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# Model Free Exercise Challenges for Religious Landmarks

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## MODEL FREE EXERCISE CHALLENGES FOR RELIGIOUS LANDMARKS

*To preserve cultural history and foster civic pride, states confer landmark status on buildings of historic or architectural significance. For owners of such property, landmark designation may prove more a burden than a blessing. Compelled to maintain the building and restrained from enlarging it, the owner may suffer spatial and financial strain. Challenges to landmark designations typically are brought on due process and eminent domain grounds. If the landmark building is a church, however, the burden of landmark designation raises first amendment concerns. This Note examines the conflict between a congregation's right to free exercise of religion and the state's interest in historic preservation. It applies the constitutional standard for infringement of free exercise to four hypothetical fact patterns, suggests alternatives to peremptory landmark designation, and concludes that the first amendment provides a viable means of challenging burdensome landmark status.*

### INTRODUCTION

WHEN A LOCAL PLANNING commission confers landmark status on a structure used for religious purposes and that designation burdens the religious organization, the competing interests of church and state must be reconciled. On the one hand, the first amendment mandates vigilant protection of a congregation's right to free exercise of religion.<sup>1</sup> On the other, the state's use of its police power to promote the health, safety, and welfare of the community is well established and zealously guarded.<sup>2</sup>

Religious liberty has occupied a preferred position throughout our nation's history.<sup>3</sup> At times the Supreme Court has given it even greater protection than that afforded freedom of press or speech.<sup>4</sup> Courts and legislatures have also begun to protect his-

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1. The first amendment provides in part: "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I.

2. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). The police power concept was first introduced into United States constitutional law by Chief Justice Taney in *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504, 578 (1847). Note, *Land Use Controls in Historic Areas*, 44 NOTRE DAME LAW. 379, 382 (1969).

3. *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943); see also *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (referring to the preferred position of freedom of religion in a conflict between property rights and religious liberty).

4. P. KAUPER, RELIGION AND THE CONSTITUTION 19 (1964). Compare *Martin v. City of Struthers*, 319 U.S. 141 (1943) (prohibiting restriction on door-to-door distribution of religious tracts) and *Jamison v. Texas*, 318 U.S. 413 (1943) (prohibiting restriction on distribution of religious pamphlets on city streets), with *Breard v. City of Alexandria*, 341 U.S. 622 (1951) (upholding restriction on door-to-door solicitation of magazine subscrip-

toric or architecturally significant structures out of recognition that too much of our cultural history has vanished in recent years.<sup>5</sup>

In the past, litigation involving church<sup>6</sup> property typically occurred when a city attempted to exclude churches from residential neighborhoods through the use of facially valid zoning ordinances.<sup>7</sup> Because of stronger historic preservation laws,<sup>8</sup> courts now face situations in which municipalities try to maintain existing buildings by giving them landmark status.<sup>9</sup> Such status may burden a church with severe financial and spatial problems. While challenges in this area are typically brought on due process and eminent domain grounds,<sup>10</sup> first amendment challenges are also made. When faced with a conflict between the right to free exercise of religion and a facially valid landmark statute, how should courts respond?

tions) and *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (upholding restriction on distribution of commercial leaflets on city streets).

5. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 107-08 (1978). "Over one-half of the buildings listed in the Historic American Buildings Survey, begun by the Federal Government in 1933, have been destroyed." *Id.* at 108 n.2.

6. Throughout this Note, the word "church" is used generically to refer to religious bodies and buildings of any and all faiths. When "landmark" is used as a verb in this Note, it refers to the process of landmark designation.

7. See *Jewish Reconstructionist Synagogue v. Incorporated Village of Roslyn Harbor*, 38 N.Y.2d 283, 342 N.E.2d 534, 379 N.Y.S.2d 747 (1975) (ordinance unconstitutional as applied because it denied special use permit for location of religious institutions in residential district without setting reasonable requirements), *cert. denied*, 426 U.S. 950 (1976); *American Friends of Soc'y of St. Pius v. Schwab*, 68 A.D.2d 646, 417 N.Y.S.2d 991 (local zoning authority must fashion such reasonable conditions as would allow church building and minimize adverse effects on community), *appeal denied*, 48 N.Y.2d 611 (1979); *Congregation Comm., N. Fort Worth Congreg., Jehovah's Witnesses v. City Council*, 287 S.W.2d 700 (Tex. Civ. App. 1956) (refusal to grant special exception to church was arbitrary and unreasonable absent showing that such refusal was for promotion of public welfare, safety, or morals).

8. Within the past 50 years, all states and over 500 municipalities have enacted historic preservation statutes. *Penn Central*, 438 U.S. at 107.

9. See *Lafayette Park Baptist Church v. Board of Adjustment*, 599 S.W.2d 61 (Mo. Ct. App. 1980) (church failed to prove inability to sell, lease, or economically utilize property; demolition permit denied); *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980) (landmark status did not physically or financially prevent or seriously interfere with charitable organization's purpose; demolition permit denied); *Lutheran Church v. City of New York*, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974) (charitable organization unable to take advantage of landmark law's compensation provisions; landmark designation violated organization's fifth and 14th amendment rights); *First Presbyterian Church v. City Council*, 25 Pa. Commw. 154, 360 A.2d 257 (1976) (church failed to show inability to reap reasonable return from property; demolition permit denied).

10. See *infra* notes 32-44 and accompanying text.

This Note proposes to answer that question by examining landmark laws in general<sup>11</sup> and the test developed by the Supreme Court for infringement of free exercise.<sup>12</sup> The Note then applies this test to several hypothetical fact patterns,<sup>13</sup> and concludes that the first amendment provides a congregation with a viable means of challenging a burdensome landmark designation.

## I. LANDMARK LAW

The general validity of landmark law is well established. Although there are federal and state statutes governing landmarks, municipal landmark ordinances have the greatest effect. Since these ordinances often regulate private property, they have been attacked on both due process and eminent domain grounds.

### A. *General Validity and Operation*

Landmark legislation is a form of zoning,<sup>14</sup> and is thus within the state's police power<sup>15</sup> to protect the health, safety, welfare, and morals of the community.<sup>16</sup> The breadth of police power protection has expanded to include spiritual and aesthetic matters.<sup>17</sup> Since the objectives enumerated in a state's enabling act are generally narrower than those embraced by the police power,<sup>18</sup> problems with the facial validity of a zoning regulation or landmark statute rarely arise, at least with regard to the legitimacy of the ends.<sup>19</sup>

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11. See *infra* notes 14–31 and accompanying text.

12. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); *infra* notes 48–62 and accompanying text.

13. See *infra* notes 63–145 and accompanying text.

14. *Penn Central*, 438 U.S. at 132; see also Sackman, *Landmark Cases on Landmark Law*, 1979 INST. ON PLANNING, ZONING & EMINENT DOMAIN 241, 247.

15. Sackman, *supra* note 14, at 247.

16. *Euclid*, 272 U.S. at 387.

17. *Berman v. Parker*, 348 U.S. 26, 33 (1954); see also Riesel, *Aesthetics as a Basis for Regulation*, 1 PACE L. REV. 629, 629 (1981) (recognizing the validity of aesthetics as a separate ground for land use regulation). While health and safety were initially the main objectives of the police power, the term "general welfare" now includes appearance, environment, community character, and maintenance of neighboring property values. *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1445–47 (1978) [hereinafter cited as *Zoning*]. One commentator has argued that the concept of "aesthetics" is so amorphous that it may be used to justify more than the court intended. *Id.* at 1450.

18. *Zoning*, *supra* note 17, at 1444.

19. Since 1928, the Court has never invalidated a zoning ordinance as exceeding the state's police power. *Id.* at 1443. Since state courts have generally failed to distinguish between the constitutional limits on the police power and the limits on zoning power imposed by state enabling legislation, *id.* at 1444, "even a court which rigorously scrutinizes

Urban landmark statutes typically seek to benefit the community by fostering civic pride, stimulating the city's economy, and educating the city's residents.<sup>20</sup> Through such statutes municipalities seek to encourage private owners to preserve properties, since acquisition by the municipality itself would be costly.<sup>21</sup> Yet the cost to private landowners may also be burdensome.<sup>22</sup>

## B. *Interaction of Federal, State, and Local Law*

### 1. *Federal Law*

Enactment of the National Historic Preservation Act of 1966<sup>23</sup> reflects the trend toward stronger protection of historic buildings. This federal law empowers the Secretary of the Interior to "maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture."<sup>24</sup> Sites which have no particular national importance may still qualify for listing so long as they meet the criteria for what is "historic."<sup>25</sup> Although the National Register was developed merely as a planning aid and not as a regulatory control, many local ordinances

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the factual connection between a zoning measure and an asserted goal may invalidate very few ordinances." *Id.* at 1445.

20. See, e.g., NEW YORK CITY, N.Y., CHARTER & CODE ch. 8-A, § 205-1.0(b) (1976 & Supp. 1983-84). In *Penn Central*, Justice Brennan noted that landmark buildings "represent the lessons of the past and . . . serve as examples of quality for today." 438 U.S. at 108.

21. *Penn Central*, 438 U.S. at 108. Public ownership of landmark properties reduces a municipality's tax base. Acquisition and maintenance costs further deplete the public treasury. Wilson & Winkler, *The Response of State Legislation to Historic Preservation*, 36 LAW & CONTEMP. PROBS. 329, 339 (1971).

22. The financial drain avoided by the city may be passed on to the private landowner. See *infra* notes 79-90 and accompanying text.

23. Pub. L. No. 89-665, 80 Stat. 915 (codified as amended at 16 U.S.C. §§ 470-470b, 470c-470n (1982)).

24. 16 U.S.C. § 470a(a)(1)(A) (1982).

25. Robinson, *Historic Preservation Law: The Metes and Bounds of a New Field*, 1 PACE L. REV. 511, 524 (1981). The Act requires the Secretary of the Interior to "establish or revise criteria for properties to be included on the National Register and criteria for National Historic Landmarks." 16 U.S.C. § 470a(a)(1)(B)(2) (1982). To qualify for listing in the National Register, the "quality of significance in American history, architecture, archeology, engineering and culture [must be] present in . . . buildings . . . that possess integrity of location, design, setting, materials, workmanship, feeling, and association." 36 C.F.R. § 60.4 (1983). The buildings must be associated with significant historical events or persons, reflect "high artistic values" or a distinctive style, or be apt to contain important historical information. *Id.* Generally, buildings less than 50 years old are ineligible, but there are exceptions, including "religious property deriving primary significance from architectural or artistic distinction or historical importance." *Id.*

regulate property according to Register guidelines.<sup>26</sup>

## 2. *State and Local Law*

A municipality normally enacts an ordinance<sup>27</sup> pursuant to authority granted by the state's enabling act.<sup>28</sup> Together, the act and the ordinance empower local government to create historic districts and isolated landmarks.<sup>29</sup> They also provide for the creation of local landmarks commissions authorized to oversee historic preservation of the exterior features of landmarks.<sup>30</sup> While states also have historic registers which are used only as planning tools, jurisdiction over private action in the historic preservation area rests entirely with local government.<sup>31</sup>

### C. *Due Process and Eminent Domain Challenges*

Due process and eminent domain challenges to the regulation of land used by religious institutions have been numerous.<sup>32</sup> At least one Supreme Court decision indicates that such challenges differ only in degree.<sup>33</sup> A state's exercise of its police power may

26. Robinson, *supra* note 25, at 524.

27. Local ordinances commonly (1) set forth criteria for what is historic, (2) authorize the establishment of a commission to apply the criteria, (3) create an inventory of historic structures, sites, and districts, (4) assemble evaluations for potential landmarks or districts, (5) provide for notice and hearing, (6) establish administrative appeal procedures, (7) provide for specific detailing of a landmark's identity, (8) require a certificate of appropriateness before alteration of the landmark is allowed, (9) provide for commission review before any building over a specified age (typically 30 years) may be demolished, and (10) impose affirmative maintenance obligations on the landmark's owner. *Id.* at 532-33 n.100; *see, e.g.*, Historic Landmark and Historic District Protection Act of 1978, D.C. CODE ch. 10, §§ 5-1001 to 5-1015 (Michie 1981); Preservation of Landmarks and Historic Districts, NEW YORK CITY, N.Y., CHARTER & CODE ch. 8-A, §§ 205-1.0 to 207-21.0 (1976 & Supp. 1983-84); Historic Buildings, PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 14-2008 (1956); ST. LOUIS, MO., HERITAGE AND URBAN DESIGN CODE, Ordinance 57,986, REV. CODE ch. 24, § 895 (1980).

28. Typically, the enabling act states the policy behind historic preservation and empowers municipalities to "designate and administer historic districts and landmarks[.] . . . grant tax concessions [to the owners of historic properties, and] acquire or condemn historic properties." Kellogg, *Role of State and Local Laws and Programs in Historic Preservation*, 12 URB. LAW. 31, 40 (1980).

29. Wilson & Winkler, *supra* note 21, at 336-37.

30. Generally, regulations do not cover either the design or the use of the building's interior, and limit the municipality to imposing those maintenance obligations contained in the local building, fire, and health ordinances. *Id.* at 337.

31. Marsh & Simon, *The Protection of Historic Resources in New York State: An Overview of Federal, State and Local Laws*, 10 FORDHAM URB. L.J. 411, 419 (1982).

32. *See supra* note 9.

33. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 415 (1922).

be valid on due process<sup>34</sup> grounds, yet if that same regulation "goes too far" it may be deemed an exercise of the eminent domain power, compensable under the fifth amendment.<sup>35</sup>

To satisfy due process, a landmark law must have legitimate ends, and the means employed must be reasonably related to the accomplishment of those ends.<sup>36</sup> The legitimacy of state objectives has long been upheld in this area,<sup>37</sup> but reasonableness of means can only be assessed in the context of a specific factual situation.<sup>38</sup>

Even though an ordinance is reasonably related to legitimate ends, it may still violate the fifth amendment.<sup>39</sup> If the law creates such interference that it deprives the landowner of reasonable, beneficial use of the property, a taking occurs and the government must pay just compensation.<sup>40</sup> Courts<sup>41</sup> and commentators<sup>42</sup> have

34. The 14th amendment provides in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

35. *Mahon*, 260 U.S. at 415. The fifth amendment provides in part, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. In *Chicago, Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897), the Court held the fifth amendment applicable to the states through the 14th amendment.

36. *Nectow v. City of Cambridge*, 277 U.S. 183, 188-89 (1928) (governmental power to regulate land use is not unlimited and cannot be imposed absent a substantial relation to the public good). *Nectow* involved a zoning regulation, and since landmark law is deemed to be a form of zoning, the principle is applicable here. See *supra* text accompanying note 14.

37. See *supra* note 2 and accompanying text.

38. Compare *Diocese of Rochester v. Planning Bd.*, 1 N.Y.2d 508, 522, 136 N.E.2d 827, 834, 154 N.Y.S.2d 849, 858 (1956) (denial of plaintiff's application for permit to build church bore no substantial relationship to promotion of community's health, safety, welfare, and morals) and *Congregation Comm., N. Fort Worth Congreg., Jehovah's Witnesses v. City Council*, 287 S.W.2d at 704-05 (same), with *Euclid*, 272 U.S. at 395 (city's comprehensive plan was substantially related to protection of health, safety, welfare, and morals of community). The courts are reluctant to substitute their judgment for that of the landmarks commission regarding a building's historic or architectural significance. One commentator has asserted that under the New York City law "[o]bjecting landowners . . . have an almost insurmountable burden in establishing that the Landmarks Commission acted arbitrarily in its designation proceeding." Comment, *Beyond the Taking Issue: Emerging Procedural Due Process Issues in Local Landmark Preservation Programs*, 10 FORDHAM URB. L.J. 441, 455 (1982).

39. *Zoning*, *supra* note 17, at 1462.

40. See *Penn Central*, 438 U.S. at 136-38. If the entire property is taken, compensation is measured by the property's fair market value. If only a portion is taken, the landowner receives the value before taking minus the value after taking. D. HAGMAN, PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT 771 (2d ed. 1980).

41. See, e.g., *Penn Central*, 438 U.S. 104; *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Mahon*, 260 U.S. 393; *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976).

42. See, e.g., Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021 (1975) (arguing

struggled to define the attributes of a taking, but as the Supreme Court has acknowledged, there is "no set formula to determine where regulation ends and taking begins."<sup>43</sup> The courts must consider each case on its particular facts.<sup>44</sup>

Due process and eminent domain will undoubtedly continue to be used in challenging landmark designations of religious properties. Nevertheless, there are compelling reasons for permitting attacks on first amendment grounds.<sup>45</sup> The preferred status of religious freedom<sup>46</sup> gives the owner of restricted church property a potent weapon for invalidating its landmark designation.<sup>47</sup>

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for a middle ground between police power and eminent domain power consisting of "accommodation power"); Gerstell, *Needed: A Landmark Decision—Takings, Landmark Preservation and Social Cost*, 8 URB. LAW. 213 (1976) (summarizing various taking tests and presenting alternatives); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) (detailing the factors that determine when a taking has occurred); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) (distinguishing between government's arbitral and enterprisal capacities and arguing that only the latter may result in takings).

43. *Goldblatt*, 369 U.S. at 594.

44. *Mahon*, 260 U.S. at 413. In the context of religious buildings, compare *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 456, 415 N.E.2d 922, 925-26, 434 N.Y.S.2d 932, 936 (1980) (no taking if landmark designation bars only most lucrative use of property), with *Lutheran Church v. City of New York*, 35 N.Y.2d 121, 132, 316 N.E.2d 305, 312, 359 N.Y.S.2d 7, 17 (1974) (taking occurred where building was totally inadequate for owner's legitimate needs and landmark designation prevented demolition). Both of these courts relied on *Trustees of Sailors' Snug Harbor v. Platt*, 29 A.D.2d 376, 288 N.Y.S.2d 314 (1968), which held that the proper test for a taking of a charitable organization's property was whether "maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose." 29 A.D.2d at 378, 288 N.Y.S.2d at 316. The *Spatt* court distinguished *Lutheran Church*, stating that the plaintiff there had established that nothing short of demolition would resolve its problems, while the plaintiff in *Spatt* had failed to show the need for such drastic action.

As one commentator points out, *Spatt* and *Lutheran Church*, both involving properties owned by religious organizations, were handled by the courts with little or no reference to potential first amendment concerns. Comment, *First Amendment Challenges to Landmark Preservation Statutes*, 11 FORDHAM URB. L.J. 115, 126-31 (1982).

45. See *infra* notes 63-146 and accompanying text. It should also be noted that a procedural due process attack may be advanced. See Comment, *supra* note 38. There are two main areas where this may occur: first, it may be argued that a local ordinance contains insufficiently detailed standards for determining whether a property qualifies for landmark status; second, there may be allegations that the notice, hearing, and review provisions are inadequate. See, e.g., *Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839, 851-56 (E.D. Va. 1980); see also *Wilson & Winkler, supra* note 21, at 338. One local group has charged that its municipal landmarks commission often designated churches as landmarks regardless of historic or architectural value. COMMITTEE OF RELIGIOUS LEADERS OF THE CITY OF NEW YORK, FINAL REPORT OF THE INTERFAITH COMMISSION TO STUDY THE LANDMARKING OF RELIGIOUS PROPERTY 8-9 (1982); see also Comment, *supra* note 44, at 121-22.

46. See *supra* note 3 and accompanying text.

47. See *infra* notes 63-146 and accompanying text.



## II. FREE EXERCISE OF RELIGION

In *Cantwell v. Connecticut*,<sup>48</sup> the Supreme Court held the free exercise clause<sup>49</sup> applicable to the states and established that the first amendment "embraces two concepts—freedom to believe and freedom to act. The first is absolute but . . . the second cannot be. Conduct remains subject to regulation for the protection of society."<sup>50</sup> The Court has distinguished between laws with distinctly secular purposes which affect citizens regardless of religious affiliation,<sup>51</sup> and laws which inhibit actions important to the practice of particular religions.<sup>52</sup> The Court has not tolerated the latter; toward the former it has been more deferential. If a state passes a law of general application which operates to burden a religious practice,<sup>53</sup> courts will uphold the law provided it regulates secular activity<sup>54</sup> and is the least restrictive means by which the state may accomplish its goals or protect its interests.<sup>55</sup>

The Court more fully developed its test for infringement of free exercise in *Sherbert v. Verner*.<sup>56</sup> Once it is satisfied that a

48. 310 U.S. 296, 304, 306 (1940) (religious action may be regulated for society's protection but no such protection required where Jehovah's Witness merely distributed religious literature on city street).

49. See *supra* note 1.

50. 310 U.S. at 303-04. But see *infra* text accompanying notes 69-71.

51. See, e.g., *Sherbert*, 374 U.S. 398 (state's denial of unemployment compensation to worker based on her religiously motivated refusal to work on Saturdays unconstitutional); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (Sunday upheld as uniform day of rest despite economic effect on retailers whose Sabbath was Saturday).

52. See, e.g., *McDaniel v. Paty*, 435 U.S. 618 (1978) (statute disqualifying ministers from public office unconstitutional); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (statute requiring notary to take oath of belief in God unconstitutional).

53. In *Braunfeld*, for instance, a statute prohibiting retailers from doing Sunday business addressed, by its terms, those who engaged in certain sales activity, not those who practiced certain faiths. While the law was of general application, it meant that Orthodox Jews, whose Sabbath was Saturday, lost two days of business a week instead of one. The burden on religious practice was evident, since it forced Jews to choose between earning a livelihood and observing the Sabbath. Nonetheless, the Court upheld the statute, noting that the law did not prohibit religious practices (direct burden) but just made them more expensive (indirect burden). 366 U.S. at 605.

54. See *supra* note 53.

55. *Braunfeld*, 366 U.S. at 607. In *International Soc'y for Krishna Consciousness v. Barber*, 650 F.2d 430 (2d Cir. 1981), the court suggested alternative protective measures which were less restrictive of the Krishnas' practices than the challenged statute prohibiting roving solicitation at state fairs. Because alternatives existed, the court refused to enforce the statute. *Id.* at 446-47.

56. 374 U.S. 398 (1963). The Court held the law invalid as applied to a worker even though the burden on religious practice was indirect. *Id.* at 403-04. Though the Court in *Braunfeld* seemed reluctant to invalidate a law on the basis of an indirect burden, 366 U.S. at 606, it did state that it would do so if "the purpose or effect of a law is to impede the

religious belief is sincerely held,<sup>57</sup> the Court examines the relationship between the belief and the religious conduct at issue.<sup>58</sup> If there is a sufficient nexus, the Court then asks whether the challenged statute or governmental action infringes on the practitioner's free exercise of religion.<sup>59</sup> If an infringement is found, the state must justify it by identifying a compelling state interest<sup>60</sup> and showing that there is no less restrictive means of protecting that interest.<sup>61</sup>

The state's burden is heavy. Perhaps for that reason "churches are being advised to lay less emphasis on property rights under the due process clause and more on religious liberty under the First Amendment."<sup>62</sup>

### III. FREE EXERCISE IN CONFLICT WITH LANDMARK LAW

This section of the Note examines the conflict between free exercise and landmark law in the context of four hypothetical fact

observance of one or all religions or is to discriminate invidiously between religions . . . ." *Id.* at 607 (emphasis added); see also P. KAUPER, *supra* note 4, at 42.

57. While the validity of a particular belief is not questioned in a free exercise inquiry, *United States v. Ballard*, 322 U.S. 78, 87 (1944), the sincerity of that belief is relevant. *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972); see also *People v. Woody*, 61 Cal. 2d 716, 720, 394 P.2d 813, 817, 40 Cal. Rptr. 69, 73 (1964) (upholding sacramental use of peyote in part because of worshipers' sincere belief that the drug was central to their religious ceremony).

58. *Yoder*, 406 U.S. at 216. The purpose of this inquiry is to determine whether the religious activity is central to the practitioners' faith. In upholding the right of Amish families to educate their teen-age children at home despite a state statute requiring school attendance, the *Yoder* Court noted that the beliefs which promoted such conduct were "shared by an organized group, and intimately related to daily living." *Id.* The Court also observed that the beliefs were related to Amish interpretation of religious literature, and had shaped Amish lifestyle for a substantial period of time. *Id.*; see also *Woody*, 61 Cal.2d at 720, 394 P.2d at 817, 40 Cal. Rptr. at 73 (noting the longevity of the Native American Church and that Church members were upstanding citizens of the Indian community).

59. *Sherbert*, 374 U.S. at 403. In addition to *Sherbert* and *Yoder*, the Court found infringement in *McDaniel*, 435 U.S. at 626 (statute disqualifying ministers from serving as state legislators), and *Torcaso*, 367 U.S. 488 (statute requiring notary to take oath of belief in God).

60. *Sherbert*, 374 U.S. at 406. The Court has found compelling state interests in a variety of situations. See, e.g., *United States v. Lee*, 455 U.S. 252 (1982) (maintaining viability of social security system); *Braunfeld*, 366 U.S. 599 (1961) (uniform day of rest); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (protecting minors through child labor laws); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccination against disease); *Reynolds v. United States*, 98 U.S. 145 (1878) (sanctity of monogamous marriage).

61. *Sherbert*, 374 U.S. at 407; see *supra* note 55.

62. J. CURRY, PUBLIC REGULATION OF THE RELIGIOUS USE OF LAND 239-40 (1964). Curry treats only cases in which religious organizations have been excluded from specified zones, but his principles are applicable in the landmark area as well. See *infra* notes 64-146 and accompanying text.

patterns.<sup>63</sup> Each involves a church that is an isolated landmark rather than a component of a historic district.

### A. *Background*

Church *A* alleges that its considerable financial problems stem primarily from its landmark status. It predicts bankruptcy by century's end. As a solution, the congregation proposes to raze its adjacent building, also a landmark, and erect in its place a multistory office tower which will provide the church with revenues sufficient to ensure financial stability. Income from the office tower would also be used to support the congregation's ministry to the poor. The new building would also provide space for the church's human service activities. Church *A* has few problems with its physical plant. The buildings are old and would be less expensive to maintain if renovation were permitted, but the congregation's needs have not yet exceeded the buildings' capacity. Church *A*'s application to the landmarks commission for permission to demolish the adjacent building has been rejected.<sup>64</sup>

Church *B*'s problems are also financial, but its proposed solution is relocation. When Church *B* was constructed in a rural setting many years ago, the members of its congregation lived nearby. Today the church stands in the center of a distinctly urban area, and almost all of its members have moved to the suburbs, more than half an hour away. Church *B* would like to sell its property and erect a new building closer to its congregation. Because its vigorous attempts to interest buyers have all failed, Church *B* has applied to the local landmarks commission for permission to raze the building so that the property will be more attractive to commercial developers. Permission has been denied. Meanwhile, Church *B*'s services are poorly attended because of the long commute, and the resulting loss in revenues has put a severe strain on the church's budget.

Church *C*'s problems are spatial. The house of worship itself

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63. The elements of each hypothetical fact pattern are summarized in the Appendix to this Note.

64. This hypothetical closely parallels the situation of St. Bartholomew's Episcopal Church in New York City, which has proposed to erect a 59-story office tower over its adjacent community house. The church has predicted that it will realize \$9.5 million in the first 10 years; otherwise, it will be bankrupt by the end of the century. Current New York City ordinances prohibit the project. N.Y. Times, Dec. 13, 1983, at 1, col. 3; see also Holubowich, *Landmark Preservation: Battleground for the 80's*, 68 A.B.A. J. 19 (1982); Comment, *supra* note 44. See generally N.Y. Times, Jan. 28, 1984, at 17, cols. 1, 4 (editorials for and against St. Bartholomew's proposal).

is not at issue. Rather, the parish house next door, which is owned by the church and shares its landmark status, is woefully inadequate for the church's needs. The parish house contains the church offices, a day care center, a soup kitchen for the poor, and classrooms for religious instruction. Instead of demolishing the parish house, the church wants to erect an addition atop it to meet the needs of its rapidly growing congregation. Three separate proposals for the alteration have been submitted to the landmarks commission and all have been rejected.

Church *D* is a small sect of one of the world's major religions. In this country only a dozen other congregations share its tenets, and none is within five hundred miles of Church *D*. Church *D*'s congregation has grown dramatically in recent years to the point where its house of worship is totally inadequate. Because of the church's age and severe structural deterioration, renovation would be infeasible and far too costly. Instead, Church *D* desires to rebuild, and has applied to the landmarks commission for a demolition permit. Permission has been denied.

In the context of these four fact patterns, will the courts uphold free exercise challenges to the landmark designations? The first step is to determine in each case whether the designation burdens religion.<sup>65</sup>

### B. *Burdens on Free Exercise: Churches A, B, C, and D*

To determine whether governmental action burdens a congregation's right to the free exercise of religion,<sup>66</sup> courts will first examine the nature of the religious practice and its relationship to religious beliefs.<sup>67</sup> Application of landmark law to religious properties places an indirect burden on free exercise since such ordinances regulate practice rather than belief.

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65. The following discussion deals not with the rights of individuals per se, but with the rights of a congregation to practice its religion collectively regardless of whether the applicable landmark law is a reasonable exercise of the police power. The discussion is based on several assumptions. First, it assumes that landmark laws are generally valid as legitimate exercises of the state's power, reasonably related to the protection of the health, safety, and welfare of the community. *See supra* notes 15-19 and accompanying text. Second, it assumes that the religion's denomination is traditional and well established, with sincerely held beliefs. *See supra* note 57 and accompanying text. (If sincerity of belief were doubted, the religious body would encounter serious problems in challenging a valid exercise of the police power.) Third, it assumes that each church is located in an urban area which was rural or semirural when the church was first constructed.

66. *See supra* notes 51-61 and accompanying text.

67. *See supra* note 58 and accompanying text.

### 1. *The Belief-Practice Nexus*

To warrant first amendment protection, the church must establish a sufficient nexus between its religious belief and the practice in question.<sup>68</sup> The *Cantwell* distinction between belief and action,<sup>69</sup> however, has been blurred by the Supreme Court in recent years. In 1978, Justice Brennan declared: "Clearly freedom of belief protected by the Free Exercise Clause embraces freedom to profess or practice that belief."<sup>70</sup> Six years earlier the Court had indicated that although religious activity must generally yield to the state's exercise of its police power, there are areas of religious conduct beyond the police power's reach.<sup>71</sup> *Yoder* nevertheless indicates that first amendment protection will be afforded only when the religious practice is closely tied to belief.<sup>72</sup>

The types of religious activity at issue in the hypothetical fact patterns fall into two main categories: worship itself, and related, or secondary, practices. Churches *A* and *D* face problems that threaten their communal worship services. In *A*'s case, the interference with worship is anticipated in the future, and preventive action is necessary. Church *D*'s problem is more immediate; the overcrowding caused by the rapid growth of its congregation has turned its worship service into the antithesis of the solemn, reflective occasion it is meant to be—and Church *D* has no alternative facility to accommodate the overflow. The Supreme Court has declared that "worship in the churches and preaching from the

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68. *Yoder*, 406 U.S. at 220–21. For examples of sufficient nexus, see *Woody*, 61 Cal. 2d 716, 394 P.2d 814, 40 Cal. Rptr. 69 (finding peyote central to Native American Church's faith); *Montgomery v. Board of Retirement*, 33 Cal. App. 3d 447, 109 Cal. Rptr. 181 (1973) (belief in divine healing sufficiently important to practitioner's faith to entitle her to disability retirement benefits despite her religiously-motivated refusal to undergo potentially life-saving surgery). For an example of insufficient nexus, see *People v. Mullins*, 50 Cal. App. 3d 61, 123 Cal. Rptr. 201 (1975) (insufficient proof that marijuana was central to religion).

69. See *supra* notes 48–50 and accompanying text.

70. *McDaniel*, 435 U.S. at 631 (Brennan, J., concurring) (referring to minister's right both to practice his career and run for public office). At the same time, Justice Brennan cautioned the Court to be wary of broadening the scope of first amendment protection, "since to do so might leave government powerless to vindicate compelling state interests." *Id.* at 627 n.7. For a discussion of compelling state interests, see *infra* notes 95–132 and accompanying text.

71. *Yoder*, 406 U.S. at 220; see also Note, *Government Noninvolvement with Religious Institutions*, 59 TEX. L. REV. 921, 923 n.22 (1981) (noting that Justice Brennan's application of free exercise protection was in context of a statute which burdened on the basis of religious status, whereas *Yoder* dealt with burden imposed by religiously neutral law).

72. 406 U.S. at 218.

pulpits" occupy a "high estate"<sup>73</sup> under the first amendment. Since the communal service is the focal point of many of the world's religions,<sup>74</sup> there is a sufficient link between belief and practice to bring the worship service within the first amendment's protective sphere.

Church *B*'s communal worship is hampered only for those individuals who make up *B*'s present congregation. Because most of its members now live in the suburbs, Church *B* has lost its ability to unite them in a religious community. Presumably, however, facilities of the same denomination may be found in the suburbs. Moreover, the congregation has not been denied the ability or the opportunity to commute to the urban church.

The landmark law has affected Church *C*'s day care center, soup kitchen, and religious classes, all of which are components of its ministry to the poor. In *Murdock v. Pennsylvania*, the Supreme Court held that hand distribution of religious literature, as a form of proselytizing, was as highly protected as worship itself.<sup>75</sup> More recently the Court extended its definition of religion to include "beliefs that are purely ethical and moral in source and content but that nevertheless impose . . . a duty of conscience."<sup>76</sup>

If ministry to the poor is seen both as a means of spreading "the Word" and as a means of actually heeding "the Word," this so-called secondary activity deserves protection whether it emanates from distinctly religious beliefs or from a deeply felt moral duty. Indeed, ministry to the poor has been described as "the very

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73. *Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943).

74. See J. MCKENZIE, *THE ROMAN CATHOLIC CHURCH* 164-65 (1971); M. STEINBERG, *BASIC JUDAISM* 117-18 (1947); J.P. WILLIAMS, *WHAT AMERICANS BELIEVE AND HOW THEY WORSHIP* 123-24 (3d ed. 1969) (Protestantism); *id.* at 396-97 (Mormonism); *id.* at 421-22 (Christian Science); see also W. TORPEY, *JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA* 148-49 (1970) (discussing common law right to religious assembly and subsequent statutory protection of that right).

75. 319 U.S. 105, 108-09 (1943).

76. *Welsh v. United States*, 398 U.S. 333, 340 (1970) (refusal to submit to induction into Armed Forces upheld where conscientious objection was based not on traditional "religious" beliefs but on principles gleaned from readings in history, philosophy, and sociology). One commentator stated that "so long as the courts can justify an activity as incidental to the doctrines, practices or rules of a religious organization, that activity will be construed to be . . . religious." Comment, *Judicial Definition of Religious Use in Zoning Cases*, 1973 URB. L. ANN. 291, 298. Another commentator emphasized the relevance of a "church related purpose" when a religious organization's use of property is restricted. Note, *Urban Landmarks: Preserving Our Cities' Aesthetic and Cultural Resources*, 39 ALBANY L. REV. 521, 542 (1975) (emphasis added) [hereinafter cited as *Urban Landmarks*]. One court has even indicated that certain forms of entertainment fall within the scope of religious activity. *Community Synagogue v. Bates*, 1 N.Y.2d 445, 453, 136 N.E.2d 488, 493, 154 N.Y.S.2d 15, 22 (1956).

essence of the Christian ministry,"<sup>77</sup> and "divine worship and human service" as the "two fundamentals of our faith."<sup>78</sup> Assuming, then, that each hypothetical church has at least some claim to the first amendment's protection, the next determination is whether the landmark law interferes with free exercise.

## 2. *Burdens on Free Exercise*

The alleged burdens on Churches *A* and *B* are financial, while those on Churches *C* and *D* are spatial. The *Braunfeld* majority asserted that a statute making religious practice more costly while regulating secular activity is not objectionable on first amendment grounds<sup>79</sup> since it does not prohibit the religious practice itself.<sup>80</sup> Yet the majority went on to say that obstruction of religious practice that is the *effect* if not the purpose of a law will not be tolerated.<sup>81</sup> Two dissenting Justices in *Braunfeld* reasoned that extreme economic hardship represents undue infringement if the believer is forced to choose between practicing religion and staying in business.<sup>82</sup> In addition, the *Murdock* Court noted with disapproval government's power to impose such expenses on a religious practice which "can make its exercise so costly as to deprive it of the resources necessary for its maintenance."<sup>83</sup>

Undoubtedly, houses of worship are subject to reasonable zon-

77. Letter to the author from Sterling Newell, Jr., Chancellor of the Episcopal Diocese of Ohio (March 28, 1983) (on file with the *Case Western Reserve Law Review*).

78. Letter from the Real Estate Committee of St. Bartholomew's Episcopal Church, New York City, to St. Bartholomew's parishioners (May 10, 1981) (discussing the alternatives open to this financially troubled landmark church) (on file with the *Case Western Reserve Law Review*).

79. 366 U.S. at 605; see *supra* note 53.

80. 366 U.S. at 606.

81. See discussion of *Braunfeld* *supra* note 56.

82. 366 U.S. at 613 (Brennan, J., concurring and dissenting); *id.* at 616 (Stewart, J., dissenting).

83. 319 U.S. at 112; see also *Westchester Reform Temple v. Brown*, 22 N.Y.2d 488, 239 N.E.2d 891, 293 N.Y.S.2d 297 (1968) (unnecessary \$100,000 burden imposed by local zoning ordinance's setback requirements was infringement of free exercise). One commentator has remarked that the severity of the financial burden in *Westchester* may well have been what motivated the court to find undue infringement. *Recent Developments: Constitutional Law—Free Exercise Clause of First Amendment Protects Houses of Worship from Restrictive Zoning Ordinances*, 44 *FORDHAM L. REV.* 1245, 1255 (1976) [hereinafter cited as *Free Exercise*]. Another has noted the New York Court of Appeals' refusal to force an owner to preserve the landmark property "without any relief or adequate compensation, when the designation imposes a burden." Comment, *Landmarks Preservation and Tax-Exempt Organizations: A Proposal in Response to Lutheran Church*, 1 *COLUM. J. ENVTL. L.* 274, 289 (1975).

ing restrictions,<sup>84</sup> but when those restrictions threaten a congregation's existence, religious practice is clearly burdened. The *Sherbert* Court based its invalidation of state law in part on the resulting "pressure . . . to forego [religious] practice."<sup>85</sup> Church *A* ultimately faces the same sort of pressure. Despite the fact that landmark laws are laws of general application, they must be examined in the context of particular circumstances; where the effect is a religious organization's bankruptcy, there would appear to be an intolerable infringement of free exercise. Since landmark laws normally impose an affirmative duty on the landmark owner to maintain the subject building at a certain level of repair,<sup>86</sup> Church *A* will eventually have to close its doors if its landmark status continues. While an adjacent building is creating the problem for Church *A*, the effect will be the inhibition of worship itself. Thus, it would seem that a demolition permit should be granted unless the state can show an interest justifying such a heavy burden.<sup>87</sup>

Church *B*'s burden is less severe than Church *A*'s. Although the inability to sell its landmarked property drains its coffers, alternative preventive measures may exist. The church must develop a new urban congregation whose contributions would enable it to function in its current setting. The present congregation may argue that the issue is not the mere maintenance of a building but the vitality of its communal worshipping unit. The response to this assertion is that a move to the suburbs itself involves the breaking of bonds—an individual parishioner's decision to relocate as a matter of personal choice does not give that individual the legal right to have the church relocated in the process. If the communal unit is essential, the worshippers can either remain in the city or endure the weekly commute from the suburbs.

Church *B*'s infringement claim would be stronger if it were unable to attract an urban congregation or if its new congregation were completely unable to support the building. In either case, the church would have to bear the cost of a building that does nothing but diminish its resources. The landmark designation would operate not only to burden free exercise, taking needed dollars away from religious programs, but also to restrain alienation

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84. See Robinson, *supra* note 25, at 555.

85. 374 U.S. at 404.

86. See Robinson, *supra* note 25, at 547-50.

87. See *infra* notes 97-132 and accompanying text.



of property and discourage its productive use.<sup>88</sup>

It is also possible that the landmark designation would deter potential members from joining the church when they discover that their religious contributions will be used for maintaining the building at a certain level of repair.<sup>89</sup> Thus, the landmark designation would obstruct not only the formation of a unit capable of ensuring solvency, but also the dissemination of the religious message, which is a protected component of the free exercise guarantee.<sup>90</sup>

Church *D* faces a dilemma similar to Church *B*'s—it is burdened with a structure that cannot accommodate its existing congregation. Church *D*'s members, however, have nowhere else to go. In the context of urban renewal, the Colorado Supreme Court allowed the razing of a church where the church was not *sui generis*, was not the birthplace of a particular denomination, and was not the mother church.<sup>91</sup> The court also noted that there were several other places of worship in the same area available to the congregants.<sup>92</sup> Thus, it seems that courts will be more willing to defend a singular facility or one which has special meaning for a denomination.

Church *D* is *sui generis*. Its members "must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region."<sup>93</sup> The *Yoder* Court, which looked upon such a choice with disapproval,<sup>94</sup> would surely find that a move of 500 miles or more would impose undue hardship—yet that is the only option open to Church *D*'s members if denial of the demolition permit is allowed to stand.

Church *C*'s parish house must expand if its ministry to the poor is to continue. A congregation seeking to protect buildings other than its house of worship bears a heavier burden in justifying first amendment coverage.<sup>95</sup> Nonetheless, if Church *C* can

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88. The latter two effects would not be germane to the free exercise challenge, but to a due process or eminent domain claim. See *supra* notes 32-44 and accompanying text. They are mentioned here only to emphasize the potential severity of infringement.

89. See Comment, *supra* note 44, at 122.

90. *Murdock*, 319 U.S. at 108-09.

91. *Denver Urban Renewal Auth. v. Pillar of Fire*, 191 Colo. 238, 240-41, 552 P.2d 23, 24-25 (1976).

92. *Id.* at 240, 552 P.2d at 25.

93. *Yoder*, 406 U.S. at 218.

94. *Id.*

95. See *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 456, 415 N.E.2d 922, 926, 434 N.Y.S.2d 932, 936 (1980). The court in *Spatt* upheld the landmark status of a school building owned by the religious organization, but indicated that if the Society's meeting

show that its nonworship activities are as central to its faith as communal prayer meetings, its infringement claim will be viable.<sup>96</sup>

### C. *Weighing the State's Interest Against the Churches'*

Once a burden on the free exercise of religion is found, courts will allow it to continue only if the state can show an interest sufficiently compelling to justify infringement.<sup>97</sup> The *Sherbert* Court noted that "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."<sup>98</sup> Although the state clearly has an interest in protecting the health, safety, and welfare of the community through the use of its police power,<sup>99</sup> the critical question is whether that interest outweighs a congregation's right to the free exercise of religion.<sup>100</sup>

A typical purpose of municipal landmark law is "fostering 'civic pride in the beauty and noble accomplishments of the past.'"<sup>101</sup> That most landmarks commissions regulate only the exterior of subject buildings<sup>102</sup> suggests that the primary motivation for landmarking is the preservation of aesthetics. Originally, aesthetics was not a permissible independent object of police power protection.<sup>103</sup> While aesthetics has since been included in the police power's penumbra,<sup>104</sup> it remains doubtful whether

house itself were at issue there might be first amendment problems. This assertion seems rebuttable when it is the drain caused by the adjacent building that affects the inability to worship, as in *Church A's* case.

96. *See supra* notes 75-78 and accompanying text. The argument is certainly stronger than some that have been unsuccessfully attempted. *See, e.g.,* *Lafayette Park Baptist Church v. Board of Adjustment*, 599 S.W.2d 61 (Mo. Ct. App. 1980) (demolition of landmark townhouse was proposed to make room for parking lot, day care facility, and recreational space); *First Presbyterian Church v. City Council*, 25 Pa. Commw. 154, 360 A.2d 257 (1976) (demolition of landmark building was proposed to make way for landscaping and parking lot).

97. *See supra* note 60 and accompanying text.

98. 374 U.S. at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

99. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

100. This is the heart of the Supreme Court's balancing test, expounded in *Sherbert* and *Yoder*. *See supra* notes 56-60 and accompanying text.

101. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 109 (1978) (quoting *NEW YORK CITY, N.Y., CHARTER AND CODE* ch. 8-A, § 205-1.0(b) (1976)).

102. *See supra* note 30 and accompanying text.

103. *See supra* note 17 and accompanying text.

104. "It is within the power of the legislature to determine that the community should be beautiful as well as healthy . . ." *Berman v. Parker*, 348 U.S. 26, 33 (1954); *see also* *Riesel, supra* note 17, at 629 (asserting that it is no longer necessary to "mask aesthetic concerns as public health, safety or welfare, in order to articulate a valid basis for regulation").

purely aesthetic concerns should be allowed to predominate over a congregation's religious rights. As one commentator has suggested, an interest in protecting aesthetics should not outweigh the state's interest in reducing its control over religious uses of property.<sup>105</sup>

It may even be argued that while landmark laws purport to promote aesthetics, they actually defeat that purpose in the context of religious buildings. By placing an economic burden on religious landowners, the law may well discourage those who are currently building churches from erecting aesthetically pleasing structures for fear that an eventual landmark designation might someday lead to financial collapse.<sup>106</sup>

The courts have typically found interests sufficiently compelling to justify infringement in cases where religious conduct poses a "substantial threat to . . . public safety, peace or order."<sup>107</sup> When the state exercises its police power, it acts to protect the public health, safety, welfare, or morals.<sup>108</sup> Religious activity that threatens no one, such as meditation or prayer, is beyond the reach of the police power. But religious activity that has a potentially harmful impact on society must yield to regulation for the public good.

Religiously motivated activities which the courts have found to constitute such a threat include child labor, polygamy, refusal to be vaccinated against disease or accept blood transfusions, and

105. *Urban Landmarks*, *supra* note 76, at 543; *see also* Note, *Eminent Domain: Constitutional Problems in the Taking of Church Lands*, 31 OKLA. L. REV. 191, 195 (1978) (arguing that functional importance rather than fame or aesthetics should be deciding factor). Although this argument was raised in the urban renewal context, its principle remains applicable because the same interests are involved. Whether the context is urban renewal or landmarking, the city's interest in health, safety, and welfare is on one side of the balance and a congregation's right to religious freedom is on the other.

In the taking context, one writer has suggested that in upholding a church's right to a demolition permit, the *Lutheran Church* court may have been saying that the "preservation of buildings of *questionable* historic or architectural value is not a public purpose under the police power." Note, *Landmark Preservation: The Problem of the Single Landmark*, 25 DE PAUL L. REV. 160, 173 (1975) (referring to *Lutheran Church v. City of New York*, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1975)) (emphasis in original). Even if the historic or architectural value is unquestioned, the preeminent status of religious freedom would seem to outweigh the interest in aesthetics and historic preservation.

106. Where such a burden exists, the value of a landmark designation as a public benefit diminishes noticeably "[t]o the extent that landmark preservation is aesthetically motivated." Gerstell, *supra* note 42, at 241.

107. *Sherbert*, 374 U.S. at 403; *see supra* note 60 and accompanying text; *see also* Comment, *Zoning Ordinances, Private Religious Conduct, and the Free Exercise of Religion*, 76 NW. U.L. REV. 786, 794 (1981).

108. *See supra* notes 2 & 15-18 and accompanying text.

handling of poisonous snakes.<sup>109</sup> The landmark churches can be distinguished from these cases. In zoning cases, where a church's exclusion from a residential area has been held unconstitutional, the holdings were based primarily on a finding that the religious conduct posed no threat to the surrounding community's welfare.<sup>110</sup> It may be argued that the demolition of landmark churches and their adjacent properties threatens the community's interest in historic and architectural preservation. But given the large number of landmarked religious properties<sup>111</sup> and the infrequency of demolitions, the threat seems minimal, particularly when the community's interest is weighed against the congregation's right to free exercise.<sup>112</sup>

Another state interest in preserving historic properties is the "curbing [of] urban blight attributable to overcrowding."<sup>113</sup> Landmarking supposedly accomplishes this goal by minimizing the development of high density buildings.<sup>114</sup> Protection of public welfare certainly entails guarding against traffic congestion, noise pollution, and overcrowding.<sup>115</sup> Nevertheless, courts must also consider that many of the religious activities of landmarked churches supplement the state's own human service programs. The state has an interest, for example, in Church C's feeding and sheltering of the poor because it reduces the burden on the state's welfare rolls. If the state's interest in "curbing urban blight" were

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109. See *supra* note 60; *In re* President of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.) (court ordered blood transfusion for mother of young child over her religiously motivated objections), *cert. denied*, 377 U.S. 978 (1964); *John F. Kennedy Hosp. v. Heston*, 58 N.J. 576, 279 A.2d 670 (1971) (young single adult near death required to receive blood transfusions despite religiously motivated objections); *Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975) (upholding state statute prohibiting handling of poisonous snakes), *cert. denied*, 424 U.S. 954 (1976); *Harden v. State*, 188 Tenn. 17, 216 S.W.2d 708 (1948) (snake handling threatens peace, order, and morals regardless of any religious motivation).

110. See *American Friends of Soc'y of St. Pius v. Schwab*, 68 A.D.2d 646, 417 N.Y.S.2d 991, *appeal denied*, 48 N.Y.2d 611 (1979); *Congregation Comm., N. Fort Worth Congreg., Jehovah's Witnesses v. City Council*, 287 S.W.2d 700 (Tex. Civ. App. 1956).

111. In New York City alone, approximately 125 religious properties have been given landmark status by the local landmarks commission. LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, A GUIDE TO NEW YORK CITY LANDMARKS (1979).

112. A commentator notes that reasonable laws for protection of the health, safety, and welfare of the community are generally upheld against free exercise challenges because these laws do not directly restrict "free expression of ideas." He adds, however, that this does not necessarily make such laws valid as applied; it only means that "religious liberty furnishes no ground for claiming [general] immunity" from them. P. KAUPER, *supra* note 4, at 38.

113. *Urban Landmarks*, *supra* note 76, at 525.

114. *Id.*

115. See *generally Euclid*, 272 U.S. 365.

allowed to override Church C's right to practice its urban ministry, the church would be unable to provide these needed services.<sup>116</sup>

The Supreme Court also has found a compelling state interest where maintenance of a system as a whole depends on mandatory compliance and necessitates a yielding of religious activity to regulation.<sup>117</sup> In *Braunfeld*, the Court emphasized the need for a *uniform* day of rest for all citizens, regardless of religious affiliation.<sup>118</sup> In *United States v. Lee*, the Court found that since mandatory compliance was essential to the vitality of the social security system, the state's interest outweighed an Amish employer's religiously motivated refusal to participate in the system.<sup>119</sup> In each case, the Court was faced with a situation in which the state objective would have failed unless mass participation were achieved. Thus, the Court required the religious practice to yield to regulation for the good of society as a whole.

In the context of religious property, the Colorado Supreme Court held that demolishing a church building is a legitimate exercise of police power when the state's urban renewal plan would be defeated absent area-wide renovation.<sup>120</sup> The need for maintaining an overall system or plan has also been deemed a compel-

116. Also to be weighed against the municipality's interest is the possibility that churches seeking relief from landmark status may find ways to make the alteration or demolition more attractive to the municipality. At St. Bartholomew's in New York City, the developer of the proposed office tower has offered to spend 30% more than normal on the construction "because of the special circumstances." Holubowich, *supra* note 64, at 20 (quoting a member of St. Bartholomew's vestry). Such concessions weaken the city's interest in maintaining the landmark building by providing a counterinterest in razing it.

117. See *infra* notes 118-26 and accompanying text.

118. 366 U.S. at 607-09.

119. 455 U.S. 252, 256-61 (1982). The Amish oppose the social security system on the grounds that it is their own religious duty to provide for their poor and elderly. *Id.* at 257. In distinguishing *Yoder*, the *Lee* majority asserted that a religious exemption from social security taxes would be deleterious in a way that excusing Amish children from the latter part of their public school education would not. In the former case, an exemption for the Amish would create a precedent for religious objections to the way tax revenues are spent. Exemption for all such claims would gravely threaten not only the social security system but the income tax system as well. In the latter case, the public education system would continue to thrive if isolated Amish children were allowed to be educated at home. Because the *Yoder* Court emphasized that the Amish can educate their children as well as or better than the public schools, 406 U.S. at 222, it seems clear that exemptions will not be lightly given. Furthermore, the impact of Amish employers on the social security system differs both in kind and degree from Amish parents who are concerned only with their own children and presumably have no effect on students in the public school system.

120. *Pillar of Fire*, 191 Colo. at 241, 552 P.2d at 25; see also *Order of Friars Minor of Province of Most Holy Name v. Denver Urban Renewal Auth.*, 186 Colo. 367, 527 P.2d 804 (1974).

ling state interest where comprehensive zoning ordinances<sup>121</sup> and historic districts<sup>122</sup> were at issue.

It is unclear whether the state's interest would be compelling in the case of a religious property that stands as an isolated landmark. The *Penn Central* Court rejected a distinction between isolated landmarks and historic districts when it found that New York City's isolated landmarks were legitimate elements of a comprehensive plan.<sup>123</sup> While the relationship of individual buildings to the success of a historic district is evident, it is much more difficult to view isolated landmarks as part of a unified system. Particularly in large urban areas, it is more realistic to view them as insular idiosyncratic units with no connection to each other or any system. Moreover, the *Penn Central* case did not involve first amendment issues, so it is not clear whether the state's interest in maintaining an amorphous "plan" could override the right to free exercise. If the religious buildings are seen as unrelated units, the state's interest in maintaining a system is insufficient justification for an infringement of religious freedom.<sup>124</sup>

A useful analogy can be drawn between the landmark situation and the social security system. Although the *Lee* Court found a compelling interest in maintaining the system, it also noted that the Internal Revenue Service provides a religious exemption from social security taxes for self-employed individuals.<sup>125</sup> The religious employer who affects the system by hiring other workers

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121. *Euclid*, 272 U.S. 365.

122. *Maier v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976).

123. 438 U.S. at 132. *Contra Pyke, Architectural Controls and the Individual Landmark*, 36 LAW & CONTEMP. PROBS. 398 (1971) (arguing that the comprehensiveness of a zoning law may serve as precedent for historic district regulation, but can only partially support regulation of isolated landmarks). The Pyke article was written before *Penn Central* was decided.

124. One author notes that "public purposes may not be as significantly present" in the case of isolated landmarks. Sackman, *supra* note 14, at 255.

125. 455 U.S. at 255-56, 260-61 (construing I.R.C. § 1402(g) (1982)). To qualify for the exemption, the taxpayer must be a member of a recognized religious sect whose teachings oppose acceptance of public or private insurance. Moreover, the Secretary of Health and Human Services must determine that the religious sect is capable of providing for its members without social security's help. The Eighth Circuit has held that Congress could have concluded that such assistance would be forthcoming from fellow members of a religious sect, while there would be no such guarantee with respect to unaffiliated members of the general public. *Jaggard v. Commissioner*, 582 F.2d 1189, 1190 (8th Cir. 1978), *cert. denied*, 440 U.S. 913 (1979). Again, the importance of maintaining the system is evident. If individuals were exempted without some assurance that they would find assistance privately, they could become burdens on the retirement system without having contributed to it.

may be analogized to the landmark that is part of a historic district, while the self-employed individual with minimal effect on the overall scheme may be likened to the isolated landmark. The state has a much stronger interest in controlling the employer and the historic district simply because the success of the comprehensive plan depends more upon their inclusion.

One state supreme court has made some rather sweeping assertions regarding the "pre-eminent status of religious institutions"<sup>126</sup> in the context of property restrictions. Ultimately, however, the determination will depend on the particular circumstances of the religious organization. That Churches *A*, *B*, *C*, and *D* are isolated landmarks should weigh significantly in their favor. None is crucial to sustaining the character of a historic area; rather, each is an individual tribute to some historic event or architectural style. This is not to suggest that *A*, *B*, and *D* would not be missed if they were demolished, or that *C*'s alteration would not be lamented. It is merely to observe that the state's interest is not as pronounced as it might be in the case of a historic district component.

Churches *A* and *C* would remain standing if their permits were granted. In *A*'s case, demolition is requested for an adjacent building. The court would have to consider whether the church and its adjacent building together represent greater historic or architectural "value" as a complete entity than would the church alone. Balanced against this possibility is the human services element,<sup>127</sup> the severity of the financial burden,<sup>128</sup> and the fact that the city will retain its landmark church. Since Church *A* itself will remain untouched, and since it needs the proposed new building to keep its congregation functioning, support its ministry to the poor, and shelter its human service activities, the scales seem to tip in Church *A*'s favor.

Like Church *A*, Church *C* proposes no alterations to the

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126. *Jewish Reconstructionist Synagogue v. Incorporated Village of Roslyn Harbor*, 38 N.Y.2d 283, 288, 342 N.E.2d 534, 538, 379 N.Y.S.2d 747, 753, cert. denied, 426 U.S. 950 (1975). Although the court's language in *Roslyn Harbor* is encouraging to religious practitioners seeking to challenge zoning laws, the court did nothing more than engage in ad hoc balancing. Faced with an ordinance that allowed setback variances for individual residences yet prohibited such variances for religious properties, the court held the ordinance unconstitutional on the particular facts before it. See also *Westchester Reform Temple v. Brown*, 22 N.Y.2d 488, 497, 239 N.E.2d 891, 896, 293 N.Y.S.2d 297, 304 (1968). But see *Free Exercise*, supra note 83, at 1254 (arguing that *Roslyn Harbor* grants religious institutions more freedom from government regulation than the Supreme Court has ever warranted).

127. See supra text accompanying notes 77-78.

128. See supra notes 79-90 and accompanying text.

church building itself. Modifications would be confined to the parish house, enabling the church to continue its ministry to the poor. Under such circumstances, the state would best protect its interests by agreeing to a parish house addition that harmonizes in style and size with the existing structure.<sup>129</sup> If this is possible, the alteration should be allowed, since the church's proposal would pose no substantial threat to the state.

Of the four scenarios, Church *B* has the weakest case. While the financial burden may become severe, it also appears that the church has alternatives yet to be explored.<sup>130</sup> Until those alternatives are pursued, the church's proposed demolition seems merely a measure of convenience insufficient to outweigh the state's interest in preservation, particularly in light of the modest burden on the congregation's right to free exercise.

In Church *D*'s case, however, there are compelling reasons for allowing demolition. It can be argued that the state itself has an interest in permitting it, since the building may soon threaten the health and safety of the congregants.<sup>131</sup> Even absent that factor, the burden on the congregation's right to free exercise would probably outweigh the state's interest in aesthetics and historic preservation.

When a congregation seeks alteration or demolition of a landmark church or adjacent building and permission is denied by the local landmarks commission, the state must show an interest of sufficient magnitude to outweigh any substantial infringement of the congregation's free exercise right. Furthermore, the state must show that there is no less restrictive means to accomplish its goals or protect its interests.<sup>132</sup>

#### D. *Less Restrictive Alternatives for Churches A, B, C, and D*

In the context of landmark law, the establishment clause of the first amendment may preclude special provisions for properties owned by religious organizations. To avoid the constitutional prohibition against establishment of religion, government regulation or action must have both a secular purpose<sup>133</sup> and a "direct

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129. *Penn Central*, 438 U.S. at 137. Such accommodations are likely to persuade the landmarks commission to grant an alteration permit. *Id.*

130. See *supra* text following note 87.

131. See *supra* text accompanying notes 91-94.

132. *Sherbert*, 374 U.S. at 407.

133. See *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963) (requirement that



and immediate" secular effect,<sup>134</sup> neither of which advances or inhibits religion.<sup>135</sup> It must also avoid "excessive governmental entanglement,"<sup>136</sup> either administrative<sup>137</sup> or political,<sup>138</sup> with religion.

A landmark law which specifically exempts religious organizations from some or all of its provisions, or provides for them in a unique way, would be problematic. By analogy to the tax exemptions afforded religious organizations, it is arguable that exemptions from the landmark laws should also be allowed. The problem with this analogy is that the Supreme Court has stressed the enduring governmental acceptance of the tax exemption in United States history.<sup>139</sup> There is no historical exemption in landmark law.

By requiring the owner's consent before a property can be given landmark status, the state's goals may be pursued in a less burdensome manner. There would be no establishment clause problems with such a requirement because it would apply to every property owner facing landmark designation. Although such a provision might appear to thwart the state's purposes, many landowners might find landmarking advantageous and consent to the designation. For some, the prestige and tourist revenues that accompany landmark status would be sufficient to entice acquiescence.<sup>140</sup> Others would be attracted by the tax advantages to owners of landmarked properties.<sup>141</sup>

The federal government, which expresses a strong interest in

portions of Bible be read at beginning of each school day struck down as violation of the establishment clause).

134. *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 773 (1973) (tuition reimbursement and income tax relief to parents of private school students held unconstitutional).

135. *Id.*

136. *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (property tax exemptions to owners of property used for religious purposes upheld). The *Walz* Court noted that some accommodation of religious interests is permissible so long as it does not involve the government in either supporting or administering religion. *Id.* at 668-69.

137. *Id.* at 675.

138. *Lemon v. Kurtzman*, 403 U.S. 602, 622-24 (1971) (reimbursement to parochial schools for teachers providing secular education unconstitutional). The Court observed that such a reimbursement program would require too much state supervision to insure that those whose salaries were at issue were not actually teaching religious subjects. *Id.* at 619.

139. *Id.* at 624; *Walz*, 397 U.S. at 676-78.

140. *See Penn Central*, 438 U.S. at 109 (quoting *NEW YORK CITY, N.Y., CHARTER & CODE ch. 8-A, § 205-1.0(b)* (1976)); *see also* Pyke, *supra* note 123, at 399.

141. *See Wilson & Winkler, supra* note 27, at 339. Thus, a city's historic and cultural resources would not be severely depleted by a consent provision.

historic preservation,<sup>142</sup> has recently amended the federal statute to require an owner's consent.<sup>143</sup> New York City, whose landmark provisions are amongst the nation's most restrictive,<sup>144</sup> is currently considering such an amendment.<sup>145</sup> There is, thus, some indication already that legislatures feel the state's interest would be sufficiently guarded if this route were taken.

If a congregation consents to a landmark designation, it can hardly object when the local commission refuses to allow demolition. Problems may occur where a church initially agrees to be landmarked, but later finds itself burdened as a result of changes over time. As the building grows older and begins to deteriorate, as in the case of Church *D*, or as the needs of the congregation increase (Church *A* and *C*) or change (Church *B*), the landmarked church may find an infringement on its ability to practice its religion that did not exist at the time of the original designation. To anticipate such situations, the law might provide for review of the designation either at the request of the owner or on a periodic basis.

Alternatively, landmark laws might provide for contractual arrangements between the government and certain property owners. Although government may not contract away the right to exercise its police power,<sup>146</sup> it may contract with private individuals in areas beyond the police power's reach. Where first amendment protection removes specific religious buildings from the embrace of the police power, a landmark commission that contracts with a religious organization would merely be bargaining for an asset to which it otherwise would not have been entitled. Landmark ordinances would continue to operate as they do now on most landmarked properties. For those structures outside the reach of the police power, however, the property owner would only assume affirmative preservation obligations by contract. Presumably

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142. See National Historic Preservation Act of 1966, § 2, 16 U.S.C. § 470-1 (1982) (declaration of policy).

143. *Id.* § 470a(a)(6). While the National Register is merely a planning tool and not a regulatory control, to the extent that municipalities use it as a basis for restricting properties, such an amendment may result in changes locally. See *supra* note 26 and accompanying text.

144. NEW YORK CITY, N.Y., CHARTER & CODE ch. 8-A, §§ 205-1.0 to 207-21.0 (1976 & Supp. 1983-84).

145. 10341 N.Y.S., 13043 N.Y.A., 205th Leg. Reg. Sess., 1982 (proposed amendment to N.Y. GEN. MUN. LAW § 96-a (McKinney 1977)).

146. See, e.g., *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976); *Zupancic v. Schimenz*, 46 Wis. 2d 22, 174 N.W.2d 533 (1970).

there would be few such structures, so the state's interest in historic and architectural preservation would not be threatened. That less burdensome alternatives exist should weigh heavily in the churches' favor.

#### IV. CONCLUSION

When the state's interest in historic and architectural preservation conflicts with a congregation's right to the free exercise of religion, courts must use a balancing test to determine whether the burden on the first amendment right will be tolerated. This involves a weighing of the nature and degree of the burden against the nature and strength of the state's concern, and an inquiry into whether the state might protect its interest through less restrictive means. The resolution will depend on the facts peculiar to each case.

In the context of historic preservation of isolated properties, the burden on free exercise will be heaviest and the state's interest weakest when worship itself or the actual church building is affected by the landmark designation, or when demolition is the only feasible solution to severe financial distress, lack of alternative sites, or structural inadequacy. The scales tip in the state's favor to some degree when religious activities other than worship are affected. If, however, these practices are central to a denomination's beliefs or supplement the state's own programs, the situation may still warrant first amendment protection.

Because of potential establishment clause problems in exempting churches from the general operation of landmark laws, the best solution lies either in a consent requirement or contractual arrangements. By virtue of these less burdensome methods of protecting state interests, infringement of a congregation's right to the free exercise of religion, caused by its church's landmark status, must not be tolerated.

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APPENDIX  
Summary of Hypothetical Fact Patterns

*Church A*

1. Isolated landmark;
2. Predicts bankruptcy by century's end;
3. Proposes to raze adjacent landmark building;
4. Proposes to replace adjacent building with multi-story office tower:
  - a. Revenues would ensure financial stability;
  - b. Revenues would support ministry to the poor;
  - c. New building would include space for human service activities;
5. Physical plant not spatially a problem:
  - a. Would be less expensive to maintain if renovated; but
  - b. Congregation has not yet outgrown it;
6. Application for permit to demolish adjacent building has been denied.

*Church B*

1. Isolated landmark;
2. When originally built in rural setting, congregation lived nearby;
3. Today church in center of urban area;
4. Most members have moved to suburbs—closest is one-half hour away;
5. Proposes sale of church building and reconstruction closer to members;
6. Attempts to find buyer have failed;
7. Dwindling congregation and resulting reduction in revenues have burdened budget;
8. Application for permission to demolish to make property more attractive to commercial developers has been denied.

*Church C*

1. Isolated landmark;
2. House of worship itself not at issue;
3. Adjacent landmarked parish house woefully inadequate.
4. Parish house contains church offices, day care center, soup kitchen, and classrooms for religious instruction;
5. Proposes addition to parish house to meet needs of rapidly expanding congregation;

6. Three sets of plans for proposed addition have been rejected.

*Church D*

1. Isolated landmark;
2. Obscure denomination of major world religion;
3. Only a dozen other such congregations in the U.S.—none within 500 miles of Church *D*;
4. Congregation has increased to point where house of worship is completely inadequate;
5. Church building experiencing structural decay;
6. Cost of alteration or addition prohibitive;
7. Application for demolition permit has been denied.

