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If They Can Raze it, Why Can't I? A Constitutional Analysis of Statutory and Judicial Religious Exemptions to Historic Preservation Ordinances

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I. Introduction

In 1996, America almost lost a great piece of its history. The Cathedral of Saint Vibiana, located in Los Angeles, was in danger of being destroyed. The "Baroque-inspired Italianate structure" was completed in 1876[1] by architect Ezra F. Kysor.[2] The cathedral is one of only a few structures from Los Angeles' early history remaining.[3] As an important part of history and a beautiful piece of architecture, the cathedral was listed on California's register of historic places.[4] In 1994, an earthquake damaged part of the building.[5] After an inspection by the building and safety department in 1996, the only portion of the cathedral found to be potentially structurally unsound was the bell tower.[6] The archdiocese began demolition of the cathedral anyway, without the demolition permits required by the building and safety department as a stipulation to an abatement order decreeing that the bell tower was an imminent danger.[7] The archdiocese desired to

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[1] *See 11 Most Endangered Places: Cathedral of St. Vibiana*, National Trust for Historic Preservation (December 2003), *available at* http://www.nationaltrust.org/11Most/list.asp?i=133.
[2] Ezra Kysor is also known for designing the Pico House in Los Angeles. The Pico House was the first three-story masonry building in Los Angeles and an upscale hotel. *See* Dr. Matthew Cahn, *Downtown Los Angeles Walking Tour* (Spring 2000), *available at* http://www.csun.edu/~cahn/downtown1.html.
[3] *See Cathedral of St. Vibiana*, Wikipedia, the free encyclopedia (November 27, 2006) at http://en.wikipedia.org/wiki/Cathedral_of_Saint_Vibiana.
[4] *See* http://www.nationaltrust.org/11Most/list.asp?i=133.
To be listed on the California Register, a structure must either 1) be "[a]ssociated with events that have made a significant contribution to the broad patterns of local or regional history or the cultural heritage of California or the United States," 2) be "[a]ssociated with the lives of persons important to local, California or national history," 3) "[e]mbod[y] the distinctive characteristics of a type, period, region or method of construction or represent[] the work of a master or possess[] high artistic values," or 4) [have] yielded, or ha[ve] the potential to yield, information important to the prehistory or history of the local area, California or the nation." Cal. Pub. Res. Code § 5024.1 (West 2004).
[5] *See* http://en.wikipedia.org/wiki/Cathedral_of_Saint_Vibiana.
[6] *Id*.
[7] *See* Maggie Garcia, *Cardinal Mahony's Other Cathedral: "Saved, But Degraded" The Rescue of St. Vibiana's Cathedral*, Los Angeles Lay Catholic Mission (December 2000).

build a larger facility on the land.[8] The archdiocese believed that the historic cathedral was outgrown and not worth repairing.[9] As a result of the dire situation, the cathedral was listed as one of the National Trust for Historic Preservation's 11 most endangered places in 1997.[10] This listing sparked further concern from the preservationist community and they came to the rescue. Because the cathedral was on California's register of historic places, an environmental impact report had to be completed before the building could be razed.[11] When the demolition was started before the church obtained permits, at the urging of preservationists, a judge issued a temporary restraining order to halt the demolition.[12] The cathedral was saved when the wrecking crane was "literally 20 feet away."[13] Because of the prevention of immediate demolition, the city and the archdiocese were able to enter into negotiations that resulted in the sale of the cathedral instead of its demolition.[14] The cathedral is now used as a performing arts complex and library.[15] Sadly, California has moved in the direction of not protecting historic religious properties. Although state laws still apply, California now completely exempts religious institutions from local historic preservation ordinances.[16] Historic structures located in other parts of the country are also in danger due to similar religious exemptions.[17]

The harm caused by these exemptions is evident. Historic preservation regulation is important to society. "Structures with special historic, cultural, or architectural

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[8] *See* http://www.nationaltrust.org/11Most/list.asp?i=133.
[9] *See* http://en.wikipedia.org/wiki/Cathedral_of_Saint_Vibiana.
[10] *See* http://www.nationaltrust.org/11Most/list.asp?i=133.
[11] *See* Garcia.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *See* http://www.nationaltrust.org/11Most/list.asp?i=133.
[16] *See* Cal. Gov't Code § 25373(d) (West 2002).
[17] See *First Covenant Church v. Seattle*, 840 P.2d 174 (Wash. 1992); *Society of Jesus v. Boston Landmarks Comm'n*, 564 N.E.2d 571 (Mass. 1990).

significance enhance the quality of life for all."[18] Preservation became a major concern in our nation in the mid-1960's and the federal government began legislative endeavors to ensure the protection of historic properties.[19] Today, in addition to federal legislation including the National Register of Historic Places, the National Historic Preservation Act,[20] the National Environmental Policy Act,[21] and Section 4(f) of the Department of Transportation Act,[22] all fifty states have preservation laws[23] and state registers of historic places.[24] There are also more than 2,000 local historic preservation ordinances.[25] The nation as a whole and by its parts is clearly concerned with keeping our history alive through regulating important historical structures.

Historic religious buildings are just as important to maintain as non-religious properties. In fact, religious structures are made landmarks frequently "because of their stature, location, and architectural significance."[26] At the time of the Second Circuit's decision in Saint Bartholomew's, "of the six hundred landmarked sites, over fifteen percent [were] religious properties."[27] Religious properties help "define our history and identity" and are "historic and architectural focal points" in our communities.[28] Our

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[18] *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 108 (1978).
[19] *See* Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 Stan. L. Rev. 473, 475 (1980-1981).
[20] 16 U.S.C. §§ 470 *et. seq.* (2000).
[21] 42 U.S.C. §§ 4321-4347 (2000).
[22] 49 U.S.C. § 303 (2000).
[23] Elizabeth Cameron Richardson, *Applying Historic Preservation Ordinances to Church Property: Protecting the Past and Preserving the Constitution*, 63 N.C. L. Rev. 404, 406 (January 1985).
[24] Sandra G. McLamb, *Preservation Law Survey 2001: State Preservation Law*, 8 Widener L. Symp. J. 463, 471 (2002).
[25] McLamb at 474.
[26] Catherine Maxson, *"Their Preservation is our Sacred Trust" – Judicially Mandated Free Exercise Exemptions to Historic Preservation Ordinances Under Employment Division v. Smith*, 45 B.C. L. Rev. 205, 214 (December 2003).
[27] *Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. New York*, 914 F.2d 348, 354 (2d Cir. 1990).
[28] Laura S. Nelson, *Remove Not the Ancient Landmark: Legal Protection for Historic Religious Properties in an Age of Religious Freedom Legislation*, 21 Cardozo L. Rev. 721, 725 (December 1999).

ability to recognize, remember and learn about history and its importance would be significantly reduced if buildings such as Old North Church in Boston where Paul Revere's lanterns were hung were no longer around.

While religious buildings are historically important, they are still religious. Historic preservation interests must be balanced with the competing important interest, and constitutional requirement, to not interfere with the free exercise of religion. Protecting religious freedom is a central tenant of our society. The First Amendment to the United States Constitution provides in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…"[29] Some religious institutions have argued that applying historic preservation laws to religious structures impairs their free exercise of religion.[30] Applying these ordinances to religious institutions has been said to restrict free exercise by allowing the government to have a say in religious matters and by not allowing religious institutions to use their property in the most financially beneficial way.[31]

Some jurisdictions have elected to alleviate any potential free exercise burdens by exempting religious institutions from the ordinances. California's Assembly Bill 133 (AB 133) provides religious institutions with a blanket exemption from historic preservation. It only requires that the institution object to the application of the ordinance to its property and determine in a public forum that it will suffer substantial hardship that will lessen economic return on the property or will affect the use of the property.[32] There

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[29] U.S. CONST. amend. I.
[30] *See, e.g., St. Bartholomew's*, 914 F.2d 348; *First Covenant*, 840 P.2d 174; *Society of Jesus*, 564 N.E.2d 571.
[31] *See First Covenant* at 219.
[32] AB 133 provides, in relevant part:

> (b) The board may, by ordinance, provide special conditions or regulations for the protection, enhancement, perpetuation, or use of places, sites, buildings, structures, works of art and other

is also an exemption from historic preservation ordinances for religious institutions in Washington. The Supreme Court of Washington created a judicial exemption by disagreeing with other courts and finding that the ordinances interfere with the free exercise of religion in violation of the United States Constitution and the Washington Constitution.[33] The Massachusetts Supreme Judicial Court also created an exemption for religious institutions. In *Society of Jesus*, the court found that interior designations of religious structures violated the Massachusetts Constitution.[34]

In this paper, I will demonstrate that complete exemptions of solely religious properties from historic preservation ordinances are unconstitutional. Such exemptions are not only unnecessary for the preservation of religious freedom but also go as far as to violate the Establishment Clause of the First Amendment to the United States Constitution.

II. Religious Free Exercise

It has long been recognized that there is an "internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause."[35] On one hand, the Constitution requires that we protect religious freedom. But, on the other hand, religious freedom cannot be so protected that the government is seen as preferring

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objects having a special character or special historical or aesthetic interest or value. These special conditions and regulations may include appropriate and reasonable control of the appearance of neighboring private property within public view.
(d) Subdivision (b) shall not apply to noncommercial property owned by any association or corporation that is religiously affiliated and not organized for private profit, whether the corporation is organized as a religious corporation, or as a public benefit corporation, provided that both of the following occur:
(1) The association or corporation objects to the application of the subdivision to its property.
(2) The association or corporation determines in a public forum that it will suffer substantial hardship, which is likely to deprive the association or corporation of economic return on its property, the reasonable use of its property, or the appropriate use of its property in the furtherance of its religious mission, if the application is approved. § 25373(d).

[33] *See First Covenant*, 840 P.2d 174.
[34] *See Society of Jesus*, 564 N.E.2d 571.
[35] *Tilton* v. *Richardson*, 403 U.S. 672, 677 (1971).

religion over non-religion.[36] An exemption for religious institutions from legislation is sometimes constitutionally necessary to avoid infringing on their free exercise of religion. The Religious Land Use and Institutionalized Persons Act (RLUIPA) [37] might also require a religious exemption even when not required by the Constitution. However, if free exercise does not mandate an exemption, Establishment Clause concerns may be raised when religious institutions are exempted from generally applicable statutes.

A. The Religious Land Use and Institutionalized Persons Act

Exemptions for religious institutions from historic preservation ordinances are not mandated to protect free exercise under either the First Amendment or RLUIPA. Under RLUIPA, "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.[38]

[36] *See, e.g. Epperson v. Arkansas*, 393 U.S. 97, 103 (1968).

[37] 42 U.S.C. § 2000cc (2000). RLUIPA is a controversial statute. This text reestablishes a strict scrutiny analysis to determine free exercise violations when land use regulations are involved. However, the Supreme Court specifically rejected strict scrutiny as the test for free exercise violations unless certain exceptions are met. *See Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). The Supreme Court even invalidated RLUIPA's predecessor, the Religious Freedom Restoration Act, holding that it was an unconstitutional use of Congress' power. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). The Supreme Court upheld RLUIPA as applied to institutionalized persons in Cutter v. Wilkinson, 544 U.S. 709 (2005). Whether RLUIPA is constitutional with respect to land use regulations has not yet been determined.

[38] *Id*.

1. Substantial Burden

The first requirement for a law to be subject to RLUIPA is that the law impose a "substantial burden" upon free exercise.[39] The phrase substantial burden is not defined in the Act, but the legislative history indicates that the determination of what constitutes a substantial burden should be based on U.S. Supreme Court precedent.[40] In Supreme Court history, laws have been invalidated as substantial burdens on free exercise in only a few cases.[41] Indeed, the Supreme Court found on numerous occasions that financial impacts on religious exercise are not substantial burdens.[42] With little guidance from the Supreme Court, the circuits have developed several different tests for determining if a substantial burden exists. These tests usually require coercion or a significant constraint on religious exercise.[43]

In practice, historic preservation ordinances do not constitute substantial burdens on the free exercise of religious beliefs. Historic preservation ordinances do not coerce or significantly inhibit religious exercise. They do not restrict the religious use of historic properties, but rather restrict alterations and demolitions to the structure itself. One can imagine a situation where this may significantly affect religious exercise. For example, if

[39] § 2000cc-1(a)(1).
[40] *See* 146 Cong. Rec. s7774-81 (July 27, 2000) (joint statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000).
[41] *See Frazee v. Illinois Employment Security Dept.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of the Indiana Employment Security Division*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).
[42] *See, e.g., Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990); *Hernandez v. Commissioner*, 490 U.S. 680 (1989); *Texas Monthly, Inc. v. Bullock*, 481 U.S. 1 (1988).
[43] *See, e.g., Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (holding that a substantial burden is "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly"); *Murphy v. Missouri Dept. of Corrections*, 372 F.3d 979, 988 (8th Cir. 2004) (holding that a substantial burden is "significantly inhibit[ing] or constrain[ing] conduct or expression that manifests some central tenet of a [person's] individual [religious] beliefs; must meaningfully curtail a [person's] ability to express adherence to his or her faith; or must deny a [person] reasonable opportunities to engage in those activities that are fundamental to a [person's] religion").

a community required a synagogue to keep a symbolic cross up on the exterior of the building because it was part of the original, historic, Catholic Church building. The rare situations, like this example, where historic preservation ordinances interfere with religious exercise may be what proponents of religious exemptions are seeking to prevent. However, almost any law could have a potential to interfere with religious exercise. A potential for interference does not require a blanket exemption.[44] Although historic preservation ordinances may seem to require such a result, there are no cases suggesting that they have been applied in such a manner. In fact, no court has thus far found a substantial burden in the context of historic preservation laws.[45]

2. Religious Exercise

RLUIPA also requires that the activity being substantially burdened is "religious exercise."[46] Although the act provides, "[t]his Act shall be construed in favor of a broad protection of religious exercise,"[47] the legislative history demonstrates that there is a limit to what is considered religious exercise:

> In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within the bill's definition of "religious exercise." For example, a burden on a commercial building, which is connected to

[44] The Supreme Court has rejected claims that statutes violate their free exercise rights in other far-fetched cases because of valid secular purposes and incidental effects on religion. *See, e.g., Bowen v. Roy*, 476 U.S. 693 (1986) (rejecting claim that Native American's should get exemption from requirement of providing social security numbers to receive food stamps because requiring Native American's to obtain social security number for their two-year-old daughter was a violation of their Native American religious beliefs that widespread use of the number would rob the child of her spirit).
[45] *Regulating Historic Religious Properties Under RLUIPA*, SL014 ALI-ABA 719, 724 (2005). *But See* Saints Constatine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895 (7th Cir. 2005) (holding that a land use case where the town denied a request to rezone property in a residential zone for a church was a substantial burden on free exercise where a series of legal errors cast doubt on the city's good faith and created an inference of hostility towards religion).
[46] § 2000cc-1(a)(1).
[47] § 2000cc-3(g)

> religious exercise primarily by the fact that the proceeds from the building's operation would be used to support religious exercise, is not a substantial burden on "religious exercise."[48]

"[t]he use, building, or conversion of real property for the purpose of *religious exercise* shall be considered to be religious exercise …"[49]

Historic preservation ordinances do not generally burden religious exercise. "Most controversies involving historic preservation and religious organizations have little to do with the free exercise of religious beliefs …"[50] Rather, most controversies involve secular, financial considerations.[51] The restrictions imposed by historic preservation ordinances on the use of historic religious property were just the sort of proscriptions that Senators Hatch and Kennedy expressly stated did not burden religious exercise.[52] Land use ordinances that restrict the demolition of buildings for the purpose of constructing an office building or other commercial endeavor affect many property owners, not just religious institutions. Therefore, these types of uses should not be considered to be religious exercise.

3. Compelling Governmental Interest

Finally, RLUIPA requires that the government show a "compelling governmental interest" for a law covered by its proviosions to be valid. Historic preservation is not likely to be considered a compelling governmental interest

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[48] 146 Cong. Rec. at s7776.
[49] § 2000cc-5(7)(B) (emphasis added).
[50] Nelson at 729 (quoted by Justice Werdegar in his dissent in *East Bay* at 1151).
[51] *See, e.g., Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643 (10th Cir. 2006); *Westchester Day School v. Village of Mamaroneck*, 379 F. Supp. 2d 550 (S.D.N.Y. 2005); *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691 (E.D. Mich. 2004); *First Church of Christ, Scientist v. Historic Dist. Comm'n of the Town of Ridgefield*, 738 A.2d 224 (Conn. Super Ct. 1998); *Metro. Baptist Church v. District of Columbia Dept. of Consumer and Regulatory Affairs*, 718 A.2d 119 (D.C. 1998); *St. Bartholomew's*, 914 F.2d 348; *Society for Ethical Culture v. Spatt*, 420 N.E.2d 102 (N.Y. 1981).
[52] *See* Supra at 7.

because it does not implicate health or safety concerns.[53] The interest of preserving historic properties is not as vital as the interests involved in other cases where a compelling governmental interest has been found.[54] Therefore, if RLUIPA is found to apply because there is a substantial burden on religious exercise, an historic preservation ordinance will almost certainly fail because the purposes of historic preservation are not compelling governmental interests.

Because historic preservation ordinances are not likely to impose substantial burdens and because the ordinances are not likely to affect religious exercise, it is unlikely that RLUIPA will apply in most cases.

B. Consitutional Free Exercise and *Smith*

If RLUIPA does not apply to an historic preservation ordinance, or is found to be unconstitutional,[55] the ordinance will be upheld if it is a neutral, generally applicable law.[56]

1. Neutral Laws of General Applicability

In *Smith*, the Supreme Court held that denying unemployment benefits to two individuals who were fired after being convicted of peyote use was not an unconsitutional interference with free exercise because the drug laws were neutral laws of general applicability that only incidentally burdened religion.[57] However, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hileah* the Supreme Court found that laws agaist animal sacrifice were not neutral because the laws did not

[53] *Regulating Historic Religious Properties Under RLUIPA* at 731.
[54] *See Bob Jones Univ. v. U.S.*, 461 U.S. 574 (1983) (preventing discrimination is a compelling governmental interest); *Hodel v. Va. Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 300 (1981) (providing healthcare to the public is a compelling governmental interest).
[55] *See* Supra note 37.
[56] *See Smith* at 885.
[57] *Id.*

also apply to types of nonreligious animal killing that raised the same concerns as animal sacrifice.[58] Rather, the court found that the laws "had as their object the suppression of religion."[59]

Historic preservation ordinances are neutral laws of general applicability that only burden religion incidentally, if at all. Historic preservation ordinances do not target religion like the laws in *Lukumi Babalu Aye*. The ordinances use secular criteria to determine when historic ordinances apply to a building and to determine whether to allow alterations or demolitions. The same criteria are used whether the structure is religious or secular. It is true that many religious structures are incidentally affected by historic preservation ordinances because the buildings are often historically and architecturally significant.[60] But it is important to recognize that they are not targeted like the city targeted religious practices in *Church of the Lukumi Babalu Aye*, but are only incidentally affected because of their historic value. One clergymen said:

> All cathedrals are not equal. Some cross the line, as it were, becoming not only a religious landmark but a kind of civic tapestry in which the strands of urban and even national history come together in a weave of great complexity, reminding an entire people both who they have been and who they might be.[61]

In fact, courts have specifically found that historic preservation ordinances are neutral laws of general applicability.[62] In *Saint Bartholomew's*, the Second Circuit held that, absent discriminatory motives, a landmark law did not violate

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[58] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).
[59] *Id*. at 542.
[60] Nelson at 737.
[61] Felipe M. Nunez & Eric Sidman, California's Statutory Exemption for Religious Properties from Landmark Ordinances: A Constitutional and Policy Analysis, 12 J.L. & Religion 271, 322 (1995-1996).
[62] *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 535 (1997); *City of Ypsilanti v. First Presbyterian Church of Ypsilanti*, 586 N.W.2d 87 (Mich. 1998). *But See First Covenant* at 215.

free exercise rights when applied to a church because it was a "valid, neutral regulation of general applicability."[63]

2. Exceptions to the *Smith* Rule

There are some exceptions where even generally applicable laws may violate free exercise rights.[64] In *Smith*, the Supreme Court implied that there may be exceptions to the generally applicable law standard in "hybrid" situations (where more than one constitutional right is at stake) or where the statute requires individual assesments that could render the law unneutral.[65] Historic preservation ordinances do not fit under either exception. Generally, only free exercise rights are truly at stake.[66] There is rarely another valid constitutional claim involved. These ordinances also do not involve individual assessments that could render the law unneutral. The elements of historic preservation ordinances are not subjective and decisions made using those elements are not arbitrary.[67] The ordinances are "narrow in focus, and are governed by specific criteria that substantially constrain the discretion of the agency."[68]

Historic preservation ordinances are not invalid as burdens upon free exercise under either RLUIPA or the First Amendment. Therefore, religious

[63] *St. Bartholomew's* at 355.
[64] *Smith* at 882-83.
[65] *Id*.
[66] *But See First Covenant* at 182. It has been argued that free speech rights are also implicated because religious architecture is a form of speech. *See generally* Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 Vill. L. Rev. 401 (April 1991). It is also plausible that historic preservation ordinances might fit the hybrid rights exception because takings claims are implicated. *See generally Penn Central* at 119. However, in *Penn Central*, the court made clear that it is not easy to make a valid takings claim with respect to land use regulations. *See id*. at 130-37.
[67] *Id*. at 132-33.
[68] Nelson at 743.

exemptions to historic preservation ordinances are not mandated statutorily or constitutionally.

III. Establishment of Religion

Because religious exemptions are clearly not mandated by free exercise rights, providing blanket exemptions for religious institutions from historic preservation ordinances is a violation of the Establishment Clause of the First Amendment. Despite this, a few states, either judicially or statutorily, have provided religious institutions with such exemptions.

A. California's Assembly Bill 133

Califiornia has what is basically a blanket religious exemption to local historic preservation ordinances in AB 133.[69] The bill allows religious institutions to exempt themselves from local historic preservation ordinances[70] as long as they object to the application of the ordinance to their institution and determine in a public forum that they "will suffer substantial hardship, which is likely to deprive the association or corporation of economic return on its property, the reasonable use of its property, or the appropriate use of its property in the furtherance of its religious mission, if the application is approved."[71] AB 133's religious exemption from generally applicable historic preservation ordinances is an unconstitutional violation of the Establishment Clause.

[69] § 25373(d) supra note 32.
[70] The exemption does not apply to state historic preservation laws as it is contained in the enabling statute for local legislatures. *See* § 25373(d). Therefore, religious organizations are still required to prepare environmental impact reports under the California Environmental Quality Act, CAL. PUB. RES. § 21000 *et. seq.* (2000).
[71] § 25373(d). Glendale, California goes even further by not only exempting churches from historic preservation ordinances, but also allowing them to be removed from the historic register. As opposed to AB 133, this ordinance applies retroactively. Glendale, Cal., Ordinance 5110 (March 5, 1996).

1. The *Lemon* Test

The generally accepted test for determining if an Establishment Clause violation has occurred was set forth by the Supreme Court in *Lemon v. Kurtzman*.[72] For a law to be upheld against an Establishment Clause challenge it must a) have a secular purpose, b) must not have the primary effect of advancing religion, and c) must not impermissibly entangle church and state.[73]

Using the *Lemon* test, in *East Bay Asian Local Dev. Corp. v. California*, the Supreme Court of California found that AB 133 did not violate the Establishment Clause.[74] The court found that the law a) had the valid secular purpose of preventing potential interference with free exercise,[75] b) did not impermissibly advance religion because it merely allowed religious institutions to continue to use their property as they see fit,[76] and c) did not foster excessive entanglement because the state was not involved with the religious institutions decision to exempt itself.[77] I believe that the *East Bay* court was incorrect in its analysis and that AB 133 does violate the Establishment Clause.

a. *Secular Purpose*

California's religious exemption from historic preservation ordinances likely satisfies the first element of the *Lemon* test; it has a secular purpose. The exemption is designed to protect religious free exercise. The stated purpose of California's AB 133 is to "ensure the protection of religious freedom" that is

[72] 403 U.S. 602 (1971).
[73] *Id*.
[74] 13 P.3d 1122 (Cal. 2000).
[75] *Id*. at 1134.
[76] *Id*. at 1136.
[77] *Id*. at 1137.

guaranteed by the California and United States Constitutions.[78] The Supreme Court has considered the accommodation of religious activity to be a valid secular purpose. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, the Supreme Court found that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[79] In that case, the church terminated an employee of its nonprofit gymnasium when he failed to qualify for a temple recommend.[80] The church was able to fire an employee based on his religious affiliation because religious organizations are exempt from Title VII's prohibition of discrimination in employment on the basis of religion by Section 702 of the Civil Rights Act of 1964.[81] The Court held that this exemption was not an unconsitutional establishment of religion because allievation of a significant burden on religion was a valid secular purpose and because the exemption did not advance religion, rather it merely allowed religious organizations to advance their own religion.[82] In addition, in *Walz v. Tax Comm'n of City of New York*, the Supreme Court held that removing a burden from free exercise by exempting a class of non-profit organizations that included religious organizations was a valid secular purpose.[83] However, the Court emphasized that the fact that the statute exempted a broad class of non-profit institutions rather than solely religious ones was an important

[78] § 25373.
[79] 483 U.S. 327, 335 (1987).
[80] *Id*. at 330.
[81] 42 U.S.C. § 2000e-1 (2002).
[82] *Amos* at 337.
[83] 397 U.S. 664, 673 (1970).

factor in their decision.[84] The Supreme Court of California also found that the mere potential to interfere with free exercise was enough for religious accommodation to be a valid secular purpose.[85] Further support can be found for the position that accommodation of religious exercise is a permissible secular legislative purpose in the Supreme Court's decision in *Smith*. There, the court left it up to the political process and the legislatures to grant religious exemptions from laws that might interfere with religious exercise.[86]

However, even considering the Supreme Court's decision in *Amos*, the exemption may be still at risk under the secular purpose prong of the *Lemon* test because it sweeps more broadly than what is necessary to protect free exercise rights. Because historic preservation ordinances do not impermissably burden the free exercise rights of the religious institutions to which they apply, accomodating religion through exemptions to the ordinances is not necessary. In Justice Werdegar's dissent in *East Bay*, she argued that overbroad religious exemptions violate the Establishment Clause, saying "'accommodation' justifies exemptions targeted to religious organizations only when the law from which an exemption is made would otherwise interfere significantly with some religious activity."[87] However, the Supreme Court seems to have made clear that "the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause."[88] The purpose of the

[84] *Id*.
[85] *East Bay* at 1134.
[86] *See Smith* at 890.
[87] *East Bay*. at 1147 (Justice Werdegar dissenting). For a similar argument, see *Nelson* at 763 ("Historic preservation regulation generally does not result in a burden on religious exercise. Thus, accommodation is neither necessary nor constitutionally acceptable.").
[88] *Walz* at 673.

California religious exemption is to avoid what has been perceived as significant governmental interference into religious beliefs. Under Supreme Court jurisprudence, even if not required by the Free Exercise Clause, this type of accommodation is a permissible secular purpose under the *Lemon* analysis.

b. *The Primary Effect of Advancing Religion*

However, California's religious exemption from historic preservation ordinances fails the second prong of the *Lemon* analysis. The exemption has the primary effect of advancing religion. AB 133 allows only religious institutions to exempt any non-commercial property from historic preservation ordinances by simply declaring that it will suffer substantial hardship that is likely to deprive the association of economic return on the property, reasonable use of the property, or appropriate use of the property in the furtherance of its religious mission.[89]

In *Texas Monthly*, the Supreme Court held that a sales tax exemption exclusively for religious periodicals had the primary effect of advancing religion because it was essentially a subsidy that forced non-religious taxpayers to support religious institutions.[90] The court specifically focused on the fact that the exemption was granted solely for religious institutions, saying, with respect to other cases where religious accommodations were upheld:

> [i]n all of those cases, however, we emphasized that the benefits derived by religious organizations flowed to a large number of nonreligious groups as well. Indeed were those benefits confined to religious organzations, they could not have appeared other than as state sponsorship of religion; if that were so, we would not have hesitated to strike them down for lacking a secular purpose and effect.[91]

[89] § 25373(d).
[90] *Texas Monthly* at 15.
[91] *Id*. at 10-11.

Although the exemption here is not a tax exemption, it still has the affect of advancing religion over nonreligion. As Professor Weinstein so strongly put it:

> Exempting religious institutions from landmark designation creates the potential for significantly advancing religious ideas over competing secular ideas. If St. Bart's is free to reap millions of dollars from the commercial development of its property and then apply those funds to support its religious and charitable programs, but secular charitable institutions must comply with the landmark ordinance and so are denied access to funds derived from property development, then religious institutions and their ideas are given a significant advantage by government action. Denying government the right to prefer religion over secularism lies at the core of the Lemon test …[92]

The Supreme Court of California thought differently. In *East Bay*, the court specifically found that the California exemption does not advance religion.[93] The court held that the exemption merely allows a religious institution to use its property "as it sees fit."[94] The court noted that the exemption does not shift any financial burdens from the religious property owners to secular property owners and thus is not a "subsidy" like the tax exemption in *Texas Monthly*.[95]

Despite contrary arguments, California's religious exemption does have the primary effect of advancing religion. Just as the tax exemption in *Texas Monthly*, California's exemption suffers a critical flaw in exempting only religious institutions and not including other nonprofit associations. By giving religious institutions the ability to use their property in a way that is more economically beneficial than secular property owners may, the exemption gives

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[92] Alan C. Weinstein, *The Myth of Ministry v. Mortar: A Legal and Policy Analysis of Landmark Designation of Religious Institutions*, 65 Temple L. Rev. 91, 157 (1992). For similar arguments, *see, e.g., East Bay* at 1143 (Mosk, J., dissenting); Madeleine Randal, *Holy War: In the Name of Religious Freedom, California Exempts Churches from Historic Preservation*, 37 Santa Clara L. Rev. 213, 240 (1996); William P. Marshall and Douglas C. Blomgren, *Regulating Religious Organizations under the Establishment Clause*, 47 Ohio St. L.J. 293, 329 (1986).
[93] *East Bay* at 1135.
[94] *Id.*
[95] *Id*. at 1136.

"added advantages of economic leverage in the secular realm" and goes "beyond reasonable accommodation."[96] It may be true that "if one is an owner of non-religious property subject to a landmark ordinance that entails real economic costs to him, those economic costs are, in almost all cases, no different if the church down the street is landmarked or not."[97] However, I think this argument misses the point. Although secular property owners might not have to directly pick up the bill like in *Texas Monthly*, they are still at a significant financial disadvantage. The exemption allows religious institutions to have more resources to carry out their religious mission than non-religious institutions have to carry out their secular missions; relgious property owners are given a financial advantage. This clearly "advances" religion and thus fails the second prong of the *Lemon* test.

c. *Excessive Entanglement*

The exemption also fails the third prong of the *Lemon* analysis by causing excessive entanglement of church and state by granting governmental power to religious organizations. The *Lemon* test prohibits not only government interference into religion but also religious organization's interference with government affairs.[98] In *Larkin v. Grendel's Den, Inc.*, the Supreme Court struck down a statute allowing religious and educational institutions to prevent businesses within a 500-foot radius from obtaining a liquor license, stating that "substitut[ing] the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body" excessively entangles

[96] *Amos* at 343.
[97] Nunez at 305.
[98] *Lemon* at 614 ("the objective is to prevent, as far as possible, the intrusion of either the state or religious institutions into the precincts of the other").

church and state.[99] In fact, the court said "few entanglements could be more offensive to the spirit of the Constitution."[100] The *East Bay* dissenters found that California's exemption excessively entangles church and state in the same way as did the law at issue in *Larkin*. Justice Werdegar found that the exemption created a "forbidden 'fusion of governmental and religious functions.'"[101] Justice Mosk stated that the exemption:

> delegate[s] to religious organizations – and religious organizations only – the power to determine their own eligibility for an exemption from historic landmark preservation laws, with no requirement of review by a neutral governmental arbiter … creating a danger of '[p]olitical fragmentation and divisiveness on religious lines.'[102]

In fact, the exemption at issue here seems to entwine the functions of church and state even more so than the statute in *Larkin*. That statute allowed both religious institutions and schools to prevent the issuance of liquor licenses. California's exemption, on the other hand, allows only religious institutions to exempt themselves from historic preservation ordinances.

However, it is also argued that the exemption avoids excessive entanglement by preventing the government from inquiring into religious matters. For example, the Supreme Court, in *Amos*, held that the law exempting religious institutions from Section 702 of the Civil Rights Act did not excessively entangle church and state because "the statute effectuates a more complete separation" by avoiding "instrusive inquir[ies] into religious belief."[103] Religious exemptions from historic preservation ordinances are different; they do not

[99] 459 U.S. 116, 127 (1982).
[100] *Id.*
[101] *East Bay* at 1156 (Werdegar, J., dissenting) (quoting *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 702 (1994)).
[102] *Id*. at 1143 (Mosk, J., dissenting) (quoting *Larkin* at 127).
[103] *Amos* at 339.

require governmental intrusion. Determining whether a religious institution must employ a certain individual or if doing so would violate their free exercise rights is clearly more intrusive than determining whether preventing alterations and demolitions to a structure would do the same. "Real estate decisions do not implicate religious beliefs or practices remotely comparable to the personal relationships involved in hiring decisions."[104] Rather they are more akin to examining financial hardship, which is not an excessive entanglement.[105]

Because delegating governmental power to religious institutions by allowing them to exempt themselves from historic preservation ordinances constitutes excessive entanglement, California's religious exemption fails the excessive entanglement portion of the *Lemon* test. It expressly allows religious institutions to determine if they meet exemption criteria.[106]

Under *Lemon*, AB 133 is a violation of the Establishment Clause of the First Amendment because it has the primary effect of advancing religion and because it fosters excessive entanglement between church and state. However, the *Lemon* test has come under fire[107] and two alternative tests have also been used to determine if a law violates the Establishment Clause. Justice O'Connor developed what has become known as the endorsement test for establishment clause violations. Under her test, an establishment clause violation exists when an

[104] *Nelson* at 767.
[105] *See St. Bartholomew's* at 963.
[106] *See* § 25373(d)(2).
[107] *See, e.g., County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); *Edwards v. Aguillard*, 482 U.S. 578, 636-640 (1987) (Scalia, J., dissenting); *Aguilar v. Felton*, 473 U.S. 402, 426-30 (1985) (O'Connor, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 108-13 (1985) (Rehnquist, J., dissenting).

objective, reasonable observer would find that the statute endorses religion.[108] An objective observer is one who is "acquainted with the text, legislative history, and implementation of the statute."[109] In addition, Justice Kennedy has developed the coercion test for Establishment Clause analysis. Under his coercion test, the Establishment Clause is violated when people are coerced into religious practice.[110] California's religious exemption also fails these two alternative tests.

2. The Endorsement Test

An objective observer would see California's religious exemption to historic preservation ordinances as an endorsement of religion. In her *East Bay* dissent, Justice Werdegar analyzed California's exemption using Justice O'Connor's endorsement test. She found that:

> [a]n objective observer familiar with the text, history, and social context of the self-exemption power granted in sections 25373(d) and 37361(c) would thus perceive it not as a reasonable attempt to prevent local government interference in religious affairs or to lift a significant burden on religious liberty, but as the unjustifiably broad award, to religiously affiliated property owners, of a unique and valuable privilege – the privilege of determining their own properties' subjection to generally applicable land use laws.[111]

Justice Werdegar found that unless the exemption was justified by a need to prevent interference with religious exercise, an objective observer "must" see the exemption as an endorsement of religious enterprises. However, the majority in *East Bay* felt that the exemption would not be seen as governmental endorsement of religion because it does

[108] See, e.g., County of Allegheny at 625-26 (O'Connor, J., concurring in part and concurring in the judgment); Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).
[109] *McCreary County v. ACLU*, 545 U.S. 844, 863 (2005).
[110] *See, e.g., Lee v. Weisman*, 505 U.S. 577, 597 (1992); *County of Allegheny* at 659-60 (Kennedy, J., concurring in the judgment in part and dissenting in part).
[111] *East Bay* at 1156 (Werdegar, J., dissenting).

"no more than permit the use of the property as it was before landmark designation."[112] Similarly, Justice O'Connor, in her concurring opinion in *Amos,* found that an objective observer would perceive the exemption of religious institutions from Section 702 of the Civil Rights Act in allowing religious institutions to base employment decisions on religious affiliation as an accommodation of religious free exercise.[113] Thus, sometimes, religious exemptions will overcome the endorsement test.

I agree with Justice Werdegar's analysis. A reasonable, objective observer familiar with the exemption is not likely to think that allowing a religious institution to demolish an important historic structure in order to build an office building to raise revenue is solely an attempt to protect religious exercise. Rather, the objective observer is likely to see the exemption as an endorsement of religion by giving preferential treatment to a religious institution because of only a small potential of interference with religious exercise. If the observer is familiar with the exemption and the history behind it, they will recognize that the possibility that an historic preservation ordinance will truly interfere with religious exercise is slim. These exemptions are unlike the exemption in *Amos* where employment decisions were at stake. An objective observer is likely to view religious exemptions from employment discrimination statutes as accommodation. The observer will recognize that the church's non-profit endeavors on which the employees work are likely to be related to the religious mission. This is a different situation than real estate decisions. It is unlikely that most alterations or demolitions to buildings will affect a religious institutions ability to carry on its religious mission and one can expect that an objective observer would see this.

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[112] *Id*. at 1136.
[113] *Amos* at 349 (O'Connor, J., concurring).

3. The Coercion Test

If Justice Kennedy's coercion test is used to analyze the exemption, it may still be found to be an Establishment Clause violation, although the case is less strong than under the *Lemon* test or the endorsement test. In *Lee v. Weisman*, the Supreme Court found that school sponsored prayer at graduation ceremonies violated the Establishment Clause because the students were coerced into at least participating or being respectful during the prayer.[114] By giving religious property owners financial advantages over nonreligious property owners, we have seen that the exemption has the effect of advancing religion. In the same way, the exemption is coercing religion. Nonreligious property owners may feel that they should or perhaps must become religiously affiliated in order to receive such great financial benefits. Or maybe, the exemptions will force nonreligious property owners to only sell their property to religious institutions so that they do not suffer a loss in value upon resale. However, it is a hard stretch to try to fit the advancement of religion through an exemption into a coercion test analysis. I think it is more likely that either the *Lemon* test or the endorsement test would be used to analyze whether religious exemptions from historic preservation ordinances violate the Establishment Clause.

B. Washington's Judicial Exemption

Washington State also exempts religious institutions from historic preservation ordinances.[115] In *First Covenant*, the Supreme Court of Washington created a religious exemption when it held that a Seattle historic preservation ordinance was invalid under both the federal constitution and the Washington

[114] *See Lee* at 593.
[115] *See First Covenant*, 840 P.2d 174.

Constitution, despite the ordinance including a liturgy exception.[116] The court held that the ordinance was not valid as a neutral, generally applicable law under *Smith*. The court first held that the Seattle ordinance was an invalid burden on free exercise rights because it referred to religious facilities specifically within the ordinance and thus was not neutral.[117] The court also found that the ordinance was not generally applicable because it invited individualized assessments of the property and its use.[118] Finally, the court found that the ordinance fit within *Smith's* "hybrid situation" exception. The ordinance violated both the church's free exercise of religion and their free speech right.[119] Thus, the court applied the *Sherbert* compelling state interest test to the Seattle ordinance and found that the ordinance was invalid.[120] To prevent a review of the decision by the Supreme Court, the court also invalidated the ordinance under the Washington Constitution.[121] Because the *First Covenant* court rejected an historic preservation ordinance that included a liturgy exemption as applied to religious property, it is likely that the court will mandate a religious exemption for any historic preservation ordinance developed.

Like AB 133, the exemption created in *First Covenant* has a valid secular purpose and thus satisfies the first prong of the *Lemon* analysis. The court's reasoning in *First Covenant* demonstrates that the religious exemption was carved out because, in including religious organizations within the scope of those

[116] *Id.*
[117] *Id.* at 214.
[118] *Id.* at 215.
[119] *Id.* at 216.
[120] *Id.* at 224.
[121] *Id.* at 225.

regulated by historic preservation requirements, the court believed that Seattle's ordinance violated free exercise rights under both the federal and Washington constitutions.[122] It is not required that an exemption is necessary to prevent a violation of a religious organization's free exercise rights for accommodation to be a secular purpose.[123] Therefore, even if the court's analysis is wrong, as I believe it to be, and the application of Seattle's historic preservation ordinance to religious institutions is not a violation of their free exercise rights, preventing any infringement on their religious exercise is still a valid secular purpose.

Washington's judicially created exemption does not fair so well under the second part of the *Lemon* analysis. The exemption has the primary effect of advancing religion. Similar to California's exemption and the tax exemption struck down in *Texas Monthly*, Washington's exemption also applies only to religious properties.[124] By allowing religious property owners to use their property in more economically beneficial ways than can their nonreligious neighbors, Washington's exemption advances religion. As noted above, exempting only properties owned by religious institutions from historic preservation ordinances gives religious institutions a distinct financial advantage over nonreligious property owners, thus causing the same type of subsidy that was found unconstitutional in *Texas Monthly*.

Washington's exemption also fails the excessive entanglement prong of the *Lemon* test. The exemption delegates governmental power to religious instituions. In *First Covenant*, the court found that the liturgy exemption allowed

[122] *Id.*
[123] *Amos* at 335.
[124] *See First Covenant*, 840 P.2d 174.

the city to control aspects of religious exercise by regulating religious properties.[125] The court's unwillingness to allow the government to determine if a religious institution qualifies for a liturgy exemption essentially allows religious institutions to declare themselves qualified. This is what *Larkin* forbids. The court is "substitut[ing] the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body."[126] Perhaps, as the *First Covenant* court was so concerned, allowing government to determine if churches qualify for a liturgy exemption may lead to some form of entanglement. But, as we saw above, the cursory examination that would tell the city if a requested alteration or demolition involves religious exercise is no more excessive than exploring the financial affairs of religious institutions. Such government intrusions have been upheld.[127]

Washington's exemption also fails to satisfy Justice O'Connor's endorsement test. Like AB 133, the exemption is likely to be seen by a reasonable observer as endorsing religion because the observer will not see the need for accommodation because the regulation of buildings does not interfere with a constitutional right.

Fitting Washington's religious exemption into the confines of the coercion test is just as difficult as fitting AB 133 into the analysis. Therefore, it is unlikely that this test would be used to determine if the exemption is a violation of the Establishment Clause. If the test was used, it might be satisfied because

[125] *Id*. at 220.
[126] *Larkin* at 127.
[127] *See St. Bartholomew's* at 963.

providing financial incentives to religious institutions may be seen as a coercion to nonreligious institutions to become religiously affiliated.

C. The Massachussetts Exemption

Massachussetts also provides for religious exemptions to land use regulation. The Supreme Judicial Court of Massachussetts created a religious exemption to interior designations in *Society of Jesus*.[128] In that case, the court held that an ordinance designating the interior of a church as a landmark violated the religious institutions free exercise rights as guaranteed by the Declaration of Rights of the Massachussetts Constitution.[129] Massachussetts also statutorily exempts religious institutions from zoning ordinances.[130] Although the text of the statute could be seen as covering historic preservation ordinances as well, no court has so held.

Despite some similarity to the California and Washington exemptions, Massachusetts' judicially created religious exemption from interior designations of historic property is not an Establishment Clause violation under any of the tests. Religious exemptions for interior designations are required under the Free Exercise Clause. The interior arrangement of a church is intertwined with religious exercise. The Massachusetts Supreme Judicial Court recognized this in *Society of Jesus*. The court found that the interior design of a church "is so freighted with religious meaning that it must be considered part and parcel of the Jesuits' religious worship."[131] At issue in

[128] *See Society of Jesus*, 564 N.E.2d 571.
[129] *Id*. at 572.
[130] The statute provides that no zoning ordinance shall "prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." M.G.L.A. 40A § 3
[131] *Society of Jesus* at 573.

Society of Jesus was alteration to the altar.[132] It is hard to imagine a part of a religious structure more central to religious exercise than its altar.

Even if religious exemptions to interior designations were unnecessary, they would still not be an establishment of religion under any of the Establishment Clause tests. Just as the California and Washington exemptions have a secular purpose, so does the Massachusetts exemption; it has the purpose of preventing governmental intrusion into religious exercise. The exemption from interior designations, however, does not have the primary effect of advancing religion. It would not give religious institutions an advantage over nonreligious property owners. They may affect the use slightly if a major interior renovation is desired, but is much less likely to affect the use of property than an exterior designation. A stronger case is also made that interior designations would cause excessive entanglement, thus, exemptions reduce entanglement rather than increase it. Because interior space is more closely related to religious exercise, there is more of a danger that determining if an alteration should be allowed would excessively entangle government with religious exercise. Thus, interior designations would more closely resemble the concerns of the Supreme Court in *Amos* that the government should not be involved in decisions so central to religious exercise.

The religious exemption from interior designation would also pass muster under the endorsement test. Unlike blanket exemptions from historic preservation ordinances, religious exemptions from interior landmark designations will be seen by an objective observer as necessary to protect free exercise. An objective observer would understand that the interior spaces of a religious building are important aspects of the religion itself, and would thus not see allowing religious institutions to do as they wish with their

[132] *Id*. at 572.

interior space as an endorsement of religion. Rather, the observer would see that the exemption is a necessary accommodation.

Religious exemptions from interior landmark designations would also be found to be constitutional using the coercion test. Because interior designations do not confer an economic benefit on religious institutions at the expense of nonreligious property owners, there is no governmental pressure into religious practice; nor is there reason for nonreligious property owners to feel forced to sell to religious institutions to receive full value for their property.

IV. Conclusion and Recommendation

Because there is an inherent conflict between free exercise and historic preservation, even if it often does not rise to the level of an impermissible burden on free exercise, it may be desirable for some jurisdictions to exempt religious properties from historic preservation ordinances. If a jurisdiction does desire to create a religious exemption from a generally applicable historic preservation ordinance, the cases that have decided these issues suggest that such exemptions should be limited. If possible, only interior spaces should be exempted because these spaces are often of great importance in religious exercise. If a jurisdiction determines that it must make exterior religious exemptions as well, those exemptions should apply to a broader group of organizations than simply religious organizations. For example, the exemptions should include other non-profit organizations, using the tax exemption in *Walz* as a model. Religion-only exemptions might never be considered constitutional. However, to make the best possible case for constitutionality, a religion-only exemption should be narrowly tailored to only apply in situations where free exercise is actually burdened and it should

also apply only to houses of worship, not to other property owned by religious institutions.[133] If these guidelines are followed, religious exemptions to historic preservation ordinances may be permissible accommodations of religion.

[133] *See generally* Randal at 249.