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# Fire and Brownstone: Historic Preservation of Religious Properties and the First Amendment

Steven P. Eakman

# NOTES

## FIRE AND BROWNSTONE: HISTORIC PRESERVATION OF RELIGIOUS PROPERTIES AND THE FIRST AMENDMENT

The application of historic preservation ordinances to property owned by religious organizations has sparked a First Amendment furor.[1] Churches are incensed about what they consider an unwarranted governmental encroachment upon their constitutional right to the free exercise of religion.[2] Meanwhile, preservationists are fighting to save what they see as the United States' cultural heritage from religious leaders acting like "Donald Trump in clerical collars."[3]

The need for historic preservation has become increasingly clear. Of the structures listed by the federal government in the 1933 *Historic American Buildings Survey*, over half have been destroyed.[4] The nation has responded slowly, but over the past fifty years every state and hundreds of municipalities have enacted some form of preservation-related law.[5] The conflict over these laws lies in the fact that landmark designation of property inevitably results in some curtailment of an owner's options as to how to use his or her

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[1] The relevant clauses of the First Amendment state that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The Free Exercise Clause was made applicable to the states through the Fourteenth Amendment in Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); the Establishment Clause was made applicable to the states in Everson v. Board of Education, 330 U.S. 1, 15 (1947).

[2] *See* George W. Cornell, *"Landmarking" of Churches Outrages Clergy*, L.A. TIMES, Oct. 4, 1986, § 2, at 4. The term "church" will be used generically in this note, and may be read to mean a house of worship of any faith unless referring to a specific organization or property.

[3] Iver Peterson, *Battle Looms on Landmarked Churches*, N.Y. TIMES, Dec. 3, 1989, § 10, at 12.

[4] Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 108 n.2 (1978).

[5] *Id.* at 107.

property.[6] When the property owner is a religious organization, specific First Amendment concerns regarding the free exercise of religion and the ban on governmental "establishment" of religion arise.[7]

The status of the law regarding Free Exercise and Establishment Clause violations in the application of historic preservation ordinances to religious properties is unclear.[8] In 1990, the Washington Supreme Court ruled that a Seattle preservation ordinance violated a church's First Amendment rights.[9] Later the same year, however, the Court of Appeals for the Second Circuit held that the New York City landmarks law did not infringe on either the Free Exercise or the Establishment Clauses when applied to the property of a Manhattan church.[10] Adding further confusion is the question of whether courts should evaluate landmark designation of the interior of churches differently from such designation of the exterior.[11]

This note examines the constitutional issues presented by historic preservation laws, with particular reference to the First Amendment problems raised by application of such ordinances to churches. The focus is on local ordinances, as these are the measures most under fire. Section I outlines the basic structure and goals of historic preservation legislation, and traces the evolution of case law

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[6] *See, e.g., Penn Central*, 438 U.S. at 138. The Supreme Court rejected a Fifth Amendment attack on a historic preservation ordinance in *Penn Central*, where the Supreme Court upheld the New York city landmark designation of Grand Central Terminal against challenges of taking without just compensation and denial of due process. See *infra* notes 45–62 and accompanying text for a discussion of *Penn Central*.

[7] Usually, churches also assert a Fifth Amendment claim for governmental taking without just compensation, arguing that landmark ordinances "steal [their] property." *See* Carlos Sadovi, *Churches Bear Landmark Burden*, CHRISTIAN SCI. MONITOR, Aug. 15, 1989 at 8.

[8] For commentary regarding this issue, see generally Robert L. Crewdson, *Ministry and Mortar: Historic Preservation and the First Amendment After* Barwick, 33 WASH. U. J. URB. & CONTEMP. L. 137 (1988); Elizabeth Cameron Richardson, Note, *Applying Historic Preservation Ordinances to Church Property: Protecting the Past and Preserving the Constitution*, 63 N.C. L. REV. 404 (1985); Stephen M. Watson, Comment, *First Amendment Challenges to Landmark Preservation Statutes*, 11 FORDHAM URB. L.J. 115 (1982).

[9] First Covenant Church v. City of Seattle, 787 P.2d 1352, 1356 (Wash. 1990), *vacated*, 111 S. Ct. 1097 (1991). See *infra* notes 303–31 and accompanying text for a discussion of this case. The United States Supreme Court has vacated this decision and remanded it to the Washington Supreme Court. The Court has directed the Washington court to reconsider the case in light of the holding in Employment Division, Department of Human Resources v. Smith, 110 S. Ct. 1595 (1990).

[10] St. Bartholomew's Church v. City of New York, 914 F.2d 348, 351, 356 n.4 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991). See *infra* notes 263–302 and accompanying text for a discussion of this case.

[11] See *infra* notes 333–64 and accompanying text for a discussion of this issue.

establishing the standards by which the validity of preservation ordinances is measured.[12] Section II examines Supreme Court interpretations of the Free Exercise and Establishment Clauses, including a recent case that marks a departure from previous free exercise jurisprudence.[13] Section II also discusses case law applications of the First Amendment standards in a land use context.[14] Section III details four recent cases involving free exercise challenges to historic preservation ordinances by religious organizations, illustrating the unsettled status of this area of the law.[15] Section IV briefly analyzes First Amendment doctrine and its impact on the efforts to preserve historic religious properties.[16] Section IV then critiques, in light of the various free exercise criteria, the judicial analysis of three recent cases involving First Amendment challenges to historic preservation ordinances, and suggests that the Supreme Court's Free Exercise Clause standards, past and present, are not the most appropriate judicial tests for evaluating the impact of landmark laws on religious freedom.[17]

## I. A Brief Overview of Historic Preservation Law

The historic preservation movement in the United States originated in the mid-nineteenth century, but generally was limited to efforts to save specific, well-known properties.[18] Recognition of the need to preserve entire historic districts provided the first impetus for moving beyond the private purchase and maintenance of historic properties to the establishment of local ordinances.[19] This step required government intervention and laid the groundwork for

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[12] *See infra* notes 18–82 and accompanying text.

[13] *See infra* notes 84–200 and accompanying text.

[14] *See infra* notes 202–49 and accompanying text.

[15] *See infra* notes 250–367 and accompanying text.

[16] *See infra* notes 368–416 and accompanying text.

[17] *See infra* notes 417–86 and accompanying text.

[18] Christopher J. Duerksen & David Bonderman, *Preservation Law: Where It's Been, Where It's Going*, *in* A Handbook on Historic Preservation Law 1 (Christopher J. Duerksen ed., 1983). The homes of famous people, such as George Washington's Mt. Vernon and Thomas Jefferson's Monticello, were the initial targets of preservationists. Richard J. Roddewig, Preparing a Historic Preservation Ordinance 1 (1983).

[19] Christopher J. Duerksen, *Local Preservation Law*, *in* A Handbook on Historic Preservation Law, *supra* note 18, at 29 n.1. Although there have been some differences in the treatment of individually landmarked properties versus those protected in historic districts, the distinction is not generally of "overriding legal significance." *Id.* But see *infra* note 65 for a discussion of the *Maher* test, a takings standard that has been applied with particular reference to sites located within a historic district.

modern preservation efforts.[20] The preservation movement today is an influential force, having expanded dramatically in the last three decades as more people have become aware of the potential destruction of many historic properties.[21] The goals of historic preservation have evolved and expanded also, driven by the realization that preservation programs often serve purposes, such as protecting the livability of neighborhoods, that accomplish more than the mere maintenance of physical structures.[22]

A comprehensive system of legislation has been set up at the federal, state and local levels to give effect to the national drive for preservation.[23] The primary state contribution to the preservation movement has been the delegation of power, through enabling legislation, to local governments to preserve historic properties.[24] It is in municipal landmark ordinances, through their ability to set specific standards and criteria based on local needs and idiosyncrasies, that real power to protect historic buildings rests.[25] Under

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[20] Recognition of the attributes of historic properties other than their specific history, such as aesthetic and architectural qualities, led to an expansion of historic preservation efforts and eventually local preservation ordinances. The first such ordinance in the United States was enacted in Charleston, South Carolina in 1931. RODDEWIG, *supra* note 18, at 1.

[21] James Biddle, *Historic Preservation: The Citizens' Quiet Revolution*, 8 CONN. L. REV. 202, 202 (1976). From 1966 to 1975 the number of organizations participating in historic preservation work had increased from 2,500 to more than 6,000, and the number of municipal preservation commissions had increased from 100 to more than 450. *Id.* at 202–03. By 1983, this number had grown to between 800 and 1,000. RODDEWIG, *supra* note 18, at 1.

[22] *See* Robert E. Stipe, *Why Preserve?*, 11 N.C. CENT. L.J. 211, 211–13 (1980). The author eloquently describes the rationale for historic preservation, concluding that the goal is not just to "sav[e] architectural artifacts," but to "conserve urban neighborhoods for human purposes." *Id.*

[23] *See, e.g.*, Antiquities Act of 1906, 16 U.S.C. §§ 431–433 (1988); Historic Sites, Buildings and Antiquities Act, 16 U.S.C. §§ 461–467 (1988); MASS. GEN. L. ch. 40C, §§ 1–17 (1986); 1975 Mass. Acts 772; CHICAGO, ILL., MUN. CODE ch. 21, §§ 21-62 to 21-95 (1987). The National Historic Preservation Act of 1966, 16 U.S.C. 470 (1982), is the primary federal historic preservation law. Duerksen & Bonderman, *Preservation Law: Where It's Been, Where It's Going*, *supra* note 18, at 10. The National Historic Preservation Act established supervision of state and local preservation programs and provided for financial incentives for preservation. *See* 16 U.S.C. § 470a(b)–(c) (1982). The act also authorized the Secretary of the Interior to maintain the National Register of Historic Places, an official list of national landmarks. *Id.* § 470a(a)(1)(A). One of the most significant features of the National Register is the favorable tax treatment listed owners are entitled to receive. *See* 26 U.S.C. § 48(g) (1988). For commentary concerning historic preservation law, see generally Nicolas A. Robinson, *Historic Preservation Law: The Metes and Bounds of a New Field*, 1 PACE L. REV. 511 (1981).

[24] Michael Mantell, *State Preservation Law*, *in* A HANDBOOK ON HISTORIC PRESERVATION LAW, *supra* note 18, at 130. Other measures that have been variously adopted by different states have included the establishment of state agencies with preservation responsibilities, state historical registers, environmental protection acts and state constitutional amendments. *Id.*

[25] Duerksen, *Local Preservation Law*, *supra* note 19, at 29.

typical enabling legislation, municipal governments establish landmarks commissions.[26] These commissions' powers include the designation of historic buildings as protected landmarks and the regulation of any proposed alterations to these structures.[27] The ordinance generally will specify the purposes for which it is enacted, usually citing educational, cultural, aesthetic, social or economic reasons.[28] The ordinance will also detail the various powers granted to the landmarks commission and the administrative procedures under which the commission will operate.[29]

A typical preservation ordinance requires the landmarks commission to follow specific guidelines in deciding upon landmark status for historic properties, to conduct an investigation and produce a report concerning any building considered for landmark status, and to hold public hearings on a proposed designation.[30] The criteria for designation vary considerably according to locale, but the aesthetic, historical and cultural significance of the structure are factors that are almost universally considered.[31] The commission generally is required to set up certain procedures by which the owner of a landmarked property may apply later for permission to make alterations to the structure.[32] The commission has authority to grant permission to make alterations to a landmark property, under guidelines set forth in the ordinance, to a particular owner by issuing a certificate of appropriateness (or exemption).[33] Standards similar to those for reviewing the original designation of a landmark usually exist for the review of a request to make alterations.[34] Most statutes now contain a provision permitting an owner

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[26] Mantell, *State Preservation Law*, *supra* note 24, at 129–30.

[27] Duerksen, *Local Preservation Law*, *supra* note 19, at 70; *see also* Stephen N. Dennis, *Recommended Model Provisions for a Preservation Ordinance, with Annotations*, *in* A HANDBOOK ON HISTORIC PRESERVATION LAW, supra note 18, A5–A127. This latter article uses excerpts from preservation ordinances throughout the U.S. to illustrate various ways of constructing a local ordinance.

[28] Duerksen, *Local Preservation Law*, *supra* note 19, at 63–64; *see, e.g.*, 1975 Mass. Acts 772, § 1 (describing the purposes of the ordinance).

[29] In addition to municipal ordinances, state statutes may also detail these powers. *See, e.g.*, 1975 Mass. Acts 772, §§ 3–11. This statute created the Boston Landmarks Commission. *See id.*

[30] *E.g.*, 1975 Mass. Acts 772, §§ 3–9. See RODDEWIG, *supra* note 18, at 7, listing ten components to be found in most preservation ordinances.

[31] *See* RODDEWIG, *supra* note 18, at 7.

[32] *E.g.*, 1975 Mass. Acts 772, §§ 3–9.

[33] *See, e.g.*, 1975 Mass. Acts, §§ 5–8. The titles of the specific certificates and their exact functions will vary slightly according to jurisdiction.

[34] Duerksen, *Local Preservation Law*, *supra* note 19, at 101.

of landmarked property to apply for an exemption based on economic or physical hardship.[35] Exemption under this provision generally is granted when the owner is unable to make a reasonable use of or return on the property.[36]

Commentators have likened historic preservation ordinances to a form of zoning, a land use control that has been subject to numerous Fifth Amendment Takings Clause challenges.[37] Not surprisingly, preservation laws have been attacked on Fifth Amendment grounds as well, and courts have applied the established standards of zoning cases similarly in preservation cases.[38] The development of these standards, therefore, is important for understanding First Amendment challenges to historic preservation laws, as some courts' analyses of takings and free exercise claims have had overlapping components.[39]

Courts have often viewed historic preservation sympathetically, recognizing that a national interest exists in preserving historically significant buildings and districts, and that historic preservation promotes the public welfare.[40] The most frequent basis upon which

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[35] Duerksen, *Local Preservation Law*, *supra* note 19, at 104; *see also* RODDEWIG, *supra* note 18, at 25 ("If a landmark commission does not consider economic hardship, a court may"). *See generally* David M. Stewart, Note, *Constitutional Standards for Hardship Relief for Non-profit Landowners under New York City's Historic Preservation Law*, 21 COLUM. J.L. & SOC. PROBS. 163 (1988).

[36] RODDEWIG, *supra* note 18, at 25. The economic hardship provision is responsive to the analysis of the Supreme Court in *Penn Central Transportation Co. v. City of New York*, where the Court stated that the New York City landmark law had not effected a "taking" of Grand Central Terminal because the law did not interfere with present uses and allowed the owner to realize a reasonable return on its property. 438 U.S. 104, 137–38 (1978). Justice Rehnquist dissented, stating that a taking does not become non-compensable because the government allows the owner to make "reasonable" use of its property. *Id.* at 149 (Rehnquist, J., dissenting). See *infra* notes 45–62 and accompanying text for a further discussion of this case. The hardship provision of a landmark law usually is designed to facilitate compromise in situations where an ordinance might be unconstitutional as applied.

[37] Duerksen, *Local Preservation Law*, *supra* note 19, at 30. For commentary concerning takings issues in a historic preservation context, see generally Faith L. Kalman, Note, *Preserving the Past: Historic Preservation Regulations and the Taking Clause*, 34 WASH. U. J. URB. & CONTEMP. L. 297 (1988).

[38] *See, e.g.*, Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 123–24 (1978).

[39] *See, e.g.*, Church of St. Paul & St. Andrew v. Barwick, 496 N.E.2d 183, 192 (N.Y. 1986).

[40] *See, e.g.*, Opinion of the Justices to the Senate, 128 N.E.2d 557, 562 (Mass. 1955) (advisory opinion approving proposed legislation authorizing the establishment of a historic districts commission for the town of Nantucket and certain historic districts there); Opinion of the Justices to the Senate, 128 N.E.2d 563, 567–69 (Mass. 1955) (advisory opinion approving proposed legislation authorizing the establishment of a historic district for the Beacon Hill section of Boston). Challenges to landmark designation laws are not a recent development, but they have become more numerous as preservation efforts have increased. For an

property owners have challenged landmark legislation has been the Takings Clause of the Fifth Amendment.[41] The Takings Clause prohibits excessive public use or interference with private property without just compensation.[42] Owners argue that preservation ordinances are so burdensome that they effect a constitutionally prohibited taking of private property for public "use" without just compensation.[43] Meanwhile, preservationists argue that the ordinances are a reasonable and necessary means for protecting irreplaceable resources.[44]

In 1978, the United States Supreme Court addressed for the first time the constitutionality of a historic preservation ordinance challenged on takings grounds.[45] In *Penn Central Transportation Co. v. City of New York*, the Supreme Court held that the New York City landmarks law did not effect a taking when applied to Grand Central Terminal because the law did not deny the property owner,

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example of an important early preservation case, see United States v. Gettysburg Electric Railway Co., 160 U.S. 668, 681 (1896) (Court held that federal government acquisition of the Gettysburg Battlefield area for historic preservation, protecting it from commercial development, was a purpose for which eminent domain powers could be used).

[41] David Bonderman, *Federal Constitutional Issues, in* A HANDBOOK ON HISTORIC PRESERVATION LAW, *supra* note 18, at 350.

[42] The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V. This was made applicable to the states through the Fourteenth Amendment in Chicago, B. & O. Railway Co. v. Chicago, 166 U.S. 226, 238–39 (1897). The principle behind regulatory takings was described by Justice Holmes in *Pennsylvania Coal v. Mahon*: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. 393, 415 (1922). For commentary that criticizes this principle when applied to land-use regulation, see Bonderman, *Federal Constitutional Issues, supra* note 41, at 351 n.24.

Preservation ordinances have also been challenged on Fifth and Fourteenth Amendment due process grounds. These amendments state that "no person shall be . . . deprived of life, liberty, or property, without due process of law," U.S. CONST. amend. V, and that "[no] state [shall] deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV. *See, e.g.*, Lafayette Park Baptist Church v. Scott, 599 S.W.2d 61, 65 (Mo. Ct. App. 1980) (court used the *Maher* test, see *infra* note 65, to find that a preservation ordinance barring demolition of a historic townhouse belonging to the church did not violate constitutional due process requirements).

[43] *See, e.g.*, Trustees of Sailors' Snug Harbor v. Platt, 288 N.Y.S.2d 314, 316 (App. Div. 1968).

[44] *See, e.g.*, Biddle, *supra* note 21, at 202.

[45] *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 138 (1978). For commentary concerning this important decision, see Norman Marcus, *The Grand Slam Grand Central Terminal Decision: A* Euclid *for Landmarks, Favorable Notice for TDR and a Resolution of the Regulatory/Taking Impasse*, 7 ECOLOGY L.Q. 731 (1978); Linda B. Samuels, *After* Penn Central*: A Look Down the Track at Constitutional Taking*, 8 REAL EST. L.J. 230 (1980); Thane D. Scott, Comment, *Alas in Wonderland: The Impact of* Penn Central v. New York *on Historic Preservation Law and Policy*, 7 B.C. ENVTL. AFF. L. REV. 317 (1978).

Penn Central, reasonable use of the building as a railroad station.[46] In *Penn Central*, the owner of Grand Central Terminal attempted to erect a commercial office tower atop the landmark-designated terminal.[47] The New York City Landmarks Preservation Commission ("the Commission") denied permission for this construction on the basis that it would destroy the meaningful presence of the structure as a landmark.[48] Penn Central filed suit, claiming that its property had been taken in violation of the Fifth Amendment.[49]

The *Penn Central* Court admitted that it had been unable to devise a standard for determining what action constitutes a taking, and indicated that the outcome of each case would be determined largely by its specific circumstances.[50] The Court, however, did outline several factors important in determining whether a taking had occurred: first, the degree to which the challenged ordinance interfered with the "distinct investment-backed expectations" of the claimant, second, the character of the challenged government action, and finally, whether the regulation promoted "'the health, safety, morals or general welfare by prohibiting . . . contemplated uses of land.'"[51]

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[46] 438 U.S. at 136–37.

[47] *Id.* at 116–17.

[48] *Id.* at 117–18. The Commission stated that the new tower would "reduce the Landmark itself to the status of a curiosity." Landmarks, the Commission stated, "cannot be divorced from their settings," and alterations must "enhance" rather than "overwhelm" the original design. *Id.* (quoting record on appeal at 2251).

[49] *Id.* at 117–18. The New York Court of Appeals decision later affirmed by the Supreme Court in *Penn Central* may be found at 366 N.E.2d 1271 (N.Y. 1977).

[50] *Penn Central*, 438 U.S. at 124.

[51] *Id.* The fact that a regulation effectively diminishes the value of the property does not of itself constitute a regulatory taking. *Id.* Nor is the "most [economically] beneficial use" of the property required. *Id.* at 125 (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 592–93 (1962)). One commentator suggests that federal courts will usually uphold land-use regulations that severely restrict property if there is any reasonable use remaining. *See* Bonderman, *Federal Constitutional Issues*, *supra* note 41, at 353.

The *Penn Central* Court indicated that it would be more ready to find a taking when the interference with property could be considered a physical invasion of the property. *Penn Central*, 438 U.S. at 124. A physical invasion may be determinative of a taking if it reaches the "extreme form of a permanent physical occupation." Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419, 426 (1982).

The Court also stated that if the regulation provided a sufficient public benefit, adverse effect upon property interests would not violate the Fifth Amendment. *Penn Central*, 438 U.S. at 124. The application of this principle is well illustrated by *Goldblatt*, 369 U.S. at 592 (Court upheld ordinance banning excavations below the water table because the regulation protected many schoolchildren in the area, despite plaintiffs' claim that it shut down their business). The Court pointed out that zoning laws are a classic example of the principle that public utility may supersede private profit. *Penn Central*, 438 U.S. at 125 (citing Euclid v. Ambler Realty Co., 272 U.S. 365, 394–95 (1926)). Preservation controls have been called

In analyzing these factors, the *Penn Central* Court held that the landmark designation did not interfere with the operation of the terminal in the manner in which it had been used for the past sixty-five years.[52] Therefore, the Court stated, the Commission's refusal to allow the tower project did not automatically prevent the owners from receiving a reasonable economic return on their investment.[53] The Supreme Court rejected the owner's argument that a physical taking had occurred in that Penn Central would not be able to use its air development rights in the space above the terminal.[54] The Court stated that the character of the city's action must be assessed in light of the interference with the parcel as a whole, and noted that the preservation law did not interfere with the economic or physical use of the present terminal.[55] Also, the Court noted that the landmark ordinance was a beneficial measure that promoted the general public welfare through the preservation of valuable aesthetic and cultural resources.[56] Applying the relevant factors, the Court ruled that the landmark law did not constitute a taking as applied to Grand Central Terminal.[57]

The *Penn Central* Court, beyond attempting to clarify standards for takings analyses, also discussed preservation law generally. First, the Court noted that the New York preservation ordinance did not discriminate specifically against Penn Central.[58] The Court distinguished landmark laws from discriminatory "spot" zoning by noting that the New York preservation law was a "comprehensive plan" of preservation applicable to qualified buildings located in any part of the city.[59] The Court also reiterated its position that aesthetic value

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"zoning's sibling," and *Penn Central* frequently has been compared to *Euclid*. *See* Duerksen, *Local Preservation Law*, *supra* note 19, at 30.

[52] *Penn Central*, 438 U.S. at 136.

[53] *Id.* The Court stated that proof of sufficiently changed circumstances, such that Penn Central could no longer obtain a reasonable return on its property, could provide a basis for relief. *Id.* at 138 n.36.

[54] *Id.* at 130.

[55] *Id.* The Court also noted that Penn Central's air rights were transferable to other sites in the vicinity. Though these rights would not necessarily qualify as just compensation if a taking had been found, the Court stated that these rights nonetheless had value, and that the existence of such rights must be considered in the takings analysis. *Id.* at 137.

[56] *Penn Central*, 438 U.S. at 138.

[57] *Id.*

[58] *Id.* at 132.

[59] *Id.* "Spot" zoning is a "land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones." *Id.* The Court noted that more than 400 landmarks and 31 historic districts had been designated under the New York law at the time of this decision. *Id.*

alone may provide sufficient basis for a building to be designated a landmark.[60] Finally, the Court rejected the argument that landmark designation is arbitrary, subjective or a matter of taste, and therefore unfair, by noting that a property owner has the right to judicial review of the designation if the owner believes that it was unfairly made.[61] *Penn Central* established the rule that if a reasonable economic return is available to the owner of a landmarked property, application of a historic preservation ordinance to the property will not constitute a taking.[62]

*Penn Central* concerned commercial property, but the United States Supreme Court has not directly addressed the question of landmark designations of property owned and operated by non-profit organizations.[63] The issue, however, has been addressed by a number of lower courts. In 1968, for example, the New York Supreme Court, Appellate Division, enunciated a takings standard for non-profit organizations in *Trustees of Sailor's Snug Harbor v. Platt*.[64] The court declared that a facially valid historic preservation ordinance may be unconstitutional if it physically or financially prevents, or seriously interferes with, the carrying out of the "charitable purpose" of the particular organization affected.[65] In *Snug Harbor*,

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[60] *Penn Central*, 438 U.S. at 129. The Court chose to make this point clear, even though it was uncontested by the appellants. *Id.*

[61] *Id.* at 132–33. The Court stated that courts should have no greater difficulty identifying unfair action in preservation cases than they do in the familiar context of zoning. *Id.*

[62] *Id.* at 138. For a discussion of cases illustrating the problems involved in establishing a taking, see Bonderman, *Federal Constitutional Issues*, *supra* note 41, at 354–56.

[63] A court has examined, however, a takings claim brought by a religious organization by applying a *Penn Central*-type analysis. *See* St. Bartholomew's Church v. City of New York, 914 F.2d 348, 356–57 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991). See *infra* notes 263–302 and accompanying text for a discussion of *St. Bartholomew's*.

[64] 288 N.Y.S.2d 314, 316 (App. Div. 1968). The case was actually remanded for further factual findings, but the appellate division took the opportunity to announce what it considered to be the applicable test.

[65] *Id.* A "reasonable return on investment" standard, such as that enunciated in *Penn Central*, is inappropriate for application to a non-profit organization and courts have endeavored to find an analogous test for these situations. *See, e.g.*, Society for Ethical Culture v. Spatt, 415 N.E.2d 922, 925 (N.Y. 1980); *Snug Harbor*, 288 N.Y.S.2d at 316; *cf.* Maher v. City of New Orleans, 371 F. Supp. 653, 662 (E.D. La. 1974), 516 F.2d 1051, 1065–67 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976). In *Maher*, a New Orleans historic district ordinance was upheld against a claim that its application to an antique cottage in the Vieux Carre section of New Orleans, barring the owner from proceeding with demolition, constituted a taking. 516 F.2d at 1067. The district court upheld the ordinance because the owner had not proven that the law precluded use of the property for any purpose for which the property was "reasonably adapted." 371 F. Supp. at 662 (quoting Summers v. City of Glen Cove, 217 N.E.2d 663, 664 (N.Y. 1966)). In its affirmance, the Fifth Circuit Court of Appeals noted

the non-profit owner of a landmarked retirement home for sailors wanted to demolish the house and construct a modern facility.[66] Because the New York City historic preservation ordinance prohibited the demolition, the charitable organization filed suit, claiming its property had been unconstitutionally taken.[67]

In addressing the takings claim, the court reasoned that allowing a non-profit organization to be free of property restrictions that seriously interfere with its charitable purpose is comparable to allowing a commercial property owner a reasonable use or return from such property.[68] The court also indicated that the appropriate guidelines for determining the existence of impermissible interference would be whether conversion of the existing structure to a useful condition or maintenance of the property in its current condition would be prohibitively expensive for the owner, in light of that owner's resources.[69] Thus, the *Snug Harbor* court established a standard specifically formulated for determining the existence of a taking with respect to non-profit organizations.[70]

The New York Court of Appeals applied the charitable purpose test in 1974 in a case involving the property of a religious organization in *Lutheran Church in America v. City of New York*.[71] The *Lutheran Church* court held that the landmark status of a historic townhouse, which was used by the church as office space, seriously interfered with the ability of the church to achieve its charitable purpose and thus constituted a taking.[72] The *Lutheran Church* court equated charitable and religious purposes and held the *Snug Harbor*

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that, although the property was non-profit, the owner had not shown an inability to receive a reasonable return on commercial rental of the existing structure, and that no alternative uses of the property were available. *Maher*, 516 F.2d at 1066. The United States Supreme Court has recognized that *Maher* supports the principle that historic district legislation generally will not give rise to a taking. *See Penn Central*, 438 U.S. at 131. The cottage in *Maher* was located in a historic district and was not individually designated, a distinction some courts have noted in their takings analyses. *See, e.g.*, First Presbyterian Church v. City of York, 360 A.2d 257, 260 (Pa. Commw. Ct. 1976). The *York* court applied the *Maher* standards rather than the *Snug Harbor* "charitable purpose" test because the building in question was part of a historic district and was capable of relatively inexpensive conversion to a useful purpose. *York*, 360 A.2d at 261.

[66] 288 N.Y.S.2d at 316.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *See id.*

[71] 316 N.E.2d 305, 311 (N.Y. 1974).

[72] *Id.* at 312.

charitable purpose standard applicable to property owned by a religious organization.[73]

The church had renovated and extended the townhouse, but found that it could not increase the size of the structure sufficiently to meet the organization's needs. The church argued that the building should be demolished and a new, adequate one constructed.[74] The church further argued that denial of permission to do so constituted a taking because, absent demolition, the church would have to abandon the building.[75]

Adopting the church's argument, the court declared that, because the church had proven its need to expand and had exhausted all possible expansion alternatives allowed by the ordinance, continued application of the landmark designation to the townhouse would be confiscatory.[76] Therefore, the court held that the Commission's refusal to permit the demolition seriously interfered with the carrying out of the church's religious mission.[77] Despite the presence of a taking in this case, the court refused to strike down the preservation ordinance entirely, stating that not all landmark designations are confiscatory.[78]

In sum, historic preservation legislation generally has been challenged on the ground that it effected an unconstitutional taking without just compensation.[79] *Penn Central* established the principle that a preservation ordinance will not constitute a taking unless it denies the owners of the property a reasonable return on their investment.[80] *Snug Harbor* enunciated the charitable purpose test, which provides that a preservation ordinance will effect a taking of the property of a non-profit organization if it prevents or seriously interferes with the charitable mission of the owner.[81] Finally, *Lutheran Church* illustrated the application of the charitable purpose test to the property of a religious organization, where the preservation law was held to have a confiscatory effect.[82]

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[73] *See Lutheran Church*, 316 N.E.2d at 312.

[74] *Id.* at 307–08.

[75] *Id.*

[76] *Id.* at 312.

[77] *Id.* The court's opinion made no mention of any First Amendment claims; if any such claims were put forward by the church, they apparently were dismissed summarily. *See id.* at 305, 312. First Amendment concerns were not addressed in the lower court either. *See* 345 N.Y.S.2d 24, 25–26 (App. Div. 1973).

[78] *Lutheran Church*, 316 N.E.2d at 311.

[79] Bonderman, *Federal Constitutional Issues*, *supra* note 41, at 350.

[80] Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 138 (1978).

[81] Trustees of Sailors' Snug Harbor v. Platt, 288 N.Y.S.2d 314, 316 (App. Div. 1968).

[82] 316 N.E.2d at 311–12.

## II. The First Amendment and Land Use Regulation

First Amendment challenges to land use regulations, such as zoning laws, began to arise in the 1960s.[83] Courts frequently have treated historic preservation ordinances as a specialized form of zoning, and these ordinances also have come under First Amendment attack.[84] The resolution of these cases necessarily must depend heavily on judicial interpretation of the religion clauses of the First Amendment. An exploration of the jurisprudential development of the Free Exercise and Establishment Clauses is useful in understanding the impact of these constitutional provisions on the application of preservation statutes to religious properties.

### A. *The Free Exercise Clause*

The First Amendment of the Constitution mandates that no law be passed that prohibits the free exercise of religion.[85] The United States Supreme Court has noted that, because religion is not defined in the Constitution, free exercise inquiry must establish precisely what freedom is covered by this constitutional guarantee.[86] The Court has broken down Free Exercise protection into two concepts: the freedom to believe and the freedom to act.[87] The Court has stated that the first of these guaranteed liberties is absolute, but that the second is "subject to regulation for the protection of society."[88]

Although religious belief itself is protected against governmental interference, the Court has acknowledged that circumstances arise in which the law may permissibly interfere with religious practices.[89] For a number of years, these circumstances generally have been grounded upon the existence of a compelling state interest in the regulation that causes the interference.[90] In determining whether a burden on the free exercise of religion is permissible,

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[83] *See* Crewdson, *supra* note 8, at 138–39.

[84] *See, e.g.*, Westchester Reform Temple v. Brown, 239 N.E.2d 891, 893 (N.Y. 1968). See *infra* notes 232–367 and accompanying text for a discussion of cases involving these claims.

[85] U.S. Const. amend. I.

[86] Reynolds v. United States, 98 U.S. 145, 162 (1878).

[87] Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

[88] *Id.*

[89] *Reynolds*, 98 U.S. at 166. The Court stated that to hold otherwise would be "to make the professed doctrines of religious belief superior to the law of the land." *Id.* at 167.

[90] *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963). See *infra* notes 102–13 and accompanying text for a discussion of this case.

the Court has distinguished between laws that specifically regulate religious activity (produce a direct burden) and those that incidentally affect religion through neutral laws of general applicability (produce an indirect burden).[91] According to the Court, laws that directly burden religion have no legitimate alternative purpose and therefore violate the First Amendment.[92] The Court traditionally has examined laws that indirectly burden religion, through analysis of the primary objective of the regulation, to determine if an impermissible infringement of religious freedom is present.[93]

The Supreme Court illustrated its distinction between laws that directly and indirectly burden the free exercise of religion in 1961 in *Braunfeld v. Brown*.[94] In *Braunfeld*, the Court held that a Pennsylvania statute forbidding retail sales on Sunday did not violate an Orthodox Jewish merchant's free exercise rights.[95] The merchant claimed that the law discriminated against his religion by forcing him to choose between observing his Saturday sabbath and opening his shop only five days a week.[96]

The Court upheld the statute because it satisfied three basic principles. First, the Court stated that the law was a general one within the power of the state to enact.[97] The Court noted that the state had the power to designate, for public welfare considerations, a specific day as a general day of rest.[98] Second, the Court observed that the purpose of the Pennsylvania law was to advance secular goals, and intended no religious conflict.[99] Finally, the Court concluded that the regulation could be considered the only feasible means by which the state could accomplish its lawful goal.[100] The

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[91] *Compare* McDaniel v. Paty, 435 U.S. 618, 627 (1978) (law barring ministers from holding public office held to be unconstitutional) *with* Braunfeld v. Brown, 366 U.S. 599, 601–02, 609 (1961) (Sunday closing law upheld despite its economic impact on Jewish merchant whose sabbath is Saturday). In the first case, the burden is direct; in the latter case, the burden is indirect. *See also* Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943) ("It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon.").

[92] *See Sherbert*, 374 U.S. at 403; *Braunfeld*, 366 U.S. at 603.

[93] *See Sherbert*, 374 U.S. at 403; *Braunfeld*, 366 U.S. at 603.

[94] 366 U.S. 599, 607 (1961).

[95] *Id.* at 609.

[96] *Id.* at 601.

[97] *Id.* at 607.

[98] *Braunfeld*, 366 U.S. at 607.

[99] *Id.*

[100] *Id.* The Court also noted that the state could create an exemption to the law for individuals such as this merchant, but held that the state was not required to do so because the exemption could undermine the effectiveness of the regulation. *Id.* at 608–09.

Court considered highly significant the fact that the Sunday closing law did not regulate any of the merchant's religious practices, but, in addressing a secular activity, only indirectly burdened his exercise of religion by making it "more expensive."[101]

The Supreme Court imposed tighter scrutiny on legislative actions affecting the practice of religion in 1963 in *Sherbert v. Verner*.[102] The *Sherbert* Court held that South Carolina could not deny unemployment benefits to a Seventh-Day Adventist who was fired from her job for refusing to work on Saturday, the sabbath day of her religion.[103] The state claimed that the plaintiff had refused suitable employment without good cause, thereby disqualifying her for benefits under South Carolina law.[104] The state maintained that the subsequent denial of unemployment benefits did not restrict the plaintiff's freedom of religion.[105]

In addressing the free exercise question, the Court held that the South Carolina law infringed the plaintiff's freedom of religion.[106] By forcing her to choose between her religion and the prospect of impoverishment, the Court reasoned that the state's denial of benefits was tantamount to economically coercing the plaintiff's religious convictions.[107] The Court analogized this denial to the state imposition of a fine for Saturday worship.[108]

While holding that the law created an unconstitutional infringement of First Amendment rights, the Court recognized that the law was not directed specifically at religion, thus allowing the state to show a compelling interest to justify its law.[109] The Court attempted

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[101] *Id.* at 605.

[102] 374 U.S. 398 (1963). See Justice Stewart's concurring opinion, in which he argued that the Court's *Sherbert* decision is inconsistent with *Braunfeld*. *Id.* at 417–18 (Stewart, J., concurring). Justice Stewart noted that, although the *Sherbert* Court ostensibly reconciled its holding with *Braunfeld*, the Court had implicitly rejected its prior thinking by recognizing a higher standard of free exercise protection. *Id.* The *Braunfeld* case was wrongly decided, Justice Stewart maintained, and should have been explicitly overruled. *Id.*

[103] *Id.* at 409–10; *see also* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 138–39, 146 (1987) (state's denial of unemployment benefits to Seventh-Day Adventist who converted to the faith during the term of her employment and refused to work Saturdays violated her free exercise rights); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 709, 720 (1981) (denial of unemployment benefits to a Jehovah's Witness, who was fired for refusing to violate religious beliefs by working in the munitions department of his employer, impermissibly burdened the free exercise of his religion).

[104] *Sherbert*, 374 U.S. at 401.

[105] *Id.*

[106] *Id.* at 403.

[107] *Id.* at 404.

[108] *Id.*

[109] *Id.* at 405–06; *cf.* Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (Court did not

to distinguish the case from *Braunfeld* by pointing to the absence of a compelling state interest, on the part of South Carolina, that would allow violation of the plaintiff's free exercise rights.[110] The Court noted that—unlike *Braunfeld*, where the allowance of an exemption for the class represented by the plaintiff would jeopardize the state goal of providing a single day of rest for all workers—the plaintiff in *Sherbert* easily could be exempted from the eligibility requirements of the state compensation statute without compromising that state's goal.[111] Thus, no compelling interest prevented the state from adapting its law to avoid violating its citizens' freedom of religion.[112] The *Sherbert* test, which expands the *Braunfeld* analysis, requires a court to determine whether a challenged law actually infringes on the plaintiff's free exercise rights, advances secular goals, is justified by a compelling state interest, and is the only feasible means for achieving the state's goals.[113]

The Supreme Court further strengthened free exercise protection in 1972 in *Wisconsin v. Yoder*.[114] The *Yoder* Court held that requiring schoolchildren of the Old Order Amish religion to comply with Wisconsin's compulsory school attendance law violated their freedom of religion.[115] The Amish removed their children from the state's public schools upon completion of eighth grade, in advance of the permissible age of sixteen, and continued educating them at home in accordance with Amish religious and social customs.[116]

Addressing the claim of unconstitutional religious infringement, the Supreme Court conceded that the state law had a valid secular purpose.[117] The Court, however, noted that the religion clauses of the First Amendment have been given a high priority and have been allowed to prevail over other strong societal interests.[118] The Court stated that otherwise neutral, valid laws may, in

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specifically mandate a showing of a compelling state interest in the *Braunfeld* opinion, only a showing that the state's regulatory objective was one within its power).

[110] *Sherbert*, 374 U.S. at 406–09.

[111] *Compare Sherbert*, 374 U.S. at 408–09 *with Braunfeld*, 366 U.S. at 605.

[112] *Sherbert*, 374 U.S. at 408–09.

[113] *See id.* at 403, 406–07. *Braunfeld* and *Sherbert* reach opposite outcomes under factual circumstances that seemingly do not justify such disparate results. *See id.* at 417–18 (Stewart, J., concurring).

[114] *See* 406 U.S. 205, 220 (1972).

[115] *Id.* at 220, 234.

[116] *Id.* at 207, 209, 223. The Amish contended that their children would be unable to develop proper Amish religious values, due to extended exposure to an environment hostile to those values, if forced to continue in public schools beyond the eighth grade. *Id.* at 211.

[117] *See id.* at 213.

[118] *Id.* at 214.

their application, unacceptably burden the free exercise of religion.[119]

Although the Court regarded the school attendance law as a neutral regulation, the Court stated that the Amish had sufficiently demonstrated that compliance with the law would burden the free exercise of their religious beliefs.[120] The Court held that the state's interest in a uniform compulsory school attendance law was not sufficiently compelling to overcome the fundamental interest of parents in the religious upbringing of their children.[121] The Court therefore refused to sustain the law's application to the Amish.[122] The *Yoder* Court indicated that the level of state interest considered "compelling" is very high, and indicated that even a neutral, useful law may not outweigh First Amendment protections.[123]

In the late 1980s, the Supreme Court could not achieve a stable consensus regarding free exercise analysis.[124] In 1988, in *Lyng v.*

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[119] *Id.* at 220.

[120] *Id.* at 219.

[121] *Id.* at 213–14, 228–29. In *Employment Division, Department of Human Resources v. Smith*, Justice Scalia used this combination of parental interest and free exercise right to distinguish *Yoder* from that case. 110 S. Ct. 1595, 1601 n.1 (1990). See *infra* notes 133–64 and accompanying text for a discussion of *Smith*.

[122] *Yoder*, 406 U.S. at 236. The Court also noted the issue of the sincerity of religious claims that are asserted in First Amendment actions, implying that clear proof of such sincerity is especially important in cases where the challenged law advances an obviously useful social goal. *Id.* at 235–36 (citing Sherbert v. Verner, 374 U.S. 398, 399 n.1 (1963)). In this case, the Court observed, the fact that the Amish had functioned for three centuries as an identifiable religious sect demonstrated the genuineness of their religious convictions. *Id.* at 235. The Court added that the Amish were probably one of the few religious groups that could make such a strong showing. *Id.*

[123] *Cf.* United States v. Lee, 455 U.S. 252 (1982), where the Supreme Court held that members of the Old Order Amish, who have a religious obligation to provide for fellow members in a manner analogous to the Social Security system, are nevertheless not exempt from payment of Social Security taxes. *Id.* at 261. The Court stated that the governmental interest in preserving the integrity of the Social Security system is sufficiently strong to justify this burden on the Amish people's free exercise of religion. *Id.* at 260. For other recent decisions involving taxes on religious groups, see, e.g., Jimmy Swaggart Ministries v. Board of Equalization of California, 110 S. Ct. 688, 697 (1990) (application to religious organization of sales and use tax does not violate the group's freedom of religion); Hernandez v. Commissioner, 490 U.S. 680, 695–96, 699–700 (1989) (disqualification of "charitable contribution" payments made by members to the Church of Scientology for "auditing" and training sessions does not violate the members' First Amendment rights); Bob Jones Univ. v. United States, 461 U.S. 574, 577–85 (1983) (government interest in eliminating racial discrimination sufficiently compelling to uphold IRS denials of charitable tax-exempt status to educational institutions that practice religiously-motivated racial discrimination).

[124] *See, e.g.*, Bowen v. Roy, 476 U.S. 693, 700–01 (1986). In that case the Court vacated a lower court's injunction barring the government from using the plaintiff's Social Security number in processing welfare benefits. *Id.* at 698. The Court held that the government's use of a numerical identifier for the plaintiff's child did not impermissibly burden the family's

*Northwest Indian Cemetery Protective Association*, the Supreme Court held that the Free Exercise Clause does not prohibit the government from developing federal lands used by Native Americans for religious rituals.[125] The Native Americans claimed that their religious ceremonies would be disturbed by state timber harvesting and road construction.[126]

The Court described the potential effect of the development on the Native Americans' religion as extremely grave, but held that, although the government program would make their religious practices more difficult, it was not intended to coerce their religious beliefs directly.[127] In de-emphasizing the compelling interest test, the Court stated that, although indirect burdens on free exercise rights must be scrutinized, the government is not required to provide a compelling justification for every burden that its actions impose.[128] The Court reasoned that *prohibition* is a critical component of the First Amendment text, and stated that the government program to develop its own land was not designed to have a prohibitive effect or to coerce individuals into actions contrary to their religious beliefs.[129]

The Court noted that, although the effect of the program on the Native Americans' religion was potentially significant, it was impractical for the Court to make distinctions in the application of legal doctrines based on their impact on a particular plaintiff's

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free exercise rights, despite a parent's claim that the numerical identifier would harm the spirit of their daughter, retarding her spiritual development. *Id.* at 696. In his plurality opinion, Chief Justice Burger moved away from the opinion he wrote in *Yoder* and advocated a less rigorous free exercise standard by stating that "the government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest." *Id.* at 707–08. Five Justices disagreed with this analysis, however. *See id.* at 713 (Blackmun, J., concurring in part); *id.* at 727 (O'Connor, J., concurring in part and dissenting in part, joined by Brennan and Marshall, JJ.); *id.* at 733 (White, J., dissenting). In *Hobbie v. Unemployment Appeals Commission*, the Court's majority opinion, written by Justice Brennan, also rejected Chief Justice Burger's *Roy* reasoning. 480 U.S. 136, 141 (1987). Justice Brennan stated that the *Roy* plurality's test provides only the "barest level of minimum scrutiny," already guaranteed by the Equal Protection Clause, for important First Amendment values. *Id.* at 141–42. Recently, however, the Court has again lessened the burden on government in free exercise inquiry. See *infra* notes 123–64 and accompanying text for a discussion of Employment Division, Department of Human Resources v. Smith, 110 S. Ct. 1595 (1990).

[125] 485 U.S. 439, 441–42 (1988). The Court attached significance to the fact that the use of federal lands was at issue. *Id.* at 453 (the rights of Native Americans to practice their religion "do not divest the Government of its right to use what is, after all, its own land").

[126] *Id.* at 443.

[127] *Id.* at 451–52.

[128] *Id.* at 450–51.

[129] *Id.* at 451, 453.

spiritual development.[130] Government activities that do not prohibit the free exercise of religion, the Court stated, cannot be subject to a *de facto* veto power by any religious group that claims that the activities interfere with its search for spiritual fulfillment.[131] The *Lyng* decision did not eliminate the compelling state interest test, but it established that the government need not show a compelling justification for programs that make given religious practices more difficult, if these programs do not coerce individuals into actions contrary to their religious beliefs.[132]

In April of 1990 the Supreme Court's free exercise jurisprudence changed significantly in *Employment Division, Department of Human Resources v. Smith.*[133] The Court held that Oregon's prohibition of the sacramental use of peyote was constitutionally permissible, and that denial of unemployment compensation based on misconduct charges stemming from such use did not violate the Free Exercise Clause.[134] In *Smith*, a private drug rehabilitation organization fired the plaintiff employees from their jobs for ingesting peyote at a ceremony of the Native American Church.[135] The state refused to grant the plaintiffs unemployment compensation because their dismissal was for "misconduct."[136] After the Oregon Supreme Court determined that peyote consumption for religious purposes was illegal under state law, the United States Supreme Court considered whether Oregon's prohibition of such conduct violated the Free Exercise Clause.[137]

In holding that Oregon's law does not violate the First Amendment, the Supreme Court refused to employ the *Sherbert* test of requiring compelling state justification for any law that infringes on

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[130] *Lyng*, 485 U.S. at 451.

[131] *Id.* at 453.

[132] *See id.* at 450–51.

[133] *See* 110 S. Ct. 1595, 1602–03 (1990). The Court's decision in this case has been described as a "radical departure" from its previous free exercise jurisprudence. David G. Savage, *Won't Shield Religions from Law, Court Says*, L.A. TIMES, April 18, 1990, § A, at 1.

[134] *Smith*, 110 S. Ct. at 1606.

[135] *Id.* at 1597–98.

[136] *Id.* at 1598.

[137] *See id.* at 1599. The United States Supreme Court heard the case twice. The first time, the Court vacated the judgment of the Oregon Supreme Court and remanded for a determination as to whether sacramental peyote use was allowed under the state's controlled substance law. Employment Div., Dep't of Human Resources v. Smith, 485 U.S. 660, 662 (1988). After the Oregon Supreme Court determined that sacramental use of peyote did violate the state drug law, Smith v. Employment Division, Department of Human Resources, 763 P.2d 146, 148 (Or. 1988), the United States Supreme Court again granted certiorari. 489 U.S. 1077 (1989).

free exercise rights.[138] The Court stated that this test is inappropriate for evaluating challenges to neutral, generally applicable laws that only incidentally burden religious practice.[139] The Oregon drug law was held to be such a provision because it did not attempt to interfere with religious belief.[140] The Court noted that it has never held that individuals are relieved of their obligation to comply with generally applicable laws simply because of an indirect burden on religion.[141]

Writing for the majority, Justice Scalia distinguished cases in which application of such a neutral, generally applicable law has been barred by pointing out that those situations implicated the Free Exercise Clause in conjunction with other constitutional protections.[142] He also maintained that all governmental actions that had been invalidated solely on the basis of the *Sherbert* test had involved unemployment compensation denials.[143] Justice Scalia distinguished these other cases by noting that they, unlike *Smith*, concerned situations in which the state had enacted a system of individualized exemption from disqualification provisions of the unemployment compensation statute.[144] These exemptions, he observed, were based on a particular plaintiff's ability to show that he or she had "good cause" for quitting or refusing employment.[145] Justice Scalia noted that given such an exemption system, a circum-

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[138] *Smith*, 110 S. Ct. at 1603. See *supra* notes 102–13 and accompanying text for a discussion of *Sherbert*.

[139] *Id.*

[140] *Id.* at 1602. Oregon's drug law was held not to "attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs." *Id.* The Oregon drug law involved criminal sanctions, a point clearly noted by Justice Scalia. *Id.* This raises the question as to whether the *Smith* rationale is limited to the criminal context. Judging from the results so far in the lower courts, the answer appears to be an unqualified "no." *See* Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927, 932 (6th Cir. 1991); Salvation Army v. New Jersey Dep't of Community Affairs, 919 F.2d 183, 194–96 (3d Cir. 1990) (both cases applying *Smith* in a civil context). See *infra* notes 263–302 and accompanying text for a discussion of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354 (2d Cir. 1990), which also applied *Smith* in a civil context.

[141] *Smith*, 110 S. Ct. at 1600.

[142] *Id.* at 1601. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (compelling state interest is required when the rights of parenthood are combined with the right to free exercise of religion). See also *Cantwell v. Connecticut*, where the Court held that vesting the power to license religious and charitable solicitations in the secretary of the state's public welfare council was a violation of the First Amendment. 310 U.S. 296, 305–06 (1940). The Court stated that the secretary's duty was discretionary, not ministerial, and therefore implicated free speech and press questions as well as free exercise concerns. *Id.*

[143] *Smith*, 110 S. Ct. at 1602.

[144] *Id.* (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).

[145] *Id.* at 1603.

stance not relevant in *Smith*, refusal to extend it to cases of "religious hardship" without a compelling reason was unconstitutional.[146]

Justice Scalia stated that, by following the *Sherbert* test, the Court might create "an extraordinary right" that would enable individuals to ignore generally applicable laws, for which the state is unable to provide a sufficiently compelling interest, by merely positing a religious mandate.[147] He noted that the *Sherbert* test deems presumptively invalid the application to a religious objector of any law that does not protect an interest of "the highest order."[148] In disagreeing with this approach, Justice Scalia stated that the political process must be relied upon to provide legislation that will be solicitous of valued religious beliefs.[149] He rejected the notion of employing the *Sherbert* test when the burdened conduct is "central" to the individual's religion because such an imprecise standard would require an impermissible intrusion of the Court's authority into the tenets of a particular religion.[150] Justice Scalia also noted that, under this approach, the sincerity of the asserted religious belief or the validity of the litigant's interpretation of the religion's precepts would have to be evaluated, and that the Court must not presume to determine these issues.[151]

Justice O'Connor concurred in the judgment in *Smith*, but sharply criticized the majority for departing from well-established First Amendment jurisprudence.[152] She stated that the First Amendment does not distinguish between laws that directly target

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[146] *Id.*

[147] *Id.* at 1600. Justice Scalia stated that any society adopting a compelling interest standard "across the board" would be "courting anarchy." *Id.* at 1605.

[148] *Id.*

[149] *Id.* at 1606.

[150] *Id.* at 1604. Justice Scalia asked "[w]hat principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?" *Id.* The government's ability to regulate conduct for societal benefit cannot depend on "measuring the effects of a governmental action on a religious objector's spiritual development." *Id.* at 1603 (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

[151] *Id.* at 1604 (citing Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 713–16 (1981)) (courts should not evaluate the sincerity of religious conviction by interpreting the specific beliefs held).

[152] *Smith*, 110 S. Ct. at 1606 (O'Connor, J., concurring). Justice O'Connor agreed with the result that the Court reached, but disagreed with its reasoning. *Id.* She argued that the Oregon law was not unconstitutional because the state interest in the uniform application of its drug laws outweighed the burden on the plaintiff's free exercise of religion. *Id.* at 1614 (O'Connor, J., concurring). Justice Blackmun, in a dissenting opinion, used a similar analysis to reach an opposite conclusion. *See id.* at 1622–23 (Blackmun, J., dissenting).

religion and laws that are neutral and generally applicable.[153] Justice O'Connor argued that the majority's interpretation of the Free Exercise Clause would render its protections applicable only in the "extreme and hypothetical" situation in which a law directly regulates religious practices.[154] She contended that the majority's approach was inconsistent with Supreme Court precedent and had been explicitly rejected in *Yoder*, where the Court stated that the Free Exercise Clause protects certain rights from any governmental regulation, even generally applicable laws.[155] Although the Court contended that the prior cases in which a neutral law had been invalidated had involved "hybrid" claims, combining First Amendment rights with other constitutional guarantees, Justice O'Connor maintained that the decisions in those cases had expressly relied on free exercise jurisprudence.[156]

Justice O'Connor distinguished cases in which application of the *Sherbert* test had been rejected by noting that they involved specialized types of restrictions, namely, military and prison regulations, for which the Court traditionally had not required a showing of a compelling governmental interest.[157] She argued that a law that impermissibly, albeit indirectly, burdens the free exercise of religion is one that forces an adherent to abandon or conform his or her religious beliefs in order to attain an equal place in the civil community.[158] Justice O'Connor disagreed with the majority's reasoning that the political process should be relied on to protect the rights of minority religions.[159] The purpose of the Free Exercise Clause, she stated, is to ensure that minority religious interests are not overwhelmed by an unsympathetic majority.[160] Justice O'Connor concluded that the *Sherbert* compelling interest test, by enabling the Court to determine thoughtfully the constitutional significance of any burden borne by an individual plaintiff, properly implements

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[153] *Smith*, 110 S. Ct. at 1608 (O'Connor, J., concurring).

[154] *Id.*

[155] *Id.* at 1609 (O'Connor, J., concurring) (citing Wisconsin v. Yoder, 406 U.S. 205, 219–20 (1972)).

[156] *Id.* at 1609 (O'Connor, J., concurring).

[157] *Id.* at 1612 (O'Connor, J., concurring); *see also* Goldman v. Weinberger, 475 U.S. 503, 507–10 (1986) (Court did not apply heightened scrutiny in upholding an Air Force regulation that barred a soldier from wearing a yarmulke while on duty, stating that the judiciary must show military regulations great deference).

[158] *Smith*, 110 S. Ct. at 1610 (O'Connor, J., concurring).

[159] *Id.* at 1613 (O'Connor, J., concurring).

[160] *Id.*

the First Amendment's intent of preserving religious freedom in a pluralistic society.[161]

*Smith* established that neutral, generally applicable laws that incidentally burden the free exercise of religion need not be subjected to the *Sherbert* test.[162] The Court concluded that requiring such a test makes all but the most crucial laws subject to suspension for anyone claiming a religious objection.[163] Because the compelling interest test requires an evaluation of the burdened action's centrality to a person's religious faith, the Court held that it must be abandoned.[164]

The Supreme Court's Free Exercise Clause jurisprudence has long recognized that laws that directly regulate religion are unconstitutional.[165] The level of scrutiny that the Court applies to laws that are generally neutral, but which indirectly burden religious practice, has not remained constant. The Court's *Sherbert* and *Yoder* decisions enunciated a requirement that states show a compelling justification for any law that indirectly burdens religious practice, a requirement not specifically included in previous opinions such as *Braunfeld*.[166] Recently, however, the Court's *Smith* decision has relieved the states of this burden, holding that indirect infringements of religious rights by neutral, generally applicable laws do not require a compelling justification to be constitutionally permissible.[167]

### B. *The Establishment Clause*

In addition to prohibiting interference with the exercise of religion, the Constitution prohibits the government from facilitating the establishment of religion.[168] The Establishment Clause ensures the fundamental separation of church and state.[169] It differs from the Free Exercise Clause in that it prohibits the enactment of laws that effect government involvement with religion, whether or not

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[161] *Smith*, 110 S. Ct. at 1611, 1613 (O'Connor, J., concurring).

[162] *Id.* at 1603.

[163] *Id.* at 1600.

[164] *Id.* at 1605 n.5.

[165] *See* Sherbert v. Verner, 374 U.S. 398, 402 (1963).

[166] *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972); *Sherbert*, 374 U.S. at 406.

[167] *Smith*, 110 S. Ct. at 1603.

[168] U.S. CONST. amend. I.

[169] *See* Abington School Dist. v. Schempp, 374 U.S. 203, 216 (1963) (Establishment Clause created a complete and permanent separation of the spheres of religious activity and civil authority).

those laws affect individual religious beliefs or practices.[170] Like the Free Exercise Clause, however, the scope of the Establishment Clause has taken shape on a case-by-case basis.[171]

In 1971, the United States Supreme Court enunciated specific criteria for determining the scope of the Establishment Clause in *Lemon v. Kurtzman*.[172] In holding that certain laws in Pennsylvania and Rhode Island, which provided non-public school teachers with salary supplements, violated the Establishment Clause, the Court laid out three criteria for compliance with the clause.[173] First, the law must have a secular purpose.[174] Second, the primary effect of the law must not advance or inhibit religion.[175] Finally, the law must not create excessive "entanglement" of government with religion.[176] The first criterion refers to the intent of the legislative body in enacting the law, whereas the second refers to the primary actual effect that the law has once it is enacted.[177] The Court has invoked the secular purpose requirement to bar governmental action only when the Court has been satisfied that the challenged law was based solely on religious considerations.[178]

The Court decided *Lemon* on the basis of the "entanglement" criterion.[179] Writing for the Court, Chief Justice Burger stated that this factor can be analyzed in two ways: continuing excessive administrative entanglements between government and religious organizations, and fostering political division along religious lines.[180] In *Lemon*, the Court first held that state-aided parochial school teachers could not be allowed to teach religion because such governmental support of religion would violate the Establishment Clause.[181] The Court then noted that, if these teachers continued

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[170] *See* Engel v. Vitale, 370 U.S. 421, 430–31 (1962) (Establishment Clause violation may occur even where a challenged law does not directly coerce non-observing individuals).

[171] *See* Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

[172] 403 U.S. 602, 612–13 (1971). The Court pointed out that the constitutional text banned any laws "respecting" the establishment of religion; laws that may only lead to the establishment of religion were therefore covered as well. *Id.*

[173] *Id.* at 612–13: The Court noted that the criteria it utilized had been gradually developed "over many years." *Id.*

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 680 (1984) (Court held that city's inclusion of a creche in a public Christmas display was based primarily on secular motives and did not violate the Establishment Clause).

[179] *Lemon*, 403 U.S. at 613–14.

[180] *Id.* at 613, 622–23.

[181] *See id.* at 619.

to receive state salary supplements, ensuring that they did not teach religion would require continual monitoring of the religiously-affiliated schools, creating excessive administrative entanglement with religion.[182] Thus, the Court held that the salary supplements were unconstitutional.[183]

Further, the Court observed the danger of political division along religious lines.[184] This danger was present, the Court noted, because only a few religious organizations would receive benefit from the salary supplements.[185] Other groups could feel politically slighted, the Court reasoned, leading to governmentally-created social polarization.[186] Thus, the salary supplements violated both aspects of the entanglement criterion.[187] In its discussion of these state salary supplement laws, the *Lemon* Court enunciated the basic criteria that provide an analytical framework for assessing potential Establishment Clause violations.[188]

Two tax cases illustrate the fundamental Establishment Clause principle of disallowing special treatment when provided solely to religious organizations. In *Walz v. Tax Commission*, decided in 1970, the Supreme Court upheld a New York City tax exemption applicable to religious properties.[189] The Court held that the exemption did not violate the Establishment Clause because it had neither the purpose nor the effect of sponsoring religion.[190] Providing tax relief to organizations performing useful and desirable community functions, the Court observed, is a legitimate secular purpose.[191] The Court noted that the exemption applied to a number of organizations other than churches, including hospitals, libraries and various non-profit groups.[192] The Court further observed that courts have

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[182] *Lemon*, 403 U.S. at 619.

[183] *Id.* at 619–20.

[184] *Id.* at 622–23.

[185] *Id.*

[186] *Id.*

[187] *Id.* at 619, 623.

[188] A case presently before the Supreme Court may have a major impact on the continued vitality of the *Lemon* test. *See* Lee v. Weisman, 728 F. Supp. 68 (D.R.I.), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991). The petitioner in this case, which concerns the permissibility of prayer at public school graduation ceremonies, has urged that the Court substantially modify its Establishment Clause jurisprudence by requiring coercion of religious conformity as a necessary element of a Clause violation. *See* Petitioners Brief at 14–35, *Lee* (No. 90-1014).

[189] 397 U.S. 664, 680 (1970).

[190] *Id.* at 672–74.

[191] *Id.* at 672–73.

[192] *Id.* at 673. *See id.* at 689 (Brennan, J., concurring) (breadth of the exemption scheme critical to its validity).

historically viewed exemptions to property tax laws granted to churches as not violative of the Establishment Clause.[193]

Circumstances leading to the opposite result are illustrated by a 1989 case, *Texas Monthly v. Bullock*, where the Supreme Court held that a state sales tax exemption specifically limited to the religious publications of religious organizations violated the Establishment Clause.[194] The Court reasoned that the exemption served no clear secular purpose and was intended to provide a special benefit to a religious group.[195] The Court held that benefits or exemptions provided to religious organizations must not be confined to those groups, but must be extended to persons or groups of a nonreligious nature as well; otherwise such benefits constitute an impermissible state sponsorship of religion.[196]

In sum, the Establishment Clause is the constitutional safeguard against governmental sponsorship of or entanglement with religion.[197] Because the religion clauses of the First Amendment are absolute mandates that tend to serve conflicting goals, the Supreme Court has urged flexibility in the application of the Establishment Clause.[198] The Court has enunciated criteria for determining whether a law violates the clause: it must have a valid secular purpose, its primary effect must not promote or inhibit religion, and it must not create excessive governmental entanglement with religion.[199] *Walz* and *Texas Monthly* illustrate the principle that special treatment given to religious organizations does not necessarily violate the Establishment Clause, but such provisions must not be strictly limited to churches.[200]

### C. *First Amendment Challenges to Land Use Controls*

Although historic preservation laws only recently have begun to be challenged on First Amendment grounds, numerous cases

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[193] *Walz*, 397 U.S. at 680.

[194] 109 S. Ct. 890, 901, 905 (1989).

[195] *Id.*

[196] *Id.* at 897; *see also* Foremaster v. City of St. George, 882 F.2d 1485, 1489 (10th Cir. 1989) (free electricity provided by city to Mormon temple conveyed message of governmental support for that religion and violated the Establishment Clause).

[197] *Walz*, 397 U.S. at 664, 669.

[198] *See id.* at 668–69. Both religion clauses are "cast in absolute terms" and therefore may tend to "clash." *Id.*

[199] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

[200] *Walz*, 397 U.S. at 680; *Texas Monthly*, 109 S. Ct. at 898.

have challenged other land use controls on the basis of the Free Exercise Clause.[201] Because landmark ordinances are related to zoning, the problems that zoning ordinances face in these situations are similar to the problems that preservation laws face. The development of the legal standards applied in preservation cases may be traced by examining the approach that courts have taken in the more numerous zoning challenges.

In 1968, for example, the Court of Appeals of New York, in *Westchester Reform Temple v. Brown*, held that the Village of Scarsdale could not apply a zoning setback ordinance to a synagogue where the owner would be forced into a substantial amount of otherwise unnecessary expense.[202] The synagogue already was a functioning facility, and the temple needed to expand the building's structure to accommodate its growing membership.[203] In determining that application of the ordinance to the synagogue would be unconstitutional, the court weighed the interest of the city in enforcing the ordinance against the burdens placed on the temple.[204]

The city planning commission failed to satisfy the court that the synagogue's violation of the setback ordinance would have an adverse effect on the safety or welfare of the community.[205] In weighing the impact on the temple, the court did not discuss the specific financial burden that would result, but observed that, through the First Amendment, religious organizations have a more protected status than commercial enterprises.[206] The court concluded that, based on this constitutional mandate, irreconcilable conflicts between the right to erect a religious structure and certain

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[201] For commentary concerning land-use controls and the Free Exercise Clause, see generally Scott D. Godshall, Note, *Land Use Regulation and the Free Exercise Clause*, 84 COLUM. L. REV. 1562 (1984); Comment, *Zoning Ordinances Affecting Churches: A Proposal for Expanded Free Exercise Protection*, 132 U. PA. L. REV. 1131 (1984).

[202] 239 N.E.2d 891, 893–94, 896 (N.Y. 1968). A setback ordinance fixes the required boundary margins from the structure to the edges of the property. BLACK'S LAW DICTIONARY 1372 (6th ed. 1990).

[203] *Westchester*, 239 N.E.2d at 894

[204] *Id.* at 896. The test used here is essentially a *Sherbert*-type balancing of state interest against the burden on the church. *See* Sherbert v. Verner, 374 U.S. 398, 406–08 (1963) (indirect burdens on religion are acceptable if the challenged law is supported by a compelling state interest). The *Westchester* opinion, however, does not specifically refer to the compelling interest standard, nor does it cite *Sherbert*.

[205] *Westchester*, 239 N.E.2d at 895.

[206] *Id.* at 894. The court's language included religious structures in this special status. *Id.* at 896. *See generally* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) (observing preferred position enjoyed by religious liberty in our nation's history).

public welfare concerns generally will be resolved in favor of the former.[207]

The United States District Court for the Southern District of New York took a less solicitous view of First Amendment protection of religion in 1979 in *Holy Spirit Association for the Unification of World Christianity v. Town of New Castle*.[208] The court held that denial to the church of a special use permit for land in a residential area was constitutionally permissible.[209] The Unification Church wanted to develop a ninety-eight acre religious retreat in an area that excluded churches.[210] The court asserted that First Amendment protection of the freedom of religion applied to religious beliefs, but was not absolute in regard to religious activities.[211] The court noted that denial of the special use permit did not inhibit the church members' faith and that the town's interest in its zoning law was of "extreme significance."[212] The court concluded that, when conflict arises between the free exercise of religion and laws protecting public safety, health and welfare, incidental burdens on religious practice do not violate the First Amendment.[213]

In a similar decision, the United States Court of Appeals for the Sixth Circuit in 1982, in *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, upheld a city zoning ordinance exclud-

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[207] *Westchester*, 239 N.E.2d at 896; *see also* Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 872 (2d Cir. 1988) (although attempting to implement court-ordered program of desegregation through its location of housing projects, city still must seek to accommodate religious organization and avoid First Amendment infringements); City of Sumner v. First Baptist Church, 639 P.2d 1358, 1363–64 (Wash. 1982) (advocating accommodation and flexibility by municipalities when dealing with situations involving possible free exercise infringements); Jewish Reconstructionist Synagogue v. Village of Roslyn Harbor, 342 N.E.2d 534, 538 (N.Y. 1975) (balancing test employed same deference to religion as *Westchester*); North Shore Hebrew Academy v. Wegman, 481 N.Y.S.2d 142, 146 (App. Div. 1984) (required special accommodation for religion in its balancing test).

[208] *See* 480 F. Supp. 1212, 1216 (S.D.N.Y. 1979). The court was less solicitous of the litigants as well, commenting in dicta that although questioning the value of a religious belief is constitutionally impermissible, inquiring into the *bona fides*, or genuineness, of that belief would be permissible. *Id.* (quoting Stevens v. Berger, 428 F. Supp. 896, 900 (E.D.N.Y. 1977)).

[209] *Id.* at 1216. A positive condition for permit approval was placed on a church in *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, where the Colorado Supreme Court upheld against a free exercise challenge a requirement that a church make certain improvements to the street abutting its property before the city would grant the church a permit to build a gymnasium on the property. 626 P.2d 668, 675 (Colo. 1981).

[210] *Holy Spirit Ass'n*, 480 F. Supp. at 1213.

[211] *Id.* at 1216; *see also* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) (stating that the right to religious beliefs is absolute, but the right to religious practice is not).

[212] *Holy Spirit Ass'n*, 480 F. Supp. at 1216–17.

[213] *Id.*

ing the erection of new churches in all but ten percent of the city.[214] Jehovah's Witnesses had purchased land in a restricted zone with the intention of building a church there.[215] The Court of Appeals for the Sixth Circuit dismissed the religious group's argument that the ordinance infringed upon their free exercise of religion, stating that the construction of a place of worship is a secular activity and therefore not subject to First Amendment protections.[216]

The court described owning a church building as a "desirable accessory" to worship, one without particular religious or ritualistic significance for the Jehovah's Witnesses, and therefore not a "fundamental tenet" of their religion.[217] The court noted that the religious group was free to purchase an existing church or to worship in private homes in any part of the city.[218] The court held it unnecessary to undertake a balancing test inquiring into the city's interest in its zoning law.[219] The court, contrasting its case with *Sherbert*, observed that in *Sherbert* the plaintiff's religion caused her to be subjected to serious sanctions that could threaten her well-being, whereas the Jehovah's Witnesses faced only an inconvenient economic burden.[220] Such an economic burden, the court held, does not constitute a free exercise infringement.[221]

The United States Court of Appeals for the Eleventh Circuit applied a modified *Sherbert* balancing test in 1983 in *Grosz v. City of Miami Beach*.[222] The court held that the city's interest in an effective zoning law outweighed the free exercise infringement the plaintiff suffered in not being allowed to establish a house of worship in the garage of his home.[223] The plaintiff was an aging rabbi who wanted

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[214] 699 F.2d 303, 307, 309 (6th Cir. 1982), *cert. denied*, 464 U.S. 815 (1983).

[215] *Id.* at 304.

[216] *Id.* at 306–07. Two cases in the New York Supreme Court of Monroe County illustrate the problem that some courts have in classifying a use as religious or secular. In *Covenant Community Church v. Town of Gates*, the court held that construction of day-care and recreational facilities on church property, in violation of the town zoning law, would strengthen and support the group's religion and therefore was protected under the Free Exercise Clause. 444 N.Y.S. 415, 417, 422 (Sup. Ct. 1981). The same court, but a different judge, held in *Bright Horizon House v. Zoning Bd. of Appeals* that a church residential care facility involved secular activity, even though religious practices were incorporated into the therapy program. 469 N.Y.S.2d 851, 857 (Sup. Ct. 1983).

[217] *Lakewood*, 699 F.2d at 307. The court noted that "[a]t most . . . [the] freedom to worship is tangentially related to worshipping in [the religious group's] own structure." *Id.*

[218] *Id.*

[219] *Id.* at 309.

[220] *Id.* at 306.

[221] *Id.*

[222] *See* 721 F.2d 729, 739 (11th Cir. 1983).

[223] *Id.* at 739, 741; *see also* State v. Cameron, 445 A.2d 75, 83 (N.J. Super. Ct. Law Div.

to hold services for a small group of followers in a garage that he had converted into a small synagogue.[224] The city received complaints from neighborhood residents concerning occasional traffic congestion and excessive noise levels attributable to the synagogue.[225]

The court observed that when broad, recognized principles fail to indicate clearly the outcome in a particular case, an *ad hoc* balancing approach should be employed.[226] Deciding that such a test was necessary, the court ruled that, because some synagogue members might not be able to worship with their leader, the plaintiff's free exercise rights were infringed.[227] The court concluded, therefore, that it was required to evaluate the city's interest in its zoning ordinance.[228]

The court held that the purposes of the zoning laws and the city's interest in enforcing them were significant.[229] The court also noted that the religious group could practice at other locations within the city, including one only a few blocks away.[230] In light of the holdings in other free exercise cases, the court concluded, problems concerning "convenience, dollars or aesthetics" did not affect the plaintiff sufficiently to constitute a First Amendment violation.[231]

A historic preservation ordinance survived a challenge based on both free exercise and takings claims in *Society for Ethical Culture v. Spatt*, decided in 1980 by the Court of Appeals of New York.[232] In *Ethical Culture*, the court held that denial of permission to the

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1982) (upholding ordinance prohibiting minister from conducting religious services in his home), *aff'd*, 460 A.2d 191, 192 (N.J. Super. Ct. App. Div. 1983).

[224] *Grosz*, 721 F.2d at 731–32.

[225] *Id.* at 732.

[226] *Id.* at 738.

[227] *Id.* at 739.

[228] *Id.* at 738.

[229] *Id.* at 738–39.

[230] *Id.* at 739.

[231] *Id.*

[232] 415 N.E.2d 922, 926 (N.Y. 1980). The lower court decision may be found at 416 N.Y.S.2d 246 (App. Div. 1979). Another case involving takings and free exercise issues, but from a different angle, is Denver Urban Renewal Authority v. Pillar of Fire, 552 P.2d 23, 24 (Colo. 1976). The Pillar of Fire church challenged, on First Amendment grounds, the eminent domain condemnation of one of their buildings. *Id.* This compensated taking was contested by the Pillar of Fire because the church wanted to preserve the original home of their sect. *Id.* The Colorado Supreme Court held that the city had a substantially compelling interest in allowing the Urban Renewal Authority to complete its renewal program, and that this interest outweighed the burden imposed on the religious group by condemning a building no longer used principally for religious services. *Id.* at 25.

Society for Ethical Culture (the "Society") to demolish its landmarked building, known as the Meeting House, did not constitute either a taking or a restriction on the Society's right to the free exercise of religion.[233] The Society, a religious and charitable organization, wished to construct a new building, for rental to non-religious tenants, on the site occupied by the Meeting House.[234] The Society claimed that the landmark designation of the Meeting House, by restricting the Society's ability to financially exploit this property, effected a taking without just compensation.[235] The Society also argued that the landmark designation interfered with the free exercise of its religious activities.[236]

Addressing the takings issue, the court applied the *Snug Harbor* charitable purpose standard, which invalidates a law that prevents or seriously interferes with the carrying out of a group's charitable mission.[237] The court held that the Society's activities would not be prevented or seriously inhibited by sustaining the landmark designation.[238] The court placed great weight upon the fact that the religious activities within the landmark were not disturbed by the designation, and indicated that the Society's argument was based primarily on the complaint that the ordinance barred the Society from putting the property to its most financially lucrative use.[239] Distinguishing *Lutheran Church*, the court noted that, in that case, the plaintiff pressed the claim that activities within the existing structure essentially would be prevented if the ordinance were enforced.[240] In *Ethical Culture*, however, the court held that no such problem existed because the Society's present activities could continue uninterrupted.[241]

The court dealt with the free exercise issue rather summarily, stating that the Society had not claimed that the landmark desig-

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[233] 415 N.E.2d at 926.

[234] *Id.* at 924, 926.

[235] *Id.* at 924.

[236] *Id.* at 926.

[237] *Id.* at 925; *see also* Trustees of Sailors' Snug Harbor v. Platt, 288 N.Y.S.2d 314, 316 (App. Div. 1968). See *supra* notes 64–70 and accompanying text for a discussion of *Snug Harbor*.

[238] *Ethical Culture*, 415 N.E.2d at 925.

[239] *Id.* at 926. The court reiterated the point that there is no constitutional requirement for allowing an owner the most beneficial use of his or her property. *Id.* (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962)).

[240] *Id.* at 925–26; *see also* Lutheran Church in America v. City of New York, 316 N.E.2d 305, 312 (N.Y. 1974).

[241] *Ethical Culture*, 415 N.E.2d at 926.

nation interfered with its religious practices, only that the designation curtailed its ability to develop the property for rental to non-religious tenants.[242] The court clearly indicated that it would consider the distinction between the religious and secular activities of a religious organization in determining whether the organization's free exercise rights had been infringed.[243] The court declared that a religious organization is not entitled to free exercise protection when engaging in secular pursuits.[244] Thus, the *Ethical Culture* court focused the charitable purpose standard upon the specific activities that a religious organization conducts within a landmark structure and established that free exercise claims must demonstrate that the burdened activity is actually religious and not secular.[245]

A threshold question in First Amendment challenges to land use regulations is whether the specific activity affected by the regulation is religious or secular.[246] As stated by the *Ethical Culture* court, if the activity is considered secular, a free exercise claim will fail.[247] First Amendment challenges to land use controls have been successful, however, when a court has held the state interest in a regulation insufficient to warrant burdening an acknowledged religious exercise.[248] But some courts have concluded that land use regulations, such as zoning and historic preservation ordinances, make important contributions to public safety and welfare, thereby justifying incidental infringement on religion.[249]

## III. Recent First Amendment Challenges to Historic Preservation Legislation

In the 1980s, First Amendment challenges to historic preservation laws began to arise. Because there have not been a large number of cases as yet, the judicial response to these claims is unsettled. Several recent cases, however, provide clues as to the future of historic preservation of religious properties.

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[242] *Id.*

[243] *See id.*

[244] *Id.*

[245] *Id.*

[246] *See* Grosz v. City of Miami Beach, 721 F.2d 729, 740–41 (11th Cir. 1983); *Ethical Culture*, 415 N.E.2d at 926.

[247] 415 N.E.2d at 926.

[248] *See, e.g.*, Westchester Reform Temple v. Brown, 239 N.E.2d 891, 896–97 (N.Y. 1968).

[249] *See, e.g.*, Holy Spirit Ass'n for Unification of World Christianity v. Town of New Castle, 480 F. Supp. 1212, 1216 (S.D.N.Y. 1979); *Grosz*, 721 F.2d at 739.

Manhattan has been the scene of two of the most important recent cases concerning First Amendment challenges to historic preservation. The first of these was *Church of St. Paul and St. Andrew v. Barwick*, which the Court of Appeals of New York decided in 1986.[250] The case involved an action by a church for declaratory judgment and, although basing its holding on ripeness doctrine, the court took the opportunity to discuss the constitutional standard applicable to religious organizations seeking relief from alleged First Amendment violations.[251]

The Church of St. Paul and St. Andrew filed suit against the New York City Landmarks Commission ("the Commission") seeking discontinuance of the landmark status of its church building.[252] The church claimed that the cost of compliance with the New York ordinance created a financial hardship that infringed its free exercise rights.[253] The church building was deteriorated and in need of fairly extensive renovation.[254] The church claimed that, with a seating capacity of 1,400 and a current congregation numbering around 100, the facility was no longer suited to its needs and beyond its means to maintain.[255] The church wished to undertake, with a private development partner, a plan that would rebuild the structure more in line with the church's current needs and would include as a separate development a commercial high-rise building.[256]

Although not deciding the merits of the case directly, the court briefly discussed the constitutional standards applicable in considering free exercise challenges to historic preservation legislation.[257] The court recognized the *Westchester* standard that invalidates zoning laws that "directly impinge" on religious uses, but declared that no such impingement was present in the case at bar.[258] The court stated that any effect generated by the landmark designation on the plaintiff's religious activities would be only indirect and incidental.[259] In endorsing the charitable purpose test as the appropri-

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[250] 496 N.E.2d 183, 191–93 (N.Y. 1986).

[251] *Id.* Based on ripeness doctrine, the court held that it could not review the church's claims until the Commission had been given the opportunity to consider the church's renovation plans and financial hardship status. *Id.* at 191.

[252] *Id.* at 185.

[253] *Id.* The church did not challenge the facial validity of the ordinance. *Id.*

[254] *Barwick*, 496 N.E.2d at 187.

[255] *Id.*

[256] *Id.*

[257] *See id.* at 191–93.

[258] *Id.* at 191–92. See *supra* notes 202–07 and accompanying text for a discussion of *Westchester*.

[259] *Id.* at 192.

ate standard for evaluating the church's claims, the court stated that the test is the same regardless of whether a charitable or religious organization is involved.[260] The court observed that historic preservation ordinances regulate secular activity and stated that it was only an "incidental overtone" of this case that the plaintiff was a church.[261] Therefore, the court concluded, a First Amendment violation only occurs when a church's religious mission is disrupted—a violation that would qualify, under the charitable purpose test, as an unconstitutional taking as well.[262]

A church once again challenged the New York City landmark law on constitutional grounds in *St. Bartholomew's Church v. City of New York*.[263] In September of 1990, the United States Court of Appeals for the Second Circuit held, *inter alia*, that the New York historic preservation ordinance did not impermissibly interfere with the church's ability to carry out its religious mission in its existing facilities.[264] The ordinance, therefore, did not violate the church's free exercise of religion.[265]

The main house of worship of St. Bartholomew's Church is located in mid-town Manhattan and was constructed in the early part of this century.[266] The New York City Landmarks Commission ("the Commission") designated it as a landmark in 1967, at which time the church did not oppose the designation.[267] The church property consists of a main church building, an appended "community house," both of which are covered by the designation, and an adjacent garden and terrace area.[268]

In 1983, the church filed an application with the Commission for a certificate of appropriateness for the purpose of demolishing the community house and erecting over it and the garden area a fifty-nine story office tower.[269] The ground floors of the new building were to be used by the church, the remainder to be rented to

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[260] *Barwick*, 496 N.E.2d at 192.

[261] *Id.*

[262] *Id.*

[263] 728 F. Supp. 958, 963, 974–75 (S.D.N.Y. 1989), *aff'd*, 914 F.2d 348, 350–51 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991). As the Supreme Court has denied certiorari in the case, the Second Circuit decision stands, for now, as the highest court to rule on First Amendment challenges to historic preservation ordinances.

[264] *St. Bartholomew's*, 914 F.2d at 351.

[265] *Id.*

[266] *Id.*

[267] *Id.*

[268] *Id.*

[269] *Id.*

non-religious, commercial tenants.[270] The Commission denied this application, on the grounds that it was an inappropriate alteration, because it called for replacement of the architecturally compatible community house with an incompatible office tower.[271] The church filed a second application for a certificate of appropriateness in 1984, this time proposing to construct a forty-seven story office tower.[272] After this proposal similarly was denied, the church made a further application to build the tower, this time making a claim of financial hardship.[273] The Commission rejected this application as well in 1986.[274]

The church filed suit, claiming that the New York landmark law violated, both facially and as applied, the Free Exercise and Establishment Clauses and effected a taking without just compensation.[275] The United States District Court for the Southern District of New York granted summary judgment to the city against the claim that the landmark law facially violated the First Amendment.[276] The court explained that free exercise is burdened only when a statute coerces the violation of religious beliefs or penalizes religion by denying to adherents benefits that are available to other citizens.[277]

The court dismissed the argument that whenever a law has any impact on a religious organization the law must be supported by a compelling state interest.[278] The court explained that a compelling interest is only required when an otherwise impermissible free exercise burden is present.[279] The court also stated that the "mere possibility" of an eventual conflict between a use permitted by the

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[270] *St. Bartholomew's*, 914 F.2d at 354.

[271] *St. Bartholomew's*, 728 F. Supp. at 961.

[272] *Id.*

[273] *Id.*

[274] *Id.* at 962.

[275] *Id.* The church made a number of other claims, charging that the landmark law violated the Equal Protection Clause of the Fourteenth Amendment because it treated charitable and commercial institutions differently; violated the doctrine of substantive due process by depriving, without a compelling state interest, the church of the reasonable income its property can produce; that the standards of the landmark law are so vague as to violate the Due Process Clause of the Fourteenth Amendment; and that certain other procedural practices of the Commission constitute due process violations. *Id.* The district court rejected all of the above claims. *Id.* at 974–75. On appeal, the church reiterated only its free exercise and takings claims. *St. Bartholomew's*, 914 F.2d at 353.

[276] *St. Bartholomew's*, 728 F. Supp. at 963.

[277] *Id.* (citing Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988)).

[278] *Id.* at 963 n.9.

[279] *Id.*

landmark law and the use a church desires to make of its property creates at most an incidental burden on religion.[280] In the event of an actual conflict, the court noted, the church could seek judicial relief.[281] Because potential conflict does not trigger the need to show a compelling state interest, the court found that the landmark designation of a church is not facially unconstitutional.[282]

Regarding application of the preservation ordinance to the plaintiffs, the court noted that the church had estimated the cost of necessary repairs and maintenance to its buildings to be approximately eleven million dollars.[283] The court, however, found approximately three million dollars to be a more reasonable figure.[284] After examining these costs and the church's financial condition, the court rejected the claim that the landmark ordinance, as applied, impermissibly infringed the church's freedom of religion.[285] The court held that the church had failed to prove that it could no longer carry out its charitable mission in its existing facilities.[286] Assuming in the church's favor that carrying out its charitable mission was an exercise of religion, the district court noted that takings and free exercise inquiries coincide in cases involving the property of religious institutions.[287] To prevail on either claim, the church was required to prove that its religious activities were no longer feasible in its existing buildings.[288] The church failed to prove this, and the court therefore found no takings or free exercise violations in the application of the preservation ordinance to the church.[289]

The Establishment Clause claim did not generate much discussion by the court. The court stated that a showing of extensive and continuous monitoring of, or involvement in, church activities is necessary to trigger the excessive entanglement aspect of Establishment Clause doctrine.[290] The court held that the Establishment Clause was not implicated by the Commission's limited inquiry into

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[280] *St. Bartholomew's*, 728 F. Supp. at 963.

[281] *See id.* at 964.

[282] *Id.* at 963.

[283] *Id.* at 967.

[284] *Id.* at 972. The court's finding was based on the estimates made by an independent expert source. *Id.* at 971.

[285] *St. Bartholomew's*, 728 F. Supp. at 974.

[286] *Id.*

[287] *Id.* at 966.

[288] *Id.*

[289] *Id.* at 974–75.

[290] *Id.* at 963; *see also* Lemon v. Kurtzman, 403 U.S. 602, 613–23 (1971) (explaining excessive entanglement analysis).

the church's finances for the purpose of determining the validity of a hardship application.[291] St. Bartholomew's appealed its First and Fifth Amendment claims to the Second Circuit Court of Appeals.

Shortly after the district court decision, the United States Supreme Court handed down *Employment Division, Department of Human Resources v. Smith*, which significantly affected free exercise jurisprudence by eliminating the requirement that the government show a compelling interest in neutral, generally applicable laws.[292] In the fall of 1990, the Court of Appeals for the Second Circuit, drawing heavily on the Supreme Court's analysis in *Smith*, upheld the district court decision in *St. Bartholomew's*.[293] The Second Circuit court held that the New York City landmark law is a neutral law of general applicability and does not implicate the Free Exercise Clause, despite its effect of reducing the church's potential income.[294] The court noted that the primary question in ascertaining a burden on religious freedom is whether claimants are coerced in their religious beliefs or "in the nature of [their religious] practices."[295] The court stated that St. Bartholomew's had presented no proof of such coercion.[296]

The Second Circuit Court of Appeals addressed the takings claim by applying a modified *Penn Central* "reasonable return on investment" analysis, altered for use in a non-commercial context.[297] The court rejected the church's argument that a reasonable return on the use of the community house was not possible, stating that this standard is applicable only to commercial properties.[298] The facilities of charitable, non-profit organizations, the court reasoned, do not yield a return on investment.[299] The court articulated the proper test as whether the landmark ordinance "impairs the continued operation of the property in the originally expected use."[300] Because the church failed to satisfy this test, the court held that no

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[291] *St. Bartholomew's*, 728 F. Supp. 963.

[292] Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1606 (1990). See *supra* notes 133–64 and accompanying text for a discussion of *Smith*.

[293] *See St. Bartholomew's*, 914 F.2d at 354.

[294] *Id.* at 355–56.

[295] *Id.* at 355 (citing Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 ("[t]he critical word in the constitutional text [of the Free Exercise Clause] is 'prohibit'")).

[296] *Id.* at 355–56.

[297] *Id.* at 356–57. See *supra* notes 45–62 and accompanying text for a discussion of Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

[298] *St. Bartholomew's*, 914 F.2d at 357.

[299] *Id.*

[300] *Id.* at 356.

unconstitutional taking had occurred.[301] The Second Circuit concluded that the district court's findings of fact were not clearly erroneous, that the neutral, generally applicable landmark ordinance did not prevent the church from carrying out its religious mission in its existing facilities and that, therefore, the ordinance did not violate the First or Fifth Amendments.[302]

In March of 1990, the Washington Supreme Court decided *First Covenant Church v. City of Seattle*, involving a free exercise challenge to a Seattle historic preservation ordinance.[303] The United States Supreme Court has vacated this decision and remanded the case to the Washington court for reconsideration in light of the holding in *Employment Division, Department of Human Resources v. Smith*.[304] The Washington court's opinion, however, illustrates a number of the issues raised by the designation of religious properties as historic landmarks.

The Washington Supreme Court held that a Seattle landmark law violated the church's First Amendment rights by incorporating provisions designed to require secular approval over matters of a religious nature.[305] These provisions, the court held, were unjustified by any compelling state interest.[306] In 1985, the Seattle Landmarks Preservation Board ("the Board"), over the objections of the church, designated the exterior of the First Covenant Church a historic landmark.[307] The church claimed that the landmark designation violated its free exercise of religion and substantially reduced the value of its property.[308] The church brought a declaratory judgment action against the city in 1986, and, after judgment for the city, eventually appealed the case to the Washington Supreme Court.[309]

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[301] *St. Bartholomew's*, 914 F.2d at 357.

[302] *Id.* at 351.

[303] 787 P.2d 1352, 1355 (Wash. 1990). The court stated that its decision was the first in the United States on this issue. *Id.* at 1356. The first *St. Bartholomew's* case, however, had already been handed down some three months earlier, on December 13, 1989. St. Bartholomew's Church v. City of New York, 728 F. Supp. 958, 958 (S.D.N.Y. 1989).

[304] City of Seattle v. First Covenant Church, 111 S. Ct. 1097 (1991). The Washington Supreme Court is scheduled to rehear the case in late 1991.

[305] *First Covenant*, 787 P.2d at 1359, 1361; *see* Seattle, Wash. City Ordinance 112425 (1985) under the authority of Seattle Landmark Preservation Ordinance 106348 (now SEATTLE MUN. CODE 25.12).

[306] *First Covenant*, 787 P.2d at 1361.

[307] *Id.* at 1354.

[308] *Id.* at 1355. The court noted that an uncontroverted affidavit estimated that the landmark designation caused the value of the church property to decline from $700,000 to $400,000. *Id.*

[309] *Id.* at 1354. The church claimed that the infringed religious freedoms included the

In addressing the church's free exercise claim, the court declared that religious freedom should be viewed as having a preferred position relative to the state's interest in maintaining historic landmarks.[310] The court stated that if a free exercise infringement is found, it must subject the challenged legislation to strict scrutiny analysis.[311] This requires the government to show a compelling interest underlying its regulation and no feasible alternative for accomplishing that goal.[312]

The court stated that by requiring Board approval for any proposed alterations to the church's facade, the landmark ordinance effectively mandated secular approval of matters that were potentially religious in nature.[313] The court held that this requirement created an unjustified governmental interference in the religious affairs of the church and therefore infringed the church's free exercise rights.[314] The city argued that the landmark ordinance contained special provisions, giving churches the final word on alterations necessary for religious purposes, that were designed to avoid infringement on religious freedom.[315] The court rejected this argument, holding that these provisions were "vague and unworkable."[316]

The court ruled that even if the special provisions were not excessively vague, they still would not free the ordinance from free exercise infringement.[317] This was because, the court stated, these provisions required that the Board be consulted on proposed changes, which constituted an unjustified governmental interfer-

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ability to alter the exterior of the church structure, the requirement of obtaining secular approval of proposed changes, the effect of uncertainty stemming from the discretionary nature of the approval, a resulting limitation on the church's ability to sell its property, and the depreciation in value of that property. *Id.* at 1355.

[310] *First Covenant*, 787 P.2d at 1356. The court first determined that the case was ripe for adjudication, and then proceeded to the First Amendment analysis. *Id.*

[311] *Id.* at 1357.

[312] *Id.*

[313] *Id.* at 1359.

[314] *Id.* at 1360.

[315] *Id.* at 1359–60. The ordinance provided that requirements "herein shall [not] prevent any alteration of the exterior when such alterations are necessitated by changes in liturgy, it being understood that the owner is the exclusive authority on liturgy and is the decisive party in determining what architectural changes are appropriate to the liturgy." Seattle, Wash. City Ordinance 112425 (1985). A later clause states that the church and the Board "shall jointly explore such possible alternative design solutions as may be appropriate . . . to preserve the landmark." *Id.*

[316] *First Covenant*, 787 P.2d at 1360.

[317] *Id.*

ence with religion.[318] The court concluded that landmark preservation laws are not a compelling state interest because they do not protect public health and safety, but merely enhance aesthetic and cultural features of the community.[319] Absent such a compelling interest, the court held that application of the Seattle landmark law to the First Covenant Church violated the church's right to the free exercise of religion.[320]

Two other opinions, one concurring and one dissenting, were filed in *First Covenant*. First, Justice Utter concurred on the grounds that application of the landmark law to the church building would diminish significantly the economic value of the church's principal asset.[321] Justice Utter argued that the Constitution protects the ability of a church to operate as an institution.[322] He reasoned that this necessarily must be so because religious rituals, and their accessories, frequently are inseparable from actual faith.[323] Justice Utter concluded, therefore, that to some extent the law must protect a church's finances.[324]

Justice Utter also proposed that the Washington Supreme Court adopt the charitable purpose test.[325] He indicated that this test's required showing of serious interference with a church's existing religious activity properly addresses the issue of a church's functionality as an institution.[326] Justice Utter suggested that the charitable purpose test is an appropriate standard for evaluating free exercise challenges to land use controls.[327]

Justice Dolliver dissented, stating that the liturgical exception incorporated into the preservation ordinance was sufficient to avoid any burden on the church's free exercise rights.[328] Justice Dolliver argued that, because the city had agreed to be bound to an interpretation of the liturgical exception clauses favorable to religious

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[318] *Id.* The Board, however, still would have no power to prevent the church from implementing its alterations. *See id.* at 1366 (Dolliver, J., dissenting).

[319] *Id.* at 1361. The court distinguished *Penn Central* by noting that the United States Supreme Court had not explicitly said that landmark laws are a compelling state interest, and that the plaintiff in *Penn Central* had not asserted the violation of a fundamental right such as free exercise. Thus, the Supreme Court was not required to use strict scrutiny. *Id.*

[320] *Id.* at 1361.

[321] *First Covenant*, 787 P.2d at 1363 (Utter, J., concurring).

[322] *Id.* at 1364 (Utter, J., concurring).

[323] *Id.*

[324] *Id.*

[325] *Id.* at 1365 (Utter, J., concurring).

[326] *Id.*

[327] *Id.*

[328] *First Covenant*, 787 P.2d at 1366 (Dolliver, J., dissenting).

organizations, no free exercise violations actually were possible.[329] He asserted that merely requiring the church to consult with the Board as to possible alternative designs was not a burden on the church's religious freedom.[330] To characterize this requirement as such a burden, Justice Dolliver stated, is to trivialize the significance of First Amendment protections.[331]

Most cases involving free exercise claims against historic preservation ordinances have addressed the effect of a landmark designation applied to the exterior of the particular structure. A fairly recent development concerning historic preservation legislation has been the controversy surrounding the designation of building interiors.[332] Because most religious groups' services and rituals are conducted primarily indoors, landmark designation of the internal arrangements of churches may be more likely to infringe on actual religious practice than similar external designations.

A case illustrating a free exercise challenge to a landmark designation as applied to the interior of church property is *Society of Jesus v. Boston Landmarks Commission*.[333] In December 1990, the Supreme Judicial Court for the Commonwealth of Massachusetts held that the landmark designation of the interior of the Church of the Immaculate Conception violated the free exercise rights of the Society of Jesus ("the Jesuits").[334] The Supreme Judicial Court based its decision, however, on the Free Exercise Clause of the Massachusetts Constitution.[335]

The Church of the Immaculate Conception was built in Boston between 1858 and 1861, and the beauty of its interior received widespread recognition.[336] In 1986, the Jesuits began demolishing the interior of the church, intending to convert the main (upper) church into office and residence space and reserving the lower

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[329] *Id.*

[330] *Id.*

[331] *Id.*

[332] A small, but increasing, number of preservation ordinances allow landmark designation of the interiors of buildings. *See, e.g.*, 1975 Mass. Acts 772, §§ 4–5; D.C. CODE ANN. § 5-1002 (1981). Some states, however, specifically proscribe interior designations in their enabling legislation. *See, e.g.*, CONN. GEN. STAT. ANN. § 7-147f (West 1989); N.C. GEN. STAT. § 160A-400.9 (1989). For an example of a case on this issue not involving free exercise questions, see Weinberg v. Barry, 634 F. Supp. 86, 93 (D.D.C. 1986) (landmark designation of the interior of a theatre does not facially violate the Takings Clause).

[333] 564 N.E.2d 571, 572 (Mass. 1990).

[334] *Id.*

[335] See *infra* note 356 for the text of this clause of the Massachusetts Constitution.

[336] Society of Jesus v. Boston Landmarks Commission, Nos. 87–3168, 87–4751, 87–6586, slip op. at 1 (Mass. Super. Ct. Oct. 11, 1989).

basement level for worship.[337] When the undertaking of these alterations became public knowledge, community sentiment sparked a drive to have the interior of the church designated as a landmark.[338] Soon thereafter, the Boston Landmarks Commission ("the Commission") approved temporary landmark status for the church, eventually making permanent the portion of the designation applying to the interior and exterior of the main church.[339] The Jesuits filed three lawsuits against the Commission at different times: the first to challenge the designation, a later suit to challenge the Commission's denial of the Jesuits' application for a certificate of alteration for the church, and a third challenging the Commission's partial approval of a similar application that the Jesuits submitted.[340] The three suits were consolidated and tried before the Suffolk County Superior Court for the Commonwealth of Massachusetts in the fall of 1989.[341]

In addressing the Jesuits' free exercise claim, the Suffolk County Superior Court stated that the United States Constitution protects a church from direct governmental interference with its affairs.[342] Citing *Westchester* for the principle that church buildings are within the scope of this constitutional shield,[343] the court noted that the interior of a church is more likely to be tied closely to the practice of religion than any other part of the building.[344] Therefore, the court determined that it was required to scrutinize closely the application of the landmark ordinance to the Church of the Immaculate Conception.[345]

The court held that the preservation statute's requirement of Commission approval for any proposed alterations, with its attendant administrative procedures, created a significant burden on the Jesuits.[346] As an example of the burden the Jesuits faced, the court

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[337] *Id.* at 1–2.

[338] *Id.* at 2.

[339] *Id.*

[340] *Society of Jesus*, 564 N.E.2d at 572. The Jesuits considered the partial approval of their application unsatisfactory. *See id.*

[341] *Society of Jesus*, Nos. 87–3168, 87–4751, 87–6586, slip op. at 3 (Mass. Super. Ct. Oct. 11, 1989).

[342] *Id.* at 4.

[343] *Id.* at 4–5. See *supra* notes 202–07 and accompanying text for a discussion of *Westchester*.

[344] *Id.* at 5.

[345] *Id.*

[346] *Society of Jesus*, Nos. 87–3168, 87–4751, 87–6586, slip op. at 7 (Mass. Super. Ct. Oct. 11, 1989).

noted that the Jesuits believed that they would not be allowed to remove the main altar from the upper church.[347] Although the Commission indicated that it was willing to allow this alteration, the court found that the Jesuits' perception of the landmark restriction was enough to create an impact on their religious freedom.[348] The court stated that this impact was dominating the administration of the Church of the Immaculate Conception, and that the Jesuits' ability to "run their church as they see fit" had been frustrated.[349]

While conceding that historic preservation is worthwhile, the court found that it is not a sufficiently compelling interest to justify the burdens placed on the Jesuits' practice of religion.[350] The court pointed out the difference between abstract considerations concerning the presence of free exercise infringements and the reality of the practical effect of landmark status on the Jesuits' religious autonomy.[351] In dicta, the court noted that landmark ordinances are not the only way to pursue historic preservation goals.[352] The court suggested that the state could pay for the preservation of the church, either directly or through eminent domain.[353] Thus, the *Society of Jesus* court held that historic preservation goals are not sufficiently compelling to offset an infringement on the Jesuits' free exercise of religion, and that therefore the Boston landmark statute could not be applied to the interior of the Church of the Immaculate Conception.[354]

The Massachusetts Supreme Judicial Court affirmed the superior court's *Society of Jesus* decision in December of 1990.[355] The Supreme Judicial Court, however, based its decision entirely on the provisions of article two of the Declaration of Rights of the Massachusetts Constitution, declining to reach any other constitutional claims.[356] The court noted that, under the state constitution, pro-

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[347] *Id.* at 6.

[348] *Id.* at 6–7.

[349] *Id.*

[350] *Id.* at 7.

[351] *Society of Jesus*, Nos. 87–3168, 87–4751, 87–6586, slip op. at 8 (Mass. Super. Ct. Oct. 11, 1989).

[352] *Id.*

[353] *Id.*

[354] *Id.*

[355] *Society of Jesus*, 564 N.E.2d at 574.

[356] *Id.* at 572–74. Article two of the Declaration of Rights of the Massachusetts Constitution states, in relevant part:

> [N]o subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments;

tection of religious freedom has always been considered a broad, uncompromising principle.[357]

In addressing the application of the landmark statute to the interior of the Church of the Immaculate Conception, the court stated that the configuration of the church interior is so imbued with religious meaning as to be inseparable from the Jesuits' religious worship.[358] The court went further, declaring that the right to design interior spaces for religious worship, barring direct public safety concerns, must be unhindered by any governmental regulation.[359] The court also noted that the "escape provisions" in article two of the Massachusetts Constitution were not applicable to this case.[360]

Addressing the first "escape provision," the court stated that if religiously motivated actions disturb the public peace, the acceptability of a law regulating those actions must be evaluated by balancing the state interest in the regulation against the individual's interest in his or her religious activity.[361] The reconfiguration of the church interior, the court noted, neither disturbed the public peace nor obstructed the religious worship of others, and therefore did not require that the balancing test be applied.[362] The court also observed that the state interest in historic preservation is not sufficiently compelling to justify infringements on religious freedom, and that the loss of culturally valuable church interiors is the price that the state constitutional hierarchy exacts for providing fundamental protections.[363] Thus, the Supreme Judicial Court held that the application of the Boston landmark statute to the interior of the Church of the Immaculate Conception violated the Jesuits' free

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provided he doth not disturb the public peace, or obstruct others in their religious worship.

MASS. CONST. pt. I, art. II. The Massachusetts Supreme Judicial Court's conspicuous avoidance of federal constitutional questions is noteworthy, especially in light of the fact that the court decided the case several months after the United States Supreme Court's decision in *Smith*. *See* Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1606 (1990) (holding that neutral, generally applicable laws do not violate the Free Exercise Clause). See *supra* notes 133–64 and accompanying text for a discussion of *Smith*.

[357] *Society of Jesus*, 564 N.E.2d at 573.

[358] *Id.*

[359] *Id.*

[360] *Id.* at 573–74.

[361] *Id.*

[362] *Id.*

[363] *Society of Jesus*, 564 N.E.2d at 574.

exercise of religion, as guaranteed by article two of the Declaration of Rights of the Massachusetts Constitution.[364]

At present, the ultimate effectiveness of First Amendment challenges to historic preservation ordinances is still unsettled. State and federal courts have used the charitable purpose test and the United States Supreme Court's most recent free exercise jurisprudence, as enunciated in *Smith*, to uphold landmark laws against First Amendment challenges.[365] Prior to the recent shift in the Supreme Court's approach to the Free Exercise Clause, some state courts had used the First Amendment of the Constitution to bar the application of preservation ordinances to both the interior and exterior of church buildings.[366] Recently, however, a Massachusetts court has avoided federal constitutional questions by using the free exercise provisions of the state constitution to invalidate the application of a landmark law to the interior of a church.[367]

## IV. Analysis of First Amendment Issues in the Historic Preservation of Religious Properties

Public and private efforts toward historic preservation, though underway in this country for well over a century, began to increase significantly approximately thirty-five years ago.[368] Inevitably, this expansion has given rise to legal challenges to the validity of laws that allow the designation of particular properties as historic landmarks. Traditionally, these challenges have taken the form of claims by property owners that historic preservation ordinances violate the Fifth Amendment by taking their property without just compensation.[369] The United States Supreme Court, in rejecting such a challenge in *Penn Central Transportation Co. v. City of New York*, has held that historic preservation ordinances do not violate the Takings

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[364] *Id.*

[365] *See, e.g.*, St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354–55 (2d Cir. 1990); Church of St. Paul and St. Andrew v. Barwick, 496 N.E.2d 183, 192 (N.Y. 1986).

[366] *See, e.g.*, First Covenant Church v. City of Seattle, 787 P.2d 1352, 1361 (Wash. 1990), *vacated*, 111 S. Ct. 1097 (1991); Society of Jesus v. Boston Landmarks Comm'n, Nos. 87–3168, 87–4751, 87–6586, slip op. at 9 (Mass. Super. Ct. Oct. 11, 1989).

[367] *See, e.g.*, Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571, 574 (Mass. 1990).

[368] *See* Duerksen & Bonderman, *Preservation Law: Where It's Been, Where It's Going*, *supra* note 18, at 1, 8.

[369] See *supra* notes 45–82 and accompanying text for a discussion of cases involving takings challenges to historic preservation laws.

Clause as long as they allow an owner a reasonable economic use of his or her property.[370]

More recently, religious organizations have attacked landmark designations of their property on First Amendment grounds, claiming that the designations violate the Free Exercise and Establishment Clauses.[371] The results of these challenges have been mixed so far, and the issue has not yet been addressed by the United States Supreme Court. The courts that have decided these cases have struggled to find standards appropriate for determining the existence or permissible extent of any burden that historic preservation ordinances place on churches' free exercise rights.[372]

### A. *Analysis of First Amendment Standards*

Judicial interpretation of the scope of free exercise protection is the crucial element in the resolution of First Amendment challenges to preservation ordinances. Most courts look to the First Amendment jurisprudence of the Supreme Court when evaluating the impact of landmark laws on free exercise rights. The Supreme Court has distinguished between laws that directly target religion, and are therefore inherently unconstitutional, and those that only indirectly affect religious practices.[373] A historic preservation ordinance, if found to affect religion at all, will normally fall in the latter category.[374] Until recently, the Supreme Court based its free exercise analysis on a form of strict scrutiny, first clearly enunciated in *Sherbert v. Verner*, that required the government to show a compelling interest in a challenged regulation to justify indirect burdens on religion.[375] The *Sherbert* test, however, essentially has been discarded by the Supreme Court, which now holds that neutral laws of general applicability do not violate the Free Exercise Clause.[376]

The implications of this recent standard, announced by Justice Scalia in *Employment Division, Department of Human Resources v. Smith*,

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[370] 438 U.S. 104, 138 (1978). See *supra* notes 45–62 and accompanying text for a discussion of *Penn Central*.

[371] See *supra* notes 232–367 and accompanying text for a discussion of cases involving First Amendment challenges to historic preservation ordinances.

[372] See *supra* notes 250–367 and accompanying text for a discussion of cases that illustrate judicial approaches to the problems raised by preservation of religious buildings.

[373] *See, e.g.*, Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1599 (1990).

[374] *See, e.g.*, St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354 (2d Cir. 1990).

[375] *See* 374 U.S. 398, 403 (1963).

[376] *See Smith*, 110 S. Ct. at 1606.

are of major significance for historic preservation law. Historic preservation ordinances are not intended to control or affect substantive religious beliefs.[377] Under *Smith*, this makes short work of the question as to whether they unconstitutionally abridge the free exercise of religion.[378] Because the only free exercise burden that landmark laws may impose is an indirect one, a court's analysis need only focus on the character of the regulation and ask whether the challenged law is applicable to non-religious parties in the same position as a church.[379] If this question is answered affirmatively, the *Smith* analysis presumes that any incidental infringements on religious liberty are not constitutionally cognizable.[380]

The *Smith* test of general applicability, however, excessively narrows the scope of the Free Exercise Clause. The clause now may be invoked to protect religious freedoms only in two exceptional situations: where a law directly coerces religious beliefs, or where a law infringes not only on religious exercise but on another constitutionally guaranteed right as well.[381] As to the first instance, Justice O'Connor correctly noted in her *Smith* concurrence that few legislatures will be so naive as to pass a law that specifically targets religious observance.[382] Because the Supreme Court has stated that the Equal Protection Clause already bars such legislation, this aspect of the Free Exercise Clause is not its central function.[383]

Neither does the second situation, where "hybrid" constitutional protections are involved, implicate the primary protections of the Free Exercise Clause. *Smith* makes free exercise protection almost completely contingent upon the presence of other constitutional infractions.[384] Clearly, this cannot have been what the framers of the First Amendment intended.[385] The cases cited by Justice Scalia to demonstrate these hybrid situations do not support such second-class treatment of the Free Exercise Clause.[386] Justice O'Con-

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[377] *See St. Bartholomew's*, 914 F.2d at 354.

[378] *See Smith*, 110 S. Ct. at 1600–01.

[379] *See id.*

[380] *See id.*

[381] *Id.* at 1599, 1601–02.

[382] *Id.* at 1608 (O'Connor, J., concurring).

[383] *Id.* (citing Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141–42 (1987)).

[384] *See id.* at 1601–02.

[385] Not only is it logical that each clause in the Constitution should be interpreted as having its own individual purpose, it is also a fundamental precept of constitutional interpretation that no clause is presumed to be without effect. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

[386] *See Smith*, 110 S. Ct. at 1609 (O'Connor, J., concurring).

nor pointed out that those decisions "expressly relied" on free exercise jurisprudence, not an aggregation of constitutional claims.[387] The *Smith* "neutral, generally applicable" standard robs the Free Exercise Clause of much of its vitality.

Justice Scalia stated in *Smith* that the *Sherbert* compelling interest test effectively presumes invalid any legislation that affects religion, unless the law is of extreme importance.[388] For a society as diverse as that of the United States, he maintained, such a presumption would lead to a disastrous circumvention of central governmental authority.[389] But under the *Smith* "neutral, generally applicable" rule, the problem merely reverses itself: burdens on religion are presumptively constitutional as long as they do not directly affect religious beliefs or practices.[390] Justice Scalia attempted to discount the potential harm such presumptions could cause by invoking the political process as the mechanism for structuring societal values, including the place of religion.[391] But this approach leaves protection of minority interests at the mercy of the majority, whose unsympathetic attitude at a given time may not properly reflect our country's long-term social outlook. The First Amendment was enacted to avoid just this dilemma.[392] Justice Scalia's solution to the problem of free exercise interpretation is to write the clause virtually out of the Constitution.

At the other end of the spectrum is the *Sherbert* compelling state interest test.[393] This standard requires the government to justify laws that infringe the free exercise of religion by demonstrating a compelling interest in the goal underlying the regulation.[394] *Sherbert*'s compelling interest test represents an expansive approach, in which all incidental infringements on religious practice may be subject to restraint.[395]

Unlike the *Smith* test, which only demands that a particular law be neutral and generally applicable, the *Sherbert* test requires a court to look closely at the specific circumstances of each case. A state has

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[387] *Smith*, 110 S. Ct. at 1609 (O'Connor, J., concurring).

[388] *Id.* at 1605.

[389] *Id.*

[390] *See id.* at 1601–02.

[391] *Id.* at 1606.

[392] *Smith*, 110 S. Ct. at 1613 (O'Connor, J., concurring).

[393] See *supra* notes 102–13 and accompanying text for a discussion of *Sherbert*.

[394] Sherbert v. Verner, 374 U.S. 398, 403 (1963).

[395] *See id.* at 406. Indeed, one form of constitutional analysis requires the use of strict scrutiny for all infringements of "fundamental" rights, including, in the conventional view, the free exercise of religion. *See* First Covenant Church v. City of Seattle, 787 P.2d 1352, 1361 (Wash. 1990), *vacated*, 111 S. Ct. 1097 (1991).

not needed to show a compelling interest, however, until a court has determined that free exercise rights have been actually and indirectly infringed.[396] If a court finds the burdened activity to be of a secular nature, by definition no free exercise injury can have occurred.[397] At the other extreme, if a particular law regulates religious beliefs rather than religious practices, the burden on religion is direct and inherently unconstitutional.[398]

Though the *Sherbert* test possibly accords the Free Exercise Clause a more appropriate constitutional role than does the *Smith* rule, it nonetheless stretches the scope of the clause. In her *Smith* concurrence, Justice O'Connor pointed out that there is "nothing talismanic" about neutral, generally applicable laws, as they can coerce religious convictions as effectively as laws targeting religion.[399] Similarly, however, there is nothing talismanic about a compelling interest test that may unevenly assess competing social interests. Where an infringed religious practice is considerably less significant to its adherents than the infringing law is to society, the compelling government interest test fails to yield an efficient distribution of the burdens of social conflict. As demonstrated by the example of historic preservation, the application of strict scrutiny to all free exercise claims will overshoot the constitutional mark. A standard that allows a more balanced approach to protecting constitutional rights and accommodating important societal goals should replace the *Smith* and *Sherbert* formulations.

Another important analytical tool for determining the legality of religious landmarking, the charitable purpose test, was first developed in a takings context in *Trustees of Sailors' Snug Harbor v. Platt*.[400] This specialized test states that any law that prevents or seriously interferes with the carrying out of the charitable mission of a non-profit property owner is unconstitutional.[401] This standard was developed in the New York courts, and has been used by at least one federal court for evaluating both free exercise and takings challenges to landmark designations.[402]

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[396] *Sherbert*, 374 U.S. at 403.

[397] *See, e.g.*, Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303, 306–07 (6th Cir. 1983).

[398] *See* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

[399] Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1612 (1990) (O'Connor, J., concurring).

[400] 288 N.Y.S.2d 314, 316 (App. Div. 1968). See *supra* notes 64–70 and accompanying text for a discussion of *Snug Harbor*.

[401] *Id.*

[402] *See* St. Bartholomew's Church v. City of New York, 728 F. Supp. 958, 966–67

The *Snug Harbor* charitable purpose test is perhaps a more logically consistent method for evaluating the churches' claims than the Supreme Court's current free exercise jurisprudence, which relies on a "neutral, generally applicable" test. Originally developed as a takings standard, the charitable purpose test is especially well-suited to analyzing First Amendment actions based on the restriction of property use. The definition that has emerged from *Society for Ethical Culture v. Spatt* and *Church of St. Paul and St. Andrew v. Barwick* of "serious interference" with the carrying out of a group's religious mission centers on the feasibility of continuing the present religious activities in the existing facility.[403] This concept has its genesis in *Penn Central,* where the Supreme Court sanctioned preservation ordinances.[404] The Court acknowledged that the ordinances would effectively "freeze" a structure in its present condition, leaving its owner only the existing use.[405] Restricting judicial inquiry to whether the present activities can be continued in the existing building is a logically consistent extrapolation of the *Penn Central* precedent.

The *Barwick* court correctly noted that, under the charitable purpose test, the takings and free exercise criteria coincide in religious properties cases.[406] A landmark ordinance regulating a church's use of its property has precisely the same economic effect on the church as it does on a commercial property owner situated similarly; it restricts the revenue that can be generated by a particular parcel of land.[407] Such restriction is specifically allowed by *Penn Central.*[408] There is no taking under the charitable purpose test if religious activities can continue uninterrupted—that is, the religious mission can be carried out—in the existing building.[409] Therefore, if a church cannot prove that interference with its property rises to

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(S.D.N.Y. 1989); Church of St. Paul and St. Andrew v. Barwick, 496 N.E.2d 183, 192 (N.Y. 1986).

[403] *Barwick*, 496 N.E.2d at 192; Society for Ethical Culture v. Spatt, 415 N.E.2d 922, 925–26 (N.Y. 1980).

[404] *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 138 (1978).

[405] *See id.* at 136.

[406] *Barwick*, 496 N.E.2d at 191–92.

[407] *See St. Bartholomew's*, 728 F. Supp. at 966. One may presume that few churches would claim that the accumulation of money is a religious exercise.

[408] *Penn Central*, 438 U.S. at 131. Commercial owners are allowed a reasonable return, not the most lucrative use of the property. The Free Exercise Clause does not seem to require, as a deviation from this rule, that churches be allowed to capitalize on the most lucrative use of their property.

[409] *See Ethical Culture*, 415 N.E.2d at 925.

the level of a compensable taking, it is difficult to see how such interference will effect a curtailment of religious liberty. The very fact of continued religious observance in the existing facility demonstrates that a landmark designation has not effected an unconstitutional prohibition of religious exercise. Thus, if a historic preservation ordinance does not seriously impede the carrying out of a church's religious mission, the church will not suffer a constitutionally cognizable infringement of religious freedom.[410]

Although the charitable purpose standard is somewhat less "bright line" than the *Smith* test, it is still sufficiently definite to permit uniform judicial application. Because the specific facts of each case have larger significance under the charitable purpose test than under *Smith*, singular circumstances are less likely to generate unjust results. Despite Justice Scalia's objections to the contrary in *Smith*, the relative assessment of conflicting interests is part of the judiciary's traditional role.[411] The charitable purpose test strikes an appropriate balance between providing clear legal principles to guide the judiciary and avoiding rigid, fact-blind legal rules.

As can be seen from the foregoing discussion, the charitable purpose test is an appropriate standard for evaluating the impact of historic preservation legislation on the free exercise of religion. This test is far better suited to the task than either the Supreme Court's *Smith* or *Sherbert* Free Exercise Clause jurisprudence. By more evenly assessing the competing interests, the charitable purpose test respects societal interest in preservation while protecting the basic religious liberty of the organizations affected by landmarking.

Landmark designation of religious properties may also implicate Establishment Clause concerns.[412] The three-part *Lemon* test, the basis for Supreme Court Establishment Clause jurisprudence, mandates that laws have a secular purpose, secular primary effect, and create no excessive governmental entanglement with religion.[413] Establishment Clause claims have not generated much discussion in

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[410] *E.g.*, *Barwick*, 496 N.E.2d at 192.

[411] Employment Div., Dep't of Human Resources v.Smith, 110 S. Ct. 1595, 1606 n.5 (1990). See Justice O'Connor's concurrence, advocating a judicial determination as to whether any burden on a plaintiff is constitutionally significant. She noted that "[this] approach [is] more consistent with [the] role [of] judges to decide each case on its individual merits." *Id.* at 1611 (O'Connor, J., concurring).

[412] See *supra* notes 168–200 and accompanying text for a discussion of the Establishment Clause.

[413] *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

the cases thus far, being overshadowed by the free exercise controversy.[414]

The essence of churches' Establishment Clause claims is that the statutory and judicial tests for granting exemption from landmark ordinances generally demand inquiry into the financial and internal workings of the applicant for exemption. According to the religious groups, this process involves excessive government entanglement in religious affairs.[415] But as noted by the district court in *St. Bartholomew's*, such inquiry is generally minimal.[416] The more persuasive Establishment Clause argument rests with the preservationists: allowing churches exemption from landmark laws would constitute impermissible governmental sponsorship of religious activity. Any entanglement burdens created through evaluating hardship applications are far less constitutionally significant than the strain placed on Establishment Clause principles by allowing churches exemption from landmark laws. In the cases to date, the Establishment Clause arguments have not attracted much judicial interest and have been only a sidelight to the essential free exercise dilemma. Frequent resolution of the free exercise question in favor of religious organizations, however, eventually should provoke a more heated argument of the Establishment Clause issue by the preservationist camp.

### B. *Application of Free Exercise Standards in Recent Preservation Cases*

The diversity of judicial response to free exercise challenges to historic preservation ordinances is illustrated well by three recent cases.[417] In *St. Bartholomew's Church v. City of New York*, the Court of Appeals for the Second Circuit upheld a landmark ordinance by applying the *Smith* standard, while framing much of its analysis in the language of the charitable purpose test.[418] Prior to the *Smith* decision, a Massachusetts court used the *Sherbert* test to bar application of a landmark ordinance to a church interior, and was affirmed by the state's highest court, post-*Smith*, on the basis of state constitutional law.[419] The Washington Supreme Court, also prior to *Smith*, used the *Sherbert* test to bar the application of a Seattle land-

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[414] *See, e.g.*, St. Bartholomew's Church v. City of New York, 728 F. Supp. 958, 963 (S.D.N.Y. 1989), *aff'd*, 914 F.2d 348, 356 n.4 (2d Cir. 1990).

[415] *See St. Bartholomew's*, 728 F. Supp. at 963.

[416] *Id.*

[417] See *supra* notes 263–364 and accompanying text for a discussion of these cases.

[418] *See St. Bartholomew's*, 914 F.2d at 354–56.

[419] *See* Society of Jesus v. Boston Landmarks Comm'n, Nos. 87–3168, 87–4751, 87–6586, slip op. at 4–8 (Mass. Super. Ct. Oct. 11, 1989), *aff'd*, 564 N.E.2d 571, 574 (1990).

mark ordinance to a church.[420] The United States Supreme Court has remanded this case and, as the *Sherbert* standard has now been discarded, it is unclear how the Washington court will handle the case. Each of these cases has involved a slightly different question concerning the effect of a preservation ordinance on religious freedom.

In *St. Bartholomew's*, the issue was whether adverse economic consequences resulting from the landmark designation of church property violated the church's free exercise rights.[421] Specifically, the question was whether St. Bartholomew's had property development rights superior to those of commercial property owners simply because it was a religious organization. The church's desire to demolish the community house and construct a forty-seven story office tower was completely incompatible with preservation goals.[422] Although the Second Circuit Court of Appeals conceded that the church's revenue producing potential was significantly affected by the landmark designation, the court correctly determined that no free exercise violation had occurred.[423]

The court arrived at this conclusion in an interesting way. First, the court applied the *Smith* standard and ruled that the preservation ordinance was neutral and generally applicable.[424] The church's argument that the ordinance was discriminatory was weak and unsupported by the facts.[425] The fact that church buildings often receive landmark designations does not signal an intent to single out religious structures for treatment different from that given secular historic buildings.[426] The Landmarks Commission has some power of discretion in deciding which structures to landmark, but, as the court correctly noted, zoning has been carried out similarly for many years and "passes constitutional muster."[427]

The court then used the language of the charitable purpose test, stating that the church failed to prove that the preservation ordinance prevented it from carrying out its religious mission in

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[420] *See* First Covenant Church v. City of Seattle, 787 P.2d 1352, 1356–61 (Wash. 1990), *vacated*, 111 S. Ct. 1097 (1991).

[421] *See St. Bartholomew's*, 914 F.2d at 353–54.

[422] *See id.* at 352.

[423] *Id.* at 355–56.

[424] *See id.* at 354–55.

[425] *See id.* Churches make up approximately 15% of the number of landmarked buildings in New York City. *Id.* at 354.

[426] *St. Bartholomew's*, 914 F.2d at 354–55.

[427] *Id.* No challenge to landmarks laws, if based on discriminatory zoning arguments, is likely to succeed in light of Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

the existing facilities.[428] The court apparently was not satisfied with a simple determination that the law was neutral and generally applicable. Though its discussion on the point was brief, the court implied that a law imposing a financial burden severe enough to threaten the continued existence of the church would be unconstitutional.[429]

St. Bartholomew's filed an application for exemption under the hardship provision of the New York City landmark ordinance, which allows a property owner exemption from the ordinance if it can demonstrate extreme physical or financial constraints.[430] The decision of a landmarks commission to grant a church an exemption from a preservation ordinance on hardship grounds is essentially a tacit admission that the ordinance is seriously impeding the religious function of the property owner. Because the church suffered no restriction on its ability to continue its existing religious services, the court properly agreed with the Landmarks Commission that denial of the hardship application did not infringe the church's free exercise rights.[431]

The interpretation of the Free Exercise Clause advocated by the church is overly broad, as it would protect almost any activity that the church desired to undertake.[432] As the United States Supreme Court has pointed out, the language of the Constitution specifically states that the free exercise of religion shall not be *prohibited*.[433] The Court thus made clear that the Constitution considers that burdens on religion not reaching prohibitive levels are potentially acceptable.[434] An appropriate interpretation of the Free Exercise Clause must recognize that some of the activities of religious organizations are more properly described as secular than religious.

The decision of the Second Circuit Court of Appeals in *St. Bartholomew's* was correct; the development of a commercial high-rise, even if undertaken by a religious organization, cannot be viewed as a religious exercise without overly expanding the scope of the Free Exercise Clause. St. Bartholomew's suffered obvious

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[428] *St. Bartholomew's*, 914 F.2d at 355.

[429] *See id.* at 355–56.

[430] *Id.* at 351–52. See *supra* notes 35–36 and accompanying text for a discussion of hardship provisions.

[431] *See St. Bartholomew's*, 914 F.2d at 354–56.

[432] *See id.* at 353–54.

[433] *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1989).

[434] *See id.*

financial constraint, but clearly no religious coercion, in the indirect impairment of its fundraising abilities.[435] Absent such coercion, the New York City landmark had no problem meeting the requirement of being neutral and generally applicable.[436] As St. Bartholomew's was able to continue religious observance in the existing facility, the results reached under the charitable purpose and *Smith* standards coincide.

It is unclear whether application of the *Sherbert* compelling interest test would have yielded a different result in *St. Bartholomew's*. As a threshold matter, the construction of a commercial office tower is a secular, rather than religious, undertaking; it would not have been necessary for the court to inquire further.[437] The outcome of the case could have been affected, however, if the court had held that the construction project was part of the church's religious practice, and that therefore the Free Exercise Clause was implicated. Under a *Sherbert* analysis, the city would have prevailed only if its interest in preservation was found "compelling."[438] The result of such an inquiry is uncertain, as few courts have ruled on the question.[439]

The Washington Supreme Court, however, has ruled that historic preservation is not a compelling state interest.[440] The court decided the case under the *Sherbert* test, as Washington has not adopted the charitable purpose test and the case was decided pre-*Smith*.[441] The court's majority opinion in *First Covenant Church v. City*

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[435] As the court carefully delineated, many other avenues of fundraising remain open to the church. *St. Bartholomew's*, 914 F.2d at 359–60.

[436] *Id.* at 355–56. The court dismissed St. Bartholomew's Establishment Clause argument rather summarily. *Id.* at 356 n.4. The Landmark Commission's simple inquiry into the church's financial status, for the purpose of evaluating its hardship application, did not rise to the level of unconstitutional governmental entanglement with religion. *See id.* The preservation ordinance had both a secular purpose and primary effect, and the court found it unnecessary even to mention these prongs of the *Lemon* test. *See id.* Because the inquiry into the church's finances was of a routine, record-keeping nature, the Establishment Clause claim was appropriately dismissed. *See id.*

[437] *Cf.* Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303, 306–07 (6th Cir. 1983) (construction of a church building held to be a secular activity).

[438] *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963).

[439] *Compare* First Covenant Church v. City of Seattle, 787 P.2d 1352, 1356–61 (Wash. 1990), *vacated*, 111 S. Ct. 1097 (1991) (state court held that historic preservation is not a compelling state interest) *with* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 107–08 (1983) (historic preservation is an important tool for promoting general public welfare). *Penn Central*, however, did not involve a First Amendment challenge to the landmark law and did not specifically decide the compelling interest question.

[440] *First Covenant*, 787 P.2d at 1356–61.

[441] Justice Utter, however, urged in his concurrence that the court adopt the charitable

*of Seattle* is rather extreme, and clearly shows how the compelling interest test can generate unbalanced results.

The court's discussion of the state interest in historic preservation was brief.[442] The court concluded that landmark laws regulate only the aesthetic features of a community, and do not contribute to the health and safety of its citizens.[443] The court's implicit assumption that preservation goals are simply cosmetic measures is incorrect. This assumption ignores the practical, if not instantly tangible, impact that historic preservation has on the development of society.[444]

It should have been unnecessary, however, for the court to reach the issue of whether the state interest in historic preservation was sufficiently compelling to justify the landmark ordinance, as there first must have been a cognizable encroachment on religious liberty. First Covenant Church sought a declaratory judgment barring application of the landmark law to its property, but did not claim that the ordinance was hindering any specific religious pursuits.[445] In addition, the Seattle preservation ordinance specifically provided that the church retain absolute power to make any structural changes to its building that were necessitated by liturgical concerns. The ordinance further provided that the church be the sole authority on liturgy and the decisive party concerning the architectural changes that could be undertaken. These provisions made the ordinance a virtual nullity, requiring only that the church consult with the Seattle Landmarks Preservation Board before proceeding with any alterations.[446]

In adopting such an ordinance, the city essentially denied itself the ability to unconstitutionally infringe the church's free exercise rights. If, as the court said, the liturgy provision was overly vague, this vagueness could only benefit the church's complete authority to make "liturgical" changes.[447] The burdens that the landmark ordinance placed on the church appeared to be minor and quite reasonable: a modest amount of paperwork, and the necessity of informing the Board, which had no power to block the plans in any

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purpose test for evaluating free exercise claims lodged against landmark laws. *Id.* at 1365 (Utter, J., concurring).

[442] *See id.* at 1361.

[443] *Id.*

[444] *See* Stipe, *supra* note 22, at 211–13.

[445] *First Covenant*, 787 P.2d at 1354.

[446] See *supra* note 315 for a discussion of this ordinance.

[447] *See First Covenant*, 787 P.2d at 1360.

event, of proposed structural alterations.[448] It is remarkable how little weight the court accorded the efforts of the preservation board to avoid violating the church's religious autonomy.[449] Although the church claimed that *any* application of the ordinance to its property was unconstitutional, these ordinance provisions seemed a positive attempt to find compromise solutions and establish a dialogue between the preservation board and the church.[450]

In holding that the preservation ordinance violated the church's free exercise rights, even in the absence of specific injury, the court essentially ruled that any application of landmark law to religious properties is facially unconstitutional.[451] This result is an egregious overextension of the Free Exercise Clause, and is entirely inconsistent with the view most courts have taken in cases involving land use controls applied to religious properties.[452] As Justice Dolliver pointed out in his dissent, the majority's holding "trivializes" the significance of First Amendment protections.[453] The court failed to recognize that some church actions are of a secular nature, and extended free exercise protection to potential restrictions upon these secular undertakings. This total, blanket exemption from the landmark law solely for religious organizations constitutes a violation of the Establishment Clause.[454] The Washington Supreme Court's extreme interpretation of the First Amendment yielded an improper result in this case.

In his concurrence, Justice Utter suggested a more credible basis for finding a free exercise encroachment than that offered by the majority.[455] He concluded that First Covenant's constitutional rights had been violated because the preservation ordinance caused a significant decrease in the value of the church's property.[456] First Covenant, however, did not claim that it desired to sell or otherwise change its interest in the property.[457] Therefore, it had not realized any direct financial loss from this diminution, and its claims were

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[448] *See id.* at 1359–61.

[449] *See id.*

[450] *Id.* at 1355.

[451] *See id.* at 1356–61.

[452] See *supra* notes 202–367 and accompanying text for a discussion of cases involving land use controls and the First Amendment. None of these cases that held the application of land use controls to religious properties is inherently unconstitutional.

[453] *First Covenant*, 787 P.2d at 1366 (Dolliver, J., dissenting).

[454] *See* Texas Monthly v. Bullock, 109 S. Ct. 890, 897 (1989).

[455] *See First Covenant*, 787 P.2d at 1363 (Utter, J., concurring).

[456] *Id.*

[457] *See id.* at 1354.

premature.[458] Even if the church had been critically affected financially, it should have been required to show that the impact of the decrease in property value seriously impaired the church's continued operation. Justice Utter was correct, however, in stating that the court should require a very specific showing of economic difficulty before ordering an exemption from land use restrictions.[459] An actual threat to religious worship should have been present before the court invoked First Amendment protections.

Analysis of the facts of this case under both the *Smith* rule and the charitable purpose test will yield a different result than that reached by the Washington Supreme Court. Under *Smith*, which was announced some three months after *First Covenant*, the church's claims would have been dismissed.[460] The preservation ordinance was neutral and generally applicable; therefore, First Covenant would have been required to comply with it even in light of an indirect burden on the church's free exercise rights.

The charitable purpose test would be similarly uncharitable to the church's claims.[461] In his concurrence, Justice Utter indicated that the charitable purpose test would yield a result in accordance with the majority opinion,[462] but this is a misreading of the New York cases. Justice Utter failed to correctly apply the test's requirement that a church make a showing that it is prevented or seriously impeded in carrying out its religious purpose in the existing facility. First Covenant failed to make this showing; therefore, its claims would not prevail under the charitable purpose standard.

The United States Supreme Court has remanded *First Covenant* to the Washington Supreme Court for reconsideration in light of the holding of *Smith*.[463] The Supreme Court's decision makes clear that the Washington court, if it continues to apply federal constitutional law, will have no choice but to uphold the application of the historic preservation ordinance to the First Covenant Church. The Washington court, however, may decide the case on the basis

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[458] The court concluded that the church's claims were ripe because the church had failed to get the landmark designation lifted through administrative procedures. *See id.* at 1356.

[459] *Id.* at 1364 (Utter, J., concurring).

[460] *Smith* requires any law that burdens free exercise rights to be neutral and generally applicable. *See* 110 S. Ct. at 1603.

[461] See *supra* notes 64–78 and accompanying text for a discussion of the charitable purpose test.

[462] *See First Covenant*, 787 P.2d at 1365 (Utter, J., concurring).

[463] City of Seattle v. First Covenant Church, 111 S. Ct. 1097 (1991). See *supra* notes 133–64 and accompanying text for a discussion of *Smith*.

of the religious freedom section of the state constitution.[464] The state court then would be free to use the compelling interest test to affirm its previous ruling barring application of the Seattle landmark law to church property.[465]

The interior arrangements of churches often are closely tied to actual religious observance, and consequently a more palpable danger exists that landmarking will result in restrictions on religious liberty. A Massachusetts case, *Society of Jesus v. Boston Landmarks Commission*, involved just this question.[466] Both the trial court and the Massachusetts Supreme Judicial Court held that the landmark designation of the interior of the Church of the Immaculate Conception violated the religious liberty of the Society of Jesus ("the Jesuits").[467] In the interval between the two decisions, however, the United States Supreme Court announced *Smith*.[468] The Supreme Court's holding in that case may have influenced the Supreme Judicial Court's choice of grounds for affirming the lower court, which had based its holding on federal constitutional law.[469]

In the original trial, the Suffolk County Superior Court used a *Sherbert* analysis to conclude that the city's interest in preservation was not compelling, and could not justify the landmark designation's encroachment on the Jesuits' religious freedom.[470] The court

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[464] Article 1, section 11 of the Washington Constitution states, in part:

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

WASH. CONST. art. 1, § 11.

[465] A similar situation already has occurred in one other state. Prior to *Smith*, the Minnesota Supreme Court used the federal compelling interest test to bar the application of a state traffic law to the vehicles of the Amish religious sect. *See* State v. Hershberger, 444 N.W.2d 282, 287–90 (Minn. 1989). The Minnesota court said that it was reserving consideration of the issue under state constitutional law until "a later date in a different case." *Id.* On remand from the United States Supreme Court, post-*Smith*, Minnesota decided that the "later date" had come, and used the state constitution to achieve the same result as its prior decision. *See* State v. Hershberger, 462 N.W.2d 393, 396–99 (Minn. 1990).

[466] Nos. 87–3168, 87–4751, 87–6586, slip op. at 1 (Mass. Super. Ct. Oct. 11, 1989), *aff'd*, 564 N.E.2d 571, 572–74 (Mass. 1990). See *supra* notes 333–64 and accompanying text for a discussion of *Society of Jesus*.

[467] *Id.*

[468] *See* 110 S. Ct. 1595 (1990). The trial and appellate decisions in *Society of Jesus* were released, respectively, on October 11, 1989 and December 31, 1990. *Smith* was decided on April 17, 1990.

[469] *See Society of Jesus*, Nos. 87–3168, 87–4751, 87–6586, slip op. at 4–8 (Mass. Super. Ct. Oct. 11, 1989).

[470] *See id.*

stated that the constitutional protection of religion extends to the buildings used for worship, and therefore particularly to the interior of those buildings.[471] The court's finding as to the burden suffered by the church, however, actually seems to have centered on the effect that certain administrative procedures, which were required to obtain exemption from the landmark ordinance, had on the church's construction plans.[472]

This basis for the decision implicitly assumed the answer to a threshold issue that the court should have specifically examined. The proper inquiry would have been whether the proposed alterations that the Jesuits sought for the church building were mandated by liturgical practices or were actually secular. If the alterations were not directly connected to religious practice, the administrative procedures imposed by the landmark ordinance would not have been unconstitutionally burdensome; if they were mandated by religious practice, then the court should have continued its analysis to determine whether restrictions imposed by the landmark ordinance would be permissible.

The Supreme Judicial Court affirmed the trial court on the basis of provisions in the Massachusetts Constitution that guarantee religious liberty.[473] Although the court stated that historic preservation is not a sufficiently compelling interest to justify infringements on religious freedom, it did not actually analyze the conflict from a *Sherbert* perspective.[474] Instead, the court's analysis relied solely on its interpretation of the protections provided by the Massachusetts Constitution.[475] The United States Supreme Court had announced the *Smith* standard some months before the appellate decision in *Society of Jesus*, so the *Sherbert* test was no longer available to the Supreme Judicial Court.[476] Under the *Smith* standard of neutral, general applicability, historic preservation ordinances that protect interiors will fare no worse than those that protect exteriors alone.[477] The burdens created by generally applicable laws will remain indirect and non-discriminatory as long as such laws also may be applied to the interiors of non-religious buildings.[478] Under

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[471] *Id.* at 4–5.

[472] *Id.* at 5–7.

[473] *Society of Jesus*, 564 N.E.2d at 574.

[474] *Id.* at 572–74.

[475] *Id.*

[476] See *supra* notes 133–64 and accompanying text for a discussion of *Smith*.

[477] *See* Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1600 (1990).

[478] *See id.*

*Smith*, therefore, the landmark designation would have been upheld.

Few courts, including state courts, have based their decisions concerning religious freedom challenges to land use controls on state constitutional law.[479] The Supreme Judicial Court's reliance on the Massachusetts Constitution seems to signal its disagreement with *Smith*. If the *Smith* decision survives, it appears likely to have a steadily decreasing influence in cases determining the permissibility of landmark designations of religious properties.[480]

Under the charitable purpose test, the landmark designation of the church interior may have been allowed to stand, but the question would have been much closer than under *Smith* or the state constitution.[481] Although the church was not required to make a showing concerning its financial health, as Massachusetts has not adopted the charitable purpose standard, the ability of the church to continue its religious services in the existing facility appears to have been understood.[482] Moreover, the construction of office and residential quarters should be considered a secular activity, even in a church building.[483] The remodeling of the church interior appears to have been motivated more by financial than ecclesiastical concerns, and, as a result, is not entirely distinguishable from the development of an office tower.[484]

A notable difference in this case, however, is that the Jesuits were not contemplating lease or sale of the renovated church space to commercial, non-religious parties.[485] Although this fact does not alter the final result under the charitable purpose test in this case, it does suggest that landmarking church interiors is especially problematic. It is not difficult to imagine circumstances in which signif-

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[479] See *supra* notes 202–364 and accompanying text for a discussion of the major cases involving land use controls challenged on religious grounds.

[480] There has been widespread alarm over the impact that the *Smith* decision may have on religious freedom. A coalition of politically diverse groups is currently attempting to have the *Smith* holding overruled legislatively. *See* Ethan Bronner, *Court's Curb on Religion Draws Fire*, BOSTON GLOBE, Jan. 6, 1991 at 2.

[481] See *supra* notes 64–78 and accompanying text for a discussion of the charitable purpose test.

[482] *See Society of Jesus*, Nos. 87–3168, 87–4751, 87–6586, slip op. at 1–3 (Mass. Super. Ct. Oct. 11, 1989).

[483] *See, e.g.*, St. Bartholomew's Church v. City of New York, 914 F.2d 348, 351–53 (2d Cir. 1990). See *supra* notes 263–302 and accompanying text for a discussion of *St. Bartholomew's*.

[484] *See Society of Jesus*, Nos. 87–3168, 87–4751, 87–6586, slip op. at 1–2 (Mass. Super. Ct. Oct. 11, 1989).

[485] *Id.*

icant restrictions on religious freedom would be created by interior landmarking. For this reason, preservation ordinances that allow designation of church interiors should be drafted carefully, with an eye toward avoiding free exercise infringements.[486] Additionally, the proper standard for evaluating the landmarking of religious properties, the charitable purpose test, should be applied in a more liberal fashion in cases concerning interior landmark designations. Such measures should ensure that sensitive religious concerns are properly respected.

## V. Conclusion

The application of historic preservation ordinances to religious buildings has been, and will remain, a difficult problem. The parties on both sides of the issue are entrenched and, as the conflicting judicial results illustrate, the inability of the courts to find a satisfactory consensus on how to evaluate each case only exacerbates the problem. The central dilemma is how to interpret and apply the Free Exercise Clause. Courts must maintain, but not exaggerate, the Constitution's unquestionably important protection of religious freedom. The traditional broad reading of the Free Exercise Clause, requiring compelling justification for every governmental encroachment, has given way to a new narrow interpretation that endows legislative action with a powerful presumption of validity. Both approaches have major flaws that, when evaluating the constitutionality of landmark designations, may produce distorted results.

The best standard for evaluating First Amendment challenges to preservation laws is the "charitable purpose" test. This test requires the party challenging a landmark law to show that it can no longer physically or financially continue its religious activities in the existing facility. Although this test has never been used by the Supreme Court, it has been applied successfully by both federal and state courts. The charitable purpose test best achieves a proper balance between protecting important religious freedoms and preserving the cultural integrity and historic legacy of this country.

Steven P. Eakman

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[486] Provisions similar to those of the Seattle ordinance that was challenged in *First Covenant* could strike a proper balance. See *supra* notes 303–31 and accompanying text for a discussion of *First Covenant* and the Seattle ordinance.