

As a result, a splintered Court failed to reach the merits of the underlying challenge, and instead remanded the case for further consideration.²⁴⁷

Miscellaneous.—In *Larkin v. Grendel's Den*,²⁴⁸ the Court held that the Establishment Clause is violated by a delegation of governmental decisionmaking to churches. At issue was a state statute permitting any church or school to block issuance of a liquor license to any establishment located within 500 feet of the church or school. Although the statute had a permissible secular purpose of protecting churches and schools from the disruptions often associated with liquor establishments, the Court indicated that these purposes could be accomplished by other means, *e.g.*, an outright ban on liquor outlets within a prescribed distance, or the vesting of discretionary authority in a governmental decisionmaker required to consider the views of affected parties. However, the conferral of a veto authority on churches had a primary effect of advancing religion both because the delegation was standardless (thereby permitting a church to exercise the power to promote parochial interests), and because “the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some.”²⁴⁹ Moreover, the Court determined, because the veto “enmeshes churches in the exercise of substantial governmental powers,” it represented an entanglement offensive to “the core rationale underlying the Establishment Clause [—] preventing ‘a fusion of governmental and religious functions.’”²⁵⁰

²⁴⁷ Justice Kennedy, joined in full by Chief Justice Roberts and in part by Justice Alito, found that the plaintiff, based on the existing injunction, had standing to challenge the land transfer. The case, however, was remanded to the district court to consider the legitimate congressional interest in reconciling Establishment Clause concerns with respect for the commemoration of military veterans, *id.* at 10–13, and to evaluate whether the land transfer would lead a “reasonable observer” to perceive government endorsement of religion. *Id.* at 16–17. Justice Alito would have upheld the land transfer, suggesting that a reasonable observer deemed to be aware of the history and all other pertinent facts relating to a challenged display would not find the transfer to be an endorsement of religion. *Id.* at 6 (Alito, J., concurring in part and in judgement). Justice Scalia, joined by Justice Thomas, held that the plaintiff had no standing to seek the expansion of the existing injunction to the display of the cross on private lands. *Id.* at 3–6 (Scalia, J., concurring in judgement).

²⁴⁸ 459 U.S. 116 (1982).

²⁴⁹ 459 U.S. at 125–26. *But cf.* *Marsh v. Chambers*, 463 U.S. 783 (1983), involving no explicit consideration of the possible symbolic implication of opening legislative sessions with prayers by paid chaplains.

²⁵⁰ 459 U.S. at 126, quoting *Abington*, 374 U.S. 203, 222 (1963).