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Cover Page Footnote
The author wishes to thank Professor Donna Christie for her help in the development of this article and the initiation of the Environmental Crimes and Archaeological Resources course at the College of Law.
CITY OF BOERNE V. FLORES AND THE RELIGIOUS FREEDOM RESTORATION ACT: THE DELICATE BALANCE BETWEEN RELIGIOUS FREEDOM AND HISTORIC PRESERVATION

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Responsible preservation requires a balance between public and private interests . . . . This is a conflict between change and continuity, between progress toward the future and preservation of the past.1

I. INTRODUCTION

Since the birth of the country, freedom from religious persecution has been a fundamental value and is embodied in the First Amendment for the protection of all citizens' religious freedom.2 Citizens nationwide enjoy the free exercise of their religious values in churches, synagogues, and other religious organizations. Many of these religious congregations worship in historic buildings that bestow distinctive cultural and aesthetic value and special character to communities across the nation.3 Though the historic preservation movement is a fledgling in comparison to religious freedom, the movement has been exponentially gaining in strength over the past thirty years, as evidenced by new ordinances, federal statutes, and judicial protection to preserve America's architectural past.4 Earlier this year, the United States Supreme Court considered the unique conflict between religious freedom rights and historic preservation in City of Boerne v. Flores.5

Flores centers around Congress's 1993 enactment of the Religious Freedom Restoration Act (RFRA).6 RFRA affords additional protection to religious practices by subjecting neutral, non-religion based

2. See discussion infra Part II (describing the constitutional protections of religious freedom).
3. See discussion infra Part VI.B.2.
4. See discussion infra Part II.B.
government laws (such as preservation ordinances) to judicial scrutiny,7 usurping the Supreme Court’s previous judicial interpretation of the First Amendment.8 In Flores, the Court ruled on the constitutionality of RFRA, thereby affecting the ability of governments to protect religious historic structures and establishments.9 The Flores decision will have significant repercussions on American religion protection law and hopefully has clarified some of its ambiguities.10

Using the backdrop of Flores, this article analyzes the constitutionality and policy behind RFRA and examines RFRA’s effects on historic preservation. Part II reviews judicial protections afforded to religious freedom, summarizing relevant case law. Additionally, Part II recounts the growth of the historic preservation movement in the United States and examines judicial opinions resolving conflicts between religious freedom and historic preservation. Part III reviews RFRA and the decisions under RFRA relating to historic preservation. Part IV examines the two views regarding the constitutionality of RFRA, reviewing the separation of powers doctrine and Congress’s power to enact RFRA, and presents the Supreme Court’s view as enunciated in Flores. Part V projects the effects that the Court’s ruling of RFRA as unconstitutional will have on historic preservation and religious freedom. This is done by using the previous effects of RFRA’s compelling interest test as a measuring tool. Part VI analyzes the costs and benefits of RFRA and the reinstatement of the Smith test, with special consideration of the religious freedom benefits that the Court’s ruling may forfeit. Lastly, Part VII explores alternatives to the Smith standard that could achieve greater balance between religious freedom interests and historic preservation.

II. REVIEW OF THE CONFLICTS BETWEEN RELIGIOUS FREEDOM AND
HISTORIC PRESERVATION

The First Amendment of the United States Constitution prevents Congress from making a law “respecting an establishment of religion, or prohibiting the free exercise thereof.”11 This clause of the constitution provides the basis of religious protection in the United States, ensuring that American citizens’ religious practices are not

8. See discussion infra Part III.
9. See discussion infra Part V.
10. See discussion infra Part V.A. (reporting the vast outside interest in the Flores litigation and suggesting the expectancy of potentially broad effects of the case).
11. U.S. CONST. amend. I.
unnecessarily impeded by the government.\textsuperscript{12} While protecting religious freedom, the government also maintains an interest in preserving the country’s historical structures and monuments, as evidenced by the vast body of legislation enacted to protect historic resources.\textsuperscript{13} The conflict between the interests of religious freedom and historic preservation can emerge when the government moves to protect a historic structure owned by a religious establishment, such as a church or synagogue.\textsuperscript{14} This section provides background case law, defining the interests of religion and historic preservation necessary to fully understand the complex intertwining of religion and historic preservation.

A. Protection Afforded to Religious Freedom

In Sherbert v. Verner,\textsuperscript{15} the Supreme Court issued a Free Exercise Clause interpretation which emphasized that governmental regulation of religious beliefs would not be tolerated unless the regulation serves a compelling state interest within the state’s constitutional power to regulate.\textsuperscript{16} The Court described an interest sufficiently compelling enough to permissibly limit a citizen’s First Amendment rights to include “[o]nly the gravest abuses, endangering paramount interest.”\textsuperscript{17} Additionally, in proving the compelling nature of an interest, the Court required the state to prove that the regulation was the least restrictive means of meeting the state’s goal.\textsuperscript{18}

In Sherbert, the appellant, a woman seeking unemployment compensation, argued that her religious faith dictated that she not work on Saturday, the Sabbath Day for her faith. The South Carolina Unemployment Compensation Act provided that a claimant is

\begin{footnotes}
\textsuperscript{12} See Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 590-91 (1989) (finding that a “government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution’s affairs” (citations omitted)).
\textsuperscript{14} See discussion \textit{infra} Part II.C (providing examples of cases where free exercise of religion and historic preservation interests have collided).
\textsuperscript{15} 374 U.S. 398 (1963).
\textsuperscript{16} See \textit{id.} at 402-03 (affirming the standard set out in \textit{NAACP v. Button}, 371 U.S. 415 (1963)).
\textsuperscript{17} See \textit{id.} at 406 (no showing of a rational interest would suffice).
\textsuperscript{18} \textit{Id.} at 406 (quoting \textit{Thomas v. Collins}, 323 U.S. 516, 530 (1945)).
\textsuperscript{19} See \textit{id.} at 407-08.
\end{footnotes}
eligible for employment benefits only if available to work and willing to accept employment unless good cause is shown why an offer of employment was declined. The appellant refused to work on Saturdays, preventing her from obtaining employment. The Employment Security Commission found that the appellant's restricted availability disqualified her from receiving employment benefits. The Supreme Court found it unacceptable that the appellant was forced to choose between following the tenets of her religious faith or receiving unemployment benefits, stating that the governmental imposition burdened the appellant's free exercise of religion. The Court ruled that the appellant should not be denied unemployment benefits.

In Wisconsin v. Yoder, the Supreme Court applied the Sherbert standard to a challenge to the Wisconsin Supreme Court's ruling that the religious convictions of parents of Amish school children were invalid on First Amendment grounds. In Yoder, Amish parents refused to send their children to private or public secondary school, violating Wisconsin's laws requiring school attendance until age sixteen. The Supreme Court found that forced application of the Wisconsin law to those of the Amish faith would interfere with the "fundamental tenets" of their beliefs, precisely the effect that the First Amendment was fashioned to prevent. The Court affirmed the principle from Sherbert that a facially neutral regulation may unduly burden the free exercise of religion by its application. The Court rejected the state's argument that it had a compelling interest in administering uniform education to all Wisconsin children, noting that the Amish alternative to traditional schooling has allowed the Amish people to function effectively in their self-sufficient community for more than two hundred years. The Court held that the state could not require the Amish children to attend formal high school.

20. See id. at 400-01.
21. See id. at 404 (likening the appellant's burden to a fine imposed on her for worshiping on Saturdays).
22. See id. at 409-10.
24. See id. at 207.
25. Id. at 218.
26. See id. at 220 (failing to find the broad application of Wisconsin's school attendance statute to all citizens in Wisconsin to be dispositive evidence that free exercise of religion was not burdened).
27. See id. at 225-26. The Court also rejected a panoply of alternative arguments by the State, attempting to forward its interest in uniform education. See id.
28. See id. at 235-36.
Taken together, Sherbert and Yoder represent strong protections of the free exercise of religion, seemingly applying strict scrutiny to the state's interest for burdening religion. After these decisions, the Court continued to apply the Sherbert-Yoder compelling interest analysis though it became increasingly unwilling to recognize religion exceptions.\(^{29}\) Several state unemployment compensation rules were invalidated using the Sherbert-Yoder analysis when a claimant was denied unemployment benefits due to religion-related conditions.\(^{30}\) However, outside the employment benefits context, the once-strict scrutiny of the Sherbert-Yoder analysis eroded to a much more lenient standard where the state often prevailed.\(^{31}\) In more than one instance, the Court refrained from protecting religious interests in favor of rubber-stamping a government regulation, even where the regulation's underlying justification appeared to be less than compelling.\(^{32}\)

In 1990, the Supreme Court decided Employment Division, Department of Human Resources v. Smith\(^{33}\) and finally departed completely from the strict scrutiny approach articulated in Sherbert and Yoder. In Smith, the respondents were fired from their job at a private drug rehabilitation organization for ingesting an illegal drug, peyote, used for sacramental purposes in their religion. They ingested the peyote at a religious ceremony of the Native American Church.\(^{34}\) The respondents were denied unemployment benefits because they had been released due to work-related misconduct. The respondents sued the state, claiming that their free exercise rights under the First Amendment had been violated.\(^{35}\)

Justice Scalia delivered the Court's opinion, declaring that the state can impose a valid and neutral law regulating religious activities, provided the law applies to all citizens generally—regardless of

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31. See Bonds, supra note 29, at 595-96.

32. See, e.g., Bowen v. Roy, 476 U.S. 693 (1986) (finding that the government did not have to present a compelling justification for requiring an Indian child to be identified by a social security number even though the child's religious beliefs might be burdened); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (holding that the government did not have to show a compelling interest for timber harvesting and road construction on sacred Indian land, as the decision was a matter of internal governmental policy).


34. See id. at 874.

35. See id.
religion. The Court supported its finding by claiming that free exercise of religion has never exempted citizens from following general laws formulated by the government. Thus, the denial of unemployment benefits to the respondents was affirmed, and the Court expressly denied extending the Sherbert-Yoder analysis outside the unemployment compensation scenario. Though an employment benefits case, the Supreme Court recognized the law in Smith as a "generally applicable criminal law," and thus grouped the Smith decision in a different niche than pure employment benefits cases such as Sherbert and Yoder. Based on the criminal aspects of the Smith case, the majority did not apply the Sherbert-Yoder analysis, overlooking that Smith's basic controversy involved employment benefits.

Further, the majority compared the compelling interest requirement contained in the Sherbert-Yoder analysis to other areas of law that require a compelling interest examination. The Court stated that

The "compelling government interest" requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, or before the government may regulate the content of speech, is not remotely comparable to using it for the purpose asserted here. What it produces in the other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly.

In sum, the Supreme Court rejected the compelling interest Sherbert-Yoder analysis, limiting it to pure unemployment benefits scenarios and imposed an analysis based on the general applicability of a

36. See id. at 879-80.
37. See id. at 880 (citing United States v. Lee, 455 U.S. 252 (1982)). In Lee, an Amish employer was denied an exemption from collection and payment of Social Security taxes. The employer's argument that his religion opposed participation in government support programs was rejected by the Court. The Court remarked that if religious activities could lead to exemptions from broad laws of general applicability, then governmental systems would become too burdensome to properly function. For example, if an individual had a religious objection to fighting in a war, the country could not afford to provide exemptions to all persons claiming these beliefs. See Lee, 455 U.S. at 260.
38. The Court noted that the unemployment compensation program context is unique because eligibility criteria must be considered, allowing deliberation of an applicant's general characteristics. The Sherbert-Yoder analysis prevents religion from being the primary reason for benefits refusal, unless the state has a compelling reason. See Smith, 494 U.S. at 884.
39. Id. at 884. Criminal laws in Oregon, the site of the Smith controversy, prohibited the use of controlled substances, making usage of them a felony. See id. at 874.
40. See id. at 874.
41. Id. at 885-86 (citations omitted).
regulation or law. Under Smith, where a regulation is neutral and generally applicable to all citizens, without regard to religion, the regulation stands even if it incidentally burdens one’s religious beliefs. Thus, Smith represented the Supreme Court’s most current view on the strength of religious rights as opposed to government’s right to regulate prior to Flores.

B. Protection Afforded to Interests in Historic Preservation

The preservation movement began early in the United States as citizens realized the importance of protecting sites of particular significance to America’s heritage. In 1813, preservationists saved Independence Hall from demolition and in 1853 saved Mount Vernon from destruction. Though preservation has long been of interest to American citizens, both the federal government and courts have been slow to develop the legal processes to reflect these concerns. Legislation and judicial opinions reflecting historic preservation concerns are therefore a relatively new occurrence.

1. Federal Involvement

As national interest in preservation grew in the late Nineteenth century, the federal government also became more actively involved in the preservation movement, first acting to preserve the country’s natural features by establishing Yellowstone National Park and second appropriating money to protect Native American dwellings in the southwestern United States. Congress enacted the Antiquities Act in 1906, the first general federal legislation protecting

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42. See id. at 880-85.
43. See University of Eastern Michigan, Early History of the Preservation Movement (visited Jan. 19, 1997) <http://www.emich.edu/public/geo/history.html> [hereinafter Early History] (recounting major events in the preservation movement in America). In 1846, John Washington offered to sell Mount Vernon to Congress for $100,000, and the State of Virginia requested that Congress consider making the home a national shrine. See Melissa A. MacGill, Old Stuff is Good Stuff: Federal Agency Responsibilities Under Section 106 of the National Historic Preservation Act, 7 ADMIN. L.J. AM. U. 697, 702 (1994). Congress did not respond to this request until 1851, when offering to buy the home and make it an asylum for sick soldiers. At this point, John Washington doubled his asking price, and Congress refused to buy Mount Vernon, setting back the preservation effort. See id. However, the Mount Vernon Ladies’ Association bought Mount Vernon in 1853, despite the federal government’s weak showing for preservation interests. See Early History, supra.
45. See Early History, supra note 43 (establishing Yellowstone National Park in 1872).
46. See id. (protecting Casa Grande (adobe dwellings) in Arizona from ruin by looters in 1889).
historic resources, evidencing the growing interest in the preservation movement. This Act provided a foundation for the current preservation scheme coordinated by the Secretary of Interior. During this time period, Congress also founded the National Park Service and defined one of its functions as protecting historic sites, particularly areas too large to be privately preserved, by designating them as national park sites. During the early to mid twentieth century, the federal government showed moderate interest in historic preservation by enacting preservation legislation on a small scale and creating the National Trust for Historic Preservation.

Beginning with the enactment of the National Historic Preservation Act in 1966, federal interest in protecting historic resources heightened. This Act created a National Register of Historic Places, historic districts, and an advisory council on historic preservation. Additionally, Congress provided tax benefits for property containing structures of historic interest in the late 1970s and early 1980s. In the last twenty years, Congress has enacted a flurry of legislation to

48. See Early History, supra note 43.
49. The Antiquities Act provides harsh penalties for destroying federally-owned historic monuments, landmarks, prehistoric structures, and other objects of historic or scientific interest. Additionally, the Act gives the President the authority to designate such areas for federal protection. See 16 U.S.C. §§ 461-467. Private efforts were also visible during the early Twentieth Century. Preservation efforts were initiated by private citizens to restore Williamsburg, Virginia, establish the Greenfield Museum, and create the first historic district in the nation in Charleston, South Carolina. See Early History, supra note 43.
50. See Early History, supra note 43. The Antiquities Act established the national policy "to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States." 16 U.S.C. § 461.
51. See Early History, supra note 43. After the National Park Service was established in 1916, the Jamestown and Yorktown sites were designated as historic areas to be protected in the Colonial National Historical Park. See id.
53. See 16 U.S.C. § 468 (1985 & Supp. 1997) (establishing the National Trust for Historic Preservation (National Trust)). The National Trust attempts to provide a link between private preservation efforts and public activity initiated by the National Park Service. The National Trust encourages preservation in a variety of ways, including lobbying, sponsorship of an annual conference, and preservation publications. See Early History, supra note 43.
56. See generally Miriam Joel Silver, Note, Federal Tax Incentives for Historic Preservation: A Strategy for Conservation and Investment, 10 Hofstra L. Rev. 887, 898-924 (1982) (outlining tax incentives for historic preservation properties). "By the mid 1970s, Congress began to consider historic structures as valuable resources that could be converted, without damage to aesthetic or historic significance, into usable commercial space and housing stock." Id. at 897. Congress's attitude is reflected in the pro-preservation legislation in the late seventies. See id. at 898.
protect historic resources, reflecting the current emphasis placed on protecting America's rich panoply of resources.  

2. Judicial Involvement

Just as the federal government has been slow to react to the strengthening of the preservation movement, judicial recognition of interests in historic preservation has also been slow to develop. In 1954, the Supreme Court first enunciated in *Berman v. Parker* that the government may regulate based on purely aesthetic interests:

> The concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

Though *Berman* did not deal directly with historic preservation, its removal of the previous "aesthetic-plus" principle affected regulations based on historic preservation. The *Berman* case departed from the previous standard that governments could only regulate based on historic preservation if the regulation involved more than just aesthetics, such as public welfare. In doing so, *Berman* broadened governments' power to regulate based purely on historic preservation interests, signifying a major judicial victory for the preservation movement.

In 1978, the Supreme Court dealt directly with historic preservation interests in *Penn Central Transportation Co. v. City of New York*, a seminal takings case involving New York City's landmark laws. In *Penn Central*, the owners of Grand Central Terminal sought to build a

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59. Id. at 33 (citations omitted).
60. *Berman* involved a dispute over whether the substandard housing and blighted buildings could be destroyed by the government to eliminate injurious conditions to the building's inhabitants. See id. at 28. Appellants in *Berman* disputed the constitutionality of destroying the buildings under the Fifth Amendment. The Court determined that the government was entitled to use its power of eminent domain to demolish the buildings. See id. at 35-36.
61. See University of Eastern Michigan, *Preservation Law* (visited Jan. 29, 1997) <http://www.emich.edu/public/geo/preservlaw.html> [hereinafter *Preservation Law*] (coining the term "aesthetic plus" to describe the pre-*Berman* rule that required the state to prove a reason to regulate beyond the historic significance of a structure).
62. See id. (commenting on the repercussions of the *Berman* case).
fifty story office building over the Terminal. Because the New York City Landmarks Preservation Committee had designated Grand Central Terminal as a landmark,64 the Commission denied plans for construction of the office building.65 Owners of the Terminal filed suit against the City of New York, alleging that the application of the landmarks preservation law constituted a taking of property without just compensation.66 The Court found that the New York City landmarks law as applied to Grand Central Terminal was not a taking because the restrictions it imposed on the Terminal were related to the promotion of the general welfare and allowed reasonable use of the landmark site.67

The Supreme Court’s majority opinion68 in *Penn Central* affirms the importance of the growing historic preservation movement in the United States.69 The Court notes two major concerns that have developed from preservation efforts around the nation: (1) the destruction of historic landmarks, structures, and areas70 without contemplation of the value of these properties or alternative uses for these structures; and (2) the prevailing belief that structures with particular historic significance enhance the quality of life and preserve the country’s past.71 Additionally, the *Penn Central* Court’s holding that no taking occurred further establishes the overwhelming judicial support for preserving historic structures. By recognizing that a law fashioned exclusively for preservation promotes the general welfare, the Court affirmed a local government’s ability to use its police powers exclusively for historic preservation, upholding the legitimacy of historic preservation ordinances.72 With the Supreme Court’s express recognition of preservation ordinances and overarching support for the preservation movement, *Penn Central* firmly rooted judicial protection of historic preservation.73

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64. New York City’s landmarks law allows the Commission to designate buildings as landmarks and designate historic districts. See id. at 110-11.
65. See id. at 115-17.
66. See id. at 119.
67. See id. at 138.
68. Justice Brennan authored the majority opinion for the Supreme Court in *Penn Central*. See id. at 107.
69. See id. (“Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance.”).
70. Of the buildings listed in the Historic American Buildings Survey, begun in 1933, over one-half have been destroyed. See id. at 108 n.2.
71. See id. at 108.
72. See *Preservation Law*, supra note 61.
73. See id.
C. Pre-RFRA: Review of Conflicts Between Religious Freedom and Historic Preservation

Conflicts between religious freedom and historic preservation embody a struggle between the constitutional rights of citizens (such as a church or synagogue congregation) and the police powers of the government through which it applies a preservation ordinance or law. 74 Prior to the enactment of RFRA, courts applied the judicially-created analysis for laws and regulations that affect religious activities when religious freedom and historic preservation interests collide.

1. Pre-1990: The Sherbert-Yoder Era

Before 1990, courts relied on the analysis set forth in Sherbert and Yoder. 77 Courts generally gave religious entities special deference when the government imposed regulations using their police powers. For example, in Westchester Reform Temple v. Brown, 78 the court stated that “[r]eligious structures enjoy a constitutionally protected status which severely curtails the permissible extent of governmental regulation in the name of the police powers.” 79 The court asserted that though the government’s use of its police power may be properly related to the health, safety, and welfare of the community, the police power may be outweighed by the First Amendment guarantee of freedom of religion. 80 The court further pointed out that “the power of [government] regulation [of religious structures] has not been altogether obliterated.” 81 Similarly, the court in Bethlehem Evangelical Lutheran Church v. City of Lakewood 82 maintained that churches are subject to the police power of the state

74. See City of Sumner v. First Baptist Church, 639 P.2d 1358 (Wash. 1982) (en banc) (recognizing such a struggle involving a church congregation and the police powers of the City of Sumner).
75. See discussion supra Part II.A.
76. For a complete description of the Sherbert-Yoder analysis, see discussion supra Part II.A. Preservation ordinance challenges fell under this framework before the Smith decision in 1990.
77. See, e.g., City of Sumner, 639 P.2d at 1363-64; Congregation of Jehovah’s Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 305-06 (6th Cir. 1983); Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Village of Roslyn Harbor, 342 N.E.2d 534, 538-39 (N.Y. 1975). Some courts failed to cite Sherbert or Yoder, yet seem to adopt analyses similar to that enunciated in Sherbert and Yoder. See, e.g., Bethlehem Evangelical Lutheran Church v. City of Lakewood, 626 P.2d 668 (Colo. 1981) (en banc); Denver Urban Renewal Auth. v. Pillar of Fire, 552 P.2d 23 (Colo. 1976); Westchester Reform Temple v. Griffin, 239 N.E.2d 891, 896-97 (N.Y. 1968) (heard after Sherbert decision but four years before Yoder).
78. 239 N.E.2d 891 (N.Y. 1968).
79. Id. at 896.
80. See id.
81. Id.
82. 626 P.2d 668 (Colo. 1981).
but should be given preferential treatment by requiring the state to show a substantial interest before using its power. Thus, the approach followed by the majority of courts faced with religion-historic preservation cases during the Sherbert-Yoder era involved weighing the legitimate concerns of the government and the detrimental effects of the government's regulation on freedom to practice religion. Such a test led to a heavily factually-based analysis, yielding mixed results dependent upon the court's perception of each party's interests. But, as a whole, courts gave deference to free exercise interests unless presented with a compelling government interest.

2. Post-1990: The Smith Era

As noted, the Supreme Court departed from the strict scrutiny Sherbert-Yoder analysis in 1990, requiring courts faced with religion-historic preservation cases to follow the Smith analysis. Though the Smith analysis allows more deference to government regulation than the previous Sherbert-Yoder standard, courts still return mixed results. One of the most prominent religion-historic preservation cases after Smith is St. Bartholomew's Church v. City of New York, decided in 1990. The case involved a church's challenge of the application of a landmark law, where the church claimed the law to be a burden on

83. Before the enactment of RFRA (codifying the compelling interest language), courts often interchanged "substantial" interest and "compelling" interest language but intended the same level of scrutiny.
84. See Bethlehem Evangelical, 626 P.2d at 674-75.
85. See, e.g., Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 305-06 (6th Cir. 1983) (applying the general rule that "the greater the cost of practicing one's religion, the more probable that the statute creates an unconstitutional infringement"); City of Sumner v. First Baptist Church, 639 P.2d 1358, 1363 (Wash. 1982) (en banc) ("There should be some play in the joints of both the zoning ordinance and the building code. An effort to accommodate the religious freedom of appellants while at the same time giving effect to the legitimate concerns of the City as expressed in its building code and zoning ordinance would seem to be in order."); Jewish Reconstructionist Synagogue v. Village of Roslyn Harbor, 342 N.E.2d 534, 538 (N.Y. 1975) (weighing the interests of the state in regulating and a synagogue's constitutionally protected rights).
86. Compare City of Lakewood, 699 F.2d at 309 (holding that a zoning ordinance prohibiting construction of church buildings in almost all residential districts in a city does not violate the Free Exercise Clause of the First Amendment), with Westchester Reform Temple, 239 N.E.2d at 896-97 (finding zoning ordinance giving planning commission power to determine building setbacks valid but ruling its application to a temple an unconstitutional burden on religious freedom).
87. Under Smith, a neutral and generally applicable regulation is constitutional, even if it incidentally burdens one's religious beliefs. See Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 880-85 (1990); see also discussion supra Part II.A.
88. See Bonds, supra note 29, at 600.
89. 914 F.2d 348 (2d Cir. 1990).
its free exercise of religion. In 1967, St. Bartholomew's Church and adjacent structures were designated by the New York Landmarks Preservation Commission as a landmark, prohibiting the alteration or demolition of the Church's buildings without approval by the Commission. 90 In 1983, the Church sought to replace its Community House with a fifty-nine story office tower, but the Commission denied this request. After several more requests were denied by the Commission, the Church brought suit against the city. 91 On appeal to the Second Circuit, the Church alleged violations of the Free Exercise Clause and Takings Clause. 92

The Church claimed that its right to continue its religious mission was impaired by the Commission because its Community House was no longer a sufficient facility in which the Church could continue its ministerial and charitable services. 93 Further, the Church claimed that renting space in the office tower would generate revenue to expand ministerial and charitable activities. 94 The court applied the Smith test, maintaining that

government regulation may affect conduct or behavior associated with [religious] beliefs. Supreme Court decisions indicate that while the government may not coerce an individual to adopt a certain belief or punish him for his religious views, it may restrict certain activities associated with the practice of religion pursuant to its general regulatory powers. 95

The court summarized the post-Smith view as requiring courts to distinguish between the constitutionally neutral, generally applicable law that bears an incidental effect on religious activities and the unconstitutional religiously-oriented law that burdens free exercise of religion. 96

The court acknowledged the restriction of the landmark law on the Church's ability to raise money and carry out ministerial programs but held that no First Amendment violation existed because of the landmark law's neutral, generally applicable nature. 97 The court pointed out that the Church could still proceed in its religious practice using its current facilities and that the landmark law possessed

90. See id. at 351.
91. See id.
92. See id. at 352-53.
93. See id. at 353.
94. See id.
95. Id. at 354.
96. See id.
97. See id. at 355.
no discriminatory motive. Based on these findings, the court ruled that no Free Exercise Clause violation existed in the application of the landmark law to St. Bartholomew’s Church.

Though Smith seemed to tip the religious freedom/historic preservation conflict toward protection of historic structures by allowing neutral, generally applicable laws carte blanche, some courts have still managed to favor protecting First Amendment freedoms over historic preservation, showing that even after Smith, religious freedom will be judicially protected. In First Covenant Church of Seattle v. City of Seattle, the City of Seattle designated First Covenant Church a landmark by adopting an ordinance which also required First Covenant Church to seek approval from the City before making certain external alterations. First Covenant Church sued the City to prohibit application of the landmark ordinance to First Covenant Church, claiming that the ordinance violated the Free Exercise Clause.

The Washington Supreme Court asserted that the Smith test did not apply to the factual situation set forth in First Covenant and promptly distinguished St. Bartholomew on its facts. In addition, the court deemed First Covenant a “hybrid situation,” in which First Covenant Church’s claim included multiple protected interests: free exercise and free speech. The court termed the design of the church building to be non-verbal conduct that expresses the Christian belief and message. Based on its hybrid situation determination (derived from the addition of the free speech claim), the court found that First Covenant fell into an exception category, free from the tentacles of the Smith test. The court then applied the Sherbert-Yoder compelling interest analysis.

98. See id. at 355-56.
99. See id.
100. 840 P.2d 174 (Wash. 1992) (en banc).
101. See id. at 177-78.
102. See id. at 178. During the litigation of this case, the Smith decision came down from the Supreme Court. Previously, the state court had applied the Sherbert-Yoder test and determined that there was a burden on free exercise of religion. The City appealed to the United States Supreme Court, and the Court vacated the ruling based on Sherbert, requiring the state court to use the new Smith standard instead. See id.
103. See id. at 181-82. The court distinguished St. Bartholomew on five major bases: (1) St. Bartholomew’s failure to immediately reject landmark designation; (2) commercial nature of St. Bartholomew’s proposed use; (3) St. Bartholomew’s failure to allege that landmark designation reduced its principal asset rather than just its ability to generate additional revenue; (4) St. Bartholomew’s failure to challenge the effect of the religious exemption on New York law’s constitutionality; and (5) bases of New York law not in “liturgy” like the Seattle law. See id. at 181.
104. See id. at 181-82.
105. See id. at 182.
First, the court determined that the government regulation on First Covenant Church burdened the church in two ways: administratively because the church must seek approval from a government body before changing their structure and financially because the value of the church’s property was reduced almost in half. Next, the court ruled that the government did not have a compelling interest to support its enactment. The court opined that historic preservation interests were not strong enough to be deemed compelling because they only encompass aesthetics and cultural interests, not public health or safety. Thus, despite the pro-regulation Smith ruling, the court in First Covenant held that the ordinance at issue was a burden on free exercise of religion and, as such, invalidated the landmark designation ordinance.

Similarly, the court in Society of Jesus v. Boston Landmarks Commission also diverged from the holding in St. Bartholomew. Society of Jesus involved a dispute between a Jesuit church and the Boston Landmarks Commission over the constitutionality of the Commission’s designation of the interior of the church as a landmark. In 1987, the Commission designated the interior of the church a landmark. The designation limited permanent alterations to the church interior without approval by the Commission. The church promptly challenged the designation on constitutional grounds. The Massachusetts Supreme Court ruled that the Commission’s designation of the interior of the church violated state and federal constitutional provisions. Because the court found that the designation violated state constitutional provisions, the court never engaged in a full discussion regarding the federal free exercise violations. But, the court did add that “[t]he government interest in historic preservation, though worthy, is not sufficiently compelling to justify restraints on the free exercise of religion, a right of primary importance.” Thus, like the First Covenant court, the Society of Jesus court placed the importance of historic preservation as unconditionally
subservient to protecting the right of religious freedom and held against preservation interests, despite the recent Smith decision.\(^{114}\)

Though the facial application of the Smith doctrine would seem to place a pro-preservation slant on religion-preservation conflicts, courts have broad interpretative leeway, making decisions highly reliant on the individual facts of each case. Surprisingly, no more cases have leaned toward protecting preservation interests under the Smith era than during the Sherbert-Yoder compelling interest era.\(^{115}\) This result is most likely due to the ability of courts to distinguish their cases factually, as in First Covenant, or "sidestep" First Amendment issues altogether and apply different laws, as in Society of Jesus. Such cases demonstrate the wide room for judicial interpretation in this area of the law.\(^{116}\) No doubt, RFRA was enacted to replace the previously judicially-created law and narrow the interpretative liberties that courts could take in deciding religion-preservation cases.\(^{117}\)

### III. Overview and Application of the Religious Freedom Restoration Act

In 1993, Congress enacted RFRA\(^{118}\) in response to the Smith decision.\(^{119}\) When enacting RFRA, Congress primarily intended to reinstate the Sherbert-Yoder compelling interest test.\(^{120}\) Specifically,

\(^{114}\) *Society of Jesus* and First Covenant both embrace the churches' religious challenges without question, while the court in St. Bartholomew delves into the facts of the case. See Karen L. Wagner, *For Whom the Bell Tolls: Religious Properties as Landmarks Under the First Amendment*, 8 Pace Envtl. L. Rev. 579, 613 (1991).

\(^{115}\) Compare *Society of Jesus*, 564 N.E.2d at 573 (ruling after Smith decision that the designation of interior of church in Boston is unconstitutional), and First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992) (allowing church to change its structure and applying the Smith test), and Vestry of St. Bartholomew's Church v. City of New York, 728 F. Supp. 958 (S.D.N.Y. 1990) (upholding a government ordinance to preserve church buildings using Smith), *with* Westchester Reform Temple v. Griffin, 239 N.E.2d 891 (N.Y. 1968) (finding setback ordinance a "constitutional abridgement of religious freedom" under the Sherbert-Yoder analysis), and Jewish Reconstructionist Synagogue v. Village of Roslyn Harbor, 342 N.E.2d 534 (N.Y. 1975) (declaring zoning ordinance affecting synagogue unconstitutional under Sherbert-Yoder), and Bethlehem Evangelical Lutheran Church v. City of Lakewood, 626 P.2d 668 (Colo. 1981) (affirming constitutionality of city's requirement that church make dedication to receive permit under Sherbert-Yoder test). An extensive electronic search of pre-Smith and post-Smith cases shows no substantial differences in case outcomes between courts' applications of the two tests.

\(^{116}\) The wide room for judicial discretion in cases involving religious freedom and government regulation is demonstrated by the confusion state courts have had in applying the Sherbert-Yoder test because courts differ in their interpretations of what a compelling interest is. See Swanner v. Anchorage Equal Rights Comm'n, 513 U.S. 979 (1994) (Thomas, J., dissenting from denial of certiorari).

\(^{117}\) See discussion infra Part III.


\(^{120}\) Some scholars argue that RFRA's compelling interest test is much stricter than the standard applied in the Sherbert-Yoder days. Such a discussion is beyond the scope of this
Congress wished to provide protection where religion is burdened by a neutral law of general applicability. To accomplish this goal, Congress enacted RFRA to override the Supreme Court's ruling in Smith which basically allowed the government to impose burdens on religion via neutral, generally applicable laws.

Among the factors motivating Congress to enact RFRA were its finding that neutral laws may burden religion just as other laws do and its finding that the framers of the Constitution recognized free exercise of religion to be an unalienable right of all citizens. Congress further cited the testimony of Reverend Oliver S. Thomas from committee hearings that the impact of the Smith decision has severely undermined freedom to practice religion—prognosticating that every American religion will eventually suffer from the Smith holding. Specifically, Reverend Thomas stated that churches had been zoned out of commercial areas, and Jews had been subjected to autopsies, violating their families' faith. After these considerations, Congress enacted RFRA.

A. Overview of RFRA

RFRA prevents the government from substantially burdening a person's free exercise of religion, even when the burden results from

article. For purposes of this article, assume that the Sherbert-Yoder and RFRA standards are identical as Congress intended them to be.

121. See S. REP. NO. 103-111.
122. See id.
123. See id. ("The Nation ... was founded upon the conviction that the right to observe one's faith, free from Government interference, is among the most treasured birthrights of every American. That right is enshrined in the free exercise clause of the first amendment ... ").
124. See id.
125. Though Reverend Thomas did not mention it in his address, churches have also been zoned out of residential areas as well as commercial areas. See, e.g., Town v. State, 377 So.2d 648, 651 (Fla. 1979) (upholding city ordinance zoning churches out of residential areas); Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983) (preventing church construction in almost all residential districts in city). Though the Town and City of Lakewood cases were decided during the Sherbert-Yoder era, intuitively, the Smith test has the potential for more churches to be zoned out of residential districts due to Smith's lesser protection of religious interests. See, e.g., First Assembly of God v. Collier County, 20 F.3d 419 (11th Cir. 1994) (Smith era case upholding ordinance preventing church from locating homeless shelter in residential area); Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F. Supp. 1554 (M.D. Fla. 1995) (denying church permit to operate food bank in residential area). The only ruling invalidating a zoning ordinance within the Eleventh Circuit under the Free Exercise Clause is Church of Jesus Christ of Latter Day Saints v. Jefferson County, 741 F. Supp. 1522 (N.D. Ala. 1990), and was decided during the Sherbert-Yoder era. See First Assembly of God v. Collier County, 775 F. Supp. 383, 388 (M.D. Fla. 1991).
126. See S. REP. NO. 103-111.
a neutral law of general applicability. The only exception is where a
government demonstrates that the burden placed on an individual is the least restrictive means of furthering a compelling governmental interest. A plaintiff has the initial burden of proof to show that a substantial burden on his or her religion exists. If this burden is satisfied, then the burden shifts to the government to demonstrate that there is a logical and rational connection between its regulation and a compelling governmental interest and that the regulation is neutral and generally applicable. RFRA entitles a person whose religious freedom has been violated to obtain appropriate relief against the government by asserting a violation of RFRA as a claim or defense. Reading the plain language of RFRA, its scope appears to encompass all First Amendment free exercise cases in order to prevent intrusive government regulations on religion.

B. Application of RFRA in the Context of Historic Preservation

Since the enactment of RFRA and the renewal of the Sherbert-Yoder test, only two cases have involved both RFRA and historic preservation. The first, Keeler v. Mayor of Cumberland, was decided in 1996 by a Maryland federal district court. The second, City of Boerne v. Flores, was decided by the Fifth Circuit in 1996 and the United States Supreme Court in June 1997 and is discussed in the

127. See 42 U.S.C. § 2000bb-1. “General applicability” requires that the government regulation cannot selectively impose burdens on conduct that is religiously motivated. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993) (finding an ordinance that prevents ritual animal sacrifice not generally applicable due to the ordinance’s under inclusion of all animal slayings, non-religious and religious in nature).


129. See id.

130. See Stefanow v. McFadden, 103 F.3d 1466, 1471 (9th Cir. 1996) (applying RFRA in an action brought by an inmate claiming that his free exercise rights were burdened by confiscation of a religious book that supported violence against Jews and the government); see also Young v. Crystal Evangelical Free Church, 82 F.3d 1407, 1417 (8th Cir. 1996) (holding that recovery of contributions to church substantially burdens debtors’ free exercise of their religion due to emphasis of tithing in religion).

131. See Swanner v. Anchorage Equal Rights Comm’n, 513 U.S. 979 (1994) (Thomas, J., dissenting from denial of certiorari) (questioning the compelling nature of Alaska’s interest in preventing discrimination on the basis of marital status); Stefanow, 103 F.3d at 1471; see also In re Tessier, 190 B.R. 396, 400 (D. Mont. 1995) (“The first two elements established, the onus then falls upon the government to show that when weighed against the First Amendment interests of the claimants, enforcement of the law in question advances a compelling government interest by the least restrictive means.”).


135. 73 F.3d 1352 (9th Cir. 1996); 117 S. Ct. 2157 (1997).
next section. 136 Several other cases have been heard that involved ordinances restricting the religious practices of churches. 137 Though not directly impacting historic preservation, these cases may prove to be useful analogies for courts hearing RFRA cases involving the application of preservation ordinances to churches.

The Keeler dispute involved St. Peter and Paul’s Roman Catholic Church, located on an entire block in the city of Cumberland, Maryland within the Washington Street Historic District. 138 Buildings and structures located within the historic district cannot be destroyed or altered without approval from the Cumberland Historic Preservation Commission. Since 1986 a chapel and monastery on the site were vacant and in disrepair. The cost to repair and maintain the structures was estimated to exceed $380,000. 139 After several failed plans to convert the chapel and monastery, the congregation decided to demolish the structures to build a much needed church annex on the property and eliminate the large financial drain created by the monastery and chapel buildings. In 1995, the congregation applied to the Commission to demolish the chapel and monastery, but the request was denied. 140

The congregation filed suit, alleging that the City’s application of the historic preservation ordinance to the chapel and monastery violated RFRA and the Free Exercise Clause because of the substantial burden it imposed on the free exercise of the congregation’s religion. 141 In response, the City argued that RFRA violates the

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136. First United Methodist Church of Seattle v. Seattle Landmarks Preservation Bd., 916 P.2d 374 (Wash. 1996) (en banc) was also decided after the enactment of RFRA and involves a religion-historic preservation dispute. Curiously, the plaintiffs did not allege a violation of RFRA and only alleged a violation of the Free Exercise Clause. See id. at 375-76. The case had a similar factual scenario to Keeler, where a church was designated a landmark, preventing alteration of the building without city approval. The Church challenged the designation. The Washington Supreme Court borrowed heavily from its 1993 decision in First Covenant and found that the landmark designation was a severe burden on the congregation’s free exercise of religion. See id. at 381. Though this case did not directly involve RFRA, it may have interpretative value because the application of RFRA borrows exclusively from the judicial decisions involving religious freedom.


138. See Keeler, 928 F. Supp. at 593.

139. See id.

140. See id.

141. See id. The congregation also included other counts in their complaint. Other counts included: violation of the United States and corresponding Maryland constitutional provision protecting free exercise of religion, violation of the Fifth Amendment due to an unconstitutional taking, and violation of the Due Process Clause of the Fourteenth Amendment due to
separation of powers doctrine because RFRA imposes the Sherbert-Yoder test, a rule of constitutional interpretation, on the courts. The congregation refuted this claim by urging the court to view RFRA as "‘prophylactic statutory protection for the Fourteenth Amendment’s free exercise guarantee, as substantively interpreted by the judiciary.’"\textsuperscript{142}

The court recounted the tradition of reserving constitutional construction questions to the courts, rather than Congress, noting that the tradition is traceable to the Federalists’ arguments for the ratification of the Constitution.\textsuperscript{143} The court determined the rule imposed by RFRA to be judicial, not legislative in nature, due to the bald assertion of RFRA to reinstate the Sherbert-Yoder test.\textsuperscript{144} Based on this determination, the court found that Congress did not have the power to enact RFRA and held the statute unconstitutional.\textsuperscript{145}

After holding RFRA unconstitutional, the court issued a separate order for the congregation’s free exercise claim and other claims.\textsuperscript{146} The court applied the Smith test and found that the congregation satisfied its initial burden of proving that their free exercise rights were burdened by proving that the new construction was crucial to the spiritual growth of the church.\textsuperscript{147} Then the court determined that the ordinance at issue in Keeler cannot be categorized as religiously neutral but placed it in an excepted category mentioned in Smith involving a system of exemptions and exceptions that require the application of principles rather than those articulated in Smith.\textsuperscript{148} Due to the ordinance’s exemption for several non-religion based circumstances, the court found that the system of exemptions should be extended for religious hardship when such interests outweigh historic preservation.\textsuperscript{149} Thus, the court applied a compelling interest

\textsuperscript{142} Id. at 598 (quoting Memo. of United States at 18).
\textsuperscript{143} See id. at 601.
\textsuperscript{144} See id. at 601-02.
\textsuperscript{145} See id. at 604.
\textsuperscript{146} See Keeler v. Mayor of Cumberland, 940 F. Supp. 879 (D. Md. 1996).
\textsuperscript{147} See id. at 884. The congregation presented evidence that construction of a church annex was critical because the existing buildings failed to meet the congregation’s current needs. Parishioners expounded that they needed space for religious education programs, weddings, funerals, baptisms, nursery, and parking facilities. See id.
\textsuperscript{148} See id. at 885. The Keeler ordinance allows for exemptions to construction and alteration rules in specific instances, such as when a structure is a major deterrent to an improvement program or retention of the structure would cause undue financial hardship on the owner. Due to this exemption portion of the ordinance, the court found the ordinance significantly differs from the generally applicable criminal prohibition in Smith. See id. at 885.
\textsuperscript{149} See id. at 886. The reasoning was that if the ordinance made an exemption for several non-religious reasons, then surely an exemption should be made for religious freedom due to its historical protection as a fundamental right provided to all American citizens since the birth
analysis, requiring the City to assert a compelling interest to support its ordinance. The court found that the City failed to present a compelling interest and held that the City’s denial of the congregation’s application for demolition was an unconstitutional violation of the First Amendment. Thus, despite the court’s rejection of RFRA, the court ironically implemented the compelling interest test for different reasons and ultimately found that religious freedom interests should prevail. Keeler provides another example of the widely variant avenues a court can take in resolving a religion-historic preservation conflict.

C. City of Boerne v. Flores: A Landmark Decision

“A little church that wants to be big will test a new law meant to guarantee freedom of religion.”

1. The Fifth Circuit’s Opinion

The Supreme Court granted certiorari to the Fifth Circuit’s Flores decision and heard oral arguments in February of 1997. Though the Flores case involved a small church in a small Texas town, many legal scholars and national organizations anticipated that the Supreme Court would take this opportunity to rule on the constitutionality of RFRA and clarify the law interpreting the Free Exercise Clause. Indeed, the Flores decision should shape First Amendment jurisprudence as it is interpreted by lower courts in the years to come. As stated by one commentator: “It’s the authority of Congress that is at stake, not only to protect the religious liberty but to protect any other constitutional liberties.” Additionally, the Flores

of the country. See id. (stating that laws which restrict religious freedom must advance interests of the “highest order”) (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993)).

150. See id. at 886-87.


152. Zeke MacCormack, Boerne case is more than church vs. state, SAN ANTONIO EXPRESS— NEWS, Feb. 17, 1997, at 1A.


154. The Flores case has drawn much public interest from a large and diverse coalition of national organizations, including the religious groups, civil liberties groups, and historic preservation groups, many who lobbied for the passage of RFRA in 1993. See Editorial, A Clash of Church vs. State, ROCKY MTN. NEWS, Feb. 25, 1997, at 28A.

155. See id.; see also MacCormack, supra note 152, at 1A.

156. MacCormack, supra note 152, at 1A (quoting Professor Douglas Laycock of the University of Texas, representing the church in Boerne).
case drew the attention of preservation groups, evidence of the widespread belief that the Supreme Court's ruling on RFRA's constitutionality will dramatically affect historic preservation efforts of governments.

The Flores dispute involved Saint Peter's Catholic Church, built in 1923 and located within a historic district in the City of Boerne, Texas. In 1993, the Church applied for a permit from the City to enlarge the church building without affecting the building's facade. The City denied the Church's application, and subsequent appeal was denied. The Church thereafter filed suit against the City, alleging that the ordinance containing the City's preservation scheme was unconstitutional and violated RFRA.

The majority of the Fifth Circuit's Flores decision analyzed whether Congress had the power to enact RFRA in light of the separation of powers doctrine. The court concluded that Section 5 of the Fourteenth Amendment empowered Congress to enact RFRA and that Congress's enactment of RFRA does not infringe on the court's power to interpret the Constitution. The court also found that RFRA does not facially violate the Tenth Amendment's limitation on the power of states to legislate in traditional areas of state prominence.

2. The Supreme Court's Opinion

Like the Fifth Circuit's opinion, much of the Supreme Court's opinion focused on whether Congress had the power to enact RFRA under the Fourteenth Amendment. The Court determined that RFRA was solely intended to replace the Smith standard. Consequently, the Court ultimately held RFRA unconstitutional, based almost entirely on a separation of powers analysis under Section 5 of

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157. Both the National Trust for Historic Preservation and San Antonio Conservation Society filed amicus briefs for the Flores case. See Amicus Brief for the San Antonio Conservation Society, City of Boerne v. Flores (No. 95-2074) (supporting petitioner); Amicus Brief for National Trust for Historic Preservation, City of Boerne v. Flores (No. 95-2074) (supporting petitioner).
158. See discussion infra Part V (projecting effects of RFRA on historic preservation).
160. See Flores v. City of Boerne, 73 F.3d 1352, 1353 (5th Cir. 1996).
161. See id. at 1364.
162. See id. at 1364-65. For a full discussion of the Fifth Circuit's analysis of Congress's power to enact RFRA and separation of powers issue, see discussion infra Part IV.
163. See id. at 1364.
164. See City of Boerne v. Flores, 117 S. Ct. 2157 (1997). For a complete analysis of the Court's treatment of the separation of powers issue, see discussion infra Part IV.B.
the Fourteenth Amendment.165 The Court then reaffirmed the Smith standard, invalidating the RFRA strict scrutiny test.166

The Court presented a panoply of additional reasons to explain why RFRA’s strict scrutiny standard should not be imposed.167 Most notably, the Court argued that RFRA’s standard is a significant “intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.”168 Additionally, the Court asserted that the exercise of religion is burdened by a variety of general laws in an incidental way. These general laws burden every citizen equally—irrespective of their religious beliefs.169 From a policy perspective, the Court recognized that RFRA’s standard imposes a significant litigation burden on states.170 The Court found that the costs of imposing the RFRA standard far outweigh the minimal benefits of the enactment.171 The coming discussion of the constitutionality of RFRA uses the Fifth Circuit’s analysis in Flores as an analytical model.

IV. THE CONSTITUTIONALITY OF RFRA

The constitutionality of RFRA occupied the majority of the Supreme Court’s opinion in Flores. As such, the Court’s decision regarding RFRA’s constitutionality will have vast consequences on future religious freedom cases, including those dealing with historic preservation issues. Specifically, the Supreme Court addressed whether Congress had the authority to enact RFRA under Section 5 of the Fourteenth Amendment, considering the traditional deference given to courts to interpret the constitution.172 This section reviews Congress’s power to enact RFRA under the Supreme Court’s Morgan decision, using the framework of Katzenbach v. Morgan173 and case law interpreting the constitutionality of RFRA. Two views are presented regarding RFRA’s constitutionality followed by the Supreme Court’s interpretation of the Morgan issue.

165. See Flores, 117 S. Ct. at 2172.
166. See id.
167. See id. at 2171.
168. Id.
169. See id. (providing zoning laws as an example of a generally applicable law that affects religion).
170. See id.
171. See id.
172. See id. at 2170-72.
A. Two Interpretations of the Fourteenth Amendment Morgan Analysis

Section 5 of the Fourteenth Amendment of the United States Constitution provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." 174 Section 5 was first interpreted in Ex Parte Virginia, 175 where the Supreme Court read Congress's power to enact legislation narrowly. 176 The Supreme Court later interpreted Section 5 during the Civil Rights Era in Morgan, which still stands today as the modern interpretation of Section 5. 177 In Morgan, the Court held that Congress's authority to legislate under Section 5 is determined by three elements: (1) whether the statute is enacted to prohibit ongoing violations of the Fourteenth Amendment; (2) whether the statute is "plainly adapted to that end;" and (3) whether the statute is consistent with the "letter and spirit of the constitution" and not prohibited by it. 178 The Supreme Court reaffirmed the Morgan interpretation of Section 5 in Oregon v. Mitchell 179 and has continued to follow these principles since Mitchell. 180

The first prong of the Morgan test focuses on whether Congress enacted RFRA to enforce ongoing violations of the Fourteenth Amendment. This prong of the Morgan test as applied to RFRA turns on the Court's interpretation of what RFRA actually was enacted to do. Lower courts are split in their interpretations of this question.

Some courts, such as Keeler and In re Tessier, assert that RFRA does not enforce ongoing violations of the Fourteenth Amendment but instead "attempts to statutorily impose upon the interpretation of federal statutes a formerly constitutional standard." 181 by bringing back the Sherbert-Yoder compelling interest test. Congress does

175. 100 U.S. 339 (1879).
176. Id. at 345-46 ("Whatever legislation is appropriate, that is, adapted to carry out the objects that the amendments have in view . . . . ").
177. See Flores v. City of Boerne, 73 F.3d 1352, 1358 (5th Cir. 1996) ("This continued adherence to the principle that Congress may explicate textually located rights and obligations pursuant to Section 5 persuades us that the three-part test from Morgan remains the benchmark.").
178. Morgan, 384 U.S. at 651.
179. 400 U.S. 112 (1970) (holding that congressional prohibitions of literacy tests in state and national elections are constitutional under Section 5).
180. See, e.g., Fulillove v. Klutznick, 448 U.S. 448 (1980) (upholding congressional efforts to remedy past discrimination under Section 5 and expanding upon the Fourteenth Amendment's prohibition on overt discrimination); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (failing to question congressional authority to enact affirmative action programs under Section 5).
181. In re Tessier, 190 B.R. at 405; see Keeler, 928 F. Supp. at 601.
possess the power to remedy judicial institutional barriers\textsuperscript{182} by passing legislation consistent with judicial interpretation to "animate the Court's decisionmaking."\textsuperscript{183} However, these courts assert that Congress cannot simply enact any legislation connected to the Fourteenth Amendment, ignoring previous judicial precedent.\textsuperscript{184} RFRA neither fine-tunes the Supreme Court's Smith interpretation nor addresses the Court's competence to implement the Smith balancing analysis. These jurisdictions hold that by reinstating the Sherbert-Yoder analysis, Congress abrogated the Court's interpretation of the Constitution in Smith because RFRA applies to all situations where Smith applies—in effect replacing the Smith standard with RFRA's statutory standard.\textsuperscript{185} Such a congressional action fails to enforce an ongoing violation of the Fourteenth Amendment and, thus, fails the first prong of the Morgan test.

Other jurisdictions counter this argument with a broader interpretation of Congress's legislative power under Section 5 of the Fourteenth Amendment. The Fifth Circuit in Flores quickly dispensed with this prong by stating that RFRA enforces ongoing violations of the Fourteenth Amendment by enforcing free exercise rights of the First Amendment, which is incorporated by the Fourteenth Amendment through the Due Process Clause.\textsuperscript{186} Citing RFRA's legislative history to advance its argument, Flores further expounds that witnesses at congressional hearings stated the immediate need for further protection of religious freedom and that the Senate Judiciary Committee responded to this need by reinstating the Sherbert-Yoder test.\textsuperscript{187}

The court in Belgard v. State of Hawaii\textsuperscript{188} countered the notion that Congress did not have the authority to enact RFRA by describing the similarities between RFRA and the Voting Rights Act at issue in Morgan.\textsuperscript{189} In Morgan, the Supreme Court ruled that Congress had the authority to enact the Voting Rights Act, even though the Supreme Court had directly upheld a standard contrary to the Voting Rights Act\textsuperscript{190} in Lassiter v. Northampton County Board of Elections.\textsuperscript{191}

\begin{itemize}
\item \textsuperscript{182} See In re Tessier, 190 B.R. at 405.
\item \textsuperscript{184} See id.
\item \textsuperscript{185} See In re Tessier, 190 B.R. at 405.
\item \textsuperscript{186} See Flores, 73 F.3d at 1358.
\item \textsuperscript{187} See id. at 1358-59.
\item \textsuperscript{188} 883 F. Supp. 510 (D. Haw. 1995).
\item \textsuperscript{189} See id. at 514-15; see also Abordo v. State of Hawaii, 902 F. Supp. 1220 (D. Haw. 1995) (holding that Congress "can act to protect a constitutional right against conduct which has previously been held constitutional by the Supreme Court").
\item \textsuperscript{190} See Belgard, 883 F. Supp. at 514-15.
\end{itemize}
Based on this distinction, the \textit{Belgard} court asserted that Congress had authority to enact RFRA despite contrary judicial precedent. The court did, however, note that opponents of this view distinguish \textit{Lassiter} and the Voting Rights Act factually, contending that the Voting Rights Act does not specifically address issues decided in \textit{Lassiter}.\footnote{360 U.S. 45 (1959).}

Thus, when determining whether RFRA was enacted to prevent violations of the Fourteenth Amendment, pre-\textit{Flores} courts varied in their interpretations of Congress’s authority to pass legislation connected to the Fourteenth Amendment,\footnote{See \textit{Belgard}, 883 F. Supp. at 515.} providing differing views of the interaction between courts and Congress in developing the law.\footnote{Eisgruber, supra note 183 at 461. Courts agree that the Fourteenth Amendment does provide Congress with a “blank check . . . to pass any legislation connected to liberty or citizenship.” See id. at 461-62.}

The second prong of \textit{Morgan} requires examination of whether RFRA is “plainly adapted to that end.”\footnote{See id. at 461-62.} Section 5 of the Fourteenth Amendment only affords Congress remedial power to remedy violations of the Fourteenth Amendment,\footnote{Flores v. City of Boerne, 73 F.3d 1352, 1359 (5th Cir. 1996).} thus RFRA must serve remedial ends. In \textit{Flores}, three remedial justifications are offered in support of RFRA. They include: (1) deterrence of government violations of the Free Exercise Clause; (2) prohibition on laws that impede freedom of religion; and (3) protection of minority religion rights.\footnote{See E.E.O.C. v. Wyoming, 460 U.S. 226, 260 (1983) (Burger, J., dissenting) (“Congress may act only where a violation lurks.”).}

The Fifth Circuit determined that RFRA serves a remedial function due to RFRA’s additional measure of free exercise protection for persons burdened by neutral, generally applicable regulations, thereby including the rights of more citizens, particularly members of minority religions.\footnote{See \textit{Flores}, 73 F.3d at 1359.} Though the \textit{Flores} court is the only court examined by this article to undertake this second prong of the \textit{Morgan} analysis as applied to RFRA, the \textit{Flores} interpretation that RFRA is remedial in nature would probably stand, assuming that the broad view of the first \textit{Morgan} prong was adopted.\footnote{See id. at 1359-60.}

Under the third prong of the \textit{Morgan} test, RFRA must be consistent “with the letter and spirit of the constitution.”\footnote{If a court took a broad view of RFRA's intent to enforce violations of the Fourteenth Amendment, then logic would dictate that court would also take a broad view of what is remedial to satisfy the second prong.} This prong

\begin{itemize}
\item \footnote{Morgan, 384 U.S. at 656.}
\end{itemize}
mandates that RFRA be consistent with all other provisions of the Constitution. Opponents of RFRA primarily contend that the statute violates the Constitution's separation of powers doctrine. They state that RFRA offends the historic principles laid out in *Marbury v. Madison* by infringing on the judiciary's power as the ultimate interpreter of the constitution. *Marbury* enunciates this principle by stating that "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." The *Keeler* court held that RFRA is judicial in nature, rather than legislative, due to its invalidation of the judicial test set out in *Smith*. Due to this result, the court maintains that Congress steps into the shoes of the judiciary. *Keeler*'s argument is quite compelling, in that the court notes that it is unaware of any other statute where Congress expressly rejects a judicial standard of review.

Proponents of RFRA's constitutionality claim that RFRA does not "second-guess" the intermediate scrutiny *Smith* test but assert that RFRA necessitates an "ad hoc review of the laws of general applicability that substantially burden the free exercise of religion," regulating all emerging violations of the Free Exercise Clause under RFRA's statutory trigger. Further, Congress can enact "constitutionally overinclusive" legislation without violating the separation of powers doctrine. Thus, proponents assert that RFRA does not supersede judicial precedent but permissibly expands the scope of government

201. See id.
203. 5 U.S. (1 Cranch) 137 (1803); see *In re Tesser*, 190 B.R. at 405 (stating that RFRA cannot change the meaning of the First Amendment under *Marbury*).
204. See *Keeler*, 928 F. Supp. at 601 (citing *Marbury* and *Baker v. Carr*, 369 U.S. 186 (1962), to support the proposition that the judiciary is the ultimate interpreter of the Constitution).
205. *Marbury*, 5 U.S. (1 Cranch) at 177. Supporters of RFRA assert that this quote from *Marbury* should not be read to prohibit Congress from providing further protection to a constitutional right that has previously been found constitutional by the Supreme Court. See *Abordo v. State of Hawaii*, 902 F. Supp. 1220, 1231-32 (D. Haw. 1995).
207. See id. at 603-04.
regulations subject to judicial scrutiny. But, no matter how creatively courts dance around RFRA’s true purpose, the statute itself clearly states Congress’s intent to denounce the Smith test, which expressly excluded judicial review of religious burdens relating to neutral laws.

Undeniably, courts have variant opinions regarding whether Congress had authority under Section 5 of the Fourteenth Amendment to enact RFRA under the three prong Morgan test. Because both sides present cogent arguments supported by judicial precedent, any accurate prediction of the Supreme Court’s result in Flores was impossible. Prior to the Court’s decision, most federal courts upheld RFRA’s constitutionality, adopting the broader view of Congress’s authority under Section 5. But regardless of the “majority” lower court opinion, the Court still was presented with the task of adopting their own view.

B. The Supreme Court’s Interpretation

In the Supreme Court’s Flores opinion, the Court began by reaffirming that Congress has only remedial enforcement power, not substantive power under the Fourteenth Amendment. The Court first addressed whether Congress’s enactment of RFRA was remedial in nature, and thus, an appropriate enactment under Congress’s remedial power. The Court noted that “[t]he appropriateness of the remedial measures must be considered in light of the evil presented.” The Court provided a comparison of RFRA and the Voting Rights Act as an illustrative tool. In 1966, the Court had found Congress’s enactment aimed at remedying voting rights discrimination to be constitutional under Section 5. The Court’s decision relied primarily on the prevalent voting rights discrimination in New York and Congress’s direct attempt to eliminate it. In contrast, the Court recognized that no recent religious discrimination incidents have occurred and that evidence of religious discrimination given at hearings was merely “anecdotal” while the thrust of the hearings centered instead on incidental burdens on religion imposed

210. See Flores, 73 F.3d at 1361; see also Abordo, 902 F. Supp. at 1231 (holding that RFRA merely provides more expansive protection of a person’s right to free exercise of religion, a constitutionally protected right).
212. The Abordo court stated that the majority of courts addressing the constitutionality of RFRA upheld the Act. See Abordo, 902 F. Supp. at 1230.
213. See Flores, 117 S. Ct. at 2167.
214. Id. at 2169.
215. See Katzenbach v. Morgan, 384 U.S. 641 (1966); see also Flores, 117 S. Ct. at 2168.
by laws of general applicability.\textsuperscript{216} Based on these findings, the Court distinguished Congress’s voting rights legislation and RFRA due to the lack of religious discrimination for Congress to remediate.

Additionally, the Court stated that Congress’s actions were not even focused on remediing the little discriminatory evidence that was presented at the congressional hearings.\textsuperscript{217} The Court concluded that RFRA is completely “out of proportion to a supposed remedial or preventive object” and cannot be considered as devised to prevent unconstitutional behavior.\textsuperscript{218} Thus, the Court deemed RFRA’s enactment as substantive rather than remedial.

The Supreme Court went further to address whether the “remedial” legislation was adapted to the end which the Fourteenth Amendment was meant to prevent.\textsuperscript{219} The Court found that RFRA has a very broad application, imposing restrictions on agencies and officials of state, federal, and local governments and affecting federal, state, and local laws.\textsuperscript{220} RFRA contains no other limitations, such as a termination date or geographic restrictions. Even upon comparison of other congressional enactments, RFRA’s reach and scope remains noticeably broad.\textsuperscript{221} Thus, the Court found RFRA to be too broad to properly address any potential religious discrimination because of the Act’s disproportionality with the legitimate ends of Section 5.\textsuperscript{222}

The \textit{Flores} Court chose to employ a narrow Section 5 interpretation of RFRA and ruled RFRA unconstitutional, finding that RFRA exceeded Congress’s remedial power under the Fourteenth Amendment.\textsuperscript{223} The Court reaffirmed its \textit{Smith} decision, finding that RFRA directly contradicts the standards for scrutiny set out in the decision.\textsuperscript{224} The following section will project the effects that the Supreme Court’s ruling will have on historic preservation and religious freedom by comparing the effects of the previous strict

\begin{itemize}
\item \textsuperscript{216} See Flores, 117 S. Ct. at 2169.
\item \textsuperscript{217} See id. at 2169-70. The Court did not foreclose enactment of preventive laws when strong reasons exist to believe that unconstitutional behavior might commence. However, the Court determined that RFRA’s enactment was too far from such a circumstance. See id. at 2170.
\item \textsuperscript{218} Id. at 2170.
\item \textsuperscript{219} See id.
\item \textsuperscript{220} See id.
\item \textsuperscript{221} See id. The Court again compared the Voting Rights Act and RFRA and found the Voting Rights Act to have a much more limited scope, tailored only to the prevalent voting discrimination. No such limitation could be found in RFRA. See id.
\item \textsuperscript{222} See id. “[T]he state laws to which RFRA applies are not ones which . . . have been motivated by religious bigotry.” Id. at 2171.
\item \textsuperscript{223} See id. at 2172. Six out of the nine justices agreed that RFRA should be held unconstitutional based on the Section 5 analysis outlined by the majority opinion. Justices O’Connor, Breyer, and Souter diverged from the majority’s analysis.
\item \textsuperscript{224} See id. at 2171.
\end{itemize}
scrutiny standard (RFRA-Sherbert-Yoder) with the reinstated intermediate scrutiny standard (Smith).

V. EFFECTS OF THE SUPREME COURT'S RFRA RULING ON HISTORIC PRESERVATION: WEIGHING THE INTERESTS OF RELIGIOUS FREEDOM VERSUS HISTORIC PRESERVATION

The Court's decision regarding the constitutionality of RFRA solidified the stronghold of the Smith intermediate scrutiny test and will hopefully provide sorely needed guidance for federal and state courts in this previously uncertain area of litigation.225 Because most ordinances affording historic protection are neutral and generally applicable,226 these ordinances fall in the class of government regulations most substantially affected by the Supreme Court's ruling. Plainly, the difference between intermediate and strict scrutiny applied to historic preservation ordinances, regulations, and laws throughout the country will have a substantial effect on the preservation movement. To more closely measure the effects of this difference, this section analyzes and predicts the effect of both the standards on historic preservation and religious freedom. Further, this section focuses on the application of the compelling interest test to historic preservation, the seminal element in determining the true impact of the standards on historic preservation and religious freedom.

A. APPLICATION OF RFRA'S COMPPELLING INTEREST TEST PRIOR TO THE FLORES DECISION: EFFECT ON THE BALANCE OF HISTORIC PRESERVATION AND RELIGIOUS FREEDOM

1. EFFECTS OF RFRA ALLEGED BY INTERESTED PARTIES

Before the Supreme Court's decision, the Sherbert-Yoder compelling interest test was applied to cases involving religious freedom and historic preservation. The Sherbert-Yoder test requires that the government present a compelling interest for its enaction once the plaintiff proves that religion is in fact burdened.227 In addition, the test requires the government to show that the application of the

225. See Wagner, supra note 114, at 617-18 (commenting on the need for Supreme Court clarification of religion-preservation conflicts).
226. See St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354 (2d Cir. 1990) ("Because of the importance of religion, and of particular churches, in our social and cultural history, and because many churches are designed to be architecturally attractive, many religious structures are likely to fall within the neutral criteria . . .").
burden is the least restrictive means of furthering that compelling interest. 228

Proponents of the compelling interest test assert that under Smith, governments have zoned churches out of commercial districts 229 and claim that governments cannot be trusted to formulate exceptions for religious minorities. 230 However, these opponents fail to mention the effect the Sherbert-Yoder test has on a government’s ability to exercise its police power (such as the power to zone) to forward the health, safety, and welfare of all citizens. In Smith, the Court denounced the broad application of the compelling interest test to all civic obligations in society that in effect grant religious exemptions for any law or obligation that burdens religion. 231 The Court stated that “[a]ny 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.” 232 The Smith Court alludes to the fact that rekindling the compelling interest test will prevent local and state governments from properly exercising their legitimate police powers to control necessary daily activities. 233 Other commentators have been troubled by RFRA’s broad application to “all forms of law at every level of government.” 234 The amicus brief submitted by fifteen states and territories urged the Supreme Court to take notice of RFRA’s massive impact on state sovereignty due to its stringent limitation on police powers that affects all core areas of state and local governance. 235 The coalition’s brief focuses particularly on RFRA’s “boundless” requirement that the least restrictive means be used when neutral laws affect religious freedom. 236 Historic preservation ordinances are among the laws that state and local

228. See id.
229. See supra note 125 and accompanying text.
231. See Smith, 494 U.S. at 888.
232. Id.
233. Smith alludes to this point because the means to the Court’s predicted anarchial end is the broad exemption from laws for religious reasons, thus weakening the overall effect of laws in place. See id. at 890. Such a process weakens the power for state and local governments to effectively use their police powers.
234. Amicus Brief for the San Antonio Conservation Society, the Municipal Art Society, and the National Alliance of Preservation Commissions at 5-6, City of Boerne v. Flores (No. 95-2074) (supporting petitioner).
236. Id.
governments enact using their police powers. Thus, RFRA's broad limitation on police powers when religion is involved will surely affect governments' abilities to protect religious structures, such as churches and synagogues, because those entities will likely cry "religious burden!" to circumvent government regulation in the future.

Critics of the Sherbert test also acknowledge the troubling inconsistencies latent in the Sherbert-Yoder compelling interest test and state that

[i]t is not clear how many senators or representatives appreciated the inconsistencies in the test they voted to restore. Some of the people who drafted RFRA did notice the problem, but, in what one might regard as an especially cynical piece of draftsmanship, they seized upon the Supreme Court's inconsistencies to obscure the Act's meaning further.

One of the most debated inconsistencies of the Sherbert-Yoder analysis has been what constitutes a compelling interest, particularly in the context of historic preservation.

2. Judicial Interpretation of RFRA's Compelling Interest Test

The Court's reinstatement of the Smith test will subject historic preservation laws to only minimal scrutiny, a drastic difference from the former strict scrutiny approach. Consequently, the full effects of the Court's Flores ruling on future religion-preservation cases cannot be fully realized without examining whether historic preservation can be deemed compelling enough to overcome a court's strict scrutiny of the government's interest. Thus, the judicial interpretation of the compelling nature of historic preservation largely impacts the magnitude of limitations that RFRA has had on historic preservation. Yoder defines a compelling interest as "truly paramount" and only of the "highest order" to outweigh a burden on the free exercise

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238. Eisebriet, supra note 183, at 451. Specifically, drafters of RFRA incorporated the decisions of Sherbert and Yoder to be the models for judicial interpretation of religious freedom violations. See id. However, the Sherbert and Yoder cases in particular were less deferential to the government than other federal jurisprudence in the area. By incorporating only Sherbert and Yoder as guidance, RFRA expressly incorporates the inconsistencies in those opinions that courts have been trying to harmonize for years. See id. at 451-52.

239. See Swanner v. Anchorage Equal Rights Comm'n, 115 S. Ct. 460, 461 (1994) (Thomas, J., dissenting) (rejecting the lower court's denial of certiorari and professing a need to hear Swanner to resolve whether preventing discrimination on marital status is compelling enough to outweigh a burden on religious freedom); see also Laycock, supra note 208, at 222 (stating that the compelling interest test has "fallen into disarray," particularly with lower courts).

240. See discussion supra Part II.
of religion.\textsuperscript{241} \textit{Penn Central} plainly states that historic preservation is a legitimate governmental interest,\textsuperscript{242} but subsequent courts disagree as to the "compelling" nature of preservation.

Though not dealing directly with historic preservation, the \textit{Bethlehem Evangelical Lutheran Church} court balanced the interests of the city in upgrading the streets and improving traffic flow\textsuperscript{243} against the burden on religious freedom and determined that the city's interest should prevail.\textsuperscript{244} In discussing the interest of the government, the court noted that religious organizations are subject to the government's police powers and that public works projects, such as street improvements, can be compelling enough to overcome a religious interest.\textsuperscript{245} Thus, under \textit{Bethlehem Evangelical Lutheran Church}, historic preservation could conceivably be compelling enough in some situations to overcome religious interests.\textsuperscript{246} The \textit{Keeler} court also balanced the government's interest in historic preservation against religious interests and stated that "[t]he ordinance embodies a legislative judgment that the City's interest in historic preservation should . . . give way to other interests, such as furthering major development and protecting property owners from financial hardship" due to the system of exemptions embodied in the ordinance.\textsuperscript{247} Thus, the \textit{Keeler} court found that the government had no compelling interest to support this particular historic preservation ordinance because the system of exemptions present in the ordinance proved that the government's "interest in enforcement is not paramount."\textsuperscript{248} However, the court did not foreclose the possibility that historic preservation could be compelling enough to override religious

\textsuperscript{242} See \textit{Penn Cent. Transp. Co. v. City of New York}, 438 U.S. 104, 129 (1978) (holding "preserving structures and areas with special historic, architectural or cultural significance" to be a legitimate governmental interest).

\textsuperscript{243} Interests in street and traffic flow are analogous to historic preservation interests. The court in \textit{Furey v. City of Sacramento}, 592 F. Supp. 463 (E.D. Cal. 1984), discusses the public's general interest in zoning as involving the assurance that a community's beauty, spaciousness, health, and safety will be maintained. See \textit{id.} at 471. The court cites the \textit{Berman} decision to support its discussion of these legitimate interests. Berman v. Parker, 348 U.S. 26 (1954). Using \textit{Furey}'s description of the public's interests in zoning, both historic preservation and public works projects would be legitimate interests, as they contribute to the beauty, health, and safety of a community. Thus, both historic preservation and public works interests should be afforded deference as comparable legitimate interests that the government must preserve.

\textsuperscript{244} See \textit{Bethlehem Evangelical Lutheran Church v. City of Lakewood}, 626 P.2d 668, 675 (Colo. 1981).
\textsuperscript{245} See \textit{id.}

\textsuperscript{246} In \textit{Bethlehem Evangelical Lutheran Church}, the court found the city's permit conditions on the Church to be only a minimal burden on religion. Thus, traffic and improvement concerns were found to outweigh religion. See \textit{id.}

\textsuperscript{248} \textit{id.}
freedom burdens in other scenarios, particularly in the absence of a system of exemptions.249

In contrast, the Westchester Reform court took the view that governmental actions (such as minimizing traffic hazards) that forward health, safety, and welfare must yield to religious interests where an irreconcilable conflict exists, implying that police power interests (similar to historic preservation) are never compelling enough to outweigh religion.250 Additionally, the Supreme Court of Washington in First Covenant Church acknowledged the importance of historic preservation, recognized its positive effects on a community’s aesthetic appeal, and noted its ability to enhance the quality of life for all citizens.251 Though these cultural and aesthetic positives are inherent in historic preservation, the court discounted historic preservation interests, stating that they fail to relate to protection of the safety or health of citizens.252 The First Covenant court found that the city’s preservation interest was not compelling and generally took a dim view of ever placing historic preservation interests over “paramount” religious freedom.253 Similarly, the court in Society of Jesus categorically held that a government’s interest in historic preservation is not compelling enough to justify burdening religious freedom under our “hierarchy of constitutional values.”254 Based on variant interpretations of the compelling nature of historic preservation, plainly no consensus exists. More courts have held that historic preservation is not compelling enough (either categorically or as applied to their factual scenario) to outweigh religious interests.255 This trend indicates the Court’s ruling in Flores will have a strong effect on historic preservation where before Flores, many courts recognized the religious freedom interests as compelling and preservation interests as less than compelling under the compelling interest test.

249. See id.
252. See id.
253. Id. (“The possible loss of significant architectural elements is a price we must accept to guarantee the paramount right of religious freedom.”).
254. Society of Jesus v. Boston Landmarks Comm’n, 564 N.E.2d 571, 574 (Mass. 1990) (“We must accept the possible loss of historically significant elements of the interior of this church as the price of safeguarding the right of religious freedom.”).
255. See, e.g., id. (categorically not compelling); First Covenant Church, 840 P.2d at 185 (not compelling as applied, leaning toward categorically not compelling); Westchester Reform Temple, 239 N.E.2d at 896 (not compelling as applied, leaning toward categorically not compelling); Keeler, 940 F. Supp. at 886 (not compelling as applied).
Supporters of RFRA argue that the Smith standard did not provide enough protection for religious freedoms. They assert that by using a compelling interest test and "careful balancing and conscientious regulation," courts and legislatures can preserve historic structures while also protecting free exercise of religion. However, the compelling interest test does not allow this balancing luxury, which is evidenced by the trend of courts to reject balancing historic preservation and religion. In contrast, the Smith intermediate scrutiny test does employ an approach to balance these interests.


After Flores, courts will now apply Smith intermediate scrutiny to subsequent conflicts involving religious freedom and historic preservation. The Smith standard gives great deference to government to exercise valid and neutral laws, such as historic preservation laws, requiring only a rational relation to a valid purpose. Though Smith critics assert that such a low level of scrutiny will give governments free reign to burden religious organizations, such

256. See Bonds, supra note 29, at 618-19.
257. Id. at 619.
258. See discussion supra Part V.A. (examining varying interpretations of the weight of a government's interest in historic preservation).
259. The intermediate and strict scrutiny tests have been employed by the Supreme Court in other areas of law. In equal protection law, the Court defines its strict scrutiny analysis as requiring the state to show that its actions are narrowly tailored in furtherance of a compelling state interest. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) (Scalia, J., concurring). The Court additionally notes that the compelling interest test is not "strict in theory but fatal in fact." Id. (citing Fulillove v. Klitznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

In contrast, the Supreme Court finds intermediate scrutiny to require government action (such as gender classification) to be "substantially related to an important governmental objective." Clark v. Jeter, 486 U.S. 456, 461 (1988). In applying this test, the Court generally weighs the state's interests and the litigant's interests to reach its result. See id. at 462-63 (weighing the interests of state having a six-year statute of limitations for establishing paternity and a litigant's interests in bringing suit after the six-year limitation period).

The Supreme Court's descriptions of the strict and intermediate scrutiny tests in equal protection litigation can be a helpful comparison to provide guidance in understanding the Smith (intermediate scrutiny) and Sherbert-Yoder (strict scrutiny) tests. Though the Smith test does not per se balance neutral regulations burdening religion, courts applying the test have, particularly when faced with a system of exemptions. See discussion supra Part II.C.2.

260. Where a state law is involved, the Smith test might not be applied. See, e.g., Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990) (ruling on state constitutional violations, failing to apply either Smith or Sherbert-Yoder).
circumstances are exaggerated and are outweighed by the positive effects that the *Smith* test will have on historic preservation.\(^{263}\)

The *Smith* test as applied does not give governments presumptive deference to employ their police power at the demise of free exercise rights. As evidence, cases under the *Smith* test have had varying results. In *St. Bartholomew*, a historic ordinance was upheld when applied to a church.\(^{264}\) But in both *First Covenant Church* and *Society of Jesus*, the courts held that the free exercise rights of the respective churches were burdened and ruled against the city’s preservation ordinances.\(^{265}\) In addition, the *Keeler* court applied the *Smith* test after overruling RFRA and found that a historic preservation ordinance violated a church’s free exercise rights.\(^{266}\) Thus, based on previous applications of the *Smith* test, the outcome of an unconstitutional ruling of RFRA will yield uncertain results due to differences in factual circumstances of cases, such as differences in ordinances. However, though results are uncertain, the *Smith* test will give the appropriate weight to historic preservation interests, allowing governments to reasonably use their police powers and preventing religious interests from having a broad exemption from general laws enacted for the safety, health, and welfare of the public.\(^{267}\)

Based on the differing views of the strength of historic preservation interests prior to the Court’s decision, the effects of RFRA were unpredictable, as each jurisdiction maintained its own opinion of the importance of preservation and religious freedom, particularly concerning whether historic preservation is a compelling interest. Regardless of whether the Court had chosen the *Sherbert-Yoder* or *Smith* test, a “chilling effect” is likely to occur on governments enacting historic preservation legislation. Both tests have yielded inconsistent results in the past. The *Sherbert-Yoder* test has been inconsistent due to the varying interpretations of historic preservation as a

\(^{263}\) See discussion infra Part VI.B.

\(^{264}\) See *St. Bartholomew’s Church* v. City of New York, 914 F.2d 348 (2d Cir. 1990).


\(^{266}\) The *Smith* exception used in *Keeler* for a system of exemptions also provides more flexibility to balance religion interests with historic preservation interests by carving out a special category of preservation schemes where courts should be more deferential to religion. See *Keeler*, 940 F. Supp. at 885-86. These situations also show that *Smith* does not merely make historic preservation a dominating interest when dealing with neutral laws.

\(^{267}\) In *Smith*, the majority stated that the Supreme Court has never held that a person’s religious beliefs excuse him or her from observing an otherwise valid law that is not based on religion. More eloquently, the Court explained that “the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law.” *Smith*, 494 U.S. at 879. The *Smith* test is in line with this concern.
compelling interest, while the Smith standard’s inconsistencies are rooted in the balancing nature of the intermediate scrutiny test. Either standard’s uncertainty will impel governments to avoid expensive litigation and transaction costs by avoiding litigation-breeding preservation ordinances. Thus, due to the judiciary’s inconsistencies, historic preservation will be detrimentally affected to some degree despite the Court’s RFRA ruling. But as a whole, RFRA’s implementation of the Sherbert-Yoder test would have produced a more negative impact on historic preservation than the Smith test because governments have less power to enact ordinances solely for preservation purposes. Additionally, governments would be even further chilled from enacting preservation ordinances applicable to religious institutions under Sherbert-Yoder, knowing that they must show a compelling interest behind the ordinance if challenged. Had RFRA been upheld by the Supreme Court, however, religious interests would have blossomed in the absence of constraining preservation ordinances under RFRA. Ultimately, the Court’s reinstatement of the Smith test will positively impact preservation efforts, in large part by avoiding the negative effects that the RFRA standard would have had on preservation efforts. However, judicial recognition of the importance of preservation efforts will necessarily diminish the religious freedom of entities impacted by preservation laws.

268. When judicial interpretations of an area of law are inconsistent, the result is often a chilling effect on the persons exercising their legal rights. When persons are not sure what the law is, many times they will compensate by avoiding the questionable activity altogether. See Kenneth E. Spahn, The Beach and Shore Preservation Act: Regulating Coastal Construction in Florida, 24 STETSON L. REV. 353, 391-92 (1995) (stating that the inconsistencies in application of Florida’s Beach and Shore Preservation Acts will have a chilling effect on development because litigation is decided on a case by case basis); Susanna Fellemma, Ethical Dilemmas and the Multistate Lawyer: A Proposed Amendment to the Choice-of-Law Rule in the Model Rules of Professional Conduct, 95 COLUM. L. REV. 1500, 1509 (1995) (asserting that inconsistencies in state ethics rules may cause a chilling effect on the information that a client reveals to his or her attorney); Note, Lawyers’ Responsibilities to the Courts: The 1993 Amendments to Federal Rule of Civil Procedure 11, 107 HARV. L. REV. 1629, 1649 (1994) (“Inconsistency arguably increases the frequency and cost of satellite litigation by increasing uncertainty and hence the chance of litigation, increases the ex ante risk that meritorious conduct will be sanctioned and hence the chilling effect of sanctions, and increases the arbitrariness and hence the potential unfairness of sanctions.” (citations omitted)).

269. Though in the past, the outcomes of historic-religion cases under the strict and intermediate scrutiny tests have not been vastly different, simply affirming RFRA’s compelling interest analysis sends a message to lower courts to return to the days before the relaxation of the Sherbert-Yoder compelling interest test. Additionally, the constitutionality of RFRA would have given courts less room to protect religious and historic preservation interests.

270. Even though results under the Smith test are inconsistent, governments will still be able to more freely enact preservation ordinances knowing that Smith excepts neutral laws from strict scrutiny. In contrast, Sherbert-Yoder provides no such exception but instead imposes an affirmative burden on governments. Based on these differences, governments would be less “chilled” from making preservation laws under the Smith test.
VI. POLICY: MEASURING THE RESULTING BENEFITS AND COSTS OF THE CURRENT SMITH STANDARD

Though the reinstatement of the Smith standard will positively impact historic preservation, a broad view of the benefits and costs to society of the former Sherbert-Yoder test must be analyzed to fully realize the impact that the change in standards will create. Through this analysis, the benefits of RFRA that will be lost become evident. This section comprehensively examines the costs of RFRA that will now be avoided and concludes by looking in hindsight at whether the negative impact on historic preservation would have been justified by RFRA’s positive effects on religious freedom and society as a whole.

A. Benefits of the Former RFRA Standard

1. Prevailing Religious Freedom

America was founded on the principle that citizens are free to practice their religion without government inference. The First Amendment embodies this fundamental birthright of all citizens, RFRA provides broad protection of religious freedom rights, limiting all government burdens on religious freedom, including generally applicable laws. Congressional testimony indicates that neutral laws have placed a significant burden on the religious activities of Americans in the past. Further, because few governments enact religiously-biased laws, most government laws that affect religion are neutral. Thus, to provide citizens with the fullest form of religious freedom feasible under the First Amendment, RFRA’s compelling interest test protects religion from its most common foe: the neutral, generally applicable law. With RFRA in place, religious entities and citizens can rest assured that only the most necessary interests will interfere with their religious activities. With this broad grant of religious freedom, religious establishments received special deference in situations such as zoning, historic preservation, and permitting, only affecting religious activities when the governmental interest is extreme. Thus, RFRA provides the benefit of broad religious protection for all citizens to enjoy. In contrast, the main

272. See U.S. CONST. amend. 1.
274. See S. REP. NO. 103-111, at 4-5.
275. See id. at 6.
276. See id. at 8-9.
concern with the Smith test lies in its pressures on religious freedom. With the increased use of preservation laws and ordinances, religious entities such as churches and synagogues must contend with the frustration of property sales, expansion efforts, and architectural preferences, all of which constrain religious expression.\textsuperscript{277}

2. Freedom from Financial Pressures of Government Regulation

Compliance with governmental regulation frequently comes with a price.\textsuperscript{278} Generally, the private property owner absorbs the cost of historic preservation up to the level that the regulation becomes a taking.\textsuperscript{279} RFRA largely exempts religious entities from bearing this financial burden. In St. Bartholomew, the church congregation contended that the prohibitive cost of complying with historic preservation laws by renovating the existing church structure would be a severe burden and prevent the church from carrying out its ministry.\textsuperscript{280} Similarly, the plaintiffs in Keeler argued that they would undergo great financial hardship as a result of the preservation ordinance.\textsuperscript{281} If RFRA were applied to both Keeler and St. Bartholomew, the governments’ interest in regulating might not be found to be compelling enough to overcome religious interests, and the churches would be saved from financial strain.\textsuperscript{282} Additionally,


\textsuperscript{278} For example, to comply with historic preservation regulations, expensive renovation, restoration, and upkeep is often necessary. When a landowner is bound to comply with regulations that prevent alteration of a structure, the cost is borne at his own expense. However, sometimes the expense and problem resulting from historic designation reaps benefits, such as an increase in property value in the area. See Roy Hunt, Professor at University of Florida College of Law, Lecture at Meeting of Environmental Crimes and Historic Preservation Class (Florida State University College of Law, Mar. 20, 1997) (discussing the rising property values of the historically protected art deco section of Miami).

\textsuperscript{279} See Pruneyard Shopping Center v. Robins, 447 U.S. 74, 83 (1980) (finding that landowner must bear the burden imposed by government regulations in some situations); Furey v. City of Sacramento, 592 F. Supp. 463, 471 (E.D. Cal. 1984) (“To the extent that the private interest is in the maximum exploitation of a piece of property, it is entitled to no weight whatsoever.”).

\textsuperscript{280} See St. Bartholomew’s Church v. City of New York, 914 F.2d 348, 357-58 (2d Cir. 1990). Under Smith, the preservation ordinance was found constitutional, but such a ruling is questionable under RFRA’s Sherbert analysis. Sherbert could have easily come to a different conclusion, showing that RFRA does help eliminate governmentally imposed financial burdens on religious entities.


\textsuperscript{282} Both St. Bartholomew and Keeler were decided under the Smith test that allowed neutral, generally applicable preservation laws in those cases to forgo strict scrutiny. But, under RFRA, these cases’ preservation laws would be required to be compelling. Based on previous erratic application of the RFRA compelling interest test, it is difficult to predict whether
complying with bankruptcy transfer regulations would have cost a church money in donations from a Chapter 7 trustee. But under RFRA, a court ruled that the church could accept these donations. With more financial resources, religious interests can expand their activities. Additionally, many religious establishments seek to better the community through service projects, food banks, and homeless shelters. Lessening financial strain on religious establishments would allow unconstrained religious activities and possibly better the community through more charitable projects. The RFRA test produces the benefits of prevailing religious freedom and relief for religious entities from financial burdens. The reinstatement of the Smith standard will eliminate these benefits.

B. Costs of the Former RFRA Standard

1. Harsh Blow to the Preservation Movement

RFRA’s codification of the compelling interest test was a large step back for the steadily growing preservation movement. RFRA greatly impeded preservation of religious buildings and structures both through challenges of laws by religious entities and the possible chilling effect that RFRA might have on government efforts to protect these structures. In many towns and cities, early community life grew around religious establishments such that the buildings that housed religious entities were often built in the center of town and became the backdrop for the development of the city. Expressing the important qualities of continuity that historic structures bring a community, Silver writes, “[C]ommunities have special irreplaceable values that must be preserved in order to provide a sense of place and continuity in people’s lives.” RFRA largely prevented governments from preserving structures such as churches and

application of the compelling interest test would reverse the outcome of those cases. However, facially, the RFRA test would provide more protection—and less financial strain.

283. See Young v. Crystal Evangelical Free Church, 82 F.3d 1407, 1410 (8th Cir. 1996).
284. See Nolon, supra note 277, at 5.
285. See, e.g., St. Bartholomew, 914 F.2d at 355 (carrying out charitable activities).
286. See discussion supra Part II.B. (describing the growth of the preservationist movement in the United States).
287. See discussion supra Part V (describing the effects of RFRA on preservation).
288. See, e.g., Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 880 (D. Md. 1996) (describing a Roman Catholic church in Washington Street Historic District of the City of Cumberland). In Tallahassee, Florida, several churches are located in the midst of the downtown area. The Tallahassee Historic Tour publication lists three churches located among other downtown historic buildings. See HISTORIC TALLAHASSEE PRESERVATION BD., FLORIDA DEPT OF STATE, TOURING TALLAHASSEE 9-12 (including St. James C.M.E. Church built in 1899, First Presbyterian Church built from 1835-1838, and St. John’s Episcopal Church built in 1880).
289. Silver, supra note 56, at 890.
synagogues—buildings which are often excellent examples of the American architectural legacy. Unfortunately, the effects of demolition of structures is permanent.  

2. Effects of the Decline of Aesthetic Quality in America’s Cities  

"[P]reservation is a potential catalyst to retaining an aesthetic quality in the urban environment where people live and work."  

Tourists flock to Paris to see the impressive monuments, buildings, and churches, like Notre Dame, Sacre Coeur, the Eiffel Tower, and the Arc de Triomphe. Similarly, the charm of the Italian town of Siena is embodied in the impressive Piazza del Campo in the valley and the beautiful City Cathedral and Romanesque bell tower at the highest point in the town, attracting visitors world-wide to see this quaint town. Regardless of the size of the city, historical structures play an important role in the aesthetics of the urban environment, embracing the spirit of the nation. Just as in Europe, America’s churches, synagogues, and other religious structures are very much a part of a city’s aesthetics.  

It is difficult to imagine the demolition of Notre Dame due to financial burdens on the congregation, or the addition of a modern building to the rear of the City Cathedral to accommodate a growing church membership. Such travesties would decrease the aesthetic appeal of their respective cities—and would do the same in American cities and towns. With the decline of aesthetic appeal comes the decline of tourism. Historic preservation efforts have a direct impact on tourism, frequently making preservation economically beneficial.

290. See Stein, supra note 44, at 243 (noting that developers and owners irreversibly alter or destroy significant historic structures). Much of alternation and demolition of historic structures occurs in urban areas where other forms of crime attract public attention and prosecutorial resources. See id. at 247.

291. Silver, supra note 56, at 890.

292. See Alexandre Polozoff, Alexandre Polozoff’s Walking Tour of Paris (visited Apr. 8, 1997) <http://exoweb.com/polozoff/parisgc.html> (discussing the monuments and religious structures in Paris). One of the values of historic preservation is truth or integrity. This value encompasses the special significance that seeing the “real thing” has. Thus, going to Disney’s Epcot Center and viewing the model Eiffel Tower would not have the same effect as seeing the original. See Hunt, supra note 277.


294. See Silver, supra note 56, at 890.

295. See Elizabeth Cameron Richardson, Applying Historic Preservation Ordinances to Church Property: Protecting the Past and Preserving the Constitution, 63 N.C. L. REV. 404, 421-22 (1985); see also NATIONAL TRUST FOR HISTORIC PRESERVATION, INFORMATION SHEET NO. 17, THE PRESERVATION OF CHURCHES SYNAGOGUES AND OTHER RELIGIOUS STRUCTURES 1 (1978) [hereinafter CHURCH PRESERVATION REPORT].
to a municipality. Aesthetic improvements have also been linked to a substantial decrease in crime in a community. Finally, due to increased tourism and public attention, historic districts and sites often raise property values when an area is restored and maintained, thus improving the area’s economy.

3. Lost Economic Opportunities

Historic districts have been found to produce other economic benefits for a community, including the “creation of new jobs, stimulation of retail sales,” and “dilution of deterioration and poverty.” As one commentator noted, “Dollar for dollar, historic preservation is one of the highest job-generating economic development options available.” In fact, several states have formalized studies proving precisely this point. In 1993, one such study examined the economic effects of Rhode Island’s preservation efforts on its communities by comparing expenditures directly related to government-sponsored preservation programs with the impact of preservation efforts on employment, wage changes, and tax revenues. The study found that for every $10 million spent on preservation through Rhode Island’s programs, 285 new jobs were created, $7.4 million was generated in wages, the gross state product increased by $9.2 million, and state and local tax revenues rose by $861 thousand. Texas and Illinois also published similar studies on the economics of their preservation efforts, both finding that preservation stimulated a considerable amount of revenue and jobs.

296. See Stein, supra note 44, at 243; see also Richardson, supra note 295, at 421.
298. See Richardson, supra note 295, at 421; see also O’CONNELL, supra note 297, at 112 (recounting results from ADVISORY COUNCIL ON HISTORIC PRESERVATION, THE CONTRIBUTION OF HISTORIC PRESERVATION TO URBAN REVITALIZATION (1979) (studying economic effects of historic preservation for the first time)).
299. O’CONNELL, supra note 297, at 112.
302. See RHODE ISLAND STUDY, supra note 301, at 27.
303. See SHLAES & CO., ECONOMIC BENEFITS FROM REHABILITATION OF CERTIFIED HISTORIC STRUCTURES IN TEXAS 31-46 (1985) (submitted to the Texas Historical Commission) (finding that Texas rehabilitation programs have generated more than 13,590 jobs and $10.16 million in state tax revenue); SHLAES & CO., ECONOMIC BENEFITS FROM REHABILITATION OF HISTORIC BUILDINGS
evidently bestows considerable economic attributes on a community. If the RFRA standard had been affirmed by the Supreme Court, preservation of religious structures would have further declined, resulting in a decrease in potential economic benefits derived from preservation.

4. Inner City Revitalization

Since World War II, industry, jobs, and people have moved from cities and towns to outlying suburbs. 304 Historic preservation aids in reducing the problems associated with urban sprawl. In states where the population is rapidly growing, metropolitan areas have become increasingly isolated from economic opportunities that lie in the suburbs. 305 Because many preservation projects are located in the core of a community, visitors are drawn to the preservation activities, bringing economic growth to the inner city rather than the suburbs. 306 Economic growth in the inner city translates into environmental advantages as well, such as savings in proportion of land used for transportation, reduction in energy consumption, and reduction in air pollution. 307 Additionally, reusing older downtown structures can lessen traffic congestion 308 and the need for new infrastructure, such as roads and bridges. 309 Thus, the preservation of religious structures also forwards urban revitalization.

If the Court in Flores had upheld RFRA, the aesthetic appeal of America’s cities and towns would likely have been damaged because religious establishments could seek exemptions from preservation laws, allowing demolition and facial changes to historic religious structures. 310 Consequently, cities dependent on visitors drawn by historic landmarks would have suffered economically, and other
positive effects resulting from preservation would not have been realized. Thus, because the Court struck down RFRA, the preservation movement will not suffer from these setbacks, and America can enjoy the amenities accompanying preservation.

This analysis of the benefits and costs predicted to result from the use of the RFRA standard demonstrates the clash between two strong interests: religious freedom and historic preservation. Each maintains a strong following willing to argue vehemently and able to point out legitimate concerns for protecting their respective interest. The widespread aesthetic, cultural, and economic effects of preservation demand adequate protection of historic structures, as preservation affords many more benefits to society as a whole than the religious interests of a smaller number of owners of religious properties. 311 Application of RFRA's compelling interest test would not have adequately represented preservation interests but would have instead resulted in an imbalance in favor of religious freedom interests over legitimate state interests such as historic preservation. 312 The Court's reaffirmation of the Smith standard is therefore a major victory for preservationists, but pervasive religious freedom will likely be sacrificed. Based on this troubling reality, this article proposes alternatives aimed to soften the Smith standard's blow to religious freedom, while retaining the Smith standard's benefits to historic preservation.

VII. ALTERNATIVES TO THE REINSTATED SMITH STANDARD: TIPPING THE SCALE TO A MORE PERFECT BALANCE BETWEEN PROTECTION OF RELIGIOUS FREEDOM AND HISTORIC PRESERVATION

"[I]t is possible to strike a balance between the competing interests of the religious property owners and municipal governments, rather than negating one interest at the expense of the other." 313

A. Reinstatement of RFRA with a Judicial Interpretation that Historic Preservation can be Compelling Enough to Override Religious Freedom in Some Situations

To balance the interests of historic preservation and religious freedom, the Supreme Court could apply the RFRA standard and at

311. See id. at 617.
312. Cf. Richardson, supra note 295, at 429 (failing to advocate the compelling interest test, but instead, arguing for a balanced approach for promotion of preservation efforts through private means using "cooperation and flexibility" so that churches and local governments can work together).
313. Wagner, supra note 114, at 619.
the same time interpret historic preservation as a compelling interest in some situations. Such an interpretation would allow religion and historic preservation to be more equally balanced—a feat that neither RFRA on its face or Smith accomplishes. The Court has enunciated historic preservation as a viable interest to consider but has not stated the magnitude of the interest. If the Supreme Court stated in dicta that historic preservation could overcome religious freedom interests in certain circumstances, then RFRA would be sufficiently diluted in historic preservation situations such that the interests could be more equally balanced. However, such a declaration from the current Supreme Court is highly unlikely, as many of the pro-preservation justices from the 1978 Penn Central Court are no longer on the Court. Of the justices from the Penn Central Court that remain on the Court today, Justices Rehnquist and Stevens were both in the Penn Central dissent. Additionally, the Court’s reaffirmation of the Smith standard in Flores makes the future adoption of a RFRA-like standard unlikely. Therefore, the likelihood of a gratuitous finding that historic preservation is a compelling governmental interest is low.

B. Avoiding Litigation: Encouraging Localities and Religious Entities to Work Together

Landmark laws already display much flexibility to accommodate the needs of religious organizations by including hardship provisions, zoning resolutions, and additional appeals opportunities. However, governments could further recognize the protected nature of religious organizations and help organizations work toward compliance with ordinances. Though the government must remain


316. In the Court’s Flores opinion, historic preservation was not addressed. See Flores, 117 S. Ct. at 2157.

317. In Penn Central, the majority was composed of Justices Brennan (writing the opinion), Stewart, White, Marshall, and Powell. The dissent was composed of Justices Rehnquist, Burger, and Stevens.

318. See Wagner, supra note 114, at 618-19; see also JULIA H. MILLER, NATIONAL TRUST FOR HISTORIC PRESERVATION, UNTangling THE PRESERVATION WEB: UNDERstanding THE DIFFERENT APPROACHES TO RESOURCE PROTECTION 6 (1995) [hereinafter RESOURCE PROTECTION REPORT] (stating that many communities have economic hardship provisions in local preservation ordinances).
neutral toward religious organizations,\textsuperscript{319} it could offer several
alternatives to soften the burden of preservation ordinances on these
organizations. The government could allow a more lenient applica-
tion of the ordinance by giving the religious organization additional
time to comply with an ordinance or allowing the organization to
move toward compliance in stages.\textsuperscript{320} Such governmental action
would advance the ultimate goal of preservation, while recognizing
that special deference should be given to religious interests.\textsuperscript{321}
Additionally, local governments could work together with religious
organizations to explore affordable construction alternatives that
would mitigate external architectural changes and also comply with
preservation ordinances.\textsuperscript{322} Finally, localities should be encouraged
to develop loan and grant programs to help religious and non-profit
organizations restore their decaying historic structures.\textsuperscript{323} Congress
could support an initiative encouraging local governments to enact
these greater protections for religious interests. If local governments
are forced to collaborate with religious entities rather than simply

\textsuperscript{319} See Richardson, supra note 295, at 429. The government would have to carefully
fashion efforts toward both non-profit and religious organizations. See id.

\textsuperscript{320} Some landmark commissions have advocated laws to provide special accommo-
diations to religious and non-profit organizations to provide them with a higher return on their
property. See Wagner, supra note 114, at 615-16.

\textsuperscript{321} This alternative operates under the philosophy that some movement forward to
achieve the final goal is preferable to none. Brownfields operate under the same philosophy.
Brownfields are contaminated former industrial sites that lie undeveloped because developers
do not want to take on CERCLA clean-up liability. To promote redevelopment of these areas,
the Environmental Protection Agency (EPA) enters into prospective purchaser agreements
with developers and limits their scope of liability and, in some cases, lessens the amount of
clean-up that the developer must do. Thus, Brownfields redevelopment moves toward the
EPA’s goal of complete clean-up. But, clean-up is not fully paid by polluters and clean-up
efforts by the developer may not be one-hundred percent. See generally Brian C. Walsh, Seeding
the Brownfields: A Proposed Statute Limiting Environmental Liability for Prospective Purchasers, 34
Harv. J. on Legis. 191 (1997) (describing the Brownfields problem and proposing solutions);
Scott H. Reisch, Reaping “Green” Harvests from “Brownfields”: Avoiding Lender Liability at Con-
taminated Sites: Part I, Colo. Law., Jan. 1997, at 3 (examining Brownfields and local, state, and
federal efforts to redevelop contaminated lands).

\textsuperscript{322} See Kay D. Weeks, U.S. DEP’T. OF INTERIOR, PRESERVATION BRIEFS 14, NEW EXTERIOR
ADDITIONS TO HISTORIC BUILDINGS: PRESERVATION CONCERNS 1. Weeks discusses the impor-
tance of maintaining a historic building’s character when making a new addition or renova-
tion. To accomplish this, Weeks describes important elements in conserving a structure’s charac-
ter, including size of addition, consistent building profile, style, and building materials. See id. at 1-9. In Tallahassee, Florida, historic preservationists worked with members of St.
John’s Episcopal Church to fashion additions to preserve the historic character of the church.
The ultimate renovation plans preserved far more of the church’s outward character then
previous plans. See Interview with David Ferro, Bureau of Historic Preservation, Florida Dep’t
of State, Tallahassee, FL (Apr. 5, 1997) (discussing St. John’s renovation and additions).

\textsuperscript{323} For example, Tallahassee, Florida has developed a property grant and loan program
to promote the conversion of historic structures to bed and breakfast inns, retail stores, hotels,
and offices. See DOWNTOWN DEVELOPMENT OFFICE, CITY OF TALLAHASSEE, HISTORIC PROPERTY
GRANT AND REVOLVING LOAN PROGRAM (1997) (detailing Tallahassee’s program and providing
eligibility requirements).
imposing rigid preservation ordinances on the entities, then religious
constraints imposed by preservation efforts can be minimized.324

C. A Law Requiring Localities to Use Their Eminent Domain Powers

Congress could enact a law requiring localities to compensate
religious entities for whole buildings that the entity can no longer
use but that cannot be altered due to historic preservation laws.
Such a law would have to be carefully drafted to place the burden on
religious entities to provide evidence of financial burdens. Additionally,
the entity should be required to show why the historical structure is no longer adequate for its needs. If the government and
religious entity could not arrive at an acceptable solution, then the
government could use its power of eminent domain to compensate
the religious institution for its property.325 This way, the govern-
ment could save the historic structure, and the religious entity could
reap enough financial benefits from the property to build a more
suitable structure in a different location.326 The government could
then use the structure for a public purpose such as a museum327 or
public building. The government could also sell the church to pri-
vate interests and include as part of the sale a covenant that the
structure cannot be modified.328 For example, in Atlanta, Georgia,
the up-scale Abbey restaurant operates in the location formerly
occupied by the congregation of a Methodist Episcopal church.329
The restaurant preserves the architectural beauty and character of
the over-eighty year-old church building330 and exemplifies the
successful use of a former church building for business purposes.
Other churches and cathedrals have been transformed to different
uses to meet community needs.331 Modern reuses of churches in-
clude conversions to: a performing arts facility,332 a modern theater

324. For example, New York zoning ordinances allow looser standards of historic pres-
ervation requirements for religious entities to mitigate religious burdens, and variances for reli-
gious entities are often allowed. See Nolon, supra note 277, at 5.
326. Though acquiring a historic structure is a viable alternative, regulation of the struc-
ture is a less expensive way of effectuating the goal of preservation. Thus, a government's
acquisition of a property would probably have to be forced by law. See O'CONNELL, supra note
297, at 29.
327. See RESOURCE PROTECTION REPORT, supra note 318, at 1 (recounting governmental
efforts to buy historic resources and turn them into house museums).
328. See O'CONNELL, supra note 297, at 23.
329. See THE ABBEY RESTAURANT, THE ABBEY ESTABLISHED 1968 (advertising the Abbey
restaurant and providing background information about the restaurant).
330. See id. The Abbey maintains the massive stained glass windows and fifty foot arched
and vaulted ceiling of the original building.
331. See CHURCH PRESERVATION REPORT, supra note 295, at 9-17.
332. See id. at 9 (Christ Church Cathedral, St. Louis, Mo.).
and offices for professional theater group, a university lecture hall and laboratory, a community activity center, and a bank. Thus, local governments have many options to consider when converting religious facilities to serve community needs.

Taking a less extreme approach, the law could require the local government to compensate the owner of a religious property for an architectural easement to preserve the structure on the land. An architectural easement may apply to the interior, exterior, or certain portions of a structure and generally prohibits the owner of the structure from modifying the protected elements. An easement grants local governments greater specificity in choosing what is protected and costs significantly less than acquiring the whole property. With such a law, local governments could distribute the burden of preservation to all citizens in the community rather than imposing the full burden of preservation on a small religious organization. Since the entire community enjoys the benefits of preservation, the community should also bear the burden.

D. Private Efforts

Private groups can assist churches and synagogues in the restoration of historic structures by contributing financial assistance. In many situations, religious establishments desire restoration over demolition but do not have the financial resources to commit to renovation and maintenance of a structure. Private efforts could enable religious entities to make expensive restoration efforts that meet religious needs of the congregation and also comply with preservation laws. Thus, churches and synagogues will not feel as religiously constrained by preservation laws and preservation would have less of an impact on religious freedom.

Private citizens can also contribute their knowledge in restoration to help the religious organization cut renovation costs. To motivate the private sector, reminders of the potential increase in property value and decrease in crime could be used. Additionally, private

333. See id. at 13 (St. Ignatius Church, Baltimore, Md.).
334. See id. at 15 (Gethsemane Lutheran Church, Austin, Tex.).
335. See id. (Immaculate Conception Church, Westerly, R.I.).
336. See id. at 17 (First Unitarian Church, Richmond, Va.).
337. See O'Connell, supra note 297, at 25.
338. See id.
339. See id.
340. See Richardson, supra note 295, at 429.
341. See, e.g., St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990).
342. See Richardson, supra note 295, at 429. Tax exemptions are also a motivating factor for private citizens who plan to contribute to historic preservation efforts by donating ownership
persons or preservation groups can also acquire historic properties, just as the government can. Thus, a private party can buy a religious landmark from the congregation so that the congregation can move to better suited accommodations and escape the pressures imposed by preservation laws. Though helpful, private efforts should only be relied upon as a supplementary source to bolster preservation of religious structures, as private efforts can be inconsistent due to their dependence on available funding.

E. Preservation Tax Incentives

To encourage preservation of historic buildings, Congress has created a program of tax incentives, which has successfully revitalized communities by promoting rehabilitation of historic properties nationwide. The federal tax incentive program is the product of Congress’s recognition that culturally-valuable historic structures can be converted to fit the current commercial and housing needs of America’s communities. The Internal Revenue Code (IRC) establishes tax credits for rehabilitation of certified historic structures and non-historic buildings built prior to 1936. Certified rehabilitation of a certified historic structure receives a twenty percent tax credit while rehabilitation of non-historic buildings built before 1936 receives a ten percent credit. Additionally, the IRC provides income and estate tax deductions for charitable contributions of interests in historic property, including easements. The federal program has been successful in attracting businesses and other

interests in such properties to the government. See discussion infra Part VII.D (summarizing tax incentives for historic structures).

343. See O’CONNELL, supra note 297, at 22-23.
344. See RESOURCE PROTECTION REPORT, supra note 318, at 1.
346. See Silver, supra note 56, at 897-98.
347. A tax credit decreases the amount of tax owed. See TAX INCENTIVES REPORT, supra note 345, at 3.
349. A certified historic structure must be either: (1) individually listed in the National Register of Historic Places; or (2) located within a registered historic district and certified by the National Park Service as advancing the historic importance of that district. I.R.C. § 47(c)(3) Additionally, certified historic structures are defined as buildings while a historic district must be listed in the National Register of Historic Places. See id.
351. See I.R.C. § 170(h) (1986 & West Supp. 1997) (qualified conservation contribution). For further discussion of additional qualifications for tax credits, see Silver, supra note 56 (providing a detailed breakdown of the tax incentives afforded to historic preservation).
private investors to restore vacant or underused historic structures, including churches.352

Unfortunately, federal tax incentive programs are not as effective in preserving religious structures because religious organizations are already exempt from taxes.353 Thus, any tax credit to a religious property owner will not help alleviate financial pressures of historic preservation laws because a full federal tax exemption is already in place.354 Tax incentive programs do offer indirect benefits to congregations that seek to sell their historic religious property and relocate. Religious property owners can more easily sell their property because the incentive program provides an attractive inducement for others to buy the historic structure.355 This way, religious entities can sell their properties more easily, giving the entity a way to alleviate financial pressures imposed by historic preservation laws and thereby allow the entity to practice its religion unburdened elsewhere. Thus, federal tax incentives indirectly increase the probability that religious structures will be restored and that religious entities can also retain more freedom in their religious activities.356

Based on the success of the federal incentive program, local and state governments should be encouraged to expand their tax incentive programs. Some states and local governments already have incentive programs, which include rehabilitation tax credits, tax deductions for easement donations, and decreased property taxes.357 Property tax exemptions, in particular, encourage restoration and rehabilitation of historic structures because many of these structures are located on desirable, highly-valued properties, either in downtown areas or in affluent suburbs.358 As is the case with federal tax incentives, local and state tax exemptions for historic properties are also not as effective for religious property owners. Most state and local governments provide exemptions for religious properties, negating additional preservation tax cuts.359 Increased local and

352. See TAX INCENTIVES REPORT, supra note 345, at 2.
354. See I.R.C. § 501(c)(3).
355. See TAX INCENTIVES REPORT, supra note 345, at 2.
356. See id.
357. See id. at 20; see also RESOURCE PROTECTION REPORT, supra note 318, at 7 (describing property tax freezes for specified time periods).
state efforts for preservation tax incentives, however, should be commended because, like federal incentives, they encourage third parties to invest in revitalizing eroding and vacant religious structures when congregations are willing to sell.\textsuperscript{360} Ultimately, tax incentives can help religious entities practice their religion more freely. However, like private efforts, tax incentive programs can only be viewed as a supplementary preservation measure for historic religious structures.

VIII. CONCLUSION

The \textit{Flores} decision will prove to have a positive effect on preservation interests. However, religious freedom will suffer, as churches, synagogues, and other religious entities must comply with rigid historic preservation ordinances that often impose expensive restoration and maintenance. Of the alternatives mentioned above, a Supreme Court declaration of the compelling nature of historic preservation would best provide the necessary balance between preservation and religious interests.\textsuperscript{361} Yet, given the current ideological climate of the Supreme Court, this alternative is probably the least likely to occur.\textsuperscript{362} Congressional action to encourage local governments to enact laws forwarding religious protection is also doubtful, considering the potential frustration\textsuperscript{363} resulting from the striking of RFRA which might deter further enactments in this area.\textsuperscript{364} If neither of the first two alternatives is viable, then indi-

\textsuperscript{360} Intuitively, state and local tax exemptions make historic properties, including religious properties, an even more attractive investment when added to the federal exemption, particularly due to the avoidance of potentially prohibitive property taxes. See Kass, supra note 358, at § 5.1.

\textsuperscript{361} Such a declaration would send a message to lower courts to take preservation and religion concerns seriously. It would slightly relax the RFRA compelling interest test in the face of historic preservation interests. Consequently, RFRA would provide strict protection of religious interests but would include a special judicial exception for historic preservation interests where more of a balancing analysis would be employed.

\textsuperscript{362} See discussion supra Part VIIA.


\textsuperscript{364} See S. REP. NO. 103-111 (1993), reprinted in 1993 U.S.C.C.A.N. 1892. Based on Congress's pro-religion attitudes, Congress might consider this option as a vehicle for national emphasis on religious freedom. However, the majority membership of Congress has changed in the last four years from the democratic to republican party which might change the general congressional attitude on religious freedom. See e.g., David M. Mason, \textit{How the 104th Congress. Reformed Itself} (visited Apr. 6, 1997) <http://www.heritage.org/heritage/congress/chapt6.html>. Additionally, because the congressional majority has made it a priority to "avoid new impositions on state and local governments," the new Congress might be in favor of giving back more preservation powers to local and state governments rather than focusing on religious rights. \textit{Id.}
individual government and private efforts, including grants, loans, tax incentives, and usage of eminent domain powers, can always be employed to mitigate the effects of the Court's ruling on religious freedom. However, without a unifying governmental initiative, the balance between religious freedom and historic preservation will suffer—as efforts will be unharmonized and inconsistent.365 Ultimately, none of these alternatives can fully balance the two interests.

365. See RESOURCE PROTECTION REPORT, supra note 318, at 1 (recognizing the merits of private preservation efforts but noting that preservation on an ad hoc basis is not as effective without governmental assistance).