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Ministry and Mortar: Historic Preservation and the First Amendment After Barwick

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MINISTRY AND MORTAR: HISTORIC PRESERVATION AND THE FIRST AMENDMENT AFTER *BARWICK*

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On July 2, 1986, the New York Court of Appeals refused to exempt the Church of St. Paul and St. Andrew in New York City from the city's landmark preservation ordinance[1] on the basis of the Free Exercise Clause of the first amendment.[2] Although *Church of St. Paul and St. Andrew v. Barwick*[3] involved a declaratory judgment action and the court based its decision on ripeness, it reaffirmed the constitutional standard for religious organizations announced six years earlier in *Society for Ethical Culture v. Spatt*.[4] The court in *Barwick* relied on the *Spatt* court's holding that application of the New York City preservation ordinance to religious property was constitutional unless the law,

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1. NEW YORK, N.Y., ADMIN. CODE ch. 8-A, §§ 205-1.0-207-21.0 (1976 & Supp. 1987). The New York City Landmarks Preservation Commission (Commission) was established in 1965 to "effect and accomplish the protection, enhancement and perpetuation of such improvements and landscape features and of districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history". *Id.* § 205-1.0(b)(a).

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

3. 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 (1986).

4. 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980).

as applied, "physically or financially prevents or seriously interferes with the charitable purpose."[5] Thus, the *Spatt* court applied what was essentially a taking standard to religious groups because the court felt that preservation statutes regulated "secular activities."[6]

In *Church of St. Paul and St. Andrew v. Barwick*,[7] the court extended the *Spatt* holding to require a church to comply with landmark regulations even if it sought to renovate the worship building for continuing religious use. The New York Court of Appeals ruled that preservation statutes do not implicate the first amendment as long as they merely regulate church buildings and church property development. The court held that all constitutional claims by religious groups fall under the less stringent taking standard first applied in charitable, nonprofit cases.[8] The Church of St. Paul and St. Andrew, determined to prevent what it considered unjust infringements on religious freedom, unsuccessfully appealed to the United States Supreme Court.[9]

I. BACKGROUND LAND USE CASES AND THE FIRST AMENDMENT

A. *State and Federal Zoning Cases*

State courts generally ignored the free exercise clause[10] in church zoning cases until the 1970's. In most instances, the constitutional fo-

5. 67 N.Y.2d at 524, n.6. Earlier applications of this rule are found in Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 9032 (1980); Lutheran Church v. City of New York, 35 N.Y.2d 121, 131, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974); Matter of Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d 376, 378, 288 N.Y.2d 314 (1968).

6. 51 N.Y.2d at 551. *Spatt* involved the construction of a skyscraper for rental to nonreligious tenants, with the profits to go to the Society.

7. 67 N.Y.2d 510, 496 N.E.2d 183, 505 N.Y.S.2d 24 (1986).

8. The origin of the non-profit standard is found in *Snug Harbor*, 29 A.D.2d 376, 288 N.Y.2d 314 (1968). Other courts have used similar approaches to preservation ordinances and religious groups. *See* First Presbyterian Church of York v. City of York, 25 Pa. 154, 360 A.2d 257 (1976) (demolition permit could be denied historic church unless the refusal precluded use of the building for any purpose for which it was reasonably adapted); Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856 (Mo. Ct. App. 1977) (applied same test as *York*). Both cases borrowed the taking rule from Maher v. New Orleans, 371 F. Supp. 653 (E.D. La. 1974), *aff'd*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 416 U.S. 195 (1976).

9. 67 N.Y.2d 510, *cert. denied*, 55 U.S.L.W. 3385 (Dec. 2, 1986). *See also* Wash. Post, Sept. 27, 1986 at E1.

10. *See supra* note 2.

cus was due process.[11] For example, courts generally hold that the exclusion of churches from an entire community is a denial of substantive due process, principally because churches contribute to the public welfare.[12] Similarly, many courts hold the exclusion of churches from residential districts unconstitutional on the same grounds.[13] Recently, courts have turned to the freedom of religion clauses to strike down residential exclusions.[14] Refusing to extend the requirements of those clauses to preservation cases, court decisions in three states addressing the issue avoided the first amendment by focusing on the fifth amendment's takings clause.[15] Missouri and Pennsylvania adopted the taking standard of *Maher v. New Orleans*,[16] in which a Louisiana court held that a preservation ordinance is unconstitutional if it precludes the use of the property for any purpose for which it is reasonably adapted.[17] This approach assumes the absence of first amendment interests.

Several states, however, have established rules of preference for churches in land use cases. Ironically, the New York Court of Appeals

11. *See infra* note 15.

12. *See* Matter of Community Synagogue v. Bates, 1 N.Y.2d 445, 136 N.E.2d 488, 154 N.Y.S.2d 15 (1956) and Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, 287 S.W.2d 700 (Tex. Ct. App. 1956). The substantive due process test usually involves determining whether a statute is reasonably related to a legitimate state interest; courts rarely find statutes unconstitutional under this test.

13. *Community Synagogue*, 1 N.Y.2d 445, 136 N.E.2d 488, 154 N.Y.S.2d 15; Board of Zoning Appeals v. Decatur, Indiana Company of Jehovah's Witnesses, 233 Ind. 83, 117 N.E.2d 115 (1954). The minority rule on this issue is found in Corporation of the Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. City of Porterville, 90 Cal. App. 2d 656, 659, 203 P.2d 823, 825, *appeal dismissed*, 338 U.S. 805 (1949) ("[S]ince the city had power to zone the property herein affected, strictly for single family dwellings, there was no abuse of power in prohibiting the erection and construction of church buildings therein.").

14. Church of Christ in Indianapolis v. Metropolitan Board of Zoning Appeals of Marion County, 175 Ind. App. 346, 371 N.E.2d 1331 (1978); Lubavitch Chabad House of Illinois, Inc. v. City of Evanston, 112 Ill. App. 3d 223, 445 N.E.2d 343 (1982), *cert. denied*, 104 S. Ct. 485 (1983).

15. First Presbyterian Church of York v. City of York, 360 A.2d 257 (Pa. Commw. Ct. 1976), and Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856 (Mo. Ct. App. 1977). The fifth amendment of the U.S. Constitution commands that "private property [shall not] be taken for public use, without just compensation." U.S. CONST., amend. V, cl. 4.

16. In *Maher*, 516 F.2d 1051 (5th Cir. 1975), an architectural control commission denied a land owner's request to demolish a building in the French Quarter of New Orleans in order to construct an apartment building.

17. *Id.* at 1066.

has been prominent in creating such preferences since 1968. In *Westchester Reform Temple v. Brown*[18] the court refused to enforce a standard setback provision against a church that desired to expand its facilities.[19] The court held that "[c]hurches and schools occupy a different status from mere commercial enterprises and when the church enters the picture, different considerations apply."[20] Redefining the relevant considerations, the court required the state plan to show that the Temple's proposed expansion would have a "direct and immediate adverse effect" upon the health, safety, or welfare of the community.[21] The court further stated that the constitutional prohibition against the free exercise of religion outweighed the problems of increased traffic and declining property values.[22] The constitutionally protected status of religious structures severely curtails the permissible extent of police power regulation.[23] This heightened protection allows churches and communities to work out problem areas, while deferring to the church in the case of an irreconcilable conflict.[24]

Given the result in *Spatt* and *Barwick*, it is interesting to note that during the eighteen year period following its formulation, the *Westchester Reform Temple* standard survived many challenges. The court in *Jewish Reconstructionist Synagogue of the North Shore v. Incorporated Village of Roslyn Harbor*[25] used the *Westchester* doctrine to strike down a setback provision because it lacked a substantial requirement to mitigate public concerns when religious groups were involved.[26] In a subsequent case, the court employed the "direct and

18. 22 N.Y.2d 488, 239 N.E.2d 891, 293 N.Y.S.2d 297 (1968).

19. *Id.* The setback is the distance from the front, side, and back lot lines to the building.

20. *Id.* at 493, 239 N.E.2d at 894, 293 N.Y.S.2d at 301, (quoting Matter of Diocese of Rochester v. Planning Board, 1 N.Y.2d 508, 523, 136 N.E.2d 827, 834, 154 N.Y.S.2d 849, 859 [1956]).

21. *Id.* at 494, 239 N.E.2d at 895, 293 N.Y.S.2d at 302. Normally the test in such cases is whether the state can show that its regulation is *reasonably* related to the general welfare.

22. *Id.* at 496, 239 N.E.2d at 896, 293 N.Y.S.2d at 303.

23. *Id.*

24. *Id.* at 497, 239 N.E.2d at 896, 293 N.Y.S.2d at 304. The court held protection of the first amendment right of religious freedom outweighed community health, safety and welfare concerns. *Id.*

25. 38 N.Y.2d 283, 342 N.E.2d 534, 539 (1975).

26. *Id.* The dissent warned that the court was setting a precedent for churches which might overcome all zoning regulations. 38 N.Y.2d at 292, 342 N.E.2d at 541 (Jones, J., dissenting).

immediate adverse effect" test to find denial of a special use permit unconstitutional, even where a hostile public reaction to the congregation was probable.[27] In a case decided after *Spatt*, the court restated the municipality's affirmative obligation to adopt less restrictive alternatives to avoid completely barring a religious institution from locating or expanding its facilities in a residential neighborhood.[28]

New York courts continue to address the question of which accessory uses of a religious organization are entitled to this additional protection. Many uses, for instance, relate only tangentially to the primary religious activity, such as a church softball field or gymnasium. The most recent case dealing with this problem, *Application of Covenant Community Church Inc.*,[29] upheld a religious group's judicially recognized right to utilize its facilities and premises for non-religious activities that support and strengthen its religious practice.[30] The conflict concerned construction of a daycare and recreational facility adjacent to the church building. Citing *Matter of Community Synagogue v. Bates*,[31] the court noted that religious uses include more than prayer and sacrifice and that social activity plays a key role in strengthening the church and its ties to the community.[32] *Bright Horizon House Inc. v. Zoning Board of Appeals*[33] tempered this principle somewhat, however, in holding that a residential care facility was a secular use even though it included prayer and contemplation as part of its healing program.[34]

The distinction between religious and secular uses has troubled other state courts. One Illinois court found that residential property used for fellowship classes constitutes a religious use.[35] An Idaho court ruled that a lighted softball complex built by a church was an accessory church use under the zoning ordinance in question.[36] The distinction

27. Holy Spirit Ass'n for Unification v. Rosenfeld, 181 A.D.2d 190, 458 N.Y.S.2d 920, 927 (App. Div. 1983).

28. North Shore Hebrew Academy v. Wegman, 105 A.D.2d 702, 481 N.Y.S.2d 142, 146 (App. Div. 1984).

29. 444 N.Y.S.2d 415, 111 Misc. 2d 537 (App. Div. 1981).

30. *Id.*

31. 1 N.Y.2d 445, 136 N.E.2d 488, 154 N.Y.S.2d 15 (1956).

32. *Covenant Community Church*, 444 N.Y.S.2d at 422, 111 Misc. at 547.

33. 469 N.Y.S.2d 851, 121 Misc. 2d 703 (1983).

34. *Id.*

35. Twin City Bible Church v. Zoning Bd. of Appeals, 50 Ill. App. 3d 924, 365 N.E.2d 1381 (1977).

36. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v.

between religious and secular uses is both unnecessary and dangerous, particularly because it demands inquiry into the purposes and goals of the religious organization.[37]

Other states have followed New York's example of instituting special tests for religious groups in land use cases. Colorado created a substantial state interest test in *Pillar of Fire v. Denver Urban Renewal Authority*.[38] In a proceeding to condemn the church building housing the Pillar of Fire organization, the court required the state to "show a substantial interest without a reasonable alternate means of accomplishment."[39] Holding that religious faith and tradition can render certain structure and land sites worthy of first amendment protection, the Colorado Supreme Court remanded the case for further proceedings.[40] The same court later applied the substantial interest test to require a church to improve certain public streets in conjunction with the development of its property.[41]

Texas and Washington have also adopted stricter standards. In a residential exclusion case, the Texas Court of Civil Appeals promulgated a balancing test within the context of due process analysis.[42] The

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Ashton, 92 Idaho 571, 448 P.2d 185 (1968). *See also* Diakonian Soc'y v. City of Chicago Zoning Bd. of Appeals, 63 Ill. App. 3d 823, 380 N.E.2d 843 (1978) (residence used by group of religious professionals must be considered appropriate monastery use); Fountain Gate Ministries, Inc. v. City of Plano, 654 S.W.2d 841 (Tex. Ct. App. 1983) (religious organization's operation of a college does not constitute religious use for first amendment protection).

37. *See infra* notes 61-71 and accompanying text. Courts feel compelled to use this distinction because of the Supreme Court's decision in Braunfeld v. Brown, 366 U.S. 601 (1960). In that case, the Court upheld Sunday closing laws even though they burdened Saturday worshippers because the regulation applied merely to secular activities, i.e., the sale of goods. The principle worked well in that case, since the plaintiffs did not claim that their selling of goods was a religious activity. Such is not the case in land use matters, which present much harder questions as to what activity is "religious."

38. 181 Colo. 411, 509 P.2d 1250, 1253 (1973).

39. *Id.*

40. 509 P.2d at 1254. The condemnation was eventually upheld in Denver Urban Renewal Auth. v. Pillar of Fire, 191 Colo. 238, 552 P.2d 23 (1976). The court balanced the interests of the Renewal Authority for urban renewal in downtown Denver against the church's interest in maintaining its building. The church used its building primarily as a rooming house since the denomination had moved its primary worship place to another part of Denver. The court found that the Renewal Authority's interests outweighed those of the church. *Id.*

41. Bethlehem Evangelical Lutheran Church v. City of Lakewood, 626 P.2d 668 (Colo. 1981).

42. Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom, 287 S.W.2d 700, 705 (Tex. Ct. App. 1956).

court held that property values and traffic problems lack a substantial relation to the safety, morals and general welfare of the community.[43] Applying its balancing test, the court reasoned that the right of freedom of worship outweighs any benefit the community would realize from maintaining property values and avoiding traffic problems.[44]

The Washington Supreme Court recently held that even indirect burdens on churches from zoning regulations required courts to balance the interest of the parties and determine which interest must yield.[45] The case concerned the application of a municipal building code to a church school. The court held that municipalities should be flexible in balancing the interests of worshipers and the legislature's concerns as expressed in the building code.[46] Judge Dolliver in dissent sharply criticized the majority for virtually adopting a compelling state interest test when religious beliefs and principles were not involved.[47] A few other states have altered their constitutional standards in zoning cases involving religious groups. In New Jersey, for example, one court enhanced its procedural due process analysis when the state attempted to apply zoning regulations to religious properties.[48]

Many state and federal courts, however, persist in their efforts to reject claims of special preference for religious groups. Several states apply a routine reasonableness test to all zoning regulations in church

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43. *Id.*

44. *Id.*

45. City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 639 P.2d 1358, 1362 (1982). A strong message was sent to municipalities that when

> confronted with rights protected by the [f]irst [a]mendment, it should not be uncompromising and rigid. Rather, it should approach the problem with flexibility. There should be some play in the joints of both the zoning ordinance and the building code. An effort to accommodate the religious freedom of the appellants while at the same time giving effect to the legitimate concerns of the city as expressed in its building code and zoning ordinance would seem to be in order.

Id. at 1363.

46. 639 P.2d at 1363.

47. 639 P.2d at 1368 (Dolliver, J., dissenting). The standard of a "necessary relationship to a compelling state interest" is required when free exercise rights are burdened.

48. State v. Cameron, 100 N.J. 586, 498 A.2d 1217 (1985) (temporary use of a minister's home for weekly services involved constitutionally protected interests.) *See also* Milharcic v. Metro. Bd. of Zoning Appeals, 489 N.E.2d 634 (Ind. Ct. App. 1966) (need or benefit of the state police power must outweigh the restriction on the rights of freedom of worship); Rapid City v. Kohler, 334 N.W.2d 510, 512 (S.D. 1983) (religious uses are favored for their unique contribution to the public welfare and because of constitutional guarantees).

cases.[49] Two recent federal circuit cases hampered efforts of religious groups to obtain special protection. In *Lakewood, Ohio, Congregation of Jehovah's Witnesses v. City of Lakewood*,[50] the Sixth Circuit examined an ordinance limiting churches to ten percent of the entire city land area.[51] Declaring the construction of a church to be a secular activity, the court found that the ordinance failed to burden first amendment interests.[52]

Also ruling against a religious group seeking special protection, in *Grosz v. City of Miami Beach*[53] the Eleventh Circuit upheld an injunction against a Jewish sect which used a member's garage for religious worship in a residential zone that excluded churches.[54] Finding that there were no protected first amendment interests, the court noted that the sect had alternative locations to worship, and that the integrity of the city's planning scheme controlled.[55] The court also held that convenience, economics, and aesthetics were not constitutionally cogniza-

49. St. John's Roman Catholic Church v. Darien, 149 Conn. 712, 184 A.2d 42 (1962) (zoning regulations are applied to church schools in the same manner as private schools). *See also* Faith Assembly of God v. State Bldg. Code Comm., 416 N.E.2d 228 (Mass. App. Ct. 1981) (church schools are not entitled to special protection from zoning regulations); Wilmington Housing Auth. v. Greater St. John Baptist Church, 291 A.2d 282 (Del. 1972) (churches get no special exemption from condemnation proceedings based on free exercise guarantees).

50. 699 F.2d 303 (6th Cir. 1982), *cert. denied*, 464 U.S. 815 (1983).

51. *Id.* The Jehovah Witness group members claimed the zoning ordinance infringed on their first, fourth and fourteenth amendment rights and sought damages pursuant to 28 U.S.C. § 1983.

52. *Id.* at 307. The court held the ordinance was a legitimate exercise of the city's police power because it merely limited, instead of completely prohibiting, the building of church facilities in the city. Noting that the zoning ordinance reserved ten percent (10%) of the city land for religious use, the court concluded that choice of location for a new facility was a secular rather than a religious decision and was therefore not constitutionally protected. *Id.* at 306-07.

53. 721 F.2d 729 (11th Cir. 1983).

54. *Id.* Petitioners in the case had not applied for a zoning change. Rather, they applied for a building permit to have their garage remodeled for use as a "playroom." When petitioners received the building permit, the city informed them that they could not use the garage for religious purposes. *Id.* at 730-32. Notwithstanding this restriction, petitioners converted the garage into a small synagogue, a shul. The city issued a notice of violation because petitioners conducted religious services twice a day in the garage, contrary to the zoning ordinance. After weighing the free exercise rights of petitioners against the city's interest in restrictive zoning, the court ruled in favor of the city. *Id.* at 739-41.

55. *Id.* at 739.

ble burdens on religion.[56]

Perhaps more damaging to the efforts of religious groups in obtaining special protection was a recent federal case in New York, where the district court held that the free exercise guarantee only covered beliefs, not religious activities.[57] The court drew on the historic distinction in *Cantwell v. Connecticut*[58] that the first amendment fully protected individuals' beliefs, but allowed states to regulate religious conduct as necessary. Moreover, the district court held that judges could inquire into the *bona fides* of religious belief if religious activity were at issue.[59]

These state and federal decisions greatly underestimate the first amendment interests involved in such cases. They reinforce the notion that the distinction between secular use and religious use ought to be dispositive.[60] Further, the courts used the distinction between belief and practice to eliminate all but the most fundamental elements of religion.

B. *Federal Land Management Cases*

Many federal land use problems occur when federal agencies attempt to manage governmental land that Indian tribes hold sacred. In *Badoni v. Higginson*[61] the Tenth Circuit examined the construction of a reservoir on federal property that Indians used for religious practices.[62] The court held that, although the flooding of religious shrines implicated free exercise interests, the state showed a compelling need to build the reservoir.[63]

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56. *Id.*

57. Holy Spirit Ass'n v. Rosenfeld, 480 F. Supp. 1212 (S.D.N.Y. 1979). *See supra* note 27 for a subsequent state decision concerning the same dispute.

58. 310 U.S. 296, 304 (1940). The Supreme Court distinguished between religious beliefs and religious activity and stated that conduct was subject to "reasonable" regulations, clarifying that there was no absolute protection.

59. 480 F. Supp. 1212, 1216 (citing Stevens v. Burger, 428 F. Supp. 896 (E.D.N.Y. 1977) and Cantwell v. Connecticut, 310 U.S. 296 (1940)).

60. *See also* Comment, *Zoning Ordinances Affecting Churches: A Proposal for Expanded Free Exercise Protection*, 132 PA. L. REV. 1131 (June 1984) [hereinater Comment] (advocating a broader free exercise analysis to protect religiously motivated activity to a time, place and manner of speech restriction standard in order to protect religious activity as well as to allow courts sufficient flexibility to uphold legitimate governmental action).

61. 638 F.2d 172 (10th Cir. 1980).

62. *Id.*

63. *Id.* at 177-78.

In contrast, although also ruling in favor of the government in a reservoir case, the court in *Seqouyah v. Tennessee Valley Authority*,[64] based its decision on the absence of a protected first amendment interest.[65] The Indian plaintiffs failed to establish that the property was indispensable to the practice of their faith.[66] Since the Indians had a compelling interest in practicing their religion,[67] this case created what appears to be an unnecessarily high standard.

Two later cases adopted the *Seqouyah* standard. *Crow v. Gullet*,[68] for example, held that the government action must affect a practice of "indispensable centrality" to the religious faith for the action to violate the first amendment. A second case, *Wilson v. Block*,[69] approved a federal expansion of a ski facility on land sacred to the Indians, holding that such encroachment did not affect a belief or practice "rooted in religion" and did not "penalize faith."[70] These courts emphasized the distinction between belief and action, holding that the location of, and burden upon, religious practice was irrelevant under the first amendment. These decisions suggest that even if the government action affects belief, it must burden "indispensable" or "central" beliefs. With minor exceptions,[71] the federal case law in this area severely restricts protection of religious activity to those activities absolutely essential to survival of the religion. Extension of these limited views of the Free Exercise Clause to cases dealing with preservation laws would hinder the growing preference for churches in land use cases.

64. 620 F.2d 1159 (6th Cir. 1980).

65. *Id.*

66. *Id.* at 1164.

67. Inupiat Community v. U.S., 548 F. Supp. 182 (D. Alaska 1982), another Indian case, emphasized the compelling interest of the government in managing offshore properties in compliance with treaty obligations.

68. 541 F. Supp. 785 (D.S.D. 1982).

69. 708 F.2d 735 (D.C. Cir. 1983).

70. *Id.* at 740.

71. Northwest Indian Cemetery Protective Ass'n v. Peterson, 764 F.2d 581 (9th Cir. 1985) (government logging interests were not compelling and such actions affected things indispensable to Indian religion); United States v. Means, 627 F. Supp. 247 (D.S.D. 1985) (government interest failed to justify Forest Service restrictions on the use of federal park land which burdened religion).

II. THE *BARWICK* CASE

A. *The Administrative Process*

In 1965 New York City created a comprehensive scheme to protect and enhance the "city's cultural, social, economic, political and architectural history."[72] The Landmarks Commission, a citizen body of architects, historians, business people and other community representatives, is the administrative agency that enforced the ordinance.[73] The designation of landmark status for a structure under this statute can be a lengthy process. After a person alerts the Commission to a potential landmark eligible for protection from alteration or demolition, the Commission investigates the merit of the particular structure or property. After notifying the owners, certain public officials and the local Community Board, the Commission schedules the nomination for a public hearing.[74] In designating a landmark, the Commission only considers historical, architectural, and aesthetic factors, ignoring economic hardship to the owner.[75] Following the hearing, the Commission can designate the structure a landmark, effective immediately.[76] The Commission then files a copy of the designation with the City Board of Estimate, which can approve, disapprove, or modify the Commission's action within sixty days.[77] If the City Board of Estimate approves the landmark status, the designation becomes final.

After the Commission designates a building a landmark, its owner must comply with maintenance and repair provisions. The New York scheme subjects the owner to criminal penalties for failure to comply with these provisions. In addition, the owner may not alter, reconstruct, or demolish the structure without consent of the Commission.[78] The owner who wishes to alter or demolish a designated landmark has two options. First, the owner may request a "Certificate of Appropriateness" for the desired project, which ensures that the proposed action

72. NEW YORK, N.Y. ADMIN. CODE ch. 8-A, §§ 205-1.0-207-21.0 (1976). *See supra* note 1. A good review of the statute can be found in Note, *First Amendment Challenges to Landmark Preservation Statutes*, 11 FORDHAM URB. L.J. 115, 119 (1982).

73. *See generally* NEW YORK, N.Y. ADMIN. CODE, ch. 8-A, §§ 205-1.0-207-21.0.

74. *Id.* These boards serve as local nominating and informational sources.

75. *See generally* COMMITTEE OF RELIGIOUS LEADERS OF THE CITY OF NEW YORK, FINAL REPORT OF THE INTERFAITH COMMISSION TO STUDY THE LANDMARKING OF RELIGIOUS PROPERTY 28 (1982) [hereinafter *Interfaith Report*].

76. NEW YORK, N.Y. ADMIN. CODE, ch. 8-A, § 207-2.0(b), (e).

77. *Id.* at § 207-2.0(g)(1).

78. *Id.* at § 207-16.0.

will not have a detrimental effect on the protected features.[79] "Certificates of No Effect" or "Permits for Minor Work" are available when protected features are not involved.[80]

Second, the owner can seek a Certificate of Appropriateness based on economic hardship. A nonprofit owner must meet three conditions: 1) there must be a contract to sell the property or lease it for twenty years or more; 2) without the proposed action, the commercial property is unable to earn a reasonable return; and 3) without the proposed action, the building is unsuitable for the owner's purpose, or the purpose for which the owner originally used it.[81] If the owner meets the economic hardship test, the Commission will seek a purchaser or tenant willing to maintain the landmark, or recommend that the city purchase the building or merely its facade.[82] If the Commission fails to choose either of these options, the owners may proceed as they wish. The potential for first amendment problems arises for two reasons. First, the appropriateness procedure requires evaluation of architecture that reflects religious doctrine.[83] Second, the hardship procedure, which determines whether the property is still suitable for the owner's purpose, entails delicate evaluation of religious ministries and activities.[84]

B. *Development of the New York Test for Landmark Legislation in Religious Property Cases*

The New York City landmark law received its first constitutional test in *Sailors' Snug Harbor v. Platt*.[85] A charitable organization that provided residential facilities for retired seamen challenged the application of the ordinance to its 19th Century Greek Revival buildings.[86] Conceding that the restrictions embodied in the statute were generally

79. Interfaith Report, *supra* note 75, at 31.

80. *Id.*

81. NEW YORK, N.Y. ADMIN. CODE, § 207-8.0(a)(2).

82. *Id.* at § 207-8.0(i)(4)(a).

83. *See infra* notes 152 & 153 and accompanying text.

84. The hardship procedure now seems to cover religious properties regardless of whether the sale-lease requirement has been met. Although the Church of St. Paul and St. Andrew had not leased away its worship building, the court of appeals required it to undergo the Commission hardship procedures.

85. Matter of Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d 376, 288 N.Y.2d 314 (1968).

86. *Id.* at 315. The organization desired to destroy the buildings and construct modern accommodations.

within the police power, the Appellate Division warned that under certain circumstances the law could amount to a taking.[87] The court's test in *Snug Harbor* for a taking was whether "maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose."[88] The court noted that the answer depended on whether conversion to a useful purpose would entail excessive cost and whether maintenance of the historic structure would involve serious expenditures "in light of the purposes and resources of the petitioner."[89]

In 1974, the *Lutheran Church* case revived debate over the constitutionality of the landmarks statute by challenging application of the law on first amendment grounds.[90] The Church owned a former residence of J. P. Morgan which had become totally inadequate for the organization's corporate and religious purposes. The Church sought to demolish the house and erect a 19-story building in its place.[91] With a *prima facie* showing that the Church would have to abandon the property if the statute denied its rebuilding plans, the court declared the landmark designation to be a taking.[92] In applying the *Snug Harbor* standard, the court ignored the free exercise claims and instead treated the religious organization as a charitable entity for purposes of constitutional adjudication.

Many religious groups hoped, however, that *Lutheran Church* left unresolved the free exercise claims. In 1980, the Society for Ethical Culture, a religious and charitable organization, sought injunctive relief from the designation of its meeting house as an historical landmark.[93] Although successful in the trial court,[94] the Appellate Division rejected the Society's taking and first amendment claims, holding the Society was unable to use free exercise rights to enhance development of religious property. The principal issue in the case was

87. *Id.* at 316.

88. *Id.*

89. *Id.*

90. Lutheran Church in America v. New York, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974).

91. 35 N.Y.2d at 133, 316 N.E.2d at 313, 359 N.Y.S.2d at 18 (Jansen, J., dissenting).

92. 35 N.Y.2d at 132, 316 N.E.2d at 316, 359 N.Y.S.2d at 17.

93. Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980).

94. 68 A.D.2d 112, 416 N.Y.S.2d 246 (1979).

whether the Society could erect an office tower to rent to non-religious tenants, thereby receiving a financial boost for the group's religious activities. The Court of Appeals affirmed the appellate court's decision, holding that feasible alternatives existed for protecting the historic facade and accommodating additional development. As a result of these alternatives, the designation failed to seriously interfere with the organization's charitable use.[95] Moreover, since the restriction merely affected development prospects, rather than buildings currently used for religious purposes, no free exercise interests existed.[96] The court reasoned that religious organizations lack immunity from government regulation when they act in "purely secular matters."[97]

In this way, the Court distinguished *Westchester*,[98] which involved the location of and right to build a worship facility. In that case, the court found a special constitutional interest in religious structures which required heightened scrutiny of zoning regulations. In *Spatt*[99] the Court drew a distinction based on the fact that the regulations only restricted development of non-religious facilities. Thus, if a group is building a church it is entitled to extra protection; if it is demolishing a portion of its facilities for construction of "secular" buildings, it receives no special protection. By failing to apply special rules to a church which desired to renovate its own worship facility,[100] the *Barwick* court eliminated this distinction.

Controversy over application of the landmarks ordinance to religious property literally erupted in the 1980's. In September, 1980, the Committee of Religious Leaders of the City of New York appointed an Interfaith Commission to study the landmark designation of religious buildings.[101] The Commission issued a detailed report in January, 1982, specifying the various ways that the ordinance interfered with religious freedom. The Commission found that landmark designation "drains off valuable resources which otherwise would be redeployed for more effective ministry."[102] The Commission objected to the government's indirect appropriation of religious contributions for architec-

95. 51 N.Y.2d at 455, 415 N.E.2d at 926, 434 N.Y.S.2d at 935.
96. 51 N.Y.2d at 456, 415 N.E.2d at 926, 434 N.Y.S.2d at 936.
97. *Id.*
98. 22 N.Y.2d 488, 239 N.E.2d 891, 293 N.Y.S.2d 297.
99. 51 N.Y.2d 449, 415 N.E.2d 922, 443 N.Y.S.2d 932.
100. 67 N.Y.2d 510, 496 N.E.2d 183, 505 N.Y.S.2d 24.
101. 1 PRESERVATION L. REP. 1039 (1982).
102. *Interfaith Report, supra* note 75 at 4.

tural preservation, arguing that it clearly violated free exercise guarantees.[103] The report further noted that the landmark procedures were susceptible to abuse and arbitrary manipulation, thereby placing tremendous burdens on congregations, even where hardship relief was unavailable.[104] Finally, the Commission proposed that every religious group be given a veto over landmark designation of its property.[105]

One of the controversies the Commission discussed in the Interfaith Report was the attempt of St. Bartholomew's Church on Park Avenue to erect an office tower on its property and demolish its landmarked parish house. Before the congregation was able to consider the development proposal, several City councilmen held a press conference to denounce the plan.[106] In May, 1982, the court of appeals settled an exhaustive battle over church bylaws by upholding a vote in favor of selling or leasing a portion of the church property to a developer.[107] Members of the congregation opposed to the development plan went to court again in January, 1986. In an effort to prevent further expenditure of church funds for the proposals without a majority vote of the congregation, these congregation members sought a preliminary injunction against the vestry.[108] Although successful in obtaining the injunction, the group must now reconsider its role in light of the lawsuit St. Bartholomew's Church recently filed against the Landmarks Commission.[109]

Originally, the vestry proposed a fifty-nine story office tower to be constructed above its community house and next to the church.[110] The Church alleged that the projected $9.5 million in revenue in the first ten years was imperative for the solvency of the congregation.[111] As in

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103. *Id.* at 6.

104. *Id.* at 10-11.

105. *Id.* at 25. In 1983, proponents of religious freedom introduced a law designed to exempt religious properties from preservation statutes, but the New York legislature rejected their proposal.

106. *Id.* at 19.

107. Rector, Church Wardens and Vestrymen of St. Bartholomew's Church v. Comm. to Preserve St. Bartholomew's Church, 56 N.Y.2d 71, 436 N.E.2d 489, 451 N.Y.S.2d 39 (1982). *See also* 1 PRESERV. L. REP. 1039 (1982).

108. Morris v. Scribner, Slip Op. No. 26992 (App. Div. N.Y. 1986).

109. *Id.* The church filed suit in federal district court against the Commission in April and the case has not gone to trial as of this writing. N.Y. Times, April 9, 1986, II, at 3, col. 4.

110. N.Y. Times, Oct. 29, 1981, at A1, col. 4.

111. *Id.* The developer was willing to spend as much as thirty percent (30%) more

the *Spatt* case, rental space in the new building would be primarily for non-religious tenants. The Commission rejected the Church's plan. Subsequently, the church proposed a scaled-down version of the development, providing for a forty-seven story brick and limestone structure.[112] The Commission also rejected the modified proposal, and the Church applied for hardship certification under the law. After a bitter battle, the Landmarks Commission ultimately rejected the hardship claim of the congregation.[113]

C. *The Barwick Decision*

In 1982, the United Methodist Church of St. Paul and St. Andrew joined the chorus of religious opposition to the landmark statute. In an effort to discontinue the landmark designation of its building, the church filed suit for injunctive relief against the Commission.[114] The church also sought $30 million in damages pursuant to 42 U.S.C. § 1983, alleging that the extreme cost of compliance with the preservation law amounted to a violation of its first amendment rights to free exercise of religion.[115] The plaintiff also contended that the repair and maintenance provisions of the statute seriously impaired the plaintiff's ability to carry out its charitable purpose.[116] The Commission argued that such claims were premature because the church failed to undertake the hardship procedure outlined in the statute, and because the Commission submitted affidavits showing it had no current intention of enforcing the repair provisions.[117] The trial court concluded that the matter was not ripe for judicial review and that the church's lack of funds, not the landmark designation, caused the church's financial crisis. The Appellate Division affirmed and the church appealed to the

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than normal on the project because of the historic structure. Note, *Model Free Exercise Challenges For Religious Landmarks*, 34 CASE W. RES. L. REV. 144, 163 n.116 (1983) [hereinafter Note].

112. N.Y. Times, July 10, 1985, II, at 1, col. 5.

113. N.Y. Times, Feb. 26, 1986, II, at 3, col. 1. Although the congregation had substantial assets, needed repairs to the church were estimated at $2 million.

114. 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 (1986).

115. 2 PRESERV. L. REP. 1061 (1983).

116. 67 N.Y.2d at 527, 496 N.E.2d at 194, 505 N.Y.S.2d at 35 (Meyer, J., dissenting).

117. *Id. See* NEW YORK, N.Y. ADMIN. CODE ch. 8-A, § 207-8.0. Also, no renovation plans had been submitted to the Commission.

New York Court of Appeals.[118]

The church's affidavits disclosed an appalling financial situation. The sanctuary, built in 1897, was designed to seat 1,400 worshippers. Although initially filled to capacity, the Sunday worship service gradually dwindled to 100 participants in the 1980's.[119] Holding services in the church became financially prohibitive. The heating expenses, which totalled only $11,400 in 1974, exceeded $40,000 in 1986.[120] In 1982 the cost of heating, insurance, and emergency repairs consumed 70% of all pledges, donations, and loans by members of the congregation for that year.[121] The parish house facilities were inadequate for many of the religious programs and activities. In addition, the church closed the balcony as unsafe and described the electrical and plumbing fixtures as "decrepit."[122] Falling masonry had become a hazard to pedestrians, sections of the walls rotted due to roof leakage, and it was estimated that more than $350,000 was necessary to complete external repairs.[123] The financial condition of the church was such that counsel for the Commission "tacitly conceded that the Church's claims of financial hardship appear well-founded."[124]

The majority opinion of the New York Court of Appeals, written by Judge Hancock, affirmed the Appellate Division, and concluded that the Commission had to consider the Church's renovation plans and its hardship status before the court could review the Church's claims.[125] The court noted that the Church claimed that the Commission's repair and maintenance provisions caused the Church immediate injury, and that the Commission's process itself interfered with the free exercise of

118. 110 A.D.2d 1095 (1985) (order and judgment affirmed without opinion).

119. 67 N.Y.2d at 528, 496 N.E.2d at 194, 505 N.Y.S.2d at 35 (Meyer, J., dissenting).

120. *Id.* Wash. Post, Sept. 27, 1986, at E1, col. 3.

121. 67 N.Y.2d at 528, 496 N.E.2d at 194, 505 N.Y.S.2d at 35 (Meyer, J., dissenting).

122. *Id.*

123. *Id.*

124. *Id.* In 1980, the church completed a proposed renovation plan that would retain the exterior walls fronting West End and 86th, but destroy the square tower at the north end of the front facade and replace the remainder of the building with a smaller sanctuary. Additionally, the church would erect an apartment building on the rear portion of the property to provide additional revenue. The parish abandoned this plan in 1981 when the church became a landmark. 67 N.Y.2d at 529, 496 N.E.2d at 195, 505 N.Y.S.2d at 36 (Meyer, J., dissenting).

125. 67 N.Y.2d at 514, 496 N.E.2d at 185-86, 505 N.Y.S.2d at 26-27.

religion.[126] Applying the ripeness inquiry of *Abbott Labs*,[127] Judge Hancock found that "finality" was lacking because the application of the law to the plaintiff was uncertain and incomplete.[128] Therefore, the court refused to address the merits of the case directly.[129]

The majority distinguished its prior zoning decisions, in which it applied special rules to religious organizations,[130] by noting that any effect on this church's religious activities would be contingent on future developments resulting from the review process.[131] Implicit in this holding is the notion that the statute can constitutionally be applied to religious groups without first amendment problems. Accordingly, the court refused to lower the standards of ripeness in order to hear the church's first amendment claims.[132] More importantly, the court reaffirmed the constitutionality test in *Spatt*, which stated that a religious group could escape a preservation ordinance if it showed that the statute materially interfered with the performance of its charitable purpose.[133]

Judge Meyer filed an extensive dissent, in which Judges Simons and Alexander concurred. The dissent posed the issue as one of a direct conflict between the police power interest in preservation, on the one hand, and free exercise rights under the first amendment, on the other. In such conflicts religious liberty should prevail. In ruling against the church, the majority had "subordinated religious freedom to a secular

126. 67 N.Y.2d at 517, n.3, 496 N.E.2d at 187, n.3, 505 N.Y.S.2d at 28, n.3. *See supra* Section IIA of this article for an explanation of the Commission's process (judicial review allowed after agency action is final and compliance with the regulation requires a substantial change in party's behavior).

127. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). The facial validity of the law was, in fact, challenged by the Church.

128. 67 N.Y.2d at 522, 496 N.E.2d at 190, 505 N.Y.S.2d at 31.

129. *Id.*

130. 67 N.Y.2d at 516, 467 N.E.2d at 187, 505 N.Y.S.2d at 28. The court distinguished this case from *Spatt* and *Snug Harbor* in three ways. First, the churches in those cases wished to demolish old buildings, whereas in this case the petitioners wanted to renovate an existing structure. Furthermore, the petitioners did not challenge the Commission's authority to declare the church a landmark. Finally, the Commission had not yet had the opportunity to act on an application for appropriateness, therefore the issue was not ripe for judicial determination.

131. *See supra* notes 13-21.

132. 67 N.Y.2d at 524-25, 496 N.E.2d at 192-93, 505 N.Y.S.2d at 33-34. As noted later in this article, the process itself causes both Establishment Clause and Free Exercise Clause problems. *See infra* Section IIIA.

133. *Id.* Since the court held, however, that the constitutionality of the statute was not ripe for judicial determination, this test was merely dicta.

purpose of lesser importance."[134] The dissent found a constitutional violation stemming from the Commission's process, not from the expenditure of church funds for architectural preservation.[135] Consequently, the dissent found that the *Snug Harbor* constitutionality test was still the appropriate standard of review for religious organizations with respect to financial burdens.[136]

Judge Meyer sharply criticized the majority for insisting that the church undertake the Commission's hardship procedure. Arguing that the issue belongs in the courts, Judge Meyer stated that the Commission lacked statutory authority to deal with the hardship issue with respect to religious and charitable organizations.[137] By forcing the church to use the appropriateness procedures, the majority encouraged the Commission to negotiate hardship under the guise of architectural appropriateness. Neither the hardship procedure nor the appropriateness procedure was a statutorily authorized function of the Commission, and both interfered with freedom of religion.[138] Meyer pointed out that the case was similar to *Lutheran Church*, where the court granted relief prior to exhaustion of the administrative remedies.[139] The identical issue was presented here, where St. Paul's showed a *prima facie* case of hardship.[140] Thus, no factual question remained

134. 67 N.Y.2d at 526, 496 N.E.2d at 193, 505 N.Y.S.2d at 34 (Meyer, J., dissenting).

135. 67 N.Y.2d at 530, 496 N.E.2d at 196, 505 N.Y.S.2d at 37 (Meyer, J., dissenting). *See supra* Section IIA of this article for an explanation of the Commission's process.

136. *Id.* This test provides that retention of landmark designation depends on the extent of interference with a building's use, as well as the cost of maintaining a building of landmark quality, considered in light of the organization's resources.

137. 67 N.Y.2d at 533, 496 N.E.2d at 198, 505 N.Y.S.2d at 39 (Meyer, J., dissenting).

138. *Id.* The dissent noted that only courts could grant hardship exemptions, under the *Spatt* standard, when the religious group was continuing its use after renovation, and not signing a contract of sale or lease. *Id.*

139. *Id. See Lutheran Church*, 35 N.Y.2d at 128, 316 N.E.2d at 310, 359 N.Y.S.2d at 14.

140. 67 N.Y.2d at 537, 496 N.E.2d at 200, 505 N.Y.S.2d at 41 (Meyer, J., dissenting). A first amendment violation was clearly made out where

> in order to achieve the financial basis necessary for it to carry out its religious and charitable work it must submit not just to the preservation of the 86th Street and West End Avenue exterior walls that have been landmarked, but also to the Commission's intermeddling in its overall rebuilding plan or establish to the satisfaction of the Commission, in the guise of the Commission providing it with a reasonable alternative, that its financial situation is such that it should be permitted to partially demolish and rebuild the existing structure.

and the case was ripe for judicial review. In this context, it was offensive to the congregation's first amendment rights to give the power it exercised in *Lutheran Church* to the Commission to approve or disapprove church plans to its satisfaction.[141]

III. THE FIRST AMENDMENT AFTER *BARWICK*

Clearly, the New York Court of Appeals is intent on avoiding the difficult issues posed by preservation and the Free Exercise Clause. In *Spatt*, the secular use distinction was an easy way to dismiss the church's fundamental first amendment claims.[142] Similarly, in *Barwick* the court used ripeness as a convenient ground for ignoring the particular burdens of the Commission process. The prevalence of first amendment concerns in these preservation cases mandates that courts conduct a thorough evaluation of the constitutional issues they have tactfully avoided.

A. *The First Amendment Burden*

Traditionally, courts have refused to find a constitutionally cognizable "burden" on religious freedom unless the challenged state action interfered with activities "integrally related" to fundamental religious beliefs or principles.[143] Several Supreme Court cases involved factual circumstances assumed to implicate fundamental religious beliefs, and thus the Court did not address areas where the connection was more tenuous or less traditional.[144] Lower courts took the Supreme Court

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Id.

141. 67 N.Y.2d at 535, 496 N.E.2d at 199, 505 N.Y.S.2d at 40 (Meyer, J., dissenting).

142. The New York Court of Appeals adopted this distinction in *Spatt* to justify avoidance of first amendment issues. 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932.

143. Note, *Applying Historic Preservation Ordinances to Church Property*, 63 N.C.L. REV. 404, 409 (Jan. 1985) [hereinafter *Historic Preservation Ordinances*]. The author states that courts generally determine whether church property is used for religious or secular purposes. If the use is not purely secular, the court then determines whether compliance with the zoning or preservation regulation unduly burdens the congregation's first amendment right to free exercise of religion. Finally, the court examines the state's purposes and decides whether the state can achieve those purposes in a less restrictive manner. The author nonetheless concludes that a total exemption of churches from landmark preservation statutes would be unconstitutional in that government must remain neutral towards religious organizations. *Id.*

144. *But see* Sherbert v. Verner, 374 U.S. 398 (1963) (Court held unconstitutional a regulation which denied unemployment benefits because the religious employee could

approach as a signal to apply the first amendment only in cases where there was a direct burden on the ability to worship or believe.[145] Exemplifying this approach, federal cases concerning Indian religious practices applied the first amendment only to state action that burdened "an indispensable belief" or practice.[146] Counsel for the Landmarks Commission in the *Barwick* case argued that courts should treat religious activity in the same manner as commercial activity when a religious organization challenges preservation ordinances.[147] This author advocates greater first amendment protection for churches because landmark regulations often impose significant burdens on both religious belief and on its exercise.

1. Architectural Infringement

One commentator remarked that "the aesthetic characteristics of a church structure and its surroundings influence the activities held within it."[148] Moreover, the "spiritual and aesthetic experience that religious ritual offers contributes to the inner life of many individuals."[149] Intimately bound up in any religious structure are religious values, symbols, and forms of expression.[150] Architectural historian Paul Goldberger described the bond between religious structure and spirit by stating that architecture "reflects our values at least as much as it creates them."[151] This is particularly true in the case of church

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not work on her Sabbath); Wisconsin v. Yoder, 406 U.S. 205 (1972) (compulsory school attendance could not be applied to Amish children since the public schools would expose such children to things incompatible with their faith). Both cases involved indirect, less traditional burdens since they regulated "secular" activities, i.e., unemployment benefits and school attendance. This seems to suggest that the Court's reasoning in Braunfeld v. Brown, 366 U.S. 601 (1960) was broader than intended.

145. *See* Lakewood, Ohio, Congregation of Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303 (6th Cir. 1982), where the court found that zoning ordinances could not possibly implicate first amendment guarantees.

146. *See, e.g.*, Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983).

147. Wash. Post, Sept. 27, 1986, at E20, col. 1.

148. Comment, *supra* note 60, at 1151-52. The author argues that since an individual's decision to join a church, as well as the congregation's decision on the location and the aesthetic features of the church, are communicative forms of expression, free speech principles should also apply to free exercise cases.

149. *Id.*

150. One need not refer to the striking characteristics of the 17th Century Anabaptist meeting house, with its whitewashed square form, to recognize the underlying religious value and symbolism of a worship facility's architecture.

151. N.Y. Times, Feb. 10, 1985, II, at 33, col. 3.

buildings because their symbolic, religious architecture has served to distinguish entire architectural periods throughout civilized history. Clearly, many elements of architectural form, including spatial arrangements, building materials and paint color play important roles in both religious ritual and religious expression. These elements are also key factors in the Landmarks Commission's determination of the "appropriateness" of alterations or new construction.[152]

Although most ordinances only affect exterior features, several cities have applied preservation laws to the interiors of churches.[153] Interior regulation affects the core instruments of religious ritual. Thus, it would seem unjust for a court to hold an interior regulation constitutional, even under a minimal standard of scrutiny. Both exterior and interior regulations touch vital areas of religious belief and practice. The free exercise guarantee of the first amendment should insulate faith from such infringements, absent a compelling state interest.

2. The Religious Mission

A group's religious "mission" is the central expression of its belief system, used to carry out the mandates of conscience. The ability to gather with fellow members of the church or group is the essence of experiencing one's faith. Generally, landmark restrictions require churches to spend funds on the maintenance and repair of their historic properties. Additionally, the church incurs costs resulting from the requirement to negotiate successfully the time-consuming Commission procedures. As is clear from the *Barwick* case, this fiscal burden could force the church out of its building and out of the community.[154] Even though the urban economy inevitably causes financial problems for old congregations, the landmark statutes accentuate these problems by imposing additional costs. Ultimately, these ordinances could strip entire urban areas of spiritual forums for the remaining residents. More importantly, the statutory requirement that churches spend donation

152. Architectural review may raise traditional free speech problems as well. This argument is forcefully made in Note, *Architecture, Aesthetic Zoning, and the First Amendment*, 28 STAN. L. REV. 179 (Nov. 1975).

153. *See* "Angels With Dirty Faces," Preservation News, December, 1986, at 1, for the Boston example. This article concerns the furtive destruction of the interior of a church by its own officials in order to avoid landmarking of the interior by the city.

154. Comment, *supra* note 60, at 1150 ("[A]ssembly of a community of believers [is essential to] shared spiritual life and common goals"). The author uses this statement to support his thesis that courts should treat issues on free exercise of religion with the same care courts afford free speech cases.

money on architectural preservation, could potentially discourage new members from joining historic churches.[155]

Another way to carry out one's religious principles is by spreading the religious message and living out the dictates of belief in society. To do either requires money. Preservation statutes limit this method by imposing financial burdens on religious groups. First, the statutes require a religious organization to spend a significant portion of its funds on maintenance and repair of landmarked structures. Second, the ordinance, through its rigid architectural and aesthetic requirements, prevents the affected group, like other owners of landmarked buildings, from developing the property in any significant manner. The loss of these two sources of funding for religious activity unconstitutionally burdens protected first amendment activity.[156]

The New York Court of Appeals eliminated development rights as protected first amendment interests because it found these rights to be commercial in nature. This approach differs from Supreme Court cases holding that the combination of first amendment activity with commercial activity requires the government to show a "sufficiently important interest in regulating the commercial activity."[157] Other cases recognize the frequent intermingling of clearly protected activity and commercial activity, which otherwise would be subject to full regulation by the state.[158]

In *Schaumburg v. Citizens For A Better Environment*,[159] the Court concluded that charitable appeals for funds come within the first

155. Note, *supra* note 111, at 159. The decline of established congregations imposes additional costs since such congregations are generally the catalysts of new congregations and strong core of any religious movement.

156. The administrative review process also imposes costs in the way of professional fees for architects and attorneys.

157. U.S. v. O'Brien, 391 U.S. 367, 376 (1968). Furthermore, the incidental effect on the protected activity may only be as great as is necessary to further the government interest. This test is the time, place, and manner standard used in free speech cases. For purposes of this discussion, the author will label it an intermediate standard of review.

158. *See, e.g.*, Murdock v. Pennsylvania, 319 U.S. 105 (1943) (the fact that religious materials are sold instead of given away fails to deprive them of first amendment protection); Heffron v. Intl. Soc. for Krishna Consciousness, 452 U.S. 640 (1980) (solicitations and sales of materials in the course of propagating one's faith is entitled to protection); Schaumburg v. Citizens For A Better Env't, 444 U.S. 620 (1979) (solicitation may be subject to regulation but only in the context of recognizing that it is intertwined with protected expression).

159. 444 U.S. 620 (1979).

amendment because "solicitation is characteristically intertwined" with speech, and "without solicitation the flow of such information and advocacy would likely cease."[160] Decades ago, in fact, the Court warned against subjecting fundraising to full state regulation. The Court stated that "[a] religious organization needs funds to remain a going concern" and that religious freedoms should be "available to all, not merely to those who can pay their own way."[161] These cases indicate that the distinction between commercial activity and religious activity is tenuous. Instead, the analysis should focus on the importance of the government's interest in regulating the activity.

The financial burden that results from the repair and maintenance requirements is different in nature than a denial of development rights. These maintenance provisions constitute an indirect tax on religious organizations, just as fire and safety codes require the expenditure of church funds on building maintenance. Even though the latter requirements have been held constitutional, a compelling state interest standard,[162] as applied in traditional free exercise cases, is the appropriate test for judicial review. Any instance where the state requires a religious organization to spend its funds for public purposes deserves close scrutiny, both to prevent ingenious attempts to injure the organization and to insure that the group enjoys the widest latitude possible in the exercise of its constitutional rights. Preservation statutes are unlikely to pass this hurdle, although many laws similar to fire and safety codes may indeed be valid.[163] It seems unlikely that the preservation of a single building or its surroundings would be compelling enough to justify, as in the *Barwick* case, the termination of a first amendment activity.

The financial issue is the core of the preservation battle in Manhattan. One reverend described the essence of the church as "the sum of

160. *Id.* at 632. It is this "mixture" that led the Court to protect commercial advertising in Bigelow v. Virginia, 421 U.S. 809 (1974), even though the advertiser had financial gain as his motive and advertised goods for sale unrelated to first amendment interests. Although the members of St. Paul and St. Andrew are constitutionally protected in soliciting funds from passersby on the street, and in placing secular advertisements in the local newspaper, they lack protection for developing their own property in an effort to raise funds.

161. *Murdock*, 319 U.S. at 111.

162. Under this standard, the law must bear "a necessary relationship to a compelling state interest." Sherbert v. Verner, 371 U.S. 398 (1963).

163. Any constitutional test, intermediate or compelling, will justify fire and safety codes, although compliance requires church expenditure. *See* City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 8, 639 P.2d 1358, 1363 (1982).

all its ministries to the congregation and to the poor and homeless."[164] The reverend warned that should financial demands continue, religious organizations may lose enthusiasm for their goals.[165] Ministry to the poor and the homeless has become an ever-increasing focus of modern church activity, especially in Protestant denominations. This ministry derives its impulse from scriptural imperatives and fundamental religious beliefs. To the extent that the financial demands of preservation diminish the ministry, the state has burdened religious belief and practice.[166] Landmark regulations demand "that religious congregations direct their . . . energy and their resources to the maintenance of mortar and not to the church's mission and ministry."[167] The free exercise of religion is unquestionably "burdened" by the financial requirements of preservation, and courts should employ a heightened standard of review to evaluate the constitutionality of preservation ordinances.

3. The Administrative Process

The administrative review process involved in historic preservation schemes constitutes a separate "burden" on religious belief and practice. In reaching decisions on architectural appropriateness, the Commission makes sensitive judgments concerning architectural formats which contain religious belief and symbolism. In deciding whether to grant hardship relief to a religious organization, the Commission makes decisions regarding the religious needs and goals of a particular group. In fact, the *Snug Harbor* court invited future courts to evaluate "the purposes and resources" of the affected organization.[168] Moreover, during the evaluation process, the Commission has an opportunity to influence church decisions with minimal review. If the Commission substitutes its judgment for that of the religious congregation, however, the Commission assumes an unacceptable role in decisions respecting the conduct of religious ministry.[169] Observers agree

164. N.Y. Times, Oct. 30, 1985, II, at 1, col. 3 (Rev. T. Bowers of the Church of St. Bartholomew).

165. N.Y. Times, Sept. 3, 1985, II, at 3, col. 4.

166. One state court held that services to the poor are protected elements of the free exercise of religion. St. John's Evangelical Lutheran Church v. Hoboken, 195 N.J. Super. 414, 479 A.2d 935 (1983).

167. Wash. Post, Sept. 27, 1986, at E20, col. 2.

168. Matter of Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d 376, 378, 288 N.Y.2d 314, 316 (1968). *See supra* notes 85-89 and accompanying text. Moreover, Commission factfinding is subject only to minimal review.

169. Interfaith Report, *supra* note 75, at 9.

that the Commission lacks the standards to resolve conflicts between architectural quality and the social or religious ambitions of a non-profit institution.[170]

The potential for abuse during the administrative process is enormous and therefore demands careful consideration before application of the Commission's procedures to religious groups. Religious leaders in New York contend that the review process is, in reality, a zoning mechanism.[171] Using building permits as a pretext to stall further commercial development, the Commission routinely denies such permits prior to designation or public hearings.[172] Essentially, preservation ordinances force churches through a political gauntlet, in which they must place their ministries and objectives at the mercy of a "not unbiased group."[173]

During the administrative review process, Commission members decide intricate questions of theological purpose and religious mission which even an activist judge would refuse to address. Indeed, one Commission member criticized the church of St. Bartholomew's application as being fraught with questionable practices and numbers.[174] Although such an evaluation may be accurate in individual cases, there exists great potential for harmful mistakes.

In short, a citizen commission is incapable of constitutionally determining the religious needs of a wide spectrum of religious groups. Allowing local commissions to arbitrate sensitive questions of theological purpose and need is blatantly unconstitutional. Since the earliest days of first amendment analysis, the Supreme Court has refused to allow interference with or censorship of religious ministries.[175] Moreover, the intense political nature of the Commission's decision-making pro-

170. N.Y. Times, Apr. 22, 1986, I, at 30, col. 1.

171. Interfaith Report, *supra* note 75, at 11.

172. *Id.* at 14-15. The Interfaith Committee revealed that in 1980 the local Community Board recommended that all churches be required to reveal detailed financial and operational reports, for planning purposes. *Id.* at 13.

173. N.Y. Times, Feb. 26, 1986, II, at 3, col. 1.

174. N.Y. Times, Feb. 25, 1986, II, at 4, col. 1 (statement of Anthony Tung). A Baltimore church refused to grant an easement to the state citing its concern that in the future there might be a government not so easy to work with and its unwillingness to cede control of church property to the state. Wash. Post, Sept. 27, 1986, at E21, col. 2.

175. Cantwell v. Connecticut, 310 U.S. 296, 305 (1940) (state secretary may not make decisions regarding whether a group is religious which involve "the appraisal of facts, the exercise of judgment, and the formation of an opinion.").

cess adds tremendous strain to intracongregational relations.[176] While church harmony on such matters is rare, the administrative process encourages some church factions to join forces with Commission members and public officials in a bitter, public battle over the church's ministry.[177]

B. *A Constitutional Test for Preservation Laws*

Given the demonstrated impact on first amendment interests, the *Barwick* court's indifference to the church's claims and its affirmation of the *Spatt* rationale is clearly erroneous. Like the reasonableness tests used by state courts in zoning cases,[178] this approach assumes the absence of first amendment interests. Even if courts limited the *Barwick* holding to those activities which are secular,[179] first amendment concerns would persist. Judicial determinations regarding what activity is "religious" are merely conclusory statements of the court's definition of religion.[180] These determinations demand an inquiry into religious purpose inconsistent with first amendment analysis. Since the Supreme Court treats first amendment activity and commercial activity the same, it is preferable for a court to apply some form of free exercise analysis to all religiously motivated activity. In other words, the court should accept a good faith claim of religious infringement or interference and allow the case to turn on the nature of the government's interest in enforcing its policy.[181]

In formulating a more appropriate test, courts should recognize that

176. It became commonplace during the Commission's review of St. Bartholomew for church members to yell at each other and hurl insults during the public hearings. N.Y. Times, Dec. 4, 1985, II, at 1, col. 2.

177. Preservation News, *supra* note 153. Boston's Church of the Immaculate Conception, a 125 year-old landmark, was "vandalized" by its own officials in October, 1986, to prevent city landmarking of the church interior. Like the Church of St. Paul and St. Andrew, this church was planning a renovation of the worship facility for continuing religious use. The preservation movement seems to have adopted a bitter tone toward church claims of interference. *Id.* at 14.

178. *See supra* notes 49-59.

179. The *Barwick* court apparently eliminated this distinction as found in *Spatt* since a major portion of the church's plan was simply to revamp its own worship building. Alternatively, of course, renovating even worship facilities could be considered secular.

180. For discussion of this approach, *see Historic Preservation Ordinances, supra* note 143, at 409; Comment, *supra* note 60, at 1162.

181. This principle is best explained in the zoning area in Comment, *supra* note 60, at 1132.

the government's interest in historic preservation varies from case to case. The governmental interest is greatest where a highly significant church anchors an important historic district, and thus demolition or alteration would hamper an entire statutory scheme.[182] Where a church is an isolated landmark, however, the governmental interest is less compelling and the congregation's first amendment rights should prevail. One commentator suggested applying a reasonableness test in land use cases, which considers the varying degrees of interest on both sides.[183] A similar test is the two-sided balancing test used by the Colorado court in *Lakewood*.[184] Applying such tests to preservation laws, however, is questionable. Both tests suffer from a propensity to weigh the interests of the religious organization. Although such interests will vary from case to case, courts should refrain from putting a value on them as a matter of judicial prudence, but should instead defer to the first amendment.[185]

A more promising test for preservation cases is the standard applied to time, place, and manner restrictions on free speech: each regulation must serve an important government purpose and must be accomplished by the least restrictive means possible.[186] Since it evaluates only the importance of the government interest, this test has the distinct advantage of being one-sided. The limitation of this approach is its inherent assumption that the religious interests are less important than those interests in the more traditional "belief" cases. In the free speech area, as in zoning cases concerning merely location, courts can clearly identify the right; the remaining question is where and how the right will be practiced. In locational zoning cases, the New York courts have adopted the intermediate standard of review to answer this question.[187] Preservation ordinances interfere with the extent and na-

182. *See Historic Preservation Ordinances, supra* note 143, at 418.

183. Note, *Zoning the Church: Toward a Concept of Reasonableness*, 12 CONN. L. REV. 571, 606 (Spring 1980). The author states that a city should deny a church construction permit only if construction would greatly impair the neighboring areas and the zoning ordinance provided an alternate location for the church to build. Moreover, the author suggests that the city should support its permit denials with evidence of potential ill effects on the community surrounding the desired site of construction.

184. *See supra* note 31.

185. Crow v. Gullet, 541 F. Supp. 785 (S.D. 1982), and Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), are examples of where courts have become embroiled in such determinations of theological importance. *See also* Comment, *supra* note 60, at 1160.

186. *See generally* Comment, *supra* note 60.

187. *See supra* notes 18-37.

ture of religious practice and belief, especially in the context of administrative review.

In the future, courts ruling on the validity of preservation ordinances should adopt the compelling state interest test employed in traditional free exercise cases.[188] Adoption of this test is problematic, since its application has become tantamount to striking down the statute at issue. In land use regulation, however, the compelling state interest test does not have this effect. For instance, the Indian cases would be consistent if those courts had imposed a compelling interest standard.[189] While courts may find municipal regulations, such as minimal fire and safety regulations, compelling, they may rule differently on setback regulations. Perhaps the result will vary in preservation cases as well, depending on the structure involved. Normally, however, it is a safe assumption that preservation restrictions will rarely pass the compelling state interest test. The Interfaith summary of the preservation conflict is close to the truth in stating that "designation of religious property as a landmark is an impermissible usurpation by government of religious assets for an inferior secular purpose."[190] Notwithstanding preservationists' great desire to protect our heritage, they must not achieve their goal at the expense of destroying the very rights which gave birth to the religious structures.[191]

188. The statute must have a "necessary relationship to a compelling state interest."

189. United States v. Means, 627 F. Supp. 247 (D.S.D. 1985), held that grazing interests on federal lands and public recreational facilities were not compelling interests. *Badoni*, 638 F.2d 172, on the other hand, correctly noted that reservoir building was such an interest.

190. Wash. Post, Sept. 27, 1986, E21 at col. 2.

191. Exempting religious groups from application of landmark ordinances will be challenged on Establishment Clause grounds. Such an accommodationist policy should be upheld; otherwise, there is no way to protect religious freedom without violating the Establishment Clause. The court in *Means* addressed this issue and held in favor of accommodation. Another favorable view is found in Note, *Land Use Regulation and the Free Exercise Clause*, 84 COLUM. L. REV. 1562, 1580 (1984) (suggests that courts should focus on the possibility of achieving a compromise between religious needs and governmental interests in order to afford greater first amendment protection to religious organizations). In the preservation context, *see* the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1982), for a statutory exemption. *But cf. Badoni*, 638 F.2d 172 (10th Cir. 1980) for a view contrary to accommodation in the federal land use context.

COMMENTARY