose twice more, in *State v. Jordan*[150] and, most recently, in *State v. Yencer*.[151] Both cases presented facts remarkably similar to those in *Pendleton* itself. In *Jordan*, a student at Methodist-affiliated Pfeiffer University was arrested for drunk driving.[152] In *Yencer*, the drunk driving arrest was of an undergraduate at Presbyterian-affiliated Davidson College.[153] In both cases, the North Carolina Court of Appeals, finding itself bound by *Pendleton*, concluded that the universities in question were "religious institutions."[154]

2. Yencer. — In its decision in *Yencer*, the North Carolina Court of Appeals strongly signaled its discomfort with the *Pendleton* line of cases, especially in light of the U.S. Supreme Court's decisions in *Tilton* and *Hunt*, and encouraged the North Carolina Supreme Court to reconsider the jurisprudence in the area.[155] The North Carolina Supreme Court obliged and, in reversing the appellate court, implicitly overruled *Pendleton* and *Jordan*.[156]

The North Carolina Supreme Court's decision in *Yencer* differed in almost every respect from its decision in *Pendleton*. First, the court acknowledged that Establishment Clause analysis should be based on the totality of the circumstances, rather than a few "'categorical absolutes.'"[157] In contrast to *Pendleton*, where the court relied exclusively on

148. The *Pendleton* majority recognized *Lemon* to be the primary vehicle for Establishment Clause analysis but did not actually analyze the case under all three prongs. Rather, the court took nondelegation to be a dispositive inquiry under the entanglement prong. Thus, though *Lemon* was not entirely ignored, it did very little analytical work in the court's reasoning. 451 S.E.2d at 277–78.

149. The reason for this is unclear. *Kiryas Joel* was decided several months before *Pendleton*, and the dissent brings up *Kiryas Joel* in its arguments. See supra text accompanying note 140.

150. 574 S.E.2d 166 (N.C. Ct. App. 2002).

151. 696 S.E.2d 875 (N.C. Ct. App. 2010), rev'd, 718 S.E.2d 615 (N.C. 2011).

152. 574 S.E.2d at 167.

153. 696 S.E.2d at 876.

154. Id. at 878–79; *Jordan*, 574 S.E.2d at 168, 170–71.

155. 696 S.E.2d at 879–80.

156. *Yencer*, 718 S.E.2d 615. *Yencer* did not technically overrule *Pendleton* and *Jordan*, since those cases involved the constitutionality of predecessor statutes. See infra note 164 and accompanying text.

157. Id. at 617 (quoting McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 859 n.10 (2005)).

an application of its bright line interpretation of *Larkin*, the court in *Yencer* applied all three prongs of *Lemon* and considered *Larkin* only as an aspect of the entanglement analysis.[158] Second, the *Yencer* court recognized the significance of the neutrality of the law. The court explained that the delegation of power was neutral in two respects[159]: First, the nature of the aid given to the university (that is, public safety) was secular, and, second, the aid was provided on a secular basis to all universities.[160] Finally, the court found that the power delegated did not fall within *Larkin* since it was subject to secular standards enforced by the state and since Davidson College was not a religious institution but an educational one.[161] In coming to this last conclusion, the court relied heavily, as the *Pendleton* dissent had, on the U.S. Supreme Court decision in *Hunt v. McNair*.[162]

Remarkably, case law had changed little in between *Pendleton* and the North Carolina Supreme Court's about-face in *Yencer*. The main precedents *Yencer* relied on—*Lemon*, *Larkin*, *Kiryas Joel*, and *Hunt*—were equally in force at the time of *Pendleton*. Indeed, almost all of the *Yencer* court's opinion directly adopted the reasoning of the *Pendleton* dissent.

The *Yencer* court tried to explain the difference by emphasizing that the campus police statute in question had changed since *Pendleton*. The new statute, section 74G, contained a number of provisions for state supervision that did not exist in the predecessor statute, section 74A. In particular, the new statute required the Attorney General to "'establish minimum education, experience and training standards,'" "set and enforce certification requirements," and "conduct investigations to ensure that campus police agencies and officers [comply] with the Act."[163] These additional safeguards, the *Yencer* court argued, "provide[d] substantially more protections to ensure neutrality and guard against excessive church-state entanglement than did the statute at issue in *Pendleton*."[164]

This explanation is unpersuasive, however. First, the change in the statute could not have affected whether the religiously affiliated university in question is a "religious institution," and yet the difference on this point factored significantly in the disparate outcomes of *Pendleton* and *Yencer*. Second, the *Pendleton* court's finding that the power delegated fell within *Larkin* was based on Supreme Court precedent about the "discre-

158. Id. at 617–18, 620–22.

159. These were two of the three respects recognized by Justice Souter in his *Mitchell* dissent. See supra note 69.

160. 718 S.E.2d at 620–21.

161. Id. at 621–22.

162. See id. ("The United States Supreme Court's decision in *Hunt v. McNair* is instructive in the present case.").

163. Id. at 620 (quoting N.C. Gen. Stat. § 74G-4 (2009)).

164. Id. Thus, *Yencer* did not technically overrule *Pendleton*. *Yencer* concerned the constitutionality of the new statute, not the propriety of *Pendleton*'s ruling on the constitutionality of the old one.

tionary" and "plenary" nature of police power, not on the lack of supervision by the state. Indeed, to the extent that the new statute provided for greater supervision, it raised possibly more serious entanglement problems than the predecessor statute. Third, the change in the statute could not have affected whether the *Larkin* rule extends to neutral delegations. In *Pendleton*, the neutrality of the delegation was raised by the dissent and ignored by the majority. In *Yencer*, the appeal to neutrality was one of the major reasons for the decision, yet the new statute, even if it ensured "neutrality," could not affect the relevance of neutrality to the analysis. In sum, the change in the statute cannot satisfactorily explain the North Carolina Supreme Court's reversal from *Pendleton* to *Yencer*.

For purposes of this Note, it is not particularly important whether the North Carolina Supreme Court got it right in *Pendleton* or in *Yencer*. The crucial point is that, based on more or less the same sources of legal authority, the same state court interpreted the nondelegation rule's scope and significance in dramatically different ways. The three issues identified in Part I were all answered in one way in *Pendleton* and in the exact opposite way in *Yencer*. *Pendleton* and *Yencer* thus illustrate the problems with applying the nondelegation rule.

North Carolina is not the only state to have struggled with the constitutionality of campus police statutes. In *Myers v. State*[165] and *People v. Van Tubbergen*,[166] state courts in Indiana and Michigan also confronted nondelegation challenges to campus police statutes.

3. Myers. — In *Myers v. State*, the defendant was arrested for drunk driving by campus police at Lutheran-affiliated Valparaiso University.[167] The defendant challenged the arrest, arguing that the campus police authorization statute, which applied to all certified universities, violated the Establishment Clause. The Indiana Court of Appeals disagreed. While the court invoked and briefly discussed the first two prongs of *Lemon*, the primary discussion centered on *Larkin*.[168] Like the North Carolina Supreme Court in *Pendleton*, the *Myers* court understood the nondelegation analysis to consist of two issues: (1) whether the power delegated was an "important discretionary power" of the sort barred by *Larkin* and (2) whether the university was a "religious institution."[169] On each of those points, however, the *Myers* court disagreed with *Pendleton*. First, the *Myers* court found that the power delegated did not fall within the *Larkin* rule, since it did not "substitute the opinion of a religious body for that of the state."[170] Second, the *Myers* court found that the university was "not a religious institution for First Amendment purposes,"

165. 714 N.E.2d 276 (Ind. Ct. App. 1999).
166. 642 N.W.2d 368 (Mich. Ct. App. 2002).
167. 714 N.E.2d at 278.
168. Id. at 281.
169. Id. at 282–83.
170. Id. at 283.

but an "institution of higher learning affiliated [with a church]."[171] Like the *Pendleton* dissent and *Yencer* court, the *Myers* court relied heavily on the *Tilton* and *Hunt* decisions to draw this conclusion.[172] On the issue of neutrality, *Myers* took the same approach as *Yencer*, and relied on the *Kiryas Joel* plurality to hold that neutral delegations do not fall within the *Larkin* rule.[173]

Conspicuously unaddressed in *Myers* was the fact that the Indiana campus police law specifically provided that deputized officers had a "duty to enforce" the institutional rules of their host university.[174] Though it is unclear from the text of the statute whether this duty was backed up by state-granted police power,[175] this aspect of the Indiana law puts *Myers* in some tension with *Yencer*, where the North Carolina Supreme Court specifically mentioned the inability of officers to enforce school rules as a basis of constitutionality.[176]

4. Van Tubbergen. — In *People v. Van Tubbergen*, the defendant was arrested by Hope College campus police officers, who were deputized under a sheriff deputization statute.[177] The Michigan Court of Appeals rejected the defendant's Establishment Clause challenge and found that the deputization statute, as applied to the officers, met all three prongs of *Lemon*.[178] In the course of discussing the entanglement prong, the court mentioned *Larkin*, and came to a similar conclusion to that in *Myers*: that the nondelegation rule did not apply since the university was not a "religious institution within the meaning of the First Amendment."[179]

Though similar to *Yencer* and *Myers* in many respects, *Van Tubbergen* raised two interesting points that run against the other campus police cases. First, to the *Van Tubbergen* court, the fact that "there [was] surprisingly little contact or coordination between Hope College and the sheriff's department" weighed *in favor* of the campus police statute's constitutionality.[180] In the court's view, the campus police agency's effective free-

171. Id. at 279, 283.

172. Id. at 282–83.

173. Id. at 283.

174. Ind. Code § 20-12-3.5-2(a) (1999) (repealed 2007) ("In addition to any other powers or duties, such police officers have the *duty to enforce and to assist the officials of their institutions in the enforcement of the rules and regulations of the institution*, and to assist and cooperate with other law enforcement agencies and officers." (emphasis added)).

175. The statute specified only a duty, not a power. Id.

176. State v. Yencer, 718 S.E.2d 615, 620 (N.C. 2011) ("In other words, campus police officers may enforce only the law, not campus policies or religious rules.").

177. 642 N.W.2d 368, 370 (Mich. Ct. App. 2002).

178. Id. at 379–82. Much of the court's analysis was taken directly from the lower court opinion, which was quoted at great length. Id.

179. Id. at 382.

180. Id. at 380 (quoting and adopting lower court's opinion) (internal quotation marks omitted).

dom from state oversight meant that there was little entanglement between the state and the school.[181] This is in significant tension with *Yencer*, which stressed that *extensive* state oversight cut in favor of the North Carolina statute.[182] Second, the lower court judge in *Van Tubbergen*, whose opinion the Michigan Court of Appeals adopted, noted that, under the campus police statute, campus police are "able to enforce not only the school's *private rules*, but may also enforce the laws of the state."[183] In its own opinion, the Court of Appeals emphasized that deputized officers could "only enforce the laws of Michigan" and, "*off campus*, [could not] enforce any other laws or rules such as those promulgated by Hope College."[184] *Van Tubbergen* thus explicitly recognized the possibility of—and ignored the possible constitutional problems with—campus police officers using their powers to enforce the private rules of a religious university on the university's campus.[185] This too is in significant tension with *Yencer*, where the inability of campus police to enforce anything other than state laws was a centerpiece of the court's finding of constitutionality.[186]

C. *Disagreements, Old and New*

The campus police cases vividly illustrate the problems caused by the nondelegation rule. In the pre-*Yencer* era, when *Pendleton* furnished the controlling law in North Carolina, disagreements in the lower courts primarily concerned the three issues identified in Part I: namely, (1) confusion about the nondelegation rule's relationship to the *Lemon* test, (2) confusion about the scope of the rule, and (3) confusion about the rule's applicability to neutral delegations. Sections 1, 2, and 3 of Part II.C take up these issues.

1. *The Nondelegation Rule's Relationship with* Lemon. — The state courts disagreed about whether the nondelegation rule functions separately from the *Lemon* test. In *Pendleton*, though the court nominally recognized the importance of the *Lemon* test, it skipped over the first two prongs entirely and mentioned the entanglement prong only to note its relationship to the nondelegation rule.[187] The court in *Jordan* similarly eschewed a full *Lemon* analysis for a discussion about the applicability of

181. Id. at 382.

182. See supra notes 163–164 and accompanying text (describing *Yencer*'s treatment of governmental oversight).

183. 642 N.W.2d at 380 (emphasis added) (quoting lower court opinion) (internal quotation marks omitted).

184. Id. at 381 (emphasis added).

185. In this respect, *Van Tubbergen* was the inverse of *Myers*, where the statute explicitly instructed officers to enforce the rules of the school, but the court ignored this issue. See supra notes 174–175 and accompanying text.

186. See State v. Yencer, 718 S.E.2d 615, 620 (N.C. 2011) (focusing on limitations on campus police power).

187. State v. Pendleton, 451 S.E.2d 274, 277 (N.C. 1994).

the nondelegation rule.[188] By contrast, though *Myers* and *Van Tubbergen* also discussed nondelegation, they did so in the context of a full *Lemon* analysis that included analysis of the other two prongs.[189]

2. *The Nondelegation Rule's Scope.* — Both of the scope issues identified in Part I—namely, what the nondelegation rule means by "religious institution" and what it means by "governmental power"—led to disagreements in the state courts. The *Pendleton* and *Jordan* courts held that "religious institution," for purposes of the rule, included religiously affiliated universities, while the *Myers* and *Van Tubbergen* courts did not.[190] Similarly, while the *Pendleton* court found the rule to apply to any "discretionary" and "important" power, the *Myers* court held that the nondelegation rule applies only to delegations of "standardless power."[191]

3. *The Nondelegation Rule's Applicability to Neutral Delegations.* — Finally, the campus police cases disagreed about whether neutral delegations come within the prohibition of *Larkin*. The *Pendleton* court ignored the significance of neutrality,[192] while the *Myers*, *Van Tubbergen*, and *Yencer* courts all cited the campus police laws' neutrality as a major factor in favor of constitutionality.[193]

At first glance, it appears that North Carolina's recent *Yencer* decision resolved many of these disagreements. Like *Myers* and *Van Tubbergen* (and unlike *Pendleton*), *Yencer* treated the nondelegation rule as an aspect of *Lemon* rather than as a doctrine unto itself.[194] Like *Myers* and *Van Tubbergen* (and unlike *Pendleton*), *Yencer* found the religiously affiliated university at issue not to be a "religious institution" for the nondelegation rule's purposes.[195] Finally, like *Myers* and *Van Tubbergen* (and unlike *Pendleton*), *Yencer* relied heavily on the neutrality of the campus police law to support its constitutionality.[196]

Even after *Yencer*, however, considerable tension exists in the state courts' understanding of the nondelegation rule. First, post-*Yencer*, there is still no clear picture of how the nondelegation rule relates to *Lemon*. *Yencer* itself is somewhat confused on this point. Though the court analyzed the nondelegation rule as part of *Lemon*'s entanglement prong, dis-

188. State v. Jordan, 574 S.E.2d 166, 168–70 (N.C. Ct. App. 2002).

189. Myers v. State, 714 N.E.2d 276, 281 (Ind. Ct. App. 1999); *Van Tubbergen*, 642 N.W.2d at 379–81.

190. Compare *Pendleton*, 451 S.E.2d at 279–80, and *Jordan*, 574 S.E.2d at 170–71, with *Myers*, 714 N.E.2d at 282–83, and *Van Tubbergen*, 642 N.W.2d at 381–82.

191. Compare *Pendleton*, 451 S.E.2d at 278–79, with *Myers*, 714 N.E.2d at 283.

192. See *Pendleton*, 451 S.E.2d at 284 (Whichard, J., dissenting) (disagreeing with majority because "police power conferred was quintessentially secular, neutral, and nonideological").

193. *Myers*, 714 N.E.2d at 283; *Van Tubbergen*, 642 N.W.2d at 382; State v. Yencer, 718 S.E.2d 615, 620 (2011).

194. See supra note 158 and accompanying text.

195. See supra note 161 and accompanying text.

196. See supra notes 159–160 and accompanying text.

cussion of delegation permeated the entirety of the opinion, including the section nominally devoted to the effects prong.[197] This parallels a similar tension between *Myers* and *Van Tubbergen*: Whereas *Myers* treated nondelegation as relevant to all three prongs of *Lemon*, *Van Tubbergen* treated it as an aspect of entanglement only.[198]

Second, post-*Yencer*, disagreement persists as to whether it is constitutionally problematic for campus police officers to enforce the rules of the religiously affiliated university at which they are employed. As a primary basis of finding the police authorization statute constitutional, *Yencer* emphasized the inability of campus police officers to enforce anything other than state law.[199] By contrast, *Myers*, through silence, and *Van Tubbergen*, by implication, seemed less concerned about the possibility that campus police officers might be charged with enforcing the (possibly religious) rules of their host institutions.[200]

Finally, *Yencer* and *Van Tubbergen* explicitly disagreed about the constitutional significance of state oversight of campus police officers. Whereas the North Carolina Supreme Court in *Yencer* regarded such oversight as essential to removing many of the concerns raised in *Pendleton*, the Michigan court in *Van Tubbergen* pointed to the *absence* of such oversight as supportive of the campus police statute's constitutionality.[201]

In conclusion, though *Yencer* superficially ended the state split that existed over the constitutionality of campus police authorization statutes, it did so in a way that preserved many of the disagreements about the proper application of the nondelegation rule. Furthermore, the *Yencer* decision itself, which overturned the *Pendleton* decision, is proof of the instability engendered by the nondelegation rule. The abrupt reversal from *Pendleton* to *Yencer*, with relatively little change in the legal landscape in the intervening years, shows that, while it appears simple to enforce a rule against the delegation of governmental power to religious institutions, actual application of that rule is fraught with complexity.

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197. 718 S.E.2d at 618–21 (discussing delegation as part of effects prong); id. at 622 (discussing nondelegation rule itself as part of entanglement analysis).

198. Compare *Myers*, 714 N.E.2d at 283 ("The delegation in the case before us was neither to a church nor a religious governing body, did not involve the exercise of civic power without standards, and did not have the purpose or effect of protecting or promoting religious interests."), with *Van Tubbergen*, 642 N.W.2d at 381–82 (citing *Larkin* and discussing nondelegation issue in analysis of entanglement prong).

199. See 718 S.E.2d at 620.

200. See supra notes 174–175 and accompanying text (discussing *Myers*); supra notes 183–185 and accompanying text (discussing *Van Tubbergen*).

201. See supra notes 180–182 and accompanying text (contrasting *Yencer* and *Van Tubbergen* courts' treatments of state oversight).

III. THE NONDELEGATION RULE'S OVERLAP WITH OTHER ESTABLISHMENT CLAUSE DOCTRINES

This Note argues that courts should not rely on the nondelegation rule as a basis for Establishment Clause adjudication: Part I emphasized three unresolved ambiguities of the rule, while Part II showed how those ambiguities have complicated state court analysis in one particular area, campus police authorization statutes. The fact that a legal doctrine is somewhat difficult to apply does not mean that it should be abandoned, however. It could be that any problems a doctrine engenders are offset by a useful function that the doctrine serves, so that, on balance, the law is better for the doctrine's presence. Part III shows that the nondelegation rule has no such saving grace. That is, any insight that the nondelegation rule might be thought to capture is already captured by more fundamental Establishment Clause doctrines. The nondelegation rule thus merely adds confusion, with no offsetting upside.

To see that the nondelegation rule merely duplicates analytical insights already available through other doctrines, it is necessary to distinguish the types of cases in which a delegation issue might arise. Part III.A distinguishes three broad genres of delegation: neutral delegations (like campus police statutes), accommodative delegations (like kosher laws), and de facto delegations (like the formation of the village in *Kiryas Joel*). Part III.B then shows that for each of these types of delegations, doctrines apart from the nondelegation rule adequately resolve the relevant constitutional issues.

A. *Types of Delegation: Neutral, Accommodative, and De Facto*

One of the shortcomings of the nondelegation rule is that it does not distinguish between different types of delegation. Depending on the motivation behind a delegation of governmental power, different constitutional concerns might be at stake. There are, roughly, three different types of delegation, each characterized by a different governmental motive.

1. *Neutral Delegations.* — Neutral delegations are delegations that occur as part of a general program designed to further a secular public policy objective. The campus police cases are examples of neutral delegation. The motive behind delegation in those cases is to achieve a secular interest, namely, improving public security at minimum cost to the state,[202] and to that end, religious institutions receive governmental power as part of a larger category of recipients defined on some secular basis (universities). As Justice Souter put it in *Kiryas Joel*, neutral delegations occur when the government delegates power based on "principles

202. See, e.g., *Van Tubbergen*, 642 N.W.2d at 381 ("Private institutions, the general public, and the state are all benefited by having increased law enforcement capabilities and the consequent protection of persons and property.").

neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority."[203]

In neutral delegations, the primary constitutional concern is that the religious recipients of governmental power will use it to promote religion. Hence, in the campus police cases, the concern is that officers of religiously affiliated universities will use their delegated powers to enforce religious rules or discriminate against members of different religions.[204] Neutral delegations also raise entanglement problems. If extensive governmental monitoring of religious institutions is needed to make sure delegated powers are not abused, that supervision might be thought to excessively entangle the government in the workings of religious institutions.[205] Neutral delegations generally do not raise issues of symbolic union or government endorsement,[206] however, since the neutral availability of the benefit minimizes any inference of symbolic government endorsement.[207]

2. *Accommodative Delegations.* — In contrast to neutral delegations, accommodative delegations occur where the government delegates power to address some need especially felt by religious institutions or individuals. Kosher laws are accommodative delegations: They are designed to address a special need of the Jewish community (and others)—namely, the need to identify trustworthy vendors of kosher goods.[208] Likewise, the

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203. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 699 (1994).

204. See, e.g., *Van Tubbergen*, 642 N.E.2d at 380–81 ("The potential constitutional danger is that the Hope College officers would impose, either intentionally or inadvertently, their personal religious beliefs (or those of the college) on the general public . . . .").

205. See supra notes 180–182, 201 and accompanying text (discussing disagreement between *Yencer* and *Van Tubbergen* courts about significance of state supervision).

206. The government endorses religion if it "[makes] adherence to a religion relevant in any way to a person's standing in the political community." Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). The *Larkin* Court's concern about the "significant symbolic benefit" provided by the statute at issue in that case was a concern about government endorsement. See Larkin v. Grendel's Den, Inc., 459 U.S. 116, 125–26 (1982).

207. See Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763–64 (1995) (plurality opinion) (reasoning that "neutral policies that happen to benefit religion" generally raise no endorsement problem); See, supra note 137, at 421–22 (noting Court's treatment of programs that are "not religious in character and . . . available to a wide spectrum of organizations"). It is possible for someone who is ignorant of the neutral reach of the campus police statute to mistakenly view the existence of campus police officers at religiously affiliated universities as evidence of government solicitude for religion. However, in *Pinette*, a plurality of Justices rejected this "transferred endorsement" argument and held that "erroneous conclusions" about endorsement stemming from ignorance "do not count." 515 U.S. at 764–65.

208. Popovsky, supra note 117, at 79. As noted above, many consumers also rely on kosher labels for nonreligious reasons, like health. Furthermore, many states, in an effort to defend against Establishment Clause challenges, have characterized their kosher statutes as primarily having a secular, antifraud purpose. See, e.g., Ran-Dav's Cnty. Kosher, Inc. v. State, 608 A.2d 1353, 1360 (N.J. 1992). As the courts have responded, however, a

statute in *Larkin* was designed to address a special incompatibility with alcohol borne by religious houses of worship.[209]

Like neutral delegations, accommodative delegations create the possibility that the recipients of the delegated power will use it to promote religion. For example, the accommodative law in *Larkin* posed the risk that churches could use the veto power "for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith."[210] In addition to concerns about religious promotion, accommodative delegations raise concerns about the special treatment they show toward religion, concerns which do not arise with respect to neutral delegations. For example, accommodative delegations, unlike neutral delegations,[211] raise concerns about endorsement.[212] More importantly, accommodative delegations raise concerns about whether the government ought to be in the business of accommodating religious practices in the first place.

3. *De Facto Delegations.* — If neutral delegations are characterized by a governmental motive to achieve some secular objective, and accommodative delegations are characterized by a governmental motive to accommodate religion, de facto delegations are characterized by the absence of a governmental motive altogether. De facto delegations occur where "religiously homogenous"[213] communities break off to form their own political subdivisions, and thus acquire the ability to exercise governmental power. The major example of de facto delegation is *Kiryas Joel*,[214] al-

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general antifraud purpose can be met by a more general antifraud law, Commack Self-Service Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 431 (2d Cir. 2002), and the fact that some consumers rely on kosher labels for nonreligious purposes does not detract from the fact that the labels are primarily addressed to accommodate a religious practice, *Ran-Dav's*, 608 A.2d at 1360 ("The State confuses the meaning of the law with the motives of consumers.").

209. *Larkin*, 459 U.S. at 129 (Rehnquist, J., dissenting) ("The concededly legitimate purpose of the statute is to protect citizens engaging in religious and educational activities from the incompatible activities of liquor outlets and their patrons.").

210. Id. at 125 (majority opinion).

211. See, e.g., Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 488–89 (1986) (arguing that there is no endorsement problem when "neutrally available state aid" is applied to religious institution).

212. See, e.g., *Larkin*, 459 U.S. at 125–26 (noting liquor license statute designed to accommodate special needs of churches and schools provided "significant symbolic benefit" to religious institution).

213. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 708 (1994).

214. Technically, the issue of de facto delegation was not addressed in the Court's opinion in *Kiryas Joel*. The nondelegation debate between the plurality and the dissent centered on the propriety of the state legislature's special action to create a school district for the village. See id. at 699–701. That is a debate about an accommodative delegation. The facts of *Kiryas Joel* raised a second type of delegation issue, however, which is whether homogenous religious communities should be allowed to form self-governing political subdivisions. This issue was discussed somewhat in Justice Scalia's dissent, which accused the plurality of adopting the "quite novel proposition that any group of citizens . . . can be invested with political power, but not if they all belong to the same religion." See id. at 736

though varieties of de facto delegation have also been discussed in other cases.[215]

The primary constitutional issue with de facto delegations is whether religiously homogenous political subdivisions should be permitted to exercise municipal powers normally enjoyed by nonreligious subdivisions of that kind.[216] The worry is that because such communities may be "subject to the actual and direct control of a religion and its leaders," granting them municipal powers might amount to creating a kind of "theocracy."[217]

B. *Doctrinal Overlap*

As the above discussion demonstrates, the problem of governmental delegation to religion really amounts to three different sets of problems posed by neutral delegations, accommodative delegations, and de facto delegations. For each of these three types of cases, however, Establishment Clause doctrines apart from the nondelegation rule already adequately address the relevant constitutional concerns. The concept of "delegation" adds no additional analytical insight.

1. *Neutral Delegation and the School Aid Cases.* — As discussed above, the primary constitutional problem raised by neutral delegations is the possibility that religious recipients will misuse the delegated power to promote religion.[218] The problem is thorny since the natural solution,

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(Scalia, J., dissenting). Given that the majority never actually made this de facto delegation argument, however, Justice Scalia may have been attacking a straw man.

215. E.g., Oregon v. City of Rajneeshpuram, 598 F. Supp. 1208 (D. Or. 1984) (finding Establishment Clause violated where city was constituted for purpose of advancing religion, all property in city was owned by corporations controlled by adherents of that religion, and religious authorities controlled entry into city); State v. Celmer, 404 A.2d 1 (N.J. 1979) (finding Establishment Clause violated where state government granted municipal powers—including police powers and powers to enforce local ordinances—to religious community governed by board of trustees, members of which had to be Methodists). *Celmer* does not present as pure a case of de facto delegation as *Kiryas Joel* or *Rajneeshpuram* since, in *Celmer*, power was specifically delegated to the municipality, whereas in *Kiryas Joel* and *Rajneeshpuram* the communities exercised power that was otherwise available to political subdivisions of that kind. See Greenawalt, Religion and the Constitution, supra note 17, at 231–36 (discussing legal questions raised by *Kiryas Joel*, *Celmer*, and *Rajneeshpuram*); David E. Steinberg, Note, Church Control of a Municipality: Establishing a First Amendment Institutional Suit, 38 Stan. L. Rev. 1363, 1363–65 (1986) (discussing historical and present-day de facto delegations).

216. This issue was extensively discussed in Justice Kennedy's concurrence in *Kiryas Joel* itself. See 512 U.S. at 728–30 (Kennedy, J., concurring). In Kennedy's view, the formation of the village presented no problems, while the formation of the school district did. Id. See generally Abner S. Greene, *Kiryas Joel* and Two Mistakes About Equality, 96 Colum. L. Rev. 1 (1996) (discussing opinions in *Kiryas Joel*).

217. *Rajneeshpuram*, 598 F. Supp. at 1212–13.

218. See, e.g., People v. Van Tubbergen, 642 N.W.2d 368, 380–81 (Mich. Ct. App. 2002) (addressing concern that campus police officers could use delegated authority to promote religious values).

close supervision by the state, raises entanglement concerns.[219] While this is by no means an easy problem, it is neither novel nor unique to cases involving delegation of government power. This precise problem was discussed, and ultimately resolved, in the Supreme Court's cases addressing the constitutionality of facially neutral government aid to religious schools.

Two of the Court's school aid cases are particularly relevant. In *Aguilar v. Felton*, the Court found unconstitutional a government program that paid public employees to teach secular subjects at private schools, including religiously affiliated schools.[220] The Court reasoned that the program created a substantial risk of religious indoctrination by the teachers and that the degree of supervision necessary to ameliorate this risk would itself create excessive entanglement.[221] In the years following *Aguilar*, however, the Court gradually relaxed this rule[222] until, in *Agostini v. Felton*, the Court explicitly rejected the reasoning behind *Aguilar* and held that public employees may provide secular education on the grounds of religious schools.[223] According to the *Agostini* Court, *Aguilar* erred by relying upon the false premise that public employees would ignore their responsibilities and engage in religious indoctrination once they got to religious schools.[224] The Court found that there was no reason to doubt that a teacher could fulfill his or her duty to refrain from engaging in religious activity while teaching, and that therefore no extensive state supervision was required to ensure compliance.[225]

The reasoning in *Agostini* is directly applicable to neutral delegations like campus police authorization statutes. Like school aid programs,

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219. See, e.g., State v. Yencer, 718 S.E.2d 615, 621 (N.C. 2011) (raising, but ultimately rejecting, argument that religious university supervision over campus police officers raises entanglement concerns).

220. 473 U.S. 402, 404–07 (1984) (setting forth facts of government program), overruled by Agostini v. Felton, 521 U.S. 203 (1997).

221. Id. at 412–13 ("This pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement."). In this respect, *Aguilar* echoed an argument that was omnipresent in the Court's school aid jurisprudence at that time, including in *Lemon* itself. See, e.g., Lemon v. Kurtzman, 403 U.S. 602, 619–20 (1971) ("A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. . . . These prophylactic contacts will involve excessive and enduring entanglement between state and church.").

222. See Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993) (holding government funding for interpreter to aid student at religious school did not violate Establishment Clause because interpreter was made available as part of neutral program); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487–88 (1986) (holding government aid for handicapped individuals could be applied to blind individual's education at religious school, since aid was neutrally available to all handicapped individuals and choice to use funds on religious education lay with individual and not with state).

223. 521 U.S. at 223.

224. Id. at 223–24.

225. Id. at 233–34.

campus police laws are troubling only if there is reason to believe that officers will abuse their positions to promote religious ends.[226] If this belief is unfounded, then, as in *Agostini*, there will be no need for extensive monitoring and hence no excessive entanglement.[227] In other words, like the school aid cases, the campus police cases boil down to an empirical question: Is there reason to believe that campus police officers will let the religious affiliations of their employers affect the manner in which they discharge their legal duties?[228]

In the actual campus police cases, the courts found that, based on the evidence, there was no significant risk of campus police officers ignoring the limitations of their power.[229] Regardless of whether that is true as a factual matter, it underscores the point that the constitutional analysis does not turn on whether a "delegation" is present. In both the school aid cases and the campus police cases, the true concern is whether an agent exercising some authority will exercise it neutrally; whether that authority takes the form of a "delegated" governmental power or something else does not matter.[230] In other words, the availability of the *Agostini*-type analysis makes the nondelegation rule irrelevant.

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226. See supra note 204 and accompanying text (discussing above concern in campus police cases).

227. 521 U.S. at 233–34.

228. The two situations are not fully analogous. In the school aid cases, the teachers were employees of the government, but it was feared that because they taught at religiously affiliated schools, they would let religion seep into their instruction. Id. at 219 (discussing concern that "teachers—even those who were not employed by the private schools—might subtly (or overtly) conform their instruction to the [pervasively sectarian] environment in which they [taught]" (alteration in original) (citations omitted) (internal quotation marks omitted)). By contrast, in the campus police cases, the worry is that the officers will be unduly influenced by the religious affiliation of their employer or by their own religious beliefs. See People v. Van Tubbergen, 642 N.W.2d 368, 380–81 (Mich. Ct. App. 2002) ("The potential constitutional danger is that the Hope College officers would impose, either intentionally or inadvertently, their personal religious beliefs (or those of the college) on the general public."). However, notwithstanding this difference, the practical question is the same: Should the teachers (in the school aid cases) and the police officers (in the campus police cases) be trusted to withstand these potential biases and perform their jobs neutrally?

229. See, e.g., *Van Tubbergen*, 642 N.W.2d at 380–81 (finding that danger of officers ignoring their duties and abusing their power to impose religious beliefs is "minimal"); State v. Yencer, 718 S.E.2d 615, 620 (N.C. 2011) ("Specifically, defendant makes no contention that the Davidson Campus Police attempt to proselytize or enforce any private or religious rules, or that her arrest was religiously motivated.").

230. Of course, the fact of delegation matters in a mundane sense in that, if the campus officers in the campus police cases were not delegated governmental power in the first place, there would be no Establishment Clause issue at all, since there would be no state action. Thus, the fact of delegation certainly is relevant to setting up the Establishment Clause problem in the first place. The claim of this Note, however, is that delegation has no role to play *within* the Establishment Clause analysis; that is, it has no role to play in determining whether or not something in fact violates the Establishment Clause.

2. *Accommodative Delegations, Accommodation, and Endorsement.* — As previously discussed, accommodative delegations, like kosher laws or the liquor law at issue in *Larkin*, raise constitutional concerns in addition to those present in neutral delegations. Specifically, accommodative delegations raise concerns about government endorsement and about the propriety of governmental accommodation of religion.[231]

Neither issue is novel and both have been addressed by the Supreme Court in contexts outside of delegation. It is now relatively settled that government accommodation of religion[232] is, in some circumstances, constitutionally required by the Free Exercise Clause[233] and, in other circumstances, permitted by the Establishment Clause.[234] In the latter case, the relevant inquiries are whether there is a "permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions" and whether the law merely "*allows* churches to advance religion."[235] It is similarly well settled that the Establishment Clause prevents government endorsement of religion,[236] though the Justices have disagreed on the appropriate test for endorsement.[237]

It is not important for present purposes to determine how particular accommodative delegations like kosher laws fare under either of these doctrines. The crucial point is that, with respect to both of these doctrines, the question of whether the government program at issue is a "delegation" is irrelevant. That is to say, the answers to the questions, "Are kosher laws permissible accommodations of religion?" and "Do kosher laws impermissibly endorse religion?" do not depend on the answer

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231. See supra note 212 and accompanying text.

232. For scholarly arguments for and against accommodation, see generally Michael W. McConnell, Accommodation of Religion, 1985 Sup. Ct. Rev. 1 (arguing that accommodation provides general theory of Religion Clause jurisprudence); Mark Tushnet, The Emerging Principle of Accommodation of Religion (Dubitante), 76 Geo. L.J. 1691 (1988) (pointing out difficulties with McConnell's proposal to view Establishment Clause cases solely through lens of accommodation).

233. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 702–07 (2012) (holding that Free Exercise Clause requires government to accommodate religion by having "ministerial exception" that exempts churches from religious discrimination laws when it comes to hiring or firing of ministers).

234. Corp. of the Presiding Bishop of the Jesus Christ Church of Latter-Day Saints v. Amos, 483 U.S. 327, 334–38 (1987).

235. Id. at 335, 337.

236. Cnty. of Allegheny v. ACLU, 492 U.S. 573, 592 (1989); Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

237. See Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 764 (1995) (plurality opinion) (arguing endorsement analysis should focus on whether government in fact expressed endorsement); id. at 773 (O'Connor, J., concurring in part) (arguing endorsement test considers whether "reasonable, informed observer" would have perceived endorsement); id. at 785 (Souter, J., concurring in part) (agreeing "intelligent observer" should be basis of endorsement analysis); id. at 800–01 (Stevens, J., dissenting) (arguing installation on government property shows endorsement).

to the question "Are kosher laws delegations of power to religious institutions?"

This is apparent from the Court's reasoning in *Larkin* itself. *Larkin* suggests that delegations are troubling *because* they signify government endorsement and *because* they might not be justifiable as accommodations.[238] The notion of "delegation" is a proxy for those two concerns, not an independent ground for constitutional worry. It follows that, if the endorsement and accommodation questions can be addressed directly (which they can be under existing Establishment Clause jurisprudence), there is no use for an independent nondelegation rule.

3. *De Facto Delegations and Political Theory.* — Analysis of the final category of delegation, de facto delegation, also does not benefit from the existence of the nondelegation rule. As discussed above, the constitutional issue in de facto delegations is whether religiously homogenous communities should be allowed to form municipalities and wield municipal power.[239]

As Professor Abner Greene has argued, the permissibility of de facto delegations is not so much an issue of constitutional doctrine as it is a problem of political theory. From a doctrinal perspective, so long as the governments of religiously homogenous communities exercise power subject to the same general limitations to which all governments are subject, there is no Establishment Clause problem.[240] To the extent that de facto delegations are problematic, they are problematic from a political theory perspective. Allowing religious communities to break off from society at large and to self-govern might be thought to offend the liberal

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238. Larkin v. Grendel's Den, Inc., 459 U.S. 116, 125–26 (1982).

239. See supra Part III.A.3.

240. Greene, supra note 216, at 5. In *Marsh v. Alabama*, the Court held that a municipality owned by a private corporation was subject to the same constitutional rules, including the First Amendment, as ordinary municipalities. 326 U.S. 501, 508 (1945). The principle of *Marsh* extends to municipalities organized by the members of a single religion. Of course, with religiously homogenous communities, there may be a higher than usual risk that the government will use power to promote religious ends. Greene, supra note 216, at 17–18. For examples of courts invalidating cession of power to municipalities owned or controlled by religious organizations, see Oregon v. City of Rajneeshpuram, 598 F. Supp. 1208, 1216 (D. Or. 1984); State v. Celmer, 404 A.2d 1, 6 (N.J. 1979). On the other hand, it is certainly not a forgone conclusion that private citizens will govern religiously simply because they belong to the same religion. Greene, supra note 216, at 24–25, 35 ("We should not assume that citizens will abuse public power"); cf. *Rajneeshpuram*, 598 F. Supp. at 1216 (finding "a difference between . . . provision of ordinary municipal services to a city of private landowners of one religion and to the City of Rajneeshpuram, where the land is communally owned and controlled by religious organizations"). This echoes the debate between the plurality and Justice Scalia in *Kiryas Joel* itself. Compare Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 698–700 (1994) (plurality opinion) (finding immaterial distinction between religious institution and religiously homogenous community for purposes of nondelegation), with id. at 736–37 (Scalia, J., dissenting) (criticizing plurality for "collapsing the distinction between religious institutions and their members").

ideal of an integrated, pluralistic society.[241] As Greene puts it, the existence of such communities might be taken as a sort of "religious gerrymander."[242]

Ultimately, Greene finds this objection to de facto delegations unpersuasive.[243] Whether he is correct lies beyond the scope of this Note.[244] The important point is that, just as the nondelegation rule offers little insight into neutral delegations and accommodative delegations, it offers little insight into de facto delegations. The political theory question of whether communities like Kiryas Joel constitute offensive "religious gerrymanders" does not depend at all on the doctrinal question of whether such communities exercise "delegated" governmental power. It is possible for a community like Kiryas Joel to concede that it exercises delegated power and still dispute that this exercise is problematic. That is to say, even though delegation is a *factual* prerequisite for de facto delegations, it does not form any part of the *normative* analysis as to whether such delegations should be permitted—that a normative inquiry is needed at all *presumes* the fact that delegation has occurred. Since the permissibility of de facto delegations does not depend on whether a delegation has actually occurred, but rather on considerations of political theory, the nondelegation rule is of little help in this class of cases.

CONCLUSION

At first blush, the nondelegation rule appears both straightforward and sensible. As the campus police cases demonstrate, however, the rule is in fact difficult to apply and riddled with ambiguity, especially regarding (1) its relationship with the *Lemon* test, (2) its scope, and (3) its applicability to neutral delegations. Even now, when the state courts to have reached the issue all nominally conclude that campus police statutes are constitutional, their reasoning still differs and reflects conflicting understandings of the nondelegation rule.

If the nondelegation rule served a useful analytical purpose, such confusion might be tolerated. But all three categories of delegation—neutral, accommodative, and de facto—are more adequately addressed by other Establishment Clause doctrines. The nondelegation rule is, at best, duplicative and, at worst, needlessly confusing.

Given the rule's limited benefit and heavy cost, a strong case exists that it should no longer form a basis for Establishment Clause analysis.

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241. Greene, supra note 216, at 6.

242. Id. at 17–18, 27–28.

243. Id. at 6–8.

244. For more scholarly discussion of de facto delegations, see Greenawalt, Religion and the Constitution, supra note 17, at 224–36 (arguing that government should be wary of granting municipal powers to religiously homogenous communities like Kiryas Joel); Steinberg, supra note 215, at 1382–93 (arguing constitutional concerns posed by de facto delegations mirror those raised by Equal Protection cases).

That does not mean delegations should be treated as irrelevant. The fact that a government program delegates governmental power to religious institutions is undoubtedly important to the constitutionality of that program. However, just as the fact that displaying a cross is constitutionally significant need not give rise to a no-display-of-crosses doctrine, the fact that delegations are constitutionally significant need not give rise to a nondelegation doctrine. In both the case of the cross and the case of the delegation, more general Establishment Clause doctrines adequately address the relevant constitutional concerns. The nondelegation rule sows much confusion for little additional fruit.

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