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The Myth of Ministry vs. Mortar: A Legal & Policy Analysis of Landmark Designation of Religious Institutions

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THE MYTH OF MINISTRY VS. MORTAR: A LEGAL AND POLICY ANALYSIS OF LANDMARK DESIGNATION OF RELIGIOUS INSTITUTIONS

Alan C. Weinstein*

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INTRODUCTION

On June 12, 1991, the Municipal Art Society ("Society") held its annual meeting in the sanctuary of St. Bartholomew's Episcopal Church. Framed by a terrace and gardens, the landmark seventy-one year old church and its adjoining community house occupy a strip of the most expensive real-estate in Manhattan: set among Park Avenue's modern high-rise office towers and older skyscrapers, St. Bartholomew's is directly across 50th Street from the Waldorf Astoria Hotel & Towers. The choice of this meeting site was symbolic. Just three months before, the Society, together with the New York City Landmarks Commission, had successfully concluded a decade-long effort to block St. Bartholomew's plan to erect a fifty-nine story office tower next to the graceful Byzantine structure in order to fund its religious and social programs.2

The church had been a formidable opponent. With an endowment of over $12 million, it could afford to hire top legal counsel and to take its case to the public with a full-page ad in the New York Times.3 If the Society's members were somewhat subdued in light of their victory, it was both an expression of courtesy — the Reverend Thomas Bowers, Rector of St. Bartholomew's and "architect" of the office-tower project would address them that afternoon — and an acknowledgment of their many past defeats and pending struggles.

The Church of St. Paul & St. Andrew, like St. Bartholomew's, is a landmarked church that sought permission to develop its site commercially. However, St. Paul & St. Andrew's, a Methodist church on Manhattan's upper west side, has an endowment of only $35,000, and its congregation struggles to pay salaries and maintain the 1,400 seat sanctuary.4 A decade ago, St. Paul &

1. The Municipal Art Society is a nonprofit organization that has been extremely active as a proponent of strong landmark and land-use controls in New York City.
2. Final victory was assured in March 1991 when the Supreme Court denied the church's petition for review of a federal appeals court ruling in favor of the Commission. St. Bartholomew's Church v. City of New York, 914 F.2d 58 (2d Cir. 1990), cert. denied, 111 S. Ct. 1103 (1991). For a discussion of St. Bartholomew's attempts to demolish its community house and raise an office building, see infra notes 166, 213-18 and accompanying text.
4. Church of St. Paul & St. Andrew v. Barwick, 496 N.E.2d 183, 194-95 (N.Y.) (Meyer, J., dissenting), cert. denied, 479 U.S. 985 (1986). The required maintenance was quite beyond the congregation's fiscal means: the balcony had deteriorated to the point where it was unsafe; the plumbing,
St. Andrew's devised a plan to alleviate its financial difficulties: it would demolish the decaying interior and roof of the existing church, while retaining the building's facade, and construct a smaller sanctuary at the front of the site and a high-rise apartment complex in the rear.

Rather than submit these plans to the Landmarks Commission for approval, the church challenged New York City's landmark preservation law on constitutional grounds. When this challenge failed, the church sought, and was denied, Commission approval for its development plan under a hardship provision in the ordinance.

As these two cases illustrate, there can be significant conflicts when landmark preservation ordinances are applied to religious institutions. In fact, the opponents of landmark designation for religious institutions argue that conflict is unavoidable because secular designation fundamentally burdens religious institutions. By definition, landmark designation prevents a church from realizing the funds that attend the commercial development of a given site. Moreover, the financial burdens associated with landmark designation — such as affirmative maintenance requirements, regulation of renovation and expansion, and the prohibition on demolition and redevelopment — divert existing church funds from the needs of religious ministry to building maintenance. In addition, a landmark ordinance's regulations and restrictions compromise a church's religious autonomy by intruding upon a church's management of its affairs "sub-

5. Id. at 185.

6. Id. at 192-93. The New York Court of Appeals affirmed a lower court ruling dismissing the church's action on ripeness grounds. Id.

7. The Commission acknowledged that the building was deteriorating and that the church could not afford to maintain it; nonetheless, it declined to find a hardship on the ground that the church's application was incomplete. The church, which claims that it has already spent $75,000 in attempting to complete its application to the Commission's satisfaction, has no choice but to return to the Commission, since it is impossible for the congregation to raise the $6 million to $8 million it would need to restore the building. See Rob Boston, Historic Battle, CHURCH & STATE, Mar. 1990, at 8-10.


10. See Carmella, Landmark Preservation, supra note 8, at 52-53 (because church's form is integral part of its function, governmental restriction on landmark use, interior or exterior, may risk governmental intrusion into religious affairs); see generally Crewdson, supra note 9, at 161-63.
ject solely to its own discretion in accord with its own polity."

Finally, and most fundamentally, opponents of landmark designation contend that such "governmental design control of houses of worship violates both the free exercise and establishment clauses of the first amendment . . . [because] the physical form of the house of worship constitutes religious expression."

Opponents of landmark designation of religious institutions have pressed these claims both in the courts and before legislative bodies. The results have been mixed. In 1990, churches in Seattle and Boston challenged their cities' landmark preservation ordinances on First Amendment grounds and won, while St. Bartholomew's was unable to dislodge New York City's ordinance on either First Amendment or takings grounds. Legislative attempts over the past few years to protect religious institutions from landmark designation have also met with checkered success at both the state and local levels.

A number of these lawsuits and legislative proposals have received extensive media coverage, and the impression of inevitable conflict between religious institutions and landmark commissions has gained popular currency. This impression may be more contrived than real. Despite the heroic proportions of some documented conflicts, like St. Bartholomew's, there are relatively few reported cases in which a religious institution has challenged its landmark status. On the contrary, many religious leaders support landmark designation of religious institutions. Some church leaders cite the theological importance of maintaining a linkage with the past and the recognition that the physical environment affects the "spiritual realities of our community" as reasons for their support.

11. *Interfaith Commission Report, supra* note 8, at 258. This claim for church autonomy does recognize, however, "that all such decisions should be undertaken in compliance with appropriate regulations affecting public safety and health." *Id. But cf. City of Sumner v. First Baptist Church,* 639 P.2d 1358 (Wash. 1982) (trial court failed to properly balance interests of parties by enjoining use of church basement for educational purposes, where full compliance with uniform building code requirements for fire safety as applied to a religious school posed financial burden for church).


13. *See infra* notes 144-265 and accompanying text for a discussion of these and other constitutional challenges to landmark preservation ordinances.

14. *See infra* notes 127-40 and accompanying text for a discussion of the legislative attempts to protect religious institutions from preservation laws and landmark designation.


Others recognize that the burden of landmark designation in historic districts is offset by the benefit of protection from incompatible neighboring development. Arguing from a less sectarian perspective, lay supporters of landmark preservation contend that the burdens placed on churches and synagogues are no greater than those imposed on other nonprofit institutions. Thus, the argument goes, exempting religious institutions from valid landmark ordinances would itself violate the First Amendment's Establishment Clause.

This Article proposes to examine the conflict between religious institutions and landmark preservation groups at both its empirical and normative levels. Part I of the Article provides an overview of historic preservation. It traces the development of the historic preservation movement, describes the standards and procedures commonly found in preservation ordinances, and discusses briefly the seminal cases in this field. Part II then attempts to answer three questions: (1) how extensive is the conflict between religious institutions and landmark commissions; (2) what has been the response of state and local legislatures to the conflict; and (3) what legal doctrines have the courts used in addressing this conflict? To answer these questions the Article presents empirical data regarding the extent and types of conflict between religious institutions and landmark commissions, and discusses the various legislative and judicial attempts to reconcile the seemingly incommensurate goals of the parties involved. Part III then considers the relevant caselaw and commentary in the context of the larger scholarly debate on First Amendment issues.

My findings suggest that, while the conflict is real, it is not so threatening as to warrant extraordinary remedial measures. As an empirical matter, it appears
that cooperation, not conflict, characterizes the relationships between religious institutions and landmark commissions. Churches may legitimately invoke constitutional protection, but only where landmark regulations effectively compromise core religious activities; structural interior restrictions are an obvious example, since a church's physical interior is intimately bound to its congregation's religious expression. However, the claims of landmark opponents for more sweeping protection from regulation do not withstand analysis and should not be granted by either the courts or the legislature. The Article concludes with suggestions as to how both courts and legislatures can uphold landmark regulation of religious institutions while guaranteeing that such regulations do not intrude too deeply into core religious values.

I. AN OVERVIEW OF HISTORIC DISTRICT AND LANDMARK PRESERVATION ORDINANCES

A. The Historic Preservation Movement

Before the 1960s, federal, state, and local governments made little effort to protect or conserve the nation's historic buildings. The early preservation movement, which began in the mid-nineteenth century, was solely the responsibility of interested individuals or private groups whose primary function was that of purchasing historically significant buildings threatened with demolition. A primary motivation for preserving such buildings was the hope that they might be a source of patriotic inspiration for the public. Despite this theme of patriotism, state and local governments were little moved to support preservation efforts, while the federal government limited its role to the acquisition of Civil War battlefield sites.

25. See Carol M. Rose, Preservation and Community: New Directions in the Law of Historic Preservation, 33 STAN. L. REV. 473, 474-75 (1981) (government at all levels slow to recognize need for preservation laws, especially in light of nation's preoccupation with growth and expansion); see also JACOB M. MORRISON, HISTORIC PRESERVATION LAW 4-19 (2d ed. 1965) (describing the limited preservation efforts undertaken before 1960s).

While we may think of historic preservation as a modern phenomenon, preservation efforts can be traced as far back as the end of the Roman Empire, when the Emperor Majorian attempted to halt the common practice of using monumental public buildings as a ready source of building materials. Id. at 1. However, Professor Sax has noted that while societies occasionally have protected or preserved their past, "for most things, and for most of history, neglect or iconoclasm were far more common than protection." Joseph L. Sax, Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea, 88 MICH. L. REV. 1142, 1143 (1990).

26. David B. Fein, Note, Historic Districts: Preserving City Neighborhoods for the Privileged, 60 N.Y.U. L. REV. 64, 71-72 (1985); see also MORRISON, supra note 25, at 2-3 (until recently, private or semi-private historical societies, art associations, and cultural organizations responsible for preservation of United States historical relics and landmarks). By this time, many historically significant structures had been lost to fire or demolished to accommodate growth or changing tastes. CHARLES B. HOSMER, JR., THE PRESENCE OF THE PAST 22 (1965).

27. See Rose, supra note 25, at 481-84 (discussion of how nineteenth century preservation was motivated by such "inspiration").

28. See HOSMER, supra note 26, at 29-62 (describing limited state and local preservation efforts).

29. See Christopher J. Duerksen & David Bonderman, Preservation Law: Where It's Been,
The historic preservation movement evolved into its next phase around the
turn of the century, when the focus of preservation efforts broadened to include
buildings that were of architectural or cultural merit.30 As this phase
progressed, the first local preservation ordinances appeared. Cities such as
Charleston, New Orleans, and San Antonio, each of which had notable historic
districts, enacted preservation ordinances in the 1930s.31 Over the next two de-
cades similar ordinances could be found in a number of other cities as well.32
These early ordinances protected historic areas rather than individual landmarks
and were usually enacted to preserve quaint districts, such as the Vieux Carre in
New Orleans, as tourist attractions.33 During this same period both the federal
and state governments began passing legislation supportive of the preservation
effort.34

Where It's Going, in A HANDBOOK ON HISTORIC PRESERVATION LAW 2 (Christopher J. Duerksen ed., 1983) [hereinafter HANDBOOK]. Even this limited federal effort was not without opposition. See Rose, supra note 25, at 482-83 (unsuccessful challenge to proposed condemnation of the Gettysburg battlefield) (citing United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668 (1896)).

30. For a discussion of the reasons behind this broadening of focus, compare Rose, supra note 25, at 480 (shift in focus due solely to entry of professional artists and architects into historic preser-
vation) with Fein, supra note 26, at 73 (extension of local land use controls beyond abatement of
nuisances played role in changing focus). Surprisingly, neither author mentions the influence of the
"City Beautiful" movement, which motivated many civic efforts to improve the aesthetics of their

31. See MORRISON, supra note 25, at 129-86 (lists and describes all local ordinances enacted
before 1965). The Charleston ordinance was enacted in 1931, followed by New Orleans in 1937, and
San Antonio in 1939. Id. at 17. Morrison notes that New Orleans passed an ordinance in 1924 to
protect the Old French Quarter, the Vieux Carre, but it was not put into effect at that time. Id. at 17
n.11.

32. See Rose, supra note 25, at 506 (citing Washington, D.C. (1950), Lexington, Kentucky
(1958); Annapolis, Maryland (1952); Nantucket Island and Boston, Massachusetts (1955); Santa Fe,
New Mexico (1957); Winston-Salem, North Carolina (1948); and Alexandria, Virginia (1946)).

33. Rose, supra note 25, at 506-07.

34. The first historic preservation legislation the federal government enacted was the Antiqui-
 authorized the President to designate national monuments on lands the federal government owned
 or controlled. 16 U.S.C. § 431. This was followed in 1935 by the Historic Sites Act, ch. 593, 49 Stat.
 "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. The Act empowered the Secretary of the Interior to survey and secure data about historic buildings and sites; to acquire such buildings and sites, provided Congress appropriated money for that purpose; and to enter into coop-
 erative agreements with state and local governments, associations, and individuals to preserve or
 maintain historic buildings and sites. Id. § 462. Interestingly, the Act contained a provision that barred acquisition of "property that is owned by any religious or educational institution" without the consent of the owner. Id. Finally, in 1949, Congress created the National Trust for Historic Preser-
vation, a nonprofit corporation organized to facilitate the preservation of historic sites and buildings.
purpose, the National Trust was authorized to accept and administer donated properties and funds;
to make cooperative agreements with government, associations, or individuals; and, generally, to
undertake any lawful activities necessary to achieve its goals. 16 U.S.C. § 468(c)-(h).
States assisted the historic preservation movement in this period in one of three ways: they
It was not until after the mid-1950s, however, that government assumed an active and dominant role in the preservation movement. By 1965, every state had enacted some form of historic preservation legislation. At the local level, New York City became the first large city to enact a comprehensive preservation ordinance authorizing the designation of both historic districts and individual landmarks. And in 1966 Congress enacted the National Historic Preservation Act, which was followed ten years later by federal tax incentives for historic preservation. By 1978, when the United States Supreme Court upheld the New York City ordinance against a constitutional challenge, 500 local govern-
ments had preservation ordinances: that number had doubled by 1985. Current estimates place the number of local ordinances between 1,500 and 2,000.

B. Local Ordinances

Federal and state contributions notwithstanding, local government has played the major regulatory role in historic landmark preservation. Local governments generally preserve historic buildings by enacting either, or both (1) historic district ordinances, which are designed to protect all buildings within a given area (most often characterized by a large number of historic buildings); or (2) landmarks ordinances, which are designed to protect individual buildings. The following paragraphs outline the basic structures, standards, and procedures of local historic preservation ordinances, as found in a recent survey of thirty-three such ordinances.

42. Carmella, Landmark Preservation, supra note 8, at 43.
43. State governments’ most important function has been to enact enabling legislation that authorizes local regulatory programs and to provide technical assistance. Some states also provide tax incentives and limited amounts of funding. See Richard J. Roddewig, Preservation Law and Economics: Government Incentives to Encourage For-Profit Preservation, in HANDBOOK, supra note 29, at 427, 449-56 (various state tax incentives analyzed).
44. The federal government has been active in two areas, technical assistance and financial and tax incentives. Technical assistance is provided through the Advisory Council on Historic Preservation and the listing activities of the National Register of Historic Places, that were both created by the National Historic Preservation Act of 1966, and the National Trust for Historic Preservation, an independent nonprofit corporation established in 1949. Fein, supra note 26, at 76. The 1966 Act also provides for matching grants to states and to the National Trust. For a discussion of federal tax incentives see supra note 39.
45. Donald G. Hagman & Julian C. Juergensmeyer, Urban Planning and Land Development Control Law § 14.9, at 469 (2d ed. 1986) ("The most important [historic] preservation work occurs at the local level . . . "); see also Carmella, Landmark Preservation, supra note 8, at 43 ("For the most part . . . preservation is most effectively and aggressively administered at the municipal level . . . ").
46. See Patrick J. Rohan, Zoning and Land Use Controls, § 7.01[2], at 7-6 to 7-7 (1987) (landmark commissions conduct architectural surveys and suggest buildings or areas that deserve landmark designation); John S. Pyke, Jr., Architectural Controls and the Individual Landmark, 36 LAW & CONTEMP. PROBS. 398, 398-99 (1971) (since 1950s, both historic districts and individual landmarks have been regulated by ordinances).
1. The Landmark Commission

Both historic district and landmark preservation rely on similar regulatory provisions. Local preservation ordinances are administered by a commission or board, whose members are typically appointed by the mayor. The size of these bodies ranges from five to fifteen members, and they generally are comprised of professionals from the various fields associated with historic preservation.47

Most ordinances require that applications for landmark or historic district designation be submitted directly to the commission.48 There are variations, such as requiring that the application be submitted to the city council, which then transmits it to the appropriate commission.49 Landmark preservation commissions must comply with due process hearing requirements either by mandating a public hearing on the proposal or allowing a public hearing at the owner's or any interested party's request. Following the hearing, the commission generally transmits a report or recommendation to the city council for approval.50


47. See, e.g., PHILADELPHIA, PA., CODE § 14-2007(3) (1985) (providing that Historical Commission be comprised of 14 members, including at least one architect, one historian, one architectural historian, one representative of a Community Development Corporation, one real estate developer, and one representative of a community organization).

48. See, e.g., ATLANTA, GA., CITY CODE § 16-20.005 (1989) (applications to be filed with Executive Director of Urban Design Commission); KANSAS CITY, MO., ADMINISTRATIVE CODE § A6.125 (1986) (applications to be filed as designated by Landmarks Commission); ALBUQUERQUE, N.M., LANDMARKS AND URBAN CONSERVATION ORDINANCE §§ 7-5.7 (1978) (amended 1991) (commission shall hold public hearing on any duly filed application); BUFFALO, N.Y., CODE § 337-6 (1974) (applications submitted to Secretary of Preservation Board); PITTSBURGH, PA., CODE tit. 10, ch. 1007, § 513.3 (1979) (nominating form filed with commission). Seventeen of the 33 ordinances surveyed state or imply that the application should be submitted to the preservation commission.

49. See, e.g., DETROIT, Mich., CODE ch. 25, art. 2, § 4 (1984) (any person may request City Council to designate: if reasonable, the City Council will direct the Historic Designation Advisory Board to investigate proposal).

50. See, e.g., SAN JOSE, CAL., MUNICIPAL CODE §§ 13.48.110 to 13.48.120 (1986) (City Council may approve, disapprove or give modified approval to proposed designation); CHICAGO, ILL., MUNICIPAL CODE § 21-73 (1987) (City Council may designate landmark by ordinance); BALTIMORE, MD., CITY CODE art. I, § 40 (J) (1964) (City Council passes ordinance); DETROIT, Mich., CITY CODE § 25-2-4 (1984) (City Council establishes historic district by ordinance); MINNEAPOLIS, MINN., CODE § 34.60 (1960) (City Council designates by ordinance or resolution); KANSAS CITY, Mo., ADMINISTRATIVE CODE § A6.125 (1986) (City Council designates historic landmark or district); ALBUQUERQUE, N.M., LANDMARK AND URBAN CONSERVATION ORDINANCE §§ 7-5.7 (1978) (amended 1991) (City Council approves or denies ordinance designating property as landmark); ALBANY, N.Y., HISTORIC RESOURCES COMMISSION ORDINANCE § 1-1.29 (1988) (City Council may
There are exceptions to this procedural scheme. An ordinance may mandate that the commission present the report to the mayor,\textsuperscript{51} or a planning commission,\textsuperscript{52} or may vary the procedure depending on the size of the area to be designated.\textsuperscript{53}

2. Designation as a Landmark

To determine whether a structure merits landmark designation, some preservation ordinances follow the Secretary of the Interior's standards for landmark evaluation,\textsuperscript{54} while others adopt various different criteria.\textsuperscript{55} Very few ordinances include a minimum-age requirement for landmark designation.\textsuperscript{56} Those that do, generally permit designation of a property that doesn't meet the age requirement if it is of exceptional importance.\textsuperscript{57}

The process for landmark designation begins with either an application by the property owner or nomination by someone other than the property owner.\textsuperscript{58}
In the case of owner initiation for historic district nomination, the ordinances typically require that a specific number or percentage of the owners in the proposed area apply. If the designation process is initiated by someone other than the owner, due process requires that the owner of the property receive notice of the proposal. Very few ordinances, however, require that the owner consent to the designation.

3. Restrictions Imposed by Designation

The majority of ordinances provide for designation of only the exteriors of buildings. Exterior designation generally prohibits the designated property's owner from demolishing the property, undertaking any alterations, renovations,
or construction on the property, or removing anything from the property without the prior approval of the preservation commission. Typically, the property’s owner applies to the building department for a building permit authorizing the proposed work. The department then forwards the application to the preservation commission. At this juncture, the commission might hold a public hearing on the work proposal, but if the proposal is for minor alterations or complies with the commission’s standards, a hearing is normally not required. Commission approval commonly takes the form of a certificate of appropriateness, which authorizes the building department to issue a permit for the proposed work.

4. Hardship and Appeals Procedures

Most ordinances contain some sort of hardship provision that enables an applicant for a building permit or certificate of appropriateness to receive an exception from the commission’s criteria. To be eligible for relief under a hardship and appeals procedure, an applicant must show that the proposed work is not feasible or that an alternative has been considered but rejected. Only 10 ordinances expressly allow for designation of interior space. See, e.g., MINNEAPOLIS, MUN., CODE § 34.40 (1985) (commission shall recommend to City Council buildings, including interiors, to be designated for historic preservation); NEW YORK, N.Y., ADMINISTRATIVE CODE § 207-2.0 (1985) (recodified at §§ 25-301 to 25-321 (1986)) (commission has power to designate a list of interior landmarks). However, church interiors are excluded from designation in New York. See NEW YORK, N.Y., ADMINISTRATIVE CODE § 207-2.0(2) (1985) (commissioner cannot designate “interiors utilized as places of religious worship”).

62. Thirty-two ordinances provide for the issuance of a certificate of appropriateness; however, some ordinances do not use the term “certificate of appropriateness.” See, e.g., MOBILE, ALA., CODE § 44-73 (1965) (Architectural Review Board must transmit “written order” to Building Inspector, who may then issue appropriate permit to applicant).


64. See, e.g., ALBANY, N.Y., HISTORIC RESOURCES COMMISSION ORDINANCE § 1-1.31 (1988) (Building Department refers proposal for alterations to Director of Planning, who may issue certificate of appropriateness for proposals for minor alterations); SEATTLE, WASH., CODE ch. 25.12, § 720 (1980) (no hearing required if Landmarks Preservation Board, owner, and applicant approve the requested work).

hardship provision, the applicant must show that denying his application will result in his inability to earn a reasonable rate of return on the designated property.66

Most ordinances allow an aggrieved party to appeal the commission’s determination, although some limit that right of appeal.67 With few exceptions, the party may appeal either to the city council (or an equivalent local government council) or directly to a municipal court.68

5. Specific Relief Provisions for Religious and Charitable Institutions

Although few in number, several municipal ordinances contain relief provisions directed specifically at religious and charitable institutions.69 In addition to New York City — whose ordinance provides the most significant protection


66. See, e.g., CHICAGO, ILL., MUNICIPAL CODE ch. 21, § 86 (1987) (applicant may apply to Commission on Chicago Landmarks for economic hardship exception on basis that denial of permit will result in loss of all reasonable and beneficial use of, or return from, property); BUFFALO, N.Y., CODE ch. 337, § 23 (1974) (Buffalo Preservation Board may issue certificates of exception where strict enforcement of code would cause undue hardship for applicant; one factor in meeting undue hardship standard is proof that property cannot yield reasonable rate-of-return without requested alteration or demolition).


69. See DADE COUNTY, FLA., CODE § 16A-10.(II) (1981) (“properties owned by religious institutions or used for religious purposes . . . will not normally be considered for designation”); CHICAGO, ILL., MUNICIPAL CODE § 21-69.1 (1987) (no building owned by religious organization and used primarily for religious ceremonies shall be designated as historic landmark without owner’s consent); BUFFALO, N.Y., CODE § 337-23(B)(3) (1974) (to prove undue hardship, applicant must show land cannot be used without preventing or seriously interfering with carrying out of charitable purpose on property held for charitable, religious, or nonprofit purposes); NEW YORK, N.Y., ADMINISTRATIVE CODE § 25-309(a)(2)(c) (1986) (nonprofit applicant shall be granted certificate of appropriateness if it shows property is no longer adequate to carry out purposes of owner and purposes to which it was devoted when acquired); COLUMBUS, OHIO, CODE § 3116.16(3) (1989) (to show unusual and compelling circumstances, nonprofit applicant must show it is infeasible to achieve its charitable purposes “while conforming to the architectural standards and guidelines”).
for such institutions\(^70\) — Columbus, Ohio provides relief to nonprofit organizations that prove that "it is infeasible to financially or physically achieve its charitable purposes while conforming to the pertinent architectural standards and guidelines" in the ordinance.\(^71\) In Buffalo, New York, the Preservation Board may issue a certificate of exception where strict enforcement of the code would result in undue hardship to charitable, religious, or nonprofit institutions.\(^72\) And although the Seattle ordinance authorizing landmark designation does not itself provide any hardship relief for religious institutions, Seattle has included a "liturgy exception" in at least one ordinance specifically designating a church as a landmark.\(^73\)

C. "Landmark" Cases

1. Upholding Historic District Designation

Because local preservation laws initially took the form of historic district ordinances, these were the first to be challenged in the courts.\(^74\) In upholding these early historic preservation efforts, courts relied on two basic arguments. The first analogized historic districting to traditional zoning.\(^75\) In both cases, the argument ran, areas of the city were designated as districts within which uniform restrictions applied; thus, property owners were benefitted and burdened identically.\(^76\) The second argument stressed the economic benefits to be gained from preserving historic districts as tourist attractions.\(^77\)

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70. See supra note 147 for a description of the New York City ordinance's protection of charitable institutions.

71. COLUMBUS, OHIO, CODE § 3116.16(3) (1989).

72. BUFFALO, N.Y., CODE § 337-23(B)(3) (1974). The applicant must prove inter alia that the property "may not be used without physically or financially preventing or seriously interfering with the carrying out of the charitable purpose in the case of properties held for charitable, religious or nonprofit purposes." Id.


74. See, e.g., City of New Orleans v. Pergament, 5 So. 2d 129 (La. 1941) (upholding ordinance establishing Vieux Carre historic district in New Orleans); Opinion of the Justices to the Senate, 128 N.E.2d 563 (Mass. 1955) (upholding the validity of state laws creating Beacon Hill historic district); Opinion of the Justices to the Senate, 128 N.E.2d 557 (Mass. 1955) (upholding validity of state laws creating Nantucket historic district). For a description of these cases and associated litigation, see MORRISON, supra note 25, at 37-42. Although the Charleston, South Carolina historic district ordinance was the first to be enacted, see supra note 31, its validity was never litigated due to the "wide public support" for preserving the city's graceful historic atmosphere. Thomas J. Reed, Note, Land Use Controls in Historic Areas, 44 NOTRE DAME L. REV. 379, 391-92 (1969).

75. See Pyke, supra note 45, at 399 (zoning laws serve as principal precedent for historic district regulation).

76. See DANIEL R. MANDELMER, LAND USE LAW § 11.22, at 434 (2d ed. 1988) (historic districts, like any zoning district, confer mutually offsetting benefits and burdens). Mandelker points out, however, that historic preservation serves different purposes than zoning. While zoning regulates use, density, and location, historic districts preserve the exteriors of buildings by prohibiting their demolition, requiring that they be maintained, and regulating their renovation. Id. at 433.

77. See Pyke, supra note 45, at 349 (both Massachusetts and Louisiana Supreme Courts emphasized value of districts as tourist attractions in upholding historic district preservation ordinances).
In more recent years, courts have recognized and endorsed a third rationale: historic districts serve a valid public purpose in preserving aesthetic and cultural values. The Fifth Circuit in *Maher v. City of New Orleans*, 78 used this rationale to uphold the validity of New Orleans' Vieux Carre historic district ordinance against a takings challenge. 79

In *Maher*, the owner of a cottage in the historic district was denied permission to tear-down the structure and replace it with a seven-unit apartment building. The Fifth Circuit upheld the ordinance as a proper exercise of the police power, explicitly recognizing that apart from economic considerations, aesthetic and spiritual values justified the creation of historic districts. 80 The court rejected Maher's claims that the ordinance had the effect of taking his property either because it denied him the most profitable use of that property or because it imposed an affirmative maintenance requirement without acquiring the property through eminent domain. 81 *Maher's* clear statement that aesthetic values may legitimate such an exercise of police power exemplifies the modern trend holding that aesthetics, standing alone, is a proper rationale upon which to uphold historic district regulations. 82 This decision remains the leading case for courts determining the constitutionality of historic districts ordinances as the Supreme Court has not addressed this issue to date. 83

78. 516 F.2d 1051 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976).
79. *Id.* The Takings Clause — "nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. — serves as a check on governmental intrusion on rights of private property. *See Maher*, 516 F.2d at 1065 (regulatory ordinance may constitute taking "if it is unduly onerous so as to be confiscatory").
81. *Id.* at 1065-67.

Some commentators have argued that aesthetic-based regulations promote pluralistic communities and values. *Compare Costonis*, supra, at 359-61, 386-91 (aesthetics-based regulations allow community to retain cultural stability while accommodating new members; historic district ordinances are example of regulations based on desire for associational harmony, an idea that focuses on shared human values and need for cultural stability) *with Rose*, supra note 25, at 488-91, 533-34 (fostering of community cohesion and encouragement of pluralism are major public purposes underlying historic district ordinances).

83. Although *Maher* was the first federal Circuit Court of Appeals case to address the constitutionality of an historic district ordinance, there had previously been a number of unsuccessful state court challenges to the New Orleans ordinance. *See*, e.g., City of New Orleans v. Levy, 64 So. 2d 798 (La. 1953) (restrictions on signs and building addition valid exercise of police power); City of New Orleans v. Pergament, 5 So. 2d 129 (La. 1941) (prohibiting display of large sign not discriminatory); City of New Orleans v. Impastato, 3 So. 2d 559 (La. 1941) (permit requirement for exterior alteration is constitutional). Those cases, however, involved challenges to the ordinance's restrictions on signs and exterior alterations and thus did not pose as serious a constitutional issue as did the denial of a demolition permit in *Maher*. The Fifth Circuit cited a number of sources to support this decision, but relied in particular on two U.S. Supreme Court decisions, Berman v. Parker, 348
2. Upholding Designation of Individual Landmarks

In *Penn Central Transportation Co. v. City of New York*, the United States Supreme Court held that the New York City Landmarks Law, which placed restrictions on individual buildings and historic districts alike, did not amount to a taking of the property occupied by the Grand Central Terminal. The crux of Penn Central's claim was that the Landmarks Commission, by rejecting a proposal to construct a high-rise office building above the existing terminal, had taken its property without just compensation. Penn Central attacked the gen-

U.S. 26 (1954) and Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). *Maher*, 516 F.2d at 1058-61. Although *Berman* involved a congressional use of the power of condemnation, rather than a state's use of the police power, 348 U.S. at 28, 36, it has been universally cited as supporting the use of the police power to achieve aesthetic and spiritual goals, including the goals of historic preservation. See *Mandelker*, supra note 76, § 2.37, at 57 (*Berman* "contains a much-quoted dictum that defines 'public welfare' to include spiritual and aesthetic as well as physical values"). *Belle Terre* upheld an ordinance in an exclusive Long Island suburb that barred "group-living" arrangements because they would interfere with "family values." 416 U.S. at 2-3, 9-10. The potential exclusionary effect of the *Belle Terre* decision is noteworthy in light of the claims that historic preservation may have exclusionary effects. See Fein, * supra note 26, at 79-103 (arguing that historic preservation, particularly in the form of historic districting, can have undesirable consequences of displacing and excluding minorities and poor from urban neighborhoods); see also Rose, * supra note 25, at 478, 512-17 (cataloguing concerns about displacement); but see Dennis E. Gale, *The Impacts of Historic District Designation*, 57 J. AM. PLAN. ASS'N 325, 329-36 (1991) (although existing research provides only a few insights into displacement issue, analysis of residential historic district legislation in Washington, D.C., finds little support for displacement threat).


85. Unlike historic district ordinances, which could be sustained by reference to traditional zoning, see * supra notes 75-76 and accompanying text, landmark ordinances were distinguishable from zoning because they did not impose uniform restrictions on all similar uses within a district. This distinction led some scholars to question the validity of landmark schemes on grounds other than an alleged violation of the Takings Clause. One author writes:

The misconception that zoning and the regulation of individual landmarks are indistinguishable manifestations of the police power probably results from the fact that early preservation ordinances focused almost exclusively on the regulation of historic districts. Historic districting may properly be viewed as a special case of zoning because of its area-wide focus. But a "zoning" measure that singles out an individual landmark property for severe bulk, use, and area restrictions not applicable to its neighbors generally would risk invalidation on spot zoning and equal protection grounds.


86. *Penn Central*, 438 U.S. at 131, 138. The Terminal building, with eight stories above-ground and many below-ground levels, is used primarily as a railroad station but also generates significant income from commercial rentals. *Id. at 115. The building was designated a landmark in 1967. *Id.* at 115-16. In 1968, Penn Central sought approval from the Landmarks Commission for either of two separate plans to construct a high-rise office building above the Terminal. *Id.* at 116. After the Commission rejected both plans, Penn Central chose not to appeal the decision or to submit other development plans. It filed suit in the New York courts claiming that the Landmarks Law had unconstitutionally taken its property. *Id. at 117. The New York Court of Appeals ultimately rejected the takings claim. Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271, 1278-79 (N.Y. 1977), aff'd, 438 U.S. 104 (1978).

87. *Penn Central*, 438 U.S. at 122. The Court announced that while takings cases were "essen-
eral validity of the Landmarks Law on similar grounds, arguing "that any substantial restriction imposed pursuant to a landmark law must be accompanied by just compensation if it is to be constitutional." 88 The Court disagreed and made short shrift of the arguments Penn Central marshalled to support its challenge. 89

The Court next analyzed whether the particular application of the law to
tially ad hoc, factual inquiries," several factors were of particular significance: (1) the economic impact of the regulation on the claimant, particularly with regard to "distinct investment-backed expectations"; (2) whether the government action is more readily characterized as a physical invasion or acquisition of resources or property for public purposes, rather than a regulatory program; and (3) whether the regulation is prohibiting otherwise lawful uses of "property" in order to effect a substantial public purpose. Id. at 124-28. See generally LAND USE AND THE CONSTITUTION: PRINCIPLES FOR PLANNING PRACTICE 70-103 (Brian W. Blaesser & Alan C. Weinstein eds., 1989) [hereinafter PLANNING PRACTICE] (land use regulation will be found unconstitutional, regardless of effect on reasonable use of property, if it is unrelated to legitimate governmental interest, fails to substantially advance legitimate state interest, or allows physical invasion or occupation of the property).

88. Penn Central, 438 U.S. at 128-29. Before considering this broad challenge to the ordinance, the Court emphasized what was not in dispute, stating that: (1) "New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal"; (2) "the restrictions imposed on its parcel are appropriate means of securing [those] purposes"; and (3) there was no question that Penn Central was earning a reasonable rate of return on its property in its current use and that the transferable development rights provided to Penn Central as a result of the Terminal's designation as a landmark are valuable. Id. at 129. For a description of the transferable development rights provision in the Landmarks Law, see Norman Marcus, Air Rights Transfers in New York City, 36 LAW & CONTEMP. PROBS. 372 (1971); Note, Development Rights Transfers in New York City, 82 YALE L.J. 338 (1972). For a critical commentary on this provision, see Costonis, supra note 85, at 586-89.

89. Penn Central's challenge delineated into three claims. It argued that the ordinance: (1) "took" the "air rights" above the terminal without just compensation; (2) differed from historic district ordinances in that it singled-out certain property owners for unfair regulatory treatment, thereby significantly diminishing the value of individual properties without providing any compensatory benefits; and (3) amounted to a governmental appropriation of part of their property for a public use. The Court rejected the first argument on the ground that "'[taking] jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.'" Penn Central, 438 U.S. at 130. It is the effect of the ordinance on the parcel as a whole, not on any separate strand in the owner's bundle of property rights, that determines whether a taking has occurred. Id. Although not cited in the Court's opinion, this argument was strongly advanced by Justice Brandeis's dissent in Pennsylvania Coal v. Mahon, 260 U.S. 393, 419 (1922) (Brandeis, J., dissenting). See Frank Michelman, Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165, 1192 (1967) (discussing how to define property interest where value has been diminished). The second claim attempted to distinguish the designation of individual landmarks from both historic district legislation and traditional zoning on the ground that the Landmarks Law "arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones." Penn Central, 438 U.S. at 132. The Court rejected this argument:

In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they may be found in the city, and, as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan.

Id. The Court also noted that it is common for zoning regulations to have a greater financial effect on some properties than others, which does not by itself invalidate such schemes. Id. at 133-34. The owners of the Terminal may have been burdened by its designation as a landmark, but because the
Grand Central Terminal so diminished Penn Central's property interests as to amount to a taking. The Court found little merit in this claim. The law did not interfere with the property's current use from which Penn Central obtained a reasonable return on its investment, and the availability of transferable development rights meant that some value remained in the air rights above the Terminal.

Penn Central made clear that historic preservation ordinances designating individual landmarks advance a legitimate public interest and are constitutional, provided that the ordinance satisfy certain criteria. First, the ordinance must be based on a comprehensive plan for designation, with reasonable standards to guide the exercise of discretion involved in selecting properties for designation. Second, it must provide some benefit to the designated property, even if that benefit is no different from that accruing to all property owners regardless of designation. And third, the ordinance must leave owners with a "reasonable use" for their designated properties.

D. Conclusions

By the late 1970s, the historic preservation movement had become a resounding success. Federal, state, and local governments had created substantial tax incentives for the preservation of historic and architecturally significant buildings. And historic district and landmark preservation ordinances had become common features in America's cities and towns. After Penn Central and Maher, the general constitutionality of these ordinances was no longer seriously in doubt. However, new constitutional claims would arise when preservation ordinances were applied to religious institutions.

preservation of landmarks improves the quality of life for the city as a whole, they too had benefitted from the ordinance. Id. at 134-35.

To support its third claim, Penn Central cited United States v. Causby, 328 U.S. 256 (1964), because in that case overflights by military aircraft could be viewed as a governmental appropriation of the claimants' airspace. Penn Central, 438 U.S. at 135. The Court rejected this contention, noting the difference between governmental use of airspace for its own purposes and the Landmarks Law's prohibition on use. Id. See infra notes 152-56 and accompanying text for a discussion of designation as governmental appropriation of property in its "enterprise" capacity.

90. Penn Central, 438 U.S. at 136-38.

91. Id. at 136-37. The Court did leave open, however, the question of whether these transferable development rights would have provided just compensation had the application of the Landmarks Law to the terminal been found to be a taking. Id. at 137.

92. Id. at 132-34.

93. Id. at 134-35.

94. Id. at 135-37.

II. THE CONFLICT BETWEEN RELIGIOUS INSTITUTIONS AND LANDMARK PRESERVATION

A. The Sources of the Conflict

Churches are frequently designated as landmarks because so many prove to be excellent examples of various architectural styles. Indeed, ecclesiastical architecture is itself a style. Though perhaps lacking architectural distinction, numerous other churches merit landmark designation because they have great cultural or historic significance.

Designation often has a more profound effect on churches than on other properties. Because historic district or landmark ordinances normally designate only the exterior of buildings and do not regulate their use, commercial property owners are free to "adaptively reuse" their landmarked properties. Thus, commercial property owners may temper any negative financial consequences flowing from designation — such as affirmative maintenance requirements — by putting their property to uses that will maximize the return on their investment. Churches obviously are far less able to "adapt" to landmark designation. As a result, they may find designation to be more onerous. Moreover, while any property owner may have financial, or even philosophical or political objections to preservation-based restrictions on his building, clergy and concerned laypersons often view any governmental efforts to regulate churches as an intrusion on church autonomy in religious matters. Church designation, then, raises First Amendment issues under both the Establishment and Free Exercise Clauses that are absent when commercial properties are landmarked.

B. The Extent of the Conflict

1. Studies and Surveys

One of the questions posed in this Article is, how extensive is the conflict

96. See Carmella, Landmark Preservation, supra note 8, at 44 (church buildings often eligible for landmark designation because of central role in development of neighborhoods and communities).

97. See supra notes 61-62 and accompanying text for a discussion of exterior designation. For a brief discussion of the leading cases involving challenges to the landmark designation of the interiors of commercial buildings, see Thomas W. Logue, Avoiding Takings Challenges While Protecting Historic Properties From Demolition, 19 STETSON L. REV. 739, 745-47 (1990). Since Logue's article was published, the Pennsylvania Supreme Court has found that the Philadelphia Historical Commission violated the takings clause of the Pennsylvania state constitution by designating the exterior and interior of a movie theater. United Artists, 595 A.2d at 13-14.

98. See generally RICHARD L. AUSTIN, ADAPTIVE REUSE (David G. Woodcock et al. eds., 1988). The new use may be one permitted "as of right" under the zoning code or available under some form of discretionary permitting process. It may also be possible for a property owner to convince the local government that the zoning code should be amended to permit certain uses for all eligible property owners in a given district. See generally MANDELMER, supra note 76, §§ 6.23 to .30, 6.49 to .57 (discussion of zoning regulations and property use).

99. See supra notes 8-12 and accompanying text for a discussion of common objections raised by religious institutions against landmarks ordinances.

100. See, e.g., Carmella, Houses of Worship, supra note 8, at 513-15 (concluding that landmark designation of religious institutions violates both clauses).
between churches and landmark commissions? There is no comprehensive study of the extent of this conflict. The bulk of the available data comes either from the small number of reported cases\textsuperscript{101} or from anecdotal information, much of which is provided by opponents of landmark designation.\textsuperscript{102}

The only other published data comes from studies analyzing the disposition of applications filed by religious institutions for certificates of appropriateness. The studies were conducted in Philadelphia and New York, both cities with large numbers of landmarked churches. These studies provide an accurate statistical portrait of the administration of the cities' respective landmark ordinances with regard to churches. To the extent that they provide information about application denials in particular cases, the studies indicate the nature and extent of conflict outside of reported cases.

The Philadelphia study, completed in late 1989, documents the outcomes for all permit applications by landmarked religious institutions.\textsuperscript{103} Out of approximately 12,000 landmarked properties in Philadelphia, 139 are religious properties.\textsuperscript{104} Sixty-one of these religious properties applied for building permits under standards governed by the city's landmarks ordinance.\textsuperscript{105} Only one out of 127 total permit applications was denied, and that request was subsequently withdrawn by the religious institution.\textsuperscript{106} Of the 126 permits that were approved, 66% were approved within one week of application (48% within one day) and only 12% took longer than thirteen calendar days.\textsuperscript{107}

An examination of the detailed information on permit applications reveals that approvals were given to convert the interiors of landmarked churches to residential\textsuperscript{108} and office space.\textsuperscript{109} Several other churches were permitted to make significant exterior changes.\textsuperscript{110} There is also considerable evidence of compromise between the applicants and the Commission. On several occasions the Commission offered to assist the applicant in obtaining private funds.\textsuperscript{111} Further, staff members confirm that the Commission attempts to accommodate, rather than confront, religious institutions that apply for a permit under the ordinance.\textsuperscript{112}

101. See infra notes 149-265 for a discussion of the reported cases in which religious institutions opposed designation.
102. See generally Interfaith Commission Report, supra note 8.
103. PHILADELPHIA HISTORICAL COMMISSION, RELIGIOUS PROPERTIES BUILDING PERMIT STUDY (1989) [hereinafter PHILADELPHIA STUDY] (copy on file with the Commission, Philadelphia, Pa.).
104. Id. at ii.
105. Id.
106. Id. at 2 (St. Augustine's Church, 260 N. 4th Street).
107. Id.
108. Id. (Third Baptist Church, 771 S. 2d Street).
109. Id. at 16 (Church of the New Jerusalem, 2129 Chestnut Street).
110. These have included the removal of spires and turrets, partial or total demolition of adjacent buildings, construction of building additions, and construction of a parking garage. Id. at 1-28.
111. Id. at 19, 23, 25.
The New York City study bears out this sense of accommodation. There are 211 designated religious institutions in New York City, constituting approximately 1.2% of that city's more than 18,000 landmark buildings. Through May 1991, a total of 423 applications were received for work on designated churches. Of these 423 applications, only nine were denied: in two cases, a certificate of appropriateness was partially denied, while in two other cases — those involving St. Bartholomew's Church and the Church of St. Paul and St. Andrew — a certificate of appropriateness on grounds of hardship was denied. Of the five certificates of appropriateness that were denied, two were for St. Bartholomew's. Two of the three remaining cases were resolved with the approval of another proposal. The study reveals that a total of five hardship applications were approved. Four of them permitted demolition of the designated building (the fifth allowed construction of an addition to the Marymount School), and in no case did the approval take more than five months.

There have also been two informal studies of the conflict between churches and landmark commissions. The first was conducted in 1988 by the National Center for Preservation Law, which mailed a “Questionnaire on Properties Owned by Religious Institutions,” to over 500 local commissions. Of the eighty responses received, sixty-eight (85%) reported that properties owned by religious institutions were subject to the commission's jurisdiction. Fifty-four (68%) of the eighty responses reported no opposition to designation from religious institutions, while 24 (30%) indicated there had been opposition. By contrast, fifty-nine (74%) of the responses indicated that churches support the commission's preservation efforts, while 14 (18%) reported no such support. Finally, only seven responses (9%) indicated that a religious institution argued that designation violated its First Amendment rights, while sixty-five (81%) re-
ported there had not been such a claim.\textsuperscript{121}

The second informal study, a telephone survey of the thirty-three cities whose landmark ordinances have been described previously,\textsuperscript{122} was conducted as part of the research for this Article. This survey produced findings in line with the studies reported above. Of the thirty-three cities surveyed, twelve reported that they had experienced no conflict whatsoever.\textsuperscript{123} Six others reported that churches had voiced some opposition to designation, but took no formal action.\textsuperscript{124} Ten cities reported minor conflicts, ranging from churches undertaking work without a permit to appeals of designation and permit denials.\textsuperscript{125} Only five cities reported more than minimal conflict.\textsuperscript{126}

In short, the data provided by both the formal and informal surveys contradicts the impression of pervasive conflict between religious institutions and landmark commissions. That erroneous impression derives from a small number of highly-publicized court battles — most of which resulted from the over-heated Manhattan real estate market in the 1980s and the efforts of a segment of the clergy who oppose landmark designation.

2. The Extent of the Conflict in State and Local Legislatures

There have been several recent attempts at both the state and local levels to amend preservation laws so as to create religious exemptions or owner consent provisions for designation of religious properties. Legislation attempting to ban landmark designation of churches has been introduced, and defeated, in both the New York and Pennsylvania legislatures. The initial effort came in New York through a bill that would have required owner consent for landmark designation of religious property.\textsuperscript{127} Religious leaders were divided on the issue and the bill was defeated.\textsuperscript{128} The bill defeated in Pennsylvania required owner consent for "any property owned and used by a church, synagogue or other religious organi-
zation in furtherance of its religious purposes," and would have applied retroactively.\textsuperscript{129} While the proposed bill received support from the Pennsylvania Council of Churches and the Pennsylvania Catholic Conference, there was opposition from some church leaders.\textsuperscript{130}

In 1987, Chicago enacted an owner consent provision for any "building that is owned by a religious organization and is used primarily as a place for the conduct of religious ceremonies."\textsuperscript{131} The New York City ordinance provides a more limited form of protection for churches. The ordinance specifically exempts church interiors from the interior designation sections of the Landmarks Law.\textsuperscript{132} It also contains a hardship provision, that is available to all tax-exempt properties.\textsuperscript{133}

New York City was also the site of the most recent attempt to provide additional protection to religious institutions. After rejecting a proposal that the new city charter\textsuperscript{134} include an owner consent requirement for landmark designation of religious institutions, the Charter Revision Commission approved a separate ballot item, asking whether the electorate would support a law creating an independent Hardship Appeals Panel to review tax exempt institutions' hardship claims. In November 1989, the city's voters approved this separate ballot item along with the new charter,\textsuperscript{135} which provided that the City Council had until July 1, 1991 to adopt a law establishing the Hardship Appeals Panel.\textsuperscript{136} Two competing proposed laws were introduced in the City Council: Introduction No. 672,\textsuperscript{137} strongly supported by the preservation community; and Introduc-

\textsuperscript{130} Compare Why the Pennsylvania Council of Churches and the Pennsylvania Catholic Conference Support Senate Bill 1228 Which Exempts the Property of All Religions from Compulsory Historic Landmarking (Oct. 1989) (memo supporting Senate Bill No. 1228 as means of eliminating problems religious institutions experience under local land laws) (copy on file with Partners for Sacred Places, Philadelphia, Pa.) with Letter from the Rev. Robert C. Linke, Pastor, First Lutheran Church, Mifflinburg, Pa., to the Rev. Paul D. Gehris, Pennsylvania Council of Churches Office for Social Ministry (Dec. 12, 1989) (expressing opposition to the Council's support of Senate Bill No. 1228) (copy on file with Partners for Sacred Places, Philadelphia, Pa.). The Rev. Linke argued that "[w]e have a responsibility to future as well as present generations to preserve important historic and architectural landmarks for those who come after us to appreciate, to learn, and to enjoy our roots and heritage." \textit{Id.}

\textsuperscript{131} CHICAGO, ILL., MUNICIPAL CODE § 21-69.1 (1987). This provision was the subject of a recent court challenge; however, the suit was dismissed on standing grounds. Alger v. City of Chicago, 748 F. Supp. 617, 625 (N.D. Ill. 1990).
\textsuperscript{132} NEW YORK CITY, N.Y., ADMINISTRATIVE CODE § 207-2.0(2) (1986).
\textsuperscript{133} NEW YORK CITY, N.Y., ADMINISTRATIVE CODE § 25-309 (1986).
\textsuperscript{134} Revision of the New York City charter was required after the U.S. Supreme Court decided in Board of Estimate v. Morris, 489 U.S. 688 (1989), that the Board, the city's governing body, unconstitutionally violated the one-person, one-vote principle. \textit{Id.} at 703.
\textsuperscript{136} \textit{Id.} If the Council did not act before July 1, the Charter required the Mayor to establish the panel by executive order.
\textsuperscript{137} New York City Council Introduction No. 672 (Apr. 10, 1991). Introduction No. 672 would establish a highly deferential appeals process, calling for a rational basis standard of review.
The polarization of support was hardly surprising. Introduction No. 672 would rarely, if ever, overturn the Commission’s denial of a hardship claim, while Introduction No. 633 would effectively gut the Landmarks Law as applied to any tax-exempt institution. On June 30, 1991, the new City Council passed Introduction No. 672 and Mayor Dinkins signed the measure into law on July 19.

C. The Conflict In the Courts

Of course, the most obvious conflicts between churches and historic preservation groups have been realized, and resolved, in the courtroom. *Penn Central* and *Maher* remain definitive statements on the facial validity of preservation ordinances; together they articulate the standards that an ordinance must meet to survive a takings challenge. However, as both cases involve commercial property only, they leave open the question whether preservation ordinances are equally valid when applied to religious institutions. Clearly, the answer is not accessible through process of analogy. Because neither case involved any claims brought under the First Amendment guarantees of religious freedom, they provide no guidance on that issue. Indeed, when removed from a commercial property context, even the outcome of a takings challenge is uncertain because the reasonable return analysis in these commercial cases does not, on its face, appear to be applicable to religious or charitable institutions.

The following sections briefly discuss challenges to preservation ordinances based on the Takings Clause of the Fifth Amendment. They then present a more extensive discussion of challenges based on the Religion Clauses of the First Amendment. Other constitutional challenges, such as those based on the Fourteenth Amendment’s Equal Protection and Due Process Clauses, will not be discussed. *Maher* and *Penn Central* have provided answers to the substantive

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138. New York City Council Introduction No. 633 (Apr. 10, 1991). Introduction No. 633 would establish a *de novo* review process, including the right to subpoena and cross-examine witnesses, limited to the issue of whether there is hardship on the appellant, with hardship defined as: [A]ny significant interference . . . upon the appellant’s ability freely to utilize, invest or develop, in accordance with its own plans and priorities, any of its real or personal property, or the full market value thereof, in order to implement, expand, or otherwise support its charitable, religious, social, educational, human welfare or other lawful activities, whether at the location of the affected site or elsewhere and including any inability of the appellant to earn a fair market return on its real or personal property or on any of its other assets. *Id.* §§ 3-5.


140. See *supra* notes 137-38 for a discussion of the proposals’ respective provisions.

141. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” ). Both the Establishment and Free Exercise Clauses are applicable to the states under the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).
due process and equal protection questions. Procedural due process claims—those challenging the procedures and rules utilized in the administration of local preservation ordinances—are of little interest in attempting to understand the development of constitutional doctrine as it pertains to landmark regulation of churches. Such challenges fail to raise any issues unique to churches because procedural shortcomings are equally invalid for all property owners. Moreover, few churches have brought such challenges, relying instead on the Fifth Amendment’s Takings Clause and the First Amendment claims discussed below.

1. Takings Challenges

Courts have analyzed takings challenges under either the “charitable purpose” test, developed in the New York state courts, or tests adopted from Penn Central and Maher. Although equal protection claims have been brought by churches, they have not been successful. See, e.g., St. Bartholomew’s Church v. City of New York, 728 F. Supp. 958, 963-64 (S.D.N.Y. 1989) (equal protection claim failed because different hardship laws for nonprofit organizations have rational basis), aff’d, 914 F.2d 348 (2d Cir. 1990), cert. denied, 111 S. Ct. 1103 (1991).

See, e.g., St. Bartholomew’s, 728 F. Supp. at 964-65 (plaintiff’s due process challenge rejected because certificate of appropriateness laws not impermissibly vague). Procedural due process issues in the preservation context have been considered by two authors, each reaching different conclusions about the adequacy of current administrative processes. Compare Ross D. Netherton, The Due Process Issue in Zoning for Historic Preservation, 19 URB. LAW. 77, 90-101 (1987) (describing existing administrative process as adequate) with Samuel A. Turvey, Comment, Beyond The Taking Issue: Emerging Procedural Due Process Issues In Local Landmark Preservation Programs, 10 FORDHAM URB. L.J. 441, 467 (1982) (arguing for adoption of greater procedural safeguards and enhanced judicial enforcement of these procedural standards).

Courts have analyzed takings challenges under either the “charitable purpose” test, developed in the New York state courts, or tests adopted from Penn Central and Maher. Although equal protection claims have been brought by churches, they have not been successful. See, e.g., St. Bartholomew’s Church v. City of New York, 728 F. Supp. 958, 963-64 (S.D.N.Y. 1989) (equal protection claim failed because different hardship laws for nonprofit organizations have rational basis), aff’d, 914 F.2d 348 (2d Cir. 1990), cert. denied, 111 S. Ct. 1103 (1991).

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142. See supra notes 78-95 and accompanying text for a discussion of Penn Central and Maher. Although equal protection claims have been brought by churches, they have not been successful. See, e.g., St. Bartholomew’s Church v. City of New York, 728 F. Supp. 958, 963-64 (S.D.N.Y. 1989) (equal protection claim failed because different hardship laws for nonprofit organizations have rational basis), aff’d, 914 F.2d 348 (2d Cir. 1990), cert. denied, 111 S. Ct. 1103 (1991).

143. See, e.g., St. Bartholomew’s, 728 F. Supp. at 964-65 (plaintiff’s due process challenge rejected because certificate of appropriateness laws not impermissibly vague). Procedural due process issues in the preservation context have been considered by two authors, each reaching different conclusions about the adequacy of current administrative processes. Compare Ross D. Netherton, The Due Process Issue in Zoning for Historic Preservation, 19 URB. LAW. 77, 90-101 (1987) (describing existing administrative process as adequate) with Samuel A. Turvey, Comment, Beyond The Taking Issue: Emerging Procedural Due Process Issues In Local Landmark Preservation Programs, 10 FORDHAM URB. L.J. 441, 467 (1982) (arguing for adoption of greater procedural safeguards and enhanced judicial enforcement of these procedural standards).

144. See infra notes 146-73 and accompanying text for a discussion of the charitable purpose test and its application. The charitable purpose test was also adopted by the U.S. District Court for the Southern District of New York in St. Bartholomew’s. See St. Bartholomew’s, 728 F. Supp. at 966 (reviewing claim to determine if existing facilities prevent church from fulfilling its religious mission and charitable purposes). New York City has been the site for all but two of the reported takings challenges to local ordinances for two related reasons. First, New York City has designated a very large number of individual landmarks. See Glenn S. Gerstell, Needed: A Landmark Decision: Takings, Landmark Preservation and Social Cost, 8 URB. LAW. 213, 265 (1976) (New York City has many individual landmarks because most of city’s landmarks are not in clusters suitable for historic district designation). Second, the location of many of the landmarked churches in areas of Manhattan with high real estate values makes them more likely to challenge the preservation ordinance because the market creates extreme development pressures on landmarked properties. See id. (many individual cases arose because potential burden very pronounced due to high real estate values in Manhattan).

Many landmarked properties, most of which were constructed before the advent of the modern, high-rise office building, occupy only a small percentage of the total square footage permitted for development on their zoning lots. The 1982 revision of the New York City Zoning Resolution permits buildings in mid-town Manhattan to have a floor area ratio (“FAR”) of 15 to 18, (i.e., a building may contain 15 to 18 times the square footage of its zoning lot). See generally DANIEL R. MANDELMER & ROGER A. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 316 (3d ed. 1990). Because church and synagogue buildings are rarely more than a few stories in height and often occupy only a portion of the zoning lot, they face considerable pressure from developers. See David M. Stewart, Constitutional Standards for Hardship Relief Eligibility for Nonprofit Landowners Under New York City’s Historic Preservation Law, 21 COLUM. J.L. & SOC. PROBS. 163,
Maher or Penn Central. New York's charitable purpose test was first announced in Trustees of Sailors' Snug Harbor v. Platt. Its purpose was to judge the validity of applying New York's landmarks law to tax-exempt property owners:

The criterion for commercial property is where the continuance of the landmark prevents the owner from obtaining an adequate return. A comparable test for a charity would be where maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose. In this instance the answer would depend on the proper resolution of subsidiary questions, namely, whether the preservation of these buildings would seriously interfere with the use of the property, whether the buildings are capable of conversion to a useful purpose without excessive cost, or whether the cost of maintaining them without use would entail serious expenditure — all in the light of the purposes and resources of the petitioner.

166-67 (1988) (buildings smaller than zoning laws permit are economically under-utilized for profits and are targeted by developers, who especially focus on landmark churches).

145. See infra notes 167-83 and accompanying text for a discussion of the tests developed from Penn Central and Maher.

146. 288 N.Y.S.2d 314 (N.Y. App. Div. 1968). In Snug Harbor, the trustees of a Staten Island charitable home for retired seamen challenged the designation of three of its buildings as historically significant. Id. at 315. The trustees wanted to demolish the landmarked structures and erect new dormitories on the site. Id. at 316. Ineligible for any relief under the landmarks law, the trustees challenged the law on constitutional grounds. See id. (trustees conceded validity of designation and raised a takings challenge).

147. See id. (court formulated test for charitable institutions comparable to test for commercial property in order to review application of landmark laws). The New York City Landmarks Law provides hardship relief for commercial property that cannot earn at least a 6% return on investment (§ 207-8.0, subd. a). However, the corresponding provisions for tax-exempt property are limited to situations where the owner seeks to alienate the property by sale or lease. New York City's Administrative Code requires a tax-exempt property owner to meet the following requirements in order to receive hardship relief: (1) the owner must have entered into an agreement to sell or to grant a lease of at least 20 years, and that agreement must be subject to or contingent upon the issuance of a certificate of appropriateness or a notice to proceed; (2) the property must be incapable of earning a reasonable return if it were not exempt from property taxation; (3) the property has ceased to be adequate, suitable, or appropriate for use to carry out both (i) the purpose to which it has been devoted by the owner and (ii) those purposes to which it had been devoted when acquired, unless the owner is no longer engaged in pursuing such purposes; and (4) the prospective purchaser or tenant intends in good faith to demolish, alter, or reconstruct the building with reasonable promptness. New York, N.Y. Admin. Code § 25-309(a), ¶ (2)(a)-(d) (1985). Since in Snug Harbor the trustees wanted to retain title to the property, but demolish the landmarked structures, no relief was available under the landmarks law. For a detailed examination of the hardship provisions of the ordinance for owners of nonprofit properties, see Stewart, supra note 144, at 169-73; see also Eric J. Gruber, Towering Above Charities: Real Estate Development By Nonprofit Organizations, Zoning Variances and the Reasonable Return Finding, 8 Cardozo L. Rev. 397, 427-36 (1986) (discussion of landmark hardship caselaw).

148. Snug Harbor, 288 N.Y.S.2d at 316. The court was unable to apply this test in Snug Harbor because the trial court had not received sufficient evidence upon which to base a judgment; thus, the court remanded the matter. Id. at 317. New York City subsequently purchased the property and it became the Sailors' Snug Harbor, Staten Island Institute of Arts and Sciences. Stephen M. Watson, Comment, First Amendment Challenges to Landmark Preservation Statutes, 11 Fordham A. L. Review 528, 540 (1988).
In *Lutheran Church in America v. City of New York*, the first case involving a church challenge to the New York City Landmarks Law, the New York Court of Appeals adopted *Snug Harbor'*s charitable purpose test. As in *Snug Harbor*, *Lutheran Church* involved a claim that a landmarked building no longer met the physical needs of its owner and would have to be demolished. The *Lutheran Church* opinion focused solely on the takings issue. The court acknowledged that government interference with an owner's use of private property is valid when the government acts in either its enterprise capacity (appropriating to itself private resources for the common good) or its arbitral capacity (intervening to resolve conflicts over land use). The court, however, objected


149. 316 N.E.2d 305 (N.Y. 1974).

150. *Id.* at 311. The sole reason stated in *Lutheran Church* for adopting the charitable purpose test is that it “is a simple enough concept and ought to apply here.” *Id.* The opinion, however, provided scant guidance as to the level of hardship required in order to find that landmark maintenance either physically or financially prevents or seriously interferes with an institution's charitable purpose. See Stewart, *supra* note 144, at 181-82 (*Lutheran Church*, like *Snug Harbor*, failed to indicate the level of hardship necessary to satisfy test).

151. *Lutheran Church*, 316 N.E.2d at 307. The property in *Lutheran Church*, an Anglo-Italianate brownstone located at the corner of Madison Avenue and 37th Street, New York City, was constructed in 1853. It had been the residence of J.P. Morgan, Jr. before the Lutheran Church in America purchased it in 1942 for conversion into its national headquarters office. *Id.* at 307-08. Despite the addition of a new wing in 1958, space proved inadequate. The plaintiff was planning to demolish the brownstone and construct a larger office building on the site when the former Morgan mansion was designated a landmark in 1965. *Id.* The church wanted to retain its offices at a single location and this site was well-located. Robert B. Stiles, *Note, Urban Landmarks: Preserving Our Cities' Aesthetic and Cultural Resources*, 39 A.B. L. REV. 521, 532 (1975). As in *Snug Harbor*, the landmarks law provided no relief for the owner of a designated building who wished to demolish, rather than sell or lease, its property. See *supra* note 147 for the relevant provisions of the landmarks law.

152. *Lutheran Church*, 316 N.E.2d at 310. The court derived this arbitral enterprise dichotomy from an article by Professor Joseph Sax. See *Joseph L. Sax, Taking and The Police Power*, 74 YALE L.J. 36, 63 (1964) (arguing that when government acts to address conflicting property uses, there is no compensable taking of property; however, when government acts in an entrepreneurial capacity to enhance its own economic position, taking occurs and compensation must be paid to affected property owners). The opinion cites both the Sax article and Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 193 A.2d 232 (N.J. 1963) to support the proposition that governments often hide behind the “facade of mere regulation” when they act in their enterprise capacity to add to a “municipality's resources.” *Lutheran Church*, 316 N.E.2d at 310-11. The court continued:

In the instant case it could likewise be well argued that the commission has added the Morgan house to the resources of the city by designation . . . and that while such designation might not wreak confiscatory results in all situations . . . it does have that effect here where plaintiff is deprived of the reasonable use of its land.

*Id.* at 311 (emphasis added). At least two commentators have viewed the portion of the opinion quoted above as stating a two-part test for determining when landmark designation is confiscatory; the criteria being that (1) the property has been appropriated to public use; and (2) the property owner has been denied the reasonable use of his land. See *Rohan*, *supra* note 45, at 7-110 (two requisite elements of confiscation established in *Lutheran Church* are that land be appropriated for public use and that owner be denied reasonable use of land); Edgar A. Smith, *Comment, Grand
to government interference that attempted to add property to public use by "in-vading the owner's right to own and manage" that property: "What has occurred here, however, where the commission is attempting to force plaintiff to retain its property as is, without any sort of relief or adequate compensation, is nothing short of a naked taking." The court stated that where the owner can make a case for alteration or demolition; the designation must give way, absent condemnation or compromise. Lutheran Church made such a case. The court found it "uncontested" that the building was inadequate for the organization's current needs and that another had to be raised in order for the organization to freely and economically use the premises. Thus, the court held that the landmark designation effectively confiscated the property.

_Lutheran Church_ affirmed that the Snug Harbor charitable purpose test was designed to fill a gap in the hardship provisions applicable to nonprofit institutions, namely that no relief was available to a property owner who sought permission to demolish, rather than sell or lease, its landmarked building. Stated another way, the charitable purpose test sought to remedy the inequities of a landmark ordinance that provided hardship relief to tax-exempt property owners who could prove financial hardship (by showing there was no market for their property as designated), but that withheld relief from owners who claimed

_Central Station — Landmark at the End of the Line, or End of the Line for Landmarks? — New York City’s Landmark Law in the Courts, 37 U. PITI. L. REV. 81, 96 (1975) (Lutheran Church requires that property be appropriated to public use and that property owner be deprived of reasonable use of land). But this supposed two-part test makes little sense. First, if a regulation truly had the effect of appropriating a property to public use without payment of compensation, that effect would itself be confiscatory, making the second part of the test superfluous. The Lutheran Church court was self-contradictory in saying that designation appropriates property but does "not wreak confiscatory results in all situations.” 316 N.E.2d at 311. This confusion can best be explained as the result of a too-facile reliance on the distinction that Sax draws between arbitral and entrepreneurial activity. While it seems plausible to argue that landmark designation implicates government in its entrepreneurial capacity, it can also be seen as arbitral activity: the government is acting as a referee between the owner of landmarked property and the interests of a diffused group of citizens who value maintaining the city’s architectural and historical heritage. See Developments in the Law — Zoning, 91 HARV. L. REV. 1427, 1475 (1978) (Sax’s governmental entrepreneurial activity could be characterized as governmental action on behalf of disaggregated interests). The notion that landmark designation is an instance in which government, acting in its enterprise capacity, appropriates property for some strictly governmental purpose was laid to rest in Penn Central. See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 135 (1978) (landmark law not governmental entrepreneurial action appropriating land for public purpose). Second, where a regulation deprives a property owner of the reasonable use of his land, it has been clear since Pennsylvania Coal that the enactment goes too far and is confiscatory on that basis alone, regardless of whether "a property has been appropriated to public use." Pennsylvania Coal v. Mahon, 260 U.S. 393, 413-14 (1922).

153. Lutheran Church, 316 N.E.2d at 312.
154. Id.
155. Id.
156. Id. While the court’s ruling permitted the Lutheran Church to demolish the Morgan home, it sold the property instead. After a subsequent sale, the Morgan house was still standing in 1988. Joshua Silver, Legal Issues of Landmark Designation for Religious Properties 10 (Apr. 1989) (unpublished student paper, on file with Partners for Sacred Places, Philadelphia, Pa.).
physical hardship and who wanted to demolish their property to build a more adequate structure.

As the Manhattan real estate market boomed in the early 1980s,\textsuperscript{157} it was inevitable that a tax-exempt property owner would attempt to use the charitable purpose test to validate a property development scheme. But, in \textit{Society for Ethical Culture v. Spatt},\textsuperscript{158} the New York Court of Appeals drew an important distinction between the “compelling circumstances” caused by the physical hardship in \textit{Lutheran Church} and cases in which landmark designation merely frustrates a development scheme.\textsuperscript{159} The court noted that, in \textit{Lutheran Church}, the landmark restrictions were so debilitating and the frustration of the charitable use so complete that landmark designation without compensation was noth-

\begin{itemize}
\item \textsuperscript{157} See Stewart, \textit{supra} note 144, at 166 n.17 (New York real estate values increased dramatically since mid-1970s as illustrated by increased construction and rental values in mid-1980s).
\item \textsuperscript{158} 415 N.E.2d 922 (N.Y. 1980).
\item \textsuperscript{159} Id. at 926. The Society was founded in 1877 as a religious, educational, and charitable organization whose goal was to unite interested persons to further the goal of nonsectarian moral improvement. \textit{Id.} at 924. The society owned two buildings that occupied the entire frontage of Central Park West between 63rd and 64th Streets. \textit{Id.} It brought this case when the Landmarks Commission designated one of the buildings, known as the Meeting House, as a landmark. \textit{Id.} After the Society was unsuccessful in opposing the proposed designation at the public hearing required under the city’s Administrative Code, it sought to annul the designation in the courts. \textit{Id.} The trial court declared the designation invalid, but was reversed by the Appellate Division. \textit{Id.} The Society argued that the Meeting House was ill-adapted to its needs and could not physically accommodate its programs, but failed to convince the court of appeals that demolition of the existing building was the “only feasible solution.” \textit{Id.} at 926. The court stated: “There is no genuine complaint that eleemosynary activities within the landmark are wrongfully disrupted, but rather the complaint is instead that the landmark stands as an effective bar against putting the property to its most lucrative use.” \textit{Id.} In analyzing the language quoted above, Stewart argues that the court created a new hardship standard:

In the court’s view, the takings clause compelled relief only if hardship interfered with charitable activities performed within the landmark building. Thus, presumably no relief would be granted where the hardship interfered only with the owner’s activities performed outside the landmark building or unrelated to the building. By extension, no relief would be granted where the owner was prevented from adding new activities to those already existing within the landmark. Strictly speaking, expanded or evolving institutional use would not require hardship relief. The test applied not only to physical hardship but also to alleged financial hardship.

Stewart, \textit{supra} note 144, at 184.

Stewart’s interpretation of \textit{Ethical Culture} as creating a “new standard” is strained on a number of accounts. First, because the impetus for the “charitable purpose” test was the failure of the landmarks law to provide relief to tax-exempt owners for physical hardship, the focus of the inquiry had always been on “activities performed within the building.” Thus, there was nothing new here. Second, the notion that increasing or evolving institutional use would not implicate hardship relief directly contradicts the facts in \textit{Lutheran Church}. See \textit{supra} notes 149-56 for a discussion of \textit{Lutheran Church}. What else but “expanding or evolving” use led the plaintiff there to claim a hardship as its activities outgrew both the original mansion and the 1958 addition? Finally, the notion that there was something “novel” about the test because it applied to physical hardship as well as to alleged financial hardship is a mistaken reading of the court’s refusal to equate a frustration of development potential with a frustration of charitable purpose. It also ignores the availability of relief for financial hardship under the landmarks law where the tax-exempt owner seeks to sell or to lease the property.

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The society, on the other hand, failed to show that its position was so dire. The court acknowledged that designation would prevent the Society from realizing the full economic value of its property. However, the court found that this did not constitute a taking under the charitable purpose test noting that "there simply is no constitutional requirement that a landowner always be allowed his property's most beneficial use." To date, the only application of the charitable purpose test to a takings claim outside of the New York state courts is the federal district court's opinion in St. Bartholomew's Church v. City of New York. There "St. Bart's" argued that it could not carry out its religious mission in its existing facilities because the facilities were inadequate and renovation was prohibitively expensive. The district court observed that while the United States Supreme Court has never determined the constitutionality of a regulation when applied to property owned by charitable or religious institution, Penn Central could be

160. Ethical Culture, 415 N.E.2d at 926.
161. Id.
162. Id. at 924.
163. Id. at 926. The court was also influenced by the fact that only the facade of the Meeting House had been designated as a landmark, which left open the possibility that the Society could modify other portions of the structure to accommodate its programs while maintaining the facade intact. Id.
164. 728 F. Supp. 958 (S.D.N.Y. 1989), aff'd, 914 F.2d 348 (2d Cir. 1990), cert. denied, 111 S. Ct. 1103 (1991). Although the Second Circuit affirmed the district court's ruling that there was no taking, it declined to adopt the charitable purpose test, relying instead on a test derived from Penn Central. St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354-57 (2d Cir. 1990), cert. denied, 111 S. Ct. 1103 (1991). The charitable purpose test has been noted in other opinions, though its adoption is far from universal. See, e.g., First Covenant Church v. City of Seattle, 787 P.2d 1352, 1364-65 (Wash. 1990) (Utter, J., concurring) (arguing for application of charitable purpose test in free exercise claims), judgment vacated and remanded, 111 S. Ct. 1097 (1991).
165. As this dispute became a cause celebre in New York City, the name of the plaintiff regularly appeared in the media as "St. Bart's." See, e.g., Dunlap, Court Backs St. Bart's, supra note 15, at B3.
166. St. Bartholomew's, 728 F. Supp. at 967. St. Bartholomew's resulted from the New York City Landmarks Commission's refusal to grant the church permission to demolish its seven-story community house and erect a high-rise office tower in its place. In December 1983, the church initially sought Commission approval to demolish the community house and construct a 59-story office tower in its place. St. Bartholomew's, 914 F.2d at 351. When this application was denied in June 1984, the church filed a second application that December seeking permission for a 47-story tower. Id. After the denial of the second application in August 1985, the church sought relief from the Commission under the hardship provisions of the Landmarks Law applicable to commercial property. Id. at 352. See supra note 147 for a discussion of Landmark Law's hardship provision. The church also sought relief through the Commission's consideration of whether the church could satisfy the judicial charitable purpose test. St. Bartholomew's, 914 F.2d at 352. St. Bartholomew's brought the instant action after the Commission denied it the relief it sought. The church claimed that its community house was too small to accommodate its programs, that renovation was impracticable and prohibitively expensive, and that both the community house and the church building required a complete overhaul and replacement of their mechanical systems and substantial repair and replacement of exterior structural systems. St. Bartholomew's, 728 F. Supp. at 967-69. Given these circumstances, the church argued that the Commission's denial of its application for a permit to demolish the landmarked structure and develop the site with a high-rise office tower deprived the church of its property in violation of the Fifth Amendment. Id. at 966.
adapted to address noncommercial property.167 *Penn Central*'s concept that regulations should not substantially interfere with continued reasonable beneficial use contemplated by the owner thus became the focus of the constitutional inquiry.168 The court, noting that the charitable purpose test embodied this concept, adopted that test to determine whether denial of the church’s hardship application amounted to a taking.169 After a lengthy examination of the factual record, the court ruled that because the church had failed to prove that it could no longer conduct its charitable activities or carry out its religious mission in its existing facilities, it failed to satisfy the charitable purpose test.170

The Second Circuit opinion in *St. Bartholomew’s* is the only instance in which a court has applied the *Penn Central* standard to property used for “charitable” purposes.171 The court framed the constitutional question as “whether the land-use regulation impairs the continued operation of the property in its originally expected use.”172 Applying that standard, the court found that denying the church’s hardship application was not a taking because the church could continue its charitable and religious activities in its current facilities.173

167. *St. Bartholomew’s*, 728 F. Supp. at 966. Not only has the Supreme Court not considered a case involving land use and the Religion Clauses of the First Amendment, but the first federal appeals court decisions came only in the past decade. See Christian Gospel Church, Inc. v. San Francisco, 896 F.2d 1221, 1225 (9th Cir.) (finding constitutional requirement that church obtain conditional use permit before converting dwelling in single-family residential district to church use), *cert. denied*, 111 S. Ct. 559 (1990); Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 825 (10th Cir. 1988) (upholding ordinance that did not conflict with religious practices of church but that restricted location of church), *cert. denied*, 490 U.S. 1005 (1989); Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir.) (zoning regulations preventing remodeling of homes in residential districts as religious institutions not unconstitutional), *cert. denied*, 469 U.S. 827 (1983); Congregation of Jehovah’s Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 309 (6th Cir.) (ordinance prohibiting churches in residential districts does not infringe upon religious freedom), *cert. denied*, 464 U.S. 815 (1983); cf. Islamic Center of Miss., Inc. v. City of Starkville, 840 F.2d 293, 302-03 (5th Cir. 1988) (Equal Protection and Free Exercise Clauses violated when city applied different standards in denying special exception for a mosque than those used to review applications of churches).

168. *St. Bartholomew’s*, 728 F. Supp. at 966. Judge Sprizzo viewed *Penn Central*'s test for commercial property as considering the economic impact and character of the government action in light of the overriding principle that the Fifth Amendment contemplates continued use of a property as it has been used in the past. *Id.* This interpretation thus permits no substantial interference with the property owner’s primary investment expectations or reasonable beneficial use. *Id.*

169. *Id.*

170. *Id.* at 974-75.


172. *Id.*

173. *Id.* at 356-57. The court noted that in both *Penn Central* and the case before it, the application of the landmark ordinance had an identical effect: it prevented a property owner from erecting a high-rise office tower, but did not interfere in any way with the owner’s present activities in the existing buildings. *Id.* at 357. The court had little difficulty in rejecting the church’s three arguments attempting to distinguish *Penn Central*. St. Bart’s first argued that while Penn Central stipulated that it could earn a reasonable return on the Terminal despite designation, use of the Community House for commercial purposes would yield an estimated return of only 6%. *Id.* The court found this to be irrelevant since the “reasonable return” analysis, while appropriate to determine the viability of the existing commercial use of the Terminal, had no bearing where the use was devoted to charitable purposes. *Id.* The court failed to note that the church’s claimed 6% rate of
Finally, the *Maher* takings test\(^\text{174}\) has been applied in several cases. In *First Presbyterian Church of York v. City Council of York*,\(^\text{175}\) the case initially came before the trial court on appeal from the City Council's denial of a permit allowing the church to demolish a landmarked building next to its sanctuary for parking.\(^\text{176}\) *Maher* had not yet been decided, and the trial court cited *Snug Harbor* with approval in remanding the matter.\(^\text{177}\) After *Maher* was decided, however, a different judge rejected *Snug Harbor* in favor of *Maher* and found that no taking had occurred.\(^\text{178}\) The judge noted that *Snug Harbor*'s charitable purpose test arose in the context of landmarking individual properties, while the instant case, like *Maher*, involved the application of an historic district ordinance.\(^\text{179}\)

The commonwealth court later agreed that the *Maher* test, because it dealt with historic districts, was preferable to the charitable purpose test.\(^\text{180}\) The opinion did not discuss the fact that *Maher* involved a commercial property while *Snug Harbor* involved a charitable institution, nor did it give any reason why the fact that the church's property had been designated under an historic district ordinance rather than as an individual landmark should be determinative of which test to be applied.

*Maher* was also applied in *Lafayette Park Baptist Church v. Scott*.\(^\text{181}\) There, the court found that the St. Louis Board of Adjustment, by considering the technological but not economical feasibility of the renovation of an historic building by the church, had applied a standard that violated the test of constitutionality required by *Maher*.\(^\text{182}\) On remand, the Board again denied the demolition permit and the denial was upheld by the Appeals Court.\(^\text{183}\)

2. Evaluating the Takings Tests

Both the charitable purpose test\(^\text{184}\) and the test applied by the Second Cir-

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\(^{174}\) See supra notes 78-82 and accompanying text for a discussion of the *Maher* test.


\(^{176}\) Id. at 259-60.

\(^{177}\) Id.

\(^{178}\) Id. at 261.

\(^{179}\) Id.

\(^{180}\) Id.

\(^{181}\) 553 S.W.2d 856 (Mo. 1977).

\(^{182}\) Id. at 859-64.

\(^{183}\) Lafayette Park Baptist Church v. Board of Adjustment, 599 S.W.2d 61 (Mo. 1980).

\(^{184}\) See supra notes 146-73 and accompanying text for a discussion of the charitable purpose test and its application. As stated in *Snug Harbor*, the charitable purpose test asks whether "mainte-
cuit in *St. Bartholomew's*¹⁸⁵ state a lower burden for finding a taking than the *Maher* test.¹⁸⁶ This discrepancy exists primarily because both the *Snug Harbor* and *St. Bartholomew's* courts explicitly addressed the question of what should be the proper takings standard for a church or charitable institution. Each recognized that a "no reasonable use" test is inappropriate for churches and charitable institutions.¹⁸⁷ By contrast, the cases that have applied *Maher's* "no reasonable use" test, a standard that arose from regulating commercial property, made no effort to adapt that test to their church-plaintiffs.¹⁸⁸

The *Maher* test is unsuitable as a takings standard for religious institutions because it fails to acknowledge the differences that flow from the charitable or religious use of property, as opposed to a commercial use. Commercial property owners are, economically speaking, unconcerned with the use of their property, so long as they can find a legal use that yields a reasonable return. If landmarking a commercial property has the effect of making an existing use unprofitable, there is no taking as long as the owner is able to put the property to some other profitable use. The owner has no inviolate right to maintain an existing use that would compel a court to lift a landmark designation merely upon a showing that the existing use is no longer profitable.

By contrast, religious institutions are not seeking to earn a reasonable return on their property regardless of its use. Rather, they are seeking to maintain an existing use. The alternate uses of their property are wholly irrelevant. Thus, for religious properties, the focus of a takings test should be on the degree of interference with that existing use alone. This, of course, is precisely the nature of the charitable purpose and *St. Bartholomew's* tests.

### 3. First Amendment Challenges

Churches have advanced two general claims in their First Amendment

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¹⁸⁵. *See supra* notes 168-73 and accompanying text for a discussion of the *St. Bartholomew* test. This test focuses on "whether the land-use regulation impairs the continued operation of the property in its originally expected use." *St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 356 (2d Cir. 1990), cert. denied, 111 S. Ct. 1103 (1991).

¹⁸⁶. *See supra* notes 78-82 and accompanying text for a discussion of *Maher*. *Maher* required the plaintiff to demonstrate that "the ordinance so diminished the property value as to leave *Maher*, in effect, nothing." *Maher v. City of New Orleans*, 516 F.2d 1051, 1066 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976). The Court defined "nothing" as when sale of the property was impracticable, when the owner could not obtain a reasonable rate of return from commercial rental, or when the alternate potential use of the property was precluded. *Id.*

¹⁸⁷. *See St. Bartholomew's*, 914 F.2d at 356 (court developed charitable institution test as counterpart to *Penn Central* commercial property test); *Snug Harbor*, 288 N.Y.S.2d at 316 (court formulated functional equivalent of commercial adequate return test for charitable institutions). As the court stated in *Ethical Culture*, "charitable organizations are not created for financial return in the same sense as private businesses." *Society for Ethical Culture v. Spatt*, 415 N.E.2d 922, 925 (N.Y. 1980).

¹⁸⁸. *See supra* notes 174-83 and accompanying text for a discussion of the cases that adopted the *Maher* test.
challenges to landmark ordinances. The first claim is that the financial burdens associated with landmark designation — such as affirmative maintenance provisions, regulation of renovation and expansion, and the prohibition on demolition and redevelopment — both divert church funds from the needs of its religious ministry to building maintenance and deny the church the funds that could be derived from realizing a given site's development potential. Arguably, to the extent that church funds and potential development profits are diverted from, or denied to the purposes of its religious ministry, a church may claim an infringement on the free exercise of its religious rights.

The second claim is that the regulations and restrictions of landmark ordinances, by intruding upon the church's management of its affairs, infringes on rights of religious autonomy guaranteed by the First Amendment.

There have been five reported decisions involving First Amendment challenges to landmark ordinances: Ethical Culture, Church of St. Paul and St. Andrew v. Barwick, St. Bartholomew's, First Covenant Church v. City of Seattle, and Society of Jesus v. Boston Landmarks. Four of these cases involved challenges to the designation of church exteriors. With the exception of First Covenant, the claim was denied in each case. In Society of Jesus, the one case involving landmark designation of a church interior, the court found a violation of the guarantee of religious freedom in the Massachusetts

189. But cf. Carmella, Landmark Preservation, supra note 8, at 47-53 (identifying four elements of free exercise burden: restrictions on adaptability, limitations on transferability, fiscal burdens, and government involvement in religious affairs); Crewdson, supra note 9, at 156-63 (arguing that three elements of landmark designation burden First Amendment rights: architectural infringement, financial drain on church's religious mission, and compliance with the administrative process in the landmark ordinance). However, these three or four elements are only more specific aspects of the two general claims that landmark ordinances divert funds from the religious ministry and intrude on rights of religious autonomy.

190. Carmella, Landmark Preservation, supra note 8, at 47; Crewdson, supra note 9, at 159.

191. See Carmella, Landmark Preservation, supra note 8, at 52-53 (preservation costs and financial decisions made by courts involve state in religious affairs); Crewdson, supra note 9, at 161-63 (administrative process necessitates judgments involving religious needs and goals of church).


197. See St. Bartholomew's, 728 F. Supp. at 961 (church, exterior of community house and surrounding property designated); Barwick, 496 N.E.2d at 185 (church and parish house designated under New York City Landmarks Law, which prohibits designation of interiors); Society for Ethical Culture v. Spatt, 415 N.E.2d 922, 924 (N.Y. 1980) (meeting house designated under some ordinance); First Covenant, 787 P.2d at 1354 (church designated pursuant to ordinance that allows for exterior designation only).
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Neither of the two New York cases provides an extended discussion of the First Amendment issue. In Ethical Culture, the Court of Appeals peremptorily rejected the Society's claim that exterior designation interfered with its free exercise of religious activities, in that it restricted the Society's ability to develop the full commercial potential of its property.199 While conceding that the Society was entitled to First Amendment protection, the court ruled that such protection "does not entitle it to immunity from reasonable government regulation when it acts in purely secular matters."200

198. Society of Jesus, 564 N.E.2d at 573.

199. Ethical Culture, 415 N.E.2d at 926. The Society planned to replace its Meeting House with a new facility that would include a high-rise apartment tower to be rented at market rates. Society for Ethical Culture v. Spatt, 416 N.Y.S.2d 246, 252 (N.Y. App. Div. 1979), aff'd, 415 N.E.2d 922 (N.Y. 1980). It would then use the income derived from the apartment tower to fund its programs. Id.

200. Ethical Culture, 416 N.Y.S.2d at 252. In its single paragraph discussion of the First Amendment issue, the court cited Westchester Reform Temple v. Brown, 239 N.E.2d 891 (N.Y. 1968) and Wisconsin v. Yoder, 406 U.S. 205 (1972). Westchester Reform Temple held a zoning regulation unconstitutional as applied to the temple because it had the effect of prohibiting the construction of an addition to a synagogue with no showing that the expansion would adversely affect the community's health, welfare, or safety. Westchester Reform, 239 N.E.2d at 895-97. The court noted that religious structures are afforded a constitutionally protected status that severely curtails the permissible extent of governmental regulation grounded in the police powers to the point that any conflict between the regulation and the right to construct a religious building must be resolved in favor of construction. Id. at 896. The Ethical Culture court reasoned that the Society's reliance on Westchester Reform Temple was misplaced because that case involved "restrictions actually impairing religious activities." Ethical Culture, 415 N.E.2d at 926. The Society could claim only that the landmarks law was frustrating its "secular" interest in maximizing the financial return it could realize on its property. Id. The court thus implicitly rejected any notion that the use of funds derived from property development for religious and charitable purposes makes a difference in characterizing activities as religious or secular. But cf. Scott David Godshal, Note, Land Use Regulation and the Free Exercise Clause, 84 Colum. L. Rev. 1562, 1567 (1984) (criticizing distinction drawn between secular and religious as weak because court simply rejected church's conception of religious activity drawing an overly facile distinction between secular and religious without stating criteria for distinction). See generally Kenneth W. Greenawalt, Church and State: Some Constitutional Questions in Landmarking of Church-Owned Properties, in PRACTICING LAW INSTITUTE, HISTORIC PRESERVATION LAW 1982, 465, 472-73 (1982) (activities undertaken by religious institution to generate income to support religious and charitable programs should not be considered secular). For a discussion of opposite viewpoints, see infra notes 325-47 and accompanying text.

The court then cited Yoder as a case in which a general regulation was held invalid as applied because it frustrated religious beliefs to too great an extent. Ethical Culture, 415 N.E.2d at 926. In Yoder, the Court held that the Free Exercise Clause required the state of Wisconsin to exempt Amish parents from compliance with the state's mandatory school-attendance law because high school attendance conflicted directly with the Amish fundamental religious belief in maintaining their unique separatist lifestyle. Yoder, 406 U.S. at 234-36. This reference indicates that the Ethical Culture court believed that the Society had not shown that any religious belief or activity was burdened by the landmarks law. Without such a showing, no First Amendment rights were implicated. The Society was unable to show that its religious activities could not be accommodated physically at the Meeting House site and offered no evidence that those activities would be burdened if it could not acquire the funds that would be generated from development. Ethical Culture, 415 N.E.2d at 926. These claims were finally addressed in the St. Bartholomew's case. See infra notes 213-25 and accompanying text for an analysis of that decision.
In *Barwick*, a landmarked church brought a declaratory judgment action claiming that the landmarks law was unconstitutional as applied. The court held that because the church had not sought administrative approval to alter its buildings, its claim was premature and the case not ripe for review. However, the court went on to consider whether its decision should have been different, given that the plaintiff was a religious organization that had partially based its claim on "prospective interference with its right of free exercise of religion" under both the federal and New York Constitutions. Following a rather succinct discussion, the court found the church's status to be irrelevant to the ripeness issue. The court distinguished several zoning cases in which it had held that religious institutions are protected from government restrictions that would prohibit or directly impinge upon the religious uses of the property. The majority determined that the landmark designation of the church did not constitute objectionable impingement: "the ultimate effect, if any, on plaintiff's religious...

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The Church of St. Paul & St. Andrew, located on the Upper West Side of Manhattan at the northeast corner of West End Avenue and 86th Street, was designated as a landmark in November 1981, and this decision was approved by New York City's Board of Estimate in March 1982 over the strong opposition of the church. *Id.* In addition to the church building itself, the site contains an attached parish house and a separate parsonage or rectory. *Id.* The Landmarks Commission designated the church and parish house, but not the rectory, as landmarks. *Id.*

The church claimed that its declining membership and perilous financial position made it impossible to maintain the church building: if the congregation was to survive, the only viable alternative was to demolish most of the church and replace it with a new smaller sanctuary and an apartment complex. *Id.* at 195 (Meyer, J., dissenting). It submitted affidavits stating that its congregation of 250 members, only 100 of whom were regular Sunday worshipers, was dwarfed by the 1,400 seat sanctuary. *Id.* at 194 (Meyer, J., dissenting). The church had not been filled to capacity in 35 years, and its resources were being consumed financially by the need to heat and maintain the building. *Id.* The church claimed that it had few assets other than the buildings, the land, and a $35,000 endowment, and that it would need to spend $350,000 to repair the building's exterior alone. *Id.* at 195 (Meyer, J., dissenting). The church had devised a plan to provide both a more suitable facility and a source of income for the congregation. It would retain the church's exterior walls fronting on West End Avenue and 86th Street but demolish the remainder of the building, replacing it with the new sanctuary and apartment complex. *Id.* Although the church never submitted a development plan to the Commission, it sought a declaratory judgment that the landmarks law was unconstitutional as applied. *Id.* at 183. The case came to the court of appeals after the trial court dismissed the claim as not ripe and the Appellate Division affirmed. *Id.* at 185.

202. *Barwick*, 496 N.E.2d at 185-86. The court outlined the three separate administrative procedures that were available to the plaintiff: (1) application for a "certificate of no effect on protected architectural features"; (2) application for a "certificate of appropriateness"; and (3) application for a certificate of appropriateness on the ground of insufficient return under the hardship provision. *Id.* at 186. The dissenting opinion argued that because none of these procedures could possibly provide relief to the church, its failure to seek administrative approval did not bar the case on ripeness grounds. *Id.* at 196-98, 202 (Meyer, J., dissenting).

203. *Id.* at 191.

204. *Id.* at 191-92.

205. *Id.*
activities will not be direct, but purely consequential." Based on that finding, the court held that the lower courts had properly exercised their discretion in dismissing the declaratory judgment action, noting that the action could be renewed after the Commission had acted on the plaintiff's application for a certificate of appropriateness.

While the Barwick majority framed its inquiry in terms of the ripeness issue, addressing the First Amendment question only at the end of its opinion, Judge Meyer's dissent cast its inquiry in First Amendment terms from the outset. Judge Meyer found that none of the administrative procedures available to the plaintiff could possibly afford it relief. Thus, the case was ripe for the

206. Id. at 192. The majority opinion continues:
What plaintiff must prove to establish its claim as a charity under the established standard is neither dependent upon nor peculiar to its religious character. Plaintiff's claim — founded on alleged interference with its building program and its inability to afford the repair requirements of the Landmarks Law — takes on incidental First Amendment overtones only because it is a church. That fact is simply not germane to the ripeness issue here. Id. (citations omitted and emphasis added). But see Crewdson, supra note 9, at 157 (religious institutions require greater First Amendment protection "because landmark regulations often impose significant burdens on both religious belief and its exercise"). Underlying Crewdson's view, of course, is a fundamental disagreement with the charitable purpose test as the correct standard by which to judge the constitutionality of landmark laws as applied to religious institutions: "Given the demonstrated impact on first amendment interests, the Barwick court's indifference to the church's claims and its affirmation of the Spatt [charitable purpose] rationale is clearly erroneous." Id. at 163.

207. Barwick, 496 N.E.2d at 192-93.
208. Id. at 193 (Meyer, J., dissenting). Judge Meyer saw the charitable purpose test as resulting from the "special status of religious institutions under the First Amendment." Id. at 196 (Meyer, J., dissenting) (citation omitted). However, it is clear that the charitable purpose test was created in Snug Harbor merely to fill a gap in the landmark law's hardship provisions and was not based on First Amendment considerations. See supra notes 146-48 and accompanying text for a discussion of Snug Harbor and the charitable purpose test.
209. Barwick, 496 N.E.2d at 202. On this point, the Commission had argued that where a tax-exempt institution presented facts showing a physical hardship, the Commission could apply the judicially-created charitable purpose test to make a finding of insufficient return. Id. (Meyer, J., dissenting). The majority declined to consider this issue because the plaintiff had never sought initial Commission approval of its building program by applying for a certificate of appropriateness. Id. at 186 n.2. The dissent argued that the only "administrative procedure" that could possibly offer the plaintiff relief was the "judicial test" (i.e., the charitable purpose test) and that the Commission had no authority either to read the charitable purpose test into the financial hardship provisions of the landmarks law or to waive any of its requirements. Id. at 198-99 (Meyer, J., dissenting) (emphasis added).

The majority and dissent in Barwick also differed on whether the church had to satisfy an "administrative finality" requirement for its "as applied" claim to be ripe. The majority argued that the church's takings claim was not ripe until the church had received a final administrative decision denying its proposed building plan. Id. at 190 (citing Williamson County Regional Plan. Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)). The dissent claimed that administrative finality should not be required because this case dealt with "First Amendment and due process" considerations, not a takings claim. Id. at 202 (Meyer, J., dissenting).

While the majority was correct in applying the finality requirement to judge whether the church's takings claim was ripe, it is not Williamson that controls here, but Agins v. City of Tiburon, 447 U.S. 255 (1980), which states that an "as applied" takings claim is not ripe until the plaintiff has submitted and been refused permission for a development proposal. Barwick, 496 N.E.2d at 202. See PLANNING PRACTICE, supra note 87, at 103-15 (ripeness doctrine discussed); cf. Brian W.
court's consideration. Arguing that the majority had subordinated the church's religious freedom to a less important secular concern, Judge Meyer concluded that the court should uphold the church's claim.

St. Bartholomew's provides a more extensive discussion of the First Amendment claim than either Ethical Culture or Barwick. After the New York City Landmarks Commission had rejected two development schemes and denied the church relief under the ordinance's hardship provisions, St. Bartholomew's filed suit in federal district court, claiming that the Landmarks Law, facially and as applied, violated both the Free Exercise and Establishment Clauses of the First Amendment. The federal district court found no merit in the church's claim that the Landmarks Law was unconstitutional on its face and granted summary judgment for defendants on these claims. Following a bench trial,

Blaesser, Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases, 2 HOFSTRA PROPP. L.J. 73, 94 (1988) (finality requirement troublesome in lower federal courts' application and is unreliable method of determining ripeness); see generally Logue, supra note 97, at 742 n.11 (listing historic preservation cases applying ripeness concept). The dissent's confusion stems from its denial that this case posed a takings issue — it did, of course — and its dismissal of the finality requirement on the grounds that it does not apply to due process and First Amendment claims. Since lower federal courts have applied Williamson's finality test to equal protection and due process claims arising out of the same facts as a takings claim, it's not so clear that the Agins finality test wouldn't also apply when a First Amendment claim arises out of the same facts as a takings claim. See, e.g., Sinaloa Lake Owners Ass'n v. City of Simi Valley, 864 F.2d 1475, 1481 (9th Cir. 1989) (private owners' due process claim is basis for their takings claim, but extent of state violation impossible to determine absent final determination by "appropriate government body"), cert. denied, 494 U.S. 1016 (1990); Herrington v. County of Sonoma, 834 F.2d 1488, 1494-96 (9th Cir. 1987) (due process and equal protection claims ripe for adjudication where developer submitted and was rejected on multiple plan submissions to county board of supervisors), cert. denied, 489 U.S. 1090 (1989); Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1455 (private property owner's equal protection claim not ripe until planning authorities make "final determination on the status of the property"), modified, 830 F.2d 968 (9th Cir. 1987), cert. denied, 484 U.S. 1043 (1988). However, the dissent's final ripeness argument, that this case is distinguishable because designation burdens the church regardless of its development proposal, is valid if you accept the dissent's view on the extent of the burden placed on the church by mere designation.


211. Id. at 193 (Meyer, J., dissenting).

212. Id. at 202.


214. 728 F. Supp. 958, 962 (S.D.N.Y. 1989), aff'd, 914 F.2d 348 (2d. Cir. 1990), cert. denied, 111 S. Ct. 1103 (1991). The church claimed that the landmark law facially violated the Free Exercise Clause to the extent it affected the property of any church, and violated the Establishment Clause by requiring an intrusive examination of the church's finances as part of the hardship review process. Id. It argued that the law was unconstitutional as applied both because the Commission's denial of the church's development plan violated the Free Exercise Clause and because the examination of the church's finances conducted during the hardship review violated the Establishment Clause. Id. St. Bart's also challenged the law on Fifth Amendment takings and Fourteenth Amendment due process grounds. Id. For a discussion of the takings challenge, see supra notes 164-73 and accompanying text.

215. St. Bartholomew's, 728 F. Supp. at 963, 975. The court argued that mere designation of a church as a landmark does not, in and of itself, violate the Free Exercise Clause. Id. at 963. Designation creates no more than an incidental burden on religion, because it merely raises the
the court also denied the church's "as applied" First Amendment and takings claims. Arguing that the church would have to meet an identical standard under both claims — the standard being "that it can no longer carry out its religious mission in its existing facilities" — the court determined that the church failed to carry its burden of proving that it met this standard.

The Court of Appeals for the Second Circuit affirmed the lower court's ruling on the as applied takings and free exercise claims, but analyzed the issues somewhat differently. As discussed earlier, rather than following the district court in explicitly adopting the charitable purpose test, the circuit court adapted a similar takings test for charitable or religious institutions from the \textit{Penn Central} decision. The appellate court's treatment of the free exercise claim also differed from the district court's approach in that the former relied heavily on \textit{Employment Division, Department of Human Resources v. Smith}, which was decided by the Supreme Court after the district court's judgment.

Citing \textit{Smith}, the court argued that while government may not punish an individual for his religious views or coerce him to adopt a particular belief, it may restrict conduct associated with religious practice pursuant to its general regulatory powers. The court viewed the Landmarks Law as a "facially neutral regulation of general applicability within the meaning of Supreme Court
decisions." The court acknowledged that rejecting St. Bartholomew's development scheme drastically reduced the funds potentially available to support the church's religious and charitable programs. Nevertheless it concluded that the Free Exercise Clause is not implicated when neutral regulations have the effect of diminishing the income of religious organizations.

On the same day that the United States Supreme Court denied St. Bart's petition for review, it granted certiorari in First Covenant Church v. City of Seattle. The Supreme Court summarily disposed of the case by vacating the judgment and remanding to the Washington Supreme Court for further consideration in light of Smith. The vacated decision — the product of a sharply-divided Washington Court — conflicted with Barwick on the ripeness issue and with St. Bartholomew's on the substantive First Amendment question. The Washington Supreme Court held that the case was ripe and that the ordinances violated the church's free exercise rights.

Three members of the ma-

223. Id. The court rejected the church's assertion that, because a large percentage of New York's landmarked buildings are religious institutions, the law was not neutral. Id.

224. Id. at 355.


228. Id.

229. First Covenant Church v. City of Seattle, 787 P.2d 1352 (Wash. 1990), judgment vacated and remanded, 111 S. Ct. 1097 (1991). The Landmarks Preservation Board nominated First Covenant as a landmark in 1980. Id. at 1354. Although the church objected to its nomination at the Board's public hearing, the Board both approved the designation and controls instituted to preserve the exterior of the church and recommended to the Seattle City Council that it approve these controls. Id. Four years of negotiations between the city and church failed to produce an agreement regarding application of the controls. Id. The City Council adopted an ordinance formally designating the church as a landmark and placing controls on the building's exterior, subject to an exemption for alterations "necessitated by changes in liturgy." Id. at 1354, 1360 (quoting Seattle, Wash., Ordinance 112425 (Sept. 17, 1985)).

The church challenged its designation as a landmark by filing a declaratory judgment action in January 1986. Id. at 1354. It sought a determination that application of the Seattle Landmarks Preservation Ordinance to churches was unconstitutional and that the separate ordinance designating First Covenant as a landmark was void. Id. Ruling on a motion for summary judgment, the trial court held that the landmarks ordinance properly applied to churches and that the First Amendment challenge to the ordinance was not ripe until the city applied the ordinance in a way that actually impinged upon First Covenant's rights. Id. The church appealed that decision to the Washington Court of Appeals, which certified the appeal to the Washington Supreme Court. Id. at 1354.

230. Id. at 1356, 1361.
majority, however, also subscribed to an unusual concurring opinion, written by Justice Utter, urging the Court to adopt the charitable purpose test in evaluating future free exercise claims in land use cases.\(^{231}\) The four dissenting Justices argued that the ordinance’s “liturgical exemption,” which exempted any exterior changes made for religious purposes from normal landmarks review, completely addressed the church’s “real concerns,” thereby making reversal of the trial court unnecessary.\(^{232}\)

The majority had little difficulty in holding that First Covenant’s challenge was ripe. Applying the ripeness doctrine the United States Supreme Court first announced in a 1967 trilogy of cases,\(^{233}\) the court resolved the issue in four brief paragraphs.\(^{234}\) The court concluded that the factual record regarding First Covenant’s designation was complete, that the designation constituted a final action by the Landmarks Commission, and that the church had exhausted its administrative remedies by appealing the designation through the procedures provided in the ordinance.\(^{235}\)

The court then analyzed the substantive First Amendment issue under the Supreme Court’s free exercise decisions before Smith. It found that the ordinance infringed on the church’s free exercise rights by requiring the church “to seek secular approval of matters potentially affecting the Church’s practice of religion.”\(^{236}\) Holding that historic preservation was not a compelling state interest, the court concluded that both the Landmarks Preservation Ordinance and the ordinance designating First Covenant as a landmark violated the church’s free exercise rights under the federal and Washington Constitutions.\(^{237}\)

By simultaneously vacating the judgment in First Covenant and denying the petition for certiorari in St. Bartholomew’s, the United States Supreme Court clearly indicated that it favors the latter over the former at least insofar as First

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\(^{231}\) Id. at 1365 (Utter, J., concurring).

\(^{232}\) Id. at 1366 (Dolliver, J., dissenting). The dissent also said that: “The discussion of other issues raised by the landmarks preservation ordinance, including the effect of a decision by plaintiff to use or sell its property for ‘nonreligious purposes,’ should wait until another day.” Id. (Utter, J., dissenting).

\(^{233}\) See Gardner v. Toilet Goods Ass’n, 387 U.S. 167 (1967); Toilet Goods Ass’n v. Gardner, 387 U.S. 158 (1967); Abbott Lab. v. Gardner, 387 U.S. 136 (1967). These cases call for a two-part analysis to determine whether a pre-enforcement challenge to an administrative regulation is ripe for judicial review. The analysis operates “first to determine whether the issues tendered are appropriate for judicial resolution, and second, to assess the hardship to the parties if judicial relief is denied.” Toilet Goods Ass’n, 387 U.S. at 162. The “appropriateness” prong of the test looks to whether the issues raised are primarily legal, and thus do not require further factual development, and whether the challenged action is final. Abbott, 387 U.S. at 149. The “hardship” prong requires an evaluation of “the hardship to the parties of withholding [or granting] court consideration.” Id.

\(^{234}\) First Covenant, 787 P.2d at 1356.

\(^{235}\) Abbott, 387 U.S. at 149. This ruling conflicts with that of the New York Court of Appeals in Barwick. See supra notes 201-12 and accompanying text for a discussion of Barwick.

\(^{236}\) First Covenant, 787 P.2d at 1359. In reaching this conclusion, the court found that the “liturgy exception” constituted a “vague and unworkable criterion” that would impose delays on the church in carrying out routine activities. Id. at 1360. Further, even if the liturgy exception represented an appropriate criterion, its requirement that the church submit plans to the Board and negotiate possible alternatives “creates unjustifiable interferences in religious matters.” Id.

\(^{237}\) Id. at 1361.
Covenant was based on the United States Constitution. In order to reaffirm its original judgment on remand, the Washington Supreme Court must find that the free exercise provision in its state constitution, which is significantly broader than its counterpart in the First Amendment, \(^2\) requires the application of a compelling interest test.

There is support in both commentary \(^3\) and caselaw \(^4\) for this position. Indeed, the Minnesota Supreme Court recently held that Minnesota's constitutional protection of religious freedom required the application of the compelling interest test. \(^5\) However, even if First Covenant is reaffirmed on state constitutional grounds, it is unlikely to have any significant future effect. As has been noted, in addition to the four dissenting justices, three members of the First Covenant majority were uncomfortable enough with the compelling interest analysis to join a concurring opinion advocating the adoption of the charitable purpose test for future cases. Under these circumstances the precedential value of a reaffirmed First Covenant would be dubious.

The only other case to uphold a First Amendment challenge to landmark preservation is Society of Jesus v. Boston Landmarks Commission, \(^6\) which differs from the others in two significant respects: it involved the designation of a church interior, and it was decided solely on state constitutional grounds. \(^7\) The Church of the Immaculate Conception, located in Boston's South End,

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238. WASH. CONST. art. I, § 11 provides:
Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

239. See, e.g., McConnell, supra note 221, at 1118, 1142 (language in state constitutions similar to "peace and safety" clause in Washington constitution implies existence of compelling interest test; religious exemptions from historic preservation laws should be granted under that test). In an earlier work, McConnell argued that the government's right to protect public "peace and safety" extends only to cases where a claimed free exercise right would trespass on private rights or the public peace. Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1455-64 (1990). Thus, where the rights of others are not involved, free exercise rights prevail, including the right of religious institutions to "define their own doctrine, membership, organization, and internal requirements without state interference." Id. at 1464-65.

240. See, e.g., City of Sumner v. First Baptist Church, 639 P.2d 1358, 1362-63 (Wash. 1982) (free exercise violation where enforcement of building code's safety standards operated to close religious school); State v. Meacham, 612 P.2d 795, 797 (Wash. 1980) (validating use of compelling interest test).

241. In State v. Hershberger, 444 N.W.2d 282 (Minn. 1989), cert. granted and judgment vacated, 495 U.S. 901 (1990), the state prosecuted an Amish defendant who refused to comply with a statute requiring the use of reflective tape and lights on horse-drawn buggies. The defendant prevailed on his free exercise claim in the state supreme court, but that decision was vacated and remanded. 495 U.S. 901. On remand, the Minnesota court applied the compelling interest test under its state constitution and determined that highway safety was not a sufficiently compelling interest to warrant this infringement on the religious beliefs of the Amish. 462 N.W.2d 393 (Minn. 1990).


243. Id. at 572. MASS. CONST. pt. I, art. II, § 3 states:
[No] subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own con-
though considered one of the "finer examples of classic mid-nineteenth century church design," was an aging, sparsely attended, oversized building which the Jesuits planned to renovate into office, counseling, and residential space. When the renovation work began, however, the Boston Landmarks Commission designated portions of the church's interior as a landmark.

The Jesuits sought court review, claiming that the designation of the interior of the church violated provisions in both the federal and state constitutions. The Massachusetts Supreme Judicial Court ruled that the landmark designation violated Article II of the state constitution because it restrained the Jesuits from worshipping "in the manner and season most agreeable to the dictates of [their] own conscience." The court argued that "[t]he configuration of the church interior is so freighted with religious meaning that it must be considered part and parcel of the Jesuits' religious worship." Further, the religious conduct burdened by the designation was not within the narrow Article II exemption permitting regulation of conduct that disturbs the peace. Finally, the court ruled that the government interest in historic preservation, although worthwhile, was not sufficiently compelling to justify a restraint on the free exercise of religion. The court concluded that "under our hierarchy of constitutional values 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."

4. Evaluating the First Amendment Challenges

The four previously discussed cases that address First Amendment challenges to landmark designation of church exteriors have produced widely divergent and irreconcilable outcomes. Ethical Culture and Barwick deny that designation implicates the First Amendment, while First Covenant, since vacated by the United States Supreme Court, held both that designation significantly

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science; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

Because the court held that the designation violated article two of the state constitution, it did not reach the remaining constitutional claims. Society of Jesus, 564 N.E.2d at 572.

244. Society of Jesus, 564 N.E.2d at 572.
245. Id.
246. Id. The designation specifically restricted permanent alteration of the "nave, chancel, vestibule and organ loft on the main floor — the volume, window glazing, architectural detail, finishes, painting, the organ, and organ case" without the commission's approval. Id.
247. Id.
248. Id. at 573.
249. Id. The religious significance of the interior of a sanctuary is not limited to the Catholic Church. See generally Carmella, Houses of Worship, supra note 8, at 449-74.
250. See supra note 243 for the text of Article II of the Massachusetts State Constitution.
251. Society of Jesus, 564 N.E.2d at 574.
252. Id. It is important to note that the court found that landmark designation of the interior itself, not the manner in which the landmark regulations were applied to the various proposed renovations, violated the religious freedom of the Jesuits. Id. (emphasis added).
burdens First Amendment rights and that historic preservation is not a sufficiently compelling state interest to justify that burden. The St. Bartholomew's decision lies between these two extremes. The court there denied a First Amendment claim absent a showing of discriminatory motive, coercion in religious practice, or the church's inability to carry out its religious mission in its existing facilities. Society of Jesus, which upheld a free exercise challenge to designation of a church interior, is of interest because it allows us to contrast the respective free exercise burdens attendant on interior and exterior designation, and because it extends the discussion to free exercise safeguards in state constitutions.

This judicial debate on the First Amendment issue has not been very illuminating. Ethical Culture and Barwick, both of which denied that landmark preservation implicated the First Amendment at all, reached that conclusion more by fiat than analysis. First Covenant, which found a First Amendment violation, is only slightly more enlightening.

Only St. Bartholomew's and Society of Jesus engage in any meaningful analysis of the First Amendment issue, and even that is limited. Society of Jesus provides the clearest guidance; however, because it involved the designation of a church interior, its application elsewhere is limited. In rejecting the Boston

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254. See supra notes 227-41 and accompanying text for a discussion of First Covenant. First Covenant Church argued that the church's free exercise rights were burdened simply because it would have to comply with the procedures and rules in the landmark ordinance and because designation lowered the market value of the church's property. First Covenant, 787 P.2d at 1355. The dissent in Barwick also argued that designation burdened free exercise because of the need to comply with the ordinance. Church of St. Paul & St. Andrew v. Barwick, 496 N.E.2d 183, 198 (N.Y.) (Meyer, J., dissenting), cert. denied, 479 U.S. 985 (1986). See supra notes 201-12 and accompanying text for a discussion of the dissent in Barwick.

255. See supra notes 213-25 and accompanying text for a discussion of St. Bartholomew's.

256. See supra notes 242-52 and accompanying text for a discussion of Society of Jesus.

257. In Ethical Culture, the court rejected the plaintiff's claim that the landmark ordinance, which restricted its ability to develop the full commercial potential of its property, interfered with the free exercise of its religious activities, by characterizing development as a "purely secular" matter. Society for Ethical Culture v. Spatt, 415 N.E.2d 922, 926 (N.Y. 1980). Barwick addressed the First Amendment issue to determine whether the court's resolution of the ripeness question would change in light of the church's free exercise claim. 496 N.E.2d at 191. The court declined to alter its view on the ripeness issue, offering, as its sole argument, the conclusory statement that the ultimate effect of the landmark ordinance on the church's religious activities would be "not direct, but purely consequential." Id. at 192.

258. See supra notes 227-41 and accompanying text for a discussion of First Covenant. The majority argued that the landmark ordinance triggered the compelling interest test because it required the church "to seek secular approval of matters potentially affecting the . . . practice of religion." First Covenant, 787 P.2d at 1360. It further argued that, even assuming that the "liturgy exception" worked to exempt the church from regulation of religious expression, the ordinance would violate the Free Exercise Clause because the church would still be required to submit its plans to a secular body, the Landmarks Board, and negotiate possible alternatives. Id. In addition, the majority viewed the ordinance's requirement that the church obtain a permit prior to making structural changes as an infringement of its free exercise rights. Id. For good measure, the concurring opinion added a third reason why the ordinance violated the Free Exercise Clause: the church had shown that application of the ordinance greatly diminished the value of its principal asset. Id. at 1363 (Utter, J., concurring).
Landmarks Commission’s claim that nothing more was at issue than “a secular question of interior decoration,” the court argued that configuration of a church interior, because it has such great religious meaning, cannot be separated from religious worship itself.\textsuperscript{259} Under the more stringent religious freedom safeguards in the Massachusetts Constitution,\textsuperscript{260} this government intrusion into religious worship clearly burdened freedom of religion. As will be seen later, Society of Jesus is undoubtedly correct in finding a burden where religious worship itself is regulated.\textsuperscript{261} It is unlikely, however, that worship would be implicated in cases involving exterior designation.\textsuperscript{262}

In \textit{St. Bartholomew’s}, the Court of Appeals for the Second Circuit observed that the primary effect of the Landmarks Law was to restrict drastically the church’s ability to develop its property commercially so as to raise funds for its charitable and religious programs.\textsuperscript{263} Nonetheless, the court denied that such a diminution in the funds potentially available for a religious institution implicates the Free Exercise Clause.\textsuperscript{264} The court held that a First Amendment claim should be denied absent a showing of discriminatory motive, coercion in religious practice, or the church’s inability to carry out its religious mission in its existing facilities,\textsuperscript{265} all factors that speak to the existence of a burden on religion, and thus a violation of the Free Exercise Clause.

\section*{III. Analyzing the Conflict: Does Landmark Designation Burden Religion?}

\subsection*{A. The Concept of Burden Under the First Amendment}

In a recent article,\textsuperscript{266} Professor Angela Carmella argues that the imposition of “design controls” — defined as either landmark designation or architectural review — on religious institutions constitutes an impermissible burden on religion under both the Free Exercise and Establishment Clauses of the First Amendment.\textsuperscript{267} In Carmella’s view, because ecclesiastical architecture is religious expression, “the state, through design control jurisdiction and process, becomes impermissibly involved in assessing and dictating the content, profession and formation of belief.”\textsuperscript{268} This argument leads her to the inevitable conclu-
sion that there is a constitutional necessity for the exemption of religious institutions from design controls.269

There is a great deal to admire in Professor Carmella’s Article, particularly her scholarly discussion of the symbiotic relationship between theology and architecture.270 She also correctly perceives that governmental interference in religion may violate both the Free Exercise Clause and the Establishment Clause271 and provides a well-reasoned analysis of the legal doctrines in the Supreme Court’s decisions under each clause,272 including a trenchant criticism of the Court’s abandonment of the compelling interest test for free exercise claims in Employment Division, Department of Human Resources v. Smith.273

Further, this author agrees with Professor Carmella both that commercial development by a religious institution is undeserving of constitutional protection274 and that the Constitution bars landmark regulation of the interiors of houses of worship.275 However, my differing view of what constitutes a burden under the religion clauses leads me to refute her claim that the Constitution requires a blanket exemption from landmark regulation for houses of worship.276

Normally, First Amendment challenges to government regulation do not involve claims that government has impermissibly singled-out religious activity for regulatory treatment, but rather, that an individual or religious institution

believes through the semiotic qualities of the sanctuary, facade and building plan; and (4) internal theological debates over authentic architectural expression and stewardship of architectural treasures. The state becomes the reviewer and arbiter of internal design decisions, arrogates to itself the role of the religious community, and places itself in a position to direct the long term development of ecclesiastical architecture.

Id.

269. Id. at 513-15. Professor Carmella does, however, recognize certain limits to this protection. “First, it does not implicate safety, health or zoning regulations that indirectly influence the design of a structure, but only those specifically focused on the aesthetic control of new or existing designs. Second, it applies only to the initial and continued use of a particular site as a house of worship.” Id. at 405 [footnotes omitted]. Finally, since “[n]on-worship use of the site or its commercial development are not within the purview of this article,” id. at 406, she would view the claims of the religious institutions in St. Bartholomew’s, Lutheran Church, and Ethical Culture as undeserving of constitutional protection.

270. Id. at 449-74. Professor Carmella, who was awarded the M.T.S. degree from the Harvard Divinity School in 1984, uses her training well to provide the reader with a thoroughly documented critique of the relationship between architecture and theology in Christianity, Islam, and Judaism.

271. Id. at 407-13 (while relationship between clauses generally understood in terms of a “division of labor,” the Free Exercise Clause offering protection from governmental interference and the Establishment Clause prohibiting both governmental support of religion and religious usurpation of state powers, Establishment Clause, like Free Exercise Clause, protects religion from state interference). See infra notes 296-99 and accompanying text.

272. Id. at 413-19 (Establishment Clause) and 419-27 (Free Exercise Clause).


274. See infra notes 358-75 and accompanying text.

275. See infra notes 352-57 and accompanying text.

276. See infra notes 379-95 and accompanying text.
should be exempted from an otherwise valid, neutral regulation of general applicability. It is beyond the scope of this article to engage in a detailed discussion of either the Supreme Court's rulings in this area or the related commentary. However, a summary of the doctrinal development up to and including the Court's 1990 decision in Smith, which restructured free exercise jurisprudence, will provide the context for our discussion of the burden issue in First Amendment jurisprudence.

The Supreme Court's first decision on the Free Exercise Clause was Reynolds v. United States where the Court affirmed a Mormon bigamy conviction. By endorsing a dichotomy between religious belief and religious practice, the Reynolds Court essentially denied that a governmental regulatory scheme could ever violate the Free Exercise Clause. The Court stated that while laws "cannot interfere with mere religious belief and opinions, they may with practices." For the next ninety years, the Court declined to recognize a claim that a general regulatory scheme violated the Free Exercise Clause.

The modern era of free exercise jurisprudence can be traced to the Court's 1963 decision in Sherbert v. Verner which upheld a free exercise challenge to


278. 98 U.S. 145 (1878).

279. Id. at 168.

280. Id. at 166. As one commentator has noted, the Reynolds dichotomy calls to mind Oliver Cromwell's directive regarding religious liberty to Catholics in Ireland: "As to freedom of conscience, I meddle with no man's conscience; but if you mean by that, liberty to celebrate the Mass, I would have you understand that in no place where the power of the Parliament of England prevails shall that be permitted." Gordon, supra note 221, at 101 n.73.

281. See Developments in the Law — Religion and the State, 100 HARV. L. REV. 1606, 1706 (1987) [hereinafter Developments in the Law]. Although the Court did invalidate a licensing system for religious and charitable solicitations in Cantwell v. Connecticut, 310 U.S. 296 (1940), and a flat tax on solicitation as applied to the dissemination of religious ideas in Murdock v. Pennsylvania, 319 U.S. 105 (1943) and Follett v. McCormick, 321 U.S. 573 (1944), the Smith Court distinguished these cases because they involved "not the Free Exercise clause alone, but the Free Exercise clause in conjunction with other constitutional protection, such as freedom of speech and of the press." Employment Div., Dept' of Human Resources v. Smith, 494 U.S. 872, 881 1601 (1990) (citations omitted). This is one of the aspects of the Smith opinion that has been sharply criticized. See, e.g., Gordon, supra note 221, at 97-99 (asserting that Court explicitly based earlier decisions on Free Exercise Clause); McConnell, supra note 221, at 1121-22 (asserting that Smith itself could be hybrid of free speech and free exercise claim and that Court did not intend notion of hybrid claims to be taken seriously).

282. 374 U.S. 398 (1963). In Sherbert, South Carolina denied unemployment benefits to a Seventh Day Adventist who was fired from her job in a textile mill for refusing to work on Saturdays, her Sabbath, after the mill expanded operations to a six-day week. The Court analogized this denial
a general regulation that effectively penalized religiously-motivated conduct. Under *Sherbert*, the Free Exercise Clause requires an exemption from any government regulation that significantly burdens religious practice, unless the regulation is justified by a compelling governmental interest and is the least restrictive means of achieving that interest.

The Court reaffirmed *Sherbert*'s principles nine years later in *Wisconsin v. Yoder*. There the Court held that a Wisconsin law criminalizing the failure to obey the state's mandatory school attendance requirement could not be enforced against Amish families who refused to send their children to school beyond the eighth grade. However, *Yoder* represents the high-water mark for free exercise exemptions. Between *Yoder* and *Smith*, the Court rejected every free exercise challenge to a general governmental regulation, except for those claims directly governed by *Sherbert*.

Despite the Court's near uniform failure to uphold claims for exemption after *Yoder*, *Sherbert*'s principles retained some vitality. State and lower federal courts continued to rely on *Sherbert* and state and local governments often developed religious exemptions to conform to their perception of what *Sherbert* required. The Court's decision in *Smith* has changed this.

In *Smith*, a sharply divided Court rejected the free exercise claim of two Oregon state employees seeking reinstatement of their unemployment benefits. The employees were fired from their jobs as drug and alcohol counselors because the state viewed their religiously-motivated peyote smoking as work-related misconduct. In denying their claim, the Court abandoned *Sherbert*'s compelling interest test, stating that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'") Stated another way, an individual's

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286. *Id.* at 234.


291. *Id.*

292. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).
religious beliefs do not excuse him from compliance with otherwise valid laws prohibiting conduct that the state may legitimately regulate.\textsuperscript{293} In the Court's view, striking a balance between protection of religious practices and the requirements imposed by laws of general application is a task for legislatures, not courts.\textsuperscript{294}

Despite the ruling in \textit{Smith}, the issue of free exercise claims for exemption from landmark ordinances survives in both judicial and legislative decisionmaking. The issue survives in the judicial context for two reasons. First, state courts remain free to apply the equivalent of the \textit{Sherbert} compelling interest analysis under the free exercise guarantees in their state constitutions. Second, because \textit{St. Bartholomew's} interprets \textit{Smith} as requiring courts to provide at least a limited degree of free exercise protection for religious institutions under landmark preservation ordinances, the threshold issue of whether landmark designation imposes a burden on the free exercise rights of churches is still viable in the federal courts as well.\textsuperscript{295}

Thus, in analyzing the issue of free exercise exemptions, we begin with this threshold consideration. For if there is no burden on the free exercise of religion, or if the burden falls on purely secular activities, the inquiry need go no further.

Claims of a burden on religion may also arise under the Establishment Clause. Under the tripartite test announced twenty years ago in \textit{Lemon v. Kurtzman},\textsuperscript{296} a challenged government action must: (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive government entanglement with religion.\textsuperscript{297} While the first two prongs of the \textit{Lemon} test are utilized to evaluate challenged governmental actions that support religion, the third prong, addressing the entanglement of government with religion, has been invoked to limit governmental regulatory programs that arguably impair religion.\textsuperscript{298} Thus, it should not be surprising that scholars who have examined the burden concept under the Establishment Clause's entanglement prong reach conclusions quite similar to scholars who address the same question under the Free Exercise Clause.\textsuperscript{299}

\textbf{B. Commentary on the Burden Issue}

Although comparatively little First Amendment scholarship has addressed

\textsuperscript{293} Id.
\textsuperscript{294} Id. at 883-84.
\textsuperscript{295} See supra notes 222-25 and accompanying text for a discussion of the Second Circuit's interpretation of \textit{Smith}. \textit{See also} Carmella, \textit{Houses of Worship, supra} note 8, at 424-26 (arguing that landmark designation falls into several categories of cases to which \textit{Smith} does not apply).
\textsuperscript{296} 403 U.S. 602 (1971).
\textsuperscript{297} Id. at 612-13.
\textsuperscript{299} See infra notes 300-12 and accompanying text.
the burden issue, in free exercise jurisprudence,\textsuperscript{300} it has been the focus of at least one article,\textsuperscript{301} and it has been discussed in several others.\textsuperscript{302} The burden issue has been discussed even less frequently in articles that focus on the Establishment Clause rather than on the Free Exercise Clause.\textsuperscript{303}

Unfortunately, the one article that specifically addresses the burden issue promises far more than it delivers. The thrust of Professor Ira Lupu’s argument is that courts should derive a constitutional “law of burdens” from common law norms.\textsuperscript{304} Examining the history and general structure of free exercise jurisprudence,\textsuperscript{305} Lupu identifies two basic approaches to the burden problem — the coercion theory articulated in Bowen v. Roy\textsuperscript{306} and Lyng v. Northwest Indian

\begin{itemize}
\item \textsuperscript{300} See Ira C. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv. L. Rev. 933, 936 (1989) (describing area as “scholarly void”). Professor Lupu may have overstated the matter. One reason for the relatively sparse scholarly discussion of the burden issue may be the fact that the U.S. Supreme Court has placed relatively little emphasis on the burden concept in deciding free exercise challenges. Professor Lupu has argued that the Court’s modern free exercise decisions on the burden issue begin with Braunfeld v. Brown, 366 U.S. 599 (1961), and Sherbert v. Verner, 374 U.S. 398 (1963). Lupu, supra, at 939-42. While Braunfeld and Sherbert taught that there was such a thing as an “indirect” burden on free exercise, neither case provided any express guidelines, outside its own facts, for determining when such a burden exists. Id. at 942.

Further, while landmark designation involves regulation of religious institutions, most free exercise scholarship focuses on individuals. Developments in the Law, supra note 281, at 1741. Indeed, Professor Lupu has argued that free exercise burdens “are entirely individual in nature,” concluding that all institutional claims to free exercise exemptions should be rejected. Lupu, supra note 277, at 765-66.

\item \textsuperscript{301} See Lupu, supra note 300, at 933.


\item \textsuperscript{303} See Esbeck, supra note 298, at 368 (increased government regulation on churches noted); Marshall & Blomgren, supra note 302; Serritella, supra note 298, passim (arguing that government regulatory schemes that support or interfere with religious activities, so as to influence religion, should be prohibited).

\item \textsuperscript{304} Lupu, supra note 300, at 966. Lupu’s “first approximation” of his theory in “rule” form is: “Whenever religious activity is met by intentional government action analogous to that which, if committed by a private party, would be actionable under general principles of law, a legally cognizable burden on religion is present.” Id.

\item \textsuperscript{305} Id. at 937-60.

\item \textsuperscript{306} 476 U.S. 693 (1986). The dispute in Bowen arose from a requirement in the Aid to Families with Dependent Children (“AFDC”) program that recipients’ Social Security numbers be on file with a state agency. Id. at 695. Stephen Roy, a Native American, objected to obtaining a Social Security number for his daughter on the ground that this would rob her of her spirit. Id. at 696. The Court found that this requirement burdened the father’s exercise of his religion but held that the
Cemetery Protective Association,307 and the substantial impact theory Justice Brennan developed in his Lyng dissent.308 Professor Lupu contends that neither approach is conceptually sound,309 particularly in that both share the common defect of pervasive uncertainty of scope, "with its concomitant invitation to unprincipled, result-oriented application."310

While Professor Lupu's argument is novel and intriguing, he ultimately fails to show how his approach would do a better job in addressing the problems of uncertain and result-oriented applications.311 Further, in the development and application of his theory, he addresses the issue of regulatory burdens on religious institutions — the focus of the present inquiry — only tangentially and with no real discussion.312

There does exist a body of First Amendment scholarship that provides a more appropriate framework in which to evaluate the burdens imposed on religious institutions by landmark designation. A major focus in many of these writings is the issue of church autonomy, which relates to churches' "constitutionally protected interest in managing their own institutions free of government

government was not required to conduct its own internal affairs so as to avoid conflict with these beliefs. Id. at 699-701.

307. 485 U.S. 439 (1988). In Lyng, Native Americans challenged a decision of the U.S. Forest Service to construct a road through a federally-owned forest in areas that are sacred to Native Americans. Id. at 442. Applying Bowen's "internal affairs" rationale to the fact of government land ownership, the five-member majority rejected the free exercise challenge. Id. at 458.

308. Lupu, supra note 300, at 961.

309. Id. at 961-66. The author finds that the coercion concept is fraught with conceptual and philosophical difficulty, particularly as to the distinctions between threats and offers, and may be easily manipulated by focusing only on the less coercive aspects of the government's conduct. Id. at 961-63. The substantial impact approach is also flawed, he argues, because there would be insuperable problems in attempts to trace causation and measure impacts. Id. at 964-66.

310. Id. at 965-66.

311. Lupu acknowledges that the divergency among common law rules would lead to uncertainty in application. Id. at 974. After rejecting several possible approaches to this problem — choosing either the majority rule, or the "best" rule, or the "distilled essence" of the common law — he advocates that a sounder approach would be for the court "to engage in a comprehensive analysis of the policies, both general and specific, advanced by the relevant common law norms." Id. at 975. Acknowledging that this approach too would stir up uncertainty, he ultimately relies on the blunt instrument of a presumption in favor of finding a burden in close free exercise cases. Id. at 974-75. This seems a rather circuitous route to travel to arrive at a presumption.

312. Lupu's only mention of the regulatory context appears at the outset of his discussion of the application of the common law principle:

Without doubt, all cases in which allegedly religious activity is met by the threat of imprisonment or fine, whether criminal or civil, would fall within the common law principle, because such cases involve physical restraints or seizures of property of the sort that the common law has long made actionable between private parties. Id. at 973. His only discussion of this statement is to note that the prohibition on polygamous marriage in Reynolds would present a clear case of free exercise burden. Id. Since government regulations are enforced by civil and criminal penalties, Lupu, taken at face value, would apparently find all regulations burdensome. A more charitable assumption would suggest that he ignored the institutional regulatory issue in part because the Court's free exercise cases and the preponderance of scholarship deal with the claims of individuals, not institutions. See supra note 300. We might then presume to apply his general rule. For a discussion of such an attempt, see infra notes 355-56 and accompanying text.
interference. For advocates of greater religious freedom, what underlies the autonomy issue is the recognition that churches are complex and dynamic institutions in which religious belief and practice are subject to change. Churches therefore need to be free from government interference so as to avoid the risk that governmental regulation will shape and influence a church's beliefs and activities and thereby alter the direction of its future development.

Professor Bruce Bagni attempts to resolve the tension between the enforcement of neutral regulatory schemes and claims for exemption from such schemes on the ground of church autonomy by identifying the burdened activity along a spectrum of "spirituality." His classification scheme resembles a series of concentric circles, with activities constituting a church's "purely spiritual life" at the epicenter and the church's least spiritual activities on the outermost circle. In Professor Bagni's view, courts should require that government regulations yield to autonomy claims relating to activities at the epicenter of his model. Activities located on the outer rings, however, are increasingly susceptible to government regulation as they take on more of the characteristics of purely secular exercises.

Rejecting Professor Bagni's model as uni-dimensional (arguing that it measures autonomy concerns only by a regulated activity's placement on a spectrum bounded by the "purely religious" and the "purely secular"), Professor Douglas Laycock suggests that courts use a three-part analysis in evaluating the validity of a church's autonomy claim. The first factor in the analysis is whether the activity burdened by the regulation is within the church's internal affairs, as opposed to its external relationships. The second factor is the "religious intensity" of the activity, that is, the activity's relation to the church's religious practices. The final factor is the extent and qualitative effect of the governmental interference.
with the church's governance of its affairs.\textsuperscript{324}

Professor Laycock is not without his own detractors. The student editors of the \textit{Harvard Law Review} have noted that both Professors Bagni and Laycock's models "suffer from severe limitations."\textsuperscript{325} Because both models require a court to assess the spirituality or intensity of a particular religious activity, "judicial incursion into institutional religious beliefs, either directly or through the assessment of their centrality, cannot be avoided."\textsuperscript{326} Professor Bagni's model is particularly deficient, they argue, in that the subject matter of most difficult cases fall in his middle category of activities that are not readily classified as being close to either the purely secular or purely religious.\textsuperscript{327} Thus, the model provides courts with little guidance.\textsuperscript{328}

Professor Laycock avoids this trap by identifying factors in addition to the degree of "spirituality" for evaluating a church's autonomy interests.\textsuperscript{329} Nonetheless, his analysis is indeterminate because it provides no single calculus by which to integrate the results of his factorial analysis into a single conclusion.\textsuperscript{330} In the end, both models lack the same element, "an orientation point from which the various factors can be weighed and integrated."\textsuperscript{331}

To cure this defect, the editors propose as the point of orientation a "continuum of substance and motivation" along which the activities of religious organizations may be located. Arguing that activities that combine religious substance and motivation cannot be separated into religious and secular components, the editors contend that regulation of such activities is tantamount to regulation of belief itself. Immunity from government regulation, then, must be close to absolute if free exercise values are to be protected. However, where activities are not substantively religious in nature, the activity's religious motiva-

\textsuperscript{324} Id. at 1412; see also \textit{Developments in the Law}, supra note 281, at 1772-73 (setting out Laycock's three-part analysis). In explicating this last factor, Professor Laycock identifies four types of regulations: (1) those that merely increase the church's costs of conducting the regulated activity; (2) those that directly regulate the manner in which the activity is conducted; (3) those that affect the selection of personnel for the activity; and (4) those that effectively prohibit the activity. Laycock, \textit{supra} note 302, at 1412. However, because these categories were developed as an aid in analyzing cases involving state interference with church control of its employees, their relevance in other regulatory settings may be limited. \textit{See} Douglas Laycock, \textit{Civil Rights and Civil Liberties}, 54 \textit{Chi.-Kent L. Rev.} 390, 433-34 (1977) (four categories of state regulation discussed).

\textsuperscript{325} \textit{Developments in the Law}, supra note 281, at 1773.

\textsuperscript{326} \textit{Id.} This is a concern, the editors argue, because unless courts are deferential in assessing institutional beliefs, adoption of either the Bagni or Laycock approach will indirectly weaken religious autonomy. \textit{Id.} The editors further argue that courts should adopt the Supreme Court's principle of nonintervention in questions of religious doctrine or governance, as seen in the Court's resolution of intrachurch disputes over property or ecclesiastical office. \textit{Id.} at 1762-70. \textit{See}, e.g., Jones v. Wolf, 443 U.S. 595 (1979) (state may adopt neutral principles of law that do not grant compulsory deference to religious authority in church property disputes).

\textsuperscript{327} \textit{Developments in the Law}, supra note 281, at 1773.

\textsuperscript{328} \textit{Id.} at 1773-74. This is not an accurate assessment of Professor Bagni's argument, which states: "If the [religious institution's] activity or relationship is outside the epicenter, however, the state clearly has the power to regulate it." Bagni, \textit{supra} note 302, at 1548.

\textsuperscript{329} \textit{Developments in the Law}, supra note 281, at 1774.

\textsuperscript{330} \textit{Id.}

\textsuperscript{331} \textit{Id.}
tion can be separated from its secular purposes and effects. In such cases, the activity's significant secular components are subject to government regulation.

The editors conclude that the preferred approach to the autonomy issue would require a court to use the three factors Professor Laycock suggested, but the activity in question would be identified along a continuum bounded at one end by activities that are substantively religious and at the other by activities that are religiously motivated but not substantively religious. Having identified the magnitude of the autonomy interest associated with a given activity, the court would then assess the governmental interest served by regulating the activity. Finally, the court would weigh the church's free exercise claim to autonomy against the state's interest in regulating an activity that affects society.

Both Professors Carl Esbeck and James Serritella have approached the issue of church autonomy from a different direction, focusing on the Establishment, rather than the Free Exercise, Clause. Commentators have noted however, that despite his focus on the Establishment Clause, Professor Esbeck's rationales for protecting church autonomy are quite similar to those Professor Laycock suggested. Professor Serritella, whose concern is that the entanglement doctrine in Establishment Clause analysis be able to "identify government contacts with religious organizations that further or impair religion by directing or influencing religious matters," has proposed a reformulation of the entanglement test that also closely resembles Professor Laycock's multifactorial

332. *Id.* at 1774-75. They argue that certain activities, such as worship and proselytization, are both religiously motivated and intrinsically religious themselves: "[t]he belief not only motivates the act, but so infuses the act that the two become intertwined." *Id.* at 1795. By contrast, other church activities, although motivated by religious belief, lack this connection. *Id.*

333. *Id.* In making the required inquiry into the substantive religious character of the activity, the editors propose a two-step procedure. First, the court determines the relationship between the activity and religious belief by reference to the religion itself (i.e., the subjective characterization placed on the activity by believers). Second, the court refines this assessment by reference to third-party perceptions of the activity's character. *Id.* at 1775-76.

334. *Id.* at 1779.

335. *Id.*

336. *Id.* The editors caution that such a test would not require churches to demonstrate that a regulation significantly burdened a central religious belief or practice before the state must show a compelling interest justifying the regulation. *Id.* Rather the court would weigh the claimed infringement on church autonomy against the competing social interest behind the regulation without regard to the significance of the burden. *Id.*

337. See Esbeck, *supra* note 298, at 348 (Establishment Clause functions as structural provision regimenting involvement between government and religious associations); Serritella, *supra* note 298, at 144 (entanglement doctrine useful in distinguishing permissible church-state contacts).

338. Marshall & Blomgren, *supra* note 302, at 308-09; *Developments in the Law, supra* note 281, at 1751 n.45. Esbeck and Laycock are both concerned about the distorting effect that government regulation will have on the theological development of the religious institution. Compare Esbeck, *supra* note 298, at 374-79 (arguing that government entanglement may subvert and redirect church programs to meet government ends) with Laycock, *supra* note 302, at 1388-92 (arguing that state interference with church autonomy frustrates doctrinal development).

Professors William Marshall and Douglas Blomgren take a critical view of Laycock's free exercise analysis and the Establishment Clause approach of Professors Esbeck and Serritella. Underlying their critique is a concern that both the Establishment Clause-based analysis and Laycock's expanded free exercise analysis advocate that a greater range of activities conducted by religious institutions should be protected from governmental regulatory programs and that the extent of the protection provided will be more comprehensive. Although Professors Marshall and Blomgren view as uncontroversial the claim that some religious activities are protected, they strongly disagree with the Laycock-Esbeck thesis that the process of theological development should be shielded from the indirect influence of government regulation. The authors also question the more moderate position that government regulation need not defer totally to religious institutions, but rather, courts should adjust the degree of protection from regulation based on such factors as religious intensity, the type and extent of regulatory intrusion, and the strength of the state's regulatory interest. They conclude that protection for religious institutions from government regulation should remain within the ambit of the Free Exercise and Free Speech Clause, not the Establishment Clause. Ultimately, they find that the Free Exercise Clause protects religious activity only if the regulation interferes

340. Serritella's proposed reformulation focuses on three factors: "(1) the religious character of the activity involved in the contacts, (2) the frequency and effects of the contacts, and (3) the government interest served." Id. See supra notes 320-24 and accompanying text for a discussion of Laycock's three factors.

341. See Marshall and Blomgren, supra note 302, at 306-15. Marshall and Blomgren conclude that, except in limited circumstances, the Establishment Clause should not be used to measure the constitutionality of government regulation of religious institutions' activities; rather, such regulations should be judged solely by reference to other constitutional provisions, primarily the Free Speech and Free Exercise Clauses. Id. at 326-31.

342. Id. at 295.

343. Id. at 307. The authors state: "The first amendment requires freedom for the theological activities of churches." Id.

344. Id. at 308-10. Marshall and Blomgren do not deny that there is some merit to the contention that regulatory requirements have an indirect and subtle effect on theological development. Id. at 308. They do note, however, that one problem with this thesis is that it singles out theological development for special treatment, when the process of theological development is no different from the development of political, literary, or artistic ideas that are wholly secular. Moreover, the indirect theological effect argument becomes too broad to be meaningful, since government, simply by its pervasive role and visibility in society, influences theological development. Id. at 310. They conclude that, absent coercion, the religious institution itself ultimately determines whether to be theoretically influenced by governmental or societal action. Id. at 310.

345. Id. at 323. Marshall and Blomgren's claim that even this more modest position is too inhibiting of government action has been largely mooted by the Smith decision. The authors argued that even if courts acknowledged degrees of protection for religious institutions, rather than a total bar on regulation, the existence of any First Amendment protection would demand "exact scrutiny of the challenged regulation." Id. Smith, of course, has mooted this concern by barring such "exact scrutiny," in the form of the compelling interest test, in claims based on the federal Constitution. However, their other argument, that such a bar places religious institutions in a preferred position vis-a-vis secular institutions, remains valid.

346. Id. at 326.
with the "practice of religious activities or violates matters of conscience." 347

Finally, the economics-based analysis of Professor Michael McConnell and Judge Richard Posner argues that two economic effects, substitution and disproportionate burden, work together to create a burden on free exercise. 348 By substitution effect, the authors refer to government actions that would induce an individual to substitute nonreligious activities for religious activities because the regulation places an economic burden on the religious activity. The disproportionate burden effect refers to government regulation having the effect of requiring those who participate in a religious activity to bear a disproportionate share of the overall economic burden. 349 Applying this analysis to religious institutions, Professor McConnell and Judge Posner argue that regulations that are particularly disruptive to such institutions may induce them to alter their conduct or structure and will impose costs on religious institutions disproportionate to those imposed on other regulated activities. 350

C. Applying the Burden Concept to the Landmark Preservation Cases

This section applies the theoretical perspectives discussed above to the claim of Professor Carmella and others that landmark designation interferes so substantially with "ecclesiastical architecture as theology," or with church autonomy and church finances as to constitute a burden on religion. 351

347. Id. at 327.
349. Id. at 38-39. "The government practice creates an incentive for the believer to 'substitute away' from the religious alternative toward a competing secular activity ... [to] avoid some or (more likely) all of the disproportionate burden." Id. at 39. "A burden of free exercise thus takes the form: either renounce your religious practices or bear a burden heavier than other members are required to bear." Id.
350. Id. at 44. Although the only examples the authors provide are regulatory interference with hierarchical religious structure, the authors' analysis can also be applied in the landmark regulatory context: the "peculiarly disruptive" element, which relates directly to churches' autonomy claims, and the "disproportionate cost" element, which can readily be applied to claimed financial burdens, fit that context well.

The authors provide two examples of "straightforward" burdens on the free exercise rights of institutions, both involving hierarchical institutions. Id. at 45. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), is cited as an instance where subjecting the institution (the schools) to a regulatory regime (the NLRB) that is inconsistent with the hierarchical structure of the church could sever that authority and give lower-ranking church agents (the lay teachers) rights and duties inconsistent with the religious structure. Similarly, in Ohio Civil Rights Comm'n v. Dayton Christian Sch., 477 U.S. 619 (1986), the fundamentalist school's requirement that employees agree, as a condition of employment, to follow "the Biblical chain of command" in raising grievances, was challenged under Ohio's civil rights law, which prohibits employers from disciplining workers for lodging a grievance with the civil rights commission.

351. See Carmella, Landmark Preservation, supra note 8, at 52 (arguing that intrusion is particularly severe in landmark context because commissions may request "extensive information regarding religious doctrine, worship, education, mission and ministry, and finances," in addition to accounts of building use, maintenance procedures, and costs); Crewdson, supra note 9, at 162 ("commission members decide intricate questions of theological purpose and religious mission" during landmark review process). As noted earlier, commentators who favor restrictions on landmarking of churches argue that designation raises several First Amendment concerns. First, they claim that exterior designation infringes on church autonomy, arguing that such designation creates the poten-
Applying the various theoretical perspectives on the burden issue to actual or hypothetical cases involving landmark designation of houses of worship shows that designation will undoubtedly constitute a burden on religion in some instances. It seems clear that interior designation, and exterior designation that would constrain the "theological aspects of building design" or have the effect of forcing a church to cease religious worship at a given site because of physical or financial exigency, would constitute a burden. Conversely, the denial of permission for commercial development would not appear to constitute a burden. On these points Professor Carmella and I agree. After discussing these applications of landmark designation, this Article now turns to murkier waters and discusses landmark regulation of church exteriors where such regulation neither closes down the church nor interferes with "architecture as theology."

Interior designation, as in Society of Jesus, constitutes a burden on free exercise under both the Bagni and Laycock analyses because the worship space of a religious institution is fundamentally intertwined with the essence of religious belief. The same result would occur under the "substance/motivation" test derived from Bagni and Laycock's work. Professors Marshall and Blomgren, no friends of free exercise exemptions, would also find cause for exemption here, because interior designation readily meets their criterion for protection of religious activity: the regulation interferes with the practice of religious activities or violates matters of conscience. Professor Lupu, if taken at face value, would find a burden here simply because a violation of the landmark ordinance imposes

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352. See supra note 268 for a discussion of the nexus between interior space and religious beliefs. Interior designation of a worship space would be at the epicenter of Bagni's model. See supra note 317. For Laycock, interior designation would involve the church's internal affairs and would be thus religiously "intense," and the extent and qualitative effect of the governmental interference would be significant. See supra notes 320-24 and accompanying text for a discussion of Laycock's analysis.

353. See supra notes 332-36 and accompanying text for a discussion of the substance/motivation test.

354. See Marshall & Blomgren, supra note 302, at 327 (protection for religious activity exists if regulation interferes with "practice of religious activities or violates matters of conscience").
a penalty. Applying his general rule, it would be easy to find a violation of common law property rights in the case of interior designation. Finally, Professor McConnell and Judge Posner's economic analysis suggests that interior designation is a violation of free exercise because the designation forces the church to alter its conduct from its preferred course.

Turning to exterior designation, the cases present several different factual settings. When such First Amendment claims are based on denying permission to engage in commercial development, as in St. Bartholomew's and Ethical Culture, it appears that not even Professors Bagni or Laycock would acknowledge the claimed burden. Professor Laycock argues that "[a]ny activity engaged in by a church as a body is an exercise of religion." Thus he views church participation in commercial enterprises, presumably including property development, as religious activity because the funds are being raised for the church. Nevertheless, he acknowledges that the church's primary interest in commercial enterprise is profit, "the same interest a secular owner would have." According to Professor Laycock, such secular enterprises should not command free exercise protection.

Similarly, Professor Bagni excludes "business activities" from his model's epicenter of purely religious activity, subjecting property development to government regulation. Further, in discussing church claims to tax-exemption, a concept closely-related to the issue of fiscal burden, Bagni argues that religious organizations are not constitutionally entitled to exemption from taxation. Rather, "such exemptions are constitutionally permissible only if they are granted to charitable, nonprofit organizations without reference to the organization's religious character, because then such aid can be justified as based on purely secular criteria."

A similar conclusion would be reached under the "substance/motivation" test, because commercial development, as a religiously motivated but not substantively religious activity, would be subject to government regulation. Professors Marshall and Blomgren would certainly not find a burden in these

355. See Lupu, supra note 300, at 973 (all instances in which religious activity is met by threat of government sanction are protected under Free Exercise Clause).
356. See supra notes 300-10 and accompanying text for discussion of Lupu's "common law" theory of free exercise burdens. As opposed to exterior designation, interior designation could not readily be justified by looking to the policies underlying the common law concept of nuisance.
357. McConnell & Posner, supra note 302, at 44.
358. Laycock, supra note 302, at 1390.
359. Id. at 1410.
360. Id. Laycock contrasts church participation in commercial business for profit alone with commercial businesses that are church-owned for intrinsically religious reasons or run in intrinsically religious ways. Id.
361. See id. ("[E]xcept for claims of conscientious objection, a claim that it is religiously impor-
tant, that the [enterprise] be conducted in some particular way is not very compelling.").
362. Bagni, supra note 302, at 1548.
363. Id. at 1546-47.
364. Id. at 1547.
365. See Developments in the Law, supra note 281, at 1775 n.159 (commercial activity undertaken by church remains secular in character).
cases, given their general belief that Establishment Clause concerns should not shield religious institutions from neutral government regulations. Professor Lupu's common law analysis could provide support for regulating commercial development by looking to the principles that underlie both private and public nuisance. Professor McConnell and Judge Posner would characterize a bar on development as having an income effect, but not a substitution effect. Because there would be no disproportionate effect here either, they would not find a burden on religion. Given this consensus on the prohibition of development issue, cases like First Covenant, in which the only burden is a claimed reduction in property value resulting from designation itself, would not present a valid free exercise claim.

This suggested unanimity among scholars would likely be the view taken by the Supreme Court, which has never found that the mere fact that a governmental regulatory program imposes costs on religious institutions burdens the free exercise of religion.

Professor Carmella has argued that the financial costs associated with landmark preservation are particularly objectionable because funds spent to meet landmark requirements serve aesthetic purposes, as opposed to the costs of meeting building and safety codes that guarantee the public's health and safety. But this argument fails to acknowledge either the modern trend recognizing the validity of regulation to achieve aesthetic goals or the historic, cultural, and communal goals served by landmark preservation. Further,

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366. Marshall & Blomgren, supra note 302, at 308-10; see id. at 324-26 (raising specific concerns about the favoritism that would be shown religious institutions if they were exempted from regulation).

367. The church's argument that any interference with its development rights would be an impermissible restraint on alienation under common law, could be countered with the claim that development which threatens to destroy a landmark could be enjoined by adapting the concepts and policies underlying both public and private nuisance to this situation.

368. McConnell & Posner, supra note 302, at 38-39. While all landmarked buildings are under the same income-reducing disability, there is no incentive to substitute membership in a landmarked secular institution over a landmarked religious institution. The bar to development operates identically as regards both St. Bartholomew's Church and, for example, the Municipal Art Society.

369. Id. at 39. Members of a landmarked religious institution bear no greater burden than members of a landmarked secular institution.


371. See, e.g., Bob Jones Univ. v. United States, 461 U.S. 574, 603-04 (1983) (government's denial of tax-exempt status to church-operated educational institution which violated federal ban on racial discrimination did not abridge Free Exercise Clause; "Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but these will not prevent those schools from observing their religious tenets."); Braunfeld v. Brown, 366 U.S. 599, 606-08 (1961) (Orthodox Jewish merchants not exempted from complying with Pennsylvania's Sunday-closing law, despite the fact that compliance potentially imposed significant economic hardship since these merchants also remain closed on Saturday, the Jewish sabbath).

372. Carmella, Landmark Preservation, supra note 8, at 50-51.

373. See Costonis, supra note 85, at 371-77 (discussing trends in aesthetic jurisprudence); Karp, supra note 85, at 310-20 (tracing judicial history of aesthetics-based regulation).

374. See Costonis, supra note 85, at 359-60, 386-91 (historic preservation is important to cul-
while judgments about the relative importance of valid governmental programs are crucial to the compelling interest test in free exercise cases, their premature use in making judgments on the threshold issue of whether there is a burden on religion improperly skews the analysis towards finding a burden. So long as the regulations serve a valid governmental purpose, judgments about the values served by that purpose should have no place in determining the burden issue.\textsuperscript{375}

A more compelling case is presented when, as in \textit{Barwick}, a church claims that landmark designation is not merely denying the church the most profitable use of its property but is forcing it to close its doors due to financial exigency.\textsuperscript{376} Where a church can prove that unyielding enforcement of a landmark ordinance will result in a forced cessation of religious worship and practice in the landmarked building, a burden would be found under any of the models we've discussed for the reasons stated in the earlier discussion of interior designation.\textsuperscript{377}

\textsuperscript{375} \textit{But see Developments in the Law}, supra note 281, at 1779-80 (arguing that courts should weigh claimed infringement on free exercise, without regard to significance of burden, against competing social interest in regulation). Even under this "substance/motivation" test, however, the substance of property development is so clearly secular that no free exercise violation would be found.

\textsuperscript{376} Church of St. Paul & St. Andrew v. Barwick, 496 N.E.2d 183, 185 (N.Y.), cert. denied, 479 U.S. 985 (1986). In that case, the church could escape its financial woes by utilizing the hardship provision in the New York City Landmarks Law, which provides for lifting the landmark designation based on a showing that the property, if sold or leased, could not earn a reasonable return in a commercial use. See supra note 147 for a discussion of the hardship provision. But, because that course would also result in destruction of the landmarked building, it is not a real option in a discussion of the tensions between religion and landmark preservation, where, as is the case here, the church declines to take such action. It is anomalous to suggest that permitting a third-party to buy and destroy the landmark is the solution to a claimed burden on free exercise caused by landmark designation.

\textsuperscript{377} See supra notes 352-57 and accompanying text for a discussion of the free exercise burden attending interior designation. The result under two of the models needs some explanation. Lupu would find a burden because an approach based on an amalgam of public and private nuisance concepts would presumably require some balancing, and here, since all reasonable use of the landmarked property would be destroyed if the landmark law were enforced unyieldingly, that balance would favor lifting the restriction. Lupu, \textit{supra} note 300, at 966-72. McConnell & Posner would find a violation because this application of landmark preservation would violate one of the general rules underlying their economic model: "religious institutions or activities can be subjected to different treatment only when necessary to minimize the effect of government action on religious practice . . . ." McConnell & Posner, \textit{supra} note 302, at 33-34.

Also, the closure of a church already in operation should be distinguished from the enforcement of zoning regulations that prohibit churches from constructing new buildings at certain locations or from continuing to operate in contravention of a zoning code, so long as reasonable alternative sites are available. See, e.g., Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir.) (ordering cessation of religious services in converted garage where churches not permitted in that zoning district), \textit{cert. denied}, 469 U.S. 827 (1983); Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir.) (prohibiting churches from residential neighborhoods), \textit{cert. denied}, 464 U.S. 815 (1983). Commentary has been divided on these and similar cases. Compare Laurie Reynolds, \textit{Zoning the Church: The Police Power Versus the First Amendment}, 64 B.U. L. REV. 767, 819 (1985) (concluding that exclusion of churches from residential areas can survive free exercise challenge, although cautioning against danger of arbitrariness and religious discrimination where special-use
Further, we would reach an identical result in cases like Lutheran Church, where a church can prove that its landmarked building is no longer physically adequate for its religious or charitable purposes. Indeed, in both of these situations, such proof would also show that applying the landmark ordinance violates the Fifth Amendment’s Takings Clause under either of the theories previously discussed.  

The most difficult aspect of landmark preservation we must address in our burden inquiry is the general effects of exterior designation on a church — that is, whether such designation constitutes a burden on religion because it intrudes on “architecture as theology,” exacting a fiscal toll through maintenance requirements and review procedures, or violates church autonomy by requiring churches to submit to “secular approval.”  

Given the outcome of our analysis of the fiscal burden issue in the context of property development, there is no reason to find a different outcome regarding maintenance costs that may be imposed by landmark regulations.  

Regarding the autonomy issue, it is important to recognize that churches normally are treated no differently from any other property owner subject to government regulation. Churches must conform to building, safety, fire, electrical, and plumbing codes, which, of course, means that churches must routinely seek secular approval before they undertake exterior (or interior) repairs and renovations that are regulated under such codes. Presumably, secular approval in these circumstances is uncontroversial because there is no religious significance to upgrading electrical wiring or replacing a broken sewer connection.  

Thus, what must lie at the heart of the autonomy and “architecture as theology” claim regarding landmark ordinances is the idea that ordinances require secular approval of matters that should remain in the sole discretion of religious permits are used) and Mark W. Cordes, Where to Pray? Religious Zoning and the First Amendment, 35 KAN. L. REV. 697, 701 (1987) (arguing that traditional position in majority of states that zoning ordinances cannot exclude churches from residential areas is unwarranted, but that “mere rationality” approach of Lakewood fails to provide sufficient scrutiny) with Godshall, supra note 200, at 1577-83, and Comment, Zoning Ordinances Affecting Churches: A Proposal for Expanded Free Exercise Protection, 132 U. PA. L. REV. 1131, 1132 (1984) (both arguing for expanded free exercise analyses in cases involving zoning regulation of churches).

378. See discussion supra at notes 144-83 and accompanying text.

379. See Carmella, Landmark Preservation, supra note 8, at 52-53 (landmark designation imposes fiscal burden and creates potential for government entanglement in church affairs); Crewdson, supra note 9, at 161-63 (administrative review process involves local landmark commissions in judgments concerning architectural expressions of religious beliefs symbolism).

380. See, e.g., Bagni, supra 302, at 1548 (“[T]he custodial maintenance of its buildings are far removed from the spiritual epicenter of the church. They more properly belong in the second concentric circle”).

381. See, e.g., Carmella, Landmark Preservation, supra note 8, at 50-51 (diocese will allocate funds to meet building code requirements because those regulations based on concern for health and safety). Despite this, the Washington Supreme Court is unique in having found a constitutional violation when enforcement of building and fire codes led to the closure of a religious school on safety grounds. City of Sumner v. First Baptist Church, 639 P.2d 1358, 1362 (Wash. 1982) (uncompromising enforcement of building codes which would close church operated school would deny church members right to guide children’s education).
Obviously, the theories discussed earlier provide no guidance in determining whether landmark designation, by definition, burdens religion in violation of the First Amendment. The polar categories implicit in each model — sacred and secular are handy tags we might apply — clearly suggest that the models contemplate some degree of harmony (if only at the secular level) between government regulation and religious autonomy. The present inquiry proceeds on a more fundamental level than the models allow. In order to determine if landmark designation is irreconcilable with the First Amendment we must examine the underlying philosophical position of the respective authors.

At this point, a clear distinction emerges between Professor Carmella's advocacy of a blanket exemption from landmark designation for houses of worship and this Article's claim that such an exemption is unwarranted. The available data on the administration of landmark preservation ordinances seems to refute Professor Carmella's insistence that all landmark regulation of houses of worship involves impermissible government intrusion on religion and thus supports the notion that there are both sacred and secular elements in this context. While the reported cases we've previously discussed provide little insight, the treatment of religious properties under the Philadelphia landmarks ordinance is instructive.

In the vast majority of the 127 permit applications reported in the Philadelphia study, the Historical Commission was asked to, and did, approve routine repairs, reconstructions, and demolitions of houses of worship or their auxiliary buildings. The only permit request that could be unequivocally identified as "sacred" rather than secular involved the Commission's 1964 denial of a request to attach a cross to the top of the Church of St. Luke and the Epiphany, based on the Commission's view that St. Luke and the Epiphany, an excellent example of a Greek Revival church, was, architecturally speaking, complete without a cross at the apex of the pediment.

Professor Carmella's claim also contrasts sharply with a basic notion in the scholarship on the burden issue: the activities of religious institutions include

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382. See, e.g., Carmella, Landmark Preservation, supra note 8, at 53 (arguing that requiring secular approval of ultimate disposal of church property creates potential for disruptive parishioner participation in hierarchical decision processes). But see Laycock, supra note 302, at 1412-14 (arguing that right to church autonomy should not depend on way in which church is organized).

383. Carmella, Houses of Worship, supra note 8, at 405. Given her view that ecclesiastical architecture is theology, the permissible scope of governmental regulation for houses of worship is limited to "safety, health or zoning regulations that indirectly influence the design of a structure." Under the "architecture as theology" theory, however, even this limitation becomes questionable. Although Professor Carmella would tolerate the imposition of zoning regulations on houses of worship, these have at least as great a potential as landmark regulations to intrude upon religious freedom. For example, zoning restrictions on the height of a house of worship could conceivably bar the construction of a Gothic cathedral or the minaret of a mosque. Presumably, Professor Carmella finds this less objectionable than design control because government is only indirectly involved in "dictating the content, profession and formation of belief." Id. at 451-52.

384. See Philadelphia Study, supra note 103.

385. Id. at 7.
both sacred and secular components. Thus, it is necessary to inquire into the nature of a particular activity in order to determine if government regulation of that activity would constitute a burden on religion.\textsuperscript{386} Further, the scholarship on the burden issue stands for the proposition that such an inquiry is itself not constitutionally suspect.

The model for such an inquiry suggested by the student editors of the \textit{Harvard Law Review} could serve this purpose quite well.\textsuperscript{387} Its distinction between activities that may be burdened — those activities that are motivated by religious belief but which are not substantively religious — and activities that must not be burdened — those that are not merely religiously motivated, but are themselves substantively religious — seems well-suited to evaluating the burden issue when religious institutions claim that landmark regulation of the exterior of a house of worship is interfering with “architecture as theology.”

This approach, however, does not address the claim that landmark designation \textit{per se} burdens religion by intruding too deeply on the right of religious institutions to autonomy. In answering this claim, it is instructive to examine the underlying philosophical positions on the issue of First Amendment exemptions of the authors who have addressed the burden issue.

Professor McConnell, a leading advocate for free exercise exemptions, argues that the text and history of the Free Exercise Clause “guarantees that believers of every faith, and not just the majority, are able to practice their religion without unnecessary interference from the government.”\textsuperscript{388} Further, Professor McConnell notes that this is “a protection that is most often needed by practitioners of non-mainstream faiths who lack the ability to protect themselves in the political sphere, but may, on occasion, be needed by any person of religious convictions caught in conflict with our secular political culture.”\textsuperscript{389}

Justifications for free exercise exemptions based on a concern for “non-mainstream faiths” appears to lack any validity in the landmark context. Indeed, it is normally only the most established of faiths that “suffer” designation because only they have produced structures significant enough to be selected.

As for the second element, the conflict between religious and secular values is, of course, the very core of the disagreement. On this point, Professor McConnell and Judge Posner have stated that “[e]ffects on religious practice must be minimized, and can be justified only on the basis of a demonstrable and unavoidable relation to public purposes unrelated to the effects on religion.”\textsuperscript{390} In another attempt to define a rule for judging conflicts between religious and secular values, Professor McConnell suggested that a law with the purpose or likely effect of increasing religious uniformity by inhibiting the religious practice of the person or group challenging the law “will be permitted only if it is the least restrictive means for (a) protecting the private rights of others, or (b) ensuring

\textsuperscript{386} See supra text accompanying notes 304-36.
\textsuperscript{387} See \textit{Development in the Law}, supra note 281, at 1775-80.
\textsuperscript{388} McConnell, supra note 221, at 1192.
\textsuperscript{389} Id.
\textsuperscript{390} McConnell & Posner, supra note 302.
that the benefits and burdens of public life are equitably shared." 391

Landmark preservation, concerned with historical, architectural, cultural and communal values, 392 satisfies Professor McConnell and Judge Posner's criterion that government regulation be justified by public purposes unrelated to the effects of religion. Moreover, landmark designation has been validated by the United States Supreme Court as meeting the constitutional test for ensuring that the benefits and burdens of public life are distributed in a fair manner. 393

A consideration of the fundamental arguments presented by Professor Marshall, a leading critic of free exercise exemptions, reinforces this judgment. Marshall identifies favoritism towards religious belief systems as one of the most serious potential problems associated with free exercise exemptions: "a constitutional preference for religious belief cuts at the heart of the central principle of the Free Speech Clause — that every idea is of equal dignity and status in the marketplace of ideas." 394 Recognizing that religion is not insular, but a powerful social and political force that competes with other forms of belief in the shaping of the mores and values of society, 395 Marshall argues that exempting religious organizations from regulatory requirements will endow them with more resources to carry on their religious enterprise and dissemination of ideas. 396 Marshall's favoritism argument is, of course, directly applicable to the landmark context. Granting exemptions to landmarked religious institutions, while retaining restrictions on secular landmarks, would have the precise effect Marshall suggests. Even if St. Bartholomew's or the Society for Ethical Culture is barred from reaping millions from commercial property development at their landmarked sites, their exemptions from the other financial burdens associated with landmark designation, such as permitting and affirmative maintenance requirements while "competing" secular charitable institutions are denied such exemption, serves to free funds to promote their religious message and mission.

D. Legislative Protections for Religious Institutions and the Establishment Clause

As has been noted previously, legislative efforts to grant religious institutions some measure of protection from landmark ordinances have recently become a viable alternative for opponents of landmark designation. Given that Smith itself suggests that churches should look to the political process rather than the courts for free exercise protections, 397 we should expect even more such efforts in the future. Smith is not unique in recognizing the role of political bodies in accommodating free exercise values, where the Free Exercise Clause itself does not compel the courts to require an exemption from a neutral law of

392. See generally authorities cited supra note 82.
394. Marshall, supra note 221, at 320.
396. Marshall, supra note 221, at 322.
general application.398 The justification for allowing such legislative accommodations "is that the government is in a better position than the courts to evaluate the strength of its own interest in governing without religious exceptions."399 But in considering laws that exempt churches from landmark ordinances, how careful must legislators be that they do not violate the Establishment Clause of the First Amendment?

The test for the constitutionality of government action that allegedly violates the Establishment Clause was set forth in Lemon v. Kurtzman: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster an excessive government entanglement with religion."400 In these cases, however, because the legislatures are avowedly seeking to promote the free exercise of religion by exempting churches,401 there is an inherent tension between the Lemon analysis and any legislation intended to advance free exercise values.402 As Justice O'Connor wrote in her concurring opinion in Wallace v. Jaffree:403

On the one hand, a rigid application of the Lemon test would invalidate legislation exempting religious observers from generally applicable government obligations. By definition, such legislation has a religious purpose and effect in promoting the free exercise of religion. On the other hand, judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute pertaining to religion can be viewed as an "accommodation" of free exercise rights.404 This tension between legislative free exercise exemptions and the Establishment Clause can be resolved in the context of landmark regulation by reference to the analysis of the burden question in the preceding section. That analysis

398. See Tribe, supra note 283, § 14-7, at 1194 (Court has extended principle of free exercise neutrality to allow Congress, and state legislatures to create necessary exemptions). Of course, after Smith, there will be few cases, if any, that will find a constitutionally-compelled free exercise exemption.


400. 403 U.S. 602, 612-13 (1971).

401. With the sole exception of New York City Council Introduction No. 633, which would have applied to all tax-exempt landmarked properties, each of the legislative proposals described previously that sought to protect churches from landmark designation did so by singling-out religious institutions, either by exempting them from designation or requiring that they consent to designation.

402. There has been extensive, and conflicting commentary on this tension and how it should be resolved. Compare Steven D. Smith, Separation and the "Secular": Reconstructing the Disestablishment Decision, 67 TEX. L. REV. 955, 990-93, 1025-31 (1989) (noting conflict between the Free Exercise and Establishment Clauses and arguing that much of conflict could be resolved by discarding "secularism" in favor of "institutional separation" as the most basic value underlying the Establishment Clause; this would permit government accommodation of religion so long as it does not involve government directly in internal affairs of churches or confer actual governmental power on churches) with Developments in the Law, supra note 281, at 1737-40 (arguing for closer scrutiny of legislative accommodations).


404. Id. at 82 (O'Connor, J., concurring).
concluded that landmark regulation only burdens religion when core religious values are affected by the designation of church interiors or when exterior designation is found to intrude upon architectural decisions that are substantially theological or has the effect of rendering a building physically or financially unsuitable for the existing activities of a religious institution.

Applying this analysis to legislative exemptions, enactments that attempt wholly to exempt churches from landmark regulations — such as owner consent provisions, barring designation of churches, or hardship appeals provisions that effectively gut landmark controls — would fail an Establishment Clause challenge because they are not permissible accommodations of free exercise, but rather unconstitutional attempts to benefit religious institutions over secular institutions that are similarly situated. By contrast, legislative enactments that accommodate core religious values, such as exemption from interior designation and hardship provisions for nonprofit institutions generally, would pass constitutional muster.

Further, the recognition that churches have both religious and secular interests in their properties, which is explicit in the burden analysis, would allow for significant government financial support of the secular components of religious buildings. For example, the burden analysis strongly indicates that the Establishment Clause would not be violated if a state or municipality established a low-interest loan program for all owners of landmarked properties, using appropriate controls to insure that funds loaned to religious institutions were expended for the sole purpose of meeting the requirements of landmark ordinances. In fact, New York State has made significant grants to landmarked religious institutions to permit exterior maintenance and repairs.

CONCLUSION

This Article has shown that much of the alleged conflict between religious

405. Exempting religious institutions from landmark designation creates the potential for significantly advancing religious ideas over competing secular ideas. If St. Bart's is free to reap millions of dollars from the commercial development of its property and then apply those funds to support its religious and charitable programs, but secular charitable institutions must comply with the landmark ordinance and so are denied access to funds derived from property development, then religious institutions and their ideas are given a significant advantage by government action. Denying government the right to prefer religion over secularism lies at the core of the Lemon test, and this may well have been the reason why New York City Council Introduction No. 633 made all tax-exempt institutions eligible for its proposed hardship appeals process, rather than limiting participation to churches. For a discussion of Introduction No. 633, see supra notes 138-40 and accompanying text.

406. The “controls” under such a program would be similar to the regulatory inspection provisions used to monitor building permits and would not create any need for a continuing government oversight of religious activities likely to violate Lemon's entanglement prong. See, e.g., Roemer v. Maryland Bd. of Pub. Works, 426 U.S. 736 (1976) (upholding grants for university construction at religious institutions); Hunt v. McNair, 413 U.S. 734 (1973) (same); Tilton v. Richardson, 403 U.S. 672 (1971) (same).

institutions and landmark preservation is mythical and there is neither a need nor a constitutional necessity for the outright exemption of churches from landmark designation. Rather than creating a blanket exemption from landmark designation for houses of worship, courts may limit the protection afforded to religious institutions, and thereby achieve an appropriate constitutional accommodation between governmental interests and religion, by focusing more closely on whether designation truly burdens core religious values.

Whether a court’s analysis proceeds under New York’s charitable purpose test, or the Second Circuit’s application of Smith to Free Exercise Clause challenges, or a consideration of the entanglement prong in an Establishment Clause challenge under Lemon, the outlines of such an accommodation are clear. Designation of church interiors, and exterior designation that leaves a building physically or financially unsuitable for the existing activities of a religious institution, would be barred as intruding too deeply into the essence of religious belief. At the same time, neither the financial costs associated with meeting the requirements of preservation ordinances — including denial of permission for commercial development — nor the fact that religious institutions must seek secular approval in accordance with the ordinance’s provisions is sufficient to uphold a First Amendment claim. Claims that exterior designation has intruded upon architectural decisions that implicate theology are not so readily categorized; however, they may be analyzed by examining the religious substance and motivation involved in each instance.

Legislatures can also play a role in reaching a more appropriate accommodation between government and religious institutions by amending their landmark ordinances to include hardship provisions specifically tailored to the needs of religious and charitable institutions, exempting the interiors of houses of worship from designation, and negotiating with religious institutions to find alternatives to full compliance with landmark ordinance requirements. State and local governments should also explore financial aid programs, available to all landmarked properties, that could aid religious institutions which find the financial burdens of designation difficult to bear.

By striving to find an appropriate accommodation between government and religion, rather than crafting a blanket exemption from landmark designation for religious institutions, courts and legislatures will hew more closely to the values that underlie the First Amendment.