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## Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review

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1991]

HOUSES OF WORSHIP AND RELIGIOUS LIBERTY:  
CONSTITUTIONAL LIMITS TO LANDMARK  
PRESERVATION AND ARCHITECTURAL  
REVIEW

ANGELA C. CARMELLA\*

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In my capacity as an attorney at Csaplár & Bok, Boston, I was involved in representation of the Society of Jesus during the designation and post-designation procedures before the Boston Landmarks Commission, which later became the subject of *Society of Jesus v. Boston Landmarks Commission* (discussed herein). Additionally, in connection with the appeal of the decision in that case to the Supreme Judicial Court of Massachusetts, I was listed as one of the attorneys for several amici curiae on a brief filed in support of the position taken by the Society of Jesus.

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## I. INTRODUCTION<sup>1</sup>

THIS article contends that governmental design control of houses of worship violates both the free exercise and establishment clauses of the first amendment.<sup>2</sup> This thesis is rooted in the presumption that a symbiotic relationship exists between theological choice and architectural design so that the physical form of the house of worship constitutes religious expression. As a consequence of aesthetic control, the government becomes the

### 1. For the purposes of this article:

"House of worship" is defined as any church, synagogue, temple, mosque or multi-use facility devoted primarily to worship, prayer, or religious ceremony.

"Sanctuary" is defined as the interior space within the house of worship in which (1) communal gathering occurs for purposes of worship, prayer, or religious ceremony or (2) rituals, ceremonies, sacramental observations or personal religious devotions occur.

"Religious community" is defined as the group of congregants that use the house of worship. This group may be accountable only to itself (*i.e.*, an autonomous, congregational polity) or may be accountable to a higher authority (*i.e.*, a hierarchical or presbyterial polity) for its house of worship design choices. This group is often the local manifestation of a larger religious tradition, regardless of polity. It will be assumed that the religious community's design decisions comport with the substantive and procedural parameters established by its tradition.

"Design" refers to the structural elements, overall plan, materials, textures, color, light, seating, acoustics, ornament, artistry and sculpture of the exterior and interior of the structure. *See generally* J. DAVIES, *TEMPLES, CHURCHES AND MOSQUES* (1982); E. LYNN, *TIRED DRAGONS: ADAPTING CHURCH ARCHITECTURE TO CHANGING NEEDS* (1972).

"Architectural review" is defined as governmental (generally municipal) control over the design of proposed new construction for the purpose of maintaining architectural compatibility with existing structures and preserving neighborhood character.

"Landmark preservation" is defined as preservation of existing individual structures or districts that are significant primarily for historic or architectural reasons. Alteration and demolition of a preserved structure is controlled or prevented. Design of new construction introduced near a preserved structure is also controlled.

"Design control" means architectural review and landmark preservation.

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

codesigner of ecclesiastical architecture, interfering with beliefs and the architectural expression of those beliefs. Hence, this article concludes that the government should be precluded from extending coercive design authority over religious communities that intend or continue to use their proposed and existing structures as houses of worship.

There is considerable consensus among architectural commentators that architecture is expression. Buildings have "semiotic properties," which means they "function as signs, conveying cognitive and emotional meanings" to their viewers.<sup>3</sup> Because of the meanings that come to be associated with the built environment, the protection of individual buildings and entire districts, as well as the contextual control of new architectural designs, provides cultural and psychological stability and identity in a rapidly changing society. Given increasing legislative and judicial appreciation for this role of the built environment, creative municipal planning techniques and aggressive design control mechanisms have been permitted to flourish over the last half century.

Most notably, in addition to the state's traditional zoning and eminent domain powers, landmark preservation and architectural review have become widely used for design control. Their purposes are to minimize destruction and alteration of important structures and to ensure visual harmony of areas, not so much to enshrine the "beauty" of the built environment as to protect the messages it signifies and the stability and identity it promotes.<sup>4</sup> Thus, governmental control of houses of worship, particularly their preservation as landmarks, occurs in the larger context of this movement to protect the semiotic nature of the built environment. Supporters of house of worship preservation argue that governmental design control must include sacred sites so that

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3. Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355, 392 (1982) [hereinafter Costonis, *Law and Aesthetics*]. See generally J. COSTONIS, *ICONS AND ALIENS* 94 (1989). ("Architecture . . . [may] communicate ideas more effectively than language . . . [and has a] capacity to evoke emotion through sensuous form, not ideas."); C. NORBERG-SCHULZ, *THE CONCEPT OF DWELLING* 72 (1985) ("In the Church, man's understanding of the cosmos, as well as his own life in the world was kept and visualized. . . . Thus, the church illustrates what architecture is all about, and teaches us how to use its 'language.'").

4. By referring to existing landmarks as "icons" and proposed new buildings as "aliens," Professor Costonis writes: "Icons are both physical entities and repositories of meanings imputed to them by their champions. Icons are both signifiers and the message they signify. Aliens menace icons either by obliterating the icon's message altogether or by contaminating it." J. COSTONIS, *supra* note 3, at 57.

these symbols of faith and tributes to God will not be obliterated from an overwhelmingly secular landscape. These supporters argue further that the failure to extend the same protection given secular structures to these architectural embodiments of faith would discriminate against religion and de-sacralize the environment.<sup>5</sup>

Yet this understandable celebration of the rich and diverse messages of the past can obscure the multi-faceted problems posed by civil jurisdiction over religious design decisions. Design control is not limited to official acknowledgement of older structures; the powers asserted are expansive. For instance, a municipality could claim the following authority under architectural review and landmark preservation powers: to prevent construction of a proposed ecclesiastical design if it considered the design visually incompatible with neighboring structures; to amend a proposed alteration to a structure if it considered the redesign aesthetically inappropriate; or to oversee the renovation of a sanctuary in order to ensure the preservation of significant architectural elements and to harmonize any additions to the interior. To use more concrete examples, by asserting jurisdiction over a proposed or existing house of worship, a design authority can be in a position to scrutinize, and to consider dissonant and inappropriate, a proposal by a Greek Orthodox community to build a Byzantine church in a predominantly colonial neighborhood; a proposal by a Moslem community to alter a landmark's facade to emphasize the side facing Mecca; or a proposal by a Jewish community to redesign and relocate Torah receptacles within its sanctuary.

Despite the sincerely held belief on the part of many supporters and regulators that governmental design control is wholly consistent with the protection of religion, the interference with design decisions raises serious constitutional issues. Ecclesiastical architecture has always been inextricably linked with basic religious choices made by worshipping communities. In both its functional and visual aspects, the house of worship reflects and influences all dimensions of a religious community's life—its primary theological principles, its liturgical practices, its faith renewal movements, its doctrinal development, its missional goals

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5. Others support governmental preservation of houses of worship out of a conviction that religious communities should be subject to the same land-use restrictions and economic burdens that other property owners may be required to endure.

and its identity.<sup>6</sup> The purpose of the structure is a religious one; religious choices are embodied in it; those choices in turn shape the individual and communal religious experience and either foster or constrain the spiritual development of the adherents. Because of the symbiosis between the building and the worshipping community, the design manifests religious expression.<sup>7</sup> The semiotic nature of the house of worship renders its “religious” and “aesthetic” aspects indistinguishable. Therefore, when the government controls ecclesiastical design or dictates design orthodoxy to any religious community, it invades the sphere of religious decisionmaking, compels some forms of religious expression while suppressing others, and distorts the development of doctrine and the religious formation of adherents. Such state action severely compromises the religious community’s freedom to adapt its worship structure to its liturgical, theological, doctrinal, and missional goals, and, consequently, its ability to protect its own expression and vitality.

This constitutional freedom from design control is not absolute. First, it does not implicate safety, health or zoning regulations that indirectly influence the design of a structure, but only those specifically focused on the aesthetic control of new or existing designs.<sup>8</sup> Second, it applies only to the initial and continued use of a particular site as a house of worship. Thus, design authorities would have no jurisdiction over religious communities

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6. Throughout history, many factors have contributed to the construction and design of sacred architecture, such as the availability of land, labor, building materials, economic resources, the state’s political, military and taxing power to initiate and sustain building programs, the prevalence of wealthy public and private patrons of the arts, and developments in the arts and in architectural and engineering sciences (such as the arch, reinforced concrete and computer graphic technology). See H. JANSON, *HISTORY OF ART* 285 (2d ed. 1978); P. THIRY, R. BENNETT & H. KAMPHOFNER, *CHURCHES & TEMPLES* 13C (1953) [hereinafter P. THIRY]; *MODERN CHURCH ARCHITECTURE* 4 (A. Christ-Janer & M. Foley eds. 1962); *Religious Buildings: Mosques, Churches, Temples*, MIMAR, Sept. 1988, at 42 [hereinafter *Religious Buildings*]. While these and countless other environmental, social, cultural and aesthetic factors contribute to the process of architectural design and construction, this article focuses exclusively on the interaction of religious choices, communal needs and architectural development. See *infra* notes 176-289 and accompanying text.

7. This religious expression is attributed to the religious community, not to the architect. This differs from the approach taken in some legal commentary that considers architecture as the expression of the architect. See, e.g., Note, *Architecture, Aesthetic Zoning, and the First Amendment*, 28 STAN. L. REV. 179, 181 (1975). Architectural commentary on houses of worship, however, considers the design professional the vehicle for the expression but attributes the content of the expression to the religious community that has commissioned the work. P. THIRY, *supra* note 6, at 17P-18P.

8. See *infra* note 92.

constructing new houses of worship,<sup>9</sup> replacing existing houses of worship with new ones, or altering existing structures for continued use in worship. Non-worship use of the site or its commercial development are not within the purview of this article.

Respect for the independence of religious communities' design decisions will ensure that the evolution of ecclesiastical forms over time—which is precisely what is celebrated by the preservation and architectural review movement—will not be inhibited and tarnished by secular oversight and involvement. Obviously a religious community is free to preserve existing structures and to harmonize new ones with surrounding design voluntarily, and can be encouraged in non-coercive ways to do so.<sup>10</sup> But continued innovation in ecclesiastical architecture, whether new forms or the reappropriation of earlier forms, depends upon keeping the government *out* of the process of ecclesiastical design. This exclusion will ensure both the vitality of religious communities and the continued diversity of architectural manifestations of belief.

To date, scholarly commentary regarding the constitutional infirmities of governmental design control has addressed such doctrines as substantive and procedural due process, equal protection, eminent domain, and free speech; in the free exercise area, the discussions tend to focus on the economic burdens of design control.<sup>11</sup> While it is true that many religious communities suffer economic hardship because of the imposition of aesthetic

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9. It is not, however, intended to protect a religious community that purchases a landmarked secular structure not originally designed to be used as a house of worship, nor ever used as one. In such a case, the religious community's renovation deserves protection only if there are no adequate alternative sites available in the municipality. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

10. See *infra* notes 394-400 and accompanying text.

11. See, e.g., J. COSTONIS, *supra* note 3; Costonis, *Law and Aesthetics*, *supra* note 3; Greenawalt, *Church and State: Some Constitutional Questions in Landmarking of Church-Owned Properties*, HISTORIC PRESERVATION LAW, Oct. 5, 1982, at 465.

For a takings analysis, see Gerstell, *Needed: A Landmark Decision-Takings, Landmark Preservation and Social Cost*, 8 URB. L. 213 (1976); Comment, *First Amendment Challenges to Landmark Preservation Statutes*, 11 FORDHAM URB. L.J. 115 (1982); Note, *Applying Historic Preservation Ordinances to Church Property: Protecting the Past and Preserving the Constitution*, 63 N.C.L. REV. 404 (1985) [hereinafter Note, *Ordinances*].

For a free speech analysis, see Note, *supra* note 7; Note, *Architectural Expression: Police Power and the First Amendment*, 16 URB. L. ANN. 273 (1979) [hereinafter Note, *Architectural Expression*]; Note, *Aesthetic Regulation and the First Amendment*, 3 VA. J. NAT. RESOURCES L. 237 (1984) [hereinafter Note, *Aesthetic Regulation*].

For a free exercise analysis, see Xeller, *The Impact of the First Amendment on the Preservation of Religious Structures*, 3 PRESERVATION L. REP. 2005 (1984); Comment, *supra*; Note, *Model Free Exercise Challenges for Religious Landmarks*, 34 CASE W. RES. L. REV. 144 (1983) [hereinafter Note, *Model Free Exercise*]; Note, *Land Use Regula-*

regulation and that these economic burdens may constitute a deprivation of free exercise rights, this article's constitutional analysis is not dependent upon any such showing. Even absent any demonstrable economic burden, governmental control of the appearance of the house of worship used by a religious community for its core religious activities constitutes an impermissible intrusion into its ecclesial life and illegitimate control of its religious expression.

Part II of this article sets forth the constitutional framework of the religion clauses and their common purpose to protect religion. Part III provides an overview of design control mechanisms and of related constitutional challenges brought by religious communities. Part IV offers historical examples of the semiotic nature of religious structures and the symbiotic relationship between theology and architecture. Part V develops the constitutional limits to design control in light of that semiotic nature and symbiotic relationship, arguing that design control by the government regulates religion selectively, compels the profession of faith, and distorts beliefs and religious formation. It is concluded that the religion clauses require exemption from coercive design control for houses of worship.

## II. THE CONSTITUTIONAL FRAMEWORK OF THE RELIGION CLAUSES

The religion clauses are designed to promote religious liberty by limiting the nature and scope of governmental support for and interference in religion.<sup>12</sup> Because the two clauses are closely interrelated, functioning with distinct and overlapping purposes, an analysis under both clauses is often necessary for a comprehensive constitutional treatment. Particularly in situations where the purposes of the clauses coincide, like that of governmental design control of houses of worship, such an analysis is most fruitful.

While concerns of governmental interference in religion arise under the free exercise clause and those of governmental support of religion arise under the establishment clause, there will be circumstances of governmental interference implicating both clauses. Generally, the relationship between the clauses is

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*tion and the Free Exercise Clause*, 84 COLUM. L. REV. 1562 (1984) [hereinafter Note, *Land Use*]; Note, *Ordinances*, *supra*.

12. See generally A. ADAMS & C. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY 37-73 (1990).



understood in terms of a division of labor: the free exercise clause is intended to protect the individual and religious community from coercive governmental action interfering with religious belief and practice,<sup>13</sup> while the establishment clause prohibits financial and symbolic support for religion as well as the usurpation of state powers by religious communities.<sup>14</sup> But this is not the only role of the establishment clause. Like the free exercise clause, it protects the religious individual and religious community from state domination, control and interference, although the state action need not be coercive.<sup>15</sup> An examination of state-supported churches of Europe and colonial America makes clear that support is not the only element of an establishment: preference to one church generally involved disadvantage, punishment and interference in the religious life of dissenting, non-established faiths.<sup>16</sup> Even in the Supreme Court's jurisprudence, from

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13. A showing of governmental coercion is required in a free exercise claim, while it is not for an establishment clause claim. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 223 (1963).

14. See A. ADAMS & C. EMMERICH, *supra* note 12, at 21-31. For a discussion of the "enlightened separationists" who were "suspicious of institutional religion and its potential for corrupting government," see *id.* at 22; see also *Larkin v. Grendel's Den*, 459 U.S. 116, 126 (1982) (core rationale underlying establishment clause is prevention of fusion of government and religious functions), *modified*, 749 F.2d 945 (1st Cir. 1984).

15. See A. ADAMS & C. EMMERICH, *supra* note 12, at 28-31 (discussion of "pietistic separationists" who sought to protect religion from corrupting effects of governmental interference; see also *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 721-22 (religious freedom includes power of religious groups to decide matters of church government without state interference), *reh'g denied*, 429 U.S. 873 (1976). For a discussion of the need to distinguish between the purposes of the clauses, limiting the free exercise clause to concerns of governmental interference and the establishment clause to concerns of governmental support, see Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981). For a discussion of the need to recognize the dual role of the establishment clause, see Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 354-61 (1984).

16. The Supreme Court has often discussed the dual role of the establishment clause and its interconnectedness with the free exercise clause.

This constitutional prohibition of denominational preference [under the establishment clause] is inextricably connected with the continuing vitality of the Free Exercise Clause. . . . Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations.

*Larson v. Valente*, 456 U.S. 228, 245 (1982). In a case requiring candidates for public notary to state their belief in God, the Court found that the power and authority of [Maryland] is put on the side of one particular sort of believers . . . . [The state's requirement] imposes burdens and disabilities of various kinds upon varied beliefs depending largely upon

which the concern over formal establishments is absent, protecting religious persons and communities from governmental interference under the establishment clause has been a frequent, albeit limited, theme.<sup>17</sup>

Coercive state action can thus violate both of the religion clauses, particularly in cases of burdensome, discriminatory and religion-inhibiting governmental conduct.<sup>18</sup> The clear prohibi-

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what group happened to be politically strong enough to legislate in favor of its own beliefs. *The effect of all this was the formal or practical 'establishment' of particular religious faiths in most of the Colonies, with consequent burdens imposed on the free exercise of the faiths of nonfavored believers.*

*Torcaso v. Watkins*, 367 U.S. 488, 490 (1961) (emphasis supplied). Since the state cannot force a person "to profess a belief or disbelief in any religion" under the establishment clause, the Court held that Maryland had invaded Torcaso's "freedom of belief and religion." *Id.* at 495-96. The Court has further described the establishment clause's dual role by considering that

[i]ts first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government *and to degrade religion*. . . . Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions *and religious persecutions* go hand in hand.

*Engel v. Vitale*, 370 U.S. 421, 431-32 (1962) (emphasis supplied). The Court further stated that the establishment clause

is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain [and possibly actionable under the free exercise clause].

*Id.* at 430-31.

17. See *infra* notes 34-50 and accompanying text.

18. For a case in which the Supreme Court appears to undertake a dual free exercise and establishment analysis, see *Larson v. Valente*, 456 U.S. 228 (1982). In *Larson*, the Court found that a statute imposing registration and reporting requirements only on religious organizations that solicit more than 50% of funds from non-members violates the requirement of denominational neutrality. *Id.* at 255. The Court subjected the statute to the free exercise strict scrutiny standard on the grounds that it should be invalidated unless "justified by a compelling governmental interest and unless . . . closely fitted to further that interest." *Id.* at 246-47. The Court continued:

Although application of the *Lemon* [establishment clause] tests is not necessary to the disposition of the case before us, those tests do reflect the same concerns that warranted the application of strict scrutiny to [the challenged statute]. . . . [The third of those tests, the entanglement concern is] most directly implicated in the present case.

*Id.* at 252.

Additionally, in *McDaniel v. Paty*, Justice Brennan characterized a state law that prevented clergy from running for public office as violating both religion clauses. 435 U.S. 618, 630 (1978) (Brennan, J., concurring). "Because the challenged provision establishes as a condition of office the willingness to eschew certain protected religious practices, *Torcaso v. Watkins* . . . compels the conclu-

tion of state action that offends both clauses may require an exemption for religious persons or communities from the government's reach.<sup>19</sup> In the design control context, this article posits that both clauses mandate a blanket exemption for houses of worship from the coercive jurisdiction of design control authorities.

Proponents of design control of houses of worship consider such exemptions unnecessary under the free exercise clause. Moreover, they consider the exemptions impermissible under the establishment clause. They do so by invoking the "tension" between the clauses.<sup>20</sup> In this view, the non-interference goal of the

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sion that it violates the Free Exercise Clause." *Id.* at 632 (Brennan, J., concurring). "As construed, the exclusion manifests patent hostility toward, not neutrality respecting religion, forces or influences a minister or priest to abandon his ministry as the price of public office, and, in sum, has a primary effect which inhibits religion." *Id.* at 636 (Brennan, J., concurring) (citations omitted). "The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here. It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life." *Id.* at 641 (Brennan, J., concurring).

19. An exemption will be necessary where the state has impermissibly extended its jurisdiction over religious communities because the clauses require the withdrawal of jurisdiction.

[T]he two clauses may overlap. As we have indicated, . . . this Court . . . has consistently held that the [establishment] clause *withdrew all legislative power* respecting religious belief or the expression thereof. . . . [T]here must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. The Free Exercise Clause . . . *withdraws from legislative power*, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority.

*School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222-23 (1963) (emphasis supplied).

20. In *Thomas v. Review Board*, then Justice Rehnquist attributed this tension in part to the Court's "overly expansive interpretation of *both* Clauses." 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting). Justice Rehnquist reasoned:

Although the Court holds that a State is constitutionally required to provide direct financial assistance to persons solely on the basis of their religious beliefs . . . the Court . . . blandly assures us . . . that its decision "plainly" does not foster the "establishment" of religion. [Prior Establishment Clause precedent], if faithfully applied, would require us to hold that such . . . action by a State *did* violate the Establishment Clause.

*Id.* at 722-25 (Rehnquist, J., dissenting) (quoting majority opinion); *see also* *Sherbert v. Verner*, 374 U.S. 398, 414 (1963) (Stewart, J., concurring in result) ("[T]here are many situations where legitimate claims under the Free Exercise Clause will run into head-on collision with . . . construction of the Establishment Clause."). *But see* Esbeck, *The Lemon Test: Should It Be Retained, Reformulated, or Rejected?*, 4 NOTRE DAME J.L., ETHICS & PUB. POL'Y 513, 515-32 (1990) (suggesting that "tension" is overstated).

One suggestion for resolving the tension is to ensure that free exercise principles supersede non-establishment principles. *See* *McDaniel v. Paty*, 435 U.S.

free exercise clause, which calls for the state to leave religion alone, clashes with the non-support goal of the establishment clause. These proponents argue that a hands-off approach by the government toward a particular religion might constitute support for that religion. In the context of this tension, religious exemptions become suspect because they appear to be special favors or privileges for religious communities unavailable to others.<sup>21</sup>

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618, 638-42 (1978) (Brennan, J., concurring in judgment); *see also* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-8, at 1201 (2d ed. 1988) ("The free exercise principle should be dominant when it conflicts with the anti-establishment principle. Such dominance is the natural result of tolerating religion as broadly as possible rather than thwarting at all costs even the faintest appearance of establishment.").

21. Some religious exemptions have been held to constitute establishments, while others have not. *Compare* *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (plurality opinion) (Texas statute providing exemption for religious organizations from sales tax violated establishment clause because exemption was specifically tailored to religious purposes and not to broad secular purpose encompassing religious publications) *with* *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (section 702 of Title VII of Civil Rights Act of 1964 which exempts religious organizations from prohibition against religious discrimination in employment does not violate establishment clause because government action which eases burden on religious organization is not required to benefit secular organizations). These cases have resulted in some doctrinal confusion as to when an exemption is permissible. Recently, the Supreme Court encouraged legislative exemptions of ritual peyote use from criminal drug laws, making it clear that religious exemptions are not presumptively suspect. *Employment Div., Dep't of Human Resources v. Smith*, 110 S. Ct. 1595, 1606 (1990). For a discussion of *Smith*, *see infra* notes 62-80 and accompanying text.

An overly expansive reading of *Texas Monthly*, however, seems to jeopardize all religious exemptions. In *Texas Monthly*, the plaintiff, publisher of a general interest magazine, challenged a Texas statute that allowed sales tax exemption for "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith." *Texas Monthly*, 489 U.S. at 5 (quoting TEX. TAX CODE ANN. § 151.312 (Vernon 1982)). *Texas Monthly* argued that the statute violated both religion clauses and the free press clause of the Constitution. *Id.* Disposing of the case on establishment clause grounds, the *Texas Monthly* Court held that the exemption was unconstitutional because it conferred a benefit on religion rather than removing a burden from religion. *Id.* at 17. The Court, however, made the following statement: "We in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause." *Id.* at 18 n.8.

Generally, religious exemptions are constitutional if they remove a burden on religion which is generally imposed on others. The specific reasons for such exemptions include reducing or avoiding entanglement, avoiding the inhibition of religion, tolerating religion, or allowing for freer religious exercise. Exemptions are unconstitutional if they confer a benefit on religion unrelated to the lifting of a burden and if the benefit to religion burdens nonbeneficiaries. Thus, the Court will find an establishment if the exemption "does not remove a demonstrated and possibly grave imposition on religious activity sheltered by the Free Exercise Clause [and] burdens nonbeneficiaries [in order to offset the

Preservation legislation exempting religious property from design control has come under attack as an establishment of religion on such a theory.<sup>22</sup> While the establishment clause's prohibition

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benefit to religion]." *Id.*; see also *Thornton v. Caldor*, 472 U.S. 703 (1985) (statute permitting employees to designate sabbath and requiring employers to accommodate schedules accordingly held unconstitutional establishment of religion).

In *Amos*, the Supreme Court determined that the governmental action at issue was intended to remove a burden to the free exercise of religion rather than foster its establishment. *Amos*, 483 U.S. at 338. The plaintiffs in *Amos* were employees of facilities operated by the Mormon Church. *Id.* at 330. All were fired because they were not members of the Mormon Church. *Id.* The plaintiffs alleged that their discharges based on religion violated Title VII. *Id.* at 331. The Church argued that it was exempt from liability under section 702 of Title VII which allowed religious organizations to discriminate on the basis of religion. *Id.* The plaintiffs countered that "allow[ing] religious employers to discriminate on religious grounds in hiring for nonreligious jobs . . . violates the Establishment Clause." *Id.* The *Amos* Court held that the exception allowing religious communities to discriminate on the basis of religion in their hiring and firing was not an establishment:

[I]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions. . . . Congress' purpose was to minimize governmental "interfer[ence] with the decisionmaking process in religions." . . . A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose.

*Id.* at 335-37 (quoting *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 594 F. Supp. 791, 812 (D. Utah 1984), *rev'd*, 483 U.S. 327 (1987)); see also *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (exemption for religious properties from real estate taxation found not to offend establishment clause).

22. See, e.g., *Alger v. City of Chicago*, 748 F. Supp. 617 (N.D. Ill. 1990). In *Alger*, the National Historic Trust and the Landmarks Preservation Council of Illinois together with three individuals filed suit challenging the consent provision of the Chicago landmarks ordinance. *Id.* at 619-20. This provision enables a religious community owning a structure to withhold consent to landmark designation and effectively halt designation proceedings. *Id.* at 619. For the text of the Chicago ordinance, see *infra* note 118.

Plaintiffs alleged injury to their "use, enjoyment and aesthetic appreciation of St. Mary's [church]" because the Archdiocese of Chicago refused to consent to the church's landmark designation. *Id.* Defendant's motion to dismiss was granted because the plaintiffs lacked standing:

[P]laintiffs have not alleged that St. Mary's is in any greater danger of demolition or alteration than any other building in Chicago . . . . Indeed, it is certainly possible that this contingency will never occur and that, even if it were to occur at some time in the future, that none of the plaintiffs will be in a position to suffer harm at the time. . . . Thus, the plaintiffs' first alleged injury does not satisfy the injury-in-fact requirement of the standing inquiry.

*Id.* at 622. Since standing was denied on the grounds that no demolition or alteration of the building was imminent—not because the allegation of aesthetic injury was too tenuous—the possibility is left open that the constitutional issues, including establishment clause challenges, will be heard in these types of cases. See *id.* Aesthetic injury allegations have also been held sufficient to confer standing in other cases not relating to religious structures. *E.g.*, *Committee to Save the Fox Bldg. v. Birmingham Branch of Fed. Reserve*, 497 F. Supp. 504, 509

on unwarranted support for religion is implicated when an exemption removes no burden from religion and actually burdens those not exempt, a religious exemption from design control is not a special benefit for religious communities. Rather, the removal of burdensome governmental intrusion in the process of the design and redesign of houses of worship is necessary to meet the needs of continuous, living religious communities.

#### A. *Establishment Clause*

Establishment clause precedent provides clear boundaries beyond which the state may not venture in the ways it burdens religion. Most fundamentally, the state may not prefer one denomination over another;<sup>23</sup> it may not force or influence a person to join or avoid a religious community or attend or not attend a religious service against his will;<sup>24</sup> it may not compel the profession of faith;<sup>25</sup> nor may it arrogate the role of a religious community, undertaking activities such as evaluating or suppressing beliefs<sup>26</sup> or articulating theology. A most egregious example of such arrogation came in *Engel v. Vitale*,<sup>27</sup> wherein the New York City Board of Regents composed a "non-denominational" prayer for students to recite at the start of each school day. The Supreme Court wrote:

There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. . . . [I]t is no part of the business of government to com-

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(N.D. Ala. 1980); *Weintraub v. Rural Electrification Admin.*, 457 F. Supp. 78, 88 (M.D. Pa. 1978); *Save the Courthouse Comm. v. Lynn*, 408 F. Supp. 1323, 1331-32 (S.D.N.Y. 1975).

New York City exempts religious sanctuaries from its preservation laws. While there is no indication that a constitutional challenge will be brought, Stephen N. Dennis, the Executive Director of the National Center for Preservation Law has stated that "[u]nder the developing line of Supreme Court cases any form of preferential treatment for religious institutions is constitutionally suspect." Gray, *A Success Story Masks a Landmarks Law Quirk*, N.Y. Times, Apr. 15, 1990, § 10, at 5, col. 1. For further discussion of the relationship between these religious exemptions and constitutional issues, see Xeller, *supra* note 11, at 2013-15; Note, *Ordinances*, *supra* note 11, at 418.

23. *Larson v. Valente*, 456 U.S. 228, 244 (1982); *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

24. *Everson*, 330 U.S. at 15-16 (1947).

25. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961); *Everson*, 330 U.S. at 15.

26. *Everson*, 330 U.S. at 15-16; *United States v. Ballard*, 322 U.S. 78, 86-87 (1944).

27. 370 U.S. 421 (1962).

pose official prayers for any group of the American people to recite as a part of a religious program carried on by government.<sup>28</sup>

The New York City Board of Regents had taken it upon itself to articulate a religious ceremony based upon its formulation of theology.<sup>29</sup> Each of the foregoing practices offends the establishment clause because each is so closely identified with the established churches seen throughout history; and each offending practice would also violate the free exercise clause had coercive state action been involved.

The three-prong establishment clause test that has developed over the last thirty years, enunciated in *Lemon v. Kurtzman*,<sup>30</sup>

28. *Id.* at 424-25.

29. The situation in *Engel* is fundamentally different from a situation where the state gives assistance to a religious body to promote its own tenets. The distinction drawn is a subtle, yet significant one. Government support or endorsement of activity that is independently undertaken by a religious community may be constitutionally suspect. Government appropriation of religion, such as the state setting up its own religious schools, would cross the line from endorsement to the state acting like a church. The prayer written by the Board of Regents in *Engel* is obviously a product of the state. See Lynch, *Madison's Religion Proposals Judicially Confounded: A Study in the Constitutional Law of Conscience*, 20 SETON HALL L. REV. 418, 453-54 (1990). It embodied a "common denominator" theology intended for a monotheistic audience and "might easily lead to a new sect—a public school sect—which would take its place alongside the existing faiths and compete with them." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 287 (1963) (Brennan, J., concurring) (citation omitted).

30. 403 U.S. 602, *reh'g denied*, 404 U.S. 876 (1971). The three-pronged *Lemon* test has come under tremendous criticism. *E.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting); *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 108-12 (1985) (Rehnquist, J., dissenting). Alternative approaches have been suggested. Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668, 691-94, *reh'g denied*, 466 U.S. 994 (1984) (O'Connor, J., concurring) and in *County of Allegheny v. ACLU*, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring) has suggested an endorsement test in which the establishment clause is violated if state action actually endorses a religious practice. Justice Kennedy prefers a coercion test. See *County of Allegheny*, 492 U.S. at 659-60 (Kennedy, J., dissenting). Finally, Chief Justice Rehnquist has recommended a non-preferentialist test under which the establishment clause is interpreted to prohibit governmental preference for a particular religious denomination but does not require the government to be "strictly neutral between religion and irreligion . . . [nor prohibit it] from pursuing legitimate secular ends through nondiscriminatory sectarian means." *Wallace*, 472 U.S. at 113 (Rehnquist, C.J., dissenting). For an eloquent argument that the *Lemon* test has evolved and has shown resilience, see Esbeck, *supra* note 20.

The Court has applied the *Lemon* test mechanically to strike down aid to or exemptions for religion. See *Aguilar*, 473 U.S. 402 (1985) (Title I program paying salaries of public school teachers teaching in parochial schools violates establishment clause). The Court later applied the test loosely to find a permissible accommodation. See *Bowen v. Kendrick*, 487 U.S. 589 (1988) (federal grant of funds to religious organizations for services and research in area of teen

requires that every law have a secular purpose,<sup>31</sup> have a primary effect that neither advances nor inhibits religion, and not excessively entangle the institutions of church and state. Note how free exercise concerns—protecting religious persons and communities from government overreaching—are built into this test: non-secular laws, laws that substantially inhibit religion and entangle the state in the affairs of the religious community may be discriminatory, burdensome and invasive to religious persons and communities. These concerns over governmental interference, as well as governmental support, are heightened particularly when the state deals with what are considered “pervasively sectarian” institutions such as religious primary and secondary schools.<sup>32</sup>

While the first two prongs of the *Lemon* test have been employed exclusively in the case law to limit governmental support and advancement of religion,<sup>33</sup> the third prong concerning entanglement has been used primarily to limit governmental interference, through its regulatory functions, in religious affairs. Involvement of the sovereign in religious activities, resulting in particular from “sustained and detailed administrative relations for enforcement of statutory or administrative standards,”<sup>34</sup> gives

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sexuality not unconstitutional, on its face). On occasion, the Court has abandoned the *Lemon* test altogether. See *Marsh v. Chambers*, 463 U.S. 783 (1983) (practice of legislature beginning sessions with prayer led by state chaplain does not violate establishment clause).

31. The secular purpose requirement was enunciated in *School District of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963) (“[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose . . .”). The Supreme Court later expanded this requirement, making it the “first prong” of the *Lemon* test. *Lemon*, 403 U.S. at 612. Obviously, the secular purpose test is an important part not only of establishment clause jurisprudence but also that of the free exercise clause. In order for the state’s interest to be compelling enough to justify a burden on free exercise, it must certainly have a secular purpose. See *infra* notes 52-60 and accompanying text.

The application of the secular purpose test has been flawed, due in large part to the Court’s misplaced emphasis on the motives of legislators rather than on the nature of the legislation. See *Board of Educ. v. Mergens*, 110 S. Ct. 2356, 2371 (1990) (“[W]hat is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law.”); *Edwards v. Aguillard*, 482 U.S. 578, 589-94 (1987) (creation science teaching considered establishment of religion despite absence of legislative motive). While legislative motive can be helpful in determining whether or not a secular purpose exists, an emphasis on motives is problematic because of free exercise rights of legislators and issues of proof. *Id.* at 636-40 (Scalia, J., dissenting).

32. See *infra* notes 383-84 and accompanying text.

33. *But see* *McDaniel v. Paty*, 435 U.S. 618, 632-41 (1978) (Brennan, J., concurring) (reliance on second prong’s prohibition on *inhibiting* religion).

34. *Walz v. Tax Comm’n*, 397 U.S. 664, 675 (1970) (establishment clause challenge to property tax exemption for religious communities). While some administrative entanglements in the form of record keeping may be permissible,



rise to an establishment clause violation. Even in decisions not explicitly resting on the entanglement prong, the protection of institutional integrity has been paramount. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*,<sup>35</sup> the Court recognized that in order to preserve the integrity of the religious institution, it was proper to prevent state interference in hiring and firing decisions made on the basis of religious affiliation and standing in the religious community.<sup>36</sup> In *NLRB v. Catholic Bishop*,<sup>37</sup> the Court entertained the question whether the National Labor Relations Board had jurisdiction over lay teachers in Catholic schools. While it answered in the negative on statutory grounds of congressional intent rather than on constitutional grounds,<sup>38</sup> the Court was nonetheless motivated by concerns of potential institutional entanglement.<sup>39</sup>

The entanglement prong's emphasis on institutional integrity is very closely related to the traditional prohibition against state involvement in intra-church property disputes. The Court has set limits on the type of internal property and ecclesiastical disputes that civil legislatures and judiciaries can become involved in, but it has never stated clearly on which clause it relies to define those

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more invasive activities are not. *Jimmy Swaggart Ministries v. Board of Equalization*, 110 S. Ct. 688 (1990) (record-keeping burdens insufficient to demonstrate excessive entanglement); *Hernandez v. Commissioner*, 490 U.S. 680 (1989) ("[R]outine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no 'detailed monitoring and close administrative contact' between secular and religious bodies does not of itself violate the nonentanglement command."); *Tony and Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 294 (1985) (required filings under Fair Labor Standards Act not excessive entanglement).

35. 483 U.S. 327 (1987).

36. *Id.* at 335-36. The exemption did not entangle church and state. "[T]he statute effectuates a more complete separation of [church and state] and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case." *Id.* at 339.

37. 440 U.S. 490 (1979).

38. *Id.* at 507 ("[I]n the absence of a clear expression of Congress' intent . . . we decline to construe the [National Labor Relations] Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.").

39. "We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow." *Id.* at 504. The Court recognized that "the record affords abundant evidence that the Board's exercise of jurisdiction over teachers in church-operated schools would implicate the guarantees of the Religion Clauses." *Id.* at 507. Given the exclusive emphasis on the entanglement prong as the predominant constitutional issue, *see id.* at 501-03, it appears that this would have been the analysis had the Court reached the constitutional issues.

boundaries.<sup>40</sup> Commentators who wish to maintain a sharp distinction between the functions of the clauses would place such cases, known as the “church autonomy” decisions, under the free exercise clause, emphasizing its role as protector of religion from government interference. Commentators who acknowledge the dual purpose of the establishment clause as preventing government support as well as government interference prefer to place the autonomy cases under the establishment clause, noting the conceptual similarities to the entanglement prong.<sup>41</sup>

In two decisions involving intra-church property disputes, *Kedroff v. Saint Nicholas Cathedral*<sup>42</sup> and *Serbian Eastern Orthodox Dio-*

40. As early as the nineteenth century, the Court recognized on non-constitutional grounds “a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (approving rationale of *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871)). The Court in *Kedroff* spoke of the choice of hierarchy as a free exercise right, free of governmental interference, *id.* at 116, but later autonomy cases have emphasized only the “first amendment” without specifying free exercise or establishment concerns. See *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, *reh'g denied*, 429 U.S. 873 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).

41. Compare Laycock, *supra* note 15, at 1379 (considering clauses as overlapping in purpose would distort their meaning and function) with Esbeck, *supra* note 15, at 381. Esbeck writes:

Although nonentanglement . . . and the avoidance of the civil resolution of intrafaith disputes . . . are often viewed as distinct doctrinal developments, they spring from the same underlying principle: government must avoid any involvement with religious societies that may touch upon the matters central to their religious identity and mission. These matters are so highly reactive when placed in contact with public authority that religious liberty requires any appreciable risk of involvement be avoided.

*Id.*

42. 344 U.S. 94 (1952). In *Kedroff*, the Russian Orthodox Church, centered in Moscow, appointed an Archbishop to sit at St. Nicholas Cathedral in New York City. *Id.* at 96-97. The Russian Church in America (subject to the Moscow-based hierarchy) had previously chosen its own archbishop to sit at the Cathedral. *Id.* A New York statute placed control of the cathedral in the American church. *Id.* at 97. The Court held that the state legislature had in effect transferred control of property from the central hierarchy of the Russian Orthodox Church in Moscow to the governing authorities of the Russian Church in America and that the statute clearly prohibited the church’s free exercise right to choose its hierarchy. *Id.* at 119. “Freedom to select the clergy . . . must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.” *Id.* at 116 (citations omitted). Even though the religious determination was dispositive of the property issues, the Court felt that it could not do otherwise because, under the free exercise clause, “when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls.” *Id.* at 120-21 (citation omitted).

*cese v. Milivojevich*,<sup>43</sup> the final decisions of the religious community were held binding upon civil government and could not be overturned. In both cases, the Court deferred to the highest decision-making authority of the church because resolution of property disputes depended upon the resolution of underlying ecclesiastical disputes over the legitimacy of appointed bishops. The Court firmly held that governmental displacement of church adjudication or decision regarding internal administration and operations, appointment of clergy and religious doctrines violated the first amendment, especially where less restrictive alternatives existed.

The Court reiterated this position in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*<sup>44</sup> when it rejected what is known as the “departure from doctrine” inquiry. In some jurisdictions, church property disputes resulting from schisms were adjudicated in civil courts, and the determination of bona fide ownership depended upon an inquiry into which of the factions had “departed from doctrine”; the faction that remained faithful to doctrine was awarded title to the church property.<sup>45</sup> The Court rejected this inquiry as forbidden by the first amendment because it “requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion.”<sup>46</sup> Thus, under *Blue Hull*, courts cannot act as arbiters of essentially religious issues and ecclesiastical questions.

If a court is able to disentangle the religious and secular issues, however, it can adjudicate the dispute. In *Jones v. Wolf*,<sup>47</sup> the

43. 426 U.S. 696 (1976). In *Serbian*, the Court dealt with another foreign hierarchy. As in *Kedroff*, the basic dispute was over control of the real property and financial assets of the North American diocese. The Mother Church of the Serbian Orthodox Church, centered in Yugoslavia, suspended and defrocked the bishop of North America, and then reorganized the North American diocese into three dioceses, with several new bishops appointed. *Id.* at 697-98. The defrocked bishop sought an injunction against the Mother Church which was granted by the Illinois Supreme Court after the court reviewed the procedural and substantive laws of the church itself and determined that the defrockment was arbitrary and the reorganization *ultra vires*. *Id.*

The Supreme Court found that the Illinois court had impermissibly substituted its own inquiry and determination of the appropriateness of internal church governance for that of the hierarchy. *Id.* at 708. The inquiry into the church procedural and substantive criteria resulted in a civil court allocating power within a hierarchical church contrary to the allocation determined by the church itself. *Id.* at 709. Such extensive inquiries into religious law and polity violate the first amendment. *Id.*

44. 393 U.S. 440, 450 (1969).

45. *Id.*

46. *Id.*

47. 443 U.S. 595 (1979).

Supreme Court fully articulated this “neutral principles” approach, which had been set forth earlier in dictum in *Blue Hull*. If a church property dispute can be settled on the basis of neutral principles, i.e., without involvement in religious issues, then civil courts may resolve the dispute.<sup>48</sup> The neutral principles approach of *Jones* respects the rule enunciated in *Kedroff* and *Serbian* requiring deference to the religious community’s ecclesiastical and temporal determination whenever the property dispute involves issues of religious doctrine and practice.<sup>49</sup> While it has been argued that the neutral principles option for non-religious disputes promotes interference into church affairs,<sup>50</sup> it remains clear that any resolution of an issue inextricably linked to religion is still outside the province of state competence absent a compelling justification.

Precedent under the establishment clause, together with this line of autonomy cases, constrains the government’s reach into personal and communal decisions regarding religiously-based belief and conduct absent a compelling justification. In particular, the Court has set out parameters to preclude state conduct most reminiscent of formal establishments, has crafted a test for finding establishments that acknowledges the need to protect religion from government impediment and intrusion, and has placed strict limits on “searching inquiries” into religious matters. Thus, despite the predominant role of establishment clause jurisprudence in preventing unwarranted support for religion, there remains a protective role for the establishment clause that must be explored. It will be necessary then, in the course of this article, to measure design control against these standards set forth in precedent to determine whether the establishment clause provides protection to religious communities resisting design control of their houses of worship.

### B. *Free Exercise Clause*

The free exercise clause would seem to be the most obvious source of protection from burdensome governmental interference with religious communities. Until recently, it was relied upon almost exclusively as a mechanism for providing exemp-

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48. *Id.* at 602-03.

49. *Id.* at 604-05.

50. See Harris, *Neutral Principles of the Law and Church Property in the United States*, 30 J. CHURCH & ST. 515 (1988).

tions to aggrieved religious claimants. It is now more difficult to argue for a mandatory exemption under the free exercise clause.

Prior to *Employment Division, Department of Human Resources v. Smith*,<sup>51</sup> free exercise analysis involved a conventional balancing test to determine when religious protections were constitutionally required. This balancing test was enunciated in *Sherbert v. Verner*.<sup>52</sup> The *Sherbert* Court ruled that state regulation may restrain or punish religious choice only if the religious conduct has "invariably posed some substantial threat to public safety, peace or order."<sup>53</sup> Mrs. Sherbert, a Seventh-day Adventist unemployed because she refused to work on her sabbath, had been denied unemployment compensation. The Court reasoned that denial of benefits constituted a penalty on the basis of her religious beliefs and that state action could not so influence, albeit indirectly, religious choice.<sup>54</sup> Indirect effects on religious choice are permissible only in the face of "the gravest abuses, endangering paramount interests," and the state must "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."<sup>55</sup> The state's goal of preventing fraud and maintaining the integrity of the compensation fund was simply insufficient to justify the burden on religious choice and could be accomplished by less burdensome means.<sup>56</sup>

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51. 110 S. Ct. 1595 (1990). For a complete discussion of *Smith*, see *infra* notes 62-80 and accompanying text.

52. 374 U.S. 398 (1963).

53. *Id.* at 403.

54. *Id.* at 404-05.

55. *Id.* at 407 (citations omitted).

56. *Id.* at 406-07. The *Sherbert* Court noted that these asserted state interests had not been argued before the state supreme court, and thus the Court was unwilling to assess their importance. *Id.* Until 1990, the Court had consistently upheld religious choices made by employees that resulted in unemployment. The Court rejected attempts by state unemployment authorities to deny benefits to individuals who became unemployed by virtue of the exercise of their religious choices. See *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981). *But see* *Employment Div., Dep't of Human Resources v. Smith*, 110 S. Ct. 1595 (1990).

In *Thomas*, the plaintiff believed that as a Jehovah's Witness he could not continue in his job in weapons production. *Thomas*, 450 U.S. at 711. Pacifism, however, was arguably not a basic tenet of the Jehovah's Witness faith. *Id.* The Court refused to limit free exercise protection to only the mandated rules of a person's faith, thereby protecting individual conscience as well. *Id.* at 715-16.

In *Hobbie*, plaintiff was a new convert to the Seventh-day Adventist Church who refused to work on Saturday and was subsequently discharged. *Hobbie*, 480 U.S. at 138. The appeals commission attempted to distinguish this case from *Sherbert* and *Thomas* by showing that Ms. Hobbie had brought the problem on herself by converting. *Id.* at 143-44. Again upholding the right to make reli-

*Wisconsin v. Yoder*,<sup>57</sup> the most notable case applying the *Sherbert* balancing test outside the unemployment compensation area, focused on the destructive effects of government action on an integrated, self-sufficient religious community. Amish parents argued that compulsory high school attendance for their children would destabilize their community because the “worldly” values inculcated by public schools could “substantially interfer[e] with the religious development of the Amish child.”<sup>58</sup> The Court found a burden and, even in the face of a compelling state interest in education, required an exemption from the school attendance requirement for Amish teenagers.<sup>59</sup> Thus, in the face of a sincerely held religious belief or practice that had been burdened directly or indirectly by government action, the state was required to demonstrate that its burdensome action was justified by a compelling state interest, that no less burdensome alternative existed, and that a religious exemption would impair the state’s ability to effectuate the compelling interest.<sup>60</sup>

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gious choices unimpeded by economic concerns caused by the government, Justice Brennan wrote that the Court cannot “single out the religious convert for different, less favorable treatment.” *Id.* at 144. The Court emphasized that “[t]he timing of [the] conversion is immaterial.” *Id.*

In *Frazee*, the plaintiff refused to work on Sunday claiming it as his Sabbath even though he belonged to no organized religious entity that held that day holy. *Frazee*, 489 U.S. at 830-31. The Court rejected “the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization.” *Id.* at 834. In each of these cases the state’s interest in preventing fraud was not compelling enough to override the individual’s first amendment liberty; therefore, they received unemployment benefits. *Sherbert* and its progeny affirm that when there is “substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.” *Thomas*, 450 U.S. at 718.

57. 406 U.S. 205 (1972).

58. *Id.* at 218.

59. *Id.* at 234. The state failed, not in the showing of a compelling nature, but in showing “with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.” *Id.* at 236. The Court emphatically stated that the state’s interest in education “is by no means absolute to the exclusion or subordination of all other interests.” *Id.* at 215.

60. Since the traditional *Sherbert* test involves a balancing, there are times when the state’s interest will simply outweigh the burdensome effects of that action, and no zone of protection will be acknowledged. Over time, the Court loosened the compelling interest standard, reasoning that the state’s interest in a uniform day of rest, its tax code and administration of internal affairs were of greater weight than burdens imposed on particular religious claimants. See *Jimmy Swaggart Ministries v. Board of Equalization*, 110 S. Ct. 688 (1990) (interstate religious ministry sought exemption from certain state sales and use taxes); *Hernandez v. Commissioner*, 490 U.S. 680 (1989) (Scientologists sought permission to deduct payments made for auditing sessions as charitable contri-

*Smith* drastically narrowed the mandatory protections of the free exercise clause. Prior to this decision, the Court had applied the *Sherbert-Yoder* "burden-compelling interest" test in all but three cases arising under the free exercise clause.<sup>61</sup> In *Smith*, however, the Court abandoned the conventional test and the strict scrutiny standard of review except in several overlapping categories of cases. The *Smith* Court asserted that protection from burdensome effects of laws would not be constitutionally cognizable where the burdens resulted from the inadvertent application of religion-neutral, general laws. *Smith* simply ignores the impact of general, secular laws on religious communities.

In *Smith*, two Native American drug counselors were discharged from their jobs with a private drug counseling center because of their participation in the religious peyote ritual of the Native American Church.<sup>62</sup> They were subsequently denied unemployment compensation on the grounds that their discharge was based on illegal drug use.<sup>63</sup> The claimants argued that they had lost their jobs due to religiously motivated conduct and that

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butions); *Bowen v. Roy*, 476 U.S. 693 (1986) (Native American couple sought exemption from social security number requirement for their child); *United States v. Lee*, 455 U.S. 252 (1982) (Amish sought exemption from payment and receipt of social security taxes and benefits); *Braunfeld v. Brown*, 366 U.S. 599 (Orthodox Jews sought exemption from Sunday closing laws), *reh'g denied*, 368 U.S. 869 (1961). The religious claimants in these cases did not prevail because the government's interest was considered to override whatever burden had been placed on their religious choice.

The Court in these cases took into account how exemptions might affect the legislative process and operation of government, focusing on the difficulty of drafting generally applicable legislation and administering internal governmental affairs. Particularly with respect to taxation, the Court was concerned with fostering the government's ability to administer federal (and state) tax programs that contained special exemptions, given the "broad public interest in maintaining a sound tax system." *United States v. Lee*, 455 U.S. 252, 260 (1982).

61. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (deference to federal government's power to manage public lands in rejecting claim of Native Americans that development destroyed sacred land); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (deference to prison officials in rejecting prisoner's free exercise claims); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (deference to military in rejecting free exercise claim).

In *Lyng*, the magnitude of the burden was extraordinary—development of the area would "virtually destroy the . . . Indians' ability to practice their religion." *Id.* at 451 (quoting *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 693 (9th Cir. 1986)). Yet, the government still prevailed without coming forward with a compelling interest. "Whatever rights the Indians may have to the use of the area . . . those rights do not divest the Government of its right to use what is, after all, *its* land." *Id.* at 453.

62. *Smith*, 110 S. Ct. at 1597.

63. *Id.* at 1599. Unlike the federal government and a number of states, Oregon did not have an exemption from criminal prosecution for ritual use of peyote, a hallucinogen. *Id.* at 1597, 1606.

deprivation of government benefits constituted a penalty against religious exercise.<sup>64</sup> The government argued that it had a compelling interest in denying the benefits because of its need for uniform enforcement of drug laws.<sup>65</sup>

Had the Court applied the “burden-compelling interest” test, as urged by the concurring and dissenting opinions, the Court would have weighed the state’s interest in enforcing drug laws against the effects of a narrow peyote exemption on the state’s ability to enforce those laws.<sup>66</sup> Instead, the Court departed altogether from strict scrutiny review of state action that inadvertently burdens religion. The compelling state interest test was held inapplicable to cases in which a generally applicable law burdens religion and in which no additional constitutional rights are threatened.<sup>67</sup> Justice Scalia, writing for the majority, warned that the state must be able to enact generally applicable, facially neutral laws so long as they are not targeted at religious beliefs. Laws that do not impose burdens on the basis of religion will pass constitutional muster.<sup>68</sup>

Departing entirely from the standard balance of liberty and governmental interests, the Court reinterpreted nearly thirty years of free exercise jurisprudence and revealed that prior cases which the Court “purported” to decide on free exercise grounds had actually been decided on the basis of some other enumerated or non-enumerated right connected with the free exercise claim.<sup>69</sup> Early free exercise protection involving rights to proselytize were reinterpreted in *Smith* as free speech cases and protec-

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64. *Id.* at 1598. The plaintiffs relied on the Court’s decisions in *Sherbert, Thomas* and *Hobbie* in which the Court had held “that a State could not condition the availability of unemployment insurance on an individual’s willingness to forgo conduct required by his religion.” *Id.*

65. *Id.* at 1603.

66. *Id.* at 1608-09 (O’Connor, J., concurring). Justice O’Connor set out the test applied in both the concurring and dissenting opinions:

To say that a person’s right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. . . . [W]e have respected both the First Amendment’s express textual mandate and the governmental interest in regulation of conduct by requiring the Government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.

*Id.* (O’Connor, J., concurring) (citations omitted).

67. *Id.* at 1602. “Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.” *Id.* (quoting *Gillette v. United States*, 401 U.S. 437, 461, *reh’g denied*, 402 U.S. 934 (1971)).

68. *Id.* at 1603.

69. *Id.* at 1600. “We have never held that an individual’s religious beliefs



tion for the Amish from compulsory secondary education laws in *Yoder* became a victory for parental rights. These “hybrid” cases merited the use of the burden-compelling interest test because they did not rely solely upon the free exercise clause.<sup>70</sup> Both the concurring and dissenting opinions lamented the decision’s sweeping overturning of settled law.<sup>71</sup>

Viewed most pessimistically, *Smith* results in the startling conclusion that religious practices—even sacramental practices—can be subject to criminal laws (or any inadvertent burden, for that matter) without a compelling interest. In fact, religious practices can be burdened without *any* reason so long as the legislation is secular and generally applicable. Religious exemptions are acceptable, but *Smith* holds that courts should not mandate them.<sup>72</sup> It is unclear what the Court will do when next faced with a free exercise claim. Such an extreme conclusion—that any neutral law which is general in application and cannot be characterized as a hybrid will pass constitutional muster—leaves the free exercise clause without any independent force. Given the place of religious liberty as the goal of the religion clauses, this conclusion cannot be right. A more careful reading of *Smith* in the context of earlier decisions under both religion clauses is needed, as is an aggressive exploration of the categories which *Smith* left unaffected.

There are six categories of cases which *Smith* does not reach and which therefore continue to be governed by the burden-compelling interest test. The first category contains those laws that

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excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate.” *Id.* at 1605.

70. *Id.* at 1601.

71. Justice O’Connor, in concurrence, wrote: “To reach this sweeping result . . . the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.” *Id.* at 1607 (O’Connor, J., concurring). Justice Blackmun, in dissent, lamented more dramatically:

[*Smith*] effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution. . . . This distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening the free exercise of religion is a “luxury” that a well-ordered society cannot afford . . . and that the repression of minority religions is an “unavoidable consequence of democratic government.”

*Id.* at 1616 (Blackmun, J., dissenting) (quoting majority opinion). Further evidence of the reaction to *Smith*’s sweeping alteration of free exercise jurisprudence can be seen in The Religious Freedom Restoration Act of 1991, H.R. 5377, 101st Cong., 2d Sess. (1991).

72. *Smith*, 110 S. Ct. at 1606.

are not generally applicable or facially neutral.<sup>73</sup> Thus, the Court will continue to apply strict scrutiny to any legislative ban on “acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display,”<sup>74</sup> such as a law criminalizing religious ritual use of peyote. The second category includes laws that are not religion-neutral, that are “specifically directed at . . . religious practice,” i.e., that have as their object the interference with religious exercise and that deliberately target or single religion out for discriminatory treatment.<sup>75</sup>

The third category to which *Smith* is not applicable contains those facially neutral, generally applicable laws that are subject to “hybrid” constitutional claims.<sup>76</sup> It is surprising that *Smith* itself is not a hybrid because a sacramental practice seems to have the requisite aspects of speech-conduct.<sup>77</sup>

A fourth category relates to laws that provide mechanisms for exemptions after individualized evaluations are made. This category emerges in *Smith*'s discussion of the unemployment compensation cases in which religious reasons for declining work were considered in “a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct.”<sup>78</sup> These cases, including *Sherbert*, “stand for the proposition that where the State has in place a system of individualized exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”<sup>79</sup> Such hardship exemptions are common in the administration of generally applicable statutes which distribute benefits or grant relief from enforcement.

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73. *Smith* assumes incorrectly that any generally applicable law is also a neutral one, confusing facial neutrality—where religion is not targeted in the law’s text—with neutrality in substance. The analyses must remain separate. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1133-34 (1990). For a discussion of the distinction between facial-neutrality and religious-neutrality, see Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DE PAUL L. REV. 993 (1990); McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1419 (1990).

74. *Smith*, 110 S. Ct. at 1599.

75. *Id.*

76. For a discussion of the *Smith* Court’s characterization of hybrid claims, see *supra* notes 69-70 and accompanying text.

77. See *infra* note 340.

78. *Smith*, 110 S. Ct. at 1603.

79. *Id.* (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)).

The fifth category is comprised of the autonomy cases.<sup>80</sup> *Smith's* inapplicability to this line of cases ensures continued limitations on the state's ability to conduct searching inquiries in connection with internal religious matters even under the theory that these issues are governed by the free exercise clause. The last category involves the content, formation and profession of belief which remains inviolable under both free exercise and establishment clause precedent.<sup>81</sup> Perhaps in the post-*Smith* period, establishment clause precedent rooted in the protection of religion from government intrusion and distortion will assume an enhanced importance and will provide some of the protection traditionally associated with the free exercise clause.

To determine the effect of *Smith*, this article will address whether design control is generally applicable; whether it singles religion out for special regulation in a non-neutral way; whether it implicates a hybrid right such as speech; whether the design control process involves an individualized assessment which must take into account religious hardship; and whether the process involves a searching inquiry into religious affairs, the lending of state support to one side of an internal dispute, or the interference with belief and profession of belief. Depending upon the answers to these questions, *Smith* may be inapplicable to design control, in which case strict scrutiny continues to apply. Under the strict scrutiny balancing test, protection of the religious community outweighs the state's aesthetic interest, and the free exercise clause will continue to provide vigorous protection to religious communities resisting design control of their houses of worship.

The constitutional approach suggested herein acknowledges the substantive problems caused by design control and insists on a comprehensive view of both religion clauses. When both clauses are analyzed together, in light of a deeper understanding of architectural history, it becomes clear that it is not the religious exemption from design control that raises constitutional issues, but the application of design control to houses of worship in the first instance that is constitutionally suspect. Both clauses, viewed in light of their shared purpose of protecting religious persons and communities in their faith and practice, can work together

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80. For a discussion of the autonomy cases, see *supra* notes 40-50 and accompanying text.

81. *Smith*, 110 S. Ct. at 1599-600. For a discussion of this inviolable category, see *supra* notes 13-18 and accompanying text.

toward the goal of limiting the state's reach into private religious affairs. The constitutional problems emerging from design control of ecclesiastical architecture provide an opportunity to develop a more comprehensive approach that unites the religion clauses.

### III. AN OVERVIEW OF LANDMARK PRESERVATION AND ARCHITECTURAL REVIEW

#### A. *The Mechanics of Design Control*

Throughout this century, aesthetic considerations have become widely accepted by the state and federal judiciaries as a proper basis for governmental exercise of police and eminent domain powers.<sup>82</sup> The Supreme Court has upheld landmark preservation,<sup>83</sup> eminent domain takings for aesthetic purposes<sup>84</sup> and

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82. J. COSTONIS, *supra* note 3, at 21; Costonis, *Law and Aesthetics*, *supra* note 3, at 373-77; Note, *The Legal History of Zoning for Aesthetic Purposes*, 8 IND. L. REV. 1028 (1975) [hereinafter Note, *Legal History of Zoning*]; Note, *Architectural Expression*, *supra* note 11, at 282.

83. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, *reh'g denied*, 439 U.S. 883 (1978). In *Penn Central*, the Court spoke directly to the issue of the constitutionality of historic preservation. After the New York City Landmarks Commission designated Grand Central Terminal, the terminal's owners were prohibited from constructing a building over the existing landmark because of the aesthetic effects such a building would have on the landmark. *Id.* at 116-17. The owners challenged the construction prohibition as a taking in violation of the fifth and fourteenth amendments. *Id.* at 119. The Court denied relief and reaffirmed its position on historic preservation:

[B]ecause this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city . . . appellants do not contest that New York City's objective of preserving structures and areas with specific historic, architectural, or cultural significance is an entirely permissible governmental goal.

*Id.* at 129-30 (citations omitted). The Court found that government may reasonably restrict private property for the cultural and aesthetic benefit of the community. *Id.* The New York City law was held facially valid as a proper exercise of the police power to preserve the cultural, architectural, historical or social significance of a designated property. *Id.* at 130.

84. See *Berman v. Parker*, 348 U.S. 26 (1954). In *Berman*, the District of Columbia Redevelopment Agency used its eminent domain powers to acquire land to create recreation space. *Id.* at 31. The owners of the condemned land argued that the District's taking violated the fifth amendment's due process and just compensation clauses. This taking was held to be valid:

The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled . . . . If those who govern the District of Columbia decide that the Nation's Capital should

certain restrictions on land use to preserve lifestyle and the visual quality of a given setting<sup>85</sup> on the grounds that these are rationally related to legitimate state interests and enjoy a presumption of constitutionality. On several occasions, however, the Court has made clear that aesthetic regulation abridging fundamental freedoms such as speech and association will be subject to a higher standard of judicial review.<sup>86</sup>

#### Landmark preservation, undertaken by municipalities pursu-

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be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

*Id.* at 33 (citation omitted).

85. See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). The *Belle Terre* Court upheld a zoning ordinance prohibiting more than two unrelated persons from living together in a single family residence. Although the ordinance was challenged as an infringement of rights of travel, privacy and association, the Court held it to be rationally related to the municipality's goals of minimizing noise and traffic congestion, and found no fundamental rights implicated. *Id.* at 7, 9.

As one can well imagine, municipalities have devised numerous ways of regulating "adult" land use so as to limit its secondary effects on commercial and residential areas, such as increases in transients and criminal activity (especially prostitution), decreases in property values and flight of residents and businesses. In *Young v. American Mini-Theatres* a Detroit zoning ordinance that dispersed adult establishments was at issue. 427 U.S. 50 (plurality opinion), *reh'g denied*, 429 U.S. 873 (1976). In contrast, *City of Renton v. Playtime Theatres* involved an ordinance that concentrated such establishments. 475 U.S. 41, *reh'g denied*, 475 U.S. 1132 (1986). The Court upheld both ordinances on the grounds that they were time, place and manner restrictions intended to limit the secondary effects caused by these establishments that disturb the quality of residential life in urban communities. *City of Renton*, 475 U.S. at 54; *Young*, 427 U.S. at 71-73. The burdens on owners were minimal because of the availability of alternative sites where these uses were permitted. *City of Renton*, 475 U.S. at 53-54; *Young*, 427 U.S. at 61.

86. See *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1982); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). These cases illustrate the constitutional limits to common zoning measures such as sign restrictions, use restrictions, and defined terms like "family" (frequently used to determine eligibility for single family districts) when these measures threaten fundamental rights such as free speech and free association.

In *Metromedia, Inc. v. City of San Diego*, the Court struck down an ordinance that virtually prohibited noncommercial billboards and severely limited commercial billboards. 453 U.S. at 494-95. This ordinance was of particular concern to the Court because noncommercial speech receives greater first amendment protection than commercial speech. *Id.* at 506-07, 513. The city's justification for the ordinance was traffic safety and aesthetics, but the Court wondered "how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city." *Id.* at 513. In so "evaluat[ing] the strength of, or distinguish[ing] between, various communicative interests," the city failed to act in a content-neutral manner, and the ordinance was held unconstitutional on its face. *Id.* at 514. *But see Taxpayers for Vincent*, 466 U.S. 789 (Court upheld ordinance prohibiting posting of signs on public property be-

ant to special state enabling legislation, constitutes the primary mechanism for direct governmental design control.<sup>87</sup> Closely related to this form of direct control is the architectural review process, created pursuant to expanded municipal zoning powers.<sup>88</sup>

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cause it was content-neutral, not aimed at suppression of speech and narrowly tailored to city's legitimate interest in aesthetics).

While in *Metromedia*, the regulation's control of speech was apparent, the Court has also recognized that a regulation affecting nonverbal communication implicates the first amendment. In *Schad*, the Court struck down an ordinance that banned all live entertainment within the municipality. The ordinance was employed to prohibit live, nonobscene nude dancing at an adult establishment. *Schad*, 452 U.S. at 63. Presumably the municipality was concerned about the "secondary effects" that such entertainment brings with it, which have been constitutionally regulated in other cities. *See id.* at 74. The way in which the municipality sought to control these effects, however, involved a sweeping ban on all types of live entertainment. *Id.* at 76. It failed to demonstrate that such land use gives rise to specific secondary effects, and further failed to demonstrate that the ordinance was narrowly tailored to address these effects. *Id.* at 74. The borough-wide ban left no other avenues of communication open to this broad category of protected expression.

Associational liberties, as distinct from free speech rights, have also been protected from land use regulation. *See Moore*, 431 U.S. 494. The *Moore* Court struck down a zoning ordinance that regulated categories of family members who could live together. *Id.* Preferring nuclear over extended families, the ordinance was intended to prevent overcrowding, to minimize traffic congestion and to relieve financial burdens on the school system. *Id.* at 499-500. As applied to Mrs. Moore, however, the ordinance made it illegal for her to live in the same house with her son and two grandsons who were cousins. *Id.* at 496-97. The *Moore* Court found that "East Cleveland . . . has chosen to regulate the occupancy of its housing by slicing deeply into the family itself." *Id.* at 498. The plurality of the Court held that the intrusion into the family rendered the ordinance unconstitutional because the ordinance failed on substantive due process grounds. *Id.* at 506. Justice Stevens determined that the East Cleveland ordinance failed as a taking without due process and without just compensation because "it cuts so deeply into a fundamental right normally associated with the ownership of residential property—that of an owner to decide who may reside on his or her property . . . ." *Id.* at 520 (Stevens, J., concurring in judgment). The Court distinguished *Moore* from *Belle Terre* because *related* persons were affected by the East Cleveland ordinance.

87. This article will not include aesthetic takings in the discussion of direct design control because the takings mechanism is no longer used as aggressively as in the past. Nevertheless, the principles developed herein remain applicable to any measures that involve the government in direct and detailed design review substantially similar to that employed in landmark preservation and architectural review, and can be extrapolated to aesthetic takings that function in the same manner and have the same effect.

88. *See, e.g., State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970); *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 192 N.E.2d 74 (1963); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217, *cert. denied*, 350 U.S. 841 (1955). For a further discussion of architectural review, see Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438, 1451-56 (1973) [hereinafter Note, *Beyond the Eye*]; Note, *Architecture, Aesthetic Zoning*, *supra* note 7; Note, *Architectural Expression*, *supra* note 11; Note, *Aesthetic Regulation*, *supra* note 11, at 243-49.

Although their statutory origins may differ,<sup>89</sup> both mechanisms focus on the preservation of the existing built environment, and their purposes often overlap. Both are committed to the maintenance of visual harmony and area character, the protection of significant structures that serve as cultural anchors for communities, and economic stability or revitalization.<sup>90</sup> The major difference between them is that landmark preservation generally protects districts and individual structures that possess special historic, architectural or cultural significance, while architectural review tends to protect the visual compatibility of areas that possess a common architectural style or harmonious visual pattern even in the absence of particular historic significance or architectural distinction.<sup>91</sup> In practice, the differences are often slight, particu-

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89. Note, however, that landmark preservation may also be enacted under zoning powers, (through separate ordinances or overlay zones), or simply treated as zoning measures. See Costonis, *Law and Aesthetics*, *supra* note 3, at 428-30; Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 504, 521 (1981); Note, *Ordinances*, *supra* note 11, at 408; see also *Lafayette Park Baptist Church v. Scott*, 553 S.W.2d 856, 861 (Mo. Ct. App. 1977) (historic district landmark ordinance "is essentially a zoning ordinance").

90. Municipalities enact preservation ordinances in order to:

- a. Promote and preserve cultural, aesthetic, social, economic, political, spiritual, ethnic, architectural, engineering, and/or archaeological heritage.
- b. Enhance neighborhood environments.
- c. Protect character and liveability of areas and structures.
- d. Increase tourism and attract business and investments.
- e. Stabilize and/or improve property values.
- f. Foster economic development and revitalization, and orderly and efficient growth.
- g. Promote use of property for education, pleasure and welfare of public.
- h. Foster civic pride in beauty and accomplishments of past, serving spiritual as well as material needs of community.
- i. Encourage private ownership and rehabilitation of structures.
- j. Prohibit unnecessary destruction of cultural assets.
- k. Encourage construction of new structures that are harmonious with existing ones; encourage good urban design.
- l. Prevent urban blight and reverse urban deterioration.

See, e.g., Albuquerque, N.M., Ordinance 22-1978, § 2 (Apr. 3, 1978); NEW YORK CITY, N.Y., ADMIN. CODE § 25-301 (1985); SAN FRANCISCO, CAL., PLANNING CODE § 1001 (1990); Tacoma, Wash., Ordinance 19845, § 1.42.040 (June 26, 1973).

91. For example, the architectural review ordinance at issue in *State ex rel. Saveland Park Holding Corp. v. Wieland*, required that the exterior architectural appeal and functional plan of the proposed structure will, when erected, not be so at variance with either the exterior architectural appeal and functional plan of the structures already constructed . . . in the immediate neighborhood or the character of the applicable district established . . . as to cause a substantial depreciation in the property values of said neighborhood . . . .

269 Wis. 262, 265, 69 N.W.2d 217, 219 (1955) (quoting *Fox Point*, Mich., Ordi-

larly where district-wide preservation is concerned.<sup>92</sup>

Landmark preservation has grown increasingly popular since the 1960s, due in particular to the passage of the National His-

nance 129, § 1 (July 23, 1946)). The ordinance in *State ex rel. Stoyanoff v. Berkeley*, prohibited "unsightly, grotesque and unsuitable structures, detrimental to the stability of value and the welfare of surrounding property, structures and residents, and to the general welfare and happiness of the community . . ." 458 S.W.2d 305, 306-07 (Mo. 1970) (quoting Ladue, Mo., Ordinance 131, as amended by Ordinance 281)).

92. This is particularly the case now that preservation is no longer confined to designations of structures with great historic significance or those designed by notable architects. See Rose, *supra* note 89.

These two design control mechanisms are not the only methods of aesthetic control available to governments. Traditional zoning and more recent comprehensive planning measures also take aesthetics into consideration in addition to public health and safety, prevention of nuisance, control of growth and density, protection of infrastructure capacity, promotion of economic growth and maintenance of property values. Thus, a municipality not only establishes its overall use and density patterns but establishes (albeit indirectly) the foundation for its aesthetic character by setting forth use restrictions, occupancy limits, and dimensional requirements. See Note, *Beyond the Eye*, *supra* note 88, at 1452; Note, *Legal History of Zoning*, *supra* note 82, at 1032, 1035.

There remains, however, a significant difference between these aesthetic control mechanisms on the one hand and landmark preservation and architectural review on the other. Zoning and planning measures control aesthetics indirectly, focusing primarily on utilitarian and functional goals—regulating uses, spatial arrangements and interrelationships, and structural consistency in gross terms. Architectural review and landmark preservation control aesthetics directly, focusing instead on the nonutilitarian, nonfunctional visual qualities of structures, the cognitive and emotional meanings they possess, their associations with historical or architectural traditions—in short, these "semiotic properties" of buildings, and the lifestyles that have come to be associated with them. Essentially, the focus is on the psychological and cultural aspects of the built environment that "conventional land use theory . . . either ignores . . . or folds . . . into more commonplace concerns." J. COSTONIS, *supra* note 3, at xv; see also Costonis, *Law and Aesthetics*, *supra* note 3, at 392-93. Landmark preservation and architectural review also focus on the visual qualities of structures far more directly and in much greater detail than other forms of aesthetic regulation. Because of these differences, this article concentrates on these direct forms of design control and will leave to another time an analysis of indirect, aesthetically-based land-use regulation.

The aesthetic benefit of precluding commercial and multi-family uses from single family residential zones was used to justify use regulation quite early in this century. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Even efforts to control adult entertainment are forms of "aesthetic regulation." See generally *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *Young v. American Mini-Theatres*, 427 U.S. 50 (1976). Costonis has correctly pointed out that by controlling the entry of new buildings into communities, landmark preservation and architectural review involve the control of uses as well as structures. Costonis, *Law and Aesthetics*, *supra*, at 451. Because this article focuses on building design and not on the zoning issues of whether houses of worship are permitted to locate in a given area pursuant to use restrictions, it will focus exclusively on the effects of direct and detailed design control measures on ecclesiastical design, not on the preclusion of religious uses.



toric Preservation Act of 1966<sup>93</sup> and the creation of the National Registry of Historic Places. Prior to that time, preservation efforts, often undertaken privately, focused on individual structures of great historic importance and districts that had become significant tourist attractions.<sup>94</sup> Federal recognition of preservation goals ushered in state-level enactments of legislation<sup>95</sup> authorizing municipalities to create preservation authorities and to designate individual structures and entire districts possessing historic, architectural, or cultural significance.<sup>96</sup> While preservation programs and registers of historic places exist at the federal and state levels,<sup>97</sup> the promotion of preservation goals has been most successful at the local level, with an estimated 1,500-2,000 municipalities administering preservation ordinances.<sup>98</sup> Most ordinances are concerned with facade preservation and therefore designate only the building exteriors, but a significant number authorize designation of building interiors.<sup>99</sup>

Ordinances vary among localities, but most provide that landmark designation of a given structure or district can be ac-

93. Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. § 470a(1)(a) (1988)).

94. For a general historical overview of the development of the preservation movement, see generally Rose, *supra* note 89.

95. For a discussion of the interaction of federal, state and local laws, see Note, *Model Free Exercise*, *supra* note 11, at 146-48.

96. Some states have direct constitutional or statutory provisions establishing specific districts. For an extensive discussion of such provisions, see Gerstell, *supra* note 11, at 216-18.

97. For a general discussion of the federal programs involved in preservation, see generally Rose, *supra* note 89. Every state has some form of preservation laws. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 107 (1978).

98. Gray, *supra* note 22. Because of the extent of activity at the municipal level, the focus of this article will be on local ordinances and any preemption issues that may arise are outside its scope.

99. See, e.g., PASADENA, CAL., MUN. CODE § 2.75.170(A) (1987); SAN FRANCISCO, CAL., PLANNING CODE § 1004(c)(1) (1990) (only publicly owned interiors); CORAL GABLES, FLA., CODE § 16B-17(2)(b)(5) (1984); Miami, Fla., Zoning Ordinance 10195, § 1604.2.2.2(2) (Dec. 11, 1986); INDIANAPOLIS, IND., IND. CODE § 36-7-11.1-6(c) (1982); BOSTON, MASS., 1975 MASS. ACTS ch. 772, § 4; DETROIT, MICH., CITY CODE § 25-2-5 (1984); MINNEAPOLIS, MINN., CODE § 34.50 (1960); Trenton, N.J., Ordinance 72-43, § 2-22.3(1) (1984); NEW YORK CITY, N.Y., ADMIN. CODE § 25-303(a)(2) (1985); Albuquerque, N.M., Ordinance 22-1978, § 8(A) (Apr. 3, 1978); PORTLAND, OR., PLANNING AND ZONING CODE § 33.120.050(a) (1988); Washington, D.C., D.C. Reg. § 124 (Apr. 12, 1985); see also *Weinberg v. Barry*, 634 F. Supp. 68 (D.D.C. 1986) (upholding interior designation). But see *United Artists Theater Circuit, Inc. v. City of Philadelphia*, No. 48 E.D. Appeal Docket 1990, 1991 Pa. LEXIS 152 (Pa. July 10, 1991) (Pennsylvania Supreme Court held that designation of property as "historic" over owner's objections constituted "taking" under Pennsylvania constitution).

completed without the owner's consent.<sup>100</sup> In fact, ordinances generally provide for a petition process that allows a group of residents, any organization, or the municipal preservation authority itself to recommend a structure or district for landmark status.<sup>101</sup> The submission of this petition commences review by a staff of experts of the architectural, cultural, historical, or educational value of the structure or district.<sup>102</sup> Based on its review, the staff may recommend designation to the municipal authority, which makes its final decision after a public hearing.<sup>103</sup> Once a structure

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100. In the federal scheme the owner's consent is required before a building can be listed on the National Register and consent of a majority of property owners in a given district is required for historic district listing. *See* 16 U.S.C. § 470a(a)(6) (1988). States and municipalities for the most part have not followed suit. For city ordinances requiring owner consent, however, see PASADENA, CAL., MUN. CODE, § 2.75.140(E)-(F) (1987); Durham County, N.C., Historic Properties Comm'n Ordinance § 3.2 (Oct. 1, 1986); Spokane, Wash. Ordinance C-26353 §§ 5.2, 5.3 (Jan. 12, 1982).

Even those ordinances that do not provide for owner consent may take hardship claims into account or provide procedural protections if the owner opposes designation. *See, e.g.*, CHICAGO, ILL., MUN. CODE § 21-69 (1987) (requiring public hearing if owner opposes preliminary designation); ROCHESTER, N.Y., CODE §§ 115-35(D)(5)(a), 115-36(D)(6) (1986) (requiring three-fourths vote of city council to designate if owner opposes); Seattle, Wash. Ordinance 106348, § 8.03 (Mar. 14, 1977) (involvement of hearing examiner if owner opposes).

101. A municipal ordinance may permit some or all of the following to nominate for landmark status: a private organization, a specified number of registered voters, the property owner or percentage of owners for a district nomination, the mayor, the city council, any governmental agency, the landmarks commission itself, and the arts or planning-related commission. *See, e.g.*, SAN FRANCISCO, CAL., PLANNING CODE § 1004.1 (1990); BOSTON, MASS., 1975 MASS. ACTS ch. 772, § 4; St. Louis, Mo., Heritage Code § 896.050(1) (1980).

102. In many municipalities, during the period of time in which the designation process is pending, no alteration or demolition of the structure may occur. *See, e.g.*, SAN FRANCISCO, CAL., PLANNING CODE § 1014 (1990); PITTSBURGH, PA., CODE ch. 1007, tit. 10, § 513.3(a)(4)(a)-(c); Seattle, Wash., Ordinance 106348, §§ 5.02, 12.01 (Mar. 14, 1977). *But see* Galich v. Catholic Bishop, 75 Ill. App. 3d 538, 394 N.E.2d 572 (1979) (religious community not prohibited from demolishing house of worship prior to final landmark designation), *cert. denied*, 445 U.S. 916 (1980).

103. Local landmarks commissions are often comprised of representatives from the architectural, preservation and business communities, as well as politically appointed representatives. The state and a variety of local agencies and groups may have the right to review and comment on the proposed designation. In addition, community councils may have consultative status to the landmarks commission.

There are a variety of procedures involving city councils, mayors, specialized preservation authorities and their staffs, and the determination of roles and allocation of powers vary from ordinance to ordinance. Often the city council or mayor may ratify the preservation authority's vote to designate a landmark, or may vote on the preservation authority's recommendation to designate. *Compare* BOSTON, MASS., 1975 MASS. ACTS ch. 772, § 4 (designation must be approved by mayor; city council may override mayor's approval) *with* Seattle, Wash., Ordinance 106348 §§ 6, 11.01 (Mar. 14, 1977) (designation approval by landmark

is landmarked, either individually or as part of a district, its owner is required to maintain it in accordance with guidelines established by the preservation authority specifically for that structure or district.<sup>104</sup>

Any proposal for repair, renovation, restoration, rehabilitation, expansion, alteration, or demolition of a landmark, or new construction in the vicinity of a landmark, is subject to review and approval by the preservation authority.<sup>105</sup> Generally, the proponent of any work proposal applies for what is often termed a certificate of appropriateness.<sup>106</sup> Special consideration may also be given to the owner's alleged "hardship," which is often characterized in financial terms as insufficient return on investment. Sometimes economic hardship claims are considered under a separate procedure.<sup>107</sup> Either way, a hardship "exemption," similar to a zoning variance, may permit major deviation from the maintenance obligations when the owner demonstrates severe financial

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designation board is final; city council may amend or repeal any designating ordinance).

104. Upon designation, specific maintenance obligations relating to the structure or district are issued which set forth in detail the areas under the commission's jurisdiction, the architectural elements that must be preserved or restored, acceptable materials and permitted repairs and alterations. The owner may have the opportunity to discuss and negotiate these maintenance obligations with the commission. *See, e.g.*, Spokane, Wash., Ordinance C-26353, § 7.5 (Jan. 12, 1982); Seattle, Wash., Ordinance 106348, §§ 8.01-8.03 (Mar. 14, 1977).

Also note that landmark preservation requires more than compliance with building and safety codes. It requires careful preservation of all designated elements, even if that level of care exceeds what is customary. Replacement of any features must be done using materials of the same or substantially the same quality as the original unless deviation is permitted by the landmarks authority. *See, e.g.*, SAN FRANCISCO, CAL., PLANNING CODE §§ 1005, 1006, 1006.1(c) (1990).

105. Failure to maintain the landmark in good repair, to obtain approval before work is undertaken, or to comply with conditions placed upon any grant of permission, subjects the owner to civil and criminal penalties. For the argument that the criminal penalties should be increased and more vigorously enforced, see Stein, *Buildings That Go Crash in the Night: A Special Problem in Historic Preservation Law*, 16 REAL EST. L.J. 242, 251 (1988); Note, *The Constructive Trust: Equity's Answer to the Need for a Strong Deterrent to the Destruction of Historic Landmarks*, 16 B.C. ENVTL. AFF. L. REV. 793 (1989).

106. *See, e.g.*, SAN FRANCISCO, CAL., PLANNING CODE §§ 1006-1006.1 (1990). In reviewing the application, the landmarks commission considers the visual effects of the proposal on the structure itself and on surrounding structures, focusing on aspects such as compatibility of new design, arrangement, materials, colors and textures. The commission reviews such structural effects as the degree to which the proposal promotes preservation goals and departs from maintenance obligations, as well as the extent to which the proposal is in the public interest. *See, e.g., id.* § 1006.7.

107. *See, e.g.*, NEW YORK CITY, N.Y., ADMIN. CODE § 25-309a(1)(a) (1985).

burden.<sup>108</sup>

As with the application for designation, the application for a certificate of appropriateness or for a hardship exemption is scrutinized by the commission's expert staff, the commission and the public. Hearings are held on the proposal prior to any decision to grant or deny permission. Often the proposal undergoes modifications during the course of public hearings and informal sessions with staff. Permission may be granted for some but not all of the requested alterations; any permission granted is usually heavily conditioned. The renovation is also monitored to ensure future compliance with the terms of the permission. The architectural review process similarly involves expert review, public comment and suggested and required design modification.<sup>109</sup>

To witness the great benefits of landmark preservation and architectural review, one need only travel to historic Charleston, South Carolina or Boston's Beacon Hill. The implementation of design control in many municipalities, however, has not been without criticism. Owners of landmarked property have complained that the ordinances' lack of objective standards encourages arbitrary and highly subjective decisionmaking,<sup>110</sup> and that claims of economic hardship receive an unsympathetic hearing.<sup>111</sup> Municipal planners complain that design administrators some-

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108. Although hardship standards vary, a landmarks commission would generally grant permission to an owner of a landmark to alter or demolish it in one or more of the following cases:

- a. denial of permission would deprive owner of all reasonable use and benefit of property or cause owner to experience unnecessary, unreasonable or undue hardship;
- b. owner cannot earn a reasonable return on the property or the property is no longer suited for owner's purposes;
- c. the effect of alteration or demolition on the historic area will be insubstantial;
- d. denial will deter a major improvement program of substantial benefit to community; or
- e. maintenance of the structure is not in public interest.

For a discussion of New York's judicially created hardship standard for non-profit landowners, see *infra* note 129 and accompanying text. For a discussion of a hardship standard in the context of historic districts, see *Maher v. City of New Orleans*, 516 F.2d 1051, 1064-67, *reh'g denied*, 521 F.2d 815 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976).

109. For a discussion of the similar processes employed in the landmark designation process, see *supra* notes 101-04 and accompanying text.

110. See *Costonis, Law and Aesthetics*, *supra* note 3, at 364. Costonis writes of the "disturbing consequences" that "the standards of most preservation ordinances are so vague that, literally read, they qualify almost any building or neighborhood as a landmark or historic district." *Id.*

111. For a discussion of these cases, see *infra* note 129 and accompanying text.

times impermissibly employ design control measures for zoning purposes, such as density control.<sup>112</sup> Housing advocates often claim that historic districting, with its attendant gentrification, displaces low income residents from their homes.<sup>113</sup> Additionally, some prominent architects are concerned that the governmental implementation of design measures tends to involve an "excessive dependence upon familiar styles and structures,"<sup>114</sup> moving far beyond the desired architectural harmony and compatibility and approaching instead an undesirable mediocrity and uniformity. Moreover, these design measures may stifle not only architectural innovation but "the process of change and imaginative reuse that is, after all, also an important part of a community's historic development."<sup>115</sup> Despite these criticisms, federal and state courts have continued to uphold landmark preservation and architectural review as legitimate forms of land use regulation.<sup>116</sup>

### B. *Design Controls on Houses of Worship*

It is not at all surprising that many houses of worship have been designated landmarks, both individually and as part of districts. They are often magnificent examples of architectural styles, sites of significant historic events and anchors of cultural stability within neighborhoods.<sup>117</sup> Only a few landmark preserva-

112. J. COSTONIS, *supra* note 3, at 30.

113. For a discussion of the effect of preservation on low income housing, see Rose, *supra* note 89, at 512-17.

114. J. COSTONIS, *supra* note 3, at 112. Among these architects are Venturi and LeCorbusier who have attacked government-imposed aesthetic regimes by arguing that "every community and state is appointing its design review board to promote the architectural revolution of the last generation . . ." *Id.* at 113.

115. Rose, *supra* note 89, at 512.

116. J. COSTONIS, *supra* note 3, at 20. This continued support of land use regulation is due to an interest in legitimate aesthetic regulation enacted through zoning, planning and eminent domain powers, that protects residential tranquility and quality of life, absent a showing of infringement of liberty. See *Young v. American Mini-Theatres*, 427 U.S. 50, 71 (1976). As early as 1926 the Court idealized suburban residential tranquility. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). More recently, the Court reaffirmed its position:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one . . . [The police power enables municipalities] to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for the people.

*Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

117. See Cox, *Saving Grace*, HISTORIC PRESERVATION, Sept.-Oct. 1988, at 34-43; see also N. L'Heureux, *Ministry v. Mortar: A Landmark Conflict*, in 2 GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS 168 (1986) ("churches and syna-

tion ordinances exempt, or otherwise classify, houses of worship.<sup>118</sup> Thus, as with other structures eligible for designation, the decision to designate houses of worship subjects the religious structure, and the religious community that owns it, to governmental review. Additionally, once the structure is designated, architectural changes to houses of worship must be approved and monitored, and the religious community's plans for alteration or demolition may be subjected to intense scrutiny by the local preservation authority.<sup>119</sup> In those communities where building interiors may be landmarked, the sanctuary design may also be subject to review by municipal authorities.<sup>120</sup> The imposition of aesthetic standards on the religious community may range from preservation and design modification to a dictated design for new construction.<sup>121</sup>

Governmental preservation, as welcome as it may be by some

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gogues are 42 times more likely to be designated as landmarks than any other buildings in [New York] City").

118. New York City provides for interior designations, but "not including interiors utilized as places of religious worship . . . ." NEW YORK CITY, N.Y., ADMIN. CODE § 25-303(a)(2) (1985). Chicago's ordinance provides that "[n]o building that is owned by a religious organization and is used primarily as a place for the conduct of religious ceremonies shall be designated as a historic landmark without the consent of its owner." CHICAGO, ILL., MUN. CODE § 21-69.1 (1987). Durham, North Carolina provides that "[p]roperties owned by religious institutions or used for religious purposes . . . shall not be considered eligible for designation . . . [unless they] deriv[e] primary significance from architectural or artistic distinction or historical importance . . . ." Durham County, N.C., Historic Properties Commission Ordinance § 5.0 (Oct. 1, 1986).

One novel protection for religious communities has been passed in New York City pursuant to a referendum vote: the city is required to establish a tribunal that will review denials of hardship applications by the landmarks commission when *non-profit* owners are involved. Peterson, *Battle Looms on Landmarked Churches*, N.Y. Times, Dec. 3, 1989, § 10, at 1, col. 2.

119. For a particularly intense review of a religious community's internal affairs in connection with its development plans, see *Saint Bartholomew's Church v. City of New York*, 728 F. Supp. 958 (S.D.N.Y.), *aff'd*, 914 F.2d 348 (2d Cir. 1989), *cert. denied*, 111 S. Ct. 1103 (1991).

120. See, e.g., *Society of Jesus v. Boston Landmarks Comm'n*, 409 Mass. 38, 564 N.E.2d 571 (1990), *aff'g* No. 87-3168, 87-4751, 87-6586, slip op. at 5-7 (Mass. Super. Ct. Nov. 2, 1989).

121. Perhaps the most extreme case of design orthodoxy is the imposition of a required design that is identical to neighboring structures. In Brooklyn, New York, one religious community intending to construct a church on a vacant lot was required to design the church as a four-story brownstone, because the vacant lot sat in an historic district in which four-story brownstones constituted the predominant architectural style. See *In Relation to the Applicability of Certain Preservation Regulations to the Property of Religious Organizations: Testimony Before the Office of the Assembly Majority Leader, Assembly Standing Comm. on Local Governments, Senate Standing Comm. on Cities, Senate Standing Comm. on Local Government* (Feb. 8, 1984) (testimony of Charles J. Tobin, General Counsel, New York State Catholic Conference).

religious communities seeking the honor and the availability of renovation assistance, is often considered an unwarranted intrusion into religious affairs and property use. Religious communities have brought numerous challenges to the application of landmark ordinances to their properties on a variety of constitutional grounds, particularly those of takings and free exercise. These challenges have involved diverse properties, including an administrative office building,<sup>122</sup> residential property<sup>123</sup> and a community house,<sup>124</sup> as well as houses of worship.<sup>125</sup> Furthermore, the plans for demolition or alteration that precipitated these clashes between owner and municipality involved proposals for both traditional religious uses and less conventional income-producing uses.<sup>126</sup>

The free exercise argument against landmark preservation has generally been based upon economic burdens sustained by the religious community such as the diminution of property value and reduced marketability brought on by landmark designation, the diversion of funds away from religious purposes and toward building maintenance, and the interference with lucrative development plans intended to fund religious ministry.<sup>127</sup> Since economic vitality undoubtedly affects religious vitality, free exercise

122. See *Lutheran Church in Am. v. City of New York*, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974). For a complete discussion of *Lutheran Church in America*, see Note, *Urban Landmarks: Preserving Our Cities' Aesthetic and Cultural Resources*, 39 ALB. L. REV. 521 (1975).

123. See *Lafayette Park Baptist Church v. Board of Adjustment*, 599 S.W.2d 61 (Mo. Ct. App. 1980); *Lafayette Park Baptist Church v. Scott*, 553 S.W.2d 856 (Mo. Ct. App. 1977); *First Presbyterian Church v. City Council*, 25 Pa. Commw. 154, 360 A.2d 257 (1976).

124. See *Saint Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990).

125. *Society of Jesus v. Boston Landmarks Comm'n*, 409 Mass. 38, 564 N.E.2d 571 (1990); *Church of St. Paul and St. Andrew v. Barwick*, 67 N.Y.2d 510, 496 N.E.2d 183, 505 N.Y.S.2d 24, cert. denied, 479 U.S. 985 (1986); *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980); *First Covenant Church v. City of Seattle*, 114 Wash. 2d 392, 787 P.2d 1352 (1990), vacated and remanded, 111 S. Ct. 1097 (1991).

126. In many cases, rising property values have made it attractive for religious communities to sell or develop their real property in order to raise funds for their ministries. See, e.g., THE COMM. OF RELIGIOUS LEADERS OF THE CITY OF NEW YORK, FINAL REPORT OF THE INTERFAITH COMM'N TO STUDY THE LANDMARKING OF RELIGIOUS PROPERTY (Jan. 26, 1982) [hereinafter FINAL REPORT].

127. *Id.* at 15-22, 24-25. If it is presumed that property development is a form of fundraising and thus an exercise of religious belief protected by the free exercise clause, then historic preservation that precludes such development imposes undue economic hardship on a religious community and interferes with its carrying out of its religious purposes. This "results in the preservation of a worthy architectural structure, and the decay and demise of an ongoing religious enterprise." Greenawalt, *supra* note 11, at 479.

claims are often coupled with takings claims.<sup>128</sup> In takings challenges, courts have applied tests developed in the context of non-profit property owners to religious communities.<sup>129</sup> While some

128. See *Saint Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990).

129. Of course the takings standards for religious communities are different from the reasonable return-on-investment standard for commercial property. For non-profit entities, New York courts apply the test enunciated in *Trustees of Sailors' Snug Harbor v. Platt*, 29 A.D.2d 376, 288 N.Y.S.2d 314 (1968). The *Snug Harbor* court found a taking "where maintenance of the landmark either physically or financially prevents or seriously interferes with the carrying out of the charitable purpose." *Snug Harbor*, 29 A.D.2d at 378, 288 N.Y.S.2d at 316. The landmark designation in *Lutheran Church in America* failed the *Snug Harbor* test because the church's office building had become "totally inadequate" to house its administrative offices. *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 132, 316 N.E.2d 305, 312, 359 N.Y.S.2d 17 (1974). Because charitable activities would have ceased if demolition was prohibited, application of the landmarks law to preclude demolition was found to constitute a "naked taking." *Id.* at 132, 316 N.E.2d at 312, 359 N.Y.S.2d at 16.

In subsequent New York cases of this type, however, the landmark law has been enforced. In *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 prevented the Society from demolishing its meeting house. Since "there [was] no genuine complaint that eleemosynary activities within the landmark [were] wrongfully disrupted," the landmark designation in *Spatt* passed the *Snug Harbor* test. *Id.* at 455-56, 415 N.E.2d at 926, 434 N.Y.S.2d at 936. Additionally, preventing the property's most lucrative use did not constitute a taking. *Id.*

In *Church of Saint Paul and Saint Andrew v. Barwick*, 67 N.Y.2d 510, 496 N.E.2d 183, 505 N.Y.S.2d (1986), a church planned to renovate its house of worship and to add an income-producing structure on the site. The court held that the church's constitutional claims were not ripe because designation alone did not cause "immediate and irremediable injury from being forced to maintain outmoded and costly landmarked buildings which they sought to replace" as claimed in other cases. *Id.* at 522, 496 N.E.2d at 191, 505 N.Y.S.2d at 32 (comparing claims at bar to those in *Society for Ethical Culture*, *Lutheran Church of America* and *Snug Harbor*). Notwithstanding the lack of ripeness, the court reiterated the applicability of the *Snug Harbor* test. *Id.* at 524 n.6, 496 N.E.2d at 2 n.6, 505 N.Y.S.2d at 33 n.6.

In *Saint Bartholomew's Church v. City of New York*, a church planned to demolish its community house adjacent to its house of worship (both landmarks) and replace it with a 47-story office tower for income-producing purposes. 914 F.2d 348, 351 (2d Cir. 1980). The court held that the denials of permission for demolition and replacement passed the *Snug Harbor* test because the existing facilities were sufficient for the church's charitable activities and because the church had sufficient funds for repair and renovation. *Id.* at 359.

Each of these New York cases involved an individually-designated landmark. A different takings standard has evolved in other states for properties within historic districts. That standard, which is particularly harsh, requires a showing by the owner that property cannot be "reasonably adapted" for any purpose or that upkeep provisions of the designation ordinance are "inordinately burdensome." *Maier v. New Orleans*, 516 F.2d 1051, 1066 (5th Cir. 1975); see *Lafayette Park Baptist Church v. Board of Adjustment*, 599 S.W.2d 61, 67 (Mo. Ct. App. 1980) (church denied permission to demolish townhouse next to house of worship for use as parking lot because it failed to prove that it was unable to "economically utilize the property or that it [was] impracticable to sell, lease it or in any way obtain a reasonable return from it or that no market ex-



courts have been sympathetic to the claim of economic harm as a free exercise burden,<sup>130</sup> others consider the concerns of economic diversion and deprivation nothing more than incidental burdens resulting from neutral, rational land use regulation.<sup>131</sup>

The most celebrated economic burden case is *Saint Bartholomew's v. City of New York*,<sup>132</sup> in which a Park Avenue Episcopal Church made an unsuccessful attempt to gain landmarks commission approval to demolish its community house (adjacent to its house of worship) in order to replace it with a forty-seven story office tower primarily to produce income for church programs. After two attempts at certificates of appropriateness, it petitioned for an economic hardship exemption.<sup>133</sup> The United States Court of Appeals for the Second Circuit, affirming the district court, applied *Employment Division, Department of Human Resources v. Smith* ruthlessly. It found the New York City landmarks law to be a generally applicable, facially neutral law; hence, the economic burdens resulting from its application were incidental effects and no balancing of burden against state interest was triggered.<sup>134</sup> The

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ist[ed] for this type of property at a reasonable price"); *First Presbyterian Church v. City Council*, 25 Pa. Commw. 154, 360 A.2d 257 (1976) (preventing church from demolishing building next to house of worship for parking purposes not taking under *Maher* test because structure could be rented, sold, or restored). See generally Note, *Ordinances*, *supra* note 11, at 422-29 (comparing relatively lenient New York single designation takings test to stringent *Maher* district designation takings test and proposing that New York would follow *Maher* if faced with plaintiff who is both charitable organization and historic district landowner).

130. See *First Covenant Church v. City of Seattle*, 114 Wash. 2d 392, 413-16, 787 P.2d 1352, 1364-65 (1990) (Utter, J., concurring).

131. *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980). In *Spatt*, the New York Court of Appeals found that no religious activities would be impaired by precluding the development of a high-rise for nonreligious tenants. "Although the Society is concededly entitled to First Amendment protection as a religious organization, this does not entitle it to immunity from reasonable government regulation when it acts in purely secular matters." *Id.* at 456, 415 N.E.2d at 926, 434 N.Y.S.2d at 936. More recently, in *Church of Saint Paul and Saint Andrew v. Barwick*, 67 N.Y.2d 510, 496 N.E.2d 183, 505 N.Y.S.2d 24 (1986), the court found that with respect to designation alone, "no such direct impingement [on religious uses] is involved. The ultimate effect, if any, on [the church's] religious activities will not be direct, but purely consequential and, moreover, contingent on future developments" such as possible approval of the church's rebuilding plan by the landmarks commission. *Id.* at 524, 496 N.E.2d at 192, 505 N.Y.S.2d at 33.

For further analysis of economic burdens and free exercise, see Xeller, *supra* note 11, at 2009; Note, *Model Free Exercise*, *supra* note 11, at 157-59.

132. 914 F.2d 348 (2d Cir. 1990).

133. *Id.* at 351-52.

134. *Id.* at 352. The Second Circuit intimated that the hardship exemption would require an exceptionally heavy burden on the nonprofit owner trying to qualify:

court found that if the religious community is able to carry out its existing religious mission in its existing facilities, neither a hardship nor a constitutional issue is presented.<sup>135</sup> The United States Supreme Court denied certiorari.<sup>136</sup>

Unlike the aforementioned decisional law focusing on economic burden, courts in Washington and Massachusetts have struck down landmark ordinances as applied to houses of worship because of the direct burden to religion and to the integrity of the religious community. Those decisions involved an exterior designation in Seattle and an interior designation in Boston. In *First Covenant Church v. City of Seattle*,<sup>137</sup> a religious community challenged the designation of First Covenant Church. As one of three domed structures in Seattle, the church building was nominated for landmark designation in 1980 and the Landmarks Board approved designation a year later over the objections of the religious community.<sup>138</sup> A hearing examiner, used in cases of

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It is obvious that the Landmarks Law has drastically restricted the Church's ability to raise revenues to carry out its various charitable and ministerial programs. In this particular case, the revenues involved are very large because the Community House is on land that would be extremely valuable if put to commercial uses. Nevertheless, we understand the Supreme Court decisions to indicate that neutral regulations that diminish the income of a religious organization do not implicate the free exercise clause.

*Id.* at 355 (citations omitted). The court failed even to acknowledge the continued applicability of strict scrutiny in cases of individualized assessment of hardship. See *supra* notes 78-79 and accompanying text.

135. 914 F.2d at 359-60. This "minimal use" standard appears to be stricter than the standard announced by the highest court of New York which protects religious communities demonstrating that preservation of their structures "seriously interferes with" their ability to carry out their charitable and religious purposes. For a discussion of the New York standard, see *supra* notes 129, 131 and accompanying text.

136. 111 S. Ct. 1103 (1991).

137. 114 Wash. 2d 392, 787 P.2d 1352 (1990).

138. *Id.* at 395-96, 787 P.2d at 1354. The architectural style of First Covenant reflects part of Seattle's Swedish heritage and is built "in an eclectic style derived from the northern renaissance. . . .

. . . .  
The church's most readily identifiable feature is its [ribbed elliptical] dome and [classical] cupola which rises from behind the parapet wall." City of Seattle Landmark Nomination Form, *reprinted in* Appendix to Petition for a Writ of Certiorari at 86a-87a, *City of Seattle v. First Covenant Church*, 114 Wash. 2d 392, 787 P.2d 1352 (1990) (No. 90-892) [hereinafter Appendix].

The designation was based on "distinctive visible characteristics of an architectural style, or period, or of a method of construction" and on the "prominence of spatial location, contrasts of siting, age, or scale, [making it] an easily identifiable visual feature of its neighborhood or the city and contributing to the distinctive quality or identity of such neighborhood or the city." See *Seattle, Wash.*, Ordinance 106348, § 3.01(4)-(6) (Mar. 14, 1977).

non-consenting owners, also recommended designation.<sup>139</sup> In 1985, the City Council approved the designation, together with specific controls requiring board approval of any proposed work on the exterior.<sup>140</sup> A “liturgical exemption,” however, was provided to the church by the City Council:

[N]othing herein shall prevent any alteration of the exterior when such alterations are necessitated by changes in liturgy, it being understood that the owner is the exclusive authority on liturgy and is the decisive party in determining what architectural changes are appropriate to the liturgy. When alterations necessitated by changes in the liturgy are proposed, the owner shall advise the Landmarks Preservation Board in writing of the nature of the proposed alterations, and the Board shall issue a Certificate of Approval. Prior to the issuance of any Certificate, however, the Board and owner shall jointly explore such possible alternative design solutions as may be appropriate or necessary to preserve the designated features of the landmark.<sup>141</sup>

The religious community sought a declaratory judgment against the city on free exercise grounds, alleging first, that the designation interfered with its freedom to alter the exterior of the church structure for the promotion of its religious mission; second, that it required submission of all plans regarding its house of worship to a secular authority with broad discretionary powers; and third, that it reduced the marketability and value of the property.<sup>142</sup>

The church was denied declaratory judgment by the lower court on grounds of ripeness. In a five to four decision, the Supreme Court of Washington, on direct review, declared the

139. *First Covenant*, 114 Wash. 2d at 396, 787 P.2d at 1354.

140. *Id.* During the five year dispute between the church and city, the church owners were subject to the Board’s jurisdiction for any proposed alteration. *Id.* The First Covenant community had no plans to renovate, demolish or sell its house of worship. In fact, it had undertaken extensive renovation of the church’s interior and exterior prior to the 1980s to accommodate its needs. Extensive work was done on the church in the late 1940s and in 1970. The 1970 work involved a total change of the entrance. Findings and Recommendations of the Hearing Examiner for the City of Seattle, In the Matter of the Recommendation of the Landmarks Preservation Board for First Covenant Church, File No. LP-81-002, para. 8, reprinted in Appendix, *supra* note 138, at 91a-95a.

141. *First Covenant*, 114 Wash. at 406-07, 787 P.2d at 1360 (quoting Seattle, Wash., Ordinance 112425, § 2 (1985)) (emphasis deleted).

142. *Id.* at 405-08, 787 P.2d at 1359-61.

designation in violation of the free exercise clause of the first amendment and the comparable state constitutional provision.<sup>143</sup> The majority found the application of the landmarks law to a house of worship to be facially unconstitutional because “[t]he practical effect of the provisions is to require a religious organization to seek secular approval of matters potentially affecting the Church’s practice of its religion.”<sup>144</sup>

The majority rejected the city’s argument that the “liturgical exemption” it provided responded sufficiently to any bona fide free exercise claims.<sup>145</sup> It found that the exemption was void for vagueness and did not sufficiently protect the religious community from government involvement in the religious aspects of its house of worship. While the exemption recognized the religious community as the exclusive authority in liturgical matters, it permitted the Landmark Board to assert jurisdiction over these “exempt” alterations in a consultative capacity.<sup>146</sup> Such required design consultation with the Board for “exempt” alterations—alterations admittedly outside the Board’s competence—constituted a patently unjustified interference in the religious life of the church.<sup>147</sup>

In *Society of Jesus v. Boston Landmarks Commission*,<sup>148</sup> Jesuits

143. Although First Covenant was not requesting permission for a specific alteration, ripeness was not an obstacle for the majority as it had been in *Church of Saint Paul and Saint Andrew v. Barwick*, because of the immediate harms claimed by First Covenant and the final action undertaken by the Board. *First Covenant*, 114 Wash. 2d at 400, 787 P.2d at 1356. For a discussion of *Barwick*, see *supra* note 129.

144. *First Covenant*, 114 Wash. at 406, 787 P.2d at 1359. A concurring opinion (joined by three justices who had joined the majority) focused entirely on the economic harm to the religious community because of the extreme diminution of value caused by the designation as constituting a substantial interference with free exercise. The concurring opinion also suggested that the standard of the New York cases be used in future cases to decide individual economic hardships justifying exemption from landmark laws. *Id.* at 415, 787 P.2d at 1364. (Utter, J., concurring). The concurrence falls in the long line of decisions that focus on the financial effects of preservation. For a discussion of these decisions, see *supra* notes 129, 131 and accompanying text.

145. *First Covenant*, 114 Wash. at 407, 787 P.2d at 1360 (“The Liturgy exemption establishes a vague standard which does not withstand close scrutiny.”).

146. *Id.* Thus, although the liturgical exemption seemed to grant the religious leaders autonomy in liturgical decisions, it provided that “the [Landmarks] Board and the owner shall *jointly* explore such possible alternative design solutions as may be appropriate or necessary to preserve the designated features of the landmark.” Seattle, Wash., Ordinance 112425, § 2 (1985) (emphasis added).

147. *First Covenant*, 114 Wash. 2d at 407-08, 787 P.2d at 1360-61.

148. No. 87-3168, 87-4751, 87-6586, slip op. (Mass. Super. Ct. 1989), *aff’d on other grounds*, 409 Mass. 38, 564 N.E.2d 571 (1990).

challenged the authority of a landmarks commission to designate the Renaissance Revival interior of the Immaculate Conception Church.<sup>149</sup> The designation required the preservation of the volume of the interior space, the lighting, windows, paint scheme, doors, finishes and architectural detail, and the painting of the Assumption of Mary.<sup>150</sup> The commission refused to include a "liturgical exemption" of the type involved in *First Covenant* to protect changes necessitated by the liturgy. Instead, it adopted the following guideline:

The designation of the interior of the Church of the Immaculate Conception as a landmark is not intended to impinge upon or infringe in any manner the free exercise in the church by the Society of Jesus or any other persons of their religious beliefs. Moreover, when any reconstruction, restoration, alteration or demolition . . . is proposed to the commission, the commission shall give as due consideration to the constitutional guarantees of the First Amendment of the United States Constitution as is necessitated [sic] by the nature of the proposed change in the designated landmark.<sup>151</sup>

The commission was reluctant to provide a "loophole" in the protection of the interior, and justified its extensive jurisdiction on the grounds that much of the interior "has major aesthetic importance independent of its religious symbolism . . ."<sup>152</sup>

The Jesuits had proposed an interior renovation that included, among other changes, the central placement of a new, free-standing altar in the midst of a fan-shaped seating arrangement and the removal of the main and side altars. Such changes were part of an effort to reflect architecturally those modifications made to the Roman Catholic liturgy during the Second Vatican

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149. *Id.* at 1-2. Note that this issue would not arise in New York City because New York City's landmarks ordinance excludes house of worship sanctuaries from its general interior designation powers. See NEW YORK CITY, N.Y., ADMIN. CODE § 25-303(a)(2) (1985).

150. Section 9.0, Specific Standards and Criteria: Church of the Immaculate Conception, 0714E, revised and adopted by Boston Landmarks Commission (May 12, 1987). The required preservation extended to "wall, column and ceiling surfaces, railings, architectural and sculptural elements, decorative enframements, embellishments, assemblies and reliefs, the wall painting behind the main reredos, enamelled and opalescent/stained glass windows, loft elements, wall mounted gas lighting sconces, the organ, and organ case." *Id.* at 86.

151. *Id.* at 85.

152. *Id.*

Council.<sup>153</sup> The commission granted permission for the installation of the new central altar, although it did reserve for itself a consultative role in the new altar's design.<sup>154</sup> With respect to two of the three existing altars,<sup>155</sup> however, the commission encouraged their screening, rather than their removal. The Jesuits revised their proposal, agreeing to screen the main altar, but continuing to request removal of the left side altar. At first the commission refused;<sup>156</sup> it later reversed this decision and permitted the removal of the left side altar because of constitutional concerns.<sup>157</sup>

In a summary judgment action, the Jesuits challenged the constitutionality of the interior designation as a violation of free exercise and as a taking. The lower court found the designation an invalid interference with the free exercise of religion under the first amendment and vacated the designation.<sup>158</sup> On direct re-

153. The altar removal was proposed on the grounds that multiple altars are liturgically redundant and detract from the exclusive focus on the new central altar. For a discussion of post-Vatican II changes in Catholic worship space configuration, see *infra* notes 227-36 and accompanying text.

154. "The commission specifically voted to acknowledge the constitutional protections relating to the proposed centralized altar and associated liturgical appointments. *It noted that it would like to participate informally in the development of design detailing of this installation.*" Letter from Judith McDonough, Executive Director of Boston Landmarks Commission to Reverend Robert Manning, S.J., the Society of Jesus (Aug. 3, 1987) (Disapproval Without Prejudice of Application # 120.87.1) (emphasis supplied).

155. Removal of the main and left side altars were the subject of discussion at the hearings. Removal of the right side altar was approved in order to accommodate access to the Blessed Sacrament Chapel behind the wall against which it stood. Letter from Judith McDonough, Executive Director of Boston Landmarks Commission to Reverend Robert Manning, S.J., the Society of Jesus (Nov. 9, 1987) (Certificate of Design Approval # 120.87.2).

156. The commission approved the entire interior renovation as proposed except for the removal of the left side altar. *Society of Jesus*, slip op. at 3. "The commission exempted from this approval the proposed redesign of the left side reredos (leading to the sacristy space) with an infill wall of fielded wooden panels and plaster. It requested further study of a possible screening, comparable to that proposed for the main reredos or a similar treatment, in this location." Letter from Judith McDonough, Executive Director of Boston Landmarks Commission to Reverend Robert Manning, S.J., the Society of Jesus (Nov. 9, 1987) (Certificate of Design Approval # 120.87.2).

157. *Society of Jesus*, slip op. at 3; Letter from Judith McDonough, Executive Director of Boston Landmarks Commission to Reverend Robert Manning, S.J., the Society of Jesus (Jan. 14, 1988) (Amendment to Certificate of Design Approval, Application # 120.87.2). A Boston Landmarks Commission staff memorandum, after defining the sacred purposes of altars, stated that "it appears that the commission in its discussions about the left side altar may have introduced an inappropriate subject." J. McDonough & J. Cronin, Memorandum to Boston Landmarks Commission (Nov. 24, 1987).

158. *Society of Jesus*, slip op. at 7-8.

view by the Massachusetts Supreme Judicial Court, the facial invalidity of interior designation of houses of worship was affirmed, but on grounds of the comparable state constitutional free exercise provision.<sup>159</sup>

Since the Washington Supreme Court and the Massachusetts Superior Court decided these cases prior to *Smith*, they employed the traditional balancing test enunciated in *Sherbert v. Verner*.<sup>160</sup> The *First Covenant* majority characterized the balance as “whether the law should prefer religious freedom or an exercise of the police power to maintain the architectural and cultural interests associated with landmark preservation.”<sup>161</sup> The majority found, in general terms, that the church’s lack of freedom with respect to its own house of worship and the required submission of any alteration plans to a secular authority were coercive in effect and infringed the church’s free exercise, thereby triggering strict scrutiny.<sup>162</sup> In *Society of Jesus*, the lower court noted that the interior of the house of worship “is more closely bound up with the practice of religion than any other element of the physical structure,” and that any changes in design renovation plans resulted “for all practical purposes” from the involvement of the Landmarks Commission in the affairs of the church.<sup>163</sup> For three years, “the Jesuits’ efforts to run their church as they see fit have been repeatedly frustrated by the actions of the Commission pursuant to the Landmark Statute.”<sup>164</sup> The lower court found that commission review of the removal, replacement and design of altars had a chilling effect on religious decisionmaking.

Neither the *First Covenant* court nor the lower Massachusetts court in *Society of Jesus* found historic preservation sufficiently compelling to justify these burdens on free exercise. The *First Covenant* court found that aesthetic regulation is unrelated to the compelling interests embodied in safety and health regula-

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159. *Society of Jesus v. Boston Landmarks Comm’n*, 409 Mass. 38, 564 N.E.2d 571 (1990). The Supreme Judicial Court of Massachusetts relied on the state constitution which provides: [N]o subject shall be hurt, molested, or restrained in his person, liberty, or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.” *Id.* at 41, 564 N.E.2d at 572 (quoting MASS. CONST. art. 2, cl. 2).

160. 374 U.S. 398 (1963). For a discussion of the *Sherbert* test, see *supra* notes 52-60 and accompanying text.

161. *First Covenant*, 114 Wash. 2d at 400, 787 P.2d at 1356.

162. *Id.* at 407-08, 787 P.2d at 1360-61.

163. *Society of Jesus*, slip op. at 5-6.

164. *Id.* at 6.

tions.<sup>165</sup> The *Society of Jesus* lower court, while finding that historical preservation is “certainly a worthy goal,”<sup>166</sup> concluded in this case that “the interest in historical preservation is not strong enough to justify the significant restraints on the practice of religion that have been imposed by the Landmark Statute.”<sup>167</sup>

The Massachusetts Supreme Judicial Court reviewed the lower court’s decision in *Society of Jesus* after the United States Supreme Court had announced its decision in *Smith*. The high state court, in affirming the lower court ruling, could have justified its decision under one of the available exceptions under *Smith* in order to retain the burden-compelling interest test. In fact, the Jesuits argued on appeal that *Smith* was inapplicable because (1) the government action was neither religion-neutral nor generally applicable, and (2) the hybrid analysis was available, coupling freedom of association together with free exercise of religion.<sup>168</sup> Instead, the high court affirmed summary judgment for the Jesuits on the ground that the designation of the church interior violated article two of the Declaration of Rights of the Massachusetts Constitution.<sup>169</sup> Because renovation of the sanctuary would not “disturb the public peace” or “obstruct the religious worship of nonmembers,” the Jesuits received absolute protection under

165. *First Covenant*, 114 Wash. 2d at 408, 787 P.2d at 1361. The Washington high court noted that the United States Supreme Court “found that the landmark preservation represented an important state interest but did not express the view that it constituted a compelling interest.” *Id.* (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978)).

166. *Society of Jesus*, slip op. at 7.

167. *Id.* at 7-8.

168. Brief for the Society of Jesus of New England and Robert Manning, S.J. at 27-32, *Society of Jesus v. Boston Landmarks Comm’n*, 409 Mass. 38, 564 N.E.2d 571 (1990) (No. 5415).

169. *Society of Jesus*, 409 Mass. at 39, 564 N.E.2d at 572 (1990) (citations omitted). The court found:

The designation restrains the Jesuits from worshipping “in the manner and season most agreeable to the dictates of [their] own conscience,” contrary to art. 2. We are not persuaded by the commission’s argument that the design and placement of, for example, the altar of the church is merely a secular question of interior decoration. That argument misapprehends the central significance of the location and positioning of the altar to the Jesuits’ religious practices. The configuration of the church interior is so freighted with religious meaning that it must be considered part and parcel of the Jesuits’ religious worship. We conclude, therefore, that art. 2 protects the right freely to design interior spaces for religious worship, thus barring the government from regulating changes in such places, provided that no public safety question is presented.

*Id.* at 42, 546 N.E.2d at 573. For the text of article 2 of the Massachusetts Constitution, see *supra* note 159.



the state constitution, where religious and state interests are not balanced unless the public peace is disturbed.<sup>170</sup> Even in the context of such a balancing, the interest in "historic preservation, though worthy, is not sufficiently compelling to justify restraints on free exercise of religion, a right of primary importance. . . . [W]e must accept the possible loss of historically significant elements of the interior of this church as the price of safeguarding the right of religious freedom."<sup>171</sup>

In addition to the tests employed pursuant to federal and state free exercise provisions, the decision in *First Covenant* and both decisions in *Society of Jesus* are grounded in strong autonomy concerns. The reliance on the burden-compelling interest test is not at all inconsistent with an autonomy analysis. In fact, the determination that these religious communities suffered burdens depended almost entirely on the findings that their right to autonomous decisionmaking in religious matters had been violated. The *First Covenant* majority was most disturbed by the requirement that a religious community submit to the jurisdiction of a secular authority for approval "of matters potentially affecting the Church's practice of its religion."<sup>172</sup>

In *Society of Jesus*, the Massachusetts Supreme Judicial Court clearly recognized both the right to community worship and the related right of the community to make autonomous design decisions. The lower court had emphasized more vigorously the problem of secular interference in religious matters and church administration.<sup>173</sup> It recognized that a sphere of autonomy protected the community with respect to design of the sanctuary.<sup>174</sup>

170. *Id.* at 43, 564 N.E.2d at 573.

171. *Id.* at 43, 564 N.E.2d at 574.

172. *First Covenant*, 114 Wash. 2d at 406, 787 P.2d at 1359 (1990). Even the concurrence characterized the financial burden in autonomy terms, reasoning that church finances are an aspect of church administration, and if the finances are affected, the church's ability to administer its programs and perform its mission may be impaired. *Id.* at 415, 787 P.2d at 1364. (Utter, J., concurring) ("If a land use restriction interferes markedly with a church's ability to perform its mission, the restriction may have to yield.")

173. *See Society of Jesus*, slip op. at 8 ("Because the constraints on the Jesuits' administration of their church can be traced to the initial designation in May of 1987, that designation must be removed.")

174. *Id.* at 4-5 (citation omitted).

It has long been recognized that the first amendment to the United States Constitution protects from government interference the way a church manages its affairs. . . .

Part of this constitutionally protected sphere of church autonomy includes the buildings used for worship. . . .

Without a doubt, the interior design of the Church of the Immacu-

The high court did not squarely address such autonomy concerns. Nonetheless, it unconditionally applied its state constitutional protection of chosen worship to the design decisions of a religious community, impliedly recognizing the significance of autonomous decisionmaking.

On a petition for certiorari in *First Covenant*, the United States Supreme Court granted review only to vacate and remand the decision to the Washington Supreme Court for reconsideration in light of *Smith*.<sup>175</sup>

#### IV. THE SYMBIOTIC RELATIONSHIP BETWEEN THEOLOGY AND ARCHITECTURE

When the Supreme Judicial Court of Massachusetts wrote that the interior church design "is so freighted with religious meaning that it must be considered part and parcel of the Jesuits' religious worship,"<sup>176</sup> it came close to acknowledging that ecclesiastical architecture is religious expression, its semiotic properties reflecting and influencing choices made by religious communities regarding theological principles, liturgical practices, faith renewal, doctrinal developments, missional goals and ecclesial identity. Major religious traditions have been keenly aware of the symbiotic interaction between architecture and theology, of architecture's connection with doctrinal and liturgical reform, and of the role architecture plays in sustaining and revitalizing faith.<sup>177</sup>

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late Conception is securely within the protection afforded by the free exercise clause.

*Id.* (citations omitted).

175. *First Covenant Church of Seattle v. City of Seattle*, 111 S. Ct. 1097 (1991).

176. *Society of Jesus v. Boston Landmarks Comm'n*, 409 Mass. 38, 42, 564 N.E.2d 571, 573 (1990).

177. This interest in architectural expression developed at different times in the histories of different religious traditions. Early Christians, early Moslems and Jews in many historical periods were unconcerned with building aesthetics, often meeting in homes or in any available space. R. KRAUTHEIMER, *EARLY CHRISTIAN AND BYZANTINE ARCHITECTURE* 24 (1981). Early Christians adapted domestic architecture to their needs because of the distasteful pagan association of existing religious architecture. *See id.* Early Moslems used a variety of spaces comfortably, needing only to emphasize the side facing Mecca. *See* H. JANSON, *supra* note 6, at 227-28. While Jews "emphasize[d] meeting in a unified space and were otherwise traditionally indifferent to the setting for prayer," the cultural assimilation of Jews created an interest in architectural development. C. KRINSKY, *SYNAGOGUES OF EUROPE: ARCHITECTURE, HISTORY, MEANING* 15 (1985). For an excellent discussion of the connections between religion and architecture, see generally *FAITH & FORM* (Journal of the Interfaith Forum on Religion, Art and Architecture).

Often, public bodies tend to interpret the relationship between architecture and religion too narrowly, if they recognize it at all.

Houses of worship possess semiotic qualities for their religious communities and for others.<sup>178</sup> Ecclesiastical structures reify particular theological, moral and social assertions.<sup>179</sup> They express, among other things, the religious community's purpose, theology, identity, hope, unity and reverence for the divine and its identification with or separation from certain aspects of the culture. They constitute "an image of an entire religious program, a world view."<sup>180</sup>

The symbiotic interaction of architecture and theology embodied in worship structures must be understood to be a dynamic one, perpetuating or redirecting religious emphases and practices. Certainly the multiplicity of ecclesiastical designs throughout history is illustrative of long term developments in doctrine

178. Winning converts through impressive architecture has been important to the Christian and Moslem traditions. See C. KRINSKY, *supra* note 177, at 13-14.

179. See D. UPTON, *HOLY THINGS AND PROFANE: ANGLICAN CHURCHES IN COLONIAL VIRGINIA* 164 (1986). Even building shape has been considered full of symbolic meaning. See R. KENNEDY, *AMERICAN CHURCHES* 235 (1982); see generally S. TIGERMAN, *THE ARCHITECTURE OF EXILE* (1988); Tillich, *On the Theology of Fine Art and Architecture*, in P. TILlich, *ON ART AND ARCHITECTURE* 204 (J. Dillenger & J. Dillenger eds. 1989) [hereinafter *ON ART AND ARCHITECTURE*]. A house of worship "is a building that both serves a purpose and is a symbol." Tillich, *supra*, at 211.

In order for architecture to constitute religious expression, it need not employ "literal symbolism," e.g., a cruciform plan for a cross, steeply pitched sides of churches for praying hands, Star of David floor plan for purposes of religious identity. For criticism of this literal symbolism, see G. BERNSTEIN & G. TINTEROW, *TWO HUNDRED YEARS OF AMERICAN SYNAGOGUE ARCHITECTURE* 32-33 (1976); *JEWISH THEOLOGICAL SEMINARY OF AMERICA, RECENT AMERICAN SYNAGOGUE ARCHITECTURE, THE JEWISH MUSEUM* 8 (1963) [hereinafter *THE JEWISH MUSEUM*]; E. LYNN, *supra* note 1, at 152; R. MAGUIRE & K. MURRAY, *MODERN CHURCHES OF THE WORLD* 10 (1965); J. WHITE, *PROTESTANT WORSHIP AND CHURCH ARCHITECTURE* 192-93 (1964). While such use of literal symbols can be powerful, such as the Cathedral of Brasilia (replica of the Crown of Thorns), it is generally considered too simplistic and forced. See *MODERN CHURCH ARCHITECTURE*, *supra* note 6, at 118. Real symbolism, it is argued, is achieved when the entire structure expresses religious values and ideals, such as the dramatic rising structure expressing "Christian hope for the resurrection of the body and life after death." EDITORS OF *ARCHITECTURAL RECORD, RELIGIOUS BUILDINGS* 114 (1979) (describing Medellin Cathedral, Colombia). For an excellent discussion of the rejection of literal symbolism and use of implicit symbolism in Islam, see Ibsen al Faruqi, *An Islamic Perspective on Symbolism in the Arts: New Thoughts on Figural Representation*, in *ART, CREATIVITY AND THE SACRED* 164 (D. Apostolos-Cappadona ed. 1989). For a discussion of cosmological symbolism of a Buddhist temple, see Eliade, *Barabudur, the Symbolic Temple*, in M. ELIADE, *SYMBOLISM, THE SACRED AND THE ARTS* 130 (D. Apostolos-Cappadona ed. 1990).

180. J. DAHINDEN, *NEW TRENDS IN CHURCH ARCHITECTURE* 87 (1967). See EDITORS OF *ARCHITECTURAL RECORD*, *supra* note 179, at 83, 97; *Religious Buildings*, *supra* note 6, at 15-44.

and ecclesial identity. Even within one house of worship, it is not uncommon to find structural and artistic modifications made over time which reflect this dynamism.<sup>181</sup>

An awareness of this semiotic character and of this interaction between architecture and religion is widespread among architectural historians and commentators, as well as proponents of landmark preservation and architectural review. Religious structures and particular sacred designs are most treasured precisely because of their religious message, their role in faith renewal and the evolving "record" they provide of the life of a religious community. If sacred architecture has developed out of the profound religious evolution so widely celebrated by the architectural world, this awareness must also inform judicial and legislative thinking on issues of governmental design control of ecclesiastical structures. The implications of this perspective in the context of the religion clauses must be explored.

Landmark preservation and architectural review ordinances continue to place local authorities in a position to evaluate the religious choices of a religious community and to substitute their own judgment for that of the religious community. As soon as the appearance of an existing or proposed house of worship comes under secular jurisdiction, the state is not merely preserving the visual qualities of the structure or of the surrounding district; rather, it becomes the judge with the authority to permit appropriate and to prevent inappropriate religious expression. By determining which religious beliefs are worthy of architectural expression, the state compels affirmation of particular religious beliefs and ecclesial self-understanding and denies affirmation to others. The greatest effect is on the worshippers themselves. The appearance of their religious home and worship environment is subject to government regulation and is even dictated where an architectural review board requires a particular architectural style, where a landmarks commission requires preservation or where any design control authority co-designs the new or existing house of worship through both its consultative and enforcement processes.

The historical overview that follows is intended to suggest that the state, through design control jurisdiction and process, becomes impermissibly involved in assessing and dictating the

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181. Jaeger, *Editorial Column: Exploring the Layers of Old Worship Places*, *INSPIRED*, Jan.-Feb. 1989, at 2.

content, profession and formation of belief.<sup>182</sup> The state becomes involved in: (1) design issues that are directly or indirectly tied to doctrinal and theological interpretation and conduct of worship; (2) architectural changes intended to promote religious renewal; (3) the actual transmission and inculcation of beliefs through the semiotic qualities of the sanctuary, facade and building plan; and (4) internal theological debates over authentic architectural expression and stewardship of architectural treasures. The state becomes the reviewer and arbiter of internal design decisions, arrogates to itself the role of the religious community, and places itself in a position to direct the long term development of ecclesiastical architecture. It is argued herein that under the religion clauses, the state cannot take on these tasks.

A. *Architectural Expression, Liturgy, and Doctrine: From Early Christian to Protestant Reformation*

Ecclesiastical structures have been “[t]he dominant building[s] in great historical building cultures.”<sup>183</sup> All major religious systems have given birth to sacred architecture. These structures are often characterized by their worshipping communities as “numinous,” that is, manifesting or containing a divine presence. The great ziggurats of Mesopotamian culture served as dwelling

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182. The historical overview provided is not intended to be exhaustive. It highlights several examples from a few religious traditions for purposes of illustrating the point that architecture is in fact a form of religious expression.

183. P. THIRY, *supra* note 6, at 3 (emphasis deleted); see also C. NORBERG-SCHULZ, *supra* note 3, at 72. Norberg-Schulz writes that “[t]hroughout the course of Western history, the church was a leading building task. In the church man’s understanding of the cosmos, as well as his own life in the world, was kept and visualized. Over and over again new interpretations of something general and timeless were offered, and over and over again the church served to give man the sense of an existential foothold.” C. NORBERG-SCHULZ, *supra*, at 72.

Some indigenous faiths do not use assembly structures to enable worship and ritual. And even among faiths that do, not all religious communities establish houses of worship. Among the many reasons contributing to this are financial limitations, scarcity of available sites, zoning restrictions, persecution, and theological emphasis on domestic or other utilitarian meeting space. In lieu of establishing houses of worship, religious communities rent space in secular buildings, or in houses of worship of different faiths, in leaders’ or members’ homes, or meet outdoors, without a structure altogether, like the tent revivals of the nineteenth century. Martin Luther wrote: “Even if you preached under a green linden-tree or willow, it would still be God’s own abode and sanctuary, for God’s Word reigns there. God’s Word alone sanctifies the place and makes it His home and abode.” R. GIESELMANN, *NEW CHURCHES* 20 (1972) (quoting EISENHOFER, *HANDBUCH* (1912)). While religious communities may believe that they sanctify any space they use, this article is limited to those spaces that are intentionally reserved and primarily used for worship, prayer, ritual and other religious purposes.

places for the gods, as did Egyptian, Greek and Roman temples.<sup>184</sup> Not all sacred space, however, is numinous. The Jewish synagogue tradition refused to shelter an image of God and departed from all prior religious traditions by dedicating its structures to prayer and study instead.<sup>185</sup> Since the "numinous" understanding of religious space, while quite common, is not universal among religious traditions, all houses of worship must be considered sacred not because of a sacral presence but because of the religious purposes to which these buildings are dedicated.

"Liturgical centers" are the spaces within houses of worship in which the main liturgical action occurs; they express the core purposes of these ecclesiastical structures and are critical to the overall building design, as well as to the interior configuration of the sanctuary. In fact, theological choices regarding liturgical and extra-liturgical arrangements have had major effects on building configuration, causing shifts between elongated and central plan structures, between divided and unified spaces, between multi-room and single-room worship areas and between remote and immediate liturgical centers. Worship structures of religious communities within each of the traditions of Judaism, Christianity and Islam contain liturgical spaces or centers: generally, the ark and bimah for Jews,<sup>186</sup> the altar (or communion table), pulpit and baptismal font (or pool) for Christians,<sup>187</sup> and the qibla, mihrab and minbar for Moslems.<sup>188</sup>

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184. See H. JANSON, *supra* note 6, at 69, 115-16; P. THIRY, *supra* note 6, at 3J; S. TIGERMAN, *supra* note 179, at 29.

185. P. THIRY, *supra* note 6, at 3J.

186. See R. KENNEDY, *supra* note 179, at 229. The Torah scrolls are stored in the ark. The Torah is read and interpreted from the bimah, a raised platform, often in front of the ark and containing a reading desk. The eternal light hangs above or near the ark. The menorah and other symbolic elements are placed prominently as well. *Id.* The ark represents the centrality of "the Law, the written tradition." The bimah represents the importance of the congregation in study and in prayer and as interpreters of the law. THE JEWISH MUSEUM, *supra* note 179, at 10 (1963). For a discussion of other important elements of a synagogue's interior, see S. BATKIN, LET THEM MAKE ME A SANCTUARY 7 (1978); EDITORS OF ARCHITECTURAL RECORD, *supra* note 179, at 114; P. THIRY, *supra* note 6, at 19J.

187. For a general discussion of the layout and liturgical centers in basilicas, see generally J. WHITE, *supra* note 179, at 57-60. For a discussion of the centrality of altars, see generally H. JANSON, *supra* note 6, at 196. Baptism was conducted in a separate building called the baptistry, usually round or polygonal in shape. R. KENNEDY, *supra* note 179, at 251; R. KRAUTHEIMER, *supra* note 177, at 40; J. WHITE, *supra* note 179, at 59, 72, 75.

188. The qibla is the architecturally distinct wall facing Mecca, and the mihrab is a niche in that wall. The Koran is read and the sermon given from the minbar, a raised pulpit in (or to the right of) the mihrab. The Koran is kept on a separate stand. The tower from which the faithful are summoned is the minaret.

The liturgical centers cannot be separated from the overall structure in a simple "interior-versus-exterior" analysis. The interior liturgical centers influence, and may dictate, the overall building plan, particularly the choice of longitudinal or central plan (i.e., circle or square-based) orientation.<sup>189</sup> Typically, in buildings built on a longitudinal axis, one of the short sides toward which the faithful face is usually architecturally distinct. The early Christian form, the basilica, featured a semi-circular side (the apse) at the far eastern end.<sup>190</sup> "Cathedral" mosques (also called Friday mosques), were also rectangular with the side facing Mecca (the qibla) emphasized by a circular or polygonal niche (the mihrab) protruding from the qibla's center, much like the basilican apse. Western Christian churches continued to use the basilican form until medieval times. Orthodox churches appearing after the East-West split in the fifth century, however, departed from the rectangular form and adopted a floor plan which resembled a Greek cross with arms of equal length topped with a dome.<sup>191</sup> This architectural form was known as the Byzantine central plan of the Orthodox Christians and influenced the design of central plan mosques as well.<sup>192</sup>

From the beginning, the altar was the focus of Christian worship space. In the basilican plan, the Eucharist was celebrated at the altar, behind which the priest stood, facing the congregation.<sup>193</sup> The semi-circular apse was behind the priest and created an architecturally distinct sanctuary for clergy to stand without physically separating themselves from the laity. The bishop

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Ceremonial washing required before prayer is often done in courtyard pools, outside of the prayer hall. See Al-Asad, *The Contemporary Mosque*, 24 FAITH & FORM 21 (Winter 1990-91); Ibsen al Faruqi, *supra* note 179, at 164; J. DAVIES, *supra* note 1, at 119-20; H. JANSON, *supra* note 6, at 228-31; C. KRINSKY, *supra* note 177, at 19; see also *Religious Buildings*, *supra* note 6, at 22-28 (discussing highly symbolic architectural treatment of Shia Moslem mosque). Note that the minaret (like a bell tower) from which the call to prayer is given and the dome (often covering either the mihrab or the entire prayer hall) are important parts of the external identity of a mosque. See Al-Asad, *supra*, at 21.

189. The "design of liturgical centers and arrangement of liturgical spaces are not merely a matter of taste but a means of showing forth definite theological concepts." J. WHITE, *supra* note 179, at 45.

190. See J. DAVIES, *supra* note 1, at 145; J. WHITE, *supra* note 179, at 145.

191. H. JANSON, *supra* note 6, at 205, 208; R. KRAUTHEIMER, *supra* note 177, at 214. For a discussion of Byzantine influences on medieval churches, see Ousterhout, *Rebuilding the Temple: Constantine Monomachus and the Holy Sepulchre*, 48 J. SOC'Y ARCHITECTURAL HISTORIANS 66 (1989).

192. H. JANSON, *supra* note 6, at 231. For discussion of the three forms of early mosques, see *id.*

193. R. KRAUTHEIMER, *supra* note 177, at 40; see R. KENNEDY, *supra* note 179, at 251.

preached from his seat located at the back wall of the apse behind the altar. Deriving from this basilican form centuries later, the Gothic cruciform cathedral design became the predominant structure of medieval, pre-Reformation ecclesiastical architecture.<sup>194</sup> The Gothic organization of liturgical centers, however, differed sharply from that of the early Christian basilican plan. Rather than the fairly unified and inclusive space of the early Christian basilica, the Gothic form consisted of two rooms: a long nave and a chancel, which was the sanctuary. The chancel contained the liturgical centers and the clergy and was physically closed off from the nave by a screen. The altar was no longer oriented toward the congregation at the juncture of the sanctuary and the nave, and the priest no longer faced the congregation in the nave. Instead, the altar was elevated and pulled to the far wall of the chancel, as far from the nave as possible, and the priest faced it, with his back to the nave and congregation. The long nave was not intended for the participation of the laity but was designed instead for the elaborate procession of the clergy to the chancel.<sup>195</sup>

The “two-room” Gothic plan is, however, more accurately described as a multiple room plan. Over the centuries, extra-liturgical practices had increased with the growing popularity of pilgrimages to sacred sites and the widespread veneration of saints and martyrs. Gothic forms accommodated these practices by providing larger churches with highly segmented spaces and multiple altars for housing sacred relics, resulting ultimately in “the elaboration of the plan of the Early Christian basilica by the addition of ambulatories, galleries, transepts, crypts, side chapels, chevets and choirs.”<sup>196</sup> The Gothic cathedral design also accommodated lay devotions to saints and martyrs, Stations of the Cross and the Rosary by providing many distinct areas separated by

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194. See R. KENNEDY, *supra* note 179, at 251-53; G. LANE, CHICAGO CHURCHES AND SYNAGOGUES: AN ARCHITECTURAL PILGRIMAGE 16 (1981); J. WHITE, *supra* note 179, at 64-77. Medieval generally refers to the twelfth through the sixteenth centuries. For a general discussion of Gothic design, see H. JANSON, *supra* note 6, at 283-310.

195. See R. KENNEDY, *supra* note 179, at 251-52. The chancel created a smaller church within a church. Many Gothic churches did not have pulpits from which the laity were addressed. If there was a pulpit it was in the chancel, but in parish churches, as opposed to cathedrals, the pulpit was out in the nave. J. WHITE, *supra* note 179, at 68-72. Gothic parish churches generally had baptism fonts at the entrance, but Gothic cathedrals retained the early Christian practice of separate baptisteries. *Id.* at 72, 75.

196. J. DAVIES, *supra* note 1, at 144-45; see H. JANSON, *supra* note 6, at 261-62; J. WHITE, *supra* note 179, at 71-72.



walls or screens.<sup>197</sup>

For as functional as the Gothic design proved to be, it was also symbolically designed to teach a largely illiterate laity by symbol and shape.<sup>198</sup> The magnificent stained glass was thought to enable the manifestation of Divine Light. Enormous, and often multiple, spires were meant to reach toward heaven, expressing the relationship of humankind to God. It was intended that all of the elements of the structure work together to create a weightlessness, a theological harmony.<sup>199</sup>

In the Orthodox tradition, whose churches developed along the central plan as opposed to the longitudinal orientation of the churches of the West, the emphasis on the "Great Mystery" (God made present through the actions of the priest) had a primary architectural effect. The growth of the theological and liturgical importance of the mystery and the clergy's corresponding role was accompanied by an expansion in architectural space.<sup>200</sup> In the Byzantine central plan churches, Mass was offered under the domed center bay<sup>201</sup> with clergy filling the entire nave while the laity watched from the entrance vestibules.<sup>202</sup> Thus, the central building configuration accommodated a center-focused liturgy, while the longitudinal configuration pointed toward main liturgical events at one focal point within the space.

The Protestant Reformation in sixteenth century Europe ushered in doctrinal and liturgical changes that had a major influence on prevailing architectural forms, liturgical centers and worship environment.<sup>203</sup> The Reformers rejected papal authority,

197. G. LANE, *supra* note 194, at 16; E. MILLS, *THE MODERN CHURCH* 21 (1956); J. WHITE, *supra* note 179, at 67-72, 76-77.

198. See J. DAHINDEN, *supra* note 180, at 75 ("church architecture always aimed to make visible the sacred"). For example, Medieval Christians considered their churches to be "microcosms, miniature models of the city of God or of the divine universe." D. UPTON, *supra* note 179, at 164. They felt that "the concrete physical properties of the church led the mind upward, enabling it to understand more difficult, abstract theological precepts." *Id.*

199. H. JANSON, *supra* note 6, at 285. The origin of Gothic design has been attributed to French cleric Abbot Suger, who "desire[d] to 'build a Dionysian theology,'" with an "emphasis on strict geometric planning and the quest for luminosity." Light and numerical harmony had long been established in Christian thought and emphasis on them was attributed to Dionysius, an early Greek Christian. *Id.*

200. R. KRAUTHEIMER, *supra* note 177, at 298.

201. *Id.*

202. *Id.* at 214.

203. J. WHITE, *supra* note 179, at 81-84. For general discussion of Reformation influence on architecture, see D. BRUGGINK & C. DROPPERS, *CHRIST AND ARCHITECTURE* 47-48, 50, 81, 90 (1965); M. GEISINGER, *THE HOUSE OF GOD* 211

clerical importance and lay devotional practices, emphasizing instead the centrality of God's Word. Catholic worship structures taken over for Protestant use were modified and, particularly in northern Europe, fell victim to a radical iconoclasm in which all interior and exterior statuary and representational art, including crucifixes, were destroyed.<sup>204</sup> Images were often replaced with reproductions of words from the Bible.

The Protestant emphasis on words rather than on images, however, affected far more than the degree of ornamentation. The primary change focused on the liturgical centers: the pulpit, altar and baptismal font. Preaching God's Word, not making Christ present in the Eucharist celebration, was now the central liturgical purpose of the worship service. The altar became a table for a meal, and the pulpit became liturgically and physically significant as the "architectural manifestation of the Word."<sup>205</sup> The baptismal font was taken from baptisteries or side rooms and placed prominently to express the significance of the entry through baptism into the Christian community.<sup>206</sup>

While many churches continued to celebrate the Eucharist, it was now a sacramental meal, not a sacrificial offering as understood in Roman Catholic theology.<sup>207</sup> Altars were thus often replaced with wooden tables.<sup>208</sup> High altars and altars storing saints' relics were torn down.<sup>209</sup> Communion was celebrated

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(1979); H. JANSON, *supra* note 6, at 474-76, 515; E. LYNN, *supra* note 1, at 97-99; R. ROBISON, *LOUISIANA CHURCH ARCHITECTURE* 14 (1984); P. THIRY, *supra* note 6, at 9; D. UPTON, *supra* note 179, at 48-55; Tillich, *Contemporary Protestant Architecture*, in *ON ART AND ARCHITECTURE*, *supra* note 179, at 214.

204. Such "takeovers" have been common throughout history. See J. COSTONIS, *supra* note 3, at 49-50. "Revolutions and protest, two of the most turbulent expressions of social change, reveal that the ties that bind people and [their buildings] can turn sour, evoking hatred, disgust, and shame [toward the structures] where affection once reigned." *Id.* Additionally, churches taken over by Moslem conquests, such as the Hagia Sophia, were whitewashed to cover over Christian mosaics. H. JANSON, *supra* note 6, at 206. The Grand Mezquita in Cordoba, Spain, formerly a mosque, has been covered with ornate, pious Christian images. Correspondence with Reverend Dean Kelley, Director for Religious Liberty, National Council of Churches (Aug. 6, 1990) (on file at *Villanova Law Review*).

205. D. BRUGGINK & C. DROPPERS, *supra* note 203, at 80 (noting that pulpit must not be relegated to secondary role); D. UPTON, *supra* note 179, at 50; Tillich, *Contemporary Protestant Architecture*, in *ON ART AND ARCHITECTURE*, *supra* note 179, at 214-16.

206. D. UPTON, *supra* note 179, at 48.

207. See D. BRUGGINK & C. DROPPERS, *supra* note 203, at 81-82; J. WHITE, *supra* note 179, at 81-83.

208. E. LYNN, *supra* note 1, at 97-99; D. UPTON, *supra* note 179, at 81; J. WHITE, *supra* note 179, at 83.

209. D. BRUGGINK & C. DROPPERS, *supra* note 203, at 81. In England,

either at long tables placed in the nave or at tables set up in the chancel.<sup>210</sup> In fact, it was common for churches to use the nave alone for worship purposes, with the chancel opened up for the occasional communion meal.<sup>211</sup>

Early Reformation experiments sought to create architecturally a "priesthood of all believers" by removing any barriers separating clergy from laity. Worship was focused on unified space in the nave, and all space was made available to the laity.<sup>212</sup> The screen between the nave and chancel was removed to end the separation between the clergy and laity, and sometimes the chancel was closed off altogether. Even choir stalls in the chancel were removed, for their purpose had been to accommodate antiphonal singing by monks. The entire area used by the congregation was now considered the sanctuary, not just the area around the altar where the clergy had celebrated Mass; the space was sacred not because clergy invoked God's presence but because the people of God were gathered there.<sup>213</sup>

The early European Protestant congregations modified Catholic space in order to worship in an environment consistent with their theology, doctrine and liturgy. Aware of the strong symbolic power of the old arrangements, the Reformers radically rearranged their churches.<sup>214</sup> As for newly constructed churches,

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shortly after Henry VIII broke with Rome, the Puritan Parliament dictated architectural changes in order to promote one religion over another. Reformers like Dr. Nicholas Ridley encouraged religious communities to destroy the altars in their churches. The altars containing relics of the saints were viewed as theologically offensive because they represented an association with Rome. S. BINDOFF, *TUDOR ENGLAND 163* (1950). Some parishes followed his suggestion, but many of the more traditionalist parishes did not. The Puritan Parliament, enamored of his suggestion, ordered all bishops to ensure that all altars were destroyed.  
*Id.*

210. J. WHITE, *supra* note 179, at 83.

211. *Id.*

212. P. THIRY, *supra* note 6, at 9 fig. 5.

213. The radical focus on unified space in the nave is evident even today in Dutch Reformed churches where one can find former chancels housing bicycle racks. R. KENNEDY, *supra* note 179, at 252.

214. Many Reform churches underwent drastic redesign:

The radical rearrangement of their churches by the Reformers makes it clear how little truth there is in the often repeated claim that they were not concerned about symbols. It was because they were so keenly aware of the symbolic power of the old arrangements that these were so completely altered. While it is true that the Reformed refused to develop an elaborate system of symbols, they used what inevitably would have symbolic value with theological accuracy.

D. BRUGGINK & C. DROPPERS, *supra* note 203, at 82 n.51. Yet, while Protestants may have rearranged to greater or lesser degrees the interiors of many previously Catholic churches for theological reasons, they were still worshipping in

radical departures from earlier Catholic forms continued in the sixteenth, seventeenth and eighteenth centuries. Designs for new construction tended to reject longitudinal basilican and cruciform floor plans in favor of a central one-room plan with auditory and visual qualities focusing the laity on the Word being preached.<sup>215</sup> Structural elements such as unified space and upper level galleries created an intimate setting even for large groups. The theological precepts of communal unity and centrality of the Word became physically embodied in the structure.

As the number of doctrinally distinct Protestant groups multiplied, a range of liturgies—and of architectural expression—resulted. Some religious communities retained liturgies with strong affinities to the Catholic Mass; others adopted liturgies that departed radically from the Catholic emphasis on sacrament, focusing solely on preaching. These doctrinal and liturgical emphases affected their worship structures. “Lower” liturgical churches, such as Congregationalists and Baptists, for instance, built simple and austere central plan structures and refused to use any visual symbols that distracted the worshipper and impeded true conversion.<sup>216</sup> Even stained glass windows were prohibited because they were understood to block and distort God’s light.<sup>217</sup> The

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Catholic structures built in Romanesque, Gothic, Renaissance and Baroque forms to accommodate Catholic liturgical and extra-liturgical practices. Tillich, *Contemporary Protestant Architecture*, in ON ART AND ARCHITECTURE, *supra* note 179, at 214-15.

215. See E. MILLS, *supra* note 197, at 25; R. ROBISON, *supra* note 203, at 12-14; J. WHITE, *supra* note 179, at 81-117; Tillich, *Contemporary Protestant Architecture*, in ON ART AND ARCHITECTURE, *supra* note 179, at 214-15. For example, St. Peter’s Church, the first Anglican church in Philadelphia, is built on a one-room plan, longitudinal axis, with the pulpit at one end and the altar at the other to distinguish Word from sacrament. The congregation, in box pews, turned to face either direction; since the Eucharist was celebrated only a few times each year, this separation of functions permitted exclusive emphasis on sermon or communion.

This move away from segregated space was both a European and American phenomenon. Central plan refers to one-room, unified space, often based on a circle, square, polygon, or Greek cross, but not intended to refer to a particular floor plan.

216. R. KENNEDY, *supra* note 179, at 190-91. For the austere Reformers, life was orderly and without mystery. God’s radiance was everywhere. The building was small and unpretentious, white, bright, inside and out. Seats were assigned. The pulpit dominated; the communion table was simple. E. LYNN, *supra* note 1, at 11. “The contrast between the Gothic cathedrals and the Puritan meeting houses exemplifies the interrelationship of theology and architectural design. . . . The essence of both . . . was their direct and honest expression of values in practical architectural forms.” *Id.* at 16. For a comparison between medieval and reformation (Gothic and Puritan) church architecture, see R. GIESELMANN, *supra* note 183, at 24; H. JANSON, *supra* note 6, at 711; LYNN, *supra*, at 10-11.

217. R. ROBISON, *supra* note 203, at 14.

most radical of all Protestants, the Quakers, rejected not only visual symbols, but an ordained clergy, a sermon, the communion meal and all formally spoken prayers. For Quakers, these distractions acted as impediments to the believer. Consistent with these beliefs, the one-room Quaker meeting houses were nearly barren of physical detail, containing only benches facing one another. The entire meeting room was the liturgical center, reflecting their radically democratic theological notions.<sup>218</sup>

B. *Architectural Change to Revitalize Religion: Gothic Revivalism, Catholic Liturgical Renewal, the Development of Indigenous Jewish Forms and Moslem Traditionalism*

These medieval Catholic and early Protestant examples demonstrate one religious tradition's rejection of doctrine and liturgy and the implications of this rejection for architectural form. For later Protestant and Catholic communities, however, doctrinal developments and continued liturgical reforms ushered in new architectural forms and the reappropriation of earlier ones. The most notable examples of this "reappropriation" were the Gothic and classical revival movements of the eighteenth, nineteenth and early twentieth century which dominated ecclesiastical design.<sup>219</sup> It is ironic that early Protestant Reformers rejected the Gothic design because it embodied a rejected doctrine and ritual, while later Protestant Gothic Revivalists sought to reappropriate the medieval form because it embodied quintessential "Christian" architecture, inspiring faith, love and reverence for God in an all-too-secular world. How two closely affiliated religious traditions could come to such radically different conclusions regarding the appropriate architecture for religious renewal and revitalization is bound up in their own histories, their own architectural and artistic legacies, their place in the surrounding culture, their doctrinal and liturgical emphases and their renewed ecclesial self-definitions.

The Anglicans were responsible in large part for the widespread revival of Gothic design. In light of a growing secularism and the challenge of religious revivalism among Catholic and evangelical churches, Anglicans focused their efforts at religious re-

218. E. MILLS, *supra* note 197, at 55; J. WHITE, *supra* note 179, at 43, 110-12.

219. H. JANSON, *supra* note 6, at 557-61; R. ROBISON, *supra* note 203, at 57. For discussion of the Gothic Revival in general, see P. STANTON, *THE GOTHIC REVIVAL & AMERICAN CHURCH ARCHITECTURE: AN EPISODE IN TASTE 1840-1856* (1968).

vitalization on reforms in liturgy and architecture.<sup>220</sup> The Oxford and Cambridge schools of thought, nineteenth century British intellectual movements in theology and architecture, respectively, emphasized Anglican clericalism, sacramentality and ceremonialized liturgy and expressed a desire to cultivate an intense faith and pietism similar to those of the medieval church.<sup>221</sup> With the growing emphasis on emotionalism in religious experience and the growing awareness of the emotive effects of architecture, Anglicans designed structures like those of the medieval period on the assumption that the medieval religious experience could be replicated.<sup>222</sup>

British architects, clergy and laity debated the religious effects of a Gothic parish church revival.<sup>223</sup> Many were convinced that Gothic was *the* Christian architectural form.<sup>224</sup> The Gothic revival ushered in a return to the longitudinal axis, a chancel-nave separation, choir stalls, chancel-bound liturgical centers, increased ornamentation, an overall emphasis on mysticism and emotivism, and reduced concern for auditory quality. The movement swept Britain and America.<sup>225</sup> It found supporters not only

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220. S. CREWE, *VISIONARY SPIRES* 75 (1986); *MODERN CHURCH ARCHITECTURE*, *supra* note 6, at 162; P. STANTON, *supra* note 219, at xviii-xix, xxii, 11.

221. J. WHITE, *supra* note 179, at 131-32. For a general discussion of the Oxford and Cambridge Schools of thought, see P. STANTON, *supra* note 219.

222. R. GIESELMANN, *supra* note 183, at 10; H. JANSON, *supra* note 6, at 557. Note also that the Anglicans returned to the basilican form in the eighteenth century, and scholars have determined that such a return was "related to theological writings of the period." The attempt was to invoke the inspiration of the Early Christian community, much like the Cambridge Movement used Gothic forms to invoke the inspiration of the medieval Christian community. Du Prey, *Hawksmoor's 'Basilica after the Primitive Christians': Architecture and Theology*, 48 *J. SOC'Y ARCHITECTURAL HISTORIANS* 38, 50-51 (1989).

223. S. CREWE, *supra* note 220, at 75. Note that Gothic parish churches differ somewhat from Gothic cathedral design.

224. P. STANTON, *supra* note 219, at 9 (citation omitted). Reverend George Ayliffe Poole, an observer of the Cambridge Movement, wrote of Gothic:

So entirely did this style arise out of the strivings of the church to give a bodily form to her teaching, that it seems to have clothed her spirit, almost as if the invisible things had put forth their energies, unseen, but powerful and plastic, and gathered around them on all sides the very forms and figures which might best serve to embody them to the eye of sense. A Gothic church, in its perfection, is an exposition of the distinctive doctrines of Christianity, clothed upon with a material form; and is, as Coleridge has more forcibly expressed it, "the petrification of our religion." The greater mysteries concerning the divine objects of our worship are symbolized in the fundamental design of the structure; other Christian verities are set forth in the minor arrangement, and in the ornamental details.

*Id.*

225. J. WHITE, *supra* note 179, at 118, 130-38.

among Episcopalians in America, but also among Methodists, Presbyterians, Baptists and other Protestants, many of whom boasted rather austere architectural traditions.<sup>226</sup>

Early in the twentieth century, at the same time that many Protestants were formalizing and ceremonializing their liturgies and building churches with designs rooted in medieval Catholicism, Pope Pius X was inaugurating the Liturgical Movement.<sup>227</sup> He envisioned a more participatory liturgy and criticized the extant Catholic architectural forms for preventing meaningful lay participation in the liturgy. Religious symbols, ornamentation and highly segmented spaces distracted and impeded worshippers, and the placement of the altar remote from the laity produced spectators, not worshippers. The Movement emphasized one central altar within unified space.<sup>228</sup>

The seeds of participatory liturgy, sown in the Liturgical Movement, bore fruit in the 1960s after the Second Vatican Council revised the liturgy of the Catholic Mass and restructured its liturgical centers.<sup>229</sup> In the Council's new understanding of the Catholic worship space, the altar is still central to the liturgy. But now the laity participate more fully in the Mass, and the altar thus takes on a new liturgical primacy.<sup>230</sup> The altar is now centrally located, as close to the congregation as it has ever been, often with seating pulled around it to encourage more participation. As in early Christian times, the priest now faces the congregation. A pulpit and baptismal font are also important liturgical centers near the congregation. Extra-liturgical centers are now considered liturgically redundant because of the primacy and ex-

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226. See S. CREWE, *supra* note 220, at 88; MODERN CHURCH ARCHITECTURE, *supra* note 6, at 192-264; Jaeger, *supra* note 181, at 2. Over the centuries, many Protestant communities relaxed their early austerity, accepting more traditional emphases and abandoning much of the hostility and distrustful attitude toward "Catholic" architectural and art forms. Neo-classical architectural forms became widespread as well. M. GEISINGER, *supra* note 203, at 113; E. MILLS, *supra* note 197, at 26; R. ROBISON, *supra* note 203, at 15; Steege, *The Book of Plans and the Early Romanesque Revival in the United States: A Study in Architectural Patronage*, 46 J. SOC'Y ARCHITECTURAL HISTORIANS 215 (1987). Note that Baptists and Methodists continued to build large, non-Gothic preaching halls throughout the nineteenth century. E. MILLS, *supra*, at 25-26.

227. G. SMITH, *THE NEW CHURCHES OF EUROPE* 11 (1963); MODERN CHURCH ARCHITECTURE, *supra* note 6, at (i), 1-3, 60-61.

228. G. SMITH, *supra* note 227, at 11.

229. R. GIESELMANN, *supra* note 183, at 20; G. LANE, *supra* note 194, at 16.

230. It is "highly recommended that side altars be removed so that they do not distract from the liturgical unity and centrality of the one altar of sacrifice." *Struempff v. McAuliffe*, 661 S.W.2d 559, 561 (Mo. Ct. App. 1983) (citation omitted).

clusivity of the one central altar.<sup>231</sup>

This new understanding of the Catholic Mass has affected not only interior furnishings but the entire building configuration and has resulted in numerous

experiments with novel types of church plans based on the square, the circle, the ellipse, the trapezoid. Such plans are not primarily the result of the freedom conferred by modern methods of construction. They are the outcome of the Church's new understanding of itself, and of the liturgy in which its essential character should be most fully realized and made manifest . . . .<sup>232</sup>

Older Catholic architectural forms expressed "an entirely different understanding of the liturgy, and of the function of the church building, from that now current in Liturgical Movement circles."<sup>233</sup> Prior to the Second Vatican Council, Catholic churches located the sacred mystery on an altar against a wall distant from the congregation. New floor plans place the sacred table in the midst of the people, suggesting that the mystery is among them.<sup>234</sup> These liturgical changes, rooted in new theological emphases and sweeping reforms in ecclesial self-understanding, were "bound to drastically alter the layout and design of Catholic places of worship."<sup>235</sup> The dispute in *Society of Jesus* illustrates the dilemma of an evolving self-understanding of a religious tradition and attempts by the state to enshrine the architectural embodiments of an earlier self-understanding.<sup>236</sup>

The long term evolution of architecture of the American Jewish community provides an excellent example of architectural development when design is not officially constrained. Historically,

231. MODERN CHURCH ARCHITECTURE, *supra* note 6, at 60.

232. *Id.* at 61 (quoting Hammond, "A Liturgical Brief," ARCHITECTURAL REVIEW (Apr. 1958)).

233. *Id.*

234. Marty, *Introduction*, in M. GEISINGER, *supra* note 203, at 10.

235. See EDITORS OF ARCHITECTURAL RECORD, *supra* note 179, at 53; R. GIESELMANN, *supra* note 183, at 20. One Catholic theologian writes:

The church building should not only furnish the appropriate space where [the Eucharist] can be performed in the proper manner by the living Church, but beyond that, it should be a symbol of the Body of Christ; it should clearly state that the entire congregation takes part in the liturgy, and convey the family-like experience of the community of God's People, reflecting tangibly its supernatural mystery.

J. DAHINDEN, *supra* note 180, at 59.

236. For a discussion of *Society of Jesus*, see *supra* notes 148-74 and accompanying text.



much of Jewish architecture was adapted from pre-existing Christian and Moslem forms<sup>237</sup> as a result of repeated persecution and pressures for cultural assimilation.<sup>238</sup> In America, in keeping with this pattern of adaptation, synagogue designs have been based on the colonial meetinghouse, Romanesque and Gothic forms, and even the Byzantine central plan.<sup>239</sup> Many pre-Christian forms were adapted as well, particularly those of the eighteenth and nineteenth century Greek and Roman revival.<sup>240</sup> Additionally, many nineteenth century synagogues borrowed from the Moorish mosque form because of Islamic associations with the ancient Near East.<sup>241</sup> In the context of these adaptations, Jewish communities were concerned to ensure only that particular, narrowly-defined liturgical needs were properly accommodated.<sup>242</sup> By the mid-twentieth century, however, many Jewish communities in America realized that such willing acceptance of architectural forms had often yielded theologically inappropriate space more suited to non-Jewish faiths. As a result, these communities began to develop an indigenous synagogue architecture sensitive to Jewish history but not constrained by other historical forms.<sup>243</sup> This

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237. The central purpose of the Jewish house of prayer is the reading of the Torah. See P. THIRY, *supra* note 6, at 19J. Because of the Torah's centrality, like the centrality of the Eucharist for Catholics and of the Word for Protestants, the ark which houses the Torah and the bimah from which it is read are significant liturgical centers. S. BATKIN, *supra* note 186, at 7; P. THIRY, *supra*, at 19J. There is much debate over whether the ark or bimah is the central focus of the service, or whether they are co-equal. Generally, visual attention is directed to the ark, bimah or both. S. BATKIN, *supra*, at 7.

238. So concerned with the appearance of assimilation, Jewish communities during medieval times kept ornamentation exclusively within the synagogue interior. Altshuler & Altshuler, *Judaism and Art*, in ART, CREATIVITY, AND THE SACRED, *supra* note 179, at 160.

239. G. BERNSTEIN & G. TINTEROW, *supra* note 179, at 10-12, 17; THE JEWISH MUSEUM, *supra* note 179, at 7.

240. G. BERNSTEIN & G. TINTEROW, *supra* note 179, at 11, 16.

241. *Id.* at 13; THE JEWISH MUSEUM, *supra* note 179, at 7; M. GEISINGER, *supra* note 203, at 105.

242. G. BERNSTEIN & G. TINTEROW, *supra* note 179, at 9-17; M. GEISINGER, *supra* note 203, at 63; P. THIRY, *supra* note 6, at 16J. It is also significant to note that Judaism, unlike Christianity and Islam, does not seek converts. The desire to build magnificent structures for the purpose of attracting new converts is therefore absent from Jewish architectural tradition. C. KRINSKY, *supra* note 177, at 13-14.

243. G. BERNSTEIN & G. TINTEROW, *supra* note 179, at 30-31. Reform Judaism has provided leadership in this movement toward indigenous architectural forms. THE JEWISH MUSEUM, *supra* note 179, at 17-18.

For Judaism in general, and Reform Judaism in particular, the liturgy has evolved from one in which spectators witness an inaccessible event, to one that is participatory in nature, with an emphasis on sermon and simplicity. M. GEISINGER, *supra* note 203, at 135; THE JEWISH MUSEUM, *supra*, at 11. Not surpris-

ongoing process of architectural innovation reflects the process of evolving ecclesial identity and self-determination.

Unlike the experimentation with unconventional architectural expression common in modern Judaism, the Moslem community in America, with highly developed Islamic forms of the past, desires to retain elements of its former architectural heritage as a way of anchoring communal identity and religious vitality in the face of a predominant western culture.<sup>244</sup> As with the architectural experimentation of the early Protestant Reformation and the reappropriation of older forms in Gothic Revival, the same tensions between ahistoricism and traditionalism are present in Islamic architecture today throughout the world. Some mosque designs, shaped by the architecture of this century's modernists, depart radically from the past, while others are dictated by a nostalgic literalism of rigidly repeated forms.<sup>245</sup> But the extremes have largely been avoided. "Most mosques constructed today incorporate a degree of architectural revivalism, or to be more specific, a replication of elements from the pre-Modern Islamic past."<sup>246</sup>

### C. *Architecture's Effects on the Worshipper*

Both the exterior facade and sanctuary have meaning for and shape the identity and attitude of the religious community and the individual worshipper.<sup>247</sup> The exterior facade of the house of

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ingly, modern Jewish designs have tended toward a central plan, emphasizing concentric seating both for auditory and visual purposes and for a greater participatory sense. For a general discussion of the historic interrelation of Judaism and art, see Altshuler & Altshuler, *supra* note 238. Additionally, because a synagogue is both a house of worship and a house of study, an architectural debate exists over the way in which this dual nature should be embodied. This debate mirrors the theological debate over the relationship between worship and study. For examples of fascinating synagogue designs of the mid-to-late twentieth century, see B. HAYES, *TRADITION BECOMES INNOVATION: MODERN RELIGIOUS ARCHITECTURE IN AMERICA* (1983). Note in particular Frank Lloyd Wright's synagogue in Elkins Park, Pennsylvania, which drew on historical allusion and symbolism of Mt. Sinai and the tent tabernacles to express continuity and connection with ancient tradition yet is not dictated by it. G. BERNSTEIN & G. TINTEROW, *supra* note 179, at 32.

244. Al-Asad, *supra* note 188, at 22. Al-Asad discusses the international Moslem community and uses examples from around the world; these international trends have been extrapolated to the American Moslem community.

245. *Id.* at 22-23.

246. *Id.* at 22.

247. J. WHITE, *supra* note 179, at 201.

For those who do enter the church, the interior is a means of teaching what it is to be the Church and what the Church does. Whereas the exterior can only proclaim in a general way the relevance, significance

worship, because of its semiotic qualities, promotes stability and identity for the religious community. Of the many different communities that may become attached to the building, the religious community has the closest ties; the house of worship becomes its "anchor of identity."<sup>248</sup> Because the structure houses the sanctuary, the worshipper's identification with the exterior is intensified; not only does it bond the members of the group to a place and to one another (as a non-religious structure might for a local community), it also provides the symbol and environment for religious formation, spiritual development and communal experience. Obviously the sanctuary itself is rich with semiotic qualities for those who use it, differing radically in degree from other interiors that are commonly considered landmarks, such as theaters and department stores.<sup>249</sup>

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and sincerity of the Church to men's lives, the interior in a very explicit manner shows forth what it is the Church does in its life together: study, social fellowship, and above all else worship. It is especially important that the building affirms that it represents a community for whom worship is the primary act that constitutes and expresses the oneness of the group.

Architecture, then, can be a means of teaching those who enter the Church what it is to be one in Christ. Liturgical architecture provides the space and tools in which the central acts of the Christian life are performed in the common worship of God.

*Id.*

248. J. COSTONIS, *supra* note 3, at xvi. The cognitive and emotional messages that the religious community associates with its house of worship "serve as magnets, bonding constituency to [structure]." *Id.* at 18. This is why demolition, or mere closing, of a house of worship is such a painful experience for religious communities. See, e.g., *Pillar of Fire v. Denver Urban Renewal Auth.*, 509 P.2d 1250, 181 Colo. 411 (1973) (challenge by religious community to eminent domain taking and demolition of house of worship which was birthplace of its denomination); Windsor, *Twenty Parishes on Detroit Hit List Spared*, Nat'l Catholic Rep., Jan. 19, 1990, at 3, col. 1 (initial announcement of church closings met with "pain, anger and protests from opponents who saw it as nothing short of a disaster"); *Detroit Cardinal Closes 43 of City's Parishes*, Nat'l Catholic Rep., Oct. 7, 1988, at 20, col. 1.

249. For a general discussion of protections from government interference in the design of the interior of a sanctuary, see *Struempf v. McAuliffe*, 661 S.W.2d 559, 560-61 (Mo. Ct. App. 1983) (civil court must defer to hierarchy's decision on disposition of altars in dispute between hierarchy and parishioners), *cert. denied*, 467 U.S. 1216 (1984). See also *Presbyterian Church (U.S.A.) v. United States*, 752 F. Supp. 1505 (D. Ariz. 1990). In *Presbyterian Church*, religious communities sued the government on free exercise grounds for surveillance activities conducted by the Immigration and Naturalization Service (INS). Among other things, the INS attended and recorded Bible studies and prayer services. The court ruled that the government is limited in the types of surveillance that it can undertake in connection with religious activities. In other words, the government "does not have unfettered discretion to conduct investigations and law enforcement activities." *Id.* at 1515.

The house of worship could be viewed as a spiritual "home," analogized to the significant privacy interest recognized by the Supreme Court in the interior

The sanctuary and exterior are closely interrelated. As discussed above, religious choices for the interior may influence the overall structural design; recall the examples of the longitudinal and central-plan configurations for Christian houses of worship rooted in liturgical and theological choices made for the interior space. It is thus inappropriate to separate the discussion of the architectural significance of houses of worship into "exterior" and "interior" elements.<sup>250</sup> The Massachusetts Supreme Judicial Court failed to perceive the interdependence of interior and exterior when it wrote in *Society of Jesus* that "[t]he government intrusion here [into the sanctuary] is substantially more invasive than restrictions on building exteriors, reaching into the church's actual worship space."<sup>251</sup> Obviously the court terminated its analysis prematurely; this error is understandable since only a connection between sanctuary design and worship was of significance in the state constitutional analysis.<sup>252</sup>

The sanctuary creates and reinforces an atmosphere that is intended to move the worshipper toward the transcendental by evoking emotional, psychical and intellectual responses.<sup>253</sup> This

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of the home. See *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965). But see *Osborne v. Ohio*, 110 S. Ct. 1691 (privacy interest in home outweighed by state's compelling interest in protecting victims of child pornography), *reh'g denied*, 110 S. Ct. 2605 (1990).

250. C. NORBERG-SCHULZ, *supra* note 3, at 71.

The built form embodies the way something is between earth and sky, whereas organized space admits its actions. In both cases a relationship between outside and inside comes into play, where the exterior acts as preparation for the interior. The built form is facade as well as interior elevation, and spatial organization consists in a path which leads from the outside towards a goal within.

*Id.*

In many cases, the exterior shapes of churches give no indication of how the interiors have been partitioned. As with any organism, however, the inside and outside of a church should be correlated if its symbolic, functional integrity is to be convincing. The interior space will then influence certain aspects of the exterior, and vice versa.

B. HAYES, *supra* note 243, at 112.

251. See *Society of Jesus*, 409 Mass. at 40 n.2, 564 N.E.2d at 572 n.2. The court distinguished the case at hand from precedent which upheld a statute requiring government approval for renovations to the exteriors of buildings, including religious buildings. *Id.* at 42-43, 564 N.E.2d at 573-79 (citing Opinion of the Justices, 333 Mass. 783, 128 N.E.2d 563 (1955)).

252. *Id.* at 41, 564 N.E.2d at 573.

253. J. DAHINDEN, *supra* note 180, at 73-75, 87; P. THIRY, *supra* note 6, at 17P-18P, 81C; J. WHITE, *supra* note 179, at 5-8. The orientation of the worshippers to the liturgical centers is a critical factor in the religious experience. In the early Christian church, worshippers stood, gathering around the liturgical center in use. Since the fourteenth century seating has been arranged to inspire reverence or to encourage participation depending on distance from and orientation

atmosphere grows out of the interrelation of the building plan, the space, the depth and height, the materials and textures, lighting, color and ornamentation.<sup>254</sup> For Christian houses of worship, a longitudinal orientation places the worshipper on a "path of salvation," moving toward the altar where Christ is "revealed at the end of a symbolic, axial succession of spaces."<sup>255</sup> Quite different from this emphasis on movement is the central plan with its "static, centralized rotunda, which does not contain any pronounced direction" but which places the worshipper immediately with Christ "at the center."<sup>256</sup> This sense of "movement versus stasis" on the horizontal plane also occurs on a vertical plane, in sanctuaries that soar upward as opposed to those creating a more intimate enclosure.<sup>257</sup>

In addition to the horizontality and verticality of the structure, inclusion or absence of particular elements within the interior is critical for the creation of the proper atmosphere. For early Orthodox Christians, the "shimmering mosaic," candles in dark space and incense together created an aura of a sacred place.<sup>258</sup> Medieval Christians were encouraged to participate in lay devotional activities through richly decorated and visually readable spaces so dedicated. Gothic Revivalists consciously used ornamentation to create an environment conducive to regenerating faith.<sup>259</sup> A sparsely decorated environment may also be critical to creating the intended atmosphere. Some religious traditions within Judaism, Islam and Protestantism use the absence of signs and symbols to express an awe-inspiring "sacred void."<sup>260</sup> Sephardic congregations, for example, retain a vacant

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to the liturgical centers. The current emphasis for many Christians and Jews is on fan-shaped or concentric seating around liturgical centers, with moveable seating to accommodate different services and numbers of people. G. BERNSTEIN & G. TINTEROW, *supra* note 179, at 30-34; EDITORS OF ARCHITECTURAL RECORD, *supra* note 179, at 52-53. Moslems kneel on prayer rugs, close to one another, facing the qibla and mihrab. J. DAVIES, *supra* note 1, at 119-20; H. JANSON, *supra* note 6, at 228-31. The individual and communal experiences of awe, participation and humility differ dramatically in different settings.

254. See generally J. DAVIES, *supra* note 1; B. HAYES, *supra* note 243.

255. C. NORBERG-SCHULZ, *supra* note 3, at 80-81.

256. *Id.* Throughout history these "themes of axiality and centralization" have been integrated to differing degrees. *Id.*

257. Robinson, *A Glimpse into Poland, An Interview with Architect Leonard Rempel*, 24 FAITH & FORM 28-29 (Winter 1990-91).

258. R. KENNEDY, *supra* note 179, at 264-65.

259. See *supra* notes 219-26 and accompanying text.

260. This "sacred emptiness" does not refer simply to a building without clutter, "not an emptiness by privation, but . . . an emptiness by inspiration. [It is] an emptiness where we feel that the empty space is filled with the presence of

area in front of the bimah in order to create "sacred ground, facing the ark."<sup>261</sup> The austere environments of radical Protestant communities were intended to focus the believer on the basic tenets of the faith and on the clarity of the religious message.

Artistic and literary elements within the structure can also contribute significantly to the worship environment. Throughout history, the type and degree of ornamentation flourishing in ecclesiastical structures have been correlated with the religious community's understanding of the role of the arts and, for many religions, prohibitions against idolatry. The basilicas of Christianity's first millenium were rich in symbolism, filled with murals and mosaics that were justified despite the prohibition on idolatry because "painting conveys the Word of God to the unlettered."<sup>262</sup> In fact, early and medieval Christians could read the interior and exterior walls of the churches. The mosaics, frescoes, paintings, stained glass windows and statuary containing "realistic presentation or . . . symbolism, heraldry, allegory, or mystical portrayal"<sup>263</sup> provided them with a visual narrative of biblical stories and church tradition, with role models of the church and stimulated extra-liturgical devotional activities.<sup>264</sup> Orthodox Christians raised representational art to a new spiritual level in their iconography. Icons, painted under strict rules of color, composition and personal asceticism, were objects for meditation through which one met the Divine.<sup>265</sup>

For Judaism and Islam, however, prohibitions against idolatry had more profound impacts, encouraging the development of nonrepresentational art forms.<sup>266</sup> Judaism has in modern times grown more comfortable with representational art within the wor-

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that which cannot be expressed in any finite form." Tillich, *Honesty and Consecration in Art and Architecture*, in *ON ART AND ARCHITECTURE*, *supra* note 179, at 221, 227.

261. THE JEWISH MUSEUM, *supra* note 179, at 16.

262. H. JANSON, *supra* note 6, at 191, 194-95, 198-99.

263. P. THIRY, *supra* note 6, at 75C.

264. P. HARDY, *A GUIDE TO THE CARE AND PRESERVATION OF MEDIEVAL CATHEDRALS AND CHURCHES* 1 (1983); H. JANSON, *supra* note 6, at 265, 309; R. KENNEDY, *supra* note 179, at 191; J. WHITE, *supra* note 179, at 73-77.

265. H. JANSON, *supra* note 6, at 214; R. KENNEDY, *supra* note 179, at 264-65. "Icon is distinguished from idol. Worshipping an icon is not an idolatrous activity, for the devout pray *through* the icon to the sacred presence manifested therein. In that sense, the icon is a threshold, a window to a sacramental encounter." M. ELIADE, *supra* note 179, at xiii.

266. *But see* Altshuler & Altshuler, *supra* note 238, at 155, 157-58 (discussing twentieth century archaeological findings of extensive use of representational art in late antiquity).

ship space, so that both types of decoration flourish in synagogues. Islam's prohibition on idolatry has resulted in an emphasis on nonrepresentational geometric decoration and calligraphic reproduction of words of the Koran.<sup>267</sup> Islam continues to develop its rich tradition using "patterns that suggest infiniteness as a quality of transcendence."<sup>268</sup>

Protestant Christians, consistent with their emphasis on the preached Word, commonly replaced images with text.<sup>269</sup> Tablets and plaques containing creedal and biblical statements were placed on the walls. As with Judaism and Islam, the Protestant concern over idolatry was great. Although this concern has been relaxed over time, many Protestants prefer (on theological grounds) nonrepresentational art, clear glass and statuary that does not stand independently.<sup>270</sup> Both the content and type of vehicle for expression—representational art and images, nonrepresentational art, geometric designs and words of the Hebrew Scriptures, Christian Bible and Koran—help create the sanctuary environment and have a profound effect on the worshipper.

Thus, the overall sanctuary design evokes a variety of emotional, cognitive and psychic responses and is capable of inspiring reverence, piety, awe, love and joy. The environment might enable one to experience deeply prayer or meditation, or to share a loving communal experience. An unsuccessful design, however, might hinder the intended religious experience or physically structure the communal experience in a way that is inconsistent with the religion's teachings or mission.<sup>271</sup> Moreover, it is important to note that the worship environment affects the worshipper even outside the scope of a particular religious service. Given the link between the religious experience and the place in which it is

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267. H. JANSON, *supra* note 6, at 228-42; *Religious Buildings*, *supra* note 6, at 28.

268. Ibsen al Faruqi, *supra* note 179, at 173. "[T]he transcendent realm, by Islamic definition, could not be depicted by images from nature. The Muslim artist, therefore, sought to express the nonrepresentableness, the inexpressibility of the divine; and in this pursuit he created structures in the visual arts, music, and literature to suggest infinity." *Id.*

269. D. UPTON, *supra* note 179, at 50-55; J. WHITE, *supra* note 179, at 83.

270. Tillich, *Contemporary Protestant Architecture*, in ON ART AND ARCHITECTURE, *supra* note 179, at 217-20. "Abstract nonrepresentational works can have great symbolic power, often far more than realistic forms." *Id.* at 219. For a further explication of the argument that art does not need to have religious content to be religious, see Tillich, *On the Theology of Fine Art and Architecture*, in ON ART AND ARCHITECTURE, *supra* note 179, at 204-12; Tillich, *Theology and Architecture*, in ON ART AND ARCHITECTURE, *supra* note 179, at 192.

271. E. LYNN, *supra* note 1, at 272.

experienced, the worshipper internalizes the sense of space (horizontal and vertical), the images, symbols, words and sacred emptiness, connects them with his or her communal experience and carries them within in individual prayer, meditation and theological understanding.<sup>272</sup>

#### D. *The Religious Architecture Debates*

Design standards are far from settled. Now, as always, there are debates and disagreements among architects, design critics and historic preservationists as to appropriate aesthetic and functional form. The multiplicity of architectural styles and movements born out of such discourse continues to fuel it.<sup>273</sup> Set against this backdrop of architectural variety are religious communities that expend significant energy on scholarly thought, theological reflection and ecumenical adaptation in an attempt to achieve the proper architectural expression that is consistent with their doctrine, liturgy, ecclesial identity and mission. As two Protestant theologians have written:

Architecture for churches is a matter of gospel. A church that is interested in proclaiming the gospel must also be interested in architecture, *for year after year the architecture of the church proclaims a message that either augments the preached Word or conflicts with it.* Church architecture cannot, therefore, be left to those of refined tastes, the aesthetic elite, or even the professional architect. If the gospel of Christ is worthy of accurate verbal proclamation week by week, *it is also worthy of faithful architectural proclamation, where its message speaks year after year.*<sup>274</sup>

This concern for faithful architectural proclamation is not a modern phenomenon. It dates to ancient times.<sup>275</sup> It will always have

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272. See Costonis, *Law and Aesthetics*, *supra* note 3, at 397-401 (in complex relationship between viewer and environment, viewer is not mere passive receptor of images but actively provides meaning to images).

273. J. COSTONIS, *supra* note 3, at 62-63.

274. D. BRUGGINK & C. DROPPERS, *supra* note 203, at 1 (emphasis added). "Once a building has been set apart for worship it acquires [specific] meanings . . . If the meanings are not made manifest in the architecture, then the symbolic means of architecture will be 'speaking' of something different and there will be a conflict, an implied negation." R. MAGUIRE & K. MURRAY, *supra* note 179, at 9; see also S. TIGERMAN, *supra* note 179, at 15 ("Greek, Roman, and Gothic builders . . . never contradict[ed] the idea of God's presence.").

275. See generally C. NORBERG-SCHULZ, *supra* note 3.



as one of its focuses the tension between the departure from tradition and the reappropriation of tradition.

The debates continue in this century between those who would reject traditional forms and those who would replicate or adapt them. Mid-twentieth century Protestant theologians and architectural historians criticized widespread architectural revivalism and called for new forms to be born out of contemporary Protestant experience, rather than out of nostalgia for an earlier time. They would have preferred to see a continuation of the early Reformation architectural experiments focusing on unified space, and central placement of pulpit, altar-table and baptismal font as the primary liturgical elements.<sup>276</sup> Rejecting the Anglican conviction that the Gothic form was the Christian form and convinced that revivalism was only an emphasis on style and not on liturgical appropriateness or theological message,<sup>277</sup> these critics argued that Protestant churches had failed to see that “[c]hurch architecture is . . . first and foremost a matter of theology rather than a matter of style,”<sup>278</sup> and in so doing had allowed “traditional styles to dictate architectural heresies.”<sup>279</sup> Such strong language—the language of heresy—is employed because medieval Catholic forms were considered inconsistent with, or blatantly contrary to, much of Protestant liturgy, theology and doctrine.<sup>280</sup> Theologian Paul Tillich writes:

Churches that retain a central aisle leading to a removed altar as the holiest place, separated from other parts of the building, are essentially un-Protestant. . . . [T]hese remnants of the Catholic tradition are religiously inadequate for a Protestant architecture. No new church should have them, and existing churches should

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276. D. BRUGGINK & C. DROPPERS, *supra* note 203, at 125. For a further discussion of the argument that any “imitation” is dishonest, see Tillich, *Honesty and Consecration in Art and Architecture*, in ON ART AND ARCHITECTURE, *supra* note 179, at 221; Tillich, *Theology and Architecture*, in ON ART AND ARCHITECTURE, *supra* note 179, at 188.

277. P. THIRY, *supra* note 6, at 15-16, 6P.

278. D. BRUGGINK & C. DROPPERS, *supra* note 203, at 6.

279. *Id.* at 36. These critics of Protestant revival architecture blamed the churches for succumbing to a larger nineteenth century trend in which style was considered dominant, thus making it possible to separate the aesthetic attributes of a particular form from its theological roots. R. MAGUIRE & K. MURRAY, *supra* note 179, at 14.

280. E. LYNN, *supra* note 1, at 85-86; Tillich, *Contemporary Protestant Architecture*, in ON ART AND ARCHITECTURE, *supra* note 179, at 216-17.

be transformed as much as possible away from this old direction. . . .

. . . .

Today, genuine Protestant architecture is possible, perhaps for the first time in our history. For the early experiments were too swiftly engulfed by eclecticism to act as evolutionary factors in developing a recognizable Protestant architectural language. . . .

. . . [O]nly by the creation of new forms can Protestant churches achieve an honest expression of their faith.<sup>281</sup>

Tillich's call for sweeping renovations to de-Catholicize Protestant churches is a shocking suggestion. It does not seem limited to interior renovation. Certainly it was never accepted wholesale by mainline Protestant denominations, and it contradicts the ecumenism of recent times.<sup>282</sup> Furthermore, even if the critique of inauthenticity were correct, communities commonly live with architectural contradiction because "time so mesmerizes later generations that they preserve distinctive settings and places whose associations clash with current political, social or moral beliefs."<sup>283</sup>

Other critics have focused not on the inappropriate nostalgic yearnings for particular ecclesiastical designs, but on the functional irrelevance of such designs which may threaten a religious community's vitality. The structure itself may dominate the religious community and so rigidify doctrine that "revitalization of liturgy, strengthening of ecumenism, and reanimation of church," as well as developments in missional objectives, become impossible to envision because the structure so limits the range of imaginable alternatives.<sup>284</sup>

More recently, other critics have called for a return to traditional forms, for more aggressive borrowing from architectural heritage. Many "modern" forms have been unsuccessful, just as

281. Tillich, *Contemporary Protestant Architecture*, in *ON ART AND ARCHITECTURE*, *supra* note 179, at 217, 220 (emphasis deleted); see also P. THIRY, *supra* note 6, at 9P. For a discussion regarding design evolution in Judaism, see *supra* notes 237-43 and accompanying text.

282. But note that modern churches for both Protestants and Catholics are often central-plan, with fan-shaped or concentric semi-circle worship arrangements. R. LINDSTROM, *CREATIVITY AND CONTRADICTION: EUROPEAN CHURCHES SINCE 1970*, at 20 (1988).

283. Costonis, *Law and Aesthetics*, *supra* note 3, at 51.

284. E. LYNN, *supra* note 1, at 8-9.

unsuccessful as those early twentieth century cookie-cutter revival forms that "copied" earlier designs too literally.<sup>285</sup> They may appear stark or empty without being sacred, or excessively ornamental without having significance. In new construction, the adaptation, reappropriation and reinterpretation of earlier forms have become more common.<sup>286</sup> With respect to existing buildings, restoration and preservation have become quite popular within religious circles in the last two decades. Many religious communities are committed wholeheartedly to the preservation of their worship structures, taking great pride in their architectural and artistic heritage and in the messages of faith expressed thereby.<sup>287</sup> Many have requested or supported the landmark designation of their houses of worship. Others, through building inventories and determinations of building condition, have undertaken sophisticated preservation efforts through wholly internal processes without governmental oversight.<sup>288</sup> Numerous private efforts are currently underway to offer financial and technical assistance to religious communities to make rehabilitation a realistic option.<sup>289</sup>

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285. For a critique of rigid and sterile modernist forms, see generally, R. VENTURI, *COMPLEXITY AND CONTRADICTION IN ARCHITECTURE* (1966). For criticism of copies of past architectural forms, see P. THIRY, *supra* note 6, at 6P.

286. See generally, R. VENTURI, *supra* note 285.

287. Many religious communities were avid preservers of their architectural heritage and artistic treasures long before preservation became an important government program. This is not to say that religious communities do not require technical assistance for restoration and preservation work, and in fact, many organizations have emerged to provide just such services. See generally *COMMON BOND* (quarterly publication of New York Landmark Conservancy for preservation of religious buildings); *INSPIRED* (quarterly publication of Philadelphia Historic Preservation Corporation devoted to preservation of historic religious buildings). A series of "Sacred Trusts" conferences sponsored jointly by local preservation organizations and religious groups from various parts of the country offer programs on preservation and restoration techniques and fundraising. Because these private organizations are closely linked to governmental preservation programs, however, certain forms of assistance may be available only on the condition that the church submit to landmark commission jurisdiction. Interview with N.J. L'Heureux (May 21, 1990).

288. For examples of internal church commitment to preservation and creation of sophisticated internal preservation commissions, see *ARCHDIOCESE OF SANTA FE, REPORT OF THE SELECT COMM. ON THE PRESERVATION OF NEW MEXICO HISTORIC CHURCHES* (1987); *ARCHITECTURE AND BUILDING COMM'N OF THE ROMAN CATHOLIC DIOCESE OF NEW YORK ARCHITECTURE AND BUILDING IN THE DIOCESE OF ALBANY* (1982); *BISHOPS' COMM. ON THE LITURGY, NAT'L CONFERENCE OF CATHOLIC BISHOPS, ENVIRONMENT AND ART IN CATHOLIC WORSHIP* (1977).

289. See *supra* note 287. The Unitarian community that owns Unity Temple, a Frank Lloyd Wright design, has granted a facade easement (interior and exterior) to the Landmarks Preservation Council of Illinois, a private, non-profit preservation organization which now holds the right to enforce specific preser-

The debates over proper architectural expression evidence the seriousness with which religious communities and their members approach the concern for architectural authenticity. The content of the criticisms differs for different religious traditions, in different places and in different cultural contexts. Suppose that a religious community, or even an entire religious tradition, after assessing such a criticism, comes to the conclusion that the religious statement made by its worship structure is *not* valid, *not* consistent with its identity or doctrine or liturgical needs, that it was never, or is not now, a "faithful proclamation." Can the government control the appearance of the house of worship? I will now take up that question.

#### V. CONSTITUTIONAL LIMITS TO DESIGN CONTROL

The symbiotic relationship between religion and architecture discussed in the previous section was given minimal recognition by the Seattle and Boston landmarks commissions, whose actions were struck down in *First Covenant Church v. City of Seattle*<sup>290</sup> and *Society of Jesus v. Boston Landmarks Commission*.<sup>291</sup> For instance, the Seattle ordinance designating First Covenant Church a landmark contained a liturgical exemption which gave a nod to the connection, noting that architectural change may be appropriate to the liturgy.<sup>292</sup> The Boston Landmarks Commission was obviously uneasy about its purported jurisdiction over the side altar, signified by its ultimate retreat on the issue.<sup>293</sup> The error of both commissions lay in their overly expansive understanding of what was within their jurisdiction. In Seattle, the liturgical exemption presumed that non-liturgical elements were clearly within the board's jurisdiction; in Boston, the commission presumed that every element within the sanctuary except the side altars could be controlled. In both cases, the commissions saw nothing wrong with asserting a consultative role in design decisions which they had conceded were in fact religious.<sup>294</sup> These commissions failed to

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vation requirements. Segal, *Easing the Fundraising Process*, INSPIRED, May 1988, at 8.

290. 114 Wash. 2d 392, 787 P.2d 1352 (1990), *vacated and remanded*, 111 S. Ct. 1097 (1991). For a further discussion of *First Covenant*, see *supra* notes 137-47, 160-75 and accompanying text.

291. 409 Mass. 38, 564 N.E.2d 571 (1990). For a further discussion of *Society of Jesus*, see *supra* notes 148-74 and accompanying text.

292. See *supra* note 141 and accompanying text.

293. See *supra* notes 154-57 and accompanying text.

294. See *supra* notes 146-47, 154 and accompanying text.

acknowledge the presumptively religious nature of house of worship design. Such designs evolve out of theological traditions and play a role in the religious formation of worshippers, as well as a semiotic role as messages of faith and identifiers of ecclesial community. It is the state's role, and not the religious communities' design freedom, that must be limited.

The Washington Supreme Court and the Massachusetts Superior Court issued their decisions in *First Covenant* and *Society of Jesus*, respectively, prior to the United States Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*.<sup>295</sup> These state court decisions, holding landmark preservation of the exterior and interior of houses of worship unconstitutional as a violation of the free exercise clause, respectively, relied on the traditional, pre-*Smith* balancing test and judged the state's interest in historic preservation insufficiently compelling to justify the burden on religion.<sup>296</sup> *Smith's* departure from this conventional strict scrutiny review in the case of religion-neutral, generally applicable laws indirectly burdening religion now calls into question the appropriate constitutional approach for religious challenges to governmental design control.<sup>297</sup>

The direct appeal to the Massachusetts Supreme Judicial Court in *Society of Jesus*, taken after *Smith* was decided, resulted in an affirmance based solely on state constitutional grounds.<sup>298</sup> By avoiding federal jurisdiction to review its decision, the high court avoided *Smith* and spoke with finality on interior landmark designations of houses of worship.<sup>299</sup>

295. 110 S. Ct. 1595, 1604-06 (1990).

296. See *supra* notes 165-67 and accompanying text.

297. See *supra* notes 62-81 and accompanying text.

298. *Society of Jesus*, 409 Mass. at 43-44, 564 N.E.2d at 574 (1990) (holding designation unconstitutional under religion clause of Massachusetts Declaration of Rights). For a discussion of *Smith*, see *supra* notes 61-81 and accompanying text.

299. A decision by the highest court of a state that rests on "adequate and independent" grounds of state constitutional law cannot be reviewed by the U.S. Supreme Court. *Michigan v. Long*, 463 U.S. 1032, 1038 (1983). The Massachusetts decision on state constitutional grounds falls within this protection. Given the uncertainty of the future direction of federal free exercise protection after *Smith*, it is not surprising that the Massachusetts Supreme Judicial Court chose this route. It acted like the Minnesota Supreme Court, which has twice chosen to avoid the uncertainties of *Smith* by basing religious exercise decisions on state constitutional grounds. In *Minnesota v. French*, 460 N.W.2d 2 (Minn. 1990) (en banc), the court decided that the religious freedom of a landlord to refuse to rent to cohabitators outweighed the state's interest in promoting access to housing for non-married couples. *Id.* at 10-11. The court noted expressly that the Minnesota state constitution granted far greater protection to religious freedom than did the federal free exercise clause, declining to apply the federal Constitu-

Unlike the Boston case, *First Covenant* has become vulnerable to reversal. The City of Seattle's petition for certiorari to the United States Supreme Court was granted in March of 1991; the decision of the Washington Supreme Court was vacated and remanded for reconsideration in light of *Smith*.<sup>300</sup> On the same day, certiorari was denied to petitioners in *Saint Bartholomew's v. City of New York*.<sup>301</sup>

The Washington Supreme Court has the option of treating the case as a state constitutional matter,<sup>302</sup> as the Massachusetts Supreme Judicial Court did in *Society of Jesus*, in order to affirm its religious protections. The implications of the state-by-state protection of free exercise, however, in the absence of a substantial federal floor, are disturbing. It is not simply the case of state protections exceeding those provided by the federal Constitution, which is permissible in many contexts;<sup>303</sup> here the state constitu-

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tion in light of the "unforeseeable changes" brought about by *Smith*. *Id.* at 8-9. In *Minnesota v. Hershberger*, 444 N.W.2d 282 (Minn. 1989) (en banc), the Minnesota Supreme Court ruled that the Amish had a free exercise right to refuse to use the required orange triangles on their horse-drawn buggies to indicate slow moving vehicles. Gaudy colors offend Amish beliefs requiring simplicity and austerity. The court approved the Amish offer to use reflective tape as a less restrictive alternative that would serve the state's safety interest. *Id.* at 289. Upon appeal to the U.S. Supreme Court, the Court vacated and remanded *Hershberger* to the Minnesota Supreme Court for reconsideration in light of *Smith*. *Minnesota v. Hershberger*, 110 S. Ct. 1918 (1990) (mem.). On remand, the state court ruled for the Amish on state constitutional grounds. *Minnesota v. Hershberger*, 462 N.W.2d 393, 399 (Minn. 1990).

300. *City of Seattle v. First Covenant Church*, 111 S. Ct. 1097 (1991). Ironically, the Washington majority opinion took particular comfort in the apparent stability of the Supreme Court's free exercise jurisprudence just a few weeks before *Smith* was decided.

301. For a discussion of *Saint Bartholomew's*, see *supra* notes 132-36 & *infra* note 306 and accompanying text. The Second Circuit held that the New York City Landmarks law was generally applicable, facially neutral and religion neutral. The court held incorrectly that the law is generally applicable. See *infra* notes 306-08 and accompanying text. The court's holding that the law was religion-neutral depended entirely on the fact that the church claimed an economic burden resulting from the inability to demolish an ancillary structure and construct an office tower. These claims differ markedly from the analysis required when a house of worship is involved. See *infra* notes 309-13 and accompanying text. The Second Circuit's analysis is completely inappropriate in cases where houses of worship are involved, and where the constitutional protections outlined herein apply. See *infra* notes 306-88 and accompanying text. The Washington Supreme Court, when reconsidering *First Covenant* in light of *Smith* on remand, should ignore the Second Circuit's treatment of *Smith* and not infer any approval of the Second Circuit's reasoning from the Supreme Court's denial of certiorari in *Saint Bartholomew's*.

302. Note that the Washington Supreme Court relied on both the federal and state constitutions in its decision. *First Covenant*, 114 Wash. 2d at 401-09, 787 P.2d at 1356-61 (1990).

303. See *Michigan v. Long*, 463 U.S. 1032 (1983).

tions are being used to *restore* minimal protections. If, as a way of avoiding *Smith*, state courts continue to interpret their own constitutions, different standards will result throughout the nation for what should be a consistent protection enjoyed by religious persons and communities. Moreover, the argument has already been asserted that state protections of free exercise that attempt to restore the pre-*Smith* protections are in violation of the establishment clause.<sup>304</sup>

In the design control context it should be unnecessary to rely on state constitutions to protect the freedom of religious communities. First, it can be shown that *Smith* is inapplicable because it poses a direct burden on religious belief and practice, is not generally applicable, is not religiously neutral, implicates additional constitutional claims such as freedom of speech and constitutes a system of individualized assessment analogous to the unemployment compensation system. Furthermore, the state may find itself supporting one side in a religious dispute. The extent of the burden is simply too great to be outweighed by a strong state interest in aesthetic control of structures.

But even relying on the burden-compelling interest test is insufficient. This approach conceptualizes the problems involved too narrowly because of its exclusive focus on the free exercise clause, unconnected to those establishment clause precedents that protect religious individuals and communities from government interference and overreaching. Design control involves fundamental threats to religious liberty that are commonly associated with the classic established church. While these are not threats to the liberty of dissenting faiths resulting from an official preference of one faith, as would typically be the case, they are far worse: they are threats to the liberty of all religious communities because they result from the state's conviction that it can codesign religious architecture, consequently reserving for itself a role as co-author of doctrine and worship and of religious expression.<sup>305</sup>

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304. Motion for Rehearing for Ten Voters, *The South End Historical Society and the Boston Preservation Alliance at 3, Society of Jesus v. Boston Landmarks Comm'n*, 409 Mass. 38, 564 N.E.2d 571 (1990) (No. 5415).

305. Governmental control of ecclesiastical design is commonly identified with an established church. In many European nations that currently recognize official state churches, for instance, tax revenues support both the design and construction of houses of worship. Architects enter state-sponsored design competitions, and a committee of clergy, laity and architects selects a design from among those submitted. No discussion takes place between the architect and the particular religious community the building will be serving, but the state

The constitutional analysis set forth below focuses on the problems brought on by coercive design control measures. First, the discretionary, evaluative process associated with design control implicates the state in searching inquiries and discriminatory conduct; second, the coercive authority that results in ecclesiastical designs implicates the state in compelled and suppressed religious expression; and, finally, invasion in the relationship between the religious community and its adherents implicates the state in the religious processes of definition and inculcation of doctrine. Precedent for each position comes from both the free exercise and the establishment clauses, given their shared purpose in protecting religion from governmental interference. The analysis involves both a restoration of the balancing test under the free exercise clause and an exploration of limits to state action under the church autonomy cases and the establishment clause.

#### A. *Infirmities of the Design Control Process*

The evaluative process of governmental design control suffers from several constitutional infirmities under the religion clauses. First, design control of houses of worship is neither generally applicable nor religion-neutral. This means that, even after *Smith*, design control legislation continues to be subject to strict scrutiny as a burden on the free exercise of religion. Design control also implicates establishment clause concerns because the targeting of religion for regulation indicates the absence of a valid secular purpose. Further, design control inevitably and inexorably entangles the state into issues of religion and into the internal decisionmaking processes of religious communities, with the attendant danger that the state might lend its support to one side in a religious dispute.

Governmental design control legislation, together with its processes, does not take the form of "generally applicable" laws.<sup>306</sup> Landmark designation of individual structures or dis-

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specifies for the architect the design needs of the religious community. The state is heavily involved in attracting the best architects, sponsoring the competition, and ensuring that tax revenues are used for construction. R. LINDSTROM, *supra* note 282, at 76, 125.

306. In the landmark preservation case of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 132, *reh'g denied*, 439 U.S. 883 (1978), the Supreme Court stated that "New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city . . . ." A "comprehensive plan" does not necessarily mean a "generally applicable" law. Such a law is not "generally applicable" to all structures, even those that are eligible; it must be made operative with respect to a



tricts is triggered by a combination of petition, expert assessment of objective and subjective eligibility criteria and public participation and comment. Neighborhoods are not subject to architectural review until municipal design officials have identified areas of particular architectural value and the district has been created pursuant to zoning code amendment or special architectural ordinance. And the individualized evaluation of structure or district does not end here. The administration of design control ordinances depends on post-designation or post-identification control over individual proposals for alteration.<sup>307</sup> Within that process, the civil authorities review not only the architectural, historical, cultural and aesthetic aspects of the proposal but the economic position, internal operations, sincerity and motivations of the applicant.<sup>308</sup> A design control commission which singles out a structure or district and asserts its jurisdiction over it can in no way claim that such selective application of the law is "generally applicable." Even if all the buildings fulfilling such an objective criteria as age were required to be considered for landmark preservation, not all of the buildings would be designated because not all would fulfill the remaining subjective criteria of aesthetic or historic value. Because design control ordinances are not generally applicable, *Smith* is inapplicable; in the face of a demonstrated burden on religion caused by landmark designation or architectural control of a house of worship, the state must justify the burden with a sufficiently compelling interest.

While design control laws are facially neutral (i.e., religion is not singled out for discriminatory treatment in the text), the state

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particular structure or district by action targeted specifically at the structure or district. The *Penn Central* Court's statement regarding the comprehensive nature of the landmarks ordinance came in answer to the charge that the law constituted spot zoning. *Id.* Many types of land use regulation that are not generally applicable are not considered spot zoning because they are part of a comprehensive plan (e.g., provisions for planned unit developments and other types of floating zones that must be specifically applied to a given parcel). See C. BERGER, *LAND OWNERSHIP AND USE* 997-1007 (1983).

The United States Court of Appeals for the Second Circuit in *Saint Bartholomew's Church v. City of New York* confused "generally applicable law" with "non-discriminatory law" when it found the New York Landmarks Law to be both facially neutral and generally applicable within the meaning of *Smith*. *Saint Bartholomew's*, 914 F.2d 348 (2d Cir. 1990). A "discriminatory exercise of discretion" differs from a law that is structured to permit discretion in the law's application, and that therefore cannot be "generally applicable." *Id.* at 354-55.

307. For a discussion of these pre- and post-designation procedures, see *supra* notes 100-09 and accompanying text.

308. For a discussion of this process, see *supra* notes 100-09 and accompanying text.

action involved in design control is nonetheless “specifically directed at [a] religious practice.”<sup>309</sup> The alleged aesthetic, cultural, historical and architectural grounds on which the religious structures are subjected to design control are inseparable from the religious significance of the structure. Religion is the source from which any secular significance is derived. The architecture is the physical manifestation of religious expression; it is the result of religious choice; it structures the life and worship of the religious community; it is inseparable from its religious meaning and purpose; the structure is “pervasively sectarian.” The aesthetic, cultural, historical and architectural aspects of the structure do not provide design commissions with independent “neutral” or “secular” purposes for regulating houses of worship because, in the context of selective determinations regarding religious design, those non-religious criteria become religious criteria de facto.<sup>310</sup>

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309. *Smith*, 110 S. Ct. at 1596.

310. Non-religious criteria become religious criteria from the perspective of the religious community. In connection with the interior designation of Immaculate Conception Church, one amicus wrote: “[T]he religious nature of the church is inextricably bound up with the cultural and historical reasons why the Commission has singled out its interior for landmark status.” Brief of Amicus Curiae American Jewish Congress at 6, *Society of Jesus v. Boston Landmarks Comm’n*, 409 Mass. 38, 564 N.E.2d 571 (1990) (No. 5415) (footnote omitted).

By way of analogy, the anthropologist who makes it a practice to seek out and excavate graveyards of native americans would explain that his interests are entirely secular: scientific study of the rituals and beliefs of the people she studies. Viewed through another lens, however, the most salient feature of this anthropologist’s behavior is her relentless pursuit and desecration of the most sacred sites of a religious minority. It is small consolation for the minority to be told that their most hallowed places and objects are being singled out, precisely because of their religious significance to that minority, for the majority’s “secular purpose.”

*Id.* at 6 n.4.

Considering religion to be inextricably linked with religious architecture differs from the Court’s analytical device employed in the holiday display cases and public education cases where the Supreme Court separates religious and secular elements with ease. See *County of Allegheny v. ACLU*, 492 U.S. 573, 620 (1989) (Christmas and Chanukah are considered to have secular and religious components and state can legitimately celebrate secular component). In public education cases, the Court distinguishes impermissible religious ceremony from learning about religion. See *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963). The Bible can be studied for its historic and literary value, but not as religious doctrine. Justice Brennan recognized that religiously inspired literature is studied solely as “literary expression” and that “[t]he same may be said of a course devoted to the study of the arts; when the course turns to Gothic architecture, the emphasis is not on the religious beliefs which the cathedrals exalt, but rather upon the ‘aesthetic consequences of [such religious] thought.’” *Lynch v. Donnelly*, 465 U.S. 668, 712 (1984) (Brennan, J., dissenting) (citations omitted).

The notion that design control is “neutral” because textually non-religious criteria are employed is simplistic and untenable. Because the *object* of design control is selective restriction based upon semiotic characteristics, and because the semiotic and religious aspects of houses of worship are inextricably linked, the object of design control as applied to houses of worship is the deliberate targeting of religion.<sup>311</sup> Both religion clauses are concerned with preventing such selective application and enforcement of laws against religious communities.<sup>312</sup> *Smith* is not applicable because the object of design control, not simply its effects, is at issue. Strict scrutiny continues to apply to this process which evaluates and restricts religious architecture through an ad hoc, discretionary process.<sup>313</sup>

This understanding of the building in its totality is supported by Supreme Court precedent. The Court has consistently rejected the view of a religious structure as a mere physical, secular shell in which religious activities occur, presuming instead that buildings used for religious purposes do possess a religious nature, particularly in the context of pervasively sectarian uses for schools and worship.<sup>314</sup> State and lower federal courts have also

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This device of treating religion as divisible into secular and religious components, and permitting the state to deal with the secular segment, is limited to those situations in which the state deals with its own institutions, such as public property and public schools. Pursuant to design control, however, the state deals with the central institution of religious communities—their own houses of worship. The attempt to separate religious from secular is misguided.

The utter failure of courts to recognize the semiotic properties of ecclesiastical design is found in dicta in *Saint Bartholomew's*: “Because of the importance of religion, and of particular churches, in our social and cultural history, and because many churches are designed to be *architecturally attractive*, many religious structures are likely to fall within the neutral criteria . . . set forth by the Landmarks Law.” *Saint Bartholomew's*, 914 F.2d at 354 (emphasis added). The court artificially separated style from theological meaning, and aesthetics from religion.

311. *Smith*, 110 S. Ct. at 1600 (“It is a permissible reading of the text . . . to say that if prohibiting the exercise of religion . . . is *not the object* of the tax but merely *the incidental effect* of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”) (citations omitted) (emphasis supplied). I am indebted to Professor Douglas Laycock for these observations.

312. See *supra* notes 12-20 and accompanying text.

313. Intent to discriminate or target religion in order to harm the religious community has never been required to show a burden on free exercise or an establishment. Just because the design control authority believes it is acting on purely neutral, technical grounds does not make it so. Even a stated intent not to violate constitutional rights does not convert an unconstitutional action into a constitutional one. See *supra* note 151 and accompanying text.

314. See *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 121 (1952) (Frankfurter, J., concurring) (house of worship is “not just a piece of real estate . . . [but] the outward symbol of a religious faith”); cf. *Penn Cent. Transp. Co. v.*

considered a house of worship inseparable from the religious purposes to which it is dedicated and the religious meaning intended by it and associated with it.<sup>315</sup>

Subjecting the religious community to this selective, non-neutral design control process gives rise to another set of free exercise and establishment clause concerns—violations of institutional autonomy and state entanglement in religious affairs.<sup>316</sup>

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City of New York, 438 U.S. 104 (1978); J. COSTONIS, *supra* note 3, at 92-93 (criticizing result in *Penn Central*); Costonis, *Law and Aesthetics*, *supra* note 3, at 446-49 (same).

315. For a further discussion of the Court's view, see *infra* notes 383-84 and accompanying text. Several state courts have acknowledged the importance of houses of worship to continued free exercise of the religious community. See *Westchester Reform Temple v. Brown*, 293 N.Y.S.2d 297, 303, 239 N.E.2d 891, 896 (1968) ("Religious structures enjoy a constitutionally protected status which severely curtails the permissible extent of governmental regulation in the name of the police powers . . ."). The clearest exposition on the significance of the house of worship structure itself came in *Pillar of Fire v. Denver Urban Renewal Authority*, 181 Colo. 411, 509 P.2d 1250 (1973). In *Pillar of Fire*, a religious community challenged the government's authority to take for demolition, by eminent domain, its original house of worship which had tremendous historic and symbolic significance for the members. The Colorado Supreme Court stated:

Not only is the building in question being used for religious purposes, but the building and the site are alleged to have unique religious significance for the Pillar of Fire. . . .

. . . .  
[R]eligious faith and tradition can invest certain structures and land sites with significance which deserves First Amendment protection.

*Id.* at 419, 509 P.2d at 1254 (emphasis supplied). The Court required the city of Denver to demonstrate a compelling government interest before it would permit the city to demolish the structure in connection with its urban renewal plans. *Id.* at 418, 509 P.2d at 1253. *But see* *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir.) (zoning ordinance prohibiting church construction in residential zone did not violate free exercise clause), *cert. denied*, 464 U.S. 815 (1983).

316. As Justice Brennan points out in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987):

What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its Free Exercise activity.

*Id.* at 343 (Brennan, J., concurring) (citation omitted).

[R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] [C]ause."

*Id.* at 341 (Brennan, J., concurring) (quoting Laycock, *supra* note 15, at 1389).

There are no neutral principles by which design control authorities can separate the secular from the religious and make wholly neutral, secular determinations.<sup>317</sup> The Court has been intolerant of discretionary statutory interpretation that disadvantages religious communities and substitutes state decisions for those made by religious communities.<sup>318</sup> Design control authorities will argue that it is possible to focus on the style, workmanship, craft and artistry on solely technical and aesthetic grounds without affecting religious content or determining religious meaning. But

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317. For a discussion of the neutral principles approach employed in resolving intra-church property disputes, see *supra* notes 47-50 and accompanying text.

318. "Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question," *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972), the state must often determine what constitutes religion, particularly to determine eligibility for statutory exemptions or protection under the religion clauses. See *Fowler v. Rhode Island*, 345 U.S. 67 (1953). In *Fowler*, the Court held that the "address" of a Jehovah's Witness minister in a public park was a sermon. The Court noted that "it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment." *Id.* at 70; see also *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (while administering programs in which religious communities take part, the state cannot "determine which expenditures are religious and which are secular."); *Cantwell v. Connecticut*, 310 U.S. 296, 304-07 (1940) (administrators cannot have the discretion to determine what is or is not religion when exercise of religious rights will be restrained).

In *Beit Havurah v. Zoning Board of Appeals*, 177 Conn. 440, 418 A.2d 82 (1979), the Connecticut Supreme Court stated:

Nontraditional as well as traditional synagogues are protected by the provisions of the state and federal constitutions guaranteeing freedom of religion. The legitimacy of nontraditional religious practices cannot depend upon what is customary among more traditional religious groups. . . . Beit Havurah has testified, without contradiction, that sleeping accommodations are essential to its religious fellowship, and that their absence would severely limit its religious activities. . . . There was therefore no basis in fact for the board's conclusion that unrestricted overnight lodging was a residential or resort type of operation, unrelated to Beit Havurah's right to worship.

*Id.* at 449-50, 418 A.2d at 87-88 (citation omitted). When interpreting words in civil statutes and ordinances, courts may have to defer to the determination of the religious body to avoid having the state defining religion on behalf of the religious community. Deference to religious communities in statutory interpretation is preferred because

it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

*Amos*, 483 U.S. at 336 (citations omitted). For an excellent discussion on the topic, see Freeman, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 GEO. L.J. 1519 (1983).

dividing a house of worship into “secular” and “religious” parts ignores: first, the symbiotic relationship between theological choice and architectural expression and the attendant inability to disentangle the liturgical and doctrinal elements from the entire house of worship structure; second, the effects of theological choice on the particular structure; and third, the effects of the structure on the theological development of the religious community and on the spiritual development of the worshipper.<sup>319</sup>

Entanglement will not be avoided by dividing the structure into exempted interior and eligible exterior. The underlying assumption that the interior is private and “religious” while the exterior is public and “secular” ignores the role of the exterior in ecclesial life and the relation between interior and exterior.<sup>320</sup> Moreover, exempting religious symbols and liturgical appointments while considering the rest of the structure “secular” and therefore eligible for design control is also implausible because religious expression is embodied in the entire structure, not just identifiably religious symbols.<sup>321</sup>

Design control authorities may be tempted to take the guesswork out of the secular-religious distinction by limiting the definition of “religious” to those features that are mandated by the faith.<sup>322</sup> This too is an implausible division because very few design elements are so mandated<sup>323</sup> and it cannot be accurately argued that all non-mandatory design decisions are based solely on secular aesthetic choices. This would mean that any religious community that did not have a specific, required design (i.e., most of them) could be subject to unlimited government scrutiny. Those religious communities that leave design decisions to the exercise of discretion by a local religious community delegated to it by its hierarchy, or to the discretion of clergy or building com-

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319. Decisions to use clear windows as opposed to stained glass, or representational stained glass as opposed to nonrepresentational design, are rooted in theological choice, and clearly affect the worship environment. Nor is there doubt that an aesthetic feature as basic as building configuration—square, round or rectangular—is inextricably connected to liturgical experience and ecclesial identity. See *supra* notes 247-72 and accompanying text.

320. See *supra* notes 247-52 and accompanying text.

321. See *supra* note 310 and accompanying text.

322. For a discussion of non-mandatory religious practices, see Laycock, *supra* note 15, at 1390-91.

323. For example, Baha'i temples must have nine sides. *Religious Buildings*, *supra* note 6, at 40-42. Moslem mosques must face Mecca and have a minaret from which the muzzein calls members to prayer. Catholics must have a central altar. Jewish synagogues must have an ark for the Torah scrolls and a bimah from which they are read. See *supra* notes 186-88 and accompanying text.

mittee within broad guidelines, would nonetheless be considered to be making secular, aesthetic choices when an issue of construction, alteration or reconstruction arose. Under this argument, for example, the Boston Landmarks Commission in *Society of Jesus* would have had jurisdiction over the entire sanctuary of the Immaculate Conception Church except for the required central altar—a position even the commission came to reject.<sup>324</sup>

This mandatory/non-mandatory distinction rests on a fundamental misconception of religion as comprised entirely of mandatory rules. This understanding incorrectly omits all aspirational exhortation and all individualized, discretionary behavior based upon general precepts. Because religion is not so constituted, there are enormous difficulties with determining what is mandatory within a particular faith. Must the mandatory practice be stated explicitly to be a “requirement” of membership in the religious community? What level of ecclesiastical authority must promulgate the “requirement?” What if the religion has no official body of rules?<sup>325</sup>

Landmark commissions and architectural review boards, given the nature of ecclesiastical architecture, might embark upon a searching inquiry of religious matters in order to fulfill the mandate of preserving worthy architecture and protecting the visual quality and architectural continuity of districts. Certainly during a hearing at which a religious community opposes designation or proposes alteration of a designated structure, a commission will require the religious community to demonstrate the necessity and propriety of any architectural change or deviation from predominant forms in the vicinity. This aesthetic protection may involve a searching inquiry by a commission of the religious community’s faith and motivations:<sup>326</sup> the doctrines and liturgical practices of

324. See *Society of Jesus*, 409 Mass. at 40-41, 564 N.E.2d at 572 (commission ultimately approved Jesuit’s plan to remove side altars).

325. A fine example comes to us from Singapore. The leadership of a syncretist (Taoist, Buddhist, Confucianist) temple instructed the architects for a new temple to first consult with the “Master” through a medium for direction on design. They were taken to the medium who, in a trance, spoke to them in ancient Chinese and, through an interpreter, provided the overall design and details for the temple, including materials, shape of the roof and number of floors. The difficulty in determining whether this is mandatory instruction is self-evident. Tay Kheng Soon, *Chee Tong Temple, Singapore: A Transformative Approach to the Design of a Chinese Temple*, MIMAR, Mar., 1988, at 46, 49.

326. See *Widmar v. Vincent*, 454 U.S. 263, 269-70 n.6 (1981) (inquiry “into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith . . . would tend inevitably to entangle the State with religion in a manner forbidden by our cases”).

the community (to determine if proposed architectural change would authentically reflect these doctrines and practices or if the current structure is adequate); the community's past efforts to renew faith (to determine if architectural change is required); the proposed religious message (to determine whether there are alternative non-architectural methods for the religious community to disseminate this proposed message that do not involve architectural change); and the motivations of those proposing to construct or alter the structure (to determine whether they are acting under a doctrinal mandate or upon aesthetic whim).

A commission may then make any or all of the following determinations: (1) the architectural change proposed is inconsistent with the religious message that the religious community attaches to it; (2) a new liturgy can be conducted within the confines of the existing structure by adding removable liturgical centers and keeping all existing ones in place or that the proposed structure is not necessary to accommodate the new liturgy; (3) the proposal is not based on religious reasons but only upon aesthetic preference; and (4) there are alternative ways of disseminating the religious message, such as through sermons and leaflets, and architectural dissemination is not necessary.<sup>327</sup> Secular authorities making these determinations evaluate religious beliefs, religious expression of those beliefs and religious choices with respect to those beliefs with full opportunity to substitute their own judgment on these issues.<sup>328</sup> These are precisely the kinds of in-

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327. These hypothetical determinations are not far-fetched. In *Society of Jesus v. Boston Landmarks Commission*, the Boston Preservation Alliance and other community groups sought intervenor status so that

to the extent that doctrinal and liturgical issues become material in the case [they] would . . . use their familiarity with canon law to aid in the discovery necessary to determining the sincerity and nature (whether religious, aesthetic or philosophical) of the grounds claimed by the Jesuits for their planned alterations and the religious burden placed on them by the disallowance of a request to make such changes.

Reply Brief for Ten Voters, The South End Historical Society, and the Boston Preservation Alliance at 53 n.31, *Society of Jesus v. Boston Landmarks Comm'n*, 409 Mass. 38, 564 N.E.2d 571 (1990) (No. S-5415). Such an intervening role could also be offered during designation and post-designation hearings before a landmarks preservation board and during hearings before an architectural review board.

For an example of the landmark commission finding that a church has sufficient alternative outlets for its ministry, see *Saint Bartholomew's Church v. City of New York*, 728 F. Supp. 958, 974-75 (S.D.N.Y. 1989), *aff'd*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991).

328. The state cannot inquire into or make determinations regarding the plausibility, validity, credibility or reasonableness of religious beliefs or their sources. See *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices



trusions into ecclesial life prohibited by the Supreme Court's decisions on religious autonomy.<sup>329</sup>

A further establishment clause (as well as free exercise) problem associated with the searching inquiry of religion by civil authorities is the potential for governmental intrusion into religious disputes in the form of support to a particular side.<sup>330</sup> As previously noted, theological debates regarding proper architectural expression are commonly intertwined with debates surrounding changes in liturgy, doctrine, mission and identity.<sup>331</sup> State involvement in design decisions entangles the state in religious dialogue and debate and provides a civil forum for a purely religious debate.<sup>332</sup> For instance, many Catholics who preferred the Latin

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to a faith, or the validity of particular litigants' interpretation of those creeds."), *reh'g denied*, 110 S. Ct. 16 (1990); *Lyng v. Northwest Indian Protective Cemetery Ass'n.*, 485 U.S. 439, 457-58 (1988) (centrality of beliefs cannot be determined); *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981) (content of belief, internal structure of belief system and interrelationship of one belief to another "need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection."); *United States v. Ballard*, 322 U.S. 78, 86-88 (1944) (state cannot question truth or falsity of religious doctrine).

329. The avoidance of searching inquiries by secular authorities are at the base of the Court's decisions. See *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952). For a further discussion of these cases, see *supra* notes 42-50 and accompanying text.

330. See *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952). See generally Laycock, *supra* note 15. After *Smith*, it is unclear whether the protection for religious communities under these autonomy cases is limited to cases of intra-church property disputes or if their principles can be expanded to compliance or enforcement actions before a legislative or regulatory body. Certainly the autonomy cases apply to the extent the regulatory body is engaged in a searching inquiry or is lending support to one side in a religious dispute. See *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987); *NLRB v. Catholic Bishop*, 440 U.S. 490, 504, 507 (1978).

331. See *supra* notes 273-88 and accompanying text.

332. The Court defers not only to substantive definitions of the religious community on religious matters, but also to its procedural practices. Since religious communities function under their own rules, "concepts of due process, involving secular notions of 'fundamental fairness' or impermissible objectives . . . are hardly relevant to . . . matters of ecclesiastical cognizance." *Serbian*, 426 U.S. at 714-15. "[I]t is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria." *Id.* at 714. The fact that design decisions within a hierarchical church may not be made with the input of any or all members of the religious community, but are made consistent with the decisionmaking structure, is supposed to be supported rather than thwarted under the religion clauses. Without neutral, secular principles on which to base ecclesiastical design decisions, the state is bound to defer to the religious community's

Mass and the grandeur of Gothic, Baroque and Renaissance forms over the changes wrought by the Second Vatican Council in both liturgy and architecture may enthusiastically support a return of the Latin Mass and seek landmark status as a way of blocking alterations of these architectural treasures. Such a situation would involve use of the state to lend support to one side in a religious dispute over the proper architectural expression of a church and would involve the state in a determination of the church's evolving identity. The state might enforce a design orthodoxy on a church, substituting the state's design decision (on behalf of a group within the church) for what is essentially a theological design decision made by the church decisionmaking authority. The state might even fashion a compromise position, requiring a particular design that would not have developed without its intervention. The religion clauses prevent disappointed members of a religious community from seeking redress in the courts, legislatures, or administrative agencies to ensure that *their* position on a religious issue prevails.<sup>333</sup>

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decisions. See *Struempf v. McAuliffe*, 661 S.W.2d 559, 566-67 (Mo. Ct. App. 1983).

333. Although *First Covenant* and *Society of Jesus* involved disputes between a religious community and the government, a case strikingly analogous to *Society of Jesus* involved an internal dispute between parishioners and the bishop in a Roman Catholic parish. See *Struempf v. McAuliffe*, 661 S.W.2d 559 (Mo. Ct. App. 1983).

The parishioners in *Struempf* sought to enjoin the removal of altars when the sanctuary was being renovated. *Id.* at 562. The court found that because the hierarchy had control of the property, it could determine the disposition of altars. Conversely, because the parishioners had no property interest in the altars, they could not stop the hierarchy from removing them. *Id.* at 561-67.

The *Struempf* court avoided characterizing the dispute as ecclesiastical (as argued by church) or involving property rights (as argued by parishioners), choosing instead to employ the deferential approach used in *Kedroff* and *Serbian*. The court noted that

in the Roman Catholic communion, the titles to church possessions are vested in the bishops and archbishops, who manage them, either directly or through the parish priests, and without participation by the congregation. A statutory alteration of the form of church government may not constitute interference with matters of faith, yet, nevertheless, the right of every religious sect to preserve the peculiar economy it prefers, and perhaps has obeyed immemorially, touches closely, if it is not part of it, that religious freedom which American Constitutions [sic] guarantee.

*Id.* at 566 (quoting *Klix v. Polish Roman Catholic Saint Stanislaus Parish*, 137 Mo. App. 347, 362, 118 S.W. 1171, 1176 (1909)). The court found that, even under neutral principles, "scrutiny of the documents in purely secular terms provides no basis for finding any control of that property to be vested in the parishioners. Such scrutiny of the canons offered in evidence clearly reveals that the property is held subject to the control of the hierarchy of the church." *Id.* at 567.

The searching inquiries and evaluations of religion, the attempts to sever the inseverable and the determinations of mandatory and non-mandatory religious designs all result in intrusion into the religious community's autonomy and the potential for church-state entanglement. Even after *Smith*, the intra-church dispute cases requiring deference to the hierarchy on religious matters remain good law. The concern in the design control context is that searching inquiries made by civil authorities involve them in evaluating credibility and logic of the religious community's faith, determining what is central or indispensable to the religion and separating out secular from religious.<sup>334</sup> There is no evidence that such intrusion is justified by a compelling state interest.

### B. *Control of Religious Speech and Compelled Profession of Faith*

As evidenced by religious architectural history, the design of the house of worship is both a profession of faith and religious speech. The semiotic properties of houses of worship as they speak to the religious community, as well as to the surrounding culture, can be traced from ancient times through today.<sup>335</sup> When house of worship design is recognized as religious speech, the "hybrid" requirement of *Smith* is satisfied, and a compelling state interest in design restriction must justify the resulting burden on religion. By considering such design to constitute a profession of faith, the state is absolutely barred from regulating the design, regardless of any compelling interest.<sup>336</sup>

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334. Searching inquiries have also arisen in the context of hardship applications. One striking example of such entanglement is found in *Saint Bartholomew's Church v. City of New York*, in which the Landmarks Commission, federal district court and Second Circuit evaluated the missional goals and financial position of the church. 914 F.2d 348 (2d Cir. 1990). The Second Circuit was mistaken when it noted that the "matters scrutinized were exclusively financial and architectural. This degree of interaction does not rise to the level of unconstitutional entanglement." *Id.* at 356 n.4. Financial and architectural issues for a church are inextricably bound up with religious issues, especially when they involve how buildings are to serve its religious mission, and how the church should conduct and pay for a renovation.

335. *See supra* notes 178-272 and accompanying text.

336. In *Smith*, the Court distinguished between profession of faith, which the government may *never* compel because it is considered to come under the absolute protection of beliefs as opposed to acts, and other types of religious speech (e.g., proselytizing) which is considered an act that can be regulated in the presence of a compelling state interest. *Smith*, 110 S. Ct. at 1599-600. Because religious speech is protected by both free speech and free exercise, it falls into a hybrid category. *Id.* at 1601-02. The "hybrid" cases involve both compelled profession of nonreligious speech that is understood to be compelled religious speech from the objectors' perspective and discretionary control or

The governmental interest in design control is directly related to the suppression of certain aesthetic values and the promotion of others.<sup>337</sup> Because these aesthetic values are inseparable from religious ones, a government design orthodoxy or aesthetic standard imposed through landmark preservation or architectural review is tantamount to a prior restraint and other content controls on religious speech and, in particular, tantamount to state-compelled profession of belief.<sup>338</sup> A design com-

prevention of speech. *See* *Wooley v. Maynard*, 430 U.S. 705 (1977) (state statute requiring motorists to display motto on license plate violates first amendment rights of objecting Jehovah's Witnesses); *Follet v. McCormick*, 321 U.S. 573 (1944) (municipal ordinance imposing license tax on preacher selling religious books violates first and fourteenth amendments); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (state cannot compel public school children to salute flag and recite pledge of allegiance); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (imposition of municipal license tax on religious solicitation violates first and fourteenth amendments); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (state statute prohibiting religious solicitation without certificate issued upon state official's determination of proper religious cause violates first and fourteenth amendments).

The *Barnette* Court stated the following:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. . . .

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

*Barnette*, 319 U.S. at 642.

337. *Cf.* *United States v. Eichman*, 110 S. Ct. 2404, 2407-08 (1990) (government violates first amendment by prohibiting flag burning because it is "prohibiting expression of idea simply because society finds the idea itself offensive").

338. To grasp the magnitude of the potential abridgement of religious liberties:

one has only to imagine what would happen if the legislature were to pass a law allowing a government agency to do *de novo* what the landmarks preservation commission does in *retrospect*. Suppose a congregation, in planning a *new* church, had to get *permission from a state agency* to have a Romanesque rather than a Gothic structure, or to put a rose window in the east end of the nave, or a baptistry at the west, or to have a parish house contiguous to, rather than detached from, the sanctuary, or to put a cross on top! (Of course, even church buildings must meet basic requirements of health and safety administered by the state, but *not* requirements as to *style, ornamentation, arrangement, or symbolism!*) Such a statute would certainly be struck down as unconstitutional on its face.

New York State Assembly and Senate Standing Comms. on Local Governments and Senate Standing Comm. on Cities, *Exemption of Certain Religious Property from Local Preservation Laws*, at 7 (Feb. 8, 1984) (statement of Rev. Dean M. Kelley, Director for Religious and Civil Liberty, National Council of Churches of Christ in the United States of America).

mission may very well decide that a circular plan is inappropriate, or that a cross is ostentatious, and may withhold permission to build until the structure and cross have been redesigned to the commission's satisfaction.

Simply because architecture has semiotic properties and communicates meaning does not necessarily qualify all architecture as "speech."<sup>339</sup> Were that the case, much of design control would be subject to free speech challenges.<sup>340</sup> But ecclesiastical

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339. Costonis has written extensively about the free speech implications of these design control mechanisms and has drawn three main conclusions. First, he concludes that new architecture is often speech. Costonis, *Law and Aesthetics*, *supra* note 3, at 447. Second, since the government cannot regulate speech on the basis of content, any ban on a particular design because the visual quality is offensive, or because it violates "certain canons of aesthetic formalism," constitutes content-based regulation and is "censorship pure and simple." *Id.* at 378. As the Supreme Court stated in *Texas v. Johnson*, "[g]overnment may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." 491 U.S. 397, 414 (1989) (citations omitted). Certainly it is arguable that landmark preservation and architectural review are not mere time, place, and manner restrictions; but rather, are content-based because they rest on an evaluation of communicative content. And third, Costonis concludes that the only legitimate government concern regarding design is in its secondary effects, those harmful externalities such as the visual dissonance created by certain designs or design changes that threaten the cultural stability and identity for the larger community. Costonis, *Law and Aesthetics*, *supra* note 3, at 360-61.

Interestingly, Costonis refuses to extend the analysis to existing structures, even though they are the structures with such semiotic properties as to be message bearers. *Id.* at 441-47. He notes that simply because something has meaning does not mean it is necessarily speech. He draws a distinction "between aesthetic controls dealing with the selection of existing resources for preservation and those affecting the modification of these resources by new entrants." *Id.* at 390. For a discussion of cases in which the Supreme Court found aesthetic regulations abridging freedom of speech, see *supra* note 86 and accompanying text.

340. The semiotic-structure-as-speech principle lends itself to treatment under the "symbolic speech" cases and has been discussed by several commentators. See Costonis, *Law and Aesthetics*, *supra* note 3, at 448-49 n.334; Note, *Aesthetic Regulation*, *supra* note 11; Note, *supra* note 7; Note, *Architectural Expression*, *supra* note 11. Non-verbal expressive conduct, such as flag burning, is protected speech when it is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence v. Washington*, 418 U.S. 405, 409 (1974) (flag burning); see also *United States v. Eichman*, 110 S. Ct. 2404 (1990) (Federal Flag Protection Act violated first amendment); *Texas v. Johnson*, 491 U.S. 397 (1989) (state may not prohibit expressive conduct relating to flag). In these cases, laws against flag burning, intended to protect the symbolic value of the flag, were directly related to the suppression of expression, i.e., enforceable only when mistreatment of the flag communicated a message. For other examples of protected non-verbal expressive conduct, see *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (black armbands to protest government protected under first and fourteenth amendments); *Stromberg v. California*, 283 U.S. 359 (1931) (state law prohibiting display of red flag violates fourteenth amendment). *But see* *People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (zoning ordinance specifically forbidding erection of clotheslines on front yards upheld because right to freedom of speech not

architecture, given its intended and resultant theological, liturgical and ecclesial meaning, and its central role in the spiritual development and understanding of the faithful, is a special class of speech—religious speech. The framers considered religious speech, like political speech, to be of central significance to the functioning of the polity and the freedom of conscience and religious liberty.<sup>341</sup> Ecclesiastical design merits first amendment “hybrid” protection in this post-*Smith* era not because it is primarily “speech,” the content of which just happens to be religious, but because it constitutes the free exercise of religion manifested in expressive and communicative form.

The history of religious intolerance that gave rise to the protection of religious exercise and guarantees of nonestablishment of religion contains overwhelming evidence of government attempts to control or suppress speech on the basis of its content. In Europe and colonial America, persecution of members of minority and disfavored religions in order to suppress dissent from orthodoxy was commonplace. Even the sixteenth-century Protestant Reformers themselves—Luther, Calvin, Zwingli, Henry VIII—endorsed the death penalty or persecution for “dissenters” from orthodox beliefs.<sup>342</sup> Interpreting the Constitution in this century, the Court protected religious speech by coupling free exercise and free speech values, particularly in early proselytization cases.<sup>343</sup> The Jehovah’s Witnesses, adherents to a relatively new

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absolute and city may prohibit conduct which harms property), *appeal dismissed*, 375 U.S. 42 (1963).

341. See *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (dissemination of religious beliefs through distribution of pamphlets protected under first amendment guarantees of freedom of speech and religion); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (first amendment prohibits state from denying right to disseminate religious beliefs).

342. J. NOONAN, *THE BELIEVER AND THE POWERS THAT ARE* 61 (1987) (“The Reformation did not bring religious toleration but increased persecution.”). A century later Roger Williams was banished from Massachusetts for teaching religious doctrines that did not comport with the official teachings of the ascendant church. *Id.* at 66. Also in that colony, Baptists and Quakers and other dissenters were expelled, imprisoned or otherwise physically brutalized. McConnell, *Origins*, *supra* note 73, at 1422-23. In eighteenth century Virginia and Massachusetts, where established churches existed, the government had the power to license preachers of non-established sects, and could thereby ban or otherwise control their message and itinerant practices. *Id.* at 1438-39. Even outside the scope of formally established churches, suppression of certain types of religious speech continued.

343. See *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (protection of right “to preach, proselyte, and perform other similar religious functions”); *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (state cannot “approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings.”).

faith, proselytized door-to-door, preaching a religious message offensive to many; their speech, however, could not be suppressed or subjected to prior restraint.<sup>344</sup> Additionally, the Court has made clear that the state cannot “enforce a content-based exclusion of religious speech” where it has created an open forum.<sup>345</sup>

Since design is restricted through an individualized, evaluative process, the government becomes involved in the discretionary control and evaluation of religious expression by and for the religious community. Such evaluation may result in the suppression of religious expression that is embodied in those design proposals rejected by the government.<sup>346</sup> Furthermore, the evaluation may result in state creation of “new forms” of religious expression when the design authorities suggest and require design modifications.<sup>347</sup> Under both free speech precedent and

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Not all religious proselytizing, however, is protected. In *Molko v. Holy Spirit Association for the Unification of World Christianity*, 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122 (1988), *modified, reh'g denied*, 417 Cal. 3d 4702, *cert. denied*, 490 U.S. 1084 (1989), the Supreme Court of California held that a religious practice of bringing outsiders into an environment allegedly conducive to “brainwashing” was conduct, not religious belief and was therefore “subject to regulation for the protection of society.” *Id.* at 1115-17, 762 P.2d at 58-59, 252 Cal. Rptr. 134-35. The Internal Revenue Code also controls some religious conduct by placing limitations on political participation of tax-exempt organizations. I.R.C. § 501(c)(3) (West Supp. 1989). The constitutionality of these I.R.C. limitations could be questioned.

344. See *Fowler*, 345 U.S. 67; *Follett v. McCormick*, 321 U.S. 573 (1944); *Murdock*, 319 U.S. 105; *Cantwell*, 310 U.S. 296. A state also cannot be involved in regulating proselytization by a member of a religious community, vis-a-vis non-members, even if his message is highly offensive to the potential converts. *Fowler*, 345 U.S. at 60-70; *Cantwell*, 310 U.S. at 306-09. Nor can a state “employ the taxing power to inhibit the dissemination of particular views.” *Sherbert v. Verner*, 374 U.S. 398, 402 (1963). In *Murdock* and *Follett*, a flat tax on solicitation was found invalid as applied to dissemination of religious ideas because it operated as a prior restraint of protected conduct. *Follett*, 321 U.S. at 574-75; *Murdock*, 319 U.S. at 113-15. The tax constituted a charge on the enjoyment of a constitutional privilege, and the issue was whether or not it had the actual effect of suppression or control of dissemination of religious ideas. *Murdock*, 319 U.S. at 112-13. This tax prohibition, however, does not apply to generally applicable taxes. See *Jimmy Swaggart Ministries v. Board of Equalization*, 110 S. Ct. 688 (1990); *Texas Monthly v. Bullock*, 489 U.S. 1 (1989).

345. *Board of Educ. v. Mergens*, 110 S. Ct. 2356, 2372-73 (1990) (permitting Bible studies club in public secondary schools prevents content-based discrimination so long as limited open forum exists for non-curricular clubs); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (university regulation prohibiting use of university property to religious groups violated principle of “content-neutral” regulation of speech).

346. For a discussion of content-based suppression, see *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

347. See *infra* note 359 and accompanying text.

Smith's hybrid analysis, the state cannot suppress the dissemination of religious ideas without a compelling justification.<sup>348</sup> Thus, a design control board finding LeCorbusier's haunting design of the chapel at Notre Dame du Haut to be architecturally inappropriate, visually disturbing or dissonant, or even grotesque, would be tantamount to placing a content-based prior restraint on religious speech, just like the attempted suppression of the Jehovah's Witnesses' "offensive" message: the design proselytizes, even if it offends.<sup>349</sup>

Design control involves not only the restrictions on religious speech, but also the compelled profession of faith. The historical roots of the prohibition against compelled profession are deep and tied to human experience with established churches.<sup>350</sup> But both religion clauses are implicated because they share the same

348. Reasonable time, place and manner restrictions on speech are constitutional. *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981). Prior restraint, content-based restriction, however, is unconstitutional. In *Cantwell v. Connecticut*, the Court held that a statute which required a license to lawfully solicit for a religious cause was a prior restraint on the practice of religion. It asserted that "[n]o one would contest the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views." *Cantwell*, 310 U.S. at 304.

349. LeCorbusier's design is located in Ronchamp, France. C. NORBERG-SCHULZ, *supra* note 3, at 87. For the connection with proselytization, see *supra* note 178 regarding the use of structures in conversion.

350. See generally *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947); S.T. BINDOFF, *supra* note 209. For instance, the British Parliament in 1539 passed "An Act Abolishing Diversity of Opinion," which made it a crime "to write or 'hold opinion' that after the consecration the bread and wine did not become 'the natural body and blood of the Saviour Jesus Christ conceived of the Virgin Mary.'" J. NOONAN, *supra* note 342, at 57. Anyone refusing to profess this opinion would be considered a heretic and burned to death. *Id.* Additionally, religious tests for civil office had been a popular way of favoring members of the established church, or at least of keeping undesirable religions out of power. The anti-Catholic British Test Act of 1672 required an officeholder to "acknowledg[e] the king's supremacy over the Church and . . . [to] deny[] that there is 'any transubstantiation in the sacrament of the Lord's supper' and should obtain a certificate [from church] . . . that they had received 'the sacrament of the Lord's supper' . . ." *Id.* at 77 (quoting 25 Charles II, c. 2 (8 Pick. Stat. 389) (1672)). Violators were subject to loss of office and certain civil rights, and fines. *Id.* In the colonies, as in England, the requirement of Christian oaths made it impossible for Jews to hold public office. *Id.* at 98.

In light of such history, of which the foregoing is but a small example, the Court had no trouble striking the requirement of a theistic oath as a condition for civil office. See *Torcaso v. Watkins*, 367 U.S. 488 (1961). In *Torcaso*, an applicant for a public notary position, who challenged the required affirmation of belief in God as a prerequisite to holding the office, was not simply excused from the requirement while believers continued to be held to it; instead, the Court held that the state had no authority to require such an affirmation from anyone. *Id.* at 495. Article VI of the Federal Constitution also prohibits any religious test for office. U.S. CONST. art. VI.



purpose of protecting persons and communities in their religious choices free from government intervention.<sup>351</sup> Supreme Court decisions on the issue of "compelled profession of faith" flow from establishment clause jurisprudence because compelled professions of faith are so commonly identified historically with established churches; the free exercise clause also restrains state-compelled professions of faith because they involve the government in forbidden regulation of religious belief.<sup>352</sup> It is well settled that the state cannot compel "acceptance of any creed or the practice of any form of worship,"<sup>353</sup> "force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets,"<sup>354</sup> or specifically compel affirmation of belief in God. Moreover, the state cannot punish the expression of religious doctrines independently expressed, no matter how incredible they may seem.<sup>355</sup> Just as the state is prohibited from compelling an individual to profess faith, it is powerless to compel a religious community to make an institutional affirmation of belief.<sup>356</sup>

The protection of the individual from such compulsion does not depend on whether the statement is offensive to the individual. The state is just as incompetent to require religious individuals to profess beliefs and engage in liturgical practices that are fully consistent with their beliefs as it is to require them to profess or practice in ways offensive to their beliefs. Obviously, the state could not require a Hindu to profess Buddhist beliefs. But neither could it require a Catholic to recite the Nicene Creed, or a Jew to celebrate Passover, or a Moslem to turn toward Mecca in prayer. These professions and acts, while presumably not inconsistent with or offensive to the faith of the individual, are undoubtedly beyond the state's capacity to require and enforce.<sup>357</sup>

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351. See *supra* notes 12-20 and accompanying text.

352. *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (prohibition on "governmental regulation of religious beliefs as such").

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

354. *Braunfeld v. Brown*, 366 U.S. 599, 603, *reh'g denied*, 368 U.S. 869 (1961).

355. See, e.g., *United States v. Ballard*, 322 U.S. 78, 86 (1944) (respondent believed he and others were selected as divine messengers and had powers to heal).

356. See *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 721-22 (1976) ("religious freedom encompasses 'the power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine' ") (quoting *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952)).

357. While the free exercise requirement of coercion has been character-

Religious communities, likewise, cannot be required to profess beliefs or engage in any liturgical acts, regardless of whether they are offensive to or consistent with its doctrines or teachings.<sup>358</sup>

Additionally, irrespective of the degree of offensiveness or consistency with the religious community's beliefs, the coercive authority of design control mandates architectural statements that constitute religious expression. The state compels institutional affirmation of belief through design control when it requires the religious community to meet an aesthetic standard or design orthodoxy, or to redesign a proposal to the satisfaction of the design commission, or when it withholds permission on a design until an appropriate design is brought forward. The resulting designs emerge from the mixing of coercive powers of the state with independent religious determinations made by the religious community. The most startling aspect is that the resulting design may be entirely or in large part government-fashioned so that virtually the entire religious statement is government-created, like a prayer for students written by a board of education.<sup>359</sup> Such state compulsion, as well as state suppression of religious speech, is constitutionally abhorrent. Instead, it must be understood that the variety of ecclesiastical architectural expression is so vast that the state cannot enshrine one or another into orthodoxy.

The state interest in design control is not sufficiently compelling to warrant such compulsion and suppression. Although the Supreme Court has had no occasion to determine whether the state's interest in aesthetics would be "compelling" under a strict scrutiny standard,<sup>360</sup> the highest courts of Massachusetts and

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ized as one that "coerce[s] individuals into acting *contrary* to their religious beliefs," *Lyng v. Northwest Cemetery Assoc.*, 485 U.S. 439, 440 (1988) (emphasis added), the establishment clause protects individuals from impermissible governmental activity regardless of consistency with the individual's beliefs. The relevant factor is the nature of the state's action, not the state of mind of the individual. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222-23 (1963).

358. *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952).

Although this statute requires the New York churches to "in all other respects conform to, maintain and follow the faith, doctrine, ritual, communion, discipline, canon law, traditions and usages of [their church]," their conformity is by legislative . . . will. Should the state assert power to change the statute requiring conformity to ancient faith and doctrine to one establishing a different doctrine, the invalidity would be unmistakable.

*Id.* at 108.

359. See *Engel v. Vitale*, 370 U.S. 421 (1962). For a further discussion of *Engel*, see *supra* notes 27-29 and accompanying text.

360. The Supreme Court has found, however, that landmark preservation

Washington have determined that the state's interest is worthy, but not sufficiently compelling to justify a burden on religion.<sup>361</sup> Under *Smith's* hybrid characterization of religious exercise and speech, design control of houses of worship will fail: there is a clearly determined burden on free exercise with no compelling interest to justify the burden. Furthermore, under what appear to be virtually absolute prohibitions on compelled profession of faith under the establishment clause and on the regulation of religious beliefs under the free exercise clause, the state must defer to the design decisions of religious communities.

### C. *Interference with Religious Belief and Individual Spiritual Formation*

As is clear from the earlier discussion on the effects of the house of worship on adherents, the visual environment is imbued with semiotic qualities, fulfilling a communicative function and possessing meaning for the worshipping community.<sup>362</sup> In governing the appearance of the worship structure, the state sits as arbiter between the religious community and the individual worshipper in identifying beliefs appropriate for transmission and inculcation. The state consequently becomes involved in the process of defining beliefs for the adherents. Thus, the state distorts the process in which the adherent interprets, gives meaning to and internalizes his or her environment and, in so doing, interferes with the individual's spiritual development, as well as with his or her communal experience.

It is a central tenet of free exercise clause jurisprudence that the freedom to believe is absolute, while the freedom to act on one's belief may be qualified by the state.<sup>363</sup> This dichotomy was

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constitutes valid economic regulation. *See Penn Cent. Transp. Corp. v. City of New York*, 483 U.S. 104, 129 (1978).

361. *See Society of Jesus*, 409 Mass. 38, 564 N.E.2d 571 (1990); *First Covenant*, 114 Wash. 2d 392, 787 P.2d 1352 (1990). The highest court of Colorado, however, found that an aesthetically-based taking of a church building under an urban renewal plan of a blighted neighborhood was supported by a substantial state interest. *See Pillar of Fire v. Denver Urban Renewal Auth.*, 181 Colo. 411, 418, 509 P.2d 1250, 1253 (1973) (en banc).

The Second Circuit in *Saint Bartholomew's* did not have the occasion to determine the nature of the state's interest because it did not employ a balancing test. *Saint Bartholomew's Church v. City of New York*, 914 F.2d 348 (1990).

362. *See supra* notes 247-72 and accompanying text.

363. *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of beliefs as such."); *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) ("The Free Exercise Clause categorically forbids government from regulating, prohibiting or rewarding religious beliefs as such."); *United States v. Ballard*, 322 U.S. 78, 86

vigorously reaffirmed in *Smith*. A parallel absolute protection exists for the development and interpretation of a religious community's doctrine.<sup>364</sup> A religious community's body of doctrine receives the same protection against regulation or compulsion as the religious beliefs held by an individual. Moreover, it is settled that the religious community is uniquely suited to the task of defining its beliefs. Yet, in the process of design control, the state evaluates and may reject the architectural manifestation of beliefs or the proposed architectural manifestation of those beliefs; it may require alternate physical manifestations and then judge which is the most appropriate, or may itself dictate the appropriate physical manifestation. As with the government-composed prayer for students, the government-designed house of worship enables the state to arrogate the formulation or articulation of theology in classic violation of the establishment clause; and because the design is coerced, it also violates the free exercise clause. In the process of controlling architectural expression, the state inhibits the free development of the religious community's doctrine and implicates secular interests in matters of purely ec-

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(1944) ("Freedom of thought, which includes freedom of religious belief, is basic in a society of free men.").

364. With respect to the analogy between the entity and an individual, a religious community obviously does not have a conscience, and the body of doctrine is an organic, fluid set of traditions, beliefs and practices that may change over time rather than a static body of rules. Nevertheless, at any given time a "canon" of orthodox beliefs of the aspirational goals—what the community professes—can be ascertained, and the good faith of the community assessed. See Laycock, *supra* note 15, at 1391; see also *Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-day Saints v. Amos*, 483 U.S. 327 (Brennan, J., concurring) ("For individuals, religious activity derives meaning in large measure from participation in a larger religious community."). Religious entities are recognized at law not simply because they are legally constituted but because they "represent[] an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals." *Id.* at 342.

As discussed previously, civil courts are incompetent to settle property disputes within religious communities if doing so would involve the interpretation and evaluation of religious issues. See *supra* notes 42-50 and accompanying text. To engage in judicial review of internal decisions of religious communities would deprive religious communities "of the right of construing their own church laws . . . and would, in effect, transfer to civil courts where property rights were concerned the decision of all ecclesiastical questions." *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 714 (1976) (citation omitted). Governmental involvement in religious doctrine and practice through civil adjudication of disputes may lead to "the hazards [that] are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern." *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969).

clesiastical concern.<sup>365</sup>

In addition to its exclusive role in defining belief, the religious community is also responsible for determining the manner of transmission and inculcation of those beliefs. The transmission and inculcation of beliefs is part of a larger relationship between the religious community and its members. This relationship is protected and recognized under the religion clauses. Doctrines of institutional autonomy and non-entanglement work together to protect the integrity of the community and the relationship between the community and its individual members. The religious community is, for instance, permitted to attract converts through a variety of protected methods<sup>366</sup> and to set membership standards.<sup>367</sup> In fact, membership is recognized as a central aspect of self-definition and self-direction.<sup>368</sup> The autonomy of religious communities' internal dispute resolution among its members receives protection.<sup>369</sup> Affiliations between religious communities, or the breaking of ties between them, is also left to the sole discretion of the communities themselves.<sup>370</sup> Of course, just as religious communities are protected in their choices of members and inter-communal ties, individuals have the freedom to affiliate with or leave religious communities under ba-

365. *Blue Hull*, 393 U.S. 440 (1969); *Everson v. Board of Educ.*, 330 U.S. 1, 15, *reh'g denied*, 330 U.S. 855 (1947).

366. For cases involving religious proselytization, see *supra* note 336 and accompanying text.

367. For an analysis of the interaction of church rules and excommunication, see *Paul v. Watchtower Bible and Tract Soc'y*, 819 F.2d 875 (9th Cir.) (Jehovah's Witness practice of shunning members protected by first amendment), *cert. denied*, 484 U.S. 926 (1987); *Guinn v. Church of Christ*, 775 P.2d 766 (Okla. 1989) (elder's disciplinary action prior to member's withdrawal protected from judicial scrutiny). *But see Bear v. Reformed Mennonite Church*, 462 Pa. 330, 341 A.2d 105 (1975) (Reformed Mennonite Church's practice of shunning excommunicated member not protected by first amendment).

368. See generally *Amos*, 483 U.S. 327.

Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. . . . The authority to engage in this process of self-definition inevitably involves what we normally regard as infringement on free exercise rights. . . . [I]f certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities.

*Id.* at 342-43 (Brennan, J., concurring).

369. See *supra* notes 42-50 and accompanying text.

370. For a discussion of cases presuming this right, see *supra id.*

sic tenets of free exercise<sup>371</sup> and free association.<sup>372</sup> This restriction on state interference with church attendance is also a bedrock principle of non-establishment in its protective role: the state can neither “force nor influence a person to go to or remain away from church against his will . . . [nor can a person] be punished for . . . church attendance or non-attendance.”<sup>373</sup>

One of the most explicit protections afforded the relationship between the religious community and its members concerns the teaching and nurturing of adherents. Religious communities take on the task of educating their adult adherents, as well as children, in the faith. In this context, religious communities are much like parents who have the right to raise children without state interference in the transmission and inculcation of beliefs.<sup>374</sup> Religious communities, like parents, are protected in the nurturing, instruction and spiritual development of their members, particularly children. Absent a compelling governmental interest such as public health and safety, the state will not interfere in the relationship between the religious community’s schools and its students. In particular, wide latitude is given to religious communities in the choice of and control over employees<sup>375</sup> and

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371. The timing of conversion is immaterial to the determination of free exercise rights. *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 144 (1987). Although *Hobbie* became a Seventh-day Adventist after she was hired she was still entitled to unemployment compensation under *Sherbert* when her religious requirements came in conflict with work requirements. *Id.* In addition to free exercise concerns, the freedom to affiliate is also related to non-establishment principles. *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

372. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

An individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

*Id.* (citations omitted); see also *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (“Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law.”).

373. *Everson*, 330 U.S. at 15-16.

374. The analogy is plausible because membership is voluntary, and the member’s consent to receive the teachings of the faith is implied. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

375. See *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) (autonomy concerns reflected in text of Title VII, not constitutional interpretation). The community’s hiring decisions are protected far beyond the school context. See

curriculum.<sup>376</sup>

The Supreme Court has consistently reiterated its concern, in connection with the establishment clause, that certain types of government interference with religious schools will distort the relationship between teachers and students.<sup>377</sup> Just as the state cannot interfere in the relationship between teacher and student when beliefs are being communicated, it cannot interfere with the relationship between religious community and member regarding religious formation and spiritual development absent a compelling interest.<sup>378</sup>

The visual environment of the house of worship communicates to the adherent. Of course the adherent is not a passive recipient in this process.<sup>379</sup> The adherent has the right to accept,

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*Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (suit alleging sexual and racial discrimination in hiring pastors barred by free exercise clause), *cert. denied*, 478 U.S. 1020 (1986); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (application of equal employment opportunity provisions of Civil Rights Act of 1964 to employment relationship between church and its ministers would violate first amendment), *cert. denied*, 409 U.S. 896 (1972).

376. In order to make such determinations, the state would have to monitor curriculum and teachers so closely that it might entail "excessive government direction of church schools and hence of churches." *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971). Referring to a state aid program for parochial school teachers, which would require state examination of amounts spent for secular versus religious activities, the Court wrote:

This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. . . . [W]e cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses.

*Id.*; see also *Aguilar v. Felton*, 473 U.S. 402 (1985); *Meek v. Pittenger*, 421 U.S. 349, *reh'g denied*, 422 U.S. 1049 (1975).

377. This close relationship between teacher and student, and its effects on religious formation of the child, has been recognized in the context of formal religious education. See, e.g., *Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Lemon v. Kurtzman*, 403 U.S. 602 (1971). But the relationship cannot be limited to teachers and students in the parochial school classroom. It also includes spiritual direction, doctrinal instruction, sacred text study, and any other relationship in which the understanding of a faith is being passed on, whether it be for children or adults. Certainly this relationship is protected by extension of the religious community's autonomy rights with respect to clergy selection and doctrinal interpretation.

378. See *Presbyterian Church (U.S.A.) v. United States*, 752 F. Supp. 1505, 1513 (D. Ariz. 1990) ("The government may only impinge upon religious liberty by showing that the challenged conduct is the least restrictive means of achieving a compelling state interest.").

379. For a discussion of the link between the worship environment and worshippers, see *supra* notes 247-72 and accompanying text. With respect to the

reject, or modify beliefs expressed in the visual environment. Since adherents are protected in their individual beliefs and decisions, even when those decisions depart from the orthodox standards of the religious communities to which they belong,<sup>380</sup> individual interpretations of the visual environment are constitutionally protected.<sup>381</sup> The adherent has the right to engage in this interpretation process free from state determinations of the appropriate visual environment.<sup>382</sup>

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effects of the environment, Costonis writes: “[W]e respond not merely to an object’s sensuous qualities but, more vitally, to its symbolic import—the meanings ascribed to it by virtue of our individual histories and our experiences as members of political, economic, religious and other societal groups.” Costonis, *Law and Aesthetics*, *supra* note 3, at 399. “The environment suggests distinctions and relations, and the observer—with great adaptability and in the light of his own purposes—selects, organizes, and endows with meaning what he sees.” *Id.* at 400 n.137 (quoting K. LYNCH, *THE IMAGE OF THE CITY* 6 (1960)).

380. See *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (religious community need not forbid members from involvement in war-related work in order for member’s pacifist sentiments to receive protection). The *Thomas* Court recognized that

[i]ntrafaith differences . . . are not uncommon among followers of a particular creed. . . . [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith.

Courts are not arbiters of scriptural interpretation.

*Id.* at 715-16; see *Frazer v. Illinois Dep’t of Employment Sec.*, 489 U.S. 829 (1989) (person’s religious belief in Sunday Sabbath protected even though not member of religious community); *Welsh v. United States*, 398 U.S. 333 (1970) (beliefs may be derived from non-religious sources as long as beliefs occupy position in life of believer parallel to that of traditional religious believer); *United States v. Seeger*, 380 U.S. 163, 176 (1965) (religion defined as “[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for [religion’s exemption]”).

381. The adherent is not a passive recipient of visual information. Instead there is an active engagement between the built environment and his or her senses, emotions, intellect and imagination. See *supra* notes 247-72, 379 and accompanying text. Note, too, that the Court has said of symbols: “Symbols of State often convey political ideas just as religious symbols come to convey theological ones. . . . A person gets from a symbol the meaning he puts into it, and what is one man’s comfort and inspiration is another’s jest and scorn.” *Board of Educ. v. Barnette*, 319 U.S. 624, 632-33 (1943) (emphasis added).

382. The Court has said that the government’s ability to enforce laws “cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.” *Employment Div., Dep’t of Human Resources v. Smith*, 110 S. Ct. 1595, 1603 (1990) (quoting *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451 (1988)); see also *Bowen v. Roy*, 476 U.S. 693 (1986). The context in which this statement was originally made differs radically from one in which the state attempts to enforce design control laws. In *Bowen* and *Lyng*, the Court was concerned that the religious claimant was attempting to tell the government how to run its own operations such as its welfare administration (*Bowen*) and its public lands (*Lyng*). In con-



While the Supreme Court has not yet had occasion to address the symbiotic relationship between religion and architecture, the Court has acknowledged this communicative and educative role of physical structures in cases relating to buildings used for religious purposes and to religious symbols. In the context of pervasively sectarian institutions like parochial schools, the Court has recognized that the religious environment created by the school building is critical to the religious formation of the building's users<sup>383</sup> and thus ineligible for public financing for construction and maintenance.<sup>384</sup> The house of worship is un-

trast to these cases, design control laws intrude deeply into the life of the religious community, regulating the religious visual environment. Design control is not a case of forcing the government to bend its internal operations or property management to accommodate spiritual development.

383. See *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971) (parochial "school buildings contain identifying religious symbols such as crosses on the exterior and crucifixes, and religious paintings and statues either in the classrooms or hallways"); see also *Yonkers Racing Corp. v. City of Yonkers*, 850 F.2d 855, 869-70 (2d Cir. 1988) (seminary challenge to taking of "apron" of land that surrounded seminary on grounds that "'apron' of quietude . . . contribute[s] to the . . . 'academic, spiritual, psychological and pastoral' preparation of young men for the priesthood"); *Aguilar v. Felton*, 473 U.S. 403, 413 (1985) (excessive state entanglement in requiring school to obey state officials' "determinations as to what is and what is not a 'religious symbol'"); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 388 (1985) (finding excessive entanglement when public school teachers teach in parochial school environment because they "may well subtly (or overtly) conform their instruction to the environment in which they teach"); *Meek v. Pittenger*, 421 U.S. 349 (1975). Together with religious instruction, religious extra-curricular activities, and the presence of nuns, parochial school buildings are "pervasively sectarian."

384. Public funding for the maintenance and repair of religious schools has been held an establishment clause violation.

[I]t simply cannot be denied that this section [of the funding law] has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools. . . .

...  
If tax-raised funds may not be granted to institutions of higher learning where the possibility exists that those funds will be used to construct a facility utilized for sectarian activities 20 years hence, *a fortiori* they may not be distributed to elementary and secondary sectarian schools for the maintenance and repair of facilities without any limitations on their use. If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair.

*Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 774, 776-77 (1973) (citations omitted). This is so because a major characteristic of an established church is one which receives tax revenues to construct its houses of worship. *A Bill Establishing a Provision for Teachers of the Christian Religion*, reprinted in J. NOONAN, *supra* note 342, at 105 (public financing of church construction). For public funding of construction of buildings at religious colleges which were found to be "religiously neutral" and rejection of the argument that they were "pervasively sectarian," see *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S.

doubtedly at least as “pervasively sectarian” as a parochial school building.

Certainly the notion that religious symbols (within or outside the context of religious buildings) have semiotic properties is uncontested. When displayed on public property, symbols such as creches and menorahs communicate a religious message in violation of the establishment clause if the context in which the symbols are placed is not sufficiently secularized to de-emphasize the religious message of the symbol.<sup>385</sup> Even a thoroughly secular environment in the public school classroom is insufficient to obliterate the inherently religious nature of the Ten Commandments.<sup>386</sup> If a creche in a courthouse and Ten Commandments in a school room have expressive religious content *inducing veneration, obedience and meditation*<sup>387</sup> outside the context of any religious observance, then these objects affixed to the inside or outside of a house of worship certainly retain their religious influence over adherents who experience them in the context of religious observance. The constitutional analysis cannot be limited to religious symbols inside a church or synagogue that communicate religious messages. The historic background of religious architecture demonstrates that it is the entire structure—even its basic shape

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672, *reh'g denied*, 404 U.S. 874 (1971); see also *Boston, Historic Battles, CHURCH & STATE*, Mar. 1990, at 59-60 (discussion of constitutionality of public funding of preservation and restoration efforts by religious communities).

385. *Lynch v. Donnelly*, 465 U.S. 668 (1984) (display of creche in park, traditional public forum, does not violate establishment clause). Some courts have chosen not to see this as government speech but as public forum. See *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984) (public forum analysis), *aff'd*, 471 U.S. 83 (1985).

Establishment clause concerns may even be triggered by the decoration of a prayer room for legislators in a state capitol building. See *Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir. 1988). While the existence of a prayer room in the Illinois Capitol building operated and maintained with private funds was found not to constitute an establishment of religion, the court stated: “We reiterate . . . that our conclusion should in no way suggest that further developments in the decoration and use of the prayer room will automatically or routinely pass constitutional muster. The intrusion of sectarian influences and religious emphases could give rise to an establishment clause violation where none presently exists.” *Id.* at 1224; see also *County of Allegheny v. ACLU*, 492 U.S. 573, 672 (1989) (Kennedy, J., dissenting) (noting that prayer room in U.S. Capitol contains large stained glass panel depicting President Washington kneeling in prayer, surrounded by words of a Psalm, Bible and American flag).

386. *Stone v. Graham*, 449 U.S. 39 (1980) (state statute requiring posting of Ten Commandments in classroom violated establishment clause), *reh'g denied*, 449 U.S. 1104 (1981).

387. *Id.* at 42 (“If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments.”).

and even the absence of symbols—that communicates, not merely its identifiable symbols.

Extrapolating from the Supreme Court's decisions involving religious buildings and symbols, the house of worship, by its pervasively sectarian and communicative nature, creates an environment for religious formation. Government regulation of the appearance of the house of worship, and hence of the message communicated, must give rise to concerns over governmental interference in the right of the religious community to transmit belief and doctrine to its adherents and the process by which adherents internalize the visual messages that inform their beliefs.

Particular concern arises when the state requires the religious community to maintain particular images, words, or sacred empty spaces *in its own worship space*. Such action by the state shapes the visual religious environment upon which the adherent's spiritual development is, in part, dependent. One example of such involvement can be seen in *Society of Jesus*. The Landmarks Commission required the Jesuits to maintain the painting of the Assumption of Mary. While no removal was proposed, and while its maintenance was in no way offensive to the Jesuits' beliefs, the commission's requirement was nonetheless a civil determination of an appropriate image for the adherents' worship environment. *Within a sanctuary to be used for worship purposes by a religious community*, the painting is not exclusively "art" or a cultural treasure, as is a religious painting hanging in a museum or gallery. Its purpose *in this pervasively sectarian context* is to evoke prayer, meditation and reverence. The painting is part of the worship space which transmits beliefs to the worshipper and inculcates religious truths in the worshipper. For the state to require the maintenance of the painting of the Virgin Mary and to deny permission to replace it with another image of Mary, an image of another figure, or no image at all, is not the preservation of aesthetic or historical values. The state is passing judgment on a tenet of faith, determining the appropriate image for the visual environment of the sanctuary.<sup>388</sup>

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388. Just as the state could not require the religious community to keep a flag of the United States in the sanctuary, neither can it dictate to the religious community the artistic and architectural elements that must remain in, or may not enter, the sanctuary. See BISHOPS' COMMITTEE ON THE LITURGY, NATIONAL CONFERENCE OF CATHOLIC BISHOPS, ENVIRONMENT AND ART IN CATHOLIC WORSHIP 45 (1977) ("identifying symbols of particular cultures, groups, or nations are not appropriate as permanent parts of the liturgical environment").

Similarly, if a design control board challenges the aesthetic quality of a proposed house of worship or alteration thereto, it in essence evaluates beliefs by denying the right to express faith through a particular physical manifestation, and by shaping the environment in which the adherent's spiritual life develops. Such design control involves illegitimate state evaluation, regulation and definition of religious beliefs.

D. *The Constitutional Necessity of a Religious Exemption  
from Design Control*

The constitutional infirmities inherent in governmental design control of houses of worship can be remedied only by exempting these structures from the coercive authority of design commissions, at least insofar as these structures house or are intended to house a worshipping community. Attempts to address the constitutional issues through consent provisions, liturgical exemptions and hardship exemptions are inadequate to protect religious communities. In all three, the government continues to possess coercive design authority, granting or denying permission to the religious community to carry out fundamental rights.

A consent provision permits the religious community to submit voluntarily to government jurisdiction over all future decisions to retain, modify, renew or replace its religious architectural expression. Arguably, a knowing and uncoerced consent would bind the religious community permanently. This type of provision remains problematic, however, for several reasons. First, the precise objects of constitutional protection are those dynamic changes in religious architectural expression *occurring over time*. If these protections can be waived by one generation to bind the next, the protection is emptied of all content. Furthermore, aside from the question of waivability of a constitutional protection, such consent is tantamount to a delegation from the religious community to the state of a religious decision that the state is not empowered to make. Such a delegation is necessarily unconstitutional under the establishment clause.

A liturgical exemption also provides inadequate protection to the religious community. One can appreciate the Seattle ordinance's attempt to acknowledge the connection between liturgical development and architectural expression and its constitutionally mandated deference to the religious community as "the exclusive authority on liturgy and . . . the decisive party in determining

what architectural changes are appropriate to the liturgy.”<sup>389</sup> Such an exemption, however, does not go far enough. The Seattle ordinance spoke of permitting architectural changes that were “necessitated by changes in the liturgy.”<sup>390</sup> This element of mandatory change is absent in most cases of architectural evolution, except for narrow instances such as the required central altar in post-Vatican II Roman Catholic churches.<sup>391</sup> It is questionable whether the embellishments of many Protestant sanctuaries occurring throughout the nineteenth and twentieth centuries would have been permitted under such a liturgical exemption had preservation laws then been in effect.<sup>392</sup>

An additional problem with a liturgical exemption is the pressure on design commissions (especially those with a preservation mandate) to permit only the most narrow deviations. A design commission would likely permit the addition of cherubs below the cornice line of the house of worship’s exterior because those are “religious symbols,” although unrelated to changes in liturgy. Yet it is clear from only a brief historical look that liturgical development generally influences, and may dictate, the configuration of the overall building plan. A religious community may propose a massive structural reorientation of its building because its revised liturgy now calls for a longitudinal space. The design commission would probably deny permission for such large scale change, rejecting the church’s definition of liturgical, thereby substituting its own interpretation and definition of “changes necessitated by the liturgy” for that of the religious community. Because of the broad discretion of design boards and the vagueness of the term “liturgy,” a liturgical exemption offers little protection.

Hardship exemptions are also not adequate to protect the design decisions of religious communities because they focus almost exclusively on economic hardship and ignore the hardship imposed on religious expression. They may be very useful in determining the economic burdens of property owners, particularly in those cases in which a religious community finds itself unable

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389. See *First Covenant Church v. City of Seattle*, 114 Wash. 2d 392, 406, 787 P.2d 1352, 1360 (1990) (quoting Seattle, Wash., Ordinance 112425 (Sept. 17, 1985)).

390. *Id.*

391. See *supra* note 323.

392. For an appreciation of the many layers of embellishment that result from ornamentation added over time in many Protestant houses of worship, see Jaeger, *supra* note 181.

to adapt or sell its building for non-religious or ancillary religious use. In fact, since the hardship doctrine provides for an exceedingly narrow exemption, it may in itself be unconstitutional as applied to religious communities.<sup>393</sup> Nonetheless, the exemption is clearly an inappropriate measure of constitutionality in the context of houses of worship that continue to be used for worship purposes. The hardship exemption is primarily a takings test relating to economic burdens that may not exist in many cases of house of worship construction or alteration. Suppose, for instance, that a religious community planning to build a house of worship on a vacant lot in an historic district is required to build it as a four-story brownstone in order to conform with surrounding architecture. There may be little or no economic difference between the costs associated with construction of the required design and of an alternative. In such case, the difference is solely one of religious architectural expression, which a hardship test would not cover. The state has dictated the appearance of the house of worship, yet it has not caused "hardship" since minimal religious use is probably possible on the inside of the four-story brownstone. For purposes of this article's constitutional analysis, permitting minimal religious use of property addresses neither the extreme burdens placed on the freedom of religious belief and expression nor the state's usurpation of the religious architectural statement.

The question remains, then, of the appropriate form of exemption from the state's power to control ecclesiastical building design. Many houses of worship have been designated landmarks individually or as part of historic districts or are subject to architectural controls as part of architectural districts. Additionally, many houses of worship were so designated because the religious communities themselves sought the public recognition of the historic and architectural role played by their structure in the visual and cultural landscape. Finally, while many religious communities are terrified of the extent of intrusive controls on their properties, others welcome governmental preservation.

With these concerns in mind, the following amendments to municipal landmarks preservation and architectural review ordinances are suggested:<sup>394</sup>

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393. See *supra* notes 107-08 & 127-36 and accompanying text.

394. Since not all landmarks are locally designated, there may be problems of preemption, particularly in cases in which a national landmark is considered by local ordinance under the jurisdiction of the local commission. Such preemption problems are beyond the scope of this article.

*Section 1.* No interior used primarily as a place for the conduct of religious ceremonies (Religious Interior) shall be designated pursuant to this ordinance. The landmark designation of any Religious Interior made prior to the date of this amendment shall be considered null and void as of the date of this amendment and the Commission shall cease to have any jurisdiction or powers (review, enforcement or otherwise) over such Religious Interior and the owner thereof.

*Section 2.* No exterior of any building owned by a religious organization and used primarily as a place for the conduct of religious ceremonies (Religious Structure) shall be designated pursuant to this ordinance except as permitted in Section 3.

*Section 3.* A Religious Structure may be recognized by the Commission as having aesthetic merit (Recognized Structure) pursuant to subsections (a), (b) and (c) of this Section.

(a) At the written request of the religious organization owning the Religious Structure, the Commission shall review the evidence provided by the religious organization in its written request, and shall vote without further study whether or not to designate the Religious Structure as a Recognized Structure. The determination shall not be appealable. Following such designation, the Commission shall have no jurisdiction or powers (review, enforcement or otherwise) over such Recognized Structure and the owner thereof.

(b) No provision of this ordinance except for Sections 2 and 3 shall be applicable to the Recognized Structure, and nothing in this ordinance shall be construed to impose any regulations or controls upon any Recognized Structure.

(c) The landmark or architectural designation of any Religious Structure (individually or as part of an historic or architectural district), made prior to the date of this amendment, shall be considered null and void and shall be replaced with the status of Recognized Structure as of the date of this amendment.

*Section 4.* The limitations on the Commission's jurisdiction in connection with Religious Structures set forth in Sections 2 and 3 shall continue until a final determination is made by the religious organization that it has permanently ceased use of its Religious Structure for religious purposes. The limitations on the Commission's jurisdiction shall not be affected by the transfer of ownership from one religious organization to another provided that there is continuity of religious use.

*Section 5.* Referrals for technical assistance and fundraising advice provided generally by the Commission to owners of designated structures undertaking preservation and restoration work shall be available to religious organizations requesting such assistance. This assistance shall include distribution of literature, including lists of artisans and craftspersons and other advice regarding the availability and costs of private services, and information regarding private sources of funding.

Section one of this proposed amendment to design control ordinances addresses the sensitive questions involving the conduct of worship and the spiritual development of adherents and the necessity of an absolute prohibition against state involvement in religious interiors beyond building and safety codes. The New York City landmarks ordinance exempting sanctuaries is similar to this section, but goes no further in its protection of houses of worship. This limited protection is rooted in the mistaken assumption that the interior is private and the exterior is public.<sup>395</sup> The assumption that the religious community's life is limited to the "interior," however, fails to acknowledge the semiotic significance of the facade to the adherents, the important connection between interior design and exterior configuration and the fact that interior redesign may involve reconfiguration of the overall structure.<sup>396</sup>

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395. See Gray, *supra* note 22, at 5, col. 1.

396. For example, Old St. Mary's Church in Philadelphia was built in 1763 and expanded in 1810. In 1882, the church's interior was turned around, with a bay (the apse) replacing the former entrance, and the Gothic facade added. The replacement, of course, affected the exterior. Similarly, a proposal to alter Charleston's St. Phillip's Episcopal Church involved the expansion of the sanctuary by enlarging an apse in the rear of the church to provide needed space and stabilize the structure. The existing apse was added to the nineteenth century structure, and the new semi-circular addition would be built around it. One landmarks board member is quoted as saying that enlarging the apse "will throw (the church) out of balance. I think it will not be as beautiful as it is now."



Thus, Sections two and three are necessary to protect the exterior from governmental restrictions. These sections do not provide an absolute prohibition, as is the case with the interior. Instead, sections two and three give *de minimis* jurisdiction to the design commission for the sole purpose of recognizing as magnificent structures those houses of worship for which the religious communities themselves seek recognition.<sup>397</sup> Such recognition may pertain to a religious community that has just undertaken a restoration of its property, a religious community about to embark on a fund raising campaign to raise funds for renovation, or simply a religious community with tremendous pride in its house of worship. Because the commission lacks review or enforcement powers, the constitutional issues concerning the state's determination of appropriate and inappropriate religious expression disappear. These sections mirror the initial motivation of many religious communities to seek landmark status where there existed no intent to submit all future generations to the jurisdiction of the state on design decisions. If a religious community does intend to preserve its structure from future changes, it can still do so through private means.<sup>398</sup>

Furthermore, the "recognized structure" status serves as a noncoercive reminder to religious communities that are about to undertake alteration, renovation or demolition that preservation or restoration may be a viable alternative. Thus, a religious community owning a recognized structure may be more apt to consider preservation as one among many design alternatives and will include such an alternative in the internal discussions on appropriate architectural expression of faith. This differs markedly from the coercive use of the state's enforcement powers to re-

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Morgan, *St. Phillips Alteration Considered*, News and Courier, Mar. 30, 1990, at 1-A, 15-A.

397. Section 1011 of the San Francisco preservation ordinance provides for a similar category of "structures of merit." SAN FRANCISCO, CAL. PLANNING CODE § 1011 (1990). There, the Planning Commission "may approve structures of historical, architectural, or aesthetic merit which have not been designated as landmarks and are not situated in designated historic districts." *Id.* The purpose is "to recognize and encourage the protection, enhancement, perpetuation and use of such structures." *Id.* It provides further that "[n]othing in this Article 10 shall be construed to impose any regulations or controls upon such structures of merit . . . ." *Id.* § 1011(b). Subsection (c) further provides that the Planning Commission "may authorize such steps as it deems desirable to recognize the merit of, and to encourage the protection, enhancement, perpetuation and use" of these meritorious structures. This includes issuing a "certificate of recognition and the authorization of a plaque to be affixed to the exterior of the structure." *Id.* § 1011(c).

398. See *supra* notes 287-89 and accompanying text.

quire preservation (or some other architectural orthodoxy) and to permit deviation only in narrow cases.

As initially circumscribed, this article's constitutional analysis applies only to sites intended to be used, or which continue to be used, as houses of worship. Section four requires a permanent cessation of use of the structure as a house of worship before design control jurisdiction can be asserted; this is necessary to prevent the aggressive assertion of jurisdiction over a structure that is temporarily unused for worship but that ultimately may be returned to such use or that may be conveyed to another religious community for such use.<sup>399</sup> Temporary abandonment of worship use may result from, among other things, review by a religious community at local or regional levels of the uses to which its structures should be put in light of changing demographics or financial situations which affect individual parishes or congregations.

Section five avoids the current problem in which religious communities interested in restoration or preservation of their houses of worship may be required to submit to landmark designation as a pre-condition to receipt of such technical or fundraising assistance. Religious communities not wanting their property subject to landmark restrictions might avoid seeking assistance and may end up doing an inadequate job of restoration or preservation. This section gives further incentive to the religious community to consider preservation as a viable alternative to other forms of architectural expression, without using the coercive power of the state to determine that the preserved structure is the appropriate religious architectural expression.<sup>400</sup>

## VI. CONCLUSION

In order for ecclesiastical design to continue to evolve, religious communities must have freedom to choose the physical

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<sup>399</sup> Upon such a final determination (e.g., the religious structure will be sold for non-religious use or put to some ancillary religious use without worship activity on the premises), preservation and architectural review authorities do not have the immediate right to designate the structure free from constitutional constraints. It is at this point that issues of economic burden become paramount, and the hardship experienced by the religious community may result in constitutionally required exemptions from design control beyond those suggested in this article. The arguments made in this article, however, apply only to the inherent religiosity of a structure while used for religious worship.

<sup>400</sup> The availability of governmental sources of funding is not discussed because the potential establishment clause concerns are outside the scope of this article.

manifestation of their religious message. The slow design evolution from early basilican to medieval Gothic forms, the radical design changes of the early Reformation, the reappropriation of earlier forms in Gothic revivalism and the Catholic Liturgical Movement, the development of indigenous Jewish forms, and the persistence of traditional themes in Islamic architecture exemplify the variety of ways in which physical structures accommodate dynamic religious expression. Of course design evolution is not a linear development; ancient, pre-modern and contemporary forms will continue to be reappropriated and adapted in new ways, and even copied literally to mimic the past. The tension between departure from and nostalgia for traditional forms will continue, and innovative architectural forms will continue to be born out of it.

Under the religion clauses, this freedom for design and doctrinal development to function in tandem must be assured: religious communities must be able to make theological, liturgical, missional and identity-related choices without state involvement. The requirements of architectural consistency and compatibility with surrounding properties and tight controls over modifications to existing structures, enforced through governmental design control, however, may have a chilling effect on the dynamism of ecclesiastical design. This long term trend as applied to religious architecture portends not only aesthetic stagnation but the distortion of communication of belief and development of doctrine. An environment that discourages (or prohibits) innovative designs for new or renovated houses of worship will dissuade (or prevent) the religious community from architectural experimentation or readaptation that would more authentically express its theological, liturgical, missional and ecclesial life. Over time, design control may lead to a uniform mediocrity that is state-directed, substituting the tastes of local residents and the aesthetic elite for the religious message of the religious community. Houses of worship will resemble the average citizen's conception of what a church, synagogue, mosque or temple should look like, or will simply replicate the surrounding structures.

Under the religion clauses and their shared goal of religious liberty and shared purpose of protecting religion from undue governmental interference, the state cannot control or evaluate the content, profession, and formation of belief and doctrine, suppress or encourage particular beliefs and practices, or appropriate to itself the role of articulating theological principles.

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**HOUSES OF WORSHIP**

**515**

**When the state extends its jurisdiction for aesthetic purposes over existing and proposed houses of worship used by religious communities, it engages in precisely such activities, and must be precluded from doing so. Because the state is constrained by both the free exercise clause and the establishment clause, an exemption from design control for houses of worship being used by active congregations is a constitutional necessity.**

