Florida State University Journal of Land Use and Environmental Law

Volume 7
Number 2 *Spring 1992*

Article 1

April 2018

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JOURNAL OF LAND USE AND ENVIRONMENTAL LAW

VOLUME 7 SPRING 1992 NUMBER 2

LANDMARKS PRESERVATION ORDINANCES: ARE THE RELIGION CLAUSES VIOLATED BY THEIR APPLICATION TO RELIGIOUS PROPERTIES?

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Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.[1]

We are a religious people whose institutions presuppose a Supreme Being.[2]

One of the greatest understatements in constitutional law is Justice Burger's pronouncement in *Walz v. Tax Commission*[3] that "[t]he Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution." These clauses have pervaded many areas of the law from school taxation to employment compensation.

This article addresses yet another area in which these clauses have been raised—the application of landmarks preservation ordinances to property owned by religious organizations. Two cases, one in New York, *St. Bartholomew's Church v. City of New York*,[4] and the other in Washington, *First Covenant Church v. City of Seattle*,[5] recently addressed this issue. After applying First Amendment principles, the courts reached opposite conclusions.

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1. U.S. CONST. amend. I.
2. Zorach v. Clauson, 343 U.S. 306, 313 (1952).
3. 397 U.S. 664, 668 (1970).
4. 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991).
5. 787 P.2d 1352 (Wash. 1990) (en banc), *vacated and remanded*, 111 S. Ct. 1097 (1991).

This article reviews the tension between the Establishment and Free Exercise Clauses, discusses historic preservation ordinances, analyzes the courts' legal rationales in *St. Bartholomew's* and *First Covenant,* and suggests an answer to the question of when, if at all, landmarks preservation ordinances should be applied to religious buildings. Part I of the article provides a brief overview of the United States Supreme Court Establishment and Free Exercise Clauses cases. An analysis of how the Court should be interpreting and applying these clauses is beyond the scope of this article. Accordingly, the discussion is limited to what the law is, or appears to be, and leaves to others the task of pulling the Court out of the Religion Clauses morass it has created.[6] Part II then examines police power, zoning ordinances, and the religion clauses. Part III explains the legal justification for landmarks preservation ordinances. This is followed by a detailed analysis of New York City's Landmarks Preservation Law to familiarize the reader with the typical burdens and duties that property owners incur once their property has been designated as a landmark. Because such ordinances are an outgrowth of a state's police powers, a review of other zoning regulations as applied to religious entities is included. Part IV discusses the courts' decisions in *St. Bartholomew's*[7] and *First Covenant.*[8] Part V concludes the article by analyzing whether the application of landmarks preservation ordinances to property owned by religious entities violates either of the Religion Clauses as they are currently interpreted by the United States Supreme Court.

I. THE ESTABLISHMENT AND FREE EXERCISE CLAUSES

> *Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion, and is violated by the enactment of laws which establish any official religion, whether those laws operate directly to coerce non-observing individuals or not.*[9]

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6. Thomas v. Review Bd., 450 U.S. 707, 720 (1981) (Rehnquist, J., dissenting) ("I believe that the decision adds mud to the already muddied waters of First Amendment jurisprudence."). *See, e.g.*, Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990); Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701 (1986); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1.

7. 914 F.2d 348.

8. 787 P.2d 1352.

9. Engel v. Vitale, 370 U.S. 421, 430 (1962).

Perhaps no other provisions of the Bill of Rights have caused as much confusion as the Establishment and Free Exercise Clauses. A good argument could be advanced that no other portion of the Bill of Rights has become entangled in so many different and diverse areas of the law. For example, the Establishment and Free Exercise Clauses are at the crux of cases involving the following: (1) the display of religious symbols in public places;[10] (2) aid to parochial schools;[11] (3) taxation of religious entities;[12] and (4) unemployment compensation[13]. These cases have not provided a bright-line delineation for determining violations of the Establishment and Free Exercise Clauses. Indeed, in many of these cases the United States Supreme Court, itself, has seemed confused, in some instances issuing as many as five separate opinions.[14]

A. Free Exercise Clause

> *In the realm of religious faith . . . sharp differences arise. . . . [T]he tenets of one man may seem the rankest error to his neighbor. . . . But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.*[15]
>
> *Religious beliefs can be accommodated but there is a point at which accommodation would "radically restrict the operating latitude of the legislature."*[16]

The basic framework for Free Exercise Clause cases was established more than fifty years ago in *Cantwell v. Connecticut*.[17] In *Cantwell*, a Jehovah's Witness was charged with violating a statute that prohibited the solicitation of services, money, and subscriptions for religious,

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10. County of Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984).

11. Lemon v. Kurtzman, 403 U.S. 602 (1971).

12. Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990); Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

13. Employment Div. v. Smith, 494 U.S. 872 (1990); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

14. *Allegheny*, 492 U.S. 573.

15. Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

16. United States v. Lee, 455 U.S. 252, 259 (1982) (citations omitted) (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).

17. 310 U.S. 296 (holding that the Free Exercise Clause was applicable to the states under the Fourteenth Amendment).

philanthropic, or charitable ends without approval from the secretary of public welfare.[18] The Court stated that such approval constituted a "forbidden burden upon the exercise of liberty protected by the Constitution" because the grant of a license to solicit rested upon the determination of a state official "as to what is a religious cause."[19]

The Court held that the religion clauses "embrace two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[20] To determine the latter, the Court established a two-part balancing test which analyzed whether the governmental action limited a religious belief or activity, and whether the governmental action was necessary to protect the "peace, good order, and comfort of the community."[21]

In *United States v. Ballard*,[22] the Court expanded this test by concluding that the legitimacy of a defendant's religion could not be called into question in a free exercise case.[23] Holding that the only permissible question is whether defendants actually believe what they allege to believe, the Court stated, "[t]he First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position."[24]

This standard for Free Exercise Clause cases failed to remain absolute. In *Braunfeld v. Brown*,[25] the Court upheld Sunday closing laws even though such laws caused an economic hardship on Orthodox Jewish shopkeepers and inconvenienced Orthodox Jewish customers.[26] The Court held that such an imposition did not prevent or prohibit the shopkeepers from practicing their religion, but rather simply made doing business more expensive.[27] Consequently, laws imposing indirect burdens on religious observance are valid if the state cannot accomplish its secular goals without such burdens.[28]

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18. *Id.* at 301-02.

19. *Id.* at 307.

20. *Id.* at 303-04. The foundation for this distinction was laid in Reynolds v. United States, 98 U.S. 145 (1879), in which the Court upheld the polygamy conviction of a Mormon even though his church imposed upon its male members the duty to practice polygamy.

21. *Cantwell*, 310 U.S. at 303-07.

22. 322 U.S. 78 (1944).

23. *Id.* at 89-90.

24. *Id.* at 87.

25. 366 U.S. 599 (1961).

26. *Id.* at 608-09; *see also*, Gallagher v. Crown Kosher Super Mkt., 366 U.S. 617, 630-31 (1961).

27. *Braunfeld*, 366 U.S. at 605.

28. *Id.* at 607. Justice Brennan strenuously objected, arguing that the State's goal being advanced—a uniform day of rest—was not an "overbalancing . . . need so weighty in the constitutional scale that it justifie[d] this substantial, though indirect, limitation of appellants' freedom." *Id.* at 614 (Brennan, J., concurring in part and dissenting in part).

Two years after *Braunfeld*, the Court, in *Sherbert v. Verner*,[29] established a new test for free exercise cases. In *Sherbert*, a Seventh Day Adventist was fired and denied unemployment compensation benefits because of her refusal to work on Saturday, which was her Sabbath.[30] Such a ruling "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[31] The Court stated that unless a law burdening the free exercise of religion is necessary to the accomplishment of a compelling governmental interest,[32] the Free Exercise Clause requires an exemption from the law.[33] In other words, absent a compelling state reason, the state must accommodate an individual's religious practices. Rejecting the state's contention that protection of its unemployment fund was a compelling reason, the Court determined that Mrs. Sherbert was entitled to receive unemployment benefits.[34]

The Court applied this new accommodation standard in *Wisconsin v. Yoder*,[35] and refused to uphold a compulsory high school attendance law for the children of Amish parents.[36] The Court found that (1) the compulsory attendance requirement burdened the Amish's free exercise of religion, and (2) the state interest in promoting high school education was not so compelling as to preclude any exemptions.[37] Particularly noteworthy about this decision is that the Court went beyond requiring accommodation of an individual's religious practices and required accommodation of an entire religious organization's practices.

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29. 374 U.S. 398 (1963). The majority opinion, which was written by Justice Brennan, was essentially an extension of his dissent in *Braunfeld*.

30. *Id.* at 399-401.

31. *Id.* at 404.

32. The governmental interest has also been described as an "overriding governmental interest," Bob Jones Univ. v. United States, 461 U.S. 574, 603 (1983) (quoting United States v. Lee, 455 U.S. 252, 257-58 (1982)), an interest "of such a high order," *Lee*, 455 U.S. at 260; an interest "of the highest order," McDaniel v. Paty, 435 U.S. 618, 628 (1978) (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)), and a "substantial governmental interest," Johnson v. Robinson, 415 U.S. 361, 384 (1974) (quoting Negre v. Larsen, 401 U.S. 437, 462 (1971)).

33. *Sherbert*, 374 U.S. at 403.

34. *Id.* at 409. Justice Brennan was able to distinguish *Braunfeld* by holding that South Carolina did have an alternative method by which to accomplish its goal, while in *Braunfeld*, the Court held that there were no such alternatives. *Id.* at 408-09.

35. 406 U.S. 205 (1972). Yoder was convicted of violating the state's compulsory attendance law, even though at trial Yoder testified that high school attendance by his children was contrary to the Amish religion and way of life. *Id.* at 209.

36. *Id.* at 236.

37. *Id.*; *see also* Thomas v. Review Bd., 450 U.S. 707 (1981) (holding Jehovah's Witness entitled to unemployment benefits though he quit his job after transfer to department manufacturing weapons); Wooley v. Maynard, 430 U.S. 705 (1977) (allowing Jehovah's Witness to cover state's motto of "Live Free or Die" on his license plate).

In 1982, with the advent of a more conservative Court, the pendulum began to swing in favor of the government and against the free exercise rights of the individual when the Court applied the compelling interest test.[38] In *United States v. Lee*,[39] the Court found that maintaining the integrity of the Social Security program was a compelling interest sufficient to limit the free exercise rights of an Amish employer.[40]

In 1986,[41] the Court held in *Bowen v. Roy*[42] that a Native American couple who had refused to provide a Social Security number for their daughter could be denied Aid to Families with Dependent Children.[43] The couple argued that "obtaining a Social Security number for their 2-year-old daughter, Little Bird of the Snow, would violate their Native American religious beliefs."[44] The Court disagreed, holding that a facially neutral law which is uniformly applied will be upheld if it is a "reasonable means of promoting a legitimate public interest."[45] In this instance, the "legitimate public interest" constituted the prevention of fraud that may occur without a Social Security number.[46] The Court relied upon the distinction that "[t]he Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's *internal procedures*."[47]

In 1988, the Court, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[48] expanded upon *Roy* by holding that the "First Amend-

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38. United States v. Lee, 455 U.S. 252 (1982). Arguably, the precursor to this swing can be found in Justice Rehnquist's dissenting opinion in *Thomas*, 450 U.S. at 720-27 (Rehnquist, J., dissenting).

39. 455 U.S. 252 (involving an Amish carpenter and farmer who was charged with refusing to file or pay Social Security taxes for his employees).

40. *Id.* at 257-59.

41. Also in 1986, the Court upheld an Air Force dress code which prevented an individual from wearing his yarmulke. Goldman v. Weinberger, 475 U.S. 503 (1986).

42. 476 U.S. 693 (1986).

43. *Id.* at 712.

44. *Id.* at 695.

45. *Id.* at 708. In Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987), Justice Brennan stated that five justices had rejected this argument.

46. *Bowen*, 476 U.S. at 709. Due to the unique nature of the welfare program which reached millions of people, the Court refused to require the Government to "justify enforcement of the use of Social Security number requirement as the least restrictive means of accomplishing a compelling state interest." *Id.* at 707.

47. *Id.* at 699 (emphasis added).

48. 485 U.S. 439 (1988). This case involved the question of "whether the First Amendment's Free Exercise Clause forbids the Government from permitting timber harvesting in, or constructing a road through, a portion of a National Forest that has traditionally been used for religious purposes by members of three American Indian tribes in northwestern California." *Id.* at 441-42.

ment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion."[49] The Court further stated that when the burden on an individual's free exercise rights is simply the incidental effect of a government program, the government is not required to show a compelling reason for its actions.[50]

In 1990, the Court continued its retreat from the Court's previous proclivity towards accommodation of an individual's religious practices.[51] In *Employment Division v. Smith*,[52] the Court upheld the denial of unemployment benefits to two members of the Native American Church who were fired from their jobs for violating an Oregon criminal law that prohibited the possession of peyote, even though the two members ingested the peyote during a religious ceremony.[53]

The Court expressly rejected the applicability of the *Sherbert* test, refusing to apply the strict scrutiny standard.[54] Rather, the Court stated that "'if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment benefits compensation to persons who engage in that conduct.'"[55] The Court justified its rejection of the compelling interest test by stating the following:

> [I]f "compelling interest" really means what it says . . . many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," . . . and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.[56]

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49. *Id.* at 452.

50. *Id.* at 450-51.

51. For an entertaining yet excellent analysis of this decision, see James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CALIF. L. REV. 91 (1991); *see also* Sarah A. Juster, *Free Exercise—or the Lack Thereof?*, 24 CREIGHTON L. REV. 239 (1990).

52. 494 U.S. 872 (1990).

53. *Id.* at 874.

54. Rather, the Court limited the *Sherbert* test solely to unemployment compensation cases. *Id.* at 883.

55. *Id.* at 875 (quoting Employment Div. v. Smith, 485 U.S. 660, 670 (1988)).

56. *Id.* at 888 (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).

Furthermore, the Court distinguished cases which used the compelling interest test by stating that in cases where the Court has "held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action, [such cases did not involve] the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press."[57]

B. The Establishment Clause

> *In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity."*[58]
>
> *In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible.*[59]

The initial interpretation of the Establishment Clause allowed the government to support religion provided it did not discriminate against any different religions.[60] This interpretation prevailed until the middle of the twentieth century.[61] The modern trend, beginning with *Everson v. Board of Education*,[62] retreated from the initial interpretation (the "Story View"[63]).

In *Everson*, the Court upheld the State of New Jersey's provision of transportation for children attending parochial schools.[64] The Court found that because the State was providing such transportation to stu-

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57. *Id.* at 881.

58. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

59. Lynch v. Donnelly, 465 U.S. 668, 672 (1984).

60. Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815). This view was coined the "Story View" in light of Justice Story's opinion in the case.

61. Government involvement was found not to violate the Establishment Clause in a host of cases during those years. *See, e.g.*, Arver v. United States, 245 U.S. 366 (1918) (exemption of theology students from the draft); Bradfield v. Roberts, 175 U.S. 291 (1899) (Congressional appropriation to religious hospital).

62. 330 U.S. 1 (1947) (holding the Establishment Clause applicable to states under the Fourteenth Amendment).

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

64. 330 U.S. at 18.

dents of non-parochial schools, the extension of the same privilege to parochial students was required in order for all citizens to be treated equally "without regard to their religious belief."[65] Justice Black, writing for the majority, recognized that the Establishment Clause was not just for the protection of religions vis-a-vis each other, but also for the protection of non-religious individuals.[66] He stated that

> [t]he "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.[67]

Accordingly, the Establishment Clause was interpreted to mean that government was required to remain "neutral in its relations with groups of religious believers and non-believers."[68]

The first modern case to establish formal guidelines for Establishment Clause analysis was *Lemon v. Kurtzman*.[69] In *Lemon*, the Court struck down a Pennsylvania statute that provided for State reimbursement to non-public schools for the costs of textbooks, instructional materials, and teachers' salaries associated with the schools' secular programs.[70] The Court established a three-part test: "First, the statute

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65. *Id.* at 16.

66. *Id.*

67. *Id.* at 15-16. Relying upon the words and deeds of James Madison and Thomas Jefferson, the Court declared that the "First Amendment has erected a wall between church and state . . . [that] must be kept high and impregnable." *Id.* at 18.

There is debate regarding whether this is an accurate interpretation of Jefferson's viewpoint on church-state relations. It has been suggested that Jefferson "embraced a more accommodating view of church-state relations than the separationist model attributed to him in conventional judicial interpretations of his famous [B]ill [for Establishing Religious Freedom]." Daniel L. Dreisbach, *A New Perspective on Jefferson's Views on Church-State Relations: The Virginia Statute for Establishing Religious Freedom in its Legislative Context*, 35 AM. J. LEGAL HIST. 172, 177 (1991). Evidence in support of this contention consists of four companion bills to Jefferson's Bill Establishing Religious Freedom which also addressed religious concerns. *Id.* at 183-97; *see also* Daniel L. Dreisbach, *Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations*, 69 N.C. L. REV. 159 (1990).

68. *Everson*, 330 U.S. at 18.

69. 403 U.S. 602 (1971).

70. *Id.* at 609-11.

must have a secular legislative purpose;[71] second, its principal or primary effect must be one that neither advances nor inhibits religion;[72] finally, the statute must not foster 'an excessive government entanglement with religion.'"[73] In applying the test, the Court found that the statute violated the third prong because to ensure proper implementation would result in excessive entanglement between government and religion.[74]

In 1984, in *Lynch v. Donnelly*,[75] a creche case, the Court applied the second prong of the *Lemon* test in a very subjective fashion.[76] Although the creche was clearly symbolic of Christianity, the Court held that the Establishment Clause was not violated.[77] The Court said that any benefit, derived from the creche, to Christianity was remote and incidental.[78]

In 1989, in *County of Allegheny v. ACLU*,[79] another holiday display case,[80] the Court modified the *Lemon* test by adopting an en-

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71. "In applying the purpose test, it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'" Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984)) (O'Connor, J., concurring). Only if the legislature's action is "*entirely* motivated by a purpose to advance religion" will the first prong of the *Lemon* test be violated. *Id.* (emphasis added); *see also*, *Lynch*, 465 U.S. at 681 n.6 (test is not whether objective is "exclusively secular").

72. As discussed *infra*, the effects' prong has been recharacterized as an examination into whether the governmental practices "have the effect of communicating a message of government endorsement or disapproval of religion." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring); *see also* County of Allegheny v. ACLU, 492 U.S. 573, 591 (1989); School Dist. v. Ball, 473 U.S. 373, 389-90 (1985).

For the proposition that the "inhibits" part of the *Lemon* test is at odds with the purpose of the Establishment Clause, see Douglas A. Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COL. L. REV. 1373, 1381, 1384 (1981) ("Government support for religion is an element of every establishment claim[;]" allegations that the government inhibits religion should be raised as a free exercise claim).

73. *Lemon*, 403 U.S. at 612-13 (citations omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)); *see also* Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 393 (1990); Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 696 (1989); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 20 (1989); Aquilar v. Felton, 473 U.S. 402, 410 (1985).

74. *Lemon*, 403 U.S. at 613.

75. 465 U.S. 668 (1984). The City of Pawtucket included as part of its annual Christmas celebration "a life-sized display depicting the biblical description of the birth of Christ." *Id.* at 695.

76. In his dissenting opinion, Justice Brennan stated that the majority's application of the Lemon test was "relaxed" as well as regrettable. *Id.* at 713.

77. *Id.* at 683.

78. *Id.* The Court also determined that the city's ownership and use of the creche did not constitute excessive entanglement between government and religion. *Id.* at 685.

79. 492 U.S. 573 (1989).

80. Two holiday displays on county property were at issue. The first was a creche located on the grand staircase inside the county courthouse. *Id.* at 580. The second display contained an eighteen-foot menorah, a forty-five foot Christmas tree, and a sign entitled "Salute to Liberty." *Id.* at 573. All were located a block from the courthouse on governmental property. *Id.* at 581.

dorsement test which reformulated *Lemon*'s first two prongs.[81] The endorsement test requires that the practice or display in question must be viewed in its particular physical context in order to determine whether viewers will interpret the practice or display to be a governmental endorsement of religion.[82]

C. *Tension Between the Clauses*[83]

> *[T]he result is that there are many situations where legitimate claims under the Free Exercise Clause will run into head-on collision with the Court's insensitive and sterile construction of the Establishment Clause.*[84]
>
> *Although the relationship of the two Clauses has been the subject of much commentary, the "tension" is a fairly recent vintage, unknown at the time of the framing and adoption of the First Amendment.*[85]

Because the Court has shifted from the principle of strict separation[86] or neutrality to the principle of accommodation, some have argued that the Court has created an irrevocable conflict between the religion clauses.[87] Taken literally, the Establishment Clause pro-

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81. Justice O'Connor formulated this approach in her concurring opinion in *Lynch*, 465 U.S. at 687 ("I write separately to suggest a clarification of our Establishment Clause doctrine.").

82. 492 U.S. at 595.

83. This is not intended to be a thorough analysis of the tension between the religion clauses. Rather, it is intended to provide an overview of the various doctrines pertaining to the interrelationship of the clauses, to set the stage for the analysis of the religion clauses and historic preservation ordinances. For an in-depth discussion of the tension, see Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 23-24; *see also*, John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. L. REV. 363 (1991).

For the proposition that the tension between the clauses view is but one of seven ways to analyze the interrelationship between the religion clauses, see Michael W. McConnell, *You Can't Tell the Players in Church-State Disputes without a Scorecard*, 10 HARV. J.L. & PUB. POL'Y 27 (1987).

84. Sherbert v. Verner, 374 U.S. 398, 414 (1963) (Stewart, J., concurring).

85. Thomas v. Review Bd., 450 U.S. 707, 720-21 (1981) (Rehnquist, J., dissenting).

86. Advocates of strict separation maintain that the historical background and the language of the religion clauses mandate a strict separation of government and religion—the Jeffersonian concept of a "wall of separation between the church and state." Shahin Rezai, County of Allegheny v. ACLU: *Evolution of Chaos in Establishment Clause Analysis*, 40 AM. U.L. REV. 503, 506-25 (1990).

87. *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (Blackmun, J., concurring); *Thomas*, 450 U.S. at 720 (Rehnquist, J., dissenting); *Sherbert*, 374 U.S. at 414 (Stewart, J., concurring); *see also*, Steven R. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 82 n.25 (1990) ("[D]espite the Court's characterization of its religion clause jurisprudence as an attempt to balance the values of accommodation and separation, the decision to accommodate at all is a decision to reject separation.").

hibits a state from advancing religion in any way. Thus, accommodating religious practices is an unconstitutional elevation of religious beliefs over nonreligious beliefs. In other words, accommodation promotes religion.

This concept is best seen in the free exercise cases in which the Court has taken a state program which was religion neutral and required the state to accommodate an individual's religious practices. For example, the Court in *Sherbert v. Verner*[88] determined that South Carolina had to accommodate Mrs. Sherbert's religious practices by exempting her from its requirement that unemployment compensation would not be paid to workers who failed to accept suitable employment. The problem arises in that by exempting religious preferences but not secular preferences from the state unemployment compensation program's requirements, the Court provided a preference for religion over nonreligion and required society at large to bear the costs of Mrs. Sherbert's individual religious views. Such a result arguably violates the Establishment Clause.[89]

Although not as pervasive as in the Free Exercise Clause cases, the Court's willingness to lean towards accommodation has been similarly witnessed in the Establishment Clause cases.[90] For example, the Court has allowed states to provide financial aid to religious organizations as long as such aid was incidental.[91] The question in these cases is not whether such aid should be allowed at all, but rather, what degree of aid is permissible.

It is interesting to note that recently the Court has begun to resist applying the principle of accommodation in Free Exercise Clause cases to the detriment of individuals, while expanding its accommodating tendencies in Establishment Clause cases to the benefit of religious institutions. Perhaps this shift away from accommodating free exercise rights of individuals can best be explained as involving rights associated with newer and less established religions,[92] whereas the shift

88. 374 U.S. 398 (1963).

89. Especially, as a result of Employment Div. v. Smith, 494 U.S. 872 (1990), it is clear that the principle of accommodation is not absolute. How far the present Court intends to retreat from its prior broad accommodating nature remains to be seen.

90. In Lynch v. Donnelly, however, the Court stated that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions." 465 U.S. 668, 673 (1984).

91. *See* Bowen v. Kendrick, 487 U.S. 589 (1988) (grant funds); Mueller v. Allen, 463 U.S. 388 (1983) (tax credits); Meek v. Pittenger, 421 U.S. 349 (1975) (loan of textbooks); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (tax exemption); Everson v. Board of Educ., 330 U.S. 1 (1946) (transportation of students to religious schools).

92. *See* Employment Div. v. Smith, 494 U.S. 872 (1990); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Bowen v. Roy, 476 U.S. 693 (1986); United States v. Lee, 455 U.S. 252 (1982).

in favor of institutions has been for older and more traditional religions.[93]

As will be discussed in Part III, this tension also is found in the question of whether landmarks preservation ordinances can constitutionally be applied to property owned by religious organizations. If an exemption is provided, arguably an Establishment Clause issue is raised. If an exemption is not provided, arguably a Free Exercise Clause issue is raised, as well as an Establishment Clause issue over the possibility of excessive entanglement of the government and religious entity.

II. POLICE POWER, ZONING, AND THE RELIGION CLAUSES

> *A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.*[94]

One area of the law in which the drafters of the Free Exercise and Establishment Clauses never could have anticipated the Clauses' impact is zoning, because zoning is a relatively new concept, having only been around for approximately seventy years. In *Village of Euclid v. Ambler Realty Co.*,[95] the seminal zoning case, the Court upheld the use of zoning as an exercise of a municipality's police power—necessary to protect the health, safety, and welfare of the public.[96] The Court stated, however, that

> [t]he governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.[97]

The majority of courts that have been confronted with a free exercise challenge to the application of a zoning regulation or building

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93. *See* County of Allegheny v. ACLU, 992 U.S. 573 (1989); *Lynch*, 465 U.S. 668.

94. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

95. *See, e.g.*, City of Sumner v. First Baptist Church, 639 P.2d 1358 (Wash. 1982) (en banc) (refusing to allow city to close school operated in church's basement even in light of fire hazards and remanded case due to lack of prior efforts to accommodate church's needs); Westchester Reform Temple v. Brown, 239 N.E.2d 891, 894 (N.Y. 1968) (stating religious organization's need for expansion superseded town's setback requirements and side-yard restrictions since "religious . . . uses are, by their very nature, 'clearly in furtherance of the public morals and general welfare'") (quoting Diocese of Rochester v. Planning Bd., 136 N.E.2d 827, 836 (N.Y. 1956)).

96. *See also* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (providing that historical function of zoning is protection of public health and welfare).

97. Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928).

code requirement have ruled against the religious organization. For example, it is well established that a city or county reasonably may regulate the location of a church.[98] Similarly, compliance with building code requirements regarding fire hazards also has survived such challenges.[99] Of the courts holding otherwise, the religious organizations were explicitly accorded special status.[100]

The courts also have upheld, in principal, the exercise of police powers over free exercise challenges in condemnation cases for desegregation purposes[101] and urban renewal programs.[102] Due to the extent of interference, i.e. the destruction of the property, however, courts have required a compelling state interest and/or no alternative means available to fulfill that interest.[103]

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98. *See, e.g.*, Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir.) (denying zoning exception to build church to congregation, which entered into an option contract for property zoned for residential use.), *cert. denied*, 464 U.S. 815 (1983); Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983) (stating that property used as small synagogue in area zoned for single-family residential constituted zoning violation), *cert. denied*, 469 U.S. 827 (1984); Holy Spirit Ass'n for the Unification of World Christianity v. Town of New Castle, 480 F. Supp. 1212 (S.D.N.Y. 1979) (disallowing religious organization's attempt to build retreat on residentially zoned tract of land); Town v. State *ex rel.* Reno, 377 So. 2d 648, 652 (Fla. 1979) (using property as church violated City of Miami Beach's zoning ordinance), *appeal dismissed* and *cert. denied*, 449 U.S. 803 (1980); Pylant v. Orange County, 328 So. 2d 199 (Fla. 1976) (holding special exception requirement applicable to individual desiring to construct church); Miami Beach United Lutheran Church of the Epiphany v. City of Miami Beach, 82 So. 2d 880 (Fla. 1955) (en banc) (upholding city's exclusion of churches from single-family district); Minney v. City of Azusa, 330 P.2d 255 (Cal. 1958) (treating churches as any other property owners when zoning regulations are at issue), *appeal dismissed*, 359 U.S. 436 (1959).

99. Congregation Beth Yitzchok of Rockland, Inc. v. Town of Ramapo, 593 F. Supp. 655 (S.D.N.Y. 1984) (closing nursery school at synagogue due to failure to comply with town's fire and safety requirements).

100. *See, e.g.*, City of Sumner v. First Baptist Church, 639 P.2d 1358 (Wash. 1982) (en banc) (refusing to allow city to close school operated in church's basement even in light of fire hazards and remanded case due to lack of prior efforts to accommodate church's needs); Westchester Reform Temple v. Brown, 239 N.E.2d 891, 894 (N.Y. 1968) (stating religious organization's need for expansion superseded town's setback requirements and side-yard restrictions since "religious . . . uses are by their very nature, 'clearly in furtherance of the public morals and general welfare'") (quoting Diocese of Rochester v. Planning Bd., 136 N.E.2d 827, 836 (N.Y. 1956)).

101. Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 872 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989).

102. Pillar of Fire v. Denver Urban Renewal Auth., 509 P.2d 1250, 1253 (Col. 1973) (en banc). It should be noted that the court found particularly persuasive the allegation that the site and building were the birthplace of the Pillar of Fire, a church organized in 1901. *Id.* at 1254. Interestingly, on remand, the trial court found that the church property was neither the mother church nor the birthplace of the Pillar of Fire denomination. *Yonkers*, 858 F.2d at 869 n.4.

103. *See Yonkers*, 858 F.2d at 872 ("If accommodation between the competing interests of church and state is possible, then it ought to be pursued no matter how compelling the state interest might be."); *Pillar of Fire*, 509 P.2d at 1253. Although the *Yonkers* court held that "urban renewal is a substantial state interest that can justify taking property dedicated to religious uses," the court remanded this case for judicial determination of balancing of interests. *Yonkers*, 858 F.2d at 872.

Over the years, what constitutes a valid exercise of the police power has grown. With that growth, the scope of what is properly included within the definition of "general welfare" has concurrently expanded. Welfare is the "soft" component of the police power in that it can be used to address intangibles such as aesthetics and historic or landmarks preservation ordinances.

III. LANDMARKS PRESERVATION ORDINANCES[104]

Historic preservation is a subclass of aesthetics.[105] Aesthetics is primarily, if not entirely, a matter of the visual sense. The development of the law on aesthetics is basically the history of preservation, with preservation boasting aesthetics by the addition of nostalgia.

Preservation of historic or cultural sites has so vigorously permeated the national conscience that today Americans regard the concept as something that has been around for most of the nation's existence. In fact, the idea that landowners may be compelled to accept the community's opinion on what is necessary to preserve in order to foster a record of the nation's cultural heritage is a comparatively recent phenomenon.[106] The Pennsylvania Railroad Station was torn down in 1963, and a handful of architects and art historians marched in protest. Indeed, it was that act of anti-preservationism that led to the enactment of the New York City Landmarks Preservation Act in 1965.[107] The Eiffel Tower built for the Paris Exposition of 1889 was regarded by many critics as a monstrosity, while today it is the symbol of Paris. Additionally, in his book, *Icons and Aliens*,[108] Dean John Costonis pointed out the widespread criticism of the Golden Gate Bridge when it was built because it destroyed the majestic sweep of the entrance to

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104. For a more complete discussion, see AIDEN RATHKOPF & DAREN RATHKOPF, LAW OF ZONING AND PLANNING, ch. 15 (4th ed. 1990).

105. Many of the cases on historic districts use the term "aesthetic" and "historic" interchangeably. *See, e.g.*, A-S-P Assocs. v. City of Raleigh, 258 S.E. 2d 444 (N.C. 1979); Town of Deering *ex rel.* Bittenbender v. Tibbetts, 202 A.2d 232 (N.H. 1964); Opinion of the Justices to the Senate, 128 N.E. 2d 557, 566-67 (Mass. 1955).

106. The historic/landmarks preservation movement in the United States began in 1850 with the State of New York's acquisition of the Hasbrouck House, General Washington's Revolutionary War headquarters at Newburgh. Lutheran Church v. City of New York, 316 N.E.2d 305, 313 (N.Y. 1974) (Jasen, J., dissenting). One of the earliest preservation cases involved the condemnation of land by the federal government to establish the Gettysburg National Battlefield. United States v. Gettysburg Elec. Ry. Co., 60 U.S. 668 (1896) (creating national battlefield constituted valid public purpose).

For a history of "aesthetics," see NORMAN WILLIAMS, AMERICAN LAND PLANNING LAW, ch. 11 (2d ed. 1988).

107. NEW YORK CITY, N.Y., CODE § 534 (1985). Regulations governing New York City's Landmarks Preservation Commission are found in NEW YORK CITY, N.Y., ADMINISTRATIVE CODE, title 25, ch. 3 (1985).

108. JOHN COSTONIS, ICONS AND ALIENS (1989).

the San Francisco Bay.[109] Many "aliens" have been transformed into "icons" within the last few decades. For example, witness the designation of the art deco mishmash in Miami Beach into an historic district in the last few years.

A. Overview

The preservation movement is enjoying a triumph today because that is what neighborhoods or communities want.[110] The rub is, as Costonis points out, that in their enthusiasm for preservation, people have tried to transfer the museum to the courthouse,[111] and the law is hardly prepared to accept the gift.

Only as recently as the turn of the century, aesthetics had no place in the law—it was a matter of taste which was outside the police power,[112] and even outside the large umbrella of "general welfare." Attempts to ban billboards were struck down and later such regulations were accepted because—so the fiction went—billboards hid lurking highwaymen or furtive fornicators.[113]

Later, billboard regulation was accepted if there was some other justification, such as economic benefit, that could be marshalled in its support.[114] Finally, it was in 1963, in the case of *People v. Stover*,[115]

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109. "When completed in 1937, the Golden Gate Bridge was castigated by one critic as an 'eye-sore to those now living and a betrayal of future generations . . . .'" *Id.* on front page (unnumbered).

110. Advocates of historic preservation contend that the nationwide effort is a result of two concerns:

> The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today.

Penn Central Trans. Co. v. City of New York, 438 U.S. 104, 108 (1978) (footnotes omitted).

111. COSTONIS, *supra* note 108, at ch. 1.

112. *See, e.g.*, City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co., 62 A. 267 (N.J. 1905); Curran Bill Posting & Distrib. Co. v. City of Denver, 107 P. 261 (Colo. 1910).

113. Thomas Cusack Co. v. City of Chicago, 108 N.E. 340 (Ill. 1914), *aff'd*, 242 U.S. 526 (1917).

114. "Beauty may not be queen, but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality, or decency." Perlmutter v. Greene, 182 N.E. 5, 6 (N.Y. 1932); *see also*, City of Miami Beach v. Ocean & Inland Co., 3 So. 2d 364 (Fla. 1941); Murphy Inc. v. Town of Westport, 40 A.2d 177 (Conn. 1944).

115. 191 N.E.2d 272 (N.Y.), *appeal dismissed*, 375 U.S. 42 (1963) (affirming convictions of defendants for violating ordinance prohibiting maintenance of clotheslines in front or side yards abutted by a street).

that the New York Court of Appeals held it was legitimate to regulate conduct "which is unnecessarily offensive to the visual sensibilities of the average person."[116] The law thus made the social tastes of the neighborhood or the community the rule in the courthouse.

Unfortunately, such judgments are not the same as the standards set from medical science on clean water, or the advice received from engineers that lead to regulations concerning sewage disposal or prevention of fire hazards, or the warnings given by traffic experts on hazards on boulevards. That is why historic preservation is described as a "soft" police power in contrast to such "hard" measures as clean water, sewage, fire, and traffic.

In the case of landmarks, the efforts to sustain regulation face particular difficulties. Unlike historic districts which may embrace several blocks of buildings, the landmark stands alone. It does not have what Justice Holmes described as the advantage of an "average reciprocity of advantage";[117] if one house is prohibited from being painted chartreuse, the same house is benefitted by similar sanctions against other homes in the district. By contrast, the landmark is usually a single building often surrounded by highrises, such as Grand Central Station, that are subject only to the zoning regulations and unhindered by the landmark designation. This, as the dissent in *Penn Central Transportation Co. v. New York City*[118] pointed out, places the entire burden on a single owner. Of course, the same consequences face St. Bartholomew's and the First Covenant Church of Seattle. For these reasons, the preservation mavens must acknowledge that they stand on a far weaker footing when they invoke cultural values in their conflict with the freedom of religion clauses of the First Amendment.

B. New York City's Landmark Preservation Law

Enacted in 1965, New York City's Landmarks Preservation Law (Landmarks Law) is typical of such ordinances currently in force across the country.[119] A Landmarks Preservation Commission, con-

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116. *Id.* at 276.

117. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

118. 438 U.S. 104, 139 (1978).

119. NEW YORK CITY, N.Y., CODE § 534 (1985). Since 1850, legislation at the state and municipal levels, *see* ARDEN RATHKOPF & DARIN RATHKOPF, LAW OF ZONING AND PLANNING § 15.02 n.22 (4th ed. 1990), as well as at the federal level, *see, e.g.*, National Historic Preservation Act, 16 U.S.C. §§ 470 to 470w-6; National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 to 4361, has been enacted in furtherance of the goals of landmarks preservation.

There have been recent cases, however, which have struck down the application of such legislation on an as applied basis. *See* Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990) (designating *interior* of church as landmark violated article 2 of Massachusetts

sisting of eleven Commissioners[120] and a full-time staff,[121] is responsible for identifying and designating the City's landmarks. Landmarks include properties,[122] buildings,[123] interior spaces,[124] and landscape features.[125]

Any improvement or landscape feature thirty years or older "which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation" may be designated as a landmark.[126] In New York City, out of approximately 850,000 building lots, the Landmarks Preservation Commission has designated more than 79 interior landmarks, 9 scenic landmarks, 850 individual landmarks, and 52 historic districts containing more than 15,000 properties.[127]

Additionally, an area that has a special character or a special aesthetic or historical interest may be designated as an historic district.[128] Each historic district represents one or more styles or periods of architecture typical of at least one era of the City's history. The size of such districts ranges from small groups of buildings[129] to areas containing several streets.[130]

Declaration of Rights); United Artists Theater Circuit, Inc. v. City of Philadelphia, 595 A.2d 6 (Pa. 1991) (designating theater building constituted a taking in violation of article 1, section 10, of the PENNSYLVANIA CONSTITUTION); *see also Have Public Regulators Gone Too Far?*, LAND LINES (Lincoln Institute of Land Policy), Nov. 1991 (There is a "general swing in favor of private property rights at the expense of public regulation.").

120. Pursuant to the Landmarks Law, the Commissioners are appointed by the Mayor and must include at least three architects, one city planner or landscape architect, one historian, and one realtor. NEW YORK CITY, N.Y., CODE § 534(2)(a) (1985). Only the Chair is a paid full-time position. *Id.* § 534(3).

121. *Id.* § 534(5). In addition to administrative, legal, and clerical personnel, the staff includes archaeologists, architects, planners, architectural historians, and restoration specialists. LANDMARKS PRESERVATION COMMISSION, WHAT IS THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION? (1990) (copy on file with author).

122. Old West Farms Soldiers' Cemetery "dates back to 1815, and serves as the last resting place of veterans of four wars, from the War of 1812 through World War I." LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, A GUIDE TO NEW YORK CITY LANDMARKS 57 (1979).

123. The Grand Central Terminal is "admired the world over as *the* prototypical terminal." *Id.* at 26.

124. The Art Deco interior of the Radio City Music Hall "is one of the most impressive achievements of theater design in the country." *Id.* at 27.

125. Central Park "was the creation of Frederick Law Olmsted . . . and was the first large-scale public park in the nation." *Id.* at 43.

126. NEW YORK CITY, N.Y., ADMINISTRATIVE CODE § 25-302n, w [hereinafter CODE].

127. LANDMARKS PRESERVATION COMMISSION, WHAT IS THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION? (1990) (copy on file with author).

128. CODE, *supra* note 126, § 25-302h.

129. Sniffen Court Historic District is an "enclave of ten Romanesque Revival houses in a narrow alley" which were erected sometime around 1850-60. LANDMARKS PRESERVATION COM-

Once designation occurs, a property owner may not alter, restore, reconstruct, or demolish the building without receiving a permit from the Landmarks Commission.[131] However, ordinary maintenance and repairs are permitted.[132] Upon submission of a permit application, the Landmarks Commission reviews the proposal to determine what effect, if any, the proposed changes will have on the historical and architectural character of the building, and if applicable, the historic district.[133] A public hearing must be held during which time the applicant and the public may comment on any proposal which will affect significant protected architectural features and require a building permit.[134]

For owners who have been denied a permit, the New York Landmarks Law provides a hardship exception only if the owners prove their property is not capable of earning a reasonable return.[135] If a hardship is found, the Landmarks Commission is required to develop a plan which alleviates the hardship through such options as new construction, tax abatements, structural alterations, and sale of the property.[136] If the Commission can provide a reasonable return through tax abatements alone, the owner must accept the plan.[137] If the other options are necessary, however, the owner may reject the Landmarks Commission's plan and either the City of New York must initiate condemnation proceedings on the property or the Commission must allow the owner's proposal to proceed.[138]

C. Penn Central Transportation Co. v. City of New York

The concept of landmark preservation ordinances was approved by the United States Supreme Court in *Penn Central Transportation Co.*

MISSION OF THE CITY OF NEW YORK, A GUIDE TO NEW YORK CITY LANDMARKS 22-23 (1979) (copy on file with author).

130. The Greenwich Village Historic District contains "the largest and most heterogeneous [architecture] in the city [and] reflects the physical growth of this section of Manhattan for over 180 years." *Id.* at 11.

131. CODE, *supra* note 126, § 25-305. Additionally, regulations regarding the "repair, rehabilitation, restoration or replacement of windows in buildings that are designated landmarks or are [located] within designated historic districts" were adopted in 1990. NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, WINDOW GUIDELINES 2 (1990) (copy on file with author).

132. CODE, *supra* note 126, § 25-302r. In addition to the necessity of seeking a permit for alterations to the building, the Landmarks Ordinance imposes an affirmative duty on owners of such properties to maintain their buildings in good repair. *Id.* § 25-311. Violators are subject to fines and/or jail. *Id.* § 25-317.

133. *Id.* §§ 25-306 to 307.

134. *Id.* § 25-308.

135. *Id.* § 25-309. A reasonable return is defined as a financial return of six percent or more of the land and building's valuation. *Id.* § 25-302v.

136. *Id.* § 25-309.

137. *Id.*

138. *Id.*

v. New York City.[139] In *Penn Central*, the Supreme Court considered the validity of the application of New York City's Landmarks Preservation Law to the Grand Central Terminal.[140]

The Grand Central Terminal is one of New York City's most famous buildings. It was opened in 1913 and is a magnificent example of French beaux arts style.[141] In 1967, the Terminal was designated a landmark by the Landmarks Preservation Commission of the City of New York.[142] In 1968, the owner of the Terminal, Penn Central Transportation Co., proposed constructing either a fifty-five or a fifty-three story office building on the roof of the Terminal.[143] The Commission denied both applications.[144] The owner, alleging a taking, sued the City of New York.[145]

The Supreme Court stated that it had "recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city."[146] The Court further held that

> landmark laws are not like discriminatory, or "reverse spot," zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest whenever they might be found in the city.[147]

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139. 438 U.S. 104 (1978). In light of the following language from the opinion, however, it can be argued that *Penn Central* does not provide the blanket approval of landmark preservation ordinances which some commentators have suggested.

> [A]ppellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal. They also do not dispute that the restrictions imposed on its parcel are appropriate means of securing the purposes of the New York City law.

Id. at 129. Thus, the question of the validity of New York's landmarks preservation ordinance was conceded as the case was presented to the Supreme Court.

For a more detailed discussion of *Penn Central*, see RICHARD F. BABCOCK & CHARLES L. SIEMON, THE ZONING GAME REVISITED, ch. 4 (1985).

140. It should be noted that had *Penn Central* come before the current Supreme Court, the outcome might have been different. The case was a six to three decision with Justices Brennan, Marshall, White, Stewart, Powell, and Blackmun in the majority. Justices Rehnquist, Burger, and Stevens were in the minority.

141. *Penn Central*, 438 U.S. at 115.

142. *Id.*

143. *Id.* at 116.

144. *Id.* at 117.

145. *Id.* at 119.

146. *Id.* at 129.

147. *Id.* at 132 (citation and footnote omitted).

D. St. Bartholomew's Church v. City of New York[148]

Since 1835, St. Bartholomew's Church (Church), an Episcopal Church, has operated as a New York non-profit religious corporation.[149] The main house of worship was constructed beginning in 1917 pursuant to the design plans of architect Bertram G. Goodhue.[150] The Church building is described as "a notable example of a Venetian adaptation of the Byzantine style, built on a Latin cross plan."[151]

Adjacent to the Church building is a terraced, seven-story building known as the Community House.[152] The Community House was completed in 1928 by associates of Goodhue and complements the Church building in scale, decoration, and materials.[153] It contains a large theater, athletic facilities, including a gymnasium, squash court, pool, weight room, and locker rooms, and a sixty-student preschool, as well as several offices and meeting rooms for counseling and fellowship programs.[154]

In 1967, without objection from the Church, the New York City Landmarks Preservation Commission (Landmarks Commission) designated the Church building and the Community House as landmarks pursuant to the Landmarks Law.[155] As a result of this designation, the

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148. St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991). Actually, *St. Bartholomew's* is not the first case in which a Free Exercise Clause challenge was raised against a landmark designation. In Society for Ethical Culture v. Spatt, 415 N.E.2d 922, 926 (N.Y. 1980), the court summarily rejected such a claim in one paragraph, stating that "[a]lthough the Society is concededly entitled to First Amendment protection as a religious organization, this does not entitle it to immunity from reasonable government regulation when it acts in purely secular matters." The Society was contesting the restriction on its ability to develop its property to allow rental to nonreligious tenants. *Id.*; *see also* Church of St. Paul & St. Andrew v. Barwick, 496 N.E.2d 183, 190 (N.Y.), *cert. denied*, 479 U.S. 985 (1986) (stating that designation alone without submittal of proposed plans to Landmarks Commission does not violate Free Exercise Clause and dismissing case as not ripe).

149. *St. Bartholomew's*, 914 F.2d at 351. The current location of the Church is its third home. The move from the second location was necessitated by the fact that in 1914 the church was sinking into Manhattan. BRENT C. BROLIN, THE BATTLE OF ST. BART'S 22 (1988).

150. *St. Bartholomew's*, 914 F.2d at 351. Due to World War I, delivery of European marble was delayed and the Church did not open for services until October, 1918. BROLIN, *supra* note 149, at 23.

151. *St. Bartholomew's*, 914 F.2d at 351. Among the building's significant design features are its soaring octagonal dome, a polychromatic stone exterior, a large rose window, and a Romanesque porch. *Id.* The porch is composed of a high arched central portal flanked by two lower arched doorways and is supported by slender columns. *Id.* Finally, the doors are constructed of grandly decorated bronze and depict Biblical themes. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. CODE, *supra* note 126, § 25-305(a)(1). The New York City Landmarks Preservation Committee determined that "St. Bartholomew's Church and Community House have a special character, special historical and aesthetic interest and value as part of the development, heritage and cultural aspects of New York City." *St. Bartholomew's*, 914 F.2d at 351.

Church was prohibited from altering or demolishing either building without the approval of the Landmarks Commission.[156]

In December of 1983, the Church sought permission from the Landmarks Commission to replace the Community House with a fifty-nine story office tower.[157] The Landmarks Commission denied the request on the basis that the tower was an inappropriate alteration.[158] A year later, the Church sought permission again to alter the Community House, this time by proposing a forty-seven story tower.[159] The result was the same; the Landmarks Commission denied the Church's request.[160]

After these two requests were denied, the Church attempted to qualify for the hardship exception to the Landmarks Law.[161] Alleging that the Community House was inadequate for church purposes, the Church filed an application to build a forty-seven story tower.[162]

In late 1985 and early 1986, public hearings were conducted before the Landmarks Commission on the Church's application.[163] During these hearings, the Landmarks Commission gathered evidence regarding the Community House's adequacy for the Church's charitable programs, the cost and necessity of structural and mechanical repairs

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156. *Id.* As of April 1990, over 700 individual buildings have been designated as landmarks by the Landmarks Preservation Commission. Appellees' Opening Brief at 3, St. Bartholomew's Church v. City of New York, 728 F. Supp. 958 (S.D.N.Y. 1990) (Nos. 88-7751, 90-7101).

157. *St. Bartholomew's*, 914 F.2d at 351. The Church argued that the lower floors of this tower would provide needed space for various Church activities, while the upper floors would generate income necessary for the Church to carry out its mission and repair and rehabilitate its church building. Brief of Plaintiff-Appellant at 2-3, *St. Bartholomew's* (No. 90-7101).

158. *St. Bartholomew's*, 914 F.2d at 351.

159. *Id.*

160. *Id.*

161. *Id.* at 352. The Church estimated that the cost of the essential rehabilitation and repair work necessary for both buildings to function adequately and safely would exceed eleven million dollars. Brief of Plaintiff-Appellant at 6-7, *St. Bartholomew's*, (No. 90-7101). The Church contended that it did not have the financial resources to fund a major rehabilitation and repair program. *Id.*

162. *St. Bartholomew's*, 914 F.2d at 352.

163. *Id.* Among the several people who testified before the Landmarks Commission was the Right Reverend Paul Moore, Jr., Bishop of the Episcopal Diocese of New York. His testimony was typical of the tenor advanced by the Church's advocates.

> Would you deny us our right to practice our religion? Would you deny us the means to pick up as best we can the burden of the poor that the public sector has so shamelessly laid down? Would you prevent us from sheltering the homeless, feeding the young, caring for desperate children in the city which in these days has seemed to have lost its heart? . . . Denying a hardship petition . . . would be the denial of our right as Christians to carry out the heart of our mission.

Brief Amici Curiae of the New York State Interfaith Commission on Landmarking of Religious Property, the Roman Catholic Archdiocese of New York, and the Roman Catholic Diocese of Brooklyn, New York, in Support of Plaintiff's Trial Brief at 6 n.4, *St. Bartholomew's* (No. 86 Civ. 2828).

to the Church property, and the financial condition of the Church.[164]

After the public meetings were concluded, the Landmarks Commission convened in a number of Executive Sessions during which it accepted further submissions, took additional testimony and reports from its own pro bono consultants, and discussed the Church's application.[165] Finally, on February 24, 1986, the Landmarks Commission denied the Church's application, finding that the Church had failed to prove the necessary hardship to be entitled to the hardship exception.[166]

The Church accepted this denial as would any other disgruntled property owner; it sued. In its complaint, filed in federal court, the Church alleged the Landmarks Law, facially and as applied, violated the Establishment and Free Exercise Clauses by requiring an intrusive examination of the church's internal affairs in the hardship application process and by interfering with the practice of religion.[167]

Specifically, the Church contended the Landmarks Commission, by denying its application to erect the commercial office tower on its property, had impaired the ability of the Church to continue and expand the charitable and ministerial activities which are central to its religious mission.[168] The Church contended that its financial base had eroded to the point that its mission needed additional revenues.[169] A solution to its dilemma was the construction of an office tower which would provide additional space for some of the Church's programs, as well as providing the necessary revenues to support and expand its various community and ministerial activities.[170] The Church contended that by preventing it from fulfilling its mission to the fullest extent possible, the Landmarks Law unconstitutionally denied it the opportunity to carry out its religious mission.[171]

In response to the Church's motion for partial summary judgment on the issues of facial unconstitutionality, the district court rejected

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164. *St. Bartholomew's*, 914 F.2d at 352.

165. *Id.*

166. *Id.*

167. St. Bartholomew's Church v. City of New York, 728 F. Supp. 958, 962 (S.D.N.Y. 1990). In support of its allegations of interference, the Church contended that "by restricting a church's ability to use its property as it wishes in support of its religious or charitable mission, the landmark laws impermissibly burden the exercise of religious belief." *Id.* at 963.

Additionally, the Church alleged violations of the Equal Protection Clause, claiming that the Landmarks Law applies different standards to commercial and charitable institutions and constitutes a taking of property without just compensation. *Id.* at 962. The Church further alleged a variety of procedural due process violations and brought a pendent state law claim. *Id.*

168. *St. Bartholomew's*, 914 F.2d at 353.

169. *Id.*

170. *Id.* at 353-54.

171. *Id.* at 354.

the Church's claims, stating that the "designation of church buildings does not in and of itself violate the free exercise clause,"[172] and that "[the] doctrine [prohibiting excessive entanglement] has no applicability where, as here, the government must make an inquiry into the church finances for the limited purpose of determining the validity of a church's claim of financial hardship."[173]

The district court proceeded with a bench trial on the as applied claims of the Church and framed the issue as requiring the plaintiff to prove "that it can no longer carry out this [charitable] work in its existing facilities to sustain its free exercise claim."[174] By so doing, the court implicitly rejected the Church's contention that a free exercise violation had occurred because the Landmarks Law precluded the Church from expanding its charitable operations.

In answering this question, the court reviewed the record before the Landmarks Commission. It examined the adequacy of the space at the Community House, the methodology used by the Church's experts, the cost and type of repairs necessary for the Church building and the Community House, and the Church's financial condition.[175] Based upon this evidence, the court found that the plaintiff failed to prove by a preponderance of the evidence that it could no longer carry out its charitable purpose in its existing facilities.[176]

The Second Circuit Court of Appeals affirmed the district court's ruling on all counts.[177] Regarding the free exercise issue, the court stated that the "critical distinction is thus between a neutral, generally applicable law that happens to bear on religiously motivated action, and a regulation that restricts certain conduct because it is religiously oriented."[178] Finding the Landmarks Law to be neutral, the Second Circuit held there was no "evidence of an intent to discriminate against, or impinge on, religious belief in the designation of landmark sites," even though nearly fifteen percent of the landmarked sites are religious properties.[179]

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172. *St. Bartholomew's*, 728 F. Supp. at 963 (footnote omitted).

173. *Id.*

174. *Id.* at 966.

175. In apparent reliance upon *Penn Central*, the Court reviewed the value of the Church's air space rights. *Id.* at 974 n.33. The court cited this fifty-five million dollar value as an example of the Church's failure to fully explore revenue raising possibilities. *Id.*

176. The court determined the Church (1) failed to demonstrate that the Community House was insufficient to accommodate the various programs housed there; (2) exaggerated the cost of the necessary structural and mechanical repairs; and (3) failed to prove that it was unable to pay for the necessary renovations and repairs of its buildings. *Id.* at 972-74.

177. *St. Bartholomew's*, 914 F.2d at 354.

178. *Id.* (quoting Employment Div. v. Smith, 494 U.S. 872 (1990)).

179. *Id.*

Although the court acknowledged the Landmarks Law "drastically restricted the Church's ability to raise revenues to carry out its various charitable and ministerial programs[,]" the court held a neutral regulation which diminishes the income potential of a religious organization does not violate the Free Exercise Clause.[180] Furthermore, the court held that the Landmarks Law did not deny the Church the ability to practice its religion or coerce the nature of its activities.[181] Thus, the court held that no First Amendment violation had occurred because the Church had "failed to prove that it cannot continue its religious practice in its existing facilities."[182]

The Church filed a petition for writ of certiorari for review by the United States Supreme Court. On March 4, 1991, the Court denied the petition.[183]

E. First Covenant Church v. City of Seattle

The First Covenant Church (First Covenant) is a Washington nonprofit corporation.[184] First Covenant is a significant part of Seattle's Swedish heritage, having been first organized by Swedish immigrants as the Swedish Mission Church in 1889.[185] In 1910 and 1911, the present building was erected.[186] Architecturally, First Covenant is significant in that it is one of only three domed structures of its type remaining in Seattle.[187]

On October 15, 1980 the Seattle Landmarks Preservation Board (Landmarks Board) nominated First Covenant as a landmark.[188] Over

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180. *Id* at 355.

181. *Id.*

182. *Id.* at 355-56 (footnote omitted).

183. 111 S. Ct. 1103 (1991). Subsequent to the lawsuit, many members of the religious community have initiated a proposal to exempt churches, synagogues, and all other tax-exempt properties from the landmarks law. Letter from Municipal Art Society of New York at 1 (May 10, 1991) (letter on file with author).

184. First Covenant Church v. City of Seattle, 787 P.2d 1352, 1354 (Wash. 1990), *vacated*, 111 S. Ct. 1097 (1991).

185. Brief of Respondent at 3, *First Covenant* (No. 2317-7-1).

186. *Id.*

187. *Id.*

188. *Id.* The Seattle Landmarks Preservation Ordinance was enacted to, *inter alia*, "designate, preserve, protect, enhance and perpetuate those sites, improvements and objects which reflect significant elements of the City's cultural, aesthetic, social, economic, political, architectural, engineering, historic or other heritage." SEATTLE, WASH., CODE § 25.12.020(B) (1977).

The procedure for designating and protecting a landmark is as follows:

(1) A site, improvement or object is "nominated."

(2) The Landmarks Preservation Board (Board) approves the nomination for further designation proceedings, identifies the particular features to be preserved, and fixes a date for a public hearing. The Board may disapprove the nomination.

First Covenant's objection to the nomination, the Landmarks Board approved the designation after a public hearing held on January 7, 1981.[189] On April 22, 1981, the Landmarks Board recommended that the city council adopt controls to preserve First Covenant's exterior.[190] More than four years later, on September 17, 1985, the city council formally designated First Covenant a landmark and placed specific controls upon First Covenant's ability to alter the structure's exterior.[191]

First Covenant filed suit against the City of Seattle and sought a declaratory judgment that: (1) the application of the Seattle Landmarks Preservation Ordinance to churches was unconstitutional, and (2) the ordinance as applied to First Covenant was void.[192] Even though First Covenant never requested permission to alter its church,[193] First Covenant argued that several impacts occurred immediately upon the Landmarks Board's designation of First Covenant as a landmark including the following: (1) interference with its freedom to alter the church structure's exterior; (2) mandatory secular approval of any proposed facade alteration; (3) a limitation on First Covenant's ability to sell its property; and (4) a depreciation in the property's market value from $700,000 to $400,000.[194]

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(3) After the hearing, if the Board is convinced that the site, improvement or object should be preserved, it is "designated" as a landmark.

(4) The Board staff seeks to negotiate "controls" on the site, improvement or object to preserve the identified features. If agreement is not possible or an agreement is not approved by the Board, the Hearing Examiner is asked to recommend controls. No controls shall be recommended which would deprive an owner of a reasonable economic return on the site, improvement or object.

(5) The City Council adopts an ordinance which acknowledges the designation of the landmark by the Board and imposes controls upon the features to be preserved.

6) A certificate of approval from the Board must be obtained before any alterations or significant changes are made to the protected features.

Brief of Respondent at 2-3, First Covenant Church v. City of Seattle, filed June 27, 1989 (No. 2317-7-1), (quoting DEPARTMENT OF COMMUNITY DEVELOPMENT, HISTORIC PRESERVATION IN SEATTLE: A GUIDE TO INCENTIVES AND PROCEDURES, DEPARTMENT OF COMMUNITY DEVELOPMENT (1988) (citations omitted)).

189. *First Covenant*, 787 P.2d at 1354.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 1355. First Covenant never invoked the review process nor attempted to qualify for either the economic hardship or free exercise exceptions. Motion for Reconsideration at 6-7, First Covenant Church v. City of Seattle, 787 P.2d 1352 (Wash. 1990) (No. 56377-2).

194. *First Covenant*, 787 P.2d at 1355. In its brief filed with the Court of Appeals, Division I of the State of Washington, First Covenant alleged that the following impacts occurred immediately:

1. Before the landmark designation, the church could raze the building or do anything it desired with the exterior of the building, subject only to valid zoning and

In response, the City of Seattle contended that without the submission of an alteration proposal by First Covenant, First Covenant's claim was speculative and premature.[195]

On a motion for summary judgment, the trial court ruled the Seattle Landmarks Preservation Ordinance (Landmarks Ordinance) properly applied to churches.[196] Furthermore, the trial court held that until the City of Seattle applied the Landmarks Ordinance in a manner that unconstitutionally interfered with First Covenant's operation of its religious property, First Covenant's as applied claim was premature.[197] Consequently, the court dismissed First Covenant's complaint in its entirety with prejudice.[198] First Covenant appealed and the Court of Appeals certified the appeal to the Supreme Court of Washington.[199]

Framing the issue as "whether the law should prefer religious freedom or an exercise of the police power to maintain the architectural and cultural interests associated with landmark preservation[,]" the Supreme Court of Washington reversed the trial court.[200] After reviewing precedent from the United States Supreme Court over the last 110 years, the court stated that "[t]he practical effect of the provisions [of the Seattle Landmarks Preservation Ordinance] is to require a religious organization to seek secular approval of matters potentially affecting the Church's practice of its religion."[201]

Although the Landmarks Ordinance contained a liturgy exception, such an exception failed to save the application of the ordinance to

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building code regulations common to all. After designation freedom was encumbered with a policy of "preservation."

2. A new additional level of bureaucratic control was imposed on the Church's activity.

3. All church planning for church purposes became subject to approval for architectural or aesthetic reasons.

4. The uncertainty of discretionary approval continuously faces the church in its planning for exterior change.

5. Any proposed changes to the exterior require new and additional paperwork, negotiations, hearings and delays.

6. Before the designation, the Church could sell the building for any purposes [sic], but the designation and controls have severely limited potential buyers and purposes for which a buyer could use the property.

7. Most importantly, the immediate effect of the Designating Ordinance was to depreciate the market value of the property from $700,000 to $400,000.

Brief of Appellant at 15-16, *First Covenant* (No. 23217-7-1).

195. *First Covenant*, 787 P.2d at 1355; Brief of Respondent at 13, *First Covenant* (No. 23217-7-1).

196. *First Covenant*, 787 P.2d at 1354.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 1356.

201. *Id.* at 1359.

churches.[202] The court stated that "the liturgy exception constitutes a vague and unworkable criterion that fails to accommodate the constitutional rights of the Church and infringes on the Church membership's ability to freely practice its religion."[203] The court further stated that even if the liturgy exception represented an appropriate criterion, the ordinance's requirements still would violate First Covenant's right of free exercise since First Covenant would have to submit its plans for alterations to the Board and negotiate possible alternatives.[204] The court determined that this requirement constituted an "unjustified governmental interference in religious matters of the Church and thereby creates an infringement on the Church's constitutional right of free exercise."[205]

Finally, the court recognized that the Landmarks Ordinance constituted a valid use of the police power.[206] The court, however, stated that although such ordinances are used to maintain the cultural and aesthetic features of a community, they "do not represent efforts by the government to further its interest in the health and safety of its citizens."[207] Accordingly, this exercise of a "soft" police power does not provide a compelling state interest necessary to sustain a substantial infringement of a first amendment right. In conclusion, the court held that

> [b]alancing the right of free exercise with the aesthetic and community values associated with landmark preservation, we find

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202. *Id.* at 1360.

203. *Id.* Section 2 of the Seattle Landmarks Preservation Ordinance imposes the following controls upon the alteration of a landmark:

> A Certificate of Approval must be obtained or the time for denying a Certificate of Approval must have expired before the owner may make any alteration which requires a building permit, to any portion of the exterior of the building; Provided, that all in kind maintenance and repair of the exterior and any alterations which do not require a building permit shall be excluded from the Certificate of Approval requirements; and Provided further that *nothing herein shall prevent any alteration of the exterior when such alterations are necessitated by changes in liturgy*, it being understood that the owner is the exclusive authority on liturgy and is the decisive party in determining what architectural changes are appropriate to the liturgy. *When alterations necessitated by changes in liturgy are proposed, the owner shall advise the Landmarks Preservation Board in writing of the nature of the proposed alterations and, the Board shall issue a Certificate of Approval. Prior to the issuance of any Certificate, however, the Board and owner shall jointly explore such possible alternative design solutions as may be appropriate or necessary to preserve the designated features of the landmark.*

Id. at 1360 (quoting SEATTLE, WASH., ORDINANCE 112425 (1985)).

204. *First Covenant*, 787 P.2d at 1360.

205. *Id.*

206. *Id.* at 1361.

207. *Id.*

> that the latter is clearly outweighed by the constitutional protection of free exercise of religion and the public benefits associated with the practice of religious worship within the community.[208]

The City filed a petition for writ of certiorari for review by the United States Supreme Court. On March 4, 1991, the Court granted the petition for writ of certiorari and vacated and remanded the case for further consideration in light of *Employment Division v. Smith*.[209] As of June, 1992, the case is still pending in the Washington courts.

IV. Analysis: Landmarks Preservation Ordinances and Religious Properties

As with most difficult constitutional issues, there are no easy answers to the questions which arise when landmarks preservation ordinances are applied to religious properties. Providing an exemption for religious organizations may be construed as violative of the Establishment Clause because it lessens the burdens of the religious organizations, whereas non-religious entities are forced to comply fully with the landmarks preservation ordinance. Not providing such an exemption, however, also may be construed as violating the Free Exercise Clause because the costs of complying with such ordinances may interfere with the organization's ability to fulfill its mission to the fullest extent possible. Furthermore, it is possible that some types of exemptions may be considered to create excessive entanglement due to the examination of the religious organization's finances by secular officials. Therefore, not only does this issue present what appears to be a dichotomy, but there is the further possibility of a dichotomy within the dichotomy. Each of these possibilities and their ramifications is explored below.

A. The Free Exercise Clause

Before an analysis of each of the possible Free Exercise Clause violations is undertaken, it is necessary to create an analytical framework within which to address the issue. In light of *United States v. Ballard*,[210] it is clear this analysis cannot begin with an inquiry into the legitimacy of a person's religion. Any claim that a set of beliefs is a religion should be sufficient. Who are we to determine which beliefs

208. *Id.*
209. 494 U.S. 872 (1991).
210. 322 U.S. 78 (1944).

should not be provided the status of religion?[211] Simply recall *Cantwell's* instruction that

> [t]he tenets of one man may seem the rankest error to his neighbor. . . . But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.[212]

Accordingly, the first question in the analysis is not what should be considered a religion but simply whether the individual has presented a prima facie case of belief in and/or practice of that religion.[213] As long as the individual meets the prima facie burden that a religion is implicated, the burden should shift to the government to show that the ordinance was enacted for a purely secular purpose. If the government fulfills its burden, a balancing test must be conducted in which the significance of the government's interest is weighed against the interference with the religious organization's activities.[214]

Inherent in such a balancing test is an acknowledgement that, just as is the case with free speech, the constitutional requirement of separation of church and state is not and should not be considered absolute. Religious organizations do not operate in a vacuum, they are part of society. To exempt religious entities from all governmental regulation would go farther than separating the two. Rather, it would elevate religion over government, because except in limited circumstances, the government itself must conduct its affairs in accordance with such regulations.

This balancing test has been used in the three situations in which the Free Exercise Clause analysis must be conducted.[215] The first relates to

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211. Just because the beliefs of a group do not contain the practice of symbolic cannibalism does not mean that their beliefs should not qualify for the title of religion. *See, e.g., John* 6:52-53 (discussing the "Body of Christ").

212. Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

213. This test applies to religious organizations as well.

214. While it seems that all tough constitutional questions resort to a balancing test, there is a valid and rational explanation for such an approach. If a black letter rule was created which would provide an answer for every problem, anybody simply could apply the rule and determine the correct result. Such a rule would negate the need for attorneys, and because the authors, as well as the majority of individuals who are reading this article, are lawyers, it does not take a rocket scientist to see why a balancing test is deemed absolutely necessary.

215. Of course, this balancing test should not be applied in those cases in which the religious organization acquires property which already has been designated as a landmark. Concerns of interference should have been addressed when the religious organization knowingly acquired property encumbered with a landmarks designation.

a religious organization's claim that by failing to allow it to develop its property to the maximum extent possible, the entity is precluded from fully pursuing its missionary work. Religious organizations, such as St. Bartholomew's Church, which are prevented from using their property for office towers which would obviously provide a greater return on investment are denied the opportunity to feed and house additional needy individuals in the community.

A second situation arises when the actual existence of the religious organization is at risk. In other words, due to fiscal difficulties, the organization is no longer able to exist without utilizing a portion of its property for different revenue-raising purposes. The corollary to this situation is that although the organization's existence is not at stake, it is unable to maintain the property as required by the landmarks preservation ordinance.

A third situation arises when the landmark designation actually interferes with the practice of religious beliefs. This seems to be the least likely of the three. It may occur, however, if the interior of the religious property is designated as a landmark.

1. Interference with Economic Development

Under the current construction of the Free Exercise Clause by the United States Supreme Court,[216] it appears the application of a landmarks preservation ordinance in the first situation would not violate the Free Exercise Clause. This construction was especially confirmed by the *Smith* rationale.[217] It is well-established that secular laws which do not prevent or prohibit individuals or organizations from practicing their religion, even if such laws do impose some economic hardships, will sustain a Free Exercise challenge.[218]

In the broad sense, the inability to maximize profits is undoubtedly an economic hardship to a religious organization, or any organization for that matter. Denying the religious organization such revenues certainly does interfere with the organization's desire to conduct its religious mission to the fullest extent possible, whether that mission helps the community's poor, or simply adds to the religious entity's coffers. Such interference, however, does not prohibit or prevent the religious organization from continuing in its present state; it prevents expansion.

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216. *See supra* text and accompanying notes 15-19.

217. Employment Div. v. Smith, 494 U.S. 872 (1990).

218. *See* Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Mkt., 366 U.S. 617 (1961).

Although some commentators have attempted to justify such interference by defining the church's revenue-raising activities as secular rather than religious, such a distinction is inappropriate.[219] While the activity may be secular, i.e. constructing an office tower or apartment building,[220] the purpose to which those funds are to be applied definitely furthers the religious organization's religious goals. Somewhere along the attenuation, the secular activities become religious activities. Taken to its logical extreme, however, the view that all of a religious organization's activities are inherently religious and, therefore, exempted from governmental interference or regulation means no activities of a religious organization could be regulated. A religious organization would be free to destroy wetlands, ignore safety and zoning regulations, or even conduct human sacrifices. This is not what is intended by the separation of church and state because it would be elevating religion over government.

Religious organizations do not operate in a vacuum, even under the principle of separation of church and state. Accordingly, rather than creating some sort of fictitious distinction in an effort to determine which of a church's activities are religious and which are secular, the courts should acknowledge a reciprocity of advantages.[221] Laws of purely secular intent, such as landmarks designation ordinances, wetlands protection regulations, and zoning requirements, should apply fully to religious organizations when the only detriment to such organizations is that they are prevented from maximizing their profits. Such laws are part and parcel of the society within which the religious organizations operate and from which they receive the benefits of society. Therefore, under this proposed analysis, the Free Exercise Clause is not violated in this situation.

2. *Interference with Actual Practice*

The other extreme is the situation in which the landmarks designation itself actually interferes with the religious practice of the organization. The best known example occurred in Boston. Over objection of the religious organization, the interior of its church was designated

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219. David Godshell, *Land Use Regulation and the Free Exercise Clause*, 16 LAND USE & ENV'T L. REV. 173, 178 (1985); Note, *Applying Historic Preservation Ordinances to Church Property: Protecting the Past and Preserving the Constitution*, 63 N.C. L. REV. 404, 409-12 (1985).

220. What if the religious organization proposes to construct the apartment building for housing for indigents? That is the difficulty with attempting to pigeon-hole the activity as either secular or religious.

221. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

as a landmark.[222] Because of the designation, the religious organization was not able to rearrange the interior of its church, including the location of its altar.[223]

It takes no stretch of imagination to realize the extent of the governmental interference to the practice of a religion that occurs when a religious organization is prohibited from physically arranging the interior of its own property in the manner it desires. Such a prohibition interferes with conduct that is central to the practice of the religious organization. In light of the previous argument that landmarks preservation is a soft police power,[224] in this situation the government's interest is much weaker than that of the religious organization. Therefore, under this proposed analysis, such interference unquestionably violates the Free Exercise Clause.[225]

3. Interference with the Survival of the Religious Entity

A far tougher question arises in the situation in which the religious entity is experiencing extreme financial difficulties. Imposition of the burdens of a landmarks preservation ordinance may be the fiscal straw which breaks the organization's back. The organization may need to generate revenue through an alternative land use or face closing its doors. In this situation, application of purely neutral, generally applicable laws could result in the religious organization's demise.

Until the *Smith*[226] decision, this issue could be subject to varying answers based upon one's interpretation of the Free Exercise Clause. *Smith* apparently provides the current answer. "[A] neutral, generally applicable law" which causes a religious organization to close its doors permanently would survive a Free Exercise Clause challenge because such a result would not involve "the Free Exercise Clause in conjunction with other constitutional protections, such as the freedom of speech and of the press."[227] In this situation, pursuant to the dictates of *Smith*, the balancing test would be resolved in favor of the government.

B. Establishment Clause

There are two possible Establishment Clause violations which may occur as a result of landmarks preservation ordinances: establishment

222. Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990).

223. *See supra* note 109 and accompanying text.

224. *See supra* text and accompanying notes 112-116.

225. The result may be different if a hard police power concern, such as fire safety requirements, was implicated and the issue did not involve the location of an altar but a cap on the total number of people allowed in the building at any one time.

226. Employment Div. v. Smith, 494 U.S. 872 (1990).

227. *Id.* at 1601.

of religion and excessive entanglement. If religious organizations are provided with a complete exemption from the landmarks preservation ordinance, an establishment of religion violation arguably may occur because such an exemption reduces the fiscal obligations of religious organizations solely due to their religious status. If a religious organization, however, is not provided with a complete exemption, an excessive entanglement violation arguably may occur because of the secular interference with the religious organization's use of its property which occurs once the property is designated as a landmark. Furthermore, if the only exemption available for a religious organization is fiscal hardship, an excessive entanglement violation may arguably occur because of the secular review of the religious organization's fiscal operations which occurs during an application for hardship exemption. Each of these possibilities is discussed below.

1. Establishment of Religion—Lemon*'s First Two Prongs*

Under the current construction of the Establishment Clause by the United States Supreme Court, a landmarks preservation ordinance which provides a complete exemption for religious property may unconstitutionally establish religion because it is unlikely that each of the first two prongs of the *Lemon* test could be met.[228] First, while the landmarks preservation ordinance itself would have a secular legislative purpose, a complete exemption for religious organizations provided solely due to their religious status would not.[229] Second, although the landmarks preservation ordinance itself would not have as its primary or principal effect the advancement of religion, a complete exemption only for religious organizations would advance religion because religious organizations would not have to incur expenses that non-religious organizations with landmarks property would incur.[230] Therefore, a complete exemption for religious organizations

228. Lemon v. Kurtzman, 403 U.S. 602 (1091). *See supra* text and accompanying notes 69-73. Although given the Supreme Court's recent proclivity towards accommodation in Establishment Clause cases, such a conclusion may be altered in the near future. *See supra* part I(C).

229. Although the Supreme Court upheld tax exemptions in Walz v. Tax Comm'n, 397 U.S. 664 (1970), such exemptions were not solely for religious organizations; rather they were part of a broad range of exemptions for properties owned by "nonprofit, quasi-public corporations which include[d] hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." *Id.* at 673.

For an excellent review of the historical practice of tax exemptions for religious property, see John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. L. REV. 363 (1991).

230. It should be noted that although the burdens of religious and non-religious organizations would differ, there would be no transfer of costs to the non-religious organizations as was the case in Sherbert v. Verner, 374 U.S. 398 (1963). *See supra* part I(A).

only arguably would violate the first and second prongs of the *Lemon* test.

2. *Excessive Entanglement—No Exemption*

A claim of excessive entanglement may arise if no exemption is provided. This is due to the continuing obligation of the religious organization to comply with the requirements of the landmarks preservation ordinance. In light of *Jimmy Swaggart Ministries v. Board of Equalization*,[231] however, such an attack no longer appears likely to succeed.

In *Swaggart*, the Court stated the test for determining excessive entanglement is whether there is an excessive involvement between the religious organization and the government *and* "'continuing surveillance leading to an impermissible degree of entanglement.'"[232] Finding that "the statutory scheme requires neither the involvement of state employees in, nor on-site continuing inspection of, appellant's day-to-day operations[,]"[233] the Court stated that the collection of sales and use taxes was not so invasive as to constitute excessive entanglement. This was true even though the scope of entanglement included "on-site inspections of appellant's evangelistic crusades, lengthy on-site audits, examinations of appellant's books and records, threats of criminal prosecution, and layers of administrative and judicial proceedings."[234]

The type of continuing obligations that are associated with landmarks preservation ordinances merely require that the religious organization maintain its property and file the appropriate applications if any alterations subject to the landmarks preservation ordinance are desired. These requirements are no more onerous than the usual zoning and building codes which, with a few exceptions, the courts have

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231. 493 U.S. 378 (1990).

232. *Id.* at 395 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970)).

233. *Id.*

234. *Id.* at 392. *See* Texas Monthly v. Bullock, 489 U.S. 1, 20 (1989) ("We have found that such compliance [with sales tax collection] would generally not impede the evangelical activities of religious groups and that the 'routine and factual inquiries' commonly associated with the enforcement of tax laws 'bear no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion.'") (quoting Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 305 (1985)); *Tony & Susan Alamo Found.*, 471 U.S. at 305-306 ("Routine regulatory interaction which involves no inquiries into religious doctrine, . . . no delegation of state power to a religious body and 'no detailed monitoring and close administrative contact' between secular and religious bodies, . . . does not violate the nonentanglement command."); *see also* Aguilar v. Felton, 473 U.S. 402, 412-14 (1985) (finding excessive entanglement existed because ongoing inspection was required with day-to-day relationship).

uniformly upheld and have not been found to constitute a continuing inspection of the religious organization's day-to-day activities.[235]

3. *Excessive Entanglement—Fiscal Hardship Exemption*

An Establishment Clause violation may also occur if the only exemption available to a religious organization is fiscal hardship. While *Lemon*'s first two prongs do not pose any difficulties to a uniformly available hardship exemption, the third prong prohibiting excessive entanglement arguably may be violated due to the secular examination of the religious organization's financial records.

In the case of hardship exemptions, while there is an examination of the religious organization's financial records by government officials, there simply is no continuing day-to-day surveillance of the organization's activities. Once the hardship review is completed and the exemption is provided, there is no further interaction between the Landmarks Preservation Commission and the religious organization. Additionally, the determination of qualification for the exemption does not remotely consider any of the doctrines of the religious organization. Therefore, in light of *Swaggart*, an excessive entanglement claim based on the fiscal hardship exemption also seems unlikely to prevail.

V. CONCLUSION

Having been enacted by municipalities in all fifty states, landmarks preservation ordinances are part of society's growing appreciation for its cultural past. Although based on a softer rationale than that of typical police powers, such ordinances routinely have withstood judicial review. An entirely separate set of legal issues arise, however, when these ordinances are applied to religious properties. The overwhelming importance of the religion clauses of the First Amendment requires a different analysis be conducted under these circumstances.

This article has shown that, in the vast majority of circumstances, governments may apply landmarks preservation ordinances to religious properties without running afoul of the religion clauses. The only mandatory exemption appears to be for the interior of religious properties because a landmark designation of the interior has the greatest likelihood of actually interfering with the practice of religion. The ex-

235. *See* Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) ("The Establishment Clause does not exempt religious organizations from secular governmental activity [such as] fire inspections and building and zoning regulations.").

emption, however, should be automatic only upon request by the religious organization. In other words, the ordinance should require that an application be made.[236] Furthermore, if the religious organization expresses such a desire during the landmarks nomination process, the interior should be dropped from consideration.

If a governmental body desires to provide a complete exemption for religious organizations due to political or economic reasons, such as to avoid potential litigation, it is clear that an exemption crafted for non-profit, quasi-public corporations such as hospitals, libraries, and scientific groups, as well as religious organizations, will withstand judicial review.[237] This approach would rely upon the "beneficial and stabilizing influences" that these organizations provide to the community as a whole.[238] Any attack on the incidental benefit received by religious organizations would most likely fail in light of the United States Supreme Court's recent proclivity for accommodation in Establishment Clause cases.[239] As was suggested for the interiors of religious property, the exemption should be available only upon request. This will allow such organizations to obtain a landmarks designation, if they so desire.

This approach offers a realistic balance between the interests of preserving landmarks and maintaining separation of church and state. Within these parameters, municipalities can apply landmarks preservation ordinances to property of religious organizations without violating either of the religion clauses of the First Amendment. Municipalities that apply landmarks preservation ordinances in this fashion will ensure that conduct central to the religious organization is not interfered with, while at the same time not elevating religion over government.

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236. An automatic exemption for interiors would preclude those religious organizations which desired to have their interiors designated as landmarks.

237. *See* Walz v. Tax Comm'n, 397 U.S. 644, 673 (1970). A municipality may be tempted simply to craft an exception for charitable organizations utilizing present definitions of what constitutes a charitable organization for taxation purposes. The inherent flaw in such an approach is that it would discriminate against those religions which do not consider charitable work to be a part of their religious mission.

238. *Id.* at 673.

239. The authors recognize that inherent in the suggested approach is that it forces a determination of what constitutes religious property. Without some definition of what qualifies, individuals or organizations which state that they have religious property would qualify for the exemption. Municipalities should be aware that any such definition must be carefully crafted so as not to be biased against newly established religions.