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PUBLIC FUNDS AND THE HISTORICAL PRESERVATION OF CHURCHES: PRESERVING HISTORY OR ADVANCING RELIGION?

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> [The First] Amendment requires the state to be a neutral [sic] in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.[1]

I. INTRODUCTION

The preservation of historic properties and structures in our national environment serves an important role in conserving our social and cultural history for present and future generations. Preserving history is a crucial part of enriching and developing our culture, our quality of life, and our future. Federal, state, and local historical preservation funds have been used to preserve a wide array of diverse structures, from George Washington's Mt. Vernon to the Main Street businesses of Viroqua, Wisconsin.[2]

Most controversies surrounding the distribution of public money for historical preservation center around two issues: (1) which structures should receive historical preservation funds, and (2) what happens to the property rights of the owners once a structure is deemed a historical landmark. When public funds are used to preserve churches, however, two other issues come into play. First, when the government donates public funds to preserve historical church buildings, do governmental restrictions placed on the use of the funds violate the church members' Free Exercise rights under the First Amendment? And second, does the mere act of donating public funds to churches

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1. Everson v. Board of Educ., 330 U.S. 1, 18 (1947) (holding the Establishment Clause applicable to the states under the Fourteenth Amendment and upholding a state statute providing bus transportation for children attending parochial schools).

In *Everson*, the Court reasoned that because the State of New Jersey was providing bus transportation to students of public schools, the same privilege must be extended to students of parochial schools so that all citizens would be treated equally without regard to their religious beliefs. *Id.*

2. Patrick Rains, *Flight or Fight: The Town That Took on Wal-Mart—and Won*, 107 AM. CITY & COUNTY 50 (Nov. 1992).

violate the Establishment Clause's charge that "Congress shall make no law respecting an establishment of religion"?[3] The first issue concerning the preservation of churches has been litigated in federal[4] and state court[5] and has been discussed extensively by several commentators.[6] The second issue, however, seems to have fallen through the cracks in religious funding jurisprudence.[7] Although no court has directly considered the issue of using public funds to historically preserve churches, the United States Supreme Court has issued almost fifty years worth of "modern" religious funding decisions[8] which this Comment will attempt to analyze and analogize to the Establishment Clause concerns involved in donating the government's money for the historical preservation of churches.

II. THE *LEMON* TEST—A CRITIQUE OF THE CURRENT TEST USED IN ESTABLISHMENT CLAUSE CASES

The United States Supreme Court has, over time, interpreted the First Amendment's Establishment Clause to afford protection from "sponsorship, financial support, and active involvement of the sover-

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3. U.S. CONST. amend. I.

4. St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

5. *See* First Covenant Church v. City of Seattle, 787 P.2d 1352 (Wash. 1990) (en banc), *vacated and remanded*, 499 U.S. 901 (1991).

6. Note, *Model Free Exercise Challenges for Religious Landmarks*, 34 CASE W. RES. L. REV. 144 (1983); Note, *Land Use Regulation and the Free Exercise Clause*, 84 COLUM. L. REV. 1562 (1984); Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401 (1991); Richard F. Babcock & David A. Theriaque, *Landmarks Preservation Ordinances: Are the Religion Clauses Violated by Their Application to Religious Properties?*, 7 FLA. ST. U. J. LAND USE & ENVTL. L. 165 (1992).

7. However, one constitutional law professor in Florida, Professor Steven G. Gey of Florida State University College of Law, has brought the issue to the attention of local and state media. *See* Martin Dyckman, *What About St. John's?*, ST. PETERSBURG TIMES, Sept. 3, 1993, at D3.

For an opposite viewpoint concerning a similar issue, community development block grants, see *"Christian" Businesses Denied Main Street $$ (Persecution in the 90s)*, PERRY TIMES (Perry, Fla.), Oct. 27, 1993, at B1.

8. The United States Supreme Court's initial interpretation of the Establishment Clause allowed the government to support religion provided it did not discriminate against any type of religion. *See* Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815). As Justice Joseph Story wrote the majority opinion in the case, this is referred to as the "Story View."

The "modern" view of the Establishment Clause began in 1947 with the United States Supreme Court's decision in *Everson v. Board of Education*. 330 U.S. 1 (1947). In *Everson*, the Court upheld a New Jersey statute providing bus transportation to parochial school children. The majority interpreted the Establishment Clause to mean that the government was required to remain "neutral in its relations with groups of religious believers and non-believers." *Id.* at 18. This Comment will consider the Supreme Court case law which has evolved in the religious financing area since *Everson*.

eign in religious activity."[9] In attempting to ensure these protections, the Court, since 1971, has used the three-prong *Lemon* test[10] to assess a statute's constitutionality under the Establishment Clause. For a law to be declared constitutional under the test, it (1) must have a secular purpose, (2) must have a primary effect that neither materially inhibits nor advances religion, and (3) must not excessively entangle religion and governmental institutions.[11] Although the test derives its name from *Lemon v. Kurtzman*,[12] the case where it was first articulated, many think it is appropriately named due to the inconsistent results it has produced.[13] In fact, on various occasions, five of the current Justices of the United States Supreme Court[14] have criticized the test for its inadequacies. For example, in her concurrence in *Wallace v. Jaffree*,[15] Justice O'Connor noted that the *Lemon* test should be "re-examined and refined . . . to make [it] more useful in achieving the underlying purpose of the First Amendment."[16] Also in *Wallace*, Justice Rehnquist criticized each prong of *Lemon* and noted the contradictory results often achieved in applying the test.[17] Referring to the *Lemon* test, he stated, "[i]f a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it."[18] Justice Kennedy also questioned the test in *County of Allegheny v. ACLU*,[19] where he agreed that "[p]ersuasive criticism of *Lemon* has emerged."[20] And, Justice Souter, in his confirmation hearings before the United States Senate in 1990, stated that he also views the *Lemon* test to be in direct conflict with the Free Exercise Clause and that the test causes a "difficulty which sooner or later the Court has to resolve."[21] Finally,

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9. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970) (upholding state tax exemptions for real property owned by religious organizations and used for religious worship).

10. The *Lemon* test was first set forth by the Court in *Lemon v. Kurtzman*. 403 U.S. 602 (1971).

11. *See id.* at 612-13.

12. 403 U.S. 602 (1971).

13. Michael S. Paulsen, Lemon *is Dead*, 43 CASE W. RES. L. REV. 795 (1993); Roald Y. Mykkeltvedt, *Souring on* Lemon: *The Supreme Court's Establishment Clause in Transition*, 44 MERCER L. REV. 881 (1993).

14. Justices Scalia, Rehnquist, Kennedy, O'Connor, and Souter have all criticized the *Lemon* test. Justice White who dissented from the decision in *Lemon*, also has strongly criticized the test. *See supra* notes 15-25 and accompanying text.

15. Wallace v. Jaffree, 472 U.S. 38, 68-69 (1985) (O'Connor, J., concurring).

16. *Id.*

17. *Id.* at 110-11 (Rehnquist, J., dissenting).

18. *Id.* at 112 (Rehnquist, J., dissenting).

19. 492 U.S. 573, 655-79 (1989) (Kennedy, J., concurring in part and dissenting in part).

20. *Id.* at 655.

21. *Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 156 (1990) (statement of nominee).

Justice Scalia has made no "bones" about the way he feels about *Lemon*. In his "night at the theater" concurrence in the 1993 *Lamb's Chapel v. Center Moriches Union Free School District*[22] decision, Justice Scalia lamented that the test is "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . . ."[23] Justice Scalia accused the *Lemon* test of "stalking" Establishment Clause jurisprudence[24] and pointed out to the Court that "[w]hen we wish to strike down a practice [Lemon] forbids, we invoke it . . .; when we wish to uphold a practice it forbids, we ignore it entirely."[25]

Because the Court has so heavily criticized the *Lemon* test, many commentators interpreted the Court's failure to apply *Lemon* in the 1992 *Lee v. Weisman*[26] decision to signify that the *Lemon* test was gone forever.[27] However, the Court's refusal to effectively repudiate the test in *Lee* and the resurfacing of the test in *Lamb's Chapel* indicate that *Lemon* may still control the Court's Establishment Clause analysis. Thus, because the Court has not officially disposed of *Lemon*, it is the first test this Comment will use to gauge the constitutionality of statutes that allow the use of public funds for the preservation of church buildings.

III. APPLYING *LEMON* TO HISTORIC PRESERVATION ACTS

As stated above in Part II, in order for a government action to be found constitutional under the *Lemon* test, it must (1) have a secular purpose, (2) have a primary effect that neither materially inhibits nor advances religion, and (3) not excessively entangle religion and governmental institutions.[28] The following analysis will apply these three prongs to a typical historic preservation statute, such as the National Historic Preservation Act.[29]

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22. 113 S. Ct. 2141 (1993).

23. *Id.* at 2149 (Scalia, J., concurring).

24. *Id.*

25. *Id.* at 2150 (citations omitted). Justice Scalia cited to Aguilar v. Felton, 473 U.S. 402 (1985), where the Court struck down state remedial education programs administered in part in parochial schools, and to Marsh v. Chambers, 463 U.S. 783 (1983), where the Court upheld state legislative chaplains, as examples.

26. 112 S. Ct. 2649 (1992) (finding state statute allowing nondenominational invocations and benedictions at public school graduation ceremonies unconstitutional).

27. *See* Paulsen, *supra* note 13.

28. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

29. 16 U.S.C. §§ 470 to 470x-6.

A. Secular Purpose

It is not difficult to argue that the purpose behind any historical preservation statute is secular. In applying the secular purpose prong of *Lemon*, the Court has stated that "it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'"[30] It is very difficult for a governmental action to fail this first prong of *Lemon*, as was demonstrated in *Lynch v. Donnelly*[31] where the Court found that a crèche, clearly a religious symbol, in a holiday display on government property did not violate the *Lemon* secular purpose prong because "[t]he evident purpose of including the creche in the larger display was not promotion of the religious content of the creche but celebration of the public holiday through its traditional symbols."[32] In fact, in several cases where the Court has ultimately found a violation of the Establishment Clause, the Court has determined that a secular purpose was behind the governmental action at issue. For example, in *Lemon* itself, the Court found that the purposes of the state statutes at issue were clearly "to enhance the quality of the secular education in all schools covered by the compulsory attendance laws,"[33] even though the statutes, allowing for salary supplements for parochial school teachers teaching secular subjects, were found unconstitutional due to excessive entanglement between government and religion.[34]

In cases where the Court has found a violation of the first prong of *Lemon*, the statutes or government actions at issue have been found to have actual purposes of advancing religion even though those purposes were cleverly disguised by state legislatures. For example, in applying the purpose prong in *Wallace v. Jaffree*,[35] the Court found an Alabama statute authorizing a period of silence for "meditation or voluntary prayer" unconstitutional because the legislative history of the statute indicated that the statute's sole purpose was to express "the State's endorsement of prayer activities for one minute at the beginning of each schoolday."[36] In addition, the Court found that the use of the words "voluntary prayer" in the statute clearly "indicates that the State intended to characterize prayer as a favored practice."[37]

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30. Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).
31. 465 U.S. 668 (1984).
32. *Id.* at 691 (O'Connor, J., concurring).
33. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).
34. *Id.* at 624-25.
35. 472 U.S. 38 (1985).
36. *Id.* at 59-60.
37. *Id.*

The Court concluded that "[s]uch an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion" and that the statute therefore violated the Establishment Clause.[38]

The Court also found a violation of *Lemon*'s first prong in *Edwards v. Aguillard*[39] where it stated that "[w]hile the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham."[40] In *Edwards*, after reviewing state legislative history, the Court found that the primary purpose of the Louisiana Balanced Treatment for Creation-Science and Evolution Science in Public School Instruction Act was to change the Louisiana public school science curriculum to provide a persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution, not to promote academic freedom, which the Louisiana Legislature had stated as the purpose of the Act.[41]

Similarly, in *Stone v. Graham*,[42] the Court invalidated Kentucky's requirement that the Ten Commandments be posted in public classrooms, rejecting the state's contention that the law was designed to provide instruction on a "fundamental legal code."[43] The Court stated that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."[44]

Conversely, the National Historic Preservation Act,[45] like most historic preservation statutes, does not mention religion, nor is the advancement of religion a part of the Act's goal. The clear purpose of the Act is to preserve history. The Act's declaration of policy provides that "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in

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38. *Id.* at 60-61.

39. 482 U.S. 578 (1987).

40. *Id.* at 586-87.

41. *Id.* at 586. In *Edwards*, the Court found it clear from the legislative history of the Act that the purpose of the Act's legislative sponsor, Senator Bill Keith, was to narrow the public schools' science curriculum and that academic freedom was not advanced by the Act. *Id.* at 587.

> It is equally clear that requiring schools to teach creation science with evolution does not advance academic freedom. The Act does not grant teachers a flexibility that they did not already possess to supplant the present science curriculum with the presentation of theories, besides evolution, about the origin of life.

Id.

42. 449 U.S. 39 (1980).

43. *Id.* at 41.

44. *Id.*

45. 16 U.S.C. § 470 (1993).

order to give a sense of orientation to the American people"[46] and that "the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans."[47] Only if the government's action is "motivated wholly by an impermissible purpose" to advance religion will the first prong of the *Lemon* test be violated.[48] It is highly improbable that the Supreme Court, or any court, would find that a historic preservation statute designed to preserve historic structures is actually motivated by a governmental purpose to advance religion.

B. Primary Effect

Even though a historic preservation statute may be motivated by a secular purpose, for the statute to pass the *Lemon* test, the state must also demonstrate that granting public funds to churches for historic preservation does not have a primary effect of advancing religion. The primary effect question is usually the most difficult one to answer in Establishment Clause cases.[49]

In *Bowen v. Kendrick*,[50] the Court directly considered whether allowing religious institutions to participate as recipients of federal funds violates the primary effect prong of *Lemon*.[51] In *Bowen*, the Court examined the constitutionality of the Adolescent Family Life Act (AFLA), which allowed religious organizations to receive federal funds for use in teenage sexuality counseling.[52] The *Bowen* Court noted that the AFLA made funds available to a "fairly wide spectrum of organizations"[53] and that nothing on the face of the Act suggested that it was "anything but neutral with respect to the grantee's status as a sectarian or purely secular institution."[54] Based on these characteristics of the AFLA, features which are also a part of the National Historic Preservation Act, the Court reasoned that the Act was similar to other statutes which have survived Establishment Clause chal-

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46. *Id.* § 470(b)(2).
47. *Id.* § 470(b)(4).
48. Bowen v. Kendrick, 487 U.S. 589, 602 (1988) (citing Lynch v. Donnelly, 465 U.S. 668, 680 (1984)); *see* Edwards v. Aguillard, 482 U.S. 578, 585-86 (1987).
49. *Bowen*, 487 U.S. at 604; *see, e.g.*, Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985); Mueller v. Allen, 463 U.S. 388 (1983).
50. 487 U.S. 589 (1988).
51. *Id.* at 606-13.
52. *Id.* at 606.
53. *Id.* at 608.
54. *Id.*

lenges—such as the Maryland statute in *Roemer v. Board of Public Works*[55] that provided subsidies directly to qualifying colleges and universities, including religiously affiliated institutions—and found that the AFLA was neutral on its face.[56] The *Bowen* Court then stated that in order to properly assess the primary effect of the Act, it must also consider to what extent the statute directed government aid to "pervasively sectarian" institutions.[57] The Court noted that "we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion. One way in which direct government aid *might* have that effect is if the aid flows to institutions that are 'pervasively sectarian.'"[58] The Court then reiterated its finding in *Hunt v. McNair*[59] that "[a]id *normally* may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . . ."[60] The *Bowen* case was then remanded for a determination as to whether particular grantees should be considered "pervasively sectarian" religious institutions[61] and whether the AFLA aid "has been used to fund 'specifically religious activit[ies] in an otherwise substantially secular setting.'"[62]

The *Bowen* decision is problematic in that the Court has not yet clearly defined the "pervasively sectarian" concept. At least one Justice is unsure about the term's meaning. Justice Kennedy stated in his concurrence in *Bowen* that "I am not confident that the term 'pervasively sectarian' is a well-founded juridical category . . . ."[63] Justice Kennedy went on to state that "I recognize the thrust of our previous decisions that a statute which provides for exclusive or disproportion-

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55. 426 U.S. 736 (1976). In *Roemer*, the plurality opinion pointed out that "religious institutions need not be quarantined from public benefits that are neutrally available to all." *Id.* at 746.

56. *Bowen*, 487 U.S. at 608-09.

57. *Id.* at 609-10.

58. *Id.*

59. 413 U.S. 734, 734-35 (1973) (rejecting a challenge to a South Carolina statute that made certain benefits "available to all institutions of higher education in the State, whether or not they have a religious affiliation").

60. *Id.* at 743 (emphasis added).

61. *Bowen*, 487 U.S. at 621.

62. *Id.* (citing Hunt v. McNair, 413 U.S. 734, 743 (1973)).

63. *Id.* at 624 (Kennedy, J., concurring). Justice Blackmun also stated in his dissent to *Bowen* that "pervasively sectarian" is a "vaguely defined term of art" that "allows us to eschew further inquiry into the use that will be made of direct government aid." *Id.* at 633 (Blackmun, J., dissenting). Justice Blackmun further warned that "[t]he label thus serves in some cases as a proxy for a more detailed analysis of the institution, the nature of the aid, and the manner in which the aid may be used." *Id.*

ate funding to pervasively sectarian institutions *may* impermissibly advance religion and as such be invalid on its face."[64] But, according to Justice Kennedy, because the Court had found the statute to be facially valid, it could not be unconstitutional as applied simply due to the religious character of a specific recipient.[65] Justice Kennedy argued that the real question in an as-applied challenge is "not whether the entity is of a religious character, but how it spends its grant."[66]

In applying the *Bowen* decision to the issue of granting funds to churches under a historic preservation statute, some may argue that churches are obviously "pervasively sectarian" and as such should be denied direct governmental aid of this kind. However, an argument in favor of giving preservation funds to churches can also be constructed from *Bowen*'s conclusions. First, it can be concluded from *Bowen* that even if an institution is found to be pervasively sectarian (as churches clearly are), it is merely *presumed* that the aid money is being spent for religious purposes. But, if that presumption can be rebutted by evidence showing that the money is being used for nonreligious purposes, then the statute should be found constitutional. In other words, borrowing from Justice Kennedy,[67] "pervasively sectarian" is merely a label that presumes that the funds will be used for religious purposes; but if it can be demonstrated that the funds will *not* be used for religious purposes, and the statute is facially valid, then the statute providing the funds should be constitutional.

For example, the Court in *Bowen* upheld giving money to religious organizations where it could be shown that the money was used for nonreligious counseling purposes.[68] Similarly then, the Court should uphold a statute granting funds to churches where it can be demonstrated that the purpose of the funds is to historically preserve the *building* in which the church is located, not to advance the religious mission of the church. It is the structure itself, not the religion, that is being preserved for the cultural enrichment of future generations. The funds given to churches to preserve their buildings do not contribute materially[69] to the advancement of the religion that the church houses, but merely ensure that the structure itself will survive for historical purposes. Additionally, an argument can be made that to deny churches historical preservation funds that are available to all other

64. *Id.* at 624 (emphasis added).
65. *Id.*
66. *Id.* at 624-25.
67. *See supra* notes 67-70 & accompanying text.
68. *Bowen*, 487 U.S. at 612-13.
69. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

types of structures would actually be inhibiting religion, a practice also prohibited by the Establishment Clause.[70]

In *Tilton v. Richardson*,[71] the Court held that the Higher Education Facilities Act of 1963, authorizing grants to church-related colleges and universities, was constitutional except for the portion of the Act that provided for a twenty-year limitation on the use of the facilities constructed with federal funds. Despite finding that the purpose of the Act was to expand college and university facilities to meet a sharply rising number of young people demanding higher education, the *Tilton* Court held that to allow the reversion of a facility to a parochial school at the end of the twenty-year limitation period would be an unconstitutional religious gift of taxpayers' funds.[72] The Court upheld the part of the Act authorizing building construction funds to sectarian schools to be used for non-religious purposes, but invalidated the part of the Act that allowed the buildings to be used for religious purposes after a twenty-year period. Some may argue that this holding implies that government grants for buildings that are used for religious purposes, such as historical preservation grants to churches, are unconstitutional. In *Tilton*, however, the Court strongly relied on the argument that to allow the buildings to be used for religious purposes after twenty years would undermine the purpose of the Act at issue, which was to promote higher education. In the situation at hand, the primary purpose of the historical preservation statute is to preserve history, and even if the building is used as a church, that purpose is still fulfilled. Furthermore, because the purpose of a historical preservation statute is to preserve history, any benefit to religion resulting from the statute can be characterized as incidental. As the Court in *Tilton* pointed out, in religious funding cases, "[t]he crucial question is not whether *some* benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."[73] The principal or primary effect of donating public funds to preserve church buildings is to preserve historic structures, not to advance religion. If religious buildings meet the same criteria that other types of buildings entitled to historic preservation funds are required to meet, then denying religious buildings access to historic preservation funds would be equivalent to determining that "a church could not be protected by the police and fire de-

70. The Establishment Clause has been interpreted to mean that the government must be neutral toward religion. *See* Lynch v. Donnelly, 465 U.S. 668 (1984); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); School District v. Schempp, 374 U.S. 203 (1963).

71. 403 U.S. 672 (1971).

72. *Id.* at 692.

73. *Id.* at 679 (emphasis added).

partments, or have its public sidewalk kept in repair'"[74]—an argument that was rejected by the Court long ago.[75]

Furthermore, *Tilton* and *Committee for Public Education & Religious Liberty v. Nyquist*,[76] a case where the Court invalidated maintenance and repair grants to nonpublic schools, can both be distinguished from the historical preservation issue at hand. Following the reasoning in *Tilton*, the *Nyquist* Court stated that "[i]f the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair."[77] Both *Tilton* and *Nyquist*, however, involved public funding for sectarian educational institutions, not for churches. The Court has frequently stated that public aid to nonpublic schools is problematic because children are impressionable and may perceive the state aid as an endorsement of religion. Yet, granting public aid for the preservation of historic church buildings does not promote religious education of children, but merely preserves church structures to enrich the historic culture of society. Furthermore, an argument can also be made that the Court's recent analysis in *Bowen* supersedes the analysis the Court used in *Tilton* and *Nyquist*, both which were cases decided in the early 1970s when the Court first began interpreting the *Lemon* test.

C. *Entanglement*

The entanglement prong of *Lemon* has been strongly criticized, mainly because of the vagueness of the term "excessive."[78] Nevertheless, a complete analysis under the *Lemon* test must include a determination as to whether a statute fosters excessive entanglement between government and religion. In answering this inquiry, a court must look at three factors: (1) the character and purpose of the institutions benefitted; (2) the nature of the aid; and (3) the nature of the relationship between the government and the religious organization.[79] In *Bowen*, the entanglement prong was found to permit government monitoring to enforce the terms of a grant condition that forbade use of the funds

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74. Widmar v. Vincent, 454 U.S. 263, 274-75 (1981) (quoting Roemer v. Board of Pub. Works, 426 U.S. 736, 747 (1976) (plurality opinion)).

75. *See id.* at 275.

76. 413 U.S. 756 (1973).

77. *Id.* at 777.

78. *See* Edward M. Gaffney, Jr., *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U. L.J. 205 (1980); *see also* Aguilar v. Felton, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting).

79. Lemon v. Kurtzman, 403 U.S. 602, 614-15 (1971).

for religious purposes.[80] When the government donates historical preservation funds to a church, a similar finding should be made that the terms of the grant can be enforced without the government becoming involved in the religious affairs of the church. In *Jimmy Swaggart Ministries v. Board of Equalization*,[81] the Court stated that "we have held that generally applicable administrative and recordkeeping regulations may be imposed on religious organization without running afoul of the Establishment Clause."[82] The Court has also stated in *Hernandez v. Commissioner*[83] that "routine regulatory interaction which involves no inquiries into religious doctrine . . . no delegation of state power to a religious body . . . and no 'detailed monitoring and close administrative contact' between secular and religious bodies . . . does not of itself violate the nonentanglement command."[84] According to both of these cases, governmental monitoring of historical preservation funds, which would probably require a church to make bookkeeping and accounting reports of its preservation expenditures, would not seem to "excessively" entangle the government in the affairs of religion.

IV. ALTERNATIVE TESTS

Applying the *Lemon* test to historic preservation statutes is a difficult analysis. It may be that the Court would not apply the *Lemon* test if faced with the issue. In fact, as stated in Part II, as several members of the Court have demonstrated a dissatisfaction with *Lemon*, the Court may instead apply Justice Kennedy's "coercion" test from *County of Allegheny v. ACLU* or Justice O'Connor's "endorsement" test from *Lynch v. Donnelly* in determining the constitutionality of historic preservation statutes which allow the use of public funds for the preservation of church buildings.

A. Justice Kennedy's Coercion Test

In 1989, Justice Kennedy wrote a significant dissent in *County of Allegheny v. ACLU*[85] endorsing a type of coercion test for Establishment Clause case analysis.[86] In applying the *Lemon* test in *Allegheny*,

80. Bowen v. Kendrick, 487 U.S. 589, 615-17 (1988).
81. 493 U.S. 378 (1990).
82. *Id.* at 395.
83. 490 U.S. 680 (1989).
84. *Id.* at 696-97.
85. 492 U.S. 573 (1989).
86. *Id.* at 656 (Kennedy, J., concurring in part and dissenting in part) (suggesting that "[s]ubstantial revision of our Establishment Clause doctrine may be in order . . . ."). It is interesting to note that in *Allegheny*, where five different opinions were produced, a majority could not be mustered to support application of the *Lemon* test.

the majority found that the holiday display of a crèche in a county courthouse was unconstitutional because it had the effect of promoting or endorsing religious beliefs,[87] while it found the holiday display of a menorah in front of a city building constitutional because it did not have the same effect.[88] Justice Kennedy, however, applying his coercion test in his partial dissent in *Allegheny*, maintained that both religious displays should have been allowed. He opined that by reading a nonendorsement mandate into *Lemon*'s primary effect test, the Court had in fact assumed a posture of hostility toward religion.[89] In support of his position, Justice Kennedy stated that "[g]overnment policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage."[90] He pointed out that two limiting principles clearly have emerged from the Court's cases dealing with Establishment Clause issues:

> [G]overnment may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so."[91]

These two limits are obviously intertwined because, as the Court wrote:

> [I]t would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing.[92]

In *Allegheny*, Justice Kennedy recognized that "psychological" coercion, a type of coercion different than the "*direct* coercion in the classic sense of an establishment of religion that the Framers knew,"[93] could sometimes occur where governmental actions support religion. Justice Kennedy observed that:

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87. *Id.* at 621.

88. *Id.*

89. *Id.* at 655.

90. *Id.* at 657. *See* Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (upholding grants to church-sponsored universities and colleges); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (exempting churches from tax obligations); Board of Educ. v. Allen, 392 U.S 236 (1968) (upholding government programs supplying textbooks to parochial school students).

91. *Allegheny*, 492 U.S. at 659 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

92. *Id.* at 659-60.

93. *Id.* at 660.

> [c]oercion need not be a direct tax in aid of religion or a test oath. Symbolic recognition or accommodation of religious faith may violate the Clause in an extreme case. I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall.[94]

Justice Kennedy argued that "such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion"[95] and thus would dangerously border on establishing a state religion. Yet, even applying this "psychological" coercion test, a test more stringent than a direct coercion test that may have been applied by the Framers, the use of public funds for the preservation of churches would arguably result in a finding that the practice is constitutional. Justice Kennedy's proposed test requires some kind of recognition on the part of the objector that the government's action somehow coerces the observer into believing that government is supporting or establishing a religion. The governmental practice of using grant money to restore and preserve historic buildings, which include historic churches, seems unlikely to psychologically "coerce" anyone into thinking that the government is supporting a particular religion or religion in general. In fact, the practice is likely to either go unnoticed by most,[96] or be seen as governmental attempt to preserve history, not to advance religion. Clearly, granting public funds to preserve churches is very different from erecting "a large Latin cross on the roof of city hall."[97]

In his concurrence in *Bowen v. Kendrick*,[98] Justice Kennedy argued in favor of the constitutionality of providing federal grants to religious applicants where the grants are distributed in a neutral fashion to religious and non-religious institutions alike. This argument suggests that the author of the coercion test, if faced with the question, would find that donating public funds for the historical preservation of churches is constitutional, provided that the grants are neutrally distributed.

In writing the majority opinion in *Lee v. Weisman*,[99] Justice Kennedy also applied his coercion test from *Allegheny* as the constitu-

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94. *Id.* at 661.

95. *Id.*

96. As is demonstrated by the fact that there are no cases on record objecting to the practice of granting public funds to churches for historical preservation.

97. *Allegheny*, 492 U.S. at 660.

98. 487 U.S. 589, 624 (1988). This opinion was written one year before Justice Kennedy announced his coercion test in *Allegheny*.

99. 112 S. Ct. 2649 (1992).

tional test for evaluating prayer in public school graduation ceremonies. He wrote, "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[100] The *Lee* Court, stating that "[t]he prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid,"[101] declared prayer in public school graduation ceremonies unconstitutional. Once again, this analysis is based on a determination that individuals participating in the graduation ceremonies would feel coerced or compelled to take part in a religious activity. Under Justice Kennedy's coercion test, the use of public funds for the historical preservation of churches would arguably be found constitutional because it is difficult to imagine how the practice would make individuals feel coerced into partaking in a religious activity.

B. Justice O'Connor's Endorsement Test

Another test that has emerged in United States Supreme Court cases involving Establishment Clause issues is Justice O'Connor's endorsement test. Justice O'Connor originally formulated the test in her concurring opinion in *Lynch v. Donnelly*,[102] where she suggested a that a clarification of the Court's Establishment Cause doctrine was necessary. Justice O'Connor reasoned that in applying *Lemon*, "[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion."[103] Justice O'Connor warned that "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[104] In explaining her test, Justice O'Connor further stated that "[f]ocusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advance-

100. *Id.* at 2655 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).
101. *Id.* at 2661.
102. 465 U.S. 668 (1984).
103. *Id.* at 692.
104. *Id.* at 688.

ment or inhibition of religion."[105] In support of her argument, Justice O'Connor cited several cases where the Court had upheld laws even though they were found to have such effects, such as *Walz v. Tax Commission*,[106] where the Court upheld property tax exemptions for religious, educational, and charitable organizations, and *McGowan v. Maryland*,[107] where the Court upheld mandatory Sunday closing laws. In *Wallace v. Jaffree*, Justice O'Connor further refined her endorsement test and stated that "[u]nder this view, *Lemon*'s inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement."[108] Justice O'Connor noted that because of the coexistence of church and state in the United States,

> it is inevitable that the secular interests of government and the religious interests of various sects and their adherents will frequently intersect, conflict, and combine. A statute that ostensibly promotes a secular interest often has an incidental or even a primary effect of helping or hindering a sectarian belief. Chaos would ensue if every such statute were invalid under the Establishment Clause.[109]

Historical preservation statutes easily fall into this category of statutes.

In applying Justice O'Connor's test to a governmental action, the relevant issue is whether an "objective observer"[110] would perceive the action as a state endorsement of religion.[111] For example, Justice O'Connor probably would have argued that the statute in *Walz* exempting religious organizations from property taxes would be seen by an objective observer as a broad program and would not have the symbolic link between government and religion necessary to prove endorsement.[112] In Justice O'Connor's concurrence to *Wallace*, she argued that a moment of silence law that is clearly drafted and implemented to permit prayer, meditation, and reflection without endorsing one alternative over the others, should also pass the endorsement test.[113] Similarly, a statute providing public funds to preserve

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105. *Id.* at 691-92.
106. 397 U.S. 664 (1970).
107. 366 U.S. 420 (1961).
108. Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).
109. *Id.* at 69-70.
110. *Id.* at 76.
111. *Id.*
112. *See* Lynch v. Donnelly, 465 U.S. 668, 691-94 (1984) (O'Connor, J., concurring).
113. *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring).

historical buildings, including churches, would not likely be seen as an endorsement of religion by the objective observer because it does not favor churches over other types of structures. Furthermore, because religion is undeniably a part of the culture of the United States, it is counterintuitive for a reasonable person to find government endorsement of religion in a statute which includes the preservation of churches in its purpose to preserve historic buildings for the cultural enrichment of future generations.

V. CONCLUSION

If neutrality towards religion is truly the goal of the Establishment Clause, then the use of public funds for the preservation of our history should not exclude religious structures from the culture we wish to preserve. The proper inquiry in any Establishment Clause case should be whether a law affects the exercise and non-exercise of religion. The law should neither advance nor inhibit the exercise of any particular religion as against the exercise of any other religion, or as against the right not to exercise any religion. However, the application of the *Lemon* test to governmental action does not always result in achieving these goals. Perhaps a better test for assessing the constitutionality of a statute under the Establishment Clause would be to determine whether the statute coerces individuals to participate in religious activity, as Justice Kennedy has suggested. Or perhaps Justice O'Connor's endorsement test, which analyzes governmental action to see if it communicates a message that government endorses or disapproves religion, would be an even better way to assess a statute's constitutionality under the First Amendment. Whichever test the Court chooses to use in the future, however, it is important that the Court keep in mind its own conclusion that neutrality towards religion is the primary goal of the Establishment Clause of the First Amendment.